

DATE OF DECISION: MARCH 4, 2016

DATE OF MAILING: MARCH 4, 2016

**BEFORE THE NEW BRITAIN TOWNSHIP
ZONING HEARING BOARD**

**RE: APPLICATION OF JERRY AND MARIAN HAAG
FOR THE PROPERTY LOCATED ALONG UPPER CHURCH ROAD,
NEAR THE INTERSECTION WITH KING ROAD,
NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-3-106**

FINDINGS OF FACT

1. On Thursday, January 21, 2016 at 7:00 p.m. at the New Britain Township Building, 207 Park Avenue, Chalfont, New Britain Township, the New Britain Township Zoning Hearing Board ("Board") held a duly noticed hearing on the application of Jerry and Marian Haag (the "Applicants").

2. The Applicants are the record owners of the property located along Upper Church Road, near the intersection with King Road, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-3-106 (the "Property").

3. Notice of the January 21, 2016 hearing was published in advance of the hearing in the Thursday, January 7, 2016 and Thursday, January 14, 2016 editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See Exhibit B-4.*

4. Notice of the hearing was sent by first class mail on January 6, 2016 by Devan Ambron ("Ambron"), the New Britain Township Zoning Officer, to (a) all record owners of properties within New Britain Township surrounding the Property; and (b) to the adjoining municipality for any surrounding properties that are located in that municipality. *See Exhibit B-7.*

5. Ambron posted notice of the hearing on the Property on January 6, 2016 at 1:25 p.m. *See Exhibit B-8.*

6. As record owners of the Property, the Applicants have the requisite standing to prosecute this zoning hearing board application.

7. The Property is located in the CR, Conservation and Recreation, zoning district under the current New Britain Township Zoning Ordinance (the "Zoning Ordinance").

8. The Property is vacant. The Applicants propose a single-family detached dwelling (use B1) on the Property. A single-family detached dwelling (use B1) is permitted by right in the CR zoning district. *See Zoning Ordinance §27-401(a).*

9. The Applicants seek the following variances from and/or interpretations of the following sections of the Zoning Ordinance:

- a. from §§27-402(b) and 27-2101(a) to permit construction of a single-family detached dwelling (principal building and use) on an existing lot with a lot area of 25,000 square feet (gross) (22,500 square feet, net), where the required minimum lot area in the CR zoning district is 2 acres;
- b. from §§27-2102(a)(1) and 27-2102(b) to permit construction of a single-family detached dwelling on a lot with a lot area of less than one (1) acre, where such lot is asserted to have been lawful when created and which, prior to the effective date of the applicable Zoning Ordinance provision(s), was in separate ownership duly recorded by plan or deed;
- c. from §§27-402(b) and 27-2103 to permit construction of a single-family detached dwelling (principal building) on a lot with an existing width of 100 feet, where the required minimum lot width is 150 feet;
- d. from §§27-402(b) and 27-2102(a)(5) to permit side yard setbacks of 20 feet, where the required minimum side yard setback in the CR district is 50 feet; and/or the aggregate side yards shall be at least 40% of the total lot width;
- e. from §27-402(b) to permit a rear yard setback of 30 feet, where the required minimum rear yard setback is 75 feet;
- f. from §27-402(c) to permit construction of a single-family detached dwelling on a lot which lacks a contiguous unrestricted area of one acre which does not contain any natural resources with 100% protection ratios;
- g. from §§27-2105 and/or 27-2107 to permit a deck to project 5 feet into the required minimum rear yard, where the maximum permitted projection is 5 feet; and
- h. from §27-2400(f)(1) to permit .385 acres of woodlands to be disturbed, producing a 74.6% disturbance ratio, where the maximum permitted disturbance ratio is 20%.

10. Introduced as exhibits at the zoning hearing are the documents identified on Schedule A attached to this decision. Schedule A is incorporated by reference as though fully set forth herein at length.

11. In addition to the Applicants, the following individuals testified in support of the application at the hearing:

- a. Thomas L. Coolbaugh (“Coolbaugh”), Registered Land Surveyor.
- b. Scott Haag (“Scott Haag”), son of the Applicants.

12. The following individuals requested and were granted party status to the application: Michael and Janet Mercure (collectively the “Mercures”), 29 Blue School Road, Perkasio, PA. The Mercures registered an objection to the application with the Board.

13. The Mercures own the adjacent property identified as 90 Upper Church Road, Bucks County TMP No. 26-3-107 (the “Mercures’ Property”). *See* Exhibit A-6, Board of Assessment Summary.

14. A few other persons appeared before the Board to make a statement on the application. All these individuals spoke in favor of the application. New Britain Township took no position on the application.

15. The Property is a .574 acre vacant lot located along Upper Church Road, near its intersection with King Road. The Property is shaped like a rectangle. *See* Exhibit B-1, Zoning Permit Plan (Exhibit “B”).

16. To the Property’s north and west is a parcel identified as 98 Upper Church Road, further designated as Bucks County TMP No. 26-3-105 (hereinafter “Scott’s Parcel”). Scott’s Parcel is 3.389 acres. *See* Exhibit B-1, 2003 Deed; *see also* Exhibit B-1, Zoning Permit Plan (Exhibit “B”).

17. Scott’s Parcel is owned by Scott Haag and his spouse, Colleen Haag. It is improved with an existing single-family detached dwelling, originally built in 1959 and remodeled in 2008. *See* Exhibit B-1, 2003 Deed and 2008 Building Permit (Exhibit “F-4”).

