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ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-23 : **HEARING DATE:** October 7, 2009
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APPLICATION OF: YSC Real Estate, LP: **DECISION DATE:** November 18, 2009
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PROPERTY: 224 County Line Road :
:
Upper Merion Township :

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

The Applicant, YSC Real Estate, LP, (hereinafter referred to as the "Applicant"), filed an application requesting a variance from Section 165-12.C in order to exceed the allowable building coverage. The Applicant is also requesting an appeal of the Zoning Officer's decision that the three (3) proposed 50 ft. tall light poles are considered structures, or, in the alternative, the Applicant requests a variance from Section 165-12.B in order to locate the light pole structures within the required side yard setback. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on October 7, 2009 at the Upper Merion Township Building. All members of the Zoning Hearing Board were present as well as the Solicitor, Zoning Officer, and Court Reporter.

FINDINGS OF FACT

1. The Applicant is YSC Real Estate, LP, c/o Rich Graham, Striker Partners, 3811 West Chester Pike, Newtown Square, PA 19073.
2. The Applicant is the legal owner of the subject property.

3. The Applicant was represented by Robert J. Kerns, Esq., 298 Wissahickon Avenue, Upper Gwynedd, PA 19454.
4. Richard Graham and Michael Trio, an expert land owner, testified on behalf of the Applicant.
5. The following were marked as exhibits:
 - A-1: Zoning Hearing Board Application;
 - A-2: Plan of existing structures when purchased by Applicant;
 - A-3: Plan titled "Bird's Eye View" of proposed structure and existing fields;
 - A-4: Plan titled "Site Plan A" of proposed structure and existing fields;
 - A-5: Plan of lighting for mini-turf fields (Source: MUSCO Illumination Summary);
 - A-6: 2 Sheet Plan Set by Momenee and Associates, Inc. dated May 18, 2009: Exhibit A: Existing Conditions Plan and Exhibit B: Site Improvements Plan
6. The property is located at 224 County Line Road, King of Prussia, PA 19406, and is further identified as Tax Parcel No. 58-00-04318-00-7 ("Property").
7. The Property is approximately 7.02 acres and is zoned "AG" Agricultural.
8. The Property is bordered to the north by undeveloped PECO property, to the east by undeveloped property owned by Upper Merion Township, to the west by an office complex and associated parking and to the south by railroad tracks and a service building for Philadelphia Suburban Water Company. Beyond the railroad tracks is the Colonial Village residential neighborhood.
9. The Property is presently used as an athletic complex in accordance with a special exception use approval received from the Upper Merion Township Zoning Hearing Board on January 14, 2006. The Applicant focuses on soccer for youth and adults.
10. Since the Applicant's purchase of the Property in June of 2008, the Applicant has made significant changes and improvements to the Property, including, extensive clean-up

and landscaping of the Property. The Applicant has agreed to landscaping on some of the neighbor's property in the Colonial Village residential neighborhood at Applicant's expense. The Applicant has removed the swimming pool and its accessory structures as well as the tennis courts which have been replaced with pervious turf mini-fields primarily used for youth soccer.

11. The Applicant intends to further improve the Property with an addition to the existing indoor facility to provide locker rooms, office, snack bar and a "Champion's Hall". The existing structure is approximately 24,000 square feet and 5,000 square feet is proposed to be added.
12. The Applicant is providing a total of 145 parking spaces.
13. The Applicant proposes to build an additional new structure to enclose a large soccer field where the previous swim club was situated. An additional soccer field with lights is permitted pursuant to the Zoning Ordinance, however, Applicant proposes to construct a structure to enclose the new soccer field in an effort to shield the Colonial Village neighborhood from a fully-lighted outdoor soccer field.
14. The Applicant has agreed to construct the structure over the proposed field as a result of continuing efforts and discussions with the Colonial Village Association. The Applicant originally considered a tension fabric structure but moved away from that consideration due to safety concerns.
15. The building is proposed to be a steel building with aluminum siding enclosing approximately 60,000 square feet. The building would enclose two (2) fields that would fit side by side and a net would be used to separate the fields. The Applicant was unsure if the building would be heated.

16. The Applicant is not proposing lighting on the proposed structure other than that required for safety and security.
17. The Applicant has also agreed to install additional fencing, berming and smaller light poles facing away from the Colonial Village neighborhood to light the existing mini-soccer fields. Normally, lighting would be 50 to 70 foot poles on both sides of the mini-fields. The Applicant has agreed to smaller light poles and three (3) light poles on one side of the field facing away from the Colonial Village neighbors. The Applicant is proposing 0-foot candles from the property line to the lighting fixtures. See Exhibit A-5.
18. The Applicant requires a variance from Section 165-12.C which permits a maximum building coverage in the AG District of 10% to allow the proposed 28.48% as a result of the proposed new structure to shield the proposed new soccer field from the Colonial Village neighborhood.
19. The Applicant is requesting an interpretation that the three (3) proposed 50 foot tall lighting structures to be located 10 feet from the southern edge of the Property to light the mini-fields do not constitute a structure under the Township Code. Or, in the alternative, a variance from Section 165-12.B. to allow the proposed lighting structures ten (10) feet from the southern property line, within the required 40 foot setback.
20. The Applicant intends to provide its athletic programs on site until extinguishment of the outdoor lighting at 11 p.m. per the Township Code.
21. The Applicant has made the necessary application to the Board of Supervisors for a conditional use for the proposed lighting of the mini-fields.

22. Neighbor Matt Hood, 1112 Lafayette Road, asked questions related to the office use on the Property.
23. Neighbor Robert Clifton, 1149 Lafayette Road, commented on sound and lights and the settlement agreement entered into with the Colonial Village Association as to a previous zoning decision appealed by the Association to the trial court and Commonwealth Court.
24. Neighbor Rick Slack, 1130 Lafayette Road, testified that as long as the agreement between the Applicant and Colonial Village was signed, he had no opposition.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, YSC Real Estate, LP, (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-12.C in order to exceed the allowable building coverage. The Applicant is also requesting an appeal of the Zoning Officer’s decision that the three (3) proposed 50 ft. tall light poles to be located 10 feet from the southern edge of the Property are considered structures, or, in the alternative, the Applicant requests a variance from Section 165-12.B in order to locate the light pole structures 10 feet from the southern Property line, within the required 40 foot side yard setback.

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.

In order to accommodate residential neighbors, the Applicant has agreed, at its expense, to enclose the proposed, permitted soccer field. No variance would be needed if the proposed field were not enclosed. The Applicant has also agreed to provide lighting on its existing mini-turf fields at a height and situated so as to accommodate neighbors' concerns. Both variances are needed in order to accommodate the neighbors' concerns. The variances requested are dimensional in nature, therefore, the standards of the Hertzberg case are applicable to the case at bar. The Applicant, through the use of testimony and exhibits, has sufficiently satisfied the standards of the Hertzberg case, therefore, the variances should be granted.

Since the Applicant has met its burden of the proof for the requested variance as to the lighting, the appeal of the Zoning Officer's determination is denied.

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 from Section 165-12.C and Section 165-12.B. The requested appeal from the Zoning Officer's determination that the lighting structures are structures under the Township Code is denied.

The relief granted is conditioned upon the Applicant's compliance with the Applicant's testimony and exhibits presented at the public hearing on October 7, 2009.

Decision Dated: November 18, 2009

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



Robert J. Montemayor - Chairman



Mark S. DePillis, Esq. - Vice Chairman



William C. Whitmore, Sr. - Secretary

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.