

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

**APPLICATION OF BRENDAN GIBBONS**

**NO. 2014-20**

**PROPERTY: 353 SOUTH GULPH ROAD  
KING OF PRUSSIA, PA 19406**

**OPINION AND ORDER**

This zoning application involves an applicant's request for a use variance to permit a landscape business on a residentially zoned property. The applicant is the owner of the property and also the owner of a landscape business. A landscape business is not a permitted use in the R-1 zoning district.

On October 1, 2014, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a duly advertised hearing on the application of Brendan Gibbons, no. 2014-20. The hearing was stenographically recorded. Members of the ZHB present at the hearing were: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, 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. The applicant, Brendan Gibbons ("Landowner"), is the owner of an R-1 Residential property located at 353 South Gulph Road (the "Property").

2. The Property consists of 67,600 square feet. The Property presently contains a single-family home, a garage, and a guest house.

3. Landowner previously resided at the Property, which is in a neighborhood of mixed uses, both residential and non-residential. Landowner has significantly upgraded the home, inside and out, over the last 10 years.

4. Landowner also owns and operates a landscape company at 403 Flint Hill Road, King of Prussia.

5. Landowner desires to move his landscape business to the Property.

6. Section 165-22 sets forth the permitted uses in the R-1 zoning district.

7. Commercial uses are not permitted in the R-1 zoning district.

8. A landscape business is not a permitted use in the R-1 zoning district.

**ZHB HEARING**

9. Landowner testified on his own behalf. Landowner did not offer the testimony of any other witnesses.

10. Landowner's testimony was as follows:

- Landowner purchased the Property in 2003, and lived there for eight years. [N.T. p. 7]
- The Property contains 3 buildings: a main house, large garage, and small guest house. [N.T. p. 7]

- Across from the Property on South Gulph Road are 5-6 residential neighbors. [N.T. pp. 7-8]
- Also in close proximity to the Property are a dentist's office, a commercial campus, and a business office. [N.T. pp. 8-9]
- Landowner's landscape company (the "Landscape Business") is a "full-service" landscape company. [N.T. p. 9]
- The Landscape Business "provide[s] every service from weeding to planting trees." [N.T. p. 9]
- The Landscape Business "typically" employs 5-6 employees. [N.T. pp. 9-10]
- Landowner would store 4-5 trucks utilized by the Landscape Business on the Property. [N.T. pp. 10, 17] All employees would park on the Property while at work. [N.T. p. 10]
- The hours of the Landscape Business are Monday through Friday, and Saturday, from 7 am to 3:30 pm. [N.T. pp. 23-25] These hours are extended as needed. [N.T. pp. 23-25]
- Landowner described the dwelling as follows:

The house itself is a beautiful home. I lived there for eight years. It's nice inside. And from the day I bought it I have improved it.

[N.T. p. 11]

- Landowner "fully renovated" the Property – inside and out. [N.T. p. 26]

- Landowner invested approximately \$215,000 in improving the Property, adding, e.g., landscaping, new windows, central air-conditioning, and hardwood floors. [N.T. p. 27]
- The house is 2500 square feet. [N.T. p. 15]
- The house contains “[f]our bedrooms, two baths, [and a] nice kitchen.” [N.T. p. 23]
- Landowner would use part of the house as the office for the Landscape Business. [N.T. p. 15]
- At least one of the neighbors (a residential neighbor) would have a direct view of the Landscape Business vehicles. [N.T. p. 18]
- Landowner listed the Property for sale in February 2014. [N.T. p. 11]
- Landowner removed the Property from the market in August 2014. The Property was on the market for only 6 months. [N.T. pp. 25-26]
- Landowner purchased the Property for \$437,000. [N.T. p. 21]
- Landowner listed the Property for \$999,000. [N.T. pp. 21-22] Landowner reduced the price to \$899,000, and later to \$799,000. [N.T. pp. 21-22]
- Landowner offered the house as a residential rental for \$2700 and reduced the rental price to \$2500. [N.T. p. 22]
- Landowner leased the Property for two and a half weeks in July 2014. [N.T. p. 25] Landowner did not identify the rental rate or the reason why the tenant vacated. [N.T. p. 25]

### **INSUFFICIENCY OF THE EVIDENCE**

11. Landowner failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB's grant of the requested use variance.

12. Landowner failed to offer proof that the use variance would be necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used for a "beautiful" single-family home, garage, and guest house.

13. Landowner failed to offer proof that the requested variances were the minimum variance that would afford relief.

### **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).

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.Cmwlth. 1994). "The burden on a landowner seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling." *Bawa Muhaiyaddeen Fellowship v. Philadelphia Zoning Bd. of Adjustment*, 19 A.3d 36, 39-40 (Pa. Commw. Ct. 2011) (citing *Valley View Civic Assoc. v. Zoning Bd. of Adjustment*, 462 A.2d 637 (Pa. 1983)).

"Further, a use variance carries a greater risk of injury to the public interest than a dimensional variance." *Id.* at 40. Therefore, the burden carried by an applicant seeking a use variance is high.

**1. Landowner failed to demonstrate an unnecessary hardship justifying a use variance to permit use of the Property for the Landscape Business.**

An applicant for a use variance has the burden of proving that "(1) the proposed use is not contrary to the public interest and (2) the property involved is subjected to an unnecessary hardship unique or peculiar to the property itself." *Zaruta v. Zoning Hearing Bd. of City of Wilkes-Barre*, 543 A.2d 1282, 1284 (Pa. Commw. Ct. 1988).

Unnecessary hardship can be demonstrated by:

...either (1) showing that the physical characteristics of the property are such that it could not be used for a permitted use or that the physical characteristics were such that it could only be arranged for such purpose at a prohibitive expense, or (2) by proving that the characteristics of the area were such that the lots had either no value or only a distress value for any purpose permitted by the zoning ordinance.

*Id.* (citing *Appeal of Nardozza*, 405 A.2d 1020 (Pa. Commw. Ct. 1979)).

Landowner did not prove that an unnecessary hardship exists on the Property to justify use of the Property for the Landscape Business. Far from demonstrating that the Property could not be used for a permitted use, or that engaging in a permitted use on the Property would be prohibitively expensive, Landowner's testimony reveals that the Property contains a "beautiful" single-family home, a garage, and a guest house. Landowner himself occupied the Property as his primary residence for 8 years. [N.T. p. 8] Landowner also leased the Property after his residence. [N.T. p. 25] Landowner touted the improvements he had made to the Property for use as a single-family home. [N.T. pp. 11, 26-27]

Landowner similarly did not prove that the characteristics of the area were such that the Property has no value, or only distress value, for a permitted use. To the contrary, Landowner's testimony demonstrated that neighboring properties are also utilized as and for single-family homes. [N.T. 7-8] Specifically, across from the Property on South Gulph Road are 5-6 residential neighbors. [N.T. pp. 7-8]

Landowner offered his minimal and questionable efforts to sell the Property as evidence of an unnecessary hardship. While "the fact that an owner has not been able to sell property for any use permitted in a particular district is evidence that is relevant to the question of unnecessary hardship," the owner's efforts to sell must be a "**sustained and vigorous effort**". *South of South Street Neighborhood Ass'n v. Philadelphia Zoning Bd. of Adjustment*, 54 A.3d 115, 125 (Pa. Commw. Ct. 2012) (emphasis added) (citing *Serban v. Zoning Bd. of City of Bethlehem*, 480 A.2d 362, 365 (Pa. Commw. Ct. 1984); *City of Philadelphia Zoning Bd. of Adjustment v. Earl Scheib Realty Corp*, 301 A.2d 423, 426 (Pa. Commw. Ct. 1973)). Whether an effort constitutes one of a "sustained and vigorous" nature must be considered on a case-by-case:

The mere placing of a “for sale” sign on the property and listing it with local real estate brokers without quoting a sales price... does not evidence “the active, prolonged, and specific testing of the marketability of the ground which is essential to demonstrate that it cannot be sold or used for the purpose zoned.”

*Rubin v. Upper Southampton Twp. Zoning Hearing Bd.*, 338 A.2d 773, 776 (Pa. Commw. Ct. 1975) (citation omitted); see also *Rees v. Zoning Hearing Bd. of Indiana Twp.*, 315 A.2d 317, 319–20 (Pa. Commw. Ct. 1974) (holding that the testimony of the prior owner that she tried to sell lot for seven years was insufficient evidence of an active, prolonged and specific testing of marketability of the lot to support unnecessary hardship). Commonwealth Court consistently finds that efforts to sell are insufficiently “sustained and vigorous” to demonstrate the unnecessary hardship needed to justify a use variance.<sup>1</sup> In this application, Landowner’s claimed marketing efforts fell short of the legal mark.

An owner’s mere desire to increase profitability by seeking a use variance to permit a more financially rewarding sale is legally insufficient:

Although a property owner is not required to show that his or her property is valueless unless a variance is granted, “[m]ere economic hardship will not of itself justify

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<sup>1</sup> See, e.g., *Rees, supra* (variance denied; conversion of a residential property to storage garage for excavating and trucking business; 3 real estate brokers listed property over 7 years); *Southland Corp. v. Zoning Bd. of Adjustment of City of Philadelphia*, 497 A.2d 673 (Pa. Commw. Ct. 1985) (variance denied; conversion of residential property into 7-Eleven convenience store; “repeated attempts” to sell property); *Bethlehem Manor Village, LLC v. Zoning Hearing Bd. of City of Bethlehem*, No. 2258 C.D. 2011, 2012 WL 8704111, at \*3 (Pa. Commw. Ct. July 5, 2012) (variance denied; conversion of institutional property into residential apartments; letters sent to various institutional entities for 1 month); *Anderson v. Witt*, 692 A.2d 292 (Pa. Commw. Ct. 1997) (variance denied; conversion of residential property into synagogue; property listed for 9 months with 4 showings); *Laurento, supra* (Pa. Commw. Ct. 1994) (variance denied; conversion of warehouse into single-family attached dwellings; attempts to lease/sell property for 1 year).



a grant of a variance.” *Wilson v. Plumstead Township Zoning Hearing Board*, 594 Pa. 416, 936 A.2d 1061, 1069 (2007) (citation omitted). In *Valley View, supra* at 640, we explained that “mere evidence that the zoned use is less financially rewarding than the proposed use is insufficient to justify a variance.” Particularly where a variance is sought in order to make a change from an existing use consistent with the zoning code to an inconsistent use, “the mere fact that the property would increase in value if a variance were granted, is not of itself a sufficient basis” upon which to find unnecessary hardship. *O’Neill v. Philadelphia Zoning Board of Adjustment*, 384 Pa. 379, 120 A.2d 901, 904 (1956); see also *Wilson, supra* at 1070 (“A variance will not be granted because a zoning ordinance deprives the landowner of the most lucrative and profitable uses.”) (internal quotation marks and citation omitted).

*Marshall v. City of Philadelphia*, 97 A.3d 323, 330 (Pa. 2014).

Here, Landowner only listed the Property for sale for 6 months before applying for this use variance. [N.T. pp. 25-26] Without explanation or justification (no expert appraisal or market evidence was offered), Landowner initially attempted to sell the Property for over twice as much as he bought it for, only 11 years following the date of purchase, during a period of significant reductions in real estate values. [N.T. pp. 21-22] Landowner attempted to lease the Property for residential use, but only reduced the proposed rent to \$2500, again without any competent expert evidence to provide a foundation. [N.T. p. 22] Landowner offered no evidence regarding comparable rental rates in the area. Landowner had successfully rented the Property for a period of time in 2014. [N.T. p. 25]

The ZHB finds that Landowner failed to demonstrate an active, sustained, and vigorous effort to sell the Property at a realistic price. To the contrary, Landowner put forth very little effort to sell the Property. Landowner offered no other evidence to

demonstrate an unnecessary hardship on the Property. Therefore, Landowner failed to demonstrate his entitlement to the requested use variance.

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

Landowner was required to provide evidence that the use variance requested represents the minimum necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa.Cmwlt. 1999). Landowner failed to offer any proof that the requested use variance was the minimum necessary to afford relief. To the contrary, testimony revealed that (1) the Property is presently improved with a beautiful single-family home, garage, and guest house; (2) that neighboring properties are also used as and for single-family homes; and (3) that Landowner failed to consider any other use for the Property – permitted or otherwise – other than the operation of a full-scale commercial landscape business on the Property.

Although Landowner pointed to other properties in the area utilized for non-residential purposes, those uses are professional offices, not a commercial landscape business with commercial truck storage, and other similar negative impacts on a residential district. Landowner failed to prove that the requested use 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 use variance 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; 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 Landowner to a use variance from section 165-22 of the Zoning Ordinance.

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

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

8. Landowner failed to sufficiently demonstrate his entitlement to the requested use variance.

At its October 1, 2014 hearing, the ZHB entered the following order:

**ORDER**

AND NOW, this 20<sup>th</sup> day of August, 2014, the Zoning Hearing Board DENIES the request for a use variance from section 165-22, Use regulations of the Upper Merion Township Zoning Ordinance of

1942, as amended to operate a landscaping business at 353 South Gulph Road.

An opinion with findings of facts, conclusions of law, and reasons will follow.

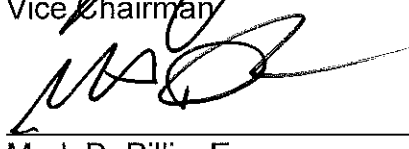
This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

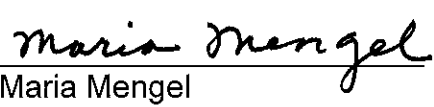
Written notice of the ZHB's decision was mailed to Landowner on October 2, 2014.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

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Lynne Gold-Bikin, Esq.  
Chairwoman

  
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John M. Tallman  
Vice Chairman

  
\_\_\_\_\_  
Mark DePillis, Esq.  
Secretary

  
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Maria Mengel  
Member

**Date of Mailing:**