

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-16 : **HEARING DATE:** July 21, 2010
: :
APPLICATION OF: Kevin & Judith Bergmaier :
: **DECISION DATE:** August 4, 2010
: :
PROPERTY: 109 Gulph Hills Road :
: :
Upper Merion Township :

**OPINION AND ORDER OF THE UPPER MERION
TOWNSHIP ZONING HEARING BOARD**

The Applicant, Kevin J. and Judith A. Bergmaier, (hereinafter referred to as the “Applicant”), filed an application requesting a special exception under Section 165-199.B(2) in order to construct an addition to the existing non-conforming property. In the alternative, the Applicant is seeking a variance from Section 165-24 to in order to construct an addition that will encroach into the required rear yard setback. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on July 21, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, Zoning Officer, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is Kevin J. and Judith A. Bergmaier, 109 Gulph Hills Road, Wayne, PA 19087.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 109 Gulph Hills Road, Wayne, PA 19087, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R1-A" Residential.
6. The Applicant's property is a corner lot with Upper Gulph Rd. running along the southern property line and Gulph Hills Rd. running along the northern property line.
7. The Applicant's parcel has a triangular shape.
8. Because the Applicant's parcel is a corner lot, it has 50 ft. front yard setbacks from each road.
9. The parcel contains a single family detached house that is approximately 1,700 sq. ft.
10. The Applicant is proposing an addition that will involve the addition of a kitchen and an expanded garage on the south side of the house.
11. The Applicant also proposes a new front entrance with an adjacent side porch to the west end of the house and a new side porch and patio to the south side of the house.
12. Six (6) of the nearest neighbors have been informed of the proposed plans and all six (6) neighbors have expressed support of the Applicant's proposal.
13. Several neighbors have recently made similar improvements to their homes which have enhanced the neighborhood.
14. The current house is non-conforming with portions of the existing structure extending beyond the building setback lines on the north, south and west sides.
15. The Applicant needs relief because of the unusual configuration of the subject parcel and the fact that it is a corner lot with 50 ft. front yard setbacks.

16. The Applicant agreed to withdraw the special exception and proceed with only the variance.
17. The Applicant introduced the following exhibits:
 - Exhibit “A-1” – A floor plan
 - Exhibit “A-2” – A narrative of the presentation
 - Exhibit “A-3” – Architectural Renderings
 - Exhibit “A-4” – Zoning Table
 - Exhibit “A-5” – Packet of letters from neighbors in support of the project
18. There were no residents who testified against the project.
19. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Kevin J. and Judith A. Bergmaier, filed an application requesting a special exception under Section 165-199.B(2) in order to construct an addition to the existing non-conforming property. In the alternative, the Applicant is seeking a variance from Section 165-24 to in order to construct an addition that will encroach into the required rear yard setback. The Applicant withdrew the special exception at the time of the hearing and proceeded with only a variance.

As a preliminary matter, the applicable standards for determining whether to grant a dimensional variance differ from those of a use variance. The standard as outlined by the Pennsylvania Supreme Court is that the Applicant must show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998); citing, Allegheny West

Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997).

In Hertzberg, the Supreme Court held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of a Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. If the Board determines that the relief is for a use variance, then the Board should use the traditional five-part test, which is set forth in both the Municipalities Planning Code and case law. If the requested relief is for a dimensional variance, then the standard to be applied will be different. Id. While the Court in Hertzberg did not specifically identify a single standard for a dimensional variance, it noted that the requirements for a dimensional variance were something less than that of a use variance. Id.

In its opinion, the Court went on to opine that some of the factors that a Zoning Hearing Board should look at to determine whether to grant a dimensional variance should include, where applicable:

- (1) The economic detriment to Applicant if the variance was denied;
- (2) The financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and,
- (3) The characteristics of the surrounding neighborhood. Id.

While these factors are not exhaustive, the Court in Hertzberg and subsequent cases have referred to them specifically as findings a Zoning Hearing Board should make in its determination of whether to grant or deny a dimensional variance.

Although the language of Hertzberg is expansive, the current trend is to apply the relaxed standard for dimensional variances only to the consideration of whether unnecessary hardship results from unique physical characteristics or conditions of the land. The Friendship

Preservation Group, Inc. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Cmwlth. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlth. 2001).

The reasons for granting a variance must be substantial, serious and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Cmwlth. 1999); Sotereanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). Moreover, variances to zoning codes should be granted sparingly and only under exceptional circumstances; a variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Cmwlth. 1996).

In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10910.2, where relevant. The law established by the Pennsylvania courts further establishes these standards, stated in full herein. See, Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Cmwlth. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Cmwlth. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created

by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
3. That such unnecessary hardship has not been created by the Applicant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

The Applicant is requesting permission to add an addition to an existing single family dwelling. The addition will expand the kitchen and increase the garage space. The Applicant has an unusual lot in that it is a corner lot with two (2) front yard setbacks of 50 ft. each. Furthermore, the lot has an irregular shape because it is triangular. Due to the setback requirements and the unusual shape of the lot, any expansion to the existing 1,700 sq. ft. single family detached dwelling would require some form of zoning relief. The Applicant withdrew the

request for a special exception and proceeded with the variance case. The Applicant's request is for a dimensional variance and not a use variance, therefore, the standards of the Hertzberg case are applicable to the case at bar. Through the use of testimony and exhibits, the Applicant sufficiently satisfied the standards of the Hertzberg case, therefore, the variance should be granted.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant a variance under Section 165-24 in order to construct an addition that will encroach into the required rear yard setback. This variance is conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on July 21, 2010. The request for a special exception was withdrawn at the time of the hearing.

Decision Dated: August 4, 2010

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

Robert J. Montemayor - Chairman

Mark S. DePillis, Esq. – Vice Chairman

William C. Whitmore, Sr. - Secretary

NOTE TO APPLICANT:

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant has received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Upper Merion Township within one (1) year of the date of the approval or the decision granting approval.