

ZONING HEARING BOARD OF UPPER MERION TOWNSHIP

MONTGOMERY COUNTY, PENNSYLVANIA

APPLICATION OF MAX POWER SPORTS, LLC

APPLICATION NO. 2017-12

PROPERTY: 250 King Manor Drive

OPINION AND ORDER

Max Power Sports, LLC ("Tenant") requests a use variance and modification of 3 conditions imposed in the decision of the Zoning Hearing Board dated December 8, 2016. The application was granted in part and denied in part.

By its prior decision, the Zoning Hearing Board granted variances from section 165-153 *Use regulations* to permit an indoor volleyball facility and fitness center in the HI Heavy Industrial District where such use is not permitted and from section 165-191 *Minimum requirements* to reduce the required number of on-site parking spaces from 136 spaces to 124 spaces. The relief was granted subject to 9 conditions:

- condition no. 1: only three (3) volleyball courts are permitted, with hours of operation limited to:
- Monday through Friday: 5:30 pm - 10:00 pm
 - Saturday and Sunday: 8:00 am – 10:00 pm
- condition no. 2: the hours of operation of the fitness center shall be limited to:
- Monday through Friday: 6:00 am – 10:00 pm
 - Saturday and Sunday: 8:00 am – 4:00 pm
- condition no. 3: no basketball use shall occur without additional relief from the Upper Merion Township Zoning Hearing Board
- condition no.4: no summer camps shall occur without additional relief from the Upper Merion Township Zoning Hearing Board

- condition no. 5: the applicant shall perform a parking study six (6) months after commencement of operations, and provide the study to the Township immediately upon completion
- condition no. 6: there shall be no flea market, retail sales, consignment sales, or community events
- condition no.7: volleyball tournaments shall be held on Saturday and Sunday only, with a traffic control person on duty at all times to direct parking
- condition no. 8: applicant shall stripe 124 on-site parking spaces prior to commencement of operations
- condition no.9: the volleyball facility and fitness center use shall conform strictly to the representations, testimony, and exhibits presented at the hearing and set forth in the application, including, but not limited to, strict conformance with exhibit "A-6", the floor plan of the proposed use, attached hereto.

Tenant filed a new application requesting a use variance from section 165-153 *Use regulations* to permit "other recreational activities...in addition to volleyball (only one sport at a time" within the facility. Tenant no longer proposed a fitness center and instead proposed a fourth volleyball court in the portion of the building previously intended for the fitness center.

Tenant also requested the following modifications to the previously imposed conditions:

- condition no. 1: removal of restriction on hours of operation¹
- condition no. 3: to permit basketball on the proposed multi-sports courts
- condition no. 4: to permit summer youth volleyball camps for a maximum of 45 youth, during the following times:

¹ In its latest application, Tenant requested additional hours of operation of Monday through Friday: 9:30 am – 5:30 pm. Tenant modified its requested relief on the record before the ZHB. [N.T. p. 35.]

- the last week of June
- the last 3 weeks of July
- the first week of August.

Under section 165-153 *Use regulations*, no use permitted in the NC, LC, and GC Commercial Districts is permitted in the HI Heavy Industrial District. An “indoor sports and recreation facility” is a permitted use in the GC General Commercial District. “Health and fitness center” is a permitted use in both the GC General Commercial District and the LC Limited Commercial District. In order to operate the “recreational activities” facility proposed by Tenant, a use variance is required.

Tenant is the lessee of a portion (29,694 square feet) of the building located at 250 King Manor Drive (the “Property”). Tenant currently operates an indoor volleyball facility in its portion of the building, containing 3 volleyball courts. The building also contains an elevator company and unoccupied space.

On June 21, 2017, the Zoning Hearing Board of Upper Merion Township (“ZHB”) held a public hearing on Tenant’s application. All ZHB members were present at the hearing: Mark S. DePillis, Esquire, Chairman; M Jonathan Garzillo, Vice-Chairman; Maria Mengel, Secretary; John M. Tallman, Jr., Member; and Lynne Z. Gold-Bikin, Esquire, Member. Marc D. Jonas, Esquire, of Eastburn and Gray, P.C. represented the ZHB as its solicitor. Tenant was represented by Edward J. Hughes, Esquire of Hughes, Kalkbrenner & Ozorowski, LLP.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded.

After careful consideration of the evidence presented, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Tenant is the lessee of 29,694 square feet of the existing building located at 250 King Manor Drive. [N.T. pp. 15-16.]

2. The building also contains an elevator company. [N.T. p. 19.]

3. The Property is located in the Township's HI *Heavy Industrial District*. [N.T. p. 30.]

4. The minimum required number of parking spaces (as calculated in the prior application) was 136 spaces:

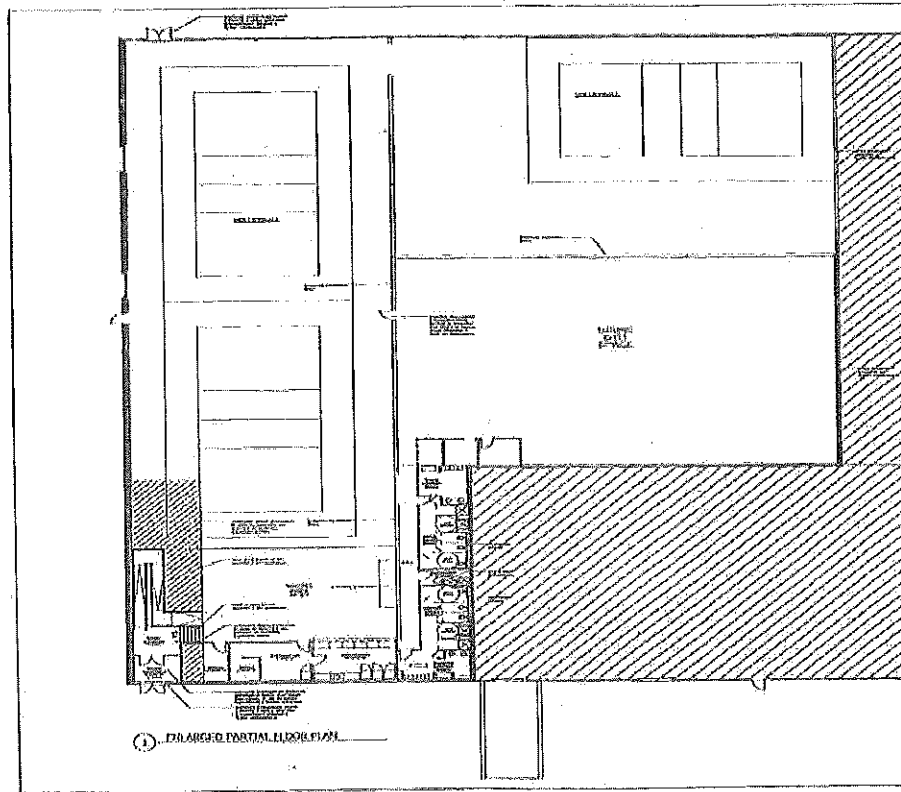
a. volleyball courts (20 spaces each x 3) = 60 spaces

b. fitness center = 37 spaces

c. elevator company = 39 spaces

total required spaces = 136 spaces

5. The previously proposed fitness facility occupied 7,289 square feet of Tenant's leasehold area, identified as "Future Gym Space" on Exhibit "A-6":



[Ex. A-6; N.T. p. 23.]

6. Tenant now proposes a fourth volleyball court within the 7,289 square feet previously proposed for the fitness center.

ZHB HEARING

7. Tenant entered the following exhibits:
- a. A-1: deed dated October 12, 2006, between Montgomery County Industrial Development Authority and Ingerman-Ginsburg Partnership, recorded with the Montgomery County Recorder of Deeds at deed book 5634, page no. 01788
 - b. A-2: Montgomery County Board of Assessment printout for Property
 - c. A-3: Agreement of Lease dated June 10, 2016, between Ingerman & Ginsburg Partnership (landlord) and Max Power-Sports LLC (tenant), with First Amendment dated June 10, 2016, amending name of landlord to "Ingerman-Ginsburg Partnership"

- d. A-4: aerial of Property
- e. A-5: two photographs of property
- f. A-6: plan titled "Enlarged Partial Floor Plan"
- g. A-7: resume of Joseph M. Estock, P.E., P.L.S.
- h. A-8: plan set plan prepared by Joseph M. Estock Consulting Engineers & Land Surveyors, 2 sheets:
 - sheet 1, titled "Survey Plan", dated October 20, 2016, no revisions
 - sheet 2, titled "Parking Plan", dated October 27, 2016, last revised November 2, 2016
- i. A-9: resume of Robert G. Richardson, P.E.
- j. A-10: letter report titled "Parking Assessment", dated November 2, 2016, prepared by Robert G. Richardson, P.E., Traffic Planning and Design, Inc.
- k. A-11: letter dated November 2, 2016, from K. Bieler, Office Manager, Thyssen Krupp Elevator
- l. A-12: floor plan titled "untitled plan", prepared by Precor, undated
- m. A-13: plan titled "Parking Plan-B", prepared by Joseph M. Estock Consulting Engineers and Land Surveyors, dated December 6, 2016, no revisions
- n. A-14: plan titled "Parking Plan C", prepared by Joseph M. Estock Consulting Engineers and Land Surveyors, dated December 6, 2016, no revisions
- o. A-15: proposed conditions
- p. A-16: decision of the zoning hearing board dated December 8, 2016
- q. A-17: plan titled "Parking Plan", prepared by Joseph M. Estock, Consulting Engineers and Land Surveyors, dated December 27, 2016

- r. A-18: 9 photographs of existing conditions in parking lot.
8. The transcripts from the prior hearings, November 2, 2016 and December 7, 2016, were incorporated by reference.
 9. Tenant had one witness, Chang Han, sole member of the LLC.
 10. Tenant's testimony was as follows:
 - a. He reaffirmed that he had agreed to all conditions imposed in the December 8, 2016 decision on behalf of Tenant. [N.T. p. 17.]
 - b. The 3 volleyball courts permitted under the December 8, 2016 decision have been operating since December 2016. [N.T. pp. 10-11.]
 - c. Tenant no longer intends to operate a fitness center within its leased area, as "[t]hat arrangement between Max Power Sports and the fitness center never came to fruition." [N.T. pp. 7, 20.]
 - d. The fitness center was proposed within a 7,289 square foot portion of Tenant's leasehold area. [N.T. p. 23.]
 - e. In the area of the proposed fitness center, Tenant intends to install another volleyball court. [N.T. pp. 12, 20, 23-24.]
 - f. Tenant did not perform the traffic study required by condition no. 5 of the December 8, 2016 decision, notwithstanding the fact that the facility has been in operation for more than 6 months. [N.T. pp. 6-7.]
 - g. Although Tenant was only required to stripe 124 spaces under the December 8, 2016 decision, Tenant striped 130 spaces. [N.T. pp. 10, 17-19.]

- h. The fitness center required 37 parking spaces. [N.T. p. 9.]
- i. The volleyball court replacing the fitness center requires 20 parking spaces, for a net decrease in the number of required parking spaces of 17 spaces. [N.T. p. 24.]
- j. Another potential tenant, a brewery, would occupy the majority of the remaining vacant space in the building. The brewery proposes to create 130 new parking spaces to serve the brewery. [N.T. pp. 12-13.]
- k. Tenant proposes to use the 4 volleyball courts for recreational activities other than volleyball, one sport at a time. [N.T. pp. 24-25.] Tenant was “not sure how many parking spaces the code might require” for the proposed use. [N.T. p. 24.]
- l. At the time of the hearing, Tenant had not yet identified the other proposed recreational activities, and the only definitive activity was volleyball.² [N.T. p. 25.]
- m. During its current hours of operation, 5:30 pm to 9:30 pm, an average of 30-40 youth athletes visit the facility daily. [N.T. p. 26.] On average, 10 parents remain on premises; the remainder drop off their children and leave. [N.T. pp. 26-27.]
- n. Tenant proposes a summer camp, for a maximum of 45 kids, with one counselor per 10-12 kids, during the following times:

² Tenant did request relief from condition no. 3, to give it the option of a basketball use on the courts. [N.T. pp. 36-37.]

- the last week of June
- the last 3 weeks of July
- the first week of August.

[N.T. pp. 28-30.]

- o. Tenant requested removal of the restriction on the hours of operation of the facility. [N.T. p. 35.]
- p. At the time of the hearing, Tenant had conducted one volleyball tournament on the Property, using 2 of the volleyball courts. Mr. Han testified that there had been sufficient parking, with only 20 spaces occupied. [N.T. pp. 45-46.]

B. DISCUSSION

1. Modification of Conditions³

In order to demonstrate an entitlement to modification of a condition of zoning relief, an applicant must demonstrate:

- (1) either grounds for a traditional variance or a change in circumstances that make the condition inappropriate, and
- (2) that the grant of relief will not injure the public.

³ The ZHB voted to grant modification of condition no. 1 (to permit a 4th volleyball court and to permit operation of the indoor volleyball facility from 8:00 am to 10:00 pm) and condition no. 4 (to permit summer youth volleyball camps for no more than 45 youth participants, during: (1) the last week of June; (2) the last 3 weeks of July; and (3) the first week of August). The relief denied compels a decision with findings of fact, conclusions of law, and reasons. However, since the application was not contested, the granted modifications are not analyzed herein.

Ford v. Zoning Hearing Bd. of Caernarvon Twp., 616 A.2d 1089, 1092 (Pa. Commw. Ct. 1992); *German v. Zoning Bd. of Adjustment*, 41 A.3d 947, 950 (Pa. Commw. Ct. 2012).

As Commonwealth Court has explained:

...conditions imposed by a zoning hearing board are presumed to be for the purpose of protecting public interest, when a party demonstrates a change in circumstances related to the land at issue which indicates that the conditions are no longer appropriate for the protection of the public's interest, a zoning hearing board may re-evaluate the conditions it originally imposed. If a party demonstrates a change in circumstances, then a reviewing body may proceed to consider whether the original conditions continue to serve the function of protecting the public interest that gave rise to the particular conditions in the first place. The question at the heart of the inquiry is what changes in circumstances render the conditions *no longer appropriate*.

German, 41 A.3d at 950.

Tenant proposes to convert the 7,289 square feet previously identified for use as a fitness facility into a 4th volleyball court. Tenant requests modification of condition no. 1 to eliminate any restriction on its hours of operation and modification of condition no. 3 to permit basketball.

Aside from the 7,289 square feet that would have been used for the fitness center, Tenant has been operating an indoor volleyball facility in the remainder of its leased area. Given the ZHB's partial grant of Tenant's request for modification of condition no. 1, the facility will now contain 4 volleyball courts.

Tenant failed to demonstrate a change in circumstances justifying additional use of the facility for unspecified "recreational activities...in additional to volleyball (only one sport at a time)." This is particularly the case given Mr. Han's utter inability to articulate what additional "recreational activities" were proposed.

In its prior application, Tenant requested relief from the Zoning Ordinance's minimum parking requirements. The ZHB's previous conditions, including the use and hours of operation restrictions, were imposed to protect the public interest and avoid a future parking problem on the Property. In order to allow the Township and Tenant to better analyze the parking needs of Tenant's use, condition no. 5 of the December 8, 2016 decision required Tenant to perform a parking study 6 months after commencement of operations. Although Tenant has been in operation since December 2016, Tenant failed to perform the required parking study.

Based on the evidence presented, the previously established conditions continue to serve the public interest. Nor did Tenant demonstrate grounds for a traditional variance, as analyzed below.

Tenant has also failed to demonstrate that the requested modifications would not injure the public. Due to the dearth of evidence presented by Tenant, demonstrated by Mr. Han's inability to identify the additional uses desired, Tenant could not articulate what the effect on the public would be.

Tenant has failed to demonstrate its entitlement to the requested modifications of conditions. This is particularly the case given the ZHB's grant of partial relief to (1) permit the 4th volleyball court and (2) permit operation of the indoor volleyball facility from 8:00 am to 10:00 pm.

2. Zoning Variance⁴

It is well-settled in Pennsylvania that a zoning hearing board may grant a variance where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;
3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;
and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of South Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Variations should be granted sparingly, and the reasons for granting variations must be substantial, serious and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). A request for a use variance carries a heavier burden than a request for a dimensional variance, as a use variance "involves a proposal to use the property in a manner that is wholly outside the zoning regulation." *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh*, 721

⁴ The ZHB voted to grant partial relief in the form of a use variance to permit the 7,289 square foot portion of Tenant's lease area, previously slotted for the fitness center use, as a 4th volleyball court. The relief denied compels a decision with findings of fact, conclusions of law, and reasons. However, since the application was not contested, the granted relief is not analyzed herein.

A.2d 43, 47 (Pa. 1998); see also *Singer v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Commw. Ct. 2011).

Tenant requests a use variance to permit “other recreational activities in addition to volleyball (only one sport at a time).”

- A. Tenant failed to demonstrate any unique physical conditions of the Property that have caused an unnecessary hardship justifying the requested variance to permit the relief requested from the Zoning Ordinance’s use regulations.**

Tenant did not prove that unique physical conditions exist on the Property to prohibit its reasonable use unless the requested variance to permit unspecified “recreational activities” were granted. The Property contains an existing building containing Tenant’s indoor recreational facility, to be increased in size by 7,289 square feet with one additional volleyball court. The building also contains an elevator company, and a brewery is proposed in the majority of the remaining vacant space.

Tenant failed to articulate a legal, as opposed to a personal, hardship for the requested relief. This application and the evidence offered by Tenant present the classic personal articulation of a hardship, which is legally insufficient for the grant of variances. *Nettleton v. Zoning Board of Adjustment of City of Pittsburgh*, 828 A.2d 1033, 1040 (Pa. 2003), citing *Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh*, 672 A.2d 286, 288 (1996); *Singer*, 29 A.3d at 149-150. Unnecessary hardship, caused by unique physical circumstance of the property, is required for the grant of a variance. *Nettleton*, 828 A.2d at 1040. For example, in *Yeager v. Zoning Hearing Board of the City of Allentown*, 779 A.2d 595 (Pa. Commw. Ct. 2001), the court held:

A variance, whether labeled dimensional or use, is appropriate “only where the *property*, not the person, is subject to hardship.” *Szmigiel v. Kranker*, 6 Pa.Cmwth. 632, 298 A.2d 629, 631 (1972) (emphasis

in original). In the present case, Daniels' property is well suited to the purpose for which it is zoned and actually used, a car dealership, which is in no way burdened by the dimensional requirements of the ordinance. Daniels has proven nothing more than that adherence to the ordinance imposes a burden on his personal desire to sell vehicles for Land Rover.

779 A.2d at 598.

In *Lamar Advantage GP Co. v. Zoning Hearing Bd. of Adjustment of City of Pittsburgh*, 997 A.2d 423 (Pa. Commw. Ct. 2010), the court upheld the denial of use and dimensional variances requested to allow signs of a type and size not permitted on a property already being used as a public parking garage. The use variance was requested to allow an LED sign in a zoning district where LED signs were not permitted. The court held:

...no error is apparent in the ZBA's determination that Lamar did not meet its burden of proof to obtain a use variance. Specifically, in denying Lamar's variance request for the LED sign, the ZBA determined Lamar did not prove the requisite unnecessary hardship. Specifically, the ZBA determined the subject property is being used in conformity with the Code's requirements. As such, the ZBA stated Lamar could not prove there were unique physical circumstances relating to the subject property that would warrant relief from the Code's requirements to allow for the reasonable use of the subject property.

Id. at 444.

As in *Yeager* and *Lamar*, Tenant did not prove that unique physical conditions exist on the Property to prohibit its reasonable use. Rather, Tenant's personal preferences and desire to increase profitability by converting its indoor volleyball facility into a full-blown recreational facility, drives the need for the variance.

Tenant has failed to demonstrate an unnecessary hardship entitling it to the requested relief.

B. Tenant failed to demonstrate that the hardship alleged is not self-created.

Tenant was required to demonstrate that the hardship alleged was not self-created. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999). Tenant's request for a variance to permit additional "recreational activities", on top of its indoor volleyball facility is driven entirely by its business desire to offer more recreational activities at its facility (and attract more customers).

Tenant has created its own need for the requested variance.

C. Tenant failed to prove the requested variances are the minimum needed to afford relief.

Tenant was required to provide evidence that the variances requested represent the minimum amount necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl*, 736 A.2d at 59. Tenant failed to prove that the requested variances were the minimum necessary to afford relief. To the contrary, testimony reveals that the Property contains Tenant's indoor volleyball facility and the elevator company. A brewery is proposed to occupy the majority of the remaining vacant space. Moreover, the ZHB granted relief to permit (1) a 4th volleyball court within the 7289 square feet previously reserved for the fitness center and (2) to increase Tenant's hours of operations. Under these circumstances, Tenant failed to prove that the requested variances represent the minimum amount necessary to afford relief, particularly in light of the relief granted in this application.

C. CONCLUSIONS OF LAW

1. Tenant has standing to seek the requested variances as lessee of the Property.

2. The ZHB has jurisdiction under section 909.1(a)(5) of the MPC, 53 P.S. §10909.1(a)(5), and Zoning Ordinance section 165-251.A(5) to grant variances from the provisions of the Zoning Ordinance.

3. The ZHB is obligated to ensure compliance with the technical requirements of the Zoning Ordinance.

4. The ZHB may grant a variance provided that an applicant demonstrates that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance, prohibiting the reasonable use of the property; (c) such unnecessary hardship has not been created by the applicant; and (d) the variance, if authorized, will represent the minimum variance that will afford relief. Zoning Ordinance §165-251.B (2).

5. The ZHB may grant modification of a condition imposed in a prior decision if an applicant demonstrates (1) either grounds for a traditional variance or a change in circumstances that makes the condition inappropriate, and (2) that the grant of relief will not injure the public. *Ford v. Zoning Hearing Bd. of Caernarvon Twp.*, 616 A.2d 1089, 1092 (Pa. Commw. Ct. 1992).

6. Tenant failed to demonstrate any unnecessary hardship entitling Tenant to the requested variance to permit use of its indoor volleyball facility for “other recreational activities...in addition to volleyball (only one sport at a time)”.

7. Tenant failed to demonstrate that the variance is necessary to permit a reasonable use of the Property.

8. Tenant failed to demonstrate that the alleged hardship was not created by Tenant.

9. Tenant failed to demonstrate that the requested variances represented the minimum necessary to afford relief.

10. Accordingly, Tenant failed to demonstrate its entitlement to the additional variances not granted by this decision.

11. Tenant failed to demonstrate a change in circumstances rendering condition no. 1 (hours of operation) or condition no. 3 (no basketball use) inappropriate.

12. Tenant failed to demonstrate grounds for a traditional variance for the requested modification of conditions.

13. Tenant failed to demonstrate that the requested modifications would not injure the public.

14. Tenant failed to demonstrate its entitlement to modification of condition 1 to eliminate the restriction on the hours of operation.

15. Tenant failed to demonstrate its entitlement to modification of condition no. 3 to permit basketball on the Property.

At its June 21, 2017 hearing, the ZHB voted to grant the application in part and deny the application in part, set forth in the following notice of decision:

AND NOW this 21st day of June 2017, the Upper Merion Township Zoning Hearing Board GRANTS IN PART and DENIES IN PART the Application of Max Power Sports, LLC. The Zoning Hearing Board GRANTS the request for a variance from section 165-153 Use regulations to permit an indoor volleyball facility with not more than 4 volleyball courts. Furthermore, the Zoning Hearing Board GRANTS the request for the following modifications to the conditions imposed in its decision dated December 8, 2016:

- *condition no. 1 is modified as follows:*
 - *the property may contain no more than 4 volleyball courts*
 - *the business may operate from 8:00 am to 10:00 pm*
- *condition no. 2 is modified as follows: there shall be no fitness center*
- *condition no. 4 is modified as follows: summer youth volleyball camps are permitted, with no more than 45 youth participants during the following times:*
 - *the last week of June*
 - *the last 3 weeks of July*
 - *the first week of August*
- *the property shall not include a fitness use or facility*

The Zoning Hearing Board denied the request for a variance from section 165-153 Use regulations to permit "other recreational activities in addition to volleyball (only one sport at a time)."

The remaining conditions in the December 8, 2016 decision remain unmodified and in full force and effect:

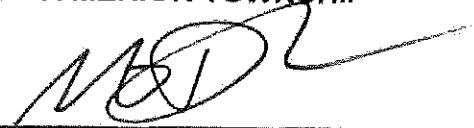
- *condition no. 3: no basketball use shall occur without additional relief from the Upper Merion Township Zoning Hearing Board*
- *condition no. 5: the applicant shall perform a parking study six (6) months after*

commencement of operations, and provide the study to the Township immediately upon completion

- *condition no. 6: there shall be no flea market, retail sales, consignment sales, or community events*
- *condition no. 7: volleyball tournaments shall be held on Saturday and Sunday only, with a traffic control person on duty at all times to direct parking*
- *condition no. 8: applicant shall stripe 124 onsite parking spaces prior to commencement of operations*
- *condition no. 9: the business shall conform strictly to the representations, testimony, and exhibits presented at the hearings and set forth in the application, including, but not limited to, strict conformance with exhibit "A-6", the floor plan of the proposed use, attached hereto.*

Because this application was denied in part, a decision with findings of fact, conclusions of law, and reasons will follow.

ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP



Mark S. DePillis, Esquire, Chairman




M Jonathan Garzillo, Vice Chairman



Maria Mengel, Secretary

John M. Tallman, Jr., Member



Lynne Z. Gold-Bikin, Esquire, Member

Date of Mailing: 8/17/17