

**ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP**

APPLICATION NO.	Z-21-07	: HEARING DATE:	March 25, 2021
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		:	
APPLICATION OF:		:	
LinMike, LLC		:	
2965 W. Germantown Pike		:	
Eagleville, PA 19403		:	
		:	
PROPERTY:		:	
Fifth Street		:	
Lower Providence Township		:	
Parcel Nos.	43-00-04663-00-1	:	
	43-00-04660-00-4	:	
	43-00-04657-00-7	:	
	43-00-04654-00-1	:	
	43-00-04651-00-4	:	
	43-00-04648-00-7	:	

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

Applicant LinMike, LLC (“Applicant”) equitable owner of the subject properties on Fifth Street Lower Providence Township, Pennsylvania filed an application requesting a variance from the Lower Providence Township Zoning Ordinance (the “Ordinance”) **§143-37.A.(2)** regarding minimum lot size, to permit the construction of a single family home with a lot size of 18,000 square feet where 30,000 square feet are required; **§143-37.A.(2)** regarding front yard setback, to permit the construction of a single family home with a front yard setback of twenty-five feet (25’) where fifty feet (50’) is required; and **§143-37.A.(2)** regarding rear yard setback, to permit construction of a single family home with a rear yard setback of thirty-four feet (34’) where a minimum of sixty feet (60’) is required. Applicant wishes to construct a 3,000 square foot single-family residence on the properties.

The application was properly advertised, and a public hearing was held before the Lower Providence Township Zoning Hearing Board (the “Board”) on March 25, 2021, via advanced

communication device due to the ongoing global pandemic. Present at the hearing were: George Ozorowski, Chairman, Joseph Pucci, vice-chairman, Members Kathie Eskie, Gail Hager, Patricia Alzamora and alternates, Christopher Gerdes and Randy Klein. Also present were Township Manager Don Delamater substituting for Michael Mrozinski, Paula Meszaros, the Court Reporter and Keith B. McLennan, Esquire, the Solicitor.

### **FINDINGS OF FACT**

1. The Applicant is LinMike, LLC, is the equitable owner of the lots located on Fifth Street by way of an agreement of sale dated February 19, 2021 attached to its Application.
2. The Applicant was represented at the hearing by M. Joseph Clement, Esquire who is also a member of the Applicant LLC.
3. Leonard DelGrippe, III, a member of the Applicant LLC testified in support of the application.
4. The subject property, on Fifth Street in Lower Providence Township, Pennsylvania is comprised of an 18,000 square foot land area comprised of multiple parcels with tax parcel numbers 43-00-04663-00-1; 43-00-04660-00-4; 43-00-04657-00-7; 43-00-04654-00-1; 43-00-04651-00-; 43-00-04648-00-7 (hereinafter the "Property").
5. The Property is a collection of six "movie lots" combined into two pre-existing, nonconforming tracts that are in single and separate ownership.<sup>1</sup>
6. Collectively the Property is approximately one hundred and eighty (180') wide and one-hundred feet (100') deep.

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<sup>1</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 label "movie lots" was coined.

7. The Property is currently vacant and not being productively used.
8. The property will be served by public sewer and private well.
9. The applicable zoning district is the R-2 residential district which permits single-family detached dwellings.
10. In the R-2 zoning district the Ordinance requires lots served by private water and public sewer, a minimum lot size of 30,000 square feet.
11. The Ordinance similarly requires a front yard setback of fifty feet (50').
12. The Ordinance also requires a rear yard setback of sixty feet (60').
13. Applicant seeks to construct a 3,000 square foot, single-family home on the Property with a front yard setback of twenty-five feet (25') and a rear yard setback of thirty-four (34').
14. There are unique characteristics of the Property, including the wide and shallow configuration and other physical conditions peculiar to the Property.
15. Because of the physical circumstances or conditions, there is no possibility that the Property can be developed in strict conformity with the provisions of the Ordinance.
16. There is an unnecessary hardship on the Applicant which was not caused by the Applicant.
17. The proposed use will not alter the essential character of the neighborhood or zoning district.
18. There will be no impact to existing traffic patterns and volumes as a result of the proposed structure.
19. The surrounding buildings and abutting properties are residential.
20. There will be no adverse impact on the development of adjacent properties.

21. The proposed relief would not be detrimental to the public welfare.
22. The propose use will not emit smoke, dust, order, or other air pollutants, noise, vibration, light, electrical disturbances, water pollutants, or chemical pollutants.
23. The proposal is compliant with all other zoning regulations.
24. There is no change of use requested.
25. The neighborhood is replete with non-conforming lots.
26. Many of the lots in the neighborhood with homes thereon are smaller than the minimum square footage required.
27. Applicant has expended reasonable effort to consolidate several undersized “movie lots” in order to increase the lot size from significantly less than 50% of the required 30,000 square foot lot size to 60%.
28. There are no other lots that can be purchased to enlarge the area.
29. The construction of the home will include provisions to address the issue of water runoff in compliance with the Township stormwater management requirements.
30. Brian Hesler was admitted as a party.
31. Michael Adams was admitted as a party and testified regrading water issues in the neighborhood.
32. Michael Pitco was admitted as a party.
33. George Lozinak was admitted as a party.
34. The following exhibits were included in the record of the hearing:
  - A – 1 Application including the addendum and exhibits including a google maps image of the Property and surrounding neighborhood, sketch plan, agreement of sale providing Applicant equitable interest, deed for the parcels;

B – 1 Letter notifying neighbors within 500 feet of the Property of the Application, Matrix of Addresses where notice was mailed, Certificate of Notification to the neighbors within 500 feet of the Property, and Certificate of Posting and Notice of Publication of the Application.

## **DISCUSSION**

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

The Applicant requested a variance from: (1) §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a lot area of 18,000 square feet where 30,000 square feet is required in the R-2 residential District; (2) §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a front yard setback of twenty-five feet (25') where fifty feet (50') is required in the R-2 residential District; and (3) §143-37.A.(2) of the Lower Providence Township Zoning Ordinance to permit a rear yard setback of thirty-four feet (34) where sixty feet (60') is required.

### **II. Variance 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 dimensional variance.

B. The Five Part Variance Test. 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.

C. Dimensional Variance Legal Standard. 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.

(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.**

The Applicant's requests for lot area, front and rear yard setback variances to construct a 3,000 square foot, single-family home on a grouping of undersized "movie lots" the Property are often encountered in Lower Providence Township. This presumably was due to the rural nature of the township in the early 1900's when the "gimmick" to raffle off exceedingly undersized lots here was employed by movie houses in Philadelphia to attract patrons was born. As a result, Lower Providence Township has been one of the more notorious movie lot townships in Montgomery County. Consequently, a segment of the community has enjoyed various small parcels of vacant, unimproved, undeveloped land within its borders. Many who live near these undeveloped tracts believe it should remain that way while owners of those parcels often believe that zoning regulations deny them the reasonable use of their property. Thus, the Board of Supervisors, when drafting the zoning code, had the difficult task of addressing the competing interests of the 2 groups. Now the Zoning Hearing Board has the challenge of addressing the interests of the 2 groups, the township as a whole and the legal standard previously articulated to determine whether

the Ordinance should be varied.

It has long been in the interest of the township for developers to consolidate as many of these movie lots as possible in order to get close to the lot size of the corresponding zoning district. It can be argued that it is also in the interest of the township to put vacant, unproductive land to good use through improvement of that land. Presently, the Property is vacant. It can also be argued that the community as a whole benefits from the preservation of open and wooded, undeveloped spaces throughout the township. To strike a balance between these competing interests is what the law seeks to achieve, zoning variances is the mechanism.

Applicant is the equitable owner of the subject property, comprised of six small lots that have been combined into two pre-existing, nonconforming tracts that are in single and separate ownership. Applicant has sought to assemble a series of movie lots containing approximately 18,000 square feet, 60% of the lot area requirement for the zoning district. Although the lot is also nonconforming for front and rear yard setbacks it otherwise complies with other provisions of the Ordinance such as impervious coverage, side yard setbacks, access and at approximately one hundred and eighty feet (180') wide and one hundred feet (100') deep, lot street frontage and lot depth.

Its irregular nature as an amalgamation of various undersized movie lots arbitrarily located along Fifth Street with no other lots readily available to contiguously increase the size of the Property without adversely impacting neighboring properties that are either already nonconforming or would be rendered so, make the Property unique. These and other physical conditions peculiar to the Property and a change to the Ordinance have made it practically impossible to construct a home on the Property in compliance with the Ordinance. This creates a hardship as it prohibits the Applicant from the reasonable and permitted use of the property. The

Applicant did not create the hardship. In fact, applicant has attempted to expand the size of the effective lot through purchasing and combining six tax parcels. There are no other adjacent lots that are for sale and could be used to enlarge the building area.

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.

The variance 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. The proposed construction of single-family home and requested variance is consistent with the neighborhood which exhibits many large homes on undersized and nonconforming lots. The introduction of another home will not negatively impact neighboring properties nor will it change the character of the neighborhood.

The variance will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue. Permitting the construction of the single family home that is consistent with the neighborhood is the minimum alteration that can be made to the Ordinance to permit the Applicant the reasonable use of its Property. Accordingly, the Board finds that Applicant suffers a hardship that is not self-imposed and the requested variance from Lower Providence Township Zoning Ordinance §143-37. A. (2).

The Board finds and concludes that the Applicants' requested relief should be granted.

### **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 due to the unique physical circumstances and characteristics of the Property and not self-imposed.

4. The requested relief is necessary to enable the Applicant reasonable use of the Property.

5. If granted, the community will not be significantly changed nor will it alter the character of the neighborhood.

6. The requested relief represents the minimum that will afford relief and represents 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 LinMike, LLC for a Variance from **§143-37.A.(2)** of the Lower Providence Township Zoning Ordinance to permit a lot area of 18,000 square feet where 30,000 square feet is required in the R-2 residential District is Granted with the following conditions:
  - a. Construction and placement of the home shall be as per the plans presented at the March 25, 2021, hearing.
2. The Application of LinMike, LLC for a Variance from **§143-37.A.(2)** of the Lower Providence Township Zoning Ordinance to permit a front yard setback of twenty-five feet (25') where fifty feet (50') is required in the R-2 residential District is Granted with the following conditions:
  - a. Construction and placement of the home shall be as per the plans presented at the March 25, 2021, hearing.
3. The Application of LinMike, LLC for a Variance from **§143-37.A.(2)** of the Lower Providence Township Zoning Ordinance to permit a rear yard setback of thirty-four

feet (34') where sixty feet (60') is required in the R-2 residential District is Granted with the following conditions:

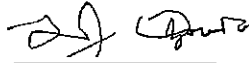
- a. Construction and placement of the home shall be as per the plans presented at the March 25, 2021, hearing.

Dated: April 27, 2021

## **ORDER**

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

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



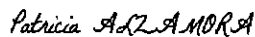
George Ozorowski



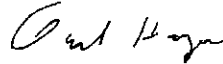
Joseph Pucci



Kathie Eskie



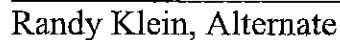
Patricia Alzamora



Gail Hager



Christopher Gerdes, 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.