18. The Property’s gross area is 25,000 square feet (22,500 square feet net). The Property has 100 feet of frontage along Upper Church Road. Along the Property’s frontage, Upper Church Road has an ultimate right-of-way of 25 feet from the centerline of the cartway. *See* Exhibit B-1, Zoning Permit Plan (Exhibit “B”).

19. The Property’s front and rear lot lines are 100 feet in length; each side lot line is 250 feet long. The Property’s lot width, measured at the front yard setback line, is 100 feet. *See* Exhibit B-1, Zoning Permit Plan (Exhibit “B”).

20. Coolbaugh stated, and the Board finds, that the Property is a completely wooded lot. Steep slopes make up much of its southern half. Based upon these characteristics, a sizeable portion of the Property consists of protected natural resources. *See* Exhibit B-1, Zoning Permit Plan (Exhibit “B”); *see also* Zoning Ordinance §§27-402(c) and 27-2400.

21. The Applicants propose a modest single-story ranch style single-family detached dwelling with a basement on the Property. The Applicants submitted elevations and floor plans, not of the actual proposed house, but representative of the style of the proposed house. *See* Exhibit A-1, Elevations.

22. The Applicants stated, and the Board finds, that while they may not live in the proposed house, the Property will remain in their family’s ownership. The dwelling will be occupied by a member of their extended family.

23. Coolbaugh stated, and the Board finds, that due to the Property’s existing dimensions and characteristics, no location exists on the Property to locate the dwelling in full compliance with the Zoning Ordinance’s dimensional and resource protection standards.

24. Coolbaugh stated, and the Board finds, that the dwelling will be located in the Property's rear section, with front and rear yard setbacks of 157 feet and 30 feet, respectively. An unenclosed deck along the dwelling's rear wall will protrude 5 feet into the rear yard setback. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

25. Coolbaugh stated, and the Board finds, that each side yard setback will be 20 feet, for an aggregate of the side yard setbacks of 40 feet. This total is 40% of the Property's 100 feet lot width. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

26. Coolbaugh stated, and the Board finds, that the proposed 13.3% impervious surface and 9.2% building coverage ratios will comply with the Zoning Ordinance. In the CR zoning district, the maximum permitted impervious surface and building coverage ratios are 15% and 10%, respectively. *See Zoning Ordinance §§27-402(b) and 27-2102(a)(3)*.

27. No driveway is proposed from Upper Church Road across the Property to the proposed dwelling. Instead, access will be from the existing driveway serving the dwelling on Scott's Parcel. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

28. A new spur off the existing driveway on Scott's Parcel will serve the proposed dwelling. The Applicants, Scott Haag and Coolbaugh each stated, and the Board finds, that a permanent declaration of easement for the driveway and spur will be recorded against the Property and Scott's Parcel. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

29. Regarding stormwater management, Coolbaugh stated, and the Board finds, that the Property generally slopes upward from Upper Church Road to the rear lot line. An infiltration seepage bed is proposed directly in front of the dwelling to handle the increased runoff. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

30. Regarding sanitary sewage disposal, Coolbaugh stated, and the Board finds, that sufficient soils are located in front of the dwelling's proposed location, next to the seepage bed, to support an on-lot system. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

31. Coolbaugh stated, and the Board finds, that permits from the Bucks County Board of Health for the proposed septic system would be obtained prior to any construction.

32. Coolbaugh stated, and the Board finds, that potable water will be supplied to the dwelling by means of an on-lot well. The well, located behind the dwelling in the Property's rear corner, meets all applicable separation and isolation distance requirements from the on-lot septic system. *See Exhibit B-1, Zoning Permit Plan (Exhibit "B")*.

33. Coolbaugh stated, and the Board finds, that mature trees are located along the Property's southern and eastern borders. Many of these trees would remain following construction of the dwelling and the related improvements.

34. To construct all the foregoing improvements, Coolbaugh stated, and the Board finds, that 74.6% of the existing regulated woodlands must be disturbed. This exceeds the permitted maximum 20% disturbance ratio. *See Zoning Ordinance §27-2400(f)(1)*.

35. At .574 acres, the Property lacks the required minimum lot area for a Property in the CR zoning district. The minimum lot size for a property in the CR zoning district is 2 acres. *See* Zoning Ordinance §27-402(b).

36. However, subject to certain other regulations, the minimum lot area for a property in the CR zoning district lawfully existing prior to the effective date of the Zoning Ordinance, and proposed to be improved with a single-family detached dwelling, is 1 acre. *See* Zoning Ordinance §27-2102(a)(1).

37. Marian Haag stated, and the Board finds, that the Applicants are descendants from the Myers family, owners and/or farmers of land in New Britain Township since the late 1800s. *See* Exhibit B-1, History of New Britain Township (Exhibit “I”).

38. Marian Haag stated, and the Board finds, that much of the land owned and/or farmed by the Myers family became Lake Galena and Peace Valley Park in New Britain Township in the 1950s and 1960s. The Property and Scott’s Parcel are remnants of this farmland.

39. Marian Haag stated, and the Board finds, that the Property and Scott’s Parcel originate from the land identified as Tract No. 4 in the January 19, 1926 deed from Abraham Myers and Sarah Myers, grantors, to Erwin Myers, grantee. *See* Exhibit B-1, 1926 Deed (Exhibit “F-1”).

40. Marian Haag stated, and the Board finds, that sometime in 1954, Tract No. 4 was divided into at least three (3) separate lots by a survey prepared by W.D. Ritchie dated January 2, 1954 (the “Ritchie Survey”). Marian Haag stated, and the Board finds, that the Ritchie Survey cannot be located.

41. From the Ritchie Survey, one of these lots is the Property (.574 acres). Two (2) other lots – a 3.079 acres parcel and a 13,200 square feet (.303 acre) narrow strip of land – constitute Scott’s Parcel. *See* Exhibits B-1, A-3 and A-4, Various Deeds.

42. From a review of the various deeds and historical zoning maps accepted into evidence by the Board, the Board finds that the 13,200 square feet strip of land is located directly north and contiguous to the 3.079 acres parcel. *See* Exhibit B-1, Various Deeds; *see also* Exhibit S-2, 1958 Zoning Map.

43. This 13,200 square feet strip led to a large parcel behind the 3.079 acres tract. This larger tract is identified as Bucks County Tax Map Parcel No. 26-3-96, is approximately 30.81 acres, and is presently owned by Bucks County. *See* Exhibit B-1, Various Deeds; *see also* Exhibit A-1, CR District Summary; *see also* Exhibit S-2, 1958 Zoning Map.

44. The Property is located directly south and is contiguous to the 3.079 acres parcel. The Property and the 13,200 square feet strip of land are not contiguous. *See* Exhibit B-1, Various Deeds; *see also* Exhibit S-2, 1958 Zoning Map; *see also* Exhibit A-2, Tax Maps.

45. Marian Haag stated, and the Board finds, that Ritchie Survey is referenced in all of the deeds describing and/or conveying the lots that constitute the Property and Scott’s Parcel since 1954. *See* Exhibits B-1, A-3 and A-4, Various Deeds.

46. Marian Haag stated, and the Board finds, that New Britain Township enacted its first Zoning Ordinance on December 2, 1958. This enactment placed the Property and Scott's Parcel in a zone designated as R-1, Residential and Agricultural. *See* Exhibit S-1 and S-2, 1958 Zoning Ordinance and 1958 Zoning Map.

47. Although the 1958 Zoning Map was not offered into evidence at the hearing, and only portions of the 1958 Zoning Ordinance were submitted, the Board may, and does, take judicial notice of all these government enactments. *See* 42 Pa.C.S. §6102; *see also* Exhibits S-1 and S-2, 1958 Zoning Ordinance and 1958 Zoning Map.

48. A single-family detached dwelling was a use permitted by right in the R-1 zoning district under the 1958 Zoning Ordinance. If the use was serviced neither by public water nor a public sanitary sewer disposal system, the required minimum lot size was 40,000 square feet. The required minimum lot width was 140 feet. *See* Exhibit S-1, 1958 Zoning Ordinance, §§301 and 302.

49. Additionally, for existing undersized lots, the 1958 Zoning Ordinance allowed a building to be constructed on a lot lacking the required minimum area if it was held in "single and separate ownership" at the time of enactment; and if the lot could support adequate on-lot water supply and sewage disposal facilities. *See* Exhibits B-1 and S-1, 1958 Zoning Ordinance, §904(1).

50. At the time of this enactment, the Board finds that the Property and the 13,200 square feet strip of land were owned by Alice Myers, as the surviving widow of Erwin Myers. The 3.079 acres lot was owned by Lawrence and Amanda Thomas (the "Thomases"), other Myers family descendants, having been previously conveyed by deed dated February 27, 1954. *See* Exhibit B-1, 1926 Deed (Exhibit "F-1") and 1954 Deed (Exhibit "F-2").

51. Based on the foregoing, the Board finds that at the time of the enactment of the 1958 Zoning Ordinance, the Property was held in separate ownership from the contiguous 3.079 acres tract.

52. Marian Haag stated, and the Board finds, that following several other conveyances between Myers family members, beginning January 21, 1966, the three (3) lots from the Ritchie Survey described in Finding of Fact 41 were all owned by the Thomases, and later by the Rev. Gerald Myers, both descendants of the Myers family. *See* Exhibit B-1, Various Deeds.

53. Marian Haag stated, and the Board finds, that at the time of enactment of the 1958 Zoning Ordinance, the Property was referred to as TMP No. 26-3-106. The 3.079 acres parcel alone was designated as TMP No. 26-3-105. These tax map parcel identifications appear on the 1958 Zoning Map. *See* Exhibit S-2, 1958 Zoning Map.

54. Marian Haag stated, and the Board finds, that sometime between 1966 and 1992, the Thomases treated the 3.079 acres parcel and the adjacent 13,200 square feet strip of land as one parcel, singularly designated as TMP No. 26-3-105, thereby creating the present-day Scott's Parcel. *See* Exhibit A-5, Excerpt.

55. Gerald Myers conveyed Scott's Parcel to Scott Haag and Colleen Lynch (k/n/a Colleen Haag) by deed dated January 16, 2003. Gerald Myers conveyed the Property to the Applicants by deed dated October 27, 2011. See Exhibit B-1, 2003 Deed (Exhibit "F-4") and 2011 Deed (Exhibit "A").

56. In processing occupancy and building permit applications made by Scott Haag, New Britain Township has treated Scott's Parcel as a single stand-alone lot consisting of 3.389 acres. See Exhibit B-1, 2002 Occupancy Permit, 2008 Building Permit and 2008 Zoning Permit (Exhibits "F-4" and "H").

57. Marian Haag stated, and the Board finds, that Alice Myers, the Thomases and Gerald Myers always treated the Property as a parcel separate and apart from Scott's Parcel. No physical improvements, such as walls, tree lines, fencing, driveway or utility extensions or similar features, were ever made to either the Property or Scott's Parcel to treat the lots as one (1) common tract.

