

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY

LGN Management, LLC	:	
Appellant	:	
vs.	:	Docket CV-23-00653
	:	
CITY OF WILLIAMSPORT	:	ZONING APPEAL
ZONING HEARING BOARD	:	
Appellee	:	

OPINION AND ORDER

I. Statement of the Case:

This matter came before the Court on the Land Use Appeal filed on June 20, 2023, by LGN Management, LLC (hereinafter “Appellant”) rejecting the application of Appellant for a use variance to permit Appellant to construct multi-unit family housing on a tract of four (4) parcels situate in the Newberry section of Williamsport (hereinafter collectively the “Property”). The Property is comprised of four different tax parcels (67-002-320, 67-002-328, 67-002-401, 67-002-501). 67-002-320 and a portion of 67-002-328 are within the R3 Zone (Residential Zone, where the proposed use is permitted). 67-002-501 is within the CC Zone (Commercial). 67-002-401 and a portion of 67-002-328 are in the ML Zone (Light Manufacturing). The Appellant sought a use variance for multi-family housing development on the Property. That proposed development would require a host of other governmental approvals, including, but not limited to, consolidation of the four (4) parcels into a single parcel, land development, and the closing of an existing looping road known as the Glynn Avenue Extension. Appellant submitted a correspondence from Appellant’s counsel with attached Letter of Intent/Supplement to Variance Application to the Zoning Administrator, dated April 25, 2023. That correspondence with attached Letter of Intent suggests that the Property is owned by Appellant’s affiliate Carlton Associates LLC, that the owner has been unable to identify any lawful and practical use for the Property since 2009, and that “there is no possibility of developing the property in strict conformity with the Zoning Ordinance.” A hearing on the application was held before the City of Williamsport Zoning Hearing Board (hereinafter the “Board”) on May 18, 2023 (hereinafter the “Hearing”).

Appellant presented the testimony of Gabe Hutchinson, the Vice President of Hutchinson Companies, an affiliate of Appellant (hereinafter “Hutchinson”). Hutchinson testified that the Property is currently being used by the Williamsport Water Authority for dumping spoils. (Reproduced Record, hereinafter RR., 11). He testified that his company began to work on the Property beginning in 2008 to 2010, when they attempted to bring in Giant Food, but the project did not come to fruition. Thereafter, the Property was sold to another investor. (RR. 12). Hutchinson testified that development of the Property is hampered because it is of the combination of three (3) different zoning districts, and due to the topography of the site. (RR. 13). He testified that the shape of the Property does not facilitate a light industrial use. (RR. 14). Hutchinson testified that the lack of roadways between the parcels means that the multiple parcels are such that the Property must be treated as if it were one lot. (RR. 15). Hutchinson testified that his company attempted to market the property to both Giant Food and commercial retailers, without success. (RR. 16). Hutchinson pointed out that, even if that marketing had been successful, some use variance would be required. (RR. 16). Counsel for the Appellant questioned Gabe Hutchinson whether there were efforts “to try to find a use” for the tract in question over the decades, to which Hutchinson replied “yes.” (RR. 19-20). Appellant also presented the testimony of Ryan Heimbach, an engineer with Hawbaker Engineering. Heimbach testified that the variance request was limited to a use variance, and that any development of the Property would require various other approvals such as subdivision and storm water management. (RR. 39). He testified that the irregular arrangement of the parcels and the three (3) different zoning districts make development “very difficult.” (RR. 44). Heimbach pointed out that the fact of three (3) different zoning districts means that any use will require zoning relief. He suggested that asking for relief from the existing residential zoning to accommodate an industrial use would be “a much greater relief than asking for residential use in an industrial district.” (RR. 47).

The Board heard testimony from residents and business owners around the Property regarding the consequences of removing Glynn Avenue Extension loop (RR. 87-90), which included concerns about how the flow of traffic would be impacted. (RR. 90-94).

