

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

APPLICATION OF ANDREW BRANCA

NO. 2013-36

**PROPERTY: 433 E. CHURCH ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves an applicant's request for use and dimensional variances to permit the construction of an oversized garage in the LI Limited Industrial zoning district on a property with a single-family residence. The applicant also appealed the zoning officer's determination that the requested garage was not a permitted use. The applicant is the owner of the property and owns and operates an auto repair facility on the neighboring property. The applicant unsuccessfully sought similar relief in August 2009.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on application no. 2013-36 of Andrew Branca on October 15, 2014. The hearing was stenographically recorded. All members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; Judith A. Vicchio, Member; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was represented by Edmund J. Campbell, Jr., Esq. of the law firm of Campbell Rocco Law LLC.

After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. The applicant, Andrew Branca ("Landowner"), is the owner of an LI Limited Industrial property located at 433 E. Church Road (the "Property").

2. The Property consists of 13,325 square feet. [Ex. A-5] The Property presently contains a single-family home.

3. Landowner owns and operates an auto repair facility on a separate parcel adjacent to the Property.

5. Landowner desires to construct a 1408 (32 x 44) square foot garage on the Property (the "Proposed Garage"). [Ex. A-5]

6. Landowner sought a determination from the Township Zoning Officer that the desired garage was a permitted use on the Property.

7. The Zoning Officer issued a determination (the "Determination") on April 18, 2014, that the Proposed Garage was not a permitted use on the Property. [Ex. A-4]

8. The Zoning Officer's Determination states:

In my opinion, the proposed 44' by 32' accessory structure is not subordinate to the principal building on the lot. Also, the proposed use is not customarily incidental to that of the principal building. Therefore, in my opinion a use variance is required.

[Ex. A-4]

9. Landowner requested the following dimensional variances:

- A variance from section 165-146.B(1) to permit side yards of 5' and 13' instead of the 15' minimum side yard required, and an aggregate side yard of 18' instead of the 40' minimum side yard required.

- A variance from section 165-146.C to permit a rear yard of 10' instead of the 20' minimum rear yard required.

10. Landowner also requested a use variance from sections 165-144.A, 165-144.G and 165-5.B to permit construction of the garage in light of the Zoning Officer's determination that the garage is not a permitted use.

11. Landowner previously applied to the ZHB for relief in August 2009. Then, as now, Landowner requested relief from the side yard and rear yard setback requirements to permit construction of a detached garage (then, 40' x 40'). Landowner also appealed the decision of the Zoning Officer that the proposed detached garage was not a permitted use on the Property. Landowner owned the neighboring auto repair business at that time and asserted that he would be storing 8 of his own cars in the proposed detached garage, even though he did not and would not reside in the house on that property.

12. In the 2009 application, the ZHB denied Landowner's appeal and request for variances. The ZHB concluded that the size of the proposed detached garage demonstrated that it was not subordinate to the residential use of the Property. The ZHB also concluded that the proposed use was not customarily incidental to the residential use. Although providing a place for tenants to park their personal cars could be customarily incidental, the ZHB concluded that storage of 8 cars by Landowner was not.

ZHB HEARING

13. Landowner testified on his own behalf. Landowner did not offer the testimony of any other witnesses, including the tenant of the property.

14. Landowner's testimony was as follows:

- Landowner purchased the Property in 2008 and has never lived on the Property. [N.T. p. 29]
- Landowner has successfully rented the Property as a residence since purchasing it. [N.T. pp. 16, 29-30]
- The Property has never contained a garage. [N.T. p. 30]
- Landowner owns the lot and the auto repair business immediately adjacent to the Property. [N.T. pp. 12-13] The auto repair business is located at 439 E. Church Road. [N.T. p. 13] Landowner has operated the auto repair business at this location for approximately 12 years. [N.T. p. 18]
- The Property is 50' wide and 266 1/2' deep. [N.T. p. 14]
- The Property contains a single-family home and a shed. [N.T. p. 14; Application]
- The single-family home is 1215 square feet in size, based on Landowner's calculations, not including the porches. [N.T. p. 30]
- Landowner intends to build the Proposed Garage to the rear of the Property. [N.T. p. 14] The Proposed Garage is 32' x 44'. [N.T. p. 15]
- Landowner asserted that he himself would not utilize the Proposed Garage, despite both its adjacency to his auto repair business and also his prior application to the ZHB. Instead, Landowner now claims that the tenant on the Property would use the garage. [N.T. p. 16]
- The tenant on the Property owns a masonry business. [N.T. pp. 16-17]

- According to Landowner, the tenant stores two trailers, two or three trucks, and miscellaneous equipment on the Property associated with his masonry business [N.T. p. 33]
 - According to Landowner, the tenant would use the Proposed Garage to store equipment and materials associated with his masonry business. [N.T. pp. 16-17] Landowner asserted that the “purpose” of his application was to facilitate the storage of his tenant’s business equipment in the Proposed Garage. [N.T. p. 17]
 - The tenant did not testify.
 - Given the dimensions of the Property and the required setbacks, there is a 10’ wide building envelope available for a garage that would not require relief from the ZHB. [N.T. p. 15]
 - Landowner asserted that he could not build a garage without the requested zoning relief. [N.T. p. 16]
 - The Property is presently improved with a single-family home and a small shed. [Application]
 - When asked whether the Proposed Garage could be smaller, Landowner was evasive: “You can never have a big enough garage.” [N.T. p. 27]
 - Landowner admitted that a smaller garage (e.g., a two-car garage) would be sufficient for the Property “under normal circumstances.” [N.T. pp. 28-29]
 - Neighboring properties include single-family homes. [N.T. p. 21; Ex. A-11]
15. The Township entered its appearance in opposition to Landowner’s application. [N.T. p. 12]

16. The Township had one witness, Zoning Officer Mark Zadroga. Mr. Zadroga offered the following testimony:

- A smaller private garage could be placed on the Property. [N.T. pp. 41-42]
- By his calculations, the Proposed Garage is approximately 400 square feet larger than the single-family home. [N.T. p. 43]
- Mr. Zadroga opined that, given its size, the Proposed Garage did not constitute a use “incidental and subordinate” to the principal use. [N.T. pp. 43-44]
- Mr. Zadroga also testified that the Proposed Garage, which, according to Landowner, would be used to store tenant’s masonry business equipment (including trucks and trailers), was a business use and not one customarily incidental to the principal residential use on the Property. [N.T. p. 44]

17. Landowner submitted two letters from neighboring property owners. One of the neighboring property owners, Greg Kolpak, testified in support of Landowner’s application. [Ex. A-12; N.T. pp. 37, 52]

- In addition to the vehicles and equipment testified to by Landowner, the tenant stores mixing equipment and scaffolding equipment on the Property. [N.T. p. 52] In the wintertime, the tenant stores a snow plow on the Property. [N.T. p. 53]

18. A neighboring property owner, Farrell Carota, testified in opposition to the application. [N.T. p. 58]

- Mr. Carota is improving the single-family home on the lot immediately adjacent to the Property. [N.T. p. 58]

- Mr. Carota was concerned with both the large size of the garage and the proximity of the garage to his property line. [N.T. p. 58]

INSUFFICIENCY OF THE EVIDENCE

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

20. Landowner failed to offer proof that the use or dimensional 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 home and shed.

21. Landowner failed to offer proof that the requested variances were the minimum variance that would afford relief.

B. DISCUSSION

CREDIBILITY

"Determinations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the [ZHB] in the performance of its factfinding role." *Borough of Youngsville v. Zoning Hearing Bd. of Youngsville*, 450 A.2d 1086, 1089 (Pa. Commw. Ct. 1982); *Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp.*, 987 A.2d 1243, 1248 (Pa. Commw. Ct. 2009).

The testimony offered by Landowner with respect to (1) the use of the Proposed Garage, and (2) the necessity of the size of the Proposed Garage was not credible.

Landowner applied to the ZHB in August 2009, for relief to use the garage to store cars unassociated with the residential use on the Property and apparently in connection with his auto repair business on the neighboring property. That application

was denied on the basis that the garage proposed was not customarily incidental or subordinate to the residential use. This conclusion was based both on the garage's size (40' x 40') and use (storage of 8 cars unrelated to the residential use). The denial was not appealed.

Landowner asserted that he no longer planned to utilize the Proposed Garage for this purpose, despite the fact that his auto repair business is still located on the neighboring lot. [N.T. p. 16]

Instead, Landowner claimed that the tenant on the Property would utilize the Proposed Garage in connection with his masonry business. Despite alleging that the Proposed Garage was being constructed for use by the tenant, the tenant did not testify at the hearing.

Landowner also asserted that he could not build a garage without the requested zoning relief. [N.T. p. 16] At the same time, however, Landowner testified that there is a 10' wide building envelope on the Property available for a garage. [N.T. p. 15] When asked whether the Proposed Garage could be smaller, Landowner stated: "You can never have a big enough garage. [N.T. p. 27] Upon questioning, Landowner admitted that a smaller garage would be sufficient to serve the Property under normal circumstances. [N.T. pp. 28-29]

Landowner's testimony regarding the use of the Proposed garage and the infeasibility of a smaller garage was not credible.

The ZHB concludes that that the proposed use of the Proposed Garage will be either (1) to permit operation of the tenant's masonry business on the Property; or (2) for use in connection with Landowner's auto repair business for, e.g., the storage of

vehicles; or (3) for the tenant's, or Landowner's, non-residential use of the garage. None is a permitted use on the Property.

ZONING OFFICER APPEAL

Landowner failed to demonstrate that the Zoning Officer erred in determining that the desired garage was not a permitted use.

In considering Landowner's appeal of the Determination, the ZHB is limited to considering whether the Zoning Officer misinterpreted or misapplied the Zoning Ordinance in reaching his decision. *Frost v. Borough of Centerville*, 533 A.2d 1130 (Pa. Commw. Ct. 1987). Landowner requested a determination that the Proposed Garage was permitted under the Zoning Ordinance. Upon review of the information submitted, the Zoning Officer made the determination that the Proposed Garage was not a permitted use under the Zoning Ordinance.

Section 165-144.A of the Zoning Ordinance permits residential uses in the LI Limited Industrial zoning district. Zoning Ordinance § 165-144.A. Section 165-144.G permits an accessory use "on the same lot with and customarily incidental to" a permitted use. Zoning Ordinance § 165-144.G. Section 165-1.5 B sets forth the definition of "accessory use or structure" and "private garage". "Accessory use or structure" is defined as:

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

Zoning Ordinance § 165-5.B. Private garage is defined as:

An accessory building or part of a principal building used for the storage of motor vehicles owned and used by the owner or tenant of the premises and for the storage of not more than two motor vehicles owned and used by persons other

than the owner or tenant of the premises. Not more than one commercial vehicle or truck may be stored in a "private garage".

Id. By definition, a private garage must be an accessory building or part of the principal building itself. Further, the ZHB interprets the phrase "used by the owner or tenant" to refer to the actual occupant of the Property.

Landowner's own testimony reveals:

- The Proposed Garage is significantly larger than the single-family residence on the Property. The single-family home, excluding the porches, is approximately 1215 square feet. [N.T. p. 30] The Proposed Garage is 1408 square feet. [N.T. p. 15] By the Zoning Officer's calculation, the difference in size between the two structures is even greater, the Proposed Garage being approximately 400' larger than the single-family dwelling. [N.T. p. 43]
- The tenant on the Property owns a masonry business. [N.T. p. 17] The tenant stores two trailers, two or three trucks, and miscellaneous equipment on the Property in association with the masonry business at any given time. [N.T. p 33]
- Landowner claimed that the tenant would use the Proposed Garage to store equipment and materials associated with his masonry business. [N.T. p. 16-17] Landowner asserted that the purpose of his application was to facilitate the storage of his tenant's business equipment in the Proposed Garage. [N.T. p. 17]
- A small garage would be sufficient to serve the Property "under normal circumstances." [N.T. pp. 28-29]

Given the foregoing, the ZHB concludes that the Zoning Officer did not misapply or misinterpret the Zoning Ordinance, or otherwise err in determining that the Proposed Garage is not a permitted use on the Property. Far from being customarily incidental or

subordinate to the single-family home on the Property, the ZHB concludes that the Proposed Garage will either be used (1) to house the tenant's commercial masonry business, or (2) in connection with Landowner's auto repair business for, e.g., the storage of vehicles, or (3) for the tenant's or landlord's non-residential use of the garage. The Proposed Garage is significantly larger than the single-family home itself, and Landowner himself admitted that a smaller garage would be sufficient to serve the single-family home. Under these circumstances, the Proposed Garage is not "customarily incidental" or "subordinate to" the single-family dwelling.

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).

Variations should be granted sparingly, and the reasons for granting variations must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). "The burden on a landowner seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling." *Bawa Muhaiyaddeen Fellowship v. Philadelphia Zoning Bd. of Adjustment*, 19 A.3d 36, 39-40 (Pa. Commw. Ct. 2011) (citing *Valley View Civic Assoc. v. Zoning Bd. of Adjustment*, 462 A.2d 637 (Pa. 1983)). "Further, a use variance carries a greater risk of injury to the public interest than a dimensional variance." *Id.* at 40. Therefore, the burden carried by an applicant seeking a use variance is high. *See id.*

An applicant for a use variance has the burden of proving that "(1) the proposed use is not contrary to the public interest and (2) the property involved is subjected to an unnecessary hardship unique or peculiar to the property itself." *Zaruta v. Zoning Hearing Bd. of City of Wilkes-Barre*, 543 A.2d 1282, 1284 (Pa. Commw. Ct. 1988).

Unnecessary hardship can be demonstrated by:

...either (1) showing that the physical characteristics of the property are such that it could not be used for a permitted use or that the physical characteristics were such that it could only be arranged for such purpose at a prohibitive expense, or (2) by proving that the characteristics of the area were such that the lots had either no value or only a distress value for any purpose permitted by the zoning ordinance.

Id. (citing *Appeal of Nardoza*, 405 A.2d 1020 (Pa. Commw. Ct. 1979)).

Although a somewhat relaxed standard applies to applications for dimensional, as opposed to use variations, 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. Commw. Ct. 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. 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. Commw. Ct. 2010).

However, this application also includes a request for a use variance.

1. Landowner failed to demonstrate an unnecessary hardship justifying the requested variances to permit construction of the garage.

Landowner requested two dimensional variances and a use variance. Despite the request for substantial relief, Landowner did not prove that an unnecessary hardship exists on the Property to justify construction of the Proposed Garage. Far from demonstrating that the Property could not be used for a permitted use, or that engaging in a permitted use on the Property would be prohibitively expensive, Landowner’s testimony reveals that the Property is presently being successfully used as and for a single-family home by a tenant. [N.T. p. 16] Landowner has rented the Property as a residence since purchasing the Property in 2008. [N.T. p. 29] The Property has never had a garage during the time that Landowner has owned the Property. [N.T. p. 30]

Landowner similarly did not prove that the characteristics of the area were such that the Property has no value, or only distress value, for a permitted use. To the contrary, Landowner’s testimony and exhibits demonstrated that neighboring properties are also utilized as and for single-family homes. [N.T. 21; Ex. A-11]

Landowner merely articulated his personal desire to add a large garage to the Property.

Despite acknowledging that a smaller garage is possible, Landowner offered no evidence that he considered a smaller garage on 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 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 circumstances 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. Commw. Ct. 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.Cmwith. 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.

In a case very similar to the case at bar, property owners applied for a dimensional variance (from a lot line setback) to permit construction of an accessory garage (a permitted use) on their property. *In re Leopardi*, 496 A.2d 867 (Pa. Commw. Ct. 1985), *order reversed in part on other grounds*, 532 A.2d 311 (Pa. 1987). Commonwealth Court concluded:

As the court of common pleas correctly determined, such reasoning will not support the grant of a variance. The fact that a garage is permitted as an accessory use in an R-1 district does not mean that Appellants must be allowed to construct a garage on their property in order to utilize that property reasonably. The dimensional requirements of the ordinance must be honored unless Appellants meet their burden of demonstrating unnecessary hardship.... Appellants presented no evidence that the physical circumstances creating the hardship were, as is also required pursuant to Section 912, unique to the property as contrasted to being a hardship created by the provisions of the ordinance in Appellants' neighborhood or district generally.

In re Leopardi, 496 A.2d at 869-70.

Here, the Property is well suited, and being reasonably used, for the purpose for which it is zoned – a single-family home. Landowner failed to articulate any manner in which the Property is burdened by the requirements of the Zoning Ordinance. Putting aside the request for a use variance and the applicable legal standard, even under the somewhat relaxed standard applicable to dimensional variances, as in *In re Leopardi*, Landowner failed to demonstrate a single legally cognizable hardship posed by the Property or by his inability to place an admittedly oversized garage on the Property that will intrude into the required setbacks. Landowner merely demonstrated, as in *Yeager*, his personal preference for an unpermitted use of the Property. This desire is insufficient to entitle Landowner to the requested variances.

2. Landowner failed to prove the requested variance is the minimum needed to afford relief.

Landowner was required to provide evidence that the variances requested represent the minimum necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999).

Landowner failed to offer any proof that the requested variances were the minimum necessary to afford relief.

Under these circumstances, Landowner failed to prove that the requested use variances represent the minimum necessary to afford relief.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under sections 909.1(a)(3) and 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §§ 10909.1(a)(3), 10909.1(a)(5), and Zoning Ordinance sections 165-251.A(3) and 165-251.A(5).

2. Landowner has standing to seek the requested variances and to appeal the Zoning Officer's determination as the legal owner of the Property.

3. Landowner's testimony regarding the nature of the proposed use and the necessity of the oversized garage was not credible.

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

5. The Zoning Officer appropriately determined that the Proposed Garage is not a permitted use on the Property.

6. 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).

7. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to a use variance from sections 165-144.A, 165-144.G and 165-5.B of the Zoning Ordinance to permit the Proposed Garage.

8. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to dimensional variances under Section 165-146.B(1) and 165-146.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 requested variances represent the minimum necessary to afford relief.

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

At its October 15, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 15th day of October, 2014, the Zoning Hearing Board DENIES the appeal of Andrew Branca from the decision of the Zoning Officer dated April 18, 2014.

The Zoning Hearing Board also DENIES the request for variances from the following sections of the Upper Merion Township Zoning Ordinance of 1942, as amended:

- section 165-146.B(1) to permit side yards of 5' and 13' instead of the 15' minimum side yard required, and an aggregate side yard of 18' instead of the 40' minimum aggregate side yard required;
- section 165-146.C to permit a rear yard of 10' instead of the 20' minimum rear yard required; and
- sections 165-144.A, 165-144.G and 165-5.B to permit construction of the proposed garage.

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 October 16, 2014.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

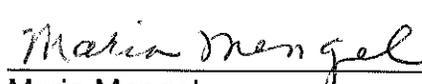
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