

## **ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

<b>APPLICATION NO. 2012-008</b>	:	<b>HEARING DATE:</b> May 2, 2012
<b>APPLICATION OF:</b>	:	<b>DECISION DATE:</b> May 2, 2012
Michael G. Kraus	:	
	:	
	:	
<b>PROPERTY:</b>	:	
203 Holstein Road	:	
Upper Merion Township	:	

### **OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD**

The Applicant, Michael G. Kraus (hereinafter referred to as the "Applicant"), filed an application requesting a special exception to Section 165-212 of the Upper Merion Zoning Code (the "Code") or, in the alternative, a variance to Section 165-22 of the Code. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on May 2, 2012 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, Zoning Officer, and Court Reporter.

### **FINDINGS OF FACT**

1. The Applicant is Mr. Michael G. Kraus with a mailing address at 203 Holstein Road, King of Prussia, Upper Merion Township.
2. The legal owner of the subject property is Mr. Michael G. Kraus.
3. The property is located at 203 Holstein Road, King of Prussia, Upper Merion Township.
4. The Applicant was not represented by an attorney.

5. The subject property is located in the "R-1" zoning district.
6. The lot size of the property is approximately 41,800 square feet.
7. The Applicant requests a special exception, or in the alternative, a variance, to convert a single family dwelling with an existing apartment unit into a two family dwelling.

8. The Applicant offered the following exhibits at the hearing:

- |      |  |
|------|--|
| A-1  | Zoning Hearing Board Application   |
| A-2  | Four (4) photographs of the property   |
| A-3  | Description of relief sought in application  |
| A-4  | Photograph of driveway   |
| A-5  | Photograph of driveway and house   |
| A-6  | Advertisement of an estate auction   |
| A-7  | Residential income property appraisal report   |
| A-8  | May 24, 2010 Article from Philadelphia Business Journal  |
| A-9  | Board of Assessment block and unit designation   |
| A-10 | Schematic picture of house   |
| A-11 | Plot plan  |
| A-12 | County property records print out  |
| A-13 | Data Trace Certificate of Property Tax Status  |
| A-14 | Two page letter signed by neighbors stating they have no objection to use of property as two family dwelling.                |
| A-15 | Two page letter signed by neighbors stating that they have full knowledge the property has been used a duplex for many years |
| A-16 | Print out from Montgomery County Board of Assessment Appeals   |

9. Applicant testified that he purchased the property on October 31, 2011.
10. Applicant testified that, at the time he purchased the property, it contained a second floor apartment that had been constructed above the garage.
11. Applicant testified that the property had been advertised as a duplex.
12. Applicant testified that the property has been taxed a duplex since 1976.
13. Applicant testified that the Applicant contacted the Township to apply for a business privilege tax certificate so that he could rent the apartment unit on the property. At that time, the Applicant was advised that the property was not zoned multi-family or two-family dwelling; therefore, Applicant would need zoning relief.
14. Applicant testified that the apartment above the garage is currently vacant and that he intends to rent it if zoning relief is granted.
15. Applicant testified that the main part of the property contains a living room, kitchen, breakfast nook, 4 bedrooms, 4.5 baths and a two car garage.
16. Applicant testified that the apartment is located above the garage and has one bedroom, one bath, living room and a kitchen.
17. Applicant testified that he uses the main part of the property as his primary residence and his intent is to rent the existing apartment located above the garage.
18. A letter received by the Chairman from Mr. & Mrs. Miller, residents, stating their opposition to the application was entered into evidence as ZHB-1.
19. Mr. Ken Forman, neighbor, testified in favor of the proposed zoning relief requested. He entered his appearance and was granted standing in this matter.

20. Ms. Ruth Fairley, neighbor, testified that the property was previously used as a rental and she is in favor of the proposed zoning relief requested. She entered her appearance and was granted standing in this matter.
21. Mr. Michael McKay, neighbor, testified that he is opposed to the proposed zoning relief requested. He entered his appearance and was granted standing in this matter.
22. Ms. Elizabeth Coplin, neighbor, testified that she is opposed to the proposed zoning relief requested. She entered her appearance and was granted standing in this matter.
23. Mr. John Sion, neighbor, testified that he is opposed to the proposed zoning relief requested. He entered his appearance and was granted standing in this matter.
24. Ms. Doris Ricings, neighbor, testified that she is opposed to the proposed zoning relief requested. She entered her appearance and was granted standing in this matter.
25. Mr. Van Weiss, neighbor, testified that he is in opposition to the proposed zoning relief requested. Mr. Weiss did not enter his appearance in this matter.
26. After considering the evidence and testimony presented at the hearing, the Board voted to deny the requested zoning relief in a 3-2 vote.

#### **CONCLUSIONS OF LAW**

1. The required minimum lot area in the R-1 District is 20,000 square feet.
2. The Applicant requests a special exception pursuant to Section 165-212 of the Code to permit the conversion of a single-family dwelling with existing apartment unit into a two-family dwelling.
3. In the alternative, the Applicant requests a variance from Section 165-22 of the Code to permit a two-family dwelling on his property.

4. In order to accomplish this request, the Applicant requires a special exception to Section 165-212 of the Code. In accordance with Section 165-212, "[a] single family detached dwelling existing on the effective date of this chapter may be converted into and used as a two-family or multifamily dwelling when authorized as a special exception provided that:
- A. The plans for the conversion of said dwelling shall be submitted to the Zoning Hearing Board.
  - B. Such plans shall provide adequate and suitable parking or storage space, at a safe distance from the public highway, for not less than one automobile per family.
  - C. Such dwelling shall be subject to the height, area, width and yard regulations effective in the district wherein such dwelling is situated, except that there shall be a lot area of not less than the product of the minimum lot area prescribed in the district regulations and the number of families for the use of which such dwelling is to be converted.
  - D. There shall be no external alteration of the building except as may be necessary for reasons of safety, and fire escapes and outside stairways shall, where practicable, be located to the rear of the building.
  - E. The Zoning Hearing Board shall specify the maximum number of families permitted to occupy such dwelling and may prescribe such further conditions and restrictions with respect to the conversion and use of such dwelling and to the use of the lot as the Board may consider appropriate."

5. The Board found that, based upon the evidence and testimony presented at the hearing, the Applicant failed to establish the necessary criteria to qualify for a special exception to Section 165-212 of the Code, or in the alternative, a variance to Section 165-22 of the Code.

### **DISCUSSION**

As a matter of law, a special exception is a conditionally permitted use, allowed by the legislature if specifically listed standards are met. Appeal of Brickstone Realty Corp., 789 A.2d 333 (Pa. Cmwlth 2001). As such, a special exception is not an exception to the zoning ordinance, but a use permitted conditionally, the application for which is to be granted or denied by the Zoning Hearing Board pursuant to express standards and criteria. Id. An applicant for a special exception has the burden of proving that it has met the criteria for a special exception contained in the ordinance. Shamah v. Hellam Township Zoning Hearing Board, 167 Pa. Cmwlth. 610, 648 A.2d 1299 (1994). The applicant must prove not only that the proposed use is of a type permitted by special exception, but also that the proposed use complies with the other applicable requirements of the ordinance which expressly govern such a grant. Id. Once the applicant for a special exception shows compliance with the specific requirements of the ordinance, it is presumed that the use is consistent with the promotion of health, safety and general welfare. Brickstone, 789 A.2d at 340.

Here, the Applicant requests a special exception pursuant to Section 165-212 of the Code to permit the conversion of a single-family dwelling with existing apartment unit into a two-family dwelling. In accordance with Section 165-212, "[a] single family detached dwelling existing on the effective date of this chapter may be converted into and used as a two-family or

multifamily dwelling when authorized as a special exception provided that...(A.) the plans for the conversion of said dwelling shall be submitted to the Zoning Hearing Board...(B.) Such plans shall provide adequate and suitable parking or storage space, at a safe distance from the public highway, for not less than one automobile per family.” At the hearing, the Applicant failed to present any plans on which the Zoning Hearing Board could base its approval. In re Appeal of SW Land Associations, LLC, 2010 WL 5943277 (Pa.Com.Pl. 2010) citing Broussard v. Zoning Board of Adjustment of the City of Pittsburgh, 907 A.2d 494, 501-502 (Pa. 2006) (applicant for a special exception must submit detailed plans to the zoning hearing board for approval). Despite the fact that the two-family dwellings currently exist on the property, the Applicant failed to demonstrate, through detailed written plans, the lay-out of the dwellings and the parking capabilities on the property. Accordingly, the Zoning Hearing Board voted to deny the Applicant’s request for a special exception to Section 165-212 of the Code.

In the alternative, the Applicant requested a variance to Section 165-22 of the Code to permit a two-family dwelling on the property. The standard to warrant the granting of a use variance, as outlined by the Pennsylvania Supreme Court, is that the Applicant must show that unnecessary hardship will result if a variance is denied and that the proposed use will not be contrary to public interest. Hertzberg v. Zoning Bd. of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998); citing, Allegheny West Civic Council, Inc. v. Zoning Bd. of Adjustment of the City of Pittsburgh, 547 Pa. 163, 167, 689 A.2d 225, 227 (1997).

The reasons for granting a variance must be substantial, serious and compelling. POA Company v. Findlay Township Zoning Hearing Board, 551 Pa. 689, 713 A.2d 70 (1998); Evans v. Zoning Hearing Board of the Borough of Spring City, 732 A.2d 686 (Pa. Cmwlth. 1999);

Sotereanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlth. 1998). Moreover, variances to zoning codes should be granted sparingly and only under exceptional circumstances; a variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Cmwlth. 1996).

In order to grant a variance, the Board must make the findings set forth in § 910.2 of the Municipalities Planning Code, 53 P.S. § 10910.2, where relevant. The law established by the Pennsylvania courts further establishes these standards, stated in full herein. See, Alpine Inc. v. Abington Township Zoning Hearing Board, 654 A.2d 186 (Pa. Cmwlth. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Cmwlth. 626, 647 A.2d 279 (1994). The findings that the Board must make, where relevant, in granting a variance as set forth in the Municipalities Planning Code are as follows:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization



of a variance is therefore necessary to enable the reasonable use of the property.

3. That such unnecessary hardship has not been created by the Applicant.
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

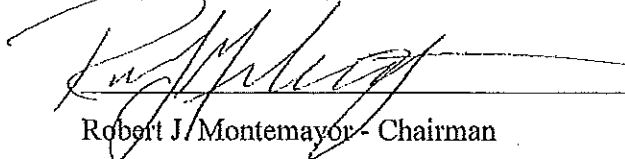
Here, the Applicant failed to establish that a necessary hardship will result if the variance is denied. The Applicant's property is located in the R-1 Residential District which provides for, *inter alia*, single family dwellings. The Applicant testified that he currently uses the property as his primary residence, but desires to maintain a rental income by renting out the apartment above the garage. A variance should not be granted simply because such a grant would permit the owner to obtain greater profit from or use of the property. Commonwealth v. Zoning Hearing Board of Susquehanna, 677 A.2d 853 (Pa. Cmwlth. 1996). The Applicant did not establish that a variance is necessary to enable the Applicant's reasonable use of the property since it is currently used a single family dwelling. Accordingly, the Zoning Hearing Board held that the Applicant failed to establish that a necessary hardship would result if the variance is denied.

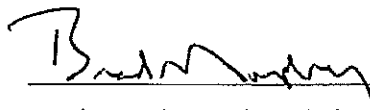
**ORDER OF THE UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception to Section 165-212 of the Upper Merion Zoning Code (the "Code) or, in the alternative, a variance to Section 165-22 of the Code to convert a single family dwelling into a two-family dwelling on the property. Accordingly, the Board denied your request for a special exception to Section 165-212 of the Code, or, in the alternative, a variance to Section 165-22 of the Code.

Decision Dated: May 2, 2012

**UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

  
Robert J. Montemayor - Chairman

  
Brad Murphy - Vice Chairman

\_\_\_\_\_  
William J. Clements

**DISSENT:**

\_\_\_\_\_  
Lynne Z. Gold-Bikin - Secretary

\_\_\_\_\_  
Stephen Levine

**ORDER OF THE UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

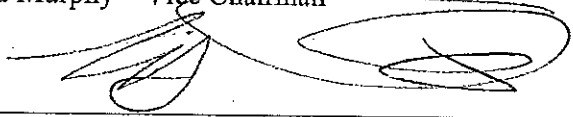
IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception to Section 165-212 of the Upper Merion Zoning Code (the "Code) or, in the alternative, a variance to Section 165-22 of the Code to convert a single family dwelling into a two-family dwelling on the property. Accordingly, the Board denied your request for a special exception to Section 165-212 of the Code, or, in the alternative, a variance to Section 165-22 of the Code.

Decision Dated: May 2, 2012

**UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

\_\_\_\_\_  
Robert J. Montemayor - Chairman

\_\_\_\_\_  
Brad Murphy -- Vice Chairman

  
\_\_\_\_\_  
William J. Clements

**DISSENT:**

\_\_\_\_\_  
Lynne Z. Gold-Bikin - Secretary

\_\_\_\_\_  
Stephen Levine

**ORDER OF THE UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception to Section 165-212 of the Upper Merion Zoning Code (the "Code) or, in the alternative, a variance to Section 165-22 of the Code to convert a single family dwelling into a two-family dwelling on the property. Accordingly, the Board denied your request for a special exception to Section 165-212 of the Code, or, in the alternative, a variance to Section 165-22 of the Code.

Decision Dated: May 2, 2012

**UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

\_\_\_\_\_  
Robert J. Montemayor - Chairman

\_\_\_\_\_  
Brad Murphy – Vice Chairman

\_\_\_\_\_  
William J. Clements

**DISSENT:**

  
\_\_\_\_\_  
Lynne Z. Gold-Bikin - Secretary

\_\_\_\_\_  
Stephen Levine

**ORDER OF THE UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant a special exception to Section 165-212 of the Upper Merion Zoning Code (the "Code) or, in the alternative, a variance to Section 165-22 of the Code to convert a single family dwelling into a two-family dwelling on the property. Accordingly, the Board denied your request for a special exception to Section 165-212 of the Code, or, in the alternative, a variance to Section 165-22 of the Code.

Decision Dated: May 2, 2012

**UPPER MERION TOWNSHIP**  
**ZONING HEARING BOARD**

\_\_\_\_\_  
Robert J. Montemayor - Chairman

\_\_\_\_\_  
Brad Murphy - Vice Chairman

\_\_\_\_\_  
William J. Clements

**DISSENT:**

\_\_\_\_\_  
Lynne Z. Gold-Bikin - Secretary

\_\_\_\_\_  
Stephen Levine

**NOTE TO APPLICANT:**

There is a thirty (30) day period after the date of a decision for an aggrieved person to file an appeal in the Court of Common Pleas of Montgomery County to contest an approval or denial by the Zoning Hearing Board. If the Applicant has been granted Zoning Hearing Board approval, the Applicant may take action on said approval during the thirty (30) day appeal period; however, the Applicant will do so at his or her own risk. If the Applicant has received Zoning Hearing Board approval, the Applicant must secure all applicable permits from Upper Merion Township within one (1) year of the date of the approval or the decision granting approval.