

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

APPLICATION OF PRIMARK US CORPORATION

NO. 2015-10

**PROPERTY: 160 NORTH GULPH ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves an applicant's request for a use variance to permit 4 animated signs in the SC Shopping Center District ("SC District") on a property within the King of Prussia Mall. Animated signs are prohibited under the Upper Merion Township Zoning Ordinance of 1942, as Amended ("Zoning Ordinance"). The Zoning Ordinance permits 4 signs of the size and at the locations proposed. The relief sought relates only to the animation, which will include changing images and videos.

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on June 17, 2015, on application no. 2015-10, the application of Primark US Corporation. The hearing was stenographically recorded. All members of the ZHB were present at the hearing: Lynne Gold-Bikin, Esq., Chairwoman; John M. Tallman, Jr., Vice Chairman; Mark DePillis, Esq., Secretary; and Maria Mengel, Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was represented by Denise R. Yarnoff, Esq., of the law firm of Riley Riper Hollin & Colagreco.

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

A. FINDINGS OF FACT

BACKGROUND

1. The applicant, Primark US Corporation (“Primark”), is the lessee of approximately 102,091 square feet of retail space at 160 North Gulph Road, in the King of Prussia Mall (the “Property”). [Ex. A-1.]

a. 96,174 square feet are on the lower level of the Sears store. [*Id.*]

b. 5,917 square feet are on the upper level of the Sears store. [*Id.*]

2. The Property is owned by King of Prussia Associates. King of Prussia Associates leases the Property to Sears Holdings. Sears Holdings has sub-leased the Property to Primark. [Exs. A-1, A-2, A-3; N.T. pp. 5, 9.]

3. The Property is located in the SC District. [N.T. p. 4.]

4. Primark desires to install 4 animated signs on the Property’s north elevation. [Ex. A-6.]

5. Section 165-168.Q(1) of the Zoning Ordinance prohibits animated signs. Zoning Ordinance § 165-168.Q(1).

6. Primark requests a use variance pursuant to section 165-168.Q(1) to permit the signs.

ZHB HEARING

7. Primark presented testimony of 2 witnesses—Peter Franks, Director of Store Development for Primark; and Kathleen Jordan, an architect registered in the state of New York, employed by Gensler, a design firm. [N.T. pp. 8, 16.]

8. Primark introduced the following exhibits:

- Ex. A-1—excerpts from Primark / Sears lease
- Ex. A-2—Deed

- Ex. A-3—Letters of Authorization from Sears Holdings and King of Prussia Associates
- Ex. A-4—Primark “brochure”
- Ex. A-5—Aerial view of site
- Ex. A-6—North elevation façade
- Ex. A-7—Rendering of façade
- Ex. A-8—*curriculum vitae* of Kathleen Jordan
- Ex. A-9—site “viewing”

9. Primark’s testimony was as follows:

- Primark proposes 4 animated window display signs with LED video. [N.T. p. 13.]

- Mr. Franks testified that the video:

Mr. Franks: ...will contain fashion imagery as well as still photography and will contain content specific to King of Prussia to reflect the character of the location and the market.

This content will also support [Primark’s] brand story that Primary is an accessible, fun, fashion environment, and it also include[s] all broad categories that [Primark] sell[s], men, women, children, gifts and home.

Id.

- The size and location of the signs otherwise comply with the Zoning Ordinance. [N.T. p. 23.]
- When the video is displaying still images, the images would change every 15 to 20 seconds. [N.T. p. 33.]

- Primark's lease is not dependent on obtaining the requested zoning relief. [N.T. p. 14.]
- Primark's store will be located in the lower level of the Property. [N.T. pp. 17, 21.]
- The animated nature of the signage will only be visible from the parking lot, on the north side of the Property. [N.T. p. 25.]
- Primark's witnesses did not know the level of illumination of the animated signs. [N.T. p. 33.]
- If the signs were not animated, they would be internally illuminated, static signs. [N.T. p. 35.]
- Although not mentioned in its initial presentation, when asked, Primark identified 2 additional signs bearing the name "Primark", of approximately 1036 square feet and 120 square feet. These are proposed for the same building elevation. [N.T. pp. 34-35.]

INSUFFICIENCY OF THE EVIDENCE

10. Primark failed to offer proof that the Property suffers an unnecessary hardship that would justify the ZHB's grant of the requested use variance.

11. Primark failed to offer proof that the use variance would be necessary to permit a reasonable use of the Property. To the contrary, Primark is committed to opening a retail store on the Property. Primark's witnesses testified that the signs could comply with the Zoning Ordinance, as internally illuminated, static signs.

12. Primark failed to offer proof that the requested variance was the minimum variance that would afford relief.

B. DISCUSSION

VARIANCES

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 (Pa. Commw Ct. 1990).¹

Variances should be granted sparingly. *Laurento v. Zoning Hearing Bd. of the Borough of West Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). “The burden on a landowner seeking a variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling.” *Bawa Muhaiyaddeen*

¹ Although counsel for Primark argued that the ZHB need not consider all elements of the 5-part variance test, she did not offer legal support for the argument. [N.T. pp. 38-39.] While counsel suggested that the last element (minimum relief) was not relevant to this application, the ZHB finds, as discussed below, that, to the contrary, the requirement that the variance requested is the minimum variance that will afford relief is not only applicable and relevant to Primark’s application, but Primark failed to meet the requirement.

