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ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-25 : HEARING DATE: September 16, 2009
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APPLICATION OF: Katherine L. and : DECISION DATE: October 21, 2009
Donald M. Dolga : :
: :
PROPERTY: 1047 Old Valley Forge Rd. :
: :
Upper Merion Township :

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

The Applicant, Katherine L. and Donald M. Dolga, (hereinafter referred to as the "Applicant"), filed an application requesting the following variances: 1) A variance from Section 165-11.B in order to construct a detached garage 18 ft. high, whereas the code allows a maximum of 14 ft. in height., 2) A variance from Section 165-12.B in order to construct the garage that will encroach into the required rear yard setback. 3) A variance from Section 165-12C in order to exceed the allowable building coverage. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on September 16, 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 Katherine L. and Donald M. Dolga, 1047 Old Valley Forge Road, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 1047 Old Valley Forge Road, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "AG" Agricultural.
6. The lot is approximately 22,855 sq. ft.
7. The Applicant currently has a single family dwelling and a framed storage structure.
8. The existing building coverage is 8.2% and after the construction of the garage, the building coverage will be 11.1%.
9. The Applicant is requesting a variance to have 18 ft. in height so he can have sufficient area above the garage for storage space. The Applicant is also asking for rear yard setback relief and building coverage relief.
10. The rear of the property borders land owned by the Commonwealth of Pennsylvania, therefore, there will be no impact to the rear property owner.
11. The Applicant's proposed detached 2 ½ car garage will be used for storing cars and other household and lawn equipment items.
12. The neighbor most greatly impacted from the proposal does not object.
13. The current house is very old and has limited storage space.
14. The board had some concern whether the storage space above the garage would ever be used for living quarters, at which time the Applicant testified that he does not plan to have any HVAC or water service for the garage.
15. The Applicant agreed as a condition of approval to have no hearing, ventilating and air conditioning or any water service to the garage or the storage area above the garage.
16. There were no residents who testified in favor of the project.

17. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Katherine L. and Donald M. Dolga, (hereinafter referred to as the “Applicant”), filed an application requesting the following variances: 1) A variance from Section 165-11.B in order to construct a detached garage 18 ft. high, whereas the code allows a maximum of 14 ft. in height., 2) A variance from Section 165-12.B in order to construct the garage that will encroach into the required rear yard setback. 3) A variance from Section 165-12C in order to exceed the allowable building coverage.

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 a 2 ½ car detached garage. The Applicant's house is a very old house that has limited storage space. The Applicant would like to use the garage for the storage of automobiles, lawn equipment and other household items. The board had some concern over whether the structure would be converted to living quarters in the future. At that time, the Applicant volunteered to impose conditions upon the approval that would prohibit HVAC service and water service to the garage and the storage area above the garage. The neighbor to the rear of the property is land owned by the Commonwealth of Pennsylvania, therefore, there is no impact on any residents. The resident neighbor most affected by the proposal does not object to the proposal.

The Applicant is asking for three (3) variances. The first variance is for height. The second variance is for rear yard setback. The third variance is for building coverage. All three (3) of the variances are dimensional in nature, therefore, the standards of the Hertzberg case are applicable to the case at bar. Based on the testimony of the Applicant and the willingness to

agree to conditions, the Applicant has satisfied its burden of proof and the variances should be granted.

ORDER OF THE UPPER MERION TOWNSHIP

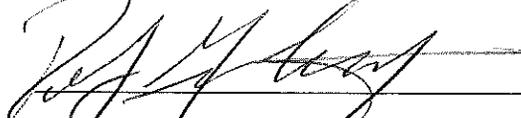
ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant the requested variances. These variances are conditioned upon the following:

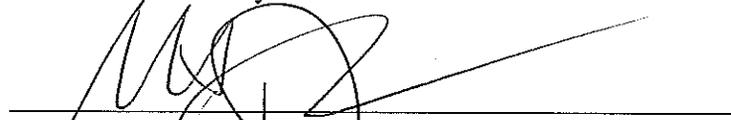
1. The Applicant must comply with the testimony of the Applicant at the public hearing on September 16, 2009.
2. There shall be no heating, ventilating and air conditioning system service extended to the garage or the storage area above the garage.
3. There shall be no water service to the garage or the storage area above the garage.

Decision Dated: October 21, 2009

**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.