ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-11	:	**HEARING DATE:** June 1, 2011
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APPLICATION OF: 145 West Dekalb Associates, L.P.	:	**DECISION DATE:** July 15, 2011
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PROPERTY: 145 W. Dekalb Pike	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, 145 West Dekalb Associates, L.P., (hereinafter referred to as "Applicant"), filed an application requesting variances to the following Sections:

1. A variance from Section 165-106 to allow and permit gasoline sales in the C-1 commercial district.

2. A variance from Section 165-191 to allow a total number of one hundred and forty three (43) parking spaces on-site, whereas, under the code, two hundred and twenty (220) overall spaces would be required for the combined Wawa and Chick-Fil-A uses.

3. A variance from Section 165-195.A to allow a Chick-Fil-A to have no designated loading space, whereas, under the code, one loading space is required for that use.

4. A variance from Section 165-168.A(1) to allow 590.84 sq. ft. of total signage on-site, whereas, under the code, a maximum of 200 sq. ft. is permitted.

5. A variance from Section 165-168.K(2) to allow the Chick-Fil-A ground sign zero ft. vertical underclearance, whereas, an 8 ft. underclearance is required when the proposed sign is located less than 15 ft. from a curbline.

6. A variance from Section 165-168.K(3)(b) to allow Chick-Fil-A a ground sign of 50 sq. ft. and Wawa a ground sign of 50 sq. ft., whereas, under the code, 35 sq. ft. maximum is allowable on lots one (1) acre to five (5) acres.

7. A variance from Section 165-168.H(1) to allow Wawa a total of eight (8) pump signs under the canopy, whereas, under the code, no more than one (1) such undercanopy sign is permitted per public entrance.

8. A variance from Section 165-168.N to allow Chick-Fil-A two (2) directional signs, whereas, under the code, directional signs are only permitted for a public or quasi-public nature.

9. A variance from Section 165-168.Q(2) to allow both Wawa and Chick-Fil-A to provide changeable copy signs on their ground signs, whereas, under the code, changeable copy signs are only permitted in the C-3 District.

10. A variance from Section 165-168.Q(3)(b) to allow the changeable copy price sign on the Wawa ground sign to be 35 sq. ft. and the changeable copy on the Chick-Fil-A ground sign to be 31.25 sq. ft., whereas, under the code, 20 sq. ft. is maximum and is allowable only on school and church properties.

11. A variance from Section 165-168.Q(3)(c) to allow zero (0) ft. vertical clearance under the Wawa changeable copy price sign and Chick-Fil-A changeable copy areas of the respective free standing signs, whereas, under the

code, 8 ft. minimum vertical clearance is required and is only permitted on school and church properties.

12. A variance from Section 165-168.K(2) to allow the outdoor advertising ground sign zero (0) ft. vertical underclearance, whereas, an 8 ft. underclearance is required when the proposed sign is located less than 15 ft. from a curbline.

13. A variance from Section 165-168.K(1) to allow the outdoor advertising ground sign a height of 22 ft., whereas, under the code, a height of 15 ft. is allowable.

14. A variance from Section 165-168.K(3) to allow the outdoor advertising ground sign an area of 128 sq. ft., whereas, under the code, 35 sq. ft. maximum is allowable on lots one (1) acre to five (5) acres.

15. A variance for rear yard buffer that was withdrawn at the time of the zoning hearing.

This application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on June 1, 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 145 West Dekalb Associates, L.P., 636 Old Yorktown Road, Jenkintown, PA 19046.
2. The Applicant is the legal owner of the subject property.

3. The property is located at 145 W. Dekalb Pike, King of Prussia, PA 19406, Upper Merion Township.
4. The Applicant was represented by Robert J. Kerns, Esq., Kerns, Pearlstine, Onorato & Hladik, LLP, 298 Wissahickon Avenue, North Wales, PA 19454.
5. The property is zoned "C-1" Commercial.
6. The lot is approximately 180,202 sq. ft.
7. The property was originally zoned "CO" and then changed to "C-1".
8. The Applicant owns two (2) properties commonly referred to as Sports Authority on one property and Petco on the other property.
9. The Petco property had a long term lease that prohibited both properties from being developed in a unified manner. The lease for the Petco property has now been terminated and the Applicant would like to develop the property in a unified manner.
10. Joseph Pizonka, Esq., solicitor for the Township entered his appearance on behalf of the Township, although it was not noted whether they were in favor or opposed to the application.
11. At the time of the hearing, the Applicant withdrew a variance for the minimum number of parking spaces, as well as the variance regarding a designated loading space because the variances were no longer necessary.
12. The Applicant also withdrew the variance regarding the sale of gasoline because the zoning officer interpreted gasoline sales to be retail, thereby, permitted in the zoning district.
13. The variance requesting rear yard buffer was also withdrawn because the Applicant complies with the code.

14. The zoning officer testified at the hearing and indicated that gasoline sales are permitted in the zoning district because it is a retail product.

15. The Applicant introduced the following exhibits:

Exhibit "A-1" -	Zoning Application
Exhibit "A-2" -	Deed
Exhibit "A-3" -	Curriculum Vitae of Ronald Klos
Exhibit "A-4" -	Curriculum Vitae of Greg Richardson
Exhibit "A-5" -	Curriculum Vitae of Van Rieker
Exhibit "A-6" -	Curriculum Vitae of John R. Martinez
Exhibit "A-7" -	Revised Site Plan (dated May 9, 2011)
Exhibit "A-8" -	Aerial photos of existing view and concept image
Exhibit "A-9" -	Concept images and existing view photograph
Exhibit "A-10" -	Concept image depiction
Exhibit "A-11" -	Photos of existing signage
Exhibit "A-12" -	Depictions of Chick-Fil-A signs
Exhibit "A-13" -	Depictions of Wawa signs
Exhibit "A-14" -	Depictions of proposed outdoor parking lot lighting
Exhibit "A-15" -	New parking ordinance
Exhibit "A-16" -	Outdoor lighting ordinance
Exhibit "A-17" -	Landscaping ordinance
Exhibit "A-18" -	Wawa comparison schedule
Exhibit "A-19" -	Traffic and parking report

16. The Applicant is proposing two (2) buildings on the property that was known as the Petco property.
17. The building comprising a Wawa will be approximately 6,018 sq. ft.
18. The other building will be a Chick-Fil-A Restaurant.
19. Surrounding the Wawa building, there will be ninety-three (93) parking spaces and surrounding the Chick-Fil-A building, there will be forty-nine (49) parking spaces.
20. The proposal is consistent with the character of the surrounding neighborhood.
21. The Applicant originally was seeking a total of 590.84 sq. ft. of total signage on the site, whereas the code provides a maximum of 200 sq. ft.
22. The Applicant is proposing electronic signage for gasoline prices. The Applicant has agreed to limit the changing of the electronic message to no more than two (2) times per day.
23. The Applicant amended the proposed signage package to eliminate the "C" from the rear of the Chick-Fil-A property.
24. There was some discussion regarding a sign that is located on another property, but labeled as off-premise signage for the subject property. Although the sign is, in fact, off-premise and related to the subject property, it is actually located on a different property, therefore, the Applicant withdrew the variance request for an off-premise sign and intends to file an application for the other property in the near future.
25. The Applicant amended the proposed sign package at the hearing to reduce the rear Wawa sign to less than 50 sq. ft.
26. At the time of the hearing, the application was amended to a total sign square footage of 450 sq. ft. for the subject property.

27. The application is amended to reflect 220 sq. ft. for Wawa and 230 sq. ft. for Chick-Fil-A.

28. The subject parcel is a unique parcel that requires additional signage to adequately advertise the two (2) different uses on the parcel.

29. The Applicant introduced an additional exhibit indicating various sign elevations and marked it as Exhibit "A-20".

30. There were no residents who testified in favor of the project.

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

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, 145 West Dekalb Associates, L.P., filed an application requesting the above referenced variances.

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 requested a series of variances primarily involving signage. The parcel is unique. The Applicant owns the adjacent parcel and the subject parcel. The Applicant, through the encouragement of the Township, has agreed to develop the two (2) parcels in a unified manner. The Applicant was prohibited from developing the parcels in a unified manner previously, because the subject parcel was under a long term lease, however, as the property next door was developed, there were a series of cross-easements and other related items that fostered the ability to have a unified development. Now the subject property is not under a long term lease and it is being developed into both a Wawa and a Chick-Fil-A. Both Wawa and Chick-Fil-A have various sign packages that are necessary to make their businesses successful. The property is unique because of the attempt to build it as a unified

development. The property also has unique physical characteristics that justify the issuance of sign variances to properly identify the properties. There were a series of amendments at the time of the hearing that reflect various concessions by the developer that made the sign package more conservative and acceptable to the board. The amended sign package is the minimum relief necessary to properly advertise the businesses. The proposal is consistent with the character of the neighborhood because the surrounding area is comprised of all commercial uses. The Applicant has the burden of satisfying the standard of proof for the criteria outlined above and through the use of testimony and exhibits, the Applicant has satisfied that standard, therefore, the amended list of variances should be granted.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

The following variances are hereby granted:

Variance #4. A variance from Section 165-168.A(1) to allow 450 sq. ft. of total signage on-site, whereas, under the code, a maximum of 200 sq. ft. is permitted.

Variance #5. A variance from Section 165-168.K(2) to allow the Chick-Fil-A ground sign zero ft. vertical underclearance, whereas, an 8 ft. underclearance is required when the proposed sign is located less than 15 ft. from a curbline.

Variance #6. A variance from Section 165-168.K(3)(b) to allow Chick-Fil-A a ground sign of 50 sq. ft. and Wawa a ground sign of 50 sq. ft., whereas, under the code, 35 sq. ft. maximum is allowable on lots one (1) acre to five (5) acres.

Variance #7. A variance from Section 165-168.H(1) to allow Wawa a total of eight (8) pump signs under the canopy, whereas, under the code, no more than one (1) such undercanopy sign is permitted per public entrance.

Variance #8. A variance from Section 165-168.N to allow Chick-Fil-A two (2) directional signs, whereas, under the code, directional signs are only permitted for a public or quasi-public nature.

Variance #9. A variance from Section 165-168.Q(2) to allow both Wawa and Chick-Fil-A to provide changeable copy signs on their ground signs, whereas, under the code, changeable copy signs are only permitted in the C-3 District.

Variance #10. A variance from Section 165-168.Q(3)(b) to allow the changeable copy price sign on the Wawa ground sign to be 35 sq. ft. and the changeable copy on the Chick-Fil-A ground sign to be 31.25 sq. ft., whereas, under the code, 20 sq. ft. is maximum and is allowable only on school and church properties.

Variance #11. A variance from Section 165-168.Q(3)(c) to allow zero (0) ft. vertical clearance under the Wawa changeable copy price sign and Chick-Fil-A changeable copy areas of the respective free standing signs, whereas, under the code, 8 ft. minimum vertical clearance is required and is only permitted on school and church properties.

The above variances are granted with the following conditions:

1. The Applicant must comply with the testimony presented by the Applicant at the hearing on July 6, 2011. Due to the numerous amendments and changes throughout the course of the testimony, the board hereby incorporates the notes of testimony that are attached hereto and the Applicant must comply with the testimony in the attached transcript.

2. The "C" sign in the rear of the Chick-Fil-A will be eliminated.

3. The maximum square footage for the rear Wawa sign will be 50 sq. ft.

4. All other variances not referenced above were withdrawn at the time of the hearing.

Decision Dated: July 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.