

Date of Mailing: 9-3-19

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF DOUGLAS AND PAMELA ANDRAKA

No. 2019-08

PROPERTY: 742 CHAMPLAIN DRIVE

DECISION

This application involves a request for a use variance to conduct a dog boarding/daycare business on a residential property located in the R-2A district where this use is not permitted. The Zoning Hearing Board denied the requested relief.

Douglas and Pamela Andraka ("Landowners") are the owners of the property located at 742 Champlain Drive, Upper Merion Township, tax parcel number 58-00-02864-70-5 (the "Property"). The Property is located in the R-2A zoning district and is improved with a single-family detached dwelling. Landowners requested a variance from section 165-22 *Use regulations* of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance"), to conduct a dog boarding/daycare business in conjunction with their residential use of the Property.

On August 7, 2019, the Zoning Hearing Board (the "ZHB") of Upper Merion Township (the "Township") held an advertised public hearing on Landowners' application. The hearing was stenographically recorded. The following members of the ZHB were present at the hearing: John Tallman, Chairman; Mark S. DePillis, Esq., Vice Chairman; Maria Mengel, Member; M. Jonathan Garzillo, Member; and Vivian Peikin, Esq., Member. The ZHB was represented by Marc D. Jonas, Esq., and Zachary A. Sivertsen, Esq. of the law firm of Eastburn and Gray, P.C. Landowners were not represented by counsel.

The Township was represented by Bernadette A. Kearney, Esq. of the law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin.

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

A. FINDINGS OF FACT

BACKGROUND

1. Landowners are the legal owners of the Property. [Ex. ZHB-2.]
2. The Property is located in the Township's R-2A Residential Zoning District. [Ex. ZHB-3.]
3. Landowners were issued a notice of violation by the Township's Chief Building/Zoning Official on May 10, 2019. The notice stated that "the residentially zoned property is being used to operate a dog boarding/daycare business which does not comply with the governing regulations of the R-2A Residential Zoning District." [Ex. ZHB-3.]
4. The notice of violation directed Landowners to "[c]ease the use of the property as a business to operate a dog boarding/daycare...." [Ex. ZHB-3.]
5. The notice of violation advised Landowners of their right to appeal the determination to the ZHB within 30 days of the date of the letter and where necessary forms and instructions could be obtained. [Ex. ZHB-3.]
6. Landowners' application was submitted on June 10, 2019, the deadline for filing an appeal of the Zoning Officer's determination. Landowners did not appeal the Zoning Officer's determination. [Ex. ZHB-1.]

ZHB HEARING

7. The following ZHB exhibits were made part of the record:
 - a. ZHB-1 — ZHB application including attachment;
 - b. ZHB-2 — deed dated September 13, 1999 between EMC Mortgage Corporation, grantor, and Douglas and Pamela Andraka, husband and wife, grantees, recorded in deed book 5298, page 245;
 - c. ZHB-3 — notice of violation dated May 10, 2019 from Upper Merion Township Board of Supervisors to Mr. and Mrs. Douglas Andraka;
 - d. ZHB-4 — two black and white photos of the front of the house and yard;
 - e. ZHB-5 — tax map of the Property;
 - f. ZHB-6 — Montgomery County Board of Assessment property information;
 - g. ZHB-7 — Google map of the Property;
 - h. ZHB-8 — legal notice;
 - i. ZHB-9 — proof of posting; and
 - j. ZHB-10 — proof of publication.
8. No Landowner exhibits were offered during the hearing.
9. A number of nearby property owners appeared in opposition to the application, including Brian and Eileen Connelly (740 Champlain Drive) (the "Connellys"), Maureen Wilkin (769 Champlain Drive), and Barbara and Edward Skoczylas (732 Ticonderoga Road) (the "Skoczylas") (collectively "Objecting Neighbors").
10. The Connellys offered the following exhibits into the record:

a. Connelly-1 — print-out of a web page for “Rover” depicting an advertisement for dog boarding and care services at the Landowners’ Property; and

b. Connelly-2 — twelve dated photographs of dogs in backyard of the Property.

11. The Skoczylas offered the following exhibits into the record:

a. Skoczylas-1 — petition; and

b. Skoczylas-2 — six photographs dated August 7, 2019.

12. Two nearby property owners, David and Debbie Balick (765 Bunker Hill Road), appeared in support of the application.

13. At the beginning of the hearing, the Township solicitor stated the Township’s position that Landowners had not appealed the Zoning Officer’s determination, and, therefore, the determination was final and unappealable.

14. Landowners did not contradict or disagree with the solicitor’s statement on behalf of the Township.

15. Landowner, Douglas Andraka, offered the following testimony:

a. Mr. Andraka resides at the Property with his wife and three children [N.T., p. 8];

b. Landowners wish to operate a business watching no more than two dogs at a time in their home. [N.T., p. 8];

c. The only employees would be Mr. Andraka and the immediate family members residing at the Property. [N.T., p. 11];

d. Dogs would either be picked up by the Landowners or dropped off at the Property by their owners. [N.T., p. 11–12];

e. An average of about 1 dog per month would board at the Property, although there would be more dogs boarding during the summer than during the winter. [N.T., p. 12, 19];

f. The rear yard is completely fenced in and would be used as an area for the dogs to go to the bathroom and play. [N.T., p. 12, 21–22];

g. Landowners prefer to be paid to watch these dogs, but are willing to do so without payment. [N.T., p. 18];

h. The longest a dog would stay at the Property is a week, but the typical stay would be a weekend. [N.T., p. 23];

i. Mr. Andraka asserted that they do not advertise the business and that most of the dogs they watch are owned by friends and family who reside in Upper Merion Township. [N.T., p. 18, 22].

16. Testimony and evidence from Objecting Neighbors contradicted this assertion.

17. The ZHB found Mr. Andraka was not credible on this issue.

18. The Connellys offered the following testimony:

a. The Connellys reside directly adjacent to the Property. [N.T., p. 26];

b. The Connellys raised concerns about noise generated by the dogs, the smell and health hazards associated with using the rear yard for the dogs, traffic related to dropping off and picking up dogs, and the impact of the business on housing prices. [N.T., p. 26–27];

c. The Connellys have seen the Landowners walking as many as 8 dogs at a time in the neighborhood and did not believe the business would be limited to 2 dogs at a time. [N.T., p. 27–28];

d. The Connellys offered a copy of a web page from 2 months prior that advertised various dog care services in the King of Prussia area with a picture of Pamela Andraka and a picture of the Landowners' residence. [N.T., p. 28–29; Ex. Connelly-1];

e. Included on the web page printout is a customer's review of services from January 2019. [N.T., p. 45; Ex. Connelly-1]; and

f. Approximately 5 years prior, police were called to round up at least 6 dogs wandering around the neighborhood that were staying with the Landowners. At the time of that incident, the only person home was the Landowners' adolescent son. [N.T., p. 29–30.]

g. The Connellys testified to having a telephone conversation with the previous zoning officer, John Waters, about a cease and desist order issued to Landowners for operating a dog boarding business from the Property. The previous zoning officer informed them that Mr. Andraka had admitted he was operating the business and would pay a \$100.00 fine. [N.T., p. 36.]

19. The Zoning Officer confirmed that a notice of violation had been issued in 2015, but that the Township had withdrawn the notice after Landowners agreed to cease operating the business and to pay court costs. [N.T., p. 40.]

20. Maureen Wilkin and the Skoczylas both testified about concerns for the safety of children in the neighborhood, and their grandchildren in particular, due to dogs escaping from the Landowners' back yard. [N.T., p. 47-54.]

21. David Balick testified in favor of the application, stating that for the last two years he has not seen more than 2 dogs at the Andraka property and that Landowners have always been responsible with the dogs. Mr. Balick stated that the Andrakas have watched his dog previously, but they did not accept payment. [N.T., p. 61-62.]

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); *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Variations should be granted sparingly, and the reasons for granting variations must be substantial, serious, and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994).

1. Landowners failed to establish the requirements for a use variance to conduct a dog boarding/daycare use on the Property.

No testimony or evidence was presented regarding the existence of an unnecessary hardship. The personal desire of a property owner to use or develop property in a manner not permitted by the zoning ordinance is insufficient to warrant the granting of a variance. *See Larsen v. ZBA of City of Pittsburgh*, 672 A.2d 286 (Pa. 1996) (“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.”); *Singer v. Phila. ZBA*, 29 A.3d 144, 149 (Pa. Cmwlth. 2011) (“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.”). Landowners’ testimony and evidence showed that the Property is no different than any other property in the vicinity. The only asserted basis for the variance request was Landowners’ desire to operate this type of business from their home. This is not a sufficient basis to grant a use variance.

Where a property is already used for a use permitted by the Zoning Ordinance, an applicant cannot demonstrate that the requested variance is necessary for the reasonable use of the property. *See Patullo v. ZHB*, 701 A.2d 295, 300 (Pa. Cmwlth. 1997) (finding a variance to construct a garage was not warranted because property was being used as a single-family home, a permitted use).

Pursuant to section 165-22 *Use regulations* a property in the R-2A district is permitted to be used for a single-family detached dwelling. Landowners testified that they currently reside on the Property in a single-family detached dwelling. The Property is

presently used in a reasonable manner permitted by the Zoning Ordinance. A use variance is not warranted.

The operation of a business from the existing residential home will be detrimental to the public welfare. Although Landowners asserted that their proposed use would have a minimal impact on the neighborhood and surrounding properties, akin to that of any property owner with pets, the ZHB found this testimony not credible.

Landowners' assertions were directly contradicted by Objecting Neighbors. Objecting Neighbors raised a number of complaints about the manner in which Landowners have conducted the business, including issues related to noise, dog excrement and waste, concerns about safety, and escaped dogs. Objecting Neighbors directly rebutted a number of Landowners' characterizations about their business, including: that more than 2 dogs were at the house at one time; that dogs were being cared for more frequently than represented; that Landowners were advertising their services beyond friends and family; and that Landowners had discontinued the use after the 2015 notice of violation.

Based on the evidence and testimony presented by Objecting Neighbors, the ZHB concluded Landowners were not truthful and that their testimony was not credible.

The asserted basis for the variance, Landowners' desire to conduct this business from their home, was personal and self-inflicted. Landowners failed to demonstrate that they met the standards for the grant of a use variance.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 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 did not appeal the determination of the Zoning Officer that they were illegally conducting a dog boarding/daycare business from the Property. This determination is final and unappealable.

5. Section 165-22 of the Zoning Ordinance does not permit a dog boarding/daycare business in the R-2A district.

6. The ZHB may only grant a variance if 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.

7. Landowners failed to demonstrate an unnecessary hardship due to the unique physical circumstances or conditions peculiar to the Property.

8. Landowners failed to demonstrate that the property cannot be developed in conformity with the zoning ordinance and that a use variance is necessary to enable the reasonable use of the property.

9. No unnecessary hardship was established. The zoning relief sought arises from the personal desire to conduct a dog boarding/daycare business from the Property; not any physical circumstances or conditions peculiar to the Property.

10. Landowners failed to demonstrate that the variance would not be detrimental to the public welfare.

11. Landowners failed to demonstrate that the requested variance was the minimum necessary to afford relief.

At the conclusion of the August 7, 2019 public hearing, the ZHB voted unanimously to deny the application. On August 8, 2019, 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, August 7, 2019.

The Zoning Hearing Board voted to deny your request for a use variance from section 165-22 Use regulations of the Upper Merion Township Zoning Ordinance of 1942, as Amended, seeking to conduct a dog boarding/daycare business use on a property in the R-2A district where this use is not permitted.

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

Since you did not appeal the enforcement notice issued by the township code enforcement officer, the zoning determination in that notice is deemed final and unassailable.

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**



John Tallman, Chairman