

## **BUILDING AND ZONING COMMITTEE**

Morton J. Simon, Jr. - Chair  
Harvey Portner - Vice Chair  
Kathy A. Hampton - Member  
Charles McKeown - Member  
J. Andrew Sharkey - Member  
Daniel Norris - Member  
Art Haywood - Ex-Officio Member

**Wednesday, April 3, 2013**  
**8:00 PM**  
**Curtis Hall**

### **AGENDA**

1. Review of the Zoning Hearing Board Agenda for April 8, 2013 (see attached).
2. Review of the Planning Commission comments on Zoning Hearing Board Appeal No. 3426, 8015 Cooke Road (see attached).
3. Review of recent Decision(s) of the Zoning Hearing Board (see attached).
4. Review of the Ad Hoc Zoning Code Revision Committee Meeting Minutes dated March 4, 2013.
5. Consider recommending to the Board of Commissioners the adoption of a Resolution amending the Township Code relating to certain Zoning Filing Fees (see attached).
6. Report of the Building Inspector for March 2013 (see attached).
7. Old Business
8. New Business
  - a. Review of the Montgomery County Court of Common Pleas Decision on Zoning Hearing Board Appeal No. 3413, Appeal of Montgomery Court Realty Co., L.P. (see attached).
9. Citizens' Forum
10. Adjournment



Bryan T. Havir  
Township Manager

**ZONING HEARING BOARD**

**AGENDA**

**FOR**

**APRIL 8, 2013**

## NOTICE

**NOTICE IS HEREBY GIVEN that an application for zoning relief for 8015 Cooke Rd, Elkins Park, PA 19027 will be reviewed by the following Township Bodies which will offer recommendations to the Zoning Hearing Board:**

- a. Cheltenham Township Building and Zoning Committee on Wednesday, April 3, 2013 at 8:00 P.M. in Curtis Hall at Curtis Arboretum, Wyncote, PA 19095.**

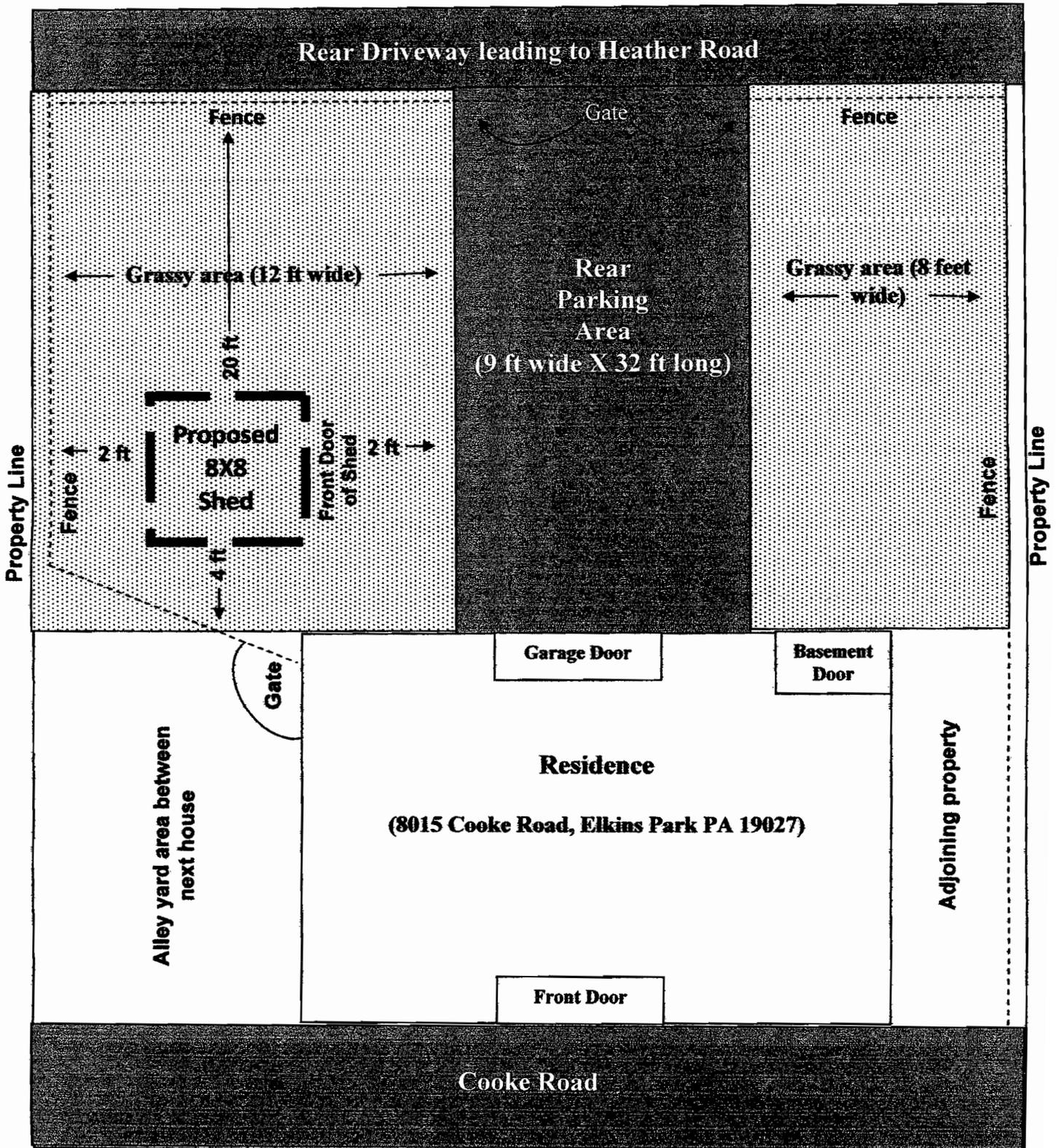
**This application will be heard by the Zoning Hearing Board on Monday, April 8, 2013 at 7:30 PM at Curtis Hall, Greenwood Avenue and Church Road, Wyncote, PA 19095.**

**APPEAL NO. 3462:** Appeal of Jared Z. Karr, owner of premises known as 8015 Cooke Rd, Elkins Park, PA, from the Decision of the Zoning Officer for a variance in accordance with the rules and regulations of the Class R-5 Residence District as outlined in CCS 295-46.B.(1) for a lesser side yard setback of 2' instead of the minimum required 8' in order to install a 8' x 8' shed.

**The above application, including site plans, is on file in the Township Administration Building, Building and Zoning Department, Room 204, 8230 Old York Road, Elkins Park, PA, 19027 and are open for review, Monday thru Friday, 8:00 AM to 4:30 PM.**

**Any person or persons with a disability requiring a special accommodation to participate in the meeting should notify the Public Information Officer at 215-887-1000 at least 5 work days prior to the meeting.**





ZHB 3462

8015 Cooke Road, Elkins Park 19027

Shed Description

Construction: Hand build on site for a residence in Oreland, Pa (Purchasing through Craigslist). All-wood, shingled roof with ventilation. Locking Door.

Dimensions: Eight feet wide by eight feet deep by six feet tall.

Contractor: Unknown

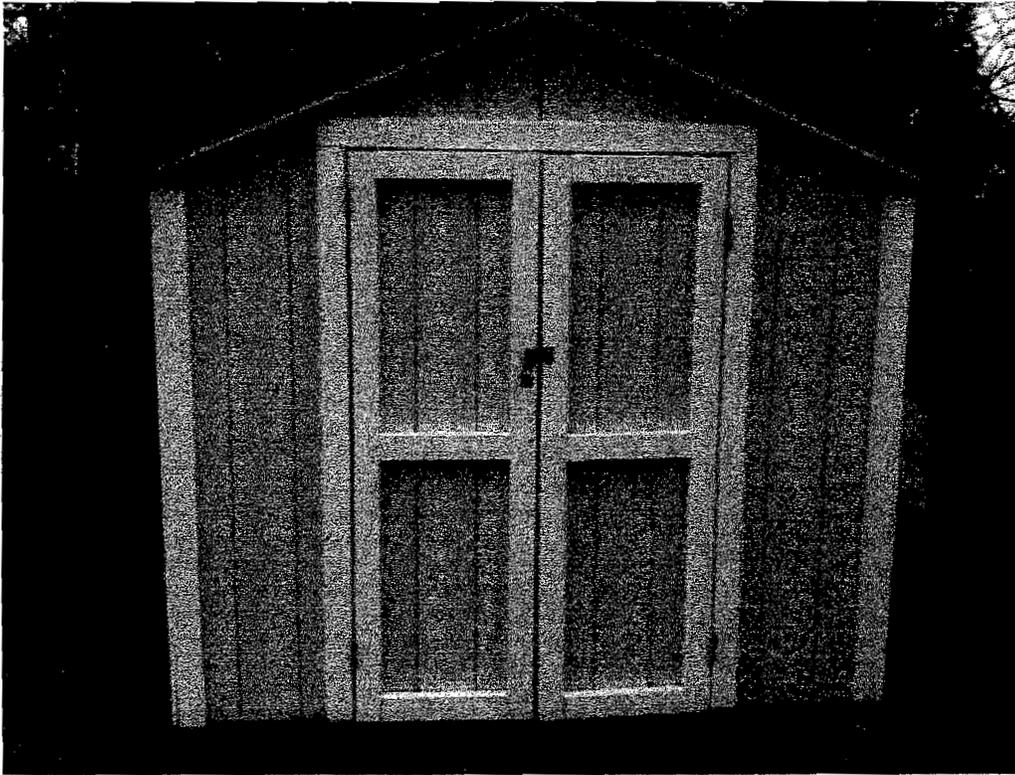
Emplacement: Will be professionally transported and emplaced by Discount Structures in Warrington, PA; 500 Easton Rd Warrington, PA 18976; (215) 343-9299.

Emplacement will be onto a leveled, slightly elevated (approximately 2 inches) surface of crushed stone encased by pressure treated wood rated for ground contact that are secured by rebar. The shed itself will sit on three to four pressure treated 4 X 4 runners rated for ground contact.

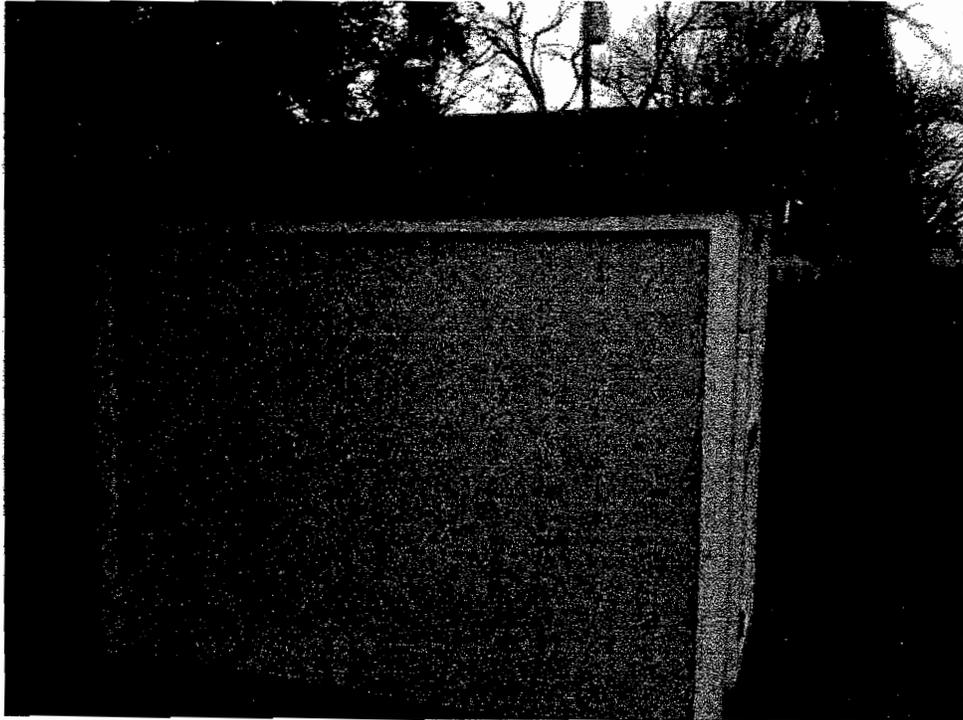
Two photos of shed follow.

ZHB 3462

Front of Shed



Profile of Shed



ZHB 3462

# Township of Cheltenham

Montgomery County, Pennsylvania

## Board of Commissioners

Art Haywood, *President*  
Harvey Portner, *Vice President*  
Kathy A. Hampton  
Charles D. McKeown  
Daniel B. Norris  
J. Andrew Sharkey  
Morton J. Simon, Jr.

**Township Manager**  
Bryan T. Havir



**Administration Building**  
8230 Old York Road  
Elkins Park, PA 19027-1589

Phone: 215 887-1000  
FAX: 215 887-1561  
WWW.CHELTENHAMTOWNSHIP.ORG

## MEMORANDUM

**March 19, 2013**

**TO:** Morton J. Simon, Jr.- Chair  
Harvey Portner - Vice Chair  
Kathy A. Hampton - Member  
Charles McKeown - Member  
J. Andrew Sharkey - Member  
Daniel Norris – Member  
Art Haywood - Ex-Officio Member

**FROM:** David R. Jones  
Interim Director – Engineering, Zoning &  
Inspections

**RE:** **ZHB Appeal No. 3462**  
**8015 Cooke Road**

The Planning Commission meeting was cancelled on March 18, 2013. However, the Committee had the following comments on the above referenced Appeal.

**“ We have a consensus from the commission to’ *take no action*’ but with the following recommendations:”**

- **Advise the applicant to secure written neighbor endorsements.**
- **Advise the applicant to look for any neighborhood precedence of similar side yard waivers which may be cited.**
- **Advise the applicant to bring photos of the site conditions. The photos should include views from up and down Heather Road, and directly across the street, looking towards the property, showing the back of the house, the driveway and rear yard areas/plantings/trees.**

cc:  
Bryan T. Havir, Township Manager \*  
\*Via email

**ZHB 3462**

**RECENT  
ZONING HEARING BOARD  
DECISIONS**

**ZONING HEARING BOARD  
OF CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPEAL NO. 3437**

**Applicant:** 1050 Ashbourne Associates, LLC  
c/o Reuven Niknam  
P.O. Box 1545  
Jackson, New Jersey 08527

**Subject Premises :** 1050 Ashbourne Road  
Cheltenham, Pennsylvania

**Owner of Premises:** 1050 Ashbourne Associates, LLC

**Nature of Application:** Applicant appeals from the determination of the Zoning Officer finding that developing the 6.05 acre Property (exclusive of right-of-way) into three or four story buildings containing 79 age-restricted units, requiring a special exception to allow the Age Restricted Overlay use of the Property, using a less than required road frontage along each single state highway bordering the Property, increasing the maximum allowed building length, seeking a determination that the condemned remnants of the existing Kerlin Farmhouse do not qualify as a Historic Resource, and allowing a disturbance of 15% or more of the slopes located on the Property would violate the Cheltenham Zoning Ordinance of 1929, as amended, and, specifically, Article XXXIII, Section 295-242, regulating uses in an Age Restricted Overlay District; Article XXXIII, Section 295-240, regulating purpose in an Age Restricted Overlay District; Article XXXIII, Section 295-241, regulating the application of an Age Restricted Overlay District; Article XXXIII, Section 295-243, regulating performance standards in an Age Restricted Overlay District; Article XXXIII, Section 295-244, regulating development; and Article XXII, Section 295-166, regulating uses and development in

A Steep Slope Conservation District.

Applicant seeks a special exception, a determination, and variances from the rules and regulations of the R-4 Residence District as follows:

- (1) a special exception to Section 295-242(B)(1) permitting an Age Restricted Overlay use of the Property;
- (2) a determination that the required frontage along a state highway is not limited to a "single" state highway pursuant to Section 295-241(C), since the proposed site has approximately 850 feet of frontage (450 feet required) along Ashbourne and Oak Lane Roads, both state highways; or

in the alternative,

- (3) a variance from Section 295-241(C) to allow a road frontage along each single state highway to be less than 450 feet. Ashbourne Road has approximately 430 feet of frontage and Oak Lane Road, has approximately 420 feet of frontage;
- (4) a variance from Section 295-243(G)(2) to allow 3 foot stairwell projections in addition to the maximum building length of 160 feet;
- (5) a determination that the Township condemned remnants of the Kerlin Farmhouse do not qualify as a Historic Resource pursuant to Section 295-244(J); and
- (6) a variance from Section 295-166(B) to allow the disturbance of 0.67 acres of areas designated as having steep slopes of 15% or more slopes within a Steep Slope Conservation District.

