

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-17-07 : HEARING DATE: April 27, 2017
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APPLICATION OF: :
Rosemary and Charles Loutey :
:
PROPERTY: :
5045 Cold Springs Drive :
Lower Providence Township :
Collegeville, PA 19426 :
Parcel No. 43-00-02663-44-4 :

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

On March 21, 2017 applicants, Rosemary and Charles Loutey (hereinafter “Applicants”), filed an application requesting a variance from the setback requirements of Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance (the “Ordinance”) in connection with the construction of a screened in porch and patio. The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on April 27, 2017, at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, Vice Chairwoman Gail Hager, members Robert Hardt, Joseph Pucci, Patricia Alzamora, and Joseph Bergquist, alternate. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Mary Ann Morella, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicants are Rosemary and Charles Loutey, husband and wife.
2. The Applicants own the subject property located at 5045 Cold Springs Drive, Collegeville, PA 19426, parcel number is 43-00-02663-44-4 (hereinafter the “Property”).

3. The Applicant was not represented by legal counsel.
4. The applicable zoning district is the R-2, residential district.
5. The use of the Property is residential.
6. Applicants' lot is undersized at approximately 20,000 square feet; the minimum lot area in the R-2 residential district is 25,000 square feet according to Section 143-37.A.(2) of the Ordinance.
7. Section 143-37.A.(2) of the Ordinance requires a side yard setback of twenty (20) feet.
8. The proposed screened in porch will build on the existing patio, and will be set back fifteen (15) feet from the side property line.
9. The application for a dimensional variance was made due to the undersized nonconforming lot.
10. Absent the variance, Applicants will be precluded from improving their home.
11. Due to the undersized lot and angled placement of the home on that lot, the addition can only be placed where requested.
12. There was no adverse public comment regarding this application.
13. The proposed addition will not alter the essential character of the neighborhood.
14. The following exhibits were marked at the hearing:
 - A-1 Property Plot Plan with Proposed Porch;
 - B-1 Appeal Application;
 - B-2 Advertisement;
 - B-3 Proof of Publication.

DISCUSSION

I. Statement of the Case

Applicants request a dimensional variance from the 20 foot side yard setback requirements of Section 143-37.A.(2) of the Ordinance. They propose to construct a screened in porch and patio with a 15 foot side yard setback.

II. Variance Legal Standard.

Generally, in order for the Board to grant a variance Section 10910.2(a) of the Pennsylvania Municipalities Planning Code and Section 143-168.A. of the Ordinance require an applicant to establish that:

(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 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 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).

A dimensional variance is at issue in this case.

III. **Dimensional Variance Legal Standard.**

Differing legal 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)). In *Hertzberg* the Supreme Court of Pennsylvania gave zoning boards and courts more flexibility in granting or sustaining variances from regulations that are dimensional in nature than in cases where a use variance is sought. The Supreme Court determined 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. Thus *Hertzberg* offers an applicant a greater chance of gaining zoning relief in dimensional variance cases on a showing of a lesser hardship.

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.Cmwlt. 2005). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance and the five part test required by the Ordinance as articulated above. Id. Sections 143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the conditions the Board must consider and the Applicants' burden of proof 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.

IV. **Facts Applied to the Legal Standard.**

The Applicants have requested a variance from the setback requirements of Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance in connection with the construction of a screened in porch and patio. The relief sought is dimensional in nature requesting the allowance of a side yard setback of fifteen (15) feet. The ordinance requires a setback of twenty (20) feet from the side property lines.

In the instant case, the uniqueness of the lot makes it difficult for the Applicants to avoid encroachment on a setback creating an unnecessary hardship for the Applicant. This hardship is not self-imposed but is rather the result of the physical characteristics of the undersized lot and the placement of the existing home on an angle.

The porch addition would not exceed the setback requirements that had existed before the current set back restrictions. Applicants have owned the property since 1978. Section 143-37.A.(2) was amended on October 20, 2011 by Ord. No. 602 to include current set back restrictions. Application of §143-37.A.(2) as amended to their home now would result in a determination that the existing house is non-compliant with the more restrictive set back requirements.

Applicants testified that the proposed addition will provide a more useful patio area, will be consistent with other homes in the neighborhood and will enhance not only the value of their property but also those in the immediate area. What is more, the proposed addition is best placed in the area of the existing porch to minimize further encroachment on the setbacks from the property line.

The Property will continue to conform to the building coverage and impervious coverage requirements. A number of surrounding homes already have similar additions thus

the essential character of the neighborhood will not be changed by granting the variance to permit the proposed addition. Further, having evaluated the various conditions of the Ordinance to determine whether the proposed variance is contrary to the public interest, the Board determines that the public interest is not adversely affected.

Applicants have proposed an addition that attempts to limit encroachment into required setbacks and makes the best use of the undersized nonconforming lot. It is therefore the minimum variance that will afford the required relief.

Accordingly, the Board finds that variance from 143-37.A.(2) of the Lower Providence Township Zoning Ordinance is appropriate.

CONCLUSIONS OF LAW

1. The Applicants have standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an unnecessary hardship on the Applicants.
3. The hardship is not self-imposed, and is due to the unique physical circumstances of the Property.
4. The requested relief is necessary to enable the Applicants' reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulation at issue.
5. The proposed porch addition will not alter the essential character of the neighborhood in which the Property is located, and neighbors have no opposition to its construction.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 6-0 vote is

as follows:

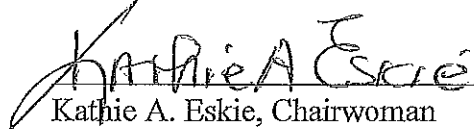
The application for a variance from Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance is granted to permit the construction of a screened in porch and patio with a side yard setback of fifteen (15) feet rather than the twenty (20) feet required by the Ordinance as amended.

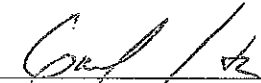
Dated: June 5, 2017


ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD

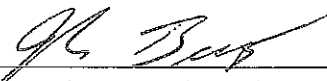

Kathie A. Eskie, Chairwoman


Gail Hager, Vice Chairwoman


Robert G. Hardt


Joseph Pucci


Patricia Alzamora


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.