

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

**IN RE: APPLICATION OF
FIGEN YILDIZ AND ROBERT FINK**

NO. 2021-15

DECISION

I. BACKGROUND

The Applicants/Owners, Figen Yildiz and Robert Fink (“Applicants”), proposed to install an inground pool on the property located at 1875 Steiger Road, Worcester Township, in the AGR-Agricultural Zoning District (“Property”).

Public hearings on the above Application were held on March 22, 2022 and May 24, 2022 at the Worcester Township Community Hall, 1031 Valley Forge Road, Fairview Village, Pennsylvania, pursuant to Notice as required by the Worcester Township Zoning Ordinance, as amended (hereinafter “Zoning Ordinance”) and the Pennsylvania Municipalities Planning Code.

A quorum of the Zoning Hearing Board participated in the public hearings and conducted a vote in accordance with law. The Applicants were represented by David Shafkowitz, Esquire. A neighboring property owner, William Doyle (“Objector”), elected to enter appearance as an objecting party, and was represented by Thomas Panzer, Esq.

At the initial hearing on March 22, 2022, the Applicants requested the following relief:

(1) A variance from Section 150-177.A(3) of the Zoning Ordinance, so as to permit a rear yard setback of 12 feet (13 feet from the water’s edge), rather than the 25 feet required.

(2) A variance from Section 150-110.7 of the Zoning Ordinance, so as to permit impervious coverage of 30.98%, rather than the 25% permitted.

(3) A modification to ZHB Decision No. 2018-02 to permit the proposed increase in impervious coverage.

At the hearing on May 24, 2022, in an attempt to address concerns of the Objector by moving the location of the pool further away from the Objector's property line, the Applicant requested the following modified relief:

(1) A variance from Section 150-177.A(3) of the Zoning Ordinance, so as to permit a rear yard setback of 5 feet (6 feet from the water's edge), rather than the 25 feet required.

(2) A variance from Section 150-110.7 of the Zoning Ordinance, so as to permit impervious coverage of 32.65%, rather than the 25% permitted.

(3) A modification to ZHB Decision No. 2018-02 to permit the proposed increase in impervious coverage from 27.7% to 32.65%.

The witnesses were duly sworn or affirmed and Notes of Testimony for the hearings were transcribed and are hereby made a part of this record. At a public meeting on May 24, 2022, after public discussion, the Board voted to deny the application for the variances requested. The Board issues Findings of Fact and Conclusions of Law in support of the Decision and Order.

II. FINDINGS OF FACT

1. The Applicants are Figen Yildiz and Robert Fink, legal owners of the Property located 1875 Steiger Road, Worcester Township, in the AGR-Agricultural Zoning District, who proposed to install an inground pool and related improvements on the Property. (N.T. 03/22/22, pp. 6-9; N.T. 05/24/22, pp. 5-10; Exhibits A-3, A-6, A-7, A-8, A-9)

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

BOARD EXHIBITS:

B-1 Public Notice

B-2 Proof of Publication

APPLICANTS' EXHIBITS:

- A-1 Prior ZHB Decision No. 2018-02
- A-2 Prior Plan
- A-3 Proposed Plan
- A-4 Deed
- A-5 Application and Narrative
- A-6 Enlarged Plan
- A-7 Tax Map Plan Diagram
- A-8 Aerial Photo
- A-9 Revised Plan
- A-10 HOA Letter

OBJECTOR'S EXHIBITS:

- D-1 Aerial Photo
- D-2 Narrative
- D-3 Photos (5)
- D-4 Plan

3. The Property measures approximately 21,936 SF, with an impervious coverage of 27.2%, pursuant to the prior ZHB Decision No. 2018-02, which permitted the Applicants to exceed the 25% impervious coverage limit up to 27.7%, in order for the Applicants to construct a rear patio on the property. (N.T. 03/22/22, pp. 6-9; Exhibit A-1)

4. The initial plan submitted with the Application showed an increase in impervious coverage of 1,543 SF, with a total impervious coverage on the lot of 34.25%, and 12 foot setback from the pool deck (13 feet from the water's edge) to the rear property line. (Exhibit A-2)

