

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gloria Marshall, :
Appellant :
v. : No. 244 C.D. 2012
: Submitted: September 14, 2012
City of Philadelphia and Zoning :
Board of Adjustment :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: October 11, 2012

Gloria Marshall (Marshall) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) affirming the City of Philadelphia Zoning Board of Adjustment's (Board) decision which granted a request by the Archdiocese of Philadelphia (Archdiocese)¹ for use and dimensional variances to convert a parish elementary school into a 63-unit senior citizen

¹ The Archdiocese filed a praecipe to intervene with the trial court dated March 3, 2011, and filed an appellate brief with this Court. The Board was precluded from filing briefs or presenting oral argument by an order of this Court dated August 20, 2012.

apartment building.² Because the Board's granting of the variances was not based on substantial evidence, we reverse.

The property in dispute, located at 3255 Belgrade Street (property) in the City of Philadelphia (City), is a three-story building in an R-10A Residential Zoning District.³ The property was utilized as a legally nonconforming school known as Nativity B.V.M. Elementary School from 1917 until 2008, at which point the Archdiocese ceased operating the school due to declining enrollment and revenue. Since the school's closing, the property has been utilized for after-school programs and community meetings. After exploring other suitable uses for the property, the Archdiocese decided in 2009 to convert the property into a 63-unit apartment building for low-income senior citizens and received funding for the project from the U.S. Department of Housing and Urban Development (HUD) under its Section 202 housing program.

In November 2010, the Archdiocese filed an application for use and dimensional variances with the Department of Licenses and Inspections (Department) in which it requested approval of various improvements to the property, including construction of a four-story addition onto the existing structure;

² This appeal was originally filed with the Pennsylvania Superior Court. This Court has jurisdiction over the appeal pursuant to 42 Pa. C.S. §762(a)(4)(i).

³ Title 14 of the Philadelphia Code (Zoning Code) was repealed and replaced on August 22, 2012, but was effective at all times relevant to this appeal. Therefore, we will refer to the previous version of the Zoning Code.

construction of four off-street parking spaces, landscaped areas and concrete walkways; and curb cuts to allow access to the parking lot.

The Department refused the application for the following reasons: (1) the proposed use was not permitted in the R-10A Residential Zoning District;⁴ (2) the proposed parking spaces were insufficient in number and size and landscaping in the proposed parking lot was insufficient; (3) rear-yard depths and areas and side-yard depth were insufficient; and (4) the height and number of stories proposed were in excess of the maximums permitted by the Zoning Code. The Archdiocese then appealed to the Board.

Before the Board, John Hayes (Hayes), the project architect, testified that the Archdiocese met repeatedly with members of the community in order to establish that there was support for the proposed project before applying for HUD funding. He also stated that the proposed project would allow the Archdiocese to utilize the property to benefit seniors in the community when it would have otherwise gone vacant and potentially become a nuisance.

⁴ Under §14-205 of the previous version of the Zoning Code, permitted uses within an R-10A Residential Zoning District included: (1) single family homes, (2) residential related uses and (3) non-residential uses. Section 14-203 listed the residential related uses and non-residential uses permitted in an R-10A district. Permitted residential related uses included, *inter alia*, professional offices within a residence; places of worship; municipal art galleries, museums, and libraries; telephone exchange buildings; and family day care for six or fewer children. Permitted non-residential uses included, *inter alia*, charitable institutions; fire or police stations; medical and surgical hospitals; rest, old age, nursing or convalescent homes, and nurseries; and water or sewage pumping stations. Multiple family dwellings were expressly prohibited in the R-10A district under the previous version of the Zoning Code.

Maria Wing (Wing), counsel for the Archdiocese, testified that the Archdiocese sought a use variance from the zoning prohibition of allowing multi-family dwellings in R-10A Zoning Districts because there is a need for such housing in the area and the project would be beneficial to the community. With respect to the dimensional variances being sought, she testified that because the existing building is nonconforming and the proposed addition is within the lines of the existing building, there would be no way for the final project to be conforming. She also testified that the Archdiocese intended to petition for removal of “no parking during school hours” signs near the property, which would create an additional 20 to 30 parking spaces on the street which would satisfy the Zoning Code’s requirement of 19 parking spaces. Wing also explained that because many residents of the proposed project would be over the age of 62 and at or below the poverty level, they would be less likely to own cars and, therefore, would have a limited need for parking. With respect to the effect the project would have on traffic in the neighborhood, Wing testified that “there was substantial congestion during the drop off and pickup hours while the school was operational,” and submitted a traffic comparison document demonstrating that traffic resulting from the proposed project would be less than when the property was operated as an elementary school. (January 5, 2011 Hearing Transcript at 11).

Finally, John Wagner (Wagner), a representative from the Archdiocese, testified that the Archdiocese chose the property for this project in order to benefit senior citizens in the area, noting “there’s a lot of people that are in row houses that are aging...who are really poorly housed, and now they’re going to have safe and affordable housing with elevators, air conditioning, on one flat,

and it's really to benefit.” *Id.* at 30. He also compared the proposed project to similar developments by the Archdiocese in the City.⁵

Marshall did not attend the hearing, but her son, Attorney Jon Marshall (Attorney Marshall), testified before the Board on her behalf. Attorney Marshall testified that the Archdiocese could have simply raised tuition instead of closing the elementary school and, therefore, any economic hardship was created by the Archdiocese itself. He testified that parking is a problem in the proposed area and introduced photographs in support of his claim. Attorney Marshall explained that the neighborhood surrounding the property consists predominantly of single-family row homes, and that there are no multi-family housing units in the neighborhood. He also expressed concerns about trash removal from the proposed apartments and pieces of cement falling from the building onto the street.

The Board found that the Archdiocese established that the property had a unique physical structure that created a hardship under the operative zoning regulations, and that this hardship was not created by the Archdiocese. It further found, based on the testimony and evidence submitted by the Archdiocese and the overwhelming support of the project by the community, that granting the variances would not “(i) substantially or permanently injure the appropriate use of adjacent conforming property; or (ii) adversely affect the public health, safety or general

⁵ The Board also submitted into evidence letters from a City Councilwoman and the Director of the neighborhood Civic Association indicating their support for the proposed project. A representative from the Philadelphia City Planning Commission (Planning Commission) also testified that the Planning Commission had no objection to the granting of the variances requested by the Archdiocese.

welfare.” (Board Decision at 9). The Board also concluded that “the variances represent the minimum variances that will afford relief at the least modification possible.” *Id.* Accordingly, the Board granted the requested variances. Marshall appealed to the trial court,⁶ which affirmed, and this appeal followed.⁷

On appeal, Marshall contends that the Archdiocese failed to demonstrate the requisite hardship to establish the need for either the use or dimensional variances. Accordingly, we must address whether the Archdiocese met its burden with respect to (1) the use variance; (2) the dimensional variance for the building height and number of stories; and (3) the dimensional variance for parking.⁸

⁶ The Archdiocese filed a motion to quash Marshall’s appeal for lack of standing which the trial court denied.

⁷ Our standard of review in a zoning case where the trial court has taken no additional evidence is limited to determining whether the Board abused its discretion or committed an error of law. An abuse of discretion will be found only if the Board’s findings are not supported by substantial evidence, that is, such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Lamar Advertising of Pennsylvania, LLC v. Zoning Hearing Board of the Borough of Deer Lake*, 915 A.2d 705, 709 n.9 (Pa. Cmwlth. 2007).

⁸ The Archdiocese argues that Marshall’s appeal should be quashed because (1) she failed to provide any citations to the record in her brief, and (2) she did not establish her standing to challenge the zoning relief sought. With respect to the first argument, while we may quash or dismiss an appeal in which the appellant’s brief or reproduced record contain substantial defects under Pa. R.A.P. 2101, we do not believe dismissal of the appeal is warranted here. With respect to the standing argument, we believe that Marshall, through her attorney, adequately demonstrated that she would be adversely affected by the action she sought to challenge. Accordingly, we will address the merits of Marshall’s appeal.

An applicant seeking a variance must demonstrate: 1) unique hardship to the property; 2) no adverse effect on the public health, safety or general welfare; and 3) that the variance will represent the minimum variance that will afford relief at the least modification possible. *North Chestnut Hill Neighbors v. Zoning Board of Adjustment of the City of Philadelphia*, 977 A.2d 1196, 1199 (Pa. Cmwlth. 2009). With respect to the first prong of proving a unique hardship to the property, to demonstrate the requisite unnecessary hardship, an applicant must prove either: (1) the physical characteristics of the property are such that it could not in any case be used for any permitted purpose, or that it could only be used for such purpose at prohibitive expense; or (2) the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the ordinance. *Oxford Corporation v. Zoning Hearing Board of the Borough of Oxford*, 34 A.3d 286, 295-96 (Pa. Cmwlth. 2011). Mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance. *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 812 (Pa. Cmwlth. 2005).

Although unnecessary hardship usually relates to the physical characteristics of the land, at times, the unnecessary hardship can relate to the building itself. Where the use of property for any purpose is possible only through extensive reconstruction or demolition of the building, it has been held sufficient to establish an unnecessary hardship. *Logan Square Neighborhood Association v. Zoning Board of Adjustment of the City of Philadelphia*, 379 A.2d 632 (Pa. Cmwlth. 1977). In *Davis v. Zoning Board of Adjustment*, 468 A.2d 1183 (Pa. Cmwlth. 1983), we upheld the grant of a variance from the lot-area requirements to

allow a property owner to rehabilitate and use an abandoned and vacant four-story apartment building located in a residential zone as a 17-unit multi-family dwelling. We held that because the premises could not conform with the zoning restrictions absent demolition and reconstruction, an unnecessary hardship existed. *Id.* at 648. *See also Zoning Hearing Board of the Township of Indiana v. Weitzel*, 465 A.2d 105 (Pa. Cmwlth. 1983) (holding that where the only options available to a property owner without a use variance were to either convert his three-story school building into a single-family dwelling or demolish the building and subdivide the lot, more than “mere economic hardship” existed and evidence of unnecessary hardship was established).

In *Wagner v. City of Erie Zoning Hearing Board*, 675 A.2d 791 (Pa. Cmwlth. 1996), this Court affirmed the granting of a dimensional variance, as well as a variance from parking-space requirements, where the subject property (a former motel) had remained vacant for several years and had subsequently been purchased for the purpose of providing shelter for low-income residents and homeless persons. We held that under those existing circumstances, i.e., the vacancy of the building and the difficulty with which it sold, there was an unnecessary hardship sufficient to warrant the granting of the variances. Our holding in *Wagner* was partly based upon the recognition that where blighted or dilapidated conditions exist in urban areas, and where the applicant for a variance has undertaken efforts to remediate or renovate those areas for a salutary, productive purpose, a slight relaxation or less stringent application of the variance criteria may be the only way the subject property will be put to any beneficial use.

Additionally, in *Price v. Zoning Board of Adjustment*, 403 A.2d 196 (1979), we also recognized that an applicant for a variance had adequately demonstrated unnecessary hardship where the property would be, as a practical matter, essentially worthless absent the granting of a variance, stating as follows:

It is undisputed here that the building could not reasonably be moved, nor could the lot dimensions be expanded. And even the appellant concedes that without a variance the property would be practically valueless. We believe, therefore, that this is sufficient evidence of hardship.

Id. at 197.

Those cases provide that in order to meet the burden necessary to obtain a use variance, a property owner must demonstrate that the entire building is functionally obsolete for any purpose other than one not permitted under the relevant zoning ordinance. Here, the Archdiocese stopped utilizing the property as a school in 2008 as a result of declining enrollment. The property was then used for various other purposes, including after-school programs and community meetings. While the Archdiocese submitted evidence to the Board demonstrating that it was no longer viable to utilize the property as an elementary school, it offered no evidence whatsoever demonstrating that the property could not in any case be used for any other permitted purpose, that it could only be used for such purposes at a prohibitive expense, or that it has no value for any purpose permitted by the Zoning Code.

A substantial portion of the Archdiocese's testimony related to the need for low-income senior housing in the neighborhood and the fact that the proposed project was one of only two such proposals in Pennsylvania to receive approval from HUD, thereby demonstrating its quality. However, the testimony never actually addressed the issue of why there was a unique hardship to the property warranting the granting of variances. For example, Wing stated:

I guess I will address the largest issue of hardship, and I may call Mr. Wagner to also illustrate some of the hardship issues. One of the things that I wanted to highlight was in the HUD application, one of the things that was greatly scrutinized was the area and location of the proposed project. And that particular area has been identified as having the greatest need for low income senior housing. You also want to pick an area where residents will be able to have basic amenities that are in proximity to them, where there will be a support system.

(January 5, 2011 Hearing Transcript at 25). In Wagner's subsequent testimony, he similarly stated:

The reason why the [Archdiocese] had looked at the reuse of this building was to benefit the seniors in that area, in that neighborhood...The other choice that we have that I think is important, counsel explains that we want to be good neighbors, but we need to be responsible neighbors. Using this asset would serve this community well over 50 years to educate young people. It's responsible for us to reuse that now to benefit the seniors of this community, and that's why we're taking the step.

Id. at 30. Such testimony, while clearly demonstrating the need for multi-family housing for low-income seniors in the neighborhood, completely failed to address

how the physical characteristics of the property would prevent it from being utilized as one of the many other permitted uses in an R-10A Zoning District. The only mention of other permitted uses came during the following exchange between a Board member and counsel for the Archdiocese:

Mr. Gonzales: Just looking at the other permitted uses, if the Archdiocese so chose to use this within the R-10A, what is allowed in the R-10A district, you could have professional offices. You could have art galleries. You could turn this into a place of worship, a library, telephone exchange building. You could have a surgical hospital here. You could have a medical hospital. You could have a water and sewage pumping station, most of which I think would provide more congestion to the neighborhood in terms of parking and traffic.

Ms. Wing: Which is exactly what I was about to assert is that those create far more congestion issues than our proposed use.

Id. at 30-31. Other than Hayes' speculation that the property would go vacant and become a nuisance if it is not utilized as a multi-family dwelling, the Archdiocese presented no evidence whatsoever demonstrating that it could not utilize the property as any of the several uses permitted in the R10-A Zoning District. Instead, it merely argued that the non-permitted use as a multi-family dwelling would be preferable to any of the permitted uses. Essentially, the Board improperly found that a unique hardship existed because the uses permitted in an R10-A Zoning District might potentially create more traffic and parking problems than the proposed multi-family dwelling.

Even if the Archdiocese had presented evidence sufficient to establish that it was entitled to a use variance because the building could not be utilized for any permitted purpose under the Zoning Code, it nevertheless failed to establish that the requested dimensional variances were necessary in order for the property to function as an apartment complex. After establishing hardship and that the variances would not be detrimental to the community, the Archdiocese is still required to demonstrate that the proposed variances would be the minimum necessary to afford it relief. However, the Archdiocese presented no evidence demonstrating, for example, why it could not have utilized the property as low-income senior housing without adding the proposed four-story addition to the existing structure. Not only would such an addition expand the number of units in the proposed apartment complex, it would not conform to the Zoning Code's height restrictions. Despite a total lack of evidence in that regard, the Board found that the proposed variances "represent the minimum variances that will afford relief at the least modification possible." Again, because that conclusion was not based on substantial evidence, it constituted an abuse of discretion.

Similarly, with respect to the issue of parking, the Archdiocese offered no evidence explaining why it could not construct 19 parking spaces in conformance with the Zoning Code. Instead, representatives for the Archdiocese merely offered speculation that most of its residents would not own cars, and that it planned to petition the City to remove "no parking signs" which would create additional parking spaces for its residents. The Archdiocese cannot merely rely on the City to take such action; it must demonstrate by substantial evidence that it

would not be feasible to construct the number of parking spaces required by the Zoning Code. Here, the Archdiocese failed to do so.

Accordingly, the order of the trial court is reversed.

DAN PELLEGRINI, President Judge

Judge Leadbetter did not participate in the decision in this case.

