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December 21, 2022

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7019 1120 0001 1274 9115**

Jared N. Klein, Esquire
Blank Rome LLP
130 N. 18th Street
Philadelphia, PA 19103

**RE: Lower Providence Township ZHB Application No. Z-22-15
Applicant: Brightview Landscaping**

Dear Mr. Klein:

In accordance with the Zoning Application filed on August 25, 2022 for the above matter, 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
Brian Jennings
Derick May

Christopher Gerdes
Randy Klein
Michael Mrozinski
Tina Blain
Rudolph Miller
Steven Ferguson

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-22-15	:	HEARING DATES:	August 25, 2022
		:		September 22, 2022
		:		November 22, 2022
APPLICATION OF:		:		
Brightview Landscaping		:		
400 N. Park Avenue		:		
Trooper, PA 19403		:		
PROPERTY:		:		
400 and 501 N. Park Avenue		:		
Lower Providence Township		:		
43-00-10543-00-7		:		
43-00-10549-00-1		:		

**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 August 25, 2022, September 22, 2022, and November 22, 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**

Brightview Landscaping ("Applicant"), owner of 400 N. Park Avenue and 501 N. Trooper Rd. in Lower Providence Township filed an application seeking a variance from Section 143-149 of the Ordinance to consolidate two non-conforming parcels held in single and separate ownership and continue and expand the non-conforming use of the Subject Property as a landscape business

in the R-2 Residential District. The Applicant is also requesting a variance from Section 143-6.2BB(1)(a)(1) of the Ordinance to permit the installation of ground mounted solar in a front yard.

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”) beginning on August 25, 2022, and concluding on November 22, 2022, where the Board accepted evidence in the matter. The matter was also called at the September 22, 2022, hearing, however no testimony was taken. The matter was continued to the November 22, 2022, hearing date at the request of the Applicant.

3. Zoning Hearing Board Members Participating

Present at the August 25, 2022, hearing were: Kathie Eskie, Member, Chris Gerdes, Member, Gail Hager, Member, George Ozorowski, Chair, Joseph Pucci, Vice Chair, and Randy Klein, Alternate.

Present at the September 22, 2022, hearing were: Kathie Eskie, Member, Chris Gerdes, Member, Gail Hager, Member, and Randy Klein, alternate.

Present at the November 22, 2022, hearing were: Joseph Pucci, Vice Chair, Kathie Eskie, Member, Chris Gerdes, Member, and Gail Hager, Member.

4. Appearances of Counsel

- a. Keith B. McLennan, Esquire and Jack Rule, Esquire appeared as Solicitors for the Zoning Hearing Board.
- b. Jared N. Klein, Esq. Blank Rome LLP, 130 N. Street, Philadelphia, PA 19103, appeared on behalf of the Applicant.

5. Appearance of Other Party

- a. Brian Jennings, a neighbor, entered his appearance as a party.

- b. Rudolph Miller, a neighbor, entered his appearance as a party.
- c. Derick May, a neighbor, entered his appearance as a party.
- d. Steven Ferguson, a neighbor, entered his appearance as a party.

6. Also Present

- a. Mike Mrozinski, the Community Development Director for Lower Providence Township.

7. Witnesses

- a. Todd Chambers, testified in support of the application.
- b. Lisa Thomas, was qualified as an expert, and testified in support of the application.
- c. Len Bradley, was qualified as an expert, and testified in support of the application.
- d. Brian Jennings, a neighbor, testified in support of the amended proposal.
- e. Steven Ferguson, a neighbor, expressed concerns about the original proposal.
- f. Rudolph Miller, a neighbor, expressed concerns about the original proposal.
- g. Derick May, a neighbor, expressed concerns about the original proposal.

8. Exhibits

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

B – 1 The Certificate of Posting.

B – 2 Certificate of Notification.

B – 3 Letter Sent to Property Owners.

B – 4 Matrix of Addresses.

B – 5 Proof of Publication.

- b. The Applicant submitted the following exhibits:

A – 1 The Application.

A – 2 Packet of information giving an overview of Brightview Landscaping as a company.

A – 3 Packet of Information including historic and current photos of the property as well as renderings of the proposed changes to the Property.

A – 4 Drawings of the current and proposed use of the Property.

A – 5 CV of Lisa L. Thomas, RLA, AICP, LEED AP.

A – S – 1 Amended rendering of proposed use for pilot project.

A – S – 2 Amended rendering of proposed use for full project.

FINDINGS OF FACT

1. The Applicant is Brightview Landscaping, who owns at the Subject Property located at 400 N. Park Ave. and 501 N. Trooper Rd., Trooper, PA in Lower Providence Township.

2. Applicant has been in operation for over 50 years and is the largest landscaping company in their area.

3. Applicant is headquartered in Pennsylvania but is a national company.

4. The Subject Property has tax parcel numbers of 43-00-10543-00-7 and 43-00-10549-00-1.

5. The Subject Property is located in the R-2 Residential Zoning district.

6. As to 400 N. Park Ave.:

a. The present use is as a landscaping company and parking lot.

b. There is currently a two-story office building, two greenhouse structures, a wood frame hut, and surface parking on the Subject Property.

c. The use of 400 N. Park Ave. as a landscaping business is a pre-existing non-conforming use.

- d. Additionally, 400 N. Park Ave. is a pre-existing non-conforming use as it exceeds the maximum allowable impervious coverage under the current Ordinance.
7. The lot at 501 N. Trooper Road is not currently a non-conforming use.
8. The surrounding area is residential with limited commercial properties.
9. Applicant proposes to combine the properties of 501 N. Trooper Road and 400 N. Park Avenue and requests a variance from Section 143-149 of the Ordinance to permit an extension of a non-conforming use, and a Variance from Section 143-6.2BB(1)(a)(1) of the Ordinance to permit the installation of ground mounted solar in a front yard.
10. Brightview Landscaping intends to use the Subject Property to pilot their project to make the company carbon neutral by 2035. If successful, they will incorporate what they learned at other branches throughout the United States.
11. Applicant's planned development of the property would be in two phases.
12. The first phase would be a smaller pilot project (Pilot Project) to test the viability of the use of solar generated electricity for the operation of the business.
13. The Pilot Project would entail the installation of solar panels on the property as well as the demolition of the residential/office building on the property.
14. If successful, a larger development (Expanded Project) would expand the breadth of the solar field as well as making alterations to the positioning of the buildings on the property.
15. The solar panels will assist in the goal of becoming carbon neutral by allowing Applicant to use a fleet of electric vehicles.
16. Applicant initially proposed to install the solar panels on a solar canopy on the 400 N. Park Road property.
17. Upon hearing feedback from the public and Board at the initial hearing in this

matter, Applicant amended its proposed development as reflected in Exhibits: A – S – 1 Amended rendering of proposed use for pilot project and A – S – 2 Amended rendering of proposed use for full project.

18. The amended plans removed the use of a solar canopy and will instead utilize the space in 501 N. Troper Road for a solar field. This is the only change from the original plan.

19. During the Pilot Project phase, Applicant intends to demolish an existing residential/office building on the property. Applicant will add electric vehicle charging stations, and a ground mounted solar field to the 501 N. Trooper lot.

20. If successful, Applicant will further develop the property in the Expanded Project to remove the existing parking lot at the 501 N. Trooper lot and install additional ground mounted solar panels.

21. Applicant intends to relocate and repurpose the existing buildings on the lot as illustrated in A-S-2. Further, Applicant will improve the parking facilities as illustrated in that exhibit.

22. As part of the proposed use, Applicant intends to use landscaped buffers.

23. There will be fencing along the frontage of Park Avenue.

24. As part of the Proposed Use, Applicant intends to remove an access road crossing to lower the flood plain in the area by 2.45 feet to improve storm water control for the benefit of the neighbors.

25. The 501 N. Troper lot is a double frontage lot with no rear yard, so no matter where Applicant constructed the solar field, the panels would technically be in the front yard.

26. This would require a variance under the Ordinance.

27. The proposed solar field will be compliant with all other aspects of the ordinance

regarding the installation of solar panels.

28. The proposed use will not emit smoke, dust, odor or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants beyond what currently exists with regard to the landscaping use.
29. The proposed use will not alter the essential character of the neighborhood.
30. The Applicant intends to continue to use the property for a landscaping business.
31. Chemicals necessary for the landscaping business are safely stored on site currently, and that practice will continue.
32. Trucks and tools will be stored on site as well as other landscaping materials.
33. There should be less emissions, less noise, and Applicant will remove some of the older buildings.
34. The property will be enhanced by the improvements.
35. Applicant is not intending to grow the branch or add additional vehicles, but instead to change the fleet to electric vehicles.
36. Lisa Thomas is an expert in land planning.
37. At the time the Property began to be used as a landscaping business, the Property was surrounded by farmland. Residential housing surrounding the Property developed later.
38. The existing impervious coverage on the site is approximately 71.2%.
39. There will be a net reduction of impervious coverage on the site.
40. The Proposed Use will comply with all setback requirements except for the requirement that there be no solar panels in the front yard.
41. The ground mounted solar is normally between 3-6 feet high.
42. There are currently four existing driveways.

43. With the Expanded Project, there will be one entrance to the Property.

44. A portion of the 501 Trooper Rd. property is leased out to another business. Applicant owns the property, but the Lessee operates the business and is required to maintain the area. Applicant did address the concerns of the neighbors with regard to that portion of the Property.

45. Applicant suffers a hardship about the property as it is unusually large compared to the surrounding lots. It has a longstanding existing nonconforming use. This use predates the development of the surrounding properties for residential use. Finally, the property is uniquely positioned in that it does not have a rear yard in which to put the solar panels.

46. Solar is an approved use, and Applicant only requests a variance regarding the location of the solar panels in the front yard.

47. There are no outstanding state or federal violations cited on this property at the time of the Application.

DISCUSSION

I. Statement of the Case

Applicant, owner of 400 N. Park Ave. and 501 N. Troper Road in Lower Providence Township filed an application seeking a variance from Section 143-149 of the Ordinance to consolidate the two parcels and extend the non-conforming use of the 400 N. Park Ave. parcel to the new consolidated lot as a landscape business in the R-2 Residential District. The Applicant is also requesting a variance from Section 143-6.2BB(1)(a)(1) of the Ordinance to permit the installation of ground mounted solar in a front yard.

II. Ordinance Subsections in Question

Section 143-149 of the Ordinance states that:

Any lawful nonconforming use of a portion of a building may be extended

throughout the building, and any lawful nonconforming building or any building of which a lawful nonconforming use is made may be extended upon the lot occupied by such building and held in single and separate ownership on the effective date of this chapter, provided that the area of such building shall not be increased by more than a total of 25% of the area of such building existing on the date it first became a lawful nonconforming building or a building of which a lawful nonconforming use is made, and provided further that any structure alteration, extension or addition shall conform with all height, area, width, yard and coverage requirements for the district in which it is located.

Section 143-6.2BB(1)(a)(1) states that “No [ground mounted solar energy systems] shall be permitted in a front yard.”

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.Cmwlt. 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's 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.

With regard to the extension of a non-conforming use:

the erection of structures upon land not previously so used, may only be accomplished by way of variance, the requisites of which are hardship to the owner and absence of detriment to the public interest. Peirce Appeal, 384 Pa. 100, 119 A. 2d 506 (1956); Mack Appeal, 384 Pa. 586, 122 A. 2d 48 (1956). The fact that an expansion of a nonconforming use is proposed is itself an important factor in the consideration of whether a variance should be granted for that purpose. Mack Appeal, *supra*.

Philadelphia v. Angelone, 3 Pa. Cmwlth. 119, 280 A.2d 672 (1971).

IV. Facts Applied to the Legal Standard.

Applicant, owner of 400 N. Park Ave. and 501 N. Troper Road in Lower Providence Township filed an application seeking a variance from Section 143-149 of the Ordinance to consolidate the two parcels and extend the non-conforming use of the 400 N. Park Ave. parcel to the new consolidated lot as a landscape business in the R-2 Residential District. The Applicant is also requesting a variance from Section 143-6.2BB(1)(a)(1) of the Ordinance to permit the installation of ground mounted solar in a front yard.

