

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

APPLICATION OF SUE LUDWIG

NO. 2013-16

**PROPERTY: 175 BROWNLIE ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

The underlying zoning application involves a lessee's request for a use variance to operate a pet-sitting business in a residential neighborhood.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held 3 public hearings with regard to application no. 2013-16 of Sue Ludwig ("Landowner"). The members of the ZHB present were William J. Clements, Esq., Chairman; Lynne Gold-Bikin, Esq., Vice-Chair; Brad Murphy¹, Secretary; John M. Tallman, Jr., Member; and Mark DePillis, Esq., Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Landowner was not represented by counsel at the first ZHB hearing, but subsequently retained N. Curtis Ward, Esq. of the law firm Butera Beausang Cohen Brennan.

Landowner sought a use variance from the Upper Merion Township Zoning Ordinance of 1942 ("Ordinance"), specifically, section 165-22, to operate a business at a residentially zoned property.

The ZHB admitted the following exhibits into the record:

¹ Mr. Murphy was not present at the September 18, 2013 ZHB hearing. By agreement of Landowner, Mr. Murphy reviewed the testimony and exhibits from the September 18, 2013 ZHB hearing and voted on the application at the October 2, 2013 ZHB hearing.

ZHB exhibits

- ZHB-1 ZHB application
- ZHB-2 deed dated July 29, 2008, between Charlotte E. Jordan, by her agent Joyce J. Klinefelter, and Michael J. Jordan and Joyce J. Klinefelter, grantors, and Grace R. Signorino, Lynne E. Signorino, Robert S. Signorino, and Sandra L. Signorino, grantees, recorded in deed book 5703, page 2023
- ZHB-3 residential lease dated October 1, 2008, between Robert S. Signorino, landlord, and Susan Marie Ludwig, tenant
- ZHB-4 letter of authorization of ZHB application by landlord dated May 9, 2013
- ZHB-5 attachment A to ZHB application regarding structures on the property
- ZHB-6 attachment B to ZHB application regarding consultation with adjoining neighbors
- ZHB-7 attachment C to ZHB application regarding the nature of the application
- ZHB-8 attachment D to ZHB application regarding use of the property
- ZHB-9 set of 24 photographs of the pet-sitting business
- ZHB-10 attachment E to ZHB application regarding impact on existing traffic patterns and volume
- ZHB-11 set of 6 photographs of the parking area
- ZHB-12 attachment F to ZHB application regarding the zoning relief and the impact on the neighborhood
- ZHB-13 license of Sue's Pet Pampering issued by the Bureau of Dog Law Enforcement dated February 28, 2013, license number 130000020838

Landowner exhibits

- A-1 ZHB application with attachments
- A-2 32 photographs of the property

- A-3 email of Shawn Gilliland in support of the application
- A-4 photograph of the front of the property
- A-5 photograph of the side of the property
- A-6 photograph of the side of the property
- A-7 photograph of the rear of the property
- A-8 photograph of the side of the residence
- A-9 photograph of the carport
- A-10 statement of Lisa Rolette in support of the application
- A-11 statement of David DiMarizio in support of the application
- A-12 statement of N. Palmer in support of the application
- A-13 statement of C. Bruno in support of the application
- A-14 statement of J. Cubler in support of the application
- A-15 statement of Wayne and Mary Sansalone in support of the application
- A-16 photograph of the property taken off the Montgomery County Board of Assessment website
- A-17 aerial photograph of the neighborhood
- A-18 aerial photograph of the neighborhood
- A-19 photograph of the front of the property
- A-20 photograph of a church located across the street from the property
- A-21 photograph of a church located across the street from the property
- A-22 panoramic photograph of the intersection of E. Beidler and Brownlie Roads
- A-23 statement of Thomas Grendisa, a tenant of the property, in support of the application
- A-24 letter to the ZHB from Joseph and Beth Stalker in support of the application

The zoning hearings were duly advertised, notice thereof was given in accordance with the requirements of the Ordinance, and the proceedings were stenographically recorded. After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the lessee of a portion of the parcel of land located at 175 Brownlie Road, King of Prussia, Pennsylvania ("Property"). The Property is zoned R-2 Residential District. [N.T. 7/15/13, pp. 4, 8; N.T. 9/18/13, pp. 39, 88; Exhibit ZHB-3]. A pet-sitting business is not permitted in this zoning district.

2. The Property contains an 1850's Victorian residence comprising approximately 6,500 square feet and divided into 4 apartment units. [N.T. 9/18/13, pp. 88, 93]. The portion of the Property leased by Landowner includes a first floor apartment, a full basement, and one room on the second floor ("Leased Premises"). [N.T. 9/18/13, pp. 87-88]. The other 3 apartments are used only as dwelling units. [N.T. 9/18/13, pp. 99-100].

3. Since 2008, Landowner has resided in, and has operated, without obtaining zoning approval, a pet-sitting business at the Leased Premises. [N.T. 9/18/13, pp. 39, 55, 83-84]. Prior to 2008, Landowner operated a state licensed pet-sitting business in Norristown. [N.T. 9/18/13, p. 84].

4. However, Landowner operated the pet-sitting business at the Leased Premises for 4 years before obtaining the required state license. [N.T. 9/18/13, p. 84].

5. A pet-sitting business is not a permitted use in the R-2 Residential District. Ordinance section 165-22.

6. Landowner's application requests a use variance to operate a pet-sitting business from the residentially zoned Property. [Exhibit ZHB-1].

ZHB HEARING

7. Landowner testified and offered the testimony of her landlord, Robert Signorino, in support of the application.

8. The testimony was as follows:

- Landowner has operated her pet-sitting business at the Property for 5 years without Township approval [N.T. 7/17/13, p. 14];
- until this past year, Landowner operated her pet-sitting business at the Property without a state license [N.T. 9/18/13, p. 84];
- prior to 2008, Landowner operated her pet-sitting business in Norristown for which she had a state kennel license [N.T. 9/18/13, p. 84];
- the Property has a large driveway and 9 parking spaces [N.T. 7/17/13, p. 11; N.T. 9/18/13, p. 49];
- the Leased Premises has 6 cat pens [N.T. 7/17/13, p. 14];
- Landowner may have up to 10 dogs at the Leased Premises at any given time [N.T. 7/17/13, p. 14];
- Landowner recently obtained a kennel license from the state and a township license after operating the pet-sitting business for years at

the Leased Premises without the required licenses [N.T. 7/17/13, p. 14; 9/18/13, p. 84];

- the pet-sitting business hours of operation are 8:30 a.m. to 8:30 p.m., 7 days per week [N.T. 7/17/13, p. 17];
- Landowner's pet-sitting business imposes no limitation on the number of animals or on length of stay [N.T. 7/17/13, pp. 21-25];
- Landowner made improvements to the Property for her pet-sitting business, including fencing, a finished basement, an enclosed porch, and a deck [N.T. 9/18/13, p. 44];
- the operation of the pet-sitting business is not visible from the street or from adjoining properties [N.T. 9/18/13, pp. 45-48; Exhibits A-4 through A-9];
- the pet-sitting business has to date caused no noise or traffic related issues [N.T. 9/18/13, p. 59];
- Landowner has had as many as 23 animals at the Property on the same day [N.T. 9/18/13, p. 61];
- Landowner has 25 clients that board their cats [N.T. 9/18/13, p. 63];
- Landowner was willing to limit the number of cats to 6 at any one time, and to limit the number of dogs to 15 at any one time [N.T. 9/18/13, pp. 63-65, 69];
- the residence at the Property is divided into 4 apartment units [N.T. 9/18/13, p. 88];
- Landowner's apartment unit is approximately 3,000 square feet [N.T. 9/18/13, p. 91];

- landlord did not attempt to rent the Leased Premises to anyone other than Landowner [N.T. 9/18/13, p. 99];
- the 3 other apartment units are leased for residential purposes [N.T. 9/18/13, pp. 99-100];
- landlord has had no difficulty renting the apartment units for residential purposes [N.T. 9/18/13, p. 101];
- Landowner operated her pet-sitting business from a property in Norristown and then moved her pet-sitting business to the Leased Premises in 2008 without looking for a property zoned commercial. [N.T. 9/18/13, pp. 163-165]; and
- Landowner had a state license at her prior location, but did not obtain a license for her current location until last year [N.T. 9/18/13, p. 84].

8. Seven persons spoke in favor of the application. [N.T. 9/18/13, pp. 27-37, 103-113]. The majority of the persons who spoke in favor of the application are clients of Landowner's pet-sitting business. [N.T. 9/18/13, pp. 27-38; 103-111].

9. Four neighboring property owners spoke in opposition to the application. Their concerns included:

- noise
- traffic
- adverse impact on the character of the neighborhood
- failure of the Landowner to meet the standards for the grant of a use variance.

[N.T. 9/18/13, pp. 113-148].

INSUFFICIENCY OF THE EVIDENCE

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

11. Landowner failed to offer proof that the use variance is necessary to permit a reasonable use of the Property. To the contrary, the Property can and is being reasonably used as residential dwelling units.

B. DISCUSSION

VARIANCES

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 Township*, 134 Pa.Cmwlth. 236, 578 A.2d 1002 (1990).

Variances should be granted sparingly, and the reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Board of the Borough*

of *West Chester*, 628 A.2d 437 (Pa.Cmwlth. 1994). To prove unnecessary hardship, a landowner must demonstrate that either the physical characteristics of the property are such that it could not in any case be used for any permitted purpose, or that the characteristics of the property are such that the lot has either no value or only distress value for any purpose permitted by the ordinance. *Laurento* at 439.

Variances, especially those allowing a commercial use in a residential district, should only be granted under exceptional circumstances. *Appeal of Dinu*, 452 A.2d 95, 97 (Pa.Cmwlth. 1982).

Landowner failed to demonstrate unique physical conditions of the Property that have caused an unnecessary hardship prohibiting reasonable use of the Property.

Landowner failed to demonstrate any unique physical conditions constraining the reasonable use of the Property. The Property is being reasonably used as residential apartments. The Property has 4 apartment units, 3 of which are being used solely for residential purposes.

Landowner failed to articulate a legal, as opposed to a personal hardship, for the operation of a commercial business from a residentially zoned property. Landowner's reasons for operating her business from the residentially zoned Property were her personal desire to relocate her business from Norristown to King of Prussia, and her friendship with the landlord of the Property. Landowner testified:

Well, I had been from King of Prussia, and the gentleman I was taking care of that was right around the block from me died. I was no longer tied to Norristown. [N.T. 9/18/13, p. 163]

...

I actually bid on a house in King of Prussia...and it was very expensive and I – well, I had been friends with [landlord] for so many years so I talked to them... [N.T. 9/18/13, p. 164]

When asked if she looked for commercial space to operate her business, Landowner stated that she had not, and that she always intended to locate her pet-sitting business in a residential neighborhood. [N.T. 9/18/13, p. 165].

Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use, or that any hardship exists. Landowner's reasons for operating her business from a residentially zoned property are personal preference, convenience, and cost; and not unique physical conditions of 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 a variance. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 574 Pa. 45, 828 A.2d 1033, 1040 (2003) citing *Larsen v. Zoning Board of Adjustment of City of Pittsburgh*, 543 Pa. 415, 672 A.2d 286, 288 (1996). Unnecessary hardship, caused by unique physical circumstance of the property, is required for the grant of a variance. *Id.* See *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa.Cmwth. 2001) wherein 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.Cmwth. 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.

Yeager at 598.

The requirement that a hardship attend the property and not the person was emphasized by the Commonwealth Court in a case where the reasons for the variance were perhaps more compelling, and in the public interest, a marked contrast to the purely personal justification advanced in the application before the ZHB. In *Township of East Caln v. Zoning Hearing Board of East Caln*, 915 A.2d 1249 (Pa.Cmwlt. 2007), the zoning hearing board granted a telecommunications company a dimensional variance to replace an existing 103-foot tower with a 123-foot tower. *Id.* at 1251. The trial court affirmed the zoning hearing board, finding unnecessary hardship based solely upon the life-safety issue posed by the coverage area gap in the telecommunications company's wireless service. *Id.* at 1252.

In reversing the trial court, the Commonwealth Court stated:

Such health and safety issues are important concerns, and the Township may wish to amend its ordinance in order to address them. However, the well-established law does not permit the grant of a variance on the basis that it is in the public interest. A variance may be granted only upon proof that a substantial burden attends all dimensionally compliant uses of the applicant's property, which is simply not the case here. Among other uses permitted by the ordinance, the property can continue to be used to house the existing one hundred and three foot telecommunications tower as well as the self-storage facility. While Cingular evaluated alternative sites and concluded no other sufficed, this does not establish a hardship that attends the *property*, as distinguished from its *owner*.

East Caln at 1254.

Landowner also failed to show hardship unique to the Property as distinguished from a hardship arising from the impact of the zoning regulations on the entire district. In *Wilson v. Plumstead Township*, 936 A.2d 1061, 1068 (Pa. 2007), a property owner sought to use his property solely as an accounting office, which was not a permitted use within the applicable residential zoning district. The trial court, in granting the use

variance, determined that the area had dissimilar uses and was not conducive to a residential use. In affirming the Commonwealth Court's reversal of the trial court's decision, the Supreme Court held that the property owner failed to make the required showing that an unnecessary hardship would result if he were not granted a variance, even though the trial court determined that area had dissimilar uses and was not conducive to residential use, where there was no showing of hardship unique or peculiar to the property as distinguished from a hardship arising from the impact of zoning regulations on the entire district.

As in *Yeager*, *Wilson*, and *East Caln*, Landowner did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Landowner's personal preferences based on convenience and cost drive the need for the variance and are totally insufficient under the law.

Both Landowner and her landlord, the property owner, demonstrated a lack of due diligence and disregard for the zoning regulations of the Township by the leasing of the property for an illegal use and the operation of that illegal use for 5 years before seeking appropriate zoning relief. Landowner did not attempt to locate a property in the Township zoned for her intended use. Landowner further demonstrated a lack of due diligence by operating the pet-sitting business for years before obtaining a state kennel license that she knew was required.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(4) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(4), and Ordinance section 165-251.A(5).
2. Landowner has standing as the lessee of the Property.
3. The ZHB is obligated to ensure compliance with the technical requirements of the 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; and (c) the variance, if authorized, will represent the minimum variance that will afford relief. Ordinance §165-251.B(2).
5. Landowner failed to provide substantial competent evidence satisfying the requirements for a use variance to operate a pet-sitting business at a residentially zoned property.
6. Landowner failed to demonstrate any unnecessary hardship entitling Landowner to a variance from section 165-22 of the Ordinance.
7. Landowner failed to demonstrate that the variance is necessary to permit a reasonable use of the Property. The Property is being reasonably used as residential apartments.

At the conclusion of its October 2, 2013 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 2nd day of October, 2013, on the application of Sue Ludwig, the Zoning Hearing Board DENIES a variance from section 165-22 to operate a business (Sue's Pet Pampering) at a residentially zoned property.

An opinion with findings of fact, 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 3, 2013.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

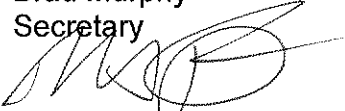


William J. Clements, Esquire
Chairman

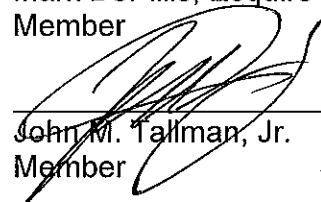
Lynne Gold-Bikin, Esquire
Vice-Chair



Brad Murphy
Secretary



Mark DePillis, Esquire
Member



John M. Tallman, Jr.
Member

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