

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-09-05	:	HEARING DATE: April 23, 2009
	:	
APPLICATION OF:	:	
Clearwireless, LLC	:	
	:	DATE OF MAILING OF OPINION
	:	AND DECISION: June 2, 2009
PROPERTY:	:	
Parcel Nos. 430015925007 &	:	
430011005004	:	
54-56 Wilson Boulevard	:	
Eagleville, PA 19403	:	

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

Applicant Clearwireless, LLC (hereinafter referred to as the "Applicant") filed an application requesting a variance under Section 143-32, Section 143-149 and Section 143-250(B)(2) of the zoning ordinance to permit installation of additional antennas on an existing wireless telecommunications tower and installation of ground equipment in the existing fenced area. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on April 23, 2009 at the Lower Providence Township Building. All of the members of the Zoning Hearing Board were present as well as the Solicitor, the Director of Community Development/Zoning Officer, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Clearwireless LLC, with an address at 5808 Lake Washington Boulevard NE, Suite 300, Kirkland, WA 98033.
2. The subject property is Parcel Nos. 430015925007 & 430011005004, located at 54-56 Wilson Boulevard, Eagleville, PA 19403.
3. The owner of the property is Charlotte M. Smith, P.O. Box 167, Zieglerville, PA 19492. The Applicant is proceeding with this application with regard to attachment of additional

antennas to the existing wireless telecommunications tower and installation of ground telecommunications equipment on the property pursuant to authority from the owner of the property and written lease agreements including the Ground Lease Agreement and Site Lease Agreement relevant portions of which were put into evidence at the hearing as Exhibits A-3 and A-4.

4. The lot size is approximately 5,000 square feet.

5. The applicable zoning is R1.

6. The Applicant was represented at the hearing by Melissa Murray Rigney, Esquire, Lemanowicz, LLP, 1012 North Bethlehem Pike, Suite 200 B-3, Lower Gwynedd, PA 19002, and on the written application by Richard Lemanowicz, Esquire of the same address.

7. The property is presently occupied by an existing wireless telecommunications site and facility including an approximately 150 feet tall lattice tower.

8. The Applicant proposes to install six antennas (specifically, three panel antennas and three dish antennas) to be affixed to the existing tower at an elevation of approximately 114 feet.

9. Applicant also proposes to install ground equipment including a cabinet at the base of the tower within the existing fence-enclosed facility located on a three feet by six feet raised steel platform and an existing concrete pad in the proposed seven feet by seven feet lease area.

10. The height of the existing tower will not be extended, and it will remain in its existing footprint.

11. The existing tower can structurally support the proposed new antennas, according to testimony at the hearing.

12. The installation of the new antennas on the existing tower is necessary to enable sufficient wireless communication services coverage for the Applicant.

13. The addition of the new antennas to the existing tower is necessary because of the terrain. This is the best location for an antenna to fill the Applicant's coverage gap regarding wireless communication services.

14. The Applicant currently is unable to transmit or receive signals in this area, which is a requirement of its FCC license.

15. A hardship is created by the physical characteristics of the land, existing structures, the rolling topography and vegetative cover and the limitations of the technology by which radio signals are propagated.

16. The Applicant's propagation analysis presented at the hearing (Exhibit A-7) demonstrated that the addition of the proposed new antennas to the existing tower is necessary to provide communications service in this area, and that the height of the proposed antennas is the minimum height necessary to fill the service gap and is well below the existing height of the tower.

17. The addition of the proposed new antennas to the existing tower will avoid any need to construct a new tower elsewhere in the Township, and is the least intrusive means of filling the Applicant's communications service gap.

18. The use of the proposed antenna would not interfere with existing communications.

19. The Applicant is licensed by the FCC to supply wireless communications.

20. The proposed equipment is similar to the existing equipment installed on this telecommunications tower.

21. No residents testified that they were opposed to the application.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board.
2. Denial of the requested variances will impose an unnecessary hardship upon the Applicant, including preventing it from complying with FCC mandates regarding reliable coverage.
3. The hardship is not self imposed, and is due to the unique topographical features of the property, where the proposed site is the best or only available site in the area that will provide reliable coverage and the addition of the proposed new antennas is necessary to provide coverage.
4. The authorization of the requested variance is necessary to enable the reasonable use of the property.
5. The grant of the requested variance 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. In addition, the requested variance represents the minimum variance that will afford relief.

The Applicant seeks a variance under Section 143-32, Section 143-149 and Section 143-250(B)(2) of the zoning ordinance to permit installation of proposed new antennas on an existing wireless telecommunications tower and installation of ground mounted equipment at the existing facility. As the property is in an R1 district, that request is in the nature of a use variance.

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 that is 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. 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 Applicant has demonstrated, and the Board finds and concludes, that the Applicant will suffer unnecessary hardship if the requested variance is not granted; that the unnecessary hardship is due to the unique physical circumstances or conditions relating to the property, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property; that the unnecessary hardship was not created by the Applicant; that the requested 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; and that the requested variance is the minimum that will afford relief and will represent the least modification possible of the applicable zoning code provisions.

The Applicant has demonstrated unnecessary hardship. Per FCC mandate the Applicant must operate within its frequency band and provide reliable coverage to subscribers. The proposed addition of the new antennas to the existing tower is necessary to fill a gap in the Applicant's coverage and provide wireless communications service in the area, because of the topography in this area. Pursuant to evidence at the hearing this is the best location to fill the communications service gap.

Also, the hardship arises from the unique topography of the property; it is not self-created. Without the variance requested the Applicant will not be able to make reasonable use of the property.

The requested variance represents the minimum relief necessary. The proposed attachment of the antennas to the existing tower is at an elevation of approximately 114 feet, well

below the existing height of the tower. The co-location of the Applicant's antennas on the existing tower will eliminate any need for construction of an additional tower in the Township. The proposed additional antennas are the least intrusive means of filling the Applicant's service gap.

The granting of the requested variance 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. The variance is for additional antennas on an existing communications tower. The proposed equipment is similar to the existing equipment installed at this telecommunications facility, and the proposed ground mounted equipment will be installed in the existing fence-enclosed area.

DECISION

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

The Applicant's request for relief, specifically the variances from the Lower Providence Township Zoning Ordinance to permit the attachment of additional antennas to an existing wireless telecommunications tower at a height of approximately 114 feet and installation of accompanying ground mounted communications equipment in an R1 district, is granted.

Dated: June 2, 2009


ORDER

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

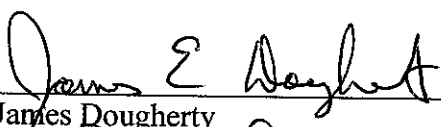
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



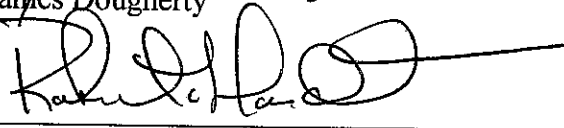
Janice Kearney




Eric Frey



James 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.

