



**Division of Development Administration and Review**

City of Pittsburgh, Department of City Planning

412 Boulevard of the Allies, Second Floor

Pittsburgh, Pennsylvania 15219

**ZONING BOARD OF ADJUSTMENT**

**Date of Hearing:** October 2, 2025  
**Date of Decision:** December 29, 2025  
  
**Zone Case:** 171 of 2024  
**Address:** 1700 Penn Avenue  
**Lot and Block:** Parcel Nos. 9-H-52 and 9-H-59  
**Zoning Districts:** UI  
**Ward:** 2  
**Neighborhood:** Strip District  
  
**Request:** New Multi-Unit Residential Building  
  
**Application:** BDA-2024-02306

|                    |                             |                                                                                                                          |
|--------------------|-----------------------------|--------------------------------------------------------------------------------------------------------------------------|
| Special Exceptions | Sections 911.02/911.04.A.85 | Multi-Unit Residential                                                                                                   |
|                    | Section 904.07.C.4          | Height above 60'/4-stories permitted as a special exception; 160'-8"/14-stories requested                                |
|                    | Section 904.07.C.5          | Maximum FAR above 3:1 up to 10:1 permitted as a special exception; 9.78:1 requested                                      |
| Variances          | Section 904.07.C.3          | Minimum 10' exterior side setback required; 0' requested<br><br>Minimum 10' interior side setback required; 0' requested |

**Appearances:**

Applicant: William R. Sittig, Jr., Esquire, Jonathan Moritz, Ryan Indovina

Opposed: Patricia Rodella, Alexis Samulski, Daniel Yates, Dan Wholey, Jim Wholey, Daniel W. Kunz, Esquire, Jean Ross

## **Findings of Fact:**

- **Description of the Subject Property**

1. The Subject Property is comprised of two parcels (Parcel Nos. 9-H-52 and 9-H-59), which use the street address of 1700 Penn Avenue, in a UI (Urban Industrial) District in the Strip District. (PDF pp. 2, 4 and 6).<sup>1</sup>
2. 1700 Penn L.P., the owner of the Subject Property, is the Applicant here.
3. The site is on a corner of Penn Avenue and 17<sup>th</sup> Street. Spring Way extends along the rear of the site. (PDF p. 6).
4. Both parcels, individually and combined, have a generally regular, rectangular shape. The combined area of the parcels is approximately 16,004 sf. (PDF p. 6 and 8).
5. Located on Parcel No. 9-H-52 are a two-story structure that is used for a restaurant and an area that is used for accessory outdoor seating for the restaurant. (PDF pp. 5, 6 and 7).
6. A parking area is located on Parcel No. 9-H-59. (PDF p. 6).
7. Parcel No. 9-H-60, with the street address of 1728 Penn Avenue, is immediately adjacent to Parcel No. 9-H-59. That parcel is used for a 4-story commercial building and a parking lot. (PDF p. 6).
8. St. Patrick's Church is located across Spring Way from the Subject Property. (Tr. 28-44; PDF pp. 5, 15 and 16).
9. The other structures in the immediate vicinity of the Subject Property are oriented towards Penn Avenue. (PDF pp. 5, 7, 15 and 16).
10. For the purposes of applying the Code's setback requirements for a structure on the corner lot, the Zoning Administrator determined that the front of the proposed development on the Subject Property is on Penn Avenue; that the rear is on Spring Way; and that the sides are along 17<sup>th</sup> Street and Parcel No. 9-H-60.
11. The distance between the Subject Property and the nearest property within a residential zoning district is more than 200'. (Tr. 5; PDF p. 4).

- **Proposed Development**

12. The Applicant proposes to demolish the existing building on Parcel No. 9-H-52 and to construct a new building on the combined parcels.
13. As proposed, the height of the building would be 160'-8"/14-stories. (Tr. 10; PDF pp. 8, 16, 18 and 19).

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<sup>1</sup> Citations are to the 27-page PDF that the Applicant submitted for the October 2, 2025 hearing and to the transcript of the hearing.

14. The primary entrance to the building would be on Penn Avenue. (PDF p. 10).

15. The Applicant proposes to use approximately 3,360 sf of the first and second floors for commercial/retail space and approximately 25,000 sf for an integral parking garage for 64 automobile parking spaces and 37 bicycle spaces. Access to the garage would be from an entrance on Spring Way. (Tr. 14; PDF p. 10).<sup>2</sup>

16. The Applicant does not intend to use any part of the first floor for residential units. (Tr. 4; PDF pp. 10 and 11).

17. The upper 13 stories would be used for 64 residential units. (PDF pp. 12, 13 and 14).

18. On the first and second floors, the structure would extend to the property lines, with 0' setbacks from Penn Avenue, Spring Way and the interior side shared with Parcel No. 9-H-60. On the exterior side on 17<sup>th</sup> Street, the setback would taper from 5'-8" at Penn Avenue to 0' at Spring Way. (PDF p. 10).

19. On the third through twelfth floors, the front setback on Penn Avenue would range from 10 to 15' and a portion of the rear setback would extend to Spring Way, with a 0' setback. On the 17<sup>th</sup> Street side, the setback would taper from 5'-6" to 15' and on the interior side, the setback would taper from 5' to 15'. (PDF pp. 12 and 13).

20. On the thirteenth and fourteenth floors, the primary structure would comply with the Code's setback requirements, with accessory decks that extend into the setbacks. (PDF p. 14).

21. The setbacks on the upper floors are intended to reduce the visual impacts of the building's overall height, massing and density. (Tr. 15-16).

22. The gross floor area for the proposed building on the 16,004 sf site would be approximately 156,500 sf, resulting in a Floor Area Ratio ("FAR") of 9.78:1. (Tr. 5; PDF pp. 6 and 8).

- **Applicant's Evidence**

23. William R. Sittig, Jr., Esquire, counsel for the Applicant, introduced the application and generally described the requested relief. He explained the Applicant's position that the Subject Property has two "fronts," on Penn Avenue and 17<sup>th</sup> Street, and two "rears," on Spring Way and on the property line shared with the interior side of Parcel No. 9-H-60. Under this interpretation, Mr. Sittig asserted that the Subject Property has no "sides" and thus, that no side setback requirements apply. (Tr. 4-7).

24. Two witnesses, in addition to counsel, testified on behalf of the Applicant: Jonathan Moritz, on behalf of 1700 Penn L.P.; and Ryan Indovina, the project architect.

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<sup>2</sup> The Applicant's post-hearing submission states that the vehicular entrance to the garage would be from 17<sup>th</sup> Street. (Applicant's proposed F/F No. 12). However, the hearing exhibits depict the garage entrance on Spring Way. (PDF p. 10). Mr. Indovina also testified that the entrance to the garage would be on Spring Way, with a retail entrance potentially located on 17<sup>th</sup> Street. (Tr. 14).

25. Mr. Moritz described his interest in developing a site for condominium units, his identification of the Subject Property; the process of designing the proposed building; and the refinement of the original design to address some of the concerns raised in community meetings. (Tr. 8-10). Mr. Moritz noted that the proposed building is now smaller but taller than the original design, with a FAR of approximately 10:1. (Tr. 10).

26. Mr. Indovina described the Applicant's hearing exhibits including site identification, zoning map, aerial and street photographs of the area, site plan, floor plans and renderings of the building. (Tr. 11-23; PDF pp. 1-27).

27. Mr. Indovina described the shape of the Subject Property as "a bit of a parallelogram." (Tr. 12; PDF p. 6). Using the floor plan exhibits, he noted the differing setbacks proposed for the different floors of the structure. (Tr. 13-17; PDF pp. 10-14).

28. Mr. Indovina testified that the 64 vehicle and 37 bicycle parking spaces proposed would exceed the Code's requirement for on-site parking. (Tr. 14; PDF pp. 10 and 11). He generally asserted that the proposed development would not have a significant impact on parking and traffic. (Tr. 14).

29. The exhibits included a depiction of other structures in the vicinity of the Subject Property with reduced or 0' side setbacks. (Tr. 17; PDF p. 15).

30. The Applicant provided an aerial view, titled "Proposed Building Height," which identifies other structures with heights greater than the base 60'4-story height permitted in UI Districts in the Strip District. The Applicant also provided an exhibit titled "Streetscape" that depicts the buildings in the Proposed Building Height exhibit in a row with a notation of a 68' street façade height and without the context of distance of the identified buildings from the Subject Property. (PDF pp. 16 and 17).

31. In the proximate area of the Subject Property, within the UI District, the Applicant identified the Penn Rose building (168'-8" or 143'-6") at 1625 Penn Avenue; the J. Marcus Wholesalers building (100'), at 1728 Smallman Street; and a building at 1700 Smallman Street (101'-4"). The Cork Factory and Otto Milk buildings, as included in the exhibits, are not proximate to the Subject Property and do not provide a context for the proposed height/massing of the proposed building on the Subject Property. (PDF pp. 16 and 17).<sup>3</sup>

32. Both the "Proposed Building Height" and "Streetscape" exhibits also include the massing of a "proposed development" with a height of approximately 318'. Mr. Sittig and Mr. Indovina acknowledged that the "proposed development," as included in the exhibits, represents a project that had been intended for a site on Penn Avenue in the GT-B (Golden Triangle, Subdistrict B) District. Although approved in 2020, the project was never developed and no structure exists on that site. (Tr. 18; PDF pp. 16 and 17).

33. The exhibits do not indicate whether the heights of the buildings depicted predated the Code's current height limitations or were the subject of zoning approvals.

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<sup>3</sup> The exhibits provide varying heights for the Penn Rose building: 168'-8", 145'-6' (cornice) and 143'-6". (Tr. 19; PDF pp. 16 and 17).

34. The building massing and sun-shading studies that the Applicant submitted illustrate how the 160'-8" height/massing of the proposed building would impact the surrounding properties at different times of the day and year. (PDF pp. 24 and 25).

35. Apart from asserting that the shape of the site is "a bit of a parallelogram," the Applicant did not provide any substantial evidence of any unique physical characteristics or conditions of the Subject Property.

- **Other Evidence and Testimony**

36. John and Rina Edwards, the owners of Parcel No. 9-H-60, submitted a letter to the Board expressing support for the proposal and the Applicant's request for a variance to allow a 0' setback on the shared property line. The Edwards indicated that a 0' setback would allow for the possibility of constructing an attached building on Parcel No. 9-H-60 in the future. The Edwards did not appear at the hearing.

37. Patricia Rodella testified at the hearing, as a resident of the Cork Factory building and on behalf of other residents of that building. She noted concerns regarding the increased height and FAR and impacts on traffic. Mr. Sittig challenged Ms. Rodella's standing. (Tr. 24-28).

38. Alexis Samulski and Daniel Yates appeared at the hearing on behalf of Saint Patrick's Church. Father Nicholas Vaskov, who was unable to attend the hearing, submitted a letter to the Board, which the Board accepted. Ms. Samulski noted that the Church had not been provided direct notice of the hearing. (Tr. 29-30). She explained that the Church and its associated garden and Holy Stairs have been in the current location since 1936 and that the Church is cultural institution in the Strip District and a prominent destination for visitors. Both Ms. Samulski and Mr. Yates expressed concerns that the proposed building would have significant detrimental impacts on the Church. (Tr. 28-44).

39. Daniel W. Kunz, Esquire, Jim Wholey and Dan Wholey appeared at the hearing on behalf of PARE, Inc./Robert Wholey Co., which owns property on the opposite side of Penn Avenue from the Subject Property. (Tr. 34-40). Jim Wholey testified that his family has operated the family business in the Strip District for 113 years. He stated that the height and density of the proposed building would permanently change the character of the Strip District and that the property could be developed in conformity with the Code without the relief request. He analogized the proposal to cramming "10 pounds of ice into a 3-pound bag." (Tr. 37). Mr. Wholey submitted a letter on behalf of the Strip District Business Association and a petition in opposition from neighboring business owners.

40. Dan Wholey agreed that the proposed building would be too large for a small space and that it would affect visibility throughout the Strip District. (Tr. 34-40).

41. Jean Ross, the owner of the property at 2627 Penn Avenue, appeared at the hearing to oppose the request and expressed concerns related to parking and the impact the proposed development would have on the character of the surrounding neighborhood. (Tr. 40-41). She indicated that the Penn Rose building, which was constructed in 1908, did not provide meaningful context for the heights of buildings in the Strip District. Mr. Sittig challenged Ms. Ross' standing. (Tr. 40).

42. The Strip District Neighbors submitted a letter that expressed partial support for the proposed building, noting support for the use, setbacks and increased FAR. The organization did not take a position on the request for additional height, because “many members expressed concern about the scale of the building and its proximity to the Strip District’s historic core.”

43. The letter in opposition from the Strip District Business Association, which Jim Wholey submitted, states that the proposed height and density of the proposed building “directly contradict the history fabric and architectural integrity of Penn Avenue” and that “[e]very building along this stretch of Penn Avenue is four stories or fewer for good reason: to preserve the very character that makes the Strip unique.”

44. A number of individuals who did not appear at the hearing provided written submissions, both in opposition and in support of the proposed development.

45. The parties were provided an opportunity to submit proposed findings of fact and conclusions of law on or before November 12, 2025 and the record closed as of that date.

46. The Board considered post-hearing submissions from the Applicant, PARE, Inc./Robert Wholey Co. and St. Patrick’s Church.

## **Conclusions of Law:**

- **Relevant Provisions of the Zoning Code**

1. Code Section 911.02 defines the “multi-unit residential” use as “the use of a zoning lot for four or more dwelling units that are contained within a single building.” The use is permitted as a special exception in UI Districts, subject to compliance with Section 911.04.A.85, which sets forth the single standard that residential units are to be limited to floors above the ground floor “when residential uses are not desirable on the ground floor.”

2. The site development standards for UI Districts are in Section 904.07.C and include minimum 10’ exterior side and 10’ interior side setback requirements.

3. The base maximum Floor Area Ratio permitted in UI Districts, where not located within 1,500’ of a Major Transit Facility, is 3:1. Where at least 75% of the proposed building is to be used for multi-unit residential purposes, Section 904.07.C.5 allows for a special exception for the increase of the FAR to a maximum of 10:1, if the site is not within 200’ of any property zoned residential and is situated so that the increase in the FAR “will not create detrimental impact on neighboring properties through consideration of the additional traffic impacts caused by adjusted FAR, including consideration of height and density.”

4. The base maximum height permitted in UI Districts is 60’/4-stories. Pursuant to Section 904.07.C.4, additional height “above four (4) stories” may be permitted as a special exception if the site is not within 200’ of any property zoned residential and is sufficiently separated from property that is zoned residential so that the Board can determine that the additional height will not create detrimental impact from “additional traffic impacts caused by the

additional height and density, the impact on views from such residential properties, and the impacts of the bulk of the buildings on residential properties.”<sup>4</sup>

5. Section 926.123 defines “Lot, Corner” as “a lot abutting two (2) or more streets at their intersection.”

6. Section 925.06.D, titled “Front Setbacks on Corner and Irregular Lots,” provides that, for corner lots, the Zoning Administrator “shall determine which frontages shall be considered the ‘front,’ ‘side,’ and ‘rear’ setbacks.” The criteria to be considered in making a determination as to what side constitutes the “front” of a corner lot are to include, but are not limited to, the “orientation of the primary structure, orientation of the neighboring structures, and the location of the entrances to the structure.”

7. Section 925.06.C allows for the reduction of side setback requirements in certain circumstances. If the adjacent lot is vacant, the required setback applies. Pursuant to Section 925.06.C.2, a side setback can be reduced to 0’ “when the side of the abutting property has a zero side setback when both building walls abut each other.” Pursuant to this provision, the 0’ setback is permitted only to the extent and height that walls on abutting parcels would be attached.

- **Code Provisions and Legal Principles Regarding Dimensional Variances**

8. Section 922.09.E sets forth the general conditions the Board is to consider with respect to variances. The criteria for determining whether to grant a variance include: 1) whether unique circumstances or conditions of a property would result in an unnecessary hardship; 2) whether the property could be developed in accordance with the Code’s requirements to allow for its reasonable use; 3) whether the applicant created the hardship; 4) whether the requested variance would adversely affect the essential character of the neighborhood or the public welfare; and 5) whether the variance requested is the minimum variance that would afford relief with the least modification possible. See *Marshall v. City of Philadelphia and Zoning Bd. of Adj.*, 97 A.3d 323, 329 (Pa. 2014); *Hertzberg v. Zoning Board of Adj. of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), citing *Allegheny West Civic Council v. Zoning Bd. of Adj. of the City of Pittsburgh*, 689 A.2d 225 (Pa. 1997); see also *Metal Green Inc. v. City of Philadelphia*, 266 A.3d 495, 510 (Pa. 2021).

9. Dimensional variances require only a reasonable adjustment of the zoning regulations to accommodate a use that is permitted in the relevant zoning district. Although a less restrictive application of the standards is appropriate when considering requests for dimensional variances, the applicant still bears the burden of presenting substantial and credible evidence regarding the variance standards. See *Hertzberg*, 721 A.2d at 47-48; see also *One Meridian Partners v. Zoning Bd. of Adj. of Philadelphia*, 867 A.2d 706, 710 (Pa. Commw. Ct. 2005) (Court observed that, although *Hertzberg* eased the requirements for dimensional variances and allowed consideration of financial hardship resulting from dimensional restrictions, it did not eliminate the requirement of demonstrating a hardship associated with the

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<sup>4</sup> Although the base maximum height limitation in Section 904.07.C.3 is expressed in both feet and stories, Section 904.07.C.4 refers only to a special exception for “additional height above four (4) stories.” This provision does not include a maximum height limitation in measured height or stories.

property and that to hold otherwise would render dimensional requirements and local governments' planning efforts meaningless).

10. Where no hardship is shown, or where the asserted hardship amounts to a simply a desire to increase profitability, the “unnecessary hardship” standard for a variance is not satisfied even under the relaxed *Hertzberg* standard for dimensional variances. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adj. of City of Pittsburgh*, 997 A.2d 423, 445–46 (Pa. Commw. Ct. 2010); see also *Lawrenceville Stakeholders v. City of Pittsburgh Zoning Bd. of Adj.*, 247 A.3d 465, 477 (Pa. Commw. Ct. 2021).

11. The inability to achieve what is asserted to be the “highest and best” use of a property without a variance does not satisfy the unnecessary hardship criterion. See, e.g., *Vagnoni v. Zoning Hearing Bd. of Exeter Twp.*, 459 A.2d 1361, 1363 (Pa. Commw. Ct. 1983).

- **Legal Principles Regarding Special Exceptions**

12. Under Pennsylvania law, a special exception is a form of a permitted use. A use that is permitted as a special exception “evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.” *Allegheny Tower Assoc.’s, LLC v. City of Scranton Zoning Hearing Bd.*, 152 A.3d 1118, 1123 (Pa. Commw. Ct. 2017), citing *Greth Dev. Grp., Inc. v. Zoning Hearing Bd. of L. Heidelberg Twp.*, 918 A.2d 181 (Pa. Comm. Ct. 2007); see also *Cogan Properties, LLC v. East Union Twp. Zoning Hearing Bd.*, 318 A.2d 981 (Pa. Commw. Ct. 2024) and *Bray v. Zoning Bd. of Adj.*, 410 A.2d 909 (Pa. Commw. Ct. 1980). By designating a use as a “special exception,” the governing body has determined that the use is one that is appropriate in the zoning district, subject to the criteria that the governing body has established for the use. *Cogan*, 318 A.3d at 986, quoting *Siya Real Est., LLC v. Allentown City Zoning Hearing Bd.*, 210 A.2d 1152, 1157 (Pa. Commw. 2019).

13. In *Cogan*, the Commonwealth Court reiterated the rules regarding the initial duty to present evidence and the burden of persuasion in special exception cases, as set forth in *Bray*. *Cogan*, 318 A.2d at 989. With respect to the specific requirements for the special exception, the applicant has the initial duty to present evidence that its proposal complies with these criteria. *Id.*, citing *Bray*, 410 A.2d at 912-13.

14. The *Cogan* court also quoted *Bray* in describing the difference between a general policy concern and “an expressed standard that is objective enough to form part of the applicant’s burden.” Even where identified as “general criteria,” ordinance provisions can be “sufficiently specific” so that they are distinct from general policy considerations regarding harmony with the spirit and purpose of the ordinance. *Id.*

15. At issue in *Cogan* was a provision which required that a “proposed use shall be compatible with adjoining development and the character of the zoning district and neighborhood where it is proposed to be located.” The Commonwealth Court concluded that the nature and intensity of the proposed use could be measured against the known composition of the adjoining properties and the character of the zoning district. The court thus determined that the requirement was sufficiently specific for it to be treated as a criterion that was within the applicant’s initial duty of putting forth evidence and subject to the burden of persuasion. *Cogan*, 318 A.3d at 990.

16. Similarly, in *Bray*, the court considered what the Philadelphia Zoning Code identified as the “general” criteria for approval and concluded that several of the “general” conditions were “sufficiently specific” to place both the initial duty of presenting evidence and the persuasion burden on the applicant. *Bray*, 410 at 525, 532 (“general” criteria regarding traffic congestion, fire and safety, overcrowding, light and air, and effect on comprehensive or redevelopment plans were specific criteria).

17. Section 922.07.D.1.a requires consideration of a proposed development’s “visual impact” and its “compatibility” as measured against the composition of the “surrounding built environment, public streets and open spaces and land use patterns.” Like the provision at issue in *Cogan*, which required demonstration of a development’s “compatibility” as measured against the “known composition” of adjoining developments and the character of the zoning district, the Board concludes that the requirements in Section 922.07.D.1.a are sufficiently specific to place on the applicant the initial duty of presenting evidence and the duty of persuasion with respect to that provision.

18. If the applicant for a special exception meets its initial burden of demonstrating compliance with the specific criteria, the burden shifts to any objectors to attempt to demonstrate that the use as proposed would result in adverse impacts not normally generated by that type of use and not anticipated when the governing body determined that the use is allowed in designated zoning districts. Objectors to a proposed special exception must raise specific issues regarding the effect of the proposed use on the public interest and must show with a high degree of probability that the effect of the proposed use would be substantial. *Manor Healthcare Corp.*, 590 A.2d at 71, quoting *Archbishop O’Hara’s Appeal*, 131 A.2d 587, 596 (Pa. 1957).

19. Because of its expertise and experience, a zoning board’s interpretation of its own zoning ordinance is entitled to great weight and deference. *Cogan*, 318 A.3d at 986, quoting *Hamilton Hills Grp., LLC v. Hamilton Twp. Zoning Hearing Bd.*, 4 A.3d 788, 793 (Pa. Commw. Ct. 2010).

- **Dimensional Variances from Section 904.07.C.3 for the Interior and Exterior Side Setback Requirements**

20. The Applicant asserted that because the Subject Property is a corner lot, it has “fronts” on Penn Avenue and 17<sup>th</sup> Street and “rears” on Spring Way and on the property line shared with Parcel No. 9-H-60. Because the property has no “sides,” the Applicant maintains that no relief is required from the Code’s interior and exterior setback requirements. The Board does not agree.

21. Section 925.06.D requires the Zoning Administrator to determine what constitutes the front, rear and sides of a corner lot, based on considerations including the orientation of the primary structure, the orientation of neighboring structures and the location of the entrance to the structure.

22. The proposed building would be oriented towards Penn Avenue, like the other structures in the same block of Penn Avenue, and its primary entrance would be on Penn

Avenue, with a vehicular entrance on Spring Way. (Tr. 14; PDF p. 10).<sup>5</sup> The Zoning Administrator thus reasonably determined, and the Board agrees, that the “front” for the purpose of determining the required setbacks is on Penn Avenue.

23. Because Penn Avenue is the front, the property has an exterior side on 17<sup>th</sup> Street and an interior side shared with Parcel No. 9-H-60 and dimensional variances from both the 10’ minimum interior and exterior side setback provisions are required for a structure on the site.

24. The Applicant also seeks to avoid the side setback requirements by asserting that the interior side setback requirement should be reduced to 0’, pursuant to Section 925.06.C.2, because the neighboring property owners may, at some point in the future, seek to construct an attached building on Parcel No. 9-H-60, with a 0’ setback and to an unspecified height. Section 925.06.C.2 allows for the reduction of a side setback to 0’ when “when both building walls abut each other.” The portion of Parcel No. 9-H-60 that abuts the Subject Property is a parking lot, not a building with a wall, which does not support a contextual reduction of the setback to 0’ under this section.<sup>6</sup>

25. Because the Applicant maintained that the side setback provisions do not apply, the Applicant did not provide substantial evidence or legal support for dimensional variances from those requirements. Because the other parties explained their objections to the dimensional variances required, the Board addresses that possible form of relief.

26. On the first and second floors, the Applicant proposes a 0’ setback on the interior side and a setback that would taper from 5’-8” to 0’ on the exterior side. (PDF pp. 10 and 11). For the third through twelfth floors, the proposed setback on the interior side would taper from 5’ to 15’ and on the exterior side, it would taper from 5’-6” to 15’. (PDF pp. 12 and 13).

27. The setbacks from the side property lines increase over almost the full 160’-8”/14-story height of the building. Only on the thirteenth and fourteenth floors would the structure fully comply with the setback requirements. In considering whether dimensional variances are warranted, the Board must consider the impact from the proposed setbacks in their entirety and how they affect the full massing and density of the proposed structure.

