

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

LOWER MERION TOWNSHIP

vs.

LOWER MERION TONWSHIP ZONING HEARING BOARD

NO. 2022-22715

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: GILBERT P HIGH JR, Esq., ID: 9419

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

Notice of Appeal

Case Type and Code

Miscellaneous:

Other

Other: LAND USE APPEAL

HIGH SWARTZ, LLP
BY: Gilbert High, Esquire
Attorney ID #09419
David J. Brooman, Esquire
Attorney ID # 36571
Matthew Hovey
Attorney ID #307698
40 East Airy Street
Norristown, PA 19401
ghigh@highswartz.com
dbrooman@highswartz.com
mhovey@highswartz.com
610-275-0700 (telephone)
610-275-5290 (fax)

Attorneys for Appellant
Lower Merion Township

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

IN RE: APPEAL OF LOWER MERION :
TOWNSHIP FROM THE DECISION : Docket No.
OF THE LOWER MERION TOWNSHIP :
ZONING HEARING BOARD : LAND USE APPEAL
IN THE MATTER OF GIANT FOOD :
STORES, LLC, APPEAL NO. 4554 :

NOTICE OF LAND USE APPEAL

TO THE HONORABLE JUDGES OF THE SAID COURT:

Appellant, Lower Merion Township, through its Solicitor, High Swartz, LLP, hereby appeals from the decision of the Lower Merion Township Zoning Hearing Board dated October 20, 2022, which concerns the matter of Giant Food Stores, LLC, Appeal No. 4554, and in support thereof avers as follows:

1. Appellant is Lower Merion Township, a municipal corporation organized and operating under the First Class Township Code, 53 P.S. §§ 55101, *et seq*, with its principal offices located at 75 E. Lancaster Avenue, Ardmore, Montgomery County, Pennsylvania 19003 (hereinafter referred to as the “Township”).

2. Appellee is Lower Merion Township Zoning Hearing Board, a duly organized and appointed zoning hearing board of the Township, with an address of 75 E. Lancaster Avenue, Ardmore, Montgomery County, Pennsylvania 19003 (hereinafter referred to as the “Board”).

3. Appellee, Giant Food Stores, LLC, is a Delaware limited liability company, with a business address of 1385 Hancock Street, Quincy, Massachusetts 02169 and a local address for notification purposes of 1149 Harrisburg Pike, Carlisle Pennsylvania 17012 (hereinafter referred to as the “Applicant”).

4. The property which is the subject of this appeal is located at 637 Lancaster Avenue, Wynnewood, Lower Merion Township, Pennsylvania 19096, consisting of two separate parcels identified respectively as Montgomery County Tax Parcel No. 40-00-31188-00-2 and Montgomery County Tax Parcel No. 40-0-68020-007 (hereinafter the “Property”).

5. The Applicant and the Board treated the two parcels as one property for the purposes of the zoning application and appeal.

6. The Applicant is the equitable owner of the Property pursuant to a lease originally dated December 27, 2012.

7. The Property is a corner property fronting Lancaster Avenue and Wynnewood Road.

8. The Property is the former site of a gasoline service station but used most recently as a storage/hauling business.

9. The Property is improved with a 2,130 square foot building formerly used for vehicle servicing and related retail sales (referred to within the Board’s decision as the “Existing Building”), concrete pads which previously served the now-removed fuel pumps, two fueling station canopies which covered the now-removed fuel pumps, and a two-story brick building not associated with the former gasoline service station use.

10. The Property is improved with defunct underground fuel conduits beneath the areas of the concrete pads which connected the now-removed pumps to the also now-removed fuel tanks.

11. The Applicant leased the Property with the knowledge and understanding that the former fuel tanks and dispensing stations were removed thereby rendering the conduits unusable.

12. The Property is located in the Town Center – TC2 Zoning District.

13. According to § 155-4.3.A of Article IV, District Specific Standards, of Chapter 155, Zoning (hereinafter referred to as the “Code”), the intent of the Town Center District is to “is to preserve and enhance the multifaceted uses of the Township's established commercial areas. . . . [and] TC Districts are the medium to larger commercial areas, related to major transportation corridors, mixing local, regional and national retail, with some residential uses above the first floor. . . . [and, specifically, the] TC2 Districts are corridor extensions of TC1 Districts, with varied front setbacks that serve as a transitional zone.”

14. Pursuant to Table 5.1, Uses, contained in Article V, Uses, of the of the Code, the uses permitted within the TC2 Districts, either as a permitted use, regulated use, conditional use, or special exception, are as follows: multifamily (small), multifamily (large), live-work, shared residence for the elderly or the disabled, community residential facility, bed-and-breakfast, hotel, student housing, auto-related services, food and beverage, health and medical, day-care, office, open air retail, place of assembly, retail, specialized retail, mixed-use, recreation establishment, religious, public school, infrastructure, municipal service, public parking, transit, and tilling of soil.

15. The Property abuts two Medium Density Residential – MDR3 Districts, one Low Density Residential – LDR3 District, and one Village Commercial – VC District.

16. The Property also abuts 625 Lancaster Avenue, identified as Montgomery County Tax Parcel No. 40-00-31192-00-7, which is improved with a multi-unit residential apartment building, referred to in the Board’s decision as the “The Wynnewood apartment building.”

17. The Applicant seeks to redevelop the Property so that it may once again be used as a gasoline service station.

18. The Applicant is proposing to install five double-walled fueling devices.

19. The proposed use is classified as an auto-related services use.

20. An auto-related services use is a regulated use within the TC2 Zoning District.

21. In order to allow the Property to accommodate the proposed use, the Applicant requested from the Board a multitude of separate variances from the Code, including two variances from Table 5.3, Use Regulations, contained in the Code, Article V, Uses, related to the minimum distance between any gasoline dispensing pump and a building with residential dwelling units.

22. For auto-related services, Table 5.3 contains a “minimum 200 feet distance requirement from a gasoline dispensing pump to a building with residential dwelling units.”

23. The Applicant seeks to locate one of the five gasoline dispensing pumps within 143.5 feet of The Wynnewood apartment building and another of the five gasoline dispensing pumps within 168 feet of the same apartment building.

24. The Board held a public hearing on the requested variances on June 16, 2022 and a subsequent, second hearing on August 11, 2022.

25. On October 20, 2022, the Board, by way of a written decision and order, granted many of the requested variances including but not limited to variances from Table 5.3, Use Regulations, to permit “two of the fueling device locations to be within the minimum required distance of 200 feet of a residential building (i.e., within 143.5 ft. and 168 ft of The Wynnewood apartment building).” *See* the Board’s “Findings of Fact, Conclusions of Law, Opinion and Order,” Exhibit A, attached hereto and incorporated herein by reference, p.24.

26. It is a longstanding principle “that a variance should be granted only where it is not contrary to the public interest and where the property involved is subjected to an unnecessary hardship

unique or peculiar to itself, and not to general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance.” See *Magrann v. Zoning Bd. of Adjustment*, 170 A.2d 553, 554 (Pa. 1961), citing to *Michener Appeal*, 115 A.2d 367 (Pa. 1955).

27. The “party applying for a variance bears the burden of proof.” See 53 P.S. § 10908(3).
28. A zoning hearing board may only grant a variance if the applicant proves:
 - (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.
 - (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
 - (3) That such unnecessary hardship has not been created by the appellant.
 - (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.
 - (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Id. at §10910.2(a)(1)-(5).

29. With respect to proving a hardship, the Supreme Court of Pennsylvania recently affirmed that “a conflict between dimensional zoning requirements and a landowner’s personal preference regarding property use alone does not create a hardship meriting a variance” because “any hardship arising from difficulties of that nature relate to the person and not the property.” See *Kneebone v. Zoning Hearing Bd. Of the Twp. Of Plainfield*, 2022 Pa. LEXIS 504 (Pa. 2022).

30. The Commonwealth Court also previously held that the “test for entitlement to a variance is not whether the proposed use is more desirable to the owner than the permitted use, but,

rather, whether the property may be used in a reasonable manner within the restrictive provisions of the zoning ordinance.” *Washington Township v. Washington Township Zoning Hearing Board*, 365 A.2d 691, 692 (Pa. Cmwlth. 1976).

31. In addition to the applicant, the parties to a zoning application are “the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board.” *Id.* at § 10908(3).

32. The municipality and any owner or tenant of property directly involved in the appealed action may intervene as of course by filing a notice of intervention, accompanied by proof of service of the same, upon each appellant or each appellant’s counsel of record. *Id.* at § 11004-A

33. Any party to the proceedings may appeal from a decision of the zoning hearing board to the Court of Common Pleas within 30 days of the decision. *Id.* at 11002-A(a).

34. The Township objects the Board’s grant of the variances from Table 5.3, Use Regulations, concerning the setback for gasoline dispensing pumps from residential buildings.

35. The Applicant can install three of the five proposed pumps without the need for relief from the setback from residential buildings.

36. The Board’s general findings with respect to hardship are inapplicable and irrelevant to the variances granted which concern the setback for gasoline dispensing pumps for the two pumps at issue in this appeal and located closest to a residential building.

37. In terms of general hardships suffered by the Applicant, the Board determined as follows:

46. The Board finds that the triangular shape of the Property, the three street frontages, the Existing Building and its location on the Property, the existing canopies and the fueling locations beneath them, and the underground infrastructure are unique physical features of the Property.

47. The Board finds that the Zoning Code inflicts an unnecessary hardship on the Property's development (to the extent discussed below) as a gasoline station based on the combination of these unique physical characteristics.

57. The Board finds that the use of the Property for any permitted purpose would require extensive demolition and reconstruction, and that the Property is uniquely suited for re-use as a gasoline station."

Exhibit A, pp.10, 12.

38. The Board's only specific findings with respect to any hardship associated with two of the five pumps are as follows:

52. The existing conduit underneath the former fueling device locations would have to be removed and relocated in order for two of the planned Lancaster Avenue fuel dispensers to be 200-feet or more from The Wynnewood apartment building. [N.T. 6/16/22 at 48]
53. The Board finds that the existing canopy covering the fueling devices would have to be removed and relocated in order for two of the planned Lancaster Avenue fuel dispensers to be 200-ft or more from the Wynnewood apartment building.

Exhibit A, p.10.

39. The Board later misstates and then overstates the holding in *Oakbrook Fire Co. No. 14 Relief Ass'n v. City of Reading Zoning Hearing Bd.*, 83 A.3d 1160 (Pa. Cmwlth. 2014) (unpublished) with respect to the principal that an applicant demonstrates a hardship when "premises cannot be converted into a permitted use without demolition and extensive reconstruction." Exhibit A, p.19.

40. In that opinion, the Commonwealth Court quoted the opinion in *Zoning Hearing Bd. V. Weitzel*, 465 A.2d 105 (Pa. Cmwlth. 1982) which therein quotes *Logan Square Neighborhood Association v. Zoning Board of Adjustment, City of Philadelphia*, 379 A.2d 632, 634 (Pa. Cmwlth. 1977).

41. In *Weitzel*, the property owner established a hardship because the property owner only had two options, "convert a three-story school building into a single-family dwelling or raze the structure and subdivide the lot." *Id.* at 112.

42. Those facts are inapposite this application.

43. The Board explains that principle as follows: “As the above quote indicates, where existing structures on a property would have to be reconstructed or demolished in order to put a property to a permitted use, courts have approved the grant of variances.” Exhibit A, p.19.

44. The qualifier “extensive” is notably absent from that explanation.

45. This is significant because the Board then goes on to explain as follows: “In the present case, the Property cannot be used for any permitted purpose unless the Existing Building, canopies and fuel dispenser infrastructure are removed.”

46. The record contains inadequate evidence, if any, as whether the two pumps at issue are essential for the economic viability of the proposed use.

47. Conversely if the two pumps can be proven to be essential to the economic viability of the proposed use, the record contains inadequate evidence, if any, as whether the Property requires demolition and **extensive** reconstruction to be used as one of the other numerous uses permitted within the TC2 District such as a food and beverage, health and medical, day-care, office, open air retail, specialized retail, mixed-use, infrastructure, public parking, or transit use.

48. The record further contains inadequate evidence, if any, as whether the costs associated with relocating one or both of the pumps outside of the required setback are more or less than the development which may be required to allow the Property to be used for any of the other numerous uses permitted within the TC2 District.

49. Conversely, if it can be shown that the pumps are essential to the economic viability of the proposed use and there are no other viable uses of the Property, the record contains inadequate evidence, if any, as to the costs associated with relocating one or both of the pumps at issue to within the required setback.

50. Likewise, if it can be shown that the pumps are essential to the economic viability of the proposed use and there are no other viable uses of the Property, the record contains inadequate evidence, if any, as to the costs associated with relocating one or both of the pumps at issue within the required setback but at any point further away from the nearest residential building.

51. With respect to the location of the pumps, the Board comingled the requested variances related to the pumps being located in the front yard and the setback from residential building and further determined as follows: “Contrary to the suggestion of several objectors, the Applicant did not create the hardship in this case. The hardship is a result of the Zoning Code’s impact on the physical features of the Property, which the Applicant did not create.”

52. The former fuel tanks and dispenser are removed, however, and did not exist on the Property at the time the Applicant leased the Property.

53. The Applicant seeks to reinstall those tanks as well as the fuel pumps at issue here.

54. The Applicant leased the Property knowing, or should have known about, the required setback from residential buildings.

55. The Property is not, and was not at the time the Applicant leased the Property, used as an automotive-related service use; specifically a gas station.

56. The record contains inadequate evidence to support the finding or conclusion that the hardship is not self-inflicted and based merely on the Applicant’s preferred use of the Property.

57. The Board improperly discounted and disregarded the objectors concerns about the potential for fumes and traffic based on the record.

58. The fuel pumps and associated tanks present legitimate concerns related to environmental hazards, fire emergencies, noise, traffic, and fumes.

59. The Property is located at a heavily congested intersection.

60. The Board improperly shifted the burden to the objectors to present “substantial evidence to refute the Applicant’s case,” and prove that the location of the fuel pumps within the setback will alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, or be detrimental to the public welfare. Exhibit A, p.21.

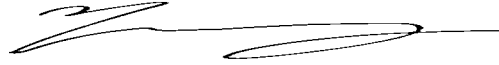
61. The record contains inadequate evidence to support the finding or conclusion that the encroachment into the buffer around residential buildings will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

62. The Township therefore asserts that the Board abused its discretion and/or committed an error of law because the Applicant did not prove a legal hardship as required by, and as defined in, § 10910.2 of the MPC; that any hardship is not self-inflicted; that the variances requested are the minimum needed to afford the Applicant relief; and that the encroachment into the buffer around residential buildings will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

WHEREFORE, Appellant, Lower Merion Township, respectfully requests that this Honorable Court reverse and vacate the written decision issued by the Lower Merion Township Zoning Hearing Board on October 20, 2022, and further deny the Applicant’s zoning application with respect to the requested variances from Table 5.3, Use Regulations, located with Chapter 155, Zoning, Article V, Uses, § 155-5.3, of the Code, concerning the two gasoline dispensing pumps proposed to be located within the required setback relevant to residential building, together with such additional relief as this Honorable Court may deem just and proper.

HIGH SWARTZ, LLP

BY:



Matthew T. Hovey, Esquire (Attorney ID #307698)
Attorney for Appellant / Lower Merion Township

Dated: 11/21/22

VERIFICATION

I, Ernie B. McNeely, hereby verify that I am the Township Manager of Lower Merion Township, I am authorized to make this verification on behalf of the Township, and the statements made in the foregoing Notice of Appeal are true and correct to the best of my knowledge, information, and belief. I understand that the statements therein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

LOWER MERION TOWNSHIP

By: Ernie B. McNeely
Ernie B. McNeely
Township Manager

Date: 11-21-2022

EXHIBIT

“A”

BEFORE THE
ZONING HEARING BOARD OF
LOWER MERION TOWNSHIP, MONTGOMERY COUNTY
PENNSYLVANIA

APPEAL NO. 4554

IN THE MATTER OF: : Applicant - Appellant
:
Giant Food Stores, LLC : 637 E. Lancaster Avenue
: Wynnewood, PA 19035

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION & ORDER

FINDINGS OF FACT

The Subject Property

1. Giant Food Stores, LLC (“Applicant”) is the lessee of the property at 637 Lancaster Avenue in Wynnewood (“Property”). [Exhibit A-2, Redacted Lease]
2. The Property is zoned Town Center 2 District (TC2). [N.T. 6/16/22 at 20]
3. The Property is approximately one half-acre in size, triangular in shape, and bounded by three streets: Wynnewood Avenue on the north; Lancaster Avenue on the west; and Morris Road on the south. [N.T. 6/16/22 at 18; Exhibit A-4, Zoning Plan Set: Existing Conditions and Demolition Plan]
4. The Property consists of two separate parcels: Montgomery County Tax Parcel 40-00-31188-00-2 (“Parcel 1”) and Montgomery County Tax Parcel 40-0-68020-007 (“Parcel 2”). The parcels have shared access and circulation. [N.T. 6/16/22 at 20; Exhibit A-1, Application ¶ 3; Exhibit A-4, Zoning Plan Set: Existing Conditions and Demolition Plan] Applicant is the lessee of both parcels. [Exhibit A-2, Redacted Lease]

5. The use of the two-story brick building located on Parcel 2 is currently vacant and is not part of the present application, but a portion of Parcel 2 will be used for driveway access, circulation, and an ADA ramp. [Exhibit A-7, Updated Zoning Plan]

6. The Board considers Parcel 1 and Parcel 2 as a single property for purposes of the present application and will refer to both parcels as the “Property.”¹

7. A number of buildings and other structures are located on the Property:

- a. a 2130 sq. ft. building where vehicle servicing and related retail sales took place (“Existing Building”);
- b. concrete pads on which the former fuel pumps were located;
- c. underground fuel conduits beneath the fueling locations;
- d. two canopies over the fueling locations, one each on the Property’s frontages on Wynnewood Avenue and Lancaster Avenue; and
- e. the two-story brick building on Parcel 2.

[N.T. 6/16/22 at 18-20, 27; Exhibit A-5, Photographs of Existing Conditions]

8. The Property is the former site of a gasoline service station and, more recently, of a storage and hauling business. [N.T. 6/16/22 at 20]

The Application and the Proposed Improvements

9. On December 15, 2021, Applicant submitted an application to the Zoning Hearing Board (“Board”) to operate a gasoline station with five double-sided fueling devices situated on

¹ Applicant’s evidence on precisely what “property” is the subject of the application was not clear. Applicant’s engineer described “the property” as triangular in shape (which it is only if Parcel 1 and Parcel 2 are combined). [N.T. 6/16/22 at 18] He subsequently stated that “the property” has a fourth boundary. [*Id.* at 20] That fourth boundary is the boundary between Parcel 1 and Parcel 2. [*Id.*] The site plan submitted by the engineer, however, does not indicate any setback line between the building on Parcel 1 and the building on Parcel 2. If Parcel 2 were considered a separate property, we would expect the engineer to have indicated a side or rear setback on Parcel 1 and Parcel 2. The only setbacks indicated on the site plan that the engineer submitted are a single 15-ft. maximum front setback line and a single 12-ft. minimum front setback line for the combined parcels. [Exhibit A-7, Updated Zoning Plan] So although the use of the brick building on Parcel 2 is not before the Board, we consider the combined parcels to be part of the application and will refer to them jointly as the “Property.”

the existing concrete pads under the existing canopies on the Property. [Exhibit A-1, Zoning Hearing Board Application, p.6]

10. According to the Application, no vehicle servicing or repair would take place on the Property, and only limited sales of ancillary retail items would occur from the Existing Building. [*Id.*]

11. The plans submitted with the application provided for site improvements to the Property including:

- a. re-surfacing the entire parking lot;
- b. modifying access to the Property to provide (i) a channelized, right-in/right-out entry/egress driveway from Wynnewood Road, with an expanded median in the Wynnewood roadway to better channel existing traffic along that road; (ii) two channelized entry/exit driveways along Morris Road; and (iii) a channelized, right-in only entry driveway from Lancaster Avenue, with a new left turn lane on Lancaster Avenue, at the Lancaster/Wynnewood intersection;
- c. the addition of sidewalk, ADA curb ramps, and green space along all three road frontages; and
- d. the addition of landscape plantings, including street trees and ornamental shrubs along all three road frontages.

12. The application requested 11 separate dimensional variances from the Zoning Code to accommodate the proposed gasoline station improvements and the station's related signage. [*Id.*, pp. 7-10]

13. After the application was submitted, but before the Board held any hearings, the Applicant modified the plan that was submitted with the application in response to comments made by neighbors at civic association meetings attended by Applicant's representatives. [N.T. 6/16/22 at p. 33; Exhibit A-7, Updated Zoning Plan]

14. The revised plan:

- a. reduced the size of the Existing Building to 1,012 sq. ft. to allow for enough space in the parking lot to provide for three parking spaces and to improve

- on-site circulation;
- b. realigned the fueling locations under the Lancaster Avenue canopy to be parallel to the street; and
- c. removed the single ingress lane and ingress driveway initially proposed on Lancaster Avenue and reduced the total number of curb cuts to three (from the existing number of eight).

[N.T. 6/16/22 at 35-38; Exhibit A-7, Updated Zoning Plan]

The Hearings

15. After granting the Applicant a requested extension of the deadline for holding an initial hearing, the Board convened the first hearing on the application on June 16, 2022.

16. The Applicant was represented at the hearing by Gregg Adelman, Esq.

17. Two witnesses testified at the June 16 hearing: Anthony Caponigro, P.E., the Applicant's site engineer; and Eric Ostimchuck, P.E., the Applicant's traffic engineer.

18. The Applicant offered Exhibits A-1 through A-13 into evidence and they were admitted without objection.

19. Mr. Caponigro described the Property's existing features and nonconformities and also described the proposed improvements and the variances required to construct and install those improvements. [N.T. 6/16/22 at 16-59]

20. Mr. Ostimchuck described the proposed improvements to the adjacent roads, the changes to the Property's access points, and the justification for Applicant's request for a monument sign that exceeds the maximum height and area regulations of the Zoning Code. [N.T. 6/16/22 at 60-108]

21. Both witnesses were questioned by Board Members and were subject to cross-examination by objectors to the application.

22. After the close of testimony at the June 16 hearing, the Applicant waived the requirement to hold a continued hearing within 45 days and the Board continued the matter to August 11, 2022. [N.T. 6/16/22 at 108-109]

23. Mr. Caponigro and Mr. Ostimchuck were re-called as witnesses for the Applicant at the August 11 hearing.

24. Mr. Caponigro testified to changes made since the June 16 hearing in the number and design of the signs proposed for the Property. Mr. Ostimchuck testified to his review of previous traffic counts at intersections near the Property and to his analysis of the impact of the Applicant's proposed use on queuing and turning movements on adjacent roads. Both witnesses were subject to re-cross-examination. [N.T. 8/11/22 at 7-22]

25. The Applicant also called Mr. Ken Kehres to testify at the August 11 hearing. Mr. Kehres is the Director of Fuel for Peapod Digital Labs, a "sister company" to Giant. [N.T. 8/11/22 at 23]

26. Mr. Kehres testified to the standard operating procedures and safety procedures at Giant gasoline stations. He was asked one question on cross-examination. [N.T. 8/11/22 at 23-33]

27. The Applicant offered Exhibits A-10A and A-14 through A-16 into evidence and they were admitted without objection.

28. Five objectors to the application, including a representative of the Wynnewood Civic Association and a representative of the Shortridge Civic Association, testified in opposition to the application. [N.T. 8/11/22 at 34-47]

29. Objector Mr. Max Hauer offered Exhibit O-1 into evidence and it was admitted by the Board over the Applicant's objection. [N.T. 8/11/22 at 37-38]

30. The Board received four emails supporting the application and those were marked as Zoning Hearing Board Exhibits 1 through 4 and admitted without objection. The Board took no notice of the factual statements in the emails and regarded them merely as expressions of support for the application.

31. At the conclusion of the testimony, the Board requested that the Applicant and any interested party to the hearing submit memoranda for the Board's consideration within 10 days. [N.T. 8/11/22 at 49-50]

32. The Board received memoranda from the Applicant, the Wynnewood Civic Association, and the Shortridge Civic Association.

33. The Applicant subsequently granted the Board an extension of time to October 21, 2022 to render a decision on the application.

The Requested Variances

34. After accounting for the several amendments that the Applicant made to its site plans and to its signage plans, the record reflects that the Applicant is requesting the following variances:

- a. from the prohibition on vehicular fueling devices in the frontage yard in Code §155-3.5 F(1)(h) to allow the five fueling pumps to be installed in the Property's frontage yard;²
- b. from Code §155 Table 5.3. Use Regulations (TC2 Auto-related services) to allow two of the fueling device locations to be within the minimum required distance of 200 feet of a residential building (i.e., within 143.5 ft. and 168 ft. of The Wynnewood apartment building);
- c. from Code §155 Table 9.2. General Sign Type Standards and Regulations B. Canopy Sign (Regulations (4)) to allow two non-illuminated "GIANT" signs on the Wynnewood Avenue canopy where only one "emblem or logo" is permitted;

² The pumps are double-sided, so there are 10 fueling "locations." [N.T. 6/16/22 at 71]

- d. from Code §155 Table 9.2. General Sign Type Standards and Regulations B. Canopy Sign (Height) to allow the three proposed canopy signs to be above the maximum permitted height of 15 feet;
- e. from Code §155 Table 9.2. General Sign Type Standards and Regulations E. Freestanding Ground/Monument Sign (Height) to allow a double-sided monument sign 6'-4" high to exceed the maximum permitted height of four feet; and
- f. from Code §155 Table 9.2. General Sign Type Standards and Regulations E. Freestanding Ground/Monument Sign (Sign Area (maximum)) to allow a double-sided monument sign 42.2 sq. ft. in area to exceed the maximum permitted area of 20 sq. ft.

35. The Applicant requested a variance from Code §155-3.11 C to allow the proposed under-canopy lighting to be more than 12 feet above finished grade. The Board finds that no variance from that provision is necessary since the under-canopy lighting would not be located on a driveway, walkway or parking area.

36. The Applicant requested a variance "to the extent required" from Code §155-10.12 F(1)(a) to increase an existing nonconforming site improvement by installing the fuel pumps under the existing canopies. The Board finds that no variance from that provision is necessary since the installation of the fueling devices does not increase the nonconforming occupation of the frontage yard by the existing canopies and concrete pads. A variance is, however, still required from Code §155-3.5 F(1)(h) to locate the fueling devices there.

