

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PENNSYLVANIA

APPLICATION OF BOWARD HOLDINGS LLC

APPLICATION NO. 2016-04

PROPERTY: 534 KEEBLER ROAD

OPINION AND ORDER

This application concerns a request for a use variance to convert a residential property in a residential neighborhood to a professional office use.

Boward Holdings LLC ("Landowner") is the owner of a residential property located in the R-2A Single-Family Residential District in Upper Merion Township, Montgomery County. Landowner filed an application seeking a use variance from section 165-22 *Use regulations* of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Zoning Ordinance"), to operate a professional office, specifically a talk therapy office, with associated parking.

Section 165-22 *Use regulations* permits a variety of uses, including residential, institutional, community services, and recreational uses. A professional office use is not permitted in the R-2A Single-Family Residential District.

On June 15, 2016, the Zoning Hearing Board of Upper Merion Township ("ZHB") held a public hearing on Landowner's application. All ZHB members were present at the hearing: John M. Tallman, Jr., Chairman, Mark S. DePillis, Esquire, Vice-Chairman, Maria Mengel, Secretary, Lynne Z. Gold-Bikin, Member, and M Jonathan Garzillo, Member. Marc D. Jonas, Esquire, of Eastburn and Gray, P.C. represented the ZHB as its solicitor. Landowner was represented by William Brennan, Esquire, of Butera, Beausang, Cohen, Brennan, Attorneys at Law. Natasha Taylor-Smith, Esquire, of the

Law Offices of Sean Kilkenny appeared on behalf of Upper Merion Township (the "Township") in opposition to Landowner's application.

The 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 equitable owner of the property located at 534 Keebler Road, Upper Merion Township, Pennsylvania, identified as tax parcel number 58-00-11707-05-2 (the "Property"). [Ex. A-1.B.]

2. The Property is located in the Township's R-2A Single-Family Residential District. [Ex. A-1.B.]

3. The Property comprises 1.2 acres. [Ex. A-1.B; N.T. p. 7.]

4. The Property contains a large Tudor-style home with three residential units. [N.T. p. 7.]

5. Landowner proposes to convert two of the units to a professional office for its talk therapy use. [N.T. pp. 21-22.]

6. The remaining unit will continue to be occupied by its current tenant and previous owner of the property, Richard Wheelan. [*Id.*]

7. Landowner requested a use variance from Zoning Ordinance section 165-22 *Use regulations* to permit the professional office.

ZHB HEARING

8. Landowner entered the following exhibits:
 - a. A-1.A—plan titled “Zoning Hearing Board Application Plan”, prepared by Joseph M. Estock Consulting Engineers & Land Surveyors, dated May 31, 2016 (size 11” x 17”, black and white)
 - b. A-1.B— plan titled “Zoning Hearing Board Application Plan”, prepared by Joseph M. Estock Consulting Engineers & Land Surveyors, dated May 31, 2016, last revised June 15, 2016 (full size, color)
 - c. A-2—undated letter from Dr. Kristine Boward, The Center, LLC, to neighbors regarding zoning hearing board application
 - d. A-3—brochure for The Center, LLC
 - e. A-4—curriculum vitae of Kristine Boward, Psy.D.
 - f. A-5—petition of property owners in favor of application, with 8 signatures
 - g. A-6—letter dated July 9, 2016, from owner of property at 140 Ivy Lane, King of Prussia
 - h. A-7— letter dated July 9, 2016, from owner of property at 121 Ivy Lane, King of Prussia
 - i. A-8—Confidential Inspection Report for Property
 - j. A-9—(not offered)
 - k. A-10.A—picture of exterior of home
 - l. A-10.B—picture of interior of home, bathroom

- m. A-10.C—picture of exterior wall of home
9. The Township entered the following exhibits:
- a. T-1—Zoning Ordinance excerpts (not admitted)
 - b. T-2—Decision of the Upper Merion Township Zoning Hearing Board, dated July 19, 1984
10. Landowner had two witnesses—Kristine Boward, Psy.D. and Richard Wheelan. Landowner did not offer the testimony of an engineer or planner.
11. Landowner's testimony was as follows:
- a. The Property contains an existing, large, Tudor-style home built in the 1800s, divided into 3 dwelling units. [N.T. pp. 21; 55.] The Property is located in a residential neighborhood on a "quiet" road. [N.T. p. 57.]
 - b. The Property and home thereon was part of a set of 3 homes of similar age and style. [N.T. pp. 54-55.] One of the other homes in the set is currently being used for residential use; the third has been torn down. [*Id.*]
 - c. Mr. Wheelan resides in one of the 3 units. [*Id.*] Mr. Wheelan has a "lifetime lease" to remain in his unit, obtained when he sold the Property to the current owner. [N.T. pp. 54-55; 77.]
 - d. Ms. Boward testified that the remaining two units are rented by students from Villanova University. [N.T. pp. 22; 58; 63.] At the time of the hearing, the 2 units had recently been re-leased for a one-year term. [N.T. p. 63.]

- e. Landowner intends to renovate 2 units and convert them into a professional office for a psychology practice known as The Center, LLC. [N.T. p. 21.]
- f. Ms. Boward is the owner of The Center, LLC. [N.T. p. 14.]
- g. The Center, LLC has 8 locations, 32 contractors, and 3 employees. [/*d.*]
- h. The Center, LLC has a current operation in King of Prussia, its “principal hub”, at Ivy Lane. [N.T. p. 14.] The Center, LLC would move its King of Prussia location to the Property should the requested relief be granted. [N.T. pp. 14-15.]
- i. In order to comply with the parking requirements of the Zoning Ordinance, Landowner proposes to install a large parking lot on the Property with 28 parking spaces. [Ex. A-1.B; N.T. pp. 26-27.] The parking area on the Property currently includes room for only 6 cars. [N.T. p. 66.]
- j. As many as 11 contractors, 2 employees, and 10 patients would be on the Property within any given hour. [N.T. pp. 29-31; 68.] Ms. Boward testified that the maximum patients-per-day at the existing King of Prussia location is 60, with a maximum of 255 patients per week. [N.T. p. 45-46.]
- k. The practice would operate from 8:00 am to 9:00 pm, Monday through Thursday; and 8:00 am through 6:00 pm, Friday and Saturday. [N.T. p. 31.]

- I. Ms. Boward acknowledged that the proposed professional office use would result in increased traffic in the residential neighborhood in which the Property is located. [N.T. pp. 32; 52.]
- m. The Property currently contains no exterior lighting. [N.T. pp. 34-35.] Landowner would install exterior lighting for the parking lot as well as “uplighting”. [N.T. pp. 34-35; 49-50.] Ms. Boward did not know whether other properties in the neighborhood have exterior lighting. [N.T. p. 64.]
- n. The Property has been for sale for less than one year. [N.T. p. 36.]
- o. Ms. Boward described the deteriorated nature of the Property, including structural deficiencies, rotting wood, mold, an unsecured front door, missing windows, and garbage and trash strewn throughout the Property. [Ex. A-10.A; Ex. A-10.B; Ex. A-10C; N.T. pp. 37-40.]
- p. If Landowner did not obtain the zoning relief requested, it would not purchase the Property. [N.T. p. 40.] Ms. Boward testified that although she had considered purchasing a building in a commercial zoning district, she would “need more than a million [dollars].” [N.T. p. 73.]
- q. Landowner has the Property under agreement for \$380,000.00, pursuant to a short sale. The listing price was \$500,000.00. [N.T. p. 74.]

r. Ms. Boward acknowledged that at least one neighbor expressed opposition to the proposed use. [N.T. p. 40.]

s. With respect to the current owner of the Property, the former owner, Mr. Wheelan testified:

The present owner of the property is in Texas. I don't think he cares about the property anymore. Out of sight, out of mind. He's lost his money, what does he care?

[N.T. pp. 84-85.]

12. The Township presented one witness, Mark Zadroga, Chief Building Official and Zoning Officer for the Township. Mr. Zadroga's testimony was as follows:

a. The Property is located in the R-2A Single-Family Residential District. [N.T. pp. 88-89.]

b. The neighborhood in which the Property is located is "mostly residential" with single-family homes on the Property-side of Keebler Road, with the exception of a day care and middle school, and single-family homes across the street. [N.T. p. 89.]

c. The day care and educational use are permitted by special exception in the R-2A Single-Family Residential District. [N.T. p. 89.]

d. The proposed professional office use is not permitted in the R-2A Single-Family Residential District. [N.T. p. 92-93.]

e. There are no unique physical circumstances or conditions of the Property, which is a "large lot...relatively rectangular in shape, and flat, for the most part." [N.T. p. 93.]

- f. There are other properties of the same size within the neighborhood, being used for residential uses. [N.T. p. 96.]
- g. In Mr. Zadroga's opinion, the proposed professional office would alter the character of the neighborhood, increasing the number of people and number of cars coming into the neighborhood. [N.T. pp. 93-94.]
- h. Mr. Zadroga was aware of another offer on the Property since being placed on the market, but with an intended residential use. [N.T. pp. 95-96.]
- i. The existing house could be torn down and multiple single-family residential dwellings placed on the Property. [N.T. p. 103.]

13. Thirteen neighbors spoke in opposition to the proposed professional office use. Neighbors' concerns involved the deleterious effect on the neighborhood, which is residential with families and children, as a result of:

- a. the operation of a professional office, with hundreds of patients, employees, and independent contractors visiting the property Monday through Saturday;
- b. increased traffic, including the danger posed to children walking from the middle school, through the neighborhood, to their homes;
- c. the addition of a 28-car parking lot to the front of the Property; and
- d. negative effect on property values.

[N.T. pp. 109-36.]

14. One neighbor in particular, Michelle Kosowski, 537 Keebler Road, who owns and resides on the property directly across the street from the proposed parking lot, concisely articulated her concerns as follows:

... My driveway faces the property and my front door faces the property.

When I go out my front door, I do not want to see a parking lot. What I have not heard in any of this tonight is how the business would improve my quality of life as a resident.

...I take care of my property. I take care of my sidewalks, my driveway, my front lawn. I don't want to have to walk out and look at a commercial property across the street from me.

...

I'm just trying to retain my quality of life for my family that doesn't involve a commercial property within 100 feet of my front door. And I wouldn't care if it's a psychological service, a vet service, a hairdressing service.

I bought the home to be a resident of this community, and that's what I wanted to retain.

[N.T. pp. 126-27.]

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).

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.Cmwlth. 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 particularly high.

Here, Landowner failed to prove that there was any unique physical circumstance or condition peculiar to the Property, or that the requested variance was necessary for the reasonable use of the Property.

1. **Landowner failed to demonstrate an unnecessary hardship justifying a use variance to permit use of the Property as a professional office.**

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 Nardozza*, 405 A.2d 1020 (Pa. Commw. Ct. 1979)). While the Supreme Court has emphasized that a property owner need not demonstrate that his or her property is valueless unless the variance is granted, “mere economic hardship will not of itself justify a variance.” See *Marshall v. City of Philadelphia*, 97 A.3d 323, 330 (Pa. 2014).

Landowner did not prove that an unnecessary hardship exists on the Property to justify use of the Property for a professional office. 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 established that the Property contains a large Tudor-style home, with three residential units, all of which are rented. In fact, one of the units is rented by the prior owner, Mr. Wheelan.

Landowner similarly did not prove that the Property had no value, or only distress value, or any circumstances warranting the grant of a use variance.

Instead, Landowner's request for a use variance is driven by her desire to use the Property for a use not permitted in the R-2A Single-Family Residential District. Landowner seeks to obtain a residential property, pursuant to a short sale, at \$120,000.00 below its listing price, and convert it to a professional office use. Landowner's mere desire to operate a professional office use on a residential property, in a residential neighborhood, falls far short of justifying a use variance.

The ZHB finds that Landowner failed to carry its heavy burden of demonstrating unnecessary hardship for the grant of a use variance.

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

Landowner was required to provide evidence that the use variance requested represented 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.Cmwlt. 1999). Landowner failed to offer any proof that the requested use variance was the minimum necessary to afford relief. Landowner merely wants to use the already productive and fully-leased Property for a use not permitted in the R2-A Single-Family Residential District.

3. **Landowner failed to prove that the alleged unnecessary hardship was not self-created.**

Landowner was similarly required to demonstrate that the alleged unnecessary hardship was not self-created. See *id.* The “hardships” alleged by Landowner—a dilapidated building requiring extensive renovations, Mr. Wheelan’s life estate, and the presence of a fraternity—were all created by Landowner’s predecessor who, as Mr. Wheelan aptly put it, does not care about the Property any longer. The alleged hardships were self-created.

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 §165-251.A(5).
2. Landowner has standing to seek the requested use variance as the equitable owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Zoning Ordinance § 165-22 *Use regulations* enumerates the uses permitted in the R-2A Single-Family Residential District.
5. A professional office is not a permitted use in the R-2A Single-Family Residential District.
6. 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.

7. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to a use variance from section 165-22 *Use regulations* of the Zoning Ordinance.
8. Landowner failed to demonstrate that the use variance is necessary to permit a reasonable use of the Property.
9. Landowner failed to demonstrate that the use variance is the minimum necessary to afford relief.
10. Landowner failed to demonstrate that the alleged hardship was not self-created.
11. Landowner failed to sufficiently demonstrate its entitlement to the requested use variance.

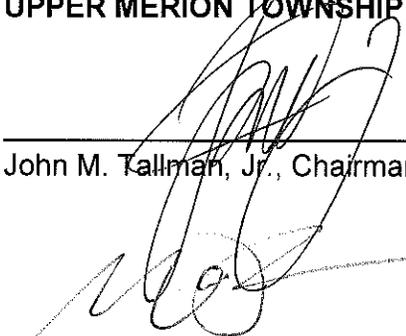
At its June 15, 2016 hearing, the ZHB rendered the following decision:

DECISION

AND NOW, this 15th day day of June, 2016, the Zoning Hearing Board of Upper Merion Township DENIES the request for a use variance from section 165-22 *Use regulations* of the Upper Merion Township Zoning Ordinance of 1942, as amended, to permit a professional office use in the R-2A Single-Family Residential District.

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

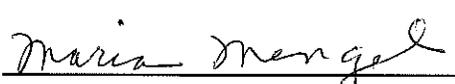
**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



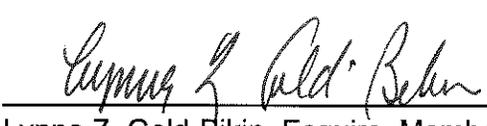
John M. Tallman, Jr., Chairman



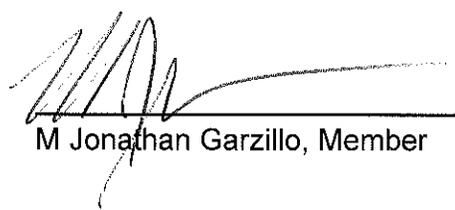
Mark S. DePillis, Esquire, Vice Chairman



Maria Mengel, Secretary



Lynne Z. Gold-Bikin, Esquire, Member



M Jonathan Garzillo, Member

Dated of Mailing: