ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-02	:	**HEARING DATE:** April 6, 2011
APPLICATION OF: Broadview Networks, Inc.	:	**DECISION DATE:** May 18, 2011
PROPERTY: 1018 W. Ninth Avenue	:	
Upper Merion Township	:	

OPINION AND ORDER OF THE UPPER MERION TOWNSHIP ZONING HEARING BOARD

The Applicant, Broadview Networks, Inc., (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-168 in order to erect a wall sign on the rear building elevation. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on April 6, 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 Broadview Networks, Inc., c/o Brian E. Coughlin, Esq., Deputy General Counsel, 1018 W. Ninth Avenue, King of Prussia, PA 19406.
2. The legal owner of the subject property is Keystone Property Group, One Presidential Boulevard, Suite #300, Bala Cynwyd, PA 19004.
3. The property is located at 1018 W. Ninth Avenue, King of Prussia, PA 19406, Upper Merion Township.

4. The Applicant was represented by Brian E. Coughlin, Esq., Deputy General Counsel, Broadview Networks, Inc., 1018 W. Ninth Avenue, King of Prussia, PA 19406.
5. The property is zoned "Suburban Metropolitan".
6. The Applicant is proposing to erect a sign on the rear elevation of the property instead of the front elevation of the property, therefore, a variance is required.
7. The main entrance of the property faces another building rather than the front of the parcel.
8. The square footage proposed by the Applicant is within the square footage permitted by the code.
9. The only relief requested by the Applicant is to place the sign on a back elevation of the property rather than the front elevation, because the front elevation is not where the main entrance is located and the Applicant wants additional visibility by placing it on an elevation facing a highway.
10. The Applicant wants a sign that would enable motorists to locate the building more easily.
11. There is no hardship inherent in the land that prevents the Applicant from reasonably using the property.
12. The Applicant did not satisfy its burden of proof to show that a variance should be granted because the parcel is currently used as zoned without any necessary zoning relief.
13. The office use has existed at the parcel without the need for additional signage.

14. The Applicant is not proposing an increase in square footage permitted under the code, but rather simply a change on the façade of the building where the sign would be located.
15. The proposed sign is smaller than the square footage requirements of the code, therefore, the property owner could erect additional signage on the front elevation unless agreed to otherwise.
16. The board wanted the Applicant to have the owner issue a letter indicating that the landlord will not erect any other signage on the building other than the signage proposed as part of this application.
17. The letters introduced by the landlord would bind the landlord to restricting signage to only the signage proposed as part of this application, however, the letters received by the landlord only made that commitment for the time period that the Applicant is a tenant in the building. Unfortunately, zoning relief runs with the land in perpetuity and does not expire upon the tenancy of the Applicant, therefore, the letters proposed do not bind the landlord because it does not run for the same time commitment as the zoning relief.
18. There were no residents who testified in favor of the application.
19. There were no residents who testified against the application.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Broadview Networks, Inc., (hereinafter referred to as the "Applicant"), filed an application requesting a variance to Section 165-168 in order to erect a wall sign on the rear building elevation.

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 requesting a variance to put a sign on an elevation facing the highway rather than on the front elevation of an existing office structure. The proposed sign is less in square footage than the maximum permitted under the code, however, a variance is needed to place it on the rear façade rather than a front façade. The Applicant did not satisfy any of the criteria for either the Hertzberg case or the Municipalities Planning Code. The Applicant offered no testimony regarding any hardship inherent in the land that would justify the granting of the variance. In an effort to have the board work with the Applicant, the board decided to grant the relief, but only if the landlord committed to not applying for any signage other than the signage proposed in this application. Because the signage is less than what is permitted in the code, the landlord could place additional signage at the front façade without any further zoning relief. The landlord could also grant permission to other tenants to apply for additional signage relief to have multiple signs on other façades of the structure. The Applicant attempted to obtain letters from the landlord purportedly agreeing to not ask for any additional relief, however, the letters consistently referenced that it would only be for as long as the Applicant is a tenant. Unfortunately, zoning relief runs in perpetuity, therefore, a condition of relief can not have a date of termination because after the Applicant is no longer a tenant, the landlord would still have the right to the signage even if it is in the name of a different tenant.

In an effort to work with the Applicant, the board is still willing to agree to the variance, however, a condition would be imposed that if in the event the landlord ever erects any other

signage on any façade of the building other than what is being proposed, then this variance shall terminate and the Applicant will lose the right to the signage permitted by this decision.

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 165-168 in order to erect a wall sign on the rear building elevation. This variance is conditioned upon the following:

1. The Applicant must comply with the testimony presented at the hearing on April 6, 2011.

2. If, in the event that the owner of the parcel or any tenant erects any signage other than the signs permitted by this decision on any façade of the building, then this approval shall expire and the owner will be required to remove the signage permitted by this decision. This condition shall apply regardless of whether the future signage is by right or with zoning relief.

Decision Dated: May 18, 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.