

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

STEPHEN PASCAL,

Appellant,

v.

CITY OF PITTSBURGH ZONING BOARD  
OF ADJUSTMENT,

Appellee.

CIVIL DIVISION

Docket No.: SA 15 -

TYPE OF PLEADING:

**LAND USE APPEAL**

Filed on behalf of:

STEPHEN PASCAL

COUNSEL OF RECORD FOR THIS PARTY:

PATRICIA L. McGRAIL, ESQ.  
PA. I.D.# 33404

JEFFREY D. RIES, ESQ.  
PA. I.D.#311901

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STEPHEN PASCAL,	)	CIVIL DIVISION
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Appellant,	)	Docket No.: SA 15 -
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v.	)	
	)	
CITY OF PITTSBURGH ZONING BOARD OF	)	
ADJUSTMENT,	)	
	)	
Appellee.	)	

**LAND USE APPEAL**

AND NOW comes the Appellant, Stephen Pascal, by and through his counsel, Patricia L. McGrail, Esquire, Jeffrey D. Ries, Esquire, and McGrail & Associates, LLC, and pursuant to 53 P.S. §11002-A(a), files the within Land Use Appeal, and avers as follows:

**Introduction**

1. This matter is an appeal from the October 8, 2015 Decision of the City of Pittsburgh Zoning Board of Adjustment (the "Board"), granting an application submitted by Trek Development Group, Inc. ("Trek") which sought the following relief:
  - a. Variance to §904.02.3 for the maximum FAR 2:1 permitted and requesting 4.8:1;
  - b. Variance to §904.02.3 for the maximum height of 45 feet/3 stories and requesting 97 feet/8 stories; and
  - c. Special Exception under §914.07.G.2.(a) seeking off-site parking.

2. Appellant, Stephen Pascal, files this appeal, contending that the Board erred in granting the requested variances and special exception on the basis that the applicant did not meet the criteria for any of the requested relief.

### **Parties**

3. Appellant, Stephen Pascal, is an adult individual residing at 127 West 82<sup>nd</sup> Street, Apt. 7B, New York, New York 10024, who owns real property located at 1313 Boyle Street, Pittsburgh, Pennsylvania 15212.
4. Appellee, Board, is the Zoning Board for the City of Pittsburgh, comprised of a three-member panel.
5. Trek is a Pennsylvania corporation with a principal place of business at Century Building, 130 7<sup>th</sup> Avenue, Suite 300, Pittsburgh, Pennsylvania 15222. Trek provides real estate development services for both residential and commercial properties.

### **Jurisdiction and Venue**

6. Jurisdiction over this land use appeal is proper in the Court of Common Pleas of Allegheny County pursuant to 53 P.S. §11002-A, which provides in pertinent part, "All appeals from all land use decisions...shall be taken to the court of common pleas of the judicial district wherein the land is located...."
7. The property at issue in this appeal is located in Allegheny County, Pennsylvania.

### **Factual and Procedural Background**

8. Trek filed an application to the Board seeking relief from the City of Pittsburgh Zoning Code (the "Code") for variances and a special exception as set forth above.

9. The property at issue consists of several parcels located at the corner of West North Avenue and Federal Street in a Local Neighborhood Commercial District ("LNC") in Pittsburgh's Central Northside neighborhood.
10. The parcels are specifically identified as 2, 4, 6, and 8 West North Avenue and 1127, 1131, 1133, and 1135 Federal Street, referred to by the Board as "West North Avenue Properties" and "Federal Street Properties" respectively and collectively as "Subject Properties."
11. The Subject properties are owned by the Urban Redevelopment Authority ("URA").
12. The URA has sought requests for proposals several times seeking to further develop the Subject Properties while maintaining the buildings on the West North Avenue Properties in an attempt to maintain the character of the neighborhood.
13. Trek's proposal for development of the URA properties seeks to preserve a portion of the West North Avenue Properties and incorporate those existing buildings into an 8-story, 97' mixed-use building that would occupy the Subject Properties.
14. Trek seeks to utilize the building for retail and residential uses.
15. The floor area ratio ("FAR") of the building, as proposed, far exceeds that permitted by the Code.
16. Additionally, the height of the building would far exceed the maximum height permitted in an LNC district.
17. For the reasons stated in Paragraphs 15 and 16 herein, Trek sought variances to the Code, specifically §904.02.3.

18. Trek also seeks to incorporate off-site parking via the Federal Street garage for the retail and residential uses and sought a special exception pursuant to the Code at §914.07.G.2.(a) for the same.
19. Trek's application, including the sizeable dimensional variances sought, was based upon the financial need of constructing a sufficient number of residential units.
20. In further support of Trek's application, Trek compared the proposed building to three "nearby" buildings all of which have a height in excess of the maximum for the LNC district.
  - a. The Masonic Hall building, located directly nearby the proposed development, has a height of 65';
  - b. Allegheny General Hospital, located .2 mile away from the proposed development, has a height of 250'; and
  - c. Allegheny Center apartment building has a height of 105' yet is across the park from the proposed development.
21. Much of the testimony presented by representatives of both URA and Trek revolved around financial considerations being the sole reason for the hardship.
22. Appellant's property is situated nearby the proposed development, being less than 500' away.
23. Appellant will have a view of the development, and should the building be constructed, his views of the surrounding area will be diminished, reducing his property value.
24. Appellant enjoys standing as a "person aggrieved" and participated in the hearing before the Board on August 6, 2015.<sup>1</sup>

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<sup>1</sup> Importantly, appellant's name is misspelled on the Board's decision. He is listed under "Appearances – Opposing" as "Stephen Pascaz."

25. The Board issued a decision on October 8, 2015, granting all of the relief requested by Trek.

### **Bases for Appeal**

#### **1. Variances**

26. The Code provides at §904.02.3 that the maximum floor area ratio (FAR) for an LNC shall be 2:1.

27. The Code further provides at §904.02.3 that the maximum height of a building in an LNC shall be 45'.

28. As applicant sought variances to these requirements, the burden was on applicant to meet **all** of the following conditions as set forth in §922.09.E of the Code (emphasis added):

1. "That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship is due to the conditions, and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
3. That such unnecessary hardship has not been created by the appellant;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially

or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.”

29. The Board must find that all of the above conditions exist or an application must be properly denied. *Doris Terry Revocable Living Trust v. Zoning Board of Adjustment of the City of Pittsburgh*, 873 A.2d 57, 62 (Pa. Commw. 2005).

30. While the Board relied upon the Supreme Court’s decision in *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998) permitting a lesser burden with regard to the necessary evidence presented for a dimensional variance, the applicant is not relieved of the burden of presenting evidence of each condition as provided in the Code at §922.09.E. *Hertzberg*, supra, has not been interpreted by the Courts to allow financial considerations to provide the primary basis for granting a variance of any type, as evidenced by the record in the instant case.

31. Simply put, financial considerations, namely the profit to be realized, is not a qualifying hardship necessary to grant a variance.

32. The Board therefore erred in granting the requested variances absent a showing of the requisite evidence required by the Code, namely:

- a. The applicant failed to provide evidence of any unique physical circumstances or conditions (emphasis added);
- b. The applicant failed to provide evidence that the property could not be developed in strict conformity with the Code, and on the contrary,

testified that the property could be developed in conformity with the Code, albeit at a cost;

- c. The applicant failed, in that they, or the property owner, created the hardship;
- d. The applicant failed to establish that the oversized building would not alter the essential character of the neighborhood;
- e. The applicant failed to demonstrate that the variances requested represented the least modification to the Code.

33. The Board erred in utilizing the property owner's "strictures" as a hardship.

34. The URA has placed mandates and limitations upon the property which are insufficient to create a hardship for zoning purposes. The proposed maintenance of the facades of the three (3) buildings is likewise not a requirement and rather a red herring utilized in an attempt to create the illusion that the proposed development would maintain the existing character of the neighborhood, which this proposal clearly does not.

35. The urban renewal zone within which this parcel falls is mandated with the removal of blight, not with historic preservation. Several buildings that stood on this parcel have been successfully stabilized; several others have been successfully demolished. The proposed reuse of the front facades of the three buildings facing North Avenue satisfies neither urban renewal mandates nor the Secretary of the Interior's Standards for the Treatment of Historic Properties.

36. The right to a variance runs with the land, and a property owner may not inflict the hardship upon itself or the applicant. *Nowicki v. Zoning Hearing Bd.*, 91 A.3d 287, 296 (Pa. Commw. Ct. 2014).

37. The proposed building is more than twice the size of the LNC allowable height and would substantially alter the character of the neighborhood. The building is adjacent to an historic row-house neighborhood, and the proposed building would substantially impact that area.
38. Finally, the requested variance is not the least modification under the Code necessary to develop the property in question. The requested variances more than double the provisions of the Code, constituting de facto rezoning, and in fact, unlawful spot zoning.

## **2. Special Exception**

39. The Board also erred in granting Trek's request for a special exception pursuant to the Code §914.07.G.2.(a) with regard to off-site parking.
40. The Code at §914.07.G.2.(a) requires the following standards be met:

(1) Location

No off-site parking space shall be located more than one thousand (1,000) feet from the primary entrance of the use served, measured along the shortest legal, practical walking route. This distance limitation may be waived by the Zoning Board of Adjustment if adequate assurances are offered that van or shuttle service will be operated between the shared lot and the primary use.

(2) Zoning Classification

Off-site parking areas shall be considered accessory uses of primary uses that the parking spaces are intended to serve. Off-site parking areas shall require the same or a less restrictive zoning classification than that required for the use served.

(Ord. 28/November 17, 2000/Amend. U-25)

(3) Report from Planning Director

The Zoning Board of Adjustment shall request a report and recommendation from the Planning Director on the planning aspects of the proposed shared parking use.

(4) Off-Site Parking Agreement

In the event that an off-site parking area is not under the same ownership as the primary use served, a written agreement among the owners of record shall be required. An attested copy of the agreement between the owners of record shall be submitted to County Recorder's Office for recordation on forms made available in the office of the Zoning Administrator. Proof of recordation of the agreement shall be presented to the Zoning Administrator prior to issuance of a building permit. An off-site parking agreement may be revoked by the parties to the agreement only if off-street parking is provided on-site pursuant to Sec. 914.02.A or if an Alternative Access and Parking Plan is approved by the Zoning Board of Adjustment pursuant to Sec. 914.07.

41. The Board erred in failing to consider the four necessary for off-site parking and cited inadequately to three (3) of the four (4) requirements.
42. The Board only addressed the first two (2) requirements and ignored the requirements of standard numbers three (3) and four (4).
43. Standard three (3) requires a report from the Planning Director to assess the planning aspects of the proposed shared parking use. The same was not provided nor admitted at the zoning hearing.
44. Standard four (4) requires that a written agreement be provided. The Code utilizes "shall" which prevents the applicant from relying upon a mere promise and requires that the written agreement be provided and recorded.
45. The four (4) delineated standards must all be satisfied for the special exception to be granted, and therefore, the Board erred in failing to require all standards be met.
46. The proposed development creates a detrimental impact on transportation, overwhelming the neighborhood's existing parking capacity.
47. The additional parking needs are a direct result of the variances granted, and in so doing, the surrounding neighborhood's parking will be insufficient to handle the excessive traffic necessitated by the retail and residential uses. While garage parking will be

available for some, it will not satisfy all and the overspill will negatively impact the surrounding area.

**Conclusion**

The appellant, Stephen Pascal, requests this Honorable Court to reverse the decision of the Board and remand with instructions to deny Trek's application.

Respectfully submitted,

Handwritten signatures of Patricia L. McGrail and Jeffrey D. Ries, written in black ink over a horizontal line.

Patricia L. McGrail, Esquire  
Jeffrey D. Ries, Esquire  
Attorneys for the Appellant

**CERTIFICATE OF SERVICE**

I, Jeffrey D. Ries, Esquire, do hereby certify that a true and correct copy of the within Land Use Appeal has been served upon the following counsel of record this 6<sup>th</sup> day of November, 2015, via first class mail:

City of Pittsburgh Zoning Board of Adjustment  
Division of Zoning & Development Review  
200 Ross Street, Third Floor  
Pittsburgh, PA 15219

City of Pittsburgh  
Law Department  
313 City-County Building  
414 Grant Street  
Pittsburgh, PA 15219

Kevin F. McKeegan, Esquire  
Meyer, Unkovic, & Scott, LLP  
Henry W. Oliver Building  
535 Smithfield Street, Suite 1300  
Pittsburgh, PA 15222  
*Counsel for Trek Development Group, applicant*

Respectfully submitted,

BY: 

Patricia L. McGrail, Esquire  
Jeffrey D. Ries, Esquire

**VERIFICATION**

I, Stephen Pascal, hereby verify that the averments set forth in the foregoing LAND USE APPEAL are true and correct to the best of my knowledge, information, and belief.

I understand that false statements made herein are subject to the penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsification to authorities.

Date: 5 November 2015

By:   
Stephen Pascal



**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).

<b>Variance:</b>	904.02.3	Maximum FAR 2:1 permitted and 4.8:1 requested Maximum height 45ft/3 stories permitted and 97ft/8 stories requested
<b>Special Exception:</b>	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 Thomson, 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.

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Alice B. Mitinger, *Chair*

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LaShawn Burton-Faulk

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John J. Richardson