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November 22, 2017

**VIA FIRST CLASS CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7016 0910 0001 0664 4083**

Michael T. Shiring, Esquire
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717 Constitution Drive
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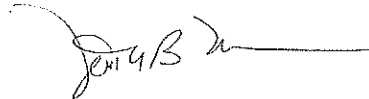
**RE: Lower Providence Township Zoning Hearing Board
Application of Family & Friends Holdings, LLC
Application No. Z-17-16**

Dear Mr. Shiring:

In accordance with your client, Family & Friends Holdings, LLC's application for variances from Lower Providence Zoning Ordinance §143-78.B(2)(a), §143-149 and appeal from the Zoning Officer's determination under §143-156 enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board. Please be sure to advise your client of the condition noted in the Decision and Order.

Should you have any questions, please contact me.

Very truly yours,



Keith B. McLennan

KBM/mac

Enclosure

pc: Kathie A. Eskie, Chairwoman
Gail Hager, Vice Chairwoman
Robert G. Hardt
Joseph Pucci
Patricia Alzamora
Joseph Bergquist
Michael Mrozinski, Community Development Director

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-17-16	:	HEARING DATE: October 26, 2017
	:	
	:	
APPLICATION OF:	:	
Family & Friends Holdings, LLC	:	
127 Second Avenue	:	
Collegeville, PA 19426	:	
	:	
PROPERTY:	:	
109 River Road	:	
Lower Providence Township	:	
Collegeville, PA 19426	:	
Parcel No. 43-00-05422-00-7	:	

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

On October 5, 2017 applicant, Family & Friends Holdings, LLC filed an application requesting variances from the front yard setback requirements of §143-78.B(2)(a) of the Lower Providence Township Zoning Ordinance (the “Ordinance”). Said variance is necessary as a result of the mandates of §143-149 that require compliance with all height, area, width, yard and coverage requirements when altering a non-conforming building in the Ridge Pike West (“RPW”) zoning district. Alternatively, the Applicant sought a variance from §143-149 to avoid the application of §143-78.B(2)(a) requiring the measurement of the front yard setback from the ultimate right-of-way line to extend a non-conforming use. Finally, and also alternatively, Applicant sought to appeal the Zoning Officer’s determination dated July 17, 2017 requiring the Applicant to obtain a variance for non-compliance with §143-149 and §143-78.B(2)(a). The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on October 26, 2017 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, Vice-Chair Gail Hager, members Robert Hardt, and Patricia Alzamora. Also present were

Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Tim Kurek, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicant is Family & Friends Holdings, LLC (“Applicant”).
2. The Applicant was represented by Michael T. Shiring, Esquire, Riley, Riper, Hollin & Colagreco, 717 Constitution Drive, P.O. Box 1265, Exton, Chester County, PA 19341.
3. The subject property is located at the northwest corner of River Road and Germantown Pike with an address of 109 River Road, Collegeville, Lower Providence Township, Pennsylvania, 19426, tax parcel number 43-00-05422-00-7 (hereinafter the “Property”).
4. Applicant purchased the Property on October 8, 2015.
5. The Property is a corner lot having 2 “front yards” under §143-16 of the Ordinance with frontage along both River Road and Germantown Pike.
6. The Property includes a pre-1945 built structure that has been used as apartments in the past but is now vacant and in need of repair (the “Structure”).
7. Germantown Pike is a Montgomery County roadway.
8. River Road is a Commonwealth of Pennsylvania roadway.
9. The applicable zoning district is the Ridge Pike West District (“RPW”), a mixed use district which permits residential, commercial and light industrial uses.
10. Applicant intends to convert the structure from residential to commercial office use to house the offices of Old Family Construction, Inc., d/b/a Basement Waterproofing Specialists.
11. Section 143-78.B.(2)(a) of the Ordinance requires a front yard setback of 0 to 25 feet from the *front lot line*.

12. The front lot line is defined in the definitions section of the Ordinance, §143-6 as the "...line identical with the ultimate right-of-way line."

13. "Frontage" is defined in the definitions section of the Ordinance as "The length of the lot line abutting a street ultimate right-of-way."

14. "ULTIMATE RIGHT-OF-WAY LINE" ("UROW") is defined in the definitions section of the Ordinance as "The line parallel to the center line of any public...road which defines the boundary of the ultimate right-of-way."

15. The UROW depicted in Applicant's plan at Exhibit A-7 as the "RELOCATED RIGHT OF WAY" runs through the northeast corner of the Structure.

16. Accordingly, the existing porch on the northeast portion of the Structure fails to conform to the RPW front yard setback requirements.

17. Applicant proposes to enclose the existing porch along the back of the Structure and build an open air porch along River Road to Germantown Pike and then across the Germantown Pike front of the Structure.

18. Section 143-149 of the Ordinance entitled "Extension of nonconforming use" requires compliance with all height, area, width, yard and coverage requirements in the RPW district when altering a non-conforming building.

19. Applicant seeks variance from §143-78.B.(2)(a) of the Ordinance to permit the extension of the existing non-conformity to enclose the porch in the northeast corner of the Structure despite its inability to satisfy the 0-25 feet setback requirement from the UROW.

20. Alternatively, Applicant seeks to appeal the Zoning Officer's determination that the front yard setback measurement in the RPW district must be from the UROW.

21. There was no adverse public comment regarding this application.

22. The following exhibits were included in the record of the hearing:

APPLICANT:

A-1 Appeal Application

A-2 Zoning Determination dated July 20, 2017

A-3 Ordinance §143-78 and §143-149

A-4 Deed for the Property

A-5 Photos of the Property

A-6 CV of Mark Wallace, Architect.

BOARD:

B-1 Advertisement

B-2 Proof of Publication

DISCUSSION

I. Statement of the Case

The Applicant requests a variances from the front yard setback requirements of Section 143-78.B.(2)(a) of the Ordinance in connection with the proposed extension of an existing non-conforming Structure. The relief sought is dimensional in nature. Applicant requests a variance to permit the extension and enclosure of an existing porch that is otherwise furcated by the UROW in the RPW district where a front yard setback of 0-25 feet from the UROW is required.

II. Variance Legal Standard

A. Dimensional v. Use Variance. There are 2 types of variances, a “dimensional” variance and a “use” variance. Differing standards apply to use and dimensional variances. One who advances a dimensional variance seeks to adjust zoning regulations so that the property can be used in a manner consistent with the zoning regulations. Hertzberg v. Zoning Bd. Of

Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). In contrast, a use variance seeks to use the property in a way that is inconsistent or outside of the zoning regulations. Tidd v. Lower Saucon Township Zoning Hearing Board, Green Gable Investment Partners, LP and Lower Saucon Township, 118 A. 3d 1 (Pa. Cmwlth. 2015).

Regardless of whether the variance sought is a use or dimensional variance, 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. Cmwlth. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). 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. In this case the Board is asked to grant a dimensional variance.

B. The Five Part Variance Test. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

(1) 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) 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) Such unnecessary hardship has not been created by the applicant.

(4) 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) 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.

See also: Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 88 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014); 53 P.S. § 10910.2.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to useless if a variance is denied, and that the proposed use will not be contrary to public interest. However in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, "...courts *may* consider multiple factors, including the economic detriment to the applicant if the variance is 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." 721 A.2d at 50 (italics supplied). In effect, no longer is an applicant required to demonstrate in a dimensional variance case, that the property was close to useless without the variance.

Although Hertzberg eased the burden of proof somewhat for a dimensional variance, it did not remove the variance requirements that are universally applicable to use and dimensional variance cases. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth. 2005). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance and satisfy the five part test articulated above. *Id.*

What is more, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicant's burden of proof and the standards to meet that burden, as follows:

D. Burden of proof. For variances, the burden of proof shall be on the applicant. For special exceptions, the applicant shall be entitled to the special exception unless others can prove that it would adversely affect the public health, safety, morals or welfare.

