

MILLER TURETSKY RULE & McLENNAN
A Professional Corporation

MARK D. TURETSKY
JOHN A. RULE
KEITH B. McLENNAN*
JOSHUA H. CAMSON*
CHRISTOPHER D. HINDERLITER*
ROBERT G. MINNICH

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

September 9, 2022

VIA CERTIFIED MAIL
RRR #: 7020 2450 0001 6265 1940

Rowan Keenan, Esquire
Keenan Ciccitto & Associates
376 E. Main Street
Collegeville, PA 19426

RE: CPM Holdings LLC & Clark Property Maintenance, LLC
Lower Providence Township Zoning Hearing Board Application Z-22-11

Dear Rowan:

In accordance with your Zoning Application filed on June 3, 2022, 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/

Enclosure

Pc: Adam Supplee, 14 Fox Road (w/encl.)
Shirly Speer, 20 Fox Road (w/encl.)
Thomas Mincavage, 20 Fox Road (w/encl.)
Moamen Sakr, 12 Fox Road (w/encl.)
Kelly Cauley, 1 Fox Road (w/encl.)
Lower Providence Township Zoning Hearing Board Members

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-22-11	:	HEARING DATE:	July 28, 2022
		:		
APPLICATION OF:		:		
	CPM Holdings LLC &	:		
	Clark Property Maintenance LLC	:		
	3752 Ridge Pike	:		
	Collegeville, PA 19426	:		
		:		
PROPERTY:		:		
	3752 Ridge Pike	:		
	Lower Providence Township	:		
	Parcel No. 43-00-11788-00-4 :	:		

**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 July 28, 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, exhibit and argument presented, the Zoning Hearing Board hereby renders its decision on the Application.

Procedural Matters

1. Application before Zoning Hearing Board

On June 3, 2022, applicants CPM Holdings LLC and Clark Property Maintenance, LLC (collectively “Applicant”) owner and tenant of 3752 Ridge Pike in Lower Providence Township filed an application seeking the following relief: (1) variance from Section 143-77.A. of the

Ordinance to permit Multi-Family residential use within 300 ft of Ridge Pike; (2) a variance from Section 143-77.A(2) of the Ordinance to Permit a non-residential use within & without a building; (3) a variance from Section 143-77.A.(2)(a) of the Ordinance to permit landscaping business classed as a permitted retail store (see 143-6.2); and (4) Section 143-77.A.(2)(t) of the Ordinance to permit mixed use on lot for combination of By-Right residential & commercial within & without buildings parking & storage or permitted use within fenced area & within garage. At the hearing, Applicant withdrew the first request relating to the residential structure.

2. Notice and Hearing

The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on July 28, 2022, where the Board accepted evidence in the matter.

3. Zoning Hearing Board Members Participating

Present at the July 28, 2022, hearing were: George Ozorowski, Chair, members, Kathy Eskie, Gail Hager, Christopher Gerdes and Randy Klein.

4. Appearances of Counsel

- a. Keith B. McLennan, Esquire, appeared as Solicitor for the Zoning Hearing Board.
- b. Rowan Keenan, Esq. of 376 E. Main Street PO Box 26460, Collegeville, PA 19426 appeared for the Applicant.

5. Appearance of Other Parties

- a. Adam Supplee, 14 Fox Road.
- b. Shirly Speer, 20 Fox Road.
- c. Thomas Mincavage, 20 Fox Road.
- d. Moamen Sakr, 12 Fox Road.

e. Kelly Cauley, 1 Fox Road.

6. Also Present

Mike Mrozinski, the Community Development Director for Lower Providence Township and Paula Meazaros, the Court reporter.

7. Witnesses

- a. Jesse Clark, testified in support of the Application.
- b. Adam Supplee, testified in opposition to the Application.
- c. Shirly Speer, testified in opposition to the Application.
- d. Thomas Mincavage, testified in opposition to the Application.
- e. Moamen Sakr, testified in opposition to the Application.
- f. Kelly Cauley, testified in opposition to the Application.

8. Exhibits

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

B – 1 Certificate of Notification.

B – 2 The Certificate of Posting.

B – 3 Letter Sent to Property Owners.

B – 4 Matrix of Addresses.

B – 5 Proof of Publication.

b. The Applicants submitted the following exhibits:

A – 1 The Application;

A – 2 An aerial photo of the property with borders represented;

A – 3 A photograph of the property depicting the fence and surface of the lot;

A – 4 A photograph of the property depicting a section of fence and portion of the

garage;

A – 5 A photograph of the property depicting a section of fence and border area outside the fence;

A – 6 A photograph of the property depicting a section of fence and border area outside the fence;

A – 7 A photograph of the property depicting a section of fence and the area just inside the fence;

A – 8 A photograph of the property depicting the yard inside the fence showing 5 parked trucks;

A – 9 A photograph of the property depicting the yard inside the fence showing trailers with landscaping equipment;

A – 10 A photograph of the property depicting the yard inside the fence showing disturbed earth.

FINDINGS OF FACT

1. The Applicants are CPM Holdings LLC and Clark Property Maintenance, LLC (Collectively “Applicant”) owner and tenant of the Subject Property located at 3752 Ridge Pike, Lower Providence Township.
2. CPM Holdings LLC purchased the Property on January 20, 2022.
3. Clark Property Maintenance, LLC is the tenant of the property.
4. The Subject Property is comprised of a 45,400 square foot lot with tax parcel number 43-00-11788-00-4 which currently has a residential duplex and garage.

5. The only access to the property is from Fox Road.
6. The Property is located in the Ridge Pike West (“RPW”) zoning district.
7. There are two units in the residential duplex that are leased to tenants.
8. The tenants have approximately 4 cars total, which they park in front of the garage.
9. The residential tenants have been renting on the property for over 10 years.
10. Applicant proposes to continue to use the existing duplex for residential tenants.
11. Applicant otherwise proposes to store its landscaping equipment on the property.
12. Storage of landscaping equipment would include, without limitation, weedwhackers, chain saws, generator, hedge trimmers, vans, a skid loader, a mini excavator, a backhoe, trucks, trailers, snow plows, and mowers.
13. Applicant, Clark Property Maintenance LLC has approximately 20 employees.
14. Applicant expects employees to enter and exit the property from the hours of around 7:00 am to 5:00 pm.
15. The property abuts residential properties on Fox Road to the south and Evansburg State Park to the east.
16. Applicant states that there will be no business operated on the site. It will be used for storage, cleaning, and maintenance only.
17. The garage will be used to store equipment.
18. The larger equipment will be parked within the fenced area of the property.
19. Applicant will use the garage for maintenance and repair of equipment.
20. There are about 5 trailers and 8 trucks.
21. Applicant will not manufacture or build anything on site.
22. There are no plans to sell items from the property.

23. All office and other work associated with the business will be done at a different location.

24. The activities proposed by Applicant would qualify as a trade use under the Ordinance.

25. The property is intended for storage of vehicles and landscape equipment and as a staging area for Applicant's employees to assemble and retrieve those vehicles and equipment in the morning to go out on assignment and then to return and store those same items in the afternoon or evening.

26. There is a school bus stop near the property on the corner of Ridge and Fox where small children access transportation to and from their respective schools.

27. The employees would be exchanging their personal vehicles for the company equipment at similar times to the school bus pick-up and drop-off times.

28. Fox is a small, narrow dead-end street without sidewalks which would not easily accommodate the Applicant's trucks, trailers and large equipment at the same time as neighbors, visitors and other motorists attempting to gain access to and drive on Fox Road.

29. The residents of Fox road enjoy a quiet, safe street with little traffic that, due to the lack of sidewalks requires foot traffic to occur on the minimal shoulder to the road placing them at risk.

30. The operation of the property as a landscape vehicle and equipment staging and storage area would be dangerous to the residents of Fox Road and the motoring public both on that road and on Ridge Pike due to the layout of the roads and the high volume of traffic.

31. The property would cause risk to the area because of the concerns for ingress and egress from the property.

DISCUSSION

I. Statement of the Case

Applicant seeks to utilize the subject property for a storage operation for his landscaping business. In order to do so, Applicant is seeking the following relief:

(1) A variance from Section 143-77.A.(2) of the Lower Providence Township Zoning Ordinance to permit the nonresidential use of an existing home for a landscape business both in and outside of the building.

(2) A variance from Section 143-77.A.(2)(t) of the Lower Providence Township Zoning Ordinance to classify a landscaping business as a retail store under 143-6.2FF.

(3) A variance from Section 143-77.A.(2) of the Lower Providence Township Zoning Ordinance to permit the mixed use on a combined lot residential & commercial within & without buildings parking & storage or permitted use within fenced area & within garage.

II. Ordinance Subsections in Question

Section 143-77 of the Ordinance outlines the uses permitted by right in the RPW Zoning district. Importantly, this includes Section 143-77(2)(a) “Retail store, including baked goods store, bookstore, children's and infants' clothing store, clothing accessories store, convenience store, meat and seafood market and butcher shop, produce shop, and specialized retail store.” Section 143-6.2(AA) states that “a plant nursery or landscaping business with more than three employees shall be considered a retail store use.” Section 143-6.2(QQ) clarifies that “a contractor’s storage yard and offices for building trades, such as but not limited to: landscaping, plumbing, electrical work, building construction, building remodeling, woodworking, and roofing” are considered “Trades.”

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 use 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.

(3) Zoning Hearing Board considerations. In considering whether the allowance of a special exception or variance is contrary to the public interest, the Zoning Hearing Board shall consider whether the application, if granted, will:

(a) Substantially increase traffic congestion in the streets surrounding the subject site;

(b) Increase the risk of fire or panic or otherwise endanger the public safety;

(c) Overcrowd the land or create undue concentration of population;

(d) Be suitable for the property in question so as to be consistent with the spirit and purpose of the provisions of this chapter;

(e) Intrude upon the adequacy of natural light and air to adjoining properties;

(f) Create extraordinary burdens on public, private or community water systems or upon groundwaters or wells within the neighborhood;

(g) Overburden the public sanitary sewer system within the Township occasion environmental problems with on-site sanitary sewer installations;

(h) Place undue burdens upon the police, fire, ambulance or other emergency services provided throughout the neighborhood;

(i) Cause adverse affects to the appropriate use of adjacent properties in the neighborhood where the property is located;

(j) Cause risk or danger to the safety of persons or property by improper location or design of facilities for ingress and egress to and from the property in question; or

(k) Otherwise adversely affect the public health, safety, morals or general public welfare of the community.

(4) Burden of proof. In all cases, whether special exception, variance, interpretation, appeals from the Building Inspector or any other appeals lawfully brought before the Zoning Hearing Board, the applicant shall have the burden of proof, including the duty of presenting credible, relevant and pertinent evidence and testimony to persuade the Zoning Hearing Board that the applicant has satisfied the criteria set forth in this section. In addition to the foregoing, where an applicant has been specifically requested by the Zoning Hearing Board to provide specific evidence or testimony on any item set forth in Subsection D(3)(a) through (j), supra, or in the event that any party opposing any application shall claim that the proposal before the Zoning Hearing Board will cause any effects upon the matters addressed in Subsection D(3)(a) through (j), supra; then the applicant's burden of proof shall include the obligation of presenting credible, relevant and pertinent evidence on such topics as to persuade the Zoning Hearing Board that the relief requested by the applicant will not be contrary to the public interest with respect to the criteria placed at issue.

IV. Facts Applied to the Legal Standard.

Applicant seeks to utilize the subject property for a storage operation for his landscaping business. In order to do so, Applicant is seeking the following relief: (1) a variance

from Section 143-77.A(2) of the Ordinance to Permit a non-residential use within & without a building; (2) a variance from Section 143-77.A.(2)(a) of the Ordinance to permit landscaping business classed as a permitted retail store (see 143-6.2); and (3) Section 143-77.A.(2)(t) of the Ordinance to permit mixed use on lot for combination of By-Right residential & commercial within & without buildings parking & storage or permitted use within fenced area & within garage. Applicant withdrew the first request relating to the residential structure.

Applicant argues that the proposed use of the property is permitted by right under the Ordinance based on reading Sections 143-77(2)(a) and 143-6.2(AA). However, it is clear from the testimony that Applicant does not intend to use the property as a landscaping business but intends to use the property to store commercial landscaping equipment. The Ordinance states that “a contractor’s storage yard and offices for building trades such as but not limited to: landscaping. . .” is considered a “Trade” and not a retail store. Ordinance Section 143-6.2(QQ). Such use is not permitted by right in the RPW district.

The facts of this case are clear in distinguishing the operation of a retail landscaping business and the proposed storage operation. Here, Applicant intends to store weedwhackers, chain saws, a generator, hedge trimmers, vans, a skid loader, a mini excavator, a backhoe, trucks, trailers, snowplows, and mowers. The Applicant stated that there will be no business operated on this site. It will be used exclusively for storage, cleaning, and maintenance. Applicant does not intend to transact business or make any sales on the property. All the business-related work will be conducted at a different location, and employees will only appear on site to pick up their work vehicles for the day. Therefore, the operation is a landscaping storage area and not a landscaping/tree nursery retail store. Due to this, Applicant is not permitted to use the facility for the proposed use by right. Thus, to conduct the proposed business on the property, Applicant has the burden to show that it is entitled to a variance.

Applicant has failed to present adequate evidence to establish that an unnecessary hardship exists necessitating a variance in this matter. The owner of the applicant companies testified that he purchased the subject property with the intention of storing his landscaping equipment on the lot, however, he did not provide any evidence as to why this non-permitted use was necessary under the circumstances. There was no evidence that the property was deprived of any other use, and in fact, the property is well suited for any number of the uses permitted by right in the Ordinance. Further, and most damning to Applicant's position, is the fact that the property is currently being used for a residential purpose which shows that the property is already being used for a valid purpose.

Further, the Applicant failed to meet its burden to prove that the variance, if authorized, will not alter the essential character of the neighborhood or be detrimental to the public welfare. The overwhelming evidence from the neighbors was quite to the contrary. The property enters onto Fox Road which is a quiet, narrow dead-end limited access street with no sidewalks. The neighbors often meet, walk their dogs and their children engage in activities along the roadway. The increased traffic and disruption from the large equipment would not only disrupt the essential character of this neighborhood the public welfare is threatened.

There are significant safety concerns with the proposed use. Children wait for the bus at the corner of Ridge Pike and Fox Road and are returned to that same bus stop around the same time Applicant's employees will be driving to and from the property. The residents testified that this limited access intersection is already dangerous with challenges to motorists turning into Fox Road and getting out onto Ridge Pike. Further, the increased traffic created by the Applicant's employees arriving at the site with their numerous vehicles and then leaving the site with the Applicant's trucks, trailers and equipment could be problematic not just for traffic control but the safety of the school children. Similarly, the narrowness of Fox Road requires

substantial maneuvering to fit larger vehicles. The disruption that the landscaping vehicles would cause creates further concerns for the safety and alteration of the character of the neighborhood. Therefore, after consideration of §§143-168.D(3)(a)(j) and (k) of the Ordinance, the Board finds that the proposed use would have a detrimental effect on both the character of the neighborhood and the public welfare.

Finally, the variance requested is not the minimum variance that would provide relief, because there has been no hardship established by Applicant. Even if there were, relief could be rendered.

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

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will not impose an unnecessary hardship on the Applicant.
3. Applicant's proposed use is a Trade under the Ordinance.
4. Applicant is not permitted to conduct the proposed use as a matter of right in the RPW district.
5. There is no hardship due to the unique physical circumstances and characteristics of the Property.
6. The requested relief is not necessary to enable the Applicant reasonable use of the Property.
7. If granted, the community will be significantly changed, will make it unsafe and will alter the character of the neighborhood.

8. The requested relief does not represent the minimum that will afford relief and does not represent the least modification possible of the regulation at issue.

DECISION

The Lower Providence Township Zoning Hearing Board, by a 5-0 vote Denied the following variances from the Lower Providence Township Zoning Ordinance requested in the CPM Holdings LLC & Clark Property Maintenance, LLC, Docket #Z-22-11:

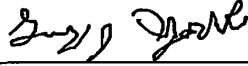
- (1) A variance from Section 143-77.A.(2) of the Lower Providence Township Zoning Ordinance to permit the nonresidential use of an existing home for a landscape business both in and outside of the building.
- (2) A determination or variance under Section 143-77.A.(2)(t) of the Lower Providence Township Zoning Ordinance to classify a landscaping business as a retail store under 143-6.2.
- (3) A variance from Section 143-77.A.(2)(t) of the Lower Providence Township Zoning Ordinance to permit the mixed use on a combined lot residential & commercial within & without buildings parking & storage or permitted use within fenced area & within garage.

Dated: September 2, 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.