

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

DAVID DEMKO, an individual, AND
STEPHEN PASCAL, an individual,

Appellants,

v.

CITY OF PITTSBURGH ZONING BOARD
OF ADJUSTMENT,

Appellee,

AND

TREK DEVELOPMENT GROUP,

Intervenor-Appellee,

AND

URBAN REDEVELOPMENT AUTHORITY
OF PITTSBURGH,

Intervenor,

AND

CITY OF PITTSBURGH,

Intervenor.

No. SA 15-000864
SA 15-000871

CONSOLIDATED AT:
SA 15-000871

OPINION AND ORDER OF COURT

Honorable Joseph M. James

Copies Sent To:

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OPINION

James, J.

March 23, 2016

This appeal arises from the decision of the City of Pittsburgh Zoning Board of Adjustment ("Board") dealing with several parcels of Property located at the corner of West North Avenue and Federal Street in a Local Neighborhood Commercial ("LNC")

district in the Central Northside neighborhood of the City of Pittsburgh. The Property is owned by Intervenor the Urban Redevelopment Authority of Pittsburgh ("URA") and consists of several unoccupied multi-story buildings in various states of disrepair and dilapidation, as well as several vacant lots. Intervenor Trek Development Group ("Trek") has a contractual relationship with the URA giving Trek the right to acquire and develop the Property. Trek plans to incorporate the facades and some additional 30 additional feet of the existing buildings into a new eight-story structure containing 72 apartments and lower floor retail space. Trek filed an Application with the Board seeking a variance from the floor-area-ratio ("FAR") and the height restrictions applicable to the Property under Code Section 904.02.3. Specifically, Trek proposes to increase the height of the project to 97 feet and 8 stories where only 45 feet and 3 stories are permitted and the FAR to 4.8:1 where a ratio of only 2:1 is permitted. Trek also requested a special exception for off-site parking pursuant to Code Section 914.07.G.2. Specifically, Trek seeks to secure off-street, off-site parking in the "Federal North Garage" located across Eloise Way to the north of the Property.

The Code provides that the purpose of the LNC district is to (1) maintain the small scale and rich diversity of neighborhood-serving community districts; (2) promote and enhance the quality of life in adjacent residential areas; and (3) reduce the adverse impacts that are sometimes associated with commercial uses in order to promote compatibility with residential development.

The Board held a hearing on August 6, 2015. The Appellants are neighboring property owners Stephen Pascal and David Demko. Councilwoman Darlene Harris, as

well as several residents of the surrounding neighborhood including the Appellants, testified in opposition to Trek's proposed Application. They cited parking and traffic concerns as well as the impact on views in the community and the size and appearance of the proposed structure. Several community groups and residents testified in support of Trek's proposed plans. The Board approved Trek's requests finding that the historic buildings at issue qualify as a unique condition and their preservation is an unnecessary hardship justifying the requested dimensional variances. They further found that any detrimental impact from the additional height and floor ratio is outweighed by the benefits anticipated from redeveloping the site. It is from that decision that the Appellants appeal.

When the trial court takes no additional evidence, the scope of its review is limited to determining whether the Board committed an error of law, abused its discretion or made findings not supported by substantial evidence. Mars Area Residents v. Zoning Hearing Board, 529 A.2d 1198, 1199 (Pa. Cmwlth. 1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637, 640 (1983).

The Board incorrectly granted Trek's requested dimensional variance under §922.09.E. The Board may approve a variance as long as the following conditions exist:

- (1) 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 such conditions and not the circumstances of

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.
- (6) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Pittsburgh Code §922.09.E

In this case, Trek is seeking a dimensional variance. A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with regulations, whereas a use variance involves a request to use property in a manner that is wholly outside zoning regulations. Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 721 A.2d 43 (Pa. 1998). The same criteria apply to use and dimensional variances. Id. However, in Hertzberg, our Supreme Court set forth a more relaxed standard for establishing unnecessary hardship for a dimensional variance, as opposed to a use variance. The Supreme Court stated in Tri-County

Landfill Inc. v. Pine Twp. Zoning Hearing Bd., 83 A.3d 488, 520 (Pa. Cmwlth. 2014):

Although Hertzberg eased the requirements, it did not remove them. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth.2005). An Applicant must still present evidence as to each of the conditions listed in the zoning ordinance, including unnecessary hardship. Id. at 520.

Even under this relaxed standard, Trek failed to prove that there are unique physical circumstances on the Property which cause unnecessary hardship in developing the Property. Trek's reasons for the unique physical circumstances mainly deal with financial hardship. At the hearing, Trek's CEO William Gatti testified about the financial considerations. He explained that in order for the development to be financially viable, Trek would need to produce enough rental units to support the cost of the project. URA has created the self-imposed condition requiring Trek to maintain the facades of the three buildings facing North Avenue. If the Property were demolished, it could easily be developed in conformity with the Code. Regarding any impact on the essential character of the neighborhood, the Board concluded that any detrimental impact is outweighed with the benefits anticipated from redevelopment of the site. However, in a similar case, One Meridian Partners, LLP v. Zoning Board of Adjustment of the City of Philadelphia, 867 A.2d 706, 710 (Pa. Cmwlth. 2005), the Court denied variances and a special exception request because the applicant's argument based on Hertzberg did not justify a variance that would substantially alter the character of the neighborhood. In One Meridian, the applicant's proposed 50-story high-rise condominium violated the City's zoning code. The Court held that the proposal was not

a mere technical and superficial deviation. Similarly in the instant case, Trek's variance request is not the least modification under the Code necessary to develop the Property.

The Board also erred in granting Trek's request for a special exception regarding off-site parking. Section 914.07.G.2.(a) provides that special exceptions are permitted when a "proposed plan will result in a better situation with respect to surrounding neighborhoods, citywide traffic circulation, and urban design than would strict compliance with otherwise applicable off-street parking standards."

"An applicant for a special exception has both the persuasion burden and the initial evidence duty to show that the proposal complies with the 'terms of the ordinance' which expressly governs such a grant." Bray v. Zoning Board of Adjustment of City of Philadelphia, 410 A. 2d 909, 910 (Pa. Cmwlth. 1980). "Once the applicant has met his burden of proof and persuasion, a presumption arises that it is consistent with the health, safety and general welfare of the community." Manor Healthcare v. Lower Moreland Township Zoning Hearing Board, 590 A. 2d 65, 70 (Pa. Cmwlth. 1991). In the instant case, Trek did not meet its initial burden of demonstrating compliance with the Code. The Code states the following with regard to off-site parking:

- (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 maybe waived by the Zoning Board of Adjustment if adequate assurances are offered that van or shuttle service will be operated between the shared a 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.

- (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 Section 914.02.A or if an Alternative Access and Parking Plan is approved by the Zoning Board of Adjustment pursuant to Section 914.07.

The evidence shows that the proposed special exception would be detrimental to the public health, safety and welfare. The proposed development creates a detrimental impact on transportation and causes traffic concerns. Trek failed to perform a traffic study to prove otherwise.

Based upon the foregoing, the Board's decision is reversed and Trek's Application is denied.

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ORDER OF COURT

AND NOW, this 23rd day of March, 2016, based upon the foregoing
Opinion, the Board's decision is reversed. Trek's two variance requests and their

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special exception request are denied.

By the Court,

 J.