

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

KIDDER TOWNSHIP,	:	
Appellant	:	
	:	
vs.	:	No. 25-CV-0458
	:	
KIDDER TOWNSHIP ZONING	:	
HEARING BOARD,	:	
Appellee	:	
	:	
vs.	:	
	:	
SOLAR STAR BLAKESLEE 2, LLC,	:	
Intervenor	:	

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CARBON COUNTY
PROthonotary

Robert Yurchak, Esquire	Counsel for Appellant
Robert Frycklund, Esquire	Counsel for Appellee
Tad J. Macfarlan, Esquire	Counsel for Intervenor

MEMORANDUM OPINION

Matika, J. - September 9, 2025

On March 3, 2025, Kidder Township (hereinafter "the Township") the Appellant in this matter filed an appeal from the Decision of the Kidder Township Zoning Hearing Board (hereinafter "ZHB") which granted the applicant, Solar Star Blakeslee 2, LLC (hereinafter "Solar Star") dimensional variances for the use of property located at 14 State Route 940, Blakeslee, Carbon County, Pennsylvania in order to construct a solar power generation facility. This Opinion and Order explains why the ZHB erred as a matter of law in granting certain variances necessitating the Court

to grant Kidder Township's appeal and overturn the decision of the ZHB.

FACTUAL AND PROCEDURAL BACKGROUND

In 2021, Solar Star secured an option to lease 14 State Route 940, from the owner, John McElroy for purposes of installing an approximately 5 megawatt "small utility scale distributed generation project." This parcel measures approximately 44.81 acres in total area. At that time, the Kidder Township Zoning Ordinance, No. 179, adopted June 15, 2017, listed "Solar Power Generation, Commercial" as a conditional use in a commercial district in which this parcel is located. On May 24, 2022, Kidder Township amended its zoning ordinance, by: 1) adding "Solar Power Generation Commercial" as a conditional use in an R/RC Zoning District, [§ 180-17-E(3)]; 2) by adding new section "18" to § 180-123.C, [pertaining to the requirement that 8 foot fencing must enclose any solar field area], and 3) by adding new section "E" to § 180-123 [pertaining to additional requirements pertaining to solar power generation facilities in an R/RC zoning district]; and 4) by amending 180-123.C(1)[pertaining to minimum lot size, distance from a utility substation, setbacks and lot coverage of solar power generation, commercial uses in general].

On January 3, 2025, Solar Star filed an application for dimensional variances from the setback requirements identified in

§ 180-123.C(1)(c)¹ as well as a variance from § 180-123.C(1)(a) which required "a minimum parcel size of 50 acres for a solar power generation use in the commercial district."

On January 27, 2025, a hearing was held before the ZHB. At that time two witnesses, Alex Fox and Chad Cello testified on behalf of Solar Star.

Solar Star intends to construct an approximately 5-megawatt solar power generation facility on a parcel of land in a commercial zone with total acreage of 44.81 acres. In constructing this project, Solar Star proposes a front yard setback of fifty (50) feet and rear yard and a side yard setback of twenty-five (25) feet from the adjoining property. They intend to "hide" the view of most of this project with not only the required fence (which was not proposed to be solid fencing) but also with conifer trees and shrubs which will not mature for a number of years. The solar panels would be built on about 11 ½ acres situated nearest the southeastern corner of the lot. These panels would be tilted in such a way as to maximize their exposure to the sun and in doing so they will be positioned in such a way that they could range in height from three feet off the ground to as high as 8 - 13 feet off the ground.

Cello testified that they believed that there were unique

¹ This amendment, *inter alia*, changed all setbacks from a distance of 50 feet for front yard setbacks and 25 feet for side and rear yard setbacks to 500 feet for all setbacks.

physical circumstances associated with the parcel that create an unnecessary hardship to Solar Star necessitating the dimensional variances, namely: 1) the irregular shape (triangular) of where the solar project is proposed; 2) extensive wetlands to the west of the proposed project as well as streams "on the western and central part of the site." Regulations require a 150-foot buffer zone from the nearest stream according to Cello, which is satisfied by the proposal. Cello also noted that a commercially viable solar project could not otherwise be developed on this parcel if Solar Star was required to conform to the 500-foot setbacks. Cello claims that nothing in this project should "generate any harmful impacts on any of the adjacent landowners or the public" including noise, odors, pollutants or visual, beyond a few locations which would allow for minimal observation of the project. Solar Star claims it is requesting the minimal variances needed with respect to the setbacks to accommodate the project design.

From a financial standpoint, Solar Star paid to PPL a deposit of several hundreds of thousands of dollars to reserve their place in the interconnection. Lastly, reference was made to the documentation attached to the variance application which reads "the project cannot be developed any further from the property lines without eliminating panels and compromising project economics."

The ZHB granted all variances requests on a 3-2 vote.

Thereafter, Kidder Township filed this appeal. In that appeal, it alleged that the ZHB erred as a matter of law and abused its discretion in granting the variances *vis-à-vis* the setbacks. It did not challenge the granting of the minimum lot size variance.

LEGAL DISCUSSION

In an appeal of a decision by a zoning hearing board granting variances as requested here, where a trial court does not receive any additional evidence, the standard of review is limited to determining whether the board abused its discretion or committed an error of law. *In Re Charlestown Outdoor LLC*, 280 A.3d 948, 957 (2022).

In order for the granting of a variance, the Pennsylvania Municipalities Planning Code sets forth the requirements to satisfy as follows:

- (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
- (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
- (3) That such unnecessary hardship has not been created by the appellant.

- (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
- (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. §10910.2; see also Kidder Township Zoning Ordinance §180-68.

The burden is on the applicant to establish the need for the variance. *Northeast Pennsylvania SMSA Limited Partnership v. Scott Township Zoning Hearing Board*, 18 A.3d 1272, 1276 (Pa. Cmwlth. Ct. 2011). The above criteria apply whether the variance sought is a use variance or a dimensional variance like here.

"Our Supreme Court in *Hertzberg*², while generally applying the above five criteria applicable to use variances to dimensional variances, opined that, in certain circumstances, courts may employ a relaxed application of the five factors when an applicant seeks a dimensional variance. In *Hertzberg*, our Supreme Court reasoned that dimensional variances differed significantly from use variances, because applicants seeking dimensional relief within an area where a use is permitted are "asking only for a **reasonable** adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations." *Schomaker v. Zoning Hearing Board of the Borough of Franklin Park*, 994 A.2d 1196, 1199-1200 (Pa. Cmwlth. Ct. 2010) (internal citation omitted) (emphasis ours).

² 721 A.2d 43 (Pa. 1998).

Further, *Hertzberg* stated that the quantum of proof required for a dimensional variance is lesser than when seeking a use variance. At 47-48. However, the hardship involved must be one associated with the property, not the person applying for the variance. *Yeager for Zoning Hearing Board of the City of Allentown*, 779 A.2d 59, 598 (Pa. Cmwlth. Ct. 2001).

"Moreover, while *Hertzberg* eased the requirements for granting a variance for dimensional requirements, it did not make dimensional requirements, [. . .], "free-fire zones" for which variances could be granted when the party seeking the variance merely articulated a reason that it would be financially "hurt" if it could not do what it wanted to do with the property[.]" *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment of City of Philadelphia*, 771 A.2d 874, 877 (Pa. Cmwlth. Ct. 2001).

In this case Solar Star's representatives testified that they possessed an option to lease the property from the owner. They further testified that they were required to pay "hundreds of thousands of dollars to reserve [their] place in the interconnection."³ Additionally, Cello testified that "a commercial viable solar project cannot be developed on this parcel in strict conformity with the lot size and the setback requirements. If you apply the 500-foot setback to this lot it

³ N.T. 1/27/25 at 61.

would really; you really could not develop any solar on the parcel.⁴" [emphasis added]. However, at no time did either witness indicate at what distance, other than that proposed with the setbacks requested, could such a use be developed and become financially feasible for Solar Star to operate. Further, when discussing the interconnection cost to PPL, neither witness indicated that the fee paid was for this project alone or for placement of a facility in any location as long as it fit within PPL's grid. Notwithstanding, economic or financial hardships are not sufficient to meet the unnecessary hardship requirement for an ordinance. *A.R.E. Lehigh Valley Partners v. Zoning Hearing Board of Upper Macungie Township*, 590 A.2d 842, 844 (Pa. Cmwlth. Ct. 1991).

Again "[t]o justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood."

However, this court consistently rejects requests for dimensional variances where proof of hardship is lacking. Where no hardship is shown, or where the asserted hardship amounts to a landowner's desire to increase profitability or maximize development potential, the unnecessary hardship criterion required to obtain a variance is not satisfied even under the relaxed standard set forth in *Hertzberg*.⁵ *Society Hill Civic Association v. Philadelphia Zoning Board of Adjustment*, 42 A.3d 1178, 1187-88 (Pa Cmwlth. Ct. 2012) (internal citations omitted).

⁴ N.T. 1/27/25 at 42-43.

As noted, the setback distances outlined in the ordinance for this use in this zoning district is 500 feet. Solar Star is proposing a 150-foot "buffer" from the wetlands. That is required by a different statute. They are also proposing a 50-foot front yard setback, a 25-foot rear yard setback and a 25-foot side year setback at the property line adjoining the neighboring property. Those setbacks are deviations from the requirements of the ordinance of 90 percent, 95 percent and 95 percent, respectively. In theory, Solar Star's proposal is to build the largest, most financially feasible solar project on this lot by utilizing as much of the available land as possible, save the minimum amounts of setback to allow for vegetative screening. These setbacks cannot be deemed as reasonable adjustments of the zoning regulations espoused in *Schomaker, Supra*.

CONCLUSION

Based upon the record created before the ZHB, this Court does not find that the setback adjustments Solar Star seeks are "mere technical and superficial deviation from space requirements" under the ordinance. *Hertzberg*, 721 A.2d 47 N.7. The deviations are nearly abolishing the setbacks established by the Township. Accordingly, Solar Star has not established the requisite hardship that would afford relief in the form of the variances to the setbacks it seeks. Accordingly, this Court finds that the Kidder Township Zoning Hearing Board erred as a matter of law and abused

its discretion in granting the setback requirements. Thus, the appeal of Kidder Township is **SUSTAINED** and the decision of the Zoning Hearing Board **OVERTURNED**.

BY THE COURT:



Joseph J. Matika, J.