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September 2, 2020

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7018 3090 0000 0752 8011**

HTC Builders, Inc.
P.O. Box 1210
Worcester, PA 19490

Attention: Louis Gambone


**RE: Lower Providence Township Zoning Hearing Board
Application #Z-20-08**

Dear Mr. Gambone:

In accordance with your Application for a variance from Lower Providence Zoning Ordinance §143-33A., 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.

MILLER, TURETSKY, RULE & McLENNAN



By: _____
Keith B. McLennan

KBM/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 Director)
Tina Blain

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-20-08 : HEARING DATE: July 23, 2020

APPLICATION OF:

HTC Builders, Inc.

P.O. Box 1210

Worcester, PA 19490

PROPERTY:

3793 Lewis Road

Lower Providence Township

Collegeville, PA 19426

Parcel Nos. 43-00-07387-00-4

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

On June 30, 2020 applicant, HTC Builders, Inc., owner of the subject property filed an application requesting variances from the minimum lot area, minimum lot width and setback requirements of Sections 143-33A. of the Lower Providence Township Zoning Ordinance (the “Ordinance”) in connection with the proposed subdivision of a parcel into 2 lots and construction of a single family home on one subdivided lot in the R-1 residential district. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on July 23, 2020 at the Lower Providence Township Building. The following members of the Board were present: Kathie Eskie, Chair, George Ozorowski, Vice-Chair, members: Joseph Pucci and alternates: Robert Hardt, and Christopher Gerdes. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Tim Kurek, the Court Reporter and Keith B. McLennan, Esq., the Solicitor.

FINDINGS OF FACT

1. The Applicant is HTC Builders, Inc. ("Applicant").
2. The subject property is comprised of a 2.013 acre parcel of ground with tax parcel number 43-00-07387-00-4 located at 3793 Lewis Road, Collegeville which borders state game lands on the southwest (hereinafter the "Property").
3. The applicable zoning district is the R-1 residential district which permits single-family detached dwellings while R-2 zoning is located across the street.
4. The Ordinance requires, at a minimum, a building lot area of 65,000 square feet, a lot width of 195 feet, front yard setback of 50 feet and a side yard setback of 50 feet.
5. Suzanne Creveling from HT Engineering testified on behalf of the Applicant.
6. Lot 1 of the proposed subdivided lots would have 39,210 square feet, lot width of 100.77 feet, front yard setback of 22.28 feet and side yard setback of 38.90 feet.
7. Lot 2 of the proposed subdivided lots would have 43,619.90 square feet, lot width of 153.90 feet and a side yard setback of 20 feet.
8. The lot proposed for subdivision already has a home on it dating back to 1930 with public water and sewer.
9. The existing home would be located on Lot #1 of the proposed subdivision.
10. Applicant seeks to retain the home on Lot #1 in its current non-conforming state.¹
11. The house on Lot #1 is the only residential dwelling on the R-1 side of Lewis Road in that immediate area.
12. Applicant proposes to subdivide the lot and place a two-story residence of

¹ The existing home at 3793 Lewis Road does not comply with the current front and side yard setbacks.

approximately 3,500 square feet with an attached two car garage on the new lot, Lot #2.

13. Applicant asserts that the Property is on a “zoning island” on account of the R-2 zoning district present across the street, the public facilities overlay (“PFO”) on at least one side for state game lands and Evansburg State Park on one side while the other two sides of about six acres are owned by one William Unangst.

14. Both of the proposed lots would come in under an acre where almost 1.5 acres is required in the R-1 Zoning District.

15. Applicant has not approached its neighbors regarding their position with regard for the proposed variances.

16. Ms. Creveling believed that the proposed variances would not alter the neighborhood nor adversely impact the use or development of adjacent property.

17. Mr. Raymond J. Martinez, Jr. 3786 Lewis Road objected to the requested variances from §143-33A. regarding the minimum building lot area and lot width required and regarding front and side yard setback requirements asserting that the subdivision and development of the parcel would alter the essential character of the neighborhood.

18. Four others who objected to the Application did not live within 500 feet of the Property.

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

A-1 Application and Site Plan;

B-1 Notice of the Application and hearing mailed to neighbors who are within 500 feet of the Property;

B-2 Mailing Matrix of those neighbors who were mailed the notice of the Application and hearing;

B-3 Certificate of Notification of the Application and hearing to the neighbors within 500 feet of the subject Property;

B-4 Certificate of Posting the Property regarding the Application and the hearing.

