

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

APPLICATION OF PIKE 705 LLC

NO. 2014-15

**PROPERTIES: 705, 707, 709 & 715 W. DEKALB PIKE
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves a request for variances to permit the construction of a retail store. Applicant is a developer and the equitable owner of the properties located at 705, 707, 709, and 715 W. DeKalb Pike. As proposed, the building fails to meet the lot area, front yard setback, and parking location requirements of the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance").

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on Application no. 2014-15 of Pike 705 LLC ("Developer") on August 6, 2014. The hearing was stenographically recorded. All members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Vice Chairman; Mark DePillis, Esq., Secretary; Judith A. Vicchio, Member; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Developer was represented by Andrew Gowa, Esq., of the law firm of Gowa Lincoln. The record was closed at the end of the August 6, 2014 hearing. Developer retained the right to make a closing argument at the conclusion of the hearings on two (2) related, but separate, variance applications before the ZHB. At the September 3, 2014 meeting of the ZHB, Developer presented closing

argument and was represented by Robert L. Brant, Esq., of the law firm of Robert L. Brant & Associates. After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Developer is Pike 705 LLC, with a business address of 2760 N. University Drive, Hollywood, Florida; Developer is the equitable owner of 705, 707, 709 and 715 W. DeKalb Pike, King of Prussia, PA ("Property").

2. The Property is located in the Commercial Office (C-O) Zoning District and constitutes 41,194 square feet (0.946 acres). [Ex. A-3]

3. The Property is presently improved with 6598 square feet of retail and office space, and more specifically contains a law office, hearing aid sales retail store, insurance retail store, and auto repair/retail store. [Ex. A-3]

4. Developer proposes to construct a 6020 square foot retail building to house a national cellphone retail seller with 20 employees. [N.T., pp. 9-10, 70; Ex. A-3]

5. The key Zoning Ordinance requirements are:
- a. Zoning Ordinance section 165-99.A(4) requires a lot area of 4.25 acres for those uses outlined in section 165-97.A(4) including, *inter alia*, certain retail uses;
 - b. Zoning Ordinance section 165-99.B requires a front yard setback of 35';
 - c. Zoning Ordinance section 165-101 prohibits parking in the required front yard and required side yards unless effectively screened;

6. Developer seeks the following variances:

- a. a variance from section 165-99.A(4), to permit a lot area of 0.946 acres (41,194 square feet) instead of the 4.25 acres required;
 - b. a variance from section 165-99.B, to permit a front yard setback of 12.2' instead of the 35' required; and
 - c. a variance from section 165-101, to permit off-street parking in the required side yard without screening.
7. At the second hearing, Developer withdrew the request for two additional variances:
- a. a variance from section 165-194, to permit no off-street loading space; and
 - b. a variance from section 165-198, to permit less than the required green space.

ZHB HEARING

8. Developer offered the testimony of Michael A. Sotl, P.E., Hector Vinas and Andreas Heinrich. Michael A. Sotl was accepted as an expert witness in the area of professional engineering. [N.T. p. 20] Andreas Heinrich was accepted as an expert witness in the area of traffic engineering. [N.T., p. 77.] Developer's witnesses testified as follows:

- If the development were designed to meet the front-yard setback requirements of the Zoning Ordinance it would "push everything to the rear of the site and [Developer] could not provide for the parking that is required in the ordinance." [N.T., p. 26]

- Developer placed the building within the front yard setback at the request of the Township to make the subject area of W. DeKalb Pike pedestrian friendly with sidewalks. [N.T., p. 27]
- If Developer obtained the C-O properties surrounding the Property the total site area would not equal the required 4.25 acres. [N.T. pp. 30, 32-33] Even if Developer obtained the eight (8) C-O parcels between Crocket Road and Shaffer Road; the combined lot area would amount to only 1.5 acres [Ex. A-4; N.T., pp. 30, 32-33]
- Neighboring uses include two (2) banks and two (2) retail stores (Blinds To Go and Porcelanosa). [N.T., pp. 36-37] The lots on which the neighboring uses are located are also undersized. [N.T., p. 37]
- The maximum front yard was 12.2'. [N.T., pp. 39-40]
- Given the location of the Property ("across [from] the large[st] mall in the country") the Property was best suited for retail use. Developer contended that without the requested variances the Property could not be economically developed. [N.T., pp. 53-54]
- The proposed development would be consistent with the other uses along the subject portion of W. DeKalb Pike. [N.T., pp. 57-58]
- Developer met with residents prior to the ZHB hearing to discuss the project and receive concerns and comments. [N.T., pp. 58-59]
- Developer also met with representatives of the Township prior to the ZHB hearing to discuss the project. [N.T., pp. 59-60]
- The Township Solicitor entered his appearance on behalf of the Township in support of the Application. [N.T., pp. 15-17]

- Developer proposes to reduce the number of driveways on W. DeKalb Pike from four to one driveway. [N.T., pp. 60, 79]
- Developer's traffic engineer opined that the proposed reduction in the number of driveways will result in a safer traffic pattern entering and exiting the Property. [N.T., pp. 101-102]
- Developer's traffic engineer asserted that the proposed use would result in less traffic than the current use. [N.T., p. 79]

9. Two neighboring property owners testified in opposition to the application. Their concerns centered on the traffic that would be generated by the proposed use, particularly in light of the other development occurring along the subject portion of W. DeKalb Pike. [N.T., pp. 74-76, 101-106]

B. DISCUSSION

VARIANCES

It is well settled in Pennsylvania that a zoning hearing board may grant a variance 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 Twp.*, 578 A.2d 1002, 1005 (1990).

The reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa.Cmwth. 1994). A relaxed standard applies to applications for dimensional, as opposed to use, variances. See *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Cmwlth. 2011). "It is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted." *Id.* at 150. Put another way, an applicant must demonstrate more than its "mere desire to increase profitability." *Id.* at 149.

Developer demonstrated that unique physical conditions exist on the Property, and that the requested variances are necessary to permit reasonable use of the Property.

1. **Unique physical conditions of the Property cause an unnecessary hardship justifying variances to permit construction of the desired retail store.**

Developer demonstrated that unique physical conditions of the Property cause an unnecessary hardship justifying three dimensional variances to permit construction of the desired retail store. The Property is 0.946 acres (41,194 square feet). [Ex. A-3] Even if Developer were to obtain all of the property zoned C-O surrounding the Property the total lot area would be 1.5 acres. [Ex.A-4; N.T., pp. 30, 32-33] Developer

demonstrated that no matter how it shifted the site around (e.g. designed the development in such a way that it met the front-yard setback requirements of the Zoning Ordinance) the shift would result in noncompliance with other parts of the Zoning Ordinance (e.g. the parking requirements). [N.T., p. 26] Developer chose to request the front yard variance at the behest of the Township, to make this portion of W. DeKalb Pike pedestrian friendly with sidewalks. [N.T., p. 27] Surrounding C-O properties with existing bank and retail store uses are similarly undersized. [N.T., pp. 36-37] Given the dimensional restraints of the Property, the ZHB concluded that Developer demonstrated that unique physical conditions of the Property itself create an unnecessary hardship.

2. The unnecessary hardship was not created by the Developer.

The unnecessary hardship was not created by the Developer. To the contrary, the hardship is created because the Property is sized well below the 4.25 acres required by the Zoning Ordinance for the retail use proposed.

3. The requested variances will not be detrimental to the public welfare.

Developer demonstrated that the requested variances would not be detrimental to the public welfare. The Property is across from one of the largest malls in the United States. [N.T., pp. 53-54] Given the Property's location, the Property is best suited for retail use consistent with the other uses along this section of W. DeKalb Pike. [N.T., pp. 53-54, 48-49] To assuage the concerns of neighboring property owners, Developer met with residents and Township officials prior to the ZHB hearing to discuss the project and receive concerns and comments. [N.T., pp. 58-60]

Developer proposes to reduce the number of driveways onto W. DeKalb Pike from four to one. [N.T., pp. 60, 79] The proposed reduction in the number of driveways will result in a safer traffic pattern entering and exiting the Property. [N.T., pp. 101-102] Additionally, the proposed use will result in less traffic than the current use. [N.T., p. 79] Indeed, the number of uses on the Property is being reduced from a law office, a hearing aid sales retail store, an insurance retail store, and an auto repair/retail store to one wireless phone sales retail store. Given the foregoing, the ZHB concludes that Developer demonstrated that the requested variances would not be detrimental to the public welfare.

4. The requested variances represent the minimum variance that will afford relief.

Developer demonstrated that the requested variances represent the minimum variance that will afford relief. Developer withdrew the request for 2 additional variances. As noted above, even if Developer obtained all of the C-O properties surrounding its Property, the lot area will never equal the 4.25 acres required. Additionally, if Developer met the front-yard requirement it would need alternate relief from other sections of the Zoning Ordinance.

Given the size of the lot (which is less than 1/4th the area required), the requested relief for parking in the side-yard without screening is necessary to permit reasonable use of the Property. Developer reduced the number of variances it was requesting by two – committing to redesigning its plan so that it met the off-street loading and green space requirements of the Zoning Ordinance. The ZHB concludes that Developer has designed the development with the Zoning Ordinance in mind and in

such a manner as requires the smallest number of variances and minimal relief possible.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(5), and Zoning Ordinance section 165-251.A(5).

2. Developer has standing to seek the requested variances as the equitable owner of the Property.

3. The ZHB is obligated to ensure compliance with the technical requirements of the Zoning Ordinance.

4. 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; (c) such unnecessary hardship has not been created by the applicant; and (d) the variance, if authorized, will represent the minimum variance that will afford relief. Zoning Ordinance §165-251.B(2).

5. Developer demonstrated the existence of unique physical circumstances or conditions peculiar to the Property.

6. Developer demonstrated that an unnecessary hardship will result if the requested variances were denied.

7. On the facts presented, Developer demonstrated that the 3 dimensional variances are necessary to permit a reasonable use of the Property.

8. Developer demonstrated that the alleged hardship was not created by the Developer.

9. Developer demonstrated that the requested variances represented the minimum necessary to afford relief.

10. Accordingly, Developer demonstrated its entitlement to the requested variances.

At its September 3, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 3rd day of September, 2014, the Zoning Hearing Board GRANTS variances from the following sections of the zoning ordinance:

- section 165-99.A(4), to permit a lot area of 0.946 acres (41,194 square feet) instead of the 4.25 acres required;
- section 165-99.B, to permit a front yard setback of 12.2' instead of the 35' required; and
- section 165-101, to permit off-street parking in the required yards.

The above variances were granted subject to the following conditions:

1. All architecture must be reviewed and approved by the Upper Merion Township Board of Supervisors.
2. Sidewalks will wrap around the entire building.
3. Applicant will reduce the curb cuts onto the streets surrounding the site as shown on the plan entitled "Record Plan", prepared by Wilkinson & Associates, Inc., dated June 11, 2014, last revised July 16, 2014, admitted as Ex. A-3 in this matter.
4. Applicant will develop the site to create a "unified development" along the West DeKalb Pike road frontage, to the satisfaction of the Upper Merion Township Board of Supervisors.

The applicant withdrew the following two variances at the time of the hearing:

- section 165-194 – Off-street loading; and
- section 165-198 – Minimum requirements regarding green space.

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.

Written notice of the ZHB's decision was mailed to Landowner on September 4, 2014.

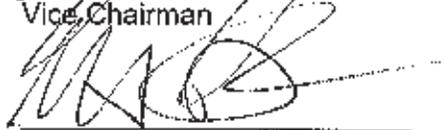
**ZONING HEARING BOARD OF
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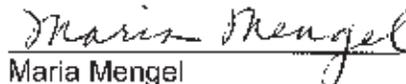
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