

BEFORE THE ZONING HEARING BOARD

TOWNSHIP OF EAST LAMPETER

IN RE: :
: No. 2022-13
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 September 8, 2022.
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. East Lampeter Township was represented at the hearing by Susan Peipher, Esquire.

10. Colin Siesholtz, East Lampeter Township Director of Planning and Zoning Officer, appeared at the hearing and testified on behalf of East Lampeter Township.

11. Applicants have:

(i) appealed the Notice of Violation, dated July 5, 2022, issued by East Lampeter Township to Applicants regarding their use of the Property (the "2022 Notice of Violation"); 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.

12. The 2022 Notice of Violation states that a pavilion was constructed on the Property without zoning approval or a building permit.

13. The 2022 Notice of Violation further alleges that Applicants are in violation of:

(i) Section 25030.A of the Zoning Ordinance which states that it shall be unlawful to commence with any subdivision, land development activities and site improvements or to change the use of any building, structure or property, until all permits have been issued by the agencies with jurisdiction; and

(ii) Section 24030.A.1 of the Zoning Ordinance which states that no expansion of a nonconforming structure or use, except a single-family dwelling and its accessory buildings, shall hereafter be made unless an appeal has been filed with the Zoning Hearing Board and such expansion has been approved.

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. 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), July 11, 2019 (Case No. 2019-06); and January 14, 2021 (Case No. 2020-19).

17. 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).

18. 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).

19. 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.

20. 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.

21. 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).

22. 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.

23. In Case No. 2020-19, the Board denied Applicants' appeal from a determination of the Township Zoning Officer with regard to Applicants' proposed drive through service window and Applicants' request in the alternative for a special exception and variance to expand the nonconforming convenience store use to include a drive through service and a drive through lane.

24. At the hearing, Colin Siesholtz, East Lampeter Township Director of Planning and Zoning Officer, testified in support of the 2022 Notice of Violation as follows:

(i) He visited the Property and reviewed the Township property file and previous zoning decisions regarding the Property.

(ii) He observed that a pavilion had been constructed on the Property.

(iii) No permit was issued by the Township for construction of the pavilion.

(iv) No zoning approval was obtained or issued for construction of the pavilion.

(v) A pavilion is a structure which requires a building permit.

(vi) A pavilion requires submission and approval of a storm water management plan and no such plan was submitted or approved.

(vii) The pavilion must comply with Americans with Disabilities Act (ADA) accessibility requirements and the pavilion is not ADA accessible.

(viii) There has never been any testimony provided by Applicants in any of the previous zoning hearings regarding any use of the outdoor grass area as and for an outdoor customer area in which the pavilion has been constructed.

(ix) Although the parking area, gas canopies, fueling tanks, sidewalks and driveways are part of the nonconforming use, the grass area (where the pavilion is now located) is not part of the nonconforming use.

(ix) Section 24030.A of the Zoning Ordinance limits expansions of nonconforming uses to a maximum of 50% of its original size and that the nonconforming use of the Property has already been expanded beyond the 50% maximum expansion limitation.

25. Township Exhibit No. 3, photo 1, which is an aerial photograph of the grass area, does not show any customer area within the grass area.

26. Applicant Anil Jivani testified at the hearing as follows:

(i) Applicants purchased the Property in 2002 and have operated a fueling station and convenience store as a nonconforming use.

(ii) The convenience store is located in the center of the Property, surrounded by the parking area, fueling area and

driveway. An outdoor grass area is located directly east of the convenience store building.

(iii) In 2020, because of Covid and restrictions on indoor dining, Applicants constructed the pavilion within the grass area.

(iv) Applicants removed picnic tables and added six 2-person tables under the pavilion.

(v) The pavilion is 24 feet 6 inches by 16 feet 6 inches.

(v) Applicants also added a playground to this area.

(vi) The pavilion and playground areas are used by customers of the convenience store and fueling station.

(vii) The pavilion and playground do not generate additional trips/traffic.

27. A review of the previous zoning decisions (going back to 1988) regarding use of the Property and the lack of testimony at any of the previous zoning hearings support a finding that use of the grass area as and for the outdoor customer area was added at some point after the use was already nonconforming and not at the time it became nonconforming.

28. Applicants did not provide any credible evidence to substantiate any claim that the grass area was used as an outdoor customer area at the time the use became nonconforming.

II. CONCLUSIONS OF LAW

A. Appeal of 2022 Notice of Violation.

1. Applicants contend that the addition of the pavilion within the grass area is simply an enclosure of the existing nonconforming use and not an expansion of the nonconforming use.

2. The Township contends that the addition of the pavilion is an expansion of the nonconforming use over property which was not part of the original nonconforming use.

3. The Board must determine the area of the Property used for the nonconforming use at the time it became nonconforming.

4. The earliest record regarding the size and areas of the Property used for the nonconforming use is the Board's decision in 1988. 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).

5. Neither Applicants' predecessors, nor Applicants, have ever testified in any hearing before the Board regarding the grass area and its use as a an outdoor customer area.

6. Applicants have not presented any credible evidence to support a claim that the grass area was used as part of the original nonconforming use at the time it became nonconforming.

7. To the extent Applicants began using the grass area as an outdoor customer area at some point after their purchase of the Property, such use was an illegal expansion.

8. The Board upholds issuance of the 2022 Notice of Violation and denies the appeal.

B. In the alternative, Applicants request a special exception and variance to expand the nonconforming convenience store use to 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 Board concludes that Applicants have failed to satisfy the requirements for a special exception pursuant to Section 24030.A of the Zoning Ordinance. Applicants have already expanded the nonconforming use in excess of the 50% expansion limitation and the expansion onto the grass area does not comply with (and is in violation of) Section 24030.A.2 of the Zoning Ordinance.

4. 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 can make a reasonable use of the Property without the pavilion and outdoor customer area.

13. 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.

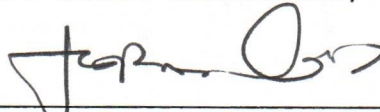
III. DECISION

Based upon the foregoing findings of fact and conclusions of law, the Zoning Hearing Board of the Township of East Lampeter hereby: (i) upholds the 2022 Notice of Violation and denies Applicants' appeal; and (ii) denies the application for 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.

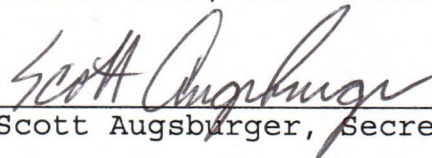
ZONING HEARING BOARD OF THE
TOWNSHIP OF EAST LAMPETER



J. Scott Enterline, Chairman



Jordan Good, Vice-Chairman



Scott Augsburg, Secretary

Dated and filed October 13, 2022, after hearing held on September 8, 2022.

The undersigned certifies that a copy of this Decision was served upon all parties on or prior to October 14, 2022.

