

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

APPLICATION NO. 2009-37 : HEARING DATE: February 3, 2010  
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APPLICATION OF: Joseph Elliott : DECISION DATE: March 3, 2010  
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: :  
PROPERTY: 287 S. Gulph Road :  
: :  
Upper Merion Township :

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

The Applicant, Joseph Elliott, (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-35 in order to use the existing single family dwelling as a professional office. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on February 3, 2020 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except Mark S. DePillis, Esq., were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. DePillis.

**FINDINGS OF FACT**

1. The Applicant is Joseph Elliot, 295 S. Gulph Road, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 287 S. Gulp Road, King of Prussia, PA 19406.
4. The Applicant was represented by Robert J. Kerns, Esq., 298 Wissahickon Avenue, Upper Gwynedd, PA 19454.

5. The property is zoned "R-2 " Residential.
6. The Applicant is proposing to convert a residential structure to a professional office.
7. The Applicant spends very little time in the office because his employees generally go out to the clients place of business, therefore, there is very little traffic.
8. The Applicant introduced an ordinance and represented that the Township is contemplating passing the ordinance that would rezone the property to permit a professional office use.
9. The proposed ordinance was marked as Exhibit "A-1".
10. The Applicant introduced two (2) pictures and marked them as Exhibit "A-2" and Exhibit "A-3".
11. The Applicant introduced an aerial photograph and marked it as Exhibit "A-4".
12. The Applicant introduced two (2) sheets of pictures with eight (8) pictures on one sheet and four (4) pictures on the other sheet and marked them collectively as Exhibit "A-5".
13. The Applicant represented that the owner can comply with all of the requirements in the proposed ordinance that was admitted into evidence as Exhibit "A-1".
14. The Applicant agreed as a condition of approval that the Applicant must comply with all of the requirements in the proposed ordinance as a condition of approval regardless of whether the ordinance is ever passed by the Township.
15. There were no residents who testified in favor of the project.
16. There were no residents who testified against the project.

## DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Joseph Elliott, (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-35 in order to use the existing single family dwelling as a professional office.

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 is proposing to use residentially zoned property for a professional office. The Applicant testified that the property can not be rented as a residence, therefore, he is requesting a professional office. The Applicant testified that he is a financial adviser and his business is growing substantially, therefore, he needs to expand. The Applicant's proposal is for a use variance, therefore, the five-part criteria of the Municipalities Planning Code is applicable to the case at bar. Generally, the standard for granting a use variance is very difficult to satisfy, however, in this case the Applicant represented that the Township intends to pass a new zoning ordinance establishing a residential office district. The Applicant introduced the ordinance as Exhibit "A-1" and represented that the Township intends to pass the ordinance in its current format. The Applicant wanted to wait until the zoning amendment occurred, however, the Applicant's business is expanding so quickly that he can not wait, therefore, he asked for a variance in the interim. The Applicant agreed as a condition of approval to comply with all the terms of the proposed ordinance regardless of whether the Township passes the ordinance or whether they pass an ordinance with different terms. Since this matter appears to be a use variance that will only be in effect for a short period of time, the board finds that the Applicant presented sufficient testimony to satisfy the five-part criteria of the Municipalities Planning Code, therefore, the variance should be granted.

**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 165-35 in order to use the existing single family dwelling as a professional office.

This variance is conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on February 3, 2010.
2. The Applicant must comply with each and every term outlined in the proposed ordinance introduced into the record as Exhibit "A-1" and attached to the decision herein regardless of whether the Township adopts the ordinance or adopts the ordinance with different terms.

Decision Dated:        March 3, 2010

**UPPER MERION TOWNSHIP  
ZONING HEARING BOARD**

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Robert J. Montemayor - Chairman

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Brad Murphy - Alternate

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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.

A-1

EXHIBIT "A-1"

**Residential Office District**

**Section 1. Intent**

The primary purpose of the Residential Office District (ROD) is to create transitions from intensively used commercial and industrial areas to residential neighborhoods.

- A. Allow limited office and commercial uses as a transition between intensive commercial/industrial uses located on major roads and existing residential areas.
- B. Mitigate the impact of non-residential development on residential areas by requiring a residential character, limiting the scale of buildings, controlling the location of parking areas and requiring buffer landscaping.
- C. Control access and limit the impact of development on the township road network.
- D. All the conversion of properties from residential uses to office/commercial uses, provided the residential character of the neighborhood is not changes.
- E. Encourage the reuse of existing residential buildings.

**Section 2. Permitted Uses**

A lot may be uses for one or more of the following by-right uses:

- A. A single-family detached dwelling.
- B. Single-family semi-detached dwellings or duplexes.
- C. Municipal buildings
- D. Outdoor parks and open space.
- E. Agriculture

**Section 3. Conditional Uses**

A lot may be used for one of the following classes of uses provided a conditional use is received in accordance with the requirements of section 165-219.1 of the Upper Merion Code and all standards of the ROD are met:

- A. Class One conditional uses. On lots which meet the class one requirements, one of the following uses is permitted:
  - 1. Conversion of an existing residence into professional offices.
  - 2. Conversion of an existing residence into a professional office and one (1) apartment.
  - 3. Conversion of an existing residence into a bed and breakfast facility.
  - 4. Conversion of an existing residence into (2) apartments.

B. Class Two conditional uses: On lots which meet the class two requirements, one of the following uses is permitted as a conditional use.

1. Professional offices.
2. Funeral homes.
3. Bed and breakfast facilities.
4. Schools, day care centers, churches and other religious establishments, meetinghouses and post offices in accordance with Institutional Use standards of Article VI and the dimensional and conditional use standards of the ROD, whichever is more restrictive.
5. Offices and one (1) apartment.

#### Section 4. Dimensional Standards

Proposed uses shall meet the following dimensional requirements:

	Uses Permitted by Right	Class One Conditional Uses	Class Two Conditional Uses
Minimum Net Lot Size (square feet)	14,000	14,000	40,000
Minimum Lot Width (feet), measured at the street line of a public street	80	80	150
Setbacks (feet)			
Front yard	30	30	30
Side yard <sup>1</sup>	10	10	25
Rear yard	40	40	40
Abutting Residential Zoning District	NA	50	70
Maximum building height (feet)	35	35	35
Minimum setback for parking areas from abutting residential zoning district	NA	25	35
Minimum setback for parking areas from all other property lines	NA	5	5
Minimum setback between buildings on the same lot	NA	25	25
Maximum building footprint (square feet)	2,000	2,000	4,000
Building coverage	10%	15%	15%
Maximum impervious coverage, excluding common driveway area from the street to the first parking space or cross-driveway	25%	50%	40%

1- Single-family semi-detached dwellings may have a side yard of 0 feet along a common property wall.

**Note: Consider using R-2 standards for permitted uses: Lot Min: 10,00 sf, Width 70 ft, Front Yard 30 ft, Rear Yard 30 ft, Side yard 10 ft min/ 25 ft agg.**

## Section 5. Conditional Use Standards and Criteria

- A. All conditional uses shall be served by public sewer and water facilities.
- B. For class one conditional uses, the proposed use must preserve, utilize, and maintain any existing principal building, provided this building was originally built for residential purposes.
- C. For class one conditional uses, no new freestanding non-residential buildings shall be constructed on the property, and existing buildings shall be expanded by no more than fifty percent (50%) of the residential building floor area that existed at the time of passage of this Article. Building additional must be to the rear or side of the existing principal building.
- D. All new conditional uses buildings and additions must have a residential character, as demonstrated through elevations and other architectural drawings, and must include the following features;
  1. A pitched roof covering the building or addition with a pitch of at least six (6) vertical inches to every twelve (12) horizontal inches. Dormers or gables shall be used to break up the bulk of roofs.
  2. On all sides of buildings, residential building materials and colors that are similar to those found in compatible residences in the immediate area.
  3. A working front door that faces the street and serves as a primary entrance.
  4. Residentially scaled windows and doors, compatible in scale to those found in residences in the immediate area.
  5. A wall to window/door opening ration that is between 2 to 1 and 1 to 1.
- E. Driveway Access Controls
  1. No more than one (1) driveway access shall be permitted per street frontage.
  2. Along arterial or collector streets, all conditional uses shall be required to share access with an adjacent Residential Office District property wherever the conditional use has proposed driveway access to the arterial or collector street. When driveway access is available on an abutting property, the applicant shall use this access, as outlined in section 5.F.2.a below. If shared access can no be provided by an existing driveway on an abutting property, the applicant shall provide access in a way that maximizes the potential for shared access in the future, as outlined in section 5.F.2.b.
    - a. Shared Access via Existing Driveways
      - i. When the nearest edge of an existing driveway on an adjacent nonresidential property zoned Residential Office with frontage on the same arterial or collector street is within 50 feet of the applicant's tract, the applicant's tract shall utilize the driveway on the adjacent tract as a shared access, provided an easement granting access to the applicant's tract has been recorded.
      - ii. The shared access shall be the sole access to the site from the applicable arterial or collector street. Any existing driveways on the site to the applicable arterial or collector street must be eliminated.

- iii. Shared access shall not be required when all possible interconnections between the two abutting lots would cross twenty (20) linear feet or more of wetlands floodplains, and/or slopes of 15% or more.

b. Shared Access via New or Existing Driveway on the Property.

- i. When shared access cannot be provided via an existing driveway consistent with section 5.F.2.b, above, a maximum of one driveway intersection shall be permitted on the property per street.
- ii. The driveway shall be located on a side lot line bordering a property zoned Residential Office. In order to accommodate required site distances, or preserve environmental features, this may be set back from the side lot line no more than fifty (50) feet. Shared access shall not be required when all possible interconnections between the two abutting lots would cross twenty (20) linear feet or more of wetlands floodplains, and/or slopes of 15% or more.
- iii. Each residential use shall provide an access easement for this driveway guaranteeing access to all abutting lots zoned Residential Office. In addition, the access easement shall provide access from the closest adjacent property to the driveway. The easement between the driveway and the closest adjacent lot line shall be in a logical location for a connection to the adjacent lot, have a minimum width of thirty-five (35) feet, and shall be usually located between fifty (50) and one-hundred-thirty (130) feet from the street ultimate right-of-way line.
- iv. Existing driveways on the applicant's site not meeting the requirements in this section shall be eliminated.
- v. The location of the driveway intersection with the street and the easement connection to the closest adjacent lot shall be subject to approval by the Board of Supervisors based on the driveway's ability to minimize the need for future driveways, preserve existing historic buildings, and/or maximizing the distance from existing street and driveway intersections, including consideration of safe sight distances.
- vi. Parking lot entranceways taking access for existing or future shared driveways shall be set back from the street ultimate right-of-way line a minimum of fifty (50) feet. parking shall not be remitted along shared driveways between the street ultimate right-of-way line and the rear edge of the easement granting access to the abutting lot.

F. Each non-residential use shall provide access easements for its parking aisles and driveways guaranteeing access and use to all abutting lots within the Residential Office District, unless all possible interconnections would cross twenty (20) linear feet or more of wetlands floodplains, and/or slopes of 15% or more. Parking areas on abutting lots shall be directly connected by a driveway. The applicant shall either construct these interconnections during the initial land development or, if an interconnection is not currently feasible, escrow funds for future construction when the abutting lot develops as a conditional use.

G. Parking is not permitted in front yards or between buildings and streets.

H. No outdoor storage is permitted, and trash must be kept inside a principal building until collection.

I. All signs must meet the requirements of Article XXVII, Signs.

**Note: There are several portions of the sign code that reference specific districts. The standards for the CO District should apply. Also, we may wish to add other restrictions such as prohibiting back lit signs.**

J. All outdoor lighting must meet the requirements Article XXIII, General Provisions.

**Note: Code permits light pole to a max of 30 ft. Should this standard be lowered?**

K. All site landscaping shall meet the requirements of Section 145-24.1, Landscaping of the Subdivision and Land Development Code.