

RE: David W. Fertig & Faith R. Fertig, : ZONING HEARING BOARD OF
Applicants : THE BOROUGH OF CARLISLE
: :
: CASE NO. 2024-02
: :
Request for Variances : **Date of Decision:** February 13, 2024

DECISION OF ZONING HEARING BOARD

I. Procedural and Factual Background

Applicants, David W. Fertig and Faith R. Fertig (the “Applicants”), are the owners of property at 35 South East Street in the Borough of Carlisle (the “Property”). The Property is located in the Borough’s R-4 Town Center Residential zoning district.

On November 20, 2023, the Applicants submitted an application to the Carlisle Borough Zoning Hearing Board (the “Board”), appealing the Zoning Officer’s interpretation of commercial activity being performed in the R-4 district pursuant to the Carlisle Zoning Ordinance (the “Ordinance”) that resulted in a Notice of Violation of § 255-38 of the Ordinance and, in the alternative, are requesting variances from §255-38 of the Ordinance to allow for commercial activity in the R-4 district; from § 255-200.C.3. to allow for off-street parking to serve a non-permitted use in the R-4 district; and from § 255-200.D.(1)(d) to permit outdoor commercial storage (the “Application”).

After proper advertisement and notice¹, a public hearing was held at 6:30 p.m. on January 4, 2024, in the Carlisle Borough Municipal Building, 53 West South Street, Carlisle, Pennsylvania,

¹ Notice of the hearing was published in the *Carlisle Sentinel* on December 21 and 28, 2023. The property was posted on December 20, 2023, and notices were mailed to adjacent landowners on December 18, 2023.

at which hearing Board Members Christopher G. Fowler (Chair), Dana Culbertson, Britt Erney-Muniz, and alternate Anna L. Knych were present. Ms. Knych participated in the hearing and in the decision. Solicitor Kurt E. Williams was present on behalf of the Board. Zoning Officer Jared Woolston was present and introduced the Application to the Board. Jim Bennett, the Assistant Zoning Officer, was also present. David W. Fertig and Faith R. Fertig represented the Applicants *pro se*.

Aside from the Application and cover letter submitted (Exhibit A-1), which included an exhibit depicting the site as well as photographs of the site, the Applicant offered Exhibit A-2, comprised of the Notice of Violation dated November 9, 2023, into the record. One other exhibit was accepted into the record by the Board, the Zoning Officer Report for the Application dated January 4, 2024 (Exhibit Borough-1). There were no objections to the admission of any exhibits. Other than the Applicant, there were no persons requesting party status. The hearing was stenographically recorded.

Zoning Officer Jared Woolston ("Mr. Woolston") presented sworn testimony as follows:

1. Mr. Woolston noted that the Applicant is appealing, pursuant to § 255-242, the Zoning Officer interpretation of commercial activity being performed at 35 South East Street in the R-4 Town Center Residential zoning district.
2. Mr. Woolston also noted that the Applicant requests, in the alternative to overturning the Zoning Officer's determination, use variances from § 255-38 of the Ordinance, to permit a commercial use in the R-4 district; from § 255-200.C.3. to allow for off-street parking to serve a non-permitted use in the R-4 district; and from § 255-200.D.(1)(d) to permit outdoor commercial storage. The subject lot is zoned R-4 Town Center Residential district.

Assistant Zoning Officer Jim Bennett ("Mr. Bennett") presented sworn testimony as follows:

1. Mr. Bennett noted that the Notice of Violation dealing with services performed by the Applicant at the Property was sent to the Applicants on November 9, 2023. A second Notice of Violation was issued based on evidence of commercial activity observed and documented at the Property. Specifically, Mr. Fertig was observed transporting barn wood from the Property to 322 East High Street, which is adjacent to the Property to the north and is in the C-4 Commercial zoning District.
2. Mr. Bennett explained that there is an alley on the Property and that Mr. Fertig was observed loading and unloading lumber with a commercial vehicle at the Property, which is a vacant lot. The commercial equipment and the material was observed on the Property, as well as storage of commercial equipment and materials. The loading and unloading of the commercial material on the Property for an intended use at 222 East High Street was in violation of the Ordinance as it was deemed to be a commercial use on a residential lot.
3. Mr. Bennett explained further that various complaints from residents led to the Zoning Officer's observations of the violation.

David W. Fertig ("Mr. Fertig"), having been duly sworn, presented testimony as follows:

1. Mr. Fertig stated that the Applicant purchased the Property on March 21, 2021. The Property had previously been used as a beer distributor, which was also used for purposes of loading, unloading, and storing trucks from 1980 until the Applicants purchased the Property.

2. The Applicants use the property at 222 East High Street as a retail store for salvage barn wood.
3. The Applicants ceased parking commercial vehicles on the Property overnight after receiving a Notice of Violation in 2021. Since that time, the Applicants have only used the Property for loading, unloading, and parking vehicles during the daytime. Now, not being able to load and unload on the Property, the Applicants are restricted to using either South East Street or East High Street for loading and unloading, which blocks a lane of traffic.
4. Mr. Fertig explained that in addition to the issue of utilizing the Property for the loading and unloading purposes, there is also not enough room on the commercial side of the alley for trucks to make the right turn onto South East Street.
5. The alley between the Property and the 222 East High Street property, called Liberty Alley, is divided between the residential zone and the commercial zone. If the Applicant does not use the residential side of the alley for truck traffic, there is not enough room for the trucks to make the right turn onto South East Street when exiting the alley.
6. The Applicant has been confronted by the Borough and State Police regarding these issues. Borough Police instructed Mr. Fertig to use either the center turn lane or the parking lane on East High Street for loading and unloading, however, PennDOT has instructed the Applicant's customers that the parking lane may not be used for loading and unloading. Additionally, larger commercial vehicles must use South East Street for loading and unloading because of their inability to make the turn onto South East Street from the alley.

7. Mr. Fertig explained that his commercial materials are generally 16 to 20 feet long and there is not enough room physically in front of the building or parking lot to load and unload those materials. If he uses the alley, he cannot unload one side of a truck without being on the residential side of the alley. If he uses the commercial zoned side of the alley, he is restricted by a hill which is not safe for forklift operations.

II. Discussion and Conclusions of Law

Under traditional zoning laws, a party seeking a change from a zoning ordinance (a variance), must meet a heavy three-prong burden.² The Municipalities Planning Code, 53 P.S. 10101, *et. seq.* (the “MPC”), provides that the Board shall hear requests for variances where it is alleged that the provisions of the Ordinance inflict unnecessary hardship upon the applicant.³ The Board may grant a variance, provided that all of the following findings are made where relevant in a given case:

- i. 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 See, *Valley View Civic Ass'n. v. Zoning Bd. of Adjustment*, 501 Pa. 550, 462 A.2d 637, 640 (1983).

³ 53 P.S. § 10910.2.(a).

- ii. 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;
- iii. That such unnecessary hardship has not been created by the applicant;
- iv. 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;
- v. 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.⁴

There is a distinction between use variances and dimensional variances. When seeking a dimensional variance within a permitted use, the owner is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with applicable regulations.⁵ Conversely, when an owner seeks a use variance, he is seeking to use the property in a manner that is wholly outside the zoning regulation.⁶

To justify the grant of a use variance (as opposed to a dimensional variance), the landowner must demonstrate unnecessary hardship.⁷ “[I]n the context of use variances . . . unnecessary hardship is established by evidence that: (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) that the property can be conformed for a permitted

⁴ *Id.*

⁵ *SPC Co., Inc. v. Zoning Bd. of Adjustment of the City of Philadelphia*, 773 A.2d 209, 213 (Pa. Cmwlth. 2001).

⁶ *Id.*

⁷ *Id.* (citing *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 721 A.2d 43 (Pa. 1998)).

use only at a prohibitive expense; or (3) that the property has no value for any purpose permitted by the zoning ordinance.”⁸

In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the MPC and the zoning ordinance.⁹

Here, the line between the residential and commercial zoning districts that lies in the middle of the alley between the Property and the 222 East High Street property, thereby limiting the commercial use of the 22 East High Street property, presents a unique physical circumstance justifying the grant of the requested variance. Without the requested variance, the Applicant is not able to park commercial vehicles to load and unload materials in a feasible manner necessary to make economically viable use of 222 East High Street, preventing the Applicant from making reasonable use of that property. As such, the authorization of a variance is necessary to enable reasonable use of that property. The restriction on commercial use now applicable to the Property preventing the commercial use of the 222 East High Street property is not a condition generally created by the zoning provisions of the R-4 District. The unnecessary hardship was not created by the Applicant.

The granting of the use variance will not have a significant negative impact on the neighborhood or be detrimental to the public welfare. The granting of a use variance for the loading and unloading of commercial material, in and of itself, will not alter the character of the neighborhood.

Permitting use variances from §255-38 of the Ordinance, to permit a commercial use in the R-4 district; from § 255-200.C.3. to allow for off-street parking to serve a non-permitted use in the

⁸ *Hertzberg*, 721 A.2d at 43.

⁹ 53 P.S. § 10910.2.(b).

R-4 district; and from § 255-200.D.(1)(d) to permit outdoor commercial storage in the R-4 district represents the least modification possible that will afford relief.

Based on the foregoing, this Board determines that the Applicant has established that it is entitled to the requested use variance.

III. Order and Decision of the Board

Based upon the Application as submitted, Exhibits A-1 and A-2, and Borough-1, and the testimony presented, the Board makes the above findings of fact and issues the following Order and Decision as set forth below.

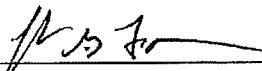
It is hereby ordered and decided as follows:

1. The Board hereby decides by a 4-0 vote to grant the requested variances to allow for loading and unloading of commercial material and to permit outdoor commercial storage at the Property located in the R-4 district.
2. The Board hereby incorporates into its decision Exhibits Borough-1, and the Application as partial justification for the grant of the variance.
3. The representations made by the Applicant in the Application, the supporting documentation, and the testimony at the public hearing shall be considered conditions of the variance granted. Changes from said representations, documentation, and testimony, other than minor technical changes, or failure to comply with the conditions of the variance approval, shall be considered a violation of the variance, and may result in revocation of the variance approval if not brought into full compliance within sixty (60) days of written notice on non-compliance from the Borough.
4. Conditions of approval:

- a. No parking any commercial vehicles in the lot between the hours of 6:30 p.m. and 9:00 a.m. any day of the week pursuant to § 255-214.C. of the Ordinance.
 - b. There shall be at least one parking space of sufficient dimensions, as determined by the Zoning Officer, to easily accommodate the largest vehicle that will be used for loading and unloading pursuant to § 255-215.B.(1).
 - c. The areas required for loading and unloading areas shall not also be used to meet off-street parking requirements pursuant to § 255-215.B.(3).
 - d. No facilities shall be designed or used in any manner so as to constitute a nuisance, a hazard or unreasonable impediment to traffic pursuant to § 255-215.B.(5).
 - e. Any building, paved surface, off-street parking or commercial or industrial storage or display area other than street or driveway crossings shall be set back a minimum of 75 feet from the edge of the closest bank of the surface water of the Letort Spring Run pursuant to § 255-176.B.(1).
5. Finally, the Board finds that the loading and unloading activity conducted by the Applicant at the Property does not constitute construction operations as defined in the Ordinance pursuant to § 255-178.

In addition to the above, the Applicant shall comply with all applicable federal, state, local and Borough laws, ordinances and regulations.

Borough of Carlisle Zoning Hearing Board

By: 
Christopher G. Fowler, Chair

MAILING DATE: February 13, 2024

Any person aggrieved by this decision of the Zoning Hearing Board may appeal to the Court of Common Pleas of Cumberland County. The appeal must be taken within thirty (30) days of the mailing date of this Decision.