

DATE OF DECISION: 3/24/2023

DATE OF MAILING: 3/24/2023

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

**RE: APPLICATION OF CRAIG AND PAULINE DEFELICE  
FOR THE PROPERTY LOCATED AT 137 SOUTH LIMEKILN PIKE,  
NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,  
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-10-27**

**FINDINGS OF FACT**

1. On Thursday, January 19, 2023, 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 Craig and Pauline Defelice (the “Applicants”).

2. The Applicants are the record co-owners of the property located at 137 South Limekiln Pike, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-10-27 (the “Property”). The Property is the subject of the instant application.

3. Notice of the January 19, 2023, hearing was published in advance of the hearing in the Thursday, January 5, 2023, and Thursday, January 12, 2023, editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-5.

4. Notice of the January 19, 2023, hearing was sent by first class mail on January 6, 2023, by Ryan Gehman (“Gehman”), the New Britain Township Assistant Planning and Zoning Officer, to (a) all record owners of properties within New Britain Township surrounding the Properties; and (b) to the adjoining municipality for any surrounding properties that are located in that municipality. *See* Exhibit B-8.

5. Gehman posted notice of the January 19, 2023, hearing on the Property on January 12, 2023, at 10:05 a.m. *See* Exhibit B-9.

6. No testimony was presented following the opening of the hearing on January 19, 2023. At the request of the Applicants’ counsel, the hearing was immediately continued on the record, and was resumed and concluded on February 16, 2023. *See* Exhibit B-11.

7. As the record co-owners of the Property, the Applicants have 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 Property is improved with a lawful non-conforming multifamily dwelling building use (use B6) containing 4 dwelling units. Such use is not permitted in the SR-2 zoning district. *See* Zoning Ordinance §27-801.

10. The Applicants propose a minor subdivision of the Property to create 2 lots. Lot 1 will contain the existing B6 use building. Lot 2 will be a new building lot to be improved with a single-family detached dwelling (use B1). *See* Exhibit B-2, Plan.

11. To permit the minor subdivision of the Property and the creation Lot 1 and Lot 2, the Applicants seek a variance Zoning Ordinance §27-305.B.B6.b.1 and §27-2101.c to reduce the lot area supporting the B6 use from 4.99 acres to 2.12 acres, where the required minimum lot area is 5 acres.<sup>1</sup>

12. 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.

13. The Applicants and Rachel L. Butch P.E. (“Butch”), professional civil engineer, testified in support of the application at the hearing.

14. No other individuals appeared at the hearings to request party status, register a position, or comment or ask questions on the application before the Board. New Britain Township took no position on the application and did not participate in the hearing.

15. The Property is an oddly shaped lot. It has 7 distinct sides, making it a heptagon. The Property’s site area is 4.99 acres. Excluding the area within the ultimate right-of-way of Limekiln Road and the septic system easement, the Property’s base site area is 4.40 acres. *See* Exhibit B-2, Plan.

16. The Property is 439.36 feet long at the center line of Limekiln Pike. At the Limekiln Pike ultimate right-of-way line, the Property is 438.69 feet wide. *See* Exhibit B-2, Plan.

17. Each of the Property’s side lot lines has a slight jog in the boundary, creating longer and shorter sections. The northern side lot line portions are 336.35 feet and 67.22 feet long. The southern side lot line sections 240.24 feet and 41.27 feet long. *See* Exhibit B-2, Plan.

18. The rear lot line consists of 2 sections that meet at a point at the deepest part of the Property. These boundary lines are 213.6 feet and 501.94 feet long. *See* Exhibit B-2, Plan.

19. The Applicants and Butch stated, and the Board finds, that the Property’s rear sections contain significant woodlands. The rear yard slopes steeply downward to a drainage channel. *See* Exhibit B-11, Viewer.

20. The Applicants and Butch stated, and the Board finds, that the B6 building is in the northern section of the Property. It is set back 345 feet from Limekiln Pike. A small storage shed is behind the B6 building along the longer rear lot line section. *See* Exhibit B-2, Plan.

21. The Applicants and Butch stated, and the Board finds, that a paved vehicle parking area is in front of the B6 building. At least 8 vehicles can be parked in this area. The driveway

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<sup>1</sup> The Applicants’ original submission alternatively sought a special exception pursuant to §27-2303.b and §27-3103 to extend the B6 use on a lot reduced in lot area. The Applicants withdrew this request.

accessing this parking area and the B6 building runs over the adjoining tract to the north through a recorded easement. *See Exhibits B-2, Plan; and A-3, Easement.*

22. The Applicants and Butch stated, and the Board finds, that the B6 building is presently served by an on-lot private sewage disposal septic system and a private well. The well and drainage field are behind the B6 building. *See Exhibit B-2, Plan.*

23. The Applicants and Butch stated, and the Board finds, that the B6 building contains 4 dwelling units in approximately 4,000 square feet of living space. It has been a lawful use since 1953. *See Exhibit A-4, Letter.*

24. The B6 use requires a minimum lot area of 5 acres.<sup>2</sup> At 4.4 acres, the Property lacks the required minimum lot area. In addition to being a non-conforming use, the Property is lawfully non-conforming as to minimum lot area. *See Exhibit B-2, Plan; see also Zoning Ordinance §27-201, §27-305.B.B6.b.1, §27-2300.b*

25. The Applicants and Butch stated, and the Board finds, that the minor subdivision will essentially split the Property lengthwise from Limekiln Pike to the rear lot line. *See Exhibit B-2, Plan.*

26. Butch stated, and the Board finds, that the proposed subdivision configuration was chosen for 2 primary reasons. First, this layout allows Lot 1 and Lot 2 to be comparable in size and layout to the surrounding properties. *See Exhibit B-2, Plan.*

27. Butch stated, and the Board finds, that Lot 1 will have an area of 2.12 acres (92,152 square feet). Lot 2 will be 2.29 acres (99,541 square feet). These sizes are in keeping with the areas of the surrounding lots. *See Exhibit B-2, Plan.*

28. The Applicant and Butch stated, and the Board finds that Lot 2 meets the minimum lot area requirement of 2 acres for a tract with a B1 use in the SR-2 zoning district. Lot 2 and the proposed dwelling thereon meet all the applicable dimensional criteria. *See Exhibit B-2, Plan.*

29. Butch stated, and the Board finds, that the new dwelling on Lot 2 will be connected to public water. A stormwater management rain garden to capture the additional water runoff will be behind the new dwelling. *See Exhibit B-2, Plan.*

30. Butch stated, and the Board finds, that the other primary reason for the subdivision layout was the location of the on-lot primary and back-up septic systems for each lot. The back-up sand mounds for each lot cannot be located closer to the rear lot line due to the steep slope. *See Exhibit B-2, Plan.*

31. Butch stated, and the Board finds, that a conservation easement roughly 1 acre in size will run through the entire rear yards of both lots. In addition, a 20 feet wide buffer yard will be on Lot 1 along the new boundary line. *See Exhibit B-2, Plan.*

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<sup>2</sup> A B6 use requires a minimum “tract” (i.e., lot) area of 5 acres or 5,000 square feet per dwelling unit, whichever is greater. In this instance, the per dwelling unit computation produces 20,000 square feet (or 0.459 acres). *See Zoning Ordinance §27-305.B.B6.b.1.*

32. The Applicants and Butch stated, and the Board finds, that Lot 1’s proposed lot area of 92,152 square feet is more than sufficient to support the existing B6 use. While still lacking the required minimum 5 acres, this area far exceeds the Zoning Ordinance’s other lot area prescription of 5,000 square feet per dwelling unit. *See* Exhibit B-2, Plan.

