

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-18-17	:	HEARING DATE:
	:	January 24, 2019
	:	
APPLICATION OF:	:	
Adegbemiga Yori Adegunwa	:	
	:	
	:	
PROPERTY:	:	
3444, 3446 & 3450 Germantown Pike	:	
Collegeville, PA 19426	:	
Parcel Nos. 43-00-05155-00-4	:	
43-00-05152-00-7	:	
43-00-05158-00-1	:	

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

On December 17, 2018 applicant, Adegbemiga Yori Adegunwa (hereinafter "Applicant") filed an application for a variance from §143-112 of the Lower Providence Township Zoning Ordinance (the "Ordinance") to permit impervious surface coverage of 64% where 25% is permitted.

The Application was properly advertised, and a public hearing was held at the Lower Providence Township Building before the Lower Providence Township Zoning Hearing Board ("Board") on January 24, 2019 Chairwoman Kathie Eskie, George Ozorowski, Vice Chair and members Gail Hager, Joseph Pucci, Patricia Alzamora were present as were alternates, Robert Hardt and Christopher Gerdes. 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 Adegbemiga Yori Adegunwa an adult individual who resides at 1723 North Hills Drive, Norristown, PA 17036.

2. The Applicant has an equitable interest in the subject property located at 3444, 3446 & 3450 Germantown Pike, Collegeville, Lower Providence Township, PA 19426 comprised 4.19 acres to the ultimate right of way (net) down from 4.3 acres in the previous application that was heard by the Board on November 30, 2017 (hereinafter the "Property").

3. The Property is commonly referred to as the Bridal Town retail complex located near the border with Worcester Township to the north.

4. The applicable zoning district is the Highway Commercial District ("HC") which, due to its size is considered a Class 3.

5. Applicant was represented at the hearing by Eric Frey, Esquire, 1800 Pennbrook Parkway, Suite 200, Lansdale, PA 19446.

6. The Applicant testified in support of the Application.

7. Applicant is the proprietor of IRoy Sports located further east on Germantown Pike in East Norriton Township who intends to construct a 47,100 square foot fitness center with indoor tennis courts and 189 parking spaces on the Property.

8. Applicant appeared before the Board on November 30, 2017 and in a formal Decision and Order dated January 12, 2018, was granted a series of variances including from the impervious coverage requirements of the Ordinance, in order to construct a 39,600 square foot fitness center with a proposal to provide 120 parking spaces both in the front of the proposed building as well as the east side.

9. Applicant has gone through the land development process with the Township including work with the Township's traffic engineer resulting in the proposed change to lot and building size and number of parking spaces.

10. In order to avoid any traffic back-ups on Germantown Pike the number of parking

spaces has increased from 120 to 189 and their location has moved from the front and east side of the building to the east side and rear.

11. Due to the necessary size of the building and increased parking requirements, the proposed fitness center to be constructed on the Property will create impervious coverage of 64% rather than the previously approved 52% while the Ordinance allows for a maximum of 25%.

12. The length of the proposed building previously approved by the Board at 330 feet will not change.

13. Those findings of fact established in the Board's January 12, 2018 Decision and Order regarding the Property that are not in conflict with those noted herein are incorporated by reference.

14. Applicant has otherwise agreed to comply with all of the conditions of the Board's January 12, 2018 Decision and Order not in conflict with the decision regarding the Application in this case.

15. The requested variance and resulting fitness center will not alter the essential character of the neighborhood in which the Property is located.

16. There was no adverse public comment to the Application.

17. The following exhibits were made of record:

A-1 Application filed on December 17, 2018;

A-2 Concept Plan for the Property from Ludgate Engineering dated October 24, 2017;

A-3 Site/Record Plan and coversheet for the Property prepared by Civil Engineering Consultants dated December 18, 2018.

B-1 Certificate of Posting of Notice of Public Hearing at 3444, 3446 & 3450

Germantown Pike on January 11, 2019.

B-2 Certificate of Notification of property owners within 500 feet of the Property on January 9, 2019 with the notice;

B-3 Proof of Publication of the Advertisement.

DISCUSSION

I. Statement of the Case

The Applicant is party to an agreement of sale to purchase 3444, 3446 & 3450 Germantown Pike, Collegeville, Lower Providence Township, PA 19426 commonly known as the Bridal Town complex to construct a fitness center and tennis courts on 4.19 (net) acres of ground. The Property is bordered on the north by Germantown Pike, the west by Sign Effects, a commercial enterprise in the HC district and vacant land in the R-1 district to the south and east. No matter how he configures the proposed building, due to the reduction in the lot size, building size and parking requirements the Applicant's previous variance from the impervious coverage requirements of Section 143-112 of the Ordinance is needed as more fully stated in previously in this Opinion, Decision and Order. The relief sought is dimensional in nature.

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 variances that are of the “dimensional” variety.

B. The Five Part Variance Test. Generally, to obtain a variance the applicant must show that unnecessary hardship will result if a variance is denied and that the proposed variance will not be contrary to public interest. Hertzberg. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

A. Variance. The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship upon the applicant. The Board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical 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) 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 the Zoning Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

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

(4) That 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) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.

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.*

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.

What is more, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicant's burden of proof and the standards to meet that burden, as follows:

D. 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.

E. 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 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.

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

III. Facts Applied to the Legal Standard.

When adopting Article XVI of the Ordinance the Supervisors articulated the following public policy for the HC district:

ARTICLE XVI HC Highway Commercial District

143-104. Legislative intent.

It is the intent of the HC Highway Commercial District to provide regulations for continuing commercial use opportunities in areas of existing commercial development. Specifically, it is the intent of the district to:

A. Relate specific types of uses to appropriate minimum lot size is to ensure adequate land

use area relative to intensity of use.

- B. Minimize the potential for increased traffic congestion, overcrowding of land, noise, glare and pollution resulting from commercial development.
- C. Discourage any use which would interfere with the use of the district as a shopping and service center for surrounding residential areas.
- D. Ensure that the character of adjacent and nearby neighborhoods is protected by design controls.
- E. Effectively regulate the establishment and maintenance of businesses requiring outdoor storage of vehicles, equipment or merchandise.

As noted in the Board's January 12, 2018 Opinion, Decision and Order, the Applicant's proposed use is permitted in the HC zoning district and would be a welcome addition to a section of the Township that appears to have been neglected for years. Here in what amounts to a request to amend the impervious coverage variance previously granted much of the dimensional variance analysis has already occurred. Nothing has changed from the January 12, 2018 Opinion, Decision and Order other than as a result of the Applicant's attempt to comply with the Township's Subdivision and Land Development Ordinance ("SALDO") the Township has sought to increase the number of parking spaces required for the Property to protect the public safety by avoiding traffic back-ups on Germantown Pike as patrons enter and exit the proposed fitness facility.¹ In order to accommodate the 69 additional parking spaces required there is no practical way for the Applicant to combine these 3 unoccupied and unproductive parcels and comply with the impervious coverage requirements of the Ordinance as varied by the Board on January 12, 2018.

Considering these changed facts the Applicant has demonstrated the existence of a

¹ Applicant's increased building size contributes to the increase in impervious coverage as well, however not as significantly as the change to the parking.

hardship that is not self-created. Applicant seeks to improve a section of the Township that needs improvement. Applicant's willingness to comply with the Township's parking preferences to enhance public safety while providing a new, first rate fitness center and tennis courts to a growing population without increased traffic congestion, should be the goal of every applicant who comes before the Board.

Applicant cannot meet the 189 parking space requirement without increasing the impervious coverage by 12%. Further, after more extensive work was performed through the land development process, the Property lot size has decreased from 4.3 to 4.19 acres. Nevertheless, the same limitations that existed at the November 2018 hearing remain. No matter how large they are or where they are placed the new 189 parking space requirement will violate the previous varied impervious surface coverage of §143-112 Class 3 - HC requirements of 25%. The parking requirements make it impossible for Applicant to meet the 52% impervious coverage variance.

Fortunately, the Applicant has agreed to:

1. The Township's plan for the parking but can only do so if the previous variance from §143-112 is increased to 64% impervious coverage;
2. Install the necessary storm water management controls necessary commensurate with the increased impervious coverage;
3. Comply with all of the conditions previously imposed in the January 12, 2018 Decision and Order.

Further, the granting of the variances will not otherwise relieve the Applicant of its responsibilities to comply with the Ordinance and the Township's Subdivision and Land Development Ordinance ("SALDO").²

² In fact, the Applicant has repeatedly agreed to comply with all local, state and federal requirements associated with the development of the Property.

Applicant has demonstrated his willingness to comply with the Township's requests regarding the project. Applicant has agreed to protect the public safety and provide a first rate fitness center and courts while improving an otherwise neglected section of the Township. The requested variances are the least modifications of the Ordinance necessary to accommodate Applicant's needs to utilize and develop the Property.

Additionally, the nature of the HC District, its overall size and its being surrounded by the R-1 District is such that this variant from the Ordinance is necessary in order to do much of anything with the Property. Of course, this creates a hardship upon both the owner and anyone interested in purchasing and thus developing the Property. The best evidence of this is the fact that these properties have been steadily deteriorating for many years. Neither the owner nor the Applicant created those conditions or the hardship. Thus the variances requested are necessary to enable the reasonable use of the Property and not self-inflicted.

Moreover, the intended use as fitness center with tennis courts will not adversely affect a surrounding neighborhood. Further, it is manifest that a fitness center and tennis courts support the public welfare and will only enhance the appropriate use or development of the surrounding residential property.

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

IV. Conclusion.

The Board finds that subject to the conditions set forth in this Opinion, the Applicant has presented sufficient evidence to satisfy the §143-168.A. test for a dimensional variance.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested

relief.

2. Denial of the requested variance relief to permit 64% impervious coverage will impose a unique hardship on the Applicant not created by him.

3. The proposed dimensional variance 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 ordinances, in fact variance therefrom enhances the public interest.

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 regulations at issue.

DECISION

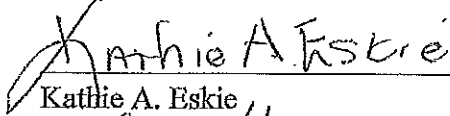
The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is the Application for a variance from the dimensional requirements of Lower Providence Township Zoning Ordinance §143-112 to permit the construction of a building and parking lot on the Property that results in a maximum impervious coverage of sixty-four percent (64%) is granted subject those conditions previously imposed that are not inconsistent with this Decision.

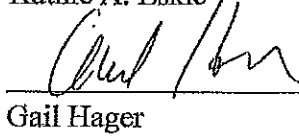
Dated: March 7, 2019

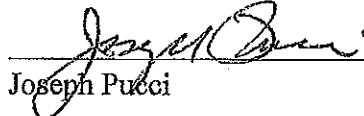
ORDER

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

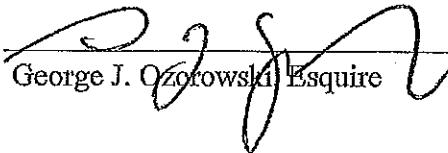
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie


Gail Hager


Joseph Pucci


Patricia Alzamora


George J. Ozorowski Esquire

Robert G. Hardt

Christopher Gerdes

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.