



ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-19	:	HEARING DATE: August 5, 2009
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APPLICATION OF: Andrew & Tina Branca	:	DECISION DATE: September 16, 2009
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PROPERTY: 433 E. Church Road	:	
	:	
Upper Merion Township	:	

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

The Applicant, Andrew and Tina Branca, (hereinafter referred to as the "Applicant"), filed an application requesting the following relief: 1) An appeal of the Zoning Officer's decision that the proposed detached garage is not permitted as an accessory use under Section 165-144.G of the Upper Merion Township Zoning Code ("Zoning Code"); 2) A variance from Section 165-146.B(1) of the Zoning Code in order to construct a detached garage that will encroach into the required side yard setback area; 3) A variance from Section 165-146.C of the Zoning Code in order to construct a detached garage that will encroach into the required rear yard setback area. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on August 5, 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 Andrew and Tina Branca, 3006 Oak Drive, Norristown, PA 19401.
2. The Applicant is the legal owner of the subject property.
3. The Applicant was represented by Edmund J. Campbell, Jr., Esq., 2701 Renaissance Blvd., 4th Fl., King of Prussia, PA 19406.
4. The property is located at 433 E. Church Road, King of Prussia, PA 19406, Upper Merion Township and is further identified on the zoning application as Tax Parcel #s 58-00-03319-00-7 (front parcel) and 58-00-03319-00-6 (rear parcel) (“Property”).
5. The Property is zoned “LI” Limited Industrial.
6. The Property is approximately 12,500 sq. ft. and 8% of the lot is occupied by the existing buildings.
7. The Property is presently used as a single-family detached dwelling.
8. The Applicant is proposing a 40 ft. x 40 ft. private garage with a height of 20 ft. at the peak.
9. The Applicant claims that the proposed garage is an accessory use to the private residence and that the garage will be an accessory use for the parking of the Applicant’s vehicles, not the tenant’s vehicles.
10. The Applicant does not live at the Property, but rents the Property.
11. The location and size of the existing dwelling and proposed garage are shown on the Sketch Plan submitted with the zoning application, prepared by Joseph Estock, dated April 14, 2009 (“Plan”).

12. Thirteen percent (13%) of the lot area would be occupied by the proposed garage. A total of twenty-one percent (21%) of the lot area would be occupied by the existing dwelling and proposed garage.
13. The Applicant, Andrew Branca, and Joseph Estock, P.E., P.L.S., testified on behalf of the Applicant.
14. Mr. Branca operates an automotive repair business from 439 East Church Road which is immediately adjacent to the Property.
15. Mr. Branca collects classic cars and wants to store his classic car collection in one location.
16. Mr. Branca has eight (8) cars that he would like to store in the proposed garage.
17. The proposed garage would look like a pole barn with a metal roof and metal siding.
18. An existing framed shed would be removed and replaced with the 40 ft. x 40 ft. proposed garage. The existing framed shed can be seen on the Plan.
19. The Applicant did submit three (3) letters from neighbors stating that the neighbors did not have an objection to the proposed garage.
20. There were no residents who testified in favor of the project.
21. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Andrew and Tina Branca, (hereinafter referred to as the "Applicant"), filed an application requesting the following relief: 1) An appeal of the Zoning Officer's decision that the proposed detached garage is not permitted as an accessory use under Section 165-144.G of the Zoning Code. 2) A variance from Section 165-146.B(1) of the Zoning Code in

order to construct a detached garage that will encroach into the required side yard setback area.

3) A variance from Section 165-146.C of the Zoning Code in order to construct a detached garage that will encroach into the required rear yard setback area. The Applicant amended the relief requested to allow for two principal uses if the Zoning Hearing Board were to determine the proposed garage was not an accessory use.

ACCESSORY USE OR STRUCTURE is defined in the Zoning Code as follows:

A use or structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal use or structure.

Section 165-144, Use regulations, of the LI Limited Industrial District, states in relevant part as follows:

G. Accessory use on the same lot with and customarily incidental to any of the foregoing permitted uses.

Section 165-146, Area, width and yard regulations, states in relevant part:

B. Side yards.

(1) On each interior lot, there shall be two side yards having an aggregate width of not less than 40 feet, neither side yard having a width of less than 15 feet, except as hereinafter provided in Subsection E hereof.

C. Rear yard. There shall be a rear yard on each lot the depth of which shall be not less than 20 feet, except as hereinafter provided in Subsection E hereof.

As to the appeal of the Zoning Officer's determination that the proposed garage is not an accessory use, the Zoning Hearing Board finds that the proposed garage is not an accessory use. The size of the proposed garage clearly demonstrates that it is not subordinate to the residential use of the Property. In addition, the proposed use is not customarily incidental to a residence. The proposed garage is not being used by the family living at the residence for the family's cars

or household storage, but instead, is being used by the Applicant for storage of his classic car collection. Storage of classic cars for an individual who does not live at a residence is not customarily incidental to the use of a residence. See Hess v. Warwick Township Zoning Hearing Board, 2009 WL 2031303 (Pa.Cmwlth.2009).

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.

In Yeager v. Zoning Hearing Bd. of the City of Allentown, 779 A.2d 595, 598 (Pa.Cmwlth.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 present case is analogous to the Boyer case. The Property continues to be used as a residence and a smaller garage can be built. The Zoning Code does not place an unnecessary hardship on the Property, it is the Applicant that is subject to the hardship because he wants a certain sized garage to store his classic car collection, yet he had full knowledge of the size of the Property when he purchased it.

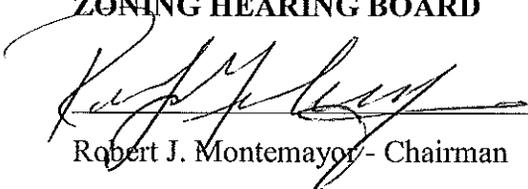
ORDER OF THE UPPER MERION TOWNSHIP

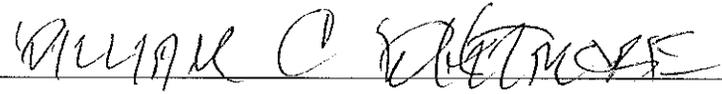
ZONING HEARING BOARD

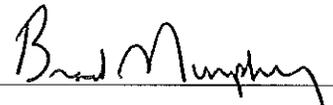
IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not prove entitlement to relief from the Zoning Officer's decision that the proposed detached garage is not an accessory use pursuant to Section 165-144.G.2. of the Zoning Code and did not prove entitlement to the requested variances from Sections 165-146.B(1) and 165-146.C. of the Zoning Code for side yard and rear yard setbacks. All of Applicant's requested relief 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.