

## **ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO. Z-09-01	:	HEARING DATE: February 26, 2009
	:	
APPLICATION OF:	:	
Brad Barry and Janet Barry	:	
	:	DATE OF MAILING OF OPINION
PROPERTY:	:	AND DECISION: April 8, 2009
1414 Wetherill Road	:	
Phoenixville, PA 19460	:	
Parcel No. 43-00-15832-00-1	:	

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

Applicants Brad Barry and Janet Barry filed an application requesting variances from Section 143-37 of the Lower Providence Township Zoning Ordinance with regard to minimum net lot area and rear yard setback requirements relating to their proposed subdivision of their improved residential property into two residential lots. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on February 26, 2009 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present as well as the Zoning Hearing Board's Solicitor, the Director of Community Development, and the Court Reporter.

### **FINDINGS OF FACT**

1. Applicants Brad Barry and Janet Barry shall be referred to as the "Applicants."
2. The Applicants are the legal owners of the subject property.
3. The property is located at 1414 Wetherill Road, Phoenixville, PA 19460.
4. The Parcel Number of the property is No. 43-00-15832-00-1.
5. The Applicant was represented by Michael E. Furey, Furey & Baldassari, P.C., 1043 S. Park Avenue, Audubon, PA 19403.
6. The property is zoned R-2 Residential District.

7. The lot size of the property is approximately 61,500 square feet.
8. The Applicants reside at the property in a single family detached dwelling.
9. The Applicants wish to subdivide their property into two residential parcels so that their daughter may build a house on the newly created lot.
10. The Applicants purchased the property in 1973. The deed for this transfer of the property refers to two lots, Lots 3 and 5 of Section J of "Little Farms and Estates Co.", in the original subdivision plan dated 1912.
11. The property has been taxed as one parcel.
12. The proposed lot with the existing dwelling on it will be Lot 1. The proposed new lot will be Lot 2.
13. The property is unusually shaped, in the form of an "L". The proposed Lot 1 fronts on Wetherill. The proposed Lot 2 fronts on Catherine.
14. The property has public sewer and a private well. When the sewer was installed, the Applicants paid for a connection from Catherine Road into Lot 2, which will be used for this proposed project.
15. Mr. Glen E. Kelczewski, P.E., project manager with Conver and Smith Engineering, Inc., 358 Main Street, Royersford, PA 19468, testified at the hearing on behalf of the Applicants, including regarding information in Exhibits A5-A8 including a sketch plan for the proposed project and a portion of the 1912 subdivision plan.
16. The Applicants proposed to place the new lot line between two existing sheds on the property. Lot 1 was proposed to have a net area of 29,773 square feet and a rear lot setback of 14.8 feet, and Lot 2 was proposed to have a net area of 24,575 square feet and a rear lot setback of 31.5 feet.

17. Proposed Lot 1 to be located on the property has a lot width of 140 feet, as it has since 1912, and proposed Lot 2 has a lot width of 150 feet.

18. At the hearing, the Applicants amended their application to ask for a variance from the required lot width of 150 feet for Lot 1.

19. There was no public comment regarding the project at the hearing.

20. Mr. Barry presented Exhibit A4, which was a packet of seven letters from surrounding neighbors stating they had no objection to the Applicants' proposed subdivision application. The addresses of the neighbors who signed these letters are as follows: 1419 Wetherill Road; 1410 Catherine Street; 1407 Catherine Street; 1415 Catherine Rd.; 4 Pawlings Circle; 1423 Lincoln Street; and 1401 Wetherill Road. Mr. Barry testified that he did not receive a letter from the residents of 1410 Wetherill Road, but that when he talked to them they did not object to his plans.

21. The proposed new single family dwelling to be built on Lot 2 is to face Catherine Street, with a driveway entrance on Catherine Street. The Applicants' daughter would construct a new single story, peaked roof home of approximately 1800 to 2000 square feet with vinyl siding which would be in keeping with the neighborhood.

22. The rear yard setback variance would be required for an existing garden shed on Lot 2, and for the existing shed located beside the Applicants' pool on Lot 1.

23. The unique physical characteristics of the lot are causing a hardship.

24. This is not a self-created hardship. Instead, it results from the unique physical characteristics of the subject property.

25. Subdividing the property into two lots will not alter the essential character of the neighborhood in which the property is located, nor will it impair the appropriate use or development of the neighboring properties.

#### **DISCUSSION/CONCLUSIONS OF LAW**

1. The Applicants have standing to appear before the Board.
2. Denial of the requested relief will impose an unnecessary hardship upon the Applicants.
3. The hardship is not self imposed, and is due to the unique physical circumstances of the property, which represents two lots on the original 1912 subdivision plan that currently form an irregular, "L"-shaped single property.
4. The approval of the requested relief is necessary to enable the reasonable use of the property.
5. The variances granted by the Board with certain conditions will not alter the essential character of the neighborhood or the zoning district in which it is located, will not substantially impair the appropriate use of adjacent properties and will not be detrimental to the public welfare.
6. The variances granted by the Board with certain conditions represent the minimum that will afford relief from the hardship.

The Applicants have requested variances from the applicable minimum lot area requirements, rear yard setback requirements and lot width requirements in connection with subdividing the subject property into two residential lots. This request is for relief from requirements of the Zoning Ordinance of a dimensional nature, not for relief as to use requirements or limitations.

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 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. The quantum of proof required to establish unnecessary hardship is lesser when a dimensional variance, as opposed to a use variance, is sought. Id. at 258-59, 721 A.2d at 47-48. In addition, to justify the grant of a dimensional variance courts may consider multiple factors, “including the economic detriment to the applicant if the variance was 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.” Id. at 263-64, 721 A.2d at 50.

It is only the stringency of the standard in proving an unnecessary hardship that varies, depending on whether a use or dimensional variance is sought. Great Valley School District v. Zoning Hearing Board of East Whiteland Township, 863 A.2d 74, 83 (Pa. Commw. 2004), appeal denied, 583 Pa. 675, 876 A.2d 398 (2005) (citing Zappala Group, Inc. v. Zoning Hearing Board of the Town of McCandless, 810 A.2d 708, 710-11 (Pa. Commw. 2002), appeal denied, 573 Pa. 718, 828 A.2d 351 (2003)); The Friendship Preservation Group, Inc. v. Zoning Hearing

Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Commw. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Commw. 2001).

Despite the trend to apply a relaxed standard to dimensional variances Pennsylvania case law is clear in its approach to the issuing of variances and demands that 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). Moreover, variances from zoning codes should be granted sparingly and only under exceptional circumstances; a variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Commw. 1996).

In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10912.2, where relevant. See Hertzberg, 554 Pa. at 256-57, 721 A.2d at 46-47. The law established by the Pennsylvania courts further establishes these standards, stated in full herein. See Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Commw. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Commw. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

(1) That 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) That 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) That such unnecessary hardship has not been created by the applicant.

(4) That 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) That 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.

The requested variances are from the applicable minimum lot area requirements, rear yard setback requirements and lot width requirements of Section 143-37 of the Lower Providence Township Zoning Ordinance. Pursuant to that section the applicable minimum lot area is 30,000 square feet, the minimum rear yard setback for principal and accessory buildings over 250 square feet is 60 feet and the minimum lot width at the building line is 150 feet.

The Applicants proposed to subdivide the property into two lots, with proposed Lot 1 having a net area of 29,773 square feet and a rear yard setback of 14.8 feet and proposed Lot 2 having a net area of 24,575 square feet and a rear yard setback of 31.5 feet. The Applicants also requested a variance from the lot width requirement for proposed Lot 1 which has (and has had since the original subdivision plan dated 1912) a width of 140.1 feet at the building line.

The Board has granted variances from the rear yard setback and lot width requirements for Lot 1 and variances from the lot area and rear yard setback requirements for Lot 2, subject to two conditions: (1) that the new lot line be relocated to provide the required sixty feet setback from the existing home and the required thirty thousand square feet minimum net lot area for Lot 1; and (2) that if the existing sheds on the property are ever replaced or rebuilt, they must be relocated within the required setbacks at that time. Pursuant to the variances granted with conditions and the relocated new lot line, Lot 1 will have a net lot area of 30,104 square feet, a rear yard setback of sixty feet from the existing home and a rear yard setback from the existing shed of 20.5 feet and will continue to have a lot width of 140.1 feet at the building line; Lot 2 will have a net lot area of 24,244 square feet, a rear yard setback from the proposed new dwelling with garage of sixty feet and a rear yard setback from the existing shed of 26.3 feet.

The variances granted with conditions are necessary to alleviate unnecessary hardship due to the unique physical circumstances and characteristics of the property, including the irregular shape of the property. The variances are necessary to permit reasonable subdivision of the property into two residential lots to permit the Applicants' daughter to construct a new house on the new lot.

This is not a self-created hardship. Instead, it results from the unique physical characteristics of the subject property. The property is irregularly shaped and represents two lots on the original 1912 subdivision plan which are combined on the deed to Applicants and have been taxed as one parcel.

The variances granted with conditions will not alter the essential character of the neighborhood in which the property is located, nor will it impair the appropriate use or development of the neighboring properties. Proposed Lot 1 will meet the required minimum net



lot area and the required rear yard setback from the existing house. Also, the variance from the rear yard setback requirement with regard to the existing shed on proposed Lot 1 is subject to the condition that if the shed is ever rebuilt or replaced it must be located within and comply with all required setbacks at that time. The variance from the required lot width is for only 9.9 feet out of 150, and the lot width of 140.1 feet is merely a continuation of an existing condition on the property which originated at the time of the original 1912 subdivision plan. Proposed Lot 2 will meet the required sixty feet rear yard setback from the proposed new dwelling and garage. The variance from the rear yard setback requirement with regard to the existing shed on proposed Lot 2 is subject to the condition that if the shed is ever rebuilt or replaced it must be located within and comply with all required setbacks at that time. The proposed new dwelling on proposed Lot 2 will be a single story home with vinyl siding of approximately 1800 to 2000 square feet which will be in keeping with the existing neighborhood. In addition, there was no public opposition to the project at the hearing and at least seven neighbors signed letters in support of the Applicants' application with regard to subdividing the property into two lots.

The granted variances with conditions represent the minimum variance that will afford relief and the least modification possible of the applicable provisions of the zoning ordinance. The new lot line will be relocated subject to the Board's first condition such that the proposed Lot 1 will meet the requirements for lot area and for rear yard setback for the existing house and proposed Lot 2 will meet the requirement for rear yard setback for the proposed new dwelling and garage. In addition, the variances are subject to the Board's second condition that if the existing sheds are ever rebuilt or replaced they must be relocated to conform to all setback requirements at that time.

The Board finds and concludes that based on the testimony and evidence presented at the hearing the standards for the requested relief, subject to the Board's conditions, have been met and that the variances from Section 143-37 of the Lower Providence Township Zoning Ordinance should be granted, subject to the Board's conditions.

### **DECISION**

The decision of the Lower Providence Township Zoning Hearing Board by a 3-2 vote is as follows:

The requested variances from the rear yard setback and lot width requirements of Section 143-37 of the Lower Providence Township Zoning Ordinance with respect to proposed Lot 1 to be located on the property and from the lot area and rear yard setback requirements of Section 143-37 with respect to proposed Lot 2 to be located on the property are granted, subject to two conditions: (1) that the new lot line between proposed Lots 1 and 2 on the property be relocated to provide the required sixty feet setback from the existing home and the required thirty thousand square feet lot area for Lot 1; and (2) that if the existing sheds on the property are ever replaced or rebuilt, they must be relocated to conform with the required setbacks at that time.

Dated: April 8, 2009


**ORDER**

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

LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD



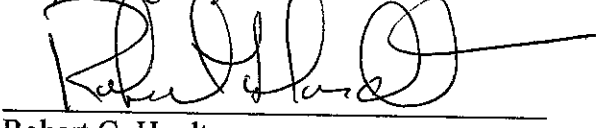
Janice Kearney



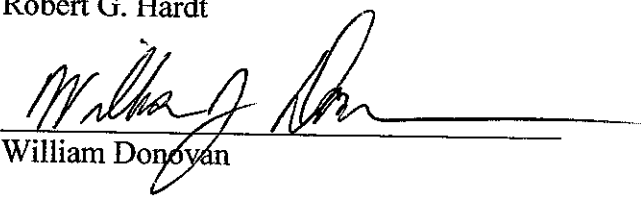
Eric Frey



James E. Dougherty



Robert G. Hardt



William Donovan

**NOTE 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.