

BEFORE THE DERRY TOWNSHIP ZONING HEARING BOARD

IN THE MATTER OF: : NO. 2021-17
:
Drury Southwest, Inc. :
:
:
: PREMISES LOCATION:
: 1214 Research Boulevard
: Hummelstown, Derry Township, PA 17036

MEMORANDUM, FINDINGS, OPINION AND ORDER

This is the application of Drury Southwest, Inc. with regard to the property located at 1214 Research Boulevard, Hummelstown, Derry Township, Pennsylvania, which is owned by the Hershey Trust Company, Trustee for the Milton Hershey School. A hearing in this matter was initially scheduled for January 19, 2022, but was continued, at the request of the applicant, and held on February 16, 2022, after proper advertising. At the hearing, Dave Albertson, the Vice President of Architecture and Design with the applicant, Larry Westrich, a senior Vice President with the applicant, Jim Webb, an architect with the applicant, William Fredericks, a professional engineer with RGS Associates, and Ken Gall, Director of Real Estate for the Hershey Trust Company, appeared on behalf of the applicant, were sworn, and testified. David Tshudy, an attorney with Troutman Pepper, represented the applicant at the hearing. The applicant submitted various exhibits at the hearing, which were all admitted into the record.

The application indicates that the subject property is located in the Planned Campus West, Planned Campus West Future Development Area Overlay, and Community Heritage Buffer Overlay zoning districts. The property is currently used as a Cocoa Beanery Restaurant, Hershey Center of Applied Research, U-GRO Learning Center, Englewood Barn (restaurant and performance venue), and agricultural uses. The proposed use will include the current uses as well as a hotel, medical research facilities, retail (small scale), food service (no drive-throughs),

business offices, life care facilities, single-family dwellings, and multi-family apartments. The applicant is the lessee of Unit F, a condominium parcel, to develop as a hotel with a conference/meeting room and accessory parking. The application seeks a variance from the maximum height of a principal structure. In addition, the application seeks an extension to secure a zoning permit, building permit, or certificate of use and occupancy.

Unit F is 5.19 acres and part of a 245 acre property that was approved by the Board of Supervisors on January 22, 2019, as a Conditional Use Master Plan for development, consisting of residential and commercial uses. The Master Plan featured a 140-room, five-story hotel and a one-story, 24,075-square foot conference center. On the Master Plan, the hotel is identified as Building T and the conference center is identified as Building S. According to the witnesses, Unit F is in the center and relative low point of the entire large tract of property with a ground elevation of 411'. While the applicant typically builds 7-story hotels, the applicant has proposed a 6-story hotel. The lease between the applicant and the Hershey Trust Company defines a hotel with at least 184 lodging rooms and a conference/meeting room of no more than 5,000 square feet and accessory parking. The Master Plan showed the hotel having a footprint of 18,200 square feet, and the conference area being 24,075 square feet for a total footprint of 42,275 square feet, with 4.15 acres of impervious coverage, 5 acres of disturbance and requiring 199 parking spaces. However, the applicant decided that a hotel with 184 rooms and a smaller 2,200 square feet of conference center area within the footprint of the hotel would be more appropriate. As such, the proposed 6-story design with 184 rooms and conference area has a footprint of 16,500 square feet, with 2.89 acres of impervious coverage, 4 acres of disturbance and requiring 186 parking spaces. The proposed hotel provides more than 1 acre of green space and separation from the parking and walking path. In addition, according to the witnesses, this 6-story design

for 184 rooms would condense the travel space and be safer for the guests. In other words, to build out and lower the height of the building, the travel distance between access and exits is increased. Under this plan, the height to the roof slab would be 65'6". OSHA guidelines and the Building Code require fall protection systems, which the applicant meets with the proposed parapet walls. As designed, a 4' parapet wall would comprise 64% of the total linear feet of parapet; 5' and 6' parapet walls would each comprise 6% of the total linear feet of parapet; 7' parapet wall would comprise 7% of the total linear feet of parapet; and 9'6" parapet wall around the stair towers would comprise 17% of the total linear feet of parapet. In addition to these parapet calculations, an additional 6" has to be added to each calculation for the finished floor. Therefore, the roof's maximum height with the proposed stair tower would be 75'. The applicant's witnesses argued that the proposed height was not inconsistent with the research building or the Penn State Milton S. Hershey Medical Center. Further, the applicant's witnesses asserted that the requested relief was not detrimental to the neighboring properties because it was consistent with the Master Plan and Pattern Book, which requires articulation in the building so as not to be a square box and quality building materials required. However, the Master Plan approved a 5-story hotel with 140 rooms and a height of 65', which the applicant's witnesses asserted the applicant could not build and honor the company's beliefs.¹ According to the applicant's witnesses, Chief Leonard of the Derry Township Volunteer Fire Department approved the proposed plans for the hotel because the Fire Department's ladder truck extends 100'. In addition, Chief Leonard approved of the use of the stair towers with a door rather than a manhole hatch to allow efficient access to the roof.

¹ Without the approved Master Plan, the Ordinance would limit the maximum height of the hotel to 60'. See Ordinance, §225-310, Table 19, Item G.

According to the witnesses, the applicant began as a family corporation in the 1950s – 1960s owned by four brothers. While the business first started constructing hotels and retail stores, it now focuses mainly on hotels. Currently, the applicant operates 130 hotels throughout the Midwest in 28 states. It keeps much of its business in-house, in that it is comprised of departments for real estate, development, legal, architectural, structural engineering, and construction management. Further, it builds its own furniture for its hotels and has its own supply companies. Its hotels are similar to a Holiday Inn Express, Hyatt, or Marriott. According to the applicant's witnesses, the leisure traveler excels with the applicant with high customer satisfaction ratings. As a result, the witnesses argued that Hershey with its tourism, sports, and Harrisburg seems like a natural fit with the applicant. Therefore, the witnesses asserted the hotel as designed is the best size hotel for the applicant to operate and serve its guests and keep the guests happy.

Jonathan Crist, Esquire, 2865 Church Road, Elizabethtown, PA 17022, at the hearing of this matter. He did not think that the Master Plan process or approval should be of any significance. He does not believe there is any hardship for the variance request but that this request related more to the applicant's return on investment. Lastly, he noted that the Medical Center's helipad was directly east of the subject property. Attorney Tshudy argued that the helipad was a non-issue.

The Ordinance limits the maximum height of a principal structure to 65 feet. *See* Ordinance, §225-501.58.A.7.d.iii. The criteria for issuing zoning variances are set forth in §225-1007.9.A of the Derry Township Zoning Ordinance. The Zoning Board may grant a variance provided that all of the following findings are made where relevant:

1. There are unique physical circumstances or conditions of the lot in question, and due to these conditions, an unnecessary hardship results to the property owner;
2. That because of the physical circumstances, 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 the variance is necessary to enable the reasonable use of the property;
3. The unnecessary hardship has not been created by the applicant;
4. The variance will not alter the essential character of the neighborhood or otherwise impair the appropriate use or development of adjacent property or 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 at issue.

The applicant argues that Board should consider the economic hardship that would result if the requested variances were not granted. *See Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 554 Pa. 249, 264, 721 A.2d 43, 50 (1998)(“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.”) The Board finds it inapplicable in the present case. In *Hertzberger*, without the variances, the applicants would not have been able to make reasonable use of the property without undue financial burden. That is not the case here. In this case, the testimony related to economic hardship had to do with how many rooms were necessary to make the project financially viable, not about the cost to make use of the property. In other words, the

applicant can make reasonable use of the property by constructing a smaller hotel without a variance. The variance, however, would allow the applicant to construct a sufficient number of rooms to increase its viability.

Even if it was determined that *Hertzberger* applied in this case, the Board finds that the applicant did not meet its burden. The applicant failed to provide any testimony regarding actual costs in this matter, especially the expenses associated with bringing the property into conformance with the Ordinance or the economic hardship the applicant would incur if the variance was denied. Instead, the applicant relied solely on vague statements that the applicant would suffer an economic hardship if the variance was not granted. As a result, the applicant has not established its alleged economic hardship or undue financial burden.

The Zoning Hearing Board must weigh the evidence before it. *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 811 (Pa. Cmwlth. 2005). “The board is the sole judge of the credibility of witnesses and the weight afforded their testimony.” *Id.* The Zoning Hearing Board “is free to reject even uncontradicted testimony it finds lacking in credibility.” *Id.* The Board gives little to no weight to the applicant’s testimony regarding its economic hardship if the variance was not granted.

In this matter, the Board finds that the applicant is not entitled to the requested relief. Initially, the Board finds that the property has no unique physical circumstances or conditions peculiar to the particular property that create an unnecessary hardship such that the property cannot be developed in strict conformity with the provisions of the Ordinance. While the property allocated for the proposed hotel is 5.19 acres, it is part of an approximately 245 acre parcel. In addition, the applicant has one acre of open space within which to construct a hotel


that has a height in compliance with the Ordinance. As such, the Board finds that the requested variance is not the minimum variance that would afford relief or the least modification possible.

The applicant argues that the requested relief is de minimis. “A de minimis variance may be granted where the variation requested is minor and rigid compliance with the zoning ordinance is not necessary to protect public policy concerns. There are no set criteria for determining what will be considered de minimis. Instead, the grant of a de minimis variance depends upon the circumstances of each case.” *Hawk v. City of Pittsburgh Zoning Board of Adjustment*, 38 A.3d 1061, 1066 (Pa. Cmwlth. 2011). The Board finds that the applicant has not requested de minimis relief. To the contrary, the Board finds that applicant requested more than 15% of the height permitted. Therefore, the requested relief cannot be considered de minimis under these circumstances.

ORDER

AND NOW, this 16th day of March, 2022:


1. The applicant’s request for a variance from §225-501.58.A.7.d.iii regarding maximum height is DENIED.
2. The applicant’s request from §225-1007.9.C regarding an extension of time to a secure a zoning permit, building permit, or certificate of use and occupancy is MOOT.



Steven Seidl



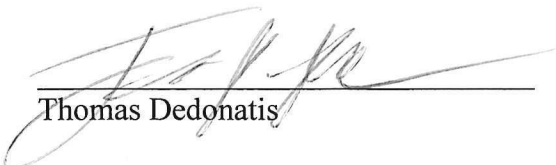
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