IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John and Patricia Paulson, Dusan Damjanovic and Leslie Peoples, Anthony and Kara Mascitti William B. Karp, Jr. and Steven and Lara Goudsouzian, Appellants	:	
v.	:	No. 471 C.D. 2011
	:	Argued: September 13, 2011
Zoning Hearing Board of Lower Saucon Township and Alex Patullo	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: October 24, 2011**

John and Patricia Paulson, Dusan Damjanovic and Leslie Peoples, Anthony and Kara Mascitti, William B. Karp, Jr. and Steven and Lara Goudsouzian (Objectors) appeal from the order of the Court of Common Pleas of Northampton County, which affirmed the decision of the Zoning Hearing Board of Lower Saucon Township (Board) to grant a number of variances to Alex Patullo. We vacate and remand for further proceedings.

Patullo is the owner of what was formerly known as the Woodland Hills Country Club and Golf Course. The course included a clubhouse, which had

a liquor license and served food and drink to golfers and the general public, and was occasionally rented out as a banquet facility. The course was located in an area of Lower Saucon Township zoned rural agricultural (RA). In RA zones, golf courses are a permitted use, and the parties are apparently under the impression that the clubhouse was permitted as an accessory use.

For economic reasons, Patullo decided to close the golf course and sell off most of its land. He planned to keep the clubhouse, and the 13.4 acres on which it sits, however, and continue to use it as a banquet facility. Patullo also planned to discontinue the daily operation of the clubhouse as a restaurant and bar, and use it only when rented out for an event.

Because he believed that the clubhouse could not continue to operate as an accessory to a golf course after the golf course itself was shut down, Patullo went to the Board for relief. Finding that the township's zoning ordinance (Ordinance) made no allowance for banquet facilities, Patullo sought authorization to continue operating the clubhouse as a "Club, Lodge or Social Building (Private)," which is a conditional use in RA districts. Ordinance § 180-20. Patullo conceded that there were a number of requirements for this use which he could not meet, including that "[t]he club will serve a purely social, religious, athletic or community service purpose" and that "[i]t will be operated on a membership basis and not conducted as a business." Ordinance § 180-112.A (1), (2). Patullo planned to use his clubhouse on a for-profit, non-membership basis, and thus sought variances from those requirements.[1]

[1] While the Board, common pleas and the parties all appear to believe that the clubhouse was a valid accessory use to the golf course, a close reading suggests that the clubhouse does not appear ever to have been a valid accessory use under the terms of the present Ordinance. Article IV of the Ordinance, dealing with RA districts, lists a number of permitted uses, including golf courses. Ordinance § 180-19. An additional section of the Ordinance spells out dimensional and

(Footnote continued on next page…)

Before the Board, Patullo testified to the above facts, which are undisputed. He also testified that the structure in question was purpose-built as a clubhouse, that it is not suitable for other uses, and that it has been used as a clubhouse for more than twenty years. Patullo also agreed to a request from the Board that, if the requested variances were granted, he would agree to cease operations at the facility by midnight each night.

Objectors also appeared before the Board. They argued that Patullo had not shown the hardship necessary to receive a variance, and that the use Patullo was proposing for the clubhouse was more like that defined by the Ordinance as a "Tavern," a use not permitted in RA districts.

The Board granted the variances. The Board considered whether the requested variances "should be deemed dimensional or use variances" and concluded that, "strictly speaking, they are neither." Board Opinion at 10. However, the Board concluded that "under the somewhat unique facts of this case

---

(continued…)

other requirements specific to golf courses, but does not mention clubhouses or the service of food and drink. Ordinance § 180-113. The Ordinance's definition section includes an entry for "golf course," but similarly does not mention clubhouses. Ordinance § 180-5. Finally, the Ordinance includes a list of 13 permitted accessory uses in RA districts, but there is no provision for clubhouses, restaurants or taverns. Ordinance § 180-21. Therefore, it may be that continuation of the banquet facility use is permitted as of right as a pre-existing, nonconforming use and that no variance was actually required.

To establish a prior nonconforming use, "the landowner is required to provide objective evidence that the subject land was devoted to such use at the time the zoning ordinance was enacted." *Smalley v. Zoning Hearing Bd. of Middletown Twp.*, 575 Pa. 85, 90, 834 A.2d 535, 538-39 (2003). This burden includes "the requirement of conclusive proof . . . of the precise extent, nature, time of creation and continuation of the alleged nonconforming use." *Jones v. Twp. of N. Huntingdon Zoning Hearing Bd.*, 467 A.2d 1206, 1207 (Pa. Cmwlth. 1983). The Ordinance in this case was adopted in 2002, superseding a prior ordinance which had been adopted in 1998. It is undisputed that Patullo has been operating the clubhouse for over twenty years. We draw no conclusions on this matter, as further fact-finding, including an evaluation of the ordinance, if any, in effect at the precise time of the construction of the clubhouse, would be required.

the requested variances should be analyzed using the standards of dimensional rather than use variances." *Id.* Analyzing the case under the standard for dimensional variances announced by our Supreme Court in *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (1998), the Board determined that Patullo had met the requirements to receive the variances. Common pleas, without taking additional evidence, affirmed. An appeal to this court followed.

On appeal, Objectors argue that the Board erred in evaluating Patullo's request under the *Hertzberg* standard for dimensional variances, and that Patullo failed to establish a number of the elements needed to receive a variance.

An applicant must establish five criteria before receiving a variance:

> (1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions of the property; (2) because of such physical circumstances or conditions the property cannot be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property; (3) the hardship is not self-inflicted; (4) granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and (5) the variance sought is the minimum variance that will afford relief.

Taliaferro v. Darby Twp. Zoning Hearing Bd., 873 A.2d 807, 811-12 (Pa. Cmwlth. 2005).

Traditionally, an applicant seeking to show unnecessary hardship was required to demonstrate that:

> (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) that the property can be conformed for a permitted use only at a

> prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance.

Taliaferro, 873 A.2d at 812. However, our Supreme Court in *Hertzberg* noted that:

> when seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.

Hertzberg, 554 Pa. at 257, 721 A.2d at 47. Therefore, the Court held that:

> in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Id. at 263-64, 721 A.2d at 50.

In this case, the Board determined that Patullo's requests should be evaluated as dimensional variances. The Board apparently reasoned that, because Patullo was not requesting a new use, but rather to be allowed to continue the use he had put his property to for a number of years, his request should not be evaluated as a use variance, but rather as a dimensional variance. This was clear error. Unlike the property owner in *Hertzberg*, Patullo did not seek relief from the dimensional requirements associated with a permitted use; rather, Patullo sought to put his property to a use not allowed under the Ordinance. This was clearly a

request for a use variance, and it was therefore error for the Board to apply the relaxed *Hertzberg* standard to it.

Because the Board applied the incorrect standard, its decision clearly cannot stand. Accordingly, we vacate and remand for the Board to consider the facts of this case under the standards applicable to use variances.[2]

BONNIE BRIGANCE LEADBETTER,
President Judge

[2] In this regard we note that variances have occasionally been granted for purpose-built structures which, through no fault of the owner, can no longer be used as zoned and would be prohibitively expensive to retrofit. *See Halberstadt v. Borough of Nazareth*, 546 Pa. 578, 687 A.2d 371 (1997); *see also* Robert Ryan, Pennsylvania Zoning Law and Practice § 6.4.12 (2011). Of course, however, substantial evidence must support any finding that the building in question qualifies as such a structure.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John and Patricia Paulson, Dusan Damjanovic and Leslie Peoples, Anthony and Kara Mascitti William B. Karp, Jr. and Steven and Lara Goudsouzian, Appellants	:	
v.	:	No. 471 C.D. 2011
Zoning Hearing Board of Lower Saucon Township and Alex Patullo	:	

O R D E R

AND NOW, this 24th day of October, 2011, the order of the Court of Common Pleas of Northampton County in the above-captioned matter is hereby VACATED and the matter is REMANDED for further proceedings consistent with this opinion.

Jurisdiction relinquished.

_____

BONNIE BRIGANCE LEADBETTER,
President Judge