

APPLICATION NO.	Z-19-11	:	HEARING DATE:	June 27, 2019
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APPLICATION OF:		:		
Janet Tompkins		:		
		:		
PROPERTY:		:		
132 Oakdale Avenue		:		
Lower Providence Township		:		
Trooper, PA 19403		:		
Parcel No. 43-00-09658-00-1		:		

The applicant, Janet Tompkins (hereinafter “Applicant”) filed an application requesting a variance from the side property/lot line deck projection requirements of §143-30.A.(2)(a) of the Lower Providence Township Zoning Ordinance (“Ordinance”) in connection with the construction of an unenclosed deck on the rear of their 18,650 square foot lot up against the side property line. Section 143-37(A)(2) of the Ordinance requires a minimum side yard setback of twenty (20) feet while §143-30.A.(2)(a) permits an unenclosed deck to project into the rear yard 16 feet¹ provided that in “no event” may it extend closer than 10 feet to the side property/lot line. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (“Board”) on June 27, 2019 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, members, Gail Hager, Joseph Pucci, Patricia Alzamora and Christopher Gerdes. Also present were, Michael Mrozinski, the Director of Community Development responsible for

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Zoning/Code Enforcement,² Paula Meszaros, the Court Reporter and Keith B. McLennan, Esq., the Solicitor.

FINDINGS OF FACT

1. The Applicant is Janet M. Tompkins the record owner of one side of a twin with an address of 132 Oakdale Avenue, Trooper, Lower Providence Township, Montgomery County, Pennsylvania, 19403 parcel number 43-00-09658-00-1(hereinafter the "Property").³

2. The applicable zoning district is the R-2, residential district.

3. The present use of the Property is residential.

4. The building was constructed in the early 1900's as a duplex with each side having its own lot.

5. The Applicant's home on the lot was constructed prior to the passage of the Ordinance and is thus non-conforming.

6. The Property has a lot size is 18,650 square feet, in a district primarily of single family homes.

7. Applicant was not represented by legal counsel however, her brother, William Tompkins, appeared on her behalf asserting that he had "some experience" in zoning matters having served for 12 years on the zoning committee of the Hatboro Borough Council.⁴

8. Applicant wishes to construct a 16' x 12' wooden deck, 52" off the ground on the rear of her home up against the Property's side property/lot line.

9. Applicant also wishes to construct a 16' x 20' lower deck 24" off the ground

² The Zoning Officer identified in §143-154 as responsible for the administration of the zoning ordinance.

³ The diagram prepared by the Applicant and attached to the Application indicates that Ms. Tompkins is the owner of the Property with one Patrick Vivona however, only Ms. Tompkins signed the Application and the deed attached thereto indicates that Ms. Tompkins is the sole owner.

⁴ Although it is unusual for a non-lawyer, non-resident, family member of an applicant to appear before the Board, a quasi-judicial body, as a representative, based upon his representation that he had experience with zoning matters, there was no objection raised to Mr. Tompkins' presentation.

connected by stairs to the 16' x 12' foot deck 10' from the Property's side property/lot line.

10. Applicant has an existing covered porch on the rear of her home to which she proposes to attach the 16' x 12' deck.

11. In or about the spring, the Township was alerted by a neighbor to the construction of a deck on the rear of the Property.

12. Visual inspection by the Township confirmed that construction had already commenced and footers for the proposed deck were already placed at least one foot from the side lot property line.

13. Inasmuch as there was no building permit of record for that construction the Applicant agreed to cease construction until a building permit was obtained.

14. Upon review of Applicant's building permit application it was discovered that the Applicant sought to place its deck against the side property/lot line which was precluded by Ordinance sections 143-37.A.(2) and §143-30.A.(2)(a).

15. On April 25, 2019, the Township notified the Applicant that the construction of the deck as proposed failed to meet the Ordinance and therefore the building permit application was denied.

16. The Applicant sought to appeal the Director of Community Development's determination that the proposed deck violated the side property/lot line setback and projection requirements of the Ordinance asserting, among other things, that there was no side yard to project into.

17. Failing a successful appeal of the Township's determination, Applicant sought a variance from §143-30.A.(2)(a) of the Ordinance to permit the construction of the deck against the side property line.

18. Applicant contends that as a “twin” home or duplex there is no side yard and, as a result, there can be no encroachment on a side lot or property line.

19. Despite there being two homes constructed upon the lot and a property line that bisects them running to the rear of the Property, Applicant equates the twin home as being constructed on what, in the Ordinance, is otherwise defined as a single family lot with two sides, a front and a back.

20. Applicant further asserts that the Ordinance was flawed since it prohibited the extension of the non-conformity which is otherwise permitted under §143-149.

21. Applicant hypothesized that since §143-149 required that any non-conforming structure, alteration or extension was required to otherwise comply with all height, area, width, yard and coverage requirements for the R-2 district, it effectively denied her the right to build a deck against the side property line just as the house was constructed.

22. The proposed deck could be located adjacent to the existing covered porch at the head of the driveway and comply with the side property/lot line setback and projection requirements of §143-37(A)(2) and §143-30.A.(2)(a) of the Ordinance but would not provide the Applicant her preferred location straight back from the covered porch.

23. Other than the objection in the spring that alerted the Township to the construction of the deck without a building permit, there was no adverse public comment regarding the purpose of the Application.

24. The following exhibits were included in the record:

A-1 Application;

A-2 Google Maps aerial image of the Property and surrounding homes;

B-1 Public Notice of the Application;

B-2 Mailing matrix to neighbors within 500 feet;

B-3 Certificate of Notification;

B-4 Legal Notice in the newspaper;

B-5 Certificate of Posting the property with the notice of the Application;

B-6 April 25, 2019 Letter from Michael Mrozinski, Director of Community Development for Lower Providence Township.

DISCUSSION

I. Statement of the Case

Applicant requests that the Board overrule the Township Community Development Director's determination that the proposed deck is precluded by §143-30.A.(2)(a) of the Ordinance. Alternatively, the applicant requests that the Board grant it a variance from §143-30.A.(2)(a) to allow a 12 by 16 foot deck to be constructed against the side property lot line where the Ordinance clearly states that it can be no closer than 10 feet to any "side property line." Finally, the Applicant asserts that her request to construct the deck against the side property line should be granted because: (i) §143-30.A.(2)(a) is at odds with §143-149 regarding the extension of the existing non-conforming use through the construction of the deck against the property line, and (ii) requiring her to construct the deck to conform with all height, area, width, yard and coverage requirements of the R-2 district then in existence as mandated by §143-149 denies her the right to extend the nonconformity.

The applicable Ordinance sections in pertinent parts with emphasis supplied by italics follow:

§ 143-19. Accessory uses and accessory buildings/structures; bus shelters.

B. Residential accessory building/structures. Accessory buildings/structures, as defined in § 143-6, shall be permitted in all residential districts subject to the provisions of § 143-27,

the limitations herein set below and any additional limitations established in the provisions of the applicable to the zoning district:

(2) Except as permitted herein below, all accessory buildings/structures on the same lot shall meet all of the zoning district setback requirements in the zoning district in which it is located that are applicable to the principal building on the same lot.

§ 143-30. Projection of awnings, patio covers, patios and decks into yards.

A. Projection of unenclosed awnings, patio covers, patios and decks. Projection of unenclosed awnings, patio covers, patios and decks shall be permitted in all residential districts subject to the following provisions:

(2) Rear yard intrusion.

(a) In all residential districts except in the R-4 and R-5 Districts, unenclosed awnings, patio covers, patios and decks shall be permitted to extend or project into the rear yard lot area a distance not to exceed 16 feet; provided, however, that *in no event shall any unenclosed awning, patio cover, patio or deck extend closer than 20 feet to the rear lot line or closer than 10 feet to any side property line.*

§ 143-37. Area, setback, bulk, height and parking requirements.

A. Site area or building lot area.

(2) The minimum building lot size, width and area requirements shall be determined by availability of public water and sanitary sewer service, as follows:

Requirement	Both Water and Sanitary Sewer Service
Side yard	20 feet
Rear yard	60 feet

§ 143-149 Extension of nonconforming use.

