

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-08 : **HEARING DATE:** November 17, 2010
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APPLICATION OF: Ted Cwienk, III : **DECISION DATE:** December 15, 2010
Electrical Contractor, Inc :
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PROPERTY: 351 Ross Road :
:
Upper Merion Township :

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

The Applicant, Ted Cwienk, III, Electrical Contractor, Inc., (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-35 in order to be permitted to continue to utilize the residential home located upon the property as his office for his electrical contracting business. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on November 17, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except William C. Whitmore, Sr., were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. Whitmore.

FINDINGS OF FACT

1. The Applicant is Ted Cwienk, III, Electrical Contractor, Inc., 351 Ross Road, King of Prussia, PA 19406.

2. The legal owner of the subject property is Mr. & Mrs. George T. Cwienk, III, 351 Ross Road, King of Prussia, PA 19406.
3. The property is located at 351 Ross Road, King of Prussia, PA 19406.
4. The Applicant was represented by Joseph K. Rejent, Esq., Kerns, Pearlstine, Onorato & Hladik, LLP, 298 Wissahickon Avenue, North Wales, PA 19454.
5. The property is zoned “R2 ” Residential.
6. The lot is approximately 18,400 sq. ft.
7. The Applicant introduced the following exhibits:
 - Exhibit “A-1” – Zoning Application
 - Exhibit “A-2” – Deed
 - Exhibit “A-3” – Applicant’s Business Card
 - Exhibit “A-4” – Assessment Map
 - Exhibit “A-5” – Zoning Map
 - Exhibit “A-6” and “A-7” - A Series of Pictures
 - Exhibit “A-8” through “A-12” - Pictures
8. The subject property contains a residential dwelling where the Applicant lives and the Applicant is proposing a use variance to permit an office for his electrical contracting business.
9. The detached garage is utilized for the storage of equipment for the Applicant’s business.
10. There is no work conducted at the property other than office work and the storage of the Applicant’s equipment and vehicles. All work is done off site.

11. The property was previously utilized as both a landscaping business and a lawn mower repair shop.
12. The hours of operation are 7:00 am to 4:30 pm, Monday through Friday.
13. There are no customers that come to the site.
14. The Applicant has a total of four (4) employees.
15. The Applicant has three (3) trucks that are kept on the property overnight.
16. The property is used as a location where the employees gather and then take the trucks to their work off-site.
17. The Applicant testified that he picks up the employees and brings them to his premises so there is no employee parking on the site.
18. The Applicant's proposed use is compatible with other uses in the neighborhood.
There is currently a commercial auto body repair shop across the street and another auto and truck repair shop located in the surrounding neighborhood.
19. The proposed relief will not alter the essential character of the neighborhood.
20. The Applicant agreed to the following conditions of approval.
 - a) There will be no future expansion of the business that is different than what is testified to at the hearing.
 - b) The use variance will only apply if the owner of the business has his primary residence at the subject parcel.
 - c) There shall be no materials or equipment stored outside.
 - d) There shall be no signage.
 - e) The Applicant shall never have more than three (3) business vehicles parked at the subject property at any one time.

f) No employees shall be permitted to park at the subject property or anywhere near the subject property and the business must always make arrangements to pick up the employees off-site and bring them to the subject property.

21. The adjacent neighbors on either side of the project are in favor of the proposal.
22. The property has been utilized in the manner proposed for approximately ten (10) years.
23. The proposal is not injurious to the public safety, health and welfare of the community.
24. There were no residents who testified in favor of the project.
25. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Ted Cwienk, III, Electrical Contractor, Inc., filed an application requesting a variance to Section 165-35 in order to be permitted to continue to utilize the residential home located upon the property as his office for his electrical contracting business.

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. Cmwlt. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlt. 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 proposing a use variance to permit a single family detached dwelling to be used for an electrical contracting business. The Applicant is proposing one (1) room of the house as an office with storage of business equipment in a detached garage. The Applicant is also proposing parking three (3) commercial vehicles at the subject property. It is necessary for the Applicant to have a use variance in order to use the property as proposed, however, in the past, the property has been used as a lawn mower repair facility and also used as a landscaping business. The Applicant described at the hearing that employees do not park at the subject property or anywhere near the subject property. The owner of the business picks up the

employees off-site and drives them to his house where they take the trucks and drive to work off-site. No actual work is conducted on the premises because all of the work is off-site. The Applicant agreed as a condition of approval to not have this business grow in any manner whatsoever, which would mean that the office would be limited to just one (1) room in the house and the Applicant would not have more than three (3) commercial vehicles parked at the premises at any one time. The Applicant also agreed to not have further storage of equipment or materials anywhere on the site other than in the detached garage. The property has been used for ten (10) years without any complaints from neighbors or enforcement action from the Township. The neighbors indicated that they are in favor of the Applicant's proposed use and that it would not have any negative impact on the community. Because the proposal is a use variance and not a dimensional variance, it is necessary to satisfy the five-part criteria of the Municipalities Planning Code. Through the use of testimony and exhibits, the Applicant sufficiently satisfied all five criteria, 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 to Section 165-35 in order to be permitted to continue to utilize the residential home located upon the property as his office for his electrical contracting business. .

The Applicant agreed to the following conditions of approval:

- a) There will be no future expansion of the business that is different than what is testified to at the hearing.
- b) The use variance will only apply if the owner of the business has his primary residence at the subject parcel.
- c) There shall be no materials or equipment stored outside.
- d) There shall be no signage.
- e) The Applicant shall never have more than three (3) business vehicles parked at the subject property at any one time.
- f) No employees shall be permitted to park at the subject property or anywhere near the subject property and the business must always make arrangements to pick up the employees off-site and bring them to the subject property.
- g) The Applicant must comply with the testimony of the Applicant at the hearing on November 17, 2010.

Decision Dated: December 15, 2010

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

Robert J. Montemayor - Chairman

Mark S. DePillis, Esq. – Vice Chairman

Brad Murphy - Alternate

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.