

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**MONTGOMERY COUNTY, PENNSYLVANIA**

**APPLICATION OF DJB PROPERTIES, LLC**

**APPLICATION NO. 2017-05**

**PROPERTY: 1235 Rebel Hill Road**

**OPINION AND ORDER**

This application concerns a request for 3 dimensional variances to permit a single-family detached dwelling on a nonconforming lot in the R-2 *Single-Family Residential District*. The application was granted.

DJB Properties, LLC ("Landowner") is the legal owner of the property located at 1235 Rebel Hill Road, Upper Merion Township (the "Property"). The Property is nonconforming as to lot size, comprising 5,156 square feet instead of the minimum required 10,000 square feet in the R-2 *Single-Family Residential District*. The Property presently contains a dilapidated single-family detached dwelling with nonconforming side yard setbacks. Landowner intends to construct a new single-family detached dwelling, situated on the lot in such a manner as to slightly decrease, in some respects, the existing nonconformities.

On March 15, 2017, the Zoning Hearing Board of Upper Merion Township ("ZHB") held the first of two public hearings on Landowner's application. All ZHB members were present at the hearing: Mark S. DePillis, Esquire, Chairman, M Jonathan Garzillo, Vice-Chairman, Maria Mengel, Secretary, John M. Tallman, Jr., Member, and Lynne Z. Gold-Bikin, Esquire, Member. Marc D. Jonas, Esquire, of Eastburn and Gray, P.C. represented the ZHB as its solicitor. Landowner was represented by John A. DiPietro, Esquire.

At the conclusion of the March 15, 2017 hearing, the matter was continued so that Landowner could provide accurate renderings of the proposed single-family detached dwelling.

On May 3, 2017, the 2<sup>nd</sup> hearing on Landowner's application resumed. All ZHB members were present. Two neighbors appeared in opposition and were represented by counsel: Stephen Shanahan, 1231 Rebel Hill Road, represented by Joseph Kuhls, Esquire, and Jeffrey Grogan, 241 Rebel Hill Road, represented by A. Lindsay Doering, Esquire.

Both hearings were duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded.

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

**A. FINDINGS OF FACT**

**BACKGROUND**

1. Landowner is the legal owner of the Property.
2. The Property is located in the Township's R-2 *Single-Family Residential District*. [Ex. Brasso-4.]
3. The Property comprises 5,156 square feet. A minimum lot area of 10,000 square feet is required in the R-2 *Single-Family Residential District*. [Ex. Brasso-4.]
4. The lot width at the building line is 38.24 feet. A minimum of 70 feet is required. [*Id.*]

5. Section 165-23 *Area, width and yard regulations* requires a minimum side yard setback of 10 feet and a minimum aggregate side yard setback of 25 feet. Zoning Ordinance § 165-23.A.

6. Applying the Zoning Ordinance's side yard setback requirements yields a building envelope of approximately 13 feet in width.

7. The Property contains a dilapidated single-family detached dwelling, which is, and has been for some time, vacant. [Brasso-1.]

8. Landowner proposed to demolish the existing structure, and build a new single-family detached dwelling as depicted in this hearing exhibit:



[Brasso-5.]

### **ZHB HEARING**

9. Landowner entered the following exhibits:

- a. Brasso-1: photograph of front of existing single-family detached dwelling

- b. Brasso-2: architectural renderings and floor plans, prepared by Luce Architects, dated December 21, 2016
  - c. Brasso-3: plan titled "Zoning Hearing Board Application Plan", prepared by Joseph M. Estock Consulting Engineers & Land Surveyors, dated January 12, 2017, last revised January 31, 2017
  - d. Brasso-4: plan titled "Zoning Hearing Board Application Plan", prepared by Joseph M. Estock Consulting Engineers & Land Surveyors, dated January 12, 2017, last revised April 18, 2017
  - e. Brasso-5: architectural renderings and floor plans, prepared by Luce Architects, dated December 21, 2016
10. Landowner offered the following testimony:
- a. Several areas of the property, including a large portion of its front yard, contain steep slopes. [Brasso-5.]
  - b. The increase in elevation from the front property line to the front door of the proposed dwelling is approximately 12 feet. [N.T. 5/3/2017, p. 22.]
  - c. As a result, the major portion of the proposed garage is located underground, and the driveway will entail significant excavation. [N.T. 5/3/2017, p. 23; Brasso-5.]
  - d. The Property contains an existing, dilapidated, vacant, single-family detached dwelling, with the following setbacks:
    - (i) side yard setback to the north of 8.6 feet
    - (ii) side yard setback to the south of 6 feet
    - (iii) aggregate side yard setback of 14.6 feet[N.T. 5/3/2017, p. 5; Brasso-4.]

- e. Landowner's proposed single-family detached dwelling would have the following setbacks:
  - (i) side yard setback to the north of 9.3 feet
  - (ii) side yard setback to the south of 6 feet
  - (iii) aggregate side yard setback of 15.3 feet[Brasso-4.]
- f. In sum, Landowner proposes to slightly increase both the northern side yard setback and the aggregate side yard setback by 0.7 feet. [N.T. 5/3/2017, p. 5; Brasso-4.]
- g. Landowner will tear down the existing single-family detached dwelling and construct a new single-family detached dwelling. [N.T. 5/3/2017, p. 11.]
- h. A viable single-family detached dwelling must be at least 20 feet wide. [N.T. 5/3/2017, p. 31.]
- i. Landowner's proposed single-family detached dwelling is 20 feet wide with a small 2 foot "bump-out" to the south. [Brasso-4.]

11. The testimony of the objector, Mr. Shanahan, was follows:

- a. In his opinion, the proposed single-family detached dwelling "present[s] as four stories." [N.T. 5/3/2017, pp. 33-34.]
- b. Although he stated that the proposed single-family detached dwelling would be "closer" to his house, the side yard setback on the north side of the Property, where Mr. Shanahan's property is located, is being *increased*. [N.T. 5/3/2017, p. 34.]

- c. Mr. Shanahan was also concerned with the height of the proposed dwelling. [N.T. 5/3/2017, p. 35.] However, Landowner did not request relief from the Zoning Ordinance's height limitations.
- d. When asked by ZHB Member Tallman whether the proposed single-family detached dwelling would be beneficial to property values in the neighborhood, Mr. Shanahan's response was as follows:

**ZHB MEMBER TALLMAN:** Do you think that having this new home in the neighborhood would be beneficial to the values in the neighborhood or detrimental?

**MR. SHANAHAN:** I think a new home, replacement home would be – add value, yes.

[N.T. 5/3/2017, pp. 43-44.]

- 12. The objector, Mr. Grogan, offered the following testimony:
  - a. He is a licensed architect in the state of Pennsylvania. [N.T. 5/3/2017, p. 45.]
  - b. Mr. Grogan resides approximately a quarter of a mile from the Property. [*Id.*]
  - c. In Mr. Grogan's opinion, the existing single-family detached dwelling could be renovated. [N.T. 5/3/2017, p. 51.] However, Mr. Grogan admitted that, although he had been on the porch of the existing dwelling, he had never been inside. [N.T. 5/3/2017, p. 64.]
  - d. Mr. Grogan opined that the proposed single-family detached dwelling constituted a 4-story dwelling, not a 2 1/2 story dwelling as

permitted by the Zoning Ordinance. [N.T. 5/3/2017, p. 53.]

Landowner did not request relief from the Zoning Ordinance's height limitations.

- e. Mr. Grogan acknowledged that the new single-family detached dwelling would add value to the neighborhood:

**ZHB MEMBER TALLMAN:** I'm going to ask you the same question I asked Mr. Shanahan. Do you think that this new home will add value to the residents in the neighborhood or detract from the value of the residents in the neighborhood?

**MR. GROGAN:** That's a good question. And I would have to go back to the fact that the existing house, if you renovated that, that would definitely add value. If you tore down the existing house and rebuilt what's proposed, I think that would also add value. So the question, I guess, is which one has more value and I don't know that there's an answer for that.

[N.T. pp. 5/3/2017, 58-59.]

## **B. DISCUSSION**

It is well settled in Pennsylvania that a zoning hearing board may 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 South Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Variations should be granted sparingly, and the reasons for granting variations 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, variations, 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 variations 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).

1. **Unique physical conditions of the Property have caused an unnecessary hardship justifying the requested dimensional variations from the Zoning Ordinance's side yard setback requirements.**

The Property contains significant physical constraints. The Property is nonconforming as to lot area and lot width, comprising just over half the required lot



area and lot width. The Property contains significant steep slopes, and requires a large amount of excavation in order to create a viable garage and driveway. In fact, the change in elevation from the front property line to the front door of the dwelling is 12 feet. The building envelope is too small for a house.

In one of the seminal cases on nonconforming undersized lots, *Schaaf v. Zoning Hearing Bd. of Borough of Edinboro*, 347 A.2d 740 (Pa. Commw. Ct. 1975), a property owner sought to construct a single-family detached dwelling, a permitted use on his property. The property was approximately 56 feet in depth. The zoning ordinance required a 20 foot rear yard setback and 30 foot front yard setback, leaving an approximate 6 foot strip on which a dwelling could be built. The property owner applied to the zoning hearing board for variances, which the zoning hearing board denied. In reversing, Commonwealth Court found that strict compliance with the zoning ordinance's yard requirements rendered the Property "virtually useless".

Similarly, in *Detwiler v. Zoning Hearing Bd. of Lower Salford Twp.*, 416 A.2d 1150 (Pa. Commw. Ct. 1980), application of the required setbacks resulted in a building envelope 10 feet in width. The property owner, wishing to construct a single-family detached dwelling on the property (a permitted use), applied to the zoning hearing board for dimensional variances from the required setbacks. The zoning hearing board granted the variances, and objecting neighbors appealed. The trial court affirmed.

Commonwealth Court, in affirming, found "as a matter of law, that the cumulative impact of the setback requirements make the construction of a residence so unreasonable as to be impossible." *Id.* at 1159, n.8. Commonwealth Court emphasized

that the proposed use, a single-family detached dwelling, was a permitted use on the property. Commonwealth Court concluded:

With regards to dimensional variances, we have held on numerous occasions that where, as here, the yard requirements make the construction of a residence impossible, an unnecessary hardship results to the landowner. See *John R. Greene Associates v. Zoning Hearing Board of Lower Allen Township*, 56 Pa.Commonwealth Ct. 605, 426 A.2d 175 (1981); *Schaaf v. Zoning Hearing Board of Edinboro*, 22 Pa. Commonwealth Ct. 50, 347A.2d 740 (1975); *Jacquelin v. Horsham Township*, 10 Pa.Commonwealth Ct. 473, 312 A.2d 124 (1973).

*Id.* at 1159.

This matter is controlled by these well-established and sound precedents. Applying the side yard setback requirements of the Zoning Ordinance, only a 13 foot wide dwelling could be built. Landowner's uncontroverted testimony was that a 13 foot wide dwelling was not viable. Landowner demonstrated unique physical conditions on the property causing an unnecessary hardship.

**2. The hardship was 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 nonconforming lot area and lot width, as well as the existing natural slopes on the Property. Landowner did not create the hardship justifying the variances from the Zoning Ordinance's side yard requirements.

**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. Notwithstanding the significant physical constraints of the Property, Landowner limited the relief requested to dimensional variances from the Zoning Ordinance's side yard setback requirements. In fact, Landowner proposed to increase the northern side yard setback and the aggregate side yard setback by 0.7 feet. Landowner requested the minimum relief necessary.

**4. The requested variances would not be detrimental to the public welfare, nor impair the appropriate use or development of adjacent property.**

Landowner proposed a single-family detached dwelling, a permitted use on the Property, in a neighborhood of single-family detached dwellings. The testimony presented demonstrated that the requested dimensional variances, required to permit a new single-family detached dwelling on the Property, would *benefit* neighboring properties. Both objecting neighbors admitted that the new single-family detached dwelling would have a positive effect on property values in the neighborhood. The requested variances would not be detrimental to the public welfare, nor impair the appropriate use or development of adjacent property. Razing of a long-vacant and dilapidated house in a residential neighborhood, and the construction of an attractive new house will enhance the public welfare and neighboring properties.

**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 variances as the legal owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Section 165-23 *Area, width and yard regulations* requires a minimum side yard setback of 10 feet and a minimum aggregate side yard setback of 25 feet. Zoning Ordinance § 165-23.A.
5. The ZHB may grant a variance provided that 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.
6. Landowner demonstrated an unnecessary hardship entitling Landowner to the requested variances from Section 165-23 *Area, width and yard regulations* to permit a side yard setback to the north of 9.3 feet, a side

yard setback to the south of 6 feet, and an aggregate side yard setback of 15.3 feet.

7. Landowner demonstrated that the variances are necessary to permit a reasonable use of the Property as and for a single-family detached dwelling.
8. Landowner demonstrated that the variances are the minimum necessary to afford relief.
9. Landowner demonstrated that the alleged hardship was not self-created.
10. Landowner demonstrated that the requested relief would not be detrimental to the public welfare, nor neighboring properties.
11. Landowner demonstrated its entitlement to the requested variances.

At its May 3, 2017 public meeting, the ZHB voted to grant the application, which was followed by the mailing of the following notice of decision:

#### **MOTION**

AND NOW, this 3rd day of May, 2017, the Zoning Hearing Board of Upper Merion Township GRANTS the request for variances from section 165-23.A *Area, width and yard regulations* to permit demolition of an existing and nonconforming single-family detached dwelling and construction of a new single-family detached dwelling with the following side yard setbacks:

- minimum northern side yard setback of 9.3 feet, instead of the minimum required 10 foot setback
- minimum southern side yard setback of 6 feet instead of the minimum required 10 foot setback
- minimum aggregate side yard setback of 15.3 feet, instead of the minimum required 25 foot aggregate setback.

The new single-family detached dwelling shall conform strictly to the representations, testimony, and exhibits presented at the hearings and set forth in the application, including, but not limited to the following exhibits, which accompany this letter:

- plan titled "Zoning Hearing Board Application Plan", prepared by Joseph M. Estock Consulting Engineers and Land Surveyors, dated January 12, 2017, last revised April 18, 2017, entered as exhibit Brasso-4
- architectural renderings and floor plans prepared by Luce Architects, dated December 21, 2016, 2 sheets, entered as exhibit Brasso-5.

Because this application was contested, a decision with findings of facts, conclusions of law, and reasons will follow.

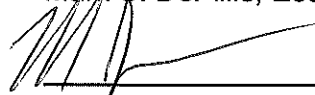
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Included with this decision are the plan titled "Zoning Hearing Board Application Plan", prepared by Joseph M. Estock Consulting Engineers and Land Surveyors, dated January 12, 2017, last revised April 18, 2017, entered as hearing exhibit Brasso-4, and architectural renderings and floor plans prepared by Luce Architects, dated December 21, 2016, 2 sheets, entered as hearing exhibit Brasso-5.

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

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

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Mark S. DePillis, Esquire, Chairman



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M Jonathan Garzillo, Vice Chairman

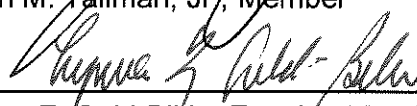


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Maria Mengel, Secretary



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John M. Tallman, Jr., Member



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Lynne Z. Gold-Bikin, Esquire, Member

Date of Mailing: