

**BERNARDS TOWNSHIP
BOARD OF ADJUSTMENT
MINUTES
Regular Meeting
January 6, 2010**

Board Chairman Orr called the regular meeting to order at 7:35 p.m.

ROLL CALL:

Members present: Lasko, Marshall, Miller, Orr, Plaza, Viola, Ross, Rhatican

Members absent: Schulenburg

Members late: none

Board Attorney Steven Warner, Esq., Board Engineer Peter Messina, and Board Planner David Schley were also present.

OPEN MEETING STATEMENT

“In accordance with the requirements of the Open Public Meetings Law, notice of this regular meeting of the Board of Adjustment of the Township of Bernards was posted on the bulletin board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, New Jersey, was sent to the Bernardsville News, Bernardsville, NJ, the Courier News, Bridgewater, NJ, and the Star-Ledger, Newark, NJ and was filed with the Township Clerk all on December 9, 2009. We received no requests for individual notice.”

APPROVAL OF MINUTES

The motion was made by Mr. Lasko and seconded by Ms. Marshall to approve the minutes of September 17, 2009 as drafted.

Roll call:

Aye: Lasko, Marshall, Miller, Plaza, Orr

(Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

The motion was made by Mr. Miller and seconded by Ms. Marshall to approve the minutes of October 7, 2009 as drafted.

Roll call:

Aye: Marshall, Miller, Orr

Abstain: Plaza

(Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

APPROVAL OF ESCROW CHARGES AGAINST ESCROW ACCOUNTS

The motion was made by Mr. Plaza and seconded by Mr. Miller to approve escrow charges from Steven Warner, Esq. for October and November 2009, from David Schley for November and December 2009, John Belardo, Esq. for September and October 2009, and Peter Messina for September and November 2009.

APPROVAL OF RESOLUTIONS

RESOLUTION – Howmichael Company and One Twelve Corp. – Block 10402, Lots 1 & 2 – Denial of Application for Bulk Variances and Lot Merger

The motion was made by Mr. Plaza and seconded by Mr. Miller to approve the resolution as drafted. Board members commended Mr. Warner for a well-drafted resolution.

Roll call:

Aye: Miller, Plaza, Orr
(Mr. Lasko, Ms. Marshall, Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

RESOLUTION – Rafferty, Eugene and Ellen – Block 9001, Lot 103 – Withdrawal of Application for Use and Bulk Variances

The motion was made by Mr. Miller and seconded by Ms. Marshall to approve the resolution as drafted.

Roll call:

Aye: Marshall, Plaza, Orr
(Mr. Lasko, Ms. Marshall, Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

RESOLUTION – Eager, Matthew and Janel – Block 3901, Lot 74 – Application for Bulk Variances

The motion was made by Mr. Plaza and seconded by Mr. Miller to approve the resolution as drafted.

Roll call:

Aye: Miller, Plaza, Orr
(Mr. Lasko, Ms. Marshall, Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

RESOLUTION – Ross, John J. – Block 7903, Lot 8 – Application for Bulk Variances

The motion was made by Mr. Miller and seconded by Mr. Orr to approve the resolution as drafted.

Roll call:

Aye: Miller, Orr
(Mr. Lasko, Ms. Marshall, Mr. Plaza, Mr. Viola, Mr. Ross and Mr. Rhatican were ineligible to vote)

Motion carried

HEARING – JAFFA BUILDING, LLC – Block 11401, Lot 26 (formerly Block 187, Lot 33.12) – 95 Emerald Valley Lane – Extension of Bulk Variance Approval to February 4, 2011

John Dusinger, Esq. represented the applicants. He said that relief was granted to Jaffa Building for Lot 26 for minimum improvable lot area in a resolution memorialized on April 4, 2009. Due to the economy, the applicants have not commenced construction of the residence on this lot. He said that as per ordinance, the applicants were requesting extension of the variance approval to April 4, 2011.

Public hearing was opened for questions and comments; hearing none, the public portion of this hearing on this application was closed.

The motion was made by Mr. Miller and seconded by Mr. Lasko to direct the Board Attorney to draft a resolution granting the extension of bulk variance approval to February 4, 2011.

Roll call:

Aye: Lasko, Marshall, Miller, Plaza, Viola, Ross

Motion carried

HEARING – SCHMALL, PAUL and PATRICIA – Block 2905, Lot 12 – 22 Peachtree Road – Extension of Bulk Variance Approval to November 15, 2010

Paul Schmall, 22 Peachtree Road, was sworn in. He said that he and his wife received variance approval in a resolution memorialized on November 5, 2008 to build an addition. Due to the increase in costs, they had not been able to begin this construction and the variance approval had lapsed on November 5, 2009.

Public hearing was opened for questions and comments; hearing none, the public portion of this hearing on this application was closed.

The motion was made by Mr. Plaza and seconded by Mr. Miller to direct the Board Attorney to draft a resolution granting extension of bulk variance approval for this variance to November 5, 2010 subject to all conditions from the previous resolution.

Roll call:

Aye: Lasko, Marshall, Miller, Plaza, Viola, Ross, Orr

Motion carried

COMPLETENESS REVIEW & PUBLIC HEARING – GANNON, JOHN and KRISTEN – Block 2906, Lot 27 – 4 Woodstone Road – Bulk Variance

John Gannon, 4 Woodstone Road, Joseph Marchese, architect, Kenil, NJ, Mr. Messina, and Mr. Schley were sworn in. Mr. Gannon said that he wants to expand his house and build an addition to accommodate his children and his wife's mother. This addition needs relief from the front yard setback from Woodstone Road and rear yard setback but conforms to all other bulk requirements. He said that the expanded stoop would remain open.

The public hearing was opened for questions and comments; hearing none, the public portion of this hearing on this application was closed.

Mr. Warner listed as conditions of approval: moving the existing shed to a conforming location; the stoop area to remain open; and the exterior treatments to be similar to the existing house.

The motion was made by Mr. Miller and seconded by Ms. Marshall to deem the application complete and to direct the Board Attorney to draft a resolution approving the application subject to the conditions discussed.

Roll call:

Aye: Lasko, Marshall, Miller, Plaza, Viola, Ross, Orr

Motion carried

COMPLETENESS REVIEW & PUBLIC HEARING – MOSHIER, MICHAEL and ELIZABETH – Block 2602, Lot 13 – 15 Dogwood Way – Bulk Variance

Vincent Bisogno, Esq. represented the applicants. He said that they wanted to demolish the existing house on this lot and build a new residence. He said that they needed relief from the minimum lot width and minimum improvable lot area requirements for this lot. He noted that the new construction will eliminate two other existing zoning violations.

Paul D. Fox, PE, Apgar Associates, Far Hills, NJ, and Mr. Schley and Mr. Messina were sworn in. Mr. Fox addressed the comments in Mr. Schley's December 23, 2009 memo. He said that the adjoining lots were nonconforming in size so the applicants could not purchase additional land. He said that the tree protection, removal and replanting plans would be subject to approval of the Township Engineer.

Public hearing was opened for questions of this witness; hearing none, the public portion of this hearing on this witness was closed.

John James, architect, Maplewood, NJ was sworn in. He testified to the condition of the existing house. He said the applicants intended to replace the pool and build a 3000 sq ft house in a rural colonial style. He submitted as Exhibits A-1, A-2 and A-3 photographs of new construction built in a similar style on Culberson Road, Lake Road and Dogwood Way.

Public hearing was opened for questions of this witness; hearing none, the public portion of this hearing on this witness was closed.

Michael Moshier, 67 South Alward Avenue was sworn in. He said that he and his wife had purchased this property in April 2009 and that currently it was rented.

Public hearing was opened for questions of this witness; hearing none, the public portion of this hearing on this witness was closed.

Board members expressed their support of the application, noting the elimination of existing zoning violations.

The motion was made by Mr. Miller and seconded by Mr. Lasko to deem the application complete and to direct the Board Attorney to draft a resolution approving the application subject to comments 4 through 9 in Mr. Schley's December 23, 2009 memo.

Roll call:

Aye: Lasko, Marshall, Miller, Plaza, Viola, Ross, Orr
Motion carried

Comments from Members

Mr. Orr welcomed the new Board members.

Comments from Staff

Mr. Warner offered to hold a class for new Board members on January 14, 2010.

The Board moved to adjourn the public meeting at 9:30 p.m., there being no further business to discuss.

Respectfully submitted,

Frances Florio
Secretary to the Board

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**HOWMICHAEL COMPANY and ONE TWELVE CORP.
Case No. ZB 06-012A**

RESOLUTION (ON REMAND)

WHEREAS, HOWMICHAEL COMPANY (“Howmichael”) and ONE TWELVE CORP. (“One Twelve”) (collectively, the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) seeking the following variance relief in connection with the proposed construction of a new dwelling on two separately owned and adjacent vacant lots designated as Block 10402, Lots 1 & 2 (formerly Block 176, Lots 1 & 2) on the Tax Map of the Township of Bernards, more commonly known as 155 Somerville Road:

(1) A variance for a pre-existing lot area of 1.037 acres, whereas the minimum required lot area in a R-1 (3 acre) residential zone is 3 acres, pursuant to Section 21-15.1(d)(1) and Table 501 of the Land Development Ordinance;

(2) A variance for a pre-existing lot width of 256.5 feet and a proposed lot width of 216.5 feet, whereas the minimum required lot widths for a corner lot in a R-1 (3 acre) residential zone are 312.5 feet and 250 feet, pursuant to Section 21-15.1(d)(1) and Table 501 of the Land Development Ordinance;

(3) A variance for a proposed front-yard setback from Somerville Road (west) of 73.8 feet, whereas the minimum required front-yard setback in R-1 (3 acre) residential zone is 100 feet, pursuant to Section 21-15.1 (b) and (d)(1) and Table 501 of the Land Development Ordinance;

(4) A variance for a proposed front-yard setback from Somerville Road stub (east) of 74.9 feet, whereas the minimum required front-yard setback in R-1 (3 acre) residential zone is 100 feet, pursuant to Section 21-15.1(b) and (d)(1) and Table 501 of the Land Development Ordinance;

(5) A variance for a proposed front-yard setback from Route 78 (south) of 39.2 feet, whereas the minimum required front-yard setback in R-1 (3 acre) residential zone is 100 feet, pursuant to Section 21-15.1(b) and (d)(1) and Table 501 of the Land Development Ordinance; and

(6) A variance for an improvable lot area of 0 square feet, whereas the minimum required improvable lot area in an R-1 (3 acre) residential zone is 25,000 square feet, pursuant to Section 21-10.4(b) and Table 401-A of the Land Development Ordinance; and

WHEREAS, public hearings on notice were held on such application on February 4, April 16, September 17, and November 12, 2009, at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicants, Objectors, and the Board, and the reports from consultants and reviewing agencies, has made the following factual findings and conclusions:

PROCEDURAL HISTORY

1. From approximately November 2006 through April 2007, the Board conducted hearings on the predecessor to the instant application under Docket No. ZB06-012, culminating in a decision on or about April 4, 2007 whereby the Board denied the predecessor application by a vote of 4 to 0.

2. The memorializing resolution, dated May 9, 2007, reflected that the Applicants originally owned approximately 40 contiguous acres and had the economic benefit of private sales and sales to the State of New Jersey of approximately 39 of those acres, thus resulting in the approximately 1 acre subject parcel (consisting of Lot 1 owned by Howmichael and comprised of 0.977 acres and Lot 2 owned by One Twelve and comprised of 0.060 acres) being left which, even if the separately owned lots were merged, would not meet the vast majority of the dimensional requirements of the Land Development Ordinance. The Board questioned from the evidence presented whether the Applicants had, in fact, already been compensated for the remainder lots by virtue of the

damages received from the State in connection with the condemnation sales of the surrounding lots. The Board also noted that, regardless, the Township taxes the subject lots as being of inconsequential value. The Board concluded that the evidence indicated that any hardship to the Applicants was “self created”. Additionally, the Board found that the Applicants failed to satisfy the negative criteria, particularly in light of the negative impact that the proposed development would have on the existing rural streetscape.

3. On or about June 7, 2007, the Applicants appealed the Board’s decision to the Superior Court of New Jersey, Law Division. The Trial Judge, in his opinion dated January 31, 2008, determined that there was an insufficient record to make a definitive determination as to whether the Applicants’ hardship was self-created or not. Also, in examining whether the Applicants had satisfied the negative criteria, the Trial Judge concluded that these matters were not fully explored on the record and there was a dearth of expert opinion on behalf of the neighboring objectors and the Township. Thus, the Trial Judge remanded the application to the Board for further testimony consistent with his decision.

4. The Order of Remand, dated February 20, 2008, specifically states, at paragraph 1, that “the within matter is remanded to the Bernards Township Board of Adjustment for the taking of additional testimony and proofs on the issues set forth in the Court’s opinion of January 31, 2008.”

SUMMARY OF APPLICATION

5. The site consists of two adjacent lots, Lot 1, comprised of only 0.977 acres and owned by Howmichael, and Lot 2, comprised of only 0.060 acres and owned by One

Twelve. The two lots, even if merged, would constitute only an approximately 1.037 acre lot, and are located in the R-1 (3 acre) residential zone. The site abuts an approximately 15,000 square foot Township-owned lot to the north (Lot 3) and is otherwise surrounded by public rights-of-way.

6. The subject lots, even if merged, would be substantially deficient in both lot area and lot width. Moreover, since the parcel abuts public rights-of-way to the east, west and south, it has three front-yard setbacks, each of which would be substantially deficient based upon the proposed development. Finally, there is no improvable lot area at the site. The Land Development Ordinance requires a minimum improvable lot of 25,000 square feet within the building envelope. However, the site contains no building envelope, since there is no area where a dwelling could be constructed in compliance with all required setbacks. As such, there is no improvable lot area at the site.

7. Subsequent to the remand by the Superior Court, the Applicants reduced the size of the dwelling proposed to be constructed on the subject lots. The current proposal compares to the previously denied proposal as follows. The floor area of the dwelling has been reduced from 3,534 square feet to 2,988 square feet. The outside dimensions of the footprint have been reduced from roughly 75 feet wide by 36 feet deep to roughly 62 feet wide by 42 feet deep, which includes an added 6 foot by 40 foot (240 square foot) open front porch. The height of the dwelling has been reduced from 30 feet, 6 inches to 27 feet, 8.5 inches. The attached garage has been reduced from an approximately 698 square foot, three-car garage to an approximately 588 square foot, two-car garage. The dwelling/driveway location, lot coverage, limits of disturbance and landscaping are substantially the same as previously proposed. The dwelling setbacks

have changed due to the revised building footprint, with the greatest change being an increase in the northerly setback from 107.2 feet to 117.4 feet.

8. The Applicants submitted a Variance and Lot Consolidation Plan, prepared by Craig Villa, P.E., of Yannaccone, Villa & Aldrich, LLC, dated October 21, 2005, and last revised December 17, 2008, same consisting of 8 pages. The Applicants also submitted architectural renderings of the proposed dwelling (elevation and floor plans) prepared by Architecture Plus, dated June 10, 2008, and last revised September 15, 2008, same consisting of one page.

9. By Memorandum dated February 18, 2009, the Township Environmental Commission noted that its previous comments still stood, including that it appeared that the Applicants did not have a reserve area for the septic system and that the tree replacement plan did not include trees from the recommended species list.

10. The Applicants seek variance relief for the pre-existing lot area and lot width deficiencies, the multiple proposed front-yard setback deviations and the absence of any, let alone the minimum required, improvable lot area, pursuant to N.J.S.A. 40:55D-70(c)(1).

TESTIMONIAL AND DOCUMENTARY EVIDENCE

11. David Schley, A.I.C.P./P.P., the Board Planner, and Peter A. Messina, P.E., P.P., the Board Engineer, both were duly sworn according to law.

12. Craig Villa, P.E., of Yannaccone, Villa & Aldrich, LLC, in Chester, New Jersey, was duly sworn according to law. Mr. Villa provided his qualifications and was accepted by the Board as an expert in the field of engineering. Mr. Villa described the site as an orphan lot, surrounded by Somerville Road and Old Somerville Road. He

referred to the Variance and Lot Consolidation Plan and testified regarding the lack of wetlands on the property, the availability of septic service, the tree removal and replacement plan, stormwater mitigation and the proposed lot coverage. Mr. Villa testified that the proposed dwelling had been reduced from a 5 bedroom, three-car garage home with 3,534 square feet of living space to a 4 bedroom, two-car garage home with 2,988 square feet of living space, and from a height of 30 feet, 6 inches to 27 feet, 8.5 inches. He testified regarding the required variances for lot area, lot width, front-yard setbacks and improvable lot area, as set forth in the January 27, 2009 memorandum of Mr. Schley, the Board Planner.

13. The Applicants introduced into evidence numerous exhibits, most of which had been previously entered into evidence during the 2007 hearings on the predecessor application. These exhibits included the following:

Exhibit A-1 – Deed dated January 16, 1963 from Dorothy Hannibal to Howmichael;

Exhibit A-2 - Survey of property owned by David Mandelbaum showing proposed location of Route 78;

Exhibit A-3 – Deed dated February 26, 1964 from Howmichael to One Twelve;

Exhibit A-4 – Three letters from 1963 to 1965 concerning purchase of land by New Jersey State Highway Department;

Exhibit A-4a –Eleven additional letters discovered by the Applicants concerning the sale of land to the State of New Jersey at various dates from December 16, 1962 through, to and including August 16, 1966;

Exhibit A-5 – A copy of a New Jersey Department of Transportation (NJDOT) Map dated 1961;

Exhibit A-5a – A copy of Exhibit A-5 with a title block added;

Exhibit A-5b – An enlargement of a portion of Exhibit A-5a using colorization to show the original acres of land bought by the State and the orphan lot that remained;

Exhibit A-6 – A copy of July 29, 1965 Purchase Agreement between Howmichael and the State;

Exhibit A-7 – A copy of July 29, 1965 Purchase Agreement between One Twelve and the State;

Exhibit A-8 – A copy of August 23, 1965 Purchase Agreement between Howmichael and the State;

Exhibit A-9 – A copy of a Planning Board Resolution granting minor subdivision of Block 86, Lot 8 to Premier Home Builders on March 19, 1996;

Exhibit A-10 – A copy of a Planning Board Resolution granting minor subdivision of Block 86, Lots 36.01, 35.01, and 35.02 to Howmichael and One Twelve;

Exhibit A-11 – Three letters concerning the possible purchase of land owned by NJDOT dated August 30, September 18, and September 20, 2006, respectively; and

Exhibit A-11a – A letter received from NJDOT on December 18, 2008 informing counsel for Applicants that the Township had purchased Lot 3.

14. Mr. Villa testified that the Applicants would comply with all of the comments set forth in the January 27, 2009 Memorandum of the Board Planner.

15. The Board Planner submitted a Memorandum, dated April 14, 2009, summarizing the zoning history of the subject property based on Township records and demonstrating, *inter alia*, that at no time since December 1954 was the subject property zoned with a minimum lot area of less than at least 2 acres.

16. Peter Streletz of P.S. Construction, Inc., Kintersville, Pennsylvania, was duly sworn according to law. Mr. Streletz testified that he was a builder licensed in Pennsylvania. He opined that the proposed “colonial” style of the home, the size of the dwelling and the proposed landscaping would work well on the subject lot. He further testified that he did not think that any blasting would be required, but that he would hire a blasting expert if it was necessary.

