

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-18-04	:	HEARING DATE: April 26, 2018
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	:	
APPLICATION OF:	:	
MICHAEL W. NYCE	:	
	:	
PROPERTY:	:	
101 W. Mt. Kirk Avenue	:	
Lower Providence Township	:	
Norristown, PA 19403	:	
Parcel No. 43-00-09019-001	:	

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

The applicant, Michael W. Nyce (hereinafter "Applicant") filed an application on March 12, 2018 requesting a variance from the twenty (20) foot side yard setback and fifty (50) foot front yard setback requirements of §143-37.A.(2) (the "Application"). Applicant further sought a variance from the corner lot yard requirements of §143-16 and of the Lower Providence Township Zoning Ordinance ("Ordinance") in connection with demolition of his existing home and construction of a new home on his property located at 101 W. Mt. Kirk Avenue, Lower Providence Township, Norristown, PA 19403, Parcel No. 43-00-09019-001 (the "Property"). The Application was properly advertised and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the "Board") on April 26, 2018 at the Lower Providence Township Building. Chairwoman, Kathy Eskie, Vice Chair Gail Hager and members Joseph Pucci, Patricia Alzamora and alternates Robert Hardt and Jill Zimmerman were present. 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 W. Nyce, although married, the sole title holder of the Property.
2. The applicable zoning district is an R-2, residential district.
3. Applicant was represented at the hearing by Michael E. Furey, Esquire, 1043 S. Park Avenue, Audubon, PA 19403.
4. Applicant and Nicholas Pugliese of Pugliese Brothers, Inc. testified in support of the Application.
5. The house currently on the Property was constructed in 1954, prior to the implementation of the Ordinance in 1955.
6. But for a short period of time over 3 years ago, the Applicant has resided in the home since 1977.
7. The Property is located at the corner of Mt. Kirk Avenue and Marilyn Avenue in Lower Providence Township and, as a result, has 2 front yards to contend with under §143-16 of the Ordinance.
8. As constructed, the house is non-conforming with a 17.6 foot side yard setback where twenty (20) feet is required and a forty (40) foot setback on Marilyn Avenue where a fifty (50) foot "front yard" setback is required under §143-37.A.(2) of the Ordinance.
9. Applicant intends to remove the existing home and construct a new modern home with a first floor bath and bedroom to aid Applicant and his wife Candy as they plan for retirement there.
10. The neighborhood has experienced several similar removals of older homes replaced by modern homes similar to what Applicant proposes.

11. The Applicant seeks to construct a new home in compliance with the fifty (50) foot front yard setback from Mt. Kirk Avenue and the sixty (60) foot rear yard setback.

12. The proposed new home will align closely with the existing home's non-conforming "footprint," will maintain the existing non-conforming 17.6 foot side yard setback while varying from the existing Marilyn Avenue front yard setback non-conformity by eight (8) inches to 39.4 feet instead of the required fifty (50) foot setback.

13. The Application for a variance was made to accommodate the unusual nature of the lot and to, in effect, continue the existing non-conformity of the home built before the current setback requirements existed.

14. There was no adverse public comment regarding this application only supportive comment was introduced.

15. Applicant obtained support of nine (9) neighbors along Mt. Kirk and Marilyn Avenues for their variances.

16. The following exhibits were marked at the hearing:

A-1 Application dated March 12, 2018;

A-2 Deeds dated January 4, 1977 and one with a final signature on May 5, 1981;

A-3 Property Plan of Shewman Surveying, Kimberton, PA dated February 8, 2018;

A-4 Two (2) photographs of the existing home on the Property;

A-5 Two (2) photographs of the conceptual new home;

A-6 Three (3) photographs of homes in the neighborhood;

A-7 Consents signed by Applicant's neighbors in support of his variance requests with a tax map indicating where those neighbors reside.

B-1 Advertisement;

B-2 Proof of Publication.

DISCUSSION

I. Statement of the Case.

The Applicant has requested a variance from the front and side yard setback requirements of §143-37.A.(2) and §143-16 of the Ordinance in connection with the construction of a new home on a non-conforming lot. The relief sought is dimensional in nature requesting the allowance of:

- A front yard setback along Marilyn Avenue, one (1) of two (2) front yards under §143-16 of the Ordinance of 39.4 feet¹ from the requirements of a fifty (50) foot setback; and
- A side yard setback of 17.6 feet from the requirements of a twenty (20) foot setback.²

Further, inasmuch as the Property is already non-confirming the issue arises whether Applicant requires a special exception under §143-145 of the Ordinance in order for the Applicant to demolish the existing non-conforming house and construct a new single-family home that would likewise be non-conforming.

The aforesaid Sections of the Ordinance state in pertinent part:

§ 143-16 Yard requirements of corner lots.

On all corner lots, the minimum setback for any facade of a building facing the street shall be equal to the required front yard setback.

§ 143-37 Area, setback, bulk, height and parking requirements.

A. Site area or building lot area.

(2) The minimum building lot size, width and area requirements shall be determined by availability of public water and sanitary sewer service, as follows:

¹ The existing home is non-conforming with a forty (40) foot front yard setback along Marilyn Avenue.

² The existing home already has a seventeen feet six inch (17'6") side yard setback.

Requirement	No Public Service	Either Water or Sanitary Sewer Service Only	Both Water and Sanitary Sewer Service
Lot area, minimum	40,000 square feet	30,000 square feet	25,000 square feet
Lot width at building line	175 feet	150 feet	100 feet
Principal and accessory buildings over 250 square feet:			
Front yard	50 feet	50 feet	50 feet
Side yard	30 feet	25 feet	20 feet
Rear yard	60 feet	60 feet	60 feet
Maximum total building coverage	20%	20%	20%
Maximum total impervious coverage	35%	35%	35%

Under §143-168.D.(4) of the Ordinance the Applicant bears the burden of proof of persuading the Board of the necessity of the requested variances and to satisfy the legal standards articulated below.

II. Variance Legal Standard.

Differing 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)). The quantum of proof required to establish unnecessary hardship in the case of a dimensional variance is, however, lesser than when a use variance is sought. Id. at 258-59.

When dealing with a dimensional variance the doctrine of a *de minimis* variance may apply. The *de minimis* doctrine is an extremely narrow exception to the heavy burden which a party seeking a variance must normally bear and is applied where the violation of an ordinance

is a relatively minor one and where rigid compliance is not necessary to protect the ordinance's public policy concerns. Hawk v. City of Pittsburgh Zoning Bd. of Adjustment, 38 A.3d 1061 (Pa. Commw. Ct. 2012). Over time Court's have held that de minimis variances may be authorized if they "...will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and so that the spirit of the ordinance shall be observed and substantial justice done." Pyzdrowski v. Bd. of Adjustment of City of Pittsburgh, 437 Pa. 481, 491, 263 A.2d 426, 432 (1970) citing Appeal of Crawford, 358 Pa. 636, 57 A.2d 862 (1948).

To obtain de minimis variance an applicant must prove that 'strict compliance (with the ordinance) is not necessary to protect the public interest.' *Id.*" Pugliese v. Zoning Hearing Bd. of Bethlehem Tp., 2015 WL 6473668 (Pa. Commw. Ct. 2015). There is no general right to a de minimis zoning variance, and the decision of whether to grant a de minimis variance is left to the discretion of the local zoning board. 200 W. Montgomery Ave. Ardmore, LLC v. Zoning Hearing Bd. of Lower Merion Tp., 985 A.2d 996 (Pa. Commw. Ct. 2009); Hawk v. City of Pittsburgh Zoning Bd. of Adjustment, 38 A.3d 1061 (Pa. Commw. Ct. 2012).

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). Pursuant to the Municipalities Planning Code the following must be found in order for the Board to grant the requested variance 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. 53 P.S. § 10910.2.

III. Facts Applied to the Legal Standard.

Not only is the Property already non-conforming with the side and front yard setback requirements of the Ordinance having been constructed in 1954, the year before a zoning ordinance was adopted by the Township, the orientation of the home on the Property is such that under § 143-16 its south east "front" faces Mt. Kirk Avenue and its north east "front" faces Marilyn Avenue. That is unique, to say the least. The Applicants merely seek to build a new home on the existing non-conforming lot, consistent with the existing non-conforming side yard setback of 17.6 feet and expand the existing Marilyn Avenue non-conformity by eight (8)

inches from forty (40) feet to 39.4 feet.

There is no other practical location on the lot that would support the construction of a new home other than where proposed by the Applicant. Said location however, would further erode the required fifty (50) foot front yard setback on the north east side of the home facing Marilyn Avenue from the existing forty (40) foot non-conforming front yard setback. Denial of the variances would deny the Applicant the ability to construct the home on what can only be seen as an undersized, unique lot thus imposing an unnecessary hardship upon the Applicant.

Presumably, the rationale for the front yard setback of fifty (50) feet was to provide privacy to the occupants and a buffer between the residence and the flow of traffic on abutting roads. In this case, the Applicant is burdened with two (2) front yards due to the home occupying a corner lot. Ordinarily, most homes have one (1) front yard, two (2) side yards and a rear yard.³

Mr. Pugliese testified that the width of the proposed home was forty-three (43) feet, only eight (8) inches wider than the existing home, hardly mansion size. Unfortunately, that width gets the home eight (8) inches closer to Marilyn Avenue, challenging the Board to determine whether the rationale for the fifty (50) foot front yard setback has been impaired. To aid the Board in its analysis, Mr. Pugliese also stated, there was no other placement of the new home on the lot to accommodate the fifty (50) foot front yard setback requirement and still have a useable home.⁴ That fact coupled with the de minimis nature of the reduction in the setback on a second front yard (that is in the nature of a side yard) will not negatively impact the neighborhood nor impact future development of adjoining property nor be contrary to the

³ Applicant's proposed new home will fully comply with the required sixty (60) foot rear yard setback under §143-37.A.(2).

⁴ In fact, any effort to comply with the existing front yard setback along Marilyn Avenue would render the kitchen of the new home to be only eight (8) feet rather than twelve (12) feet.

public interest.⁵ Further, adherence to the 1954 non-conforming 17.6 foot side yard setback in light of the foregoing is eminently reasonable and cries out for the grant of the requested variances.

Applicant has proposed a variance to demolish his existing non-conforming home and construct a new similarly non-conforming home eight (8) inches wider that attempts to: (i) address the unique nature of the Property, (ii) limit encroachment into the required setbacks, (iii) is the minimum variance that will afford the required relief, (iv) will not alter the essential character of the neighborhood, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, and (v) has not been created by the Applicant.

Accordingly, Applicant has carried his burden of proof warranting the grant of the dimensional variances from the front and side yard setback requirements of the Ordinance.

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 unnecessary hardship on the Applicant.
3. The hardship is not self-imposed, and is due to the unique physical circumstances of the Property.
5. 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 As noted by Applicant's counsel (which Applicant ratified) the neighborhood is evolving with several other owners doing the same thing Applicant proposes.

6. The proposed new home with a 17.6 foot side yard setback and 39.4 foot front yard setback along Marilyn Avenue will not alter the essential character of the neighborhood.

DECISION

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

1. The Application for a Variance from Section 143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit front and side yard setbacks of 39.4 feet and 17.6 feet respectively for a new home to be constructed on this corner lot in the R2 Residential District is GRANTED.

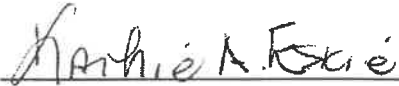
2. The application for a variance from §143-16 of the Lower Providence Township Zoning Ordinance to permit a front yard setback along Marilyn Avenue, of 39.4 feet for the construction of a new home is GRANTED.


Dated: June 7, 2018


ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman

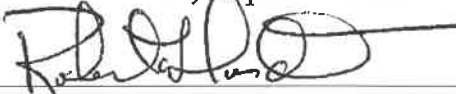

Gail Hager, Vice Chairwoman


Joseph Pucci


Patricia Alzamora

George J. Ozorowski, Esquire

Jill Zimmerman, Esquire Alternate


Robert G. Hardt, 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.