

**BEFORE THE ZONING HEARING BOARD OF POCOPSON TOWNSHIP
CHESTER COUNTY, PENNSYLVANIA**

In Re: Application of Thomas M. Dorff and Gina T. Dorff, seeking special exceptions and/or variances from Zoning Ordinance Sections: 250-19.C(3) and (4) (impervious coverage); 250-41.15.D (floodplain); 250-41.15.F(2) (floodplain); 250-87.B(8) (floodplain); 250-87.D(1)(a), (b) and (c) (moderately steep slopes, very steep slopes and steep slope margins); 250-87.D(1)(c) (uses within very steep slopes); 250-87.K(1) (woodland disturbance); 250-87.F(4)(b) and (d) (water body and riparian buffer encroachment); 250-87.K(4)(a) and (b) (woodland replacement); 250-87.K(4)(a) and (b) (woodland replacement); 250-87.F(5)(a) (riparian buffer disturbance); and 250-87.H(a) and 250-17.C(2) (removal of Heritage Trees). All so as to permit the construction of a residential dwelling, driveway, garage, covered patio, patio, retaining walls and septic system on a 2.03-acre property located at 920 Denton Hollow Road, West Chester, PA (UPI#63-4-120), in the Township's RA – Residential and Agricultural zoning district.

DECISION AND ORDER

I. PROCEDURAL HISTORY

On or about March 14, 2022, the Applicants filed an (amended) application to the Pocopson Township Zoning Hearing Board, seeking special exceptions and/or variances from the Pocopson Township Zoning Ordinance Sections: 250-19.C(3) and (4) (impervious coverage); 250-41.15.D (floodplain); 250-41.15.F(2) (floodplain); 250-87.B(8) (floodplain); 250-87.D(1)(a), (b) and (c) (moderately steep slopes, very steep slopes and steep slope margins); 250-87.D(1)(c) (uses within very steep slopes); 250-87.K(1) (woodland disturbance); 250-87.F(4)(b) and (d) (water body and riparian buffer encroachment); 250-87.K(4)(a) and (b) (woodland replacement); 250-87.K(4)(a) and (b) (woodland replacement); 250-87.F(5)(a) (riparian buffer disturbance); and 250-87.H(a) and 250-17.C(2) (removal of Heritage Trees). All so as to permit the construction of a residential dwelling, driveway, garage, covered patio, patio, retaining walls and septic system on a 2.03-acre property located at 920 Denton Hollow Road, West Chester, PA (UPI#63-4-120) (hereinafter the "Property"), in the Township's RA – Residential and Agricultural zoning district.

The Applicants' attorney had granted the Zoning Hearing Board extensions of time through and including April 30, 2022, in which to commence the hearing in this matter. (Exhibits B-9 and B-10). However, those extensions were rendered moot when Applicants filed their third amended application on or about April 19, 2022 (Exhibit A-4).

On April 6, 2022, the Pocopson Township planning commission reviewed the Applicants' revised plans and, after noting its preference for the revised plan over the original version, recommended that the Board of Supervisors take no position as to the revised application other than requesting certain conditions be imposed if the ZHB granted approvals. (Exhibit B-7).

On April 25, 2022, the Township Board of Supervisors met and, consistent with the planning commission's recommendations, voted unanimously to take no position on the amended application, other than requesting certain enumerated conditions on any approval by the ZHB, including compliance with the various review letters from the Township's consultants. (Exhibit B-8).

A ZHB hearing was originally scheduled for the evening of May 3, 2022 at 7:00 p.m. but was then rescheduled for May 5, 2022 at 7:00 p.m. Unfortunately, despite having timely received the corrected notice of the May 5 hearing for publication, the Daily Local News published the original notice, incorrectly advertising the hearing for May 3. Accordingly, the ZHB solicitor appeared for the May 3 "hearing" and announced the postponement to May 5. In addition, written notice of the postponement from May 3 to May 5 was posted on the entrance door of the Township building. See the transcript of the May 3 announcement (Exhibit B-12).

All of the required notices to the Applicants, the mailings to neighboring property owners, and the hearing notice posted on the subject Property, contained the correct hearing date and it appears that no one was misled by the newspaper's publication of the incorrect hearing date, as no one appeared for the May 3 hearing.

The hearing was conducted on the evening of May 5, 2022. The Zoning Hearing Board was comprised of its chairman, James H. Noon, Jr. and members Nathan Wilson and David H. Ziegler, Sr. The Applicant was ably represented by Gina Gerber, Esq. of Riley, Riper, Hollin & Colagreco. The Township, having issued a conditional letter of neutrality for the application, was not represented by counsel at the hearing, although Kenneth Hoffman, the representative of the Township Engineers, Gilmore & Associates, Inc. was present.

At the hearing the following neighboring property owners appeared and were granted "party" status:

- Barbara and Edward McClatchy, Jr.
7 Bittersweet Drive
West Chester, PA 19382
- Denise and Rowland Kern
4 Bittersweet Drive
West Chester, PA 19382

(Mrs. Kern's request, in her capacity as president of the Bittersweet Drive homeowner's association, for admission of the HOA as a party was denied in the absence of any documentation of any vote or resolution of the HOA to seek party status or to authorize her to do so.)

In addition, pursuant to discussions prior to the hearing, the adjacent property owner

- Deborah Sellers
910 Denton Hollow Road
West Chester, PA 19382

was admitted as a party, despite her inability to attend in person (she having consented to the hearing being conducted in her absence.) (Exhibit Sellers-1).

Various exhibits were admitted into the record without objection, as follows:

Zoning Hearing Board Exhibits:

- B-1** Applicant's (amended) Application with all attachments, filed March 14, 2022.
- B-2** Chester County aerial photograph / tax parcel map of the subject property.
- B-3** Copy of official Notice of Hearing, as published, posted and mailed to all parties.
- B-4** Proof of Publication showing newspaper publication on April 20, 2022 and April 27, 2022.
- B-5** Verification of Posting of Notice.
- B-6** Verification of Mailing of Notice.
- B-7** Copy of April 8, 2022 recommendation from the Township Planning Commission, noting its preference for the revised plan and suggesting conditions to be attached to any approval.
- B-8** Copy the position statement of the Township Board of Supervisors.
- B-9** Email dated November 5, 2021 from Applicant's attorney granting extension of time for a hearing.
- B-10** Email dated February 9, 2021 from Applicant's attorney granting second extension of time for a hearing.
- B-11** Copy of March 26, 2022 and May 2, 2022 reports from the Township Fire Marshall.
- B-12** Transcript of 5/3/2022 announcement of correct 5/5/2022 hearing date.
- B-13** 5/5/2022 email exchange with all parties and prospective party re: no need to postpone the hearing.
- B-14** (In the event of any appeal) Copy of the Pocopson Township Zoning Ordinance in effect on the date of the Application.

Applicant's Exhibits:

- A-1** Zoning Hearing Board Application and Recitation of Zoning Relief dated October 13, 2021, and Zoning Plan prepared by InLand Design, dated October 13, 2021.

- A-2** First Amended Zoning Hearing Board Application and Recitation of Zoning Relief, dated November 2, 2021.
- A-3** Second Amended Zoning Hearing Board Enclosure Letter, Application and Recitation of Zoning Relief dated March 14, 2021, and Zoning Plan prepared by InLand Design, dated October 13, 2021, last revised January 14, 2022.
- A-4** Third Amended Zoning Hearing Board Enclosure Letter and Recitation of Zoning Relief dated April 19, 2022.
- A-5** Response to Township Engineer Review Letter by InLand Design, dated April 22, 2022 and Zoning Plan prepared by InLand Design, dated October 13, 2021, last revised April 22, 2022.
- A-6** Pocopson Township Zoning Ordinance of 1972, as amended (*incorporated by reference*).
- A-7** Deed for 920 Denton Hollow Road.
- A-8** Aerial of 920 Denton Hollow Road.
- A-9** Zoning Plan prepared by InLand Design, dated October 13, 2021, last revised May 4, 2022 (3 sheets).
- A-10** Architectural Rendering of Proposed Residence.
- A-11** Brandywine Conservancy, Inc. Conservation Easement, recorded July, 1977 at Deed Book 378, Page 484.
- A-12** Brandywine Conservancy Letter, dated March 28, 2022.
- A-13** C.V. of Evan Pellegrino, P.E.
- A-14** Natural Resource Rendered Zoning Plan, prepared by InLand Design, dated October 13, 2021, last revised May 4, 2022.
- A-15** C.V. of Meghan Shomper, RLA.
- A-16** Photographs of Existing Vegetation (A through E).
- A-17** Arborist Report prepared by Rockwell Associates, dated April 28, 2022.
- A-18** C.V. of Thomas F. Smith, P.E.
- A-19** Floodplain Study and Driveway Culvert Design Report for Thomas M. & Gina T. Dorff, prepared by Bercek & Associates, dated March 3, 2022.

Other Parties' Exhibit:

Sellers-1 Email dated May 4, 2022 from Deborah Sellers

II. FINDINGS OF FACT

1. The Applicants, Thomas M. Dorff and Gina T. Dorff, are the record owner of the subject Property located at 920 Denton Hollow Road, West Chester, Pocopson Township, Chester County, Pennsylvania, being UPI #63-4-120, having acquired the Property by deed dated April 29, 2021. (Exhibit A-7).

