



ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-03 : HEARING DATE: March 17, 2010
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APPLICATION OF: Richard Melikian : DECISION DATE: April 21, 2010
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: :
PROPERTY: 808 N. Henderson Road :
: :
Upper Merion Township :

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Richard Melikian, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-106 in order to construct an apartment on the second floor of the existing building. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on March 17, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except William C. Whitmore, Sr., were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. Whitmore.

FINDINGS OF FACT

1. The Applicant is Richard Melikian, 1 Victoria Circle, Collegeville, PA 19426.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 808 N. Henderson Road, King of Prussia, PA 19406 .
4. The Applicant was not represented by an attorney.
5. The property is zoned "CI " Commercial.

6. The subject parcel currently has a commercial building.
7. The owner of the parcel has recently lost some tenants freeing up some space in the building.
8. The owner of the building wants to take a portion of the building and convert it to a residential use so he can live inside the commercial building.
9. The Applicant's reason why he wants this use variance is to live closer to his work and to have his mother have a shorter drive to visit him.
10. The Applicant claims that the building is not marketable for commercial tenants at this time, however, the Applicant admitted that Allstate just signed a new five (5) year lease.
11. Another tenant referred to as the Spotted Frog, moved into the building two (2) months ago and signed a five (5) year lease.
12. There is no testimony regarding any unique physical characteristics of the parcel.
13. There is no hardship inherent in the land.
14. A residential use is not compatible with the other uses throughout the building.
15. The Applicant did not ask for the minimum relief necessary to reasonably use the property.
16. The property can be reasonably used as zoned.
17. There were no residents who testified in favor of the project.
18. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Richard Melikian, (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-106 in order to construct an apartment on the second floor of the existing building.

As a preliminary matter, the applicable standards for determining whether to grant a dimensional variance differ from those of a use variance. The standard 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).

In Hertzberg, the Supreme Court held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of a Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. If the Board determines that the relief is for a use variance, then the Board should use the traditional five-part test, which is set forth in both the Municipalities Planning Code and case law. If the requested relief is for a dimensional variance, then the standard to be applied will be different. Id. While the Court in Hertzberg did not specifically identify a single standard for a dimensional variance, it noted that the requirements for a dimensional variance were something less than that of a use variance. Id.

In its opinion, the Court went on to opine that some of the factors that a Zoning Hearing Board should look at to determine whether to grant a dimensional variance should include, where applicable:

- (1) The economic detriment to Applicant if the variance was denied;

- (2) The financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and,
- (3) The characteristics of the surrounding neighborhood. Id.

While these factors are not exhaustive, the Court in Hertzberg and subsequent cases have referred to them specifically as findings a Zoning Hearing Board should make in its determination of whether to grant or deny a dimensional variance.

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).

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).

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:

1. 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.
2. 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.
3. That such unnecessary hardship has not been created by the Applicant.
4. 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.

5. 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.

The Applicant currently owns a commercial building. The Applicant recently lost some tenants, which frees up some space in his building. The Applicant would like to take a portion of that space and convert it to a residence so the Applicant can live closer to his work. The Applicant also wanted to have a property closer to his mother's residence so she would not have to drive as far to visit him. The Applicant's proposal is a use variance and not a dimensional variance, therefore, the five-part criteria of the Municipalities Planning Code applies. The Applicant offered absolutely no testimony regarding any unique physical characteristics of the property. The Applicant introduced no testimony indicating any hardship inherent in the property other than the fact that it is difficult to obtain commercial tenants. Despite the fact that the Applicant testified that it is difficult to obtain commercial tenants, he was still able to have Allstate recently sign a new five (5) year lease and as late as two (2) months ago, he had Spotted Frog sign a five (5) year lease. The Applicant's proposal is not consistent with the other uses throughout the building. It is the burden of the Applicant to prove that there is a hardship inherent in the land and to satisfy the five-part criteria of the Municipalities Planning Code as outlined above. The Applicant failed to satisfy that burden of proof, therefore, the variance should be denied.

ORDER OF THE UPPER MERION TOWNSHIP

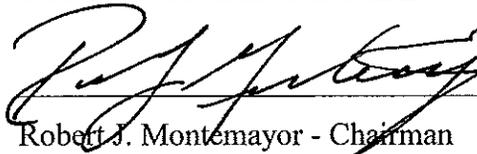
ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant a variance to Section 165-37.D in order to construct an addition that will encroach into the rear yard setback area.

This variance is conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on March 17, 2010.

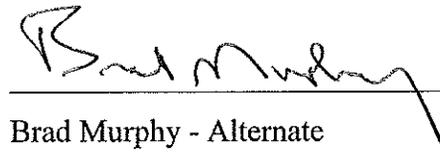
Decision Dated: April 21, 2010

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor - Chairman

Mark S. DePillis, Esq. – Vice Chairman



Brad Murphy - Alternate

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.