



**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**APPLICATION NO.** 2009-21 : **HEARING DATE:** August 19, 2009  
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**APPLICATION OF:** Brian & Mary Halak: **DECISION DATE:** September 16, 2009  
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:  
**PROPERTY:** 1000 Winsome Ct. :  
:  
Upper Merion Township :

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

The Applicant, Brian & Mary Halak, (hereinafter referred to as the "Applicant"), filed an application requesting variances to Section 165-5 and Section 165-22 of the Upper Merion Township Zoning Ordinance ("Zoning Ordinance") in order to construct a second kitchen in their residence. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on August 19, 2009 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except Mark S. DePillis, Esquire, were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mark DePillis.

**FINDINGS OF FACT**

1. The Applicant is Brian and Mary Halak, 1000 Winsome Court, Wayne, PA 19087.
2. The Applicant is the legal owner of the subject property.
3. The Applicant was not represented by an attorney.

4. The property is located at 1000 Winsome Court, Wayne, PA 19087, Upper Merion Township.
5. The property is zoned "R-1A " Residential.
6. The Applicant is finishing the lower level of the residence which includes a kitchen to service a planned outdoor entertainment/pool area.
7. As seen on the layout attached to the zoning application, there is a walkout slider and a 5' x 9' sliding service window as part of the kitchen.
8. The Applicant has roughed in a bedroom and bathroom on the lower level of the residence.
9. A sink and microwave are permitted on the lower level without a variance but an oven/range needs a variance.
10. There were no residents who testified in favor of the project.
11. There were no residents who testified against the project.

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Applicant, Brian & Mary Halak, (hereinafter referred to as the "Applicant"), filed an application requesting variances to Section 165-5 and Section 165-22 in order to construct a second kitchen in their residence.

Section 165-22, Use Regulations, in the R-1A Residential Districts, states the following:

A building may be erected, altered or used and a lot may be occupied for any of the following purposes and no other:

- A. Single-family detached dwelling.

DWELLING, SINGLE-FAMILY DETACHED is defined as follows:

A building designed for and occupied exclusively as a residence for only one (1) family and having no party wall in common with an adjacent building. Where a private garage is structurally attached to such building, it shall be considered as a part thereof. In the event that an existing "single-family detached dwelling" is expanded to include additional rooms, including an additional kitchen, whether located in such addition or not, such dwelling shall be considered to be a two-family dwelling as defined herein.

A two-family dwelling is not permitted by right in the R-1A Residential District, therefore, the Applicant is requesting a variance to permit the kitchen in the lower level of the residence.

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). Economic and

personal considerations in and of themselves are not sufficient to constitute a hardship. McNally v. Bonner, 645 A.2d 287 (Pa.Cmwlth.1994).

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 Yeager v. Zoning Hearing Bd. of the City of Allentown, 779 A.2d 595, 598 (Pa.Cmwlt.2001), the Commonwealth Court stated that “a substantial burden must attend all dimensionally compliant uses of the property, not just the particular use the owner chooses [and a] variance, whether labeled dimensional or use, is appropriate ‘only where the property, not the person, is subject to hardship.’ ” In a very similar case to the present case, In re Leopardi, 496 A.3d 867, 869 (1985), *overturned in part on other grounds*, 516 Pa. 115, 532 A.2d 311 (1987), the property owners sought a building permit to add a garage, a permitted accessory use, to their residence,. The Commonwealth Court affirmed the trial court reversal of the request stating that “[t]he fact that a garage is permitted as an accessory use . . . does not mean that [the property owners] must be allowed to construct a garage on their property in order to utilize the property reasonably.”

In the case of Boyer v. Zoning Hearing Board of Upper Merion Township, 960 A.2d 179 (Pa.Cmwlt.2008), this Zoning Hearing Board granted a variance to construct an in-ground swimming pool on a residential property. The trial court affirmed the decision of the Zoning Hearing Board and the Commonwealth Court reversed holding that the property owner was not entitled to a variance even though the property exhibited unique topographic and physical conditions:

The record in the case before us is clear that the unique, naturally-occurring topographical and physical conditions of Green's property prohibit her from placing her proposed pool entirely within the rear quarter of her property in strict compliance with the Township's Code. The evidence before the ZHB demonstrated that Green purchased the property as a residence, and she continues to use the property in that capacity. (ZHB Notes of Testimony (N.T.) at 48-49). She purchased the property with the intention of installing a swimming pool. (N.T. at 46). She had full knowledge of the property's topography when she purchased it. (N.T. at 49-50). There was no indication that the Code sections at issue burden all dimensionally compliant uses of Green's property, but only the

particular use she has chosen. In fact, Green could, and is willing to, construct a smaller pool within the requirements of the Township's Code. (N.T. at 37, 39). **Thus, it is not the property, but Green, that is arguably subject to hardship. Yet it is clear to this Court, based upon controlling law, that the Township's Code does not place an unnecessary hardship on the property.**

In order for the ZHB to have properly examined Green's application under Section 910.2(a) of the MPC **it must first have found that the Township's Code placed an unnecessary hardship on her property.**

Id. at 184 (emphasis added).

The Applicant's request for a variance for a second kitchen in the residence is a use variance. The Applicant has not presented the Zoning Hearing Board with any testimony or evidence of unique physical circumstances or conditions of the property that render the property unable to be developed in strict conformity with the provisions of the Zoning Ordinance, and, in fact, the property is being reasonably used as a single family detached dwelling. The Applicant did not present any testimony or evidence of an unnecessary hardship inherent in the property, rather, the considerations presented to the Zoning Hearing Board as to the need for a second kitchen are personal desires and do not meet the heavy burden needed for a variance. The Applicant presented no testimony or evidence that the requested variance is the minimum to afford relief.

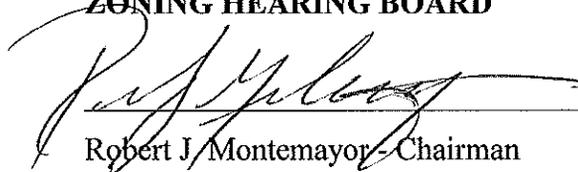
**ORDER OF THE UPPER MERION TOWNSHIP**

**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 variances, therefore, the application is **denied**.

Decision Dated: September 16, 2009

**UPPER MERION TOWNSHIP  
ZONING HEARING BOARD**

  
Robert J. Montemayor - Chairman

  
William C. Whitmore, Sr. - Secretary

  
Brad Murphy - Alternate

**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.