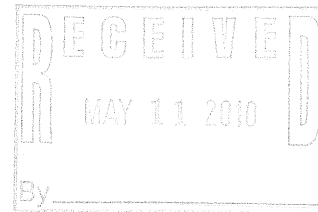


cc: Bos
TA
MS
Prop. File

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JEFFREY W. SODERBERG

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May 8, 2010

Mr. Joseph Dunbar
Township Manager
Lower Providence Township
100 Parklane Drive
Eagleville, PA 19403

**RE: Lower Providence Township Zoning Hearing Board – Marisa Cavalieri,
Application No. Z-10-03**

Dear Mr. Dunbar:

Enclosed is a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board in the above matter. Please be advised that the mail date is today.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jeffrey W. Soderberg". The signature is fluid and cursive, with a large loop at the end.

Jeffrey W. Soderberg

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-10-03 : HEARING DATE: March 25, 2010
:
APPLICATION OF: :
Marisa Cavalieri :
:
:
PROPERTY: :
2805 Sandpiper Drive :
Audubon, PA 19403 :
Parcel No. 43-00-12715-00-4 :

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

The applicant, Marisa Cavalieri (hereinafter referred to as the "Applicant"), filed an application requesting a variance from Lower Providence Township Ordinance 535, Section 1. § 81-1 in connection with proposed construction of a fence on her single family residential corner property. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on March 25, 2010 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present as well as Code Enforcement Manager Tom Heisner, the Solicitor, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Marisa Cavalieri.
2. The Applicant is the legal owner of the subject property, effective March 31, 2010.
3. The subject property is located at 2805 Sandpiper Drive, Audubon, PA 19403 (the "Property"). The parcel no. is 43-00-12715-00-4.
4. The applicable zoning is R-2, Residential District.
5. The Applicant was not represented by legal counsel.

6. The lot size of the Property is approximately .4 acres.
7. The Property is a corner property, with one side of the Property facing busy Park Avenue.
8. The Applicant proposes to erect a vinyl fence of approximately 400 feet in length on the Property, including in the rear of the parcel and along Park Avenue and Sandpiper Drive.
9. The purpose of the proposed fence is safety and privacy.
10. The Applicant testified that she sought a variance from the Township Ordinance requirement that the fence contain openings of no less than four (4) inches because that was so large as to not provide privacy, especially on busy Park Avenue, and as to be unsafe because a dog's head is four inches.
11. The Applicant also sought a variance from the Ordinance requirement that the height of the fence be no more than five (5) feet.
12. The Code Enforcement Officer denied the Applicant's requested permit for erection of the fence due to height in excess of five feet and openings lesser than four inches.
13. The Applicant submitted as Exhibit A-1 three photographs of fence styles she proposed, which had openings of less than four inches.
14. The Applicant submitted a plan attached to the application for relief which demonstrated where the proposed fence would be erected.
15. The proposed fence would be erected ten feet in from the sidewalk on Park Avenue.
16. The proposed fence would not be erected close to the curve on Sandpiper Drive or to the corner of Sandpiper Drive and Park Avenue.

17. As proposed, the driveway of the next door neighbor in the rear of the Property would be past the fence when pulling out.

18. Resident of the Property James Morrison testified at the hearing as to a proposed option to put the portion of the fence which is parallel to Sandpiper Drive flush with the house and garage, which would pull it back farther from Sandpiper Drive.

19. As proposed, the fence would comply with required 75 foot triangular sight lines from the center of the intersection.

20. The proposed fence, at a height not to exceed five feet and with openings of less than four inches per the styles shown in Exhibit A-1, will not alter the essential character of the neighborhood in which the Property is located.

21. No neighbors testified in opposition to the proposal.

22. Per testimony on behalf of the Applicant at the hearing, all neighbors have been advised of the fence proposal and none objected.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicant is and/or at the relevant time will be the legal owner of the Property and has standing to appear before the Board regarding the requested relief.

2. Denial of the requested relief as to a variance from the requirement that openings in the fence be no less than four inches will impose an unnecessary hardship upon the Applicant, and the hardship was not created by the Applicant but is premised upon the unique physical characteristics of the Property.

3. The approval of the requested relief for a variance from the requirement that openings in the fence be no less than four inches per the styles set forth in Exhibit A-1 is necessary to enable the reasonable use of the Property.

4. The construction of the fence, as proposed per the testimony at the hearing, at a height not to exceed five feet and with openings of less than four inches per the styles shown in Exhibit A-1, 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 Applicant has requested relief in connection with the proposed erection of a fence for safety and privacy on the Property, including along Sandpiper Drive and Park Avenue. The Applicant has requested a variance from the applicable requirements and limitations, set forth in Lower Providence Township Ordinance 535, Section 1. § 81-1, to erect a fence (a) which is six feet high rather than the maximum height of five feet and (b) which has openings of less than four inches. This is a request for relief from requirements 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 Board finds and concludes that based on the testimony presented by the Applicant, the Applicant has met the applicable standards for the requested relief regarding erection of a fence with a maximum height of five feet and with openings of less than four inches per the styles set forth in Exhibit A-1, and that such relief should be granted.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-1 vote is as follows:

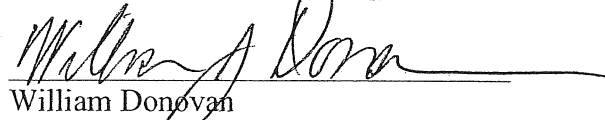
The application for a variance from Lower Providence Township Ordinance 535, Section 1.§ 81-1 to permit erection of a fence, as proposed per the testimony at the hearing, with a height not to exceed five feet and with openings of less than four inches per the styles set forth in Exhibit A-1, is granted. Further, to the extent that approval of such a variance and/or relief from Lower Providence Township Ordinance 535, Section 1.§ 81-1 is within the authority and/or jurisdiction of the Lower Providence Township Board of Supervisors or other applicable appeal board, the Zoning Hearing Board recommends that the Board of Supervisors or such other appeal board approve such variance/relief.

Dated: May 8, 2010

ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


William Donovan
Chairman

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.