ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2012-005	:	**HEARING DATE:** April 4, 2012
APPLICATION OF:	:	**DECISION DATE:** April 4, 2012
Hugo & Kristie Mazzalupi	:	
	:	
	:	
PROPERTY:	:	
176 Hughes Road	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Mr. and Mrs. Hugo and Kristie Mazzalupi (hereinafter collectively referred to as the "Applicant"), filed an application requesting a special exception and variance to Section 165-212 of the Upper Merion Township Zoning Code (the "Code"). The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on April 4, 2012 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present, except Mr. Stephen Levine, as well as the Solicitor, Zoning Officer, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is Mr. and Mrs. Hugo and Kristie Mazzalupi, with a mailing address at 176 Hughes Road, King of Prussia, Upper Merion Township.
2. The legal owner of the subject property is Mr. and Mrs. Hugo and Kristie Mazzalupi.
3. The property is located at 176 Hughes Road, King of Prussia, Upper Merion Township.
4. The Applicant was represented by Eric Frey, Esquire of Dischell, Bartle and Dooley.

5. The subject property is located in the "R1A" zoning district.

6. The lot is approximately 59,721 square feet.

7. The subject property is a single family residence with an attached garage which has been improved and used as an apartment.

8. The Township issued the Applicant an enforcement notice on February 7, 2012, in which it advised the Applicant, *inter alia*, that their property is in violation of Section 165-212 of the Code because it being used as a two-family dwelling since it has an apartment located in the garage attached to the dwelling.

9. The Applicant timely appealed the February 7, 2012 enforcement notice.

10. In addition to appealing the enforcement notice, the Applicant requested a special exception and variance to Section 165-212 of the Code.

11. Specifically, the Applicant requested a special exception to permit a two-family dwelling on the subject property and a variance to comply with the minimum lot area requirement for R1A District, which is two (2) acres for a two-family dwelling.

12. There were two residents who expressed concern about the relief sought with regards to the subject property.

CONCLUSIONS OF LAW

13. In order to accomplish this request, the Applicant requires a variance to Section 165-212(C) of the Code. In accordance with Section 165-212(C) "[a] single family detached dwelling existing on the effective date of this chapter may be converted into and used as a two-family or multifamily dwelling when authorized as a special exception provided that… (C) Such dwelling shall be subject to the height, area, width and yard regulations effective in the district wherein such dwelling is situated, except that there shall be a lot

area of not less than the product of the minimum lot area prescribed in the district regulations and the number of families for the use of which such dwelling is to be converted."

14. The minimum lot area for the RIA District is "not less than one acre." See Section 165-24.

15. Thus, the subject property must have a minimum of two (2) acres for a two-family dwelling.

16. Here, the subject property is only 59,721 square feet.

17. The standard to determine whether to grant a dimensional variance as outlined by the Pennsylvania Supreme Court is that the Applicant must show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998); citing, Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997).

18. Although the language of Hertzberg is expansive, the current trend is to apply the relaxed standard for dimensional variances only to the consideration of whether unnecessary hardship results from unique physical characteristics or conditions of the land. The Friendship Preservation Group, Inc. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Cmwlth. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlth. 2001).

19. The reasons for granting a variance must be substantial, serious and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa.

Cmwlth. 1999); Sotereanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). Moreover, variances to zoning codes should be granted sparingly and only under exceptional circumstances; a variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Cmwlth. 1996).

20. In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10910.2, where relevant. The law established by the Pennsylvania courts further establishes these standards, stated in full herein. See, Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Cmwlth. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Cmwlth. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

    a. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

    b. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization

of a variance is therefore necessary to enable the reasonable use of the property.

c. That such unnecessary hardship has not been created by the Applicant.

d. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

e. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

21. Here, the Applicant is requesting permission use the subject property as a two-family dwelling. The subject property does not meet the lot area requirement for the R1A District. In order to accomplish this request, the Applicant must request a variance to Section 165-212(c) of the Code. Based upon the testimony of the Applicant, the Board found that the Applicant did not meet the aforementioned criteria to warrant granting of the variance because no unnecessary hardship results from the unique physical characteristics or conditions of the land. The only hardship that the Applicant suggested was a financial hardship. The law is clear that "absent evidence that property will be rendered valueless, financial hardship alone is not a sufficient basis for granting a variance." Society Created to Reduce Urban Blights (SCRUB) v. Zoning Bd of Adjustment, 713 A2d 135 (Pa.Cmwlth 1998). Accordingly, the Board finds that the

Applicant did not meet the burden of proving that a hardship exists to meet the requirements for a variance.

22. Even if the Applicant would have established a hardship to warrant the granting of a variance, the Applicant also requires a special exception to Section 165-212 of the Code.

23. In accordance with Section 165-212, "[a] single family detached dwelling existing on the effective date of this chapter may be converted into and used as a two-family or multifamily dwelling when authorized as a special exception provided that…(A) plans for the conversion of said dwelling shall be submitted to the Zoning Hearing Board; (B) Such plans shall provide adequate and suitable parking or storage space, at a safe distance from the public highway, for not less than one automobile per family; (C) Such dwelling shall be subject to the height, area, width and yard regulations effective in the district wherein such dwelling is situated, except that there shall be a lot area of not less than the product of the minimum lot area prescribed in the district regulations and the number of families for the use of which such dwelling is to be converted; (D) there shall be no external alteration of the building except as may be necessary for reasons of safety, and fire escapes and outside stairways shall, where practicable, be located to the rear of the building; and (E) the Zoning Hearing Board shall specify the maximum number of families permitted to occupy such dwelling and may prescribe such further conditions and restrictions with respect to the conversion of use of such dwelling and to the use of the lot as the Board may consider appropriate."

24. A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met. Appeal of Brickstone Realty Corp, 789 A.2d 333 (Pa. Cmwlth 2001). As such, a special exception is not an exception to the zoning

ordinance, but a use permitted conditionally, the application for which is to be granted or denied by the Zoning Hearing Board pursuant to express standards and criteria. Id.

25. An applicant for a special exception has the burden of proving that it has met the criteria for a special exception contained in the ordinance. Shamah v. Hellam Township Zoning Hearing Board, 167 Pa. Cmwlth. 610, 648 A.2d 1299 (1994). The applicant must prove not only that the proposed use is of a type permitted by special exception, but also that the proposed use complies with the other applicable requirements of the ordinance which expressly govern such a grant. Id. Once the applicant for a special exception shows compliance with the specific requirements of the ordinance, it is presumed that the use is consistent with the promotion of health, safety and general welfare. Brickstone, 789 A.2d at 340.

26. Pursuant to Section 165-250B(1) of the Upper Merion Zoning Code, the Board is required to consider the following criteria that is outlined in Section 165-250B of the Zoning Code.

(a) The Applicant shall establish, by credible evidence, that the special exception complies with the statement of community development objectives as stated in Article I of this Chapter and with the declaration of legislative intent that may appear at the beginning of the applicable district under which approval is sought.

(b) The Applicant shall establish, by credible evidence, compliance with all conditions on the special exception enumerated in the section which gives the Applicant the right to seek a special exception.

(c) The Applicant shall establish, by credible evidence, that the proposed special exception will not adversely affect neighboring land uses in any way and will not

impose upon its neighbors in any way but rather shall blend with them in a harmonious manner.

(d) The Applicant shall establish, by credible evidence, that the proposed special exception shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of the approval shall be accommodated in a safe and efficient manner, or improvements shall be made in order to effect the same. Similar responsibility shall be assumed with respect to other public service systems, including, but not limited to, police protection, fire protection, utilities, parks and recreation.

(e) The Applicant shall establish, by credible evidence, that the proposed special exception shall be in and of itself properly designed with regard to internal circulation, parking, buffering and all other elements of proper design.

(f) The Applicant shall provide the Board with sufficient plans, studies or other data to demonstrate compliance with all applicable regulations.

(g) The Board shall impose such conditions as are necessary to ensure compliance with the purpose and intent of this chapter, which conditions may include plantings and buffers, harmonious design of buildings and the elimination of noxious, offensive or hazardous elements.

27. Here, the Applicant is requesting permission to use the subject property as a two-family dwelling by using the attached garage as an apartment. Since the subject property does not meet the minimum lot area requirements for the RIA District, the Applicant failed to meet the requirements for a special exception pursuant to Section 165-212 of the Code.

Accordingly, the Board denied the Applicant's request for a special exception to Section 165-212.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a variance nor special exception to Section 165-212 to use the subject property a two-family dwelling. Accordingly, the Applicant's request for a variance and special exception is denied.

Decision Dated:

UPPER MERION TOWNSHIP
ZONING HEARING BOARD

Robert J. Montemayor - Chairman

Brad Murphy -- Vice Chairman

Lynne Z. Gold-Bikin - Secretary

William J. Clements

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Accordingly, the Board denied the Applicant's request for a special exception to Section 165-212.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a variance nor special exception to Section 165-212 to use the subject property a two-family dwelling. Accordingly, the Applicant's request for a variance and special exception is denied.

Decision Dated:

UPPER MERION TOWNSHIP
ZONING HEARING BOARD

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Robert J. Montemayor - Chairman

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Brad Murphy – Vice Chairman

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Lynne Z. Gold-Bikin - Secretary

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William J. Clements

NOTE TO APPLICANT:

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant has received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Upper Merion Township within one (1) year of the date of the approval or the decision granting approval.