

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

APPLICATION OF JOYCE OUTDOOR ADVERTISING

NO. 2014-13

**PROPERTY: 349 S. HENDERSON RD.
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves an applicant's request for numerous variances to permit the erection of a billboard on a lot already improved with two industrial buildings. Applicant is an outdoor advertising company. As proposed the billboard fails to meet these requirements of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance"): (1) maximum sign area; (2) maximum height; (3) minimum distance from another billboard; and (4) minimum distance from a residential zoning district.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a duly advertised hearing on Application no. 2014-13 of Joyce Outdoor Advertising on August 20, 2014; the hearing was stenographically recorded. All members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esquire, Chairwoman; Mark DePillis, Esquire, Secretary; Judith A. Vicchio, Member; Maria Mengel, Member; and John M. Tallman, Jr., Member. The ZHB was represented by Michael E. Peters, Esquire, of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Billboard Company was represented by T. Ryan Fitzpatrick, Esquire of the law firm Lavin O'Neill Cedrone & DiSipio.

8. The key Zoning Ordinance requirements are:
 - a. Zoning Ordinance section 165-168.1.A limits billboard sign area to 336 square feet;
 - b. Zoning Ordinance section 165-168.1.B limits billboard height to 40';
 - c. Zoning Ordinance section 165-168.1.E(1) requires a minimum 1500' distance between any two billboards; and
 - d. Zoning Ordinance section 165-168.1.E(2) requires a minimum 500' buffer from a residential district.
9. Billboard Company seeks the following variances:
 - a. A variance from section 165-168.1.A to permit a billboard of 672 square feet instead of the 336 SF permitted;
 - b. a variance from section 165-168.1.B to permit a height of 54' where 40' is the maximum permitted;
 - c. a variance from section 165-168.1.E(1) to permit a radius of 580' from another billboard instead of the 1500' permitted; and
 - d. a variance from section 165-168.1.E(2) to permit a billboard closer than 500' from a residential zoning district.

ZHB HEARING

10. Billboard Company offered the testimony of Kevin P. Joyce of Joyce Outdoor Advertising and Walter E. Kunda, one of the Landowners, as follows:

INSUFFICIENCY OF THE EVIDENCE

12. Billboard Company failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB's grant of the requested variances.

13. Billboard Company failed to offer proof that the variances would be necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used for two successful businesses -- (1) a warehouse and retail store for a beer distributor owned by Landowner; and (2) a warehouse and distribution center for an auto parts company that pays rent to Landowner.

14. Specifically, Landowner testified as follows, in response to questions by the ZHB solicitor:

MR PETERS (ZHB solicitor): I have a question related to the two businesses that are currently operating on the property. Have you stayed familiar with... Kunda Beverage? It's still open correct?

MR. KUNDA: Yes.

MR. PETERS: And it's still operating?

MR KUNDA: Yes.

MR. PETERS: ... You're still taking in income correct?

MR. KUNDA: We are still generating income.

MR. PETERS: And the other business that is there is the auto parts store?

MR. KUNDA: It's a wholesaler. It's a Canadian wholesaler. They have seven hundred locations.

MR. PETERS: And you rent the other building to them?

Id. Finally, developer is defined under the MPC as:

any landowner, agent of such landowner, or tenant with the permission of such land-owner, who makes or causes to be made a subdivision of land or a land development.

Id.

Although Billboard Company asserted that it had entered into a forty (40) year lease with Landowner, Billboard Company failed to introduce a copy of the lease at the hearing. In fact, Billboard Company failed to introduce any documentary evidence that it had entered into a lease with Landowner, despite the fact that the alleged lease is subject to Pennsylvania's Statute of Frauds. See 68 P.S. § 250.202. Upon questioning, the ZHB found Billboard Company elusive and not credible with respect to the existence of the lease. Upon consideration of the evidence before it, the ZHB concludes that Billboard Company failed to establish either the existence of a lease with Landowner or Billboard Company's standing to seek the variances requested.

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

One building contains Kunda Beverage, a company owned by Landowner that remains an economically viable and successful use, continuing to generate income for Landowner. [N.T., p. 20] The other building on the Property is presently occupied by a tenant – Uni-Select Auto Parts – that pays rent to Landowner. [N.T., p. 21]

Billboard Company failed to articulate a legal, as opposed to a personal, hardship for the erection of a billboard on the Property which fails to meet the height, billboard face area, and radial distance (from another billboard and from a residential district) criteria of the Zoning Ordinance. In fact, Billboard Company proposes to erect a billboard that is twice as large as that permitted by the Zoning Ordinance, 14' higher than permitted by the Zoning Ordinance, approximately 1/3 of the distance from another billboard than that permitted by the Zoning Ordinance, and closer to a residential district than permitted by the Zoning Ordinance.

Despite its request for extensive relief, Billboard Company failed to articulate a single hardship in existence on the Property not created by its desire to locate a billboard of inappropriate size and in a location where it is simply not permitted, all for financial gain. In fact, Billboard Company testified that the billboard could be both smaller (and still meet industry size standards) and shorter. To the extent Billboard Company attempted to assert a hardship on the part of Landowner, the hardship asserted is nothing more than Landowner's own preference to engage in a use not permitted at this location to maximize profitability on a property already containing two financially successful uses.

Maximization of profit is self-inflicted hardship relating to a property owner and/or applicant and not, as required by the Pennsylvania Municipalities Planning Code, to the

900 A.2d at 466.

As in *Yeager* and *Ken-Med*, Billboard Company did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Billboard Company's personal preferences drive the need for the variances and are totally insufficient under the law.

2. Billboard Company failed to prove the requested variances are the minimum needed to afford relief.

Billboard Company was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Holt v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa.Cmwlth. 1999). Billboard Company failed to offer any proof that the variances to permit erection of the proposed billboard were the minimum necessary to afford relief. To the contrary, testimony reveals that (1) the Property is presently being reasonably used as a warehouse and retail store for a beer distributor and as a warehouse and distribution center for an auto parts company; (2) the billboard could be shorter; and (3) the billboard sign face could meet the requirements of the Zoning Ordinance while still meeting industry standard size. Billboard Company admitted that, even if there were an unnecessary hardship, relief could be afforded with fewer, and/or minimized, variances. Under these circumstances, Billboard Company failed to prove that the required variances represent the minimum amount necessary to afford relief.

C. CONCLUSIONS OF LAW

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

At its August 20, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 20th day of August, 2014, the Zoning Hearing Board DENIES variances from the following sections of the zoning ordinance:

- Section 165-168.1.A to allow a billboard sign area of 672 SF instead of the maximum permitted 336 SF
- Section 165-168.1.B to allow a billboard height of 54' instead of the maximum permitted 40'
- Section 165-168.1.E(1) to allow a billboard closer than the required 1500' radius from another billboard
- Section 165-168.1.E(2) to allow a billboard closer than the required 500' from a residential zoning district

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 Billboard Company on August 21, 2014.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

Lynne Gold-Bikin, Esquire
Chairwoman

Mark DePillis
Secretary

John M. Tallman
Member

Maria Mengel
Member

Judith A. Vicchio
Member

Date of Mailing: