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In Re: Middlecreek Property Holdings LLC : MILLCREEK TOWNSHIP
: LEBANON COUNTY, PENNSYLVANIA
:
Petition for Variance : CASE # 4-24

**DECISION OF THE ZONING HEARING BOARD
OF MILLCREEK TOWNSHIP**

I. INTRODUCTION

The Zoning Hearing Board of Millcreek Township, Lebanon County, Pennsylvania, met on Monday, December 30, 2024 at a duly-advertised public hearing to hear a Petition for Variance submitted by Middlecreek Property Holdings LLC.

II. FINDINGS OF FACT

1. The Petitioner is Middlecreek Property Holdings LLC, with an address of 5 Stump Road, Newmanstown, PA 17073-9153. The Petitioner was represented by Matthew Mack, P.E. of Mack Engineering, Inc. and Ben Lapp, principal of the LLC. (Hearing Exhibit 1, Hearing Testimony).

2. Petitioner Middlecreek Property Holdings LLC is the owner of 328 Stricklerstown Road, Newmanstown, PA 17073, consisting of approximately 9.99 acres, GPIN #24-2393207-363844-0000. (Hearing Exhibits 1, 2).

3. 328 Stricklerstown Road, Newmanstown, PA 17073 ("Subject Property") is located in the C-2 Convenience Commercial Zoning District in Millcreek Township. (Hearing Exhibits 1, 2).

4. The Subject Property is improved with a single-family dwelling. (Hearing Exhibits 1, 2; Hearing Testimony).

5. Petitioner also owns 334 Stricklerstown Road, on which property he conducts his roofing business.¹ Petitioner wishes to relocate his roofing business to the Subject Property, and proposes to add a building behind (to the east of) the existing residential dwelling to serve as a contractor's office/shop for the roofing business. (Hearing Exhibit 1, 2; Hearing Testimony).

6. A variance is being sought to Section 10.02 of the Millcreek Township Zoning Ordinance (hereinafter sometimes referred to as "Zoning Ordinance"), related to Permitted Uses in the C-2 District, to allow the use of the Subject Property as a contractor's office/shop. (Hearing Exhibit 1).

7. Petitioner asserts that the contractor's office/shop use is neither permitted nor prohibited in the C-2 District, and thus the Zoning Hearing Board, with a recommendation from the Planning Commission, must make a determination as to the similarity or compatibility of the use in question to the permitted uses in the district, basing the decision of the overall intent stipulated for the district, pursuant to Section 4.05 of the Zoning Ordinance. (Hearing Exhibit 1).

8. Petitioner further seeks a variance to Section 10.03.A. of the Millcreek Township Zoning Ordinance, related to Lot Area, Building Height, and Yard Requirements, which requires that a lot width, lot area, and lot depth of not less than

¹ Mr. Lapp testified that 334 Stricklerstown Road and 336 Stricklerstown Road are addresses corresponding to the same tract of land, with 334 Stricklerstown Road being a residential dwelling and 336 Stricklerstown Road being the building associated with his roofing business. Although there are two post office addresses, both 334 and 336 Stricklerstown Road are located on one parcel known as 334 Stricklerstown Road for assessment purposes, Tax Parcel No. 24-2393073-363395-0000.

certain dimensions shall be provided for every principal building for any use permitted in the C-2 district. (Hearing Exhibit 1).

9. Specifically, Section 10.03.A. requires a minimum lot width of one hundred fifty feet (150') for each principal building on the lot. Because the Subject Property has an existing residential structure and an additional structure (the contractor's office/shop for the roofing business) is proposed on the same lot, the minimum requirement is a total of three hundred feet (300') of lot frontage for the two (2) buildings. However, the lot has frontage of only two hundred twenty-four and seventeen hundredths feet (224.17'), thus necessitating a variance. (Hearing Exhibit 1).

10. A variance is also being sought to Section 10.03.C. of the Millcreek Township Zoning Ordinance, which requires side and rear yard setbacks of no less than fifty (50) feet with appropriate landscaping where such yards adjoin a residential district. Petitioner states that while such setbacks are shown on the proposed sketch plan, relief is requested from the landscaping requirements because the Subject Property's property lines already contain existing treeline, abut property that is currently farmland, or abut other properties in the C-2 Zoning District. (Hearing Exhibit 1, 2).

11. A hearing to consider Petitioner's request for a Variance was scheduled for Monday, December 30, 2024, at 7:00 p.m. at the Millcreek Township Municipal Building, 81 East Alumni Avenue, Newmanstown, PA 17073. (Hearing Exhibit 4).

12. Notice of the zoning hearing was duly advertised in the *Lebanon Daily News* on Monday, December 16, 2024 and Monday, December 23, 2024. (Hearing Exhibit 5).

13. Notice of the zoning hearing was sent to Township officials and neighboring property owners by United States First Class Mail. (Hearing Exhibit 6).

14. Notice of the zoning hearing was posted on the Subject Property on December 20, 2024. (Hearing Exhibit 7).

15. The Petition for Variance was heard by the Millcreek Township Zoning Hearing Board (sometimes referred to herein as “ZHB”) before Zoning Hearing Board Members Robert Beisel, Chairman; Timothy Bartow, Vice-Chairman; and Scott Sweigart, Member.

16. Present at the December 30, 2024 zoning hearing were:

Robert Beisel – ZHB Chairman

Timothy Bartow – ZHB Vice-Chairman

Scott Sweigart – ZHB Member

Matthew Mack, P.E. – Representative and Engineer for Petitioner

Ben Lapp – Middlecreek Property Holdings LLC

Kimberly Paugh – Zoning Officer, Lebanon County Planning Department

Summer Miller, Court Stenographer

Amy B. Leonard, Esquire – ZHB Solicitor

Members of the Public²

17. Mr. Mack and Mr. Lapp presented the case for the variances on behalf of the Petitioner. (Hearing Testimony).

18. Mr. Mack presented a sketch plan showing the existing residential dwelling and the proposed new contractor’s office/shop building to be located the Subject Property. (Hearing Exhibit 2; Hearing Testimony).

19. Section 10.02 of the Zoning Ordinance permits the following uses in the C-2 Zoning District:

² Members of the public present at the hearing are as identified on the sign-in sheet.

- A. Shops for the retailing of food, drugs, and pharmaceutical products;
- B. Automobile service and filling stations subject to certain conditions;
- C. Communications antennas mounted on an existing Public Utility Transmission Tower, building, or other structure, and Communications Equipment Buildings, subject to certain standards;
- D. Churches and similar places of worship; and,
- E. Group Care Facilities (as a Special Exception use).

20. Offices and workshops of a plumber, electrician or similar trade and banking, printing, laundry, cabinet making and similar establishments are permitted uses in the C-1 Retail Business District pursuant to Section 9.02 of the Zoning Ordinance, but are not permitted uses in the C-2 Convenience Commercial District.

21. Mr. Mack indicated that the Subject Property is not able to be developed into a number of the permitted uses in the C-2 District, such as shops for the retailing of food, drugs, and pharmaceutical products. (Hearing Testimony).

22. Mr. Mack stated that there is another automobile repair business nearby, and therefore it would not be desirable to develop the Subject Property for that use. (Hearing Testimony).

23. Mr. Mack stated that he did not know whether the Subject Property could be developed with a communications antenna or a church, but he noted that although the property is large, its development is limited by the amount of road frontage. (Hearing Testimony).

24. Mr. Mack stated that the Subject Property could be developed with a Group Care facility, as allowed in the C-2 District by special exception. (Hearing Testimony).

25. Mr. Mack agreed that the Subject Property is presently developed with a residential dwelling, which is understood to be a nonconforming use in the C-2 District. (Hearing Testimony).

26. Mr. Mack argued that the proposed use of a contractor's office/shop should be allowed on the Subject Property because there is no land zoned C-1 in Millcreek Township that is available for Mr. Lapp to purchase and use for his roofing business. (Hearing Testimony).

27. Mr. Lapp testified that he currently rents the existing residential dwelling on the Subject Property to a tenant. (Hearing Testimony).

28. Mr. Lapp testified that he bought 334 Stricklerstown Road in 2019, reusing an existing building for his roofing business. He stated he believed the Subject Property was previously used for automobile repair. (Hearing Testimony).

29. Mr. Lapp stated that he did not obtain a zoning permit when he began using 334 Stricklerstown Road for his roofing business, nor did he seek a variance or other zoning relief to enable him to initiate that use in the C-2 District. (Hearing Testimony).

30. Mr. Lapp now wishes to relocate his roofing business to the Subject Property so that 334 Stricklerstown Road can be sold to a new owner and developed with a new use. (Hearing Testimony).

31. Petitioner was questioned as to whether the proposed concept plan was compliant with Section 16.04 of the Zoning Ordinance, which requires that where more than one structure housing a permitted or permissible use is erected on a single lot, each structure must meet yard and other zoning requirements as though it were on an individual lot. (Hearing Testimony).

32. The sketch plan for the Subject Property does not show each structure (existing residential dwelling and proposed roofing shop/office building) meeting yard and other zoning requirements as though it were on an individual lot. (Hearing Exhibit 2).

33. Section 10.03.B. of the Zoning Ordinance states: "Parking areas may be included in 50% of the required yards of the C-2 Commercial District except where they adjoin a residential district. All yards or portions of yards not used for parking shall be appropriately landscaped and maintained."

34. Although Petitioner's sketch plan does not specifically identify the required rear yard of the existing residential dwelling or the required front yard of the proposed roofing business building, a total of twenty-two (22) parking spaces are shown in the entire area between the two structures. (Hearing Exhibit 2).

35. Petitioner's sketch plan does not show proposed landscaping in any yards or portions of yards not used for parking. (Hearing Exhibit 2).

36. Petitioner provided no evidence that the yards could not be landscaped in accordance with Section 10.03.B. and 10.03.C. of the Zoning Ordinance.

37. The Millcreek Township Planning Commission's meeting minutes of August 7, 2024 indicated that the Planning Commission had reviewed the variance request from Petitioner to relocate the contractor's office and shop from its present location at 334 Stricklerstown Road to the Subject Property. The Planning Commission noted, "This is not an allowed use for this zone – a use variance would be required." (Hearing Exhibit 8).

38. The Planning Commission's meeting minutes indicate a number of comments regarding the proposal, including, *inter alia*, comments that the off-street

parking as proposed does not conform to the Zoning Ordinance; that adjacent property existing sewer systems cross onto the Subject Property; that truck traffic is a concern on the local roadways and that traffic/trucks/emergency vehicle circulation on the Subject Property would have to be improved; and that **heavy buffering** along property lines should be provided (emphasis in original). (Hearing Exhibit 8).

39. The Planning Commission's meeting minutes state that the Board is "not necessarily opposed to use variance provided the proposed building is relocated further east onto lot, proposed truck circulation/parking adequate, remove proposed connection drive between properties, compliance with all comments above and approvals received from all agencies having jurisdiction & no other variances requested." (Hearing Exhibit 8).

40. Mr. Mack indicated that he incorporated recommendations from the Planning Commission into the sketch plan. (Hearing Testimony).

41. It was noted by the Zoning Hearing Board that the Petitioner would not need a variance regarding the required road frontage if the Petitioner proposed only one principal use and structure on the Subject Property, as the Subject Property contains more frontage than the minimum 150 feet required by Section 10.03.A. of the Zoning Ordinance. (Hearing Testimony).

42. There was discussion that the Petitioner would consider discontinuing the residential use and removing the existing residential dwelling so that the only use/structure on the Subject Property, should the variance be granted, would be the contractor's office/shop associated with the roofing business; however, the sketch plan and Petitioner's application both indicated an intention to add a new structure/use

without eliminating the existing residential structure/use. (Hearing Testimony; Hearing Exhibit 2).

43. Members of the public asked a number of questions and made comments about stormwater runoff from the Subject Property, as well as the continued use of existing drain fields on the Subject Property that serve the neighboring property to the north. (Hearing Testimony).

44. David Hertzog, owner of 320 Stricklerstown Road, which is adjacent to the Subject Property to the north, testified that the overhead electric lines serve his property and he has an easement for those lines. He also stated that two (2) of the drain fields on the Subject Property are used by the residence and cabinet shop on his property. He expressed concern that Petitioner's proposed use would negatively affect his use of the existing drain fields. (Hearing Testimony).

III. HEARING EXHIBITS

Hearing Exhibit 1 – Petition for Variance

Hearing Exhibit 2 – Sketch Plan

Hearing Exhibit 3 – Signed Variance Criteria

Hearing Exhibit 4 – Notice of Public Hearing

Hearing Exhibit 5 - Proof of Publication in the *Lebanon Daily News* on December 16, 2024 and December 23, 2024

Hearing Exhibit 6 – Mailing List

Hearing Exhibit 7 – Photo of public notice posted on 328 Stricklerstown Road

Hearing Exhibit 8 – Meeting minutes of the Millcreek Township Planning & Zoning Commission dated August 7, 2024

IV. DISCUSSION

The Petitioner is Middlecreek Property Holdings LLC ("Petitioner"), with an address of 5 Stump Road, Newmanstown, PA 17073-9153. The Petitioner was represented by Matthew Mack, P.E. of Mack Engineering, Inc. and Ben Lapp, principal of the LLC. Petitioner is the owner of 328 Stricklerstown Road, Newmanstown, PA 17073, consisting of approximately 9.99 acres, GPIN #24-2393207-363844-0000 (the "Subject Property"). The Subject Property is located in the C-2 Convenience Commercial Zoning District in Millcreek Township. The Subject Property is improved with a single-family dwelling.

Petitioner wishes to relocate his roofing business from 334 Stricklerstown Road to the Subject Property, and proposes to add a building behind (to the east of) the existing residential dwelling to serve as a contractor's office/shop for the roofing business. A variance is being sought to Section 10.02 of the Millcreek Township Zoning Ordinance ("Zoning Ordinance"), related to Permitted Uses in the C-2 District, to allow the use of the Subject Property as a contractor's office/shop.

Petitioner further seeks a variance to Section 10.03.A. of the Millcreek Township Zoning Ordinance, related to Lot Area, Building Height, and Yard Requirements, which requires that a lot width, lot area, and lot depth of not less than certain dimensions shall be provided for every principal building for any use permitted in the C-2 district. Specifically, Section 10.03.A. requires a minimum lot width of one hundred fifty feet (150') for each principal building on the lot. Because the Subject Property has an existing residential structure and an additional structure (the contractor's office/shop for the roofing business) is proposed on the same lot, the minimum requirement is a total of

three hundred feet (300') of lot frontage for the two (2) buildings. However, the lot has frontage of only two hundred twenty-four and seventeen hundredths feet (224.17').

A variance is also being sought to Section 10.03.C. of the Millcreek Township Zoning Ordinance, which requires side and rear yard setbacks of no less than fifty (50) feet with appropriate landscaping where such yards adjoin a residential district.

Zoning Hearing Boards hear requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. A Zoning Hearing Board may grant a variance when all of the following criteria are met: (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 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) That 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; and (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 in issue. See Pennsylvania Municipalities Planning Code, Section 910.2, 53 P.S. § 10910.2.

An applicant must establish all elements to be entitled to a variance. See *Demko v. City of Pittsburgh Zoning Board of Adjustment*, 155 A.3d 1163, 1172 (Pa. Commw. Ct. 2017). A variance is the proper relief where an unnecessary hardship attends the property; a variance cannot provide relief where a hardship afflicts the property holder's desired use of the land and not the land itself. *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Commw. Ct. 2001). Although zoning ordinances are to be liberally construed to allow for the broadest possible use of the land, the applicant seeking a variance bears a heavy burden. See *Beers ex rel. P/O/A Beers v. Zoning Hearing Board of Towamensing Township*, 933 A.2d 1067, 1069 (Pa. Commw. Ct. 2007); *Borough of Latrobe v. Paul B. Sweeney*, 17 Pa.Cmwlth. 356, 331 A.2d 925, 927 (1975) (personal and economic considerations are not sufficient grounds upon which to base the grant of a variance). The reasons for granting a variance must be substantial, serious, and compelling. *Valley View Civic Association v. Zoning Board of Adjustment*, 462 A.2d 637, 640 (Pa. 1983).

A. Request for variance to Section 10.02 of the Zoning Ordinance – Use Variance

Evaluating each of the criteria required to grant a variance with regard to Petitioner's request for a use variance, Petitioner cannot meet all the elements here. Petitioner has not established an unnecessary hardship. First, there was no evidence presented 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 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. The Subject Property is of sufficient size and shape to be developed in the C-2 Zoning District. The lot meets the minimum lot area for the C-2 District and has sufficient minimum lot width to be developed in accordance with the Zoning Ordinance. No testimony or evidence was presented by Petitioner indicating that the Subject Property could not be developed due to physical circumstances or conditions.

Petitioner's argument is that its intended use of contractor's office/shop is only permitted in the C-1 Zoning District and not the C-2 Zoning District. Petitioner further asserts that because of the width of the Subject Property, it could not be developed for some of the permitted uses in the C-2 Zoning District; however, Petitioner conceded that it could be developed for other permitted uses, such as an automobile service station or group care facility, but Petitioner did not wish to pursue development of those uses. Petitioner also claimed that there was no land in the C-1 Zoning District available for purchase to allow for development of the roofing business use in that District. All of these alleged "hardships" relate to the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located, and not the land itself. The fact that the C-2 Zoning District limits permitted uses to a small group of commercial convenience facilities, and Petitioner does not wish to pursue any of those uses, is a circumstance of the zoning ordinance and not the property itself. A variance cannot be granted "where a hardship afflicts the property holder's desired use of the land and not the land itself." See *Yeager, supra*. Likewise, the fact that the Subject Property may not be able to be developed for every permitted use in the C-2 District does not constitute a hardship.

Second, a variance is not necessary to enable the reasonable use of the Subject Properties. To the contrary, Petitioner's testimony indicated that the Subject Property is already developed with a single-family residential dwelling, which Petitioner rents to a tenant. Although the residential use is nonconforming, there was no evidence that the nonconforming residential use was unlawful or that the Subject Property could not continue to be used in that manner. Additionally, Petitioner admitted the Subject Property could potentially be developed with an automobile service station or a group care facility, both of which are allowed uses in the C-2 Zoning District – Petitioner simply does not wish to pursue those uses.

Third, any hardship asserted by Petitioner is self-inflicted, as the any alleged "hardship" is related only to Petitioner's interest in adding a commercial use to the Subject Property that is permitted only in another Zoning District (C-1). The testimony presented on behalf of Petitioner made it clear that Petitioner wished to relocate the roofing business on 334 Stricklerstown Road to the Subject Property to enable Petitioner to sell 334 Stricklerstown Road to another business that intended to use it as a retail food shop. Thus, Petitioner's "hardship" is the result of its desire to profit from the sale of 334 Stricklerstown Road while simultaneously continuing the roofing business and maintaining the existing residential use on the Subject Property. The self-inflicted aspect of the alleged hardship is further exacerbated by the fact that Petitioner established the roofing business use on 334 Stricklerstown Road without seeking any zoning relief to establish such a use in the C-2 Zoning District and without obtaining any zoning permit for such use. Petitioner's desire to relocate an existing use that has not been lawfully established within the Zoning District is a problem of Petitioner's own making.

The Zoning Hearing Board also considered whether allowing the contractor's shop/office would alter the essential character of the neighborhood or district in which the property is located, or substantially or permanently impair the appropriate use or development of adjacent property, or be detrimental to the public welfare. However, in reviewing the intent of the C-2 Zoning District, a roofing business is not the type of commercial convenience facility contemplated as appropriate in that district, which was intended to serve the immediate needs of residents. It is clear that the intent of the C-2 District provisions was to restrict commercial activity to only a few essential uses, while designating the C-1 Retail Business Districts as areas intended for more intensive commercial uses such as retail shopping, restaurants, professional offices and banks, and personal service shops. The use Petitioner proposes is encompassed squarely within the C-1 permitted uses, which include "offices and workshops of a plumber, electrician or similar trade and banking, printing, laundry, cabinet making and similar establishments."

In addition, there were concerns raised by a neighboring property owner regarding drain fields on the Subject Property which presently serve the neighboring property. While Petitioner indicated that the status of such drain fields was not known, the neighboring property owner testified that at least two (2) of the drain fields were currently in use and serving his existing buildings. Petitioner's sketch plan depicted the proposed new office/shop building being located directly on top of one of the drain fields serving the neighboring property. While Petitioner indicated that there were other locations on the Subject Property that could be used for an on-lot sewage system, it was not clear that Petitioner's proposed plan would not negatively impact the neighboring property's sewage system.

Finally, Petitioner has not met its burden of proving that the variance requested is the minimum variance that would afford relief, as Petitioner does not need a variance to pursue other permitted uses for the Subject Property, or to allow the present residential use of the Subject Property to continue. Petitioner's testimony established that the variance requested was a matter of preference rather than actual necessity.

Petitioner's Petition states that Petitioner is "Requesting a Variance to allow the use (contractors [sic] office) for this property in the C2 district: Per Section 4.05 when a specific use is neither permitted nor prohibited in the schedule of district regulations, the Zoning Hearing Board with a recommendation from the Planning Commission shall make a determination as to the similarity or compatibility of the use in question to the permitted uses in the district basing the decision on the overall intent stipulated for the district." While Petitioner correctly recites the language of Section 4.05 of the Zoning Ordinance, Petitioner seems to assert that a use variance can be granted simply through a recommendation from the Planning Commission and the Zoning Hearing Board's determination that the proposed use is similar to or compatible to the permitted uses in the zoning district. This interpretation ignores the clear criteria for a use variance set forth in the Pennsylvania Municipalities Planning Code. Section 4.05 cannot be used as a mechanism by the Petitioner to avoid the burden of establishing all the elements necessary for a use variance.

Moreover, Section 4.05 cannot be interpreted as giving the Zoning Hearing Board the authority to disregard or ignore the specific language of the Zoning Ordinance. In interpreting a zoning ordinance, the rules of statutory construction must be applied. Delchester Developers, L.P. v. Zoning Hearing Board of Township of London Grove, 161 A.3d 1081, 1103 (Pa. Commw. Ct. 2017), citing Borough of

Fleetwood v. Zoning Hearing Board of Borough of Fleetwood, 649 A.2d 651, 656 (Pa. 1994). The plain language of a statute generally provides the best indication of legislative intent, and therefore, statutory construction begins with analyzing the text itself. Malt Beverages Distributors Association v. Pennsylvania Liquor Control Board, 918 A.2d 171, 176 (Pa. Commw. Ct. 2007) (en banc), *aff'd*, 974 A.2d 1144 (Pa. 2009). Since a zoning hearing board is not a legislative body, it lacks the authority to modify or amend the terms of a zoning ordinance. *Id.*, citing Hill v. Zoning Hearing Board of Maxatawny Township, 597 A.2d 1245, 1251 (Pa. Commw. Ct. 1991). “[Zoning] boards ... must not impose their concept of what the zoning ordinance should be, but rather their function is only to enforce the zoning ordinance in accordance with the applicable law.” Ludwig v. Zoning Hearing Board of Earl Township, 658 A.2d 836, 838 (Pa. Commw. Ct. 1995), quoting In re Kline Zoning Case, 148 A.2d 915, 916 (Pa. 1959).

Here, the plain language of the Zoning Ordinance states that “Offices and workshops of a plumber, electrician or similar trade and banking, printing, laundry, cabinet making and similar establishments” are permitted uses in the C-1 Retail Business District. The list of permitted uses in the C-2 Convenience Commercial District is far more limited in scope and does not allow contractors’ offices or workshops. The Zoning Hearing Board cannot simply disregard the specific decision of the governing body of Millcreek Township to permit such uses only in the C-1 District and not in the C-2 District. If the Zoning Hearing Board were to ignore the zoning district designated for the specific use Petitioner proposes and allow the use to be permitted elsewhere, without requiring Petitioner to meet the use variance criteria, this would be an abuse of discretion. The Zoning Hearing Board may not substitute its judgment or

opinion where the governing body has already regulated the use through the Zoning Ordinance.

This stance is reiterated by the Planning Commission, which specified that Petitioner's proposed use was not an allowed use for the C-2 Zoning District and a use variance would be required. Nevertheless, the Planning Commission noted a number of concerns about Petitioner's proposal, and while Petitioner indicated that these comments were addressed, it is apparent that Petitioner's sketch plan does not adequately address several of the concerns. Specifically, the sketch plan shows off-street parking that does not conform to the Zoning Ordinance provisions in Section 10.03, fails to address the existing sewer systems serving the neighboring property, and fails to include any buffering or landscaping along the property lines, despite the Planning Commission's direction that these items be addressed and that heavy buffering along the property lines be provided. Additionally, the Planning Commission's position was based upon "no other variances requested." Petitioner has not only proposed the use variance, but also requests variances regarding the minimum lot width/lot frontage requirement and a variance to the landscaping requirements.

Where a use variance is required, Petitioner must meet all the elements set forth in the Municipalities Planning Code, and Petitioner has failed to meet that burden.

B. Request to variance to Section 10.03.A. of the Zoning Ordinance, related to Lot Area, Building Height, and Yard Requirements

Petitioner further requests a variance to Section 10.03.A. of the Zoning Ordinance. Section 10.03.A. requires a minimum lot width of one hundred fifty feet (150') for each principal building on the lot. Because the Subject Property has an existing residential structure and an additional structure for the contractor's office/shop

is proposed on the same lot, the minimum requirement is a total of three hundred feet (300') of lot frontage for the two (2) principal buildings. However, the lot has frontage of only two hundred twenty-four and seventeen hundredths feet (224.17').

A dimensional variance involves a request to adjust zoning regulations to use the property in a manner consistent with regulations, whereas a use variance involves a request to use property in a manner that is wholly outside zoning regulations. See *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa.1998). The same criteria apply to use and dimensional variances. See *Tri-Cnty. Landfill, Inc. v. Pine Twp. Zoning Hearing Bd.*, 83 A.3d 488, 520 (Pa. Commw. Ct. 2014). The law is well settled that "[t]he [ZHB] has no discretion to grant a variance unless it finds that *all* of the above-enumerated conditions are met." *Doris Terry Revocable Living Tr. v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 873 A.2d 57, 62 (Pa. Commw. Ct. 2005).

The Pennsylvania Supreme Court in *Hertzberg* set forth a more relaxed standard for establishing unnecessary hardship for a dimensional variance. The *Hertzberg* Court held:

When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.

Hertzberg, supra at 47 (emphasis added).

However, where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under

the relaxed standard set forth in *Hertzberg*. See, e.g., *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of [the] City of Pittsburgh*, 997 A.2d 423 (Pa. Commw. Ct. 2010). [W]hile *Hertzberg* eased the requirements ... it did not make dimensional requirements ... “free-fire zones” for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially “hurt” if it could not do what it wanted to do with the property, even if the property was already being occupied by another use. If that were the case, dimensional requirements would be meaningless...and the planning efforts that local governments go through in setting them to have light, area (side yards) and density (area) buffers would be a waste of time. *Slate Hills Enterprises, Inc. v. Zoning Hearing Bd. of Portland Borough*, 303 A.3d 846, 850–51 (Pa. Commw. Ct. 2023), citing *Soc[.]y Created to Reduce Urban Blight v. Zoning Bd. of Adjustment*, 771 A.2d 874, 878 (Pa. Commw. Ct. 2001); *Yeager v. Zoning Hearing Bd. of the City of Allentown*, 779 A.2d 595, 598 (Pa. Commw. Ct. 2001).

Here, Petitioner fails to meet dimensional variance requirements for multiple reasons. First, a dimensional variance applies where the proposed use is permitted and consistent with the zoning regulations. As discussed herein, Petitioner’s proposed use is not permitted in the C-2 Zoning District. Regardless, Petitioner cannot meet the elements for a dimensional variance to the lot width requirement for each principal building. Petitioner must prove that there is hardship related to the property itself, and such hardship does not exist. The lot is not an irregular shape or size, and it is not nonconforming within the C-2 Zoning District. The Subject Property is of sufficient size and shape to be developed in the C-2 Zoning District. The lot meets the minimum lot area for the C-2 District and has sufficient minimum lot width to be developed in

accordance with the Zoning Ordinance, as the minimum lot width is 150' and the Subject Property has a width of 224.17'. Therefore, the lot is of sufficient width to develop the Subject Property with one (1) principal building.

The Petitioner's asserted hardship is a direct result of Petitioner wishing to develop the Subject Property with more than one (1) principal building and more than one (1) use. Petitioner's proposal is to continue the existing residential use and add a contractor's office/shop for its roofing business. There is clearly no inability of Petitioner to meet the Zoning Ordinance requirements, and the existing use on the property currently meets those requirements. Petitioner's variance request is based solely on its desire maximize development potential, and thus the unnecessary hardship criterion required to obtain a variance is not satisfied.

C. Request for variance to Section 10.03.C. of the Zoning Ordinance, which requires side and rear yard setbacks of no less than fifty (50) feet with appropriate landscaping where such yards adjoin a residential district

Petitioner requests a variance to the provisions of Section 10.03.C. of the Zoning Ordinance, which states: "Where side or rear yards adjoin a residential district, they shall be no less than fifty (50) feet, shall not be used for parking and shall be appropriately landscaped and maintained." The side yard on the south side of the Subject Property partially abuts a residential zoning district, and the rear yard along the eastern boundary of the Subject Property also abuts a residential zoning district.

Petitioner indicates in the Petition that its sketch plan depicts the required fifty (50) foot setbacks for the yards adjacent to residential zoning districts, but that Petitioner does not believe the additional proposed use on the Subject Property will impact the neighbors due to the distance between the improvements proposed on the Subject Property and improvements on adjacent properties. Petitioner also notes that

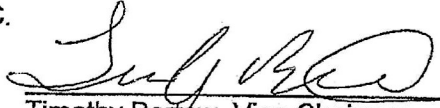
one neighboring property “contained several truck bodies previously.” Petitioner argues in support of its position that “the property lines either already contain existing treeline, is abutting property that is currently farmland, or abut properties located it [sic] the C-2 District.”

Petitioner’s arguments are largely irrelevant to the determination as to the request for a variance to the landscaping requirements. Petitioner presented no testimony or evidence that the physical circumstances of the Subject Property made compliance with the Zoning Ordinance requirements impossible. Likewise, Petitioner does not claim any specific hardship – there is nothing preventing Petitioner from landscaping the required side or rear yards adjoining the residential zoning district. Petitioner fails to acknowledge that the same landscaping requirement also applies to other yards or portions of yards not used for parking, as stated in Section 10.03.B. of the Zoning Ordinance, even where those yards do not adjoin a residential district. Quite simply, Petitioner has done no more than indicate that it does not wish to install the required landscaping. This is an insufficient basis for a variance to be granted.

Because Petitioners have not established all the elements necessary to be entitled to a variance to Section 10.02, Section 10.03.A., or Section 10.03.C. of the Millcreek Township Zoning Ordinance, the request for variances will not be granted.

DECISION


Now, therefore, this 30th day of December, 2024, the Zoning Hearing Board of Millcreek Township, by a 2-1 vote, hereby DENIES the Petition for Variance filed by Petitioner Middlecreek Property Holdings LLC.



Timothy Bartow, Vice-Chairman
Millcreek Township
Zoning Hearing Board

Date: Feb. 10, 2025

I, Robert Beisel, respectfully dissent from the decision rendered by the Millcreek Township Zoning Hearing Board in case 4-24.



Robert Beisel