

The fence would be constructed of wood and metal. The posts would be 4" x 4" wooden with a welded wire panel and a decorative header including a diamond shape cap. The posts would likely be 6" x 6" in some places to make the fence sturdier. The posts will be 7 ½ to 8 feet tall with the decorative header on the top. The applicant intends to beautify the fence as much as possible and will not let it be an eyesore. The applicant does not intend to remove any trees for the fence.

Because deer can jump high, the applicant proposes to construct the fence to be no more than 10 feet high. The PennState Extension information provided by the applicant indicates that an 8 feet high fence can be effective, but the applicant testified that a game commission warden told him that deer can jump 10 feet high. Mr. D'Angelo intends to construct the fence in phases with the main structure being constructed to a height of 7½ feet. As strategically needed, additional feet will be added in the form of a header. The fence may be varying heights depending on need, but the fence will be no more than 10 feet high. Because the applicant does not know how high the fence will need to be to deter the deer, he requests that he have two years to fully construct the fence. He may install groundcover at the base of the fence to further prevent the deer from jumping the fence.

Brenda Peffley, who resides at 279 E. Canal Street and owns 1091 Swatara Road, testified at the hearing of this matter. Her property is at the top of the hill. She sought confirmation that fences could be constructed on the property lines. Mrs. Peffley was of the opinion that Mr. D'Angelo would not be successful in deterring the deer no matter what he tried.

She did not think that deterring the deer was a special need that qualified for a higher fence than is regularly prescribed. She had no objection to Mr. D'Angelo protecting the orchard/garden.

Bobbi Holland, who resides at 1231 Swatara Road, testified at the hearing of this matter. She lives right next to the applicant. Initially, she was concerned that the fence would be next to her driveway, which would create sight line issues for her as she exited her driveway. She was relieved the fence would not be next to her driveway. She does not know how the applicant can stop the deer.

The applicant also challenges the validity of §225-407 of the Ordinance as it pertains to approval for fence heights on properties used for residential purposes. He argues that it is quite a process to go through to construct a fence on his property, including, what he deemed was unnecessary paperwork. He thought the Ordinance focused too much on certain parts of the community while others got less attention. The applicant argues that the Ordinance does not allow for flexibility to take into consideration different uses for the property. He thought the fence heights were arbitrary and unreasonable. The applicant objected to the Ordinance's focus on aesthetics and the prohibition against chain link fences. He also argued the Ordinance violated the due process and equal protection provisions of the U.S. Constitution without any factual basis to support such allegations. He also objected to the fees charged to seek relief from the Zoning Hearing Board and requested a refund.

The Director of Community Development, Charles Emerick, appeared, was sworn, and testified at the hearing in this matter. Mr. Emerick explained that the special exception process that the applicant followed is the way for citizens to obtain relief if the Ordinance unduly

restricts their use of their properties. Mr. Emerick noted that this process allows for the neighbors to receive notice of what is happening on adjacent properties. According to Mr. Emerick, the Township tries to keep the filing fees reasonable based on the costs of posting the property and advertising requirements, which are required by statute. His research revealed that none of the adjacent Townships charge less than Derry Township. While the applicant cites East Hanover Township as having a reasonable Ordinance, Mr. Emerick noted that East Hanover Township is a sprawling, agricultural community as opposed to the Township that includes a central, residential community. Mr. Emerick also explained that the Township has restricted chain link fences since 1996.

Fences erected on properties used in whole or in part for residential purposes are limited to a maximum height of six feet. *See Ordinance, §225-407.A.1.* In order to qualify for a special exception to erect fence panels on a property used for residential purposes that would have a height of 10 feet, the applicant must demonstrate, to the Board's satisfaction, that "due to topographical constraints or special needs related to the use of the property in question, fence panels of a greater height than is normally prescribed is necessary." *See Ordinance, §225-407.F.* The Board must also find that the fence panels of a greater height than is normally prescribed "will not have a significant negative impact to surrounding properties from an aesthetic or safety standpoint." *See Ordinance, §225-407.F.*

As this Board has often repeated, a special exception is neither special nor an exception. Instead, it is a permitted use provided the applicant can demonstrate compliance with the applicable criteria. In this case, because of the applicant's orchard/garden, the Board finds that

applicant has a special need for a fence with a maximum height of 10 feet for the proposed fencing that encloses the orchard/garden. The Board further finds that the proposed fencing around the orchard/garden will not negatively impact the surrounding properties from either an aesthetic or safety standpoint. This special need for an increased fence height, however, does not exist for the proposed fencing on the rear property line that does not enclose the orchard/garden, which can be built to a maximum height of six feet in compliance with the Ordinance.

The applicant also challenges the validity of §225-407 of the Ordinance. “Property owners have a constitutionally protected right to enjoy their property. That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, i.e., governmental action taken to protect or preserve the public health, safety, morality, and welfare.” *C&M Developers, Inc. v. Bedminster Township Zoning Hearing Board*, 573 Pa. 2, 14, 820 A.2d 143, 150 (2002)(citations omitted). “A zoning ordinance must be presumed constitutionally valid unless a challenging party shows that it is unreasonable, arbitrary, or not substantially related to the police power interest that the ordinance purports to serve.” *Id.*, 573 Pa. at 14, 820 A.2d at 150 - 151.

“These zoning regulations are enacted for the purpose of promoting and facilitating the public health, safety and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations; the provision of adequate light and air, access to incident solar energy; police protection; vehicle parking and loading space; reliable sewage facilities, stormwater facilities; recreational facilities and public uses; the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural, industrial and fire-fighting use; the preservation of natural, scenic and historic values in the environment; the preservation of forests; wetlands; aquifers; and floodplains.”

See Ordinance, §225-103.

The Board concludes that the Ordinance is valid. The Board finds that the public purpose served by the Ordinance for safety and to have a coordinated and practical community development adequately outweighs the applicant's right to construct a fence to his preferred height. The Board finds that the Ordinance is not unduly restrictive as citizens, such as the applicant, can apply for a special exception if the height limitations normally prescribed do not fit their needs. In other words, the citizens have remedies if they feel aggrieved by the Ordinance. Further, the Ordinance is not exclusionary and does not result in disparate treatment of similarly situated landowners. While the applicant argues that the Ordinance does not allow for flexibility to take into consideration different uses for the property, the Township is comprised of a variety of different communities for which the Ordinance must account. The applicant's due process and equal protection arguments are without merit. Lastly, the applicant's complaints also focus on the filing fees, but the Board finds that the fees are reasonable, especially compared to the neighboring communities. Moreover, the Board does not have the authority to set, or refund, the fees. The applicant has not met his burden to prove that the Ordinance is invalid.

In granting relief, the Zoning Hearing Board may attach such reasonable conditions and safeguards as it deems necessary to implement the purposes of the Pennsylvania Municipalities Planning Code, and the Ordinance. *See* Ordinance, §§225-407.F and 1007.10.A. Based on the Board's findings and conclusions, the Board adopts the following:

ORDER

AND NOW, this 17th day of May, 2023:

1. The applicant's request for a special exception pursuant to §225-407.F. regarding the maximum height of a fence is GRANTED in part and DENIED in part. The applicant may construct a fence that has a maximum height of 10 feet for the enclosed portion around the orchard/garden. The applicant may construct a fence that has a maximum height of 6 feet on the rear property line that does not enclose the orchard/garden.

2. The relief granted herein is strictly contingent on no part of the fence crossing the applicant's property lines.

3. For all the foregoing reasons, the applicant's challenge to validity of §225-407 of the Ordinance is DENIED.

4. The applicant's request for reimbursement of the filing fees is beyond the purview of this Zoning Hearing Board.

5. The applicant shall construct the improvements, as approved, in strict compliance with the plans and specifications submitted to the Board during the hearing of this matter, provided, however, that if the improvements that are the subject of this hearing, as finally constructed, require less relief than granted by the Board herein, no additional relief from this Board shall be required.

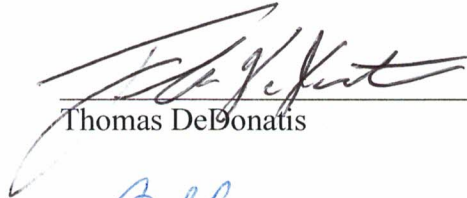
6. Except as extended by applicable law, the relief granted herein shall be valid for two (2) years from the date hereof. In the event the applicant has not, within the time period provided herein, commenced operations, applied for a building permit relative to the

improvements where permits are necessary, or constructed the improvements not requiring permits, the relief granted herein shall be deemed to have expired, and the applicant shall be required to comply with the then existing terms of the Zoning Ordinance.

7. Any violation of any condition imposed herein shall be a violation of the Township Zoning Ordinance and shall be enforced as provided in the Ordinance.



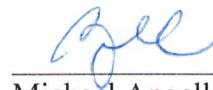
Steven Seidl



Thomas DeDonatis



Lindsay Drew



Michael Angello



William Tafuto