

IN RE: THE APPLICATION OF : BEFORE THE ZONING HEARING BOARD

STEPHEN T. ITALIANO : OF WESTTOWN TOWNSHIP

### OPINION

In this Application before the Board, Stephen T. Italiano (hereinafter “the Appellant”) , being the legal and equitable owner in fee of a certain tract of land known as 811 Kimberly Lane, this Township, said premises being designated on the Maps of the Assessor of Chester County as Tax Parcel UPI 67-4J-36 seeks variance or any other relief that may be available to permit the retention of a fence, previously constructed in the Township right-of-way without a permit. The Appellant also seeks variance relief to permit him to retain two gates on the on the fence taller than the five foot limitation set forth in the relevant provisions of the Zoning Ordinance. The Premises is situate in an area designated on the Zoning Map of Westtown Township as lying within an R-1 Residential Zoning District.

Pursuant to the Application filed, a hearing was scheduled and held at the Westtown Township Municipal Building, 1039 Wilmington Pike (US Route 202) commencing at 6:00 p.m. on Thursday, April 4, 2019. Notice of the hearing was duly advertised according to law by publication in the Daily Local News, a newspaper of general circulation in the Township and the newspaper duly designated for publication of legal notices, on March 11 and March 18, 2019. The Applicant was notified by Certified Mail on March 4, 2019. Notice of the Hearing was sent to the by regular first class mail to those persons entitled to receive such notices and to adjacent property owners on March 15, 2019. The Property was posted on March 18, 2019. The Application was forwarded to the Westtown Township Planning Commission, who reviewed the

same and filed a report and recommendation, a copy of which was forwarded to the Applicant and the report was entered in evidence without objection.

At the hearing there appeared David Scaggs, Esquire, Chairman of the Zoning Hearing Board and Seamus Lavin, Esquire, and Laura Scanlon, Esquire, Members of the Board, constituting the entire Board. Also appearing were the Applicants, Ronald M Agulnick, Esquire, Solicitor to the Zoning Hearing Board and Mark Dimico, Esquire, Attorney for the Applicant.

Based upon the testimony and exhibits presented, the Board Makes the following:

#### FINDINGS OF FACT

- 1 The Applicant, along with his wife, Joanne Italiano, are the owners in fee simple of the subject premises and have standing to bring this application.
- 2 The Premises is improved with a principal dwelling with attached garage, an out-door pool, a pool shed, a rear patio and a circular driveway and a perimeter aluminum picket fence.
- 3 The perimeter fence was installed sometime in June of 2014. No permit was applied for or obtained for the construction of the fence.
- 4 The Appellant alleged that the contractor made some inquiry by telephone to some unidentified person at the Township and was informed that permits for fences were not required if the fence was less than five feet in height. The Applicant admitted that during that discussion no mention was made of any intention to construct the fence within the Township right-of-way.
- 5 A Township official, while performing routine inspections within the area notice that the fence appeared to be in the Township right-of-way and that the gate appeared to

be more than the allowable height. The Zoning Officer, upon receipt of the report, made an inspection of the premises and based upon his observation, sent a violation notice to the Appellant and failing a proper response, issued an Enforcement Notice. The notice was never appealed and the time for such appeal has long expired.

- 6 The construction of the fence in the right-o-way, the absence of a permit and the excessive height of the gate are thus conclusively established by the enforcement notice and failure to appeal. Further, at the hearing, the Appellant acknowledged the violative features described.
- 7 The gates to the fence are generally left open during the day and are closed at night. The Appellant acknowledged that the fencing was not essential to the use of the premises. Further, the Board finds that the removal of the fence from its present location would not cause any major disruption of the driveway, but the moving of the fence behind the front property line would require some modification of the plantings in the front yard. The Board does not consider this a sufficiently serious hardship since the fence is not essential to the use of the property as presently extant.
- 8 Since no permit was ever issued for the fence to be placed in the right-of-way the Appellant acquired no vested right to place or maintain it in its present location
- 9 While the fence is located within the right-of-way, the gates are set back within the Appellants property and in light of our disposition of the height limitation issue, they can be maintained at their present locations. The driveway configuration is circular and approximately 13 feet in width. The portion of the driveway nearest the road seems unnecessary since a u-shaped driveway would provide the same access. Thus there is no compelling need to consider the driveway as creating any particular

hardship or impairment of access. In short, the driveway portion along the road, while perhaps architecturally attractive, imposes no compelling hardship. There is no showing that the configuration in size or shape of the property creates the type of hardship envisioned in the law justifying the grant of a variance. Clearly, the premises can be used without the fence encroachment as zoned and without the need of variance relief.

10 The Applicant never disclosed to the Township any intent to construct the fence in the right-of-way and never obtained a permit so to do. Thus any hardship existing was self-created.

11 As previously noted, each gate is approximately 13+ feet wide and the encroachment on the height limitation is roughly an arc or triangle rising from a compliant five feet at either end to six feet in the center. The area of the encroachment would thus be approximately seven and one half square feet for each gate along a frontage of 177 feet. The Board considers the violation de minimis in nature and impact.

## DISCUSSION

The standards set by the Zoning Ordinance are legislative in nature and are thus established by the Board of Supervisors and not the Zoning Hearing Board. The Zoning Hearing Board is legislatively granted the power to deviate from those standards only to the extent articulated within its delegated power and such deviations are narrowly proscribed. The enabling delegation of power is to be exercised sparingly and only upon findings of conditions falling within the five enumerated standards set forth in the Municipalities Planning Code. All five of the standards must be met where relevant. To meet this threshold there must be shown, inter alia, (1) a unique limitation imposed by the conditions on the land not common to the other

properties in district and not personal to the Applicant; (2) that because of the land configuration or condition, there is imposed upon the property an unnecessary hardship preventing the property from being used as zoned; (3) that the hardship was not self-created; (4) the variance granted is the minimum necessary to afford relief and that the variance, if granted, would not be contrary to the public interest. In the instant case there is no unnecessary hardship impairing the use of the land and it is and has always been used as zoned. There is no hardship shown beyond that created by the Applicant, which was self-imposed by his failure to disclose to the Zoning Officer an intent to build the fence within the Township right-of-way. Further, construction of structures within the Township right-of-way is forbidden by the terms of the Ordinance and such a permit could not have been granted. Since a circular driveway is not required, there is no impelling reason to grant zoning relief for an access pattern constructed as designed. Road rights-of-way serve more of a purpose than accommodating the cartway. They also serve for a maintenance easement for maintaining the cartway, stormwater management and accommodating utility easements. Finally, we have doubts as to the proposition that construction within the right-of-way would not be contrary to the public interest since the right-of-way is not owned by the Applicant.

With respect to the violative height of the gates, we consider the small deviation to be de minimis and that relief should be granted to permit the two gates as constructed to be retained in their present location and configuration.

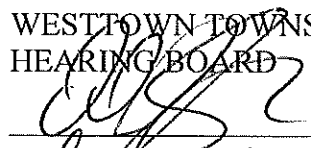
Therefore, in light of the foregoing, we enter the following

## ORDER

AND NOW, this 2nd day of May, 2019, upon consideration of the testimony and exhibits presented it is ordered that the variance sought to retain the encroaching structure within the right-of-way shall be and hereby is DENIED and the Applicant is directed to remove that entire portion of the fence from the Township right-of-way within fifteen days from the date of this Order.

With respect to the variance sought to retain the two gates at their present configuration and location the same is and shall be granted. Upon proper application and payment of proper fees, the Zoning Officer is authorized and directed to issue occupancy permits to permit the retention at their present location, structure and configuration the two gate structures as the same are now extant with such modifications as may be desired by the then landowners may desire from time to time provided no such change shall be permitted which may increase any nonconformity under the terms of the then applicable terms of the zoning ordinance and only in conformity with the terms of this Order and not otherwise.

WESTTOWN TOWNSHIP ZONING  
HEARING BOARD

  
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*Laura McCarroll*  
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