17. On questioning by Board Members, Mr. Streletz conceded that he was not licensed as a planner such that he was not qualified to render opinions regarding how the proposed dwelling would, or would not, fit in with the neighborhood. On further questioning by Board Members, Mr. Streletz testified regarding the procedures required by contractors when blasting is necessary. Several Board Members expressed their concern regarding blasting at the site, including the possible impact that it could have on the wall to the south along Route 78 and the adjacent home at 165 Somerville Road owned by the Napolitanos.

18. Michael Mandelbaum, Vice President of Howmichael Company, Short Hills, New Jersey, was duly sworn according to law. Mr. Mandelbaum testified that he was an attorney and that his family has been in the real estate business as investors for generations. He testified that his father, David Mandelbaum, was the President of Howmichael Company and that his father had bought the subject property from the

Hannibals in 1963. The documentary evidence submitted by the Applicants, including Exhibits A-1 and A-3, revealed that Howmichael initially purchased 2 tracts of land, consisting of 25.191 acres and 8.779 acres, for a cumulative acreage of approximately 34 acres, from the Hannibals in January of 1963, and thereafter sold the second smaller tract (8.779 acres) to One Twelve by Deed dated February 26, 1964. Michael Mandelbaum stated that his testimony was based upon his discussions with his father, David Mandelbaum, and that his father had no independent recollection of the transactions and negotiations that had taken place back in the 1960's, but instead based his recollection on a review of those records that had been maintained since that time.

19. The Applicants introduced into evidence additional documents as follows:

Exhibit A-14 - Copies of 14 letters from the New Jersey State Highway Department archives;

Exhibit A-15 - A copy of a New Jersey State Highway Department general property parcel map for Section 4A of Route 78;

Exhibit A-16 - A portion the same map as Exhibit A-15 showing the remainder lots outlined; and

Exhibit A-17 - A similar map with the remainder lots colorized.

20. The Applicants also introduced into evidence as Exhibit A-18, a copy of a Government Records Request submitted to NJDOT under the Open Public Records Act ("OPRA"), together with a copy of the documents produced in response to said request; and as Exhibit A-19 an August 25, 1998 letter from the then Township Administrator to David Mandelbaum.

21. David Mandelbaum was duly sworn according to law. David Mandelbaum testified that he graduated from Princeton University and Harvard Law School, that he was a real estate investor and an attorney, having passed the bar in 1960. He testified that he was the President of both Howmichael and One Twelve.

22. Mr. Mandelbaum testified that he purchased approximately 34 acres of land from the Hannibals in 1963 with the intention of having his children reside on the lots. On a subsequent hearing date, Michael Mandelbaum, David's son, testified that his father must have been mistaken since none of David's children had yet been born at the time of the land purchase. David Mandelbaum further testified that he had little recollection of the negotiations with the Hannibals and the subsequent negotiations with the New Jersey State Highway Department regarding the condemnation of a portion of the property. He stated that the basis of his testimony was his review of those documents which remained in his files from 45 years ago. He testified that he did not have any independent recollection of the events of that time.

23. Mr. Mandelbaum testified that he did not have any input in the redesign of Route 78 or Somerville Road. He testified that there was nothing in the documents that he reviewed that indicated that there were any negotiations with the State regarding the location of Route 78 or Somerville Road. He further testified that he did not know what the zoning was for the subject property during that timeframe.

24. Mr. Mandelbaum testified that throughout the 1960's and thereafter he purchased, individually or in syndication with others, numerous parcels of land. He further testified that he was aware of the State Highway program and the construction of Routes 78, 287 and 80. On cross examination by Board Members, Mr. Mandelbaum

testified that he was elected to the New Jersey Assembly in 1961 and that he served three consecutive two-year terms until 1967, before being elected to the State Senate. He further testified that he was on the Appropriations Committee, but he denied that he was privy to any discussions regarding proposals for the creation and location of Route 78 during his time in public office.

25. David Mandelbaum testified that in the 1960's both Howmichael and One Twelve were founded by his father and that he has more than 100 other entities for purposes of investing, holding and managing property. Mr. Mandelbaum testified in detail regarding his sophistication as a real estate investor and property owner. He testified, *inter alia*, that he formed Interstate Properties, an investment partnership, in the late 1960's with Steven Roth and Russell Wright. He further testified that Interstate Properties joined with other investors in taking over Vornado Realty in a proxy contest, and that they built it into a real estate investment company currently with more than \$10 billion dollars in assets. He testified that the company started building shopping centers and is now the largest owner of office buildings in the New York metropolitan area.

26. The Board specifically requested that David Mandelbaum be produced since the Applicants informed the Board that he would be the only individual who might have personal knowledge regarding the subject negotiations and transactions with the Hannibals and the State. Mr. Mandelbaum was produced on the third hearing date of September 17, 2009. After being permitted to testify for a relatively short period of time, and questioned by just 2 of the 7 Board Members neither of whom completed initial questioning, Michael Mandelbaum, David Mandelbaum's son, refused to permit his father to answer any further questions, citing concerns about his father's health. David

Mandelbaum took offense to the Board's questions since, in his opinion, the questions related to his credibility. Michael Mandelbaum's objection to his father's continued questioning followed Board questions related, in part, to (a) the fair market value of the property for condemnation purposes and the discrepancy, as reflected in the Department of Transportation documents, between David Mandelbaum's representation to the Department that he purchased the property at \$2,500/acre and the seller Dorothy Hannibal's representation that Mr. Mandelbaum paid \$250/acre; and (b) Mr. Mandelbaum's knowledge of Route 78 prior to purchasing the lots in question and his intentions regarding the property. The Board requested that David Mandelbaum return on a subsequent evening so as to permit the Board the opportunity to further develop the record and question David Mandelbaum regarding, *inter alia*, the issue of whether or not the alleged hardship was self-created. The Applicants refused, however, to reproduce David Mandelbaum for any further testimony or questioning.

27. Adrian Humbert, P.P., was duly sworn according to law, provided his qualifications and was accepted by the Board as an expert planner. Mr. Humbert explained that the subject property was an isolated, undersized lot, with a Township owned lot to the North and Route 78 to the South, and with right-of-ways on both the East and the West. Mr. Humbert testified that, in his opinion, the Applicants had satisfied the positive criteria for the subject bulk variance relief on undue hardship grounds. He explained that the subject property has only approximately one-third the minimum required lot area and that the literal application of the Land Development Ordinance results in the parcel having 3 deficient front-yard setbacks and no building envelope whatsoever.

28. Mr. Humbert testified that he could not render any opinions regarding whether the alleged qualifying hardship was self-created, since same was a legal issue and he could only provide his observations as a professional planner.

29. Mr. Humbert opined that the Applicants had satisfied the negative criteria; that is that the proposal would not be substantially detrimental to the public good, nor would it substantially impair the intent and purpose of the zone plan or zoning ordinance. He characterized as the relevant neighborhood the approximately 17 lots to the north of Route 78, the closest of which were the 10 recently developed homes on Parkwood Lane. Mr. Humbert testified that he would not consider the property to the south of Route 78 as part of the neighborhood because Route 78 was a significant physical barrier between the subject property and the homes on the other side. He opined that the proposed dwelling would not be of a size or scale conflicting with the size and scale of the 17 properties in the immediate neighborhood, nor would it constitute a different use since all of these properties are used for residential purposes. Mr. Humbert testified that 14 of the 17 neighboring properties did not meet the 3-acre minimum lot size requirement under the Land Development Ordinance. He also testified that 10 of the 17 neighboring properties did not meet the 100-foot minimum front-yard setback requirement. Upon questioning by a Board Member, Mr. Humbert agreed that the degree of nonconformity is relevant in evaluating the negative criteria.

30. The Applicants introduced into evidence, as Exhibit A-20a and b, two photoboards with 6 photos on each, all of which Mr. Humbert testified he took on January 10, 2007. Mr. Humbert opined that the Applicants had satisfied their obligation in this isolated, undersized lot case to make an offer to either purchase additional land

from adjoining property owners or sell the subject undersized lot to the owners of adjoining properties.

31. On questioning by Board Members, Mr. Humbert conceded that all of the 17 neighboring properties that he used for comparisons purposes were at least 2 to 2 ½ acres in size, whereas the subject parcel was little more than 1 acre.

32. The Board Planner testified, in detail, regarding his opinion that the Applicants had failed to satisfy the negative criteria. He opined that the proposed development would substantially impair the intent and purpose of the zone plan and zoning ordinance since it would have a negative impact on the existing rural streetscape, the preservation of which is a goal stated in the Township's Master Plan. He testified that one of the Master Plan's goals was preserving the countryside character and rural streetscapes in this area of the Township. The Board Planner testified that there were only 5 homes within 1,000 feet of Route 78 to the north and that all 5 of these homes had front-yard setbacks between 98 feet and 152 feet along Somerville Road, whereas the subject property is proposed to have less than a 75 foot front-yard setback. He further testified that the specific zoning provisions regarding front-yard setbacks were designed with the intent of preserving the rural streetscapes.

33. The Board Planner further opined that the proposed development would constitute a substantial detriment to the public good. He opined that the elevation of the subject property would exacerbate the negative impact of the already deficient front-yard setback on the rural streetscape. On questioning by Board Members, the Board Planner opined that the proposed dwelling would have a negative visual impact on the neighboring Napolitano property at 165 Somerville Road, since the subject property was

of a significantly higher elevation and the Napolitano home is less than two-thirds the size of the proposed dwelling.

34. The Applicants introduced into evidence, as Exhibit A-21, a letter from their counsel dated November 9, 2009, offering to purchase from the Township Lot 3, the approximately 15,000 square foot contiguous lot to the north of the subject property. The Applicants' counsel recognized that it had been only 2 days since the letter was sent to the Township and obviously there had not yet been sufficient time for any response thereto.

35. The Board introduced into evidence, as Exhibit B-1, copies of an intergovernmental Document Request Form submitted by the Township Engineering Department to NJDOT, together with 8 sets of plans (5 roadway plans and 3 right-of-way plans) provided by NJDOT in response to the request.

36. Eileen Napolitano, 165 Somerville Road, was duly sworn according to law and testified in opposition to the application during the public comment period. Mrs. Napolitano testified that she and her husband, James A. Napolitano, purchased Block 11201, Lot 21, just to the east of the subject lot (across the Somerville Road stub) in 1953 and have since resided there. She introduced into evidence, as Exhibit O-1, a portion of the Township Tax Map (page 68) depicting the subject lots and the surrounding neighborhood. Mrs. Napolitano testified that, in her opinion, the subject lot was never a buildable lot. Mrs. Napolitano introduced into evidence, as Exhibit O-2, a letter addressed to the Board setting forth the objections that she and her husband had to the subject development application. Mrs. Napolitano read the entire letter into the record.

THE BOARD'S DECISION

37. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicants have failed to satisfy their burden of proving an entitlement to the requested variance relief under N.J.S.A. 40:55D-70(c)(1). First, the Board finds that the Applicants have failed to demonstrate that the alleged hardship was not self-created. Second, and cumulatively, the Board finds that the Applicants have failed to satisfy the “negative criteria.”

Undue Hardship/Self-Created Hardship

The Legal Parameters:

38. An applicant seeking variance relief under N.J.S.A. 40:55D-70(c)(1) must, in order to satisfy the “positive criteria”, demonstrate that the strict application of the zoning regulations would result in (1) peculiar and exceptional practical difficulties to, or (2) exceptional and undue hardship upon, the applicant, arising out of (a) the exceptional narrowness, shallowness or shape of the specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting the specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting the specific piece of property or the structures lawfully existing thereon. An applicant also must establish the “negative criteria” in a c-1 “undue hardship” case, as in all variance applications. See Dallmeyer v. Lacey Twp. Bd. of Adj., 219 N.J. Super. 134, 146 (Law Div. 1987) (holding, *inter alia*, that an applicant in an undersized lot case “should be required to carry the burden of proof, as in all other cases, and develop the positive and negative criteria”).

39. If the alleged hardship is created by the applicant itself, then the applicant has failed to satisfy the “positive criteria” and is precluded from c-1 variance relief. Jock

v. Zoning Bd. of Adj., 184 N.J. 562, 591 (2005). The concept of “self-created hardship” was examined by the Supreme Court in Commons v. Westwood Zoning Bd. of Adj., 81 N.J. 597 (1980), a case, like the subject case, involving a request for a variance to permit construction of a home on an undersized, isolated lot. The Court discussed the concept as follows:

it is appropriate to consider first the origin of the existing situation. If the property owner or predecessor in title created the non-conforming condition, then the hardship may be deemed to be self-imposed. To measure this type of impact it is necessary to know when the zoning ordinance limitations were adopted and the status of the property with respect to those limitations at that time. Thus, if the lot had contained a 75-foot frontage and despite the existence of that requirement, the owner sold a 40-foot strip of the land, the owner or the successors in title would have little cause to complain. Likewise, no undue hardship is suffered by an owner of a lot with a 35-foot frontage who acquired a 40-foot strip so that the lot complied with the ordinance and then sold a part of the land. These examples serve to illustrate the nature of a self-inflicted hardship which would not satisfy the statutory criteria.

81 N.J. at 606 (emphasis added).

40. The Board finds that the Applicants have the burden of proving that the alleged hardship was not self-created. The Appellate Division in Deer-Glen Estates v. Bd. of Adj. & Appeal, 39 N.J. Super. 380 (App. Div. 1956), presumed that the applicant in a c-1 variance case has the burden of proving that the undue hardship was not self-created. Moreover, the Applicants, themselves, acknowledge, in their counsel’s July 28, 2009 memorandum, that they have the burden of establishing that the alleged hardship was not self-created.

41. The Board rejects the Applicants’ contention that a finding of a self-created hardship requires a determination that an applicant or its predecessor-in-title acted with the intent to, and in fact did, commit flagrant violations of the zoning

ordinance or otherwise exhibited signs of bad faith. The Applicants' contention directly contradicts the recent Appellate Division decision in Egeland v. Bd. of Adj. of the Twp. of Colts Neck, 405 N.J. Super 329 (App. Div. 2009). In Egeland, the owner of an undersized lot created by a testamentary devise (a bequest in his mother's will) brought an action to challenge a zoning board's denial of a hardship variance application after a finding by the board that the hardship was self-created. The Law Division affirmed the zoning board's decision and the Appellate Division upheld the trial court. Notably, the applicant in Egeland argued, as the Applicants did herein, that there must be an element of "illegality" or an "adroitly purposeful act" by the landowner or a predecessor-in-title to warrant the application of the concept of a self-created hardship. The Appellate Division in Egeland explicitly rejected this argument. 405 N.J. Super at 334. The Court recognized that, despite Egeland's contention to the contrary, there was nothing in the Supreme Court's opinion in Jock to support the contention that there must have been some sort of misconduct or bad motive on the part of the person creating the non-conforming lot.

The Factual Findings and Conclusions:

42. The Board finds that the Applicants have failed to satisfy their burden of proving that the alleged hardship was not a self-created one and, thus, the Applicants are precluded from variance relief under N.J.S.A. 40:55D-70(c)(1).

43. First, with respect to the origin of the subject parcel, the Board finds that the subject parcel was part of a larger conforming tract prior to 1963 when the Applicants purchased the larger tract from the Hannibals and then, through 1966, voluntarily negotiated with the State Highway Department for acquisition by it of portions of the tract, ultimately resulting in the subject undersized lots. In fact, since the State purchased what is now designated as Lot 3, the 15,000 square foot contiguous lot to the north, the Applicants retained only a portion of a remainder parcel. Moreover, the parcel itself consists of 2 separate lots (Lot 1 owned by Howmichael with 0.977 acres and Lot 2 owned by One Twelve with 0.060 acres), each of which was, and remain, under separate ownership.

44. The Board further finds that there was no change in the applicable zoning that created the alleged hardship by causing a compliant parcel to become undersized. At no relevant time would the subject lots, even if they had been merged, have been in compliance with the minimum lot size requirements of the Land Development Ordinance. Pursuant to the April 14, 2009 Memorandum prepared by the Board Planner, the approximately 1 acre merged parcel would never have been compliant, since the applicable zoning provisions required a minimum lot area of at least 2 acres at all relevant times. Thus, the Board finds that the sale by the Applicants to the State of the surrounding property, and the Applicants' deliberate retention of, or failure to request

that the State purchase, the remaining lots, caused the Applicants to be left with the subject undersized parcel. In other words, the sales by the Applicants, coupled with their retention of the remainder lots, created the hardship about which the Applicants now complain.

45. The Board further finds that the Applicants have failed to demonstrate that the State would not have purchased the subject lots along with the balance of the property that the State did purchase from the Applicants. As such, the Board concludes that the Applicants have failed to meet their burden of demonstrating that they did not create the alleged hardship of which they now complain.

46. First, and foremost, the Board concludes that the Applicants have failed to introduce any testimonial or documentary evidence to support their contention that they were, in essence, forced by the State to be “stuck” with the subject lots. The only witness offered by the Applicants as possibly possessing knowledge of any facts relevant to this issue, David Mandelbaum, testified that he had no independent recollection of the facts and circumstances surrounding the subject transactions, which took place during the 1960’s. Moreover, none of the documentary evidence introduced by the Applicants or otherwise submitted to the Board indicated, let alone demonstrated, that the Applicants had no choice but to be “stuck” with the subject undersized lots. In fact, certain of the documentary evidence indicated that the converse was true, that is, that the Applicants did have at least some control over whether the State would acquire the subject lots along with the balance of the property. Board members and the public were deprived the opportunity to present such documentary evidence to David Mandelbaum for the purpose of refreshing his recollection of events.

47. Second, the Board finds that the applicable provisions of the Eminent Domain Act, and the apparent practice and procedure by the State Highway Department in pre-condemnation proceedings, further suggest that the Applicants did have the ability, if not the right, to require that the State Highway Department acquire the subject grossly undersized lots along with the balance of the property acquired by it. The Eminent Domain Act of 1971 provides, in relevant part, that:

If, as a result of a partial taking of property, the property remaining consists of a parcel or parcels of land having little or no economic value, the condemnor, in its own discretion or at the request of the condemnee, shall acquire the entire parcel.

N.J.S.A. 20:3-37.

One Twelve's remaining lot comprised only 0.060 acres, and Howmichael's remaining lot only comprised of 0.977 acres.

48. While the Eminent Domain Act was not created until 1971, the Act resulted from the recommendations of the Eminent Domain Revision Commission, which was created in 1962 to study and prepare a proposed revision of the existing statutes governing eminent domain. Moreover, the Eminent Domain Act was not an enabling statute, but, rather it created a uniform practice and procedure for the exercise of the power of eminent domain by all bodies vested with such power pursuant to statutes which preexisted the Act. The Report of the Eminent Domain Revision Commission, dated April 15, 1965, suggests that no change was made with regard to the State's procedures for acquiring uneconomic remnants. Thus, the authority of a condemnor to take the entire parcel rather than leave an uneconomic remnant, as well as the right of a condemnee to request same, was the law applicable in the 1960's when the State Highway Department purchased the property surrounding the subject undersized lots.

49. Moreover, N.J.S.A. 27:7-22.6 pertaining to the acquisition, construction and maintenance of state highways, vests in the Commissioner of Transportation the discretion to acquire an entire tract of land if, by doing so, the interests of the public would be best served, even though the entire tract is not needed for the right-of-way proper, if the portion outside the normal right-of-way is landlocked (as was the case with the subject remainder lots) or is so situated that the costs of acquisition to the State would be practically equivalent to the total value of the whole parcel of land.

50. In State by Commissioner of Transp. v. William G. Rohrer, Inc., 80 N.J. 462 (1979), the Supreme Court held that where it can be reasonably foreseen that condemnation, although denominated partial, will in fact drain a property of all economic worth, it would normally be the better practice for the public condemnor to undertake to condemn the whole property in the first place. The Rohrer Court recognized that, under the applicable Eminent Domain statute, where a parcel taken for a highway left valueless a remnant of land, the landowner must be given the option of either (1) electing to receive full compensation for the entire tract and conveying the remnant to the condemnor, (2) electing to accept the full value of the whole tract and also retaining title to the remnant and accepting any future liability or any expenses of guarding against such liability, or (3) negotiating a settlement.

51. Similarly, in State by State Highway Commissioner v. Buck, 94 N.J. Super. 84 (App. Div.), certif. denied, 49 N.J. 359 (1967), appealed dismissed, 389 U.S. 571 (1968), the State Highway Commissioner condemned an entire parcel of land so that a neighboring property would have access to the highway and not be landlocked, rather

than leaving a borderline strip too small to be in compliance with the existing residential zoning ordinance.

52. Simply put, the applicable statutory and case law belies the Applicants' contention, unsupported by documentary and testimonial evidence to begin with, that the State refused to acquire either or both of the subject lots along with the balance of the property, and instead left the Applicants with no choice but to be "stuck" with the undersized lots.

53. Third, the Board finds that the Applicants were sophisticated real estate investors. This fact further belies the Applicants' contention that they were without the ability to negotiate to have the State acquire either or both of the subject lots along with the balance of the property.

54. Fourth, the evidence revealed that the Applicants had at least some, if not absolute, control over whether they were left with the subject undersized lots. The documents revealed that David Mandelbaum had extensive negotiations with the Department of Transportation, including visits by a Department agent at his office. Moreover, Mr. Mandelbaum successfully negotiated a higher fair market value for the property and agreed to a settlement rather than proceeding through condemnation, a route he advised the Department of Transportation he would pursue if the Department did not accept his counterdemand. Thus, the evidence before the Board indicated that David Mandelbaum had bargaining power at least equal to that of the Department.

55. Fifth, the Board notes that during the construction of Route 78, old Somerville Road was realigned. This realignment placed Lots 1 and 2 in a then-designated commercial zone. Thus, the Board finds it likely that the Applicants viewed

the subject property as being valuable to them for future development because of its' designation as commercial property and its' proximity to Route 78. These facts further suggest the likelihood that the Applicants consciously chose to retain the subject undersized lots rather than have the State acquire them.

56. Sixth, the Board notes that some of the documents obtained by way of the OPRA request, and introduced into evidence by the Applicants as Exhibit A-18, demonstrate that the Commissioner of Transportation compensated other property owners for damages to their remainder tracts in partial acquisition scenarios. So too, the documents reflect that the Department of Transportation compensated the Applicants for any and all damage, including damages to the remainder lots.

57. Seventh, Board Members testified that they have knowledge of the neighborhood and visited the site. The Board finds it implausible that the Department of Transportation would have purchased Lot 3, the approximately 20,000 square foot tip of the remainder parcel, yet left the two remaining undersized lots to the Applicants, unless the Applicants consciously chose to retain these lots. The Board finds that the Applicants' contention in this regard is all the more implausible since separately owned Lot 1 is merely 0.060 acres. The Board finds that it strains credulity for One Twelve to contend that the State would refuse to acquire its barely 2,600 square foot remainder lot while acquiring virtually all of the property surrounding it. Because the Applicants offered no proofs on this issue, the Board must reasonably infer that the Applicants either actively negotiated to retain the remainder or, at least, intentionally chose not to negotiate its' sale.

58. Eighth, the Board acknowledges that the Applicants curtailed the questioning of fact witness David Mandelbaum, thus depriving the Board of the opportunity to fully question him on the issue of self-created hardship. In this regard, the Board finds that it may reasonably infer that David Mandelbaum's continued testimony on cross-examination would contradict the Applicants' contention that the hardship was not self-created. The Board recognizes the legal proposition that a finder-of-fact may infer from the non-production of a likely witness that his testimony would have been unfavorable to the party expected to produce him. See, Wild v. Roman, 91 N.J. Super. 410 (App. Div. 1966). See also, Maul v. Kirkman, 270 N.J. Super. 596, 610 (App. Div. 1994) (wherein the court recognized that, where the witness from whom the testimony is expected is a party to the action, there is even "a stronger, more persuasive reason" for drawing an adverse inference).

Negative Criteria

The Legal Parameters:

59. The Board also finds that the Applicants have failed to demonstrate that the requested variance relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and the zoning ordinance. The focus of the "substantial detriment" prong of the negative criteria is on the impact of the variance on nearby properties. The focus of the "substantial impairment" prong of the negative criteria is the extent to which a grant of the variance would constitute an arrogation of the governing body and planning board authority.

The Factual Findings and Conclusions:

60. The Board concludes that the requested variance relief cannot be granted without substantial impairment to the zone plan and the zoning ordinance. In this regard, the Board adopts the opinion testimony of the Board Planner that the proposed development would have a negative impact on the existing rural streetscape, the preservation of which is a stated goal in the Township's Master Plan.

61. The evidence revealed that the subject parcel is substantially higher in elevation than neighboring properties and the construction of the proposed dwelling thereon would have a significant visual impact from the streetscape and also would be visible from Route 78. The evidence further revealed that the parcel has no natural buffers behind which the Applicants could locate the proposed dwelling so as to screen it from the street, nor could the Applicants set the proposed dwelling back sufficiently from Somerville Road since doing so would increase the front-yard setback deviation from the Somerville Road stub on the opposite (east) side.

62. The Board further finds that its conclusion that the Applicants' have failed to satisfy the negative criteria would not have changed if the Applicants were able to have acquired from the Township Lot 3, the 15,000 square foot contiguous lot to the north. The acquisition of Lot 3, and the subsequent merger of all three lots, would have resulted in an approximately 1.38 acre lot, which still would have been less than one-half of the minimum required lot size of 3 acres. Moreover, while the Applicants' Planner testified that many of the neighboring properties had deficient front-yard setbacks, as the Board Planner pointed out, all of these properties were at least approximately twice the size of the subject parcel and had front-yard setbacks of between 98 and 152 feet along

Somerville Road, whereas the subject parcel post-development would have less than a 75 foot front-yard setback.

63. The Board further finds that the opinions rendered by the Board Planner are more credible and persuasive than those rendered by the Applicants' Planner. The Applicants' Planner compared the subject parcel's front-yard setbacks to the front-yard setbacks of 17 properties, the vast majority of which were greater than 2 acres in size, whereas the subject parcel is little more than 1 acre and, even assuming acquisition of Lot 3 from the Township, still would be less than 1 ½ acres. Simply put, while the front-yard setback for many of these neighboring properties may be deficient, the Board finds that these deviations pale in comparison to the setback deviations for which the Applicants seek variance relief.

64. In evaluating the negative impact on the zone plan and ordinance, as well as the detriment to the public good, the Board acknowledges that its members are familiar with the subject property and neighborhood, and have visited the site. See, Medical Center v. Princeton Township Zoning, 343 N.J. Super. 177, 198 (App. Div. 2001) (local citizens familiar with a community's characteristics and interests are best equipped to assess the merits of variance applications).

65. The Board further finds that the requested variance relief cannot be granted without substantial detriment to the public good. The evidence revealed that the subject parcel has a substantially higher elevation than the surrounding area and is comprised of very rocky terrain. Neighboring property owners testified as to stormwater runoff and icing problems. The Applicants' proposal calls for the removal of a significant number of trees which, the Board understands, serve to hold soil in place and

reduce stormwater runoff by virtue of the absorption of groundwater by tree roots. The Board is particularly concerned about the possibility of “sheeting” whereby water runs downhill along the grass and onto neighboring properties. The Board finds that the Applicants have failed to demonstrate through sufficient expert testimony that they could adequately mitigate the anticipated stormwater runoff from the proposed development. Moreover, the Board finds that the Applicants have not adequately addressed the Board’s concerns regarding blasting, which could negatively impact the adjacent residential property at 165 Somerville Road, and further disrupt existing groundwater. The Board considers in this regard that neither the Applicants’ engineer nor their builder could provide expert testimony as to the need for blasting and the viability of protective measures if blasting becomes necessary.

66. The Board considers the Appellate Division’s decision in Miriam Homes, Inc. v. Bd. of Adj. of Perth Amboy, 156 N.J. Super. 456 (App. Div. 1976), aff’d., 75 N.J. 508 (1978), to be supportive of its determination that the Applicants have failed to satisfy the negative criteria herein. In Miriam Homes, the appellate court found sufficient evidence to conclude that the applicant had failed to satisfy the negative criteria in an undersized lot case where a contract purchaser sought to construct a residence on a lot having frontage of 50% of the ordinance minimum, area of less than 50% of the required square footage and side-yards 30% less than the minimum required. The Miriam Homes Court found that the board had a sufficient basis to deny the application on negative criteria grounds, even assuming, *arguendo*, that the applicant therein had established an exceptional and undue hardship (*i.e.*, the “positive criteria”). Moreover, the Miriam Homes court rejected the applicant’s contention therein that the mere inability of a

property owner to construct a building because of a violation of ordinance standards should dictate that the zoning variances should be granted. See also, Holman v. Board of Adjustment of the Borough of Norwood, 78 N.J. Super. 74 (App. Div. 1963) (negative criteria not satisfied when applicant proposes to construct a residence on a lot very small in comparison to others in the zone).

WHEREAS, the Board took action on this application at its meeting on November 12, 2009, and this Resolution constitutes a Resolution of Memorialization of the 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 Township of Bernards, on the 12th day of November, 2009, that the application of Howmichael Company and One Twelve Corp., for variance relief as aforesaid, be and is hereby denied.

ROLL CALL VOTE:

Those in Favor: Bianchi, Gilmore, Kleiber, Miller, Plaza, Schulenburg, Orr

Those Opposed: none

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting on January 6, 2010 as copied from the Minutes of said meeting.

ADJUSTMENT

FRANCES FLORIO, Secretary
ZONING BOARD OF

OF THE TOWNSHIP OF
BERNARDS, COUNTY OF
SOMERSET,
STATE OF NEW JERSEY

Dated: _____, 2010

ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS

EUGENE AND ELLEN RAFFERTY (MARION FARMS)
Case No. ZB08-034

RESOLUTION

WHEREAS, EUGENE AND ELLEN RAFFERTY (MARION FARMS) (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) for the following variance relief in connection with the expansion of the existing farm stand’s outdoor display area, including a new cloth cover/canopy structure and additional freestanding signage, at property identified as Block 9001, Lot 103 on the Tax Map, more commonly known as 3281 Valley Road:

- (1) A d(2) variance for the expansion of a pre-existing nonconforming use of the existing farm stand, which is not a permitted use in the R-5 residential zone pursuant to Section 21-10.4(a)(1) of the Land Development Ordinance;
- (2) A bulk variance for the proposed display area, cover/canopy structure located within the frontyard along Acken Road in violation of Section 21-16.1(b) of the Land Development Ordinance which prohibits accessory buildings from being located in a frontyard;
- (3) A bulk variance for the proposed temporary display signs in violation of Section 21-17.2(1)(3) of the Land Development Ordinance which prohibits freestanding signs with wire supports and any signs constructed of cardboard or corrugated plastic; and
- (4) A bulk variance for the proposed commercial signs in violation of Section 21-17.3 of the Land Development Ordinance which prohibits commercial signs in residential zones; and

WHEREAS, public hearings on notice was held on such application on July 8 and December 9, 2009, at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, at the commencement of the December 9, 2009 hearing, the Applicants requested that the Board permit the Applicants to withdraw the pending application without prejudice, and neither counsel for the objector nor any member of the public objected to said request by the Applicants; and

WHEREAS, the Rules and Regulations of the Board provides, at Rule 2:7-1, that “[a]n applicant may, at any time before the commencement of the hearing, voluntarily withdraw its application, in which case the action shall be dismissed without prejudice”, but the Rules and Regulations do not specifically address the Board’s procedure if an applicant seeks to voluntarily withdraw without prejudice an application after the commencement of the hearing; and

WHEREAS, the Board Attorney advised the Board that applicable case law, specifically the court in Sansone Oldsmobile-Cadillac, Inc. v. Shrewsbury Borough Bd. of Adj., 211 N.J. Super. 304 (Law Div. 1986), concluded that, where, as here, an applicant seeks to withdraw a pending application before a zoning board of adjustment without prejudice, the principles of N.J. Court Rule 4:37-1(b) should be applied, such that a request to grant a voluntary dismissal without prejudice during the pendency of an application is within the discretion of the Board and the Board may impose such terms and conditions as it deems appropriate;

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 9th day of December 2009, that the request by the Applicants, Eugene and Ellen Rafferty (Marion Farms), for voluntary dismissal without prejudice of their pending application for variance relief, as aforesaid, be granted, subject to the following condition:

The Applicants shall post funds with the Township sufficient to satisfy any and all deficiencies in the Applicants' escrow account and shall remain obligated to replenish that escrow account and otherwise reimburse the Township for all expenses incurred by it and its professionals in connection with the subject application for variance relief.

ROLL CALL VOTE:

Those in Favor: Bianchi, Gilmore, Kleiber, Miller, Schulenburg, Marshall, Orr

Those Opposed: none

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting on January 6, 2010 as copied from the Minutes of said meeting.

ADJUSTMENT

FRANCES FLORIO, Secretary
ZONING BOARD OF

OF THE TOWNSHIP OF
BERNARDS, COUNTY OF
SOMERSET,
STATE OF NEW JERSEY

Dated: _____, 2010

ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS

MATTHEW AND JANEL EAGER
Case No. ZB07-003A

RESOLUTION

WHEREAS, MATTHEW AND JANEL EAGER (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) to amend the Board’s June 6, 2007 variance approval in order to permit additional grading and retaining walls which have already been constructed in the rear yard of property identified as Block 3901, Lot 74 (formerly Block 106, Lot 49) on the Tax Map, more commonly known as 230 Lake Road:

- (5) A variance to permit permanent structures (retaining walls) within a stream buffer conservation area in violation of Section 21-14.4(d)(11) of the Land Development Ordinance; and
- (6) A variance to permit excessive land disturbance within three separate steep slope categories in violation of Section 21-14.2(b) on the Land Development Ordinance; and

WHEREAS, a public hearing on notice was held on such application on December 9, 2009, at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicants and the reports from consultants and reviewing agencies, has made the following factual findings and conclusions:

1. The Board reviewed the application and deemed it to be complete.

2. The subject property is an approximately 4.85 acre lot located in the R-2 (2 acre) residential zone and fronting on Lake Road, most of which is encumbered by environmental constraints.

3. On June 6, 2007, the Board granted the Applicants a front-yard setback variance to allow for the renovation and expansion of the existing dwelling by the addition of approximately 728 square feet. The Applicants' rear-yard is traversed by Harrison Brook, though the approved project conformed to all stream buffer and steep slope regulations. The project is now substantially completed and the Applicants are seeking approval of the existing/as-built conditions, which include additional grading and retaining walls which were not approved as part of the 2007 variance application.

4. The Applicants disturbance of the regulated wetlands, buffers and conservation easement area was in violation of DEP regulations and the Township's stream buffer conservation and steep slope ordinances. The Applicants now seek variance relief pursuant to N.J.S.A. 40:55D-70(c)(1).

5. The Applicants submitted a Variance Map prepared by Gregory E. Yannaccone, P.E., of Yannaccone, Villa & Aldrich, LLC, dated August 10, 2009, consisting of four sheets (area map, environmental constraints map, easement boundary plan and landscape plan).

6. The Applicants obtained General Permit # 8 from the New Jersey Department of Environmental Protection ("DEP") in order to construct the approved addition in the regulated wetlands and buffers, as reflected in the March 9, 2007 letter from DEP submitted by the Applicants.

7. The Applicants submitted a letter from the DEP, dated June 9, 2009, acknowledging that an additional approximately 500 square feet of transition area had been disturbed and considering this to have a “de minimus impact to the regulated transition area,” such that the DEP determined that it would take no enforcement action.

8. The Applicants submitted a letter, dated August 24, 2009, wherein Denis Nicolaysen, P.E., opined as to the proper construction and structural adequacy of the retaining walls.

9. By Memorandum dated September 28, 2009, the Township Environmental Commission commented that “the site is located in the Harrison Brook drainage area, which is subject to frequent flooding. The Commission recommends that no additional impervious area be allowed on the site. However, due to the problem of erosion of the steep slope, the Commission can understand the need to build a retaining wall. When the application is presented to the Board of Adjustment, additional information should be presented to explain the stabilization of the area.”

10. David Schley, A.I.C.P./P.P., the Board Planner, was duly sworn according to law.

11. Matthew Eager, one of the Applicants, residing at 230 Lake Road, Basking Ridge, was duly sworn according to law. Mr. Eager testified that he and his wife have resided at the subject property since 1998 and they now have 3 young children. He testified that the dwelling was built in approximately 1940. Mr. Eager further testified that the Board approved an approximately 728 square foot addition in 2007, extending the basement and back porch area and on the second floor allowing the Applicants to add a bedroom and a bathroom for their growing family. Mr. Eager

testified that the property slopes steeply downward to the rear of the dwelling and, during the construction process, it became apparent that the ground was eroding and he needed to take some protective measure to prevent a dangerous condition. He testified that he hired a landscaper and a determination was made to install retaining walls across the rear of the home and the area behind their swimming pool to the south.

12. Mr. Eager attempted to justify why he did not first seek the requisite permits, testifying that he did not realize that landscaping and retaining walls constituted prohibited activities within the stream buffer conservation area. He testified that he mistakenly assumed that only the construction of a structure would constitute such a prohibited activity. Mr. Eager explained that a “stop work” order was issued, that he contacted the Township and notified DEP. He testified that DEP inspected the property and determined that it was not necessary for the agency to take any enforcement action.

13. On questioning by various Board Members, Mr. Eager testified that, due to the small size of the conservation easement markers and their location mostly in the woods, he was unaware of the exact location of the conservation area, but regardless he did not believe the construction of the retaining walls and the disturbance of the land in connection therewith constituted an activity that was prohibited within the stream buffer conservation area.

14. Mr. Eager testified that, sometime in the Summer of 2009, his wife took the three photographs that were submitted with the application materials.

15. Gregory E. Yannaccone, P.E., with a business address of 460 Main Street, Chester, was duly sworn according to law. Mr. Yannaccone provided his background and qualifications and was accepted by the Board as an expert in the field of engineering.

Mr. Yannaccone testified that he was the site engineer retained to assist the Applicants in rectifying the violations. He outlined on the plans the limits of disturbance, the boundaries of the stream buffer conservation easement and the location of the 10 conservation easement markers. Mr. Yannaccone also introduced into evidence as Exhibit A-1, a version of the environmental constraints map with the location of the 10 conservation easement markers identified thereon. Mr. Yannaccone explained that the Applicants, with his assistance, determined that the logical course was to first resolve the matter with the DEP and then request variance relief from the Board. He testified that they stabilized the site with temporary silt fences and safety fencing on the top of the retaining walls and near the swimming pool, and then submitted drawings and plans requesting variance relief from the Board.

16. Mr. Yannaccone further testified that the Landscape Plan constituted the proposed stream buffer management plan. He testified that the subject area already has been regraded such that it is flatter now and there is less potential for soil erosion. The Applicants also propose to install significant landscaping to further stabilize the soil. Mr. Yannaccone clarified a discrepancy in the August 24th letter from Denis Nicolaysen, P.E., wherein Mr. Nicolaysen stated that there was approximately 250 feet of retaining wall. Mr. Yannaccone confirmed that there actually is approximately 400 feet of retaining wall that was constructed at the property.

17. On questioning by Board Members, Mr. Eager confirmed that it was his decision to extend the retaining wall to the south behind the pool area and to regrade an approximately 10 foot wide area with the intention of adding additional backyard play

space for his family. He testified that they previously had removed a shed and a dilapidated chicken coop in that area.

18. Mr. Yannaccone opined that a retaining wall or some similar structure was necessary to prevent the soil erosion that was evident at the property and that such erosion could ultimately have threatened the structural integrity of the dwelling. Mr. Yannaccone did not opine as to whether the entire expanse of the retaining wall was necessary.

19. On questioning by a member of the public, Mr. Eager testified that all of the grading had been completed and that there remained the need to add topsoil for planting purposes. The Board Planner testified that the Applicants would not need a permit to install topsoil.

20. David Krueger, President of Environmental Technology, Inc., with a business address of 535 East Main Street, Chester, provided his background and qualifications and was accepted by the Board as a certified wetland delineator and a professional wetland scientist. Mr. Krueger testified that he participated in the formulation of the stream buffer management plan (*i.e.*, the landscape plan) and he explained same in detail. He opined that if the retaining wall were removed then erosion problems would occur. He testified that the subject area appears to be stabilized and he expects that it would be further stabilized for the long term by the additional proposed plantings.

21. On questioning by Board Members, Mr. Krueger conceded that a 150 foot transition area is applicable since the subject wetlands are classified as having an exceptional resource value due to it being a wood turtle habitat, but he pointed out that

the land disturbance at issue occurred a significant distance uphill towards the dwelling and not in what would be expected to be a high utilization area for wood turtles, which would be nearer to the stream. Mr. Krueger opined that it would be better from an environmental perspective to leave the retaining wall as it is rather than to remove the portion of it to the south behind the Applicants' swimming pool, since removing a portion of the wall would cause additional land disturbance within the stream buffer conservation area.

22. On questioning by a member of the public, Mr. Eager testified that there would be no need for heavy equipment on the property since the proposed landscaping can be installed primarily by hand.

23. The Applicants stipulated, as conditions of approval, to the following:

- A. The Applicants shall amend the existing conservation easement to reflect the retaining wall encroachment as approved by the Board. The amended conservation easement shall be prepared by the Township Attorney, executed by the Applicants and recorded with the Somerset County Clerk;
- B. The Applicants shall recover, reset and relocate all previously installed conservation easement markers as deemed necessary by the Township Engineer;
- C. The Applicants and all subsequent property owners shall utilize only organic fertilizers, pesticides and other substances within the conservation easement, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- D. A Landscape Committee consisting of designated Board Members shall be formed for the purposes of investigating and requiring that the Applicant install such additional landscaping as the Committee deems necessary and appropriate for purposes of screening the subject construction from the view of adjoining properties;
- E. The Applicants and all subsequent property owners shall be prohibited from locating any non-naturally occurring substance, object or structure within the conservation easement without the express prior

approval of the Township Engineer, and this condition shall be explicitly stated in the aforementioned amended conservation easement;

- F. The Applicants and all subsequent property owners shall be obligated to maintain all landscaping, plantings, etc. in the conservation easement in substantially the same condition as installed, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- G. Any fencing installed in the conservation easement shall be of a “split rail” design and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- H. The Applicants and all subsequent property owners shall be prohibited from permitting any heavy equipment to be utilized in the conservation easement, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- I. The Applicants and all subsequent property owners shall be permitted to install no more than six inches of topsoil within the conservation easement, and this condition shall be explicitly stated in the aforementioned amended conservation easement; and
- J. The Applicants shall satisfy all of the conditions of approval set forth herein within four (4) months of the date of the adoption of this Memorializing Resolution.

24. No member of the public commented on, or objected to, the requested variance relief.

25. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicants have satisfied their burden of establishing their entitlement to the requested variance relief for both the construction of the retaining walls within a stream buffer conservation area and the associated excessive land disturbance within the three separate steep slope categories, pursuant to N.J.S.A. 40:55D-70(c)(1).

26. First, with respect to the positive criteria for a “c(1)” or “hardship” variance, the Board finds that the Applicants have satisfied their burden of demonstrating

that strict application of the zoning regulations will result in peculiar and exceptional difficulties to, or exceptional and undue hardship upon, them as the owners of the subject property. The Board recognizes that the Applicants' rear yard is traversed by the Harrison Brook, and the evidence revealed that the construction of the previously approved home addition rendered it necessary to construct the subject retaining walls in order to stabilize the area and prevent a dangerous condition.

27. The Board further finds that the subject retaining walls actually will serve to offset disturbances to the stream buffer conservation area and otherwise reduce the amount of harmful substances that reach this watercourse. The Board takes note that the DEP characterized the impact of the land disturbance to the regulated transition area as "de minimus".

28. The Board recognizes that the Applicants have submitted a landscape plan that, in the opinion of the Board Planner, satisfies the requirement for a stream buffer management plan pursuant to Section 21-14.4(h)(1). The Board further recognizes that, as a condition of approval, the Applicants will submit the requisite certification from a licensed engineer attesting to the proper construction and structural adequacy of the retaining walls so as to satisfy the requirements of Section 21-16.3 of the Land Development Ordinance.

29. Moreover, with respect to the disturbance within the three separate steep slope categories, the Board finds that drainage and erosion problems will not result from the construction of the retaining walls thereon and that the architecture of the retaining walls are specifically designed to accommodate the topography, as required by Section 21-14.2(b)(2) of the Land Development Ordinance.

30. The Board finds that the Applicants have not demonstrated that the portion of the retaining wall in the area of the rear yard to the South near the swimming pool is necessary for soil stabilization purposes, however the Board accepts the testimony of the Applicants' experts that to require the removal of this portion of the wall would be detrimental as it would cause additional land disturbance in the stream buffer conservation area.

31. Finally, the Board finds that the Applicants have satisfied the negative criteria. The Applicants have demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board took action on this application at its meeting on December 9, 2009, and this Resolution constitutes a Resolution of Memorialization of the 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 Township of Bernards, on the 9th day of December, 2009, that the application of Mathew and Janel Eager, for variance relief, as aforesaid, be and is hereby granted, subject to the following conditions:

- (1) The Applicants shall post sufficient funds with the Township to satisfy any deficiency in the Applicants' escrow account;
- (2) The Applicants shall amend the existing conservation easement to reflect the retaining wall encroachment as approved by the Board. The amended conservation easement shall be prepared by the Township Attorney, executed by the Applicants and recorded with the Somerset County Clerk;
- (3) The Applicants shall recover, reset and relocate all previously installed conservation easement markers as deemed necessary by the Township Engineer;

- (4) The Applicants and all subsequent property owners shall utilize only organic fertilizers, pesticides and other substances within the conservation easement, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- (5) A Landscape Committee consisting of designated Board Members shall be formed for the purposes of investigating and requiring that the Applicant install such additional landscaping as the Committee deems necessary and appropriate for purposes of screening the subject construction from the view of adjoining properties;
- (6) The Applicants and all subsequent property owners shall be prohibited from locating any non-naturally occurring substance, object or structure within the conservation easement without the express prior approval of the Township Engineer, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- (7) The Applicants and all subsequent property owners shall be obligated to maintain all landscaping, plantings, etc. in the conservation easement in substantially the same condition as installed, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- (8) Any fencing installed in the conservation easement shall be of a “split rail” design and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- (9) The Applicants and all subsequent property owners shall be prohibited from permitting any heavy equipment to be utilized in the conservation easement, and this condition shall be explicitly stated in the aforementioned amended conservation easement;
- (10) The Applicants and all subsequent property owners shall only be permitted to install no more than six inches of topsoil within the conservation easement and same shall be explicitly stated in the aforementioned amended conservation easement;
- (11) The Applicants shall submit a certification from a licensed engineer attesting to the proper construction and structural adequacy of the retaining walls so as to satisfy the requirements of Section 21-16.3 of the Land Development Ordinance
- (12) The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein;

- (13) The aforementioned approval shall be subject to all State, County and Township statutes, ordinances, rules and regulations affecting development in the Township, County and State; and
- (14) The Applicants shall satisfy all of the conditions of approval set forth herein within four (4) months of the date of the adoption of this Memorializing Resolution.

ROLL CALL VOTE:

Those in Favor: Bianchi, Gilmore, Kleiber, Miller, Plaza, Schulenburg, Orr

Those Opposed: none

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting on January 6, 2010 as copied from the Minutes of said meeting.

ADJUSTMENT

Dated: _____, 2010

FRANCES FLORIO, Secretary
ZONING BOARD OF

OF THE TOWNSHIP OF
BERNARDS, COUNTY OF
SOMERSET,
STATE OF NEW JERSEY

ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS

JOHN J. ROSS
Case No. ZB09-027

RESOLUTION

WHEREAS, JOHN J. ROSS (the “Applicant”) has applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) for the following variances in connection with a 10 foot by 15 foot (approximately 150 foot including stairs) second floor deck and a 24 foot diameter (approximately 450 square foot) above-ground swimming pool, that have already been constructed in the rear yard of the existing single-family dwelling on property identified as Block 7903, Lot 8 on the Tax Map, more commonly known as 41 Harrison Brook Drive:

- (1) A variance for the construction of permanent structures (deck and pool) within a stream buffer conservation area in violation of Section 21-14.4(d)(11) of the Land Development Ordinance;
- (2) A variance for a rear-yard setback for the previously constructed second floor deck of approximately 14 feet (from the centerline of “Zone Two” of the stream buffer conservation area), whereas the minimum required rear-yard setback in an R-4 (1 acre) residential zone is 75 feet, pursuant to Section 21-14.4(c)(2)(a)(4) and Table 501 of the Land Development Ordinance;
- (3) A variance for locating a private swimming pool closer than 20 feet to any property line as measured from the centerline of Zone Two of the stream buffer conservation area, pursuant to Section 21-18.1 and Section 21-14.4(c)(2)(a)(4) of the Land Development Ordinance; and
- (4) A variance for locating a private swimming pool in front of the rear building line of existing residential structures on adjoining lots, in violation of Section 21-18.1 of the Land Development Ordinance; and

WHEREAS, a public hearing on notice was held on such application on December 9, 2009, at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant and the reports from consultants and reviewing agencies, has made the following factual findings and conclusions:

1. The Board reviewed the application and deemed it to be complete.
2. The subject property is an approximately 1.274 acre lot located in the R-4 (1 acre) residential zone, fronting on Harrison Brook Drive. The lot is traversed by Harrison Brook, placing the entire rear yard and part of the existing dwelling within a stream buffer conservation area. The dwelling, including the lower deck, but excluding the upper deck, predates the stream buffer conservation ordinance which was adopted in 2001.
3. The Applicant constructed an approximately 150 square foot second floor deck and an approximately 450 square foot above-ground swimming pool in the rear yard within the stream buffer conservation area and now, post construction, seeks variance approval for same. The upper deck is located above an existing patio, and is further from the stream than the existing deck.
4. The Applicant submitted a letter, dated November 19, 2009, from the Applicant's environmental consultant, PK Environmental, addressing the New Jersey Department of Environmental Protection ("DEP") wetlands and flood hazard area regulations applicable to this site and concluding that the subject deck and above-ground swimming pool do not require any DEP permits or waivers.

5. The Applicant submitted a Plan of Survey prepared by Charles E. Saladin, Jr., N.J.P.L.S., dated November 17, 2009, reflecting, *inter alia*, the 25 foot wide “zone one” and 50 foot wide “zone two” of the stream buffer conservation area, and other drainage and sewer easements.

6. David Schley, A.I.C.P./P.P., the Board Planner, was duly sworn according to law.

7. John J. Ross, the Applicant, residing at 41 Harrison Brook Drive, Basking Ridge, NJ, was duly sworn according to law. Mr. Ross initially informed the Board that he was withdrawing with prejudice that portion of his application seeking variance relief for the above-ground swimming pool setback and location. He stipulated, as a condition of approval, to the removal of the 450 square foot above-ground swimming pool that had already been constructed in the rear yard of the subject dwelling.

8. John J. Peel, P.P., of PK Environmental, with a business address of 205 Main Street, Chatham, was duly sworn according to law, provided his background and qualifications and was accepted by the Board as an expert environmental scientist and professional planner, having been so accepted by the Board previously. Mr. Peel reiterated his opinion, as set forth in his November 19, 2009 correspondence to the Applicant, that the previously constructed overhead deck and above-ground swimming pool did not require any DEP permits or waivers, but that the Applicant needed a variance for the improvements within “zone two” of the Township’s stream buffer conservation area. He explained that there were no wetlands in the rear yard area between Harrison Brook and the existing single-family dwelling, but the DEP regulated flood hazard area of the Harrison Brook does extend through the rear yard to the edge of

the existing residence. Mr. Peel acknowledged that c-1 variance relief was required for the elevated deck and confirmed that the Applicant was abandoning the request for variance relief relative to the above-ground swimming pool since same would be removed.

9. Mr. Peel testified that although the upper deck did not pre-date the stream buffer conservation ordinance, which was adopted in 2001, the deck is located above an existing patio, which did pre-date the ordinance, and the upper deck is further from the stream than the existing dwelling/patio. The Board Planner confirmed Mr. Peel's testimony in this regard.

10. On questioning by Board Members, Mr. Peel testified that he took photographs #1 and 2, which were submitted with the application materials, and that he did so on November 3, 2009. Photo #1 depicts the paver patio and overhead deck looking north and Photo #2 depicts the overhead deck and the at-grade deck looking northeast.

11. On cross-examination by a Board Member, Mr. Ross conceded that he was aware that permits were required prior to the construction of the upper deck and the installation of the above-ground swimming pool, but nevertheless he proceeded without obtaining the requisite permits from the Township.

12. The Applicant stipulated, as conditions of approval, to the following:
- A. The Applicant shall grant to the Township a stream buffer conservation easement encompassing the stream buffer conservation area, which easement shall be prepared by the Township Attorney, executed by the Applicant and all other property owner(s) and recorded with the Somerset County Clerk;
 - B. The Survey shall be amended to clarify the location of the 100-year flood line within the stream buffer conservation area;

- C. The Applicant shall obtain approval from the Township Sewerage Authority to permit the upper deck to encroach upon the existing sanitary sewer easement;
- D. The subject overhead deck shall remain an open deck;
- E. The Applicant shall remove the entirety of the above-ground swimming pool inclusive of all attached decking, stairs, etc. and shall provide vegetative cover to stabilize the area to the satisfaction of the Township Engineer;
- F. The Applicant shall provide a certification or affidavit under penalty of perjury from the other owner of the subject property, understood to be Karen Pranzo, wherein she confirms the Applicant's authority to act as her agent in the prosecution of the subject variance application and consents to the variance relief afforded herein, inclusive of all conditions of approval;
- G. The Applicant shall provide to the Township Engineer a certification from a licensed engineer attesting to the adequacy of the footings of the already constructed overhead deck and the structural integrity of same; and
- H. The Applicant shall satisfy all conditions of approval set forth herein within four months from the date of adoption of this Memorializing Resolution.

13. Leslie Phelps, 47 Harrison Brook Drive, was duly sworn according to law. Ms. Phelps expressed her concerns with regard to the subject variance application. Ms. Phelps inquired as to the post-construction permitting process to ensure that the footings for the subject deck were structurally adequate. Ms. Phelps introduced into evidence, as Exhibit O-1, a photograph that she testified she took the morning of the hearings depicting the rear yard of the subject property. Ms. Phelps testified as to the significant water problems at the subject property and in this area of the Township.

14. After reviewing the evidence submitted, the Board, by a vote of 5 to 2, finds that the Applicant has satisfied his burden of establishing an entitlement to the

requested variance relief for the as-built overhead deck within a stream buffer conservation area and the related rear yard setback, pursuant to N.J.S.A. 40:55D-70(c)(1).

15. First, with respect to the positive criteria for a “c(1)” or “hardship” variance, the Board finds that the Applicant has satisfied his burden of demonstrating that strict application of the zoning regulations will result in peculiar and exceptional difficulties to, or exceptional and undue hardship upon, him as an owner of the subject property. The Board recognizes that the Applicant’s lot is traversed by Harrison Brook, placing the entire rear yard and part of the existing dwelling within a stream buffer conservation area. The Board also recognizes that the dwelling, including the lower deck but excluding the recently constructed upper deck, predates the stream buffer conservation ordinance, which was adopted in 2001. The Board further recognizes that the recently constructed upper deck is located above an existing patio, and is further from the stream than the existing dwelling/deck.

16. The Board expressed significant concern that the Applicant apparently proceeded with the construction of the overhead deck and the installation of the above-ground swimming pool without obtaining requisite permits, despite knowing that same were required. The Board understands that the Applicant will be required to pay an “enhanced” fee for a post-construction permit, which enhanced fee should have some deterrent effect on the Applicant and similarly situated property owners who fail to obtain the requisite municipal permits prior to developing their property. The Board determines that granting the requested variance relief, with all of the conditions set forth below, presents a better alternative than denying said relief and requiring the Applicant to

tear down the previously constructed overhead deck. The Board relies on the Construction Department to, in the context of the post-construction permitting process, investigate and ensure the adequacy of the existing footings and the overall structural integrity of the overhead deck.

17. Finally, the Board finds that the Applicant has satisfied the negative criteria. The Applicant has demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board took action on this application at its meeting on December 9, 2009, and this Resolution constitutes a Resolution of Memorialization of the 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 Township of Bernards, on the 9th day of December, 2009, that the application of John J. Ross, for variance relief as to the previously constructed overhead deck (variances #1 and 2), but not as to the above-ground swimming pool (variances #3 and 4), as aforesaid, be and is hereby granted, subject to the following conditions:

- (1) The Applicant shall post sufficient funds with the Township to satisfy any deficiency in the Applicant's escrow account;
- (2) The Applicant shall grant to the Township a stream buffer conservation easement encompassing the stream buffer conservation area, which easement shall be prepared by the Township Attorney, executed by the Applicant and all other property owner(s) and recorded with the Somerset County Clerk;
- (3) The Survey shall be amended to clarify the location of the 100-year flood line within the stream buffer conservation area;

- (4) The Applicant shall obtain approval from the Township Sewerage Authority to permit the upper deck to encroach upon the existing sanitary sewer easement;
- (5) The subject overhead deck shall remain an open deck;
- (6) The Applicant shall remove the entirety of the above-ground swimming pool inclusive of all attached decking, stairs, etc. and shall provide vegetative cover to stabilize the area to the satisfaction of the Township Engineer;
- (7) The Applicant shall provide a certification or affidavit under penalty of perjury from the other owner of the subject property, understood to be Karen Pranzo, wherein she confirms the Applicant's authority to act as her agent in the prosecution of the subject variance application and consents to the variance relief afforded herein, inclusive of all conditions of approval;
- (8) The Applicant shall provide to the Township Engineer a certification from a licensed engineer attesting to the adequacy of the footings of the already constructed overhead deck and the structural integrity of same;
- (9) The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein;
- (10) The aforementioned approval shall be subject to all State, County and Township statutes, ordinances, rules and regulations affecting development in the Township, County and State; and
- (11) The Applicant shall satisfy all conditions of approval set forth herein within four months from the date of adoption of this Memorializing Resolution.

ROLL CALL VOTE:

Those in Favor: Gilmore, Kleiber, Miller, Schulenburg, Orr

Those Opposed: Bianchi, Plaza

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting on January 6, 2010 as copied from the Minutes of said meeting.

FRANCES FLORIO, Secretary
ZONING BOARD OF
ADJUSTMENT
OF THE TOWNSHIP OF
BERNARDS, COUNTY OF
SOMERSET,
STATE OF NEW JERSEY

Dated: _____, 2010