33. Upon questioning from the Board, the Applicants and Butch stated, and the Board finds, that any minor subdivision or other effort to improve the B6 use or building necessarily requires some form a zoning relief.

34. The surrounding properties consist of similar style residences and large lots. The Applicants stated, and the Board finds, that no other surrounding property owners have spoken to them to voice any objections to the proposed minor subdivision of the Property.

35. Due to the Property being an oddly shaped undersized lot, along with the existence of the non-conforming B6 use, the Property contains unique physical characteristics that support relief for the lot area variance in connection with the proposed minor subdivision.

36. The dimensional limitations found at Zoning Ordinance §27-305.B.B6.b.1 and §27-2101.c impose a hardship on the Property and the Applicants in that these provisions prevent a reasonable minor subdivision of the Property with 2 residentially used lots that are harmonious with the tracts in the surrounding area.

37. Subject to the conditions imposed herein, the proposed minor subdivision plan, and the lot area of Lot 1 containing the B6 use and building, are consistent with uses of other properties in the surrounding neighborhood.

**CONCLUSIONS OF LAW**

1. Required public notice of the date, time and location of the January 19, 2023, 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 lot area variance requested 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. An applicant can demonstrate “unnecessary hardship” for a use or dimensional variance by showing that: (a) a property’s physical characteristics are such that the property cannot be used for any permitted use or purpose; (b) the property can only conform to a permitted use or purpose at prohibitive expense; or (c) that the property has either no value or only distress value for any permitted purpose. *See Nowicki v. Zoning Hearing Board of Monaca Borough*, 91 A.3d 287 (Pa. 2014).

5. 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 (a) the economic detriment to the applicant if relief is denied; (b) the financial hardship created by any work necessary to bring the proposed improvements into strict compliance with the zoning requirements; and (c) the characteristics of the surrounding neighborhood. *See Hertzberg, supra*, at 47, 50.

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, undersized nature, and the existence of the non-conforming use, establish a hardship under the *Hertzberg* standard sufficient to justify the variance requested.

9. The Board notes that “lot area” is defined, in relevant part, as the “area contained within the property lines of the individual parcels of land shown on a subdivision plan or required by [the Zoning Ordinance], excluding any area within an existing or designated future street right-of-way.” *See Zoning Ordinance §27-201*.

10. Applying this definition to the instant application, Lot 1’s proposed lot area is 2.12 acres. This excludes the Property’s area located within the ultimate right-of-way of Limekiln Pike. *See Exhibit B-2, Plan*.

11. The Board concludes that Lot 1 will be 42.4% of the required minimum lot area of 5 acres. It will exceed the required minimum lot area of 2 acres for a property improved with a

B1 use in the SR-2 zoning district. It will be 4.6 times greater than the alternative minimum lot area standard of 5,000 feet per dwelling unit for a B6 use. See Exhibit B-2, Plan.

12. Critical to the Board’s conclusions herein is that much of the Property will be protected pursuant to a conversation easement as part of the minor subdivision. With this protection, the small lot area is more than sufficient to support the existing non-conforming B6 use.

13. Based on the credible testimony presented, the Board concludes that the requested lot area variance proposes reasonable adjustments to the Zoning Ordinance in connection with the minor subdivision.

14. The Board concludes that while the Applicants have established hardships to justify the requested variance, the Applicants can mitigate any adverse effects that the area of Lot 1 may have on surrounding tracts by implementing the conservation easements shown on the definitive plan. See Exhibit B-2, Plan.

15. 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 effect a minor subdivision of the Property, with the resulting dimensions and sizes of Lot 1 and Lot 2, as shown in with the definitive plan identified as Exhibit B-2.

16. 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.

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

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

19. 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 24<sup>th</sup> day of March, 2023, 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 §27-305.B.B6.b.1 and §27-2101.c to reduce the lot area supporting the B6 use from 4.99 acres to 2.12 acres, subject to the following conditions:

1. The proposed two (2) lot minor subdivision of the Property, and the resulting layout of Lot 1 and Lot 2, shall be in accordance with definitive plan marked as Exhibit B-2, the other evidence, representations and credible testimony made at the hearing.

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

The signatures of the New Britain Township Zoning Hearing Board members that appear on the following page attached hereto and incorporated herein, confirms the Board's decision and order.

DocuSigned by:  
By: Ryan Gehman  
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Ryan Gehman  
New Britain Township  
Assistant Planning and Zoning Officer

Date: March 24, 2023

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

<b>Exhibit</b>	<b>Description</b>
B-1	Zoning Hearing Board application dated 12/14/22. Included with the Application: <ul style="list-style-type: none"><li>• Addendum</li><li>• Deed dated 10/20/2014</li><li>• List of property owners within 500 feet</li></ul>
B-2	Zoning Exhibit, prepared by R.L. Showalter & Associates, Inc., dated 12/14/22, consisting of 1 sheet
B-3	Letter to The Intelligencer dated 12/29/22 forwarding public notice of 1/19/23 hearing for publication
B-4	Public Notice of the hearing on 1/19/23
B-5	Proof of publication of public notice in 1/5/23 and 1/12/23 editions of The Intelligencer
B-6	Letter to Applicant and Attorney dated 12/29/22 providing notice of the 1/19/23 hearing
B-7	Township list of the record owners of all properties within 500 feet of the Property; map of properties
B-8	Affidavit of mailing to property owners – notice of hearing mailed on 1/6/23 to property owners on exhibit B-8
B-9	Affidavit of posting of public notice at property – notice posted on 1/12/23 at 10:05 a.m.
B-10	Bucks County Floodplain Viewer and Map of Property
B-11	Letter from H. Brown, Esq., dated 1/17/23 requesting continuance
A-1	Curriculum Vitae of Rachel L. Butch, P.E.
A-2	Zoning Exhibit, prepared by R.L. Showalter & Associates, Inc., dated 12/14/22, consisting of 1 sheet (same as Exhibit B-2)
A-3	Cross-Easements for Driveways and Utilities, dated 2/24/2000
A-4	Township non-conforming use letter dated 2/25/2014



**New Britain Township**  
**Zoning Hearing Board**

**Signature Page**

Re: Craig and Pauline Defelice  
137 South Limekiln Road  
New Britain Township  
TMP No. 26-10-27

Date: March 24, 2023

Chuck Coxhead, Chair

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Charles D Coxhead  
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Cathy Basilio, Vice Chair

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Cathy Basilio  
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Scott Fischer, Member

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Scott Fischer  
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Ryan Wantz, Alternate Member

1st RYAN WANTZ

DATE OF DECISION: 2/21/2023

DATE OF MAILING: 2/21/2023

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

**RE: APPLICATION OF NIVIYA, LLC, FOR THE PROPERTY  
LOCATED AT 4275 COUNTY LINE ROAD, SUITE 15,  
NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,  
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-5-49-2**

**FINDINGS OF FACT**

1. On Thursday, January 19, 2023, 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 Niviya, LLC (the “Applicant”).

2. The real property that is the subject of this application is located at 4275 County Line Road, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-5-49-2 (the “Property”).

3. The Applicant is the tenant of a certain 2,418 square feet portion of one of the non-residential buildings on the Property, further designated as Suite 15 (the “Premises”). The Premises are also the subject of this application. *See* Exhibits B-1, Lease; and Floor Plan.

4. The record owner of the Property is ERP New Britain Property Owner, L.P. (“ERP”). The Property’s current deed is recorded in the Bucks County Recorder of Deeds Office at Deed Book 4878, Page 0088.

5. Notice of the January 19, 2023, hearing was published in advance of the hearing in the Thursday, January 5, 2023, and Thursday, January 12, 2023, editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-4.

6. Notice of the January 19, 2023, hearing was sent by first class mail on January 6, 2023, by Ryan Gehman (“Gehman”), the New Britain Township Assistant Planning and 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.

7. Gehman posted notice of the January 19, 2023, hearing on the Property on January 12, 2023, at 9:48 a.m. *See* Exhibit B-8.

8. The Applicant is a Pennsylvania limited liability company. Paras Patel (“Paras”) and his spouse are the officers and representatives of the Applicant.

9. The Premises and certain exterior portions of the Property are subject to a Lease Agreement dated October 4, 2022 (the “Lease”) between the Applicant (as tenant) and ERP (as landlord). *See* Exhibit B-1, Lease.

10. As the occupant and tenant of the Premises, together with the right to use portions of the Property pursuant to the Lease, the Applicant has the requisite standing to prosecute this zoning hearing board application. *See* Exhibit B-1, Lease.

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 four (4) non-residential buildings, collectively used for a shopping center use (J24). A J24 use is permitted by right in the C-2 Commercial, zoning district. *See* Exhibit A-1, Aerial; *see also* Zoning Ordinance §27-1301.a.

13. The Applicant proposes to conduct an indoor athletic club use (use J11) in the Premises and portions of the Property.

14. To permit the indoor athletic club use, the Applicant seeks a special exception pursuant to Zoning Ordinance §27-305.J.J24.b.1(j) and §27-3103 allowing an individual sub-use in the shopping center that is of the same general character as the specifically permitted shopping center sub-uses.

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. Paras testified on behalf of the Applicant in support of the application at the hearing. No other individuals appeared at the hearing to request party status, register a position, or comment or ask questions on the application before the Board.

17. The Property is a large lot with primary road frontage along West Butler Avenue and County Line Road. It consists of 21.125 acres. The Property is surrounded by many other non-residential properties. *See* Exhibit A-1, Aerial.

18. Vehicles access the Property from County Line Road, West Butler Avenue, and Andre Drive (an access road to the rear of the Property). Numerous buffer plantings and planted water detention facilities are along the Property’s perimeter. *See* Exhibit A-1, Aerial.

19. The shopping center was constructed in the early 1990s. As currently designed, the shopping center can accommodate over 25 occupants and users in the various buildings. *See* Exhibit A-1, Aerial.

20. Paras stated, and the Board finds, that the Applicant intends to operate a Hotworx 24-hour infrared heat absorption fitness studio. All club attendees must be paid registered members of the club. *See* Exhibit A-4, Signage.

21. Paras stated, and the Board finds, that the infrared workout sessions are conducted in 9 feet by 7 feet sauna rooms at high temperatures. Each sauna session lasts 15 or 30 minutes.

22. Paras stated, and the Board finds, that the Premises will contain 10 sauna rooms. Each sauna room can accommodate up to 3 people working out at the same time. Sauna rooms are cleaned by club members and staff regularly and after each training session. *See* Exhibit B-1, Floor Plan.

23. Paras stated, and the Board finds, that training sessions are virtually instructed. All workouts are scheduled remotely through the Applicant's online web portal or a smart device application.

24. Paras stated, and the Board finds, that the Premises will also contain a lobby / reception area in front of the saunas. To the Premises' rear will be a separate open training area, bathrooms, storage and cleaning facilities. Individual storage lockers and cubbies are also available. *See Exhibit B-1, Floor Plan.*

25. Paras stated, and the Board finds, that the proposed fitness studio will be open each day of the week on a 24 hour basis. The Applicant will have 3 employees at the Premises between 11 a.m. to 8 p.m. Monday through Friday; and 9 a.m. to 4 p.m. on Saturday.

26. Paras stated, and the Board finds, that the off-hours on those days as well as Sunday are unstaffed. Members are provided key fobs with dongle technology to allow access to the Premises during unstaffed hours.

27. Paras stated, and the Board finds, that security cameras will be installed throughout the Premises. No one under age 12 will be admitted. Children and teenagers between the ages of 12 and 18 must be accompanied by a responsible adult.

28. Paras stated, and the Board finds, that the Premises was previously occupied by a 24 hour indoor fitness and workout club known as Anytime Fitness. Paras stated that the Applicant's proposed fitness studio, including hours of operation, is similar to this previous use.

29. Paras stated, and the Board finds, that other uses operating in the New Britain Village shopping center are many retail stores (use J1), a Giant supermarket (use J1), a hair stylist (use J3), several restaurants (use J6), a bank (use J4), a karate center (use J11), and an insurance agent (use I3). All these sub-uses are permitted within a shopping center use (use J24). *See Exhibit A-1, Aerial; see also Zoning Ordinance §27-305.J.J24.*

30. Paras stated, and the Board finds, that each of these existing shopping center sub-uses serve the end needs of consumers. Like the karate center and the prior fitness operation, the proposed Hotworx athletic club is similarly designed to meet a person's individual training and fitness needs.

31. Paras stated, and the Board finds, that the proposed Hotworx indoor athletic club use is not dissimilar nor different from the permitted or existing sub-uses in the shopping center.

32. The Board finds that the proposed Hotworx indoor athletic club use, its size, location and manner of operation, is harmonious with the Premises and the Property and is consistent with uses of other properties in the surrounding neighborhood.

33. Subject to the conditions imposed herein, proposed indoor athletic club use is of the same general character as other sub-uses operating and permitted in the existing New Britain Village shopping center (use J24).

### **CONCLUSIONS OF LAW**

1. Required public notice of the date, time and location of the January 19, 2023, hearing was made by sufficient advanced publication, posting and mailing to affected property owners.

2. Before the Board are 2 questions. The first inquiry is whether the proposed indoor athletic club use (use J11) is of the “same general character” as the other sub-uses permitted in the shopping center use (use J24) under the Zoning Ordinance.

3. If the Board concludes that it is, then the Board must determine whether the Applicant is entitled to a special exception to conduct the proposed Hotworx indoor athletic club use (use J11) in the existing New Britain Village shopping center (use J24).

4. The question of whether a proposed use is of the “same general character” of specifically permitted uses in a zoning ordinance is a question of law. *See Cook v. Zoning Hearing Board of Ridley Township*, 408 A.2d 1157 (Pa. Commw. 1979).

5. “Same” does not mean identical. Instead, it means that the proposed use must exhibit a “similarity” or be “of the same kind of species” as the other uses permitted under the applicable zoning scheme. *See In re Appeal of U.S. Magnet & Alloy*, 1987 Pa. D&C Dec LEXIS 229; *see also Markwest Liberty Midstream v. Cecil Township Zoning Hearing Board*, 102 A.3d 549 (Pa. Commw. 2014).

6. To properly conduct such an analysis, the Board must (a) comprehensively review all the listed permitted uses; and (b) undertake a fact-sensitive analysis of how the proposed use is similar to, or different from, the permitted uses. *See Markwest Liberty, supra*.

7. As a threshold matter, the Board notes that an indoor athletic club use is permitted by right as a stand-alone *principal* use in the C-2 zoning district. Clearly, the Zoning Ordinance contemplates a J11 use being conducted on a tract in the C-2 district. *See Zoning Ordinance §27-1301.a*.

8. An “indoor athletic club” is defined to include “buildings for indoor games, played with a ball such as racquetball, handball, squash, tennis, basketball and volleyball; *facilities for exercise equipment and health clubs*.” *See Zoning Ordinance §27-305.J.J11.a* (emphasis added).

9. The Board concludes that the Applicant’s proposed use qualifies as an “indoor athletic club” as it offers “facilities for exercise equipment and health.” The proposed use does not include “indoor games played with a ball.”

10. By limiting its “athletic club” features to individual exercise and health facilities, the Applicant’s use is not dissimilar from the existing retail, restaurant and other consumer-oriented sub-uses operating in the shopping center.

