

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-17-08 : HEARING DATE: May 25, 2017

APPLICATION OF:

Michael Hegarty Sr.
21 Clearfield Avenue
Eagleville, PA 19403

PROPERTY:

21 Clearfield Avenue
Lower Providence Township
Eagleville, PA 19403
Parcel No. 43-00-02569-00-7

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

On April 27, 2017 applicant Michael Hegarty Sr. filed an application requesting two (2) variances from the Lower Providence Township Zoning Ordinance (the "Ordinance"), one from **§143-18 Minimum lot dimensions without public sanitary sewer and public water** and the other from **§143-37 A.(2) Area setback, bulk, height and parking requirements**. Applicant also requested a special exception under **§143-150 Change or resumption of a nonconforming use** all in connection with the proposed construction of a single family home on a 7,500 square foot lot currently occupied by a two car garage in the R-2 residential district.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on May 25, 2017 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, Gail Hager, Vice-Chair, members Robert Hardt, Patricia Alzamora and 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 Applicant is Michael Hegarty Sr. ("Applicant").
2. The Applicant was not represented by counsel.
3. The subject property is comprised of a 7,500 square foot parcel of ground with tax parcel number 43-00-02569-00-7 located at 21 Clearfield Avenue in Eagleville currently occupied by a two car garage (hereinafter the "Property").
4. Applicant is the owner of the Property subject to this variance request.
5. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings.
6. The Ordinance requires, at a minimum, for all lots not served by public water or sewer, regardless of the zoning district, a building lot area of 30,000 square feet and a lot width of 150 feet.
7. The Ordinance requires in the R-2 zoning district for lots not served by public water or sewer a building lot area of 40,000, a lot width of 175 feet, a front yard setback of 50 feet, a rear yard setback of 60 feet, and a side yard setback of 30 feet.
8. The building lot area of the parcel is 7,500 square feet.
9. The building lot width is 75 feet.
10. The proposed rear yard setback is 15 feet.
11. The proposed side yard setback is 11 feet.
12. The proposed home to be built on the Property is a single family, three bedroom, two bath dwelling adjacent to an existing residential triplex on a 125 foot by 100 foot lot.
13. There was adverse public comment regarding this application.

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

A-1 Appeal Application

A-2 Existing Site/Plot Plan

A-3 Proposed Site/Plot Plan

A-4 Zoning Map

A-5 Existing Property Photos

B-1 Appeal Application

B-2 Advertisement

B-3 Proof of Publication

DISCUSSION

I. Statement of the Case

The Applicant requests variances from §§ 143-18, 143-37.A.(2), and 143-150 of the Ordinance in connection with the proposed development of a plot of land currently occupied by a 2-car garage. The relief sought is dimensional in nature requesting variances to permit:

- a. A building lot area in the R-2 district of seventy five hundred (7,500) square feet where forty thousand (40,000) square feet is required;
- b. A side yard setback of eleven (11) feet where thirty (30) feet is required;
- c. A rear yard setback of fifteen (15) feet where sixty (60) feet is required; and
- d. A lot width of seventy five (75) feet where one hundred seventy five (175) 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 effects 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.

D. The Law of Special Exceptions. 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 not an exception to a zoning ordinance, but rather a

it is an exception to 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). A nonconforming use is converted into a permitted use by Special Exception once it is zoned for that use in the township zoning ordinance. Pennridge Development Enterprises, Inc. v. Volovnik, 624 A.2d 674, 676 (Pa. Commw. 1993).

E. 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). An applicant for a special exception has the burden of establishing by competent evidence and testimony both: (a) that the applicant's application falls within the provisions of the ordinance which accords to the applicant the right to seek a special exception; and (b) that the allowance of a special exception will not be contrary to the public interest. See Section 143-168(D).(1). When determining whether the grant of a special exception is contrary to the public interest, the Zoning Hearing Board will 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 ground waters 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 effects 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. LPTZO Section 143-168(D).(3).

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

The Applicant has requested dimensional variances from §§143-18 and 143-37.A.(2) in order to permit the construction of a three bedroom, two bath home on a 7,500 square foot, so called “movie lot”.¹ Presently, the Property is occupied by a 2 car garage which provides parking for the 2,919 sq. ft. residential triplex immediately adjacent to it. Presumably the Applicant believes that since the garage is non-conforming, its removal and replacement with an equally non-conforming single family home “shoe horned” into a 7,500 square foot lot warrants approval of his application. Unfortunately for the Applicant he misses the very point of §§143-168.C. & D.(2), (3) & (4) and §143-168(D)(3) of the Ordinance. With the passage of the Ordinance, the Board of Supervisors sought to balance the competing interests of township residents by establishing rules for the orderly development of land. As noted in the aforesaid Ordinance section, the Supervisors sought to avoid overcrowding of land, manage population

¹ 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.

concentration and promote the general health, safety and welfare of the community. The Board's task is to respect that public policy while at the same time, in the proper case, vary from that Ordinance. This case is not a proper case.

Construction of a single family home on a lot that is only 18.75% of the 40,000 square feet required by the Ordinance is extreme for even the most noble of uses or intentions.² When the Board of Supervisors included these "movie lots" in the R-2 residential district they had to know that unless several of these lots were combined to garner the required 40,000 square feet lot size, construction of single-family dwellings required by the R-2 district was impossible. When enacting the Ordinance the Supervisors exercised the power granted them by the Municipalities Planning Code, particularly §604³ 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-2.⁴ Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959). The Supervisors, as the 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, Applicant wishes to construct a three bedroom, two bath single family home on a significantly undersized building lot with 75 feet of frontage. The size of the

² 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.

³ 53 P.S. § 10604

⁴ 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.

lot alone cannot support the proposed single family home.⁵ Further, the proposed 15 foot rear and 11 foot side yard setbacks materially violate the 60 foot rear and 30 foot side yard setback requirements of the Ordinance.⁶ Yet the Applicant offers no compelling reasons recognized by the Ordinance to either warrant the grant of a dimensional variance or special exception.

Accordingly, no unique characteristics exist which require the grant of the requested variances. The need for relief is neither serious nor substantial. The request asks for, among other things, approval of a lot size that is materially less than what is required in the applicable R-2 district, and would require an extreme dimensional variance.⁷

Further, to justify those significant variances from the Ordinance Applicant offers no evidence that undue hardship would result from a denial of the variance. The Applicant merely asserts that the eyesore that is the existing garage would be eliminated with the grant of the variances and construction of the home. 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
- 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.Cmwlt. 2007).

No evidence was offered to prove a., b. or c. of the Solebury Township case referenced above.

⁵ The case of Appeal of W.B. Dodge, Jr. 43 Pa. Cmmwlth. 65, 402 A.2d 273 (1979) essentially held that you cannot build too large a house on too small a lot.

⁶ Applicant believes that since the existing non-conforming garage has a 7 foot rear yard setback the construction of a home with a 15 foot rear yard setback is an improvement, it is not.

⁷ In Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlt. 2001), an owner sought variances from zoning provisions establishing frontage requirements for rear or "flag" lots in order to permit the creation of a second lot, which owner planned to sell to obtain funds to improve her residence. There was no evidence of any condition that made it difficult to use the property for a single-family residence. Applying the more relaxed standard of Hertzberg, the trial court ruled that unnecessary hardship was not established by loss of the revenue obtainable through sale of the second lot. The Commonwealth Court affirmed.

Rather than address those factors, Applicant merely clamored for variances from a required lot size of 40,000 square feet to 7,500, a required lot width from one hundred seventy-five (175) feet to seventy-five (75) feet, rear yard setback from sixty (60) feet to fifteen (15) feet and side yard setback from thirty (30) feet to eleven (11) feet.

A discussion regarding whether a property owner should be rewarded with a variance for allowing an existing structure to degenerate into an eyesore will be reserved for another day however, this is arguably the precise set of facts the legislature and Board of Supervisors contemplated when stating that the need for a variance not be self-imposed.

For the same reasons, Applicant's request that the Board grant him a special exception under §143-150 to equate the proposed single family home with the existing non-conforming 2 car garage fails. Not only has Applicant offered no evidence under §143-168(D).(1) or (3) that the applicant's application falls within the provisions of the ordinance which accords to the applicant the right to seek a special exception or that the allowance of a special exception will not be contrary to the public interest. Frankly, what Applicant has offered into evidence demonstrates that his proposed home on a 7,500 foot lot is overtly contrary to the public interest.

Finally, 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.⁸ 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

⁸ Essentially this was the basis for the objections to the variances brought by the neighbors at the hearing.

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).

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 §143-18 regarding 30,000 square foot minimum lot size and 150 feet width; §143-37. A(2) regarding a 60 foot rear yard setback and 30 foot side yard setback; and §143-150 regarding a change or resumption of nonconforming use are denied.

CONCLUSIONS OF LAW

1. The Applicant has 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 Applicant's 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-2 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 Applicant to vary from the restrictions of the Ordinance.

DECISION

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

The requested variances from §§143-18, 143-37 A.(2) and 143-150 of the Lower Providence Township Zoning Ordinance are denied.

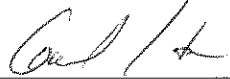
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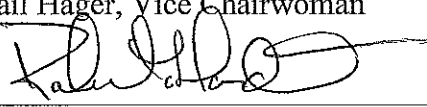
ORDER

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.