

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2010-26 : **HEARING DATE:** November 17, 2010
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APPLICATION OF: King of Prussia : **DECISION DATE:** December 15, 2010
Hotel Associates, L.P. :
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PROPERTY: 240 Mall Boulevard :
:
Upper Merion Township :

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

The Applicant, King of Prussia Hotel Associates, L.P., (hereinafter referred to as the “Applicant”), filed an application requesting an appeal of the Zoning Officer’s determination that the Pennsylvania Turnpike does not qualify as frontage under the Township Zoning Ordinance. In the alternative, the Applicant is requesting a variance to Section 165-168A(3) to permit a sign to be erected on the building elevation facing the Pennsylvania Turnpike. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on November 17, 2010 at the Upper Merion Township Building. All members of the Zoning Hearing Board, except William C. Whitmore, Sr., were present as well as the Solicitor, Zoning Officer, and Court Reporter. Brad Murphy, the alternate for the board, sat in place of Mr. Whitmore.

FINDINGS OF FACT

1. The Applicant is King of Prussia Hotel Associates, L.P., N. Building 500, 8100 E. 22nd Street, Wichita, KS 67266.
2. The Applicant is the legal owner of the subject property.
3. The property is located at 240 Mall Boulevard, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was represented by Debra A. Shulski, Esq., Riley Riper Hollin & Colagreco, 717 Constitution Drive, Suite 201, Exton, PA 19341.
5. The property is zoned “SC ” Shopping Center.
6. The lot is approximately 6.524 acres.
7. The Applicant is requesting that part of the permitted signage be erected on an elevation that is not otherwise permitted in the code.
8. The Applicant is not asking for any additional square feet of signage than what is permitted in the code.
9. The sign proposed for the elevation facing the Turnpike is only 60 sq. ft.
10. Other hotels in the area have signs that face the Turnpike.
11. The Applicant introduced the following exhibits:
 - Exhibit “A-1” – Zoning Hearing Board Application
 - Exhibit “A-2” – Deed
 - Exhibit “A-3” – Aerial Map
 - Exhibit “A-4” – Site Plan
 - Exhibit “A-5” – Rendering of Hotel

Exhibit “A-6” – Sign Plan

Exhibit “A-7” – Photographs of existing signage on the Turnpike

12. The Applicant’s proposal is consistent with the character of the neighborhood.
13. The Applicant’s proposed use of the property is for a hotel and restaurant.
14. The property is uniquely situated in that it is triangular in shape and has minimal frontage on Mall Boulevard.
15. The property also fronts on the Pennsylvania Turnpike, but does not take access from the Turnpike.
16. Due to the topography in the area, the property is difficult to locate because it is beneath the streetscape and the visibility is blocked by other large buildings.
17. The Applicant agreed to withdraw the Applicant’s request for an interpretation and/or appeal of the zoning officer’s determination and only proceed with the variance request.
18. There were no residents who testified in favor of the project.
19. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, King of Prussia Hotel Associates, L.P., filed an application requesting an appeal of the Zoning Officer’s determination that the Pennsylvania Turnpike does not qualify as frontage under the Township Zoning Ordinance. In the alternative, the Applicant is requesting a variance to Section 165-168A(3) to permit a sign to be erected on the building elevation facing the Pennsylvania Turnpike.

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. Cmwlt. 2002); Cardamone v. Whitpain Township Zoning Hearing Board, 771 A.2d 103 (Pa. Cmwlt. 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. Cmwlt. 1999); Sotereanos, Inc. v. Zoning Board of Adjustment of the City of Pittsburgh, 711 A.2d 549 (Pa. Cmwlt. 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. Cmwlt. 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. Cmwlt. 1995); Appeal of Lester M. Prang, Inc., 169 Pa. Cmwlt. 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 subject property is situated in the shopping center zoning district and is approximately 6.5 acres in size. The property has unique characteristics in that it is triangular in shape and is adjacent to two (2) roads, both the Mall Boulevard and the Pennsylvania Turnpike. It does not have frontage on the Turnpike because it does not take access from the Turnpike, however, the Applicant would like to erect a small sign on the elevation that faces the Turnpike. The signage proposed is less than or equal to the total amount of square footage that is permitted under the sign code and the only relief being sought is the location of one wall sign on the elevation that faces the Turnpike. The proposed sign on the elevation facing the Turnpike, is only 60 sq. ft. in size, therefore, it would not present any kind of a distraction to the motoring public. The uses in the area, such as other hotels, have signage that face the Turnpike.

The property is unique in that it has some unusual site constraints and very limited visibility of the building. Because of the property's uniqueness and the fact that the proposal is not injurious to the public safety, health and welfare, it is sufficient to satisfy the standards of the Hertzberg case, therefore, the variance 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 165-168A(3) to permit a sign to be erected on the building elevation facing the Pennsylvania Turnpike. This variance is conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on November 17, 2010.

Decision Dated: December 15, 2010

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

Robert J. Montemayor – Chairman - (deny)

Mark S. DePillis, Esq. – Vice Chairman – (approve)

Brad Murphy - Alternate - (approve)

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.