

# MILLER TURETSKY RULE & MCLENNAN

MARK D. TURETSKY  
JOHN A. RULE  
KEITH B. MCLENNAN\*  
JOSHUA H. CAMSON  
RONALD A. KOLLA  
\*ALSO MEMBER OF NEW JERSEY BAR

ATTORNEYS AT LAW  
3770 RIDGE PIKE  
COLLEGEVILLE, PENNSYLVANIA 19426  
(610) 489-3300 OFFICE  
(610) 489-1157 FACSIMILE  
[www.millerturetsky.com](http://www.millerturetsky.com)

JAMES H. FREEMAN  
OF COUNSEL  
JILL K. ANDERSON, J.D.

August 10, 2020

Abubakr Aslamkhan  
4005 Coulter Court  
Collegeville, PA 19426

**RE: Lower Providence Township Zoning Hearing Board  
Application of Abubakr Aslamkhan  
Application No. Z-20-06**

Dear Mr. Aslamkahn:

In accordance with your application for a variance from the building coverage requirements of the Lower Providence Zoning Ordinance §143-49.A.(2), enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board.

Should you have any questions, please contact me. Best of luck with your project.

Very truly yours,

  
Keith B. McLennan

KBM/mac  
Enclosure  
pc: Kathie A. Eskie, Chairwoman  
George Ozorowski, Vice Chairman  
Gail Hager  
Joseph Pucci  
Patricia Alzamora  
Robert G. Hardt  
Chris Gerdes  
Michael Mrozinski, Community Development Director



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

<b>APPLICATION NO.</b>	<b>Z-20-06</b>	:	<b>HEARING DATE:</b>
		:	<b>June 25, 2020</b>
		:	
<b>APPLICATION OF:</b>		:	
<b>Abubakr Aslamkhan</b>		:	
		:	
		:	
<b>PROPERTY:</b>		:	
<b>4005 Coulter Court</b>		:	
<b>Collegeville, PA 19426</b>		:	
<b>Parcel No. 43-00-02695-09-7</b>		:	

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

On May 18, 2020<sup>1</sup> applicant, Abubakr Aslamkhan (hereinafter “Applicant”) filed an application for a variance from §143-49.A.(2) of the Lower Providence Township Zoning Ordinance (the “Ordinance”) to permit building coverage of 31.2% where a maximum of 20% is permitted.

The Application was properly advertised and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on June 25, 2020 at the Lower Providence Township Building. Kathy Eskie, Chairman, George Ozorowski, Vice-Chair and members Gail Hager, Joseph Pucci, Patricia Alzamora and alternates, Robert Hardt and Christopher Gerdes were present. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Tim Kruek, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

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<sup>1</sup> On May 21, 2020 Applicant was notified under Act 15 of 2020 that as a result of the March 6, 2020 Covid-19 pandemic Disaster Proclamation of Governor Wolf, the April 28, 2020 Order of the Pennsylvania Supreme Court and the May 5, 2020 Order of the Court of Common Pleas of Montgomery County his application was delayed and his Application stayed and the requisite time requirements of §908(1.2) of the Municipalities Planning Code waived.

## **FINDINGS OF FACT**

1. The Applicant is Abubakr Aslamkhan an adult individual and owner (“Applicant”) of 4005 Coulter Court, Collegeville, Lower Providence Township, PA 19426, Parcel No. 43-00-02695-09-7 (“Property”).

2. The Applicant testified in support of the Application.

3. The Applicant purchased the Property as his residence on March 25, 2005.

4. The Property is on a lot of 8,000 square feet in the R-3 residential district.

5. The Applicant previously appeared before the Board on July 25, 2019 seeking variances to construct a sunroom and was granted a variance from the building coverage requirement at issue here to permit 29.6% for the construction of a sunroom and deck on the back of his house.

6. Applicant now seeks to rework the design to add a deck off of the sunroom and it was determined that the total building coverage would be 31.2% prompting this Application.

7. The proposed deck will be twelve feet (12’) by fourteen feet (14’) and will not exceed thirty inches (30”) above grade.

8. Applicant suffers from polio which has caused him to be unstable on his feet compounded by age.

9. Not only will the deck allow for leisure use but it will allow for safe transition from the sunroom as well as a safer step down to the backyard of the Property.

10. The compact nature of the deck and its lower profile make it less noticeable and intrusive to others.

11. The deck will be made of AZEK planks, a synthetic material that will include gaps between each plank for water to drain from the deck to the ground below.

12. Decks that are close to grade and include gaps to permit water to escape to the ground are not considered impervious.

13. Those findings of fact established in the Board's previous Decision and Order regarding the Property that are not in conflict with those noted herein are incorporated by reference.

14. Applicant has otherwise agreed to comply with all of the conditions of the Board's previous Decision and Order not in conflict with the decision regarding the Application in this case.

15. The requested variance and resulting deck will not alter the essential character of the neighborhood in which the Property is located.

16. There was no adverse public comment to the Application.

17. The following exhibits were made of record:

A-1 Application filed on May 18, 2020;

B-1 Certificate of Posting of Notice of Public Hearing on June 12, 2020.

B-2 Letter notifying property owners within 500 feet of the Property of the Application and hearing;

B-3 Mailing matrix listing those neighbors who the letter of notice was mailed to;

B-4 Certificate of Notification of mailing the letter notice.

## **DISCUSSION**

### **I. Statement of the Case**

The Applicant seeks a variance from §143-49.A.(2) which provides that the maximum building coverage represented by a percentage of lot area cannot exceed 20%. With the inclusion of a 12' x 24' deck less than 30" above grade, the building coverage for this project would be 31.2%, 1.6% more than the 29.6% maximum building coverage permitted by variance from the

Board in August of 2019 at #Z-19-14. Due to the limited lot size and configuration of the existing residence, the Applicant's previous variance from the building coverage requirements of Section 143-49.A.(2) of the Ordinance is needed to install the proposed deck. The relief sought is dimensional in nature.

## **II. Variance Legal Standard**

A. Dimensional v. Use Variance. There are 2 types of variances, a "dimensional" variance and a "use" variance. Differing standards apply to use and dimensional variances. One who advances a dimensional variance seeks to adjust zoning regulations so that the property can be used in a manner consistent with the zoning regulations. *Hertzberg v. Zoning Bd. Of Pittsburgh*, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). In contrast, a use variance seeks to use the property in a way that is inconsistent or outside of the zoning regulations. *Tidd v. Lower Saucon Township Zoning Hearing Board, Green Gable Investment Partners, LP and Lower Saucon Township*, 118 A. 3d 1 (Pa. Cmwlth. 2015).

Regardless of whether the variance sought is a use or dimensional variance, the reasons for granting a variance must be substantial, serious, and compelling. *POA Company v. Findlay Township Zoning Hearing Board*, 551 Pa. 689, 713 A.2d 70 (1998); *Evans v. Zoning Hearing Board of the Borough of Spring City*, 732 A.2d 686 (Pa. Cmwlth. 1999); *Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh*, 711 A.2d 549 (Pa. Cmwlth. 1998). The Supreme Court in *Hertzberg* held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. *Id.* at 263-64, 721 A.2d at 50. In this case the Board is asked to grant a series of variances that are of the "dimensional" variety.

B. The Five Part Variance Test. Generally, to obtain a variance the applicant must show that unnecessary hardship will result if a variance is denied and that the proposed variance

will not be contrary to public interest. Hertzberg. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

A. Variance. The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship upon the applicant. The Board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical 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) That 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) That the unnecessary hardship has not been created by the applicant.

(4) That 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) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.

In establishing hardship, an applicant for a variance is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose, though there must be more than mere economic hardship or increase in property value. Id.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to useless if a variance is denied, and that the proposed use will not be contrary to public interest. However in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of

proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, "...courts *may* consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood." 721 A.2d at 50 (italics supplied). In effect, no longer is an applicant required to demonstrate in a dimensional variance case, that the property was close to useless without the variance.

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

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

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

E. Standards of proof.

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

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

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

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

interest.

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

- (a) Substantially increase traffic congestion in the streets surrounding the subject site;
- (b) Increase the risk of fire or panic or otherwise endanger the public safety;
- (c) Overcrowd the land or create undue concentration of population;
- (d) Be suitable for the property in question so as to be consistent with the spirit and purpose of the provisions of this chapter;
- (e) Intrude upon the adequacy of natural light and air to adjoining properties;
- (f) Create extraordinary burdens on public, private or community water systems or upon 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.

### **III. Facts Applied to the Legal Standard.**

When adopting Article VIII of the Ordinance the Supervisors articulated the following public policy for the R-3 district:

#### **ARTICLE VIII R-3 Residential District**

##### **§143–47 Declaration of legislative intent; applicability.**

A. Declaration of legislative intent of an R-3 Zoning District as follows:

- (1) To provide for a variety of carefully designed housing types at medium densities.
- (2) To make sure that varied housing types are compatible with any existing single-family detached houses.
- (3) To make sure that the street system of the Township and other community facilities and services are fully able to handle moderately dense growth in an area.
- (4) To work to encourage affordable housing, especially for young families and senior citizens.

As noted in the Board's previous Opinion, Decision and Order, the Applicant's hardship is the lot's small size which already exceeds the building coverage limitation in the R-3 Residential District. That nonconformity was caused by the 2006 amendment to the Ordinance, not by the Applicant. Neither of those facts has changed. Here, in what amounts to a request to increase the building coverage variance previously granted by a de minimis 1.06%, much of the dimensional variance analysis has already occurred. Nothing has changed from the August, 2019 Opinion, Decision and Order other than the deck nominally increases the amount of building

coverage.<sup>2</sup>

In order to accommodate the deck there is no practical way for the Applicant to comply with the building coverage requirements of the Ordinance as previously varied by the Board. As the Applicant testified, installation of the deck will assist him as he ambulates around his property due to the ravaging that polio inflicted upon him as a child. His goal complies with each and every intention spelled out by the Board of Supervisors when they enacted §143–47.A. Further, Applicant has established that this 1.06% increased maximum building coverage will not have a negative impact upon public safety, will not burden public facilities nor will it tax police, fire or emergency medical services in the Township.

Considering these facts the Applicant has demonstrated the existence of a hardship that is not self-created.

Moreover, the intended deck will not adversely affect or alter the essential character of the surrounding neighborhood nor impair the appropriate use or development of adjacent property. Finally, the requested variance represents the minimum variance that will afford relief and the least modification possible of the Ordinance.

#### **IV. Conclusion.**

The Board finds that the Applicant has presented sufficient evidence to satisfy the §143-168.A. test for a dimensional variance.

#### **CONCLUSIONS OF LAW**

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested variance relief to permit 31.2% total building coverage

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<sup>2</sup> Due to the installation of deck planking that permits water to reach the ground underneath, Applicant's increased building coverage does not contribute to an increase in impervious coverage.

will impose a unique hardship on the Applicant not created by him.

3. The proposed dimensional variance will not alter the essential character of the neighborhood in which the Property is located and will not contravene the use of adjacent property or endanger public safety.

4. Rigid compliance with the Ordinance in this case is unnecessary for preservation of the public interest sought to be protected by the ordinances, in fact variance therefrom enhances the public interest.

5. The requested relief is necessary to enable the Applicant's reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulations at issue.

### **DECISION**

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote:

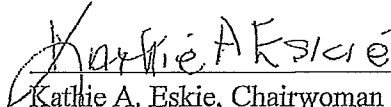
The Application for a variance from the dimensional requirements of Lower Providence Township Zoning Ordinance §143-49.A.(2) to permit the construction of a deck on the Property that results in a maximum building coverage of 31.02% is GRANTED.

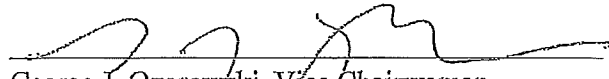
Dated: August 7, 2020

**ORDER**

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

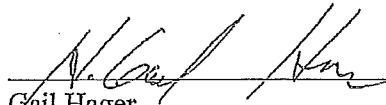
LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD

  
Kathie A. Eskie, Chairwoman


  
George J. Ozorowski, Vice Chairwoman

  
Joseph Pucci

Patricia Alzamora

  
Gail Hager

Robert G. Hardt, Alternate

  
Christopher Gerdes, Alternate

**NOTICE TO APPLICANT**

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.

