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JILL K. ANDERSON, J.D.

September 6, 2017

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. 7015 3430 0000 4433 5648**

Mr. Louis Gambone
357 Level Road
Collegeville, PA 19426

**Re: Zoning Hearing Board Application #2-17-10
357 Level Road, Collegeville, PA 19426**

Dear Mr. Gambone:

As you know, I am the Solicitor for the Lower Providence Township Zoning Hearing Board ("Board"). I am writing in accordance with the Pennsylvania Municipalities Planning Code.

As per the enclosed decision of the Board your application to change the garage location condition set forth in the Lower Providence Township Zoning Hearing Board's Opinion, Decision and Order of September 8, 2016 granting you variances to construct a garage in the floodway at 357 Level Road was granted. As you will note in the enclosed opinion and order, the grant of the changed garage location condition remains subject to those numerous conditions outlined therein, as well as in the September 8, 2016 opinion, decision and order of the Flood Plan Ordinance and those other applicable ordinances and laws in effect in Lower Providence Township. The Board expects that you will satisfy those conditions when constructing the garage.

You are advised pursuant to §86-505.C.(1) of the Flood Plan Ordinance as follows:


- a. The granting of the variance may result in increased premium rates for flood insurance; and

Mr. Louis Gambone
September 6, 2017
Page 2

- b. Such variances may increase the risks to life and property.

Should you have any questions regarding the foregoing, please contact me.

Yours very truly,



Keith B. McLennan

KBM/jds
Enclosures

pc: Kathie A. Eskie, Chairwoman (via e-mail)
Gail Hager, Vice Chairwoman (via e-mail)
Robert G. Hardt (via e-mail)
Joseph Pucci (via e-mail)
Patricia Alzamora (via e-mail)
Joseph Bergquist (via e-mail)
Michael Mrozinski, Community Development Director (via e-mail)

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-17-10	:	HEARING DATE:
		:	July 25, 2017
		:	
APPLICATION OF:		:	
Louis Gambone		:	
		:	
		:	
PROPERTY:		:	
357 Level Road,		:	
Collegeville, PA 19426		:	
Parcel No. 43-00-07300-00-1		:	

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

On June 30, 2017 applicant, Louis Gambone (hereinafter "Applicant") filed an application to modify a condition imposed upon him by the Lower Providence Township Zoning Hearing Board ("Board") in its Opinion and Order dated September 8, 2016. Applicant sought to change the location of the garage he intends to construct in the flood plain at his property located next to the Perkiomen Creek at 357 Level Road.

The current Application was properly advertised, and a public hearing was held before the Board on July 25, 2017 at the Lower Providence Township Building. Chairwoman, Kathy Eskie, Vice Chair Gail Hager and members Robert Hardt, Patricia Alzamora and Joseph Bergquist were present. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement and Keith B. McLennan, Esquire, the Solicitor. As a result of a scheduling snafu the court reporter was not present however, the Applicant agreed to rely upon the video of the hearing as the official record and waived any requirement that hearing be recorded by a stenographer.

FINDINGS OF FACT

1. The Applicant is Louis Gambone.

2. The Applicant is the owner of the subject property located at 357 Level Road, Collegeville, Lower Providence Township, PA 19426, parcel number 43-00-07300-00-1 comprised of approximately 6.21 acres (hereinafter the "Property").

3. The applicable zoning district is R-2 Residential within the FCD.

4. The Applicant was not represented by legal counsel however, SuSanne M. Creveling, P.E., President of HT Engineering, Inc., testified on his behalf as did the Applicant.

5. During the planning for the construction of the Garage it was determined that the previous proposed location of the Garage was not ideal as it would: (i) disturb a number of mature trees, (ii) create traffic congestion on the shared driveway.

6. Alteration of the location of the garage next to the existing attached garage would: (i) protect those trees that were otherwise impacted by the original proposed location, (ii) reduce traffic congestion on the shared driveway, (iii) provide more functionality of use, (iv) permit easier access to utilities making their connection less intrusive, (v) eliminate invasive bamboo growing on the property.

7. The balance of the Findings of Fact set forth in the Board's written opinion and decision dated September 8, 2016 (except #19) remain the same and are incorporated herein by reference.

8. The following exhibits were made of record:

A-1 The original application filed on June 30, 2017.

A-2 Site plan of HT Engineering, Inc. for Applicant dated June 28, 2017.

B-1 Application Advertisement.

B-2 Proof of Publication of the Advertisement.

9. There was no adverse public comment regarding this application.

DISCUSSION

I. Statement of the Case.

On May 19, 2016 Applicant filed an application for a variance from the newly instituted Lower Providence Township Floodplain Ordinance §86-100 et seq. (the “Ordinance”) under §86-500 requesting a variance from the Lower Providence Floodplain Ordinance §86-100 et seq. (the “Ordinance”) particularly §86-401.A. regarding building in the Floodplain Conservation District (“FCD”), §86-601.D.(1)(b), regarding floor area not to exceed 100 square feet and §86-601.D.(1)(e), regarding elevated power lines. On August 25, 2016 Applicant was granted the relief he requested subject to several important conditions as more fully set forth in the Board’s decision dated September 8, 2016 attached hereto and made a part hereof as Exhibit “A.”

At the 2016 hearings, Applicant asserted that the best location for the garage he proposed was on a parcel of ground immediately to the left of the driveway entry on the south side of the property adjacent to the Arcola Road bridge over the Perkiomen Creek. The Board accepted Applicant’s testimony and imposed the placement of the garage in that location as a condition of the relief that was granted (See condition #3 of the Board’s September 8, 2016 decision).

In or about May and early June, 2017 Applicant approached Lower Providence Township requesting relief from the location condition imposed by the Board in its original decision. On June 30, 2017 Applicant filed his instant Application.

II. Alteration of Zoning Conditions

A. Express Conditions

A condition is designed by the zoning board to protect the public interest in a

particular case. Although most zoning ordinances lack express conditions, due to obvious safety and related concerns associated with alteration of flood plains, the Lower Providence Township Supervisors expressly included many conditions in the Flood Plain Ordinance which the Applicant sought to vary from. Recognizing the importance of those conditions and the impact any variance from the Flood Plain Ordinance could have upon public safety, the Board imposed fourteen (14) conditions upon the Applicant when granting him the variances he requested. The third condition limited the Applicant to placement of the garage on the south side of the Property, immediately to the left when entering the driveway to the Property.¹ After almost a year of additional evaluation of the site, the Applicant, a builder/developer well-known to the Board, determined that the garage would be better placed next to the existing attached garage.

A condition previously imposed by the Board can be changed but it must be the subject of a petition to modify the condition, filed before the zoning hearing board. Bonner v. Upper Makefield Township, 142 Pa. Commonwealth Ct. 205, 597 A.2d 196 (1991). To obtain an amendment or deletion of a condition, the applicant must demonstrate to the Board at a public hearing:

- (1) Grounds for a traditional variance to change the condition/location of the garage:
- or
- (2) Changed circumstances which render the condition inappropriate; and
- (3) Absence of injury to the public interest.

Ford v. Zoning Hearing Board of Caernarvon Township, 151 Pa. Commonwealth Ct. 323, 616 A.2d 1089 (1992). The Commonwealth Court has held that an application for relief from a condition should be governed by the same standard applicable to an application for a variance.

¹ At the hearings on the initial Application the Applicant asserted that for ease of storm water flow, this was the best place to put the garage.

Amoco Oil Company v. Zoning Hearing Board of Middletown Twp., 76 Pa. Commonwealth Ct. 35, 463 A.2d 103 (1983).

Finally, the burden of proof as to both issues is on the applicant. Ford, supra.

B. Reasons for Alteration

The third stated condition of the variance grant was that the garage "...be located on the site where indicated on the photographs introduced by the Applicant as A-4 so as to cause the least obstruction to the flow of floodwaters." This condition was imposed in order to comply with the Flood Plain Ordinance at §86-601D. The key premise of the Board's decision was that the location of the proposed garage would not alter the creek, stream flow or the natural conditions that contain floodwaters.

Accordingly, the Applicant must demonstrate to the Board that a change in the location of the garage will not alter the previous concerns of the Board and the Ordinance at §86-100, specifically "To permit only those uses in the floodplain that are compatible with preserving natural conditions and stream flow." Further, the Applicant must show that the new location for the proposed garage would either have minimal impact upon the stream and its natural drainage or none at all. If in fact the new location promotes those concepts and enhances the public interest the Board is likely to change the condition.

