The Chairman called the regular meeting to order at 7:41 p.m. The meeting was video-streamed and broadcast.

OPEN MEETING STATEMENT
“In accordance with the requirements of the Open Public Meetings Law of 1975, notice of this special hearing of the Planning Board of the Township of Bernards was posted on the bulletin board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, NJ, was mailed to the Bernardsville News, Bernardsville, NJ, and to the Courier News, Bridgewater, NJ all on December 11, 2015, and was electronically mailed to all those people who have requested individual notice.

“The following procedure has been adopted by the Bernards Township Planning Board. There will be no new cases heard after 10:00 p.m., and no new witnesses or new testimony heard after 10:30 p.m.”

ROLL CALL:
Members present: Axt, Baldassare, Kleinert, Malay, Piedici, Santoro, Plaza
Members late: Alper (7:44 p.m.)
Members absent: Harris; Moschello; Ross; on motion by Baldassare, seconded by Santoro, the absences of Mr. Harris, Mr. Moschello and Mr. Ross were excused.

Board Attorney Jonathan Drill, Esq., Board Engineer Tom Quinn, Board Planner David Banisch, and Township Planner David Schley were also present.

APPROVAL OF MINUTES
The motion was made by Mr. Santoro and seconded by Ms. Kleinert to approve the minutes of the January 5, 2016 reorganization meeting as drafted.

Roll call:
Aye: Axt, Baldassare, Kleinert, Malay, Santoro, Plaza
(Ms. Piedici was ineligible to vote)
Motion carried

APPROVAL OF CHARGES AGAINST ESCROW ACCOUNTS
The motion was made by Ms. Piedici and seconded by Ms. Kleinert to approve the charges submitted by John Belardo, Esq. for December 2015.

Roll call:
Aye: Axt, Baldassare, Kleinert, Malay, Piedici, Santoro, Plaza
Motion carried

Ms. Alper joined the meeting.
APPROVAL OF RESOLUTIONS

RESOLUTION – United States Golf Association (PB15-003) – Block 9601, Lot 5.01 – Preliminary and Final Site Plan & Variance Approval

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

Roll call:

Aye: Alper, Axt, Kleinert, Santoro, Plaza
(Mr. Baldassare, Mr. Malay, & Ms. Piedici were ineligible to vote)

Motion carried

RESOLUTION – Islamic Society of Basking Ridge, Inc. (PB12-001) – Block 9301, Lot 2 – 124 Church Street – Denial of Preliminary and Final Site Plan Approval and Denial/Dismissal of Requests for Other Relief

Mr. Drill clarified which Board members were eligible to vote on this resolution. Mr. Drill referred to Foot Note #10 in the resolution and said Ms. Alper, Ms. Kleinert, Ms Piedici and Mr. Plaza were eligible to vote on the resolution because they had voted in favor of the first motion to deny final site plan approval, opposed the second motion to grant preliminary site plan approval, voted in favor of the third motion to grant the two exceptions, and voted in favor of the fourth motion to deny the “c” fence variances.

The motion was made by Ms. Alper and seconded by Ms. Piedici to approve the resolution as drafted.

Roll call:

Aye: Alper, Kleinert, Piedici, Plaza
(Ms. Axt, Mr. Baldassare, Mr. Malay, and Mr. Santoro were ineligible to vote)

Motion carried

Appointment of Landscape Committee – United States Golf Association

Mr. Plaza asked for volunteers. He noted that although Mr. Harris was not at this meeting, he had expressed a desire to be on this committee. Ms. Axt and Ms. Kleinert also volunteered.

On motion by Mr. Santoro, seconded by Ms. Piedici, the vote was unanimous to appoint Ms. Axt, Mr. Harris, and Ms. Kleinert to the United States Golf Association Landscape Committee.

CONTINUED PUBLIC HEARING – Bell, Christopher and CC Edwards Developers, LLC (PB11-011) – Block 7702, Lots 10 & 11 – 3526 & 3536 Valley Road – Preliminary Major Subdivision (5 lots)

Mr. Baldassare left the meeting since he is recused from voting on this application.

The applicants were represented by John Gallina, Esq. Mr. Gallina advised the Board that the applicants had hired a new engineering firm and a professional planner. Mr. Drill swore in James Kyle, PP, Kyle Planning & Design, Hopewell, NJ, Dawson Bloom, PE,
Chief Operating Officer, and Kevin Smith, PE, Project Manager, Finelli Consulting Engineers, Washington, NJ.

Mr. Christopher Bell, applicant, previously sworn, said they listened to the Board’s comments at the June 2, 2015 hearing on the concept plans; the applicants decided to use the Concept C plan. This site plan proposes no houses fronting on Valley Road.

Public hearing was opened for questions of Mr. Bell. The following residents asked questions:

- Gerald Elson, 26 Wedgewood Road – asked for the reasons Concept B was not chosen.
- Marisa Taormina, 1276 Mt. Airy Road – asked what the benefits of Concept C over Concept B were. Mr. Gallina said that Mr. Kyle will address her concerns.
- John Pruskowski, 10 Everson Place – asked about published comments made by Board members about this application. He noted that Ms. Axt had identified herself at a previous meeting as a contractor; Mr. Drill said her comment referred to her personal experience and did not disqualify her. Mr. Pruskowski said that Mr. Malay commented upon this application in a newspaper article and used the term ‘bending the rules’.

A short recess was taken. Mr. Drill said Mr. Pruskowski was quoting from an article in the Bernardsville News several months ago where John Malay said that the Board might be willing to grant variances to eliminate a house close to the road. Mr. Drill explained how conflict of interest is defined for Board members. Mr. Pruskowski said he thought the statements made by Mr. Malay indicated a bias toward the applicants. Mr. Malay said he believes he is not biased but he will recuse himself. Mr. Malay left the meeting.

Mr. Pruskowski asked Mr. Bell how traffic and parking problems will be addressed and asked if a traffic study had been done. Mr. Galina said no traffic study was required for this application. Mr. Pruskowski asked if Somerset County had been notified; Mr. Bell noted that he filed the application with Somerset County Planning Board at the same time the application was filed with Bernards Township Planning Board.

Hearing no further questions, the public portion of this hearing for questions of Mr. Bell was closed.

Mr. Dawson Bloom, presented his credentials and was accepted as an expert in civil engineering. Mr. Bloom described the conforming plan that met all ordinance requirements; he said this plan placed the bulb of the cul de sac closer to the western property line and put smaller detention basins on each lot. He said it was preferable to construct one larger retention basin, as shown on the Concept C plan. Concept C locates all five lots off of the new road and in the northern part of the property. The proposed road is centered; proposed house locations are closer to the new road to create additional separation from existing houses.
Mr. Bloom clarified the depth of the rear yards and the impact of the proposed 25-ft buffer easement. He said the conforming plan put retention basins in rear yards which limited the use of the rear yards by future home owners. The advantage of Concept C was that storm water management facilities were located on one lot and not on each residential lot.

Mr. Bloom discussed the proposed road; he said the bulb of the cul-de-sac had a 50-ft radius to accommodate the Fire Official’s and Liberty Corner Fire Company’s request. Mr. Bloom said the proposed road would be a public, not a private, road with a sidewalk on the western side.

Mr. Bloom submitted as Exhibit A-6, Impervious Lot Areas exhibit. He addressed the comments in Mr. Quinn’s January 15, 2016 review memo and said the applicant would comply with all comments. Mr. Bloom said, as per Comment #2, Tree Replacement, that the applicant would maintain the existing swale and revise its landscape plan. Mr. Bloom addressed the comments in Mr. Banisch’s January 18, 2016 review memo. He said the applicant would apply for a new transition area waiver when the current approval lapsed. Mr. Bloom addressed the comments in Mr. Schley’s January 16, 2016 review memo. There was discussion on Comment # 11 concerning fencing in the tree preservation easement. It was noted that no structures would be allowed in the easement. Mr. Bloom stated that the number of proposed evergreen trees would be adjusted (Comment #24); there was discussion about the proposed landscaping of the detention basin (Comments #25 & 26).

Public hearing was opened for questions of Mr. Bloom.
- Marisa Taormina, 1276 Mt. Airy Road – asked Mr. Bloom about the distance of the proposed house on the lot (Lot 10.02) adjacent to her lot. She submitted Exhibits OT-1, OT-2, and OT-3, photographs of the rear yard of her property. She asked about the impact of lights from cars in the proposed driveway for Lot 10.02.
- Gerald Elson, 26 Wedgewood Road – asked about stormwater runoff and the existing swale. He asked about the status of the applicants’ Letter of Interpretation (LOI). Mr. Bloom said the LOI had been obtained in 2010 and will expire on July 1, 2016. He said the applicants can request an extension of the LOI from NJ DEP.
- James Pruskowski, 10 Everson Place – asked about the importance of wetlands on the applicants’ property, the presence of endangered species, and the amount of proposed grading. He asked about the lot coverage shown on the plan, location of the proposed road, and if fencing will be allowed in the wetlands buffer.
- John Schulenberg, 14 Wedgewood Place – asked about the proposed tree plantings and swale location.
- John Campbell, 28 Wedgewood Place – asked about tree replacement.

Seeing no further questions, the public portion of this hearing for questions of Mr. Bloom was closed.
The applicant agreed to extend the time to act to May 31, 2106; Mr. Drill announced that this hearing would be continued at the April 5, 2016 meeting.

**Closed Session – Discussion of Employment and Appointment of Banisch Associates as Planning Board Planner**
The Closed Session was not held and was carried to the next meeting

There being no further business, the meeting was adjourned at 10:45 p.m.

Respectfully submitted,

Frances Florio
Secretary to the Board
RESOLUTION MEMORIALIZING THE GRANT OF PRELIMINARY AND FINAL
SITE PLAN APPROVAL, “C(1)” VARIANCES AND AN EXCEPTION TO ALLOW:
SMALL ADDITIONS AND RENOVATIONS TO THE EXISTING ADMINISTRATION
BUILDING, THE RELOCATION OF AN EXISTING EMERGENCY GENERATOR AND
THE INSTALLATION OF FOUR ADDITIONAL EMERGENCY GENERATORS, AND
RELATED SITE IMPROVEMENTS

WHEREAS, United States Golf Association (the “applicant” or “USGA”) owns
certain property located in the Township of Bernards (the “Township”) designated on the
Township tax maps as Block 9601, Lot 5.01 (the “property”), which property is situated in the
GH Golf Heritage zoning district (the “GH zone”) and contains the headquarters of the USGA,
which includes a golf museum in an approximately 33,000 square foot, two-and-a-half-story,
brick building (the “golf museum building”), the USGA administrative offices in a large
approximately 100,000 square foot, four-story brick building (the “administrative building”), an
equipment testing facility in an approximately 18,000 square foot, three-story brick building (the
“equipment testing building”), a maintenance facility in a small approximately 5,000 square
foot, one-story building (the “maintenance building”), and a main drive, a service drive, and a
series of parking lots (all buildings and site improvements together referred to as the “USGA
facility”);

WHEREAS, USGA submitted an application form dated June 18, 2015 to the
Bernards Township Planning Board (the “Board”) seeking preliminary and final site plan
approval, “c(1)” variances and an exception (the “application”) to allow (a) installation of a new
exterior façade on the existing administration building, (b) relocation of the existing emergency
generator situated adjacent to the administration building to an area adjacent to the maintenance
building, (c) installation of four new emergency generators on a new generator pad adjacent to the
maintenance building, (d) construction of small in-fill additions to the administration building
consisting of approximately 785 square feet of new interior space on the second and third floors
of the administration building under an existing fourth floor overhang, (e) renovations to the
interior of the administration building, and (f) construction of an underground utility room
adjacent to the administration building (the “proposed development”);

WHEREAS, the USGA facility is a permitted use in the GH zone and the Board
has exclusive subject matter jurisdiction over the application pursuant to N.J.S.A. 40:55D-20, 46,
50, 51 and 60 because the application does not require any “d” variances to construct the
development pursuant to N.J.S.A., 40:55D-70d;

WHEREAS, the application was deemed to be complete;

WHEREAS, a number of documents were submitted by the applicant, Board and
Township experts and officials, and outside agencies with regard to the application, all of which
documents are on file with the Board and are part of the record in this matter, and the following
are the latest versions of the plans, drawings and documents for which Board approval is sought,
which plans, drawings and documents have been on file and available for public inspection for at least 10 days prior to the hearing on the application in accordance with N.J.S.A. 40:55D-10b:

1. “USGA Headquarters Administration Building Renovation,” prepared by Robert C. Moschello, PE, PP, of Gladstone Design, Inc., signed and dated June 5, 2015, last revised September 4, 2015, and consisting of four sheets (the “site plans”),

2. “USGA Campus Renovation, Administration Building, 77 Liberty Corner Road” prepared by Gensler, dated June 15, 2015, and consisting of 17 drawings (the “architectural plans”), and


WHEREAS, the Board considered the application at a duly noticed public hearing conducted on October 6, 2015, with affidavits of publication and service of notice of the hearing being submitted to the Board and being on file with the Board, thereby conferring procedural jurisdiction over the application with the Board, during which hearing the applicants were represented by Thomas J. Malman, Esq., and the Board was represented by Jonathan E. Drill, Esq.;

WHEREAS, the following individuals testified under oath during the hearing, were subject to cross-examination, and the testimony is part of the record in this matter:

1. Robert Williams (applicant’s manager and representative),
2. Ronald Kennedy, PE (applicant’s engineering expert),
3. Reid Brockmeier, AIA (applicant’s architectural expert),
4. Thomas Quinn, PE (Board’s engineering expert),
5. David Banisch, PP (Board’s planning expert), and
6. David Schley, PP (Township’s planner),

WHEREAS, the following exhibits were entered into evidence during the hearing, are on file with the Board, and are part of the record in this matter:

A-1 Paper copy of the PowerPoint shown during the hearing titled “USGA Headquarters Administration Building Renovation”;


A. FACTUAL FINDINGS
1. **The Property, Zoning, Improvements and Prior Approvals.** The property is comprised of 68.537 acres, is located at 77 Liberty Corner Road, and is situated in the GH Zone. As set forth above, the property contains the USGA facility which consists of the headquarters of the USGA, which includes the golf museum, the USGA administrative offices in the administration building, the equipment testing building, the maintenance building, and a main drive, service drive, and a series of parking lots. The USGA facility was initially approved by the Board of Adjustment by way of a “d(1)” use variance and site plan approval in 1971. The USGA facility has expanded a number of times over the years, all by way of “d” variances and site plan approval from the Board of Adjustment. The most recent approval for the property was a 2014 minor subdivision approval granted by the Board to the applicant to allow a portion of neighboring Lot 4.01 (owned by James and Kyung-Mi Orthmann) to be subdivided and conveyed to the applicant to increase the size of the property from 67.136 acres to 68.537 acres. The Board recognized in 2014 that the USGA facility was not then a permitted use in the R-1 zone and, in fact, the USGA use was allowed by “d(1)” variance granted by the Bernards Township Zoning Board of Adjustment. The Board found, however, that the minor subdivision of neighboring Lot 4.01 to add land to the property was not intensifying and/or expanding the then non-permitted USGA use, so no “d” variance was required as part of that minor subdivision application pursuant to N.J.S.A. 40:55D-70d so that the Board had jurisdiction over the minor subdivision. The property was situated in a residential zone since prior to the time of the initial use variance and site plan approval granted by the Board of Adjustment in 1971 and only recently was re-zoned to GH zone by Ordinance #2302 adopted on January 27, 2015. Since January 27, 2015, the USGA facility has been a permitted use on the property.

2. **The Proposed Development.** The proposed development consists of the following: (a) installation of a new exterior façade on the existing administration building; (b) relocation of the existing emergency generator situated adjacent to the administration building to an area adjacent to the maintenance building; (c) installation of four new emergency generators on a new generator pad adjacent to the maintenance building; (d) construction of small in-fill additions to the administration building consisting of approximately 785 square feet of new interior space on the second and third floors of the administration building under an existing fourth floor overhang; and (e) interior renovations of the administrative building.

3. **The Application.** In order to construct the proposed development, the applicant submitted the application which seeks the following relief: (a) preliminary and final site plan approval; (b) “c(1)” variance from zoning ordinance section 21-10.9.1.a.3(c) which requires structures to be setback at least 75 feet from property lines to allow the lawfully created pre-existing equipment testing building which is 32.9 feet from the southwesterly side property line to remain in that location and to allow the lawfully created pre-existing maintenance building which is 49.6 feet from the southwesterly side property line to remain in that location as well; (c) “c(1)” variance from zoning ordinance section 21-10.9.1.a.3(d) which requires parking spaces to be setback at least 50 feet from property lines to allow the lawfully created pre-existing parking spaces that are less than 50 feet from the southwesterly property side property line to remain in their current locations; (d) “e(1)” variance from zoning ordinance section 21-28.2.a, which requires a minimum buffer width abutting a residentially zoned lot to be at least 50 feet wide, to allow the lawfully created pre-existing buffer to be less than 50 feet at various locations; and (e) an exception from site plan ordinance section 21-42.1.f.2, which requires installation of seepage

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1 While the applicant initially also sought approval to construct an underground utility room adjacent to the administration building, the applicant withdrew and abandoned that aspect of the proposed development during the hearing on the application.
pits or other infiltration measures for “minor developments,” to allow no stormwater management improvements to be installed.  

4. **Findings as to the “C(1)” Variances to Allow the Lawfully Created Pre-Existing Nonconforming Conditions to Remain.** As set forth above, the applicant has requested “c(1)” variances to allow some lawfully created pre-existing nonconforming conditions to remain as part of the proposed development. In the past, the Board might have viewed such lawfully created pre-existing deviations as being immune from review in a subsequent application on the basis of N.J.S.A. 40:55D-68, which provides: “Any nonconforming . . . structure existing at the time of the passage of an ordinance may be continued upon the lot . . . and any such structure may be restored or repaired in the event of partial destruction thereof.” However, the Time of Application Law, N.J.S.A. 40:55D-10.5, has changed this. N.J.S.A. 40:55D-10.5 provides: “Notwithstanding any provision of law to the contrary, those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application.” Thus, lawfully created pre-existing nonconforming conditions are entitled to remain only if no further development application is submitted related to the property at issue. Despite the fact that the proposed development will have no impact whatsoever on the lawfully created pre-existing nonconforming conditions at issue in the application, and despite the fact that these nonconforming conditions are entitled to remain in the absence of further development, because an application for development has been submitted, the Board finds that it must now judge all conditions, even the lawfully created pre-existing nonconforming conditions, against the development regulations in effect on the date of the submission of the application. As such, “c” variances are required to allow the lawfully created pre-existing nonconforming conditions to remain as part of the proposed development. The applicant applied for “c(1)” or so-called “hardship” variances to allow the pre-existing nonconforming conditions to remain. The Board’s findings as to the positive and negative criteria of the “c(1)” variances are as follows:

a. **Positive Criteria of the “C(1)” Variances.** The Board’s findings as to the positive criteria of the “c(1)” variances are as follows. First, the Board finds that the ordinance deviations at issue constitute extraordinary and exceptional situations uniquely affecting the structures lawfully existing on the property because all of the conditions were lawfully created by virtue of prior approvals by the Board of Adjustment. Second, the Board finds and notes that the proposed development will have no impact whatsoever on these pre-existing nonconforming conditions. In fact, the deviations are related to buildings other than the administration building, and the administration building is the building subject to the application. Likewise, the deviations are related to parking spaces which are not the subject of the application. Third, the Board finds that the strict application of the ordinance regulations now in effect will result in exceptional and undue hardship upon the applicant because it is unreasonable to require the applicant to re-construct the two existing buildings which encroach into the setback area to

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2. Despite the fact that there will be less than 1,000 square feet of additional impervious coverage created by the proposed development, the proposed development is nonetheless classified as a “minor development” under ordinance section 21-42.1.e.2 because there will be over 2,500 square feet of land area disturbed. The approximate area of disturbance will be 6,000 square feet, although approximately 5,000 square feet of the disturbance is to previously disturbed land now covered by impervious surfaces. Due to the fact that over 2,500 square feet of land area will be disturbed, ordinance section 21-42.1.f.2 applies and requires seepage pits or other infiltration methods to be installed.

satisfy the setback regulations, and there is no room to relocate the existing parking spaces that encroach into the setback area to satisfy the setback regulations. The Board finds that to deny the requested variances to allow the lawfully created pre-existing nonconforming situations to remain would have the effect of prohibiting the applicant from upgrading its existing facilities which will inhibit the extent to which the property can be used, especially in light of the fact that the proposed development complies with the maximum impervious coverage and maximum floor area regulations established in the newly created GH zone. The Board finds that this is a “classic hardship” situation and that “c(1)” variances should be granted to relieve the hardship.

b. **Negative Criteria of the “C(1)” Variances.** The Board’s findings as to the negative criteria of the “c(1)” variances are as follows. The Board finds that the “c(1)” variances can be granted without substantial detriment to the public good, without the necessity of imposing any conditions. The reason is that the deviations at issue have existed since the Board of Adjustment approved the USGA facilities over the years and there have been no problems reported during this entire time period. The Board also finds that the “c(1)” variances can be granted without substantially impairing the intent and purpose of the master plan and zoning ordinance, without the necessity of imposing any conditions. The reason is that, even though the newly adopted GH zoning regulations did not legitimize the deviations by lessening the setback regulations applicable to these pre-existing conditions, the ordinance amendment did make the underlying use permitted and, the Board finds, the new GH zone implicitly recognized that the pre-existing conditions should be allowed to remain in future applications through the grant of “c(1)” variances unless the proposed development at issue impacted or worsened one of the pre-existing conditions.

5. **Findings as to the Stormwater Exception.** As set forth above, an exception from the requirement in site plan ordinance section 21-42.1.f.2 that seepage pits or other infiltration measures be installed is sought to allow no stormwater management improvements to be installed. The Board’s findings as to the requested exception are as follows: First, the Board finds that granting the exception is reasonable and within the general purpose and intent of the provisions for site plan review and approval for the following reasons. The Board finds and notes that, while the construction of the proposed development will disturb approximately 6,000 square feet of area, over 5,000 square feet of that disturbance is of areas of the site that have been previously disturbed and currently contain impervious surface so, in essence, constitute a temporary – not permanent – disturbance. In fact, the applicant proposes to remove pavement at the rear of the museum building to keep the additional impervious coverage under 1,000 square feet (approximately 750 square feet of impervious coverage will be added by the proposed development). Further, the application involves only 963 square feet of added disturbed area. Significantly, if the total area disturbed had been less than 2,500 square feet, the proposed development would have been an “exempt development” under ordinance section 21-42.1.e.2 and, therefore, no stormwater management improvements would be required. And, the amount of area that will be permanently disturbed is less than 1,000 square feet. As such, the Board finds that it is reasonable under the unique circumstances present in this particular application, as well as within the intent and purpose of the site plan ordinance requirement at issue, to grant the exception to, in essence, treat the situation as one where less than 2,500 square feet of area will be disturbed. Second, the Board finds that the literal enforcement of the site plan ordinance requirement at issue is impracticable because of peculiar conditions pertaining to the land in question, namely, the fact that only 963 square feet of added disturbed area is at issue. The Board finds that it makes no sense to require stormwater management improvements under the circumstances when they are not needed as a matter of practicality and are only needed as a matter of technicality.
6. **Findings as to Preliminary and Final Major Site Plan Review.** The Board’s findings as to preliminary and final site plan review are as follows:

   a. **Compliance with Ordinance Provisions.** Other than the zoning ordinance regulations and site plan ordinance requirement set forth above from which the applicant sought and the Board will grant variances and/or exceptions, the Board finds that the application and site plans will comply with all other applicable zoning ordinance regulations and site plan ordinance requirements, provided however that the conditions set forth below are imposed and complied with. This includes but is not limited to the following specific site plan ordinance requirements:

   (1) Ordinance section 21-28.1 provides that “visual screens shall be provided through landscaping or other means as approved by the Board” and such “screens shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis,” and ordinance section 21-43.1, providing that the “project shall be landscaped so as to . . . enhance the appearance of the project, both on-site and from the surrounding area.” The Board finds that the site plans will comply with these landscaping requirements provided that the conditions set forth below are imposed and complied with.

   (2) Ordinance section 21-35.4 incorporates by reference the NJDEP noise regulations, also known as the State Noise Code, which are found in N.J.A.C. 7:29-1 et seq. and provide that noise levels emanating from a property cannot exceed 65 decibels at the property line abutting a residential use or zone during daytime hours (7 a.m. to 10 p.m.) and cannot exceed 50 decibels at the property line abutting a residential use or zone during nighttime hours (10 p.m. to 7 a.m.). With specific reference to noise generated by the proposed emergency generators at the property lines abutting the residential zones surrounding the property while being tested and/or “exercised” (not while being used during an emergency because use of generators during an emergency is exempt from the noise regulations), the Board finds that the proposed generators will comply with the noise regulations provided that the conditions set forth below are imposed and complied with.

The Board finds that conditional approval of the site plans, subject to the site plan revisions required below being made, is appropriate in this particular application because the site plans, as revised, will then comply with all applicable ordinance regulations and requirements (other than from those ordinance provisions from which variances or exceptions have been sought).

   c. **Compliance with Matters Vital to Public Health.** Provided that the conditions set forth below are imposed and complied with, the Board also finds that matters vital to the public health (water supply, sewage disposal, stormwater drainage, and traffic circulation) will be adequately provided for and appropriately designed as part of the proposed development. See, ordinance sections 21-54.8.a.1(c),(d), (e)&(f). Water supply, sewage disposal and traffic generation will not change under the proposed development. And, while there will be a minor impact to stormwater management, it will be a de minimis impact and no changes to the stormwater management system are proposed or needed.

B. **CONCLUSIONS OF LAW**

1. **Conclusions as to the “C(1)” Variances.** The Board’s conclusions as to the “c(1)” variance are as follows:
a. **Standards for Considering the “C(1)” Variances.** The Board has the power to grant “c(1)” or so-called “hardship” variances pursuant to N.J.S.A. 40:55D-70c(1) where: (1) “(a) by reason of exceptional narrowness, shallowness or shape of a specific piece property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon; (2) the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property.” This is the so-called “positive” criteria of a “c(1)” variance. The “hardship” that the applicant must prove is not that the zoning regulation at issue has zoned the property into inutility. While inutility caused by a zoning regulation would require a variance to avoid an unconstitutional taking of the property, the Board may (but is not required to) grant a variance where the hardship at issue may inhibit “the extent” to which the property can be used. **Lang v. North Caldwell Board of Adjustment,** 160 N.J. 41, 54-55 (1999). To be clear, a hardship variance is not available to relieve “personal hardship” of the owner, financial or otherwise. **Jock v. Wall Township Zoning Board of Adj.,** 184 N.J. 562, 590 (2005). A hardship variance is also not available to relieve hardship caused by a mistake, **Deer-Glen Estates v. Borough of Fort Lee,** 39 N.J. Super. 380, 386 (App. Div. 1956), and/or for an intentionally created situation, which is referred to as a “self created” hardship. **Commons v. Westwood Board of Adj.,** 81 N.J. 597, 606 (1980); **Chirichello v. Monmouth Park Board of Adj.,** 78 N.J. 544, 553 (1979). Finally, even if an applicant proves the “positive” criteria of a “c(1)” variance, the Board may not exercise its power to grant the variance unless the so-called “negative criteria” has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70, “no variance or other relief ... may be granted ... unless such variance or other relief ... can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” The phrase “zone plan” as used in the N.J.S.A. 40:55D-70 means the Township “master plan.” **Medici v. BPR Co.,** 107 N.J. 1, 4, 21 (1987).

b. **Conclusions as to Grant of the “C(1)” Variances.** As set forth above in the factual findings, the Board found that the ordinance deviations at issue constitute extraordinary and exceptional situations uniquely affecting the structures lawfully existing on the property because all of the nonconforming conditions were lawfully created by the Board of Adjustment in approving the USGA facility and the expansions of the USGA facility over the years. Further, the Board found that the strict application of the ordinance regulations now in effect will result in exceptional and undue hardship upon the applicant because it is unreasonable to require the applicant to re-construct the two existing buildings which encroach into the setback area to satisfy the setback regulations, and there is no room to relocate the existing parking spaces that encroach into the setback area to satisfy the setback regulations. The Board thus found that to deny the requested variances to allow the lawfully created pre-existing nonconforming situations to remain would have the effect of prohibiting the applicant from upgrading its existing facilities which will inhibit the extent to which the property can be used, especially in light of the fact that the proposed development complies with the maximum impervious coverage and maximum floor area regulations established in the newly created GH zone. The Board further found that this is a “classic hardship” situation and that “c(1)” variances should be granted to relieve the hardship. Finally, as also set forth above in the factual findings, the Board found that the “c(1)” variances could be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the master plan and zoning ordinance. As such, the Board concludes that it can and should grant the “c(1)” variances to allow the lawfully created pre-existing nonconforming conditions to remain on the property after construction of the proposed development, and without the imposition of any conditions.
2. Conclusions as to the Exception. The Board’s conclusions as to the exception are as follows:

   a. Standards for Considering the Exception. The Board has the power to grant exceptions from subdivision and site plan ordinance requirements pursuant to N.J.S.A. 40:55D-51a and 51b “as may be reasonable and within the general purpose and intent of the provisions” for site plan review and approval “if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.”

   b. Conclusions as to Grant of the Exception. As set forth above in the factual findings, the Board found that it is reasonable under the unique circumstances present in this particular application, as well as within the intent and purpose of the site plan ordinance requirement at issue, to grant the exception. Second, the Board finds that the literal enforcement of the site plan ordinance requirement at issue is impracticable because of peculiar conditions pertaining to the land in question, namely, the fact that only 963 square feet of added disturbed area is at issue. The Board found that it makes no sense to require stormwater management improvements under the circumstances when they are not needed as a matter of practicality and are only needed as a matter of technicality. Finally, the Board found that the exception could be granted without the necessity of imposing any conditions. The Board thus concludes that the exception can and should be granted, and without the imposition of any conditions.

3. Preliminary and Final Major Site Plan Review. The Board’s conclusions as to Preliminary and Final Major Site Plan review are as follows:

   a. Standards for Preliminary and Final Site Plan Review. N.J.S.A. 40:55D-46a and 50a are the focal points for preliminary and final site plan review. N.J.S.A. 40:55D-46a provides that the Board “shall” grant preliminary approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final approval “shall” be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. Thus, if the application complies with all ordinance provisions, the Board must grant approval. Conversely, if the application does not comply with all ordinance provisions, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are exceptions:

      (1) The first exception is where an application does not comply with all ordinance regulations and requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance regulations and requirements and grant approval if the application complies with all such remaining regulations and requirements.

      (2) The second exception is where the application does not comply with all ordinance regulations and requirements but a condition can be imposed requiring a change that will satisfy the ordinance provisions. In that case, the Board can either grant approval on the condition that the application be revised prior to signing the plan to comply with the ordinance provisions or the Board can adjourn the hearing to permit the applicant the opportunity to revise the prior to the Board granting approval.
Finally, the Board cannot grant approval unless matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety are addressed. D’Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). And, if information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the subdivision review process, approval must be denied. Id.

b. Conclusions as to Grant of Preliminary and Final Site Plan Approval. As set forth above in the factual findings, other than the zoning ordinance regulations and site plan ordinance requirement set forth above from which the applicant sought and the Board will grant variances and/or exceptions, the Board finds that the application and site plans will comply with all other applicable zoning ordinance regulations and site plan ordinance requirements, provided however that the conditions set forth below are imposed and complied with. The Board thus concludes that preliminary and final site plan approval for the proposed development can and should be granted, subject to the conditions set forth below being imposed and complied with.

4. Imposition of Conditions. Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. See, Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to insure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to insure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See also, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that “aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances” and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff’d o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J. 418, 438-439 (2000) (explaining that site plan review “typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping” and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2015), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board’s implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by Board’s experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): “The
MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications” and using such professional consultants to review and evaluate revised plans “was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application.” The conditions set forth below have been imposed on all of the above bases.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD BY MOTION DULY MADE AND SECONDED ON OCTOBER 6, 2015 THAT THE APPLICATION IS GRANTED AS FOLLOWS:

C. RELIEF GRANTED

1. Grant of “C(1)” Variances. The Board hereby grants “c(1)” variances from the following zoning ordinance regulations to allow the following lawfully created pre-existing deviations to remain after construction of the proposed development, and without imposition of any conditions:

   a. Building Setback Variances. “C(1)” variance from zoning ordinance section 21-10.9.1.a.3(c), which requires structures to be setback at least 75 feet from property lines, to allow the lawfully created pre-existing equipment testing building which is 32.9 feet from the southwesterly side property line to remain in that location and to allow the lawfully created pre-existing maintenance building which is 49.6 feet from the southwesterly side property line to remain in that location.

   b. Parking Space Setback Variance. “C(1)” variance from zoning ordinance section 21-10.9.1.a.3(d), which requires parking spaces to be setback at least 50 feet from property lines, to allow the lawfully created pre-existing parking spaces that are less than 50 feet from the southwesterly property side property line to remain in their current locations.

   c. Buffer Width Variance. “C(1)” variance from zoning ordinance section 21-28.2.a, which requires a minimum buffer width abutting a residentially zoned lot to be at least 50 feet wide, to allow the pre-existing buffer to be less than 50 feet at various locations abutting the residentially zoned neighboring lots.

2. Grant of Exception. The Board hereby grants an exception from site plan ordinance section 21-42.1.f.2, which requires installation of seepage pits or other infiltration measures for “minor developments,” to allow no stormwater management improvements to be employed, and without imposition of any conditions.

3. Grant of Preliminary and Final Site Approval for the Proposed Development Subject to Conditions. Subject to the conditions set forth below, the Board hereby grants preliminary and final site plan approval to the site plans and architectural plans as well as the other documents referenced above to allow construction of the proposed development.

D. CONDITIONS

1. Revisions to Plans and other Documents. Revisions to the site plans, architectural plans, and other documents referenced below shall be made by notes and/or drawings to the satisfaction of the Board expert(s) who filed the report or testified as well as to
the satisfaction of the Township Engineer and Township Planner as set forth below. All revisions shall be made and the site plans signed by the Board Chair and Secretary by July 19, 2016 (which is six (6) months from the date of the adoption of the within resolution on January 19, 2016). In the event that the applicant fails to revise the plans and documents as required by the within condition and/or fails to obtain signatures on the site plans as required by the within condition, all within said time period, or extension thereof as granted by the Board, the approvals shall expire and become automatically null and void. (The Board notes that, in the absence of the within time limitation condition, it would decline to grant conditional approvals and, instead, would continue the hearing on an application for no more than a six month period to provide the applicant with the opportunity to revise the plat, plans and documents and, failure by the applicant to resubmit same to the Board within that period or submission within that period but failure of the applicant to make all the required revisions, would result in denial of the application.) Any dispute(s) concerning satisfaction of any conditions related to the revisions of theplat, plans and documents may be brought to the Board for resolution by written letter application submitted by the applicant without the necessity for public notice but on written notice to the Board engineering expert and Township Planner. The required revisions and the expert report from which they emanated are as follows:

a. **Following comments emanating in the memo to the Board from David Schley, PP, AICP, Township Planner, dated September 16, 2015, relating to the site plans and the architectural plans:**

   (1) Sheet 3 of the site plans – On the footprint of the administration building, delineate and label the area of the proposed second and third floor expansion.

   (2) Sheet 3 of the site plans – Show existing/proposed pavement, concrete, curbing, and other surfaces/structures in the vicinity of the maintenance building generator.

   (3) Sheet 3 of the site plans – In the tree removal/replacement schedules, revise the tree size ranges to reflect that replacement trees are required for removed trees which are greater than or equal to 10” diameter. Also, revise the tree counts shown in the schedules to match the plan. Based on the plan, it appears that a total of 8 trees are to be removed, requiring 14 to 23 replacements trees. The applicant shall consult with the Township Planner and the Township Planner will determine the number of required replacement trees. The applicant shall then revise the site plans to add the required number of additional trees to be planted. The plans shall then be subject to review and approval by a Board appointed landscaping committee, and the plans shall be further revised to comply with any and all reasonable recommendations of the landscaping committee relative to the locations and types of replacement trees, which shall be native species unless otherwise approved by the landscaping committee. Any dispute(s) concerning the determinations of the landscaping committee may be brought to the Board for resolution by written letter application submitted by the applicant without the necessity for public notice but on written notice to the Township Engineer and Township Planner.

   (4) Sheet 3 of the site plans – At the administration building generator area, show the proposed replacement of the existing hedge and railing and/or other improvements to provide for screening and safety along the top of the retaining wall.
(5) Sheet 4 of the site plans – Amend the shade tree planting detail to specify staking in accordance with Township standards.

(6) Architectural Plans – Show a written and graphic scale for each drawing.

(7) Architectural Plans – On the floor plans, show dimensions of the proposed additions.

(8) (Intentionally omitted as these comments apply only if the applicant proposes changes to the existing elevators and the applicant represented during the hearing that it did not propose any changes to the existing elevators. However, in the event that the applicant proposes changes to the existing elevators in the construction drawings it submits for zoning and construction permits, and in the further event that such changes do not require an amended site plan approval (and amended site plan approval would be required if the changes to the existing elevators increases the footprint of the building or the height of any part of the building), the applicant shall submit the proposed changes for review and approval by the Liberty Corner First Aid Squad prior to making the changes and prior to issuance of any permit.)

(9) Architectural Plans – On the elevations, label proposed building materials and colors, which shall be substantially similar to those reflected in the color elevations contained in the PowerPoint entered into evidence during the hearing on the application as Exhibit A-1.

(10) (Intentionally omitted as these are general comments and require no plan or other document revisions)

(11) Architectural Plans – Show any proposed roof-mounted utility equipment, with means of screening, or add a note stating there shall be no roof-mounted utility equipment.

(12-14) (Intentionally omitted as these are general comments and require no plan or other document revisions)

(15-20) (Intentionally omitted as these comments are included in the conditions set forth below and require no plan or other document revisions)

b. Following comments emanating in the memo to the Board from David J. Banisch, PP, AICP, Board Planning Expert, dated October 5, 2015, relating to the site plans and landscape plans:

(1-3) (Intentionally omitted as these are general comments and require no plan or other document revisions)

(4) Add all existing and proposed setbacks to the site plans, including but not limited to the following:

(a) The proposed expanded generator pad for the four new generators will be setback from the property line approximately 278’ vs. 75’ required.
(b) Existing nonconforming setbacks including 32.9’ (equipment testing building) and 49.6’ (maintenance building), and add note that these nonconforming setbacks have previously received Board of Adjustment approval, will remain unchanged, and have been granted “c(1)” variance approval by the Board as memorialized in the within resolution.

(c) The proposed concrete pad and generator location at the maintenance facility will be setback approximately 92.5’ from the property line vs. 75’ required.

(5-11) (Intentionally omitted as these are general comments and require no plan or other document revisions)

c. Following comments emanating in the letter to the Board from Thomas J. Quinn, PE, CME, Board Engineering Expert, dated October 5, 2015, relating to the site plans and the EIA:

[1] Project Data/Vicinity Plan sheet of the site plans:

(1) (Intentionally omitted as the Board has granted an exception from the requirement that seepage pits or other infiltration measures be installed so no site plan revisions are required.)

(2) Confirm that the 2005 wetlands LOI from the NJDEP referenced in the general notes was extended / renewed and revise the note to reflect the extension / renewal date. If the 2005 wetlands LOI was not extended / renewed, the applicant shall obtain a new LOI and the note shall be revised to reference the new LOI.

[2] Site Dimension and Grading Plan sheet of the site plans:

(1) Field topography shall be provided in the vicinity of the work areas.

(2) (Intentionally omitted as these are general comments and require no plan revisions)

(3) (Intentionally omitted as these are general comments and require no plan revisions)

(4) Revise / clarify the sheet to reflect that the relocated generator adjacent to the maintenance building will be placed on a level concrete pad. Top and bottom of slab elevations shall be provided along with any other required grading.

(5) Revise the sheet to reflect that the existing security chain link fence within the generator area will be removed and new security fencing will be installed as required for both proposed generator locations.

(6) (Intentionally omitted as these are general comments and require no plan revisions)
(7) Revise the sheet to reflect the height of the existing retaining wall.

(8) Revise / clarify the sheet to reflect that the expanded generator area will drain stormwater runoff with a minimum 1% slope in this area.

(9) Add a dimension between the proposed generators and the building.

(10) (Intentionally omitted as these are general comments and require no plan revisions)

(11) (Intentionally omitted as the proposed underground utility room has been eliminated from the proposed plan by the applicant)

[3] Construction Details:

(1) Add notes and/or drawings to include in the sequence of construction the installation of the generators and the required conduits.

(2) The Tree Replacement Inset shows a small area of existing pavement to be removed. Revise this sheet to include this as an area of disturbance and to call for the area to be restored with minimum 6” topsoil, seed and mulch.


(1) Revise the EIA to specify the size of the proposed generators.

(2) Revise section 2.5 of the EIA to state that the project is subject to stormwater design standards for a minor development. Include in the EIA any associated stormwater design calculations, recognizing that the Board granted an exception from the applicant having to install seepage pits or other infiltration measures.

(3) Correct section 2.6 of the EIA which incorrectly states that the area of disturbance is 5,000 square feet to reflect that the area of disturbance is the square footage reflected on the site plans. Add to section 2.6 of the EIA that the Board granted an exception from the applicant having to install seepage pits or other infiltration measures and explain the basis of the exception as reflected in the within resolution.

2. **Design, Construction and Location of Improvements.** The applicant shall be required to design, construct and locate the proposed improvements in substantial conformity with the site plans and landscape plans referenced above after they have been revised in accordance with the conditions of the within resolution. The exterior of the administration building shall be substantially similar to that reflected in the color elevations contained in the PowerPoint entered into evidence during the hearing on the application as Exhibit A-1.

3. **Submission of Digital Plans.** The applicant shall submit digital copies of all plans and documents in formats acceptable to the Township Engineering Department.
4. **Affordable Housing Development Fee.** The applicant shall be required to pay an affordable housing non-residential development fee to the extent such fee is required by applicable law and in an amount provided by applicable law.

5. **Escrow Fees.** Any and all outstanding escrow fees shall be paid in full and the escrow account replenished to the level required by ordinance within 10 days of the adoption of the within resolution, within 10 days of written notice that a deficiency exists in the escrow account, prior to signing the site plans, prior to the issuance of a zoning permit, prior to the issuance of construction permits, and prior to the issuance of a temporary and/or permanent certificate of occupancy, completion or compliance (whichever is applicable).

6. **Pre-Construction Meeting.** The applicant shall attend a pre-construction meeting with the Township Engineering Department prior to the start of any construction activity.

7. **Time to Obtain Construction Permits and Commence and Complete Construction.** The applicant shall apply for and obtain a construction permit by January 19, 2018 (which is within two (2) years of the date the within resolution granting final site plan approval was adopted on January 19, 2016). If during said two (2) year period, or extension thereof as granted by the Board, the applicant fails to obtain a construction permit, the within final approval shall automatically expire and become null and void. The applicant shall also have one (1) year from the date of issuance of the first construction permit to commence construction and obtain a permanent certificate of occupancy. If during said one (1) year period, or extension thereof as granted by the Board, work is not commenced and/or a permanent certificate of occupancy is not obtained, the within final approval shall automatically expire and become null and void.

8. **Specific Approvals and Permits.** The within approval shall be conditioned upon the applicant obtaining permits and/or approvals from all applicable agencies and/or departments including (if applicable) but not necessarily limited to the following municipal, county and/or state agencies and/or departments:

a. Township Board of Health (N/A).

b. Somerset County Department of Health (N/A).

c. Bernards Township Sewerage Authority (N/A).

d. Somerset - Union Soil Conservation District certification / approval of the soil erosion and sediment control plan.

e. Somerset County Planning Board approval of any aspect of the proposed development within its jurisdiction, and

f. NJDEP approval of any aspect of the proposed development within its jurisdiction.

9. **Easements, Dedications and Conveyances.** Any and all easements, dedications and/or conveyances which are proposed on the site plans and/or required by the preceding conditions shall, in addition to being identified on the plans, be contained in separate documents, if required, satisfactory to the Township Attorney and Township Engineer. The
documents shall be prepared by the Township Attorney or the applicant’s attorney, at the discretion of the Township Attorney. Said documents shall specifically outline the grant of the easement, dedication and/or conveyance and its purpose and shall contain a metes and bounds description and a map of the easement, dedication and/or conveyance area. All such documents shall be recorded prior to issuance of any permits and, upon completion of the recording process, be transmitted to the Township Clerk for maintenance with other title documents of the Township.

10. **Landscaping.** All landscaping, as installed, shall conform to and be in accordance with the landscaping plan approved and signed by the Board, and which landscape plan shall include any and all the landscaping changes required by condition #1 above. Prior to the issuance of a permanent certificate of occupancy, completion or compliance (whichever is applicable) and prior to the release of any performance guaranty, the landscaping shall be installed. If the applicant applies for a certificate of occupancy during a non-planting season, the applicant may obtain a temporary certificate of occupancy without installation of the landscaping but if and only if the applicant posts a performance guaranty in a form acceptable to the Township Attorney and in an amount acceptable to the Township Engineer guaranteeing installation of the landscaping during the next planting season. The applicant shall have a continuing obligation to maintain all landscaping in perpetuity for its intended purpose (i.e., for screening if planted for buffering purposes or for aesthetics if planted for enhancement purposes), which shall include but not be limited to repairing and/or replanting to the satisfaction of the Township Planning / Engineering Department any and all landscaping that becomes damaged and/or dies. (This continuing maintenance obligation is in addition to, and notwithstanding, the fact that a maintenance guarantee may or may not be required in any particular application.) In the event that Township Planning / Engineering Department personnel determine that utilization of an outside expert (e.g. Board landscape architectural expert) is necessary to fulfill the intent of this section, all costs and expenses of such outside experts shall be reimbursed to the Township by the applicant.

11. **Enforcement and Maintenance of Parking and Fire Lanes and Fire Hydrants and FDC’s, and Unobstructed Access to all Buildings.** The applicant shall strictly monitor and enforce parking as permitted and reflected on a signed site plan. This means that parking shall be permitted only in those areas and in those spaces designated on the site plan for same. The owner of the property shall include provisions in all leases to this effect. The applicant shall identify on the site through pavement markings and signage (as approved by the Township Engineer) all parking spaces and fire lanes/zones. The applicant shall have a continuing obligation to maintain all parking areas, which shall include but not be limited to repainting and reinstalling signage for all required spaces. As specified in Township Fire Official Janet Lake’s October 5, 2015 email to the Board, parking of large trucks and the additional vehicles that will be at the USGA facility, even during loading and unloading, shall maintain fire company access and they shall not obstruct fire hydrants, fire department connections, Knox Boxes and/or entry to any and all of the buildings on the property.

12. **Generator Testing and Exercising Condition.** Testing and “exercising” of all generators on the property shall be done during daytime hours only (7 a.m. to 5 p.m.) and during weekdays only.

13. **Pre-Construction Meeting.** The applicant shall attend a pre-construction meeting with the Township Engineering Department prior to the start of any construction activity.
14. **Subject to all Conditions of prior Board of Adjustment and Planning Board Approvals.** The site and the USGA facility shall remain subject to all conditions of prior Board of Adjustment and Planning Board approvals and conditions of approvals not specifically eliminated or modified in the within resolution.

15. **Subject to Other Approvals and Laws.** The within approval and the use of the property are also conditioned upon and made subject to any and all laws, ordinances, requirements and/or regulations of and/or by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. The within approval and the use of the property are also conditioned upon and made subject to any and all approvals by and/or required by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. In the event of any inconsistency(ies) between the terms and conditions of the within approval and any approval(s) required above, the terms and/or conditions of the within approval shall prevail unless and until changed by the Board upon proper application.

**VOTE ON MOTION DULY MADE AND SECONDED ON OCTOBER 6, 2015:**

**THOSE IN FAVOR:** ALPER, CARLUCCI, KLEINERT, SANTORO, AXT & PLAZA.

**THOSE OPPOSED:** NONE.

**The above memorializing resolution was adopted on January 19, 2016 by the following vote of eligible Board members:**

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<th>Members</th>
<th>Yes</th>
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I, Frances Florio, Secretary to the Planning Board of the Township of Bernards in the County of Somerset, do hereby certify that the foregoing is a true and correct copy of the memorializing resolution duly adopted by the said Planning Board on January 19, 2016.

FRANCES FLORIO, Board Secretary
RESOLUTION MEMORIALIZING DENIAL OF PRELIMINARY AND FINAL SITE PLAN APPROVAL AND DENIAL / DISMISSAL OF REQUESTS FOR OTHER RELIEF

WHEREAS, the Islamic Society of Basking Ridge, Inc. (the “applicant” or “ISBR”) owns certain property in the Township of Bernards (the “Township”) located at 124 Church Street and designated on the Township tax maps as Block 9301, Lot 2 (the “property”), which property is 4.088 acres in size, is situated in the R-2 residential zoning district (the “R-2 zone”) and contains an existing permitted single family dwelling (the “existing dwelling”), accessory building (the “accessory building”) and paved circular driveway (the “existing driveway”), with the dwelling connected to and served by the public water and sanitary sewer systems;

WHEREAS, ISBR submitted an application to the Bernards Township Planning Board (the “Board”) in 2012 seeking preliminary and final site plan approval with certain “c” variances and exceptions (the “application”) to allow: (1) demolition of the existing dwelling, (2) construction of a one-story, 4,252 square foot Mosque containing a prayer hall and multi-purpose room having a combined stated capacity for 150 people, as well as other smaller rooms, (3) one-way entrance and exit drives to provide ingress from and egress to Church Street, (4) a paved parking lot consisting of 50 parking spaces (5) two bio-retention basins, one in the front yard and one in the easterly side yard (and within the easterly buffer), (6) other related site improvements, and (7) retention of the 750 square foot accessory building for use accessory to the proposed Mosque, all as reflected on the applicant’s initial plans and drawings submission consisting of a “Preliminary and Final Site Plan” revised through May 18, 2012 (consisting of 11 sheets), “Topographic & Boundary Survey revised through March 4, 2012 (consisting of 1 sheet), and architectural drawings revised through July 6, 2012 (consisting of 3 drawings) (the “initial site plans and architectural drawings”);

WHEREAS, the application was revised a few times during the course of the hearing on the application by submission of supplemental and/or replacement plans and drawings, and the last set of plans and drawings (which are referenced below) reflect that the applicant seeks preliminary and final site plan approval and exceptions to allow: (1) demolition of the existing dwelling, (2) construction of a one-story, 4,216 square foot Mosque (the “proposed Mosque”) containing a prayer hall (the “prayer hall”) and multi-purpose room (the “multi-purpose room”) having a combined stated capacity for 150 people, as well as other smaller rooms, (3) a 20 foot wide westerly one-way entrance drive providing ingress to the property from Church Street, (4) a 24 foot wide easterly one-way exit drive providing egress from the property to Church Street, (5) a 107 space parking lot consisting of 69 paved spaces and 38 spaces to be “banked” for future construction (the “proposed parking lot”), (6) two detention basins, one in the front yard and one in the easterly side yard (and within the easterly buffer) (the “detention basins”), (7) other related site improvements including but not limited to landscaping and fencing, and (8) retention of the 750 square foot accessory building for storage use (all of the proposed improvements together being referred to as the “proposed development”);
WHEREAS, as explained in greater detail below, the proposed Mosque is a “house of worship” pursuant to ordinance section 21-3.1, houses of worship were principally permitted uses in the R-2 zone at the time the application was submitted to the Board in 2012 accordance with Township zoning ordinance section 21-10.4.a.1.(c), and the Time of Application Law, specifically, N.J.S.A. 40:55D-10.5, provides that those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application, so the proposed Mosque is deemed to be a principally permitted use on the property and, as such, the Board has exclusive subject matter jurisdiction over the application by virtue of N.J.S.A. 40:55D-20, 46, 50, and 51, by reason of the application not requiring any “d” type variances to construct the proposed development pursuant to N.J.S.A. 40:55D-70d;

WHEREAS, the application was deemed to be complete in accordance with N.J.S.A. 40:55D-10.3 and, while nothing in that statutory section diminishes the applicant’s obligation to prove in the application process that it is entitled to approval of the application, should the Board during the course of the hearing on the application require correction of any information found to be in error, or require submission of additional information not required by the Township ordinance, or require revisions in any documents, the application may not be thereafter deemed incomplete, but the Board may deny the application on the merits if the application lacks any information or documents reasonably necessary for the Board to make an informed decision as to whether the requirements necessary for approval of the application have been met;

WHEREAS, a number of documents were submitted by the applicant, Board and Township experts and officials, and outside agencies with regard to the application, all of which documents are on file with the Board and are part of the record in this matter, and the following are the latest versions of the plans and drawings for which Board approval is sought, which plans and drawings have been on file and available for public inspection in accordance with N.J.S.A. 40:55D-10b, and the drawings referenced in items #1 through #3 below supplementing and superseding the last revised full site plan set referenced in item #4 below (and all the plans and drawings referenced below being referred to as the “site plans and architectural drawings”):

1. “Site Development Plan” (sheet C-03) revised through December 8, 2014,
2. “Fire Service Plan” (sheet EX) revised through January 22, 2015,
3. Floor plans and building elevations (drawings A-01 and A-02) revised through December 5, 2014,
4. “Preliminary and final site plan,” (consisting of 14 sheets) revised through September 19, 2014,
5. “Topographic & Boundary Survey (consisting of 1 sheet) revised through October 23, 2013, and
6. Four (4) architectural drawings revised through December 20, 2013;

WHEREAS, the Board considered the application at a duly noticed public hearing, commencing on August 7, 2012 and concluding December 8, 2015, with affidavits of publication and service of notice of the hearing being submitted to and being on file with the Board thereby conferring procedural jurisdiction over the application with the Board, with the hearing sessions taking place on the following dates:

1. August 7, 2012,
2. September 4, 2012,
3. October 25, 2012,
4. November 28, 2012,
5. January 8, 2013,
6. February 5, 2013,
7. April 25, 2013,
8. June 4, 2013,
9. August 6, 2013,
10. October 8, 2013,
11. December 3, 2013,
12. January 15, 2014,
13. February 4, 2014,
14. March 4, 2014,
15. April 8, 2014,
16. April 24, 2014,
17. May 6, 2014,
18. June 12, 2014,
19. June 25, 2014,
20. July 8, 2014,
21. July 24, 2014,
22. September 4, 2014,
23. September 30, 2014,
24. October 30, 2014,
25. December 2, 2014,
26. January 6, 2015,
27. January 20, 2015,
28. February 17, 2015,
29. March 17, 2015,
30. April 21, 2015,
31. May 19, 2015,
32. July 21, 2015,
33. August 4, 2015,
34. August 18, 2015,
35. September 8, 2015,
36. September 16, 2015,
37. November 3, 2015, and
38. December 8, 2015;

WHEREAS, the applicant was represented by Vincent Bisogno, Esq. and Robert Raymar, Esq., objector Bernards Township Citizens for Responsible Development (“BTCRD”) was represented by Robert Simon, Esq., and the Board was represented by Stuart R. Koenig, Esq. and Jonathan E. Drill, Esq.;

WHEREAS, the following individuals testified under oath during the hearing (not necessarily in the order that they are listed), were subject to cross-examination, and their testimony is part of the record in this matter:

1. Dr. Ali Chaudry (applicant’s president and fact witness),
2. Henry J. Ney, PE (applicant’s traffic engineering expert),
3. Daniel Lincoln, RA (applicant’s architectural expert),
4. Adnan Khan, PE (applicant’s civil engineering expert),
5. P. David Zimmerman, PP (applicant’s planning expert),
6. Alexander Litwornia, PE (objector BTCRD’s traffic engineering expert),
7. Peter Steck, PP (objector BTCRD’s planning expert),
1. Peter Aprahamian (Liberty Corner Fire Company Fire Chief),
2. Janet Lake (Township Fire Official),
3. David Schley, PP (Township planning expert),
4. David Banisch, PP (Board planning expert),
5. Thomas Quinn, PE (Board engineering expert),
6. Michael Barth (member of the public residing at 14 Annin Road),
7. Wei Zhou (member of the public residing at 9 Queenberry Way),
8. Dan Churchill (member of the public residing at 320 Mt. Prospect Road),
9. Nancy Campbell (member of the public residing at 33 Brittany Place),
10. Tom De Feo (member of the public residing at 54 Church Street),
11. Lori Caratzola (member of the public residing at 13 Minuteman Court),
12. Qijun (Peter) Shen (member of the public residing at 18 Talmadge Lane),
13. Randy Mendelson (member of the public residing at 40 Musket Drive),
14. Paul Zubulate (member of the public residing at 73 Church Street),
15. Loretta Quick (adjoining neighbor residing at 114 Church Street – Lot 3 in Block 9301),
16. Joseph Abbate (adjoining neighbor residing at 485 Somerville Road – Lot 1 in Block 9301),
17. Walter Ruby (member of the public residing at 65 North Fullerton Avenue, Montvale),
18. Adel Jandal (member of the public residing at 371 South Maple Avenue),
19. Keri Samuels (member of the public residing at 67 Church Street),
20. Cody Smith (member of the public residing at 36 Royal Oak Drive),
21. Alex Marcus (member of the public residing at 15 Lafayette Lane),
22. David Tancredi (member of the public residing at 125 Church Street),
23. Evelyn Drake (member of the public residing at 56 Pill Hill Road, Bernardsville),
24. Lloyd Martinson (member of the public residing at 4 Carriage Way),
25. Katie Martinson (member of the public residing at 4 Carriage Way),
26. Nadim Ahmed (102 Independence Way),
27. Cathleen Hothersall (member of the public residing at 45 Winding Lane),
28. Peter Fitzpatrick (member of the public residing at 277 Mt. Prospect Road),
29. Christina Ehret (member of the public residing at 56 Peachtree Road),
30. Douglas Watson (member of the public residing at 52 Liberty Corner Road),
31. Zhen Zhung (member of the public residing at 3 Wellington Drive),
32. Frank Zhao (member of the public residing at 50 Alder Place),
33. Barbara Burger (member of the public residing at 94 Church Street),
34. Isobel Ortega (member of the public residing at 21 Prescott Court),
35. Xiu Shuang Zheng (member of the public residing at 77 Dorchester Drive),
36. Xingyue Huang (member of the public residing at 18 Vanderveer Drive),
37. Janet Ashnault (member of the public residing at 309 Douglas Drive),
38. Brian Curley (member of the public residing at 2 Hardin Court, Chester),
39. Birger Brinck-Lund (member of the public residing at 190 Alexandria Way),
WHEREAS, the following exhibits were entered into evidence during the hearing, are on file with the Board, and are part of the record in this matter (the “A” exhibits were submitted by the applicant, the “O” exhibits were submitted by objector BTRCD, and the “P” exhibits were submitted by various members of the public):

