IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gregory Campbell,	:	
	:	
Appellant	:	
	:	
v.	:	No. 274 C.D. 2012
	:	
Doylestown Borough Zoning Hearing Board and 148 N. Clinton Street Associates, L.P.	:	Argued: October 15, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: January 7, 2013**

Gregory Campbell (Objector) appeals from the January 17, 2012 Order of the Court of Common Pleas of Bucks County (trial court) affirming the Decision and Order of the Zoning Hearing Board (Board) of Doylestown Borough (Borough) granting 148 N. Clinton Street Associates, L.P. (Applicant) a special exception and dimensional variances, pursuant the Doylestown Borough Zoning Ordinance of 1985 (Ordinance), in order to change two nonconforming uses located on two separate lots to one nonconforming use located on one merged lot (Proposed Use). On appeal, Objector argues that the Board erred in granting Applicant a special exception and the requested variances where Applicant failed to present substantial evidence necessary to obtain such relief pursuant to the

Ordinance. Upon review, we conclude that the Board properly granted Applicant the relief requested and, therefore, we affirm.

Applicant, as equitable owner of real estate located at 287 Union Street, Tax Parcel No. 8-4-121 (Lot 1)[1] and as owner of record of real estate located at 148 North Clinton Street, Tax Parcel No. 8-4-127 (Lot 2), (together, the "Property") submitted a zoning application (Application) to the Board on March 18, 2011, requesting relief in the nature of a special exception and variances.[2] The Property is located in the CR Central Residential District (CR District).[3] (Application ¶ 8, R.R. at 180a.) Lot 1 is improved with two residential buildings comprising nine

[1] Applicant acknowledged that he entered into an agreement with Royal Doner for the purchase of Lot 1, contingent upon approval of the Application, in accordance with the testimony of Royal Doner. (Hr'g Tr. at 13, 17, R.R. at 104a, 108a.)

[2] At the hearing before the Board, the Board Chairman requested that the Application be amended to include the Board's decision dated December 29, 2010, denying an earlier application by Applicant requesting similar relief for the Property. In his opening statement before the Board during the hearing on the present Application, Applicant's counsel stated that this is a revised Application that addresses the concerns raised by the Board when it denied the prior application. (Hr'g Tr. at 5-6, 8-9, R.R. at 96a-97a, 99a-100a.)

[3] The CR Central Residential District is defined in the Ordinance as follows:

> 5. CR Central Residential District. The purpose and intent of this district is to retain and maintain the character and density of the central residential areas where a variety of housing types are permitted, as well as to provide standards for the development of new housing sites in order to broaden the borough's housing base and to add to the vitality of the core of the borough, to provide reasonable standards to prevent overcrowding of land, to regulate the density of population, to avoid undue congestion in the streets, to allow for the harmonious development and to create conditions conducive to carrying out the broad purposes of this chapter.

Ordinance, § 305.5, R.R. at 287a.

apartments—designated as nonconforming, multi-family low-rise; Lot 2 is improved with an industrial building used for light manufacturing—designated as nonconforming manufacturing. The existing, nonconforming uses presently exceed the Ordinance's maximum allowances for lot coverage, floor area ratio, and minimum lot size.

On March 18, 2011, Applicant filed its Application with the Board requesting a special exception to change the existing nonconforming uses to the Proposed Use. (Application ¶¶ 1-13, R.R. at 179a-80a.) Applicant further requested: (1) a use variance to permit the Property to be used as multi-family low-rise within the CR District;[4] and (2) dimensional variances "to address the [dimensional] requirements of the CR [District] that would be exceeded by the proposed new construction." (Applicant's Br. at 12; Application ¶ 14, R.R. at 183a.) On April 20, 2011, the Board held a hearing at which Applicant presented documentary evidence and the testimony of: Royal Doner, owner of Lot 1 for 41 years; Joseph Ventresca, builder/developer and principal of Applicant; and expert witnesses, architect Richard Brown and traffic engineer, David Horner. Neighbors who testified in favor of the Application included Christopher Ball and Teresa Valdez from Union Street; neighbors who testified against the Application were Objector, Elizabeth Campbell, and Jessica Muller of 166 N. Clinton Street.

The Board credited Applicant's witnesses, their studies, and analyses, (Board Decision at 6), and concluded that Applicant proved by clear and

[4] Because Section 906 of the Ordinance provides for a change in nonconforming use through a special exception, we do not reach any analysis of a use variance pursuant to the Municipalities Planning Code in this case. Ordinance, § 906.

convincing evidence that Applicant was entitled to the special exception, pursuant to Sections 1120 and 906 of the Ordinance, and to the dimensional variance for floor area ratio pursuant to Section 910.2 of the Pennsylvania Municipalities Planning Code (MPC).[5] (Board Decision at 6.) In granting the special exception and dimensional variances, the Board imposed conditions which were agreed to by Applicant, including, *inter alia*, that Applicant shall obtain LEED[6] Silver certification and have no more than 20 units. (Board Decision/Order at 8.)

Objector appealed to the trial court, which affirmed the Board's Order without taking any additional evidence. The trial court held that: (1) Applicant met its burden to prove that the Proposed Use complied with the requirements of the Ordinance; and (2) Objector did not present evidence or meet the required standard of showing, to a high degree of probability, that the Application would have a negative substantial effect on the health and safety of the community, but merely presented speculation at best, which was insufficient. (Trial Ct. Op. at 7-8.) This appeal followed.[7] On appeal, Objector presents the following questions for

---

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

[6] LEED is used herein as the abbreviation for Leadership in Energy and Environmental Design.

[7] "Because no additional evidence was presented to the trial court in [its] review of the Board's findings, our scope of review is limited to a determination of whether the Board committed a manifest abuse of discretion or an error of law." Blancett-Maddock v. City of Pittsburgh Zoning Board of Adjustment, 640 A.2d 498, 500 (Pa. Cmwlth. 1994). An abuse of discretion occurs when the Board's findings of fact are not based on substantial evidence in the record, which is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mehring v. Zoning Hearing Board of Manchester Township, 762 A.2d 1137, 1139 n.1 (Pa. Cmwlth. 2000). A conclusion that the zoning hearing board abused its discretion may be reached *only* if its findings are not supported by substantial evidence. Money v. Zoning Hearing Board of Haverford Township, 755 A.2d 732, 736 n.3 (Pa. Cmwlth. 2000).

(Continued…)

our review: (1) whether the Board erred as a matter of law or abused its discretion in granting the special exception; and (2) whether the Board erred as a matter of law or abused its discretion in granting the dimensional variances for floor area and lot coverage.[8]

We begin our analysis with a review of the law applicable to the special exception granted in this case. "A special exception is not an exception to a zoning ordinance, but rather *a use, which is expressly permitted"* when express standards and criteria are met "absent a showing of a detrimental effect on the community." Greaton Properties, Inc. v. Lower Merion Township, 796 A.2d 1038, 1045 (Pa. Cmwlth. 2002) (emphasis added). "Where a particular use is permitted in a zone by special exception, it is *presumed* that the local [governing body] has already considered that such use satisfies local concerns for the general health, safety, and welfare and that such use comports with the intent of the zoning ordinance." In re

---

Moreover, "[d]eterminations as to the credibility of witnesses and the weight to be given to the evidence are matters left solely to the Board in the performance of its factfinding role." Shamah v. Hellam Township Zoning Hearing Board, 648 A.2d 1299, 1304 (Pa. Cmwlth. 1994). In reviewing the record to determine whether there is substantial evidence to support the findings, we must "view the record in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). That there may be other testimony with a different view than the testimony credited by the Board "is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1109 (Pa. Cmwlth. 1994).

[8] We have consolidated and re-ordered Objector's arguments.

