

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

APPLICATION OF ROCKWELL REALTY LLC

No. 2020-20

PROPERTY: 534 KEEBLER ROAD

DECISION

This application involves requests for both a modification of a previous grant of a special exception to permit the conversion of a former single-family dwelling into 5 dwelling units, rather than the previously approved 4 dwelling units, and also a variance to allow 5 dwelling units where the zoning ordinance permits only 4 dwelling units based on the size of the property.

The Upper Merion Township Zoning Hearing Board (the “ZHB”) denied the requested relief.

Rockwell Realty LLC (“Landowner”) is the owner of the property located at 534 Keebler Road, Upper Merion Township, tax parcel no. 58-00-11707-05-2 (the “Property”). The 62,500 square foot Property is located in the R-2A zoning district and is improved with a 7,042 square foot former farmhouse that was previously converted into 3 multifamily residential dwelling units.

Special exception approval, pursuant to section 165-212 *Conversion of dwellings* of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the “Zoning Ordinance”), was granted to Landowner’s predecessor-in-title by the ZHB in August, 2019. The ZHB’s decision allowed an increase in the number multifamily dwelling units from 3 units to 4 units conditioned, in part, upon there being no more than 4 dwelling units on the Property.

In this application, Landowner requests the ZHB revisit its previous approval and allow certain modifications of the floorplans and grant a variance to allow 5 units where the size of the Property permits a maximum of 4 units.

On November 18, 2020, the ZHB held a virtual public hearing¹ on Landowner's application. The ZHB members present at the hearing were: Mark S. DePillis, Esq., Chairman; M Jonathan Garzillo, Vice-Chairman; Maria Mengel, member; Vivian Peikin, Esq., member; and Hedda Schupak, alternate 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. Landowner was unrepresented.

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

I. FINDINGS OF FACT

BACKGROUND

1. Landowner is the legal owner of the Property located at 534 Keebler Road, Upper Merion Township, tax parcel number 58-00-11707-05-2. [Ex. ZHB-2].

2. Landowner's predecessor in title was granted special exception approval to increase the number of dwelling units in the existing building from 3 units to 4 units in August, 2019. [Ex. ZHB-4].

3. The ZHB imposed a condition setting a maximum of 4 dwelling units on the Property. [Ex. ZHB-4].

¹ The virtual hearing was held via WebEx, as permitted by Act 2020-15, which authorizes political subdivisions subject to the COVID-19 disaster emergency declaration to conduct business through an authorized telecommunications device. The virtual hearing was conducted in accordance with the requirements set forth in 35 Pa.C.S. § 5741.

4. Landowner proposes to reconfigure the floorplans provided at the prior hearing and add a fifth dwelling unit. [Ex. ZHB-6].

5. The Property is located in the R-2A zoning district of the Township. [Ex. ZHB-1].

6. The Property is approximately 62,500 square feet in size. [Ex. ZHB-7].

7. Section 165-212.C of the Zoning Ordinance requires "...a lot area of not less than the product of the minimum lot area prescribed in the district regulations and the number of families for the use of which such dwelling is to be converted." Zoning Ordinance § 165-212.C.

8. The minimum lot size in the R-2A district is 12,500 square feet, Zoning Ordinance § 165-23.A. Thus, a maximum of 4 multifamily dwelling units is permitted on the Property.

ZHB HEARING

9. The ZHB marked the following exhibits:

- a. ZHB-1 — ZHB application
- b. ZHB-2 — deed between OOO Investments LLC, a Pennsylvania Limited Liability Company (grantor) and Rockwell Realty LLC, a Pennsylvania Limited Liability Company (grantee), dated July 3, 2020, recorded in deed book 6186, page 972.
- c. ZHB-3 — 5 color photographs of building exterior
- d. ZHB-4 — ZHB decision dated September 5, 2019 and cover letter
- e. ZHB-5 — plan entitled "Survey Plan for Orirosen Krantz," prepared by Yerkes Associates, Inc., dated June 19, 2019

- f. ZHB-6 — plan set, consisting of 8 sheets, prepared by Heta Designs, dated October 2020
 - g. ZHB-7 — Montgomery County Board of Assessment Appeals property information and tax map
 - h. ZHB-8 — Google Map of Property
 - i. ZHB-9 — legal notice
 - j. ZHB-10 — proof of posting
10. Landowner offered testimony from a single witness, Srini Yadamreddi, a member of Landowner, who testified as follows:
- a. Landowner proposes to modify a multifamily residential building from 4 units to 5 units and seeks special exception and variance relief from section 165-212 of the Zoning Ordinance. [N.T., p. 11].
 - b. The modification will entail certain changes to floor plans previously presented to the ZHB in the prior application by Landowner's predecessor-in-title. [N.T., p. 11].
 - c. The building is made up of 3 "blocks," a left wing and a right wing, which are independent, and a center block containing 3 floors and approximately 5,000 sq. ft. of living area. [N.T., pp. 11–12].
 - d. The second and third floors of the center block presently comprise one unit of approximately 3,000 sq. ft. of living area, connected by a shared stairway. [N.T., pp. 12–13].

- e. If relief were granted, each floor of the center block would be a separate unit of approximately 1,650 sq. ft. of living area. [N.T., p. 13].
- f. Landowner asserts that the price paid for the Property is a hardship and that allowing a fifth unit will increase the viability of the project. [N.T., p. 13].
- g. No evidence was offered to substantiate the viability contention.
- h. There are 14 parking spaces on the Property. Each unit will have two dedicated parking spaces, plus 4 visitor spaces. [N.T., pp. 13–14].
- i. Special exception approval and a variance were granted by the ZHB in 2007 to allow 5 units on the Property. However, that relief lapsed. [N.T., p. 14].
- j. The larger 3,000 sq. ft. unit is not as desirable to Landowner because it may be harder to rent and would have higher utility costs than two smaller units. [N.T., pp. 34–35].
- k. No evidence was offered to substantiate the marketing opinion.
- l. Landowner proposes replacing the existing slate roof, removing an existing dormer window, and elevating the roof 2 or 3 feet to install a row of new windows on the front and rear facades of the third floor of the center block. [N.T., pp. 39–41].

- m. The roof will be replaced regardless of whether zoning relief is granted, but the additional row of windows will only be installed if relief is granted. [N.T., pp. 41–42].
- n. If the zoning relief is not granted, Landowner intends to continue renovating the Property and will rent out the 4 units that have already been approved. [N.T., p. 46].
- o. Landowner paid \$535,000 for the Property and was aware at the time of purchase that the Property was only approved for 4 multifamily units. [N.T., p. 50].
- p. Landowner did not present any financial information to support the contention that the project was not feasible with only 4 units.

11. Several nearby property owners—Shanique and Ondrej Nikel (410 Langdale Court), Mary and John Vanasek (470 James Street), Diane Funsten (no address provided), and Sue Bartholomew (526 Keebler Road)—attended the virtual hearing and asked questions of Landowner’s witness. Only the Vanaseks and Ms. Bartholomew raised concerns about the application:

- a. The Vanaseks were concerned about stormwater runoff and flooding as the result of the removal of landscaping near their shared property line; and
- b. Sue Bartholomew was concerned about the additional traffic a fifth unit would bring to the property.

II. 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 § 165-251.B(2)(a); *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 Township v. Zoning Hearing Board of Pequea Township*, 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 (emphasis added).

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 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.

In *Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa. Cmwlth. 2016), an applicant sought variances from maximum density and lot width requirements in order to demolish his existing home, subdivide the property, and construct two new homes. The Commonwealth Court concluded that the only hardship asserted by the applicant was his desire to increase profitability, an insufficient basis for granting the requested dimensional variances. The Court concluded:

Indeed, where no hardship is shown, or where the asserted hardship amounts to a landowner's mere desire to increase profitability, the unnecessary hardship criterion required to

obtain a variance is not satisfied even under the relaxed standard set forth by the Supreme Court in *Hertzberg*. See, e.g., *Soc'y Hill Civic Ass'n v. Phila. Zoning Bd. of Adjustment*, 42 A.3d 1178 (Pa.Cmwlt.2012) (rejecting applicants' request for dimensional variance from zoning code's loading space requirement where need for variance was triggered by applicants' desire to expand use of property to maximize profitability); *Singer v. Zoning Bd. of Adjustment of City of Phila.*, 29 A.3d 144 (Pa.Cmwlt.2011) (rejecting applicant's request for dimensional variances from zoning code's parking, floor area ratio and loading dock requirements where asserted hardship amounted to applicant's desire to maximize development potential of property); *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh*, 997 A.2d 423 (Pa.Cmwlt.2010) (rejecting applicant's request for dimensional variance for proposed sign where only asserted hardship involved alleged benefit to community and increase in income); *Twp. of Northampton v. Zoning Hearing Bd. of Northampton Twp.*, 969 A.2d 24 (Pa.Cmwlt.2009) (rejecting applicant's request for variance from ordinance's off-street parking requirements where no evidence of hardship presented even under relaxed *Hertzberg* standard and evidence revealed applicant could use property in a manner consistent with ordinance requirements); *In re Boyer*, 960 A.2d 179 (Pa.Cmwlt.2008) (rejecting applicant's requests for dimensional variances from ordinance's steep slope and setback requirements in order to construct in-ground pool where no evidence of hardship presented even under relaxed *Hertzberg* standard); *Se. Chester County Refuse Auth. v. Zoning Hearing Bd. of London Grove Twp.*, 898 A.2d 680 (Pa.Cmwlt.2006) (rejecting request for dimensional variance where evidence indicated applicant could continue to operate at a profit without variance relief; no hardship shown); *One Meridian Partners, LLP v. Zoning Board of Adjustment of City of Phila.*, 867 A.2d 706 (Pa.Cmwlt.2005) (rejecting request for dimensional variance from floor area ratio and height requirements where asserted hardship was essentially financial in nature); *Yeager v. Zoning Hearing Board of City of Allentown*, 779 A.2d 595 (Pa.Cmwlt.2001) (rejecting applicant's request for dimensional variances from ordinance's setback and clear sight triangle requirements where only hardship amounted to applicant's desire to

construct a building for its new car dealership that complied with specifications required by vehicle manufacturer).

Dunn, 143 A.3d at 506.

Landowner in this application failed to satisfy the requirements for obtaining variance relief. The claimed hardship asserted by Landowner was that the purchase price was high and the project would be more profitable with 5 units than 4 units. This is purely a personal, economic hardship, which is insufficient to warrant variance relief. Furthermore, Landowner failed to substantiate this hardship. Instead, it provided solely conclusory assertions that the project would be more viable with five units, but provided none of the requisite financial information to substantiate this claim.

The relief is not necessary for Landowner to make reasonable use of the Property, as its representative admitted that if relief were denied Landowner would renovate the building and lease the Property as 4 units. The personal desire to maximize profits is self-created and does not stem from a physical characteristic or condition of the Property.

As Landowner failed to satisfy the statutory requirements for entitlement to a variance, the ZHB denied the requested relief.

III. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(6) of the Pennsylvania Municipalities Planning Code, 53 P.S. § 10909.1(a)(6), and Zoning Ordinance § 165-251.A(6).

2. Landowner has standing to seek the requested zoning relief as the owner of the Property.

3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

4. Section 165-212 *Conversion of dwellings* permits an existing single-family detached dwelling to be converted into and used as a multifamily dwelling by special exception if the applicant demonstrates compliance with the special exception criteria in the Zoning Ordinance.

5. Based on the size of the Property, section 165-212.C allows for a maximum of 4 dwelling units on the Property. Thus, to obtain a special exception, first a variance from the minimum lot size requirement was required.

6. The ZHB can 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. Landowner failed to demonstrate an unnecessary hardship due to the unique physical circumstances or conditions peculiar to the Property.

8. Landowner 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 add a fifth dwelling unit to maximize economic profits; not any physical circumstances or conditions peculiar to the Property.

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

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

At the conclusion of the November 18, 2020 virtual public hearing, the ZHB voted unanimously to deny the application. On November 19, 2020, the ZHB mailed the following notice of decision to Landowner:

This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board following the conclusion of the hearing on Wednesday, November 18, 2020.

The Zoning Hearing Board voted to deny the application for special exception and variance relief to increase the number of permitted dwelling units from 4 units to 5 units.

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
UPPPER MERION TOWNSHIP**

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Mark S. DePillis, Esq., Chairman