

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPLICATION OF DKC 31 LLC**

**NO. 2014-16**

**PROPERTIES: 727, 729 & 731 W. DEKALB PIKE; 113 CROCKETT RD.  
KING OF PRUSSIA, PA 19406**

**OPINION AND ORDER**

This application involves a developer's request for numerous variances to permit the construction of 2 buildings -- one for retail use and one for restaurant use with carry-out and drive-through. As proposed, the 2 buildings fail to meet numerous requirements of the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance"): (1) and (2) minimum lot area under two sections of the Zoning Ordinance; (3) minimum lot width; (4) minimum front yard setback; (5) minimum side yard setback; (6) parking in required yards; (7) off-street parking; (8) off-street loading space; and (9) green space.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held the first of 2 duly advertised hearings on Application no. 2014-16 of DKC 31 LLC ("Developer") on August 6, 2014. The hearing was stenographically recorded. All members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; Judith A. Vicchio, Member; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Developer was represented by Andrew Gowa, Esq., of the law firm of Gowa Lincoln.

The record remained open at the end of the August 6, 2014 hearing. The hearing was continued to September 3, 2014. At the September 3, 2014 meeting, Developer was represented by Robert L. Brant, Esq., of the law firm of Robert L Brant & Associates. Developer presented additional evidence and closing argument.

After careful consideration, the ZHB makes the following findings of fact and conclusions of law.

**A. FINDINGS OF FACT**

**BACKGROUND**

1. Developer has a business address of 2760 N. University Drive, Hollywood, Florida. Developer is the equitable owner of 727, 729, and 731 W. DeKalb Pike and also 113 Crockett Road ("Property").

2. The Property is located in the Commercial Office (C-O) Zoning District and constitutes 24,410 square feet (0.530 acres). [Ex. B-1]

3. The Property is presently improved with 3,964 square feet of professional office, retail, and residential space. [Ex. B-1; Application] The Property presently is occupied by a retail store, music school, and a residence. [Application]

4. Developer proposes to construct 2 buildings – an 1850 square foot restaurant with carry-out and drive-through service; and a 2500 square foot retail use – for a total of 4350 square feet. [Ex. B-1]

5. The key Zoning Ordinance requirements are:

- a. Zoning Ordinance section 165-99.A(3) requires a lot area of 3 acres for those uses outlined in section 165-97.A(3) including, *inter alia*, restaurant use;

- b. Zoning Ordinance section 165-99.A(4) requires a lot area of 4.25 acres for those uses outlined in section 165-97.A(4) including, *inter alia*, certain retail uses;
  - c. Zoning Ordinance section 165-99.A(3) and section 165-99.A(4) require a minimum lot width of 300’;
  - d. Zoning Ordinance section 165-99.B requires a front yard setback of 35’;
  - e. Zoning Ordinance section 165-99.C requires, *inter alia*, a minimum side yard setback of 35’ abutting a street and an aggregate side yard of 35’;
  - f. Zoning Ordinance section 165-101 prohibits parking in the required front yard and the required side yards unless effectively screened;
  - g. Zoning Ordinance section 165-191 requires, for uses permitted by section 165-97.A(4), 4 parking spaces for every 1,000 square feet;
  - h. Zoning Ordinance section 165-194 requires one off-street loading space for uses with a gross floor area of 12,500 square feet and below; and
  - i. Zoning Ordinance section 165-198 requires 25% green space in the Commercial Office (C-O) district.
6. Developer seeks numerous variances:
- a. A variance from section 165-99.A(3), to permit a lot area of 24,410 square feet (0.560 acres) instead of the 3 acres required;
  - b. a variance from section 165-99.A(4), to permit a lot area of 24,410 square feet (0.560 acres) instead of the 4.25 acres required;

- c. a variance from sections 165-99.A(3) and 165-99.A(4), to permit a minimum lot width of 151.62' instead of the required 300';
- d. a variance from section 165-99.B, to permit a front yard setback of 6.6' instead of the 35' required;
- e. a variance from section 165-99.C, to permit a minimum side yard setback of 5' abutting a street instead of the required 35'; and an aggregate side yard of 21.7' instead of the required 35';
- f. a variance from section 165-101, to permit parking in the required side yard without screening;
- g. a variance from section 165-191, to permit 26 off-street parking spaces instead of the required 29 spaces;
- h. a variance from section 165-194, to permit no off-street loading spaces instead of the required 1 loading space; and
- i. a variance from section 165-198, to permit 16.3% of green area instead of the required 25%.

### **ZHB HEARING**

7. Developer offered the testimony of Michael A. Sottl, P.E., a civil engineer; Hector Vinas, the Developer; Andreas Heinrich, a traffic engineer; and Joseph Zadlo, a registered architect and planner. [N.T. 8/6/2014, pp. 20, 77; N.T. 9/3/2014, p.14] Developer offered the following evidence:

- Developer proposes the construction of 2 buildings on the Property. [Ex. B-1; N.T. 8/6/2014, p. 120] The first building is an 1850 square foot

restaurant with carry-out and drive-through service. [Ex. B-1] The second proposed building is 2500 square feet of retail space. [Ex. B-1]

- The 2500 square foot retail building contains a front yard setback of only 6.6'. [Ex. B-1]
- Other than stating that a driver coming to the intersection of Crockett Road and W. DeKalb Pike would have the necessary sight distance, Developer's traffic engineer provided no additional testimony with respect to the proposed development of the Property. [N.T. 8/6/2014, pp. 86-87]
- Developer prepared a plan with 4350 square feet of floor space "based on the proposed tenant[s]", a mattress sales/service/showroom and a national restaurant/café. [N.T. 8/6/2014, p. 122; Application]
- Developer asserted that the Township desired sidewalks along W. DeKalb Pike and wanted the "corridor along W. DeKalb Pike to be pedestrian friendly." [N.T. 8/6/2014, pp. 123-124]
- To the west of the Property, there is a Chili's restaurant. [N.T. 8/6/2014, p. 124]
- The available lot area on the Property is large enough to permit office, studio, and municipal uses in compliance with the lot area requirements of the Commercial Office (C-O) district. [N.T. 8/6/2014, pp. 124-125]
- Developer's engineer testified as follows with respect to numerous variances that would no longer be necessary should the Property be developed with only 1 of the proposed buildings:

**MR. JONAS (ZHB SOLICITOR):** If you got rid of a building, could you provide the missing five parking spaces as a shortfall?

**MR. SOTL:** I suppose we could.

**MR. JONAS:** And if you eliminated a building and complied or tried to comply with the ordinance, could you comply with the side yard setback?

**MR. SOTL:** I suppose, if you shifted the building to the middle.

**MR. JONAS:** How about the front yard setback?

**MR. SOTL:** The front yard, I believe the building is where it is in concert with what the township wants as far as having the buildings off the street.

**MR. JONAS:** ... aside from what you say the township wants, we are talking about what the township wants as required in its zoning ordinance. So, if you eliminated a building, could you comply with the zoning ordinance front setback requirements?

**MR. SOTL:** Possibly. I would have to look at the plan to see if we would meet the parking space requirements.

**MR. JONAS:** Could you comply with the minimum green space requirements, or at least lessen the variance?

**MR. SOTL:** I suppose.

[N.T. 8/6/2014, pp. 130-132]

- Developer's engineer acknowledged that additional traffic would be generated as a result of the proposed development. [N.T. 8/6/2014, pp. 138-139]
- Developer's planning expert offered unsubstantiated assertions that the requested variances were necessary for the "reasonable development" of the Property. [N.T. 9/3/2014, p. 27]

- Developer's planner conceded the following points:
  - If the proposed development involved only 1 of the 2 buildings, fewer variances would be required. [N.T. 9/3/2014, p. 37]
  - If the proposed development involved only 1 of the 2 buildings, less traffic would be created as a result of the development. [N.T. 9/3/2014, p. 52]
  - If the restaurant use did not include a drive-through, the proposed development would require fewer variances. [N.T. 9/3/2014, pp. 54-55]
  - The Developer's planner was unfamiliar with the economic "rules of thumb and the formulas for commercial development". [N.T. 9/3/2014, pp. 39-40]
  - As a general rule, if a property is not zoned for a particular use, "you would probably not pay as much speculatively or buy it". [N.T. 9/3/2014, pp. 40-41]

- To summarize the testimony of Developer's planner:

**MR. JONAS (ZHB SOLICITOR):** ...You cited and we talked about eight different dimensional variances. So the question is from a dimensional area and bulk perspective, if you eliminated... one of the buildings, wouldn't you be able to reduce the intensity or eliminate some or almost all of the variances?....

**MR. ZADLO:** ... Yes, that's an absolute. If you reduce the development you reduce the variances...

[N.T. 9/3/2014, pp. 50-51]

- Developer provided no evidentiary support for the assertions that, should the variances be denied, or should the Property be developed with only

one of the two buildings, the proposed development and purchase of the Property would not be economically feasible. [N.T. 8/6/2014, pp. 143-145]

8. Three neighboring residential property owners testified in opposition to the application. Their concerns centered around traffic circulation in and around the Property, increased traffic generally as a result of the proposed development, and the effect of the proposed development on the neighboring residential properties. [N.T. 8/6/2014, pp. 134-139; N.T. 9/3/2014, pp. 107-109]

9. One neighboring commercial property owner testified in opposition to the application. This objector's concerns centered around the density of the proposed uses, the effect on traffic during peak hours, the proximity of the sidewalks to Route 202, and the number of variances being requested. [N.T. 9/3/2014, pp. 98-105]

10. Two neighboring property owners, both with a financial interest in the outcome of the Application, testified in support of the application. The supporters touted the benefits of development along this portion of W. DeKalb Pike, and the quality of previous developments completed by Developer. [N.T. 9/3/2014, pp. 95-98]

### **INSUFFICIENCY OF THE EVIDENCE**

11. Developer failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB's grant of the requested variances.

12. Developer failed to offer proof that the variances would be necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used as a retail store, music school, and a residence. [Application]

13. Developer failed to offer proof that the requested variances were the minimum variance that would afford relief. To the contrary, Developer conceded that by

reducing the number of buildings, removing the drive-through associated with the restaurant use, or developing the Property with a use permitted on a C-O lot of this size, Developer could eliminate “some or almost all of the variances.” [N.T. 8/6/2014, pp. 50-51]

## **B. DISCUSSION**

### **JURISDICTION**

The jurisdiction of the ZHB is limited to those matters set forth in section 909.1(a) of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10101, *et seq.*, (“MPC”). See 53 P.S. § 10909.1(a). The ZHB has “jurisdiction to hear and render final adjudications in... (5) [a]pplications for variances from the terms of the zoning ordinance...” 53 P.S. §10909.1(a)(5); *see also* Zoning Ordinance §165-251.A(5). The Board of Supervisors of Upper Merion Township, on the other hand, has exclusive jurisdiction over applications seeking relief in the form of rezoning. 53 P.S. § 10909.1(b)(5); 53 P.S. § 10609.

The ZHB is without authority to grant a rezoning under the guise of a variance. See *Commissioners of Plymouth Twp. v. Wannop*, 320 A.2d 455, 458 (Pa.Cmwlth. 1974).

Our Supreme Court has explained:

A rezoning and a variance are fundamentally different and a board of adjustment has jurisdiction only where there is a request for a variance and not where it is for a rezoning under the guise of a variance. *Lukens v. Ridley Township Zoning Board*, 367 Pa. 608, 613, 80 A.2d 765; *Volpe Appeal*, 384 Pa. 374, 378, 121 A.2d 97; *Catholic Cemeteries Association, etc. Zoning Case*, 379 Pa. 516, 520, 521, 109 A.2d 537; *Richman v. Zoning Board of Adjustment, supra*, 391 Pa. p. 259, 137 A.2d p. 283. In *Richman, supra*, this

Court stated (391 Pa. p. 259, 137 A.2d 283): 'A variance is a departure from the letter, but not the spirit, of the zoning statute. It is not to be considered that a rezoning may be accomplished under the guise of the grant of a variance.' What the owner of this property actually seeks to accomplish is a rezoning of this property from residential to commercial; that cannot and should not be done under the guise of a request for a variance.

*MacLean v. Zoning Bd. of Adjustment of Borough of Crafton*, 185 A.2d 533, 537-38 (Pa. 1962).

This is the case even if an applicant presents a persuasive case for rezoning, e.g., the obsolete nature of certain zoning regulations. See *Wannop*, 320 A.2d at 458; *West Torresdale Civic Ass'n v. Zoning Bd. of Adjustment*, 513 A.2d 515, 517-18 (Pa.Cmwltth. 1986). Commonwealth Court in *West Torresdale Civic Ass'n v. Zoning Bd. of Adjustment*, 513 A.2d 515 (Pa. Cmwltth. 1986), noted:

The commercial nature of the requested variance is in complete conflict with the permitted residential uses... It is undisputed that the tracts leased by Potamkin cannot be utilized for the residential purposes originally intended by City Council due to the airport flight path restrictions. However, any hardship created by this condition is an inappropriate subject for a variance request since it is not caused by the physical characteristics of the subject land or the characteristics of the surrounding area, and there is nothing in the record indicating that this hardship is unique to Potamkin's land... Moreover, in these particular circumstances, the zoning regulations placed upon a substantial area of land have been rendered obsolete by superseding government regulations. Rezoning is therefore the appropriate administrative avenue for attempting to cure any substantive defect in the residential zoning of land affected by the airport restrictions.

513 A.2d at 517-18 (internal citations omitted).

In *One Meridian Partners LLP v. Zoning Bd. of Adjustment of City of Philadelphia*, 867 A.2d 706, 708 (Pa.Cmwlt. 2005), an applicant sought 9 variances<sup>1</sup> to permit construction of a luxury high-rise condominium tower. In holding that the zoning hearing board erred in granting the requested variances, Commonwealth Court noted that the requested variances were not a “mere technical and superficial deviation” from the zoning ordinance, and that “[developer’s] appropriate remedy would be a rezoning”. *Id.* at 709-710.

Commonwealth Court, in an unreported panel decision, recently considered a developer's request for multiple variances in *Steranchak v. Zoning Bd. of Adjustment of Pittsburgh*, 696 C.D. 2013, 2014 WL 31462 (Pa.Cmwlt. Jan. 6, 2014). In *Steranchack*, a developer requested 4 variances from the following requirements of a zoning ordinance to construct 4 three-story single-family detached dwellings with one-car garages: (1) minimum lot size; (2) minimum front setback; (3) minimum rear setback; and (4) minimum side-yard setback. In reversing the zoning hearing board’s grant of the requested variances, Commonwealth Court noted:

Developer’s request was more than a mere technical or superficial deviation from the terms of the Pittsburgh Zoning Code. It was, in essence, a request to triple the minimum density requirements...

Developer's appropriate remedy was a rezoning of the property. See *O'Neill v. Zoning Board of Adjustment of Philadelphia*, 434 Pa. 331, 254 A .2d 12 (1969) (holding that a dimensional variance for two and one half times the floor space permitted by the Ordinance was not a mere superficial and technical deviation from the terms of the Ordinance and,

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<sup>1</sup> Specifically the applicant sought variances from: (1) lot coverage; (2) floor area ratio; (3) maximum building height; (4) maximum curb cut width; (5) dedication of parking spaces to building residents; (6) maximum number of parking spaces for compact cars; (7) retail frontage on certain streets; (8) minimum number of loading areas; and (9) minimum size of loading area. *Id.* at 708.

therefore, that the applicant's appropriate remedy was a rezoning of the property); see also *One Meridian Partners, LLP v. Zoning Board of Adjustment of City of Philadelphia*, 867 A.2d 706 (Pa.Cmwlt.2005) (holding that a dimensional variance for three times the floor space permitted by the Ordinance was not a mere superficial and technical deviation from the terms of the Ordinance and, therefore, that the applicant's appropriate remedy was a rezoning of the property).

*Steranchack*, 2014 WL 31462, at \*3-\*4.

Here, Developer seeks 9 variances from the Zoning Ordinance in the effort to effect a complete metamorphosis of the Property. Developer requests substantial deviations from the Zoning Ordinance to permit the construction of two buildings with: (1) and (2) a lot area of less than 1/6 of the size required for the desired uses under two sections of the Zoning Ordinance; (3) a front yard setback less than 1/5 of the front yard setback required; (4) a minimum side yard abutting a street less than 1/7 of the side yard required; (5) an aggregate side yard of over 10' less than that required; (6) less parking than is required; (7) no screening of parking in the required side yard as required; (8) no off-street loading space as required; and (9) only 65% of the green space required.

The requested variances are more than "mere superficial and technical deviation[s]" from the terms of the Zoning Ordinance. See *One Meridian Partners LLP*, 867 A.2d at 709-10. Instead, the requested variances constitute significant deviations from the terms of the Zoning Ordinance, terms that Developer merely asserts are outdated and no longer consistent with planning objectives of promoting "urbanism and the walkable community."<sup>2</sup> [N.T. 2, pp. 25-26] Developer also suggested that at least 1 of the variances (from front-yard setback) was being requested because the Township

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<sup>2</sup> Developer did not submit a rezoning request with the Township. When asked why it did not, Developer testified: "We did consider that, but given our time constraints we thought this process would be a little faster." [N.T. 8/6/2014, pp. 62-63]

desires the "corridor along West DeKalb Pike to be pedestrian friendly." [N.T., pp. 123-124]

Notwithstanding Developer's assertions with respect to the anachronistic nature of the Zoning Ordinance or the desires of the Township, Developer cannot proceed under the "guise of a variance" to obtain relief more appropriate for the municipal legislators. Given the significant variances requested by Developer and the restrictions placed upon its jurisdiction by the MPC and the Zoning Ordinance, the ZHB finds that Developer is not entitled to the requested variances. See *MacLean*, 185 A.2d at 537-38. What Developer seeks is a rezoning of the Property. See *id.* The appropriate forum for Developer's plans is the Township Board of Supervisors.

### VARIANCES

It is well settled in Pennsylvania that a zoning hearing board may grant a variance where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;
3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;  
and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of South Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Variances should be granted sparingly, and the reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa.Cmwth. 1994). Although a somewhat relaxed standard applies to applications for dimensional, as opposed to use, variances, an applicant must still demonstrate an unnecessary hardship caused by unique physical characteristics of the property. See *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Cmwth. 2011). Additionally, "[i]t is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted." *Id.* at 150. Put another way, an applicant must demonstrate more than its "mere desire to increase profitability." *Id.* at 149.

Commonwealth Court rejects requests for dimensional variances where proof of hardship is lacking. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of the City of Pittsburgh*, 997 A.2d 423, 445 (Pa.Cmwth. 2010).

- 1. Developer failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying variances to permit construction of the buildings on the Property.**

Developer did not prove that unique physical conditions exist on the Property to prohibit its reasonable use unless the requested variances were granted. The Property presently contains a retail store, music school, and a residence. [Application]

Developer failed to articulate a legal, as opposed to a personal, hardship for the construction of 2 commercial buildings on the Property which fail to meet the minimum lot area, minimum lot width, minimum front yard setback, minimum side yard setback, off-street parking, parking in the required yards, off-street loading space, and green space requirements of the Zoning ordinance.

Developer proposes to construct two buildings that fail to meet the requirements of 9 separate sections of the Zoning Ordinance. Specifically, Developer requests variances to permit the construction of a building each to house a retail use and a restaurant use with carry-out and drive-through service with the following characteristics: the lot area is less than 1/6 of the size required for the desired uses; the front yard setback is less than 1/5 of the front yard setback required; the minimum side yard abutting a street is less than 1/7 of the side yard required; and the aggregate side yard is over 10' less than that required. As an additional result of Developer's decision to construct 2 buildings on the Property, the proposed development fails to meet the minimum parking requirements, parking screening requirements, the off-street loading space requirement, and the green area requirement of the Zoning Ordinance.

Despite its request for extensive relief, Developer failed to articulate a hardship in existence on the Property not created by its desire to overdevelop a Property that is drastically undersized for the uses desired for financial gain. Developer's expert engineer and planner both agreed that if the Property were developed for a use permitted on a lot of this size and/or was developed with only one building, almost all of the requested variances would no longer be required. Although Developer's planner offered bare assertions that the requested variances were necessary for "reasonable development" of the Property, he (1) did not address the fact that the Property is

presently being utilized for commercial and residential uses, and (2) admitted that he was unfamiliar with the economics of commercial development. [N.T. 9/3/2014, pp. 27, 39-40] Maximization of profit is self-inflicted hardship relating to a property owner and/or applicant and not, as required by the MPC, to the property itself. *See Ken-Med Associates v. Bd. of Twp. Supervisors of Kennedy Twp.*, 900 A.2d 460, 466 (Pa.Cmwlth. 2006).

This application and the evidence offered by Developer present the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003) (citing *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (Pa. 1996)); *Singer*, 29 A.3d at 149-150. Unnecessary hardship, caused by unique physical circumstance of the property, is required for the grant of a variance. *Nettleton*, 828 A.2d at 1040. For example, in *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa.Cmwlth. 2001), the court held:

A variance, whether labeled dimensional or use, is appropriate "only where the *property*, not the person, is subject to hardship." *Szmigiel v. Kranker*, 6 Pa.Cmwlth. 632, 298 A.2d 629, 631 (1972) (emphasis in original). In the present case, Daniels' property is well suited to the purpose for which it is zoned and actually used, a car dealership, which is in no way burdened by the dimensional requirements of the ordinance. Daniels has proven nothing more than that adherence to the ordinance imposes a burden on his personal desire to sell vehicles for Land Rover.

779 A.2d at 598. Similarly, in *Ken-Med Associates v. Board of Township Supervisors of Kennedy Township*, 900 A.2d 460 (Pa.Cmwlth. 2006), a landowner sought a buffer yard variance to permit construction of a parking garage providing additional parking for a medical practice; the court held:

Landowner's efforts to obtain a variance, which would allow for a greater number of physicians to practice at the Property and a general expansion of the Property's profitability, is nothing less than an impermissible attempt to attain a variance to maximize the economic value of the Property. This Court, time and again, has held that expanding the use of a particular property to maximize profitability is not a sufficient hardship to justify the granting of a variance, because such financial hardship is a form of self-inflicted hardship relating to a landowner and not, as required by the MPC, the property.

900 A.2d at 466.

As in *Yeager* and *Ken-Med*, Developer did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Developer's personal preferences drive the need for the variances and are totally insufficient under the law.

**2. Developer failed to prove the requested variances are the minimum needed to afford relief.**

Developer was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa.Cmwlt. 1999). Developer failed to prove that the requested variances were the minimum necessary to afford relief. To the contrary, testimony reveals that (1) the Property contains the appropriate lot area for the uses enumerated in Section 165-97.A (1) of the Zoning Ordinance; (2) reducing the proposed development from 2 buildings to 1 building would eliminate the need for almost all of the variances; and (3) removing the drive-through from the restaurant use would eliminate the number of variances required. Under these

circumstances, Developer failed to prove that the required variances represent the minimum amount necessary to afford relief.

**C. CONCLUSIONS OF LAW**

1. Developer has standing to seek the requested variances as the equitable owner of the Property.

2. The ZHB has jurisdiction under section 909.1(a)(5) of the MPC, 53 P.S. §10909.1(a)(5), and Zoning Ordinance section 165-251.A(5) to grant variances from the provisions of the Zoning Ordinance

3. The ZHB does not have jurisdiction to rezone property; that power is held by the Board of Supervisors.

4. The ZHB may not rezone property under the guise of a request for variances.

5. The requested variances would essentially constitute a rezoning of the Property.

6. The ZHB is obligated to ensure compliance with the technical requirements of the Zoning Ordinance.

7. The ZHB may grant a variance provided that an applicant demonstrates that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance, prohibiting the reasonable use of the property; (c) such unnecessary hardship has not been created by the applicant; and (d) the variance, if authorized, will represent the minimum variance that will afford relief. Zoning Ordinance §165-251.B(2).

8. Developer failed to demonstrate any unnecessary hardship entitling Developer to the 9 requested variances.

9. Developer failed to demonstrate that the variances are necessary to permit a reasonable use of the Property.

10. Developer failed to demonstrate that the alleged hardship was not created by Developer.

11. Developer failed to demonstrate that the requested variances represented the minimum necessary to afford relief.

12. Accordingly, Developer failed to sufficiently demonstrate its entitlement to the requested variances.

At its September 3, 2014 hearing, the ZHB entered the following order:

#### **ORDER**

AND NOW, this 3rd day of September, 2014, the Zoning Hearing Board DENIES variances from the following sections of the zoning ordinance:

- section 165-99.A(3), to permit a lot area of 24,410 SF (0.560 acres) instead of the 3 acres required
- section 165-99.A(4), to permit a lot area of 24,410 SF (0.560 acres) instead of the 4.25 acres required
- sections 165-99.A(3) and 165-99.A(4), to permit a minimum lot width of 151.62' instead of the required 300'
- section 165-99(B), to permit a front yard setback of 6.6' instead of the 35' required
- section 165-99(C), to permit a minimum side yard setback of 5' abutting a street instead of the required 35'; and an aggregate side yard of 21.7' instead of the required 35'
- section 165-101, to permit parking in the required yards
- section 165-191, to permit 26 off-street parking spaces instead of the required 29
- section 165-194, to permit no off-street loading spaces instead of the required 1 loading space

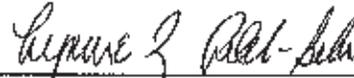
- section 165-198, to permit 16.3% of green area instead of the required 25%

An opinion with findings of facts, conclusions of law, and reasons will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

Written notice of the ZHB's decision was mailed to Developer on September 4, 2014.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**



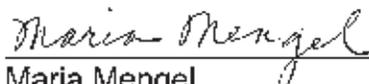
Lynne Gold-Bikin, Esquire  
Chairwoman



John M. Tallman  
Vice Chairman



Mark DePillis, Esquire  
Secretary



Maria Mengel  
Member

Judith A. Vicchio  
Member

**Date of Mailing:**