A-1 Color rendering of building prepared by Sanah Nasse,
A-2 Sheet A-03 of architectural drawings dated August 7, 2012,
A-3 Color rendered copy of Sheet C-05 (sheet 5 of 11 of site plans),
A-4 Color rendered copy of Sheet A-02 of architectural drawings,
A-5 Color rendered copy of Sheet A-01 of architectural drawings,
A-6 Color rendered copy of Sheet A-00 or architectural drawings,
A-7 Prayer rug layout dated November 26, 2012 showing 142 prayer rugs,
A-8 Timberline shingle sample board proposing charcoal bark,
A-9 Hardi plank sample board,
A-10 Halo lighting product literature w/“A” and “B” fixtures indicated in red,
A-11 Map of State and Federal Historic District from book in Historic Society,
A-12 Color rendered drawing C-02 (sheet 2 of 11 of site plans),
A-13 Plan entitled “Proposed Addition for Abbate” dated September 18, 2011,
A-14 Selected portions of the “Parking Generation” Manual published by the
Institute of Transportation Engineers (ITE),
A-15 Parking study results dated February 1, 2013, prepared by Henry J. Ney,
PE (applicant’s traffic engineering expert),
A-16 Traffic Counter Chart prepared by Henry J. Ney, PE (applicant’s traffic
engineering expert),
A-17 Parking Counter Summary Sheets prepared by Henry J. Ney, PE
(applicant’s traffic engineering expert),
A-18 “Summary of Study Results for Four New Jersey Mosques” consisting of
“Modified Appendix A (annotated with 100 percentage calculations”
dated June 4, 2013, prepared by Henry J. Ney, PE (applicant’s traffic
engineering expert),
A-19 Sheet C-03E of plans dated October 4, 2013,
A-20 Sheet C-04E of plans dated October 4, 2013,
A-21 Sheet C-05E of plans dated October 4, 2013,
A-22 Sign details “5” revised December 3, 2013, with light fixture “C” cut
sheet attached,
A-23 Color rendered architectural drawing A-02 revised December 3, 2013,
A-24 Minaret mockup photo taken May 11, 2013,
A-25 Drawing EX-01 titled “Concept Plan” dated November 6, 2013 signed
December 20, 2013,
A-26 Sheet C-02 signed January 22, 2014,
A-27 Sheet C-03 signed January 23, 2014,
A-28 Sheet C-03 signed February 4, 2014,
A-29 Email from David Schley to Fran Florio with email from Chris Melick to
David Schley dated February 4, 2014,
A-30 Exhibit titled “Houses of Worship in Bernards Twp” dated April 8, 2014,
prepared by P. David Zimmerman, PP (applicant’s planning expert),
A-31 Exhibit titled “Examples of Houses of Worship Abutting Single Family
Residences in Bernards Twp” dated April 8, 2014, prepared by P. David
Zimmerman, PP (applicant’s planning expert),
A-32 Aerial photo of Covenant Chapel Reformed-Episcopal Church,
A-33 Aerial photo of St. Mark’s Episcopal Church,
A-34 Aerial photo of Chabad Jewish Center & Millington Baptist Church,
A-35 Aerial photo of Somerset Hills Baptist Church,
A-36 Aerial photo of Somerset Hills Lutheran Church,
A-37 Base map (2012) aerial photo of property and general neighborhood,
A-38 1st overlay showing lots containing institutional uses in neighborhood,
A-39 2nd overlay showing the ISBR property,
A-40 Photo taken of landscaping at firehouse on April 23, 2014,
A-41 Photo taken of landscaping at firehouse on April 23, 2014,
A-42 Drawing “EX” titled “Fire Truck Circulation Plan” dated March 30,
2012, signed by Adnan Khan, PE on September 19, 2014,
A-43 Screen shot of new corner of building,
A-44 Screen shot of rear parking lot area turning radius,
A-45 Picture of Liberty Corner Fire Company Tower Truck No. 40, undated,
with the following attachments: (a) approximate dimensions drawing of
Liberty Corner Fire Company Tower Truck No. 40, and (b) detailed
specifications for the Liberty Corner Fire Company Tower Truck No. 40, both (a) and (b) dated October 1, 2014,
A-46 Drawing “EX” titled “Fire Truck Circulation Plan” dated March 30, 2012, signed by Adnan Khan, PE on September 19, 2014, but containing information not reflected on Exhibit A-42,
A-47 Screen shot of 9 feet x 18 feet parking stalls with 6-inch high wheel stops,
A-48 “Public Entrance Exhibit” hand dated December 2, 2014,
A-49 Screen shot of A-48 with markups in blue by Adnan Khan, PE (applicant’s engineering expert);
A-50 Screen shot of driveway dimension distances;
A-51 Screen shot of vegetation outside property line & in ROW,
A-52 Screen shot of non-public entrance distances from building to curb,
A-53 Screen shot of rear of building with sidewalk dimensions,
A-54 Screen shot of proposed access to public entrance,
A-55 Screen shot of shrubs adjacent to parking spaces,
A-56 Screen shot of entrances to building,
A-57 Screen shot of C-03 entrances and drop offs,
O-1 Parking Analysis prepared by Alexander Litwornia, PE (objector BTCRD’s traffic engineering expert),
O-2 Aerial view of the property with zoning and property lines superimposed,
O-3 Photos #1 thru #4 of the property dated April 24, 2014, prepared on April 23, 2014 by Peter G. Steck, PP (objector BTCRD’s planning expert),
O-4 Graphic boxes #5 & #6 showing trees to be removed from the easterly buffer and disturbance of the northerly and easterly buffers, prepared by Peter G. Steck, PP (objector BTCRD’s planning expert),
O-5 Packet of 11 photos (each being 8” x 10”),
P-1 “Manner of Performing Prayers” from link on ISBR website,
P-2 Paper copy of Cody Smith’s Public Comment PowerPoint dated April 21, 2015,
P-3 Selected portions of pamphlet titled “Understanding Islamic Prayer,” with website information,
P-8 Pages 9.5-1 & 9.5-2 of NJDEP Stormwater BMP Manual,
P-9 Loretta Quick PowerPoint dated May 19, 2015 with agreed upon removals,
P-10 Selected portions of the Tree Owner’s Manual dated November, 2008 published by the USDA,
P-11 3D Tree Exhibit prepared by Christopher Quick and three 8” x 10” photos of the 3D Tree Analysis taken from different angles during the hearing on August 4, 2015,
P-12 Paper copy of Linda Arnold’s PowerPoint titled “ISBR Public Comment” dated August 18, 2015,
P-13 Letter to Linda Arnold dated August 18, 2015 from William Grundmann, New Jersey certified tree expert #310,
P-14 Paper copy of Christopher Quick’s PowerPoint titled “ISBR Tree Analysis” dated August 4, 2015,
P-15 Paper copy of Christopher Quick’s PowerPoint titled “ISBR Drainage Analysis Public Comment” undated, and
P-16 Letter to Board from Paul D. Fox, PE dated September 8, 2015 regarding stormwater management design review;

A. FACTUAL FINDINGS

1. **The Property, Zoning, Existing Use and Proposed Use.** As set forth above, the property is a 4.088 acre lot located at 124 Church Street and situated in the R-2 zone. The property has been situated in the R-2 zone since 1980. Pursuant to ordinance sections 21-10.4.a.1.(a) and 21-10.4.b, residential development is a principal permitted use in the R-2 zone in accordance with ordinance Tables 401 and 401A. The existing use of the property is a principally permitted residential development, namely, a single family residential home use. Specifically, the property contains the existing dwelling, accessory building and paved circular driveway, with the dwelling connected to and served by the public water and sanitary sewer systems. Under the current R-2 zoning regulations, which were amended by Ordinance #2242 adopted on October 15, 2013, a house of worship is a conditionally permitted use on the property in accordance with ordinance section 21-10.4.a.3.(g). However, under the R-2 zoning regulations in effect at the time the application was submitted in 2012, a house of worship was a principal permitted use in accordance with ordinance section 21-10.4.a.1.(c). The Board finds that the proposed Mosque is a special purpose building designed and particularly adapted for the primary use of conducting on a regular basis formal religious services by a religious congregation. As such, the Board further finds that the proposed Mosque is a “house of worship” pursuant to ordinance section 21-3.1. The Board further finds that the proposed Mosque must be treated as a principal permitted use by operation of the Time of Application Law, specifically, N.J.S.A. 40:55D-10.5, which provides that those development regulations which are in effect on the date of submission of an application for development shall govern the review of that application.

2. **The Proposed Development.** As set forth above, the application and proposed development were revised a few times during the course of the hearing on the application by submission of supplemental and/or replacement drawings and plans, and the last set of drawings and plans (which are referenced above) reflect that the applicant seeks preliminary and final site plan approval and exceptions to (1) demolish the existing dwelling and allow construction of the following improvements: (2) the proposed Mosque (which is proposed as a one-story, 4,216 square foot building containing the prayer hall and multi-purpose room having a combined stated capacity for 150 people, as well as other smaller rooms), (3) a 20 foot wide westerly one-way entrance drive providing ingress to the property from Church Street, (4) a 24 foot wide easterly one-way exit drive providing egress from the property to Church Street, (5) a proposed parking lot (containing 107 spaces, 69 of which are proposed to be paved and 38 of which are proposed to be “banked” for future construction), (6) two detention basins (one in the front yard and one in the easterly side yard), (7) other related site improvements including but not limited to landscaping and fencing, and (8) retention of the accessory building for storage use. The applicant proposes to connect the proposed Mosque to the same public water and sanitary sewer
systems to which the existing dwelling is connected. The applicant also agreed during the hearing to make the following additional revisions to the application and proposed development but, significantly, the applicant did not submit any additional supplemental and/or replacement plans and drawings to reflect the following additional revisions: (a) reduced levels of site lighting, (b) relocating one of the two fire hydrants, (c) adjustments to the easterly swale to save existing trees and satisfy the requirements of various ordinance provisions, (d) adding / adjusting proposed plantings to satisfy the requirements of various ordinance provisions, and (e) redesign of the stormwater management plan to provide for recharge. As will be discussed below, the failure of the applicant to submit additional supplemental and/or replacement plans and drawings to reflect these additional revisions are fatal to the application for final site plan approval, and the failure of the applicant to submit some of the additional supplemental and/or replacement plans and drawings are fatal to the application for preliminary site plan approval.

3. **Required Relief under the MLUL.** The applicant requires the following relief from the Board under the Municipal Land Use Law (“MLUL”): (a) preliminary site plan approval in accordance with N.J.S.A. 40:55D-46 to establish the general terms and conditions applicable to the proposed development, (b) final site plan approval in accordance with N.J.S.A. 40:55D-50 to allow construction of the proposed development, (c) “c” variance in accordance with N.J.S.A. 40:55D-60a and -70c from zoning ordinance section 21-16.2.c, which provides that all fences must be symmetrical in appearance and have posts separated by identical distances and consist of material conforming to a definite pattern or size, to allow the proposed fence which is intended to screen the property from neighboring Lot 3 to the east (owned by Christopher and Loretta Quick) on a year round basis to be routed so as not to disturb existing trees in the easterly buffer in the event that the Board requires the applicant to so re-route the fence, (d) “c” variance in accordance with N.J.S.A. 40:55D-60a and -70c from zoning ordinance section 21-16.2.a, which prohibits fencing in a front yard to exceed 4 feet in height and requires such front yard fencing to be more than 50% open, to allow that portion of the proposed fence in the easterly buffer that will be located in the northerly front yard area to be 6 feet high instead of no more than 4 feet high and to be solid instead of not less than 50% open, (e) exception in accordance with N.J.S.A. 40:55D-51 from site plan ordinance section 21-39.1.b.3, which requires the minimum dimensions of parking spaces to be 9 feet by 20 feet but which also provides that “the length of any parking stall may be reduced by two feet if the front of the stall abuts a curb or other approved wheel stop and the two feet is not used for any other purpose such as sidewalks,” to allow the 31 parking spaces proposed along the easterly property line abutting Lot 3 (owned by Christopher and Loretta Quick) to be 9 feet by 18 feet without a two feet vehicle overhang but where wheel stops are proposed for the spaces such that a 6 inch vehicle overhang area will be provided, and (f) exception in accordance with N.J.S.A. 40:55D-51 from site plan ordinance section 21-39.2.a, which requires a minimum of one loading / unloading space, to allow no loading / unloading spaces.

4. **Required Determinations under the Ordinance.** The applicant also requires the following determinations be made by the Board under the following Township ordinance provisions: (a) allow use of flush curbing within the parking lot in accordance with ordinance section 21-39.3.a.(2), which requires that all parking areas be curbed to Township standard specifications (6-inch high curbs) unless the applicant can demonstrate that elimination of the curbing will not decrease the useful life of the pavement, have a negative effect on drainage, or increase maintenance costs, (b) allow banked parking in accordance with ordinance section 21-22.1.a.(1)(a) to allow construction of only 69 of the required 107 paved parking spaces and reservation or “banking” of a sufficient area for construction of the remaining 38 of the 107 spaces in the future if necessary, (c) specific approval in accordance with ordinance section 21-28.1 of the proposed fence in the easterly buffer as a “visual screen” to provide a solid barrier.
obstructing the view of the property from neighboring Lot 3 (owned by Christopher and Loretta Quick) to the east on a year round basis, and (d) specific approval of the following drainage improvements in the easterly buffer area in accordance with ordinance section 21-28.2.b: the large detention basin, and the drainage swale.

5. **Additional Relief Argued to be Required by Various Objectors but Determined to Not be Required by the Board.** Various objectors argued that the following additional relief was required but the Board determined that the additional relief was not required:

a. **Proposed Mosque is not a Principally Permitted House of Worship so Requires a “D” Type Variance.** Various individual objectors (not objector BTCRD) argued that the proposed Mosque was not a “house of worship” under the Township ordinance but, instead, was an “institutional” use, which is defined in ordinance section 21-3.1 as meaning “a use by a public or nonprofit quasi-public, or private institution for educational, religious, charitable, medical or civic purposes.” These objectors further argued that, since “institutional” uses are not listed as permitted in the R-2 zone under ordinance section 21-10.4.a.1, institutional uses – and the proposed Mosque in particular – were prohibited by virtue of ordinance section 21-10.3 which provides: “Where a use is not specifically permitted in any zone, it is prohibited.” As such, these individual objectors argued that a “d(1)” use variance pursuant to N.J.S.A. 40:55D-70d(1) is required. The Board finds that the proposed Mosque can both be an “institutional use” as defined in the ordinance as well as a “house of worship” as defined in the ordinance, similar to a public or private school which fits within the definition of “institutional use” as well as the definition of “public and private school” contained in ordinance section 21-3.1. In both cases, the uses (houses of worship and schools) are expressly permitted in the R-2 zone in accordance with the ordinance despite the fact that the ordinance does not include “institutional use” on the list of permitted uses. As set forth above, the Board finds that the proposed Mosque is a special purpose building designed and particularly adapted for the primary use of conducting on a regular basis formal religious services by a religious congregation. As such, the Board finds that the proposed Mosque is a “house of worship” pursuant to ordinance section 21-3.1 so is a principally permitted use on the property. As such, the Board rejects the individual objectors’ arguments that the application requires a “d(1)” use variance.

Additionally, the Board rejects an argument made by objector BTRCD’s planning expert Peter Steck, PP during his testimony during the April 24, 2014 hearing session. Mr. Steck argued that, even though “houses of worship” are included on the list of principally permitted uses in the R-2 zone found in ordinance section 21-10.4.a.1, houses of worship are actually conditionally permitted under the ordinance because the ordinance contains conditions with which such houses of worship must comply. As such, Mr. Steck argued that a “d(3)” conditional use variance pursuant to N.J.S.A. 40:55D-70d(3) is required. The Board rejected on April 24, 2014, and ratifies and rejects again at this time, Mr. Steck’s argument that houses of worship are conditionally permitted in the R-2 zone. The basis for the Board’s rejection of Mr. Steck’s argument is that for a use to be a conditionally permitted use, it must be specifically

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4 If any “d” type variance was required, the Zoning Board of Adjustment – not the Board – would have exclusive subject matter jurisdiction over the application in accordance with N.J.S.A. 40:55D-60 and, in that event, the Board would have to dismiss the application for lack of subject matter jurisdiction.

5 As set forth above, if any “d” type variance was required, the Zoning Board of Adjustment – not the Board – would have exclusive subject matter jurisdiction over the application in accordance with N.J.S.A. 40:55D-60 and, in that event, the Board would have to dismiss the application for lack of subject matter jurisdiction.
included on the list of “conditionally permitted” uses in the ordinance which is found in ordinance section 21-10.4.a.3, and not on the list of principally permitted uses which is found in ordinance section 21-10.4.a.1. 6 Finally, the Board notes that objector BTCRD agreed during the closing argument of its attorney during the November 3, 2015 hearing session that a proposed Mosque was a principally permitted use on the property as a house of worship. To be clear, while objector BTCRD’s attorney took the position that ISBR had the legal right to construct “a” Mosque on the property as a permitted house of worship in the R-2 zone, it strongly disagreed that ISBR had a legal right to construct “the” proposed Mosque on the property on the basis that the site plans and drawings under review violate various ordinance provisions. The Board will address in its findings below relating to site plan review the issue of whether the site plans and drawings comply with all provisions of the ordinance.

b. **Drainage Improvements such as the Detention Basin and the Drainage Swale are Not Allowed in the Buffer Area so Require “C” Variances.** Ordinance section 21-28.2 provides that “buffers shall be required on all lots zoned other than residential or used for nonresidential purposes where the lot . . . abuts a residentially zoned lot . . . .” Ordinance section 21-28.2.b further provides that “no construction shall occur within any buffer area except for the following [four items], if specifically approved by the Board” and item #1 is “drainage improvements.” The proposed development includes a large approximately 7,500 square foot drainage basin as well as a drainage swale in the easterly buffer. Objector BTCRD argued that the drainage basin and the drainage swale were not the sort of “drainage improvements” that were subject to “specific approval” by the Board and, in fact, required “c” variances to allow them in the buffer. The Board conducted a straw poll on this issue during the September 4, 2014 hearing session and found, and now ratifies its finding, that the drainage basin as well as drainage swale are “drainage improvements” within the meaning of ordinance section 21-28.2.b so that no “c” variances are required for them to be located in a buffer area. That said, neither the detention basin nor the drainage swale is allowed in the easterly buffer unless the Board “specifically approves” them in the buffer. The Board will address in its findings below relating to site plan review the issue of whether it will approve the detention basin and drainage swale that have been proposed in the easterly buffer.

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6 See, PRB Enterprises, Inc. v. South Brunswick, 105 N.J. 1, 8-9 (1987) which explains that a conditional use must be “explicitly described” as a “conditional use.” The Board further notes that the Township amended ordinance section 21-10.4 by Ordinance #2242 adopted on October 15, 2013 to remove houses of worship as well as public and private schools from the list of principally permitted uses and to move them to the list of conditionally permitted uses. See, ordinance section 21-10.4.a.3.(g). The Board finds that this ordinance amendment is a clear indication that, at the time the application was submitted in 2012, the Township treated houses of worship as principally permitted. See also, memo to the Board from Township planning expert David Schley dated May 23, 2014, which provides documentary support for the opinion testimony Mr. Schley provided during the April 24, 2014 hearing session to the effect that the prior ordinance amendment in 2001 was intended to make it clear that houses of worship were principal permitted uses, not conditionally permitted uses, in the R-2 zone. Finally, the Board also notes that, after hearing Mr. Steck’s testimony on this issue during the April 24, 2014 hearing session, the Board voted on formal motion that Mr. Steck’s testimony was an impermissible “net opinion” as it had no support in any authoritative text or any minutes of the Bernards Township Committee from 2001 when the initial ordinance amendment was adopted, nor any minutes since that date through the recent 2013 ordinance amendment. The Board viewed Mr. Steck’s testimony on this issue as an advocate’s argument rather than a professional’s opinion. The Board also notes that it accepts and agrees with the opinion of Township planning expert David Schley on this issue not only because it makes logical sense but because it is supported by the numerous documents cited in Mr. Schley’s memo dated May 23, 2014 as well as the PRB Enterprises case cited above.
c. The Proposed Fence is Not Allowed in the Buffer so Requires a “C” Variance. Objector BTCRD argued that, as fencing is not included on the list of four (4) items allowed in a buffer in accordance with ordinance section 21-28.2.b if “specifically approved” by the Board, fencing is not allowed in a buffer in the absence of a “c” variance. The Board disagrees and finds that fencing is a form of “landscaping” that is expressly allowed in a buffer area pursuant to ordinance section 21-28.2, section 21-43.1.d, and section 21-43.4. Specifically, ordinance section 21-28.1 provides that “visual screens shall be provided through landscaping or other means approved by the Board” and the Board finds that fencing is one such “other means” that can be approved by the Board. Further, ordinance section 21-28.1 provides “such screens shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis,” “all screens shall be shown on the landscape plan,” and includes a reference to ordinance section 21-43 which governs landscaping. Ordinance section 21-43.1 provides that the “entire development shall be landscaped” and lists seven (7) items that constitute “landscaping,” including item “d” which is “walls and fences.” Moreover, ordinance section 21-43.4 provides that “screening, where required, shall be achieved by fencing, earth forms and plantings. As such, the Board finds it clear that fencing is a form of landscaping because the ordinance designates fencing as a form of landscaping in a number of sections. For all of the foregoing reasons, the Board finds that the fence proposed in the easterly buffer is a form of, and another means of, landscaping other than plantings so does not require a “c” variance to be located in the buffer. That said, the proposed fence is not allowed in the easterly buffer unless the Board “approves” it in the buffer as part of the landscaping. Additionally, as set forth above, “c” variances are required from zoning ordinance section 21-16.2.a to allow that portion of the proposed fence which will be located within the northerly front yard to exceed 4 feet in height and be less than 50% open. Moreover, ordinance section 21-43.1 requires all landscaping shall include “items having an effect on project safety, habitability and appearance,” so issues related to the fence causing damage to existing trees and issues related to aesthetics of the buffer and the fence itself will have to be addressed. The Board will address in its findings below relating to site plan review and variance review these other issue related to the fence proposed in the easterly buffer.

6. Findings as to Preliminary Site Plan Review. The Board’s findings as to preliminary site plan review are as follows. First, as set forth in the legal conclusions below, N.J.S.A. 40:55D-46a allows site plans and accompanying engineering documents to be submitted in “tentative” form and allows architectural plans to be in “preliminary” form for “discussion purposes for preliminary approval.” That said, as also set forth in the legal conclusions below, the tentative site plans and engineering documents and the preliminary architectural drawings still must contain sufficient information to allow the Board to make an informed decision as to whether the requirements necessary to grant preliminary site plan approval have been met and, if the application does not comply with all zoning ordinance regulations and site plan ordinance requirements, the Board must deny preliminary approval. Finally, as set forth in the legal conclusions below, while the site plans and accompanying engineering documents can be submitted in “tentative” form “for discussion purposes for preliminary approval,” the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management, drainage, and traffic circulation safety, including circulation for fire trucks. If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, preliminary approval must be denied. With these general parameters in mind, the Board’s findings as to preliminary site plan review are as follows.
a. **Non-Compliance with Ordinance Provisions Requires Denial of Preliminary Site Plan Approval.** The Board finds that the proposed development fails to comply with the following ordinance provisions which require denial of preliminary site plan approval. Further, the Board finds that it is inappropriate to grant a conditional approval based on the applicant’s promise of future compliance with these ordinance provisions as the applicant must meet its burden of proving compliance with the ordinance provisions as a prerequisite of approval.

   (1) First and foremost, the Board cannot “specifically approve” the 7,500 square foot detention basin wholly within the required 50 foot wide buffer because allowing such a large drainage improvement wholly within the buffer represents the exception swallowing the rule and defeats the very purpose of the buffer. As set forth above, ordinance section 21-28.2 provides that “buffers shall be required on all lots zoned other than residential or used for nonresidential purposes, where the lot . . . abuts a residentially zoned lot . . . .” Ordinance section 21-3.1 defines a buffer as “a strip of land of specified width containing natural woodlands, earth mounds or other planted screening material, and separating one kind of use from another . . . .” The Board finds that the purpose of a buffer is to separate non-residential uses from abutting residential uses. The mechanics established in the ordinance for doing this are that: (a) “all buffers shall be a minimum of 50 feet in width” pursuant to ordinance section 21-28.2.a; (b) “no construction shall occur within any buffer area except for the following, if specifically approved by the Board” pursuant to ordinance section 21-28.2.b, and the four (4) items that follow (drainage improvements, underground utilities, pedestrian and bicycle paths, and crossings of access roads) represent what are supposed to be limited intrusions into the buffer to be considered by the Board on a case-by-case basis; (c) “no removal of existing vegetation shall occur in any buffer unless the removal is in conjunction with construction or selective thinning of trees as approved by the Board” pursuant to ordinance section 21-28.2.c; and (d) “where nonresidential uses abut residentially zoned lots, and where existing vegetation within the buffer does not provide adequate screening, screening shall be provided in accordance with subsection 28-28.1 . . . (the screening provision of the ordinance), unless the Board shall determine that because of the design of the site, screening is not necessary” pursuant to ordinance section 21-28.2.d. In accordance with ordinance section 21-28.1, screening “shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis.” In this case, the Board finds that the existing vegetation in the buffer separating the property from Lot 3 to the east (owned by the Quicks) does not provide adequate screening of the proposed development from Lot 3. As such, the Board finds that screening pursuant to ordinance section 21-28.1 is necessary. And, while fencing is a form of landscaping that is allowed in the buffer to provide screening, the Board finds that planted screening is a much more aesthetically desirable alternative in this application and, in fact, the only reason additional planted screening cannot be provided here is because such a large detention basin has been proposed in the buffer. In fact, the Board finds that, in order for the ISBR application to be granted preliminary approval, the detention basin would have to be removed from the buffer, if not entirely, then substantially, to allow room for planted screening and obviate the need for the fence or, at least, provide room for the fence to abut the edge of the parking lot / drive aisle pavement rather than where currently proposed which interferes with existing trees and vegetation. The Board finds that the parking lot on the property will be active both during the week and on weekends so creating a 50 foot wide buffer is critical, only limited intrusions into that buffer by structures should be allowed, and anything other than trees and vegetation in the buffer should be avoided if at all possible.
ISBR argues that the Board’s determination that 107 parking spaces are required in the parking lot not only significantly increased the impervious coverage on the property, thereby resulting in the need for larger detention basins, but also reduced the available area of the property to accommodate the detention basin placement, thereby leaving the applicant with nowhere to locate the large basin other than wholly within the buffer. The Board could not disagree more. First, the Board notes that the initial site plans (revised through May 18, 2012), specifically sheet C-03, show an even larger bio-retention basin in the easterly buffer, and the initial site plans proposed 50, not 107, parking spaces. Second, the Board finds it was the applicant’s insistence in the first instance of setting the maximum occupancy in the building of 150 people that resulted in the 107 parking spaces. And, while the applicant subsequently agreed to limit the occupancy of the Mosque to 142 people, the reduction of 8 people is simply not enough to drive the parking demand down to a level which will result in a substantial reduction in the impervious coverage on the property and the freeing up of additional space to accommodate the detention basin somewhere other than in the buffer area. The Board finds that the property is simply not large enough to accommodate the maximum number of occupants the applicant wishes to have allowed in the building at any one time. As set forth below in footnote 4, if the applicant was willing to reduce the maximum occupancy of the building to 112 (the number of prayer rugs that can be accommodated in the prayer hall) and that number was divided by a factor of 1.35 (the factor developed by Henry J. Ney, PE, ISBR’s traffic engineering expert), the total number of required parking spaces would be reduced from 107 to 83. The Board believes that this would go a long way in reducing the impervious coverage on the property, which would result in a reduction in the size of the detention basins, while also making more land area available on the property on which to locate the large basin, which would result in the basin being moved out of the buffer area. However, the applicant has not given any indication that it is willing to reduce the maximum occupancy of the building or reduce the size of the building so, at

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7 The Board notes that it formally voted during the June 4, 2013 hearing session on a motion to establish the number of parking spaces in accordance with ordinance section 21-22.1 which provides that, “since a specific use may generate a parking demand different from those enumerated below, documentation and testimony shall be presented to the Board as to the anticipated parking demand.” The ordinance continues: “Based upon such documentation and testimony, the Board may: (a) allow construction of a lesser number of spaces, provided that adequate provision is made for construction of the required number of spaces in the future, or (b) in the case of nonresidential uses, require that provision be made for the construction of spaces in excess of those required herein below, to ensure that the parking demand will be accommodated by off-street spaces.” The Board heard testimony from the applicant’s traffic engineering expert Henry J. Ney, PE and objector BTCRD’s traffic engineering expert Alexander Litwornia, PE. Mr. Ney opined that the number of occupants should be divided by a factor of 1.35 to establish the number of spaces while Mr. Litwornia opined that the number of occupants should be divided by a factor of 1.4 to establish the number of spaces. Ultimately, the Board gave more weight to the opinion of Mr. Litwornia than to Mr. Ney due to the strengths / weaknesses of their respective analyses, so decided that the required number of parking spaces was 107 (150 maximum occupants determined by the applicant’s architectural expert Daniel Lincoln, RA divided by the Litwornia factor of 1.4) rather than 105 (142 maximum occupancy based on Exhibit A-7 which shows the maximum number of prayer rugs that would fit in the prayer hall as 112 and the maximum number of prayer rugs that would fit in the multi-purpose room as 30 for a total of 142, and then dividing the 142 maximum occupancy by the Ney factor of 1.35). If the applicant was willing to reduce the maximum occupancy of the building to 112 (the number of prayer rugs that can be accommodated in the prayer hall) and that number was divided by the Ney factor of 1.35 (as Mr. Ney was the applicant’s expert), the total number of required parking spaces would be reduced to 83. The Board believes that this would go a long way in reducing the impervious coverage on the property, which would result in a reduction in the size of the detention basins, while also making more land area available on the property on which to locate the large basin, which could result in the basin being removed from the buffer area.
this time, it is impossible for the applicant to remove the detention basin from the buffer, resulting in the Board finding that preliminary site plan approval must be denied.

(2) Second, and related to the inadequate easterly buffer resulting from the placement of the large detention basin wholly within that buffer area, is the failure of the applicant to prove compliance with all of the landscaping requirements and fencing regulations. Ordinance section 21-22.3.a provides that, if a parking area abuts a residential use, the parking ... area shall be completely screened from view from the adjoining property in accordance with ordinance section 21-28. Ordinance section 21-28.1 provides that “visual screens shall be provided through landscaping or other means as approved by the Board” and that “such screens shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis.” Further, ordinance section 21-43.1 provides that all projects “shall be landscaped so as to best adapt the site to the intended use, to control the project’s environmental impact and to enhance the appearance of the project, both on-site and from the surrounding area.” Were it not for the fact that the large detention basin is located wholly within the easterly buffer, the applicant would not have needed to propose the fence in the buffer area as the solid barrier to obstruct the view of the proposed development from the Quick’s dwelling and property, and the fence would not have needed to be proposed as close to the existing trees as it has been proposed, with the distinct probability of causing damage to the roots of the existing trees unless the fence and the fence posts are gerrymandered in such fashion to avoid all roots. However, that creates another planning problem, namely, the fence not complying with zoning ordinance section 21-16.2.c, which provides that all fences must be symmetrical in appearance and have posts separated by identical distances and consist of material conforming to a definite pattern or size, to allow the proposed fence which is intended to screen the property from the Quick’s lot on a year round basis to be routed so as not to disturb existing trees in the easterly buffer. The Board finds that a “c(1)” or so-called “hardship” variance is not available because the situation is the result of self-created hardship in that the applicant has just proposed too much building and improvements on the property and could eliminate the “hardship” by reducing the size of the building or reducing the maximum occupancy of the building. The Board also finds that a “c(2)” or “benefits v. detriments” variance is not available because the zoning benefit of providing a solid year round barrier for screening is substantially outweighed by the detrimental aesthetics that will result from installing the fence in a non-symmetrical gerrymandered fashion. The Quicks deserve more from a new use than inadequate screening or adequate screening but by an aesthetically displeasing fence. As the Board cannot grant a “c” variance to allow the fence to be installed without damaging the trees, the Board cannot approve the fence in the buffer to provide year round screening. As such, the application does not comply with ordinance sections 21-22.3, 21-28.1, and 21-28.2 and preliminary site plan approval must be denied.

(3) Third, and unrelated to the inadequate easterly buffer, is the failure of the applicant to prove compliance with all of the landscape screening requirements as to the northerly and southerly sides of the property. Ordinance section 21-10.4.a.1.(c), which establishes a house of worship as a permitted use in the R-2 zone, contains six (6) zoning regulations applicable to the development of a house of worship. Item #6 provides that: “Parking shall be screened from view from all property lines.” (emphasis added). Further, ordinance section 21-22.3.a provides that, if a parking area abuts a residential use, the parking . . . area shall be completely screened from view from the adjoining property in accordance with ordinance section 21-28. Ordinance section 21-28.1 provides that “visual screens shall be provided through landscaping or other means as approved by the Board” and that “such screens shall be designed
and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis.” Further, ordinance section 21-43.1 provides that all projects “shall be landscaped so as to best adapt the site to the intended use, to control the project’s environmental impact and to enhance the appearance of the project, both on-site and from the surrounding area.” The Board finds that these ordinance provisions are not simply for aesthetic purposes during the day to ensure that neighbors and the traveling public on Church Street do not have to view a “sea” of cars in a parking lot, but they are also for safety and nuisance protection purposes to ensure that car headlights from parking lots do not shine into neighboring dwellings’ windows, onto neighboring residential lots, and do not shine into the windows of the vehicles traveling on Church Street. The applicant did not submit or present any scientifically prepared study, exhibit or plan to show that lights from car headlights would be “screened from view of all property lines.” Nor did the applicant submit or present a complete landscaping plan showing all of the existing and proposed landscaping and how the landscaping would control lights from car headlights shining onto neighboring residential lots. For example, sheet C-06 of the site plans (the “Vehicle Circulation and Landscaping Plan”) shows a plan view of the proposed landscaping and contains planting details but contains no cross section views of the proposed parking area to demonstrate that “all parking areas” will be screened from view with a “year round solid barrier.” While the applicant submitted into evidence an architectural rendering of the proposed building (Exhibit A-1), it did not submit into evidence a rendering of the landscape screening despite all of the questions that were asked about whether the landscaping would adequately screen the parking lot. Instead, the applicant presented its civil engineering expert, Mr. Khan – who is admittedly not a lighting expert – to present a “car headlight test” he had conducted in an attempt to show the Board that the car headlights would not shine past the property’s lot lines. The Board found Mr. Khan’s testimony scientifically unreliable and unconvincing. The Board simply did not believe Mr. Khan’s testimony as the “headlight test” he had conducted had no controls, with the use of two different cars – a SUV and a smaller vehicle – with Mr. Khan unable to establish for the Board each vehicle’s headlight height above grade and strength in footcandles at the source of each headlight. In fact, while Mr. Khan testified that no car headlights would be seen from the dwelling located on 465 Somerville Road (owned by Ashok Wahi) by reason of the existing vegetation to the south and west of the property, Mr. Khan admitted that the headlights would be visible from Mr. Wahi’s driveway. The Board finds that the applicant has not met its burden of proving that (a) the parking lot would be “screened from view from all property lines” via a “solid barrier obstructing the view of the area to be screened on a year round basis” as required by zoning ordinance section 21-10.4.a.1.(c)(6) and section 21-28.1, and (b) the project would be “landscaped so as to best . . . control the project’s environmental impact . . . .” as required by ordinance section 21-43.1.

b. **Failure to Prove Compliance with the Internal Circulation Requirements, and Fire Access and Circulation Requirements, and Stormwater Drainage Requirements, all of which are Matters Vital to Public Health and Welfare.** As set forth above, the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater drainage, and traffic circulation safety, which includes access and circulation for fire trucks. If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, preliminary approval must be denied. The Board finds that the applicant has failed to prove compliance with the internal circulation requirements and fire safety requirements of the ordinance, both of which are matters vital to public health and welfare. As such, preliminary site plan approval must be denied. The Board’s specific findings in this regard are as follows.
As to internal circulation, ordinance section 21-39.3.a.3.(b) provides that “traffic circulation shall be designed to minimize the use of aisles serving parking areas.” Ordinance section 21-54.6.h.2 requires the preparation and submission of an “internal circulation plan” and an analysis of how the internal circulation plan relates to the anticipated traffic volumes. Finally, ordinance section 21-54.8.a.1.(f) requires the Board to make a specific finding of fact as to what degree the internal circulation system is able to handle the traffic generated by the development. 8 While Mr. Khan, the applicant’s civil engineering expert, did prepare and submit to the Board a “Supplemental Report on Internal Circulation” dated May 23, 2014, and the proposed site access, circulation and parking is depicted on sheet C-06 of the site plans (the “Vehicle Circulation and Landscaping Plan”), neither Mr. Khan nor the applicant submitted a traffic circulation plan showing how congregants and Sunday school children drop off and pick up would take place. Instead, the applicant presented Mr. Khan – who is admittedly not a traffic engineering expert – to verbally explain the plan for congregant and Sunday school drop off and pick up. The Board was not persuaded by Mr. Khan’s testimony that drop off and pick up could be safely achieved in light of the fact that pedestrians exiting vehicles would have to walk across parking aisles and in front of and through parking spaces to gain entrance to the building. In fact, the Board notes that Mr. Khan admitted that he did not rely on any of the studies conducted by the applicant’s traffic engineering expert Mr. Ney and, further, Mr. Khan admitted that he did not prepare any traffic study of his own on which to base his testimony. Mr. Khan explained that he based his testimony on information provided to him by ISBR’s president regarding the pedestrian circulation issues. The Board finds that the applicant did not meet its burden of proving that the parking aisle layout is designed in such a manner to ensure the safety of pedestrians accessing the proposed Mosque. While the Board believes that the applicant’s stated intention to use of a vested monitor to be available on Sunday mornings in order to direct parents and children during the drop off period is a step in the right direction, the Board needs to see a written plan incorporating the use of monitors during drop off and pick up in order to be

8 Ordinance section 21-54.8.a.1.(f) also requires the Board to make a specific finding of fact as to what degree the existing external circulation system is capable of handling the traffic generated from the development. A number of individual objectors complained that the Board was ignoring the external circulation system. However, the Board ruled that, because Church Street is a county road, the Somerset County Planning Board, and not the Bernards Township Planning Board, has jurisdiction over the external circulation system. See, N.J.S.A. 40:27-6.6 which provides that the County “may” elect to review site plans along County roads. Here, Somerset County has, in fact, made an election to so review such site plans. As such, the County Planning Board’s review of site plans for sites along County roads preempts the Bernards Township Planning Board review of such ingress and egress. Under the MLUL, the Board is limited to conditioning any approvals it grants for projects abutting a County road to review and approval by the County Planning Board. See, N.J.S.A. 40:55D-37c which provides: “Each application . . . for site plan approval, where required pursuant to [N.J.S.A. 40:27-6.6] shall be submitted by the applicant to the county planning board for review and approval, as required by the aforesaid sections, and the municipal planning board shall condition any approval it grants upon timely receipt of a favorable report on the application by the county planning board . . . .” See also, N.J.S.A. 40:55D-50b which provides: “Whenever review or approval of the application by the county planning board is required by . . . [N.J.S.A. 40:27-6.6], in the case of a site plan, the municipal planning board shall condition any approval that it grants upon timely receipt of a favorable report on the application by the county planning board. . . .” Other individual objectors complained that, with the Liberty Corner Fire Company located across Church Street from the property, the impact of traffic generated to and from the proposed Mosque would add traffic congestion to Church Street and negatively impact the response time of the Fire Company. The Board ruled that it could not consider any off-site traffic issues because the proposed Mosque was a permitted use and the governing body presumably considered off site traffic impacts when it allowed houses of worship as permitted uses in the R-2 zone. See, Lionel’s Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 268-269 (Law Div. 1978), approved, Dunkin Donuts of N.J. v. Twp. of North Brunswick, 193 N.J. Super. 513, 515 (App. Div. 1984).
assured that the drop off and pick up operation would be done safely. As set forth above, ordinance section 21-39.3.a.3.(b) provides that “traffic circulation shall be designed to minimize the use of aisles serving parking areas.” The Board finds that the traffic circulation as reflected on the site plans and as described in the May 23, 2014 “Supplemental Report on Internal Circulation” maximizes, rather than minimizes, the use of aisles serving parking areas for pedestrian circulation. As such, and because the applicant did not meet its burden of proving that pedestrian circulation will be safe, the Board finds that internal circulation system will not be able to safely handle the traffic generated by the proposed development. For all of the foregoing reasons, the Board must deny preliminary site plan approval.

