ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-10	:	**HEARING DATE:** May 18, 2011
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APPLICATION OF: King Shooters Supply, Inc.	:	**DECISION DATE:** June 15, 2011
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PROPERTY: 346 E. Church Road	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, King Shooters Supply, Inc., (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-153(A) in order to permit retail sales. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on May 18, 2011 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 Shooters Supply, Inc., 124 W. Church Road, King of Prussia, PA 19406.
2. The legal owner of the subject property is Twinbrook Realty Partnership, L.P., by RGE Investment Co., LLC, General Partner, 346 E. Church Road, King of Prussia, PA 19406.

3. The property is located at 346 E. Church Road, King of Prussia, PA 19406, Upper Merion Township.

4. The Applicant was represented by Michael E. Furey, Esq., Furey & Baldassari, PC, 1043 S. Park Avenue, Audubon, PA 19403.

5. The property is zoned "HI" Heavy Industrial.

6. The lot is approximately one (1) acre.

7. The Applicant currently operates its business at 124 W. Church Road in Upper Merion Township.

8. The Applicant is proposing to move its business to the subject property, which is in the "HI" Heavy Industrial Zoning District.

9. The Applicant manufactures bullets and engages in the retail and wholesale sale of firearms related accessories.

10. The Applicant is requesting a special exception under Section 165-153(C)(1)(d) of the zoning ordinance to permit the Applicant's business on the premise that the use is noxious or offensive by reason of odor, dust, fumes, smoke, gas, vibration, illumination or noise.

11. The Applicant is also requesting an interpretation that the proposed parking lot is non-conforming and, in the alternative, is requesting a variance to Section 165-157 to permit parking in the required front yard as shown on the plans.

12. The Applicant is also requesting an interpretation that the existing buffer area by the front lot line is an existing non-conforming condition and that no additional buffer or plantings are required. In the alternative, the Applicant is requesting variances.

13. The Applicant is requesting interpretation that the proposed stairs and ADA ramp to be located in the required front yard are extensions of an existing lawful non-conforming structure and permitted by right. In the alternative, the Applicant is asking for variances.

14. The Applicant is requesting a variance to permit its intended use of the property, which is retail sales in the "HI" Heavy Industrial Zoning District.

15. The Applicant introduced a packet of exhibits and marked them as Exhibit "A-1" through Exhibit "A-8" containing the following:

    Exhibit "A-1" - Application and Narrative

    Exhibit "A-2" - Deed

    Exhibit "A-3" - Tax Assessment Information and Tax Map

    Exhibit "A-4" - Legal Owner Authorization and Agreement of Sale Excerpt

    Exhibit "A-5" - Property Photos

    Exhibit "A-6" - Zoning Map and Zoning Table

    Exhibit "A-7" - Surrounding Property Photos

    Exhibit "A-8" - Plan

16. At the time of the hearing, the Applicant withdrew its request for a special exception.

17. At the time of the hearing, the Applicant withdrew all interpretations that were presented with the application and all requests to declare any features as being non-conforming.

18. The Applicant currently has three (3) employees.

19. The retail use will be on the first floor only.

20. The Applicant is licensed by the appropriate state and federal authorities.

21. The Applicant agreed as a condition of approval to limit the retail use to the first floor only and have it be contained within 1,600 sq. ft. or less of the first floor.

22. Several people attended the hearing and testified in favor of the Applicant.

23. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, King Shooters Supply, Inc., filed an application requesting a variance to Section 165-153(A) in order to permit retail sales.

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 is proposing a retail and manufacturing firearms and ammunition supply facility. The retail use requires a use variance. Because it is a use variance and not a dimensional variance, the five-part criteria of the Municipalities Planning Code as outlined above, is the relevant standard that the Applicant must satisfy. Through the use of testimony and exhibits, the Applicant sufficiently satisfied the five-part criteria of the Municipalities Planning Code, therefore, the use variance for a retail use should be granted. The Applicant agreed as a condition of approval that the retail use will be limited to the first floor and it will be contained in an area no greater that 1,600 sq. ft.

The Applicant withdrew the special exception under the section of the code in the "HI" Heavy Industrial Zoning District that would actually require the Applicant to prove just how bad the use is before he would qualify for a special exception. Fortunately, the Applicant withdrew this request because it was no longer necessary after the board decided to grant a variance. The Applicant also withdrew the interpretation request and, in the alternative, the applicable variances, because the zoning officer ruled in a manner consistent with the Applicant's interpretation, therefore, it was not necessary for the Applicant to pursue the interpretation

because the zoning officer agreed with the Applicant, therefore, there was no dispute pending before the board. In turn, the Applicant withdrew the relevant variances and interpretation requests.

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 165-153(A) in order to permit retail sales. This variance is conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on May 18, 2011.

2. The retail use must be limited to a total of 1,600 sq. ft. or less and it must be wholly contained within the first floor of the facility.

Decision Dated: June 15, 2011

UPPER MERION TOWNSHIP
ZONING HEARING BOARD

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Robert J. Montemayor - Chairman

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Mark S. DePillis, Esq. – Vice Chairman

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Brad Murphy - 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.