Alternatively, if the Applicant shows a subsequent substantial change in conditions incident to the land itself which rendered the condition inappropriate, he may succeed in changing the condition. Bonner, supra.

Here, the Applicant sought to demonstrate that the relocation of the garage promotes better flood water management, safety and enhancement of the public interest. The previous location, although manageable, revealed that access to the shared driveway servicing the Property and those upstream from it could be impaired. Further, Applicant asserted that

mature trees located to the west of the original garage placement would be adversely affected while the new location would not. In addition, the location adjacent to the existing attached garage rather than separate and away from the existing building could reduce flood water obstruction. Applicant offered as a bonus that the new location would eradicate invasive bamboo located on the property. Importantly, the change of location would not alter the design or diminish or reduce the construction standards of the garage required by the initial Application. The same conditions imposed in the September 8, 2016 decision would apply to the relocated garage. As such public safety would be at the very least the same as that which formed the basis for the variances on September 8, 2016 and at most, enhanced.

Finally Applicant provided testimony, corroborated by the Director of Community Development, that Tim Woodrow, the Township engineer, supported the change in location.² Accordingly, Applicant carried his burden of proof for a change of condition.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Applicant has met its burden of proof by demonstrating that the change in location of the garage will not alter the variance determinations of September 8, 2016.
3. Denial of the requested relief will impose an exceptional hardship on the Applicant.
4. The proposed use will not alter the essential character of the neighborhood in which the Property is located, and will not contravene the use of adjacent property or endanger public safety.

² In fact, the Director of Community Development stated that both he and Mr. Woodrow believed that the new location was less intrusive to flood waters and thus supported the change. The Applicant also provided a letter from Mr. Woodrow supportive of the new location.

5. Rigid compliance with the Ordinance in this case is unnecessary for preservation of the public interest sought to be protected by the Ordinance.

6. The requested relief is necessary to enable the Applicant's reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulation at issue.

7. The granting of the variance subject to the conditions imposed by Board herein and those provisions of the Ordinance unaffected by the variance will not increase flood heights or threaten public safety or expense.

8. Subject to the conditions set forth herein, the variance does not create nuisance, cause fraud on, or victimize the public, or conflict with any other applicable state or local ordinances or regulations.

DECISION

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

The Decision and Order of the Lower Providence Township Zoning Hearing Board dated September 8, 2016 granting variances from the use requirements of Lower Providence Township Zoning Floodplain Ordinance §86-401.A., the size requirements of §86-601.D.(1)(b) and the electrical requirements of §86-601.D.(1)(e) to permit the Applicant to construct a 797 square foot detached garage is modified to permit the construction of the garage as designated on Applicant's Exhibit "A-2" subject to the following conditions as provided by §86-505.B. to protect the public health, safety and welfare:

1. The building will not be used for human habitation purposes or for commercial purposes and shall be limited to the parking of vehicles, or to the storage of tools, material, and

equipment related to the principal use or activity on the property;

2. The Garage will have a low damage potential;

3. The Garage will be located on the site where indicated on the plans introduced by the Applicant as A-2 so as to cause the least obstruction to the flow of floodwaters;

4. Power lines, wiring, and outlets will be constructed, installed and elevated as presented by the Applicant as described in the Opinion to minimize the chance of impairment during a flood as well as the potential for damage, injury, fire or other hazard;

5. No permanently affixed utility equipment or appliances such as furnaces, heaters, washers, dryers, etc. shall be installed in or around the Garage;

6. No sanitary facilities shall be installed in or around the Garage;

7. The Garage shall be adequately anchored to prevent flotation, collapse or movement and shall be designed to automatically provide for the entry and exit of floodwater for the purpose of equalizing hydrostatic forces on the walls. Designs for meeting this requirement must either be certified by a licensed professional engineer or architect, or meet or exceed the following minimum criteria:

a. A minimum of two (2) openings having a net total area of not less than one (1) square inch for every one (1) square foot of enclosed space;

b. The bottom of all openings shall be no higher than one (1) foot above grade; and

c. Openings may be equipped with screens, louvers, etc., or other coverings or devices, provided that they permit the automatic entry and exit of floodwaters.

8. The following items installed below the RFE shall be of "marine," "water resistant" material to withstand inundation:

a. Plywood;

b. Walls and ceilings;

c. Windows, doors and other components to the Garage.

9. All wooden components (doors, trim, cabinets, etc.) installed at or below the RFE shall be finished with paints and other finishes, of the “marine” or “water-resistant” variety.

10. All paints and other finishes as well as adhesives used on components at or below the RFE shall of the “marine” or “water-resistant” variety.

11. Items permitted by the Ordinance to be stored in the Garage shall be at or above the RFE and/or flood proofed to the maximum extent possible.

12. Applicant shall construct the Garage in accordance with the application, plans and exhibits he submitted.

13. Applicant shall otherwise comply with the provisions of the Ordinance as well as any other applicable Lower Providence Township Ordinances.

14. Applicant shall obtain the necessary floodplain permit from the Lower Providence Township Zoning Officer/Director of Community Development before construction commences within the FCD.

Applicant is advised pursuant to § 86-505.C.(1) as follows:

a. The granting of the variance may result in increased premium rates for flood insurance; and

b. Such variances may increase the risks to life and property.

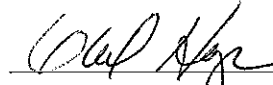
Dated: September 6, 2017


ORDER

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

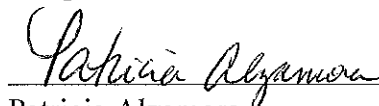
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

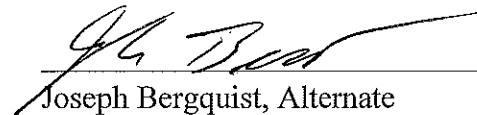

Kathie A. Eskie, Chairwoman


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.

EXHIBIT “A”

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-16-06	:	HEARING DATES:
		:	July 28, 2016 & August 25, 2016
		:	
APPLICATION OF:		:	
Louis Gambone		:	
		:	
		:	
PROPERTY:		:	
357 Level Road,		:	
Collegeville, PA 19426		:	
Parcel No. 43-00-07300-00-1		:	

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

On May 19, 2016 applicant, Louis Gambone (hereinafter "Applicant") filed an application for a variance from the newly instituted Lower Providence Township Floodplain Ordinance §86-100 et seq. (the "Ordinance") under §86-500. Thereafter, Applicant, after waiving the time constraints of the Municipalities Planning Code, requested that the hearing on his application scheduled for June 23, 2016 be continued until July 28, 2016 in order for him to make revisions to his application. On June 10, 2016, Applicant filed his revised variance application. The original application and revised application are collectively referred to hereinafter as the "Application."

Applicant requested a variance from Ordinance §86-401.A. regarding building in the Floodplain Conservation District ("FCD"), §86-600.D.(1)(a) (sic), (Applicant's intended reference was to §86-601.D.(1)(b)), regarding floor area not to exceed 100 square feet and §86-600.D.(1)(e) (sic), (Applicant's intended reference was to §86-601.D.(e)), regarding elevated power lines (the "Application").

The Application was properly advertised, and public hearings were held before the Lower Providence Township Zoning Hearing Board ("Board") on July 28, 2016 and August

25, 2016 at the Lower Providence Township Building. Chairwoman Joyce Cluley, members Robert Hardt, Gail Hager, Joseph Pucci, Patricia Alzamora and Joseph Bergquist of the Zoning Hearing Board were present at the July 28, 2016 hearing while Chairwoman Joyce Cluley, Vice Chair Kathy Eskie and members Robert Hardt, Gail Hager and Patricia Alzamora were present at the August 25, 2016 hearing. Also present at both hearings were, Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement and Paula Meszaros, the Court Reporter. Keith B. McLennan, Esquire, the Solicitor was present at the July 28, 2016 hearing and John A. Rule, Esquire substituted for Mr. McLennan at the August 25, 2016 hearing.

FINDINGS OF FACT

1. The Applicant is Louis Gambone.
2. The Applicant is the owner of the subject property located at 357 Level Road, Collegeville, Lower Providence Township, PA 19426, parcel number 43-00-07300-00-1 comprised of approximately 6.21 acres (hereinafter the "Property").
3. The Property partially traverses the Perkiomen Creek to the west, is adjacent to a steep rock face up to Level Road to the East a shared driveway to the north and the new Arcola Road Bridge to the South.
4. Much of the parcel that makes up the Property is underwater with approximately 30,000 square feet of the Property as buildable land.
5. The applicable zoning district is R-2 Residential within the FCD.
6. The Applicant was not represented by legal counsel however, SuSanne M. Creveling, P.E. president of HT Engineering, Inc. testified on his behalf as did the Applicant.
7. The Property is unique having initially been built circa 1730 as a water powered

grist mill transecting the Perkiomen Creek. Historically grist mills operated with farmers transporting their grain to the mill to be ground into meal or flour to make bread. The proprietor, known as a “miller,” received, a percentage of the product in lieu of wages as a “miller’s toll” for his/her work grinding the grain.

8. The Applicant acquired the 2 unit residential dwelling outright on March 2, 2012 and has performed extensive and impressive renovations to the grounds and structure.

9. The Federal Emergency Management Agency (“FEMA”) has mapped the Property’s Base Flood Elevation (“BFE”) (commonly known as the 100 year flood elevation) at approximately 104.5.

10. The proposed accessory structure, a detached garage (“Garage”) will have an elevation of approximately 92 be an open concept to allow for the free flow of floodwaters, be 35’ x 25’ in size with 797 square feet of floor space and have a second floor storage area.

11. The openings in the structure to allow for the free flow of floodwaters required by the Ordinance will exceed those required.

12. A standard size parking space is 9’ x 18’ or 162 square feet.

13. The Garage cannot be constructed within the 100 square foot floor area limit of §86-601.D.(1)(b) of the Ordinance.

14. The Regulatory Flood Elevation (“RFE”) required by the Ordinance as applicable to the Property is the Base Flood Elevation (“BFE”) plus 1.5 feet or in this case +/- 14.5 feet above the ground floor elevation of the Garage.

15. The Ordinance at §86-601.D.(1)(e) requires all power lines, wiring and outlets to be elevated to the RFE level.

16. Power lines, wiring and outlets at 14.5’ above the ground floor elevation of the

Garage would render the electrical system useless and, as a result the flood alarm and automatic door opening to permit free flow of floodwater.

17. Applicant agreed that any electrical outlets would be of the ground-fault circuit interrupter variety ("GFCI") and elevated at least five feet (5') above the floor of the Garage.

18. The power lines will originate at the existing dwelling on the Property and be installed underground to the Garage, travel up to into the 2nd floor storage area of the Garage and then down to the outlets and lighting fixtures.

19. The proposed location of the Garage is the only location where it can be placed due to the rock wall on the east side of the property at Level Road, the shared driveway to the north and the Perkiomen Creek to the west.

20. Applicant agreed that the Garage will be limited to the parking of non-commercial vehicles, will not be used as a commercial enterprise and will not be used for human habitation.

21. Applicant further agreed that there will be no storage of explosive, toxic or other materials dangerous to human life in or around the Garage.

22. Applicant has otherwise agreed to comply with all other sections of the Ordinance.

23. The Garage would be an open form of construction to facilitate floodwater flow as required by the Ordinance, in particular Chapter 600. The Garage design would provide for the free flow of floodwaters through the structure during a flood event. The vehicles would be evacuated out of the garage in the event of a pending storm event.

24. The Garage will be firmly anchored in reinforced concrete as per the drawings at Exhibit A-3.

25. The Garage is to be placed, designed and built without impacting Perkiomen

Creek or its flow and will provide for sufficient water flow in the event of a flood.

26. The Garage will not increase flood heights, cause additional threats to public safety, or extraordinary public expense.

27. The Garage will be constructed of materials consistent with the existing home and of the “marine” or “water resistant variety” in accordance with the Ordinance.

28. Granting the requested variance will not alter the essential character of the neighborhood in which the Property is located.

29. Absent the requested relief, the Applicant will suffer an exceptional hardship not created by the Applicant. Rather, it results from the unique physical characteristics of the Property including the unique topography of the Property and the location of the existing non-conforming dwelling dating from circa the 18th century.

30. The following exhibits were made of record:

A-1 The original application filed on May 19, 2016 and the revised application dated June 10, 2016.

A-2 Site plan dated May 7, 2016.

A-3 Drawings for the proposed garage prepared by Hi-Tech Construction, Company.

A-4 Series of 8 photographs of the Property including an indication of where the Garage will be constructed.

B-1 Application Advertisement.

