



Division of Development Administration and Review

City of Pittsburgh, Department of City Planning

200 Ross Street, Third Floor

Pittsburgh, Pennsylvania 15219

2008 DEC 19 P 5:55

**CITY OF PITTSBURGH**  
**ZONING BOARD OF ADJUSTMENT** CITY CLERKS OFFICE

**ZONE CASES 63, 131 and 132 OF 2008**

**Date of Hearing:** September 4, 2008  
**Date of Decision:** December 19, 2008  
  
**Location:** 55 11th Street  
**Ward:** 2nd  
**Neighborhood:** Downtown  
**Zoning District:** GT-B (Golden Triangle, Subdistrict B)

*Distribute  
to all  
members*  
*DAS*

**Split Decision**

The two voting members of the Board concur that the effect of a divided vote of the Board members essentially acts as a legal denial of the claim.

However, the members do not concur in the findings of fact or in the decision. This Board member finds the testimony of the various witnesses presented by Lamar to be credible, that the testimonies were consistent, reliable and opined the experience of experts in their fields. The collective testimonies of the Lamar witnesses, including the testimony of the Director of the Parking Authority and that of the Zoning Administrator, viewed in the totality of the circumstances, that being a fairly well established custom and practice agreed to and participated in by three (3) mayoral administrations over the course of five (5) years (beginning in 2003), resulting in twelve (12) to fourteen (14) LED billboards, all over the city, in locations very visible to residents, elected officials and enforcement officers, established evidence of a vested rights interest and/or an equitable estoppel claim. Additionally, Ms. Rodgers, the Executive Director of Neighbors in the Strip, testified in support, identifying the eyesores of the other Lamar signs and that the LED and ticker would brighten up the blighted area.

I agree that the visibility by the residents of the Pennsylvanian is limited to being visible at the entrances and exits and therefore find that the public health, safety and welfare of the residents of the Pennsylvanian would not be adversely affected. I hold a high regard for each of the persons who testified in objection, but found it interesting that Mr. Carter, whom I believe represented the Penguins and the plans for the new arena before the City Planning Commission, objected to this LED board, however, the Penguins had erected a similar LED board for which no permit was sought which broadcast advertising in addition to the Penguin play-off games. The surrounding residents, the office buildings workforces and the countless passersby looked at this board day and night. Which seemed to be a case of "NIMBY". I am empathetic with the other residents, but find that liking the LED board is very subjective and that those who don't like LEDs are passionate and speak out. The residents who testified and

presented a petition signed by eighty (80) other residents numbered less than one half (1/2) of the two hundred and twenty-five (225) residents in the building.

I agree with the conclusion drawn by the City Solicitor, George Spector, as set forth in a letter, submitted at the hearing, dated April 2, 2008, addressed to the President and Members of City Council, re: Lamar Outdoor Advertising – LED, wherein he concluded that, "...based upon prior practice first approved by the Mayor and acted upon affirmatively by three (3) prior Zoning Administrators, the Zoning Administrator acted appropriately in approving the application; but (2) the practice of permitting by negotiation the approval of LEDs in return for elimination of non-conforming billboards is not permitted by the Code, and the practice should cease prospectively."

The foregoing findings and conclusions are very well written and supported by established case law regarding zoning. However, a review of the totality of the circumstances and of the law in pari materia, reliance on an agreement with three administrations and established by the custom and practice of each of these administrations coupled with the unrecoverable expenditures by Lamar in reliance upon an issued permit, issued by a zoning administrator who did so, also, as did her predecessors, in reliance on the same established custom and practice created by the administrations, create an unnecessary hardship for the Appellant, that he relied to his detriment. Additionally, it is recognized that needed revenue will be generated for the City, the parking authority specifically, and that this attraction will bring excitement and consumers in to town for public events at this apex. This is an appropriate mix of the beautiful old, historic development with the exciting, new development vital and necessary to boost to the City's continued current negative economic circumstances (Act 47 status), and assist in sustaining and developing this city for the future.

  
Wrenna L. Watson, Chair

The Board reserves the right to supplement the decision with further Findings of Fact and Conclusions of Law in the event of an appeal of the Board's decision.

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**Appearing/Testifying on Behalf of Appellant:**

Samuel P. Kamin, Esquire – counsel for Lamar Advertising  
Jonathan M. Kamin, Esquire – counsel for Lamar Advertising  
John C. Schrott, III – IKM Incorporated (project architect)  
Richard Glance – Glance & Associates (architect/urban planner)  
David Onorato – Pittsburgh Parking Authority  
Jason Wrona, Esquire – counsel for Pittsburgh Parking Authority  
Stan Geier – Vice President/General Manager for Lamar Advertising in Pittsburgh  
Becky Rodgers – Executive Director of Neighbors in the Strip

**Appearing/Testifying as Objectors or Observers:**

Dan Gilman – on behalf of Councilman Bill Peduto  
Bruce Kraus – Member, City Council  
Douglas A. Shields – President, City Council  
George Specter, Esquire – City Solicitor  
Lawrence H. Baumiller – Assistant City Solicitor  
Claire Meehan – resident of The Pennsylvanian  
Donald Carter – resident of The Pennsylvanian and president of Urban Design Associates  
Greg Weimerskirch – architect and urban planner  
Anne-Marie Lubeneau – president and CEO of the Community Design Center of Pittsburgh

**Also Testifying**

Susan Tymoczko – Zoning Administrator



### **Appeal and Applications at Issue:**

Zone Case 63 of 2008	Appeal of April 24, 2008 revocation of sign permit;
Zone Case 131 of 2008	Request for dimensional variance from Code Section 910.01.D.2 to allow 1082.5 sf Electronic Message Sign; 300 sf permitted ("Ticker Sign"); and
Zone Case 132 of 2008	Request for use variance from Code Section 919.02(B) to allow a 1098 sf Light Emitting Diode ("LED") advertising sign in a GT-B District ("LED Sign").

### **RELEVANT PROVISIONS OF THE ZONING CODE**

1. Section 919.01.C.2 defines "Advertising Sign" as "a sign that directs attention to a business, commodity, service or entertainment, conducted, sold or offered" on sites other than the premises where the sign is displayed or as minor or incidental activity on those premises.

2. Section 919.01.C.12 defines "Electronic Message Sign" as "a sign with changing text or graphics generated by electronic components."

3. Pursuant to Section 919.02.A, "Advertising Signs" are permitted only in the AS-O District which includes subdistricts in the UI, GI, LNC and UNC Districts. Advertising signs are not permitted in the GT-B District. Pursuant to Section 919.02.B, the maximum size for any advertising sign, as permitted only in UI (Urban Industrial) Subdistricts of the AS-O District, is 750 sf.

4. Pursuant to Section 910.01.D.2.b, Electronic Sign Messages are permitted as a conditional use in the GT-B District, provided that signs are limited to 300 sf in size, do not extend more than 30' above grade, are not visible from districts where electronic message signs are not permitted and are not visible from roadways with speed limits greater than 35 m.p.h.

5. Section 922.10 sets forth the requirements for review and approval of Project Development Plans in various zoning districts, including GT (Golden Triangle) Districts. Pursuant to Section 922.10.B, any new or changed use of land and any structure that is erected, enlarged, demolished or externally altered at a cost of more than \$50,000 must be in accordance with an approved Project Development Plan. Pursuant to Section 919.10.F, the Zoning Administrator "may approve minor amendments to approved Project Development Plans without the refiling of a new application."

6. Section 921.02.A sets forth the requirements governing the movement, alteration and enlargements of nonconforming uses, generally. Section 921.03.F contains provisions relating to nonconforming signs.



7. Section 919.02.N applies specifically to nonconforming advertising signs. Section 919.02.N.2 provides that alteration of a nonconforming advertising sign is permitted if it will eliminate the nonconforming condition. Section 919.02.N.3 states that nonconforming advertising signs “[s]hall not be moved to a different location.”

8. The standards for the Board’s consideration of variance requests are set forth in Section 922.09.E.

## **FINDINGS OF FACT**

### **Description of Subject Property and Owner/Applicant**

9. The Subject Property is located at 55 11<sup>th</sup> Street, at the corner of Liberty Avenue and the terminus of Grant Street, in a GT-B (Golden Triangle, Subdistrict B) District.

10. The Pittsburgh Parking Authority (“Parking Authority”) is the owner of the 3.58 acre Subject Property and has constructed a five-story public parking garage building, known as the Grant Street Transportation Center (“GSTC”), on the site. The site is bisected by a railroad line with two trestles located on the Subject Property.

11. The Protestant/Appellant is Lamar Outdoor Advertising. (“Lamar”).

12. Lamar proposes to erect both a 1098 sf Light Emitting Diode (“LED”) advertising sign (“LED Sign”) and a 1082.5 sf Electronic Message Sign; 300 sf permitted (“Ticker Sign”) on the Subject Property. The estimated cost for each sign, as indicated on Lamar’s applications, is \$3,500,000. (Tr. 119).

### **Chronology of Events**

13. In 2003, the Parking Authority issued a request for proposal for designs for the parking garage to be located on the Subject Property. (Tr. 20). IKM Incorporated (“IKM”) was selected to provide architectural services for the project. (Tr. 26). As part of its original proposal for the project, IKM envisioned a number of large LED signs around the building. (Tr. 23-26, Ex. B). However, through the design and value engineering processes, the sign concept was first limited to a video board on the cylindrical corner piece of the building and then eliminated from the design, apparently because the Parking Authority could not justify the cost of that design component. (Tr. 31-32).

14. During the design process, the Parking Authority did not consider or investigate the requirements of the Zoning Code with respect to the conceptual signs. (Tr. 180-81).

15. The Pittsburgh Planning Commission approved a Project Development Plan for the Parking Authority garage, without an LED Sign or Ticker Sign (“GSTC PDP Approval”).

16. IKM continued to promote the concept of a video board component to the design of the GSTC building and sought out parties that might be interested in financing it. (Tr. 33-34).

Lamar was approached with the scheme of financing the LED Sign as well as a Ticker Sign. (Tr. 34-37).

17. On December 21, 2007, Lamar entered a License Agreement with the Parking Authority for the installation of the LED Sign and the Ticker Sign. (Ex. D).

18. Although the Ticker Sign required a dimensional variance from the Zoning Code's size limitations, as well as conditional use approval, Lamar did not apply for those approvals prior to entering the License Agreement.

19. The Zoning Administrator approved the LED Sign as a "minor amendment" to the GSTC PDP Approval for the GSTC building and Sign Permit No. 07-08817 was issued on December 19, 2007. Sign Permit No. 07-08817 indicates an estimated cost of the sign of \$5,000. (Ex. E).

20. Following the issuance of Sign Permit No. 07-08817, on December 21, 2007, Lamar erected a temporary vinyl banner sign on the partially-constructed GSTC building on the Subject Property. (Ex. B). The text on the vinyl banner sign advertised an exhibit at the Sports Museum, celebrating the Steelers' 75<sup>th</sup> Season. The banner did not indicate that it was intended as notice of the issuance of a permit for the LED Sign. The banner remained in place for at least 30 days prior to the time construction commenced on the LED Sign. (Tr. 98-99, 105).

21. On March 11, 2008, within 30 days of when the construction of the LED Sign had become apparent, Councilman Patrick Dowd filed a protest appeal, Zone Case No. 63 of 2008, contesting the issuance of Sign Permit No. 07-08817. Several other members of City Council filed a protest appeal as of March 12, 2008. Lamar responded by filing a civil action against the various Council Members in the Court of Common Pleas of Allegheny County.

22. With a April 17, 2008 Memorandum of Understanding among Councilman Dowd, Lamar and the City of Pittsburgh, Lamar agreed that the City would revoke Sign Permit No. 07-08817, with the condition that Lamar would be permitted to appeal the revocation to this Board and would be permitted to file an application for a variance for the sign then under construction. (Ex. I). Lamar agreed to abide by a stop work order and withdrew its civil action against the Council Members.

23. On June 4, 2008, Lamar filed its applications for variances for the LED Sign and the Ticker Sign.



24. The Board conducted a hearing on both the protest appeal and Lamar's variance applications on September 4, 2008. Board Member David F. Toal, Esquire recused himself from the proceeding on the basis of a conflict of interest. (Tr. 10).<sup>1</sup>

25. In the context of the protest appeal, Lamar presented evidence with regard to its claim of a vested right in the issuance of Sign Permit No. 07-08817. Councilman Dowd had originally filed the protest appeal, contesting the validity of Sign Permit No. 07-08817. Councilman Dowd, however, did not participate in the hearing and thus that aspect of the hearing was limited to Lamar's vested right claim. In the context of its variance applications, Lamar presented evidence intended to meet the standards for variances under the Zoning Code and Pennsylvania law.

26. A number of interested persons, including several members of City Council, appeared to present their concerns regarding the proposed signs.

### **Lamar Testimony**

27. Lamar witness, John Schrott, the project architect for IKM, described the history of the project design and the concept of the LED Sign as a design element for the GSTC building. Mr. Schrott acknowledged that the sign regulations in the Zoning Code were not considered in the development of the design. Mr. Schrott also conceded that, in the design review process, the City's Design Review Commission was not in favor of the video board component of the project. (Tr. 30; Ex. 3).

28. Mr. Schrott explained that, at the time Lamar became interested in the project, the project had been redesigned so that the reintroduction of the LED Sign into the design required a custom-made, curved video board mounted on the curve of the "sail" portion of the building. (Tr. 36, 39).

29. With respect to the Ticker Sign, Mr. Schrott asserted that the length and height of the sign, from trestle to trestle, were necessary to allow the sign to be visible from Liberty Plaza and on Grant Street and that the trestles were natural endpoints for the ticker. (Tr. 40-41).

30. Mr. Schrott identified a photograph depicting the banner sign that was placed on the building as of December 21, 2007. (Tr. 43; Ex. B). He also identified the location of Lamar signs in the vicinity of the Subject Property. (Tr. 43-45; Ex. B).

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<sup>1</sup> Given the recusal of one member of the three-member Board, the votes of both of the other members of the Board would be required for Lamar to prevail because, where the two voting members of a zoning board cast a divided one-to-one decision, the divided vote has the legal effect of denying the application. See *Giant Food Stores v. Zoning Hearing Board of Whitehall Twp.*, 501 A.2d 353 (Pa. Commw. Ct. 1985) (Judge Craig recognized the well-settled principle that a tribunal's divided vote confirms the status quo and held that where a zoning tribunal, with an evenly divided vote, declines to depart from the *status quo*, the aggrieved party has the ability to file a statutory appeal).



31. Mr. Schrott opined that the signs would benefit the public, emphasizing the possible use of the LED Sign for public events and for broadcasts of local interest. (Tr. 37-38).

32. Lamar witness, Richard Glance, an architect and urban planner, testified regarding the impact of the LED Sign on the area. Mr. Glance opined that the LED Sign would have no negative impact on the public health, safety or welfare. (Tr. 50). He noted that the LED Sign was an appropriate architectural feature for the building because it was designed to be an integral part of the building and because it would provide a visual impact for a unique urban location. (Tr. 51-52).

33. Mr. Glance presented a series of depictions of the City's nodes and districts, including the node at the Subject Property. (Tr. 57). He also described the view corridors of the LED Sign and stated that, in his opinion, the sign would have a visual impact and excitement within its node and would not have an impact on The Pennsylvanian, an historic building with multiple residential units located across the street from the Subject Property. (Tr. 60, 63).

34. Mr. Glance also opined that the height of the LED Sign was necessary to fit within the scale of the building and the size was necessary to make it fit within the architecture so that it not appear to be an afterthought. (Tr. 66-67). He noted that the Ticker Sign needed to stop and start at a logical place and needed to be at the proposed size to be effective. (Tr. 62-65).

35. Mr. Glance did not refer to the applicable provisions of the Zoning Code in presenting his testimony.

36. David Onorato, the executive director of the Parking Authority which is the owner of the Subject Property and the GSTC, confirmed the history of the project's design. (Tr. 70). He indicated that the LED Sign and Ticker Sign had been value-engineered out of the project but were reintroduced when the Parking Authority entered the License Agreement with Lamar for the LED Sign and the Ticker Sign. (Tr. 72-75).

37. Mr. Onorato indicated that the benefit of both signs would be as additional revenue sources for the Parking Authority, with no out-of-pocket expenses for the Parking Authority. (Tr. 76-77).

38. Mr. Onorato noted that, although the Parking Authority was excited about the signs as design elements and amenities for the building, the Parking Authority did not review the requirements of the Zoning Code regarding the signs and relied on the architects for that information. (Tr. 180-81).

39. Lamar also called Susan Tymoczko, the Zoning Administrator, as a witness. Ms. Tymoczko testified that she approved the application for Sign Permit No. 07-08817 as a "minor amendment" to the approved PDP for the GSTC building, based on her belief that the approval was in accordance with the City's rules and regulations. (Tr. 81). She explained that she believed that the City administration had reached an agreement with Lamar with regard to the removal of six nonconforming advertising signs in exchange for approval of the LED Sign. (Tr. 81, 220).

40. Stan Geier, vice president and general manager for Lamar in Pittsburgh, testified as to Lamar's involvement with the GSTC project, noting that IKM had approached Lamar in 2006. (Tr. 88). He described the Lamar sign on the site and five other of Lamar's nonconforming advertising signs within 500 feet of the Subject Property. (Tr. 90; Ex. B).

41. Mr. Geier testified that Lamar contacted various City officials with regard to the LED Sign and reached an agreement for a "six-to-one swap" of the six nonconforming signs for the one LED Sign. (Tr. 92-97). He testified that the City had a "practice" of allowing this type of swap but did not identify any documentary support or legal authority for the "practice." (Tr. 94-95). Mr. Geier did not address the applicable provisions of the Zoning Code regarding advertising signs.

42. Mr. Geier testified that, upon the issuance of Sign Permit No. 07-08817, Lamar erected the temporary vinyl banner sign to serve as notice that an LED advertising sign was going to be installed. (Tr. 99). He conceded, however, that the temporary vinyl banner sign was not similar to the proposed LED Sign. (Tr. 99-100).

43. Mr. Geier also described the customized nature and costs of the LED Sign, noting that it is one-of-a-kind. (Tr. 101). He indicated that \$1.3 million had been spent on the sign itself, to date, in unrecoverable costs, with additional costs of approximately a couple hundred thousand dollars for workmen and consultants required for the sign installation. (Tr. 103).

44. Mr. Geier opined that the public would benefit from the sign because of its possible use for the broadcast of various events of local interest. (Tr. 107-08).

45. Becky Rodgers, the executive director of Neighbors in the Strip, testified in support of the signs. She noted that the existing Lamar signs in the vicinity of the Subject Property are eyesores and that the LED and Ticker Signs would brighten up a blighted area. (Tr. 115-18). In the letter Ms. Rodgers presented, it was noted that the signs would be comparable to those at CAPA and in the Cultural District. (Ex. L).

### **Objectors/Observers Testimony**

46. Claire Meehan, a resident of The Pennsylvanian, testified in opposition to the proposed signs. She presented a petition from 80 residents of The Pennsylvanian indicating opposition to the signs. (Tr. 123-26; Ex. 1). She noted that the signs would be visible at the primary entrance and exit of the building. (Tr. 134).

47. Donald Carter, also a resident of The Pennsylvanian and an architect, provided a copy of his letter to the editor of the Post-Gazette in which he described reasons for his opposition to the signs. (Tr. 138-42; Ex. 2). Mr. Carter explained that he had been part of the development team that worked collaboratively with the Department of City Planning to design the civic space at the intersection of Liberty Avenue and Grant Street, which is, in part, framed by the Subject Property. (Tr. 138). He noted the intent to preserve the vista down Grant Street to the site and the negative impact of the LED Sign, as proposed. (Tr. 139-41). Mr. Carter also noted that the banner sign on the GSTC building during its construction did not provide notice to the residents of The Pennsylvanian of an approval of any sign. (Tr. 141). He acknowledged the possible



amenity of a video screen for occasional display of local sporting events but noted that, for the majority of the time, the LED Sign would display changing advertising signs. (Tr. 143).

48. Greg Weimerskirch, a City resident and architect whose office is located in proximity to the Subject Property, also opined as to the detrimental effect of a digital billboard in the context of the historic buildings in the vicinity of the Subject Property. (Tr. 148-51).

49. Anne-Marie Lubenau, a registered architect and president/CEO of the Community Design Center of Pittsburgh, presented oral and written testimony in opposition to the signs. (Tr. 156-61; Ex. 3). Ms. Lunenau also serves on the City's Contextual Design Advisory Panel and served on the City's Design Review Committee in 2004 when that panel reviewed the Parking Authority's proposal. As set forth in the Design Review Committee's July 28, 2004 Summary of Review, the panel determined that "[t]he presence of an electronic messaging sign is unacceptable", that "[n]o need or demand for this sign has been demonstrated", and that the sign would have a high degree of visibility from Grant Street, Penn Avenue and Liberty Avenue and "the sign does not contribute positively to the urban landscape." (Tr. 158; Ex. 3).

50. Dan Gilman, chief of staff to Councilman Peduto, presented a letter on behalf of the Councilman, indicating his concerns regarding the proposed signs. (Tr. 168; Ex. 4).

51. Douglas Shields, President of City Council, appeared to oppose the LED Sign and as an observer with respect to the Ticker Sign. (Tr. 172). He noted a lack of evidence with respect to the variance request. (Tr. 174-75). He also questioned Mr. Onorato with respect to the initial design of the GSTC building, the removal of video board concept and the subsequent amendment for the LED Sign. (Tr. 179-84). In the course of Mr. Shields' questions, Mr. Onorato confirmed that the plan for the GSTC building that was presented to the Planning Commission did not include the LED Sign. (Tr. 186). In the course of Mr. Shields' questions, Ms. Tymoczko confirmed the existence of one non-conforming Lamar advertising sign on a railroad pier on the Subject Property. (Tr. 203). In response to Mr. Kamin's questions, Mr. Shields indicated that he had met with representatives of IKM and Lamar to discuss the possibility of an LED sign on the GSTC building but had noted at that time that an LED sign would require amendments to the Zoning Code because the Code does not permit advertising signs in the GT-B District. (Tr. 206).

52. Bruce Kraus, a member of City Council, appeared as an observer and presented a memorandum of law from the City Law Department regarding the proposed signs; the April 2, 2008 letter from City Solicitor George Specter regarding the "swap" agreement with Lamar; the Design Review Committee's 2004 summary of its review of the LED Sign; a copy of City Council's moratorium regarding signs; memoranda regarding the relocation of nonconforming signs; case law related to signs; assorted newspaper articles and photographs relating to the effects of digital billboards. (Tr. 209; Exs. 6, 7 and 8).

53. In his April 2, 2008 letter, the City Solicitor opined that the Zoning Administrator acted appropriately to approve the application for the LED Sign but stated that "the practice of permitting by negotiations the approval of LEDs in return for elimination of non-conforming billboards is not permitted by the Code, and the practice should cease prospectively." (Ex. G).



### **Findings Regarding Lamar's Vested Right/Equitable Estoppel Claims For the LED Sign**

54. As a sign company with a long history in the City of Pittsburgh and familiarity with the applicable provisions of the Pittsburgh Zoning Code, and with experienced counsel, Lamar knew, or should have been aware, that the provisions of the Zoning Code prohibit advertising signs in GT-B Districts. Although Lamar presented testimony regarding the City's "past practice" of permitting "swaps" of non-conforming advertising signs for LED signs, it did not present evidence of any legal authority or written City policy or ordinance that would allow the "relocation" of nonconforming advertising signs on a different property. Lamar also did not present any evidence addressing the Zoning Code's specific prohibition against advertising signs in the GT-B District or the specific prohibition against relocating nonconforming advertising signs to a different location. Assuming that Lamar must have been aware of the prohibition against advertising signs in the GT-B District, its efforts to arrange a "swap" can only be viewed as an effort to circumvent the Code's prohibition against advertising signs in the GT-B District.

55. Lamar cannot reasonably claim that it exercised due diligence in attempting to comply with the Zoning Code or Pennsylvania law.

56. Lamar cannot credibly claim that it acted in good faith in obtaining Sign Permit No. 07-08817.

57. Amending a project development plan to include a type of sign that the Zoning Code prohibits in the GT-B District and that involves well over \$50,000 in costs does not constitute a "minor amendment" to an approved project development plan.

58. The estimated cost of the sign identified in Sign Permit No. 07-08817 was \$5,000. (Ex. E). Yet, Lamar's witnesses testified that the total cost of the LED Sign and the Ticker Signs would be approximately \$6 to 7 million and the sign applications indicate a cost of \$3,500,000 per sign. (Tr. 119).

59. Lamar's reliance on the issuance of Sign Permit No. 07-08817, which was approved as a "minor amendment" of the approved project development plan for the GSTC and based, in part, on the representation that the estimated cost of the sign was \$5,000, was misplaced.

60. Sign Permit No. 07-08817 was not a valid permit and was properly revoked.

61. Lamar's effort to characterize the placement of a temporary vinyl banner sign, which advertised a Steeler exhibit at the Sports Museum, as "notice" of a permit to install a 1098 sf LED sign is particularly disingenuous. Nothing from the vinyl banner sign provided any indication that it was intended for any purpose but advertising the Steeler exhibit and certainly not that it was intended as notice of the issuance of a permit for a sign that would be in direct violation of the provisions of the Zoning Code.

62. Notice of the issuance Sign Permit No. 07-08817 was not effectuated until construction of the LED Sign became apparent.

## **Findings Related to Lamar's Application for Variances for the LED Sign and Ticker Sign**

63. Although Lamar presented evidence that the GTSC building and the Subject Property are unique, it did not present evidence of any unique conditions of the Subject Property that would result in an unnecessary hardship related to the property or that would prevent or inhibit reasonable use of the Subject Property without the proposed signs. In fact, the Subject Property is reasonably being used for the GTSC.

64. The evidence presented described the unique location of the Subject Property, its unique visibility in the area and the unique architecture of the GSTC building but did not relate to any unique condition of the Subject Property that results in an unnecessary hardship.

65. The variances requested, both the use variance for the LED Sign and the dimensional variance for the Ticker Sign, are not merely superficial or technical deviations from the Zoning Code's requirements but represent significant departures from the Code.

66. Even if it were not a use prohibited in the GT-B District, the requested 1098 sf LED Sign reflects more than a 50% increase in size from the 750 sf for the largest permitted advertising signs in any AS-O district. 750 sf signs are permitted only in UI Districts.

67. The requested 1082.5 sf for the Ticker Sign reflects more than a 350% increase from the 300 sf permitted for Electronic Sign Messages in the GT-B District.

68. Lamar's witnesses, including the project architect and urban planning consultant, who testified that the impact of the LED Sign and the Ticker Sign would not be detrimental, did not address the applicable requirements of the Zoning Code relating to the proposed sign. Their testimony did not address the pertinent issues and was not credible.

69. Lamar presented no credible evidence indicating that any purported hardship necessitating the variances was not self-created.

## **CONCLUSIONS OF LAW AND DECISION**

### **Vested Right/Equitable Estoppel Claims**

1. The doctrine of vested rights is intended to protect innocent landowners in situations where a municipality or governmental entity may have erroneously issued a permit and the landowner has proceeded in reliance upon that permit. *Commonwealth Department of Environmental Resources v. Flynn*, 344 A.2d 720 (Pa. Commw. Ct. 1975). In *Flynn*, the Commonwealth Court enunciated five factors, which must be considered in determining the applicability of vested rights in a given situation:

1. Due diligence in attempting to comply with the law;
2. Good faith throughout the proceedings;
3. The expenditure of substantial unrecoverable funds;



4. The expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit;
5. The insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

*Flynn*, 344 A.2d at 725. The Pennsylvania Supreme Court adopted this vested rights analysis in *Petrosky v. Zoning Hearing Board of Upper Chichester Township*, 402 A.2d 1385 (Pa. 1979). The factors set forth in *Flynn* and *Petrosky* establish a logical framework that allows a fact-finding body to evaluate the circumstances and relative equities associated with the issuance of a permit and the reasonableness of the landowner's reliance on receipt of the permit.

2. Under *Flynn* and *Petrosky*, Lamar has the burden of proof in establishing the five factors.

3. In *Highland Park Community Club v. Zoning Bd. of Adj.*, 475 A.2d 925 (Pa. Commw. Ct. 1984) *aff'd* 506 A.2d 887 (Pa. 1986), the Supreme Court considered a community group's appeal, in 1982, of the Zoning Administrator's approval, in 1979, of a certificate of occupancy for six dwelling units on property zoned only for one or two family residences. The Court determined that the landowner knew that the property was located in a district where a multi-unit use was not permitted and failed to apply for the appropriate zoning approval. The Court concluded that the owner had not acted in good faith or with due diligence under the *Petrosky* standards, specifically criticizing the owner for ignoring the Zoning Code's requirements, stating that a pre-condition to application of the vested rights doctrine is "a good faith to attempt to comply with the requirements of the applicable Zoning Code." 506 A.2d at 892.

4. Pennsylvania law does not require a landowner to establish that all five factors are present to be entitled to a vested right. *Mirkovic v. Zoning Hearing Board*, 149 Pa. Commw. 587, 596, 613 A.2d 662, 667 n.2 (1992) (citing *Highland Park Community Club*). *See also Three Rivers Youth v. Zoning Board of Adjustment for the City of Pittsburgh*, 437 A.2d 1064 (Pa. Commw. Ct. 1981) (vested right established when only four of the five factors were met). The equities associated with the specific circumstances must be weighed to determine whether a finding of a vested right is appropriate.

5. In *Schoepple v. Lower Saucon Township*, 624 A.2d 699 (Pa. Commw. Ct. 1993), the Commonwealth Court considered whether a landowner could enter an agreement with the municipality under which the municipality would consider his property as legal nonconforming lots. President Judge Craig, writing for the Court, rejected the trial court's conclusion that the township's solicitor, on behalf of the municipality, was empowered to enter the agreement reclassifying the property. The Commonwealth Court held that "[a]ny such agreement would render meaningless the rights and procedures established under the MPC and municipal zoning ordinances." 624 A.2d at 705. The court reasoned that a zoning ordinance is municipal legislation that is intended to "ensure a logical and well-reasoned approach to land development" and that if municipalities were permitted to enter agreements outside the terms of a zoning ordinance, they could bypass remedial safeguards and the rights of objectors. *Id.* The court thus concluded that the township's agreement with the landowner was not valid.



6. The City's Zoning Code is the definitive articulation of the public health, safety and welfare in the context of zoning and planning. A use that the Code specifically prohibits in a specific district is, as a matter of law, contrary to the City's defined statement of its public health, safety and welfare interests.

7. The Commonwealth Court set forth the elements of equitable estoppel in *Cicchiello v. Bloomsburg Zoning Hearing Board*, 617 A.2d 835, 837 (Pa. Commw. Ct. 1992), holding that equitable estoppel could be applied to a zoning board if the party asserting the claim established that the governmental agency: 1) intentionally or negligently misrepresented a material fact; 2) knew or had reason to know that the other party would rely justifiably on the misrepresentation; and 3) induced the other party to act to its detriment in reliance on the misrepresentation. The elements of due diligence and good faith are inherent in the requirement that reliance must be "justifiable." Thus, the elements of equitable estoppel are essentially the same as those for a claim of a vested right. See Robert S. Ryan, *Pennsylvania Zoning Law and Practice*, § 8.3.7. In *Cicchiello*, the court rejected the equitable estoppel claim because it found that the zoning board had not made any misrepresentation to the claimant. See also *Strunk v. Zoning Hearing Board of Upper Milford Township*, 684 A.2d 682, 685 (Pa. Commw. Ct. 1996) (Court rejected equitable estoppel claim because it found that property owners did not have "clean hands").

8. In *Lamar Advertising Company v. Zoning Hearing Board of Monroeville*, 939 A.2d 994 (Pa. Commw. Ct. 2008), the Commonwealth Court considered whether a change from conventional billboard signs to LED signs was a change simply to the "sign face" or constituted a significant change to the billboard structure, necessitating appropriate zoning approvals. The court concluded that LED screens required significant structural alterations to the conventional billboard structures and thus were not exempt from the required zoning approvals.

9. Here, Lamar has not established a vested right in Permit No. 07-08817 under the standards the Supreme Court established in *Petrosky* and has demonstrated due diligence only in its efforts to circumvent the explicit requirements of the Zoning Code.

10. In asserting its vested rights claim, Lamar relies almost exclusively on a "swap" agreement with the City to assert that it exercised due diligence in attempting to comply with the law and acted in good faith throughout the proceedings. However, the very nature of the purported "swap" agreement is redolent of Lamar's efforts to avoid the Code's requirements. Lamar presents no written documentation of a "swap" agreement and no legal authority that would justify it, even if similar swaps had been accomplished in the past.

11. The Zoning Code explicitly prohibits advertising signs in the GT-B District. Section 919.02.A. The Zoning Code also prohibits moving nonconforming advertising signs to a different location. Section 919.02.N.2. Nonconforming signs cannot even be relocated on the same lot without approval as a special exception. Section 921.03.E. Thus, as a matter of law, an advertising sign, even as the relocation of a single nonconforming advertising sign, is not permitted on the Subject Property. Further, as the Commonwealth Court noted in *Lamar Advertising Company v. Monroeville*, the change from a conventional billboard to an LED screen requires substantial structural changes which require appropriate zoning approvals.

12. The issuance of Sign Permit No. 07-08817 resulted from the Zoning Administrator's determination that the addition of the 1098 sf LED Sign was a "minor amendment" to an approved project development plan. Although Sign Permit No. 07-08817 indicates an estimated cost of \$5,000, Lamar's witnesses testified that the cost of the LED Sign is approximately \$3,500,000. The Code provides that any external alteration of a structure in the GT Districts, which exceeds \$50,000 in costs, must be in accordance with a plan approved by the Planning Commission. Section 922.10.B. Under the Code, the LED Sign was prohibited in the GT-B District. That fact, in and of itself, makes clear that the re-introduction the LED Sign was not a "minor amendment" to the PDP for the GSTC building, particularly where the "amendment" requested was for a feature which the Design Review Committee had identified as "unacceptable" for the building. Further, despite the estimate listed on the sign permit, the cost of the sign is well in excess of the \$50,000 which required, at the very least, Planning Commission review of the change to the approved PDP for the GSTC building. The Zoning Administrator thus clearly erred in determining that the LED Sign constituted a "minor amendment" to the approved PDP for the GSTC building.

13. The effort to characterize a 1098 sf LED Sign – the cost of which Lamar now estimates to be \$3,500,000 and not the \$5,000 identified in Sign Permit No. 07-08817 – as a "minor amendment" to a project development plan is singularly disingenuous and indicative of a lack of good faith, even if the Zoning Administrator approved the change as a "minor amendment."

14. Lamar was, or should have been, aware that no City official had the authority to enter any agreement, written or otherwise, that ignored the requirements of the Zoning Code and bypassed the remedial safeguards and processes that the Code requires. The City Solicitor's letter, in fact, confirms that nothing in the Code permits a "swap" agreement.

15. For these reasons, Lamar did not exercise due diligence in attempting to comply with the Code and did not act in good faith throughout the proceedings.

16. Lamar also failed to demonstrate that it commenced construction after the period during which an appeal could have been reasonably taken from the issuance of Permit No. 07-08817. It asserts that the temporary vinyl banner which advertised a Steeler exhibit constituted notice of the issuance of a permit for a use which the Zoning Code prohibits. Nothing about the sign gave any indication that it was intended as legal notice. Lamar presented no evidence that it attempted to provide reasonable notice of the issuance of Permit No. 07-08817 in any manner that was reasonably calculated to put any interested party on notice of the permit's issuance or the need to examine the file regarding the permit. Thus, the appeal period had not expired when Lamar began construction of the LED Sign.

17. Lamar presented evidence that it expended substantial sums for the construction of the LED Sign prior to the revocation of Sign Permit No. 07-08817. That factor alone, however, cannot justify the finding of a vested right in that permit, particularly in the absence of due diligence to comply with the Code, the absence of good faith and the lack of notice of the issuance of the permit.



18. Lamar's efforts to demonstrate that the LED Sign would not be detrimental to the public health, safety or welfare are self-serving, at best. Lamar's architect and urban planning witnesses, not surprisingly, opined that the LED Sign would not have any detrimental impact. They used circular illogic to assert that the LED Sign would be a unique visual feature in a unique urban location and that it was an appropriate architectural feature because it had been designed to be an integral part of the building façade. They also claim that the LED Sign would provide a visually exciting feature that is "needed" on the Subject Property. Those witnesses, however, did not address the Zoning Code's prohibition against advertising signs in the GT-B District and the legislative determination, reflected in that Code, that advertising signs, even visually exciting ones, are not "needed" in GT Districts. Further, the touted "public benefit" of an occasional use of the LED Sign for public events does not outweigh the fact that the LED Sign would be used primarily for constantly changing advertising that would directly benefit only Lamar and the Parking Authority, with only a possible and tangential effect on public parking rates. The Zoning Code's prohibition against advertising signs in GT Districts, and not the opinion of Lamar's witnesses, is controlling with respect to a finding regarding the public health, safety and welfare.

19. For these reasons, Lamar did not meet its burden of proof with respect to its vested rights claim or its equitable estoppel claim and does not have a vested right in Sign Permit No. 07-08817. Sign Permit No. 07-08817 was properly revoked.

20. It is unclear whether Lamar attempts here to assert an equitable estoppel claim against the City administration which purportedly agreed to a "swap" or the Board. It does not identify what entity is to be estopped from what action. Because Lamar did not establish the elements of due diligence or good faith, its putative equitable estoppel claim must be rejected.

#### **Use Variance Request for the LED Sign**

21. Because Section 919.02.A of the Zoning Code prohibits advertising signs in the GT-B District, the variance Lamar requests with respect to the LED Sign must be evaluated under the standards for a use variance.

22. Section 922.09.E sets forth the general conditions the Board is to consider with respect to variances. These standards are consistent with the general variance standards under Pennsylvania law. See, e.g., *Hertzberg v. Zoning Board of Adjustment of the City of Pittsburgh*, 721 A.2d 43 (Pa. 1998), citing *Allegheny West Civic Council v. Zoning Bd. of Adj. of the City of Pittsburgh*, 689 A.2d 225 (Pa. 1997); see also *Valley View Civic Ass'n v. Zoning Bd. of Adj.*, 462 A.2d 637 (Pa. 1983). To grant a variance the Board must find: 1) that there are unique physical circumstances or conditions relating to a property and that, due to these physical conditions, the application of the requirements of the Code results in an unnecessary hardship; 2) that because of the unique physical conditions, the property cannot be developed in strict conformity with the zoning ordinance and a variance is necessary to allow reasonable use of the property; 3) that the appellant has not created the hardship; 4) that the variance, if granted, would not alter the essential character of the neighborhood nor be detrimental to the public welfare; and 5) that the



variance, if authorized, would represent the least modification possible of the regulation at issue. It is the applicant's burden to present evidence to support each of these criteria.

23. The Subject Property can be and is being used in conformity with the Code's requirements. Lamar did not and cannot demonstrate that there are unique physical circumstances relating to the Subject Property that would warrant relief from the application of the Code's requirements to allow for reasonable use of the property. Evidence that the Subject Property, its location and the GSTC building on it are "unique" are not relevant to the variance analysis. Every property and every building are arguably unique. The relevant inquiry is whether, due to a unique condition, the Code's application would result in an unnecessary hardship. Lamar has not demonstrated that a unique condition of the Subject Property results in an unnecessary hardship. Lamar's effort to assert that the LED Sign is uniquely suited to the unique architecture of the building which included a unique video component as part of its unique design is circular, at best, and unavailing.

24. Lamar did not and cannot present any evidence that would support its assertion that it should be granted a variance to allow a use that is prohibited on every other property in the GT Districts, providing an economic benefit to Lamar and the Parking Authority that is not provided to any other property owner or tenant in those districts.

25. Evidence that the LED Sign might be occasionally used for public events or that the Parking Authority's income from the sign might have an effect on public parking rates is not sufficient to justify the grant of a use variance.

26. Lamar presented evidence indicating that the LED Sign would not have a visual impact on The Pennsylvanian. Its witnesses also expressed their opinions that the LED Sign would bring a needed improvement to the area. Those witnesses did not, however, address the express legislative determination that advertising signs are prohibited in GT Districts. The opinion of an applicant's witnesses cannot be substituted for the clear legislative determination that advertising signs are prohibited.

27. Further, Lamar asserts that the 1098 sf LED Sign must be of this size or it would appear to be an "afterthought" in the context of the building. Even if considered as a dimensional variance, the LED Sign, as proposed, is more than 50% larger than the largest advertising sign permitted in any district. In no way can the proposed use variance be construed as the "least" modification of the prohibition against advertising signs in the GT-B District.

28. For these reasons, Lamar has not met its burden of proof with respect to its application for a use variance for the LED Sign.

#### **Dimensional Variance Request for the Ticker Sign**

29. Pursuant to Section 910.01.D.2.b of the Code, which permits Electronic Sign Messages as a conditional use in the GT-B District, the variance requested for the 1082.5 sf Ticker Sign is a dimensional variance from the 300 sf size limitation contained in Section 910.01.D.2.b.1.

30. A dimensional variance is distinct from a use variance, and is subject to a less restrictive standard, because a property owner seeking a dimensional variance asks for a reasonable adjustment of the zoning regulations to accommodate a use of the property which the ordinance permits. *Hertzberg*, 721 A.2d at 47; *Daley v. Zoning Hearing Bd.*, 770 A.2d 815 (Pa. Commw. Ct. 2001).

31. In *Hertzberg*, the court recognized that an unreasonable economic burden may be considered in determining whether a hardship would result from strict adherence to the dimensional requirements for a particular property. As the Commonwealth Court noted in *One Meridian Partners v. ZBA of Philadelphia*, 867 A.2d 706 (Pa. Commw. Ct. 2005), however, *Hertzberg* did not relax the dimensional variance standard to such a degree as to give developers a carte blanche with respect to any and all dimensional variances requested. 867 A.2d at 710. In *One Meridian*, a developer sought “dimensional variances” to allow a 50-story luxury condominium tower to be constructed in the center of Philadelphia. The applicant’s requested variances included a 300% increase in the permitted floor area ratio and an increase of more than 100 feet in height above what the zoning ordinance allowed. The court rejected these dimensional variance requests, holding the height regulations were an exercise of the city’s zoning power and “the wisdom of such policy making is for the City Council to decide.” 867 A.2d at 710.

32. Where substantial deviations from the a zoning code are requested, the appropriate remedy would be rezoning. *One Meridian*, 867 A.2d at 710, citing *O’Neill v. Zoning Board of Adjustment*, 254 A.2d 12 (Pa. 1969).

33. Here, Lamar seeks more than a 350% increase from the 300 sf permitted for Electronic Sign Messages. The only justifications it offers for this substantial deviation are the self-interested opinion that the Ticker Sign would be a community benefit and the assertion that the income from the sign would benefit the Parking Authority.

34. For the reasons set forth with respect to the use variance request for the LED Sign, a dimensional variance for the Ticker Sign is also inappropriate. A more appropriate remedy would be seek amend to the Zoning Code to allow for Electronic Sign Messages that are larger than the Code’s current 300 sf limitation.

### **Standing**

35. Lamar challenges the standing of the various individuals who appeared both to observe and to oppose the various requests. Because Lamar failed to meet its burden of proof with respect to both its vested rights claim and its variance requests, it is unnecessary to rule on the question of standing of the various individuals. It is noted, however, that the residents of The Pennsylvanian are clearly aggrieved parties for the purpose of standing and the Members of City Council, who represent the interests of all City residents and who have their primary offices Downtown, within proximity of the GSTC and within view of the signs, have sufficient interest to have standing in this matter.



**DECISION**

AND NOW, on the 19<sup>th</sup> day of December, 2008, after a hearing before the Zoning Board of Adjustment on September 4, 2008 and consideration of the parties' post-hearing submissions, the protest of the issuance of Sign Permit No. 07-08817 is upheld and the vested right and equitable estoppel claims asserted in response to the protest appeal are DENIED. Further, the request for a use variance for the LED Sign is DENIED; and the request for a dimensional variance for the Ticker Sign is also DENIED.

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**Wrenna L. Watson, Chair**

  
**Alice B. Mitinger**

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**Recused**  
**David F. Toal**