The uncontroverted evidence presented at the hearing established that the parcel at 400 N. Park Ave. had been in operation as a landscaping business prior to the enactment of the current zoning standards. The Property is therefore a preexisting non-conforming use. As part of the original plan, Applicant did not intend to extend operations of its landscaping business into the additional lot at 501 N. Trooper Rd. following the combination of the lots. The original proposal included a planned solar canopy to be included at 400 N. Park Ave. and for the parking lot at 501 N. Trooper Rd. to be converted to green space.

Due to the change in plans as a result of the feedback from the Board and the Public, the Applicant amended the plans to exclude the solar canopy and instead use the area located at 501 N. Trooper Rd. as a solar field. This requires a variance under the standard that there is a hardship to the Applicant and that there will be no detriment to the public.

Applicant has proven a hardship in this instance. The property is unusually large compared to the surrounding lots. It has a longstanding existing nonconforming use. This use predates the development of the surrounding properties for residential use. Finally, the property is uniquely positioned in that it does not have a rear yard in which to put the solar panels.

The original plan to use a solar canopy was amended in part due to the concerns of the impact on the residential neighborhood surrounding the property. Applicant's use predates the residential use of the surrounding area. Without the canopy, there is nowhere else on the subject property to include the solar panels due to the building configuration, parking needs, and existing topography. This prohibits Applicant from adding the solar panels to the property creating the hardship.

The public interest will not be burdened, but instead will benefit from the proposed changes to the Property. Locally, there will be a reduction in sound, vehicle emissions, and improvements to the storm water issues in the area. Globally, shifting to renewable energy sources will help decrease harmful carbon emissions. Further, from a business standpoint, the use of renewable energy may have a positive impact as the company is less affected by fluctuations in the global petroleum market.

As for the location of the solar field, Applicant requests a dimensional variance to allow for the placement of the panels in the front yard. Along with the above-mentioned hardships, Applicant has proven that the lot is unique in that it has two front yards. Therefore, it is impossible to place a solar field on the property within the requirements of the Ordinance. This is the most basic example of a hardship to a landowner who would otherwise be permitted to use its property in this way. Applicant did not create this hardship as it is a direct result of the zoning scheme. Further, the proposed variance is the minimum variance that will afford relief.

Importantly, the addition of solar panels will not alter the character of the neighborhood.

The use of the Subject Property as a landscaping business predates the surrounding residential development. Therefore, this business has been a part of the neighborhood since its inception. The switch to an electric fleet will decrease the impact the business has on the neighbors, and Applicant has proposed substantial landscaping to obscure the panels from the view of the neighbors. This will further minimize the current impact that the existing business has on the neighbors. Additionally, Applicant has shown that it will mitigate existing storm water issues in the area with the development. This further improves the neighborhood.

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

On November 22, 2022, the Lower Providence Township Zoning Hearing Board by a

4-0 vote granted the following variances from the Lower Providence Township Zoning Ordinance requested in the Application of Brightview Landscaping docket#Z-22-16:

- a. A variance from Section 143-149 of the Lower Providence Township Zoning Ordinance to consolidate two non-conforming parcels held in single and separate ownership and continue and expand the pre-existing non-conforming use as a landscape business in the R-2 Residential District.
- b. A variance from Section 143-6.2BB(1)(a)(1) to permit placement of ground-based solar electricity panels in the locations identified on the exhibits presented to the Board.
- c. The variances are granted subject to the following conditions:
 - i. Applicant shall provide adequate buffering along Park Avenue as represented to the Board.
 - ii. Applicant will remove the access road and culvert on the 501 N. Trooper Road parcel to address storm water issues as represented to the Board.
 - iii. The ground-mounted solar panels shall not exceed 6 feet in height measured from the ground on which they are placed.

Dated: December 20, 2022

ORDER

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

**LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD**

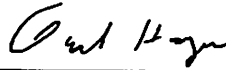
George Ozorowski



Joseph Pucci



Kathie Eskie



Gail Hager



Christopher Gerdes

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.