DISCUSSION

I. Statement of the Case

The Applicant requests variances from the minimum lot area, minimum lot width and setback requirements of Section 143-33A. of the Ordinance in connection with the proposed subdivision and development of a subdivided lot where each lot would be less than 61 and 67% respectively of the required lot size in the R-1 residential district. The relief sought is dimensional in nature requesting variances to permit the following in the R-1 district:

- a. Lot #1 area of thirty-nine thousand two hundred thirteen (39,213) square feet where sixty-five thousand (65,000) square feet is required;
- b. Lot #2 area of forty-three thousand six hundred nineteen and nine tenths (43,619.90) square feet where sixty-five thousand (65,000) square feet is required;
- c. Lot #1 front yard setback of twenty-two and twenty-eight hundredths feet (22.28) feet where fifty (50) feet is required;
- d. Lots #1 & #2 side yard setbacks of thirty-eight and nine tenths (38.90) feet and twenty (20) feet respectively where fifty (50) feet is required; and
- e. Lot widths of one hundred and seventy-seven hundredths (100.77) and one hundred fifty-three and nine tenths (153.90) feet respectively where one hundred ninety-five (195) feet is required.

II. Variance Legal Standard

- A. Dimensional v. Use Variance. There are two 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 dimensional variances.

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 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. 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. 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 groundwaters 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.**

The Applicant has requested dimensional variances from §143-33A. in order to permit the subdivision of a 1.9 acre lot and the construction of a 3,500 square foot single family dwelling on the proposed Lot #2 at the Property. The Applicants are requesting to have lot sizes which are less than 61 and 67% respectively of the 65,000 square feet required by the Lower Providence Board of Supervisors under §143-33.A. of the Ordinance for the R-1 district. When enacting the Ordinance the Supervisors exercised the power granted them by the Municipalities

Planning Code, particularly §604² to promote, protect and facilitate (among other things), public health and safety, the general welfare and the proper density of population. Of all the dimensional zoning regulations, lot area is the most critical as it controls density. It follows that the Supervisors made a mindful decision to manage the density of this particular neighborhood. Since density control is a proper zoning purpose, it is not for the Board to second guess the Supervisors' intentions when they zoned the area as R-1.³ Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959). The Supervisors, as the township's legislative body, has the right to adopt reasonable zoning rules even if other reasonable rules could have been adopted. *Ryan on Zoning* §3.3.3; see also Swade v. Springfield Township Zoning Board of Adjustment, 392 Pa. 269, 140 A.2d 597 (1958).

In the case at bar, Applicant, wishes to construct a three thousand five hundred (3,500) square foot home on a new lot created from one that already has a single family home built on it in the 1930's. Applicant's lot currently complies with the area requirements of the Ordinance but is non-conforming regarding the front yard setback. The total lot area of 82,832 square feet is 47,168 square feet short of what is needed to create two area conforming lots. The space proposed for use as two lots is not quite sixty four percent (64%) of what the Ordinance requires.⁴

What is more, the size of the lots materially violates the lot width, front and side yard requirements of the Ordinance. Applicant asserts that the subdivision and construction of a new single-family home on Lot #2 would not materially alter the neighborhood however, neighbors testified to the contrary. The existing home on the Property is similar to those other properties

² 53 P.S. § 10604

³ Even if the Board were to believe that the lot size was too burdensome, it is not the Board's province to refuse to enforce the ordinance.

⁴ Had this been a case of a de minimis variance from the building lot size and setbacks the result might be different. The de minimis doctrine, supports a dimensional variance where there are only minor deviations from dimensional requirements of the Ordinance. Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Cmwlth. 1996)

in the less densely populated R-1 area. It borders Evansburg State Park on one side, which by its name indicates that the land there is undeveloped and open. Thus, the Board of Supervisors decision to designate it as an R-1 district with large lots was intentional to make those properties close to the Park consistent with the area.

In its case in chief, Applicant failed to demonstrate why this Property should be treated differently from those that adjoin the Park. At no time did the Applicant address the standard of proof set forth in §§143-168.C. & D. of the Ordinance. As a result, Applicant failed to demonstrate that the grant of the variances and resulting development was not contrary to the public interest. As noted heretofore, Applicant was required to establish that the proposed variances and resulting subdivision and development would not adversely affect a range of public interest and safety considerations ranging from traffic congestion, fire or panic, land over-crowding, burden on public facilities and safety providers or cause adverse impact upon adjoining properties. Applicant failed to carry its burden of proof.

When asked about the precedential value the variances might provide to adjoining properties, Applicant acknowledged its impact but demurred claiming that each application would need to be considered on its own facts. On the contrary, if granted, the flood gates of others seeking similar variances will, eventually, swing open using this case as precedent. Needless to say, that will adversely affect the rights of the neighbors and be detrimental to the public welfare. 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.⁵ 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

⁵ Essentially this was the basis for the objections to the variances brought by the neighbors at the hearing.

enforce the zoning ordinance in accordance with the applicable law. Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959).

Further, Suzanne Creveling, P.E. with HT Engineering, Inc. testified that the property was located on a “zoning island” due to the R-2 district across the street and the state game lands on the southeast side of the property. However, it was elicited at the hearing that the property that borders the Property to the north and west is owned by one William Unangst. That property is mostly undeveloped and totals over 6 acres, a small portion of which could get the Applicant land that would comply with the Ordinance. Ms. Creveling testified that Applicant was given the “cold shoulder” by Mr. Unangst without offering evidence of the efforts made to satisfy the building lot requirement of the Ordinance. What is more, Applicant offered no evidence that it suffered an economic or other hardship. Rather, Applicants appear to have “thrown up their hands” in response to the cold shoulder. Presumably, since everyone has their price, there is abundant vacant land available to the Applicants which, if acquired and added to the Property could be developed in a manner which would not require such an extreme dimensional variance.

Moreover, no undue hardship would result from a denial of the variance. To establish that an unnecessary hardship exists warranting a variance from the Ordinance, the Applicant must prove that:

- a. Physical characteristics of the property were such that the property could not be used for any permitted purpose; or
- b. The permitted purpose could only be achieved at prohibitive expense; or
- c. Characteristics of the property were such that it would have no value or only distress value for any use approved by the zoning ordinance. Solebury Twp. v. Solebury Twp. Zoning Hearing Bd., 914 A.2d 972 (Pa.Cmwlt. 2007).

The Applicant is using the lot for its intended purpose, as a residence. No evidence was offered to prove a., b. and c of the Solebury Township case referenced above. The fact that the denial of the variance restricts Applicant from subdividing, developing and selling a portion of the Property does not deny it the reasonable use of its property.

Clearly the result requested flies in the face of the Ordinance and the Supervisors who reserved this section of the Township for larger lots to achieve fewer houses and thus less density. Any other result could tax the Township and its resources, cause congestion and manifestly change the complexion of the neighborhood. Precisely what §143-168.D.(3) requires the Board to consider in its analysis. The relief requested is not the minimum variance that will afford the required relief.

No unique characteristics exist which require the grant of the requested variances. The need for relief is neither serious nor substantial. The request asks for, among other things, approval of a lot size that is materially less than what is required in the applicable R-1 district. Not only has the Applicant failed to meet its burden of proof under the Ordinance it has failed to exhaust opportunities to acquire additional land. Thus, Applicant has failed to justify the need for these variances.

Accordingly, the Board finds that the requested variances from Lower Providence Township Zoning Ordinance §143-33A. regarding 65,000 square foot minimum lot size, 195 feet width; a 50-foot front yard setback and 50-foot side yard setback are denied.

CONCLUSIONS OF LAW

1. The Applicant is the owner of the Property and have standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will not impose an unnecessary hardship on the Applicants.

3. The hardship, if any, is self-imposed, and is not due to the unique physical circumstances and characteristics of the Property.

4. The requested relief is not necessary to enable the Applicants' reasonable use of the Property.

5. If granted, the community will be significantly changed from how it is zoned altering the character of the neighborhood and this R-1 district. In turn it will substantially impair the appropriate use or development in this district impacting the adjacent property and the public welfare.

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.

Zoning's limitations on the rights of the property owner are based on the propositions that the (i) public is capable of forming a rational, objective plan for land development and (ii) public interest in that plan overrides the right of the property owner to do as he sees fit. In this case, the rights of the community to regulate density of its population and protect the public welfare outweigh the interest of the Applicants to vary from the restrictions of the Ordinance.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-1 vote is as follows:

The requested variances from §143-33A. of the Lower Providence Township Zoning Ordinance are denied.

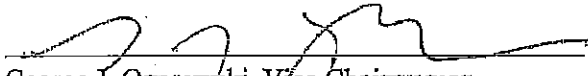
Dated: September 1, 2020

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.