

DATE OF DECISION: SEPT 17, 2020

DATE OF MAILING: SEPT 18, 2020

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

**RE: APPLICATION OF ROBERT AND KATHLEEN FERRALL FOR
THE PROPERTY LOCATED AT 209 CREEK ROAD,
NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-11-110**

FINDINGS OF FACT

1. On Thursday, August 20, 2020 at 7:30 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 Robert and Kathleen Ferrall (the "Applicants").
2. The Applicants are the record co-owners of the property located at 209 Creek Road, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-11-110 (the "Property"). The Property is the subject of the instant application.
3. Notice of the August 20, 2020 hearing was published in advance of the hearing in the Thursday, August 6, 2020 and August 13, 2020 editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-7.
4. Notice of the August 20, 2020 hearing was sent by first class mail on August 4, 2020 by Kelsey Harris ("Harris"), 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-10.
5. Harris posted notice of the August 20, 2020 hearing on the Property on August 10, 2020. *See* Exhibit B-11.
6. As the record co-owners of the Property, the Applicants have the requisite standing to prosecute this zoning hearing board application.
7. The Property is located in the WS, Watershed, zoning district under the New Britain Township Zoning Ordinance (the "Zoning Ordinance").
8. The Property is improved with a single-family detached residential dwelling (use B1) and an accessory storage shed. *See* Exhibit B-2, Permit Plan.
9. The Applicants propose accessory uses and structures consisting of a non-commercial swimming pool (use H4), pool coping, pool patio, and related improvements on the Property. Such accessory uses and structures are permitted by right in the WS zoning district. *See* Zoning Ordinance §27-501.a.

10. To permit the swimming pool, coping, and patio, the Applicants seek a variance from Zoning Ordinance §27-502.b.1(h)2) to permit an impervious surface ratio of 21.5% on the Property, where the maximum impervious surface ratio permitted by right is 8% (applicable to resident).

11. 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.

12. Robert Ferrall (“Ferrall”), a co-Applicant, and Robert Cunningham, P.E. (“Cunningham”), professional civil engineer, testified in support of the application at the hearing.

13. No other persons appeared at the August 20, 2020 hearing to request party status, to comment on the application, nor to register a position before the Board. New Britain Township took no position on the application. *See* Exhibit B-12.

14. Relevant to this application, the Property is the subject of a prior decision of the Board dated September 15, 2016 (the “2016 Decision”). At the time the 2016 Decision was rendered, the Property was unimproved. *See* Exhibit B-13, 2016 Decision.

15. In the 2016 Decision, the Property’s then-owner proposed to construct the now existing single-family detached dwelling. To permit the new home, the Board granted a variance to protect only 47% of the woodlands then existing on the Property, where the required protection ratio is 80%. *See* Exhibit B-13, 2016 Decision.

16. According to Ferrall and Bucks County records, the Applicants acquired the Property in or around November 2018. The dwelling was constructed in or around 2019. *See* Exhibit B-1, Deed.

17. The Property is shaped like a rectangle. Its site area (gross) is 1.469 acres (63,989 square feet). *See* Exhibit B-2, Permit Plan.

18. The Property has 0.108 acres (4,704 square feet) within the ultimate right-of-way of Creek Road. The Property also has 0.55 acres (23,958 square feet) that contain woodlands protected as a condition of construction of the dwelling. *See* Exhibit B-2, Permit Plan.

19. Deducting this 28,662 square feet from the Property’s gross site area, the Property’s resulting base site area is 0.811 acres (35,327 square feet). *See* Exhibit B-2, Permit Plan.

20. The Property has 160 feet of frontage along Creek Road, and is 160 feet wide along its rear lot line. The side lot lines are each 400 feet long. *See* Exhibit B-2, Permit Plan.

21. The dwelling is located in the center of the Property, oriented toward Creek Road. A driveway to Creek Road travels along the northern side lot line and connects to a side-entry attached garage. *See* Exhibit B-2, Permit Plan.

22. A deck abuts the dwelling’s rear wall. Walkways connect the front door of the house to the driveway. A small storage shed is in the far rear yard. *See* Exhibit B-2, Permit Plan.

23. A septic system with related dose tank is located in the Property's front yard. The on-lot well supplying potable water is located in the rear yard. *See Exhibit B-2, Building Permit Plan.*

24. Two (2) rain garden infiltration BMP facilities manage stormwater runoff. One garden is in front of the dwelling. The other rain garden is to the northern side and rear of the existing dwelling. *See Exhibit B-2, Permit Plan.*

25. Ferrall and Cunningham stated, and the Board finds, that these rain gardens are sized to handle up to 7,678 square feet of impervious surfaces on the Property. This figure represents 12% of the Property's pre-2016 Decision site area. *See Exhibit B-2, Permit Plan.*

26. Ferrall and Cunningham stated, and the Board finds, that the proposed pool, pool coping and patio will be in the Property's rear yard behind the dwelling. The new pool and patio will connect to the existing deck. *See Exhibit B-2, Permit Plan.*

27. Ferrall and Cunningham stated, and the Board finds, that the pool, pool coping and patio will be inside an area surrounded by a fence, in accordance with all applicable and required ordinances. *See Exhibit B-2, Permit Plan.*

28. Ferrall and Smith stated, and the Board finds, that the Property contains 6,094 square feet of existing impervious surfaces. These surfaces consist of the dwelling (2,857 square feet); driveway (2,891 square feet); walkways (248 square feet); and shed (98 square feet). *See Exhibit A-11, Calculations.*

29. These existing impervious surfaces produce a ratio of 17.2%, when applying the Property's current base site area. This exceeds the maximum 8% impervious surface ratio permitted for a B1 use that is applicable a lot owned by the resident. *See Exhibit B-2, Permit Plan.*

30. A brief history of the Property's existing impervious surface ratio is warranted. In the 2016 Decision, the Board found that the definitive plan proposed an impervious surface ratio of 11.27%. *See Exhibit B-13, 2016 Decision.*

31. The Board found that this ratio was based upon the Property's then-existing base site area of 59,285 square feet. Only the Property's area within the ultimate right-of-way of Creek Road was deducted from the Property's site area. *See Exhibit B-13, 2016 Decision.*

32. At the time of the 2016 Decision, the woodlands were only protected from *disturbance*. They were not considered "set aside or reserved" as a naturally protected resource for base site area purposes. *See Exhibit B-13, 2016 Decision; see also Zoning Ordinance §27-201.*

33. At the time of the 2016 Decision, the Board also found that the Township considered the Property to be a "site," and that the maximum permitted impervious surface ratio was 12%. *See Exhibit B-13, 2016 Decision; see also Zoning Ordinance §27-502.b.1(h)1) and 3).*

34. Following construction of the dwelling, the Board finds that that Township now considers the Property to be a "lot," which must comply with the 8% ratio. *See Exhibit B-13, 2016 Decision; see also Zoning Ordinance §27-502.b.1(h)1) and 3).*

35. Applying the site area and base site area figures from the 2016 Decision, following installation of the 6,094 square feet of hard surfaces, the Property's "as-built" impervious surface ratio is 10.3%. As found above, applying the present base site area figure, the "as-built" impervious surface ratio is 17.2%. *See* Exhibit B-2, Permit Plan.

36. The proposed pool (700 square feet), and patio and coping (800 square feet) add a total of 1,500 square feet of new impervious surfaces to the Property. These new surfaces produce a new total new impervious surface area of 7,594 square feet. This produces a ratio of 21.5%. *See* Exhibit B-2, Permit Plan.

37. Cunningham stated, and the Board finds, that the existing rain gardens are more than adequately sized to attend to the increased runoff. No additional stormwater management facilities are necessary on the Property to manage the additional runoff. *See* Exhibit B-2, Permit Plan.

38. The surrounding properties consist of similar style residences and lots. Ferrall stated that no nearby residents have raised any objection to the proposed pool, pool coping and patio, and related improvements. *See* Exhibit B-2, Permit Plan.

39. The Property contains unique physical characteristics that support relief for the proposed accessory non-commercial pool, coping, patio and related improvements that produce an impervious surface ratio of 21.5%.

40. The Zoning Ordinance's dimensional limitations impose a hardship on the Property and the Applicants in that these regulations prevent a reasonably sized residential accessory pool, pool patio and related improvements on a lot in the WS zoning district.

41. Subject to the conditions imposed herein, the proposed accessory non-commercial swimming pool, coping and patio, their size and location, are harmonious with the Property's size and consistent with uses of other properties in the surrounding neighborhood.

CONCLUSIONS OF LAW

1. Required advanced public notice of the date, time and location of the August 20, 2020 hearing was made by sufficient advanced publication, posting and mailing to affected property owners.

2. 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.

3. The Board finds that the requested impervious surface ratio is a dimensional variance. A dimensional variance involves a request to adjust or vary a zoning ordinance provision by degree to be able to otherwise use a property consistent with the regulations. *See Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa Commw. 2015); *see also Constantino v. ZHB of Forest Hills Borough*, 636 A.2d 1266 (Pa. Commw. 1994).

4. 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.

5. 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).

6. 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.

7. The Board concludes that the multiple rain gardens, the large amount of protected woodlands, and the low base site area figure as compared the Property’s overall size, establish a hardship under the *Hertzberg* standard sufficient to justify the variance requested.

8. The Board concludes that the Applicants have established a hardship to justify an impervious surface ratio of 21.5%. The Applicants will alleviate any runoff hazards by directing the runoff toward the existing rain gardens.

9. 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 the proposed accessory non-commercial pool, coping and patio, and related improvements.

10. The approved variance 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.

11. The approved variance will not be detrimental to the public welfare.

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

13. The approved variance represents the minimum variance that will afford relief and represents the least modification of the zoning regulations under the circumstances.

DECISION

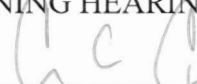
AND NOW, this 17th day of September, 2020, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **GRANTS** the Applicants' request for a variance from Zoning Ordinance §27-502.b.1(h)2) to permit an impervious surface ratio of 21.5% on the Property, subject to the following conditions:

1. The proposed accessory non-commercial swimming pool, pool coping and pool patio, and related improvements' dimensions, size, location and appearance shall be in accordance with the plans, evidence, representations, exhibits and credible testimony made and submitted at the hearing.

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

NEW BRITAIN TOWNSHIP
ZONING HEARING BOARD

DATE: 9/17/20



Chuck Coxhead, Chair

DATE: 9/17/20



Jim Scanzillo, Member

Thomas J. Walsh III, Esquire
Solicitor, New Britain Township Zoning Hearing Board
3655 Route 202, Suite 105
Doylestown, PA 18902

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.

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SCHEDULE A – TABLE OF EXHIBITS

Exhibit	Description
B-1	Zoning Hearing Board application dated 5/25/20. Included with Application: <ul style="list-style-type: none">• Current Deed dated 11/21/2018• List of property owners within 500 feet
B-2	Permit Plan, consisting of 1 sheet, prepared by Holmes Cunningham, LLC, dated 4/29/20, last revised 6/23/20
B-3	Zoning Officer letter dated 5/26/20
B-4	Zoning Officer letter dated 6/8/20
B-5	Letter to The Intelligencer dated 7/31/20 forwarding public notice of 8/20/20 hearing for advertisement
B-6	Public Notice of the hearing on 8/20/20
B-7	Proof of publication of public notice in 8/6/20 and 8/13/20 editions of The Intelligencer
B-8	Letter to Applicants dated 7/31/20 providing notice of the 8/20/20 hearing
B-9	List of the record owners of all properties within 500 feet of the Property
B-10	Affidavit of mailing to property owners – notice mailed on 8/10/20
B-11	Affidavit of posting of public notice at property – notice posted on 8/10/20
B-12	Email message from E. Bradley dated 7/29/20
B-13	Zoning Hearing Board Decision dated 9/15/2016

DATE OF DECISION: OCT 15, 2020

DATE OF MAILING: OCT 16, 2020

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

**RE: APPLICATION OF McDONALD'S USA, LLC FOR THE
PROPERTY LOCATED AT 4272 COUNTY LINE ROAD, NEW
BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-5-49-5**

FINDINGS OF FACT

1. On Thursday, August 20, 2020 at 7:30 p.m. at the New Britain Township Building, 207 Park Avenue, Chalfont, New Britain Township, the New Britain Township Zoning Hearing Board ("Board") opened a duly noticed hearing on the application of McDonald's USA, LLC (the "Applicant").
2. No testimony was presented following the opening of the hearing on August 20, 2020. At the request of the Applicant's representatives, the hearing was immediately continued on the record, and was resumed and concluded on September 17, 2020.
3. The Applicant is the long-term tenant and occupant of the property located at 4272 County Line Road, New Britain Township, further known as Bucks County Tax Map Parcel No. 26-5-49-5 (the "Property").
4. Notice of the August 20, 2020 hearing was published in advance of the hearing in the Thursday, August 6, 2020 and Thursday, August 13, 2020 editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-7.
5. Notice of the August 20, 2020 hearing was sent by first class mail on August 4, 2020 by Kelsey Harris ("Harris"), 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-10.
6. Harris posted notice of the August 20, 2020 hearing on the Property on August 10, 2020 at 2:39 p.m. *See* Exhibit B-11.
7. The Applicant is a Delaware limited liability company. Michael Jeitner, P.E. ("Jeitner"), professional civil engineer for the Applicant, testified in support of the application at the September 17, 2020 hearing.
8. The record owner of the Property is ERP New Britain Property, L.P. ("ERP"). The Property's current deed is recorded in the Bucks County Recorder of Deeds Office at Land Record Book 4878, Page 88.

9. Jeitner stated, and the Board finds, that representatives of ERP have authorized the Applicant to proceed with the instant application.

10. As the current tenant of the Property with the express authorization of the Property's record owner, the Applicant has the requisite standing to prosecute this zoning hearing board application.

11. The Property is located in the C-2, Commercial, zoning district under the New Britain Township Zoning Ordinance (the "Zoning Ordinance").

12. The Property is improved with a non-residential building containing a McDonald's restaurant use, with parking areas, drive aisles and a drive-through facility (use J7). A J7 use is permitted by right in the C-2 Commercial, zoning district. *See* Zoning Ordinance §27-1301.a.

13. The Applicant proposes a new service sidewalk and a third menu board on the Property¹.

14. To permit the additional impervious surfaces and third menu board, the Applicant seeks variances from the following sections of the Zoning Ordinance:

- a. From §27-1302.b to permit an impervious surface ratio of 81.49% on the Property, where existing ratio is 81.2%, and the maximum ratio permitted by right is 65%; and
- b. From §27-306.J7.b.2 to permit a third menu board that is 10 square feet on the Property, where only 2 menu boards are permitted, and the maximum permitted area of a menu board is 20 square feet.

15. 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.

16. No individuals appeared at the hearings to request party status or register a position on the application before the Board. One individual offered comments in favor of the application before the Board.

17. The Property is shaped like the capital letter "L." It is within the New Britain Village Shopping Center and is surrounded by many other non-residential properties and uses. *See* Exhibit A-1, Plan.

18. The Property is located near the intersection of West Butler Avenue and County Line Road. The Property's lot area is 1.04 acres. *See* Exhibit A-1, Plan.

19. The restaurant building is oriented in an east to west direction. To the side and rear of the building are parking areas serving the restaurant. The Property is accessed by drive aisles that each enter on the internal road through the shopping center. *See* Exhibit A-1, Plan.

¹ In the originally submitted application, the Applicant characterized this sign as a *directional* sign. At the resumed September 17, 2020 hearing, the Applicant requested leave to amend the application to re-describe this proposed sign as a third *menu* board sign. The Board granted the amendment. *See* Exhibit B-14, Amendment.

20. The restaurant building has 4,892 square feet of floor area. It is located in the Property's longer and narrower section. *See Exhibit A-1, Plan.*

21. The existing single lane drive-through facility with order stand is behind the building's rear wall. The drive-through lane starts on the north side of the building. *See Exhibit A-1, Plan.*

22. The drive-through lane wraps around the rear of the building where it intersects with the existing menu and pre-menu boards. The lane continues around to the south side of the building where it passes the payment and delivery windows. *See Exhibit A-1, Plan.*

23. Jeitner stated, and the Board finds, that the Applicant's restaurant has been undergoing a "facelift and overhaul" beginning in 2018. The changes are intended to promote McDonald's current marketing, modernize the drive-through facility, and add ADA compliant features. *See Exhibit A-1, Plan.*

24. Jeitner stated, and the Board finds, that 2 menu boards presently exist at the Property. One is a 19.98 square feet prime menu board, approved by Building Permit No. 2018-9299-S5, dated June 14, 2018. *See Exhibits A-1, Plan; A-2, Permits; and A-3, Specifications.*

25. Jeitner stated, and the Board finds, that this sign describes the Applicant's full menu. It is an electronic sign. The displayed data changes based upon the food and beverage items that are available at the specific time of the day. *See Exhibits A-2, Permits; and A-3, Specifications.*

26. Jeitner stated, and the Board finds, that the second sign is a pre-menu board. This display is 10 square feet, approved by Building Permit No. 2018-9299-S6, dated June 14, 2018. *See Exhibits A-2, Permits; and A-3, Specifications.*

27. Jeitner stated, and the Board finds, that the pre-menu board identifies specialty and new menu items available for purchase that may not otherwise be notable on the primary menu board. *See Exhibits A-2, Permits; and A-3, Specifications.*

28. Jeitner stated, and the Board finds, that these 2 existing menu board signs are located behind the building at ordering intervals along the drive-through lane. They are each mounted on pedestals. *See Exhibits A-3, Specifications; and A-4, Photos.*

29. Jeitner stated, and the Board finds, that the third and new menu board will be identical to the existing 19.98 square feet primary menu board sign. *See Exhibits A-3, Specifications.*

30. Jeitner stated, and the Board finds, that the 3 menu boards will be located behind and to the side of the rear of the building. None of the signs will be visible from the West Butler Avenue and County Line Road intersection. *See Exhibits A-1, Plan; and A-4, Photos.*

31. Jeitner stated, and the Board finds, that the third menu board promotes safety and efficiency gains at the drive-through facility. Allowing patrons to view available promotions and regular menu items before they reach the ordering menu board keeps vehicles at a safe speed

through the drive-through lane and reduces the overall amount of time spent at the ordering facility and board. See Exhibit A-1, Plan.

32. Jeitner stated, and the Board finds, that to reduce the degree of variance sought to the minimum relief necessary, the Applicant will “transfer” the Building Permit issued to the existing pre-menu board to the new 20 square feet regular menu board. See Exhibit A-3, Permits.