11. Although limited testimony was introduced describing the existing karate use, critical to the Board’s conclusion is that this karate use, as well as the prior Anytime Fitness use, likely would be considered an “indoor athletic club” under the Zoning Ordinance.

12. Based upon the credible testimony describing the Applicant’s activity, the Board concludes that the proposed indoor athletic club use is of the same general character as other sub-uses operating and permitted in the existing shopping center.

13. Turning the relief sought, when a landowner applies for a special exception, the Board’s function is to determine that such specific facts, circumstances and conditions exist which comply with the standards of the Zoning Ordinance and merit the granting of the special exception. *See Broussard v. Zoning Board of Adjustment of City of Pittsburgh*, 907 A.2d 494 (Pa. 2006).

14. As previously noted, an “indoor athletic club” club use (use J11), when determined by the Board to be of the same general character to permitted shopping center uses, is authorized in the shopping center by special exception. *See Zoning Ordinance §27-305.J.J24.b.1(j)*.

15. Zoning Ordinance §27-3103.a provides that “the Board shall grant a special exception only if it finds adequate evidence that any proposed development submitted will meet all of the following general requirements as well as any specific requirements and standards listed [in this Zoning Ordinance] for the proposed use.”

16. Regarding the general criteria applicable to a special exception, Zoning Ordinance §27-3103.a provides that the Board shall, among other things, require the proposed use and location to be:

- a. in accordance with the New Britain Township Comprehensive Plan and consistent with the spirit, purposes and intent of [the Zoning Ordinance];
- b. in the best interests of [New Britain] Township, the convenience of the community, the public welfare and be a substantial improvement to the property in the immediate vicinity;
- c. suitable for the property in question and designed, constructed, operated and maintained so as to be in harmony with and appropriate in appearance to the existing or intended character of the general vicinity;
- d. in conformance with all applicable requirements of [the Zoning Ordinance];
- e. suitable in terms of effects on highway traffic and safety with adequate access arrangements to protect streets from undue congestion and hazard; and
- f. in accordance with sound standards of subdivision practice where applicable.

17. Regarding the specific criteria applicable to the same general character indoor athletic club use, the Zoning Ordinance provides that the buffer requirements must be met; and the use shall be permitted upon such reasonable restrictions that the Board may determine. *See Zoning Ordinance §27-305.J.J11.b.1 and §27-305.J.J24.b.1(j)*.

18. If an applicant demonstrates that the proposal meets the specific and general criteria of Zoning Ordinance, and no evidence is presented that requires a finding that the proposal is detrimental to the public interest, the Board must find that the proposed indoor athletic club use is

permitted. *See Lafayette College v. Zoning Hearing Board of City of Easton*, 588 A.2d 1323 (Pa. Commw. 1991).

19. Under Pennsylvania law, the Board may refuse an application for special exception only if (a) the application fails to meet or secure a variance from an applicable zoning regulation; or (b) opponents to the application establish by a preponderance of evidence that the application is contrary to the health, safety and morals of the general welfare of the community at large. *See Lafayette College, supra*.

20. No variance is required. No relevant evidence was presented by any objecting or protesting party to show that the proposed indoor athletic club use in the shopping center is detrimental to the public interest, or contrary to the health, safety and morals the community.

21. The Board concludes that the proposed indoor athletic club use satisfies the general and specific conditions of the Zoning Ordinance required for the special exception. To be sure, an “indoor athletic club” is a permitted stand-alone use in the CR-2 zoning district.

22. No outdoor training facilities, or large rooms designed to accommodate big groups or teams, are proposed in connection with the Applicant’s J11 use. Such features might render the indoor athletic club use dissimilar to the uses permitted and operating in the shopping center.

23. Lastly, the Board concludes that the Property’s existing natural resources and the plantings around the shopping center provide sufficient buffer screening.

24. Subject to the conditions attached hereto, the proposed indoor athletic club use is in accordance with the New Britain Township Comprehensive Plan and is consistent with the spirit, purposes and intent of the Zoning Ordinance.

25. Subject to the conditions attached hereto, the proposed indoor athletic club use is suitable for the Premises and the Property; and will be designed, constructed, operated and maintained in harmony with and appropriate in appearance to the general vicinity’s character.

26. Provided the proposed indoor athletic club use is conducted in accordance with the conditions attached herein, the use is suitable in terms of effects on highway traffic and safety.

27. As nearby properties exhibit uses and sizes similar to the Property, provided the proposed the indoor athletic club use is conducted in accordance with the conditions attached herein, the use will be harmonious with the shopping center and the surrounding neighborhood.

**DECISION**

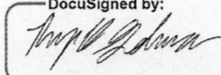
AND NOW, this 21<sup>st</sup> day of February, 2023, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **GRANTS** the Applicant’s request for a special exception pursuant to Zoning Ordinance §27-305.J.J24.b.1(j) and §27-3103 to conduct an indoor athletic club use (use J11) in the Premises and portions of the Property as a sub-use that is of the same general character as the specifically authorized shopping center (use J24) sub-uses, subject to the following conditions:

1. The proposed indoor athletic club use’s dimensions, size, location, improvements, operations and appearance shall be consistent with and in accordance with the definitive plans, representations, photographs, evidence and credible testimony made at the hearing.

2. The permitted “use of the same general character” shall be limited to the indoor athletic club use described in the testimony and evidence. Should the Applicant or any future owner/occupant of the Premise or Property wish to conduct any other type of use of the same general character or an indoor athletic club use of a different character at the shopping center, further relief from the Board shall be required.

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.

The signatures of the New Britain Township Zoning Hearing Board members that appear on the following page attached hereto and incorporated herein, confirms the Board’s decision and order.

DocuSigned by:  
  
By: \_\_\_\_\_  
808095910F7E4D6...  
Ryan Gehman  
New Britain Township  
Assistant Planning and Zoning Officer

Date: 2/21/2023

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.



## SCHEDULE A – TABLE OF EXHIBITS

<b>Exhibit</b>	<b>Description</b>
B-1	Zoning Hearing Board application (dated 12/7/22). Attachments: <ul style="list-style-type: none"><li>• List of surrounding property owners</li><li>• Lease Agreement dated 10/4/2022</li><li>• Existing and Proposed Floor Plan sheet</li><li>• Signage plan</li></ul>
B-2	Letter to The Intelligencer dated 12/29/22 forwarding public notice of 1/19/23 hearing for publication
B-3	Public Notice of the hearing on 1/19/23
B-4	Proof of publication of public notice in 1/5/23 and 1/12/23 editions of The Intelligencer
B-5	Letter to Applicant and attorney 12/29/22 providing notice of the hearing
B-6	List of the record owners of all properties within 500 feet of the Property; map
B-7	Affidavit of mailing to property owners on B-6 – notice mailed on 1/6/23
B-8	Affidavit of posting of public notice at property – notice posted on 1/12/23 at 9:48 a.m., together with photos of notice on property
B-9	Bucks County Viewer Map and Aerial
A-1	Aerial Photo of New Britain Village shopping center
A-2	Photo – street view of premises
A-3	Sheet 1 of Signage Plan
A-4	Sheet 2 of Signage Plan

**New Britain Township**  
**Zoning Hearing Board**

**Signature Page**

Re: Niviya, LLC  
4275 County Line Road, Suite 15  
New Britain Township  
TMP No. 26-5-49-2

Date: 2/21/2023

Chuck Coxhead, Chair

DocuSigned by:  
*Charles A Coxhead*  
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Cathy Basilio, Vice Chair

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*Cathy Basilio*  
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Scott Fischer, Member

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*Scott W. Fischer*  
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Ryan Wantz, Alternate Member

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*Ryan Wantz*  
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