37. The Applicant withdrew the following variance requests:
- a. from the minimum 13.5-ft. canopy sign height requirement of Code §155-9.3 D(5)(b);
 - b. from the prohibition in Code §155-10.12 F(1)(b) on increasing the degree of the nonconformity of the nonconforming parking;
 - c. from the requirement for nine parking spaces for the auto-related use of the Property in Code §155 Table 8.1. Minimum Parking Requirements (Commercial (Auto-related service))

- d. from Code §155 Table 9.1. Permitted Sign Locations and Permit Types to permit signage on the fuel pumps;
- e. from Code §155 Table 9.2 General Sign Type Standards and Regulations E. Freestanding Ground/Monument Sign to allow LED lighting for the pricing portion of the proposed sign;
- f. from the parking location regulations of Code §155-8.4 C; and
- g. from the maximum permitted total sign area regulations of Code §155-9.3 F.

38. The evidence produced at the hearings (discussed below) supports the Applicant's claim that the existing structural and dimensional nonconformities on the Property and the amendments Applicants made to the site plan make the variances described in paragraphs 37. a. through 37. e. unnecessary.

39. The Board makes no findings or conclusions regarding the necessity for the relief requested in the variance requests described in paragraphs 37. f. and 37. g., as there is insufficient record evidence to prove that the amended plan complies with the maximum cumulative sign area in Code §155-9.3 F(1) and the masking requirement for surface parking in Code §155-8.4 C(1). It will be for Township staff to determine in the first instance whether variances from those Zoning Code provisions are yet required.

The Evidence in Support of the Variance Requests

The existing features of the Property

- 40. The following features of the Property are legally nonconforming:
 - a. the Existing Building is not a minimum of two stories (Code §155 Table 4.3.3. TC2 Dimensional Standards I);
 - b. the Existing Building exceeds the maximum 15-ft. front setback (Code §155 Table 4.3.3. TC2 Dimensional Standards B);
 - c. the canopies and vehicle fueling locations are in the required frontage yard (Code §155-3.5 D(1));

- d. the canopies range in height from 16.7 ft. to 19.3 ft., exceeding the permitted 15-ft. maximum height (Code §155-3.6 E(1)(c));
- e. the canopies do not meet the front (5-ft.) and front corner (12-ft.) setbacks for accessory structures (Code §155 Table 4.3.3. TC2 Dimensional Standards E, F)
- f. the impervious surface of 99% exceeds the permitted maximum 70% (Code §155 Table 4.3.3. TC2 Dimensional Standards A);
- g. no landscape buffer is provided (Code §155-3.10);
- h. with no rear or side yards, the service and trash areas are not properly located (Code §155-3.14 A);
- i. surface parking is not screened (Code §155-8.4 C(1));
- j. the three parking spaces provided do not meet the minimum of nine required for auto related services on the Property (Code §155 Table 8.1. Minimum Parking Requirements)
- k. the existing eight curb cuts exceeds the permitted maximum of two for the Property (Code §155-8.5 C(2)(b)); and
- l. bicycle parking is not provided (Code §155-8.8);

[See, N.T. 6/16/22 at 23-26; Exhibit A-6, Zoning Determination]³

41. Because the Property is bordered on all three sides by streets, the Property has three front setbacks. [N.T. 6/16/22 at 20; Exhibit A-7, Updated Zoning Plan]

42. The areas of the Property between the Existing Building and the cartways of Lancaster Avenue, Wynnewood Road and Morris Road Property are “frontage yards.” [N.T. 6/16/22 at 24-25; Exhibit A-7, Updated Zoning Plan]

43. The underground fuel storage tanks and the fueling devices that were used in connection with the gasoline service station were removed from the Property. The

³ Exhibit A-6 is the Township Zoning Officer’s registration of the legal nonconformities on the Property. The registration cites 13 sections of the Zoning Code to which the Property is nonconforming, but does not, in each instance, describe the particular way in which the Property does not conform to those sections. Applicant’s engineer, Anthony A. Caponigro, P.E. testified to his interpretation of Exhibit A-6 at N.T. 6/16/22 at 23-26. The Board’s listing here of the Property’s nonconformities is based on a review of the Zoning Officer’s registration, Mr. Caponigro’s testimony, and the Board’s own review of the site plans and the Zoning Code.

underground conduits that at one time connected the fueling devices pumps to the fuel storage tanks remain. [N.T. 6/16/22 at 19, 27]

44. The existing canopies are sloped and are between 16.7 ft. and 19.3 ft. in height. [N.T. 6/16/22 at 56] The canopies and the concrete pads underneath them on which the former fueling devices were situated are in the frontage yard of the Property. [N.T. 6/16/22 at 25]

45. The Applicant proposes to keep the canopies in their present location, in the Property's frontage yard. [N.T. 6/16/22 at 45]

46. The Board finds that the triangular shape of the Property, the three street frontages, the Existing Building and its location on the Property, the existing canopies and the fueling locations beneath them, and the underground infrastructure are unique physical features of the Property.

47. The Board finds that the Zoning Code inflicts an unnecessary hardship on the Property's development (to the extent discussed below) as a gasoline station based on the combination of these unique physical features.

The variances for the location of the fueling devices

48. The five double-sided fueling devices will be installed beneath the canopies and in the same locations as the previous fueling devices were located to take advantage of the existing infrastructure. [N.T. 6/16/22 at 29, 45-46, 71-72; Exhibit A-7, Updated Zoning Plan] The devices will be aligned to be parallel to the adjacent streets. [N.T. 6/16/22 at 36; Exhibit A-7, Updated Zoning Plan]

49. The fueling devices will be in the frontage yard between the Existing Building and Lancaster Avenue and between the Existing Building and Wynnewood Road. [Exhibit A-7, Updated Zoning Plan]

50. The Wynnewood apartment building is located across Morris Road from the Property. One of the Lancaster Avenue fueling devices will be 143.5 ft. from the corner of the Wynnewood building and one of the Lancaster Avenue fueling devices will be 168.3 ft. from the Wynnewood building. [N.T. 6/16/22 at 45-46]

51. The Zoning Code's use regulations for auto-related services requires a minimum 200 feet distance from a gasoline dispensing pump to a building with residential dwelling units. Code §155 Table 5.3. Use Regulations (Commercial (Auto-related services)).

52. The existing conduit underneath the former fueling device locations would have to be removed and relocated in order for two of the planned Lancaster Avenue fuel dispensers to be 200-ft. or more from The Wynnewood apartment building. [N.T. 6/16/22 at 48]

53. The Board finds that the existing canopy covering the fueling devices would have to be removed and relocated in order for two of the planned Lancaster Avenue fuel dispensers to be 200-ft. or more from the Wynnewood apartment building.

54. The Zoning Code prohibits "Vehicular fueling device[s] (gas pump, electric vehicle charging station)" in the frontage yard. Code §155-3.5 F(1)(h).

55. There is no location on the Property to locate fueling devices without violating the prohibition on locating such dispensers in a frontage yard. [N.T. 6/16/22 at 46-47]

56. The Board finds that the Existing Building would have to be demolished in order to install the fuel dispensers outside of a "frontage yard."

57. The Board finds that the use of the Property for any permitted purpose would require extensive demolition and reconstruction, and that the Property is uniquely suited for re-use as a gasoline station.

58. The number of curb cuts on the Property will be reduced from the existing eight to three. [N.T. 6/16/22 at 37-38]

59. The three existing driveways onto the Property from Lancaster Avenue will be eliminated and there will be one right-in and right-out driveway on Wynnewood Road and two full access driveways on Morris Road, which is a one-way street running north from Lancaster Avenue to Wynnewood Road. [N.T. 6/16/22 at 37-38]

60. The Applicant's planned "access management" will reduce traffic conflict points from the existing 26 to three. [N.T. 6/16/22 at 63, 89-91]

61. Applicant will install a dedicated left turn lane on westbound Lancaster Avenue at Wynnewood Road that will reduce vehicle queuing and will enhance safety at that location. [*Id.* at 95-96]

62. The Existing Building will serve as a kiosk where one employee will accept payment through a window and monitor the station. There will be no inside sales area and no retail sales from the Existing Building. [N.T. 6/16/22 at 35, 40, 62]

63. There will be no vehicle service bays on the Property. [N.T. 6/16/22 at 70-71]

64. Lighting on the Property will be turned off during non-business hours (10 p.m. to 6 a.m.) except for security lighting at the kiosk. [N.T. 6/16/22 at 64, 67, 78, 85]

65. The Applicant will install landscaping around the perimeter of Parcel 1 (including Morris Road) to "soften" the view of the fueling devices from adjacent properties. [N.T. 6/16/22 at 47; Exhibit A-4, Zoning Plan Set (Landscape Plan)]

66. Giant operates nine gasoline stations that are located within 200 feet of residential dwelling units and has not had any reported issues with vapors, spills or other emergencies. [N.T. 8/11/22 at 31-32]

67. There are 230 Giant fuel stations located from Maine to South Carolina, 106 of which are operated by Giant. [*Id.* at 24]

68. Giant has adopted standard operating procedures for education and training of fuel station staff. The EPA and the PADEP mandate training for those staff as well. The proposed fuel station in this case will have the safety and emergency management features that the training involves. [*Id.* at 25-26]

69. The safety features to be incorporated into the design of the proposed fuel station will include: double-walled underground storage tanks; wet/dry tank sensors that are monitored 24/7; breakaway hoses at the fuel dispensers; dispenser shear valves to cut off fuel in the event of a vehicle impact; an emergency shutoff located in the kiosk; vapor capture during fuel delivery; daily and weekly inspections; and independent contractor equipment maintenance with PADEP reporting responsibility. [*Id.* at 26-31]

70. The Board gives no weight to the three studies offered by Mr. Hauser regarding the purported effects of benzene and hydrocarbon emissions at gasoline stations. [Exhibit O-1] The documents were not authenticated and no foundation was laid for the relevance of the studies to the particular gasoline station proposed by the Applicant.

71. The Board credits the testimony of the Applicant's witnesses regarding on-site circulation, traffic safety, and gasoline station safety and emergency management and finds that the location of the fuel dispensers within the frontage yard and the location of two fueling devices

within 200 feet of The Wynnewood apartment building will not be detrimental to the public welfare.

72. The hardship with respect to the location of the fuel dispensers was not created by the Applicant.

73. The variances requested for the location of the fuel dispensers are the minimum that will afford relief from the Zoning Code.

The variances for the signage

74. Applicant proposes to put signs on both existing canopies: one sign on the side of the Lancaster Avenue canopy facing the intersection of Lancaster Avenue and Wynnewood Road; and two on the canopy that is along Wynnewood Road. The height of the lettering on the canopy signs will be 18-in. [N.T. 8/11/22 at 7-9]

75. The Zoning Code's sign regulations allow only one "emblem or logo" on a canopy and limit the height of canopy signs to 15 feet.

76. The heights of the existing canopies range from 16.7 ft. to 19.3 ft., so the canopy signs will exceed the Zoning Code limit. [N.T. 6/16/22 at 56]

77. The Board finds that there is no substantial evidence to support a finding of unnecessary hardship with respect to the request for two signs on the Wynnewood Road canopy.

78. The Board finds that hardship exists with respect to the request to exceed the canopy sign height limit, that the Applicant did not create the hardship, that the variance for the canopy sign height will not be detrimental to the public welfare, and that the variance represents the minimum that will afford relief from the Zoning Code.

79. The Applicant proposes to install a new monument sign on the Property at the corner of Lancaster Avenue and Wynnewood Road. The “GIANT” logo would be internally lit channel lettering and the gasoline price information on the sign would be LED. [N.T. 6/16/22 at 56-57]

80. The monument sign would be six feet high and 42.2 sq. ft. in area. The Zoning Code limits monument signs to four feet in height and 20 sq. ft. in area. [*Id.*]

81. Mr. Ostimchuck testified regarding the contents of a 2006 publication issued by a sign industry group, the United States Sign Council titled “Sign Legibility Rules of Thumb.” [N.T. 6/16/22 at 97-104; Exhibit A-13, USSC Sign Legibility Rules of Thumb]

82. Mr. Ostimchuck stated that the “rules of thumb” were guidelines issued by the industry group and that there is no standard for the size of lettering for on-premises signs. [N.T. 6/16/22 at 100-101]

83. Based on the USSC “rules of thumb” that recommend a sign size of 50 sq. ft. for a freestanding sign on a two-lane road with a speed limit of 25 m.p.h., Mr. Ostimchuck opined that the Applicant’s proposed 42 sq. ft. monument sign would create a “safer condition” for travelers on the adjacent roads than the maximum 20 sq. ft. sign that the Zoning Code permits. [*Id.* at 104]

84. The Board gives no weight to the USSC “Sign Legibility Rules of Thumb” and, consequently, to Mr. Ostimchuck’s opinion for the reasons that the USSC industry publication does not provide any specific analysis of monument signs, gas station signs, or pricing signs, and that the publication illustrates the typical freestanding sign to be a pole sign (at p. 2).

Case# 2022-22715-0 Docketed at Montgomery County Prothonotary on 11/21/2022 2:36 PM. Fee = \$68.50. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

85. There was no testimony to support the request to exceed the Zoning Code's height limit for monument signs.

86. The Board finds that there is no substantial evidence to support a finding of unnecessary hardship with respect to the request to exceed the height and area limits for the proposed monument sign.

CONCLUSIONS OF LAW

1. The Applicant sustained its burden of proving that there are unique physical conditions peculiar to the Property.

2. The Applicant sustained its burden of proving that, with respect to the fuel dispenser locations and the height of the canopy signs, the unique physical conditions create an unnecessary hardship and that variances for those aspects of the Applicant's application are necessary to allow a reasonable use of the Property.

3. The Applicant sustained its burden of proving that the variances granted herein will not be detrimental to the public health, safety or welfare, that the hardship was not created by the Applicant, and that the variances are the minimum that will afford relief from the Zoning Code.

4. The Applicant failed to sustain its burden of proving an unnecessary hardship exists with respect to the proposed violation of the limit on the number of signs on a canopy and the proposed violation of the area and height limits for a monument sign.

5. A variance is not required to allow the under-canopy lighting to exceed the 12-ft. height limit of Code §155-3.11 C.

OPINION

The Variance Standard

In determining whether the Applicant is entitled to the requested dimensional variances, the Board applies the standards of the Municipalities Planning Code (“MPC”).⁴ The MPC requires the Applicant to have proven that the fuel dispenser location provisions and the canopy sign height provision of the Zoning Code inflict an unnecessary hardship based on the physical features of its Property. 53 P.S. §10910.2; Code §155-11.2 D(1)(a). And substantial evidence must support all of the following findings in order for the Board to grant the variances:

1. That there are unique physical conditions peculiar to the Property and that the unnecessary hardship is due to those conditions;
2. That because of the physical conditions, there is no possibility that the Property can be developed in strict conformity with the zoning ordinance and that a variance is needed to enable reasonable use of the Property;
3. That unnecessary hardship has not been created by the Applicants;
4. That the variance is not detrimental to the public welfare; and
5. That the variance is the minimum variance that will afford relief and is the least modification of the provision.

Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh, 554 Pa. 249, 721 A.2d 43, 46-47 (1998); 53 P.S. §10910.2; and *see*, Code §155-11.2 D .

Hertzberg remains the seminal case on the proof required for a dimensional variance. There the Pennsylvania Supreme Court held that the standard for proving unnecessary hardship in such cases is less strict than the standard of proof in a use variance case. The Court reasoned that when seeking a dimensional variance, a property owner:

is asking only for a reasonable adjustment of the zoning regulations in order to utilize the property in a manner consistent with the applicable regulations. Thus, the grant of a dimensional variance is of lesser moment than the grant of a use variance since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation.

⁴ The standards for a variance under the Lower Merion Zoning Code are virtually identical to those in the MPC. Code §155-11.2 D.

721 A.2d at 47.

Under *Hertzberg* the Board may consider a number of factors in deciding whether an applicant proved the unnecessary hardship required for a dimensional variance. These factors include: “the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.” *Id.* at 50.

The Board finds that the Applicant met its burden of proof with respect to the Zoning Code’s regulations on fuel dispenser location and on canopy sign height, but not with respect to the Zoning Code’s regulations on the area and height of monument signs and on the number of permitted canopy signs.

The Fuel Dispenser Location and Canopy Sign Height Variances

The Applicant proved that there are unique physical conditions on the Property that create an unnecessary hardship with respect to the location of the Applicant’s fuel dispensers and the height of the canopy signs. The Property is triangular in shape and is bordered on all three sides by a street, creating three front yards and three front setbacks. In addition, the Property is uniquely burdened by the Zoning Code’s use of the term “frontage yard,” defined as “The area between a building facade and the cartway.” Code §155-2.1 (FRONTAGE YARD). There appears to be no area on the Property that is not between a facade of the Existing Building and a cartway of one of the three streets bordering the Property. The noneconforming structures and site improvements on the Property, including the Existing Building, the canopies and the underground fuel line infrastructure, are also unique physical conditions in this case.⁵

⁵ See, Finding of Fact No. 40.

All these conditions combine to create an unnecessary hardship. Cases of hardship usually stem from the unique physical conditions on the property itself.⁶ Certainly in this case, the Property being irregular in shape and surrounded by streets constitutes that sort of unique physical condition resulting in hardship. Courts have also held, however, that an unnecessary hardship can also result from the existing structures on a property:

Although unnecessary hardship usually relates to the physical characteristics of the land, unnecessary hardship can relate to the building itself. *Wagner v. City of Erie Zoning Hearing Board*, 675 A.2d 791, 799 (Pa.Cmwlth.), *appeal denied*, 546 Pa. 672, 685 A.2d 549 (1996). This Court has previously explained that “where premises cannot be converted into a permitted use without demolition and extensive reconstruction, more than ‘mere economic hardship’ exists.” *Zoning Hearing Board of the Township of Indiana v. Weitzel*, 465 A.2d 105, 107 (Pa.Cmwlth.1983) quoting *Logan Square Neighborhood Association v. Zoning Board of Adjustment of the City of Philadelphia*, 379 A.2d 632, 634 (Pa.Cmwlth.1977). Moreover, “a property owner should not be required to reconstruct a building to a conforming use regardless of the financial burden that would be incident thereto.” *Id.*

Oakbrook Fire Co. No. 14 Relief Association v. City of Reading Zoning Hearing Board, No. 697 C.D.2013, 2014 WL 61312 *3 (Pa. Cmwlth. January 8, 2014) (footnote omitted).

As the above quote indicates, where existing structures on a property would have to be reconstructed or demolished in order to put a property to a permitted use, courts have approved the grant of variances. *Halberstadt v. Borough of Nazareth*, 687 A.2d 371 (Pa. 1997). The Supreme Court expressly announced the relaxed hardship standard in *Hertzberg* to address that kind of circumstance. *Hertzberg, supra* at 50.

In the present case, the Property cannot be used for any permitted purpose unless the Existing Building, canopies and fuel dispenser infrastructure are removed. And even if that is done, the erection of a new building on the Property would create “frontage yards” that have to be kept

⁶ The MPC states that unique physical circumstances or conditions include “irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property[.]” 53 P.S. §10910.2(a)(1).

“wholly open to the sky and unobstructed.” Code §155-3.5 D(1). No parking would be permitted there. *See also*, Code §155-8.4 C(1) (parking required to be located “between the structure and the rear lot line, where feasible.”) The Board finds, therefore, that: (1) the combination of the irregular shape of the Property itself and the presence of the nonconforming structures on the Property are unique physical conditions; (2) due to those conditions, there is no possibility that the Property can be developed in strict conformity with the Zoning Code; and (3) that a variance is needed to enable reasonable use of the Property.

The Applicant also met its burden of proving that the variances granted here would not alter the character of the neighborhood or be detrimental to the public welfare. We note first in this regard that a full-service gasoline station operated at the Property for years with the fuel dispensers and the canopy signs in the same locations as proposed by the Applicant in this matter. [Exhibit A-9, Citgo Signage Exhibit]⁷ That station operated with only single-walled tanks and single-walled lines, with no sensors. [N.T. 8/11/22 at 28] There was no evidence produced to support a finding that the prior gas station was a detriment to the public welfare. Moreover, the use as a gasoline station is in keeping with the character of the neighborhood given the Property’s past use, the commercial uses nearby, and the presence of the Sunoco gasoline station a block away on Lancaster Avenue. [Exhibit A-5, Illustrative Aerials and Images] The Applicant will also install site improvements and will employ safety features to protect the public welfare: there will be no noise-generating vehicle service bays; on-site circulation will be enhanced by reducing the size of the Existing Building; queuing on westbound Lancaster Avenue will be reduced and traffic safety will be improved; sidewalks will be refurbished; landscaping will be installed; lighting will

⁷ *See, Otto v. Zoning Hearing Board of Hampden Township*, 686 A.2d 36, 39 (Pa. Cmwlth. 1996) (applicant entitled to dimensional variances to continue permitted prior use of his property; no change in the character of the neighborhood).

be turned off during non-business hours (except for security lighting at the kiosk); and the Applicant will employ state of the art gasoline station safety training and equipment.⁸ While the Board understands the concerns of the neighbors and the civic associations regarding traffic in the area and the potential for fumes being emitted from the site, the Applicant's evidence addressed these concerns and the Board was not presented with any substantial evidence to refute the Applicant's case.

Contrary to the suggestion of several objectors, the Applicant did not create the hardship in this case. The hardship is a result of the Zoning Code's impact on the physical features of the Property, which the Applicant did not create. *Accord, Otto, supra.*

Finally, the Board finds that these variances are the minimum that will afford relief from the Zoning Code. The canopies are already nonconforming to the Zoning Code's height limit and are allowed to remain so. Code §155-10.12 C(1). There is no way to minimize the height variance here without reducing the height of the canopy. As for the fuel dispenser locations, since the entire open area on the Property is frontage yard, the variance from the frontage yard regulation cannot be further minimized. Minimizing the variance from the 200-ft. distance requirement of Code §155 Table 5.3. Use Regulations (TC2 Auto-related services) would require removing and relocating the existing Lancaster Avenue canopy and excavating and relocating the existing fuel line conduit underneath. The Board has already found requiring that work to be contributing to the unnecessary hardship in this case.

In sum, the Property is uniquely suited for re-use as a gasoline station. The two variances granted here are based on the hardship caused by the unique physical features of the Property and the presence of the nonconforming structures related to the previous operation as a gasoline station.

⁸ Findings of Fact Nos. 58-69.

The Wynnewood Canopy Sign Variance and the Monument Sign Variances

The Board will deny the requested variances for a second sign on the Wynnewood canopy and for a monument sign that would exceed the Zoning Code's area and height limits. Applicant did not produce any evidence to prove that a second sign on the Wynnewood Avenue canopy is necessary for a reasonable use of the Property. *Lamar Advantage GP Company v. Zoning Board of Adjustment of the City of Pittsburgh*, 997 A.2d 423 (Pa. Cmwlth. 2010). Regarding the monument sign, it would not - unlike the canopy signs for which the Board is granting relief from the applicable height limitations - be installed on an existing nonconforming structure. In that way, the unique physical features of the Property have no bearing on the monument sign. The height and total area of the proposed monument sign are simply a matter of the Applicant's own chosen design.

The Board gave no weight to Mr. Ostimchuck's opinion that a 50 sq. ft. sign would be safer than the maximum 20 sq. ft. sign permitted by the Zoning Code. His opinion was based on an industry group publication that described "rules of thumb" for the size of lettering on on-premises signs. [N.T. 6/16/22 at 97-104; Exhibit A-13, USSC Sign Legibility Rules of Thumb] That publication does not provide any specific analysis of monument signs, signs for gasoline stations, or LED signs containing gasoline price information. The freestanding sign illustrated as the "typical" one in the publication's analysis is simply a large pole sign. [Exhibit A-13, USSC Sign Legibility Rules of Thumb, p.2] So while the Board recognizes that there is a requirement for gasoline stations to display price information, there was no suggestion at the hearings in this case that that requirement necessitated a monument sign of the size and height requested by the Applicant. In the absence of that evidence, the Board finds *SCRUB v. Zoning Board of Adjustment of the City of Philadelphia*, 771 A.2d 874 (Pa. Cmwlth. 2001) (Tantala) to be persuasive in

response to the argument that a larger sign than one permitted by the Zoning Code is needed so the traveling public can see it. In that case, the Court affirmed the reversal of a zoning board's grant of a variance for an oversized billboard. In holding that the applicant had failed to prove unnecessary hardship, the Court stated:

The variance to increase the size of Keystone's sign board from 1,500 square feet to 2,400 square feet is not justified so it can be seen from the road; requiring a larger sign just means that the lot on which the sign is located is too far from the road . . . or that the variance is needed so the sign will stand out above the existing sign clutter, also not a justifiable reason to grant a variance.

Id. at 878 (citations omitted).

ORDER

AND NOW, this 20th day of October, 2022, it is hereby ORDERED, for all the reasons set forth in the foregoing opinion, that the application of Giant Food Stores, LLC for dimensional variances to use the property at 637 East Lancaster Avenue in Wynnewood is GRANTED in part and DENIED in part as follows.

The Board GRANTS the requested variances

- a. from the prohibition on vehicular fueling devices in the frontage yard in Code §155-3.5 F(1)(h) to allow the five fueling pumps to be installed in the Property's frontage yard;
- b. from Code §155 Table 5.3. Use Regulations (TC2 Auto-related services) to allow two of the fueling device locations to be within the minimum required distance of 200 feet of a residential building (i.e., within 143.5 ft. and 168 ft. of The Wynnewood apartment building);
- c. from Code §155 Table 9.2. General Sign Type Standards and Regulations B. Canopy Sign (Height) to allow two proposed canopy signs to be installed above the maximum permitted height of 15 feet.

The Board DENIES the requested variances

- d. from Code §155 Table 9.2. General Sign Type Standards and Regulations B. Canopy Sign (Regulations (4)) to allow two non-illuminated "GIANT" signs on the Wynnewood Avenue canopy where only one "emblem or logo" is permitted;
- e. from Code §155 Table 9.2. General Sign Type Standards and Regulations E. Freestanding Ground/Monument Sign (Height) to allow a double-sided monument sign 6'-4" high to exceed the maximum permitted height of four feet; and
- f. from Code §155 Table 9.2. General Sign Type Standards and Regulations E. Freestanding Ground/Monument Sign (Sign Area (maximum)) to allow a double-sided monument sign 42.2 sq. ft. in area to exceed the maximum permitted area of 20 sq. ft.

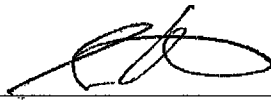
The Applicant's variance requests from Code §155-3.11 C to allow proposed under-canopy lighting to be more than 12 feet above finished grade and from Code §155-10.12 F(1)(a) to increase an existing nonconforming site improvement by installing the fuel pumps under the existing

canopies are DENIED as moot, the Board having found that no variances from those provisions are necessary for those proposed improvements..

The grant of the variances is based on, and conditioned on substantial adherence to the amended plans and the testimony presented at the hearings in this matter and on compliance with all other applicable Township codes and ordinances.

Chairman Brier and Members Ritterband and Vale participating, all voting "aye."

Attest:



Scott Houchins
Secretary