B-2 Proof of Publication of the Advertisement.

31. There was no adverse public comment regarding this application.

DISCUSSION

I. 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 use variance.

II. Variance Legal Standard.

Generally, a variance requires the applicant to show that unnecessary hardship¹ will

¹ When dealing with floodplains the variance standard utilized in non-floodplain related cases changes from an “undue hardship” standard to an “exceptional hardship” standard. The “exceptional hardship” standard is defined by FEMA in 44 CFR Part 60.6(a) as unusual and specific to the property involved and not the personal circumstances of the applicant. Inconvenience to the applicant, aesthetic considerations, physical handicaps, personal preferences, the disapproval of one’s neighbors, or homeowners association restrictions do not qualify as exceptional hardships. Further, a hardship does not lie where alternative means of construction exist that are more expensive or complicated than building the structure with a variance. See also, FEMA, Floodplain Management Bulletin: Variances and the National Flood Insurance Program, FEMA P-993 July 2014.

result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg. According to §86-505 there is good and sufficient cause to grant a variance when the following criteria are satisfied:

(a) There are unique physical 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 this Chapter (*referring to the Ordinance*) in the neighborhood or district in which the property is located.

(b) 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 this Chapter and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(c) That such unnecessary hardship has not been created by the applicant.

(d) That the variance, if authorized, will not alter the essential character of the neighborhood or zoning 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.

(e) 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.

Further, the Ordinance requires the Board to find:

(1) The failure to grant the variance would result in exceptional hardship to the applicant.

(2) That the granting of the variance will:

(a) Neither result in a prohibited increase in flood heights, additional threats to public safety, or extraordinary public expense;

(b) Nor create nuisance, cause fraud on, or victimize the public, or conflict with any other applicable state or local ordinances or regulations.

III. Use Variance Legal Standard.

In the context of use variances, “unnecessary hardship” is established by evidence that: (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance.” Marshall v. City of Philadelphia, 626 Pa. 385, 395, 97 A.3d 323, 329 (2014) (citing Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998) and 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 establishing hardship, an applicant for a variance is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose, though there must be more than mere economic hardship or increase in property value. Id.

IV. Facts Applied to the Legal Standard.

A. The Purpose of the Floodplain Ordinance.

The variance requested here is to permit the continued use of the property as a residence with the addition of a detached garage. Clearly the residential use is permitted in the R-2 zoning district, however, the Ordinance restricts new construction in the FCD. The intention of the Ordinance is manifest, §86-100 labeled “Intent” states:

The intent of this chapter is to:

A. Protect areas of the floodplain necessary to contain floodwaters.

- B. To permit only those uses in the floodplain that are compatible with preserving natural conditions and stream flow.
- C. Promote the general health, welfare, and safety of the community by providing development in areas prone to flooding.
- D. Encourage the utilization of appropriate construction practices in order to prevent or minimize flood damage in the future.
- E. Minimize danger to public-health by protecting water supply natural drainage.
- F. Reduce financial burdens imposed on the community, its governmental units, and its residents, by preventing excessive development in areas subject to flooding.
- G. Comply with the federal and state floodplain management requirements.

Applying these intentions to the current set of facts reveals that the Applicant has demonstrated the existence of an exceptional hardship that is not self-created. Applicant seeks to build a detached garage for the parking of non-commercial, personal vehicles consistent with residential use. The location of the Garage will not alter the creek, stream flow or the natural conditions that contain floodwaters. Further, the Garage is designed to withstand any 100 year flood with little or no impact upon general health, welfare, and safety of the community. The Applicant has demonstrated his meticulous construction practices already utilized to improve the existing Property. He has agreed he will institute those same practices in the design and construction of the Garage to minimize flood damage should a flood occur. What is more, the Garage will have minimal impact upon the water supply and its natural drainage. The construction of a Garage on a small section of ground that is otherwise useless adjacent to the house and creek, can hardly be characterized as excessive development that would impose a financial burden upon the community, governmental units or the residents of Lower Providence Township. On the contrary, due to Applicant's improvement of the Property to date, it is

evident that he has only developed the property with full recognition and sensitivity to the creek, floodplain and uniqueness of the Property enhancing the Township and its finances by making the parcel more valuable.

B. The Hardship.

1. *Prohibited Uses Under §86-401.A.* This section of the Ordinance states that no new construction, alteration or improvement of buildings and any other type of permanent structure are permitted in the floodway. As noted above, §86-505 of the Ordinance permits the Board to grant a variance from such restrictions provided the Applicant can establish “sufficient cause” for same. Applicant has demonstrated such sufficient cause primarily due to the unique physical characteristics of the Property. Most of the Property to the west including a mill race channels water downstream. There is a shared driveway to the north, a rock wall up to Level Road in the east and the new Arcola Road bridge to the south. The only buildable portion unhindered by streamflow or access road is a small portion of open ground to the south. Fortunately, there is sufficient ground away from Level and Arcola Roads and the new bridge to locate the Garage such that the sight lines from the roadways and bridge are not impacted. This unique topography of the lot and the limited amount of buildable ground on the parcel where a grist mill from the 18th century was converted into a residence demonstrate that the physical features of the property as restricted by the Ordinance are such that its use is impaired. This condition is natural, it was not created by the Applicant, in fact, the Applicant has to date sought to improve his Property so as not to alter the natural conditions or stream flow.

Further, if the Applicant were to expend excessive resources in an effort to channel the flow of floodwaters in an effort to negate flooding of the ground where he intends to construct the Garage, he would violate the intention of the Ordinance by altering the natural

conditions and stream flow. Accordingly, without a variance, the sole remaining buildable parcel of dry ground becomes valueless. Thus the requested variance is necessary to alleviate the exceptional hardship the unique physical circumstances and characteristics of the Property cause.

Additionally, the Garage permitted by variance is consistent with the existing dwelling on the Property and with the neighborhood generally. Its unique construction to allow for the free flow of floodwaters will not adversely affect the floodplain. Further, the Garage will not impair the appropriate use or development of any adjacent properties nor be detrimental to the public welfare.

Finally, the requested use variance represents the minimum variance that will afford relief and the least modification possible of the Ordinance.

The Board finds that subject to the conditions set forth in this Opinion, the Applicant has presented sufficient evidence to satisfy the §86-505 test for a use variance under from §86-401.A. of the Ordinance.

2. *Size of Accessory Structures - §86-601.D.(1)(b).* This section of the Ordinance states that the floor area of the Garage cannot exceed 100 square feet. Applying the same variance test embodied in §86-505 to this section warrants the same result.

Applicant seeks to construct a non-commercial garage. As testified by the Applicant's engineer, a typical parking space is at least 168 square feet. Clearly, the 100 square foot requirement of the Ordinance precludes a garage presumably due to the avowed intention of the Ordinance. As noted in subsections IV.A. and B. above the Applicant's construction of the Garage will not be contrary to those intentions. Further, considering the nature of this parcel and the open form of construction of the Garage to allow sufficient flow of floodwaters, the 100 foot restriction is unduly restrictive. With the conditions imposed by the Board herein, the

spirit of the Ordinance can be maintained along with the expansion of the floor area sought by the Applicant. Any other result would render the only remaining buildable portion of the Property useless. The requested variance is warranted.

3. *Power Line Elevation Under §86-601.D.(1)(e).* Finally, the Applicant has requested a variance from the requirement that all power lines, wiring and outlets be elevated to the RFE of 14.5' above the ground floor elevation of the Garage. The policy rationale for such a rule is manifest however, electrical outlets 14.5 feet in the air are not just impractical, they are useless. The Applicant has agreed to bring the electric to the Garage underground and then continue the main line to the upper section of the structure then to pull down and/or elevated outlets at least five feet (5') above the ground floor which shall be of the GFCI variety which will trip at the first introduction of water similar to what is already installed in the residence on the Property. In addition, the Applicant shall connect the electric systems in the Garage to a power generation back up system to insure that the doorways that are to open to permit the free flow of flood waters will function in the event of a power outage. This plan reasonably addresses the policy behind the rule without in any way affecting the flood plain, altering the character of the neighborhood, impair the development of adjacent property nor detrimental to public welfare and represents the least modification to the rule.

Accordingly, the Board concludes that the test for a variance embodied in §86-505 has been met subject to those conditions specified in this Opinion.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an exceptional hardship on the Applicant.

3. The proposed use will not alter the essential character of the neighborhood in which the Property is located, and will not contravene the use of adjacent property or endanger public safety.

4. Rigid compliance with the Ordinance in this case is unnecessary for preservation of the public interest sought to be protected by the Ordinance.

5. The requested relief is necessary to enable the Applicant's reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulation at issue.

6. The granting of the variance subject to the conditions imposed by Board herein and those provisions of the Ordinance unaffected by the variance will not increase flood heights or threaten public safety or expense.

7. Nor will the variance subject to the conditions set forth in this Opinion create nuisance, cause fraud on, or victimize the public, or conflict with any other applicable state or local ordinances or regulations.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 4-0 vote with one abstention, is as follows:

The Application for variances from the use requirements of Lower Providence Township Zoning Floodplain Ordinance § 86-401(A), the size requirements of §86-601.D.(1)(b) and the electrical requirements of 86-601.D.(e) are GRANTED in order to permit the Applicant to construct a 797 square foot detached garage subject to the following conditions as provided by §86-505.B. to protect the public health, safety and welfare:

1. The building will not be used for human habitation purposes or for commercial purposes and shall be limited to the parking of vehicles, or to the storage of tools, material, and equipment related to the principal use or activity on the property;

2. The Garage will have a low damage potential;

3. The Garage will be located on the site where indicated on the photographs introduced by the Applicant as A-4 so as to cause the least obstruction to the flow of floodwaters;

4. Power lines, wiring, and outlets will be constructed, installed and elevated as presented by the Applicant as described in the Opinion to minimize the chance of impairment during a flood as well as the potential for damage, injury, fire or other hazard;

5. No permanently affixed utility equipment or appliances such as furnaces, heaters, washers, dryers, etc. shall be installed in or around the Garage;

6. No sanitary facilities shall be installed in or around the Garage;

7. The Garage shall be adequately anchored to prevent flotation, collapse or movement and shall be designed to automatically provide for the entry and exit of floodwater for the purpose of equalizing hydrostatic forces on the walls. Designs for meeting this requirement must either be certified by a licensed professional engineer or architect, or meet or exceed the following minimum criteria:

a. A minimum of two (2) openings having a net total area of not less than one (1) square inch for every one (1) square foot of enclosed space;

b. The bottom of all openings shall be no higher than one (1) foot above grade; and

c. Openings may be equipped with screens, louvers, etc., or other coverings or devices, provided that they permit the automatic entry and exit of floodwaters.

8. The following items installed below the RFE shall be of "marine," "water

resistant” material to withstand inundation:

- a. Plywood;
- b. Walls and ceilings;
- c. Windows, doors and other components to the Garage.

9. All wooden components (doors, trim, cabinets, etc.) installed at or below the RFE shall be finished with paints and other finishes, of the “marine” or “water-resistant” variety.

10. All paints and other finishes as well as adhesives used on components at or below the RFE shall of the “marine” or “water-resistant” variety.

11. Items permitted by the Ordinance to be stored in the Garage shall be at or above the RFE and/or flood proofed to the maximum extent possible.

12. Applicant shall construct the Garage in accordance with the application, plans and exhibits he submitted.

13. Applicant shall otherwise comply with the provisions of the Ordinance as well as any other applicable Lower Providence Township Ordinances.

14. Applicant shall obtain the necessary floodplain permit from the Lower Providence Township Zoning Officer/Director of Community Development before construction commences within the FCD.

Applicant is advised pursuant to § 86-505.C.(1) as follows:

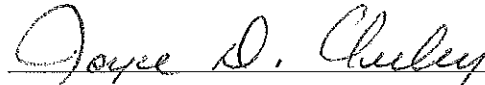
- a. The granting of the variance may result in increased premium rates for flood insurance; and
- b. Such variances may increase the risks to life and property.

Dated: September 8, 2016

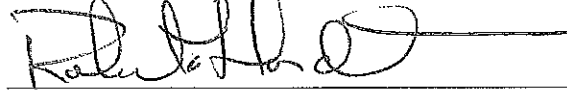
ORDER

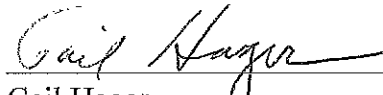
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD



Joyce D. Cluley, Chairwoman

ABSTAINED
Kathie A. Eskie, Vice Chairwoman


Robert G. Hardt


Gail Hager

Joseph Pucci


Patricia Alzamora, Alternate

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.