

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF PEP BOYS

NO. 2012-034

**PROPERTY: 214 EAST DEKALB PIKE
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves a commercial lessee's request for a special exception and variances to permit an automotive service center, with retail sales of automotive parts, on a property split by 2 zoning districts.

On February 20, 2013, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a public hearing with regard to Application No. 2012-034 of Pep Boys ("Landowner"). The members of the ZHB present were William J. Clements, Esquire, Chairman; Brad Murphy, Secretary; John M. Tallman, Jr., Member; and Mark DePillis, Esquire, Member. The ZHB was represented by Marc D. Jonas, Esquire, of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Landowner was represented by Denise R. Yarnoff, Esquire, of the law firm of Riley Riper Hollin & Colagreco.

Landowner sought a special exception, or, in the alternative, a variance, from section 165-97.A and C, a use variance from section 165-153, and a dimensional variance from section 165-99.A of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Ordinance") to permit an automotive service center with sales of automotive parts in the CO and HI zoning districts.

The ZHB admitted the following exhibits into the record:

ZHB exhibits

- A-1 ZHB application
- A-2 letter dated February 4, 2013 from Denise Yarnoff, Esquire, to Mark Zadroga, Zoning Officer, clarifying the zoning relief requested in the ZHB application
- A-3 lease agreement dated September 24, 2012, between Statek and A.W. Hannacker Co., landlord, and The Pep Boys – Manny, Moe & Jack, tenant
- A-4 *Curriculum vitae* of Keith J. Marshall, P.E.
- A-5 aerial photograph
- A-6 illustrative site plan
- A-7 ZHB decision dated March 13, 1984 for application of Midas Realty Corporation, granting a use variance to permit a brake and alignment shop in the CO Commercial Office district
- A-8 ZHB opinion and order dated January 15, 1997 for application no. 96-24 of A.W. Hannacker Company, granting a variance to permit an addition to a nonconforming property and structure
- A-9 *Curriculum vitae* of Matthew I. Hammond, P.E.

The zoning hearing was duly advertised, notice thereof was given in accordance with the requirements of the Ordinance, and the proceedings were stenographically recorded. After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the lessee of the parcel of land located at 214 East DeKalb Pike, King of Prussia, Pennsylvania ("Property"). [N.T. 16; Exhibit A-3]

2. The Property is approximately 2.13 acres in area, and is split zoned with the front portion of the Property along DeKalb Pike located in the CO Commercial Office district and the rear portion of the Property located in the HI Heavy Industrial district. The Property is a corner lot with access from both DeKalb Pike and a private driveway. [N.T. 22-24; Exhibit A-6]

3. Improvements on the Property include a vacant building previously occupied by a sign manufacturing company. [N.T. 24; Exhibit A-5]

4. Landowner proposes the demolition of the existing building and the construction of a 14,000 square foot Pep Boys automotive service center with retail sales of automotive parts, and with 66 parking spaces. [N.T. 24-25; Exhibit A-6]

5. The CO Commercial Office district does not permit an automotive service center use with retail sales of automotive parts. Ordinance section 165-97.C permits a use of the same general character as the uses permitted in the CO Commercial Office district when authorized as a special exception, and subject to the minimum lot area requirements of the permitted use. Ordinance section 165-99.A requires a minimum lot area of 3 acres.

6. Landowner's application requests zoning relief to permit an automotive service center use with retail sales of automotive parts on a Property less than 3 acres in the CO Commercial Office district.

7. Section 165-153 of the Ordinance does not permit an automotive service center use with the retail sale of automotive parts in the HI Heavy Industrial district.

8. Landowner seeks a variance to permit an automotive service center use with retail sales of automotive parts on the portion of the Property located in the HI Heavy Industrial district.

ZHB HEARING

9. Landowner offered the testimony of Allison Mathern, P.E., architectural project manager for Pep Boys; Keith J. Marshall, P.E., project engineer; and Matthew I. Hammond, project traffic engineer, in support of the application.

10. The testimony was as follows:

- Pep Boys performs minor automotive repairs, testing, and inspections, and sells automotive parts [N.T. 17-18];
- a 14,360 square foot building is proposed; 64% of the building is retail sales of automotive parts, and 21% of the building is used for service [N.T. 18];
- the Property has been vacant since 2009, and the Property owner has been unsuccessful in marketing the Property [N.T. 19];
- the Property is long and narrow with a small amount of frontage on DeKalb Pike and a private driveway to the west of the Property [N.T. 22];
- similar uses along DeKalb Pike include a Tires Plus, a Hess gasoline station, and a Midas automotive service center [N.T. 22];

- the Midas, Hess, and Tires Plus are all located in the Township's CO Commercial Office district [N.T. 31];
- the Property is split zoned, and the proposed building would be located in both zoning districts [N.T. 24];
- the existing building of 23,000 square feet will be demolished [N.T. 24];
- 66 parking spaces are proposed [N.T. 24];
- the existing entrance on DeKalb Pike will be closed, and the Property will take access from the private driveway [N.T. 25];
- stormwater management and sidewalks are proposed for the Property [N.T. 25];
- both building coverage and impervious coverage will be reduced [N.T. 25];
- the proposal complies with applicable area and bulk requirements of the zoning districts [N.T. 26];
- the CO Commercial Office district permits retail establishments and uses of the same general character by special exception [N.T. 27];
- an automotive service center with retail sales of automotive parts is consistent with permitted CO zoning district uses [N.T. 27];
- the Property is uniquely configured [N.T. 29];
- the peak traffic generated by the Pep Boys use will be accommodated in a safe and efficient manner [N.T. 38]; and

- the proposal is adequately designed to provide internal circulation and parking [N.T. 39].

11. No one testified either in favor of or in opposition to the application.

B. DISCUSSION

1. Special Exception

Landowner proved compliance with the criteria necessary for the grant of a special exception to permit an automotive service center use with retail sales of automotive parts on the Property partially located in the CO Commercial Office district.

Landowner sought a special exception to permit an automotive service center with retail sales of automotive parts on the Property partially located in the CO Commercial Office district. Ordinance section 165-97.C permits by special exception any use of the same general character as the uses permitted in the CO district. Sections 165-97.A(3)F(1) and (2) of the Ordinance permit certain retail establishments and personal service shops. Landowner sought a special exception based on the proposed automotive service center with retail sales of automotive parts as a use of the same general character as the retail establishments and personal service shops permitted by sections 165-97.A(3)F(1) and (2) of the Ordinance.

A special exception is not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a high degree of probability that the proposed use will adversely impact the community. *Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Board*, 646 A.2d 717 (Pa.Cmwlt. 1994), *appeal denied*, 658 A.2d 798 (Pa. 1995). Once the landowner meets its burden of proof that

the proposed use satisfies the requirements of the zoning ordinance for the grant of a special exception, a presumption arises that the proposed use is consistent with the health, safety and general welfare of the community. *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038 (Pa.Cmwth. 2002).

Testimony presented by Landowner demonstrated compliance with the special exception requirements stated in section 165-251.B(1) of the Ordinance. Landowner demonstrated through the testimony of its traffic engineer that the peak traffic generated by the proposed use will be accommodated in a safe and efficient manner, and that the site is properly designed with regard to internal circulation, parking, buffering, and all other elements of proper design. [N.T. 38-39]

Landowner established the existence of similar uses in the surrounding area, such as Midas, Hess, and Tires Plus. [N.T. 22] The proposed Pep Boys is of the same general character as the uses permitted in the CO district, including retail establishments and service shop uses.

Landowner demonstrated compliance with the special exception requirements. The proposed automotive service center, with retail sales of automotive parts is consistent with the health, safety, and welfare of the community. No evidence was presented to the contrary. Thus, Landowner proved entitlement to the special exception.

2. Variance

Landowner demonstrated unique physical conditions of the Property that have caused an unnecessary hardship prohibiting reasonable use of the Property, thereby entitling Landowner to variances to permit an automotive service center with retail sales of automotive parts on a property less than 3 acres and partially located within the HI Heavy Industrial district.

It is well settled in Pennsylvania that a zoning hearing board may grant a variance only 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); *Cope v. Zoning Hearing Bd. of South Whitehall Township*, 134 Pa.Cmwlth. 236, 578 A.2d 1002 (1990).

Landowner demonstrated unique physical conditions constraining the reasonable use of the Property. The Property is split zoned, bisected by the CO and HI district boundary lines. [N.T. 24] The Property is uniquely shaped, long and narrow, with limited frontage on DeKalb Pike. [N.T. 22] As a result of the unique characteristics of the Property, Landowner has proven that the Property cannot be reasonably developed

in strict conformity with the Ordinance requirements for permitted uses in the HI Heavy Industrial district.

With regard to the dimensional variance request, the Pennsylvania Supreme Court has held that dimensional variances require a lesser quantum of proof than use variances and that economic detriment to the land owner is one of the factors that may be considered. See *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998). The Property has been vacant for a number of years and is unmarketable due to the zoning district boundary line splitting the Property and the limited frontage on DeKalb Pike. [N.T. 19] Landowner demonstrated that the Property cannot be reasonably developed in strict conformity with the Ordinance given the Property's unique characteristics, and, therefore, variances are warranted to permit the automotive service center with retail sales of automotive parts on a property less than 3 acres and partially located in the HI Heavy Industrial district.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under sections 909.1(a)(4) and (5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(4) and (5), and Ordinance sections 165-251.A(5) and (6).
2. Landowner has standing as the lessee of the Property.
3. The ZHB is obligated to ensure compliance with the technical requirements of the Ordinance.
4. A special exception is a conditionally permitted use, legislatively allowed where specific criteria in an ordinance are met.

5. Landowner provided substantial competent evidence satisfying all of the specific and general criteria for a special exception to permit an automotive service center use with retail sales of automotive parts in the CO Commercial Office district.

6. The ZHB may grant a variance provided that an applicant demonstrates that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance, prohibiting the reasonable use of the property; and (c) the variance, if authorized, will represent the minimum variance that will afford relief. Ordinance §165-251.B(2).

7. Landowner provided substantial competent evidence satisfying the requirements for variances to permit an automotive service center use with retail sales of automotive parts on a Property less than 3 acres in the HI Heavy Industrial district.

At the conclusion of its February 20, 2013 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 20th day of February, 2013, on the application of Pep Boys, the following relief is GRANTED:

1. A special exception permitted by section 165-97.C of the Upper Merion Township Zoning Ordinance of 1942, as amended, to permit an automotive service center including the retail sales of automotive parts in the C-O Commercial Office district as a use of the same general character as uses permitted in that district;
2. A use variance from section 165-153 of the zoning ordinance to permit the proposed automotive service center with the retail

sale of automotive parts in that portion of the property located in the HI Heavy Industrial district.

3. A variance from section 165-99.A, minimum lot area and minimum lot width to permit the proposed automotive service center including the retail sales of automotive parts.

An opinion with findings of facts, conclusions of law, and reasons will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

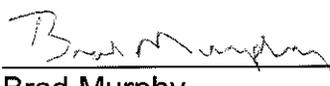
The applicant is directed to section 165-257 "Expiration of Special Exceptions or Variances" and applicable statutory provisions governing the expiration of special exceptions and variances.

Written notice of the ZHB's decision was mailed to Landowner on February 21, 2013.

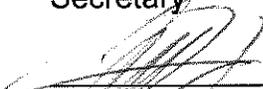
**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



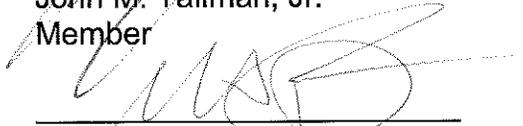
William J. Clements, Esquire
Chairman



Brad Murphy
Secretary



John M. Tallman, Jr.
Member



Mark DePillis, Esquire
Member

Date of Mailing: