



ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-10 : HEARING DATE: June 3, 2009
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APPLICATION OF: Ski Properties, LP : DECISION DATE: July 15, 2009
: :
: :
PROPERTY: :
: :
Upper Merion Township :

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

The Applicant, Ski Properties, LP, (hereinafter referred to as the "Applicant"), filed an application requesting the following relief: 1) Variance from Section 165-108.B to allow a 20 ft. front yard setback, whereas the code requires a 50 ft. front yard setback, 2) Variance from Section 165-108.D to allow a 12 ft. rear yard setback, whereas the code requires a 35 ft. rear yard setback, 3) Applicant seeks to increase the number of non-conforming parking spaces from six (6) to fourteen (14) parking spaces. In the alternative, the Applicant requests a variance from Section 165-191 in order to reduce the number of required parking spaces from twenty (20) parking spaces to fourteen (14) parking spaces. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on June 3, 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 Ski Properties, LP, 105 Airport Rd., Pottstown, PA 19464 .

2. The Applicant is the legal owner of the subject property.
3. The property is located at 736 & 750 W. DeKalb Pike, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was represented by Gregory W. Philips, Esq., 1129 High St., P.O. Box 776, Pottstown, PA 19464
5. The property is zoned "C-1 " Commercial.
6. The parcel currently has a two-story retail space on lot #1 and a one-story retail space on lot #2.
7. On lot #2, there is a one-story building with a basement housing/retail use known as the Mattress Giant store.
8. The Applicant is proposing the reconfiguration of the non-conforming building to improve retail operations and to increase traffic safety.
9. The Applicant is requesting a variance for the front yard setback to allow a setback of 28 ft., whereas the existing front yard setback is now 21 ft. The code requires a 50 ft. front yard setback. Originally, the Applicant was requesting a 30 ft. encroachment, however, now the Applicant is only requesting a 22 ft. encroachment.
10. The Applicant originally asked for a variance to Section 165-08.B to permit a 12 ft. rear yard setback which is the amount of setback that currently exists at the subject parcel. This relief was not modified at the second hearing.
11. The Applicant requested a variance to Section 165-191(b)(1) for a reduction in number of retail parking spaces. At the time of the second hearing, the Applicant withdrew the request for a variance regarding parking spaces, therefore, the Applicant will comply with the parking requirements in the code. At the time of the first hearing, the

neighboring property owner entered its' appearance in opposition to the application, however, before the hearing began on the second night, the Applicant and the adjacent property owner resolved their differences and the adjacent property owner withdrew its' opposition.

12. The Applicant's proposal is consistent with the character of the neighborhood.
13. The Applicant's proposal will have no significant impact on traffic patterns or traffic volumes.
14. The subject parcel is unique in that it is narrow with an irregular shape, therefore, strict adherence to the zoning code would impose an unnecessary hardship upon the Applicant.
15. The proposed redevelopment of the Mattress Giant lot will eliminate an existing hazardous vehicle movement and the proposed development will be more aesthetically pleasing than the structures that currently exist on the subject properties.
16. The Applicant introduced a print-out from the Recorder of Deeds and marked it as Exhibit "A-1".
17. The Applicant introduced a deed and marked it additionally as Exhibit "A-1".
18. The Applicant introduced an aerial photograph and marked it as Exhibit "A-2".
19. The Applicant introduced a plot plan and marked it as Exhibit "A-3".
20. The Applicant introduced a photograph of the front of the store and marked it as Exhibit "A-4".
21. The Applicant introduced a photograph of the rear of the store and marked it as Exhibit "A-5".

22. The Applicant introduced a photograph showing the street elevation and marked it as Exhibit "A-6".
23. The Applicant introduced a photograph showing the side elevation and marked it as Exhibit "A-7".
24. The Applicant showed a front elevation for the ski shop and marked it as Exhibit "A-8".
25. The Applicant showed a picture of a nearby use and marked it as Exhibit "A-9".
26. The Applicant introduced a picture of uses across the street and marked it as Exhibit "A-10".
27. The Applicant introduced pictures of existing uses down the street and marked it as Exhibit "A-11".
28. The Applicant introduced a picture showing the road configuration and marked it as Exhibit "A-12".
29. The Applicant showed a picture of the adjacent property to the rear and marked it as Exhibit "A-13".
30. The Applicant showed a revised plot plan and marked it as Exhibit "A-14".
31. The Applicant showed a computer schematic and marked it as Exhibit "A-15".
32. The Applicant showed another computer schematic and marked it as Exhibit "A-16".
33. The Applicant introduced a resume of a surveyor and marked it as Exhibit "A-17".
34. There were no residents who testified in favor of the project.
35. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Ski Properties, LP, (hereinafter referred to as the “Applicant”), filed an application requesting the following relief: 1) Variance from Section 165-108.B to allow a 20 ft. front yard setback, whereas the code requires a 50 ft. front yard setback, 2) Variance from Section 165-108.D to allow a 12 ft. rear yard setback, whereas the code requires a 35 ft. rear yard setback, 3) Applicant seeks to increase the number of non-conforming parking spaces from six (6) to fourteen (14) parking spaces. In the alternative, the Applicant requests a variance from Section 165-191 in order to reduce the number of required parking spaces from twenty (20) parking spaces to fourteen (14) parking spaces.

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 has a structure on two (2) lots. On one lot, there is a two-story structure. On the other lot, there is a one-story structure. The two-story structure is a non-conforming structure that already encroaches into the setback areas. The Applicant would like the ability to match up the non-conforming structure by putting up a building that also encroaches to the same extent into the setback areas. The Applicant originally asked for a 20 ft. front yard setback, however, the Applicant now limited that to a 22 ft. encroachment which produces a 28 ft. front yard setback. The Applicant intends to encroach in the rear yard setback area to the same extent as the existing neighboring structure. At the hearing, the Applicant withdrew the Applicant's request for a reduction in required parking spaces. The Applicant's proposal will result in safer traffic movements and a more aesthetically pleasing building. It will also make the building function better from an operational standpoint. The Applicant's proposed encroachments are consistent with the existing features and will not pose any detriment to adjoining property owners. The Applicant's parcel is unique in that it is long and narrow and that uniqueness

creates the hardship inherent in the land to justify the granting of a variance. The Applicant did not create its own hardship. The proposal is consistent with the character of the neighborhood and consistent with similar uses in the area. The Applicant's request is the minimum relief necessary to reasonably use the property. The Applicant's proposal was originally opposed by the adjacent property owner to the rear, which is a large shopping mall. At the first hearing, the matter was opened and then continued so the parties could have an opportunity to discuss the concerns of the adjacent property owner. Between the time of the first hearing and the second hearing, the adjacent property owner communicated with the board and indicated that they are withdrawing their opposition. The Applicant has the burden of proving all the criteria as outlined above and in the case at bar, the Applicant sufficiently satisfied all of the necessary criteria, therefore the variances should be granted.

ORDER OF THE UPPER MERION TOWNSHIP

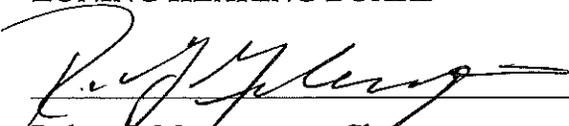
ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant presented sufficient testimony to grant a variance to Section 165-108.B to permit a 28 ft. front yard setback and a variance to Section 165-108.D to permit a 12 ft. rear yard setback. These variances are conditioned upon the following:

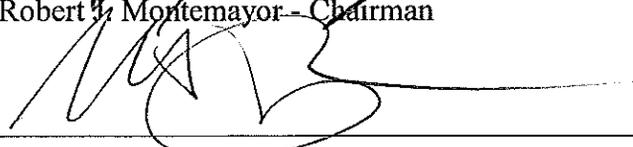
1. The Applicant must comply with the testimony of the Applicant at the public hearing on June 3, 2009.
2. The Applicant must file a deed of consolidation in the Recorder of Deeds consolidating the ownership of lot #1 and lot #2.

Decision Dated: July 15, 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.