

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**APPLICATION NO. 2011-29** : **HEARING DATE:** January 18, 2012  
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**APPLICATION OF** : **DECISION DATE:** January 18, 2012  
Valley Forge Colonial, L.P. :  
:  
:  
**PROPERTY:** :  
1160 First Avenue :  
Upper Merion Township :

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

The Applicant, Valley Forge Colonial, L.P., (hereinafter referred to as the “Applicant”), filed an application requesting a variance to Section 165-168(Q) in order to permit illuminated monument signs. The application was properly advertised, and a public hearing was held before the Upper Merion Township Zoning Hearing Board on January 18, 2012, 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 Valley Forge Colonial, L.P, 1628 JFK Boulevard, 23<sup>rd</sup> Floor, Philadelphia, PA 19103.
2. The legal owner of the subject property is Valley Forge Colonial, L.P, 1628 JFK Boulevard, 23<sup>rd</sup> Floor, Philadelphia, PA 19103.
3. The property is located at 1160 First Avenue, Upper Merion Township.

4. The Applicant was represented by Ross Weiss, Esquire of Cozen O'Connor.
5. The property is zoned "AR-1" .
6. The lot is approximately 24.03 acres.
7. There were no residents who testified in favor of the project.
8. There were no residents who testified against the project.
9. The Township intervened in this matter and was represented by Joseph J. McGrory, Jr., Esquire.
10. The Applicant proposes to use the property as a Casino Resort with hotels, restaurants, convention center, conference rooms and casino.
11. The Applicant applied for zoning relief pertaining to signage on the property.
12. The Applicant submitted an exhibit package introduced and marked as A-1, which showed the size, location, and types of signs it sought to install on the property. This included:
  - a. An existing freestanding monument sign shown on A-1 as Location 2 Option 2 with electronic changeable messages.
  - b. An existing freestanding monument sign shown on A-1 as Location 3 Option 2 with electronic changeable messages.
  - c. A new monument sign to be installed at Location 17 as shown on A-1 with electronic changeable messages; and
  - d. A logo sign in the form of a "V" to be located on the roof.
13. Initially, the Applicant appealed the zoning officer's interpretation that the "V" roof sign is not allowed. In the alternative, the Applicant challenged the legality of Section 165-168D(4) which allows roof signs extending above the sign height limit in the AR-1

District. In the alternative, the Applicant requested a variance from Section 165-168D(4) to allow the installation of the roof sign.

14. At the hearing, the Applicant, through its attorney, withdrew its request for relief to construct the “V” roof sign.

15. Section 165-168(Q) of the Township Zoning Ordinance does not permit illuminated monument signs with changeable messages as proposed by the Applicant in the AR-1 District. The Applicant sought relief in the alternative:

- a. That the Zoning Officer’s interpretation that illuminated changeable signs are not permitted is incorrect; or
- b. A variance to allow such signs.

16. The Applicant’s property is located next to a limited access highway (Route 422) and heavily traveled collector road (N. Gulph Road and First Avenue).

17. The Applicant presented testimony that the proposed scale and location of the proposed signs is crucial to the property to function and to properly identify the services offered at the facility.

18. The Applicant agreed to a list of proposed conditions that were reviewed and approved by Upper Merion Township. This was submitted at the hearing as Exhibit T-1 and indicated the following conditions.

- a. There shall be no signs on the roof of any of the buildings at the subject property. All rights granted to the subject premises under an appeal listed as Montgomery County Docket No 74-12169 decided by Judge Honeyman on April 4, 1975 are by agreement forever waived by the land owner.

- b. The electronic signage will not change more than one time in any twenty-four (24) hour period.
  - c. The electronic signage shall not have scrolling script, either vertically or horizontally.
  - d. The electronic sign shall not move, rotate, oscillate, vibrate or shimmer.
  - e. The electronic sign shall not flash, scintillate or blink.
  - f. The electronic signage must change script instantaneously and not a gradual or scrolling change of script. The change must occur in less than one second.
  - g. The electronic signage must have the electronic portions of the signs change at the same time, thereby preventing different portions of the sign changing at different times.
  - h. The electronic signage shall not have a luminance greater than thirty (30) candelas per square meter for night time and one thousand (1,000) candelas per square meter for daytime.
19. The Township endorsed the application subject to the acceptance by the Applicant of the conditions set forth in Exhibit T-1.

### **DISCUSSION AND CONCLUSIONS OF LAW**

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 permission to erect three (3) freestanding or monument signs because the Applicant's property is located next to a limited access highway (Route 422) and heavily traveled collector roads (N. Gulph Road and First Avenue). The Applicant initially asserted that a variance should be granted because a similar variance was granted in 2002-36 for Pace Properties for their project located at 119 E. DeKalb Pike. This argument is misplaced since variances are unique to a specific property and the granting of a variance does not set a

precedent for future variance relief. English v. Zoning Bd. of Adjustment of Borough of Norristown, 148 A.2d 912, 913-914 (Pa. 1959). Notwithstanding the foregoing, the Board does find that the Applicant's parcel is unique because it is not a corner lot; however, it is still located next to a limited access highway and heavily traveled collector roads. The Applicant wants recognition from the travelers of Route 422, N. Gulph Road and First Avenue, while at the same time needing signage to direct customers.

The Applicant presented sufficient testimony to satisfy the legal criteria outlined above; therefore, the variance should be granted pursuant to the aforementioned conditions set forth in Exhibit T-1.

**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(Q) to erect three (3) freestanding or monument signs upon the following conditions:

- i. There shall be no signs on the roof of any of the buildings at the subject property.

All rights granted to the subject premises under an appeal listed as Montgomery County Docket No 74-12169 decided by Judge Honeyman on April 4, 1975 are by agreement forever waived by the land owner.

- j. The electronic signage will not change more than one time in any twenty-four (24) hour period.
- k. The electronic signage shall not have scrolling script, either vertically or horizontally.
- l. The electronic sign shall not move, rotate, oscillate, vibrate or shimmer.
- m. The electronic sign shall not flash, scintillate or blink.
- n. The electronic signage must change script instantaneously and not a gradual or scrolling change of script. The change must occur in less than one second.
- o. The electronic signage must have the electronic portions of the signs change at the same time, thereby preventing different portions of the sign changing at different times.
- p. The electronic signage shall not have a luminance greater than thirty (30) candelas per square meter for night time and one thousand (1,000) candelas per square meter for daytime.

This variance is conditioned upon the Applicant's compliance with the testimony of the Applicant at the public hearing on January 18, 2012.

Decision Dated:

**UPPER MERION TOWNSHIP  
ZONING HEARING BOARD**

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Robert J. Montemayor - Chairman

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Brad Murphy – Vice Chairman

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Lynne Z. Gold-Biken - 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.