Any lawful nonconforming use of a portion of a building may be extended throughout the building, and any lawful nonconforming building or any building of which a lawful nonconforming use is made may be extended upon the lot occupied by such building and held in single and separate ownership on the effective date of this chapter, provided that the area of such building shall not be increased by more than a total of 25% of the area of such building existing on the date it first became a lawful nonconforming building or a building of which a lawful nonconforming use is made, and *provided further that any structure alteration, extension or addition shall conform with all height, area, width, yard and coverage*

requirements for the district in which it is located.

The applicable Ordinance definitions are set forth in pertinent part with emphasis supplied by italics as follows:

§ 143-6 Definitions.

B. Unless otherwise expressly stated, the following words shall, for the purpose of this chapter, have the meanings herein indicated:

ACCESSORY BUILDING/STRUCTURE

A building/structure which is subordinate, accessory, incidental, and customarily associated with a principal building on the same lot in the applicable zoning district and used for purposes of a permitted accessory use.

ACCESSORY USE

A use which is subordinate, accessory, incidental, and customarily associated with the principal use permitted in the applicable zoning district.

DWELLING

A building or part of a building constructed for or intended for occupancy as a permanent residence, containing one or more dwelling units.

Dwellings may include but shall not be limited to the following types, not considering ownership or leasing arrangements:

(1) SINGLE-FAMILY DWELLING

A freestanding residential building of one or more dwelling units which may or may not have common walls or floors *and is constructed on one lot or adjacent lots, with each dwelling unit having direct entrance from the outside and having yard or private open space assigned for the exclusive use of the occupants of the dwelling unit located immediately adjacent to the unit.* "Single-family dwellings," for the purposes of this chapter, are further defined as:

(a) SINGLE-FAMILY DETACHED

A building of one dwelling unit constructed on one lot and having yard area on all sides of the dwelling unit.

(b) SINGLE-FAMILY ATTACHED

A building or more than one dwelling unit constructed to be a:

[1] Two-family unit: two dwelling units on one lot, attached side by side, having one wall or floor in common, with yard area on all sides of the dwelling units;

[2] Duplex: two dwelling units on two adjacent lots, attached side by side, having one common wall, with yard area on at least three sides of each dwelling unit;

LOT

A parcel of land which is occupied or is to be occupied by one principal building or other structure or use, together with any necessary buildings or other structures or uses, customarily incidental to such principal building or other structure or use, and such open spaces as are arranged or designed to be used in connection with such principal building or other structure or use, such as open spaces, and the area and dimensions of such lot being not less than the minimum required by this chapter. The term "lot" as used in this chapter is used for purposes of describing zoning requirements and, as such, is not limited to being a tax lot or deeded lot. The term "lot" or "building lot" means the same when used in describing regulations based upon buildings.

LOT AREA

The total horizontal area of the lot lying within the lot lines, provided that, for the area of any lot abutting a road, the area shall be measured to the ultimate right-of-way line. Lot area shall exclude any public right-of-way but shall include the area within any easement. Lots shall be measured in square feet in lots up to three acres in size and, for lots over three acres, it shall be measured in acres.

LOT LINE

(1) *Any property boundary line of a lot*, further defined as follows:

(a) Front lot line: the line identical with the ultimate right-of-way line. Also known as "street line."

(b) Rear lot line: the line or lines most nearly parallel or concentric to the front lot line.

(c) *Side lot lines: the lines most nearly perpendicular or radial to the front lot line.* On a corner lot, the side lot line shall be the line or lines most nearly perpendicular or radial to the higher classification of street, where applicable, as described in the Township Comprehensive Plan. The remaining line shall be considered the rear lot line.

(2) A lot which fronts on more than one street shall have a front lot line on each street frontage.

(3) *A property boundary line of any lot held in single and separate ownership*, except that, in the case of any lot abutting a street, the lot line for such portion of the lot as abuts the street shall be deemed to be the same as the street line and shall not be the center line of the street or any other line within the street line, even though such may be the property boundary line.

LOT WIDTH

The horizontal distance between side lot lines, measured at the building line, parallel or concentric to the ultimate right-of-way line. For a corner lot, lot width shall be measured parallel or concentric to the ultimate right-of-way line of the higher classification of street, where applicable.

PROPERTY LINE

Has the same meaning as "lot line."

RESIDENTIAL USE

An existing or proposed dwelling or dwelling unit on a lot.

RESIDENTIAL LOT LINES

The lot line of a lot containing an existing dwelling or the lot line of undeveloped land zoned as a residential district.

SITE

A land area having metes and bounds description and distinguished by the fact that development of the area is existing or intended to exist, and the land development of the area is existing or intended to exist, and the land development has or shall be undertaken comprehensively as a whole. A site contains one or more buildings and/or building lots, a circulation system and supporting facilities.

STRUCTURE

Any form or arrangement of building materials involving the necessity of providing proper support, bracing, tying, anchoring *or other protection against the forces of the elements.*

YARD, REAR

A yard extending the full width of the lot along the rear lot line and extending in depth from the rear lot line to the nearest point of any structure on the lot.

YARD, SIDE

A yard extending the full depth of the lot along a side lot line and extending in width from such side lot line to the nearest point of any structure on the lot.

II. Variance Legal Standard.

A. 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.

B. Dimensional v. Use Variance.

There are two types of variances, a “dimensional” variance and a “use” variance.

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). A dimensional variance is at issue in this case.

Regardless of the type of variance sought, 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); Sotencanos, Inc. v. Zoning Board of

Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998).

III. Dimensional Variance Legal Standard.

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)).

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.Cmwlt. 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. In addition, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicants' burden of proof and the standards to meet that burden as follows:

C. 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.

D. Standard 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 ground waters 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.

IV. Facts Applied to the Legal Standard.

As noted previously the Applicant has requested that the Board (i) determine that the Zoning Officer's application of §143-30.A.(2)(a) to the deck under construction is erroneous claiming that there is no side yard; or (ii) that a variance from §143-30.A.(2)(a) is appropriate due to the hardship she would encounter by not being permitted to finish construction of her deck; or (iii) the application of §143-30.A.(2)(a) denies her the right to extend the non-conformity of her dwelling otherwise permitted by § 143-149 of the ordinance. Applicant's arguments will be addressed in that order.

A. Zoning Officer's April 25, 2019 application of §143-30.A.(2)(a). Applicant initiated construction of her deck without a building permit and thus without regard for the Township building code. Inevitably this led to a complaint to the Township which prompted an investigation, confirmation and a cessation of work on the deck pending the application for and issuance of a building permit. Her application for that building permit revealed that she intended to construct a deck on the rear of her property which is generally permitted by the Ordinance provided that under §143-30.A.(2)(a) "...in no event shall any ... deck extend closer than **20 feet to the rear lot line** or closer than **10 feet to any side property line.**" (Emphasis supplied). Applicant proposed to construct the deck up against the property

line that bisects her lot from that of her neighbor. Mr. Tompkins, Applicant's brother and advocate asserted that as a duplex, there was no *side yard* and therefore no application of the side yard setback requirements in the R-2 residential district of 20 feet under §143-37(A)(2). Mr. Tompkins further asserted that if there was no *side yard*, the Zoning Officer was wrong to apply §143-30.A.(2)(a) to the proposed deck conflating side yard with a "side property line." By doing so, Mr. Tompkins and thus the Applicant ignore the express terms used and their definitions under the Ordinance. For example, the term "Property Line" is defined in §143-6 as having "...the same meaning as "lot line." "Lot Line" is defined in pertinent part as:

(1) *Any property boundary line of a lot*, further defined as follows:

(a) Front lot line: the line identical with the ultimate right-of-way line. Also known as "street line."

(b) Rear lot line: the line or lines most nearly parallel or concentric to the front lot line.

(c) *Side lot lines: the lines most nearly perpendicular or radial to the front lot line.* On a corner lot, the side lot line shall be the line or lines most nearly perpendicular or radial to the higher classification of street, where applicable, as described in the Township Comprehensive Plan. *The remaining line shall be considered the rear lot line.*

(2) A lot which fronts on more than one street shall have a front lot line on each street frontage.

(3) *A property boundary line of any lot held in single and separate ownership*, except that, in the case of any lot abutting a street, the lot line for such portion of the lot as abuts the street shall be deemed to be the same as the street line and shall not be the center line of the street or any other line within the street line, even though such may be the property boundary line. (Italics supplied).

LOT WIDTH

The horizontal distance between side lot lines, measured at the building line, parallel or concentric to the ultimate right-of-way line. For a corner lot, lot width shall be measured parallel or concentric to the ultimate right-of-way line of the higher classification of street, where applicable. (Italics supplied).

By their very definitions a "lot" and "lot line" necessarily include front, rear and side boundaries. In fact the Applicant acknowledged both in the diagram attached to her Application and at the hearing that her home was constructed on its own lot with a boundary/property line running directly through the middle of the duplex home all the way back to the rear property line. To now ignore that property line to subscribe to the Applicant's argument that no side yard exists and thus there is no side property/lot or boundary line the Board would be required to ignore the plain meaning of the definition of lot line and defy both reality and logic. The Board cannot engage in such mental gymnastics for the mere purpose of permitting the Applicant to utilize the footers installed without a permit approximately one foot from the side property line so that she could finish construction of her deck abutting the side property line. This is particularly true where, as here, the deck could be located partially or fully adjacent to the existing covered porch providing connection continuity with her home and compliance with the Ordinance.

Furthermore, the definition of "SITE" is illustrative:

SITE

A land area having metes and bounds description and distinguished by the fact that development of the area is existing or intended to exist, and the land development of the area is existing or intended to exist, and the land development has or shall be undertaken comprehensively as a whole. A site contains one or more buildings and/or building lots, a circulation system and supporting facilities.

As noted in the definition in order to measure a land area, a metes and bounds description is necessary. The Applicant acknowledged that requirement by attaching a copy of her deed for the Property to her Application. The deed clearly includes a metes and bounds description that establishes her property as rectangular having a front, rear and side property lines. It is disingenuous to now assert that there is no property lot line or that the one at issue is

not a side lot or property line.⁵

B. Variance from §143-30.A.(2)(a).

Alternatively, Applicant argues that if the Zoning Officer's determination is sustained she would be subject to a hardship, not of her own making should she be denied to complete the deck utilizing the footers poured without a building permit a foot from the property line that divides the neighbor's yard from her yard. In order to prove a hardship §143-168.C. of the Ordinance places the burden of proof squarely upon the Applicant. That burden required the Applicant to establish that:

1. *There are unique physical circumstances, or conditions, including irregularity, narrowness or shallowness of lot size or shape or exceptional topographical or other physical conditions regarding the property.*

Applicant offered no evidence that her Property was in anyway different from any other duplex within or without the Township. In fact, she testified and her exhibit A-1 demonstrates that the lot is rectangular in shape with a size of at least 50 feet wide and over 200 feet deep. As was learned in geometry class, a rectangle has four straight sides, four right angles and two sides longer than the other two; the subject Property is no different. Further there was nothing remarkable presented regarding exceptional topographical or other physical conditions regarding the Property.

2. *Because of the unique physical conditions of the property there is no possibility that the property can be developed in strict conformity with the Ordinance and thus a variance is necessary to enable reasonable use of the Property.*

Inasmuch as Applicant failed to establish that there were any unique physical conditions

⁵ Applicant should be careful for what she wishes for. If the Board was to accept the her argument that there is no side yard and therefore no side property/lot line bisecting the duplex and running all the way to the rear lot line, her acknowledgement that a property line perpendicular to the front lot line bisects the duplex and runs through the rear of the Property would necessarily make that lot line a rear lot line. §143-37.A.(2) requires a rear yard setback from the rear yard property line of 60 feet in the R-2 district. Moreover, as noted in §143-30.A.(2)(a) "...in no event shall any ... deck extend closer than 20 feet to the rear lot line..." making Applicant's position worse than if the property/lot line at issue were a side lot line.

associated with the Property this part of the five-part variance test is lacking. In fact, even if Applicant's assertion that a duplex makes the Property unique, the evidence demonstrates that in order to comply with the Ordinance all the Applicant had to do was to shift the proposed deck toward the accepted side property line such that it was connected to the existing covered porch but off the side property/lot line held in common with 134 Oakdale Road. Thus a variance is unnecessary for the Applicant to reasonably use her property.

3. *The unnecessary hardship was not created by the Applicant.*

So far, the Applicant has failed to establish a hardship, let alone one that is unnecessary. Regardless, any hardship is self-imposed. The key to any such determination is whether the Applicant has *reasonable* use of her Property. Applicant has acknowledged the significant lot size of her property. Further, it is evident from the diagram provided by her that the deck can be shifted east so that it is 10 feet off the side property/lot line with 134 Oakdale in compliance with §143-30.A.(2)(a). Applicant asserted that any such shift would impede her driveway. However, the aerial image of the Property provided by the Applicant belies this assertion. Shifting the deck a few feet may not be exactly what the Applicant wants however, as our Supreme Court has consistently held, 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). Unilateral choice or preference of the Applicant for the placement of her deck where alternative placement is available is not a substantial, serious or compelling reason.⁶

⁶It is submitted that the real reason Applicant is not enamored with shifting the deck is that she has, without a permit, already installed concrete footers for the deck 1 foot off of the side property/lot line and does not wish to

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

Although Applicant asserted in her presentation that the deck placed up against the neighboring property line will in no way alter the character of the neighborhood, permanently impair the development of adjacent property nor be detrimental to public welfare presumably at least one neighbor believed it would otherwise the Township would not have received a complaint regarding the placement of the deck. Further, Applicant offered no evidence to address what impact a deck placed up against the property line might have upon her neighboring duplex and development that its owner may have for that property or its resale value.

5. *The variance sought would represent the minimum variance that would afford relief and would be the least modification of the regulation at issue.*

As noted already, Applicant seeks to override the 10 foot side property/lot line requirement in toto. Despite given the opportunity at the hearing to provide some setback from the side property/lot line the Applicant dismissed it out of hand. Clearly anything short of elimination of §143-30.A.(2)(a) is unacceptable to the Applicant; so much for the least modification of the regulation at issue.

Fundamentally, variance rules are designed to protect the decision of the legislative body (here the Board of Supervisors) in enacting the zoning ordinance and to make sure that the Ordinance is not “adjusted” out of existence by variance. O’Neill v. Zoning Board of Adjust., 434 Pa. 331, 254 A.2d 12 (1969). It is well settled that zoning boards and courts cannot substitute their concept of what the zoning ordinance should be, their function is only to enforce the zoning ordinance in accordance with the applicable law. Kline Zoning Case, 395 Pa. 122,

124-5, 148 A.2d 915, 916 (1959). The Applicant has failed to justify the need for a variance.

The Applicant failed to meet her burden of proof under 143-168.A.C. & D. by presenting credible, relevant and pertinent evidence to persuade the Board that the relief requested will not be contrary to the public interest in preserving those reasonable zoning regulations at issue.

C. Extension of Nonconforming Use under §143-149.

Applicant's brother took great pains to assert that as a non-conforming use the Applicant had the unbridled right to construct the deck up against the side property/lot line as an extension of the dwelling asserting that denial would render §143-149 a nullity.⁷ Failing that, he asserted that the provisions of §143-149 requiring that any structure alteration, extension or addition of a non-conformity must conform to all height, area, width, yard and coverage requirements for the district in which it is located was an incongruity. In effect, Applicant asserts that where an owner of a non-conforming lot seeks to extend a dimensional non-conformity the dimensional restrictions such as the ones at issue are permanently waived. Appellant's argument would render her non-conforming property fundamentally superior to a conforming property. The Commonwealth Court addressed that very argument in Jenkintown Towing Service v. Zoning Hearing Board of Upper Moreland Township, 67 Pa. Cmwlth. 183, 446 A.2d 716 (1983) and held it unacceptable. In fact the Court addressed the very issue of setbacks when it stated that as a general rule, allowing non-conforming properties such additional expansion rights "...would effect a kind of permanent waiver of setback and other similar requirements, placing the nonconforming use in a favored position, compared with conforming uses." See also, *Ryan on Zoning*, §7.7.3 and Appeal of Horsham Township, 103

⁷ He even went as far as to argue that an uncovered deck, exposed to the elements was living space the same as the dwelling to justify his assertion that it was a mere extension of the non-conformity.

Pa. Cmwlth. 508, 520 A.2d 1226 (1987) where expansion of the non-conformity was denied when such expansion increased the violations of the applicable dimensional limitations in the zoning district.

Accordingly, despite Applicant's strenuous arguments, she does not maintain a "get out of jail free card" with respect to the dimensional restrictions of §143-149, her deck must comply with 143-30.A.(2)(a).

V. Conclusion

Applicant believes that whatever she determines is the ultimate and efficient use of the property should dictate the outcome of her Application, not the standards developed by the Supervisors when they passed the Ordinance. In fact, the Applicant was unwilling to take any steps in an effort to lessen the encroachment of the deck on the side property/lot line. Accordingly, the Board finds that: (i) the Zoning Officer's April 25, 2019 determination that the proposed deck violated §143-30.A.(2)(a) was appropriate and correct, and (ii) Applicant has failed to demonstrate any hardship, unique or unnecessary, which requires the grant of a variance from the limitation on the construction of a deck up against the side property/lot line in the R2 zoning district, and (iii) §143-149 is valid on its face and Applicant must comply with the dimensional restrictions thereunder requiring compliance with §143-30.A.(2)(a) if the construction of the proposed deck is determined to be an extension of a non-conforming use.⁸

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.

⁸ Although Applicant asserted that a deck was a "portion" of the dwelling and thus its construction was an extension thereof such a determination has not been made by the Board.

2. §143-30.A.(2)(a) of the Ordinance requires that the proposed deck be at least 10 feet from the side property/lot line that bisects the duplex from the front yard to the rear yard.

3. Denial of the requested relief will not impose an unnecessary hardship on the Applicant.

4. Any hardship, is entirely self-imposed, and is due to the Applicant's unilateral desire for a deck to adjoin the existing covered porch of her dwelling for aesthetic as well as installation of a second deck as depicted in her diagram attached to her Application rather than due to any unique physical circumstances of the Property.

5. The requested relief is not necessary to enable the Applicant's reasonable use of the Property.

6. There was no evidence introduced to demonstrate that construction of the deck in compliance with the Ordinance could only be achieved at prohibitive expense.

7. The proposed variance does not represent the minimum variance that will afford relief and fails to represent the least modification possible of §143-30.A.(2)(a) of the Ordinance.

8. Any hardship experienced by the Applicant was self-imposed.

9. Section 143-149 of the Ordinance is valid and enforceable.

10. Any extension of the non-conforming use must comply with the dimensional requirements of the R-2 zoning district.

DECISION

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

1. Applicant's request that the Director of Community Development's April 25,

2019 determination that the proposed deck violated the side property/lot line setback and projection requirements of §143-30.A.(2)(a) of the Ordinance was erroneous is DENIED.

2. Applicant's request for a dimensional variance from §143-30.A.(2)(a) of the Ordinance to construct a deck up against the side property/lot line in the R2 zoning district is DENIED.

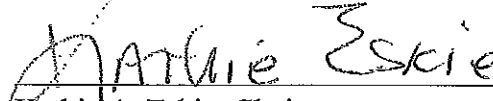
3. Applicant's request that the Board determine that Ordinance §143-149 regarding extension of a non-conforming use is a nullity or that Applicant has no obligation to comply with the dimensional requirements of the R-2 zoning district are DENIED.

Dated: August 7, 2019

ORDER

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

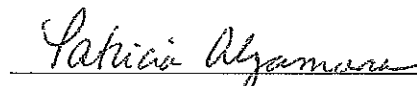
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


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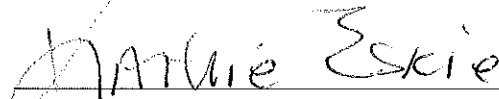
NOTICE TO APPLICANT

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.

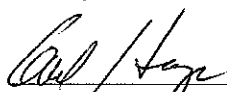
ORDER

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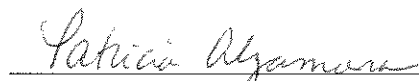
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