

# MILLER TURETSKY RULE & McLENNAN

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**DATE OF MAILING: May 5, 2023**  
**SENT VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**  
**NO. 7020 2450 0001 6269 2431**

Mr. Philip E. DiGinto  
DFD Properties, LLC  
3848 Germantown Pike  
Collegeville PA 19426

**Re: Lower Providence Township Zoning Hearing Board**  
**Application No: Z-23-04**  
**Property: 3848 Germantown Pike, Collegeville PA 19426**  
**Parcel No. 43-00-05263-00-4**

Dear Mr. DiGinto:

In accordance with your Zoning Application filed February 16, 2023, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board. Please note that if you have any objections to the Order, you have thirty (30) days from its date to file an appeal with the Court of Common Pleas in Norristown.

Yours very truly,



Keith B. McLennan

Pc: Kathie A. Eskie  
Christopher Gerdes  
Gail Hager  
Randy Klein  
Joseph Pucci  
Gary Brown  
Tejal Mehta  
Mike Mrozinski, Community Development Director  
Gregory Heleniak, Esquire, Township Solicitor

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

<b>APPLICATION NO.</b>	<b>Z-23-04</b>	<b>: HEARING DATE: March 23, 2023</b>
		:
		:
<b>APPLICATION OF:</b>		:
<b>DFD Properties, LLC</b>		:
<b>3848 Germantown Pike</b>		:
<b>Collegeville, PA 19426</b>		:
		:
<b>PROPERTY:</b>		:
<b>3848 Germantown Pike</b>		:
<b>Lower Providence Township</b>		:
<b>Parcel Nos. 43-00-00-5265-00-4</b>		:

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

A public hearing on the above Application having been held on March 23, 2023, before the Zoning Hearing Board of Lower Providence Township (the “Zoning Hearing Board” or “Board”), in the Township Administration Building, 100 Parklane Drive, Eagleville, PA, (the “hearing”) pursuant to Notice as required by the Lower Providence Township Zoning Ordinance (the “Ordinance”) and the Pennsylvania Municipalities Planning Code (the “MPC”), concerning the above captioned premises (the “Property” or “Subject Property”), and having considered the Application and the testimony, exhibits, and argument presented, the Zoning Hearing Board hereby renders its decision on the Application.

**Procedural Matters**

1. Application before Zoning Hearing Board

Applicant, DFD Properties, LLC of 3848 Germantown Pike, Collegeville, PA 19426 (Applicant) filed an application relating to the property located at 3848 Germantown Pike in Lower Providence Township requesting the following variances from the Lower Providence Township

Zoning Ordinance:

1. Relief from 143-275.C(4) to allow multiple buildings on the same property;
2. Relief from 143-282.A(5) to provide for impervious coverage of 55.15% where a maximum of 50% is permitted. This request was amended to reflect the correct subsection of 143-282.A(6);
3. Relief from 143-282.B(2) to provide for a side yard setback of 11.6 ft where a minimum of 20 ft is required;
4. Relief from 143-282.B(3) to provide for a rear yard setback of 7.97 ft where a minimum of 30 ft is required;
5. Relief from 143-282.B(5) to provide for a parking setback from a residential district of 0.16 ft where a minimum of 6 ft is required. This request was amended to reflect the correct subsection of 143-282.C(2) of the Ordinance.

Applicant seeks to add an addition to an existing garage for the existing landscaping business that operates on the Property (the “Application”).

2. Notice and Hearing

The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on March 23, 2023, where the Board accepted evidence in the matter.

3. Zoning Hearing Board Members Participating

Present at the March 23, 2023, hearing were: Kathie Eskie, Chair, Chris Gerdes, Vice-Chair, Gail Hager, Member, Randy Klein, Member, and Gary Brown, alternate.

4. Appearances of Counsel

- a. Keith B. McLennan, Esquire, appeared as Solicitor for the Zoning Hearing Board.

- b. Applicant was not represented by counsel.
- 5. Appearance of Other Party
  - a. No other party entered their appearance in the matter.
- 6. Also Present
  - a. Mike Mrozinski, the Community Development Director for Lower Providence Township.
- 7. Witnesses
  - a. Philip Diginto testified in support of the application.
  - b. Daniel Testa testified in support of the application.
- 8. Exhibits

The Applicants submitted the following exhibits:

A – 1 The Addendum to the Application with all attachments.

The Board entered the following exhibits:

B – 1 Public Notice by Posting.

B – 2 Certificate of Posting.

B – 3 Letter notifying neighbors within 500 feet of the Property of the Application.

B – 4 Certificate of Notification to the neighbors within 500 feet of the Property.

B – 5 Matrix of Addresses where notice was mailed.

B – 6 Certificate of Publication.

### **FINDINGS OF FACT**

- 1. The subject property is located at 3848 Germantown Pike Collegeville, PA with a parcel number of 43-00-00-5265-00-4 (hereinafter the “Property”).
- 2. The applicable zoning district is EVC.

3. The lot size is approximately 37,500 square feet.
4. The Property is of a currently existing landscaping contractor business and office.
5. The Property shall continue with that use.
6. The Property is service by public water and public sewer.
7. The proposed addition is extending an existing garage.
8. Section 143-275.C(4) of the Ordinance allows multiple buildings on the same property by conditional use.
9. Section 143-80 of the Ordinance places jurisdiction for conditional use applications with the Board of Supervisors.
10. The proposed use requires a variance from 143-282.B(2) of the Ordinance as it will amount to impervious coverage of 55.15% where a maximum of 50% is permitted.
11. The side yard setback will of the proposed use will be 11.6 feet.
12. Section 143-282.B(2) requires a side yard setback of a minimum of 20 feet.;
13. The rear yard setback will be 7.97 feet.
14. Section 143-282.B(3) requires a rear yard setback of a minimum of 30 feet.
15. The parking setback will be .16 feet.
16. Section 143-282.C(2) requires a parking setback that is a minimum of 6 feet.
17. The original garage was built in 1970.
18. The existing garage is nonconforming with regard to the existing setback requirements.
19. The proposed addition will be nonconforming, but less non-conforming than the existing garage as it expands away from the property line.
20. There will be no additional impervious coverage as the addition to the garage will

be built upon an existing concrete pad.

21. The extended garage will be used for maintaining the equipment for the existing landscaping business.

22. The property behind the Subject Property is a farm.

23. The Applicant discussed the project with the rear neighbor who had no objection.

24. Applicant is unable to fit his equipment in the existing garage which creates a hardship as he is unable to make use of the existing garage to maintain his equipment entirely inside during the winter.

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

## **DISCUSSION**

### **I. Statement of the Case**

Applicant filed an application relating to the property located at 3848 Germantown Pike in Lower Providence Township requesting the following variances from the Lower Providence Township Zoning Ordinance:

1. Relief from 143-275.C(4) to allow multiple buildings on the same property;
2. Relief from 143-282.A(5) to provide for impervious coverage of 55.15% where a maximum of 50% is permitted. This request was amended to reflect the correct subsection of 143-282.A(6);
3. Relief from 143-282.B(2) to provide for a side yard setback of 11.6 ft where a minimum of 20 ft is required;
4. Relief from 143-282.B(3) to provide for a rear yard setback of 7.97 ft where a minimum of 30 ft is required;
5. Relief from 143-282.B(5) to provide for a parking setback from a residential district of 0.16 ft where a minimum of 6 ft is required. This request was amended to reflect the

correct subsection of 143-282.C(2) of the Ordinance.

Applicant seeks to add an addition to an existing garage for the existing landscaping business that operates on the Property.

### **III. 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 dimensional variance.

B. The Five Part Variance Test. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

(1) There are unique circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical

conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) Because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

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

(4) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

See also: Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 88 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014); 53 P.S. § 10910.2.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to useless if a variance is denied, and that the proposed use will not be contrary to public interest. However in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, “...courts *may* consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” 721 A.2d at 50 (*italics supplied*). In effect, no longer is an applicant



required to demonstrate in a dimensional variance case, that the property was close to useless without the variance.

Although Hertzberg eased the burden of proof somewhat for a dimensional variance, it did not remove the variance requirements that are universally applicable to use and dimensional variance cases. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth. 2005). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance and satisfy the five-part test articulated above. Id. In addition, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicant' burden of proof and the standards to meet that burden as follows:

C. Burden of proof. For variances, the burden of proof shall be on the applicant. For special exceptions, the applicant shall be entitled to the special exception unless others can prove that it would adversely affect the public health, safety, morals or welfare.

D. Standards of proof.

(2) Variance case. An applicant for a variance shall have the burden of establishing:

(a) All the requirements of § 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, No. 247, as amended, 53 P.S. § 10910.2;

(b) That literal enforcement of the provisions of this chapter will result in unnecessary hardship, as the term is defined by relevant statutory provisions and case law; and

(c) That the allowance of a variance will not be contrary to the public interest.

## **II. Facts Applied to the Legal Standard.**

The Applicant, a landscaping contractor business, has filed a zoning application seeking a conditional use and variance from the Zoning Ordinance to extend an existing garage on the Property located at 3848 Germantown Pike, Collegeville, PA. The Property is currently used for a

landscaping contractor business and office, and the proposed use shall continue with that use.

The Board finds that Section 143-275.C(4) of the Ordinance allows multiple buildings on the same property by conditional use, and Section 143-80 of the Ordinance places jurisdiction for conditional use applications with the Board of Supervisors. Therefore, the Zoning Hearing Board is without jurisdiction to rule on this request, and it is denied.

The Board finds that the Property is located in the EVC zoning district, and the lot size is approximately 37,500 square feet. The proposed addition is an extension of an existing garage and requires a variance from 143-282.B(2) of the Ordinance as it will amount to impervious coverage of 55.15% where a maximum of 50% is permitted. The side yard setback of the proposed use will be 11.6 feet, while section 143-282.B(2) requires a side yard setback of a minimum of 20 feet. The rear yard setback will be 7.97 feet, and section 143-282.B(3) requires a rear yard setback of a minimum of 30 feet. The parking setback will be 0.16 feet, and section 143-282.C(2) requires a parking setback that is a minimum of 6 feet.

The Board finds that the proposed addition will be nonconforming with the existing setback requirements, but less non-conforming than the existing garage as it expands away from the property line. Furthermore, there will be no additional impervious coverage as the addition to the garage will be built upon an existing concrete pad.

The Applicant stated that the extended garage will be used for maintaining the equipment for the existing landscaping business. The Applicant discussed the project with the rear neighbor who had no objection. Additionally, the Applicant is unable to fit his equipment in the existing garage which creates a hardship as he is unable to make use of the existing garage to maintain his equipment entirely inside during the winter.

The Board also finds that the Applicant meets the criteria for a variance from the setback

requirements as the Applicant has demonstrated an unnecessary hardship due to the inability to fit his equipment in the existing garage during the winter. Moreover, the proposed addition will be nonconforming but less non-conforming than the existing garage as it expands away from the property line. Therefore, the variance sought is the minimum that will allow relief in consideration of the circumstances.

Finally, there was no adverse public comment regarding this application. Accordingly, the Board grants the Applicant's application for variances.

### **CONCLUSIONS OF LAW**

1. Section 143-80 of the Ordinance places jurisdiction for conditional use applications with the Board of Supervisors, not the Zoning Hearing Board. Thus the Applicant lacks standing before the Zoning Hearing Board on the request for a conditional use.
2. The Applicant has standing to appear before the Board regarding the requested variances.
3. Denial of the requested variance relief will impose an unnecessary hardship on the Applicant.
4. The hardship is not self-imposed and is due to the unique physical circumstances of the Property.
5. The requested variance 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 proposed sign will also not alter the essential character of the neighborhood in which the Property is located.

### **DECISION**

On March 23, 2023, the Lower Providence Township Zoning Hearing Board by 5-0 vote Denied Applicant a conditional use and/or variance from Section 143-275.C.(4) of the Lower Providence Township Zoning Ordinance, to permit multiple buildings on the same property for lack of standing of Applicant and jurisdiction of the Board.

The Lower Providence Township Zoning Hearing Board by 5-0 vote Granted the following variances from the Lower Providence Township Zoning Ordinance:

- 1) A variance from 143-282.A(6) to provide for impervious coverage of 55.15% where a maximum of 50% is permitted;
- 2) A variance from 143-282.B(2) to provide for a side yard setback of 11.6 ft where a minimum of 20 ft is required;
- 3) A variance from 143-282.B(3) to provide for a rear yard setback of 7.97 ft where a minimum of 30 ft is required;
- 4) A variance from 143-282.C(2) to provide for a parking setback from a residential district of 0.16 ft where a minimum of 6 ft is required.

This approval is conditioned upon the following:

1. Construction placement shall be as per the plans introduced into evidence in this case as exhibits.
2. Strict compliance with the testimony and evidence presented at the hearing and the information set forth in the application, as amended; and
3. Compliance with all other applicable Township ordinances.

Dated: May 2, 2023

## **ORDER**

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

### LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD

*Kathie A Eskie*

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Kathie A. Eskie

*J. Jones*

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Christopher Gerdes

*Gail Hager*

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Gail Hager

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Randy Klein

---

Joseph Pucci

*Gary R Brown*

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Gary Brown, Alternate

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Tejal Mehta, 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.