

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-09-07	:	HEARING DATE: May 28, 2009
	:	
APPLICATION OF:	:	
Vincent and Barbara Cane	:	DATE OF MAILING OF OPINION
	:	AND DECISION: June 23, 2009
PROPERTY:	:	
815 N. Park Avenue	:	
Norristown, PA 19403	:	
Parcel I.D. No. 43-00-10303-00-4	:	

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

The applicants, Vincent and Barbara Cane, (hereinafter referred to as the "Applicants"), filed an application requesting: an interpretation that two residential uses which existed on the property for approximately 45 years may continue under Sections 143-145, 143-146 and 143-147 of the Township Zoning Ordinance; an interpretation that dual use of the property has not been discontinued or abandoned under Section 143-148 of the Township Zoning Ordinance; or, in the alternative, a use variance under Section 143-36 of the Zoning Ordinance to permit two residences on the property or a variance by estoppel or by vested right. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on May 28, 2009 at the Lower Providence Township Building. All 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 Applicants are Vincent and Barbara Cane.
2. The Applicants are the legal owners of the subject property.
3. The subject property is located at 815 N. Park Avenue, Norristown, PA 19403, Parcel I.D. No. 43-00-10303-00-4 (the "Property").

4. The applicable zoning is R-2, Residential District.
5. The Applicants were represented by Michael E. Furey, Esquire, Furey & Baldassari, PC, 1043 S. Park Avenue, Audubon, PA 19403.
6. The lot size of the Property is approximately 80,000 square feet.
7. Applicant Vincent Cane testified at the hearing in support of the application.
8. There were no residents other than Mr. Cane who testified regarding the application.
9. The Property has been used for at least two uses since before the enactment of zoning in Lower Providence Township in 1955.
10. The Property was used as a barbershop and a residence from approximately 1952 through approximately 1960.
11. The Property was used as a barbershop and two residences from approximately 1960 through approximately 1996, when the barbershop ceased operation.
12. The Property was used as two residences without the barbershop from approximately 1996 through approximately 2004.
13. The Applicants acquired the Property from the prior owners, Ralph Milner and his wife, in March 2009.
14. Mr. Milner and his wife had owned the Property since August 1997. The front portion of the Property where the buildings are located has been in Mr. Milner's family since 1942, and the rear portion of the Property belonged to Mr. Milner's family since 1960.
15. Mr. Milner and his family intended to continue the two residence use on the Property after 2004 and did not abandon this use. The two residences continue to exist on the Property and the Property has not been used inconsistently with the two residential uses.

16. Exhibit A-2 presented at the hearing is an affidavit by Mr. Milner regarding the history of the uses of the Property.

17. Applicant Mr. Cane lives next door to the Property and has done so for approximately 50 years. Based on his personal knowledge he confirmed that the history of the uses of the Property is as stated in Exhibit A-2.

18. Exhibit A-3 presented at the hearing is a series of seven photographs of the Property.

19. Exhibit A-4 presented at the hearing consists of a Lower Providence Township Zoning Permit dated October 17, 1963, approving the building of a garage on the Property, and an application for the permit which shows two uses on the Property.

20. Exhibit A-5 presented at the hearing consists of a Lower Providence Township use and occupancy permit dated May 14, 1976, permitting use of the alteration to second floor addition at the Property for a dwelling, and an application for use and occupancy permit dated August 21, 1973, to use the addition to the barber shop second floor at the Property for a dwelling.

21. Exhibit A-6 presented at the hearing consists of an application to Lower Providence Township for plan examination and building permit dated March 22, 2004, with regard to relocating a historic barn on the Property; a Decision of the Lower Providence Township Zoning Hearing Board dated April 22, 2004 granting Mr. and Mrs. Milner a variance to permit the barn to be located within ten feet of the side property line between the Property and 819 North Park Avenue; Lower Providence Township building permit with regard to relocation of the barn on the Property dated July 14, 2004, and permit tracking sheets; and a Lower Providence Township use and occupancy permit dated March 21, 2005 permitting the use of the

alteration/relocation of the barn. The application for plan examination and building permit states that there are 2 existing residential units on the Property.

22. Exhibit A-7 presented at the hearing is a report of Franc Environmental, Inc., dated May 8, 2009, which states that the septic system on the Property is in satisfactory operating condition.

23. The landowners of the Property made substantial expenditures with regard to improvements of the Property for two residential uses in reasonable reliance on the Township's issuance of building permits and use and occupancy permits with knowledge that there were two uses on the Property, including two residences, and there would be substantial cost to the Applicants to demolish one of the existing residential dwellings on the Property or to leave one of the dwellings vacant.

24. Mr. Cane testified that he intends to rent the two existing residences on the Property, and that he intends to keep the adjacent property on which he resides and the Property as separate properties and currently does not have any intention to subdivide the Property.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicants are the legal owners of the Property and have standing to appear before the Board regarding the requested relief.

2. Unnecessary hardship would result if the Applicants were not permitted to continue the two residence use on the Property and had to demolish one of the existing dwellings on the Property or leave one of the dwellings vacant.

3. The landowners of the Property reasonably relied on the Township's issuance of building permits and/or use and occupancy permits in connection with stated or demonstrated dual uses of the Property including two residences.

4. There is no evidence that the use of two residences on the Property is a threat to the public health, safety or morals.

5. It would be inequitable to enforce the restriction regarding the use of two residences on the Property in the circumstances of this application, which include the Township's acquiescence and approval of dual uses on the Property over a long period of time.

"The case law regarding the theory of variance by estoppel, or vested rights as it is frequently termed, has not produced a clearly defined test for determining when it has become inequitable to enforce a particular zoning restriction against a landowner." Knake v. Zoning Hearing Board of the Borough of Dormont, 74 Pa. Commw. 265, 267, 459 A.2d 1331, 1332 (1983). A number of court decisions have held that it was inequitable to enforce a zoning restriction against a landowner in various situations. See, e.g., Appeal of Heidorn, 412 Pa. 570, 195 A.2d 349 (1963) (landowners entitled to remove illegal overhang and stoop and erect awning and concrete slab violating setback requirement where Township failed to object to violation for ten years); Sheedy v. Zoning Board of Adjustment, 409 Pa. 655, 187 A.2d 907 (1963) (variance by estoppel regarding use of house as five-unit multi-family dwelling based on 23 years of municipal inaction and evidence that board of adjustment knew of illegal use for thirteen years); Knake, supra, 74 Pa. Commw. 265, 459 A.2d 1331 (landowner entitled to use of building as five-family dwelling due to lengthy period of municipal inaction and municipality's knowledge of illegal use for approximately 23 years); see also, e.g., Petrosky v. Zoning Hearing Board of Township of Upper Chichester, 485 Pa. 501, 402 A.2d 1385 (1979) (landowners acquired vested rights regarding garage in violation of setback requirements where garage was constructed pursuant to permits issued by township); East Hempfield Township v. Brubaker, 828

A.2d 1184 (Pa. Commw. 2003) (erroneously issued building permit gave owner vested right in communications tower).

The Board finds and concludes that based on the circumstances of this application as demonstrated by the testimony and other evidence presented at the hearing, and in accordance with the principles of Pennsylvania law including the principles stated in the court decisions noted above, the Applicants are entitled to a variance by estoppel with regard to the use of the two existing residences on the Property.

DECISION

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

The application for a variance by estoppel regarding the use of the two existing residences on the Property is granted.

Dated: June 23, 2009

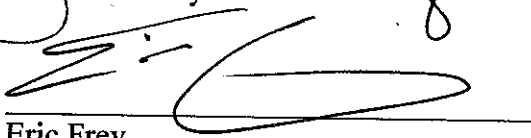
ORDER

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.

