

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

APPLICATION OF JOE GALLEO

NO. 2014-10

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

OPINION AND ORDER

This zoning application involves a landowner's request for numerous dimensional variances to permit the subdivision of a lot already improved with a single-family dwelling. Landowner seeks to create essentially three (3) nonconforming lots – Lots 1 through 3. Lot 1 contains the existing single-family dwelling. Landowner is a builder who wishes to construct a twin dwelling with 2 additional dwelling units on Lots 2 and 3. As proposed, Lot 1 fails to meet the lot area, lot width, and side yard setback requirements of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance"). Lots 2 and 3 fail to meet the lot width and side yard setback requirements of the Zoning Ordinance.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held 2 hearings on Application no. 2014-10 of Joe Galleo ("Landowner"). On June 4, 2014, the ZHB held the first public hearing. All members of the ZHB were present: Lynne Gold-Bikin, Esquire, Chairwoman; Mark DePillis, Esquire, Secretary; Judith A. Vicchio, Member; Maria Mengel, Member; and John M. Tallman, Jr., 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 Gregory P. DiPippo, Esquire of the

law firm Pizonka, Reilley, Bello & McGrory, P.C. After the ZHB heard testimony from Landowner and objecting neighbors, the hearing was continued to June 18, 2014.

At the hearing on June 18, 2014, all members of the ZHB were again present. The ZHB was represented by Michael E. Peters, Esquire, of the law firm of Eastburn and Gray. Landowner was again represented by Gregory P. DiPippo, Esquire.

Landowner sought variances from sections 165-61.A and C of the Zoning Ordinance to permit subdivision of an improved residential property into 3 lots, retain the single-family dwelling on one of the lots, and allow construction of a twin dwelling on the other two lots that fail to meet the lot width and side yard setback regulations of the Zoning Ordinance.

Both zoning hearings were duly advertised, notice thereof was given in accordance with the requirements of the Zoning 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. 6/4/2014, 5-6]
2. The Property is approximately 13,616 square feet in area and is zoned R-3 Residential district. [Exhibit A-5]
3. The Property is improved with a single-family dwelling. [N.T. 6/4/2014, 6; Ex. 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.6/4/2014, 8; Ex. A-5]

5. The key Zoning Ordinance requirements are:

- a. Zoning Ordinance section 165-61.A(1) requires a minimum lot area of 5,000 square feet for a single-family detached dwelling unit.
- b. Zoning Ordinance section 165-61.A(1) requires a minimum lot width of 50 feet for a single-family detached dwelling unit.
- c. Zoning 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.
- d. Zoning Ordinance section 165-61.A(1) requires a minimum lot width of 40 feet for a single-family semidetached dwelling.
- e. Zoning Ordinance section 165-61.C(1) requires a minimum side yard of 15 feet for a single-family semidetached dwelling.

6. Landowner seeks the following variances:

- a. for lot 1, to permit a lot area of 4553 square feet, a lot width of 26.75 feet, and a side yard of 5.1 feet, with an aggregate side yard of 7.7 feet;
- b. for lot 2, to permit a lot width of 24.1 feet and a side yard of 5.1 feet; and
- c. for lot 3, to permit a lot width of 29.15 feet and a side yard of 10.15 feet.

ZHB HEARING

7. Landowner testified and also 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 town homes [N.T. 6/4/2014, 7];
- the Property is 80 feet wide and contains a single-family dwelling [Ex. A-5];
- the existing single-family dwelling is an "irreplaceable" beautiful brick house, with central air, high efficiency heat, new windows, new cabinets, hardwood floors and granite countertops; Landowner stated that he spent \$50,000 to improve the existing single-family dwelling [N.T. 6/4/2014, 10-11, 49, 51; N.T. 6/18/2014, 12; Ex. A-2];
- the existing single-family dwelling is consistent with the character of the neighborhood [N.T. 6/4/2014 10; N.T. 6/18/2014, 10-11];
- Landowner spoke with neighboring property owners who, Landowner contended, requested that Landowner not demolish the single-family dwelling [N.T. 6/4/2014 7-10; Ex. A-1];
- Landowner claimed that he obtained the signatures of "thirty-eight (38) homes within the surrounding area" in support of his application [N.T. 6/4/2014 8-9; Ex. A-1];
- Landowner wants to construct a twin dwelling on 2 of the lots (Lots 2 and 3), and leave the existing single-family dwelling on the third lot (Lot 1) [A-5];

- Landowner contends that he can develop the property with three row homes in compliance with the Zoning Ordinance [N.T. 6/4/2014 20-21; A-4]
- Landowner's engineer did not analyze what variances would be required to construct a single-family detached dwelling in lieu of the twin home on lots 2 and 3. Nor did Landowner submit a plan depicting same, but Landowner's engineer asserted that a single-family home on lots 2 and 3 would require approximately five (5) variances [N.T. 6/4/2014 31-32; 41-42]
- The plan submitted with Landowner's application proposing the twin dwelling requires eight (8) variances from the Zoning Ordinance
- Landowner testified that there are two (2) or three (3) other twins in the surrounding neighborhood [N.T. 6/18/2014, 23-24]
- Landowner essentially threatened that if the application were denied, he would tear down the existing single-family detached dwelling and construct three town homes [N.T. 6/18/2014, 9]
- Landowner stated that it will cost him \$10,000 to tear down the existing single-family dwelling [N.T. 6/18/2014, 12-13]

9. Two neighboring property owners testified in opposition to the application.

Their concerns included [N.T. 6/4/2014, 52-60]:

- incompatibility of proposed twin dwelling with dwellings in the surrounding neighborhood;
- water runoff;
- 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 or, alternatively, Roosevelt Avenue and Pershing 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 likely be constructed at the Property with fewer variances than the proposed twin dwelling requires. [N.T. 6/4/2014, 31-32; 41-42] Landowner asserted that he could construct three (3) row homes on the Property in compliance with the Zoning Ordinance.

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 Twp.*, 578 A.2d 1002, 1005 (1990).

Variances should be granted sparingly, and the reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa.Cmwith. 1994). Although a relaxed standard applies to applications for dimensional, as opposed to use, variances, an applicant must still demonstrate an unnecessary hardship caused by unique physical characteristics of the property. See *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Cmwlth. 2011). Additionally, “[i]t is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted.” *Id.* at 150. Put another way, an applicant must demonstrate more than its “mere desire to increase profitability.” *Id.* at 149.

The Commonwealth Court rejects requests for dimensional variances where proof of hardship is lacking. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of the City of Pittsburgh*, 997 A.2d 423, 445 (Pa.Cmwith. 2010).

1. Landowner failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying variances 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 variances were granted. The Property presently contains a beautiful, recently-improved, brick single-family dwelling which is consistent with the residences in the surrounding neighborhood. [N.T. 6/4/2014, 10, 49, 51; N.T. 6/18/2014, 12; Ex. A-2]

Landowner failed to articulate a legal, as opposed to a personal hardship for the construction of a twin dwelling on Lots 2 and 3. As proposed, the twin dwelling fails to meet the lot width and side yard setback requirements of the Zoning Ordinance. In fact, the addition of the twin dwelling and proposed subdivision of the Property result in noncompliant lot area, lot width, and side yard setbacks on Lot 1 as well. Landowner failed to articulate a single hardship in existence on the Property that is not created by Landowner's own preference for a twin-dwelling on lots 2 and 3. Landowner's reason for subdividing the Property, and thereby creating the need for a multitude of variances, is based on nothing more than personal preference for a twin-dwelling in order to maximize profitability. In fact, Landowner's engineer testified that Landowner did not request that the engineer consider and/or analyze whether a single-family home could be placed on Lots 2 and 3 in compliance with the Zoning Ordinance. [N.T. 6/4/2014 31-32; 41-42]. Landowner acknowledged that (1) on the Property is a beautiful single-family home and (2) the Property could be developed in conformance with the Zoning Ordinance.

Maximization of profit is self-inflicted hardship relating to a property owner and not, as required by the Pennsylvania Municipalities Planning Code, to the property itself. See *Ken-Med Associates v. Bd. of Twp. Supervisors of Kennedy Twp.*, 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*, 828 A.2d 1033, 1040 (Pa. 2003) citing *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (1996); *Singer*, 29 A.3d at 149-150. Unnecessary hardship, caused by unique physical circumstance of the property, is required for the grant of a variance. *Nettleton*, 828 A.2d at 1040. For example, in *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa.Cmwth. 2001), 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.

779 A.2d at 598. Similarly, in *Ken-Med Associates v. Board of Township Supervisors of Kennedy Township*, 900 A.2d 460 (Pa.Cmwth. 2006), a landowner sought a buffer yard variance to permit construction of a parking garage providing additional parking for a medical practice; the court held:

Landowner's efforts to obtain a variance, which would allow for a greater number of physicians to practice at the Property and a general expansion of the Property's profitability, is nothing less than an impermissible attempt to attain a variance to maximize the economic value of the Property. This Court, time and again, has held that expanding the use of a particular property to maximize

profitability is not a sufficient hardship to justify the granting of a variance, because such financial hardship is a form of self-inflicted hardship relating to a landowner and not, as required by the MPC, the property.

900 A.2d at 466.

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 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. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa.Cmwth. 1999). Landowner failed to offer any proof that the variances to permit construction of a twin dwelling were the minimum necessary to afford relief. To the contrary, the testimony reveals that (1) the Property is presently being reasonably used as a single-family dwelling; and (2) although Landowner's engineer did not prepare a plan depicting a single-family home, the engineer estimated that construction of a single-family home would require fewer variances than construction of the desired twins. Under these circumstances, Landowner has failed to prove that the required variances represent the minimum amount necessary to afford relief.

C. CONCLUSIONS OF LAW

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

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

7. Landowner failed to demonstrate that the alleged hardship was not created by the Landowner.

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

9. Accordingly, Landowner failed to sufficiently demonstrate his entitlement to the requested variances.

At its July 16, 2014 hearing, the ZHB entered the following order:

ORDER

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

- section 165-61.A to reduce the required lot area for lot no. 1
- section 165-61.A, 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.

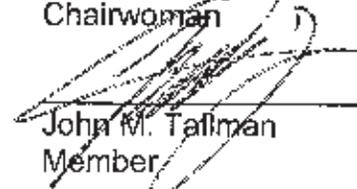
This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

Written notice of the ZHB's decision was mailed to Landowner on July 17, 2014.

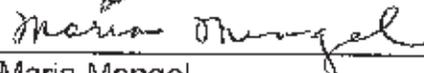
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Lynne Gold-Bikin, Esquire
Chairwoman



John M. Tallman
Member



Maria Mengel
Member

Date of Mailing: