ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-06	:	**HEARING DATE:** April 6, 2011
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APPLICATION OF: Liqing Feng	:	**DECISION DATE:** May 18, 2011
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	:	
PROPERTY: 400 Brandywine Lane	:	
(aka 394 W. Dekalb Pike)	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Liqing Feng, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-35 in order to operate her therapeutic massage business from her residence. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on April 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 Liqing Feng, 400 Brandywine Lane, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 400 Brandywine Lane, (aka 394 W. Dekalb Pike), King of Prussia, PA 19406.
4. The Applicant was not represented by an attorney.

5. The property is zoned “R-2 ” Residential.

6. The Township entered its appearance in opposition and sent Joseph Pizonka, Esq. to represent the Township.

7. The Applicant is requesting a use variance.

8. The Applicant is currently using the property in accordance with the provisions of the zoning code, therefore, a use variance should not be granted.

9. There was no testimony indicating any unusual characteristics of the property that would prevent the property from being reasonably used as zoned.

10. There was no testimony regarding the compatibility of the proposed use with the uses in the neighborhood.

11. There was no testimony whether the proposed use is the minimum relief necessary to reasonably use the property.

12. There was no testimony indicating that there is any hardship inherent in the land that would justify the granting of a variance.

13. The identical application was previously denied for the same property and the same Applicant.

14. The Applicant failed to satisfy her burden of proof to justify the granting of a use variance.

15. There were two (2) neighbors who testified against the project because they were concerned about the impact on the adjacent intersection.

16. There were no residents who testified in favor of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Liqing Feng, filed an application requesting a variance to Section 165-35 in order to operate her therapeutic massage business from her residence.

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 therapeutic massage business from her residence. The Applicant is currently using the property as her residence. The current use of the property is compliant with the terms of the zoning ordinance. The Applicant wants to use the property for a therapeutic massage business that would require a use variance. In order to grant a use variance, the board must consider the five-part criteria of the Municipalities Planning Code. The Applicant did not offer any evidence indicating how the property is unique or has any unusual physical characteristics. The Applicant is currently using the property as a residence, which is permitted by the zoning code, therefore, there is no hardship inherent in the land that would prevent the Applicant from reasonably using the property. The Applicant offered no testimony to indicate how the proposed use would be compatible with the character of the neighborhood and how it would have no impact on the use and enjoyment of adjacent parcels. The Applicant offered no testimony regarding whether the proposed use is the minimum relief necessary to reasonably use the property. The burden of proof is on the Applicant to satisfy the five-part criteria of the Municipalities Planning Code. In the case at bar, the Applicant failed to prove any of the criteria required by the Municipalities Planning Code, therefore, the variance must 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 variance to Section 165-35, therefore, the application is denied.

Decision Dated: May 18, 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.