

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PENNSYLVANIA

APPLICATION OF NDR BUILDERS, LLC

NO. 2017-23

PROPERTY: 179 Rebel Hill Road

DECISION

This application concerns a request for variances to permit the subdivision of a property and construction of a new single family residence on the undeveloped new lot in the R-2 Residential Zoning District. The application was approved with conditions.

NDR Builders, LLC ("Landowner") is the equitable owner of the property located at 179 Rebel Hill Road, Upper Merion Township, tax parcel number 58-00-01303-007 (the "Property"). The Property is presently improved with a single-family detached home and accessory studio building. Landowner proposes subdividing the 27,268 square foot property into two lots. The existing home would be located on Lot 1, the accessory studio building on Lot 2 would be demolished, and a new 2,400 square foot single-family detached residence with an attached garage would be constructed on Lot 2.

Landowner requested variances from section 165-23¹ and section 165-232.4(A), (C) and (D)² of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance").

¹ § 165-23 **Area, width and yard regulations.**

Lots, buildings and structures may be created and/or constructed in the single-family districts in accordance with the following dimensional criteria:

A. Dimensional regulations for all single-family detached dwellings and permitted uses not specifically listed in Subsection B below.

| | |
|------------|------------|
| | R-2 |
| Front Yard | 30 feet |

² § 165-232.4 **Steep slope regulations.**

In every zoning district, the following regulations shall apply:

A. Every lot hereafter created by subdivision or presently undeveloped having an average slope greater than or equal to 15% shall have a minimum lot area, as defined by the underlying zoning district, increased by a factor of 1.5 and shall not have impervious surfaces exceeding 20% of the

(continued on next page)

On October 18 and November 15, 2017, the Zoning Hearing Board (the "ZHB") of Upper Merion Township (the "Township") held two advertised hearings on Landowner's application no. 2017-22. Both hearings were stenographically recorded. All members of the ZHB were present at both hearings: Mark S. DePillis, Esq., Chairman; M Jonathan Garzillo, Vice-Chairman; Maria Mengel, Secretary; John M. Tallman, Jr., Member; and Lynn Z. Gold-Bikin, Esq., Member. The ZHB was represented by Marc D. Jonas, Esq. and Michael E. Peters, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was represented by John A. DiPietro, Esq.

At the conclusion of the first hearing, Landowner requested and was granted a continuance to provide the ZHB with additional information related to the dimensions of the proposed residential structure and stormwater retention system. Landowner submitted a revised plan [Exhibit A-4] at the beginning of the second hearing that modified the requested relief.

Five parties appeared in opposition to Landowner's application: Jacqueline Prather who resides at 1258 Supplee Lane; Dennis Michael who resides at 191 Rebel Hill Road; Barbara Williamson who resides at 183 Lincoln Avenue; and Ronnie and Angela Haynie who reside at 201 Rebel Hill Road. None of the objectors was represented by counsel.

After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

lot area or 50% of the maximum permitted impervious coverage permitted in the underlying district, whichever is greater.

- ...
- C. Each disturbance, including regrading, filling, clearing, driveways and utilities is limited to a total of 20% of all areas of significant slope on a parcel or tract and only when the Township Engineer determines that no other location is feasible.
- D. Earth disturbance for purposes of regrading, filling, clearing, driveways and utilities is limited to a total of 30% of all areas of steep slope on a parcel or tract and only when the Township Engineer determines that no other location is feasible.

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the equitable owner of the Property. [Exhibit ZHB-3; Exhibit ZHB-4; Exhibit A-3.]
2. The Property is located in the Township's R-2 Residential Zoning District. [Exhibit A-4.]
3. The Property has a total tract area of 27,628 square feet. [Exhibit A-4.]
4. The proposed subdivision would create two lots with lot areas of 10,565 square feet (Lot 1) and 15,113 square feet (Lot 2). [Exhibit A-4.]
5. The existing residential structure has a nonconforming front yard setback of 1 foot. [Exhibit A-4.]
6. The average slope of the ground on Lot 1 is 17.25% and the average slope on Lot 2 is 18.1%. [Exhibit A-4.]
7. Lot 2 has areas of "significant" slopes (25% slope or greater) of 948 square feet, and areas of "steep" slopes (15% to 25% slope) of 7,800 square feet. [Exhibit A-4.]
8. Landowner proposes disturbing 100% of the areas of significant slope and 73% of the areas of steep slope on Lot 2. [Exhibit A-4.]
9. Landowner requested the following variances from the following regulations:
 - a. section 165-23 to permit a front yard setback of 11.75 feet instead of the required 30 feet for Lot 2.
 - b. section 165-232.4(A) to permit a reduction of the 15,000 square foot minimum lot area, increased by a factor of 1.5 due to the presence of steep slopes, to 10,565 square feet for Lot 1.
 - c. section 165-232.4(C) to permit a disturbance of 100% of the areas of significant slopes on Lot 2 where no more than 20% is permitted.

- d. section 165-232.4(D) to permit a disturbance of 73% of the areas of steep slope on Lot 2 where no more than 30% is permitted.

ZHB HEARING

- 1. The ZHB marked the following exhibits:
 - a. ZHB-1 — application and one-page attachment
 - b. ZHB-2 — revised application narrative sent on September 19, 2017
 - c. ZHB-3 — deed dated January 22, 2001 between Russell F. Holt and Lucinda B. Duncalfe (now known as Lucinda Holt), grantors, and Deborah M. Baldwin, grantee, recorded in deed book 5348, page 1958
 - d. ZHB-4 — Standard Agreement for the Sale of Real Estate between NDR Builders, LLC (buyer) and Deborah M. Baldwin (seller) dated July 19, 2017, with a settlement date on or before October 20, 2017
 - e. ZHB-5 — letter dated September 1, 2017 from John Adam DiPietro, Esquire to Mark Zadroga, Zoning Officer, Upper Merion Township
 - f. ZHB-6 — undated partial tax map of a portion of Rebel Hill Road
 - g. ZHB-7 — two (2) photographs, one black and white and one color, of the existing residence
 - h. ZHB-8 — plan entitled “Zoning Presentation Plan” sheet 1 of 2, prepared by OTM, LLC, undated
 - i. ZHB-9 — plan entitled “Zoning Presentation Plan” sheet 2 of 2, prepared by OTM, LLC, undated
 - j. ZHB-10 — Montgomery County Board of Assessment property information and tax map, parcel 58-00-01303-00-7
 - k. ZHB-11 — legal notice
 - l. ZHB-12 — proof of posting
 - m. ZHB-13 — proof of publication

- n. ZHB-14 — plan entitled “Zoning Presentation Plan for Lands of Deborah M. Baldwin” prepared by OTM LLC:
 - i. “Proposed Site,” sheet 1 of 3, dated September 13, 2017
 - ii. “Existing Site,” sheet 2 of 3, dated September 13, 2017
 - iii. “Site Pictures,” sheet 3 of 3, dated September 13, 2017
 - o. ZHB-15 — curriculum vitae of Gary D. Kraft, P.E.
 - p. ZHB-16 — narrative titled “Stormwater Management Approach”
 - q. ZHB-17 — sketch of trench drain.
2. Landowner entered the following exhibits:
- a. A-1 — five (5) color photographs
 - b. A-2 — letter from Michael Sroka to neighbors, undated
 - c. A-3 — Amendment to Agreement for the Purchase and Sale of Real Estate between Deborah M. Baldwin (seller) and NDR Builders, LLC (buyer) dated October 20, 2017, with a settlement date on or before December 31, 2017
 - d. A-4 — plan entitled “Zoning Presentation Plan for Lands of Deborah M. Baldwin” prepared by OTM LLC, dated September 13, 2017, revised November 13, 2017
 - e. A-5 — curriculum vitae of Gary D. Kraft, P.E., narrative entitled “Stormwater Management Approach,” and marked-up excerpt of site plan showing the location of storm water management facilities
 - f. A-6 — architectural drawings titled “Proposed Residence” prepared by Gordon L. Todd, Associates:
 - i. Sheet SK-2, “North East Elevation” and “South East Elevation,” dated November 9, 2017
 - ii. Sheet SK-3, “Roof Plan,” dated November 9, 2017.

3. Landowner presented three witnesses: Nicholas DiRenzo, the sole owner of Landowner; Bradford Grauel, a professional land surveyor; and Gary D. Kraft, P.E., a professional engineer. Both Mr. Grauel and Mr. Kraft were accepted by the ZHB as experts in their respective fields.
4. Mr. DiRenzo offered the following testimony at the first hearing:
 - a. The existing residential structure on proposed Lot 1 is in good condition, and Landowner plans to retain it. [10/18/17 N.T. p. 9.]
 - b. Landowner plans to construct a new single-family residential structure on proposed Lot 2 with four parking spaces: two in the attached garage, and two in the driveway. [10/18/17 N.T. p. 9.]
 - c. Landowner spoke with several neighbors about its application and left a letter [Exhibit A-2] at nearby houses. The primary concerns raised in these conversations were water runoff and retention. [10/18/17 N.T. pp. 10-11.]
 - d. Adjacent and nearby properties along Rebel Hill Road are improved with houses that are located within the 30-foot front yard setback. [10/18/17 N.T. pp. 12, 13.]
 - e. There are two existing curb cuts into the Property. [Exhibit A-1; 10/18/17 N.T. pp. 12-13.]
 - f. In his opinion, the requested relief is the minimum necessary to make the project on Lot 2 and the subdivision of the Property viable. [10/18/17 N.T. pp. 14-15.]
5. Mr. Grauel offered the following testimony at the first hearing:
 - a. The property contains several areas that qualify as significant slope areas and steep slope areas, as defined by the Zoning Ordinance, making the Property part of the steep slope overlay district. [10/18/17 N.T. p. 23.]

- b. Soil testing was performed. The Property was found to have very sandy soil to a depth of almost 80 inches with good percolation rates. A stormwater management system can be designed that will reduce the amount of runoff currently leaving the Property. [10/18/17 N.T. pp. 27-28, 74.]
 - c. In his opinion, the requested zoning relief is the minimum necessary to viably develop the Property. [10/18/17 N.T. pp. 28-29.]
 - d. The proposed residential dwelling is also located closer to the property line along Rebel Hill Road to minimize disturbance of steep slopes and to better integrate the structure into the surrounding neighborhood. Locating the structure farther from the road would create problems transitioning from the road down to the structure. The proposed configuration allows for adequate parking without impeding upon the curb line, while maintaining room for a sidewalk. [10/18/17 N.T. pp. 44-45.]
 - e. Landowner will install stormwater facilities that will prevent any additional stormwater runoff from the Property than already occurs and may result in less stormwater runoff than presently occurs. [10/18/17 N.T. pp. 73-74.]
 - f. Two trees would be removed -- one that is in bad health and another that is located where the new house will be located. [10/18/17 N.T. p. 78.]
6. The revised plan submitted at the beginning of the second hearing:
- a. reduced the size of the proposed structure from 2,400 square feet to 2,004 square feet;
 - b. reconfigured the garage to the side of the proposed house rather than beneath it;

- c. moved the proposed house closer to Rebel Hill Road, increasing the requested zoning relief from 16.37 feet to 11.75 feet instead of the required 30 feet; and
 - d. increased the impervious surface coverage on Lot 2 from 18.3% to 22.3%.³
[Exhibit A-4.]
7. Mr. Grauel offered the following testimony at the second hearing:
- a. The house was moved closer to Rebel Hill Road to accommodate the stormwater management system. [11/15/17 N.T. p. 11.]
 - b. In his professional opinion, moving the house closer to Rebel Hill Road will have no detrimental impact on surrounding properties and is in keeping with the visual line of setbacks and the character of the neighborhood. [11/15/17 N.T. p. 12.]
8. Mr. Kraft offered the following testimony at the second hearing:
- a. It is not appropriate to install an infiltration-type stormwater facility near the rear property line because it would be within 100 feet of the basements of the down-slope neighboring residences, which is counter to the recommendations of the Pennsylvania Storm Water BMP manual. [11/15/17 N.T. pp. 16-17.]
 - b. The stormwater management system will retain stormwater in a 60-foot long pipe, approximately 30 inches in diameter, that would be buried in the front yard and slowly discharge stormwater into the inlet in Rebel Hill Road through a smaller pipe of less than 4 inches. [11/15/17 N.T. pp. 17-18, 21, 32; Exhibit A-5.]

³ Zoning Ordinance section 165-232.4(A), in addition to imposing a larger lot area requirement on properties with steep slope areas, imposes a 20% impervious coverage limitation on such properties in the R-2 district. Because Landowner requested no relief related to impervious coverage and the revised plan calls for impervious coverage of 22.3% on Lot 2, additional zoning relief is necessary.

- c. Gutters will go around the roofline of the residential structure and garage, collect roof runoff, and discharge it through downspouts tied into the underground pipe or the stormwater inlet. [11/15/17 N.T. pp. 19-20, 21.]
 - d. A small portion of the roof, where the garage connects to the main structure, will have to discharge toward the rear of the Property. The amount of runoff from this small section creates approximately one third of the runoff from the existing accessory studio structure, which will be demolished, resulting a net reduction in runoff. [11/15/17 N.T. pp. 25-26.]
 - e. Landowner would be willing to accept as a condition of approval that capped gutters be installed to prevent clogging with leaves and other debris. [11/15/17 N.T. p. 32.]
 - f. Other than a potential waiver to allow a pipe smaller than 4 inches to connect the retention pipe to the inlet, Landowner would not require any other waivers from the stormwater requirements of the Township's subdivision and land development ordinance ("SALDO"). [11/15/17 N.T. pp. 40-43.]
9. Objectors generally testified about concerns related to stormwater runoff from the Property due to additional impervious coverage, and the removal of trees that presently buffer sound from nearby Routes 76 and 476. [10/18/17 N.T. pp. 70, 72, 76-77, 79-81; 11/15/17 N.T. pp. 36-37.]

B. DISCUSSION

In Pennsylvania, a zoning hearing board may only grant a variance where:

- 1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
- 2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;

3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;
and
5. the variance sought will represent the minimum variance that will
afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Variances should be granted sparingly, and the reasons for granting variances must be substantial, serious and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). A relaxed standard applies to applications for dimensional, as opposed to use, variances, but an applicant must still demonstrate an unnecessary hardship caused by unique physical characteristics of the property. See *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Commw. Ct. 2011). Additionally, “[i]t is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted.” *Id.* at 150. Commonwealth Court rejects requests for dimensional variances where proof of hardship is lacking. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of the City of Pittsburgh*, 997 A.2d 423, 445 (Pa. Commw. Ct. 2010).

Instead, “multiple factors are to be taken into account when assessing whether unnecessary hardship has been established”. *Id.* (citing *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 48 (Pa. 1998)). These factors have long included blighted/dilapidated conditions on a property, as well as an applicant’s efforts to remediate/renovate for a salutary/productive purpose. *Vitti v. Zoning Bd. of Adjustment of City of Pittsburgh*, 710 A.2d 653, 657-58 (Pa. Commw. Ct. 1998) (citing *Wagner v. City of Erie Zoning Hearing Bd.*, 675 A.2d 791 (Pa. Commw. Ct. 1996)).

- 1. Unique physical conditions of the Property have caused an unnecessary hardship justifying the requested variances to permit a smaller front yard setback, a reduced lot size, and additional disturbance of areas of significant and steep slopes.**

The Property is considerably constrained by its existing physical features. Proposed Lot 2 contains areas of significant and steep slopes that cover more than half of the entire lot, and nearly the entire building envelope. For any development of Lot 2 to be cohesively incorporated into the existing street line, and to avoid a precipitous drop from the curb to the building entrance or garage, a house must be located in part on the flatter area within the front yard setback. Locating the house closer to Rebel Hill Road minimizes the disturbance of steep slope areas, as a house that complies with the 30-foot front yard setback would be located entirely within the steep slope area.

With regard to the lot area variance for Lot 1, this lot satisfies the minimum lot requirement in the R-2 District, but not the increased requirement imposed on parcels containing steep slope areas. Lot 1 is encumbered with an existing, nonconforming residential dwelling that sits largely outside the permitted building envelope. No additional development or modification is proposed for Lot 1, thereby creating no additional stormwater runoff than what already comes from the Property.

Landowner has demonstrated that an unnecessary hardship exists to justify the requested variances to permit a reduced front yard setback for Lot 2, a reduced lot size for Lot 1, and disturbance of areas of significant and steep slopes on Lot 2 in excess of that permitted by the Zoning Ordinance.

- 2. The hardship with respect to the requested variances were not self-created.**

Landowner was required to demonstrate that the hardship alleged was not self-created. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999). The hardship is created by the existing conditions of the Property, including

significant and steep slope areas and the presence of an existing, nonconforming residential dwelling. Landowner did not create the hardship justifying the requested variances.

3. The requested variances are the minimum needed to afford relief.

Landowner was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl*, 736 A.2d at 59. Given the significant physical constraints present on the Property, Landowner's requested relief to permit a smaller front yard setback, a reduced lot size, and additional disturbance of areas of significant and steep slopes are the minimum relief necessary to allow Landowner a reasonable use of Lot 2 for a single-family residence, a permitted by right use in the R-2 District.

4. The requested variances to permit a smaller front yard setback, a reduced lot size, and additional disturbance of areas of significant and steep slopes would not be detrimental to the public welfare, nor impair the appropriate use or development of adjacent property.

Landowner presented evidence that the neighborhood contained several other properties that are similarly close, or closer, to Rebel Hill Road, and that sufficient space was provided to install necessary off-street parking and stormwater management facilities within the proposed front yard setback. Landowner's witnesses also credibly testified that the proposed stormwater management facilities would ensure that no additional stormwater runoff would flow onto down-slope properties, and would likely reduce runoff from what currently occurs.

Objecting neighbors' concerns regarding runoff and the removal of trees were not substantiated. Landowner sufficiently demonstrated that these abstract concerns feared by the objecting neighbors would be adequately addressed through the proposed stormwater management facilities that would be reviewed during the subdivision and land development process before the Township Board of Supervisors.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(5), and Zoning Ordinance §165-215.A(5).
2. Landowner has standing to seek the requested variance as the equitable owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Section 165-23 requires a front yard setback of 30 feet in the R-2 District.
5. Section 165-232.4(A) requires an increase in the 10,000 square foot minimum lot area of the underlying district by a factor of 1.5 for a presently undeveloped property containing steep slope areas. This results in a required minimum lot area of 15,000 square feet for Lot 2.
6. Section 165-232.4(C) prohibits disturbance of more than 20% of all areas of significant slopes on a parcel or tract.
7. Section 165-232.4(D) prohibits disturbance of more than 30% of all areas of steep slopes on a parcel or tract.
8. The ZHB may only grant a variance if an applicant establishes that: (1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property; (2) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property; (3) the unnecessary hardship was not created by the applicant; (4) the variance will not be detrimental to the public welfare; and (5) the variance sought will represent the minimum variance that will afford relief.
9. Landowner demonstrated an unnecessary hardship that entitled it to the requested variances that was not self-inflicted, was the minimum relief necessary to allow the

reasonable use of Lot 2, was not self-inflicted, and would not detrimentally affect the surrounding community or inhibit the development of neighboring parcels.

At the conclusion of the November 15, 2017 public hearing, the ZHB voted unanimously to grant the application subject to certain conditions. The ZHB mailed the following notice of decision:

This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board at the conclusion of the hearing on November 15, 2017.

The Zoning Hearing Board voted to grant the following variances from the Upper Merion Township Zoning Ordinance of 1942, as Amended, to permit a 2-lot subdivision and construction of a single-family detached dwelling on lot 2:

- *lot 1:*
 - *variance from section 165-232.4.A Steep slope regulations to permit a lot area of 10,565 square feet instead of the minimum required lot area of 15,000 square feet*
- *lot 2:*
 - *a variance from section 165-23 Area, width and yard regulations to permit a front yard setback of 11.75 feet instead of the minimum required setback of 30 feet*
 - *the following variances from section 165-232.4 Steep slope regulations*
 - *a variance from section 165-232.4.B to permit construction of the single-family detached dwelling within an area of significant slopes*
 - *a variance from section 165-232.4.C to permit disturbance of 100% of the significant slopes (25% or greater) instead of the maximum permitted disturbance of 20%*
 - *a variance from section 165-232.4.D to permit disturbance of 73% of the steep slopes (15% to 25%) instead of the maximum permitted disturbance of 30%.*

The Zoning Hearing Board conditioned the relief as follows:

1. *gutter caps shall be installed on all gutters; and*

2. *development of the property shall conform strictly with the representations, testimony, and exhibits presented at the hearing and set forth in the application, including, but not limited to, the building elevations, titled "Proposed Residence", prepared by Gordon L. Todd, Associates, dated November 9, 2017, sheets SK-2 and SK-3, accepted into evidence as exhibit "A-6" and attached hereto.*

Since this application was contested, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons.

The applicant is directed to section 165-257 Expiration of special exceptions or variances and applicable statutory provisions governing the expiration of special exceptions and variances. The applicant shall comply with Township stormwater management regulations as part of its subdivision application.

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

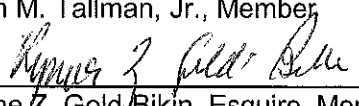
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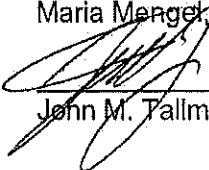
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- a variance from section 165-232.4.D to permit disturbance of 73% of the steep slopes (15% to 25%) instead of the maximum permitted disturbance of 30%.

The Zoning Hearing Board conditioned the relief as follows:

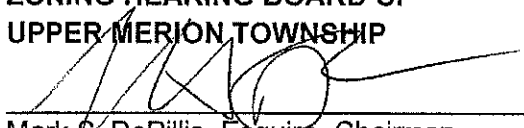
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