

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-10-20	:	HEARING DATE: March 24, 2011
	:	
APPLICATION OF:	:	
Michael Spence	:	
	:	
PROPERTY:	:	
151 Tyson Mill Road	:	
Lower Providence Township	:	
Collegeville, PA	:	
Parcel No. 43-00-10990-00-1	:	

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

Applicant Michael Spence (hereinafter referred to as the “Applicant”) filed an application requesting variances from the side yard setback requirements of Section 143-33.A(2) of the Lower Providence Township Zoning Ordinance and the requirements of Section 143-188.A of the Lower Providence Township Zoning Ordinance regarding expansion of a nonconforming structure, in connection with previous construction of an addition to the already-existing single family residence and a storage shed. 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 Applicant is Michael Spence.
2. The Applicant is the owner of the subject property, which is located at 151 Tyson Mill Road, Lower Providence Township, Collegeville, PA (the “Property”). The parcel no. is 43-00-10990-00-1.

3. The Applicant was represented by Thomas J. Speers, Esquire, 651 W. Germantown Pike, Plymouth Meeting, PA 19462.
4. Mr. Dan Small, a neighbor who resides at 155 Tyson Mill Road, an adjacent property, appeared as Protestant through his attorney, William Morrow, Esquire, One Montgomery Plaza, Suite 902, Norristown, PA 19401.
5. The applicable zoning is R-1 Residential District.
6. The present use on the Property is a single family residence, which commenced pre-1960. The Applicant acquired the Property in 2004.
7. The lot size is 13,026 square feet.
8. The Property currently is served by private well and private on-lot septic.
9. The following exhibits were marked at the hearing:
 - B-1: Application
 - B-2: Advertisement
 - B-3: Proof of publication
 - A-1: Plan/boundary survey
 - A-2: Board of assessment record
10. Mr. Robert Beers, a licensed professional surveyor, testified at the hearing on behalf of the Applicant as an expert in surveying. He is with Barry Isett & Associates, Inc., West Norriton, PA 19403.
11. The Applicant constructed an addition to the rear of the single story residential dwelling and also constructed a storage shed on the Property.

12. The construction of the addition and the storage shed was completed without first obtaining required permits, resulting in notice of violation from the Township preceding this application.

13. As shown on Exhibit A-1, the size of the addition to the residential dwelling is 11 feet by 17 feet (or 187 square feet).

14. The addition is 4.9 feet from the line on the north side of the Property.

15. Approximately 2 to 3 feet to the rear of the addition is a shale rock embankment with a 60% to 70% grade. As a result the addition could not go back farther to the rear of the Property.

16. On the north side of the Property the corner of the residential dwelling (in existence prior to the addition) is 15.7 feet from the property line.

17. At the approximate low water mark of Perkiomen Creek the Property is 80.6 feet wide.

18. As shown on Exhibit A-1, the footprint of the storage shed is 10.5 feet by 14.2 feet, or 149.1 square feet. The shed also has a roof overhang. The shed is approximately 1.4 feet from the side property line.

19. Mr. Beers testified that there was a 60% to 65% grade from the shed to the back of the Property, and as a result the shed could not go back any farther to the rear.

20. The stone wall that extends back on the south side of the Property lines up with one wall of the shed.

21. Mr. Harry Garman, a licensed professional civil engineer and professional land surveyor with Barry Isett & Associates in Trexlertown, testified on behalf of the Applicant as an expert witness in civil engineering.

22. Mr. Garman testified that he was familiar with the Montgomery County flood insurance study dated 1976.

23. Mr. Garman stated that the flood insurance study used data at certain cross sections. He testified that the Property is located between cross sections which were upstream and downstream. He testified that the addition which was constructed (and the patio and the stone wall) would not have an impact on flood elevations at the two cross sections used in the flood insurance study.

24. Mr. Garman testified that the shed was outside of the floodplain because it was located at an elevation higher than the base flood elevation.

25. Mr. Garman stated that an area of the addition was below the base flood elevation and therefore was within the floodplain.

26. The addition is within the floodplain, according to testimony by the Applicant's civil engineering expert.

27. The Applicant's civil engineering expert stated that the addition would increase flood elevation across the floodplain in the approximate amount of less than ¼ inch. He stated that stairs on the northwest side would provide some mitigation to this increase.

28. The Applicant's civil engineering expert did not testify or establish that any expansion of flood heights resulting from the new construction of the addition to the residential dwelling would be fully offset by accompanying improvements.

