

DATE OF MAILING: February 27, 2024

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PA

APPLICATION OF RBK DEVELOPMENT, LLC

APPLICATION NO. 2023-14

PROPERTY: 1034 MOUNT PLEASANT AVENUE

TAX PARCEL NO. 58-00-13843-00-4

DECISION

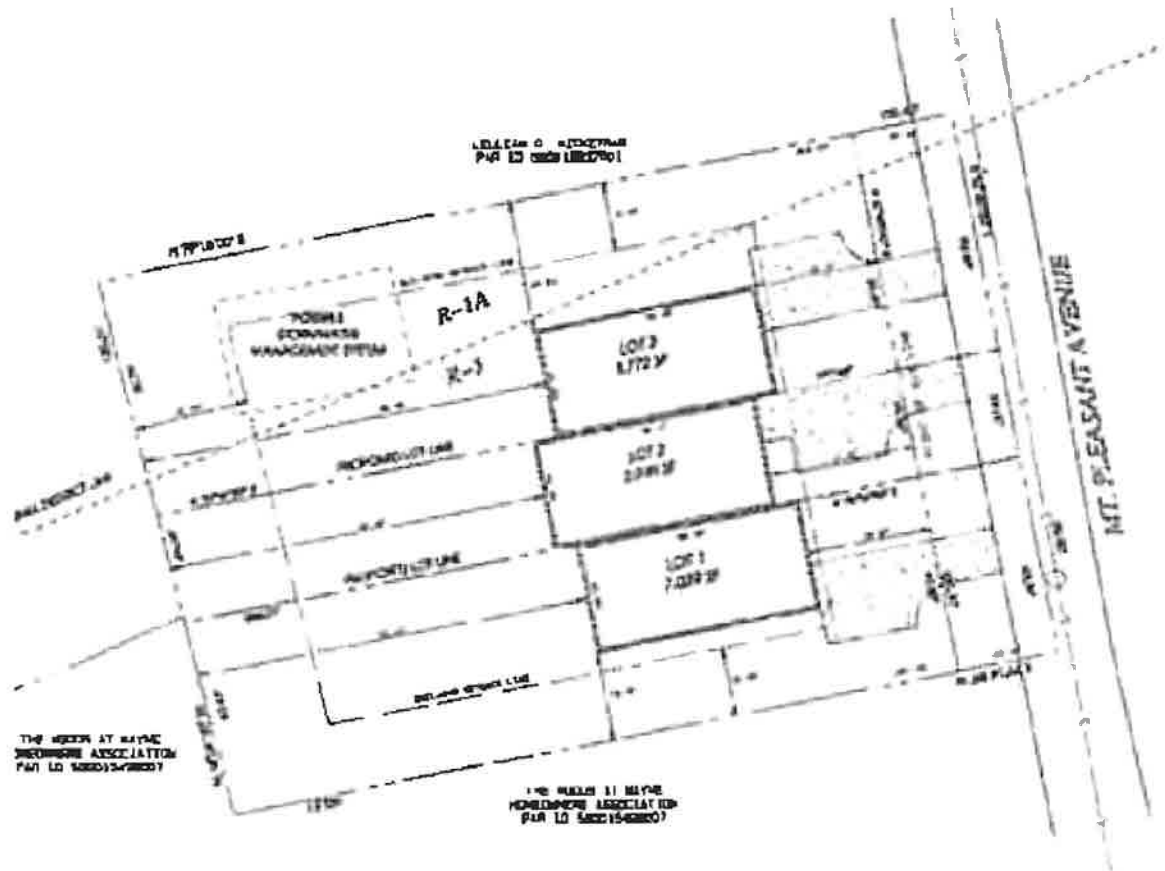
The Zoning Hearing Board of Upper Merion Township (“ZHB”) considered an application for variances to reduce the minimum tract size and exceed the maximum density to construct three townhouses on applicant’s property. The applicant did not prove entitlement to the grant of relief.

RBK Development, LLC (“Landowner”) is the owner of the property located at 1034 Mount Pleasant Avenue, tax parcel no. 58-00-13843-00-4 (the “Property”). The Property is split-zoned within both the R-1A Residential zoning district (“R-1A District”) and the R-3 Residential zoning district (“R-3 District”) of Upper Merion Township (the “Township”).

The Property is a vacant, unimproved lot. The prior owner of the Property received variances to subdivide the Property into four lots and construct four townhouses on the Property. Those variances expired pursuant to section 165-257 of the Upper Merion Township Zoning Ordinance of 1942, as amended (the “Zoning Ordinance”) because the prior owner did not obtain a building permit within one year of the grant of the variances.

In 2022, Landowner submitted an application to the ZHB for variances to subdivide the Property into three lots and construct two single-family semidetached dwellings on Lots 1 and 2 and a single-family detached dwelling on Lot 3. The ZHB denied that application in a written decision dated April 3, 2023.

