

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bethlehem Manor Village, LLC, :
 Appellant :
 :
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 v. :
 :
 :
The Zoning Hearing Board of :
The City of Bethlehem :
 :

No. 2258 C.D. 2011
Argued: June 4, 2012

**BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: July 5, 2012

Bethlehem Manor Village (Owner) appeals from an order of the Court of Common Pleas of Northampton County (trial court). The trial court affirmed the decision of the Zoning Hearing Board of the City of Bethlehem (ZHB), which denied the use variance that Owner requested in order to develop its property as an apartment complex.

Owner’s property consists of a five-acre lot (the Property) in the Institutional zoning district in the City of Bethlehem. Owner purchased the Property in 2007 for approximately \$1.4 million. After acquiring the Property, Owner obtained approval for the development of the Property as a 125-bed personal care center/assisted living facility. In or about July 2010, Owner submitted a request for a use permit from the zoning officer of the City of Bethlehem, authorizing Owner to build four (4) apartment buildings consisting of 102 apartments on the Property. The zoning officer denied that request because

apartment buildings are not a permitted use in the Institutional zoning district. Owner appealed the zoning officer's denial to the ZHB, seeking a use variance for the development of the Property for apartment buildings.¹ (Reproduced Record (R.R.) at 7a-8a.)

The ZHB held a hearing, during which Owner, *inter alia*, offered evidence regarding its attempt to market the Property for sale to certain institutional entities in the area. This evidence consisted of letters Owner sent to various entities approximately one month before the ZHB's hearing. Owner also submitted evidence regarding the then-current market in the area for assisted living residences and testimony from a real estate expert, indicating that a lending institution would be unlikely to provide financing under current market circumstances. The ZHB denied Owner's appeal. The ZHB rendered factual findings regarding Owner's ability to develop the Property for a permitted use. Based upon its findings, the ZHB concluded that Owner failed to demonstrate that the Property was subject to an unnecessary hardship, by virtue of the application of the Zoning Ordinance, such that Owner was entitled to a use variance. Owner appealed the ZHB's decision to the trial court, which affirmed.

¹ The Zoning Ordinance of the City of Bethlehem (Zoning Ordinance) permits the following uses as of right in the Institutional zoning district: public parks, commercial communication towers, personal care centers, and assisted living facilities. The Zoning Ordinance also permits the following uses as special exceptions: public or parochial schools, colleges, seminaries, or other non-profit educational institutions, hospitals, nursing homes, convalescent homes, medical or health centers, housing facilities for students and/or staff of educational facilities, professional office buildings as long as 75% of the space is used for health or medical purposes, theatres, auditoriums, museums, libraries, and arenas. Section 1309.02 of the Zoning Ordinance

Owner now appeals the trial court's order,² raising the question of whether the ZHB erred in concluding that Owner failed to establish that the Property is subject to an unnecessary hardship, thereby denying Owner's request for a use variance.

Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC)³ sets forth the general standards that a zoning hearing board should consider in evaluating a request for a use variance and provides, in pertinent part:

Zoning hearing board's functions; variances

(a) The board shall hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant The board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(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 such 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

² When the trial court accepts no additional evidence in a zoning appeal, our review is limited to considering whether the zoning hearing board erred as a matter of law or abused its discretion. *German v. Zoning Board of Adjustment*, 41 A.3d 947 (Pa. Cmwlth. 2012).

³ Act of July 31, 1968, P.L. 805, added by Section 89 of the Act of December 21, 1988, P.L. 1329, 53 P.S. § 10910.2.

is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

In *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807 (Pa. Cmwlth. 2005), this Court held that, in order to establish unnecessary hardship “an applicant must prove: (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property is valueless for any purpose permitted by the zoning ordinance.” *Taliaferro*, 873 A.2d at 807 (quoting *SPC Co., Inc. v. Zoning Hearing Bd. of Adjustment of the City of Phila.*, 773 A.2d 209 (Pa. Cmwlth. 2001)). A property owner seeking a use variance must always demonstrate that an unnecessary hardship exists with respect to the property at issue and in light of the permitted uses in the particular zoning district in which the property is located. *Sweeney v. Zoning Hearing Bd. of Lower Merion Twp.*, 534 Pa. 197, 626 A.2d 1147 (1993).

The evidence in this case does not establish that Owner cannot develop the Property for a permitted use, or that Owner could only conform the Property for a permitted use at a prohibitive expense. The Property could be developed for the initial use Owner sought—a personal care/assisted living facility—and Owner would not have to alter the physical characteristics of the Property in order to do so. Thus, the only possible basis for finding that an unnecessary hardship exists would be if the Property has no value for any use permitted by the Zoning Ordinance.

As indicated above, Owner submitted evidence through which it attempted to demonstrate that the Property lacks value for a permitted use, including evidence of Owner’s attempt to sell the Property and a decline in the

market for assisted living residences. Owner argues that the ZHB erred in concluding that this evidence was insufficient to establish the existence of an unnecessary hardship.

In *Philadelphia v. Earl Scheib Realty Corporation*, 301 A.2d 423 (Pa. Cmwlth. 1973), this Court reviewed a denial of a use variance involving assertions by the owner that it could not use the property for a permitted use. The owner, Scheib, wanted to construct a two-story building with accessory off-street parking on a vacant lot for an auto body paint and body repair shop, a use not permitted in the commercial district in which the property was located. Scheib introduced evidence that similar commercial and industrial uses existed in the area, as well as evidence that the use would not be offensive. The zoning hearing board concluded that no hardship existed. The applicant appealed. This Court opined:

We additionally find unique the proposition that, since “[t]here is immutable evidence that the lot has stood abandoned and unoccupied for a long number of years,” it “was not necessary, in order to establish hardship, to describe specific attempts at sale.” It is axiomatic that the applicant for a variance must prove that the subject property could not be used within the permissible limits of the existing zoning classification. “Proof that the land cannot be sold for any use permitted by the ordinance is evidence that the land will not yield a reasonable return if the uses are confined to those permitted by existing zoning regulations. To be sure, *inability to sell after a sustained and vigorous effort to do so is evidence that the land is not saleable for a permitted purpose*. But it is not the only evidence which might be adduced to show that land cannot be sold for any use permitted by the ordinance. The Pennsylvania Supreme Court has, on numerous occasions, sustained findings of unnecessary hardship where no evidence of attempt to sell was recited. Thus, infeasibility might be proved either (1) by a showing that the physical characteristics of the property were such that it could not in any case be

used for the permitted purpose or that the physical characteristics were such that it could only be arranged for such purpose at prohibitive expense; or (2) *by proving that the characteristics of the area were such that the lot has either no value or only a distress value for any purpose permitted by the zoning ordinance.*

Scheib, 301 A.2d at 426 (emphasis added; citations omitted).

The highlighted language quoted above suggests two possible means by which a property owner may demonstrate that a property lacks value for any permitted use. First, an owner may be able to establish that a property lacks value based upon “a sustained and vigorous” attempt to sell the property in order to prove that the property lacks value for a permitted use. *Id.* Second, an owner may demonstrate unnecessary hardship through evidence that the “characteristics of the area [are] such that [the property] has . . . no value or only a distress value for any” permitted use. *Id.*

Owner’s only attempt in this case to sell the Property involved sending letters targeted to certain possible buyers, and this attempt to attract a potential buyer occurred only approximately thirty (30) days before the ZHB’s hearing. Also, one of the responses that Owner received indicated that the letter writer was forwarding the offer of sale to a potential buyer for consideration based upon the price. Based upon the limited amount of time and limited scope of the Owner’s effort to obtain a buyer, as well as evidence of a potentially interested entity, the ZHB reasonably concluded that Owner failed to demonstrate unnecessary hardship based upon an inability to sell the Property.⁴

⁴ Our Supreme Court’s decision in *Ferry v. Kownacki*, 396 Pa. 283, 152 A.2d 456 (1959), also supports this conclusion. In *Ferry*, the Supreme Court considered a challenge by neighbors to an order of a trial court affirming a decision of a zoning hearing board granting a variance to build a gas station in a residential zone. The use variance request involved property that was **(Footnote continued on next page...)**

Owner also submitted evidence regarding a decline in interest in an assisted living residence and lack of available financing because of such a decline. Such evidence, however, does not support a determination that there is *no* market for all types of personal care/assisted living facilities. The evidence does not indicate that Owner would be unable to obtain financing or find sufficient interested residents for a smaller assisted living facility. Section 1302.06 of the Zoning Ordinance defines the term “Assisted Living Facility” by reference to Section 1302.63 of the Zoning Ordinance, which defines the term “Personal Care Center,” as follows:

Personal Care Center means a facility which provides, on a regular basis, housing, limited health care, and specialized assistance with daily living to individuals who do not need care within a hospital or nursing home, but who need such care because of their advanced age, physical or mental handicap or illness. The term

(continued...)

unique in that it was not suited for the one permitted use in the district in which it was located—residential. The record also included testimony of a real estate broker who testified that he offered the land for residential sale and received no offers. He testified that he offered the land at a throw-away price in order to test the market. The Supreme Court indicated that the broker offered the property at such below-market prices for over a year. He also testified that the property had no value for residential purposes. The Supreme Court opined that:

The effect of the zoning ordinance and the development of the area is to destroy the value of these peoples’ land altogether, or at least to the distress level where buying sharks can always be found: that is not real value. It is not a case . . . [in which] there was basic value but the siren voice of progress made a variance seem a luscious thing to have. Here there is not only no value above a ‘distinct sacrifice’ that is a ‘ridiculous’ figure, but there is no market at all. These people would become land-poor indeed.”

Ferry, 396 Pa. at 286-87, 152 A.2d at 458.

Personal Care Center shall only include facilities licensed by the Pennsylvania Department of Public Welfare or its successor agency. Personal Care Center may also be known as Assisted Living Facilities.

Although the parties do not delve into the reference in this definition to Personal Care Facilities licensed by the Department of Public Welfare (DPW), we note that DPW's regulations define the term personal care home to include

[a] premise in which food, shelter and personal assistance or supervision are provided for a period exceeding 24 hours, for four or more adults who are not relatives of the operator, who do not require the services of a licensed long-term care facility, but who do require assistance or supervision in activities of daily living or instrumental activities of daily living.

55 Pa. Code § 2600.4.

Owner submitted no evidence suggesting that it could not develop the Property for a smaller personal care or assisted living facility. "Showing that a lot can be used in a more profitable fashion is insufficient; there must be no permitted use to which the land can feasibly be put before a use variance is granted." *Twp. of East Caln v. Zoning Hearing Bd. of East Caln Twp.*, 915 A.2d 1249, 1253-54 (Pa. Cmwlth. 2007). Although Owner's evidence, if accepted as credible by the ZHB, might have been sufficient to demonstrate that Owner could not develop the Property for the highest profitable use, the ZHB reasonably concluded that Owner failed to demonstrate that the Property lacked value for all permitted uses, including those that might have returned a lesser profit for Owner.⁵

⁵ *Somerton Civic Association v. Zoning Hearing Board of Adjustment (Philadelphia)*, 471 A.2d 578 (Pa. Cmwlth. 1984), upon which the ZHB relies, does not provide full support for the ZHB's position that market information is insufficient to establish that property lacks value for any permitted purpose. Unlike this case, the Court in *Somerton Civic Association* observed that **(Footnote continued on next page...)**

The ZHB has the power to evaluate the evidence and decide the weight to be given to the evidence that Owner submitted. *Pennsy Supply Inc. v. Zoning Hearing Bd. of Dorrance Twp.*, 987 A.2d 1243, 1248 (Pa. Cmwlth. 2009). Based upon those considerations, the ZHB concluded that (1) there are no unique aspects of the Property that preclude development for a permitted use; and (2) the evidence regarding marketing and the ability of Owner to use the Property for a permitted use was insufficient to establish that the Property has no value for any permitted purpose.

In summary, we conclude that the ZHB did not err in concluding that Owner failed to satisfy its burden to prove that the Property is subject to an unnecessary hardship by virtue of the Zoning Ordinance. Because we have concluded that the ZHB did not err in this regard, we need not consider whether Owner satisfied the other necessary requirements for the grant of a use variance. Accordingly, we affirm the trial court's order.

P. KEVIN BROBSON, Judge

(continued...)

the owner's self-serving testimony regarding a lack of marketability was insufficient. Here, Owner submitted evidence that could be regarded as expert opinion, but the ZHB did not find that evidence sufficient to support Owner's claim of unnecessary hardship.

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ORDER

AND NOW, this 5th day of July, 2012, the order of the Court of Common Pleas of Northampton County is AFFIRMED.

P. KEVIN BROBSON, Judge