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ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-14 : HEARING DATE: July 1, 2009  
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APPLICATION OF: Michael R. Ruggieri : DECISION DATE: August 5, 2009  
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: :  
PROPERTY: 196 Holstein Rd. : :  
: :  
Upper Merion Township :

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

The Applicant, Michael R. Ruggieri, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-28 in order to construct an accessory structure 18 ft. in height, whereas the code allows a maximum of 14 ft. in height. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on July 1, 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 Michael R. Ruggieri, 196 Holstein Road, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 196 Holstein Road, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-1 " Residential.

6. The lot is approximately 12,200 sq. ft.
7. The Applicant is requesting permission to build a shed that is 18 ft. in height, which is 4 ft. higher than the maximum height permitted under the Code.
8. The Applicant originally requested an 18 ft. high shed when they applied for a building permit, however, he was told the maximum height is 14 ft., at which time he applied for a building permit for a 14 ft. high shed. The Applicant then commenced to build an 18 ft. high shed knowing that 14 ft. was the maximum height permitted in the Code.
9. The Applicant did not act in good faith.
10. The Applicant introduced four (4) pictures and marked them collectively as Exhibit "A-1".
11. The four (4) pictures show a poorly constructed and unsightly structure that the Applicant is proposing as the shed.
12. The picture also shows a trailer and a Bobcat that the Applicant intends to store in the open portion of the shed.
13. The only reason that the Applicant submitted for the additional height was the fact that he wanted to store the Bobcat on top of the trailer and wanted to maintain a certain roof pitch to accommodate the Bobcat while it was still on the trailer.
14. The Applicant does not have a hardship inherent in the land.
15. The proposal is not consistent with the character of the neighborhood.
16. The Applicant created his own hardship.
17. The Applicant did not ask for the minimum relief necessary to reasonably use the property.
18. There are no unique features to the property that warrant the granting of a variance.

19. The Applicant introduced no testimony whatsoever regarding any financial hardship.
20. The Applicant's deviation from the code is not de minimus, but rather a substantial deviation with no justifiable reason for the additional height.
21. There were no residents who testified in favor of the application.

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

The Applicant, Michael R. Ruggieri, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-28 in order to construct an accessory structure 18 ft. in height, whereas the code allows a maximum of 14 ft. in height.

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 was told that the maximum height for sheds is 14 ft., however, the Applicant still proceeded with the construction of an 18 ft. high shed. The Applicant did not act in good faith and constructed a shed that violates the zoning ordinance. The Applicant's reason was his desire to store a Bobcat while it is still on top of a trailer in the open portion of the shed. This is not a sufficient reason for the granting of a height variance. Although a height variance is dimensional in nature, it is still necessary for the Applicant to satisfy the standards outlined in the Hertzberg case. The Applicant made no attempt whatsoever to outline any of the standards in the Hertzberg case, therefore, the variance should be denied. The Applicant offered no testimony regarding any unique features of the property or any hardship that would be inherent in the land. The Applicant offered no testimony regarding any financial hardship that would be created if forced to comply with the zoning code. The Applicant offered no testimony regarding how the project would be consistent with the character of the neighborhood. The Applicant offered no testimony regarding why the height proposed is the minimum relief necessary to cure

any alleged hardship. Based on the lack of testimony and the inability of the Applicant to prove the standards necessary for granting the variance, this board has no alternative but to deny the Applicant's request for a height variance.

**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, therefore, the Board is denying the Applicant's request for a variance to Section 165-28 in order to construct an accessory structure 18 ft. in height.

Decision Dated: August 5, 2009

**UPPER MERION TOWNSHIP  
ZONING HEARING BOARD**

  
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Robert J. Montemayor - Chairman

  
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Mark S. DePillis, Esq. - Vice Chairman

  
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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.