

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2012-021 : **HEARING DATE:** February 6, 2013
:
APPLICATION OF: :
Roland W .Muller and Anh Pham :
:
: **DECISION DATE:** March 20, 2013
PROPERTY: :
123 Gypsy Lane :
King of Prussia, PA 19406 :

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicants, Roland W. Muller and Anh Pham, husband and wife (hereinafter collectively referred to as the "Applicant"), filed an application requesting a variance from Section 165-22 of the Upper Merion Township Zoning Code (the "Code") pertaining to Use Regulations in the R-1 single family zoning district to permit the operation of a Bed and Breakfast on the property. The application was properly advertised. A public hearing was initially held before the Upper Merion Township Zoning Hearing Board on October 31, 2012 at the Upper Merion Township Building. The Applicant appeared and were unrepresented by counsel. The Township solicitor entered his appearance on behalf of the Township in opposition to the application at which time the Applicant made a request request for a continuance in order to allow them time to obtain legal counsel. Eventually, Frank Bartle, Esquire entered his appearance on behalf of the Applicant. By e mail dated January 21, 2013 Mr. McGrory withdrew his appearance on behalf of the Township and the hearing was scheduled and heard on February 6, 2013 without opposition from the Township.

The members of the Zoning Hearing Board present were William Clements, Esquire, Chairman, Lynn Z. Gold, Esquire, Vice Chairman, Mark DePillis, Esquire, member and John Tallman, member. Brad Murphy, member, was not present and did not participate in the hearing. Also present were Mark Zadroga, the Township Zoning Officer, Joseph Pizonka, Esquire, the solicitor for the Zoning Hearing Board and Pat Crudo, the Court Reporter.

FINDINGS OF FACT

1. The Applicant is Roland W. Muller and Ahn Pham, husband and wife with a mailing address of 123 Gypsy Lane, King of Prussia, PA 19406.
2. Ahn Pham is the legal owner of the subject property having purchased it for \$270,000 as evidenced by a deed dated July 24, 1998 recorded September 21, 1998 which was entered and made part of the record.
3. The property is located at 123 Gypsy Lane, King of Prussia, PA 19406.
4. The applicant was represented by Frank Bartle, Esquire. He submitted Exhibits marked A-1 through A-12 which were accepted into the record.
5. The subject property is located in the "R1" Single Family Residential zoning district.
6. The lot is approximately 2.49 acres in size.
7. The lot is occupied by a single family Georgian type structure originally constructed in 1904 and later enlarged in 1920.
8. The house has twenty rooms consisting of seven bedrooms, two dining rooms, a kitchen, living room, den and six and a half baths. It has been vacant and unoccupied since the time of purchase by the Applicant.

9. The property is located in the R1 Residential District which consists mostly of single family dwelling homes.

10. Ronald Muller testified on behalf of the Applicant.

11. He and his wife own and operate a functioning bed and breakfast house in Upper Providence Township, Delaware County known as the Alpenhof property. They have over ten years' experience in running this type of business.

12. They propose to convert the existing structure on the subject property to a bed and breakfast facility similar to the one they own and operate in Delaware County.

13. He testified that it is his belief that there is a need for such a facility to serve the local and adjacent communities which has industries such as GlaxoSmithKline and several area universities.

14. The typical stay for transient guests is one or two nights with a maximum of two weeks.

15. The maximum number of people at any time staying at the facility would be fourteen – which is double occupancy per room.

16. If the variance is granted, they would make improvements to the property including landscaping, tree barriers, parking, addition of a fire escape and evergreen buffering

17. Ellen Renish testified on behalf of the Applicant.

18. She is a licensed realtor and a certified appraiser in the Commonwealth of Pennsylvania. She was offered and accepted as an expert witness.

19. She testified that in her expert opinion the property met the five part criterion for the grant of a variance based on the following factors:

(1) the property fronts on Gulph Road, Gypsy Lane and is very close to Rte. 76 which negatively impacts the ability to use the property as a single family residence.

(2) the age, large size, number of bedrooms and type of construction is dissimilar to other properties in the area and would negatively impact on the use of the property as a single family residence and the ability to sell it as such. Essentially, the property is functionally obsolescent.

(3) it would not be economically feasible to knock down the property and replace it with a structure similar to those of the neighboring community

(4) she offered her expert opinion that the Zoning Code would allow the by right use of the property as a group home and that this is the only feasible economic use of the property other than as a bed and breakfast.

20. Several residents testified either in favor of or against the application.

21. Testifying in favor of the application were: William B. Dwinnell III; Vance Grosso; Kay Axelrod; Morton Axelrod; Kevin Nerz ; Lisbeth Felciano; Kenneth Forman; and Daniel Gorman.

22. Testifying against the application were: Robin Greene; Van Weiss; Heidi Tirjin; Griffith Barger; Mina Barger; Cynthia Miller; Richard Doughert; Shawn Machese. Only Heidi Tirjin and Griffith Barger entered their appearance on the record while those remaining offered individual comment.

23. The Applicant testified that they are entitled to variance relief and satisfy the five part test because:

- a. The property is unique given it is a hundred year old, six thousand square foot stone single family dwelling that is functionally obsolescent.
- b. The property cannot be used as a single family dwelling in strict conformity with the R-1 use regulations.
- c. The applicant did not create the hardship
- d. The variance will not alter the essential character of the neighborhood nor be detrimental to public welfare since it will be used residentially and the architectural character of the property will not be altered.
- e. The variance requested represents minimum variance that will afford relief.

24. The individuals that raised issues against the application submitted that although the property is unique, it is currently operable as a single family dwelling – thus no hardship exists. Certain health and safety issues exist, i.e., capacity of septic system, fire safety, increased noise level, increased transients in community, increased traffic. Lastly, those that testified stated that the variance, if granted, would alter the essential character of the neighborhood as it would change from residential to commercial use.

25. After considering the evidence and testimony at the hearing, the Board voted two (2) in favor and two (2) opposed to the variance. A tie vote constitutes a denial in accordance with Section 906 of the Municipalities Planning Code.

CONCLUSIONS OF LAW

26. The Applicant filed an application requesting a variance from Section 165-22 in order to convert the existing single-family dwelling into a bed and breakfast facility.

27. As a preliminary matter, the applicable standards for determining whether to grant a dimensional variance differ from those of a use variance. The standard 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).

28. In the case of a use variance, the Board should use the traditional five-part test, which is set forth in both the Municipalities Planning Code and case law. Id.

29. 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.

30. The Applicant testified that they are entitled to variance relief and satisfy the five part test because:

- a. The property is unique given it is a hundred year old, six thousand square foot stone single family dwelling that is functionally obsolete.
- b. The property cannot be used as a single family dwelling in strict conformity with the R-1 use regulations.

- c. The applicant did not create the hardship
- d. The variance will not alter the essential character of the neighborhood nor be detrimental to public welfare since it will be used residentially and the architectural character of the property will not be altered.
- e. The variance requested represents minimum variance that will afford relief.

31. The individuals that raised issues against the application submitted that although the property is unique, it is currently operable as a single family dwelling – thus no hardship exists. Certain health and safety issues exist, i.e., capacity of septic system, fire safety, increased noise level, increased transients in community, increased traffic. Lastly, those that testified stated that the variance, if granted, would alter the essential character of the neighborhood as it would change from residential to commercial use.

32. The Board voted two (2) in favor and two (2) opposed to the variance. A tie vote constitutes a denial in accordance with Section 906 of the Municipalities Planning Code.

ORDER OF THE UPPER MERION TOWNSHIP


ZONING HEARING BOARD

A tie vote constitutes a denial in accordance with Section 906 of the Municipalities Planning Code. Two (2) Members of the Board voted in favor of the application and two (2) Members of the Board voted to deny the application. Therefore, it is **ORDERED AND DECREED** that the Applicant's request for a variance is denied.

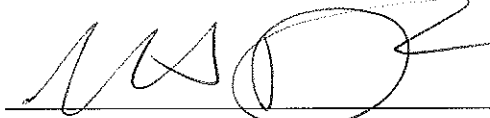
Decision Dated: March 20, 2013

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

MEMBERS VOTING AGAINST APPLICATION:




Lynne Gold-Bikin, Vice-Chair

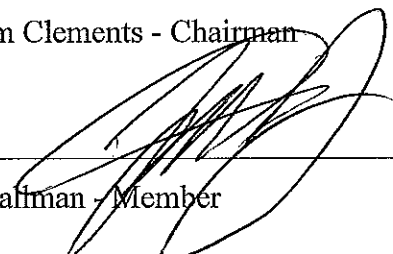


Mark DePillis - Member

MEMBERS VOTING IN FAVOR OF APPLICATION:



William Clements - Chairman



John Tallman - Member

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.