

DATE OF MAILING: MAY 7, 2024

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP**

**MONTGOMERY COUNTY, PA**

**APPLICATION OF FIVE BELOW, INC.**

**APPLICATION NO. 2024-02**

**PROPERTY: 224 West Dekalb Pike**

**TAX PARCEL NO. 58-00-06094-00-4**

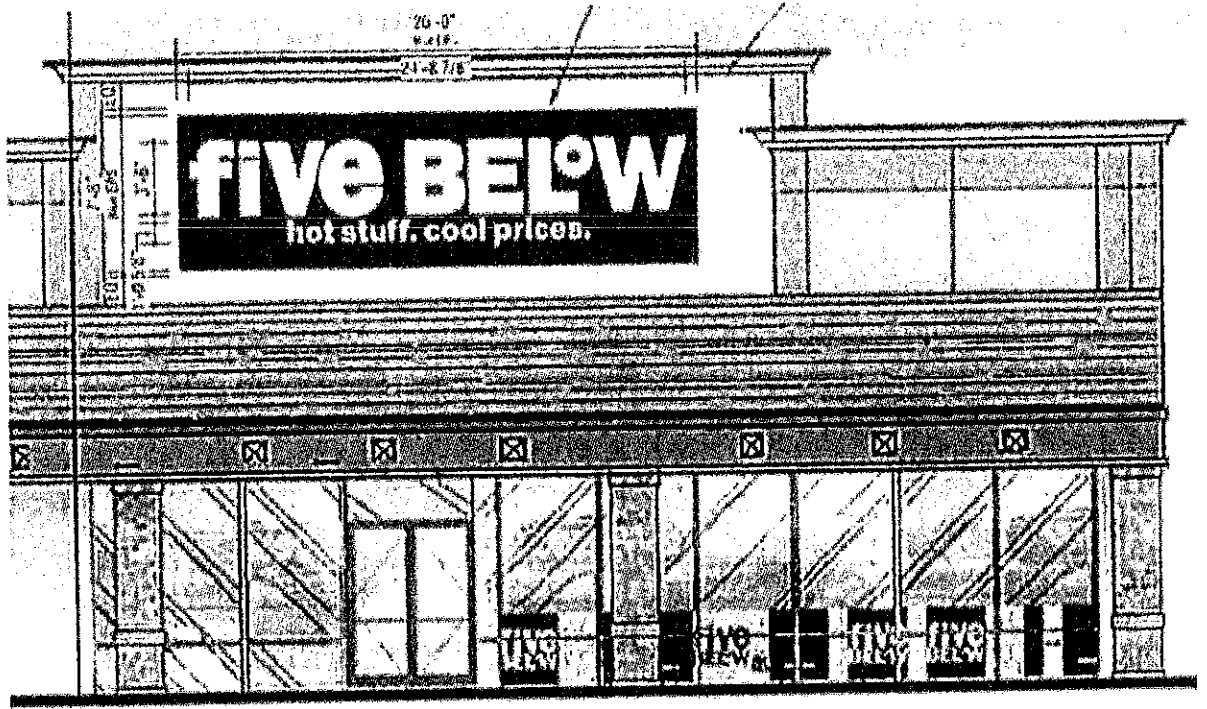
**DECISION**

The Zoning Hearing Board of Upper Merion Township (“ZHB”) considered an application for a variance to erect a wall sign exceeding the allowable square footage. The applicant failed to prove entitlement to the grant of relief. The ZHB voted to deny the application.

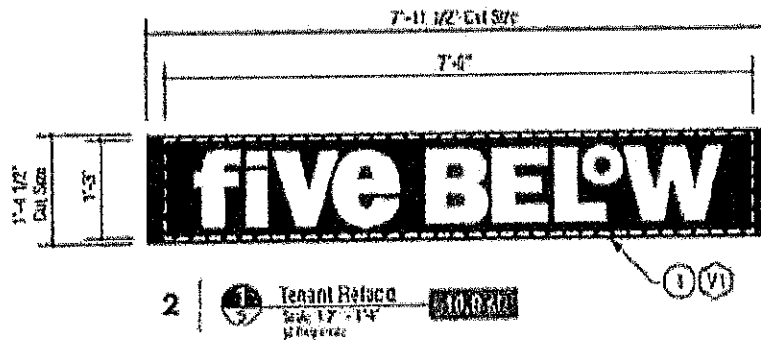
Five Below, Inc. (“Landowner”) is the tenant of the property located at 224 West Dekalb Pike, tax parcel no. 58-00-06094-00-4 (the “Property”). VF Center Associates, L.P., is the record owner of the Property. The Property is located in the SC Shopping Center Zoning District (“SC District”) of Upper Merion Township (“Township”).

The Property is a retail store within the Valley Forge Center shopping mall. Landowner is opening a Five Below retail store within the building on the Property. Prior to Landowner, the building was occupied by a Bed, Bath & Beyond retail store.

Landowner intends to install signage on the Property, including a 199.3 square foot wall sign on the front of the retail store as depicted below:



This proposed sign is in addition to other Five Below signs, including an existing free-standing sign near the public street depicted below:



Section 165-168(A) of the Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance"), provides that the maximum total sign area is two square feet for every one linear foot of building frontage, with a maximum area of 200 square feet. Based on the frontage of Landowner's building, the maximum area of the wall sign is 108.7 square feet. Landowner requires a variance from section 165-168(A)

to erect the proposed 199.3 square foot sign, which is almost twice the square footage allowed.

On April 3, 2024, the ZHB held an advertised public hearing on Landowner's application. The following members of the ZHB were present at the hearing: Mark S. DePillis, Esq., Chairperson; John M. Tallman, Jr., Vice Chairperson; Chiragi Raval, Secretary; Vivian Peikin, Esq., member; and M. Jonathan Garzillo, member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm Eastburn and Gray, P.C. Landowner was represented by Leonard B. Altieri, III, Esq., of the law firm Klehr Harrison Harvey Branzburg, LLP.

The hearing was duly advertised, notice was given in accordance with the requirements of the Zoning Ordinance, and the proceedings were stenographically recorded. Because the application was denied, the ZHB issues this decision with findings of fact, conclusions of law, and reasons.

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. VF Center Associates, L.P. is the owner of the Property. [Ex. ZHB-2]
2. Landowner is the tenant of the Property. [Ex. ZHB-3]
3. The Property is identified as tax parcel no. 58-00-06094-00-4. [Ex. ZHB-2]

**ZHB HEARING**

4. The ZHB marked the following exhibits:
  - a. ZHB-1 – application;

- b. ZHB-2 – deed dated November 16, 2009 between VF Center Associates, L.P. (grantor) and VF Center Associates, L.P. (grantee), recorded in deed book 5753, page 2951;
- c. ZHB-3 – redacted lease agreement between VF Center Association L.P. and Five Below, Inc. dated 1/31/2024;
- d. ZHB-4 – signage plans prepared by CIMA Network;
- e. ZHB-5 – legal notice.

5. Landowner offered the following exhibits:

- a. A-1 – application;
- b. A-2 – addendum to the application;
- c. A-3 – aerial photograph of shopping center;
- d. A-4 – photographs of the Property;
- e. A-5 – signage plan prepared by CIMA Network;
- f. A-6 – deed dated November 16, 2009 between VF Center Associates, L.P. (grantor) and VF Center Associates, L.P. (grantee), recorded in deed book 5753, page 2951;
- g. A-7 – redacted copy of the lease agreement between VF Center Association L.P. and Five Below, Inc. dated 1/31/2024; and
- h. A-8 – landlord authorization.

6. Lindsey Lupino, a senior project manager for CIMA Network, testified as a fact witness on behalf of the Landowner as follows:

- a. CIMA Network is the national sign manufacturer for Landowner. [N.T. 4/3/2024, p. 13]

- b. Landowner's building is set back 315 feet from Dekalb Pike. [N.T. 4/3/2024, p. 16]
- c. Ms. Lupino opined that Landowner's store front is difficult for motorists on Dekalb Pike to see due to the elevation of the road and landscaping. [N.T. 4/3/2024, pp. 15-16]
- d. Landowner's proposed wall sign includes 2 lines of text in white channel letters with a blue background measuring 7.8 feet x 26 feet and totaling 199.3square feet. [N.T. 4/3/2024, p. 16; Ex. A-5]
- e. The blue background of the wall sign is painted behind the white channel lettering. [N.T. 4/3/2024, p. 17]
- f. Landowner's proposed wall sign is designed to be consistent with the national brand of Five Below. [N.T. 4/3/2024, pp. 17; 20]
- g. Although not offered or qualified as an expert witness, in Ms. Lupino's opinion, due the building's setback from Dekalb Pike the proposed size of the lettering provides the best visibility for Landowner's brand to be successful. [N.T. 4/3/2024, p. 17]
- h. Ms. Lupino was not qualified as an expert in traffic engineering, but opined that Landowner's proposed wall sign is designed to allow motorists traveling on Dekalb Pike to safely identify the store. [N.T. 4/3/2024, p. 19]
- i. Landowner's proposed wall sign includes a tag line which reads "Hot stuff. Cool Prices." [N.T. 4/3/2024, p. 18; Ex. A-5]

- j. Prior to the COVID-19 Pandemic, Landowner's signs did not include the "Hot stuff. Cool Prices." tag line. [N.T. 4/3/2024, p. 22]
  - k. Landowner did not present an alternate wall sign design without the blue background, or without the "Hot stuff. Cool Prices." tag line. [N.T. 4/3/2024, pp. 22; 25]
  - l. Landowner will have a sign on the free-standing pylon sign for the retail store located near Dekalb Pike. [N.T. 4/3/2024, p. 26; Ex. A-5]
  - m. The sign on the pylon sign will not include the 2<sup>nd</sup> line of text.
7. Ms. Lupino could not provide the size of the wall sign without the "Hot stuff. Cool Prices." tag line.
8. Ms. Lupino was not qualified as an expert in traffic engineering and did not offer any traffic report or study in support of her testimony and opinions.
9. David Sarney, an architecture manager for Five Below, testified on behalf of the Landowner as follows:
- a. Landowner's pylon sign will not include the "Hot stuff. Cool Prices." tag line. [N.T. 4/3/2024, p. 30]
  - b. Landowner wants to include the blue background in the design of the wall sign. [N.T. 4/3/2024, pp. 33-35]
  - c. Approval of the sign is not essential to the commencement of business. Landowner plans to begin to fit out the interior space of the retail store on the Property in the near future. [N.T. 4/3/2024, p. 35]
  - d. The approval of the variance for the wall sign is not delaying Landowner's efforts to fit out the retail store. [N.T. 4/3/2024, p. 36]

10. Landowner provided no expert testimony in support of the variance.

11. Landowner offered no competent evidence of any unique physical conditions or characteristics of the Property or any resulting unnecessary hardship requiring the variance.

12. The basis for a variance from the maximum size for a wall sign is personal to the Landowner, relating to Landowner's desire to install a sign consistent with the Five Below national brand.

13. No competent evidence was offered by Landowner that the variance sought represents the minimum variance that will afford relief for a reasonable use of the Property. Landowner rejected opportunities to reduce the size of the sign.

14. No competent evidence was offered by Landowner that the variance would not be detrimental to the public welfare.

## **B. DISCUSSION**

A zoning hearing board may only 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); Zoning Ordinance §165-251.B.2; *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (Pa. Cmwlth. 1990).

The variance standard is a “high hurdle[ ]” *Omnipoint Comms. Ent. L.P. v. Zoning Hearing Bd. Easttown Twp.*, 331 F.3d 386, n\*11 (3d Cir. 2003). “[T]he reasons for granting the variance must be substantial, serious and compelling.” *Commonwealth v. Zoning Hearing Bd. Susquehanna Twp.*, 677 A.2d 853, 855 (Pa. Cmwlth. 1996). Variances are to be granted “sparingly and only under exceptional circumstances.” *Id.*; see also *Appeal of Lester M. Prange, Inc.*, 647 A.2d 279, 284 (Pa. Cmwlth. 1994); *Laurento v. Zoning Hearing Bd. of Borough of W. Chester*, 638 A.2d 437, 439 (Pa. Cmwlth. 1994).

“[T]o establish unnecessary hardship, an applicant must show more than a mere economic or personal hardship.” *Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp.*, 979 A.2d 969, 980 (Pa. Cmwlth. 2009); see also *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 150 (Pa. Cmwlth. 2011) (“It is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted.”); *Marple Gardens, Inc. v. Bd. of Zoning Adjustment of Marple Tp.*, 303 A.2d 239, 241 (Pa. Cmwlth. 1973) (“a variance will not be granted solely because the petitioner will suffer an economic hardship if he does not receive a variance.”)

An applicant for a variance from maximum sign area must demonstrate that the hardship is more than a financial hardship related to the applicant’s income or brand. See *Lamar Advantage GP Co. v. Zoning Hrg. Bd. of Adjustment of City of Pittsburgh*, 997 A.2d



423 (Pa. Cmwlth. 2010) (rejecting applicant's request for dimensional variance from maximum square footage for proposed sign where only asserted hardship involved alleged benefit to community and increase in income); *App. of R.C. Maxwell Co.*, 548 A.2d 1300, 1305 (Pa. Cmwlth. 1988) (mere fact that a municipal zoning ordinance does not permit signs to be the size of an industry standard is insufficient to constitute unique hardship for grant of a dimensional variance); *Accord*, *Appeal of Marshall Automobile Co. Inc.* 57 Pa. D.&C.2d 373 (Bucks Co. 1972) (car dealership signage which matching national brand specifications was financial in nature and not sufficient to require grant of a variance. *Id.* at 374; *Beecham Enterprises, Inc. v. Zoning Hrg. Bd. of Kennedy Tp.*, 556 A.2d 981, 987 (Pa. Cmwlth. 1989), *aff'd*, 608 A.2d 1017 (Pa. 1992) (applicant motel's testimony that due to the contour of the land a twelve foot sign would not be visible enough to attract customers and it would not be able to compete with other motels in vicinity, did not demonstrate a hardship entitling applicant to a variance for a 320 square foot sign. The evidence did not establish that the property could not be reasonably used as a motel).

In the current application, Landowner did not satisfy the statutory requirements for establishing entitlement to the requested variance. Landowner failed to demonstrate an unnecessary hardship due to unique physical characteristics of the Property. The evidence established merely that the need for the variance is self-created -- Landowner's desire to install a 199.3 square foot wall sign – 183% larger than permitted by the Zoning Ordinance.

Landowner's proposed 199.3 square foot sign includes white channel letters and the blue background. Landowner's counsel argued that the ZHB should not consider the

square footage of the blue background, while acknowledging that the blue background is part of the sign area per the Zoning Ordinance:

...that taking [out] that blue backer, which is essentially painted, the total square footage of the channel letters is only 102.4 square feet, which is below the 108.7 square feet that we would be permitted based off the amount of frontage of the building.<sup>1</sup>

[N.T. 4/3/2024, p. 9] Landowner prefers to install a non-compliant sign with the blue background because “that blue backer is part of that national brand. It would be out of character for Five Below to have a sign that would not be inclusive of that blue background.” [N.T. 4/3/2024, p. 37] When asked if Landowner has an alternate sign without the blue background, Mr. Sarney responded, “I don't think we could eliminate the blue and I think -- yeah, I don't see a way we could do that. We don't do that.” [N.T. 4/3/2024, p. 35]

At the hearing, elimination of the 2<sup>nd</sup> line of text on the sign was discussed. Landowner's proposed sign includes the tag line “Hot stuff. Cool Prices”. Despite the fact that the size of the size of the sign would be smaller without the tag line, Landowner did not provide an alternate design without the tag line. [N.T. 4/3/2024, p. 22]

While Landowner argued that the size of the proposed wall sign was necessary to allow motorists to safely identify the store due to the elevation of Dekalb Pike and existing landscaping which limits visibility of the store, there was no credible expert testimony or study from a traffic engineer offered by Landowner to support this claim.

The evidence fell short of establishing an unnecessary hardship that prevents the reasonable use of the Property, or that the requested variance is the minimum variance

---

<sup>1</sup> The painted blue background is part of the measured sign area pursuant to section 165-5 of the Zoning Ordinance.

necessary. The requested variance relates only to Landowner's uncompromising demand to install signage consistent with Five Below's national brand. This is an example of a personal rationale which does not demonstrate unnecessary hardship as defined by the wealth of court decisions. See *Lamar Advantage GP Co.*, 997 A.2d 423; *Beecham Enterprises, Inc.*, 556 A.2d at 987; *App. of R.C. Maxwell Co.*, 548 A.2d at 1305. Accordingly, the variance was denied.

### **C. CONCLUSIONS OF LAW**

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

2. Landowner has standing to seek the requested zoning relief as the tenant of the Property.

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

4. Landowner requires a variance from section 165-168(A) of the Zoning Ordinance to install a wall sign that is 199.3 square feet.

5. The ZHB may grant a variance provided that an applicant establishes that: (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.

6. Landowner failed to demonstrate an unnecessary hardship entitling it to the requested variance.

7. The reason for the variance is self-created by Landowner's desire to install signage consistent with its national brand.

8. Landowner failed to establish that the variance sought represents the minimum variance that will afford relief.

9. Landowner failed to establish the variance sought will not be detrimental to the public welfare.

10. Landowner made no effort to minimize the relief sought.

11. At the conclusion of the April 3, 2024 hearing, the ZHB voted unanimously to deny the application. On April 4, 2024, the ZHB mailed the following notice of decision to Landowner:

*This letter provides notice of the decision of the Upper Merion Township Zoning Hearing Board following the conclusion of the hearing on Wednesday, April 3, 2024.*

*The Zoning Hearing Board voted to deny the application for a variance from section 165-168(A) of the Upper Merion Township Zoning Ordinance of 1942, as Amended, to permit a business sign larger than what the zoning ordinance permits.*

*Because this application was denied, the Zoning Hearing Board will issue a decision with findings of fact, conclusions of law, and reasons*

---

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.

**ZONING HEARING BOARD OF  
UPPER MERION TOWNSHIP**

A handwritten signature in black ink, appearing to read 'M. DePillis', with a long horizontal flourish extending to the right.

---

Mark S. DePillis, Esq.  
Chairperson

