

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

<b>APPLICATION NO.</b>	<b>Z-19-05</b>	<b>: HEARING DATE: February 28, 2018</b>
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<b>APPLICATION OF:</b>		:
<b>LIDL US Operations, LLC</b>		:
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		:
<b>PROPERTY:</b>		:
<b>2601 – 2619 Ridge Pike</b>		:
<b>Lower Providence Township</b>		:
<b>Norristown, PA 19403</b>		:
<b>Parcel Nos. 43-00-11875-007</b>		:
<b>43-00-11872-001</b>		:
<b>43-00-11866-007</b>		:
<b>43-00-11869-004</b>		:

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

On February 6, 2019 LIDL US Operations, LLC filed an application requesting two (2) additional<sup>1</sup> variances from the size requirements of wall and freestanding signs under Sections 143-141.3.E.1. & 2. and 143-264.F. respectively of the Lower Providence Township Zoning Ordinance (the “Ordinance”) in connection with the proposed LIDL store at 2601 – 2619 Ridge Pike, Norristown, PA 19403 (the “Application”). The Application was properly advertised and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on February 28, 2019 at the Lower Providence Township Building. Chairwoman, Kathy Eskie, Vice Chairman, George J. Ozorowski and members Gail Hager, Joseph Pucci, Patricia Alzamora and alternate Christopher Gerdes were present. Also present were Michael Mrozinski, the Director of Community Development responsible for Zoning/Code

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<sup>1</sup> Reference is made to *additional* variances due the fact that the Applicant was before the Board both in 2017 and 2018 requesting variances regarding the construction of its grocery store on Ridge Pike resulting in a Decision and Order of the Board dated June 6, 2018 which is incorporated by reference.

Enforcement, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

### **FINDINGS OF FACT**

1. The subject property is located at 2601 – 2619 Ridge Pike, Lower Providence Township, Norristown, PA 19403 and comprise parcel numbers 43-00-11875-007; 43-00-11872-001; 43-00-11866-007 and 43-00-11869-004 (hereinafter the “Property”).
2. LIDL US Operations, LLC (“Applicant”) closed on the purchase of the Property in two (2) steps on June 19, 2018 and June 20, 2018 and has commenced construction of the LIDL store.
3. The applicable zoning district is the Ridge Pike Business/R2 – district (“RPBD”).
4. The Property is the former Norristown Ford car dealership which has been vacant for many years.
5. Applicant intends to construct and operate a LIDL supermarket on the Property (the “Store”).
6. On June 6, 2018 Applicant was provided variances to permit a free-standing sign along Ridge Pike not to exceed nineteen (19) feet in height and sixty seven and thirty seven hundredths (67.37) square feet in area per side and to permit two (2) wall mounted signs not to exceed twenty four (24) feet in height and sixty seven and thirty eight hundredths (67.38) square feet in area.
7. The Applicant now seeks what, in effect, amounts to a modification of the previous variances from §143-141.3.E.2. and §143-264.F of the Ordinance granted by the Board on June 6, 2018 and a new variance from §143-141.3.E.1. to add another wall sign to include the tag line or slogan “rethink grocery” to the wall and free-standing signs along Ridge Pike.

8. Applicant proclaims that although the LIDL brand is ubiquitous in Europe, as a German company new to the United States, particularly Pennsylvania, it is little known here.

9. Whenever a new store is opened in Pennsylvania most consumers are unaware of the brand and when driving by often forget the best safety practices out of curiosity which causes an unsafe condition.

10. To educate Pennsylvania consumers the inclusion of its slogan “rethink grocery” will educate the consuming public thereby reducing the instances of distracted driving.

11. Inclusion of the “rethink grocery” slogan improves LIDL’s business opportunities while assisting the public by providing additional choices, greater variety in a one stop shopping experience and savings on grocery and related purchases.

12. Applicant requests that the Board further vary from §143-141.3.E.1. to add a wall sign of the slogan “rethink grocery” to precede the previously approved sixty seven and thirty eight hundredths (67.38) square foot LIDL yellow, red and blue iconic wall sign along Ridge Pike.<sup>2</sup>

13. The “rethink grocery” wall sign at ninety nine and twenty nine hundredths (99.29) square feet, exceeds the thirty two (32) square foot area limitation of §143-141.3.E.2.

14. The aggregate wall sign area proposed for the Ridge Pike store frontage combining the “rethink grocery” and LIDL wall signs visualized as if a box was placed around both signs is one hundred ninety five and twelve hundredths (195.12) square feet.

15. The Applicant also requests that the Board approve a variance from §143-264.F. to enable it to include the slogan “rethink grocery” on the double-sided free-standing monument sign on Ridge Pike by exceeding the prior varied sign area limitation of sixty seven and thirty

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<sup>2</sup> Neither sign will exceed the previously granted twenty-four foot height restriction established in at 18-05 for the LIDL wall mounted sign.

seven hundredths (67.37) square feet to permit ninety nine and forty seven hundredths (99.47) square feet without alteration of the previously varied height requirement.

16. Applicant sought incorporation of the record including the findings of fact and conclusions of law from the Opinion, Decision and Order at Z-18-05.

17. Cornelius Brown, professional engineer with Bohler Engineering and Steve D'Amico Construction and Development Manager for the Applicant appeared as witnesses on behalf of the Applicant.

18. There was no adverse public comment regarding this application.

19. The following exhibits were presented:

A-1 – Application inclusive of

Exhibit A - the prior decision at Z-18-05

Exhibit B - Zoning Plan

Exhibit C - Signage Detail & Deeds to the Property

B-1 Certification of Notification of the neighbors of the Application and hearing

B-2 Address Matrix for the neighbors notified of the Application and hearing

B-3 Proof of Posting

## **DISCUSSION**

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

The Applicant has requested a variance from the number of wall mounted signs and the sign area requirements of §143-141.3.E.1., §143-141.3.E.2. and from the area requirements for a free-standing sign under §143-264.F. of the Lower Providence Township Zoning Ordinance. The aforesaid Sections of the Ordinance state in pertinent part:

**§143-141.3 Signs in General Commercial (GC), Highway Commercial (HC), Professional and Business Office (PBO), Limited Industrial (LI), Industrial (I), Industrial Park (IP), Mixed-Use (MU), Ridge Pike Business (RPB) and Ridge Pike West (RPW) Districts.**

Except as noted below, the following numbers and types of signs may be erected in the GC, HC, PBO, LI, I, IP, MU, RPB, and RPW Districts, subject to the conditions specified here and elsewhere within this article.

E. Wall signs for nonresidential uses shall be permitted subject to the following regulations:

- (1) Number: One sign per tenant per street frontage, up to a maximum of two signs per tenant. Where a store has entrances facing both a street and a parking lot, a second sign is permitted to face the parking lot.
- (2) Area. Each sign shall have a maximum area of 32 square feet per sign face.

**§143-264 Special sign regulations for all uses.**

The following standards shall apply in addition to the regulations set forth in Article XIX, Signs, of the Lower Providence Township Zoning Code, as amended. Where the regulations of Article XIX are in conflict with the standards of this section, this section shall control.

F. Signs shall not exceed 50 square feet per side.

The Applicant seeks relief as to the dimensional requirements of the Ordinance to permit:

- Each side of a two-sided freestanding sign on Ridge Pike be permitted to exceed the previously varied sign area of sixty seven and thirty seven hundredths (67.37) square feet by thirty two and one tenth 32.10 square feet per side area requirement without alteration of the previously varied height requirement;
- An additional wall mounted sign on the Ridge Pike frontage of the proposed building; and

- The new wall sign to exceed the previously varied area limitation by thirty one and ninety one hundredths (31.91) square feet.

Under §143-168.D.(4) of the Ordinance the Applicant bears the burden of proof of persuading the Board of the necessity of the requested variances and to satisfy the legal standards articulated below.

## **II. Variance Legal Standard.**

Pursuant to the Municipalities Planning Code and the Ordinance at §143-168.A. the following must be established by the Applicant in order for the Board to grant the requested variance:

(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. 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.

### **III. Dimensional v. Use Variance.**

There are 2 types of variances, a “dimensional” variance and a “use” variance. 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). A dimensional variance is at issue in this case.

Although Hertzberg eased the variance requirements for a dimensional variance, it did not remove them. 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 the five part test articulated above. *Id.* Therefore, regardless of the type of variance sought, 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. Commw. 1999); Soteneanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Commw. 1998).

#### **IV. Facts Applied to the Legal Standard.**

In the instant case, the Property is located at the intersection of Ridge Pike and Trooper Road, one of the Township's key commercial interchanges. Applicant is the United States division of a German enterprise engaged in the business of owning and operating supermarkets throughout Europe. Applicant has recently introduced its "one stop shop" European supermarket concept to the United States and seeks to construct a supermarket on ground that previously served as a car dealership but has been vacant and unproductive for many years and described by Mr. Thomas as an "eye sore." Previously, Applicant believed that upon coming to the United States its brand name "LIDL" ubiquitous throughout Europe would become easily identified in the United States generally and Pennsylvania specifically. Unfortunately, after having left the old world for the new and arrived on our shores three years ago, that presumption has faltered. Perhaps displaying the infrequency of their travel to Europe, the consuming public here has not recognized both the name LIDL nor its iconic LIDL brand logo projected by its bright yellow, blue and red signs.

##### **A. The Hardship.**

Applicant asserts that its reasons for the new "rethink grocery" sign and its size requirements are primarily safety, visibility, store identification and branding. Due to the busy nature of the Ridge Pike and Trooper Road location the tag line of slogan to be added to the previously approved larger and higher signs promote safety through visibility and ease of identification of the Store for passing or seeking motorists. Applicant is convinced that by including the additional words "rethink grocery" to its existing signage the consuming/motoring public in Pennsylvania will understand what LIDL is and act accordingly. As a new



supermarket, occasion for traffic disruption from passing or seeking motorists is a real concern. Denial of the Applicant's requests not only creates a hardship for the Applicant to be quickly identified but also fosters genuine safety concerns for the Township. The importance of safety in the law of sign regulation is well settled. As noted by the United States Supreme Court in Cusack Company v. Chicago, 242 U.S. 526, 37 S.Ct. 190; St. Louis Poster Advertising Co. v. St. Louis, 249 U.S. 269, 39 S.Ct. 274 a municipality has the power to regulate signs provided such regulation is not unreasonable, arbitrary or discriminatory and bears a reasonable relationship to the *safety, morals, health or general welfare of the community*.

Adding a wall sign and including more area on as free standing sign to remove the mystery and educate the public regarding the nature of the building and its business can only help the fundamental reason for zoning regulation, to enhance the safety of the community. Further, the placement of the additional wall sign and inclusion of the slogan on the freestanding monument sign on Ridge Pike with areas of 195.12 for the wall sign and 99.4 square feet per side for the free-standing sign reasonably addresses the traffic, visibility and branding issues.

Reliance upon signage consistent with the Ordinance in this case impairs those with a legitimate interest in locating the Property to do so safely. The smaller the sign, the harder it is to read. The harder it is to read causes motorists to act recklessly in an effort to read the sign to locate the property. Thus, a larger sign, particularly on a busy roadway such as Ridge Pike for a motorist to easily view the sign not only makes pragmatic but logical sense.

According to *Hertzberg* a request for a dimensional variance invokes a lesser standard to demonstrate unnecessary hardship. Multiple additional factors are to be considered when evaluating the hardship, including:

- Economic detriment to the applicant if the variance is denied;

- Financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and
- Characteristics of the surrounding neighborhood.

Although the lesser degree of hardship is difficult to define with precision, the cases after *Hertzberg* provide a zoning board broader discretion in resolving the issue provided the board considers the proper factors. With *Hertzberg*, financial hardship and economic detriment can now be considered. The key question is whether those two factors flow from the dimensional requirement involved.

As noted above and in the Applicant's presentation, LIDL is new to the United States and thus not well known. It has developed a brand, sign and store design that, although taking on notoriety has not, by itself nor coupled with mass media advertising employed by LIDL worked to fully inform the public regarding its business. Inclusion of the descriptive tag line "rethink grocery" will only help educate the public and thus promote safe access to its stores while promoting its brand. Denial of the variances at issue will have a significant impact upon visibility, branding and ultimately business at the Store. That of course means reduced profitability. There is no dispute that such reduced profitability flows from the signage dimensional requirements.

Finally, the last factor to consider in any dimensional variance case under *Hertzberg* is whether there is injury to the public interest. Injury to the public interest overrides other factors such as financial hardship in the dimensional variance analysis. If proved, such injury requires rejection of a dimensional variance application. No such injury was proven in the case at bar, in fact, a reasonable presumption from the testimony of the Applicant is that the additional wall

sign and increased sign area of the free-standing sign with the “rethink grocery” slogan not only helps the Applicant in its marketing but it solves the mystery to our neighbors of this newly constructed building in the heart of our community.

Thus, there exist exceptional topographical, economic, financial and other conditions unique to the Property that make compliance with the Ordinance difficult if not impossible. The undersized signage specified by the Ordinance denies the public the visibility it undoubtedly will seek when looking for the LIDL supermarket. Signs that comply with the Ordinance will make it harder for Township residents and other consumers to learn about LIDL and locate its Store thus undercutting Applicant’s brand and business. The proposed additional and larger signs solve that problem while improving the safety of the motoring public and, in turn, the residents of the Township. Finally, this hardship was not created by the Applicant who is merely seeking to promote safety through the enhancement of safe identification and access while also promoting its brand. Rather, the hardship is a result of the location and unique nature of the Applicant and its occupancy of the Property. As a result, Applicant, due to no fault of its own, is denied reasonable use of the Property for its intended purpose.

#### B. Impact of the Variances

A primary purpose of the Ordinance generally is to promote public safety. §143-3 of the Ordinance provides:

§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)

As noted above, the Property is primarily located in the Ridge Pike Business District at perhaps one of the most heavily used intersections. A Burger King Fast Food restaurant is on one corner, Citadel bank on another a proposed Dunkin' Donuts previously approved by the Board on yet another with the final corner previously supporting a Sunoco gas station and convenience store. Across the street from the Property is a car dealership with at least one illuminated large monument and two (2) wall signs. Needless to say, the character of the neighborhood will not be altered by the grant of these variances. The proposed signs represent the minimum variance possible to promote visibility and identification of the Store and its entrances. As a result, the safety of the motoring public and thus the Township's residents, the primary purpose of the Ordinance, is enhanced.

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.

Furthermore, the 5<sup>th</sup> part of the variance legal standard requires a determination by the Board of whether the proposed variances represent the minimum variance that will afford relief and represents the least modification possible of the regulation at issue. Although Applicant previously received significant relief from the Board, its supplemental requests are not excessive but are reasonable when considering Applicant's arguments regarding visibility, ease of access and egress, safety, branding and financial and economic hardship.

Finally, the Applicant has not sought to otherwise alter the previous variances granted by

the Board but has in fact sought confirmation thereof demonstrating Applicant's acute need to enhance its signage to the benefit of all.

Thus, *Hertzberg* reduces the degree of hardship necessary to sustain a dimensional variance. In defiance of convention, financial hardship can support a dimensional variance. No longer must the Applicant demonstrate that because of the zoning rules the property has been rendered close to useless. The Applicant has carried its lesser burden of proof for the dimensional variances from the sign ordinance.

### **CONCLUSIONS OF LAW**

1. The Applicant has standing to appear before the Board regarding the requested relief.
2. Denial of the requested relief will impose an unnecessary hardship on the Applicant.
3. The hardship is not self-imposed and is due to the unique circumstances of the Property.
4. The requested relief is necessary to enable the Applicant's reasonable use of the Property, represents the minimum that will afford relief, and represents the least modification possible of the regulation at issue.
5. The proposed signs will also not alter the essential character of the neighborhood in which the Property is located.
6. Those variances previously granted at Application docket number Z-18-05 unchanged by this decision are confirmed and continued.

## **DECISION**

The unanimous decision of the Lower Providence Township Zoning Hearing Board is as follows:

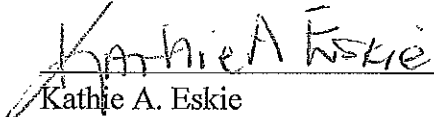
1. The Application to modify the Lower Providence Township Zoning Board's dimensional variance from §143-264.F at Z-18-05 to permit a total sign area of 99.47 square feet per side on the freestanding sign along Ridge Pike is granted.
2. The Application for a Variance from Section 143-141.3.E.1. and E.2 of the Lower Providence Township Zoning Ordinance to permit two wall mounted signs on the Ridge Pike facade of the proposed building with a sign area not to exceed 195.12 square feet is granted.

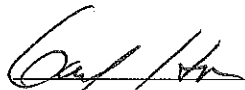
Dated: April 12, 2019

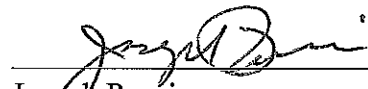
**ORDER**

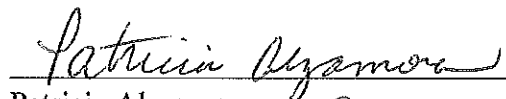
The foregoing Findings, Discussion and Decision are hereby approved and ordered.

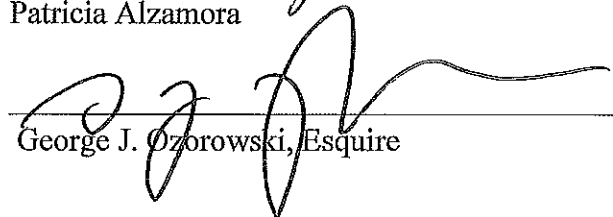
LOWER PROVIDENCE TOWNSHIP  
ZONING HEARING BOARD

  
Kathie A. Eskie


  
Gail Hager

  
Joseph Pucci

  
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George J. Ozorowski, Esquire

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.

