IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Bernstein and Drew Yenchak,	:	
	:	
Appellants	:	
	:	
v.	:	No. 1565 C.D. 2010
	:	
The City of Pittsburgh Zoning Board of Adjustment	:	Argued: April 5, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: May 5, 2011**

William Bernstein and Drew Yenchak (Objectors) appeal from the Order of the Court of Common Pleas of Allegheny County that affirmed the Decision of the City of Pittsburgh (City) Zoning Board of Adjustment (Board), which, *inter alia*: (1) concluded that four variances requested by the Salvation Army ARC (Salvation Army) were not necessary; (2) granted, in part, a dimensional variance from a provision relating to the maximum lot coverage permissible; and (3) denied the Objectors' Protest Appeal to the Administrator Exception allowing housing proposed by Salvation Army to qualify as a Multi-Suite Residential use. Objectors

argue that the Board erred in a number of its interpretations of the Pittsburgh Zoning Code (Code).

Salvation Army owns two parcels of land in a Neighborhood Industrial (NDI) zoning district in Pittsburgh's Southside neighborhood. One parcel (Building Parcel) is located on Carson Street between South 8th Street and South 9th Street. The Building Parcel is in the East Carson Historic District (Historic District) and, therefore, the Historic Review Commission of Pittsburgh (HRC), along with a Local Review Committee, must approve any construction or demolition on the Building Parcel. The Building Parcel contains an existing 856 square foot building that has been designated as a contributing structure (Contributing Structure) in the Historic District. The other Parcel (Parking Lot Parcel) is located on Bingham Street between South 7th Street and South 8th Street.

Salvation Army wishes to construct a two-story building (Proposed Building) on the Building Parcel. "The first floor of the building would be used for a retail store and the second floor would be used for a chapel, an apartment and a housing area [(Alumni Housing)] for individuals who have completed" a drug and alcohol rehabilitation program run by the Salvation Army. (Board Decision, Finding of Fact (FOF) ¶ 4.) These residents would pay a weekly charge for the Alumni Housing. The HRC and the Local Review Committee required that the front of the Contributing Structure not be demolished but be incorporated into the Proposed Building. In addition, the Local Review Committee recommended the entire square footage of the Contributing Building be incorporated into the

Proposed Building in order to avoid unsightly gaps between buildings in the area. The HRC and the Local Review Committee both requested that the Proposed Building be two stories so as to conform to the appearance of other buildings in the neighborhood.

A parking lot, which did not meet the current requirements of the Code, was located on the Parking Lot Parcel but was demolished. "The Parking Lot Parcel covers an entire city block." (FOF ¶ 14.)

Salvation Army submitted an application to the Board seeking the following variances:

> a. A variance from Section 904.03.C of the Code requiring that lot coverage development cannot exceed 90% of the area of the subject property [(Variance A)];
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> b. A variance from Section 914.09.A.1 of the Code requiring that an off-street parking area cannot be located within 10 feet of a street right-of-way [(Variance B)];
>
> c. A variance from Section 914.09.F of the Code requiring that driveways and curb cuts serving off-street parking areas cannot be located within 60 feet from an intersecting street right-of-way [(Variance C)]; and
>
> d. Two variances from Section 914.09.F of the Code requiring that access gates cannot be located within 20 feet from a street right-of-way [(Variances D1 and D2)].

(FOF ¶ 16(a)-(d).) Salvation Army amended this application "to include a request for a Special Exception pursuant to Section 914.07.G.2(a)(1) of the Code to allow for the location of an off-site parking area (the "Proposed Parking Area") within [less] than 1,000 feet of the primary entrance of the Proposed Building." (FOF ¶ 17.)

The Board held a hearing on Salvation Army's application on March 19, 2009 (First Hearing). On March 20, 2009, Salvation Army submitted a request to the City Zoning Administrator (Zoning Administrator) requesting an exception (Administrator Exception) "pursuant to Section 911.02 of the Code to operate the Proposed Alumni Housing as a 'Multi-Suite Residential (General)' use." (FOF ¶ 21.) At the First Hearing on March 19, 2009, Objectors appeared and expressed their intent to appeal the anticipated Administrator Exception to the Board. Objectors and Salvation Army agreed to combine the hearing on the appeal of the Administrator Exception with the hearing on the requests for variances and special exception. The Zoning Administrator granted the Administrator Exception on March 23, 2009. Objectors appealed the grant of the Administrator Exception to the Board to the extent it allowed the Alumni Housing.

The Board held a second hearing on April 23, 2009 (Second Hearing), at which the Board considered Objectors' Appeal of the Administrator Exception as well as Salvation Army's application for variances and a special exception. Following the Hearing, the Board issued its written decision on July 9, 2009. In its decision, the Board granted Variance A, in part, with respect to the area under the Contributing Structure, but denied Variance A with respect to the remainder of the rear yard area.[1] The Board denied Variance B. The Board held that Variances C, D1, and D2 were not necessary because the proposed plan did not violate those parts of the Code from which Salvation Army sought the variances. The Board granted the special exceptions. The Board denied Objectors' appeal from the

[1] This partial grant of the variance application required a revision to the plan for the Proposed Building.

Administrator Exception with the caveat that the operation and use of the Alumni Housing must conform to the Board's findings regarding such use and that these conditions be included in the occupancy permit. Objectors appealed to the trial court, which affirmed the decision of the Board. Objectors now appeal to this Court.[2]

Before this Court, Objectors argue that the Board and the trial court erred in: (1) determining that the Alumni Housing qualified as a Multi-Suite Residential use under the Code rather than a Community Home for purposes of the Administrator Exception; (2) deciding that the distance from an intersection of rights-of-way should be measured from the center lines of the rights-of-way rather than the closest point of intersection of the rights-of-way; (3) construing "street rights-of-way" in Section 914.09.F and 914.09.A.1 so as not to include alleys or ways; and (4) concluding that the hardship necessitating Variance A was not caused by Salvation Army.

We first address Objectors' argument that the Board and the trial court erred in affirming the Zoning Administrator's determination that the Alumni Housing qualifies as a Multi-Suite Residential use rather than a Community Home. Pursuant to Section 922.08 of the Code, the Zoning Administrator may grant an Administrator Exception when an application complies with the Code. Pursuant to the Use Table at Section 911.02 of the Code, a Multi-Suite Residential (General)

[2] "When a trial court reviewing the decision of a zoning hearing board takes no additional evidence, this Court reviews the zoning hearing board's decision only for an abuse of discretion or errors of law." Hamilton Hills Group, LLC v. Hamilton Township Zoning Hearing Board, 4 A.3d 788, 792 n.6 (Pa. Cmwlth. 2010).

use is a Multi-Suite Residential use with more than eight sleeping rooms, and is permitted in an NDI district with an Administrator Exception. Code §§ 911.01.C, 911.02. Section 911.02 defines a Multi-Suite Residential use as "a building or portion thereof, containing rooms rented as sleeping or living quarters, without private kitchens and with or without private bathrooms. Lodging or meals or both are provided for compensation on a weekly or monthly basis. Multi-Suite Residential uses shall not include Dormitory and Fraternity/Sorority." Code § 911.02. By contrast, Section 911.02 defines a Community Home as:

> a group of more than eight unrelated disabled persons living together *as a single housekeeping unit with shared common facilities*. If required, staff persons may reside on the premises. *A Community Home may not be a Multi-Suite Residential use or an Assisted Living use as defined in Section 911.02*. For the purposes of this definition, "disabled" means "handicapped" as defined according to the Fair Housing Act Amendments of 1988, 42 U.S.C.S. 3602(h) [(FHA)], and any amendments thereto. This use does not include Custodial Care Facilities. This use includes halfway houses where persons are aided in readjusting to society following a period of hospitalization or institutionalized treatment for a medical, psychiatric, developmental, emotional, or other disability or handicap. This does not include halfway houses for people leaving a correctional facility.

Code § 911.02 (emphases added). A Community Home is a special exception use in an NDI district. Code §§ 911.01.D, 911.02.

In its decision, the Board concluded that although the residents of the Alumni Housing, as individuals recovering from substance abuse, might qualify as handicapped individuals under the FHA, being handicapped does not preclude an individual from living in a Multi-Suite Residential use facility and "Salvation Army's control over and supervision of the residents . . . does not rise to the level

of supervision required for a Community Home." (Board Decision, Conclusions of Law (COL) ¶¶ 36-37.) Objectors argue that the Board erred by focusing on the level of supervision of the residents of the Alumni Housing as neither the definition of Community Home use nor Multi-Suite Residential use references the degree of supervision over a facility's residents. While we agree that the level of the facility's supervision over the facility's residents is not relevant under either the definition of Community Home or Multi-Suite Residential use, our inquiry does not end here.

As Salvation Army points out, the definition of Community Home states that the unrelated disabled residents of a Community Home live together "as a single housekeeping unit with shared common facilities." Code § 911.02. The Board found that the Alumni Housing will have a common bathroom and will not have separate kitchens. (FOF ¶¶ 110-11; COL ¶ 33.) The Board also found that meals are available for residents of the Alumni Housing at a nearby, separate Salvation Army building, but that the residents are not required to attend these meals. (FOF ¶ 112; COL ¶ 33.) Such living conditions do not constitute a "single housekeeping unit with shared common facilities." The only shared common facilities are the common bathroom, laundry area, and television room. There was no evidence presented indicating that the residents of the Alumni Housing would function as a housekeeping unit or a household—that the residents would share housekeeping duties such as chores or live as a unit. The residents would not necessarily take meals together. They would not share a kitchen, although food would be made available to them. They would not share common areas or recreational facilities

aside from the television room.[3] Therefore, we hold that the Board did not err in holding that the proposed Alumni Housing qualified for an Administrator Exception as a Multi-Suite Residential use.

We next address Objectors' argument that the Board erred in determining that the distance from an intersection of rights-of-way should be measured from the center lines of the rights-of-way rather than the closest point of intersection of the rights-of-way (i.e., the closest intersection of the boundary lines of the rights-of-way). Section 914.09.F of the Code provides that:

> Access to parking garages and parking areas containing more than five (5) spaces shall be designed to ensure that entering and exiting vehicles do not disrupt vehicle and pedestrian circulation patterns. At a minimum, all garage doors, ticket machines or entrance gates shall be located so as to allow a minimum of twenty (20) feet clearance from sidewalks and street rights-of-way. Driveways serving such parking areas shall be located *at least sixty (60) feet from intersecting street rights-of-way*, and joint access to abutting parcels shall be provided wherever practical.

Code § 914.09.F (emphasis added). Variance C sought a dimensional variance from this provision for an exit gate driveway onto 7th Street between Bingham Street and Cabot Way. The Board determined that this variance was not necessary

[3] This assumes that the residents of the Alumni Housing qualify as handicapped under the FHA. This point is arguable. For a discussion of whether recovering substance abusers who are abstinent from alcohol and illegal drugs are considered handicapped for purposes of the FHA, compare Lakeside Resort Enterprises, LP v. Board of Supervisors, 455 F.3d 154, 156 n.5 (3d Cir. 2006) (noting "that at least two other courts have held that recovering alcoholics and drug addicts are handicapped, so long as they are not currently using illegal drugs") (citing United States v. South Management Corp., 955 F.2d 914, 920-23 (4th Cir. 1992)); Connecticut Hospital v. City of New London, 129 F.Supp. 2d 123, 125 (D. Conn. 2001)), with RHJ Medical Center v. City of DuBois, 78 Fed. R. Serv. 3d (Callaghan) 112 (2010) (engaging in a nuanced discussion of whether recovering substance abusers are *per se* handicapped for purposes of the FHA).

because the Board considered the distance at issue in Section 914.09.F, i.e., the distance between the exit gate driveway and the intersections of the rights-of-way of 7th Street and Bingham Street, and 7th Street and Cabot Way, to be measured from the intersection of the center lines of the intersecting rights-of-way rather than from the intersection of the nearest borders of the intersecting rights-of-way. (FOF ¶ 76; COL ¶¶ 9-13.) Using this method, the Proposed Parking Area complied with Section 914.09.F, thus, no variance was required.

Objectors argue that the Board's construction of the term "intersecting street rights-of-way" in Section 914.09.F is not consistent with the plain language of the Code, is not reasonable, and produces an absurd result. Both parties agree that this issue is one of statutory construction. Under Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a), "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." Id. When the words of a statute are not ambiguous, courts may not stray from the plain language of the statute "under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). These "rules of statutory construction apply to [zoning] ordinances as well as statutes." In re Appeal of Holtz, 8 A.3d 374, 378 (Pa. Cmwlth. 2010).

Section 914.09.F does not explicitly provide how distances from intersecting street rights-of-way shall be measured, whether from the intersection of the center lines of the rights-of-way or the intersection of the nearest borders of the rights-of-way. Both interpretations appear, on their faces, to be reasonable. Courts are to

give great deference and weight to a zoning board's interpretation of the zoning ordinance that it is charged to interpret. Tink-Wig Mountain Lake Forest Property Owners Association v. Lackawaxen Township Zoning Hearing Board, 986 A.2d 935, 941 (Pa. Cmwlth. 2009); Ruley v. West Nantmeal Township Zoning Hearing Board, 948 A.2d 265, 269 (Pa. Cmwlth. 2008). In addition, when there is doubt as to the meaning of a term in a zoning ordinance, that doubt is to be "resolved in favor of the landowner and the least restrictive use of the land." Tink-Wig, 986 A.2d at 941 (citing Caln Nether Company, L.P. v. Board of Supervisors of Thornbury Township, 840 A.2d 484 (Pa. Cmwlth. 2004)).

Objectors argue that the Board's proposed interpretation of "intersecting street rights-of-way" in Section 914.09.F could lead to an absurd result:

> [i]f the [Board]'s logic were followed, a point of egress would continually be moved based on the width of street-rights-of-way. In other words, at a four lane intersection, the ingress / egress point could be moved twelve (12) feet closer to the intersection because of the existence of greater distance to the center line of the intersections. At a six (6) way intersection, the point of ingress / egress could be moved twenty-four (24) feet closer.

(Objectors' Br. at 16.) When a statute is ambiguous and it is necessary for a court to attempt to ascertain the intent of the enacting body, a court should, of course, presume that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Section 1922(1) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1922(1). However, the record reflects that it has been the Board's practice to measure intersections from street rights-of-way

from the center lines of the intersecting rights-of-way.[4] Presumably, it would have come to the Board's attention, in its administration of the Code, if this interpretation was leading to undesirable results.

Objectors also argue that the Board's interpretation of "intersecting street rights-of-way" conflicts with the definition of "intersection" found in the Vehicle Code, 75 Pa. C.S. §§ 101 – 9805, which defines the term in part as:

> (1) The area embraced within the prolongation or connection of the *lateral curb lines*, or, if none, then the *lateral boundary lines of the roadways* of two highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

75 Pa. C.S. § 102 (emphasis added). However, the Code does not incorporate the Vehicle Code's definition of "intersection," nor do Objectors point to any authority

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[4] The Board held a discussion during the Second Hearing regarding the interpretation of this provision:

> MR. TOAL [Board Member]: I hate to keep confusing things here, but I'm worried. On the variance request the way it's written up, it says curb cut within 60 feet of the centerline of intersecting streets referring to Subsection F. And these bisections – F doesn't say that. It says from intersecting street rights of way, which seems to me to be where the corners, not the centerline – so, I mean, where are we? I mean, I'm –
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> MS. TYMOCZKO [Zoning Administrator]: I think based on the past interpretation, it's usually within the centerline that's being intersected to – that's what we've applied when we refer to interpretations that (inaudible.)
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> MR. KAMIN [counsel for *Objectors*]: Just to add, I've had that issue before, and I believe Ms. Tymoczko's answer is correct. That's the way that they apply it.
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> MR. TOAL: All right. So that's fine.

(Bd. Hr'g Tr. at 64-65, April 23, 2009, R.R. at 72a-73a.)

stating that the Vehicle Code and the Code are to be read *in pari materia*. Therefore, there is no requirement that the Board apply the Vehicle Code's definition of "intersection" in interpreting the Code. Moreover, the fact that the Legislature felt it necessary to specifically define the term intersection in the Vehicle Code as meaning the area embraced within the connection of the lateral boundary lines of a highway's roadway, supports the conclusion that Objectors' proposed meaning is not necessarily the plain meaning of the term "intersection" or "intersecting" without further definition.

Finally, Objectors argue that the practice of the Board with respect to the use of the term "right-of-way line" in Section 926.220 of the Code is inconsistent with its interpretation of the term "intersecting street rights-of-way" in Section 914.09.F. Section 926.220 defines "[s]etback, [f]ront" as "a setback that is to extend across the full width of a lot, the required depth of which is measured as the minimum horizontal distance between the *street right-of-way line* and a line parallel thereto on the lot." Code § 926.220 (emphasis added). Objectors argue that it has been the Board's practice in measuring setbacks to use the boundary line of a street right-of-way, not the center line. This argument actually undermines Objectors' position. Under their logic, if "street right-of-way line" means the outside or boundary line of a street right-of-way, and the 60 feet in Section 914.09.F are to be measured from this outside or boundary line, then the provision in Section 914.09.F should read "at least sixty (60) feet from intersecting street right-of-way *lines*" rather than "at least sixty (60) feet from intersecting street rights-of-way," as it does. Code § 914.09.F. For these reasons, we hold that the

trial court did not err in affirming the Board's holding that Variance C was not necessary.

We next address Objectors' argument that the Board erred in construing the term "street rights-of-way" in Sections 914.09.F and 914.09.A.1 as excluding alleys or ways. As noted above, with regard to parking lots containing more than five parking spaces, such as the Proposed Parking Area, Section 914.09.F provides "all garage doors, ticket machines or entrance gates shall be located so as to allow a minimum of *twenty (20) feet clearance* from sidewalks and *street rights-of-way*." Code § 914.09.F (emphasis added). Salvation Army requested Variances D1 and D2 from Section 914.09.F for the exit gates onto South 7th Street and Cabot Way because these gates would not be 20 feet from the rights-of-way of 7th Street and Cabot Way. Section 914.09.A.1 provides that "in no case shall a surface parking lot in [an] NDI . . . zoning district be located within ten (10) feet of the street right-of-way." Code § 914.09.A.1. Salvation Army requested Variance B because Proposed Parking Area is just less than 10 feet from the right-of-way of Cabot Way.

We first note that, with respect to the exit gates onto South 7th Street and Cabot Way, the Board primarily rested its holding, that variances from the 20-foot-clearance provision of Section 914.09.F were not necessary, on the applicability of this provision, by its explicit terms, to "all garage doors, ticket machines, or *entrance* gates," Code § 914.09.F (emphasis added), and, therefore, not to the exit gates at issue, which the Board found would be designed to permit only egress and not ingress. (FOF ¶¶ 72, 81-88; COL ¶ 6.) Objectors do not appear to challenge

this conclusion, and, therefore, this argument is only relevant with respect to the Board's holding that a variance from Section 914.09.A.1 was not necessary.[5]

Section 926.234 of the Code defines "[s]treet" as "a strip of land at least twenty-five (25) feet wide that provides access to public property, or in a plan of land subdivision approved by the Planning Commission, the boundary lines of which include roadway or sidewalk area." Code § 926.234. By contrast, the Code defines a "[w]ay" as "a strip of land less than twenty-five (25) feet wide that provides access to public property or in a plan of land subdivision approved by the Planning Commission, the boundary lines of which include roadway and/or sidewalk area." Code § 926.260. Cabot Way is only 20 feet wide. The Board found, therefore, that "Cabot Way is not a 'street' as defined in § 926.234." (FOF ¶ 93.) Because Section 914.09.A.1 speaks explicitly in terms of a "street right-of-way" the Board concluded that this provision does not apply to ways. (COL ¶¶ 18-19.) Because the definitional section of the Code differentiates between "streets" and "ways," the Board's conclusion that Section 914.09.A.1's provision referring to a "street right-of-way" applies only to streets appears to adhere to the express meaning of this provision. Moreover, even if Section 914.09.A.1 was ambiguous, as per this Court's case law as discussed above, we are to grant great deference to the Board in its interpretation of the Code. Tink-Wig; Caln Nether Co.

[5] Even if the question of whether Section 914.09.F's use of the term "street rights-of-way" applied to ways as well as streets were at issue, the following discussion of the Board's interpretation of the same term in Section 914.09.A.1 would apply equally to the use of this term in Section 914.09.F.

Objectors argue that the definitions of both "street" and "way" contain the disjunctive phrase "or in a plan of land subdivision approved by the Planning Commission, the boundary lines of which include roadway . . . area." Code §§ 926.234, 926.260. Therefore, Objectors argue, the width of a right-of-way is not necessarily determinative of whether the right-of-way is a street or a way—instead the determinant could be the strip of land's designation on a plan of land subdivision. However, this is not necessarily the only, or even the clearest way to read this disjunctive phrase. This phrase could be seen as an alternative to the clause "that provides access to public property" in the definitions of "street" and "way." Code §§ 926.234, 926.260. Under this reading, a strip of land could be a street or way even if it did not yet provide access to public property as long as it was shown on a plan of land subdivision approved by the Planning Commission. Again, when a phrase in the Code is ambiguous, deference is to be given to the Board's interpretations. Objectors do not offer a compelling reason why the Board's interpretations of these definitions are incorrect.

Objectors also argue that the term "street right-of-way" in Section 914.09.A.1 could refer to a type of right-of-way as defined in Section 926.213 of the Code, which Objectors characterize as setting forth "various types of rights-of-way such as street, electric, storm and sewer." (Objectors' Br. at 21 n.1.) In fact, Section 926.213 does not use the word "street" at all, but defines "[r]ight-of-way" as "a strip of land acquired by reservation, dedication, forced dedication, prescription, or condemnation and intended to be occupied by a *road*, crosswalk, railroad, electric transmission lines, oil or gas pipeline, water line, sanitary storm sewer, and other similar uses." Code § 926.213 (emphasis added). Nothing in the

definition of "right-of-way" found at Section 926.213 implies that the term "street right-of-way" would be used as a term of art to denote a right-of-way containing a roadway as opposed to some other type of right-of-way.

Next, we address Objectors' argument that the Board's application of the term "street right-of-way" in Section 914.09.A.1 in this case is inconsistent with the Board's application of the term "[s]etback, [f]ront" found at Section 926.220, which defines this term as "a setback that is to extend across the full width of a lot, the required depth of which is measured as the minimum horizontal distance between the street right-of-way line and a line parallel thereto on the lot." Code § 926.220. Objectors argue that the Board applies this definition to front setbacks regardless of whether a property is on a street or a way. Objectors do not, however, offer any authority for support of this proposition nor do they point to evidence in the record for this. For these reasons, therefore, we hold that the trial court did not err in affirming the Board's holding that Section 914.09.A.1 does not apply to "ways."

Finally, we address Objectors' argument that the Board erred in holding that Salvation Army met the hardship requirements for a dimensional variance from Section 904.03.C of the Code and that Salvation Army's hardship was not self-created. Section 904.03.C provides that maximum lot coverage in an NDI district is 90%. Code § 904.03.C (table). Salvation Army sought a dimensional variance to permit 100% lot coverage. In order to qualify for a dimensional variance, an applicant must show:

> 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.

Code § 922.09.E. Objectors argue that the reason offered by Salvation Army, that the hardship it would suffer was "programmatic hardship," does not satisfy the requirement of Section 922.09.E, in that there is no hardship unique to the Building Parcel that prevents its development in compliance with the Code. However, the "programmatic hardship" offered by Salvation Army is not the hardship upon which the Board based its decision to grant, in part, the requested dimensional variance. Rather, it was HRC's request that the Contributing Structure be preserved, in conjunction with provisions of the Code, that made it impossible for Salvation Army to develop the Building Parcel to the extent otherwise allowed by the Code and retain the Contributing Structure.

The Board made the following findings of fact with regard to the variance requested from Section 904.03.C:

37. The HRC required that the building be two stories high and that window panes throughout the structure must be clear glass.

38. The total area of the Building Parcel is 19,254 square feet.

39. The total area of the Proposed Building is 18,960 square feet.

40. A concrete, party wall is adjacent to the rear of Proposed Building

41. *If the Proposed Building were not extended to the length of the Building Parcel, the concrete party wall would be exposed.*

42. Exceeding the Code's lot coverage requirements is common in the vicinity of Building Parcel given how the community has "built up" and developed over the years.

43. The building parcel is a corner lot.

44. The shortest street frontage is on South Ninth Street[.]

45. The Building Parcel has its front along South Ninth Street. (§ 925.06.D)

46. Although East Carson Street is the major thoroughfare, under the Code's definitions, one of the sideyards of the Building Parcel is along East Carson Street.

47. *The Proposed Building as designed will be contextual with the existing structures on East Carson Street.*

48. *The imposition of the twenty foot rear setback requirement would create a "missing tooth" in the building facades along East Carson Street.*

49. One of the purposes of the Code is to: "recognize and preserve the uniqueness of Pittsburgh". (§ 901.03(c)).

50. The required open space of 1,925 square feet (10% of the Building Parcel area) and the rear setback of 2,000 square feet (20 feet from the rear property line) are in essence duplicative of each other for the Proposed Building. Thus, if the Proposed Building is designed to meet the rear setback requirement, it would also meet the 90% lot coverage limitation.

. . . .

53. Adjusting for the four feet that is in the buildable area of the Building Parcel, *the HRC requires preservation of a 713 s.f. portion of the Contributing Structure in the rear yard.*

54. *To preserve the Contributing Structure, it must be allowed to remain in the rear yard area.*

(FOF ¶¶ 37-50, 53-54 (citations omitted) (emphasis added).) With respect to the Building Parcel, the Board also made the following conclusions of law:

> 27. Pursuant to the Site Development Standards set forth in § 904.03.C in NDI Districts, when not adjacent to a way, a twenty (20) foot rear setback is required.
>
> 28. *The preservation of the Contributing Structure in the East Carson Street Historic District justifies relief from a portion of the rear setback requirement.*
>
> 29. The hardship imposed is not of the Salvation Army's making but results from the City's regulation of the demolition of historic structures and the establishment of historic districts.
>
> 30. The Salvation Army did not submit evidence of a hardship with respect to the portion of the rear setback on Building Parcel that is not covered by the Contributing Structure.

(COL ¶¶ 27-30 (emphasis added).)

In Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Supreme Court stated:

> in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was 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*.

Id. at 263-64, 721 A.2d at 50 (emphasis added). Here, in determining that Salvation Army suffered from an unnecessary hardship meriting the partial grant of the dimensional variance, the Board considered the fact that HRC requested Salvation Army incorporate the Contributing Building into the Proposed Building in order to preserve the historic character of the surrounding neighborhood. The

need to incorporate the Contributing Building, coupled with the Code provisions discussed in the Board's findings of fact, made it impossible for Salvation Army to make use of 90% of the coverage on the Building Lot as it would otherwise be allowed. Therefore, the Board did not err in determining that Building Lot suffered from a unique hardship that was not caused by Salvation Army and, therefore, was entitled to a partial grant of its dimensional variance request.

For these reasons, we affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Bernstein and Drew Yenchak,	:	
	:	
Appellants	:	
	:	
v.	:	No. 1565 C.D. 2010
	:	
The City of Pittsburgh Zoning Board of Adjustment	:	

O R D E R

NOW, May 5, 2011, the Order of the Court of Common Pleas of Allegheny County in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge