

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO.	Z-12-08	:	HEARING DATE:	October 25, 2012
		:		
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 the “Applicants”) filed a third application requesting a variance from the side yard setback requirements of Sections 143-37(A)(2), 143-19(B)(2), and 142-120 of the Lower Providence Township Zoning Ordinance, in connection with the prior construction of a solar panel array (the “Array”) on their property. Applicants have also requested, in the alternative, a variance to permit a structure in the Steep Slope Conservation District. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on October 25, 2012 at the Lower Providence Township Building. All members of the Board were present except for William Donovan, who was excused. Kathie Eskie, alternate, served in his absence. Also present were the Solicitor, Randee J. Elton, the Director of Community Development responsible for Zoning/Code Enforcement 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, located at 80 Pechins Mill

Road, Lower Providence Township, Collegeville, PA 19426 (the "Property"). The parcel number is 43-00-10903-00-7.

3. Applicants were represented by Keely A. Carr, Esq. 326 W. State Street, Media, PA 19063.

4. Local 380 of the International Brotherhood of Electrical Workers ("IBEW") appeared as a protestant and it was represented by Bridget Walsh, Esquire 510 Walnut Street, 16<sup>th</sup> Floor, Philadelphia, PA 19106.

5. Testimony was provided by Mr. Costanza, Adam Supplee, land planner on the Applicants' behalf.

6. David Schaaf, Business Manager for the IBEW testified in opposition to the application.

7. The property is located within the R-2 Residential District.

8. The present use of the Property is as a single family residence with an associated home office and farmette.

9. The Applicants acquired the Property in 1983.

10. The lot size is 9.6 acres.

11. The Property was previously served by a private well but is now served by public water.

12. The following exhibits were marked at the hearing:

- B-1 Application filed at Z 12-08.
- B-2 Advertisement.
- B-3 Proof of publication.
- B-4 Letter from the Applicants' Counsel requesting a continuance dated August 20, 2012.

- A-1 Set of four (4) land plans depicting the floodplain, tree canopy, and Steep Slope Conservation District.
- A-2 Set of ten (10) photographs depicting the parcel.
- A-3 A set of four (4) pages showing a cross section of the steep slope in front of each array.
- A-4 Photograph of a tool known as a solar pathfinder.
- A-5 Pictures of the pathfinder tool at three (3) different locations.
- A-6 Enlarged picture of pathfinder results at array 4.
- A-7 Report entitled “Solar Audit Result & Estimated PV Generation.”
- A-8 Diagram of foundation construction for a typical solar array.
- A-9 Letter from Thomas Heisner dated February 8, 2010 denying application for solar fence.

13. The Array is a solar energy system consisting of four groups of solar panels with support poles in concrete foundations.

14. Each panel of the Array measures twelve (12) feet by twelve (12) feet for a total structure size in excess of 500 square feet.

15. The Array is located primarily on Applicants’ Property but also partially on the property owned by the IBEW.

16. The Array, as constructed, overhangs the property line shared with IBEW disregarding the setback requirements.

17. The Array is connected to the Applicants’ residence by conduit two hundred and fifty (250) feet in length installed underground through the steep slope area of Applicants’ property.

18. The Applicants constructed the Array on the Property without first obtaining the

required permits and failed to insure that all elements of the Array remained on their Property.

19. Numerous trees were removed when the Array was installed.

20. Additional trees would have to be removed if the Applicants are required to comply with the setback requirements.

21. The Array protruding into the IBEW's property could negatively impact the value or sale of the IBEW's property.

22. The Array protruding into the IBEW's property could limit the use of that property should it be sold or developed.

23. The Applicants sought a similar variance from the setback requirements of Sections 143-37 and 143-19(C) for the Array at a hearing on March 24, 2011.

24. The Board denied the application at the hearing on March 24, 2011 and filed its opinion on May 6, 2011.

25. The Board found that the variance was not necessary to avoid undue hardship nor was it necessary to enable reasonable use of the property.

26. On November 8, 2011, Applicants filed a second application requesting the same relief as that sought and denied in the May 6, 2011 Board opinion.

27. Although Applicants failed to correctly complete their 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.

28. Again the request for a variance was denied in a decision dated January 27, 2012 as there was still no undue hardship nor a denial of Applicants' reasonable use of the property.

29. Applicants were also informed that their appeal of the enforcement notice was denied as untimely and their application for a variance on the same grounds as their original

application was precluded by res judicata.

30. The Board determined at that time the Array could be feasibly located elsewhere on the property: a) without encroaching upon; and b) farther away from, the property line.

31. Applicants now file the instant application to again request a variance from the setback requirements of the Lower Providence Township Zoning Ordinances 143-37(A)(2), 143-19(B)(2), and 142-120 asserting similar reasons as previously asserted as well as that the steep slopes, flood plain, dense tree canopy and reduced solar efficiency create an undue hardship and that the use of solar energy should be encouraged.

32. Applicants propose to move the panel from the array that encroaches on the IBEW's property so that it will be ten (10) feet from the property line, where a setback of twenty five (25) feet is required.

33. The Array could be feasibly located elsewhere on the Property without encroaching upon the IBEW's property or negatively impacting the Steep Slope Conservation District and the property can be reasonably used without the requested variance.

### **DISCUSSION**

As the Board found in the previous two decisions, 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.

### **A. Hardship Standard**

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.

In this third application, the Applicants have again failed to meet their burden to require the grant of a variance. While Applicants have extensively educated the board as to the internal workings of the solar arrays, and their placement requirements, they again failed to demonstrate

that the hardship claimed was not self-imposed, or that the denial of a variance would preclude the reasonable use of the property.

### **B. Steep Slopes**

Applicants assert that the Array cannot be moved to a distance that would comply with ordinance as that violates a *recommendation* not to build in the 15-25% slope area. Allowing the Array to occupy the proposed location, however, violates the *requirement* of the ordinance that the array be setback twenty five feet (25') from the property line. The zoning ordinance takes precedence over the recommendations regarding the Steep Slope Conservation District. Further, the Applicants chose to install the Array without a permit or variance and now attempt to justify their unlawful actions by claiming that they wish to honor the recommendations regarding steep slopes (recommendations that Applicant already ignored when it installed 250' of electrical conduit across steep slopes to connect the Array to their residence without a permit or variance). This disingenuous argument must also fail.

Further, the applicants have failed to assert the necessary hardship required for a variance from the requirements of the steep slope conservation district. § 143-235 *et seq.* As clarified at the hearing on the instant matter, the location of the array, as required by the setback ordinance, will place it within the 15%-25% slope region. This area is not covered by the Steep Slope Conservation district which includes only those areas with slopes of 25% or greater. § 143-236. Therefore, the variance is not required as development will not be within the Steep Slope Conservation district.

### **C. Encroachment**

Applicants also claim that the IBEW, its neighbor to the east, presented “no specific

instance” why the dimensional variance should be denied. It is the Applicants who have the burden to show why a variance should be granted, not the neighbor’s responsibility to combat it. This burden was made clear in both prior decisions of the Board, yet Applicants have continually failed to appreciate this simple requirement. Counsel for IBEW also stressed that the placement of the panels has caused continuing concern for the IBEW. Mr. Schaaf, Business Manager for the IBEW testified that if the variance was granted the use of the IBEW could be significantly impaired. He elaborated that by Mr. Costanza’s own admission at the hearing that once legally established, solar access rights would then inure to Mr. Costanza, making it difficult if not impossible to erect a building or otherwise use the IBEW property such that it would shade or block the Array. If IBEW wants to build a building or plant trees, provided those acts conform to relevant zoning requirements it should be able to do so without the fear of conflict with its neighbor craving additional sunlight. As a landowner in the Township, the IBEW may rely upon the Township’s zoning code to protect it from conflicts with other landowners regarding land use; that is the intent and purpose of the zoning code. The rights of property owners, long recognized by law, are superior to Applicant’s right to capture a maximum amount of sunlight on a sliver of their property they have determined was ideal for such use.

#### **D. Reasonable Use of Property**

Applicants claim that in order to be able to reasonably use the Property a variance is required. Applicants base their reasonable use argument primarily on 2 reasons: 1) The present location of the Array is the only location where the optimal amount of sunlight can be captured; and 2) there are no other uses for the Property.

As stated by Applicants’ counsel natural features preclude the placement of the array on



96% of the land denying the Applicants reasonable use of the Property. On a parcel the size of the Applicants' however, that leaves slightly under half an acre of land that would, according to their own assessment, be appropriate for the solar array. This Argument makes it evident that Applicants have failed to grasp that a variance will not be granted merely because a use is the best, or most convenient, there must be actual, demonstrable hardship.

Finally, the Applicants assert that without the variance they will be denied reasonable use of the Property. Reasonable use does not mean all uses. There already exist multiple reasonable uses of the Property and the denial of the instant application will in no way prevent these varying uses. The Property is used as a residence, a home office, a farmette and even a training center for students interested in solar energy. Requiring compliance with the ordinance will in no way restrict the ability of Applicants to continue these uses. In other words, it is not a hardship to require the placement of the solar array in a location with less than optimal sunlight. The denial of this variance will not leave Applicants in the dark. It merely restricts the applicants from doing as they please without regard for its neighbors or the zoning ordinances enacted to protect the property rights of Lower Providence Township residents.

Therefore, the Applicants' third request for a variance from the setback requirements of 143-37(A)(2), 143-19(B)(2), and 142-120 is denied. There is no hardship, multiple reasonable uses still exist for the Property, and the denial is necessary to preserve the land rights of neighboring landowners.

### **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 on the

Applicants.

3. Any hardship is entirely self-imposed having been created by the Applicants who installed the Array without first obtaining the required permits or variance.
4. The physical circumstances of the Property are not sufficiently unique to require a variance.
5. The requested variance is not necessary to enable reasonable use of the Property.
6. The instant application is the Applicants' third application before the Board.
7. To the extent that the same issues are raised by the instant application that were raised in previous applications, those issues are barred by the doctrine of res judicata.

### **DECISION**

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

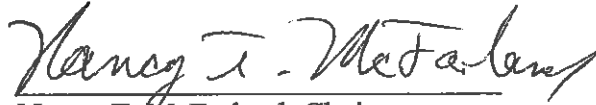
The application for a variance from Sections 143-37(A)(2), 143-19(B)(2), and 142-120 of the Lower Providence Township Zoning Ordinance is denied. The variance from the requirements of the Steep Slope Conservation District is also denied.

Dated: November 27, 2012

**ORDER**

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

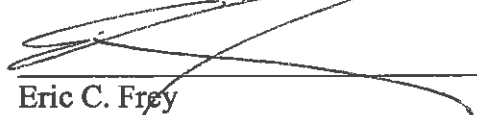
**LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD**



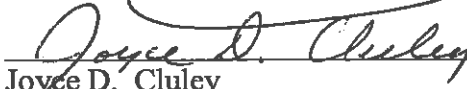
Nancy T. McFarland, Chair



Thomas A. Borai, Vice Chairman

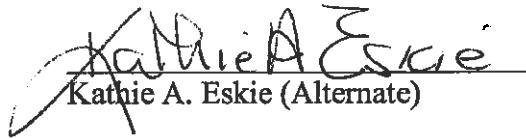


Eric C. Frey



Joyce D. Cluley

William J. Donovan



Kathie A. Eskie (Alternate)

Robert G. Hardt (Alternate)

**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.