

RE: 100 WPS PARTNERS, LLC, : ZONING HEARING BOARD OF  
Applicant : THE BOROUGH OF CARLISLE  
: :  
: CASE NO. 19-09  
: :  
Request for Variance : **Date of Decision:** October \_\_\_\_, 2019

DECISION OF ZONING HEARING BOARD

**I. Procedural and Factual Background**

Applicant, 100 WPS Partners, LLC, is the owner of real property located at 614-620 Walnut Street in the Borough of Carlisle (the “Property”). The Property is located in the Borough’s R-5 zoning district.

On September 11, 2019, the Applicant submitted to the Borough of Carlisle Zoning Hearing Board (the “Board”) a request for a variance from Section 255-47.C. of the Borough of Carlisle Zoning Ordinance (the “Zoning Ordinance” or “Ordinance”) (the “Application”) which sets forth a minimum lot width at the street right-of-way line and at the minimum setback line of 45 feet. The Applicant proposes to subdivide the Property into four (4) separate lots each containing one-half of a single-family semidetached dwelling unit. Single family semidetached dwellings are a permitted use in the R-5 zone. Ordinance §255-44.B.

The Applicant’s specific request is for a variance of two (2) feet from the minimum lot width requirement for proposed Lot 2 and a one (1) foot variance from the minimum lot width for proposed lots 3 and 4. After proper advertisement and notice, a public hearing was held on October 3, 2019, in the Carlisle Borough Municipal Building, 53 West South Street, Carlisle, Pennsylvania, at which hearing Board Members Stephanie E. Chertok (Chair), Vincent Champion, Christopher Fowler, John Rovegno and Alternate Board Member Dana Culbertson were present. Solicitor Kurt

E. Williams was present on behalf of the Board. Zoning Officer Mike Skelly, AICP was present and introduced the Application to the Board. Attorney Hubert X. Gilroy represented the Applicant. The hearing was stenographically recorded.

The Applicant presented two witnesses in support of the Application. Project engineer Justin Doty, PE testified regarding the Property's size (0.71 acres), location (corner of Wilson and Walnut), general neighborhood (residential), proposed lot widths (45, 43, 44 and 44 feet) and depth (165 feet). Mr. Doty also presented evidence and testimony regarding proposed parking for the four (4) proposed dwelling units and he presented a list of other lots in the R-5 zone with less than 45-foot widths (Exhibit 5). Finally, Mr. Doty described the 1908 subdivision plan for the Mooreland Land Co. that showed many lots created by that subdivision had lot widths less than 45 feet (Exhibit 6).

Michael Garrity, a principal and owner of the Applicant testified regarding the current and proposed use of the Property. The Property is currently occupied by a former office building that was used by the Carlisle Hospital when it was located across the street from the Property. That building is currently vacant. The Applicant proposes to demolish the existing building and construct a total of four dwellings in the form of two (2) single-family semidetached units, each with four (4) off-street parking spaces. Mr. Garrity testified that the style and finishing of the proposed dwellings will be similar to the homes in the adjacent Mooreland Mews development and have a selling price in the \$400,000 to \$500,000 range.

Chair Chertok asked if there were any audience questions. The questions were in the nature of project timeline, street parking concerns, construction materials to be used, consideration of alternatives to semidetached dwellings, and whether a builder had been identified yet. There were

no objections voiced to the requested relief. One member of the public voiced support for the Application.

The Applicant moved, and the Board received, the following exhibits into the record:

- Exhibit 1 Cumberland County Tax Map of the Property.
- Exhibit 2 Cumberland County Tax Map of the Property (close in view).
- Exhibit 3 Proposed floor plan for the semidetached dwelling units (ZHB01).
- Exhibit 4 Concept Plan for the proposed semidetached dwelling units.
- Exhibit 5 List of properties in R-5 zone with less than 45' lot widths.
- Exhibit 6 Plan of Lots for Mooreland Land Co. (February 28, 1908).
- Exhibit 7 Notice of Appeal for #19-09 filed on September 11, 2019.

In addressing the hardship requirement for variance relief, the Applicant presented argument that the requested relief qualifies as a *de minimis* variance, where a showing of hardship is not required.

## II. Discussion

When an applicant claims a dimensional variance request qualifies as a “*de minimis*” (very minor) variance, and should be granted without proof of all the traditional requirements, the following principles apply:

- A. Is it really minor? The *de minimis* doctrine is a very limited exception, granted only to minor deviations, where potential loss to owner is quite substantial. Although there is no exact mathematical formula to determine the question, percentage of deviation is utilized for guidance. In *Leonard v. Zoning Hearing Board of the City of Bethlehem*, 583 A.2d 11 (Pa.Cmwlth. 1990), a 6% deviation was considered too large to qualify as a *de minimis* variance. In *Pzydrowski v. Pittsburgh Board of Adjustment*, 263 A2d 426 (Pa. 1970), the

encroachment was 8 inches, and this qualified as *de minimis* 'in an absolute sense', although the percentage of violation was 7%.

- B. Will it impact public policy concerns? A *de minimis* variance is only appropriate when "rigid enforcement is not necessary to protect public policy concerns inherent in the ordinance". *King v. Zoning Hearing Board of the Borough of Nazareth*, 76 Pa.Cmwlth. 318, 483 A.2d 505 (1983).
- C. Did Applicant claim the variance is *de minimis*? The request for *de minimis* variance must be raised by Applicant or is waived. *Segal v. ZHB of Buckingham Twp.*, 771 A. 2d 90 (Pa.Cmwlth. 2001).

Under traditional zoning laws, a party seeking a change from a zoning ordinance ("a variance"), must meet a heavy three-prong burden. See *Valley View Civic Ass'n. v. Zoning Bd. of Adjustment*, 501 Pa. 550, 462 A.2d 637, 640 (1983). It is well-established, however, that a developer who seeks a *de minimis* change from a zoning ordinance does not have to meet the heavy burden for obtaining a variance. *Stewart v. Zoning Hearing Bd. of Radnor Township*, 110 Pa.Cmwlth. 111, 531 A.2d 1180, 1182 (1987). This *de minimis* exception "applies where only a minor deviation from the zoning ordinance is sought and rigid compliance is not necessary to protect the public policy concerns inherent in the ordinance." *Constantino v. Zoning Hearing Bd. of Borough of Forest Hills*, 152 Pa.Cmwlth. 258, 618 A.2d 1193, 1196 (1992). There are no set criteria for a *de minimis* variance. Rather, *de minimis* variances are granted according to the particular circumstances of each case. See *Stewart*, 531 A.2d at 1182 (*de minimis* variance exception proper where landowner wanted to vary site a few feet short of one acre requirement);

*Pyzdrowski v. Bd. of Adjustment of City of Pittsburgh*, 437 Pa. 481, 263 A.2d 426, 431-32 (1970) (zoning board properly granted a *de minimis* variance to allow increase of approximately 4% of the width in a one-acre lot); *Swemley v. Zoning Hearing Bd. of Windsor Township*, 698 A.2d 160, 163 (Pa.Cmwlth. 1997) (34% deviation from setback requirement was not *de minimis* despite fact that neighbor was granted variance for similar deviation).

Here, the requested variance should be considered *de minimis* in nature. The maximum variance requested is two (2) feet to allow a 43-foot lot width instead of the required 45 feet (a 4.4% change). Given the change of the use of the Property from commercial to a permitted and conforming residential use, rigid compliance with Ordinance §255-47.C. is not necessary to protect the public policy concerns inherent in the Ordinance. As a *de minimis* variance, the request may be granted without proof of all the requirements needed to show the necessity for a variance.

### **III. Order and Decision of the Board**

Based upon the Application as submitted, Exhibits 1-7, 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:

- A. Rigid enforcement here is not necessary to protect the public policy concerns inherent in the Zoning Ordinance.
- B. The Board finds the requested variance to be *de minimis* in nature.

C. The Board hereby decides by a 3-2 vote<sup>1</sup> to grant the requested variance to Zoning Ordinance §255-48.C.

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: 

Stephanie E. Chertok, Chair

Date: October 11, 2019

**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 date of this Decision.**

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<sup>1</sup> Chair Chertok and Board Member Rovegno voted against the motion to approve.