

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-14-22	:	HEARING DATE:	December 22, 2014
		:		
		:		
APPLICATION OF:		:		
Shaya Trooper, L.P. d/b/a		:		
Dunkin Donuts		:		
		:		
PROPERTY:		:		
2600 W. Ridge Pike		:		
Lower Providence Township		:		
Trooper, PA 19403		:		
Parcel No. 43-00-11476-001		:		

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

On November 26, 2014 applicant, Shaya Trooper, L.P. d/b/a Dunkin Donuts (hereinafter “Applicant”) filed an application requesting variances from Section 143-262 (E) of the Lower Providence Township Zoning Code (“Zoning Code”) regarding impervious coverage limitations. Applicant seeks to develop a Dunkin Donuts restaurant at 2600 West Ridge Pike in the Ridge Pike Business District. Currently the impervious coverage of ninety-five percent (95%) exceeds the fifty percent (50%) permitted by the Zoning Code however, Applicant plans to reduce the impervious coverage to approximately seventy three and one half percent (73.5%). Applicant asserts that it will:

1. Significantly reduce the current non-conformity; and
2. Beautify what now is a blighted corner that serves as a gateway to the Township from the east; and
3. Be in the public interest; and
4. Suffer an unnecessary hardship if a variance is denied.

The application was properly advertised. A public hearing was held before the Lower

Providence Township Zoning Hearing Board (the “Board”) on December 22, 2014 at the Lower Providence Township Building. All members of the Board were present. Also present at the meeting were, Carl N. Weiner, Esquire for the applicant, Michael Mrozinski, Director of Community Development, Keith B. McLennan, Esquire, the Solicitor, and the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Shaya Trooper, L.P. d/b/a Dunkin Donuts.
2. The property subject to the application is a corner lot at the eastern edge of the Lower Providence Township located at 2600 W. Ridge Pike, , Trooper, PA 19403 (hereinafter the “Property”).
3. Applicant has an equitable interest in the Property as the “ Buyer” under an agreement of sale with the owner, Lukoil North America, LLC dated July 28, 2014 (“Agreement of Sale”).
4. The parcel number for the Property is 43-00-11476-001.
5. The Property is located in the Ridge Pike Business District.
6. The lot measures approximately 34,935 square feet.
7. The Property is a former Lukoil Gas Station and is vacant.
8. The Applicant was represented by Carl N. Weiner, Esq. of Lansdale.
9. The following exhibits were marked at the hearing:

B-1 Appeal Application

B-2 Advertisement

B-3 Proof of Publication

A-1 Resume of Rolph Graff, Project Engineer

A-2 Agreement of Sale

A-3 Concept Plan Drawing by Graf Engineering, LLC dated September 17, 2014.

10. Applicant requests a variance from § 143-262 (E) for maximum impervious coverage from ninety-five percent (95%) to seventy three and one half percent (73.5%) where the standard is fifty percent (50%) with a possible twenty percent (20%) increase subject to satisfying several conditions.
11. There was adverse public comment regarding the application.
12. There are certain existing non-conformities that impact the property.
13. Applicant has demonstrated an unnecessary hardship requiring the grant of a variance.

DISCUSSION

The instant Application for a variance from Section 143-262 (E) of the Lower Providence Township Zoning Ordinance suggests that since the Applicant plans to reduce the existing non-conforming impervious coverage from ninety-five percent (95%) to seventy three and one half percent (73.5%) a variance should issue. As articulated hereafter, the reduction of the non-conforming impervious coverage, although a factor, is not dispositive to whether a variance is appropriate.

A. Legal Standard for a Variance

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. Nevertheless it remains the Applicant's burden to prove. 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) 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) 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) Such unnecessary hardship has not been created by the applicant.

(4) 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) 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.

B. Impervious Coverage – Section 143-262

The goal of the Ridge Pike Business District (“RPBD”) is to provide regulations to improve the overall appearance and safety of Ridge Pike as well as allow for continuing commercial use opportunities. Specifically, it is the intent of the Zoning Hearing Board to

minimize the potential for increased traffic congestion by providing incentives that require shared access points, cross-access easements, shared parking areas, and quality public spaces.

Section 143-262 of the Zoning Code was specifically designed to assist in the above goal. It specifies the impervious coverage requirements in the RPBD as follows:

The following dimensional requirements apply to all properties within the RPBD:

E. Maximum impervious coverage: Fifty percent, except that impervious coverage may be increased to a maximum of 70% through the cooperative actions by the property owner or land development applicant to comply with the sections as listed and described below. In order to take advantage of the additional bonus provision 20% as well as to further meet the intent of the Ridge Pike Business District, an applicant must provide the Township with three of the five following bonus provision options, listed below:

- (1) Pedestrian and vehicular connections with adjacent properties to facilitate circulation.
- (2) Consolidation of two or more parcels, under separate ownership, prior to development, with the purpose of providing a more unified development.
- (3) A minimum of one three-inch caliper Township-qualified street tree as required in the Lower Providence Township Subdivision and Land Development Ordinance, having a minimum of six feet high planted on the backside of the public sidewalk for every 25 feet of the property lot frontage width.
- (4) Renovation of existing building façades along Ridge Pike to conform to SLDO Section 123–142, Design Standards for all uses within the RPBD.
- (5) Where existing use is to remain, bring façade wall and sidewalk into conformity with SLDO section 123–142, Design standard for all uses.

In the present case, Applicant signed an Agreement of Sale to purchase the Property pursuant that grants Applicant the right to advance the instant variance application. Applicant intends to construct a Dunkin Donuts franchised restaurant on the Property. Its prior use as a pumping, filling or gas station propagated into a parcel fully covered by a building, concrete and macadam passageways and parking areas. It is undisputed that the Property fails to comply with the Zoning Ordinance. No record was introduced to establish whether the non-conformity of ninety-five percent (95%) impervious coverage existed prior to the introduction of the

Zoning Code or whether a variance for same was previously granted. Further, there was no assertion that the non-conforming use should be extended. Rather, the Applicant asserts that it has attempted to design the Dunkin Donuts so as to comply with the Zoning Ordinance. However, due to the uniqueness of the Property it cannot reduce the impervious coverage to less than seventy three and one half percent (73.5%).

To determine whether Applicant can comply with the Zoning Ordinance, or, if not, a variance is warranted, we must first determine whether it can demonstrate that it is entitled to the additional twenty percent (20%) “bonus” impervious coverage available under Section 143-262(E).

Although the code standard maximum impervious coverage is 50%, an additional 20% allowance is available provided the Applicant can satisfy three of the above bonus provisions. Applicant has done so by providing:

- Pedestrian and vehicular connections with adjacent properties to facilitate circulation.
- A minimum of one three-inch caliper Township-qualified street tree as required in the Lower Providence Township Subdivision and Land Development Ordinance, having a minimum of six feet high planted on the back side of the public sidewalk for every 25 feet of the property lot frontage width.
- Renovation of existing building facades along Ridge Pike to conform to SLDO § 123-142, Design Standards for all uses within the RPBD.

As a consequence, the Applicant’s design has reduced the non-conformity from ninety-five percent (95%) to seventy three and one half percent (73.5%), three and one half percent more than what is permitted by the Zoning Ordinance. Applicant’s efforts to reduce the non-

conformity, although commendable, do not negate the need for the variance.

Consequently, Applicant proffered Rolph A. Graf, P.E., its expert, who testified that no matter what efforts were expended to design the development so that it would comply with the Zoning Ordinance, the uniqueness of the Property made it impossible to do so. He provided various examples of the unique nature of the Property as follows:

- 1) Irregularity and physical conditions of the Property;
- 2) The multiple curb cuts;
- 3) Numerous and irregular access points;
- 4) Underground storm water retention;
- 5) Required thirty foot (30') entrances;
- 6) Connection to the adjoining property; and
- 7) The location of the Property at the entrance to the Township.

In reviewing all of the evidence, the goal of the RPBD, the three and one half percent (3.5%) de minimis differential, the resulting beautification of what otherwise is a blighted corner, as well as the exceptional efforts expended by the Applicant to conform to the Zoning Ordinance, the Zoning Hearing Board believes a variance, permitting reduction of the impervious coverage from 95% to 73.5% is warranted.

There are unique circumstances that require a variance from the prescribed impervious coverage requirements, including a thirty foot entrance required by ordinance which has pushed the impervious coverage over the 70% requirement. The hardship has not been created by the Applicant, but rather by need to comply with multiple ordinances. The Applicant has also proposed a reduction of curb-cuts which will improve traffic issues, landscaping the property, and introducing storm water controls. The Applicant demonstrated that the proposal would

constitute and overall improvement to the Property despite the physical constraints of its size and the fact that the Property is located on a corner lot. There would be no adverse impact on surrounding properties with this proposal, the essential character of the neighborhood will not be changed, and surrounding property values will not be impaired. Finally, the opposition presented was tepid at best and misplaced. An adjoining landowner asserted that he was in favor of the project but concerned about traffic. Another resident was concerned about storm water management. Inasmuch as each of these concerns are to be addressed in the land development phase of the project, they were not germane to the zoning case.

Said grant of a variance is subject to the condition that the applicant fulfills the requirements of Section 143-262 (E), sub paragraphs 1, 3 and 4. These requirements include pedestrian and vehicular connections with adjacent properties to facilitate circulation, a minimum of one three-inch caliper Township-qualified street tree as required in the Lower Providence Township Subdivision and Land Development Ordinance, having a minimum of six feet high planted on the back side of the public sidewalk for every 25 feet of the property lot frontage width, and renovation of existing building facades along Ridge Pike to conform to SLDO § 123-142, Design Standards for all uses within the RPBD.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an unnecessary hardship on the Applicant.
3. The hardship is not self-imposed, and is due to unique physical

circumstances of the Property.

4. The requested relief is necessary to enable the Applicant's reasonable use of the Property and represents the minimum deviation from the ordinance that will afford relief.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board is as follows:


By unanimous vote, the variance from Section 143-262 (E) of the Lower Providence Township Zoning Ordinance to allow a reduction in impervious coverage from 95% to 73.5% is GRANTED with the condition that the Applicant fulfils the requirements of Section 143-262 (E) sub paragraphs 1, 3, and 4, which include pedestrian and vehicular connections with adjacent properties to facilitate circulation, a minimum of one three-inch caliper Township-qualified street tree as required in the Lower Providence Township Subdivision and Land Development Ordinance, having a minimum of six feet high planted on the back side of the public sidewalk for every 25 feet of the property lot frontage width, and renovation of existing building facades along Ridge Pike to conform to SLDO § 123-142, Design Standards for all uses within the RPBD.

Dated: January 26, 2015

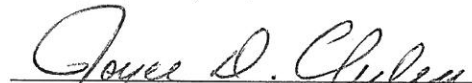
ORDER

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

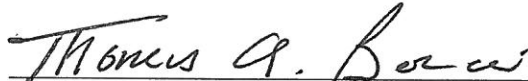
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



Nancy McFarland, Chairwoman



Joyce D. Cluley, Vice Chairwoman



Thomas A. Borai



Robert G. Hardt



Kathie A. Eskie

Gail Hager, Alternate

NOTICE 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.