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January 12, 2018

**VIA FIRST CLASS CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7016 0910 0001 0664 4113**

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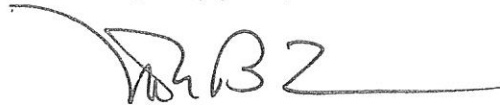
**RE: Lower Providence Township Zoning Hearing Board
Application of Adegbemiga Yori Adegunwa
Application No. Z-17-18**

Dear Eric:

In accordance with your client, Adegbemiga Yori Adegunwa's application for a variance from Lower Providence Zoning Ordinance § 143-112;1 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.

Very truly yours,



Keith B. McLennan

KBM/mac
Enclosure

pc: Kathie A. Eskie, Chairwoman
Gail Hager, Vice Chairwoman
Robert G. Hardt
Joseph Pucci
Patricia Alzamora
Joseph Bergquist
Michael Mrozinski, Community Development Director

ZONING HEARING BOARD OF LOWER PROVIDENCE TOWNSHIP

APPLICATION NO.	Z-17-18	:	HEARING DATE:
		:	November 30, 2017
		:	
APPLICATION OF:		:	
Adegbemiga Yori Adegunwa		:	
		:	
		:	
PROPERTY:		:	
3444, 3446 & 3450 Germantown Pike		:	
Collegeville, PA 19426		:	
Parcel Nos. 43-00-05155-00-4		:	
43-00-05152-00-7		:	
43-00-05158-00-1		:	

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

On October 30, 2017 applicant, Adegbemiga Yori Adegunwa (hereinafter "Applicant") filed an application for variances from §143-112 of the Lower Providence Township Zoning Ordinance (the "Ordinance") for the following issues:

- Construction of a 330 foot long building where 300 feet is permitted in Class 3 of the Highway Commercial ("HC") district;
- Impervious surface coverage of 52% where 25% is permitted;
- Minimum parking, driveway, loading area setback from residential district of 24 feet where 50 feet is required.

The Application was properly advertised, and a public hearing was held at the Lower Providence Township Building before the Lower Providence Township Zoning Hearing Board ("Board") on November 30, 2017 Chairwoman Gail Hager and members Robert Hardt and Joseph Pucci were present. 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 Adegbemiga Yori Adegunwa an adult individual who resides at 1723 North Hills Drive, Norristown, PA 17036.
2. The Applicant has an equitable interest in the subject property located at 3444, 3446 & 3450 Germantown Pike, Collegeville, Lower Providence Township, PA 19426 comprised of 4.6 acres (gross), 4.3 acres to the ultimate right of way (net) (hereinafter the "Property").
3. The Property is commonly referred to as the Bridal Town retail complex located near the border with Worcester Township to the north.
4. The applicable zoning district is the Highway Commercial District ("HC") which, due to its size is considered a Class 3.
5. Applicant was represented at the hearing by Eric Frey, Esquire, 1800 Pennbrook Parkway, Suite 200, Lansdale, PA 19446.
6. Both the Applicant and Thomas Ludgate, P.E. (professional engineer) testified to advance the Application.
7. Applicant is the proprietor of IRoy Sports located further east on Germantown Pike in East Norriton Township who intends to construct a 39,600 square foot fitness center with indoor tennis courts and 120 parking spaces on the Property.
8. The proposed fitness center would eliminate 3 different curb cuts for driveways and install one driveway for access.
9. The three tracts of ground to make up the Property will be consolidated to support the size of the building and parking requirements.
10. The Property is bordered on the west by additional property in the HC district

while the eastern and southern sides of the Property border the R-1 district.

11. Due to the necessary size of the building and parking required by the Ordinance, the proposed fitness center to be constructed on the Property will create impervious coverage of 52% while the Ordinance allows for a maximum of 25%.

