

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-21-06	:	HEARING DATE:	March 25, 2021
		:		
APPLICATION OF:		:		
	Brian and Gisela Mulligan	:		
	2735 Audubon Rd.	:		
	Audubon, PA 19403	:		
		:		
PROPERTY:		:		
	2735 Audubon Rd.	:		
	Lower Providence Township	:		
	Audubon, PA 19403	:		
	Parcel No. 43-00-00925-01-03	:		

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

On February 24, 2021, applicants Brian and Gisela Mulligan (“Applicants”) owners of 2735 Audubon Rd. Audubon, Pennsylvania wish to install a chicken coop in their back yard to teach their children about food and sustainability. However, in order to do so, they were required to file an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) §§143-6.2 and 143-37.A.(2) regarding rear yard setback, to permit the construction of an accessory structure with a rear yard setback of thirty-five feet (35’) where a minimum of sixty feet (60’) is required.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on March 25, 2021, via advanced communication device due to the ongoing global pandemic. Present at the hearing were: George Ozorowski, Chairman, Joseph Pucci, vice-chairman, Members Kathie Eskie, Gail Hager, Patricia Alzamora and alternates, Christopher Gerdes and Randy Klein. Also present were Township Manager Don Delamater substituting for Michael Mrozinski, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicants are Brian and Gisela Mulligan, owners of the lot and home located at 2735 Audubon Road which they purchased in 2007.
2. The Applicants were not represented by counsel.
3. Brian Mulligan testified in support of the application.
4. The subject property, 2735 Audubon Road, Audubon, Pennsylvania is comprised of a 25,750 square foot parcel with a tax parcel number 43-00-00925-01-3 with a single-family residential structure (hereinafter the "Property").
5. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings.
6. In the R-2 zoning district the Ordinance requires lots served by public water and sewer, a rear yard setback of sixty feet (60').
7. Applicants seek to construct a chicken coop that is six feet (6') by eighteen feet (18') by seven and one-half feet (7.5').
8. There is currently a smaller chicken coop with chickens on the property.
9. Applicants wish to install a larger chicken coop for their chickens.
10. The proposed structure will be in the rear yard and will be screened from the adjacent properties by existing arborvitae on the east side yard line, forsythia on the rear yard line, and a six-foot (6') stockade fence on the northwest yard line.
11. There will be no impact to existing traffic patterns and volumes because of the proposed structure.
12. There will be no parking spaces or unloading areas because of the proposed structure.

13. The surrounding buildings and abutting properties are residential.
14. The surrounding properties include accessory structures such as sheds, pools, and detached garages.
15. The area also has dog houses on other properties.
16. There are other chicken coops in the surrounding area.
17. The proposed use will not alter the essential character of the neighborhood.
18. The property will continue to be used as a single-family home.
19. There will be no adverse impact on the development of adjacent properties.
20. The proposed relief would not be detrimental to the public welfare.
21. The proposed use will not emit smoke, dust, odor, or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.
22. The proposal is compliant with all other zoning regulations.
23. There is no change of use requested.
24. There are no utilities to the structure.
25. Due to the irregular configuration of the property, there are few options to locate the chicken coop within the setbacks where they will be screened from the neighbor's property.
26. The only other location that the chicken coop could be located would require additional construction, would be in the view of neighbors, and would potentially impact drainage.
27. The structure could be easily removed from the property.
28. Raising chickens meets Lower Providence Township's *Living Green* initiative by reducing waste and providing natural fertilizer for plants.
29. The family raises chickens to educate their children in responsibility and knowledge of food sourcing.

30. The family currently has six chickens.
31. The family has no roosters.
32. The neighbors have not expressed any concerns with the chickens.
33. The closest structure on an adjacent property will be one hundred and fifty feet (150') from the proposed chicken coop.
34. Applicant testified that the neighbors directly adjacent to his property were not opposed to the requested relief.
35. The following exhibits were included in the record of the hearing:
- A – 1 Application;
 - A – 2 Site Plan;
 - B – 1 Letter notifying neighbors within 500 feet of the Property of the Application, Matrix of Addresses where notice was mailed, Certificate of Notification to the neighbors within 500 feet of the Property, and Certificate of Posting.

DISCUSSION

I. Statement of the Case

The Applicants request a variance from the rear yard setback requirements of §143-6.2 and §143-37 A. (2) to permit the construction of a chicken coop with a rear yard setback of thirty-five feet (35') where a minimum of sixty feet (60') 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.

Presently, the Property is occupied by a single family detached residence. The Applicants currently have six chickens in smaller chicken coop on the property. The neighbors have not voiced any concerns with the chickens and have expressed no objection to the requested relief. The Applicants request for dimensional variances from §143-6.2 and §143-37 A. to permit the construction of a chicken coop with a rear yard setback of thirty-five feet (35') where a minimum of sixty feet (60') is required.

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 chicken coop on any other portion of the property, particularly

without imposing upon neighbors. The location of the road and dimensions of the property form an unusual shape that prohibits the normal use of the property in conformity with the Ordinance. Another potential location for the chicken coop would require additional alterations to the topography, would be visible to the neighbors, and would potentially disrupt the water drainage. This creates a hardship as it prohibits the Applicants from the reasonable and permitted use of the property in raising chickens in an adequately sized coop. 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 the authorization of a variance is therefore necessary to enable the reasonable use of the property. There is no pragmatic alternative location for the proposed chicken coop on the property.

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 proposed construction of chicken coop and requested variance is consistent with the neighborhood and will not negatively impact neighboring properties nor will it change the character of the neighborhood. The neighborhood is replete with sheds, dog houses, chicken coops, and other accessory structures. Further, the adjoining property owners had no objection to the proposed use.

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 the chicken coop 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 §143-37. A. (2).

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 Brian and Gisela Mulligan for a Variance from **§143-6.2** and **§143-37.A.(2)** of the Lower Providence Township Zoning Ordinance to permit the construction of a chicken coop with a rear yard setback of thirty-five feet (35') where sixty feet (60') is required in the R-2 residential District is Granted with the following conditions:

1. Construction placement shall be as per the plans as described at the March 25, 2021, hearing;

Dated: May 3, 2021

ORDER

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

LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

George Ozorowski



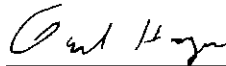
Joseph Pucci

Kathie A Eskie

Kathie Eskie

Patricia ALZAMORA

Patricia Alzamora



Gail Hager



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.