

Board of Zoning Adjustment

Staff Report

March 4, 2024



Case No:	23-VARIANCE-0161
Project Name:	Andy's Frozen Custard
Location:	11600 Shelbyville Road
Owner(s):	ECP Holdings LLC.
Applicant:	Brandon Arnold, Bluegrass Custard LLC.
Representative:	Brandon Harp, P.E., CEDC
Jurisdiction:	City of Middletown
Council District:	19 – Anthony Piagentini
Case Manager:	Jeremy Chesler, Planner I

REQUEST(S)

- **Variance** from Land Development Code (LDC), Section 5.5.1.A.2 to allow a building to not be constructed at the right-of-way line (23-VARIANCE-0161).
- **Waivers:**
 1. **Waiver** of LDC, Section 5.5.1.A.3.d to not provide connections between parking lots (23-WAIVER-0184).
 2. **Waiver** of LDC, Section 5.5.1.A.3.a to not provide a 3' masonry wall along the parking areas adjacent to right-of-way (23-WAIVER-0185).
 3. **Waiver** of LDC, Section 5.5.1.A.3.a to allow parking between the building and right-of-way (23-WAIVER-0186)
 4. **Waiver** of LDC, Section 10.2.9 to reduce the vehicle use area landscape buffer area (VUA/LBA) from 10' to 5' along Harrison Avenue (24-WAIVER-0031).
 5. **Waiver** of LDC, Section 10.3.6 to reduce the scenic corridor buffer area from 25' to 5' and to reduce the scenic corridor setback from 40' to 35' along Shelbyville Road(24-WAIVER-0031).

CASE SUMMARY

The applicant proposes the redevelopment of the subject site for a restaurant, specifically a Frozen Custard business. The property is located in the City of Middletown, in the C-1, Commercial zoning district and Town Center form district on the southeast corner of Shelbyville Road and Harrison Avenue. The site is currently developed with two commercial structures and parking areas, which are proposed to be demolished. The applicant is proposing to construct a 1,532 SF drive-thru oriented frozen custard business which will also contain a walk-up window and outdoor dining.

This portion of Shelbyville Road fronting the subject site is a designated scenic corridor which requires a 40-foot setback. Site design standards for corner lots in traditional form districts require structures to be built on the right of way lines. These two regulations conflict, prompting relief from the requirements of the LDC. The traditional form district site design standards also state that parking shall not be located between a building and the street on a lot, that a minimum 3' tall masonry wall shall separate a parking area and an adjacent to a right of way, and that a connection between parking lots shall be provided. The applicant is requesting to waive all three of these standards. The applicant is further

proposing to reduce the width of the vehicular use area landscape buffer area adjacent to Harrison Avenue, as well as the scenic corridor landscape buffer and setback. No vehicular use areas are permitted to be located in a scenic corridor buffer, excluding necessary drive ways. The applicant is requesting a waiver that would allow for the vehicular use area to encroach into the scenic corridor buffer and for the scenic corridor setback to be reduced. The applicant will still be responsible for the required plantings.

STAFF FINDING

The variance and waivers appear to be adequately justified for approval based on staff's analysis contained in the standard of review.

TECHNICAL REVIEW

- All comments received have been placed in the record and made available to the Board in advance of the public hearing.
- The development plan has received preliminary approval from Transportation Planning and MSD.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR VARIANCE

- (a) The requested variance will not adversely affect the public health, safety or welfare.

STAFF: The requested variance will not adversely affect the public health, safety, or welfare. The building will sit further back from the intersection of Shelbyville Road and Harrison Avenue than what the site design standards require; however, this condition is not uncommon at this intersection and there do not appear to be any adverse impacts resulting for the increased setback.

- (b) The requested variance will not alter the essential character of the general vicinity.

STAFF: The requested variance will not alter the essential character of the general vicinity. Although the form district requires the structure to be built to the corner with 0' setbacks, the existing pattern of development along Shelbyville Road does not match the design standards, with most structures being setback away from the right-of-way, with parking in the front rather than being built to the property line. This condition is also the result of a neighborhood form district opposite Shelbyville Road where structures are not required to be at the right-of-way and parking is allowed in front. The deviation does not appear to negatively impact Main Street in the City of Middletown.

- (c) The requested variance will not cause a hazard or nuisance to the public.

STAFF: The requested variance will not cause a hazard or nuisance to the public as the proposed setbacks do not interfere with the safe movement of pedestrians or motorists.

- (d) The requested variance will not allow an unreasonable circumvention of the zoning regulations.

STAFF: The requested variance will not allow an unreasonable circumvention of the zoning regulations as the requested setback does not adversely impact public health, safety, or welfare and no hazards or nuisances are created. Further, it is consistent with the patterns of development in the area and will not alter the essential character of the general vicinity.

ADDITIONAL CONSIDERATIONS:

1. The requested variance does not arise from special circumstances which do not generally apply to land in the general vicinity or the same zone.

STAFF: The requested variance does arise from special circumstances which do not generally apply to land in the general vicinity or in the same zone. The lot is a corner lot which has different site design standards and additional restrictions than non-corner lots in the same area. Additionally, the lot has a scenic corridor buffer and setback along Shelbyville Road which contradicts applicable corner lot site design standards.

2. The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or create an unnecessary hardship on the applicant.

STAFF: The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land as adhering strictly to the provisions in the code would limit the ability to include a drive-thru window on the proposed structure where such development pattern is consistent with the area.

3. The circumstances are not the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

STAFF: The circumstances are not the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought as no development has occurred.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR WAIVER (#1 - 5.5.1.A.3.d)

- (a) The waiver will not adversely affect adjacent property owners; and

STAFF: The waiver will not adversely affect adjacent property owners. While there is no direct connection between parking lots, either for pedestrians or motorists. There will be connections to existing public sidewalks in the area that can serve as a pedestrian connection between the subject property and the adjacent property.

- (b) The waiver will not violate specific guidelines of Plan 2040; and

STAFF: Guideline 1, Policy 4 strives to ensure new development and redevelopment are compatible with scale and site design of nearby existing development with the desired pattern of development within the Form district. The waiver will not violate specific guidelines of Cornerstone 2040 as the proposal will allow for the development of the site in a manner that is appropriate for the form district. The Town Center form district encourages uses that are located in close proximity to major thoroughfares with the intensity of uses gradually declining toward the adjacent neighborhoods. The waiver will not allow an unreasonable circumvention of the regulations or cause a hazard to the public.

- (c) The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant; and

STAFF: The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant as the type of development proposed as laid out on the lot does not allow for connection without conflicting with the operation of the drive-thru.

- (d) Either:
(i) The applicant has incorporated other design measures that exceed the minimums of the district and compensate for non-compliance with the requirements to be waived (net beneficial effect);
OR
(ii) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant

STAFF: The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land because the unique shape limits the ability to develop the site for the intended use. Placing a connection between the parking on the subject site and the adjacent property would create a point of conflict between pedestrians and drive-thru customers, and pedestrian connection is available from the public sidewalk.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR WAIVER (#2 - 5.5.1.A.3.a)

- (a) The waiver will not adversely affect adjacent property owners; and

STAFF: The waiver will not adversely affect adjacent property owners as the applicant will still be providing landscaping in the buffer area which will mitigate the omission of the 3' masonry wall. There is also a significant verge which provides for greater separation than is common when utilizing a masonry wall to separate parking from pedestrians.

- (b) The waiver will not violate specific guidelines of Plan 2040; and

STAFF: Community Form Goal 1, Policy 12 calls for the proposal to Design parking, loading and delivery areas located adjacent to residential areas to minimize adverse impacts from noise, lights, and other potential impacts. Ensure that parking, loading and delivery is adequate and convenient for motorists and does not negatively impact nearby residents or pedestrians. The applicant will still be providing plantings in place of the masonry wall which will serve to separate the parking area from the right-of-way and will not have any adverse impacts on motorists or pedestrians.

- (c) The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant; and

STAFF: The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant. The proposed waiver will permit the applicant to provide mixed-uses on a single development site while also increasing the tree canopy and green space.

- (d) Either:

(i) The applicant has incorporated other design measures that exceed the minimums of the district and compensate for non-compliance with the requirements to be waived (net beneficial effect);

OR

(ii) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant.

STAFF: The strict application of the provisions of the regulation would create an unnecessary hardship on the applicant as the requested waiver does not violate Plan 2040 or adversely impact adjacent residents.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR WAIVER (#3 - 5.5.1.A.3.a)

- (a) The waiver will not adversely affect adjacent property owners; and

STAFF: The waiver will not adversely affect adjacent property owners as the waiver will allow the subject site to be developed in a similar manner to the adjacent properties, with parking located between the right-of-way and the principal building on the lot.

- (b) The waiver will not violate specific guidelines of Plan 2040; and

STAFF: Guideline 1, Policy 4 strives to ensure new development and redevelopment are compatible with scale and site design of nearby existing development with the desired pattern of development within the Form district. The waiver will not violate specific guidelines of Cornerstone 2040 as the proposal will allow for the development of the site in a manner that is appropriate for the form district. The Town Center form district encourages uses that are located in close proximity to major thoroughfares with the intensity of uses gradually declining toward the adjacent neighborhoods. The waiver will not violate any of these guidelines.

- (c) The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant; and

STAFF: The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant as relocating the parking behind the front façade of the building will not provide sufficient room for vehicles to maneuver on the property. The proposed parking is in a similar location relative to the building to the other properties along both sides of Shelbyville Road. Waiver of 5.5.1.A.3.a previously approved for Scooter's Coffee at 11506 Shelbyville Road (21-WAIVER-0016).

- (d) Either:

(i) The applicant has incorporated other design measures that exceed the minimums of the district and compensate for non-compliance with the requirements to be waived (net beneficial effect);

OR

(ii) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant.

STAFF: The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land. Placing the parking behind the building would not allow for sufficient space for the dumpster enclosure and other required features on the site. The proposal, as laid out, is consistent with the area.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR WAIVER (#4 - 10.2.9)

- (a) The waiver will not adversely affect adjacent property owners; and

STAFF: The waiver will not adversely affect adjacent property owners as this will reduce the VUA/LBA from 10' to 5', not eliminate the buffer area. The applicant will still be required to provide the required plantings with the buffer area.

- (b) The waiver will not violate specific guidelines of Plan 2040; and

STAFF: Community Form Goal 1, Policy 4 calls for the proposal to ensure new development and redevelopment are compatible with the scale and site design of nearby existing development and with the desired pattern of development within the Form District. The surrounding area is an established employment center characterized by uses and site design of similar layout and intensity. The waiver to reduce the VUA/LBA will not violate this goal or any others.

- (c) The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant; and

STAFF: The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant. The waiver is only for a reduction in the width and will still be required to comply with applicable landscaping requirements.

- (d) Either:

(i) The applicant has incorporated other design measures that exceed the minimums of the district and compensate for non-compliance with the requirements to be waived (net beneficial effect);

OR

(ii) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant.

STAFF: The strict application of the provisions of the regulation would not create an unnecessary hardship on the applicant nor would it deprive them of the reasonable use of the land.

STANDARD OF REVIEW AND STAFF ANALYSIS FOR WAIVER (#5 - 10.3.6)

- (a) The waiver will not adversely affect adjacent property owners; and

STAFF: The waiver will not adversely affect adjacent property owners, although the buffer within the property is being reduced there is over 40' of right-of-way between the property line and the sidewalk, or over 50' of right-of-way between the property line and the roadway.

- (b) The waiver will not violate specific guidelines of Plan 2040; and

STAFF: Guideline 1, Policy 20 of Cornerstone 2040 states to mitigate adverse visual intrusions when there are impacts to residential areas, roadway corridors, and public spaces. Policy 9 of the Mobility Goal #2 encourages the preservation of scenic corridors to ensure a quality visual experience. Although this waiver would allow the width of the scenic corridor buffer to be reduced the greenspace within the public right-of-way helps to nullify the loss of buffer within the property.

- (c) The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant; and

STAFF: The extent of the waiver of the regulation is the minimum necessary to afford relief to the applicant. The proposed scenic corridor buffer and setback still provide for adequate space for the required buffering.

- (d) Either:
(i) The applicant has incorporated other design measures that exceed the minimums of the district and compensate for non-compliance with the requirements to be waived (net beneficial effect);
OR
(ii) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant.

STAFF: The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of land because a large part of what functionally serves as a scenic corridor buffer is within the right-of-way and cannot be used to meet compliance.

REQUIRED ACTIONS

- **APPROVE** or **DENY** the **Variance** from LDC , Section 5.5.1.A.2 to allow building to not be constructed at the right of way line (23-VARIANCE-0161).
- **RECOMMEND APPROVAL** or **DENIAL** of the **Waivers** to the City of Middletown:
 1. **Waiver** of LDC, Section 5.5.1.A.3.d to not provide connections between parking lots (23-WAIVER-0184).
 2. **Waiver** of LDC, Section 5.5.1.A.3.a to not provide a 3' masonry wall along the parking areas adjacent to right-of-way (23-WAIVER-0185).
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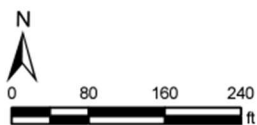
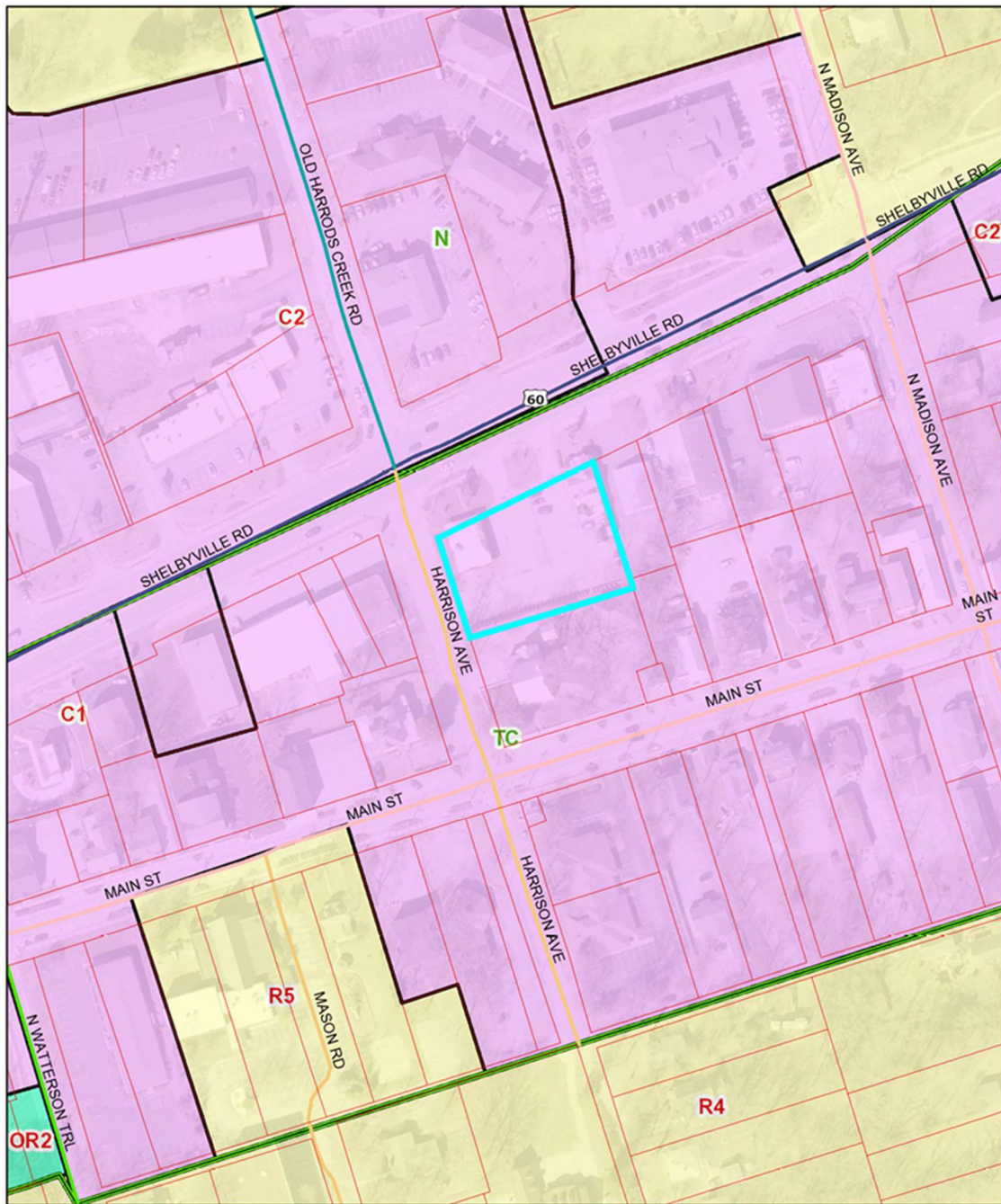
NOTIFICATION

Date	Purpose of Notice	Recipients
2/15/2024	Hearing before BOZA	1st tier adjoining property owners and residents
2/15/2024		Registered Neighborhood Groups in Council District 19
2/16/2024	Hearing before BOZA	Notice posted on property

ATTACHMENTS

1. Zoning Map
2. Aerial Map

1. **Zoning Map**



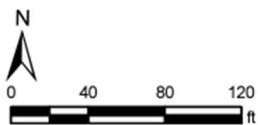
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2. **Aerial Map**



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