

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

APPLICATION OF DAVID E. MARCH

NO. 2014-23

**PROPERTY: 417 BLUEBUFF ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves an applicant's request for variances to allow an existing firewood shed in the required side and rear yards in the R-2 zoning district. The applicant is the owner of the property.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a duly advertised hearing on Application no. 2014-23 of David E. March on November 5, 2014. Members of the ZHB present at the hearing were: John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; Judith A. Vicchio, Member; and Maria Mengel, Member. The ZHB was represented by Michael E. Peters, Esq. of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was unrepresented.

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

A. FINDINGS OF FACT

BACKGROUND

1. The applicant, David E. March ("Landowner"), is the owner of an R-2 property located at 417 Bluebuff Road (the "Property").

2. The Property consists of 7700 square feet. [Ex. A-1] The Property presently contains a single-family home and a large garage. [Exs. A-1; A-3]

3. Landowner resides in the single-family home.

4. Landowner constructed a large 160 square foot "firewood shed" (the "Shed") in the required side and rear yard setback of the Property. [Exs. A-1; A-4; A-5; N.T. p. 10]

5. Landowner did not seek zoning relief, nor did he apply for a permit, before constructing the Shed.

6. Landowner requests variances from section 165-23 of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance") to allow the Shed to remain in the required side and rear yard setback.

7. Section 165-23 of the Zoning Ordinance sets forth the dimensional regulations in the R-2 zoning district:

- Minimum side yard – 10'
- Side yard (accessory use) – 4'
- Rear yard – 30'
- Rear yard (accessory use) – 10'

ZHB HEARING

8. Landowner testified on his own behalf.
9. Landowner's testimony was as follows:
 - Landowner purchased the Property in August 2011, and has lived there since.
[Ex. A-6]
 - The house is "kind of close to [the] rear end of the property." [N.T. p. 4]
 - Landowner chose the location of the Shed because the location is "not really usable space". [N.T. p. 4]
 - The Shed is located 6" from the eastern property line and 1' from the southern property line. [Exs. A-2; A-5]
 - Landowner opined that:

...if I were to put it within the regulated footage away from [the rear and side yard setbacks], it kind of puts it right up against the house. And if I were to move it out into the side yard, it would kind of be against the street. I don't think it would have a good look.

[N.T. pp. 5-6]
 - The Shed sits at the southeast corner of the Property. [Ex. A-4, A-5]
 - The Shed is very large, and wraps around the eastern and southern property lines. [Exs. A-4, A-5]
 - The total length of the Shed is 40', although Landowner also has a pile of unsheltered wood continuing for approximately 20' on the southern property line, for a total of 60'. [Exs. A-4; A-5; N.T. p. 10]
 - The Shed is 7 1/2' in height. [N.T. p. 12]

- Landowner was aware that the maximum height for fences in the Township is 6'. [N.T. p. 12]
- The wood piled under the roof is stacked 2 rows deep, with each pile being 18" wide. [N.T. p. 21]
- The Shed is 160 square feet total. [N.T. p. 10]
- The Shed has an A-frame roof. [N.T. p. 12]
- The Shed and the associated uncovered woodpile dwarf the neighboring fences, forming, in total, a 60' long obstruction around the southeastern corner of the Property. [Ex. A-4]
- Landowner chose the height and roof style of the Shed for the purpose of blocking his view of a newly constructed 2-story house in the neighborhood, to "have a little bit more privacy." [Ex. A-2; N.T. p. 15]
- When asked why he did not install a fence on the Property, Landowner testified:

... I kind of looked at it, but it clearly was not high enough. That's why I kept holding something up, to kind of see where it would start to break the view. And that's where it starts to break the view.

[N.T. pp. 18-19]
- One of Landowner's neighbors requested that Landowner reduce the height of one of the woodpiles so that they could see through their window. [N.T. p. 17]
- Landowner was unaware of any other wood shed of this type in the neighborhood or, for that matter, in any residential neighborhood. [N.T. pp. 17-18]

- Landowner utilizes the wood for a wood stove during the winter. [N.T. pp. 9-10, 21 Landowner uses forced heat as his main heat source during the winter. [N.T. p. 21]
- Landowner brings the wood onto the Property, and then “seasons” the wood on site to prepare it for use as firewood. [N.T. pp. 12, 22]
- Landowner was questioned regarding the flammability of the Shed and the wood piles:

MR. TALLMAN [ZHB VICE CHAIRMAN]: ... What do you think would happen if this wood caught on fire? ... in my head that poses a major fire hazard.

MR. MARCH: That’s true. I don’t know how to answer that other than the fact that, you know, houses are made of wood. And worst case is if somebody was using a shed to store their wood, it would be the same.

[N.T. p. 24]

10. Landowner was asked whether he had considered other options for storage of the firewood:

MS. VICCHIO [ZHB MEMBER]: Have you researched any other options available for storage of this wood?

MR. MARCH: Never thought about doing that, no ma’am.

[N.T. p. 28]

11. Landowner submitted signatures from two neighboring property owners and represented that the neighbors had “no objection” to the Shed. [Ex. A-2] The neighbors did not testify at the hearing.

12. One resident of the Township, Ed Mustard, testified. Mr. Mustard owns and lives in a residence approximately 6 houses away from the Property. [N.T. pp. 26-27]. Mr. Mustard stated that he encouraged “residents to enhance our community, build appropriately” and that he had no objection to the Shed. [N.T. p. 27]

INSUFFICIENCY OF THE EVIDENCE

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

14. 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 home and associated garage.

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

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 (Pa. 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.Cmwlt. 1994). Although a somewhat 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.

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.Cmwlt. 2010).

1. **Landowner failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying variances to allow the Shed in the required rear and side yards.**

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 single-family home and large garage. [Exs. A-1; A-4; A-5]

Landowner failed to articulate a legal, as opposed to a personal, hardship to permit the continued presence of the Shed in the required rear and side yards.

Landowner constructed the Shed in the required rear and side yards, and specifically 6" from the eastern property line and 1' from the southern property line, without seeking zoning relief or applying for a permit. As a result, at the corner of the Property where the Shed is located there is almost no separation from the neighboring properties.

Landowner failed to articulate a hardship in existence on the Property not created by his desire to (1) maintain a very large firewood shed, and a large quantity of firewood, on the Property in close proximity to neighboring properties and (2) block out the recently built 2-story house. Landowner did not construct a fence under the terms of the Zoning Ordinance because, quite simply, he wanted an obstruction higher than the permitted fence height.

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 (Pa. 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.Cmwlt. 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.Cmwlt. 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.Cmwlt. 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 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.Cmwlth. 1999). Landowner failed to offer any proof that the requested variances were the minimum necessary to afford relief. To the contrary, testimony reveals that (1) the Property presently contains a single-family home, inhabited by Landowner, and a large garage; (2) Landowner could have installed a fence under the requirements of the Zoning Ordinance; (3) Landowner chose not to locate the Shed where permitted (e.g. outside of the required setbacks) because he did not want the Shed next to his house or in a location where it would not “have a good look” and (4) Landowner failed to consider other options for storage of the firewood in a manner that would be consistent with the Zoning Ordinance.

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 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 to seek the requested variances as the legal 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 dimensional variances from section 165-23 of the Zoning Ordinance to permit the Shed in the required rear and side yards.

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 November 19, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 19th day of November, 2014, the Zoning Hearing Board DENIES the request for variances from the following section of the Upper Merion Township Zoning Ordinance of 1942, as amended:

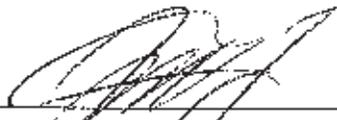
- 165-23 Area, width and yard regulations for side yard and rear yard setbacks to allow an existing firewood shelter to stay in its current location.

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 November 20, 2014.

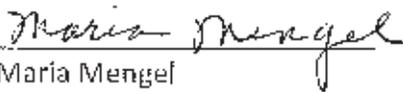
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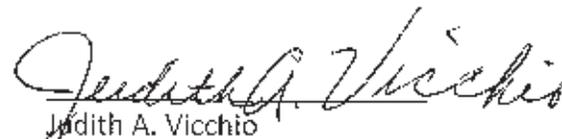
John M. Tallman
Vice Chairman



Mark DePillis, Esq.
Secretary



Maria Mengel
Member



Judith A. Vicchio
Member

Date of Mailing: