

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION
COVER SHEET**

Plaintiff(s) David Demko	CIVIL DIVISION	
	Case Number : SA - 15 - 864	
Defendant(s) City of Pittsburgh Zoning Board of Adjustment	Type of pleading : Land Use Appeal	
	Code and Classification :	
Vs	Filed on behalf of David Demko	
2015 NOV - 6 3:20 PM RECEIVED CIVIL DIVISION ALLEGHENY COUNTY, PA	(Name of the filing party)	
	<input type="checkbox"/> Counsel of Record <input checked="" type="checkbox"/> Individual, If Pro Se	
	Name, Address and Telephone Number : David Demko 1303 Boyle St. Pittsburgh, PA 15212	
Attorney's State ID :		
Attorney's Firm ID SA-15-000864 11-06-2015 03:21:09 OP23PAUL01		

SA-15

N.S. 11/9/15

In the Court of Common Pleas Allegheny County, Pennsylvania

Re.

David Demko, the Appellant

v.

City of Pittsburgh Zoning Board of Adjustment

Land Use Appeal

This appeal is in response to the October 8, 2015 Decision by the City of Pittsburgh Zoning Board of Adjustment (the "ZBA"), case 216 of 2015, granting the application for variance to zoning ordinances §904.02.3 for the maximum FAR (2:1) and maximum height (45 feet/ 3 stories) and special exception to zoning ordinance §914.07.G.2.(a) seeking off-site parking to the applicant Trek Development Group Inc., 130 7th Avenue, Suite 300, Pittsburgh Pennsylvania (the "Applicant").

I, David Demko, residing at 1303 Boyle Street, Pittsburgh Pennsylvania, file this Land Use Appeal requesting reversal of the ZBA decision for the following reasons:

1. The Applicant has not identified unique physical circumstances or other conditions peculiar to this property that constitute an unnecessary hardship.
2. The Applicant has not proven this property cannot be developed in conformity with existing zoning ordinances. To the contrary, the Applicant admitted this property could be developed in conformity at an alternative cost level.
3. The preferred financial return target set by the Applicant is a self-imposed hardship created by the Applicant and therefore does not qualify a variance.
4. The Applicant has fail to provide evidence this variance, granting a building more than twice the size of that allowed by ordinance, will not alter the essential character of the neighborhood.
5. The requested variance does not represent the minimum modification that will afford relief and does not represent the least modification possible of the regulation in issue.
6. The extreme size of the building granted by the variance decision represents a de facto zoning district change. This de facto change is accomplished without the going through the process required for a zoning district change.
7. The parking plan submitted by the Applicant does not provide a reasonable parking alternative for the proposed development and therefore the special exception seeking off-site parking would have a detrimental effect on the businesses and residents on Federal Street and in the surrounding neighborhoods.

8. The Applicant has not provided the written and recorded agreement between the applicant and the owners of the parking garage as required by zoning ordinance.

9. The necessity of a special exception for the required number of parking spaces is the result of the ZBA decision to grant FAR and height variances listed above. A smaller building with fewer units would less of an impact on parking.

For the foregoing reasons, David Demko respectfully request that this Honorable Court reverse these decisions of the ZBA and issue an order to deny the Applicant's request.

Thank you very much for your attention and consideration.

Sincerely,

Signed David Demko Date Nov 6, 2015

David Demko

1303 Boyle St., Pittsburgh PA 15212

Verification

I, David Demko verify that all of the information above is correct and true to the best of my knowledge and belief. I understand that any false statements in this document are made under penalty of perjury, and that making a false statement is a violation of law subject to fine and imprisonment.

Signed David Demko Date Nov 6, 2015



Division of Development Administration and Review
 City of Pittsburgh, Department of City Planning
 200 Ross Street, Third Floor
 Pittsburgh, Pennsylvania 15219

ZONING BOARD OF ADJUSTMENT

Date of Hearing: August 6, 2015
Date of Decision: October 8, 2015

Zone Case: 216 of 2015
Address: 8 West North Avenue
Zoning District: LNC, Local
Ward: 22
Neighborhood: Central Northside

Owner: URA of Pittsburgh
Applicant: Trek Development Group
Request: Multi-unit residential with up to 72 units and 69 off-site parking spaces for cars (26 bike spaces on site).

Variance:	904.02.3	Maximum FAR 2:1 permitted and 4.8:1 requested Maximum height 45ft/3 stories permitted and 97ft/8 stories requested
Special Exception:	914.07.G.2.(a)	Off-site parking is a Special Exception

Appearances:

Applicant: William Gatti, Kevin F. Mckeegan (Attorney), Ken Doyno, Cynthia Jampole, Kyra Straussman, John Ginocchi, Dirk Taylor

Observing: Tom Fontaine, Kevin Kunak, Charles Rosenblum, Loyd Hedlund, Martha Hermreich, Marylynne Pitz, Diana Jones,

Opposing: John Desantis, Catherine Serventi, David Denk, Donald Ssoen, Odd Ssoen, Charles Moore, Christopher Gates, Stephen Pascaz,

In-Favor: Nick Cafardi, Kevin Pavlick, Robert Tunan, Duncan Henricks, Jana Thompsom, Jamie Shairrick, Andrew Behnke, Allan Slider, William Donovan, Craig Melichar, Brian Kaminski, Joel Pace, Randy Burns, Adin Hamilton, Michael Lobick, Katherine French, Matthew Craig, John Augustine, James Pastorius, Nicole Chandet, Jasmine Goldband, Doug Duerr, Rick Belloli, Tom Hardy, Matt Quigley, Matt Lasek, Nathan Clark, Timothy Nuttle, Deena Kelly, Joan Gielas, Patrick Dexter, Dan Hosier, Deborah Israel, Henry Reese, Jennifer Bender, Jeff Brizek, Craig Rainhard, Sheila Sechler, Kathy Deis, Daniel Deis, Caitlin Ruane, Jeremy

Branson, Rebecca Davidson-Wagner, Nancy Donovan, J. Daniel Wintermontel, Kirk Ley, Sarah Ley, Carolyn Klingman, Meredith Centner, Heather Staab, Trey Barbar, Chris Rigatti, Daniel Pond, Christopher Nygren, Todd Palck, Karanainagi Rujumba, Richard Worl, Tim Johnson, Rebecca Huduck, Patrick Sweeney,

Findings of Fact

Properties at Issue:

1. At issue are several parcels located at the corner of West North Avenue and Federal Street in a LNC (Local Neighborhood Commercial) District in the Central Northside neighborhood. The parcels are identified as 2, 4, 6, and 8 West North Avenue ("West North Avenue Properties") and 1131, 1133 and 1135 Federal Street ("Federal Street Properties") (collectively "Subject Properties").

2. Located on the West North Avenue Properties are three buildings on four lots that have been unoccupied for a number of years and are in deteriorating condition. Located on the Federal Street Properties are two, two-story brick structures, also in deteriorating condition.

3. The West North Avenue Properties are part of what has been known as the "Garden Theater Block." The former Garden Theater itself, located at 12 West North Avenue, is not part of the current application.

4. The Urban Redevelopment Authority of Pittsburgh (URA) owns the Subject Properties and has continued its efforts to acquire all of Garden Theater Block properties since the 1980s, culminating with acquisition of full control of the Garden Theater property in 2007.

5. During the time the URA endeavored to acquire the properties in the Garden Theater Block, the structures on the West North Avenue Properties remained vacant and were not well maintained. A fire on one of the properties led to additional deterioration.

6. The façades of three of the structures on the West North Avenue Properties remain generally intact, with heights of 67', 38' and 50', and are part of the area's history and character.

7. Since completion of the acquisition efforts in 2007, the URA initiated redevelopment efforts for the properties by issuing a request for proposal ("RFP") in 2007 and again in 2011 and 2014. In each of the RFPs, the URA included the requirement that the existing buildings on the West North Avenue Properties must be preserved, rehabilitated and incorporated into the proposed redevelopment project.

8. Although proposed projects were selected from the 2007 and 2011 RFPs, final development could not be accomplished, leading to the third, 2014 RFP, from which the proposal of Trek Development Group ("Trek") was selected. The URA has authorized Trek to seek approvals for its proposed development.

Description of Proposed Development:

9. Trek, as the Applicant here, proposes to preserve and rehabilitate the structures on West North Avenue Properties and to incorporate those buildings into an 8-story, 97' mixed-use building that would occupy both the West North Avenue Properties and the Federal Street Properties. As proposed, the floor area ratio for the building on those properties would be 4.8:1. The building would comply with the setback requirements for the LNC District but would exceed both the height and FAR limitations.

10. The new building is proposed as a mixed use building, with 7,139 sf of undetermined retail uses on the ground floor, facing Federal Street, and up to 72 residential units on the upper stories.

11. To support the proposed retail and residential uses, Trek proposes to provide 69 off-site parking spaces in an existing Pittsburgh Parking Authority garage that is located on Federal Street, across Eloise Way from the Federal Street Properties ("Federal Street Garage"). The Applicant also intends to provide 26 bicycle spaces on the Subject Properties.

12. The Federal Street Garage is located within 1,000 feet of the Subject Property and contains 554 parking spaces. Pursuant to a disposition agreement with the Parking Authority, the URA has the ability to designate the use of a number of spaces in the garage and the details of parking agreement for the requested number of spaces are being negotiated.

Conditions of the Existing Structures And Costs Associated With Rehabilitation:

13. The structures on the West North Avenue Properties are currently dilapidated and continue to deteriorate. Significant structural work is required to rehabilitate to the extent that the structures would comply with building code requirements.

14. The cost of incorporating the existing structures into the redevelopment of the site would be approximately \$1.5 to \$2.7 million.

15. Viability of the project is dependent upon having a sufficient number of residential units, at rents that are within market rates, to justify the costs of preserving the buildings on the West North Avenue Properties.

16. Based on an evaluation of rents that could be charged for the proposed residential units, a minimum of 68 units would be necessary to justify the project costs, including the preservation of the existing buildings. The means of providing additional residential units on the site would be to include the additional height/stories proposed.

17. Other efforts to redevelop the site have been unsuccessful because of the costs associated with preserving the existing structures.

Character of the Surrounding Neighborhood:

18. The Central Northside neighborhood, and the Garden Theater Block, have been subject of revitalization efforts for a number of years and those efforts have seen fruition, as reflected in the development of businesses on Federal Street and East Ohio Street.

19. The neighborhood includes the Allegheny General Hospital, the Mexican War Street Historic District and the Allegheny Commons Park Historic District. (App. Ex. 1).

20. The Garden Theater Block and the historic, albeit dilapidated, buildings within that block are poised for improvement. The Masonic Hall building, at a height of 65', and the Garden Theater are located within the same block and like the buildings on the West North Avenue Properties are part of the unique and historic character of the area.

21. Three of the five buildings that remain on the Garden Theater Block do not conform to the Code's current height restrictions for the LNC District and extend to the property lines at the front and interior, and exterior side property lines. (App. Ex. 1).

22. Although not immediately proximate to the Subject Properties, the main building of Allegheny General Hospital reaches a height of 250' with the tower extending to 310'. Across the park, towards the view of downtown, the Allegheny Center apartment building extends to 105'. (App. Ex. 1).

Summary of Testimony:

23. Kyra Straussman, a representative of the URA, described the URA's process of acquisition of the Subject Properties and the URA's RFP processes in 2007, 2011 and 2014. She explained that the projects selected in the 2007 and 2011 RFP process were financially infeasible, in part because of the extensive costs of maintaining the existing buildings. She indicated that any future URA RFP, if necessary, would continue to require preservation of the existing buildings. Ms. Straussman also explained the URA's control of parking spaces within the Federal Street Garage and the negotiations regarding the spaces subject to the disposition agreement for the proposed use.

24. Dirk Taylor, a structural engineer retained by Trek, assessed the existing structural condition of the buildings. He provided photographs of the buildings' interiors and indicated that he had rarely observed buildings in such poor condition. He stated that the buildings would require significant and costly structural work to meet building code requirements and estimated that restoring the buildings could cost twice as much as a typical restoration project. (App. Ex. 2).

25. Trek's CEO, William Gatti, testified that, based on Trek's analysis, incorporating the existing buildings into the proposal would add between \$1.5 to \$2.7 million to the project's costs.

26. Mr. Gatti also described the three potential development options that Trek evaluated with regard to its proposal: (1) renovation of the existing buildings; (2) incorporation of new buildings with the existing buildings, in compliance with the Code's dimensional requirements, including height; (3) the proposed project, including incorporation of new construction with the existing buildings, with the requested height variance. Mr. Gatti provided a summary of the cost analysis of these options as an exhibit and noted the report's conclusion that only the third option, the option presented to the Board, would be viable. (App. Ex. 3). He further stated that uses other than the multi-unit residential use, such as retail or office uses, would not be viable options for the site.

27. Mr. Gatti's report assumed 68 residential units for the multi-unit, 8-story building proposed. The report indicates that the cost per square foot for that option would be \$217 and the cost per unit would be \$258,000. The report then sets forth an evaluation of the rental rates that would be required for the different options. Mr. Gatti explained that the projected rental income for the units in the Trek analysis for the proposed building were higher than the market rate for that area of the City. Comparing the rental income that could be anticipated with the costs of construction, including the additional costs for preserving the existing buildings, he testified that the project is financially viable, as proposed, but minimal margins. (App. Ex. 3).

28. Mr. Gatti also described the efforts to involve the community in the planning process for the proposed building, noting that many community meetings had been held over the past few months and the community had indicated general support for the project.

29. The project architect, Ken Doyno, asserted that it would not be possible to build the same number of units on the property in a smaller building or one with a lower FAR. He further stated that preserving the existing buildings limits the available open area where additional building area could be added. Mr. Doyno also described the heights of nearby buildings and the general character of the neighborhood.

30. Cindy Jampole, Trek's transportation engineer, submitted a parking analysis which assumed 72 residential units and 7,139 sf of retail space. Based on the Zoning Code's parking requirements, she determined that for the apartment use, 51 automobile parking spaces (including 3 ADA spaces) would be required if 24 bicycle spaces were provided to allow for the maximum reduction in required automobile parking spaces. For the 7,139 sf retail use, she determined that 5 automobile parking spaces (including 1 ADA space) would be required, with 2 bicycle parking spaces for the maximum reduction permitted. Ms. Jampole also noted that the existing parking garage across Eloise Way is within 1,000 feet of the Subject Properties.

31. Tom Hardy, Executive Director of the Allegheny City Central Association ("ACCA"), testified and submitted a letter from that organization in support of the proposed development.

32. John Augustine, a representative of the Mexican War Street Association, testified in favor of the proposed development.

33. Karamagi Rujumba, a representative of the Pittsburgh History and Landmarks Foundation also testified in support the project.

34. Several other community groups and a number of residents of the surrounding neighborhood appeared in support of the proposed development.

35. Councilwoman Darlene Harris testified in opposition to the proposed development. Councilwoman Harris explained the concerns of neighborhood residents regarding the size of the proposed development and its potential impact on parking in the area. She further stated that proposed off-site spaces, located in the Federal Street Garage, were intended to serve the businesses on Federal Street, and that those businesses would be negatively impacted if a number of the spaces in the garage were to be dedicated to the proposed development.

36. Several residents of the surrounding neighborhood also testified in opposition to the proposal, expressing concerns regarding the potential impact of the proposed 8-story structure on views in the community, the size and appearance of the structure, and potential impact on parking and traffic in the area. Several objectors asserted that the requested variances are not the minimal necessary to afford relief and expressed skepticism as to whether the Applicant had demonstrated an unnecessary hardship associated with the development of the site.

37. Several residents of the Allegheny West neighborhood and a representative of the Allegheny West Civic Association also testified in opposition to the requested relief. Although these individuals did not demonstrate standing with respect to the application, the Board considered their testimony.

Conclusions of Law

Dimensional Variances From Section 904.02.3 (Height and FAR):

1. Trek seeks to use the Subject Properties for multi-unit residential and retail uses, which are uses permitted as of right in LNC District.

2. Although the uses are permitted, Trek seeks dimensional variances from the Code's height and FAR limitations, as set forth in Code Section 904.02.3, the site development standards for LNC Districts, to allow for the proposed development of the site.

3. Under Section 922.09 of the Code, the Board may grant a dimensional variance where it finds that 1) unique circumstances or conditions of a property would result in an unnecessary hardship; 2) that the proposed variance would have no adverse effect on the public welfare; and that 3) the proposed variance is the minimum variance that would afford relief with the least modification possible. *Marshall v. City of Philadelphia and Zoning Bd. of Adj.*, 97 A.3d 323, 329 (Pa. 2014); see also *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), citing *Allegheny West Civic Council v. Zoning Bd. of Adj. of the City of Pittsburgh*, 689 A.2d 225 (Pa. 1997).

4. In determining whether unnecessary hardship has been established with regard to dimensional variances, the Board may consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

5. The Board is mindful that although *Hertzberg* allows for consideration of financial hardship with respect to dimensional variances, *Hertzberg* does not give a developer a "carte blanche" right to use property for the highest financial gain simply because denial of dimensional variance might result in financial "hurt." See, e.g., *Yeager v. ZHB of the City of Allentown*, 779 A.2d 595 (Pa. Commw. Ct. 2001); *One Meridian Partners v. ZBA of Philadelphia*, 867 A.2d 706, 710 (Pa. Commw. Ct. 2005).

6. In *Hertzberg*, however, the Supreme Court specifically recognized the hardship associated with a building that had stood vacant for a number of years and was in a deteriorating condition and the costs of bringing the building into building code compliance, plus the expense of renovation. The Court affirmed the Board's determination that dimensional variances were appropriate, noting its findings that it would not have been economically feasible for the owner to purchase the building and convert it to the desired use absent the granting of variances and that, as a result of the deterioration of the building, the type of building, the type of neighborhood and the requirements of the ordinance, the building would have been difficult to sell to another purchaser for another use. More recently, in *Marshall*, the Supreme Court considered a requested use variance to allow the reuse of a century-old, non-conforming school building, which was vacant and in need of repair, for multi-unit residential use. The Court recognized and affirmed its holding in *O'Neill v. Philadelphia Zoning Bd. of Adj.*, 120 A.2d 901 (Pa. 1956), that the "unnecessary hardship" standard does not require a showing that the property would be "practically valueless" without a variance and recognized that it is within a zoning board's discretion to consider the unique circumstances related to efforts to preserve and redevelop a vacant historic building. In the context of a request for a use variance, the Court held that a zoning board's discretion is not so circumscribed as to require a property owner to reconstruct a building for a conforming use, regardless of prohibitive expense, particularly where the proposed reuse of the building would have a beneficial impact on the neighborhood.

7. Here, the Board concludes that Trek presented substantial evidence regarding the unique current condition of the historic buildings on the Subject Properties and the costs associated with the complying with the requirement, which the URA, the property owner has imposed, that the buildings on the West North Avenue Properties must be rehabilitated and incorporated into the proposed development. For viable redevelopment of the site, the proposed use must generate sufficient revenue to justify not only the development costs but the costs of restoring and reusing the existing buildings, which the URA would require of any development. The additional units, which the additional height and massing proposed here would allow, are intended to provide sufficient revenue to justify those substantial development costs, not merely for the highest financial gain.

8. It could be asserted that the URA's condition of preserving the historic buildings is a self-imposed condition and that the site could be used for other purposes that would be permitted in the LNC District. The unsuccessful projects selected from the URA's 2007 and 2011 RFP processes demonstrate the challenges of developing the Subject Properties while still maintaining those buildings. However,

apart from the assertion of potential conforming uses and structures for the site, no evidence was presented of any project that could be viable and comply with the property owner's strictures. As the Supreme Court recognized in both *Hertzberg* and *Marshall*, it is within the Board's discretion to consider the existence of the historic buildings and the consequences to the neighborhood of requiring a use that would make their demolition necessary, contrary to the URA's redevelopment efforts. The Board concludes that the historic buildings at issue here constitute a unique condition of the Subject Properties and that they should be preserved, in accordance with the URA's requirement. The unique circumstances here result in an unnecessary hardship that justify the requested dimensional variances.

9. Further, although some residents expressed concerns regarding the impact of the additional height and floor area ratio associated with the proposed building, the Board concludes that any detrimental impact is outweighed with the benefits anticipated from redevelopment of the site. When the 8-story, 92' height proposed is considered within the context of the nonconforming height of the existing structures in the Garden Theater Block (up to 67'), the proposed dimensional variances will not have the same impact as it would if all of the buildings in the area conformed with the current height restriction. The height and FAR variances requested will undoubtedly have some impact within the neighborhood but is the least impact that would also allow for the redevelopment of the site.

10. Consistent with the evidence and testimony presented and the applicable legal standards governing dimensional variances, the Board concludes that approval of the proposed 8-story, 92' height and 4.8:1 FAR.

Special Exception Pursuant to Section 914.07.G.2 (Off-Site Parking):

11. Trek also seeks a special exception pursuant to Code Section 914.07.G.2.(a), to allow for offsite parking.

12. The specific requirements for a special exception for off-site parking are: 1) the off-site parking must be located within 1,000 feet from the primary entrance of the use served; 2) site for off-site parking must be in the same or a less restrictive zoning district than that of the use served; and 3) if the off-site parking area is not under the same ownership as the primary use, a recorded off-site parking agreement must be provided.

13. Pursuant to the off-street parking schedule for automobiles in Section 914.02.A of the Code, the bicycle parking requirements in Section 914.05.D and Section 914.05.E, which allows for a reduction in the required number of automobile parking spaces with the provision of bicycle parking, for the proposed 72 residential units and 7,139 sf of retail space, a total of 56 automobile and 26 bicycle parking spaces are required, with the maximum reduction permitted.

14. Trek proposed to locate 69 parking spaces for the proposed uses in the Pittsburgh Parking Authority's 554-space Federal Street Garage. The garage is within 1,000 feet of the primary entrance of the proposed building on the Subject Properties and is in the same LNC District. Trek presented substantial evidence, as confirmed by the URA, that the URA controls a certain number of parking spaces within the garage and that negotiations are being conducted for an agreement regarding use of 69 spaces for the proposed uses.

15. Although an agreement for the proposed parking was not provided, Trek demonstrated its intent to comply with the requirement of a recorded agreement for the off-site parking in the Federal Street Garage and thus complied with the special exception criteria. See *Broussard v. Zoning Bd. of Adj.*, 907 A.2d 494 (Pa. 2006) (Pennsylvania Supreme Court held an actual, recordable contract for parking spaces was not required at the time of plan submission for a special exception that required parking).

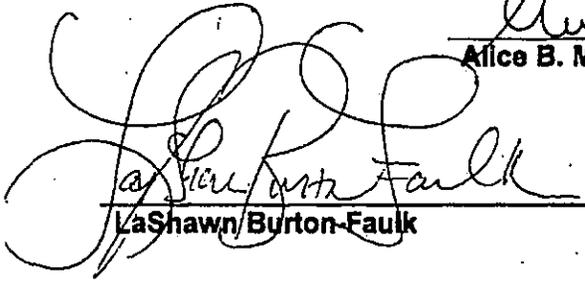
16. The Board recognizes the concern of Councilwoman Harris and other neighbors with regard to the potential impact relating to parking. However, with the provision of 69 off-site parking space, Trek would comply with the Code's requirements for providing off-street parking for the proposed uses.

17. Based on the substantial evidence presented and the applicable law, the Board concludes that grant of a special exception for off-site parking is appropriate, subject to the provision of a recorded agreement for 69 off-site parking spaces.

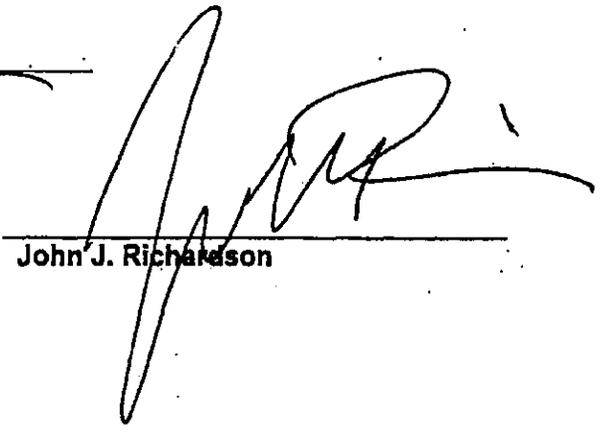
Decision: The Applicant's request for dimensional variances from Section 904.02.3 to allow for an 8-story, 92' height and 4.8:1 FAR is APPROVED; and the request for a special exception pursuant to Section 914.07.G.2 to allow for 69 off-site parking spaces, is APPROVED, subject to the submission of a recorded agreement for the proposed parking.



Alice B. Mitliger, Chair



LaShawn Burton-Faulk



John J. Richardson

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

David Demko

Appellant/Plaintiff

v.

No: SA-15-864

City of Pittsburgh Zoning Board of Adjustment

Appellee/Defendant

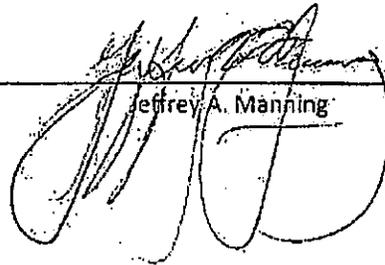
WRIT OF CERTIORARI

TO: City of Pittsburgh Zoning Board of Adjustment

You are hereby ordered to file in the Allegheny County Department of Court Records, Civil/Family Division, the entire record or certified copies thereof, together with a copy of this Writ, concerning the above-captioned appeal within twenty (20) days from service of this Writ.

WITNESS the Honorable Jeffrey A. Manning, President Judge of the Court of Common Pleas of Allegheny County, this 9 day of November 20 15.

BY THE COURT:


_____, P.J.
Jeffrey A. Manning



Clerk