

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

APPLICATION OF DKF 11 LLC

NO. 2014-17

**PROPERTIES: 611 W. DEKALB PIKE
AND
107 FORGE ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This application involves a developer's request for a significant number of variances, both use and dimensional, to permit the construction of 2 buildings -- one for retail/office use and one for restaurant use.

Developer is the equitable owner of the properties located at 611 W. DeKalb Pike and 107 Forge Road. The proposed development spans two zoning districts -- the R-2 Residential district and C-O Commercial Office district. The buildings are bisected by the boundary of these districts.

The proposed development fails to meet the requirements of 17 separate sections of the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance"). In the C-O district, the proposed development fails to meet these requirements of the Zoning Ordinance:

- (1) maximum building height;
- (2) minimum lot area;
- (3) minimum lot width;
- (4) minimum front yard setback;
- (5) minimum side yard setback;

- (6) minimum rear yard setback;
- (7) minimum setback from residential district;
- (8) minimum ratio of lot area to gross floor area;
- (9) off-street parking in required yards;
- (10) screening of off-street parking in required yards; and
- (11) off-street loading space.

In the R-2 district, the proposed development fails to meet these requirements of the Zoning Ordinance:

- (1) use;
- (2) minimum front yard setback;
- (3) minimum side yard setback;
- (4) minimum rear yard setback;
- (5) maximum building height; and
- (6) maximum impervious coverage.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a duly advertised hearing on Application no. 2014-17 of DKF 11 LLC ("Developer") on September 3, 2014.¹ 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

¹ Developer's application was originally scheduled for August 6, 2014. On that date, the hearing was opened and continued to September 3, 2014.

by Robert L. Brant, Esq., of the law firm of Robert L Brant & Associates. 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 611 W. DeKalb Pike and 107 Forge Road ("Property").

2. The Property is located in the Commercial Office (C-O) Zoning District and R-2 Residential Zoning District and constitutes 1.077 acres (46,920 square feet). [Ex. C-3]

3. The Property is presently improved with 6540 square feet of retail, residential, and office space. [Ex. C-3; Application]

4. Developer proposes to construct 2 buildings – a 5,000 square foot, 2-story retail/office building (10,000 square feet of floor area); and a 2,500 square foot retail restaurant. [Ex. C-3]

5. The key Zoning Ordinance requirements and variances requested are:

ZONING ORDINANCE §	REQUIRED	VARIANCE REQUESTED
<u>165-98 – Building Height</u>	35'	36'
<u>165-99.A(3) – Lot Area for Uses Under § 165-97.A(3) (e.g., eat-in-restaurant, office, and certain retail uses)</u>	3 acres	1.077 acres
<u>165-99.A(3) – Lot Width</u>	300'	211.4'

ZONING ORDINANCE §	REQUIRED	VARIANCE REQUESTED
<u>165-99.B – Front Yard Setback (C-O District)</u>	35'	4'
<u>165-99.C – Side Yard Requirements (C-O District)</u>	Minimum side yard setback abutting a street – 35' Aggregate side yard – 35'	Minimum side yard setback abutting a street – 12.6' Aggregate side yard – 28.7'
<u>165-99.D – Minimum Rear Yard Setback (C-O District)</u>	25'	0'
<u>165-99.E – Minimum Setback for Yard Abutting Residential District (C-O District)</u>	50'	0'
<u>165-100.B – Minimum Ratio of Lot Area to Gross Floor Area (C-O District)</u>	Restaurant/office – 4.1	3:75:1
<u>165-101 – Parking in Required Yards</u>	Prohibited in required front yard and required side yard unless effectively screened	Proposed parking in required yard without screening
<u>165-102 – Screening Requirements</u>	Sets requirements for screening under § 165-101	No screening
<u>165-194 – Off-Street Loading Requirements</u>	1 off-street loading space for uses with gross floor area of 12,500 square feet and below	No loading space provided
<u>165-22 – Permitted Uses in R-2 District</u>	Limits permitted uses in R-2 District to those enumerated	Use variance to allow commercial office, retail and restaurant uses in the R-2 district
<u>165-23 – Minimum Front Yard Setback (R-2 District)</u>	30'	12.6'
<u>165-23 – Minimum Side Yard Setback (R-2 District)</u>	10'	0'
<u>165-23 – Minimum Rear Yard Setback (R-2 District)</u>	30'	0'

ZONING ORDINANCE §	REQUIRED	VARIANCE REQUESTED
<u>165-23 – Maximum Impervious Coverage (R-2 District)</u>	40%	81.7%
<u>165-23 – Maximum Building Height (R-2 District)</u>	35'	36'

ZHB HEARING

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

- The Property contains 1.077 acres (46,920 square feet) including both the C-O and R-2 parcels. [Ex. C-3] The Property is 3.172² acres smaller than the lot area required for restaurant, retail, and office uses. [N.T. 9/3/2014, p. 69]
- The Property presently contains a residence and home office and retail/restaurant space. [Application]
- Developer proposes the construction of 2 buildings on the Property. [Ex. C-3] The first building is a 10,000 square foot retail/office building (2 floors of 5,000 square feet each). [Ex. C-3; N.T. 9/3/2014, p. 68] The second

² Developer's testimony on this point was confounding. Developer asserts that the uses on the Property require a 3 acre lot, but requested at the time of the hearing a variance for a lot area of 3.172 acres less than that required. Developer may have confused the requirements for a use under section 165-99.A(4) (4.25 acres) with those required under section 165-99.A(3) (3 acres).

proposed building is a 2500 square foot restaurant. [Ex. C-3; N.T. 9/3/2014, p. 80]

- Both buildings propose a front yard setback of only 4' in the C-O district (along W. DeKalb Pike); 31' less than the 35' required. [Ex. C-3; N.T. 9/3/2014, p. 71]
- The proposed side yard on the northeast side of the Property along Forge Road is only 12.6'. [N.T. 9/3/2014, p. 72] The total aggregate side yards are only 28.7' [N.T. 9/3/2014, p. 72]
- Despite significant development and a large proposed parking lot, Developer proposes a minimum residential buffer along the parking lot of only 6.8'. [Ex. C-3; N.T. 9/3/2014, p. 73]
- Developer designed one of the buildings with a height of 36', instead of the 35' permitted. [Ex. C-3; N.T. 9/3/2014, p. 76]
- As a result of the large buildings proposed on this small lot, Developer seeks a ratio of gross lot area to gross floor area of only 3.753:1. [N.T. 9/3/2014, p. 76]
- Developer offered no testimony (beyond bare assertions of the necessity of the variances) with respect to the off-street parking and parking screening requirements of the Zoning Ordinance, despite the fact that Developer requested three variances. [N.T. 9/3/2014, p. 79]
- In the R-2 district, Developer proposes a 12.6' front yard, less than half the front yard required. [N.T. 9/3/2014, p. 81]
- In the R-2 district, Developer proposes a minimum side and rear yard setback of 0'. [N.T. 9/3/2014, p. 82-84]

- The extensive impervious coverage results in 81.7% impervious coverage, over twice as much as that permitted. [N.T. 9/3/2014, p. 85]
- Developer's traffic engineer provided no specific testimony with respect to the proposed development of the Property.
- When questioned regarding the intensity of the use proposed, Developer's planner conceded: "... If there were smaller buildings or less buildings, there's no question that there would be less variances." [N.T. 9/3/2014, p. 94]

7. Three neighboring residential property owners testified in opposition to the application. Their concerns centered around the height of the proposed buildings, the location of the sidewalks to W. DeKalb Pike, the proposed density and intensity of the proposed development, increased traffic as a result of the proposed development, and the effect of the proposed development on the neighboring residential properties. [N.T. 9/3/2014, pp. 89-95; 107-109]

8. 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]

9. Two neighboring property owners, both with a financial interest in the outcome of the Application, testified in support of the application. These biased 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

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

11. 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 residence, home office and retail/restaurant space. [Application]

12. Developer failed to offer proof that the requested variances were the minimum variances that would afford relief. To the contrary, Developer conceded that by reducing the number, or size, of the buildings, fewer variances would be required. [N.T. 9/3/2014, p. 94]

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.Cmwlt. 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.Cmwlt. 1986). Commonwealth Court in *West Torresdale Civic Ass'n v. Zoning Bd. of Adjustment*, 513 A.2d 515 (Pa. Cmwlt. 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.Cmwth. 2005), an applicant sought 9 variances³ 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 request for multiple variances in *Steranchak v. Zoning Bd. of Adjustment of Pittsburgh*, 696 C.D. 2013, 2014 WL 31462 (Pa.Cmwth. Jan. 6, 2014). In *Steranchack*, an applicant 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)

³ 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.

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, 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.Cmwth.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 **17** 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:

- a lot area of approximately 1/3 of the size required for the desired uses;
- a building height higher than that permitted;
- a lot width of 88.6' less than the minimum required;
- a front yard setback of approximately 1/8 the size required;
- a minimum side yard abutting a street in the C-O district of 1/3 the size required and an aggregate 6' less than that required;
- no setback along a residential district where a 50' setback is required;

- a ratio of lot area to gross floor area of significantly less than that required;
- parking in the required side yard with no screening;
- no loading spaces despite the fact that only 1 space is required;
- a use variance to permit commercial office, retail, and restaurant uses in a residential district;
- a front yard setback of less than 1/2 that required in the R-2 district;
- no side yard setback in the R-2 district, despite the 10' required;
- no rear yard setback in the R-2 district despite the 30' required;
- impervious coverage over twice as much as that permitted in the R-2 district.

The 17 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.”⁴ [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 desires the “corridor along West DeKalb Pike to be pedestrian friendly.” [N.T., pp. 123-124]

Notwithstanding Developer’s assertions with respect to the outdated 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

⁴ Developer did not file 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]

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.Cmwlt. 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. Cmwlth. 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 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.Cmwlth. 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 residence, home office and retail/restaurant space. [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 17 different provisions of the Zoning Ordinance. Specifically, Developer requests variances to permit the construction of a retail/office building and restaurant building that fail to meet, in one form or another, the lot area, height, lot width, front yard setback, side yard setback, residential buffer, ratio of lot area to gross floor area, loading space, rear yard setback and impervious coverage requirements of the Zoning Ordinance. Developer

also requests a use variance to permit office, retail, and restaurant uses in a residential district.

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. Developer's planner conceded that if the Property were developed with only one building or smaller buildings, fewer variances would be required. Although Developer's planner asserted 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 residential, home office, and retail/restaurant space, and (2) admitted that he was unfamiliar with the economics of commercial development. [N.T. 9/3/2014, pp. 27, 39-40]

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. 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). 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.Cmwth. 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.Cmwth. 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 such permitted uses as offices, studios, municipal uses, and medical offices; and (2) reducing the proposed development from 2 buildings to 1 building (or smaller buildings) would eliminate the need for almost all of the variances. 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 17 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 165-98, to permit a building height of 36' instead of the maximum permitted 35'

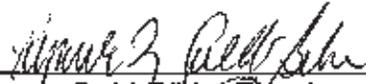
- sections 165-99.A(3), to permit a lot area of 0.840 acres (36,574 SF) instead of the 3 acres required
- section 165-99.A(3), to permit a minimum lot width of 211.4' instead of the required 300'
- section 165-99.B to permit a front yard setback of 4.0', instead of the 35' required
- section 165-99.C, to permit a minimum side yard setback of 12.6' abutting a street instead of the required 35'; and an aggregate side yard of 28.7' instead of the required 35'
- section 165-99.D, to permit a rear yard setback of 0' instead of the required 25'
- section 165-99.E, to permit a setback of 0' for a yard abutting a residential district instead of the required 50'
- section 165-100.B, to permit a ratio of lot area to gross floor area of 3.75:1 instead of the required 4:1 (restaurant; office) and 5:1 (retail)
- section 165-101, to permit parking in the required yards
- section 165-102, to provide no off-street parking screening
- section 165-194, to permit no loading spaces instead of the required 1 loading space
- section 165-22, to permit commercial office, retail, and restaurant uses in the R-2 district
- section 165-23, to permit a front yard setback of 12.6' instead of the required 30'
- section 165-23, to permit a side yard setback of 0' instead of the required 10'
- section 165-23, to permit a rear yard setback of 0' instead of the required 30'
- section 165-23, to permit a building height of 36' instead of the maximum permitted 35'; and
- section 165-23, to permit an impervious coverage of 81.7% instead of the maximum permitted 40%.

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**



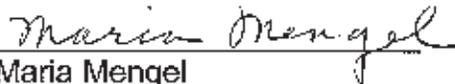
Lynne Gold Bilkin, Esquire
Chairwoman



John M. Tallman
Vice Chairman



Mark DePillis, Esquire
Secretary



Maria Mengel
Member

Judith A. Vicchio
Member

Date of Mailing: