

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

APPLICATION OF JOE GALLEO

NO. 2014-01

**PROPERTY: 724 FRALEY STREET
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves a landowner's request for variances to permit the subdivision of a lot now improved with a single-family dwelling, into 3 nonconforming lots which fail to meet the lot width and side yard setback requirements of the zoning ordinance. Landowner is a builder who wishes to construct a twin dwelling with 2 additional dwelling units.

On April 16, 2014, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a public hearing with regard to Application No. 2014-01 of Joe Galleo ("Landowner"). The members of the ZHB present were Lynne Gold-Bikin, Esquire, Chairwoman; Mark DePillis, Esquire, Secretary; Judith A. Vicchio, Member; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, Esquire, of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Landowner was represented by Joseph J. Pizonka, Esquire of the law firm Pizonka, Reilley, Bello & McGrory, P.C.

Landowner sought variances from sections 165-61.A and C of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Ordinance") to permit subdivision of an improved residential property into 3 lots, to allow for construction of a twin dwelling on lots that fail to meet the lot width and side yard setback provisions of the Ordinance.

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 residential property located at 724 Fraley Street, King of Prussia, Pennsylvania ("Property"). [N.T. 8]
2. The Property is approximately 13,616 square feet in area and is zoned R-3 Residential district. [N.T. 9; Exhibit A-16]
3. The Property is improved with a single-family dwelling. [N.T. 9; Exhibits A-1, A-5]
4. Landowner is a builder who proposes subdivision of the Property into 3 lots. On lot 1 the existing single-family dwelling would remain. On lots 2 and 3, construction of a twin dwelling is proposed. [N.T. 9-10; Exhibit A-16]
5. The key Ordinance requirements are:
 - a. Ordinance section 165-61.A(1) requires a minimum lot width of 50 feet for a single-family detached dwelling unit.
 - b. Ordinance section 165-61.C(1) requires a minimum side yard setback of 10 feet and aggregate side yard setbacks of 25 feet for a single-family detached dwelling unit.
 - c. Ordinance section 165-61.A(1) requires a minimum lot width of 40 feet for a single-family semidetached dwelling.

d. Ordinance section 165-61.C(1) requires a minimum side yard of 15 feet for a single-family semidetached dwelling.

6. Landowner seeks variances for lot 1 to permit a lot width of 28 feet and a side yard of 6.4 feet, with an aggregate side yard of 9 feet.

7. Landowner seeks variances for lots 2 and 3 to permit lot widths of 26 feet and side yards of 5 feet for the single-family semidetached dwelling.

ZHB HEARING

8. Landowner testified and offered the testimony of Joseph M. Estock, P.E., as follows:

- the Property was purchased with the intention of demolishing the existing single-family dwelling and constructing 3 townhouses [N.T. 8-9];
- the Property is 80 feet wide and contains a single-family dwelling [N.T. 27];
- the existing single-family dwelling is long, thin, narrow, and similar to other houses on Fraley Street [N.T. 28];
- the existing single-family dwelling is a beautiful brick house [N.T. 9];
- Landowner spoke with neighboring property owners who, Landowner contended, requested that Landowner not demolish the single-family dwelling [N.T. 9];
- Landowner wants to construct a twin dwelling on 2 of the lots, and leave the existing single-family dwelling on the third lot [N.T. 10];

- Landowner wants to derive the same economic benefit that he would receive if he constructed 3 townhouses at the Property [N.T. 21, 23];
- construction of a twin dwelling on 2 of the subdivided lots requires lot width and side yard variances [N.T. 28];
- Landowner claimed that he could construct 3 townhouses by-right on the Property if the existing single-family dwelling is demolished [N.T. 36-37]. However, no plan was offered confirming this claim.
- the Property could be subdivided into 2 lots and a second single-family dwelling could be constructed fronting Roosevelt Avenue by-right [N.T. 37, 46]; and
- Landowner's engineer did not analyze whether a second single-family dwelling could be constructed fronting Fraley Street by-right [N.T. 38-39], and what variances would be required to accommodate one additional dwelling unit.

9. Three neighboring property owners testified in opposition to the application. Their concerns included:

- parking;
- lack of hardship;
- the effect of minimizing the side yard in proximity to adjacent property; and
- safety issues associated with driveway access to Fraley Street.

INSUFFICIENCY OF THE EVIDENCE

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

11. Landowner failed to offer proof that the variances would be necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used for a single-family dwelling.

12. Landowner failed to offer proof that the requested variances were the minimum variance that would afford relief. To the contrary, Landowner conceded that a single-family dwelling could be constructed at the Property either by-right or with fewer variances than the proposed twin dwelling requires. [N.T. 37-39, 46]

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 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 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 any unique physical conditions of the Property that have caused an unnecessary hardship justifying variations to permit construction of a twin dwelling at the Property.**

Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use unless the requested variations were granted. The Property contains a beautiful brick single-family dwelling. [N.T. 9]

Landowner failed to articulate a legal, as opposed to a personal hardship, for the construction of a twin dwelling which fails to meet lot width and side yard setback requirements of the Ordinance. Landowner's reason for subdividing the Property, and thereby creating nonconforming lot widths and side yard setbacks, is based solely on

personal preferences and the desire to maximize profitability. Landowner admitted that his goal was to derive the economic benefit of having 3 saleable lots. [N.T. 21, 23]

Landowner's efforts to obtain variances to allow 3 saleable lots is nothing less than an impermissible attempt to attain variances to maximize the economic value of the Property. Expanding the use of a particular property to maximize profitability is not a sufficient hardship to justify the granting of variances because such financial hardship is a form of self-inflicted hardship relating to a property owner and not, as required by the Pennsylvania Municipalities Planning Code, the property. *See Ken-Med Associates v. Board of Township Supervisors of Kennedy Township*, 900 A.2d 460, 466 (Pa.Cmwth. 2006).

This application and the evidence offered by Landowner present the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *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.Cmwth. 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.Cmwth. 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.

As in *Yeager* and *Ken-Med*, Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Landowner's personal preferences based on maximizing profitability drive the need for the variances and are totally insufficient under the law.

2. Landowner failed to prove the requested variances are 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 requested variances to allow subdivision of a property into 3 lots that fail to meet the lot width and side yard setback provisions of the Ordinance. Landowner acknowledged that subdivision of the Property into 2 lots and construction of a single-family dwelling could be achieved without the need for any variances. [N.T. 37, 46] Landowner failed to offer any proof that the variances to permit construction of a twin dwelling were the minimum necessary to afford relief.

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; (c) such unnecessary hardship has not been created by the applicant; and (d) the variance, if authorized, will represent the minimum variance that will afford relief. Ordinance §165-251.B(2).

5. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to variances from sections 165-61.A and C of the Ordinance.

6. Landowner failed to demonstrate 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.

7. Landowner failed to demonstrate that the alleged hardship was not created by the Landowner. To the contrary, Landowner's desire to maximize profitability by subdividing the Property into 3 saleable lots creates the need for variances.

8. Landowner failed to demonstrate that the requested variances represented the minimum necessary to afford relief. To the contrary, Landowner admitted that construction of an additional single-family dwelling on the Property does not require any variances.

At the conclusion of its April 16, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 16th day of April, 2014, the Zoning Hearing Board DENIES variances from the following sections of the zoning ordinance:

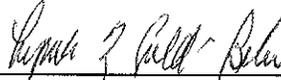
- section 165-61, to reduce the required lot width for lot nos. 1, 2, and 3; and
- section 165-61.C, to reduce the required side yard setback for lot nos. 1, 2, and 3, and to reduce the required aggregate side yards for lot no. 1.

An opinion with findings of facts, 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 April 17, 2014.

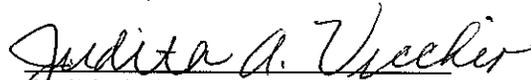
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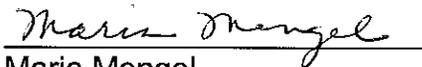
Lynne Gold-Bikin, Esquire
Chairwoman



Mark S. DePillis, Esquire
Secretary



Judith A. Vicchio
Member



Maria Mengel
Member

Date of Mailing: