

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Column Realty, LLC,	:	
Appellant	:	
	:	
v.	:	
	:	
The Zoning Hearing Board of the City of Allentown	:	
	:	
v.	:	
	:	No. 1544 C.D. 2014
The City of Allentown	:	Argued: March 12, 2015

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE ANNE E. COVEY, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
 PRESIDENT JUDGE PELLEGRINI FILED: March 30, 2015

Column Realty, LLC (Column) appeals from an order of the Court of Common Pleas of Lehigh County (trial court) affirming the City of Allentown Zoning Hearing Board’s (Board) denial of Column’s application to change from one legal nonconforming use to another or, alternatively, for a variance with regard to its proposed drug and alcohol rehabilitation center. Because we find no error in the Board’s decision, we affirm.

I.

A.

The following facts are not in dispute. In May 2012, Column purchased from Lehigh County (County) real property situated in Allentown, Pennsylvania, consisting of a lot and vacant building which previously served as a County correctional facility. The property is located in an area zoned Medium-High Density Residential (R-MH) and Traditional Neighborhood Development Overlay (TNDO). The building is approximately 15,000 square feet and is located within 1,000 feet of the Lehigh Valley Community Mental Health Clinic, a temporary shelter owned and operated by the Salvation Army, and the Sixth Street Shelter providing temporary shelter for domestic-abuse victims.

The building was initially constructed as an elementary school before the City of Allentown (City) enacted its zoning laws, at which time the building became nonconforming. Subsequently, the Board permitted the school to be converted into 16 apartments, with a physician's office housed on the basement level. In 1988, the County sought to use the building as a community corrections center for low-risk, female inmates pending completion of a new corrections facility it was constructing, but the Board denied the application, finding that the proposed use would result in an overuse of the property, would reduce neighboring property values, and would be detrimental to the neighborhood because it did not align with the City's comprehensive plan for rehabilitating the area. In response, the City commenced litigation which was resolved when the parties reached a settlement providing as follows:

[T]he application of the County of Lehigh to use [the subject] premises as a work release facility shall be deemed to have been rendered in favor of said applicant....

2. The use of said premises as a work release facility shall be temporary. Said use shall terminate four (4) years after date hereof or thirty (30) days after the completion of construction of the new proposed prison facility....

3. Subsequent to the termination of the use of [the subject] premises... as a work release facility as set forth above, said property shall not be occupied and utilized by the County of Lehigh as any prison related or drug or alcohol rehabilitative use. For the purposes of this agreement, a prison-related use shall encompass any use for penal or correctional purposes including, but not limited to, a work-release facility or juvenile detention facility....

(Certified Record [C.R.], Order (8/19/88) ¶¶1-3.)

Approximately two years later, the parties entered into an amended agreement stating that the subject property “shall continue to be used as a work release facility for the County of Lehigh without restriction beyond the four year period [specified in the prior agreement]” and that “the County may continue to use the premises as a permanent correctional work release facility” so long as the facility is not operated in a manner detrimental to the surrounding neighborhood. (C.R., Order (12/7/90) ¶¶1-2.) It further stated:

4. The City may at any time present a petition to the court to review the manner of operation of the facility. If after hearing, the court finds by clear and convincing evidence that the facility is being operated in any manner detrimental to the health, safety and welfare of the surrounding neighborhood, the court shall impose such conditions on the operation of said facility as the court

deems necessary and appropriate or such other relief as may be advisable.

(*Id.* at ¶4.) The amended settlement agreement was approved and incorporated into the initial settlement by a 1990 court order.

Two years later, in 1992, the City Zoning Ordinance (Ordinance) was amended to provide as follows:

1353.04 The following standards shall be minimum requests and no special exception shall be issued for these uses within the specified zones, unless these standards are met to the satisfaction of the Zoning Hearing Board. Site plans shall be submitted for all uses listed below:

* * *

“The facility shall be located no closer to another drug and alcohol treatment and rehabilitation facility, temporary shelter, halfway house, or group home than 1,000 feet measures on a straight line radius from the property line so used to the property line proposed to be used (13154 §9 10/8/92).”

Allentown City Zoning Ordinance §1353.04.

B.

After construction of the County’s new correctional facility was complete, the County conveyed the subject property to Column by deed dated May 1, 2012, together with:

all and singular the lot, buildings, improvements, ways, waters, water-courses, rights, liberties, privileges,

hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the said Grantor, in law, equity or otherwise, howsoever, in and to the same and every part thereof.

SUBJECT, HOWEVER, to any and all easements, covenants, conditions, and restrictions whether of record or visible on the above-described premises, or otherwise, if any.

(C.R., 5/1/2012 Special Warranty Deed, at 1, 3.)

Column then filed an application with the Board on behalf of God's Grace Adolescent Treatment Center (Center) seeking a special exception to change the building from the nonconforming use as a correctional facility to an 87-bed drug and alcohol rehabilitation center for males aged 12 through 18 and to erect a freestanding, non-illuminated sign at the Center's entrance. In the alternative, Column also sought a use/validity variance.

C.

Before the Board, Mickey Thompson, Column's Chief Operating Officer (COO Thompson) and a land-use attorney, provided a history of the property at issue. He described the purpose of the Center as "tak[ing] the correctional facility that is used and us[ing] it for treatment, a much less onerous use than what a correctional facility is, and provid[ing] treatment to a very under served and needed part of our community." (8/26/13 Hearing Transcript, at 28-29.)

He testified that following enactment of Section 1353.04 of the Ordinance, notwithstanding that this use was not permitted, the court-approved settlement agreement still controlled the property's use and, therefore, permitted continuation of the prior use as a nonconforming use. In support of this position, COO Thompson referenced a Certificate of Occupancy that Column obtained in February 2013 describing the use of the property as a "correction facility" which use Column is not permitted to make as of right but only because "whatever rights accrue to the property pass with the property." (*Id.* at 30.)

On cross-examination, COO Thompson acknowledged that nothing in the agreement of sale assigned any rights that the County had to operate the property as a correctional facility. However, emphasizing that uses run with the land, he maintained that Column "would step in [the County's] shoes," while admitting that the prior use could not continue if it had a detrimental impact upon the community. (*Id.* at 34.)

Next, David Harte, Vice President of Business Development for Pennsylvania Venture Capital and its related entities, including Column, described the facility as a two-story building consisting of about 10,300 square feet of usable space and a 26-vehicle parking lot. He explained that the Center would use the entire building, would not add any structural elements to it, and planned to maintain the same room configuration and floor layout. He also confirmed that two other facilities exist within 1,000 feet of the property but denied that either constituted a residential drug and alcohol facility. Instead, he stated that the Salvation Army provides temporary shelter and senior-citizens programs while the Lehigh County Community

Mental Health Clinic provides psychiatric evaluation, medication management and individual, family and group psychotherapy.

Abraham Richard Atiyeh, the property's owner, also testified in support of the application and described the 1,000 foot setback requirement as "exclusionary," explaining that the property is "[t]otally incomparable" to the Salvation Army's shelter and the Lehigh Valley Community Mental Health Clinic. (*Id.* at 62-63.) Mr. Atiyeh explained that he planned to operate the property in the same manner that he operated his other 400-bed, licensed, assisted-living facilities, meaning that he would obtain Commonwealth licensure and hire licensed counselors. He stated that although this would be the first adolescent-treatment facility he operated, he planned to contract with private insurers for treatment of their insureds and envisioned a 28-day in-patient treatment program offering full supervision, with three to four boys sharing rooms in the 87-bed facility.¹ In terms of operations, the Center would require 11 supervisors during waking hours, one administrative secretary, one maintenance worker and one dietician.

Mr. Atiyeh testified that residents would not be permitted to leave the premises or to interact with neighbors due to secured doors and security cameras. Rather, children would be dropped off for treatment, and to the extent they needed to leave for medical attention or planned activities, Column would provide transportation. In terms of visitors, he testified that a psychiatrist would visit the

¹ Column's original application for a variance proposed outpatient treatment as well as long-term (three- to nine-months) in-patient care for both males and females, but the application was orally amended to remove these proposals at the hearing and to limit care to teenage males.

property for one or two hours daily. He described the possible models of treatment as: (1) the Malvern Model under which residents would have no in-person or telephonic communication with non-residents during the 28-day period; and (2) the Family Model under which family members would be permitted to visit residents for about an hour each weekend.² Mr. Atiyeh stated his strong preference to proceed under the Malvern Model and stipulated that if this plan were not imposed, Column would need to come before the Board again, as the Family Model would have a greater impact on the community.

On cross-examination, Mr. Atiyeh stated that the Center's operation would increase neighboring property values because it would convert an otherwise vacant building into a "high class treatment center." (*Id.* at 77.) He also stated that the facility would serve Lehigh Valley teenagers and that approximately 1,000 residents would cycle through the system per year.

Peter A. Terry, a civil engineer specializing in traffic and transportation engineering who prepared a traffic analysis for the Center at Column's request, further testified in support of Column's application. He stated that his report compared the traffic associated with the Center and that of the work-release correction center, concluding that the prior use resulted in 72 trips over a 24-hour period whereas 34 trips per 24-hour period will result from the Center. He continued:

This facility, because it doesn't involve the residents coming and going back to work, will have less of an impact

² Follow-up care would not be provided on-premises but rather, out-patient care would be offered at a different facility.

on the neighborhood. This facility will have visitors and traffic associated with it because of the staff that's working there, because of physician visits, because of family dropping off patients, people who would be admitted there. It will have less of a traffic impact than a work release center would.

(Id. at 80-81.)

On cross-examination, Mr. Terry conceded that he had not previously performed a traffic study for an adolescent treatment center but explained that he based his calculations upon the number of trips associated with the Malvern Model.

Finally, Column presented testimony from Cynthia Mota and Lori Vargo Heffner, two individuals with experience working in the drug and alcohol rehabilitation field. Ms. Mota, a member of the Allentown City Council who appeared in her individual capacity, stated that she worked in the drug and alcohol field for about 11 years and recently served as the director of an adolescent and adult outpatient alcohol- and drug-abuse facility. She testified to the prevalence of the drug- and alcohol-abuse problem among adolescents in the area and the great need for a facility such as this one. She explained that the facility would not burden the community but rather would provide it with a local option for nearby children requiring treatment.

On cross-examination, she explained that the City needed a local facility. She admitted that regardless of where the facility was located, residents would not have outside access but stated that a nearby facility is preferable because many

families in the City do not have the money necessary to travel out of town to stay involved in their children's treatment.

Ms. Heffner, a licensed professional counselor and a licensed, certified drug and alcohol counselor in New Jersey, as well as a certified addictions counselor in Pennsylvania, stated that she has 28 years of experience treating adolescents and adults in substance abuse. She explained that in her experience, residents are highly supervised at treatment facilities, are not permitted to leave the premises before discharge, and have no contact with neighbors as per Commonwealth regulations. She stated that the majority of employees are required to have at least a Master's degree, while all must have a Bachelor's degree.

Regarding the facility's potential impact on the community, she continued:

I would say that there's a lot of stigma that people have about it and I think the only threat is the fear in people's minds of what it could possibly do, but for the most part, you know, these people are inside. It's like having a nursing home or any other kind of hospital or operating center next door. They're inside doing what they're doing inside. No one's going to catch the disease or no one's going to be affected. It's not going to increase criminality or any kind of problem like that. It's just going to be a place where people are getting care.

(Id. at 112-113.)

In opposition to the application, testimony was presented by six objectors, the first of whom was Ann Nora Bell, a nearby resident and owner of real

property since 1975. Specifically, Ms. Bell explained that since the building became vacant and was no longer being used for correctional purposes, the neighborhood “quieted down” and became “a lot more friendly to families.” (*Id.* at 120.) She objected to using the building for drug and alcohol treatment because of its proximity to residences and to using the building which is built as a jail to treat minors. Further, she opined that 87 beds would be an overuse of the property considering that residents would not leave the facility, compared to the prior work-release program where participants merely slept in the building.

Patricia A. Jackson testified on behalf of the Jordan Heights Neighborhood Partnership (Partnership), a partnership between private funders and community groups established for the purpose of improving the Jordan Heights neighborhood, which encompasses the facility at issue. She stated that the Partnership opposes the requested variance because the proposal would result in overuse, the parking lot is not large enough to accommodate the necessary vehicles, and the facility is too close to the other two shelters. In response to Ms. Heffner’s earlier testimony, Ms. Jackson continued:

No, the community is not afraid. The community does not think that drug addiction is contagious.... I know it’s not contagious. But it is not good for this community. This is a residential area, primarily. And that’s what we’re working, to build it back up to a viable community of residences.

(*Id.* at 126.) She also voiced concern over the decreasing property values that would result from operation of the Center.

Further, Ms. Jackson questioned the Center's means of overnight supervision, particularly since the 18-year-old residents could leave the facility of their own volition as adults. She emphasized that Mr. Atiyeh's testimony that the program would be limited to private-insurance clients contradicted Ms. Mota's testimony that the facility would benefit the community by allowing low- or fixed-income residents to receive treatment in their own community, noting that such residents likely would not have access to private insurance. On cross-examination, Ms. Jackson opined that half as many beds would be proper for this district.

Next, neighbor Christiana Dominguez testified that "this is an excellent facility [but] I think it's the wrong place." (*Id.* at 131.) She explained that in her line of work, she frequently encounters 12 to 18 year olds with drug and alcohol addictions in Allentown, but that they do not have the type of insurance that would allow them to use this facility. She testified that it would be ineffective to bring minors into a rural area such as this for treatment and that she wants the Center to succeed, "[j]ust not in [her] backyard," because the surrounding community is not strong enough to support the Center. (*Id.* at 132.)

Debra Skinner, an objector who also lives in the neighborhood, stated that based on her personal experience as a mother and as a friend of drug addicts, allowing 12 to 18-year-old males to share rooms at a treatment center "is iffy at best." (*Id.* at 138.) She echoed the other objectors' sentiments that there is a great need for a facility of this nature but that its proposed location is improper because it could not serve a community consisting mostly of individuals on fixed incomes. She further questioned the success rate of such a facility attempting to treat residents while keeping them "right in the midst of it." (*Id.* at 140).

Gabriel Dominguez argued that residents at the Center would regress and return to their old ways because they will not be removed to a different area for treatment. He stated, “[P]ut a treatment facility by [Mr. Atiyeh’s] house, but the fact of the matter, the point is he wouldn’t. Neither would anyone else. And more residents would come up here, they would not want them in their backyard.” (*Id.* at 146-147.) He also objected to the Center operating on constant lockdown, explaining that children require some form of recreation and that when such recreation is provided, the residents will go out into the neighborhood and possibly gain access to controlled substances. He concluded, “[N]one of this is for the betterment of [the] neighborhood. Trying to improve it. All we’re doing is bringing it more and more down. All we’re creating here is rehab row...and I just don’t want that in my neighborhood.” (*Id.* at 150.)

Additionally, Dan Bosca, the Chief Financial Officer for the nearby Union Baptist Church and Director of Community Action, which operates the Partnership, testified. He acknowledged the need for a drug and alcohol treatment center for the subject age group but questioned whether the insureds of private insurers paying higher reimbursement rates would be given preferential treatment over others who had a greater need for rehabilitation.³ Also, he questioned the number of beds as inconsistent with the district’s R-MH and TNDO density.⁴

³ In response, Mr. Atiyeh stated that the majority of the residents would be admitted under private-insurance contracts but that the facility would do a certain amount “to help out with people that are uninsured.” (8/26/13 Hearing Transcript, at 154.)

⁴ In response, Mr. Atiyeh agreed to reduce the number of beds to 60 to satisfy the objectors.

Finally, Julio Guridy testified as neither a supporter nor an objector and cited his concern that Column might attempt to use the facility for a work-release program if its current application were denied.

II.

A.

Following deliberations at a subsequent hearing, the Board denied Column's application. Regarding Column's argument that its proposed use is a change from one nonconforming use to another, the Board pointed to Section 1329.04(B) of the Ordinance and held that "the new use would be more detrimental to the neighborhood" than the County's prior use of the facility as a corrections center because the Center would generate significantly more traffic, particularly when its entire residency turned over every 28 days. (Reproduced Record [R.R.] at 12a.)

The Board likewise rejected Column's argument that the Center was permitted pursuant to the court-approved settlement, finding that the use permitted by court order does not align with the Center's use of the building as a rehabilitation facility, and that to the extent the use is characterized as a correctional-type use, the use was abandoned in late 2011. The Board noted that Column presented no evidence that the County conveyed the right to use the property as a correctional facility, and that even if such evidence did exist, it would not provide Column a vested right to use the facility in the manner proposed.

Regarding Column's request for a variance under Section 1307.03(A) of the Ordinance, the Board found no evidence that the Center had unique physical

characteristics foreclosing the possibility of developing it in compliance with the Ordinance.

Finally, the Board declined to provide Column relief on the basis that Column enjoys the same rights the County enjoyed when operating the property as a corrections facility before enactment of the 1,000 foot limitation. The Board reasoned that the County did not assign its rights to Column, and that even if such a transfer occurred, such rights do not authorize Column to use the property for a rehabilitation center.

B.

Asserting the same grounds for a variance as below, Column appealed to the trial court, which affirmed the Board's decision without taking additional evidence. With regard to the purported change from one nonconforming use to another, the trial court rejected the Board's finding that the prior nonconforming use was abandoned. Nonetheless, it affirmed the Board's denial on the basis that substantial evidence showed that the Center's use would be more detrimental than the County's prior use. The trial court further affirmed the Board's ruling with regard to the requested variance, reasoning that Column failed to establish any unique physical conditions of the property precluding Column from developing it in compliance with the Ordinance. This appeal followed.⁵

⁵ Where the trial court takes no additional evidence, our review of a zoning board decision is limited to determining whether the Board committed an error of law or abused its discretion. *St. John The Baptist Ukrainian Greek Catholic Church v. City of Pittsburgh Zoning Board of Adjustment*, 88 A.3d 1046, 1050 n.2 (Pa. Cmwlth. 2014).

III.

A.

Column raises 16 issues on appeal, the first half of which pertain to its application to change from one legal, nonconforming use to another.⁶

1. Judicial Preemption

Initially, Column argues that the amended agreement entered into by the parties in 1990 providing that the City may petition the trial court to impose conditions on the use of the facility upon a showing that it is being operated in a manner detrimental to the health, safety and welfare of the surrounding neighborhood somehow preempts the instant dispute.⁷ In support of this argument, Column cites a

⁶ As this Court has explained, “a lawful, nonconforming use of a property is a use predating the subsequent, prohibitory zoning restriction.” *Hafner v. Zoning Hearing Board of Allen Township*, 974 A.2d 1201, 1204 (Pa. Cmwlth. 2009). “The right to maintain this nonconforming use is only available for uses that were lawful when they came into existence and which existed when the ordinance took effect.” *Id.* at 1210–11. “[A] lawful nonconforming use establishes in the property owner a vested property right, which cannot be abrogated or destroyed unless it is a nuisance, is abandoned, or is extinguished by eminent domain.” *St. John The Baptist Ukrainian Greek Catholic Church*, 88 A.3d at 1051.

At oral argument, Column abandoned its argument that the trial court erred in failing to find that the County’s prior, nonconforming use was *not* abandoned. As such, we will not address this issue.

⁷ Although Column also asserts that the City’s sole method of precluding Column from operating the Center is to file a petition with the court asserting that the Center is being operated in a manner detrimental to the health, safety and welfare of the surrounding community, it failed to brief this issue and thereby waived it. *See Pennsylvania AFL-CIO ex rel. George v. Commonwealth*, 757 A.2d 917, 924 (Pa. 2000) (stating that issues not developed in a brief are waived).

Further, Column’s argument that the trial court erred in failing to find that the 1990 order extended the County’s operation of the facility four years beyond the period specified in the 1988 order is unsupported by the record. Indeed, the trial court expressly made this finding. (Trial Court **(Footnote continued on next page...)**)

clause in the settlement order approved by the trial court providing that the County or its assigns could continue to use the facility in perpetuity. Based on this, Column claims it has a right to continue the use under this provision, and that any subsequent zoning change is ineffective to preclude continued use of the property in the same manner the County used it.

Upon review of the record, this Court has not identified, and Column has not pointed to, any specific provision in the 1988 or 1990 order conferring a right on the County's assigns. Rather, the 1988 order expressly states that the County's application to use the facility "as a work release facility shall be deemed to have been rendered in favor of said applicant effective June 28, 1988 and the [Board] shall issue a zoning permit for the use of said premises as a work release facility as set forth in the County's application." (C.R., Order (8/19/88) ¶1.) Although the 1988 order terminated the County's right to use the premises as a work release facility upon completion of the new facility, the 1990 order extended the County's rights indefinitely, stating that the premises "shall continue to be used as a work release facility **for the County of Lehigh** without restriction beyond the four year period" and that "**the County** may continue to use the premises as a permanent correctional work release facility." (C.R., Order (1/9/90) ¶¶1-2) (emphasis added). It did not extend any such rights to Column and, as such, the Board did not err in determining that the 1990 order does not establish the proposed juvenile drug and alcohol rehabilitation facility as a legal, nonconforming use.

(continued...)

Opinion, at 4) ("On January 9, 1990, the work release facility was allowed to continue, without restriction, beyond the four-year limit.")

2. Continuation of a Preexisting, Legal, Nonconforming Use

Nonetheless, our courts have long recognized that “[t]he adoption of a zoning ordinance does not mandate discontinuance of the existing use of a property affected by the ordinance” because it operates prospectively, not retrospectively. *Hempfield Township v. Hapchuk*, 620 A.2d 668, 671 (Pa. Cmwlth. 1993), *appeal denied*, 644 A.2d 165 (Pa. 1994). “[T]he use simply becomes a nonconforming one which may continue, but may not be changed or expanded.” *Id.*

As our Supreme Court explained:

The use of the property which the ordinance protects, or “freezes”, is the use which was in existence at the time of the passage of the ordinance or the change of a use district but it offers no protection to a use *different* from the use in existence when the ordinance was passed. The latter does not render the ordinance invalid. The nonconforming use which is within the orbit of protection of the law and the Constitution is the nonconforming use which exists at the time of the passage of the zoning ordinance or the change in a use district under a zoning ordinance, not a *new* or *different* nonconforming use.

Hanna v. Board of Adjustment of Borough of Forest Hills, 183 A.2d 539, 543-544 (Pa. 1962) (internal citation omitted). If Column satisfies its burden of establishing that its proposed use is a continuation of the same, prior use, its noncompliance with Section 1353.04’s 1,000 foot requirement will be excused. *See Little v. Zoning Hearing Board of Abington Township*, 357 A.2d 266, 267 (Pa. Cmwlth. 1976).

Although Column argues that it satisfied its burden by presenting Mr. Harte’s testimony that the physical layouts of both uses are substantially similar, and

concluding that it is, therefore, obvious that a new use would not result, the absence of physical alterations to a structure is not dispositive. While structural alterations to a building which are inconsistent with an existing nonconforming use are one indicium of an owner's intent to cease the prior nonconforming use, *see Money v. Zoning Hearing Board of Haverford Township*, 755 A.2d 732, 737 (Pa. Cmwlth. 2000), the lack of alterations does not equate to continuation of the same use. Indeed, a nonconforming use exists when the particular *use* of a property is inconsistent with the orderly development of a city as set forth in a specific zoning ordinance, regardless of whether structural changes are made. *See Lawrence v. Zoning Hearing Board of Lower Gwynedd Township*, 338 A.2d 779, 781 (Pa. Cmwlth. 1975).

Instead of presenting evidence regarding how Column's use of the property as a juvenile drug and alcohol rehabilitation center is the same as the County's use of the property as a correctional work-release facility, Column relied on the 2013 Certificate of Occupancy labeling the property as a "correction facility." This evidence does not address *how* the uses are the same but merely concludes that the property was a correctional facility as of February 2013, a conclusion the trial court was not bound to adopt and a conclusion which may or may not have been based upon information regarding the intended, future use. Because the only non-conclusory evidence presented on this issue established the prior use as a work-release corrections facility and the proposed use as a juvenile drug and alcohol rehabilitation center, the Board did not err in finding that Column did not intend to continue the same use.

3. Change From One Legal, Nonconforming Use to Another

Still, Column may seek approval of a change from one legal, nonconforming use to another if the proposed use is “no more detrimental to its neighborhood and surroundings than the use it is to replace” and if the requirements of a special exception are satisfied. Allentown City Zoning Ordinance §1329.04(B).⁸ On this point, Column argues that its proposed use is less intense than was the County’s use and, therefore, that it should be permitted as a change of nonconforming use.

Putting aside the other requirements under Section 1329.04(B) of the Ordinance, there is substantial evidence to support the Board’s finding that the Center will be more detrimental to the neighborhood than was the work-release facility. Mr. Atiyeh testified that 14 staff members would be on-site daily in addition to the 87 monthly residents, or 1,134 annual residents, with regular deliveries and visits from psychiatrists. As a result of these factors plus the fact that parents, educators and medical personnel would frequent the facility to evaluate it for placement, the Board rejected Mr. Terry’s testimony and concluded that traffic would increase in this already highly urban area. Also, Ms. Bell’s testimony that since the facility became vacant, the character of the neighborhood has shifted toward residential, and

⁸ Section 1329.04(B) provides:

A nonconforming use all or partially conducted in a structure(s) may be changed to another nonconforming use only upon determination by the Zoning Hearing Board as a special exception that the proposed new use will be no more detrimental to its neighborhood and surroundings than the use it is to replace . . .

Allentown City Zoning Ordinance §1329.04(B).

testimony that the rehabilitative services would be of limited benefit to community members who primarily are on fixed incomes, offer substantial support for the Board's finding that the proposed use would negatively impact the character of the residential community.⁹

B.

Next, Column asserts that the Board erred by denying its application for a validity variance.¹⁰ An applicant for a validity variance must establish, where applicable, that: “(1) the effect of the regulations complained of is unique to the applicant's property and not merely a difficulty common to other land in the neighborhood; and (2) the regulation is confiscatory in that it deprives the owner of the use of the property.” *Hunt*, 61 A.3d at 385.

In support of its argument, Column claims that the Center is comparable to the facility in *Halberstadt v. Borough of Nazareth*, 687 A.2d 371 (Pa. 1997). In that case, the Pennsylvania Supreme Court determined, “[t]he full testimony established that while there may be other uses for the property, the cost of converting the property for those uses is not feasible.” *Id.* at 373. Regardless of whether the

⁹ Column's argument that its proposed use is comparable to other drug and alcohol rehabilitation facilities located within 1,000 feet misses the mark. The relevant inquiry under Section 1329.04(B) is whether the proposed use is more detrimental than that of its predecessor; comparison of the proposed use with other, similar uses is irrelevant.

¹⁰ A validity variance “differs from the ‘normal variance’ in that the ‘normal variance’ is granted to adjust the zoning regulation to the particular property; a validity variance holds that the zoning regulation is restrictive to the point of confiscation and requires the issuance of a variance permitting a *reasonable* use of the land” to prevent an unconstitutional taking. *Hunt v. Zoning Hearing Board of Conewago Township*, 61 A.3d 380, 384-85 (Pa. Cmwlth.) (internal quotation marks and citations omitted), *appeal denied*, 72 A.3d 605 (Pa. 2013).

facility at issue here is comparable to the building in *Halberstadt*, Column offered no evidence of record regarding the infeasibility of using the facility for or converting the facility to a conforming use. Therefore, *Halberstadt* is inapposite.¹¹

Accordingly, because the Board did not err in finding that Column did not intend to continue the County’s preexisting nonconforming use through operating its Center, or in finding that Column failed to satisfy the requirements of a validity variance, we affirm the decision below.

DAN PELLEGRINI, President Judge

¹¹ Although Column also asserts that the Board erred by denying Column’s application for a use variance, it failed to develop this issue in its brief and, therefore, waived it. *See Pennsylvania AFL-CIO ex rel. George v. Commonwealth*, 757 A.2d 917, 924 (Pa. 2000). Similarly, we decline to address Column’s argument that the trial court erred in failing to reverse the Board’s decision because the Board “has displayed a history disregarding and rejecting relevant credible evidence without any supporting evidence or findings permitting it to do so.” (Br. of Appellant, at 53.) For the reasons set forth above, we find that the Board’s findings are supported by substantial evidence. Finally, because Column has been denied the relief necessary to operate its proposed juvenile drug and alcohol rehabilitation center, whether it is entitled to erect a sign identifying the Center is moot.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Column Realty, LLC,	:
Appellant	:
v.	:
The Zoning Hearing Board of the	:
City of Allentown	:
v.	:
The City of Allentown	: No. 1544 C.D. 2014

ORDER

AND NOW, this 30th day of March, 2015, the order of the Court of Common Pleas of Lehigh County dated August 20, 2014, in this matter is affirmed.

DAN PELLEGRINI, President Judge