

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-29 : **HEARING DATE:** January 5, 2011
:
APPLICATION OF: David Cugno’s : **DECISION DATE:** February 16, 2011
Canine Center :
:
:
PROPERTY: 385 S. Gulph Road :
:
Upper Merion Township :

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

The Applicant, David Cugno’s Canine Center, (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-127 to permit the use of an existing residentially zoned property for dog training and dog boarding with an accessory residential use. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on January 5, 2011 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 David Cugno’s Canine Center, 385 S. Gulph Road, King of Prussia, Pa 19406.
2. The legal owner of the subject property is Darryl R. Bacchi, 805 DeKalb Street, Bridgeport, PA 19405.
3. The property is located at 385 S. Gulph Road, King of Prussia, PA 19406.

4. The Applicant was not represented by an attorney.
5. The property is zoned “R-1 ” Residential.
6. The subject property is currently used as an overnight boarding facility for domestic dogs that are involved in a dog training program operated by the Applicant.
7. David Cugno, the owner of the property, testified that he has been involved with dog training for fifteen (15) years.
8. The Applicant received a prior variance for the property that permitted up to sixteen (16) dogs.
9. The Applicant is now requesting to increase the number of dogs to forty (40) at any one time.
10. The dog training and overnight program is a 24-hour operation with up to four (4) full time employees and one (1) employee who resides at the property.
11. The only difference between the prior application and the use proposed by this application is the number of dogs being increased from sixteen (16) dogs to forty (40) dogs.
12. The adjacent neighbor, a veterinarian, has no objection to the proposal.
13. The owner currently has six (6) dogs himself, as well as two (2) dogs for the employee that lives at the subject property.
14. The Applicant introduced a letter from the neighbor in favor of the project and marked it as Exhibit “A-1”.
15. Robin Sutton, an employee of Dr. Greenspan, the adjacent neighbor, testified in favor of the project.

16. The Applicant currently has permission for sixteen (16) dogs and eight (8) of those dogs are either owned by the Applicant or the employee that resides at the property, therefore, there are only eight (8) dogs that are not owned by the property owner or tenant.
17. There was discussion between the board and the Applicant about limiting the number of dogs that can be on the property at any one time and the Applicant agreed to reduce the number to something less than forty (40) dogs.
18. There is no hardship inherent in the land that is any different than the hardship that would have existed at the time of the previous zoning relief.
19. The previously granted zoning relief cured any hardship inherent in the land and provided for the reasonable use of the property.
20. The Applicant failed to introduce any testimony that would satisfy the requirements for the granting of a variance.
21. There were no residents who testified in favor of the project.
22. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, David Cugno's Canine Center, filed an application requesting a variance to Section 165-127 to permit the use of an existing residentially zoned property for dog training and dog boarding with an accessory residential use.

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 proposing to increase a dog training facility from sixteen (16) dogs to forty (40) dogs. The prior zoning relief limited the number of dogs to sixteen (16) and the Applicant is proposing two and a half (2 ½) times that amount. The board was concerned about

the number of dogs at the facility. The Applicant did not satisfy any of the criteria outlined above for the granting of a variance. The prior relief on the property cured whatever alleged hardship there is inherent in the land and the property is currently being used in a reasonable manner. Despite the Applicant's failure to satisfy the legal standards outlined above, the board wanted to work with the Applicant to allow his business to reasonably expand without having a negative impact on the surrounding community. The neighbor most affected by the project sent a representative to testify that they have no objection to the proposal. It was clear during the hearing that the Applicant is a responsible business man who tries to do his best to have the least amount of impact on the community, however, zoning relief runs with the land and would apply to other proprietors that lease or buy the property in the future. Although the board recognizes that the Applicant is a responsible proprietor, the board must safeguard the community against someone that may be less responsible who may own or rent the land in the future. The board did not want to grant the request for forty (40) dogs because they thought it was unreasonable. The board thought twenty-five (25) dogs would be more reasonable. Out of the twenty-five (25) dogs, eight (8) of them are owned by either the owner or the tenant of the subject property, thereby, leaving seventeen (17) dogs that would be in the training program. The prior approval was for sixteen (16) dogs leaving only eight (8) dogs that would be in the training program. The limit proposed by the board would more than double the number of dogs that are currently permitted to be in the training program. Although the board can not conclude that the standards outlined above have been satisfied, the board still wanted to grant the relief with a reasonable safeguard of a maximum number of dogs so the impact would not be negative on the community.

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 165-127 to permit the use of an existing residentially zoned property for dog training and dog boarding with an accessory residential use. This variance is conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on January 5, 2011.

2. The maximum number of dogs permitted on the property at any one time shall be twenty-five (25) and this number shall include all dogs owned by the owner of the property or the tenant. Currently, the tenant and owner have eight (8) dogs, therefore, only an additional seventeen (17) dogs would be permitted by this condition at this time.

Decision Dated: February 16, 2011

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

Robert J. Montemayor - Chairman

Mark S. DePillis, Esq. – Vice Chairman

Brad Murphy - 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.