

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF HART PROPERTIES, LLC

NO. 2017-11

PROPERTY: 239 Rebel Hill Road

OPINION AND ORDER

This application concerns a request for dimensional variances to permit a single-family residence on an undeveloped property in the R-2 Residential Zoning District. The application was denied.

Hart Properties, LLC ("Landowner") is the equitable owner of the property located at 239 Rebel Hill Road, Upper Merion Township, tax parcel number 58-00-01282-00-1 (the "Property"). The Property is presently unimproved and vacant. Landowner proposes to develop a 25-foot by 39-foot single family home with a walk-out basement. Landowner requested variances from section 165-23¹ and section 165-232.4(a), (b), and (c)² of the

¹ § 165-23 **Area, width and yard regulations.**

Lots, buildings and structures may be created and/or constructed in the single-family districts in accordance with the following dimensional criteria:

- A. Dimensional regulations for all single-family detached dwellings and permitted uses not specifically listed in Subsection B below.

	R-2
Minimum lot area	10,000 square feet
Minimum lot width (At building line)	70 feet

² § 165-232.4 **Steep slope regulations.**

In every zoning district, the following regulations shall apply:

- A. Every lot hereafter created by subdivision or presently undeveloped having an average slope greater than or equal to 15% shall have a minimum lot area, as defined by the underlying zoning district, increased by a factor of 1.5 and shall not have impervious surfaces exceeding 20% of the lot area or 50% of the maximum permitted impervious coverage permitted in the underlying district, whichever is greater.
- B. All freestanding structures, buildings and substantial improvements (with the exception of driveways and utilities when no other location is feasible) are prohibited in areas of significant slope and are prohibited on slopes where the soil type is classified as "stony land, steep" by that document entitled "Soil Survey Montgomery County, Pennsylvania," prepared by the United States Department of Agriculture. Soil Conservation Service, dated April, 1967, and subsequent updates and revisions thereof.

(continued on following page)

Upper Merion Township Zoning Ordinance of 1942, as Amended (the "Zoning Ordinance").

The Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held an advertised hearing on July 5, 2017, on Landowner's application, no. 2017-11. The hearing was stenographically recorded. All members of the ZHB were present at the hearing: Mark S. DePillis, Esq., Chairman; Jonathan Garzillo, Vice-Chairman; Maria Mengel, Secretary; John M. Tallman, Jr., Member; and Lynn Z. Gold-Bikin, Esq., Member. The ZHB was represented by Marc D. Jonas, Esq., of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. The applicant was represented by George J. Ozorowski, Esq., of the law firm of Hughes, Kalkbrenner & Ozorowski.

Two parties appeared in opposition to Landowner's application: Jeffrey L. Grogan who resides at 241 Rebel Hill Road, and Christopher Digangi who resides at 223 Rebel Hill Road. Mr. Grogan was represented by A. Lindsay Doering, Esq. Mr. Digangi was unrepresented.

After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the equitable owner of the Property. [Exhibit A-1, A-2.]
2. The Property is located in the Township's R-2 Residential Zoning District.
[Exhibit A-9.]

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- C. Each disturbance, including regrading, filling, clearing, driveways and utilities is limited to a total of 20% of all areas of significant slope on a parcel or tract and only when the Township Engineer determines that no other location is feasible.

3. The Property has a lot area of 5,467.9 square feet. [Exhibit A-9.]
4. The Property is 55.25 feet wide and 99 feet deep. [Exhibit A-9.]
5. The Property's configuration dates back to at least 1916. [Exhibits A-1, A-5, A-6, A-8.]
6. Landowner requested the following variances from the following regulations:
 - a. section 165-23 to permit
 - i. a reduction in the required minimum lot area from the required 10,000 square feet to the existing 5,467.9 square feet,
 - ii. minimum lot width of 55.25 feet – 70 feet are required
 - iii. minimum front yard setback of 5 feet – 30 feet are required.
 - b. section 165-232.4(A) to permit
 - i. a reduction of the 15,000 square foot minimum lot area, increased by a factor of 1.5 due to steep slopes, to the existing 5,467.9 square feet
 - ii. impervious surface coverage exceeding 20% of the lot area.
 - c. section 165-232.4(B) to permit freestanding structures, buildings, and substantial improvements in areas of significant slope.
 - d. section 165-232.4(C) to permit disturbance of more than 20% of all areas of significant slope on the Property.

ZHB HEARING

7. The ZHB marked the following exhibits:
 - a. ZHB-1 — application and one-page attachment

- b. ZHB-2 — deed dated September 17, 2015 between Tax Claim Bureau of the County of Montgomery, grantor, and Scott Mendelsohn, Irving Askow, and Seth Q. Deleo, grantees, recorded in deed book 5981, page 779, including Realty Transfer Tax Statement of Value
- c. ZHB-3 — Standard Agreement For The Sale Of Vacant Land between Hart Properties LLC (buyer) and Irving Askow, Seth Deleo, and Scott Mendelsohn (sellers) dated December 1, 2016; and Change in Terms Addendum to Agreement of Sale dated January 10, 2017 changing the settlement date to June 30, 2017
- d. ZHB-4 — Montgomery County Board of Assessment property information and tax map, parcel 58-00-01282-00-1
- e. ZHB-5 — site plan
- f. ZHB-6 — legal notice
- g. ZHB-7 — proof of publication
- h. ZHB-8 — proof of posting
- i. ZHB-9 — plan entitled “Proposed Site Plan” for 239 Rebel Hill Road, sheet 1 of 1, prepared by Paul Lonie, PA Professional Land Surveyor and Aqua Economics, dated April 10, 2017
- j. ZHB-10 — letter dated June 12, 2017 from Lindsay Doering, Esquire, requesting continuance of June 21, 2017 hearing
- k. ZHB-11 — Proposed Site Plan prepared by Paul Lonie, Aqua Economics, dated April 10, 2017, revised June 29, 2017

- i. ZHB-12 — Addendum to Agreement of Sale dated January 10, 2017, extending closing to August 30, 2017.

8. Landowner entered the following exhibits:

- A-1 — deed dated September 17, 2015 between Tax Claim Bureau of the County of Montgomery, grantor, and Scott Mendelsohn, Irving Askow, and Seth Q. Deleo, grantees, recorded in deed book 5981, page 779, including Realty Transfer Tax Statement of Value
- A-2 — Standard Agreement For The Sale Of Vacant Land between Hart Properties, LLC (buyer) and Irving Askow, Seth Deleo, and Scott Mendelsohn (sellers) dated December 1, 2016; and Change in Terms Addendum to Agreement of Sale dated January 10, 2017 changing the settlement date to June 30, 2017
- A-3 — aerial photograph of the Property with Property boundaries superimposed upon it
- A-4 — photographs of the Property from Rebel Hill Road
- A-5 — tax map of the Property
- A-6 — deed dated October 30, 1997 between Claire DiGangi, Executor of the Estate of Jean Call Digangi, grantor, and Christopher Digangi, grantee, recorded in deed book 5211, page 1289
- A-7 — deed dated January 4, 1956 between John H. Soplaski and Alice A. Soplaski, grantors, and Samuel Boyd and Jane C. Boyd, grantees, recorded in deed book 2647, page 238

- A-8 — deed dated June 28, 1916 between Arthur A. Ramsey and Emma Ramsey, grantors, and John H. Soplaski and Alice A. Soplaski, grantees
- A-9 — Proposed Site Plan prepared by Paul Lonie, Aqua Economics, dated April 10, 2017, revised June 29, 2017
- A-10 — 3D, Isometric & Renderings prepared by Plato Marinakos, Jr. Architect, LLC, dated May 24, 2017

9. Landowner presented one witness: Paul N. Lonie, President, Aqua Economics, LLC, who was accepted as an expert in land surveying. [N.T. p. 15.]

