

TOWN OF PHILLIPSBURG LAND USE BOARD RESOLUTION NO. 2022-3

**RESOLUTION DENYING PRELIMINARY AND FINAL MINOR SITE PLAN APPROVAL,
BULK VARIANCE APPROVAL AND USE VARIANCE APPROVAL IN NO. 2021-14**

**JAOR Holding, LLC – Applicant/Owner
246 Morris Street
Phillipsburg, New Jersey 08865**

**Block 808, Lot 31
246 Morris Street**

Application #2021-14

WHEREAS, JAOR Holding, LLC, (“Applicant”) applied to the Town of Phillipsburg Land Use Board (“Board”) for Preliminary and Final Minor Site Plan Approval; Bulk Variance Approval pursuant to N.J.S. 40:55D-70(c); Use Variance Approval pursuant to N.J.S. 40:55D-70(d); and any and all design exceptions and/or waivers (collectively “the Application”) for the construction of a fencing on the property, line striping of the existing parking lot and to conduct used auto sales on the premises, for the property identified on the Town Tax Map as Block 808, Lot 31, with a street address of 246 Morris Street, Phillipsburg, Warren County; and

WHEREAS, the Board having satisfied itself that proper notice was given to neighboring property owners and to all others entitled to notice, as well as publication pursuant to both the Town of Phillipsburg Code and to N.J.S. 40:55D-12, on or about January of 2022; and

WHEREAS, due to the public health emergency necessitated by the Covid-19 pandemic, beginning in March of 2020, pursuant to the Executive Orders of the Governor of the State of New Jersey and the existing laws of the State of New Jersey, public gatherings have been limited in size, space, location and duration; and

WHEREAS, due to the public health emergency necessitated by the Covid-19 pandemic, pursuant to the Executive Orders of the Governor of the State of New Jersey and the existing laws of the State of New Jersey, public bodies, such as the Board, are expressly authorized by law to conduct public meetings remotely through the use of audio and video technology; and

WHEREAS, due to the public health emergency necessitated by the Covid-19 pandemic, it was the decision of the Board that it was in the best interests of the Board, the Town of Phillipsburg, the Applicant and the general public for this Application to proceed without further delay, consistent with the Executive Orders of the Governor of the State of New Jersey and the existing laws of the State of New Jersey; and

WHEREAS, the Board was of the opinion, after consultation with its professionals, that the Board could consider this Application remotely and that its consideration would not be impeded whatsoever by considering the Application remotely; and

WHEREAS, the Applicant appeared before the Board at a regularly-scheduled meeting on December 16, 2021, at which time the Applicant requested certain temporary and permanent waivers from the Preliminary Site Plan checklist requirements, said waivers being summarized in the Board Engineer's December 14, 2021 review letter, and the Board having determined that said waivers can be granted and the Application was determined by the Board to be complete; and

WHEREAS, the Applicant appeared virtually before the Board again at a regularly-scheduled meeting on February 24, 2022, at which time the Application was considered, as more fully set forth herein below; and

WHEREAS, at the preceding hearings, the Applicant was represented by William R. Edleston, Esq., who presented a brief explanation concerning the Applicant's intended use of the subject property and the approvals sought at both the December 16, 2021, and February 24, 2022 meetings; and

WHEREAS, prior to the February 24, 2022 hearing the following Board members recused themselves from consideration of this Application: Mayor Tersigni, Mr. Kennedy and Mr. Rooney; and

WHEREAS, a quorum of the Board was present to consider the Application despite the aforementioned recusals; and

WHEREAS, the Board has received certain documentation and reports from the Applicant, the Board's professional consultants and other interested parties, all of these having been given due consideration and being the following:

- A. Town of Phillipsburg Division of Inspections Denial of Zoning Permit, dated October 22, 2021;
- B. Town of Phillipsburg "Application for Minor or Conventional Site Plans" for Block 808, Lot 31, dated July 27, 2021, which included a Certification from the Collector Taxes that realty taxes are current;
- C. Town of Phillipsburg – "Application for Minor Site Plan," dated September 10, 2021;
- D. Town of Phillipsburg – Preliminary Site Plan Checklist for Conventional Site Plan, dated September 10, 2021;
- E. Town of Phillipsburg – Final Checklist for Conventional Site Plan, dated September 10, 2021;
- F. Transmittal letter submitted by William R. Edleston, Esq., dated November 8, 2021;
- G. Preliminary and Final Site Plan entitled: "Preliminary & Final Site Plan, OJR Auto Sales, Block 808, Lot 31, prepared by E&LP, dated July 27, 2021, revised on September 29, 2021, and January 17, 2022, and consisting of three (3) sheets; and
- H. Phillipsburg Fire Chief's letter dated November 18, 2021; and

WHEREAS, the Applicant requested the following variances from the Town Ordinances:

1. A "d" use variance, pursuant to N.J.S. 40:55D-70(d)(1), to permit expansion of a commercial non-conforming use in an R-50 Residential Zone which is prohibited by L.O. 625-51, et. seq.;
2. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not comply with the minimum front yard setback requirements of L.O. 625-80, et. seq.;
3. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not comply with the maximum density requirements of L.O. 625-80, et. seq., regarding the number of residential units on the subject lot;
4. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to permit the storage of vehicles, other than on a driveway, which is prohibited by L.O. 625-11(B);
5. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to permit outdoor storage or display of more than fifty percent (50%) of a rear yard, which is prohibited by L.O. 625-11(C);
6. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not comply with the lot yard requirements of L.O. 625-14, which prohibits the location of a building less than three feet (3') from the property line;
7. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to permit fewer parking spaces than required by L.O. 625-32(B);
8. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not comply with the requirements of L.O. 625-44, regarding the placements of signs on buildings in a R-50 Residential Zone;
9. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to permit outdoor storage or commercial supplies, which is prohibited by L.O. 625-11(D);
10. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not meet the buffer strip requirements of L.O. 625-12(A);
11. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not meet the buffer strip requirements of L.O. 625-12(B); and
12. A "c" use variance, pursuant to N.J.S. 40:55D-70(c), to continue its non-conforming use which does not meet the parking aisle requirements of L.O. 625-26(D); and

WHEREAS the Applicant requested the following permanent design waivers from the Town Ordinances:

1. A waiver from L.O. 510-12(A)(3) which requires site plans to design adequate parking and vehicular and pedestrian circulation;
2. A waiver from L.O. 510-11(A)(6) which requires site plans to design advertising which does not detract from the building and the surrounding properties;
3. A waiver from L.O. 510-11(A)(7) which requires site plans to design outdoor storage, service areas and accessory uses in accordance with required setbacks, fencing, or screening so as to prevent the same from being incongruous with site and the surrounding properties;
4. A waiver from L.O. 510-12(B)(1)(b) which requires site plans to include site triangles at the intersection of all driveways on the property;
5. A waiver from L.O. 510-11(B)(2)(a) which requires site plans to include site lighting in all areas accessible to the public in accordance with standards set forth therein
6. A waiver from L.O. 510-11(B)(2)(b) which requires site plans to include adequate storm drainage facilities; and
7. A waiver from L.O. 510-11(B)(2)(f) which requires site plans to include adequate access for fire protection; and

WHEREAS, the Applicant had requested certain temporary design waivers from the Town Ordinances which are identified in the Board Engineer's December 14, 2021 and January 26, 2022 review letters and which the Board Engineer recommended to be granted; and

WHEREAS, the Board having considered the letters of the Board Engineer dated December 14, 2021, and January 26, 2022, the contents of which the Board adopts and incorporates its finding of fact by reference herein; and

WHEREAS, the Applicant presented the sworn testimony of the following individuals on December 16, 2021 and February 24, 2022:

1. Christopher Nusser, P.E. who is the Applicant's engineer;
2. Pablo Guzman, who is the property owner; and
3. Oscar Ramirez, who is the tenant and the Applicant; and

WHEREAS, the following documents were marked as exhibits at the December 16, 2021 and February 24, 2022 hearings and were discussed and testified to by the Applicant's witnesses. These are now included as part of the record:

1. A-1: Curriculum Vitae of Christopher Nusser, P.E.;
2. A-2: Preliminary and Final Site Plan entitled: "Preliminary & Final Site Plan, OJR Auto Sales, Block 808, Lot 31, prepared by E&LP, dated July 27, 2021, revised on September 29, 2021, and January 17, 2022, and consisting of three (3) sheets; and
3. A-3: November 18, 2021 letter from the Phillipsburg Fire Chief; and

WHEREAS, before the testimony of the Applicant's witnesses on December 16, 2021, the Board's engineer discussed the waivers from the Town's Site Plan checklist which was requested by the Applicant and which are referenced in the Board engineer's December 14, 2021, and January 26, 2022 letters and further recommended that the Board grant temporary waivers from the Town's Preliminary Site Plan Checklist, as outlined in the December 14, 2021 letter, to items 2a, 2b, 2d, 2e, 2g, 2i and 2j, and grant permanent waivers as to items 2c, 2f and 2h; and grant temporary waivers from the Town's Final Site Plan Checklist, as outlined in the December 14, 2021, and January 26, 2022 letters, to items 3a, 3b, 3c, 3d, 3e, 3h, 3i, 3j, 3k, 3l, 3m and 3n, and grant permanent waivers as to items 3f and 3g;

WHEREAS, by unanimous vote on December 14, 2021, the Board granted the permanent waivers and temporary waivers referenced above; and

WHEREAS, the Applicant first jointly offered the testimony of Oscar Ramirez and Pablo Guzman, both of whom were sworn. Mr. Ramirez is identified on the application as the Applicant's principal. Mr. Guzman is the owner of the subject property. Mr. Ramirez testified that he wants to move his used car sales business from Hackettstown to Phillipsburg. He summarized how long he has been in the business and how he obtains customers. He stated that generally cars would not be stored on the property. The cars are driven to the site to be picked-up after he attends auctions, purchases cars, drives them to the site and then restores them for customers who pick-up the vehicles. He stated that he would have five (and no more) vehicles transported to the site. He does not do any advertising. He does not intend to erect new signs or advertise. Mr. Guzman testified that he performs general auto repair on the site currently. He has one vehicle lift. He is a master technician and has been in the business for 37 years. Almost all of his work is done by appointment. He does not have more than two waiting cars at a time – one inside and one outside the building. He testified that waste and junk are stored inside including a 250 gallon waste oil tank and that junk and waste are not left on site. He testified that he has not experienced any neighborhood complaints regarding his business. Chairman Duffy then asked a few questions which were answered by the gentlemen. There are two residential units on the top of the building for which two parking spots are allotted. There are no employees. Mr. Guzman lives four blocks away and walks to work, gets dropped-off or parks legally on

the street. His customary hours are 10 a.m. -5:00 p.m. Mr. Guzman confirmed there will be no change to the existing signage. He stated that Mr. Ramirez has an off-site parking spot when he is on premises. Planner Knowles then inquired about the existing office space to which Mr. Guzman says there is a small office. She asked if employees are anticipated and Mr. Guzman said maybe a part-time person to clean the cars. Mr. Zwicker then asked some questions and was satisfied with the responses; and

WHEREAS, the Board was satisfied with Mr Ramirez' and Mr. Guzman's testimony such that the Board did not have any additional questions or comments; and

WHEREAS, Christopher Nusser, P.E., a New Jersey Licensed Engineer, of Davies Engineering, was offered as the third witness, who after being sworn and accepted as an engineering expert and a professional planner expert based upon Exhibit "A-1" and the Board's familiarity with Mr. Nusser who has testified as an expert on previous occasions, and wo provided testimony on behalf of the Applicant. Mr. Nusser discussed all the following. He marked the 3-sheet site plan set, revised January 17, 2022, as Exhibit "A-2." Mr. Nusser explained that site has been completely impervious at least since 1981 and therefore pre-dates New Jersey Department of Environmental Protection stormwater regulations. He identified what is on the property and what is proposed. There will be no site improvements proposed and sixteen (16) on-site parking spaces are proposed. He says there is no change to how the site looks or how operations will be conducted on-site. He testified that the proposed site plan actually cleans-up the property. He then addressed the technical comments on Board Engineer's January 26, 2022 letter at page 12. As for 1a, he said the site is not poorly shaped and believes the Applicant has testified as to how the cars will be parked. As for 1b, he stated that the Applicant will provide an ADA parking space in accordance with the law. As for 1c, the Applicant would comply with Fire Department requests, but the gate will not be locked – so he believes this request is not necessary. As for 1d, the witness' testimony was that there are no changes to the building layout. As for 1e, he believes sight lines are not necessary. The Board Engineer commented that, given the busy street, site lines should be provided. Mr. Nusser said he would provide two-dimensional site triangles. As for 1f, Mr. Nusser does not believe that ADA curb ramps and sidewalks should be installed given the age of the use at the site. Mr. Guzman then stated that customers park their cars on the street and do not park in the back of the site. Therefore, Mr. Nusser testified that he does not believe ADA compliance is required on site. He believes the property is properly designed. The Board Engineer said that only the Town Council can waive ADA sidewalk requirements and that the Board cannot grant sidewalk exemption as part of an Application. The Board Engineer also said that there are a lot of school children walking along the site and that is why code-compliant sidewalks are necessary. Mr. Nusser responded that ripping-up existing asphalt sidewalks, and replacing with concrete, does not make sense. The Board Engineer said that as long as the asphalt is ADA-compliant grade, it would be satisfactory. As for 1g, Mr. Nusser said that there are no lighting changes. Mr. Guzman then said the lights are motion-sensed only all the time. No

lights otherwise. As for 1h, Mr. Nusser said the site looks the same now as it did in 2004 and therefore this is inapplicable. As for 1i, he believes that is addressed in the site plan. As for 1j, Mr. Nusser states that he believes that the existing parking spaces are not an issue. The Board Engineer says that vehicles have parked across sidewalk as well as asphalt which has caused pedestrian travel into the street. The Board Engineer and Mr. Nusser then agreed that the parking spaces should be painted properly to discourage this improper parking. As for 1k, Mr. Nusser was seeking input from the Board. As for 1l, Mr. Nusser said there is fencing along the rear of the lot. He said there is inadequate space to remove impervious coverage and install vegetative buffers. He said that site has not been disturbed for more than forty (40) years and does not understand why this is requested. As for 1m, Mr. Nusser said that not all parking for the residences is on-site, some is off-site, but the Applicant will sign the spaces. As for 1n, Mr. Nusser agrees that Warren County approval is required. As for 1o and 1p, the Board engineer said that this comment addresses the floor drain for cars that are driven in for oil changes and concerns about leaking into the public water supply. Mr. Guzman then said there is a floor drain and is not aware of any grease traps or oil/water separators. Mr. Nusser said this he believes floor drains are a building code issue, and not an issue for the Board in considering a site plan. Further, because the building is not being altered, Mr. Nusser believes this request is inappropriate. As for 1q, the Board Engineer said the proper connections to the sanitary system are required by the Town Code and that a dye test would suffice -- to which Mr. Nusser consented. As for 1r, the Applicant said there are no exterior drains on site. As for 1s, the Applicant said vehicles are not washed on-site. As for 1t, the Applicant said there is no outside fluid storage. The Applicant said the shed stores some parts and equipment -- no liquids, gases, hazardous materials -- and that he has a permit from the Town for the same. Then, Planner Knowles made a few comments on the technical review. Mr. Nusser then offered planning testimony as it relates to the use variance -- expansion of a non-conforming use -- and the bulk variances. Mr. Nusser addressed the Variances as outlined on the Board Engineer's January 26, 2022 review letter as well as the design waivers. He then testified from a planning perspective that the proposed use is complimentary to the existing use. He says that expansion of the non-conforming use is minimal and of the same character and there is no detriment to the master plan and zone ordinance. The Chairman had some questions which were answered satisfactorily. The Fire Chief's November 18, 2021 letter was read into the record by the Board Secretary and marked as Exhibit "A-3;" and

WHEREAS, the Board was satisfied with Mr. Nusser's testimony, especially in light of the Board engineer's comments and review, such that the Board did not have any additional questions or comments; and

WHEREAS, the Applicant did not offer any additional witnesses, documents or evidence; and

WHEREAS, the Board asked for public comment and received the same; and

WHEREAS, the Board considered all of the preceding;

WHEREAS, Mr. Turnbull moved for approval of a "d(1)" variance. No one seconded the motion.

NOW THEREFORE, as a result of the Applicant's presentation, testimony and exhibits presented by the Applicant's witnesses as aforesaid and the documentation submitted, the Board finds as follows:

1. The subject property is located in the Town of Phillipsburg R-50 Residential Zone.
2. There exists a non-conforming use on the property, *to wit*, an auto repair shop along with two residential units.
3. N.J.S. 40:55D-1, et. seq., the "New Jersey Municipal Land Use Law," provides for review and Approval of Preliminary and Final Minor Site Plans by the Board.
4. The alteration, expansion or intensification of a lawfully created preexisting nonconforming use requires a variance pursuant to N.J.S. 40:55D-70(d)(2).
5. The "Town of Phillipsburg's Site Plan Ordinance of 1979" provides for review and Approval of Preliminary and Final Minor Site Plans by the Board, pursuant to L.O. 510-1, et. seq.
6. The Applicant must obtain Preliminary and Final Minor Site Plan Approval from the Board before it alters, expands or intensifies a non-conforming use.
7. The Board has the authority to grant waivers from the provisions of Chapter 510 of the Town of Phillipsburg's Ordinances, *to wit*, the "Town of Phillipsburg's Site Plan Ordinance of 1979," pursuant to N.J.S. 40:55D-51.
8. N.J.S. 40:55D-51(b) states: "The planning board when acting upon applications for preliminary site plan approval shall have the power to grant such exceptions from the requirements for site plan approval as may be reasonable and within the general purpose and intent of the provisions of the site plan review and approval of an ordinance adopted pursuant to this article, if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question."
9. A waiver is an acknowledgment by the Board that conditions of the property are satisfactory and meet the requirements of the Town of Phillipsburg Ordinances.
10. The Board has authority to grant variances from the provisions of N.J.S. 40:55D-1, et. seq., the "New Jersey Municipal Land Use Law," pursuant to N.J.S. 40:55D-70 and pursuant to Section 555-22 of the "Town of Phillipsburg's Site Plan Review Ordinance of 1979."
11. A variance is a deviation from the strict application of Chapter 625 of the Town of Phillipsburg's Ordinances, *to wit*, the "Town of Phillipsburg Zoning Ordinance," as set forth therein pursuant to N.J.S. 40:55D-62, et. seq., and the regulations established thereto.
12. The Applicant who is seeking an alteration, expansion or intensification of a lawfully created preexisting nonconforming use pursuant to N.J.S. 40:55D-70(d)(2), bears the burden of proving "special reasons" for the variance by demonstrating that the alteration, expansion or intensification of the

use will not be a "substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."

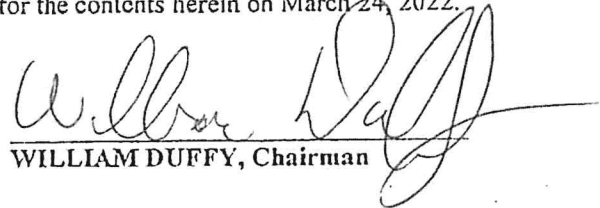
13. The "mere existence of a nonconforming use, does not, of itself, give rise to special reasons entitling the owner to a variance for the enlargement of the use." Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 281 (1967).

14. The Board determines that the Applicant did not meet its burden of proof in its presentation of its witnesses' testimony and documentation.

NOW THEREFORE, BE IT RESOLVED THAT the Applicant's request for a bulk variance pursuant to N.J.S. 40:55D-70(d)(1) is DENIED, and consequently the entire Application is deemed denied.

The foregoing Resolution memorializing the action taken by the Town of Phillipsburg Planning Board was duly adopted at its regular meeting on the 24th day of February, 2022, by a majority of the aforesaid members approving the oral approval for the contents herein on March 24, 2022.

Dated: March 24, 2022


WILLIAM DUFFY, Chairman