

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-19-26	:	HEARING DATE: October 22, 2020
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	:	
APPLICATION OF:	:	
CURTIS BUILDING CO., INC.	:	
	:	
PROPERTY:	:	
Fifth Street between the house at 3002	:	
Fifth Street and the lot of Suburban	:	
Building	:	
Block 22, Units 96 & 97	:	
Parcel No. 43-00-04681-00-1	:	

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

The applicants, Moser Construction Co., Inc. and Curtis Building Co., Inc. (hereinafter, collectively, "Applicant") filed an application on October 31, 2019 requesting a variance in connection with the property known as Block 22, Units 96 and 97, on Fifth Street between the house at 3002 Fifth Street and the lot of Suburban Building, Lower Providence Township, Montgomery County, Pennsylvania, being designated as Parcel No. 43-00-04631-00-1 (hereinafter, collectively, "Property"). Applicant seeks a Variance from §143-37 of the Lower Providence Township Zoning Ordinance, as amended, (hereinafter "Ordinance") to allow the construction of a single family detached dwelling on an existing non-conforming vacant lot. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on October 22, 2020 at the Lower Providence Township Building. The following members of the Board were present: Kathie A. Eskie, Chairwoman, George J. Ozorowski, Esquire, Vice Chairman, Member, Gail Hager, Member,

Patricia Alzamora, Member, and Robert G. Hardt. Also present was Eric C. Frey, Esquire, Acting Solicitor.

FINDINGS OF FACT

1. The Applicant, Curtis Building Co., Inc. (hereinafter "Curtis"), with a mailing address of P.O. Box 415, Jenkintown, Pennsylvania, 19046 is the owner of the Property. A second applicant, Moser Construction Co., Inc. (hereinafter "Moser"), of 101 Stewart Lane, Chalfont, Pennsylvania, 18914, was the equitable owner of the subject Property by Agreement of Sale at the time of the Application. The Agreement expired prior to the hearing on the Application, as such Moser had no standing to continue as an applicant. Curtis, therefore, remains as the sole Applicant and shall be referred to herein as either "Curtis" or "Applicant."
2. The Property is a vacant lot located on Fifth Street between the house at 3002 Fifth Street and the lot of Suburban Building, being identified as Block 22, Units 96 and 97, designated as Parcel No. 43-00-04681-00-1, Lower Providence Township, Montgomery County, Pennsylvania.
3. The Property is located in an R-2 Residential District.
4. The Applicant is represented by G. Michael Carr, Esquire of Eastburn and Gray, P.O. Box 1389, Doylestown, Pennsylvania, 18901-0137.
5. The following neighbors entered their appearance as protestants to the Application;
 - A. Brian Heiser, 2976 Fifth Street , Eagleville, PA 19403;
 - B. Michael Adams, 3002 Fifth Street, Eagleville, PA 19403;
 - C. Patrick McKernan, 2912 Seventh Street, Eagleville, PA 19403;
 - D. Anthony and Phyllis DiCicco, 640 Hillside, Eagleville, PA 19403;
 - E. Carl and Betty Allen, 2992 Sixth Street, Eagleville, PA 19403;
 - F. George Lozinak, 2994 Fifth Street, Eagleville, PA 19403;

- G. John Zedar, 2998 Fifth Street, Eagleville, PA 19403;
- H. Patricia Beideman, 82 W. Mt. Kirk Ave, Eagleville, PA 19403;
- I. Gary Bolis, 65 W. Mt Kirk Ave, Eagleville, PA 19403;
- J. Alvin and Kelly Swenson, 62 W. Mt Kirk Ave, Eagleville, PA 19403;
- K. Jeffrey Sarnocinski and Stacey Rymkiewicz, 400 Hillside Ave, Eagleville, PA 19403;
- L. John Munro, 2981 Sixth Street, Eagleville, PA 19403; and
- M. Gary Rittenhouse, 58 W. Mt. Kirk Ave, Eagleville, PA 19403.

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

Applicant Exhibits:

- A-1 Curriculum Vitae of Charles A. Breinig;
- A-2 chart of deed references for properties
- A-3 Package of MCCCCP Orders for similar cases
- A-4 Application testimony summary updated to include references to recent court cases
- A-5 Package of prior zoning cases with details

Board Exhibits:

- B-1 Application;
- B-2 Legal Notice;
- B-3 Certification of Notification;
- B-4 Certification of Posting;
- B-5 Proof of Publication;
- B-6 package of continuation letters and emails resulting in timely hearing on 10/22/2020

7. The present use of the Property is currently vacant ground.
8. The Property is a rectangular lot measuring approximately 60 feet wide by 100 feet deep.
9. Curtis also claims ownership to the center line of Fifth Street which is an improved paper street.
10. Applicant proposes to construct either:
- a. A manufactured home with the following specifications:
 - (i) 14 feet wide by 66 feet deep, plus an addition of a 10 feet by 14

feet deck, a bilco door and a shed measuring 12 feet wide by 20 feet deep;

- (ii) Front yard: 20 feet;
- (iii) Rear yard 14 feet;
- (iv) Side yard: 21 and 25;
- (v) Building coverage: 19%
- (vi) Impervious coverage: 34%

b. A stick built home with the following specifications:

- (i) 26 feet wide by 45 feet deep with a garage and two off street parking spaces;
- (ii) Front yard: 25 feet
- (iii) Side yard: 20 feet and 14 feet
- (iv) Rear yard: 30 feet
- (v) Building coverage: 19.5%
- (vi) Impervious coverage: 25%

- 11. The property slopes 8 feet from front to back -- away from Fifth Street.
- 12. Public sewer is proposed but not public water.
- 13. Charles Breinig ("Breinig") of Curtis testified that Curtis has owned the Property since the 1998
- 14. Breinig also testified that he owns the adjacent parcels (as Suburban Building Materials Co., Inc. and other entities) which could be utilize to make the subject property larger.

15. Breinig also testified that that there will be two off street parking spaces
16. The Applicant presented that he would do erosion and sediment control and will design storm water as required by the Township.
17. Applicant did not present any testimony regarding any consultation with emergency service providers to determine their respective abilities to access the Property.
18. Michael Adams testified of stormwater issues, on site well issues, and that he would prefer a stick built home
19. Phyllis DiCicco testified that she did not want a modular home built on Porperty.
20. Brian Heiser preferred a stick built home
21. Betty Allen testified regarding strom water issues and that she does not like manufactured homes
22. Anthony DiCicco testified that he there are existing stormwater issues with area.
23. Jeffrey Sarnocinski testified that there are existing stormwater issues in area.
24. John Munro and Gary Bolis testified of stormwater issues
25. Gary Rittenhouse testified thatthere are environmental habitats here and site issues.

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26. With a stick built home, as prosed, the requirements for site development are as follows:

<u>Requirement</u>	<u>Proposed</u>	<u>Required</u>
Lot Area	6,000	30,000
Lot width	60	150
Front yard	18	50
Side yard	20/14	25
Rear yard	30	60
Building Coverage	19.5%	20%
Impervious coverage	27%	35%
Access to public street	60	50

DISCUSSION

I. Variance Legal Standard.

Pursuant to the Municipalities Planning Code and the Ordinance §143-168.A. the following must be established by the Applicant in order for the Board to grant the requested variance:

(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. 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.

II. Facts Applied to the Legal Standard – Variance Relief.

The Applicant filed an application requesting Variances from §143-37 of the Ordinance to permit the construction of a single family detached dwelling on a pre-existing non-conforming lot.

The applicable sections of the Ordinance state:

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

A. Site area or building lot area.

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

(1) The maximum percentage of building coverage permitted shall be 35% of the net site area in any new land developments of more than one building. In addition, the maximum percentage of impervious material coverage shall be 30% of the net site area or building lot area in any new land development, whichever is applicable.

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

[Amended 10-20-2011 by Ord. No. 602]

Requirement	No Public Service	Either Water or Sanitary Sewer Service Only	Both Water & 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%

B. All buildings/structures shall be located and constructed so as not to exceed a maximum height of 35 feet from the finished grade level to the highest point of the

building/structure, except as herein otherwise provided, including the provisions of § 143-19B related to accessory building/structures.

[Amended 10-20-2011 by Ord. No. 602]

C. Parking. A minimum of two off-street parking spaces shall be required for each dwelling unit.

To establish that an unnecessary hardship exists warranting a variance from the Ordinance, the Applicant must prove that:

- a. Physical characteristics of the property were such that the property could not be used for any permitted purpose; or
- b. The permitted purpose could only be achieved at prohibitive expense; or
- c. Characteristics of the property were such that it would have no value or only distress value for any use approved by the zoning ordinance.

Solebury Twp. v. Solebury Twp. Zoning Hearing Bd., 914 A.2d 972 (Pa.Cmwlt. 2007).

In the instant case, the Applicant seeks a Variance due to the pre-existing non-conformity of the lot. The Board finds that the record establishes that the Property was rendered undersized and too narrow by the subsequently enacted Ordinance. Pennsylvania Courts have held that where a subsequently enacted zoning ordinance causes a property to be undersized or too narrow, the undersized nature and narrowness of the property are unique physical circumstances peculiar to that property giving rise to an unnecessary hardship. Searles v. Zoning Hearing Board, 545 A.2d 476, 478–79 (Pa.Cmwlt.1987); Jones v. Zoning Board of North Catasauqua, 455 A.2d 754, 755–56 (Pa.Cmwlt.1983); Township of Salisbury v. Rummel, 406 A.2d 808, 809 (Pa.Cmwlt.1979). Accordingly, the undersized nature and narrowness of the Property are unique physical circumstances peculiar to the Property giving rise to an unnecessary hardship.

The applicant failed, however, to address Ordinance Section 143-145.B(3), which provides as follows:

As of or subsequent to January 19, 2020 (the date of adoption of this provision), where two or more adjacent lots, one or more of which is nonconforming based on lot size, are concurrently owned by the same owner, these adjacent lots shall be merged to minimize the nonconformity. The term "same owner" as used in this subsection includes, in addition to a single person or entity, multiple persons with familial relationships and multiple parties with common ownership, business, and/or financial interests. Corporations, partnerships, or other for-profit or nonprofit entities organized or used for the purpose of avoiding of having adjacent lots being owned by the "same owner" are not recognized as separate owners for the purposes of this subsection.

Breinig testified that he owns adjacent tracts of ground under different entities. This section 143-145(3) would require the merger of all adjacent lots to get to the required dimensional requirements of the Zoning Ordinance. As evidence regarding these other tracts was not presented, the Board finds that the Application has failed in the first prong of the variance test as the Property could be brought into compliance on many of the dimensional criteria if the additional lots were merged with the Subject Property.

Moreover, The Board finds that the Applicant has failed to satisfy the second prong of the variance test. The Ordinance requires a minimum lot area of 30,000 square feet and a minimum lot width of 150 feet (Ordinance § 143-37.A). The Property, however, only has an area of 6,000 square feet and is only 60 feet wide. The Ordinance also requires a front yard setback of 50 feet, a rear yard setback of 60 feet, and side yard setbacks of 25 feet each. Thus, if the Ordinance were strictly adhered to, the Applicants would be able to build a home that is 10 feet wide but -10 feet deep. Again, this may not be true if Applicants would address the merger requirements of Ordinance Section 143-145(3). If the merger requirements of the Ordinance are met by the Applicant, the Property would be potentially brought into compliance with the strict requirements of the Ordinance and many of the requested variances may be unnecessary to allow

for the reasonable residential use of the Property. As Applicant failed to address the merger requirements of Ordinance 143-145.B(3), it has failed to satisfy the second prong for the variance request.

The Board also finds that the Applicant has failed to satisfy the third prong of the variance test. Because the Property can be merged with adjacent tracts with common ownership interests (as required by Ordinance Section 143-145(3)), the undersized and narrow property is not caused by a subsequently enacted Ordinance. The claimed hardship is self-inflicted by Applicant failing to merge tracts as required by the Ordinance. The Applicant has, therefore, failed to satisfy the first three prongs of the variance test.

With regard to the area and setback requirements, the Ordinance requires: (1) lot area of 30,000 square feet; (2) a lot width of 150 feet; (3) front yard of 50 feet; (4) rear yard of 60 feet; and (5) side yards of 25 feet each. (Ordinance § 143-37.A). The Board finds that the Applicant did not meet the fourth or fifth prong of the variance test for this variance request for a single family home as proposed in Applicant's plans.

Applicant testified that the propose home was designed to fit the neighborhood and to be the smallest marketable home possible. The Board finds that the single family residential use is reasonable available in the area of the Property. Accordingly, the construction of the home will not have detrimental impacts on the character of the neighborhood and the use and enjoyment of adjacent properties. This shows Applicant's attempt to comply with the fourth prong of the Variance test. The Applicant's failure to comply is to merge tracts to limit the variance impacts. If tracts were merged as required by Ordinance Section 143-145.B(3), the potential for detrimental impacts would also be minimized. As Applicant failed to address the merger

provisions, there remains to many potential detrimental impacts of overdevelop in the vicinity of the Subject Property.

The Applicant also fails to satisfy the fifth prong - that the requested variance is the minimum variance to afford relief. The Applicant stated that it previously requested to merge two tracts to build a more complaint home on a more compliant property. In this Application, Applicant has failed to do so despite the Township's adoption of Ordinance Section 143-145.B(3). Applicant actually failed to present any evidence related to the number and location of adjacent tracts with common ownership. It is believed that here are such tracts located adjacent to the property on both Fifth Street and Fourth Street. As such, these adjacent tracts would require merger before any variances could be granted from the dimensional requirements of the Ordinance. This merger would be the only way to ensure that the minimum variances were being requested and that there are the least detrimental impacts on the surrounding properties and neighborhood..

As the Applicant failed to satisfy the fourth and fifth prongs of the variance test for the variance requested from the area and setback provisions of Section 143-37.A of the Ordinance, the requested variance should be denied.

CONCLUSIONS OF LAW

1. The Applicant Curtis Building Co., Inc, has standing to appear before the Board regarding the requested relief.
2. The applicant Moser Construction Co., Inc. does not have standing and as such was removed as an applicant.
3. The Application for a variance from the area and setback requirements of Ordinance Section 143-37 to permit a reduced lot area and setback requirement for the development of a single family stick built home on the Property is denied.
4. Applicant failed to satisfy the five prong test for a variance.
5. Applicant failed to present any evidence related to adjacent tracts and the merger of the same as required by Ordinance Section 143-145.B(3).

ORDER

AND NOW, this 12th day of November 2020, the Application of Curtis Building Co., Inc. is hereby **DENIED**. The Board **DENIES** the variances from the area and setback requirements of Zoning Ordinance Section 143-37.A(2) to permit a single family home (either as a manufactured home or as a stick built home) to be built on a nonconforming lot having: (1) an area of 6,000 square feet, where 30,000 square feet is required; (2) a lot width of 60 feet where 150 feet is required; (3) a front yard of 25 feet where 50 feet is required; (4) a rear yard of 30 feet where 60 feet is required; (5) side yards of 20 feet and 14 feet where 25 feet is required for each side yard, on the Subject Property located along the northeast side of Fifth Street (being parcel No. 43-00-04681-00-1) in the R-2 Residential District.¹

¹ During the Hearing, the Applicant advised that Moser Construction Co., Inc., which is listed in the Application as a Co-Applicant no longer had an equitable interest in the Subject Property and therefore lacked standing to remain as an applicant. As such the Application was amended during the Hearing to name Curtis Building Co., Inc., as the sole Applicant.

ORDER

The foregoing Findings of Fact, Discussion, Conclusions of Law and Order are hereby approved and adopted as the Decision and Order of the Board.

**LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD**

Dated: 11-12-20

BY:


Kathie A. Eskie, Chairwoman


George J. Ozorowski, Vice Chairman


Gail Hager


Patricia Alzamora


Robert G. Hardt

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 permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.