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December 13, 2019

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7016 0910 0001 0663 6071**

Mr. Simon Eastmure
3812 Landis Mill Road
Collegeville, PA 19426

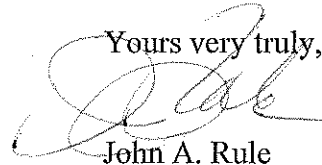
**RE: Lower Providence Township Zoning Hearing Board
Application #Z-19-25**

Dear Mr. Eastmure:

In accordance with your Application for a variance from Lower Providence Zoning Ordinance §143.37.A.(2)(b), enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board providing the reasons why the Board denied your Application.

Please note that you have thirty (30) days from the date of this decision to appeal to the Court of Common Pleas of Montgomery County in Norristown, PA.

Yours very truly,



John A. Rule

JAR/jds

Enclosure

pc: Kathie A. Eskie, Chairman
George Ozorowski, Esq., Vice Chairman
Gail Hager
Joseph Pucci
Patricia Alzamora
Robert G. Hardt
Christopher Gerdes
Michael Mrozinski, Community Development Directors

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-19-25	: HEARING DATE:	November 14, 2019
		:	
		:	
APPLICATION OF:		:	
	Simon Eastmure	:	
	3812 Landis Mill Road	:	
	Collegeville, Pa 19426	:	
		:	
PROPERTY:		:	
	3812 Landis Mill Road	:	
	Lower Providence Township	:	
	Collegeville, PA 19426	:	
	Parcel No. 43-00-06676-00-4	:	

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

On October 15, 2019 applicant, Simon Eastmure, filed an application requesting a variance from the building lot size, width and side yard requirements of Zoning Code section 143.37.A.(2), specifically: for a lot width of less than 100 feet, a lot size of less than the required 25,000 ft.² and a side setback of less than the required 20 feet. This request for zoning relief was filed as a precursor to the Applicant's intent to subdivide the subject property into two (2) separate parcels.

The application was properly advertised, and a public hearing was held before the Board on November 14, 2019 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, Robert Hardt, George Ozorowski, Joseph Pucci, Patricia Alzamora and Chris Gerdes. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Paula Meszaros, the Court Reporter and John A. Rule, Esquire, substituting for the Solicitor.

FINDINGS OF FACT

1. The Applicant, along with his wife, Alice J. Eastmure, who was in attendance at the hearing are the owners of the subject property.

2. According to the plan submitted by the Applicant, the subject property comprises 48,570 ft.², however, records of the Montgomery County Board of Assessment reflects a lot size at 46,800 ft.²

3. The applicable zoning district is the R-2 residential district, which permits single-family detached dwellings.

4. The Ordinance at §143.37.A.(2) requires a minimum lot area of 25,000 ft.² in the R-2 zoning district. The proposed lot size of Parcel 1 of the proposed subdivision would have 27,120 ft.² and the lot area of the proposed Parcel 2 would be only 21,450 ft.² and a variance was requested for this undersized lot.

5. The same Ordinance section requires a minimum lot width of 100 feet in the R-2 zoning district and variances were requested for both of the proposed parcel 1 and parcel 2 which would only have lot widths of 66.19 feet and 58 feet, respectively.

6. The same Ordinance section further requires a side yard setback of 20 feet and a variance was requested with respect to Parcel 1 to allow for a left side yard setback of 8'10" and a variance was requested for Parcel 2 to allow for a right side yard setback of 5 feet.

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

A-1 Constituted a number of photographs depicting the subject property and

improvements currently existing on the subject property.

B-1 the Appeal Application, which included as an exhibit a plan of the subject property as proposed to be subdivided.

B-2 Advertisement.

B-3 Proof of Publication.

B-4 Certificate of Posting.

B-5 Certificate of Notification of public hearing sent to property owners within 500 feet of the subject property.

B-6 List of property owners receiving notice of public hearing.

DISCUSSION

I. Statement of the Case

Applicant requests dimensional variances from the required minimum lot width, lot area and side yard setback requirements of section 143.37.A.(2)(b), specifically:

- a. Lot area of proposed Parcel 2 at 21,450 ft.², where 25,000 ft.² is required;
- b. Lot width at street frontage of 66.19 feet for Parcel 1 and 58 feet for Parcel 2, where 100 feet for each parcel is required;
- c. Left side yard setback of 8'10" for Parcel 1 and right side yard setback of 5 feet for Parcel 2, where the ordinance requires 20 feet.

It must be noted at this point that while the Applicant presented a case for the above-noted dimensional variances, the Applicant did not submit an application for special exception which would allow the undersized lot (Parcel 2) to be used for the intended use as a single-family detached dwelling separate and apart from the larger parcel from which it is derived. Accordingly, this aspect of the Application is in the nature of a use variance in that there is no right to use an undersized parcel unless the requirements of §143-145 can be met. As will be discussed later in this Decision it is clear from the Application that the requirements for grant of a special exception cannot be satisfied and in fact the Applicant presented no evidence or argument that the undersized parcel in question can meet the requirements of the aforementioned section, so accordingly this aspect of the Application has to be treated as a request for a use variance to allow the use of the undersized parcel, which is in addition to any dimensional variance request by the Applicant.

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. As noted above in this case the Board is asked to grant a series of dimensional variances and by implication a request for a use variance as a variance from the requirement to obtain a special exception permitting use of the undersized lot pursuant to Ordinance §143-145.

B. The Five Part Variance Test. To obtain a variance the Applicants 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 v. Use Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property useless if a variance is denied, and that the proposed use will not be contrary to public interest. In the case of this Appeal for the subject property a variance from §143-145 allowing use of an undersized lot only upon meeting specified requirements for grant of a special exception allowing for such use. The applicant has not presented any evidence that not granting the variance from this use requirement will render the property useless. To the contrary, the property is and has been used as a single-family dwelling, with an in- law suite situated on the portion of the property that would be proposed for the undersized lot. A use variance from the requirements of §143-145 is required because a special exception allowing use of the undersized lot has as one of its requirements that the undersized lot in question be held in single and separate ownership at the enactment of the zoning ordinance. In this case the undersized parcel is being carved out of an existing parcel, so it cannot meet the special exception requirements and a variance allowing for the use of the undersized parcel would be required even before the dimensional variances discussed below can be considered.

With respect to dimensional variances, 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 essentially 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.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.

III. Facts Applied to the Legal Standard

Upon applying the facts of the Application to the applicable standards for grant of a variance, the Application does not meet all of the requirements for a variance.

1. There are no unique circumstances or conditions relating to the subject property; it is a lot which currently conforms with all aspects of the area zoning and on which improvements have been constructed and are in continuing conforming use.

2. There is no impossibility that the subject property cannot be developed or used in strict conformity with the provisions of the zoning ordinance, since it is already being used in such a fashion. The Applicant simply desires to convert the property into 2 separate parcels by carving out a parcel that does not conform to lot area, frontage and side yard requirements.

3. It is also necessary that any hardship which the Applicant would assert as a grounds for granting a variance was not self-imposed. In the case of this application it is hard to see that there is any hardship, in light of the fact that the property has been developed and is in continuing use. The inability to convert a property to allow for multiple independent residential uses is not a hardship the law would recognize as supporting a variance. Even if it were, it is

clear that this is a self-inflicted hardship, since the property is already in a conforming use under the Ordinance and to the extent there is any hardship, it is being created by the desire of the Applicant to carve out an undersized parcel to allow for independent residential use and occupancy of two parcels where only one legally is permitted.

The Applicant clearly has the burden of proof of satisfying all of the foregoing requirements for the grant of a variance. §§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. Standards of proof.

(1) Special exception case. An applicant for a special exception shall have the burden of establishing by competent evidence and testimony both:

(a) That the applicant's application falls within the provisions of the ordinance which accords to the applicant the right to seek a special exception; and

(b) That the allowance of a special exception will not be contrary to the public interest.

(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 affects 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.

From the foregoing, the Zoning Hearing Board was correct in determining that the Applicant has not satisfied his burden of proof to establish the essential elements justifying the grant of a variance.

IV. Conclusions of Law

1. The Applicant is the owner of the Property and has standing to appear before the Board regarding the requested relief.

2. Applicant did not present evidence supporting the grant of a special exception which would allow the use of the proposed undersized parcel.

3. Applicant's evidence does not support the grant of the variances requested in the Application.

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

5. The Zoning Hearing Board has a legal obligation to uphold the Zoning Ordinance and granting the requested variances would require the Board to ignore the clear requirements of the Ordinance and will present a precedent for the proposition that variances should be readily granted to allow subdivision of existing parcels into undersized parcels allowing for independent ownership and development of the divided parcels.

6. 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.

V. Decision

The decision of the Lower Providence Township Zoning Hearing Board by a 6-0 vote is as follows: The requested variances from the required minimum lot width, lot area and side yard setback requirements of section 143.37.A.(2)(b), specifically:

- a. Lot area of proposed Parcel 2 at 21,450 ft.², where 25,000 ft.² is required;
- b. Lot width at street frontage of 88 feet for Parcel 1 and 70 feet for Parcel 2, where 100 feet for each parcel is required;
- c. Side yard setback of 8'10" for Parcel 1 and 5 feet for Parcel 2 are DENIED.

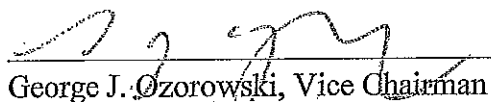
Dated: December 9, 2019.


ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



Kathie A. Eskie, Chairwoman


George J. Ozorowski, Vice Chairman


Joseph Pucci

Patricia Alzamora

Robert G. Hardt


Christopher Gerdes

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.