

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

IN RE: APPLICATION OF
NORTH PENN WATER AUTHORITY

NO. 2019-11
APPLICATION FOR VARIANCES

DECISION

I. BACKGROUND

The Applicant/Equitable Owner, North Penn Water Authority, requests variances so as to construct a 122 foot high water tower (with a 10 foot antenna) on a 10,000 square foot lot to be subdivided from property owned by Worcester Township, which property is located at 1575 N. Trooper Road, Worcester Township, in the AGR- Agricultural Zoning District.

Public hearings on the above Application were held on July 23, 2019 and August 26, 2019, 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.

The Applicant requested the following relief:

1. A use variance from Section 150-11 of the Zoning Ordinance, so as to permit the water tank use in the AGR District.
2. Variances from Section 150-12(A) and (B) of the Zoning Ordinance, so as to permit a lot area of 10, 000 square feet with a lot width of 100 feet, rather than a required lot area of 80,000 square feet and a required lot width of 250 feet.
3. Variances from Section 150-13(B)(2) of the Zoning Ordinance, so as to permit a front yard setback of 34 feet rather than the 250 feet required, as well as side yard setbacks of 34 feet and a rear yard setback of 34 feet, rather than the 125 feet required.

4. A variance from Section 150-14(B) of the Zoning Ordinance, so as to permit impervious coverage of 30%, rather than the 20% permitted.
5. A variance from Section 150-15 of the Zoning Ordinance, so as to permit a tank consisting of 132 feet in height (a 122 foot water tank with a 10 foot communications antenna).
6. A variance from Section 150-178(A) of the Zoning Ordinance, so as to permit a lot without frontage on a public street.
7. A variance from Section 150-182(A) of the Zoning Ordinance, so as to permit a six (6) foot high chain link fence.

A quorum of the Zoning Hearing Board participated in the public hearings and conducted a vote in accordance with law. The Applicant was represented by Carl Weiner, Esquire. The following neighboring property owners elected to enter appearance as parties, represented by counsel as follows:

Dennis Carney, represented by Jordan Yeager, Esquire
Sam Chambers, represented by Matthew McHugh, Esquire
Michael and Linda Clement, represented by M. Joseph Clement, Esquire

The following neighboring property owners elected to enter appearance as unrepresented parties:

Robert Andorn, John Chambers, Jr., Burt Hynes,
Floyd Nellet, Jr., Terrance and Georgiana Walsh

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. Upon consideration of the evidence and testimony presented regarding the Application, the Zoning Hearing Board of Worcester Township voted to deny the application at the meeting on August 26, 2019. 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 North Penn Water Authority (“NPWA”), equitable owner of a 10,000 square foot portion of Parcel No. 67-00-00665-00-6, 1575 N. Trooper Road, Worcester Township, Montgomery County, Pennsylvania (“Property”), by virtue of an Agreement of Sale with the owner, Worcester Township. (N.T. 07/23/19, pp. 34-35, Exhibits A-3, A-7, Carney-1)

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

BOARD EXHIBITS:

B-1	Public Notice
B-2	Proof of Publication
B-3	Township Solicitor’s Letter dated July 23, 2019

APPLICANT’S EXHIBITS:

A-1	Township Resolution
A-2	Aerial Photo
A-3	Agreement of Sale
A-4	CV – Daniel Preston, P.E.
A-5	Site Plan
A-6	Photos
A-7	Application and Narrative
A-8	DHHS Letter
A-9	Email from National Park Service
A-10	NPWA Memo

OBJECTOR EXHIBITS:

Carney-1	Deed
Carney-2	Excerpt - Chapter 5 of the Township Comprehensive Plan
Carney-3	Memo

Chambers-1 Memo

3. The Property was proposed to measure 10,000 square feet, subdivided off of the approximately 9.2 acres owned by the Township. (N.T. 07/23/19, pp. 21-23, Exhibits A-3, A-5, A-7, Carney-1)

4. The Property is located in the AGR – Agricultural Zoning District, the highest and most restrictive zoning district in the Township. (N.T. 07/23/19, p. 11, Exhibit A-7)
5. The Applicant presented the testimony of Anthony Bellitto, the Executive Director of the NPWA. (N.T. 07/23/19, p. 31)
6. The NPWA was formed in 1965 to provide drinking water and fire protection to the public; Worcester Township is one of the owners of the NPWA. (N.T. 07/23/19, pp. 32-33, Exhibit A-1)
7. The purposes of the proposed water tank is for water storage and to provide gravity water flow for fire protection and water pressure stabilization. (N.T. 07/23/19, pp. 37-39)
8. The NPWA has never experienced a zero pressure situation in this area, the tank was not required due to imminent mechanical failure, but rather this tank would have provided a redundant safeguard against low pressure situations. (N.T. 07/23/19, pp. 54-56, 63, 112, 174)
9. The tank was proposed to be located at elevation 466 feet, one of the highest locations in the area. (N.T. 07/23/19, pp. 56, 87)
10. The tank was proposed to be 122 feet high, with a 10 foot antenna for emergency communications and NPWA meter-reading use only. (N.T. 07/23/19, pp. 56, 66-68, 98)
11. The goal of constructing the water tank was to provide “optimal” water pressure and equalize water pressure, as there is adequate water pressure in the area. (N.T. 07/23/19, pp. 61-63, 136-137)
12. The Applicant presented the expert testimony of Daniel Preston, P.E. (N.T. 07/23/19, pp. 83-85, Exhibit A-4)
13. The water tank was designed to hold 150,000 gallons of water to service approximately 750 customers. (N.T. 07/23/19, pp. 86, 92)

14. The tank was designed to look like a grain silo, but being 122 feet high with a ground elevation of 466 feet, the water tank would be highly visible to the surrounding area. (N.T. 07/23/19, pp. 87-90, Exhibit A-6)

15. The Applicant's engineer confirmed that NPWA has adequate pressure for drinking water and fire protection for the area this tank would serve, and therefore there is no overarching public need or emergency situation requiring the construction of the tank. (N.T. 07/23/19, pp. 93-94, 116-117)

16. The goal of the tank was to not rely solely on pumping equipment, but rather also rely on gravity to provide assurances of water pressure, but the filling of the tank itself and maintaining the level in the tank are still dependent upon mechanical equipment. (N.T. 07/23/19, pp. 94-96, 105-106)

17. The engineer testified that it is important for the tank to be located at the elevation as proposed, but also admitted that the adjacent property would have the same or slightly higher elevation, with an applicable limited industrial zoning classification anticipating more intense uses. (N.T. 07/23/19, pp. 95-97, 121-123, 129, 179-180)

18. There are low profile or ground water storage tanks which also provide storage of water, but mechanical pumps are required not just to fill the tank (as with the proposed tank), but also to pump the water out of the tank. (N.T. 07/23/19, pp. 99-100, 141-142)

19. The Applicant can achieve the same amount of water storage with a low profile or ground water storage tank, virtually invisible to the surrounding area, but instead has chosen an elevated gravity tank which has a substantial impact on the viewshed in the area.

20. The tank will provide only 1 to 1-1/2 days of water storage for the area it is intended to serve, and only 2 to 2-1/2 hours of water pressure for a fire. (N.T. 07/23/19, pp. 113, 145-146, 151-152)

21. The Township's Comprehensive Plan anticipates the use of this property as a public park and recreational area. (N.T. 07/23/19, pp. 127-128, 179, Exhibit Carney-2)

22. The NPWA has eminent domain authority and can locate this tank virtually anywhere it wishes if the applicable zoning allows it.

23. The Property is the site of a former Nike missile site, and subject to a deed restriction contained in the original grant from the United States of America, restricting the use of the property to public park and public recreational purposes. (N.T. 07/23/19, pp. 27-30, 85-86, Exhibit Carney-1)

24. Municipal Use is permitted in the AGR-Agricultural Zoning District under Section 150-11 of the Zoning Ordinance.

25. Section 150-9 of the Zoning Ordinance defines Municipal Use as any use for a purpose authorized by the Second Class Township Code.

26. The Second Class Township Code specifically permits the Township to own and designate lands for public parks and public recreational areas. 53 P.S. §67201.

27. For many years, the Township has intended, and still intends, to use the property for public park and public recreational purposes as reflected in Chapter 5 of the Comprehensive Plan. (Carney-2)

28. Prior to the August 26, 2019 hearing, counsel submitted Memoranda of Law, accepted as part of the Record. (N.T. 08/26/19, pp. 234-235, Exhibits A-10, Carney-3, Chambers-1)

29. At the hearing on August 26, 2019, the Applicant presented evidence of conditional approval by the Department of Health and Human Services for the land transfer. (N.T. 08/26/19, pp. 192-197, Exhibits A-8 and A-9)

30. The engineer for the Applicant testified that approximately 20-30% of the water in the tank will be turned over on a daily basis so as to guard against “water age”, but presumably that turn over is dependent upon mechanical pumps. (N.T. 08/26/19, pp. 198-199)

31. The stated “hardship” by the Applicant was to provide “the most reliable service ... to customers and also reliable fire flow in order to fight fires ... to build in contingencies and layers of contingencies ... and 99.99 percent reliable is the goal ...” (N.T. 08/26/19, pp. 201-202)

32. While the stated purpose of the tank by the Applicant is surely commendable, it does not rise to the level of unnecessary hardship for zoning purposes.

