

**BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF
JOHNSON FAMILY TRUST**

**NO. 2020-19
APPLICATION FOR A VARIANCE**

DECISION

I. BACKGROUND

A public hearing on the above Application was held on November 24, 2020 by telecommunication device as authorized by Act 15 of 2020, pursuant to Notice as required by the Worcester Township Zoning Ordinance, as amended (hereinafter "Zoning Ordinance") and the Pennsylvania Municipalities Planning Code. The Applicant/Owner, Johnson Family Trust, proposed to install a fence on the Property located at 1133 Hollow Road, Worcester Township, in the AGR - Agricultural Zoning District.

The Applicant requested the following relief:

A variance from Section 150-182.A of the Zoning Ordinance, so as to permit the installation of an opaque fence within the required setback on the Property, and exceed the height limitation so as to measure 6 feet high with a 2 foot "deer topper", for a total height of 8 feet. (Exhibit A-1)

A quorum of the Zoning Hearing Board participated in the public hearing and conducted a vote in accordance with law. The Applicant was represented by Bernadette Kearney, Esq. No neighboring property owners elected to enter appearance as parties, however a number of neighbors signed letters of support, and one neighbor offered written comment in opposition. The witnesses were duly sworn or affirmed and Notes of Testimony for the hearing were transcribed and are hereby made a part of this record.

At the public meeting on November 24, 2020, the Board voted to deny the application. The

Board issues Findings of Fact and Conclusions of Law in support of the Decision and Order.

II. FINDINGS OF FACT

1. The Applicant is Johnson Family Trust, legal owner of the Property located at 1133 Hollow Road, Parcel No. 67-00-01298-00-3 Worcester Township, Montgomery County, PA, since 2013 ("Property"). (N.T. 11/24/20, pp. 8-9, Exhibits A-1, A-5)

2. The following Exhibits were marked and duly admitted into evidence:

BOARD EXHIBITS:

B-1 Public Notice
B-2 Proof of Publication

APPLICANT'S EXHIBITS:

A-1 Application with Attachments
A-2 Neighbor Support Letters with Plan and Photos
A-3 Letter from Applicant with Tax Map, Plan of Property, Revised Plan Showing Fence Layout, Plan Legend and Explanations of Fence Locations, Photos, PA Game Commission Guide, Survey Report
A-4 Schematic Showing Deer Topper
A-5 Deed
A-6 List of Property Owners within 500 Feet Submitted with Application

Haines-1 Comment from Neighbor in Opposition

3. The Property measures in excess of 7 acres, and is located in the AGR - Agricultural Zoning District (N.T. 11/24/20, pp. 8-9, Exhibit A-1)

4. The Applicant had filed a previous Application with this Board at No. 2020-14, but modified his fencing project, eliminating some of the relief previously requested, and withdrew that Application. (N.T. 11/24/20, pp. 15-17)

5. The Applicant proposed to install a fence along the northeastern property lines of the Property, with some of the 6 foot opaque fence located directly on the property line, with a portion of such fence extended to 8 feet with a "deer topper". (N.T. 11/24/20, pp. 11-15, 26-27,

Exhibit A-3)

6. The Applicant's goal was to exclude deer from the Property, in order to limit exposure to ticks, as well as protect the flowering vegetation on the Property. (N.T. 11/24/20, pp. 9-11)

7. Of course, this plan would only work if the deer may not access the Property in some other way, and along those lines, the Applicant testified that, if he were successful, one of his adjoining neighbors would likewise apply to construct a similar fence around his property, enclosing the two properties in somewhat of a compound. (N.T. 11/24/20, pp. 19, 31, 42-43, 45-47)

8. Some of the modifications from the previously-filed Application, which the Applicant withdrew, reflected an effort and ability of the Applicant to design and install fencing that would achieve the goal of excluding the deer, but still comply with the Zoning Ordinance requirements regarding setbacks, and, particularly the more stringent requirements attendant to the type of fencing that may be constructed in the front yard. (N.T. 11/24/20, pp. 15-17, 24-26, 29-31, 40-41, Exhibit A-3)

9. The Applicant designed a fence and vegetation combination along the front of the Property which would allow the Applicant to comply with the requirements of a 30 inch high decorative open post-and-rail fence, with dense vegetation behind the fence unattractive to the deer for jumping over the fence, so that no relief would be required from Section 150-182.B of the Zoning Ordinance. (N.T. 11/24/20, pp. 15-17, 22-23)

10. The Applicant was also able to obtain a permit for a 4 foot fence meeting the height and setback requirements along the adjoining Haines property. (N.T. 11/24/20, pp. 22-23, 29-31, 47)

11. Unfortunately for the Applicant, the ability to achieve the goal of protection against deer for a portion of the Property, with fencing and landscaping that comply with the Zoning Ordinance, necessarily leads to the determination that the Applicant is suffering from no hardship whatsoever, let alone one that is unnecessary, to install the proposed fence so contrary to the Ordinance along another portion of his Property.

12. The Applicant testified that he is able to achieve the goal of preventing deer from entering into his property, without the need of any variance, in at least two ways: use of a post and rail fence with landscaping behind that fence (as he proposes in the front of the Property and along the adjoining Haines property), and installation of a 5 foot high fence which is apparently sufficient to prevent deer from entering the property. (N.T. 11/24/20, pp. 15-17, 22-25, 30)

13. Not only is a 6 foot high opaque solid compound-style fence with another 2 feet of metal mesh "deer topper" (with appearance similar to that of a barbed wire topped fence) not necessary to stop the deer from entering the Property, but the Applicant has failed to demonstrate how he cannot continue to reasonably use and enjoy his Property as he has for years without the proposed fence. (N.T. 11/24/20, pp. 32-34)

14. The Applicant admitted that ticks may be introduced to the Property by many other mammals, such as dogs, squirrels, mice, rabbits, and racoons, and an 8 foot high fence along a portion of the Property would not protect against other mammals. (N.T. 11/24/20, pp. 28-29)

15. The Applicant's own evidence belies the need for the fence proposed, in that the Guide from the PA Game Commission indicates that 5 foot high fences are effective in excluding deer. (N.T. 11/24/20, pp. 30-31, Exhibit A-3)

16. The Applicant admitted that when he bought the Property, he was aware that it was in a rural area, and that all different kinds of animals, wild and domestic, (not just deer) may access

the Property carrying ticks. (N.T. 11/24/20, pp. 27-29)

17. The Applicant was unable to identify any other property in Worcester Township which has a fence similar to the proposed fence. (N.T. 11/24/20, pp. 43-44)

18. The issue of deer traversing properties applies to nearly every property in Worcester Township and is not an issue unique to the Applicant's Property. (N.T. 11/24/20, pp. 42-43, 49-53)

19. Although the Applicant is requesting a dimensional variance, he is requesting one that is completely unnecessary, and the Applicant as much as admitted same during the hearing. (N.T. 11/24/20, pp. 37-41)

20. The Property has already been developed for reasonable use and no fencing in violation with the Ordinance is required.

21. With reference to the variance requested, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following:

- (A) There are no unique physical circumstances or conditions peculiar to the particular Property, resulting in an unnecessary hardship which would justify the requested variance.
- (B) The Property can be used, and, in fact, has been consistently used in strict conformity with the provisions of the Zoning Ordinance; and therefore, the authorization of the variance is not necessary to enable the reasonable use of the Property.
- (C) Any alleged "hardship" has been created by the Applicant by proposing to install a fence on the Property contrary to the applicable zoning.

- (D) The granting of the variance will alter the essential character of the neighborhood, would substantially impair the use or development of adjacent property, and would be detrimental to public welfare.
- (E) The variance requested is not the minimum variance to afford relief under the circumstances.

22. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the requested variance will be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship.

23. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action:

- (A) The Property is not suitable for the use, and the variance is not consistent with the spirit, purpose and intent of the Zoning Ordinance.

- (B) The relief will injure or detract from the use of neighboring property and from the character of the neighborhood, and the neighboring properties will not be adequately safeguarded.

- (C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

- (D) There may not be an adverse impact upon the public services of police and fire protection by the proposed fence, but such a finding does not require the granting of relief.

- (E) There may not be an adverse impact upon proper disposal of waste resulting from the proposed use, but such a finding does not require the granting of relief.

(F) The record does not support a determination that the installation of the barricade-type fencing would not cause runoff water or drainage problems injurious to adjacent or nearby properties, but such is not determinative for the purposes of this Decision.

(G) There are no special circumstances or conditions applying to the Property for which the variance is sought, which would justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicant of the reasonable use and development of such Property.

(H) The circumstances for which the variance is sought were created by the Applicant, which circumstances result from general conditions in the zoning district in which the Property is located.

24. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever on the land or Applicant, the variance requested is not de minimis, and therefore, the requested variance should be denied.

III. DISCUSSION

There are two types of variances, a "dimensional" variance and a "use" variance. Differing standards apply to use and dimensional variances. One who advances a dimensional variance seeks to adjust zoning regulations so that the property may be used in a manner consistent with the zoning regulations. In contrast, a use variance seeks to use the property in a way that is inconsistent with the zoning regulations. In Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998), the Supreme Court of Pennsylvania determined that, in evaluating a hardship for a dimensional variance, the Zoning Hearing Board should consider various factors, including economics, and the characteristics of the surrounding neighborhood, in determining

whether a variance would be appropriate. The Court also held that, when considering a dimensional variance, a Zoning Hearing Board should adopt a somewhat more relaxed standard of scrutiny than when the Board is considering a use variance.

In Marshall v. City of Philadelphia and Zoning Board of Adjustment, 626 Pa. 385, 97 A.3d 323 (2014), the Supreme Court recognized that a property does not have to be valueless in order to obtain a use variance. The Court further indicated that economic considerations may be considered in a use variance case, if the property can only be brought into conformance at a prohibitive expense. The Supreme Court reiterated in the Hertzberg and Marshall cases, that an Applicant need not prove that the property cannot be used for any other permitted use in order to be entitled to a variance.

The Applicant in this case is not requesting a use variance, but rather a dimensional variance, which requires a relaxed level of scrutiny. Society Hill Civic Association v. Philadelphia Zoning Board of Adjustment, 42 A.3d 1178 (Pa. Cmwlth. 2012). However, the Applicant's justifications for the requested variance do not even rise to the level sufficient to grant the dimensional variance. An applicant seeking a variance must prove that unnecessary hardship will result if the variance is denied, and must also prove that the proposed use is not contrary to the public interest. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). "The burden on an applicant seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling." Singer v. Zoning Board of Adjustment, 29 A.3d 144, 149 (Pa. Cmwlth. 2011).

A Zoning Hearing Board is the sole determiner of the credibility of witnesses. Taliaferro v. Darby Township Zoning Hearing Board, 873 A.2d 807 (Pa. Cmwlth. 2005), Tri-County Landfill, Inc. v. Pike Township Zoning Hearing Board, 83 A.3d 488 (Pa. Cmwlth. 2014). The

Zoning Hearing Board has discretionary power to determine whether a party has met its burden of proof. Broussard v. Zoning Board of Adjustment, 831 A.2d 764 (Pa. Cmwlth. 2003), affirmed on appeal @ 589 Pa. 71, 907 A.2d 494 (2006), Cohen v. Zoning Board of Adjustment of the City of Philadelphia, 276 A.2d 352 (Pa. Cmwlth. 1971).

Section 150-182.A of the Zoning Ordinance provides that no fence over 4 feet high may be installed in the 50 foot side yard setback, or the 100 foot rear yard setback, but if the fence is of open design, post-and-rail, post-and-board, or metal openwork (specifically excluding chain link or mesh), then a 5 foot high fence may be installed 3 feet from the side and rear property lines.

The Applicant proposes a 6 foot high solid fence, with another 2 feet of metal chain link netting or mesh on top of a portion of the proposed fence, part of which fence would be located directly on the property line. This is exactly the type of fence the Ordinance intends to exclude in Worcester Township. The Board determined that such a fence is contrary to the letter, spirit and intent of the Ordinance, and, in fact, is wholly unnecessary to achieve the goals intended by the Applicant based upon the evidence presented.

The case before the Board involves the request for a completely unnecessary variance with respect to the installation of an unreasonably high fence, where the Applicant can and has made reasonable use of the Property for years, and may continue to do so, installing fencing that meets the requirements of the Zoning Ordinance, and still achieving the goal of limiting access to the Property by deer.

Unfortunately, the facts which would support a finding of unnecessary hardship required to grant variance relief were not available, otherwise, the Applicant's very capable and experienced counsel would have surely presented same. The fact of the matter is that there is no hardship whatsoever which would allow the Board to grant the variance requested.

The Board notes that the five (5) criteria for a hardship variance need not be shown when the variance is de minimis. West Bradford Township v. Evans, 384 A.2d 1382 (Pa. Cmwlth. 1978), Stewart v. Zoning Hearing Board of Radnor Township, 531 A.2d 1180 (Pa. Cmwlth. 1987), Middletown Township vs. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Cmwlth. 1996), Lench v. Zoning Board of Adjustment of the City of Pittsburgh, 13 A.3d 576 (Pa. Cmwlth. 2011), Appeal of Ressler Mill Foundation, 573 A.2d 675 (Pa. Cmwlth. 1990). However, in this case, the relief requested is not de minimis, and rigid compliance with these provisions is required to protect the underlying public policy concerns of the applicable Ordinance provisions.

IV. CONCLUSIONS OF LAW

1. The Zoning Hearing Board has jurisdiction over the subject matter of the application.
2. The Applicant is the legal owner of the Property in question.
3. The Applicant and the subject matter are properly before the Board, and the Applicant has standing to submit the Application.
4. Hearing notices were duly published and posted in accordance with law, by advertisement in the newspaper and posting on the Property.
5. With reference to the variance requested, upon consideration of Section 910.2 of the Pennsylvania Municipalities Planning Code, and Section 150-219 of the Worcester Township Zoning Ordinance, the Board determines the following as a matter of law:
 - (A) There are no unique physical circumstances or conditions peculiar to the particular Property, resulting in an unnecessary hardship which would justify the requested variance.

- (B) The Property can be used, and, in fact, has been consistently used in strict conformity with the provisions of the Zoning Ordinance; and therefore, the authorization of the variance is not necessary to enable the reasonable use of the Property.
- (C) Any alleged “hardship” has been created by the Applicant by proposing to install a fence on the Property contrary to the applicable zoning.
- (D) The granting of the variance will alter the essential character of the neighborhood, would substantially impair the use or development of adjacent property, and would be detrimental to public welfare.
- (E) The variance requested is not the minimum variance to afford relief under the circumstances.

6. Under Section 150-217 of the Zoning Ordinance, the Board determines that granting the requested variance will be contrary to the public interest, and that a literal enforcement of the provisions of the Ordinance does not result in unnecessary hardship, as a matter of law.

7. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action, and determines the following as a matter of law:

- (A) The Property is not suitable for the use, and the variance is not consistent with the spirit, purpose and intent of the Zoning Ordinance.
- (B) The relief will injure or detract from the use of neighboring property and from the character of the neighborhood, and the neighboring properties will not be adequately safeguarded.

(C) The proposal will not serve the best interest of the Township, the convenience of the community and the public welfare.

(D) There may not be an adverse impact upon the public services of police and fire protection by the proposed fence, but such a finding does not require the granting of relief.

(E) There may not be an adverse impact upon proper disposal of waste resulting from the proposed use, but such a finding does not require the granting of relief.

(F) The record does not support a determination that the installation of the barricade-type fencing would not cause runoff water or drainage problems injurious to adjacent or nearby properties, but such is not determinative for the purposes of this Decision.

(G) There are no special circumstances or conditions applying to the Property for which the variance is sought, which would justify the conclusion that the application of the provisions of the Zoning Ordinance would deprive the Applicant of the reasonable use and development of such Property.

(H) The circumstances for which the variance is sought were created by the Applicant, which circumstances result from general conditions in the zoning district in which the Property is located.

8. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever on the land or Applicant, the variance requested is not de minimis, and therefore, the requested variance should be denied, as a matter of law.

V. OPINION

Upon consideration of the evidence and testimony presented regarding the Application, the Zoning Hearing Board of Worcester Township determines that the Application should be denied. The Board therefore enters the following Order.

**BEFORE THE ZONING HEARING BOARD OF WORCESTER TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

**IN RE: APPLICATION OF
JOHNSON FAMILY TRUST**

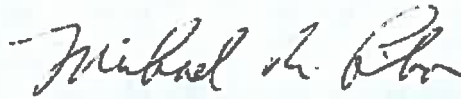
**NO. 2020-19
APPLICATION FOR A VARIANCE**

ORDER

The request for a variance from Section 150-182.A of the Zoning Ordinance, so as to permit the installation of an opaque fence within the required setback on the Property, and exceed the height limitation so as to measure 6 feet high with a 2 foot "deer topper", for a total height of 8 feet, is **DENIED**.

The Application is therefore denied in its entirety.

WORCESTER TOWNSHIP ZONING HEARING BOARD



Michael Libor, Chair

(Absent)

Caesar Gambone, Vice Chair

John D'Lauro, Secretary

Bradford Smith

Order Entered: 12/30/20

Circulation Date: 12/30/20

This Decision and Order of the Board is final and any appeal of it must be filed with the Court of Common Pleas of Montgomery County within thirty (30) days following the Circulation Date set forth above.


The Board reserves the right to supplement these Findings of Fact and Conclusions of Law in support of this Decision if an appeal is filed.

WORCESTER TOWNSHIP ZONING HEARING BOARD

Michael Libor, Chair

(Absent)

Caesar Gambone, Vice Chair



John D'Lauro, Secretary

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Order Entered: _____

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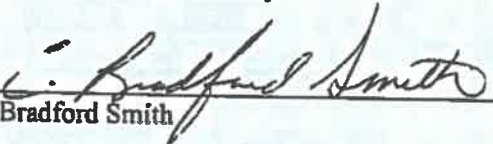
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