

DATE OF DECISION: 2/19/2021

DATE OF MAILING: 2/19/2021

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

**RE: APPLICATION OF KATHARINE AND JOHN O’ROURKE FOR  
THE PROPERTY LOCATED AT 206 WEST FAIRWOOD DRIVE,  
NEW BRITAIN TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA,  
FURTHER IDENTIFIED AS TAX MAP PARCEL NO. 26-28-10**

**FINDINGS OF FACT**

1. On Thursday, January 21, 2021, at 7:00 p.m., the New Britain Township Zoning Hearing Board (“Board”) held a duly noticed hearing on the application of Katharine and John O’Rourke (the “Applicants”).

2. The Board conducted the hearing through the use of an authorized telecommunications device<sup>1</sup>, specifically the Zoom meetings platform. Such platform permits video and audio communication between individuals over a computer application.

3. The Board, the Board’s stenographer, the Applicants, the Applicants’ representatives, and interested members of the public were all able to view, hear and communicate with each other over the authorized telecommunications device.

4. The Applicants are the record co-owners of the property located at 206 West Fairwood Drive, New Britain Township, also known as Bucks County Tax Map Parcel No. 26-28-10 (the “Property”). The Property is the subject of the instant application.

5. Notice of the January 21, 2021, hearing was published in advance of the hearing in the Thursday, January 7, 2021, and Thursday, January 14, 2021, editions of The Intelligencer, a newspaper publication of general circulation in New Britain Township. *See* Exhibit B-6.

6. Notice of the January 21, 2021, hearing was sent by first class mail on January 6, 2021, by Kelsey Harris (“Harris”), the New Britain Township Zoning Officer, to (a) all record owners of properties within New Britain Township surrounding the Property; and (b) to the adjoining municipality for any surrounding properties that are located in that municipality. *See* Exhibit B-9.

7. Harris posted notice of the January 21, 2021, hearing on the Property on January 7, 2021, at 10:07 a.m. *See* Exhibit B-10.

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<sup>1</sup> During the pendency of the Governor’s emergency declaration regarding the COVID-19 virus, Act 15 of 2020 (“Act 15”) authorizes the Board to conduct a hearing through the use of an “authorized telecommunication device,” defined as “any device which permits, at a minimum, audio communication between individuals.” Hearings conducted pursuant to Act 15 do not require individual Board members to be physically present at the same location to achieve a quorum.

8. Pursuant to Act 15, notice of the January 21, 2021, hearing was posted on the New Britain Township website. The notice described the authorized telecommunications device technology (Zoom platform) to be used at the hearing.

9. The Board allowed for public participation at the January 21, 2021, hearing through both the authorized communications device, and through the submission of written questions or comments to the Board delivered by regular mail or email to Harris's attention at New Britain Township.

10. As the record co-owners of the Property, the Applicants have the requisite standing to prosecute this zoning hearing board application.

11. The Property is located in the RR, Residential, zoning district under the New Britain Township Zoning Ordinance (the "Zoning Ordinance").

12. The Property is improved with a single-family detached residential dwelling developed as part of a cluster subdivision (use B2). Such use is permitted by right in the RR zoning district. *See* Zoning Ordinance §27-901.a.

13. The Applicants propose an addition to the existing single-family detached dwelling. The addition will replace an existing sunroom. *See* Exhibit B-3, Plan.

14. To permit the dwelling addition, the Applicants seek a variance from Zoning Ordinance §27-903.a to permit a rear yard setback of 21 feet 6 inches<sup>2</sup>, where the required minimum rear yard setback permitted by right is 40 feet. *See* Exhibit B-3, Plan.

15. The Applicants also seek a special exception pursuant to Zoning Ordinance §27-2303.a to permit the dwelling addition to extend along the existing building line that has a non-conforming side yard setback of 10 feet. *See* Exhibit B-3, Plan.

16. Introduced as exhibits at the zoning hearing are the documents identified on Schedule A attached to this decision. Schedule A is incorporated by reference as though fully set forth herein at length.

17. In addition to the Applicants, the following individuals testified in support of the application at the hearing:

- a. Jeffrey Harris ("Harris"), project architect; and
- b. Jerry Farra ("Farra"), contractor.

18. Through its solicitor, the Township appeared at the hearing. The Township took no position on the application. The Township solicitor advised the Board of actions intended by the Township that will impact municipal open space abutting the Property.

19. No other individuals appeared at the January 21, 2021, hearing through the authorized telecommunications device. One nearby property owner submitted written comments

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<sup>2</sup> The originally submitted application and public notice recited the desired setback at 22 feet. The Applicants requested, and the Board granted, that their application be amended to reflect the correct dimension.

by email to Harris in support of the application. No one requested party status to the application before the Board.

20. The Property is lot 14 in the Final Plan of Fairwood residential subdivision. This plan is recorded in the Office of the Recorder of Deeds for Bucks County in Plan Book 160, page 35-B-1. The Board takes judicial notice of this Fairwood subdivision record plan. *See* 42 Pa.C.S §6102.

21. According to Bucks County records, the Applicants acquired the Property in or around May 2020. The dwelling was constructed in or around 1984. The dwelling is served by public water and public sewer systems.

22. The Property is shaped like a rectangle. Its base site area is 9,750 square feet. *See* Exhibit B-3, Plan.

23. The Property’s undersized lot area is a lawful non-conformity. The minimum lot area is 12,500 square feet for a lot improved with a single-family detached dwelling developed as part of a cluster subdivision that is served by public water and public sewer systems. *See* Zoning Ordinance §27-903.a.

24. The Property has 75 feet of frontage along West Fairwood Drive. The rear lot line is also 75 feet in length. The side lot lines are each 130 feet long. *See* Exhibits B-1, Deed; and B-3, Plan.

25. The dwelling’s front wall is oriented toward the intersection of West Fairwood Drive and Poplar Road. Poplar Road intersects West Fairwood Drive directly in front of the Property. *See* Exhibit B-11, Viewer.

26. The dwelling is located in the center of the Property. The dwelling’s front wall is set back 36 feet from West Fairwood Drive. The Board finds that this front setback dimension is a lawful non-conformity. *See* Exhibit B-3, Plan.

27. The rear wall of the dwelling is set exactly at the 40 feet rear yard setback line. A deck and sun room abut the dwelling’s rear wall. The deck projects into the rear yard approximately 12 feet. *See* B-3, Plan.

28. The sunroom’s rear wall is recessed back from the edge of the deck, giving it a greater setback than 22 feet. The sunroom’s floor area is 160 square feet. *See* Exhibit B-3, Plan.

29. The side wall of the house and sun room are each setback 10 feet from the closest side lot line. The required minimum side yard setback is 15 feet. The Board finds that this setback dimension is a lawful non-conformity. *See* Exhibit B-3, Plan.

30. A driveway connects the dwelling’s front-entry garage to West Fairwood Drive. A short walkway connects the driveway to the front door. *See* Exhibit B-3, Plan.

31. The Applicants and Harris stated, and the Board finds, that to the side and rear of the Property is a large municipally owned open space area. Despite any permission the Applicants may have to use this space, it is not part of the Property’s base site area for purposes of the application and this Decision. *See* Exhibit B-3, Plan.

