

**MILLER TURETSKY RULE & McLENNAN**  
*A Professional Corporation*

KEITH B. McLENNAN\*  
JOSHUA H. CAMSON\*  
JACQUELINE A. JOHNSON  
ALI S. MUNSHI

ATTORNEYS AT LAW  
3770 RIDGE PIKE  
COLLEGEVILLE, PENNSYLVANIA 19426  
(610) 489-3300 Office  
(610) 489-1157 Facsimile  
[www.millerturetsky.com](http://www.millerturetsky.com)

MARK D. TURETSKY  
JOHN A. RULE  
Of Counsel

\*ALSO MEMBER OF NEW JERSEY BAR

**DATE OF MAILING: November 3, 2023**  
**SENT VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
**NO. 7018 3090 0000 0752 8486**

Keith M. and Kacey M. Brown  
720 South Park Avenue  
Audubon, PA 19407

**Re: Lower Providence Township Zoning Hearing Board**  
**Application No: Z-23-25**  
**Property: 720 S. Park Avenue, Audubon PA 19403**  
**Parcel No. 43-00-10345-00-7**

Dear Mr. and Mrs. Brown:

In accordance with the Zoning Application filed on August 24, 2023, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board. Please note that if you have any objections to the Order, you have thirty (30) days from its date to file an appeal with the Court of Common Pleas in Norristown.

Yours very truly,



Keith B. McLennan

Pc: Kathie A. Eskie  
Christopher Gerdes  
Gail Hager  
Randy Klein  
Joseph Pucci  
Tejal Mehta  
Gary Brown  
Mike Mrozinski, Community Development Director  
Gregory Heleniak, Esquire, Township Solicitor  
Tina Blain  
Donald & Kelly Harper, Trustees – Attendees  
James Kelsh - Attendee

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

<b>APPLIATION NO.</b>	<b>Z-23-25</b>	<b>: HEARING DATE: September 28, 2023</b>
		:
<b>APPLICATION OF:</b>		:
<b>Keith &amp; Kacey Brown</b>		:
<b>720 S. Park Avenue</b>		:
<b>Audubon, PA 19403</b>		:
		:
<b>PROPERTY:</b>		:
<b>720 S. Park Avenue</b>		:
<b>Audubon, PA 19403</b>		:
<b>Lower Providence Township</b>		:
<b>Parcel Nos. 43-00-10345-00-7</b>		:

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

A public hearing on the above Application (the “Application”) having been held on September 28, 2023, before the Zoning Hearing Board of Lower Providence Township (the “Zoning Hearing Board” or “Board”), in the Township Administration Building, 100 Parklane Drive, Eagleville, PA, (the “hearing”) pursuant to Notice as required by the Lower Providence Township Zoning Ordinance (the “Ordinance”) and the Pennsylvania Municipalities Planning Code (the “MPC”), concerning the above captioned premises (the “Property” or “Subject Property”), and having considered the Application and the testimony, exhibits, and argument presented, the Zoning Hearing Board hereby renders its decision on the Application.

**Procedural Matters**

**Application to Zoning Hearing Board**

1. Keith & Kacey Brown, of 720 S. Park Avenue, Audubon, PA 19403 (Applicants) submitted the Zoning Hearing Board Appeal Application No: Z-23-25 to the Board on August 25, 2023.

Applicants propose to add a 10'4" addition to an existing garage with a side yard setback of 10 feet where a minimum of 20 feet is required in the R-2 Residential Zoning District under Section 143-37.A.(2).<sup>1</sup>

Notice and Hearing

2. The Application was properly advertised, and a public hearing took place before the Lower Providence Township Zoning Hearing Board (the "Board") on September 28, 2023.

3. Participating Zoning Hearing Board Members Present at the September 28, 2023, hearing were: Kathie Eskie, Chairwoman, Members, Gail Hager, Joseph Pucci, Randy Klein, Gary Brown and Tejal Mehta (Alternate).

4. Appearances of Counsel

- a. Keith B. McLennan, Solicitor for the Zoning Hearing Board.
- b. The Applicant was not represented by counsel.

5. Appearance of Other Party

- a. Kelly Harper, a neighbor entered his appearance as a party.
- b. Gene Kelsh, a neighbor entered his appearance as a party.

6. Additional Attendees

- a. Mike Mrozinski, the Community Development Director for Lower Providence Township.
- b. Paula Meszaros, the court reporter.

7. Witnesses:

- a. Keith Brown testified in support of the Application.
  - b. Kelly Harper, raised concerns about the proposal.
  - c. Gene Kelsh, raised general concerns about flooding in the neighborhood.
8. Exhibits
- a. The Applicants submitted the following exhibits:
    - A-1: Application with all attachments.
    - A-2: Site plan for Brown residence.
  - b. The Board entered the following exhibits:
    - B-1: Public Notice by Posting.
    - B-2: Certificate of Posting.
    - B-3: Letter notifying neighbors within 500 feet of the Property of the Application.
    - B-4: Matrix of Addresses where notice was mailed.
    - B-5: Certificate of mailing.
    - B-6: Certificate of Publication in a newspaper.

#### **Findings of Fact**

- 1. The subject property is located at 720 S. Park Avenue, Audubon, PA, with a parcel number of 43-00-10345-00-7 (the "Property").
- 2. Applicants currently own the Property.
- 3. The applicable zoning district is the R-2 Residential Zoning District.
- 4. The Property consists of a 23,549 square foot lot with a single-family home with a garage.

5. The property is a wooded site, and the perimeter of the site is covered with trees and natural underbrush.
6. The existing lot is 153 feet wide, 170 feet deep on one side, and 112 feet deep on the other side.
7. The property has a steep topographical decline of 27 feet in elevation in 160 lateral feet.
8. The flat area that would accommodate an addition to the building is minimal.
9. There is insufficient area to add a storage shed to the property.
10. The present use began in 1969.
11. The current house was constructed prior to the 2006 change in zoning requirements and is currently a preexisting non-conforming use.
12. Prior to the meeting, Applicants adjusted their construction plans to limit the zoning impact.
13. Applicants acquired the property on June 20, 2007.
14. The property is serviced by public water and sewer.
15. There are no outstanding state or federal violations cited on this property.
16. There has been no previous zoning appeal filed in connection with this property.
17. There will be no change of use with the proposed use.
18. The proposed use is consistent with the character of the neighborhood.
19. There will be no changes to existing traffic patterns or volume with the proposed use.
20. Applicants intend to increase their single car garage to a two-car garage.
21. Many houses in the neighborhood have two-car garages.

22. The garage will be extended 10 feet 4 inches into a paved area.

23. The addition will have a side yard setback of 10 feet.

24. Section 143-37.A.(2) of the Ordinance requires a side yard setback of a minimum of 20 feet.

Therefore, Applicants require a variance for their proposed project.

25. They will add a 500 square foot in-law suite above the garage.

26. Access to the suite will be only through the main house.

27. The suite will not have its own fully functional kitchen, it will include a bedroom and bathroom.

28. Applicants have an elderly family member that they would like to have live in their home, but they do not currently have the room available.

29. The proposed use will not increase the impervious coverage of the area.

30. The topographic features and family needs of the Applicants create a hardship.

## **DISCUSSION**

### **I. Statement of the Case**

Keith & Kacey Brown, of 720 S. Park Avenue, Audubon, PA 19403 (Applicants) submitted the Zoning Hearing Board Appeal Application No: Z-23-25 to the Board on August 25, 2023, requesting relief from Section 143-37.A.2 of the Ordinance to permit the construction of an addition to their existing garage with a 10 foot side yard setback where a minimum of 20 feet is required in the R-2 Residential Zoning District.

### **II. Ordinance Subsections in Question**

The Applicants request relief from the following subsections of the Ordinance:

- Section 143-37A(2) of the Ordinance which requires properties in the R-2 Residential Zoning district serviced by public sewer and water to have a side yard setback of a minimum of 20 feet.

### **III. 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.Cmwlt. 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 Applicants' 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.**

Applicants are requesting relief from Section 143-37.A.(2) of the Ordinance to permit the construction of an addition to their existing garage with a 10 foot side yard setback where a minimum of 20 feet is required in the R-2 Residential Zoning District. The Property is characterized by a number of unique physical attributes. Specifically, it has a significant drop in elevation, minimal flat area conducive to building, and an irregular depth. The property's capacity to accommodate additional structures like storage sheds is quite limited due to these unique topographical conditions. The unique physical characteristics of the property present a situation where adherence to the strict zoning requirements would

impose an unnecessary hardship on the Applicants by hindering the reasonable use and improvement of their property.

Due to the unique circumstances, particularly the topographical challenges and limited flat area for building, it is impractical for the property to be developed in strict conformity with the zoning ordinance's setback requirements. The necessary hardship imposed is not the result of conditions generally present in the neighborhood and is unique to the property itself. A variance is essential to facilitate the Applicants' reasonable use of the property, especially considering their intended use to accommodate an elderly family member.

The hardships stated, including the topographical challenges, are intrinsic to the property and have not been created by the Applicants. The peculiar shape and topographical features predate the Applicants' ownership of the property, and therefore, they did not create the hardship that they now seek relief from. Further, the property was developed prior to the establishment of the current zoning standards.

The proposed use – an addition to an existing garage and the construction of an in-law suite – will not be detrimental to the public welfare. The proposed addition will not alter the essential character of the neighborhood, as it has been established that many houses in the vicinity are equipped with two-car garages, and the Applicants' intention to expand their single-car garage to a two-car garage aligns with the prevailing neighborhood aesthetic and functionality.

The proposed 10'4" addition and side yard setback of 10 feet represents the minimum variance required to afford relief to the Applicants. Given the property's unique circumstances and the Applicants' demonstrated need (intending to house an elderly family member in the suite above the garage, this proposed use and corresponding variance is the least modification possible to secure reasonable use of the property.

Given these considerations, Applicants have satisfied the legal standards necessary for the granting of a dimensional variance. The specific, unique conditions of the property, the impracticality of strict ordinance adherence, the non-self-imposed hardship, the consistent character of the proposed use with the neighborhood, and the minimal variance required all weigh in favor of the Applicants' request. The Board finds that the Application should be GRANTED.

### **CONCLUSIONS OF LAW**

1. The Applicants have 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 Applicants 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 Lower Providence Township Zoning Hearing Board by a 5-0 vote hereby GRANTS the Application of Keith & Kacey Brown at Application No: **Z-23-25** to permit the construction of an addition to the existing garage with a side yard setback of 10 feet where a minimum of 20 feet is required in the R-2 Residential Zoning District under Section 143-37.A(2) of the Ordinance.

The above relief is granted with the following conditions:

1. Construction and placement shall be as per the plans introduced into evidence in this case as Exhibit A-2.

Dated: October 30, 2023

## **ORDER**

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

### LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

*Kathie A Eskie*

Kathie A. Eskie

Christopher Gerdes

Gail Hager

Randy Klein

Joseph Pucci

Gary Brown, Alternate

Tejal Mehta, 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.