

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-18-08	:	HEARING DATE: July 26, 2018
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	:	
APPLICATION OF:	:	
ASB HOME IMPROVEMENTS LLC	:	
	:	
PROPERTY:	:	
3829 Yerkes Road	:	
Collegeville, PA 19426	:	
Parcel No. 43-00-16522-00-4	:	

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

On June 4, 2018 the applicant, ASB Home Improvements LLC (hereinafter the “Applicant”), filed a Special Exception and Variance application regarding its intended development of a parcel of land located at 3829 Yerkes Road, Collegeville, Lower Providence Township, PA 19426 parcel number 43-00-16522-00-4 (hereinafter the “Property”). Applicant is seeking to create three (3) single-family residential lots for the construction of two (2) single-family detached homes in the R-2 zoning district with Steep Slope Conservation District overlay. The Applicant has requested that the Lower Providence Township Zoning Hearing Board (the “Board”) grant it a Special Exception under §143-239.A. of the Lower Providence Township Zoning Ordinance (“Ordinance”) to permit the intended use in the Steep Slope Conservation District. The Applicant has also requested a variance from §143-37.A. of the Ordinance as well §143-240, particularly subsections A., B. and C., to permit development within the boundaries of the Steep Slope Conservation District. The Application was properly advertised, and, after Applicant’s continuance request from the June 28, 2018 meeting was granted a public hearing was held before the Board on July 26, 2018 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, Vice-Chairwoman

Gail Hager, members: Joseph Pucci, Patricia Alzamora, George Ozorowski and Robert Hardt, alternate. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esq., the Solicitor

FINDINGS OF FACT

1. The Applicant is ASB Home Improvements LLC with an address of 3310 Stump Hall Road, Collegeville, Lower Providence Township, Pennsylvania 19426.
2. The Applicant is the owner of the subject Property located at 3829 Yerkes Road, Collegeville, Lower Providence Township, Pennsylvania 19426.
3. The Applicant was represented by Bernadette A. Kearney, Esquire of Hamburg, Rubin, Mullin, Maxwell & Lupin, 375 Morris Road, Lansdale, PA 19446-0773.
4. Testimony for the Applicant was provided by Rolph A. Graf, Professional Engineer from Graf Engineering, LLC who was accepted as an expert.
5. Three (3) township residents appeared at the hearing and expressed opposition to the Application.
6. The Property is located within the R-2 Residential District and contains “steep slopes” as defined in §143-236 of the Ordinance and thus is subject to the Steep Slope Conservation District overlay.
7. The present use of the Property is residential with one residence located thereon since 1953.
8. The Property is 4.68 acres and best described as a “flag lot” as it is significantly deeper than wide.

9. The Property is served by public water and public sewer which will be extended to the 2 new lots if the variances, special exception and subdivision are approved.

10. Applicant seeks to subdivide the property to create two (2) additional single family residential building lots which shall comply with all other dimensional requirements of the R2 Residential District.

11. The proposed development will be consistent with the existing R2 Residential District neighborhood.

12. The proposed 2 additional residential building lots will not cause any material health or safety risks to the general public.

13. The existing home at the front of the Property shall remain.

14. Neither the existing home nor Yerkes Road is being moved.

15. The existing front yard setback for the existing home is fifty-five and two tenths feet (55.2').

16. Applicant proposes to reduce the front yard setback to forty-one and seven tenths feet (41.7') due to the impact of the proposed subdivision and land development.

17. As a result of the land development, measurement from the ultimate right of way is required to be provided for dedication of the new improvements reducing the front yard setback by thirteen and one half feet (13.5').

18. Applicant intends to install a driveway linking the proposed 2 rear building lots to Yerkes Road traversing an area of steep slopes and flood plain.

19. Installation of the driveway as proposed requires the installation of a culvert over an existing drainage swale, and in the steep slopes.

20. Applicant is seeking to disturb 5.72% of the of steep slopes greater than 25% on the property.

21. Applicant is seeking a conditional use from the Lower Providence Township Board of Supervisors under §143-186.C.(1) to permit the proposed common driveway and culvert to cross the floodplain and drainage swale.

22. The Application and plans were submitted to the Lower Providence Township Planning Commission for its review and recommendations in compliance with § 143-242.A.(3) of the Ordinance.

23. The following exhibits were made of record:

- A-1 Resume of Rolf A. Graf, Professional Engineer.
- A-2 Application filed on June 4, 2018.
- A-3 Deed for 3829 Yerkes Road, Collegeville, Lower Providence Township, Pennsylvania 19426.
- A-4 Layout Plan from Graf Engineering dated May 14, 2018.
- A-5 Zoning Plan from Graf Engineering dated May 14, 2018.
- B-1 The Application's advertisement.
- B-2 Proof of Publication of the advertisement of the Application.
- B-3 Notice to the surrounding property owners.

24. The Applicant seeks to develop the Property while substantially preserving the natural features of the Property, including the steep slopes and wooded areas.

25. The minimum lot size in the R2 district is 25,000 square feet.

26. Each proposed lot and building will conform to lot size and setback requirements of the Zoning Ordinance.

27. The essential character of the neighborhood will remain unchanged should the Application be granted.

DISCUSSION

I. Statement of the Case

The Applicant has requested a Special Exception pursuant to § 143-239 of the Lower Providence Township Zoning Ordinance, to permit the creation and development of two (2) single family residential building lots in the Steep Slope Conservation District. The Steep Slope Conservation District was created by Article XXIX § 143-235 of the Lower Providence Code to (among other things):

“... conserve and protect those areas having steep slopes, as defined herein, from inappropriate development and excessive grading, as well as to permit and encourage the use of the said areas for open space purposes so as to constitute a harmonious aspect of the continuing physical development of Lower Providence Township.”

§143-236 of the Ordinance defines the Steep Slope Conservation District as those areas having slopes of 25% or greater. The Applicant has acknowledged in its Application that the Property contains steep slopes as defined by the Ordinance.

Ordinance §143-238 sets out 9 uses permitted in the Steep Slope Conservation District, none of which include Applicant's intended use. Fortunately for the Applicant, §143-239.A. of the Ordinance provides it the opportunity to install site improvements to the Property to support the development of building lots by special exception. Applicant has requested such relief to permit the side yard of the proposed lots to have steep slopes.

However, Applicant cannot yet be sanguine. In order to develop the Property into two (2) building lots for single-family dwellings Applicant must contend with the prohibitions of

§143-240 of the Ordinance. §143-240 prohibits the following uses in the Steep Slope Conservation District:

- A. Freestanding structures, buildings and retaining walls.
- B. Roads, access driveways and parking facilities.
- C. Clearing or excavation of the land.

In order to accomplish its goal, in addition to the special exception required under §143-239 the Applicant needs a series of variances from §143-240.A., B. and C.

Finally, Applicant has requested that due to the extensive work that must be done to obtain the conditional use and SALDO approvals that it be granted an extension of the time period to complete its project from the typical six (6) months to twelve (12) months.

II. The Special Exception

A. General Rules.

A special exception is a conditionally permitted use, which the municipal legislative body has determined to be appropriate in the zoning district if specific standards set forth in the zoning ordinance are met. Mehring v. Zoning Hearing Bd. of Manchester Twp., 762 A.2d 1137, 1139 (Pa. Commw. 2000); In re Brickstone Realty Corp., 789 A.2d 333, 340 (Pa. Commw. 2001)(citing Bray v. Zoning Bd. of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980)). A special exception is thus not an exception to a zoning ordinance, but rather a use which is expressly permitted, absent a showing of a detrimental effect on the community. Greaton Properties, Inc. v. Lower Merion Twp., 796 A.2d 1038, 1045 (Pa. Commw. 2002); Freedom Healthcare Services, Inc. v. Zoning Hearing Bd. of City of New Castle, 983 A.2d 1286, 1291 (Pa. Commw. 2009); Morrell v. Zoning Hearing Bd. of Borough of Shrewsbury, 17 A.3d 972, 975 (Pa. Commw. 2011).

B. Establishing a Right to a Special Exception

To establish entitlement to a special exception, the applicant must initially prove that the proposed use complies with the specific, objective criteria set forth in the zoning ordinance.

Mehring v. Zoning Hearing Bd. of Manchester Twp., 762 A.2d 1137, 1139 (Pa. Commw. 2000).

Under Ordinance §§143-241 and 242, an applicant for a special exception in the Steep Slope Conservation District must submit an application along with the required studies to educate the Board why a special exception is appropriate.

The Board then under §143-168 B. of the Ordinance must evaluate the Application with guidance from §143-242.B which states:

§ 143-242 Procedures and standards for special exception uses and variances.

B. Standards for approval of uses by special exception. In considering a use as a special exception, the Zoning Hearing Board shall consider the following:

- (1) That the use is one which is permitted by special exception in §143-239 herein.
- (2) The relationship of the proposed use to the specific objectives set forth in §143-235 of this article.
- (3) The design standards set forth in the Subdivision and Land Development Ordinance of Lower Providence Township.
- (4) The erosion and sediment control plan submitted with the application, drawn in accordance with the requirements of the Subdivision and Land Development Ordinance of Lower Providence Township.
- (5) Abutting property shall not be adversely affected by runoff or erosion from the proposed use.
- (6) The general welfare, safety and public interest of Lower Providence Township or adjacent municipalities shall not be adversely affected.
- (7) Any use permitted by special exception shall provide evidence that:

(a) Proposed buildings or structures are of sound engineering design and that footings are designed to extend to stable soil and/or bedrock as required by the Township Building Code.

(b) Proposed vehicular facilities, including roads, drives and/or parking areas, shall be so designed that land clearing and/or grading will not cause accelerated erosion. Both vertical and horizontal alignments of vehicular facilities shall be so designed that hazardous circulation conditions shall not be created.

(c) Proposed on-lot sewage disposal facilities shall be properly designed and installed in conformance with all pertinent health regulations.

(d) Proposed nonagricultural displacement of soil shall be for causes consistent with the intent of this article and shall be executed in a manner that will not cause excessive erosion or other unstable conditions.

(e) Surface runoff of water will not create unstable conditions, including erosion, and that appropriate stormwater drainage facilities or systems will be constructed as deemed necessary.

Finally, § 143-242 A.(5) of the Ordinance provides that the Board: "...may impose special measures or conditions as deemed reasonably necessary and appropriate for the proposed use(s) to conform to the intent of this article." See also §913.2 of the Pennsylvania Municipalities Planning Code and Feldman v. Board of Supervisors of East Caln Twp., 48 A.3d 543, 548 (Pa. Commw. 2012).

C. Applicant's Special Exception to Permit Side Yard Steep Slopes

Applicant's proposed residential use for the development of single family detached dwellings is consistent with the R-2 zoning district. Applicant's proposed use with a side yard comprised of limited steep slopes is, for the most part, consistent with the legislative intent behind the Steep Slope Conservation District set forth in Ordinance §143-235. The Applicant's engineer testified that development of the property will not disturb the natural features of the property such as the steep slopes noted on Exhibit A-2. Further, Applicant's engineer testified that with the installation of the culvert the inclusion of steep slopes in the side yard of the

subdivided parcels will not adversely impact water runoff or create erosion issues. In addition, Applicant pledged to work with surrounding landowners to create a buffer of trees to maintain privacy between and among the new and existing homes, keeping as many trees as possible. Regardless, the Applicant must comply with the Township's Subdivision and Land Development Ordinance ("SALDO"), erosion control, storm water management and other related ordinances.

The development will not alter the character of the neighborhood nor impair development of adjacent property or be detrimental to public welfare, safety or the public interest. Finally, of the sixteen-thousand forty-four (16,044) square feet of slopes greater than twenty five percent (25%) existent at the Property, a limited amount of those steep slopes will be in the proposed side yard and only nine hundred eighteen (918) square feet or 5.72% of the total will be impacted by the proposed subdivision.

III. The Variances from §143-240

Applicant has requested variances from §143-240.A, B. and C. of the Lower Providence Township Zoning Ordinance to permit the clearing and grading/excavation of land in the Steep Slope Conservation District and installation of a culvert structure and driveway to develop the 2 proposed lots in the rear of the Property.

Section 143-240 states as follows:

§143-240 Prohibited uses.

The following uses shall be prohibited within the boundaries of the Steep Slope Conservation District:

- A. Freestanding structures, buildings and retaining walls.
- B. Roads, access driveways and parking facilities.
- C. Clearing or excavation of the land, except when related to an activity approved either by special exception, as set forth in § 143-239 of this article, or by variance.

In order to obtain the requested variances from these prohibitions Applicant must pass the variance test embodied in the Municipalities Planning Code 53 P.S. § 10910.2 and the Ordinance §143-168.A which provide that:

(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.

In addition, 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. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998).

In addition to the above test, when evaluating an application for a use variance in the Steep Slopes Conservation District §143-242.C. of the Ordinance requires the Zoning Hearing Board consider the same standards applicable to a request for a special exception under §143-242.B.(2) – (7) noted above in Section II.

With its Application Applicant argues that it is entitled to the requested variances both because the variances requested are de minimis or, alternatively, there are unique circumstances and peculiar aspects of the property that create a hardship that require the grant of a variance. For example, of the Property's 4.68 acres less than twenty four percent (24%) (1.14 acres) is currently being used for the existing residence leaving more than 3.5 acres available for the 2 proposed other homes. The Applicant has provided plans for reasonable use and development of the property. The Applicant has (i) limited the number of houses to construct on the property, (ii) will comply with the other dimensional requirements of the Ordinance, (iii) must comply with SALDO and the various other Lower Providence Township Ordinances that govern, (iv) preserved as many of the natural features of the property, including the existing pond, wooded area and drainage swale. What is more the Applicant has provided for safe and reliable access ways and pull off areas to serve the proposed two (2) new lots and has provided for a relatively nominal steep slope area of disturbance. As noted heretofore, only 5.72% of steep slopes greater than twenty five percent (25%) will be impacted by the proposed subdivision.

Strict conformity with the requirements of §143-240 would defeat the reasonable use of the Property. Further, this hardship was not created by the Applicant. Additionally, the effect of the variance is minimal, at most affecting 914 square feet of steep slopes out of sixteen-thousand forty-four (16,044) square feet. Therefore, variances from the provisions of §143-240.A, B and C of the Ordinance are appropriate.

Finally, since the proposed use is just as benign as the Property's current use for a single family residence, the addition of two (2) more homes on lots that far exceed the minimum lot requirements of the R2 district can hardly be said to negatively impact the general welfare, safety and public interest of the Township under §143-242.C. and §143-242.B.(2) – (7) of the Ordinance. Regardless, the Applicant must comply with the Township's Subdivision and Land Development Ordinance ("SALDO"), erosion control, storm water management and other related ordinances.

The Applicant has demonstrated that the development will not alter the character of the neighborhood and is consistent with the existing neighborhood and will not impair development of adjacent property nor be detrimental to public welfare, safety or the public interest. Finally, of the sixteen-thousand forty-four (16,044) square feet of slopes greater than twenty five percent (25%) existent at the Property, only nine hundred eighteen (918) square feet or 5.72% of the total will be impacted by the proposed subdivision.

IV. Variance from Section 143-37.A.(2)

Finally, due to the impact the subdivision will have on the measurement of the front yard setback from the ultimate right of way, Applicant has requested a variance from §143-37.A.(2) of the Ordinance that requires a front yard setback of fifty feet (50') to permit a forty-one and seven tenths foot (41.17') setback on the existing home. Accordingly, Applicant has requested a dimensional variance.

A. Dimensional v. Use Variance.

There are 2 types of variances, a "dimensional" variance and a "use" variance. 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 the type of variance sought, 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. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998).

B. Dimensional Variance Legal Standard.

Differing standards apply to use and dimensional variances. Generally, a variance requires the applicant to show that unnecessary hardship will result if a variance is denied, and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) (citing Allegheny West Civic Council, Inc. v. Zoning Bd. Of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997)). Although Hertzberg eased the variance requirements for a dimensional variance, it did not remove them. 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 the five part test articulated above. Id.

In the instant case, the existing residence is not moving. Pre-subdivision the Property is setback in the front fifty-five and two tenths feet (55.2'). However, as proposed post subdivision, due to the alteration of the lot, the front yard setback becomes forty-one and seven tenths feet (41.7') from the ultimate right of way. This difference of 13.5' can hardly be said to be a

material change particularly since neither the roadway nor the house is moving. It is merely created by the necessity of measurement in light of the proposed subdivision of the Property. Therefore, at best it is de minimis or, at worst, an analysis of the factors for a dimensional variance would demonstrate satisfaction of that liberal test. See Lench v. Zoning Board of Adjustment of the City of Pittsburgh, 13 A.3d 576 (2011).

CONCLUSIONS OF LAW

1. Applicant has standing to appear before the Board regarding the requested relief.
2. Applicant has complied with the special exception and variance procedures required by Ordinance §§143-239 and 143-242.
3. The proposed use is one which is permitted by special exception in §143-239 herein.
4. The proposed use is consistent with the legislative intent and specific objectives set forth in §143-235.
5. The general welfare, safety and public interest of the Township or adjacent municipalities will not be adversely affected by the grant of the relief requested.
6. Applicant is required to comply with the design, erosion and sediment control standards of the Township's SALDO, building code and related ordinances such that (among other things addressed by those ordinances):
 - a. Abutting properties shall not be adversely affected by runoff or erosion.
 - b. Proposed buildings or structures are of sound engineering design and that footings are designed to extend to stable soil and/or bedrock as required by the Township Building Code.
 - c. Proposed vehicular facilities, including roads, drives and/or parking areas, shall be so designed that land clearing and/or grading will not cause accelerated erosion. Both

vertical and horizontal alignments of vehicular facilities shall be so designed that hazardous circulation conditions shall not be created.

d. Any on-lot sewage disposal facilities shall be properly designed and installed in conformance with all pertinent health regulations.

e. Any nonagricultural displacement of soil shall be for causes consistent with the intent of this article and shall be executed in a manner that will not cause excessive erosion or other unstable conditions.

f. Surface runoff of water will not create unstable conditions, including erosion, and that appropriate storm water drainage facilities or systems will be constructed as deemed necessary by the Township.

7. The variance is necessary to enable the Applicant's reasonable use of the Property.

8. Denial of the requested variances from §143-240.A., B. and C. will impose an unnecessary hardship upon the Applicant.

9. The hardship is due to the unique physical circumstances and/or characteristics of the Property and not self-imposed.

10. The variances will not alter the essential character of the neighborhood or the zoning district in which it is located.

11. The variances represent the minimum that will afford relief from the hardship.

12. The Board has the authority to impose special measures or conditions as deemed reasonably necessary and appropriate for the proposed use.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a vote of 4-1 Vice-Chair Hager, against the Application, is as follows:

1. The Application for a variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a front yard setback for the existing house on the Property of forty-one and seven tenths feet (41.7') from the ultimate right of way is GRANTED.

2. The Application for a special exception pursuant to §143-239.A. of the Lower Providence Township Zoning Ordinance to permit steep slopes in the side yard is GRANTED with the condition that the Applicant submit an erosion and sediment control plan to be approved in the ordinary course in compliance with all applicable Lower Providence Township Ordinances.

3. The Application for a variance from §143-240.A. from the Lower Providence Township Zoning Ordinance to permit installation of a culvert in the Steep Slope Conservation District where designated in the plans provided the Board is GRANTED.

4. The Application for a variance from §143-240.B. from the Lower Providence Township Zoning Ordinance to permit the installation of a driveway and culvert in the Steep Slope Conservation District where designated in the plans provided the Board is GRANTED.

5. The Application for a variance from §143-240.C. from the Lower Providence Township Zoning Ordinance to permit the clearing and excavation of the Property in the Steep Slope Conservation District to construct the culvert and driveway where designated in the plans provided the Board is GRANTED.


6. The request for an extension of time to complete the project that is the subject of the Application to twelve months from the date of this Decision and Order is granted.

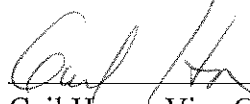
Dated: September 7, 2018

ORDER

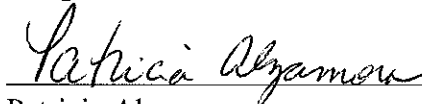
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

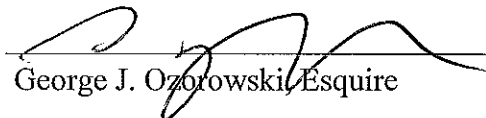
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman


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Joseph Pucci


Patricia Alzamora


George J. Ozorowski, Esquire

Jill Zimmerman, Esquire Alternate

Robert G. Hardt, 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.