

PAUL L. KREMSER and CARMEN	:	IN THE COURT OF COMMON PLEAS OF
J.KREMSER, ROBERT E. LAUDIG	:	LYCOMING COUNTY, PENNSYLVANIA
and VIRGINIA LAUDIG, MICHAEL	:	
MELLOY, HARRY L. DIEFFENBACHER	:	
And MARION DIEFFENBACHER,	:	
CLYDE LAUCHLE, TODD A. KREMSER	:	
and BRENDA A. KREMSER, RICHARD	:	
W.EGLI and SYLVIA EGLI, GEORGE	:	
L. CONRAD and LOIS CONRAD,	:	NO. 02-02,246
JAMES DRAKE and LINDA DRAKE	:	
JOHN CARNEY and MARY CARNEY,	:	
PAUL W. LUDWIG and JUNE	:	
LAUDWIG, and ROBERT F. SHULTZ	:	
Appellants;	:	
	:	
vs.	:	
	:	
MONTOURSVILLE BOROUGH	:	
ZONING HEARING BOARD,	:	
Appellee;	:	LAND USE APPEAL
	:	
vs.	:	
	:	
SUSQUEHANNA VALLEY	:	
DEVELOPMENT GROUP, INC.	:	
Intervener;	:	

Date: April 11, 2003

OPINION and ORDER

Facts

Before the Court for determination is Appellants' Paul L. Kremser *et al* (Kremser) Land Use Appeal filed December 10, 2002. The case *sub judice* centers on three variances granted by the Montoursville Zoning Hearing Board (ZHB). This Court must decide whether the Montoursville ZHB acted in error when granting the variances. This Court holds that it did because the evidence presented does not establish that an unnecessary hardship would result if the variances were denied. As such, the variances are invalid.

Intervener Susquehanna Valley Development Group, Inc. (Susquehanna) has proposed to construct an elderly housing complex at 1093-1095 Broad Street, Montoursville, Pennsylvania. The size of the parcel on which the proposed facility would be constructed is 300 feet by 175 feet. The facility would have twenty-four apartments. The facility would also have a community room with a kitchen and storage facilities. Other common areas would consist of an office, laundry room, and public restrooms. The exterior of the building would be vinyl siding and brick venire at the first floor level.

The Montoursville Zoning Ordinance requires a total lot area of 79,000 square feet for the proposed facility, 750 square feet of habitable floor space for each apartment, and two parking spaces per apartment. Susquehanna's proposed facility would have a lot area of 52,500 square feet, apartments with 626 square feet of habitable floor space, and one parking space per apartment. In order to construct the elderly housing facility according to the proposed plan, Susquehanna needed to obtain three variances.

On October 29, 2002, a public hearing was held before the Montoursville ZHB so that the Board could take testimony and hear comments regarding the lot size, habitable floor space, and parking space variances that Susquehanna sought. At the hearing, a representative of Susquehanna testified, *inter alia*, that the variance requests were minimal and would allow a pressing need for affordable elderly housing located in close proximity to facilities and services depended upon by the elderly in Montoursville to be met. At the close of testimony, the ZHB announced that it intended to make a decision and publish it in writing instead of waiting for the next meeting to state their decision. No objections were made to this at the time it was

announced at the meeting. On November 11, 2002, the ZHB rendered its written decision and granted the three requested variances.

Kremser contends that the variances should be invalidated for two reasons. The first is that the Montoursville ZHB abused its discretion and erred as a matter of law in granting Susquehanna the three variances. The second is that the Montoursville ZHB violated provisions of the Sunshine Act.

Kremser argues that the Montoursville ZHB abused its discretion and erred as a matter of law in granting the variances because Susquehanna has not met its burden of establishing that an unnecessary hardship would result if the variances were denied. Kremser asserts that Susquehanna has not shown why the property could be used or developed in strict conformity with the zoning ordinance. Kremser asserts that Susquehanna has failed to produce evidence demonstrating that there is any irregularity, narrowness, or topography feature particular to the property that would prevent its use in compliance with the zoning ordinance. Kremser also asserts that the financial benefit of having smaller and therefore more numerous apartments is insufficient to establish unnecessary hardship. Kremser further asserts that the variance requests are not minimal. According to Kremser, the variances would result in a thirty four percent reduction in lot area, a sixteen and a half percent reduction in habitable floor space, and a reduction in half of the required parking spaces.

With regard to the Sunshine Act, Kremser argues that the Board did not deliberate or vote in an open public meeting. According to Kremser, the ZHB's decision was made in a closed private session. Kremser asserts that the Sunshine Act objection is timely because there is a one-year limit on any challenge to a meeting that was not open. Also, Kremser

asserts that the Sunshine Act challenge was not waived when no one objected at the meeting. In fact, Kremser argues that such a challenge cannot be waived.

In response, Susquehanna asserts that the Board did not abuse its discretion in granting the three variances. Susquehanna argues that the surrounding circumstances demonstrate that an unnecessary hardship would result if the variances were denied. Susquehanna contends that there is a pressing need for elderly housing in Montoursville, and that denying these variances would exacerbate the problem, as the need would go unfulfilled. Susquehanna contends that the elderly housing facility cannot be constructed in strict compliance with the zoning ordinance since the requirements of the elderly tenants need to be considered. Susquehanna asserts that elderly tenants do not want nor can they maintain large apartments. Susquehanna also contends that at most elderly tenants only need one parking space per apartment. As to the lot size requirement, Susquehanna contends it is antiquated, because the requirement was instituted when it was believed that 3,000 square feet of space would be needed for an on sight septic system and now that the properties are part of the sewer system the lot size requirement has been reduced in importance. Susquehanna also argues that the denial of the variances would work an economic detriment not only to Susquehanna but also to the elderly citizens of Montoursville by making elderly housing economically infeasible.

As to the Sunshine Act, Susquehanna argues that the challenge is untimely because there is a thirty-day period from the day of discovery of the alleged violation (which would be the October 29, 2002 hearing when the variances were considered) within which to raise the challenge. Also, Susquehanna asserts that there was no objection made at the meeting when the intention of the Board to render a written decision was announced. Susquehanna argues

that the Act was not violated because the act only requires that official actions and deliberations take place at meetings open to the public, not that the public be allowed to participate in the official actions and deliberations. Susquehanna asserts that the requirements of the Act were met when the Board held an open public hearing where testimony and comments were taken regarding the variance requests.

Discussion

The issue before the Court is whether the Montoursville ZHB abused its discretion or erred as a matter of law in granting Susquehanna the lot area, habitable floor space, and parking space variances so that it could construct the elderly housing complex. To answer that question, the Court must decide if Susquehanna has carried its burden of providing evidence to establish that an unnecessary hardship would result if the three variances were denied. The Court must also determine if the Montoursville ZHB violated the Sunshine Act when the ZHB rendered its decision via written opinion. The Court believes that Susquehanna has failed to meet its burden regarding unnecessary hardship. Consequently, the variances must be invalidated. Based on this determination, the Court does not need to address the issue of whether the Montoursville ZHB violated the Sunshine Act.

A zoning hearing board has the power to hear requests for and grant variances. 53 Pa.C.S.A. § 10910.2(a). However, a zoning hearing board's power regarding variances is not plenary. The function of the zoning hearing board is to administer the zoning law enacted by the legislative body of the municipality. *Schaub v. Brentwood Borough Zoning Bd. of Adjustment*, 118 A.2d 292, 295 (Pa. Super. 1955). Members of the zoning hearing board have an obligation to enforce the zoning ordinance and cannot effectively change or amend the

ordinance “under the guise of a variance.” *Ibid; In re Appeal of Volpe*, 121 A.2d 97, 100 (Pa. 1956) (A zoning hearing board “has no power or right to set at naught a zoning statute or ordinance under the guise of a variance.”). It is the responsibility of the legislative body to keep abreast of changes and developments within the community that impact upon the zoning ordinance so that the zoning ordinance does not “become obsolete, but realistically reflects the changes which occur in the community.” *English v. Zoning Bd. of Adjustment*, 148 A.2d 912, 914-15 (Pa. 1959). If the legislative body fails to meet this obligation “the legislative function does not pass to the zoning board,” and the zoning board must still enforce the zoning ordinance despite its perceived faults. *Ibid*.

If no additional testimony is presented subsequent to the zoning hearing board’s determination, then “the scope of ... review is limited to determining whether the board committed a manifest abuse of discretion or an error of law” in granting the variance. *Valley View Civic Association v. Zoning Bd. of Adjustment*, 462 A.2d 637, 639 (Pa. 1983); *see also, Accelerated Enterprises, Inc. v. Hazel Township Zoning Hearing Bd.*, 773 A.2d 824, 826 (Pa. Cmwlth. 2001). An abuse of discretion only occurs if the board’s “findings are not supported by substantial evidence.” *Valley View*, 462 A.2d at 640. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Ibid.*; *Cardamone v. Whitpain Township Zoning Hearing Bd.*, 771 A.2d 103, 104 (Pa. Cmwlth. 2001). Also, a zoning hearing board commits an error of law if it fails to consider each requirement of a zoning ordinance prior to granting a variance. *Larsen v. Zoning Bd. of Adjustment of the City Of Pittsburgh*, 672 A.2d 286, 289-90 (Pa. 1996). The reasons for granting a variance must be “substantial, serious, and compelling.” *Valley View*, 462 A.2d at

640; *Pektor v. Zoning Hearing Board*, 671 A.2d 295, 298 (Pa. Cmwlth. 1996). Generally, a variance will only be granted “under exceptional circumstances and that an applicant must satisfy all criteria necessary for the grant of a variance.” *Pektor*, 671 A.2d at 298.

There are two general types of variances, use and dimensional. A use variance seeks to use the property in a manner entirely outside that prescribed by the zoning ordinance. *Hertzberg v. Zoning Bd. of Adjustment of Pittsburgh*, 721 A.2d 43, 47 (Pa. 1998). A dimensional variance seeks to use the property in a manner consistent with the zoning ordinance, but requests relief from various requirements of the zoning ordinance. *Ibid.* The difference between a dimensional and use variance permits the standard for proving unnecessary hardship with regard to a dimensional variance to be relaxed. *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001).

However, the relaxed standard does not “alter the principle that a substantial burden must attend *all* dimensionally compliant uses of the property not just the particular use the owner chooses.” *Yeager*, 779 A.2d at 598. (emphasis in original). The relaxed standard does not entitle a property owner to a dimensional variance merely because the dimensional requirement of the zoning ordinance “prevents or financially burdens a property owner’s ability to employ his property *exactly as he wishes*, so long as the use is permitted.” *Ibid.* (emphasis in original). “A variance, whether labeled dimensional or use, is appropriate ‘only where the *property*, not the person, is subject to hardship.’” *Ibid.* (quoting *Szmigiel v. Kranker*, 298 A.2d 628, 631 (Pa. Cmwlth. 1972) (emphasis in original). Therefore, an applicant seeking a variance, whether it is dimensional or use, bears the burden of demonstrating that an unnecessary hardship will result if the variance is denied and that the proposed use will not be

contrary to public interest. *Zappalla Group, Inc. v. Zoning Hearing Bd.*, 810 A.2d 708, 711 (Pa. Cmwlth. 2002); *see also, Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment*, 772 A.2d 1040, 1044 (Pa. Cmwlth. 2001).

In determining whether the denial of a dimensional variance will create an unnecessary hardship, a court may consider several factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the property into strict compliance with the zoning regulations, and the characteristics of the surrounding neighborhood. *Hertzberg*, 721 A.2d at 47; *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment*, 771 A.2d 874, 877 (Pa. Cmwlth. 2001). It is not necessary to prove that the property is valueless without the variance. *Society Created to Reduce Urban Blight*, 771 A.2d at 877. However, the “mere showing of economic hardship or that a property could be utilized more profitably is insufficient to support the grant of a variance.” *Society Created to Reduce Urban Blight*, 772 A.2d at 1044; *In re Pierorazio*, 419 A.2d 221, 222 (Pa. Cmwlth. 1980) (“Simply because an owner of land can earn more money does not justify the grant of a zoning variance.”).

Susquehanna has not carried its burden of demonstrating that a denial of the dimensional variances would result in an unnecessary hardship. There is no indication that the dimensional requirements of the Montoursville Zoning Ordinance prevent the property from being used in a manner permitted in this district. The Court notes that there is **no** evidence in the ZHB’s record that the lot cannot be used for a conforming permitted purpose.

In fact, there is no indication that a smaller elderly housing facility cannot be constructed on the property and still conform to the zoning regulations. *McClintock v. Zoning*

Hearing Bd. of Fairview Borough, 545 A.2d 470 (Pa. Cmwlth. 1988) (Insufficient space to erect a two car garage is not an unnecessary hardship, especially when a one-car garage could still be constructed without a variance.); *Yeager*, 779 A.2d at 598 (An unnecessary hardship was not established to show that the granting of dimensional variance was appropriate when the property could still be used to sell cars and the burden only resulted from a desire to sell Land Rovers that required special needs.); *but see, Damico v. Zoning Bd. of Adjustment*, 643 A.2d 156 (Pa. Cmwlth. 1994) (Prospects of constructing a viable building were nil on property where side yard requirements would result in a ten-foot wide structure.). Twenty conforming units could be built in the 15,024 square foot area required for the proposed twenty-four nonconforming 626 square foot apartments. Nevertheless, even twenty apartments would no doubt exceed the lot area requirement. However, fifteen 720 square foot apartments require a 52,000 square foot lot area and could be erected on the property as a conditional use, without a variance as to lot size. Such a size reduction in the building (twenty-four 626 square foot apartments would require 15,024 square feet of habitable floor space; fifteen 720 square foot apartments would require 10,800 feet of habitable floor space) would also make enough land available for the required thirty parking spaces. Thus, the unnecessary hardship results not from the zoning ordinance but from Susquehanna's desire to erect an elderly housing facility with twenty-four apartments having a lot area of 52,500 square feet, 626 square feet of habitable floor space per apartment, and one parking space per apartment. Thus, the evidence presented by Susquehanna does not establish that the dimensional requirements of the Montoursville Zoning Ordinance create an unnecessary hardship to the particular property.

The evidence presented by Susquehanna would be more appropriate at a hearing to amend the Montoursville Zoning Ordinance. Susquehanna presented evidence indicating it believed that there is a need for elderly housing in Montoursville and that this facility in this location would be ideal to meet that need. Ensuring that the housing needs of elderly citizens are met is a laudable goal, but the Montoursville ZHB had an obligation to enforce the Zoning Ordinance according to the law. The Montoursville ZHB may agree with Susquehanna that there is a pressing need for affordable elderly housing in Montoursville and that this facility would fulfill that need, but the Montoursville ZHB should not have granted the variances in the absence of evidence demonstrating that the dimensional requirements created an unnecessary hardship as to that property. By doing so, the Montoursville ZHB took upon itself the legislative duty to bring the Zoning Ordinance in line with the changing circumstances of the community. This Court cannot permit such action, despite the noble intentions. Susquehanna has not carried its burden and the Montoursville ZHB should not have granted the variances. Therefore, the Court must invalidate the three variances.

Having disposed of the matter, the Court will not address the contention that the Montoursville ZHB violated the Sunshine Act in rendering its decision as to the three variances at issue in writing. Still, the Court would caution the Board to be cognizant of the requirements of the Sunshine Act and make every effort to comply with those requirements. The Court makes no determination as to whether the Board's action violated or conformed to the Sunshine Act.

ORDER

It is hereby ORDERED that Appellants' Paul L. Kremser *et al* Land Use Appeal filed December 10, 2002 is granted. The decision of the Montoursville Zoning Hearing Board as to the lot area, habitable floor space, and parking space variances is reversed and the variances are invalidated.

BY THE COURT:

William S. Kieser, Judge

cc: J. Howard Langdon, Esquire
Michael H. Collins, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)