

3. The property is located at 1050 Trinity Lane (aka 1050 Trinity Road), Conshohocken, PA 19428.
4. The Applicant was represented by Melissa Murray Rigney-Lemanowicz, LLP, 1012 N. Bethlehem Pike, Suite 200B-3, Lower Gwynedd, PA 19002
5. The property is zoned "R-2 " Residential.
6. The lot is approximately 5 acres.
7. The Applicant introduced the following exhibits:

Exhibit "A-1" - A copy of the Application of Clearwire US, LLC submitted to the Upper Merion Township Zoning Hearing Board for the subject property, filed 8/6/9.

Exhibit "A-2" - A copy of the Deed for the subject property.

Exhibit "A-3" - A copy of the Lease Agreement between the subject property owner and Cingular Wireless.

Exhibit "A-4" - A copy of the Ground Site Lease Agreement between Clearwire US, LLC and the property owner.

Exhibit "A-5" - A copy of the Site Lease Agreement between Cingular Wireless and Clearwire US, LLC.

Exhibit "A-6" - A copy of the FCC License of Clearwire US, LLC.

Exhibit "A-7" - A copy of a map depicting the Applicant's radio frequency coverage with the operation of the proposed use.

Exhibit "A-8" - A copy of a map depicting the Applicant's radio frequency coverage with the operation of the proposed use.

Exhibit "A-9" - A copy of the Electromagnetic Emissions Analysis of the proposed facility.

Exhibit "A-10" - A copy of the Structural Analysis of the existing structure.

Exhibit "A-11" - Aerial photographs of the proposed facility.

Exhibit "A-12" - A copy of the Site Plan and Elevation Drawings of the proposed use, signed and sealed by Robert N. Duculos, a Professional Engineer of C&S Engineers, Inc., with a latest revision date of 8/3/09.

An additional exhibit was introduced at the second hearing on October 7, 2009.

The last exhibit showed a picture of the existing tower indicating that it is a stealth tower designed to look like a tree. It also contained a computer rendering showing what the additional 8 ft. would look like in the field. The exhibit also contained two (2) aerials indicating existing visual impact of the tower and proposed visual impact of the addition.

8. The Applicant currently has a 110 ft. high cellular tower.
9. The Applicant is proposing an 8 ft. extension making it a total of 118 ft.
10. The proposed extension is for the purpose of accommodating another carrier.
11. Co-location should always be encouraged so the construction of additional towers throughout the Township will not be necessary.
12. The impact from the proposed 8 ft. addition will be *de minimus*.
13. Richard Dougert, testified as president of the Gulph Mills Civic Association, as well as in his individual capacity and indicated a concern that the carrier may continue to go up in height until it reaches a point where it will have a visible impact for residents in the

area. If, in the event that the carrier wants to exceed the height being proposed at this time, they will need an additional variance and once again have to prove a hardship.

14. Lloyd Gross testified that in the wintertime the tower may be seen above the trees.
15. John Sion testified that the tower may be seen in the wintertime.
16. The board was concerned that the Applicant would continue to increase the height of the tower with future applications and they asked the Applicant to consider a condition that would prohibit future variances. The Applicant consulted with the legal owner of the property and the legal owner decided not to agree to that condition.
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, Clearwire US, LLC, (hereinafter referred to as the “Applicant”), filed an application requesting variances to Section 165-35 and Section 165-36 in order to permit an 8 ft. extension of an existing 110 ft. stealth tree tower for the co-location of a wireless communications antenna at approximately 118 ft.

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 110 ft. cellular tower. Because the Applicant wants to co-locate an additional user, it will be necessary for the Applicant to put an 8 ft. extension to the top of the cellular tower. The Applicant testified that the proposed 8 ft. extension can be handled structurally by the existing tower. Currently existing, is a stealth style tower designed to look like a tree. There were some concerns by neighbors indicating that if the tower continues to climb in height, that it will become visible to the surrounding area. At this time, the tower is

located in a heavily wooded area and it blends in with the environment. The Applicant introduced pictures and aerials showing that the 8 ft. extension would have a *de minimus* impact on the visible impact of the tower. The 8 ft. extension would also be designed to look like tree branches like the rest of the tower. Co-location in the Township should always be encouraged because whenever a user is able to co-locate, it is one less tower that will be built in the Township. There was some concern regarding future applications for future height extensions, however, the Applicant was not willing to agree to limit future requests. This board can not, without agreement, limit future requests for variances. If, in the event that the Applicant comes in with future requests for height variances, this board, at that time, may consider a future application to have a greater impact on the neighborhood and, in turn, deny the application.

The Applicant's proposal is for both a use variance, as well as a dimensional variance. The dimensional variance is for the 8 ft. extension in height and the use variance is to have a tower in a residential zone. The use variance is necessary because the tower is increasing in size from what was originally proposed when the prior use variance was granted. For the use variance, the Applicant must satisfy the five-part criteria of the Municipalities Planning Code and for the dimensional variance, the Applicant must satisfy the criteria outlined in the Hertzberg case. Through the use of testimony and exhibits, the Applicant has sufficiently satisfied both standards, therefore, 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 variances to Section 165-35 and Section 165-36 in order to permit an 8 ft. extension of an existing 110 ft. stealth tree tower for the co-location of a wireless communications antenna at approximately 118 ft.

These variances are conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on October 7, 2009.

Decision Dated: November 18, 1009

**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.