

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-19-10 : HEARING DATE: May 23, 2019
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: :
APPLICATION OF: :
MARISSA CAVALIERI :
: :
PROPERTY: :
2805 Sandpiper Drive :
Lower Providence Township :
Audubon, PA 19403 :
Parcel No. 43-00-12715-00-4 :

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

The applicant, Marisa Cavalieri (hereinafter “Applicant”) filed an application on May 9, 2019 requesting variances in connection with her existing home located at 2805 Sandpiper Drive, Lower Providence Township, Audubon, PA 19403, Parcel No. 43-00-12715-00-4 (the “Property”). Applicant seeks to build a deck on the rear of the Property with a rear yard setback of seventeen feet (17’) where sixty feet (60’) is required under §143-37.A.(2) of the Lower Providence Township Zoning Ordinance (“Ordinance”). Applicant further seeks a variance from the deck projection and set back requirements of §143-30.A.(2)(a) which permit the projection of a rear deck into the rear yard not to exceed sixteen feet (16’) nor be closer than twenty feet (20’) to the rear lot line (the “Application”). The Application was properly advertised and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on May 23, 2019 at the Lower Providence Township Building. Chairwoman, Kathy Eskie, and members Gail Hager, Patricia Alzamora, Robert Hardt and Christopher Gerdes were present. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicant is Marisa Cavaleri, the owner of the Property.
2. The applicable zoning district is an R-2, residential district.
3. Applicant was unrepresented at the hearing.
4. Applicant testified in support of the Application.
5. Applicant has resided in the Property since April 21, 2012.
6. The house currently on the Property was constructed in 1970, prior to the changes to the R-2 section of the Ordinance in 2006.
7. The Property is located at the corner of Sandpiper and South Park Avenue.
8. As constructed, the house is non-conforming with an 18,051 square foot lot where 25,000 square feet is required.
9. The house sits on an angle far back on the property thus the rear yard is limited in its use restricting replacement and expansion of her deck.
10. Applicant intends to construct a deck on the rear of the Property that already is nonconforming with a rear yard setback of twenty feet (20').
11. The proposed deck will replace a deck previously installed in 1970 under a more permissive Ordinance.
12. The existing deck needs to be replaced both for utility and safety.
13. The proposed deck setback of seventeen feet (17') from the rear property line is forty-three feet (43') less than is required under §143-37.A.(2) of the Ordinance.
14. The proposed deck will project seventeen feet (17') into the rear yard setback where only sixteen feet (16') is permitted under §143-30.A.(2)(a) of the Ordinance provided that

there is at least twenty feet (20') between the deck and the rear property line.

15. The neighborhood has homes with rear decks some of which are similar to what Applicant proposes.

16. The proposed new deck will align closely with the existing home's non-conforming "footprint," will only slightly vary from the existing non-conforming twenty-foot (20') rear yard setback.

17. The Application for a variance was made to accommodate the unusual nature of the corner lot and to, in effect, continue the existing non-conformity of the home built before the current setback requirements existed.

18. There was no adverse public comment regarding this application only supportive comment was introduced.

19. Applicant obtained support of the next-door neighbors for the variances requested.

20. The following exhibits were marked at the hearing:

A-1 Application dated May 9, 2019;

A-2 letters dated May 10 and 13, 2019 from Mr. and Mrs. Nicholas Catania, 1019 S. Park Avenue and Dave and Sandy Civitello 2809 Sandpiper Drive, respectively in support of the Application.

B-1 Notice of the Application sent to those neighbors within 500 feet of the Property;

B-2 Certificate of Posting of the Property of Notice of the Application.

DISCUSSION

I. Statement of the Case.

The Applicant has requested a variance from the rear yard setback requirements of §143-37.A.(2) and §143-30.A.(2)(a) of the Ordinance in connection with the construction of a new rear deck on a corner, non-conforming lot. The relief sought is dimensional in nature requesting the allowance of:

- A rear yard setback of seventeen feet (17') from the requirements of a sixty (60) foot setback; and
- A deck protrusion that is seventeen foot (17') from the rear yard property line rather than the twenty foot (20') permitted.

The aforesaid Sections of the Ordinance state in pertinent part:

§ 143-37 Area, setback, bulk, height and parking requirements.

A. Site area or building lot area.

(2) The minimum building lot size, width and area requirements shall be determined by availability of public water and sanitary sewer service, as follows:

Requirement	No Public Service	Either Water or Sanitary Sewer Service Only	Both Water and Sanitary Sewer Service
Lot area, minimum	40,000 square feet	30,000 square feet	25,000 square feet
Lot width at building line	175 feet	150 feet	100 feet
Principal and accessory buildings over 250 square feet:			
Front yard	50 feet	50 feet	50 feet
Side yard	30 feet	25 feet	20 feet
Rear yard	60 feet	60 feet	60 feet
Maximum total building coverage	20%	20%	20%
Maximum total impervious coverage	35%	35%	35%

§ 143-30 Projection of awnings, patio covers, patios and decks into yards.

[Amended 9-21-2006 by Ord. No. 556]

A. Projection of unenclosed awnings, patio covers, patios and decks. Projection of unenclosed awnings, patio covers, patios and decks shall be permitted in all residential districts subject to the following provisions:

(2) Rear yard intrusion.

(a) In all residential districts except in the R-4 and R-5 Districts, unenclosed awnings, patio covers, patios and decks shall be permitted to extend or project into the rear yard lot area a distance not to exceed 16 feet; provided, however, that in no event shall any unenclosed awning, patio cover, patio or deck extend closer than 20 feet to the rear lot line or closer than 10 feet to any side property line.

(b) Rear yard intrusions in the R-4 and R-5 Districts. Unenclosed awnings, patio covers, patios and decks shall be permitted to project or extend into the rear yard lot area a distance not to exceed 16 feet; provided, however, that no rear yard extension of said awnings, patio covers, patios or decks shall be permitted into any common open space, green space or landscaping set aside in the original development plan for the residential community developed pursuant to the provisions of the R-4 and R-5 Zoning Districts. In the case of attached residential structures, no unenclosed awning, patio cover, patio or deck shall be connected to any other adjoining unenclosed awning, patio cover, patio or deck, and no unenclosed awning, patio cover, patio or deck on any end unit constructed pursuant to the provisions of the R-4 or R-5 District shall be connected to any adjoining unenclosed awning, patio cover, patio or deck or be located closer than 10 feet to any side yard property line.

Under §143-168.D.(4) of the Ordinance the Applicant bears the burden of proof of persuading the Board of the necessity of the requested variances and to satisfy the legal standards articulated below.

II. 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)). The quantum of proof required to establish unnecessary hardship in the case of a dimensional variance is, however, lesser than when a use variance is sought. Id. at 258-59.

When dealing with a dimensional variance the doctrine of a *de minimis* variance may

apply. The de minimis doctrine is an extremely narrow exception to the heavy burden which a party seeking a variance must normally bear and is applied where the violation of an ordinance is a relatively minor one and where rigid compliance is not necessary to protect the ordinance's public policy concerns. Hawk v. City of Pittsburgh Zoning Bd. of Adjustment, 38 A.3d 1061 (Pa. Commw. Ct. 2012). Over time Courts have held that de minimis variances may be authorized if they "...will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done." Pyzdrowski v. Bd. of Adjustment of City of Pittsburgh, 437 Pa. 481, 491, 263 A.2d 426, 432 (1970) citing Appeal of Crawford, 358 Pa. 636, 57 A.2d 862 (1948).

To obtain de minimis variance an applicant must prove that 'strict compliance (with the ordinance) is not necessary to protect the public interest.' *Id.*" Pugliese v. Zoning Hearing Bd. of Bethlehem Tp., 2015 WL 6473668 (Pa. Commw. Ct. 2015). There is no general right to a de minimis zoning variance, and the decision of whether to grant a de minimis variance is left to the discretion of the local zoning board. 200 W. Montgomery Ave. Ardmore, LLC v. Zoning Hearing Bd. of Lower Merion Tp., 985 A.2d 996 (Pa. Commw. Ct. 2009); Hawk v. City of Pittsburgh Zoning Bd. of Adjustment, 38 A.3d 1061 (Pa. Commw. Ct. 2012).

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). Pursuant to the Municipalities Planning Code the following must be found in order for the Board to grant the requested variance 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. 53 P.S. § 10910.2.

III. Facts Applied to the Legal Standard.

Not only is the Property already non-conforming with the lot size and rear yard setback requirements of the Ordinance as amended in 2006. That is unique, to say the least. The Applicant merely seeks to build a new deck on the existing non-conforming lot, with an additional three feet (3') encroachment on the existing non-conforming rear yard setback of twenty feet (20') such that the setback will be seventeen feet (17'). Inasmuch as said

encroachment is three feet (3') less than twenty feet (20') from the rear yard property line, the grant of a de minimis dimensional variance from §143-30.A.(2)(a) of the Ordinance makes sense.

There is no other practical location on the lot that would support the construction of a new deck other than where proposed by the Applicant. Said location however, would further erode the required sixty foot (60') rear yard setback from the existing twenty foot (20') non-conforming rear yard setback. Denial of the variances would deny the Applicant the ability to construct the deck on what can only be seen as an undersized, unique lot thus imposing an unnecessary hardship upon the Applicant.

A three foot (3') additional encroachment on a property that has been non-conforming with a twenty foot (20') rear yard setback for almost fifty (50) years, will hardly alter the character of the neighborhood nor impact future development of adjoining property nor be contrary to the public interest.¹ Further, adherence to the 2006 amendments to the R-2 district rendering the Property non-conforming with the twenty foot (20') side yard setback in light of the foregoing is eminently reasonable and cries out for the grant of the requested variances.

Applicant has requested variances to remove an existing presumably dangerous deck on a non-conforming lot and construct a new building code compliant and aesthetically pleasing deck that would add to the non-conformity by three feet (3'). Those variances: (i) are required to address the unique nature of the Property, (ii) limit encroachment into the required setbacks, (iii) is the minimum variance that will afford the required relief, (iv) will not alter the essential character of the neighborhood, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, and (v) have not been created by the Applicant.

¹ As noted by the Township's Community Development Director (which Applicant ratified) the neighborhood has many decks similar to that proposed by the Applicant.

Accordingly, Applicant has carried her burden of proof warranting the grant of the dimensional variances from the front and side yard setback requirements of the Ordinance.

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 not self-imposed, and is due to the unique physical circumstances of the Property.
5. The requested relief is necessary to enable the Applicants' reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulation at issue.
6. The proposed new deck with a seventeen foot (17') rear yard setback will not alter the essential character of the neighborhood.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is as follows:

1. The Application for a Variance from Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a rear yard setback of seventeen feet (17') for a new construction of a new deck on this corner lot in the R2 Residential District is GRANTED.
2. The application for a variance from §143-30.A.(2)(a) of the Lower Providence Township Zoning Ordinance to permit the proposed deck to project into the twenty foot (20')

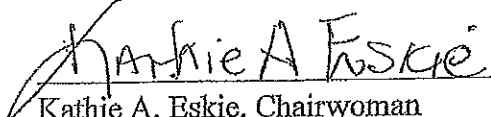
setback such that it is seventeen feet (17') from the rear property line is GRANTED.

Dated: July 5, 2019

ORDER

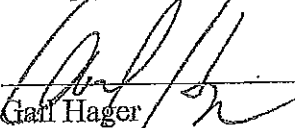
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



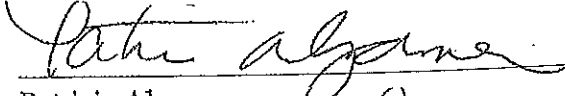
Kathie A. Eskie, Chairwoman

George J. Ozorowski, Vice Chairman



Gail Hager

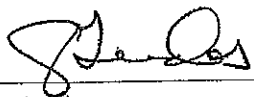
Joseph Pucci



Patricia Alzamora



Robert G. Hardt



Christopher Gerdes

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.