33. Even though the Applicant received a letter indicating initial approval of the transfer from the Federal Government, there is still a determination to be made with respect to the “suitability” of the transfer and approval by the U.S. General Services Administration. (N.T. 08/26/19, pp. 204-207, Exhibit A-8)

34. The Applicant presented the testimony of David Cornish on behalf of the Worcester Volunteer Fire Company. (N.T. 08/26/19, pp. 223-224)

35. Mr. Cornish verified the need of the Fire Company to have a reliable water source, but also indicated on cross examination that since a new pump was recently installed, the Fire Company has experienced no pressure problems, and that water storage on another property would also address that concern. (N.T. 08/26/19, pp. 224-228)

36. Upon recall, the Applicant attempted to clarify the stated “hardship” in that the current system relies on mechanical equipment and power, and this gravity tank will guard against

a zero pressure system with "...redundancy, a contingency..." so that the currently adequate system would be "excellent." (N.T. 08/26/19, pp. 229-231)

37. Again, the Applicant's concerns are evident, but do not rise to the level of "hardship", so as to be entitled to a zoning use variance.

38. The dimensional variances were designed to limit the impact of the use variance, for which there is no basis in fact or law justifying relief.

39. There was simply no evidence of hardship to justify even the dimensional variances, let alone the use variance.

40. With reference to the use and 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 requested use variance or the dimensional variances.
- (B) The Property can be used as a specifically permitted Municipal Use, under the AGR Zoning District, for a public park or public recreational area, in full conformity with the provisions of the Zoning Ordinance, and therefore, the variances are not necessary to enable the reasonable use of the property.
- (C) Any "hardship" has been created by the Applicant by signing an Agreement of Sale and proposing to use the Property contrary to numerous provisions of the applicable zoning.
- (D) The granting of the variances will alter the essential character of the neighborhood, and substantially impair the use of adjacent property.

- (E) The variances requested are clearly not the minimum variances to afford relief under the circumstances.

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

42. 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 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 neighborhood property and from the character of the neighborhood, and considering the structure will extend 132 feet high, a number of neighboring property owners would have an unobstructed view of the structure, and there is no way to adequately safeguard such neighboring properties from the visual impact of the proposed water tank.
- (C) The record does not support a determination that the proposed visually obstructive public utility use in the highest zoning classification in the Township (AGR) would serve the best interest of the Township, the convenience of the community, or the public welfare.
- (D) There will not be an adverse impact upon the public services of police and fire protection by the proposed use, and in fact, there would be a benefit to the public water supply and fire protection capabilities of the volunteer fire company servicing the Township, but such a finding does not require the

granting of relief. In fact, the Applicant could exercise its power of eminent domain in an area of the Township which would permit such a use and provide the same benefit to the water supply and fire protection capabilities.

- (E) Just from the number of dimensional variances requested, completely unsupported by a finding of hardship, it is clear that sound standards of subdivision practice are not being followed.
- (F) There are no special circumstances or conditions applicable 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 reasonable use and development of such Property as a public park or public recreational area.
- (G) The circumstances for which the variances are sought were created by the Applicant, which circumstances result from general conditions in the zoning district in which the property is located.

43. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever, and therefore, the requested variances should be denied.

44. There is no basis in fact for granting the variances requested.

III. DISCUSSION

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 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, or not able to be used for any other permitted use, in order to obtain a use variance. The Board did not require any such a level of proof in this case. 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, but no such evidence was presented in this case.

The Zoning Hearing Board has the 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, 3 Pa. Cmwlth. 50, 276 A.2d 352 (1971).

The case before the Board involves the request for a use variance and numerous dimensional variances so as to carve a 10,000 square foot lot out of 9.2 acres owned by the Township for the construction of a 12 story (122 feet) water tank, with a 10 foot communications antenna for emergency services and meter reading by the Water Authority.

The challenges for the Applicant to establish entitlement to such variances are further compounded by certain statutory limitations and the deed restriction governing the use of the property, restricting the use to public park and public recreational uses, which are specifically permitted by right in the AGR Zoning District governing the Property. While the Objectors

maintained that the deed restriction resulted in the Applicant's lack of standing to bring the Application, the Board determined that such a deed restriction did not result in a lack of standing. Nor does the existence of the deed restriction dictate the outcome of this case, as the case law instructs the Board to review the merits of the zoning application regardless of the deed restriction. While the Board fully recognizes that the Applicant would have to seek and obtain final approval for relief from the deed restriction and, perhaps, Court approval, the lack of such relief or approval does not prevent the Applicant from pursuing the application as the equitable owner, and for the Board to consider the matter on the merits. Having said that, it is instructive that ever since the Township acquired the property, by deed restriction contained in the grant, and by the Zoning Ordinance provisions governing the use of the property, the Township has consistently maintained the position that the property is to be dedicated to public park and public recreational areas, and for no other use. That use is permitted by right and there was no evidence presented that the property cannot be used as a park or recreational area. The fact of the matter is that there was no evidence of hardship presented because no such evidence exists. The Board is, therefore, not authorized to grant the relief requested.

IV. CONCLUSIONS OF LAW

1. The Zoning Hearing Board has jurisdiction over the subject matter of the application.

2. The Applicant and the subject matter are properly before the Board, in that the Applicant is the equitable owner of the Property in question and has standing to present the application. The Objectors have standing to oppose the application.

3. Hearing notices were duly published and posted in accordance with law, by advertisement in the newspaper and posting on the property.

4. With reference to the use and 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 requested use variance or the dimensional variances.
- (B) The Property can be used as a specifically permitted Municipal Use, under the AGR Zoning District, for a public park or public recreational area, in full conformity with the provisions of the Zoning Ordinance, and therefore, the variances are not necessary to enable the reasonable use of the property.
- (C) Any "hardship" has been created by the Applicant by signing an Agreement of Sale and proposing to use the Property contrary to numerous provisions of the applicable zoning.
- (D) The granting of the variances will alter the essential character of the neighborhood, and substantially impair the use of adjacent property.

- (E) The variances requested are clearly not the minimum variances to afford relief under the circumstances.

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

6. Under Section 150-218 of the Zoning Ordinance, the Board has considered the following criteria and standards for Zoning Hearing Board action, and 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 neighborhood property and from the character of the neighborhood, and considering the structure will extend 132 feet high, a number of the neighboring property owners would have an unobstructed view of the structure, and there is no way to adequately safeguard such neighboring properties from the visual impact of the proposed water tank.
- (C) The record does not support a determination that the proposed visually obstructive public utility use in the highest zoning classification in the Township (AGR) would serve the best interest of the Township, the convenience of the community, or the public welfare
- (D) There will not be an adverse impact upon the public services of police and fire protection by the proposed use, and in fact, there would be a benefit to the public water supply and fire protection capabilities of the volunteer fire

company servicing the Township, but such a finding does not require the granting of relief. In fact, the Applicant could exercise its power of eminent domain in an area of the Township which would permit such a use and provide the same benefit to the water supply and fire protection capabilities.

- (E) Just from the number of dimensional variances requested, completely unsupported by a finding of hardship, it is clear that sound standards of subdivision practice are not being followed.
- (F) There are no special circumstances or conditions applicable 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 reasonable use and development of such Property as a public park or public recreational area.
- (G) The circumstances for which the variances are sought were created by the Applicant, which circumstances result from general conditions in the zoning district in which the property is located.

7. The provisions of the Zoning Ordinance do not impose an unnecessary hardship whatsoever, and therefore, the requested variances should be denied.

8. As a matter of law, there is no basis for granting the variances requested.

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

**IN RE: APPLICATION OF NO. 2019-11
 NORTH PENN WATER AUTHORITY APPLICATION FOR VARIANCES**

ORDER

1. A use variance from Section 150-11 of the Zoning Ordinance, so as to permit the water tank use in the AGR District, is **DENIED**.

2. Variances from Section 150-12(A) and (B) of the Zoning Ordinance, so as to permit a lot area of 10,000 square feet with a lot width of 100 feet, rather than a required lot area of 80,000 square feet and a required lot width of 250 feet, are **DENIED**.

3. Variances from Section 150-13(B)(2) of the Zoning Ordinance, so as to permit a front yard setback of 34 feet rather than the 250 feet required, as well as side yard setbacks of 34 feet and a rear yard setback of 34 feet, rather than the 125 feet required, are **DENIED**.

4. A variance from Section 150-14(B) of the Zoning Ordinance, so as to permit impervious coverage of 30%, rather than the 20% permitted, is **DENIED**.

5. A variance from Section 150-15 of the Zoning Ordinance, so as to permit a tank consisting of 132 feet in height (a 122 foot water tank with a 10 foot communications antenna), is **DENIED**.

6. A variance from Section 150-178(A) of the Zoning Ordinance, so as to permit a lot without frontage on a public street, is **DENIED**.

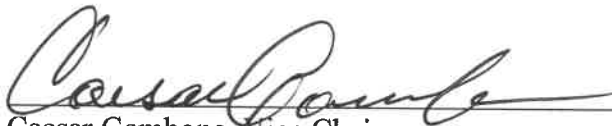
7. A variance from Section 150-182(A) of the Zoning Ordinance, so as to permit a six (6) foot high chain link fence, is **DENIED**.

The application is therefore **DENIED** in its entirety.

WORCESTER TOWNSHIP ZONING HEARING BOARD



Michael Libor, Chair



Caesar Gambone, Vice Chair



John D'Lauro, Secretary

Alternate – not present at the first hearing
Bradford Smith

Order Entered: 9-25-19

Circulation Date: 9-25-19

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 the Findings of Fact and Conclusions of Law in support of this Decision if an appeal is filed.