

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

APPLICATION OF KING OF PRUSSIA VOLUNTEER FIRE COMPANY

NO. 2014-26

**PROPERTY: 170 ALLENDALE ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves a request for a use variance to permit an electronic changeable sign in the C-1 Commercial Office zoning district. The applicant is the owner of the property.

On November 19, 2014, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on application no. 2014-26 of the King of Prussia Volunteer Fire Company. Members of the ZHB present at the hearing were: Lynne Gold-Bikin, Esq., Chairwoman; 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. The applicant was represented by Edmund J. Campbell, Jr., Esq. of the law firm of Campbell Rocco Law LLC.

After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. The applicant, King of Prussia Volunteer Fire Company ("Fire Company"), is the owner of a C-1 Commercial Office property located at 170 Allendale Road (the "Property").

2. The Property consists of 1.96 acres. [Ex. A-1] The Property is used as and for Fire Company's firehouse and related facilities. [Exs. A-1; A-3]

3. The Property contains an existing sign which is 5' x 4' and internally illuminated. [Ex. A-1]

4. Fire Company proposes a double-sided 24 square foot (4' x 6') sign, with each side containing a changeable "component for digital messages" (the "Sign"). [Ex. A-1]

5. Fire Company requests a use variance from section 165-168 of the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance") to permit a changeable digital face on each side of the Sign.

6. Section 165-168 of the Zoning Ordinance sets forth the regulations with respect to signage in the C-1 Commercial Office zoning district. Business signs are permitted within the C-1 Commercial Office district, subject to the requirements of Section 165-168. Section 165-168 does not permit changeable signs in the C-1 Commercial Office zoning district. Changeable signs are only permitted (1) in the C-3 district and (2) on school and church properties.

7. A changeable sign is not a permitted use on the Property.

ZHB HEARING

8. Fire Company offered the testimony of one witness, Mark Forster, Chairman of Fire Company's Board of Directors.

9. Mr. Forster's testimony was as follows:

- Fire Company's primary facility is located on the Property. [N.T. p. 7]
- There is an existing sign along Allendale Road. [Ex. A-3; N.T. p. 11]
- The Sign as proposed is 6' in height by 4' in width. [N.T. p. 12, Ex. A-1]
- The bottom 2' of the Sign consists of a "digital message area" (the "Digital Component"). [N.T. p. 12]
- The top 4' of the Sign is, essentially, the same as the existing static sign, and identifies Fire Company. [N.T. pp. 12-13]
- The Sign will be placed on the same brick foundation used for the existing sign. [N.T. p. 12] The brick foundation is 29" in height. [N.T. p. 13]
- The existing sign is approximately 1' shorter than the proposed Sign. [N.T. pp. 21-22]
- The proposed Sign is taller, with a height of 8'5". [N.T. p. 13]
- The Digital Component of the Sign will contain digital messages consisting of letters or numbers. [N.T. p. 14]
- The Digital Component of the Sign will be used for recruitment of new members and for advertising fundraising events on the Property. [N.T. p. 14]
- The Digital Component will be controlled from a laptop computer. [N.T. p. 14]

- Fire Company presently uses a sign with changeable static letters to display messages. [N.T. p. 18]
 - Forster did not know how often the message on the existing static-letter sign is changed. [N.T. p. 19] Forster testified that the existing static-letter sign is generally blank unless an event is advertised. [N.T. p. 19]
 - Forster testified that the existing static-letter sign is underutilized. [N.T. p. 19]
 - Fire Company plans on having a rotation of messages at any given time of 3-4 messages on the Sign. [N.T. p. 20]
 - Fire Company would keep the Sign on 24 hours a day, 7 days a week. [N.T. p. 21]
10. One resident, Diana Sherlock, directly connected to Fire Company, testified in

support of the application:

- Sherlock is the treasurer for Fire Company. [N.T. p. 25]
- Sherlock is in favor of the Sign for purposes of bringing revenue to the Fire Company. [N.T. p. 25]
- Sherlock clarified that Fire Company changes the existing static-letter sign on a “minimal basis”. [N.T. p. 26]

INSUFFICIENCY OF THE EVIDENCE

11. Fire Company failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB’s grant of the requested use variance.

12. Fire Company failed to offer proof that the use variance would be necessary to permit a reasonable use of the Property. To the contrary, the Property is being reasonably used

for Fire Company's firehouse and related facilities. The Property presently contains an existing sign that Fire Company utilizes to display its messages and identify Fire Company.