E. Standards of proof.

(2) Variance case. An applicant for a variance shall have the burden of establishing:

(a) All the requirements of § 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, No. 247, as amended, 53 P.S. § 10910.2;

(b) That literal enforcement of the provisions of this chapter will result in unnecessary hardship, as the term is defined by relevant statutory provisions and case law; and

(c) That the allowance of a variance will not be contrary to the public interest.

(3) Zoning Hearing Board considerations. In considering whether the allowance of a special exception or variance is contrary to the public interest, the Zoning Hearing Board shall consider whether the application, if granted, will:

(a) Substantially increase traffic congestion in the streets surrounding the subject site;

(b) Increase the risk of fire or panic or otherwise endanger the public safety;

(c) Overcrowd the land or create undue concentration of population;

(d) Be suitable for the property in question so as to be consistent with the spirit and purpose of the provisions of this chapter;

(e) Intrude upon the adequacy of natural light and air to adjoining properties;

(f) Create extraordinary burdens on public, private or community water systems or upon groundwaters or wells within the neighborhood;

(g) Overburden the public sanitary sewer system within the Township occasion environmental problems with on-site sanitary sewer installations;

(h) Place undue burdens upon the police, fire, ambulance or other emergency services provided throughout the neighborhood;

(i) Cause adverse effects to the appropriate use of adjacent properties in the neighborhood where the property is located;

(j) Cause risk or danger to the safety of persons or property by improper location or design of facilities for ingress and egress to and from the property in question; or

(k) Otherwise adversely affect the public health, safety, morals or general public welfare of the community.

(4) Burden of proof. In all cases, whether special exception, variance, interpretation, appeals from the Building Inspector or any other appeals lawfully brought before the Zoning Hearing Board, the applicant shall have the burden of proof, including the duty of presenting credible, relevant and pertinent evidence and testimony to persuade the Zoning Hearing Board that the applicant has satisfied the criteria set forth in this section. In addition to the foregoing, where an applicant has been specifically requested by the Zoning Hearing Board to provide specific evidence or testimony on any item set forth in Subsection D(3)(a) through (j), supra, or in the event that any party opposing any application shall claim that the proposal before the Zoning Hearing Board will cause any effects upon the matters addressed in Subsection D(3)(a) through (j), supra; then the applicant's burden of proof shall include the obligation of presenting credible, relevant and pertinent evidence on such topics as to persuade the Zoning Hearing Board that the relief requested by the applicant will not be contrary to the public interest with respect to the criteria placed at issue.

III. Facts Applied to the Legal Standard.

The Applicant has requested a dimensional variance from §143-78.B.(2)(a) of the Ordinance to permit the extension and enclosure of an existing non-conforming porch on the Structure that already has the UROW running through the Structure.¹ §143-78.B.(2)(a) of the Ordinance states:

Article III. RPW Ridge Pike West District

§143-78 Dimensional standards.

B. Nonresidential uses. All nonresidential uses shall conform to the following standards:

(2) Building setbacks.

(a) Maximum front yard: 25 feet (allowing a front yard setback of zero feet to 25 feet, as measured from the front lot line).

¹ Not only does the Applicant seek to improve the non-compliant porch but it also seeks to improve a building that is vacant and otherwise unproductive.

As noted in the Findings of Fact, the front yard setback requirements of the RPW is 0-25 feet from the UROW. Due to the nature of the property and the UROW, it is impossible for the Applicant to comply with the RPW front yard setback requirement.² This impossibility was not created by the Applicant, in fact, such impossibility was created when Lower Providence Township passed and created the RPW district well after the construction of the Structure prior to 1945.

Further, although it is possible that in the future the Commonwealth of Pennsylvania, through the Pennsylvania Department of Transportation (“PENNDOT”) may seek to expand River Road into the UROW, that appears unlikely. Although the Township is experiencing more development, so far PENNDOT has exhibited no inclination to alter River Road such that the UROW would be impacted. Regardless, the Applicant has agreed to assume the risk of condemnation of the Property by PENNDOT in the future should it need to enforce its UROW.

What is more, arguably this is a case of a de minimis variance from the front yard setback. The de minimis doctrine, supports a dimensional variance where there are only minor deviations from dimensional requirements of the Ordinance.³ Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Cmwlth. 1996).

Finally, the intent of the RPW district as stated in §143-75 of the Ordinance is to:

- encourage development along Germantown Pike from the intersection with Ridge Pike almost directly across from the Property;
- Improve the safety and appearance of the RPW district;
- Provide opportunities for well-designed commercial development; and
- Promote the reuse of existing buildings.

The Applicant has established that without the variance it would suffer an unnecessary

² As noted in the testimony, under the existing RPW ordinance measuring the setback from the UROW would mean that most of the eastern portion of the Structure is non-compliant.

³ Although not dispositive, it is perhaps persuasive that if the measurement for the front yard setback was from the existing right of way line rather than the UROW the Applicant would be in compliance with the RPW district Ordinance by 2.33 feet.

hardship under Hertzberg. Not only are the physical characteristics of the property such that the property could not be used for any permitted purpose but to make it compliant with the RPW district half the Structure would need to be removed having a devastating impact on the value of the Property. See: Solebury Twp. v. Solebury Twp. Zoning Hearing Bd., 914 A.2d 972 (Pa.Cmwlth. 2007).

This hardship is not self-imposed.⁴ The relief requested is the minimum variance that will afford the required relief. The 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.

Accordingly, due to the unique characteristics of the Property, it's becoming non-conforming due to the passage of the RPW district Ordinance, the unlikely use of the UROW and the avowed intention of the RPW district the grant of the requested variance is reasonable. Accordingly, the Board finds that the requested variance from Lower Providence Township Zoning Ordinance §143-78.(B)(2)(a) regarding a 0-25 foot front yard setback from the UROW is GRANTED.

Inasmuch as the Applicant has prevailed with its variance request, the variance request from §143-149 and appeal of the Zoning Officer's determination under and §143-156 are denied as moot.

CONCLUSIONS OF LAW

1. The unique physical circumstances and characteristics of the Property particularly its size, shape and location create an unnecessary hardship upon the Applicant.

⁴ Arguments have been made in the past that by knowing the restrictive zoning at issue and then purchasing the Property an Applicant created their hardship. Although an appealing argument, the law is quite clear that knowing the property was subject to a zoning restriction when purchasing does not amount to a self-induced hardship. Unless the hardship arises from the purchase itself, as where the price paid was too compelling, the mere acquisition of the property does not create the hardship. Manayunk Neighborhood Council v. Zoning Board of Adjustment of the City of Philadelphia, 815 A.2d 653 (Pa. Cmwlth. 2003).

2. Because of the nature of the Property the Applicant cannot develop the property in strict conformity with the Ordinance.

3. The variance is necessary to enable the reasonable use of the Property.

4. The hardship was not created by the Applicant.

5. The variance will not alter the essential character of the neighborhood, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

6. The variance represents the minimum variance that will afford relief and will represent the least modification possible of the RPW district Ordinance.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-0 vote is as follows:

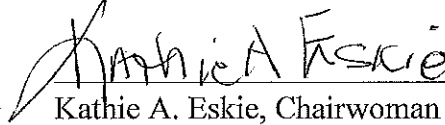
The requested variance from §143-78.B.(2)(a) of the Lower Providence Township Zoning Ordinance regarding a 0-25 foot front yard setback from the ultimate right-of-way is GRANTED provided that no further extension of the existing porch is made into the existing ultimate right-of-way.

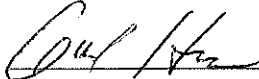
Dated: November 22, 2017

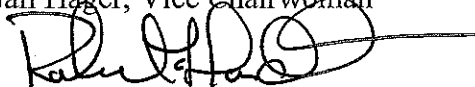
ORDER

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

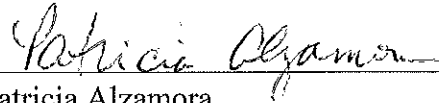
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman


Gail Hager, Vice Chairwoman


Robert G. Hardt

Joseph Pucci


Patricia Alzamora

Joseph Bergquist, Alternate

NOTICE 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.