

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

**APPLICATION OF JAMES HAGAN**

**NO. 2015-09**

**PROPERTY: 567 A STREET**

**OPINION AND ORDER**

In this zoning application, the owner of a property located in the R-3 Residential District requests dimensional variances to allow an existing patio and an existing shed to remain in the required side yard.

James Hagan ("Landowner") constructed a shed and patio without obtaining the requisite permits or zoning relief. Landowner requests a dimensional variance from section 165-206.B (projections into required yards) of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Zoning Ordinance") to permit the patio to remain in the required side yard. Landowner also requests a dimensional variance from section 165-61.C(4) to permit the shed to remain outside of the rear quarter of the Property as required—specifically 56' from the rear lot line and 15' from the side lot line.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on July 15, 2015, on Landowner's application, no. 2015-09. The hearing was stenographically recorded. Three members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; and Maria Mengel, Member. The ZHB was represented by Michael E. Peters, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was unrepresented.

After careful consideration, 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 parcel of land located at 567 A Street, Upper Merion Township, Pennsylvania ("Property"), identified as parcel no. 58-00-00133-00-7. [Ex. A-1; Ex. A-4.]

2. The Property is located in the Township's R-3 Residential District. ("R-3 District"). [Ex. A-1.]

3. Landowner resides in a single-family home on the Property. [Ex. A-1.]  
The Property also contains a deck and a shed. [Ex. A-2.]

4. Landowner constructed a paver patio in the required side yard without obtaining a permit or the necessary zoning relief. [Ex. A-1.]

5. Zoning Ordinance section 165-206.B provides:

B. A terrace, platform or landing place not covered by a roof, canopy or trellis, which does not extend above the level of the first floor of the building, may be erected to extend into a required yard a distance of not more than 12 feet, provided that it shall not extend into such yard more than 40% of the required depth or width of the yard.

Zoning Ordinance § 165-206.B.

6. Landowner requests a variance from section 165-206.B to permit the patio to encroach into the required side yard, up to the property line. [Ex. A-1.] The minimum side yard in the R-3 District is 10'. Zoning Ordinance § 165-61.C(1).

7. Zoning Ordinance section 165-61.C(4) provides:

On any lot, in any side yard not abutting a street, an accessory structure may be erected and maintained within the rear quarter of the lot if not closer to the side lot line than four feet, and accessory structures may be erected and maintained on adjacent lots within the rear quarters thereof having a wall in common located on the common side lot line.

Zoning Ordinance § 165-61.C(4).

8. Landowner requested a dimensional variance from section 165-61.C(4) to permit the shed to remain outside of the rear quarter of the Property as required—specifically 56' from the rear lot line and 15' from the side lot line.

9. The ZHB granted Landowner's request for a variance from section 165-61.C(4), permitting the shed to remain in its current location. Because this variance was granted and not contested, the variance need not be addressed herein.

#### **ZHB Hearing**

10. Landowner introduced the following exhibits:

- a. A-1—zoning hearing board application
- b. A-2—hand-drawn plan for shed
- c. A-3—letter dated April 23, 2015, from M. Zadroga, zoning officer, to Landowner regarding incompleteness of zoning hearing board application
- d. A-4—deed dated February 29, 2012, between M.E. Fox, executrix of estate of Anna Lawless, a/k/a Anne Lawless, deceased (grantor) and James Hagan and Theresa Spada (grantees), recorded in deed book 5829, page 312
- e. A-5—5 photographs of the shed and patio

11. Landowner testified on his own behalf. There were no other witnesses.
12. The limited testimony was as follows:
  - a. Landowner is a general contractor and stores tools in the shed and on the patio. [N.T. pp. 6-8.]
  - b. Prior to storing tools in the shed and patio, Landowner stored tools in the basement. [N.T. pp. 8-9.]
  - c. The rear of the Property contains "a hill that goes down and...leads back to the rear quadrant." [N.T. p. 6.]
  - d. Landowner asserted that, upon learning that he was required to obtain permits, he "took action immediately...[and has been] in contact with the Township." [N.T. p. 7.]
  - e. The Property is surrounded by a privacy fence. [N.T. p. 8.]
  - f. The patio was constructed with pavers. To comply with the Zoning Ordinance, Landowner must remove the pavers. [N.T. p. 12.]
13. Three citizens offered public comment:
  - a. John Williams, owner of the property across the street from Landowner's Property, supports Landowner's application, and complimented Landowner on his improvements to the Property, including the shed. [N.T. pp. 13-14.]
  - b. John Gee, owner of the property directly behind the Property, is concerned that the patio is located on the property line. Mr. Gee is particularly concerned about stormwater management. [N.T. p. 16.]

- c. Theresa Spada, Landowner's wife, stated that the shed "looks great", and that prior to construction of the shed, Landowner had "tools in the back yard". [N.T p. 18.]

**B. DISCUSSION**

**1. Landowner did not prove that he is entitled to a variance from Zoning Ordinance section 165-206.B.**

Landowner did not show that he is entitled to the requested variance. A zoning hearing board may only grant a variance in Pennsylvania when:

- 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;
- 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 (Pa. Commw. Ct. 1990); see also Zoning Ordinance § 165-251.B(2) (setting forth elements necessary for variance).

Variances should be granted sparingly, and the reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). Although a somewhat relaxed standard applies to applications for dimensional, as opposed to use, variances, 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). “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.” *Id.* at 150.

The Commonwealth Court rejects requests for dimensional variances 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).

- a. **Landowner failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying a variance to allow the patio to remain in the required side yard.**

Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use unless the requested variance is granted. Landowner presently resides in a single-family home on the Property. [Ex. A-1.] In addition to the offending patio, the Property contains a shed and a deck. [Ex. A-2.] The only proffered justification for the size of the patio and its encroachment into the required side yard is Landowner’s desire to “store” tools there. [N.T. pp. 6-8.]

Landowner failed to articulate a legal, as opposed to a personal, hardship to permit the patio to remain in the required side yard, with *no setback* from the property line.

Landowner failed to articulate a hardship in existence on the Property not created by his desire to have a larger-than-permitted patio on the Property.

This application and the evidence offered by Landowner present the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003) (citing *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (Pa. 1996)); *Singer*, 29 A.3d at 149-150. Unnecessary hardship, caused by unique physical circumstances of the property, is required for the grant of a variance. *Nettleton*, 828 A.2d at 1040. For example, in *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa. Commw. Ct. 2001), the court held:

A variance, whether labeled dimensional or use, is appropriate "only where the property, not the person, is subject to hardship." *Szmigiel v. Kranker*, 6 Pa.Cmwlth. 632, 298 A.2d 629, 631 (1972) (emphasis in original). In the present case, Daniels' property is well suited to the purpose for which it is zoned and actually used, a car dealership, which is in no way burdened by the dimensional requirements of the ordinance. Daniels has proven nothing more than that adherence to the ordinance imposes a burden on his personal desire to sell vehicles for Land Rover.

779 A.2d at 598.

Similarly, in *Ken-Med Associates v. Board of Township Supervisors of Kennedy Township*, 900 A.2d 460 (Pa. Commw. Ct. 2006), a landowner sought a buffer yard variance to permit construction of a parking garage providing additional parking for a medical practice; the court held:

Landowner's efforts to obtain a variance, which would allow for a greater number of physicians to practice at the Property and a general expansion of the Property's profitability, is nothing less than an impermissible attempt to attain a variance to maximize the economic value of the Property. This Court, time and again, has held that expanding the use of a particular property to maximize profitability is not a sufficient hardship to justify the granting of a variance,

because such financial hardship is a form of self-inflicted hardship relating to a landowner and not, as required by the MPC, the property.

900 A.2d at 466.

Finally, in *Vito v. Zoning Hearing Board of Borough of Whitehall*, 458 A.2d 620 (Pa. Commw. Ct. 1983), a property owner sought a dimensional variance to permit construction of an additional garage to a home already containing a two-car garage. In affirming the decision of the zoning hearing board denying the requested dimensional variance, Commonwealth Court noted:

Clearly, the property is fully usable in its present condition.

...

The Vitos presently have the existing two-car garage in which to park their vehicles... there is no hardship in the legal sense...

*Id.* at 622.

Similar to *Yeager*, *Ken-Med*, and *Vito*, Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Landowner's personal preferences and construction without a permit drive the need for the variance and are totally insufficient under the law.

**b. Landowner failed to prove the requested variance is the minimum needed to afford relief.**

Landowner was required to provide evidence that the variance requested represents the minimum necessary to afford relief. 53 P.S. § 10910.2(a)(5); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999); Zoning Ordinance § 165-251.B(2)(a)(5). Landowner failed to offer any proof that the requested variance was the minimum necessary to afford relief. To the contrary, testimony reveals



that (1) Landowner can bring the patio into compliance by removing the pavers; (2) the Property is improved with a single-family home on the Property, including a deck and shed.

Under these circumstances, Landowner failed to prove that the requested variance represents the minimum necessary to afford relief.

### **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 section 165-251.A(5).

2. Landowner has standing to seek the requested variance as legal owner of the Property.

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

4. The ZHB may grant a variance provided that an applicant demonstrates that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance, prohibiting the reasonable use of the property; (c) such unnecessary hardship has not been created by the applicant; and (d) the variance, if authorized, will represent the minimum variance that will afford relief. Zoning Ordinance §165-251.B(2).

5. Landowner failed to demonstrate any unnecessary hardship entitling it to a dimensional variance from section 165-206.B of the Zoning Ordinance to permit the patio to remain in the required side yard.

6. Landowner failed to demonstrate that the dimensional variance is necessary to permit a reasonable use of the Property.

7. Landowner failed to demonstrate that the requested variance represents the minimum necessary to afford relief.

8. Accordingly, Landowner failed to sufficiently demonstrate its entitlement to the requested variance.

At the conclusion of the July 15, 2015 hearing, the ZHB voted to deny the application and issued the following notice of the decision, which was sent to Landowner via certified mail on July 16, 2015:

### **ORDER**

The Zoning Hearing Board hereby DENIES the request for a variance from section 165-206.B of the Upper Merion Township Zoning Ordinance of 1942, as amended, to permit an existing patio to remain in the required 10' side yard with a 0' setback. The patio shall be brought into compliance with all requirements of the Zoning Ordinance within 45 days of the date of entry (mailing) of this decision.

The Zoning Hearing Board hereby GRANTS the request for a variance from section 165-61.C(4) of the Zoning Ordinance to permit the existing shed to remain within the required yards, specifically 56' from the rear lot line, and 15' from the side lot line.

A decision with findings of fact and conclusions of law on the denial of the requested variance for the patio will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

The applicant is directed to section 165-257 "Expiration of Special Exceptions or Variances" and applicable statutory provisions governing the expiration of special exceptions and variances.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**



Lynne Gold-Bikin, Esq.  
Chairwoman

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John M. Tallman  
Vice Chairman

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Maria Mengel  
Member

**Date of Mailing:**

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