

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-06 : **HEARING DATE:** June 2, 2010
: :
APPLICATION OF: Saleem Hasan : :
: **DECISION DATE:** June 16, 2010
: :
PROPERTY: 690 Allendale Road : :
: :
Upper Merion Township : :

**OPINION AND ORDER OF THE UPPER MERION
TOWNSHIP ZONING HEARING BOARD**

The Applicant, Saleem Hasan, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-209.A(2)(d) to permit a professional office as an accessory use to the dwelling. In the alternative, the Applicant requests a variance from Section 165-31.A to permit a professional office as an accessory use to the dwelling. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on June 2, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, Zoning Officer, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is Saleem Hasan, 690 Allendale Road, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 690 Allendale Road, King of Prussia, PA 19406, Upper Merion Township.

4. The Applicant was represented by Alan W. Flenner, Esq., High Swartz, 40 E. Airy Street, Norristown, PA 19404.
5. The property is zoned "R2A" Residential.
6. The Applicant is proposing a business that develops and markets medical equipment hardware and software.
7. The Applicant will have five (5) employees at the subject property.
8. Sales will occur on-site, but there will be customers visiting the subject property.
9. The area comprising the business office will be approximately 1,400 sq. ft. in the basement of a single family detached dwelling.
10. The Applicant will be getting deliveries by UPS and Federal Express.
11. The Applicant will be adding impervious surface to accommodate the parking demands.
12. The Applicant previously received zoning relief to construct the house.
13. The Applicant is alleging that the proposed use is accessory as outlined in Section 165-209 of the code. An accessory use, as defined in Section 209, is permitted by special exception as long as the proposed accessory use is not deemed to be a business or personal service shop.
14. The Applicant introduced Exhibit "A-1", which is information on his business.
15. The Applicant's has five (5) full time employees that he characterized as follows:
 - A. Office Manager, who also does the phones
 - B. Sales and Marketing
 - C. Accounting
 - D. Computer Support
 - E. Computer Engineer

16. During the course of the testimony, the Applicant did agree that his use could be classified as a business office.
17. The Applicant indicated that if he did not receive approval, he would simply look somewhere else for his use.
18. Out of all five (5) employees, only one (1) employee actually designs software and he is located off-site.
19. The Applicant indicated that they are an engineering business, however, their only designer is located in Dallas.
20. The Applicant offered no testimony regarding whether the proposed use complies with the statement of community development objectives and the declaration of legislative intent for the applicable district.
21. The Applicant offered no credible testimony regarding the traffic that would be generated from the proposed use and how it would be handled in a safe and efficient manner.
22. The Applicant offered no credible testimony regarding internal circulation buffering or other elements of proper design.
23. The Applicant offered no testimony regarding the Applicant's compliance with all applicable regulations.
24. The Applicant did not satisfy the standards for all special exceptions that appear in Section 165-250(B)(1) of the code.
25. The Applicant offered no testimony regarding any unique physical features to the property that would prevent the property from being reasonably used as zoned.
26. The Applicant offered no testimony regarding any hardship inherent in the land.

27. The Applicant offered no testimony proving that the proposed use was the minimum relief necessary to reasonably use the property.
28. The Applicant created his own hardship, if a hardship exists.
29. Upper Merion Township has a significant amount of vacant office space that can be used by the Applicant.
30. There were no residents who testified against the project.
31. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Saleem Hasan, filed an application requesting a special exception under Section 165-209.A(2)(d) to permit a professional office as an accessory use to the dwelling. In the alternative, the Applicant requests a variance from Section 165-31.A to permit a professional office as an accessory use to the dwelling.

Special Exception

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. As a matter of law, an applicant has an absolute right to a special exception, *unless it is injurious to the public safety, health, and welfare of the community.* Manor Health Care v. Zoning Hearing Bd., 139 Pa. Commw. 206, 590 A.2d 65 (1991) (emphasis supplied).

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. At this point, the burden shifts to objectors to prove that the proposed use is not consistent with the health, safety and general welfare. Id.

In accordance with § 912.1 of the Municipalities Planning Code, 53 P.S. § 10912.1, the Zoning Hearing Board may attach reasonable safeguards and conditions on the grant of a special exception.

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.

Variance

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.

In order for the Applicant's use to be permitted as an accessory use by special exception, the Applicant must show that the proposed use is permitted by special exception under Section 165-209(A)(2)(d). Under Section 209(A)(2)(d), a special exception may be granted for a professional or engineering office, however, there is a specific prohibition in Section 165-209(B) that excludes a business from being considered an accessory use. At the hearing, the Applicant classified his use as a business, therefore, the proposed use is specifically prohibited by the code. When the Applicant tried to show that he was a professional office or an engineering office, it was determined that the employees and the functions that they perform, more closely resembled a business, rather than a professional office. The engineering that is performed is performed by an employee located in another city. The rest of the employees provide office management, sales, marketing, accounting and computer support. These are all functions of a business, rather than a professional or engineer's office. Although some of these functions may take place in a professional or engineer's office, it is not the main purpose of the office. In this case, the engineering that is taking place is done off-site, therefore, it can not be considered an engineering office, but rather a business office that supports engineering that is taking place elsewhere. Because the Applicant can not satisfy the burden of proof to show that his proposed use is permitted by special exception, this board has no recourse but to deny the application.

If, in the event that the Applicant were successful in proving that this use was permitted by Section 165-209(A)(2)(d), then the Applicant would have to go further to prove that the standards of Section 165-250(B)(1) have been met. The standards outlined above in Section

165-250(B)(1) are required to be proven before a special exception can be granted. The Applicant's use does not qualify for a special exception and even if it did, it does not meet the criteria necessary to grant a special exception.

With reference to a variance, the variance would be for a use variance and not a dimensional variance, therefore, the standards of the Municipalities Planning Code (MPC) would be applicable to the case at bar. The Applicant's testimony did not satisfy any of the five-part criteria under the MPC as outlined above. The Applicant introduced no testimony indicating any unique physical features of the property that prevent the property from being reasonably used as zoned. The Applicant introduced no testimony indicating any hardship inherent in the land. The Applicant created his own hardship by building a residential structure by a previously granted zoning decision. To whatever extent there would have been any hardship inherent in the land, theoretically it would have been satisfied by the previously granted relief. The Applicant introduced no testimony regarding whether the proposed use is the minimum relief necessary to reasonably use the property. The Applicant has the burden of proving all five (5) criteria of the Municipalities Planning Code before a use variance can be granted and in this case, the Applicant proved none of the criteria, therefore, the variance must be denied.

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 the requested special exception under Section 165-209(A)(2)(d). The Applicant also did not present sufficient testimony to grant the requested variance under Section 165-31(A). Therefore, all requested zoning relief including the special exception and variance outlined above are hereby denied.

Decision Dated: June 16, 2010

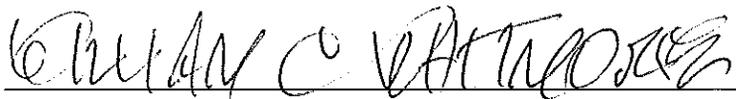
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor, Chairman



Mark S. DePillis, Esq. – Vice Chairman



William C. Whitmore, Sr. - Secretary

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.