

BEFORE THE ZONING HEARING BOARD

TOWNSHIP OF EAST LAMPETER

IN RE: :
 : No. 2020-19
APPLICATION OF JYOTSNA JIVANI :
AND ANIL JIVANI :

DECISION

I. FINDINGS OF FACT

1. Applicants are Jyotsna Jivani and Anil Jivani, 103 Evermore Circle, North Wales, Pennsylvania 19454 ("Applicants").

2. The property which is the subject of the instant application is 2622 Lincoln Highway East, East Lampeter Township, Lancaster County, Pennsylvania (the "Property").

3. The Property is located within the Agricultural District as shown on the Official Zoning Map of East Lampeter Township.

4. Notice of the hearing on the within application was duly advertised and posted in accordance with the provisions of the Pennsylvania Municipalities Planning Code ("MPC") and the East Lampeter Zoning Ordinance of 2016 (the "Zoning Ordinance").

5. A public hearing was held before the Zoning Hearing Board of East Lampeter Township ("Board") on this application on December 10, 2020.

6. Testimony at the hearing was stenographically recorded.

7. Applicants were represented at the hearing by Sheila O'Rourke, Esquire.

8. Anil Jivani appeared at the hearing and testified on behalf of Applicants.

9. Kenneth Budd, of Constructive Concepts, Ltd., and Erik Harmon, of Light-Heigel & Associates, Inc., also appeared at the hearing and testified on behalf of Applicants.

10. East Lampeter Township was represented at the hearing by Susan Peipher, Esquire.

11. Tara Hitchens, East Lampeter Township Director of Planning and Zoning Officer, appeared at the hearing and testified on behalf of East Lampeter Township.

12. Applicants initially:

(i) appealed the denial of a zoning permit for a drive through service window for a convenience store; and

(ii) in the alternative, requested a special exception pursuant to Section 24030.A of the Zoning Ordinance to expand a nonconforming use and a variance from the terms of Section 24030.A of the Zoning Ordinance to expand the nonconforming use in excess of the maximum permitted pursuant to the terms of the Zoning Ordinance.

13. At the hearing, Applicants withdrew their appeal of the denial of a zoning permit for a drive through service window. Instead, Applicants argue that the addition of a drive through

service window is an accessory use and a continuation of a nonconforming convenience store use.

14. The Property contains 5.7 acres.

15. Applicants operate on the Property a facility which dispenses automotive and truck fuels, including a convenience store, as a nonconforming use.

16. Although Applicants characterized the nonconforming use as a convenience store with accessory restaurant, the nonconforming use of the Property has consistently been recognized in past hearings before the Board as a convenience store with fueling station and truck stop. At no time has the Board recognized a restaurant use (even as an accessory use) as a nonconforming use on the Property.

17. The Property has been the subject of previous zoning hearings and the Board takes administrative notice of its prior Decisions, including, but not limited to, Decisions dated November 10, 1988, June 22, 2006 (Case No. 2006-11), August 9, 2018 (Case No. 2018-12); April 11, 2019 (Case No. 2019-02), and July 11, 2019 (Case No. 2019-06).

18. In the Case dated November 10, 1988, the Board found that the total area involved in the original nonconforming use of the Property was 5,799 square feet of area (see Case dated November 10, 1988, Finding of Fact No. 21).

19. In the Case dated November 10, 1988, the Board further found that the area of the nonconforming use, as of November 10, 1988, had been increased to 10,525 square feet of area (4,125 square feet for the building, 3,600 for the rear pump canopy area and 2,800 square feet for the front fuel pump canopy area).

20. In the Case dated November 10, 1988, the Board concluded that the landowner had already been afforded the maximum expansion permitted by the applicable provisions of the zoning ordinance.

21. In Case No. 2018-12, the Board again found that Applicants' predecessor in title already expanded the nonconforming use upon the Property in excess of the 50% expansion permitted by the Zoning Ordinance (see Case No. 2018-12, Finding of Fact No. 12). In that case, a small shed was placed upon an already impervious surface. Applicants sell diesel fuel and the shed was necessary to store required diesel fuel additives. The Board granted a variance from the maximum expansion limitations set forth in the Zoning Ordinance.

22. In Case No. 2019-02, the Board denied the request for a special exception pursuant to Section 24030.A of the Zoning Ordinance in order to expand the nonconforming use by adding a propane filling station (the propane filling station was erected on the Property without first obtaining Board approval).

23. In Case No. 2019-06, the Board denied a request for variances from Sections 23530.A, 23530.C.1, and 23590.A of the

Zoning Ordinance, and any and all other and further relief requested, to operate a video gaming terminal upon the Property.

24. Applicants now propose to add a drive-through service window and lane to the existing convenience store.

25. The drive-through service window and lane would allow customers to order and purchase sandwiches and convenience store items without entering the store.

26. Applicants propose to construct an addition, containing 38 square feet of floor area, on the rear of the convenience store building for the location of the drive-through window. The proposed addition is more fully shown on the plans and materials (collectively the "Plans") submitted by Applicants at the hearing.

27. Applicants will remove 38 square feet of existing floor area from the front of the convenience store by moving /relocating the front doors further back.

28. Vehicles would queue along the side and rear of the building.

29. An order board would be located between 80 feet and 100 feet before the drive through window.

30. Four cars can be accommodated before the order board and four additional cars can be accommodated after the order board.

31. Convenience store items, Subway sandwiches and Champs Fried Chicken would be available at the drive through window.

32. A portion of the drive through lane is currently identified as a bus lane. Applicants testified that the bus lane is no longer used for bus-only traffic.

33. The drive through lane will split into two lanes, each 9 feet in width. One of the lanes will be a "bypass" lane for drivers who decide they do not want to wait in the drive through lane.

34. Although there are fuel pumps located to the rear of the building, Applicants testified that there would be no fuel dispensing operations in the lane adjacent to the drive through.

35. Applicants testified that they desire to have the drive through because customers are not willing to enter the convenience store because of the current COVID epidemic. There has been a downward trend in sales since March of 2020.

II. CONCLUSIONS OF LAW

A. Applicants argue that the drive through service window is an accessory use and a continuation of a nonconforming convenience store use which does not require zoning hearing board approval.

1. Applicants contend that the drive through service window is an accessory use and a continuation of a nonconforming convenience store use which does not require zoning hearing board approval.

2. The Township contends that the addition of the drive through window and dedicated drive through lane is the addition of

a new or additional use to the convenience store use and is not permitted.

3. The Township directs the Board's attention to the definition of the term "convenience store" as set forth in Section 2020 of the Zoning Ordinance. The term "convenience store" is defined as follows:

A retail use that primarily sells household goods, groceries, and ready-to-eat foods to the general public, but that is not primarily a restaurant, and that includes a building that complies with the provisions of this Zoning Ordinance. A convenience store shall not have drive-through service facilities or lanes (emphasis supplied). The supplemental regulations for convenience stores are specified under Section 23200 of this Zoning Ordinance.

4. In response, Applicants direct the Board's attention to Section 23200.E.7 of the Zoning Ordinance which states as follows:

A drive-up or drive-through service lane shall only be permitted as part of a convenience store.

5. The Township Zoning Officer testified that the current Zoning Ordinance was developed over ten years and that Section 23200.E.7 was included by error.

6. The Township Zoning Officer further testified that she was unaware of any other convenience stores in East Lampeter Township which contain a drive through window.

7. Section 1050.A of the Zoning Ordinance (captioned "Conflict, Validity and Severability"), states in pertinent part as follows:

Further, if a discrepancy exists between any regulations contained within this Zoning Ordinance, that regulation which imposes the greater restriction shall apply.

8. "[A] specific ordinance provision takes precedence over a general provision, see *Heck v. Zoning Hearing Board for Harveys Lake Borough*, 39 Pa. Commonwealth Ct. 570, 397 A.2d 15 (1979)." *Epting v. Marion Township Zoning Hearing Board*, 110 Pa. Commonwealth Ct. 389, 532 A.2d 537, 543 (1987).

9. "The more specific provisions control over the more general ones." *Latimore Township v. Latimore Township Zoning Hearing Board*, 58 A.3d 883, 887 (Pa. Cmwlth. 2013).

10. "Moreover, because the . . . Zoning Officer is charged with the administration and execution of the . . . Township Zoning Ordinance, his interpretation of the Ordinance is entitled to deference and should not be disregarded unless shown to be clearly erroneous." *McIntyre v. Board of Supervisors of Shohola Township*, 150 Pa. Commw. 15, 614 A.2d 335 337 (1992).

11. The Board concludes that: (i) the more specific Ordinance provision (being the definition of the term "convenience store" which states that convenience stores shall not have drive-through service facilities or lanes) controls over the more general supplemental provision which was inadvertently included in Section 23200.E.7 of the Zoning Ordinance; (ii) the Township's Zoning Officer is charged with the administration and execution of the Zoning Ordinance and her interpretation of the Zoning Ordinance that convenience stores are prohibited from having drive through service and lanes is entitled to deference and is not clearly erroneous; (iii) Section 1050.A of the Zoning Ordinance, which

states that if a discrepancy exists between any regulations contained within this Zoning Ordinance, the regulation which imposes the greater restriction (in this case being the definition of the term "convenience store") shall apply; and (iv) there is no doubt or ambiguity with regard to the intended meaning of the Zoning Ordinance with regard to convenience stores.

12. In East Lampeter Township, convenience stores, whether permitted by right or as a nonconforming use, are not permitted to have drive through service and drive through lanes.

13. The Board denies and rejects Applicants argument that the addition of a drive through service window and drive though lane is an accessory use and a continuation of a nonconforming convenience store use. Convenience stores permitted by right within East Lampeter Township are not permitted to utilize drive through service. Certainly, the fact that Applicants' operate a convenience store as a nonconforming use does not give them such right. The Township has the power and right to prohibit drive through uses in combination with convenience stores.

B. In the alternative, Applicants request a special exception and variance to expand the nonconforming convenience store use tom include drive through service and a drive through lane.

1. "[T]o be entitled to a special exception, an applicant must bring the proposal within the specific requirements in the zoning ordinance." *Act I, Inc. v. Zoning Hearing Board of Bushkill Township*, 704 A.2d 732, 735 (Pa. Cmwlth. 1997).

2. An applicant for a special exception has the burden of persuasion as to the specific criteria and standards of the zoning ordinance. *Shamah v. Hellam Township Zoning Hearing Board*, 648 A.2d 1299 (Pa. Cmwlth. 1994); *Abbey v. Zoning Hearing Board of the Borough of East Stroudsburg*, 126 Pa. Commonwealth Ct. 235, 559 A.2d 107 (1989).

3. The proposed drive through use does not appear to fall within an ordinance provision which permits the expansion of nonconforming uses. Applicants' proposal to add a drive through window and lane constitutes the addition of a use which is prohibited within the Township and is not an expansion of the nonconforming use permitted by special exception.

4. The Board concludes that Applicants have failed to satisfy the requirements for a special exception pursuant to Section 24030.A of the Zoning Ordinance.

5. With regard to Applicants' request for a variance, in order to be entitled to a variance, an applicant must demonstrate that the zoning ordinance inflicts an unnecessary hardship on the property. *Goldstein v. Zoning Hearing Board of Lower Merion Township*, 19 A.3d 565 (Pa. Cmwlth. 2011); *In re: Appeal of Boyer*, 960 A.2d 179, 183 (Pa. Cmwlth. 2008); *Valley View Civic Association v. Zoning Board of Adjustment of the City of Philadelphia*, 501 Pa. 550, 462 A.2d 637 (1983); MPC §910.2(a).

2. A variance, if granted "must be the minimum that will afford relief and will represent the least modification of the

ordinance." *Rogers v. Zoning Hearing Board of East Pikeland Township*, 103 Pa. Commonwealth Ct. 478, 520 A.2d 922, 924 (1987); MPC §910.2(a)(5).

3. A variance will be granted when a zoning ordinance imposes an unnecessary hardship because of unique physical circumstances or conditions peculiar to the property and the unnecessary hardship is due to such conditions. Unnecessary hardship justifying a grant of a variance is shown where denial of the variance would render the property practically useless. Economic and personal considerations in and of themselves are insufficient to constitute hardship. *McNally v. Bonner*, 645 A.2d 287, 289 (Pa. Cmwlth. 1994) (citations omitted).

4. In order to warrant the grant of a variance, the hardship must be unique to the property and not one which is generally suffered by other properties in the district. *D'Amato v. Zoning Board of Adjustment of the City of Philadelphia*, 585 A.2d 580, 583 (Pa. Cmwlth. 1991).

5. Circumstances unique to the user of a property and not the property itself do not constitute unnecessary hardship. See, e.g. *Chrin v. Zoning Hearing Board of the Borough of Nazareth*, 127 Pa. Cmwlth. 279, 561 A.2d 833 (1989).

6. "The policy of the law [of nonconforming uses] is to restrict such uses closely and to strictly construe ordinance provisions providing for their continuance, so that they may be reduced to conformity as speedily as is compatible with the law and

the constitution." *South Coventry Township v. Zoning Hearing Board of South Coventry Township*, 732 A.2d 12, 15 (Pa. Cmwlth. 1999).

7. Generally, it is well-settled Pennsylvania law that "mere economic hardship will not of itself justify a grant of a variance" and "economic factors are relevant, albeit not determinative, in a variance assessment." *Marshall v. City of Phila.*, 97 A.3d 323, 330-31 (Pa. 2014).

8. "A variance will not be granted because a zoning ordinance deprives the landowner of the most lucrative and profitable uses." *Wilson v. Plumstead*, 936 A.2d 1061, 1070 (Pa. 2007).

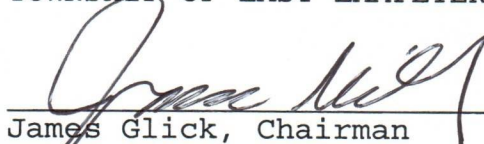
13. Applicants are making a reasonable use of the Property. In fact, Applicants have already expanded the nonconforming use in excess of the maximum expansion limitations of the Zoning Ordinance.


14. Applicants have failed to demonstrate evidence sufficient to warrant the granting of the requested variance.


III. DECISION

Based upon the foregoing findings of fact and conclusions of law, the Zoning Hearing Board of the Township of East Lampeter hereby denies the application of Jyotsna Jivani and Anil Jivani for any and all relief requested.

ZONING HEARING BOARD OF THE
TOWNSHIP OF EAST LAMPETER


James Glick, Chairman


J. Scott Enterline, Vice-Chairman


Jordan Good, Secretary

Dated and filed January 14, 2021, after hearing held on
December 10, 2020.

The undersigned certifies that a copy of this Decision was
served upon all parties on or prior to January 15, 2021.


Sara A. Hitchens