

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-34 : HEARING DATE: January 6, 2010
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APPLICATION OF: MPO Properties, LLC: DECISION DATE: February 17, 2010
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PROPERTY: 250 Mall Boulevard :
:
Upper Merion Township :

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

The Applicant, MPO Properties, LLC, (hereinafter referred to as the "Applicant"), filed an application requesting variances to Section 165-168.A(1) to permit the overall sign area to be 588 sq. ft. and Section 165-168.A(3) to permit two (2) signs to be erected on the side of a building that is not considered frontage. The Applicant is also appealing the Zoning Officer's determination that the property does not have two (2) frontages. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on January 6, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except William C. Whitmore, Sr., were present, as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. Whitmore.

FINDINGS OF FACT

1. The Applicant is MPO Properties, LLC, 1 Geoffrey Way, Wayne, NJ 07470.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 250 Mall Boulevard, King of Prussia, PA 19406.
4. The Applicant was represented by Denise R. Yarnoff, Esq., Riley, Riper, Hollin & Colagreco, P.O. Box 1265, Exton, PA 19341.
5. The property is zoned "SC " Shopping Center District.
6. The lot is approximately 8.566 acres.
7. There are currently two (2) buildings on the subject parcel. Both buildings will be demolished and a new building of 62,000 sq. ft. will be erected. The building to be erected will be occupied by a Toys-R-Us and a Babies-R-Us.
8. The Applicant is proposing four (4) wall signs on the subject property. The front of the building will have a 142 sq. ft. sign for a Toys-R-Us, as well as a 153 sq. ft. sign for the Babies-R-Us. Equally sized signs will be placed on the elevation that faces Mall Boulevard which is the elevation first seen when gaining access to the property.
9. The Applicant is seeking a variance to Section 165-168.A(1) to permit 588 sq. ft. of signage when the code only permits 400 sq. ft. of signage.
10. The Applicant is also requesting a variance to Section 165-168.A(3) to permit two (2) signs to be erected on the side of the building that is not considered frontage.
11. The application originally asked for an interpretation that would permit the elevation facing the Turnpike to be considered frontage, however, at the time of the hearing the Applicant agreed to withdraw the request for an interpretation and appeal of the zoning officer's decision.
12. At the time of the hearing, the Applicant introduced seven (7) exhibits marked Exhibit "A-1" through Exhibit "A-7" as follows:

Exhibit "A-1" - Zoning Hearing Board Application (incorporated by reference);

Exhibit "A-2" - Deed

Exhibit "A-3" - Aerial Photograph

Exhibit "A-4" - Site Plan

Exhibit "A-5" - Photographs of Property (consisting of 4 sheets)

Exhibit "A-6" - Building Elevations with Signage (consisting of 2 sheets)

Exhibit "A-7" - Sign Plan

13. The Applicant has an unusually shaped property.
14. Because of the property's triangular shape and the fact that it is accessed by a 400 ft. drive, it is difficult to see the signage from the road.
15. Through the land development approval process, the Township encouraged the Applicant to change the alignment of the building to facilitate more parking to the front of the building. When the alignment of the building was changed, it made it necessary for the Applicant to seek relief for signage on another elevation. The Applicant wants signage on the front of the building by the entrance and also on the elevation facing Mall Boulevard, which is the first elevation seen by people accessing the property.
16. In addition to the unusual shape and the setback from the road, the property is also partially shielded by a building in front of the subject building.
17. The unique property, as well as the alignment of the building, create a hardship inherent in the property that can be cured with variances for signage.
18. There were no residents who testified in favor of the project.
19. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, MPO Properties, LLC, (hereinafter referred to as the “Applicant”), filed an application requesting variances to Section 165-168.A(1) to permit the overall sign area to be 588 sq. ft. and Section 165-168.A(3) to permit two (2) signs to be erected on the side of a building that is not considered frontage. The Applicant is also appealing the Zoning Officer’s determination that the property does not have two (2) frontages.

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. Cmwlt. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlt. 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. Cmwlt. 1999); Sotereanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlt. 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 is proposing to take two (2) separate freestanding buildings and demolish them for the purpose of erecting one (1) 62,000 sq. ft. building. The 62,000 sq. ft. building will have both Toys-R-Us and Babies-R-Us, therefore, different sign packages are needed for each use of the building. The code permits 400 sq. ft. of signage and the Applicant is requesting 588 sq. ft. of signage. The code also prohibits any signage to be placed on an elevation that is not considered a front elevation. A front elevation is the elevation facing the street that the property takes access. This property is adjacent to the Pennsylvania Turnpike and Mall Boulevard, however, the zoning officer's interpretation is that the Turnpike is not considered frontage because there is no access from the Turnpike, therefore, only one (1) front elevation for 400 sq. ft. of signage is permitted rather than 500 sq. ft. of signage. The Applicant is asking for additional signage and permission to place signage on another elevation. Through the land development approval process, the Applicant was encouraged to align the building in such a manner that it would provide the maximum amount of parking toward the front of the building. When the building was realigned in this manner, it made it difficult to have the building comply with the signage requirements of the code. In addition to the land development constraints, the parcel is also very unique in that it is triangular shaped and it has a 400 ft. access drive. In addition to the setback from the road and the unique shape of the parcel, the visibility of the building is also partially impaired by a building in front of the subject building. The signage on the elevation facing Mall Boulevard is necessary for people accessing the site to determine the

uses in the subject building. The signage at the front entrance of the building is necessary for people to identify the building and the entrance to the building. The signage requests are dimensional in nature, therefore, the standards of the Hertzberg case are applicable to the case at bar. Through the use of testimony and exhibits, the Applicant sufficiently satisfied the standards of the Hertzberg case, therefore, both variances should be granted.

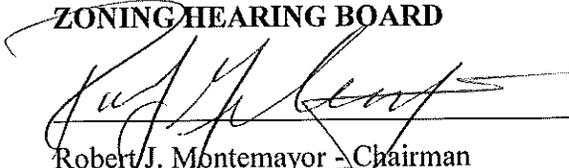
ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant the requested variances. These variances are conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on January 6, 2010.

Decision Dated: February 17, 2010

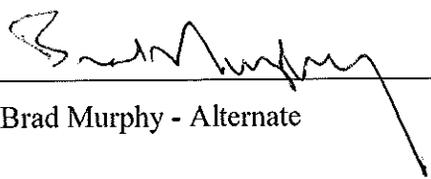
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor - Chairman



Mark S. DePillis, Esq. - Vice Chairman



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.