

**BOROUGH OF MIDLAND PARK
ZONING BOARD OF ADJUSTMENT**

MHF Midland Park, LLC (Taco Bell)
Block 6, Lot 17.02
80 Godwin Avenue, Midland Park, New Jersey 07432

RESOLUTION

WHEREAS, MHF Midland Park, LLC (“Applicant”), applied to the Midland Park Zoning Board of Adjustment (“Board”) for a (d)(1) “use” variance, preliminary and final major site plan approval, and (c) “bulk” variance and design waiver relief, all as set forth in more detail below, in connection with the Applicant's proposal to construct a 2,000 square foot one story building for use as a quick-service Taco Bell restaurant with a drive-through at the existing shopping center located at 80 Godwin Avenue, Block 6, Lot 17.02 (the “Property”), which Property is located in the B-3 Business-Retail/Office Zone:

1. A variance pursuant to N.J.S.A. 40:55D-70(d)(1), referred to as a “use” variance, to permit a drive-thru restaurant, where Section 34-9.1(h) of the Code of the Borough of Midland Park (the “Code”); prohibits drive-through restaurants;
2. A variance pursuant to N.J.S.A. 40:55D-70(c)(1) and/or (c)(2), referred to as a “bulk” variance for the placement of a sign facing the proposed drive-through, where Section 34-17.8(b)(1) of the Code requires any sign “referring to or advertising the premises upon which it is located or displayed, or to identify the occupant thereof, or a service rendered thereon or therein, or to a product or item available therein, or to a trade, business or profession carried thereon or therein” to be erected facing a street and/or a municipal or public parking area;
3. A bulk variance for the size of signage on the east façade of the proposed building, where 120 square feet is permitted by Section 34-17.8b.2 of the Code and a total of 138 square feet (inclusive of the murals) is proposed;
4. A bulk variance for the size of signage on the south façade of the proposed building, where 37.5 square feet is permitted by Section 34-17.8b.2 of the Code and a total of 77 square feet (inclusive of the murals) is proposed;
5. A bulk variance for the proposed refuse enclosure to be located within a front yard, where Section 34-13.1b of the Code requires that accessory structures may only be located in a side or rear yard area;

6. A bulk variance for the proposed drive-through clearance bar to be located within a front yard, where Section 34-13.1b of the Code requires that accessory structures may only be located in a side or rear yard area
7. A bulk variance to permit a buffer zone of 5 feet, where Section 34-15.2 of the Code requires a buffer zone of 15 feet;
8. A bulk variance to permit an improved lot coverage of 82.6% , where Section 34-9.2a of the Code permits a maximum improved lot coverage of 75% (and where the Property presently has an improved lot coverage of 83.6%); and
9. A design waiver pursuant to N.J.S.A. 40:55D-51 to permit off-street parking area to have a buffer strip of 3 feet in width where Section 32-6.2h.3 of the Code requires off-street parking area to have a buffer strip of at least 5 feet in width.

WHEREAS, duly noticed public hearings were held on this application on March 8, April 12, July 12, August 9, September 13 and October 11, 2023, in compliance with the Open Public Meetings Act and the Municipal Land Use Law (“MLUL”), at which time any interested parties and members of the public were afforded the opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant, any interested parties, the general public, and its own professionals, has hereby made the following findings of fact and conclusions of law:

1. All of the application materials and hearing exhibits were made available to members of the public within the requisite timeframes in advance of the hearing.
2. The Applicant submitted the required affidavits of publication and affidavits of service, which the Board's attorney determined gave the Board jurisdiction to hear the application. The application took place in at the meeting dates listed above in the courtroom at the Borough Municipal Building, located at 280 Godwin Avenue, Midland Park, New Jersey.
3. As part of its application, the Applicant submitted the following plans and documents, which the Board considered as part of the record, and many of which were presented also as Exhibits during the public hearing, as modified and revised (such modified and revised plans and documents superseding those submitted with the initial application):
 - a. Borough of Midland Park Application for Development, with addendum to application, attachments and checklists, signed and dated January 24, 2022, and submitted by the Applicant.
 - b. Site Plan entitled “Proposed Quick Service Restaurant” prepared by Lapatka Associates, Inc., dated 11/02/2021, last revised 5/23/2022, consisting of 3 sheets.

- c. Architectural Plans entitled “Taco Bell Endeavor 2.0” prepared by Zelta Design, dated 2/01/2022, no revisions, consisting of 3 sheets.
 - d. Traffic Evaluation, prepared by Dean & Dolan, dated June 1, 2023.
 - e. Plan entitled “Partial Lighting Photometric Analysis” for Proposed Quick service Restaurant, prepared by Lapatka Associates, Inc., dated 4/12/23, last revised .
4. The Board also received and considered the following correspondence and memoranda prepared by the Board's and municipality's own professionals, which the Board considered as part of the record:

- a. Review letters prepared by Board Engineer, Richard Wostbrock & Associates, dated January 18, 2023 and May 8, 2023.
- b. Memoranda prepared by Board Planner, Burgis Associates, Inc. dated January 20, 2023 and May 9, 2023.
- c. Memoranda (2) from Construction Official, both undated.
- d. Emails from Matthew Tauber, Superintendent of Public Works, dated February 21, 2023 and April 5, 2023.
- e. Memorandum from Police Chief, received February 17, 2023.
- f. Emails from John Lazzari, EMS Chief/EMT, dated February 21, 2023 and April 1, 2023.
- g. Memoranda (2) from Fire Prevention, undated and received March 31, 2023.
- h. Review letter prepared by Board Traffic Consultant, Boswell Engineering, dated June 9, 2023.

5. The following exhibits were submitted during the public hearings:

Number	Date Entered	Description
A-1	3-8-22	Application for Use Variance and Site Plan Approval
A-2	3-8-22	Alta/NS PS Land Title Survey Prepared By DPK Consulting, Dated 11/12/21
A-3	3-8-22	Site Plan prepared by Lapatka Associates, dated 11/2/21. Last revised 5/23/22. 3 sheets
A-4	3-8-22	Architectural Plans Prepared by Zelta Design, Dated 10/04/22. Sheets 2 & 3 revised 3/8/23, 3 sheets
A-5	4-12-22	Site Plan Prepared by Lapatka Associates, Date 11/12/21, Last Revised 3/20/23 (3 sheets)
A-6	4-12-22	Refuse Area Exhibit

A-7	7-12-23	Site Plan prepared by Lapatka Associates, dated 11/2/21. Last revised 4/24/23. 3 sheets
A-8	7-12-23	Partial Lighting Photometric Analysis prepared by Lapatka Associates dated 4/12/23
A-9	7-12-23	Traffic Report prepared by Dolan and Dean dated 6/1/23
A-10	8-9-23	Taco Bell Truck Circulation Exhibit Prepared by Dolan & Dean, Dated July 31, 2023
A-11	8-9-23	Google Street View Photo of Parking Lot/Rea Avenue exit
A-12	8-9-23	Aerial Image Prepared by Stonefield Engineering & Design, Drawing 2 of 2, Dated August 9, 2023
A-13	8-9-23	Colorized Zoning Map, Zone District And Flood Hazard Area Overlay Map, Dated March 2020
A-14	8-9-23	B1 & B3 Lot Comparison Chart prepared by Stonefield Engineering, dated 8/9/23. 3 pages.
A-15	10-11-23	Transcript of a portion of the Borough of Midland Park Mayor & Council Meeting Regular Session held on Thursday, September 23, 2021, made by Laura A. Carucci, C.S.R., R.P.R., L.L.C., 5 pages.
A-16	10-11-23	Transcript of a portion of the Borough of Midland Planning Board Meeting held on Monday, October 18, 2021, made by Laura A. Carucci, C.S.R., R.P.R., L.L.C., 6 pages.
A-17	10-11-23	Minutes from the Mayor and Council Open Public Meeting held on October 28, 2021, 12 pages.
A-18	10-11-23	Outline prepared by Atty. Whitaker summarizing the application in question, 1 page.
A-19	10-11-23	List of previously discussed stipulations prepared by Atty. Whitaker, 1 page.
PB-1	6-9-23	Report of Frank Dobiszewski, P.E., Boswell Engineering
O-1	8-9-23	E-mail from Wendy Martin to Jessica Harmon, Dated September 28, 2021
O-2	9-13-23	Figure 1, Land Use, Prepared by Donna Holmqvist, P.P., Dated May 1, 2023
O-3	9-13-23	Figure 2, Zoning, Prepared by Donna Holmqvist, P.P., Dated May 1, 2023
O-4	9-13-23	Figure 3, Adverse Impacts, Prepared by Donna Holmqvist, P.P. Dated May 1, 2023
O-5	9-13-23	GoogleEarth Street View from 10/2021, captured 9/12/23

6. The Board Engineer, Richard Wostbrock, P.E., Board Planner(s) Thomas Behrens, P.P. and Dave Novack, P.P., and Board Traffic Consultant(s) Frank Dobiszewski, P.E. and John Yakimik, P.E., were duly sworn according to law.