Time and Place of  
Hearing:

Monday, August 13, 2012 – 9:05 p.m.  
Monday, October 15 2012 – 7:30 p.m.  
Tuesday, November 27, 2012 – 7:35 p.m.

Monday, December 10, 2012 – 7:55 p.m.  
Monday, January 14, 2013 – 10:55 p.m.  
Curtis Hall  
Church Road and Greenwood Avenue  
Wyncote, Pennsylvania

### **FINDINGS OF FACT**

1. Applicant 1050 Ashbourne Associates, LLC (“Applicant”) is the owner of the premises known as 1050 Ashbourne Road, Cheltenham, Pennsylvania (a/k/a Kerlin Farm) (the “Property”).

2. Prior to the holding of the hearing in this matter, an advertisement, noting the time and place of the hearing and the contents of the appeal, was placed in a newspaper of general circulation.

3. The Property is located in an R-4 Residence District and is improved by an unoccupied and unused farmhouse.

4. The following documents were made a part of the record:

ZHB-1. a copy of the notice of appeal;

ZHB-2. an Application to the Zoning Hearing Board, referenced as Appeal No. 3437;

ZHB-3. a plan entitled Age Restricted Apartments, prepared by David J. Plante, Professional Engineer;

ZHB-4. a copy of memorandum from the Building and Zoning Committee dated August 1, 2012, recommending denial of the appeal based on insufficient road frontage along the state highway;

A-1. a copy of the recorded deed to the Property, dated November 10, 2010;

A-2. a photograph, marked "1050 Ashbourne Road, Sample Section Reconstructed Wall";

A-3. a series of photographs of the existing structure on the Property;

A-4. an unsigned copy of a letter addressed to Ms. Elizabeth Barclay from Township Director of Engineering, Zoning and Inspections and dated June 8, 2009;

A-5. Demolition Permit No. 10-5834, dated February 11, 2001, Building Permit Application and associated materials;

A-6. a series of site plans, subtitled Neighborhood Plan, Illustrative Site Plan, Illustrative utility Plan, Illustrative Steep Slope Plan, Boundary and Topographic Survey and Existing Boundary Exhibit, prepared by Ritter & Plante Associates, LLC; supplemented by Zoning Plan, bearing the signature and seal of David J. Plante, PE;

A-7. a series of photographs of the farmhouse entitled, Photographs of Existing Conditions, prepared by John J. Di Benedetto Associates, Architects, Inc.

A-8. map entitled, National Register Eligibility of Properties Included in the 2008 Cultural Resources Survey;

A-9. copy of email from William Curry;

A-10. a letter from Joseph W. Cooke, P.E., to John Di Benedetto Associates, Inc. dated December 5, 2011;

A-11. Environmental Impact Study, Phase I prepared by John J. Di Benedetto Associates, Architects, Inc.;

A-12. Arboricultural Report prepared by Andrew William Graham, Jr. dated June 29, 2011;

A-13. Traffic Impact Study for the Proposed 1050 Ashbourne Road Residential Development prepared by McMahon Transportation Engineers.

A-14. Boundary and Topographic Survey dated July 13, 2011;

A-15. Curriculum vitae of David Plante, PE, PP;

A-16. Curriculum vitae of George Ritter;

A-17. Planning Report Fiscal Impact prepared by Ritter & Plante Associates, LLC;

A-18. Preliminary Land Development Plan, dated June 13, 2012;

A-19. Open Space Plan prepared by Ritter & Plante Associates, LLC;

A-20. portions of an advertising brochure from EP Henry, illustrating stone materials proposed for the Project's two stone retaining walls near the southern boundary line;

A-21-A. revised Site Plan produced in 11" x 17" format;

A-21-B. revised Site Plan produced in full size;

A-22. reproductions of a portion of the Cheltenham Zoning Code, Exhibits A and B;

A-23. a series of three (A-23(a),(b) and (c)) rendered floor plans of the Project's buildings;

A-24. a series of three (A-24 (a),(b) and (c)) rendered elevations of the Project's buildings and a rendered aerial perspective;

A-25. a site section illustrating buffers, neighboring residences, location of infiltration basins and a building proposed for the Property;

A-26. Memorandum of Law in Support of the Application to the Cheltenham Township Zoning Hearing board of 1050 Ashbourne Associates, LLC;

A-27. Illustrative Cross-Section prepared by Ritter & Plante Associates, LLC;

A-28. photographs (A-28 (a), (b) and (c), of building materials provides by John J. Di Benedetto Associates Architects, Inc.;

P-1. prepared comments of Ed Landau, Board of Directors, Old York Road Historical Society;

P-2. history of Bolton-Heidelberg Farm, Ashbourne Road and Oak Lane Road, Cheltenham;

P-3. a portion of a newsletter entitled, Preserving Pennsylvania;

P-4. Historic Resource Information, part of a report from the Pennsylvania Historical and Museum Commission's database;

P-5. a portion of the Cheltenham Township Comprehensive Plan, adopted February 2005;

P-6. a portion of the Cheltenham Township Open Space Plan, dated February 2006;

5. The Property is located in the southeast corner of Oak Lane and Ashbourne Roads in an R-4 Residence District and consists of 7.32 acres including .67 acres designated as having steep slopes. The Property slopes to the south and has a grade difference of 28 feet.

6. Located east of the Property is Cheltenham Elementary School, a public school, part of the School District of Cheltenham Township.

7. The Property is bounded to the southwest by five single-family homes which also enjoy the R-4 Residence District zoning classification.

8. Two properties, used as single family residences, are contiguous to the site along Ashbourne Road and also zoned in an R-4 Residence District.

9. Applicant described the Property as wooded with a low, deteriorating stone wall along Ashbourne Road, and Applicant represented that it will repair the stone wall.

10. Applicant proposes to develop the Property for 79 market rate, age-restricted apartments in three four-story buildings, resulting in a density of 11 dwelling units per acre (the "Project").

11. The Property was at some time known as the Kerlin/Heidelberg Farm, which was determined by the Pennsylvania Historical and Museum Commission to be eligible for listing on the National Register of Historic Places, a listing which does not place any limitations on the owner's use of the Property.

12. The Property was at one time improved by a residential building which is now vacant and located in approximately the middle of the Property (the "farmhouse").

13. Applicant proposes to demolish the existing vacant farmhouse.

14. Preservation advocate, Preservation Pennsylvania, listed the property among Pennsylvania's most endangered historic properties with an "at risk" designation that means the property had not been properly maintained and was in danger of being lost due to extensive water damage and overall neglect.

15. The Property and its farmhouse are not listed in Cheltenham Township's Cultural Resources Survey.

16. Applicant proposes to develop a Kerlin Farm Memorial Garden and to celebrate the history of the Property. The Garden is proposed to be located between the buildings and Ashbourne Road.

17. Applicant proposes to develop the Project in accordance with Cheltenham Township Ordinance 2236-12, providing for age-restricted housing developments for residents 55 years of age or older in all residentially zoned properties.

18. The Project includes three (3) four-story buildings. The proposed Building 1 will be "T" – shaped, include 31 apartments and contain first-floor accessory services for the residents. Buildings 2 and 3 will be similar in form, being rectangular and having 24 apartments in each.

19. In addition to the principal residential use, Building 1 will house accessory meeting and dining areas and retail and personal service shops and stores on its first floor.

20. Building 1 will house an assembly, activity or community room (the "community room"). The area will measure 1,902 square feet including 527 square feet dedicated to a kitchen. The community room will not be offered for public rental and will be limited to use by residents and their guests. Use of the community room will not include events or celebrations that will bring large numbers of non-residents to the Property.

21. Applicant asserts that the Project is code compliant with regard to permitted units, building and parking setbacks, building height, length of building, distances between buildings, building area coverage, impervious coverage, open space areas and parking.

22. John J. Di Benedetto of John J. Di Benedetto Associates, Architects, Inc., was sworn and accepted as an expert in architecture on behalf of Applicant. The Board relied upon Mr. Di Benedetto's testimony.

23. Mr. Di Benedetto testified that there are no wetlands on the Property.

24. Mr. Di Benedetto testified that fewer trees will be removed for the proposed development of the Property than with a single-family residential development.

25. Mr. Di Benedetto's firm prepared an Environmental Impact Study, Phase 1, which stated the Project's impact on existing floodplains, wetlands, woodlands, steep slopes, and other natural features of the Property.

26. Applicant proposes a new curb cut driveway entry to be installed on Ashbourne Road at a distance of 240 feet from the 1034 Ashbourne Road residence and a distance of 505 feet from the Cheltenham Elementary School property.

27. Mr. Di Benedetto testified that no official documentation proves the farmhouse's historic value and there is no evidence of hand-hewn rafters within the remains of the farmhouse at the Property. Applicant proposes to demolish the structure.

28. Mr. Di Benedetto testified that the Township issued a demolition permit and a condemnation notice in connection with the demolition of a two-story wing and porch structure on the Property, with the remaining portions of the structure remaining open to the weather, collapsing and deteriorating.

29. Carmen Reitano, Assistant to the Director of Building, Engineering and Zoning, identified seven (7) photographs of the existing structure on the Property, two (2) of which were taken on March 6, 2012, by Abbey Spector, one (1) taken on April 15, 2012, two (2) taken on July 22, 2011, and two additional photographs which are undated. The photographs depict the condition of portions of the farmhouse on the days that the photographs were taken.

30. Mr. Reitano and Mr. Spector inspected the Property on March 6, 2012 in order to determine the condition of the farmhouse.

31. Following an inspection of the Property by Mr. Reitano and Mr. Spector on May 21, 2009 and on June 8, 2009, Mr. David M. Lynch, the Township's Director of Engineering, Zoning and Inspections issued a letter to the then-owner of the Property. Lynch's letter notified the Property owner that the Township had determined the farmhouse to be unsafe and in imminent danger of collapse. In addition, the letter notified the Property owner that she was required to take certain protective actions.

32. Following the issuance of Lynch's June 8, 2009 letter, Mr. Reitano and Mr. Spector posted the Property with an orange poster notice that the farmhouse was unsafe.

33. Mr. Reitano testified that there were several inspections of the Property and that the Property was twice posted with red notices of condemnation.

34. On February 11, 2011, the Township issued a demolition permit to allow the demolition of the farmhouse.<sup>1</sup>

35. Stephen H. Higgins, of Ritter & Plante Associates, LLC, was sworn and accepted as an expert in surveying on behalf of Applicant. The Board relied in part upon Mr. Higgins's testimony.

36. Mr. Higgins performed and prepared a Boundary and Topographic Survey and an Existing Boundary Exhibit of the Property, and the Survey was based upon the deed description.

37. In response to a question from applicant's counsel, Mr. Higgins testified that the "total dimension" of the street front along Ashbourne Road is 452.88 feet. In order to arrive at that measurement, Mr. Higgins extended the right-of-way lines of Ashbourne Road and Oak Lane Road to a point where those lines intersected. Mr. Higgins measurement was a measurement from the most easterly point of the Property's Ashbourne Road property line to the intersection of the extended rights-of-way. The Zoning Board did not find Mr. Higgins' testimony with regard to the measurement of the Ashbourne Road frontage to be credible.<sup>2</sup>

38. The Property does not have a frontage along Ashbourne Road that measures 452.88 feet and the frontage measures less than 450 feet.

39. The existing Ashbourne Road frontage provides sufficient distance to allow the applicant to locate entrances and driveways with adequate separations to ensure safe ingress and egress. The frontage and resulting shape and area of the Property allow the applicant to appropriately buffer the Project from neighboring properties as wells as sufficient distance to allow the applicant to establish the Project's identity.

40. Providing less than the required 450 feet of Ashbourne Road frontage will not result in any adverse effect to the public interest.

41. Architect Di Benedetto testified that the structure of the farmhouse "is lost." Mr. Di Benedetto further stated that the farmhouse was far too deteriorated to save, relying in part upon the opinion of preservation architect John Milner.

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<sup>1</sup> In accordance with the Commonwealth's Permit Extension Act, the demolition permit remains valid until final action is taken under the authority of the permit or July 1, 2016.

<sup>2</sup> Counsel's question was, "What is the dimension along Ashbourne Road on the site?" Mr. Higgins answered, "[t]he total dimension when you take the two existing right-of-way lines and intersect them is 452.88."

42. Joseph W. Cooke, a professional structural engineer, was sworn and accepted as an expert structural engineer on behalf of Applicant. The Board relied upon Mr. Cooke's testimony.

43. Mr. Cooke visited the Property on three or four occasions and formed an opinion as to its condition, which he expressed in a letter to applicant's architect on December 5, 2011.

44. The farmhouse's structural elements have been exposed to the weather for an extended time with the result that much of the wood elements as well as bearing walls have rotted. Floor framing has fallen and collapsed, at times taking down portions of exterior stone walls. Deterioration caused the loss of the roof, and stone walls were no longer attached to interior mortar.

45. The farmhouse structure is not safe to enter and no longer provides protection against weather and other elements.

46. Joseph DeSantis, a principal of McMahon Associates, was sworn and accepted as an expert traffic engineer on behalf of Applicant. The Board relied upon Mr. DeSantis's testimony.

47. Applicant's Traffic Impact Study documented the impact of the Project on the Township and regional transportation system and the ability of adjacent streets and intersection to efficiently and safely handle traffic generated by the Project.

48. Trip generation for an age-restricted apartment complete is one fourth that of a single family home development of the same number of units.

49. The Project will result in 20 total trips during the morning and afternoon peak traffic hours.

50. The Project will result in no significant impact to traffic on adjacent or nearby roadways.

51. While Mr. DeSantis conceded that delays may increase by a second or two, the Project will not change the level of service at nearby intersections and the additional generated traffic will be an insignificant change to the nearby traffic.

52. Proposed traffic improvements including the widening of Oak Lane Road will result in a benefit to the traveling public.

53. David Plante, of Ritter & Plante Associates, LLC, was sworn and accepted as an expert civil engineer on behalf of Applicant.

54. In response to applicant's counsel's question asking for the dimension of the Property's Ashbourne Road distance, Mr. Plante offered an opinion that the only method that "really makes sense to measure the frontage here is to project the right-of-way lines" and that "there's no other way to measure directly the frontage along the existing right-of-way line."

55. Mr. Plante admitted that the municipal code provided no guidance for determining the street frontage in the Project's circumstances and that no other rule of construction or rule of measurement provided a solution. Mr. Plante's opinion was based solely on his experience. The Zoning Board did not agree with Mr. Plante that the only way to measure the Ashbourne Road frontage was to include distances created by lines intersecting outside of the metes and bounds of the Property.

56. Both Ashbourne Road and Oak Lane Road are state roads and have a combined road frontage of over 800 feet at the Property.

57. George Ritter, a principal of Ritter & Plante Associates, LLC, was sworn and qualified as a professional landscape architect and expert land planner for the applicant. The Board relied upon the testimony of Mr. Ritter.

58. The governing ordinance provides substantial setbacks resulting in siting the principal buildings at the center of the Property, creating distances between the buildings and the street and the neighboring properties. Where the minimum front yard setback in this and other residential districts is 40 feet, the minimum front yard setback for the Project is 106 feet. The siting of the Project exceeds the minimum setback requirements in order to maximize the separation distances. From Oak Lane Road, the setback to the nearest building is over 200 feet and 190 feet on the south side of the project. The nearest distance measured from a building to a residence is 140 feet.

59. Existing stormwater is discharged directly on the Property. The Project includes extension of the existing drainage pipe to a proposed stormwater conveyance system on the Property. Proposed measures include a subsurface detention/infiltration basin designed to carry increased flows from the site area. The system will infiltrate and control peak run-off rate and volumes and will regulate the outflow into existing storm sewer on Berwyn Road without flooding adjacent properties.

60. Stormwater measures for the Project will improve some drainage conditions in the nearby area. Stormwater drainage to the south of the project will be improved by the Project's stormwater facilities that include stormwater infiltration basins resulting in a reduction of stormwater run-off through infiltration.

61. Applicant's Registered Consulting Arborist examined six trees at the Property and recommended preserving and retaining four trees.

62. The Project is allowed a building coverage of 18%, and the Project proposes building coverage of 12.2%.

63. The Project is allowed an impervious coverage of 42%, and the Project proposes impervious coverage of 39.2%.

64. Building 1 has an overall length of 160 feet excluding the measure of the attached canopy which is an additional 4 feet and which Applicant considers an architectural embellishment. If the Building is deemed to measure 164 feet in length on account of the canopy, Applicant may choose to remove the canopy.