58. Marian Haag and Coolbaugh stated, and the Board finds, that sometime in 1995, New Britain Township re-designated the zoning district containing the Property as the current CR zoning district. At this time, the minimum lot size for a property in the CR zoning district was 25 acres. In 2002, this lot size was reduced to current standard of 2 acres. See Zoning Ordinance §27-402(b).

59. The Board finds that at all times after enactment of the 1958 Zoning Ordinance, as amended, the Property's .574 acre (25,000 gross square feet) lot size was well short of the prescribed minimum lot area, whether it be 25 acres, 2 acres, 1 acre or 40,000 square feet.

60. The Mercures stated, and the Board finds, that the Mercures' Property is approximately 1.4 acres. It is improved with a detached dwelling constructed in or around 1940 that currently serves as a rental property.

61. The Board finds that the Mercures' Property is contiguous to the Property. It is located directly south of the Property. See Exhibit A-2, Tax Maps; see also Exhibits B-1 and S-2, Various Zoning Maps.

62. The Mercures expressed concerns that the Property is too small to support a dwelling. They also expressed general concerns that the proposed well will adversely affect the private water supply to the dwelling on the Mercures' Property.

63. Due to the Property being a pre-existing non-conforming lot as to lot area and lot width, and the fact that much of the Property is improved with protected woodlands and steep slopes, the Property lacks any location to build a single-family detached dwelling in compliance with the Zoning Ordinance's applicable regulations.

64. The Property contains unique physical characteristics that support relief for the interpretations and/or variances requested by the Applicants to permit the construction of a single-family detached dwelling on the Property, with the dimensions proposed on the submitted Zoning Permit Plan. See Exhibit B-1, Zoning Permit Plan (Exhibit "B").

65. The dimensional limitations found at Zoning Ordinance §27-402(b), §27-2101(a), §27-2102, §27-2103, §27-2105, §27-2107 and/or §27-2400 impose a hardship on the Property and the Applicants in that these provision prevents the installation of a reasonably-sized single-family detached dwelling on a lawful pre-existing non-conforming lot.

66. Subject to the conditions imposed herein, the proposed single-family detached dwelling, its size and location, is harmonious with the Property's size and consistent with uses of other properties in the surrounding neighborhood.

CONCLUSIONS OF LAW

1. Required public notice of the hearing was made by sufficient publication, posting and mailing to affected property owners.

2. The Board concludes that the threshold question is whether the Property meets the applicable Zoning Ordinance and Pennsylvania law criteria to qualify as a separate undersized lot that can support a single-family detached dwelling.

3. As will be discussed and explained in these Conclusions of Law, the Board concludes that the Property qualifies as an independent building lot. The Board further concludes that variance relief is warranted in order to permit the proposed single-family detached dwelling.

4. As found previously, the Property was lawfully created in or around 1954 pursuant to the Ritchie Survey. Its lot width is 100 feet and its lot area is 25,000 gross square feet (22,500 net square feet).

5. These dimensions do not meet (a) the 1958 Zoning Ordinance required minimum lot area (40,000 square feet) or minimum lot width (140 feet) criteria; or (b) the current Zoning Ordinance minimum lot area (2 acres) or minimum lot width (150 feet) provisions applicable to properties in the CR zoning district proposed to be improved with a single-family detached dwelling.

6. Based upon these characteristics, the Board concludes that the Property is a "non-conforming lot." A "non-conforming lot" is defined as "a lot, the area, dimensions, or locations of which was lawful prior to the adoption, revision, or amendment of the [Zoning Ordinance] but fails by reason of such adoption, revision, or amendment to conform to the present requirements of the zoning district. *See* Zoning Ordinance §27-201.

7. Non-conforming lots are subject to the applicable provisions of Zoning Ordinance §27-2102.

8. Zoning Ordinance §27-2102(a) authorizes construction of a single-family detached dwelling on a lot lacking the minimum lot area and/or minimum lot width in the CR zoning district if the following relevant criteria are met:

a. The lot was lawful when created;

- b. The lot was created prior to the effective date of the Zoning Ordinance;
- c. The lot was in separate ownership duly recorded by plan or deed;
- d. The lot is not less than one (1) acre in the CR zoning district;
- e. The lot, if not served by public water and/or sanitary sewer, shall meet all requirements of the Bucks County Department of Health;
- f. The percentage of the lot area covered by the detached dwelling shall not exceed 15% of the lot;
- g. The front and rear yards shall aggregate at least 60% of the total lot depth, or meet the normal requirements of the CR zoning district, but in no case shall the front or rear yard be less than 30 feet; and
- h. The side yards shall aggregate at least 40% of the total lot width or meet the normal requirements of the CR zoning district, but in no case shall either side yard be less than 15 feet.

9. Zoning Ordinance §27-2102(b) specifies that the exception set forth in §27-2102(a) shall not apply “to any two or more contiguous lots in a single ownership as of or subsequent to the effect date of [the Zoning Ordinance]. These lots shall be consolidated to minimum the non-conformity.”

10. Under Pennsylvania law, an applicant’s right to build on a pre-existing property non-conforming as to lot area and/or lot width is predicated on one of three theories: variance; special exception if provided for in the ordinance; or authorized exemption. *See Rogers v. Zoning Hearing Board of East Pikeland Township*, 520 A.2d 922 (Pa. Commw. 1987); *see also N. Pugliese, Inc. v. Palmer Township Zoning Hearing Board*, 592 A.2d 118 (Pa. Commw. 1991).

11. Zoning Ordinance §27-2102(a) contemplates the exemption theory. To succeed under this theory, an applicant must (a) meet the exemption standards; and (b) show that the “doctrine of merger” does not otherwise bar relief. *See Montoro v. Bethlehm Township Zoning Hearing Board*, 573 A.2d 116 (Pa. Commw. 1990); *see also Tinicum Township v. Jones*, 723 A.2d 1086 (Pa. Commw. 1998).

12. Under Pennsylvania zoning law, the “doctrine of merger” is used to describe the effect of a zoning ordinance on lots held in single/common ownership and is related to the issue of the physical merger of adjoining undersized lots. *See In re: Appeal of Gregor*, 627 A.2d 308 (Pa. Commw. 1993).

13. Reviewing Pennsylvania law on zoning merger principles, mere common ownership of adjoining undersized properties does not *automatically* result in a physical merger of the properties for zoning purposes. *See Dudlik v. Upper Moreland Township Zoning Hearing Board*, 840 A.2d 1048 (Pa. Commw. 2004).

14. Adjoining properties under common ownership (i.e. single) can merge where a zoning ordinance provision causes one or more of the adjoining lots to become undersized as to lot area and/or lot width, depending upon the facts and circumstances of each case. *See*

Township of Middletown v. Middletown Township Zoning Hearing Board, 548 A.2d 1297 (Pa. Commw. 1988).

15. The focus of the inquiry is (a) when the properties in question came into common ownership; and (2) the effective date of the applicable zoning ordinance. *See Cottone v. Zoning Hearing Board of Polk Township*, 954 A.2d 1271 (Pa. Commw. 2008).

16. Adjoining lots held in *separate/different* ownership before a zoning ordinance enactment makes the lots too small and/or narrow to build upon are presumed to remain separate and distinct lots. *See Cottone, supra*; *see also In re: Appeal of Moyer*, 978 A.2d 405 (Pa. Commw. 2009).

17. Should the adjoining undersized lots thereafter be acquired by a single/common owner, the burden is on the municipality or the party asserting merger to show that the new single/common owner has integrated the two lots into one. *See Cottone, supra*; *see also In re: Appeal of Puleo*, 729 A.2d 654 (Pa. Commw. 1999).

18. However, adjoining undersized lots are presumed to merge as necessary to comply with a zoning ordinance's lot size and lot width requirements where they are under *common/single* ownership prior to the passage of the zoning ordinance rendering the lot(s) non-conforming. *See Cottone, supra*; *see also Puleo, supra*.

19. Without this presumption, an undersized and non-conforming property would perpetually escape the requirements of the zoning ordinance, rendering the ordinance ineffective and meaningless. *See Cottone, supra*.

20. Under this scenario, it is the *landowner's* burden to rebut this presumption by proving an intent to keep the lots separate and distinct. *See Cottone, supra*; *see also Moyer, supra*.

21. To meet this burden, a landowner must produce objective evidence of some overt or physical manifestation of an intent to keep the adjoining undersized lots separate and distinct. *See Dudlik, supra*; *see also West Goshen Township v. Crater*, 538 A.2d 952 (Pa. Commw. 1988).

22. It is the intent of the single/common owner at the time the adjoining undersized lots became non-conforming, as evidenced by overt and physical manifestations to the ground, that controls. *See Moyer, supra*; *see also Parkside Associates, v. Zoning Hearing Board of Montgomery Township*, 532 A.2d 47 (Pa. Commw. 1987).

23. Pennsylvania courts have ruled that a physical manifestation on the land of an intent to keep contiguous undersized lots separate and distinct consists of a tangible boundary such as a line of trees, a fence or a wall separating the lots. *See Moyer, supra*.

24. Subjective statements of the landowner not evidenced by a physical improvement, and abstract legal attributes such as separate street addresses, tax map parcel numbers, utilities and/or deeds do not constitute physical manifestations of an intent to keep the two lots separate. *See Jacquelin, supra*; *see also Cottone, supra*.

25. Applying these principles to the instant application, the inquiry is whether the Property “merged” with the larger contiguous property – the 3.079 acre portion of Scott’s Parcel.

26. After evaluating the evidence, and accepting the credible testimony of the witnesses, the Board concludes that the Property is presumed to be a separate and distinct lot, has not merged for zoning purposes with any contiguous property, and no objecting party has rebutted that presumption.

27. The Board concludes that the applicable Zoning Ordinance provisions rendering the Property undersized as to required minimum lot area and lot width became effective on December 2, 1958.

28. As found previously, at the time of this enactment, the Property was already in existence, having been created by the Ritchie Survey in 1954. Moreover, the Property’s relevant dimensions (lot area and lot width) were already established, and have not changed since its creation in 1954.

29. Also at the time of the enactment of the 1958 Zoning Ordinance, the Property was owned by Alice Myers, surviving widow of Erwin Myers. At that time, the only properties contiguous to the Property were (a) the 3.079 acres tract from the Ritchie Survey; and (b) the Mercures’ Property.

30. As found previously, at the time of the enactment of the 1958 Zoning Ordinance, the 3.079 acres tract was owned by the Thomases. The Property was owned by Alice Myers.

31. The Board concludes that this ownership structure precedes and was in place at the time of enactment of the 1958 Zoning Ordinance provisions imposing the 140 feet minimum lot width (later to become 150 feet); and the 40,000 square feet minimum lot area (later to become 2 acres) requirements.

32. No evidence was submitted to the Board as to the ownership of the adjoining Mercures’ Property in 1958. Moreover, no party asserted that the Property was “merged” with the Mercures’ Property. Hence, these properties’ contiguous nature is irrelevant to the Board’s decision.

33. The Board concludes that the credible testimony of Marian Haag confirms that the Myers family, by never installing physical manifestations or tangible boundaries that would have treated the Property and Scott’s Parcel as one tract, displays their objective intent to keep the lots separate and distinct.

34. The Board concludes that the Property and the 3.079 acres tract came into common/single ownership on January 21, 1966, the date on which the Thomases first owned both lots, which is *after* the date of enactment of the 1958 Zoning Ordinance.

35. Against this chronology, Pennsylvania law mandates the conclusion that the Property and Scott’s Parcel (the 3.079 acre portion of it) are not presumed merged for zoning purposes. As such, any party asserting merger bears the burden to show that the new single/common owner has affirmatively integrated the two lots into one.

36. As found previously, New Britain Township took no position on the application. The Board concludes that the Township has always treated the Property and Scott's Parcel as separate lots, as evidenced by its issuance of separate occupancy, zoning and building permits that reference only Scott's Parcel. *See* Exhibit B-1, Certificate of Occupancy (Exhibit "F-4") and Zoning Permit (Exhibit "H").

37. The Mercures, as the lone objecting parties, did not expressly raise the doctrine of merger at the hearing. However, the Mercures did state their belief that the Property is "too small" to support a dwelling. The Mercures also expressed concerns over the proposed new well's impact on the existing private well on the Mercures' Property.

38. The Board concludes that neither of these concerns constitutes credible evidence that would rebut the presumption that the Property was not merged with the contiguous 3.079 acre tract for zoning purposes.

39. Concluding that the Property is a separate and distinct lot under the Zoning Ordinance does not end the inquiry. This conclusion simply eliminates the doctrine of merger from applying to the Property as contemplated by Zoning Ordinance §27-2102(b).

40. Where the Property fails to meet the specific exemption criteria of Zoning Ordinance §27-2102(a) or elsewhere as applicable, and variance is required to permit the construction of the proposed single-family detached dwelling.

41. In order to show entitlement to a variance, use or dimensional, an applicant must demonstrate all the following elements:

- a. an unnecessary hardship stemming from unique physical characteristics or conditions will result if the variance is denied;
- b. 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 a variance is necessary to enable the reasonable use of the property;
- c. the hardship has not been created by the applicant;
- d. granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and
- e. the variance sought is the minimum that will afford relief.

42. The Board finds that all the variances requested by the Applicants are dimensional variances. A dimensional variance arises in situations where the Zoning Ordinance permits or requires a certain dimension and that requirement or allowance is sought to be varied by degree. *See Constantino v. ZHB of Forest Hills Borough*, 636 A.2d 1266 (Pa. Commw. 1994).

43. Ordinarily, an applicant can demonstrate "unnecessary hardship" for a use or dimensional variance by showing that a property's physical characteristics are such that the property cannot be used for any permitted purpose, or can only conform to a permitted purpose

at prohibitive expense; or that the property has either no value or only distress value for any permitted purpose.

44. However, under Pennsylvania law, a dimensional variance is subject to a lesser standard of proof to establish unnecessary hardship than a use variance. *See Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43 (Pa. 1998) (when seeking a dimensional variance within a permitted use, the owner is asking only for a *reasonable adjustment* of the zoning regulations. 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).

45. When deciding whether a hardship has been established in dimensional variance cases, the *Hertzberg* rationale authorizes the Board to consider multiple factors, including the characteristics of the surrounding neighborhood. *See Hertzberg, supra*, at 47.

46. The Board concludes that the Property’s lawful non-conforming status, its existing undersized lot area and lot width, and the fact that the Property consists almost entirely of protected woodlands and steep slopes, establish a hardship under the *Hertzberg* standard.

47. While the dwelling could be located at various points throughout the Property, the Board concludes that the proposed location will minimize the length of the spur to the driveway on Scott’s Parcel, thereby reducing additional impervious surfaces.

48. Addressing each variance request in turn, the Board concludes that a variance is warranted from Zoning Ordinance §§27-402(b), 27-2101(a) and 27-2102(a)(1) to permit construction of the detached single-family dwelling on the Property which lacks requirement minimum lot area, whether it be 2 acres in the CR zoning district, or 1 acre for pre-existing lots.

49. The Board concludes that the Property’s existing .574 lot acre area has been in existence since 1954. To foreclose a reasonable use of the Property by imposing a 1 acre lot minimum on a half-century old separate lot would inflict an unreasonable hardship.

50. Similarly, the Board concludes that a variance is warranted from Zoning Ordinance §§27-402(b) and 27-2103, to permit construction of the single-family detached dwelling on the Property which lacks the minimum required lot width of 150 feet. Like the Property’s area, the Property’s 100 feet lot width dimension has existed since its inception in 1954.

51. Regarding the proposed side yard setbacks, the Board concludes that no variance relief is necessary from either Zoning Ordinance §§27-402(b) or 27-2102(a)(5).

52. The Board concludes that as a non-conforming undersized lot, the Property is subject to the specific dimensional standards set forth in Zoning Ordinance §27-2102(a), rather than the general criteria for properties in the CR zoning district set forth in §27-402.

53. As found previously, the Zoning Permit Plan indicates that each side yard will be 20 feet, for an aggregate of the side yards of 40 feet, which is 40% of the Property’s 100 feet lot width. *See Exhibit B-1, Zoning Permit Plan (Exhibit “B”)*.

54. These proposed dimensions exceed the minimum 15 feet requirement, and complies with the alternative criteria that the proposed side yard setbacks aggregate at least 40% of the total lot width. *See* Zoning Ordinance §27-2102(a)(5).

55. Regarding the front and rear yards, the Board similarly concludes that no variance relief is necessary from either Zoning Ordinance §§27-402(c) or 27-2102(a)(4).

56. The Applicants propose front and rear yard setbacks of 157 feet and 30 feet, respectively. This aggregate is 187 feet. Measured against the Property's depth of 250 feet, the front and rear yards aggregate is 75% of the total lot depth. *See* Exhibit B-1, Zoning Permit Plan (Exhibit "B").

57. These proposed dimensions comply with the requirement that neither the front nor rear yard shall be less than 30 feet, nor the aggregate be less than 60% of the total lot depth. *See* Zoning Ordinance §27-2102(a)(4).

58. Regarding the unenclosed deck protrusion into the rear yard, the Applicants stated the deck will extend five (5) feet beyond the dwelling's rear wall. This produces an effective rear yard setback of 25 feet in the area of the deck. *See* Exhibit B-1, Zoning Permit Plan (Exhibit "B").

59. The Board concludes that no variance relief is needed from either Zoning Ordinance §§27-2105 or 27-2107 for the proposed deck. These overlapping provisions provide conflicting dimensional restrictions regarding permitted intrusions into the rear yard by unenclosed porches and/or decks.

60. Reading these sections to afford the Applicants the most liberal use of the Property, the Board concludes that these clauses jointly operate to limit a single story deck's intrusion into the rear yard setback by the lesser of one-third of the required rear yard setback or 15 feet.

61. Applied here against the thirty (30) feet rear yard setback, this produces an allowable maximum deck/porch intrusion of ten (10) feet. As such, the Board concludes that the five (5) feet deck intrusion complies with the applicable Zoning Ordinance provisions.

62. The Board concludes that variance relief is justified from the requirement that each lot in the CR zoning district have "a contiguous unrestricted area of one acre" that is void of any natural protected resources. *See* Zoning Ordinance §27-402(c).

63. As the Property has been less than one (1) acre in total since 1954, it would be counter-intuitive to deny variance relief premised upon the Property's lack of one acre free from protected natural resources.

64. Lastly, the Board concludes that a variance is justified from Zoning Ordinance §27-2400(f)(1), to permit the disturbance of .385 acres, or 74.6%, of the woodlands on the Property. Any amount of reasonable disturbance that is required to construct the dwelling will exceed the permitted 20% disturbance ratio.

65. Critical to the Board's conclusion on this point is the fact that many of the mature trees along the Property's common border with the Mercures' Property will be protected during construction, and remain after completion of the dwelling.

66. Lastly, the Board agrees that installing a spur to the existing driveway on Scott's Parcel will reduce the amount of additional impervious surfaces on the Property, while also keeping the number of a driveway accesses on to Church Road at a minimum.

67. However, the Board is mindful that as the spur improvements will be on Scott's Parcel, Scott's Parcel must equally comply with the minimum requirements of the Zoning Ordinance accounting for those improvements (i.e. impervious surface, disturbance, etc.).

68. Provided the Applicants comply with the reasonable conditions attached to the relief granted herein, the Applicants have met the Zoning Ordinance and Pennsylvania law requirements for the variance, including hardship, to construct and install a single-family detached dwelling on the Property as set forth in the Zoning Permit Plan. *See* Exhibit B-1, Zoning Permit Plan (Exhibit "B").

69. The approved variances will not alter the essential character of the neighborhood in which the Property is located nor substantially impair the appropriate use or development of adjacent properties.

70. The approved variances will not be detrimental to the public welfare.

71. The conditions and circumstances imposing a hardship upon the Property for the approved variances are not of the Applicants' own doing.

72. The approved variances represent the minimum variances that will afford relief and represent the least modification of the zoning regulations under the circumstances.

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DECISION

AND NOW, this 4th day of MARCH, 2016, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **GRANTS** the Applicants' requests for variances from and/or interpretations of the Zoning Ordinance as follows:

1. The Board determines that interpretative relief is warranted, or alternatively a variance is granted, from §§27-402(b) and 27-2101(a) to permit construction of a single-family detached dwelling (principal building and use) on the Property with a lot area of 25,000 square feet (gross) (22,500 square feet, net), where the required minimum lot area in the CR zoning district is 2 acres.

2. The Board determines that interpretive relief is warranted, or alternative a variance is granted, from §§27-2102(a)(1) and 27-2102(b) to permit construction of a single-family detached dwelling on the Property, which has a lot area of less than one (1) acre, where such Property was lawful when created and which, prior to the effective date of the applicable Zoning Ordinance provision(s), was in separate ownership duly recorded by plan or deed.

3. The Board grants a variance from §§27-402(b) and 27-2103 to permit construction of a single-family detached dwelling (principal building) on the Property with an existing width of 100 feet, where the required minimum lot width is 150 feet.

4. The Board concludes that no variance relief is necessary from §§27-402(b) and 27-2102(a)(5). The proposed side yard setbacks are 20 feet, with an aggregate of 40 feet. The minimum side yard setback dimension applicable to the Property is 15 feet, with an aggregate of at least 40% of the total lot width. The 20 feet individual, and 40 feet aggregate, meet the foregoing requirements.

5. The Board concludes that no variance relief is necessary from §§27-402(b) and 27-2102(4) to permit front and rear yard setbacks of 157 and 30 feet, respectively. The 30 feet rear yard setback meets the specific dimensional criteria; and the aggregate 187 is 75% of the Property's 250 feet lot depth, which exceeds the required 60% aggregate.

6. The Board grants a variance from §27-402(c) to permit construction of a single-family detached dwelling on the Property which lacks a contiguous unrestricted area of one acre which does not contain any protected natural resources.

7. The Board concludes that no variance relief is necessary from §§27-2105 and/or 27-2107 to permit the unenclosed deck/porch to project 5 feet into the required minimum rear yard.

8. The Board grants a variance from §27-2400(f)(1) to permit .385 acres of woodlands on the Property to be disturbed, producing a 74.6% disturbance ratio, where the maximum permitted disturbance ratio is 20%.

The relief granted above is subject to the following conditions:

a. The proposed single-family detached dwelling proposed for the Property, its dimensions, size, location and appearance, shall be in accordance with evidence, exhibits, representations and credible testimony made at the hearing.

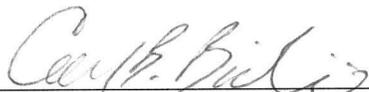
b. A permanent easement for the driveway and spur to be located on Scott's Parcel (TMP No. 26-3-105), to serve the Property, shall be recorded against both the Property and Scott's Parcel (TMP No. 26-3-105). Proof of such recording shall be provided to New Britain Township prior to the issuance of a zoning and/or occupancy permit for the single-family detached dwelling.

c. Scott's Parcel (TMP No. 26-3-105) shall meet all applicable Zoning Ordinance criteria in connection with the proposed driveway spur extension to the Property. Sufficient documentation shall be submitted to New Britain Township to demonstrate such compliance.

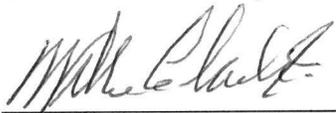
d. This decision does not waive any requirements of any other applicable New Britain Township Ordinance(s); and the proposed addition must meet all other applicable federal, state, county and New Britain Township regulations and codes.

NEW BRITAIN TOWNSHIP
ZONING HEARING BOARD

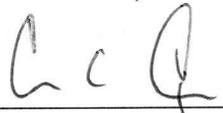
DATE: 3/4/16


Catherine B. Basilio, Chair

DATE: 3/4/16


William Clarke, Member

DATE: 3/4/16


Chuck Coxhead, Member

Thomas J. Walsh III, Esquire
Solicitor, New Britain Township Zoning Hearing Board
2500 York Road, Suite 120
Jamison, PA 18929

Note to Applicant: This Decision is NOT an authorization to build. Zoning and building permits must be obtained from New Britain Township prior to the commencement of any construction.

SCHEDULE A – TABLE OF EXHIBITS

Exhibit	Description
B-1	<p>Zoning Hearing Board application dated November 13, 2015 (filed with New Britain Township on December 7, 2015). Attachments to Application (Exhibit designations are as submitted by Applicants):</p> <ul style="list-style-type: none">• Narrative attachment summarizing requested relief• Deed dated October 27, 2011 for TMP No. 26-3-106 (Exhibit “A”)• Zoning Permit Plan, dated 7/31/15 (Exhibit “B”)• Engineering Review letter, dated 9/14/15 (Exhibit “C”)• Cover Sheet and selected sections of 1958 Zoning Ordinance, as amended 4/14/64 and 1/2/68 (Exhibit “D”)• 2 Zoning Maps – (1) undated; and (2) last revised 1/23/1989 (Exhibit “E”)• Deed dated 1/19/1926 (Exhibit “F-1”)• Deed dated 2/27/1954 (Exhibit “F-2”)• Deed dated 3/17/1959 (Exhibit “F-3”)• Deed dated 1/16/2003, Certificate of Occupancy dated 12/31/2002, Building Permit Application dated 1/8/008, and Property Transfer Forms (collectively Exhibit “F-4”)• Current Zoning Map of New Britain Township (Exhibit “G”)• Zoning Permit for TMP No. 26-3-105 dated 1/10/2008, with general site plan (collectively Exhibit “H”)• Selected portions of History of New Britain Township (Exhibit “I”)
B-2	Letter to The Intelligencer dated December 28, 2015 forwarding public notice of hearing for advertisement
B-3	Public Notice of the hearing on January 21, 2016
B-4	Proof of publication of public notice in 1/7/16 and 1/14/16 editions of The Intelligencer
B-5	Letter to Applicants and Attorney dated December 28, 2016 providing notice of the hearing
B-6	List of the record owners of all properties surrounding the Property (TMP No. 26-3-106)
B-7	Affidavit of mailing to property owners – notice mailed on January 6, 2016
B-8	Affidavit of posting of public notice at property – notice posted on January 6, 2015 at 1:25 p.m.

Exhibit	Description
A-1	Elevations and floor plans of representative dwelling (3 pages)
A-2	Summary of properties in CR zoning district, and Tax Maps of properties
A-3	Deed dated 4/22/1964
A-4	Deed dated 1/21/1966
A-5	Excerpt from Schedule of Distribution of Estate of Amanda M. Thomas, Deceased, excerpt dated 8/11/1992
A-6	Board of Assessment for TMP No. 26-3-107
S-1	Selected sections of 1958 Zoning Ordinance (different from the sections submitted by Applicants with application)
S-2	1958 Zoning Map of New Britain Township