

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-10-14 : HEARING DATE: July 22, 2010
:
APPLICATION OF: :
Clearwireless, LLC :
:
PROPERTY: :
N. Barry Avenue (Block 2, Unit 5) :
Norristown, PA 19403 :
Parcel No.: 43-00-01342-00-1 :

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 from Section 143-250(B)(2) and Section 143-36 of the Lower Providence Township Zoning Ordinance and all other necessary variances required to permit Applicant's proposed installation of wireless telecommunications antennas on an existing water tank and proposed installation of ground equipment in a fenced area at the base of such water tank. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board on July 22, 2010 at the Lower Providence Township Building. All of the members of the Zoning Hearing Board except William Donovan were present as well as the Code Enforcement Manager, the Solicitor, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Clearwireless LLC, with an address as follows: c/o Lemanowicz, LLP, 1012 North Bethlehem Pike, Suite 200 B-3, Lower Gwynedd, PA 19002.
2. The subject property is located at N. Barry Avenue (Block 2, Unit 5), Norristown, PA 19403 (the "Property"). The parcel number of the Property is 43-00-01342-00-1.
3. The owner of the property is Pennsylvania American Water Company, with its principal office located at 800 West Hershey Park Drive, Hershey, PA 17033. The Applicant is

proceeding with this application pursuant to a Telecommunications Site Lease with the property owner, a copy of which was introduced into evidence at the hearing as Exhibit A-2.

4. The size of the Property is ten acres.
5. The applicable zoning is R-2 Residential District.
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.
7. The Applicant presented testimony by Mr. Peter Kallipourey, site acquisition manager, of BCI Communication Inc.; Mr. Faraz Ahmed, design engineer, of TTS Wireless; and Mr. Fran Greene, professional engineer, of J & S Consultants.
8. The Property presently is used as a water storage facility. The existing structures on the Property are a water tank which is 49 feet and 8 inches high, a fence surrounding the base of the tank, and a one-story masonry building. The Property is surrounded by mature vegetation, and access is by an existing gravel road.
9. The Applicant proposes to install seven antennas, specifically, three panel antennas, three dish antennas and one GPS antenna, to be affixed to the existing handrail on the top of the existing water tank. The antennas can be colored to match the color of the existing tank.
10. Applicant also proposes to install ground equipment near the base of the water tank, specifically, equipment cabinets mounted on a raised platform with dimensions of seven feet by four feet and eight inches within a ten feet by ten feet leased area surrounded by a chain link fence which will be eight feet high.

11. The existing water tank structure will be able to support the proposed antennas and mounts, according to testimony at the hearing and an engineering report by Philip Burtner, PE, for CMX Telecommunications, which was submitted as Exhibit A-7.

12. The installation of the antennas on the existing water tank is necessary to enable sufficient wireless telecommunication services coverage for the Applicant.

13. Applicant is currently unable to transmit reliable wireless telecommunication signals in the area around the Property, as required pursuant to its FCC license. Exhibit A-4 demonstrates this coverage gap.

14. The addition of the antennas to the existing water tank is necessary because of the structures, rolling topography and vegetative cover in the area.

15. This is the best and only feasible location for antennas to fill the Applicant's coverage gap regarding wireless communication services. Exhibit A-5 demonstrates the proposed coverage with the proposed installation.

16. Applicant searched for other existing structures on which to install the proposed antennas but was unable to locate a suitable alternative structure which would resolve the Applicant's wireless communications coverage gap.

17. The proposed installation of the antennas on the existing water tank is a less intrusive means of resolving the Applicant's wireless telecommunications coverage gap than erecting a new wireless telecommunications tower and installing antennas on such a new tower.

18. The maximum height of the antennas proposed to be installed on the existing handrail on the water tank would be 60 feet. This is between ten and eleven feet in excess of the height of the existing water tower structure.

19. The proposed equipment cabinets will be located behind an eight feet tall fence in the 10 feet by 10 feet area near the base of the existing water tank and will be locked and alarmed. According to testimony by engineer Mr. Greene if someone broke into the proposed equipment cabinets and pulled out wires they would not be injured.

20. The proposed installation would be fully automated with a visit one time per month during normal business hours to check the equipment. There would be no additional lighting on the water tank. There would be a 75 watt light bulb only on the equipment cabinets, if there was need for access in the dark.

21. According to testimony at the hearing and an engineering report which was introduced into evidence as Exhibit A-6, authored by Andrew M. Petersohn, P.E., of dBm Engineering, P.C., the proposed antennas and equipment would comply with FCC radio-frequency exposure limitations. According to testimony and the engineering report, at full operation the radio-frequency exposure levels would be at least 830 times less than the applicable FCC limits.

22. A hardship is created by the physical characteristics of the land, existing structures, the rolling topography and vegetative cover and the limitations of wireless telecommunications transmission technology.

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

24. No residents testified at the hearing in support of or in opposition 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 area in question, where the proposed site is the best or only feasible site in the area that will provide reliable coverage and the installation of the proposed antennas is necessary to provide coverage.

4. The authorization of the requested variance is necessary to eliminate the hardship upon the Applicant.

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 from Section 143-250(B)(2) and Section 143-36 of the Lower Providence Township Zoning Ordinance to permit installation of proposed wireless telecommunication antennas on an existing water tank structure and installation of ground mounted equipment near the base of the existing water tank. As the property is in an R2 district, this 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. § 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 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 the surrounding area, and that the authorization of a variance is therefore necessary to alleviate the hardship and enable 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 installation of the antennas on the existing water tank is necessary to resolve a gap in the Applicant's coverage and provide wireless communications service in the area, because of the structures, topography and vegetative coverage in this area. Pursuant to Applicant's evidence presented at the hearing this is the only available and most feasible location to fill the Applicant's communications service gap. Also, the hardship arises from the structures, topography and vegetative cover of the area around the Property. It is not self-created.

The requested variance represents the minimum relief necessary. The proposed attachment of the antennas to the existing water tank will eliminate any need for construction of

an additional communications tower in the Township. The proposed antennas are the least intrusive means of resolving the Applicant's wireless telecommunications coverage gap.

The granting of the requested variance, subject to 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.

DECISION

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

The Applicant's request for variances from Section 143-250(B)(2) and Section 143-36 of the Lower Providence Township Zoning Ordinance and all other necessary variances required to permit Applicant's proposed installation of wireless telecommunications antennas on an existing water tank and proposed installation of ground equipment in a fenced area at the base of such water tank is approved and granted, subject to the following conditions:

- 1) The ground mounted equipment cabinets to be installed by Applicant shall be enclosed within an eight feet tall fence;
- 2) The color of the antennas to be installed by the Applicant shall match the color of the existing water tank; and
- 3) The maximum height of the antennas and mounts to be attached to the existing water tank shall be no more than 60 feet from the ground.


Dated: September 3, 2010

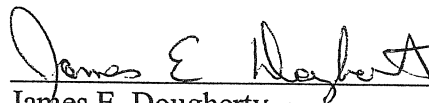
ORDER

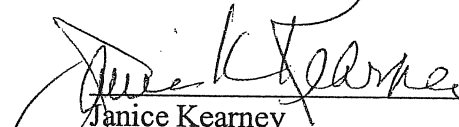
The foregoing Findings, Discussion and Decision are hereby approved and ordered.


LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

Absent
William Donovan, Chairman


Eric Frey, Vice Chairman


James E. Dougherty


Janice Kearney


Nancy McFarland

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.