

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO. Z-15-06	:	HEARING DATE: November 23, 2015
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	:	
APPLICATION OF:	:	
Theodore J. Anderko	:	
	:	
PROPERTY:	:	
37 Crawford Road	:	
Audubon, PA 19403	:	
Parcel No. 43-00-02713-00-7	:	

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

On August 6, 2015 the applicant, Theodore J. Anderko (hereinafter the “Applicant”), filed a Special Exception and Variance application regarding his intended development of a parcel of land located at 37 Crawford Road, Audubon, PA 19403 parcel number 43-00-02713-00-7 (hereinafter the “Property”). Applicant is seeking to create eleven (11) single-family residential lots for the construction of single-family detached homes in the R-2 zoning district with Steep Slope Conservation District overlay. The Applicant has requested that the Lower Providence Township Zoning Hearing Board (the “Board”) grant him a Special Exception under §143-239 of the Lower Providence Township Zoning Ordinance (“Ordinance”) to permit the intended use in the Steep Slope Conservation District. The Applicant has also requested a variance from §143-240 of the Ordinance, particularly subsections A., B. and C., to permit development within the boundaries of the Steep Slope Conservation District. The Application was properly advertised, and, after Applicant’s continuance request from the September 24, 2015 meeting was granted a public hearing was held before the Board on November 23, 2015 at the Lower Providence Township Building. All members of the Zoning Hearing Board were present. Also present were Keith McLennan, the Solicitor, Michael Mrozinski, the Director of

Community Development responsible for Zoning/Code enforcement and Paula Meszaros, the Court Reporter.

### **FINDINGS OF FACT**

1. The Applicant is Theodore J. Anderko who resides at 903 South Park Avenue, Audubon, Pennsylvania 19403.
2. The Applicant is the equitable owner of the subject Property located at 37 Crawford Road, Audubon, PA 19403.
3. The Applicant was represented by Loren Szczesny, Esquire of Fox Rothschild LLP, 10 Sentry Parkway, Suite 200, Blue Bell, PA 19422.
4. Testimony for the Applicant was provided by the Applicant and Kevin Fruck, Project Engineer from Cornerstone Consulting.
5. Four (4) township residents appeared at the hearing with at least one expressing opposition to the Applicant's requests.
6. The Property is located within the R-2 Residential District and contains "steep slopes" as defined in §143-236 of the Ordinance and thus is subject to the Steep Slope Conservation District overlay.
7. The present use of the Property is residential.
8. The Property is approximately 11 acres.
9. The Property is or will be served by public water (or private well) and public sewer.
10. Applicant submitted his application and plans to the Office of the Montgomery County Conservation District for review on October 20, 2015 in compliance with § 143-242 A. (2) of the Ordinance.

11. The Application and plans were submitted to the Lower Providence Township Planning Commission for its review and recommendations in compliance with § 143-242 A. (3) of the Ordinance.

12. The following exhibits were made of record:

- A-1 Undated Agreement of Sale for the Subject Property between Joseph and LuRay Nicolo as sellers and Theodore J. Anderko as the buyer.
- A-2 Property Plan dated July 29, 2015 identifying the existent steep slopes Prepared by Kevin H. Fruck, P.E. Cornerstone Engineering.
- A-3 Resume of Kevin Fruck., Professional Engineer.
- A-4 Letter from Kevin Fruck, P.E. to the Montgomery County Conservation District dated October 20, 2015.
- B-1 The Application filed on August 2, 2015.
- B-2 The Application's advertisement.
- B-3 Proof of Publication of the Advertisement of the Application.

13. The application seeks development of the property while substantially preserving the natural features of the property, including the steep slopes and wooded areas.

14. Each proposed lot and building will conform to lot size and setback requirements of the Zoning Ordinance.

### **DISCUSSION**

#### **I. Procedural and Factual Background**

The Applicant has requested a Special Exception pursuant to § 143-239 of the Lower Providence Township Zoning Ordinance, to permit the creation and development of eleven (11)

building lots in the Steep Slope Conservation District. The Steep Slope Conservation District was created by Article XXIX § 143-235 of the Lower Providence Code to (among other things):

“... conserve and protect those areas having steep slopes, as defined herein, from inappropriate development and excessive grading, as well as to permit and encourage the use of the said areas for open space purposes so as to constitute a harmonious aspect of the continuing physical development of Lower Providence Township.”

§143-236 of the Ordinance defines the Steep Slope Conservation District as those areas having slopes of 25% or greater. The Applicant has acknowledged in his Exhibit A-2 that the Property contains steep slopes as defined by the Ordinance.

Ordinance §143-238 sets out 9 uses permitted in the Steep Slope Conservation District, none of which include Applicant’s intended use. Fortunately for the Applicant, §143-239 of the Ordinance provides him the opportunity to install site improvements to the Property to support the development of building lots by special exception upon the submission of an erosion and sediment control plan and all other supporting plans and documentation required by §143-241.

However, Applicant is not yet “out of the woods.” In order to develop the Property into 11 lots for single-family dwellings Applicant must contend with the prohibitions of §143-240 of the Ordinance. §143-240 prohibits the following uses in the Steep Slope Conservation District:

- A. Freestanding structures, buildings and retaining walls.
- B. Roads, access driveways and parking facilities.
- C. Clearing or excavation of the land.

In order to accomplish his goal, in addition to the special exception required under §143-239 the Applicant needs a variance from §143-240.

## II. The Special Exception

A special exception is a conditionally permitted use, which the municipal legislative body has determined to be appropriate in the zoning district if specific standards set forth in the zoning ordinance are met. Mehring v. Zoning Hearing Bd. of Manchester Twp., 762 A.2d 1137, 1139 (Pa. Commw. 2000); In re Brickstone Realty Corp., 789 A.2d 333, 340 (Pa. Commw. 2001)(citing Bray v. Zoning Bd. of Adjustment, 410 A.2d 909, 911 (Pa. Commw. 1980)). A special exception is thus not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a detrimental effect on the community. Greaton Properties, Inc. v. Lower Merion Twp., 796 A.2d 1038, 1045 (Pa. Commw. 2002); Freedom Healthcare Services, Inc. v. Zoning Hearing Bd. of City of New Castle, 983 A.2d 1286, 1291 (Pa. Commw. 2009); Morrell v. Zoning Hearing Bd. of Borough of Shrewsbury, 17 A.3d 972, 975 (Pa. Commw. 2011).

### III. Establishing a Right to a Special Exception

To establish entitlement to a special exception, the applicant must initially prove that the proposed use complies with the specific, objective criteria set forth in the zoning ordinance. Mehring v. Zoning Hearing Bd. of Manchester Twp., 762 A.2d 1137, 1139 (Pa. Commw. 2000). Under Ordinance §§143-241 and 242, an applicant for a special exception in the Steep Slope Conservation District must submit an application along with the required studies to educate the Board why a special exception is appropriate. That application packet must not only be provided to the Board, but it must also be delivered to the Montgomery County Conservation District and to the Township's Planning Commission for review at least 30 days prior to the Board's hearing. These requirements were met.

The Board then under §143-168 B. of the Ordinance must evaluate the Application under §143-242 B which states:

**§ 143-242 Procedures and standards for special exception uses and variances.**

B. Standards for approval of uses by special exception. In considering a use as a special exception, the Zoning Hearing Board shall consider the following:

- (1) That the use is one which is permitted by special exception in §143-239 herein.
- (2) The relationship of the proposed use to the specific objectives set forth in §143-235 of this article.
- (3) The design standards set forth in the Subdivision and Land Development Ordinance of Lower Providence Township.
- (4) The erosion and sediment control plan submitted with the application, drawn in accordance with the requirements of the Subdivision and Land Development Ordinance of Lower Providence Township.
- (5) Abutting property shall not be adversely affected by runoff or erosion from the proposed use.
- (6) The general welfare, safety and public interest of Lower Providence Township or adjacent municipalities shall not be adversely affected.
- (7) Any use permitted by special exception shall provide evidence that:
  - (a) Proposed buildings or structures are of sound engineering design and that footings are designed to extend to stable soil and/or bedrock as required by the Township Building Code.
  - (b) Proposed vehicular facilities, including roads, drives and/or parking areas, shall be so designed that land clearing and/or grading will not cause accelerated erosion. Both vertical and horizontal alignments of vehicular facilities shall be so designed that hazardous circulation conditions shall not be created.
  - (c) Proposed on-lot sewage disposal facilities shall be properly designed and installed in conformance with all pertinent health regulations.
  - (d) Proposed nonagricultural displacement of soil shall be for causes consistent with the intent of this article and shall be executed in a manner that will not cause excessive erosion or other unstable conditions.
  - (e) Surface runoff of water will not create unstable conditions, including erosion, and that appropriate stormwater drainage facilities or systems will be constructed as deemed necessary.

Finally, § 143-242 A.(5) of the Ordinance provides that the Board: "...may impose special measures or conditions as deemed reasonably necessary and appropriate for the proposed use(s) to conform to the intent of this article." See also §913.2 of the Pennsylvania Municipalities Planning Code and Feldman v. Board of Supervisors of East Caln Twp., 48 A.3d 543, 548 (Pa. Commw. 2012).

#### IV. Applicant's Proposed Use

Applicant's proposed residential use for the development of single family detached dwellings is consistent with the R-2 zoning district. Applicant's proposed use is, for the most part, consistent with the legislative intent behind the Steep Slope Conservation District set forth in Ordinance § 143-235. The Applicant testified that he will develop the property without disturbing the natural features of the property such as the steep slopes noted on Exhibit A-2 and the wooded areas. Applicant also asserted that he would further improve the property by correcting existing erosion issues. In addition, Applicant pledged to work with surrounding landowners to create a buffer of trees to maintain privacy between and among the new and existing homes, keeping as many trees as possible. Regardless, the Applicant must comply with the Township's Subdivision and Land Development Ordinance ("SALDO"), erosion control, storm water management and other related ordinances. The Applicant has demonstrated that the development will not alter the character of the neighborhood and is consistent with both existing development in the area and the Township's master plan. Further, the development will not impair development of adjacent property nor be detrimental to public welfare, safety or the public interest. Finally, of the one thousand thirty three (1033) square feet of slopes greater than twenty five percent (25%) existent at the Property, only one hundred twenty five (125) square feet will be impacted by the proposed development.

Accordingly, the Board grants the Special Exception requested by the Applicant with the condition that the total disturbance of the twenty five percent (25%) or greater steep slope area will be limited to one hundred twenty five (125) square feet as set forth in Exhibit A2.

V. The Variance from §143-240

Applicants have requested a variance from §143-240 of the Lower Providence Township Zoning Ordinance to permit freestanding structures, buildings and retaining walls, as well as roads, access driveways and clearing or excavation of the land in order to develop the Property.

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). Generally, pursuant to the Municipalities Planning Code 53 P.S. § 10910.2 and the Ordinance at §143-168 A. the following must be present 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.

In addition to the above test, when evaluating an application for a use variance in the Steep Slopes Conservation District §143-242 C. the Zoning Hearing Board must consider the same standards applicable to a request for a special exception under §143-242 B.(2) – (7).

In the instant application, there are unique circumstances and peculiar aspects of the property that create a hardship that require the grant of a variance. The Applicant has provided plans for reasonable use and development of the property. The Applicant has limited the number of houses he proposes to construct on the property in order to preserve as many of the natural features of the property, including the wooded area. What is more the Applicant has provided for safe and reliable access ways, parking areas and utility systems to serve the development on or around steep slope areas where more sensitive grading and siting is essential. Strict conformity with the requirements of §143-240 would defeat the reasonable use of the Property. Further, this hardship was not created by the Applicants. Additionally, the effect of the variance is minimal, at most affecting 125 square feet of steep slopes out of 1,033 square feet. Therefore, a variance will be granted from the provisions of the Ordinance §143-240 provided the Applicant's disturbance only affects the 125 square feet of steep slopes as noted on Exhibit A-2.

## **CONCLUSIONS OF LAW**

1. Applicant has standing to appear before the Board regarding the requested relief.
2. Applicant has complied with the special exception and variance procedures required by Ordinance §§143-241 and 143-242 A.
3. The proposed use is one which is permitted by special exception in §143-239 herein.
4. The proposed use is consistent with the legislative intent and specific objectives set forth in §143-235.
5. The general welfare, safety and public interest of the Township or adjacent municipalities will not be adversely affected by the grant of the relief requested.
6. Applicant is required to comply with the design, erosion and sediment control standards of the Township's SALDO, building code and related ordinances such that (among other things addressed by those ordinances):
  - a. Abutting properties shall not be adversely affected by runoff or erosion.
  - b. Proposed buildings or structures are of sound engineering design and that footings are designed to extend to stable soil and/or bedrock as required by the Township Building Code.
  - c. Proposed vehicular facilities, including roads, drives and/or parking areas, shall be so designed that land clearing and/or grading will not cause accelerated erosion. Both vertical and horizontal alignments of vehicular facilities shall be so designed that hazardous circulation conditions shall not be created.
  - d. Any on-lot sewage disposal facilities shall be properly designed and installed in conformance with all pertinent health regulations.
  - e. Any nonagricultural displacement of soil shall be for causes consistent with the intent of this article and shall be executed in a manner that will not cause excessive erosion or other unstable conditions.

f. Surface runoff of water will not create unstable conditions, including erosion, and that appropriate storm water drainage facilities or systems will be constructed as deemed necessary by the Township.

7. The variance is necessary to enable the Applicant's reasonable use of the Property.

8. Denial of the requested variance from § 143-240 will impose an unnecessary hardship upon the Applicant.

9. The hardship is due to the unique physical circumstances and/or characteristics of the Property and not self-imposed.

10. The variance will not alter the essential character of the neighborhood or the zoning district in which it is located.

11. The variance represents the minimum that will afford relief from the hardship.

12. The Board has the authority to impose special measures or conditions as deemed reasonably necessary and appropriate for the proposed use.

### **DECISION**

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

1. The application for a special exception pursuant to §143-239 of the Lower Providence Township Zoning Ordinance is GRANTED by a vote of 4 in favor and 1 opposed with the condition that the total disturbance of the 25% or greater steep slope area will be limited to 125 square feet as set forth in Exhibit A2 and compliance with all other Lower Providence Township applicable Ordinances.

2. By a vote of 4 in favor and 1 opposed, the application for a variance from the Lower Providence Township Zoning Ordinance § 143-240 to permit Applicant to clear and excavate the Property as well as install site improvements to the Property and build single family

houses consistent with the R-2 residential district is GRANTED provided that the total disturbance of the 25% or greater steep slope area will be limited to 125 square feet set forth in Applicant's Exhibit A2 and compliance with all other Lower Providence Township applicable Ordinances.

Dated: January 7, 2016