

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-10-05	:	HEARING DATE: March 24, 2011
	:	
APPLICATION OF:	:	
Jon and Lori Costanza	:	
	:	
PROPERTY:	:	
80 Pechins Mill Road	:	
Lower Providence Township	:	
Collegeville, PA 19426	:	
Parcel No. 43-00-10903-00-7	:	

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

Applicants Jon and Lori Costanza (hereinafter referred to as the “Applicants”) filed an application requesting variances from the side yard setback requirements of Section 143-37 of the Lower Providence Township Zoning Ordinance, in connection with previous construction of a solar panel array on their property. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on March 24, 2011 at the Lower Providence Township Building. All members of the Zoning Hearing Board except James Dougherty were present as well as the Solicitor, the Zoning/Code Enforcement Officer and the Court Reporter.

FINDINGS OF FACT

1. The Applicants are Jon and Lori Costanza.
2. The Applicants are the owners of the subject property, which is located at 80 Pechins Mill Road, Lower Providence Township, Collegeville, PA 19426 (the “Property”). The parcel no. is 43-00-10903-00-7
3. The Applicants were represented by Thomas M. Keenan, Esquire, 376 East Main Street, PO Box 26460, Collegeville, PA 19426-0460.

4. The applicable zoning is R-2 Residential District.
5. The present use of the Property is as a single family residence. The Applicants acquired the Property in 1983.
6. The lot size is 9.6 acres.
7. The Property currently is served by private well and private on-lot septic.
8. The following exhibits were marked at the hearing:
 - B-1: Application
 - B-2: Advertisement
 - B-3: Proof of publication
 - A-1 Plan
 - A-2 Site Plan with 2 color photos
 - A-3 Letter dated February 8, 2010
 - A-4 Photo
9. The Applicants constructed a solar panel array (the "Array") on the Property.
10. The construction of the Array was completed without first obtaining required permits. [Exhibit A-3.]
11. The Array is a solar energy system consisting of four groups of solar panels with support poles in concrete foundations connected by underground conduit to the rest of the system. [Site Plan attached to Application.]
12. The Array is located on the portion of the Property which is adjacent to property owned by Local 380 of the International Brotherhood of Electrical Workers or IBEW.
13. Local 380 appeared at the hearing as Protestant, and it was represented by Bridget Walsh, Esquire, 510 Walnut Street, 16th Floor, Philadelphia, PA 19106.

14. Applicant Mr. Jon Costanza testified at the hearing.
15. Mr. Costanza stated that the Array is located on the portion of the Property at the top of a slope where it is able to receive at least 5 ½ hours of direct sun daily, a solar window.
16. Mr. Costanza stated that due to inadvertent error in the installation of the Array several of the solar panels overhang the property line between the Property and the property owned by Local 380.
17. Numerous trees were removed in connection with the installation of the Array.
18. If the Array were to be moved farther away from the property line shared with Local 380's property additional trees would have to be removed because that area of the Property is wooded.
19. Each of the four groups of solar panels in the Array is 12 feet by 12 feet, resulting in a structure with a total size in excess of 500 square feet.
20. David Schaaf, business manager and financial secretary of Local 380, testified in opposition to the application.
21. The Array protruding into Local 380's property would be a negative and could limit use of that property if the property were to be sold or developed, and the Array being right up against the line of Local 380's property also could negatively impact sale or development of that adjacent property.
22. Mr. Schaaf and another witness for Local 380, Jeffrey Kurtz, who conducted a survey of the property line in question, both testified that trees on Local 380's property were taken down in connection with the installation of the Array on the Property.
23. Sean Dippold, who resides at 85 Pechins Mill Road, stated on behalf of the Applicants that he had no objection to the Array, which has no impact on his property.

24. The Applicants requested a variance from the setback requirements of the Lower Providence Township Zoning Ordinance to allow the Array to remain where it is presently located. Applicants proposed removing solar panels in the Array which overhang the property line shared with Local 380's property.

25. The Array could feasibly be located elsewhere on the Property, a) without encroaching upon, and b) being farther away from, the property line shared with Local 380's property if additional trees on the Property were removed.

26. The Property could be reasonably used without the requested variance.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicants have standing to appear before the Board regarding the requested relief.

2. Denial of the requested relief will not impose an unnecessary hardship upon the Applicants, and the requested variance is not necessary to enable reasonable use of the Property.

3. The variance requested by the Applicants does not represent the minimum that will afford relief and does not represent the least modification possible of the regulation at issue.

4. Any hardship has been created by the Applicants, who installed the Array without first obtaining required permits or seeking a variance.

5. Granting a variance to allow the Array to remain where it is located on the Property would impair the appropriate use or development of adjacent property.

The Applicants have requested a variance from the setback requirements of Section 143-37 of the Lower Providence Township Zoning Ordinance for a solar panel Array that the

Applicants have constructed on the Property. The request for variance seeks relief as to dimensional requirements.

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 the Municipalities Planning Code, 53 P.S. § 10910.2, 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 Applicants contended that the Array was not subject to any regulations under the Zoning Ordinance. To the contrary, the Array is an accessory structure. Otherwise it would not be a permitted use, as the Zoning Ordinance does not specify that a solar energy system is a permitted use in the applicable zoning district. The Array is subject to the setback requirements under Sections 143-37.A(2) and 143-19.C of the Zoning Ordinance.

The Applicants failed to submit evidence which demonstrates that there exists an unnecessary hardship, which is not self created, or that the requested variance is necessary to enable reasonable use of the Property. The Applicants also have failed to demonstrate that the requested variance will represent the minimum variance that will afford relief and the least modification possible of the regulation in issue.

The Applicants could relocate the Array so that it does not immediately abut the property line shared with the adjacent property and complies with setback requirements, if additional trees were removed. Removal of trees in a wooded lot which has a total size of 9.6 acres does not constitute an unnecessary hardship where Applicants already removed numerous trees in connection with the installation of the Array at its existing location. The existence of trees on the area of the parcel near the Array does not constitute unique physical circumstances or characteristics of the lot where the Property (and much of the area in which the Property is located) is wooded. In addition, testimony demonstrated that authorizing the Array -- a structure in excess of 500 square feet in total size -- to remain in its existing location immediately abutting the adjacent property (and partially protruding into the adjacent property) would negatively impact and significantly impair possible use or development of the adjacent property.

The Board finds and concludes that the Applicants have failed to sustain their burden for justifying a variance from the applicable provisions of the Zoning Ordinance.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-0 vote is as follows:

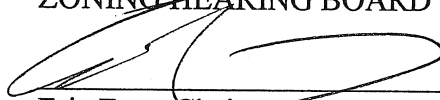
The application for a variance from the applicable setback requirements of Section 143-37 of the Zoning Ordinance is denied.

Dated: May 6, 2011

ORDER

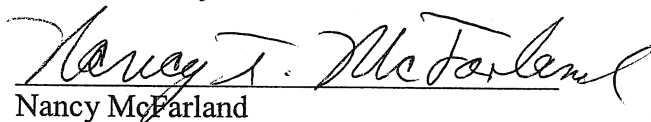
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

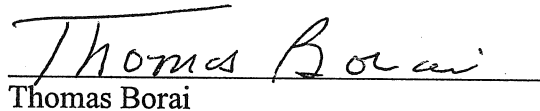
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Eric Frey, Chairman

James E. Dougherty, Vice Chairman


William Donovan


Nancy McFarland


Thomas Borai

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.