28. The Applicant’s only assertion of a unique condition associated with the site is that the generally rectangular site is a parallelogram and that the shape creates a hardship for the building as proposed. Even under the more relaxed variance standards described in *Hertzberg*, this asserted “hardship” is not sufficient. Any hardship resulting from the slightly irregular shape

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<sup>5</sup> The Applicant offered contradictory statements as to whether an entrance would be located on 17<sup>th</sup> Street. (Applicant’s Proposed F/F No. 12; Tr. 14). The hearing exhibits depict the primary entrance on Penn Avenue and do not depict a retail entrance or a garage entrance on 17<sup>th</sup> Street. (PDF p. 10).

<sup>6</sup> The owners of Parcel No. 9-H-60 might seek to construct a building on their property at some point, but the only representation of that speculative possibility is contained in an undated letter, which the owners sent to the Board, but did not present at the hearing. Even if the letter could be considered as record evidence of their imminent intent to seek approval for a building with a 0’ setback for some portion of an undefined height, Section 925.06.C.2 requires an existing building, with a wall, to allow for a reduced setback. A contextual setback would apply only to the height of an attached structure and the letter does not indicate whether the proposed height of a future neighboring structure might be used to provide a context for a reduced setback for 2 stories, 14 stories or some other height.

relates more to a preference to construct the building as proposed and not to any unique conditions of the Subject Property.

29. The Applicant maintained that the proposed building constitutes the “highest and best” use for the site (Applicant’s proposed F/F No. 12), but this assertion does not satisfy the “unnecessary hardship” criterion, even for a dimensional variance.

30. The variance standards also require an applicant to demonstrate that a proposed variance would not adversely affect the essential character of the neighborhood.

31. As reflected in the Applicant’s exhibits, the Strip District, in the immediate vicinity of the Subject Property and beyond, is characterized by buildings that have reduced side setbacks, but with heights that do not exceed four stories. (PDF pp. 5, 15 and 16). The massing and density of 4-story structures with reduced setbacks are significantly different than the massing and density of a structure with reduced setbacks for 12 of its proposed 14 stories. The Applicant’s exhibits make clear that the only structure with a similar height and reduced setbacks in the vicinity of the Subject Property is the 168’-8” or 143’-6”/12-story Penn Rose building, which predated the Zoning Code and the current setback requirements. That single building does not reflect the essential character of the neighborhood.

32. The Applicant thus did not provide any evidence that the massing and density of the proposed building, with the noncompliant setbacks proposed, would be consistent with the other buildings or with the essential character of the area in the vicinity of the Subject Property.

33. The Applicant asserted that that the building’s design had been modified to address community concerns but did not provide any evidence as to why the reduced setbacks proposed reflect the minimum variances necessary from the Code’s requirements.

34. For these reasons, the Board concludes that, without substantial evidence under the applicable variance standards, the required dimensional variances from the interior and exterior setback requirements cannot be granted.

- **Special Exception for Multi-Unit Residential Use**

35. The Applicant seeks a special exception pursuant to Section 911.02 and 911.04.A.85 to allow the proposed multi-unit residential use in a UI District.

36. The sole criterion for the multi-unit residential use in UI Districts involves consideration of whether ground floor residential units are appropriate.

37. The Applicant does not propose any ground floor residential units. Thus, approval of the special exception to allow a multi-unit residential use on the site is appropriate.

- **Special Exceptions for Increased FAR and Additional Height in UI District**

38. The Applicant also seeks special exceptions pursuant Sections 904.07.C.4 and 5 to allow additional height and FAR adjustment above the base maximum 60’/4-stories and 3:1 FAR permitted by right.

39. Although the proposed increase in the FAR to 9.78:1 is within the maximum 10:1 FAR permitted as a special exception, the proposed 160'-8"/14-story height exceeds the maximum height permitted by right by 100' and 10 stories.

40. The special exception for FAR adjustment is permitted where at least 75% of the proposed building is to be used for multi-unit residential purposes. The maximum FAR for the proposed building is limited to 10:1; the site must not be within 200' of any property with a residential zoning designation; and the adjusted FAR must not create detrimental impacts "on neighboring properties through consideration of the additional traffic impacts caused by the adjusted FAR, including consideration of height and density."

41. The special exception for additional height, which allows for additional height "above four (4) stories," without reference to a measured height, requires that the site must not be within 200' of any property with a residential zoning designation and that the additional height must not have detrimental impacts on traffic or on views or bulk.<sup>7</sup>

42. Section 922.07.D.1.a requires the Board to consider whether a proposed development's "visual impact" and its "compatibility" as measured against the composition of the "surrounding built environment, public streets and open spaces and land use patterns." The requirements of Section 922.07.D.1.a are sufficiently specific to place on the Applicant the initial duty of presenting evidence and the duty of persuasion with respect to that provision.

43. The Applicant demonstrated that more than 75% of the proposed building would be used for multi-unit residential purposes and that the Subject Property is not within 200' of any property that is zoned residential. (Tr. 5; PDF p. 4). The Applicant also asserted that the additional height/FAR adjustment would not have any detrimental impacts on traffic because the 64 vehicle parking and 37 bicycle parking spaces provided exceed the Code's requirements for the proposed 64 units. (Tr. 14).

44. The Applicant did not prove that the proposed development's visual impact would be compatible with the surrounding built environment, public streets and open spaces and land use patterns as required under Section 922.07.D.1.a.

45. The only tall building in the immediate vicinity of the Subject Property on Penn Avenue is the 168'-8" or 143'-6"/12-story Penn Rose building, which was constructed in 1908, long before the current Code requirements were in place. The other structures included in the exhibits either do not exist, have heights that do not exceed 108'-5" and/or are blocks away from the Subject Property. (PDF pp. 16 and 17). Those other structures do not provide the proposed structure with a context for compatibility with the built environment.

46. As reflected in the exhibits that the Applicant submitted, the surrounding built environment is characterized by buildings that may have 0' side setbacks but, with the few identified exceptions, do not exceed a height of 60'-4-stories. (PDF pp. 5, 7, 15 and 16). The Applicant's "Proposed Building Height" and "Streetscape" exhibits identify only limited examples of buildings within the Subject Property's vicinity and within the same UI District that have heights above 100': 1700 Smallman at 108', J. Marcus Wholesalers at 100'-5"; and the Penn

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<sup>7</sup> The maximum 10:1 FAR allowed as a special exception is some indication that the maximum additional height, also permitted by special exception, is not to be limitless.

Rose building.<sup>8</sup> Only the Penn Rose building, at the height of 168'-8" or 143'-6"/12-stories, is remotely comparable to the 160'-8"/14-story height proposed for the building on the Subject Property.

47. As the exhibits reflect and as other witnesses testified, the proposed structure would be inconsistent with the built environment of this portion of the Strip District. The Strip District Business Association observed that "[e]very building along this stretch of Penn Avenue is four stories or fewer for good reason: to preserve the very character that makes the Strip unique." Because it would extend to all property lines on the first two stories, the proposed structure would not allow for any on-site open space. Also, at certain times of day/year, it would cast portions of the Strip District into shadow. (Tr. 36-38; PDF pp. 5, 7, 15, 16, 24 and 25).

48. The proposed structure would also have significant detrimental impacts on the historic Church, on the opposite side of Spring Way. (Tr. 30-34).

49. Even if the burden of demonstrating detrimental impacts pursuant to Section 922.07.D.1.a were to be on the objectors, the objectors raised specific issues regarding the impact of the height and massing of the proposed structure on the Strip District. The record evidence, including the Applicant's exhibits and the objectors' testimony, demonstrates with a high degree of probability that the effect of the proposed building on the surrounding built environment, open spaces and land use patterns, in the context of this distinctive neighborhood, would be substantial. (Tr. 32-34, 35-38; PDF pp. 15-25).

50. Consistent with the evidence and testimony presented and the applicable legal standards, the Board concludes that the special exceptions for additional height and FAR adjustment must be denied.

**Decision: For the foregoing reasons, the Board APPROVES the request for a special exception pursuant to Sections 911.02 and 911.04.A.85 for a multi-residential use in a UI District; DENIES the dimensional variances from the interior and exterior side setback requirements in Section 904.07.C.3; and DENIES the request for special exceptions pursuant to Sections 904.07.C.4 and 5.**

s/Alice B. Mitinger  
**Alice B. Mitinger, Chair**

s/Lashawn Burton-Faulk  
**LaShawn Burton-Faulk**

RECUSED  
**John J. Richardson**

Note: Decision issued with electronic signatures, with the Board members' review and approval.

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<sup>8</sup> The massing of a 318'-6" structure, as included in the exhibits, cannot be viewed as providing a context for the proposed structure because it does not exist and because, even if it was once approved, it would have been considered under the site development standards for the GT-B District, not the UI District.