Fellowship v. Philadelphia Zoning Bd. of Adjustment, 19 A.3d 36, 39-40 (Pa. Commw. Ct. 2011) (citing *Valley View Civic Assoc. v. Zoning Bd. of Adjustment*, 462 A.2d 637 (Pa. 1983)). “Further, a use variance carries a greater risk of injury to the public interest than a dimensional variance.” *Id.* at 40. Therefore, the burden carried by an applicant seeking a use variance is high. *See id.*

An applicant for a use variance has the burden of proving that “(1) the proposed use is not contrary to the public interest and (2) the property involved is subjected to an unnecessary hardship unique or peculiar to the property itself.” *Zaruta v. Zoning Hearing Bd. of City of Wilkes-Barre*, 543 A.2d 1282, 1284 (Pa. Commw. Ct. 1988). Unnecessary hardship can be demonstrated by:

...either (1) showing that the physical characteristics of the property are such that it could not be used for a permitted use or that the physical characteristics were such that it could only be arranged for such purpose at a prohibitive expense, or (2) by proving that the characteristics of the area were such that the lots had either no value or only a distress value for any purpose permitted by the zoning ordinance.

Id. (citing *Appeal of Nardoza*, 405 A.2d 1020 (Pa. Commw. Ct. 1979)).

1. Primark failed to demonstrate an unnecessary hardship justifying the requested variance to permit 4 animated signs.

Primark requested a use variance to permit 4 animated signs. Animated signs are absolutely prohibited under the terms of the Zoning Ordinance. Zoning Ordinance § 165-168.Q(1). Despite requesting substantial relief, Primark did not prove that an unnecessary hardship exists on the Property to justify the signs. Far from demonstrating that the Property could not be used for a permitted use, or that engaging in a permitted use on the Property would be prohibitively expensive, the testimony reveals that

Primark will open and operate a retail store on the Property. Primark's lease is not contingent on receiving the requested zoning relief.

Primark similarly did not prove that the characteristics of the area were such that the Property has no value, or only distress value, for a permitted use. The Property is located in the King of Prussia Mall, surrounded by other retail uses.

Primark merely articulated its personal desire to have 4 animated signs to communicate its "brand story" of "accessibility", "fun" and "fashion". [N.T. p. 13.] At the same time, Primark acknowledged that it could install signs that complied with the Zoning Ordinance.

This application and the evidence offered by Primark 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 v. Philadelphia Zoning Bd. of Adjustment*, 29 A.3d 144, 149-150 (Pa. Commw. Ct. 2011). Unnecessary hardship, caused by unique physical circumstances 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.Cmwlth. 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.

Here, the Property is well suited for the purpose for which it is zoned—Primark's retail store. The Zoning Ordinance permits Primark to have a significant number of large signs on the store facade. Primark failed to articulate how the Property is burdened by the requirements of the Zoning Ordinance. Primark failed to demonstrate a single legally cognizable hardship posed by the Property or by its inability to place 4 prohibited animated signs on the Property. Primark merely demonstrated, as in *Yeager*, its personal preference for a use (animated signs) not permitted on the Property. This desire is insufficient to entitle Primark to the requested variance.

2. Primark failed to prove the requested variance is the minimum needed to afford relief.

Primark was required to provide evidence that the variance requested represents the minimum necessary to afford relief. 53 P.S. § 10910.2(a); *Hohl v. Caernarvon Twp. Zoning Hearing Bd.*, 736 A.2d 57, 59 (Pa. Commw. Ct. 1999). Primark's witnesses failed to offer any proof that the requested variance was the minimum necessary to afford relief. The witnesses stated that the relief sought was the minimum relief, but were unable to support that conclusion.

Under these circumstances, Primark failed to prove that the requested use variance represents the minimum necessary to afford relief.

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 section 165-251.A(5).

2. Primark has standing to seek the requested variance as lessee of the Property.

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. Primark failed to demonstrate any unnecessary hardship entitling it to a use variance from section 165-168.Q(1) of the Zoning Ordinance to permit 4 prohibited animated signs.

6. Primark failed to demonstrate that the use variance is necessary to permit a reasonable use of the Property.

7. Primark failed to demonstrate that the requested variance represents the minimum necessary to afford relief.

8. Accordingly, Primark failed to sufficiently demonstrate its entitlement to the requested variance.

At its June 17, 2015 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 17th day of June, 2015, the Zoning Hearing Board DENIES the request for a variance from the following section of the Upper Merion Township Zoning Ordinance of 1942, as amended:

165-168.Q(1). Business signs. Animated and Changeable signs. Animated signs shall be prohibited.

An opinion with findings of facts, conclusions of law, and reasons will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

Written notice of the ZHB's decision was mailed to Primark on June 18, 2015.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**

Lynne Gold-Bikin, Esq.
Chairwoman

John M. Tallman
Vice Chairman

Mark DePillis, Esq.
Secretary

Maria Mengel
Member

Date of Mailing: