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July 7, 2022

Via E-mail: [ehughes@hkolaw.com](mailto:ehughes@hkolaw.com)  
and VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED  
NO. 7018 3090 0000 0752 8349

Edward J. Hughes, Esquire  
Hughes, Kalkbrenner & Ozorowski, LLP  
1250 Commons, Suite 205  
1250 Germantown Pike  
Plymouth Meeting, PA 19462

**RE: Michael James Builders & Developers, LLC  
Lower Providence Township Zoning Hearing Board Application Z-22-05**

Dear Ed:

In accordance with your client, Michael James Builders and Developers, LLC's application for variances from Lower Providence Zoning Ordinance Sections 143-33, enclosed please find a copy of the Opinion, Decision and Order of the Lower Providence Township Zoning Hearing Board.

Should you have any questions, please contact me.

Yours very truly,



Keith B. McLennan

KBM/

Edward J. Hughes, Esquire  
July 7, 2022  
Page Two

Pc: Via U.S. First Class Mail:

Gregory R. Heleniak, Esquire (via email: [gheleniak@rudolphclarke.com](mailto:gheleniak@rudolphclarke.com))  
James Jones, Donna Colavecchi  
Dori Larrivee  
Mike and Marguerite Hayes  
Keir Maloney  
Chris Simon  
Margaret Labosh  
Tom Ford  
Alan and Laura Markley

Lower Providence Township ZHB Members (via e-mail)

Joseph Pucci  
Kathie A. Eskie  
Gail Hager  
Christopher Gerdes  
Randy Klein  
Terrance Barnes

Mike Mrozinski (via e-mail)  
Tina Blain (via e-mail)

## **ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO. Z-22-05 : HEARING DATE: April 28, 2022; May 26, 2022  
:  
:  
APPLICATION OF: :  
Michael James Builders :  
and Developers, LLC :  
3839 Landis Mill Road :  
Collegeville, PA 19426 :  
:  
PROPERTY: :  
S. Grange Road :  
Lower Providence Township :  
Parcel No. 43-00-05737-00-7 :

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

A public hearing on the application (“Application”) concerning the above captioned premises (the “Property” or “Subject Property”) was held on April 28, 2022 and concluding on May 26, 2022, before the Zoning Hearing Board of Lower Providence Township (the “Board”) in the Township Administration Building, 100 Parklane Drive, Eagleville, PA, (the “hearing”) pursuant to notice as required by the Lower Providence Township Zoning Ordinance (the “Ordinance”) and the Pennsylvania Municipalities Planning Code (the “MPC”). After consideration of the Application and the testimony, exhibits, and argument presented, the Zoning Hearing Board hereby renders its decision on the Application.

#### **Procedural Matters**

##### **1. Application before Zoning Hearing Board**

On February 9, 2022, applicant Michael James Builders and Developers, LLC (“Applicant”) owner of an undeveloped lot located on S. Grange Ave., Collegeville, Lower Providence Township, Pennsylvania, filed an application seeking the following variances to permit the construction of a single-family home on the Property in the R-1 Residential Zoning District to

permit:

- 1) A lot area of 10,045.7 square feet where a minimum of 65,000 square feet is required.
- 2) A lot width to 85.69 feet where a minimum of 195 feet is required.
- 3) A front yard setback of 30.98 feet where a minimum of 50 feet is required.
- 4) A rear yard setback of 27.07 feet where a minimum of 60 feet is required.
- 5) A side yard setback of 11.46 feet where a minimum of 50 feet is required.
- 6) Building coverage of 25.7% where a maximum of 15% is permitted.

At the May 26, 2022, Hearing, Applicant amended its Application to request the following:

- 1) To permit a side yard setback of 20.35 feet left side and 18.72 feet on the right side where a minimum of 50 feet is required.
- 2) To permit a front yard of 30.08 feet where a minimum of 50 feet is required.
- 3) To permit a rear yard setback of 41.21 feet where a minimum of 60 feet is required.
- 4) To permit a lot size of 10,045.7 square feet where a minimum of 65,000 square feet is required.
- 5) To permit a lot width of 85.69 feet where a minimum of 195 feet is required.
- 6) Applicant withdrew the request for building coverage relief.<sup>1</sup>

## 2. Notice and Hearing

The Application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on April 28, 2022, and continuing on

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<sup>1</sup> Applicant withdrew its request for a variance from Section 143-33 of the Ordinance to permit building coverage of 25.7% and requested no relief about building coverage. Section 143-33 of the Ordinance permits residential buildings in the R-1 district to have a maximum building coverage of 15%.

May 26, 2022, where the Board accepted evidence in the matter.

3. Zoning Hearing Board Members Participating

- a. Present at the hearing on April 28, 2022, were: Kathie Eskie, Member, Chris Gerdes, Member Gail Hager, Member, Randy Kline, Alternate.
- b. Present at the hearing on May 26, 2022, were: Kathie Eskie, acting Chair and members Chris Gerdes, Gail Hager and Terrance Barnes.
- c. Members present at the meeting on June 23, 2022 to vote on the Application were: Kathie Eskie, Chris Gerdes and Terrance Barnes.

4. Appearances of Counsel

- a. Applicant was represented by Edward J. Hughes, Esquire of 1250 Germantown Pike, Suite 205, Plymouth Meeting, PA 19462.
- b. Keith B. McLennan, Esquire, appeared as Solicitor for the Zoning Hearing Board.

5. Appearance of Other Party

- a. Lower Providence Township entered its appearance as permitted under the Ordinance and was represented by Gregory R. Heleniak, Esquire, of Rudolph Clarke, LLC with an address of Seven Neshaminy Interplex, Suite 200, Trevose, PA 19053.
- b. Unrepresented parties included:
  - i. Mike Hayes of 38 S. Grange Ave, Collegeville, PA 19426.
  - ii. Marguerite C. Hayes of 38 S. Grange Ave, Collegeville, PA 19426.
  - iii. Tom Ford of 17 S. Grange Avenue, Collegeville, PA 19426.
  - iv. James Jones of 31 S. Grange Avenue, Collegeville, PA 19426.
  - v. Margaret E. Labosh of 43 S. Grange Avenue, Collegeville, PA 19426.

- vi. Donna Colavecchi of 31 S. Grange Avenue, Collegeville, PA 19426.
- vii. Christopher Simon of 3528 Baker Street, Collegeville, PA 19426.
- viii. Laura Markley of 27 S. Grange Avenue, Collegeville, PA 19426.
- ix. Keir Maloney of 97 S. Grange Avenue, Collegeville, PA 19426.
- x. Dori Larrivee of 41 S. Grange Avenue, Collegeville, PA 19426.

6. Also Present

- a. Mike Mrozinski, the Community Development Director for Lower Providence Township.
- b. Paula Meszaros, the Court Reporter.

7. Witnesses

- a. Michael Marchese testified in support of the Application.
- b. Jeremy Madaras, PE testified as an expert witness in support of the Application.
- c. Mike Hayes testified in opposition to the Application.
- d. Marguerite C. Hayes testified in opposition to the Application.
- e. Tom Ford testified in opposition to the Application.
- f. James Jones testified in opposition to the Application.
- g. Margaret E. Labosh testified in opposition to the Application.
- h. Donna Colavecchi testified in opposition to the Application.
- i. Christopher Simon testified in opposition to the Application.
- j. Laura Markley testified in opposition to the Application.
- k. Keir Maloney testified in opposition to the Application.
- l. Dori Larrivee testified in opposition to the Application.

8. Exhibits

a. The Board submitted the following exhibits at the hearing:

B – 1 The Certificate of Posting.

B – 2 Certificate of Notification.

B – 3 Letter Sent to Property Owners.

B – 4 Matrix of Addresses.

B – 5 Proof of Publication.

b. The Applicant submitted the following exhibits:

A – 1: Application and attached exhibits.

A - 2: Deed to the Property.

A – 3: Board of Assessor's Property Record.

A -4: Tax Map.

A – 5: Norristown Park a/k/a Collegeville Park Plan DB 745, Page 600.

A – 6: Google Aerial.

A – 7: Photographs of the Subject Property.

A – 8: Site Plan.

A – 9: Rendering of Proposed Structure.

A -10: CV Engineering Testimony.

A -11: Rendering of the Proposed Home.

A – 12: Revised site plan.

A – 13: Revised Rendering of the Proposed Home.

c. Margaret E. Labosh submitted the following exhibits:

Labosh – 1: Map and grid of Collegeville Park.

Labosh – 2: Summary of information.

## **FINDINGS OF FACT**

1. The Applicant is Michael James Builders and Developers, LLC (Applicant) owner of the Subject Property located at S. Grange Ave. Collegeville, PA 19426.
2. Mr. Michael Marchese is the sole owner of Michael James Builders and Developers, LLC.
3. Mr. Marchese is a home builder and general contractor.
4. The Subject Property is comprised of a 10,045.7 square foot lot with tax parcel number 43-00-05737-00-7 which is currently undeveloped.
5. The property has 85.69 feet of frontage on S. Grange Avenue.
6. The property abuts an unopened paper street known as Getty Street.
7. Applicant acquired the Property on November 23, 2021.
8. The applicable zoning district is the R-1 Residential Zoning District.
9. The Property is not currently serviced by sewer or water.
10. Under the current zoning standards there is no building envelope on the property.
11. Applicant proposes to construct a two-story home that is 47 feet wide, 45 feet deep, and a total of 2,899 square feet.
12. The proposed home would have 4 bedrooms, 2.5 baths, and a 2-car garage. There would be an unfinished basement.
13. Applicant made his determination as to the size and type of home to construct based upon his estimation of the saleable value of the home in the current market.
14. Based on the statements of Applicant, the square footage of the home could be increased by finishing the basement.
15. The Proposed Use would allow for a front yard setback of 30.08 feet, side yard



setbacks of 20.36 feet and 18.72 feet, a rear yard setback of 41 feet, building coverage of 19.2%, and impervious coverage of 25.9%.

16. The proposed use does not comply with the Ordinance with regard to building coverage maximums in the R-1 Residential District.

17. Applicant failed to present competent testimony that the proposed use would not alter the essential character of the neighborhood.

18. The testimony of the various neighbors established that the proposed use would alter the essential character of the neighborhood in that the lot is substantially smaller than other developed lots in the neighborhood, and the proposed single-family home is larger than many of the homes in the neighborhood.

19. The neighborhood is a spacious bucolic area. The area has a substantial amount of green space.

20. There are numerous 20-foot lots in the area of the Subject Property.

21. Due to the small lots, many of the houses in the area are smaller than the proposed construction.

22. The houses are well spaced, and there are no developed lots in the area that are as small as the Subject Property.

23. The proposed use will impair the appropriate use or development of adjacent properties.

24. Applicant failed to present competent testimony that the requested variances represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

25. The proposed use would alter the essential character of the neighborhood.

26. The requested variances do not represent the minimum variance that will afford relief or that will represent the least modification possible of the regulation at issue.

## **DISCUSSION**

### **I. Statement of the Case**

Applicant seeks to construct a single-family home on an undersized lot and requests the following relief from Section 143-33 of the Ordinance:

- 1) To permit a side yard setback of 20.35 feet on the left side and 18.72 feet on the right side where a minimum of 50 feet is required.
- 2) To permit a front yard of 30.08 feet where a minimum of 50 feet is required.
- 3) To permit a rear yard setback of 41.21 feet where a minimum of 60 feet is required.
- 4) To permit a lot size of 10,045.7 square feet where a minimum of 65,000 square feet is required.
- 5) To permit a lot width of 85.69 feet where a minimum of 195 feet is required.

### **II. Ordinance Subsections in Question.**

Section 143-33 of the Ordinance requires that a property in the R-1 Residential Zoning District have the following dimensions:

- a. A minimum lot area of 65,000 square feet.
- b. A minimum lot width of 195 feet.
- c. A minimum front yard of 50 feet.
- d. A minimum side yard of 50 feet.
- e. A minimum rear yard of 60 feet.

- f. A maximum building coverage of 15%.

### **III. Variance Legal Standard**

There are two 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 dimensional variance.

To obtain a variance the Applicant 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.

Generally, a use variance requires the applicant to show that unnecessary hardship will result rendering the property close to 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 close to 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 Applicant' 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. Standards 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.

Further, according to Section 143-168D. of the Ordinance the Applicant must pass the following tests:

(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.**

Applicant seeks to construct a single-family home on an undersized lot and requests extensive relief from Section 143-33 of the Ordinance. Applicant proposes to construct a home larger than the vast majority of the homes in this area of the R-1 district. two-story home that is 47 feet wide, 45 feet deep, and a total of. The proposed 2,899 square foot home would have 4 bedrooms, 2.5 baths, and a 2-car garage. Based on the statements of Applicant, the square footage of the home could be increased by finishing the basement. The Proposed Use would allow for a front yard setback of 30.08 feet, side yard setbacks of 20.36 feet and 18.72 feet, a rear yard setback of 41 feet, building coverage of 19.2%, and impervious coverage of 25.9%.

The land in question is comprised of four “movie lots.”<sup>2</sup> These “movie lots” are substantially undersized micro-parcels that have been in existence in Lower Providence Township since the 1920’s. The lots predate the existence of the modern zoning Ordinance and are so undersized as to make their development difficult. The Lower Providence Township Zoning scheme classifies the area in which these “movie lots” exist as R-1 Residential, and therefore, those standards apply. Due to this, the development of these lots is dependent on consolidation to achieve a minimum lot area and width of 65,000 square feet and 195 feet respectively. What is more, the front, side and rear yard setbacks require additional variances. Applicant’s proposed use meets none of the existing requirements in the R-1 District. In fact, the parcel in question does not even contain a building envelope under these standards. Therefore, a hardship exists.

Further, despite purchasing the property knowing that it was not a conforming lot, Applicant is not considered the cause of the non-conformity. Township of Haverford v. Zoning Hearing Board of Haverford Township, 55 Pa. Cmwlth. 209, 423 A.2d 757 (1980). Therefore, a hardship exists, and the Applicant did not create the hardship.

Moreover, the property is too small to be developed in conformity with the Ordinance. However, Applicant failed to show that 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. Further, Applicant also failed to show that the variance, if authorized, will not alter the essential character of the neighborhood nor substantially impact the development of adjacent properties. Therefore, the Application must be denied.

**A. The variance requested will not represent the minimum variance that will afford**

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<sup>2</sup> 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; thus the reference to “movie lots” was born.

**relief.**

“For variances, the burden of proof shall be on the applicant.” Ordinance §§143-168.C. After multiple days of hearings, Applicant failed to provide competent evidence that the variances requested were the minimum variance that would afford relief. Of particular note is the fact that during the course of the first day of the hearing, Applicant stated that the initial proposal and the necessary variances would be the minimum that would afford relief. This bald assertion was not substantiated by fact and was later belied by Applicant’s own testimony when he stated that he could construct a smaller home on the lot. At the second day of the hearing, Applicant brought forth a new proposal which is the subject of this opinion. The amended proposal has a smaller footprint and requires a reduced deviation from the Ordinance. Following the amendment, Applicant again stated that this was the minimum variance that could afford relief.

As a consequence, the Board discounted the testimony of Applicant due to Applicant’s changing definition of minimum relief coupled with, has clear financial motives to construct the largest house possible on the Property. The 2,899 square foot home Applicant proposes to build is a large, marketable home. The Applicant opines that the relief requested is the minimum variance that could afford relief on the market for homes in the area. Applicant desires to maximize his profit and admits that this was part of his criteria as he made the determination that this was the smallest house he could build on the property. However, this is not a consideration when determining whether a deviation from the zoning scheme is appropriate. Variances are intended to ensure that land has a use but are not intended to insure the maximized profitability to the owner. Society Created to Reduce Urban Blight v. Zoning Bd. Of Adjustment, 771 A.2d 874, 878 (Pa.Commw.Ct.2001). An Applicant may not succeed by simply articulating a “reason it would be financially ‘hurt’ if it could not do what it wanted to do with the property. . . .” Id. The record is



void of any credible evidence supporting Applicant's position, which is fatal to its application. *See Mulligan v. Zoning Board of Adjustment of East Norriton Township*, 90 Pa. Cmwlth. 394, 495 A.2d 647 (1985).

Moreover, the evidence provided by the neighbors, and in fact Applicant's own witness, indicated that there are smaller houses in the area. These houses are happily occupied. The owners have made the best use of their property with smaller homes. Naturally, this belies Applicant's argument that the particularly large home he intends to build requires the minimum variance to provide relief. Therefore, not only has Applicant failed to meet its burden to show that the Variance is the minimum variance necessary to provide relief, but the evidence on the record also supports the opposite conclusion. Therefore, the Application must be denied.

**B. Applicant also failed to show that the variance, if authorized, will not alter the essential character of the neighborhood.**

Once again, the burden is on the Applicant to show that the proposed use will not alter the essential character of the neighborhood. The underlying principle being that "the variance will not have an adverse effect upon the public health, safety or welfare." *John R. Greene Assocs. v. Zoning Hearing Bd. of Lower Allen Twp.*, 56 Pa. Cmwlth. 605, 607, 426 A.2d 175, 176 (1981). In rendering a decision on this element of the variance analysis, the Board may consider whether the use would overcrowd the land and whether the use would be "suitable for the property in question so as to be consistent with the spirit and purposes" of the Ordinance. Ordinance Section 143-168D.(3). The Board must consider "whether the proposed use of land would be in harmony with the character of the neighborhood or would unreasonably interfere with the use and enjoyment of adjoining property." *Hood v. Zoning Board of Adjustment* 6 Pa.D.&C. 2d 275 (C.C.P. Montgomery).

To meet its burden, an Applicant must provide more evidence than their mere opinion as to the possible impact on the neighborhood. Id. The lack of evidence is remarkably similar in this matter as it was in John R. Greene Assocs. There the Applicant stated, "If we get much narrower than the 26 feet, I think the building would take on the appearance of possibly a mobile home or a modular home, and I don't think it would do any justice to the homes in the existing neighborhood." Id. The court found this was not adequate. While a similar sentiment was expressed at the hearing on behalf of Applicant in this matter, the argument was even less compelling as the proposed home in this case was still substantially larger than a mobile home.

Here, the proposed construction and requested variances are so vastly contrary to the zoning scheme codified in the Ordinance as to prohibit the Board from granting the requested relief. The testimony of the various neighbors established that the proposed use would alter the essential character of the neighborhood in that the lot is substantially smaller than other developed lots in the neighborhood, and the proposed single-family home is larger than many of the homes in the neighborhood. The neighborhood is a spacious bucolic area. It is zone R-1 Residential and requires 65,000 square feet per lot. As noted by the neighbors in their testimony, the neighborhood is populated with mostly smaller homes and is replete with trees and open space. Applicant intends to construct a very large home on a significantly undersized lot. In fact, the lot would be 1/6<sup>th</sup> the size required. Allowing this construction on such an undersized lot, especially with a home as large as the one proposed, would change this neighborhood from its currently rural character to one of a more densely urban character.

Applicant's own argument on the record and in his brief illustrate this point. Applicant consistently argued that the proposed use would be consistent with construction in an R-3 Residential Zoning District. With the passage of the Ordinance, the Board of Supervisors

designated the Subject Property (among others) in the R-1 District, not the R-3 District. Allowing construction using the guidelines of the R-3 district would undermine the entire zoning scheme and alter the character of the neighborhood.

Applicant attempted to present evidence through its expert witness to show that the proposed use would be consistent with the character of the neighborhood. The witness testified that he drove around and *felt* that the proposed home would fit in with other homes in the area. However, upon further questioning, he admitted that the homes in the area were mostly smaller.

Finally, Applicant freely admits that the lot in question is vastly undersized for the R-1 District. It is manifest that constructing a 2,899 square foot home on a lot that is only 15.45% of the required lot size with side yard setbacks that meet 37.44% and 40.7% of the requirements and 60.16% and 68.68% of front and rear yard requirements and only 44% of the lot width requirements is not only an aggressive request, it places the proposed home so close to the boundaries that it will impact the surrounding neighbors and their ability to use and develop their own properties. Applicant has failed to meet its burden to show that the proposed use would not alter the essential character of the neighborhood.

Accordingly, at its public meeting on June 23, 2022, 2 of the 3 members qualified to vote, concluded that the Applicant's requested relief should be denied.<sup>3</sup>

## **V. Quorum**

After the aforesaid vote, Applicant took exception thereto asserting that the members present did not constitute a quorum.<sup>4</sup> Ordinance §143-160 states in relevant part: "a quorum shall

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<sup>3</sup> Kathie Eskie, the third member qualified to vote abstained. Chairman of the meeting, Joseph Pucci, having not been present at any of the prior hearings for the case, did not vote. Board Member Gail Hager who attended the previous hearings was absent from the June 23, 2022 meeting.

<sup>4</sup> Previously, Applicant consented to four members of the Board hearing testimony and to briefing for the decision to be rendered on June 23, 2022

be no less than two voting members.” Further, §906 of the Municipalities Planning Code (“MPC”) states in pertinent part: “for the conduct of any hearing and the taking of any action, a quorum shall be not less than the majority of all members of the board. . . .” Finally, Pennsylvania law recognizes that “a person abstaining still counts towards the quorum.” Walker Pontiac, Inc. v. Dept. of State, Bureau of Pro. & Occupational Affs., 136 Pa. Cmwlth. 54, 59, 582 A.2d 410, 413 (1990). Therefore, there were three voting members at the June 23, 2022, meeting who had heard evidence in the matter and were competent to vote. Thus, a quorum existed at the June 23, 2022, hearing.

### **CONCLUSIONS OF LAW**

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. A hardship exists due to the small size of the property.
3. The hardship is due to the unique physical circumstances and characteristics of the Property and not self-imposed.
4. The requested relief is not necessary to enable the Applicant reasonable use of the Property.
5. If granted, the community would be significantly changed, and the proposed use would alter the character of the neighborhood.
6. The requested relief does not represent the minimum that will afford relief and represents the least modification possible of the regulation at issue.

### **DECISION**

The Lower Providence Township Zoning Hearing Board, by a 2-0 vote with one

abstention denied the following variances from Section 143-33 of the Lower Providence Township Zoning Ordinance to permit the construction of a single-family home in the R-1 Residential District with:

- 1) a side yard setback of 20.35 feet on the left side and 18.72 feet on the right side where a minimum of 50 feet is required;
- 2) a front yard setback of 30.08 feet where a minimum of 50 feet is required;
- 3) a rear yard setback of 41.21 feet where a minimum of 60 feet is required;
- 4) a lot size of 10,045.7 square feet where a minimum of 65,000 square feet is required;
- 5) a lot width of 85.69 feet where a minimum of 195 feet is required.

Dated: July 7, 2022

### **ORDER**

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

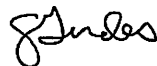
#### **LOWER PROVIDENCE TOWNSHIP ZONING HEARING BOARD**

\_\_\_\_\_  
George Ozorowski

\_\_\_\_\_  
Joseph Pucci

\_\_\_\_\_  
Kathie Eskie

\_\_\_\_\_  
Gail Hager



\_\_\_\_\_  
Christopher Gerdes



\_\_\_\_\_  
Terrance Barnes, Alternate

\_\_\_\_\_  
Randy Klein, Alternate

### **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.