

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-08-16 : HEARING DATE: September 25, 2008
: :
APPLICATION OF: :
Metro PCS Pennsylvania LLC :
: DATE OF MAILING OF OPINION
: AND DECISION: November 7, 2008
PROPERTY: :
Parcel No. 43-00-05290-40-9 :
3944 West Germantown Pike :
Collegetown, PA 19426 :

**OPINION, DECISION AND ORDER OF THE
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

Applicant Metro PCS Pennsylvania LLC (hereinafter referred to as the "Applicant") filed an application requesting a variance under Section 143-250(E)(2) to permit extension of an existing wireless telecommunications tower by ten feet to a height of 158 feet. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on September 25, 2008 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, the Director of Community Development/Zoning Officer, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Metro PCS Pennsylvania LLC.
2. The subject property is Parcel No. 43-00-05290-40-9, located at 3944 Germantown Pike, Collegetown, Lower Providence Township, Montgomery County, PA.
3. The owner of the property is Crown Atlantic Co., LLC. The Applicant is proceeding with this application with regard to the extension of the existing wireless telecommunications tower on the property pursuant to authority from the owner of the property

and a written Site License Acknowledgement entered into by the owner and the Applicant, which was put into evidence at the hearing as Exhibit A-3.

4. The lot size is 5.39 acres.
5. The applicable zoning is I – Industrial District.
6. The Applicant was represented by Chris H. Schubert, Esquire and Debra A.

Shulski, Esquire, of Riley Riper Hollin & Colagrecio, P.O. Box 1265, Exton, PA 19341, and Michael Murray, Esquire.

7. The property is presently occupied by an existing wireless telecommunications site and facility including a 148 feet tall lattice tower.

8. The Applicant proposes to install a ten feet tall extension of the existing lattice tower with additional antennas.

9. Applicant also proposes to install equipment cabinets at the base of the tower within the existing facility on a ten feet by 16 feet steel platform in the ten feet by twenty feet lease area.

10. The extension of the tower height by ten feet to 158 feet is necessary to enable sufficient wireless coverage for the Applicant and to enable the proposed facility and antennas to satisfy their function in the Applicant's grid system.

11. The ten feet extension of the tower is necessary because of the terrain. The Applicant was unable to co-locate at a lower tower location because of the terrain. There are currently five other wireless carriers using this tower with one other spot reserved for an additional carrier. 158 feet is the minimum height of the tower based on the other uses already taken.

12. A hardship is created by the existing height of the existing structures, the rolling topography and vegetative cover and the limitations of the technology by which radio signals are propagated.

13. The Applicant's propagation analysis presented at the hearing (Exhibits A-5, A-6 and A-7) demonstrated that the extension of the tower is necessary to provide wireless telecommunications coverage, and that the height of the proposed antenna is the minimum height necessary for it to perform its function.

14. The extension of the tower will avoid any need to construct a new tower elsewhere in the Township.

15. A structural analysis was done on the tower and it is and will be structurally sound with the extension added. The Applicant will be adding additional structural supports to the Tower.

16. There will be a 175 foot tower setback, which is sufficient for the proposed tower height of 158 feet.

17. According to Exhibit A-11, an electromagnetic safety consulting report, the maximum exposure at any location of public access from the proposed base station will be far below the relevant FCC exposure limit, and the cumulative signal levels from the existing and proposed wireless communications antennas also will be in compliance with FCC regulations.

18. The Applicant is licensed by the FCC to operate the telecommunications facility, and the facility will be in compliance with all applicable FAA and FCC regulations.

19. There were no residents who appeared and testified against the project.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board.

2. Denial of the requested variances will impose an unnecessary hardship upon the Applicant, including by preventing it from complying with FCC mandates regarding reliable coverage.

3. The hardship is not self imposed, and is due to the unique topographical features of the property, where the proposed site is the only available site in the area that will provide reliable coverage and the tower height is necessary to provide coverage.

4. The authorization of the requested variance is necessary to enable the reasonable use of the property.

5. The grant of the requested variance will not alter the essential character of the neighborhood or the zoning district in which it is located, will not substantially impair the appropriate use of adjacent properties and will not be detrimental to the public welfare. In addition, the requested variance represents the minimum variance that will afford relief.

The Applicant seeks a variance under Section 143-250(E)(2) for an extension of the height of the existing wireless telecommunications tower. That request is in the nature of a dimensional variance, rather than a use variance.

Differing standards apply to use and dimensional variances. Generally, a variance requires the Applicant to show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) (citing Allegheny West Civic Council, Inc. v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997)).

The Supreme Court in Hertzberg held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine

whether the requested relief is for a use variance or a dimensional variance. Id. at 263-64, 721 A.2d at 50. The quantum of proof that is required to establish unnecessary hardship is lesser when a dimensional variance, as opposed to a use variance, is sought. Id. at 258-59, 721 A.2d at 47-48. In addition, 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.” Id. at 263-64, 721 A.2d at 50.

It is only the stringency of the standard in proving an unnecessary hardship that varies, depending on whether a use or dimensional variance is sought. Great Valley School District v. Zoning Hearing Board of East Whiteland Township, 863 A.2d 74, 83 (Pa. Commw. 2004), appeal denied, 583 Pa. 675, 876 A.2d 398 (2005) (citing Zappala Group, Inc. v. Zoning Hearing Board of the Town of McCandless, 810 A.2d 708, 710-11 (Pa. Commw. 2002), appeal denied, 573 Pa. 718, 828 A.2d 351 (2003)); The Friendship Preservation Group, Inc. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Commw. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Commw. 2001).

Despite the trend to apply a relaxed standard to dimensional variances Pennsylvania case law is clear in its approach to the issuing of variances and demands that the reasons for granting a variance must be substantial, serious, and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998). Moreover, variances from zoning codes should be granted sparingly and only under exceptional circumstances; a

variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Commw. 1996).

In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10912.2, where relevant. See Hertzberg, 554 Pa. at 256-57. 721 A.2d at 46-47. The law established by the Pennsylvania courts further establishes these standards, stated in full herein. See Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Commw. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Commw. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

(1) That there are unique 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 that 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.

(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 in issue.

The Applicant has demonstrated, and the Board finds and concludes, that the Applicant will suffer unnecessary hardship if the requested variance is not granted; that the unnecessary hardship is due to the unique physical circumstances or conditions relating to the property, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property; that the unnecessary hardship was not created by the Applicant; that the requested variance 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 that the requested variance is the minimum that will afford relief and will represent the least modification possible of the applicable zoning code provisions.

The Applicant has demonstrated unnecessary hardship. Per FCC mandate the Applicant must operate within its frequency band and provide reliable coverage to subscribers. The proposed ten feet extension of the existing tower to 158 feet is necessary to provide wireless telecommunications coverage in the area, because of the topography in this area. Pursuant to testimony there is not another acceptable location for co-location to fill the coverage gap.

Also, the hardship arises from the unique topography of the property; it is not self-created. Without the variance requested the Applicant will not be able to make reasonable use of the property.

The requested variance represents the minimum relief necessary. The proposed extension of the existing 148 feet tall tower is only ten feet, and the co-location of the Applicant's antennas

on the existing tower will eliminate any need for construction of an additional tower in the Township.

The granting of the requested variance will not alter the essential character of the neighborhood or the zoning district in which it is located, will not substantially impair the appropriate use of adjacent properties and will not be detrimental to the public welfare. The variance is for a minimal extension of an existing wireless telecommunications tower. The property is zoned I – Industrial District. The emissions will be far below what is allowed by the FCC.

DECISION

The following is the decision of the Lower Providence Township Zoning Hearing Board by a vote of 5-0:

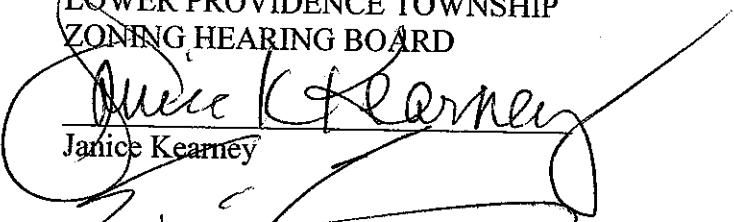
The Applicant's request for relief in Appeal No. Z-08-16, specifically the variance from Section 143-250(E)(2) of the Lower Providence Township Zoning Ordinance to permit the extension by ten feet of an existing wireless telecommunications tower to a total height of 158 feet, is granted.


Dated: November 7, 2008

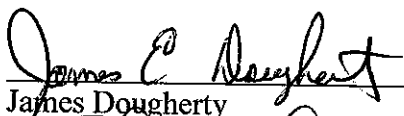
ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.


LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Janice Kearney


Eric Frey


James Dougherty


Robert G. Hardt


William Donovan

NOTE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.