Brickstone Realty Corp., 789 A.2d 333, 340 (Pa. Cmwlth. 2001) (internal citations omitted) (emphasis added).[9]

Section 912.1 of the MPC[10] authorizes special exceptions when a zoning ordinance provides express standards pursuant to which the zoning hearing board decides whether to grant or deny a special exception as follows:

> Where the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

53 P.S. § 10912.1. Section 1120 of the Ordinance provides for special exceptions and sets forth the standards and criteria to be considered by the Board when hearing and deciding requests for special exceptions. Ordinance, § 1120. Sections 1120(2)(A) and (B) require that the Board consider and determine "[t]hat the proposed change is consistent with the spirit, purpose, and intent of the Zoning Chapter" and "[t]hat the proposed special exception will not substantially injure or detract from the use of the neighboring property, or from the character of the

[9] Once an applicant has proven that the proposed use has met the express standards, "[t]he burden then shifts to objectors to prove that the proposed use is not, in fact, consistent with the promotion of health, safety, and general welfare." In re Brickstone Realty Corp., 789 A.2d at 340. In attempting to meet this burden of proof, the objectors must present evidence showing, to a high degree of probability, that the use will generate an adverse impact not normally generated by this type of use and that this impact will pose a substantial threat to the health and safety of the community. Greaton Properties, 796 A.2d at 1046.

[10] 53 P.S. § 10912.1, added by Section 91 of the Act of December 21, 1988, P.L. 1329.

neighborhood." Ordinance, § 1120(2)(A), (B), R.R. at 353a. Section 906 of the Ordinance permits a current, nonconforming use to be changed as follows:

> § 906. Changes. Once changed to a conforming use, no structure or land shall be permitted to revert to a nonconforming use. *A nonconforming use*, together with the specific activity conducted or otherwise lawfully proposed and permitted to be conducted thereunder, *may be changed to a specific activity to be conducted under another nonconforming use, provided that the following conditions are satisfied:*
>
> 1. Such change shall be permitted only by special exception granted by the . . . Board pursuant to the provisions of Part 11 of this chapter.
>
> 2. The applicant shall show by clear and convincing evidence that the existing nonconforming use and the specific activity conducted or otherwise lawfully proposed and permitted to be conducted thereunder cannot reasonably be changed to a permitted use in the district where such nonconforming use is located.
>
> 3. The applicant shall show by clear and convincing evidence that the proposed specific activity to be conducted under another nonconforming use will be less objectionable in external effects than the specific activity conducted or otherwise lawfully proposed and permitted to be conducted under the existing nonconforming use with respect to:
>
> A. Traffic generation and congestion, including truck, passenger car and pedestrian traffic.
> B. Noise, smoke, dust, fumes, vapors, gases, heat, odor, glare or vibration.
> C. Storage and waste disposal.
> D. Appearance.
> E. Parking facilities.
>
> 4. The activity to be conducted under another proposed nonconforming use shall be limited in nature and scope to the specific activity as proposed and approved, subject nevertheless to such conditions and restrictions as may be imposed by the . . . Board.

Ordinance § 906, R.R. at 338a-39a (emphasis added). "The terms of the ordinance govern the change from one nonconforming use to another and provide the parameters under which it must be considered." Blancett-Maddock v. City of Pittsburgh Zoning Board of Adjustment, 640 A.2d 498, 500 (Pa. Cmwlth. 1994).

In considering the parameters of Section 906 and whether the express standards of Sections 906(2) and (3) have been fulfilled, we first review whether there is substantial evidence to support the Board's findings and conclusions. First, pursuant to Section 906(2), we conclude that the following testimony provides substantial evidence that the Property cannot reasonably be changed to a permitted use without a special exception. Mr. Doner, owner of Lot 1 for 41 years, testified that for more than 60 years Lot 1 contained two structures with nine apartments for which the Borough has provided use and occupancy permits and, more than 60 years ago, it contained a broom factory and a retirement home. Mr. Doner stated that tenants park in the alley and on the street because there is none available on the property, and Lot 1 has been for sale for five years, but is under agreement with Applicant *contingent upon* approval by the Board for the Proposed Use. (Hr'g Tr. at 11-14, R.R. at 102a-05a.) Mr. Ventresca testified that: Lot 2 contains a masonry building with four tenants, and a mezzanine used for light manufacturing, office space, and storage; one to three trucks visit Lot 2 daily; and 20 employees work on site, where construction equipment is stored. Mr. Ventresca stated that he and his architect, Mr. Brown, analyzed each of the possible permitted uses and scenarios, including duplex, industrial use, office uses, single family detached, semi-detached and multi-family, but determined that it was unreasonable to develop the Property as zoned because converting Lot 1 and Lot 2 to a permitted

use in the CR District would result in a financial loss in a best-case scenario.[11] Mr. Ventresca presented cost analyses showing that: none of the permitted uses of the Property were reasonable, and changing the use of the Property into a cultural center/auditorium is not reasonable or appropriate for the neighborhood since neighbors would not want 50-60 cars entering and exiting the Property for shows or similar reasons; the Property could not be used as a permitted use with the current structures without demolition; and subdivision was not feasible because no combination of subdivided lots would ever cover the cost of development.[12] (Hr'g Tr. at 21-37, R.R. at 112a-28a; Hr'g Tr. Exs. A-7, A-12-A-14.)

Mr. Brown testified that, after performing a series of design studies, he concluded that the multi-family low-rise use with uniform architecture and design is a preferred and reasonable use for the Property; this use eliminates the encroachments and the nonconforming manufacturing use on Lot 2 yet maintains

[11] Mr. Ventresca's credited evidence includes that the development costs for the permitted single family, single family semi-detached, and two family duplex uses, including acquisition, demolition, and subdivision/land development, would exceed the net proceeds for the three scenarios: five single family lots; seven single family semi-detached lots; and two family duplex lots. (Hr'g Tr. at 23-32, R.R. at 114a-23a; Ex. A-7, R.R. at 230a-31a.) Mr. Brown agreed, testifying that the costs listed in Ex. A-7 were reasonable, and that any combination of subdivided lots would not cover the cost to develop them and was not feasible. (Hr'g Tr. at 41-42, R.R. at 132a-33a.)

[12] Mr. Ventresca acknowledged that, in considering permitted uses for the Property in the CR District he "went through several scenarios," including single family, single semi-detached, and two family duplex uses. After taking into consideration the price of the lots, factoring in the cost of demolition for the industrial building and apartment building because the Property could not be utilized for any of the permitted uses and still retain the current structures, costs for subdivision, land development and engineering, and using comparable sales to estimate a market price for the developed homes, the expenses and development costs would make it unreasonable to develop the Property under the permitted uses. (Hr'g Tr. at 23, 26-30, R.R. at 114a, 117a-21a.)

the accessibility of the alley at the rear of the Property for the neighbors, and reduces dimensional nonconformities. (Hr'g Tr. at 38-40, 43, R.R. at 129a-31a, 134a.) Neighbor, Christopher Ball, stated that: Applicant did an outstanding job in making changes to address the concerns of the residents; the proposal was a significant upgrade to the neighborhood; and, adjacent properties would benefit. (Hr'g Tr. at 81-82, R.R. at 172a-73a.) Additionally, neighbor Teresa Valdez testified that: the use was very impressive, promoted living in the Borough, would enable her to remain a resident of the Borough since she would need to look for one-floor living very soon, she was very excited to have this option, and she looked forward to it replacing the eyesore that presently exists. (Hr'g Tr. at 81-83, R.R. at 172a-74a.)

Second, pursuant to Section 906(3), Applicant's credited testimony provides substantial evidence that the Proposed Use will be less objectionable in appearance, traffic, parking, noise and waste disposal. Mr. Ventresca testified that neither he nor Mr. Doner did anything to increase the existing nonconformities on the Property, requested the minimum relief necessary to develop the Property reasonably with no adverse impact upon the neighborhood, and explained that the Proposed Use improves the neighborhood by: removing a factory building, which was an eyesore in the middle of a nice neighborhood; eliminating encroachments; addressing neighbors' concerns by moving the proposed buildings further away from neighbors' property by 25-30 feet; lowering the building height; removing the existing buildings; and providing on-site, but out-of-sight, underground parking. (Hr'g Tr. at 15-22, 32-34, R.R. at 106a-13a, 123a-25a.)

Mr. Brown testified that: the "intent is to create some attractive buildings and . . . landscaping and to have it fit into the character of the neighborhood." (Hr'g Tr. at 53, R.R. at 144a.) This was accomplished by: being responsive to the character of the neighborhood; reducing the height and mass of the buildings from what was originally proposed; and emphasizing the appearance from the street by adding porches, reducing lot coverage by ten percent, moving waste disposal out of sight to the underground parking area, and placing all parking underground and out of sight, which simultaneously relieves sixteen public parking spaces on the street. Mr. Brown submitted architectural renderings, including streetscapes with porches, retaining walls, landscaping, and "green" components. While acknowledging that the floor area ratio increases by 35%, the Application lowers the building height to comply with the Ordinance for the CR District; decreases existing lot and impervious surface coverage by ten percent;[13] decreases building mass; provides for a more attractive exterior appearance by adding porches, walkways, and streetscapes; will be less objectionable regarding noise, dust, waste disposal, and storage; preserves the use of the existing alley; reduces on-street parking by providing for out-of-sight, off-street parking; and reduces traffic. (Hr'g Tr. at 44-53, 56, 70, 74-76, R.R. at 135a-44a, 147a, 161a, 165a-67a; Ex. A-11, R.R. at 245a.) Mr. Horner, an expert in traffic engineering, testified that he performed a traffic/parking study and concluded that the Application: provides more than adequate parking,[14] would result in less a.m. and p.m. peak hour trips to and from

[13] Mr. Brown acknowledged that impervious surfaces must be included in the lot coverage calculations. (Hr'g Tr. at 51, R.R. at 142a.)

[14] Mr. Horner testified that the Ordinance requires 1.75 off-street parking spaces for two bedroom units and two off-street parking spaces for three bedroom units and that the Application proposes 40 parking spaces which is more than required for a maximum of 20 units, 18 of which are two bedroom units and two of which are three bedroom units. (Hr'g Tr. at 73, R.R. at 164a.)

the Property, is less objectionable than the existing use, and addresses the current lack of any off-street parking for Lot 1. (Hr'g Tr. at 71-78, R.R. at 162a-69a.)

This credited testimony establishes that Applicant's witnesses presented substantial evidence to establish that the present, nonconforming uses of the Property cannot reasonably be changed to a permitted use and that the change from the nonconforming manufacturing use to the proposed multi-family low-rise use on the Property will be less objectionable with respect to each of the categories listed in Section 906(3)(A-E). We conclude that there is substantial evidence from which the Board could properly determine that the Proposed Use "will not only rectify the majority of the non[]conformities and encroachments, but will yield the residential product that will be an upgrade from the existing improvements on the Property and to the neighborhood at large" and "is in keeping with the character of the neighborhood." (Board Decision at 6.) Thus, not only is there substantial evidence to support that the Application meets the requirements of Section 906 of the Ordinance for a change in nonconforming use on the Property, this result is also consistent with the purpose and intent of the CR District pursuant to Section 305.5,[15] and will not substantially injure or detract from the use of the neighboring properties or the character of the neighborhood, pursuant to Sections 1120.2(A-B).[16]

[15] Ordinance, § 305.5, R.R. at 287a.

[16] Ordinance, § 1120.2 (A, B), R.R. at 353a.

Next, Objector argues that the Board erred or abused its discretion in granting the dimensional variance because Applicant did not present substantial evidence that the proposed nonconforming use is "otherwise lawfully proposed" pursuant to Section 906(2); specifically, the Property does not meet the minimum acreage requirement of the Ordinance. Objector maintains that because Applicant failed to seek the required variance for the minimum acreage requirement, Applicant cannot proceed even if the dimensional variances were properly granted.

Objector's argument fails to acknowledge that the existing nonconforming uses are also *presently nonconforming* regarding minimum lot size. Section 502 and its Table of Dimensional Requirements[17] provide for a minimum lot size of three acres for multi-family low-rise use and the Property consists of 1.026 acres. (Application ¶ 9, R.R. at 180a.) Because the Property is already nonconforming regarding both use and minimum lot size, after Lot 1 and Lot 2 are consolidated and thereby enlarged, the existing nonconformity will actually decrease. Section 906(2) does not impose any additional requirement that Applicant seek a variance for minimum lot size when such a dimensional nonconformity already exists and the nonconformity will be reduced by the Proposed Use.[18] Moreover, to interpret

[17] Ordinance, § 502, R.R. at 322a-23a.