5. The revised plan submitted for the purposes of the hearing on March 22, 2022 showed an increase of 824 SF (with some impervious coverage removed), with a total impervious

coverage on the lot of 30.98%, and a 12 foot setback from the pool deck (13 feet from the water's edge) to the rear property line with a reconfigured pool layout. (Exhibit A-3)

6. The revised plan submitted for the purposes of the hearing on May 24, 2022 showed an increase of 1191 SF (with some impervious coverage removed), with a total impervious coverage on the lot of 32.65%, and a 5 foot setback from the pool deck (6 feet from the water's edge) to the rear property line, with a reconfigured pool layout. (N.T. 05/24/22, pp. 5-10; Exhibit A-9)

7. The proposed removal of portions of the driveway and patio do not fully account for the increase in imperious coverage. (N.T. 03/22/22, pp. 13-14; N.T. 05/24/22, pp. 5-14)

8. The fact that the Property backs up to open space does not permit the Applicants to treat the open space as additional rear yard to justify the setback relief. (N.T. 03/22/22, pp. 8-9, 18-19, 34-35; N.T. 05/24/22, pp. 5-14)

9. The Applicants' personal preferences for the pool (for example, a depth of at least 8 feet for diving) dictated the larger size of the pool. (N.T. 03/22/22, pp. 15-16, 25-27)

10. The Applicants proposed to install the inground pool in a location 6 feet of the property line within the rear yard setback, rather than respecting the 25 foot setback required, a 76% variance from the setback requirement. (N.T. 05/24/22, pp. 5-14; Exhibit A-9)

11. In addition, the Applicants proposed to exceed the impervious coverage requirements so as to permit an impervious coverage of 32.65 %, which is approximately 5% more than the existing impervious permitted by prior relief granted, and a 30% variance from the impervious coverage limit in the Zoning Ordinance. (N.T. 05/24/22, pp. 5-14; Exhibit A-9)

12. The Board determines that the variances requested are not de minimis, and therefore, the Applicants must establish hardship to be entitled to relief. (N.T. 05/24/22, pp. 14-18, 28-31)

13. Unfortunately, even though there were lots in this development that would have accommodated the installation of a pool, as well as the other improvements which the Applicants have already made to their property, the Applicants elected to purchase the subject Property, which simply is not large enough for the Applicants' plans. (N.T. 03/22/22, pp. 47-51, 65-66; N.T. 05/24/22, pp. 23-27, 28-31)

14. Furthermore, the Applicants have clearly created their own hardship by exceeding the impervious coverage requirements for their patio, and then electing not to remove sufficient impervious coverages, or the deck, to accommodate the proposed pool; if the Applicants had elected to remove these structures (or not construct the structures in the first place), then the Applicants may have only needed de minimis relief, or no relief, to install the pool. (N.T. 03/22/22, pp. 6, 8, 12, 16-17, 61-62; N.T. 05/24/22, pp. 23-27, 28-31)

15. As demonstrated by the various plans submitted, and the testimony presented, the Applicants could have elected to install a smaller pool, but the Applicants elected not to do so. (N.T. 03/22/22, pp. 6, 8, 12, 15-17, 19-21, 25-27; N.T. 05/24/22, pp. 6-7; Exhibits A-2, A-3, A-9)

16. The Objector presented evidence, exhibits or testimony that the relief, if granted, would substantially impair the use of the Objector's property, the proposed landscaping would not be sufficient to adequately safeguard the Objector's enjoyment of his property, and that the variances requested were clearly not the minimum to afford relief. (N.T. 03/22/22, pp. 53-64; N.T. 05/24/22, pp. 10-14; Exhibits D-1, D-2, D-3, D-4)

17. It should be noted that the Objector's concern regarding potential noise resulting from the pool was not a determinative factor for the Board. (N.T. 03/22/22, p. 67)

18. The Property has already been reasonably developed for single-family residential use, and the Applicants presented no evidence of hardship to install the pool, other than to enhance their enjoyment of the property, which cannot be the sole reason for variance relief. (N.T. 03/22/22, pp. 47-50; N.T. 05/24/22, pp. 23-27, 28-31)

19. The law requires the Board to deny the dimensional variances requested.

20. With reference to the dimensional variances 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 dimensional variances requested. While there is some slope on the Property, the topography is not the issue, but rather the conforming size of the lot, and the existing structures installed by the Applicants, which the Applicants will not remove to accommodate the proposed pool, present the issue.

(B) The Property can be used, and, in fact, has been consistently used in excess of the provisions of the Zoning Ordinance by prior relief granted, and therefore, the authorization of the dimensional variances is not necessary to enable the reasonable use of the Property.

- (C) Any alleged “hardship” has been created by the Applicants by adding structures pursuant to prior relief requested, and then proposing to add a fairly large pool without removing structures to accommodate the installation of the pool.
- (D) The granting of the variances will alter the essential character of the neighborhood and would substantially impair the use or development of adjacent property of the Objector.
- (E) The variances requested are not the minimum variances to afford relief under the circumstances; the fact that the Applicants presented plans showing a 13 foot rear yard setback, and a 30.98% impervious coverage, demonstrates that the Applicants’ proposal for a 6 foot rear yard setback and 32.65% impervious coverage is clearly not the minimum to afford relief.

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

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

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

(B) The relief will injure or detract from the use of the Objector's neighboring property and from the character of the neighborhood, and the Objector's neighboring property 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 will not be an adverse impact upon the public services of police and fire protection by the proposed use, but such a finding does not require the granting of relief.

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

(F) The Applicants indicated that as a result of the slope on the Property, additional measures would be installed to control stormwater, and the Applicant's civil engineer presented testimony that there would be no runoff water or drainage problems injurious to adjacent or nearby properties; nevertheless, such a finding does not require the granting of relief. (N.T. 03/22/22, pp. 29-40)

(G) The construction would not cause congestion or hazard on the streets of the Township, but such a finding does not require the granting of relief.

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

(l) The circumstances for which the variances are sought were clearly created by the Applicants, and which circumstances result from general conditions in the zoning district in which the Property is located.

23. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever on the land or Applicants and, therefore, the requested variances 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.

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).

Section 150-177.A(3) of the Zoning Ordinance governing Accessory Uses and Structures

provides as follows:

§ 150-177 Accessory uses and structures.

(3)

Private swimming pools shall be constructed in accordance with the applicable Township ordinances, and shall be located entirely within the rear yard of the lot on which the pool is located and at least 10 feet behind the closest part of the main building. However, in no case shall the distance from the pool to the side or rear property line be less than 25 feet. In the AGR, R-175, and R-AG-175 districts, excluding properties created pursuant to Option 1 or Option 2, as set forth in Article XVIA, Conservation Subdivisions, the distance from the pool to the side and rear property lines shall be not less than 50 feet. The water edge shall be the line for measurement of these setbacks. All filters, heaters and accessory structures incidental thereto shall meet the same setback criteria. Freestanding spas and hot tubs shall be exempt from the requirement to be located at least 10 feet behind the closest part of the main building.

[Amended 5-19-2021 by Ord. No. 284]

Section 150-110.7 of the Zoning Ordinance governing impervious coverage requirements in the AGR-Agricultural Zoning District developed under the Conservation Subdivision concept, provides as follows:

§ 150-110.7 Impervious surface coverage.

[Amended 10-20-2021 by Ord. No. 287]

Maximum impervious surface limitations shall be established as follows:

Lot Area	Maximum Impervious Surface Coverage
18,000 to 39,999 sq. ft.	25%
40,000 to 49,999 sq. ft.	24%
50,000 to 59,999 sq. ft.	23%
60,000 to 69,000 sq. ft.	22%
70,000 to 79,999 sq. ft.	20%
80,000 sq. ft. — 2.99 acres	18%
3.00 to 3.99 acres	16%
4.00 to 4.99 acres	14%

Lot Area	Maximum Impervious Surface Coverage
5.00 to 5.99 acres	12%
6.00 to 6.99 acres	10%
7.00 to 7.99 acres	8%
8.00 to 8.99 acres	7%
9.00 to 13.99 acres	6%
14.00 or more acres	Not to exceed 39,500 sq. ft.

The Applicants in this case are requesting a dimensional variance, not a use variance which would have otherwise required the Board to engage in a heightened level of scrutiny. Society Hill Civic Association v. Philadelphia Zoning Board of Adjustment, 42 A.3d 1178 (Pa. Cmwlth. 2012). But, even with the relaxed level of scrutiny, the law does not permit the Board to grant relief on these facts. The lot is a conforming size in this development. The shape of the lot has no bearing on the impervious coverage calculations. The setback relief is only needed because the Applicants built the deck and patio.

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) The Board determines that the Applicants failed to meet their burden of proof, and such determination is surely within the discretion of the Board.

IV. CONCLUSIONS OF LAW

1. The Zoning Hearing Board has jurisdiction over the subject matter of the application.
2. The Applicants are the legal owners of the Property.
3. The Applicants and the subject matter are properly before the Board. The Applicants have standing to submit the Application. The Objector has standing to oppose the Application
4. Hearing notices were duly published and posted in accordance with law.
5. With reference to the dimensional variances 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 dimensional variances requested. While there is some slope on the Property, the topography is not the issue, but rather the conforming size of the lot, and the existing structures installed by the Applicants, which the Applicants will not remove to accommodate the proposed pool, present the issue.
 - (B) The Property can be used, and, in fact, has been consistently used in excess of the provisions of the Zoning Ordinance by prior relief granted, and

therefore, the authorization of the dimensional variances is not necessary to enable the reasonable use of the Property.

- (C) Any alleged “hardship” has been created by the Applicants by adding structures pursuant to prior relief requested, and then proposing to add a fairly large pool without removing structures to accommodate the installation of the pool.
- (D) The granting of the variances will alter the essential character of the neighborhood and would substantially impair the use or development of adjacent property of the Objector.
- (E) The variances requested are not the minimum variances to afford relief under the circumstances; the fact that the Applicants presented plans showing a 13 foot rear yard setback, and a 30.98% impervious coverage, demonstrates that the Applicants’ proposal for a 6 foot rear yard setback and 32.65% impervious coverage is clearly not the minimum to afford relief.

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

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

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

(B) The relief will injure or detract from the use of the Objector's neighboring property and from the character of the neighborhood, and the Objector's neighboring property 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 will not be an adverse impact upon the public services of police and fire protection by the proposed use, but such a finding does not require the granting of relief.

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

(F) The Applicants indicated that as a result of the slope on the Property, additional measures would be installed to control stormwater, and the Applicant's civil engineer presented testimony that there would be no runoff water or drainage problems injurious to adjacent or nearby properties; nevertheless, such a finding does not require the granting of relief.

(G) The construction would not cause congestion or hazard on the streets of the Township, but such a finding does not require the granting of relief.

(H) There are no special circumstances or conditions applying to the Property for which the variances are sought, which would justify the conclusion that the application

of the provisions of the Zoning Ordinance would deprive the Applicants of the reasonable use and development of such Property.

(l) The circumstances for which the variances are sought were clearly created by the Applicants, and 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 Applicants and, therefore, the requested variances should be denied.

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
FIGEN YILDIZ AND ROBERT FINK**

NO. 2021-15

ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, the following relief is **DENIED**:

(1) A variance from Section 150-177.A(3) of the Zoning Ordinance, so as to permit a rear yard setback of 5 feet (6 feet from the water's edge), rather than the 25 feet required.

(2) A variance from Section 150-110.7 of the Zoning Ordinance, so as to permit impervious coverage of 32.65%, rather than the 25% permitted.

(3) A modification to ZHB Decision No. 2018-02 to permit the proposed increase in impervious coverage from 27.7% to 32.65%.

The Application is therefore denied in its entirety.

WORCESTER TOWNSHIP ZONING HEARING BOARD



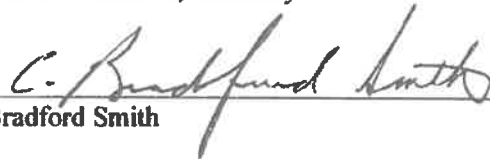
Michael Libor, Chair



John D'Lauro, Vice Chair

(Absent)

Caesar Gambone, Secretary



Bradford Smith

Order Entered: 6/15/22

Circulation Date: 6/15/22

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.