

MILLER TURETSKY RULE & McLENNAN
A Professional Corporation

MARK D. TURETSKY
JOHN A. RULE
KEITH B. McLENNAN*
JOSHUA H. CAMSON

ATTORNEYS AT LAW
3770 RIDGE PIKE
COLLEGEVILLE, PENNSYLVANIA 19426
(610) 489-3300 Office
(610) 489-1157 Facsimile
www.millerturetsky.com

JAMES H. FREEMAN
Of Counsel

JILL K. ANDERSON, J.D.

*ALSO MEMBER OF NEW JERSEY BAR

June 3, 2021

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7020 2450 0001 6265 0059**

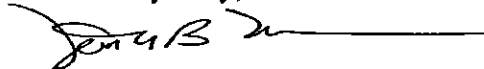
Mr. George Gibson
33 Brant Road
Trooper, PA 19403

RE: Zoning Application No. Z-21-09

Dear Mr. Gibson:

In accordance with the initial application filed on March 30, 2021, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board.

Yours very truly,



Keith B. McLennan

KBM/jds
Enclosure

Pc: George Ozorowski, Esq. Chairman
Joseph Pucci Vice-Chairman
Kathie A. Eskie
Gail Hager
Tina Blain

Patricia Alzamora
Christopher Gerdes
Randy Klein
Michael Mrozinski

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-21-09 : HEARING DATE: April 22, 2021

APPLICATION OF:

George Gibson
33 Brant Rd.
Trooper, PA 19403

PROPERTY:

33 Brant Rd.
Lower Providence Township
Trooper, PA 19403
Parcel No. 43-00-01534-00-7

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

On March 30, 2021, applicant George Gibson (“Applicant”) owner of 33 Brant Rd. Trooper, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §143-6.2CC(6)(a) to permit a side yard setback of ten feet (10’) where a minimum of fifteen (15’) is required for an accessory structure. Applicant wishes to construct above ground swimming pool in the R2 – Residential District.

The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on April 22, 2021 at the Lower Providence Township Building. George Ozorowski, Chairman, Vice Chairman, Joseph Pucci, members Kathie Eskie, Gail Hager and Patricia Alzamora and alternate members Christopher Gerdes, and Randy Klein were present. Also present were Mike Mrozinski, the Community Development Director, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicant is George Gibson, owner of the lot and home located at 33 Brant Rd. Trooper, PA 19403 which was acquired in 2005.
2. The subject property, 33 Brant Rd. Trooper, Pennsylvania is comprised of a 9,920 square foot parcel with tax parcel number 43-00-01534-00-7 with a single-family home and a shed (hereinafter the "Property").
3. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings.
4. The Ordinance requires in the R-2 zoning district a side yard setback of fifteen feet (15') for accessory structures.
5. The proposed pool to be built on the Property would have a rear yard setback of ten feet (10').
6. Applicant wishes to install an above ground swimming pool with the dimensions of 15' x 30 x 52".
7. A four-foot (4') fence on the property line of the backyard is already in place.
8. Due the location of the existing shed, the location of a 45-year-old Japanese maple tree, and the overhead powerlines, there are no alternative locations on the property where the pool can practically be placed.
9. The nearest house neighboring house will be seventy feet (70') away from the proposed pool.
10. Other property owners in the neighborhood have installed pools in a similar manner without adverse impacts on the character of the neighborhood.
11. The proposal is compliant with all other zoning regulations.

12. There is no change of use requested.
13. There will be no impact on traffic patterns in the neighborhood by the proposed addition.
14. Having a pool is consistent with the character of the neighborhood.
15. There is nowhere else on the property that the addition could be practically constructed.
16. The proposed addition will not emit smoke, dust, odor or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.
17. The pool will not have a negative impact on the neighborhood.
18. There was no adverse public comment regarding this application.
19. The following exhibits were included in the record of the hearing:
 - A-1 The Application;
 - B-1 Certificate of Notification to the neighbors within 500 feet of the Property including notice mailed and matrix of addresses where notice was mailed;
 - B-2 Certification that the Property was posted with Public Notice;
 - B-3 Public Notice;
 - B-4 Public Notice in Newspaper.

DISCUSSION

I. Statement of the Case

The Applicant requests a variance from §143-6.2.CC(6)(a) of the Ordinance in connection with the proposed installation of an above ground pool. The relief sought is dimensional in nature requesting variances to permit a side yard setback of ten feet (10') where

fifteen feet (15') is required for an accessory structure.

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 dimensional variance.

B. The Five Part Variance Test. To obtain a variance the Applicant 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 Applicant' 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.

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

The Applicant requests a dimensional variance from § 143-6.2.CC(6)(a) in order to permit the installation of an above ground pool which are common in the neighborhood. Presently, the Property is occupied by a single family detached residence with one shed on the property.

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 in that the size, shape, and change to the Ordinance has made it practically impossible to install a pool on the property while conforming to the Ordinance which creates a hardship for the Applicant. Specifically, the location of the current shed, the location of a Japanese maple tree, and the overhead wires limit the ability of the Applicant to install a pool. This prevents the Applicant from making full reasonable use of the Property. The Applicant did not create the hardship.

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. There is no alternative location for the proposed pool on the property that would not require additional relief or substantial cost.

The variance 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. The neighborhood is replete with pools which are common on single family homes. The proposed installation of a pool and requested variance is consistent with the neighborhood and will not negatively impact neighboring properties nor will it change the character of the neighborhood.

The variance will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. Permitting the installation of an in-law suite that is consistent with the neighborhood is the minimum alteration that can be made to the Ordinance to permit the Applicant the reasonable use of their Property. Accordingly, the Board finds that Applicant suffers a hardship that is not self-imposed and the requested variance from Lower Providence Township Zoning Ordinance §143—6.2.CC(6)(a) regarding the required side

yard setback of fifteen feet (15') is the minimum variance that can provide relief from the hardship.

The Board finds and concludes that the Applicant's requested relief should be granted.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an unnecessary hardship on the Applicant.
3. The hardship is due to the unique physical circumstances and characteristics of the Property and not self-imposed.
4. The requested relief is necessary to enable the Applicant reasonable use of the Property.
5. If granted, the community will not be significantly changed nor will it alter the character of the neighborhood.
6. The requested relief represents the minimum that will afford relief and represents the least modification possible of the regulation at issue.

DECISION

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

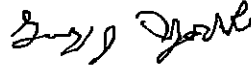
The Application of George Gibson for a Variance from Section 143-6.2.CC. Swimming Pool, Household, (6)(a) to permit the installation of a 15' X 30' X 52" oval shaped above ground pool and associated decking and equipment ten feet (10') from the side property line where fifteen feet (15') is required in the R2 Residential District is GRANTED.

Dated: June 2, 2021

ORDER

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

LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD



George Ozorowski



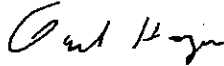
Joseph Pucci



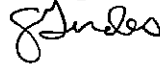
Kathie Eskie



Patricia Alzamora



Gail Hager



Christopher Gerdes, Alternate

Randy Klein, 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.