

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPLICATION OF VALERIE HELENSKI**

**NO. 2013-22**

**PROPERTY: 685 THIRD STREET  
KING OF PRUSSIA, PA 19406**

**OPINION AND ORDER**

This zoning application involves a residential landowner's request for variances to permit the construction of a detached garage in a side yard, but not within the rear quarter of the lot, and which exceeds the allowable accessory structure height requirements of the zoning ordinance.

On August 21, 2013, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a public hearing with regard to application no. 2013-22 of Valerie Helenski ("Landowner"). The members of the ZHB present were William J. Clements, Esq., Chairman; John M. Tallman, Jr., Member; and Mark DePillis, Esq., Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Landowner was not represented by counsel.

Landowner sought variances from the Upper Merion Township Zoning Ordinance of 1942 ("Ordinance"), specifically, section 165-60, to exceed the allowable building height for an accessory structure, and section 165-61 to locate the accessory structure in a side yard outside of the rear quarter of the lot.

The ZHB admitted the following exhibits into the record:

**Landowner exhibits**

A-1 ZHB application

- A-2 work outline
- A-3 proposed house plot plan, revised May 17, 2013
- A-4 proposed garage plan, dated December 26, 2011, last revised April 23, 2013
- A-5 proposed garage plan, dated December 28, 2011, last revised April 23, 2013, showing front, left, right, and rear views of the garage
- A-6 deed of consolidation dated May 17, 2012, between Valerie Helenski, grantor, and Valerie Helenski, grantee
- A-7 set of 3 photographs of a van and a camper

The zoning hearing was duly advertised, notice thereof was given in accordance with the requirements of the Ordinance, and the proceedings were stenographically recorded. After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

**A. FINDINGS OF FACT**

**BACKGROUND**

1. Landowner is the owner of the parcel of land located at 685 Third Street, King of Prussia, Pennsylvania ("Property"). [N.T. 7; Exhibit A-6]
2. The Property is approximately 33,541 square feet in area and is zoned R-3 Residential District. A portion of the Property is located in the floodplain, and there is a recharge basin on the Property. [N.T. 11, 13, 27-29; Exhibits A-1, A-3]
3. Improvements on the Property include a single-family dwelling with a deck, a crushed stone driveway, and a shed. [N.T. 7, 12, 16-17; Exhibits A-1, A-3, A-7]

4. Landowner proposes the construction of 24' by 28' detached garage, with a height of 16' 4" to be located in a side yard outside of the rear quarter of the lot. [N.T. 7-8, 22, 30, 34-35 ; Exhibits A-1, A-3 through A-5]

5. Section 165-60 of the Ordinance permits a maximum accessory structure height of 14' in the R-3 district.

6. Section 165-61 of the Ordinance permits an accessory structure to be located in the side yard, provided that the side yard does not abut a street, and provided that the accessory structure is located within the rear quarter of the lot.

7. Landowner's application requests variances to permit a 16'4" high accessory structure located in a side yard outside of the rear quarter of the lot.

### **ZHB HEARING**

8. Landowner testified and offered the testimony of David W. Gehret, a professional surveyor and planner, in support of the application.

9. The testimony was as follows:

- the proposed detached garage is 24' by 28' and is set back 12' from the front of the house [N.T. 7];
- the peak of the roof of the garage is 2' 4" higher than the Ordinance allows [N.T. 8, 22];
- the existing single-family dwelling is located outside of the floodplain on the Property [N.T. 11];
- the original single-family dwelling plans contemplated a garage, but Landowner chose to construct a deck instead [N.T. 12];

- the proposed garage will house a van and a camper with room for a workbench and storage [N.T. 14; Exhibit A-7];
- no trees need to be removed to locate the garage in the rear quarter of the lot [N.T. 15];
- the Property contains a shed in the rear corner of the lot; Landowner is unwilling to relocate or remove the shed [N.T. 16, 52-53];
- Landowner is also unwilling to change the roof pitch design or reduce the roof height [N.T. 21, 30]; and
- it is possible to locate the garage closer to the rear quarter of the lot [N.T. 35].

10. Three neighboring property owners spoke in opposition to the application. [N.T. 44-47]

#### **INSUFFICIENCY OF THE EVIDENCE**

11. Landowner failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB's grant of the requested variances.

12. Landowner failed to offer proof that the variances are necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used as a single-family dwelling.

13. Landowner failed to offer proof that the requested variances were the minimum variance that would afford relief. To the contrary, Landowner admitted that the pitch of the roof could be lowered to reduce the garage height, and that the location of the garage could be moved closer to the rear quarter of the Property. Thus, Landowner knowingly rejected changes to the plan which would lessen the variances sought.

## B. DISCUSSION

### VARIANCES

It is well settled in Pennsylvania that a zoning hearing board may grant a variance where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;
3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;  
and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of South Whitehall Township*, 134 Pa.Cmwlth. 236, 578 A.2d 1002 (1990).

Variations should be granted sparingly, and the reasons for granting variations must be substantial and compelling. *Laurento v. Zoning Hearing Board of the Borough of West Chester*, 628 A.2d 437 (Pa.Cmwlth. 1994). To prove unnecessary hardship, a landowner must demonstrate that either the physical characteristics of the property are such that it could not in any case be used for any permitted purpose, or that the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the ordinance. *Laurento* at 439.

The Commonwealth Court consistently rejects requests for dimensional variations where proof of hardship is lacking. *Lamar Advantage GP Company v. Zoning*

*Hearing Board of Adjustment of the City of Pittsburgh, 997 A.2d 423, 445 (Pa.Cmwlth. 2010).*

- 1. Landowner failed to demonstrate unique physical conditions of the Property that have caused an unnecessary hardship prohibiting reasonable use of the Property.**

Landowner failed to demonstrate any unique physical conditions constraining the reasonable use of the Property. Landowner is making reasonable use of the Property as a single-family dwelling. Additionally, the Property already has a shed in the rear yard which Landowner uses for storage.

Landowner failed to articulate a legal, as opposed to a personal hardship, for the construction of an accessory structure that exceeds the maximum height allowance of the Ordinance. Landowner's reason for exceeding the maximum height for accessory structures is based solely on personal preferences and aesthetics. Landowner testified:

The problem is, it would look odd the way the roof is. It wouldn't go.  
[N.T. 21]

Landowner's surveyor confirmed the concern of aesthetics:

Now, I agree that if you lower the pitch, you might be able to get close to what [the Ordinance] requires... For the difference it would not match the house. I know aesthetics aren't supposed to take a stance here, but it would look a lot better if it matched the house.  
[N.T. 30]

Landowner failed to provide any substantial and competent evidence as to why a garage height of 16' 4" was necessary, as opposed to the maximum height of 14' permitted by the Ordinance.

Assuming that a variance can be granted to permit an accessory detached garage, Landowner failed to provide any substantial and competent evidence as to why

the location of the detached garage could not be moved closer to the rear quarter of the lot;

Chairman Clements: I think what Mr. DePillis is getting at is, to the extent a variance is required, I mean, is it – where you are planning to build it, you were asked if you were at the property, is that the minimum – you're asking for the minimum variance, or can you push it back a couple more feet without impacting –

Mr. Gehret: Well, anything can be done. However, the more you push it back, there are other factors that come into play. A situation that's going to cost more money, because the driveway has to be longer.

Mr. DePillis: That's not a factor.

Mr. Gehret: Also, a convenience factor, because if you look –

Mr. DePillis: Not a factor.

Mr. Gehret: at these plans, the door from the house goes right at the door of the garage.

...

Chairman Clements: In your professional opinion, would the location where you plotted it, that's the – is that where the garage should be, all other things being equal?

Mr. Gehret: In the best interest of my client, that's where the garage should be.

[N.T. 35-36]

Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use, or that any hardship exists. Landowner's reasons for the location of the detached garage outside of the rear quarter of the lot are based on personal preference, convenience, and cost; and not unique physical conditions of the Property.

This application and the evidence offered by Landowner present the classic personal articulation of a hardship, which is legally insufficient for the grant of a variance. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033, 1040 (2003) citing *Larsen v. Zoning Board of Adjustment of City of Pittsburgh*, 543 Pa. 415, 672 A.2d 286, 288 (1996). Unnecessary hardship, caused by unique physical circumstance of the property, is required for the grant of a variance. *Id.* See *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa.Cmwlth. 2001) wherein the court held:

A variance, whether labeled dimensional or use, is appropriate "only where the *property*, not the person, is subject to hardship." *Szmigiel v. Kranker*, 6 Pa.Cmwlth. 632, 298 A.2d 629, 631 (1972) (emphasis in original). In the present case, Daniels' property is well suited to the purpose for which it is zoned and actually used, a car dealership, which is in no way burdened by the dimensional requirements of the ordinance. Daniels has proven nothing more than that adherence to the ordinance imposes a burden on his personal desire to sell vehicles for Land Rover.

*Yeager* at 598.

The requirement that a hardship attend the property and not the person was emphasized by the Commonwealth Court in a case where the reasons for the variance were perhaps more compelling, and in the public interest, a marked contrast to the purely personal justification advanced in the application before the ZHB. In *Township of East Caln v. Zoning Hearing Board of East Caln*, 915 A.2d 1249 (Pa.Cmwlth. 2007), the zoning hearing board granted a telecommunications company a dimensional variance to replace an existing 103-foot tower with a 123-foot tower. *Id.* at 1251. The trial court affirmed the zoning hearing board, finding unnecessary hardship based solely upon the life-safety issue posed by the coverage area gap in the telecommunications company's wireless service. *Id.* at 1252.

In reversing the trial court, the Commonwealth Court stated:

Such health and safety issues are important concerns, and the Township may wish to amend its ordinance in order to address them. However, the well-established law does not permit the grant of a variance on the basis that it is in the public interest. A variance may be granted only upon proof that a substantial burden attends all dimensionally compliant uses of the applicant's property, which is simply not the case here. Among other uses permitted by the ordinance, the property can continue to be used to house the existing one hundred and three foot telecommunications tower as well as the self-storage facility. While Cingular evaluated alternative sites and concluded no other sufficed, this does not establish a hardship that attends the *property*, as distinguished from its *owner*.

*East Caln* at 1254.

As in *Yeager* and *East Caln*, Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Landowner's personal preferences based on aesthetics, convenience, and cost drive the need for the variances and are totally insufficient under the law.

**2. Landowner failed to prove the requested variances were the minimum needed to afford relief.**

Landowner was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. *Hohl v. Caernarvon Township Zoning Hearing Board*, 736 A.2d 57 (Pa.Cmwlth. 1999).

Landowner failed to provide any evidence that the variances requested represent the minimum amount necessary to afford relief. Landowner's surveyor acknowledged that by changing the roof pitch the proposed detached garage would comply, or be close to complying, with the height requirements of the Ordinance. [N.T. 30]

Landowner's surveyor also admitted that it was physically possible to locate the detached garage further toward the rear quarter of the lot. [N.T. 35]

**C. CONCLUSIONS OF LAW**

1. The ZHB has jurisdiction under section 909.1(a)(4) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(4), and Ordinance section 165-251.A(5).

2. Landowner has standing as the owner of the Property.

3. The ZHB is obligated to ensure compliance with the technical requirements of the Ordinance.

4. The ZHB may grant a variance provided that an applicant demonstrates that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance, prohibiting the reasonable use of the property; and (c) the variance, if authorized, will represent the minimum variance that will afford relief. Ordinance §165-251.B(2).

5. Landowner failed to provide substantial competent evidence satisfying the requirements for a variance to permit a detached garage of greater than 14' in height and located outside of the rear quarter of the lot.

6. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to variances from sections 165-60 and 165-61 of the Ordinance.

7. Landowner failed to demonstrate that the variances are necessary to permit a reasonable use of the Property.

8. Landowner failed to demonstrate that the requested variances represented the minimum necessary to afford relief.

At the conclusion of its August 21, 2013 hearing, the ZHB entered the following order:

**ORDER**

AND NOW, this 21<sup>st</sup> day of August, 2013, on the application of Valerie Helenski, the Zoning Hearing Board DENIES variances from section 165-60 and 165-61 to construct a detached two-car garage.

An opinion with findings of fact, conclusions of law, and reasons will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

Written notice of the ZHB's decision was mailed to Landowner on August 22, 2013.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

\_\_\_\_\_  
William J. Clements, Esquire  
Chairman

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John M. Tallman, Jr.  
Member

\_\_\_\_\_  
Mark DePillis, Esquire  
Member

**Date of Mailing:**

