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May 4, 2022

**VIA CERTIFIED MAIL**  
**RRR # 7020 2450 0001 6265 1772**

Eric C. Frey, Esquire  
Dischell, Bartle & Dooley, P.C.  
224 King Street  
Pottstown, PA 19464

**RE: Lower Providence Township Zoning Hearing Board**  
**Application of Christian & Meredith Nascimento**  
**Application No. Z-22-01**

Dear Eric:

In accordance with the Zoning application filed on January 21, 2022 by Mr. and Mrs. Nascimento, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board. Please note that if you have any objections to the Order, you have thirty (30) days from its date to file an appeal with the Court of Common Pleas in Norristown.

Yours very truly,



Keith B. McLennan

KBM/

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

Christopher Gerdes  
Randy Klein  
Terrance Barnes  
Michael Mrozinski  
Tina Blain

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO.	Z-22-01	:	HEARING DATE:	March 24, 2022
		:		
		:		
APPLICATION OF:		:		
	Christian & Meredith Nascimento	:		
	2500 Condor Drive	:		
	Audubon, PA 19403	:		
		:		
PROPERTY:		:		
	2500 Condor Drive	:		
	Lower Providence Township	:		
	Parcel No. 43-00-00458-26-4	:		

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

A public hearing on the application (“Application”) concerning the above captioned premises (the “Property” or “Subject Property”) was held on March 24, 2022, before the Zoning Hearing Board of Lower Providence Township (the “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”). After consideration of 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 January 21, 2022, applicants Christian & Meredith Nascimento (“Applicants”) owners of 2500 Condor Drive, Audubon, Pennsylvania in Lower Providence Township filed an application seeking a variance from Ordinance sections: (1) 143-235 to permit the construction of a pool along with grading, excavation, and a retaining wall in the Steep Slope Conservation

District; (2) 143-27 to permit construction of a pool with a rear yard setback of 15.6 feet; and (3) 143-6.2 to allow construction of a pool and decking that would increase the impervious coverage on the Subject Property to 36.1% where a maximum of 35% is permitted. At the time of the hearing, Applicants withdrew their request for a variance from the rear-yard setback as the proposed use is compliant with the relevant provisions of the Ordinance.

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 March 24, 2022, where the Board accepted evidence in the case.

3. Zoning Hearing Board Members Participating

Present at the hearing on March 24, 2022, were: George J. Ozorowski, Chair, Joseph Pucci, Vice-chair, Kathie Eskie, Member, Chris Gerdes, Member, Gail Hager, Member, Randy Klein, Alternate and Terrance Barnes, Alternate.

4. Appearances of Counsel

- a. Keith B. McLennan, Esquire, appeared as Solicitor for the Zoning Hearing Board.
- b. Applicant was represented by Eric C. Frey, Esquire, of Dischell, Bartle & Dooley, P.C., 224 King Street, Pottstown, PA 19464.

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.

7. Witnesses

- a. Glen Kelczewski testified as an expert witness in support of the Application.
- b. Sergio Christian Nascimento testified in support of the Application.

8. Exhibits

- a. The Board submitted the following exhibits at the hearing:

B – 1 Letter Sent to Property Owners.

B – 2 Mailing Matrix of Addresses.

B – 3 The Certificate of Posting.

B – 4 The Certificate of Notification.

B – 5 Proof of Publication.

- b. The Applicants submitted the following exhibits:

A – 1: The Application and attached exhibits.

A – 2: The deed of the subject property.

A – 3: The relevant site plan.

A – 3(a): The plan as provided to the Montgomery County Conservation District.

A – 4: Aerial photographs of the subject property.

A – 5: Photographs of the subject property.

A – 6: Letter from the Montgomery County Conservation District.

A – 7: CV of Glen Kelczewski.

A – 8: Letter from neighboring property owner in favor of the requested relief.

**FINDINGS OF FACT**

- 1. The Applicants are Mr. Sergio Christian Nascimento and Ms. Meredith Nascimento

(Applicants) owner of the lot located at 2500 Condor Drive, Audubon, PA 19403.

2. The Subject Property is comprised of a 15,038 square foot lot with tax parcel number 43-00-00458-26-4 which currently has a single-family home.

3. Applicant acquired the Property on December 17, 2007.

4. The present use began in 2001.

5. The Property is surrounded by open space on two sides, and a single-family home on one side.

6. The applicable zoning district is R-1 Residential Zoning District and the Property is located within the Steep Slope Conservation District.

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

8. Section 143-235 of the Ordinance codified the legislative intent relating to the creation of the Steep Slope Conservation District. Section 143-240 (D) of the Ordinance prohibits the construction of swimming pools in the Steep Slope Conservation District.

9. Section 143-33 of the Ordinance sets a maximum amount of impervious coverage of 35% for residential uses in the R-1 Residential District.

10. Applicants propose to construct a residential pool with grading, excavation, and a retaining wall which could not be completed without zoning relief.

11. Applicants' proposed use would create impervious coverage of 36.1% on the Subject Property.

12. The existing rear yard contains steep slopes.

13. The steep slopes extend into open space and not towards any other residential property.

14. The Subject Property is a smaller than normal lot because it was developed prior to

the current zoning requirements.

15. The subject Property is adjacent to Providence Oaks Open Space, and therefore, the proposed use will have no impact on any adjacent properties.

16. Storm water is not a concern on the property; however, a storm water system will be included in the proposed use.

17. The storm water system will control more storm water than would be created by the increased impervious coverage.

18. The storm water control has an underground basin. The water is discharged into the open space area downstream on the slope.

19. The proposed use would include a retaining wall as well as landscaping around the pool.

20. The subject property was part of a cluster development which created smaller than normal lots.

21. The Montgomery County Conservation District approved of the plan.

22. The Township Planning Commission approved of the plan on the following conditions:

a. The retaining wall design be approved by the Township;

b. That any cutting or disturbance of the open space be limited to what is absolutely necessary.

23. There are other pools in the neighborhood and the addition of the pool would not be contrary to the character of the neighborhood.

24. The proposed use will meet the side yard and rear yard setback requirements of the Ordinance.

25. The neighboring wooded open space will not be developed due to use restrictions on those areas.

26. There will be no additional signs, traffic, or parking due to the proposed use.

27. There was no adverse comment regarding the Application.

28. There are no outstanding state or federal violations cited on the Property.

29. The proposed use will not impact existing traffic patterns or volumes.

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

31. The proposed use will not alter the essential character of the neighborhood or district in which it is located.

32. The proposed use will not impair the appropriate use or development of adjacent properties.

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

## **DISCUSSION**

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

Applicants seek to construct a pool and retaining wall within the R-1 Residential District and within the Steep Slope Conservation District and seeks relief from: (1) the Ordinance Section 143-235 to permit the construction of a pool along with grading, excavation, and a retaining wall; and (2) the Ordinance Section 143-6.2 to allow construction of a pool and decking that would increase the impervious coverage on the Subject Property to 36.1% where a maximum of 35% is permitted.

### **II. Ordinance Subsections Subject to Variance.**

Section 143-235 of the Ordinance codified the legislative intent relating to the creation of

the Steep Slope Conservation District. Section 143-240 (D) of the Ordinance prohibits the construction of swimming pools in the Steep Slope Conservation District. Section 143-33 of the Ordinance allows a maximum amount of impervious coverage of 35% for residential uses in the R-1 Residential District.

### **III. 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.

#### IV. Facts Applied to the Legal Standard.

Applicants seek to construct a pool and retaining wall within the R-1 Residential District within the Steep Slope Conservation District and seeks relief from Ordinance Sections: (1) 143-

235 to permit the construction of a pool along with grading, excavation, and a retaining wall; and (2) 143-6.2 to allow construction of a pool and decking that would increase the impervious coverage on the Subject Property to 36.1% where a maximum of 35% is permitted.

The Subject Property is of a uniquely small size due to the plot being developed in a cluster development prior to the currently applicable Ordinance being adopted. There are topographical features on the property that cause construction to be difficult, particularly the steep slope in the rear yard. The Subject Property has one single family home which abuts the lot but is otherwise surrounded by open space which will remain undeveloped as part of the Providence Oaks Open Space. As part of the Steep Slope Conservation District, the Ordinance prohibits construction of a pool on the Subject Property without relief from the Zoning Hearing Board. Applicants have previously received approval from the Township Planning Commission and the Montgomery County Conservation District for the construction of the pool.

Regarding the impervious coverage, the additional 1.1% of coverage is de minimis. Further, Applicant intends to include a substantial storm water abatement system which will improve the storm water mitigation well beyond any additional burden the proposed use would have. Further, any additional storm water would drain into the adjoining open space and would not burden neighboring properties.

Therefore, there are unique circumstances or conditions on the Property which cause there to be no possibility that the property can be developed in strict conformity with the provisions of the Zoning Ordinance. Authorization of a variance is therefore necessary to enable the reasonable use of the Property. Applicants did not create the existing hardship, and the requested relief will not alter the essential character of the neighborhood or district in which the Property is located. Finally, the requested relief will represent the least modification possible of the regulation in issue.

The Board finds and concludes that the Applicants' 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:

1. The Application of Christian & Meredith Nascimento for a Variance from §143-235 of the Lower Providence Township Zoning Ordinance to permit the installation of a swimming pool, pool decking, fence, retaining wall, and related excavation and grading in the Steep Slope Conservation District is GRANTED subject to the following conditions:
  - a. The Applicants comply with the recommendations and conditions of the Planning

Commission;

b. The Applicants follow all other codes and regulations regarding the installation of the pool.

2. The Application of Christian & Meredith Nascimento for a Variance from §143-33.A. of the Lower Providence Township Zoning Ordinance regarding Dimensional and Area Requirements for individual lots, to permit impervious surface coverage of 36.1% of lot area where a maximum of 35% is permitted is GRANTED subject to the following conditions:

a. The Applicants comply with the recommendations and conditions of the Planning Commission;

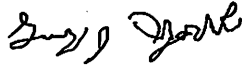
b. The Applicants follow all other codes and regulations regarding the installation of the pool.

Dated: May 3, 2022

## **ORDER**

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

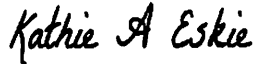
### **LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**



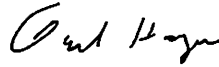
George Ozorowski




Joseph Pucci



Kathie Eskie



Gail Hager



Christopher Gerdes

Terrance Barnes, 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.