

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

APPLICATION NO. 2011-23	:	HEARING DATES: October 5, 2011 and November 16, 2011
	:	
APPLICATION OF: Matt Outdoor	:	DECISION DATE: December 7, 2011
	:	
PROPERTY: 170 Allendale Road	:	
Upper Merion Township	:	

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

The Applicant, Matt Outdoor, (hereinafter referred to as the “Applicant”), filed an application requesting the following: 1) a variance from Section 165-168.1A in order to allow a sign area of 672 sq. ft., whereas the Zoning Code allows 336 sq. ft.; 2) a variance from Section 165-168.1E(2) to permit the proposed billboard to be located approximately 419 ft. from a residential zoning district, whereas the Zoning Code requires 500 ft.; and 3) a variance to Section 165-223.B in order to install the proposed billboard within the floodplain. The application was properly advertised, and public hearings were held before the Upper Merion Township Zoning Hearing Board on October 5, 2011 and November 16, 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 Matt Outdoor, 28 Whitall Drive, Sicklerville, NJ 08081.

2. The legal owner of the subject property is King of Prussia Volunteer Fire Company, 170 Allendale Road, King of Prussia, PA 19406.
3. The property is located at 170 Allendale Road, King of Prussia, PA 19406, Upper Merion Township and is further identified as Tax Parcel # 58-00-00352-00-4 (“Property”).
4. The Applicant is the tenant of the Property pursuant to a lease dated May 15, 2011. See Exhibit A-5.
5. The Applicant was represented by Robert J. Kerns, Esq., Kerns, Pearlstine, Onorato & Hladik, LLP, 298 Wissahickon Avenue, Upper Gwynedd, PA 19454.
6. The following were marked as exhibits at the October 5, 2011 and November 16, 2011 zoning hearings:

- A1: Zoning Application
- A2: Deed
- A3: Curriculum Vitae of Scott Mancini
- A4: Curriculum Vitae of E. Van Rieker, AICP
- A5: Lease Agreement with King of Prussia Fire Company
- A6: Permission Letter — Bill Jenaway on behalf of King of Prussia Volunteer Fire Company
- A7: Site Plan — Reduced Size (June 28, 2011)
- A8: Photographs — Existing Views
- A9: Photographs — Aerial Views
- A10: Billboard Ordinance § 165-168.1A
- A11: “Outdoor Advertising Devices” — 67 Pa. Code § 445.1 et seq.
- A12: DVD — “LED View from Roadway”
- A13: DVD — “K.O.P. Fire Company”
- A14: Description of Nearby Use
- A15: DVD
- A16: Official Zoning Map as modified
- A-17: DVD
- A-18: Map

7. The Applicant presented the testimony of Scott Mancini, an expert witness in signage and billboards, and E. Van Rieker, AICP, an expert in land planning.
8. The Property is zoned "C-1" Commercial.
9. The Property is located in the Township Overlay District which provides for and allows use of billboard signs.
10. The Property is approximately 1.96 acres.
11. The Property has been utilized as a fire house since 1955.
12. There are currently two (2) sheds on the eastern portion of the Property which are utilized for general storage purposes, fire equipment, chairs, etc.. There is a gazebo on the lower eastern portion of the Property.
13. The Property is served by public water and public sewer.
14. The surrounding uses include a series of hotels to the east, the King of Prussia Mall immediately south behind the Property, several commercial businesses to the west, and a ball field to the north side of the Pennsylvania Turnpike beyond the sound wall. To the northwest of the Property is zoned residential but is used for commercial purposes.
15. The Applicant is seeking to construct a billboard sign on the easternmost portion of the Property facing the Pennsylvania Turnpike.
16. As part of its Application, the Applicant proposed a single monopole, double-faced billboard sign measuring 14' x 48' with an overall height of 40 feet. The Applicant proposed that the eastbound face of the billboard sign be a digital LED sign with changeable messages and the westbound face be static.
17. At the November 16, 2011 zoning hearing, the Applicant agreed that the proposed billboard would not be an electronic sign and further agreed that it would enter into a

recorded covenant to that effect which covenant would be enforceable by the Township. The attached Voluntary Declaration of Restrictive Covenants is attached hereto and made a part hereof as "Exhibit "A".

18. At the November 16, 2011 zoning hearing, the Applicant also agreed to reduce the size of the proposed billboard to 500 square feet.
19. PennDOT permits billboards of up to 1200 square feet along the Pennsylvania Turnpike.
20. The illumination of the proposed billboard sign will be extinguished as midnight.
21. No business equipment for the proposed billboard will be stored at the Property. No employees will be needed for the operation of the proposed billboard.
22. The proposed billboard sign will be constructed in accordance with PennDOT standards, billboard industry standards and the specific building codes of Upper Merion Township.
23. In the area of the proposed billboard, the right-of-way for the Pennsylvania Turnpike is approximately 200 feet and there are 3 lanes going both ways, not including the stop areas, rest areas or pull-over areas.
24. It is very difficult to read and interpret a billboard sign of 336 square feet on a roadway the size of the Pennsylvania Turnpike where the right-of-way is extreme and traffic is moving at a high rate of speed.
25. There are no billboards signs currently located on the Property along the Pennsylvania Turnpike.

26. The residential district to the northwest of the Property is 420 feet from the proposed billboard but there are no residential homes or residential uses within 500 feet of the Property.
27. There are two locations along the Pennsylvania Turnpike in Upper Merion Township that meet the requirements of both PennDOT and the Township Zoning Code for billboard signs. In those two locations, zoning relief is needed from the Township Zoning Code.
28. The only incursion into the floodplain would be the pole for the billboard sign which measures 3 to 4 feet in diameter and would include 8 to 12 square feet of the Property in the floodplain.
29. The size of the pole will not cause any diversion of floodplain or flood waters.
30. Linda Richmond, 277 Anthony Road, and Terry Hoover, 256 Anthony Road asked questions in reference to the Application.
31. Steve Gelfman, 365 Covered Drive, the first resident trustee of the King of Prussia Volunteer Fire Department, testified in support of the Application.
32. There were no residents who testified against the project.

DISCUSSION AND CONCLUSIONS OF LAW

The Applicant, Matt Outdoor, (hereinafter referred to as the “Applicant”), filed an application requesting the following: 1) A variance from Section 165-168.1A in order to allow a sign area of 672 sq. ft., whereas the Zoning Code allows 336 sq. ft.; 2) a variance from Section 165-168.1E(2) to permit the proposed billboard to be located approximately 419 ft. from a residential zoning district, whereas the Zoning Code ode requires 500 ft., and; 3) a variance from

Section 165-223.B in order to install the billboard within the floodplain. At the zoning hearings, the Applicant then agreed to reduce the size of the proposed billboard to 500 feet and agreed that the proposed billboard would not be an electronic sign.

The relevant Zoning Code sections are:

§ 165-168.1. Billboards.

A. Billboard size. A maximum of two sides are allowed per billboard. The sign area of a billboard in the overlay district shall not exceed 336 square feet on each of not more than two sides of the sign.

E. Separation. The location of each billboard shall comply with the following separation requirements:

(2) At least 500 feet from any residential zoning district, including those of a neighboring municipality.

§ 165-223. Permitted uses; prohibited uses.

B. The following uses shall be specifically prohibited in an FP Floodplain Conservation District:

(1) All freestanding structures and buildings and retaining walls, with the exception of flood retention dams, culverts and bridges as approved by the Pennsylvania Department of Environmental Resources.

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).

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 requested relief is dimensional in nature as billboard signs are a permitted use in the Township Overlay District, and, therefore, the standards of Hertzberg apply. The Applicant reduced the requested dimension relief for the size of the sign from 672 square feet to 500 square

feet and agreed to covenant that the billboard sign would not be an electronic sign. The Property is unique due to its use, size and location. The Applicant through the testimony and exhibits presented met its burden for entitlement to the requested relief to permit a sign area of 500 square feet.

The proposed billboard sign, although within 500 feet of a residential zoning district, is not within 500 feet of a residential home or residential use, and, therefore, meets the spirit and intent of the Zoning Code. The Applicant through the testimony and exhibits presented met its burden for entitlement to the requested relief as to the location of the proposed billboard.

The request for relief in order to install the proposed billboard in the floodplain is de minimis as only the pole will intrude into the floodplain and the size of the pole will not cause any diversion of floodplain or flood waters. The Applicant through the testimony and exhibits presented met its burden for entitlement to the requested relief as to the floodplain.

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 the requested variances. These variances are conditioned upon the following:

1. The Applicant must comply with the testimony of the Applicant at the public hearing on October 5, 2011 and November 16, 2011.
2. The proposed billboard shall be no more than 500 square feet.
3. The Applicant and owner of the Property shall enter into and abide by the Declaration of Restrictive Covenants which is attached hereto and made a part hereof as Exhibit "A".

Decision Dated: December 7, 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.

Prepared by and return to:

Joseph J. McGrory, Jr., Esq.
Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C.
375 Morris Road, P.O. Box 1479
Lansdale, PA 19446

Parcel Number: 58-00-00352-00-4

VOLUNTARY DECLARATION OF RESTRICTIVE COVENANTS

THIS VOLUNTARY DECLARATION OF RESTRICTIVE COVENANTS (“Declaration”) is made on this ___ day of _____, 2011, by the KING OF PRUSSIA VOLUNTEER FIRE COMPANY with an address of 170 Allendale Road, King of Prussia, Pennsylvania, 19406 (hereinafter referred to as “Declarant”).

BACKGROUND OF DECLARATION:

1. Declarant is the owner of a certain piece of property located in Upper Merion Township, Montgomery County, Pennsylvania with an address of 170 Allendale Road, further identified as Montgomery County Tax Parcel No. 58-00-00352-00-4 (the “Property”).
2. Declarant leases a portion of the Property to Matt Outdoor, a Pennsylvania general partnership, (“Tenant”) with an address of 28 Whitall Drive, Sicklersville, NJ 08081 (“Leased Property”).
3. Tenant intends to use the Leased Property for a two-sided billboard sign facing the Pennsylvania Turnpike (“Billboard Sign”). Tenant’s Billboard Sign will be the only billboard sign on the Property.
4. Tenant requested zoning relief in order to construct the Billboard Sign.
5. Declarant and Tenant have agreed that a voluntary restrictive covenant shall be recorded against the Property related to the Billboard Sign on the Leased Property.

NOW, THEREFORE, this Voluntary Declaration of Restrictive Covenants is as follows:

1. **Declaration.** Declarant hereby declares that the Property is and shall be held, transferred, sold, conveyed, leased, developed, occupied and used subject to the rights, obligations and restrictions declared and set forth in this Declaration.

2. **Covenant Running with the Land.** The rights, covenants, obligations, restrictions, conditions and other provisions created, declared and contained in this Declaration shall benefit Upper Merion Township and the Declarant. This Declaration shall be deemed to run with the land in perpetuity and shall bind and inure to the benefit of the Declarant and Upper Merion Township and their successors and assigns in title, together with all lessees and users of the Property. Every person who owns, occupies or acquires any right, title, estate or interest in and to the Property or any portion thereof shall be deemed to have consented and agreed to every restriction and covenant contained herein, whether or not reference to these restrictions and covenants is contained in the instrument by which such person acquired an interest in the Property or any portion thereof. The Declarant shall include reference to this Declaration in any lease related to the Billboard Sign.

4. **The Restrictive Covenants.**

a. **One Billboard Sign Permitted on Property.** The Billboard Sign shall

be the only billboard sign on the Property. A billboard sign is defined as 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.

b. **Electronic sign not permitted.** The Billboard Sign shall not be permitted to be an electronic sign. An electronic sign is a sign whose content may be changed by electronic process through the use of intermittent light or lights including but not limited to light emitting diodes, liquid crystal display and plasma screen image display or other similar technology.

4. **General Provisions.**

a. **Modification.** This Declaration may not be modified except by written agreement executed by Declarant and the Upper Merion Township Board of Supervisors.

b. **Enforcement.** This Declaration shall be enforceable only by Upper Merion Township and the Declarant in law or equity

c. **Governing Law.** This Declaration shall be construed in accordance with the laws of the Commonwealth of Pennsylvania.

d. **Recording.** This Declaration shall be recorded in the Office of the Recorder of Deeds in and for the County of Montgomery, Commonwealth of Pennsylvania.

e. **Severability.** If any term or provision of this Declaration, or any part of such term or provision, or the application thereof to any person or circumstance shall to any extent be held invalid or unenforceable, the remainder of this Declaration or the application of such term or provision or remainder thereof to invalid and unenforceable shall not be affected thereby and each term and provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

IN WITNESS WHEREOF, Declarant has executed this Declaration on the date first written above.

Witness

Consent and Joinder of Matt Outdoor:

Matt Outdoor as Tenant of the Leased Property hereby consents to the Declaration and agrees that it, and its successors and assigns, will be bound by the Declaration and will give notice of this Declaration to its successors and assigns.

Witness

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF _____ :

On the ____ day of _____, 2011 before me, the undersigned officer, personally appeared _____, who executed the foregoing instrument for the purposes therein contained and acknowledged the contents to be true to the best of her knowledge, information and belief.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF _____ :

On the ____ day of _____, 2011 before me, the undersigned officer, personally appeared _____, who executed the foregoing instrument for the purposes therein contained and acknowledged the contents to be true to the best of his knowledge, information and belief.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public