



ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-27	:	HEARING DATE: November 4, 2009 and November 18, 2009
	:	
APPLICATION OF: Liqinq Feng	:	
	:	DECISION DATE: January 20, 2009
	:	
PROPERTY: 394 W. DeKalb Pike	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Liqinq (Rose) Feng, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-209.A(2) in order to operate a therapeutic massage practice from her residence. In the alternative, the Applicant is requesting a variance from Section 165-35 for the same. The application was properly advertised, and public hearings were held before the Upper Merion Township Zoning Hearing Board on November 4, 2009 and November 18, 2009 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 Liqinq (Rose) Feng, 144 Ivy Lane, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 394 W. DeKalb Pike, King of Prussia, PA 19406, Upper Merion Township.

4. The Applicant was represented by Edward J. Hughes, Esq. and George J. Ozorowski, Esq., 1250 Germantown Pike, Suite 205, Plymouth Meeting, PA 19462.
5. Upper Merion Township was represented by Gregory P. DiPippo, Esq., 144 E. DeKalb Pike, Suite 300, King of Prussia, PA 19406.
6. The property is zoned "R-2" Residential.
7. The lot is approximately 14,000 sq. ft.
8. The first hearing scheduled for November 4, 2009 was continued and the beginning of the testimony was taken at the hearing scheduled for November 18, 2009.
9. The Applicant introduced an aerial photograph and marked it as Exhibit "A-1".
10. The Applicant introduced existing features of the site and marked it as Exhibit "A-2".
11. The Applicant introduced a deed and marked it as Exhibit "A-3".
12. The Applicant is from China and became a resident approximately six (6) years ago.
13. The Applicant bought the property in September of 2009.
14. The Applicant has a son that does not reside at the property.
15. The Applicant does not currently reside at the property, but intends to move into the house.
16. The Applicant introduced four (4) photos of the exterior of the property and marked them collectively as Exhibit "A-4".
17. The property was previously used for a psychic's office that was accessory to a residential use.
18. The Applicant introduced a floor plan and marked it as Exhibit "A-5".

19. The Applicant introduced four (4) photographs of the inside of the house and marked it as Exhibit "A-6".
20. The Applicant introduced a school transcript indicating that the Applicant is studying massage therapy and marked it as Exhibit "A-7".
21. The Applicant introduced an excerpt from the Applicant's web page and marked it as Exhibit "A-8".
22. At the time of the hearing, the Applicant proposed hours of operation from 9:00 am to 8:00 pm, Monday through Friday and Saturday from 10:00 am to 7:00 pm, as well as Sundays from 10:00 am to 7:00 pm. When the Applicant's attorney submitted a brief, the Applicant proposed different hours of operation from 10:00 am to 8:00 pm, Monday through Saturday, with no business on Sundays.
23. The Applicant has an assistant that will work at the subject property.
24. The Applicant introduced two (2) petitions and had them marked as Exhibit "A-9" and Exhibit "A-10".
25. The Applicant introduced a letter from a patient and marked it as Exhibit "A-11".
26. The Applicant introduced another letter from a patient and marked it as Exhibit "A-12".
27. The Applicant introduced a CPR exhibit and marked it as Exhibit "A-13".
28. The Applicant introduced a brochure from Cortiva Institute and marked it as Exhibit "A-14".
29. The Applicant marked the Common Pleas court decision in the DeMetro case as Exhibit "A-15" and the unreported Commonwealth Court decision as Exhibit "A-16".

30. The Applicant introduced a document containing some definitions and marked it as Exhibit "A-17".
31. The Applicant introduced a permit for another property and marked it as Exhibit "A-18".
32. The Applicant introduced a use and occupancy permit for another property and marked it as Exhibit "A-19".
33. The Applicant is proposing two (2) massage rooms for the subject property.
34. The Applicant is proposing to have one-half hour and one hour sessions.
35. The Applicant will have an average of three (3) to eight (8) customers per day.
36. The Applicant currently has a massage therapy business in the Township and lives at another location. The Applicant's plan is to move her business and her residence to the subject property.
37. The Applicant testified that 5% of her business is referred by physicians.
38. The living area of the house is approximately 970 sq. ft.
39. The Applicant was not a credible witness. The Applicant testified that she was getting referrals from physicians and chiropractors, yet when asked for the names of those doctors, she could not remember any of the names.
40. Carol Alasacki testified against the application.
41. Ms. Alasacki referenced the Applicant's use as a "highly personal service".
42. Ms. Alasacki further testified that she thinks the Applicant will eventually be selling retail products like many other uses of her nature.
43. The Applicant testified that she will not be performing any sexual services on the subject property, however, the board has found that the Applicant is not credible.

44. Brian Hankin testified against the project.
45. Howard DeHaven testified against the project.
46. Joseph Gentile, address unknown, testified that he is a friend of the Applicant.
47. The Applicant withdrew the Commonwealth Court decision as an exhibit because it is an unreported decision.
48. The use as described by the Applicant is a personal service shop.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Liqinq (Rose) Feng, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-209.A(2) in order to operate a therapeutic massage practice from her residence. In the alternative, the Applicant is requesting a variance from Section 165-35 for the same.

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.

The Applicant is requesting a special exception to permit a therapeutic massage use as an accessory use to a residential structure. In the alternative, the Applicant is asking for a variance. This board will consider the variance first. Quite simply, the Applicant did not introduce any evidence that would rise to the level necessary to grant a variance. The Applicant is requesting a use variance and not a dimensional variance, therefore, the standards of the Hertzberg case are not applicable to the case at bar. The five-part criteria of the Municipalities Planning Code is the

proper standard to evaluate the variance request. The Applicant offered no testimony regarding the uniqueness of the property that would prevent the property from being used as a residence and, in fact, the Applicant actually intends to use the property as a residence. The Applicant offered no testimony indicating how there is a hardship if the ordinance is strictly enforced. The property is zoned "Residential". It is intended to be used "Residential" and it has been used "Residential" in the past. There was no testimony to indicate why the property could not be used as zoned, therefore, the Applicant did not sufficiently satisfy the standards outlined in the Municipalities Planning Code and the variance must be denied.

The board will now consider the request for a special exception. This request is much more complicated than the request for a variance. As outlined above, the Applicant must first show that the proposed use falls within the criteria outlined in the code for the granting of a special exception. If the Applicant satisfies this burden, then the protestants must then show that the proposed use is injurious to the public safety, health and welfare of the community. To determine whether the proposed use is permitted by special exception under the code, one must first look at the specific language of the code. The code reads as follows:

Section 165-209A(2)(d) and (B). Accessory Uses.

A. Accessory uses authorized in this chapter shall include, but not by way of limitation, the following:

- (1) ...
- (2) Uses accessory to dwelling.

* * *

- (d) When authorized as a special exception by the Zoning Hearing Board, professional office or studio of a doctor, dentist, minister, teacher, artist, architect, landscape architect, musician, lawyer, engineer or practitioner of a similar character or rooms for home occupations, provided that such office, studio or rooms are located in a dwelling in which the practitioner resides, and provided further that no goods are publicly displayed on the premises.

B. Uses authorized in this chapter as accessory to a dwelling shall not be deemed to include a business or personal service shop. (Emphasis added).

The Applicant is arguing that the proposed use is “of a similar character” to the uses enumerated in the code such as doctor, dentist, etc. The Applicant is relying on the DeMetro case decided by Judge Drayer and Judge Branca in the Montgomery County Court of Common Pleas under Docket No. 02-10579. The Applicant is also relying on a subsequent Commonwealth Court opinion on the same case, however, it is an unreported opinion, so it is not being considered by this board. The Common Pleas court analogized the use of a psychic to the uses enumerated in the code and determined that the impact on the community from the psychic’s business was similar or less than the impact on the community from the enumerated uses, therefore, it was of the same character and it should be permitted by special exception. This case is distinguishable from the psychic case because a proposed massage use is substantially different in character than the psychic use. The code specifically prohibits a personal service shop. Although a psychic may not be considered a personal service, a therapeutic massage certainly would be considered a personal service. If a massage is not a personal service, then one has to question what would be considered a personal service.

The Code does not specifically define the term “personal service shop.” Consequently, the law is clear that “in interpreting provisions of a zoning ordinance, undefined terms must be given their plain, ordinary meaning.” Kissell v. Ferguson Township Zoning Hearing Board, 729 A.2d 194, 197 (Pa.Cmwlt. 1999). “Personal Services” is defined as “[e]stablishments primarily engaged in providing services involving the care of a person or his or her personal goods or apparel.” The Latest Illustrative Book of Development Definitions, Harvey S. Moskowitz and Carl G. Lindbloom (2004). Personal services usually included, among other things: beauty

shops, barbershops, shoe repair, funeral services,, steam baths, reducing salons and health clubs; and domestic services. Id. Furthermore, “massage” is defined as “pressing, squeezing, stretching or stimulating the fact, scalp, neck, limbs or other parts of the human body with or without cosmetic preparation, either by hand, or with a mechanical or electrical appliances. Id. To that extent, “massage is normally part of the services offered by physical therapists, beauty parlors, spas, gyms or similar establishments. As such, it normally falls into the category of retail services.” Id. The “retail service” category is a broad category that includes “personal services.” Id. Accordingly, by way of definition, it seems clear that massage therapy is in fact a “personal service.”

Further, the courts have agreed with this analysis and opined that “a massage is certainly a personal service and the use of a premises as a massage center is certainly a use of the same general character as the use of a premises as a [personal service shop, like] a barber shop or a beauty salon.” Hawkins v. ZHB of Township of Bristol, 463 A.2d 1291, 1292 (PaCmwlt. 1983). Consequently, in the zoning application, the massage therapy shop would fall within the definition of a personal service shop, which is precluded under the code. See §165-209.B. Therefore, the special exception should be denied.

It is not necessary for the board to determine whether the proposed use is of a similar character to other practitioners because the board has found as fact that the use is a personal service, therefore, there does not need to be any comparison to any of the other uses enumerated in the code. The fact that the board is determining that it is a personal service would remove from consideration all arguments raised in the DeMetro case previously decided for this same parcel.

Since the board has determined that the use as described is a personal service shop, it is not necessary to compare the impact of the use to other specifically, albeit similar uses, permitted by special exception. Likewise, it is also not necessary for the board to determine whether the use is injurious to the public safety, health and welfare of the community because the board is specifically determining that the use is not permitted by special exception. The board did not consider any testimony that may indicate that the use would have a negative impact on the community because the use is simply not permitted by special exception, therefore, its impact is not relevant.

The Township raises another argument in its brief regarding whether the proposed use is, in fact, an accessory use and incidental to a residential use. There is no need for this board to determine whether the proposed massage therapy use is a principal use or an accessory use because the board is determining that it is not a permitted use. If the board had determined that it is not a personal service shop, then the board would have to consider whether it is, in fact, subordinate to and incidental to a principal use of a residence. Since the board has determined that it is not a permitted accessory use, there is no reason for the board to rule on whether it is, in fact, an accessory use or a principal use.

In summary, the board believes that therapeutic massage therapy is most definitely a personal service. If, in the event one were to determine that massage therapy is not a personal service, then one must ask itself, what, in fact, would be considered any more personal than massage therapy. Based on the above, the board should deny the request for a special exception and also for a variance in the alternative.

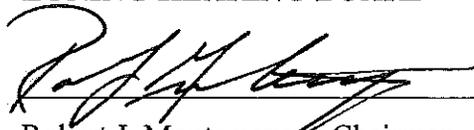
ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

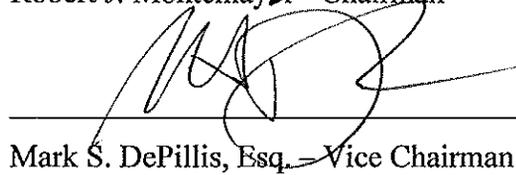
IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant the requested special exception or the variance in the alternative. All forms of zoning relief requested are hereby denied.

Decision Dated: January 20, 2010

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayer - Chairman



Mark S. DePillis, Esq. - Vice Chairman

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.