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July 31, 2020

**VIA FIRST CLASS CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7018 3090 0000 0752 7991**

Lauren and Michael Pires
4014 Redwing Lane
Audubon, PA 19403

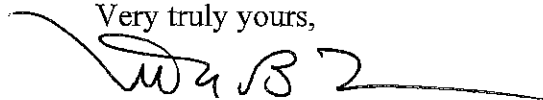
**RE: Lower Providence Township Zoning Hearing Board
Application of Michael and Lauren Pires
Application No. Z-20-02**

Dear Mr. & Mrs. Pires:

In accordance with your application for variances from Lower Providence Zoning Ordinance Sections 143-265, 269 & 272, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board.

Should you have any questions, please contact me. Best of luck with your project.

Very truly yours,



Keith B. McLennan

KBM/mac

Enclosure

pc: Kathie A. Eskie, Chairwoman
George Ozorowski, Vice Chairman
Gail Hager
Joseph Pucci
Patricia Alzamora
Robert G. Hardt
Chris Gerdes
Michael Mrozinski, Community Development Director

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-20-02	:	HEARING DATE:
		:	June 25, 2020
		:	
APPLICATION OF:		:	
Lauren and Michael Pires		:	
		:	
PROPERTY:		:	
4014 Redwing Lane		:	
Audubon, PA 19403		:	
Parcel No. 43-00-11472-12-2		:	

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

On February 26, 2020 applicants, Michael and Lauren Pires (hereinafter “Applicants”) filed an application¹ for a series of variances from the following sections of the Lower Providence Township Zoning Ordinance:

- §143-265 regarding the creation and purpose of riparian buffers;
- §143-269 regarding prohibited activities in the Riparian Buffer Overlay Zone;
- §143-272 regarding restoration and revegetation of riparian buffers.

The Application was properly advertised, and public hearings were held at the Lower Providence Township Building before the Lower Providence Township Zoning Hearing Board (“Board”) on June 25, 2020.² Chairwoman Kathie Eskie, vice chair George Ozorkowski and members Gail Hager, Joseph Pucci, Patricia Alzamora and alternates Robert Hardt and Christopher Gerdes were present at the hearing. Also present were, Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Tim Kurek, the Court

¹ On March 9, 2020 Applicants amended their application seeking a variance to permit encroachment and the addition of fill to the riparian corridor behind their home. The original application and revised application are collectively referred to hereinafter as the “Application.”

² In response to the Covid-19 pandemic, the Pennsylvania Supreme Court extended all deadlines for judicial and quasi-judicial hearings thereby delaying the hearing in this case.

Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicants are Michael and Lauren Pires, husband and wife and the original owners and residents of 4014 Redwing Lane, Audubon, Lower Providence Township, PA 19403 constructed in 1996 (hereinafter the "Property").

2. The Property is residential with a backyard located adjacent to a wooded area owned by the Township near a riparian water channel.

3. The applicable zoning district is the R-2 Residential District ("R-2").

4. On January 21, 2016 Article XXXIV establishing a Riparian Buffer Overlay Zone was made a part of the Lower Providence Township Zoning Ordinance to protect riparian channels restricting unbridled use of the back yard of the Property.

5. The Property is within the Riparian Buffer Overlay Zone and therefore, §143-265 of the Ordinance requires the Applicants to protect and preserve the riparian buffer that in their back yard.

6. The rear of the Property is relatively flat with a drop in grade in the back of the lot.

7. Applicants wish to widen their rear deck and construct a 20' by 44' in-ground pool in their backyard requiring them to install fill in the riparian corridor of the rear yard.

8. The pool will likely be 40 – 50 feet from the creek that runs along the rear of the Property.

9. Applicants wish to add fill from the excavation of the pool to the sloping portion of the rear of the Property in order to flatten the grade to make it more useful as part of the back yard.

10. Applicants intend to construct a proposed retaining wall to support the rear of the pool due to the slope into the riparian channel.

11. The retaining wall is to be placed, designed and built without significantly impacting the riparian channel or the creek or its flow.

12. The proposed installations are capable of being completed with minimal impact upon the riparian corridor.

13. The neighborhood where the Property is located contains many similar in-ground pools in the rear yards.

14. The proposed location of the pool is influenced by the unique nature of the property with the creek channel and slope to the rear of the Property.

15. No alternative means of design or construction exist to avoid the placement of the pool and retaining wall in portions of the riparian channel restricted by the 2016 amendments to the Ordinance.

16. But for the 2016 institution of the Riparian Buffer Overlay Zone, Applicants would have no restrictions for the widening of their existing deck and installation of the proposed pool.

17. Applicants have otherwise agreed to comply with all other applicable sections of the Ordinance and all other applicable federal, state, county and township regulations.

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

19. The proposed plan satisfies impervious coverage requirements of the Ordinance.

20. Absent the requested relief, the Applicant will suffer an exceptional hardship not created by the Applicant. Rather, it results from the 2016 amendment to the Ordinance and the unique physical characteristics of the Property including its unique topography and the riparian channel.

21. Mr. & Mrs. Pires testified in support of their Application and there were no

witnesses who testified in opposition to the Application.

22. The following exhibits were made of record:

A-1 Application;

A-2 Series of 4 drawings of the pool placement and deck improvements

B-1 Certificate of Posting the Property with Notice of the Application;

B-2 Notice of the Application mailed to neighbors within 500 feet of the Property;

B-3 Mailing matrix of the addressees for the mailing of the Notice of the Application;

B-4 Proof of Publication of the newspaper Advertisement of the 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 series of variances that are of the more restrictive “use” variety.

II. Use Variance Legal Standard.

A. Use Variance Generally.

A traditional use 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. 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 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.*

B. Riparian Buffer Use Variance.

Often when dealing with overlay or other specified districts the Ordinance requires a variance standard that differs from that articulated in §143-168.A. of the Ordinance. Although Article XXXIV creating the Riparian Buffer Overlay Zone sets forth various instances where conditional use approval is required from the Lower Providence Township Board of Supervisors, it does not impose a heightened variance standard. In fact, §143-267 states, in pertinent part:

§143-267 Relationship to other zoning regulations.

The RBOZ is an overlay to the existing zoning districts within the Township. The provisions of the underlying district shall remain in full force, except where the provisions of the RBOZ differ from the provisions of the underlying district, in which case the provision which is more restrictive and less permissive shall apply.

Accordingly, the variance standard delineated by §143-168.A. of the Ordinance set forth in full above applies in the Board’s analysis of whether the requested variances from §§143-265, 143-269 and 143-272 are appropriate in the Riparian Buffer Overlay Zone.

III. Facts Applied to the Legal Standard.

A. The Purpose of the Riparian Buffer Zone.

Section 143-265 of the Ordinance provides for the establishment of the Riparian Buffer Overlay District in pertinent part as follows:

“§143-265 **Creation and purposes of riparian buffers.** Riparian Buffer Overlay Zone (RBOZ) shall be and hereby is created in order to protect and preserve the numerous benefits that are provided by riparian buffers...”

§143-268 provides that the RBOZ includes:

(12) all other perennial and intermittent streams.

As noted in the Application, a stream channel, defined in §143-266 of the Ordinance as the bed and banks of a watercourse or waters of the commonwealth and perennial and intermittent streams, exists behind the Property. §143-269 of the Ordinance prohibits the installation of a “structure” or the disturbance of land in the RBOZ. Further, §143-272 of the Ordinance requires that any use permitted in the RBOZ be mitigated by replacing the affected area with two times the size of that area.

Previous Board precedent has established that a swimming pool is a structure under the Ordinance. Clearly the installation of a pool in the riparian channel would require the disturbance of land in the RBOZ. Accordingly, the Applicants must satisfy the five-part variance test of §143-168.A.

The variances requested seek permission to construct a 20' x 44' in-ground swimming pool in Applicants' backyard that would include installation of a retaining wall for one segment of the pool and fill in the riparian channel. Importantly, before the passage of Article XXXIV of the Ordinance imposing the Riparian Buffer Overlay Zone upon the Applicants, they were free to install this very pool in their backyard along with the retaining wall proposed and to attempt to level the slope. §143-265 of the Ordinance restricts new construction in the RBOZ for several reasons, many of which are intended to protect streams and associated flora and fauna. For example:

- Subsection A. seeks to reduce the amount of nutrients, sediment and organic matter, pesticides, and other harmful substances that reach watercourses;
- Subsection C. seeks to preserve stream shade which moderates stream temperature and protects fish habitats;
- Subsection D. seeks to provide stream bank stability;
- Subsection G's goal is to improve and maintain the safety, reliability and adequacy of the water supply for domestic, agricultural, commercial, industrial and recreational uses along with sustaining diverse populations of aquatic flora and fauna.

Applying these intentions to the current set of facts, none of these goals of the RBOZ are adversely impacted by the Applicants' plans. In fact, Applicants seek to preserve the stream channel, testifying that it is a unique laboratory of adventure for their children who enjoy the wooded area and stream often. The placement of fill and construction of a retaining wall in the channel will not alter the stream flow or the natural conditions associated therewith. Further, the granting of the variance will not otherwise relieve the Applicants of their responsibilities to comply with the Ordinance generally, the balance of the RBOZ Ordinance and, if applicable, the Township's Subdivision and Land Development Ordinance ("SALDO").³

Applicants have demonstrated that they will suffer a hardship due to the unique nature of their property and the change to the Ordinance that deprived them of reasonable use of the property that only 4 short years ago they could have used for their intended purpose. Clearly that hardship is not self-created.

The Applicants have presented a plan that will minimize incursions into the riparian buffer with little disturbance therein. Applicant has agreed to institute those same practices in the further design, engineering and construction of the pool, retaining wall and flattening of the slope to minimize the impact upon the stream channel such that its course will not be altered. The requested variances are the least modifications of the Ordinance necessary to accommodate

³ In fact, the Applicants have repeatedly agreed to comply with all local, state and federal requirements associated with their intended alteration of the Property.

Applicants' reasonable use of the Property.

What is more, the location of the Property, its topographical composition and the fact that the riparian buffer overlay was imposed upon the Applicants renders it impossible for them to do anything to their backyard. Of course, this creates a hardship upon both the Applicants and any future owners of the Property. The Applicants did not create those conditions or the hardship. Thus the variances requested are necessary to enable the reasonable use of the Property.

Applicants unrefuted testimony was that the proposed pool will have minimal impact upon the stream channel and its natural flow. Further, the construction of the retaining wall and fill on a small section of ground that is otherwise unimpeded, 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, the Applicant's planned pool on the Property only places the Applicants in parity with many other residents in their neighborhood.

Finally, no matter how much Applicants would like to be able to offer two times the amount of the encroachment upon the RBOZ as provided in §143-272, there is no possible way they can. The property is sized and situate such that there is no more land to give.

As noted above, §143-168.A. of the Ordinance permits the Board to grant variances from such restrictions provided the Applicants can satisfy the 5 part test for same. Applicants have demonstrated such sufficient cause primarily due to the unique physical characteristics of the Property as previously noted and the change to the Ordinance in 2016. The placement of fill necessary to construct the retaining wall in order to install a pool necessarily must be done in a way that will leave the stream channel unhindered. This unique topography of the lot demonstrates that the physical features of the property as restricted by the RBOZ are such that its use is impaired. This condition is natural, it was not created by the Applicant, in fact the

condition was created with the amendment to the Ordinance. Applicants propose plans that will not materially impact the natural conditions of the watercourse or creek flow.

Accordingly, without the requested variance from §143-265, 269 & 272 of the Ordinance⁴ to build the pool and the retaining wall to support one side and to add fill to flatten the rear yard, the Applicants will be precluded from the reasonable use of their Property. Thus the requested variances are necessary to alleviate the hardship the unique physical circumstances and characteristics of the Property and the RBOZ cause.

Finally, the requested 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 Applicants have presented sufficient evidence to satisfy the §143-168.A. test for the requested use variances under Article XXXIV of the Ordinance.

CONCLUSIONS OF LAW

1. The Applicants have standing to appear before the Board regarding the requested relief.
2. Denial of the requested variance relief addressed hereby will impose an hardship upon the Applicants.
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 RBOZ Ordinance in this case is unnecessary for preservation of the public interest sought to be protected by the ordinances.
5. The requested relief is necessary to enable the Applicants' reasonable use of the

⁴ Subject to the conditions set forth in the Opinion and Order below.

Property, represents the minimum that will afford relief, and represents the least modification possible of the regulations at issue.

6. The granting of the variances subject to the conditions imposed by the Board herein and those provisions of the ordinances unaffected by the variances will not threaten public safety or expense.

7. The variances subject to the conditions set forth in this Opinion will not create a 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 Application for variances from the use requirements of Lower Providence Township Zoning Ordinance §143-265, §143-269 and §143-272 to permit the (i) widening of their existing deck, (ii) installation of an in-ground swimming pool, (iii) placement of fill, and (iv) construction of a retaining wall in their back yard of the Property as proposed without providing mitigation land is Granted subject to the following conditions:

1. Applicants obtain any applicable conditional use approval from the Lower Providence Township Board of Supervisors;

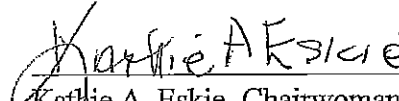
2. Applicants obtain all approvals required for the construction of the pool, deck, retaining wall and fill from the Lower Providence Township Engineer.

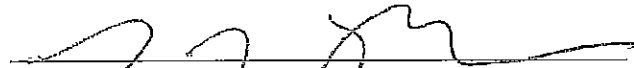
Dated: July 30, 2020

ORDER

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

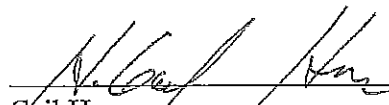
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman



George J. Ozorowski, Vice Chairwoman


Joseph Pucci

Patricia Alzamora


Gail Hager

Robert G. Hardt, Alternate


Christopher Gerdes, 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.