[18] Here, the Board found that Applicant's Proposed Use satisfied the express standards and criteria of Section 906, concluded that "[c]onversion to a permitted use is not reasonable," (FOF ¶ 21), and that the Proposed Use will be less objectionable with regard to noise and dust, appearance, waste disposal, parking, and traffic generation. (FOF ¶¶ 36, 37, 39.) Therefore, upon granting the special exception after concluding that Applicant cannot reasonably convert the Property to a permitted use, a presumption arose, pursuant to In re Brickstone Realty Corp. and Greaton Properties, that the multi-family low-rise use met the express standards of the Ordinance and any local concerns for general health, safety, and welfare. Importantly, this presumption shifted the burden to Objector to prove "to 'a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community' greater

(Continued…)

the phrase "otherwise lawfully proposed" within Section 906(2), as Objector does, would impose an additional requirement on an applicant seeking to change a nonconforming use beyond those expressly stated in that section. Such a strained reading of the Ordinance would produce an unreasonable result contrary to Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a).[19] Section 906 of the Ordinance does not contain a requirement that, in order to be granted a special exception, the use must conform to *every* dimensional requirement for the CR District. Therefore, we disagree with Objector's interpretation that the Application was "not otherwise lawfully proposed." In sum, we find no error or abuse of discretion in the Board's granting of the special exception to Applicant.[20]

---

than what is normally expected from that type of use and not just speculation of possible harms." Sunnyside Up Corporation v. City of Lancaster Zoning Hearing Board, 739 A.2d 644, 650 (Pa. Cmwlth. 1999) (quoting Tuckfelt v. Zoning Board of Adjustment of the City of Pittsburgh, 471 A.2d 1311, 1314 (Pa. Cmwlth. 1984)). Thus, once the Board concluded that the multi-family low-rise use is not only a reasonable use, but a preferred use for the Property, in order to overcome the presumption of the use being consistent with the requirements of the MPC and the Ordinance, it was necessary that Objector produce testimony or evidence beyond mere speculation to prove that the proposed use is not, in fact, consistent with the promotion of health, safety, and general welfare, and to "persuade the [B]oard that the proposed use will have a generally detrimental effect." Greaton Properties, 796 A.2d at 1046. However, our review of the record reveals that the Objector did not present evidence that the Proposed Use was not consistent with the promotion of health, safety and general welfare or would have a generally detrimental effect, but presented "just speculation of possible harms." Sunnyside Up Corporation, 739 A.2d at 650.

[19] Section 1921(a) provides that "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S. § 1921(a).

[20] Objector further contends that Applicant failed to prove that the multi-family low-rise use is "otherwise lawfully proposed" pursuant to Section 906 of the Ordinance because Applicant did not present expert testimony regarding whether it would have been economically feasible to sell developed lots for permitted uses or consider the reasonableness of other permitted uses such as a cultural center or auditorium. Objector essentially argues that Applicant did not prove the necessary elements for a use variance pursuant to the requirements of the MPC.

(Continued…)

Objector next argues that the Board erred as a matter of law or abused its discretion in granting a variance for floor area ratio.[21] Objector argues that Applicant did not meet the requirements pursuant to Section 910.2 of the MPC,[22]

However, because the Board properly granted a special exception pursuant to Section 906, we do not reach these arguments.

[21] In addition to requesting a variance for floor area ratios, Applicant also requested dimensional variances for front, rear, and side yard setbacks. (Application ¶ 14, R.R. at 183a.) However, during the hearing before the Board, Mr. Brown testified that all of the structures shown on the plans on the Application before the Board "are all within the 15-foot setback lines as currently in force in the CR [D]istrict." (Hr'g Tr. at 54, R.R. at 145a.) The Board credited Applicant's witnesses' testimony. (Board Op. at 6.)

[22] 53 P.S. § 10910.2. Section 910.2 of the MPC authorizes variances and provides:

> (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 is therefore *necessary to enable the reasonable use of the property*.
> >
> > (3) That such *unnecessary hardship has not been created by the appellant*.

