ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-03	:	**HEARING DATE:** March 16, 2011
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APPLICATION OF: Jerome Vernick and Sandra Barenbaum	:	**DECISION DATE:** April 20, 2011
	:	
PROPERTY: 770 Hilltop Circle	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicants, Jerome Vernick and Sandra Barenbaum, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-23 in order to construct a detached garage that will exceed the allowable height. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on March 16, 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 Jerome Vernick and Sandra Barenbaum, 770 Hilltop Circle, Wayne, PA 19087.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 770 Hilltop Circle, Wayne, PA 19087, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-1A" Residential.
6. The lot is approximately 43,547 sq. ft.
7. The Applicant is proposing a detached garage that will be 18.5 ft. in height, whereas the code has a maximum height for accessory buildings of 14 ft.
8. The structure will consist of a garage and greenhouse.
9. The architecture will be similar to the architecture of the principal dwelling unit.
10. The proposed structure requires more height because the owner wants to maintain the same pitch to the roof as the pitch that currently exists on the roof of the single family detached dwelling.
11. The garage will have three (3) bays plus an area for a lawn mower.
12. The garage has setbacks that would comply even if the building was a principal building and not an accessory structure. If the garage was attached to the house, it would be permitted to be 35 ft. in height, however, because it is detached, it is bound by the accessory structure height limits.
13. The neighbor most affected by the project does not object.
14. The Applicant agreed as a condition of approval that the garage will never be converted to any living area whatsoever.
15. The Applicant agreed as a condition of approval that the greenhouse will not involve any commercial growing activity.

16. The Applicant introduced Robert Lambert and the board found Mr. Lambert qualified to testify as an expert in the field of civil engineering.

17. The Applicant introduced the following five (5) exhibits:

    Exhibit "A-1" – CV for Robert Lambert

    Exhibit "A-2" – Existing Conditions Plan

    Exhibit "A-3" – Site Plan

    Exhibit "A-4" – Elevations Plan

    Exhibit "A-5" - Pictures of Existing Houses

18. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicants, Jerome Vernick and Sandra Barenbaum, filed an application requesting a variance to Section 165-23 in order to construct a detached garage that will exceed the allowable height.

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 an accessory structure that will be 18.5 ft. in height, whereas the code has a maximum height limit of 14 ft. The accessory structure will be a three (3) bay garage with a storage area and a greenhouse. If the structure was attached to the house, it would be subject to building setbacks, however, it would be permitted to be 35 ft. in height. The location of the proposed accessory structure does not violate minimum building setbacks, however, because it is an accessory structure not attached to the house, it is subject to a maximum height of 14 ft. The Applicant wants the roof to be pitched the same as the roof pitch on the main dwelling, therefore, a height of 18.5 ft. is required to allow for architectural

uniformity. The Applicant's proposal is a dimensional variance and not a use variance, therefore, the standards of the Hertzberg case are applicable to the case at bar. Through the use of expert testimony and exhibits, the Applicant sufficiently satisfied the standards of the Hertzberg case, 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 165-23 in order to construct a detached garage that will exceed the allowable height.

This variance is conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on March 16, 2011.
2. The accessory structure shall never be used for any kind of living space.
3. The greenhouse shall not be used for commercial growing activity.

Decision Dated: April 20, 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.