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December 7, 2021

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7020 2450 0001 6126 2512**

Mr. Christopher Barber
116 Farmhouse Drive
Audubon, PA 19403

**RE: Opinion, Decision and Order
Lower Providence Township Zoning Hearing Board Application Z-21-21
Hearing Date: October 28, 2021**

Dear Mr. Barber:

In accordance with the initial application filed on September 15, 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 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-21-21 | : | HEARING DATE: |
| | | : | October 28, 2021 |
| | | : | |
| APPLICATION OF: | | : | |
| Christopher Barber | | : | |
| 116 Farmhouse Drive | | : | |
| Audubon, PA 19403 | | : | |
| | | : | |
| PROPERTY: | | : | |
| 116 Farmhouse Drive | | : | |
| Audubon, PA 19403 | | : | |
| Lower Providence Township | | : | |
| Parcel No. 43-00-04143-04-4 | | : | Request for Variance |

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

A public hearing on the above Application having been held on October 28, 2021, before the Zoning Hearing Board of Lower Providence Township (the “Zoning Hearing Board” or “Board”), in the Township Administration Building, 100 Parklane Drive, Eagleville, PA, (the “Hearing”) pursuant to Notice as required by the Lower Providence Township Zoning Ordinance (the “Ordinance”) and the Pennsylvania Municipalities Planning Code (the “MPC”), concerning the above captioned premises (the “Property” or “Subject Property”), and having considered the Application and the testimony, exhibits, and argument presented, the Zoning Hearing Board hereby renders its decision on the Application.

Procedural Matters

1. Application before Zoning Hearing Board

On September 15, 2021, applicant Christopher Barber (“Applicant”) owner of 116 Farmhouse Drive, Audubon, PA in Lower Providence Township, Pennsylvania filed an application relating to Applicant’s proposal to construct a deck on the Subject Property requesting relief from

Sections 143-27.A(2) and 143-37.A(2) for a rear yard setback of fifteen feet (15') where a minimum of forty-four feet (44') is required for an accessory structure to permit construction of a deck, together with any other relief deemed necessary or appropriate by the Board.

2. Notice and Hearing

The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on October 28, 2021, where the Board accepted evidence in the matter.

3. Zoning Hearing Board Members Participating

Present at the hearing on October 28, 2021, were: Joseph Pucci, Member, Kathie Eskie, Member, Gail Hager, Member, and Randy Klein, Alternate.

4. Appearances of Counsel

- a. Keith B. McLennan, Esquire, appeared as Solicitor for the Zoning Hearing Board.
- b. Applicant was not represented by counsel.

5. Appearance of Other Party

- a. No other party appeared regarding the Application.

6. Also Present

- a. Mike Mrozinski, the Community Development Director for Lower Providence Township.
- b. Robert Samtmann provided public comment in support of the Application.

7. Witnesses

- a. Christopher Barber testified in support of the Application.

8. Exhibits

- a. Applicant submitted the following exhibits at the hearing in support of the

Application:

A – 1: Application and Attached Exhibits;

b. The Board submitted the following exhibits at the hearing:

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.

FINDINGS OF FACT

1. The Applicant is Christopher Barber (Applicant) owner of the lot located at 116 Farmhouse Drive, Audubon, PA 19403.

2. The Subject Property, is comprised of a 17,860 square foot parcel with tax parcel number 43-00-0413-04-4 which currently has a single-family home, shed, and above ground pool. There are existing decks attached to the house.

3. Applicant acquired the Property in July of 2005.

4. The applicable zoning district is the R-2 Residential Zoning District.

5. The Property is currently serviced by public water and public sewer.

6. The Ordinance § 143-37 requires that single-family homes constructed on parcels in the R-2 Residential Zoning District that are serviced by public water and sewer have a minimum rear yard setback of sixty feet (60').

7. The Ordinance § 143-27.A(2) permits unenclosed awnings, patio covers, patios, and decks to “project or extend into the rear yard setback area a distance not to exceed sixteen feet (16’).”

8. Therefore, the statutes read together allow for a deck to be constructed so long as there is a minimum rear yard setback of forty-four feet (44').

9. The Ordinance § 143-27.A(2) prohibits any unenclosed awning, patio cover, patio, or deck to be closer than twenty feet (20') to the rear lot line.

10. The Ordinance § 143-6.2(CC)(6) pertaining to special setbacks states that "No pool or associate decking/equipment shall be located less than 15 feet from any property or street line."

11. The Property currently has an above ground pool.

12. Applicant is proposing the expansion of the currently existing deck (which is attached to the house) to surround the pool.

13. There are existing decks on the property.

14. There is a covered porch with a stepdown to another existing deck.

15. The proposal is to transition to a stepdown deck that will transition to the deck around the pool.

16. All of the decks would be contiguous and connected to the home.

17. The proposed construction of a deck constitutes the construction of an accessory structure improvement to the Property.

18. The proposed deck extension would have a rear yard setback of fifteen feet (15').

19. The topography of the Property is such that there is no other practical location the pool and deck may be situated.

20. The dimensions of the back yard of the Property are unusual.

21. There is a large side yard and the plot has an unusual shape.

22. Applicant decided to install an above ground pool instead of an inground pool because the yard is on a steep slope which would make construction of an inground pool

impractical.

23. The pool is positioned at the top part of the property.
24. The slope of the property does not allow for patio style decking as is common with an inground pool.
25. A deck that fully surrounds the pool would be more esthetically pleasing and would allow for more practical pool maintenance.
26. There was no adverse comment regarding the Application.
27. The neighborhood is replete with other homes that include pools and accompanying decks.
28. The addition of the deck to the pool will improve the Property.
29. There is little other use that can be made of the rear yard due to the special conditions of the Property.
30. Applicant intends to use all composite materials which will be high quality.
31. The proposed deck will not implicate impervious coverage restrictions.
32. All buildings and proposed structures, including the pool and deck, are consistent with other properties in the neighborhood.
33. There are no outstanding state or federal violations cited on the Property.
34. The proposed use will not impact existing traffic patterns or volumes.
35. The proposed use will not emit smoke, dust, odor or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.
36. The proposed use will not alter the essential character of the neighborhood or district in which it is located.
37. The proposed use will not impair the appropriate use or development of adjacent

properties.

38. The proposed use will not be detrimental to the public welfare.

DISCUSSION

I. Statement of the Case

Applicant seeks to construct a pool deck on the Subject Property and is requesting relief from Sections 143-27.A(2) and 143-37.A(2) for a rear yard setback of fifteen feet (15') where a minimum of forty-four feet (44') is required for an accessory structure to permit construction of a deck, together with any other relief deemed necessary or appropriate by the Board.

II. Ordinance Subsections in Question

The Ordinance § 143-37 requires that single-family homes constructed on parcels in the R-2 Residential Zoning District conform to the following requirements where the property has access to public water and sewer: A minimum rear yard setback of 60 feet. The Ordinance § 143-27.A(2) permits unenclosed awnings, patio covers, patios, and decks to “project or extend into the rear yard setback area a distance not to exceed sixteen feet (16’).” Therefore, the statutes read together allow for a deck to be constructed so long as there is a minimum rear yard setback of forty-four feet (44’). The Ordinance § 143-6.2(CC)(6) pertaining to special setbacks states that “[n]o pool or associate decking/equipment shall be located less than 15 feet from any property or street line.”

III. 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.

IV. Facts Applied to the Legal Standard

Applicant first argues that a variance is not necessary because the applicable zoning ordinance subsection would be § 143-6.2(CC)(6). That subsection permits a pool and associated decking to be constructed up to fifteen feet from any property line. Applicant argues that his proposed use falls within the term “decking” as used in that subsection of the Ordinance. The proposed use would comply with that dimensional requirement if that were the appropriate subsection. However, it appears from the facts of this case that the provisions and requirements of § 143-27.A(2) and 143-37.A(2) in fact do apply. The proposed deck in this matter is an accessory structure that extends from the home. The deck will not simply be a necessary extension of the pool. Instead, the proposed deck will be an extension of the current accessory structure that will allow for direct access to the pool. This is not the “decking” envisioned in § 143-6.2(CC)(6) which would be more akin to a slab upon which an above ground pool sits, or the concrete pool deck that often surrounds an inground pool. Instead, this is an accessory structure improvement to the

Property. Therefore, the Board finds that the applicable Section to be 143-27.A(2) and 143-37.A(2) which would prohibit the proposed use without this Board granting the applicable variance.

Applicant seeks to construct a pool deck on the Subject Property and is requesting relief from Sections 143-27.A(2) and 143-37.A(2) for a rear yard setback of fifteen feet (15') where a minimum of forty-four feet (44') is required for an accessory structure to permit construction of a deck, 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 and 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. Specifically, the topography of the lot is such that the grade is increasingly steep as it extends towards the rear property line. This combined with the unusual narrowness of the lot, and location of the house, make it difficult to use the rear yard for normal purposes. This creates a hardship that the Applicant did not create.

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. The construction of the pool deck surrounding the pool would make use of this otherwise unusable land. The use of the property for a pool and deck is reasonable within the R-2 Residential District. Without the relief sought, Applicant would be unable to make use of the unusually shaped rear yard.

The Applicant testified that there are many pools in the neighborhood that are similar to his. In fact, he is modeling the pool and deck he is proposing after a neighbor's pool. There are

also inground pools on the neighboring properties. Further, there was positive public comment in favor of the Application from a neighbor who also has a pool in the area. Applicant further testified that, in addition to making use of otherwise difficult land, the deck and pool would make the yard more aesthetically pleasing than it currently is. Therefore, 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. Finally, 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.

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 4-0 vote is as follows:

1. The Application of Christopher Barber, docket #Z-21-21 for a Variance from Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit the construction of a deck with a rear yard setback of 15 feet where a minimum of 44 feet is required in the R-2 Residential District is GRANTED.
2. The Application of Christopher Barber, docket #Z-21-21 for a Variance from Section 143-27.A.(2) of the Lower Providence Township Zoning Ordinance to permit the construction of a deck with a rear yard intrusion of 29 feet where 15 feet is required in the R-2 Residential District is GRANTED.


Dated: November 30, 2021

ORDER

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

LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

George Ozorowski

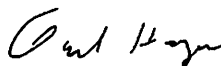


Joseph Pucci

Kathie A Eskie

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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.