7. The Applicant was represented by Bruce Whitaker, Esq., of McDonnell & Whitaker. Mr. Whitaker provided an overview of the application and introduced the witnesses on whose testimony the Applicant relied.

8. The Applicant first called Ever Santana to provide fact witness testimony as an employee of PN Restaurants, a company that operates quick-service restaurants, including Taco

Bell. Mr. Santana has worked in the restaurant industry for over 30 years, has experience in restaurant operations, and is currently responsible for real estate development and construction with PN Restaurants. Mr. Santana was duly sworn according to law and testified with respect to the day-to-day operations of a typical Taco Bell quick-service restaurant. He testified that they are open 7 days a week, from 8:00 am to midnight, Monday through Thursday and from 8:00 am until 1:00 am on Friday and Saturday. There are 3 overlapping shifts each day, with 5 to 8 employees per shift. Mr. Santana testified that there would be 2 deliveries per week, lasting 45 minutes to an hour, in the early morning when the restaurant is closed. Delivery access to the restaurant is by a lockbox key and drop off the product for the staff to put away when they arrive.

9. Mr. Santana went on to testify regarding the increased reliance upon self-service kiosks, drive-throughs and third party delivery services by quick service restaurants since the onset of the Covid-19 pandemic. He discussed the percentage of the overall Taco Bell operations that are generated during each part of the day, i.e. breakfast, lunch and dinner, and described in detail how the restaurant, and in particular the drive through, would operate during lunch, which is the busiest time of the typical day. Specifically, Mr. Santana testified that approximately 75% of all transactions were done at the drive through and that there could be up to 30-35 drive-through transactions each hour during the 3 hour lunch peak. He testified that the drive-through queue could accommodate up to 11 vehicles and any excess would back up within the shopping center parking lot and not onto Godwin Avenue. The Board questioned Mr. Santana regarding the potential for cars which are queued within the shopping center parking lot to interfere with cars trying to exit onto Rea Avenue or cars trying to exit from certain parking spaces, as well as concerning the location of the drive-through wrapping around the building and in between the front of the building and Godwin Avenue.

10. Steven Tombalakian, Esq. of the Weiner Law Group, entered his appearance as counsel for Burger Barn, LLC, the operator of a Burger King restaurant across Godwin Avenue from the Property (the "Objector"). Mr. Tombalakian cross examined Mr. Santana. He questioned whether a drive-through was a requirement by Taco Bell in order to open at this location and if he was familiar with any Taco Bell or other quick service restaurant locations without a drive through.

11. James Brennan, 32 Rea Avenue, appeared to ask questions about the noise that the microphone and speakers associated with the proposed drive through would generate and its impact on the surrounding residential area. Anthony Lorusso, 64 Godwin Avenue, appeared to

ask questions about the potential negative impacts of the drive through queue. John Knepper, 30 Rea Avenue, appeared to ask questions about the noise associated with deliveries to the restaurant and the intended flow of traffic to the Property.

12. The Applicant then called Andrew Missey, P.E., to present engineering testimony. He was duly sworn according to law and the Board accepted his credentials in the field of engineer. Mr. Missey testified with respect to the existing site conditions which include a lot size of approximately 3.5 acres, a CVS anchor store, a multi-tenant commercial space currently undergoing construction and a vacant former bank building with a drive through located in the southeast corner of the lot. He described the access to and from the site. Mr. Missey testified that the Applicant proposes to demolish the vacant bank building and construct a new building for Taco Bell that will comply with all of the B-3 setback requirements and eliminate certain existing non-conforming conditions.

13. Mr. Missey continued testifying at the next meeting and referenced Exhibit A-5. He described the changes that the Applicant made to the site plan in response to comments received from the Board's consultants, including the removal of the existing curb cut on Godwin Avenue previously utilized by the bank and screening of the drive-through lane along Godwin Avenue. Mr. Missey then answered questions from Board members regarding the drive through stacking and interference with on-site circulation and parking. In response to questions from the Board engineer, Mr. Missey stated that delivery truck maneuvering would occur off hours so as to not conflict with on-site traffic. Mr. Missey then answered questions from Anne Marie Rizzuto, Esq., also with the Weiner Law Group, on behalf of the objector, as well as a member of the public, Karen Ng, 30 Rea Avenue.

14. Mr. Missey testified once again at the next meeting with respect to Exhibit A-9. He described the additional changes that the Applicant made to the site plan including relocation of the refuse area as well as certain light fixtures, the addition of a loading space for the delivery vehicle and a fence along Godwin Avenue. Mr. Missey was questioned by Ms. Rizzuto regarding the size of the loading space and the type of vehicle that would make deliveries and by the Board with respect to whether the truck would block parking spaces while parked for deliveries.

15. The Applicant next called Gary Dean, a licensed professional engineer, who was duly sworn, to provide expert testimony as a traffic consultant. The Board accepted his credentials. Mr. Dean testified with respect to a traffic study that he conducted for the proposed drive-through

restaurant, that his study focused in the difference in traffic numbers between the previous bank drive through and the proposed restaurant drive through, acknowledging that a restaurant drive through will generate more traffic, and on the characteristics of the Property and, more specifically, the portion of the Property where the drive through restaurant will be located, which he described as "skinny but deep."

16. Mr. Dean testified that the drive through queue could utilize three sides of the building and accommodate 11-12 vehicles depending upon the size of the vehicles. He went on to discuss the difference in traffic between a bank drive through and restaurant drive through, noting the most significant difference in traffic between the two uses is at lunchtime where approximately 61 trips, or 30 more cars, would be expected. He concluded that the increase in traffic would not have a significant impact. Mr. Dean also testified that access to and egress from the Property will not change except for the elimination of the second egress point to Godwin Avenue from the bank drive through. He also referenced other nearby quick service restaurants with drive-throughs and distinguish their design from the proposed Taco Bell, noting that the proposed Taco Bell site would function with greater efficiency.

17. Mr. Dean then responded to questions from Board members regarding the queue, at what point it might interfere with access from Godwin Avenue and how customers entering at Rea Avenue would access the queue from the opposite direction. He was asked what portion of customers would they expect to enter from Rea Avenue vs. Godwin Avenue. Mr. Dean did not know but stated that he did not think it made a difference to the adequacy of circulation on-site. He also testified that in his opinion if the queue was longer than 11 cars customers would park and go inside and that a queue in excess of 11 cars would impact only on-site circulation and not the adjacent streets. However, at its peak hour Mr. Dean stated he anticipated 7 cars in a queue. Board members also expressed concern with access to the site and the on-site circulation of a delivery truck. Board members drew an analysis to Chick-fil-A and Starbucks, and questioned whether the ITE data used for trips was, in fact, indicative of actual use.

18. Mr. Dean returned at the next meeting and testified with respect to Exhibit A-10 regarding truck circulation and fielded additional questions from the Board and the Board's consultants, and from the attorney for the Objector.

19. The Applicant then called Erik Liepins, R.A., of Zelta Design, the Applicant's architect, who was duly sworn and the Board accepted his credentials in the filed of architecture.

Mr. Liepins testified to the proposed interior layout and the exterior elevations of the proposed building. He also described the signage proposed on each building elevation. The size of the signs proposed complies with the zoning ordinance but the location of certain signs do not and a variance is required. Mr. Liepins fielded questions from the Board and its consultants.

20. The Applicant then called Matthew Seckler, P.E., P.P., of Stonefield Engineering, who was duly sworn and the Board accepted his credentials as a professional planner. Mr. Seckler described the existing site conditions as well as the surrounding area and then provided the Board with an analysis of the variances requested by the Applicant. In particular, with respect to the variance required pursuant to N.J.S.A. 40:55D-70(d) for the drive-through restaurant, he testified concerning the positive and the negative criteria. With respect to the positive criteria, he testified that the Applicant must show that the site is particularly suited for the proposed use. He looked at the uniqueness of the site as it relates to other properties also impacted by the recent ordinance that prohibits drive-through restaurants in certain zones within the Borough. Mr. Seckler found that the size of this property is much larger than other properties subject to the prohibition. The property size, together with the site configuration which allows queuing to occur on-site and not spill onto adjacent roadways make this site particularly suited. He went on state that in his opinion that the proposed development would be an improvement from a visual environment perspective.

21. Next, Mr. Seckler addressed the negative criteria. He testified that there would not be a substantial detriment to the public good because there would be no negative impact on parking, no significant noise generated from the drive-through use nor any adverse lighting impacts. He then went on to testify to the second prong of the negative criteria and whether the grant of the variance would substantially impair the intent and purpose of the zone plan or zoning ordinance. The ordinance prohibiting drive-through restaurants was adopted in 2021 and does not include a clear preamble of reasons why the ordinance was adopted. Mr. Seckler infers from the timing of the adoption of the Ordinance, that it was in reaction to recent applications by Starbucks and Dunkin Donuts, which were both much smaller sites. He testified that this site, due to its size, does not face the challenges that those smaller drive-through restaurant sites faced. He then went on to discuss the Master Plan and concludes that none of the goals in the master Plan would be substantially impacted and, in fact, in his opinion certain Master Plan goals would be advanced. Mr. Seckler also testified in support of the remaining variances requested as part of the Application. Mr. Seckler responded to questioning from the Board, the Board's consultants.

22. At the next meeting, the Objector presented the testimony of Donna Holmqvist, P.P. who was duly sworn and the Board accepted her credentials as a professional planner. Ms. Holmqvist described the existing site conditions generally, as well as existing uses in the surrounding area and then provided the Board with an analysis of the proofs presented by the Applicant in support of variances requested. In particular, with respect to the variance required pursuant to N.J.S.A. 40:55D-70(d) for the drive-through restaurant, she testified that the Applicant did not satisfy either the positive or negative criteria and, therefore, failed to meet its burden of proof in support of the granting of the use variance.

23. At the conclusion of the meeting, the Board heard public comments in support of the Application from Helene Rosso, 32 Susan drive, A.J. Rosso, 32 Susan Drive, Nicole Cieri, 3 Hillside Avenue and Stan Usherenko, 417 Prospect Street.

24. At the final meeting, the Board planner provided a recap of the variances requested by the Application and the required proofs. Mr. Novak answered questions from the Board, Mr. Whitaker and counsel for the objector. The Applicant attempted to demonstrate the purpose behind the governing body's adoption of the ordinance prohibiting drive-through restaurants in an effort to show the Applicant proved special reasons in support of the use variance. Both the Applicant and the objector made a closing statement through its counsel and the Board conducted its deliberations and vote.

WHEREAS, the Applicant requires an affirmative vote of at least five (5) members of the Board in order to be granted a variance pursuant to N.J.S.A. 40:55D-70(d); and

WHEREAS, after reviewing the evidence submitted and the testimony presented, the Board, by a vote of four in favor of approval and three against an approval, failed to find that the Applicant has demonstrated an entitlement to a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a drive-through restaurant in B-1 zone, where a drive-through restaurant is prohibited; and

WHEREAS, the Board concluded that the Applicant did not provide sufficient proof in support of the positive and negative criteria for the grant of the variance. Board members noted that the adoption on the ordinance specifically prohibiting any drive through restaurant in the zone was only two years prior and they did not find that there had been a change in circumstances or change to the subject property since the adoption of that ordinance that would allow for the finding of special reasons in support of the variance. At the time of the adoption of Ordinance 19-21, the former bank building was already vacant, the size of the subject property and its ability to handle

a drive-through queue and the types of potential drive-through restaurants, such as a Taco Bell, that may seek to occupy the space were known to the governing body; and

WHEREAS, the Board also failed to find that the Applicant had adequately demonstrated the negative criteria for the requested variance. Board members noted that the grant of the variance would result in substantial impairment of the zoning ordinance; and

WHEREAS, the Board, having failed to approve the requested variance pursuant to N.J.S.A. 40:55D-70(d)(1) did not reach a conclusion with respect to the variances pursuant to N.J.S.A. 40:55D-70(c) nor the preliminary and final site plan aspect of the application; and

WHEREAS, the Board took action on this application at its meeting on October 11, 2023, and this Resolution constitutes a Resolution of Memorialization of such action taken in accordance with N.J.S.A. 40:55D-10(g).

NOW, THEREFORE, BE IT RESOLVED, by the Zoning Board of Adjustment of the Borough of Midland Park, on this 13th day of December, 2023, that the application filed by MHF Midland Park, LLC, for a (d)(1) “use” variance, preliminary and final major site plan approval, and (c) “bulk” variance and design waiver relief, be and is hereby **DENIED**.

I hereby certify that this is a true copy of a resolution of the Midland Park Zoning Board of Adjustment duly adopted at a regular public meeting held on December 13, 2023. This Resolution memorializes an action of the Board taken on October 11, 2023.

Richard Formicola, Secretary

Les Andersen, Chairman