

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

| | | |
|--|---|-------------------------------------|
| APPLICATION NO. 22010-05 | : | HEARING DATE: April 21, 2010 |
| | : | |
| APPLICATION OF: PA Turnpike Commission | : | DECISION DATE: May 19, 2010 |
| | : | |
| | : | |
| PROPERTY: Valley Forge Interchange | : | |
| of PA Turnpike at Gulph Rd.: | : | |
| | : | |
| Upper Merion Township | : | |

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

The Applicant, PA Turnpike Commission, (hereinafter referred to as the "Applicant"), filed an application requesting variances to Section 165-117 in order to construct the proposed lattice tower for use by PATC and the co-location of cellular antennas and use, and a height variance to Section 165-118 to allow the 195 ft. height required by the Turnpike for its microwave system. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on April 21, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except Mark S. DePillis, Esq., were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. DePillis.

FINDINGS OF FACT

1. The Applicant is PA Turnpike Commission, P.O. Box 67676, Harrisburg, PA 17106,
Attn: Mr. Donald C. Lowell, PLS.

2. The Applicant is the legal owner of the subject property.
3. The property is located at the Valley Forge Interchange of PA Turnpike at Gulph Road, Upper Merion Township.
4. The Applicant was represented by Megan E. King, Esq., Saul Ewing, LLC, 1200 Liberty Ridge Drive, Suite 200, Wayne, PA 19087.
5. The property is zoned "C-3 " Commercial.
6. The lot is approximately 5.5 acres.
7. The Applicant previously received a special exception for a tower and a variance for height on September 16, 2009, however, the previous decision required a monopole tower rather than a lattice tower.
8. The property was rezoned from "AG" Agricultural to "C3" Commercial.
9. The Applicant is now asking for a use variance and a height variance because they want a lattice tower, rather than a monopole tower and it is now a different zoning district that does not permit towers by special exception.
10. The tower will be 195 ft. in height.
11. The record of the September 16, 2009 decision is incorporated herein as if set forth in full.
12. The prior decision of the board dated September 16, 2009 is incorporated herein as if set forth in full.
13. In the September 16, 2009 decision, the board granted a height variance for the same location of the tower that is proposed in the subject application. The only difference between the prior application and the current application is the type of tower utilized and the change in the zoning district.

14. There were no residents who testified in favor of the project.
15. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, PA Turnpike Commission, filed an application requesting variances to Section 165-117 in order to construct the proposed lattice tower for use by PATC and the co-location of cellular antennas and use, and a height variance to Section 165-118 to allow the 195 ft. height required by the Turnpike for its microwave system.

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).

In Hertzberg, the Supreme Court held that the Zoning Hearing Board must, at the beginning of its analysis of an appeal from the terms of a Zoning Ordinance, determine whether the requested relief is for a use variance or a dimensional variance. Id. If the Board determines that the relief is for a use variance, then the Board should use the traditional five-part test, which is set forth in both the Municipalities Planning Code and case law. If the requested relief is for a dimensional variance, then the standard to be applied will be different. Id. While the Court in Hertzberg did not specifically identify a single standard for a dimensional variance, it noted that the requirements for a dimensional variance were something less than that of a use variance. Id.

In its opinion, the Court went on to opine that some of the factors that a Zoning Hearing Board should look at to determine whether to grant a dimensional variance should include, where applicable:

- (1) The economic detriment to Applicant if the variance was denied;
- (2) The financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements; and,
- (3) The characteristics of the surrounding neighborhood. Id.

While these factors are not exhaustive, the Court in Hertzberg and subsequent cases have referred to them specifically as findings a Zoning Hearing Board should make in its determination of whether to grant or deny a dimensional variance.

Although the language of Hertzberg is expansive, the current trend is to apply the relaxed standard for dimensional variances only to the consideration of whether unnecessary hardship results from unique physical characteristics or conditions of the land. The Friendship Preservation Group, Inc. v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 808 A.2d 327 (Pa. Cmwlth. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlth. 2001).

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.

The Applicant previously received a special exception to use the property for a tower and a variance for height. The board previously granted the relief requested, however, the Applicant now wants to have a lattice-type tower, rather than a monopole tower. In the intervening time between the decision and the application, the property was rezoned to a different zoning district, therefore, a variance is needed for the use. Another variance is needed for the height because the type of tower being utilized has been changed. The Applicant incorporated the testimony from the previous hearing as well as the decision from the previous hearing. The change in the application has very little, if any significance, to the surrounding area and it does not have any other detrimental impact that didn't exist at the time that the previous relief was granted. The Applicant's request is for both a use variance and a dimensional variance, therefore the Applicant must satisfy the standards of the Municipalities Planning Code, as well as the standards of the Hertzberg case. Through the use of testimony and exhibits, the Applicant sufficiently satisfied the applicable standards, therefore, the variances should be granted.

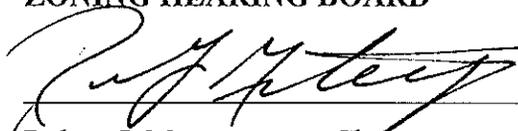
ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant the requested variances to Section 165-117 and Section 165-118. These variances are conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on April 21, 2010.

Decision Dated: May 19, 2010

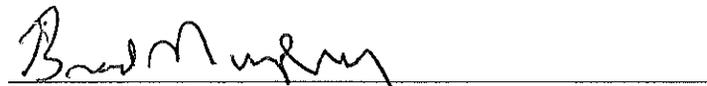
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor - Chairman



William C. Whitmore, Sr. - Secretary



Brad Murphy - Alternate

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.