ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-30	:	**HEARING DATE:** January 19, 2011
APPLICATION OF: Wade T. Styers	:	**DECISION DATE:** February 16, 2011
PROPERTY: 708 Colbert St.	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Wade T. Styers, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-199 in order to construct a third floor addition to an existing non-conforming dwelling. In the alternative, the Applicant is requesting a variance from Section 165-60 for the same. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on January 19, 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 Wade T. Styers, 708 Colbert Street, Swedesburg, PA 19405, Upper Merion Township.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 708 Colbert Street, Swedesburg, PA 19405, Upper Merion Township.
4. The Applicant was not represented by an attorney.

5. The property is zoned "R-3" Residential.
6. The Applicant wants to add a third floor to an existing single family detached dwelling.
7. The Applicant wants the addition to be a third-story, rather than an addition that would increase the footprint of the existing dwelling.
8. The Applicant moved to the area approximately five (5) years ago and now he requires more living space.
9. Under Section 164-11 of the Code, the Applicant can have two and a half (2 ½) stories, but not three (3) stories.
10. If the Applicant only built one-half (1/2) of a story, it would only be 600 sq. ft., which would not be sufficient to accommodate the Applicant's needs.
11. The proposal is consistent with the character of the neighborhood.
12. The neighbors do not object to the zoning relief.
13. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Wade Styers, filed an application requesting a special exception under Section 165-199 in order to construct a third floor addition to an existing non-conforming dwelling. In the alternative, the Applicant is requesting a variance from Section 165-60 for the same.

Special Exception

A special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met. Appeal of Brickstone Realty Corp, 789 A.2d 333 (Pa. Cmwlth 2001). As such, a special exception is not an exception to the zoning ordinance, but a

use permitted conditionally, the application for which is to be granted or denied by the Zoning Hearing Board pursuant to express standards and criteria. Id. As a matter of law, an applicant has an absolute right to a special exception, *unless it is injurious to the public safety, health, and welfare of the community*. Manor Health Care v. Zoning Hearing Bd., 139 Pa. Commw. 206, 590 A.2d 65 (1991) (emphasis supplied).

An applicant for a special exception has the burden of proving that it has met the criteria for a special exception contained in the ordinance. Shamah v. Hellam Township Zoning Hearing Board, 167 Pa. Cmwlth. 610, 648 A.2d 1299 (1994). The applicant must prove not only that the proposed use is of a type permitted by special exception, but also that the proposed use complies with the other applicable requirements of the ordinance which expressly govern such a grant. Id. Once the applicant for a special exception shows compliance with the specific requirements of the ordinance, it is presumed that the use is consistent with the promotion of health, safety and general welfare. Brickstone, 789 A.2d at 340. At this point, the burden shifts to objectors to prove that the proposed use is not consistent with the health, safety and general welfare. Id.

In accordance with § 912.1 of the Municipalities Planning Code, 53 P.S. § 10912.1, the Zoning Hearing Board may attach reasonable safeguards and conditions on the grant of a special exception.

Pursuant to Section 165-250B(1) of the Upper Merion Zoning Code, the Board is required to consider the following criteria that is outlined in Section 165-250B of the Zoning Code.

(a) The Applicant shall establish, by credible evidence, that the special exception complies with the statement of community development objectives as stated in

Article I of this Chapter and with the declaration of legislative intent that may appear at the beginning of the applicable district under which approval is sought.

(b) The Applicant shall establish, by credible evidence, compliance with all conditions on the special exception enumerated in the section which gives the Applicant the right to seek a special exception.

(c) The Applicant shall establish, by credible evidence, that the proposed special exception will not adversely affect neighboring land uses in any way and will not impose upon its neighbors in any way but rather shall blend with them in a harmonious manner.

(d) The Applicant shall establish, by credible evidence, that the proposed special exception shall be properly serviced by all existing public service systems. The peak traffic generated by the subject of the approval shall be accommodated in a safe and efficient manner, or improvements shall be made in order to effect the same. Similar responsibility shall be assumed with respect to other public service systems, including, but not limited to, police protection, fire protection, utilities, parks and recreation.

(e) The Applicant shall establish, by credible evidence, that the proposed special exception shall be in and of itself properly designed with regard to internal circulation, parking, buffering and all other elements of proper design.

(f) The Applicant shall provide the Board with sufficient plans, studies or other data to demonstrate compliance with all applicable regulations.

(g) The Board shall impose such conditions as are necessary to ensure compliance with the purpose and intent of this chapter, which conditions may include

plantings and buffers, harmonious design of buildings and the elimination of noxious, offensive or hazardous elements.

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 proposing a full third story addition to an existing single family dwelling. Section 165-60 refers height requirements for that zoning district over to Section 165-11. Section 165-11 only permits two and a half (2 ½) stories for the zoning district where the property is located. The Applicant requested a special exception to expand a non-conforming use, however, a special exception can not be granted to expand the non-conforming use when the expansion calls for additional zoning relief in the ordinance. For that reason, the special exception must be denied.

The Applicant requested a variance to Section 165-60 in the alternative and that section refers to Section 165-11 that has the two and a half (2 ½) story requirement. The Applicant testified that if he built only a ½-story addition, then it would not be sufficient to accommodate the Applicant's needs because it would only be 600 sq. ft. The Applicant testified that his proposal is consistent with the character of the neighborhood and would blend harmoniously with the existing dwellings. The Applicant further testified that he consulted with neighbors who do not object to the proposal.

Based on the testimony presented, as well as the exhibits attached to the application, the Applicant's request for a variance should be approved and the Applicant's request for a special exception should be denied.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception under Section 165-199, therefore, the special exception request is denied. Conversely, the Applicant did present sufficient testimony to grant a variance to Section 165-60 to permit a third story addition to an existing non-conforming building, which is in excess of the two and a half (2 ½) stories required by Section 165-11, therefore, the variance should be granted conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on January 19, 2011.

Decision Dated: February 16, 2011

UPPER MERION TOWNSHIP
ZONING HEARING BOARD

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Robert J. Montemayor - Chairman

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Mark S. DePillis, Esq. – Vice Chairman

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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.