

station, a 22,100 square foot ALDI Grocery store, an approximately 6,950 square foot multi-tenant retail building, as well as three retail out parcels, two of which are proposed to have drive-thru facilities. *Tr. Day 1, pp. 23-26; Exhibits A-2, A-4.* (collectively, the “Proposed Development.”)

5. The Application requests variances from Sections 135-122, 135-256.A(1), and 135-256.A(3) of the Mount Joy Township Zoning Ordinance (the “Zoning Ordinance”), to authorize construction of a shopping center in excess of 50,000 square feet in the Limited Commercial - C-1 Zoning District and to provide accessory fuel pumps for the proposed convenience store’s use in the shopping center (the “Proposed Use”). *Exhibit A-2.*

6. After a continuance requested by Applicant, hearings on the Application were held before the Board on June 7, 2023 (the “First Hearing”) and July 26, 2023 (the “Second Hearing”). The testimony was closed on July 26, 2023 and the Board allowed for public comment before the record was closed.

7. Notice of the hearings was duly posted, advertised, or provided on the record in accordance with the applicable provisions of the Pennsylvania Municipalities Planning Code (“MPC”), 53 P.S. § 10101, *et seq.*, and the Zoning Ordinance. The hearings were held in the Elizabethtown Area School District Middle School auditorium.

8. Board members Gregory R. Hitz, Sr.; James E. Hershey; and Robert F. Newtown, Jr., attended the hearings.

9. The Applicant was represented by its counsel Craig R. Lewis, Esquire of the law firm Kaplin Stewart.

10. The Township was represented by its counsel Josele Cleary, Esquire of Morgan, Hallgren, Crosswell & Kane P.C. The Board recognized the Township as a party.

11. The following persons appeared and were recognized as parties to the matter, without objection (hereinafter collectively, “Objectors”):

- a. Dale Hess and Carol Hess, husband and wife, 10 Ridge Run Road, Mount Joy, PA 17552.
- b. Jay Brubaker, 382 Ridge Run Road, Mount Joy, PA 17552.

B. Witnesses; Experts

12. Testimony was offered on behalf of the Applicant by the following individuals: Todd Smeigh, PE, a civil engineer (*N.T. 06/07/23 pp.20-47*); Greg Creasy, PE, a professional transportation engineer (*N.T. 06/07/23 pp. 48-100*); and Brian Seidel, a certified land planner (*N.T. 06/07/23 pp. 102-177 and 07/26/23 pp. 5-28*).

13. Mr. Smeigh and Mr. Creasy testified at the First Hearing.

14. The Board accepted Mr. Smeigh as an expert in civil engineering. *N.T. 06/07/23 p. 22; Exhibit A-16.*

15. The Board accepted Mr. Creasy as an expert in traffic engineering. *N.T. 06/07/23 pp. 49-50; Exhibit A-18.*

16. Mr. Seidel testified at the First Hearing and the Second Hearing.

17. The Board accepted Mr. Seidel as an expert in landscape architecture and land planning. *N.T. 06/07/23, p. 104; Exhibit A-17.*

18. At the hearing on June 7, 2023, Applicant presented a package of pre-marked exhibits A-1 through A-21, as well as A-22, as follows:

- A-1 Deed to the Property.
- A-2 Application and Amended Addendum and Cover Letter.
- A-3 Aerial Photograph of Property.

- A-4 Amended Zoning Plan, dated March 30, 2023.
- A-5 Township Zoning Review.
- A-6 Stipulated Conditions.
- A-7 Mass Transit Consistency Transit Letter.
- A-8 Lighting Plans.
- A-9 Landscape Plans.
- A-10 Traffic Study Executive Summary.
- A-11 Transportation Details and Design Incentives.
- A-12 Streetscape Details.
- A-13 Shopping Center Elevation.
- A-14 Wawa Elevation.
- A-15 Aldi Elevation.
- A-16 Todd Smeigh, PE C.V.
- A-17 Brian Seidel, Land Planner, C.V.
- A-18 Greg Creasy, PE, C.V.
- A-19 Traffic Planning and Design May 25, 2023 Review Letter.
- A-20 Sewer Service Agreement.
- A-21 Water Service Agreement.
- A-22 Large Aerial Photograph of the Property and Immediate

Neighborhood.

19. The Township did not present testimony. Rather, the Township requested that if the Board granted the Application, that the conditions set forth in Applicant's Exhibit A-6 be imposed upon such grant of relief.

20. The Party Opponents testified on behalf of themselves.

C. Characteristics of the Subject Property and Surrounding Neighborhood

21. Applicant or an affiliate entity has owned the Property since 1977. *Exhibit A-1.*

22. The Property contains approximately 22.12 acres of undeveloped land located at the northeast quadrant of the intersection of Cloverleaf Road and State Route 230 in Mount Joy Township, Lancaster County, Pennsylvania. *Tr. Day 1, pp. 12; 17.*

23. The Property abuts the Penn Medicine Lancaster General Hospital medical complex to the north, the Tyson Foods hatchery to the northeast, agricultural lands owned by Applicant to the east, West Main Street to the south, and Cloverleaf Road to the west. *Tr. Day 1, pp. 23-25; Exhibit A-3.*

24. Stormwater on the Property flows downward from the northeast corner to the southwest corner. *Tr. Day 1, pp. 35-38.*

25. The Property is in the Township's C1- Limited Commercial District (the "C1-District"). *Tr. Day 1, pp. 25.*

26. The purpose of the C1-District is to "provide for the orderly development of office and light commercial uses in areas that are particularly sensitive because of traffic capacity limitations, lack of public facilities, natural features and/or closeness to residential neighborhoods and/or agricultural areas." *Tr. Day 1, pp. 106.*

27. The C1-District prescribes a minimum lot area of 10,000 square feet. *Tr. Day 1, pp. 105.*

D. The Application and Proposed Development

28. Applicant proposes to construct an extension of Norlanco Drive on a portion of the Property as well as on the adjacent property owned by Applicant. The Norlanco Drive extension will intersect State Route 230 to form a signalized intersection. *Tr. Day 1, pp. 18; 27-28; Exhibit A-4.*

29. Access to the Proposed Development will include three connections to the Norlanco Drive extension, one right-in/right-out only access to Cloverleaf Road (identified as Access Drive “D”), one right-on only access point along Cloverleaf Road, and one right-in only access along state route 230. *Tr. Day 1, pp. 27-28; Exhibit A-4.*

30. The Property can be developed with any of the permitted-by-right uses in the C-1 District (Section 135-112). *Tr. Day 2, pp. 25-26.*

31. Due to the size of the Property currently, multiple uses on the Property, or a subdivision of the Property into multiple smaller lots, may lead to disjointed development, lack of aesthetic cohesion, and disjointed stormwater management. *Tr. Day 1, pp. 108-11.*

32. The Proposed Development addresses the requirements applicable to retail stores and shopping centers containing a gross floor area in excess of 10,000 square feet set forth in Section 256 of the Zoning Ordinance¹, as follows:

a. As to Section 135-256.A(2) of the Zoning Ordinance, The Proposed Development provides a building coverage of 12%. *See Exhibit A-4.*

b. As to Section 135-256.A(3) of the Zoning Ordinance, the Proposed Development will contain individual uses located in detached and attached structures and includes only uses permitted by right or by special exception within the zoning district, except for the variance requested as to fuel pumps. Moreover, Applicant testified that adult-oriented businesses,

¹ Sections 135-256.A(1) is not discussed in Paragraph 31 of this Decision, as it is the subject of Applicant’s variance request.

nightclubs, and/or manufactured home parks are not proposed as part of the Proposed Development. *Tr. Day 1, pp. 113.*

c. As to Section 135-256.A(4), the closest point of any two buildings or groups of units of attached buildings in the Proposed Development is not less than 20 feet.

d. As to Section 135-256.A(5), the Proposed Development provides designated shopping cart storage facilities which are not counted toward the required minimum off-street parking facilities. *See Exhibit A-4.*

e. As to Section 135-256.A(6), the Proposed Development will be served by public sewer and public water. *See Exhibits A-20 and A-21.*

f. As to Section 135-256.A(7), the Proposed Development includes drive-through facilities which will comply with the requirements of drive-through facilities set forth in Section 135-255 of the Zoning Ordinance.

g. As to Section 135-256.A(8), the Proposed Development contains lighting facilities for the proposed buildings, signs, accessways, and parking areas in a manner which will protect the highway and neighboring properties from glare or hazardous interference of any kind, as detailed on the plans entitled "Site Lighting Calculations" prepared by Independence Lighting, dated February 28, 2023, consisting of 8 sheets. *See Exhibit A-8.*

h. As to Section 135-256.B(1) the side and rear yards of the Property do not abut a residential district and therefore these regulations do not apply. Nonetheless, the Proposed Development includes substantial landscaping proposals which are detailed on plans prepared by Seidel Planning and Design, entitled "Mount Joy Towne Center" dated March 1, 2023. *Tr. Day 2, pp. 5; See Exhibit A-9.*

i. As to Sections 135-256.B(2), 135-256.B(3), and 135-256.B(4) the Proposed Development does not include parking areas located within the side or rear buffer yards. Applicant's landscape plan (Exhibit A-9) depicts that landscaping strips and screening will be located, maintained, and contain such materials as required by Section 135-299 of the Zoning Ordinance. *See Exhibit A-4; Exhibit A-9.*

j. As to Section 135-256.C(1), the Proposed Development provides more than two points of ingress and egress and the Property fronts on an arterial or collector street. *See Exhibit A-4.*

k. As to Section 135-256.C(2), at the hearing Applicant submitted a traffic study for the Proposed Development prepared by Grove Miller Engineering, Inc. and dated February 2023. *See Exhibit A-10.*

l. As to Section 135-256.C(3), the Proposed Development provides an improved bus stop which is conveniently accessible for patrons who would travel to and from the site by bus. The proposed bus stop includes a shelter, seating, a waste receptacle, and at least one shade tree. The location of the required bus stop is acceptable to the Red Rose Transit Authority. *See Exhibit A-4; Exhibit A-7; Exhibit A-11.*

m. As to Section 135-256.C(4), the Proposed Development integrates a portion of the required off-street parking for public use as a park-and-ride facility. The facility is readily identifiable and conveniently accessible to passing motorists. At least 3% of the parking spaces provided for the use are for public use as a park-and-ride area. *See Exhibit A-4; Exhibit A-11.*

n. As to Section 135-256.C(5), the Proposed Use provides pedestrian walkways providing safe and convenient pedestrian linkages. *See Exhibit A-4; Exhibit A-12.*

o. As to Section 135-256.D(1), the Proposed Development is constructed in accordance with an overall plan (Exhibit A-4) and uses a single architectural style with appropriate landscaping. The Proposed Development contains an architectural style that is reminiscent of the residential and rural areas of the Township which are located in close proximity to the C-1 District. *See Exhibit A-13; Exhibit A-14; Exhibit A-15.*

p. The roofs and façades within the Proposed Development will be compliant with the specifications set forth in Section 135-256.D(2) of the Zoning Ordinance. *See Exhibit A-4; Exhibit A-13; Exhibit A-15.*

q. As to Section 135-256.E, Applicant demonstrated the Proposed Development will incorporate and is consistent with the “Main Street Environment” optional design standards. *See Exhibit A-4; Exhibit A-11; Exhibit A-12; Exhibit A-13.*

II. CONCLUSIONS OF LAW

A. Procedural Conclusions

33. Public hearings on the Application were held pursuant to appropriate public notice provided in accordance with the terms of the Zoning Ordinance and the MPC and due process was afforded to all parties during those hearings.

34. Section 135-485 of the Zoning Ordinance and Section 908(9) of the MPC, 53 P.S. § 10908(9), require the Board to render a written decision within forty-five (45) days of the last hearing. The parties stipulated on the record to a schedule that permitted the Board to not render a written decision within the forty-five (45) day period. Rather, this written decision was agreed to be due on October 4, 2023, after Applicant submitted proposed findings of fact and conclusions of law, and such submission was due and delivered to the Zoning Hearing Board Solicitor on September 5, 2023.

35. The Application is properly within the jurisdiction of the Board as a request for variances from Sections 135-122, 135-256.A(1), and 135-256.A(3) of the Zoning Ordinance.

B. Ordinance Criteria

36. With the exception of the requested variances as to Sections 135-256.A(1) and 135-256.A(3), as provided in detail in the Findings of Fact above, the Applicant, through its Application and demonstrative and oral testimony, including expert testimony presented during the hearings, met its burden to establish that the Application and Proposed Use comply with all other applicable objective requirements of Section 135-256 of the Zoning Ordinance (“Retail stores and shopping centers in excess of 10,000 square feet of gross floor area”).

C. Use Variance

37. Section 135-122.C of the Zoning Ordinance prohibits shopping centers and vehicular fuel pumps in the C-1 zoning district.

38. Applicant requests variances from section 135-122.C of the Zoning Ordinance to permit the proposed shopping center and vehicular fuel pumps in the C-1 district.

39. Section 135-256.A(1) of the Zoning Ordinance states that the floor area of a retail store or shopping center shall not exceed 50,000 square feet of gross floor area.

40. Applicant requests a variance from Section 135-256.A(1) of the Zoning Ordinance to permit the Proposed Development (a shopping center in excess of 50,000 square feet).

41. Section 135-256.A(3) of the Zoning Ordinance states that individual uses of a shopping center shall include only uses permitted by right or by special exception within the zoning district the shopping center is to be located.

42. Applicant requests a variance from section 135-256.A(3) of the Zoning Ordinance to permit vehicular fuel pumps in the Proposed Development in the C-1 district.

43. Section 910.2 of the Pennsylvania Municipalities Planning Code (the “MPC”) provides that a board may grant a variance, provided the applicant proves the following:

- a. That there are unique physical circumstances or conditions, including 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.
- 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 the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.
- 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, nor be detrimental to the public welfare.
- 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.

53 P.S. § 10910.2; *see also* Section 135-383.C of the Zoning Ordinance.

44. In order to grant a variance, unique physical circumstances which are not self-inflicted must exist and cause an unnecessary hardship or unreasonable inhibition of the use of the property. *Carman v. Zoning Board of Adjustment*, 638 A. 2d 365, 369 (Pa. Commw. Ct. 1994). In addition, the variance must not adversely impact the health, safety, and welfare of the general public or authorize more than the minimum variance necessary to afford relief.” *Id.*

45. A variance can be characterized as a use variance or a dimensional variance. *Hertzberg v. Zoning Bd. of Adjustment*, 721 A.2d 43, 47-48 (Pa. 1998).

46. “A dimensional variance involves a request to adjust zoning regulations to use the property in a manner inconsistent with regulations, whereas a use variance involves a request to use property in a manner that is wholly outside zoning regulations.” *Tidd v. Lower Saucon Twp. Zoning Hearing Bd.*, 118 A.2d 1, 8 (Pa. Commw. Ct. 2015).

47. The quantum of proof required to establish unnecessary hardship is greater when a use variance, rather than a dimensional variance, is sought by the applicant. *Hertzberg*, 721 A.2d at 47-48.

48. The burden on an applicant seeking a use variance is a heavy one, and the reasons for granting the variance must be substantial, serious and compelling. *Liberties Lofts LLC v. Zoning Bd. of Adjustment*, 182 A.3d 513, 530 (Pa. Commw. Ct. 2018).

49. Use variances should be granted sparingly and only under exceptional circumstances. *Appeal of Lester M. Prange*, 647 A.2d 279, 284 (Pa. Commw. Ct. 1994).

50. In the context of use variances, unnecessary hardship is established by evidence that: (1) the physical features of the property are such that it cannot be used for a permitted purpose; or (2) the property can be conformed for a permitted use only at a prohibitive expense; or (3) the property has no value for any purpose permitted by the zoning ordinance. *Marshall v. City of Philadelphia*, 97 A.3d 323, 329 (Pa. 2014) (citing *Hertzberg*, 721 A.2d at 47).

51. Additionally, in order to show that a variance is necessary to enable reasonable use of a property, an applicant must show that the denial of the requested variance would make the property practically useless. *Larsen v. Zoning Hearing Bd. of Adjustment*, 672 A.2d 286, 291-92 (Pa. 1996).

52. Evidence that the zoned use is less financially profitable than the proposed use is insufficient to grant a variance; however, an applicant seeking a use variance need not demonstrate that the property is rendered valueless as zoned in order to show that a variance is needed to make reasonable use of the property. *Nowicki v. Zoning Hearing Bd.*, 91 A.3d 287, 293 (Pa. Commw. Ct. 2014).

53. Here, the Applicant's requested variances are use variances.

54. The Applicant presented credible evidence sufficient to demonstrate that the large lot size of the Property, relative to the typical C-1 district lot sizes, is a unique physical circumstance or condition peculiar to the Property.

55. The Applicant presented credible evidence sufficient to demonstrate that the Proposed Development, if approved, would not alter the essential character of the neighborhood, impair development of adjoining properties, or injure the public welfare.

56. Specifically as to the requested variances to permit a retail shopping center in the C-1 district, Applicant failed to demonstrate through substantial credible evidence an unnecessary hardship sufficient to warrant granting of such variances.

57. The Board finds the Applicant's expert testimony regarding the alleged unnecessary hardship being the prevention of reasonable use of the Property to be not credible.

58. The Applicant failed to meet its burden to demonstrate through substantial evidence any one of the following: (1) the physical features of the property are such that the Property cannot be used for a permitted purpose; (2) the Property can be conformed for a permitted use only at a prohibitive expense; or (3) the Property has no value for any purpose permitted by the zoning ordinance.

59. Indeed, the Applicant's land planning expert agreed that the Property could be used for any of the permitted by right uses prescribed by Section 135-122 of the Zoning Ordinance; at least thirty (30) uses permitted by right can be developed on the Property. *Tr. Day 2, pp. 25-26.*

60. The Board does not find credible the Applicant's land planner expert's testimony that any of the permitted-by-right uses would be unreasonable uses or not in conformity with the C-1 district regulations. While having multiple uses may lead to a lack of cohesive development aesthetics, stormwater systems, and the like, this testimony from the Applicant's expert to support the conclusion that the Property cannot be reasonably used is rejected.

61. The Applicant's expert testimony does not rise to the quantum of proof required of an applicant for a use variance to show the physical characteristics prevent the reasonable use of the Property.

62. Development of the Property in conformance with the C-1 district regulations, including the numerous uses permitted by right, may not be the Applicant's preferred use of the Property given its size (22 acres), but such does not rise to the level of unnecessary hardship required to establish entitlement to a use variance. *See Abe Oil Co. v. Zoning Hearing Bd. of Richmond Tp.*, 649 A.2d 182, 185 (Pa. Commw. Ct. 1994).

63. Applicant's repeated references to the minimum lot size of 10,000 square feet in the C-1 district, in comparison to the size of the Property (22 acres), is not given weight by this Board in the consideration of reasonable use of the Property; indeed, 10,000 square feet is the *minimum* lot size, and there is no maximum lot size prescribed for the C-1 district.

64. Thus, the Property can be reasonably used for a variety of uses permitted within the C1-District. Where the Applicant fails to establish that the Property has no reasonable

use as zoned, then the requested variances are improper, whether or not the use is regarded as beneficial. *See, Abe Oil Co.* 649 A.2d at 185.

65. For the same reasons above, Applicant failed to meet its burden to demonstrate through substantial evidence entitlement to the requested variances to permit vehicular fuel pumps within the Proposed Development.

66. The Board finds that the testimony and evidence presented by the Applicant focused on the variance request to permit the retail shopping center in the C-1 district, without attributing any of such evidence to the variances requested for vehicular fuel pumps other than the fact that there are vehicular fuel pumps on nearby properties which are located in the General Commercial (C-2) and or Mixed Use (MU) districts.

67. Having found that the Applicant is not prevented from making reasonable use of the Property for the above-stated reasons, the remaining variance criteria are moot.

68. However, without altering those such findings, the Board notes that despite the Applicant's attempts to reduce the size and scope of the Proposed Development, which attempts are appreciated, the requested variances would not be the minimum relief necessary to afford Applicant relief from its claimed, albeit rejected, hardship; given the Property size and number of permitted-by-right uses available to Applicant, there are numerous requests for relief available to Applicant, namely dimensional in nature, short of the requested use variances.

69. Based on the Application and the testimony and evidence presented at the hearings, the Board concludes that the Applicant is not entitled to the requested variances from Sections 135-122.C, 135-256.A(1), and 135-256.A(3) of the Zoning Ordinance.

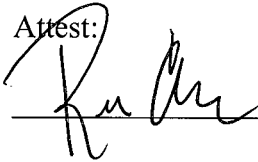
C. Decision

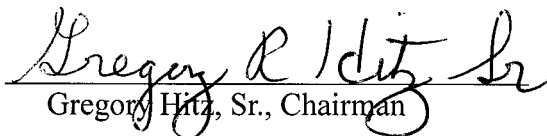
70. The Board hereby denies the Application for variances from Sections 135-122, 135-256.A(1), and 135-256.A(3) of the Mount Joy Township Zoning Ordinance.

Decision made this 4th day of October, 2023.

ZONING HEARING BOARD FOR THE
TOWNSHIP OF MOUNT JOY

Attest:



By: 
Gregory R. Hitz, Sr., Chairman

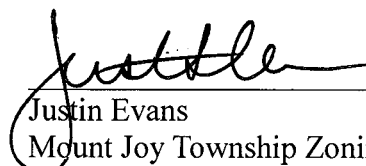
The undersigned certifies that a copy of this Decision has been personally or by First Class Mail, postage prepaid, served upon:

Applicant c/o Craig Lewis, Esquire
Kaplin Stewart
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 October 4, 2023
Justin Evans
Mount Joy Township Zoning Officer