On November 6, 2023, Landowner submitted a new application to the ZHB requesting variances from sections 165-61.F(1) and 165-61.F(2) of the Zoning Ordinance to construct three townhouses on the portion of the Property located within the R-3 District as depicted below:



The variances are required for three townhouses because the portion of the Property within the R-3 District is 0.453 acres, and section 165-61.F(1) requires a minimum tract size of 5 acres for development of multifamily and row house dwellings. Section 165-61.F(2) states that the maximum permitted density is six dwelling units per developable acre.

On February 7, 2024, the ZHB held an advertised public hearing on Landowner's application. The following members of the ZHB were present at the hearing: Mark S. DePillis, Esq., Chairperson; John M. Tallman, Jr., Vice Chairman; Chiragi Raval, Secretary; M. Jonathan Garzillo, member; and Vivian Peikin, Esq., member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm Eastburn and Gray, P.C. Landowner was represented by George J. Ozorowski, Esq., of the law firm Hughes Kalkbrenner & Ozorowski.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded. Because the application was denied, the ZHB issues this decision with findings of fact, conclusions of law, and reasons.

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the owner of the Property. [Ex. ZHB-3]
2. The Property is identified as tax parcel no. 58-00-13843-00-4. [Ex. ZHB-2]
3. The Property is located in the Township's R-1A Residential and R-3 Residential zoning districts. [EX. ZHB-2]
4. The Property is vacant and unimproved. [Ex. ZHB-2]
5. On June 7, 2006, the ZHB issued a decision granting the application of James Morgan, application no. 2006-08, for a variance from section 165-22 of the Zoning Ordinance to permit the construction of townhouse-type homes in the R-1A District of the Property. The relief was conditioned on limiting the development to four or less residential dwellings. [Ex. ZHB-1]

6. On February 21, 2007, the ZHB issued a decision granting the application of James Morgan, application no. 2006-47, for a variance from section 165-24.C of the Zoning Ordinance to permit the construction of a townhouse on the Property that would encroach into the required side yard setback. The relief was conditioned upon a 15 ft. side yard setback on the R-1A portion of the Property and a 15 ft. side yard setback on the R-3 portion of the Property. [Ex. ZHB-1]

7. The variances referenced in paragraphs 5 and 6, *supra*, expired pursuant to section 165-257 of the Zoning Ordinance. [Ex. ZHB-1]

8. On April 3, 2023, the ZHB issued a decision denying the application of Landowner, application no. 2022-24, for variances to construct two single-family semidetached dwellings and a single-family detached dwelling on the Property. [Ex. ZHB-1]

ZHB HEARING

9. The ZHB marked the following exhibits:

- a. ZHB-1 – ZHB decision on application No. 2022-24;
- b. ZHB-2 – application;
- c. ZHB-3 – deed dated January 6, 2009, between James and Vivian Morgan (grantor) and RBK Development, LLC (grantee) recorded in deed book 5719, page 00927;
- d. ZHB-4 – sketch plan entitled “Sketch Plan of Proposed 3 Unit Townhome Development Prepared for RBK Development, LLC,” prepared by OTM, LLC, dated June 6, 2023;
- e. ZHB-5 – legal notice for December 6, 2023, ZHB hearing;

- f. ZHB-6 – legal notice for February 7, 2024, ZHB hearing.
10. Landowner marked the following exhibits:
- a. A-1 – application;
 - b. A-2 – deed dated January 6, 2009, between James and Vivian Morgan (grantor) and RBK Development, LLC (grantee) recorded in deed book 5719, page 00927;
 - c. A-3 – aerial photograph;
 - d. A-4 – sketch plan entitled “Sketch Plan of Proposed 3 Unit Townhome Development Prepared for RBK Development, LLC,” prepared by OTM, LLC, dated June 6, 2023.
11. Bradford Gruel, was qualified and admitted as an expert in the area of surveying and land planning and testified on behalf of Landowner, in pertinent part, as follows:
- a. The Property is split-zoned between the R-3 and the R-1A Districts. The majority of the Property is located within the R-3 District. [N.T. 2/7/24, p.17]
 - b. The Property is 22,446 square feet. [N.T. 2/7/24, p.17]
 - c. The Property is rectangular in shape. [N.T. 2/7/24, p.17]
 - d. The topography of the Property slopes away from Mount Pleasant Avenue. [N.T. 2/7/24, p.17]
 - e. The Property is located in a residential area that includes a mix of single-family dwellings and duplexes. [N.T. 2/7/24, p.17]

- f. Landowner is proposing to develop three townhouse units, each to be individually owned. [N.T. 2/7/24, p.17]
- g. Each townhouse will be served by a driveway which provides access to Mount Pleasant Avenue. [N.T. 2/7/24, p.20]
- h. Each townhouse will provide three off-street parking spaces. [N.T. 2/7/24, p.20]
- i. A co-owned stormwater management system is proposed to be located on the northwest corner of the Property. [N.T. 2/7/24, p.20]
- j. In Mr. Gruel's opinion, the three townhouses would have a minimal impact on traffic in the surrounding area. [N.T. 2/7/24, p.20; 24]
- k. Mr. Gruel's expertise does not include traffic engineering.
- l. There are no steep slopes or wetlands on the Property. [N.T. 2/7/24, p.21]
- m. The Property is not located within a flood zone, riparian corridor, or conservation corridor. [N.T. 2/7/24, p.21]
- n. Pursuant to section 165-61.F(2) of the Zoning Ordinance, the permitted number of dwelling units on the Property is 2.72 units. [N.T. 2/7/24, p.22]
- o. In Mr. Gruel's opinion, the requested variance from Section 165-61.F(2) would not alter the essential character of the neighborhood, or impair the use and development of adjacent properties. [N.T. 2/7/24, p.23]
- p. Mr. Gruel acknowledged that it is possible to develop only two townhouses on the Property in compliance with the Zoning Ordinance. [N.T. 2/7/24, p.27]

12. Shawn Jackson, the owner of the properties located at 1077 Mount Pleasant Avenue and 1010 Mount Pleasant Avenue, was granted party status at the hearing.

13. Ms. Jackson raised concerns regarding increased traffic volume in the surrounding area and the adverse impact on the character of the surrounding neighborhood. [N.T. 2/7/24, p.34]

14. Landowner offered no competent evidence of any unique physical conditions or characteristics on the Property or any resulting unnecessary hardship requiring the variances.

15. The hardship, if any, relates to Landowner's desire to construct three townhouses within the R-3 District as opposed to two townhouses. This hardship was created by the Landowner.

16. No competent evidence was offered by Landowner that the variances sought represent the minimum variances that will afford relief for a reasonable use of the Property.

17. No representative of Landowner testified.

B. DISCUSSION

A zoning hearing board may only 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); Zoning Ordinance § 165-251.B(2); *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (Pa. Cmwlth. 1990).

The variance standard is a “high hurdle[.]” *Omnipoint Comms. Ent. L.P. v. Zoning Hearing Bd. Easttown Twp.*, 331 F.3d 386, n*11 (3d Cir. 2003). “[T]he reasons for granting the variance must be substantial, serious and compelling.” *Commonwealth v. Zoning Hearing Bd. Susquehanna Twp.*, 677 A.2d 853, 855 (Pa. Cmwlth. 1996). Variances are to be granted “sparingly and only under exceptional circumstances.” *Id.*; see also *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279, 284 (Pa. Cmwlth. 1994); *Laurento v. Zoning Hearing Bd. of Borough of W. Chester*, 638 A.2d 437, 439 (Pa. Cmwlth. 1994). “[T]o establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship.” *Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 980 (Pa. Cmwlth. 2009); see also *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 150 (Pa. Cmwlth. 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.”).

A variance seeking relief from a maximum density requirement is a dimensional variance. See *Dunn v. Middletown Tp. Zoning Hrg. Bd.*, 143 A.3d 494, 501 (Pa. Cmwlth. 2016). The Commonwealth Court in *Pequea Twp. v. Zoning Hearing Board of Pequea Twp.*, 180 A.3d 500 (Pa. Cmwlth. 2018) summarized the standard applied to requests for dimensional variances:

Although *Hertzberg* sets forth a more relaxed standard for a dimensional variance, it does not stand for the proposition that “a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner’s ability to employ his property *exactly as he wishes*, so long as the use itself is permitted.” *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595, 598 (Pa. Cmwlth. 2001) (emphasis in original); see also *Singer* (quoting *Yeager*). Additionally, it has been the law of this Commonwealth that the mere desire for more space does not establish the requisite unnecessary hardship for a variance. See *Larsen v. Zoning Board of Adjustment of City of Pittsburgh*, 543 Pa. 415, 672 A.2d 286, 290 (1996) (ruling that the zoning board erred as a matter of law in granting a dimensional variance where the applicants sought a variance to construct a 400–square foot deck in order to provide a play area for their child, because the “mere desire to provide more room for a family member’s enjoyment fails to constitute the type of ‘unnecessary hardship’ required by the law of this Commonwealth”); see also *McClintock v. Zoning Hearing Board of Fairview Borough*, 118 Pa.Cmwlth. 448, 545 A.2d 470 (1988) (denying a dimensional variance where the property could be used for a one-car garage instead of a two-car garage); *Vito v. Zoning Hearing Board of Borough of Whitehall*, 73 Pa.Cmwlth. 270, 458 A.2d 620 (1983) (finding no hardship to grant a dimensional variance to build an addition to an existing two-car garage where the property was useable in its present condition).

Pequea Twp., 180 A.3d at 507–08.

In order to support a request for a dimensional variance, the applicant must establish that any hardship requiring a variance was not self-created. *Goldstein v. Zoning*

Hearing Bd. of Lower Merion, 19 A.3d 565, 569 (Pa. Cmwlth. 2011). The Pennsylvania Supreme Court has held that a “personal articulation of hardship cannot constitute the ‘unnecessary hardship...which is caused by unique physical circumstances of the property’ required to justify a zoning variance.” *Nettleton v. Zoning Bd. of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003) (quoting *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (Pa. 1996)). See also *Angle v. Zoning Hrg. Bd. of Borough of Dormont*, 475 A.2d 1371 (Pa. Cmwlth. 1984) (holding that personal family needs could constitute a sufficient hardship basis for a variance); *App. of Kline*, 148 A.2d 915 (Pa. 1959) (holding there was no basis for allowing a variance to permit a porch to be enclosed where the hardship was based on purely personal needs - an attempt to ameliorate the respiratory complaints of members of his family).

In *Dunn v. Middletown Tp. Zoning Hrg. Bd.*, 143 A.3d 494 (Pa. Cmwlth. 2016), the applicant sought a variance from the maximum density requirement to subdivide its property and construct two homes. The Commonwealth Court held that applicant failed to prove the requisite unnecessary hardship or that any alleged hardship was not self-inflicted because the property could be used for one home in compliance with the zoning ordinance. *Id.* at 503. Thus, the applicant created the hardship it sought to remedy, and because the property could be used for one home without the need for zoning relief, the variance was not the minimum variance that would afford relief. *Id.*

Landowner failed to demonstrate an unnecessary hardship due to unique physical characteristics of the Property. The evidence established merely that the need for the variances stems solely from a self-created hardship – Landowner’s financially-based desire to construct three townhouses on the Property within the R-3 District.

Landowner's expert witness, Bradford Gruel, testified as follows:

Mr. Garzillo [ZHB member]: You had testified...that three [townhouses] is necessary for the development of the lot...Can you explain to me why two is not possible?

...

Mr. Gruel: I'm not sure that I testified that three is necessary.

Mr. Garzillo: That's the basis for the request.

Mr. Gruel: I should clarify. I think three makes sense given the 2.7 density. However, we show three. Can two be done? Yes.

Mr. Garzillo: Your testimony at this point is that the by-right number of two is doable?

Mr. Gruel: Yes.

[N.T. 2/7/24, pp. 26-27]

Landowner's expert witness acknowledged that the Property can be developed in strict conformity with the Zoning Ordinance. No variance is required if Landowner proposed to build two townhouses on the Property.

Landowner argued that the split-zoning of the Property imposes a hardship on the use of the Property. There was no evidence presented, however, establishing that the split-zoning prevents the reasonable use of the Property. It was acknowledged that even with the split-zoning, the Property can be reasonably used for two townhouses. The underlying reason for the variances is the Landowner's personal desire to instead construct three townhouses.

The testimony fell markedly short of establishing an unnecessary hardship that prevents the reasonable use of the Property. This is the classical example of the personal articulation of a hardship and not unnecessary hardship as defined by the wealth of court

decisions. See *Nettleton*, 828 A.2d 1040; *Angle*, 475 A.2d at 1371; *App. of Kline*, 148 A.2d at 915. Accordingly, the variances were denied.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the MPC, 53 P.S. §10909.1(a)(5), and Zoning Ordinance §165-251.A(5).

2. Landowner has standing to seek the requested zoning relief as the owner of the Property.

3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

4. Landowner requires a variance from sections 165-61.F(1) and 165-61.F(2) of the Zoning Ordinance.

5. The ZHB may grant a variance provided that an applicant establishes that: (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.

6. Landowner failed to demonstrate an unnecessary hardship entitling it to the requested variances.

7. Any claimed hardship is self-created and based on personal financial objectives.

8. Landowner failed to establish that the variances sought represent the minimum variances that will afford relief.

9. At the conclusion of the February 7, 2024, hearing, the ZHB voted unanimously to deny the application. On February 8, 2024, the ZHB mailed the following notice of decision to Landowner:

This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board following the conclusion of the hearing on Wednesday, February 7, 2024.

The Zoning Hearing Board voted to deny the application for variances from sections 165-F(1) and 165-F(2) of the Upper Merion Township Zoning Ordinance of 1942, as Amended, in order to construct three (3) townhome units

Because this application was denied, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons.

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

DocuSigned by:

Mark DePillis

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Mark S. DePillis. Esq.
Chairperson