

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-17 : **HEARING DATE:** July 6, 2011
:
APPLICATION OF: Blue Star Henderson : **DECISION DATE:** August 3, 2011
Enterprises, LP :
:
:
PROPERTY: 125 W. Dekalb Pike :
:
Upper Merion Township :

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

The Applicant, Blue Star Henderson Enterprises, LP, (hereinafter referred to as the “Applicant”), filed an application requesting the following variances to the Upper Merion Township Zoning Ordinance (“Zoning Ordinance”):

- 1) A variance to Section 165-168.K(2) to allow a zero (0) foot clearance ground sign when the proposed sign is less than 15 ft. from a curb line.
- 2) A variance to Section 165-168.K(1) to allow the sign to exceed the allowable height of 15 ft.
- 3) A variance to Section 165-168.K(3)(b) to allow the sign to exceed the allowable area of 35 ft.
- 4) A variance to Section 165-168.1 to allow a billboard outside the 200 ft. overlay area of the Pennsylvania Turnpike right-of-way line.
- 5) A variance to Section 165-168.E(1) to allow the proposed billboard to be located within 1,500 ft. from any other billboard.
- 6) A variance from Section 165-168.E(2) to allow the proposed billboard to be located within 500 ft. of a residential district.

The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on July 6, 2011 (“Zoning Hearing”) 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 Blue Star Henderson Enterprises, 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 125 W. Dekalb Pike, King of Prussia, PA 19406, Upper Merion Township and is further identified as Tax Parcel #58-00-06292-00-4 (“Property”).
4. The property is zoned “C-1” Commercial Zoning District.
5. The lot is approximately 4.475 acres.
6. Sports Authority, a retail sporting goods store, is the only structure currently located on the Property.
7. The Applicant was represented by Robert J. Kerns, Esq., Kerns, Pearlstine, Onorato & Hladik, LLP, 298 Wissahickon Avenue, North Wales, PA 19454.
8. E. Van Rieker, accepted by the Zoning Hearing Board as a land development expert, testified on behalf of the Applicant
9. The following were marked as exhibits at the Zoning Hearing:
Exhibit “A-1”: Package of Exhibits prepared by the Applicant identified as follows:
 1. Zoning Application (includes a deed to the subject property);

2. Curriculum Vitae for Van Rieker;
3. Enlarged revised site plans;
4. Revised site plans (reduced size copy);
5. Photographs of existing sign on Henderson Road;
6. Depiction of proposed sign on Henderson Road;
7. Side by side comparison of existing sign against proposed sign.
8. Photographs of other similar signs within Upper Merion Township.

Exhibit "A-2": Aerial;

Exhibit "A-3": Henderson Square Sign;

Exhibit "A-4": Proposed Sign;

Exhibit "A-5": Site Plan.

10. The Applicant is seeking to replace a sign currently located upon property along Henderson Road with another sign which will advertise Sports Authority, Wells Fargo Bank, Chick-fil-A and Wawa. See Exhibit A-4.
11. The proposed sign is an on-premises sign as to Sports Authority and is an off-premises sign for Wawa, Wells Fargo and Chick-fil-A.
12. The existing sign proposed to be replaced is located on the Wells Fargo property.
13. The Property and the adjacent property, 145 Dekalb Pike (145 Dekalb Pike Property") owned by 145 West Dekalb Associates, L.P., were contemplated by the Township as a unified development as part of land development. Wawa and Chick-fil-A are proposed for the 145 Dekalb Pike Property.
14. Bruce Goodman is a principal and has an ownership interest in both the subject Property and the 145 Dekalb Pike Property.
15. The Applicant is proposing one, free-standing sign at the one driveway off of Henderson Road that services the unified development and Wells Fargo. See Exhibit A-1, #4.

16. The surrounding uses to the Property are essentially commercial uses.
17. The copy on the proposed sign is 40.55 square feet.
18. Billboard is defined in the Zoning Ordinance as follows:

A sign which has a sign area larger than 50 square feet and which directs attention to a business, commodity, service, entertainment, facility or other subject matter not located, conducted, sold or offered upon the premises where such sign is located or which calls public attention to a candidate, cause, public issue or other such subject matter and which may be either freestanding or mounted upon the roof or wall of a building.

19. The proposed sign is not a billboard as defined by the Zoning Ordinance.
20. Zoning Ordinance section, 165-168.K, states in relevant part as follows:

K. Ground or freestanding signs. A ground or freestanding sign shall be permitted in the CO, C-1, C-2, C-3, AR, AR-1, SM, SM-1, LI and HI Districts, subject to the following regulations:

- (1) The overall height of such signs shall not exceed 15 feet.
- (2) Whenever such signs are to be located within 15 feet of the curblinor or the edge of the paved road, said signs shall have a minimum vertical clearance of eight feet.
- (3) The size of such signs shall be limited as follows:
 - (b) On lots of one acre or more but less than five acres, 35 square feet in size.

21. The proposed sign will be internally illuminated. See Exhibit "A-4". The copy on the proposed signage will only identify the user. There will be no additional advertising on the proposed signage and the copy will remain static.
22. The 4 panels on the proposed sign are from top to bottom: Sport Authority, Chick-fil-A, Wawa and Wells Fargo. See Exhibit "A-4".

23. The copy for Wells Fargo is located at the bottom of the proposed sign and, although internally illuminated, the letters will only be seen. See Exhibit “A-4”.
24. The proposed sign is 18 feet in height whereas 15 feet is permitted.
25. The nearby Henderson Square sign is very similar to the proposed sign. See Exhibit “A-3”.
26. The current structure on the Property, Sports Authority, will not change and will continue its current operating hours and have the same number of employees.
27. The Applicant indicated that there is an agreement with Wells Fargo as to the removal of the existing sign.
28. The Property is unique in that it is contemplated as a unified development with the 145 Dekalb Pike Property and, therefore, there are four (4) principal users on 8+ acres of land .
29. One sign as compared to four (4) individual signs is preferable.
30. The proposed signage is located outside the clear site triangle.
31. Ken Forman, 971 Natton Ct.; Mark McKie, 1091 Jones Road; and Frank Giaccio, 100 Tyler Road, testified against the project
32. There were no residents who testified in favor of the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Blue Star Henderson Enterprises, LP, filed an application requesting the following variances:

- 1) A variance to Section 165-168.K(2) to allow a zero (0) foot clearance ground sign when the proposed sign is less than 15 ft. from a curb line.

- 2) A variance to Section 165-168.K(1) to allow the sign to exceed the allowable height of 15 ft.
- 3) A variance to Section 165-168.K(3)(b) to allow the sign to exceed the allowable area of 35 ft.
- 4) A variance to Section 165-168.1 to allow a billboard outside the 200 ft. overlay area of the Pennsylvania Turnpike right-of-way line.
- 5) A variance to Section 165-168.E(1) to allow the proposed billboard to be located within 1,500 ft. from any other billboard.
- 6) A variance from Section 165-168.E(2) to allow the proposed billboard to be located within 500 ft. of a residential district.

Billboard is defined by the Zoning Ordinance as follows:

A sign which has a sign area larger than 50 square feet and which directs attention to a business, commodity, service, entertainment, facility or other subject matter not located, conducted, sold or offered upon the premises where such sign is located or which calls public attention to a candidate, cause, public issue or other such subject matter and which may be either freestanding or mounted upon the roof or wall of a building.

As a preliminary matter, the Zoning Hearing Board determined that the proposed signage is not a billboard, and, therefore, the requested billboard relief, identified as #4 through #6 is inapplicable and moot.

Section 165-168.K of the Zoning Ordinance states in relevant part as follows:

K. Ground or freestanding signs. A ground or freestanding sign shall be permitted in the CO, C-1, C-2, C-3, AR, AR-1, SM, SM-1, LI and HI Districts, subject to the following regulations:

- (1) The overall height of such signs shall not exceed 15 feet.
- (2) Whenever such signs are to be located within 15 feet of the curblin e or the edge of the paved road, said signs shall have a minimum vertical clearance of eight feet.
- (3) The size of such signs shall be limited as follows:

(b) On lots of one acre or more but less than five acres, 35 square feet in size.

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 Applicant requested variances related to the proposed signage's height, location and size. The Property is unique in that it is being developed in a unified manner with the 145 Dekalb Pike Property and there is a common owner of the two (2) properties. The Property also has unique physical characteristics that justify the issuance of the requested sign variances to properly identify the four business on the 8+ acre properties that have one access off of Henderson Road.. The requested relief is the minimum relief necessary to properly advertise the four (4) businesses on the 8+ acres. The height, location and size of the

proposed signage is consistent with the character of the neighborhood because the surrounding area is comprised of all commercial uses. The height, location and size of the proposed signage will not adversely affect the public health, safety or welfare. 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 applicable variances should be granted.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the requested variances related to billboard relief, identified as relief #4 through #6 in this Opinion and Order are inapplicable and moot since the Board finds that the proposes signage is not a billboard.

The Board finds that Applicant presented sufficient testimony to grant the following requested variances:

- 1) A variance to Section 165-168.K(2) to allow a zero (0) foot clearance ground sign when the proposed sign is less than 15 ft. from a curb line.
- 2) A variance to Section 165-168.K(1) to allow the sign to exceed the allowable height of 15 ft.
- 3) A variance to Section 165-168.K(3)(b) to allow the sign to exceed the allowable area of 35 ft.

These variances are conditioned upon the Applicant’s compliance with the testimony of the Applicant at the public hearing on July 6, 2011 and the following:

1. The existing Wells Fargo sign must be removed
2. The panels on the proposed sign shall be four equally-sized panels.

Decision Dated: August 3 , 2011

**UPPER MERION TOWNSHIP
ZONING HEARING BOARD**

Robert J. Montemayor - Chairman

Mark S. DePillis, Esq. – Vice Chairman

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.