(Continued…)

contending that there are no unique physical circumstances or conditions on the property that would warrant a variance and that any hardship that existed was self-inflicted and created by Applicant, because: the L-shape of the Property is a self-imposed hardship created by the consolidation of Lot 1 and Lot 2; Applicant was aware of the zoning restrictions when he paid the price for the Property, which he now claims makes the Property unreasonable to develop within permitted uses; and the encroachment created by the building is not a physical condition of the Property, pursuant to Wagner v. City of Erie Zoning Hearing Board, 675 A.2d 791, 799 (Pa. Cmwlth. 1996). Objector further contends that such self-inflicted hardships cannot be the basis for a dimensional variance and are not the minimum variances that will afford relief.

The variance requested by Applicant in this case is a dimensional variance for floor area ratio. In contrast to use variances, which involve a request to use property in a manner wholly outside zoning regulations, dimensional variances

---

> (4) That the variance, if authorized, *will not alter the essential character of the neighborhood or district in which the property is located*, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
>
> (5) That the variance, if authorized, *will represent the minimum variance that will afford relief* and will represent the least modification possible of the regulation in issue.
>
> (b) In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Id. (emphasis added).

involve a request to adjust zoning regulations to use property in a manner consistent with regulations—"an important distinction." Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 257-258, 721 A.2d 43, 47 (1998). Our Supreme Court has explained that "the quantum of proof required to establish unnecessary hardship is indeed lesser when a dimensional variance, as opposed to a use variance, is sought." Hertzberg, 554 Pa. at 258-59, 721 A.2d at 48. Because the request for a dimensional variance is "of lesser moment than the grant of a use variance," id. at 257, 721 A.2d at 47,

> 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 . . . from obtaining the necessary variances.

Id. at 264, 721 A.2d at 50. In applying the Hertzberg standard that multiple factors that may be considered to justify a variance, "this Court has stated that 'where blighted or dilapidated conditions exist . . . and where the applicant for a variance has undertaken efforts to remediate or renovate those areas for a salutary purpose, a slight relaxation, or less stringent application, of the variance criteria may be the only way that the land is put to beneficial use.'" 1700 Columbus Associates, LLC v. City of Philadelphia Zoning Board of Adjustment, 976 A.2d 1257, 1265 (Pa. Cmwlth. 2009) (quoting Vitti v. Zoning Board of Adjustment of the City of Pittsburgh, 710 A.2d 653, 658 (Pa. Cmwlth. 1998)). Thus, once a certain use has been permitted, "the Hertzberg standard of proof applicable to dimensional variances . . . seeks only a 'reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations.'" Id. (quoting Hertzberg, 554 Pa. at 257, 721 A.2d at 47). "While

Hertzberg eased the requirements for granting a variance for dimensional requirements," this Court has also acknowledged that "it did not make dimensional requirements . . . 'free-fire zones' for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially 'hurt' if it could not do what it wanted to do with the property." Society Created to Reduce Urban Blight v. Zoning Hearing Board of Adjustment of the City of Philadelphia, 771 A.2d 874, 877 (Pa. Cmwlth. 2001). We have stated that "it is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate *something more* than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted." Singer v. Philadelphia Zoning Board of Adjustment, 29 A.3d 144, 150 (Pa. Cmwlth. 2011) (emphasis added).

Here, that "something more" involves the Property, which is already nonconforming and the Board has properly determined meets the requirements for a special exception for multi-family low-rise use. Several unique conditions and/or physical characteristics already exist on the Property, as well as nonconformities with regard to minimum lot size, lot coverage, and floor area ratio. (Ex. A-9 "Dimensional Calculations," R.R. at 242a-43a.) In addition, an alley bisects the Property and makes development difficult. (Hr'g Tr. at 18-19, 25, R.R. at 109a-10a, 116a.) The existing, nonconforming industrial building existing on Lot 2 encroaches both onto the adjacent residential property, an existing easement, and is considered an eyesore. (Hr'g Tr. at 18-19, R.R. at 109a-10a.) There is also a lack of on-site parking. The existence of these conditions supports the Board's finding that the Property suffers from unnecessary hardships, and that the hardships were

not created by Applicant, thereby establishing the prerequisites pursuant to Section 910.2(a)(1), (3) of the MPC.[23]

There is also substantial evidence in the record to support the Board's findings that Applicant established the other requirements, pursuant to Section 910.2 of the MPC, for the grant of the dimensional variance. The Board found that the Application will not alter the essential character of the residential neighborhood, pursuant to Section 910.2(a)(4), but rather will enhance it in several ways by: (1) removing the encroachments that are unique physical characteristics of the Property; (2) replacing the industrial use with a residential use for the entire Property; and (3) reducing the existing lot coverage ratio from 75% to 65%, which is a ten percent improvement over the existing nonconformity in lot coverage.[24] Although the Ordinance has a lot coverage limit of 40%, (FOF ¶ 34), no variance for lot coverage ratio is necessary because there is a ten percent reduction to the presently existing nonconforming lot coverage ratio; hence, the lot coverage ratio decreases. Moreover, the decrease in lot coverage ratio is consistent with the general aspiration that all nonconformities should be encouraged to diminish which, here, will diminish from 75% to 65%. See Money v. Zoning Hearing Board of Haverford Township, 755 A.2d 732, 738 (Pa. Cmwlth. 2000) (permitting

[23] While Objector relies upon Wagner v. City of Erie Zoning Hearing Board, 675 A.2d 791, 799 (Pa. Cmwlth. 1996), as support for the argument that unnecessary hardship must relate to the physical land and not the building on the land, we stated in that case that, "[a]lthough unnecessary hardship usually relates to the physical characteristics of the land, at times, the unnecessary hardship can relate to the building itself."

[24] The Board determined that the existing lot coverage of 75% would be reduced to 65% with the Proposed Use. (FOF ¶ 34.)

landowners to demolish nonconforming structures and replace them with new nonconforming structures reducing nonconformities).

Next, the Board found that, pursuant to Section 910.2(a)(2), the Property cannot be developed in strict conformance with the Ordinance without the requested variance for floor area ratio. The variance requests an increase from the existing 52% to 87%, (FOF ¶ 35), which is attributable to the addition of vertical floors. Notably, a height variance is *not* needed to obtain the number of proposed units (20); therefore, the redevelopment of the Property is feasible. Mr. Brown testified that "the difference is the fact that we're . . . putting the units vertically now . . . that increases the floor area dramatically," but also "allows us to keep the [lot] coverage [ratio] lower." (Hr'g Tr. at 52, R.R. at 143a.) The Board credited the testimony of Mr. Ventresca and Mr. Brown that because of the encroachments and other nonconformities, it would not be possible to develop the Property for the only reasonable use—multi-family low-rise use—in strict conformity with the floor area ratio provision of the Ordinance because it was not feasible to use and develop the Property within the Ordinance. (Hr'g Tr. at 30-31, 41-41, R.R. at 121a-22a, 132a-33a.) This credited testimony provides substantial evidence to support the finding that the Property could not be developed for a reasonable use in strict conformity with the Ordinance.

The Board also found that the variance represents the minimum variance necessary to afford relief to Applicant, pursuant to Section 910.2(a)(5). As the trial court noted, Applicant originally submitted a significantly more expansive proposal in December 2010, which the Board rejected. (Trial Ct. Op. at 16.) However, Applicant then made changes in response to the rejected proposal and

reduced the scale of the requested variances significantly. Applicant's changes to the Application, in response to the rejected proposal that addressed all areas of the Board's concerns, provided substantial evidence to support the Board's finding. Therefore, the credited testimony establishes that a dimensional variance is warranted so that the development of the Property is feasible, along with a removal of the less desirable manufacturing use, to convert the entire Property to a residential use. Accordingly, the Board properly granted Applicant's dimensional variance from the Ordinance's floor area ratio requirements for a multi-family low-rise use.

For the foregoing reasons, we affirm the trial court's Order.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gregory Campbell,	:	
	:	
Appellant	:	
	:	
v.	:	No. 274 C.D. 2012
	:	
Doylestown Borough Zoning Hearing Board and 148 N. Clinton Street Associates, L.P.	:	

O R D E R

NOW, January 7, 2013, the Order of the Court of Common Pleas of Bucks County in the above-captioned matter is **AFFIRMED.**

RENÉE COHN JUBELIRER, Judge