(2) The Board also finds that the internal circulation system will not be able to handle access and circulation of fire trucks in a safe manner. Ordinance section 21-46A.1.e establishes standards for “means of access for Fire Department apparatus.” Subsection “e” consists of two sentences. The first sentence states: “Means of access for Fire Department apparatus shall be constructed in accordance with N.J.A.C. 5:21-4.” The second sentence states: “The National Fire Codes Protection Association Standards will apply where the following is not specific,” and what follows are 10 numbered items. The first sentence of ordinance section 21-46A.1.e does not apply to the application because N.J.A.C. 5:21-4 contains the “Streets and Parking” subchapter of the State Residential Site Improvement Standards (the “RSIS”), and RSIS applies only to residential development. See, N.J.A.C. 5:21-1.5(a) which provides that the RSIS “shall govern any site improvements carried out . . . in connection with any application for residential subdivision, site plan or subdivision . . . .” The ISBR application is not a residential development so the RSIS do not apply to it. The second sentence of ordinance section 21-46A.1.e does apply. Again, the second sentence provides: “The National Fire Codes Protection Association Standards will apply where the following is not specific.”

As a threshold matter, the Board finds that ordinance section 21-46A.1.e contains an apparent drafting error in that there is no such entity as “The National Fire Codes Protection Association.” The Board finds that the obvious intent of the draftsman was to reference “The National Fire Protection Association” and, more specifically, the codes and standards adopted by the National Fire Protection Association, commonly referred to as the “NFPA codes and standards.” The issue becomes whether any of the items in subparagraphs (1) through (10) of subsection “e” of the ordinance are “not specific” on an issue so that a NFPA code or standard would, in essence, be incorporated by reference into the ordinance and, hence, would need to be complied with. In this regard, the Board finds that the only item in subsection “e” that is “not specific” is subparagraph (1) which provides: “Means of access for Fire Department apparatus shall consist of fire lanes, private streets, streets, parking lot lanes or a combination thereof.” In fact, the Board finds this requirement is anything but specific because the requirement does not provide a minimum width for the required fire lanes and parking lot lanes. As the Board has found this requirement to be “not specific,” ordinance section 21-46A.1.e provides that the NFPA “will apply.”

The next issue that must be addressed is which of the many NFPA standards apply. Individual objector Cody Smith argued that NFPA 1141 applies. And, the applicant did not suggest any other NFPA standard that should apply in the absence of NFPA 1141. Additionally, the Board notes that the applicant’s attorney cited NFPA 1141 both during the hearing and in his closing argument. In light of the fact that no one has proposed any alternative NFPA standard, the Board finds that NFPA 1141 applies to the required fire lanes and parking lot lanes. The significance of this is that NFPA 1141 contains two provisions contained in § 5.4, governing “parking lots,” that are not complied with by the proposed site plan.
NFPA § 5.4.1 provides that the minimum parking lot aisle width “shall be as shown on Table 5.4.1” and that table provides that the minimum aisle width for 90 degree parking stalls is 26 feet, regardless of whether the traffic flow is one-way or two-way. The parking lot aisle widths adjacent to the 90 degree parking stalls to the easterly side and westerly side of the site as well as to the rear of the building are all 24 feet. Further, NFPA 1141 § 5.4.2 provides: “Parking lot aisles adjacent to any building shall provide a travel lane with a minimum 24 feet clear width.” The one way in drive aisle adjacent to the westerly side of the building leading to the parking lot to the rear of the building is as narrow as 20 feet. The Board finds that the proposed development does not comply with these NFPA 1141 requirements which have been incorporated by reference into and by ordinance section 21-46A.1.e.1. Further, the Board finds that internal traffic circulation, including access and circulation for fire trucks, is an essential element of a site plan and constitutes a matter vital to public health and safety. For all of the foregoing reasons, the Board must deny preliminary site plan approval.

(3) As to the provisions for stormwater drainage, ordinance section 21-42.1.f.2.(b) requires the use of stormwater “infiltration measures” with the capacity of three inches of stormwater runoff for each square foot of new impervious area, and that is for minor developments. Ordinance section 21-42.1.f.3 provides that all major developments (and the proposed development is a major development) “shall have their stormwater management designed in accordance with the . . . NJDEP Stormwater Rules” found at N.J.A.C. 7:8, and these rules require a “major development,” which is a development that disturbs at least 1 acre of land or creates at least 0.25 acres of new or additional impervious surface, to include groundwater recharge in the development. The stormwater management system as reflected on the site plans does not provide for any groundwater infiltration. And, an exception from or waiver of this requirement has not only not been requested but is not permitted pursuant to ordinance section 21-42.1.g.2 unless a “mitigation plan” is submitted to and approved by the Board, and the applicant has not submitted any such mitigation plan, nor has the applicant indicated that it intends to submit such a mitigation plan. In fact, the applicant has promised to comply with the recharge requirement by re-designing its stormwater management system as a condition of preliminary site plan approval and then submitting it to the Board’s engineering expert for review and approval. The Board finds that the applicant’s promise to re-design and submit a detailed ordinance compliant stormwater management plan is an admission by the applicant that the current stormwater management plan does not satisfy the stormwater management requirements of the ordinance and the NJDEP Stormwater Rules. And, the Board finds that it would be inappropriate to delegate review and approval of the re-designed plan to its engineering expert where the MLUL requires the Board to review and approve the matters vital to the public health and welfare.

Further, the Board directed its engineering expert Thomas Quinn, PE to review Exhibit P-16, a September 8, 2015 letter prepared by Paul D. Fox, PE, an engineering expert who testified for objector Kevin Tartaglione (residing at 30 Royal Oak Drive), which raised 13 issues with the applicant’s stormwater management design. Mr. Quinn prepared a responding letter dated September 28, 2015 which addressed each of the 13 issues and he also addressed the issues in testimony during the hearing. While Mr. Quinn opined that only one of the issues required a re-design – the stormwater recharge as set forth above – and he obtained from the applicant’s engineering expert Mr. Khan information addressing all of the items which he believed would have very little or no impact on the current design, the applicant made a

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9 Ordinance section 21-23.1.a provides that “all development applications shall include drainage facilities capable of providing for stormwater.” Ordinance section 21-23.4 governs the design standards for stormwater management and references ordinance section 21.42.
calculated decision not to submit to the Board the information it submitted to Mr. Quinn. The Board believes the reason the information was not submitted to the Board was to avoid having to produce Mr. Khan for further cross examination which would have been required. The problem that has created, however, is that the Board finds that it would be inappropriate to delegate review and approval of essential elements of a development plan such as stormwater drainage which is a matter vital to the public health and welfare.

Finally, in as much as the Board has rejected the location of the large detention basin in the buffer area, the applicant is going to have to re-design at least half of its stormwater drainage system. Thus, the current system, to the extent is could be said to be approvable on a preliminary basis (but the Board finds that it is not approvable on a preliminary basis), is going to have to undergo significant changes such that conditional preliminary approval is inappropriate and would amount to a further improper delegation of the Board’s review and approval function over essential elements of a development plan such as stormwater drainage which is a matter vital to the public health and welfare.

For all of the foregoing reasons, the Board must deny preliminary site plan approval based on the failure of the applicant to satisfy the stormwater drainage requirements set forth in ordinance section 21-23.1.a, which provides that “all development applications shall include drainage facilities capable of providing for stormwater,” and ordinance section 21-23.4, which governs the design standards for stormwater management and references ordinance section 21.42.

(4) Before leaving preliminary site plan review and commencing final site plan review, the Board wants to address an issue raised by a number of the individual objectors, namely, the provision of sanitary sewer service for the proposed development. As set forth above, the applicant proposes to connect the proposed Mosque to the same public water and sanitary sewer systems to which the existing dwelling is connected. There are actually two issues to address.

The first issue is that, according to the February 13, 1995 minutes of the Bernards Township Sewerage Authority (the “BTSA”), the property was allocated sanitary sewer capacity of 350 gallons per day (the BTSA Director’s letter to Mr. Khan dated January 12, 2002 appears to incorrectly state that the capacity allocated was 300 gpd) and ISBR requires 426 gpd to provide sanitary service for the proposed Mosque. A number of objectors took the position that the Board should deny preliminary site plan approval on the basis that the applicant did not have sufficient sewer capacity for its proposed development and the provision for sewerage is an essential element of a development plan and a matter vital to public health and welfare. The Board rejects this position for the following reasons. First, in an attempt to moot the issue, the Board directed the applicant to apply to the BTSA for the additional capacity. ISBR did that by letter from Mr. Khan to the BTSA dated August 15, 2013. The BTSA Director replied by letter dated August 19, 2013, advising that “the request for additional allocation is premature as preliminary site plan approval is required first.” The BTSA Director’s letter cited a BTSA regulation which provides that if a developer obtains preliminary site plan approval from the Board, then the developer applies to determine if capacity is available and to determine the method of intended service. In light of this letter, and in light of the difference between the feasibility of providing sewerage disposal through the BTSA sewerage system and the ability of the applicant to obtain additional capacity and a permit to discharge sanitary waste from a new use into the BTSA system, the Board previously ruled, and affirms that ruling at this time, that the applicant has proven that disposal of sanitary waste is feasible through its existing pipes connecting into the BTSA sanitary sewer system. See, Dowel Associates v. Harmony Twp., 403
N.J. Super. 1, 30-32 (App. Div. 2008), certif. denied, 197 N.J. 15 (2008) (upholding the trial court’s ruling that “feasibility is something less than permittability,” and holding that essential elements of a development that are vital to public health and welfare such as stormwater drainage and sewerage disposal must be resolved “at least as to feasibility of specific proposals” prior to preliminary approval being granted (citing Field v. Franklin Twp., 190 N.J. Super. 326, 332-333 (App. Div. 1983), certif. denied, 95 N.J. 183 (1983)). As such, preliminary site plan approval is not being denied on the basis of the applicant not having sufficient sewer capacity at this time.

The second issue is that, according to objector Christopher Quick, the sewer pipe through which the applicant’s sanitary waste currently flows runs under Lot 3 (owned by the Quicks) and the applicant does not have the benefit of an easement allowing the pipe to be there. Objector Quick’s argument is that the applicant has no right to use the sewer pipe under his lot so, in the absence of the applicant proposing to run its sewer pipe to and up Church Street, it cannot prove that it will have a connection to the BTSA system so it cannot prove that its sanitary sewer service is feasible. The Board previously ruled, and affirms that ruling at this time, that the applicant has proven that disposal of sanitary waste is feasible through its existing pipes connecting into the BTSA sanitary sewer system. As the Board explained at the time of its ruling, the Board is not a court and has no jurisdiction to make a legal determination as to whether the applicant has the right to use the existing sewer pipe running under Lot 3 in the absence of an easement. 10 In fact, it was suggested to Mr. Quick that he contact an attorney and consider instituting an action in the Superior Court to determine his and the applicant’s rights. The facts are that, currently, the dwelling on the property is connected to the BTSA system and the site plans show that the proposed Mosque will be connected to the existing pipe at the point of an ejector pump on the applicant’s property. As such, preliminary site plan approval is not being denied on the basis of the applicant not having a sewer connection to the BTSA system.

7. **Findings as to Final Site Plan Review.** The Board’s findings as to final site plan review are as follows.

a. **Site Plans and Drawings and Accompanying Engineering Documents do Not Contain Sufficient Detail so Final Site Plan Approval Must be Denied.** As set forth in the legal conclusions below, N.J.S.A. 40:55D-46a allows site plans and accompanying engineering documents to be submitted in “tentative” form and allows architectural plans to be in “preliminary” form for “discussion purposes for preliminary approval.” As also set forth in the legal conclusions below, in contrast, N.J.S.A. 40:55D-50a requires plans, drawings and engineering documents submitted for final approval to be “detailed” and include “specifications”

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10 Land use boards are not limited to making only factual determinations. Both boards possess express and implicit power under the MLUL to also determine “certain questions of law.” Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann. 2015), section 15-1.1, page 294 (citing Centennial Land & Dev. Co. v. Medford, 165 N.J. Super. 220 (Law Div. 1979)). That said, the key is determining which “certain questions of law” can be determined by a board because they are land use agencies, not courts of law. Our courts have held that land use boards have no jurisdiction to determine legal issues which are solely within the jurisdiction of the courts to decide, such as: (1) whether equitable estoppel is applicable in a certain case, Springsteel v. West Orange, 149 N.J. Super. 107, 111 (App. Div. 1977), certif. denied 75 N.J. 10 (1977); (2) the legality of an ordinance, Fischer v. Twp. of Bedminster, 5 N.J. 534 (1950); and (3) constitutional questions, Messer v. Burlington Tp., 172 N.J. Super. 479, 487 (Law Div. 1980). On the issue of easements, the court in Kline v. Bernardsville Ass’n, 267 N.J. Super. 473, 479-480 (App. Div., 1993), held that the MLUL provided no authority to a planning board to rule on or order a change in the character or place of an easement. The Kline court suggested that the board could condition a development approval on the applicant’s attempt to seek an agreement and could also “direct it to commence an action in the courts.” Id.
and for such detailed plans, drawings and specifications to “conform to the standards established by ordinance.” In brief, the Board finds that the site plans and architectural drawings and accompanying engineering documents do not contain sufficient details so final site plan approval must be denied. Specifically, the site plans and architectural drawings were simply not coordinated and, even in areas where additional revisions were not needed, the site plans and architectural drawings were lacking in detail and specifications. That said, additional revisions are needed and proof of this is the fact that the applicant agreed during the hearing to make the following additional revisions to the application and proposed development but, significantly, the applicant did not submit any additional supplemental and/or replacement drawings and plans to reflect these additional revisions, but promised to do so as a condition of preliminary site plan approval: (a) reduced levels of site lighting, (b) adding / adjusting proposed plantings to satisfy the requirements of various ordinance provisions, (c) adjusting the easterly swale to save existing trees and satisfy the requirements of various ordinance provisions, and (d) redesign of the stormwater management plan to provide for required stormwater recharge. The following are specific examples of the tentative nature of the site plans and architectural drawings which require the Board to deny final site plan approval.

(1) First, site lighting. Ordinance section 21-41.2 requires all outdoor site lighting to be shown on a lighting plan “in sufficient detail to show a determination of the effects upon adjacent properties . . .” and the “objective of these specifications is to minimize undesirable off-premises effects.” Additionally, ordinance section 21-41.2 provides that to “achieve these requirements, the intensity of such light sources, the method of light shielding and similar specifications shall be subject to development plan approval.” The Board found the lighting plan lacking in detail and, in response, the applicant did not submit a more detailed lighting plan but, rather, presented its civil engineering expert, Mr. Kahn – who is admittedly not a lighting expert – to testify to try to convince the Board that the site lighting would not have an adverse impact on Lot 1 abutting the property to the west (owned by the Abbates). Without detailed plans and detailed lighting specifications to show the reduced lighting levels for site lighting (the applicant agreed to decrease the site lighting levels to .5 footcandles and to “look into” decreasing the site lighting levels to .3 footcandles as sought by the Board), and without a lighting plan is sufficient detail to prove to the Board that there would be no adverse impact on neighboring Lot 1, if the Board was to grant final site plan approval, the applicant would be able to obtain zoning and construction permits to construct the proposed development without the Board being assured that the site lighting levels would be, in fact, lowered as promised, and would not adversely impact neighboring Lot 1 to the west as required by the lighting ordinance provisions. The Board notes that the site lighting levels proposed on sheet C-07 of the site plans is an average of .7 footcandles in the main drive aisles and .81 footcandles in the parking lot, which the Board finds is too intense for the adjacent residential lots and does not minimize undesirable off-premises effects as required by ordinance section 21-41.2.

(2) Second, lights from car headlights. While the Board has found that preliminary site plan approval must be denied by reason of the applicant’s failure to prove compliance with the regulation contained in ordinance section 21-10.4.a.1.(c)(6) providing that “parking shall be screened from view from all property lines,” the Board also finds that final site plan approval must be denied on the basis of this ordinance regulation because of insufficient site plan details. As set forth above, ordinance section 21-22.3.a provides that, if a parking area abuts a residential use, the parking . . . area shall be completely screened from view from the adjoining property in accordance with ordinance section 21-28. And, ordinance section 21-28.1 provides that “visual screens shall be provided through landscaping or other means as approved by the Board” and that “such screens shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis.” Further,
ordinance section 21-43.1 provides that all projects “shall be landscaped so as to best adapt the site to the intended use, to control the project’s environmental impact and to enhance the appearance of the project, both on-site and from the surrounding area.” As set forth above, the Board found that these ordinance provisions are not simply for aesthetic purposes during the day to ensure that neighbors and the traveling public on Church Street do not have to view a “sea” of cars in a parking lot, but they are also for safety and nuisance protection purposes to ensure that car headlights from parking lots do not shine into neighboring dwellings’ windows, onto neighboring residential lots, and do not shine into the windows of the vehicles traveling on Church Street. Not only did the applicant fail to submit or present any scientifically prepared study, exhibit or plan to show that lights from car headlights would be “screened from view of all property lines,” but the applicant also failed to submit or present a detailed landscaping plan showing the existing and/or proposed landscaping would control lights from car headlights shining onto neighboring residential lots. Instead, the applicant presented its civil engineering expert, Mr. Khan who is admittedly not a lighting expert—to present a “car headlight test” he had conducted in an attempt to show the Board that the car headlights would not shine past the property’s lot lines. As set forth above, the Board found Mr. Khan’s testimony scientifically unreliable and unconvincing. And, while Mr. Khan testified that no car headlights would be seen from the dwelling located on 465 Somerville Road (owned by Ashok Wahi) by reason of the existing vegetation to the south and west of the property, Mr. Khan admitted that the headlights would be visible from Mr. Wahi’s driveway. Without a landscaping plan in sufficient detail being submitted to prove to the Board that there would be no adverse impact on Mr. Wahi’s lot and on the Abbate’s lot from car headlights, if the Board was to grant final site plan approval, the applicant would be able to obtain zoning and construction permits to construct the proposed development without the Board being assured that (a) the parking lot would be “screened from view from all property lines” via a “solid barrier obstructing the view of the area to be screened on a year round basis” as required by zoning ordinance section 21-10.4.a.1.(c)(6) and section 21-28.1, and (b) the project would be “landscaped so as to best... control the project’s environmental impact...” as required by ordinance section 21-43.1.

(3) Third, as to landscape screening of the property beyond the impact of car headlights from the parking lot on neighboring residential lots, without detailed and coordinated landscaping plans and specifications to show the added and/or adjusted proposed plantings to provide year round screening, if the Board was to grant final site plan approval, the applicant would be able to obtain zoning and construction permits to construct the proposed development without the Board being assured that (a) the parking lot would be “screened from view from all property lines” via a “solid barrier obstructing the view of the area to be screened on a year round basis” as required by zoning ordinance section 21-10.4.a.1.(c)(6), and (b) the project would be “landscaped so as to best... control the project’s environmental impact...” as required by ordinance section 21-43.1.

(4) Fourth, adjustments to the easterly drainage swale to save existing trees. An important requirement in the Township Land Development ordinance is to save existing trees. Ordinance section 21-45.2.a makes this clear by stating that the “first priority is to protect all trees on the site whenever possible.” While the Board was pleased that the applicant agreed to adjust the easterly drainage swale to save existing trees, without detailed and coordinated landscaping plans and drawings to show the adjustments that would be made to the easterly drainage swale to save existing trees, if the Board was to grant final site plan approval, the applicant would be able to obtain zoning and construction permits to construct the proposed development without the Board being assured that the adjustments that would be made to the easterly drainage swale would actually save existing trees.
Fifth, stormwater drainage. As set forth above, ordinance section 21-23.1.a provides that “all development applications shall include drainage facilities capable of providing for stormwater.” Ordinance section 21-23.4 governs the design standards for stormwater management and references ordinance section 21.42. As set forth in the findings as to preliminary site plan review above, the Board finds that the applicant’s promise to re-design and submit a detailed stormwater compliant stormwater management plan is an admission by the applicant that the current stormwater management plan is not sufficiently detailed and does not satisfy the stormwater management requirements of the ordinance and the NJDEP Stormwater Rules. And, the Board finds that it would be inappropriate to delegate review and approval of the detailed plan to its engineering expert where the MLUL requires the Board to review and approve the details of the plan. As such, the Board finds that it must deny final site plan approval.

8. **Site Plan Exceptions.** While the denial of preliminary site plan approval moots the requests for exceptions from the site plan ordinance requirements at issue, and the Board will thus dismiss the requests for the exceptions, the Board deliberated on the exceptions for purposes of making a complete record. The Board’s findings as to the requested exceptions are as follows:

a. **Exception from Site Plan Ordinance Section 21-39.1.b.3 to Allow 31 Parking Spaces Proposed Along the Easterly Property Line to be 9’ x 18’ without Two Foot Vehicle Overhangs.** As set forth above, the application included a request for an exception from site plan ordinance section 21-39.1.b.3, which requires the minimum dimensions of parking spaces to be 9 feet by 20 feet but which also provides that “the length of any parking stall may be reduced by two feet if the front of the stall abuts a curb or other approved wheel stop and the two feet is not used for any other purpose such as sidewalks,” to allow the 31 parking spaces proposed along the easterly property line abutting Lot 3 (owned by Christopher and Loretta Quick) to be 9 feet by 18 feet without a two feet vehicle overhang but where wheel stops are proposed for the spaces such that a 6 inch vehicle overhang area will be provided. The Board finds that if the drive aisles adjacent to the building were increased in width to 24 feet and the parking aisles adjacent to the 90 degree parking stalls were increased in width to 26 feet, and if the other zoning ordinance regulations and site plan ordinance requirements discussed above were complied with so that the Board was in a position to grant preliminary site plan approval, the Board would have granted the requested exception to allow the reduced size for the parking spaces at issue because the widened aisles would have left sufficient space for easy access and circulation for fire trucks even in snow events so that it would have been reasonable and within the general purpose and intent of site plan review to grant the requested exception. The Board further finds that the literal enforcement of the site plan ordinance requirement at issue would be impracticable in the event of the widening of the drive / parking aisles because there would be no logical reason in that event to require the larger parking stalls.

b. **Exception from Site Plan Ordinance Section 21-39.2.a to Allow No Loading / Unloading Space.** As set forth above, the application included a request for an exception from site plan ordinance section 21-39.2.a, which requires a minimum of one loading / unloading space, to allow no loading / unloading spaces. The Board finds that if the zoning ordinance regulations and site plan ordinance requirements discussed above were complied with so that the Board was in a position to grant preliminary site plan approval, the Board would have granted the requested exception to allow no loading / unloading spaces. The Board finds that deliveries could be scheduled to arrive at low points of usage of the parking lot and the Board finds that it could have and would have imposed a condition to that effect. As such, the Board finds that it would have been reasonable and within the general purpose and intent of site plan review to grant the requested exception, especially in light of the fact that space is at a premium.
on the site. The Board further finds that the literal enforcement of the site plan ordinance requirement at issue would be impracticable in the event the aforementioned condition was imposed because there would be no logical reason in that event to require the provision of a large extra space in the parking lot for loading / unloading when it was not needed and would serve to exacerbate the lack of space problem.

9. **“C” Fence Variances.** While the denial of preliminary site plan approval moots the requests for the “c” fence variances from the zoning ordinance regulations at issue, and the Board will thus dismiss the requests for the variances, the Board deliberated on the variances for purposes of making a complete record. The Board’s findings as to the requested “c” variances are as follows.

a. **“C” Variance from Zoning Ordinance Section 21-16.2.c to Allow Installation of the Fence in a Gerrymandered manner and with Unequal Spaced Posts.** As set forth above, the applicant included a request for a “c” variance from zoning ordinance section 21-16.2.c, which provides that all fences must be symmetrical in appearance and have posts separated by identical distances and consist of material conforming to a definite pattern or size, to allow the proposed fence which is intended to screen the property from neighboring Lot 3 to the east (owned by Christopher and Loretta Quick) on a year round basis to be routed so as not to disturb existing trees in the easterly buffer in the event that the Board requires the applicant to so re-route the fence. The Board finds that a “c(1)” or so-called “hardship” variance is not available because the situation is the result of self-created hardship in that the applicant has just proposed too much building and improvements on the property and could eliminate the “hardship” by reducing the size of the building or reducing the maximum occupancy of the building. The Board also finds that a “c(2)” or “benefits v. detriments” variance is not available because the zoning benefit of providing a solid year round barrier for screening is substantially outweighed by the detrimental aesthetics that will result from installing the fence in a non-symmetrical gerrymandered fashion. The Board further finds that the resulting detrimental aesthetics constitutes a substantial detriment to the public good. The Quicks deserve more from a new use than inadequate screening or adequate screening but by an aesthetically displeasing fence.

b. **“C” Variance from Zoning Ordinance Section 21-16.2.a to Allow Solid Fencing in the Front Yard and Exceeding 4 Feet in Height.** As set forth above, the applicant included a request for a “c” variance from zoning ordinance section 21-16.2.a, which prohibits fencing in a front yard to exceed 4 feet in height and requires such front yard fencing to be not less than 50% open, to allow that portion of the proposed fence in the easterly buffer that will be located in the northerly front yard area to be 6 feet high instead of no more than 4 feet high and to be solid instead of not less than 50% open. Similar to the Board’s findings on the other fence variance, the Board finds that a “c(1)” or so-called “hardship” variance is not available because the situation is the result of self-created hardship in that the applicant has just proposed too much building and improvements on the property and could eliminate the “hardship” by reducing the size of the building or reducing the maximum occupancy of the building. The Board also finds that a “c(2)” or “benefits v. detriments” variance is not available because the zoning benefit of providing a solid year round barrier for screening is substantially outweighed by the detrimental aesthetics that will result from having a 6 foot high solid wood fence in the front yard. The Board further finds that the resulting detrimental aesthetics constitutes a substantial detriment to the public good.

10. **Required Determinations under the Ordinance.** Finally, to complete the record, the applicant also required the following determinations be made by the Board under the following Township ordinance provisions: (a) allow use of flush curbing within the parking lot in
accordance with ordinance section 21-39.3.a.(2), which requires that all parking areas be curbed to Township standard specifications (6-inch high curbs) unless the applicant can demonstrate that elimination of the curbing will not decrease the useful life of the pavement, have a negative effect on drainage, or increase maintenance costs, (b) allow banked parking in accordance with ordinance section 21-22.1.a.(1)(a) to allow construction of only 69 of the required 107 paved parking spaces and reservation or “banking” of a sufficient area for construction of the remaining 38 of the 107 spaces in the future if necessary, (c) specific approval in accordance with ordinance section 21-28.1 of the proposed fence in the easterly buffer as a “visual screen” to provide a solid barrier obstructing the view of the property from neighboring Lot 3 (owned by Christopher and Loretta Quick) to the east on a year round basis, and (d) specific approval of the following drainage improvements in the easterly buffer area in accordance with ordinance section 21-28.2.b: the large detention basin, and the drainage swale. The Board’s findings as to these required determinations are as follows:

a. **Denial of Approval for Detention Basin in the Buffer.** As set forth above, the Board determined that it could not specifically approve the large detention basin in the easterly buffer. The Board found that it could not approve the 7,500 square foot detention basin wholly within the required 50 foot wide buffer because allowing such a large drainage improvement wholly within the buffer represents the exception swallowing the rule and defeats the very purpose of the buffer. The Board finds that there are no factors in favor of allowing the detention basin in the buffer and only factors that weigh against allowing it.

b. **Request for Specific Approval of Drainage Swale in the Buffer is Moot.** Once the preliminary site plan application was denied, the request for specific approval of the drainage swale in the easterly buffer became moot and the Board did not specifically deliberate on it. However, the Board indicated its displeasure with the location of the drainage swale as evidenced by the fact that the applicant promised to revise the site plans to attempt to relocate it so as to save trees. This is evidence of the fact that the Board did not specifically approve the drainage swale in the easterly buffer in the precise location shown on the most current site plans.

c. **Denial of Approval for Fencing in the Buffer.** As set forth above, the Board determined that it could not specifically approve the proposed fence in the easterly buffer as a “visual screen.” As set forth above, the Board found that the existing vegetation in the buffer separating the property from Lot 3 to the east (owned by the Quicks) does not provide adequate screening of the proposed development from Lot 3. As such, the Board found that screening pursuant to ordinance section 21-28.1 was necessary. And, while fencing is a form of landscaping that is allowed in the buffer to provide screening, the Board finds that planted screening is a much more aesthetically desirable alternative in this application and, in fact, the only reason additional planted screening cannot be provided here is because such a large detention basin has been proposed in the buffer. Moreover, the Board found that, in order for the ISBR application to be granted preliminary approval, the detention basin would have to be removed from the buffer, if not entirely, then substantially, to allow room for planted screening and obviate the need for the fence or, at least, provide room for the fence to abut the edge of the parking lot / drive aisle pavement rather than where currently proposed which interferes with existing trees and vegetation.

d. **Request to Use Flush Curbs is Moot.** As to the request to use flush curbing, while that requests is now moot by reason of the denial of preliminary site plan approval, and the Board did not deliberate on the request, the Board finds that it probably would have approved the use of the flush curbing as the applicant’s civil engineering expert testified on
personal and expert knowledge that use of the flush curbing would not decrease the useful life of the pavement, could positively – not negatively – effect drainage, and would not increase maintenance costs. The request to use flush curbs, however, is dismissed as moot.

e. **Request for Banking of 69 of the 107 Parking Spaces is Moot.** As to the request to allow banking of 69 of the 107 paved parking spaces, the request is now moot and the Board did not deliberate on it. One of the reasons that the preliminary site plan application was denied was due to the applicant attempting to squeeze too much onto the site and, as discussed above, a solution to this problem would be for the applicant to decrease the maximum capacity of the building to reduce the number of parking spaces and free up space on the site to allow the large detention basin to be relocated outside of the buffer. The Board does not know how it would treat the request to bank parking spaces in the event that the number of spaces required was reduced so will dismiss the request as moot.

B. **LEGAL CONCLUSIONS**

1. **Conclusions as to the Burden of Proof.** The Board’s understanding is that it is long established land use law in New Jersey that the “burden of proving the right to relief sought in an application rests at all times upon the applicant.” Cox and Koenig, *New Jersey Zoning and Land Use Administration* (Gann 2015), section 18-4.1, page 365 (citing *Ten Stary Dom v. Mauro*, 216 N.J. 16, 30 (2013). See also, *Toll Bros., Inc. v. Burlington County Freeholders*, 194 N.J. 223, 255 (2008) (quoting Cox and Koenig). As explained by Cox and Koenig, if the applicant does not meet its burden of proof, “the board has no alternative but to deny the application.” *Id.* As held in *Weiner v. Glassboro Zoning Board of Adjustment*, 144 N.J. Super. 509, 516 (App. Div. 1976), certif. denied, 73 N.J. 55 (1977) (affirming the denial of a variance for an inherently beneficial use): “It was not the burden of the Board to find affirmatively that the ordinance provisions will not be complied with . . . . It was, rather, the burden of the applicant to prove the converse.” See also, *N.J.S.A. 40:55D-103* which provides in the third to last sentence: “Nothing herein shall be construed as diminishing the applicant’s obligation to prove in the application process that he is entitled to approval of the application.” Finally, the Board notes that an applicant is required to prove entitlement to an approval at the time of the hearing on the application. Promises from an applicant about future potential compliance is not permitted under the MLUL. *CBS Outdoor, Inc. v. Lebanon Planning Board*, 414 N.J. Super. 563, 582 (App. Div. 2010). For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board concludes that the applicant failed to meet its burden of proving entitlement during the hearing to all of the relief that was ultimately denied by the Board.

2. **Conclusions as to Believability of Certain Expert Testimony.** The Board’s understanding is that it is well established land use law in New Jersey that a Board may choose whether or not to believe an expert and his or her opinion. *TSI E. Brunswick v. E. Brunswick Board of Adj.*, 215 N.J. 26, 46 (2013); *Klug v. Bridgewater Planning Board*, 407 N.J. Super. 1, 13 (App. Div. 2009) (“If the testimony of different experts conflicts, it is within the Board’s discretion to decide which expert testimony it will accept”). In fact, the board may choose not to believe an expert and his or her opinion even if there is no contrary expert opinion offered, and even when the expert happens to be the Board’s expert, not an expert offered by a party. *El Shaer v. Lawrence Tp. Planning Board*, 249 N.J. Super. 323, 330 (App. Div. 1991), certif. denied, 127 N.J. 546 (1991). However, to be binding on appeal, the choice to reject an expert’s opinion must be reasonably made and, significantly, must be explained. *Clifton Board of Ed. v. Clifton Zoning Board of Adj.*, 409 N.J. Super. at 434. For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board chose to accept the
opinions offered by Township Planner David Schley, PP as specifically explained above, and chose not to believe certain opinions offered by ISBR’s civil engineering expert Adnan Khan, PE as specifically explained above.

3. **Conclusions as to “Net Opinion” Testimony.** Likewise, in order for the Board to reject expert testimony on the basis of it being “net opinion,” the Board must explain the basis for such rejection, explaining whether the opinion was not based on factual evidence, or on other data or treatises relied upon by similar experts in the field, or based on a personal, rather than objective, standard. Two recent New Jersey Supreme Court opinions have addressed the net opinion rule. In Townsend v. Pierre, 221 N.J. 36, 53 (2015), the Court observed that N.J.R.E. 703 requires expert opinion to be “grounded in facts or data derived from (1) the expert’s personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.” “An expert’s conclusion is excluded if it is based merely on unfounded speculation and unqualified possibilities.” Id. In Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014), the Court stated that the net opinion rule “requires that the expert give the why and wherefore that supports the opinion, rather than a mere conclusion” and that an expert renders an “inadmissible net opinion if he or she cannot offer objective support for his or her opinion, but testified only to a view about a standards that is personal.” For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board rejected objector BCTRD’s planning expert Peter Steck’s testimony as to the proposed Mosque being a conditionally permitted use, rather than a principally permitted use, on the basis of his testimony constituting impermissible “net opinion.”

4. **Conclusions as to Preliminary and Final Site Plan Review.** The Board’s conclusions as to preliminary and final site plan review are as follows:

a. **Standards for Preliminary and Final Site Plan Review.** N.J.S.A. 40:55D-46a and 50a are the focal points for preliminary and final site plan review. N.J.S.A. 40:55D-46a provides that the Board “shall” grant preliminary approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final approval “shall” be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. Thus, if the application complies with all ordinance provisions, the Board must grant approval. Conversely, if the application does not comply with all ordinance provisions, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the plans to comply with the ordinance requirement prior to the Board granting approval. However, there are exceptions:
While N.J.S.A. 40:55D-46a allows the site plan and engineering documents required to be submitted to be in “tentative form for discussion purposes for preliminary approval” and the architectural drawings to be in preliminary form, the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater drainage, sewage disposal, water supply, and traffic circulation safety, which would include access and circulation for fire trucks. See, Field v. Franklin Twp., 190 N.J. Super. 326, 332-333 (App. Div. 1983) (“Certain elements – for example, drainage, sewage disposal and water supply – may have such a pervasive impact on the public health and welfare in the community that they must be resolved at least as to feasibility of specific proposals or solutions before preliminary approval is granted”), certif. denied, 95 N.J. 183 (1983); D’Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 83-84 (App. Div. 1992) (without percolation tests being submitted, stormwater drainage and septic disposal, matters vital to the public health and welfare, could not be resolved), certif. denied, 130 N.J. 18 (1992); Dowel Associates v. Harmony Twp., 403 N.J. Super. 1, 30-32 (App. Div. 2008), certif. denied, 197 N.J. 15 (2008) (upholding the trial court’s ruling that “feasibility is something less than permittability,” and holding that essential elements of a development that are vital to public health and safety such as stormwater drainage and sewerage disposal must be resolved “at least as to feasibility of specific proposals” prior to preliminary approval being granted (citing Field, supra.); Morris County Fair Housing Council v. Boonton Twp., 228 N.J. Super. 635, 642-645 (Law Div. 1988) (affirming a planning board’s denial of preliminary site plan approval for an affordable housing development because the applicant failed to calculate the stormwater flow so could not prove the feasibility of its stormwater management plan, which the court found was a fundamental element of the development and had to be resolved prior to preliminary approval).

If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, preliminary approval must also be denied. Field, 190 N.J. Super. at 333.

And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a, which provides for final approval of “detailed drawings [and] specifications” if application “conform[es] to the standards of all applicable ordinances and the conditions of preliminary approval.” See also, N.J.S.A. 40:55D-4 which defines “final approval” as the action of the Board taken “after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . .”

b. **Denial of Preliminary Site Plan Approval.** For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board concludes that preliminary site plan approval should be denied.

c. **Denial of Final Site Plan Approval.** For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board concludes that final site plan approval should be denied.

5. **Conclusions as to Dismissal on Mootness Grounds of those aspects of the Application which have Not been otherwise Denied.** A request for relief becomes “moot” when the relief sought, if granted, can have no practical effect. N.Y. Susquehanna & Western Railway v. State, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff’d o.b., 204 N.J. Super.
Requests for relief that become moot should ordinarily be dismissed. Cinque v. Dept. of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993). As such, because the Board has denied the application for preliminary site plan approval, all other relief sought should ordinarily be dismissed as moot, except if any of the other relief has been denied on the merits as part of the denial of the preliminary site plan application or as part of the additional deliberations that were conducted for purposes of making a complete record. As such, the “relief denied” section of the within resolution will reflect all specific denials of relief as having been denied on the merits and all other relief as having been dismissed on the basis of mootness, even if the results of a deliberation would have granted the relief.

6. **Conclusions as to the Requested Exceptions.** The Board’s conclusions as to the exceptions are as follows:

   a. **Standards for Considering the Exception.** The Board has the power to grant exceptions from subdivision and site plan ordinance requirements pursuant to N.J.S.A. 40:55D-51a and 51b “as may be reasonable and within the general purpose and intent of the provisions” for site plan review and approval “if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.”

   b. **Dismissal of Exceptions as Moot.** For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board would have found that it was reasonable under certain circumstances explained above, as well as within the intent and purpose of the site plan ordinance requirement at issue, to grant the requested exceptions. And, the Board would have found under certain circumstances explained above that the literal enforcement of the site plan ordinance requirements at issue were impracticable. As such, the Board would have concluded that the exceptions can and should be granted, but subject to the imposition of conditions. However, because the Board denied the preliminary site application, the Board concludes that the exceptions should be dismissed as moot.

7. **Conclusions as to the “C” Variances.** The Board’s conclusions as to the “c” variance are as follows:

   a. **Standards for Considering “C(1)” Variances.** The Board has the power to grant “c(1)” or so-called “hardship” variances pursuant to N.J.S.A. 40:55D-70c(1) where: (1) “(a) by reason of exceptional narrowness, shallowness or shape of a specific piece property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon; (2) the strict application of any regulation . . . would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property.” This is the so-called “positive” criteria of a “c(1)” variance. The “hardship” that the applicant must prove is not that the zoning regulation at issue has zoned the property into inutility. While inutility caused by a zoning regulation would require a variance to avoid an unconstitutional taking of the property, the Board may (but is not required to) grant a variance where the hardship at issue may inhibit “the extent” to which the property can be used. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). To be clear, a hardship variance is not available to relieve “personal hardship” of the owner, financial or otherwise. Jock v. Wall Township Zoning Board of Adj., 184 N.J. 562, 590 (2005). A hardship variance is also not available to relieve hardship caused by a mistake, Deer-Glen Estates v. Borough of Fort Lee, 39 N.J. Super.
380, 386 (App. Div. 1956), and/or for an intentionally created situation, which is referred to as a “self created” hardship. Commons v. Westwood Board of Adj., 81 N.J. 597, 606 (1980); Chirichello v. Monmouth Park Board of Adj., 78 N.J. 544, 553 (1979). Note that the determination of whether a lot is a “specific piece of property” within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone. If all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. Beirn v. Morris, 14 N.J. 529, 535-536 (1954). Finally, even if an applicant proves the “positive” criteria of a “c(1)” variance, the Board may not exercise its power to grant the variance unless the so-called “negative criteria” has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70, “no variance or other relief ... may be granted ... unless such variance or other relief ... can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” The phrase “zone plan” as used in the N.J.S.A. 40:55D-70 means the Township “master plan.” Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

b. Standards for Considering “C(2)” Variances. The Board has the power to grant “c(2)” or so-called “benefits v. burdens” variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(2) where, “in an application or appeal relating to a specific piece of property the purposes of [the MLUL] would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment.” As set forth above in the discussion of the standards for considering “c(1)” variances, note that the determination of whether a lot is a “specific piece of property” within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone. If all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. Beirn v. Morris, 14 N.J. 529, 535-536 (1954). Note further that the zoning benefits resulting from permitting the deviation(s) must be for the community (“improved zoning and planning that will benefit the community”) and not merely for the private purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). The Appellate Division has held that the zoning benefits resulting from permitting the deviation(s) are not restricted to those directly obtained from permitting the deviation(s) at issue; the benefits of permitting the deviation can be considered in light of benefits resulting from the entire development proposed. Pullen v. South Plainfield Planning Board, 291 N.J. Super. 1, 9 (App. Div. 1996). However, the Supreme Court has cautioned boards to consider only those purposes of zoning that are actually implicated by the variance relief sought. Ten Stary Dom v. Mauro, 216 N.J. 16, 32-33 (2013). Note further that, while “c(1)” or so-called hardship variances are not available for self created situations and/or for mistakes, our courts have not held that an intentionally created situation or a mistake serves to bar a “c(2)” variance because the focus of a “c(2)” variance is not on hardship but, rather, on advancing the purposes of zoning. Ketcherick v. Mountain Lakes Board of Adj., 256 N.J. Super. 647, 656-657 (App. Div. 1992); Green Meadows v. Montville Planning Board, 329 N.J. Super. 12, 22 (App. Div. 2000). Significantly, however, a “c(2)” variance can be denied where it does not provide a benefit to the community and would “merely alleviate a hardship to the applicant which he himself created.” Wilson v. Brick Twp. Zoning Board, 405 N.J. Super. 189, 199 (App. Div. 2009). Finally, even if an applicant proves the “positive” criteria of a “c(2)” variance, the Board may not exercise its power to grant the variance unless the so-called “negative criteria” has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70, “no variance or other relief ... may be granted ... unless such variance or other relief ... can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” The phrase “zone plan” as used in the N.J.S.A. 40:55D-70 means the Township “master plan.” Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).
c. **Denial of the “C” Variances.** For all of the reasons set forth in the factual findings above, and based on the Board’s understanding of applicable law, the Board concludes that “c(1)” and “c(2)” variances for the fencing in the easterly buffer are not warranted. As such, the Board concludes that the “c” variances should be denied.

8. **Conclusions as to the Requested Determinations under the Ordinance.** The Board’s conclusions as to the requested determinations under the ordinance are as follows:

a. **Standards for Considering whether or not to Specifically Approve the Detention Basin, the Drainage Swale, and Landscape Fencing in the Easterly Buffer.** As set forth above, ordinance section 21-28.2.b provides that “no construction shall occur within any buffer area except for the following, if specifically approved by the Board,” and four (4) items are then listed (drainage improvements, underground utilities, pedestrian and bicycle paths, and crossings of access roads). While the ordinance is silent as to what standards the Board should use to determine whether to “specifically approve” the listed improvements in the buffer, the Board concludes that the standard should be based in the buffer and landscaping ordinance provisions. Specifically, ordinance section 21-3.1 defines a buffer as “a strip of land of specified width containing natural woodlands, earth mounds or other planted screening material, and separating one kind of use from another . . . .” The Board found above and concludes here that the purpose of a buffer is to separate non-residential uses from abutting residential uses. The Board further concludes that ordinance section 21-28.2.b establishes an exception to the general rule of “no construction shall occur within any buffer area” to allow what are supposed to be limited intrusions into the buffer to be considered by the Board on a case-by-case basis. And, ordinance section 21-28.2.d provides that “where nonresidential uses abut residentially zoned lots, and where existing vegetation within the buffer does not provide adequate screening, screening shall be provided in accordance with subsection 28-28.1 . . . (the screening provision of the ordinance), unless the Board shall determine that because of the design of the site, screening is not necessary.” In accordance with ordinance section 21-28.1, screening “shall be designed and constructed in such a manner as to provide a solid barrier obstructing the view of the area to be screened on a year round basis,” and fencing is included in the list of landscape screening methods. In as much as buffer ordinance section 21-28.2 references landscaping ordinance section 21-43, the Board concludes that ordinance section 21-43.1 should be consulted to ascertain the purpose of the buffer separation requirement and the exception to the general rule of “no construction in the buffer.” Ordinance section 21-43.1 provides the intent of the buffer separation requirement in the following words: “The project shall be landscaped so as to best adapt the site to the intended use, to control the property’s environmental impact, and enhance the appearance of the project, both on-site and from the surrounding area.” The Board concludes that it should engage in a balancing test in which it should consider (1) factors that weigh in favor of approving improvements in the buffer and (2) factors that weigh against approving improvements in the buffer and, as part of this balancing, the Board should evaluate each of the improvements proposed in the buffer and determine whether or not they (1) allow for the adaption of the site to its intended use, (2) provide for control of the property’s environmental impact, and (3) provide for the enhancement of the appearance of the project on-site and from the surrounding area. Finally, the Board concludes that it may impose conditions on the extent of the improvements allowed in the buffer in the event that the Board finds that same is necessary in order to strike a proper balance. See generally, *Sica v. Wall Township Board of Adjustment*, 127 N.J. 152 (1992) for the sort of balancing test the Board has in mind.

b. **Denial of Specific Approval for Large Detention Basin in the Easterly Buffer.** For all of the reasons set forth above, the Board found that it could not approve
the 7,500 square foot detention basin wholly within the required 50 foot wide buffer because allowing such a large drainage improvement wholly within the buffer represents the exception swallowing the rule and defeats the very purpose of the buffer. The Board finds that there are no factors in favor of allowing the detention basin in the buffer and only factors that weigh against allowing it.

c. **Dismissal of the Request for Specific Approval for Drainage Swale in the Easterly Buffer as Moot.** Once the preliminary site plan application was denied, the request for specific approval of the drainage swale in the easterly buffer became moot and the Board did not specifically deliberate on it. However, the Board indicated its displeasure with the location of the drainage swale as evidenced by the fact that the applicant promised to revise the site plans to attempt to relocate it so as to save trees. This is also evidence of the fact that the Board did not specifically approve the drainage swale in the easterly buffer in the precise location shown on the most current site plans because, the factors in favor of approving it in the buffer (providing for stormwater drainage) were outweighed by the factors against approving it in the buffer where proposed (probable harm to existing trees). In any event, the Board will treat and dismiss the request for specific approval of the drainage swale in the easterly buffer as moot.

d. **Denial of Approval for Fencing in the Buffer.** For all of the reasons set forth above, the Board determined that it could not specifically approve the proposed fence in the easterly buffer as a “visual screen.” As set forth above, the Board found that the existing vegetation in the buffer separating the property from Lot 3 to the east (owned by the Quicks) does not provide adequate screening of the proposed development from Lot 3. As such, the Board found that screening pursuant to ordinance section 21-28.1 was necessary. And, while fencing is a form of landscaping that is allowed in the buffer to provide screening, the Board finds that planted screening is a much more aesthetically desirable alternative in this application and, in fact, the only reason additional planted screening cannot be provided here is because such a large detention basin has been proposed in the buffer. Moreover, the Board found that, in order for the ISBR application to be granted preliminary approval, the detention basin would have to be removed from the buffer, if not entirely, then substantially, to allow room for planted screening and obviate the need for the fence or, at least, provide room for the fence to abut the edge of the parking lot / drive aisle pavement rather than where currently proposed which interferes with existing trees and vegetation.

e. **Standards for Consideration of Flush Curbing and Request to Use Flush Curbs is Moot.** As set forth above, the applicant requested to be allowed to use flush curbing within the parking lot in accordance with ordinance section 21-39.3.a.(2), which requires that all parking areas be curbed to Township standard specifications (6-inch high curbs) unless the applicant can demonstrate that elimination of the curbing will not decrease the useful life of the pavement, have a negative effect on drainage, or increase maintenance costs. The ordinance contains the standard that the Board must use to consider the request. While the request is now moot by reason of the denial of preliminary site plan approval, and the Board did not deliberate on the request, the Board finds that it probably would have approved the use of the flush curbing as the applicant’s civil engineering expert testified on personal and expert knowledge that use of the flush curbing would not decrease the useful life of the pavement, could positively – not negatively – affect drainage, and would not increase maintenance costs. The request to use flush curbs, however, is dismissed as moot.

f. **Standards for Consideration of Banked Parking and Request to Bank 38 of 107 Parking Spaces is Moot.** As set forth above, the applicant requested to be allowed to bank 38 of the 107 parking spaces on the property in accordance with ordinance
section 21-22.1.a.(1)(a) to allow construction of only 69 of the required 107 paved parking spaces and reservation or “banking” of a sufficient area for construction of the remaining 38 if needed in the future. The Board concludes that the standard it should use to determine this request is whether it appears that all of the spaces are needed now. The request to allow the banking of 38 of the 107 paved parking spaces is now moot and the Board did not deliberate on it. One of the reasons that the preliminary site plan application was denied was due to the applicant attempting to squeeze too much onto the site and, as discussed above, a solution to this problem would be for the applicant to decrease the maximum capacity of the building to reduce the number of parking spaces and free up space on the site to allow the large detention basin to be relocated outside of the buffer. The Board does not know how it would treat the request to bank parking spaces in the event that the number of spaces required was reduced so will dismiss the request as moot.

9. **Imposition of Conditions.** Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. See, Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to insure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to insure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See also, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that “aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances” and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff’d o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J. 418, 438-439 (2000) (explaining that site plan review “typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping” and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2015), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board’s implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by Board’s experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011) “the MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications” and using such professional consultants to review and evaluate revised plans “was well within the scope of service anticipated by the applicable statutes.” It must be the Board, and not any consultant, that exercises the authority to approve an application. Id.
NOW, THEREFORE, BE IT RESOLVED BY THE BOARD BY MOTION DULY MADE AND SECONDED ON DECEMBER 8, 2015 THAT THE FOLLOWING RELIEF IS DENIED AND/OR DISMISSED AS FOLLOWS:

C. **RELIEF DENIED / DISMISSED**

1. **Denial of Preliminary Site Plan Approval.** For all of the reasons set forth in the factual findings and conclusions above, preliminary site plan approval is denied to the site plans and architectural drawings.

2. **Denial of Final Site Plan Approval.** For all of the reasons set forth in the factual findings and conclusions above, final site plan approval is denied to the site plans and architectural drawings.

3. **Dismissal of Exceptions as Moot.** For all of the reasons set forth in the factual findings and conclusions above, the exceptions are dismissed as moot.

4. **Denial of the “C” Variances.** For all of the reasons set forth in the factual findings and conclusions above, “c(1)” and “c(2)” variances for the fencing in the easterly buffer are denied.

5. **Denial of Specific Approval for Large Detention Basin in the Easterly Buffer.** For all of the reasons set forth in the factual findings and conclusions above, the request for specific approval to allow the large detention basin to be located as proposed in the easterly buffer is denied.

6. **Dismissal of the Request for Specific Approval for Drainage Swale in the Easterly Buffer as Moot.** For all of the reasons set forth in the factual findings and conclusions above, the request for specific approval of the drainage swale in the easterly buffer is dismissed as moot.

7. **Denial of Approval for Fencing in the Buffer.** For all of the reasons set forth in the factual findings and conclusions above, the request to allow fencing in the buffer as a landscape screen is denied.

8. **Dismissal of Request to Use Flush Curbs as Moot.** For all of the reasons set forth in the factual findings and conclusions above, the request to use flush curbs is dismissed as moot.

9. **Dismissal of Request to Bank 38 of 107 Parking Spaces as Moot.** For all of the reasons set forth in the factual findings and conclusions above, the request to bank 38 of the 107 parking spaces is dismissed as moot.

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1. **VOTE ON MOTION DULY MADE AND SECONDED ON DECEMBER 8, 2015 TO DENY FINAL SITE PLAN APPROVAL:**

THOSE IN FAVOR: ALPER, KLEINERT, PAVLINI, PIEDICI, SANTORO & PLAZA.

THOSE OPPOSED: NONE.

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2. VOTE ON MOTION DULY MADE AND SECONDED ON DECEMBER 8, 2015 TO GRANT PRELIMINARY SITE PLAN APPROVAL:

THOSE IN FAVOR: PAVLINI & SANTORO.

THOSE OPPOSED: ALPER, KLEINERT, PIEDICI, & PLAZA.

3. VOTE ON MOTION DULY MADE AND SECONDED ON DECEMBER 8, 2015 TO GRANT TWO EXCEPTIONS:

THOSE IN FAVOR: KLEINERT, PAVLINI, PIEDICI, SANTORO & PLAZA.

THOSE OPPOSED: ALPER.

4. VOTE ON MOTION DULY MADE AND SECONDED ON DECEMBER 8, 2015 TO DENY “C” FENCE VARIANCES:

THOSE IN FAVOR: ALPER, KLEINERT, PIEDICI, & PLAZA.

THOSE OPPOSED: PAVLINI & SANTORO.

The above memorializing resolution was adopted on January 19, 2016 by the following vote of eligible Board members:

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11 N.J.S.A. 40:55D-9 provides that the “failure of a motion to receive the number of votes required to approve an application for development shall be deemed an action denying the application” so the failure of the motion to grant preliminary site plan approval to receive four (4) votes is deemed to be denial of preliminary site plan approval.

12 The denial of preliminary site plan approval made the request for the two exceptions moot and results in the dismissal of the exceptions as moot. The reason the Board deliberated and voted on the request for the exceptions after determining to dismiss them as moot was to make a complete record.

13 Eligible Board members to vote on the adoption of the within memorializing resolution would have been those who voted (a) in favor of the first motion to deny final site plan approval, (b) opposed to the second motion to grant preliminary site plan approval because the failure of that motion to receive four (4) votes is deemed a denial of preliminary site plan approval, (c) in favor of the third motion to grant the two exceptions (although the exceptions have been dismissed as moot because of the denial of preliminary site plan approval), and (d) in favor of the fourth motion to deny the “c” fence variances. This would have made the following three Board members eligible to vote on the adoption of the within memorializing resolution: Kleinert, Piedici and Plaza. However, the fact that Board member Alper voted opposed to the third motion to grant the two exceptions does not make her ineligible to vote on the adoption of the within memorializing resolution because the Board dismissed the requests for the two exceptions as moot (with the Board deliberating and voting on the exceptions for the purpose of making a complete record). Thus, the following four Board members are eligible to vote on the adoption of the within memorializing resolution: Alper, Kleinert, Piedici and Plaza.
<table>
<thead>
<tr>
<th>Members</th>
<th>Yes</th>
<th>No</th>
<th>Abstain</th>
<th>Absent</th>
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<tbody>
<tr>
<td>ALPER</td>
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<td></td>
<td></td>
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<tr>
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<td>X</td>
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<td>X</td>
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<tr>
<td>PLAZA</td>
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I, Frances Florio, Secretary to the Planning Board of the Township of Bernards in the County of Somerset, do hereby certify that the foregoing is a true and correct copy of the memorializing resolution duly adopted by the said Planning Board on January 19, 2016.

FRANCES FLORIO, Board Secretary