

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-16	:	HEARING DATE: August 5, 2009
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APPLICATION OF: PA Turnpike Commission	:	DECISION DATE: September 16, 2009
	:	
PROPERTY: Valley Forge Interchange of the PA Turnpike	:	
	:	
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 a special exception pursuant to Section 165-10.E(6) of the Upper Merion Township Zoning Code ("Zoning Code") that the proposed use shall be permitted as a "radio and television station and monopole" or a determination that the use is exempt from zoning as an essential operation of a state governmental agency or a use variance be granted. The Applicant is also requesting a variance under Section 165-11.C of the Zoning Code in order to erect the proposed monopole structure 198 ft. high, whereas the Zoning Code allows a maximum of 65 ft. or a determination that the use is exempt from zoning as an essential operation of the PA Turnpike. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on August 5, 2009 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except Mark S. DePillis, Esquire, were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mark DePillis.

FINDINGS OF FACT

1. The Applicant is the PA Turnpike Commission, P.O. Box 67676, Harrisburg, PA 17106-7676, Attn: Donald C. Lowell, PLS.
2. The Applicant is the legal owner of the subject property.
3. The Applicant was represented by Megan E. King, Esq., Saul Ewing, LLP, 1200 Liberty Ridge, Suite 200, Wayne, PA 19087.
4. The property is located at the Valley Forge Interchange of the Pennsylvania Turnpike, Upper Merion Township, and is further identified as Tax Parcel #58-00-14086-22-9 ("Property").
5. The Property is zoned "AG" Agricultural.
6. The Property is approximately 5.5 ± acres.
7. The Property is presently used as a toll plaza and related parking and buildings.
8. The following were admitted as exhibits:
 - A-1 Zoning Hearing Board Application and Cover Letter
 - A-2 Deed
 - A-3 Lease (between PA Turnpike Commission and T-Mobile)
 - A-4 Donald L. Lowell, P.L.S. – CV
 - A-5 Ronald Snyder – CV
 - A-6 Valley Forge relay to Valley Forge IC Path Study
 - A-7 Bassem Iskander, RF – CV
 - A-8 FCC License
 - A-9 Propagation Map – Existing Coverage
 - A-10 Propagation Map – Proposed Coverage
 - A-11 Dr. Kenneth Forster – Emissions Report
 - A-12 Jeffrey M. Thoms, P.E. – CV
 - A-13 Site Plan – Title Sheet T-1
 - A-14 Site Plan – Site Plan and Notes LS-1
 - A-15 Site Plan – Site Elevation S-1
 - A-16 Photographs
 - A-17 Douglas C. Cowen, AICP, PP, RLA – CV
 - A-18 Aerial

9. The Applicant presented the testimony of several experts who testified in reference to the exhibits.
10. The Applicant is proposing a communication tower to be owned and used by the Applicant with the potential to lease the unused vertical tower space to telecommunication carriers and other third parties.
11. The proposed communication tower is a monopole, 198 ft. in height, for the Applicant's communication infrastructure to send toll, safety and other data along the Turnpike; for Pennsylvania State Police and emergency responder communications along the Turnpike; and to provide for telecommunication co-locations, as tenants, with its cellular antennas and equipment.
12. The Property has been used as an access road to the plaza for its employees, as an access for emergency vehicles onto the Turnpike, and as a parking area for Turnpike employees.
13. The proposed communication tower will be constructed by T-Mobile as an agent/contractor but owned by the Applicant.
14. T-Mobile proposes to co-locate its antennas on the towers under a lease agreement with the Applicant.
15. T-Mobile's equipment radio equipment will be located on the ground near the base of the monopole within a fenced area.
16. Installation of the communication tower will meet all regulations of the Federal Communications Commission, including power level and exposure limits, and will meet all applicable building codes regulating structural safety.
17. The surrounding area is impacted by commercial, office and government uses.

18. Presently, high mast lighting exists at the interchange, utilizing similar poles to that which is being proposed for the communication tower.
19. The Applicant testified that there is a governmental need for the proposed communication tower to serve its microwave communications system.
20. The proposed height is essential for the Turnpike microwave radio communication system.
21. The Applicant withdrew its request for relief for a special exception.
22. UGI Corporation entered its appearance through its Associate Counsel, Michelle A. Bimson.
23. There were no residents who testified against the project.
24. There were no residents who testified in support of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, PA Turnpike Commission, (hereinafter referred to as the "Applicant"), filed an application requesting a special exception under Section 165-10.E(6) that the proposed use shall be permitted as a "radio and television station and monopole" or a determination that the use is exempt from zoning as an essential operation of a state governmental agency or a use variance be granted. The Applicant is also requesting a variance under Section 165-11.C in order to erect the proposed monopole structure 198 ft. high, whereas the Code allows a maximum of 65 ft. or a determination that the use is exempt from zoning as an essential operation of the PA Turnpike.

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).

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 has demonstrated through its testimony and exhibits that there are unique physical circumstances and conditions on the Property and that the requested use variance for the "radio and television station and monopole" is warranted for the reasonable use of the Property. The unnecessary hardship has not been created by the Applicant and the requested variance is the minimum variance to afford relief.

In addition, through the use of testimony and exhibits, the Applicant demonstrated that the requested dimensional relief to erect the proposed monopole structure 198 ft. high is warranted.

ORDER OF THE UPPER MERION TOWNSHIP

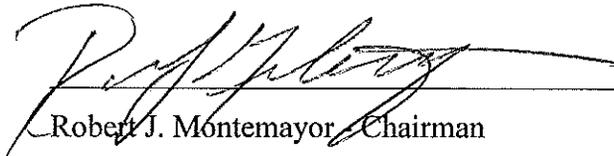
ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony and evidence to grant a variance to Section 165-10.E(6) of the Zoning Code for the proposed radio and television station and monopole” to grant a variance from Section 165-11.C of the Zoning Code in order to erect the proposed monopole structure 198 ft. high. This variance is conditioned upon the Applicant’s compliance with Applicant’s testimony and exhibits at the public hearing on August 5, 2009 .

The requested special exception was withdrawn and the requested determinations are **DENIED.**

Decision Dated: September 16, 2009

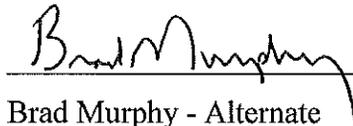
**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**



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.