

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

**APPLICATION OF CHU PHAN AND ANH PHAM**

**NO. 2015-18**

**PROPERTY: 127 CONCORD CIRCLE**

**OPINION AND ORDER**

In this zoning application, the owner of a property located in the R-2 Residential District requests dimensional variances to allow an existing addition to a single-family detached dwelling to remain in the required side yard.

Chu Phan and Anh Pham (together referred to as "Landowner") constructed an addition to their single-family detached dwelling without obtaining the required permits or zoning relief. Landowner requests dimensional variances from section 165-23.A *Area, width and yard regulations* of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Zoning Ordinance") to permit the building addition to remain in the required side yard, and to permit less than the required aggregate side yard. Specifically, Landowner requests dimensional variances to permit the building addition to encroach into the required side yard by 1.98 feet (for a minimum side yard of 8.02 feet instead of the 10 feet required) with an aggregate side yard of 19.8 feet instead of the 25 feet required.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on October 7, 2015. The hearing was stenographically recorded. Four members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; and M Jonathan Garzillo, 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 127 Concord Circle, Upper Merion Township ("Property"), identified as parcel no. 58-00-04090-001. [Ex. ZHB-1; Ex. ZHB-3.]
2. The Property is located in the Township's R-2 Residential District ("R-2 District"). [Ex. ZHB-1.]
3. The Property is 8,512 square feet. [Ex. ZHB-2.]
4. Landowner resides in a single-family detached dwelling on the Property. [Ex. ZHB-1.]
5. Landowner constructed a 35' x 11' addition in the required side yard, without obtaining a building permit or zoning relief. [Ex. ZHB-1; Ex. ZHB-2; Ex. ZHB-4.] With the building addition, the property contains a minimum side yard of 8.02 feet and an aggregate side yard of 19.8 feet. [ZHB-2.]
6. Zoning Ordinance section 165-23.A requires a minimum side yard of 10 feet and a minimum aggregate side yard of 25 feet.
7. Landowner requests dimensional variances from section 165-23.A to permit the building addition to encroach into the required side yard and to

provide less than the minimum required aggregate side yard. Specifically, Landowner seeks relief to permit the building addition to remain in its current location—8.02 feet from the southern side yard (an encroachment of 1.98 feet) with an aggregate side yard of 19.8 feet. [ZHB-2.]

### **ZHB Hearing**

8. The ZHB entered the following exhibits:

- a. ZHB-1—ZHB application
- b. ZHB-2—survey of Property, prepared by Bear Gully Survey Company, dated July 29, 2015
- c. ZHB-3—deed for the Property
- d. ZHB-4—twelve photographs of interior and exterior of building addition
- e. ZHB-5—legal notice
- f. ZHB-6—proof of publication
- g. ZHB-7—affidavit of posting

9. Landowner's son testified on Landowner's behalf. Landowner's son resides in the single-family detached dwelling on the Property. Landowner offered no other witnesses.

10. The testimony was as follows:

- a. Landowner obtained a permit from the Township to construct a porch on the Property, in the location of the building addition. [N.T. p. 5.]

- b. Other single-family detached dwellings in the neighborhood have similar additions. [N.T. p. 9.]
- c. Observing other neighbors with “enclosed living space” in the location of the proposed porch, Landowner constructed a building addition instead of a porch. [N.T. p. 6.]
- d. Landowner was not aware that another, different, permit was required for construction of the addition, or that zoning relief was required. [N.T. p. 6.]
- e. The single-family detached dwelling, prior to construction of the building addition, had only one bathroom. [N.T. p. 6.] The building addition contains “living space” and a second bathroom. [N.T. pp. 6, 9.]
- f. The Property forms a “triangle”—with the base of the triangle located along Concord Circle, and the point of the triangle located at the rear of the Property. [N.T. p. 6; Ex. ZHB-2.] The Property narrows from front to rear. [Ex. ZHB-2.]
- g. The addition was built on the back of the pre-existing single-family detached dwelling, towards the rear of the Property. [Ex. ZHB-2.] This area of the Property is narrow. [Ex. ZHB-2.]
- h. The addition is the same width as the pre-existing single-family detached dwelling. [N.T. pp. 6-7; Ex. ZHB-2.]

- i. But for the Property's triangular shape, the addition would not encroach into the required side yard, and Landowner would not need a dimensional variance. [N.T. p. 8.]
11. One neighbor testified in opposition to the application—George Eckhardt.
- a. Mr. Eckhardt resides at 138 Concord Place. [N.T. p. 10.]
  - b. Mr. Eckhardt's property is located on a different street, separated from the Property by 4 houses. [N.T. pp. 11-12.]
  - c. When asked to articulate his specific concerns, Mr. Eckhardt testified as follows:

**ZHB Member DePillis:** Sir, can you articulate, can you state for us what about what [Landowner is] doing with the property that concerns you? What exactly is it about it that concerns you?

**Mr. Eckhardt:** What concerns me is, as I was told, that some of the expansion does not actually conform to the zoning code.

...

... [I]t's a matter of following the rules and what the situation should be like in the neighborhood to conform to it.

[N.T. pp. 14-15.]
  - d. Mr. Eckhardt also expressed concern regarding houses in the neighborhood being "inhabited by seven or more people, and ... cars on the front lawn piling up." [N.T. p. 18.] Mr. Eckhardt acknowledged, however, that Landowner did not have cars on the Property's front lawn. [/d.]

- e. Mr. Eckhardt voiced no particular concern regarding Landowner's use of the Property.<sup>1</sup>
- f. Although Mr. Eckhardt presented a petition to the ZHB, purportedly signed by other residents of the neighborhood, Mr. Eckhardt did not request that the petition be made a part of the record, nor did Mr. Eckhardt authenticate the document. The ZHB did not accept the petition as an exhibit. [N.T. p. 20.]

**B. DISCUSSION**

**VARIANCES**

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

---

<sup>1</sup> Mr. Eckhardt's concerns were unsubstantiated and unrelated to the specific application before the ZHB. Mr. Eckhardt failed to offer credible, competent, evidence in opposition to the application.

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.Cmwlth. 1994). A relaxed standard applies to applications for dimensional, as opposed to use, variances. 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.

In granting a variance, the ZHB “may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the [MPC] and the [Z]oning [O]rdinance.” 53 P.S. § 10910.2(b).

Landowner demonstrated that unique physical conditions exist on the Property, and that the requested variances are necessary to permit reasonable use of the Property.

- 1. Unique physical conditions of the Property cause an unnecessary hardship justifying variances to permit the building addition to remain in the required side yard.**

Landowner demonstrated that unique physical conditions of the Property cause an unnecessary hardship justifying two minor dimensional variances to permit the building to remain in the required side yard with less than the required aggregate side yard.

Landowner testified that the building addition would comply with the Zoning Ordinance but for the triangular shape of the Property. [N.T. p. 6; ZHB-2.] Although the building addition is the same width as the pre-existing single-family detached dwelling,

because the building addition was built on the back of the house toward the triangle point, the building addition encroaches into the required side yard. [N.T. p. 8; ZHB-2.]

Given the dimensional restraints of the Property, the Landowner demonstrated that unique physical conditions of the Property create an unnecessary hardship.

**2. The unnecessary hardship was not created by the Landowner.**

The unnecessary hardship was not created by the Landowner. To the contrary, the hardship is created because the property is triangular in shape. [N.T. p. 8; ZHB-2.]

**3. The requested variances will not be detrimental to the public welfare.**

Landowner demonstrated that the requested variances would not be detrimental to the public welfare. The Property is located in a residential neighborhood. Other properties in the neighborhood have similar building additions. [N.T. p. 6.] No competent evidence suggested otherwise.

**4. The requested variances represent the minimum variance that will afford relief.**

Landowner demonstrated that the requested variances represent the minimum variance that will afford relief. Landowner is encroaching into the required side yard by 1.98 feet and is still providing an aggregate side yard of 19.8 feet.



**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 variances as the 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; (d) the variance, if authorized, will not be detrimental to the public welfare; and (e) the variance, if authorized, will represent the minimum variance that will afford relief. Zoning Ordinance §165-251.B(2).

5. Landowner demonstrated the existence of unique physical circumstances or conditions peculiar to the Property.

6. Landowner demonstrated that an unnecessary hardship will result if the requested variances were denied.

7. On the facts presented, Landowner demonstrated that the dimensional variances are necessary to permit a reasonable use of the Property.

9. Landowner demonstrated that the alleged hardship was not created by the Landowner.

10. Landowner demonstrated that the requested variances represented the minimum necessary to afford relief.

11. Accordingly, Landowner demonstrated its entitlement to the requested variances.

At its October 7, 2015 hearing, the ZHB entered the following order:

### **ORDER**

The Zoning Hearing Board hereby grants the request for 2 variances from section 165-23.A *Area, width and yard regulations* of the Upper Merion Township Zoning Ordinance of 1942, as amended to permit (1) a side yard of 8.02 feet instead of the minimum 10 feet required, and (2) an aggregate side yard of 19.8 feet instead of the minimum 25 feet required.

The variances were granted to permit an existing addition to a single-family detached dwelling to remain in the required side yard, pursuant to the condition that the addition shall otherwise comply with all ordinances, resolutions, and codes of Upper Merion Township, including the requirements of an application for, and receipt of a building permit.

Because this application was opposed, an opinion with findings of facts, conclusions of law, and reasons 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.

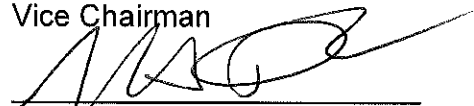
---

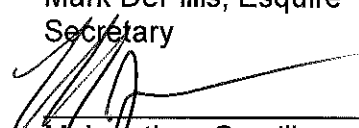
Written notice of the ZHB's decision was mailed to Landowner on October 8, 2015.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

  
\_\_\_\_\_  
Lynne Gold-Bikin, Esquire  
Chairwoman

\_\_\_\_\_  
John M. Tallman  
Vice Chairman

  
\_\_\_\_\_  
Mark DePillis, Esquire  
Secretary

  
\_\_\_\_\_  
M. Jonathan Garzillo  
Member

**Date of Mailing:**