

ZONING — VARIANCE—ADJOINING LANDOWNER'S OFFER TO BUY  
DOES NOT COMPEL DENIAL OF HARDSHIP VARIANCE — *Davis  
Enterprises v. Karpf*, 105 N.J. 476, 523 A.2d 137 (1987).

The regulation of land use is an inherent exercise of a state's police power.<sup>1</sup> Accordingly, a landowner's use of his property is subject to regulation "which will promote the public health, safety, morals, and general welfare."<sup>2</sup> In order to alleviate any inequities that a zoning ordinance may impose upon a particular parcel of land, the relaxation technique of a variance<sup>3</sup> may be employed.<sup>4</sup>

The hardship variance<sup>5</sup> is designed to provide relief to the

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<sup>1</sup> See generally D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 3.6 (2d ed. 1986) (explaining sources of zoning power). This power extends to New Jersey municipalities by virtue of the Municipal Land Use Law which provides in pertinent part:

The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon.

N.J. STAT. ANN. § 40:55D-62(a) (West Supp. 1988). See also W. COX, NEW JERSEY ZONING AND LAND USE ADMINISTRATION § 1-1 (1988).

<sup>2</sup> N.J. STAT. ANN. § 40:55D-2(a) (West Supp. 1988).

<sup>3</sup> There are two different kinds of variances. One type, bulk variances, are non-use variances which consist of restrictions of area, height, setback, density, side line restrictions and restrictions covering various other subjects. 3 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 38.01 (4th ed. 1987). Use variances are designed to permit a use prohibited by the ordinance. *Id.*

<sup>4</sup> See D. HAGMAN & J. JUERGENSMEYER, *supra* note 1, § 6.5.

<sup>5</sup> The statutory criteria for granting a variance when the unique shape of the property precludes compliance with a zoning ordinance are set forth in N.J. STAT. ANN. § 40:55D-70(c) (West Supp. 1988). The statute provides in pertinent part:

(1) Where: (a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship, (2) where in an application or appeal relating to a specific piece of property the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations . . . .

N.J. STAT. ANN. § 40:55D-70(c) (West Supp. 1988).

To receive a variance, applicants must satisfy both the positive criteria, that the applicant will suffer exceptional or undue hardship without a variance, and the negative criteria, that the variance will not cause a substantial detriment to the zon-

property owner whose land would otherwise be zoned into inutility.<sup>6</sup> In protecting the interests of the adjoining landowner and the community, zoning boards and courts have utilized the conditional variance doctrine<sup>7</sup> to impose reasonable conditions upon the granting of a hardship variance.<sup>8</sup> One such condition afforded by the doctrine allows an adjoining property owner the opportunity to purchase the property for its fair market value.<sup>9</sup> Historically, New Jersey case law has restricted the use of conditional variances to litigation involving vacant, undersized lots that required a variance before the property was usable.<sup>10</sup> Recently, however, in *Davis Enterprises v. Karpf*,<sup>11</sup> the New Jersey Supreme Court held that an adjoining property owner's offer to purchase developed land would not compel the denial of a hardship variance.<sup>12</sup>

In 1939, Julia Schallenhammer purchased a lot in Cherry Hill, New Jersey.<sup>13</sup> A house and garage existed on the property at the time of the purchase.<sup>14</sup> The lot, located in a highway business zone, was used concurrently for business and residential purposes.<sup>15</sup> Land owned by Davis Enterprises (Davis) bordered

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ing scheme or to the public good. *Nash v. Board of Adjustment*, 96 N.J. 97, 102, 474 A.2d 241, 243 (1984).

<sup>6</sup> See 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 20.02 (2d ed. 1977). The fifth amendment provides in pertinent part that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. The court has explained that zoning property into inutility is tantamount to confiscation for which the owner must be compensated. See *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 32-33, 243 A.2d 233, 239 (1968). See also *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 607, 410 A.2d 1138, 1143 (1980) (denial of hardship variance may result in confiscation of land by the government for which compensation must be paid).

<sup>7</sup> The conditional variance is an equitable remedy that may be imposed upon the grant of a hardship variance. See *Nash*, 96 N.J. at 106, 474 A.2d at 245.

<sup>8</sup> See 6 P. ROHAN, *ZONING & LAND USE CONTROLS* § 43.03(1) (1987). The power to impose reasonable conditions upon the grant of a variance allows the board to balance the principal property owner's hardship against the interest of the public. *Id.*

<sup>9</sup> *Nash*, 96 N.J. at 106, 474 A.2d at 245.

<sup>10</sup> See *id.* See also *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 410 A.2d 1138 (1980); *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 397 A.2d 646 (1979); *Gougeon v. Board of Adjustment*, 52 N.J. 212, 245 A.2d 7 (1968); *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 243 A.2d 233 (1968).

<sup>11</sup> 105 N.J. 476, 523 A.2d 137 (1987).

<sup>12</sup> *Id.* at 487, 523 A.2d at 142-43.

<sup>13</sup> *Id.* at 478, 523 A.2d at 138.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 478-79, 523 A.2d at 138. The premises were used for a tap room, an

the principal property on two sides.<sup>16</sup>

In 1982, Mrs. Schallenhammer entered into an agreement to sell the property to Philip Kogan for \$50,000, contingent upon Kogan obtaining certain bulk variances.<sup>17</sup> This agreement, however, collapsed when faced with opposition by Davis.<sup>18</sup> Subsequently, Davis, who intended to consolidate the principal property with adjoining lots in order to construct a building, made offers of \$15,000 and \$30,000 for the property.<sup>19</sup> Mrs. Schallenhammer rejected these offers.<sup>20</sup> Another purchaser had offered \$60,000, but withdrew his offer due to Davis's threats of litigation.<sup>21</sup> Davis then increased his offer to \$40,000 with certain provisions.<sup>22</sup> Responding to this offer, Mrs. Schallenhammer stated through a realtor that \$45,000 would be an acceptable price.<sup>23</sup> Before being apprised of Davis's response, Mrs. Schallenhammer entered into an agreement for sale with Richard and Jack Karpf for \$45,000, contingent upon site plan approval<sup>24</sup> and

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upholstery business, and a tool and dye shop. *Id.* In 1975, the Schallenhammers ceased using the premises for commercial purposes. *Id.* at 479, 523 A.2d at 138.

<sup>16</sup> *Id.* The principal property is also surrounded by a gas station, a fire hall, a bank and a diner. *Id.*

<sup>17</sup> *Id.* at 479-80, 523 A.2d at 139.

<sup>18</sup> *Id.* at 480, 523 A.2d at 139. Davis appeared before the planning board to oppose Kogan's variance application. Brief for Defendant-Appellant Richard Karpf at 3, *Davis Enters. v. Karpf*, 105 N.J. 476, 523 A.2d 137 (1987) (A-5715-83T7) [hereinafter Brief for Appellant]. Deciding that he did not have enough money or time to fight Davis for the principal property, Kogan did not pursue his variance application. *Id.* at 4.

<sup>19</sup> *Davis*, 105 N.J. at 480, 523 A.2d at 139. Davis intended to raze both the existing structure on the principal property and a gas station on contiguous property. *Id.* Davis stated that after combining the lots, he would nearly have the minimum lot size required by the ordinance to construct a building. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* After learning that Davis would interfere in order to prevent his purchase, Sam Benlolo, a prospective purchaser, decided not to buy the principal property because he could not afford the additional cost and time. See Brief for Appellant, *supra* note 18, at 4.

<sup>22</sup> *Davis*, 105 N.J. at 480, 523 A.2d at 139. Davis's offer was contingent upon replacing the existing structure with a new office building. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* A site plan may be required to show the "proposed location of the buildings, parking areas, and other installations on the plot, and their relation to existing conditions, such as roads, neighboring land uses, natural features, public facilities, ingress and egress roads, interior roads, and similar features." 4 A. RATHKOPF & D. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 62.01 (4th ed. 1987) (footnote omitted). The purpose of site plan approval is "to insure that the details of the site plan for the authorized use will be such that the operation will not offend the public interest." *Kozesnik v. Montgomery Township*, 24 N.J. 154, 186, 131 A.2d 1, 18 (1957). Each plan is subjected to the expertise of a planning board, because it would be too cumbersome to set forth extensive requirements in the ordinance. *Id.*

the necessary variances.<sup>25</sup> Subsequently, Davis made an unconditional offer of \$45,000.<sup>26</sup>

Although the Karpfs intended to use the property for a small law and real estate office, a use permitted by the zoning scheme, the lot was undersized and the house was situated in such a way that the Karpfs applied for certain bulk variances.<sup>27</sup> Finding that the Karpfs would suffer undue hardship<sup>28</sup> and that the variances would not cause a substantial detriment to the public good, the local planning board granted the site plan approval and the requested variances, notwithstanding Davis's offer.<sup>29</sup> Davis then filed a complaint in lieu of prerogative writ to contest the granting of the variances.<sup>30</sup> The New Jersey Superior Court, Law Division, sustained the planning board's findings, but imposed a condition on the variance, permitting the adjoining landowner to purchase the principal property at a matching price, thereby eliminating any hardship.<sup>31</sup> The appellate division affirmed the trial court's decision, ruling that a property owner who refuses a fair and reasonable offer cannot be found "to have suffered undue hardship."<sup>32</sup> The New Jersey Supreme Court granted certifi-

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<sup>25</sup> *Davis*, 105 N.J. at 479-80, 523 A.2d at 138-39. The Cherry Hill Ordinance required a lot size of 20,000 square feet, 120 feet frontage, 30 feet for front setback, 10 feet for side setback, 20 feet for side aggregate, 25 feet driveway width, 19 parking spaces and 25% of open space. See Cherry Hill, N.J., Ordinance 76-71 (Feb. 20, 1986). The Karpfs requested a variance altering the lot size to 6,571 square feet, frontage to 45.87 feet, front setback to 14 feet, side setback to 2 feet, side aggregate to 12.8 feet, driveway width to 10.8 feet, parking spaces to 6 feet, and open space to 13%. *Davis*, 105 N.J. at 479, 523 A.2d at 138.

<sup>26</sup> *Davis*, 105 N.J. at 480, 523 A.2d at 139.

<sup>27</sup> *Id.* at 479, 523 A.2d at 138. The Karpfs applied for the following bulk variances: lot size, frontage, front setback, side setback, side aggregate, driveway width, parking spaces and open spaces. *Id.*

<sup>28</sup> Underlying the notion of undue hardship is the premise that without a variance the property will have no effective use. *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 605, 410 A.2d 1138, 1142 (1980).

<sup>29</sup> *Davis*, 105 N.J. at 480, 523 A.2d at 139. Thus, the planning board determined that the Karpfs satisfied both the positive and the negative criteria as set forth in the statute. *Id.* See *supra* note 5 (listing statutory criteria for granting of a variance). Although the planning board considered Davis's offer, it determined that the applicant's hardship allowed for the granting of the variances. *Davis*, 105 N.J. at 480, 523 A.2d at 139.

<sup>30</sup> Brief for Appellant, *supra* note 18, at iii.

<sup>31</sup> *Davis*, 105 N.J. at 480, 523 A.2d at 139. Davis had thirty days to make an unconditional offer to purchase the property for matching value. *Id.* at 480-81, 523 A.2d at 139. If he did so, the variances would be deemed null and void. *Id.*

<sup>32</sup> *Id.* at 481, 523 A.2d at 139. Finding that Davis's offer was fair and reasonable, the appellate court concluded that the variances were null and void. *Id.* Mrs. Schallenhammer subsequently conveyed the property to the Karpfs during the pendency of the appeal to the New Jersey Supreme Court. *Id.* at 478, 523 A.2d at 138.

ation<sup>33</sup> and reversed, holding that an adjoining landowner's matching offer to purchase does not preclude an applicant from obtaining a hardship variance.<sup>34</sup>

The New Jersey Supreme Court first suggested that an unconditional offer to buy adjacent property might preclude an owner from obtaining a hardship variance in *Harrington Glen, Inc. v. Municipal Board of Adjustment*.<sup>35</sup> In *Harrington Glen*, the owners of an undersized, vacant lot located in a residential zone contracted to sell the property to the plaintiff, Harrington Glen.<sup>36</sup> The transaction, however, was contingent upon the plaintiff obtaining a bulk variance, which would permit the construction of a house on the undersized lot.<sup>37</sup> Without the variance, the property would have been useless.<sup>38</sup> Although a small lot adjoined the principal property, no evidence existed to indicate that the plaintiff could have purchased the adjoining lot.<sup>39</sup>

The Board of Adjustment denied the variance without making any factual findings.<sup>40</sup> On appeal, the law division reversed the Board of Adjustment's denial of the variance.<sup>41</sup> Finding that the board's decision was not arbitrary or unreasonable, the appellate division reversed the trial court's decision.<sup>42</sup>

In evaluating the plaintiff's claims, the New Jersey Supreme

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<sup>33</sup> *Davis Enters. v. Karpf*, 103 N.J. 479, 511 A.2d 657 (1986).

<sup>34</sup> See *Davis*, 105 N.J. at 485, 487, 523 A.2d at 141-43.

<sup>35</sup> 52 N.J. 22, 243 A.2d 233 (1968).

<sup>36</sup> See *id.* at 25, 243 A.2d at 235.

<sup>37</sup> *Id.* The zoning ordinance required a minimum frontage of 80 feet and a minimum area of 8,000 square feet. *Id.* The principal lot had a frontage of 40 feet and a maximum building area of 4,880 square feet. *Id.* Therefore, the plaintiff could not build a house on the property. *Id.*

<sup>38</sup> *Id.* at 27, 243 A.2d at 236. The real estate broker testified that unless a single-family home was constructed, the property would be useless. *Id.* Thus, the court noted that to deny the variance would deprive the landowner "of all productive or beneficial use." *Id.* at 29, 243 A.2d at 237. The court, in relying on its previous decisions, further explained that zoning property into inutility is tantamount to confiscation for which the owner must be compensated. *Id.* at 32-33, 243 A.2d at 239.

<sup>39</sup> *Id.* at 26-27, 243 A.2d at 236. A 40 foot by 60 foot lot adjoining the principal lot would have added approximately 2,400 square feet to the principal property. *Id.* at 26, 243 A.2d at 236. Even if the plaintiff could purchase the adjoining lot, the principal lot would still be under the 8,000 square feet required by the ordinance. *Id.* at 26-27, 243 A.2d at 236.

<sup>40</sup> *Id.* at 27, 243 A.2d at 236. The board merely stated that "no satisfactory evidence was introduced showing sufficient hardship to justify [a] grant of a side-yard variance or a variance to construct a dwelling on the property in question." *Id.*

<sup>41</sup> *Id.* at 24, 243 A.2d at 234-35.

<sup>42</sup> *Id.*, 243 A.2d at 235.

Court emphasized that if both the positive and negative criteria<sup>43</sup> under the statute were satisfied, a hardship variance should not be denied simply because an adjoining property owner refused to sell additional land to the plaintiff.<sup>44</sup> The court stated, however, that in cases where the negative criteria have not been satisfied, the board should consider whether the principal property owner was able to purchase adjacent property to reduce the nonconformity.<sup>45</sup> Thus, the court concluded that a board may condition the granting of a variance upon the acquisition of adjoining property.<sup>46</sup> Furthermore, the court indicated that in determining hardship, the board may also consider an adjoining property owner's offer to purchase the property.<sup>47</sup>

Approximately one month later, in *Gougeon v. Board of Adjustment*,<sup>48</sup> the New Jersey Supreme Court further refined the parameters set forth in *Harrington Glen*. In *Gougeon*, the plaintiff sought a variance to construct a house on an undersized, vacant lot.<sup>49</sup> Finding no hardship, the board rejected the plaintiff's application for a variance.<sup>50</sup> In arriving at this decision, the board found persuasive the adjoining property owner's offer to purchase the plaintiff's property.<sup>51</sup> The trial court reversed the denial of the variance and the appellate division affirmed.<sup>52</sup>

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<sup>43</sup> See *supra* note 5 and accompanying text.

<sup>44</sup> See *Harrington Glen*, 52 N.J. at 29-30, 243 A.2d at 237-38.

<sup>45</sup> *Id.* at 30, 243 A.2d at 237-38. If the principal lot is brought into conformity by the acquisition of additional land, the need for a variance will be eliminated. *Id.* Alternatively, purchasing additional land may improve the status of the principal lot, thereby satisfying the statute's criteria. *Id.*

<sup>46</sup> *Id.*, 243 A.2d at 238.

<sup>47</sup> *Id.* at 31, 243 A.2d at 238. If the principal property owner's lot could be sold for a fair price, then no hardship would result. See *id.*

<sup>48</sup> 52 N.J. 212, 245 A.2d 7 (1968).

<sup>49</sup> *Id.* at 217, 245 A.2d at 9. The plaintiff's 30 foot by 110 foot lot did not meet the lot area requirement of 5,000 square feet. *Id.* at 216-17, 245 A.2d at 8-9. The plaintiff's lot was irreplaceable because it was the last available lot on the bay. *Id.* at 220, 245 A.2d at 11.

<sup>50</sup> *Id.* at 219, 245 A.2d at 10. The board gave the following four reasons in support of its findings:

1. Aesthetic beauty and intent of the Zoning Ordinance would be impaired.
2. The neighboring building . . . would be only 9.14 feet from proposed building.
3. Fire and safety hazard.
4. Construction on this lot would definitely be detrimental, since the Ordinance was adopted to prevent overcrowding.

*Id.* The court pointed out that with the exception of (2), the statements were conclusory in nature and therefore inadequate. *Id.*

<sup>51</sup> See *id.* at 223, 245 A.2d at 12.

<sup>52</sup> *Id.* at 216, 245 A.2d at 8.

On appeal, the New Jersey Supreme Court held that a variance may be denied if a binding offer to buy the principal property for fair value would alleviate the hardship.<sup>53</sup> Thus, the court reasoned that if a plaintiff refuses to accept a fair offer, the board may find that the plaintiff is not suffering undue hardship.<sup>54</sup> Conversely, the court stated that if the principal property owner was willing to sell at a fair price and the adjoining property owner refused to purchase the principal lot, undue hardship would exist and a variance could be granted.<sup>55</sup> Finally, the court remanded the case, instructing the board to elaborate on its factual findings.<sup>56</sup>

On remand, the board again denied the plaintiff a variance due to the plaintiff's rejection of an adjoining property owner's fair and reasonable offer to buy the principal property.<sup>57</sup> Pursuant to the New Jersey Supreme Court's reservation of jurisdiction, the plaintiff sought a review of the board's decision in the supreme court.<sup>58</sup> The court clarified its previous ruling by stating that it did not intend that the mere existence of a fair market value offer would, by itself, compel the denial of a variance.<sup>59</sup> Thus, the court concluded that the offer was simply a factor to be considered, and that notwithstanding the offer, the board could still grant the variance.<sup>60</sup>

The New Jersey Supreme Court further examined the relationship between a fair offer to purchase the principal property and one of the criteria of undue hardship in *Chirichello v. Zoning Board of Adjustment*.<sup>61</sup> In *Chirichello*, as in the previous cases, the board denied the plaintiff a variance to construct a house on an undersized lot in a residential zone.<sup>62</sup> The board found that the plaintiff received a fair and reasonable offer for his property, and

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<sup>53</sup> See *id.* at 224, 245 A.2d at 13.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 219, 226, 245 A.2d at 10, 14.

<sup>57</sup> *Gougeon v. Board of Adjustment*, 54 N.J. 138, 141, 253 A.2d 806, 808 (1969). The board found that a fair market value offer "would remove any claim of undue or exceptional hardship," even if the statutory criteria were met. *Id.*

<sup>58</sup> *Id.* at 142, 253 A.2d at 808.

<sup>59</sup> *Id.* at 148-49, 253 A.2d at 812-13.

<sup>60</sup> *Id.* at 149, 253 A.2d at 813.

<sup>61</sup> 78 N.J. 544, 397 A.2d 646 (1979).

<sup>62</sup> *Id.* at 548, 397 A.2d at 648. The zoning ordinance required a minimum width of 75 feet and a minimum lot acreage of 9,000 square feet. *Id.* at 549, 397 A.2d at 648. The plans for the plaintiff's house provided for a frontage of 53.6 feet and a total area of 6,400 square feet. *Id.*

therefore, determined that undue hardship did not exist.<sup>63</sup> Both the trial and appellate courts affirmed the board's denial of the variance and the plaintiff appealed.<sup>64</sup>

Applying the conditional variance doctrine, the New Jersey Supreme Court held that a board may consider an adjoining property owner's fair offer in determining whether the denial of a variance would result in undue hardship to the plaintiff.<sup>65</sup> Noting that the "salability" of property is "[a]nother yardstick by which undue hardship is to be measured," the court acknowledged that adjoining property owners have an increased interest in the development and sale of adjacent lots.<sup>66</sup> The court reasoned that the principal property owner would suffer no monetary loss once he received the fair value of the land.<sup>67</sup> Hence, the court stated that if the principal property owner refused to sell the land, he would have no reason to complain.<sup>68</sup> Therefore, the court ruled that the board must balance the interests of the principal property owner with those of the adjoining property owner.<sup>69</sup> Finally, the court concluded that the adjoining landowner's offer was not fair, and remanded the matter for further proceedings in order to develop a more adequate record.<sup>70</sup>

In a landmark concurring opinion, Justice Pashman considered the inequities that could arise if the fairness of an offer were determined without assuming that a variance had already been secured.<sup>71</sup> The justice expressed his view that the existence of a variance must be assumed before the fairness of an offer can be determined.<sup>72</sup> Otherwise, the justice noted, a landowner would rarely satisfy the hardship criteria because the land's value without a variance would be minimal and the adjoining landowner

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<sup>63</sup> *Id.* at 550, 397 A.2d at 649. The plaintiff refused an offer of \$5,000, because he believed that the land was more valuable. *Id.* at 555, 397 A.2d at 651. The court noted that the record lacked sufficient evidence to determine the true value of the property. *Id.*

<sup>64</sup> *Id.* at 551, 397 A.2d at 649.

<sup>65</sup> *See id.* at 555, 397 A.2d at 651.

<sup>66</sup> *Id.* Adjoining property owner's interests include maintenance of the zoning plan and aesthetic pleasure. *Id.* at 555-56, 397 A.2d at 651.

<sup>67</sup> *Id.* at 556, 397 A.2d at 651.

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* at 561, 397 A.2d at 654.

<sup>70</sup> *Id.* at 551, 561, 397 A.2d at 649, 654-55.

<sup>71</sup> *Id.* at 562, 397 A.2d at 655 (Pashman, J., concurring).

<sup>72</sup> *Id.* The court adopted and maintained this view in later cases. *See, e.g.,* Davis Enters. v. Karpf, 105 N.J. 476, 523 A.2d 137 (1987); Nash v. Board of Adjustment, 96 N.J. 97, 474 A.2d 241 (1984); Commons v. Westwood Zoning Bd. of Adjustment, 81 N.J. 597, 410 A.2d 1138 (1980).

would then have the opportunity to buy at a fair, albeit low price.<sup>73</sup>

One year later, in *Commons v. Westwood Zoning Board of Adjustment*,<sup>74</sup> the court adopted Justice Pashman's concurrence in *Chirichello*. In *Commons*, the court once again reviewed a board's denial of a variance to construct a residence on a vacant, undersized lot.<sup>75</sup> The board found no evidence of hardship, even though an adjoining property owner's offer was far below the plaintiff's asking price.<sup>76</sup> Both the trial and appellate courts affirmed the board's denial of the variance.<sup>77</sup>

Applying Justice Pashman's method of valuation to the undersized lot, the New Jersey Supreme Court noted that some evidence of hardship existed.<sup>78</sup> Thus, the court, in embracing notions of fairness, ruled that the proper method for determining fair market value is to assume that a variance has already been granted.<sup>79</sup> Expanding on its earlier holdings, the court reiterated that a principal property owner's attempts to purchase additional land, his efforts to sell the lot to an adjoining property owner, and the fairness and reasonableness of the offer are all relevant factors in determining hardship.<sup>80</sup> The court further examined the possibility of zoning the property into inutility and determined that conditioning a variance upon the sale of property to an adjoining landowner at its fair market value is the preferred solution.<sup>81</sup> Finally, the court remanded the case to the board for

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<sup>73</sup> See *Chirichello*, 78 N.J. at 562-63, 397 A.2d at 655 (Pashman, J., concurring).

<sup>74</sup> 81 N.J. 597, 410 A.2d 1138 (1980).

<sup>75</sup> *Id.* at 602, 410 A.2d at 1141. The zoning ordinance required a minimum area of 7,500 square feet and a minimum frontage of 75 feet. *Id.* The lot in question, however, had a total area of only 5,190 square feet and a frontage of only 30 feet. *Id.*

<sup>76</sup> See *id.* at 603-04, 410 A.2d at 1141-42. The plaintiff sought \$7,500 for the lot, while the adjoining property owner offered only \$1,600, the property's assessed value. *Id.* at 603, 410 A.2d at 1141-42. The board denied the variance, finding "that the applicant failed to demonstrate any evidence to establish hardship and that the granting of the variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance of the Borough of Westwood." *Id.* at 604, 410 A.2d at 1142.

<sup>77</sup> *Id.* The trial court affirmed, stating that granting the variance "would be detrimental to the entire area wherein the property in question is situated." *Id.* The appellate court affirmed, holding that the board's decision was not arbitrary. *Id.*

<sup>78</sup> *Id.* at 608-11, 410 A.2d at 1144-45.

<sup>79</sup> *Id.* at 608, 410 A.2d at 1144 (citing *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 562, 397 A.2d 646, 655 (1979) (Pashman, J., concurring); *Gougeon v. Board of Adjustment*, 52 N.J. 212, 224, 245 A.2d 7, 13 (1968)).

<sup>80</sup> *Id.* at 606, 410 A.2d at 1143 (citing *Gougeon v. Board of Adjustment*, 52 N.J. 212, 224, 245 A.2d 7, 13 (1968)).

<sup>81</sup> See *id.* at 607, 410 A.2d at 1143. If the property were zoned into inutility, "all

reconsideration.<sup>82</sup>

More recently, the court eliminated any uncertainty concerning the proper standard of valuation of an adjoining landowner's offer in *Nash v. Board of Adjustment*.<sup>83</sup> In *Nash*, after acquiring a conditional variance, the principal property owner rejected an adjoining landowner's offer to purchase the undersized lot.<sup>84</sup> The amount of the offer was based on the property's worth without the variance.<sup>85</sup> The board rejected the adjoining landowner's argument that a fair offer had been made and concluded that a reasonable offer must reflect the value of the lot *with* the variance.<sup>86</sup> The trial court affirmed the board's grant of the variance, but ruled that the lot's value should not be "based on the property's highest and best use," but only "on a fair and reasonable use."<sup>87</sup> The appellate court also affirmed the grant of the variance, but reversed the trial court's determination of the property's value, holding that the value of the property in question must be based on its use assuming that the variance had been granted.<sup>88</sup> Agreeing with the board's method of valuation, the New Jersey Supreme Court affirmed.<sup>89</sup>

Justice Garibaldi, writing for the court, reviewed the procedures necessary to obtain a hardship variance.<sup>90</sup> First, the principal property owner must meet both the positive and negative

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the taxpayers in the municipality [would] share the economic burden of achieving the intent and purpose of the zoning scheme," because under the exercise of eminent domain, compensation must be paid to the property owner. *Id.* (quoting *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 33, 243 A.2d 233, 239 (1968)). Conversely, if the variance is conditioned upon the adjoining property owner's fair offer to purchase the principal lot, the adjoining property owner, who is benefitted by having the land remain undeveloped, may bear the cost. *Id.* This, the court believed, was a more equitable solution. *See id.*

<sup>82</sup> *Id.* at 611, 410 A.2d at 1146.

<sup>83</sup> 96 N.J. 97, 474 A.2d 241 (1984).

<sup>84</sup> *Id.* at 101-04, 474 A.2d at 243-44. The defendant offered the property for \$34,600, but only received a counter-offer of \$17,250 and then a final offer of \$22,000. *Id.* at 104, 474 A.2d at 244. The board found that the property was best suited for a single-family residence. *Id.* at 105, 474 A.2d at 245.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 103, 474 A.2d at 244 (emphasis added). The applicant's expert testified before the board that without a variance the lot would be worth \$17,000 and that with a variance, the property was worth between \$31,000 and \$34,000. *Id.* at 105, 474 A.2d at 245.

<sup>87</sup> *Id.* at 103, 474 A.2d at 244. The trial court determined that no undue hardship existed because the principal property owner had received such an offer. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 110, 474 A.2d at 248.

<sup>90</sup> *See id.* at 106, 474 A.2d at 245.

criteria as set forth in the statute.<sup>91</sup> Next, the justice stated that it is within the discretion of the board or the court to determine whether the variance should be conditioned upon an adjoining landowner's offer to purchase the principal property at a fair market value.<sup>92</sup> If the property owner rejects a fair offer, the court may determine that the hardship has been eliminated, thereby rendering the property ineligible for the requested relief.<sup>93</sup> Thus, the majority noted that a conditional variance is strictly for the benefit of the adjoining property owner.<sup>94</sup> Finally, the court held that the "proper standard of valuation in deciding the fair price to be offered to an owner to avoid hardship . . . is the fair market value of the property assuming that all necessary variances have been granted."<sup>95</sup>

Prior to the decision of *Davis Enterprises v. Karpf*,<sup>96</sup> the conditional variance doctrine had been applied solely to vacant, undersized property.<sup>97</sup> In *Davis*, the New Jersey Supreme Court for the first time applied the doctrine to developed property.<sup>98</sup> In so doing, the court ruled that an adjoining property owner's offer to purchase the principal property owner's developed land would not necessarily compel the denial of a hardship variance.<sup>99</sup>

Writing for the majority, Justice Pollock restated the long-recognized principle that without the relief of a hardship variance, property may be zoned into idleness.<sup>100</sup> To avoid this problem, the court stated that a board has the discretion to im-

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<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 109, 474 A.2d at 247. The court noted that "[t]he conditional variance is intended to give adjoining property owners the opportunity to prevent the granting of a variance by paying the owner of the property that property's fair and reasonable market value." *Id.*

<sup>95</sup> *Id.* at 107, 474 A.2d at 246. The fair market value test, as enunciated in *Nash*, has been criticized as creating a windfall for the owner of the undersized property. *See Rose, Who Should Benefit When Land Value is Increased by Governmental Action? The Case of the Conditional Variance*, 14 REAL EST. L. J. 27 (1985).

<sup>96</sup> 105 N.J. 476, 523 A.2d 137 (1987).

<sup>97</sup> *See, e.g., Nash v. Board of Adjustment*, 96 N.J. 97, 474 A.2d 241 (1984); *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 410 A.2d 1138 (1980); *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 397 A.2d 646 (1979); *Gougeon v. Board of Adjustment*, 52 N.J. 212, 245 A.2d 7 (1968); *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 243 A.2d 233 (1968).

<sup>98</sup> *See Davis*, 105 N.J. at 484, 523 A.2d at 141.

<sup>99</sup> *See id.* at 487, 523 A.2d at 142.

<sup>100</sup> *Id.* at 481, 523 A.2d at 139 (citing *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 607, 410 A.2d 1138, 1143 (1980)).

pose reasonable conditions upon the granting of a variance.<sup>101</sup> In so doing, the court stated that the zoning board must balance the interests of the principal landowner, the adjacent property owners and the community.<sup>102</sup> Thus, the court concluded that conditioning a variance upon an adjacent owner's offer serves both individual and community interests.<sup>103</sup>

Justice Pollock explained that before the zoning board may consider an adjoining property owner's offer, the applicant must first prove that he is entitled to the variance.<sup>104</sup> Hence, an adjoining landowner's offer to purchase the property is pertinent, but not dispositive in deciding the hardship issue.<sup>105</sup> Furthermore, the court postulated that once the applicant has proven that he is entitled to the variance, the board may then recognize an adjoining property owner's fair offer to purchase the property by imposing a condition subsequent on the grant of the variance.<sup>106</sup> The court noted, however, that if an applicant rejects a fair offer, the board may find that his hardship has been eliminated and the variance may then be denied.<sup>107</sup>

Recognizing that a property owner has the right to use his land, the court conceded that he should not be required to sell his property simply because he has received a binding offer.<sup>108</sup>

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<sup>101</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 105, 474 A.2d 241, 245 (1984); 6 P. ROHAN, *supra* note 8, § 43.03 (1)). For example, the board may impose a condition upon the grant of a variance affording an adjoining property owner the chance to purchase the subject property at its fair market value. *Id.*

<sup>102</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 105, 474 A.2d 241, 245 (1984)). More specifically, it has been noted that a board may "grant a variance alleviating the hardship . . . while, at the same time, protecting the public from the harm that might result from activity allowed by the variance." 6 P. ROHAN, *supra* note 8, § 43.03(1).

<sup>103</sup> See *Davis*, 105 N.J. at 482, 523 A.2d at 140. The justice noted that, "[c]onditioning the grant of a variance on an adjacent owner's offer to purchase prevents the strict application of an ordinance from zoning property into inutility, while avoiding the possible intrusion of substandard lots or structures into a neighborhood." *Id.* (citing *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 556, 397 A.2d 646, 652 (1979)).

<sup>104</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 109, 474 A.2d 241, 247 (1984)).

<sup>105</sup> *Id.* (citing *Gougeon v. Board of Adjustment*, 54 N.J. 138, 148-49, 253 A.2d 806, 812 (1969)).

<sup>106</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 102, 109, 474 A.2d 241, 245, 247 (1984)).

<sup>107</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 106, 474 A.2d 241, 245 (1984); *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 555-56, 397 A.2d 646, 651 (1979)).

<sup>108</sup> *Id.* at 483, 523 A.2d at 140 (quoting 3 R. ANDERSON, *AMERICAN LAW OF ZONING* § 18.54 (2d ed. 1977)).

In support of this view, the court noted that courts in various jurisdictions have granted variances despite the fact that a landowner received a fair market value offer from an adjoining property owner.<sup>109</sup> Consequently, the court determined that a fair market value offer to purchase the property is not enough to warrant the denial of a hardship variance.<sup>110</sup> Indeed, the court posited that such an offer is merely a factor for the board to consider.<sup>111</sup> Concomitant with its prior decisions, the court reiterated that an adjoining property owner's offer to purchase the principal property may authorize, but does not necessarily require, the denial of a variance.<sup>112</sup> Thus, the court concluded that notwithstanding an adjoining property owner's offer to purchase the principal lot, a planning board may grant a variance.<sup>113</sup>

Finding that a conditional variance subordinates a property owner's rights "to use his or her property to another's desire to purchase it," the court characterized the conditional variance as "strong medicine."<sup>114</sup> Thus, the court noted that its prior decisions have properly limited the conditional variance doctrine to cases involving vacant, residential property that would be useless without a variance.<sup>115</sup> In such cases, the court determined that granting a conditional variance is preferable to zoning the property into idleness, a result tantamount to an unconstitutional taking of a person's property.<sup>116</sup>

The court noted, however, that the conditional variance doc-

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<sup>109</sup> *Id.* (citing *Marchi v. Town of Scarborough*, 511 A.2d 1071, 1073 (Me. 1986); *Kent County Land Co. v. Zoning Bd. of Review*, 100 R.I. 418, 216 A.2d 511 (1966); *Macchia v. Board of Appeals*, 7 Misc. 2d 763, 764, 164 N.Y.S.2d 463, 465 (N.Y. Sup. Ct. 1957)).

<sup>110</sup> *Id.* (citing *Gougeon v. Board of Adjustment*, 52 N.J. 212, 224, 245 A.2d 7, 13 (1968)).

<sup>111</sup> *Id.* Justice Pollock noted that in previous decisions involving conditional variances, fair market value offers by adjacent landowners were merely one factor in determining hardship. *Id.* at 483-84, 523 A.2d at 141.

<sup>112</sup> *Id.* at 483, 523 A.2d at 140-41 (citing *Commons v. Westwood Zoning Bd. of Adjustment*, 81 N.J. 597, 410 A.2d 1138 (1980); *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 397 A.2d 646 (1979); *Gougeon v. Board of Adjustment*, 52 N.J. 212, 245 A.2d 7 (1968); *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 243 A.2d 233 (1968)).

<sup>113</sup> *Davis*, 105 N.J. at 484, 523 A.2d at 141 (citing *Gougeon v. Board of Adjustment*, 54 N.J. 138, 253 A.2d 806 (1969)).

<sup>114</sup> *Id.* (citing *Nash v. Board of Adjustment*, 96 N.J. 97, 109, 474 A.2d 241, 247 (1984)).

<sup>115</sup> *Id.* See also 6 P. ROHAN, *supra* note 8, § 43.03(1) (Without the conditional variance power, a board "might be forced, at times, to deny a variance and thus perpetrate an owner's plight.").

<sup>116</sup> *Davis*, 105 N.J. at 484, 523 A.2d at 141.

trine had never been applied to a developed, commercial lot.<sup>117</sup> Furthermore, the court stated that it had never forced an owner of improved land to sell to an adjacent property owner when the owner merely sought to build an addition to an already existing structure.<sup>118</sup> The court also explained that compelling a homeowner to sell his property to a neighbor who would retain the house, does not serve any suitable land use purpose.<sup>119</sup> Under such circumstances, the court declared that a conditional variance is usually unwarranted.<sup>120</sup>

In restating the proper standard for review of a zoning board's decision, the court noted that it is the judiciary's function to determine whether a board "reasonably" reached its decision.<sup>121</sup> Finding that the board's decision was not "arbitrary, capricious or unreasonable," the court preserved the validity of the board's decision.<sup>122</sup> Consequently, the court decided that it need not address the issue of "whether the [b]oard erred in considering the adjoining owner's offer to sell."<sup>123</sup>

The court also addressed the question concerning whether all of the requested variances were actually needed.<sup>124</sup> Although the record did not disclose the status of the property before the genesis of the zoning law, the court stated that any pre-existing structure was expressly afforded statutory protection and would not necessitate a variance.<sup>125</sup> The court, however, declined to adjudicate this matter on the grounds that no variances were required.<sup>126</sup>

In his concurring opinion, Justice Stein expressed the view that the planning board should not have considered the adjoin-

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 485, 523 A.2d at 141. One of the purposes of zoning is to encourage the development of property in a comprehensive manner. See 1 A. RATHKOPF & D. RATHKOPF, *THE LAW AND ZONING AND PLANNING* § 1.03 (4th ed. 1987).

<sup>120</sup> *Davis*, 105 N.J. at 484, 523 A.2d at 141.

<sup>121</sup> *Id.* at 485, 523 A.2d at 141 (citing *Kramer v. Board of Adjustment*, 45 N.J. 268, 285, 212 A.2d 153, 162 (1965)).

<sup>122</sup> *Id.* at 485, 523 A.2d at 141-42. The court noted that a board's decision should be "presumed valid and should not be set aside unless it is arbitrary, capricious, or unreasonable." *Id.*, 523 A.2d at 141. Thus, Justice Pollock concluded that the trial and appellate courts erred in their review of the board's decision. See *id.*, 523 A.2d at 141-42.

<sup>123</sup> *Id.* at 487, 523 A.2d at 142.

<sup>124</sup> *Id.* at 486, 523 A.2d at 142.

<sup>125</sup> *Id.* If the house were built before the zoning ordinance was in effect, the dwelling would be permitted as a non-conforming structure, and therefore, would not require a variance. *Id.* See N.J. STAT. ANN. § 40:55D-68 (West Supp. 1988).

<sup>126</sup> *Davis*, 105 N.J. at 486, 523 A.2d at 142.

ing property owner's offer.<sup>127</sup> According to the justice, this evidence should not be presented before the planning board in cases involving developed property.<sup>128</sup> Recognizing that the conditional variance doctrine had traditionally been restricted to vacant property, Justice Stein stated that offers to purchase should only be considered where the hardship precludes any and all use of the property.<sup>129</sup> In such cases, a fair offer for the property is relevant to the applicant's claim that unless a variance is granted, the property will essentially be confiscated by the municipality.<sup>130</sup> Accordingly, Justice Stein concluded that conditional variances should be limited to property that would be useless without a variance.<sup>131</sup>

In support of his view that the conditional variance was misapplied in this case, Justice Stein noted that the structure, built prior to 1939, constituted a "nonconforming" structure.<sup>132</sup> As such, the justice posited that the structure should have been afforded statutory protection.<sup>133</sup> Thus, Justice Stein concluded that the municipality erred in requiring the Karpfs to obtain the bulk variances.<sup>134</sup>

Despite the *Davis* court's finding that an adjacent property owner's offer to purchase property does not require the denial of a hardship variance, the decision is not without shortcomings. Most notably, the majority leaves unresolved the question of whether evidence of an adjoining property owner's offer to purchase property is admissible before the planning board. The concurring opinion does, however, address this issue and states that such evidence should not be presented where the affected property is a developed, commercial lot.<sup>135</sup>

The concurrence correctly recognizes that the prior cases involved vacant, undersized lots in residential zones, whereas *Davis* involved developed property in a commercial zone. Conversely,

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<sup>127</sup> *Id.* at 498, 523 A.2d at 148 (Stein, J., concurring).

<sup>128</sup> *See id.* at 488, 523 A.2d at 143 (Stein, J., concurring).

<sup>129</sup> *See id.* at 494, 523 A.2d at 146 (Stein, J., concurring). Such an offer is relevant only when the property will be zoned into inutility without the variance. *Id.*

<sup>130</sup> *Id.* (citing *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 29, 243 A.2d 233, 237 (1968)). Justice Stein stated that "[a]bsent a variance claim based on inutility, evidence of offers to purchase the affected property should be excluded since they are irrelevant to the statutory criteria on which the municipal board is required to base its decision." *Id.*

<sup>131</sup> *Id.* at 488, 523 A.2d at 143 (Stein, J., concurring).

<sup>132</sup> *Id.* at 495-96, 523 A.2d at 147 (Stein, J., concurring).

<sup>133</sup> *Id.* at 496-97, 523 A.2d at 147-48 (Stein, J., concurring).

<sup>134</sup> *Id.* at 496, 523 A.2d at 147 (Stein, J., concurring).

<sup>135</sup> *Id.* at 488, 523 A.2d at 143 (Stein, J., concurring).

the majority opinion, by not addressing the issue of relevance of an adjoining landowner's offer, fails to distinguish these cases. Offers to purchase should not be considered in all cases.<sup>136</sup> Such offers should be admissible only where the property in question is a vacant lot in a residential zone with no other uses.<sup>137</sup> Moreover, offers to purchase are pertinent only where the hardship precludes any and all use of the property.<sup>138</sup> Under these circumstances, the court is providing an alternative to confiscation.<sup>139</sup> The conditional variance, however, does not serve as an alternative to an unconstitutional taking when the property is developed and other uses are still available. Furthermore, by imposing a condition upon improved property, the planning board is not preserving any legitimate governmental interests.

In its prior decisions, the court has correctly restricted the conditional variance doctrine to cases involving vacant, under-sized lots in which the denial of a variance would render the affected property useless.<sup>140</sup> Unlike past cases, however, where the only other alternative to the conditional variance would be confiscation, the property in *Davis* could still be used for other purposes.<sup>141</sup> Therefore, the planning board should never have considered the offer in this case.<sup>142</sup>

Instead, the property owner should prove the positive and negative criteria as set forth in the statute, and the planning board should base its decision on that alone.<sup>143</sup> Property owners should be allowed to satisfy hardship requirements under the ordinance without having to introduce evidence of an adjoining

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<sup>136</sup> *Id.* at 494, 523 A.2d at 146 (Stein, J., concurring). Justice Stein reasoned that offers should only be considered in cases where they are "germane to the particular claim of hardship that is advanced to support the variance." *Id.*

<sup>137</sup> *See id.* In *Dallmeyer v. Lacey Township Bd. of Adjustment*, 219 N.J. Super. 134, 529 A.2d 1063 (Law Div. 1987), a case decided after *Davis*, the court recognized that an adjoining property owner's offer to purchase is relevant in cases involving vacant lots. *Id.* at 140, 529 A.2d at 1066. Additionally, the court noted that "[t]here are considerations involved in the developed nonconforming lot cases which are not implicated in the vacant nonconforming lot cases." *Id.* at 140 n.1, 529 A.2d at 1066 n.1. Because *Dallmeyer* involved a vacant lot, the court did not discuss the implications. *Id.*

<sup>138</sup> *Davis*, 105 N.J. at 494, 523 A.2d at 146 (Stein, J., concurring).

<sup>139</sup> *See id.* (citing *Harrington Glen, Inc. v. Municipal Bd. of Adjustment*, 52 N.J. 22, 29, 243 A.2d 233, 237 (1968)).

<sup>140</sup> *Id.* at 498, 523 A.2d at 148 (Stein, J., concurring).

<sup>141</sup> *Id.* at 497, 523 A.2d at 148 (Stein, J., concurring). A smaller office building with parking under the building would be an acceptable use. *Id.*

<sup>142</sup> *Id.* at 498, 523 A.2d at 148 (Stein, J., concurring).

<sup>143</sup> *See id.*

owner's offer to buy the property.<sup>144</sup> By considering an adjoining property owner's offer in developed land cases, the court is, in effect, forcing the owner to sell his property to eliminate the hardship. The *Davis* court stated that it would not require a homeowner to sell his property before granting a hardship variance.<sup>145</sup> Thus, it would be inconsistent for a court to give a planning board the authority to require a landowner to sell his commercial premises as a condition upon the granting of a variance.

Further, only one party, the adjoining property owner, is benefitted by the conditional variance doctrine.<sup>146</sup> As in *Davis*, animosity may exist between the parties, and the adjoining property owner may intentionally interfere with the property owner's variance application.<sup>147</sup> The adjoining property owner should not be allowed to reap the benefit of the conditional variance at the expense of the property owner.<sup>148</sup> In such cases, the property owner should not be required to accept another's offer to buy his property.

Finally, the planning board in *Davis* found that notwithstanding the offer, the landowner proved the necessary criteria for a hardship variance.<sup>149</sup> Thus, the majority chose not to consider the issue of whether evidence of an adjoining property owner's offer should be admitted.<sup>150</sup> Instead, the majority deferred to the planning board's findings and affirmed the board's decision, concluding that it was a reasonable one.<sup>151</sup> This neutral position will undoubtedly lead to inconsistent results and unnecessary confusion.<sup>152</sup> Therefore, the majority should have resolved the issue posed by the concurring opinion so that planning boards will be guided more adequately by proper evidentiary standards.

*Marlene F. Nisch*

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<sup>144</sup> See *id.* at 494, 523 A.2d at 146 (Stein, J., concurring).

<sup>145</sup> *Id.* at 484, 523 A.2d at 141.

<sup>146</sup> See *Nash v. Board of Adjustment*, 96 N.J. 97, 109, 474 A.2d 241, 247 (1984).

<sup>147</sup> See, e.g., *Davis*, 105 N.J. at 479, 523 A.2d at 138. ("The [b]oard proceedings are colored by animosity between *Davis* and Mrs. Schallenhammer, apparently because *Davis* tried to thwart her efforts to sell the property.")

<sup>148</sup> *Chirichello v. Zoning Bd. of Adjustment*, 78 N.J. 544, 562-63, 397 A.2d 646, 655 (1979) (Pashman, J., concurring).

<sup>149</sup> See *Davis*, 105 N.J. at 487, 523 A.2d at 142.

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*

<sup>152</sup> *Id.* at 498, 523 A.2d at 148 (Stein, J., concurring).