

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-21-01 : HEARING DATE: February 25, 2021

APPLICATION OF:

Christopher and Erin DiPaolo
30 N. Grange Ave.
Collegeville, PA 19426

PROPERTY:

30 N. Grange Ave.
Lower Providence Township
Collegeville, PA 19426
Parcel No. 43-00-05848-00-4

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

On January 18, 2021, applicants Christopher and Erin DiPaolo ("Applicants") owners of 30 N. Grange Ave., Collegeville, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the "Ordinance") §143-33 A. (Side-yard setback) to permit the construction of an addition with a side yard setback of ten feet six inches (10'6") where a minimum of fifty feet (50') is required and to permit the construction of a barn with a side-yard setback of ten feet (10') where a minimum of fifty (50') feet is required. Applicant wishes to install an addition and a bank barn to the property.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on February 25, 2021, via advanced communication device due to the ongoing global pandemic. Present at the hearing were: Kathie Eskie, Member, Gail Hager, Member, Patricia Alzamora, Member Serving as Chair, Christopher Gerdes, Alternate, Randy Klein, Alternate. Also present was Keith B. McLennan, Esquire, the Solicitor, and Mike Mrozinski, the Community Development Director.

FINDINGS OF FACT

1. The Applicants are Christopher and Erin DiPaolo, owners of the lot and home located at 38 N. Grange Avenue which was constructed in 1768.
2. The Applicants were represented by Edward J. Hughes, Esquire.
3. Christopher DiPaolo testified in support of the application.
4. The subject property, 38 N. Grange Avenue, Collegeville, Pennsylvania is comprised of a 53,810 square foot parcel with tax parcel number 43-00-05848-00-4 with a home, attached carport, and two sheds (hereinafter the "Property").
5. The applicable zoning district is the R-1 residential district which permits single-family detached dwellings.
6. The Ordinance requires in the R-1 zoning district for lots served by public water and sewer a side yard setback of 50 feet.
7. Applicants seek to construct an addition with a footprint of 675 square feet.
8. Applicants seek to construct a two-story bank barn that will be 975 square feet.
9. The proposed bank barn would be used for storage and as a garage on the first floor. The second floor would be used as a hobby room.
10. The addition and bank barn will be constructed to maintain the historic appearance of the property.
11. The bank barn will be consistent with the character of the neighborhood.
12. The property will continue to be used as a single-family home.
13. There will be no adverse impact on the development of adjacent properties.
14. The proposed relief would not be detrimental to the public welfare.

15. The surrounding neighborhood consists of primarily single-family homes.
16. The lot was created prior to the existence of modern zoning standards.
17. The home was constructed before the road upon which it was located was constructed.
18. The shape and size of the lot is unusual due to the home being constructed before any zoning regulations were established.
19. The property is approximately one-hundred and fifty feet (150') wide.
20. Due to this, the entire home is technically outside the building envelope.
21. There are numerous problems within the house which stem from the age of the property.
22. The staircase is difficult to use due to the construction of the home.
23. The basement is not useful due to moisture and lack of space.
24. The home is not moderately useful due to the issues in the home derived from its age dating back to the 1768.
25. The Applicants are unable to utilize the space in a reasonable manner due to the conditions of the property that predated modern zoning.
26. The property is nonconforming.
27. The addition will maintain the current setback of ten feet six inches (10'6") that exists with the carport located on the property.
28. Other properties have had variances to allow for encroachment on the side-yard setback requirement.
29. The location of the proposed bank barn is the only logical place on the property upon which to construct it.

30. There is no change of use requested.

31. There will be no living spaces in the proposed garage.

32. The proposal is compliant with all other zoning regulations.

33. Darren Ritter was made a party and testified in opposition to the Variance.

34. Thomas Borris was made a party and testified in opposition to the Variance.

35. Mr. DiPaolo testified that most of the neighbors approved the Application, however he outlined the concerns of one neighbor and testified to how the Applicants intend to address those concerns.

36. The following exhibits were included in the record of the hearing:

B – 1 Letter notifying neighbors within 500 feet of the Property of the Application, and Matrix of Addresses where notice was mailed

B – 2 Certificate of Notification to the neighbors within 500 feet of the Property.

B – 3 Public Notice of the Application and Hearing.

B – 4 Certificate of Posting the Property with Notice of the Application.

B – 5 Public Notice advertised in a newspaper of general circulation.

DISCUSSION

I. Statement of the Case

The Applicants request a variance from §143-33 A. (Side-yard setback) to permit the construction of an addition with a side yard setback of ten feet six inches (10'6") where a minimum of fifty feet (50') is required and to permit the construction of a barn with a side-yard setback of ten feet (10') where a minimum of fifty (50') feet is required.

II. 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.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'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.

III. Facts Applied to the Legal Standard.

The Applicants requested a dimensional variance from §143-33 A. (Side-yard setback) to permit the construction of an addition with a side yard setback of ten feet six inches (10'6") where a minimum of fifty feet (50') is required and to permit the construction of a barn with a side-yard setback of ten feet (10') where a minimum of fifty (50') feet is required. Applicants wish to install an addition and a bank barn to the property. Presently, the Property is occupied by a single family detached residence which was originally constructed around 1768. The house was constructed prior to the road being installed and prior to there being any zoning requirements in the country.

Therefore, not only is the lot and home constructed thereon unique, it is and has been since the passage of the Ordinance, nonconforming. In fact, the current home is entirely outside the building envelope and cannot be made conforming.

Due to the historic nature of the house, the building is not sufficiently equipped for modern living. The Applicants wish to add an addition to improve the home significantly and address safety concerns regarding the stairs. Further, the Applicants wish to construct a bank barn to have additional storage and reasonable use of the property.

The creation of the Ordinance after this home was already constructed made the current lot non-conforming. 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 in that the size, shape, and change to the Ordinance has made it practically impossible to construct a bank barn and update the main home for modern living while conforming to the Ordinance which creates a hardship for the Applicants. The Applicants did not create the hardship.

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. There is no alternative location for the proposed addition and bank barn on the property that would not require substantial costs or alterations to the historic building.

The Variance 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. The neighborhood is replete with similar structures. Several of these structures encroach on the setback requirements

of the Ordinance. The requested variance for the proposed construction of an addition and bank barn and is consistent with the neighborhood and will not negatively impact neighboring properties nor will it change the character of the neighborhood. Further, the Applicant has commendably sought to preserve the existing 1760 structure by proposing an addition and bank barn that will emulate that historic structure.

The variance will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. Permitting the construction of an addition and a bank barn that is consistent with the neighborhood is the minimum alteration that can be made to the Ordinance to permit the Applicants the reasonable use of their Property. Accordingly, the Board finds that Applicants suffer a hardship that is not self-imposed and the requested variance from Lower Providence Township Zoning Ordinance §143-33. A.

The Board finds and concludes that the Applicants' 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

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

The Application of Christopher and Erin DiPaolo for a Variance from §143-33.A. of the Lower Providence Township Zoning Ordinance to permit the construction of an addition to their home with a side-yard setback from the north side of the property line with side-yard setback of ten feet six inches (10'6") where fifty feet (50') is required in the R-1 Residential District with the following conditions:

(1) The dimensions shall conform to the design presented at the hearing.

Further, the Application of Christopher and Erin DiPaolo for a Variance from §143-33.A. of the Lower Providence Township Zoning Ordinance to permit the construction of a bank barn with a side-yard setback from the southside of the property line of ten feet (10') where fifty feet (50') is required in the R-1 Residential District on the condition that the dimensions shall conform to the design presented at the hearing in addition to the following conditions:

(1) The dimensions shall conform to the design presented at the hearing.

(2) The Bank Barn shall not be used as a residence with sleeping quarters;

(3) Applicants shall install evergreen trees such as Leland Cypress or Green Giant Arborvitae sufficiently mature (4-5' tall at installation) to screen the Bank Barn from their neighbor to the south.

Dated: April 6, 2021

ORDER

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

**LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD**

George Ozorowski

Joseph Pucci

Kathie Eskie

Patricia ALZAMORA
Patricia Alzamora

Gail Hager

Christopher Gerdes
Christopher Gerdes, 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.