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July 2, 2021

**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NO. 7020 2450 0001 6265 0073**

Mr. and Mrs. Michael Rothman  
4009 Browning Court  
Norristown, PA 19403

**RE: Zoning Application No. Z-21-10**

Dear Mr. and Mrs. Rothman:

In accordance with the initial application filed on April 12, 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-21-10 : HEARING DATE: May 27, 2021

APPLICATION OF:

Rita and Michael Rothman  
4009 Browning Ct  
Norristown, PA 19403

PROPERTY:

4009 Browning Ct  
Lower Providence Township  
Norristown, PA 19403  
Parcel No. 43-00-01903-14-1

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

On April 12, 2021, applicants Rita and Michael Rothman (“Applicants”) owners of 4009 Browning Ct. Norristown, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §143-27 A(2)(a) Projection of awnings, patio covers, patios and decks into yards (the “Application”). in the R-2 Residential District. Applicants seek permission to construct a patio to protrude twenty-five feet (25’) into the rear yard setback where only sixteen feet (16’) is permitted leaving only rear yard setback of thirty-five feet (35’). Applicant’s further request a Variance from §143-37A(2) of the Ordinance to permit the construction of the patio with the thirty-five foot (35’) rear yard setback where a minimum of sixty-feet (60’) is required.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on May 27, 2021, via advanced communication device due to the ongoing global pandemic. Present at the hearing were: Kathie Eskie, Chairwoman, and members Gail Hager, Patricia Alzamora, Christopher Gerdes and Randy Klein, alternate. 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 Applicants, Rita and Michael Rothman, purchased the lot and single-family home located at 4009 Browning Court, Norristown, Pennsylvania with tax parcel number 43-00-01903-14-1 in 2014 (hereinafter the "Property").
2. The Applicants were not represented by counsel at the hearing.
3. Both Rita and Michael Rothman testified in support of the Application.
4. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings.
5. The Ordinance requires a rear yard setback of sixty feet (60') in the R-2 zoning district for lots served by public water and sewer.
6. The Ordinance requires that patios protrude into the rear yard setback by no more than sixteen feet (16').
7. The proposed outdoor patio would leave a rear yard setback of thirty-five (35') feet.
8. The Property has a unique shape.
9. The Property is a corner lot with two side yards and a small rear yard.
10. The Property was created with five different property lines.
11. The lot was created in 1990 under different and more permissive standards.
12. The house on the property sits on an angle across the diagonal of the Property.
13. The placement of the single-family home on the lot creates a smaller backyard than would normally be present.

14. The neighborhood has many homes that have been improved with structures such as the patio proposed.

15. The Property abuts a home in the development that is set back significantly from the street.

16. There will be no explosive or toxic materials stored on the property.

17. If granted, the proposed construction will be completed within the confines of the current lot and in no way impact the adjacent properties.

18. The proposed use will not impact the development of adjacent properties.

19. The neighborhood is replete with houses that have patios and the proposed patio will not change the character of the neighborhood.

20. The Property has a rear yard that is unusually narrow making construction of a patio in conformity with the Ordinance impractical.

21. There was no adverse public comment regarding the Application.

22. Applicant testified that all his neighbors approved the Application.

23. All required notices of the application and hearing were properly provided.

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

B-1 Public Notice of the Hearing;

B-2 Certificate of Posting;

B-3 Letter notifying neighbors within 500 feet of the Property of the Application;

B-4 Matrix of Addresses where notice was sent;

B-5 Certificate of Notification;

A-1 Appeal Application;

A-2 Letter from Neighbor approving of the proposed use.

## **DISCUSSION**

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

The Applicants request variances from §§143-27 A(2)(a) and §143-37.A.(2) of the Ordinance in connection with the proposed construction of an outdoor patio. The relief sought is dimensional in nature requesting variances to permit the construction of a patio to protrude twenty-five feet (25') into the rear yard setback where only sixteen feet (16') is permitted and to permit a thirty-five foot (35') rear yard setback where sixty-feet (60') is required in the R-2 Residential District.

### **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 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. In effect, no longer is an applicant required, in a dimensional variance case, to demonstrate 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.

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

The Applicants request a variance from §§143-27 A(2)(a) and §143-37.A.(2) of the Ordinance in connection with the proposed construction of an outdoor patio. The relief sought is dimensional in nature requesting variances to permit the construction of a patio to protrude twenty-five feet (25') into the rear yard setback where only sixteen feet (16') is permitted while leaving a rear yard setback of thirty-five feet (35') where sixty-feet (60') is required in the R-2 Residential District.

The Property is a unique shape due to:

- The lot being on a corner providing five property lines;
- The shape of the lot;
- Placement of the home on the lot rendering a smaller rear yard than what would normally be expected;
- The situs of the neighboring home set back from the road much further than other homes in the neighborhood further limiting the size of the rear yard;
- The lot was originally designated in 1990 prior to certain changes to the zoning ordinance which impacts the reasonable use of the Property.

Thus, there are unique circumstances or conditions peculiar to this Property contributing to the establishment of an unnecessary hardship. Applicants did not create this hardship.

Because of the location of the house, the shape of the lot, and the location of the building and neighboring structures relative to the shape of the lot, there is no possibility that the property



can be developed in strict conformity with the provisions of the zoning ordinance and the authorization of a variance is necessary to enable the reasonable use of the property.

Deck and patio structures are common around single-family homes. In fact, many neighboring properties have patios similar to the one proposed. Accordingly, the variance, if granted, will not alter the essential character of the neighborhood in which the Property is located.

The proposed variance from the setback requirement is minimal and all adjoining property owners agree with the proposed patio and the variances requested.

Addition of the patio and the variances required therefor will in no way adversely affect the public interest, negatively impact public services or facilities or adversely impact neighbors or the community.

Finally, permitting the construction of the patio is consistent with the neighborhood and is the minimum alteration that can be made to the Ordinance to permit the Applicants the reasonable use of the Property. Accordingly, the Board finds that Applicants suffer a hardship that is not self-imposed and the requested variance from Lower Providence Township Zoning Ordinance from §§143-27 A(2)(a) and §143-37.A.(2) is necessary.

### **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 Applicants.
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 Applicants 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 Rita & Michael Rothman docket #Z-21-10 for a Variance from Section 143-27.A.(2)(a) of the Lower Providence Township Zoning Ordinance to permit the construction of a patio to protrude 25 feet into the rear yard setback where only 16 feet is permitted in the R-2 Residential District is GRANTED.

The Application of Rita & Michael Rothman docket #Z-21-10 for a Variance from Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit the construction of a patio with a rear yard setback of thirty-five feet (35') where a minimum of 60 feet is required in the R-2 Residential District GRANTED.

Dated: June 28, 2021

## **ORDER**

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

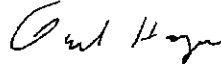
### **LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

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George Ozorowski

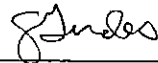
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Patricia Alzamora



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Gail Hager



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Christopher Gerdes, Alternate

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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.