

IN THE MATTER OF : **BEFORE THE FAIRVIEW TOWNSHIP**
THE APPLICATION OF : **ZONING HEARING BOARD**
AG-HS FAIRVIEW 629 PROPERTY : **YORK COUNTY, PENNSYLVANIA**
OWNER, L.L.C. : **DOCKET NO. 2019-08**

DECISION GRANTING A VARIANCE TO SECTION 300-21(G)
OF THE FAIRVIEW TOWNSHIP ZONING ORDINANCE

The Applicant applied for a dimensional variance to Section 300-21(G) of the Fairview Township Zoning Ordinance for the property in the Industrial Business (IB) Zoning District at 629 Lowther Road, Lewisberry, PA 17339. A hearing on the application was held on October 17, 2019, at 6:30 p.m. at the Fairview Township Municipal Building, 599 Lewisberry Road, New Cumberland, PA 17070.

FINDINGS OF FACT

1. This hearing application was filed by AG-HS Portfolio Subsidiary, L.L.C, c/o High Street Realty Company, LLC, 1S450 Summit Avenue, Suite 250, Oakbrook, IL 60181. At the time of the application, the existing owners of the property at 629 Lowther Road were Fairview Industrial – NDI, LLC and Fairview Industrial – BD, LLC, both with an address of c/o Real Estate Capital Solutions, Inc., 371 Centennial Parkway, Suite 200, Louisville, CO 80027. However, as of the date of the hearing, the property had been purchased by and was owned by AG-HS Fairview 629 Property Owner, L.L.C., a Delaware limited liability company, by deed recorded October 15, 2019, and filed in the Office of the Recorder of Deeds of York County, Pennsylvania at Instrument No. 2019045630. At the hearing, the Board granted the request of the Applicant to amend the application to reflect the current ownership so that this Decision would be in the name of the current legal owner, AG-HS Fairview 629 Property Owner, L.L.C.,

High Street Realty Company, LLC, 1S450 Summit Avenue, Suite 250, Oakbrook Terrace, IL 60181.

2. Notice of the hearing was properly advertised; the property was properly posted; and all neighboring property owners required to be notified of the hearing were notified in accordance with the Township Ordinance and the Pennsylvania Municipalities Planning Code.

3. The Applicant was represented by David J. Tshudy, Esquire, of *Pepper Hamilton, LLP*, 100 Market Street, Suite 200, P.O. Box 1181, Harrisburg, PA 17108. Testifying on behalf of Applicant was James Redland, *High Street Realty Company, LLC*, 1S450 Summit Avenue, Suite 250, Oakbrook Terrace, IL 60181. He testified to the survey and subdivision plan documents of the property which were entered as Applicant's Exhibits A-1 through A-5.

4. The Applicant is requesting a dimensional variance to 300-21(G) of the Zoning Ordinance which establishes building setback distances in the Industrial Business Zoning District, to allow for a portion of the North side of the existing principal structure to encroach into the required 25-foot side setback.

5. The portion of the building which encroaches into the setback is an elevator shaft. The elevator shaft intrudes into the setback area 9½ feet for a linear distance of 18½ feet, less than 5% of the 405-foot total length of the building.

6. The Final Subdivision Plan for Fairview Industrial – NDI, LLC and Fairview Industrial – BD, LLC, recorded in the Office of the Recorder of Deeds of York County at Instrument No. 2019038790, notes that this one-story masonry building is “nonconforming”. See Applicant's Exhibit A-3, Page 2. This Final Subdivision Plan was approved by the Board of Supervisors of Fairview Township on July 29, 2019.

7. Neither the Applicant nor the Township officials could identify documentation to establish when the elevator shaft was constructed, or if any permits were issued for such construction. Also, the Township does not have any registration of the structure as a non-conformity¹. Consequently, this structure is not presently a “lawfully” existing nonconformity and, in order for the elevator shaft to remain in place, relief under the Ordinance is required.

8. The area of encroachment of this building’s elevator shaft into the setback area of this lot is very minimal. There are no issues with respect to the adjoining property at the point of this encroachment. Under the circumstances, the dimensional variance required is a *de minimus* variance.

CONCLUSIONS

1. The Applicant has the burden of establishing its entitlement to this dimensional variance.

2. On the basis of the testimony and documentary evidence presented, the Board concludes that the Applicant established that it would cause an unreasonable and unnecessary hardship in the use of this property if the literal requirements of the Ordinances were imposed. Therefore, the Fairview Township Zoning Hearing Board should grant the requested *de minimus* dimensional variance from the requirements of Section 300-21(G) of the Zoning Ordinance to allow for the elevator shaft located on the North side of the existing principal structure to encroach 9½ feet into the required 25-foot side setback.

¹ Under the Pennsylvania Municipalities Planning Code, and the Fairview Township Zoning Ordinance, in order to meet the definition of a nonconforming structure, a structure must have ‘lawfully’ existed prior to the application of such ordinance or amendment to which it now does not apply.

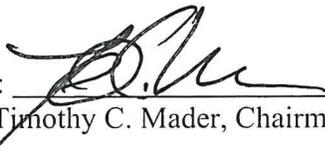
DECISION

On the basis of the foregoing findings and conclusions and on the basis of all the testimony and evidence presented to the Board at the hearing, the request for the dimensional variance is granted to allow the elevator shaft located on the North side of the existing principal structure to encroach 9.5 feet into the required 25-foot side setback.

The Application was approved as stated upon the motion of Mr. Bashore, seconded by Mr. Perry and adopted 3-0 by the Board Members present and voting.

FAIRVIEW TOWNSHIP ZONING HEARING
BOARD

Dated: November 21, 2019

By:  _____
Timothy C. Mader, Chairman

Distribution: David J. Tshudy, Esquire, *for Applicant*



BOARD of SUPERVISORS
Dr. Larry Cox, *Chairman*
Korey Leslie, *Vice-Chairman*
Christopher L. Allen, *Supervisor*
John W. Jones, *Supervisor*
Mario D. Pirritano, *Supervisor*

MANAGER
Donald F. Martin, III

The Fairview Township Zoning Hearing Board will hold a Public Hearing on Thursday, **October 17, 2019**, at 6:30 p.m., at the Fairview Township Municipal Building, 599 Lewisberry Road, New Cumberland, PA 17070, to discuss the following:

Docket No. 2019-08: AG-HS Portfolio subsidiary, L.L.C, C/O High Street Realty Company, LLC, 1S450 Summit Ave., Suite 250, Oakbrook, IL 60181. The Applicant, an equitable owner, is requesting a variance to the Fairview Township Zoning Ordinance, §300-21.G – Area and Design Requirements – Industrial Business Zoning District. The Applicant is requesting a variance to allow for a structure that currently encroaches into the required 25-foot side setback. The property is located at 629 Lowther Road, Lewisberry, PA 17339, and is in the Industrial Business District.



ZONING HEARING BOARD APPLICATION
YORK COUNTY, PENNSYLVANIA

❖ Part 1:

APPLICANT(S)/EQUITABLE OWNER

Name: AG-HS Portfolio Subsidiary, L.L.C.
Address: c/o High Street Realty Company, LLC
1S450 Summit Avenue, Suite 250, Oakbrook, IL 60181
Phone:

PROPERTY LOCATION:

Address: 629 Lowther Road
Lot Size: 4.29 acres
Date Purchased: May 8, 2017
Location:

EXISTING OWNER OF PROPERTY:

Name: Fairview Industrial - NDI, LLC and Fairview Industrial - BD, LLC
Address: c/o Real Estate Capital Solutions, Inc.
371 Centennial Parkway, Suite 200, Louisville, CO 80027

PRESENT USE OF PROPERTY:

Industrial

EXISTING ZONE: IB - Industrial Building

❖ Part 2:

ZONING REQUEST (Identification of the applicable request(s)):

- () SUBSTANTIVE CHALLENGE
() SPECIAL EXCEPTION
(✓) VARIANCE
() APPEAL OF THE ZONING OFFICERS DECISION

SECTION(S) OF ZONING ORDINANCE WHICH APPLY TO THIS REQUEST - Please identify the specific section(s) of the Zoning Ordinance involved in the request):

§300-21.G (Side Setback)

❖ Part 3:

DESCRIPTION OF REQUEST:

See Attached Narrative and Survey

❖ *Part 4*

LIST ALL INDIVIDUAL PROPERTY OWNERS WITHIN 200 FEET OF THE PERIMETER OF THE ENTIRE PROPERTY.

NAME	ADDRESS	USE TYPE
Leonardo Herrada	630 Lowther Road, Lewisberry, PA 17339	C - Office Building - Low Rise - 1-4 Story
Regents Partnership LLP	640 Lowther Road, Lewisberry, PA 17339	I - Small Shop
Jackson Mobile Home Park LP	510-512 Grandview Drive, Lewisberry, PA 17339	A - Apartment - Low Rise - 1-3 Story
Jackson Mobile Home Park LP	610 Lowther Road, Lewisberry, PA 17339	C - Commercial Auxiliary Improvements
DLR Real Estate Investment LLC	6841 Distribution Drive, Beltsville, MD 20705	I - General Warehouse 1 Story
George E. III & Rebecca A. Hevel	592 Grandview Circle, "Lewisberry, PA 17339	R - Residential Split-Level House
Glenn E. Wanbaugh	511 Grandview Drive, Lewisberry, PA 17339	R - Residential Vacant Land
Dennis L. & Vickie L. Hetherington	594 Grandview Circle, Lewisberry, PA 17339	R - Residential Split-Level House

**ATTACHED NARRATIVE TO ZONING HEARING BOARD APPLICATION
629 LOWTHER ROAD**

By virtue of an Agreement of Purchase and Sale dated May 13, 2019, with Fairview Industrial – NDI, LLC and Fairview Industrial – BD, LLC (collectively, the “Owner”), AG-HS Portfolio Subsidiary, L.L.C. (“Applicant”) is the equitable owner of the parcel of real property located at 629 Lowther Road, Fairview Township, York County, Pennsylvania (the “Property”).

The Property is located in the IB – Industrial Business District on the Fairview Township Zoning Map and is improved with a one-story masonry building measuring 54,067 square feet (the “Building”). A portion of the north side of the Building, which appears to be an elevator shaft (the “Elevator Shaft”) encroaches into the 25-foot side setback required under §300-21.G (Table 5-9) of the Fairview Township Zoning Ordinance (the “Zoning Ordinance”). Based on observation, the Elevator Shaft appears to have been constructed over a decade ago and is used in conjunction with the Building. Applicant is requesting a dimensional variance to allow for the Elevator Shaft to remain.

Despite reasonable efforts (including requests to the Township under Pennsylvania’s Right to Know Law), neither Applicant nor the Owner could determine conclusively when the Elevator Shaft was erected and what, if any, permits were issued for the construction of the Elevator Shaft. Consequently, neither Applicant nor the Owner have sufficient facts to support a finding that the Elevator Shaft is a legal nonconformity under §300-77 of the Zoning Ordinance. Moreover, the Township has no registration of the Property, the Building, or the Elevator Shaft as legal nonconformities under §300-78 of the Zoning Ordinance.

On July 29, 2019, the Fairview Township Board of Supervisors approved a subdivision plan with the Elevator Shaft identified as “nonconforming.” A copy of the approved subdivision plan together with an ALTA survey of the Property are attached hereto.

Applicant is entitled to the requested dimensional variance under the criteria in §300-99.E(4) of the Zoning Ordinance and §910.2 of the Pennsylvania Municipalities Planning Code, 53 P.S. §10910.2(a). Alternatively, Applicant is entitled to the requested variance as a de minimis variance, as the dimensional variance is minor and rigid compliance with the Zoning Ordinance’s setback requirements is not necessary to protect public concerns, or under the theory of variance by estoppel, as it is assumed that the Elevator Shaft was initially constructed pursuant to a facially valid building permit and the Township has acquiesced in its existence.

Applicant will present testimony and evidence to support its position at the hearing on this matter.

