

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel G. Kamin, Robert S. Kamin, :
Carole Kamin, Philip Kamin, Michael :
Kamin, Matthew Kamin, Tiziana :
DiMatteo, Rubert Croft, Joanne :
Harvey, Michael Lotze, :
Cathleen Digioia, Paula Deasy, :
Henry Hoffstot and Morewood :
Shadyside Civil Association :

v. :

Zoning Board of Adjustment of the :
City of Pittsburgh, Botero :
Development, LLC :
and The City of Pittsburgh :

No. 485 C.D. 2009
Argued: October 15, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: January 7, 2010

Botero Development, LLC (the Applicant) appeals the order of the Court of Common Pleas of Allegheny County (C.P. Court) which reversed the City of Pittsburgh Zoning Board of Adjustment’s (Board) decision that granted the Applicant’s application for two variances under the Pittsburgh Zoning Code (Code).

The Applicant requested variances related to the proposed demolition of an existing building located at 5135 Fifth Avenue in a RM-M [Residential Multi-Unit Moderate Density] District in the City of Pittsburgh and construction of a three-story structure containing sixteen apartment units with interior parking spaces.

The Applicant sought a density variance from Code Section 903.03.C to decrease the minimum lot size per unit from the required 1,800 square feet to 736.9 square feet, thus expanding the number of units permitted on the site from six units under the Code to sixteen units. Applicant also sought a variance from Code Section 925.06.A.15 to allow an Americans with Disabilities Act [ADA]-compliant access ramp to the proposed parking garage to encroach upon a required sideyard setback by 108 inches, instead of the 40 inches permitted by the Code.

On March 6, 2008, the Board conducted a hearing on the Applicant's applications. In a June 7, 2008, decision the Board granted both variances. The Board held that an unnecessary hardship prevented compliance with minimum lot size requirements of the Code and as to the installation of an access ramp, the variance was de minimus and there was no opposition.

The Board made the following relevant conclusions of law:

6. Here, the Subject Property is unique in its location, its size and its topography. The building has also been vacant for a number of years and credible testimony was presented that the property could not be reasonably used for any use permitted and would not be financially viable without some type of variance.

.....

9. The hardship reflected by the existing conditions of the property, including the costs associated with the need to provide a parking structure to provide off-street parking, and the costs associated with construction of the site, justifies the grant of a variance from the minimum lot size requirement for the Subject Property. The increase in the number of units requested is not an effort to increase the

developer's profits but to develop a financially viable project.

City of Pittsburgh Zoning Board of Adjustment, Decision June 7, 2008, Conclusions of Law (C.L.) Nos. 6, 9, at 6. (Emphasis added).

Daniel G. Kamin, Robert S. Kamin, Carole Kamin, Philip Kamin, Michael Kamin, Matthew Kamin, Tiziana DiMatteo, Ruper Croft, Joanne Harvey, Michael Lotze, Cathleen Digioia, Paula Deasy, Henry Hoffstot and Morewood-Shadyside Civic Association timely appealed the Board's decision.

By order dated February 25, 2009, the C.P. Court reversed:

A review of the record shows that the previous occupants of the Subject Property were an architectural studio and a day care. Although vacant for a number of years, it is disputed that the Subject Property will suffer economic detriment if the variance is not granted. In fact, testimony^[1] was presented that there was an offer of \$500,000.00 to purchase the Subject Property with the intention of remodeling [sic] the Subject Property exactly as it is now without any request for variance.

The Board found that any use of the property would require demolition of the building even though evidence was presented that the Subject Property could in fact be used in strict conformity with the Code.

There is also nothing unique or unusual about the Subject Property indicating that its dimensions imposed an unnecessary hardship not shared by other property owners that would justify a variance in this case.

¹ Jeffrey Weinberg (Weinberg), an owner of rental property located adjacent to the Property, testified that he had once made a \$500,000 offer to purchase the property. Hearing Transcript, March 6, 2008, at 171; R.R. at 182a. The Board did not make any findings of fact related to this specific testimony.

The purpose of the proposed variances are to demolish an existing building and construct a 3-story structure containing 16 apartment units, which does not currently fit in the zoning district.

Court of Common Pleas of Allegheny County, Opinion and Order, February 23, 2009, at 4-5.

The Applicant contends: 1) the Board's decision to grant dimensional variances should be affirmed where the Board made findings of fact that were supported by substantial evidence; 2) the C.P. Court erred when it relied on evidence which the Board had rejected; and 3) the C.P. Court erred when it concluded that a dimensional variance may only be supported by a finding that the dimensions of the Property are unusual and where the C.P. Court discarded the Board's determination that the property could not reasonably be used for any permitted use and was not financially viable without some type of variance.²

The Applicant's principal argument is that Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), controls and the Board properly granted the proposed dimensional variance.

² In reviewing this matter, where the common pleas court has taken no additional evidence, this Court's standard of review is identical to that of the common pleas court and is limited to determining whether the zoning board abused its discretion or committed an error of law in granting the variances. Collier Stone Company v. Township of Collier Board of Commissioners, 735 A.2d 768 (Pa. Cmwlth. 1999).

Section 910.2(a) of the Municipalities Planning Code³ establishes the condition under which a zoning board may grant a variance:

(1) That there are unique 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 the conditions, and the 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;

(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; and

(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. (Emphasis added).

Here, the density variance was required because a multi-unit residential building was a permitted use. For a dimensional variance, the “applicant must show

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

that unnecessary hardship will result if a variance is denied [and the applicant is required to comply with the ordinance] and that the proposed use will not be contrary to the public interest.” Hertzberg, 554 Pa. at 257, 721 A.2d at 47.

In Hertzberg, our Pennsylvania Supreme Court set forth the criteria for determining the grant of a dimensional variance:

In 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 consistent with applicable regulations . . . the grant of the dimensional variance is of lesser moment than the grant of a use variance.

. . . .

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.

Hertzberg, 554 Pa. at 256, 264, 741 A.2d at 47, 50.

In Hertzberg however, our Supreme Court recognized and distinguished O’Neill v. Zoning Board of Adjustment, 434 Pa. 331, 254 A.2d 12 (1969). The O’Neill case is directly on point with the controversy at hand. Our Supreme Court stated in Hertzberg:

In *O’Neill*, this Court refused to uphold the grant of variances to an applicant who wished to construct a twenty-six story apartment building consisting of 225,809 square feet of floor space The property was located in a C-3 commercial district which permitted the construction of apartment buildings but limited the allowable floor space to

86,646 square feet This Court found that *O'Neill* was not the appropriate case to apply a less strict standard for the grant of a dimensional variance because the 'apartment building would be more than a mere technical and superficial deviation from the space requirements. The building would contain approximately two and one half times as much floor space as is now permitted under the zoning regulation. In such a situation, petitioner's remedy would appear to be a rezoning and not a variance.' *O'Neill*, 434 Pa. at 338, 254 A.2d at 16.

554 Pa. at 258, 721 A.2d at 47 n.7. (Emphasis added).

Here, the proposed variance was greater than in O'Neill. This Court notes that if the proposed building was constructed in accordance with the current density requirements of the Code, then fewer parking spaces would be needed and there would be ample room to construct an ADA-compliant access ramp without the necessity of an additional variance.

This Court must focus on the density variance. The minimum lot size required in the RM-M district was 1,800 square feet per unit. The Applicant seeks to construct sixteen units where the total minimum lot size required for development was 28,800 square feet. Obviously, the lot size of the Property, was only 11,790 square feet or about 40% of the required lot size. The proposed density of sixteen units on the Property would only conform to the standards of the Code in an RM-V (Very High Density) District. There are no RM-V Districts in the vicinity of the Property.

The C.P. Court inescapably and correctly concluded that the Applicant did not establish an unnecessary hardship sufficient to justify the award of the variance. This Court finds no error in the C.P. Court's conclusion.⁴

Accordingly, this Court affirms.⁵

BERNARD L. McGINLEY, Judge

Senior Judge Kelley dissents.

⁴ In O'Neill, the applicant had argued that the apartment rental costs would be too expensive if he were constrained to build within the zoning ordinance. He needed to build more apartments. The applicant explained that if the building was limited to smaller floor plans then the costs of acquisition and construction would require a monthly rent of \$320.00 per unit whereas apartment rental costs could be reduced to \$220.00 per unit if the applicant was permitted to construct a larger building. O'Neill, 434 Pa. at 333, 254 A.2d at 14.

Here, the Applicant argues that the proposed sixteen units were needed because the additional units would justify the significant costs associated with construction. The proposed apartment rental costs of between \$1,200 and \$2,000 per unit were among the highest level of rentals in the area. Decision, F.F. No. 15 at 3. The Board concluded that a building built strictly according to the Code would not be financially viable. The Applicant's appropriate remedy here is rezoning and not a variance. O'Neill. A zoning board may not grant rezoning under the guise of a variance; to remedy improper zoning one must file a request for a curative amendment or a request for rezoning, which are fundamentally different procedures from a request for a variance. Sposato v. Board of Adjustment of Radnor Township, 440 Pa. 107, 270 A.2d 616 (1970).

⁵ Because of this Court's conclusion, it is unnecessary to address the Applicant's remaining issues. To the extent that it is necessary to address the Applicant's issue regarding the use of Weinberg's testimony regarding his offer to purchase the property, to which the Board did not attach a specific finding, the testimony is immaterial because the sheer magnitude of the proposed apartment building with respect to the size authorized in the Code determined that the Applicant was not entitled to a variance.

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ORDER

AND NOW, this 7th day of January, 2010, the order of the Court of
Common Pleas of Allegheny County is affirmed.

BERNARD L. MCGINLEY, Judge