

turned out to be 11'-11". [*Id.*] This resulted, according to the memorandum, in an aggregate side yard at the time of the 1955 application of 29'-11" - technically a one-inch violation of the Ordinance as it existed in 1935. The zoning officer pointedly noted in the memorandum, however, that the aggregate side yard was "approximately 30' ". [*Id.*] In any event, by the time the application to enclose the porch was presented to the Board in January 1956, the property had been rezoned to R 2 Residence District, which imposed a 35-ft. aggregate side yard requirement, with neither side yard being less than 12 feet. In its decision granting a special exception to enclose the porch, the Board considered the property legally (give or take an inch from 1935) nonconforming to the 12-ft. side yard and 35-ft. aggregate side yard requirements.¹ [Exhibit A-21, Notice of Resolution in Appeal No. 1362] We will likewise consider the dwelling legally nonconforming for purposes of deciding the present application.²

The Applicant filed that application with the Board on June 11, 2019, requesting dimensional variances to extend certain nonconforming portions of the dwelling. The Board held a hearing on the application on July 11, during which the Board requested that the Applicant return at a later hearing to clarify the relief he was requesting and the extent of the existing nonconformities. The Applicant agreed to continue the matter and then returned, represented by counsel, on July 25, 2019. At that hearing, the Applicant presented new site plans that more precisely depicted the proposed improvements in relation to the existing nonconformities.

With the aid of those plans, the Applicant testified that he proposes five structural changes to the dwelling that will be impacted by the side yard setback limitations:

¹ In 1955, Section 1700.2.b. of the Zoning Ordinance permitted by special exception extensions of a "building constituting a nonconforming use." [Exhibit A-24, Zoning Ordinance Sixth Edition, Revised July 6, 1954]

² The as-built 2015 site plan shows a west side yard setback of 11.03', an east side yard setback of 17.65', and an aggregate side yard setback of 28.68'. [Exhibit A-13, Site Plan with Applicant's edits] As Applicant's counsel observed at the July 25 hearing on this matter, the technology available to precisely measure setbacks when the dwelling and porch were built in 1936 is vastly different from the technology in use today.

1. constructing a one-story addition over the enclosed porch on the west side of the dwelling, which will infringe .97' into the required 12' setback (but no farther than the existing dwelling infringes); [See Exhibit A-31A, Site Plan, enlarged and color-coded for project proposals 1-3]
2. constructing a one-story addition over the east side of the attached garage, which will infringe up to 3'-6" into the required aggregate side yard setback (but no farther than the existing attached garage does); [Id.]
3. replacing the existing 5'-8" x 4'-3" stair and landing assembly on the east side of the dwelling with a 4' x 16' stair and landing assembly, which will decrease the nonconforming infringement in that area by 1'-8"; [Id.]
4. replacing a 3' x 6'-3" canopy over the existing stairs with a 4' x 21'-6" canopy, which will increase the infringement into the side yard setback by 1'; [See Exhibit A-31B, Site Plan, enlarged and color-coded for project proposals 4 and 5] and
5. constructing a new 4' x 19'-9" canopy over the existing attached garage door, in-line with the proposed stair canopy, which will also be one foot farther into the side yard setback than the existing dwelling. [Id.]

The Board entered an order at the conclusion of the July 25 hearing granting the requested relief and the Applicant later extended the time for the Board to issue findings and conclusions to October 25. This Memorandum, Findings and Opinion constitutes those findings and conclusions.

As noted above, the Board deems the existing dwelling and attached garage to be legally nonconforming to the individual (12') and aggregate (35') side yard requirements in the R 2 Residence District. The variances for the additions to the dwelling and the attached garage (items 1 and 2 listed above) were granted based on the Board's long-standing and consistent interpretation

of the *Yocum* and *Grubb* line of cases, which deal with additions to legally nonconforming structures.

In *Yocum Zoning Case*, 393 Pa. 148, 141 A.2d 601 (1958), the Court allowed a landowner to extend the second floor of his building forward to match the front edge of the first floor of the building even though the first floor was already nonconforming to the front and side yard setbacks. Although the second floor addition would now also exceed the setback limits, the Court observed that “no additional land area” would be required for the addition. 141 A.2d at 604. Although not directly stated, this would appear to be connected with the Court's conclusion that this kind of addition is not an extension of the existing nonconforming setback:

Nor do [landowners] plan to extend, enlarge or increase the nonconformity of the building to the zoning requirements; neither the front yard nor the side yard "set back" requirements of the ordinance would suffer further encroachment by the proposed construction.

141 A.2d at 605.

The Court went on to state:

The proposed construction does not violate the Zoning Ordinance by a vertical or upward extension of the building nor does the extension frontward and horizontally of the second floor substantially violate the front yard "set back" provision of the ordinance.

Id. (emphasis supplied).

The Court concluded that a building permit should have been issued for the additions to match the first floor, stating that neither a variance nor an “exception” was required.

Appeal of Grubb, 395 Pa. 619, 151 A.2d 599 (1959) involved the extension of a nonconforming building over an area of the property not occupied by the existing building footprint (although the area was occupied by a flagstone patio). The building in *Grubb* was “L”

shaped. The front and side of the building were nonconforming as to the yard setback requirements. The owner proposed to “fill in” the L by extending the front of the building in both directions. The Court sustained the grant of a variance to extend the nonconforming building, stating that “for all practical purposes” the portions of the building proposed for expansion were already as close as the expansion would be to the lot lines. 151 A.2d at 601.

Following the reasoning of these cases, the Board generally has granted a variance for a reasonable addition to a building nonconforming as to setbacks where (1) the addition does not increase the nonconformity, (2) because of factors inherent in the property the addition cannot reasonably be placed at another location, and (3) there is no injury to the public interest. *See, e.g., Appeal of Ramage*, No. 4432 (February 22, 2018) (demolish and replace sunroom addition); *Appeal of Williams*, No. 4415 (September 14, 2017) (two-story addition and deck); and *Appeal of Keeler*, No. 4317 (November 17, 2013) (demolish one-story addition and build expanded two-story addition).

The Board finds here that because the original dwelling and garage are legally nonconforming to the side yard setback and the proposed additions will not increase the setback nonconformities any farther than they are, the Applicants are entitled to variances to construct the additions to those parts of the dwelling. The Board also finds that there will be no adverse impact to the public health, safety and welfare as a result of the grant of those variances.

The variance for the stair and landing assembly (item 3 on the list) is somewhat different. The new construction will not be a vertical addition to a dimensionally nonconforming building. Instead, the new stair and landing assembly will be one foot less wide than the existing, but will also be 11'-3" longer than the existing assembly. The Board finds support for a variance to construct this new assembly in *Trettle v. Zoning Hearing Board of Harrison Township*, 540 Pa.

430, 658 A.2d 741 (1995). In *Trettle*, the Supreme Court approved the grant of a permit to demolish a nonconforming shed on the owner's property and replace it with one in the same location, but 10 feet longer than the existing shed. The Court reasoned that because the municipality's ordinance permitted the continuation of nonconforming uses, the fact that the shed had not been destroyed by fire or casualty (the ordinance's explicit conditions for reconstruction of damaged nonconforming structures), the shed could be replaced if there were no detrimental impact.

As in *Trettle*, the Lower Merion Zoning Ordinance contains no prohibition on the replacement of nonconforming structures that are not damaged. *Cf.*, Code §155-99 D (restoration of a nonconforming building). Moreover, the new stair and landing assembly in this case is not an unreasonable extension in length of the existing one; it will reduce the width of the infringement into the setback, and it will not cause any injury to the public health, safety or welfare.

As for the two new canopies over the dwelling entrance and the garage entrance (items 4 and 5 on the list), unlike the previous items, the infringement into the nonconforming setback will be increased - by one foot. Had the existing dwelling not already infringed into the setback, these canopies would have been permitted (at least as to their width) under the current Zoning Ordinance.³ However, a variance was indeed required in this instance. The Board's grant of a variance for the canopies is justified under the *de minimis* doctrine. This doctrine authorizes the Board to grant a variance in the absence of unnecessary hardship where the violation is relatively minor and strict compliance is not necessary to preserve the public policy inherent in the ordinance. *Nettleton v. Zoning Board of Adjustment of the City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033

³ The Zoning Ordinance permits "steps and canopies" over entrances to infringe up to four feet into the required setback. Code §155-135(a)(2). In this case, however, the existing dwelling already infringes into the side yard setback in the area of the proposed steps and landing by up to four feet.

(2003); *200 W. Montgomery Ave., Ardmore, LLC v. Zoning Hearing Board of Lower Merion Township*, 985 A.2d 996 (Pa. Cmwlth. 2009). There are no set criteria for a *de minimis* variance. Rather, it is granted or denied according to the particular circumstances of each case. The decision whether to grant a *de minimis* variance is left to the Board's discretion. *Bailey v. Zoning Board of Adjustment of the City of Philadelphia*, 801 A.2d 492, (Pa. 2002); *Segal v. Zoning Hearing Board of Buckingham Township*, 771 A.2d 90, (Pa. Cmwlth. 2001).

Based on the particular circumstances of this matter, the Board finds that the requested relief is *de minimis*. The deviation from the Zoning Ordinance is relatively minor and strict compliance with the side yard setback for the canopies is not necessary to preserve the public policy inherent in the setback requirement, as the infringement will not involve a building, will be less than the existing stairs and landing, and will not result in any injury to the public health, safety and welfare.

For all of the foregoing reasons, the Board granted the variances on July 25, 2019.

The Order of July 25, 2019 is attached and incorporated herein.

Chairman Brier and Members Davidson and Taichman-Robins participating, all voting "aye." Alternate Member Ritterband participated in the hearing, but not in the decision.

Attest:



Michael Wylie, Secretary



Date

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

APPEAL NO. 4467

IN THE MATTER OF:

: Applicant- Appellant

:

Edward I. White

: 719 Clarendon Road

: Narberth, PA 19072

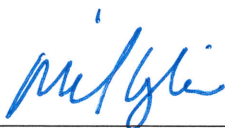
ORDER

AND NOW, this 25th day of July, 2019 it is hereby ORDERED that the application of Edward I. White for variances from Code §§155-24 D(1) and 155-135 A(1) and A(2) to construct certain additions and improvements within the required side yard setbacks on the property at 719 Clarendon Road in Narberth is GRANTED based on, and conditioned on substantial compliance with the plans and testimony presented at the hearing and on compliance with all other applicable Township codes and ordinances.

The Applicant has waived the requirement under Section 908 (9) of the Municipalities Planning Code that the Board issue written findings within 45 days of the last hearing. The Board shall issue written findings in this matter on or before September 13, 2019.

Chairman Brier and Members Davidson and Taichman-Robins participating, all voting "aye." Alternate Member Ritterband participated in the hearing, but not in the decision.

Attest:



Michael Wylie, Secretary