2. The subject Property has a gross tract area of 2.03 and is zoned RA – Residential and Agriculture.

3. By reference to the legal description attached to Applicants' deed, the subject Property was created in its current configuration by a subdivision plan of part of the Hollingsworth property dated May 24, 1968.

4. The Property is presently unimproved and is heavily wooded with a stream, floodplain and associated riparian buffer zones traversing the entire width of the Property, along the Denton Hollow Road frontage.

5. In addition, by reference to the Applicant's plan (Exhibit A-9) and the testimony of Evan Pellegrino, the Applicants' civil engineer, the Property is severely constrained, including that 87.33% is comprised of steep slopes; 13.69% is located within the floodplain; 18.15% is located in the inner riparian buffer zone; and 14.89% is located in the outer riparian buffer zone.

6. In addition, almost an acre of this 2.054 acre Property is located within a conservation easement area, precluding construction of the house and garage in those areas.¹ As to that portion of the driveway and septic system proposed to be located within the conservation easement area, Applicants presented a letter from the Brandywine Conservancy, approving the location of those features within the conservation easement area, as depicted on the plans. (Exhibit A-12, dated March 28, 2022). Because that letter recites that the Conservancy had "carefully reviewed the plans," the ZHB interprets their letter as including approval for the grading, retaining walls and stormwater management facilities associated with the proposed driveway.

7. As reflected by the Applicants' plans, Applicants propose to construct a residential dwelling with garage, driveway, driveway culvert, retaining walls, septic system and related stormwater management structures. Surrounding properties are improved with single-family dwellings on individual lots.

¹ Clearly, this Property, created back in 1968, would not be approved as a building lot under the Township's current zoning or subdivision ordinances.

8. Applicants propose a standard, in-ground (i.e. not a sand-mound or other nonconventional) sewage system, to be permitted by the Chester County Health Department and thereby certified as adequate for the proposed dwelling size and number of bedrooms. (Three bedrooms, 2.5 baths.)

9. The subject Property has frontage on a public road, known as Denton Hollow Road. As depicted on Exhibit A-9, the area between the house site and the road is comprised of moderately steep slopes (10% to 20%) and very steep slopes (over 20%). The proposed driveway runs from the road, across the stream, and uphill to the house site, which is located on the most level portion of the building envelope on the lot.

10. In the absence of an alternative driveway access to the house site, there is no way to avoid the stream crossing and significant disturbance of the riparian buffer zones and steep slopes.

11. By reference to Exhibits A-9 and B-2 it is clear that the most direct route for vehicular access to the house site would be a driveway from the adjacent Bittersweet Drive.

12. Unfortunately, the Property is not immediately adjacent to Bittersweet Drive, and it would be necessary for such a driveway to cross a small wedge of land owned by others, (varying in width from mere inches to approximately five (5) feet).

13. In addition, Bittersweet Drive is not a Township road, but is a private road owned by others.

14. In order to avoid the significant disruption of the stream corridor, riparian buffer zones, steep slopes, and intrusion into the floodplain by the proposed driveway, it would be necessary for the Township to exercise its power of eminent domain to "take" the small wedge of property separating the Property from Bittersweet Drive, along with an easement for use by the Property owners of that portion of Bittersweet Drive from the relocated driveway to Denton Hollow Road. Because no such action was proposed by the Township, it was necessary for the ZHB to consider the application as presented.

15. By reference to the existing conditions plan and the proposed Layout Plan (Exhibit A-9) it is clear that the proposed dwelling and garage have been located so as to minimize their intrusion into the very steep slope areas. Intrusion into the moderate steep slope areas cannot be avoided on this Property. Likewise, disturbance of the small area of steep slope margins adjacent to the house site cannot be avoided.

16. Because stormwater from the house site in the center portion of the Property will accumulate and run downhill to the east and south, Applicants propose to construct two stormwater recharge basins, one at the low point of the buildable area, and another one downhill from it.

17. In addition, because stormwater from the driveway will accumulate and run downhill, Applicants propose an additional stormwater facility underneath, and at the bottom of, the driveway.

18. By reference to their Landscaping Plan (Sheet 3 of Exhibit A-9), Applicants are proposing replacement screening to create a visual buffer from, and for the benefit of, the neighbor to the north, Ms. Sellers.

19. Additional screening is proposed along the southwestern property line where Bittersweet Drive runs close by, and along the driveway where it climbs the steep slopes.

20. Additional screening, including evergreen screening, would be desirable along the northern property line for the protection and benefit of the Sellers property, especially during the winter months when the deciduous trees will lose their foliage.

21. Evan Pellegrino, P.E., the Applicants' project engineer, testified that the Proposed Layout Plan dated October 13, 2021, as revised on April 22 and May 4, 2022 following discussions between the Applicant and the Township, constitutes the minimum intrusion upon the environmental resources of the Property sought to be protected by the ordinance, and that the resource protection purposes of Ordinance Section 250-87 are being adhered to, to the maximum extent practicable.

22. Mr. Pellegrino assured the ZHB that the Applicant could comply with all requirements of the Township engineer's review letter dated April 19, 2022 (part of Exhibit B-8), although there may need to be some minor modifications to the plan upon review of the final stormwater management plan.

23. Applicant's floodplain specialist, Thomas F. Smith, P.E., testified that requested variance from ordinance section 250-87.F(5)(a) is necessitated by the unique physical characteristics of the property, resulting in an unnecessary hardship not created by the Applicants, and that the requested variance is the minimum that will enable the reasonable use of the Property.

24. Mr. Smith also testified that the Applicants can comply with all requirements of the April 19, 2022 memorandum/review letter of the Township's consultant, Castle Valley Consultants, Inc. (part of Exhibit A-8).

25. The Zoning Hearing Board reluctantly concludes, as a factual matter, that disturbance of the steep slopes and riparian buffer zones have been avoided to the maximum extent practicable, and that the allowance of most of the requested special exceptions and variances are necessary so as to enable the reasonable use of the Property.

26. In the absence of an alternative driveway access, the Board was reluctantly satisfied that the Property is suitable for the proposed use in terms of highway access, and was satisfied as to the proposed means of sewage disposal and water supply.

27 Likewise, the Board was satisfied that the proposed use and development will not unduly alter the character of the existing neighborhood or adjacent tracts, although there is significant doubt as to whether the proposed mitigation measures will ultimately be effective.

28. Prior to issuance of any building or other permits the Township engineer will review the detailed stormwater management plan and certify that adequate stormwater recharge or storage facilities are being installed to handle all roof and impervious surface drainage, and resolve any existing problems and any increase in runoff.

29. A majority of the Board was reluctantly satisfied that the approval of the requested special exceptions will not result in any unduly or unusually negative impacts beyond those normally associated with the proposed uses and activities.

III. DISCUSSION

As noted, the Applicants seek a total of fourteen special exceptions and/or variances. Neither the Township planning commission nor the Board of Supervisors took any position in opposition, and much of the requested relief will be granted. Each of the requests will be addressed in turn:

A. The Individual Special Exceptions.

The general ordinance standards and criteria for the grant of special exceptions appear at Zoning Ordinance section 250-79.C, which requires the ZHB to consider whether the Applicant met its burden of proving that, if granted, the requested use or activity will not result in unduly or unusually negative impacts beyond those normally associated with such a use or activity. In particular, the ZHB is required to consider:

- “(1) Suitability of the tract. Demonstration by the applicant of the suitability of the proposed tract, including, as applicable, environmental conditions, highway access, means of sewage disposal, and water supply, and demonstration by the applicant of the extent to which the proposed use is susceptible to regulatory restriction through the imposition of appropriate conditions.
- (2) Impact on existing neighborhood character. Demonstration by the applicant of the extent to which the proposed special exception:
 - (a) Will alter unduly the character of the existing neighborhood and adjacent tracts, and the effectiveness of proposed or potential mitigation measure;
 - (b) Will, in terms of the character and type of development in the area surrounding the location of the proposed special exception, constitute an appropriate use in the area.

- (3) Impact on existing neighborhood character. Demonstration by the applicant that the proposed special exception will have no undesirable impacts on traffic patterns and volumes, access and parking.
- (4) Economic impact evaluation by the applicant of the character and type of development proposed in terms of generating revenue for the Township and imposing demands on municipal services. In addition, the Board shall give general consideration to the size, scope, extent, and character of the proposed special exception and to its consistency with the purposes and objectives of the Pocopson Township Comprehensive Plan, including protection and promotion of the public health, safety and welfare.”

Section 250-79 also provides that “In granting a special exception the Board may attach such reasonable conditions and safeguards, in addition to those expressed in the [zoning] chapter, as it may deem necessary to implement the purposes of this chapter. In that regard, the ZHB is mindful of the **requirement** that where a proposed use or permission will have an adverse effect sufficient to justify the denial of an exception, the ZHB is obligated to reduce that impact to an acceptable level, if it can, by imposing conditions, rather than by denying the exception. *Edgemont Township v. Springton Lake Montessori School*, 154 Pa. Cmwlth. 76, 622 A.2d 481, 420 (n.4) (1993) (citing Ryan, Pennsylvania Zoning Law and Practice §5.2.7); *Mansion v. Lancaster Twp. ZHB*, 2015 Pa. Dist. & Cnty. Dec. LEXIS 10439.

With those criteria in mind², the ZHB considered each of the special exception requests, as follows:

1.-2. Special Exceptions from Ordinance Sections 250-19.C(3) and (4).

In addition to the number (fourteen) of special exceptions and variances, Ordinance section 250-19 provides the area and bulk regulations for both residential uses on preexisting parcels (i.e. including parcels that were previously approved as building lots under older, less environmentally protective ordinances). Applicants seek special exception relief from the 15% maximum impervious coverage of the net acreage under Section 19.C(3), and from the 10% maximum building coverage of the net acreage under Section 19.C(4). Applicants point out that, because of the significant areas (more than one acre) of this 2.054 acre Property that are contained within the environmentally protected areas, the net lot area is reduced by the terms of the ordinance by more than 50% to just 1.019 acres.

Ordinance section 19.C(3) contains additional *specific* criteria for the granting of these special exceptions as follows:

² Including that the ZHB is unanimously concerned as to whether this Property is, in fact, suitable for residential development in view of the numerous environmental constraints. The number of items of relief requested, the large size (square footage), and the high percentage of relief requested from the various environmental constraints, all call into question the suitability of the tract.

- (a) The sewage system shall be certified adequate for the size of the dwelling by the Chester County Health Department.
- (b) The Township Engineer shall certify that adequate stormwater recharge or storage facilities exist or shall be installed to handle all roof drainage and resolve any existing problems and any increase in runoff.
- (c) No such increase in impervious coverage shall be permitted where any building requiring such increase shall require the installation of a sand-mound or other nonconventional sewage system on a substandard lot of less than one acre.

Because Applicants are proposing a standard in-ground septic system to be approved by the County Health Department, and because no building or other permits will be issued until the detailed stormwater management plan has been reviewed and approved by the Township engineer as meeting this criteria, the ZHB is satisfied that these specific criteria, as well as the criteria under ordinance section 250-79.C, will be met.

At 23.6% impervious coverage and only 10.89% building coverage, Applicants are not seeking to exceed the 30% impervious coverage or the 20% building coverage maximums for special exception relief under the respective ordinance sections. These special exceptions will be granted, and appropriate conditions as to the type and approval of the septic system, and approval of the detailed stormwater management plan, will be imposed.

3. Special Exception under Ordinance section 250-41.15.F(2).

Ordinance section 41.15.F(2) permits certain uses and activities within the identified flood plan area by special exception "provided they are in compliance with the provisions of this article [IV] and the underlying district, and are not prohibited by any other ordinance of Pocopson Township."

Applicants seek permission for construction of the private driveway, and retaining walls associated therewith, utilities and stormwater management facilities for the driveway within the floodplain area, arguing that development of the site is not otherwise possible.

In that regard, the ZHB makes two observations: First, by reference to the Floodplain Study and Driveway Culvert Design Report prepared by Bercek & Associates (Exhibit A-9) it is clear that the area along (and on both sides of) the stream that flows along Denton Hollow Road and across the entire road frontage of the Property precludes any driveway access from Denton Hollow Road without crossing the stream and its associated floodplain. Second, by reference to the Existing Features Plan prepared by InLand Design (Sheet 1 of Exhibit A-9) it is clear that the Property has no road frontage on the nearby Bittersweet Drive. Moreover, Bittersweet Drive is a private road owned by others, and not a Township Road. The deed to the Property (Exhibit A-7) contains no reference to, or any right of access from, Bittersweet Drive.

Accordingly (absent any action by the Township to create access to Bittersweet Drive), the sole access to the Property is from Denton Hollow Road, necessarily crossing the stream, the associated floodplain [and, as referenced below, both the inner and outer riparian buffer zones, and the area measured 50 feet landward from the top-of-bank of the on-site watercourse].

Applicants are entitled to special exception relief to permit the crossing of the floodplain by the residential driveway, the retaining wall associated therewith, and utilities under ordinance section 250-41.15.F(2).

Applicants also request approval for construction of stormwater facilities within the floodplain. The location of that (underground) stormwater recharge basin or bed is shown on the Proposed Layout Plan (Sheet 2 of Exhibit A-9) as being located underneath the proposed driveway, near the bottom of the hill.

Stormwater management facilities are not expressly listed in Section 41.15.F as a use or activity permitted by special exception within the floodplain. At the hearing, Kenneth Hoffman, the representative of the Township engineer, properly raised the question of whether a special exception can be granted for that use under that section.

Having apparently anticipated that issue, the Applicants applied, in the alternative, for a variance so as to permit those uses within the floodplain. While it is likely that the Applicants could meet their burden of proof for such use by variance, the ZHB is satisfied that a special exception may be granted in this context. First, the stormwater management facilities are being located so as to control the runoff *from the driveway* and, as such, constitute an integral and necessary part of the permitted driveway itself. Second, ordinance section 41.15.F(7) permits the construction of "Other similar uses and activities, provided that they do not require structures [or] storage of materials and equipment, and are not otherwise prohibited by any other section of this chapter [zoning] or by other applicable regulations."

In the context of protecting the floodplain from any new constrictions of the floodwater flow, any increase in the elevation of the floodwaters, or any placement of structures, materials or equipment that could be washed downstream to the detriment of downstream properties, the words "structure," "materials," and "equipment" must be understood here to mean *above-ground* structures, materials and equipment.

Accordingly, the special exception for underground stormwater facilities within the floodplain will also be granted. An appropriate condition requiring all of the structures located within the floodplain to comply with the floodproofing provisions of the Pocopson Township Zoning Ordinance and its Building Code will be imposed.

B. The Special Exceptions under Ordinance Section 250-87.M(3).

Ordinance section 250-87.M(3) permits applicants to seek modifications of any³ of the natural resource conservation standards contained in ordinance section 250-87 via special exception. The additional specific criteria for the grant of any such special exceptions is listed at Section 87.M(3)(d) as follows:

“In consideration of approval of any request for modification(s) under this §250-87, it shall be determined that the specific nature of the lawful use or activity, existing site conditions, and/or safety consideration warrant such modification(s) and that the resource protection purposes of this §250-87 shall be adhered to, to the maximum extent practicable.”

Each of the special exceptions addressed below were applied for under the criteria of ordinance section 250-87.M(3).

4. Special Exception from Ordinance Section 87.C.

Applicant’s application actually seeks a special exception from the summary chart in ordinance section 87.B(8) where the maximum disturbance of “Floodplain” is summarized as “0%.”⁴ However, the actual substantive language appears at Section 87.C which, in turn, incorporates all of Article VI (“Floodplains”) by reference.

Article VI of the ordinance does not, in fact, preclude any disturbance within the floodplain. It does, however, require submission of detailed plans to the Floodplain Administrator (the zoning officer, per Section 250-40.A), and payment of an application fee per Section 250-41.2.D, and review by the County Conservation District per Section 250-41.3, and compliance with all requirements. Upon satisfaction of all requirements and the issuance of all required permits, disturbance within the floodplain is, in fact, permitted.

It is the ZHB’s understanding that Applicants have commenced this application process, and that no relief from the process itself is being requested. No relief from the procedures or requirements of ordinance section 87.C or Article VI will be granted.

To the limited extent that ordinance section 87.B(8) can be read to preclude any disturbance whatsoever within the floodplain area, it has been superseded by the 2017 ordinance amendments, adding Article VI (“Floodplains”). Nevertheless, for clarity, a special exception will be granted from Section 87.B(8), allowing disturbance of the floodplain, to the limited extent allowed by the required permits, but conditioned upon Applicants’ compliance with Article VI.

5.-7. Special Exceptions from Ordinance Section 250-87.D(1)(a), (b) and (c).

³ The only exception, pursuant to Section 87.M(3)(e), is that no alterations of the use regulations in the riparian buffer zones under sections 87.F(3) through (5) may be granted by special exception. Any such relief shall require a variance under section 250-78.

⁴ This entry on the chart is, possibly, a carry-over reference to former ordinance section 250-56 (“Floodplain Restrictions”) which was amended 8/14/2017 by ordinance No. 1-2017, substituting Article VI (“Floodplains”).

Applicants seek special exceptions to permit disturbance, greater than the ordinance maximums, of the moderately steep slopes (52% requested), very steep slopes (26% requested), and steep slope margins at the top of the slopes (67% requested). Applicants point out that the entire lot slopes steeply up from the road to the logical house location, which is at the most level area of the Property that is not within the conservation easement area where construction is prohibited.

By reference to the topographical lines on the zoning plan (Exhibit A-9) the driveway rises from elevation level 218 feet at the stream crossing to 236 feet or more at the logical location of the house and garage. This eighteen foot rise occurs over a horizontal distance of approximately 135 feet, resulting in an average slope in excess of 13%, and crossing areas of both moderately steep slopes (10% to 20%) and very steep slopes (greater than 20%). As with the floodplain discussed above, the slopes cover the entire width of the Property and there is no location for a driveway that would not have to "climb" through both the very steep and moderately steep slope areas.

In order to allow the driveway to climb a 13% hillside without exceeding the maximum 10% slope of a driveway for fire and emergency vehicle access (see the fire marshall's reports – Exhibit B-11) it is necessary for the driveway to generally follow the contour lines, climbing the very steep slopes in excess of 20% more gradually, until reaching the moderately steep slopes which can be crossed perpendicularly. This necessarily requires disturbance of more of the slope areas than if the driveway could climb the hill directly.

The Township engineer has reviewed the Applicant's plan, and concludes that the steep slope areas are being preserved to the maximum extent practicable.⁵ See Gilmore & Associates, Inc. review letter of April 19, 2002, included as part of Exhibit B-8.

The only non-sloped area of the Property outside the floodplain and the conservation easement area is the small rectangular area (shown in white on the existing features plan – Sheet 1 of Exhibit A-9) which appears to be approximately 25 feet wide and 40 feet long. Being located at the top of the moderately steep slopes, and less than 50 feet wide, this area is, by definition a "steep slope margin."

As shown on the proposed Layout Plan (Sheet 2 of Exhibit A-9), most of this area will be disturbed during construction of the adjacent house, but will be restored to the same contours following construction. While the percentage (67%) of steep slope margins to be disturbed is high, Sheet 2 of Applicant's plan (Exhibit A-9) lists the total amount of steep slope margins to be disturbed as only 1,163 square feet. On a Property with a gross area in excess of 2 acres, this temporary disturbance seems relatively insignificant.

The requested special exceptions will be granted, subject to a condition of compliance with all the recommendations contained within the Gilmore & Associates report of April 10, 2022.

⁵ In fact, Gilmore requires the plan to be revised so that the maximum slope cut grading will be reduced from 2:1 to 3:1. This will likely result in an *increase* in the disturbed areas, and Gilmore's note requires adjustment of the Limit of Disturbance line to reflect that increase.

8. Special Exception from Ordinance Section 250-87.D(1)(c).

Applicants seek special exception relief from the use restrictions⁶ of ordinance section 87.D(1)(c) so as to allow construction of a portion of the dwelling, retaining wall and stormwater management facilities, as well as the associated grading, within the very steep slopes.

By reference to Applicants' plan (Exhibit A-9) most of the central area of the Property where the house and garage are proposed is comprised of moderately steep (10% to 20%) slopes. However, there are two small areas of very steep slopes where, by reference to Sheet 2, the garage, a portion of the house, and three retaining walls are proposed. Although not specifically depicted, it appears that stormwater conveyancing from the rear of the house and garage to the proposed stormwater infiltration bed to the north of the house will also be required.

Even to the untrained eye, it is readily apparent that there is no location for, or configuration of, a reasonably-sized dwelling on the Property that would completely avoid these two small areas of very steep slopes (especially while also staying outside of the conservation easement area to the west and the riparian buffer zones to the east). This conclusion is consistent with the testimony of the Applicants' engineer.

Comment #19 of the Township engineer's review letter does not object to this requested relief, and requires only that the maximum post-development slopes be kept to a 3:1 maximum grade. The requested special exception will be granted, subject to that condition.

9. Special Exception from Ordinance Section 250-87.K(1).

Ordinance section 250-87.K(1)(b) permits disturbance of woodlands other than forest interior habitat⁷ to a maximum of 20%. This section expressly contemplates that modification by special exception under section 87.M(3) is permitted.

Applicants argue that the entire building envelope of the Property is comprised of woodlands, and a review of Exhibit B-2 confirms that. Accordingly, disturbance of some woodlands is necessary for residential development of the Property, and the limitation under ordinance section 87.M(3)(d) is that the woodlands shall be preserved "to the maximum extent practicable."

Although the Applicants' witnesses testified that they are not proposing to "clear cut" the disturbed area of the Property, the ZHB has strong concerns in that regard. However, the Township engineer's review letter did not identify any areas of the woodlands that could be

⁶ Ordinance Section 87.M(3)(c) permits modification of the natural resource conservation standards of ordinance section 87. As previously noted, only the use restrictions within the *riparian buffer zones* are excluded from special exception relief by section 87.M(3)(e). By necessary implication, relief from the use restriction in other natural resource areas, including steep slopes, is permitted via special exception.

⁷ There was no suggestion by the Applicants or by the Township engineer that any of the woodlands on the Property qualified as the more restricted "forest interior habitat," as to which only a 10% maximum disturbance is permitted under subsection K(1)(a).

preserved from disturbance. As noted, neither the Township planning commission nor the Board of Supervisors voted to oppose the requested relief, both having voted to take "no position," other than requesting certain conditions be imposed on any approval (Exhibits B-7 and B-8).

Fortunately, ordinance section 250-87.K(4) ("Woodland Replacement," discussed below) requires replacement plantings whenever woodland disturbance is permitted in excess of the 20% maximum allowed by the ordinance.

The ZHB will reluctantly grant the requested special exception for disturbance of up to 36% of the woodlands, conditioned upon strict compliance with ordinance section 250-87.K(4).

10. Special Exceptions under Ordinance Sections 250-87.F(4)(b) and (d).

Applicants seek a special exception under ordinance sections 250-87.F(4)/(b) and (d) to permit the proposed driveway crossing, culvert, retaining walls, utilities and stormwater management facilities to be constructed within the riparian buffer. Applicants' plan also depicts two long retaining walls along the driveway, one on the "high" side and another on the "lower" side. Applicants point out that access to the Property from Denton Hollow Road can only be achieved by crossing the stream and its associated riparian buffer zones.

Ordinance section 87.F(4) expressly permits special exceptions for "the following uses or activities. . . in riparian buffer areas:

(b) Road crossings (when perpendicular to the stream or buffer), bridges, culverts, utilities and impoundments. [and]

(d) Stormwater conveyance structures and outfalls."

The ZHB has strong concerns about the fact that the proposed driveway after crossing the stream, does **not** cross the riparian buffer areas perpendicularly and, instead, turns to the northeast, running almost parallel to the stream, supported by two retaining walls within the inner riparian buffer zone. This also seems contrary to the requirement under ordinance section 87.M(3)(d) that the resource protection purposes of the ordinance be adhered to, to the maximum extent practicable.

However, that section also requires consideration of the existing site conditions and whether safety considerations warrant the requested relief.

By reference to the Proposed Layout Plan (Exhibit A-9, Sheet 2) it is clear that, immediately upon crossing the culvert and stream, the driveway enters, and is located in, the very steep slopes. As discussed above, it is necessary to turn the driveway to run diagonally along and across the topo lines in order to achieve the maximum 10% permitted slope of the driveway itself. This is necessary both for the safety of drivers during the icy winter months, and to meet the health and safety requirements for emergency vehicle access. (See Exhibit B-

11, where the Township Fire Marshall rejected Applicants' original plan which exceeded the 10% driveway grade, but approved the revised plan showing a 10% grade.)

For these reasons and others⁸ the Board will approve the requested special exceptions for the culvert (which **is** perpendicular to the stream), and for the driveway and retaining walls, despite the fact that they are not. Since the stormwater conveyance structures serving the driveway will necessarily follow (and be located under) the driveway, the special exception for those under subsection (a) will also be granted.

The ZHB notes that, especially in view of the steep slopes discussed above, construction of the culvert, driveway and stormwater facilities will necessarily require some regrading, filling, or other alteration of the topography within the inner and outer riparian areas. The special exception is intended to include those necessary activities.

Applicants specifically applied for permission to disturb up to 29% of the inner riparian buffer and 65% of the outer riparian buffer. The Township engineer did not contest that these percentages are required to allow the driveway and related facilities to climb the steep slopes within the riparian buffer zones.⁹ Appropriate conditions will be imposed to comply with the ordinance to the maximum extent practicable.

C. The Variance Requests

Consistent with section 910.2 of the MPC,¹⁰ ordinance section 250-78.A(5) sets forth the criteria for the grant of variances by the ZHB as follows:

(a) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of the 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 this chapter in the neighborhood or district in which the property is located;

(b) 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 this chapter, and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

⁸ The ZHB is also cognizant of the intended purposes of riparian buffer zones to serve as groundwater recharge areas close to bodies of water and, in the case of flowing streams, to have vegetation that can slow the water flow and prevent or minimize erosion when the stream overtops its banks. (See, e.g. Ordinance section 87.F(7) requiring all riparian buffer areas to be continually maintained with a diverse mix of locally adapted native species of canopy trees, understory trees, shrubs, and herbaceous plants so as to constitute a forested riparian buffer where not otherwise occupied by any existing use. Where, as here, the inner riparian buffer zone consists of very steep slopes in excess of 20%, it is likely that neither of those purposes is being achieved in the area sought to be protected. Applicants are proposing to infiltrate stormwater into the ground via an underground recharge basin within the inner riparian buffer zone, so some of the effects of the proposed disturbance are being mitigated.

⁹ In fact, the Township engineer's prohibition of post-development slopes steeper than 3:1 may actually result in slightly *higher* percentages of disturbance.

¹⁰ 53 P.S. §10910.2

(c) That such unnecessary hardship has not been created by the applicant;

(d) 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, and will not be detrimental to the public welfare; and

(e) 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.

In addition, ordinance section 250-78.B provides that "In granting any variance, the Board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purpose of this chapter. The Board shall require that all other applicable land development regulations apply."

In addition to the ten special exceptions discussed above, Applicants have requested four variances, each of which is discussed below:

11. Variance from Ordinance Section 250-41.15.D.

Ordinance section 250-41.15.D provides that "Within any identified floodplain area, no new construction or development shall be located within the area measured 50 feet landward from the top-of-bank of any watercourse."

This stand-alone provision seems somewhat inconsistent with ordinance sections 41.15.F and 87.F(4), permitting various uses within the floodplain and the riparian buffer areas (including the inner 50 feet) by special exception. However, since section 41.15.F precludes relief by special exception for uses "prohibited by other sections of this chapter," and since the general special exception relief available under ordinance section 87.M(3) does not extend to Article VI ("Floodplain"), Applicants request for variance relief is proper.

But the factual analysis of this request is identical to the analysis for crossing the floodplain and the riparian buffer zones, discussed above. The stream (and, therefore, the areas measured 50 feet landward from both stream banks) extend across the entire frontage of the Property. There is no alternative driveway access to the building envelope, and no reasonable use of the Property can be made without relief from this ordinance section.

The requested variance will be granted, subject to conditions as discussed above, to allow for construction of the driveway, culvert, retaining walls, utilities and stormwater facilities within 50 feet of the stream top-of-bank.

12. Variance from Ordinance Section 250-87.H(a) and 250-17.C(2).

Applicants seek a variance so as to allow the removal of two “heritage trees” from the Property. Heritage trees are defined as (i) any tree greater than 30 inches dbh¹¹ regardless of species, and trees of certain desirable species which are greater than 24 inches dbh. (Ordinance section 250-6).

By reference to the tree survey on Applicants’ Existing Features Plan (Exhibit A-9, Sheet 1) there appear to be two heritage trees being removed: Tree #31 – a 30” Ash; and Tree #34 – a 32” Tulip Poplar.¹²

By reference to Sheet 2 of the plan, tree #31 is immediately adjacent to the proposed driveway and in the location of one of the proposed stormwater recharge basins. Its removal cannot be avoided. Likewise, tree #34 is located in a very steep slope adjacent to the proposed garage and in the location of one of the proposed retaining walls. Again, its removal cannot be avoided. (See ordinance section 87.K(3)(a), requiring that, where existing trees are to remain, no change in the existing grade shall be permitted within the drip line of the trees.) Accordingly, removal of all two trees will be permitted, subject to conditions for replacement tree plantings, discussed below.

Although the Applicants requested this relief by variance, the specific prohibition against removal of heritage trees appears at section 250-87.H(1). Accordingly, relief from this prohibition is available by special exception under section 87.M(3)(c), provided that the resource protection purposes of the ordinance are adhered to the maximum extent practicable. The ZHB is satisfied that the removal of the two heritage trees cannot be avoided, and a special exception will be granted. The resource protection goals of the ordinance will be met by strict adherence to the replacement tree planting requirements of the ordinance, as discussed below.

The ZHB notes that the Township’s engineer’s review letter (comment #5) also addresses the heritage trees as being one of the “unique natural features of the tract” to be preserved under ordinance section 250-17.C(2). Possibly, that is what generated the Applicants’ request for variance relief. Although the Board feels that the specific requirements of the heritage tree provisions override this general development criteria, the requested variance from section 250-17.C(2) will be granted, again subject to the requirements for replacement tree planting.

13. Variance from Ordinance Section 250-87.F(5)(a).

Applicants requested a variance from Ordinance section 250-87.F(5)(a) which permits certain additional uses only within the outer 50 feet of the riparian buffer area. However, all of the Applicants’ proposed development within the riparian buffer areas (driveway crossing, culvert, utilities and stormwater management facilities) are being allowed by special

¹¹ Diameter at breast height.

¹² At the hearing, the Applicants prevented the testimony of Meghan E. A. Shomper, Registered Landscape Architect, presently of InLand Design, LLC, and the April 28, 2022 report of John Rockwell Hosbach, Jr., Registered Consulting Arborist, forester and TRAQ Qualified Tree Risk Assessor (Exhibit A-17), both concluding that neither of the two trees are, in fact, Heritage Trees because (1) both are actually Ash trees, and (2) both were re-measured as being under 30 inches dba. Regardless, their opinions about the two trees are being rendered irrelevant by the ZHB’s allowance of the removal of both trees.

exception under ordinance sections 250-87.F(4)(b) and (d), discussed in paragraph 10, above. To the extent Applicants requested the variance so as to allow the “regrading, filling or alteration” associated with the driveway and other structures in the inner riparian area, they are already permitted as an integral part of those structures as discussed in paragraph 10, above.

Applicants also requested a variance so as to allow disturbance of 29% of the inner riparian buffer and 65% of the outer riparian buffer zone. But since these are only requests for relief from the *extent* of disturbance, and not from the use restrictions, no variance is required by ordinance section 87.M(3)(e) (requiring variance relief from the use restrictions of the riparian buffer sections).

Despite the Board’s strong concerns, it appears that the Applicants have minimized the proposed disturbance of the riparian buffer zones to the extent practicable, as required by the ordinance. While Applicants could likely meet the variance criteria, the requested relief is being granted by special exception, as discussed in paragraph 10, above. Again, appropriate conditions will be imposed. The requested variance will be denied, but only because it is not necessary.

14. Variance from Ordinance Section 250-87.K(4)(a) and (b).

Applicants have requested a variance from the replacement tree planting requirements of ordinance sections 250-87.K(4)(a) and (b), seeking a reduction¹³ so as to require only 27 replacement trees.

Ordinance section 87.K(4)(a) requires replacement trees based on the area of woodland disturbance. “For each 500 square feet of woodland disturbance area, or fraction thereof, in excess of the woodland disturbance allowed, one tree at least 2 to 2-1/2 inch caliper shall be planted.”

Ordinance section 87.K(4)(b) requires replacement trees based on specific tree removal. “Regardless of any disturbance allowances, for each tree greater than 12 inches dbh to be removed, required replacement trees also¹⁴ shall be calculated in accordance with the following schedule [requiring increasing numbers of replacement trees for each tree removed, depending upon its size].” And “For purposes of this section it shall be assumed that any tree greater than 12 inches dbh shall be removed if located within 25 feet of any proposed land disturbance.

Although the Applicants requested relief from these subsections by *variance*, the ordinance allows such relief by special exception. First, ordinance section 87.M(3) generally allows special exception relief from any section or subdivision of the natural resource conservation standards of ordinance section 87. Second, ordinance sections 87.K(4)(e), (f) and

¹³ According to the Township engineer, those two sections presently would require 58 or 60 replacement trees, respectively. However, the modification of the Applicants’ plans in accordance with the engineer’s requirements may result in an increase of that number.

¹⁴ Although ordinance section 87.K(4)(b) “also” requires calculation of replacement trees under that subsection, the two subsections are not cumulative, and only the larger number of replacement trees is required, after performing the calculations under both subsections.

(g) (discussed below) each expressly contemplate that modification of the replacement tree planting requirements is available under replacement ordinance section 87.M(3). Accordingly, Applicants' request for relief will be considered as an application for special exception, with the resulting lower burden of proof on the Applicants than for a variance.¹⁵

Notwithstanding the foregoing, the ZHB concludes that the Applicants have not met their burden of proof for two reasons:

(1) First, the stated reason for Applicants' (variance) request was to allow a lower number of replacement trees "as the full number of required replacement trees being planted *on the site* . . . is not feasible *due to area constraints*." (Paragraph 6 of the April 19, 2022 list of zoning relief requested being part of Applicants' Third Amended Application, Exhibit A-4 (*emphasis added*)). This request completely ignores ordinance subsection 250-87.K(4)(f) which allows the ZHB to modify the replacement tree planting requirements by allowing that "some or all of the required replacement plantings may be installed at a site other than [the Property] subject to required replacement planting." Accordingly, modification of the replacement tree planting requirements will be allowed as to the *location* of the replacement trees in excess of the twenty-seven (27) proposed by Applicants, but not as to the *number* of trees required.

In addition, Applicants' request completely ignores ordinance subsection 250-87.K(4)(g) which allows "In lieu of actual installation of replacement plantings, the Township may permit any applicant to place the equivalent cash value, as agreed upon by the Township and the applicant, for some or all of the requested replacement plantings into a special fund established for that purpose where the provisions of this section are otherwise applicable, any grant of approval of modifications requested pursuant to §250-87.M(3) also may be conditioned upon the placement of equivalent cash value for otherwise required replacement plantings into such a fund." (*emphasis added*).

Accordingly, modification of the replacement tree plantings will be allowed, in part, so as to permit, upon agreement between the Township Board of Supervisors and the Applicants, the substitution of a fee-in-lieu of some of the replacement trees in excess of the twenty-seven (27) proposed by Applicants, but not as to the *number* of trees required.

(2) Second, during the hearing the Applicants' attorney made a passing reference to the full number of required replacement trees being "cost prohibitive." However, no evidence or testimony was presented as to the actual or projected cost of the full number of replacement trees required under subsections 87.K(a) or (b). Moreover, ordinance

¹⁵ Consideration of an Applicant's request for relief under a different legal theory than specified in the application is permitted, so long as the hearing notice put the public and integrated parties on adequate notice of the actual physical permissions or approvals being sought, and provided that the change in theory is announced at the hearing, thereby giving any protestants the opportunity to present relevant evidence in opposition. *Appeal of Booz*, 111 Pa Cmwlth. Ct 330, 533 A.2d 1096 (1987). Here, although the change in the legal theory was not announced at the hearing, any deficiency is being rendered moot by the ZHB's denial of the requested relief under either legal theory.

section 87.M(3) requires the Applicants to demonstrate "that the resource protection purposes of this §250-87 [are being] adhered to, to the maximum extent practicable."¹⁶

For all these reasons, a special exception will be granted so as to allow some or all of the replacement trees in the excess of 27 to be installed at sites other than the subject Property and, upon agreement between the Township and the Applicants, to allow the payment of an agreed fee-in-lieu of some of the additional replacement trees. Appropriate conditions will be imposed as to the replacement trees required.

In the event that Applicants intentionally applied for variance relief instead of special exception relief, their requested variance will be denied for the reasons stated above. In addition, because of the opportunities for off-site planting of replacement trees and/or payment of a fee-in-lieu, Applicants have not, and cannot demonstrate that there is "no possibility" that the Property can be developed in strict conformity with the provisions of subsections 87.K(4)(a) and (b), or that the variance, if authorized, would represent the least modification possible of the regulation in issue. As to the "cost prohibitive" argument, Pennsylvania law is clear that financial hardship alone does not constitute an "unnecessary hardship" within the meaning of the MPC or the ordinance so as to justify the grant of a variance.¹⁷

Even if the requested reduction in the number of replacement trees was considered to be a "dimensional variance" under *Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 554 Pa. 249, 721 A.2d 43 (Pa. 1998) the Applicants' request must be denied. For although *Hertzberg* permits the ZHB to consider other factors, in considering a dimensional variance, including the cost of bringing the Property into strict compliance with the ordinance requirements, no such evidence of testimony was presented, and the Applicants failed to meet even that relaxed standard for variance relief. Applicants' request for variance relief from the replacement tree planting requirements will be denied.

It is noteworthy that this discussion has not addressed the actual *number* of replacement trees that will ultimately be required. This is for two reasons:

(1) First, the ZHB does not accept the testimony of Applicants' witness, Meghan Shomper, RLA, or the notations on Applicants' Tree Survey on Sheet 1 of Exhibit A-9, that living trees that are presently choked in climbing vines are "hazardous" within the meaning of the ordinance or "non-viable" so as to be excluded from the replacement tree count.

(2) Second, because the Township engineer has recommended that the post-development slopes on the Property be limited to a 3:1 grade and that the limit of

¹⁶ Webster's defines "practicable" to mean "possible to perform." Webster's New Collegiate Dictionary, G. & C. Merriam Company (1977). Clearly, it is possible for Applicants to plant replacement trees on other (Township) property and/or to pay a fee-in-lieu for some or all of the additional trees required.

¹⁷ *Ryan*, Pennsylvania Zoning Law and Practice, 36.2.5; *Botula v. Zoning Bd. of Adjustment*, 69 Pa. Cmwlth. Ct. 164, 168, 450 A.2d 316, 318 (Pa. Cmwlth.1982), stating: "In the instant case the hardship which will accrue to Appellee if the variance denied is economic. Much of it will derive from Appellee's own failure to properly ascertain the status of the building's zoning compliance at the time he bought it. Economic hardship is not justification for the grant of a variance. [citing cases]."

disturbance line on the plan shall be adjusted [expanded] as needed to reflect this¹⁸ (which recommendations are being imposed as conditions of the ZHB's approval), it is presently not clear what the actual extent of the woodland disturbance will be, or the final number and caliper of the trees being removed or presumed removed, including trees greater than 12 inches dbh located within 25 feet of the (now-to-be enlarged) area of land disturbance, as required by subsection 87.K(4)(b).

Accordingly, a condition will be imposed requiring Applicants to revise their zoning plan to show the adjusted limit of disturbance line, and a corrected tree survey showing all living trees greater than 12 inches dbh located in, or within 25 feet of, the adjusted limit of disturbance. Strict compliance with the resulting tree replacement calculations under ordinance subsections 87.K(4)(a) and (b), (whichever is greater) will be required.

The ZHB's requirement of a post-hearing revision to Applicant's plans and compliance with the resulting increase in tree replacement is proper under *Edgmont Township v. Springton Lake Montessori School*, 622 A.2d 418, 419 (Pa. Cmwlth. Ct. 1993) since it is clear here (unlike in that case) that the Applicants have the demonstrated ability to comply with the increased tree count, in view of the ordinance's alternatives for off-site tree planting and/or fees-in-lieu of some or all of the resulting additional replacement trees. Again, appropriate conditions for utilizing those alternatives will be imposed.

IV. CONCLUSIONS OF LAW

1. The Applicants and other parties are properly before the Zoning Hearing Board, which has jurisdiction to consider this application in accordance with the *Pennsylvania Municipalities Planning Code* (the "MPC").

2. The Zoning Hearing Board has complied with all "public notice" requirements for the hearing pursuant to the MPC and the Township's Ordinances.

3. The Applicants' proposed use of the Property for construction of a moderately sized dwelling with associated garage, driveway, retaining walls, and septic system constitutes a "reasonable use" of the Property within the meaning of the zoning ordinance and the MPC.

4. The Applicants met their burdens of proof in establishing their entitlement to special exceptions under Ordinance Sections 250-19.C(3) and (4); 250-41.15.F(2); and under section 250-87.M.(3)(c) so as to entitle them to relief from the requirements of Ordinance Sections 250-87.B.(8); 250-87.D(1)(a), (b) and (c); 250-87.D(1)(c); 250-87.K(1); and 250-87.F(4)(b) and (d).

5. The Applicants met their burdens of proof in establishing their entitlement to variances from the requirements of ordinance section 250-41.15.D; and from the requirements of sections 250-87.H(a) and 250-17.C(2) (if necessary). In particular:

¹⁸ Comment #19 of the Gilmore & Associates, Inc. review letter of April 19, 2022, part of Exhibit B-8.

(a) There are unique physical circumstances or conditions, including 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.

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

(c) Such unnecessary hardship has not been created by the Applicant.

(d) The variances, 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.

(e) The variances, if authorized, will represent the minimum variances that will afford relief and will represent the least modification possible of the regulations in issue.

6. No variance from ordinance section 250-87.F(5)(a) is necessary, as the requested relief from that section is available, and being granted, as a special exception under ordinance sections 250-87.F(4)(b) and (d); and 250-87.M(3)(e).

7. Applicants did not meet their burden of proof for a variance from the replacement tree planting requirements of ordinance sections 250-87.K(4)(a) or (b). Even when their request is considered as a special exception request, there is no demonstrated reason that the Applicants cannot fully comply with the tree planting requirements, including planting the additional required replacement trees (in excess of the 27 trees proposed by Applicants) at a site other than the subject Property and/or payment of the equivalent cash value of the excess trees into a Township fund established for replacement tree planting.

Applicants presented no evidence of any unnecessary hardship, including any financial hardship, so as to justify the grant of a variance, even under the relaxed standards of *Hertzberg, supra*. And, the requirements of ordinance section 250-87.M(3)(d) require the resource protection purposes of the ordinance be adhered to, to the maximum extent practicable.

8. Both the Ordinance and the *MPC* permit the Zoning Hearing Board to attach reasonable conditions to the grant of any zoning relief so as to effectuate the intent of the Ordinance. Accordingly, the Zoning Hearing Board will attach conditions as discussed above.

Accordingly, the Zoning Hearing Board will enter an appropriate Order as follows:

V. ORDER

A. In view of the Zoning Hearing Board's Findings of Fact, Discussion and Conclusions of Law, the Applicants' following requests for special exceptions and variances are hereby **GRANTED** as follows:

1. A special exception under ordinance section 250-19.C(3) so as to allow impervious coverage in excess of 15% of the net lot area, to a maximum of 23.6%.
2. A special exception under ordinance section 250-19.C(4) so as to allow building coverage in excess of 10% of the net lot area, to a maximum of 10.89%.
3. A special exception under ordinance section 250-41.15.F(2) so as to permit the crossing of the floodplain by the proposed residential driveway, the retaining walls and stormwater management facilities associates therewith, and utilities.
4. A special exception for relief from ordinance section 87.B(8) to the extent it can be read to preclude any disturbance whatsoever within the floodplain area, so as to permit the crossing of the floodplain as aforesaid.
5. A special exception from the 25% maximum disturbance of the moderately steep slopes under ordinance section 250-87.D(1)(a) so as to permit a maximum disturbance of 52%.
6. A special exception from the 25% maximum disturbance of the steep slope margins under ordinance section 250-87.D(1)(b) so as to allow a maximum disturbance of 67%.
7. A special exception from the 10% maximum disturbance of the very steep slopes under ordinance section 250-87.D(1)(c) so as to allow a maximum disturbance of 26%.
8. A special exception from the use restrictions of ordinance section 87.D(1)(c) so as to allow construction of a portion of the dwelling, retaining walls and stormwater management facilities, including the associated grading, within the very steep slopes.
9. A special exception from the 20% maximum disturbance of woodlands under ordinance section 250-87.K(1) so as to permit disturbance to a maximum of 36%.
10. Special exceptions under ordinance sections 250-87 F.(4)(b) and (d) so as to allow the proposed driveway crossing, culvert, retaining walls, utilities and stormwater management facilities to be constructed within the riparian buffer areas. Disturbance of the inner riparian buffer shall be limited to a maximum of 29%. Disturbance of the outer riparian buffer area shall be limited to a maximum of 65%.

11. A variance from ordinance section 250-41.15.D so as to allow the construction of the driveway, culvert, retaining walls, utilities and stormwater facilities within 50 feet of the stream top-of-bank.

12. A variance from ordinance sections 250-87.H(a) and 250-17.C(2), to the extent necessary so as to permit the removal of two Heritage Trees, identified as trees number 31 and number 34 on the Applicants' Zoning Plan.

B. The following items of relief requested by the Applicants are hereby **DENIED**:

13. Applicants' request for a variance from the use restrictions within the outer riparian buffer area is denied, but only because that relief is being granted via special exception, as set forth above. Likewise, the variance requests for disturbance of 29% of the inner riparian buffer and 65% of the outer riparian buffer as being granted by special exception, and no variances are required.

14. Applicants' request for a variance or special exception from the replacement tree planting requirements of ordinance sections 250-87.K(4)(a) and (b) is denied. Applicants shall strictly comply with the requirements of those sections (whichever requires the greater number of replacement trees), including by compliance with the alternatives to on-site tree planting under ordinance sections 250-87.K(4)(f) and/or 250-87.K(4)(g).

C. All of the foregoing relief is granted **under and subject to the following conditions**:

(1) Applicants shall fully comply with the recommendations of the Township Fire Marshall's review letters of March 26, 2022 and May 2, 2022.

(2) Prior to the commencement of driveway construction Applicants shall fully comply with the comments of the April 19, 2022 Memorandum from Theodore G. Koven, Jr., P.E. of Castle Valley Consultants, Inc.

(3) Prior to the issuance of any permits, Applicants shall fully comply with the comments contained in the April 29, 2022 review letter from Gilmore & Associates, Inc., Township engineers, including revisions of the zoning plan to include all plan notes, maintenance requirements, documentations and other revisions required therein, and including making any further required changes to the plans following the Township engineer's re-review.

(4) In particular, Applicants shall submit a revised plan showing no post-development grades in excess of 3:1, and showing the revised limit of disturbance lines, and the revised tree survey resulting from that revision.

(5) All retaining walls shall have a maximum height of four (4) feet for child safety protection. As noted above, all grades above and below the retaining walls shall have a maximum slope of 3:1.

(6) No building or other permits shall be issued until the Township engineer has reviewed the detailed Grading, Erosion Sedimentation Control, and Stormwater Management Plan and report, and certified that adequate stormwater recharge or storage facilities are being installed to handle all roof and impervious surface drainage, and resolve any existing problems and any increase in runoff. Simultaneously with their submission of the Stormwater Management Plan to the Township engineer, Applicants shall provide a copy of all plans and calculations to the adjacent property owner, Deborah Sellers, 910 Denton Hollow Road, West Chester, PA 19382. Likewise, all review letters from the Township engineer, and any revised plans, shall be copied to Ms. Sellers.

(7) In particular, the Township engineer shall certify that appropriate inlets, berms and/or other controls are being installed so that there shall be no increase in the rate or volume of stormwater (i.e. none) flowing onto the adjacent (Sellers) property, being UPI #63-4-120.4, post-development.

(8) Applicants shall install a standard, in-ground (i.e. not a sand-mound or other nonconventional) sewage system, to be permitted by the Chester County Health Department and thereby certified as adequate for the proposed dwelling size and number of bedrooms.

(9) All structures, including the culvert, driveway, utilities and stormwater management facilities to be located within the identified floodplain shall comply with the floodproofing provisions of the Pocopson Township Zoning Ordinance, the Pocopson Township Building Code, and all other applicable County, State and Federal ordinances, laws, rules and regulations.

(10) Prior to any disturbance of the identified floodplain areas, Applicants shall fully comply with the procedures, and obtain all permits, required by Article VI of the zoning ordinance and all applicable county, state and federal ordinances, laws, rules and regulations.

(11) All riparian buffer areas shall be continually maintained with a diverse mix of locally adapted native species of canopy trees, understory trees, shrubs and herbaceous plants so as to constitute a forested riparian buffer where not otherwise occupied by the driveway, culvert or stormwater management facilities.

(12) All exterior lighting fixtures shall comply with the Township ordinances and shall be downward shielded so as to prevent the light source from being visible to Denton Hollow Road, Bittersweet Drive, or any adjacent properties. In view of the higher elevation of the subject Property as compared with the roads and the adjoining Sellers property, this may require more protective measures than mere compliance with the ordinances.

(13) All site work and exterior construction work on the project shall be limited to the following schedule so as to avoid any disruption of the neighbors' use and enjoyment of their properties:

- Not before 7:30 am or after 5:30 pm Monday through Friday
- Not before 8:00 am or after 4:30 pm on Saturdays; and
- Not on Sundays or federal holidays.

(14) Except as the Plan, including the extent of disturbed area, and the disturbances of the other natural resources, and the tree survey, may be modified in accordance with the foregoing conditions, the project shall be constructed substantially in accordance with the plans and testimony presented to the Zoning Hearing Board at the May 5, 2022 hearing.

(15) Applicants shall fully comply with the replacement tree planting requirements of ordinance sections 250-87.K(4)(a) or (b) (whichever requires the greater number of replacement trees).¹⁹ All replacement trees shall be planted by Applicants' designated landscaping contractor or nursery, and shall be guaranteed for a minimum of one (1) year. Any tree which does not survive shall be replaced by such contractor or nursery. As required by the ordinance, all replacement trees and re-replacement trees shall be at least 2" to 2.5" caliper.

(a) Applicants shall fully comply with the replacement tree and replacement shrubbery plan as shown on their Landscaping Plan (Sheet 3). In addition, if the revisions to the limits of disturbance area required by this Order make it feasible and desirable to add additional replacement trees upon the subject Property, Applicants shall do so.

(b) Pursuant to Ordinance section 250-87.K(4)(f), Applicants shall make available to the owner of the adjacent (Sellers) property, UPI #63-4-120.4, replacement trees, including evergreen trees, to be planted upon the Sellers property adjacent to the common property line. Any such trees desired by the owner of the Sellers property shall be planted by Applicants' designated landscape contractor or nursery (under direct contract with the owner of the Sellers property to avoid the necessity of construction easements, additional liability insurance or waivers of liability, etc.) but at the Applicants' sole expense. Nothing contained herein shall require the planting of any tree in a hazardous location, or in a location where survival of the tree cannot be guaranteed for a minimum of one year unless the owner of the Sellers property expressly waives such guarantee.

(c) Pursuant to ordinance sections 250-87.K(4)(f) Applicants shall make available to the Township any additional replacement trees, to be planted

¹⁹ In calculating the replacement tree requirements based on individual trees, the two trees thought to be heritage Trees shall be treated as a 26" dbh Ash Tree and a 28" dbh Ash Tree, respectively. See Exhibit A-17.

upon property owned by the Township. Again, any such trees desired by the Township shall be planted by Applicants' designated landscape contractor or nursery under direct contract with the Township, but at the Applicants' sole expense.

(d) Nothing contained herein shall preclude the Applicants and Township from agreeing upon payment of a fee-in-lieu of planting the additional replacement trees required by sub-paragraph (c), above, in accordance with ordinance section 250-87.K(4)(g).

(16) Except for the items of zoning relief granted herein, Applicant shall comply with all other Township ordinances, and with all applicable county, state and federal statutes, ordinances, rules and regulations, including obtaining all required permits and approvals prior to commencement of construction.

(17) No additional impervious surfaces of any kind whatsoever shall be added to the Property without a further application to, and approval by, the Township and its zoning hearing board. Prior to the issuance of any permits, Applicants shall record a new Deed to themselves containing the statement that "The subject property is conveyed under and subject to the requirement that no additional impervious surfaces of any kind whatsoever shall be added to the Property without a further application to, and approval by, the Township of Pocopson and its zoning hearing board."

(18) Applicants shall execute and record a Stormwater and Best Management Operations and maintenance Agreement in form acceptable to the Township Solicitor, in the Office of the Recorder of Deeds of Chester County, Pennsylvania, and indexed against the subject Property.

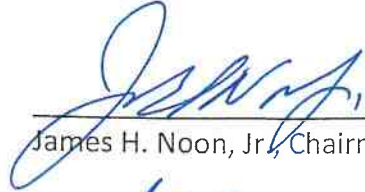
(19) Following the expiration of any appeal period (or the resolution of any appeal) a copy of this Order (or any final Court Order) shall be recorded in the Office of the Recorder of Deeds of Chester County, Pennsylvania, and indexed against the subject Property.

(20) In accordance with Zoning Ordinance section 250-80 ("Expiration of approval for special exception or variance") Applicants are reminded that any approval of a special exception or variance request shall be deemed null and void six months from the date of such approval if, within that period, no application is made for a building permit, a certificate of occupancy, or subdivision or land development approval, whichever is appropriate, unless the Zoning Hearing Board shall grant an extension.

(Signatures on next page)

POCOPSON TOWNSHIP ZONING HEARING BOARD

BY:


James H. Noon, Jr., Chairman


Nathan Wilson, Member

VI. DISSENT

With all due respect for the opinions of my colleagues, I dissent. In my opinion the subject Property is simply not suitable for residential development as required by ordinance section 250-79.C(1) in view of the numerous environmental constraints and the size, scope, extent and magnitude of the requested relief, consideration of which is mandated by section 250-79.C(4). I would have denied the requested special exceptions and variances.

I realize that the Property was approved as a separate building lot under the Township's old ordinances back in the 1960's, and understand that such a denial could constitute a "taking" of the Applicants' property. Frankly, in view of the likely environmental damage that will result from the additional stormwater and disturbance of almost every single environmentally protected area of the Property, I would find that result to be preferable. In particular, while the stormwater from a post-development 2-year storm will apparently be controlled to the level of a pre-development 1-year storm, there will and can be no controlling of the rate and volume of stormwater generated by the new impervious surfaces during the 10, 25, 50 and 100+ year storms. There is no doubt that this additional run-off will cause erosion of the slopes, damage to the riparian buffer zones, and increased floodwater with adverse consequences to Township residents, property and the environment downstream.

Accordingly, and as an alternative and less environmentally damaging solution, I feel that the Township and its solicitor should look into the Township's ability to condemn the narrow strip of land (approximately one to five feet deep, and assume 20 feet wide to allow a 10 foot wide driveway) to create a new driveway access to the Property from Bittersweet Drive.²⁰ The cost to the Township, being the fair market value of less than 100 square feet of land, would be minimal (and might even be reimbursed by the Applicants). But the environmental benefits of avoiding the stream crossing, invasion of the floodplain, riparian buffer zones and steep slopes, as well as the significant reduction in new impervious coverage and stormwater/floodwater runoff would be of significant benefit to the public, including those

²⁰While I am not recommending it, the Township *could*, in the alternative, but at much higher cost, exercise its power of eminent domain to take the subject Property itself for environmental conservation, and convert the Property into dedicated open space within the Township. Section 2201 of the Second Class Township Code, 53 P.S. §67201, authorizes the Board of Supervisors to designate lands owned by the Township for use as public parks and other recreation areas. That section also enables the Board to acquire lands by the exercise of its right of eminent domain for recreational purposes. The procedure is set forth in Article XXXIV (sections 68401 et seq.) and, obviously, requires payment to the property owner for the value of the land taken.

In view of the location and topography of the Property, it is likely that its designation as public open space would result in very little actual use by the public. Nevertheless, I believe that its preservation from the currently-planned environmental disruption would be in the best interests of the Township residents and their rights to "clean air, pure water and preservation of the natural, scenic, historic and esthetic values of the environment" under the Pennsylvania Constitution, which charges the various agencies of government (including this ZHB and the Board of Supervisors) with the duty to act within their power, as trustees of public natural resources, to make reasonable efforts to protect and preserve those resources which may be threatened by the actions of the agency concerned.

future generations whose rights we are charged with protecting.²¹

I have been advised that Section 204 of the Pennsylvania Eminent Domain Code, 26 Pa. C.S.A. §204, generally prohibits the taking of private property in order to use it for private enterprise. However, there are exceptions to that rule, including takings to avoid or correct a threat to the public health or safety, and takings for use as a road or trafficway or to acquire access to a public thoroughfare for a property which would otherwise be inaccessible, or for ingress, egress or parking of motor vehicles.²²

Our courts have held that Pennsylvania law allows for a township to take property by eminent domain, even where there is some element of private use or benefit. In the case of *In re Land Along Woodside Road*, Frankstown Township in Blair County, Pa. enacted a resolution authorizing the condemnation of a strip of land to be used as an access road for a new residential development, and subsequently filed a declaration of taking in the Court of Common Pleas. Several neighboring property owners objected and argued, in part, that the taking was not proper because it was for a private purpose. In upholding the trial court's ruling that the taking was proper, the Commonwealth Court of Pennsylvania held that a taking does not lose its public character merely because there may exist in operation some feature of private gain. *In re Land Along Woodside Road*, 617 A.2d. 74, 78 (Pa. Cmwlth. Ct. 1992). Additionally, the Court found that the agreement that the developer would assume all costs involved with the taking by eminent domain made logical sense in that there would be no imposition on taxpayers in taking the land and creating the access road.

I believe that the benefit to the Township residents from minimizing the environmental disruption of this Property would far outweigh any private benefit to the Applicants. And, it is possible that the Applicants (like the developer in the *Woodside Road* case) might assume the costs of the eminent domain taking, rather than expend the significant funds to construct the stream crossing, lengthy driveway, retaining walls and the related stormwater management facilities.

Here, the inevitable creation of environmentally hazardous conditions by the Applicants can be cured by taking a small strip of land leading from the existing private road to the south, together with an easement over the existing (but private) Bittersweet Drive for driveway access to the Property.²³ Because, in my view, the relief Applicants seek for the construction of the

²¹ Pennsylvania Constitution, Article 1, Section 27, providing, in part, that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth [and its political subdivisions] shall conserve and maintain them for the benefit of all the people." *Riehl v. Millcreek Township Sewer Authority*, 362 A.2d 478 (Pa. Cmwlth. Ct. 1976) citing *Community College of Delaware County v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975); *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 213 A.2d 86 (1973). (Emphasis added).


²² 26 Pa. C.S.A. §204(b)(3) and (9).

²³ The Township has the ability to "take" a road easement over private property via eminent domain. See 53 P.S. §68404. See also *In re Crouse Condemnation*, 18 Adams L.J. (Adams Co. Com. Pl. 1976) (The Condemnor need only take so much property as is needed for its purpose.) And *Riehl v. Millcreek Township Sewer Authority* (The Eminent Domain Code does not require that a condemnor take steps to amicably acquire an easement prior to condemnation.) Again, the fair market value of a non-exclusive right to use the lower portion of Bittersweet Drive in conjunction with the other users would be minimal.

currently proposed driveway should not be granted due to those concerns over environmental hazards, the building lot is essentially rendered landlocked. The homeowners whose properties are currently situated on Bittersweet Drive would not lose access to their properties from the road, and Applicants would be able to use their Property as intended without significant disturbance of the steep slopes on the Property or removal of so many trees.

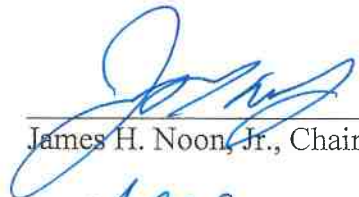
If the Township finds that it has the ability to exercise its eminent domain power for a taking of this nature, conditions should be imposed to further increase the public benefit of the taking. Namely: (1) Applicants should be responsible for reimbursing the Township for all costs involved with the taking and creation of the property and easement; (2) Applicants should be subject to any operating agreement for the private road which calls for pro rata contribution to the maintenance and repair of, and snow removal from, the road; and (3) Applicants should be required to take steps necessary to restore the dilapidated woodlands on the Property.

Respectfully submitted,


David H. Ziegler, Sr., ZHB member

VII. LIMITED JOINDER IN DISSENT

Notwithstanding my/our Decision and Order in this matter, I/we join in that portion of Mr. Ziegler's Dissent recommending that the Township and its solicitor explore the possibilities of exercising its powers of eminent domain to either: (i) acquire an alternative driveway access to the Property from Bittersweet Drive to minimize the environmental impacts of the project; or even (ii) acquire the subject Property itself for conversion to public open/recreational space.



James H. Noon, Jr., Chairman



Nathan Wilson, Member

**BEFORE THE ZONING HEARING BOARD OF POCOPSON TOWNSHIP
CHESTER COUNTY, PENNSYLVANIA**

In re: Pocopson Township Zoning Hearing Board- Application of Thomas M. Dorff and Gina T. Dorff for Special Exception and Variance Relief

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing Decision and Order has been served upon the following individuals in the manner indicated below this 3rd day of June, 2022.

Service by First Class Mail, addressed as follows:

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Weatogue, CT 06089

Mr. and Mrs. Edward McClatchy, Jr.
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West Chester, PA 19382

Pocopson Township
Planning Commission
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BRUTSCHER, FOLEY, MILLINER, LAND & KELLY, LLP

BY: _____


Edward M. Foley, Solicitor for the
Pocopson Township Zoning Hearing Board