

THE ZONING HEARING BOARD OF DOVER TOWNSHIP
YORK COUNTY, PENNSYLVANIA

IN RE: :
: :
APPLICATION OF : Application No. ZHB-23-2
: :
INVESTMENT REAL ESTATE LLC :

DECISION

DO NOT DISCARD

NATURE OF APPLICATION

This is an application by Investment Real Estate, LLC for a special exception to alter an existing dimensionally non-conforming building by adding additional building coverage on the existing impervious parking area and maintaining the existing non-conforming setback, and also for a variance for less than the required parking on property at 3025 Carlisle Road in a Commercial Zoning District.

HEARING

A hearing was held by the Dover Township Zoning Hearing Board, with Chairwoman Ginter, Vice-Chairman Wright, and members Reynolds and Myers present on Wednesday, April 19, 2023, beginning at 7:00 p.m., in the large meeting room of the Dover Township Community Building at 3700 Davidsburg Road. The Zoning Officer, John T. McLucas, was present. The Zoning Board Solicitor, D. Michael Craley, was present. The Applicant was represented by Glen Williams, agent for Investment Real Estate, LLC, and Lena Barone, Senior Project Manager. Also present were other adjoining property owners and interested persons as set forth in the record. There was no opposition to the application. The proceedings were recorded by Rinehart Reporting Service.

NOTICE

Notice of the hearing was provided in accordance with the Pennsylvania Municipalities Planning Code and the Dover Township Zoning Ordinance requirements.

PLANNING COMMISSION RECOMMENDATIONS

The application was considered by the Dover Township Planning Commission, and recommendation was made to grant the requested special exception and deny the variance.

FINDINGS OF FACT

1. The property is located in the Commercial Zoning District.
2. The property contains approximately 181,239 square feet with approximately 371.11 feet of frontage on Carlisle Road and approximately 368.89 feet of frontage on Hilton Avenue.
3. The property was used for many years as a grocery store, however the current building has been unoccupied for several years.
4. The property is improved with the unoccupied building and impervious parking lot as shown on Applicant's "Existing Conditions and Demolition Plan" Exhibit.
5. The property has been the subject of two other zoning applications:
 - a. Associated Wholesalers requested sign variances in Case No. 2005-1 which were denied on May 17, 2005.
 - b. Lidl US Operations, LLC, requested two dimensional variances to permit 1) a 17.7 foot encroachment into the 50 foot setback and 2) a freestanding sign exceeding the 18 foot height limitation by 1-foot for use in conjunction with a retail store in Case No. 2017-3. The requested variances were granted.
6. The side of the existing building is 31 feet from the right of way line of Hilton Avenue, which is a lawful pre-existing dimensional non-conformity.

7. The Applicant proposes to add a two-story addition with a 29,096 sq. ft. footprint on existing impervious area as shown on Applicant's "Layout and Dimensional Plan" Exhibit.

8. The Applicant is the contract purchaser/equitable owner of the property.

9. The Applicant proposes to operate a self-storage facility on the property.

10. A self-storage facility is a use permitted by right in the Commercial Zoning District.

11. The existing building exterior will remain and be modified to contain 266 storage units with the remaining 364 to be located in the new 2-story addition, for a total of 630 storage units.

12. Section 27-703.1 of the Zoning Ordinance requires one parking space for every five (5) storage units, plus 1 space for each employee, for a total of 128 parking spaces for the proposed use. The Applicant is requesting a variance to be allowed to have only have nineteen (19) parking spaces.

13. The existing parking area contains approximately 150 parking spaces.

14. The Applicant's representatives admitted that ample parking exists to provide 72 parking spaces for the 266 units proposed in the existing building and an additional smaller expansion could be added and still comply with parking requirements of the Ordinance.

15. To justify the variance from the required parking, the Applicant's representatives testified that:

- a. The parking required by the Ordinance is "excessive" for the operation of this type of multi-story climate controlled storage facility.
- b. The parking requirement would not permit "suitable" development of the property for this type of storage facility.
- c. The proposed 19 parking spaces are more than adequate to cover peak usage during May and June, based on studies and data from the Applicant's Lititz, Pennsylvania location.

d. The reduction in parking will have no adverse impact on the neighborhood.

16. No physical conditions are present at the property that prevent the Applicant from meeting the parking requirements, but it would require a smaller overall building and less storage units.

17. The Applicant was not represented by legal counsel at the April 19, 2023, zoning hearing, but did submit a three-page written Memorandum of Law in Support of Zoning Application prepared by Devon M. Myers, Esquire of CGA Law Firm, P.C.

CONCLUSIONS OF LAW

I. Special Exception:

The Applicant has requested a special exception pursuant to Section 27-902 of the Zoning Ordinance to alter a non-conforming structure to maintain the 23.03 foot setback (Section 407-5.C) and maintain the existing 84% lot coverage (Section 407.5.E).

Despite its name, a special exception is not an exception to the zoning ordinance, but rather a use to which the applicant is entitled unless the zoning board determines, according to the standards set forth in the ordinance, that the proposed use would adversely effect the community. *East Manchester Township v. Dallmeyer*, 609 A. 2d 604 (Pa. Cmwlt., 1992). However, special exception uses are made available as a privilege, not as a right. *Hogan, Lepore & Hogan v. Pequea Twp. Zoning Hearing Board*, 638 A.2d 464 (Pa. Cmwlt., 1994). A special exception should be granted only in such situations as are expressly provided for and enunciated by the terms of the ordinance and the rules that determine the grant or refusal of the exception are enumerated in the ordinance itself. *McGinty v. Zoning Board of Adjustment of the City of Pittsburgh*, 717 A.2d 34 (Pa. Cmwlt., 1998).

It is well settled that the initial burden is on the Applicant to meet specific requirements of the ordinance relative to the use of the property. The Applicant has the duty to present evidence and

the burden of persuading the Board that the proposed use satisfies the objective requirement of the Ordinance for the proposed use. Opponents then have both the duty and burden of establishing general detrimental effect and general policy concerns. *Bray v. Zoning Board of Adjustment*, 410 A.2d 909 (Pa. Cmwlth., 1980); *Greaton Properties, Inc. v. Lower Merion Twp.*, 796 A.2d 1038 (Pa. Cmwlth., 2002).

This Board finds that the Applicant has met the requirements of the Zoning Ordinance relative to the special exception for the continuation of the existing dimensional non-conformities, and therefore the special exception is granted. This grant does not relieve the Applicant from the need for compliance with all other Ordinance requirements relative to the proposed expansion and alteration, particularly parking, as shall now be discussed.

II. Variance:

The Applicant has requested a variance from the parking requirements of Section 27-703.1. As noted in the Findings of Fact, above, the Applicant wishes to renovate the existing building and construct a two-story addition with a total of 630 storage units and utilize two employees. Instead of the required 128 spaces, the Applicant requests a variance to permit only 19 parking spaces.

Under traditional hardship standards, the zoning hearing board is permitted to grant a variance only if the criteria of Section 910.2 of the Pennsylvania Municipalities Planning Code (53 P.S. s.10910.2) are met.

Section 910.2 (a) authorizes a zoning hearing board to grant a variance from the provisions of a zoning ordinance which inflicts unnecessary hardship upon the property owner when the board finds:

1. 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 generally created by the provisions of the zoning ordinance or district in which the property is located and that unnecessary hardship is due to unique physical circumstances or conditions;

2. The unique physical circumstances or conditions prevent the use of the property in strict conformity with the ordinance and a variance is necessary to enable a reasonable use to be made thereof;

3. The landowner has not created the undue hardship;

4. The variance will not alter the essential character of the area or be detrimental to the surrounding area or properties;

5. The requested relief represents the minimum variance that will afford relief.

The zoning hearing board must consider each of the separate requirements for a variance and find that the applicant has met its burden with respect to all. *Larsen v. Zoning Board of Adjustment of the City of Pittsburgh*, 543 Pa. 415, 672 A.2d 286 (1996).

The party seeking a variance bears the burden of proving the justification for its grant. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 462 A.2d 637 (1983). In order to establish the right to a variance, applicants must show that the zoning ordinance uniquely burdens the property with an unnecessary hardship and that the variance would not adversely affect the public health, safety, or welfare. *Vanguard v. Zoning Hearing Board*, 568 A.2d 703 (Pa. Cmwlth., 1989).

Unnecessary hardship may be established by proving that the physical characteristics of the property are such that the property cannot be used for any permitted purpose or could only be used for such purpose at prohibitive expense, or that the characteristics of the area are such that the property has either no value or only distress value for any purpose permitted by the ordinance. *Larsen*, supra.

The Applicant argues that the variance requested is dimensional in nature. Dimensional variance requests require a lesser degree of proof of hardship than a use variance because the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with applicable regulations. Hertzberg v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998). Courts and zoning boards may now consider other factors, including economic detriment to the applicant and the characteristics of the surrounding neighborhood. South Coventry Twp. v. South Coventry Twp. ZHB, 732 A.2d 12 (Pa. Cmwlth., 1999). However, Hertzberg did not alter the principle that a substantial burden must still attend to all dimensional variance cases. Yeager v. Zoning Hearing Board of the City of Allentown, 779 A.2d 595, (Pa. Cmwlth., 2001). Whether the applicant is seeking a dimensional or use variance, it must still show unnecessary hardship will result if a variance is denied. Zappala Group, Inc. v. ZHB of the Town of McCandless, 180 A.2d 798 (Pa. Cmwlth., 2002), petition for allowance of appeal denied, 573 Pa. 718, 828 A.2d 351 (2003). It is only the stringency of the standard in proving unnecessary hardship that varies, depending on whether a use or dimensional variance is sought. Zappala Group, *supra*. The showing of unnecessary hardship is an indispensable requirement to the granting of a variance, and often the most difficult element to establish. Jacobs v. Philadelphia Zoning Board of Adjustment, 273 A.2d 746 (Pa. Cmwlth., 1971).

Is this parking requirement a use variance or a dimensional variance? In Zappala Group, Inc. v. ZHB of the Town of McCandless, 810 A.2d 708 (Pa. Cmwlth., 2002), petition for allowance of appeal denied, 573 Pa. 718, 828 A.2d 351 (2003), the applicant wished to develop the property into a use “indisputably” allowed in the zoning district. The issue was whether or not the requested variance to exceed the 2.18 acre “buildable area” limitation in the zoning ordinance was a dimensional variance or a use variance. There, the zoning hearing board held that it was a use variance, determining that the use was constrained by the required site capacity analysis of the site. On appeal, Commonwealth Court noted that some variances fall into a “grey area”:

Because this scenario is not like setbacks or other traditional dimensional variances and is not like seeking a use for the property outside of the uses enumerated in the Zoning Ordinance, it falls into a grey area. 810 A.2d at 711.

However, Commonwealth Court did not look further at this issue, but rather, affirmed the denial on the grounds that even under the so-called “relaxed” standard for a dimensional variance the appellant did not meet its burden.

Subsequent to *Zapalla*, the term “hybrid” was used to describe a variance from a steep slope limitation. See *Upper Roxborough Civic Assn. v. Zoning Board of Adjustment of the City of Philadelphia*, 372 C.D. 2019 (Pa. Cmwlth., 2020).

More extensive discussion of this issue can be found at 2 Ryan, *Pa Zoning Law and Practice*, s. 6.3.1. (2020 revised main text, p.48-50). Analysis of the discussion and cases cited therein leads to the conclusion that if the limitation set forth in the zoning ordinance is an integral part of the decision to permit the use, and is closely related to the use provision, it should be treated as a use regulation, *even though stated in numerical or dimensional terms* (emphasis added).

Here, the required parking is an integral part of the requirement for the use to be allowed and would appear to require the more stringent standards of a use variance. However, when applying the appropriate legal analysis to this application, the requirements for the variance sought have not been met, and like *Zapalla* and *Upper Roxborough*, this is true regardless of whether it is considered as a use or dimensional variance. It is well settled law that a variance, whether labeled dimensional or use, is appropriate “only where the property, not the person, is subject to hardship” *Szmigel v. Kranker*, 298 A.2d 629, 631 (Pa. Cmwlth., 1972).

Here, no evidence or testimony was presented that the property could not be used for any use permitted as of right or by special exception in the Commercial Zoning District. A variance is

not warranted where the hardship is related to the landowner's desired use of the land, rather than the land itself. Ciferno v. Zoning Hearing Board of Twp. of Rostraver, 173 A.2d 1258 (Pa. Cmwlth., 2017), citing Yeager, supra. Ordinance requirements which render property unsuitable for a proposed permitted use just because it is what the applicant designs is insufficient to require the grant of a variance. Commonwealth of Pennsylvania v. Zoning Hearing Board of Susquehanna Township, 677 A.2d 853, 857 (Pa. Cmwlth., 1996).

In addition, the Applicant's argument that the variance should be granted because the required parking spaces were excessive and not necessary was identical to the argument expressly rejected by Commonwealth Court in Township of Northampton v. Zoning Hearing Board of the Township of Northampton, 969 A.2d 24, Pa. Cmwlth., 2009). In Northampton, a developer proposed to construct a Rite-Aid, which was a permitted use in the zone in which it was proposed. Based on the size of the "prototype" store proposed, 112 parking spaces were required. The Applicant provided expert testimony that 67 parking spaces were sufficient for the needs of the store at its' busiest time. The Applicant's expert also opined that the ordinance at issue was "pretty heavy with parking" and the requested variance could "set the standard for a common sense approach to parking". A second expert also testified that 67 parking spaces would be more than sufficient based on his review of the parking needs for over 30 other Rite-Aid stores. While the zoning hearing board granted the variance and the Common Pleas Court affirmed the grant, Commonwealth Court reversed the grant on appeal:

The evidence here shows that the Applicant's compliance with the Zoning Code would only burden the Applicant in its desire to construct a Rite-Aid on the property due to the building size and drive-thru requirements desired by that company. The evidence presented is insufficient to meet even the relaxed hardship standard under Hertzberg. 969 A.2d at 30.

This Board finds Northampton to be controlling appellate court precedent on this issue. As noted in Finding of Fact 14. above, the Applicant’s representatives candidly admitted that ample parking exists to provide 72 parking spaces for the 266 units proposed in the renovation of the existing building. Also, nothing would prevent construction of a smaller addition or smaller expansion which could be added and still comply with parking requirements of the Zoning Ordinance. Like the situation in Northampton involving Rite-Aid, the proffered lack of need for the required parking is simply insufficient as a matter of law to justify the grant of the requested variance.

In making this decision, the Board is not unmindful of the analysis made by the Applicant’s witnesses that the current parking requirements may be excessive for the proposed use. The remedy, however, is not a variance, but a request to the Dover Township Board of Supervisors to consider amending the Zoning Ordinance to require fewer parking spaces for these type of self-storage units.

DISPOSITION OF CASE

1. The requested special exception for the continuation of the existing dimensional nonconformities is granted.
2. The requested variance to reduce the required number of parking spaces is denied.

DOVER TOWNSHIP ZONING
HEARING BOARD:

Jane Ginter,
Chairwoman

Robert Wright,
Vice-Chairman

Jonathan Reynolds,

Member

Gina Myers,
Member

Date: 5/23/23

NOTICE: Any party aggrieved by this decision may appeal to the Court of Common Pleas of York County within thirty days from the date of entry of this decision.