

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

In Re: Appeal of 2766 Route 100 Associates, LLC                   :       Case No. 176  
  :       Appeal No. 21-3  
  :         
  :       Hearing Date: July 20, 2021

**DECISION OF THE ZONING HEARING BOARD**

1.       This is a Zoning Hearing Board Decision rendered pursuant to the Appeal of Applicant, 2766 Route 100 Associates, LLC. Testimony was taken before the Lowhill Township Zoning Hearing Board on July 20, 2021.

2.       2766 Route 100 Associates, LLC, the Applicant herein, is the equitable owner of the property located at 2766 Route 100 (south of Clauseville Road and North of Wertman Road), Orefield, Lowhill Township, Lehigh County, PA 18069. Applicant is the equitable owner of the property under an Agreement of Sale contingent upon various governmental approvals including the requested zoning relief from the Lowhill Township Zoning Hearing Board.

3.       Appearing and testifying on behalf of the Applicant was Mr. Matthew Nunn, Senior Vice President of Trammell Crow Company with an address of 300 Conshohocken State Road, Suite 250, West Conshohocken, PA 19428 and Mr. James S. Snyder, P.E., Principal Managing Partner of Snyder Secary & Associates, LLC with an address of 2000 Linglestown Road, Suite 304, Harrisburg, PA 17110.

4.       Applicant prepared a site plan for the proposed variance relief, requesting a fifty (50) foot variance from Zoning Ordinance Section 544 regarding permitted uses for the proposed use of “wholesale establishment, distribution station, storage building” which is permitted by right under Ordinance Section 541.25.

5. Applicant was represented by counsel, Christopher M. McLean, Esquire (at the time of application, Applicant was additionally represented by Catherine E. N. Durso, Esquire), both of the Law Firm of Fitzpatrick Lentz & Bubba of Two City Center, 645 West Hamilton Street, Suite 800, Allentown, PA 18101.

6. 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.

7. Pursuant to Applicant's application, Applicant was 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.

8. Applicant and 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.

9. Pursuant to Applicant's application, the property is located at 2766 Route 100 (south of Clauseville Road and north of Wertman Road), Orefield, Lehigh County, Pennsylvania, with a PIN of 545702330003 1.

10. Applicant's witness, Mr. Nunn, 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.

11. 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.

12. 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.

13. The subject property is located at 2766 Route 100, south of Clausseville Road and north of Wertman Road in Lowhill Township, Lehigh County.

14. The subject property consists of approximately 4.3 acres and is irregularly shaped in the RV Zone.

15. The proposed use as a warehouse as proposed would contain approximately Three Hundred Ten Thousand Two Hundred (310,200) square feet in size.

16. Applicant's witness, Mr. James Snyder, was offered as an expert in civil engineering and development without opposition. Applicant's expert, Mr. James Snyder, described the requisite variance as a dimensional variance requiring a lower threshold than the normal Municipalities Planning Code (MPC) variance.

17. 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.

18. 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.

19. 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.

20. 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.

21. The property or development requested permitted use provides three hundred (300) parking spaces as required by both the Land Development Ordinance as well as the Zoning Ordinance, in full compliance with all required zoning criteria, except for the fifty (50) foot height requirement, which is precluded based on the inability to provide public septic.

22. 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 1 is the list of names and addresses of those appearing as interested parties and/or objector(s).

23. The Hearing was advertised per Act 15 as a Covid-Zoom Hearing and was advertised in accordance with the Municipalities Planning Code (MPC).

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

## **FINDINGS OF FACT**

25. As required by the Municipalities Planning Code, public notice of the hearing was advertised in the East Penn Press on four occasions.

26. As required by the Municipalities Planning Code, Lowhill Township posted notice of the public hearing on the property.

27. As required by the Lowhill Township Zoning Ordinance, notice of the hearing was mailed to neighboring property owners.

28. Mr. James Snyder, P.E. of Snyder Secary & Associates, LLC was engaged by Applicant and for the hearing, was admitted as an Expert in the field of engineering/planning/development and presented testimony in support of the zoning relief requested in the Appeal Petition.

29. 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.

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

31. 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 VARIANCES FOR SECTION 544 FOR FIFTY (50) FOOT HEIGHT**

32. Applicant is the equitable owner through the requisite Agreement of Sale with the estate, authorizing Applicant to appear and have standing for Applicant's relief as requested in Applicant's application.

33. 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.

34. 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.

35. 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.

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

37. 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.

38. The Zoning Hearing Board (by a unanimous vote of 3-0) approved the use variance for height for the use as a warehouse.

39. 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.

40. 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.

41. 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.

42. 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.

### **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. Cmwlth. 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**

**A. USE VARIANCES FOR SECTION 544**

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 a fifty (50) foot height variance

AND NOW, this 20 day of August, 2021 upon consideration of the foregoing requested Section 544 variance, the Lowhill Township Zoning Hearing Board approves Applicants' request for said Section 544 Variance.

Date: 8/20/2021

Date Mailed: 8/23/2021

ZONING HEARING BOARD  
LOWHILL TOWNSHIP

Approval:

By:

Karl Reed  
Karl Reed, Chairman

By:

Terry Nangle  
Terry Nangle, Member

By:

Tim Snyder  
Tim Snyder, Alternate Member