ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-16	:	**HEARING DATE:**	July 6, 2011
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APPLICATION OF: Edward J. Cicutti	:	**DECISION DATE:**	August 17, 2011
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	:		
PROPERTY: 911 Stewart Street	:		
	:		
Upper Merion Township	:		

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Edward J. Cicutti, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-59 in order to use the property as a professional office and storage of electrical components ("Application"). The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on July 6, 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 Edward J. Cicutti, 573 Summit Street, King of Prussia, PA 19406.
2. The legal owner of the subject property is Dante and Margaret Saldutti, 1 Stewart Street, King of Prussia, PA 19406.
3. The property is located at 911 Stewart Street, King of Prussia, PA 19406, Upper Merion Township and is further identified as Tax Parcel #58-00-17962-00-7 ("Property").

4. The Applicant was not represented by an attorney.

5. The Property is zoned "R-3" Residential and is located in a residential neighborhood.

6. The lot is approximately 5,200 sq. ft.

7. The Application states "unknown" for the date when the present use of the Property began.

8. The Application states that the building on the Property was originally built to house a residential unit/office area/and a storage work area on the lower level.

9. Mr. Cicutti testified on behalf of the Application.

10. Mr. Cicutti testified that the Property would be used for office and storage and nothing would be built or manufactured at the Property.

11. Mr. Cicutti testified that he may rent the third floor as a residence or use it as alternate storage.

12. Mr. Cicutti's business manufactures circuit boards but he has space in another building where he builds the circuit boards.

13. The storage on the Property would consist of electrical components that can be carried, small machine parts and components. None of the material stored on the Property would be hazardous.

14. The building on the Property is a three-story building with the third floor being a residence which is currently vacant; the first story being an office and the basement being used for storage. The Property is currently vacant.

15. There are no bathrooms on the first floor, only powder rooms.

16. The floor of the building is concrete and the building is a steel support structure but appears to look like a residence from the outside. See pictures attached to Application.

17. There are three (3) entrances to the building.

18. The first floor is an open area with the a stairwell in the middle that leads to the residential unit above.

19. Mr. Cicutti testified that he would have salespeople, marketing personnel, support and customer service personnel at the Property.

20. Mr. Cicutti testified that similar commercial use was made of the Property in the past.

21. Mr. Cicutti testified that he would not have walk-in traffic or customers at the Property.

22. The hours of operation would be Monday through Friday, 8:30 a.m. to 5:30 p.m. and no scheduled work on weekends although an employee may be in the office.

23. Mr. Cicutti testified that he would have three (3) to four (4) employees at the Property and the parking would be in the driveway or garage.

24. Mr. Cicutti that the number of the employees at the Property could reach six (6) but he would not agree to limit the number of employees at the Property to six (6).

25. Mr. Cicutti testified that approximately 6 cars can be parking on the Property in the garage and the driveway.

26. Mr. Cicutti testified that on-street parking may be utilized by his employees.

27. Mr. Cicutti testified that there will be pick up and drop off of the stored product from the Property by car and/or trucks such as UPS and Federal Express.

28. The frequency of the deliveries to and from the Property could be once a day or once a week. There could be shuffling of product from the present business site to the Property. The cars and trucks would attempt to load and unload in the driveway depending on the number of cars already parked in the driveway.

29. Dante Saldutti, son-in-law of the owner of the Property, stated at the zoning hearing that he would provide a letter from the nearby Sacred Heart Church that a certain number of parking spaces at the Church could be used by the Applicant but no such letter was provided to the Zoning Hearing Board.

30. Residential neighbors, Bertha Matz, 921 Stewart Street, James Maypole, 33 Stewart Street, and Louis Walsh, 910 Stewart Street, testified that Stewart Street is a small one-way street with ever increasing traffic which sometimes speeds down Stewart going the wrong way.

31. On-street parking in the residential neighborhood is limited and is an existing problem.

32. The requested relief is a use, rather than a dimensional, variance.

33. The Property does not suffer from an unnecessary hardship as the Property can be used in conformance with Section 165-59 of the Zoning Ordinance as a residential use.

34. The requested variance would alter the essential character of the neighborhood as the residential neighbors testified it would create traffic and parking issues on Stewart Street.

35. The requested variance is not the minimum variance to afford relief. The Applicant could clearly have requested a less intense use of the Property and, in addition, could have limited the number of employees at the Property.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Edward J. Cicutti, filed an application requesting a variance to Section 165-59 in order to use the property as a professional office and storage of electrical components which states as follows:

> **§ 165-59. Use regulations.**
>
> A building may be erected, altered or used and a lot may be used or occupied for any of the following purposes and no other:
>
> A. Any use permitted in R-2 Residential Districts, except cluster development overlay.
>
> B. Single-family semidetached dwelling.
>
> C. Two-family detached dwelling.
>
> D. Two-family semidetached dwelling.
>
> E. Multifamily dwelling.
>
> F. Row house, not to exceed six dwellings per structural unit.
>
> G. Municipal uses.
>
> H. Storage garage when authorized as a special exception.
>
> I. Accessory use on the same lot with and customarily incidental to any of the foregoing permitted uses.
>
> J. Personal care facility as a conditional use in accordance with § 165-219.1.

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 did not present testimony and evidence to prove the elements set forth in § 910.2 of the Municipalities Planning Code. There is no unnecessary hardship inherent in the Property. The requested relief will adversely impact the residential neighborhood and is not the minimum variance to afford relief. The Property can be used as a residence as there is nothing that precludes such use. The Property appears as a residential use from the outside and the third floor is used residentially and nothing on the ground floor impedes the use of the ground floor for a residence. The basement and garage can also be used for residential purposes of cars and storage. The fact that a greater profit may be made of the Property if it is used for both residential and office purposes does not create an unnecessary hardship. The proposed use of the Property may maximize the use of the Property for the Applicant but maximization of the use of the Property and profit from the Property is not a basis for a variance.

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 and evidence to grant a use variance to Section 165-59 of the Zoning Ordinance.

Decision Dated: August 17, 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.