

BERLIN TOWNSHIP BOARD OF ZONING APPEALS (BZA)

OF DELAWARE COUNTY, OHIO

HEARING

JULY 7, 2022: 7:00 PM

CALL TO ORDER

1
2
3 The meeting was held at the Berlin Township Hall, 3271 Cheshire Road, Delaware,
4 Ohio 43015.

5
6 The meeting was called to order by Chairperson Don Sutton at 7:00 PM.

7
8 Pledge of Allegiance.

9
10 BZA members present: Chairperson Don Sutton, Vice-Chairperson Jason Acevedo,
11 Brad Cook, Michelle Cook, Larry Harmon.

12 Also present: Zoning Clerk Lisa Knapp; Zoning Secretary Cathy Rippel. BZA second
13 alternate member Jessica Kuenzli, Assistant Zoning Inspector Sherry Graham,
14 Assistant Delaware County Prosecuting Attorney Mark Fowler.

15 Not present: Quinn Machan (BZA first alternate member).

16
17 Those wishing to speak were sworn in by Court Reporter Allison Coss from Runfola
18 Reporters.

19
20 Mr. Sutton said the Board is a quasi-judicial board, made up of residents of Berlin
21 Township, that is tasked with reading and trying to interpret the zoning resolution,
22 and making fair decisions on behalf of the township. They will do their best to do
23 that tonight.

24
25 Mr. Sutton said he would like to read something regarding how the Board looks at an
26 area variance from the zoning resolution Section 32.04 Powers of the Board:

27
28 *Area variances- The Board of Zoning Appeals shall have the power to*
29 *authorize, in specific cases, variances that relate solely to area requirements*
30 *from the provisions of this resolution as will not be contrary to the public*
31 *interest. Such area variances shall be granted only in cases of special*
32 *conditions, involving physical conditions of the land, whereby strict*
33 *application of such provisions or requirements would*
34 *result in practical difficulty that would deprive the owner of the beneficial use*
35 *of the land and buildings involved.*

36
37 *No variance from the strict application of any provision of this Resolution*
38 *shall be granted by the Board unless it finds that, based upon the relevant*
39 *facts and circumstances, that applicant has established by a preponderance of*
40 *the evidence that the applicant has encountered practical difficulties and that*
41 *a strict application of an area zoning requirement, e.g. frontage, setback is*
42 *inequitable.*

43
44 *In considering an application for an area variance, the Board of Zoning*
45 *Appeals shall observe the spirit of this Resolution and weigh the competing*
46 *interests of the applicant and the community. The factors to be considered and*
47 *weighed in determining whether an applicant has encountered practical*
48 *difficulties include, but are not limited to the following:*

49
50 Mr. Sutton said the Board would go into those criteria at this hearing.

51
52 **AGENDA ITEM: BZA 22-001 BRIAN & JENNIFER BARNHART**

53
54 *Brian & Jennifer Barnhart, requesting a 10' variance from the rear setback at 466*
55 *Cliff View Drive, for a pool that has already been built.*

56
57 Mr. Sutton said he has served on this Board for 15 years and has never seen a
58 situation like this in the past. This will be an interesting hearing, he noted. The BZA
59 will do the best to hear the case and see what they can do to make a decision.

60

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List of Exhibits

61

62

63 Ms. Knapp read the list of exhibits into the record as follows:

64

65 Original File Exhibits –

66

67 1. Application for Area Variance, 3 pages, submitted 05/20/2022.

68

69 2. Email from David Loveless, to Scott Sanders regarding the no build line at 466
70 Cliff View Drive, 1-page, dated June 23, 2020, submitted 05/20/2022.

71

72 3. Approved zoning permit, application, and plat plan for the inground pool, 3 pages,
73 dated 02/19/2021, submitted 05/20/2022

74

75 4. Berlin Township Trustees excerpt approved meeting minutes, Resolution 22-04-48,
76 to waive the applicant BZA fees, 1-page, dated 4/25/2022.

77

78 5. Berlin Township Trustees excerpt approved meeting minutes, pool permit
79 discussion, 1-page, dated 05/09/22.

80

81 6. Letter to Brian & Jen Barnhart, from Sherry Graham, Assistant Zoning Inspector,
82 informing applicants the pool does not conform with requirements. 1-page, dated
83 05/09/2022 .

84

85 7. Ariel view of 466 Cliff Drive, and surrounding property owners within 300 feet,
86 from Delaware County Auditor's GIS Office, dated, 05/23/22, & list of owner's
87 addresses.

88

89 8. Request of publication in the Delaware Gazette via email, dated 06/10/2022.

90

91 9. Notice of Hearing to applicant dated 06/21/2022

92

93 10. Certified mail receipts, dated 06/20/2022 and landowner letter dated 06/22/2022.

94

95 11. Proof of publication in the Delaware Gazette dated 06/16/2022

96

97

Applicant Presentation

98

99 Mr. Sutton said this hearing involves some challenges the township has not seen
100 before. This hearing was sent to the BZA by the trustees to hear, and resulted from
101 an approval of a permit that was made by the previous zoning inspector. There is a
102 lot to consider. This normally would be considered an area variance, but now the
103 BZA needs to find out more about the conversations that were had as they went
104 through the application process. The BZA has a responsibility to look at the zoning
105 resolution and make a decision tonight on the case.

106

107 Mr. Sutton said in cases like this, the BZA reverts to the Duncan vs. Middlefield case
108 and there are several different items that the Board must ask the applicant and get
109 their responses to in order to help them make their decision. He started with the
110 arguments for the variance.

111 1) The requirement for a variance does not merely serve as a convenience to the
112 applicant but is necessary to alleviate the demonstrable undue hardships and
113 difficulties.

114 Mr. Barnhart said he would consider an undue hardship to be the amount of money he
115 spent on the patio and the amount of effort and time he spent on the patio to make it
116 look beautiful. He went through difficulty to receive the permits he thought were
117 appropriate at the time.

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118 2) Whether special conditions and circumstances exist which are peculiar to the
119 land or structure involved and which are not applicable to other lands or
120 structures in the same Zoning District.

121 Mr. Barnhart asked him to explain why the township requires a 25' no-build line and
122 he would like to get his definition of that. Mr. Sutton said the zoning resolution was
123 established by Berlin Township and it was established that there are to be no
124 structures within 25' of a rear setback.

125
126 Mr. Barnhart said he assumed one reason was to ensure that two adjoining property
127 owners do not build structures right up against each other. Mr. Sutton said it is
128 concerning that homebuilders don't consider that in laying out the lots to allow for
129 structures. However, that is not the fault of the township. The developers are aware
130 of this, and the contractors should also know there are zoning restrictions. These
131 restrictions protect all Berlin Township residents.

132
133 Mr. Barnhart said his property is different because he backs up to a ravine and there is
134 nobody behind him. It is a couple hundred feet to the next residence behind him, and
135 he took great care to ensure that the ravine was restored to its exact condition before
136 he started the project. He was "stuck on a no larger than a 12-foot variance in land
137 height" when grading, and he adhered to that.

138 Mr. Barnhart said their landscaper was very strict with that, so there is no more than a
139 12" variance in land height, and it does not protrude into the ravine. The variance
140 will affect nobody behind him, and the ravine behind him was in better shape than it
141 was prior to starting the work as far as dead brush, poison ivy, holes, mud etc.

142 3) The literal interpretation of the provisions of the zoning resolution would deprive
143 the applicant of the rights commonly enjoyed by other properties in the same
144 zoning district under the terms of the zoning resolution.

145 Mr. Sutton said the application states, "See number one above" and he asked whether
146 he wanted to add anything. Mr. Barnhart said it was self-explanatory and he would
147 like to have the same rights as others that put a pool in. When he was going through
148 the process to put this pool in, he had other options, but he went with this option due
149 to the written permission and approval provided to him by then-zoning inspector
150 David Loveless, as well as from Delaware and another entity.

151 4) Special conditions and circumstances do not result from the actions of the
152 applicant.

153 Mr. Barnhart said he spoke with Mr. Loveless multiple times including at the subject
154 property, and Mr. Loveless told him he did not need a variance. He had the
155 paperwork at his house and they were going to complete it and submit a request for a
156 variance. The variance as stated shows 10', but it is actually less than 5' and it only
157 protrudes 4' into the no-build line. Mr. Barnhart said Mr. Loveless told him the
158 variance was unnecessary. He was aware that the fee is \$850 and he was well aware
159 of the case being referred to, and he decided he did not need to submit a request.

160 Mr. Acevedo asked whether it was correct that the variance was less than 10' and he
161 asked whether it had been re-measured. Ms. Graham said no and that the no-build line
162 is shown in a different exhibit. This is referring to the rear setback from the property
163 line. That is what the township looks at: they do not look at the no-build line. It is
164 not permitted to build a home or other building in the no-build line, but the rear
165 property line is what the township uses to make a determination. It is 25' from that,
166 and the pool encroaches by 10'.

167 Mr. Barnhart said the corner of the pool sits in the no-build zone about 5'. Over the
168 course of the process, the pool was moved close to the house due to various

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169 circumstances and the variance was reduced. The back of the property line is difficult
170 to get exactly because one of the stakes is missing, and it goes down into the ravine.

171 5) Granting the variance requested will not confer on the applicant a special
172 burden which is denied by the zoning resolution to other lands or structures in
173 the zoning district.

174 Mr. Barnhart said the township told him he could proceed to install the pool, but he
175 was not aware of any special privilege that he received. He said it does not impinge
176 on other lands or structures and his house sits back so far that nobody can even see
177 the pool.

178 Mr. Sutton said the Board must decide and consider the following provisions pursuant
179 to *Duncan vs. the Village of Middlefield* 23 Ohio St. 3d 83 (Ohio 1986), which must
180 be met before a variance can be granted.

181
182 a.) Whether the property in question will yield reasonable return or whether there
183 can be beneficial use of the property without the variance;
184

185 Mr. Barnhart said “no, it’s not possible” as the pool has been installed and paid for,
186 and the landscaping is complete and restored to what they were requested. He said it
187 was very straightforward that he was not to have anything steeper than 12” due to the
188 ravine and that was strictly followed.

189
190 Mr. Sutton said the Board needs to determine whether there is a beneficial use of the
191 property without a variance. Mr. Barnhart asked that he define “beneficial use.” Mr.
192 Sutton said that would be whether the property could be used without the variance.
193 Mr. Barnhart said he could not because the pool had been installed, although there is
194 a house on the property. The beneficial use of the property that his family is able to
195 use the pool.

196
197 b.) Whether the variance is substantial;
198

199 Mr. Barnhart said it is not, and it is minimal. Mrs. Cook asked what the exact
200 variance being requested is. Mr. Fowler said it appears the applicant is requesting
201 two variances; one is for the rear setback from the zoning resolution, and the other is
202 for the no-build line, which is probably from the development plan, as it is not in the
203 zoning resolution.

204
205 Mr. Barnhart said nobody was sent out from the township to measure it. Mr. Sutton
206 asked how close to the rear property line is the swimming pool. Mr. Barnhart said it
207 was 22’ so it was a 3-4’ variance. Mr. Fowler said it appears from the development
208 plan maps that it is established from the development plan, so they would need a
209 variance from the no-build line. The applicant can amend their application to ask for
210 the 10’ rear yard setback variance, and the no-build setback variance of 5’.

211
212 Mr. Fowler said the pool is 10’ closer to the rear property line than is permitted
213 without a variance, and it encroached on the rear build line. Mr. Barnhart said he did
214 not think it was 10’ although he has not had the land surveyed for the no-build line.
215 Ms. Graham said the pool company and everybody who signed off on it said it is 15’
216 from the property line.

217
218 c.) Whether the essential character of the neighborhood would be substantially
219 altered, adjoining properties suffer substantial detriment.
220

221 Mr. Barnhart said “no.”
222

223 d.) Whether the variance would adversely affect the delivery of governmental
224 services;
225

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226 Mr. Barnhart said “no.”

227

228 e.) Whether the property owner purchased the property with knowledge of zoning
229 restrictions.

230

231 Mr. Barnhart said “yes.” He said he was aware of them and so he met with the
232 township zoning inspector prior to spending \$150,000 numerous times, in order to
233 ensure he was within his rights to build the pool.

234

235 f.) Whether the problem can be solved by some other manner other than granting
236 a variance.

237

238 Mr. Barnhart said it could not be, unless the pool was removed.

239

240 g.) Whether the variance preserves the spirit and intent of the zoning
241 requirements and whether substantial justice would be done by granting the
242 variance.

243 Mr. Barnhart said the spirit and intent is that properties do not back up to each other,
244 and in this case, they do not. Substantial justice is that he spent a significant amount
245 of money for the pool.

246

247 Mr. Sutton said the challenge is looking at the situation that was approved by the
248 previous zoning inspector, but also not setting precedence for the future. The process
249 should have happened first before a pool was built. If the zoning inspector had told
250 them they had to request a variance, they would have gone to the BZA to request it.

251

252 Mr. Sutton said the rear yard would not be able to accommodate the pool without the
253 variance. He asked whether there were any questions from the Board.

254

255 Mr. Cook asked what section of the code was being used to determine that a 25’
256 setback was required and that variance was necessary. Ms. Graham 31:04

257

258 Ms. Graham said it is from the PRD for this specific subdivision.

259

260 Ms. Rippel was sworn in by the court reporter. She said this development was from
261 the ravines at Alum Creek when in 1999, Ron Sabatino came in for Sherman Lakes 1
262 and 2. The BZC denied those due to the proposed setbacks. Mr. Sabatino found a
263 loophole and he took the township all the way to the Supreme Court and he won and
264 the front and rear setback were set. She said many residents are upset that decks and
265 pools cannot be built, or sheds. She said Mr. Loveless had gone out many times to
266 the property.

267

268 Mr. Cook asked whether Mr. Loveless was not aware of the special circumstances.
269 Ms. Rippel said she was not sure. Ms. Graham said each subdivision has their own
270 setback requirements. The rear setbacks for the final development plan are 25’ for
271 the rear setback which is about average for most of the subdivisions in Berlin
272 Township. Some are 50’, some are 35’, etc. She noticed the subject property
273 setbacks seemed lower than others in the area, so she verified that the information
274 was factual.

275

276 Mr. Fowler noted that he probably created confusion earlier as he stated one variance
277 was from the development plan and one was from the zoning resolution, but both
278 variances are requested from the strictures of the development plan.

279

280 Mr. Sutton said the answer to Mr. Cook’s question is that the BZA should be looking
281 at R-3. Ms. Rippel said it was just a regular PRD back then, and it was divided out to
282 R-1, 2, 3, and 4 years later. Mr. Cook said it appears that it is R-2.

283

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284 Mr. Barnhart said Ms. Graham has helped him along with this process and she has
285 laid witness to this pool project. He in no way has diminished the property value,
286 harmed the property, or hurt the ravine behind them. If anything, they have improved
287 the value of his neighbors' properties. The project has been done professionally, he
288 said.

289
290 Mr. Harmon asked for a chronology of what happened and when, beginning in June
291 2020.

292
293 Mr. Barnhart said he knew they wanted a pool and were bound by the build line, as he
294 had to stake his deck outside of the build line. He spoke with Mr. Loveless multiple
295 times via email as well as Ms. Rippel regarding how they could install a pool and
296 avoid the build line. He said Mr. Loveless had said he had spoken with the Delaware
297 County zoning commission, who stated that as long as they return the ravine area
298 behind the house to the way it was, there would be no issue at all.

299
300 Mr. Sutton asked whether the BZA had that email. Mr. Barnhart said he would pull
301 up the emails.

302
303 Ms. Rippel said she thought Mr. Loveless did not mean the Delaware County zoning
304 commission, but rather the Berlin Township zoning commission.

305
306 6/9/20 Loveless: "I've left a message with no return answer. I have a meeting with
307 the township trustees tonight. I'm going to tun it by them and ask how they would
308 like me to proceed. It looks like the pool will work out. You may want to have some
309 drawings made that show exactly where the pool will be located, and also how the
310 back yard slope will be addressed during and after construction."

311
312 Mr. Barnhart commented that the biggest issue has been the slope.

313
314 Loveless: "The more information you have in regard to the pool and the final
315 landscaping with them, the easier it is to promote approval of this project."

316
317 Barnhart: "Thank you. I know you said you had a ton of landscaping in the past.
318 Any recommendations on how to address this?"

319
320 Barnhart: "I spoke to the landscapers and the pool people today. I can get a drawing
321 from the landscape architect for \$600-800. If you think the trustees are on board, I
322 will get that drawing made and address any issues with the ravine and landscaping.
323 Thanks again for all your help. Any advice you have for me, I'd appreciate. I will
324 give whatever it takes to get it approved and move it forward."

325
326 6/10/20 Loveless: "The designer can make a free hand sketch showing the pool and
327 how they plan on handling the swale around the pool. That should be a minimum
328 fee."

329
330 Loveless: "Designers can create a preliminary sketch plan they have to submit prior
331 to the prior design. Once the pool is approved, they need to have a final plan drawn
332 up for permits. I would think that the pool contractor had an in-house designer. They
333 generally show you a design before you've entered into a contractor for construction
334 so you know what you're paying for.

335
336 I am talking with a trustee this afternoon about the no-build line restrictions. I should
337 have more information for you on Thursday."

338
339 7/15/20 Barnhart: "Hi Dave. Any luck with the trustees?"

340
341 Loveless: "Brian, it turns out this is a trickier situation than expected. I have
342 contacted the EPA and I'm waiting for their response. I've talked with a township

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343 trustee, and they are investigating the matter. Because of the pandemic,
344 communication is taking longer.”

345

346 Barnhart: “Thanks Dave. Hopefully we can figure this out.

347

348 Barnhart: “Just wondering if you’ve had any luck figuring things out. Sorry to bother
349 you again but the pool people are on a 12-month wait list and if for some chance we
350 could. If there is some chance we can put the pool, we need to get on the list.
351 Anyway, thanks again for checking. Much appreciated.”

352

353 6/22/20 Loveless: “Do not have a definitive answer yet. Still talking between trustees
354 and EPA about limitations.

355

356 6/24/20 Loveless: “Just got word from the Regional Planning Commission . I can
357 approve your pool zoning with the following conditions:

- 358 - Provide a detailed section drawing showing the back slope behind the pool
359 after the construction. We want to minimize the effects the construction will
360 have in the no-build zone.
361 - Natural landscaping, and larger river rocks for any retaining are preferred.
362 - When the pool is dug, the dirt must be hauled away, except for the dirt needed
363 for landscaping backside.
364 - Absolutely no dirt to be dumped in the no-build zone during or after
365 construction.”

366 9/7/20 Barnhart: “I have attached what I believe is the section drawing you requested
367 showing the slope and backfill for the pool we would like approval for. We also plan
368 to keep the landscaping as natural as possible as requested. Please let me know if this
369 is acceptable. I will inform the pool company they have your approval for permits if
370 so.”

371

372 9/14/20 Loveless: “Looks good. The important thing is to minimize in the no-build
373 area. Some fill is required to match grades, which is understandable. You can get the
374 permit started. Your permit will require a drawing showing your property with home
375 and new pool location. Include setback information (front, sides and rear).”

376

377 Mr. Sutton asked Ms. Graham whether the township has those emails. Ms. Graham
378 said they do not have those emails, but Ex. 2 shows the email from, which makes
379 more sense now. Mr. Sutton asked Mr. Fowler whether the BZA can accept all of
380 that into evidence, or whether he needs copies of those emails. Mr. Fowler said if it
381 would make the Board feel better and for it to be more reliable, Mr. Barnhart could
382 submit those emails after this hearing. Verbal testimony can be taken into
383 consideration.

384

385 Mr. Harmon asked for details about a lawsuit that was mentioned as needing to be
386 “treaded lightly” about. Ms. Graham said that was the Supreme Court case
387 mentioned by Ms. Rippel earlier in this hearing. Mr. Barnhart said he took great care
388 to ensure the pool could be build prior to him spending so much money on the
389 project.

390

391 Mr. Harmon asked when Mr. Loveless gave him “the thumbs up” and when did he
392 decide to build the pool. Ms. Graham said that was when the permit was issued on
393 2/19/21. Mr. Harmon asked how this came to a head later. Ms. Graham said a
394 neighbor requested a pool permit and that was when this was discovered. She called
395 the pool builder, who told him the pool was accepted via email. Then she went
396 through the other pool permits in the neighborhood.

397

398 Ms. Rippel said in case the applicant would like to sell their house in the future, the
399 real estate agent will ask whether a variance was granted because a 25’ setback is

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400 required. In order to protect the property owner, the variance would need to be
401 granted.

402

403 Ms. Graham said it seems that some verbal and written promises were made by Mr.
404 Loveless. Mr. Harmon said if this was a new application, the BZA may have
405 concerns, as the 10' variance would be significant. However, Mr. Loveless approved
406 this in writing.

407

408 Mr. Acevedo said there are development standards with setbacks. He asked what
409 district this was. Ms. Graham said it is an R-2 with a PRD overlay. Because of the
410 overlay and the final development plan, it is not all within the zoning resolution. The
411 R-2 requires 50' for the rear setbacks, but the PRD overlay changes that.,
412 Mr. Acevedo asked what the PRD overlay was. Mr. Fowler said that was what was
413 approved by the developer during the zoning process.

414

415 Mr. Acevedo said per the R-2 it is considered an accessory structure. Ms. Graham
416 said there are no accessory structure requirements in the neighborhood. Mr. Fowler
417 said there are no limitations on accessory structures in the neighborhood, but all
418 structures are subject to the setback.

419

420 Ms. Graham said that sometimes, accessory structures can have different setbacks,
421 but in this particular neighborhood, it is a simple 25' setback rule with no separate
422 rules for accessory structures.

423

424 Mr. Acevedo said the R-2 indicates a rear yard setback requirement for the principal
425 structure and accessory building, and he asked whether the PRD supersedes those.
426 Mark said that was correct. He said there are probably not many variances granted
427 for that because they are usually specified on the development plan, which is the
428 zoning law for that area.

429

430 Mrs. Cook said during Mr. Barnhart's testimony, he stated that he had an application
431 and was aware of the variance requirement, and Ms. Rippel stated that she had
432 requested that of him. She asked at what point in time did the applicant decide to not
433 follow through, and why. Ms. Rippel said Mr. Loveless told them they did not need
434 the variance.

435

436 Mr. Barnhart said that was shown on Exhibit 2. Mrs. Cook said he was told that he
437 needed a variance and he knew he needed a variance. Mr. Barnhart said he was told
438 there may be a variance required, but Mr. Loveless then later told him no variance
439 was required.

440

441 Mrs. Cook asked whether there was any legal document other than the email from
442 Berlin Township on their letterhead showing the variance was not needed. Ms.
443 Graham said no, but that the permit was approved and that it meets the requirement.
444 Ms. Rippel said that permit goes on to Delaware County code compliance, who also
445 accepted it.

446

447 Mr. Barnhart said Ex. 3, page 3 shows "Ok to cross no-build line as per Dave
448 Loveless" and it is signed and stamped.

449

450 Mr. Sutton said that clearly, there is a process that should have been followed. The
451 township zoning inspector appears to have not followed that process. Mr. Harmon
452 asked what the implications of the BZA not approving the variance would be, and
453 whether that would just "mess you up in the future to resell the home?" Ms. Graham
454 said that was correct. Mr. Harmon asked whether the BZA has the right to undue
455 what has already been done. Mrs. Cook suggested seeking counsel instead of having
456 that discussion in public. Mr. Fowler said that would be fine.

457

458 Mr. Barnhart asked what more he should have done outside what he did to get
459 approval. Mr. Sutton said the process is that he should have come in to get a variance

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460 request. Mr. Barnhart asked what he would have done differently. Mr. Sutton said he
461 would have applied for an area variance. Mr. Barnhart asked whether he would have
462 done that even if he was told he did not have to. Mrs. Barnhart said the permit was
463 signed and approved and issued.

464
465 Mr. Sutton said he has already stated that the permit should not have been issued.
466 Mr. Barnhart asked how he would have known that. Mr. Sutton said he is not saying
467 he needed to know that. The information being provided here is what the Board has
468 and they do not know anything else. Mr. Barnhart said the township provided most
469 of the information and he answered some of the questions.

470
471 Mr. Sutton said the Board is taking the information provided for this hearing and they
472 will make a decision. He said he is aware of the zoning restrictions and would have
473 requested an area variance, which is what Mr. Loveless should have instructed him to
474 do. He does not want to set a precedent for future variances like this.

475
476 Mr. Sutton said the township has zoning requirements that protect all residents.

477
478 Mr. Acevedo said the applicant has provided facts tonight that will allow the BZA to
479 come to a conclusion. Mr. Barnhart asked what additional facts they would like him
480 to present. Mr. Sutton said the emails that he read earlier. Ms. Graham said the
481 township did not request those emails because they told the applicants this process
482 was to protect them in the future. The trustees waived the BZA fees and the zoning
483 office created the packets for the applicants.

484
485 Mrs. Cook said the BZA is trying to do what is in the best interest of the township so
486 that all parties involved are questioned. The BZA has not had the conversations that
487 others present have had and they are all educated on; they only have the list of 11
488 items provided.

489
490 Ms. Barnhart asked what would happen if the variance was not approved and they
491 sold their house. Mr. Fowler noted that the decision made this evening could be
492 appealed. He noted the BZA has the authority to break and deliberate privately. The
493 Board recessed for a brief period and returned to session.

494 **RESOLUTION 2022.07.08.#A: APPROVE BZA 22-001**

495 Mr. Acevedo made a motion to approve BZA 22-001, with the findings that
496 considering the aforementioned facts, it was decided that the applicant has a practical
497 difficulty that can be remedied only by the granting of a variance, and that the
498 granting of the variance would be consistent with the spirit and intent of the zoning
499 requirements.

500
501 The approval is due to the unique circumstances created by the township zoning
502 inspector not being clear on the process. The variance was substantial, and in the
503 future, property owners should follow the process so this situation is not repeated.

504
505 Approved is a 10' reduction of the required 25' rear yard setback, and a 5' reduction
506 of the no-build erosion control line. All encroachments will be as already built and
507 indicated in the final development plan.

508
509 Vote: Acevedo, yes; Harmon, yes; Mrs. Cook, yes; Mr. Cook, yes; Sutton, yes.

510
511 Motion carried, application was approved.

512
513 Mr. Barnhart asked whether the variance for the build line reduction was just for the
514 section discussed or for the entire build line along the back of the property. It was
515 confirmed that it was just for the pool as already built.

516

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517 Mrs. Cook said the Board just wants to make sure this was clear for the applicant, and
518 she apologized for putting the applicants on the defense. Mr. Barnhart said he
519 understood, but it was more intense than they had expected.

520

521 Ms. Graham suggested the for the next case, the applicant be permitted to present
522 their situation in advance of the Board questions so there is a clear idea of the
523 situation. Mr. Sutton said no, and that they would go through the same process as the
524 last applicant to protect them for the same reasons.

525

526

AGENDA ITEM: BZA 22-002 DAVE & ALEX GUISTINO

527

528 *Dave and Alex Guistino, 605 Cliff View Drive, appeal of the decision of the zoning*
529 *inspector to approve a rear setback of 10' build for an inground swimming pool at*
530 *605 Cliff View Drive.*

531

532

List of Exhibits

533

534 Ms. Knapp read the list of exhibits into the record as follows:

535

536 Original File Exhibits –

537 1. Application for Area Variance, 3 pages, submitted 05/12/2022.

538

539 2. Text messages from David Loveless, to Jim Moore, Moore Brothers Landscaping
540 regarding having the rear setback approval, 3-pages, dated July 28 & 29, 2021.

541

542 3. Invoice to Alex Guistino from Jim Moore, Moore Brothers Landscaping, in the
543 amount of \$54,798.83, 1-Page, dated April 1, 2022.

544

545 4. Quotation from Jim Moore, Moore Brothers Landscaping, for the Guistino pool
546 project, 4 2-sided pages, dated 04/20/2022.

547

548 5. Email to Alexandra Guistino, from James Moore, dig sheet approval, 1-page, dated
549 01/14/22.

550

551 6. Berlin Township Trustees excerpt approved meeting minutes, Resolution 22-04-48,
552 to waive the applicant BZA fees, 1-page, dated 4/25/2022.

553

554 7. Berlin Township Trustees excerpt approved meeting minutes, pool permit
555 discussion, 1-page, dated 05/09/22.

556

557 8. Zoning permit, application, plat survey showing 10' feet for a setback to rear
558 property line, 3 pages, dated 04/13/22.

559

560 9. Letter to Dave & Alex Guistino, from Sherry Graham, Assistant Zoning Inspector,
561 informing applicants the pool does not meet the required 25' setback. 1-page, dated
562 05/09/22.

563

564 10. Ariel view of 605 Cliff View Drive, and surrounding property owners within 300
565 feet, from Delaware County Auditor's GIS Office, dated, 05/25/22, & list of owner's
566 addresses.

567

568 11. Request of publication in the Delaware Gazette via email, dated 06/16/2022.

569

570 12. Notice of Hearing to applicant dated 06/21/2022

571

572 13. Certified mail receipts, dated 06/21/2022 and landowner letter dated 06/22/2022.

573

574 14. Proof of publication in the Delaware Gazette dated 06/16/2022

575

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576 Mr. Sutton said this case was also sent to the BZA by the trustees with a request to
577 hear it. This is another area variance for a swimming pool. He asked the applicant
578 whether they had any questions regarding what was read earlier regarding area
579 variances or the function of the board and what it needs to consider through this
580 process. Ms. Guistino said she had no questions.

581
582 Mr. Sutton said the applicants are appealing a permit denial. He asked whether the
583 pool would be 10' from the property line. Ms. Guistino said that was correct. Mr.
584 Sutton asked whether there was a no-build line on this property as well. Ms. Guistino
585 said there is a 25' setback and they are requesting a 15' reduction.

586
587 Mr. Sutton read the following questions and requested a verbal response from the
588 applicant:

589 1) The requirement for a variance does not merely serve as a convenience to the
590 applicant but is necessary to alleviate the demonstrable undue hardships and
591 difficulties.

592 Ms. Guistino said similar to the prior case, the applicants spoke to the same zoning
593 inspector and they did go into a full contract based on approvals provided by the
594 zoning inspector to the pool company directly through email. He was also asked for
595 sketches and measurements, and the zoning inspector said they would work find for
596 the zoning permit. The applicants did enter into contract with the pool company.

597
598 Ms. Guistino said an investment of \$60,000 was made towards a custom pool
599 designed around their property needs, based on the written approval from Mr.
600 Loveless.

601
602 Mr. Acevedo asked whether they have copies of the contract. Ms. Guistino
603 distributed 4 items to the Board, including the initial communication from July 21,
604 2021, and said the full amount is \$99,336.00. They do not owe the entire amount yet,
605 but do owe for the parts and pieces that have been purchased. The pool company
606 could not attend this hearing, but they were the ones most in communication with Mr.
607 Loveless.

608
609 Mr. Acevedo said the letter from the pool company, initial communication, initial
610 estimate, and approval letter from the homeowners association was included.

611
612 Mr. Acevedo said she received a past due notice in April from Moore Landscaping as
613 she was supposed to pay for the equipment, although she was hesitant to pay it
614 because the pool has not been installed yet or a permit yet. She went into contract on
615 July 28, 2021.

616
617 Mr. Sutton asked about Exhibit 8, page 3 and asked whether the pool could be moved
618 closer to the home as it has not been built yet. Ms. Guistino said that was not an
619 option as a custom patio was already build with the intent of having a pool there. Ms.
620 Graham noted that permits are not required for patios, so it is not in their files. She
621 said an aerial photo has been included that shows the patio has been built.

622 2) That special conditions and circumstances exist which are peculiar to the land
623 or structure involved and which are not applicable to other lands or structures
624 in the same Zoning District.

625 Ms. Guistino said that this is similar to the Barnhart property in that it backs up to a
626 state park that will never be built on. No future land development will be affected.
627 She said she has provided letters from her next door neighbors stating that their
628 properties will not affected by the variance.

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629 3) The literal interpretation of the provisions of the zoning resolution would
630 deprive the applicant of the rights commonly enjoyed by other properties in
631 the same zoning district under the terms of the zoning resolution.

632 Ms. Guistino said she is appealing the decision to not issue the permit based on their
633 hardship that they are in a non-refundable agreement with a pool company, which
634 they did based on the written word that they can move forward with the zoning
635 permit. The pool was something they have been thinking about for a long time, and
636 this is not a good time to move as interest rates have dramatically increased recently.
637 The interest rate would go from 2% to 6.5%, which she said is an additional hardship
638 for her.

639 4) Special conditions and circumstances do not result from the actions of the
640 applicant.

641 Ms. Guistino said she received written approval from Mr. Loveless, which caused her
642 to go into contract. There were 38 or 39 people waiting in front of her, which is what
643 took so long.

644 5) Granting the variance requested will not confer on the applicant a special
645 burden which is denied by the zoning resolution to other lands or structures in
646 the zoning district.

647 Ms. Guistino said she was misled to believe that the pool design and permit would be
648 approved, and documentation has been provided to the township regarding that.

649 Mr. Sutton said the Board must decide and consider the following provisions pursuant
650 to *Duncan vs. the Village of Middlefield* 23 Ohio St. 3d 83 (Ohio 1986), which must
651 be met before a variance can be granted.
652

653 a.) Whether the property in question will yield reasonable return or whether there
654 can be beneficial use of the property without the variance;
655 656

657 Mr. Guistino said “no” and that the intent of having this home at this location was to
658 put a pool in so there is no beneficial use of the property.
659

660 b.) Whether the variance is substantial;
661

662 Ms. Guistino said she does not believe it is substantial based upon where the location
663 is in relation to the state park and the neighbors. This will not affect any neighbors
664 and will be barely seen by anybody.
665

666 c.) Whether the essential character of the neighborhood would be substantially
667 altered, adjoining properties suffer substantial detriment.
668

669 Ms. Guistino said there will not be any alterations done that would affect the
670 neighborhood and there are other pools in the neighborhood.
671

672 d.) Whether the variance would adversely affect the delivery of governmental
673 services;
674

675 Mr. Guistino said “no.”
676

677 e.) Whether the property owner purchased the property with knowledge of zoning
678 restrictions.
679

680 Mr. Guistino said “no” and that the builder had informed him a pool was possible.
681

682 Ms. Guistino said they told them there were no restrictions whatsoever and that they
683 could build all the way up to the property line. The builder is Ryan Homes.

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f.) Whether the problem can be solved by some other manner other than granting a variance.

Mr. Guistino said he could not see how it would. Ms. Guistino said no, and that they still owe \$56,000 in equipment and she does not want to move. This would result in a large financial loss for her.

g.) Whether the variance preserves the spirit and intent of the zoning requirements and whether substantial justice would be done by granting the variance.

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Mr. Guistino said the spirit and intent here is met and granting a variance will have minimal implications to the neighborhood, and none for the state park behind them and the neighbors on either side.

Ms. Guistino said justice would be served as they were provided with incorrect information. They did not question the information as it was provided by Berlin Township.

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707

Mr. Sutton asked her to walk them through the conversation they had with Mr. Loveless so they can understand that. Ms. Guistino said it was mostly done by their pool builder, who reached out to Mr. Loveless to look at the property. She read the letter from the pool company:

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714

“This letter of submission is on behalf of Moore Pools and Patios in reference to the zoning appeal for an inground swimming pool and pool deck installed at 605 Cliffview Drive. Only July 28, 2021, David Loveless, Berlin Township zoning inspector, approved the zoning permit for said property for a custom in-ground pool and pool deck and saw no further adjustments needed based on the 10’ setback in the design.

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724

Upon approval, it is customary to begin ordering the custom pool package as there is a long time processing due to a shortage on supplies relating to covid shutdowns and mass increase in sales. The cost of the pool prior to installation was involved to David and Alex Guistino in the amount of \$54,798.83. Moore Brothers Pools and Patios filed an application for the permit on April 13, 2022. On May 9, 2022, a letter was issued by Sherry Graham, assistant zoning inspector, denying the permit due to the determination that the setbacks for the pool did not meet the Berlin Township zoning requirements.

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734

It was at this time that Moore Brothers Pools and Patios and the Guistinos were informed that David Loveless no longer worked for Berlin Township. The mistake was not the fault of Moore Brothers Pools and Patios or David and Alex Guistino but rather falls on the shoulders of David Loveless and the Berlin Township zoning offices. 8 months had passed and the project was assumed to be in good standing order. This is a hardship of \$55,000 for the homeowners, a great delay in the project, and the stress of potentially having paid for a product that cannot be installed. I am asking for your kindness and understanding in this sensitive situation.”

735

736

737

Ms. Guistino said the pool builder was unfortunately not able to come to this hearing because he is out of town.

738

739

740

741

742

Ms. Graham said it was her second day on the job when the request came to her, and she researched it prior to denying it. It was the second permit she has ever done. She called the pool company back and they told her that Mr. Loveless had told them the pool would work after coming out to the property. Ms. Graham said she told them it would not work because they have to follow the zoning resolution.

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743

744 Ms. Graham said she received an email from Jim Moore that day regarding the issue.
745 She and Ms. Rippel worked on this project as they knew it was a hardship for each of
746 the applicants to have to come here and deal with something that was a township
747 mistake. The zoning office created the application packets for the applicants.

748

749 Mr. Acevedo asked whether a permit was issued. Ms. Graham said no and that she
750 had denied their permit after viewing the land and the exact drawing.

751

752 Mrs. Cook asked whether a plan was submitted to Mr. Loveless. Ms. Graham said
753 there was, and it is shown on page 3 of Exhibit 8.

754

755 Ms. Graham said Exhibit 2 is what Jim Moore submitted to her to approve, which she
756 did not. She said that was sent to Mr. Loveless and he had stated that it would work
757 for the zoning permit. Mrs. Cook asked whether they had a copy of the email with
758 that picture attached. Ms. Graham said "yes."

759

760 Ms. Graham said she did not sign the permit because it was not granted. Ms.
761 Guistino said Exhibit 2 shows the drawing submitted with the exact same design. Ms.
762 Guistino said one of the emails had a photo and one did not.

763

764 Mr. Sutton asked what was given to the township trustees for the purpose of this
765 application. Ms. Graham said there is a screenshot of Gmail. She has an email that
766 was forwarded from Mr. Moore to her and she provided that to the trustees. There has
767 been input received from Mr. Fowler as well. There was additional discussion.

768

769 Ms. Kuenzli was sworn in by the court reporter. She said the verbiage that was used
770 calls into question whether the intent was approved. Was the intent that the drawing
771 itself would work for a permanent application, or the intent was that it was
772 approvable for the pool plan itself. Mr. Sutton said the BZA is just trying to
773 understand the communications. Ms. Kuenzli said it would be helpful if there was
774 additional information because her read of it was that would work fine for the permit
775 application.

776

777 Ms. Guistino said the drawing shows the measurements including the setback and that
778 the pool would be 10' from the property. Additionally, Mr. Loveless did come out to
779 the property and said it would work.

780

781 Mr. Sutton said a property line is a property line, and the neighboring properties do
782 not affect that. This is a substantial variance reduction of 15'. DA said the park
783 behind him upholds the spirit and intent of the zoning resolution.

784

785 Mr. Acevedo said the applicant had mentioned a financial hardship, and he asked
786 whether the applicants had a contract that showed that the payments were non-
787 refundable. Ms. Guistino said it was entered as an exhibit and that she owes the
788 amount shown. The pool equipment was purchased in January.

789

790 Mrs. Cook asked whether there was a signed contract that the payments are non-
791 refundable. Ms. Guistino said the contract was entered and she owes for the parts but
792 not the labor. She said an exhibit shows the parts and labor and an email that states
793 "let me know if you want me to add you to the list." Her response to that is the
794 official contract, she said.

795

796 Mrs. Cook asked whether it was correct that this contract does not state anywhere that
797 it is nonrefundable. Mr. Guistino said it does not state that. Ms. Guistino said it is a
798 custom pool that was ordered based on written approval from the zoning inspector.
799 Mrs. Cook said the email states "That will work fine for a zoning permit." However,
800 that does not state that is fine for actual permit approval.

801

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802 Ms. Guistino said when one gets the verbal approval from Mr. Loveless, they think it
803 is ok to order. The permit is only good for 6 months so when one is waiting 1-2 years
804 for the pool to be built, they will proceed and then apply for the actual permit later.

805

806 Mrs. Cook said a hardship that was brought up by the applicant was that they had to
807 pay for the pool. For her clarity, she would like to see an email that states it was
808 approval for the permit. Ms. Guistino said she thought it was that it would be
809 approved when the time comes. Ms. Graham said that was the zoning office's
810 determination as well.

811

812 Mr. Guistino said a drawing was provided, and he had to assume that he saw the rear
813 setback of 10.54' and gave his response. Mrs. Cook asked whether Mr. Loveless
814 measured it. Ms. Guistino said he did and he spent time there.

815

816 Mr. Harmon said the trustees referred this to the BZA and waived the fees. He asked
817 whether the applicants had met with the trustees. Ms. Guistino said she did not. Ms.
818 Graham said she noted the situation and contacted Trustee Meghan Raehl to ask her
819 what to do with this. Ms. Rippel said she also spoke with Trustee Bullard and Mr.
820 Fowler.

821

822 Mr. Harmon said Mr. Loveless obviously met with the trustees at some point, and he
823 asked whether Mr. Loveless had provided testimony regarding what he had expressed
824 to these people.

825

826 Ms. Guistino said if the paperwork had been submitted a month before, the permit
827 would have been issued by Mr. Loveless. Ms. Graham said Mr. Loveless was
828 terminated the day before she was hired for the assistant zoning inspector position.
829 Ms. Graham said she had stated that she would be willing to help out with signing
830 permits, etc. in the absence of the true zoning inspector. She then began doing the
831 zoning permits.

832

833 Mr. Sutton asked whether she had the emails from Mr. Loveless. Ms. Graham said
834 she did not have access to those emails and she does not use the zoning inspector's
835 email. She said everybody testifying is under oath.

836

837 Mr. Acevedo said the BZA will use the evidence that is here to make a determination
838 relative to what they believe and a judgement will be made.

839

840 Mr. Harmon said it would be helpful if the representative from the pool was here.
841 Ms. Graham said they were out of town and sent a statement. Mr. Sutton asked
842 whether Mr. Moore filed the permit. Ms. Guistino said he or a company employee
843 filed for it.

844

845 Mr. Fowler said the hearing could be continued to a later date and that Trustee Raehl
846 has access to Mr. Loveless' emails. Perhaps the pool company representative could
847 attend.

848

849 Mr. Acevedo asked when the process was initiated. Mr. Guistino said it was July
850 2021. Mr. Acevedo asked how long the permit was valid for. Ms. Rippel said it
851 needs to be started in 6 months. Mr. Acevedo said it was his understanding that the
852 applicant had discussions with the Moore Brothers, and they ordered all of the
853 materials. They provided a quote and they put them on a list to build, the equipment
854 is ordered, and they wait for the equipment in order to install it. Ms. Guistino said
855 that the permit process was done prior to that.

856

857 Ms. Guistino said in January 2022 the equipment was ordered and the estimated date
858 for installation was July 2022. Ms. Guistino said the invoice date was April 1, 2022,
859 and the application was April 13, 2022.

860

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861 Mrs. Cook said the date for application permit was April 13, 2022 typed and it is
862 handwritten on page 2. It was signed by Ms. Graham on April 13, 2022. She asked if
863 that was when Ms. Graham was looking at it. Ms. Graham said it was not. She said
864 one of these occurred after it was determined that a variance was required and the
865 permit was denied. The zoning office asked for information from them and others in
866 order to prepare the application.

867
868 Ms. Graham said Exhibit 3 is dated April 1, 2022. She reviewed it on April 13, 2022.
869 She is unsure of the rest of the details.

870
871 Mrs. Cook said Moore Brothers signed it on April 12, 2022. The quote for the
872 custom pool was on April 20, 2022. Ms. Graham said that was requested in order to
873 prepare for this variance application.

874
875 Mr. Acevedo said it appears as though the applicant received their invoice at the
876 beginning of April 2022, and they submitted their permit in the middle of April. He
877 assumed that they had received the equipment and they invoiced the applicant and
878 they are now ready to schedule a date, which is why they requested the permit. Ms.
879 Guistino said that was correct.

880
881 Mr. Acevedo asked whether the applicant believed that when they accepted the email
882 quote of \$99,000 that it bound them to a contractual arrangement that they were
883 not able to retract. The applicants both said that was correct.

884 Ms. Guistino said there had been communication between July 2021 and April 2022
885 to make selections. Mr. Acevedo asked whether it was correct that at this point, they
886 have a liability of \$56,000. Ms. Guistino said that was the amount they owed for the
887 equipment and that does not include the labor. She wants to give her kids the
888 American Dream, and she purchased this property believing that would be a
889 possibility and that would happen. They followed the steps to get there.

890
891 Mr. Sutton said this is a substantial variance request of 15' into a 25' setback, and
892 there are extenuating circumstances in this hearing. It would be helpful to see more
893 of an official email than what was submitted, and the actual applicant is not here.

894
895 The BZA took a break to meet with legal counsel and returned to session.

896
897 Mr. Sutton said the application was submitted as an appeal of an administrative
898 decision, and on the next page they are appealing the permit denial. The rest of the
899 paperwork that was completed was for a variance from the zoning resolution
900 requirements for an area variance. He said it needs to be cleaned up and determined
901 whether they are applying for an area variance or for an appeal of an administrative
902 decision. Ms. Guistino was not certain.

903
904 Ms. Graham said this is a good learning experience for how to help people who are
905 requesting an appeal.

906
907 Mr. Sutton noted that this is considered as a variance from the zoning resolution
908 requirements, and the rest of the application is correct.

909
910 Mr. Sutton said the discussion that was had, and also in consultation with Mr. Fowler,
911 was that it would be best to extend the hearing to a later date in order to gather more
912 information. They would like to hear from the pool builder as he submitted the
913 application. Ms. Guistino said she had no input as to what date was going to be
914 selected for this hearing, and the pool installer had a trip planned. Ms. Graham noted
915 that she did not indicate to the Guistinos that Mr. Moore should be present at the
916 hearing.

917
918 Mr. Acevedo said that Mr. Moore worked with Mr. Loveless the most, and they
919 would like to hear more of the details from Mr. Moore. Ms. Guistino said she has
920 stated her case and provided all the information she has. Mr. Sutton said the Board

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921 has made a decision that they cannot take a vote because they do not feel they have
922 enough information on the situation.

923

924 Mr. Acevedo asked what information she should bring to the next hearing so she is
925 prepared. Mr. Harmon said for example, the first paragraph indicates that “David
926 Loveless approved the zoning permit,” but the Board does not have that. Ms.
927 Guistino said that was included in Exhibit 2. Mr. Harmon said that is subject to
928 interpretation. Ms. Guistino said that is all the representative will bring and all they
929 have are the emails. She will bring legal representation.

930

931 Mrs. Cook said they will reach out to Trustee Raehll to see whether more information
932 is available. The reason why they are asking for the continuance is because if they
933 were to take a vote tonight, it may not be favorable. If they continue the hearing, they
934 would like to have the information from Mr. Moore. It was not known until tonight
935 that the Board would like to hear from him.

936

937 Ms. Graham said the zoning office provided this data and created the packets to the
938 applicants, so she does feel some responsibility for having to hold another 2 hour
939 meeting. Mr. Acevedo said the meeting would hopefully not be two hours.

940

941 Mr. Harmon said the Board has empathy for what the applicants are going through
942 and they sincerely apologize for the delay, but they do not want to set a precedent.
943 They need to make firm decisions based on facts, and having him state under oath the
944 conversations that were had is more substantial than what may have been said or
945 stated in an email. They have to make this more concrete.

946

947 Mrs. Cook said the Board is just trying to make sure that the applicant and the
948 township are both covered. The Board are citizens who volunteer on this Board to
949 make sure they are following the guidelines the township citizens have approved and
950 given their data for.

951

952 Mr. Harmon said Mr. Loveless may have stated that this pool could be built, and that
953 is the kind of concrete information the Board needs.

954

955 Mr. Sutton said this is a substantial variance and another one could come before the
956 Board. Ms. Guistino said there will be more, as this is a pattern by the zoning
957 inspector. Mr. Sutton said it would be a challenge for the Board to ever approve
958 another one of these if the correct process was followed. They are requesting a
959 substantial variance to the setback line.

960

961 Mr. Acevedo said they understand the circumstances are unique for this application
962 and situation, which is why they want to hear from Mr. Moore. The conditions for a
963 variance request would generally be denied because it does not meet the criteria. The
964 applicant’s circumstances may be different, and that is why he wants all the evidence
965 they can gather in order to come to a conclusion.

966

RESOLUTION 2022.07.08.#B: CONTINUE BZA 22-002

967 Mrs. Cook made a motion to continue this hearing to Wednesday July 20, 2022 at
968 7:30 PM. Mr. Acevedo seconded the motion.

969

970 Vote: Mrs. Cook, yes; Acevedo, yes; Mr. Cook, yes; Harmon, yes; Sutton, yes.

971

972 There was no further business.

973

974

975

Don Sutton, Chairperson

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Jason Acevedo, Vice-Chairperson

Bradley Cook, member

Michelle Cook, member

Larry Harmon, member

Quinn Machan, 1st alternate member

Jessica Kuenzli, 2nd alternate member

Attest: _____
Berlin Township Zoning Clerk Lisa F. Knapp