32. The open space has 50 feet of frontage along West Fairwood Drive next to the Property. It opens up considerably behind the Property. *See Exhibits B-3, Plan; and B-11 Viewer.*

33. The Applicants and Harris stated, and the Board finds, that the dwelling addition will contain a small bedroom that will allow Ms. O'Rourke's elderly parents to move into the dwelling. *See Exhibit B-3, Plan.*

34. The Applicants and Harris stated, and the Board finds, that the addition will be one story. It will be 14.5 feet wide by 18 feet long, producing a footprint of 238 square feet. *See Exhibit B-3, Plan.*

35. The Applicants and Harris stated, and the Board finds, that the dwelling addition is setback 21 feet 6 inches from rear lot line. The side of the addition follows the plane of the dwelling's side wall. It is also setback 10 feet from the nearest side lot line. *See Exhibit B-3, Plan.*

36. The Applicants, Harris and Farra stated, and the Board finds, that the footprint of the proposed dwelling addition will be 78 square feet larger than the sunroom's existing footprint. *See Exhibit B-3, Plan.*

37. The Applicants, Harris and Farra stated, and the Board finds, that the dwelling addition could not be reduced in depth to provide a greater rear or side yard setback. The dwelling addition is at the minimum size necessary to provide reasonable living space. *See Exhibit B-3, Plan.*

38. The Applicants and Harris stated, and the Board finds, that the proposed addition will be designed to complement the existing dwelling's architecture and materials. *See Exhibit B-3, Plan.*

39. The surrounding properties consist of similar style residences and lots. The Applicants stated that no nearby residents have raised any objection to the proposed dwelling addition or its location.

40. Due to the Property being a non-conforming lot with a non-conforming dwelling location, the Property contains unique characteristics that support relief for the proposed dwelling addition to have a rear yard setback of 21 feet 6 inches; and a side yard setback of 10 feet. *See Exhibit B-2, Plan.*

41. The Zoning Ordinance's dimensional limitations imposes a hardship on the Property and the Applicant in that this regulation prevents a reasonably sized addition to a modest size residential dwelling.

42. Subject to the conditions imposed herein, the proposed dwelling addition, its size and location, are harmonious with the Property's size and consistent with uses of other properties in the surrounding neighborhood.

## **CONCLUSIONS OF LAW**

1. Required public notice of the date, time and location of the January 21, 2021, hearing was made by sufficient advanced publication, posting and mailing to affected property owners.

2. Required advanced notice of the authorized telecommunications device to be used at the January 21, 2021, hearing was made by sufficient posting on the New Britain Township publicly accessible internet website.

3. As required by Act 15, allowance for public participation at the January 21, 2021, hearing was made through the authorized telecommunications device and through the submission of written comments or questions by regular mail or email to Harris's attention at New Britain Township.

4. In order to show entitlement to a variance, use or dimensional, an applicant must demonstrate all the following elements:

- a. an unnecessary hardship stemming from unique physical characteristics or conditions will result if the variance is denied;
- b. because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and a variance is necessary to enable the reasonable use of the property;
- c. the hardship has not been created by the applicant;
- d. granting the variance will not alter the essential character of the neighborhood nor be detrimental to the public welfare; and
- e. the variance sought is the minimum that will afford relief.

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

6. Ordinarily, an applicant can demonstrate "unnecessary hardship" for a use or dimensional variance by showing that a property's physical characteristics are such that the property cannot be used for any permitted purpose, or can only conform to a permitted purpose at prohibitive expense; or that the property has either no value or only distress value for any permitted purpose.

7. However, under Pennsylvania law, a dimensional variance is subject to a lesser standard of proof to establish unnecessary hardship than a use variance. *See Hertzberg v. Zoning Board of Adjustment of City of Pittsburgh*, 721 A.2d 43 (Pa. 1998) (when seeking a dimensional variance within a permitted use, the owner is asking only for a *reasonable adjustment* of the zoning regulations. The grant of a dimensional variance is of lesser moment than the grant of a use

variance, since the latter involves a proposal to use the property in a manner that is wholly outside the zoning regulation).

8. When deciding whether a hardship has been established in dimensional variance cases, the *Hertzberg* rationale authorizes the Board to consider multiple factors, including the characteristics of the surrounding neighborhood. *See Hertzberg, supra*, at 47.

9. The Board concludes that the fact that the Property is a non-conforming lot, together with the existing non-conforming location of the dwelling, sunroom and deck, establish a hardship under the *Hertzberg* standard sufficient to justify the variance requested.

10. Based upon the credible testimony provided, the Board concludes that the proposed addition will essentially be in the same non-conforming location as the existing sunroom. The addition will protrude only slightly further into the rear yard than the adjoining deck. *See Exhibit B-3, Plan*.

11. Critical to the Board's conclusion is that the dwelling addition will follow the same 10 feet building setback line as the dwelling's side wall facing the open space. Extension of the structure along this existing non-conforming side yard setback line is permitted by special exception. *See Zoning Ordinance §27-2303.a*.

12. Provided the Applicants comply with the reasonable conditions attached to the relief granted herein, the Applicants have met the Zoning Ordinance and Pennsylvania law requirements for the variance and special exception relief to construct and install the dwelling addition with a rear yard setback of 21 feet 6 inches; and a side yard setback of 10 feet.

13. The approved variance will not alter the essential character of the neighborhood in which the Property is located nor substantially impair the appropriate use or development of adjacent properties.

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

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

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

### **DECISION**

AND NOW, this 19<sup>th</sup> day of February, 2021, upon consideration of the foregoing Findings of Fact and Conclusions of Law, the New Britain Township Zoning Hearing Board hereby **GRANTS** the Applicant's requests for (a) a variance from Zoning Ordinance §27-903.a to permit the addition to have a rear yard setback of 21 feet 6 inches; and (b) a special exception pursuant to Zoning Ordinance §27-2303.a to extend the addition along the existing non-conforming 10 feet side yard setback building line, subject to the following conditions:

1. The proposed dwelling addition and related improvements' dimensions, size, location and appearance shall be in accordance with the definitive plans, evidence, representations, exhibits and credible testimony made and submitted at the hearing.

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

NEW BRITAIN TOWNSHIP  
ZONING HEARING BOARD

DATE: 2/19/2021

/s/ Chuck Coxhead  
Chuck Coxhead, Chair

DATE: 2/19/2021

/s/ Cathy Basilio  
Cathy Basilio, Member

DATE: 2/19/2021

/s/ Jim Scanzillo  
Jim Scanzillo, Member

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

**Note to Applicant:** This Decision is NOT an authorization to build. Zoning and building permits must be obtained from New Britain Township prior to the commencement of any construction.

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## SCHEDULE A – TABLE OF EXHIBITS

<b>Exhibit</b>	<b>Description</b>
B-1	Zoning Hearing Board application. Attachments to Application: <ul style="list-style-type: none"><li>• List of property owners within 500 feet</li><li>• Deed dated 6/5/2015 (not current; title changed in May 2020)</li></ul>
B-2	Determination by Zoning Officer dated 11/30/20. Township file documents: <ul style="list-style-type: none"><li>• Zoning &amp; Earth Disturbance permit application (11/12/20)</li><li>• Zoning Use permit application (11/12/20)</li><li>• Impervious Coverage sheet</li></ul>
B-3	O'Rourke Residence Plan, prepared by Jeffrey Harris Architect, dated 12/15/2020
B-4	Letter to The Intelligencer dated 12/30/20 forwarding public notice of 1/21/21 hearing for advertisement
B-5	Public Notice of the hearing on 1/21/21
B-6	Proof of publication of public notice in 1/7/21 and 1/14/21 editions of The Intelligencer
B-7	Letter to Applicants dated 12/30/20 providing notice of the 1/21/21 hearing
B-8	List of the record owners of all properties within 500 feet of the Property
B-9	Affidavit of mailing to property owners – notice mailed on 1/6/21 by Kelsey Harris
B-10	Affidavit of posting of public notice at property – notice posted on 1/7/21 at 10:07 a.m. by Kelsey Harris
B-11	Bucks County Viewer Map and Aerial