

BEFORE THE LOWHILL TOWNSHIP ZONING HEARING BOARD
LOWHILL TOWNSHIP, LEHIGH COUNTY, PENNSYLVANIA

In Re: CRG Acquisition, LLC	:	Case No. 2021-6
	:	Appeal No. 182
	:	
	:	Hearing Date: December 21, 2021

DECISION OF THE ZONING HEARING BOARD

1. This is a Zoning Hearing Board Decision rendered pursuant to the Appeal of Applicant, CRG Acquisition, LLC. Testimony was taken before the Lowhill Township Zoning Hearing Board on December 21, 2021.

2. CRG Acquisition, LLC, the Applicant herein, is the equitable owner of the property located at 2951 Betz Court, Orefield, Lowhill Township, Lehigh County, PA 18069. Applicant is the equitable owner of the property under an Agreement of Sale with current Owners, George W. Wessner, Jr. and Cheree Wessner.

3. On or about November 12, 2021, Zoning Officer, Brian Carl issued a correspondence outlining the Zoning Officer's denial of Applicant's request for proceeding on the project via the EP Environmental Protection Zone via Site #1 and Site #2 and outlining reasons for the denial.

4. In response to the Township Zoning Officer's correspondence, Exhibit 5, Applicant filed the within appeal of the November 12 correspondence as well as the within appeal for a variance to the height requirement pursuant to Lowhill Township Zoning Ordinance Section 544 requesting a fifty (50) foot height requirement rather than the Zoning Ordinance Section 544 required thirty-five (35) foot height requirements.

5. Appearing and testifying on behalf of the Applicant was Mr. Fred Ferraro of CRG Acquisition, LLC, Owner George "Buddy" Wessner, Jr. (owner of the property), and Joshua D. Hoffman, P.E., Senior Project Manager of Snyder Secary & Associates LLC, identified as the Applicant's project manager with expertise in civil engineering.

6. Applicant was requesting a de minimums variance and in the alternate, appealing the November 12, 2021 Zoning Officer's correspondence, specifically pertaining to steep slopes, Area #1 and Area #2 as outlined in Brian Carl's- Zoning Officer's correspondence of November 12, 2021, as well as the implication of Area #1 and Area #2 under Lowhill Township's EP Environmental Protection Overlay and the application of Lowhill Township's EP Environmental Protection Zoning Ordinance, specifically Sections 810/850 et seq.

7. Applicant was represented by counsel, Blake Marles, Esquire, of the law firm of Stevens & Lee, 840 Hamilton Street #521, Allentown, PA 18101.

8. The Zoning Officer, Brian Carl additionally appeared and testified, providing background information for Applicant's requested variance relief, specifics with regard to the height requirements surrounding Section 544, as well as information pertaining to public water and proposed public septic and the prohibition of same as outlined in Applicant's application, as well as the circumstances and his analysis as the Zoning Officer of Applicant's request, specifically pursuant to the designated Area #1 and Area #2 and the impact of the EP Environmental Protection Overlay as well as the requisite Zoning Ordinance, specifically Section 810/850 et seq., and the Zoning Officer's rejection of Applicant's request leading to the appeal of the November 12, 2021 Zoning Officer's correspondence, the subject of Applicant's application.

9. Brian Carl additionally testified to Exhibits 1-5 being, Exhibit 1 – the advertised Public Notice, advertised in accordance with the Municipalities Planning Code (MPC) and Lowhill Township; Exhibit 2 – the letter/Notice to adjoining land owners; Exhibit 3 – the November 12, 2021 Zoning Officer/Brian Carl correspondence to Applicant rejecting and requesting the appeal to said notice; Exhibit 4 – the notice placed on the property for said Hearing; and Exhibit 5 – Applicant’s application.

10. Applicant, per request to the Zoning Officer requested Applicant’s application to proceed without disturbance of alleged steep slopes and the impact of the EP Environmental Protection Overlay.

11. The Zoning Officer, pursuant to correspondence dated November 12, 2021, was unable to verify and/or authorize Applicant’s proposed use to proceed without directly complying with the impact of Area #1 and Area #2 with regard to the EP Environmental Protection Overlay District, specifically full compliance with Sections 810-850 et seq. of the Lowhill Township Zoning Ordinance.

12. Pursuant to Applicant’s application, Applicant was also seeking a height variance from Section 544, which limits permitted industrial areas in the RV Zone to a maximum height of thirty-five (35) feet if a property is served with centralized water and on lot sewage but allows a fifty (50) foot height if centralized water and sewer is provided.

13. As required by the Municipalities Planning Code (MPC), the public notice of the hearing was advertised on two (2) occasions pursuant to Township Exhibit 3, as well as the adjoining neighbors were notified via correspondence outlined on Township Exhibit 4.

14. As required by the Municipalities Planning Code (MPC), public notice of the hearing was posted on the subject property. A photograph of the posting of the subject property was marked as Township Exhibit 5 and made a part of the record.

15. Applicant and his witnesses testified that Applicant attempted to provide public septic to the property, but was unable to, due to the moratorium/prohibition from any expansion on public septic to the property in Lowhill Township.

16. Pursuant to Applicant's application, the property is located at 2951 Betz Court, Orefield, Lehigh County, Pennsylvania, with a PIN 5457257554291.

17. Applicant's witness, Mr. Fred Ferraro and Joshua D. Hoffman, testified that the economic development of potential tenants or feasibility of future tenants to the property request/require a fifty (50) foot height, rather than a thirty-five (35) foot height which would not be economically beneficial to potential tenants for Applicant's proposed use based on the size of the proposed building.

18. The requisite property, as testified by both witnesses is unique and has unique topography as outlined by both witnesses. Additionally, the requisite hardship is found in that despite Applicant's best intent, the request and/or requirement to bring public septic to the property is impossible under the current moratorium as outlined by Applicant's witnesses.

19. The uniqueness of the topography of the property combined with the inability, due to the moratorium, to bring public septic to the property was the identified as the necessary hardship criteria under the Lowhill Township Zoning Ordinance and the Municipalities Planning Code (MPC), meeting the necessary requirements for a variance.

20. The subject property consists of approximately fifty-one (51) acres with approximately twenty-five percent (25%) of the fifty-one (51) acres to be used for the proposed use and is irregularly shaped in the RV Zone.

21. The proposed use as a warehouse as proposed would contain approximately three hundred thousand (300,000) square feet in size.

22. Applicant's expert, Mr. Joshua D. Hoffman, P.E., described the requisite variance due to the inability to bring public septic to the property in Lowhill Township, as well as outlining that Lowhill Township's ordinance containing or nexus between building height and public septic was not in fact related or connected.

23. Had public septic been available to bring to the property as Applicant requested, without the moratorium, Applicant as a matter of right, would have been allowed to bring the proposed height to fifty (50) feet rather than thirty-five (35) feet, if centralized/public water and septic is available.

24. Applicant testified that they were more than ready and able to bring public septic to the property, had the moratorium/prohibition not been in effect. The lack of availability of public septic based on the moratorium does not in any way harm or affect the proposed development pertaining to the thirty-five (35) foot height requirement or the fifty (50) foot height requirement if public water and septic is in fact provided.

25. The only impediment and/or hardship for Applicant in requesting the variance for a fifty (50) foot height was the lack of availability of the public septic to the property in Lowhill Township.

26. Suitable parking and compliance with all of Lowhill Township land development procedure and operations will be complied with at the development stage, including safety, fire

prevention, sprinkler systems, lighting, slope, excavation, landscaping, as required by the Lowhill Township Land Development Ordinance and in compliance with same.

27. Many interested parties and objector(s) appeared personally and on Zoom (video) to comment and/or offer objection(s). Attached and incorporated herein by reference as Township Exhibit 6 is the list of names and addresses of those appearing as interested parties and/or objector(s).

28. The Hearing was advertised per Act 15 as a COVID/Zoom Hearing and was advertised in accordance with the Municipalities Planning Code (MPC).

29. From the testimony and exhibits, the Board makes the following Findings of Fact:

FINDINGS OF FACT

30. As required by the Municipalities Planning Code, public notice of the hearing was advertised in the East Penn Press on two (2) occasions.

31. As required by the Municipalities Planning Code, Lowhill Township posted notice of the public hearing on the property (per Applicant's Exhibit 1).

32. As required by the Lowhill Township Zoning Ordinance, notice of the hearing was mailed to neighboring property owners, as testified to by Township Zoning Officer, Brian Carl.

33. Pursuant to testimony of Applicant and its expert witness, a Section 544 variance was necessary for the property in accordance with Applicant's testimony, exhibits and outlined hardship.

34. All of Applicant's exhibits outlining the unique physical circumstances and the hardship to the property via use variance are made a part hereof.

35. All appropriate criteria under the Municipalities Planning Code (MPC) and the Township Zoning Ordinance for hardship via use variance from Section 544 have been met pursuant to the testimony and exhibits of Applicant and Applicant's expert.

A. USE VARIANCE FOR SECTION 544 FOR A FIFTY (50) FOOT HEIGHT

36. Applicant is the equitable owner through the requisite Agreement of Sale with the existing Owners, George W. Wessner, Jr. and Cheree Wessner, authorizing Applicant to appear and have standing for Applicant's relief as requested in Applicant's application.

37. Given the unique physical circumstances of the property, the inability to provide public septic due to the moratorium in existence prohibited public septic to the property, the property's location, combined with the unique placement, all create the necessary hardship and need for a variance for Applicant's intended use under Section 544 of the Lowhill Township Zoning Ordinance.

38. The Board found that the subject property has unique physical circumstances or conditions in the nature of an irregularly shaped lot as well as the inability to procure public septic as the basis for the required hardship.

39. Based upon the testimony presented at the hearing, the Board also finds that there are unique physical circumstances in the nature of the topography of the subject property; that is, the existence of a sloped property, varying in the degree of the slopes as shown by the evidence presented pursuant to the testimony and exhibits of Applicant.

40. All of Applicant's exhibits outlining the unique physical circumstances and the hardship to the property are made a part hereof.

41. All appropriate criteria under the Municipalities Planning Code (MPC) and the Township Zoning Ordinance for a hardship via variance have been met pursuant to the testimony and exhibits of Applicant.

42. The Zoning Hearing Board (by a vote of 3-0) approved the use variance for height for the use as a warehouse, subject to Applicant's condition that the height may not be greater than fifty (50) feet.

43. In construing the foregoing statutory law, the Courts have consistently held that in order to obtain a variance, the Applicant must demonstrate that the effect of the particular Zoning Ordinance in issue imposes an unnecessary hardship on the Applicant's property; that the hardship is unique or peculiar to the Applicant's property as distinguished from the impact of zoning on the entire district; that the variance, if granted, would not adversely impact on the health, safety or welfare of the general public; and that the hardship was not self-inflicted. Steven v. Zoning Hearing Board of Franklin Township, 634 C.D. 2009 (Pa. Cmwlth. 2010); Solebury Twp. v. Solebury Township Zoning Hearing Bd., 914 A.2d 972 (Pa. Cmwlth. 2007); Ken-Med Associates v. Bd. of Twp. Supervisors, 900 A.2d 460 (Pa. Cmwlth. 2006); Taliaferro v. Darby Tp. Zoning Hearing Board, 2005 W.L. 839932, Pa. Cmwlth. App., 2005; Shaner v. Schuylkill County Zoning Hearing Board, 2004 W.L. 2238534, Pa. Cmwlth. App., 2004; Manayunk Neighborhood Council V. Zoning Bd. Of Adjustment of City of Philadelphia, 2002 W.L. 31855223, Pa. Cmwlth. App. 2002.

44. The Applicant must also show that the variance requested is the minimum departure from the Zoning Ordinance that will afford relief, Cope v. Zoning Hearing Board of South Whitehall Township, 134 Pa. Cmwlth. 236, 578 A.2d 1002 (1990); Gamestown, Inc. v. Zoning Board of Adjustment of City of Pittsburgh, 70 Pa. Cmlwth. 59, 452 A.2d 584 (1982);

The Estate of Carla Barbagalo v. The Zoning Hearing Board of Ingram Borough, 133 Pa. Cmwlth. 38, 574 A.2d 1171 (1990), as the Zoning Hearing Board may only grant a variance when the reasons therefore are substantial, serious, and compelling. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637; Filiberto J. Vito and Virginia J. Vito, his wife v. Zoning Hearing Board of the Borough of Whitehall, et al., 73 Pa. Cmwlth. 270 (1983); Evans v. Zoning Hearing Board of Borough of Spring City, 732 A.2d 686, Pa. Cmwlth. App., 1999; POA Co. v. Findlay Township Zoning Hearing Board, 713 A.2d 70, Pa. 1998.

45. The evidence presented in the within matter clearly establishes the existence of unique physical circumstances such as the prohibition/moratorium of the inability to procure public septic to the property. It was also established that there are unique physical circumstances concerning the subject property in the nature of an irregularly shaped lot. The Board believes that as a result of these unique circumstances or conditions, the subject property cannot be developed in strict conformity with the provisions of the Zoning Ordinance, and that the authorization of variance relief is necessary to enable the reasonable use of the property. The testimony of Applicant's expert witnesses that the property cannot be developed for any use without variance relief is particularly persuasive. Applicant has also proven that the unnecessary hardship has not been self-created.

46. The Board is also satisfied that the requested variance 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.

APPEAL OF TOWNSHIP ZONING OFFICER CORRESPONDENCE OF

11/12/2021

47. Applicant's appeal of Zoning Officer's correspondence dated November 12, 2021, Lowhill Township Zoning Officer, Brian Carl, pursuant to Township Exhibit 3, issued the November 12, 2021, correspondence denying Applicant's request for compliance with the EP District, specifically with regard to application of Area #1 and Area #2.

48. The Zoning Officer, Brian Carl, additionally provided testimony of the correspondence, his reasoning and justification for the requisite denial, and need to appeal to the Zoning Hearing Board.

49. Based on the documentation, expert report, and data, Zoning Officer (Brian Carl) was not in a position or within his authority as Zoning Officer to approve Applicant's request.

50. The November 12, 2021 correspondence from Brian Carl outlined that, specifically pursuant to Lowhill Township Zoning Ordinance Section 830, Location of Environmental Protection Areas, 841, Determination of the Requisite Areas (specifically Area #1 and Area #2 as designated), and Section 850, Site Plan Approval for Permitted Uses, needed to be complied with and approval verification and/or rejection by the Zoning Hearing Board, given the Zoning Hearing Board's jurisdiction for determination.

51. At the hearing, Applicant's engineer/expert outlined the justification and compliance with Lowhill Township Zoning Ordinance Sections 830, 840, and 850 with regard to the designated areas, Site #1 and Site #2, as complying with the EP Overlay District, having no impact on the EP areas, and based on the documentation, finding that Area #1 and Area #2 were not those designated EP areas, which those Lowhill Township Zoning Ordinance Sections 830-850 et seq, the proposed use would in fact be in Compliance.

52. The Zoning Hearing Board believed Applicant's testimony, documentation, and expertise with regard to the impact of the EP areas, specifically with regard to the Township Zoning Officer, agreeing with the analysis and the Township being unable to provide documentation to counter any documentation and/or testimony regarding the non-application of the EP area to Site #1 and Site #2.

DISCUSSION

Applicant is desirous of the requested zoning relief by the Zoning Hearing Board through a Section 544 height-use variance in the Rural Village (RV) Zone.

