

# MILLER TURETSKY RULE & MCLENNAN

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JILL K. ANDERSON, J.D.

November 3, 2021

**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NO. 7020 2450 0001 6269 2424**

Marc C. Mann  
Kelly A. Cauley  
1 Fox Road  
Collegeville, PA 19426

**RE: Opinion, Decision and Order  
Lower Providence Township Zoning Hearing Board Application No. Z-21-18**

Dear Mr. Mann and Ms. Cauley:

In accordance with the initial application filed on August 24, 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/  
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-21-18	:	HEARING DATE:	September 23, 2021
		:		
		:		
APPLICATION OF:		:		
	Marc C. Mann and Kelly A. Cauley	:		
	1 Fox Road	:		
	Collegeville, PA 19426	:		
		:		
PROPERTY:		:		
	1 Fox Road	:		
	Lower Providence Township	:		
	Collegeville, PA 19426	:		
	Parcel No. 43-00-05077-00-1	:		

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

On August 24, 2021, applicants Marc C. Mann and Kelly A. Cauley (“Applicants”) owners of 1 Fox Road Collegeville, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §143-78 and 143-37.A(2) to permit a front yard setback of 33.5' where a minimum of 50' is required and a rear yard setback of 20' where a minimum of 60' is required for an accessory structure to permit construction of an in-law suite and attached garage, together with any other relief deemed necessary or appropriate by the Board.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on September 23, 2021. Present at the hearing were: George Ozorowski, Chairman, Kathie Eskie, Member, Gail Hager, Member, Patricia Alzamora, Member, Christopher Gerdes, Alternate, and Randy Klein, Alternate. Also present was Keith B. McLennan, Esquire, the Solicitor, and Mike Mrozinski, the Community Development Director.

## **FINDINGS OF FACT**

1. The Applicants are Marc C. Mann and Kelly A. Cauley, owners of the lot and home located at 1 Fox Road, Collegeville, PA 19426 which was acquired in 2016.
2. Marc C. Mann testified in support of the application.
3. The subject property, 1 Fox Road Collegeville, Pennsylvania is comprised of a 40,000 square foot parcel with tax parcel number 43-00-05077-00-1 with a single-family home (hereinafter the "Property").
4. The Present Use of the Property began in 1932.
5. The applicable zoning district is the RPW residential district which permits single family detached residential development in conformity with the R-2 Residential District zoning standards.
6. The home is serviced by public sewer and private well.
7. The Property is an unusually shaped lot.
8. Due to the property being constructed prior to the modern zoning rules, what is classified as the rear, side, and front yards of the property do not conform to the practical use of those yards based on the orientation of the house.
9. The Property faces Ridge Pike and is therefore zoned RPW which is primarily a commercial zoning district.
10. The imposition of the Ridge Pike zoning in 2016 made this lot non-conforming.
11. There is a hardship due to the complication of the odd shaped lot and the imposition of the Ridge Pike West zoning standards after the home was constructed.
12. Applicants intend to remove their existing driveway and detached garage.

13. Applicants spoke with their immediately adjacent neighbors who had no objections to the requested relief.

14. The proposal is compliant with impervious and building coverage requirements.

15. The Ordinance requires that properties with either water or sanitary sewer service only in the R-2 zoning district have a front yard setback of fifty feet (50') and a rear yard setback of sixty (60').

16. The proposed in-law suite and detached garage would have a front-yard setback of thirty-three and one-half feet (33.5') and a rear yard setback of twenty feet (20').

17. The proposal is compliant with all other zoning regulations.

18. There is no change of use requested.

19. There will be no impact on traffic patterns in the neighborhood by the proposed addition.

20. There is nowhere else on the property that the addition could be practically constructed.

21. The proposed addition will not emit smoke, dust, odor or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.

22. The proposed use would not have a negative impact on the neighborhood.

23. There was no adverse public comment regarding this Application.

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

A – 1 The Application including the attached plans.

B – 1 The Certificate of Posting.

B – 2 The Certificate of Notification.

B – 3 Letter Sent to Property Owners.

B – 4 Matrix of Addresses.

B – 5 Proof of Publication

## **DISCUSSION**

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

Applicants are requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §143-78 and 143-37.A(2) to permit a front yard setback of 33.5' where a minimum of 50' is required and a rear yard setback of 20' where a minimum of 60' is required for an accessory structure to permit construction of an in-law suite and attached garage, together with any other relief deemed necessary or appropriate by the Board.

### **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 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.**

Applicants are requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §143-78 and 143-37.A(2) to permit a front yard setback of 33.5' where a minimum of 50' is required and a rear yard setback of 20' where a minimum of 60' is required for an accessory structure to permit construction of an in-law suite and attached garage, together with any other relief deemed necessary or appropriate by the Board.

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 an attached garage with an in-law suite on the property while conforming to the Ordinance. This creates a hardship for the Applicants. Specifically, the Property and home constructed upon it are oriented in such a way that the pragmatic side-yard, front-yard, and rear-yard do not correlate with the definition of those yards under the Ordinance. The lot was developed long prior to the current zoning standards, and therefore, it is a nonconforming lot through no fault of the current owners.

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 Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property. The present use predates the current zoning standards, and the lot is currently non-conforming. Therefore, Applicants did not create the hardship. 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 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 and detached garage 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 Applicants suffer a hardship that is not self-imposed and the requested variance from Lower Providence Township Zoning Ordinance.

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

#### **CONCLUSIONS OF LAW**

1. The Applicants have 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 Marc Mann and Kelly Cauley docket #Z-21-18 for a Variance from Section 143-78 and 143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit the construction of an in-law suite and garage addition to an existing single-family home with a front yard setback of thirty-three and one-half feet (33.5') where a minimum of fifty feet (50') is required and with a rear yard setback of twenty feet (20') where sixty feet (60') is required in the RPW is: GRANTED subject to the following Conditions:

1. Applicants will remove the existing garage and driveway;
2. The in-law suite may only be used for family members/ in-laws as required by the Ordinance;
3. Compliance with the existing zoning requirements for in law-suites.

Dated: November 1, 2021

## **ORDER**

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

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



George Ozorowski

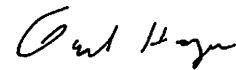
Joseph Pucci



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.