29. The Applicant did not testify in support of the application.

30. The Applicant rested his case after presenting the testimony of Mr. Beers and Mr. Garman and Exhibits A-1 and A-2.

31. The Applicant did not establish or present any evidence regarding (a) why the addition could not have been located elsewhere on the Property farther from the side property line, (b) why the Applicant would be deprived of reasonable use of the Property without variances allowing the previously-constructed improvements which are the subject of his application, or (c) what hardship (if any) the Applicant would suffer absent the requested relief.

32. The Applicant is requesting variances from the side yard setback requirements of Section 143-33.A(2) of the Lower Providence Township Zoning Ordinance and the requirements of Section 143-188.A of the Lower Providence Township Zoning Ordinance.

33. The requested variances do not represent the minimum that will afford relief and do not represent the least modification possible of the regulation at issue, and the requested variances are not necessary to enable reasonable use of the Property.

DISCUSSION/CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.

2. Denial of the requested relief will not impose an unnecessary hardship upon the Applicant, and the requested variances are not necessary to enable reasonable use of the Property.

3. The variances requested by the Applicant do not represent the minimum that will afford relief and do not represent the least modification possible of the regulation at issue.

4. Any hardship has been created by the Applicant, who constructed the improvements which are the subject of his application without first seeking required permits or a variance.

The Applicant has requested variances from side yard setback requirements of Section 143-33.A(2) of the Lower Providence Township Zoning Ordinance and the requirements of Section 143-188.A of the Lower Providence Township Zoning Ordinance. The request for variances seeks relief of a dimensional nature. Section 143-33.A(2)(b), which is applicable in the R-1 Residential District, sets forth a side yard setback requirement of 50 feet for certain buildings. Section 143-188.A sets forth requirements regarding expansion or enlargement of existing structures located in any identified floodplain.

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

The Applicant did not demonstrate that it would be impossible or would create an unnecessary hardship to situate (or configure) the addition elsewhere on the Property farther away from the property line shared with the adjacent property. Even though the Applicant's surveyor testified that there is a steep slope to the rear of the Property, the Applicant failed to present any evidence establishing that the addition could not be situated or configured on another portion of the Property farther from the side property line in question.

In addition, the Applicant did not demonstrate why he would be deprived of reasonable use of the Property without a variance allowing the addition which he constructed on the Property. The Applicant acquired the Property, with an existing dwelling without the addition, in 2004. The Applicant also did not demonstrate why failing to allow the addition at its current location would create an unnecessary hardship. Any hardship relating to removal or relocation of the subject improvements Applicant constructed without first obtaining required permits or seeking a variance would be entirely self created. See, e.g., Robert S. Ryan, Pennsylvania Zoning Law and Practice, §6.2.11 (2002).

The Board finds and concludes that the Applicant has failed to sustain the required 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 3-1 vote is as follows:


The application for variances from Sections 143-33.A(2) and Section 143-188.A is denied.

Dated: May 6, 2011

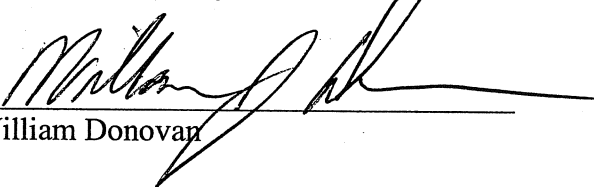
ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD

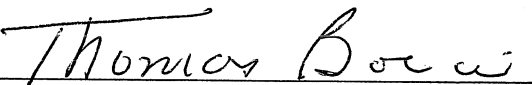

Eric Frey, Chairman

James E. Dougherty, Vice Chairman


William Donovan

dissenting

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.

MANDRACCHIA & McWHIRK, LLC

ATTORNEYS AT LAW

2024 Cressman Road, P. O. Box 1229

Skippack, PA 19474-1229

Tel 610.584.0700

Fax 610.584.0507

CHARLES D. MANDRACCHIA*

JEFFREY W. SODERBERG

KEITH M. MCWHIRK*

MICHAEL J. HAWLEY*

JOSEPH N. BUSILLO

direct email: jws@mmattorneys.com

*member of Pennsylvania and New Jersey Bar

May 6, 2011

Thomas J. Speers, Esquire
651 West Germantown Pike
Plymouth Meeting, PA 19462

**RE: Lower Providence Township Zoning Hearing Board – Michael Spence,
Application No. Z-10-20**

Dear Mr. Speers:

Enclosed is a copy of the Findings of Fact and Discussion/Conclusions of Law of the Lower Providence Township Zoning Hearing Board in the above matter.

Sincerely,

Jeffrey W. Soderberg

Enclosure

cc (w/encl.): William Morrow, Esquire

Mr. Eric Frey, Zoning Hearing Board Chairman