A variance is a grant of administrative relief to a landowner from the strictest terms of the literal enforcement of the zoning regulations, Cricklewood Hill Realty Associates v. Zoning Hearing Board of Adjustment, 125 Pa. Commonwealth 653, 558 A.2d 178 (1989). A variance should only be granted sparingly and under exceptional circumstances, Oakane v. Zoning Hearing Board of Haverford Township, 136 Pa. Commonwealth 188, 582 A.2d 716 (1990). The modification of the Zoning Ordinance by the issuance of a variance is itself an exercise of a form of legislative power. H.A. Steen Ind., Inc. vs. Cavanaugh, 430 Pa. 10, 17, 241 A.2d 771, 775 (1968).

In order to grant a variance, the Zoning Hearing Board must find, where relevant, all findings set forth in Section 910.2 of the Municipalities Planning Code, 53 P.S. Section 10910.2. Those findings are set forth in Section 1090 of the Lowhill Township Zoning Ordinance.

The Municipalities Planning Code (hereinafter MPC) and Section 1090 of the Lowhill Township Zoning Ordinance requires the following criteria, where relevant, in order for the Board to grant a variance:

1. Their unique physical 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. 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. as such, 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. the variance, if authorized will represent the minimum variance that will afford relief and will be represented in the least modification possible with regulation and issue; cited as Lowhill Township Zoning Ordinance 1090 for variances and cited as Taliaferro vs. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlt. 2005).

A. USE VARIANCES FOR SECTION 544

After reviewing all the data, facts, exhibits, and testimony by Applicant, its witnesses and expert witnesses, Applicant has sufficiently justified the criteria necessary for a variance as required by the Lowhill Township Zoning Ordinance and the Municipalities Planning Code for finding and issuance for said variance.

The Board found that Applicant had successfully met all the necessary criteria, which were required for Applicant in meeting his burden in establishing a use variance from Section 544 to enable applicant to make the necessary use of the property for a warehouse. The evidence presented in the within matter clearly establishes that the subject property is unique in that it has unique topography and combined with the inability to bring public septic to the property, given the current moratorium, outlines the requisite hardship necessary for the variance.

It was also established that there are unique physical circumstances concerning the subject property in the nature of an irregularly shaped lot. The Board believes that as a result of these unique circumstances or conditions, the subject property cannot be developed in strict conformity with the provisions of the Zoning Ordinance, and that the authorization of variance(s) relief is necessary to enable the reasonable use of the property. The testimony of Applicant's expert witnesses that the property cannot be developed for any use without variance relief is particularly persuasive. Applicant has also proven that the unnecessary hardship has not been self-created. The Board is also satisfied that the requested variance 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.

CONCLUSIONS OF LAW

1. The Appeal is properly before the Lowhill Township Zoning Hearing Board.
2. The Applicant has sufficiently shown the requisite criteria for a variance(s) from the following Section:
 - A Section 544 for a fifty (50) foot height variance .
3. The Appeal of the Zoning Officer's 11/12/2021, Correspondence was overruled, in that the ZHB found that Applicant had met his burden by providing/verifying Areas designated #1 and #2 were in compliance with the EP Overlay District and the sites #1 and #2 did comply with the Lowhill Zoning Ordinance Section 830-850, and there was no impairment to the Applicant's proposed use as applied to Site #1 and Site #2, there

was no proof said areas were in the EP impacted areas and/ no prejudice in Compliance with those EP overlay sections of the Lowhill Zoning ordinance.

AND NOW, this 24th day of January, 2022 upon consideration of the foregoing requested Section 544 variance, the Lowhill Township Zoning Hearing Board approves Applicants' request for said Section 544 Variance.

Date: 1/24/2022

Date Mailed: 1/24/2022

ZONING HEARING BOARD
LOWHILL TOWNSHIP

Approval:

By: 
Karl Reed, Chairman

By: 
Terry Naugle, Member

By: 
Glenn Moyer, Member