65. In addition to the building's 160' length, the building has an enclosed stairway that measures 3 feet in depth and, if added to the 160' building length, will exceed the maximum building length.

66. The stairway encroaches into the rear yard.

67. Applicant's land planner's final calculation of common open space was arrived at by deducting the portions of the Property that will be used for the buildings, the roads and parking lot and intervening open space. The open space resulting from the calculation was that 4.23 acres, 57.8% of the Property, will be common open space.

68. The Project will have 153 parking spaces. The 153 spaces allows for 119 resident spaces (1.5 spaces per dwelling unit), 6 employee spaces (1 space per employee) and 28 guest spaces (1 space for every 5 dwelling units).

69. The Project's utility lines will be underground.

70. The Project will provide sidewalks along all perimeter road frontages and along the perimeters of all parking areas. In addition, pedestrian connections will be provided to the fronts of all buildings, parking areas and all pedestrian destination points.

71. The Project features walking trails to, among other things, the interpretive garden area.

72. Applicant did not submit a landscape plan.

73. Applicant submitted an open space plan which illustrated a substantial amount of vegetation and number of trees. Some trees are existing and others, shown on the plan, will be added to "fortify the buffer" in order to become code compliant. Applicant represented that its final landscaping plan will include a buffer, measuring no less than 25 feet, along the Project's perimeter.

74. The Project requires the removal of 251 trees measuring 6 inches or greater. Forty-nine of those trees measure 20 inches or greater. Applicant represents that it will replace these trees as required by the Township's ordinances.

75. Applicant admitted it did not submit a lighting plan, but committed to strict compliance with the Township's codes.

76. Trash at the Project will be kept totally within the buildings and dumpster and other trash provisions illustrated on submitted plans will be removed from future submissions.

77. Applicant submitted a Planning Report Fiscal Impacts, which noted in detail the immediate post-construction financial benefit to the Township, School District and county.

78. A portion of the Property, described by applicant as a band of land, consists of areas designated as having steep slopes and crosses the Property in an approximate east to west fashion in the center of the Property. Other areas designated as having steep slopes occur along the southwestern Property boundary and in an area near Oak Lane Road. The total area of these steep slopes is .67 acres.

79. Of the .67 acres of areas designated as having steep slopes, .49 acres will be disturbed by or during construction of the Project.

80. All of the disturbed steep slopes are located toward the center of the Property.

81. Any reasonable development of the Property will require disturbance of a substantial portion of the areas identified as having steep slopes.

82. Applicant represented that it will grade and stabilize the disturbed areas to minimize any public threat and to minimize stormwater run-off from these areas.

83. Applicant proposes two stone retaining walls near the southern boundary of the Property. The length and height of the walls vary in accordance with the topography of the Property. The wall closest to the buildings is approximately 360 feet in length and the wall farther from the building runs for a length of 237 feet. The walls are intended to maintain a vegetative buffer and to prevent a grading of the Property that would remove vegetation and preserve perimeter plantings.

84. Applicant represented that the stone walls to the rear of the Property will be constructed in place as an architectural wall with enhanced materials as distinguished from a concrete block wall.

85. The Project will include the addition of substantial plantings and landscaping between the stone walls and the properties south of the Project.

86. Applicant will plant a solid evergreen hedge, measuring 3 to 4 feet in height at the time of planting along the retaining walls in order to provide a dense hedge to block the light from vehicle headlights in the parking fields.

87. In its current condition, the Property's low point is toward Berwyn Road so that stormwater drainage flows toward Berwyn road and the neighboring residential properties. Proposed stormwater facilities will be underground, will include both infiltration and detention, and will be located below the parking fields. The facilities will include 4 stormwater basins that will handle run-off from all developed areas of the Property as well as a small portion of undeveloped area near Oak Lane Road.

88. Applicant represented that neighboring properties will experience a decrease in the Property's stormwater run-off from the current conditions, and the stormwater piping system will be extended from Berwyn Road so that stormwater will be piped directly to the Township's storm and sewer system.

89. Applicant represented that almost no stormwater run-off will leave the Property and fall directly onto neighboring properties, a significant improvement over current conditions.

90. With regard to minimum frontage on a state road, Applicant has demonstrated a hardship.

91. With regard to development of the Project with an enclosed stairway to the rear of Building 1, Applicant has demonstrated a hardship.

92. With regard to development of the Project with disturbances of areas designated as having steep slopes, Applicant has demonstrated a hardship.

93. Applicant met the requirements of the Zoning Code in order to develop the Project in accordance with the provisions of the Age Restricted Overlay District.

94. A grant of relief to allow development of the Property as proposed pursuant to requirements and limitations of the Age Restricted Overlay District will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

95. A grant of relief to allow development of the Property as proposed pursuant to requirements and limitations of the Age Restricted Overlay District will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

96. A grant of relief to allow development of the Property as proposed pursuant to requirements and limitations of the Age Restricted Overlay District will not be contrary to the public interest.

97. A grant of relief to allow development of the Property as proposed with Building 1 measuring 163 in length due to the inclusion of a rear stairwell will result in no adverse effects to individual property rights or to the public health, safety or welfare.

98. A grant of relief to allow development of the Property as proposed with Building 1 measuring 163 feet in length due to the inclusion of a rear stairwell will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

99. A grant of relief to allow development of the Property as proposed with Building 1 measuring 163 feet in length due to the inclusion of a rear stairwell will not be contrary to the public interest.

100. A grant of relief to allow development of the Property with disturbances of .67 acres of areas designated as having steep slopes will result in no adverse effects to individual property rights or to the public health, safety or welfare.

101. A grant of relief to allow development of the Property as proposed with disturbances of .67 acres of areas designated as having steep slopes will result in premises

consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

102. A grant of relief to allow development of the Property with disturbances to .67 acres of areas designated as having steep slopes will not be contrary to the public interest.

### DISCUSSION

Applicant, 1050 Ashbourne Associates, LLC ("Ashbourne") is the owner of a 7.32 parcel located at the intersection of Oak Lane Road and Ashbourne Road in Cheltenham Township, Pennsylvania (the "Property").<sup>3</sup> Ashbourne proposes to develop the Property with three four-story buildings housing 79 age-restricted apartment dwellings with modest accessory retail and community room uses. The Property has been known as Kerlin Farm and has a long history which some claim dates to the 1700s, making it one of the three oldest developed properties in Cheltenham Township. To memorialize the Property's history, Ashbourne proposes a Kerlin Farm Memorial Garden.

Although the Property is located in an R-4 Residence District, Ashbourne seeks the development advantages of building the Project pursuant to Cheltenham Township's Age Restricted Overlay District (the "Overlay"), which it may do if Ashbourne qualifies for a special exception. One precondition to employing the Overlay is that the Property must have frontage on a state road equal to no less than 450 feet. Zoning Code, § 295-241(C)(1). Both Oak Lane Road and Ashbourne Road are state roads.

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<sup>3</sup> The Record reveals minor deviations to the gross area of the Property. Applicant's experts regularly refer to the Property as having 7.32 acres; the site plan states that the area to title lines is 7.64 acres and to right-of-way lines is 7.49 acres. The Record demonstrates no significance to these variations as the Overlay and its provision pertinent to this matter applies to a property having 5 to 8 acres.

While much of the Property parallel to Ashbourne Road has a width of 750 feet, the distance of the property line on Ashbourne Road is less. The Property has a straight line which turns into a corner radius before becoming a straight line along Oak Lane Road. Applicant's Exhibit 14 (Boundary and Topographic Survey). The distance from the adjoining property on Ashbourne Road to the beginning of the radius is 410.22 feet. Applicant's Exhibit A-6.6. The radius measures 49.13 feet, and the Oak Lane Road property line is 397.54 feet.

Applicant argues that the only reasonable method by which to measure the Ashbourne Road frontage is to extend the straight property lines on Oak Lane Road and Ashbourne Road to a point at which these lines intersect. Applicant then claims that the Ashbourne Road frontage should be the distance between this intersection and the beginning point, which applicant figures to be 452 feet. Id. However, applicant points to no accepted rule of measurement or engineering principal to support its method. Because applicant does not own the land on which applicant has drawn the extended property lines, the Board cannot accept this method of measurement.

In the alternative, applicant argues that all frontages on state road should be added together in which case the total of frontages on Oak Lane Road and Ashbourne Road approximates 800 feet, far in excess of the minimum 450 feet. Applicant again failed to produce a code provision or a rule of construction that warrants the additive approach. Indeed, where the words of an ordinance are clear and free from all ambiguity, the Zoning Board may not ignore the letter of the ordinance under the pretext of pursuing its intent. 1 Pa.C.S.A. § 1921(b) (Rules of Construction).

On the other hand, protestant David L. Cohen, a resident and urban planner, urged a strict construction requiring an absolute 450 feet.<sup>4</sup> The Zoning Board concluded that there was a middle ground which is reasonable and supportive of the Overlay's purposes.

The Zoning Board concludes that it is reasonable to measure the Ashbourne Road frontage by adding the straight property line dimension (410 feet) to one-half of the corner radius (25 feet) -- resulting in a frontage of 435 feet. Accordingly, the deficiency is 15 feet or approximately 3%. Where a deviation from the requirement is 3%, the Zoning Board may consider the *de minimis* variance doctrine.

"The *de minimis* variance doctrine is a narrow exception to the heavy burden of proof involved in seeking a variance. The doctrine applies only where: (1) a minor deviation from the dimensional uses of a zoning ordinance is sought, and (2) rigid compliance with the zoning ordinance is not necessary to protect the public policy concern inherent in the ordinance." *Appletree Land Development v. Zoning Hearing Bd. of York Twp.*, 834 A.2d 1214, 1216 (Pa. Commw. Ct. 2003). There is no precise mathematical percentage which marks a dividing line between deviations which are *de minimis* and significant. The Zoning Board is within its discretion to decide that 15 feet is a minor deviation from the requirement for 450 feet and satisfies the first prong in a *de minimis* analysis. See *Swemley v. Zoning Hearing Bd. of Windsor Twp.*, 698 A.2d 160, 162-3 (Pa. Commw. Ct. 1997).

The second prong requires an investigation into the protected public interest. Here, neither applicant nor objectors could identify the public interest protected by the frontage

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<sup>4</sup> Mr. Cohen offered cogent testimony which the Zoning Board respected although arriving at contrary results.

requirement. In *Zimmerman v. Zoning Bd. of Adjustment*, 626 A.2d 1182 (Pa. Commw. 1993), Commonwealth Court instructed that

[t]he obvious purposes of a zoning ordinance requiring lots to have street frontage are to protect the public by insuring access of fire, police and emergency vehicles to the property, and to provide suitable and reliable access routes to and from the property.

Id. at 1186. Here, the testimony of Applicant's qualified planning expert established that the existing Ashbourne Road frontage afforded the Project with adequate and safe distances and separations between access points. In addition, the expert traffic engineer testified that the Project posed no traffic problems for the Project or the community. Accordingly, mandating a rigid compliance for an Ashbourne Road frontage of 450 feet is not necessary to protect the public interest, and a deviation of 3% equally protects those interests in the circumstances of this matter. *See Middleton Twp. v. Zoning Hearing Bd.*, 682 A.2d 900, 902 (Pa. Commw. Ct. 1996) (a 6.7% deviation in maximum building coverage warranted a *de minimis* variance). The Zoning Board, therefore, exercises its discretion to grant a *de minimis* variance with regard to road frontage.

The Overlay provides for the protection of historic resources, and the Record demonstrates that the fate of the farmhouse was critical to the application of the Overlay. The farmhouse is located at the center of the Property and its preservation and required buffer from new development of 50 feet would likely prevent or significantly alter the proposed development. Zoning Code, § 295-244(J)(3). The Record contains much credible testimony on the historic importance that Kerlin Farm once had. Indeed, it is eligible for the National Register of Historic Places. But eligibility and actual listing on the National Register alone does not and would not limit the ability of a property owner to demolish a structure. But the local ordinance does protect structures.

The Overlay defines HISTORIC RESOURCE as a *structure* listed on any of a number of registers or lists of historic and cultural resources or other appropriate documentation. Zoning Code, § 295-2.C. Critical to this analysis, however, is the Zoning Code's definition of "structure."

STRUCTURE – any form or arrangement of building materials involving the necessity of provided proper support, bracing, tying, anchoring or other protection against the forces of the elements.

Zoning Code, § 295-2(C).

Here, the uncontradicted evidence is that Township officials inspected the farmhouse on numerous occasions and determined the farmhouse to be unsafe. The Building Code Official notified the owner on June 8, 2009 that the building was "in imminent danger of collapse." Applicant's Exhibit 4 ("Lynch Letter"). The Lynch Letter further informed the owner that the Township would post the farmhouse property as "Condemned as Dangerous and Unsafe – Danger Keep Out." Id. The Property was, in turn, posted with condemnation placards.

Structural engineer Joseph Cooke testified that the farmhouse structure was not safe and that workmen should not be allowed inside the farmhouse. In a professionally sealed letter to architect Di Benedetto, Cooke wrote that the "structure is in a state of severe disrepair and apparently has not been used for two decades or more." Applicant's Exhibit A-10. Photographic evidence establishes that roof, wall and flooring systems have failed. Finally, on February 11, 2011, the owner obtained a demolition permit and the demolition permit was posted at some time at the Property. There is no Record of an appeal from the issuance of the permit, and the owner is entitled to demolish the farmhouse.

The Zoning Board concludes, therefore, that the farmhouse no longer provides proper support, protects against the elements and no longer qualifies as a structure. Since it is

not a structure, the farmhouse does not come under the protections for historic structure provided in the Overlay.

Applicant also seeks a variance to allow a stairwell that extends the length of Building 1 by 3 feet, resulting in an overall length of 163 feet. Zoning Code, § 295-244(G)(2). Applicant directs the Zoning Board to consider the Zoning Code's allowances for certain projections even into required front, side and rear yards. Zoning Code, § 295-220(A), (B) and (C). Accessory cornices, eaves, gutters and chimneys may project 3 feet into the required yards. Here, the stairwell does not project into required setbacks or yards, but, instead, merely extends the length of the building. Given the small amount of the footprint of this single stairwell, the importance of the stairwell to the safety of the building residents, and the overall 7.32 acres of Property, the Zoning Board applies the *de minimis* analysis above and concludes that the applicant is entitled to a variance to allow the stairwell to exceed the maximum building length by less than 2%.

The Property is burdened by .67 acres of areas designated of having steep slopes. Applicant proposes to disturb approximately .49 acres in construction of buildings, the central driveway loop and parking areas of the Project. For the most part, the .49 acres occur in a narrow strip running through the center of the Property. Applicant's Exhibit A.-6.3 (Illustrative Steep Slope Plan). Allowing for a reasonable separation distance from the corner of Oak Lane Road and Ashbourne Road, an entrance into the site would necessarily transect the greater portion of the areas designated as having steep slopes. Any reasonable development would likely disturb this centrally located area, and the Property could not be developed without disturbances.

The Project otherwise meets the requirements to qualify for Overlay treatment of the Project as follows:

**Zoning Code, § 295-241 OVERLAY**

The Property is greater than 5 acres. Zoning Code, § 295-241(A). The Property is located in an R-4 Residence District. Zoning code, § 295-241(B). The Property has state highway frontage of 450 feet or greater. Zoning Code, § 295-241(C) (see discussion above).

**Zoning Code, § 295-242 USE REGULATIONS**

Proposed uses are age restricted dwellings, accessory retail or personal service shops, dining facilities, recreational facilities and community room. Zoning Code, § 295-242 (A) and (B)(1), (2) and (3).

**Zoning Code § 295-243 PERFORMANCE STANDARDS**

The Project meets all minimum setbacks for buildings and parking areas. Zoning Code, § 295-243(A)(1), (2) and (3); Applicant's Exhibit A-21. The Project's housing type is midrise multi-family dwellings organized in buildings having 4 stories with a height of 47 feet. Zoning Code, § 295-243(B). The dwelling density for this multi-family dwelling is less than 12 dwelling units per developable acre. Zoning Code, § 295-243(D)(2). The building coverage will be 12.2% and will not exceed 18%. Zoning Code, § 295-243(D); Applicant's Exhibit A-21. The Project's impervious coverage will be 39.2% and will not exceed 45%. Zoning Code, § 295-243(E); Applicant's Exhibit A-21. The buildings in the Project will not exceed 47 feet in height. Zoning code, § 295-243(F); Applicant's Exhibit A-21. The minimum distance between the Project's buildings will be 35 feet and will not be less than 30 feet. Zoning Code, § 295-

243(G)(1). Except as otherwise allowed by variance, the maximum length of the buildings shall be 160 feet. Zoning code, § 295-243(G)(2). The minimum setback from internal accessways will be 25 feet. Zoning Code, § 295-243(G)(3); Applicant's Exhibit A-21. The Project's common open space will be 65% of the tract. Zoning Code, § 295-243(H)(1). Applicant represents that the areas designated as common areas shall be maintained by a single owner of the apartment complex. Applicant represents that an arrangement will be made to guarantee the maintenance requirement. Zoning Code, § 295-243(H)(2). As relief granted will be conditioned upon substantial compliance with the representations made by applicant, the Township may seek to have requirement memorialized for enforcement. The Project has no riparian buffers to protect. Zoning Code, § 295-243(I).

**Zoning Code, § 295-244 MASTER PLAN**

Applicant's exhibits illustrate the complete development of the site. In addition, the Project will require compliance with the Township's Subdivision and Land Development Ordinance. The Zoning Board concludes that applicant's exhibits together with SALDO approval is a master plan for the Project. Zoning Code, § 295-244(A)(1). Applicant represented that the initial phase of the project will include all off-site improvements, internal roadways, parking areas, stormwater management facilities and Building 1. Zoning Code, § 295-244(A)(2). Financial guarantees are part of the Township's land development approval, and any security agreement will be within the authority of the Board of Commissioners. Zoning Code, § 295-244(A)(3). The Project has 153 parking spaces and meets the parking requirements of the Zoning Code. Zoning Code, § 295-244(B); Applicant's Exhibit A-21. All utilities shall be located underground. Zoning Code, § 295-244(C). The Project will be serviced by public sewer and water. Zoning Code, § 295-244(D). The Project has sidewalks along all perimeter road

frontages and along road frontages within the site. Zoning Code, § 295-244(E)((1); Applicant's Exhibits A-18, A-21. Pedestrian connections will be provided to the fronts of all buildings, parking areas and other pedestrian destinations. Zoning Code, § 295-244(E)(2) and (3); Applicant's Exhibits A-18, A-21. The Project includes walking paths that are incorporated in common areas. Zoning Code, § 295-244 (E)(4); Applicant's Exhibit A-21. The Project includes a landscape buffer of no less than 25 feet along the perimeter and applicant has demonstrated its intent toward tree preservation. Zoning Code, § 295-244(F). As a condition of this approval granted by the Zoning Board, applicant will be required to present a detailed landscape plan that conforms to the exhibits presented during the course of hearings before the Zoning Board. Applicant represented that its lighting plan will be code compliant. Zoning Code, § 295-244(G). Trash will be stored within the buildings. Zoning Code, § 295-244(H).

Applicant's architect submitted sample materials and rendered site plans illustrating the proposed materials. Zoning Code, § 295-244(I)(4). These exhibits demonstrate that the Project has a single unifying architectural theme in keeping with the community's architecture. Zoning Code, § 295-244(I)(1). The Project demonstrates articulations by the use of roof details, balconies and alteration of materials. Zoning Code, § 295-244(I)(2) and (3). Applicant will be required to meet the energy standards and verification required by the Zoning Code, § 295-244(I)(5).

Applicant submitted an environmental impact study (Applicant's Exhibit A-11, a traffic impact study (Applicant's Exhibit A-13) and a fiscal impact study (Applicant's Exhibit A-17). Zoning Code, § 295-244(K). The additional requirements are within the jurisdiction of the Township. Zoning Code, § 295-244(L).

## CONCLUSIONS OF LAW

1. Development of the Property as proposed without a special exception to allow development in accordance with the Age Restricted Overlay District is not permitted as-of-right by the Cheltenham Township Zoning Ordinance. In addition, development as proposed with a building measuring 163 feet, disturbances of .67 acres of areas designated as having steep slopes and with less than required state road frontage is not permitted by the Cheltenham Township Zoning Ordinance. However, in accordance with the Pennsylvania Municipalities Planning Code and the Cheltenham Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to hear and decide requests for variances where it is alleged that strict conformance with the governing ordinances would result in unnecessary hardship. Similarly, the Zoning Hearing Board is empowered to grant special exceptions where the application meets the criteria of the zoning ordinances.

2. The existing and vacant farmhouse is not an historic structure.

3. Under the circumstances of this matter, applicant has met its burden in establishing that, due to the unique physical circumstances of the Property and those imposed by surrounding properties, a failure to grant relief in order to allow development of the Property with state road frontage as illustrated on sealed plans of record would result in an unnecessary hardship.

4. Applicant has demonstrated by the facts of record that the application meets the requirements for the grant of a special exception.

5. Under the circumstances of this matter, applicant has met its burden in establishing that, due to the unique physical circumstances of the Property and those imposed by surrounding properties, a failure to grant relief to allow construction of Building 1, with a length of 163 feet, would result in an unnecessary hardship.

6. Under the circumstances of this matter, applicant has met its burden in establishing that, due to unique physical circumstances of the Property and those imposed by surrounding properties, a failure to grant relief to allow disturbances of less than .67 acres of areas designated as having steep slopes would result in an unnecessary hardship.

7. The physical circumstances giving rise to hardships in this matter were not created by the applicant.

8. The variances as hereafter granted are the minimum variances that will afford Applicant relief and represent the least departure from the governing regulations.

9. The variances will not be contrary to the public interest.

## DECISION

**WHEREFORE**, this 14<sup>th</sup> day of January, 2013, the Cheltenham Township Zoning Hearing Board, by a 2-1 vote, grants to Applicant the following variances:

- (1) a special exception to the rules and regulations of Article XXXIII, Section 295-242, permitting the application of the Age Restricted Overlay to the subject;
- (2) a variance from the rules and regulations of Article XXXIII, Section 295-241, to allow development of the project with less than required street frontage;
- (3) a variance from the rules and regulations of Article XXXIII, Section 295-243, to allow development of the project with the proposed stairwell projections; and
- (4) a variance from the rules and regulations of Article XXII, Section 295-166, to allow development of the project with disturbances to areas identified as having steep slopes.

The Zoning Board decides, in addition, that the existing remnants of a former farmhouse no longer constitute a structure which can be an historic resource.

This grant of relief is subject, however, to the following conditions:

- (1) with particular application to the landscaping of the property, development shall be in substantial accordance with the documents, testimony and other evidence presented by the applicant at the hearings before the Zoning Hearing Board;
- (2) Applicant shall submit a detailed landscape plan;
- (3) use of the common room shall be limited to use by the residents and no area shall be rented to or be used by third parties; and
- (4) development of the project shall be in substantial accordance with the plans and testimony presented by the applicant at the hearings on this application before the Zoning Hearing Board.

This grant of relief is not a waiver of any provision of the Cheltenham Zoning Ordinances not specifically addressed in this decision.

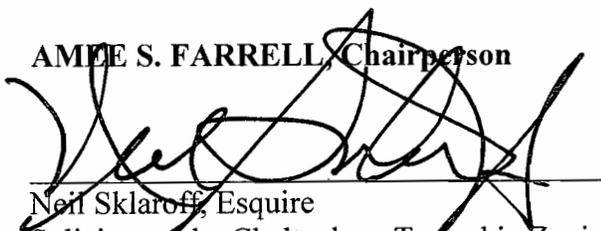
**CHELTENHAM TOWNSHIP ZONING HEARING BOARD**

*Voting in favor of the above grant of relief:*

**ALAN S. GOLD, Vice Chairman and Secretary**  
**PETER LABIAK, Member**

*Voting against the above grant of relief:*

**AMDE S. FARRELL, Chairperson**



Neil Sklaroff, Esquire  
Solicitor to the Cheltenham Township Zoning Hearing Board

**THIS DECISION IS OFFICIALLY ISSUED ON MARCH 13, 2013.**

**ZONING HEARING BOARD  
OF CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPEAL NO. 3452**

Applicant: Calvary Orthodox Presbyterian Church  
734 Willow Grove Avenue  
Glenside, Pennsylvania 19038

Subject Premises : 734 Willow Grove Avenue  
Glenside, Pennsylvania

Owner of Premises: Calvary Orthodox Presbyterian Church

Nature of Application: Applicant appeals from the determination of the Zoning Officer finding that construction of two additions, measuring 24 feet by 20 feet, and expansion of the existing parking lot, creating a less than require front yard setback, disturbing a Steep Slope Conservation District, creating a less than require number of parking spaces, and expanding an existing nonconforming building would violate the Cheltenham Zoning Ordinance of 1929, as amended, and, specifically, Article VII, Section 295-39, regulating yard setbacks, Article XXII, Section 295-166, regulating the Steep Slopes Conservation District, Article XXIX, Section 295-2212, regulating off-street parking, and Article XXIX, Section 295-227, regulating nonconforming uses.

Applicant seeks variances and a special exception from the rules and regulations of the R-4 Residence District as follows:

- (1) a variance from Section 295-39(A) to allow construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback;

- (2) a variance from Section 295-166(B) to allow construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot disturbing 7,250 square feet of steep slopes (less than or equal to 15%) of the steep slopes) or approximately 60.86% of the steep slopes within a Steep Slope Conservation District on the Property;
- (3) a variance from Section 295-221(H) to allow construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 83 parking spaces based on one space per 100 square feet of gross floor area of the existing building on the Property; and
- (4) a special exception to Section 295-227(B) permitting the expansion of the existing nonconforming building on the Property.

Time and Place of Hearing: Monday, November 19, 2012 – 7:35 p.m.  
Curtis Hall  
Church Road and Greenwood Avenue  
Wyncote, Pennsylvania

### **FINDINGS OF FACT**

1. Applicant Calvary Orthodox Presbyterian Church (“Applicant”) is the owner of the premises known as 734 Willow Grove, Glenside, Pennsylvania (the “Property”).
2. Prior to the holding of the hearing in this matter, an advertisement, noting the time and place of the hearing and the contents of the appeal, was placed in a newspaper of general circulation.
3. The property is located in an R-4 Residence District and is improved by a church.
4. The following documents were made a part of the record:
  - ZHB-1. a listing of exhibits;
  - ZHB-2. a copy of the legal notice with regard to the holding of hearing;

No. 3452; ZHB-3. an Application to the Zoning Hearing Board, referenced as Appeal

ZHB-4. a location map marked as Real Estate Registry Block 108, showing the location of the property;

ZHB-5. MEA Land Record Parcel Information on Property dated August 17, 2012;

ZHB-6. Building and Zoning Committee recommendation letter dated October 15, 2012;

ZHB-7. site plan of the Property;

ZHB-8. steep slope calculation plans;

ZHB-9. letter requesting a continuance dated November 1, 2012;

A-1. photograph showing entrance accessed from the parking lot (the right side of the existing church);

A-2. photograph showing the inside of the entrance accessed from the parking lot;

A-3. photograph inside of the entrance accessed from the parking lot, taken from the steps leading to the second floor;

A-4. photograph showing the front entrance to the church;

A-5. photograph showing the front of the church;

A-6. photograph from the west side of the building where the proposed nursery would be constructed;

A-7. photograph showing the parking lot;

A-8. curriculum vitae of Richard Knudsen of Knudsen Engineering;

A-9. schematic site plan showing a two-tiered wall in the rear of the propose parking lot expansion; and

A-10. true and correct depiction of the interior of the church building.

5. Applicant proposes to construct two (2) two-story additions, measuring 24 feet by 20 feet, and to expand the existing parking lot on the Property. The proposed construction does not increase the size of Applicant's sanctuary.

6. The proposed construction creates a front yard setback of 26.92 feet where a 40 foot front yard setback is required. The existing church building's front yard setback is

33.47 feet, which is legal nonconforming as a result of PennDOT acquiring an additional right-of-way along Willow Grove Avenue.

7. Parishioners enter the church via a side door off of the parking lot. The side door leads to a small landing, measuring approximately 4 foot wide, before taking the stairs up to the sanctuary or down into the basement. This small landing creates an unsafe situation at the end of church services.

8. The parking lot currently has 48 parking spaces. Applicant proposes to increase the number of parking spaces to between 60 to 64 spaces (depending on the proposed land development plan) and will be added to the back of the parking lot. Currently, once the existing parking lot is full, vehicles are parked across the street at the Westminster Seminary parking lot, making it necessary to cross Church Road to attend church services.

9. The proposed construction to the right of the existing structure will provide handicap access, including an elevator and wider landing and steps.

10. Applicant intends to use the space created by the proposed construction to the left of the existing structure as a nursery, located on the same floor as the church sanctuary. The proposed construction encroaches into the front yard setback by 63 feet, and encroaches less than 10 feet into the steep slope area.

11. The proposed expansion to the rear of the parking lot will disturb and eliminate a man-made slope area and will include a storm water management system.

12. The church has been in existence at the Property since 1950 with the most recent addition being constructed in 1964.

13. Sunday services typically average 150 attendees at the morning services and 80 attendees at the evening services. The sanctuary accommodates approximately 200 attendees at one time.

14. The surrounding neighborhood is residential with the exception of the Westminster Seminary, which is located across the street from the Property.

15. The second floor of the building consists of the auditorium and vestibule, with a back staircase used by the pastor. There is no bathroom on the second floor of the building. The first floor currently houses the nursery, pastor's office, a media room, and men's and ladies' restrooms. The proposed construction on the left side of the building would move the nursery to the second floor, allowing for the expansion of the restrooms to comply with ADA code regulations.

16. PennDOT took the corner of Church Road and Willow Grove Avenue and widened the intersection, which encroached on the Property.

17. The purpose for the proposed construction is the make the church safely accessible to all members, especially the elderly.

18. Applicant stated that the proposed improvements to the Property are not being done to increase the number of activities at the church.

19. Richard Knudsen of Knudsen Engineering was sworn and accepted as an expert in engineering on behalf of Applicant. The Board relied upon Mr. Knudsen's testimony.

20. Mr. Knudsen testified that the spaces provided within the existing building on the Property are substandard according to current standards and that, while the sanctuary was expanded to meet the needs of the church, the space available for ancillary functions is too small.

21. Mr. Knudsen testified that, had PennDOT not taken parts of the Property, the left addition would not require a front yard setback variance.

22. Mr. Knudsen testified that part of the existing building on the Property also is within the front yard setback.

23. Mr. Knudsen testified that a very small area of the proposed construction on the left addition disturbs the steep slope area, and that the steep slope areas were created as part of a retaining wall and is the only part of the existing building which impacts the steep slopes.

24. Mr. Knudsen testified that the steep slopes existing on the Property were those created around the building and parking lot in order to meet the surrounding existing grades.

25. Mr. Knudsen testified that 64 parking spaces are required under the present code, and that the current 48 parking spaces is a nonconforming use. Mr. Knudsen also testified that 83 parking spaces would be required under the code in connection with the proposed additions, but that there is no configuration that would provide 83 parking spaces.

26. Mr. Knudsen testified that the steep slopes are located to the rear of the existing parking lot and the rear of the existing building and around the retaining wall that was constructed to meet the surrounding grade at the front entrance.

27. The proposed parking lot expansion is located within the steep slope area and that the steep slopes were manmade.

28. Mr. Knudsen testified that the proposed construction will fully comply with all of the regulations of Cheltenham Township regarding storm water management. Further, because of the construction of the retaining wall and storm water management basin, the amount of runoff going directly to the neighbors would be captured and then discharged to the existing storm water system in Church Road.

29. Mr. Knudsen testified that the proposed construction and parking lot expansion would reduce the area of steep slopes making the area safer and reducing the impact of storm water on adjacent properties.

30. Mr. Knudsen testified that it would not be possible to make the proposed improvements to the building on the Property within its existing footprint.

31. Henry P. Jacquelin, realtor and member of the Planning Commission of Montgomery County, testified that the proposed additions and parking lot expansion are necessary to bring the Property up to current standards.

32. Mr. Jacquelin testified that, in his opinion, the proposed changes to the Property are the highest and best use of the current building and that a grant for relief would not affect neighborhood property values.

33. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

34. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

35. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback will not be contrary to the public interest.

36. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot disturbing 7,250 square feet of steep slopes or approximately 60.86% of the steep slopes within a Steep Slope Conservation District on the Property will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

37. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot disturbing 7,250 square feet of steep slopes or approximately 60.86% of the steep slopes within a Steep Slope Conservation District on the Property will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

38. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot disturbing 7,250 square feet of steep slopes or approximately 60.86% of the steep slopes within a Steep Slope Conservation District on the Property will not be contrary to the public interest.

39. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 83 parking spaces based on one space per 100 square feet of gross floor area of the existing

building on the Property will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

40. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 83 parking spaces based on one space per 100 square feet of gross floor area of the existing building on the Property will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

41. A grant of relief to allow the construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 83 parking spaces based on one space per 100 square feet of gross floor area of the existing building on the Property will not be contrary to the public interest.

42. A grant of relief to permit the expansion of the existing nonconforming building on the Property will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

43. A grant of relief to permit the expansion of the existing nonconforming building on the Property will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

44. A grant of relief to permit the expansion of the existing nonconforming building on the Property will not be contrary to the public interest.

### **CONCLUSIONS OF LAW**

1. Construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback is not permitted by the Cheltenham Township Zoning Ordinance.

2. Construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot which disturb 7,250 square feet of steep slopes (less than or equal to 15%) of the steep slopes) or approximately 60.86% of the steep slopes within a Steep Slope Conservation District is not permitted by the Cheltenham Township Zoning Ordinance.

3. Construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 83 parking spaces based on one space per 100 square feet of gross floor area of an existing building on a property is not permitted by the Cheltenham Township Zoning Ordinance.

4. Permitting the expansion of the existing nonconforming building on a property is not permitted by the Cheltenham Township Zoning Ordinance.

5. However, in accordance with the Pennsylvania Municipalities Planning Code and the Cheltenham Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to hear and decide requests for variances where it is alleged that strict

conformance with the governing ordinances would result in unnecessary hardship. Similarly, the Zoning Hearing Board is empowered to grant special exceptions where the application meets the criteria of the zoning ordinances.

6. Under the circumstances of this matter, Applicant has met their burden in establishing that, due to the unique physical circumstances of the Property and those imposed by surrounding properties, a failure to grant relief to allow construction of two (2) two-story additions, measuring 24 feet by 20 feet, with a front yard setback of 26.92 feet instead of the maximum required 40 foot front yard setback, which disturb 7,250 square feet of steep slopes within a Steep Slope Conservation District, as well as expansion of the existing off-street parking lot and of the existing nonconforming building on the Property would result in an unnecessary hardship.

7. Under the circumstances of this matter, Applicant has met their burden in establishing that the application meets the criteria of the ordinance and Applicant is entitled to special exception.

8. The variances and special exception as hereafter granted are the minimum variances and special exception that will afford Applicant relief and represent the least departure from the governing regulations.

9. The variances and special exception will not be contrary to the public interest.

### **DECISION**

**WHEREFORE**, this 19th day of November, 2012, the Cheltenham Township Zoning Hearing Board, by a 3-0 vote, grants to Applicant the following variances:

- (1) a variance from the rules and regulations of Article VII, Section 295-39(A), allowing construction of two (2) two-story additions, measuring 24 feet by 20 feet, with the front yard setback of 26.92 feet;
- (2) a variance from the rules and regulations of Article XXII, Section 295-166(B), allowing construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot disturbing 7,250 square feet of steep slopes (less than or equal to 15%) of the steep slopes) within a Steep Slope Conservation District;
- (3) a variance from the rules and regulations of Article XXIX, Section 295-221(H), allowing construction of two (2) two-story additions, measuring 24 feet by 20 feet, and expansion of the existing off-street parking lot, and allowing 60-64 parking spaces based on one space per 100 square feet of gross floor area of the existing building on the Property; and
- (4) a special exception to the rules and regulations of Article XXIX, Section 295-227(B), permitting the expansion of the existing nonconforming building on the Property.

This grant of relief is subject, however, to the following conditions:

- (1) a complete copy of the recorded deed of the subject Property shall be submitted to the Zoning Officer within four (4) weeks of the date of Hearing.
- (2) the proposed improvements shall be constructed in substantial conformity with the plans submitted to the Zoning Hearing Board and the presentation made to the Zoning Hearing Board at its November 19, 2012 meeting.

This grant of relief is not a waiver of any provision of the Cheltenham Zoning Ordinances not specifically addressed in this decision.

**CHEL TENHAM TOWNSHIP ZONING HEARING BOARD**

*Voting in favor of the above grant of relief: (remove names as needed)*

**PETER LABIAK, Chairperson**  
**ALAN S. GOLD, Vice Chairman and Secretary**  
**AMEE S. FARRELL, Member**

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Neil Sklaroff, Esquire  
Solicitor to the Cheltenham Township Zoning Hearing Board

**THIS DECISION IS OFFICIALLY ISSUED ON MARCH 27, 2013.**

**ZONING HEARING BOARD  
OF CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPEAL NO. 3453**

Applicants: Jennifer & Joseph McCormick  
527 Lindley Road  
Glenside, Pennsylvania 19031

Subject Premises : 527 Lindley Road  
Glenside, Pennsylvania

Owner of Premises: Jennifer & Joseph McCormick

Nature of Application: Applicants appeal from the determination of the Zoning Officer finding that construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property and creating a less than required side yard setback would violate the Cheltenham Zoning Ordinance of 1929, as amended, and, specifically, Article VII, Section 295-39, regulating yard setbacks.

Applicants seek a variance from Section 295-39(B)(1) of the rules and regulations of the R-4 Residence District to allow the construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet instead of the minimum required 10 foot side yard setback.

Time and Place of Hearing: Monday, November 19, 2012 – 11:10 p.m.  
Curtis Hall  
Church Road and Greenwood Avenue  
Wyncote, Pennsylvania

## FINDINGS OF FACT

1. Applicants Jennifer and Joseph McCormick (“Applicants”) are the owners of the premises known as 527 Lindley Road, Glenside, Pennsylvania (the “Property”).

2. Prior to the holding of the hearing in this matter, an advertisement, noting the time and place of the hearing and the contents of the appeal, was placed in a newspaper of general circulation.

3. The property is located in an R-4 Residence District and is improved by a single-family residence.

4. The following documents were made a part of the record:

ZHB-1. a listing of exhibits;

ZHB-2. a copy of the legal notice with regard to the holding of hearing;

ZHB-3. an Application to the Zoning Hearing Board, referenced as Appeal No. 3453;

ZHB-4. a location map marked as Real Estate Registry Block 117-C, showing the location of the property;

ZHB-5. MEA Land Record Parcel Information on Property dated October 9, 2012;

ZHB-6. Building and Zoning Committee recommendation letter dated November 13, 2012;

ZHB-7. site plan of the Property;

ZHB-8. copy of the recorded deed to the Property;

A-1. copy of the recorded deed to the Property; and

A-2. photograph of the house taken from Lindley Road

5. Applicants propose to construct a garage, measuring 22 feet by 25 feet, to the northwest side of the Property.

6. The proposed location of the garage creates a side yard setback of 5.08 feet instead of the minimum 10 foot wide side yard setback.

7. Michael Beuke of Showalter & Associates was sworn and accepted as an expert in landscape architecture on behalf of Applicant. The Board relied upon Mr. Beuke’s testimony.

8. Mr. Beuke testified that the front of the residence on the Property is rotated 90 degrees so that the front yard is actually the side yard of the Property. Unlike the other properties on the street which have a front porch, front door and garage facing the street, the Property has the front door and porch facing the side yard.

9. Mr. Beuke testified that in order for the proposed garage not to be blocked by the house, it must be located at the end of the existing driveway located within the side yard setback.

10. Attaching the garage to the side of the house would locate the garage in the back yard and would deter any reasonable future expansion of the house itself.

11. Mr. Beuke testified that reconfiguring the interior network of the house to accommodate an attached garage would be expensive and difficult and create a hardship for Applicant.

12. Applicants' neighbors are in favor of the proposed project.

13. A grant of relief to allow the construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet instead of the minimum required 10 foot side yard setback will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

14. A grant of relief to allow the construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet instead of the minimum required 10 foot side yard setback will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

15. A grant of relief to allow the construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet instead of the minimum required 10 foot side yard setback will not be contrary to the public interest.

### **CONCLUSIONS OF LAW**

1. Construction of a garage, measuring 22 feet by 25 feet, on the northwest side of a Property with a side yard setback of approximately 5.08 feet instead of the minimum required 10 foot side yard setback is not permitted by the Cheltenham Township Zoning Ordinance. However, in accordance with the Pennsylvania Municipalities Planning Code and the Cheltenham Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to hear and decide requests for variances where it is alleged that strict conformance with the governing ordinances would result in unnecessary hardship.

2. Under the circumstances of this matter, Applicants have met their burden in establishing that, due to the unique physical circumstances of the Property and those imposed by surrounding properties, a failure to grant relief to allow the construction of a garage,

measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet would result in an unnecessary hardship.

3. The variance as hereafter granted is the minimum variance that will afford Applicants relief and represent the least departure from the governing regulations.

4. The variance will not be contrary to the public interest.

### **DECISION**

**WHEREFORE**, this 19<sup>th</sup> day of November, 2012, the Cheltenham Township Zoning Hearing Board, by a 3-0 vote, grants to Applicants a variance from the rules and regulations of Article VII, Section 295-39(B)(1) to allow the construction of a garage, measuring 22 feet by 25 feet, on the northwest side of the Property with a side yard setback of approximately 5.08 feet.

This grant of relief is subject, however, to the following conditions:

- (1) a complete copy of the recorded deed of the subject Property shall be submitted to the Zoning Officer within four (4) weeks of the date of Hearing.
- (2) the proposed improvements shall be constructed in substantial conformity with the plans submitted to the Zoning Hearing Board and the presentation made to the Zoning Hearing Board at its November 19, 2012 meeting.

This grant of relief is not a waiver of any provision of the Cheltenham Zoning Ordinances not specifically addressed in this decision.

### **CHELTENHAM TOWNSHIP ZONING HEARING BOARD**

*Voting in favor of the above grant of relief: (remove names as needed)*

**PETER LABIAK, Chairperson**  
**ALAN S. GOLD, Vice Chairman and Secretary**  
**AMEE S. FARRELL, Member**

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Neil Sklaroff, Esquire  
Solicitor to the Cheltenham Township Zoning Hearing Board

**THIS DECISION IS OFFICIALLY ISSUED ON MARCH 27, 2013.**

**ZONING HEARING BOARD  
OF CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPEAL NO. 3455**

Applicant: Young Suk Jeon  
560 E. Church Road  
Elkins Park, PA 19027

Subject Premises : 560 E. Church Road  
Elkins Park, PA

Owner of Premises: Young Suk Jeon

Nature of Application: Applicant appeals from the determination of the Zoning Officer finding that a 21% expansion of an existing nonconforming building with a less than allowed buffer area would violate the Cheltenham Zoning Ordinance of 1929, as amended, and, specifically, Article XXIX, Section 295-227, regulating nonconforming uses, and Article XVIII, Section 295-133, regulating buffer area.

Applicant seeks special exceptions or a variance from the rules and regulations of the C-4 Commercial and Business District as follows:

- (1) a special exception to Section 295-227(B) permitting an expansion of a nonconforming building on the Property;
- (2) a special exception to Section 295-227(C)(2) permitting an addition to a nonconforming building not to exceed 25% of the original building;
- (3) a special exception to Section 295-227(C)(3) permitting a nonconforming use not to increase the number of employees by more than 25% due to the expansion of the

nonconforming building; and

in the alternative,

- (4) a variance from Section 295-133 to allow a lesser buffer area of zero feet instead of the minimum required 8 feet.

Time and Place of Hearing: Monday, December 10, 2012 – 7:30 p.m.  
Curtis Hall  
Church Road and Greenwood Avenue  
Wyncote, Pennsylvania

### **FINDINGS OF FACT**

1. Applicant Young Suk Jeon (“Applicant”) is the owner of the premises known as 560 E. Church Road, Elkins Park, Pennsylvania (the “Property”).
2. Prior to the holding of the hearing in this matter, an advertisement, noting the time and place of the hearing and the contents of the appeal, was placed in a newspaper of general circulation.
3. The property is located in C-4 Commercial and Business District and is improved by a retail building.
4. The following documents were made a part of the record:
  - ZHB-1. a listing of exhibits;
  - ZHB-2. a copy of the legal notice with regard to the holding of hearing;
  - ZHB-3. an Application to the Zoning Hearing Board, referenced as Appeal No. 3455;
  - ZHB-4. a location map marked as Real Estate Registry Block 13, showing the location of the property;
  - ZHB-5. MEA Land Record Parcel Information on Property dated November 26, 2012;
  - ZHB-7. zoning plan for the Property dated December 2, 2012, prepared by GLP Architects, PC;
  - ZHB-8. three photographs of the Property;
  - ZHB-9. recorded Assignment of Leases and Rents, recorded December 19, 2008; and

A-1. two page zoning plan prepared by GLP Architects.

5. Applicant proposes to construct a 420 square foot addition to the existing building on the Property that comes out toward Church Road.

6. The proposed expansion is a 20 foot deep extension of the existing building, which is less than 25 percent of the existing square footage of the building.

7. The existing building was built in approximately 1950. The building sits on both the easterly side and rear property lines.

8. The Property is currently being used as a nail salon with approximately ten employees. Applicant intends to increase the number of employees to twelve.

9. Special exceptions are needed to construct this expansion since the construction is under the 25 percent of a nonconforming use.

10. Harold Lichtman of GLP Architects, PC, was sworn and accepted as an expert in architecture on behalf of Applicant. The Board relied upon Mr. Lichtman's testimony.

11. Currently two stacked parking spaces exist on the Property which accommodates four vehicles. The expansion would not create additional parking on the Property and additional vehicles would park in public parking areas.

12. The existing building is currently 2,000 square feet and the proposed expansion consists of a one story, 420 square foot addition, which is under the 25 percent expansion of the Property.

13. Mr. Lichtman testified that the Planning Commission attached four conditions to the proposed expansion:

(a) The existing stone and paved area on the side yard on the west side of the building be removed and turned into green area.

(b) A seepage bed to accommodate the area covered by the proposed addition is required and is to be made part of the application.

(c) The existing stone retaining wall will be repaired and restored subject to the township engineer's inspection.

(d) If any additional HVAC equipment is required to accommodate the proposed expansion, said equipment shall be installed on the second level of the building and not on grade.

14. Mr. Lichtman testified that the width of the proposed expansion is the same as the width of the building.

15. Mr. Lichtman testified that the buffer area requirement results in the building being nonconforming.

16. A grant of relief permitting an expansion of a nonconforming building on the Property will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

17. A grant of relief permitting an expansion of a nonconforming building on the Property will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

18. A grant of relief permitting an expansion of a nonconforming building on the Property will not be contrary to the public interest.

19. A grant of relief permitting an addition to a nonconforming building not to exceed 25% of the original building will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

20. A grant of relief permitting an addition to a nonconforming building not to exceed 25% of the original building will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

21. A grant of relief permitting an addition to a nonconforming building not to exceed 25% of the original building will not be contrary to the public interest.

22. A grant of relief permitting a nonconforming use not to increase the number of employees by more than 25% due to the expansion of the nonconforming building will result in no adverse effect to individual property rights or to the public health, safety, or welfare.

23. A grant of relief permitting a nonconforming use not to increase the number of employees by more than 25% due to the expansion of the nonconforming building will result in premises consistent with the character of the neighborhood and will not materially alter the character of the zoning district or of the community.

24. A grant of relief permitting a nonconforming use not to increase the number of employees by more than 25% due to the expansion of the nonconforming building will not be contrary to the public interest.

### **CONCLUSIONS OF LAW**

1. The proposed expansion of a nonconforming building on a Property is not permitted by the Cheltenham Township Zoning Ordinance.

2. Construction of an addition to a nonconforming building not to exceed 25% of the original building is not permitted by the Cheltenham Township Zoning Ordinance.

3. A nonconforming use not to increase the number of employees by more than 25% due to the expansion of the nonconforming building is not permitted by the Cheltenham Township Zoning Ordinance.

4. However, in accordance with the Pennsylvania Municipalities Planning Code and the Cheltenham Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to grant special exceptions where the application meets the criteria of the zoning ordinances.

5. Under the circumstances of this matter, Applicant has met his burden in establishing that the application meets the criteria of the ordinance and Applicant is entitled to special exceptions.

6. The special exceptions as hereafter granted are the minimum special exceptions that will afford Applicant relief and represent the least departure from the governing regulations.

7. The special exceptions will not be contrary to the public interest.

### **DECISION**

**WHEREFORE**, this 10<sup>th</sup> day of December, 2012 the Cheltenham Township Zoning Hearing Board, by a 3-0 vote, grants to Applicant the following special exceptions:

- (1) a special exception to the rules and regulations of Article XXIX, Section 295-227(B), permitting an expansion of a nonconforming building on the Property;
- (2) a special exception to the rules and regulations of Article XXIX, Section 295-227(C)(2), permitting an addition to a nonconforming building not to exceed 25% of the original building; and
- (3) a special exception to the rules and regulations of Article XXIX, Section 295-227(C)(3), permitting a nonconforming use not to increase the number of employees by more than 25% due to the expansion of the nonconforming building.

This grant of relief is subject, however, to the following conditions:

- (1) a complete copy of the recorded deed of the subject Property shall be submitted to the Zoning Officer within four (4) weeks of the date of Hearing.
- (2) the existing impervious service on the west side of the Property shall be replaced with open and green area;

- (3) in accordance with the instructions of the Township Engineer, a seepage bed shall be installed to accommodate storm water run-off from the area covered by the addition;
- (4) the existing retaining wall on the eastern property line shall be repaired and restored in accordance with the direction of the Township Engineer;
- (5) in the event that additional HVAC equipment is required for the building, any additional HVAC equipment shall be installed on the roof of the taller portion of the structure; and
- (6) the proposed improvements shall be constructed in substantial conformity with the plans submitted to the Zoning Hearing Board and the presentation made to the Zoning Hearing Board.

This grant of relief is not a waiver of any provision of the Cheltenham Zoning Ordinances not specifically addressed in this decision.

#### **CHELTENHAM TOWNSHIP ZONING HEARING BOARD**

*Voting in favor of the above grant of relief: (remove names as needed)*

**PETER LABIAK , Chairperson**  
**ALAN S. GOLD, Vice Chairman and Secretary**  
**AMEE S. FARRELL, Member**

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Neil Sklaroff, Esquire  
Solicitor to the Cheltenham Township Zoning Hearing Board

**THIS DECISION IS OFFICIALLY ISSUED ON MARCH 27, 2013.**

Carriage House  
March 4, 2013

An AdHoc Zoning Code Revision Committee meeting was held this night. Members present were: Messrs. Cohen, Mirsky, Leighton, Labiak, Pransky and Harrower. Also in attendance were: Mr. Bryan T. Havir, Township Manager, Mr. Carmen G. Reitano, Assistant to the Director of Engineering, Zoning and Inspections; and Joseph Nixon, Montgomery County Planning Commission.

- Mr. Nixon began the meeting with a power point presentation.
- Mr. Cohen stated that the maps need to be reconciled.
- Mr. Nixon stated that the C2 district is more car dependent.
- Mr. Nixon stated that a cluster development Ordinance needs to be written and the Floodplain Ordinance is being written by MCPC.
- Mr. Nixon stated that the Riparian Corridor Conservation District Ordinance was tabled at the last Board of Commissioners' Meeting and is scheduled for consideration at the March 20, 2013 Board Meeting.
- Discussion ensued regarding Community Service Uses and Places of Worship. Mr. Nixon stated that he will research religious uses.
- Mr. Cohen suggested allowing special events, festivals, and farmers markets at High School Park.
- A discussion regarding parking ensued. Parking is a known problem in these areas.
  - SEPTA Parking Lot
  - Creekside Parking
  - Garden Apartments Parking
- Mr. Nixon asked if Glasgow and the Quarries should be listed as Industrial. Mr. Labiak stated that the Quarry has been present for many

years and is an existing non-conforming use. Discussion ensued about making the area mixed use.

- Discussion ensued regarding the RO district. (Residential Office). RO changed to MU-3 (Mixed Use).
- Mr. Nixon stated he will do the following:
  - Address mapping issues.
  - Research religious uses-what's included.
  - Adjust MU-3 to include office space.
  - Look into agriculture uses and developing regulations for farm animals, livestock and chickens.
  - Cluster Overlay.
- Meeting adjourned at 8:30 PM.



Bryan T. Havar  
Township Manager

Per: Holly Nagy

**CHELTENHAM TOWNSHIP**  
**MONTGOMERY COUNTY, PENNSYLVANIA**

**RESOLUTION No. \_\_\_\_-13**

**A RESOLUTION ESTABLISHING AND MODIFYING  
CERTAIN ZONING FILING FEES**

**WHEREAS**, the costs associated with scheduling, staffing, recording and conducting zoning hearings has increased while the fees associated with such activities are not keeping pace with such increased costs; and

**WHEREAS**, the Board of Commissioners of Cheltenham Township seeks to increase certain zoning fees to keep pace with the costs associated with scheduling, staffing, recording and conducting zoning hearings.

**NOW THEREFORE**, it is hereby resolved by the Board of Commissioners of Cheltenham Township to modify the fees to be paid to the Township for certain zoning filings as follows:

1. Chapter A300 of the Cheltenham Township Code, entitled "Fees", Section A300-24 entitled "Zoning", is hereby amended as follows:

In subsection A., for the filing of a petition or application, the sum of "\$1,000" is deleted and replaced with the sum of "**\$2,000**".

In subsection B.(4), for the filing of a notice of appeal or application for special exception or variance for nonresidential buildings/properties, the sum of "\$1,000" is deleted and replaced with the sum of "**\$1,500**".

A new Subsection B.(6) shall be added, which states as follows:

**(5) Application or submission of plans for the replacement, co-location or modification of each wireless telecommunications facility upon an existing wireless support structure: \$600 per submission.**

2. In addition, Chapter A300 of the Cheltenham Township Code, entitled "Fees", Section A300-24, entitled "Zoning", the following sentence shall be added as Section A 300-24B.(7):

**The filing fee for a validity or curative amendment challenge shall be \$2,500.**

**DULY ADOPTED**, this \_\_\_\_\_ day of \_\_\_\_\_, 2013, by the Board of Commissioners of Cheltenham Township, Montgomery County, in lawful session duly assembled.

**CHELTENHAM TOWNSHIP**

By: \_\_\_\_\_  
**Art Haywood, President**

Attest: \_\_\_\_\_  
**Bryan T. Havir, Township Secretary**

March 27, 2013

COMMISSIONERS OF CHELTENHAM TOWNSHIP  
ELKINS PARK, PA 19027

COMMISSIONERS OF CHELTENHAM TOWNSHIP  
REPORT OF THE BUILDING INSPECTOR FOR MARCH, 2013

	# PERMITS	TOT. FEES	\$ VALUE
<b>RESIDENTIAL</b>			
RENOVATIONS / ALTERATIONS	52	4,270	213,500
<b>MULTI-FAMILY</b>			
RENOVATIONS / ALTERATIONS	1	835	41,750
<b>COMMERCIAL</b>			
RENOVATIONS / ALTERATIONS	1	3,240	162,000
<b>INSTITUTIONAL</b>			
RENOVATIONS / ALTERATIONS	1	115	5,750
<b>FENCE</b>	1	121.50	121.50
<b>MARCH, 2013</b>	56	5,582	423,122
<b>MARCH, 2012</b>	67	22,580	1,123,120
<b>YEAR-TO-DATE 2013</b>	147	30,403	1,659,314
<b>TOTAL 2012</b>	604	224,950	11,247,500

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**HEATING & AIR CONDITIONING**

<b>MARCH, 2013</b>	6	1,113	55,650
<b>MARCH, 2012</b>	5	1,714	85,700
<b>YEAR-TO-DATE 2013</b>	16	4,313	277,900
<b>TOTAL 2012</b>	48	20,671	1,033,550

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**ELECTRICAL**

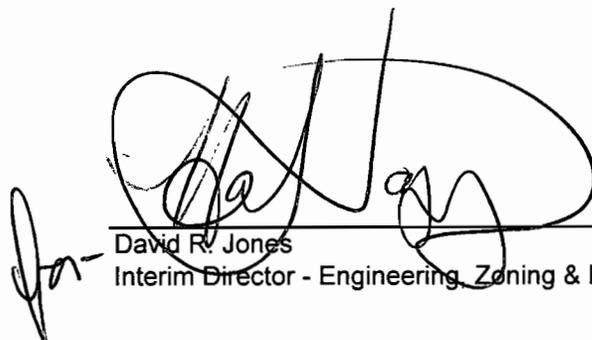
<b>MARCH, 2013</b>	5	1,070	53,500
<b>MARCH, 2012</b>	7	2,211	110,550
<b>YEAR-TO-DATE 2013</b>	19	3,476	172,800
<b>TOTAL 2012</b>	80	20,055	1,002,750

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**PLUMBING**

<b>MARCH, 2013</b>	11	1,382	69,100
<b>MARCH, 2012</b>		NOT PREVIOUSLY RECORDED	
<b>YEAR-TO-DATE 2013</b>	34	3,966	197,300
<b>TOTAL 2012</b>		NOT PREVIOUSLY RECORDED	

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\_\_\_\_\_  
David R. Jones  
Interim Director - Engineering, Zoning & Inspections

7803-7809

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

MONTGOMERY COURT REALTY CO, L.P

Plaintiff

vs.

CHELTENHAM TOWNSHIP ZONING  
HEARING BOARD and CHELTENHAM  
TOWNSHIP

Defendant

No 2012-21025

LAND USE APPEAL

FINDINGS OF FACT

This Findings of Fact and included Order disposes of all issues between Plaintiff ("Montgomery Court") and Defendant ("ZHB")

PROCEDURAL HISTORY

In 2004, Montgomery Court became the owner of the premises at issue, 7803-7809 Montgomery Avenue, Cheltenham Township, Montgomery County *ZHB Memo, p 1* On the property is a single-story building, measuring approximately 9,100 square feet *Id* While the property is located within the R-5 residential zoning district, it has been granted a non-conforming commercial use *Id at 1-2* In 1954, the ZHB granted an exception to the rules and regulations of the residence district, through Order No 629, which stated, in pertinent part "[t]he petition for exception in order to determine what change or resumption of non-conforming use is of the same class of use and permissible, in order to use the premises as a public garage is granted with the provision that no painting or body or fender repairs are to be done on the premises at any time" *Mont Ct Brief, p 4* In 1970, the ZHB entered Order No 1563 (regarding the legal non-conforming use of the property in question) and determined, "[t]he intended use of the premises by petitioners for the wholesale sale only, storage, display and minor repair and polishing of automobiles is a use which is within the same class of use and is permissible as the last non-conforming use of the premises" *Mont Ct Notice of Appeal, p 6*

1



2012-21025-0021  
7/27/2013 11:49:30 AM  
Order  
Receipt # Z1782926  
Mark Levy - Montgomery County Prothonotary

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At the time of Montgomery Court's purchase of the property, the property had been used for the storage of automobile parts, vehicles and forklifts as well as a police impound lot *ZIIB Memo, p 3* The most current certification (2004 Application for Zoning Use and Certification) states that the current use of the property is "warehouse/auto repair/auto storage" *Mont Ct Notice of Appeal, p 6* Between 2004 (when Montgomery Court acquired the property) and 2010 (when Montgomery Court began leasing the premises to Patient Care Ambulance Inc)("Patient Care"), Montgomery Court used the property for the storage, maintenance and repair of construction equipment including backhoes, Bobcats and Zambonis *ZIIB FOF p 7* On August 12, 2010, Montgomery Court entered into a lease agreement with Patient Care to allow Patient Care to store ambulances at the property in exchange for rent *Id at 5* It is Montgomery Court's position that this storage of ambulances is a legal, non-conforming use of the property, however, the ZHB determined that this use conducted at the property was the operation of a private ambulance service

Patient Care provides patients with non-emergency transportation to medical providers *Id at 6* Four ambulances are parked at the property overnight throughout the week and employees park their private vehicles at the property during the day while they drive the ambulances *Id at 7* Employees operate the ambulances from approximately 4:30 am until 4:30 pm, Monday through Saturday *Id at 6* The employees do not return to the property during the day, however, there is a bathroom on the property *Id at 7* These ambulances do not use sirens or flashing lights *Id at 6* Ordinary maintenance to the ambulances is performed on the property *Id* Patient Care also has a registered location at 1135 West Cheltenham Avenue with the Commonwealth of Pennsylvania as its place of business *Id* It is this location where customary business activities and all business records are kept *Id at 7* Patient Care has ten (10) total employees, which consists of four drivers, three office workers and three EMTs *Id at 6*

Pursuant to the ZHB's position, on June 17, 2011, Township Zoning Officer David Lynch issued a notice of violation to Montgomery Court *Id at 4* In the notice of violation, Zoning Officer Lynch determined that (1) the property was located within the R-5 residence district, (2) the R-5 residence district regulations do not permit the operation of commercial uses, and (3) the current use was not the "wholesaling of passenger cars allowed pursuant to a 1970 Zoning Board decision" *Id.* On July 15, 2011, Montgomery Court filed an appeal to the ZHB

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ZHB FOF at 5. Consequently, hearings occurred before the ZHB *Mont Ct Notice of Appeal*, p 3. On March 12, 2012, the ZHB issued a decision upholding the Township's decision. *Id*. On July 3, 2012, the ZHB issued its Findings of Fact and Conclusions of Law. *Id*. On August 2, 2012, Montgomery Court took an appeal from the ZHB's decision. The undersigned scheduled argument for January 15, 2013, which was ultimately continued until February 5, 2013. This order resolves all issues between the parties.

#### ANALYSIS

In an appeal from the decision of a zoning hearing board where the reviewing court takes no additional evidence, the scope of review is limited to determining whether the zoning board committed an abuse of discretion or erred in the application of the law. *Valley View Civic Ass'n v Zoning Bd of Adjustment*, 462 A 2d 637, 639 (Pa 1983). A reviewing court may conclude that a zoning board abused its discretion only if its findings are not supported by substantial evidence. *Id* at 640. Substantial evidence is defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id*. The core of this case revolves around nonconforming use. According to the Cheltenham Zoning Code, Section 295-2, a "nonconforming use" is defined as "a use, whether of land or of structure, which does not comply with the applicable use provisions in a zoning ordinance or amendment heretofore or hereafter enacted, where such use was lawfully in existence prior to the enactment of such ordinance or amendment prior to the application of such ordinance or amendment to its location by reason or annexation."

This case began when Officer Lynch issued Montgomery Court a notice of violation. However, after an analysis of the necessary documents, the undersigned finds that Officer Lynch improperly issued this notice of violation based on an improper interpretation of the 1970 Order (Order No 1563). Officer Lynch found that "[o]n March 26, 1970, under ZHB Appeal No 1563, Zoning Relief was granted for the use of the Property for the 'Wholesaling of Passenger Cars'. Now, as the operation of a private ambulance service from the Property is a commercial use of the Property, and, as this use is not the 'Wholesaling of Passenger Cars' permitted under ZHB Appeal No 1563, the operation of a private ambulance service from the Property is in violation of the Cheltenham Code." A reading of ZHB Appeal No 1563 demonstrates that this order did not merely provide for the wholesaling of passenger cars, rather, this order stated, "[t]he intended use of the premises by petitioners for the wholesale only, storage, display and

minor repair and polishing of automobiles is a use which is within the same class of use and is permissible as the last non-conforming use of the premises” Non-conforming uses at the property from 1970 forward have included the storage and repair of automobiles—proper uses under ZHB Appeal No 1563 It was improper for Officer Lynch to issue a violation based on a misstatement of the governing zoning order It is the undersigned’s belief that the ZHB then committed an abuse of discretion in upholding this erroneous violation Based on a review of the history of the zoning orders (and the applicable uses of the property), the undersigned remains unconvinced that the actions of Montgomery Court (i e the storage of ambulances by Patient Care) constitute an “ambulance service business” as opposed to a legal nonconforming use

Pursuant to the Cheltenham Zoning Code, Section 295-2(C), a “public garage” is “a building not a private or minor garage or carport, one or more stories in height used for the storage and/or repair of motor vehicles” In 1954, the ZHB granted an exception to the rules and regulations of the residence district, through Order No 629, in order for the premises to be used as a public garage In 1970, the ZHB permitted “the wholesale only, storage, display and minor repair and polishing of automobiles [as] a use which is within the same class of use and is permissible as the last non-conforming use of the premises” While the ZHB found that the 1970 order (No 1563) provided that the property had most recently been used as a machine shop, the undersigned found no evidence for this conclusion<sup>1</sup> The most current zoning documents from 2004 state that the property’s use is “warehouse/auto repair/auto storage” The undersigned did not find that there was valid evidence that the warehouse/auto repair/auto storage non-conforming use was ever abandoned With regard to the actions of Patient Care, testimony revealed that ambulances and employee vehicles are stored at 7803 Montgomery Avenue Minor ambulance repair is also performed at the property From a review of any prior zoning document, storage and automobile repair fall within the legal non-conforming uses of the property

The undersigned does not find the cases cited by the ZHB compelling The ZHB first cites *Taddeo v Commonwealth*, 412 A 2d 212 (Pa Commw Ct 1980), to support its position In *Taddeo*, the operator of an asphalt business was convicted of operating a commercial

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<sup>1</sup> The ZHB’s Finding of Fact #10 stated “[o]n January 28, 1955, the ZBA denied an application to permit the use of the first floor at 7803-7809 for assembly and transport of conveyors on the basis that such use was not a change of nonconforming use to a use in the same category of use” Other than this statement, the undersigned can find no evidence that the property was ever used (or attempted to be used) as a machine shop

enterprise on property zoned rural-residential 412 A 2d at 212 The Commonwealth Court held that "the evidence was sufficient to determine that Appellant's residential property was being used for commercial purposes The use of the equipment parked at Appellant's home and in the vacant lot adjacent to it is such an integral part of Appellant's business, which is certainly commercial in nature, as to be inseparable from that business By parking the equipment at his residence, Appellant has transferred that part of his commercial enterprise to a residential site, something the zoning ordinance will not permit him to do " *Id* at 213

In *Fayette County v Blout*, 387 A 2d 167 (Pa Commw Ct 1978), appellants were enjoined from using a garage (including storing and parking trucks and employee vehicles) in an agricultural-rural zone for commercial purposes 387 A 2d at 524 While the ZHB states "it finds no reason to distinguish these cases on the basis that the properties were otherwise used for residential purposes," the undersigned disagrees *ZHB Memo, p 9, fn 4* First, the fact that the properties were rural-residential and agricultural-rural (and not subject to nonconforming uses) was extremely important to the holdings of the cases Moreover, the zoning of these properties makes these cases dissimilar to the case at bar The property in question is located in a residential district but subject to a nonconforming use and therefore remains exempt from this residential zoning classification The current nonconforming use allows a commercial use (with primary uses of automobile storage, minor auto repair and warehousing)

The ZHB then cites *Pietropalo v Zoning Hearing Board of Lower Merion Township*, 979 A 2d 969 (Pa Commw Ct 2009), to support its position In this case, the Lower Merion ZHB entered a notice requiring Appellant to cease using his residentially-zoned property for a landscape business 979 A 2d at 972 Appellant argued that the operation of his business was the continuation of a lawful nonconforming use *Id* Around 1930, the property began to be used for the storage of two trucks and two cars and was zoned for business use, which allowed a "private or minor garage " *Id* at 974 In 1948, the property continued to be used for the storage of two trucks and two cars *Id* However, in 1969, when Appellant purchased the property, he began operating his landscaping business, which included "pickup trucks com[ing] in and out of the subject property several times each day early in the morning The dump truck is often parked outside the garage the mowers must be started to move them into the trailer, a very noisy operation according to the Objector Objector also testified the five employees (sometimes more) commonly engage in loud conversations and shouting in the morning On the weekends,

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[Appellant] sharpens the mower blades on a grinding stone for several hours, also a loud operation " 979 A 2d at 973-74 The Lower Merion ZHB determined Appellant's landscaping business did not constitute a continuation of a prior nonconforming use but rather was a prohibited change from the "minor garage" use *Id* at 975 Again, the undersigned does not find the above case persuasive While the actions in the above case are clearly a change in use, after analyzing the 1970 ordinance in its entirety (as well as the prior uses at the property in question), this Court finds that the uses by Montgomery Court are a continuation of a lawful conforming use

Therefore, due to the misstatement of the language of Zoning Order 1563 in the Township's notice of violation, it is the undersigned's belief that both the notice of violation and the ZHB's decision are fundamentally flawed and these flaws have led to an abuse of discretion and an error of law Therefore, it is hereby **ORDERED** and **DECREED** that the decision of the Cheltenham Township Zoning Hearing Board is **REVERSED**

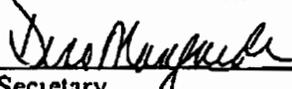
BY THE COURT:

  
KELLY C. WALL, J.

3/27/13

Copies of this Order  
Mailed to the following on 3/27/13

Francine Boone, Esquire for Plaintiff  
Joseph Bagley, Esquire for Defendant  
Neil Sklaroff, Esquire for Defendant  
Court Administration

  
Secretary

**ZONING HEARING BOARD  
OF CHELTENHAM TOWNSHIP  
MONTGOMERY COUNTY, PENNSYLVANIA**

**APPEAL NO. 3413**

Applicant: Montgomery Court Realty Co., L.P.  
P.O. Box 549  
Abington, Pennsylvania 19001-549

Subject Premises : 7803 Montgomery Avenue  
Elkins Park, Pennsylvania

Owner of Premises: Montgomery Court Realty Co., L.P.

Nature of Application: Applicant appeals from the determination of the Zoning Officer finding that operation of a private ambulance services at the Property instead of one of the enumerated permitted uses would violate the Cheltenham Zoning Ordinance of 1929, as amended, and, specifically, Article XXIX, Section 295-227, regulating nonconforming uses, and Article VIII, Section 295-43, regulating uses.

Applicant seeks a determination or variance from the rules and regulations of the R-5 Residence District as follows:

- (1) a determination that the overnight storage of a private ambulance on the Property is not a function of the operation of a private ambulance service and thus permitted as a legal nonconforming use of the Property per relief granted by the Zoning Hearing Board at appeal 1563;

In the alternative to (1) above,

- (2) a determination, pursuant to "Nonconforming Uses" as outlined in Section 295-227(F), that the operation of a

private ambulance service is of the same class of use as the previously approved nonconforming use(s) and thus permissible; and

In the alternative to (1) and (2) above,

- (3) a variance from Section 295-43 to allow for the operation of a private ambulance service at the Property instead of one of the enumerated permitted uses.

Time and Place of Hearing: Monday, September 12, 2011 – 7:35 p.m.  
Monday, October 17, 2011 – 7:30 p.m.  
Monday, November 14, 2011 – 7:35 p.m.  
Monday, December 12, 2011 – 7:35 p.m.  
Monday, February 13, 2012 – 7:30 p.m.  
Monday, March 12, 2012 – 7:30 p.m.  
Curtis Hall  
Church Road and Greenwood Avenue  
Wyncote, Pennsylvania

### **FINDINGS OF FACT**

1. Applicant Montgomery Court Realty Co., L.P. (“Applicant”) is the owner of the premises known as 7803 Montgomery Avenue, Elkins Park, Pennsylvania (the “Property”).

2. Prior to the holding of the hearing in this matter, an advertisement, noting the time and place of the hearing and the contents of the appeal, was placed in a newspaper of general circulation.

3. The property is located in an R-5 Residence District and is improved by a garage.

4. The following documents were made a part of the record:

ZHB-1. a listing of exhibits;

ZHB-2. a copy of the legal notice with regard to the holding of hearing;

ZHB-3. an Application to the Zoning Hearing Board, referenced as Appeal No. 3413.

ZHB-4. a location map marked as Real Estate Registry Block 42 showing the location of the property;

ZHB-5. MEA Land Record Parcel Information on Property dated July 29, 2011;

ZHB-6. Building and Zoning Committee recommendation letters dated September 12, 2011, October 17, 2011, and November 3, 2011;

ZHB-7. Supplemental Memorandum of Law, prepared by Francine Thornton Boone, Esquire, attorney for Applicant, dated July 15, 2011 and including decisions of the Zoning Hearing Board at Appeals No. 629 and 1563 (dated March 26, 1970);

ZHB-8. plot plan, dated January 25, 1954, and prepared by Rosengarten & Kraemer;

ZHB-9. Plan of Land Survey, dated April 8, 2008, and prepared by Bear Gully Survey Company;

ZHB-10. a series of photographs of the Property and surrounding area;

ZHB-11. Notice of Violation letter, dated June 17, 2011, from the Board of Commissioners of the Township of Cheltenham;

ZHB-12. copy of letter from Kristen Lerner of Around the corner Catering, Inc., dated October 17, 2011;

ZHB-13. copy of letter from Dan Weintraub, owner of Franks Pizza, dated October 8, 2011;

ZHB-14. copy of letter from MiMi Caruso of Rometta Salon & Spa, dated September 14, 2011;

ZHB-15. letter extending the deadline to submit findings of fact and conclusions of law, and any briefs until March 1, 2012;

ZHB-16. Findings of Fact, Conclusions of Law, and a Brief submitted on behalf of Applicant on March 1, 2012;

ZHB-17. Findings of Fact, Conclusions of Law and Legal Discussion of Cheltenham Township, submitted on behalf of the Township of Cheltenham;

A-1. Notice of Violation dated June 17, 2011, signed by David M. Lynch, P.E., P.L.S., Director – Engineering, Zoning & Inspections;

A-2. copy of Application to the Zoning Hearing Board, referenced as Appeal No. 3413;

A-3. copy of letter dated September 9, 2011, sent to David Lynch for distribution to the Zoning Board;

A-4. Supplemental Memorandum of Law dated September 12, 2011;

A-5. copy of deed to the Property;

A-6. copy of decision of the Zoning Hearing Board at Appeals No. 629, dated February 23, 1954, and No. 1563, dated March 26, 1970;

A-7. copy of Application for Zoning & Use Certification dated July 13, 2004;

A-8. redacted Lease between Patient Care Ambulance, Inc. and Applicant;

A-9. copy of certain applicable sections of Pennsylvania Code (Section 1005.10) governing ambulance service business;

A-10. copy of online/Internet Yellow Page Directory for Patient Care Ambulance, Inc.;

A-11. series of photographs of the Property, the ambulances stored at the Property, and Applicant's office;

A-12. site plan/drawing of Property;

A-13. letter dated November 28, 2011, from Philip C. Pulley, president of SBG Management Services Inc. clarifying the correct address of the Property;

A-14. copy of Lease between Patient Care Ambulance, Inc., and Applicant, dated August 12, 2010, with only the rental figure redacted;

A-15. *Orange Stones Co. v. Borough of Hamburg, etc.*, 28 A.3d 228;

P-1. series of photographs of Montgomery Avenue and portions of the building on the Property;

T-1. copy of page 205 of the PC/Codebook, Township of Cheltenham, PA;

T-2. decision of the Board of Adjustment at Appeal No. 670;

T-3. *County of Fayette v. Helen A. Blout, etc.*; and

T-4. *Taddeo v. Commonwealth of Pennsylvania.*

5. David M. Lynch, P.E., P.L.S., Cheltenham Township's Director of Engineering, Zoning and Inspections, determined that use conducted at the Property was the operation of a private ambulance service and issued a Notice of Violation on June 17, 2011.

6. In the Notice of Violation, Mr. Lynch determined that (1) the Property was located within an R-5 Residence District, (2) the R-5 Residence District regulations do not permit the operation of commercial uses, and (3) the current use was not the "wholesaling of passenger cars allowed pursuant to a 1970 Zoning Board decision."

7. In the Notice of Violation, Mr. Lynch advised the owner that it had the option to bring the Property into compliance with the Zoning Code by ceasing operation of a private ambulance service or to file an appeal to the Zoning Board.

8. On July 15, 2011, Applicant filed an Application to Zoning Hearing Board for Zoning Relief by which Applicant challenged Mr. Lynch's determination of a violation of the Zoning Code and, alternatively, sought appropriate zoning relief.

9. On February 23, 1954, the Cheltenham Township Zoning Board of Adjustment (the "ZBA") decided that the use of the premises known as 7803-09 as a public garage was a lawful change or resumption of a prior nonconforming use provided that no painting or body work would occur at the Property.

10. On January 28, 1955, the ZBA denied an application to permit the use of the first floor at 7803-09 for assembly and transport of conveyors on the basis that such use was not a change of nonconforming use to a use in the same category of use.

11. On March 26, 1970, the Zoning Board decided, with conditions, that the use of the premises known as 7803-09 for the sale of passenger automobiles at wholesale was of the same class of use as a prior lawful nonconforming use.

12. Prior to the action of the Zoning Board in 1970, the Property had been used as a machine shop.

13. On July 13, 2004, the Zoning Officer signed an Application for Zoning & Use Certification (the "Certification") for the premises known as 7803-09 in which he categorized the described use as legal, nonconforming in accordance with Zoning Board decisions at Appeal Nos. 1563, 629 and 670.

14. The sales agent for the then owner represented on the Certification that the then current use of the Property was for warehouse, auto repair and auto storage.

15. From a deed offered into evidence by the Applicant, the premises known as 7803-09 was conveyed to the Applicant on July 28, 2004.

16. There are two buildings on the premises known as 7803-09, one of which, 7803 Montgomery Avenue, is the Property.

17. Applicant opposes the characterization of Zoning Order 1563, as noted in the Notice of Violation letter dated June 17, 2011, stating that no proof has been submitted evidencing that an ambulance service business is operating at the Property.

18. On August 12, 2010, SBG Management Services offered to enter into an agreement with Patient Care Ambulance, Inc. ("Patient Care") as tenant, the terms of which allowed Patient Care to store ambulances on the Property in exchange for rent.

19. Patient Care has conducted its business with its ambulances housed at the Property since August 31, 2010, and currently continues on the basis of a month-to-month lease.

20. Devin Spady, the tenant at the Property, is the owner and president of Patient Care, and Patient Care provides a private ambulance service. The business address of the Company is 1135 West Cheltenham Avenue, Elkins Park, Pennsylvania 19027. Patient Care has operated at this address for approximately three years. Patient Care provides non-emergency, routine transports for patients. Patient Care has ten employees, six of which work in pairs as ambulance drivers/EMTs. Patient Care owns four Ford E-350 diesel ambulances.

21. Patient Care stores all four ambulances at the Property, and the ambulances are registered with the Department of Transportation at the 1135 West Cheltenham Avenue address. The private vehicles of the ambulance drivers/EMTs are parked at the Property during the day while the ambulances are being used.

22. Patient Care stores a limited amount of ambulance-related supplies and materials at 7803 Montgomery Avenue. Patient Care also stores an air compressor, a jack, fluids and very limited repair and maintenance supplies in the building at the Property.

23. Patient Care's hours of operation are from approximately 4:30 a.m. until 4:30 p.m. Monday through Saturday. Generally, the ambulances do not return to the garage during the day unless in need of repair. Anything more than simple repairs to ambulances are completed at a dealership in Jenkintown.

24. Patient Care operates three of the four ambulances daily, keeping the remaining ambulance as a backup. The radios inside the ambulances are used for emergency only; communication with the drivers is made via cell phone.

25. Six of Patient Care's ten employees are engaged in the actual transport operation of the ambulances. Three employees in addition to Mr. Spady work out of the Cheltenham Avenue offices.

26. Patient Care is certified by the Commonwealth of Pennsylvania to transport patients by ambulance, and Patient Care maintains its main office and all records at the Cheltenham Avenue address.

27. On each day, Monday through Saturday, the ambulances transport clients, usually as many as six per day, according to pre-arranged appointments, transferring patients to medical care providers.

28. Patient Care assigns two employees, at least one of which is EMT trained, to each ambulance.

29. Mr. Spady stated that Patient Care does not respond to 911 emergency calls and that the ambulances do not use sirens or flashing lights as part of their normal, non-emergency use.

30. Mr. Spady stated that Patient Care needed a secured, covered garage for storage of its ambulances to prevent vandalism and to easily dispatch ambulances during inclement weather.

31. Employees who operate the ambulances park their personal vehicles inside the building at the Property.

32. Legal two-hour parallel parking on Montgomery Avenue is available on the side of the street opposite the Property.

33. None of the normal office operations of Patient Care take place at the Property. The Property is used strictly for storage of Patient Care's ambulances and for minor repairs and restocking of necessary inventory required for ambulance operation.

34. David Lynch, Director of Engineering, Zoning and Inspections for the Township of Cheltenham, stated that he observed that the Property contained a bathroom, storage of miscellaneous parts and inventory and storage of motor vehicles.

35. Philip C. Pulley, a principal of the Applicant/Owner of the Property, stated that the previous owner used the Property as a police impound yard and for automotive related uses, including parts storage and forklifts used to move automotive parts.

36. From the time of purchase until the current leasehold on 7803 Montgomery Avenue, the Applicant used the Property for the storage, maintenance and repair of construction equipment including backhoes, Bobcats and Zambonies (from an ice rink).

37. In 2010, Mr. Pulley leased the Property to Patient Care Ambulance for the storage of ambulances. Mr. Pulley stated that running a private ambulance service from the Property would be a breach of the lease. In addition, Mr. Pulley stated that the Property does not contain any of the necessary amenities for business office use and that the Property is best suited for warehouse or industrial storage.

38. The parking of ambulances on Montgomery Avenue is an essential part of Patient Care's business.

39. Patient Care is conducting a business when it stores and dispatches ambulances from 7803 Montgomery Avenue.

40. Applicant did not demonstrate that the Property could not be developed for a use permitted by the Zoning Code.

41. Applicant did not demonstrate an unnecessary hardship.

### **DISCUSSION**

The Cheltenham Township Zoning Officer issued a Notice of Violation to Montgomery Court Realty Co., L.P., owner of 7803 Montgomery Avenue. The Property is located in an R-5 Residence District, the regulations for which do not permit commercial uses.

The Zoning Officer determined that the operator of the Property, Patient Care, was conducting a private ambulance service. The Notice advised the owner to bring the use of the Property into compliance with the Zoning Code by ceasing the private ambulance service. Advised of its right to appeal the Notice, Applicant appealed to the Zoning Board, claiming that the Property was not operated for a prohibited commercial enterprise.

**I. OPERATIONS AT THE PROPERTY CONSTITUTE A PRIVATE AMBULANCE SERVICE**

**A. BACKGROUND**

The threshold question is whether the basis of the Zoning Officer's Notice is warranted in the record. There is no dispute that the Applicant leases the premises to Patient Care, which locates four ambulances at the Property. Generally, from Monday to Saturday, three teams of two Patient Care employees arrive at the Property, park their personal vehicles at the Property and leave the Property in an ambulance. Most days, the ambulances follow a pre-arranged route, picking up patients, delivering those patients to medical care providers and returning those patients to their homes or other destinations. Each ambulance crew repeats these tasks for about six patients each day, most often without returning to the Property.

Patient Care keeps a fourth ambulance at the Property in case one of the ambulances breaks down. While Patient Care keeps a modest amount of supplies for vehicle maintenance, repairs are generally performed off-site. Related ambulance supplies are kept on-site at the Property.

The business related tasks of communicating with patrons, insurers, Commonwealth oversight and other business functions, including the scheduling of patient pick-

ups and drop-offs, take place at Patient Care's offices on Cheltenham Avenue. Patient Care's financial functions and official address are at the Cheltenham Avenue offices.

**B. THE OPERATIONS AT THE PROPERTY ARE PART AND PARCEL OF THE AMBULANCE BUSINESS**

The record demonstrates that operations at the Property are not merely the storage of ambulances but are, in fact, an essential component of the private ambulance service. Had Patient Care housed the ambulances in the same manner on a surface parking lot or enclosed garage on the Cheltenham Avenue lot, no one could claim that the use was not part of the principal use and the parking lot or garage was not accessory to the use. Here, it is Patient Care, rather than some independent entity, that operates the garage in a manner clearly accessory to its principal business.

Commonwealth Court's reasoning in Taddeo v. Commonwealth, 412 A.2d 212 (Pa. Commw. Ct. 1980) is controlling. There, an operator of an asphalt business conducted at one address also parked a number of vehicles and equipment at his home address because it was more convenient for the business's employees. Id. at 213. The Taddeo Court held that when equipment, commercial in nature and inseparable from the business enterprise, was parked at a residence, a part of the commercial enterprise is transferred to the residence. Id. Here, the ambulances are critical to the ambulance service business, and parking the ambulances on Montgomery Avenue "transfers" a portion of the business to 7803 Montgomery Avenue. Accordingly, the Zoning Officer was correct in determining that the lessee was engaged in the ambulance service business at the Property.

Similarly, in Fayette County v. Blout, 398 A.2d 167 (Pa. Commw. Ct. 1978), landowner used a garage in a residential district to park vehicles used in a trucking, hauling and

asphalt business. Non-family employees arrived the residential property, parked their personal vehicles and took the trucks to engage in the business. The Court found that the parking of the vehicles was more than the mere storage of vehicles and constituted a commercial operation.<sup>1</sup> Id. Here, the commercial operation is an ambulance service business operated from the Property, and the Zoning Officer was correct to categorize the use as such. See also Galliford v. Commonwealth, 430 A.2d 1222, 1224 (Pa. Commw. Ct. 1981).

**C. THE AMBULANCE BUSINESS IS NOT A LAWFUL NONCONFORMING USE**

Applicant argues that the current practice of parking ambulances overnight at the Property and parking employee passenger vehicles during the daytime is the storage of ambulances and is the exercise of a lawful nonconforming use. Alternatively, Applicant’s brief argues that the storage of ambulances is a natural expansion of a lawful nonconforming use.

On February 29, 1954, the Cheltenham Township Zoning board of Adjustment granted a special exception to allow a “public garage” at the Property subject to certain conditions not relevant here. The basis for the decision was a determination that the public garage use was either a resumption of a nonconforming use or a use in the same class of use as the prior lawful nonconforming use and, therefore, lawful. Under either analysis, the lawful use became a public garage. The public garage use became protected. Pappas v. Phila. Zoning Bd. of Adjustment,

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<sup>1</sup> The Zoning Board finds no reason in the record or in governing precedent to distinguish these cases on the basis that the properties were otherwise used for residential purposes. The applicable conclusion is that the use was a commercial use, part of a business principally conducted elsewhere.

589 A.2d 675, 676 (Pa. 1991) (owner of property with lawful nonconforming use enjoys a vested property right).

A threshold question is whether Patient Care’s use of the Property comes within the “public garage” use allowed by the 1954 decision and under which Applicant claims entitlement. Applicant bears the burden of establishing the nature and extent of the nonconforming use under which Applicant claims entitlement. Brighton Enterprises, Inc. v. City of Phila., 505 A.2d 1084, 1086 (Pa. Commw. Ct. 1986). There is little in the record that identifies with clarity the use that followed the 1954 decision.

While the Record does not include the zoning code that was in effect in 1954, the Zoning Board will consider, arguendo, that the current Zoning Code definitions were applicable in 1954 because that alone may inform the Zoning Board’s findings of fact.<sup>2</sup> The Zoning Code defines public garage as “[a] building not a private or minor garage or carport, one or more stories in height used for the storage and/or repair of motor vehicles.” Zoning Code, § 295-2(C). A public garage is not a minor garage which the Zoning Code defines as “[a] building not a private garage used solely for the storage of motor vehicles.” Id. Nor is it a parking lot which is “[a] lot on a tract of land employed for the transient and open air parking of motor vehicles.” Id. Clearly, the legislative body knew the manner in which to craft an ordinance that allowed transient, in-and-out parking, but did not choose to include the terms transient or parking in the definition of public garage.

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<sup>2</sup> Applicant relies upon the current definitions and, therefore, is not disadvantaged by the use here of current definitions. Applicant’s Brief at 33.

Webster's II New College Dictionary defines "garage" first as "a building or wing of a building in which to park a car." The second definition is "[a] commercial establishment where cars are repaired, serviced or parked." The Illustrated Book of Development Definitions defines garage as "[a] deck, building or structure, or part thereof, intended to be used for the parking and storage of vehicles" and public garage as "[a] building, or portion thereof, other than a private customer and employee garage or private residential garage, used primarily for the parking and storage of vehicles and available to the general public." Taken together, these definitions would lead to the conclusion that a public garage is place to park vehicles on a temporary basis and open to the general public. But that is not the use that the record describes here.

The public garage use was likely meant to characterize what are now called service stations and automobile repair shops. In any event, the record includes little evidence of what kind of activities perfected (or failed to perfect) the public garage use. In the decision rendered at Appeal No. 670, the Zoning Board explained the use by the then-petitioner as the storage of new automobiles and preparation of those automobiles to "distributors in the area." Appeal No. 670 at 3. However, as illustrated hereafter, the public garage use, contrary to Applicant's argument, did not survive until Applicant's ownership.

In any event, the public garage use was abandoned. On March 26, 1970, the Zoning Hearing Board found that the Property had most recently been used as a machine shop. Appeal No. 1563. The petitioner there sought zoning relief in order to operate the Property for the wholesaling of used automobiles. The Zoning Board found that the Property had most recently been used as a machine shop. Appeal No. 1563. The petitioner there sought zoning relief in order to operate the Property for the wholesaling of used automobiles. Id. at 2. Cars

were to be brought to the Property to undergo limited motor repair excluding body work and painting and transported directly to use car dealers. Id. The description of the proposed use did not include any mention of public garage. Subject to conditions that prohibited use on Saturdays and the parking of any vehicle outside of the building at the Property, the Zoning Board granted relief concluding that the “intended use . . . is a use which is within the same class of use and is permissible as the last non-conforming use of the premises.” Id. at 2-3. While the burden of proof of abandonment rests with the Township, the only facts on the continuing use issue in 1970 is that the public garage use had ceased. Appeal No. 1563; Pappas, 589 A.23d at 677.

With that decision, the permitted use of the Property changed from “public garage” to “wholesaling of used automobiles.” The clear impact of the ordinance, Section 295-227(F), is that the prior use is discontinued in favor of the new use. No evidence in the record demonstrates that the public garage use, if it had not already been abandoned, continued. As discussed hereafter, abandonment rests on intent and a critical element necessary to demonstrate intent to abandon is an act inconsistent with the continuing use. See Latrobe Speedway, Inc. v. Zoning Hearing Bd., 686 A.2d 888, 890 (Pa. Commw. Ct. 1996). Here, that act is the securing of a special exception on the basis that the public garage use will change to auto wholesaling use.

**D. THE AMBULANCE SERVICE IS NOT AN EXPANSION OF A LAWFUL NONCONFORMING USE.**

Alternatively, Applicant argues that its use is an expansion of a lawful nonconforming use protected by the principle of natural expansion of lawful nonconforming uses. “A non-conforming commercial or industrial use is permitted to expand because expansion is an essential part of the most commercial or industrial uses.” Miller & Son Paving, Inc. v. Wrightstown Township, 451 A.2d 1002, 1007 (Pa. 1982) (quoting Ryan, *Pennsylvania*

*Zoning Law and Practice*, § 7.72 (1970)). “To qualify as a continuation of an existing nonconforming use, a proposed use must be sufficiently similar to the nonconforming use as not to constitute a new or different use.” Limley v. Zoning Hearing Bd. of Port Vue Borough, 625 A.2d 54, 55 (Pa. 1993). While governing authority holds that “ a change in instrumentality will not defeat the purpose or existence of a nonconforming use,” the proposed ambulance service use is a fundamental change in use and not an expansion to take advantage of modern technology or to expand the use to additional property. Chartiers v. Martin, 542 A.2d 985, 988 (Pa. 1988); Arter v. Phila. Zoning Bd. of Adjustment, 916 A.2d 1222, 1230 (Pa. Commw. Ct. 2007). As in Arter, the proposed nonconforming use is a use in addition to the approved wholesaling use and not otherwise permitted as a matter of right. Id. Stated differently, there is no constitutionally protected right to introduce a new use onto a property that is operated for a different nonconforming use. See Pietropaolo v. Zoning Hearing Bd. of Lower Merion Twp., 979 A.2d 969, 974 (Pa. Commw. Ct. 2009).

**E. APPLICANT CANNOT RELY UPON THE CERTIFICATION.**

Applicant asserts that it can rely on the 2004 Application for Zoning and Use Certification (the “Certification”), partially completed by the landowner and partially by the Township Code Officer. On that form, the Applicant characterized the “Current Use of the Property” as “Warehouse /Auto Repair / Auto Storage.” The Township Official confirmed that the “Current Use” was “Legal – non-conforming – granted by Zoning Board under Appeal No. 1563, 629, 670.” The form does help establish that, based upon the landowners representation of the use, the use was indeed legally nonconforming to the extent provided by the Zoning Board’s decision in the referenced decisions. The Zoning Officer was correct because the landowner’s use description mirrored the relief grant at Appeal No. 1563, and the Certification stands for

nothing more. Applied here, the use is not the automotive use described as “wholesaling of used automobiles,” but is an ambulance service.

In addition, in order to claim vested rights (which Applicant did not do in this matter), Applicant needed to prove, among other things, that it expended substantial sums in reliance upon the Certification. The Record contains no such proofs. Applicant, further, needed to establish its good faith by showing that it investigated the zoning of the Property. In doing so, it needed to show that it investigated the Zoning Board decisions at the time of expenditure and that its reading was reasonable. Not only is the Record barren of such proofs, ambulance service cannot be reconciled with a simple reading of the decision at Appeal No. 1563.

**F. AMBULANCE SERVICE IS NOT IN THE SAME CLASS OF USE**

Applicant claims that its use is of the same class of use as the lawful nonconforming use and that is it, therefore, entitled to a determination of permissible under Section 295-227(F). However, Applicant made no showing that an ambulance service is in the same class of use as the “wholesale of automobiles.”

**G. APPLICANT FAILED TO DEMONSTRATE HARDSHIP**

Section 910.2(a) of the MPC clearly empowers the Board to grant variance only in a matter where the Board can make all of the following findings where relevant:

- (1) That there are unique physical circumstances or conditions, including the irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant.

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

Applicant bears the burden of establishing that its Application meets the relevant criteria. Nothing in the record demonstrates that the Property cannot be developed for a use permitted by the Zoning Code. Instead, Applicant claims, citing Arter, supra, that its character as a nonconforming use fulfills the hardship criteria. In Arter, a cemetery owner sought to include a crematory use on the basis of natural expansion. Applicant's reliance is, however, misplaced. The Arter Court noted that the "right to expand does not include the right to add a second nonconforming use." Arter, 916 A.2d at 1230. Like the Zoning Board here, the Court found that the crematory use constituted a new and different use than the cemetery use. Id.

In addition, Applicant's use of Arter's footnote 14 is inapposite. There, the Court repeats the direction of Jenkintown towing Service v. Zoning hearing Bd. of Upper Moreland Twp., 446 A.2d 716 (Pa. Commw. Ct. 1982), finding that a pre-existing nonconforming use itself constitutes the unique physical circumstance which can make a property unique and the stuff from which a zoning board can make a finding of hardship. Arter, 916 A.2d at 1230 n. 14; Jenkintown, 716 A.2d at 720. However, that is only one prong of the test. The doctrine of natural expansion's utilization of the uniqueness prong only produces hardship where the

economic survival of the business at the property hangs in the balance. Jenkintown, 916 A.2d at 720-21. Here, there is no such similar set of facts upon which Applicant can rely. Accordingly, Applicant cannot prove an unnecessary hardship with regard to the Property, and the elements of hardship are unproven.

In order to grant a variance, the Zoning Board must be empowered by authority delegated through the MPC. The requirements for a variance are, in this case, clear and bind the Board's discretion. Accordingly, upon the record in this matter, the Board is without power to grant relief and must deny Applicants' request for variance.

#### **CONCLUSIONS OF LAW**

1. Operation of a private ambulance service in the R-5 Residence District is not permitted by the Cheltenham Township Zoning Ordinance. However, in accordance with the Pennsylvania Municipalities Planning Code and the Cheltenham Zoning Ordinance, the Cheltenham Township Zoning Hearing Board is empowered to hear and decide requests for variances where it is alleged that strict conformance with the governing ordinances would result in unnecessary hardship.

2. The current use of the Property is an ambulance service.

3. The zoning regulations applicable to an R-5 Residence District do not permit the operation of an ambulance service.

4. The Zoning Officer was correct to conclude that the ambulance service operated out of the Property and correct to issue a Notice of Violation.

5. The ambulance service is not a lawful nonconforming use

6. The Zoning Board decision at Appeal No. 629 that allowed a public garage was superseded by the Zoning Board decision at Appeal No. 1563.

7. Any use of the Property as a public garage was abandoned by landowner's successful application to the Zoning Board at Appeal No. 1563.

8. The Zoning Board decision at Appeal No. 1563 allowed the use of the Property for the wholesale of automobiles and accessory storage and repair.

9. The use of the Property for an ambulance service is a new and different use that the wholesale of automobiles and accessory storage and repair.

10. Applicant failed to demonstrate that the Property could not be developed and used for uses permitted in an R-5 Residence District.

11. Applicant failed to demonstrate an unnecessary hardship.

12. Under the circumstances of this matter, Applicant has failed to meet its burden to establish that, due to the unique physical circumstances of the Property or conditions imposed by surrounding properties, a failure to grant relief to allow the storage of a private ambulance on the Property would result in an unnecessary hardship.

### **DECISION**

**WHEREFORE**, this 12<sup>th</sup> day of March, 2012, the Cheltenham Township Zoning Hearing Board, by a 2-0 vote, upholds the Cheltenham Township Notice of Violation and denies Applicant's request for relief.

### **CHELTENHAM TOWNSHIP ZONING HEARING BOARD**

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**PETER LABIAK, Chairman**

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**AMEE FARRELL, Member**

**THIS DECISION IS OFFICIALLY ISSUED ON JULY 3, 2012.**