13. Fire Company failed to offer proof that the requested variance is the minimum variance that would afford relief.

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 (Pa. 1990).

Variations should be granted sparingly, and the reasons for granting variations must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). "The burden on a landowner seeking a variance is a

heavy one, and the reasons for granting the variance must be substantial, serious and compelling.” *Bawa Muhaiyaddeen Fellowship v. Philadelphia Zoning Bd. of Adjustment*, 19 A.3d 36, 39-40 (Pa. Commw. Ct. 2011) (citing *Valley View Civic Assoc. v. Zoning Bd. of Adjustment*, 462 A.2d 637 (Pa. 1983)). “Further, a use variance carries a greater risk of injury to the public interest than a dimensional variance.” *Id.* at 40. Therefore, the burden carried by an applicant seeking a use variance is high. *See id.*

An applicant for a use variance has the burden of proving that “(1) the proposed use is not contrary to the public interest and (2) the property involved is subjected to an unnecessary hardship unique or peculiar to the property itself.” *Zaruta v. Zoning Hearing Bd. of City of Wilkes-Barre*, 543 A.2d 1282, 1284 (Pa. Commw. Ct. 1988). Unnecessary hardship can be demonstrated by:

...either (1) showing that the physical characteristics of the property are such that it could not be used for a permitted use or that the physical characteristics were such that it could only be arranged for such purpose at a prohibitive expense, or (2) by proving that the characteristics of the area were such that the lots had either no value or only a distress value for any purpose permitted by the zoning ordinance.

Id. (citing *Appeal of Nardozza*, 405 A.2d 1020 (Pa. Commw. Ct. 1979)).

- 1. Fire Company failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying a use variance to permit the desired changeable, digital, sign.**

Fire Company requested a use variance to permit the changeable digital Sign on the Property. Despite the heavy burden borne by Fire Company in requesting a use variance, Fire Company did not prove that an unnecessary hardship exists on the Property to justify the

desired sign. Far from demonstrating that the Property could not be used for a permitted use, or that engaging in a permitted use on the Property would be prohibitively expensive, Fire Company's testimony established that the Property is presently being used as the main location of its firehouse. Fire Company already has a large, readily identifiable and illuminated sign on the Property, the existing sign has changeable text which is and can be used to display Fire Company's messages, and even though it has an existing changeable sign, it rarely has a need for the sign.

Fire Company similarly did not prove that the characteristics of the area were such that the Property has no value, or only distress value, for a permitted use.

Fire Company merely articulated its "personal" desire to add a changeable digital sign to the Property, notwithstanding the fact that such a sign is not permitted in the C-1 Commercial Office zoning district, and notwithstanding the fact that it presently has a functioning changeable sign on the Property. Fire Company offered no evidence that it considered a sign of a permitted nature on the Property.

This application and the evidence offered by Fire Company present the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003) (citing *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (1996)); *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149-150 (Pa. Commw. Ct. 2011). Unnecessary hardship, caused by unique physical circumstances of the property, is required for the grant of a variance. *Nettleton*, 828 A.2d at 1040. For example, in *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa. Commw. Ct. 2001), the court held:

A variance, whether labeled dimensional or use, is appropriate “only where the *property*, not the person, is subject to hardship.” *Szmigiel v. Kranker*, 6 Pa.Cmwlt. 632, 298 A.2d 629, 631 (1972) (emphasis in original). In the present case, Daniels’ property is well suited to the purpose for which it is zoned and actually used, a car dealership, which is in no way burdened by the dimensional requirements of the ordinance. Daniels has proven nothing more than that adherence to the ordinance imposes a burden on his personal desire to sell vehicles for Land Rover.

779 A.2d at 598.

In a case similar to the facts presented here, *Society Created to Reduce Urban Blight (SCRUB) v. Zoning Bd. of Adjustment*, 831 A.2d 1255 (Pa. Commw. Ct. 2003), a property owner sought to install a mounted, single-face, wall-wrap display on a commercial building. The first floor of the building was used as a beauty salon, and the remaining 8 stories were empty. *Id.* at 1257. The owner asserted that the rental income from the beauty salon was not sufficient to cover the expenses of the property.

In holding that the asserted hardship did not warrant the grant of a use variance, Commonwealth Court noted:

Further, a party seeking a variance bears the burden of proving, *inter alia*, that an unnecessary hardship will result if the variance is not granted. *Society Created to Reduce Urban Blight v. Zoning Board of Adjustment*, 804 A.2d 116, 119-120 (Pa.Cmwlt.2002). Absent a finding that property will be rendered valueless, financial hardship alone is not a sufficient basis for granting a variance. *Id.* at 120. Typically, the loss of rental income from disallowed outdoor advertising signs is not an unnecessary hardship. *Id.* (collecting cases). Under the Zoning Code, the applicant must also present evidence that the conditions on which the appeal for a variance is based are unique to the property and that the special conditions or circumstances forming the basis for the variance did not result from the actions of the applicant. Zoning Code, § 14-1802(1)(b) and (d).

Here, the only hardship asserted by Applicant was a financial hardship. ... The denial of a variance will have no effect on the ability of the property to continue to be used for purposes permitted in a C-5 Commercial District.

Id. at 1262.

Here as well, the Property is well suited for its present use – the firehouse for a volunteer fire company with an existing identification and changeable free-standing sign. Fire Company failed to articulate any manner in which the Property is burdened by the requirements of the Zoning Ordinance. As with the *SCRUB* property, the Property can be utilized, and is being utilized, for a use permitted in the C-1 Commercial Office zoning district. Fire Company's desire to utilize the Sign to raise revenue through, *e.g.*, fundraising, is insufficient to establish and unnecessary hardship. *Id.* Fire Company merely demonstrated, as in *Yeager*, its personal preference for an unpermitted sign, despite the Property's present, reasonable, use. This desire is insufficient to entitle Fire Company to the requested use variance.

2. Fire Company failed to prove the requested variance is the minimum needed to afford relief.

Fire Company was required to provide evidence that the use variance requested represent the minimum necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa.Cmwlt. 1999). Fire Company failed to offer any proof that the requested use variance was the minimum necessary to afford relief. To the contrary, testimony reveals that (1) the Property presently contains Fire Company's firehouse; (2) the Property presently contains a changeable sign used by Fire Company to display the same

information it would display on the Sign; and (3) Fire Company failed to consider other, permitted, options to display the desired messages.

Under these circumstances, Fire Company failed to prove that the requested use variance represents the minimum necessary to afford relief.

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. Fire Company has standing to seek the requested use variance as the legal 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. Fire Company failed to demonstrate any unnecessary hardship entitling it to a use variance from section 165-168 of the Zoning Ordinance to permit a changeable, digital, Sign.

6. Fire Company failed to demonstrate that the use variance is necessary to permit a reasonable use of the Property.

7. Fire Company failed to demonstrate that the requested use variance represents the minimum necessary to afford relief.

8. Accordingly, Fire Company failed to sufficiently demonstrate its entitlement to the requested use variance.

At its November 19, 2014 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 19th day of November, 2014, the Zoning Hearing Board DENIES the request for variances from the following section of the Upper Merion Township Zoning Ordinance of 1942, as amended:

- 165-168.Q Animated and changeable signs to install an electronic activated changeable freestanding sign approximately 4 feet in width and 6 feet in height.

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.

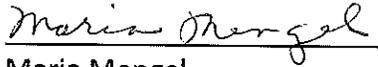
Written notice of the ZHB's decision was mailed to Fire Company on November 20, 2014.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

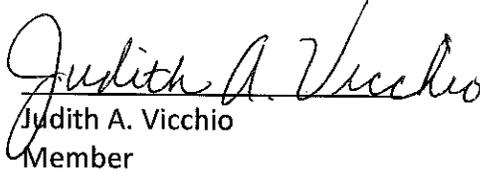
Lynne Gold-Bikin, Esq.
Chairwoman



Mark DePillis, Esq.
Secretary



Maria Mengel
Member



Judith A. Vicchio
Member

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