ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-25	:	**HEARING DATE:** November 2, 2011
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APPLICATION OF: Howard Hoffman	:	**DECISION DATE:** December 7, 2011
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	:	
PROPERTY: 336 Overlook Lane	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Howard Hoffman, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-35 in order to allow an apartment in the basement of a single family dwelling. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on November 2, 2011 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except Brad Murphy, were present as well as the Solicitor, Zoning Officer, and Court Reporter. Gina, LaMarra the alternate for the board, sat in place of Mr. Murphy.

FINDINGS OF FACT

1. The Applicant is Howard Hoffman, 336 Overlook Lane, Gulph Mills, PA 19428.
2. The Applicant is the legal owner of the subject property.

3. The property is located at , 336 Overlook Lane, Gulph Mills, PA 19428, Upper Merion Township.
4. The Applicant was not represented by an attorney.
5. The property is zoned "R-2" Residential.
6. The Applicant purchased the property in 1989.
7. The Applicant converted his basement to a second dwelling unit.
8. The Applicant has used the basement as a second dwelling unit and rented it to third parties for the past twenty-one (21) years.
9. The Applicant testified that currently, his cousin, Mike, is living in the basement.
10. The Applicant's cousin, Mike, has been living in the basement for two (2) years.
11. Before the Applicant's cousin, Mike, moved into the basement, there was a friend living in the basement.
12. The previous tenants of the basement paid rent in the form of helping out with some household bills.
13. The basement has been advertised by the Applicant as a rental property.
14. The Applicant testified at the hearing that he wants to continue to rent the basement out and receive future rent.
15. The basement contains cooking facilities, therefore, it constitutes a second dwelling unit.
16. The Applicant testified that he would be willing to remove the cooking facilities and make the property legal if the board denies the application.
17. The Greenwich Homeowners Association entered their appearance in opposition to the application and Kevin Palmer, Esq. represented the Association.

18. The current tenant pays approximately $800.0 per month.

19. The Applicant testified that the reason he is renting out the basement is because he needs money to pay his bills.

20. The Applicant admitted that there is a parking problem in the neighborhood.

21. The Association has a rule prohibiting on-street parking and, in the past, the Applicant has violated the rule.

22. Arnold Weiner testified at the hearing.

23. Mr. Weiner is a member of the board for the Greenwich Homeowners Association.

24. The Association introduced a resolution and marked it as Exhibit "P-1".

25. Mr. Weiner testified that there is a parking problem in the development and that the Applicant has had previous issues with tenant parking.

26. No other houses have been converted to a duplex.

27. Mr. Weiner testified that he does not want houses converted to duplexes throughout the development.

28. The Association introduced its Declaration and marked it as Exhibit "P-2".

29. Carl Sopp testified at the hearing that he was concerned about the character of the development if the application was granted.

30. Marlene Weiner testified at the hearing and her concern was ventilation of the cooking facilities.

31. Adam Rosenweig testified at the hearing about the number of unrelated people living in the house.

32. Peter Trosini testified that he did not want a rental property in his neighborhood.

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

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Howard Hoffman, (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-35 in order to allow an apartment in the basement of a 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.

The Applicant is proposing a second dwelling unit in the basement of a single family detached dwelling. The second dwelling unit has cooking facilities, therefore, it would be equivalent to converting a single family dwelling to a duplex. This type of variance is a use variance and not a dimensional variance, therefore, the standards of the five-part criteria of the Municipalities Planning Code is applicable to the case at bar. The Applicant offered absolutely no evidence that his property was in any way different from the other forty-seven (47) houses that exist in the subject neighborhood. There are no unique physical characteristics of the property and the only hardship offered by the Applicant was a financial hardship. A financial hardship is not sufficient proof to grant a use variance. The Applicant further failed to prove any unnecessary hardship inherent in the land. There was no testimony offered that the property could not be used as zoned and, in fact, the property can be used as a single family detached dwelling just like the other forty-seven (47) properties are used in the subject neighborhood. The Applicant did create his own hardship by constructing a second dwelling in the basement. The Applicant's proposal is not consistent with the character of the neighborhood because no other properties in the neighborhood have been converted to a duplex. The Applicant has not proven that the request is the minimum relief necessary to cure any alleged hardship. Based on all the above, the Applicant failed to satisfy any of the five-part criteria enumerated in the Municipalities Planning Code that must be proven by the Applicant before a use variance may be

granted by this board. Because of the Applicant's failure to satisfy his burden of proof, 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 the requested variance, therefore, the application is denied.

Decision Dated: December 7, 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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Gina LaMarra - Alternate

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.