

5. The property is zoned "R-2" Residential.
6. The lot is approximately 15,000 sq. ft.
7. The Applicant purchased the property approximately twelve (12) years ago and it had a second kitchen in a single family detached dwelling.
8. The cooking facilities in the second kitchen constitute a second dwelling unit, therefore, a variance is required.
9. The Applicant wants to use the second dwelling unit for an in-laws quarters.
10. The Applicant's father is in a wheelchair and he wants his father to move into the house on the first floor while the Applicant lives on the second floor.
11. The Applicant also has a caretaker that will live at the house and take care of the Applicant's parents.
12. When the Applicant bought the property, it was advertised as having an in-laws suite, however, there were never any approvals granted for the in-laws suite.
13. There will be no additional construction to the interior or exterior of the house. It is simply permission to use what is existing to facilitate the care of the Applicant's parents.
14. The Applicant's father is eighty-nine (89) years old and his mother is eighty-three (83) years old.
15. Both kitchens were functional with cooking facilities when purchased by the Applicant.
16. The Applicant agreed to limit the occupancy of the in-laws quarters to a member of the Applicant's immediate family.

17. The Applicant agreed to execute a covenant running with the land that would require the removal of the cooking facilities in the second kitchen if the area is no longer occupied by a member of the Applicant's immediate family.
18. Although this approval will run with the land, the covenant to be executed by the Applicant will also run with the land and limit all future owners to occupancy of the second dwelling unit to members of the owner's immediate family while the owner is living at the property.
19. There were no residents who testified in favor of the project.
20. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Philip and Anya Siu, filed an application requesting a variance to Section 165-35 in order to allow an in-laws suite in the existing single family dwelling.

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.

Twelve years ago, the Applicant bought a property that had two (2) functioning kitchens. At that time, the property was advertised as having an in-laws suite. The property was never approved for an in-laws suite and the second kitchen should have never been installed. The cooking facilities in the second kitchen constitutes a second dwelling unit, therefore, a variance is required. The Applicant's father is eighty-nine (89) years old and in a wheelchair and the Applicant's mother is eighty-three (83) years old. The Applicant would like to have his parents live on the first floor while having a paid caretaker and the Applicant living on the second floor. The concern of the board is that the property could be converted to a duplex in the future. After the Applicant sells or after the space is no longer occupied by a member of the immediate family, it could be converted to a duplex. In an effort to make sure that the property is not converted to a duplex, but rather it is limited solely to an in-laws suite, the board asked the Applicant to

execute a covenant running with the land. The Applicant agreed to execute a covenant and a copy of the proposed covenant is attached hereto. The Applicant further agreed to pay for the cost of filing of the covenant. The covenant would restrict occupancy of the second dwelling unit to members of the immediate family of the owner while the owner is occupying the premises. If, in the event that it is not occupied by members of the immediate family of the owner, then the cooking facilities of the second kitchen must be removed. This covenant will run with the land and apply to all future owners. The Applicant's variance request is a use variance and not a dimensional variance, therefore, the standards of the Municipalities Planning Code apply. The Applicant offered sufficient evidence to satisfy the standards of the Municipalities Planning Code, therefore, the variance should be granted.

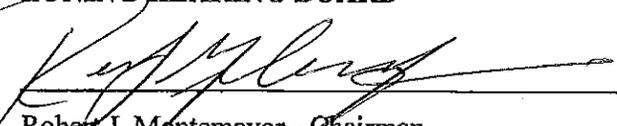
ORDER OF THE UPPER MERION TOWNSHIP
ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant a variance to Section 165-35 in order to allow an in-laws suite in the existing single family dwelling. This variance is conditioned upon the following:

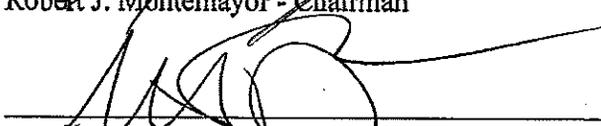
1. The Applicant must comply with the testimony of the Applicant at the public hearing on October 5, 2011.
2. The occupancy of the in-laws suite shall be limited to members of the Applicant's immediate family while the Applicant is living at the premises. If, in the event that it is no longer occupied for a one (1) year time period by members of the immediate family, then the cooking facilities of the second kitchen shall be removed and this approval shall be declared null and void.
3. The Applicant will execute the covenant that is attached hereto and pay for all filing costs associated with recording the covenant against the property.

Decision Dated: October 26, 2011

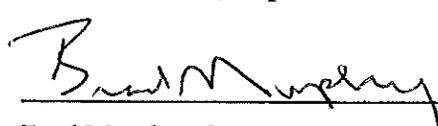
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



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.