At the conclusion of the testimony, Board members Carlson, Cauley, and Frey voted no and Board member Miele voted yes. Board member Miele elected to explain his vote. He stated that the historic inability of the owners of the Property to find any suitable development demonstrated that:

The proof is in the pudding, that this property, as some of you folks have talked about, has been vacant for basically decades. No one's been about to develop it. Maybe it's a product of topography, maybe it's a product of the zoning. But the reality of it is, I think that there's a hardship. Number two, the physical circumstances or conditions. Because of those there's no possibility that the property could be developed in strict conformity with the zoning. I think that the problem we have there is you have three different zoning types, and again, the proof is in the pudding. Nothing's been done over these decades to develop it. Obviously the - - and I find there is an unnecessary hardship. I don't think it's been created by the applicants here. I don't believe, number four, that the development of townhouses would alter the essential character of the neighborhood. I've heard you complain about traffic, but again, that isn't for us...the area is a combination of light industry, residential, and commercial. I don't believe adding housing in and of itself, is a problem...I think that being cut off from your home and being cut off from your business is an issue. But again, they are not factors for us...We're talking about putting housing in a residential area, and I believe they have a right to do that. I think that's the least amount, the least minimal variance. I have a vote yes for, and I'd vote for those reasons. Thank you. We are adjourned (RR. 103-105).

II. Question Presented:

Whether The Twenty-Three (23) Findings Of The Board Are Supported By Substantial Evidence On the Record.

III. Answer to Question Presented:

Many Of The Twenty-Three (23) Findings Of The Board Are Not Supported By Substantial Evidence On the Record, And Several Reflect an Error of Law By the Board. Further, the Record Is Insufficient To Support Any Finding On Two of the Elements For A Variance Request, Under the Ordinance. For That Reason, The Court Will Remand The Matter To The Board For Additional Evidence.

IV. The Zoning Ordinance Section At Issue:

§ 1319.13 of the Zoning Ordinance of the City of Williamsport provides as follows:

(a) Upon appeal from a decision by the Zoning Officer, the Zoning Hearing 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 shall prescribe the form of application and require preliminary application to the Zoning Officer. The Board may grant a variance; provided, 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 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 applicant;

(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 which will afford relief and 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 Zoning Ordinance.

V. The Applicable Legal Standard On Appeal:

The Court has taken no additional evidence on appeal. Thus, the Court's scope of review is limited to a determination of whether the Board committed a manifest abuse of discretion or an error of law. *Filanowski v. Zoning Board of Adjustment*, 439 Pa. 360, 266 A.2d 670 (Pa. 1970), citing *Pyzdrowski v. Pittsburgh Board of Adjustment*, 437 Pa. 481, 263 A.2d 426 (Pa. 1970), accord, *German v. Zoning Board of Adjustment*, 41 A.3d 947 (Pa. Commw. Ct. 2012).

The Court may conclude that the Board abused its discretion only if its findings are not supported by substantial evidence. *Valley View Civic Association v. Zoning Board of Adjustment*, 501 Pa. 550, 554-555, 462 A.2d 637, 639-640 (Pa. 1983). "Substantial evidence" is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. *Republic Steel Corp. v. Workmen's Compensation Appeal Board*, 492 Pa. 1, 5, 421 A.2d 1060, 1062 (Pa. 1980), citing, *Shenandoah Suburban Bus Lines*, 355 Pa. 521, 50 A.2d 301 (Pa. 1947).

Our Commonwealth Court has observed "that a property owner in this Commonwealth may still use his property as he sees fit so long as he does not violate the constitutional rights of others or the statutory provisions regulating the use of his property under the police powers." *Brauns v. Swarthmore Borough*, 288 A.2d 830 (Pa. Commw. Ct. 1972). In the matter of *Appeal of Molnar*, 414 A.2d 401 (Pa. Commw. Ct. 1980), the Court of Common Pleas of Allegheny County took additional evidence on an appeal from the Bethel Park Council, resolved some findings in a manner inconsistent with the Council, and remanded other matters to the Council for a determination consistent with the Court's opinion. By doing so, the trial court ensured that the matter could be considered by the Commonwealth Court, on a full record.

In the matter of *South of South Street Neighborhood Association v. Philadelphia Zoning Hearing Board*, 54 A.3d 115, 121 (Pa. Commw. Ct. 2012), the Court cited *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 812 (Pa. Commw. Ct. 2005), *appeal denied*, 585 Pa. 692, 887 A.2d 1243 (Pa. 2005), for the proposition that, in order to establish unnecessary hardship to justify a land use variance "an applicant must prove that either '(1) physical features of the property are such that it cannot be used for a permitted purpose; or (2) that property can be conformed for a permitted purpose

only at a prohibitive expense; or (3) the property is valueless for any purpose permitted by the zoning ordinance.” The *South Street* Court pointed to the holding in *City of Philadelphia Board of Adjustment v. Earl Scheib Realty Corporation*, 301 A.2d 423 (Pa. Commw. Ct. 1973), for the proposition that:

a sustained, but unsuccessful attempt to sell property constitutes evidence that the property lacks value for any permitted use. In this case, the ZBA found credible evidence concerning Dung Phat's efforts to sell the Property for an industrial use. The ZBA made the following factual finding: “(Mr. [Phat] Amot[, an officer of Dung Phat] testified that after acquiring the subject property, he listed it for approximately five years with a broker who tried to sell it as an industrial property. He did not receive any offers during that time.)” (FF Nos. 36, 37.) The ZBA has the power to evaluate the evidence and decide the weight to be given to the evidence that Dung Phat submitted. See *Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp.*, 987 A.2d 1243, 1248 (Pa.Cmwth.2009), *appeal denied*, 607 Pa. 708, 4 A.3d 1056 (2010). The ZBA, as the ultimate arbiter of credibility and finder of facts, determined that Dung Phat made a long-term attempt to seek a buyer who could use the Property for an industrial purpose. Based upon that attempt and failure, the ZBA reasonably concluded that Dung Phat demonstrated the existence of an unnecessary hardship based upon an inability to sell the Property.

South of South Street Neighborhood Association v. Philadelphia Zoning Hearing Board, 54 A.3d 115, 122 (Pa. Commw. Ct. 2012).

VI. Evidentiary Support for the Findings:

The Court has compared each of the twenty-three (23) Findings of Fact entered by the Board to the record evidence. Many are supported by substantial evidence in the record, but others (which are truly legal conclusions) are not. The Court notes that Findings one (1) through eleven (11) are true Findings of Fact, while twelve (12) through twenty-three (23) are actually conclusions of law. In fact, Board Conclusion Two (2) states that they are “mixed” Findings and Conclusions. The Court will review each Board Finding as if they were true Findings of Fact. Comments by the Court will be bolded for ease of reference.

1. The subject property is located as depicted on Exhibit A-2 in the vicinity of Arch Street, Race Street, Glynn Avenue and Moore Avenue in the Newberry Section of Williamsport.

This Board Finding is a true Finding of Fact, and is supported by the record.

2. The subject property has some frontage on Arch Street and some frontage on Race Street. The Glynn Avenue Extension creates a loop road in the northern part of the property.

This Board Finding is a true Finding of Fact, and is supported by the record.

3. The subject property has no frontage on West Third Street.

This Board Finding is a true Finding of Fact, and is supported by the record.

4. The Site Plans that are part of Exhibit A-1 show that access will be provided through a driveway that would connect to West Third Street and from a driveway that would be connected to Arch Street.

This Board Finding is a true Finding of Fact, and is supported by the record.

5. Those same Site Plans do not show the Glynn Avenue Extension, and thus seem to reflect an intention of the Applicant to seek the closure of Glynn Avenue Extension. See also Exhibit A-4.

This Board Finding is a true Finding of Fact, and is supported by the record.

6. Exhibit A-3 prepared by Hawbaker Engineering, shows Glynn Avenue Extension with the notation “Proposed street vacation - City PADOT Approval Required.”

This Board Finding is a true Finding of Fact, and is supported by the record.

7. Based upon the Site Plans, it is unclear whether and how vehicles on Race Street or Moore Avenue would access Arnold Street after the development is completed.

This Board Finding is a true Finding of Fact, and is supported by the record.

8. Arnold Street has no means of access from the north; therefore, access to the businesses and the residence on Arnold Street would be cut off if there is not an adequate substitute for the Glynn Avenue Extension loop.

This Board Finding is a true Finding of Fact, and is supported by the record.

9. Tax Parcels 67-002-320 and 67-002-328 are in the northwest portion of the subject property and comprise approximately one-fourth of the subject property. Those Tax Parcels are in the R-3 Zone where multi-unit family housing is permitted.

This Board Finding is a true Finding of Fact, and is supported by the record.

10. Tax Parcel 67-002-501 is in the southwest portion of the subject property and also comprises approximately one-fourth of the site. That parcel is located in the CC (Commercial) Zoning District, where multi-unit housing is not a permitted use.

This Board Finding is a true Finding of Fact, and is supported by the record.

11. Tax Parcels 67-002-328 and 67-002-401 comprise the eastern and northeastern portion of the subject property, and are slightly more than one-half of the site. Those parcels are in the ML (Light Manufacturing) Zoning District, where multi-unit housing is not a permitted use.

This Board Finding is a true Finding of Fact, and is supported by the record.

12. Section 1319.13 of the Ordinance sets forth those standards which the Board must consider when evaluating an Application for Variance. No variance from the provisions of or requirements of the Ordinance shall be authorized by the Board unless the Board finds that a hardship exists and that the following facts and conditions exist:

- a) 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;
- b) 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 Ordinance and the authorization of a variance is therefore necessary to enable a reasonable use of the property;

- c) That such unnecessary hardship has not been created by the Applicant;
- d) That the variance, if authorized, will not alter the essential character of the neighborhood or district;
- e) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification of the regulation at issue.

This Board Finding is not a true Finding of Fact, but a restatement of the Section.

13. The Applicant did not demonstrate that unique physical circumstances or conditions exist that create an unnecessary hardship.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law, and is not supported by substantial evidence in the record. On the contrary, the record supports a finding that a combination of unique physical circumstances and conditions at the Property create a “perfect storm” of hardship. The Property consists of multiple parcels within three (3) different zoning districts, which cannot be developed for a single, harmonious use. Testimony introduced by the Appellant suggested that the absence of interior roads contributes to the historic inability of any owner to develop the parcels for separate, distinct uses. The Appellant presented testimony that any use of the Property will require some zoning relief. There was no inconsistent testimony, and no testimony which would support a finding that the Property could realistically be developed in a manner consistent with existing zoning. The Court notes that the Board did not enter any finding that the Property lacked unique physical circumstances or conditions, or that the Property could be developed in a manner consistent with existing zoning. The Court infers that the Board entered no such finding since the record evidence is clearly to the contrary, and since Appellant

introduced testimony that no use consistent with existing zoning has been identified for decades. The fact that the Board ignored that evidence in reaching this Finding constitutes an abuse of discretion. In this regard, the Court notes the comments by Board member Miele, who cast the dissenting vote:

The proof is in the pudding, that this property, as some of you folks have talked about, has been vacant for basically decades. No one's been about to develop it. Maybe it's a product of topography, maybe it's a product of the zoning. But the reality of it is, I think that there's a hardship. Number two, the physical circumstances or conditions. Because of those there's no possibility that the property could be developed in strict conformity with the zoning. I think that the problem we have there is you have three different zoning types, and again, the proof is in the pudding. Nothing's been done over these decades to develop it. Obviously the - - and I find there is an unnecessary hardship. I don't think it's been created by the applicants here.

14. To the contrary, the Applicant's presentation indicates that circumstances or conditions generally created by provisions of the Zoning Ordinance create the hardship; that is, the hardship exists because there are three different zoning areas within the subject parcel, some of which do not allow multi-unit housing.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law, and is not supported by substantial evidence in the record. On the contrary, for the reasons more fully set forth in response to Board Finding 13, the record supports a finding that a combination of unique physical circumstances and conditions at the Property create a "perfect storm" of hardship. Further, the Board made an error of law by ignoring the practical effect of the fact that the Property consists of multiple parcels within three (3) difference zoning districts, which cannot be developed for a single, harmonious use. *Bawa Muhaiyaddeen Fellowship v. Philadelphia Zoning Board of Adjustment*, 19 A.3d 36, 41 (Pa. Commw. Ct. 2011) ("the relevant inquiry is whether the hardship created by the . . . zoning provisions is unique to the subject property as distinguished from the hardship arising from the impact of the zoning regulations on the entire district, or the impact of the zoning regulations on the owner of the property."). The record clearly supports a finding that the Property consists of multiple parcels within three (3) difference zoning districts, which cannot be developed for a single, harmonious use. It is not any single one of the zoning districts

that constitutes the hardship to the Appellant. Rather, is it the combination of the factors that (1) the parcels are in three (3) different zoning districts, and (2) the parcels lack interior roads that might facilitate separate and distinct uses, and (3) the historic inability of the owner to develop the parcels for separate, distinct uses, consistent with the existing zoning. The fact that the Board ignored that evidence in reaching this Finding constitutes an abuse of discretion.

15. The Applicant did not demonstrate that because of physical circumstances or condition there is no possibility that the property can be developed in strict conformity with the provisions with the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law, and is not supported by substantial evidence the record. On the contrary, the Board failed to consider whether the evidence presented by the Appellant regarding the three (3) distinct zoning districts applicable to the Property and the absence of interior roads and the historic inability to develop the parcels for separate, distinct uses, consistent with existing zoning, all constitute proof that the Property cannot be developed in strict conformity with the provisions of the Zoning Ordinance. The fact that the Board ignored that evidence in reaching this Finding constitutes an abuse of discretion. *The Court notes that the Board did not enter a finding that the Property can be developed in strict conformity with the provisions of the Zoning Ordinance.* The Court infers that the Board entered no such finding because the question was not sufficiently developed at the hearing. For that reason, the matter will be remanded to the Board for additional evidence on that issue.

16. The Applicant's presentation did not demonstrate that access from Arch Street could not be utilized to allow commercial and/or light manufacturing development.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. While that conclusion is supported by the record, the question of commercial and/or light manufacturing vehicle traffic was not sufficiently developed at the hearing.

17. In addition, there was testimony that tractor trailers and other commercial vehicles are able to access properties on Arnold Street via the Glynn Avenue Extension loop.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. While that conclusion is supported by the record, the question of commercial vehicle traffic was not sufficiently developed at the hearing.

18. Accordingly, it also seems likely that the Glynn Avenue Extension loop could be utilized for access for commercial properties and light manufacturing properties on the Applicant' subject parcel.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. While that conclusion is supported by the record, the question of commercial and/or light manufacturing vehicle traffic was not sufficiently developed at the hearing.

19. The Applicant's presentation did not demonstrate that the variance will not alter the essential character of the neighborhood, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. The conclusion is not supported by substantial evidence in the record, because the issue of whether the variance would or would not alter the essential character of the neighborhood was not sufficiently developed at the hearing. *The Court notes that the Board did not enter any finding that the development would alter the essential character of the neighborhood.* The Court infers that the Board entered no such finding because the question was not sufficiently developed at the hearing. For that reason, the matter will be remanded to the Board for additional evidence on that issue.

20. To the contrary, the Applicant's presentation showed that the density of the residential use would be significantly increased.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. The conclusion is supported by the record, since the construction of even one single

family home on vacant land would increase population density. Population density is not a factor listed in Section 1319.13 of the Ordinance.

21. In addition, the testimony of parties in opposition to the Application demonstrated that the ability to use properties on Arnold Street would be detrimentally affected by the development as proposed.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. The conclusion is not supported by the record, since the question of whether the variance would or would not alter the essential character of the neighborhood was never developed at the hearing. Parties in opposition to the Application complained about past removal of tree and the need for some street access to replace the Glynn Avenue Extension loop. *The Court notes that the Board did not enter any finding that the development would alter the essential character of the neighborhood.* The Court infers that the Board entered no such finding because the question was not sufficiently developed at the hearing. For that reason, the matter will be remanded to the Board for additional evidence on that issue.

22. The Applicant's presentation did not demonstrate that the variance, if authorized, will represent that minimum variance, will afford relief and will represent the least modification possible of the regulation in issue.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. The conclusion is not supported by substantial evidence in the record, and constitutes an error of law by the Board. The requirement of a "minimum variance" is ordinarily applied to applications for dimension variances. See *South of South Street Neighborhood Association v. Philadelphia Zoning Hearing Board*, 54 A.3d 115, 124 (Pa. Commw. Ct. 2012). The Court is aware that the applicability of the minimization requirement to a use variance was the subject of debate within our Supreme Court in the matter of *Metal Green Inc. v. City of Philadelphia*, 266 A.3d 495 (Pa. 2021). Three justices writing the Opinion Announcing the Judgment of the Court concluded that, under the Philadelphia Zoning Code, "a minimization inquiry is not limited to dimension variances. It applies equally to use variances." 266 A.3d at 508. Justice

Saylor, concurring, observed that “the concept of a minimum variance requirement already is confounding in the context of use (as opposed to dimension) variance scenarios.” 266 A.3d at 518. Justice Wecht in dissent explained the practical difficulty of “minimization line-drawing” in the context of a use variance request:

If we endorse the view that minimization requires literal proofs as to the infeasibility of even the most trivial or incremental adjustments in this or that aspect of a given use, where will that microscopic focus end? If a Zoning Board can require a developer to parse its choices down to the question whether fifteen or sixteen rather than the eighteen proposed units is feasible, then what stops it from scrutinizing every cost-benefit decision the developer makes, questioning, for instance, the necessity of using premium building materials if the use of cheaper materials will increase the per-unit profit margin perhaps enabling an incremental adjustment in the most granular aspect of a given proposed variance? Moreover, if we view minimization so strictly, why haven't we adopted a similarly literal approach to the unnecessary hardship requirement? How unstintingly may a board assess, for example, what comprises a “prohibitive expense” of converting a property to a permitted use such that it constitutes unnecessary hardship? Why, for that matter, have we rejected the “practically valueless” test? As noted above, our case law seems to anticipate and seek to preclude applying such a formidable standard as to that element. I would endeavor to do the same with respect to minimization, but the OAJC foregoes the opportunity to do so.

266 A.3d at 523-524.

In the view of the Court, the question of whether Appellant should, or should not, be granted a use variance for the construction of multi-family housing ought not to be determined based upon the number of proposed units. That question will certainly be relevant to any potential future land development application. The question presented to the Board is whether a multi-family residential use variance is appropriate at all, rather than land development issues for the proposed development.

23. To the contrary, the presentation by the Applicant, which involves an initial construction of 32 to 40 units, rather than 104 units, demonstrates that a lesser variance could be utilized in order to afford relief.

This Board Finding is not a true Finding of Fact, but simply a Conclusion of Law. The conclusion is not supported by the record, and constitutes an error of law by the Board. For the reasons more fully set forth in response to Finding Number 22 above, the question of whether Appellant should, or should not, be granted a use variance for the construction of multi-family housing ought not to be determined based upon the number of proposed units. That question will certainly be relevant to any potential future land development application. The question presented to the Board is whether a multi-family residential use variance is appropriate at all, rather than land development issues for the proposed development.

VII. Conclusion:

The Court finds that Board Findings 13 and 14 and 15 and 19 and 21 and 22 and 23 are not supported by substantial evidence in the record, and constitute either an abuse of discretion or an error of law, or both. For that reason, the Court will reverse the decision of the Board on the questions presented within those Findings. The evidence on the record is insufficient to support any finding as to the following two (2) elements set forth in Section 1319.13 of the Ordinance.

- (1) Whether the Property can be developed in strict conformity with the provisions with the Zoning Ordinance, and
- (2) Whether the proposed use variance would, or would not, alter the essential character of the neighborhood.

For that reason, the matter will be remanded to the Board for additional evidence on those issues. On remand, the issue of whether the Property can be developed in strict conformity with the provisions with the Zoning Ordinance should be resolved by consideration of all factors related to development, including, but not limited to, the size of each of the parcels, the neighborhood, the topography, the absence of streets between the parcels, and the fact that the parcels are located within different zones. If the Board finds that some zoning relief would be required in order to make any development practical, that necessarily means that the Property cannot be developed in strict conformity with the provisions with the Zoning Ordinance. On remand, the issue of whether the proposed use variance would, or would not, alter the essential character of the neighborhood should not turn solely on land development questions, such as the past removal of trees, or the potential need for access replacement if development requires the closing of one more streets, or other issues of land development or storm water management. The issue is simply whether the multi-family residential use proposed by the Appellant would, or would not, alter the essential character of the neighborhood.

If the Board chooses to grant the requested variance, the Board may “attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes” of the Zoning Ordinance.

ORDER

And now, this 29th day of December, 2023, for the reasons more fully set forth above, the Court finds that Board Findings 13 and 14 and 15 and 19 and 21 and 22 and 23 are not supported by substantial evidence in the record, and constitute either an abuse of discretion or an error of law, or both. For that reason, the Court will reverse the decision of the Board on the questions presented within those Findings. The Court finds that the evidence on the record is insufficient to support any finding as to the following two (2) elements set forth in Section 1319.13 of the Ordinance.

- (1) Whether the Property can be developed in strict conformity with the provisions with the Zoning Ordinance, and
- (2) Whether the proposed use variance would, or would not, alter the essential character of the neighborhood.

For that reason, the matter will be remanded to the Board for additional evidence on those two (2) issues, and reconsideration of the applicant on the basis of this Opinion and Order, supplemented by the additional evidence.

It is the recommendation of this Court that interested parties consider securing expert testimony to assist the Board in reaching findings of fact on those two (2) issues, which can be supported by substantial evidence.

BY THE COURT,

William P. Carlucci, Judge

C: Court Administrator
Fred Holland, Esquire
Marc Drier, Esquire