

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-17-04 : HEARING DATE: March 23, 2017

APPLICATION OF:

Michael and Kelly McHugh Kostyk :
1074 North Academy Avenue :
Glenolden, PA 19036 :

PROPERTY:

Washington Blvd. and Elizabeth St. :
Lower Providence Township :
Eagleville, PA 19403 :
Parcel Nos. 43-00-03145-00-1 :
43-00-03742-00-4 :
43-00-03737-00-7 :

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

On February 13, 2017 applicants, Michael and Kelly McHugh Kostyk filed an application requesting variances from the minimum lot area, minimum lot width and setback requirements of Sections 143-33(A)(1) and (A)(2)(a)(6) of the Lower Providence Township Zoning Ordinance (the "Ordinance") in connection with the proposed construction of a single family home on a plot of land comprised of three (3) parcels of vacant ground in the R-1 residential district. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on March 23, 2017 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, members Gail Hager, Robert Hardt, Joseph Pucci, Patricia Alzamora and alternate, Joseph Bergquist. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicants are Michael and Kelly McHugh Kostyk ("Applicants").
2. The Applicants were represented by Lee A. Stivale, Esquire, Stivale Law Offices, PLLC, Mills of Victoria, Suite 103, 1489 Baltimore Pike, Springfield, Delaware County, PA 19064.
3. The subject property is comprised of 3 parcels of ground with tax parcel numbers 43-00-03145-00-1, 43-00-03742-00-4, and 43-00-03737-00-7 and located at the south west corner of the intersection of Washington Boulevard and Elizabeth Street, an unopened, undedicated, "paper street" (hereinafter the "Property").
4. On or about August 8, 2016 the Applicants entered into an agreement of sale to purchase the Property from sellers Walter F. Golas, Jr. and Dawn M. Golas and are thus equitable owners of the Property.
5. The sale of the Property to the Applicant is contingent upon the grant of the variances requested in the subject application.
6. The applicable zoning district is the R-1 residential district which permits single-family detached dwellings.
7. The Ordinance requires, at a minimum, a building lot area of 65,000 square feet, a lot width of 195 feet, front yard setback of 50 feet and a side yard setback of 50 feet.
8. The combined building lot area of the three (3) parcels is 37,487 square feet.¹
9. The proposed lot width is 125 feet.
10. The proposed front yard setback is 30 feet.
11. The proposed side yard setback is 37 feet.

¹ Applicants' Zoning Plan admitted as A-4 provides that the precise square footage is 37,486.74 which has been rounded up to 37,487 for purposes of this opinion.

12. The proposed home to be built on the Property is a three bedroom, two and a half bath, two story home with a total square footage of approximately 2,500 square feet.

13. The Applicants seek variances from §143-33.A.(1) regarding the minimum building lot area and lot width required and §143-33.A.(2)(a) & (b) regarding front and side yard setback requirements.

14. There was adverse public comment regarding this application.

15. The following exhibits were included in the record of the hearing:

A-1 Appeal Application

A-2 Agreement of Sale

A-3 Letter from Current Legal Owner

A-4 Site/Plot Plan

A-5 Deeds of Properties

A-6 CV of Michael J. Ciocco, P.E., S.E.O.

B-1 Appeal Application

B-2 Advertisement

B-3 Proof of Publication

DISCUSSION

I. Statement of the Case

The Applicants request variances from the minimum lot area, minimum lot width and setback requirements of Section 143-33.A. of the Ordinance in connection with the proposed development of a vacant plot of land containing three (3) tax parcels. The relief sought is dimensional in nature requesting variances to permit:

- a. A building lot area in the R-1 district of thirty seven thousand four hundred

eighty seven (37,487) square feet where sixty five thousand (65,000) square feet is required;

- b. A front yard setback of thirty (30) feet where fifty (50) feet is required;
- c. A side yard setback of thirty seven (37) feet where fifty (50) feet is required; and
- d. A lot width of one hundred twenty five (125) feet where one hundred ninety five

(195) feet is required.

II. Variance Legal Standard

A. Dimensional v. Use Variance. There are 2 types of variances, a “dimensional” variance and a “use” variance. Differing standards apply to use and dimensional variances. 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). The Supreme Court in Hertzberg held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. at 263-64, 721 A.2d at 50. In this case the Board is asked to grant a series of dimensional variances.

B. The Five Part Variance Test. To obtain a variance the Applicants must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

(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.

See also: 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.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to useless if a variance is denied, and that the proposed use will not be contrary to public interest. However in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, "...courts *may* consider multiple factors, including the economic detriment to the

applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” 721 A.2d at 50 (*italics supplied*). In effect, no longer is an applicant required to demonstrate in a dimensional variance case, that the property was close to useless without the variance.

Although Hertzberg eased the burden of proof somewhat for a dimensional variance, it did not remove the variance requirements that are universally applicable to use and dimensional variance cases. 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 satisfy the five part test articulated above. *Id.* In addition, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicants’ burden of proof and the standards to meet that burden as follows:

C. Burden of proof. For variances, the burden of proof shall be on the applicant. For special exceptions, the applicant shall be entitled to the special exception unless others can prove that it would adversely affect the public health, safety, morals or welfare.

D. Standards of proof.

(2) Variance case. An applicant for a variance shall have the burden of establishing:

(a) All the requirements of § 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, No. 247, as amended, 53 P.S. § 10910.2;

(b) That literal enforcement of the provisions of this chapter will result in unnecessary hardship, as the term is defined by relevant statutory provisions and case law; and

(c) That the allowance of a variance will not be contrary to the public interest.

(3) Zoning Hearing Board considerations. In considering whether the allowance of a special exception or variance is contrary to the public interest, the Zoning Hearing Board shall consider whether the application, if granted, will:

(a) Substantially increase traffic congestion in the streets surrounding the subject site;

(b) Increase the risk of fire or panic or otherwise endanger the public safety;

(c) Overcrowd the land or create undue concentration of population;

(d) Be suitable for the property in question so as to be consistent with the spirit and purpose of the provisions of this chapter;

(e) Intrude upon the adequacy of natural light and air to adjoining properties;

(f) Create extraordinary burdens on public, private or community water systems or upon groundwaters or wells within the neighborhood;

(g) Overburden the public sanitary sewer system within the Township occasion environmental problems with on-site sanitary sewer installations;

(h) Place undue burdens upon the police, fire, ambulance or other emergency services provided throughout the neighborhood;

(i) Cause adverse affects to the appropriate use of adjacent properties in the neighborhood where the property is located;

(j) Cause risk or danger to the safety of persons or property by improper location or design of facilities for ingress and egress to and from the property in question; or

(k) Otherwise adversely affect the public health, safety, morals or general public welfare of the community.

(4) Burden of proof. In all cases, whether special exception, variance, interpretation, appeals from the Building Inspector or any other appeals lawfully brought before the Zoning Hearing Board, the applicant shall have the burden of proof, including the duty of presenting credible, relevant and pertinent evidence and testimony to persuade the Zoning Hearing Board that the applicant has satisfied the criteria set forth in this section. In addition to the foregoing, where an applicant has been specifically requested by the Zoning Hearing Board to provide specific evidence or testimony on any item set forth in Subsection D(3)(a) through (j), supra, or in the event that any party opposing any application shall claim that the proposal before the Zoning Hearing Board will cause any effects upon the matters addressed in Subsection D(3)(a) through (j), supra; then the applicant's burden of proof shall include the obligation of presenting credible, relevant and pertinent evidence on such topics as to persuade the Zoning Hearing Board that the relief requested by the applicant will not be contrary to the public interest with respect to

the criteria placed at issue.

III. Facts Applied to the Legal Standard.

The Applicants have requested dimensional variances from §§143-33.A.(1) and A. (2)(a)&(b) in order to permit the reverse subdivision of three (3) so called “movie lots”² and the construction of a 2,500 square foot single family dwelling on the Property. The Applicants are requesting to have a lot size which is 57.67% of the 65,000 square feet required by the Lower Providence Board of Supervisors when they amended §143-33.A. of the Ordinance in 2006 for the R-1 district. As suggested at the hearing, these movie lots have not only been in existence in the Township since the early 1900’s,³ they have been the subject of numerous variance applications. When the Board of Supervisors included these “movie lots” in the R-1 residential district they had to know that unless several of these lots were combined to garner the required 65,000 square feet lot size, construction of single-family dwellings required by the R-1 district was impossible.⁴ When enacting the Ordinance the Supervisors exercised the power granted them by the Municipalities Planning Code, particularly §604⁵ to promote, protect and facilitate (among other things), public health and safety, the general welfare and the proper density of population. Of all the dimensional zoning regulations, lot area is the most critical as it controls density. It follows that the Supervisors made a mindful decision to manage the density of this particular neighborhood. Since density control is a proper zoning purpose, it is not for the Board to second guess the Supervisors’ intentions when they zoned the area as R-1.⁶ Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959). The Supervisors, as the

² Urban legend has it that in the early 1900’s, in order to lure people to movie theaters, deeds to these exceedingly small lots were raffled to movie goers in the city of Philadelphia.

³ Michael J. Ciocco, P.E. testified that these “movie lots” were created in 1918.

⁴ In Fisher v. Viola, 789 A.2d 782 (Pa. Cmwlth. 2001) the Court sustained 1.25 and 1.50 acre minimum lot sizes for residences in less urban residential zoning districts.

⁵ 53 P.S. § 10604

⁶ Even if the Board were to believe that the lot size was too burdensome, it is not the Board’s province to refuse to enforce the ordinance.

township's legislative body, has the right to adopt reasonable zoning rules even if other reasonable rules could have been adopted. *Ryan on Zoning* §3.3.3; see also Swade v. Springfield Township Zoning Board of Adjustment, 392 Pa. 269, 140 A.2d 597 (1958).

In the case at bar, Applicants, wish to construct a two thousand five hundred (2,500) square foot home on a significantly undersized building lot.⁷ To their credit, they have assembled three (3) lots that total thirty-seven thousand four hundred eighty-seven (37,487) square feet of space not quite fifty-eight percent (58%) of what the Ordinance requires.⁸ However, the size of the lots and home and its location on the combined lots materially violate the front and side yard requirements of the Ordinance. Applicants assert that there are two (2) planned streets that provide boundaries to their efforts to obtain additional lots to comply with the building lot size of the Ordinance. North of the three (3) lots there is a so called paper street known as Elizabeth Street and southwest there is another paper street known as Lincoln Avenue. However, the paper streets should be no barrier for Applicants to assemble additional lots to accomplish their goal while remaining true to the Ordinance. It is well settled that where a paper street has not been dedicated, opened or used by the public for more than twenty-one (21) years, the right of the public is lost, and the township seeking to open the Paper Street to public use thereafter may do so only by eminent domain. 36 P.S. §1961,⁹ see also: Whittaker Appeal, 386 Pa. 403 (1956). The lots having been created in 1918 border the paper streets of Elizabeth Street and Lincoln Avenue both of which likewise date back that far. Michael J. Ciocco, P.E. testified that there were no additional parcels that could be added to make the

⁷ The case of Appeal of W.B. Dodge, Jr. 43 Pa. Cmwlth. 65, 402 A.2d 273 (1979) essentially held that you cannot build too large a house on too small a lot.

⁸ Had this been a case of a de minimis variance from the building lot size and setbacks the result might be different. The de minimis doctrine, supports a dimensional variance where there are only minor deviations from dimensional requirements of the Ordinance. Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Cmwlth. 1996)

⁹ § 1961. Unopened ways or streets on towns plots. Any street, lane or alley, laid out by any person or persons in any village or town plot or plan of lots, on lands owned by such person or persons in case the same has not been opened to, or used by, the public for twenty-one years next after the laying out of the same, shall be and have no force and effect and shall not be opened, without the consent of the owner or owners of the land on which the same has been, or shall be, laid out.

Property larger. However, it was made clear at the hearing by at least three (3) of the neighbors and Mr. Kostyk that the ground north and west of the Property at issue was densely wooded and undeveloped. The Applicants offered no evidence that they made any effort to contact owners of other adjoining parcels or the Township regarding the paper streets in an effort to assemble additional movie lots to satisfy the building lot requirement of the Ordinance. What is more, Applicants offered no evidence that pursuit of additional lots or adverse possession of the paper streets to augment the Property would constitute an economic hardship. Rather, Applicants appear to have “thrown up their hands” as a result of the paper streets.

Accordingly, no unique characteristics exist which require the grant of the requested variances. The need for relief is neither serious nor substantial. Presumably, since everyone has their price, there is abundant vacant land available to the Applicants which, if acquired and added to the Property could be developed in a manner which would not require such an extreme dimensional variance. The request asks for, among other things, approval of a lot size that is materially less than what is required in the applicable R-1 district. Not only have the Applicants failed to exhaust opportunities to acquire additional lots but they have failed to seek the land associated with the paper streets. No justifications have been provided for Applicants’ failure to resolve the paper streets¹⁰ and seek additional land. Thus Applicants have failed to justify the need for these variances.

Further, no undue hardship would result from a denial of the variance. To establish that an unnecessary hardship exists warranting a variance from the Ordinance, the Applicants must prove that:

a. Physical characteristics of the property were such that the property could not be used for any permitted purpose; or

¹⁰ Arguably, by including this neighborhood in the R-1 district requiring 65,000 square foot building lots the Supervisors pre-ordained that the planned paper streets in this area would be abandoned to residents.

- b. The permitted purpose could only be achieved at prohibitive expense; or
- c. 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).

This hardship, if any exists is self-imposed since the Applicants have failed to address what are admittedly challenging but not insurmountable issues.¹¹ Rather than address those issues seriatim Applicants clamor for variances from required lot size and width of one hundred ninety-five (195) feet reduced to one hundred twenty-five (125) feet, front and side yard setbacks from fifty (50) feet reduced to thirty (30) and thirty-seven (37) feet respectively so that they can construct a two (2) story single family home that is simply too large for the lots in question. No evidence was offered to prove a., b. and c of the Solebury Township case referenced above.

On the contrary, if granted, the flood gates of others seeking similar variances will, eventually, swing open using this case as precedent. Needless to say, that will adversely affect the rights of the neighbors and be detrimental to the public welfare. Fundamentally, variance rules are designed to protect the decision of the legislative body (here the Board of Supervisors) in enacting the zoning ordinance and to make sure that the Ordinance is not “adjusted” out of existence by variance.¹² O’Neill v. Zoning Board of Adjust., 434 Pa. 331, 254 A.2d 12 (1969). It is well settled that zoning boards and courts cannot substitute their concept of what the zoning ordinance should be, their function is only to enforce the zoning ordinance in accordance with the applicable law. Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959).

¹¹ The argument was made at the hearing that by knowing the restrictive zoning at issue and then purchasing the Property the Applicants created their hardship. Although an appealing argument, the law is quite clear that knowing the property was R-1 when purchasing it is not a self-induced hardship. Unless the hardship arises from the purchase itself, as where the price paid was too compelling, the mere acquisition of the property does not create the hardship. Manayunk Neighborhood Council v. Zoning Board of Adjustment of the City of Philadelphia, 815 A.2d 653 (Pa. Cmwlth. 2003).

¹² Essentially this was the basis for the objections to the variances brought by the neighbors at the hearing.

Clearly the result requested flies in the face of the Ordinance and the Supervisors who reserved this section of the Township for larger lots to achieve fewer houses and thus less density. Any other result could tax the Township and its resources, cause congestion and manifestly change the complexion of the neighborhood. Precisely what §143-168.D.(3) requires the Board to consider in its analysis. The relief requested is not the minimum variance that will afford the required relief.

Accordingly, the Board finds that the requested variances from Lower Providence Township Zoning Ordinance §143-33. A(1) regarding 65,000 square foot minimum lot size and 195 feet width; §143-33. A(2)(a) regarding a 50 foot front yard setback; and §143-33. A(2)(b) regarding a 50 foot side yard setback are denied.

CONCLUSIONS OF LAW

1. The Applicants are the equitable owners of the Property and 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. The hardship, if any, is self-imposed, and is not due to the unique physical circumstances and characteristics of the Property.

4. The requested relief is not necessary to enable the Applicants' reasonable use of the Property.

5. If granted, the community will be significantly changed from how it's zoned altering the character of the neighborhood and this R-1 district. In turn it will substantially impair the appropriate use or development in this district impacting the adjacent property and the public welfare.

6. The requested relief does not represent the minimum that will afford relief, and

does not represent the least modification possible of the regulation at issue.

Zoning's limitations on the rights of the property owner are based on the propositions that the (i) public is capable of forming a rational, objective plan for land development and (ii) public interest in that plan overrides the right of the property owner to do as he sees fit. In this case, the rights of the community to regulate density of its population and protect the public welfare outweigh the interest of the Applicants to vary from the restrictions of the Ordinance.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-1 vote is as follows:

The requested variances from §§143-33(A)(1) and (A)(2)(a) & (b) of the Lower Providence Township Zoning Ordinance are denied.

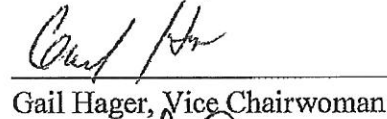
Dated: May 8, 2017

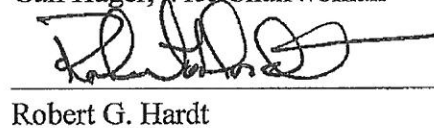
ORDER

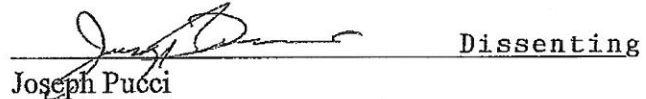
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

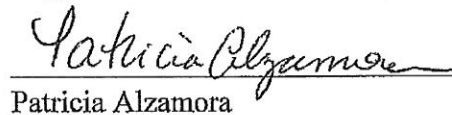
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

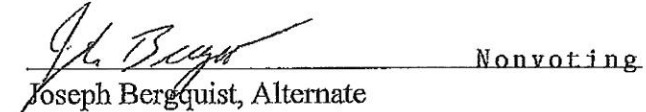

Kathie A. Eskie, Chairwoman


Gail Hager, Vice Chairwoman


Robert G. Hardt

 Dissenting
Joseph Pucci


Patricia Alzamora

 Nonvoting
Joseph Bergquist, 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.