

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2009-05 : HEARING DATE: April 7, 2010
: :
APPLICATION OF: King of Prussia : DECISION DATE: May 19, 2010
Volunteer Fire Company : :
: :
PROPERTY: 170 Allendale Road : :
: :
Upper Merion Township :

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

The Applicant, King of Prussia Volunteer Fire Company, (hereinafter referred to as the "Applicant"), filed an application requesting the following variances: 1) Section 165-168.1.D(4) in order to propose an electronic message center on one side of the billboard, 2) Section 165-168.1.E(2) in order to locate the billboard within 500 ft. from any residential zoning district and, 3) 165-223 in order to install the billboard within the floodplain. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on April 7, 2010 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 King of Prussia Volunteer Fire Company, 170 Allendale Road, King of Prussia, PA 19406.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 170 Allendale Road, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was represented by Richard Crawford, Esq.
5. The property is zoned "C-1 " Commercial Zoning District.
6. The lot is approximately 1.836 acres.
7. The Applicant is proposing an electronic billboard with an LED message on one side and a stationary message on the other side.
8. The proposed sign is perpendicular to the Turnpike with the eastbound traffic seeing the electronic signage and the westbound traffic seeing a static traditional billboard that is externally illuminated.
9. Steve Goldman testified on behalf of the Fire Company and indicated that the purpose of the project was to create an additional revenue stream to offset the expenses of the Fire Company.
10. The Applicant is proposing that the message on the sign change every five (5) seconds or longer to comply with the PennDOT regulations.
11. The proposed location of the sign is in the floodplain.
12. The Applicant located the billboard in the floodplain because of considerations for visibility.
13. The Applicant's representative testified that they did a flag test to see if anyone can see the sign within 500 ft. in the residential area. As a result of the flag test, the Applicant lowered the sign from 40 ft. to 30 ft.
14. The sign could be seen by residents on the Brandywine Village side, which is within 500 ft. of the sign, however, they would be looking at the static side of the billboard.

15. The flag test was done at a 40 ft. height and the person sitting inside the bucket with the flag could be seen by houses within 500 ft., however, the Applicant introduced testimony that they don't believe the sign could be seen by those houses if the sign is reduced to 30 ft. in height. The Applicant did not perform a flag test at the 30 ft. height and the Applicant did not perform a flag test in the winter time when there is no foliage.
16. The sign is approximately 288 sq. ft., whereas the code permits 336 sq. ft.
17. The Applicant introduced testimony indicating that the subject property is unique, but there was no specific testimony indicating in what way the property is unique or in what way the uniqueness of the property prevents the Applicant from the reasonable use of its property.
18. There was no testimony indicating that there is any hardship inherent in the property.
19. The current fire house use indicates that the property can be reasonably used as zoned.
20. The property is being reasonably used without any zoning relief.
21. The Applicant offered no testimony regarding whether the proposal is the minimum relief necessary to cure any alleged hardship.
22. The electronic billboard at the location proposed will not be consistent with the character of the neighborhood.
23. The Applicant indicated that the location of the billboard may move 100 ft. west from the location that is proposed in the subject application.
24. The board finds that moving the sign negates all of the testimony presented by the Applicant regarding its visibility to residential properties.

25. The board can not measure the impact on the community of a location somewhere between what is proposed and as far away as 100 ft. west of the proposed location without having further testimony when the location has been decided.
26. The poles for the sign are 20 ft. high, with the sign being an additional 30 ft. above the foundation. The Applicant testified that the 30 ft. requirement is from the grade of the Turnpike.
27. Ken Forman testified against the project.
28. Mr. Forman testified that the sign can be seen from residential areas because the static side of the sign is in plain view.
29. Mr. Forman testified that the Applicant did not prove any hardship inherent in the land and the application should be denied.
30. Roland Urbano testified against the project.
31. Mr. Urbano testified that the sign would clutter the fire house property.
32. Darrell Bockhead testified on behalf of the Fire Company indicating that the sign was needed to help the Fire Company pay its bills.
33. The Applicant presented no evidence to justify why the billboard had to be placed in the floodplain area.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, King of Prussia Volunteer Fire Company, filed an application requesting the following variances: 1) Section 165-168.1.D(4) in order to propose an electronic message center on one side of the billboard, 2) Section 165-168.1.E(2) in order to locate the billboard

within 500 ft. from any residential zoning district and, 3) 165-223 in order to install the billboard within the floodplain.

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 offered testimony from representatives of the Fire Company and it became apparent that the driving force for the proposal was to generate revenue for the Fire Company. There was some discussion regarding different sources of revenue, however, the Fire Company's ability to raise revenue is not relevant to the application because the financial hardship standard outlined in the Hertzberg case does not involve the ability of an applicant to raise revenue, but it involves the financial hardship of an applicant to bring a property into compliance with the code. The standard is financial hardship, rather than financial opportunity.

Although the board thinks very highly of the Fire Company and its volunteer efforts throughout the community, the board is bound to review this application against the standards that are required by law. The property is currently used without a billboard and there was no testimony indicating that the property is not being reasonably used as zoned. This board specifically found that the property is being reasonably used as zoned and that there are no unique features to this property that would prevent the property from continuing to be reasonably used as zoned. The Applicant is requesting a dimensional variance regarding the location of the billboard to residentially zoned property. The amount of the variance is necessary to determine whether the minimum relief is being requested. The Applicant indicated that the sign may move as much as 100 ft. to the west, therefore, the Applicant has not indicated what the minimum relief is to reasonably use the property. The Applicant indicated that it would not have an impact on the character of the neighborhood, however, their testimony relied upon a flag test that was done at a different height and potentially a different location. The flag test was done in July

during full foliage. The testimony also showed that the sign can be seen from residential areas and there was no dispute regarding the visibility of the static portion of the billboard from being seen from residential areas.

Although the standards of the Hertzberg case are applicable to portions of the relief requested by the Applicant, the Applicant must still prove that there is a hardship and that the proposal is consistent with the character of the neighborhood as well as representing the minimum relief necessary to cure any alleged hardship. The Applicant's case centered on the revenue that would be created by the Fire Company and although the board is sympathetic to a volunteer Fire Company's effort to raise revenue, the board can not simply ignore the legal standards that are imposed upon them to review applications of this nature. The Applicant testified that there were unique features to the property, however, the Applicant never brought out any of the unique features to the property that would show that there is a hardship inherent in the land. The Applicant simply testified that there was a hardship without explaining the hardship and simply testified that there were unique features without outlining the extent of the unique features. It is not sufficient for the Applicant to simply reiterate the standards of the Hertzberg case without showing the basis upon which they are making their conclusions. The burden of proof is on the Applicant to show that the law as outlined above, has been satisfied. The Applicant failed to meet this burden, therefore, all three (3) variances should be denied.

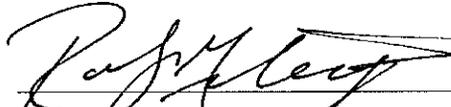
ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

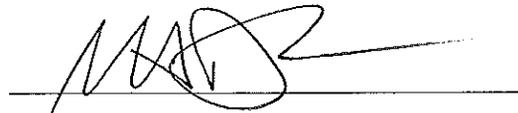
IT IS HEREBY ORDERED AND DECREED that the Board finds that the Applicant did not present sufficient testimony to grant the requested variances, therefore, the application is denied.

Decision Dated: May 19, 2010

**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.