10. Mr. Lonie, offered the following testimony:

- a. The Property is currently a vacant lot with some trash on it. [N.T. p. 16, Exhibit A-4.]
- b. The lot has dimensions of 99 feet by 55.25 feet. [N.T. p. 17.]
- c. The Property contains a number of steep slope areas. [N.T. p. 18.]
- d. The elevation in the front of the lot is 97 feet, and the elevation in the rear of the lot is 70 feet. [N.T. p. 19.]
- e. There is a 26-foot elevation drop from the front of the property to the rear of the property. [N.T. p. 19.]
- f. The property to the southwest of the Property is located about five feet from the street curb line. [N.T. p. 22, Exhibits A-3, A-4.]
- g. The legal description for the property has not changed since at least 1916. [N.T. p. 25.]

- h. The first zoning ordinance for Upper Merion Township was adopted in March 1942. [N.T. p. 26.]
- i. Landowner proposes a 5-foot setback from the ultimate right-of-way of Rebel Hill Road. [N.T. p. 29, Exhibit A-9.]
- j. The proposed structure must be located closer to Rebel Hill Road because that is the most level portion of the property. [N.T. p. 29.]
- k. Moving the proposed structure further back would “hurt” the steep slope calculation. [N.T. p. 30.]
- l. The two properties adjacent to the subject Property, 227 and 241 Rebel Hill Road, are built within the ultimate right-of-way of Rebel Hill Road. [N.T. p. 30.]
- m. The proposed house satisfies the required side and rear setbacks, as well as the building coverage and maximum impervious requirements. [N.T. p. 31, Exhibit A-9.]
- n. There are no steep slopes on the portion of the property closest to Rebel Hill Road. [N.T. p. 32.]
- o. Steep slopes above 25% or between 15 and 25% extend from the rear edge of the proposed driveway all the way to the rear property line [N.T. p. 32-33, Exhibit A-9.]
- p. The overall property has a slope of 22.3% [N.T. p. 34, Exhibit A-9.]
- q. The area with steep slopes of 15 to 25% is 424 square feet, the area with significant slopes of 25% and greater is 3,750 square feet, and

the total lot area with steep slopes is 4,174 square feet. [N.T. p. 34-35, Exhibit A-9.]

- r. The proposed building envelope is 25 feet by 39 feet, which results in a building area of 975 square feet. [N.T. p. 36, Exhibit A-9.]
- s. A total of 581 square feet of the proposed 975 square foot building area would be located in steep slopes. [N.T. p. 37, Exhibit A-9.]
- t. In Mr. Lonie's opinion, it would not be possible to build a house on the Property if the requested zoning variances were not granted. [N.T. p. 38.]
- u. Mr. Lonie was unable to state whether the Property was affected by unique physical circumstances or conditions that create an unnecessary hardship, only that it was a challenging site to build on due to its topography:

MR. OZOROWSKI. Mr. Lonie, do you have an opinion that the subject property is affected by unique physical circumstances or conditions that create an unnecessary hardship on the site?

MR. LONIE. It is a challenging site to build. That's as far as I can go.

[N.T. p. 40.]

- v. In his opinion, it would not be possible to develop the property in strict compliance with the Zoning Ordinance. [N.T. p. 41.]
- w. Any hardship that exists on the Property was not created by the Landowner. [N.T. p. 41.]

- x. A single-family home on the Property would not alter the essential nature of the neighborhood, impair the use or development of adjacent properties, or be detrimental to the public welfare. [N.T. p. 41.]
- y. The requested zoning relief is the minimal necessary to develop the Property. [N.T. p. 42.]

11. On cross-examination, Mr. Lonie testified as follows:

- a. The lot area was calculated using the existing legal right-of-way, rather than the ultimate right-of-way, although the front yard setback was calculated from the ultimate right-of-way. [N.T. p. 43.]
- b. No trees or vegetation will be disturbed beyond the limit of disturbance as the plan is currently proposed; however, tests for stormwater management could increase the limit of disturbance. [N.T. p. 44, Exhibit A-9.]

12. Objector, represented by counsel, presented one witness: Bradford R. Grauel, a Licensed Professional Land Surveyor, and the owner and general partner of OTM, LLC.

13. Mr. Grauel, who was accepted as an expert in zoning regulations [N.T. p. 56], offered the following testimony:

- a. If the lot area were measured from the ultimate right-of-way, rather than the existing right-of-way, the lot area would be 4,917 square feet. [N.T. p. 59.]

- b. The rationale for increasing minimum lot area by a factor of 1.5 is to ensure that there is enough area to construct the proposed improvements and construct the required stormwater management with minimal disturbance to the steep slopes. [N.T. p. 59.]
- c. Based on his professional experience, the entire lot would need to be disturbed and all of the vegetation removed to effectively construct the dwelling and associated infrastructure [N.T. p. 62-63.]
- d. Mr. Grauel interprets § 165-232.4 of the Zoning Ordinance as requiring maximum impervious coverage of 20%, rather than the 40% stated by Mr. Lonie. [N.T. p. 64.]
- e. Using the lot area calculated from the ultimate right-of-way, the property is only permitted to have 983.4 square feet of impervious coverage, while Landowner proposes 1,435 square feet of impervious coverage. [N.T. p. 64-65.]

14. Objector, Christopher Digangi (223 Rebel Hill Road) testified that he had owned the Property until it was sold to the present owners at an upset sale, and that he was challenging the sale in court. [N.T. p. 79.]

15. Mr. Digangi testified in opposition to the application on the basis that it would reduce open space and on-street parking, and would diminish the aesthetics of the neighborhood and value of adjacent properties. [N.T. p. 81.]

16. Based on Mr. Digangi's personal interest with the Property, the Board determined that his testimony was biased and not credible.

INSUFFICIENCY OF THE EVIDENCE

17. Landowner failed to offer proof that the requested variances would be necessary to permit a reasonable use of the Property.

18. Landowner failed to offer proof that the requested variances were the minimum that would afford relief.

B. DISCUSSION

In Pennsylvania, a zoning hearing board may only grant a variance where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;
3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;
and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

The applicant for a variance has the burden of proving that the statutory requirements are met to justify relief; it is not the zoning hearing board's burden to establish why the property owner is not so entitled. *Swemley v. Zoning Hearing Bd.*, 698 A.2d 160, 162 (Pa. Commw. Ct. 1997). Although zoning ordinances are to be liberally construed to allow for the broadest possible use of the land, variance applicants bear a heavy burden. *Nowicki v. Zoning Hearing Bd. of Borough of Monaca*, 91 A.3d 287, 291

(Pa. Commw. Ct. 2014). Variances should be granted sparingly, and the reasons for granting variances must be substantial, serious, and compelling. *Laurento v. Zoning Hearing Bd. of the Borough of W. Chester*, 638 A.2d 437, 439 (Pa. Commw. Ct. 1994). A relaxed standard applies to applications for dimensional, as opposed to use, variances, but an applicant must still demonstrate an unnecessary hardship caused by unique physical characteristics of the property. See *Singer v. Phila. Zoning Bd. of Adjustment*, 29 A.3d 144, 149 (Pa. Commw. Ct. 2011). Additionally, “[i]t is well-settled that in order to establish unnecessary hardship for a dimensional variance an applicant must demonstrate something more than a mere desire to develop a property as it wishes or that it will be financially burdened if the variance is not granted.” *Id.* at 150.

CREDIBILITY AND WEIGHT OF THE EVIDENCE

“Determinations as to the credibility of witnesses and the weight to be given to evidence are matters left solely to the [ZHB] in the performance of its factfinding role.” *Borough of Youngsville v. Zoning Hearing Bd. of Youngsville*, 450 A.2d 1086, 1089 (Pa. Commw. Ct. 1982); *Pennsy Supply, Inc. v. Zoning Hearing Bd. of Dorrance Twp.*, 987 A.2d 1243, 1248 (Pa. Commw. Ct. 2009).

The testimony offered by Landowner’s expert with respect to (1) lot area, (2) impervious coverage, (3) the impact of moving the proposed structure outside of the 30-foot front yard setback, and (4) the conclusion that requested zoning relief is the minimum necessary, was deemed not credible. Conversely, the testimony offered by Objector’s expert was credible as it pertained to (1) lot area, (2) impervious coverage, and (3) the extent of disturbance that would be necessary to construct the proposed structure on the Property.

Landowner's expert, Mr. Lonie, admitted on cross-examination that the lot area stated on Exhibit A-9 to which he had testified was calculated using the existing legal right-of-way rather than the ultimate right-of-way, as required by the Zoning Ordinance. The testimony of Objector's expert was that using the ultimate right-of-way would reduce the defined lot area from 5,467 square feet to 4,917 square feet, a nearly 500 square foot reduction in lot area. A reduced lot area would also impact Mr. Lonie's calculations related to maximum impervious coverage. The precise extent of relief sought by Landowner was not clearly established.

As for Mr. Lonie's testimony regarding the need to locate the proposed structure within the 30-foot front yard setback, his testimony was as follows:

Q. Now, why would you not just move the house back 30 feet?

A. Well, in this case this is where it's relatively level up here.

...

Q. So if you move the house back, would that help or hurt the steep slope calculations?

A. It would hurt, because they also put the driveway in, and then you put the entire house on the steeper slope area.

Q. So this is a way of minimizing the requested relief, is that right?

A. That's correct.

[N.T. p. 29-30.]

This testimony was conclusory and lacks a substantive basis. Rather than stating the difference between the amount of steep slope area and significant slope disturbance that would result from the proposed configuration and a configuration that would comply with the 30-foot setback, Mr. Lonie merely concluded that moving the structure back would "hurt the steep slope calculations." Mr. Lonie failed to provide the amount of significant slope being disturbed within the limit of disturbance and building area, or the percentage

of significant slope being disturbed on the entire Property. Both calculations were critical to Landowner's request for variances from section 165-232.4(B) and (C).

When asked about the level of disturbance to the Property as a whole, Mr. Lonie testified as follows:

MR. OZOROWSKI. You have a perimeter, a dotted perimeter, on here called LOD, Limit of Disturbance. Are you suggesting that no other area of the property will be disturbed during construction of the building? Is that what that means?

MR. LONIE. We're going to do our best to keep it within that Limit of Disturbance.

Q. So no trees or vegetation is going to be removed outside of that LOD area?

A. At this point? I would say no. But tests coming up for storm water management and things like that could increase that area. And I just cannot make an opinion on that yet.

[N.T. p. 44.]

Objector's expert, Mr. Grauel, credibly rebutted this testimony:

I would anticipate from my professional experience that the entire lot would virtually need to be disturbed. So the entire area of the lot would need to be disturbed in order to effectively construct the dwelling and all of the associated infrastructure that is going to come down the pike with it, your storm water, all those things.

[N.T. p. 63.]

In effect, the two witnesses agreed that the installation of required stormwater facilities would, more likely than not, require a larger disturbance area than indicated on the site plan. Therefore, Mr. Lonie's assertion that no trees or vegetation would be removed outside of the designated limit of disturbance was not credible.

Based on the errors and omissions in Mr. Lonie's testimony and in the exhibits he prepared, the ZHB concluded that his testimony was not credible.

MINIMUM RELIEF NECESSARY TO AFFORD RELIEF

To warrant a variance from the requirements of a zoning ordinance, the applicant must demonstrate that the variance sought represents the minimum necessary to afford relief. 53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of S. Whitehall Twp.*, 578 A.2d 1002, 1005 (1990).

Due to the inaccuracies in Mr. Lonie's testimony and exhibits, the ZHB was not presented with the precise amount of relief Landowner required from section 165-232.4(A), (B), and (C). Without this information, it was impossible for the ZHB to determine whether the relief sought was the minimum necessary. Landowner also presented no evidence that the proposed structure, with a footprint of 975 square feet, was the minimum sized structure that could be erected on the Property for the reasonable use of the Property. No testimony was presented as to other sizes, layouts, or configurations that were considered but ultimately discarded because they required more variance relief. Landowner also failed to provide any substantiated justification for locating the proposed structure within the 30-foot front yard setback.

In pertinent part, the intent of the Steep Slope District was to "maintain existing vegetation and stable soil coverage on steep slopes," "minimize the grading and removal of vegetation," "prevent development that would cause excessive erosion and subsequent increase in flood hazards," and "promote the preservation of natural features of the land which are necessary to maintain the ecological balance of the environment." Zoning Ordinance section 165-232.1(A)-(D). The ZHB is obligated to ensure that this intent is carried out through the interpretation and application of the Zoning Ordinance.

Granting the requested variances without knowing the full extent of the disturbance to significant slopes would constitute a dereliction of the ZHB's duty.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under section 909.1(a)(5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(5), and Zoning Ordinance §165-215.A(5).

2. Landowner has standing to seek the requested variance as the equitable owner of the Property.

3. The ZHB is obligated to ensure compliance with the Zoning Ordinance.

4. Section 165-23 requires a minimum lot area of 10,000 square feet, a minimum lot width of 70 feet, and a minimum front yard setback of 30 feet, as measured from the ultimate right-of-way of Rebel Hill Road.

5. Section 165-232.4(A) requires an increase in the 10,000 square foot minimum lot area of the underlying district by a factor of 1.5 for a presently undeveloped property containing steep slope areas, and a reduction in the maximum permitted impervious surface to 20% of the lot area, or 50% of that allowed in the underlying district, whichever is greater. This results in a required minimum lot area of 15,000 square feet, and a maximum permitted impervious surface coverage of 20%.

6. Section 165-232.4(B) prohibits all freestanding structures, buildings, and substantial improvements in areas of significant steep slopes.

7. Section 165-232.4(C) prohibits disturbance of more than 20% of all areas of significant slopes on a property.

8. The ZHB may only grant a variance if an applicant establishes that: (1) an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property; (2) because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property; (3) the unnecessary hardship was not created by the applicant; (4) the variance will not be detrimental to the public welfare; and (5) the variance sought will represent the minimum variance that will afford relief.

9. The lot area and lot width dimensions of the Property existed prior to the effective date of the Zoning Ordinance. Zoning relief from section 165-23 for lot width is not necessary because the existing lot width is legally nonconforming. However, the steep slopes increase the minimum lot area required, and, thus, a variance is required.

10. The Board did not find credible Mr. Lonie's testimony regarding lot area, impervious surface coverage, or steep slope disturbance area.

11. Landowner failed to establish that the proposed house could not be located in compliance with the 30-foot front yard setback imposed by section 165-23, or that a 5-foot setback was the maximum setback that would afford relief.

12. Landowner failed to establish the percentage of impervious surface coverage that was proposed for the Property. Without knowing the extent of the proposed deviation from the maximum impervious coverage imposed by section 165-232.4(A), the ZHB could not determine that the requested relief was the minimum necessary to afford relief.

13. Landowner failed to identify the extent to which the proposed house and significant improvements would be located in areas of significant slope. Without knowing the extent of the proposed intrusion, the ZHB could not determine that the requested relief was the minimum necessary to afford relief from the absolute prohibition of such intrusions imposed by section 165-232.4(B).


14. Landowner failed to provide the percentage of significant slopes within the Property that would be disturbed by the proposed improvements. The ZHB was unable to determine that the proposed disturbance above the 20% permitted by section 165-232.4(C) was the minimum necessary to afford relief.

15. Landowner failed to demonstrate that the size of the proposed house was the minimum that would afford relief.

At its July 5, 2017 public meeting, the ZHB voted unanimously to deny the application, which was followed by the mailing of a notice of decision.

This decision may be appealed to the Court of Common Pleas of Montgomery County within 30 days of the date of mailing.


ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP



Mark S. DePillis, Esquire, Chairman

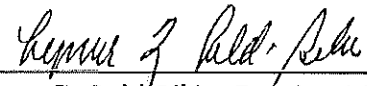


M. Jonathan Garzillo, Vice Chairman



Maria Mengel, Secretary

John M. Tallman, Jr., Member



Lynne Z. Gold-Bikin, Esquire, Member

Date of Mailing: 5/12/17