

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Spahn, :
Appellant :
v. : No. 215 C.D. 2011
Zoning Board of Adjustment and : SUBMITTED: May 27, 2011
Metro Impact, LLC :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER FILED: August 5, 2011**

Gary Spahn appeals, *pro se*, from the decision of the Court of Common Pleas of Philadelphia County, which affirmed the decision of the Philadelphia Zoning Board of Adjustment (Board) to grant a number of variances to Metro Impact, LLC. We affirm in part and reverse in part.

In 2009, Metro Impact, the owner of a vacant lot located at 760-62 Chadwick Street, Philadelphia, a residential area zoned R-10A, filed an application with the Department of Licenses and Inspections for the relocation of lot lines, and for the erection of a single family dwelling on the lot. The application was denied for five reasons: the proposed lot size was less than required; the proposed open area was less than required; the proposal did not include a required side yard; the

proposed building height exceeded the maximum allowed; and the proposed four stories exceeded the three story limit. Metro Impact filed an appeal with the Board seeking dimensional variances to the five requirements identified by Licenses and Inspections. Spahn, a neighbor, appeared in opposition. The Board granted the variances, and Spahn appealed to common pleas. Without taking additional evidence, common pleas affirmed, and appeal to this court followed.

In this appeal, Spahn challenges only the variance to the open space requirement. The lot at issue in this case, even after a reallocation of the lot lines increased its size, is 1080 square feet, less than the 1440 square feet minimum lot size required by the Philadelphia Zoning and Planning Code (Code). *See* Code § 14-205. The structure proposed by Metro Impact would leave 182 square feet of open space, less than the 330 square feet required by the Code’s 30% open space requirement. At the hearing before the Board, Metro Impact’s counsel argued that a variance of the open space requirement would allow the construction of a “more commodious and proper kind of house.” Transcript of Hearing (January 26, 2010) at 4. He also noted that the proposed variance was similar to the variances granted to two neighboring properties.¹ *Id.* at 11.

The Board found as a fact that the existing lots were unique in that they are unusually small. The Board also found that Metro Impact had met its burden of establishing that literal enforcement of the Code would create an unnecessary hardship, and that the variance was required for the construction of

¹ Spahn also objected to the variances for the neighboring properties. On appeal, this court held that the testimony of the developer’s architect that open space variances were necessary to “create nicer more useable properties” did not demonstrate unnecessary hardship and therefore reversed the grant of the variances. *Spahn v. Zoning Board of Adjustment*, 2071 C.D. 2010 (Pa. Cmwlth., filed March 22, 2011).

houses on the property. On appeal, Spahn argues that common pleas erred in affirming the Board for a number of reasons, including that the evidence presented to the Board was insufficient to justify a finding of unnecessary hardship.

Our Supreme Court has made clear that:

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. To hold otherwise would prohibit the rehabilitation of neighborhoods by precluding an applicant who wishes to renovate a building in a blighted area from obtaining the necessary variances.

Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh, 554 Pa. 249, 263-64, 721 A.2d 43, 50 (1998). However, this court has stated:

Ever since our Supreme Court decided *Hertzberg*, we have seen a pattern of cases arguing that a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property exactly as he wishes, so long as the use itself is permitted. *Hertzberg* stands for nothing of the kind. *Hertzberg* articulated the principle that unreasonable economic burden may be considered in determining the presence of unnecessary hardship. It may also have somewhat relaxed the degree of hardship that will justify a dimensional variance. However, it did not alter the principle that a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses.

Yeager v. Zoning Hearing Bd. of the City of Allentown, 779 A.2d 595, 598 (Pa. Cmwlth. 2001).

In this case, in which a developer sought dimensional variances to build residences on currently vacant lots, the Board correctly looked to *Hertzberg*, but erred in finding that standard met. The testimony before the Board, quoted above, established only that the variance was required to meet the developer's goal of building a "more commodious and proper" dwelling on the lot. There was no testimony establishing that any hardship, economic or otherwise, would result if the open space variance was not granted. For that reason, we must reverse the Board's grant of the open space variance. *Yeager*. As Spahn's appeal only challenged that variance, we affirm in all other respects.

BONNIE BRIGANCE LEADBETTER,
President Judge