12. The parcels at issue have no storm water management devices in place presently.

13. The proposed building would be 330 feet long where the Ordinance provides a maximum length of 300 feet.

14. The Ordinance for property in Class 3 HC district requires that parking areas be setback 50 feet from adjoining property in the R-1 district.

15. The Applicant seeks approval for a 24 foot parking setback on the east and south sides of the building which abuts property that is in the R-1 Residential District.

16. Applicant proposes to install a "cut-wall" of approximately 5-6 feet high on the east side of the Property such that the parking area grade would be lower than that of the R-1 property that it abuts forcing the headlights of any cars parking there to shine into the wall, not the abutting R-1 property.

17. Applicant has otherwise agreed to comply with all other applicable sections of the Ordinance, the Ordinance and the Township's Subdivision and Land Development Ordinance ("SALDO").

18. The neighborhood includes commercial uses including, Local 126 of the International Brotherhood of Electrical Workers Union Hall, Wesselt Capital, a financial services company, Sign Effects, a sign company, Vincent's Auto Repair and CDI Lawn Equipment.

19. The requested variance and resulting fitness center will not alter the essential character of the neighborhood in which the Property is located.

20. There was no adverse public comment to the Application.

21. The following exhibits were made of record:

A-1 Tax Map displaying the 3 parcels that make up the Property dated November 17, 2017;

A-2 Google Maps aerial view of the Property and surrounding area November 17, 2017;

A-3 Existing Conditions Plan for the Property prepared by Ludgate Engineering Corporation. dated October 24, 2017.

A-4 Concept Plan for the Property prepared by Ludgate Engineering Corporation. dated October 24, 2017

A-5 Alternate Concept Plan with parking located on the east and south sides of the building.

A-6 The Application.

B-1 Application Advertisement.

B-2 Proof of Publication of the Advertisement.

DISCUSSION

I. Statement of the Case

The Applicant is party to an agreement of sale to purchase 3444, 3446 & 3450 Germantown Pike, Collegeville, Lower Providence Township, PA 19426 commonly known as the Bridal Town complex to construct a fitness center and tennis courts on 4.6 acres of ground. Applicant intends to demolish the existing structures, at least one of which is dilapidated. The Property is bordered on the north by Germantown Pike, the west by Sign Effects, a commercial enterprise in the HC district and vacant land in the R-1 district to the south and east. No matter

how he configures the proposed building, due to the building size and parking requirements a series of variances from the building length, parking setback and impervious coverage requirements of Section 143-112 of the Ordinance are needed as more fully stated in the opening paragraph of this Opinion, Decision and Order. The relief sought is dimensional in nature.

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 series of variances that are of the “dimensional” variety.

B. The Five Part Variance Test. Generally, to obtain a variance the applicant must

show that unnecessary hardship will result if a variance is denied and that the proposed variance will not be contrary to public interest. Hertzberg. To obtain a variance the Applicant must pass the following five (5) part variance test set forth in §143-168.A. of the Ordinance:

A. Variance. The Board shall hear requests for variances where it is alleged that the provisions of the Zoning Ordinance inflict unnecessary hardship upon the applicant. The Board may grant a variance, provided that all of the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical 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) That 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) That the unnecessary hardship has not been created by the applicant.

(4) That 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) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.

In establishing hardship, an applicant for a variance is not required to show that the property at issue is valueless without the variance or that the property cannot be used for any permitted purpose, though there must be more than mere economic hardship or increase in property value. *Id.*

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.Cmwlt. 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.*

What is more, §§143-168.C. & D.(2), (3) & (4) of the Ordinance articulate the Applicant's burden of proof and the standards to meet that burden, as follows:

D. 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.

E. 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 ground waters 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.

When adopting Article XVI of the Ordinance the Supervisors articulated the following public policy for the HC district:

ARTICLE XVI HC Highway Commercial District

143-104. Legislative intent.

It is the intent of the HC Highway Commercial District to provide regulations for continuing commercial use opportunities in areas of existing commercial development. Specifically, it is the intent of the district to:

- A. Relate specific types of uses to appropriate minimum lot size is to ensure adequate land use area relative to intensity of use.
- B. Minimize the potential for increased traffic congestion, overcrowding of land, noise, glare and pollution resulting from commercial development.
- C. Discourage any use which would interfere with the use of the district as a shopping and service center for surrounding residential areas.
- D. Ensure that the character of adjacent and nearby neighborhoods is protected by design controls.
- E. Effectively regulate the establishment and maintenance of businesses requiring outdoor storage of vehicles, equipment or merchandise.

When considering a variance, the legislative intention for the regulation subject to a variance is a paramount consideration. The variances requested here are to permit the development and use of property which, by some fiat, is located in what is the larger of 2 HC districts in the township. Interestingly, the Property is surrounded by R-1 and R-2 residential districts.¹ Applicant seeks to combine 3 parcels that, as currently configured, fail to comply with the impervious coverage requirements of the Ordinance. Applicant's plan is to tear down what can only be described as enervated buildings to construct a fitness center and tennis courts. The use is permitted in the HC zoning district and would be a welcome addition to a section of the Township that appears to have been neglected for years.

To do that however, despite consolidating the three parcels to create 4.6 acres of gross area to accommodate the fitness center and tennis courts the building size limitations must be exceeded by a nominal 30 feet or 10% more than the Ordinance provides. Further despite the size of the combined parcels in order to accommodate the required 120 parking spaces² the Applicant cannot avoid (i) exceeding the impervious surface coverage limitations of 25% by 27% or (ii) due to its being surrounded by R-1 district lands, parking spaces that are 24 feet from residential property where 50 feet are required. Nevertheless, the intended use and the building's configuration³ are consistent with the intent and purpose of the HC District as stated in §143-104. A-D.

Applying these intentions to the current set of facts reveals that the Applicant has demonstrated the existence of a hardship that is not self-created. Applicant seeks to improve a section of the Township that needs improvement. Applicant's plan to provide a new, first rate fitness center and tennis courts to a growing population in need of such a facility without

¹ As noted by Applicant's counsel, it almost appears as though the HC district was an afterthought, created for and grafted onto existing uses at the passage of the zoning code in May of 1955.

² Inclusive of 2 van and 2 ADA oversized spaces.

³ With those design controls agreeable to the Applicant imposed as conditions hereinafter.

increased traffic congestion, overcrowding of land or increased noise while enhancing the use of the district as a shopping and service center bodes well for the Applicant.

Applicant cannot meet the 50 foot parking area buffer on his 4.6 acre parcel. No matter where he places the 120 parking spaces a portion of the lot borders on vacant land in the R-1 district. Here the size of this HC District plays an oversized role. The Property is bordered on 2 sides by the R-1 District thus no matter where he places the parking area it will border the R-1 District on at least one side.⁴ Despite the Applicant's efforts to assemble 4.6 acres of ground in the HC District the relative small size of the HC District makes it impossible for him to acquire more HC land to alleviate the parking setbacks from the R-1 District.

Similarly, Applicant cannot meet the 25% Class 3 - HC requirements of §143-112 for maximum impervious surface. To accommodate the use as a fitness center and tennis courts, and insure financial success, the building size needs to be what it is. The building alone at 39,600 square feet represents 19.76% impervious coverage. The Ordinance parking requirements make it impossible for a building of that size to meet the 25% impervious coverage rule. A gym necessarily includes various courts ranging from basketball to tennis, to racket ball, to volleyball to squash; they require a large footprint. Reduction of the building size would make the intended use impossible denying the Applicant reasonable use of the Property.

Fortunately, to minimize the impact of the variances, Applicant has agreed to:

(i) Build a cut-wall on the east side of the property so that the parking area that borders the R-1 District would be shielded from headlights and unimpeded views of parked cars;

(ii) Install a berm/vegetative buffer to separate any parking area that is within 50 feet of a bordering R-1 District;

⁴ The west side is HC while the north side is Germantown Pike, a small sliver of R-2 and Worcester Township.

(iii) Install the necessary storm water management controls necessary commensurate with the increased impervious coverage;

(iv) Provide architectural variants to the building agreeable to the Township to address the policy behind the building length limit of 300 feet.

Further, the granting of the variances will not otherwise relieve the Applicant of its responsibilities to comply with the Ordinance and the Township's Subdivision and Land Development Ordinance ("SALDO").⁵

The Applicant has demonstrated thorough design and engineering practices to minimize HC conflicts. Applicant has agreed to institute those same practices in the further design, engineering and construction of the facility to provide a first rate fitness center and courts while improving an otherwise neglected section of the Township. The requested variances are the least modifications of the Ordinance necessary to accommodate Applicant's needs to utilize and develop the Property.

Additionally, the nature of the HC District, its overall size and its being surrounded by the R-1 District is such that some variant from the HC District rules is necessary in order to do much of anything with the Property. Of course, this creates a hardship upon both the owner and anyone interested in purchasing and thus developing the Property. The best evidence of this is the fact that these properties have been steadily deteriorating for many years. Neither the owner nor the Applicant created those conditions or the hardship. Thus the variances requested are necessary to enable the reasonable use of the Property and not self-inflicted.

What is more, the intended use as fitness center with tennis courts will not adversely affect a surrounding neighborhood comprised of a union hall, financial services firm or a sign making business. Further, it is manifest that a fitness center and tennis courts support the

⁵ In fact, the Applicant has repeatedly agreed to comply with all local, state and federal requirements associated with the development of the Property.

public welfare and will only enhance the appropriate use or development of the surrounding residential property.

Finally, the requested variance represents the minimum variance that will afford relief and the least modification possible of the Ordinance.

IV. Conclusion.

The Board finds that subject to the conditions set forth in this Opinion, the Applicant has presented sufficient evidence to satisfy the §143-168.A. test for a dimensional variance.

CONCLUSIONS OF LAW

1. The Applicant has standing to appear before the Board regarding the requested relief.

2. Applicant's proposed use of the Property as a fitness center with tennis courts is a permitted use under §143-110.E.

3. Denial of the requested variance relief will impose a unique hardship on the Applicant not created by him.

4. The proposed use subject to the variances requested will not alter the essential character of the neighborhood in which the Property is located, and will not contravene the use of adjacent property or endanger public safety.

5. Rigid compliance with the Ordinance in this case is unnecessary for preservation of the public interest sought to be protected by the ordinances.

6. 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 regulations at issue.

DECISION

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

1. The Application for a variance from the dimensional requirements of Lower Providence Township Zoning Ordinance §143-112 to permit the construction of a building 330 feet long is Granted in the HC District is granted subject to the condition that the building provide architectural variations as agreed by the Township.

2. The Application for a variance from the dimensional requirements of Lower Providence Township Zoning Ordinance §143-112 to permit the construction of a building and parking lot on the Property that results in a maximum impervious coverage of fifty-two percent (52%) is granted.

3. The Application for a variance from the use requirements of Lower Providence Township Zoning Ordinance §143-112 to permit the construction of a parking lot on the Property at a minimum of twenty four feet (24') setback from adjoining property in the R-1 District is granted subject to the conditions that Applicant provide enhanced landscaping and cut-wall retaining wall to provide a buffer at the reduced setback areas as agreed by the Township.

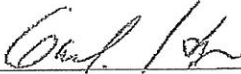
Dated: January 12, 2018

ORDER


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

LOWER PROVIDENCE TOWNSHIP
ZONING HEARING BOARD


Kathie A. Eskie, Chairwoman



Gail Hager, Vice Chairwoman



Robert G. Hardt



Joseph Puoci

Patricia Alzamora

Joseph Bergquist, 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.