ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-009	:	**HEARING DATE:** May 18, 2011
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APPLICATION OF: Avalon Carpet Tile & Flooring	:	**DECISION DATE:** July 15, 2011
	:	
PROPERTY: 316 S. Henderson Road	:	
	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Avalon Carpet Tile & Flooring, (hereinafter referred to as the "Applicant"), is appealing the Zoning Officer's decision to deny a sign permit to be erected on the rear building elevation. In the alternative, the Applicant is requesting a variance to Section 165-168.A(2) and (3) for the same. 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 Sovereign Distributors, Inc., d/a/a Avalon Carpet Tile & Flooring, 2030 Springdale Road, Suite 400, Cherry Hill, NJ 08003.
2. The legal owner of the subject property is KI-Henderson Square Associates, L.P., c/o Kravco Simon Company, 234 Mall Boulevard, King of Prussia, PA 19406

3. The property is located at 316 S . Henderson Road, 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, P.O. Box 1265, Exton, PA 19341.

5. The property is zoned "C-1" Commercial.

6. The subject property contains an existing shopping center known as The Henderson Square Shopping Center and is occupied by various retail stores, including, a Genuardi's, CVS and Avalon Carpet Tile and Flooring Store.

7. The Applicant is proposing to place a wall sign on the rear elevation of the building which fronts Saulin Boulevard.

8. The zoning officer has determined that the property may have a total of 300 sq. ft. of signage and that the signage may be placed on the front elevation facing Monroe Boulevard or on the side elevation facing Henderson Road, but not on the rear of the building which faces Saulin Boulevard.

9. The total sign package proposed by the Applicant is less than 300 sq. ft., therefore, the only issue is the placement of the signage.

10. Avalon is a tenant with permission of the landlord to proceed with the application.

11. On February 9, 2011, the zoning officer issued an opinion denying the Applicant's right to erect signage on the rear elevation of the existing building. The Applicant is now appealing that determination.

12. The Applicant introduced the following exhibits at the hearing:

    Exhibit "A-1" - Zoning Hearing Board Application dated April 4, 2011

    Exhibit "A-2" - Lease Agreement

Exhibit "A-3" - Aerial Photographs

Exhibit "A-4" - Photograph of Existing Signage (on front of building)

Exhibit "A-5" - Photograph of Existing Signage (on side of building)

Exhibit "A-6" - Proposed Signage (on rear of building)

Exhibit "A-7" - Photograph of proposed location for the rear sign

Exhibit "A-8" - Photographs of CVS sign (consisting of 2 sheets)

Exhibit "A-9" - Staples Zoning Hearing Board Decision of November 8, 2000

Exhibit "A-10" - Transcripts from Staples Zoning Hearing

13. In addition to asking for an appeal of the Applicant's zoning interpretation, the Applicant is also asking for a variance and is alleging that the variance is *de minimus*.

14. The Applicant's store has been in existence for a considerable time with the signage that currently exists.

15. Previous requests of a similar nature for the subject parcel have either been denied or withdrawn at the time of the hearing in the past.

16. The Applicant is making the argument that this particular store as contrasted to the other stores in the shopping center should have rear signage because they have access to the rear to pick up products that are sold in the store.

17. The Applicant did not offer any credible testimony indicating that there is a hardship inherent in the land.

18. Although the Applicant attempted to show that the property is unique, it is not different from any other stores in the shopping center and it has adequate visibility on streets where the property takes access.

19. The zoning officer's interpretation denying the signage on the rear elevation was dated February 9, 2011 and the appeal of that determination was dated April 4, 2011.

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

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

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Avalon Carpet Tile & Flooring, is appealing the Zoning Officer's decision to deny a sign permit to be erected on the rear building elevation. In the alternative, the Applicant is requesting a variance to Section 165-168.A(2) and (3) for the same.

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 has filed an appeal of the zoning officer's determination regarding the placement of a sign on the rear elevation of a building. In the alternative, the Applicant is requesting a variance. This board will first consider the interpretation.

This board finds that the interpretation request is moot because it must be filed within thirty (30) days from the date of the interpretation. In this case, the zoning application was received more than thirty (30) days after the zoning officer's determination, therefore, the determination is final. Despite the procedural inadequacies, this board will still rule on the merits of the interpretation. The Applicant is requesting signage on a rear elevation of a building in addition to signage on the front and side elevations of the building. Section 165-168.A(3) is the relevant section and it reads as follows, "The sign area calculated for each frontage shall be erected on that frontage only and shall not be increased by the sign area calculated for another frontage." This section does not permit signage to be placed on an elevation that does not constitute frontage. The definition of building frontage reads as follows, "The linear footage of

building face which serves as the principal approach to a building and which building face fronts upon a public street, a shopping center, driveway, parking area or pedestrian mall or walkway." This definition requires a frontage to be the elevation of the building that fronts upon a public street that is the principal approach to a building. The definition then has a subsection for corner lots which reads as follows, "For corner lots, such footage may be calculated separately for the principal approach and one adjacent face if such face also fronts on a public street or shopping center driveway, public parking area, pedestrian mall or public walkway." When a property is a corner lot, signage can be place on two (2) different elevations, the first of which must be the principal approach and the second would be an adjacent face that also fronts on a public street. One must then turn to the definition of street in the zoning ordinance. That definition reads as follows, "A public or privately owned right of way serving as a means of vehicular and pedestrian travel furnishing access to abutting properties." Once again, the definition of street requires access and the definition of frontage requires access from the street. In this case, the elevation proposed by the Applicant is not the principal access and it is not an adjacent elevation to the façade with the principal access. The zoning officer's interpretation that the rear elevation does not qualify for signage is correct when looking at the definition of frontage and the definition of street. The Applicant simply wants the additional signage for advertising purposes, but is purporting to want it so people can go to the rear of the building to pick up the products that they have already purchased inside the building. If the Applicant's interpretation of the code was correct, then all shopping centers could have signage on front and rear elevations. It doesn't serve any legitimate purpose to direct people to the rear of the store when the only reason to go to the rear of the store is to pick up products which can easily be explained to the customer inside the store.

The board then considered the variance request. The Applicant is making the argument that the variance request is *de minimus*, however, this board does not believe that it is *de minimus*. Ordinarily, a *de minimus* variance is one that involves the magnitude of the request being made. In this case, there is a total prohibition for any signage on a rear elevation, therefore, how can it be a *de minimus* request when it is a total prohibition. This is not a situation where a 10 ft. side yard setback is required and the Applicant is proposing 9 ft. 11 ins. for a setback, but rather this is a situation where there is a total prohibition of any signage on a rear elevation and the Applicant is simply trying to violate the terms of the ordinance.

With reference to a traditional variance, the Applicant attempted to allege a hardship inherent in the land, however, this board specifically finds that the property is sufficiently recognizable from its principal entrance to have people safely access the parcel. The shopping center has been in existence for a considerable time with the sign package that currently exists. There has been no evidence that any hardship inherent in the land exists at the subject property. This board believes that the property is reasonably used as zoned and there is no necessity to provide signage for the rear of the property.

Based on the above, this board must uphold the zoning officer's determination and deny the variance request.

ORDER OF THE UPPER MERION TOWNSHIP

ZONING HEARING BOARD

IT IS HEREBY ORDERED AND DECREED that the Board finds that the zoning officer's interpretation dated February 9, 2011 is correct, therefore, the Applicant's appeal of that determination is denied. The board further finds that the Applicant's request for a variance to Section 165-168.A(2) and (3) is denied.

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.