

DATE OF MAILING: February 5, 2024

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PA

APPLICATION OF JAYANT WARUNKAR

APPLICATION NO. 2023-16

PROPERTY: 667 W. VALLEY FORGE ROAD

TAX PARCEL NO. 58-00-19867-00-1

DECISION

The Zoning Hearing Board of Upper Merion Township (“ZHB”) considered an application for a variance to permit a child day-care home for up to twelve children in an existing single family dwelling. The applicant did not prove entitlement to the grant of relief. Thus, the ZHB voted to deny the application.

Jayant Warunkar (“Landowner”) is the owner of property located at 667 W. Valley Forge Road, tax parcel no. 58-00-19867-00-1 (the “Property”). The Property is in the R-2A Residential District (“R-2A District”) of Upper Merion Township (“Township”). The Property is improved with a single-family residential dwelling.

In 2007, the ZHB granted Landowner a special exception to permit a child day-care home on the Property for no more than six children pursuant to section 165-218(B) of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the “Zoning Ordinance”). Section 165(B) of the Zoning Ordinance permits a child day-care home in any single family dwelling when authorized by the Zoning Hearing Board as a special exception. A “child day-care home” is defined in section 165(A)(1) of the Zoning Ordinance as “a dwelling at which child-care services are available on a full- or part-time basis, whether or not for profit, *for no more than six children* who are not permanent

residents of the dwelling; provided, however, that the operator of such services resides at the dwelling where the services are made available.” (Emphasis added.)

In the current application, Landowner sought a variance from section 165-218(B) of the Zoning Ordinance to permit a child day-care home for *up to twelve children*. On January 17, 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 Tallman, Vice-Chairperson; Chiragi Raval, Secretary; and M Jonathan Garzillo, member. The ZHB was represented by Mark D. Eastburn, Esq. of the law firm of Eastburn and Gray, P.C. The applicant was unrepresented.

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.

After careful consideration of the evidence presented, the ZHB makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

BACKGROUND

- 1. Landowner is the owner of the Property. [Ex. ZHB-5]
- 2. The Property is identified as tax parcel no. 58-00-19867-00-1. [Ex. ZHB-5]
- 3. The Property is located in the Township’s R-2A Residential zoning district. [Ex. ZHB-1]
- 4. The Property is improved with a single-family residential dwelling. [Ex. ZHB-1]

5. The ZHB granted Landowner a special exception in 2007 to permit a child day-care home for up to six children on the Property. [Ex. ZHB-4]

ZHB HEARING

6. The ZHB marked the following exhibits:
- a. ZHB-1 – application;
 - b. ZHB-2 – photographs (3) of the exterior and interior of the Property;
 - c. ZHB-3 – testimonials (3) from Landowner’s clients;
 - d. ZHB-4 – Opinion and Order of the Upper Merion Township Zoning Hearing Board dated August 15, 2007 for the application of Jayant Warunkar, 667 W. Valley Forge Road;
 - e. ZHB-5 – deed between William C. Douts and Patricia A. Douts, husband and wife (Grantors) and Jayant Warunkar (Grantee) dated November 26, 1996 for 667 W. Valley Forge Road;
 - f. ZHB-6 – a sketch of the structure on the Property from Montgomery County property records; and
 - g. ZHB-7 – legal notice.
7. Landowner testified in support of the application as follows:
- a. Landowner and his wife have lived in the Township since 1995. [N.T. 1/17/2024, p. 3]
 - b. Landowner obtained a special exception from the ZHB in 2007 to operate a child day-care home on the Property for up to six children. [N.T. 1/17/2024, p. 5].

- c. Landowner operated a child day-care home on the Property for twelve years and then took a break due to the Covid-19 pandemic. [N.T. 1/17/2024, pp. 5-6]
- d. Landowner previously ran a successful day-care business and now would like to grow the business to accommodate up to twelve children. [N.T. 1/17/2024, pp. 6-11]
- e. Landowner predicted that it may take time to restart the business to a point where it can accommodate up to twelve children. [N.T. 1/17/2024, p. 11]
- f. Landowner believes that growing the business will benefit Landowner's clients and the community as a whole. [N.T. 1/17/2024, pp. 12-15 and 16-17]
- g. Landowner testified that there are eight parking spaces at the Property and that there had been no traffic incidents at the Property during the prior twelve years in business. [N.T. 1/17/2024, pp. 15-16, 19-20]
- h. No expert witness testified regarding parking, traffic, ingress, or egress.
- i. Landowner hopes to transition the business to a larger location in the future. [N.T. 1/27/2024, p. 30]

8. Sujatha Deepak, a resident of 278 Jasper Road, and Jatin Patel, a resident of 440 Glenn Rose Circle, were prior clients of Landowner's daycare and offered public comment in support of the application. [N.T. 1/17/2024, pp. 22-25]

9. No individual testified in opposition to the application.

10. Landowner offered no evidence of any unique physical conditions or characteristics on the Property or any resulting unnecessary hardship to justify a variance.

11. Landowner failed to prove that the Property cannot be developed in conformity with the zoning ordinance and that a variance is necessary to enable reasonable use of the property.

12. The Property has been used for both a residence and a business.

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 §§ 164-133 and 164-134; *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).

Variations 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.” *Pietro Paolo 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).

In *Singer v. Philadelphia Zoning Bd. Of Adjustment*, 29 A.3d 144 (Pa. Cmwlth. 2011), the applicant sought zoning relief from the Philadelphia Zoning Board of Adjustment (the “Board”), in part, to permit a takeout restaurant. The Board granted the requested variance, and objectors appealed to the trial court. *Id.* At 147-48. The trial court affirmed the Board’s decision and objectors appealed to the Commonwealth Court. *Id.* The Commonwealth Court reversed the Board’s decision, finding that the applicant failed to meet its burden to demonstrate an unnecessary hardship. *Id.* At 151. The Commonwealth Court reasoned that the property was already being used as a parking lot, a permissible use under the zoning ordinance. *Id.* Therefore, the property could be used and had value for a use permitted in the zoning district. *Id.* The Court found that the applicant’s desire to maximize the potential use of the property—by including a takeout restaurant—was insufficient to establish an unnecessary hardship. *Id.* (citing *Society Created to Reduce Urban Blight v. Zoning Bd. of Adjustment of City of Phila.*, 771 A.2d 874, 878 (Pa. Cmwlth. 2001)(stating “just because a person wants to do more with his or her land in addition to the use that it is presently being used for is not a sufficient unnecessary hardship unique to that piece of land.”).

In this case, Landowner did not offer any evidence of unique physical circumstances or conditions of the Property to justify the need for a variance. Landowner failed to prove that the Property cannot be developed in accordance with the Zoning Ordinance and that a variance is necessary to enable reasonable use of the Property. To the contrary, Landowner testified that he and his family have lived in the Property since 1995 and operated a child day-care home on the Property for twelve years. Similar to the applicant in *Singer*, Landowner's testimony demonstrates that the Property can be used and has value for uses permitted in the zoning district. Landowner's desire to maximize the potential use of his property is irrelevant. Therefore, no unnecessary hardship will result if the variance is denied and a variance is unnecessary for Landowner to make reasonable use of the Property.

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 section 165-218(B) of the Zoning Ordinance to operate a child day-care home for up to twelve children.

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 him to variance relief from section 165-218(B) of the Zoning Ordinance.

At the conclusion of the January 17, 2024 hearing, the ZHB voted unanimously to deny the application. On July 18, 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, January 17, 2024.

The Zoning Hearing Board voted to deny your application for a variance from section 165-218 of the Upper Merion Township Zoning Ordinance of 1942, as Amended, in order to operate a child day-care home for up to twelve children on the property.

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