

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Appeal of the J.W. McGrath :
Organization from Denial of the :
Council for the Township of Bristol : No. 2119 C.D. 2009
:
Appeal of: J.W. McGrath Organization : Argued: September 14, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: December 1, 2010

J.W. McGrath Organization (McGrath) appeals from the Order of the Court of Common Pleas of Bucks County (trial court) denying its land use appeal from the determination of the Bristol Township (Township) Council (Council), which denied McGrath's requested waivers from certain provisions of the Township Subdivision and Land Development Ordinance (SALDO) and rejected McGrath's revised Preliminary/Final land development plan (Revised Plan). On appeal, McGrath argues that Council erred and/or abused its discretion by misinterpreting certain provisions of the SALDO, not recognizing that McGrath established its entitlement to waivers under the SALDO, and relying upon perceived problems with McGrath's use of pervious paving materials and McGrath's traffic impact study (Traffic Study) to deny approval. For the following reasons, we affirm.

In March 2008, McGrath submitted an application for approval of its proposed development of a 15,000 square foot CVS Pharmacy pursuant to the Pennsylvania Municipalities Planning Code¹ (MPC) and the SALDO. McGrath's development plan sought to demolish an existing medical office building located on a 2.046-acre parcel (Property) and construct the proposed pharmacy. The Property is zoned C-Commercial, and the proposed CVS Pharmacy is a permitted use in that zoning district. Throughout the planning process, McGrath met with Township representatives, including the Township Engineer, and together worked to make revisions to the development plan. McGrath presented each revision to the Township Engineer, who reviewed the changes and issued a review letter to, *inter alia*, the Township and McGrath, identifying any SALDO violations and violations of the Township Zoning Ordinance (Zoning Ordinance) that McGrath would either have to address or receive waivers or variances from to obtain approval. Review letters were issued on March 17, 2008, April 11, 2008, June 16, 2008, and September 5, 2008. In each of these letters, the Township Engineer identified problems with Sections 523(1), 509(f), and 803(c)(3) of the SALDO and commented on McGrath's proposed use of pervious paving materials for the parking lot.² (Letters from Township Engineer to Township (March 17, 2008, April 11, 2008, June 16, 2008, September 5, 2008), R.R. at 153a-62a, 175a-78a, 186a-88a.)

¹ Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101 - 11202.

² McGrath proposed to use the pervious paving materials in order to satisfy the Zoning Ordinance's impervious surface ratio of 70 percent as set forth in Section 902(D) of the Zoning Ordinance. (Zoning Ordinance § 902(D).) Using the pervious paving materials, the impervious surface ratio of the Revised Plan is 67.9% of the net buildable area. (Letter from Township Engineer to Township (September 5, 2008), R.R. at 188a.)

On April 11, 2008, the Bucks County Planning Commission (County Planning Commission) issued a report raising concerns regarding the size and location of the loading zones and the proposed storm water management facilities. (Review Letter from County Planning Commission to Township (April 11, 2008), R.R. at 29a-32a.) On May 21, 2008, the Township Planning Commission reviewed the proposed development and the same issues as identified before the County Planning Commission were raised as concerns, as well as concerns about traffic impact. (Township Planning Commission, May 21, 2008, Meeting Minutes, R.R. at 33a-35a.)

On August 27, 2008, McGrath submitted the Revised Plan and requests for waivers from certain mandatory requirements of the SALDO to Council for approval. McGrath requested waivers from the following SALDO provisions: (1) Section 523(1)(1)(b), which requires that off-street loading spaces be at least 12 feet wide and 55 feet long; (2) Section 509(f), which establishes a minimum of 15 feet of open space between a curblineline of any uncovered parking area and the outside wall of the nearest building; and (3) Section 803(c)(3), which mandates that land development plans name significant manmade features, such as roads, utilities, and gas lines, located within 200 feet of the Property. (SALDO §§ 509(f), 523(1)(1)(b), 803(c)(3).) The Revised Plan, as submitted, provided: (1) four, back to back, loading spaces of 12.5 feet wide by 20 feet long; (2) 9 feet of open space in one area and 4.5 feet of open space in two other areas between the curblineline and the outside wall of the proposed building; and (3) no identification of the required named features. In addition to these factors, the Revised Plan indicated that McGrath proposed to use pervious paving materials in the parking areas. These materials had never been used in the Township and would replace all of the grass surfaces in the parking areas.

Furthermore, McGrath submitted the Traffic Study, performed in July 2007, to determine the impact the Revised Plan would have on traffic patterns. The Township's Traffic Engineer reviewed the Traffic Study and issued a report, dated October 9, 2008, with various comments and suggested improvements. (Letter from Philip W. Wursta, P.E. (Traffic Engineer) to Township (October 9, 2008), R.R. at 39a-41a.)

Council held a public hearing to review the Revised Plan and McGrath's waiver requests on October 16, 2008. At the hearing, McGrath presented the testimony of Sam Guiguis, a CVS Pharmacy Representative, and Matthew Hammond, P.E., who performed the Traffic Study. McGrath also presented evidence that, between 2003 and 2005, the Township Zoning Hearing Board (ZHB) granted variances from the Zoning Ordinance's loading area requirements and Council granted waivers from Sections 509(f) and 803(c) of the SALDO to two Walgreens stores, which had development plans that were substantially similar to the Revised Plan. The Township did not appeal the grant of the variances or the waivers.

The Township Engineer testified regarding his concerns about the Revised Plan, particularly McGrath's proposed use of pervious paving materials. (Hr'g Tr. at 34-35, October 16, 2008, R.R. at 96a-97a.) The Township Engineer stated that pervious paving materials had not been used in the surrounding area and that, if the pervious surface was not properly maintained, that surface would become impervious, which would result in an impervious surface ratio that would exceed the level allowed by the Zoning Ordinance. (Hr'g Tr. at 34-35, 41-42, R.R. at 96a-97a, 103a-04a.) Property owners in the vicinity of the Property also appeared and

presented, *inter alia*: personal statements regarding their concerns about the Revised Plan and proposed CVS Pharmacy, a petition opposing the Revised Plan signed by 210 individuals, and photographs of problems with tractor trailer deliveries and traffic at one of the Walgreens stores represented by McGrath as being substantially similar to the proposed CVS Pharmacy. (Hr’g Tr. at 47-67, R.R. at 109a-29a.) After considering the testimony and evidence presented, Council unanimously voted to deny McGrath’s waiver requests and to reject the Revised Plan. (Hr’g Tr. at 70, R.R. at 132a.)

On October 22, 2008, Council issued a written decision denying the waiver requests and rejecting the Revised Plan (Decision), holding that McGrath did not meet the requirements necessary to modify the SALDO’s mandatory provisions because McGrath did not: (1) establish that the provisions are “unreasonable and cause unique and undue hardships”; or (2) present a modification request in writing stating in full the grounds and facts of unreasonableness or hardship on which the modification request is based, the provision or provisions of the SALDO involved, and the minimum modification necessary. (Decision at ¶ 1, October 22, 2008, R.R. at 135a-36a.) Council also found that McGrath failed to address concerns of the County Planning Commission, raised in its April 11, 2008, review letter, pertaining to: the location of the loading area in relation to the proposed drive-thru windows for the CVS Pharmacy potentially confusing motorists exiting the drive-thru; the potential lack of maneuverability based on the location of the loading area; and the loading area appearing to jut out into the area where vehicles exit the drive-thru area. (Decision at ¶ 4, R.R. at 138a-39a.) Council rejected McGrath’s proposed use of pervious paving materials based on the Township Engineer’s testimony and noted

that such materials had never been accepted or used in the Township. (Decision at ¶ 5, R.R. at 139a-40a.) Finally, Council held that the Property is within close proximity of two large schools and that the Traffic Study was performed in July 2007, when the schools were not in session. As such, Council “determined that the [Traffic Study] did not reflect an accurate depiction of the traffic and/or pedestrian patterns that would occur at the [Property] during the months of September through June.” (Decision at ¶ 6, R.R. at 140a.)

McGrath did not seek to revise or amend the Revised Plan in response to the Decision, choosing instead to file an appeal to the trial court arguing, *inter alia*, that Council abused its discretion.³ The trial court, taking no additional evidence, affirmed on the grounds that: McGrath failed to satisfy its burden of proving that the mandatory provisions were unreasonable and created an undue or unique hardship on the Revised Plan; Council’s findings of fact and reasons for denying the waivers and rejecting the Revised Plan were supported by substantial evidence; and, once McGrath submitted the Traffic Study, Council had “every right to question its trustworthiness and reliability.” (Trial Ct. Op. at 12, September 29, 2009.) McGrath now appeals to this Court.⁴

³ McGrath also argued that Council violated its right to equal protection by denying its Revised Plan where Council approved the substantially similar plans of Walgreens, a competitor of the proposed CVS Pharmacy. The trial court rejected this argument, holding that McGrath failed to prove that Council consciously discriminated against it in denying the Revised Plan. (Trial Ct. Op. at 3-6, September 29, 2009.) McGrath does not argue that it was denied equal protection in its appeal to this Court and, therefore, we will not address it further.

⁴ Where, as here, the trial court takes no additional evidence, our scope of review is limited to determining whether the governing body has committed an error of law or an abuse of discretion. Ruf v. Buckingham Township, 765 A.2d 1166, 1168 n.2 (Pa. Cmwlth. 2001). This Court may conclude that the governing body abused its discretion only if its findings of fact are not supported
(Continued...)

In its appeal, McGrath asserts that Council erred and/or abused its discretion by: interpreting its SALDO as requiring McGrath to establish that the SALDO's requirements were both unreasonable and created a unique or undue hardship to obtain waivers; denying McGrath's requested waivers where McGrath established its entitlement to such waivers; denying approval for its development plan based on McGrath's proposed use of pervious paving materials and on Council's concerns regarding the accuracy of the Traffic Study; and breaching its duty to act in good faith in processing McGrath's development plan.⁵ We will discuss each issue in turn.

A. Denial of Requested Waivers from the SALDO's Requirements

1. Whether Section 900 of the SALDO requires McGrath to show both unreasonableness and undue hardship.

Section 900(b) and (c) of the SALDO provides, in relevant part:

b. If any mandatory provisions of this ordinance are *shown by the applicant to be unreasonable **and** cause unique and undue hardship as they apply to the proposed subdivision or land development*, Council may grant a modification in writing to such applicant from such mandatory provisions so that substantial justice may be done and the public interest secured, provided such modifications will not have the effect of nullifying the intent and purpose of this ordinance.

c. All requests for modification shall be in writing, signed by the applicant, and shall accompany and be a part of the application for development. *The request shall state in full the grounds and facts of unreasonableness **or** hardship on which the request is based*, the provision or provisions of the ordinance involved, and the minimum

by substantial evidence. Id. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id.

⁵ McGrath's arguments have been rearranged for ease of resolution.

modification necessary. The request for modification may be referred to the Planning Commission for advisory comments.

(SALDO § 900 (b) and (c) (emphasis added).)

McGrath argues that Council, and the trial court, erred in interpreting Section 900 as requiring McGrath to show **both** that the SALDO's mandatory provisions from which it sought waivers were unreasonable **and** created a unique or undue hardship when applied to the Revised Plan. It claims that the use of the terms "and" in subsection (b) and "or" in subsection (c) renders Section 900 ambiguous and that the less restrictive interpretation of Section 900 should control. Pursuant to this Court's decision in Valenti v. Washington Township, 737 A.2d 346 (Pa. Cmwlth. 1999), which McGrath asserts involved the same language as the SALDO here, Section 900 of the SALDO is ambiguous and should be interpreted in the least restrictive way and in favor of the landowner. See H.E. Rohrer, Inc. v. Zoning Hearing Board of Jackson Township, 808 A.2d 1014 (Pa. Cmwlth. 2002) (holding that landowners are entitled to the least restrictive interpretation of the language of an ambiguous ordinance). According to McGrath, this least restrictive interpretation allows it to establish an entitlement to a waiver by showing **either** that the SALDO's mandatory provisions were unreasonable **or** created a unique or undue hardship when applied to the Revised Plan. For its part, Council asserts that Section 900 is not ambiguous and that Valenti is distinguishable. We agree with McGrath.

The primary objective of interpreting ordinances, like statutes, is to ascertain the intent of the legislative body that enacted the ordinance. Adams Outdoor Advertising v. Zoning Hearing Board of Smithfield Township, 909 A.2d 469, 483 (Pa. Cmwlth. 2006). Where an ordinance's words "are free from all ambiguity, the

letter of the ordinance may not be disregarded under the pretext of pursuing its spirit.” Id. (citing Section 1921 of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921). However, “[a]n ambiguity exists when language is subject to two or more reasonable interpretations and not merely because two conflicting interpretations may be suggested.” Id. Subdivision ordinances must be strictly construed against the municipality. Akin v. South Middletown Township Zoning Hearing Board, 547 A.2d 883, 886 (Pa. Cmwlth. 1988).

In Valenti, this Court affirmed a trial court’s interpretation of a local ordinance, which tracked the language of Section 512.1(a) and (b) of the MPC, 53 P.S. § 10512.1(a), (b),⁶ as allowing an applicant to establish grounds for a waiver based on the unreasonableness of the ordinance’s provision, even in the absence of evidence of undue hardship. Id., 737 A.2d at 348. Section 512.1(a) of the MPC and the language of the ordinance at issue in Valenti provides for the grant of “a modification of the requirements of one or more provisions if literal enforcement **will exact undue hardship** because of peculiar conditions pertaining to the land in question. . . .” 53 P.S. § 10512.1 (emphasis added). Subsection (b) of Section 512.1 and the ordinance in Valenti, like Section 900(c) of the SALDO, requires an applicant to include in a modification application “the grounds and facts of **unreasonableness or hardship** on which the request is based. . . .” 53 P.S. § 10512.1(b) (emphasis added). Reading the two subsections together, our Court in Valenti held that the

⁶ Added by Section 40 of the Act of December 21, 1988, P.L. 1329.

landowner established entitlement to waivers from the ordinance's provisions by showing that the provisions were unreasonable.⁷

Here, as in Valenti and Section 512.1 of the MPC, Section 900(b) appears to set forth one requirement for an applicant seeking a waiver, unreasonableness **and** undue hardship, while Section 900(c) advises applicants that they can base their request on either unreasonableness **or** undue hardship. Although the differences between Section 900(b) and (c) are not as substantial as those in the ordinance in Valenti and Section 512.1 of the MPC (where unreasonableness does not appear at all in the first subsection of the ordinance), Section 900 is subject to two reasonable interpretations and, consequently, is ambiguous. See Adams, 909 A.2d at 483. Because subdivision ordinances are to be strictly construed against the municipality, Akin, 547 A.2d at 886, McGrath only had to establish that the mandatory provisions of the SALDO from which it sought waivers were unreasonable as applied to the Revised Plan.

2. Whether Council abused its discretion in denying the requested waivers.

a. Legal Framework for Granting Waivers

Generally, a governing body may not withhold approval of a subdivision or land development plan where the plan complies with all of the applicable

⁷ In Valenti, the municipality amended the ordinance after the landowners submitted their plan, which sought waivers from certain provisions. Id., 737 A.2d at 347. The amendment made three of the four provisions from which the landowners were seeking waivers less restrictive. Id.

requirements of an ordinance.⁸ Akin, 547 A.2d at 884. Where a plan does not comport with the requirements of an ordinance, an applicant may request the governing body to modify those requirements where the literal enforcement would be unreasonable or would result in undue hardship when applied to the land development or subdivision plan. 53 P.S. § 10512.1; (SALDO § 900). The request for a waiver must be in writing and must, *inter alia*, “state in full the grounds and facts of unreasonableness or hardship on which the request is based.” 53 P.S. § 10512.1; (SALDO § 900). The SALDO does not define “unreasonable,” but Webster’s Third New International Dictionary defines the term as “not governed by or acting according to reason: evincing indifference to reality or appropriate conduct.” Webster’s Third New International Dictionary 2507 (2002).⁹ A township may grant waivers only where such waivers are deemed to be appropriate in the interest of the township. Hallett’s Wood, 686 A.2d 748, 751 (Pa. Cmwlth. 1997). Where, as here, a governing body denies the approval of a plan for multiple reasons, “the denial of approval for a plan can stand if supported by any one of the reasons set forth for the denial.” Kassouf v. Township of Scott, 584 Pa. 219, 234, 883 A.2d 463, 473 (2005). The denial of a subdivision plan may be properly based on the rejection of an applicant’s waiver request. Herr v. Lancaster County Planning Commission, 625 A.2d 164, 170 (Pa. Cmwlth. 1993).

⁸ Where the plan submitted is a preliminary plan that does not comport with the substantive, objective requirements of the ordinance, the governing body may, in its discretion, either reject the plan outright or grant conditional approval. CACO Three, Inc. v. Board of Supervisors of Huntington Township, 845 A.2d 991, 994 (Pa. Cmwlth. 2004).

⁹ When a term used in a zoning ordinance is undefined, a court may consult, *inter alia*, dictionaries for guidance in defining the term. Nether Providence Township v. R.L. Fatscher Associates, Inc., 674 A.2d 749, 750-51 (Pa. Cmwlth. 1996).

b. The SALDO Provisions and Waiver Requests at Issue

Section 523(1)(1)(b) of the SALDO provides:

Off-Street Loading Facilities – Off-street loading facilities for nonresidential uses shall be designed to conform to the following requirements:

1) Off-street loading facilities shall be appropriately dimensioned and located with relation to the types of deliveries and pick-ups anticipated. . . . Loading or unloading which takes place at ground level shall be designed to conform to the specifications for a loading space.

. . . .

(b) Each loading space shall be at least 12 feet in width and 55 feet in length.

(SALDO § 523(1)(1)(b).)¹⁰ In support of its waiver request, McGrath asserted the following in its written request:

2. Waiver from Section 523.1.1.b to allow loading spaces to be less than fifty-five (55) feet in depth. The township has determined that four (4) off-street loading spaces are required by the Zoning Ordinance. As a practical matter, only one (1) tractor trailer delivery will be made to the site per week during off-hours. The four (4) – twenty (20) foot long parallel spaces provided allow sufficient space for the tractor trailer to unload. The waiver is sought [so] as [to] not require the creation of three (3) unneeded fifty-five (55) foot long loading spaces. Granting of this waiver will also be consistent with Section 2116.B of the Zoning Ordinance which states: The off-street loading facilities shall be sufficient to accommodate the maximum number of trucks that will normally be loading, unloading, or stored on the premises at any one time.

¹⁰ Section 2116(H) of the Zoning Ordinance requires that a 15,000 square foot building, such as the proposed CVS Pharmacy, has four off-street loading berths or spaces. (Zoning Ordinance § 2116(H).) McGrath is providing the four off-street loading berths required by the Zoning Ordinance, but proposes to shorten the length of each berth from 55 feet, as required by the SALDO, to 20 feet.

(Letter from Bohler Engineering, Inc. to Township (Waiver Request) (August 27, 2008), R.R. at 180a.)

Section 509(f) of the SALDO states: “No less than 15 feet of open space shall be provided between the curb line of any uncovered parking area and the outside wall of the nearest building except for parking areas associated with single-family dwelling units.” (SALDO § 509(f).) In its waiver request, McGrath stated:

1. Waiver from Section 509.4 to allow less than fifteen (15) feet of open space to be provided between the curb line of any uncovered parking area and the outside wall of the nearest building. Both six (6) inch reveal curb and concrete wheel stops have been provided between the parking area and sidewalk to prevent any vehicle impact to the pedestrian way or building.

(Waiver Request, R.R. at 180a.)

Finally, Section 803(c)(3) provides:

The preliminary plan shall . . . show or be accompanied by the following information:

c. Existing Features

- 3) The location, names, and widths of streets, the location and name of railroads, the location of sanitary sewers, storm drains, water mains, culverts, petroleum or petroleum product lines, gas lines, electric and telephone lines, fire hydrants, and all other utilities or significant man-made features on or within 200 feet of any part of the tract[.]

(SALDO § 803(c)(3).) McGrath’s waiver request states: “Waiver from Section 803[(c)(3)] to not show existing features within 200’ of any part of the tract. This waiver is requested subject to the condition that the applicant is responsible for

providing any off-site information deemed necessary by the township engineer.” (Waiver Request, R.R. at 180a.)

c. McGrath’s Arguments

McGrath argues that Council abused its discretion when it denied McGrath’s requested waiver from Section 523(l)(1)(b) because its waiver request provided a detailed explanation as to why the dimensional requirements in Section 523(l)(1)(b) were unreasonable as applied to the Revised Plan. McGrath further asserts that, because its loading area dimensions are the same as the two approved Walgreens stores, it should be granted a waiver from this requirement. Finally, McGrath contends that Council’s denial of the waiver precludes reasonable use of the Property and frustrates its ability to meet the Zoning Ordinance’s requirement that it provide four loading spaces, thereby conflicting with this Court’s decision in Ruf v. Buckingham Township, 765 A.2d 1166, 1169 (Pa. Cmwlth. 2001).

McGrath further asserts that Council abused its discretion when it denied McGrath’s requested waiver from Section 509(f) because the waiver letter adequately set forth the reason why this section was unreasonable and unnecessary. Additionally, the unreasonableness of this requirement is illustrated by the fact that the Walgreens stores were granted this waiver and Walgreens did not provide some of the same features as the Revised Plan.¹¹

¹¹ McGrath also asserts that the literal enforcement of Section 509(f) would make it difficult, if not impossible, to comply with the requirements of the Zoning Ordinance, thereby violating this Court’s holding in Ruf, 765 A.2d at 1166. (McGrath’s Br. at 22.) However, McGrath offers no specificity as to what Zoning Ordinance requirements are at issue or how the SALDO’s open space requirement prevents it from complying with those unspecified zoning provisions.

Finally, McGrath contends that Council abused its discretion when it denied its request for a partial waiver from Section 803(c)(3) because: (1) this partial waiver request was supported by the Township Engineer and is a standard waiver routinely requested from and granted by Council, as was done with regard to the two Walgreens stores; and (2) its failure to comply with Section 803(c)(3) is a minor technical defect, which can be corrected by amending the Revised Plan, and should not be considered an objective defect that will justify the outright disapproval of the Revised Plan. CACO Three, Inc. v. Board of Supervisors of Huntington Township, 845 A.2d 991, 994 (Pa. Cmwlth. 2004); Shelbourne Square Associates, L.P. v. Board of Supervisors of Township of Exeter, 794 A.2d 946, 950 (Pa. Cmwlth. 2002).

d. Discussion

We first address McGrath's repeated assertions that Council's prior grant of waivers and the ZHB's grant of variances to the two Walgreens stores require Council to grant McGrath's current waiver requests. The grant of prior modifications from an ordinance's requirements "do not, as a matter of law, furnish a property owner with any legal justification" for a modification. See Vito v. Zoning Hearing Board of Borough of Whitehall, 458 A.2d 620, 621 (Pa. Cmwlth. 1983) (discussing variances from a zoning ordinance). "Each must be judged on its own merits." Id. Accordingly, the fact that Council and/or the ZHB granted Walgreens waivers or variances in the past neither provides McGrath with legal justification for a waiver nor obliges Council to grant the waiver requests for the CVS Pharmacy at issue. Id.

After reviewing McGrath's waiver requests, the evidence McGrath presented in support of its requests, and the evidence presented by the neighboring property

owners who attended the hearing, we conclude that Council did not err or abuse its discretion in denying McGrath's waiver requests. Pursuant to Sections 900(b) and (c) of the SALDO, McGrath was required to establish that the SALDO's requirements regarding the dimensions of the loading berths, the 15 feet of open space between the parking lot and building, and the listing of all of the manmade features within 200 feet of the Property were unreasonable when applied to the Revised Plan. (SALDO § 900(b), (c).) McGrath had to set forth, in full, the grounds and facts as to why these provisions were unreasonable in its waiver requests, as well as establish the unreasonableness of these provisions before Council at the hearing. (SALDO § 900(b), (c).) None of McGrath's written requests express, in full, the grounds or facts as to why the SALDO provisions are unreasonable when applied to the Revised Plan.

With regard to the waiver request from Section 523(l)(1)(b), McGrath essentially stated, in a very conclusory fashion, that the proposed loading spaces allow sufficient room for its once-a-week delivery and that anything over that amount is unnecessary. There is no explanation of unreasonableness beyond this statement. Moreover, neither waiver request submitted for Sections 509(f) or 803(c)(3) make any attempt to explain why those sections are unreasonable when applied to the Revised Plan. Instead, the waiver requests simply explain what the Revised Plan proposed to construct in lieu of the SALDO's requirements. Accordingly, all three waiver requests fail to set forth, in full, the grounds and facts for the unreasonableness of the SALDO's provisions and, accordingly, do not satisfy the requirements of Section 512.1(b) of the MPC and Section 900(c) of the SALDO. Therefore, Council properly rejected McGrath's waiver requests. However, even if the waiver requests sufficiently articulated the grounds and facts of unreasonableness,

McGrath failed to establish that the SALDO sections at issue were unreasonable when applied to the Revised Plan.

The only evidence McGrath produced at the hearing to support its waiver request from Section 523(l)(1)(b) was Mr. Guiguis' testimony pertaining to the frequency of the anticipated deliveries at the new CVS Pharmacy. Mr. Guiguis stated that there would be a 56-foot-long warehouse delivery truck that would make deliveries twice per week and that 20-to-30-foot panel trucks would make deliveries seven to eight times per week. (Hr'g Tr. at 12, R.R. at 74a.) We note that Mr. Guiguis' testimony regarding the frequency of warehouse delivery trucks contradicts the statement in McGrath's waiver request that only one tractor-trailer truck delivery would occur each week. According to Mr. Guiguis, the proposed 12 1/2-foot by 80-foot loading area was more than adequate to accommodate the deliveries in that it could hold one warehouse delivery truck at a time and two panel delivery trucks at a time, and he indicated that it would be rare for more than one truck to deliver at the same time. (Hr'g Tr. at 13-15, R.R. at 75a-77a.) However, McGrath's counsel acknowledged that the proposed loading space would not accommodate both a 56-foot warehouse delivery truck and a 20-to-30 foot panel truck at the same time, although he pointed out that this would not be a normal occurrence. (Hr'g Tr. at 24-25, R.R. at 86a-87a.)

In opposition to this requested waiver, an objector introduced photographs he took the morning of the hearing of a tractor-trailer delivery at one of the Walgreens stores that McGrath asserts is similar to its proposed development. (Hr'g Tr. at 52-53, R.R. at 114a-15a.) In the photographs, a tractor-trailer making deliveries is

observed jutting out into the travel lanes, precluding vehicles from properly exiting and entering the Walgreens' parking lot, and being in very close proximity to the drive-thru window. (Photographs, R.R. at 55a-62a; Hr'g Tr. at 51-53, R.R. at 113a-15a.)

We conclude that Council did not err or abuse its discretion in denying a waiver from Section 523(1)(1)(b) of the SALDO. McGrath's evidence pertaining to the unreasonableness of Section 523(1)(1)(b) discussed only CVS Pharmacy's proposed delivery schedule and did not address any of the concerns regarding, *inter alia*, the location of the loading berths in comparison to the pharmacy drive-thru lanes. We note that the proposed loading area, consisting of four, back to back, 12 1/2-foot wide by 20-foot long loading berths is essentially one, 12 1/2-foot-by-80-foot loading berth, which is the dimensional equivalent of fewer than two dimensionally-compliant loading berths under the Zoning Ordinance.¹² Moreover, we will not hold that Council erred or abused its discretion in denying McGrath's waiver request when it considered and compared the evidence. Furthermore, McGrath acknowledged that it was feasible to comply with the requirements by making the store smaller, but that a smaller store was not a "CVS prototype," and that there was no point in making a smaller store. (Hr'g Tr. at 26-27, R.R. at 88a-89a.) Given this evidence, we conclude that Council did not err or abuse its discretion in finding that McGrath did not establish that the dimensional requirements of Section 523(1)(1)(b)

¹² Pursuant to the Zoning Ordinance and the SALDO, a compliant development plan would offer four 12-foot wide by 55-foot long loading berths, which, if arranged back-to-back as the loading berths here are, would result in a 12-foot wide by 220-foot long loading area. Accordingly, two dimensionally-compliant loading berths arranged as here would be 12 feet wide by 110 feet long.

were “not governed by or acting according to reason [or] evince[ed] indifference to reality or appropriate conduct,” i.e., were unreasonable, as applied to the Revised Plan.

Moreover, to the extent McGrath asserts that Council’s denial of its waiver from Section 523(1)(1)(b) was erroneous because it conflicts with Ruf in that Council’s decision frustrates McGrath’s ability to satisfy the Zoning Ordinance’s requirements, we disagree. See Ruf, 765 A.2d at 1166. In Ruf, the landowners sought, but were denied, waivers from ordinance provisions that required them to widen the roadway fronting their property by 24 feet and to reduce water runoff. Id. at 1167-68. The landowners presented evidence that the road was on a steep slope of a mountain containing solid rocks and would require blasting the mountain to widen the road. Id. at 1168. The township’s public works director indicated that proper road widening may not be feasible for the entire length of the property because of the existing conditions and cost factor, but that a smaller area of widening would be appropriate, and the township’s civil engineer and public works director recommended a particular solution to improve stormwater management, which landowners agreed to implement. Id. at 1169. At the hearing, the civil engineer testified, in relevant part, that the proposed stormwater management plan was acceptable and it was “very doubtful” that the road could be widened and improved in compliance with the ordinance without violating the natural resource protections of another ordinance. Id. The board denied the waivers, but the trial court reversed. Id. On appeal, this Court stated that “where literal enforcement of a requirement under a subdivision and land development ordinance will frustrate the effect of the improvements designed to implement other requirements, grant of a waiver is proper

under Section 512.1(a) of the MPC.” Id. In affirming the trial court’s order, we held that the overwhelming and undisputed evidence established that, due to the unique topography of the property, “the [landowners] cannot comply with the road widening and stormwater control standards without violating the natural resource protection standards set forth in the [z]oning [o]rdinance” and that to literally enforce the provisions at issue would be unreasonable and cause undue hardship. Id.

Ruf is distinguishable. First, unlike the landowners in Ruf, McGrath failed to present evidence that the SALDO’s requirement was unreasonable or that it could not comply with the dimensional requirements and the Zoning Ordinance’s four-space requirement. Instead, McGrath indicated that it could comply, but would have to construct a smaller store than desired. Second, this is not a situation where the Property itself, like the property in Ruf, precludes compliance with both the SALDO and the Zoning Ordinance. Third, our holding in Ruf essentially indicated that the natural resource protection standards set forth in the zoning ordinance would not be served if, in order to satisfy the water runoff and road widening requirements of the subdivision and land use ordinance, the landowners had to blast away part of the mountain. Here, the Zoning Ordinance’s four-space requirement, presumably to allow a sufficient number of spaces for deliveries so as to not interfere with the normal traffic flow, would not be “frustrated” by requiring McGrath to comply with the dimensional requirements of the SALDO, which likewise were made to ensure sufficient space for deliveries to occur without interfering with traffic flow or maneuverability. Finally, McGrath was well aware that it would have to seek either a variance from the Zoning Ordinance’s requirement or a waiver from the SALDO’s dimensional requirements if it proceeded with the Revised Plan as designed.

McGrath chose to comply with the Zoning Ordinance's requirements, thereby not having to establish an unnecessary hardship before the ZHB. Accordingly, we reject McGrath's reliance on Ruf and affirm Council's denial of this waiver.

We now turn to the waiver request for Section 509(f). McGrath attempted to support this request by relying on its counsel's statements comparing the Revised Plan to the Walgreens' plans, the Walgreens' plans themselves, and various documents related to the Walgreens' plans, namely the ZHB decision granting Walgreens' variances and the Council decision granting Walgreens' waivers from Section 509(f). (Hr'g Tr. at 8, R.R. at 70a.) McGrath made no attempt to introduce any other evidence or explanation as to why Section 509(f) was unreasonable. As indicated *supra*, prior modifications from an ordinance's requirements "do not, as a matter of law, furnish a property owner with any legal justification" for a modification. Vito, 458 A.2d at 621. Moreover, even if Council was required to consider its prior actions, we note that, to the extent McGrath alleges that the Revised Plan provides more space between the parking lot and the building than the Walgreens' plans, such allegations are only partially true. The Walgreens' plans provided 7 feet of open space; the Revised Plan provides 9 feet of open space on **one** side and **4.5 feet of open space on two other sides**. Finally, with regard to McGrath's specific explanation for its waiver request from Section 509(f), we agree with the trial court's statement that "neither the proposed curb height nor the wheel stops for the parking spaces address how the curb[]line requirement was unreasonable" (Trial Ct. Op. at 10.) Therefore, Council did not err in holding that McGrath failed to establish that Section 509(f) was unreasonable as applied to the Revised Plan.

For support of its waiver from Section 803(c)(3), McGrath's counsel again relied upon the grant of waivers from this section to the Walgreens stores and also made the following statement:

[W]ith respect to the existing features, this is a third waiver. This is a waiver that we request subject to a condition. The ordinance requires that all manmade features within 200 feet of any part of the tract be shown on the plan. What we offered to do and are requesting a waiver subject to the condition that we provide an aerial photograph, and also that we provide any additional off-site information [the Township Engineer] may feel is necessary in order to properly evaluate the plan. So if he says we have to be 400 feet off in one direction, we're willing to do that. In other words, it is a conditional waiver, not an absolute waiver that we're requesting.

(Hr'g Tr. at 16, R.R. at 78a.) McGrath made no attempt to introduce any other evidence or explanation as to why Section 803(c)(3) was unreasonable. Moreover, to the extent that McGrath asserts that it had the Township Engineer's support for its partial waiver request from Section 803(c)(3), there is no support for this statement in the record. The Township Engineer acknowledged this waiver request in the majority of his review letters simply by stating that McGrath was requesting a waiver from Section 803(c)(3), but made no statement in support of or in opposition to that request. (Township Engineer's Review Letters to Township (April 11, 2008, June 16, 2008, September 5, 2008), R.R. at 159a-62a, 175a-78a, 186a-88a.)

Finally, although McGrath correctly cites CACO Three and Shelbourne Square for the proposition that, where a minor technical defect can be easily amended, the governing body should not deny the plan outright but should grant approval conditioned on the applicant correcting the defects in the plan, those cases are

inapplicable here. CACO Three, 845 A.2d at 994;¹³ Shelbourne Square, 794 A.2d at 950.¹⁴ We agree with McGrath that the failure to include the existing features in the Revised Plan as required by Section 803(c)(3) is a technical defect that could easily be remedied by an amendment. However, neither CACO Three nor Shelbourne Square involved the grant or denial of a waiver request. Rather, in those cases, the applicants' plans did not comply with the ordinances' requirements, and the applicants should have been given an opportunity to amend those minor, technical defects in order to comply with the ordinances. In contrast to those cases, McGrath does not want to comply with all of the requirements of Section 803(c)(3); hence, the waiver request. Arguably, if this had been the only waiver request submitted by McGrath, Council could have denied the waiver, but granted approval of the Revised Plan conditioned on McGrath's amending the Revised Plan to provide the information required by Section 803(c)(3). However, this was not the only waiver requested and, as stated above, Council did not abuse its discretion in denying

¹³ In CACO Three, this Court reversed the denial of a revised preliminary land development plan, concluding that the board had erred by, *inter alia*, basing its denial on failing to label certain topographical features, include details and design calculations of certain features, or make certain notations on its stormwater management plan. Id., 845 A.2d at 997. We held that such defects were minor technical defects that could be corrected by amending the plan and, therefore, the board should have granted approval conditioned on amending the plan to correct the defects. Id.

¹⁴ In Shelbourne Square, this Court ultimately affirmed the denial of a land development plan because the board had a valid reason for doing so, but concluded that the majority of the reasons provided to deny the plan were improper. Id., 794 A.2d at 950. One improper reason was that the denial was based on the applicant's mislabeling the plan, failure to use the proper wording and format for the land survey, failure to describe the material and size of the water and sewer mains, and failure to provide a letter from the water utility indicating that the plan had adequate water capacity. Id. We held that none of these were objective defects that would justify outright denial, but that the board should have conditioned approval upon the applicant's making the necessary corrections to the plan. Id.

McGrath's waiver request of Section 803(c)(3), despite McGrath's assertions that it would provide anything that the Township Engineer deemed necessary. Moreover, even if Council did abuse its discretion, Council's rejection of the Revised Plan is affirmed because Council properly denied McGrath's other waiver requests. Kassouf, 584 Pa. at 234, 883 A.2d at 473; Herr, 625 A.2d at 170.

Based on the lack of evidence as to why Sections 523(l)(1)(b), 509(f), and 803(c)(3) are unreasonable as applied to the Revised Plan, McGrath failed to satisfy its burden of proving an entitlement to the requested waivers. Because Council did not abuse its discretion or commit an error of law in denying any of the requested waivers, Council properly denied approval of the Revised Plans on these grounds. Herr, 625 A.2d at 170.

Because Council's denial of the Revised Plan is properly based on its denial of McGrath's waiver requests from Sections 523(l)(1)(b), 509(f), 803(c)(3), Herr, 625 A.2d at 170, we need not address McGrath's other arguments regarding whether Council erred or abused its discretion in denying approval based on McGrath's use of pervious paving material or the perceived inaccuracies of the Traffic Study.

B. Whether Council Breached its Duty to Act in Good Faith in Processing McGrath's Revised Plan.

McGrath next argues that, pursuant to Highway Materials, Inc. v. Board of Supervisors of Whitemarsh Township, 974 A.2d 539 (Pa. Cmwlth. 2009) and Raum v. Board of Supervisors of Tredyffrin Township, 370 A.2d 777 (Pa. Cmwlth. 1977), Council had the duty to act in good faith in processing the Revised Plan, but breached

that duty in denying the Revised Plan. McGrath asserts three bases to supports its argument that Council acted in bad faith: (1) although it engaged in significant dialogue with Township prior to the hearing on the Revised Plan, the issues which served as the basis for the denial were raised for the first time at the hearing, allowing McGrath no opportunity to cure the defects; (2) it relied upon the input it received from Township officials, particularly about the use of pervious paving materials, to revise its plans and that Council disregarded that input when faced with public opposition; and (3) Council had previously approved substantially similar plans submitted by Walgreens.

We agree with Council that both Raum and Highway Materials are distinguishable and that Council did not act in bad faith in denying approval of the Revised Plan. In Raum, this Court stated:

A municipality has a legal obligation to proceed in good faith in reviewing and processing development plans. The duty of good faith includes discussing matters involving technical requirements or ordinance interpretation with an applicant, and providing an applicant a reasonable opportunity to respond to objections or to modify plans where there has been a misunderstanding or difference of opinion.

Id., 370 A.2d at 798. We reiterated this holding in Highway Materials. Id., 974 A.2d at 544. Council's conduct here does not rise to the level of conduct we concluded was bad faith in Raum and Highway Materials. In Raum, we held that the municipality acted in bad faith by engaging in a deliberate attempt to thwart this Court's order by, *inter alia*, unjustifiably refusing to grant permits, imposing harsh and unreasonable fee schedules to the property, and purposely delaying action on the application. Id., 370 A.2d at 780, 801. In Highway Materials, we held that the municipality exhibited bad faith by refusing to meet and discuss the plan's defects so

as to prevent the developer from being able to revise his plan, telling the developer not to ask any questions, rezoning the property to preclude development, and acting on the application at an informal hearing without allowing the developer to present any evidence. Id., 974 A.2d at 542-45.

In this case, it is undisputed that Township officials met with McGrath in an effort to resolve the defects and that, for the most part, the defects were either resolved outright or McGrath indicated it was going to request a waiver. Moreover, Council scheduled a hearing and allowed McGrath to introduce evidence in support of the Revised Plan and waiver requests. To the extent that McGrath asserts that it was not aware of the defects until the Revised Plan was denied, this assertion is not supported by the record. In all but one of the Township Engineer's review letters, McGrath was advised that the Revised Plan violated Sections 523(1)(1)(b), 509(f), and 803(c)(3) of the SALDO. Furthermore, each review letter included comments regarding McGrath's use of pervious paving materials on the Property. Although Township officials may have discussed the use of these materials with McGrath previously, the public hearing was the first time Council had the opportunity to consider the use of such materials. Accordingly, we disagree with McGrath that Council acted in bad faith in considering the use of those materials, especially in light of the Township Engineer's concerns regarding the maintenance of the pervious paving materials, which had never been used in the Township before. Moreover, we agree with Council that once it became apparent that **Council** had concerns with the grant of the waivers and the use of pervious paving materials, McGrath could have sought to amend its Revised Plan in response to those concerns.

Additionally, we disagree with McGrath that the grant of the waivers to Walgreens and the approval of the Walgreens' plans required Council to approve the Revised Plan or provided McGrath with evidence that Council acted in bad faith. In Highway Materials, this Court affirmed the trial court's grant of the developer's motion to supplement the record, holding that the trial court needed to compare the board's review of one developer's applications with its review of other developers' applications in order to determine whether the board engaged in bad faith. Id. at 544. Thus, this Court was looking at the **process** of reviewing the applications and not at the merits of whether other development plans were approved or denied. Highway Materials does not stand for the proposition that because a governing body grants a waiver or approves a plan to one developer, the refusal to do so for another constitutes bad faith. A review of the record reveals that there is no evidence supporting McGrath's contention that the process of reviewing the Walgreens' applications was any different than the Revised Plan. Finally, Council's prior granting of Walgreens' waiver requests and approving Walgreens' plans does not legally obligate Council to approve McGrath's Revised Plan. Vito, 458 A.2d at 621. Therefore, we reject McGrath's arguments that Council acted in bad faith while processing and reviewing the Revised Plan.

Accordingly, we affirm the Order of the trial court.

RENÉE COHN JUBELIRER, Judge

