

Date of Mailing:

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF WORKHORSE BREWING COMPANY, LLC

NO. 2017-10

PROPERTY: 250 King Manor Drive

OPINION AND ORDER

This application concerns requests for a special exception and variances from the Upper Merion Township Zoning Ordinance of 1942, as amended (the "Zoning Ordinance"), to permit a brewery and a tasting room without the minimum required parking on a property located in the HI Heavy Industrial Zoning District.

The application was amended to include an appeal from the determination of the Upper Merion Township zoning officer who concluded that the proposed tasting room was not permitted. In the alternative, the applicant requested a use variance to permit a drinking establishment. The Zoning Hearing Board ("ZHB") granted the special exception and parking variance, but denied both the appeal of the zoning officer's determination and the use variance.

Workhorse Brewing Company, LLC ("Brewery") is the lessee of 49,327 square feet of the building located at 250 King Manor Drive (the "Property"). The building contains an elevator company and an indoor volleyball facility. Brewery proposes to operate a brewery with a "tasting room," pursuant to a brewery license from the Pennsylvania Liquor Control Board ("PLCB").

Under Zoning Ordinance section 165-153.C(1)(a) *Use regulations*, a brewery is permitted by special exception in the HI Heavy Industrial Zoning District. Zoning Ordinance § 165-153.C(1)(a). Brewery requested a special exception pursuant to section 165-153.C(1)(a), a parking variance from section 165-191 *Minimum requirements*, and a dimensional variance from section 165-157 *Off-street parking and loading* to permit less than the minimum required parking and to permit parking within the required front yard where parking is not permitted.

In its application, Brewery asserted that a tasting room was a “normal and customary” attribute of a brewery and was, therefore, encompassed in its request for a special exception.

After its application was filed, Brewery requested a determination by the zoning officer that a tasting room was permitted as part of the brewery. By letter dated June 19, 2017, the zoning officer determined that the tasting room as proposed by Brewery constituted a “drinking establishment.” A drinking establishment is not permitted in the HI Heavy Industrial Zoning District. By letter dated June 26, 2017, Brewery amended its application to include an appeal of the zoning officer’s determination, and, in the alternative, a request for a use variance.¹

The ZHB held two advertised hearings -- the first on June 7, 2017, and the second on July 19, 2017. The hearings were stenographically recorded. During both hearings, four members of the ZHB were present. At the June hearing, Jonathan Garzillo, Vice-Chairman; Maria Mengel, Secretary; John M. Tallman, Jr., Member; and Lynne Z. Gold-Bikin, Esq., Member, were present. At the July hearing, Chairman Mark S. DePillis, Esq., was present, but Lynne Z. Gold-Bikin, Esq. was absent. The ZHB was represented at both hearings by Michael E. Peters, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Brewery was represented by Edward J. Hughes, Esq., of the law firm of Hughes, Kalkbrenner & Ozorowski, LLP. At the second hearing, which focused on the appeal of the zoning officer’s determination, Upper Merion Township (“Township”) was represented by Bernadette Kearney, Esq., of the law firm of Hamburg, Rubin, Mullin, Maxwell & Lupin, P.C.

In support of Brewery’s application was Eric Goldstein, executive director of the King of Prussia Business Improvement District. One person appeared in opposition to Brewery’s application: Kevin Lehman, the commercial tenant of the property located at 200 King Manor Drive.

¹ Because the zoning officer determined that the proposed use constituted a “drinking establishment,” the ZHB analyzes Tenant’s request for a use variance as a request to permit a “drinking establishment.”

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

A. FINDINGS OF FACT

BACKGROUND

1. Ingerman-Ginsburg Partnership is the owner of the Property. [Exhibit A-1.]
2. Brewery entered into a lease with Ingerman-Ginsburg Partnership for approximately 50,000 square feet of the Building, with a right of first refusal for another 22,000 square feet (the "Premises"). [Exhibit A-2.]
3. Brewery proposes a brewery with associated production area, warehouse, and tasting room in the Premises. [Exhibit A-1.]
4. Brewery requested the following zoning relief:
 - a. A special exception from section 165-153.C(1)(a) *Use regulations* to permit a brewery;
 - b. A variance from section 165-191 *Minimum requirements* to permit 149 off-street parking spaces where a total of 170 spaces are required (100 spaces for the tap room, 7 spaces for tap room employees, 30 spaces for the production area, and 33 spaces for the warehouse);
 - c. A variance from section 165-157 *Off-street parking and loading* to permit an off-street parking area within the required 40-foot front yard setback;
 - d. An appeal of the zoning officer's determination dated June 19, 2017, that the tasting room constitutes a drinking establishment;
 - e. In the alternative, a variance from section 165-153.A *Use regulations* to permit a drinking establishment.

ZHB HEARING

5. The ZHB marked the following exhibits:
 - a. ZHB-1 — application and one page attachment
 - b. ZHB-2 — letter dated March 29, 2017 from Ingerman-Ginsburg Partnership, LP to the ZHB granting “permission” to Brewery to file application
 - c. ZHB-3 — site plan titled “Concept - B,” sheet 1 of 1, prepared by Nicholas L. Vastardis, P.E. of Vastardis Consulting Engineers, LLC, dated March 7, 2017
 - d. ZHB-4 — aerial photograph of the Property from Google Maps, dated October 31, 2016
 - e. ZHB-5 — photograph from Google Maps Street View showing the building from King Manor Boulevard, dated November 2, 2016
 - f. ZHB-6 — photograph from Google Maps Street View showing a portion of King Manor Boulevard, dated October 4, 2016
 - g. ZHB-7 — floor plan titled “Existing Conditions Plan” sheet EC-1
 - h. ZHB-8 — Montgomery County Board of Assessment Appeals property information and tax map
 - i. ZHB-9 — letter from ZHB to Edward J. Hughes, Esq. providing notice of decision for Application No. 2016-15 of Max Power Sports, dated December 8, 2016
 - j. ZHB-10 — legal notice
 - k. ZHB-11 — proof of publication
 - l. ZHB-12 — proof of posting
 - m. ZHB-13 — letter from Edward J. Hughes, Esq. to Mark Zadroga, Chief Building/Zoning Official requesting determination of zoning officer
 - n. ZHB-14 — lease dated April 6, 2017 between Ingerman & Ginsburg Partnership, landlord, and Workhorse Brewery, tenant
 - o. ZHB-15 — floor plan, undated, preparer unknown
 - p. ZHB-16 — letter from Mark Zadroga, Chief Building/Zoning Official, to Edward J. Hughes, Esq., dated June 19, 2017 providing the zoning officer’s determination

- q. ZHB-17 — notes of testimony from ZHB hearing held on June 7, 2017
 - r. ZHB-18 — letter from Edward J. Hughes, Esq. to Mark Zadroga, Chief Building/Zoning Official, dated June 26, 2017, amending application no. 2017-10 to include an appeal of the zoning officer's June 19, 2017 determination
 - s. ZHB-19 — notes of testimony from ZHB hearing held on July 19, 2017.
6. The Township offered the following exhibits:
- a. T-1 — letter from Edward J. Hughes, Esq. to Mark Zadroga, Chief Building/Zoning Official, dated May 23, 2017 including:
 - i. four (4) page question and answer sheet
 - ii. plan entitled "Exhibit A," preparer and date unknown
 - iii. brewery case studies entitled "Exhibit B"
 - iv. enlarged parking and floor plan entitled "Exhibit C"
 - v. Pennsylvania Liquor Control Board regulation 40 Pa.Code §3.93. *Breweries*
 - b. T-2 — excerpt from *Webster's New World Dictionary, Second College Edition* with "bar" highlighted
 - c. T-3 — excerpt from *Webster's New World Dictionary, Second College Edition* with "tavern" highlighted
 - d. T-4 — Pennsylvania Liquor Control Board regulation 40 Pa.Code §13.201. *Definitions.*
7. Landowner offered the following exhibits:
- a. A-1 — deed dated October 12, 2006 between the Montgomery County Industrial Development Authority (grantor) and Ingerman-Ginsburg Partnership (grantee), recorded in deed book 5634, page 1789, including Realty Transfer Tax Statement of Value
 - b. A-2 — lease dated April 6, 2017 between Ingerman & Ginsburg Partnership (landlord) and Workhorse Brewery (tenant)
 - c. A-3 — two-dimensional aerial photograph of the Property from Google Maps, dated June 5, 2017
 - d. A-4 — three dimensional aerial photograph of the Property from Google maps, dated June 5, 2017
 - e. A-5 — site plan entitled "Concept - B," sheet 1 of 1, prepared by Nicholas L. Vastardis, P.E. of Vastardis Consulting Engineers, LLC, dated March 7, 2017

- f. A-6 — parking and floor plan
- g. A-7 — enlarged parking and floor plan
- h. A-8 — Pennsylvania Liquor Control Board regulation 40 Pa.Code § 3.93. *Breweries*
- i. A-9 — Brewery Case Studies
- j. A-10 — curriculum vitae of Nicholas L. Vastardis, P.E., President, Vastardis Consulting Engineers, LLC
- k. A-11 — curriculum vitae of Nancy L. Templeton, AICP, PP, Senior Planner, Glackin Thomas Panzak, Inc.
- l. A-12 — resume of Nathan L. Olewine, Brewmaster
- m. A-13 — list of offered conditions
- n. A-14 — letter from John Stemler, Brewmaster, Free Will Brewing Company, LLC to the ZHB, dated June 6, 2017
- o. A-15 — letter from Paul Andrew Sgroi, Principal, Bernardon, P.C. to the ZHB, dated June 7, 2017
- p. A-16 — letter from Robert Euler, Vice President, King Limousine & Transportation Service, Inc. to the ZHB, dated June 7, 2017
- q. A-17 — memorandum from Nancy L. Templeton to the ZHB, dated June 7, 2017
- r. A-18 — letter from Edward J. Hughes, Esq. to Mark Zadroga, Chief Building/Zoning Official, dated June 26, 2017, amending Application No. 2017-10 to include an appeal of the zoning officer's June 19, 2017 determination
- s. A-19 — letter from Mark Zadroga, Chief Building/Zoning Official, to Edward J. Hughes, Esq., dated June 19, 2017 providing zoning officer's determination
- t. A-20 — Pennsylvania Liquor Control Board regulation 40 Pa.Code §13.211. *Tasting events*
- u. A-20 — memorandum of law prepared by Edward J. Hughes, Esquire.

8. Landowner presented four witnesses at the June Hearing: Daniel Hershberg; Nathan Olewine; Nicholas Vastardis, P.E.; and Nancy Templeton.

9. Mr. Hershberg is a principal of Brewery with his uncle, Peter Fineberg, and Mr. Olewine. [6/7/17 N.T. p. 11.]

10. Mr. Olewine would be the brewmaster and was accepted by the ZHB as an expert in brewing. [6/7/17 N.T. p. 51.]

11. Mr. Vastardis prepared the plans submitted with the application and was accepted by the ZHB as a qualified professional engineer. [6/7/17 N.T. p. 55.]

12. Ms. Templeton is a professional land planner retained by Brewery to evaluate whether the proposed use satisfied the special exception criteria and whether the proposed parking was sufficient. [6/7/17 N.T. p. 66-67.]

13. Brewery's witnesses at the June Hearing testified as follows:

- a. The entire building is approximately 120,000 square feet in size. [6/7/17 N.T. p. 16.]
- b. Brewery has leased approximately 50,000 square feet, with a right of first refusal for another 22,000 square feet. [6/7/17 N.T. p. 16-17; Exhibit A-6.]
- c. The other tenants in the Building are Max Power Sports ("Max Power") and Thyssen Elevator Company ("Thyssen"). [6/7/17 N.T. p. 17-18.]
- d. The Premises would house a number of related uses associated with the brewery, including a production area of 20,000 square feet, a warehouse area of approximately 20,000 square feet, an office and restroom area of approximately 5,000 square feet, and a tasting room of approximately 5,000 square feet. [6/7/17 N.T. p. 17, 19-20; Exhibit A-6.]
- e. The tasting room would have approximately 90 seats, consisting of a bar with seats around it and a few tables. [6/7/17 N.T. p. 22-23, 26.]
- f. Breweries are required to obtain brewery licenses from the PLCB, which Brewery intends to obtain if it receives zoning approval. [6/7/17 N.T. p. 21.]

- g. Brewery will not seek a brew pub, restaurant, retail dispenser, or hotel license from the PLCB. [6/7/17 N.T. p. 23.]
- h. A brewery license is subject to certain conditions: consumption may only occur between 10:00 a.m. and midnight; any alcohol consumed on the premises must be produced and owned by the brewery; at least 10 seats must be available for patrons; and food, such as potato chips, pretzels, or the like, must be available. [6/7/17 N.T. p. 21-22; Exhibit A-8.]
- i. There will be no kitchen facilities on the premises. Instead, a rotating assortment of food trucks will sell food. Brewery will sell light snacks, such as chips, pretzels, and popcorn. [6/7/17 N.T. p. 23-24.]
- j. The food trucks would park in a separate area near the drive-in bays and would not obstruct any parking spaces. [6/7/17 N.T. p. 40.]
- k. Similar arrangements with food trucks is common among breweries with tasting rooms in the area. [6/7/17 N.T. p. 24.]
- l. There are at least 200 breweries in Pennsylvania. The vast majority have tasting rooms. [6/7/17 N.T. p. 25.]
- m. The production facilities would be automated. Less than 5 employees would be necessary to run the production and warehousing portions of the facility. [6/7/17 N.T. p. 27-28.]
- n. Brewery anticipates hiring 5 employees initially and to have 30 employees in five years who would work in shifts of 15 employees per shift. [6/7/17 N.T. p. 27-28.]
- o. Brewery never intends to have more than 15 employees on the premises at one time. [6/7/17 N.T. p. 31, 53.]

- p. The tasting room would be open 7 days a week from 10:00 a.m. until midnight. [6/7/17 N.T. p. 28.]
- q. There are currently 131 striped parking spaces on the Property. Brewery proposes adding 130 parking spaces, increasing the total to 261 spaces. [6/7/17 N.T. p. 18-19, 28-29, 56; Exhibit A-6.]
- r. Thyssen operates from 8 am until 5 p.m. Monday through Friday, and requires 39 parking spaces pursuant to the Zoning Ordinance. [6/7/17 N.T. p. 29-30, 71; Exhibit A-6.]
- s. Max Power Sports has the exclusive right under its lease to 54 parking spaces, and the right to use an additional 43 parking spaces after 5:30 p.m., on weekdays, and all day on weekends. [6/7/17 N.T. p. 30; Exhibit A-6.]
- t. The Zoning Ordinance requires 170 parking spaces for Brewery's proposed use. [Exhibit A-1.]
- u. The production facilities will be operated 24 hours a day, 7 days a week. [6/7/17 N.T. p. 40.]
- v. The majority of the beer produced on the premises will be sold at retail outlets, with around 10% being consumed in the tasting room at first, and less than 5% as the brewery grows. [6/7/17 N.T. p. 41.]
- w. There will be no noxious odors, noise, fumes, or hazardous materials emitted from the brewing operation. [6/7/17 N.T. p. 53-54.]
- x. The new parking area would be set back 15 feet from Crooked Lane and 40 feet from King Manor Drive. [6/7/17 N.T. p. 57.]

- y. In Ms. Templeton's opinion the surrounding uses were similar to and compatible with the proposed use, and the proposed use was served by adequate public infrastructure. [6/7/17 N.T. p. 68.]
- z. Ms. Templeton opined, based on the number of seats in the tasting room and the number of employees, that the proposed parking would be adequate. [6/7/17 N.T. p. 69-70.] Ms. Templeton explained that the parking requirements in the Zoning Ordinance relate to square footage rather than the number of employees or patrons, resulting in an over-supply of parking.

14. Mr. Goldstein spoke in favor of the application, expressing confidence in the strength of the proposed operations and marketing plan, highlighting the value that similar projects have had on the surrounding communities. [6/7/17 N.T. p. 74-76.]

15. Mr. Lehman spoke in opposition to the application, raising concerns that the brewery would change the character of the area, generate increased traffic and congestion, and restrict access for his customers. [6/7/17 N.T. p. 84-86.]

16. At the conclusion of the June hearing, the application was continued for the zoning officer to issue a determination letter regarding Brewery's request for a determination whether the tasting room, as proposed, is a component part of the brewery and thereby permitted by special exception. [See Exhibit T-1.]

17. On June 19, 2017, the zoning officer issued a determination letter, concluding the proposed use was "more similar to a drinking establishment than a tasting room and therefore would require a use variance." [Exhibit ZHB-16.]

18. Brewery responded by letter dated June 26, 2017, appealing the determination and requesting its application be amended. [Exhibit ZHB-18.]

19. At the second hearing, after Brewery amended its application to appeal the determination, Brewery recalled Mr. Hershberg to testify. Mr. Hershberg explained that the tasting room would include: indoor and outdoor events, corporate events, amusement permits, live music and similar entertainment, interior fit-out with several televisions and seating for a minimum of 90 people, billiard tables and other similar games, rotating food trucks to provide additional food, and potential expansion of the 5,000 square foot tasting room. [7/19/17 N.T. p. 10.]

20. Mr. Zadroga testified on behalf of the Township, as follows:

- a. A tasting room, in Mr. Zadroga's determination, relates to a brewery tour where patrons take a tour, sample a few beers, and leave; and
- b. Brewery's proposed amenities would have patrons stay to play pool, watch a sporting event, or listen to a live music performance -- essentially similar to a bar or tavern. [7/19/17 N.T. p. 33-35.]

B. Discussion

1. Special exception to operate a brewery

An application for a special exception "is to be granted or denied by the ZHB pursuant to the express standards and criteria set forth in the applicable zoning ordinance." *Elizabethtown/Mt. Joy Assocs. v. Mt. Joy Twp. Zoning Hearing Bd.*, 934 A.2d 759, 764 (Pa. Commw. Ct. 2007); *In re Brickstone Realty Corp.*, 789 A.2d 333, 340 (Pa. Commw. Ct. 2001). What an applicant must demonstrate in seeking a special exception "is determined on a case-by-case basis and will vary among municipalities based on the use requested and the language in the ordinance." *Elizabethtown/Mt. Joy Assocs.*, *supra*, at 764; *In re Thompson*, 896 A.2d 659, 670 (Pa. Commw. Ct. 2006).

Brewery seeks a special exception to permit a "brewery" in the HI Heavy Industrial Zoning District, pursuant to section 165-153.C(1)(a) *Use regulations*. In order to operate a brewery,

Brewery must obtain a brewery license from the PLCB. Brewery intends to obtain a brewery license.

With respect to the tasting room, on-premises consumption of alcohol is permitted pursuant to a brewery license, subject to certain requirements. 40 Pa. Code § 3.93. A brewery license holder that does not have another type of liquor license is permitted to serve alcohol on its premises if the following conditions are satisfied:

- (1) Consumption occurs between 10 a.m. and midnight,
- (2) The alcohol consumed is produced and owned by the brewery,
- (3) There are at least 10 seats for patrons to use while consuming alcohol, and
- (4) Food is available to patrons consisting of, at a minimum, potato chips, pretzels, and similar foods, which may be prepared by the brewery or a third party.

40 Pa. Code § 3.93.

Section 3.93(d) permits breweries to offer “tastings” in accordance with sections 13.201 and 13.211. Section 13.201 defines a “tasting/tasting events” as a “[a] presentation of alcoholic products to the public for the purpose of market research, disseminating product information and education of the public as to quality and availability.” 40 Pa. Code § 13.201. Section 13.211 provides regulations for “tasting events” on licensed or unlicensed premises, and prohibits purchase requirements, limits the size of products being offered to a “standard size alcoholic beverage for that product,” and limits samples to one per participant per brand. 40 Pa. Code § 13.211.

Aside from consumption of alcohol, Brewery proposes a wide variety of activities, including: indoor and outdoor events, corporate events, amusement permits, live music and similar entertainment, interior fit-out with several televisions and seating for a minimum of 90 people, billiard tables and other similar games, and rotating food trucks to provide additional food. [7/19/17 N.T. p. 10; Exhibit A-19.] These activities are not specifically permitted by the PLCB

regulations. See 40 Pa. Code §§3.93, 13.201, 13.211. To the extent that these activities exceed the permissible scope of a “tasting room,” as allowed by section 3.93(d), they are not permitted in conjunction with the grant of a special exception for a brewery.

Brewery demonstrated compliance with the general requirements for a special exception pursuant to Zoning Ordinance §165-251.B(1).

Brewery demonstrated its entitlement to a special exception to operate a brewery. The special exception is limited to a “brewery” as defined and regulated by a brewery license pursuant to the PLCB regulations, 40 Pa. Code §§3.93, 13.201, and 13.211.

2. Zoning officer’s determination

Municipalities possess the authority to promulgate and enforce appropriate liquor-neutral zoning controls. 47 P.S. §4–493.1; *Aboud v. City of Pittsburgh Dep’t of Planning*, 17 A.3d 455, 460 (Pa. Commw. Ct. 2011). They may dictate where an establishment with a PLCB license may locate, but once it is determined that the use is permitted, further conditions on the use of the license encroach upon the exclusive domain of the PLCB. *Aboud*, 17 A.3d at 462.

A brewery is permitted on the Property by special exception, to which Brewery has demonstrated entitlement. Brewery must obtain a brewery license from the PLCB to operate the brewery. Brewery will seek no type of PLCB license other than a brewery license. Pursuant to §3.93 of the Pennsylvania Code, consumption of alcohol on the premises of a licensed brewery is permitted subject to a number of conditions.

The use proposed by Brewery, a “tasting room,” is restricted by the limitations set forth in Pa. Code §§3.93(d), 13.201, and 13.211. Specifically, under these regulations Brewery is permitted to:

- Hold tastings where Brewery presents alcoholic products for the purpose of market research, disseminating product information and education;

- Provide a single serving per participant per brand and limited to a standard size alcoholic beverage of 12 fluid ounces of a malt or brewed beverage, 4 fluid ounces of wine (including fortified wine) or 1 1/2 fluid ounces of spirits;

Purchase requirements may not be associated with the tasting.

The activities proposed by Brewery in its request for the zoning officer's determination — indoor and outdoor events, corporate events, amusement permits, live music and similar entertainment, interior fit-out with several televisions and seating for a minimum of 90 people, billiard tables and other similar games, and rotating food trucks to provide additional food—to the extent that they exceed the scope of a tasting room as permitted by the PLCB regulations, are more akin to a “drinking establishment.” A drinking establishment is not permitted in the HI district, but is permitted in the Neighborhood Commercial, Limited Commercial, General Commercial, and Shopping Center districts of the Township. As this determination relates to whether a proposed use is permitted on the Premises and does not impose conditions upon the Brewery's serving of alcohol under a PLCB license, it permissibly focuses on the location of the proposed use per the Zoning Ordinance and does not intrude into the PLCB's exclusive jurisdiction.

3. Parking and parking setback variances

A zoning hearing board may grant a variance in Pennsylvania when:

- 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 (Pa. Commw. Ct. 1990); see also Zoning Ordinance §165-251.B(2) (setting forth elements necessary for variance).

The reasons for granting variances must be substantial and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. 1994). A relaxed standard applies to applications for dimensional, as opposed to use, variances. See *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Commw. Ct. 2011). In granting a variance, the ZHB “may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of the [MPC] and the [Z]oning [O]rdinance.” 53 P.S. §10910.2(b).

Brewery successfully demonstrated entitlement to the requested parking and parking setback variances. Mr. Hershberg testified that fewer than 5 employees would be required to operate both the production and warehousing portions of the facility, and no more than 15 employees would ever be on the premises at one time. [6/7/17 N.T. p. 27-28.] The Zoning Ordinance, however, requires 70 parking spaces for use by these employees (30 for the production use, 33 for the warehouse use, and 7 for the tasting room), resulting in 55 extraneous parking spaces. Brewery proposes adding 130 spaces to the existing 131, creating a total of 261 spaces.

The Zoning Ordinance does not contemplate the automated use proposed by Brewery. In this circumstance, the ZHB concludes that Brewery has demonstrated its entitlement to the requested parking variance.

Furthermore, the existing improvements on the Property and the corner lot location restrict where a new parking area can be placed. The only available location is that proposed by Brewery. Brewery would not be able to provide sufficient parking to utilize the space for the permitted brewery use absent the requested parking infringement upon the front yard setback from Crooked

Lane. As this variance would have no deleterious impact upon the health safety and general welfare of the community and would not negatively impact or impair neighboring property owners, Brewery has demonstrated entitlement to the requested variance.

4. Use variance to operate a drinking establishment

Brewery failed to establish entitlement to the requested use variance to permit a drinking establishment on the Premises. The Property is presently improved with a sports facility and elevator manufacturer. The ZHB granted a special exception to permit a brewery on the Premises. These existing and ongoing uses are viable, permitted uses on the Property. Therefore, Brewery cannot establish that absent the requested zoning relief it could not reasonably use the Property.

C. Conclusions of Law

1. The ZHB has jurisdiction under section 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(5), and Zoning Ordinance §165-215.A(5).
2. Brewery has standing to seek the requested variance as the tenant of the Premises.
3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.
4. Section 165-152.C permits a brewery by special exception.
5. Section 165-191 requires 170 spaces for the brewery (100 spaces for the tap room use, 7 spaces for tap room employees, 30 spaces for the production area use, and 33 spaces for the warehouse use).
6. Section 165-157 prohibits off-street parking areas from being located within the front yard setback.
7. A drinking establishment is not a permitted use in the HI Heavy Industrial Zoning District. Zoning Ordinance §165-153.A.

8. The ZHB may only grant a variance if 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.
9. Brewery has satisfied the requirements for obtaining a special exception to operate a brewery on the Property.
10. Brewery has satisfied the requirements for a variance from the minimum off-street parking requirements associated with the proposed brewery uses.
11. Brewery has satisfied the requirements for a variance to allow off-street parking areas within the front-yard setback.
12. The ZHB cannot make a determination regarding the permissible scope of a "tasting room" under 40 Pa.Code §3.93, because it lacks jurisdiction to interpret or apply PLCB regulations.
13. Within the context of the appeal of the zoning officer's determination, the Brewery's described use was a "drinking establishment", a land use not permitted in the HI Heavy Industrial Zoning District.
14. Brewery failed to demonstrate that the requested use variance to permit a drinking establishment was necessary for the reasonable use of the Property.

At its August 16, 2017 public meeting, the ZHB voted to grant the application in part and deny the application in part, set forth in the following notice of decision:

This letter is the notice of the decision of the Zoning Hearing Board following the hearing on August 16, 2017.


At the conclusion of the hearing, the Zoning Hearing Board voted as follows with regard to the application and appeal:

- 1. The Zoning Hearing Board granted a special exception from section 165-153.C(1) of the Upper Merion Township Zoning Ordinance of 1942 as amended, to permit a brewery as defined and regulated by a brewery license per Pennsylvania Liquor Control Board regulations, 40 Pa. Code sections 3.93, 13.201, and 13.211;*
- 2. The Zoning Hearing Board denied the appeal from the zoning officer's determination dated June 19, 2017 which concluded that the scope of the brewery as proposed by applicant constituted a drinking establishment which is not permitted in the HI Heavy Industrial District, and did not constitute a tasting room which is permitted within the scope of a brewery license issued by the Pennsylvania Liquor Control Board;*
- 3. The Zoning Hearing Board denied the request for a use variance for a drinking establishment; and*
- 4. The Zoning Hearing Board granted a variance from section 165-157 off-street parking and loading to permit a brewery with 130 parking spaces instead of the required 170 parking spaces.*

Since this application was granted in part and denied in part, 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.

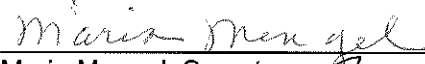
**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



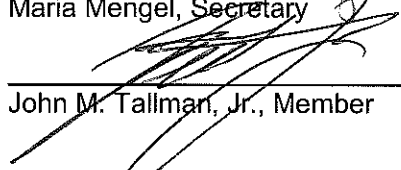
Mark S. DePillis, Esquire, Chairman




M Jonathan Garzillo, Vice Chairman



Maria Mengel, Secretary



John M. Tallman, Jr., Member



Lynne Z. Gold-Bikin, Esquire, Member