

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

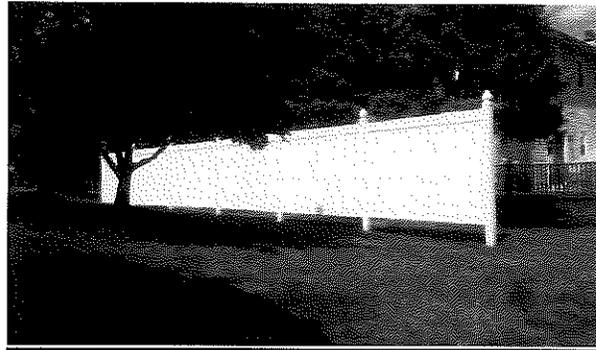
MONTGOMERY COUNTY, PENNSYLVANIA

APPLICATION OF LINDA KASHISHIAN

APPLICATION NO. 2016-09

PROPERTY: 411 JEAN DRIVE

OPINION AND ORDER



Black's Law Dictionary defines a "spite fence" as:

A fence erected solely to annoy a neighbor, as by blocking the neighbor's view or preventing the neighbor from acquiring an easement of light.

That is the essence of this application—a request for a height variance to permit an existing fence, knowingly and intentionally installed in violation of the fence height restrictions of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Zoning Ordinance").

Linda Kashishian ("Landowner") is the owner of a residential property located in the R-3A Residential District in Upper Merion Township, Montgomery County. Landowner filed an application seeking a variance from Zoning Ordinance section 165-208 *Fences and walls* to permit a fence of over 7 feet in height to remain where the maximum fence height permitted in the Township is 6 feet.

On July 20, 2016, the Zoning Hearing Board of Upper Merion Township (“ZHB”) held a public hearing on Landowner’s application. The following ZHB members were present at the hearing: John M. Tallman, Jr., Chairman, Mark S. DePillis, Esquire, Vice-Chairman, Maria Mengel, Secretary, and M Jonathan Garzillo, Member. Michael E. Peters, Esquire of Eastburn and Gray, P.C. represented the ZHB. Landowner was unrepresented.

The zoning hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded. After careful consideration of the evidence presented, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the legal owner of the property located at 411 Jean Drive, Upper Merion Township, Pennsylvania, identified as tax parcel number 58-00-11384-10-5 (the “Property”). [Ex. ZHB-1; Ex. ZHB-2.]

2. The Property is located in the Township’s R-3A Residential District. [ZHB-1.]

3. The Property comprises 6343 square feet. [Ex. ZHB-7; Ex. ZHB-8.]

4. The Property contains Landowners’ home, an end-unit townhouse. [N.T. p. 9.]

5. In December 2015, Landowner installed a fence in the Property’s side yard. [N.T. p. 11.] The fence is over one foot higher than permitted under the Zoning Ordinance.

6. Landowner requested a variance from Zoning Ordinance section 165-208 *Fences and walls* to permit the fence to remain.

ZHB HEARING

7. The Zoning Hearing Board entered the following exhibits:
- a. ZHB-1—Zoning Hearing Board Application
 - b. ZHB-2—Deed dated December 26, 1997, between Ethel M. Donoske (grantor) and Linda Kashishian (grantee)
 - c. ZHB-3—Real Estate Tax Certification, dated November 20, 1997
 - d. ZHB-4—Proposal Contract from Home Depot, dated September 3, 2015
 - e. ZHB-5—four double-sided pages of photographs of Property
 - f. ZHB-6—Notice of Violation dated May 26, 2016, from Mark Zadroga, Chief Building/Zoning Official regarding fence
 - g. ZHB-7—portion of tax map showing Property
 - h. ZHB-8—Montgomery County Board of Assessment records
 - i. ZHB-9—legal notice
 - j. ZHB-10—proof of publication
 - k. ZHB-11—affidavit of posting
8. Landowner entered no exhibits.
9. Landowner testified on her own behalf. Landowner had no other witnesses.
10. Landowner's testimony was as follows:
- a. Landowner resides on the Property. [N.T. p. 9.]

- b. Landowner previously had a privacy fence installed in her backyard, which faces Beidler Road. [*Id.*]
- c. The entrance to Landowner's home is on the side of the house, facing the entrance to the home of her neighbor, Ms. Faith Gefvert. [*Id.*]
- d. The property line between Landowner's property and Ms. Gefvert's property is lined with large spruce trees, which previously served as natural screening. [N.T. pp. 9-10.]
- e. In August 2015, the spruce trees were pruned, resulting in partial loss of the natural screening. [N.T. p. 10.]
- f. Landowner testified that her neighbor, Ms. Gefvert's husband, "didn't like my fence" and stated: "No more fences...that fence in your backyard looks like crap." [N.T. pp. 14-15.]
- g. Although Landowner ordered a 6 foot fence which would comply with the Zoning Ordinance, Landowner intentionally directed the fence installers to install the fence higher than 6 feet, knowingly in violation of the Zoning Ordinance:

The fence was purchased from Home Depot and put up by the Fence Authority in December 2015. Because I had already put up a six-foot fence in my backyard that did not require a permit, I knew I did not need one for the six-foot, six-panel fence I was about to purchase.

When the Fence Authority came to install my fence, the placement of the panels did not give me the privacy I needed...I asked them to raise up the panels a little higher so as not to see my neighbors kitchen window, which faces mine.

And as long as I've lived in my home their window has never had drapes or shades. Also, my neighbor's town home sits up higher than mine, which caused me to ask for the panels to be raised.

[N.T. p. 11 (emphasis added).]

- h. Landowner requested the variance "to keep the fence at the height it is now so as to maintain the level of privacy I need for my home that I'm comfortable and accustomed to..." [N.T. p. 12.]
 - i. When asked whether she would be willing to lower the fence to bring it into compliance with the Zoning Ordinance, Landowner replied, "Not really." [N.T. p. 16.]
 - j. Landowner did not know how high the fence, as installed, is at its highest point. [N.T. pp. 17-18.]
- 11. Ms. Gefvert testified in opposition to the application:
 - a. Ms. Gefvert resides at 413 Jean Drive, the property separated from Landowner's Property by the fence. [N.T. p. 20.]
 - b. Ms. Gefvert objected to the fence, stating: "...the [Zoning Ordinance] is there for a purpose. This is not conforming to the [Zoning Ordinance]." [N.T. p. 21.]
 - c. In Ms. Gefvert's opinion, the fence alters the essential character of the neighborhood, which is a townhouse development. [N.T. p. 22.]
No other fence of this type is in the development. [*Id.*]
 - d. The fence, at its highest point, is over 7 feet tall. [N.T. p. 24.]

- e. Although Ms. Gefvert understood that the fence could be 6 feet tall, she testified “[b]ut at least it wouldn’t be that tall...it’s just a big blockade...this would make it softer looking than, you know, here’s this wall, big rectangle on stilts.” [N.T. p. 28.]

B. DISCUSSION

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, serious and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 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. 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. 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. Commw. Ct. 2010).

1. **Landowner failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying a height variance to permit the fence to remain.**

This is a quintessential meritless zoning application. Ill will does not a hardship establish.

Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use unless the requested variance was granted. The Property contains Landowner’s home, a fence in the backyard, and could include a fence between Landowner’s and Ms. Gefvert’s properties, provided it complied with the Zoning Ordinance.

Landowner failed to articulate a legal, as opposed to a personal hardship for the fence with a height in violation of the Zoning Ordinance, and specifically over a foot taller than permitted. Instead, the fence is nothing more, and nothing less, than a “spite

fence”, installed by Landowner to block the view of a neighboring property owner with whom she does not get along.

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. 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.Cmwlth. 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.

As in *Yeager*, Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Landowner’s personal preferences and desire for a taller fence than that permitted by the Zoning Ordinance drive the need for the variance and are totally insufficient under the law.

2. Landowner failed to demonstrate that the hardship alleged was not self-created.

Landowner was required to demonstrate that the hardship alleged was not self-created. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999). Landowner was aware of the 6-foot height maximum. Nonetheless, Landowner admitted that, when the contractors were installing the fence at its appropriate height, she asked them to install it higher to block the view of her neighbor's home. Landowner quite purposefully violated the Zoning Ordinance, creating her need for the variance.

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

Landowner was required to provide evidence that the variance requested represents the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl*, 736 A.2d at 59. Landowner failed to prove that the requested variance was the minimum necessary to afford relief. To the contrary, testimony revealed that Landowner could comply with the Zoning Ordinance by simply lowering the fence. When asked whether she would be willing to lower the fence to bring it into compliance with the Zoning Ordinance, Landowner replied, "Not really". [N.T. p. 16.] Under these circumstances, Landowner failed to prove that the requested variance represents 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 §165-215.A(5).

2. Landowner has standing to seek the requested variance as the legal owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Zoning Ordinance § 165-208 *Fences and walls* sets a height restriction of 6 feet on fences and walls.
5. The ZHB may grant a variance provided that an applicant establishes that:
(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.
6. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to a height variance from section 165-208 *Fences and walls* of the Zoning Ordinance.
7. Landowner failed to demonstrate that the variance is necessary to permit a reasonable use of the Property.
8. Landowner failed to demonstrate that the variance is the minimum necessary to afford relief.
9. Landowner failed to demonstrate that the alleged hardship was not self-created.

10. Landowner failed to sufficiently demonstrate her entitlement to the requested variance.

At its July 20, 2016 hearing, the ZHB rendered the following decision:

DECISION

AND NOW, this 20th day day of July, 2016, the Zoning Hearing Board of Upper Merion Township DENIES the request for a variance from section 165-208 *Fences and walls* of the Upper Merion Township Zoning Ordinance of 1942, as amended, to permit a fence of +/- 7 feet where the maximum permitted fence height is 6 feet.

The decision with findings of facts, conclusions of law, and reasons will follow.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



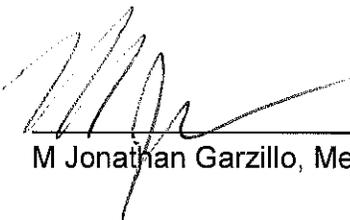
John M. Tallman, Jr., Chairman



Mark S. DePillis, Esquire, Vice Chairman



Maria Mengel, Secretary



M Jonathan Garzillo, Member

Date of Mailing: