

## **ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

**APPLICATION NO. Z-19-23** :  
:  
**APPLICATION OF:** :  
**C. Everett, Inc.** : **Hearing Date: October 24, 2019**  
**PO Box 415** :  
**Jenkintown, PA 19046** :  
:  
**PROPERTY:** :  
**Block 18, Units 100 & 101** :  
**Fifth Street and Barry Ave.** :

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

#### **INTRODUCTION AND BACKGROUND**

Applicant seeks variances from Ordinance Sections 143-37 and 143-20 in order to place a manufactured home at the Subject Property located near to the intersection of Fifth Street and Barry Street (Block 18, Units 100 and 101). Section 143-37 establishes front, side and rear yard setbacks, as well as lot coverage limitations. Section 143-20 requires 50 feet of frontage on a public street. Applicant proposes setbacks of 18 feet for the front yard (50 is required), six feet for one side yard (20 feet is required and one side is compliant), and a rear yard of five feet where 60 feet are required. Applicant proposes 30.2% building coverage where the limit is 20%, and 48.5% impervious coverage where the limit is 35%. No portion of the lot fronts 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 October 24, 2019 at 7:00 p.m. at the Lower Providence Township Building. The following members of the Board were present: Kathie Eskie, Chairperson; George Ozorowski, Vice Chairman; Patricia Alzamora, Member; Joseph Pucci, Member; Gail Hager, Member; and Robert Hardt, Alternate. Joseph E. Bresnan,

Esquire served as conflict counsel to the Zoning Hearing Board. Alternate Hardt attended but did not participate in the decision.

Applicant was represented by G. Michael Carr, Esquire. Party status was granted to Christopher C. Johnson, 164 Regency, and Gerald Kunz, 148 Regency.

### **FINDINGS OF FACT**

1. The following Board exhibits were admitted:
  - B-1. A copy of the application;
  - B-2. Notice of Hearing;
  - B-3. Copy of Notification;
  - B-4. Certificate of Posting.
2. The following Applicant exhibits were admitted:
  - A-1. CV of Charles Breinig;
  - A-2. Deeds showing chain of title;
  - A-3. Case summary;
  - A-4. Case arising out of Horsham Township;
3. The following additional exhibit was admitted:
  - J-1. A letter objecting to the application.
4. Charles Breinig's testimony essentially was in support of the narrative that is attached to the application.
5. Although the location and minor details are different, this application is similar for purposes of analysis to the applications that were submitted at Z-19-18, Z-19-19, and Z-19-20. Each application attaches a narrative which is modified slightly to incorporate the particular

dimensions and location of the lot in question, but each includes identical discussions of a manufactured home. The previous three applications were heard on September 26, 2019, and the decision of the Board on all three was handed down at the public meeting on October 24, 2019, prior to the hearing on the instant application. In all four cases, the applicant or applicants (Mr. Breinig owns numerous properties through different entities and in some cases co-applies with a builder) seek to place a manufactured home on an undersized lot that was created prior to the adoption of a Township Zoning Ordinance. Z-19-18, like the present application, also involves a lot on 5<sup>th</sup> Street, which is not a public road. There are also other applications submitted prior to the applications referenced here, some relating to the same properties, but only the present case and Z-19-18/19/20 involve a manufactured home.

6. In addition to Msrs. Johnson and Kunz, questions and comments were presented by Elaine Meckes and Marla DiCicco, residents.
7. A majority of the Board, finding the instant matter to present all of the same issues presented in the three cases that were voted upon earlier the same evening, voted at the close of evidence to decide this matter in the same fashion as the prior three, granting the road frontage variance subject to conditions, and denying the remaining relief.

### **CONCLUSIONS OF LAW**

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

2. The Board incorporates by reference its detailed decision and discussion at Z-19-18. The relevant portion of that decision is attached as an appendix to this decision.
3. There are no factual differences between the present application and the application at Z-19-18 that would compel a different conclusion or different reasoning.
4. For the reasons set forth previously, Applicant has sustained its burden of proof on its application for a variance from Section 143-20, frontage on a public street, subject to conditions.
5. For the reasons set forth previously, Applicant has failed to sustain its burden of proof with respect to its request for variances from the requirements in Section 143-37.
6. In the present case, Applicant argued one additional point that was not a part of the previous manufactured home applications, namely, the issue of merger. Although an adjoining lot is held by an entity that has some manner of affiliation with Applicant, no evidence was presented to demonstrate any overt act that would cause the lots to be considered merged, and thus the Board does not address that issue further.

{ORDER FOLLOWS ON NEXT PAGE}

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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 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.

{ SIGNATURE PAGE FOLLOWS }

Z-19-23, ORDER

**LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD**

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Kathie A. Eskie, Chairwoman

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George J. Ozorowski, Vice Chairman

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Gail Hager

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Joseph Pucci

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Patricia Alzamora

## **APPENDIX**

## 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.