

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**MONTGOMERY COUNTY, PENNSYLVANIA**

**APPLICATION OF 106 DEKALB, INC.**

**APPLICATION NO. 2017-08**

**PROPERTY: 555 Lower East Valley Forge Road**

**DECISION**

This application concerns a request for use and dimensional variances: (1) a use variance to permit conversion of an existing single-family residence into a twin dwelling; (2) a height variance to permit a 2-story residential accessory garage with a maximum height of 24 feet, instead of the permitted 1-story, 14 foot height maximum; and (3) a variance to permit the residential accessory garage outside of the rear quarter of the lot.

The use variance to permit a twin dwelling on the property was granted as was the request to permit the garage outside of the rear quarter of the lot. The request for the height variance for the garage was denied.

The corporate entity, 106 DeKalb, Inc. ("Landowner"), is the legal owner of the property located at 555 Lower East Valley Forge Road (the "Property"). The Property contains an existing vacant house, built in the 1700s. The Property contains physical constraints, including significant steep slopes, a large natural spring, PennDOT and Township easements, and a large lattice transmission tower.

On May 17, 2017, the Zoning Hearing Board of Upper Merion Township ("ZHB") held a public hearing on Landowner's application. All ZHB members were present at the hearing: Mark S. DePillis, Esquire, Chairman, M Jonathan Garzillo, Vice-Chairman, Maria Mengel, Secretary, John M. Tallman, Jr., Member, and Lynne Z. Gold-Bikin,

Esquire, Member. Marc D. Jonas, Esquire, of Eastburn and Gray, P.C. represented the ZHB as its solicitor. Landowner was represented by John A. DiPietro, Esquire.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded.

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. Landowner is the legal owner of the Property. [ZHB Application.]
2. The Property is located in the Township's R-2 *Single-Family Residential District*. [ZHB Application.]
3. The lot area of the Property is 1.636 acres: a gross lot area of 3.728 acres less 2.102 acres within PennDOT/Township rights-of-way. [ZHB Application.]
4. Section 165-22 *Use regulations* of the zoning ordinance contains the use regulations for the R-2 *Single-Family Residential District*. Twin dwellings are not a permitted use.
5. Section 165-23 *Area, width and yard regulations* limits the height of accessory buildings to 14 feet, not to exceed 1 story. Section 165-23 also requires accessory buildings to be located within the rear quarter of the lot.
6. The Property contains an existing dwelling, which is, and has been for some time, vacant.

7. Landowner proposes to convert the dwelling to a twin dwelling, and to construct a 2-story, 24 foot high residential accessory garage, located outside of the rear quarter of the lot.

### ZHB HEARING

8. Landowner entered the following exhibits:
- a. A-1: aerial of property
  - b. A-2: photograph of existing dwelling, taken February 2016
  - c. A-3: photograph of existing dwelling, taken February 2017
  - d. A-4: photograph of dirt driveway
  - e. A-5: letter from Ronald J. Farrington to Richard Schildt, dated March 4, 2017 (not admitted)
  - f. A-6: hand-drawn elevation, identifying exterior wall and roof materials
  - g. A-7: photograph of existing dwelling, identifying stone type
  - h. A-8: hand-drawn floor plans
  - i. A-9: photograph titled "A House, 1st Floor, Door 1"
  - j. A-10: photograph titled "B House, 1st Floor, Door 1"
  - k. A-11: photograph titled "A House, Door 2"
  - l. A-12: photograph titled "B House, 1st Floor, Door 2"
  - m. A-13: photograph titled "House A, 1st Floor, Stairs"
  - n. A-14: photograph titled "House B, 1st Floor, Stairs"
  - o. A-15: photograph titled "House A, 1st Floor, Kit"
  - p. A-16: photograph of undemolished kitchen, House A, 1st Floor
  - q. A-17: photograph of undemolished kitchen, House B, 1st Floor

- r. A-18: photograph titled "House B, 1st Floor, Kit"
- s. A-19: photograph titled "House A, 2nd Floor, Bath"
- t. A-20: photograph titled "House B, 2nd Floor, Bath"
- u. A-21: photograph titled "House A, 2nd Floor, Hand Hewn Door, Wide Plank Floor, No Trim"
- v. A-22: photograph titled "House B, 2nd Floor, Six Panel Doors, Decorative Trim, Narrow Board Floor"
- w. A-23: photograph titled "Old Barn Demolished June 2017"
- x. A-24: photograph titled "New Barn", with dimensions
- y. A-25: photograph titled "327 and 329 LE Valley Forge Rd."
- z. A-26: photograph titled "528 and 526 LE Valley Forge Rd."
- aa. A-27: photograph titled "544 and 542 LE Valley Forge Rd."
- bb. A-28: photograph titled "607 and 609 Tabor Ave"
- cc. A-29: flyer for open house, March 25, 2017.

9. Landowner had two witnesses: Richard Schildt, president of Landowner, and Joseph M. Estock, P.E., Landowner's engineer.

10. Landowner's testimony was as follows:

- a. The existing dwelling was built in the 1700s. [N.T. p. 10.]
- b. Mr. Schildt testified that when Landowner purchased the Property:

...the property was vacant for approximately two years when we purchased it. It was under numerous citations from Upper Merion Township for overgrown vegetation, deplorable condition, and we went in and completely stripped the property of the vegetation, leaving the major trees, and preparing it for renovation.

[N.T. p. 10.]

- c. The Property contains significant steep slopes. [N.T. pp. 12, 14-15.]
- d. The Property contains a large transmission line structure to the rear. [*Id.*]
- e. The Property contains a large natural spring. [N.T. pp. 14-15.]
- f. Due to the transmission line and slopes, a residential accessory garage could not be located in the rear quarter of the lot. [N.T. p. 12.]
- g. Landowner proposed to convert the existing dwelling structure into a twin dwelling, with no change to the building footprint. [N.T. p. 18.]
- h. Landowner proposed a 2-story, 25' x 40' residential accessory garage, 24 feet in height. [N.T. p. 18.]
- i. The first floor of the proposed residential accessory garage would be used solely as accessory to the proposed twin dwelling. [N.T. p. 8.] The proposed garage would be used to house 2 vehicles and maintenance equipment. [N.T. p. 22.]
- j. Mr. Schildt contended that the second floor of the garage would be used for "[m]aybe a workshop or, you know, to – whatever's necessary." [N.T. p. 29.]
- k. Mr. Schildt is a real estate developer and does not intend to reside in either of the twin dwelling units. [N.T. pp. 23-24.] This raised a question regarding the actual use of the garage.

- l. There are 6 other twin homes in the neighborhood, including the home next door. [N.T. p. 19; Ex. A-25; Ex. A-26; Ex. A-27.]
- m. Landowner's engineer testified that the remainder of the Property could be developed with one additional single-family detached dwelling and one additional twin dwelling -- 3 additional dwelling units for a total of 5 potential dwelling units on the Property. [N.T. pp. 39-40.]
- n. Landowner agreed to the condition that the Property would not be developed for additional twin dwellings and agreed to execute and record a deed restriction to that effect.

11. Two owners of properties in the neighborhood testified in support of the application. The proponents applauded Landowner for its efforts to clean up the Property, ameliorating nuisance conditions, and bringing the house back "to its original beauty." [N.T. pp. 41-46.]

12. Two owners of properties in the neighborhood objected to the application, with unspecified and unsubstantiated concerns about traffic and "what a rental property will do to the neighborhood." [N.T. pp. 51-52.] Objecting neighbors were also concerned about additional development of the Property in the future. [N.T. p. 59.]

## **B. DISCUSSION**

It is well settled in Pennsylvania that a zoning hearing board may 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 South 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). A relaxed standard applies to applications for dimensional, as opposed to use, variations, but an applicant must still demonstrate an unnecessary hardship caused by unique physical characteristics of the property. See *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Commw. Ct. 2011). Additionally, “[i]t 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.” *Id.* at 150. Commonwealth Court rejects requests for dimensional variations where proof of hardship is lacking. *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of the City of Pittsburgh*, 997 A.2d 423, 445 (Pa. Commw. Ct. 2010).

An applicant for a use variance need not prove that its property is valueless as zoned or that the property cannot be used for a permitted purpose, absent relief. See

*Marshall v. City of Philadelphia*, 97 A.3d 323 (Pa. 2014) (discussing numerous zoning decisions). Nor must an applicant try to sell its property as a prerequisite to receiving a use variance. *Id.* (citing *Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 689 A.2d 225, 227-38 (Pa. 1997)).

Instead, “multiple factors are to be taken into account when assessing whether unnecessary hardship has been established”. *Id.* (citing *Hertzberg v. Zoning Bd. of Adjustment of the City of Pittsburgh*, 721 A.2d 43, 48 (Pa. 1998)). These factors have long included blighted/dilapidated conditions on a property, as well as an applicant’s efforts to remediate/renovate for a salutary/productive purpose. *Vitti v. Zoning Bd. of Adjustment of City of Pittsburgh*, 710 A.2d 653, 657-58 (Pa. Commw. Ct. 1998) (citing *Wagner v. City of Erie Zoning Hearing Bd.*, 675 A.2d 791 (Pa. Commw. Ct. 1996)).

The Supreme Court in *Marshall v. City of Philadelphia*, 97 A.3d 323 (Pa. 2014), developed a concise, clear, fact-intensive framework for the unnecessary hardship analysis:

1. the zoning hearing board has broad discretion in determining unnecessary hardship;
2. the zoning hearing board is entitled to use its knowledge of local conditions in determining unnecessary hardship; and
3. a variety of factors are relevant to the zoning hearing board’s determination of unnecessary hardship, including:
  - a. a unique building;
  - b. financial burden borne by the property owner;
  - c. adaptive reuse of existing buildings;
  - d. avoidance of nuisance conditions, considering age of building and need for repairs;



- e. impact of proposed use compared to other, permitted, uses of the property; and
- f. benefits to the community, including the community's need for the proposed use; and community support for the project.

*Id.* Under the appropriate circumstances, these factors result in the "unnecessary hardship" required for a use variance. *Id.*

Landowner requested both use and dimensional (height) variances.

1. **Unique physical conditions of the Property have caused an unnecessary hardship justifying the requested use variances to permit the twin dwelling and location of the residential accessory garage outside of the rear quarter of the lot, but not for the requested height variance.**

The Property is considerably constrained. It contains significant steep slopes. In the area of the existing dwelling, the Property slopes from front to rear. The Property also contains a large natural spring, over which no development can take place. The existing building on the Property, built in the 1700s, was in a dilapidated condition when Landowner purchased the Property. The Property was unkempt and under numerous citations for overgrown vegetation.

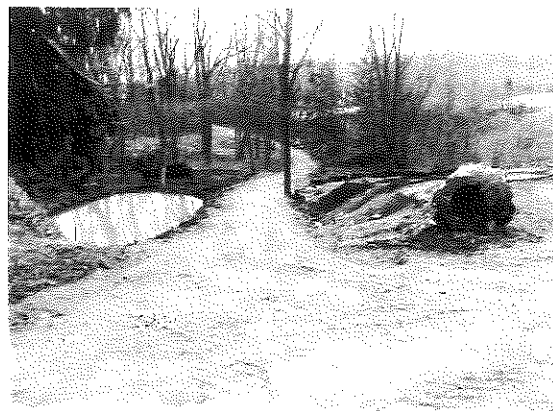
The facts before the ZHB are similar to those in *Halberstadt v. Borough of Nazareth*, 687 A.2d 371 (Pa. 1997). There, the Pennsylvania Supreme Court considered whether Commonwealth Court had erred in reversing a decision of the court of common pleas affirming the grant of a use variance to permit apartments and commercial space within an existing building. The building, constructed in 1914, was described as "fortress-like", had been vacant for several years, and was in disrepair. Moreover, the property contained heavy rock and steep slopes. In reversing and remanding to Commonwealth Court, the Supreme Court found:

Here, the zoning ordinance affects Mr. Orwig in a way not common to the typical lot owner in the commercial district because of the combination of the land's physical condition and the fortress-like building upon it.

*Id.* at 373.

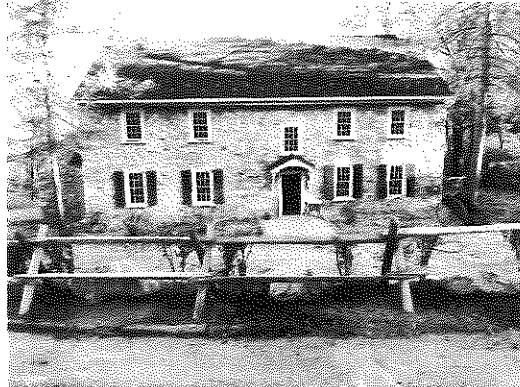
More recently, in *Marshall, supra*, the Supreme Court considered a request for a use variance by the Archdiocese of Philadelphia to permit conversion of a dilapidated, vacant, elementary school into an apartment building. In holding that the Archdiocese had demonstrated unnecessary hardship justifying the use variance, the Supreme Court considered a variety of factors, enumerated in detail above, including the presence of a unique/historic building, financial burden to convert the building to a permitted use, avoidance of nuisance conditions, and impact of the proposed on the community. The Supreme Court concluded that the zoning board of adjustment "was entitled to infer that the building could not be used for any permitted purpose without major, prohibitively expensive renovation." *Id.* at 333.

This matter is controlled by these sound precedents. The Property contains significant steep slopes from front to rear. The Property also contains a large natural spring and extensive right-of-way easements.



[Ex. A-4.]

Landowner's proposed use will permit rehabilitation of the existing building, preventing future nuisance conditions. Landowner has already restored the exterior of the building and performed significant work to clean up the Property.



[Ex. A-3.]

Landowner has demonstrated that an unnecessary hardship exists to justify the use variance to permit a twin dwelling and a use variance to permit the residential accessory garage outside of the rear quarter of the lot.<sup>1</sup>

However, the unique conditions of the Property do not justify Landowner's request for a dimensional variance to permit a 2-story residential accessory garage of 24 feet in height, instead of the maximum permitted 1-story, 12 foot height. Landowner's request for a height variance presents the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003), citing

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<sup>1</sup> Applicant's request to locate the garage in a location where it is not permitted (outside of the rear quarter of the lot) is a request for a use variance. See *Rollins Outdoor Advertising, Inc. v. Zoning Board of Adjustment*, 108 Pa. Cmwlth. Ct. 277, 529 A.2d 99 (1987) (variance request for sign encroaching into buffer zone was use variance and not dimensional variance).

*Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (1996); *Singer*, 29 A.3d at 149-150.

2. **The hardship with respect to the requested use variances to permit the twin dwelling and location of the residential accessory garage outside of the rear quarter of the lot were not self-created. The request for a height variance was.**

Landowner was required to demonstrate that the hardship alleged was not self-created. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999). The hardship is created by the existing conditions of the Property, including significant steep slopes, a large natural spring, an historic and dilapidated building, and significant public easements. Landowner did not create the hardship justifying the use variances to permit the twin dwelling and a residential accessory garage outside of the rear quarter of the lot.

However, Landowner's request for a height variance to permit a 2-story residential accessory garage, 24 feet in height is purely self-created.

3. **The requested variances to permit the twin dwelling and location of the residential accessory garage outside of the rear quarter of the lot are the minimum needed to afford relief.**

Landowner was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl*, 736 A.2d at 59. Given the significant constraints present on the Property, Landowner's requested relief to permit a twin dwelling and a residential accessory garage outside of the rear quarter of the lot are the minimum variances necessary to afford relief for the reasonable use of the Property. Notably, Landowner agreed to a deed restriction, prohibiting additional twin dwellings on the Property.

4. **The requested variances to permit the twin dwelling and location of the residential accessory garage would not be detrimental to the public welfare, nor impair the appropriate use or development of adjacent property.**

Landowner presented evidence that the neighborhood contained no fewer than 6 other twin dwellings. Moreover, Landowner has undertaken significant efforts to clean up the property, remediating nuisance conditions.

Objecting neighbors' concerns regarding traffic and the effect of rental units on the neighborhood were not substantiated. Concerns regarding future development of the Property were addressed by Landowner's agreement to a deed restriction prohibiting additional twin dwellings on the Property.

### **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. Landowner has standing to seek the requested variances as the legal owner of the Property.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Section 165-22 *Use regulations* limits the uses permitted in the R-2 *Single-Family Residential District*. A twin-dwelling is not a permitted use.
5. Section 165-23 *Area, width and yard regulations* requires location of a residential accessory garage within the rear quarter of the lot
6. Section 165-23 *Area, width and yard regulations* limits the height of accessory structures to 14 feet, 1-story.

7. 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.
8. Landowner demonstrated an unnecessary hardship entitling Landowner to a use variance from section 165-22 *Use regulations* to permit a twin dwelling within the existing building.
9. Landowner demonstrated an unnecessary hardship entitling Landowner to a use variance from section 165-23 *Area, width and yard regulations* to permit a residential accessory garage outside of the rear quarter of the lot.
10. Landowner failed to demonstrate an unnecessary hardship entitling Landowner to the requested height variance to permit a 2-story residential accessory garage with a height of 24 feet instead of the maximum permitted 1-story, 14 foot height.
11. Landowner demonstrated that the use variances to permit the twin dwelling and residential accessory garage outside of the rear quarter of the lot are necessary to permit a reasonable use of the Property.

12. Landowner failed to demonstrate that the requested height variance to permit a 2-story, residential accessory garage with a height of 24 feet instead of the maximum permitted 1-story, 14 foot height, is necessary to permit a reasonable use of the Property.
13. Landowner demonstrated that the use variances to permit the twin dwelling and residential accessory garage outside of the rear quarter of the lot are the minimum necessary to afford relief.
14. The requested height variance is not necessary to afford relief.
15. Landowner demonstrated that the alleged hardship creating the need for the use variances to permit the twin dwelling and residential accessory garage outside of the rear quarter of the lot are were not self-created.
16. Landowner's request for a height variance was self-created.
17. Landowner demonstrated that the requested relief for use variances to permit the twin dwelling and residential accessory garage outside of the rear quarter of the lot would not be detrimental to the public welfare, nor to neighboring properties.
18. Landowner demonstrated its entitlement to the requested use variances to permit the twin dwelling and a residential accessory garage outside of the rear quarter of the lot.
19. Landowner failed to demonstrate its entitlement to the requested height variance.

At its May 3, 2017 public meeting, the ZHB voted to grant the application in part, and deny in part, which was followed by the mailing of the following notice of decision:

**MOTION**

AND NOW, this 17th day of May, 2017, the Zoning Hearing Board of Upper Merion Township GRANTS the requests for (1) a use variance from section 165-22 *Use regulations* to permit a twin dwelling in an existing building in the R-2 *Single-Family Residential District* and (2) a dimensional variance from section 165-23 *Area, width and yard regulations* to permit a residential accessory garage outside of the rear quarter of the lot.

The Zoning Hearing Board DENIES the request for a height variance from section 165-23 *Area, width and yard regulations* for the residential accessory garage.

The relief is conditioned as follows:

- The twin dwelling and residential accessory garage shall conform strictly to the representations, testimony, and exhibits presented at the hearings and set forth in the application, including, but not limited to the plan titled "Plot Plan", prepared by Joseph M. Estock, dated February 16, 2017, portions of which are attached hereto.
- Applicant shall record, at its sole expense, a declaration of covenants, prepared by the Zoning Hearing Board solicitor, which would prohibit the construction of a twin dwelling anywhere else on the entire 3.738 acre property, unless future zoning permits a twin dwelling unit.

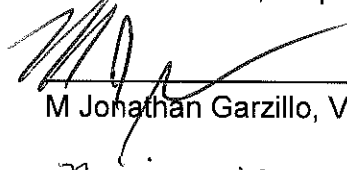
Because this application was contested, and denied in part, a decision with findings of facts, conclusions of law, and reasons will follow.



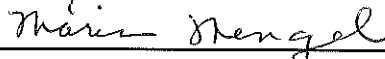
This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

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Mark S. DePillis, Esquire, Chairman



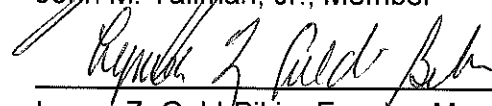
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M Jonathan Garzillo, Vice Chairman



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Maria Mengel, Secretary



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John M. Tallman, Jr., Member



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Lynne Z. Gold/Bikin, Esquire, Member

Date of Mailing: