

Date of Mailing: November 5, 2021

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PA

APPLICATION OF ROBERT AND CLAIRE HARDIMAN

APPLICATION NO. 2021-17

PROPERTY: 1044 HEDGEROW CIRCLE

TAX PARCEL NO. 58-00-09559-00-4

DECISION

The Zoning Hearing Board of Upper Merion Township (“ZHB”) considered an application for a variance to allow the applicants to construct an 8-foot tall ornamental steel fence around the perimeter of their two adjacent and legally separate properties. The maximum height for a fence is 6 feet. The applicants did not prove entitlement to the grant of relief.

Robert and Claire Hardiman are the owners of the property located at 1044 Hedgerow Circle, tax parcel no. 58-00-09559-00-4 (the “1044 Parcel”), and the adjacent property located at 1081 Hedgerow Circle, tax parcel no. 58-00-09562-00-1 (the “1081 Parcel” and collectively referred to as the “Property”). The 1044 Parcel and 1081 Parcel have not been consolidated. The Property is in the R-1A Residential zoning district (“R-1A District”) of Upper Merion Township (the “Township”).

The 1044 Parcel is improved with a single-family residential dwelling. The 1081 Parcel was previously improved with a single-family dwelling that was demolished in 2020. That 1081 Parcel is now used as the front yard for the 1044 Parcel. Landowners propose to construct an 8-foot tall ornamental steel fence around the perimeter of the Property. Because the 1044 Parcel and the 1081 Parcel are legally separate tax parcels,

which Landowners do not intend to consolidate, two separate applications were submitted for variances.

Landowners require a variance from section 165-208 *Fences and walls* of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the “Zoning Ordinance”), to permit a fence that exceeds the 6-foot maximum fence height.

On October 6, 2021, the ZHB held an advertised public hearing on Landowners’ application. The following members of the ZHB were present at the hearing: M Jonathan Garzillo, Chairman; John Tallman, Vice Chairman; Vivian Peikin, Esq., Secretary; Mark DePillis, Esq., member; Maria Mengel, member; and Hedda Schupak, alternate member. The ZHB was represented by Marc D. Jonas, Esq. of the law firm of Eastburn and Gray, P.C. The applicant was unrepresented.

Neighboring property owners, Pernell Williams, Tim Williams, and John Sutter (“Objectors”) appeared in opposition to the application.

The hearing was duly advertised, notice was given in accordance with the requirements of the zoning ordinance, and the proceedings were stenographically recorded. Because the application was denied, the ZHB issues this decision with findings of fact, conclusions of law, and reasons.

After careful consideration of the evidence presented, the ZHB makes the following findings of fact and conclusions of law

A. FINDINGS OF FACT

BACKGROUND

1. Landowners are the owners of the Property. [Ex. ZHB-2].

2. The 1044 Parcel is identified as tax parcel no. 58-00-09559-00-4. [Ex. ZHB-7].
3. The Property is located in the Township's R-1A Residential zoning district. [Ex. ZHB-1].
4. The 1044 Parcel is improved with a single-family residential dwelling. [Ex. ZHB-1].

ZHB HEARING

5. The ZHB marked the following exhibits:
 - a. ZHB-1 – application;
 - b. ZHB-2 – deed dated February 24, 2020, between Robert D. Hardiman and Claire E. Hardiman as tenants in common (grantors), and Robert D. Hardiman and Claire E. Hardiman as tenants by the entireties (grantees), recorded in deed book 6197, page 965;
 - c. ZHB-3 – site plan titled “Survey Plan,” prepared by Nicholas Cirilli, P.E., dated March 8, 2020;
 - d. ZHB-4 – description of the proposed new fence;
 - e. ZHB-5 – photograph of the fence;
 - f. ZHB-6 – fence Ordinance No. 2021-873
 - g. ZHB-7 – Montgomery County Board of Assessment Appeals property records and tax map for tax parcel 58-00-09559-00-4;
 - h. ZHB-8 – Google maps aerial view maps, and street view photographs; and
 - i. ZHB-9 – Legal notice.

6. Landowners introduced the following exhibits:
 - a. A-1 – photograph; and
 - b. A-2 – survey plan.
7. The Objectors did not introduce any exhibits during the hearing.
8. Landowner, Robert D. Hardiman, was the only witness to testify in support of the application.

9. Mr. Hardiman testified, in pertinent part, as follows:

- a. Landowners own two adjacent lots, 1044 Hedgerow Circle and 1081 Hedgerow Circle. The lots share a common driveway. [N.T., p. 6]
- b. Both parcels are located where Hedgerow Circle dead-ends at a circle. Landowners' shared driveway connects to the street at the circle. [N.T., p. 7]
- c. Landowners purchased the 1044 Parcel in 2014, and utilize the single-family dwelling on the Property as their main residence. [N.T., p. 6]
- d. Landowners purchased the 1081 Parcel in 2020 and demolished the existing dwelling on that property. The 1081 Parcel serves as Landowners' front yard. [N.T., pp. 6-7]
- e. The Property is surrounded by eight neighboring lots. There are two neighboring lots to the south, two neighboring lots to the east, three neighboring lots to the north, and one neighboring lot to the west. [N.T., p. 7]

- f. All eight neighbors' residences face away from the Property. [N.T., p. 7]
- g. Landowners are seeking a variance to install an 8-foot ornamental steel fence around the perimeter of the Property. [N.T., pp. 6-8]
- h. Landowners' goal is to make the Property look like a single lot by enclosing everything except for the driveway. [N.T., p. 8]
- i. Landowners have a problem with deer on the Property. The deer eat Landowners' plants. [N.T., p. 9]
- j. The 8-foot fence is sought to keep deer out of the Property. [N.T., pp. 8-9]
- k. Fence companies informed Landowners that the fence needs to be 8-feet tall because deer will jump over a 7-foot tall fence. [N.T., p. 12]
- l. No one testified on behalf of a fence company to substantiate this contention.
- m. Landowners have attempted to address the deer problem by other means, including planting deer-resistant plants, electric noisemakers, and smelling sprays. Those efforts have failed to prevent deer from entering the Property. [N.T., p. 9]
- n. Landowners have seen an increase in deer since demolishing the dwelling on the 1081 Parcel. [N.T., p. 10]
- o. Landowners believe the fence will not affect the essential character of the neighborhood because it will remain residential, and the fence will be barely visible from the street. [N.T., p. 11]

- p. Landowners believe the Property is unique because it faces only the backyards of the neighboring lots. [N.T., p. 11]
- q. Landowners would commit to a condition of approval to install the proposed ornamental steel fence, as opposed to another style fence. [N.T., pp. 12-13]

10. Landowners offered no expert testimony in support of their application.

11. Three objectors testified: Pernell Williams, who resides at 1071 Hedgerow Circle; Tim Williams, who resides at 1071 Hedgerow Circle; and John Sutter, who resides at 540 Mitchford Road.

12. Mr. Williams expressed concerns about the proposed 8-foot fence changing the essential character of the neighborhood because there are no other 8-foot fences in the surrounding area. [N.T., pp. 14-16].

13. Mr. Williams offered that the proposed 8-foot fence would change the view of the neighborhood from his backyard and would be obtrusive. [N.T., pp. 17-18]

14. Mr. Sutter testified that the proposed 8-foot fence would cause deer to relocate onto his property.

15. Objectors did not present expert testimony in support of their expressed concerns.

16. No evidence was offered by Landowners regarding unique physical circumstances or conditions preventing the reasonable use of the Property.

17. The Property is already reasonably used as a single-family residential dwelling, a permitted use in the Township's R-1A District.

18. No competent evidence was offered by Landowners that the variance will not be detrimental to the public welfare.

B. DISCUSSION

A zoning hearing board may only grant a variance where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;
3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare; and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); Zoning Ordinance §§ 164-133 and 164-134; *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (Pa. Cmwlth. 1990).

The variance standard is a “high hurdle[]” *Omnipoint Comms. Ent. L.P. v. Zoning Hearing Bd. Easttown Twp.*, 331 F.3d 386, n*11 (3d Cir. 2003). “[T]he reasons for granting the variance must be substantial, serious and compelling.” *Commonwealth v. Zoning Hearing Bd. Susquehanna Twp.*, 677 A.2d 853, 855 (Pa. Cmwlth. 1996). Variances are to be granted “sparingly and only under exceptional circumstances.” *Id.*; see also *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279, 284 (Pa. Cmwlth. 1994); *Laurento v. Zoning Hearing Bd. of Borough of W. Chester*, 638 A.2d 437, 439 (Pa. Cmwlth. 1994). “[T]o establish unnecessary hardship, an applicant must show more than

a mere economic or personal hardship.” *Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 980 (Pa. Cmwlth. 2009); see also *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 150 (Pa. Cmwlth. 2011) (“It is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted.”).

The Commonwealth Court in *Pequea Twp. v. Zoning Hearing Board of Pequea Twp.*, 180 A.3d 500 (Pa. Cmwlth. 2018) summarized the standard applied to requests for dimensional variances:

Although *Hertzberg* sets forth a more relaxed standard for a dimensional variance, it does not stand for the proposition that “a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property *exactly as he wishes*, so long as the use itself is permitted.” *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001) (emphasis in original); see also *Singer* (quoting *Yeager*). Additionally, it has been the law of this Commonwealth that the mere desire for more space does not establish the requisite unnecessary hardship for a variance. See *Larsen v. Zoning Board of Adjustment of City of Pittsburgh*, 543 Pa. 415, 672 A.2d 286, 290 (1996) (ruling that the zoning board erred as a matter of law in granting a dimensional variance where the applicants sought a variance to construct a 400–square foot deck in order to provide a play area for their child, because the “mere desire to provide more room for a family member's enjoyment fails to constitute the type of ‘unnecessary hardship’ required by the law of this Commonwealth”); see also *McClintock v. Zoning Hearing Board of Fairview Borough*, 118 Pa.Cmwlth. 448, 545 A.2d 470 (1988) (denying a dimensional variance where the property could be used for a one-car garage instead of a two-car garage); *Vito v. Zoning Hearing Board of Borough of Whitehall*, 73 Pa.Cmwlth. 270, 458 A.2d 620 (1983) (finding no hardship to grant a dimensional variance to build an

addition to an existing two-car garage where the property was useable in its present condition).

Pequea Twp., 180 A.3d at 507–08.

In *Pequea Township*, the applicant sought a variance to construct a second floor addition over his garage to a height of 28 feet, where a maximum height of 20 feet was permitted by the zoning ordinance for accessory structures. The applicant stated that he wanted the additional space to accommodate overnight guests and argued that building on top of the existing garage was his only option due to the spatial constraints presented by an in-ground pool located behind the garage and the setback requirement to the side of the garage. The zoning hearing board granted the dimensional variance.

The Commonwealth Court reversed the ZHB’s decision. It found that “[t]he desire to provide more living space fails to constitute the type of ‘unnecessary hardship’ required by the law of this Commonwealth.” *Pequea Twp.*, 180 A.3d at 508. The court reasoned that:

Applicant does not need the variance to construct the second floor addition on the garage in order to make reasonable use of the Property, as he is already doing so. Indeed, Applicant's Property is improved with, among other things, a principal residence and a garage. (F.F. No. 2.) Because the variance is not necessary to enable Applicant to pursue the reasonable use of the Property, Applicant has not met his burden to establish that he is entitled to a variance. See 53 P.S. § 10910.2, Yeager. The failure of the Board to consider and address this requirement for a variance constitutes legal error.

Pequea Twp., 180 A.3d at 508–09.

Landowners failed to satisfy the statutory requirements for establishing entitlement to the requested variance. No unique physical circumstances or conditions exist that necessitate the requested relief for a reasonable use of the Property. Although

Landowner asserted that the remote location of the Property, which only faces the backyards of each neighboring lot, constitutes a unique condition, this condition does not necessitate the requested variance relief for a higher-than-allowed fence. Rather, the need for the variance stems purely from a personal hardship – the subjective and personal desire to keep deer out of the Property and prevent deer from eating Landowners’ plants. Landowners are required to demonstrate more than a personal hardship and desire to develop the Property as they wish. Furthermore, Landowner testified that the deer problem, which the proposed fence arguably would address, was caused in part by Landowners’ decision to demolish the dwelling on the 1081 Parcel.

The testimony fell well short of establishing a hardship that prevents the reasonable use of the 1044 Parcel. The 1044 Parcel is reasonably used as a single-family residential dwelling. The variance is not necessary to allow the reasonable use of the Property. Further, the objectors’ testimony suggests that the higher fence is out of character with the neighborhood and would have an adverse effect on the neighboring properties.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the MPC, 53 P.S. §10909.1(a)(5), and Zoning Ordinance §165-215.A(5).
2. Landowners have standing to seek the requested zoning relief as the owners of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

4. Landowners require a variance from section 165-208 of the Zoning Ordinance to construct an 8-foot tall ornamental steel fence where a fence is not permitted to exceed 6 feet in height.

5. The ZHB may grant a variance provided that an applicant establishes that: (1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property; (2) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property; (3) the unnecessary hardship was not created by the applicant; (4) the variance will not be detrimental to the public welfare; and (5) the variance sought will represent the minimum variance that will afford relief.

6. Landowners failed to demonstrate an unnecessary hardship entitling them to variance relief from section 165-208 of the Zoning Ordinance.

7. The 1044 Parcel is reasonably used as a single-family dwelling, a permitted use in the R-1A Residential zoning district.

8. Any claimed hardship is self-created by Landowners' personal desire to prevent deer from entering their properties and eating their plants.

At the conclusion of the October 6, 2021 hearing, the ZHB voted unanimously to deny the application. On October 7, 2021, the ZHB mailed the following notice of decision to Landowners:

This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board following the conclusion of the hearing on Wednesday, October 6, 2021.

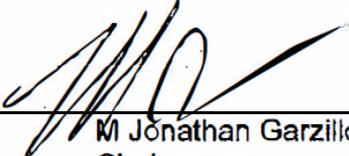
The Zoning Hearing Board voted to deny the request for variance relief from section 165-208 of the Upper Merion

Township Zoning Ordinance of 1942, as Amended, for an 8-foot tall fence around the perimeter of the property located at 1044 Hedgerow Circle.

Because this application was denied, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



Jonathan Garzillo
Chairperson