

AN ADVISORY OPINION OF THE PLANNING COMMISSION OF WESTTOWN TOWNSHIP,  
CHESTER COUNTY, PENNSYLVANIA,  
ON THE SPECIAL EXCEPTION APPLICATION OF  
Nathan and Cheryl Bump, 1106 Cardinal Dr, WEST CHESTER, PA 19382

Having considered the application materials and oral presentation by the applicant at their regular meeting of March 4, 2020, the Planning Commission recommends the Zoning Hearing Board for Westtown Township **consider favorably** the variance application to allow the improvement of the property with a two-story detached, residential accessory structure, 8.5 feet from the south side lot line as depicted on the applicants' submitted site plan.

This opinion was decided upon a 5-1 vote of the members in attendance at the March 4, 2020 regular meeting of the Planning Commission. Mr. Embick's minority report is attached.

WESTTOWN TOWNSHIP  
PLANNING COMMISSION

Minority Report.

In 1998, the Pennsylvania Supreme Court, in its decision in Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh, 721 A.2d 43 (Pa. 1998), announced a less stringent standard for the granting of dimensional variances, which include relief from setback, minimum lot size, and building height requirements.

In Hertzberg, the court stated:

"[W]e now hold that in determining whether unnecessary hardship has been established, courts should examine whether the variance sought is use or dimensional. To justify the grant of a dimensional variance, courts may consider multiple factors, including the economic detriment to the applicant if the variance is denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood. To hold otherwise would prohibit the rehabilitation of neighborhoods by precluding an applicant who wishes to renovate a building in a blighted area from obtaining the necessary variances."

Although not statutorily authorized by the MPC, it has been my experience that many zoning hearing boards also grant "de minimis" variances, which are small deviations from the dimensional standards of a zoning ordinance. I consider this to be more of a custom, more in keeping with the statement made by Mr. Petrosa that "any variance is OK if nobody objects." I would tend to favorably consider such variances if I were convinced that rigid compliance is not necessary to protect the public concerns inherent in the zoning ordinance, and if compelling reasons are presented justifying a variance. I do not believe that there is any set of criteria upon which de minimis variances are granted; instead, they are evaluated according to the particular circumstances of each request for relief, or on an ad hoc basis. However, I am not convinced that such variance approvals are strictly "legal."

With respect to the presentation last night by the Bumps, I am not convinced that the presentation meets the Hertzberg standard. I don't think the Bumps proved that:

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 (it is true that the lot is irregularly shaped, but the "hardship" is caused, in my opinion, by the initial decision to construct the type of house that was built);
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 reasonable use of the

property (in my view the Bumps did not establish that they could not develop the property in an alternative fashion – they chose to propose a variance because they prefer the proposed garage to something else);

3. That such unnecessary hardship has not been created by the appellant (in my opinion, the hardship (if it is a hardship at all), was created by the decision to build the existing house in the position it is on the lot);
4. That the Bumps would suffer any economic detriment; and
5. That the Bumps would suffer any financial hardship to build a complying structure or addition;

-John R. Embick, Esq.

3/4/2020