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July 3, 2019

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
No. 7018 3090 0000 0752 7946**

Michael E. Furey, Esquire
Furey & Baldassari, P.C.
1043 S. Park Avenue
Audubon, PA 19403

**RE: Application of ERH Capital Partners, LLC
Notice of Decision of the Lower Providence Township Zoning
Hearing Board
Application Z-19-09**

Dear Mr. Furey:

Enclosed please find a Notice of Decision of the Lower Providence Township Zoning Hearing Board taken at the hearing held on May 23, 2019. Pursuant to the decision of the Zoning Hearing Board, the application of ERH Capital Partners, LLC for variances from Section 143-37.A.(2) of the Lower Providence Zoning Ordinance was denied. Please note that an appeal of this decision must be filed within 30 days of the date of the decision.

Should you have any questions, please contact me.

Yours very truly,



Keith B. McLennan

KBM/jds
Enclosure

pc: Kathie A. Eskie, Chairwoman
George Ozorowski, Vice Chairman
Gail Hager
Joseph Pucci
Patricia Alzamora
Robert G. Hardt

Christopher Gerdes
Michael Mrozinski
Community Development Director

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO. Z-19-09 : HEARING DATE: May 23, 2019

APPLICATION OF:

ERH Capital Partners, LLC
290 Upper Indian Head Road
Collegeville, PA 19426

PROPERTY:

5th Street and Barry Avenue
Lower Providence Township
Norristown, PA 19403
Parcel Nos. 43-00-04480-00-4
43-00-04474-00-1
43-00-04471-00-4
43-00-04468-00-7

**OPINION, DECISION AND ORDER OF THE
LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

On May 3, 2019 applicant, ERH Capital Partners, LLC (“Applicant”) filed an application requesting a special exception to allow a purported non-conforming lot to be utilized for a single family dwelling under Section 143-145 of the Lower Providence Township Zoning Ordinance (the “Ordinance”) and, alternatively, a series of variances from the lot area, front and rear yard setback requirements of Sections 143-37.A.(2) of the Ordinance in connection with the proposed construction of a single family home on a combination of six (6) lots (represented by the four parcel numbers) to comprise a 10,800 square foot plot of vacant land in the R-2 residential district (“Application”). At the hearing the Applicant withdrew its request for a special exception leaving the variance requests as the surviving issues on appeal. The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on May 23, 2019 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie,

members Gail Hager, Patricia Alzamora, Robert Hardt and Christopher Gerdes. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code Enforcement, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

FINDINGS OF FACT

1. The Applicant is ERH Capital Partners, LLC, (“Applicant”) the equitable owner of parcel numbers 43-00-04480-00-4, 43-00-04474-00-1, 43-00-04471-00-4 and 43-00-04468-00-7 by way of three (3) agreements introduced into evidence at the hearing as Exhibit 3 (collectively the “Property”).

2. The Applicant was represented by Michael E. Furey, Esquire 1043 S. Park Avenue, Audubon, PA 19403.

3. Bruce Fazio is the managing member of the Applicant and testified on its behalf.

4. In its Application, Applicant sought a Special Exception under §143-145 regarding the minimum building lot area and lot width requirements however, at the hearing, Applicant withdrew its request for a special exception opting to use it solely for illustrative purposes and instead pursued its requests for variances from §143-37.A.(2) regarding front, side and rear yard setback requirements.

5. The six (6) lots that comprise the Property are juxtaposed in a row on 5th Street, a “paper street” at the corner of South Barry Avenue, Lower Providence Township, PA.¹

6. The lots that comprise the Property are depicted on Applicant’s Exhibit 4 as lot numbers 17 – 22 at the top of the property grid on that exhibit.

7. The lots that comprise the Property are approximately twenty feet (20’) wide by

¹ 5th Street is a “paper street” that to date has not been constructed.

ninety feet (90') deep.

8. Applicant proposes to combine six (6) lots comprised of approximately 10,800 square feet of vacant land where 25,000 square feet is required to construct a 2,100 square foot, two (2) story, four (4) bedroom, two (2) car garage home thereon with a 1,050 square feet foot print on the lot.

9. The lots are bordered on the one side by a similarly undersized lot owned by the Township depicted as lot #23 on Exhibit 4 and on the other by lots 15 and 16 owned George Bartholomew who Applicant asserts is not interested in selling those adjoining similarly sized lots.

10. Applicant has several of the lots next to the Township owned lot #23 under purchase agreements from the same sellers who own several of the lots Applicant is seeking to combine under this Application.

11. Applicant asserted that the Township obtained ownership of lot #23 many years ago at the founding of the tax claim bureau which presumably sold the lot for unpaid real estate taxes and conveyed it to the Township.

12. Applicant further testified that his attorney reached out to the Township in an attempt to purchase the Township owned lot but it "went nowhere."

13. Applicant seeks a variance from §143-37.A.(2) regarding the minimum building lot area, front and rear yard setback requirements.

14. Applicant proposes to construct a two-story 2,100 square foot home on a lot that is less than 45% of the lot size required by the Ordinance.

15. Applicant proposes to build a home on the Property with a twenty-five foot (25') front yard setback where fifty feet (50') is required and a twenty-five foot (25') rear yard setback

where sixty (60) feet is required.

16. The Property complies with building coverage and frontage requirements of the Ordinance.

17. Applicant proposes to use portions of 5th Street to construct a driveway from South Barry Avenue to gain ingress and egress to the Property.

18. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings at low density only.

19. The proposed home to be built on the Property is a two (2) story home twenty-four (24') feet wide by fifty feet long (50') or approximately 1200 square feet with a one car garage and a driveway twenty (20') feet wide.

20. There was adverse public comment regarding the application.

21. Applicant approached 20 interested neighbors 15 of whom supported his application.

22. None of the homeowners who back up to this property on Regency Circle expressed support for the Application.

23. The following exhibits were included in the record of the hearing:

A-1 Copy of the Application executed and filed by the Applicant on May 3, 2019.

A-2 Agreements of Sale for the six (6) lots.

A-3 Deeds for the six (6) lots.

A-4 Plan of Lots dated May 11, 1923.

A-5 Board of Assessment information regarding the Property.

A-6 Google Earth image of the Property and surrounding neighborhood.

A-7 Concept Plan for the Property.

A-8 Rendering of Single Family Home proposed to be built on the Property.

A-9 Signatures of those who support the Application.

A-10 Lot Area of Homes prepared by Applicant.

Kunz -1 Applicant's flier distributed to Mr. Jerry Kunz who resides at 148 Regency Drive, behind the Property

B-1 Copy of the newspaper advertisement in the Times Herald of the hearing on the Application.

B-2 Copy of the letter to neighbors of the hearing on the Application with mailing matrix of those neighbors within 500 feet of the property.

B-3 Certification of Notification of those neighbors within five hundred feet (500') of the Property.

B-4 – Certificate of Posting the Property with a Notice of Public Hearing.

DISCUSSION

I. Statement of the Case

Applicant requests variances from the minimum front and rear yard setback requirements of §143-37.A.(2) of the Ordinance in connection with the proposed development of a 10,800 square foot vacant plot of land which, according to Exhibit A-4, is an aggregation of 6 – 20 foot wide so called "movie lots."² At the hearing, Applicant abandoned its request for a special exception under §143-145 of the Ordinance.

The variance relief sought is dimensional in nature requesting that the Board vary from

² Urban legend has it that in the early 1900's, in order to lure people to movie theaters, deeds to these exceedingly small lots were raffled to movie goers in the city of Philadelphia.

the Ordinance to permit:

- a. A front yard setback of twenty-five feet (25') where fifty feet (50') is required;
- and
- b. A rear yard setback of twenty-five feet (25') where sixty feet (60') is required;
- c. A building lot area in the R-2 district of ten thousand eight hundred (10,800) square feet where twenty-five thousand (25,000) square feet is required or 43.2% of the required lot size.

II. Zoning Purpose

A. Why Zoning?

When the Ordinance was enacted in 1955, over 30 years since the lots at issue were formulated, the Lower Providence Township Supervisors set forth the following purposes:

§ 143-3 Purpose.

This chapter is enacted for the *purpose of promoting the health, safety and general welfare of the Township*, is in accordance with a Comprehensive Plan and is designed to lessen congestion in the streets, roads and highways and to secure safety from fire, panic and other dangerous concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements and to encourage the most appropriate use of land throughout the Township. (Italics supplied)

B. Community Objectives.

Further, the Supervisors set forth a number of objectives in the Ordinance as follows:

§143-4 Community Development Objectives.

In interpreting and applying the provisions of this chapter, they shall *be held to be the minimum requirements for the promotion of the health, safety, morals and general welfare of the Township*. The community development objectives which shall be encompassed in the Lower Providence Township Comprehensive Plan when it is enacted shall be stated therein and have been formulated to implement the purposes set forth in § 143-3 hereinabove, with a view toward the following objectives:

- A. Guiding and encouraging the future development of the Township in accordance

with comprehensive planning of land use and *population density that represents most beneficial and convenient relationships among the residential, commercial, industrial and recreational areas within the Township, having regard to their suitability for the various uses, as indicated by topography and soil conditions, and the trends in population in the direction and manner of the use of land in building development and in economic activity*, considering such conditions and trends both within the Township and with respect to the relation of the Township to surrounding areas.

B. Protecting the character and social and economic stability of each of such areas and *encouraging their orderly and beneficial growth.*

C. *Protecting and conserving the value of land and buildings throughout the Township* appropriate to the various zoning districts established herein.

D. Bringing about through proper timing the gradual conformity of land use to the Comprehensive Plan aforesaid and minimizing conflicts among the uses of land and buildings.

E. *Aiding in bringing about the most beneficial relation between land use and the circulation of traffic throughout the Township. Having particular regard to and from the expressways and to avoidance of congestion in the streets and the provisions of safe and convenient access appropriate to the various land uses.*

F. Aiding in providing a guide for public safety and action in the efficient provision of public facilities and services, in the provision of safe and proper sanitary sewage disposal and for private enterprise in building, development, investment and other economic activity relating to land use; insofar as such objectives are consistent with the purpose set forth in § 143-3 and with the aforesaid minimum requirements interpreted, administered and applied in such a manner as will facilitate attainment of said objectives. (Italics supplied)

C. Intent of the Ordinance.

To further drive the point of §143-3 home, the Supervisors sought to emphasize and make clear their intentions regarding the Ordinance in §143-35 as follows:

§143-35 Declaration of legislative intent; applicability.

A. Legislative intent:

(1) To provide for the orderly expansion of areas that offer neighborhoods of single-family detached houses at a low density.

(2) To carefully protect these areas from nonresidential uses or higher residential density that may not be fully compatible with the existing neighborhood.

B. In an R-2 Residential District, the following regulations shall apply.

§ 143-38 Design and development standards and requirements.

Site development within an R-2 District shall be in accordance with an overall plan for

locating buildings and structures, providing a safe and efficient circulation of vehicles and pedestrians, preservation and extension of the natural amenities of the site and providing for the continued maintenance of the land improvements thereon. Design and the operation and maintenance of the site and improvements shall meet at least the minimum standards and requirements set out in § 143-28H and I of this chapter.

What the Applicant proposes to do with this grossly undersized lot fails to conform to the purpose and objectives of the Ordinance.

III. Legal Standard

Dimensional v. Use Variance. There are 2 types of variances, a “dimensional” variance and a “use” variance. Differing standards apply to use and dimensional variances. One who advances a dimensional variance seeks to adjust zoning regulations so that the property can be used in a manner consistent with the zoning regulations. Hertzberg v. Zoning Bd. Of Pittsburgh, 554 Pa. 249, 257, 721 A.2d 43, 47 (1998). In contrast, a use variance seeks to use the property in a way that is inconsistent or outside of the zoning regulations. Tidd v. Lower Saucon Township Zoning Hearing Board, Green Gable Investment Partners, LP and Lower Saucon Township, 118 A. 3d 1 (Pa. Cmwlth. 2015). Regardless of whether the variance sought is a use or dimensional variance, the reasons for granting a variance must be substantial, serious, and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Cmwlth. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). The Supreme Court in Hertzberg held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of the Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. at 263-64, 721 A.2d at 50. In this case the Board is asked to grant a series of dimensional variances.

B. The Five Part Variance Test. To obtain a variance the Applicants must pass the

following five (5) part variance test set forth in §143-168.A. of the Ordinance:

(1) There are unique circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) Because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) Such unnecessary hardship has not been created by the applicant.

(4) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. See also: Tri-County Landfill, Inc. v. Pine Township Zoning Hearing Board, 88 A.3d 488, 520 (Pa. Cmwlth. 2014) appeal denied, 101 A.3d 788 (Pa. 2014) and appeal denied, 101 A.3d 788 (Pa. 2014); 53 P.S. § 10910.2.

C. Dimensional Variance Legal Standard. Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property useless if a variance is denied, and that the proposed use will not be contrary to public interest. However, in the case of Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998) our Supreme Court held that in the case of a dimensional variance, the quantum of proof required to establish unnecessary hardship is lesser than when a use variance is sought. *Id.* at 258-59. For example, the Hertzberg Court held that to justify the grant of a dimensional variance, "...courts *may* consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring

the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” 721 A.2d at 50 (italics supplied). In effect, no longer is an applicant required to demonstrate in a dimensional variance case, that the property was essentially useless without the variance.

Although Hertzberg eased the burden of proof somewhat for a dimensional variance, it did not remove the variance requirements that are universally applicable to use and dimensional variance cases. Doris Terry Revocable Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa.Cmwlth. 2005). An applicant must still present evidence as to each of the conditions listed in the zoning ordinance and satisfy the five part test articulated above. Id. In addition, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicants’ burden of proof and the standards to meet that burden as follows:

C. Burden of proof. For variances, the burden of proof shall be on the applicant. For special exceptions, the applicant shall be entitled to the special exception unless others can prove that it would adversely affect the public health, safety, morals or welfare.

D. Standard of proof.

(2) Variance case. An applicant for a variance shall have the burden of establishing:

(a) All the requirements of § 910.2 of the Municipalities Planning Code, Act of July 31, 1968, P.L. 805, No. 247, as amended, 53 P.S. § 10910.2;

(b) That literal enforcement of the provisions of this chapter will result in unnecessary hardship, as the term is defined by relevant statutory provisions and case law; and

(c) That the allowance of a variance will not be contrary to the public interest.

(3) Zoning Hearing Board considerations. In considering whether the allowance of a special exception or variance is contrary to the public interest, the Zoning Hearing Board shall consider whether the application, if granted, will:

(a) Substantially increase traffic congestion in the streets surrounding the

subject site;

(b) Increase the risk of fire or panic or otherwise endanger the public safety;

(c) Overcrowd the land or create undue concentration of population;

(d) Be suitable for the property in question so as to be consistent with the spirit and purpose of the provisions of this chapter;

(e) Intrude upon the adequacy of natural light and air to adjoining properties;

(f) Create extraordinary burdens on public, private or community water systems or upon groundwaters or wells within the neighborhood;

(g) Overburden the public sanitary sewer system within the Township occasion environmental problems with on-site sanitary sewer installations;

(h) Place undue burdens upon the police, fire, ambulance or other emergency services provided throughout the neighborhood;

(i) Cause adverse affects to the appropriate use of adjacent properties in the neighborhood where the property is located;

(j) Cause risk or danger to the safety of persons or property by improper location or design of facilities for ingress and egress to and from the property in question; or

(k) Otherwise adversely affect the public health, safety, morals or general public welfare of the community.

(4) Burden of proof. In all cases, whether special exception, variance, interpretation, appeals from the Building Inspector or any other appeals lawfully brought before the Zoning Hearing Board, the applicant shall have the burden of proof, including the duty of presenting credible, relevant and pertinent evidence and testimony to persuade the Zoning Hearing Board that the applicant has satisfied the criteria set forth in this section. In addition to the foregoing, where an applicant has been specifically requested by the Zoning Hearing Board to provide specific evidence or testimony on any item set forth in Subsection D(3)(a) through (j), supra, or in the event that any party opposing any application shall claim that the proposal before the Zoning Hearing Board will cause any effects upon the matters addressed in Subsection D(3)(a) through (j), supra; then the applicant's burden of proof shall include the obligation of presenting credible, relevant and pertinent evidence on such topics as to persuade the Zoning Hearing Board that the relief requested by the applicant will not be contrary to the public

interest with respect to the criteria placed at issue.

IV. Facts Applied to the Legal Standard.

A. Lot Area Variance from §143-37.A.(2).

Applicant is requesting variances to build a single family home on a consolidation of 6 movie lots with an area amounting to 10,800 square feet or 43.2% of the 25,000 square feet required by §143-37.A.(2) of the Ordinance, the proposed lot is grossly undersized from what the residents, through the Lower Providence Board of Supervisors, wanted. Similarly, Applicant asserts that it meets all the criteria necessary for variances to construct the home on a lot that, as configured, does not even reach 50% of the lot area requirement. Applicant's bold request is particularly troubling where additional lots are available to increase the lot size and, if not comply with the lot area requirements of the Ordinance, come much closer to the required area. As such the variance requested does not represent the minimum variance that will afford relief nor will it represent the least modification possible of the lot area regulation.

As noted in Applicant's Exhibit 4, these movie lots have been in existence in the Township since the early 1900's. What is more, movie lots generally have been the subject of numerous variance applications. When the Board of Supervisors included these "movie lots" in the R-2 residential district they had to know that unless several of these lots were combined to garner the required 25,000 square feet lot size, construction of single-family dwellings required by the R-2 district was impossible.³ When enacting the Ordinance the Supervisors exercised the power granted them by the Municipalities Planning Code, particularly §604⁴ to promote, protect and facilitate (among other things), public health and safety, the general welfare and the proper density of population. Of all the zoning regulations, lot area is the most critical as it

³ In Fisher v. Viola, 789 A.2d 782 (Pa. Cmwlth. 2001) the Court sustained 1.25 and 1.50 acre minimum lot sizes for residences in less urban residential zoning districts.

⁴ 53 P.S. § 10604

controls density, something of unique interest to the public. It follows that the Supervisors made a mindful decision to manage the density of this particular neighborhood. Since density control is a proper zoning purpose, it is not for the Board to second guess the Supervisors' intentions when they zoned the area as R-2.⁵ Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959). The Supervisors, as the township's legislative body, has the right to adopt reasonable zoning rules even if other reasonable rules could have been adopted. *Ryan on Zoning* §3.3.3; see also Swade v. Springfield Township Zoning Board of Adjustment, 392 Pa. 269, 140 A.2d 597 (1958).

In the case at bar, Applicant wishes to construct a home approximately twenty-one hundred (2,100) square feet in size on a significantly undersized building lot.⁶ Applicant testified that other than his attorney inquiring of the Township to sell it lot #23⁷ and thereby expand the lot size to not only include lot #23 but also lots 24 and 25 and beyond,⁸ it has done nothing to assemble more undersized lots in the area to comply with the Ordinance setback or lot size requirements. Instead, Applicant makes the audacious claim that it should be permitted to construct a home on a lot that barely meets 43% of the 25,000 foot required lot size in the R-2 district.⁹ Accepting that assertion would arguably permit the construction of any type of structure on any of the 6 smaller lots that make up the Property and would stand the Ordinance "on its head."

The Applicant cannot escape the fact that it is seeking to build a larger home in a district that encourages significantly larger lots. As noted heretofore, the Supervisors sought to restrict

⁵ Even if the Board were to believe that the lot size was too burdensome, it is not the Board's province to refuse to enforce the Ordinance.

⁶ The case of Appeal of W.B. Dodge, Jr. 43 Pa. Cmwlth. 65, 402 A.2d 273 (1979) essentially held that you cannot build too large a house on too small a lot.

⁷ A lot that the Applicant testified the Township acquired many years ago from the Tax Claim Bureau gratis and was not using.

⁸ In fact, Applicant testified that it already had a number of those adjoining lots under agreement which it intended to develop but presently determined that it was not economically feasible to develop.

⁹ Had this been a case of a de minimis variance from the building lot size and setbacks the result might be different. The de minimis doctrine, supports a dimensional variance where there are only minor deviations from dimensional requirements of the Ordinance. Township of Middletown v. Zoning Hearing Board of Middletown Township, 682 A.2d 900 (Pa. Cmwlth. 1996)

such an effort. In fact, the Supervisors clearly expressed their intentions in §143-35 Declaration of legislative intent; applicability.

A. Legislative intent:

(1) To provide for *the orderly expansion of areas that offer neighborhoods of single-family detached houses at a low density.*

(2) To carefully protect these areas from nonresidential uses *or higher residential density that may not be fully compatible with the existing neighborhood.*

(italics supplied)

The legislative intent works “hand in glove” with §§143-168.C. & D.(2), (3) & (4) that spell out the factors the Board should consider when considering an application for a variance. As testified to by at least 4 people at the hearing regarding those factors, with the variance will come:

- Access issues for this and any future development;
- Overcrowding the land creating undue concentration of population;
- A home unsuitable for the Property, inconsistent with the neighborhood;
- Extraordinary burden upon storm and ground water;
- By implication, increased burdens upon emergency services in the Township that increased population and population density brings;
- Adversely impact the appropriate use of adjacent properties;
- Adverse impact upon the public welfare, particularly those who reside in the neighborhood and the storm and ground water issues the neighbors raised.

Thus Applicant failed in its burden to prove to the Board that it has satisfied the above criteria to persuade the Board to grant a variance to permit the construction of a 2,100 square foot single family home on a lot of 10,800 square feet that does not even come close to satisfying R-2 lot size or setback requirements as required by §143-168.D.(3) & (4).

Finally, in effect, Applicant asserts that undersized lots are perpetually immunized from

zoning regulations upon a mere showing that the lots were undersized when created prior to the adoption of zoning regulations. Applicant's theory of recovery in effect would render all undersized lots subject to development without regard for any reasonable regulation. Although creative, that simply is not the law.

Granting the variance will beget more of the same development that will convert what is otherwise a pleasant, manageable neighborhood of larger structures with significant distances between homes into an urbanized anomaly that is the antithesis of this suburban township. Public policy is in no way served by such unbridled use of undersized lots.

B. Setback Variances from §143-37.A.(2).

Applicant's variance requests to allow front and rear yard setbacks that are 50% and 41.66% respectively of those required by the Ordinance demonstrates that said variances fail the five part test of §143-168.A. of the Ordinance.

The Applicant asserts that the existing 50 foot front and 60 foot rear yard setback requirements cause it an *unnecessary* hardship. Zoning, by its very nature restricts the use of property. If the hardship caused by a zoning regulation does not work to confiscate the property it is not unnecessary and will not support a variance under the MPC – 53 P.S. §10910.2(a)(1). No direct evidence was introduced to demonstrate that the Property was in effect confiscated in this case. In fact, there is a market for the property as evidenced by Applicant's own testimony that he had not only those lots at issue under agreement but several more in proximity. Financial hardship alone is not enough to justify a variance. Such hardship must be balanced against the public need to regulate land use and to keep a zoning hearing board from usurping the role of the Supervisors and rewriting the Ordinance on an ad hoc basis.

Even if an unnecessary hardship exists a variance can only issue if the variance: (i) represents the minimum variance that will afford relief; (ii) is the least modification possible of

the regulation in issue, (iii) will not alter the essential character of the neighborhood or district in which the property is located, (iv) will not substantially or permanently impair the appropriate use or development of adjacent property, (v) will not be detrimental to the public welfare. In light of the above analysis we know that there is another way for the Applicant to develop this property without significantly varying the Ordinance thereby satisfying the test of securing the minimum variance that would afford relief. Further, should the variances requested be granted: (i) the essential character of the neighborhood that will lose its last remaining wooded area; (ii) adjacent property will be substantially impaired due to limited access of 5th Street caused by Applicant's placement of a home at the head of the entry to the other movie lots south of its proposed home; (iii) the R-2 district will become more like the R-3 zone with 1,200 square foot homes built on 8,000 square foot lots; (iv) the public welfare will be adversely affected. It is well settled that generally a variance should not be granted if it would be injurious to the public interest. Altering the dimensions to permit the construction of a home on a woefully undersized lot in an R-2 district undercuts the very purpose of the Ordinance and the public interest of regulation of population density.

Accordingly, the Applicant fails the §143-168.A. test. Any hardship is neither unique nor unnecessary. The grant of a variance to permit a lot size that is significantly less than what is required in the applicable R-2 district will materially alter the character of the neighborhood and be adverse to the public interest.

Moreover, so long as any permitted use can be reasonably accommodated, there is no hardship that would require a variance. See: Roth v. Zoning Hearing Board of Springfield Township, 91 Pa. Cmwlth. 445, 497 A.2d 295 (1985). In Roth, applicant purchased an undersized lot and obtained dimensional variances to accommodate construction of a new building for a permitted use. Even though the use was conforming, the Commonwealth Court

held that the variances were improperly granted since there was no evidence that the lot could not be used for another permitted use, without the variances. The fact that a permitted use cannot operate on a given lot without dimensional variances is not enough to justify the variances.

Fundamentally, variance rules are designed to protect the decision of the legislative body (here the Board of Supervisors) in enacting the zoning ordinance and to make sure that the Ordinance is not “adjusted” out of existence by variance. O'Neill v. Zoning Board of Adjust., 434 Pa. 331, 254 A.2d 12 (1969). It is well settled that zoning boards and courts cannot substitute their concept of what the zoning ordinance should be, their function is only to enforce the zoning ordinance in accordance with the applicable law. Kline Zoning Case, 395 Pa. 122, 124-5, 148 A.2d 915, 916 (1959). Thus, Applicant has failed to justify the need for these variances.

Clearly the result requested contradicts the Ordinance and the Supervisors who reserved this section of the Township for larger lots to achieve fewer houses and thus less density. Any other result could tax the Township and its resources, cause congestion and manifestly change the complexion of the neighborhood. Precisely what §143-168.D.(3) requires the Board to consider in its analysis. The relief requested is not the minimum variance that will afford the required relief.

Zoning's limitations on the rights of the property owner are based on the propositions that the (i) public is capable of forming a rational, objective plan for land development; and (ii) public interest in that plan overrides the right of the property owner to do as he sees fit. In this case, the rights of the community to regulate density of its population and protect the public welfare outweigh the interest of the Applicants to vary from the restrictions of the Ordinance.

CONCLUSIONS OF LAW

1. The Applicant is the equitable owner of the Property and has standing to appear before the Board regarding the requested relief.
2. Applicant failed to meet its burden of proof to warrant the requested variances.
3. Denial of the requested relief will not impose an unnecessary hardship on the Applicants.
4. If the requested variances were to be granted, the community will be significantly changed altering the character of the neighborhood and this R-2 district.
5. The requested variance will substantially impair the appropriate use or development of the adjacent property
6. The requested variance will negatively impact the public welfare.
7. The variance, if authorized, does not represent the minimum variance that will afford relief.
8. The requested relief does not represent the least modification possible of the regulation at issue.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 5-0 vote is as follows:

1. The Application of ERH Capital Partners, LLC for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to allow lot area of 10,800 square feet where 25,000 square feet is required is denied.
2. The Application of ERH Capital Partners, LLC for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a front yard

setback of 25 feet where 50 feet is required, is denied.

3. The Application of ERH Capital Partners, LLC for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a rear yard setback of 25 feet where 60 feet is required, is denied.

Dated: July 3, 2019

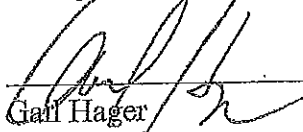
ORDER

The foregoing Findings, Discussion and Decision are hereby approved and ordered.

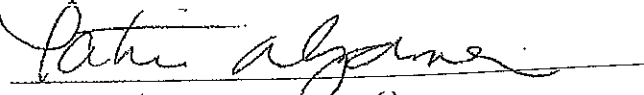
LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman


George J. Ozorowski, Vice Chairman


Gail Hager

Joseph Pucci


Patricia Alzamora

Robert G. Hardt


Christopher Gerdes

NOTICE TO APPLICANT

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Lower Providence Township within one (1) year of the date of the approval or the decision granting approval.