

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-19-18	:	
	:	
APPLICATION OF:	:	
MOSER CONSTRUCTION CO.	:	
101 Stewart Lane	:	
Chalfont, PA 18914	:	
and	:	
GRACE BUILDING CO., INC.	:	HEARING DATE: September 26, 2019
P.O. Box 4008	:	
Rydal, PA 19046	:	
	:	
PROPERTY:	:	
Fifth St. between 2915 Fifth St. and	:	
the house at the corner of 5 th St. and	:	
Sunnyside Avenue	:	
Being block 21, Units 21 and 22	:	

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

INTRODUCTION AND BACKGROUND

The applicant, Moser Construction Co. and Grace Building Co., Inc. (collectively, “Applicants”) filed an application requesting variances from section 143-37 of the Township Zoning Ordinance with respect to lot size, lot coverage, and yard setbacks, and section 143-20, requiring access to a public street.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on September 26, 2019 at 7:00 p.m. at the Lower Providence Township Building. The following members of the Board were present: Kathie Eskie, Chairperson, Patricia Alzamora, Member, Chris Gerdes, Member, Gail Hager, Member, Robert Hardt, Member, and George Ozorowski, Member. Joseph E. Bresnan, Esquire served as conflict counsel to the Zoning Hearing Board.

The following persons sought party status on the basis of their proximity to the subject location. Such status was not opposed by Applicant and was granted by the Board.

David Meckes, 419 Sunnyside Avenue
John Meckes, 2915 5th Street
Helen Beswick, 501 Sunnyside Avenue
Harry Cornog, 2930 4th Street
Elaine Meckes, 2915 5th Street
Phyllis DiCicco, 640 Hillside Avenue
Patrick McKernan, 2912 7th Street
Stacey Rymkiewicz, 400 Hillside Avenue
John Munro, 2981 6th Street
Joan Munro, 2981 6th Street
Christopher Wrigley, 502 Hillside Avenue
Carl Allen, 2992 6th Street
Anthony DiCicco, 640 Hillside Avenue
Taylor Hallowell, 2952 2nd Street
Brian Heiser, 2976 5th Street
Betty Allen, 2992 6th Street
Bob Gamache, 501 Hillside Avenue
Paul Cook, 2990 6th Street
Debbie Lepine, 601 Hillside Avenue
Daria Cook, 2990 6th Street
Jeff Sarnocinski, 400 Hillside Avenue
Larry Povlow, 2996 6th Street
Danielle Lepine, 601 Hillside Avenue

This application was heard in conjunction with two other applications from the same Applicants, each involving undersized parcels in close proximity with one another. By agreement of all parties, and in order to streamline the hearing process, Applicants first presented, at this application number, evidence that was common to all three applications. Thereafter, that testimony was incorporated by reference into the other two hearings, and at each application number Applicants separately presented evidence that was unique to that particular application. The other two matters were, respectively, Z-19-19 and Z-19-20.

FINDINGS OF FACT

1. The Applicants are Moser Construction Co. and J. Grace Building Co., Inc.
2. Applicant Grace Building Co is the record owner of the subject property, and Applicant Moser Construction Co. is the equitable owner. Applicants are represented by G. Michael Carr, Esquire.
3. The present use of the Property is single family residential, R2 zoning district.
4. The Property is approximately 60 x 100 feet or 6000 square feet. The lot size requirement, 143-37, is 25,000 square feet.
5. The property does not front a public street; Section 143-20 of the zoning ordinance requires every lot to abut a street for at least 50 feet. As shown on the plans, the manufactured home would be 14 feet wide and 66 feet long. (NT 39). The front yard setback would be 33 feet and the rear yard setback would be 14 feet. The ordinance at section 143-37 requires a 50 foot front yard and a 60 foot rear yard.
6. The lot predates the Township's adoption of its zoning ordinance (NT 49).
7. Applicants were previously denied variance relief partly because the previously requested relief was found by the Board to not be the minimum possible relief. That application, Z-19-15, is on appeal to the Court of Common Pleas but at the same time, Applicants seek through this application to seek variances based upon a smaller home than the home that was proposed in a previous proceeding.
8. Charles Breinig was sworn and was qualified as an expert witness in the areas of real estate and land development (NT 34).
9. Mr. Breinig offered the opinion that the manufactured home he proposes is the smallest possible home that could be placed on the lot (NT 39).

10. Mr. Breinig testified generally regarding the neighborhood and homes in close proximity, in some cases including previous grants of zoning relief (NT 40-41).

11. The zoning ordinance measures the front yard setback from the cartway; he proposes a 33 foot setback from that point, or stated another way, a 20 foot setback from the legal right of way (NT 41).

12. Mr. Breinig testified to the side yard setbacks being 25 feet (NT 41) and expressly stated a need for side yard setback relief; however, the ordinance requires 20 feet for properties with public water and sewer, making the application compliant with side yards, as the plot plan shows side yards of 21 and 25 feet.

13. The witness testified to the availability and intention to connect to public water and sewer (NT 50).

14. The witness testified to similarities between conventional “stick built” homes and manufactured homes (NT 43-46), and to a successful manufactured home project in Horsham Township (NT 53). The proposed home would comply with zoning in the Township’s Mobile Home Park zoning district. The witness was questioned about differences between that district and R2 (NT 52).

15. The witness fielded questions about the proposed home’s compatibility with the neighborhood and manner of delivery of the manufactured home (NT 57-60).

16. Mr. Breinig testified that it is not his responsibility to “build a home that fits in with other homes next to it” (NT 83).

17. Mr. Breinig testified that he does not know whether a modular home would reduce the value of the homes around it (NT 84).

18. Mr. Breinig also testified that if he obtains approval for a modular home through this application, he assumes he would construct a modular home on each property he owns in the neighborhood. (NT 97).

19. Ed Moser, on behalf of the co-applicant Moser Construction, testified that a stick-built house could “probably” not be profitably constructed at the same size as the proposed manufactured home (NT 101).

20. Mr. Breinig testified that he wishes to access the property pursuant to a maintenance agreement with his neighbors, stating that the neighbors do not presently agree to do so. (NT 106).

21. He testified that he should not be required to improve 5th street to the standards of a public street because it would include a portion of the street that goes beyond his lot and because it would increase impervious coverage (NT 107).

22. Applicant does not believe there is a significant storm water problem in the area of the parcel and submitted photos of road shoulders and driveways, taken in dry weather, showing a lack of channeling or scour caused by storm water (NT 110-117). He stated that there were no significant rain events to photograph since the date of the last zoning hearing on this parcel (NT 123).

23. John Meckes testified in disagreement with Mr. Breinig’s statement that none of the surrounding properties took steps to alleviate storm water, stating that he created trenches and stone ballast (NT 129).

24. David Meckes testified that he has video of storm water runoff that is contrary to the testimony of Mr. Breinig (NT 131).

25. Concerns and complaints voiced through questions and testimony of the residents who obtained party status included the steepness of the slope at the location, the possibility of a slab as a foundation and other foundation-related details, damage to neighboring property during delivery and installation, the lack of detail about the structure's appearance due to a manufacturer not yet being selected, the delay in developing the parcel, who holds officer position in the company that owns the parcel, profit motive, proximity of a connection to public water, (NT 66-98).

26. Other than Applicants, no person spoke in favor of the application.

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

Board Exhibits:

B-1, Copy of Application

B-2, Certificate of Posting

B-3, Certification of Notification to those within 500 feet

B-4, Proof of Publication

Applicant Exhibits:

A-1, Collection of photos related to storm water

DISCUSSION

I. Variance Legal Standard.

Pursuant to the Municipalities Planning Code and Ordinance §143-168.A, the following must be established by the Applicant in order for the Board to grant the requested variance:

(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. 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.

II. Application of Legal Standard to the Facts Presented

In this Board's decision and order at Application Number Z-19-15, involving the same parcel as the present application, this Board concluded that the first three prongs of the five part test were satisfied, and there is no basis upon which to reach a different conclusion now on those points, as they concern the nature of the existing lot and do not focus upon the specifics of the current application. As in the previous decision, satisfaction of the fourth and fifth prongs

of the test must be examined in the context of the particular variance request being considered.

A. Access to Public Street

Ordinance 143-20 requires that each lot abut a public street for at least 50 feet of the right of way lines. In the present matter, Applicant referred to testimony in the prior matter and reiterated a legal right of easement across the paper street known as Fifth Street.

Currently Fifth Street is only improved with the private driveways and shared driveways of the adjacent landowners. Applicant currently proposes to simply add a driveway connection to link the Property and the proposed home to the existing private driveways. The Board finds that this will violate the fourth prong of the variance test by altering the character of the neighborhood, impairing the use of adjoining properties, and being detrimental to the public welfare.

In the present matter, 23 residents sought and obtained party status, and numerous of them credibly presented concerns about storm water. The Board notes that whereas Applicant stated in testimony at application Z-19-15 that it would design erosion and sediment controls (although possibly meaning in connection with the home itself and not with respect to a street), in the present matter it took the position that no meaningful storm water problem exists and that even if there is a storm water problem, it should not be responsible for correcting the problem. In this regard, Applicant presented dry weather photos showing a lack of storm water scour along the shoulders of roads. The Board does not accept such testimony as proof that no storm water problem exists (especially since the point was conceded that there had not been a significant rainfall in a long time when the photos were taken), and the Board finds credible the various neighbor complaints about storm water. While it may be fair to argue in the abstract that the developer of a single parcel should not be required to cure every existing ill in the neighborhood,

a variance application is considered in the context of whether the proposed use is contrary to the health, safety and welfare of the community; an existing problem should not be compelled to be exacerbated on the basis that the applicant did not cause the previously existing problem.

Since, as before, the Board finds the existence of such a problem, then it follows that the Board should and does impose the same condition for approval. Although Applicant stated that it finds the residents' concerns to be inconsistent- they are concerned about storm water yet also would prefer that the paper street be improved to the standards of a public street- storm water controls incidental to improving the street addresses this. Accordingly, the Applicant can satisfy the requirements for a variance from Section 143-20 of the Ordinance only by complying with the following condition:

- (1) Improve Fifth Street to the standards applicable to a public street for curbing, road improvements and storm water improvements.

It is noted that this Board's decision on application Z-19-15 stated this condition as having to be satisfied through the land development process. Upon further consideration it is left to Township staff to determine whether the improvements required to satisfy this condition may be handled through the permit process or whether a land development plan is required.

This condition is also required to satisfy the fifth prong of the test, namely, that the variance be the least modification possible.

Further, Applicant presented no evidence whatsoever concerning fire truck and EMS responder access across the paper street. A street improved to the standards of a public street will connect at either end to existing public (improved) streets, removing any concern about the single access being blocked by a parked car or other obstruction.

B. Area and setback requirements

With regard to the area and setback requirements, the Ordinance requires: (1) lot area of 25,000 square feet; (2) front yard of 50 feet; (3) rear yard of 60 feet; and (4) side yards of 20 feet each. (Ordinance § 143-37.A). Although the Board reads the application as complying with the side yard requirements, even assuming that relief is required in that regard, it does not change the following analysis.

Initially, the Board offers an observation on the use of the phrases “mobile home”, “manufactured home”, and “modular home”. At certain points in the hearing, the terms “manufactured home” and “modular home” seemed to be used interchangeably, although at other times the words were seemingly used to indicate a difference between them. (NT 76). In popular literature and even in some court cases, there also seems to be inconsistent definitions of manufactured and modular homes. While it is the impression of the Board that manufactured homes are closer to being mobile homes and modular homes are generally placed on a foundation, the Board’s decision does not hinge upon nomenclature and the Board accepts Applicant’s point of emphasis, namely, that the structure would be transported to the site, but upon installation would lose the ability to be moved again in the future, unlike a mobile home that can be moved repeatedly.

During the testimony presented in connection with application Z-19-15, Applicant testified that the home included in that application was the smallest marketable home that could be built. Apparently, such was not the case, because now the testimony is that *this* proposed home is the smallest one that can be built. This means either that Applicant is misrepresenting the smallest house that can be built, or, that even Applicant recognizes a distinction between homes built on site and manufactured homes that are delivered on a trailer. Although modular homes are not mobile homes in that their delivery system is removed and they are placed on a foundation

(causing them to be recognized as single family detached homes), it does not necessarily follow that this Board must be blind to aesthetic and other differences when deciding whether the home would be consistent with the overall welfare of that portion of the community. In this regard, the Board notes that Applicant said it was safe to assume that he would seek to place modular homes on each of his properties once he gets approval on any of them, and, that he did not know whether a modular home would reduce the value of nearby homes.

Further, even if the currently proposed home were a “stick built” home, there is nothing that changes the analysis with respect to the fourth prong and the Board’s previous conclusion that it was not satisfied. Although through testimony Applicant credibly explained that he can place trash cans at the corner of the nearest dedicated street, no evidence was presented to address the related concerns about fire and EMS safety, and storm water concerns are only slightly lessened by the change in the footprint of the home.

Applicant asks the Board to rely upon a 1998 decision from the Court of Common Pleas of Montgomery County, *Appeal of Edgewood Building Co.* There, the Court concluded that the Zoning Hearing Board of Horsham Township improperly denied an application for a modular home on an undersized lot. The ultimate conclusion that the Board acted improperly appears to have been partly driven by the Court’s disagreement with the Board that the hardship was self-created (an issue not involved here), and possibly because the Board asserted that the proposed home would come within a foot of the property line, while the Court found no such thing, concluding that the home would be set back forty feet on one side and eighty on the other. Further, while there are numerous cases setting forth the general proposition that a variance is the proper mechanism through which to avoid the sterilization of an undersized lot, the Board

does not view these cases as requiring an automatic approval of a variance application related to a lot that is undersized relative to a subsequently adopted zoning ordinance.

The Board also recognizes *Appeal of W.B. Dodge, Jr.*, 402 A.2d 273 (Pa. Commwlth. 1979). In that case, which also arose out of Montgomery County, the Court held that the Upper Merion Township Zoning Hearing Board properly denied a variance request to build a home on an undersized lot where the proposed site had only one third of the total required lot area and could not conform with setbacks. The Court emphasized that the Board at all times enjoys the discretion to consider whether the variance would change the essential character of the neighborhood, and doing so includes a consideration of the required and proposed dimensions. While in a related hearing Applicant's counsel characterized this case as an outlier, it has not been reversed or questioned in subsequent decisions.

Applicant and before that Mr. Breinig's father have together owned the parcel for approximately fifty years, and developing it is something that until recently they simply "did not get around to". (NT 73). Certainly, that is their unquestioned prerogative. During those fifty years, however, the neighborhood, like any neighborhood, took on a certain character, with many of the lots merging for purposes of constructing homes. While Applicant represents that this application is seeking to comply with the prior Board ruling by bringing in an application for an even smaller house, Applicant has presented a horse of a different stripe for consideration. While certainly case law recognizes an important distinction between mobile homes and modular homes (the latter generally being recognized as a single family detached dwelling for zoning purposes), and while Applicant did clearly explain the important differences between them, the Board nonetheless feels that within the context of the neighborhood, it would be contrary to the character of the neighborhood to include a modular home that, in appearance,

could only be distinguished from a mobile home by someone who has been instructed on the differences between them. For their part, the Township ordinances do not distinguish between modular homes and mobile homes; there is a “mobile home park” zoning district, but also limitations in the floodplain ordinance on the siting of “manufactured homes”. The Board notes that within the Mobile Home Park zoning district, Ordinance 143-59 states one of the purposes behind mobile homes being limited to distinct areas is to prevent a diminution of surrounding property values.

Aesthetic considerations, even standing alone, can be a basis for the denial of requested relief when the aesthetics have some impact on health, safety and welfare. *Orwell Township Supervisors v. Jewett*, 571 A.2d 1100 (Pa. Commwlth. 1990), and aesthetics can always be considered in conjunction with other concerns. *Berman v. Board of Commissioners of Lower Merion Township*, 608 A.2d 585 (Pa. Commwlth. 1992). *See also, John R. Green Associates v. Zoning Hearing Board of Lower Allen Township*, 426 A.2d 175 (Pa. Commwlth. 1981)(recognizing the testimony of an applicant asked about building a narrower home to meet side yard setbacks who stated as a reason for not doing so, “if we get any narrower, the home would take on the appearance of a mobile or modular home, and I do not think that would do any justice to the existing homes in the neighborhood” *Id.* at 177). The Board does not believe that a modular home is consistent with the overall character of the neighborhood.

The Board also finds the testimony equivocal on whether the minimum amount of relief is requested. The testimony was to the effect that an equivalent stick built home “probably” could not be built profitably. With respect to modular homes, the Board observes that under the Manufactured Home Construction and Safety Standards Act, 42 USC 5402, which are

incorporated by reference in Pennsylvania's Manufactured Housing Improvement Act, 35 PS 1658.3, manufactured homes are regulated down to 320 square feet.

CONCLUSIONS OF LAW

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

2. The Application for a variance from the dimensional requirements of Ordinance Section 143-20 to permit less than 50 feet of frontage on a public street is granted so long as the condition set forth in the Order below is satisfied.

3. The Application for a variance from the area and setback requirements of Ordinance Section 143-37 to permit a reduced lot area and setback requirement for the development of a single family home on the Property is denied.

- a. If the requested variance were to be granted, the community will be significantly changed altering the character of the neighborhood and the R2 District, and the proposed development will substantially impair the appropriate use and/or development in the district thus detrimentally impacting the adjacent properties and the public welfare; and
- b. The requested relief does not represent the minimum that will afford relief and does not represent the least modification possible of the regulation at issue.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

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	:	
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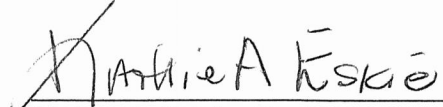
ORDER

For the reasons set forth in the foregoing decision, the Order of the Lower Providence Township Zoning Hearing Board is as follows:

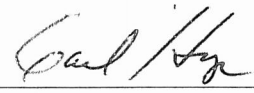
1. The Application for a variance from the area and setback requirements of Ordinance Section 143-37 to permit a single family home to be built on a lot having an area of 6,000 square feet with a front yard of 33 feet and a rear yard of 14 feet, is denied.
2. The Application for a variance from the dimensional requirements of Ordinance Section 143-20 to permit less than 50 feet of frontage on a public street is granted so long as the following condition is satisfied:


- a. Applicant shall improve Fifth Street from Sunnyside Avenue to Hillside Avenue to the standard of a public street. Improvements to cartway, curbing and storm water controls shall be installed as required by the Township.

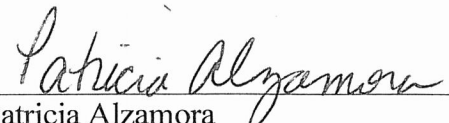
**LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD**


Kathie A. Eskie, Chairwoman


George J. Ozorowski, Vice Chairman


Gail Hager


Robert G. Hardt


Patricia Alzamora

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