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ATTORNEYS FOR APPELLEE
ZONING HEARING BOARD OF
EAST FALLOWFIELD TOWNSHIP

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BY: Denise Miller

BOARD OF SUPERVISORS OF EAST FALLOWFIELD TOWNSHIP, Appellants	:	IN THE COURT OF COMMON PLEAS
	:	CHESTER COUNTY, PENNSYLVANIA
vs.	:	CIVIL ACTION -- LAW
ZONING HEARING BOARD OF EAST FALLOWFIELD TOWNSHIP Appellee	:	NO. 2009-14025-LU and 2010-02575-LU **(consolidated under 2009-14025-LU)**
	:	ZONING APPEAL
and	:	
ANDREW F. JEREMIAS and KEIGHLEY C. JEREMIAS, Intervenor-Appellees	:	

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PRAECIPE FOR DETERMINATION

TO THE PROTHONOTARY:

Kindly submit the following matter to the Honorable Ronald C. Nagle for determination:

BRIEF OF THE EAST FALLOWFIELD TOWNSHIP ZONING HEARING BOARD IN SUPPORT OF ITS DECISION

Oral argument is **not** requested.

BUCKLEY, BRION, McGUIRE, MORRIS & SOMMER LLP

Date: June 14, 2010 BY: Jeffrey R. Sommer
JEFFREY R. SOMMER, ESQUIRE
Attorney for Appellee, East Fallowfield Township Zoning Hearing Board

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BRIEF OF THE EAST FALLOWFIELD TOWNSHIP ZONING HEARING BOARD IN SUPPORT OF ITS DECISION

I. PROCEDURAL SETTING:

This matter comes before this Honorable Court as a result of an appeal filed by East Fallowfield Township (hereinafter "Township") as a result of the decision of the East Fallowfield Township Zoning Hearing Board (hereinafter "Board") which granted the application of Andrew Jeremias and Keighley Jeremias (hereinafter "Applicants") requested relief of a special exception for an in home business and a variance to permit the driveway to be used as two off street parking spaces pursuant to the condition that

the home occupation will be in accordance with the testimony presented and that there will no additional employees at this site.

Upon filing of briefs, this matter will ready for determination.

II. **FACTS**:

The Applicants' filed a request to the Board for a special exception pursuant to Section 702.3(a) of the East Fallowfield Township Zoning Ordinance (hereinafter referred to as the "Ordinance") to operate a single chair "hair salon" in their home located at 125 Watch Hill Road, East Fallowfield, Pennsylvania 19320 (hereinafter referred to as the "Property"). They also sought, if needed, a variance from Section 1712 of the Ordinance which would have required two off street parking spaces to be constructed on the site.

Present at the hearing were Board members, Peter Davis, Chris J. Rechenberg and Dennis O'Neill. Also present were the Applicants, Andrew F. Jeremias and Keighley C. Jeremias, who appeared without benefit of counsel. Mark P. Thompson, Esquire, Solicitor for East Fallowfield Township, was present on behalf of the Township. Other than the Township, no one entered their appearance as a party to this application.

At the hearing, the following exhibits were presented and accepted into evidence at the hearing:

B-1: Zoning Application

B-2: Photographs

B-3: Proof of Publication in Daily Local News on September 10, 2009 and September 16, 2009

B-4: List of adjacent property owners

B-5: Letter dated September 8, 2009 from Jeffrey R. Sommer to adjacent property owners regarding application and hearing.

B-6: Affidavit of Posting

The Code and the Zoning Map were incorporated herein by reference.

Section 702.3A of the Ordinance permits the operation of a hair salon as a home occupation when such use is granted by special exception by the Zoning Hearing Board. The Ordinance sets forth the criteria to be met by an applicant seeking the grant of a special exception. Section 1712 was interpreted by the Township to require two off street parking spaces.

III. **ISSUE**:

Whether the Zoning Hearing Board committed an error of law or an abuse of discretion in granting the special exception and variance.

IV. **HOLDING**:

The Zoning Hearing Board did not commit an error of law or an abuse of discretion in granting the special exception and variance.

V. **RATIONALE**:

The Ordinance contains language that empowers the Board to render both special exceptions and variances. The language that is contained in the Ordinance is a mirror of the language that is contained in the underlying enabling statute, the Pennsylvania Municipalities Planning Code (hereinafter referred to as the "MPC"). It is clear that the Ordinance permits a hair salon as an in-home occupation when approved by special exception.

The law recognizes that a use permitted by special exception is a use that is legislatively permitted if it complies with the objective standards and criteria of the Zoning Ordinance. See, *Appeal of Lynch Community Homes, Inc.*, 123 Pa. Cmwlth. 278, 554 A.2d 155 (1989). The Board considered the criteria that is set forth in the Ordinance and believes that the Applicants have demonstrated that they can objectively comply with the criteria except for that one area in which they have sought a variance. Once the objective criteria is met, the burden then shifts to any interested neighbor or party protestant to provide substantive evidence and possibly exhibits which would support the contrary position. In this particular case, the opposition was presented by the Township. It is a fair summation to say that the Township did not oppose the Applicants' request for the hair salon, but focused more directly on the grant of the variance. As a result, we too shall focus on the request to count the driveway as the two off street parking spaces.

The traditional standards for consideration of an Applicant's entitlement to a variance are set forth in Section 910.2(A) of the MPC. This Board is authorized to grant variances provided it makes those findings <u>where relevant</u> in a given case. The criteria most often cited are that a hardship exists through the application of the zoning ordinance, which the Applicant could not meet. The Township argues that no hardship exists and therefore the relief should be denied. The Board believes and held that the findings required by the MPC or the Ordinance are not relevant findings which must be made in this particular case.

The nature of the hardship under the facts of this case is different and is caused by an underlying belief of the Ordinance that multiple employees or multiple customers will be coming to the hair salon at the same time. The testimony of the Applicants was clear that it was their intention only to operate a single chair hair salon. The Applicants' testified that all clients were by appointment only and therefore, could be scheduled at the appropriate time convenient to Ms. Jeremias. The Applicants' testified that the bulk of the appointments would be at such a time where there is space available for that person to park, if they chose to, in the driveway. The Applicants testified that they would have no employees and therefore, there was no need for employee parking.

As a result, when the Board announced its decision in open session on October 28, 2009, the Board was very specific in imposing the condition that the operation of the single chair hair salon would be in accordance with all of the testimony presented at the hearing, there would be no additional employees and there would be no outside signage which would indicate that this was a commercial operation in the residential district. The Applicants indicated on the record that they would agree to and comply with all those conditions.

It seems that the Township wishes to appear to grant citizens the right to have an in home occupation with one section of the Ordinance and then impose requirements (such as parking) which cannot be met. Thus, effectively taking away with one hand what it wished to permit with the other. Therefore, to the extent the traditional standards for a variance are relevant, the particular circumstances and testimony with this application creates a hardship sufficient enough to the entitlement of

a grant of a variance. In other words, the Ordinance grants the Applicants the right to operate a hair salon, yet then takes away the right to have anyone drive to the hair salon. One supposes that you could operate the hair salon with only walk in traffic, thus, obviating the need for the parking space. However, in today's suburban/rural environment of East Fallowfield it is high unlikely that people would walk to the Applicant's home.

VI. **CONCLUSION**:

Therefore, the Board concluded that the "hardship" requirement was not a finding which was relevant to this application. Since the MPC specifically states that the findings are to be made by the Board "where relevant" and the Board has concluded that this criteria is not relevant to the application, the relief was granted.

Respectfully submitted,

BUCKLEY, BRION, McGUIRE, MORRIS & SOMMER LLP

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CERTIFICATE OF SERVICE

I, Jeffrey R. Sommer, Esquire, hereby certify that on the below date, I forwarded a true and correct copy of the forgoing Brief of the East Fallowfield Township Zoning Hearing Board in Support of Its Decision, postage prepaid, upon the following person(s):

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BUCKLEY, BRION, McGUIRE,
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Date: June 14, 2010

By: _____
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Township Zoning Hearing Board