

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JIM CAMACHO,	: NO. 15 - 02,265
Appellant	:
	: CIVIL ACTION - LAW
vs.	:
	: LAND USE APPEAL
ZONING HEARING BOARD OF MUNCY CREEK	:
TOWNSHIP,	:
Appellee	:
	:
MUNCY CREEK TOWNSHIP,	:
Intervenor	: Decision

OPINION AND ORDER

Before the court is Appellant’s appeal of the decision of the Zoning Hearing Board of Muncy Creek Township, which upheld the decision of the Zoning Officer that Appellant was not entitled to the variance required to construct a deck on the back side of his swimming pool. Briefs were filed December 31, 2015 and January 20, 2016, and argument was heard February 1, 2016.

The proposed deck¹ is a permitted use, but as designed will encroach on the ten-foot setback requirement by seven feet and thus requires a variance from that set-back requirement. The Board held that “[t]he criteria for granting a variance requires the applicant to prove that there exists unique hardship to the property; no adverse effect on the public health, safety or general welfare; and the variance will represent the minimum variance that will afford relief.” The variance request was denied based on the Board’s conclusion that “a unique

¹ Although the deck has already been built, since the variance is required *before* constructing the deck, the court will address the situation as though what was required to be done had been done.

hardship to the property does not exist as the deck could have been built in a different location or the applicant could have installed a smaller swimming pool.”

Since the court took no additional evidence, the applicable standard of review is whether the Board committed an abuse of discretion or an error of law. Larsen v. Zoning Board of Adjustment of the City of Pittsburgh, 672 A.2d 286 (Pa. 1996). Here, Appellant contends the Board committed an error of law by applying an incorrect standard. Specifically, Appellant argues that there is a more relaxed standard of proving “hardship” than was applied by the Board, citing Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 721 A.2d 43 (Pa. 1998).

The Municipal Planning Code, addressing the standards for granting a variance, requires an applicant to show:

- (1) That there are unique physical conditions peculiar to the property and that the unnecessary hardship is due to those conditions;
- (2) That because of the physical conditions, there is no possibility that the property can be developed in strict conformity with the zoning ordinance and that a variance is needed to enable reasonable use of the property;
- (3) That unnecessary hardship has not been created by the applicant;
- (4) That the variance is not detrimental to the public welfare; and
- (5) That the variance is the minimum variance that will afford relief and is the least modification of the regulation at issue.

53 P.S. § 10910.2 (Supp. 1995).

Hertzberg, *supra*, at 46-47. The Hertzberg Court “articulated the principle that unreasonable economic burden may be considered in determining the presence of economic hardship” and “somewhat relaxed the degree of hardship that will justify a dimensional variance”. One Meridian Partners, LLP v. Zoning Board of Adjustment of the City of Philadelphia, 867 A.2d 706, 710 (Pa. Commw. 2005).

It appears the Board in the instant case combined “unique physical conditions” and “unnecessary hardship” when it stated that the applicant must “prove that there exists unique hardship to the property”. Its conclusion that “the deck could have been built in a different location” is supported by the evidence, however, and negates a showing of “unique physical conditions peculiar to the property and that the unnecessary hardship is due to those conditions”. Appellant testified that the deck could have been built on either side of the pool but that he would have to backfill an area on one side (which he stated he planned to do in the future) and preferred to leave open the other side for recreational use. There are thus no unique physical conditions peculiar to the property, and having to put the deck on one side or the other rather than in the back does not constitute a hardship. As the Court in One Meridian Partners stressed, Hertzberg “did not alter the principle that a substantial burden must attend *all* dimensionally compliant uses of the property, not just the particular use the owner chooses.” Id.

As the Board’s findings are supported by Appellant’s own testimony, and as these findings lead to the conclusion reached by the Board that Appellant has failed to show the requisite hardship, even under the relaxed standard set forth in Herzberg, the court finds no abuse of discretion or error of law in the Board’s decision. Therefore, the following will be entered:

ORDER

AND NOW, this day of February 2016, for the foregoing reasons, the decision of the Zoning Hearing Board of Muncy Creek Township is hereby AFFIRMED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Scott T. Williams, Esq.
Joseph F. Orso, III, Esq.
J. Michael Wiley, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson