

APPLICATION NOS.	Z-10-05.& Z-11-29	:	HEARING DATE:	January 27, 2011
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		:		
APPLICATION OF:		:		
Jon and Lori Costanza		:		
		:		
PROPERTY:		:		
80 Pechins Mill Road		:		
Lower Providence Township		:		
Collegeville, PA 19426		:		
Parcel No. 43-00-10903-00-7		:		

On November 8, 2011 Applicants Jon and Lori Costanza (hereinafter the "Applicants") filed a second application requesting filed a Variance and Special Exception Appeal s from the side yard setback requirements of Sections 143-37 and 143-19.C of the Lower Providence Township Zoning Ordinance, in connection with previous construction of a solar panel array (the "Array") on their property. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on January 27, 2012 at the Lower Providence Township Building. All members of the Board were present as well as the Solicitor, the Zoning/Code Enforcement Officer and the Court Reporter. At the hearing Mr. Costanza asserted that his intention when filing his appeal was not only for a variance appeal but also to appeal the Board's decision of from May 6, 2011 and the Notice of Violation dated October 6, 2011.

1. The Applicants are Jon and Lori Costanza.
2. The Applicants are the owners of the subject property, located at 80

Pechins Mill Road, Lower Providence Township, Collegeville, PA 19426 (the "Property"). The parcel no. is 43-00-10903-00-7.

3. Applicants were not represented by counsel at the hearing.
4. The property is located within an 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 is currently served by a private well and private on-lot septic.
8. The following exhibits were marked at the hearing:
 - B-1 Application filed at Z 11-29
 - B-2 Advertisement
 - B-3 Proof of publication
 - B-4 Email from the Applicant for a continuance dated December 13, 2011
 - A-1 As built drawing with 2 color aerial photos of the site
 - A-2 Letter dated November 4, 2011
 - T-1 Notice of Violation from Lower Providence Township dated October 6, 2011
 - T-2 Decision and Order at Z-10-05 dated May 6, 2011
 - T-3 Notes of Testimony from the hearing at Z-10-05 on March 24, 2011
 - T-4 Certification of Public Records signed by Randee J. Elton for Lower Providence Township

9. The applicants constructed the Array on the Property without first obtaining the required permits. [Exhibit A-3 of the Notes of Testimony at Z-10-05.]
10. 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. [Exhibit A-1]
11. Each panel of the Array measures twelve (12) feet by twelve (12) feet for a total structure size in excess of 500 square feet.
12. The Array is located on the portion of the Property adjacent to property owned by Local 380 of the International Brotherhood of Electrical Workers (“IBEW”).
13. The Array as constructed overhangs the property line shared with IBEW and intrudes on the required setback. [Exhibit A-1.]
14. Applicants had applied for, and were granted a hearing regarding variance from the setback requirements of Sections 143-37 and 143-19.C for the Array on March 24, 2011. [Exhibit T-3.]
15. The Board filed a decision on May 6, 2011 denying Applicant’s request for a variance. [Exhibit T-2.]
16. The decision of the Board was mailed to Applicant’s attorney on May 6, 2011.
17. The Board found that the variance was not necessary to avoid undue hardship nor was it necessary to enable reasonable use of the property. [Exhibit T-2.]
18. The Board further found that numerous trees were removed in connection with the installation of the Array. [Exhibit T-2.]
19. The Array could be feasibly located elsewhere on the property, a) without encroaching upon; and b) farther away from, the property line. [Exhibit T-2.]

20. On November 8, 2011, Applicants filed the application currently at issue requesting the same relief as that sought and denied in the May 6, 2011 Board opinion. [Exhibit B-1.]

21. Although Applicants failed to correctly complete its application by selecting the option of an Enforcement Notice Appeal Applicants were afforded the opportunity to also appeal the Notice of Violation dated October 6, 2011.

22. Applicants believed that their Application at Z-11-29 also served as an appeal of the Decision and Order dated May 6, 2011 at Z-10-05.

23. Applicant admitted that the Array has remained unchanged since the original request for a variance in March of 2011.

24. A hearing before the Board was held on January 27, 2012.

DISCUSSION and CONCLUSIONS OF LAW

A. Appeal of Notice of Violation dated October 6, 2011.

1. The Applicants have standing to appear before the Board regarding the requested relief from the Notice of Violation.

2. Notice dated October 6, 2011 was sent to Applicants directing them to cease and desist from violations of Zoning Ordinance Sections 143-19.C and 143-157.

3. The Notice provides Applicants the right to appeal the enforcement notice within thirty (30) days of receipt.

4. Applicants purportedly mailed an application for the variance at issue on November 4, 2011.

5. No changes were made to the property or to the Array to abate the zoning ordinance violations at issue in the Notice of Violation.

The doctrine of res judicata is applicable in zoning cases. Harrington v. Zoning

Hearing Bd. of East Vincent Twp., 117 Pa.Comm.w. 197, 543 A.2d 226, 228 (1988) (citing Schubach v. Silver 461 Pa. 366, 336 A.2d 328 (1975)). However, if an applicant requests the same relief based on a different theory, res judicata is not applicable. Id. In the case where the applications are nearly identical will the relief requested by barred by res judicata. See Id.

The application at hand is practically identical to that which was denied by the Board in its May 6, 2011 opinion. The same Array is at issue. The dimensions of the Array remain the same, as does its location. Further, Applicants have provided no potential justification for the continued violation of Zoning Ordinance Sections 143-19.C and 143-157 not previously asserted in their initial application which was denied by this Board. Due to the identical nature of the assertions made, and based on the previous decision of this Board, the doctrine of res judicata will apply to bar Applicant's purported appeal of the enforcement notice of October 6, 2011.

Accordingly, the Board finds that the Appeal of the Notice of Violation dated October 6, 2011 is denied.

B. Application for Variance.

1. The Applicants have standing to appear before the Board regarding the requested variance and special exception appeal.
2. Denial of relief requested will not impose unnecessary hardship on the Applicants.
3. The variance is not necessary to enable a reasonable use of the property, 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 was created by the Applicants by failing to secure the required permits and variance prior to the construction of the Array.

5. A grant of the requested variance would impair the appropriate use and/or development of the adjacent property.

Applicants have requested a variance from the setback requirements of Section 143-37 and 143-19.C of the Lower Providence Zoning Ordinance.

As the Board previously found, 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 quantum of proof required to establish unnecessary hardship in the case of a dimensional variance is, however, lesser than when a use variance is sought. Id. at 258-59.

Regardless of the type of variance sought, 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). Pursuant to the Municipalities Planning Code the following must be found in order for the Board to grant the requested variance:

- (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. 53 P.S. § 10910.2.

There has been no change in the evidence set forth by Applicants in support of their request for a variance. The Applicants have failed to demonstrate that the relief requested is the minimum variance that will afford relief, and the least modification possible of the regulation at issue. Applicants merely assert that the removal trees will be necessary for the Array to meet the proper setback requirements. As the Board found, numerous trees were removed during the initial installation of the Array and therefore further removal of trees is also appropriate to meet the setback requirements.

Additionally, any hardship placed on Applicants is solely due to their failure to secure

the permits required for the Array prior to its installation.

Accordingly, the Board finds that the application for a variance from Zoning Ordinance Sections 143-19.C and 143-157 is denied.

C. The Appeal from the Decision of the Board dated May 6, 2011.

1. The Applicants do not have standing to appear before the Board regarding the Decision of the Board dated May 6, 2011.

2. The decision of May 6, 2011 contained a notice pursuant to 53 P.S. § 11002-A that the applicants had thirty (30) days from the date of the decision to file an appeal in the Court of Common Pleas of Montgomery County.

3. No such appeal was filed pursuant to 53 P.S. § 11002-A.

4. Applicants, instead, re-applied for a variance with the Board on November 8, 2011 at Z-11-29 asserting in its cover letter of November 4, 2011 that they were appealing "...the decision of the Zoning Hearing Board that concluded that the installation of a Solar Energy System consisting of 4 solar panels arrays, or a solar fence, is not within the definitions of applicable zoning regulations."

Applicants' failed to institute a timely appeal of the decision of the Board dated May 6, 2011. Further, the Applicants failed to institute an appeal in the proper forum. Applicants had the right to appeal the decision of the Board to the Montgomery County Court of Common Pleas from May 6, 2011 to June 6, 2011. No appeal was filed notwithstanding the fact that Applicants were notified of a right to appeal in the decision of the Board. Applicants' subsequent re-application to the Board on November 8, 2011 is therefore neither timely nor instituted in the proper forum.

The purported appeal from the decision and order of the Board dated May 6, 2011

at Application No. Z-10-05 is therefore denied.

DECISION

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

1. The purported enforcement notice appeal from the Notice of Violation dated October 6, 2011 at Application No. Z-11-29 is denied.
2. The application for a variance and special exception appeal from the applicable setback requirements of Section 143-19.C and 143-37 of the Zoning Ordinance at Application No. Z-11-29 is denied.
3. The purported appeal from the decision and order of The Lower Providence Zoning Hearing Board dated May 6, 2011 at Application No. Z-10-05 is denied.

Dated: March 8, 2012

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.

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

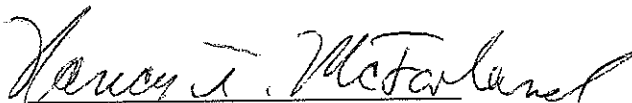
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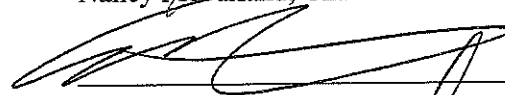
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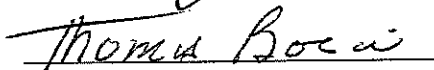
DECISION

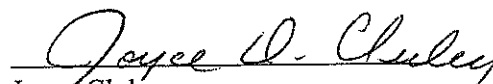
The purported enforcement notice appeal from the Notice of Violation dated October 6, 2011 at Application No. Z-11-29 is denied.


Nancy McFarland, Chair


Eric Frey


William Donovan


Thomas Borai

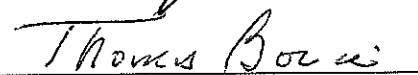

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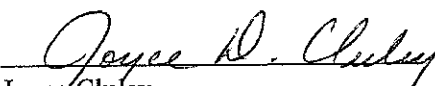
The application for a variance from the applicable setback requirements of Section 143-19c & 143-37 of the Zoning Ordinance at Application No. Z-11-29 is denied.


Nancy McFarland, Chair

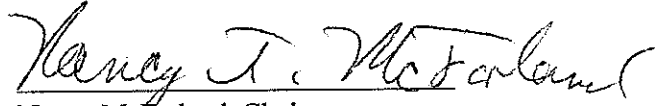

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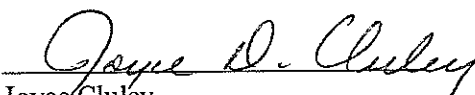
The purported appeal from the decision and order of The Lower Providence Zoning Hearing Board dated May 6, 2011 at Application No. Z-10-05 is denied.


Nancy McFarland, Chair


Eric Frey


William Donovan


Thomas Borai


Joyce Cluley