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October 8, 2019

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
No. 7014 2870 0002 3801 1981

LinMike, LLC
c/o Michael J. Clement, Esquire
Wisler Pearlstine
460 Norristown Road, Suite 110
Blue Bell, PA 19422

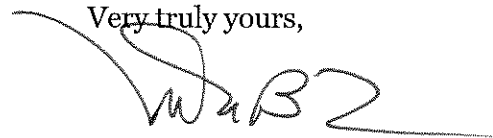
RE: Application of LinMike, LLC
Lower Providence Township Appeal Application No. Z-19-16

Dear Mr. Clement:

Enclosed please find a Notice of Decision of the Lower Providence Township Zoning Hearing Board taken at the hearing held on August 22, 2019. Pursuant to the decision of the Zoning Hearing Board, your application for a variance from sections 143-37.A.(2) of the Lower Providence Zoning Ordinance was approved. The Application for a Special Exception under section 143-145 and 143-37.A.(2) are moot.

I wish your client the best of luck with his project.

Very truly yours,



Keith B. McLennan

KBM/jds
Enclosure

pc: Kathie A. Eskie, Chairwoman
Gero J. Ozorowski, Vice Chairman
Gail Hager
Joseph Pucci
Patricia Alzamora
Christopher Gerdes
Robert G. Hardt
Michael Mrozinski
(Via e-mail with enclosure)

APPLICATION NO.	Z-19-16	HEARING DATE:	August 22, 2019
APPLICATION OF:	LinMike, LLC		
	C/o Michael J. Clement		
	460 Norristown Road		
	Blue Bell, PA 19422		
PROPERTY:	Hillside Avenue at Third Avenue		
	Lower Providence Township		
	Norristown, PA 19403		
	Parcel Nos. 43-00-06304-00-7		
	43-00-06301-00-1		
	43-00-14692-00-7		

On July 22, 2019 applicant, LinMike, 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 three (3) lots to comprise a 22,000 square foot plot of vacant land in the R-2 residential district (“Application”). The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on August 22, 2019 at the Lower Providence Township Building. The following members of the Board were present: Chairwoman Kathie Eskie, members Patricia Alzamora and Robert Hardt. 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 LinMike, LLC, (“Applicant”) the equitable owner of parcel numbers 43-00-06304-00-7, 43-00-06301-00-1 and 43-00-14692-00-7 identified in the County Tax Assessor’s Map in the application and at the hearing as Exhibit “B” (collectively the “Property”).

2. The Applicant was represented by M. Joseph Clement, Esquire from Wisler Pearlstine, 460 Norristown Road, Blue Bell, PA 19422.

3. Len Del Grippo is a member of the Applicant and testified on its behalf.

4. Applicant has the parcels that make up the Property under agreement of sale and thus is the equitable owner of the Property that is the subject of the Application.

5. Applicant sought an interpretation of §143-145 of the Ordinance regarding the minimum building lot area and lot width requirements to permit the construction of a single family home on a series of 3 lots laid out in a 1928 subdivision plan comprising 22,000 square feet where 25,000 square feet was required.¹

6. Alternatively, Applicant asserted that the facts satisfied the provisions of §143-145 of the Ordinance and requested a special exception to permit such use.

7. Finally, failing the special exception Applicant requested variances from §143-37.A.(2) of the Ordinance regarding the lot size, front and rear yard setback requirements.

8. The three (3) lots that comprise the Property are located at the corner of Hillside

¹ Applicant also argues that under Murphy v. Martini, 884 A.2d 262, 265 (2005) the failure of the Township to open 3rd Street, the owners of the adjoining properties, including Applicant own to the center line of 3rd Street. Such ownership then provides Applicant an additional 3,600 square feet of land such that Applicant has 25,600 square feet.

Avenue and 3rd Street, a so called “paper street” in Lower Providence Township, PA.²

9. The lots that comprise the Property are depicted on Applicant’s Exhibit “B” to its Application as noted on that exhibit and constitute a consolidation of several so called “movie lots” that were originally were 40’ wide by 100’ deep.³

10. The lots that comprise the Property otherwise satisfy the frontage and depth requirements of the Ordinance.

11. Applicant proposes to combine 3 parcels of ground to reach 22,000 square feet of vacant land where 25,000 square feet is required.

12. Applicant seeks a variance from §143-37.A.(2) to permit a building lot of 22,000 square feet with a front yard setback of 20 feet where 50 feet is required and a 40 foot rear yard setback where 60 feet is required.

13. The Property otherwise complies with off-street parking, building and impervious coverage and frontage requirements of the Ordinance.

14. The Property includes 4,419 square feet of steep slopes at greater than 25% in the rear of the Property.

15. The steep slopes in the rear of the Property force the Applicant to construct the proposed home closer to Hillside Avenue than that required by the Ordinance.

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

17. The proposed home to be built on the Property is to range from 2,800 to 3,400 square feet in size.

² 3rd Street has been laid out on the Tax Assessor’s Map attached as Exhibit “B” but has not been constructed, thus the reference to it is a “paper street.”

³ 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.

18. The proposed single-family home would be two (2) stories with a two-car garage and a driveway from Hillside Avenue.

19. There was adverse public comment regarding the application.

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

Applicant Exhibits:

A-1 Copy of the Application executed and filed by the Applicant on July 17, 2019.

A-2 Concept Plan of Bursich Associates dated July 1, 2019.

A-3 Plan depicting Lots 93-97 that comprise the Property.

A-4 Deeds for the lots that comprise the Property.

A-5 Memorandum of Law regarding the issues posed by a paper street.

Board Exhibits:

B-1 Certificate of Posting the Property with a Notice of Public Hearing.

B-2 Certification of Notification of those neighbors within five hundred feet (500') of the Property.

B-3 Notice of Publication of the Application.

DISCUSSION

I. Statement of the Case

Applicant requests a special exception under §143-145 of the Ordinance to permit construction of a single-family home on 22,000 square feet of land where 25,000 square feet is required. Alternatively, Applicant seeks 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 22,000 square foot vacant plot of land which, according to Exhibit A-4, is an aggregation of 5 so called “movie lots.”

The variance relief sought is dimensional in nature requesting that the Board vary from the Ordinance to permit:

- a. A front yard setback of twenty feet (20’) where fifty feet (50’) is required; and
- b. A rear yard setback of forty feet (40’) where sixty feet (60’) is required;
- c. A building lot area in the R-2 district of twenty-two thousand (22,000) square feet where twenty-five thousand (25,000) square feet is required.

II. Legal Standard

A. 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 effects 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.

III. Facts Applied to the Legal Standard.

A. Special Exception - §143-145 of the Ordinance .

In order to obtain a special exception to use the property without variance as requested, §143-145 of the Lower Province Township Zoning Code (hereinafter the "Zoning Code") provides in material part:

§143-145 Land.

Any land, the existing lawful use of which at the time of passage of this chapter does not conform to the regulations of the district in which it is located, either because of the original passage of this chapter or because of subsequent amendments of applicable regulations, shall have such use considered as a nonconforming use, which may continue on such land but shall be subject to the regulations governing nonconforming uses. A nonconforming lot which is of public record and single and separate ownership at the time of the enactment of the zoning ordinance, namely May 8, 1955, may, by special exception, be used for a permitted use in the district in which is located.

Single and separate ownership is defined in §143-6 as: "[t]he ownership of a lot by one or more person, partnership or corporation, which ownership is separate and distinct from that of any abutting or adjoining lot." Applicant asserts that the lots at issue have been in single and separate ownership such that a special exception is warranted. Although applicant sought to establish that the subject lots have been in single and separate ownership since prior to the passage of the Ordinance in 1955, it is not clear that is the case. Nevertheless, Applicant's efforts to assemble a requisite number of lots to reasonably comply with the Ordinance's lot area

requirements renders Applicant's request for a special exception moot.

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

Applicant is requesting variances to build a single family home on a consolidation of 5 lots with an area amounting to 22,000 square feet or 88% of the 25,000 square feet required by §143-37.A.(2) of the Ordinance. Applicant's reasonable efforts to assemble the necessary land to closely comply with the Ordinance differs from that of several other applicants who have appeared before the Board seeking to construct homes on grossly undersized lots. Although the residents, through the Lower Providence Board of Supervisors, sought to restrict development in this section of the Township to 25,000 square foot lots, variance from that lot size requirement is available in the appropriate case to permit the reasonable use of the property. This is that case.

Applicant has not sought to impose an oversized building on an undersized lot. Rather, applicant has assembled additional lots to increase the lot size and building envelope in an effort to comply with the lot area requirements of the Ordinance. In the process, applicant has come much closer to the required area. In fact, arguably applicant exceeds the lot area requirements if it is correct that an additional 3,600 square feet is to be added to the Property on account of the Township's failure to open 3rd Street.

Nevertheless, the 5 part variance test must be applied to the facts at issue in this dimensional variance case. Clearly there are unique circumstances or conditions including irregularity and narrowness of the lots coupled with exceptional topographical and physical conditions peculiar to this property that make it difficult to allow the reasonable use of that property by the Applicant. Not only are the lots undersized unless consolidated, however, they also include significant steep slopes that restrict the placement of a home. Such irregularities are caused by the Ordinance, not the Applicant, creating a hardship. Further, those physical

circumstances and conditions preclude the possibility of development of the Property in conformity with the Ordinance. If the hardship caused by a zoning regulation works to confiscate the property a variance is necessary under the MPC – 53 P.S. §10910.2(a)(1). A variance is therefore appropriate to permit to the applicant reasonable use of its property.

Further, although there was testimony that the proposed home differs from that of the homes already constructed in the neighborhood, no evidence was introduced to demonstrate that the variance, if authorized would permanently impair the appropriate use or development of adjacent property nor be detrimental to the public welfare. It is evident from the documentary evidence provided that the neighborhood is a mixture of smaller and larger single family homes. As such the residential nature of the neighborhood is not being altered.

Finally, denying a lot area variance for want of a mere 3,000 square feet of additional land (or 12% of the required lot area) not only denies the applicant reasonable use of its property, but is arguably a de minimis variance request.⁴ Further, if the Applicant is correct and it owns a portion of 3rd Street, there is no doubt that the variance requested represents the minimum variance that will afford relief and represents the least modification possible of the lot area regulation.

C. Front Yard Setback Variance from §143-37.A.(2).

The result is the same when applying the same five part test to the Applicant's request for variance to permit a twenty (20) foot front yard setback where fifty (50) feet is required. The property is unique due to the location of the steep slopes in the rear of the property that forces the Applicant to place the home closer to the front of the Property. Without the requested setback

⁴ 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)

variance, applicant would be denied the right to construct a home on its property under §§143 -- 236 & 240.A. of the ordinance which precludes the construction of freestanding structures or buildings wherever steep slopes of 25% or greater exist. As was introduced at the hearing, due to the topography of the Property, steep slopes are present in the general area where the proposed building would be placed if it was required to comply with the front yard setback of 50 feet. Such would be the hardship that is not imposed by the applicant.

Many of the homes in the surrounding neighborhood already are non-complaint with the fifty (50) foot front yard setback requirement and thus the proposed variance will not alter the essential character of the neighborhood nor impair the appropriate use or development of adjacent property or be detrimental to public welfare. Finally, a front yard setback consistent with similar setbacks in the neighborhood represents the minimum variance that will afford relief and the least modification possible of the Ordinance.

D. Rear Yard Setback Variance from §143-37.A.(2).

Upon further analysis of Applicant's variance request for a rear yard setback it was determined that the placement of the proposed home with frontage on Hillside Avenue did not require a rear yard setback. Accordingly that variance request was deemed moot.

In the case at bar, Applicant wishes to construct a home approximately twenty-eight hundred (2,800) to thirty-four hundred (3,400) square feet in size on building lot that closely complies with the Ordinance. Applicant has exercised reasonable efforts to expand the lot size to comply with the Ordinance. The Applicant has worked diligently to respect and honor the Supervisors clearly expressed intentions articulated in §143-35 of the Ordinance for the R-2 Residential District.

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)

Applicant's efforts to substantially comply with the Ordinance so that it can reasonably use the Property should be rewarded, not for want of rigidity, denied.

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 met its burden of proof to warrant the noted variances.
3. Denial of the requested relief will impose an unnecessary hardship on the Applicant.
4. The requested variances if granted, will not alter the character of the neighborhood and this R-2 district.
5. The requested variance will not impair the appropriate use or development of adjacent property
6. The requested variances will not impact the public welfare.
7. The variances, if authorized, represents the minimum variances that will afford relief.
8. The variances requested represent the least modification possible of the Ordinance.

DECISION

The decision of the Lower Providence Township Zoning Hearing Board by a 3-0 vote is as follows:

1. The Application of LinMike, LLC for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to allow lot area of 22,000 square feet where 25,000 square feet is required is GRANTED provided construction of the proposed home shall be as per the plans introduced into evidence before the Board.

2. The Application of LinMike, LLC for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a front yard setback of twenty (20) feet where fifty (50) feet is required, is GRANTED provided construction of the proposed home shall be as per the plans introduced into evidence before the Board.

3. The Application of LinMike, LLC. for a Special Exception under §143-145 of the Lower Providence Township Zoning Ordinance is moot.

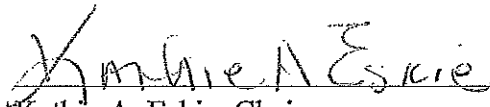
4. The Application of LinMike, LLC. for a Dimensional Variance from §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a rear yard setback of 40 feet where 60 feet is required is moot.

Dated: October 6, 2019

ORDER

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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD

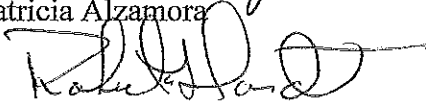

Kathie A. Eskie, Chairwoman

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.