

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-15-07 : HEARING DATE: November 23, 2015
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APPLICATION OF: :
Philip A. and Sandra E. Schafer :
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PROPERTY: :
1061 Shearwater Drive :
Audubon, PA 19403 :
Parcel No. 43-00-13165-00-4 :

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

On August 26, 2015 applicants, Philip A. and Sandra E. Schafer (hereinafter “Applicants”) filed an application for a variance from the setback requirements for a deck around an existing above ground pool. The application was in the nature of an appeal from an Enforcement Notice issued by Lower Providence Township (the “Township”) dated July 27, 2015. The Enforcement Notice was issued as a result of an inspection that revealed the deck was constructed without regard for the ten foot (10’) setback requirement found in Lower Providence Township swimming pool ordinance §§126-5 as well as Lower Providence Township Zoning Ordinance (the “Ordinance”) § 143-19 (primarily subsection B.(2) regarding accessory structures setback requirements), 143-30 (primarily subsection A.(2)(a) regarding the location of decks in the rear side yard), 143-37 A.(2) regarding rear yard setback requirements) and 143-157 A.(2) regarding revocation of Applicants’ building permit. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on October 22, 2015 when testimony was taken resulting in Applicants’ request for a continuance which was granted. The continued hearing re-commenced on November 23, 2015 at the Lower Providence Township Building. All five members of the

Board were present. Also present were Keith B. McLennan, Esq., 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 Applicants are Philip A. and Sandra E. Schafer.
2. The Applicants are the owners of the subject property located at 1061 Shearwater Drive, Audubon, PA 19403, parcel number 43-00-13165-00-4. (hereinafter the "Property").
3. The Property is located in the R-2 Residential District.
4. The Applicant was represented by Michael E. Furey, Esquire of 1043 S. Park Avenue, Audubon, PA 19403.
5. The lot consists of approximately 29,250 square feet.
6. The present use of the Property is residential with a single family dwelling located thereon.
7. Applicants constructed an above ground pool in the backyard of their property in such a way as to maximize open space on the Property between the house and the pool and provide better sight lines to the pool from the dwelling.
8. After the pool was constructed the Applicants sought a building permit to construct a deck around a portion of the pool.
9. In their application for a building permit Applicants represented to the Township that the pool deck would be in compliance with setback requirements and Building permit B-150094 was issued.
10. Applicants constructed a 10' by 16' deck made of composite material on the right

rear portion of the pool (if one is facing the pool from the back of the dwelling).

11. Applicants failed to survey the property to identify the property line prior to construction of the pool deck.

12. Upon final visual inspection of the pool deck it was discovered that it was set back 30.75' from the rear yard property line and .71' from the side yard property line.

13. On or about July 27, 2015 Applicants were notified of the violation of the setback requirements and the revocation of their building permit under § 143-157 A(2) of the Ordinance.

14. The following exhibits were made of record:

B-1 Appeal Application

B-2 Advertisement

B-3 Proof of Publication

A-1 Deed of the Property dated August 21, 2006 and recorded at Deed Book and Page number 05615-0881 on September 7, 2006 at the Montgomery County Recorder of Deeds.

A-2 Board of Assessment Record of the Property with a date of August 25, 2015.

A-3 An undated portion of the Lower Providence Township Zoning Map

A-4 Lower Providence Township Enforcement Notice dated July 27, 2015

A-5 Boundary Survey Plan for the Property prepared by Joseph M. Estock dated August 25, 2015

A-6 Six photographs of the rear yard of the Property

A-7 Seven letters of no objection to the variance relief sought by the Applicants

15. There was adverse public comment regarding this application from at least one of Applicants' neighbors.

16. Applicants failed to establish a hardship that required the grant of a variance.

17. Any hardship claimed by the Applicants was self-imposed when they chose to place the above ground pool in close proximity to the side and rear yard setback lines.

DISCUSSION

I. Dimensional v. Use Variance.

There are 2 types of variances, a “dimensional” variance and a “use” variance. One who advances a dimensional variance seeks to adjust zoning regulations so that the property can be used in a manner consistent with the zoning regulations. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). In contrast, a use variance seeks to use the property in a way that is inconsistent or outside of the zoning regulations. Tidd v. Lower Saucon Township Zoning Hearing Board, Green Gable Investment Partners, LP and Lower Saucon Township, 118 A. 3d 1 (Pa. Cmwlth. 2015). Regardless of whether the variance sought is a use or dimensional variance, 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. Cmwlth. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998).

II. Variance Legal Standard.

Generally a Zoning Board may grant a variance when the following criteria are established:

(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. Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 88 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014); 53 P.S. § 10910.2.

III. Dimensional Variance Legal Standard.

Differing standards apply to use and dimensional variances. In Hertzberg, our Supreme Court relaxed the standard for establishing unnecessary hardship in a dimensional variance case. Generally, multiple factors must be considered to determine whether an unnecessary hardship exists if the variance is denied, including the cost to bring the deck into compliance and whether 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)).

Although Hertzberg eased the variance requirements for a dimensional variance, it did not remove them. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth. 2005). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance and the five part test articulated above. Id.

IV. Facts Applied to the Legal Standard.

To establish that an unnecessary hardship existed the Applicants had to prove that either the physical characteristics of the property were such that the property could not be used for any permitted purpose or only for a permitted purpose at prohibitive expense or that the characteristics of the property were such that it would have no value or only distress value for any use approved by the zoning ordinance. Solebury Twp. v. Solebury Twp. Zoning Hearing Bd., 914 A.2d 972 (Pa.Cmwlth. 2007). Although relocating the deck would cost the Applicants, that cost would not be incurred as a result of the physical characteristics of the property rather it was due to the actions or inactions of the Applicants. The Property remains capable of use for its permitted purpose and there was no question that it remains valuable. The Applicants are simply unable to satisfy the hardship requirements. Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, as in this case, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed standard set forth in Hertzberg. Tri-County Landfill, Inc. v. Pine Twp. Zoning Hearing Bd., 83 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014).

The Applicants have presented no evidence that enforcement of the zoning regulations would prevent them from using the Property as intended. There are no unique circumstances of the Property which require a variance from the rear or side yard setbacks as requested. There is no hardship which requires the grant of a variance and the requested variance is not the

minimum variance that will afford relief.

Further, even if the Applicants could establish a hardship under *Hertzberg* or *Tidd* as Applicants asserted any hardship suffered was self-created. The Applicants chose to place the above ground pool in the rear of the Property abutting the setback lines in order to provide open space rather than in the center of the rear yard closer to the dwelling. That was the Applicants' choice. The pool deck was built after the pool was installed. Unfortunately, it encroached on the 10' side yard setback coming within less than a foot of the neighboring property line negating the installation of a fence to separate the property from the neighbors. Although less egregious, the rear yard setback was also violated. Applicants admit that it was their mistake yet they made no effort to abate the setback issue by placing the pool deck in a different area where it would not encroach on the setbacks or address the fence issue. Accordingly, the Board finds that the application for a variance from setback requirements for a deck around an existing above ground pool pursuant to Lower Providence Township Zoning Ordinance §§ 126-5, 143-30 and 143-37, and an appeal from an enforcement notice pursuant to Ordinance § 143-157 are denied.

CONCLUSIONS OF LAW

1. The Applicants have standing to appear before the Board regarding the requested relief.
2. Applicants compliance with §126-5 of the Lower Providence Township Ordinance which requires an outdoor facility such as a swimming pool deck, to have a 10' setback from any property line was lacking.
3. Applicants failed to comply with §143-19 of the Lower Providence Township Zoning Ordinance requiring all accessory buildings /structures including pool decks to comply with all setback requirements required by the Applicants' R-2 zoning district.

4. The construction of a pool deck within one foot from the side property line failed to conform to §143-30 A. (2) of the Lower Providence Township Zoning Ordinance which states that unenclosed decks shall be no closer than 10 feet to any side property line.

5. Applicants failed to comply with the 60 foot rear set back requirements of §143-37 A (2).

6. §143-157 A (2) of the Lower Providence Township Zoning Ordinance requires an applicant to have a validly issued and unrevoked zoning and building permit issued by the Township for the erection of a pool deck.

7. Denial of the requested relief will not impose an unnecessary hardship on the Applicants.

8. The hardship, if any, is entirely self-imposed, and is not due to any unique physical circumstances of the Property.

9. The requested relief is not necessary to enable the Applicants' reasonable use of the Property and does not represent the minimum deviation from the ordinance that will afford relief.

DECISION

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

The application for a variance setback requirements for a deck around an existing above ground pool pursuant to Lower Providence Township Zoning Ordinance §§ 126-5, 143-30 and 143-37, and an appeal from an enforcement notice pursuant to Ordinance § 143-157 are DENIED.

Dated: January 6, 2016

ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



Thomas A. Borai, Chairman



Kathie A. Eskie, Vice Chairwoman



Joyce D. Cluley



Robert G. Hardt



Gail Hager

Patricia Alzamora, Alternate

Joseph Pucci, 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.