33. Through this “transfer,” the Applicant’s prayer for relief is reduced by half. If relief is granted, the 10 square foot pre-menu board will exist *by variance* rather than by right. The new 20 square feet menu board sign will exist by right. See Exhibit A-3, Permits.

34. Jeitner stated, and the Board finds, that if the variance relief related to the menu boards is granted, the Applicant will make the necessary amended filings with New Britain Township to properly classify the relevant sign permits. See Exhibit A-3, Permits.

35. Regarding the impervious surface ratio, Jeitner stated, and the Board finds, that the Applicant is adding a 120 square feet sidewalk to the building’s rear. The new sidewalk will provide a safe direct access to the trash collector. See Exhibit A-1, Plan.

36. Jeitner stated, and the Board finds, that the Property’s current impervious surface ratio is 81.2%. This exceeds the 65% ratio permitted by right in the C-2 zoning district. The Board finds that this is a lawful existing-nonconforming condition. See Exhibit A-1, Plan.

37. The new impervious surfaces produce a coverage ratio of 81.49%. This exceeds the existing 81.2% impervious surface ratio by a *de minimis* amount. See Exhibit A-1, Plan.

38. As a result of this *de minimis* impact, Jeitner stated, and the Board finds, that no new stormwater management facilities or features are needed on the Property to support the new sidewalk.

39. Due to the Property having an odd shape, as well as the existing level of impervious surfaces, the Property contains unique physical characteristics that support relief for the proposed third menu board sign and impervious surface ratio variance requested in connection with the proposed improvements.

40. The limitations found at Zoning Ordinance §27-306.J7.b.2 and §27-1302.b impose a hardship on the Property and the Applicant in that these provisions prevent modernizing a non-residential building in a shopping center that is being used as a permitted restaurant use with a drive-through facility.

41. Subject to the conditions imposed herein, the proposed new third menu board sign and sidewalk are harmonious with the Property’s size and are consistent with uses of other properties in the surrounding neighborhood.

CONCLUSIONS OF LAW

1. Required advanced public notice of the date, time and location of the August 20, 2020 hearing was made by sufficient advanced publication, posting and mailing to affected property owners.

2. 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.

3. The Board finds that the impervious surface ratio and amended third menu board sign variances requested are dimensional variances. A dimensional variance involves a request to adjust or vary a zoning ordinance provision by degree to be able to otherwise use a property consistent with the regulations. *See Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa Commw. 2015); *see also Constantino v. ZHB of Forest Hills Borough*, 636 A.2d 1266 (Pa. Commw. 1994).

4. 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.

5. 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).

6. 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.

7. Nevertheless, the reasons for granting a variance must be substantial, serious and compelling. The party seeking the variance bears the burden of proving that (a) unnecessary hardship will result if the variance is denied; and (b) the proposed use will not be contrary to the public interest. *See Wilson v. Plumstead Township Zoning Hearing Board*, 936 A.2d 1061 (Pa. 2007).

8. The Board concludes that the Property's odd shape as well as existing level of impervious surfaces establish a hardship under the *Hertzberg* standard sufficient to justify the variances requested.

9. The Board concludes that the new menu board sign will result in a safer and more efficient drive-through facility.

10. The Board concludes that by amending the application to have the variance apply to the existing 10 square feet pre-menu board sign, the Applicant is seeking the minimum variance necessary.

11. The Applicant's representative describes the additional 120 square feet of sidewalk as having a "de minimis" upon the Property. The Board notes that under Pennsylvania zoning law, it is empowered to grant a *de minimis* variance as a narrow exception to an applicant's traditional heavy burden of proof in seeking a variance.

12. The *de minimis* doctrine applies where (a) a minor deviation from the dimensional requirements of a zoning ordinance is sought; and (b) rigid compliance with the zoning ordinance is not necessary to protect the public policy concerns inherent in the ordinance. See *Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa. Commw. 2016).

13. The Board concludes that the *de minimis* doctrine applies in this instance. The increase in the impervious surface ratio from 81.2% to 81.49% is a minor, almost miniscule, deviation from the applicable dimensional requirement, with no adverse impact whatsoever.

14. Provided the Applicant complies with the reasonable conditions attached to the relief granted herein, the Applicant has met the Zoning Ordinance and Pennsylvania law requirements for the variances, including hardship, to install a third menu board sign that is 10 square feet in area and a 120 square feet sidewalk on the Property.

15. 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.

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

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

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

DECISION

AND NOW, this 15th day of OCTOBER, 2020, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **GRANTS** the Applicant's request for variances from (a) Zoning Ordinance §27-306.J7.b.2 to install a third menu board on the Property not to exceed 10 square feet; and (b) Zoning Ordinance §27-1302.b to permit an impervious surface ratio of 81.49% on the Property, subject to the following conditions:

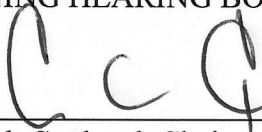
1. The proposed new menu board and sidewalk's dimensions, size, location and appearance shall be in accordance with the definitive plans, evidence, representations and credible testimony made at the hearing.

2. The Applicant shall update and amend its issued sign permits and applications to reflect that the new 20 square feet menu board is permitted by right, and the variance relief granted herein applies to the 10 square feet pre-menu board sign.

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

NEW BRITAIN TOWNSHIP
ZONING HEARING BOARD

DATE: 10/15/20



Chuck Coxhead, Chair

DATE: 10/15/20



Cathy Basilio, Member

DATE: 10/15/20



Jim Scanzillo, 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.

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SCHEDULE A – TABLE OF EXHIBITS

Exhibit	Description
B-1	Zoning Hearing Board application (dated 7/7/20; received on 7/9/20). Attachments: <ul style="list-style-type: none">• Cover letter dated 7/8/20• Deed dated 2/14/2006• List of property owners within 500 feet
B-2	Zoning Plan, consisting of 1 sheet, prepared by Bohler Engineering, dated 5/22/20
B-3	Grading Plan, consisting of 1 sheet, prepared by Bohler Engineering, dated 5/22/20
B-4	Site Improvement Plans, prepared by Core States, consisting of 7 sheets, dated 3/13/18, last revised 10/25/18; together with Boundary Survey prepared by Gallas Surveying Group, 1 sheet, dated 1/4/2018
B-5	Letter to The Intelligencer dated 7/31/20 forwarding public notice of 8/20/20 hearing for advertisement
B-6	Public Notice of the hearing on 8/20/20
B-7	Proof of publication of public notice in 8/6/20 and 8/20/20 editions of The Intelligencer
B-8	Letter to Applicant and Engineer dated 7/31/20 providing notice of the hearing
B-9	List of the record owners of all properties surrounding the Property
B-10	Affidavit of mailing to property owners – notice mailed on 8/3/20
B-11	Affidavit of posting of public notice at property – notice posted on 8/10/20
B-12	Email message from E. Bradley dated 7/29/20 advising that Township takes no position on application
B-13	Letter dated 8/19/20 from Bohler Engineering requesting continuance of 8/20/20 hearing
B-14	Letter dated 9/15/20 from K. McGowan, Esq., amending sign portion of application

Exhibit**Description**

- | | |
|-----|---|
| A-1 | Zoning Plan, consisting of 1 sheet, prepared by Bohler Engineering, dated 5/22/20 (same as Exhibit B-2) |
| A-2 | Building Permit Nos. 2018-9299-S5 and 2018-9299-S6 |
| A-3 | Menu Board Specifications |
| A-4 | Photos of installed menu boards at Bethlehem PA McDonald's restaurant, taken May 2019 |

DATE OF DECISION: NOV 6, 2020

DATE OF MAILING: NOV 6, 2020

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

**RE: APPLICATION OF EDWARD MORTIMER FOR THE
PROPERTY LOCATED AT 55 CURLEY MILL ROAD, NEW
BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-1-92**

FINDINGS OF FACT

1. On Thursday, August 20, 2020 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") opened a duly noticed hearing on the application of Edward Mortimer (the "Applicant").
2. No testimony was presented following the opening of the hearing on August 20, 2020. At the request of the Applicant's counsel, the hearing was immediately continued on the record, and was resumed and concluded on September 29, 2020.
3. The Applicant is the record owner of the property located at 55 Curley Mill Road, Chalfont, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-1-92 (the "Property"). The Property is the subject of the instant application.
4. Notice of the August 20, 2020 hearing was published in advance of the hearing in the Thursday, August 6, 2020 and Thursday, August 13, 2020 editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-7.
5. Notice of the August 20, 2020 hearing was sent by first class mail on August 4, 2020 by Kelsey Harris ("Harris"), 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-10.
6. Harris posted notice of the August 20, 2020 hearing on the Property on August 10, 2020 at 9:44 a.m. *See* Exhibit B-11.
7. As the record owner of the Property, the Applicant has the requisite standing to prosecute this zoning hearing board application.
8. The Property is located in the SR-2, Suburban Residential, zoning district under the New Britain Township Zoning Ordinance (the "Zoning Ordinance").
9. The Applicant seeks to subdivide the Property into two (2) lots. Lot 1 will contain the existing single-family detached residential dwelling (use B1), and existing accessory detached

garage (use H1). Uses B1 and H1 are permitted by right in the SR-2 zoning district. *See* Zoning Ordinance §27-801.a.

10. Lot 2 is proposed to be a flag or lane lot that will contain a new single-family detached residential dwelling (use B1).

11. To permit the proposed minor subdivision and new single-family detached dwelling, the Applicant seeks variances from the following sections of the Zoning Ordinance:

- a. from §27-2104.a.2 to allow the proposed lane lot (Lot 2) to have a lot area of 6.36 acres, net of the access lane (7.23 acres gross), where the minimum net lot area for a lane lot is 10 acres; and
- b. from §27-2112 to modify previously protected wetlands and to allow such modified wetlands to count toward the required resource protection land.

12. As submitted, the application also included a request for a variance from Zoning Ordinance §27-2400.d to allow the sanitary sewer lateral for the dwelling on Lot 2 to encroach within wetlands on the Property. The Applicant withdrew this request on the record during the hearing.

13. 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.

14. The Applicant and Robert L. Showalter, P.E. (“Showalter”), professional civil engineer, testified in support of the application at the hearing.

15. Numerous individuals appeared at the hearing to ask questions of the witnesses, register positions on the application, and make comments on the application to the Board.

16. Most of these persons opposed the relief requested. The names and addresses of all the participating individuals appear in the Board’s official transcript and records of the hearings. No one requested intervening party status.

17. Represented by counsel, New Britain Township (the “Township”) appeared at the hearing as an active party opposing the application. The Board notes that by law, the Township is automatically granted party status to the hearing. *See* 53 P.S. §10908(3).

18. The Property is the subject of a prior decision of the Board dated April 15, 2010 (the “2010 Decision.”). In the 2010 Decision, the Board denied the Applicant’s request for a use variance to maintain an accessory dwelling unit (use H14) in the detached accessory garage. *See* Exhibit B-14, 2010 Decision.

19. The Applicant appealed the 2010 Decision to the Bucks County Court of Common Pleas, and the Pennsylvania Commonwealth Court. Both appellate courts upheld the 2010 Decision. *See* Exhibit T-3, Decisions.

20. The Applicant acquired the Property in May 2007. The single-family detached residential dwelling was constructed in or around 2006. *See* Exhibit A-1, Deed.

21. The Property's parent tract was designated as Lot No. 7 in the final subdivision plan for the Borden Farm Partnership. This original subdivision plan was recorded in or around 1995. *See Exhibit A-3, Prime Plan, Note 1.*

22. The Property's parent tract was thereafter subdivided into three (3) lots through the Final Subdivision Plan of Prime Properties, Inc. (the "Prime Plan"). The Prime Plan was recorded, and the Property created in its current configuration, in 2004. *See Exhibit A-3, Prime Plan.*

23. The Prime Plan continued to refer to the Property as Lot No. 7. Lot Nos. 8 and 9 on the Prime Plan were two (2) newly created lots containing a single-family detached dwelling. Lot Nos. 8 and 9 front on Curley Mill Road. *See Exhibit A-3, Prime Plan.*

24. The Property is 9.73 gross acres. Deducting for areas within the right-of-way of Curley Mill Road (1,992 square feet) and wetlands (31,979 square feet, as identified on the Prime Plan), the Property's base site area is 8.95 acres. *See Exhibit B-2, Plan.*

25. The Property is oddly shaped, and has two (2) large definable areas. The front portion is shaped like a rectangle. The existing single-family detached dwelling, detached garage, pool, pool house, storage shed and track are in the front portion. *See Exhibit B-2, Existing Features Plan.*

26. The Property has 775 feet of frontage along Curley Mill Road. The western side lot line of the Property's front portion is 366.2 feet long. The eastern side lot line of the front portion is 430.6 feet long. *See Exhibit B-2, Existing Features Plan.*

27. The Property's rear portion is shaped like a triangle. It commences at the end of each of these side lot lines. This rear section wraps around the two (2) adjoining properties (Lot Nos. 8 and 9) that front on Curley Mill Road. *See Exhibit A-3, Prime Plan.*

28. The Property's front lot line that is a common rear lot line with Lot Nos. 8 and 9 is 411.09 feet long. The angled side lot lines of the Property's rear portion are 983.5 and 637.38 feet long. These side lot lines converge at the rear lot line, which is only 116.9 feet long. *See Exhibit B-2, Existing Features Plan.*

29. The Applicant stated that the Property's rear section is essentially in meadow condition. *See Exhibit B-2, Existing Features Plan.*

30. Regarding the natural resources, the Applicant and Showalter stated, and the Board finds, that .73 acres (31,979 square feet) are identified as protected wetlands on the Prime Plan. *See Exhibit A-3, Prime Plan.*

31. Showalter stated, and the Board finds, that the Prime Plan wetlands were determined using soil maps. In January 2020, the Applicant secured the services of a soil scientist to delineate these field limits. *See Exhibit B-2, Plan.*

32. Showalter stated, and the Board finds, that the wetlands and related margins are in 2 discernible areas. The larger area (23,503 square feet) is along the eastern side lot line in the Property's rear section. *See Exhibit B-2, Plan.*

33. Showalter stated, and the Board finds, that the smaller wetland and margin area is located along the Property's western side lot line at the end of the front section. This smaller area is 2,137 square feet. *See Exhibit B-2, Plan.*

34. Showalter stated, and the Board finds, that the Property also has .061 acres (2,657 square feet) of woodlands. The woodlands are located mainly along the eastern side lot line and rear lot line in the Property's rear section. *See Exhibit B-2, Plan.*

35. The Applicant and Showalter stated, and the Board finds, that even though the Property only requires .587 acres of the natural resources to be undisturbed in connection with the proposed minor subdivision, the Applicant intends protect the .734 acres called for on the Prime Plan. *See Exhibits B-2, Plan; and A-3, Prime Plan.*

36. The Applicant and Showalter stated, and the Board finds, that Lot 1 of the proposed minor subdivision will contain the existing single-family detached dwelling. Lot 1's gross lot area will be 2.5 acres. Lot 1's base site area will be 2.4 (net) acres. *See Exhibit B-2, Plan.*

37. The Applicant and Showalter stated, and the Board finds, that Lot 1 will be shaped like a square. Lot 1 will essentially be most of the front portion of the Property's existing configuration. *See Exhibit B-2, Plan.*

38. The Applicant and Showalter stated, and the Board finds, that the lane serving Lot 2 will travel along the eastern side lot line of Lot 1. The lane will be 25 feet wide, and 317.82 feet long. *See Exhibit B-2, Plan.*

39. Lot 2's gross area is 7.23 acres. Exclusive of the lane (7,945 square feet), and the areas within the Curley Mill Road right-of-way and protected natural resources, Lot 2's base site area is 6.36 acres. *See Exhibit B-2, Plan.*

40. The Applicant and Showalter stated, and the Board finds, that the new dwelling on Lot 2 will be constructed in the large open area behind the two (2) abutting tracts on Curley Mill Road. *See Exhibit B-2, Plan.*

41. The Applicant and Showalter stated, and the Board finds, that the new dwelling on Lot 2 was originally intended to be serviced by a public sewer lateral that connected to a manhole on the parcel immediately to the west of the Property. Access to this manhole required the lateral to cross the smaller delineated wetlands area. *See Exhibit B-2, Plan.*

42. Following a discussion with the Board, the Applicant and Showalter stated, and the Board finds, that the lateral will be redesigned to travel through the Lot 2 lane to the sewer main in Curley Mill Road. This eliminated the variance request to traverse the wetlands. *See Exhibit B-2, Plan.*

43. The Applicant stated, and the Board finds, that prior to submitting the instant application, he commissioned a sketch plan showing the Property subdivided into 3 lots (the "2 Tier Plan"). *See Exhibit A-4, 2 Tier Plan.*

44. Under the 2 Tier Plan, one lot would contain the existing dwelling and abut Curley Mill Road. The other 2 lots would be stacked flag lots, each with a new single-family detached

dwelling (use B1). The lanes for each flag lot would be on either side of the frontage lot. *See* Exhibit A-4, 2 Tier Plan.

45. The Applicant stated, and the Board finds, that he elected not pursue the 2 Tier Plan after receiving reviews from the Bucks County Planning Commission and the Township's professionals. *See* Exhibits A-5, A-6 and A-7, Reviews.

46. The Applicant and Showalter stated, and the Board finds, that he pursued the instant 2 lot minor subdivision as it eliminates the need for several areas of variance relief required to allow the 2 Tier Plan. *See* Exhibits A-5, A6 and A-7, Reviews.

47. The Applicant and Showalter stated, and the Board finds, that they also designed a sketch plan showing the Property developed with a conventional 3 lot subdivision (the "3 Lot Plan"). *See* Exhibit A-8(a), 3 Lot Plan.

48. The Applicant and Showalter stated that according to their calculations, the Property can be developed with one (1) existing lot and two (2) new building lots along a conventional cul-de-sac road. The existing accessory detached garage would need to be relocated. *See* Exhibit A-8(a), 3 Lot Plan.

49. The Applicant and Showalter stated that each lot in the 3 Lot Plan would possess the required minimum lot area of 2 acres, as well as the required minimum lot width of 200 feet at the front building setback line. *See* Exhibit A-8(a), 3 Lot Plan.

50. Showalter opined that zoning relief is not necessary to improve the Property with the 3 Lot Plan. The Applicant and Showalter referred to the 3 Lot Plan layout as a "by right" plan. *See* Exhibit A-8(a), 3 Lot Plan.

51. The Applicant and Showalter did not present into evidence any formal review of the 3 Lot Plan by the New Britain Township engineer or Harris to verify their claim that the Property could be developed pursuant to the 3 Lot Plan without zoning relief.

52. The Applicant stated that he does not wish to develop the Property pursuant to the 3 Lot Plan. Instead, the Applicant stated that he prefers the minor flag lot subdivision plan submitted with the application and presented to the Board.

53. The Applicant stated that the cost to construct the site improvements for the 3 Lot Plan is excessive. Showalter estimated the charges to construct the cul-de-sac, perform a groundwater impact study, and relocate the existing detached garage to be \$191,631.00. *See* Exhibit A-13, Estimate.

54. The Township, as well as the residents in attendance at the hearing who live near the Property, objected to the requested relief on the grounds that developing the Property for an additional undersized flag lot is not necessary to permit a reasonable use of the Property.

55. The surrounding properties consist of lots of varying size, ranging generally from 1 acre abutting Sellersville Road in the SR-2 zoning district, to larger lots of 10 to 15 acres. These lots are primarily used for farmland and single-family detached residential dwelling purposes. *See* Exhibit A-14, Surrounding Properties.

56. The Applicant maintains that the Property's odd shape and the costs to construct the 3 Lot Plan are unique physical characteristics that impose an unnecessary hardship on the Property sufficient to support the minimum lot area variance for the proposed lane lot.

57. The Board rejects this position. These characteristics are not unique. They do not relate to whether the Property is presently being denied a reasonable use if the variance to allow an undersized lane lot is proscribed.

58. As found previously, the Property's lot area is 8.95 acres. This existing condition is already less than the required minimum lot area for a lane lot under the Zoning Ordinance. At 6.36 net acres, the proposed Lot 2 flag lot will contain less than 70% of the required minimum lot area. *See Exhibit B-2, Plan.*

59. Assuming but not conceding that the 3 Lot Plan complies with all the relevant Zoning Ordinance provisions, the 3 Lot Plan would, by the Applicant's admission, require fewer variances (i.e. none) than the Applicant's preferred minor flag lot subdivision plan.

60. The application requests more than the minimum deviation from the terms of the Zoning Ordinance to permit a reasonable use of the Property. Hence, the application does not satisfy all the relevant criteria that must be shown to permit the Board to grant the requested variances.

61. As the Property is presently being reasonably used as zoned for a single-family detached residential dwelling, the Property is free of any hardship that would allow a minor subdivision of the Property to create a flag lot that is only 6.36 acres.

CONCLUSIONS OF LAW

1. Required advanced public notice of the date, time and location of the August 20, 2020 hearing was made by sufficient advanced publication, posting and mailing to affected property owners.

2. In order to show entitlement to a variance, use or dimensional, an applicant must demonstrate all the following elements where relevant in any given case:

- 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 variance that will afford relief and will represent the least modification possible of the regulation at issue.

3. The Board finds that the lot size and natural resource protection variances requested are dimensional variances. A dimensional variance involves a request to adjust or vary a zoning ordinance provision by degree to be able to otherwise use a property consistent with the regulations. *See Dunn v. Middletown Township Zoning Hearing Board*, 143 A.3d 494 (Pa. Commw. 2015); *see also Constantino v. ZHB of Forest Hills Borough*, 636 A.2d 1266 (Pa. Commw. 1994).

4. 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.

5. 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).

6. Under the standard announced in *Hertzberg*, 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.

7. 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.

8. Nevertheless, the reasons for granting a variance must be substantial, serious and compelling. The party seeking the variance bears the burden of proving that (a) unnecessary hardship will result if the variance is denied; and (b) the proposed use will not be contrary to the public interest. *See Wilson v. Plumstead Township Zoning Hearing Board*, 936 A.2d 1061 (Pa. 2007).

9. In the instant matter, the Board concludes that the Applicant is not entitled to a variance under the *Hertzberg* standard to develop the Property for two (2) residential dwelling lots, where the new lot is proposed to be a flag lot without the required minimum lot area.

10. The Board concludes that not only does the Property presently exhibit a reasonable use, a separate reasonable use of the Property exists that requires less deviation from the Zoning Ordinance.

11. Assuming, but not conceding, that the Applicant’s analysis of the Property’s development potential under the 3 Lot Plan is accurate, the Board concludes that a reasonable use of the Property is available without the need for *any* relief from or under the Zoning Ordinance.

12. That finding and conclusion alone defeats any application to develop the Property pursuant to a permitted use that requires a variance to allow an undersized flag lot.

13. However, the Board concludes that the Property's current one (1) single-family detached dwelling residential use (use B1) is a permitted and "reasonable" use under the circumstances.

14. The Board concludes that comparative analysis of an alleged "by right" plan to a proposed plan that requires zoning relief distracts from the actual issue, which is whether the Applicant has proven the relevant elements, by substantial evidence, to demonstrate his entitlement to a variance for the proposed minor flag lot subdivision of the Property.

15. As an initial matter, the Board notes that Section 910.2 of the Pennsylvania Municipalities Planning Code (the "MPC"), 53 P.S. 10910.2, authorizes the Board to grant variances provided that it makes findings regarding all of the factors "*where relevant in a given case*" (emphasis added). *See* MPC §10910.2(a); *see also Sombers v. Stroud Township Zoning Hearing Board*, 913 A.2d 306 (Pa. Commw. 2006).

16. While all the criteria are *required* to be demonstrated in any variance case, the implication of the "where relevant in a given case" language is simply that if a particular factor is not relevant in a particular case, the Board need not make a specific factual finding. *See Sombers, supra*, at 312; *see also Vaughn v. Zoning Hearing Board of Township of Shaler*, 947 A.2d 218, 223 fn 11 (Pa. Commw. 2008).

17. The Board concludes that this prefatory language does not abrogate the Applicant's obligation to demonstrate compliance with each variance factor.

18. Based on the Property's physical characteristics, the Board concludes that the Applicant has not satisfied four (4) of the five (5) factors set forth in MPC §10901.2(a).¹

19. The Board concludes that the Property lacks any unique physical characteristics. Other than the Property's shape, which is addressed below, the Property exhibits common natural features. The small amount of protected resources do not rise to the level of being unique to the Property.

20. The Board concludes that none of the Property's physical characteristics have prevented the Property from being reasonably used since its creation in conformance with the Zoning Ordinance. To be sure, the Property has been used, free of Zoning Ordinance infraction, for a permitted residential dwelling since 2006.

21. Moreover, the Board concludes that the Property's shape was created by the Prime Plan. To later claim this shape imposes a hardship on the Property is to admit that the alleged hardship is self-created.

¹ The Board notes that the variance criteria established in MPS §10910.2(a) are essentially identical to the criteria set forth in Zoning Ordinance §27-3104.

22. The Board concludes that adding a second dwelling on the newly created lot would not alter the essential character of the neighborhood, nor be detrimental to the public welfare. This is the only prong of the elements of a variance that the Applicant has demonstrated.

23. The Board concludes that the Applicant's minor flag lot subdivision plan runs afoul of the rule that a Board may grant a variance where it is the *minimum* necessary to afford relief. *See Sombers, supra*, at 313.

24. The proposed minor flag lot subdivision plan requires at least one (1) variance, i.e. for the area of the new flag lot. By the Applicant's own admission, a proposed 3 Lot Plan would not require *any* variances.

25. Moreover, the Applicant's only justification for not pursuing the variance free 3 Lot plan is cost. He specifically acknowledged that "the costs are too great." *See* Finding of Fact 42.

26. The Applicant essentially asks the Board to sanction his requested variances so he will not pursue a more costly "by right" plan that produces a higher density. In this sense, the Applicant has overreached.


27. Lastly, because the Board finds no grounds to support the minimum lot area variance, the Board denies the requested variance to modify the natural resource protection standards triggered by the proposed minor flag lot subdivision.

DECISION

AND NOW, this 6th day of NOVEMBER, 2020, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **DENIES** the Applicant's requests for variances in connection with a proposed two (2) lot subdivision of the Property, each lot to be improved with a B1, single-family detached dwelling, residential use, specifically from Zoning Ordinance §27-2104.b to allow a lane lot with a minimum lot size of 5.37 acres, net of the access lane, where 10 acres is required; and from §27-2112 to modify previously protected wetlands and to allow such modified wetlands to count toward the required resource protection land.

DATE: 11/6/2020

NEW BRITAIN TOWNSHIP
ZONING HEARING BOARD



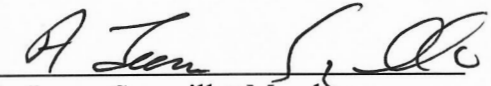
Chuck Coxhead, Chair

DATE: 11/6/2020



Catherine B. Basilio, Vice Chair

DATE: 11/6/2020



A. James Scanzillo, Member

Thomas J. Walsh III, Esquire
Solicitor, New Britain Township Zoning Hearing Board
3655 Route 202, Suite 105
Doylestown, PA 18902

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SCHEDULE A – TABLE OF EXHIBITS

Exhibit	Description
B-1	Zoning Hearing Board application (dated 7/16/20; received 7/17/20) Attachments to Application: <ul style="list-style-type: none">• Cover letter dated 7/16/20• Narrative attachment outlining requested relief• List of property owners within 500 feet• Deed dated 5/25/2007
B-2	2 lot minor subdivision plan, consisting of 3 sheets, prepare by R.L. Showalter & Associates, dated 2/17/20, last revised 7/8/20
B-3	Engineering Review Letter, dated 4/20/20
B-4	Zoning Officer Review Letter, dated 5/5/20
B-5	Letter to The Intelligencer dated 7/31/20 forwarding public notice of 8/20/20 hearing for advertisement
B-6	Public Notice of the hearing on 8/20/20
B-7	Proof of publication of public notice in 8/6/20 and 8/13/20 editions of The Intelligencer
B-8	Letter to Applicant and Attorney dated 7/31/20 providing notice of the hearing
B-9	List of the record owners of all properties surrounding the Property
B-10	Affidavit of mailing to property owners – notice mailed on 8/4/20
B-11	Affidavit of posting of public notice at property – notice posted on 8/10/20
B-12	Email dated 8/18/20 from E. Bradley advising that New Britain Township Board of Supervisors oppose application
B-13	Email dated 8/18/20 from Attorney for Applicant requested continuance of 8/20/20 hearing
B-14	Zoning Hearing Board Decision dated 4/15/2010
A-1	Deed for property dated 5/25/2007
A-2	2 lot minor subdivision plan, consisting of 3 sheets, prepare by R.L. Showalter & Associates, dated 2/17/20, last revised 7/8/20 (same as Exhibit B-2)

Exhibit	Description
A-3	Final record subdivision plan for Prime Properties, dated 6/17/1996, last revised 11/1/98. Recorded in plan book 321 page 34 on 10/14/2004
A-4	2 Tier flag lot subdivision plan, sheet 1 of 3, prepared by R.L. Showalter & Associates, dated 2/17/20
A-5	Bucks County Planning Commission review letter dated 4/13/20 (review of Exhibit A-4 plan)
A-6	Engineering review letter dated 4/20/20 (review of Exhibit A-4 plan)
A-7	Zoning Officer review letter dated 5/5/20 (review of Exhibit A-4 plan)
A-8	Email dated 8/13/20 from T. Savarese, Esq., to K. Harris re revised 3 lot subdivision plan
A-8(a)	3 Lot By-Right Sketch Plan, 1 sheet, prepared by R.L. Showalter & Associates, dated 2/17/20, last revised 7/8/20
A-9	Zoning Hearing Board Decision dated 11/14/2001, application of B&D Customer Builders, Inc.
A-9(a)	Record Plan of Minor Subdivision for B&D Customer Builders, prepared by ProTract Engineering, dated 1/29/2002, last revised 7/25/2002; recorded in Plan Book 311 page 6 on 12/4/2002
A-10	Zoning Hearing Board Decision dated 11/28/2010, application of Karl Brosious
A-10(a)	Minor Subdivision Plan for Karl Brosious, prepared by R.L. Showalter & Associates, 1 sheet, dated 12/30/2009, last revised 8/9/2012
A-11	Zoning Hearing Board Decision dated 11/8/2006, application of Michael and Danielle Matarese
A-11(a)	Record Minor Subdivision Plan for Michael and Danielle Matarese, prepared by R.L. Showalter & Associates, sheet 1 of 5, dated 12/12/2006, last revised 11/7/2007
A-12	Stipulation and Settlement Agreement dated 2/23/2015, Appeal of Benjamin Goldthorp, Docket No. 2013-00332
A-12(a)	Record Subdivision Plan for Benjamin Goldthorp, 1 sheet, prepared by Langan Engineering, dated 6/1/2015