

# **TOWNSHIP OF BERNARDS**

## **PLANNING BOARD**

### **MINUTES <sup>v3</sup>**

#### **REGULAR SESSION**

June 7, 2022

Chairwoman Piedici called the meeting to order at 7:32 PM.

#### **FLAG SALUTE**

Chairwoman Piedici read the following open meeting and procedural statements:

#### **OPEN MEETING STATEMENT**

"In accordance with the requirements of the Open Public Meetings Law of 1975, notice of this meeting 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, Whippany, and to the Courier News, Bridgewater on January 19, 2022 and was mailed to all those people who have requested individual notice and paid the required fee."

"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 testimony heard after 10:30 p.m."

#### **ROLL CALL**

Members Present: Baumann, Damurjian, Eorio, Mallach, Manduke (7:45 PM), Mastrangelo, Piedici, Seville  
Members Absent: Crane, McNally  
Also Present: Board Attorney, Jonathan E. Drill, Esq.; Township Planner, David Schley, PP, AICP;  
Board Planner, David Banisch, PP, AICP

Moved by Mr. Seville, seconded by Ms. Mastrangelo, all eligible in favor and carried, that the absences of Mr. Crane and Deputy Mayor McNally be excused.

#### **APPROVAL OF MINUTES**

May 17, 2022 – Regular Session - On motion made by Ms. Mastrangelo and seconded by Mr. Damurjian, all eligible in favor and carried, the minutes were adopted as drafted. (Ineligible: Baumann, Mallach, Seville)

#### **APPROVAL OF RESOLUTION**

Moye; William & Carol; Block 11401, Lot 11; 11 Mountain Road; Minor Subdivision; PB22-001 (approved)  
Mr. Damurjian moved to adopt the resolution (as amended) memorializing the Board's actions in granting approval of the Minor Subdivision and associated relief, subject to the conditions stipulated to by the Applicants. Mr. Baumann seconded.

Roll Call:	Aye:	Baumann, Damurjian, Eorio, Mallach, Piedici, Seville
	Nay:	NONE
	Ineligible:	Manduke, Mastrangelo

Motion carried.

#### **PUBLIC HEARING** (continued from 05/03/2022)

Ahmed, F./Faizan, A./Kirkwood, Kevin & Nathalie; Block 2301 Lots 4 & 5; 48 & 62 Wisteria Way; Amended Preliminary/Final Subdivision; PB21-005

Present: Faizan Ahmed/Anila Faizan, Applicants  
Nathalie Kirkwood, Applicant

After reminding all parties that they remained under oath, Mr. Drill stated that at the last hearing (05/03/2022), the Applicants had agreed to revise their request to not only eliminating the condition requiring that the emergency access easement be maintained by the owners of 48 and 62 Wisteria Way but also to requesting that the easement be eliminated altogether. He added that vacating an easement falls under the sole purview of the

Township Committee (TC) and that this Board could only recommend vacation to the TC. Mr. Drill noted that at the 05/03/2022 meeting, a straw poll of the Board members indicated that the majority would support a proposal to recommend vacation of the easement if the Applicants could secure signed letters from all Wisteria Way residents consenting to that recommendation. Faizan Ahmed, Applicant and owner of 62 Wisteria Way affirmed that he had secured all the signatures and those letters were entered into evidence as **Exhibit A-1**.

Ms. Manduke entered the meeting at 7:45 PM. She and Ms. Mastrangelo confirmed that they had viewed the video of the 05/03/2022 meeting and were eligible to vote.

After the conclusion of the Board's deliberations, Mr. Baumann moved to grant approval of the Applicants' request to eliminate the condition requiring the emergency access easement and to recommend vacation of the easement to the TC, subject to the conditions stipulated to by the Applicants and as stated during deliberations. Ms. Manduke seconded.

Roll call:       Aye:               Baumann, Mallach, Manduke, Seville  
                  Nay:               Damurjian, Eorio, Mastrangelo, Piedici  
Motion FAILED therefore the application is denied.

### **PUBLIC HEARING**

Fellowship Senior Living Inc.; Block 9301, Lot 33; 33 Allen Road; Elimination/Modification of Conditions; PB13-006A

Present:       Jennifer Phillips Smith, Esq., Attorney for the Applicant  
                  Scott Hart, Applicant's Theater Manager  
                  Gary W. Dean, PE, Traffic Engineer for the Applicant

Jennifer Phillips Smith, Esq., attorney with the firm of *Gibbons PC*, Red Bank, NJ entered her appearance on behalf of the Applicant. She stated that in response to concerns about potential parking issues, the 10/18/2016 resolution of approval for the Mitchell and Ann Sieminski Theater/Multi-Purpose Room at Fellowship Village (Application #PB13-006) contained several conditions limiting the hours of operation and the number of performances/productions per year. She stated that since none of the traffic/parking concerns had materialized, the Applicant is requesting the elimination of Conditions #6 and #10 and a modification of Condition #22 as stated below:

- Condition #6 – "There shall be no weekday (Monday through Friday) public paid performances in the multi-purpose/theater before 7 PM."
- Condition #10 – "Use of the multi-purpose room/theater shall be limited to Trilogy, Light Opera and other professional organizations and to the number of productions..." (12 productions/maximum 48 performances)
- Condition #22 – "The Applicant shall implement and abide by the Parking Management Program dated 02/16/2016..." specifically paragraph 6 which states that for ticketed theater events that are open to the general public, doors shall open for attendee admission no earlier than 7:00 PM on weekdays.

Mr. Hart, Mr. Dean, Mr. Banisch and Mr. Schley were duly sworn.

Scott Hart, Manager of the Fellowship Cultural Arts Center and the Mitchell and Ann Sieminski Theater at Fellowship Village, provided a summary of his theater experience for the Board. He testified that the theater is open to the residents of Fellowship Village and to the public, offering a variety of programs/productions but because of the restrictions on the number of performances/productions per year and on the hours of operation, the theater is idle a lot of the time. Mr. Hart confirmed that the maximum capacity of the theater is 257 seats and during busy performances, a parking attendant is on hand to manage the flow of traffic. The "Oval" parking area which is closest to the theater, is used for attendees that arrive in cars (most of the residents walk). There is a grassy overflow parking area inside the "Oval" which Mr. Hart testified he had only seen used three (3) times since the theater opened in 2019. He stated that attendance has been steadily increasing since the theater reopened in September of 2021 (after closing over Covid concerns) and that the closest the theater has come to operating at full capacity was during a January 2022 show when 229 tickets (89.1%) had been sold.

With strict Covid protocols in place and a general increase in the public's comfort level, Mr. Hart believed that the theater would be consistently well attended even with an increase in the number of programs/productions.

The hearing was opened to the public for questions. Hearing none, that portion of the hearing was closed.

Gary W. Dean, PE, PP, professional engineer with the firm of *Dolan & Dean Consulting Engineers LLC* (D&D), Somerville, NJ, was accepted by the Board as an expert in the field of traffic engineering. Mr. Dean testified that during the original hearings for the theater, parking and traffic concerns emerged as significant issues and some of the conditions in the 2016 resolution were created to limit the exposure of both residents and neighbors, should those concerns materialize. Referring to a parking evaluation report prepared by D&D, dated 03/14/2022 and submitted with the application, he testified that to assess the parking demand associated with theater performances, an on-site parking demand count was conducted during two (2) performances: Saturday, 12/18/2021 and Saturday, 01/01/2022. The survey area consisted of the "Oval", consisting of 67 permanent paved parking spaces as well as an overflow area of 54 stabilized grass-paver spaces in the interior of the Oval (121 stalls total) and the southerly parking lot (197 stalls). Noting that the cast and crew parked in the southerly lot, Mr. Dean testified that during the two performances, a total of six (6) cars had parked in the overflow parking area of the Oval. During the 01/01/2022 performance when 89.1% of the tickets were sold, only 66 vehicles or 55% of the Oval's parking stalls were used, adding that all of the cars were counted without regard as to whether the occupants were attending a show or visiting a resident. Based on the figures generated during the two (2) performances, Mr. Dean testified that if the theater was at 100% capacity, there would be more than sufficient parking available in the Oval. Ms. Phillips Smith reminded the Board that Mr. Dean's conclusions are based on two seats/space when, in the 2016 resolution and in the ordinance, a ratio of three seats/space is used. Mr. Hart added that he had never received a complaint from either a resident or a theatergoer about parking.

A discussion ensued as to whether the parking areas and interior roads in Fellowship Village could handle the theater traffic along with the normal everyday traffic of the remainder of the facility especially during rush hour/shift changes. Mr. Dean testified that the theater traffic would not coincide with rush hour traffic nor with the shift changes at the facility which occur at 3:00 PM. Mr. Drill suggested that Condition #6 (and paragraph 6 of Condition #22) be modified to create a performance blackout between the hours of 4:00 PM and 7:00 PM during weekdays to circumvent any adverse traffic effects on the local roads during rush hour. The Applicant requested a recess to discuss the modification.

\* \* \* *The Open Session was recessed at 9:07 PM and reconvened at 9:18 PM.* \* \* \*

The Applicant agreed to the performance blackout time period modification and Mr. Drill noted that the Applicant would now be able to schedule matinee performances during the week.

A straw poll indicated that the Board was divided on the issue as to whether Condition #10 (and Item I in Exhibit A-6 attached to the resolution) which regulates the number of performances/productions allowed each year should be eliminated. Chairwoman Piedici opened the hearing to the public for comment specifically about that subject. The following spoke in favor of lifting all restrictions on the number of performances/productions:

- Jaye Barre, 165 South Maple Avenue
- Bertha Whalin, 2131 Fellowship Road
- Ronald Whalin, 2131 Fellowship Road
- Jim Vagias, Producing Artistic Director of the Company in Residence, The American Theater Group

Hearing no further comments, that portion of the hearing was closed. The hearing was then opened to the public for questions about Mr. Dean's testimony. Hearing none, that portion of the hearing was closed.

A second straw poll indicated that the Board was in favor of lifting all restrictions on the number of performances/productions.

A discussion ensued summarizing the requests for revisions to the following three (3) conditions (changes in italics):

- Condition #6 – Revised to read, “There shall be no weekday (Monday through Friday) public paid performances in the multi-purpose room/theater *between the hours of 4:00 PM and 7:00PM.*”
- Condition #10 – In Exhibit A-6 (Use of the Multi-Purpose Room), *eliminate all in section "I. Use of Theater in Multi-Purpose Room" except for Item 3 in the "Notes" section.*
- Condition #10 – In Exhibit A-6, keep all in “II. Current Uses of Multi-Purpose Room by Non-Residents”
- Condition #22 – In Paragraph 6 of the Parking Management Program (02/16/2016), the first sentence shall read, “There shall be no weekday (Monday through Friday) public paid performances in the multi-purpose room/theater *between the hours of 4:00 PM and 7:00PM*” so that it is consistent with Condition #6.

The hearing was opened to the public for comments. Hearing none, that portion of the hearing was closed.

After deliberations, Ms. Mastrangelo moved to direct the Board Attorney to draft a resolution approving the revisions to the Conditions of Approval in the 2016 Resolution for Fellowship Senior Living Inc. (PB13-006) as listed above and as stipulated to during testimony by the Applicant and its professionals and as stated during deliberations.

Roll Call:	Aye:	Baumann, Eorio, Mallach, Manduke, Mastrangelo, Piedici, Seville
	Nay:	Damurjian

Motion carried.

Mr. Drill noted that Mr. Baumann had lived at 80 Shannon Hill Road (listed in the 200-foot Property Owners List) many years ago and somehow, the Applicant got his name and addressed a service letter to him. Because he is not named on the 200-foot Property Owners List and has not lived at that address for many years, Mr. Drill opined that there is no conflict of interest and that Mr. Baumann was eligible to vote on this application.

#### **LANDSCAPE COMMITTEE REPORT**

Christopher Bell & CC Edwards Developers LLC (Fenwick Place); Block 7702 Lots 10 & 11; 3526 & 3536 Valley Road; PB11-011

Mr. Damurjian described the landscaping that had been installed and reported that the plantings were sufficient. Val DaSilva, who was present at the site visit, commented that there should be more plantings between his property and the detention basin and the developer offered to provide additional vegetation. Gerard Elson, also present, voiced concerns about additional water runoff to his property and was advised that once final grading was complete, the situation should be alleviated.

#### **COMMENTS FROM MEMBERS AND STAFF**

Chairwoman Piedici cancelled the meeting scheduled for July 5, 2022 citing concerns about attendance due to the holiday.

#### **ADJOURN**

Moved by Ms. Mastrangelo, seconded by Mr. Baumann, all eligible in favor and carried, the meeting was adjourned at 10:12 PM.

Respectfully submitted,

*Cyndi Kiefer*

Cyndi Kiefer, Secretary  
Planning Board

*Adopted as drafted 08/02/2022*

06/21/2022dskpjd

**BERNARDS TOWNSHIP PLANNING BOARD**

**WILLIAM AND CAROL MOYE  
BLOCK 11401, LOT 11  
11 MOUNTAIN ROAD**

**APPLICATION NO. PB22-001**

**RESOLUTION MEMORIALIZING GRANT OF “C(2)” VARIANCE AS TO LOT YIELD  
AND MINOR SUBDIVISION APPROVAL**

**WHEREAS**, William and Carol Moyer (the "**applicant**") is the owner of an approximately 5.9-acre roughly 400-feet by 650-feet rectangular lot located on the northwest corner of Mountain Road and Martinsville Road in the Township of Bernards (the "**Township**") which has an address of 11 Mountain Road and is designated on the Township tax maps as Block 11401, Lot 11 (the "**property**"), and the property is situated in the R-3 residential zoning district (the “R-3 zone”) and is developed with an existing single family dwelling and accessory improvements (the “**existing improvements**”);

**WHEREAS**, the applicant applied to and obtained from the Bernards Township Planning Board (the “**Board**”) a “c(2)” variance and minor subdivision approval (the “**prior approvals**”) to allow the subdivision of the property into two lots (the “**proposed subdivision**”), a 2.70 acre lot on which the existing improvements would be located, and a 3.19 acre lot on which a proposed dwelling and associated improvements would be located (the “**proposed improvements**”), which prior approvals were memorialized in a resolution adopted by the Board on October 19, 2021 (the “**prior approval resolution**”);

**WHEREAS**, the prior approval resolution contained a number of conditions, one of which is relevant here, namely condition #19, which provides: “**Time to Perfect Subdivision.** In accordance with N.J.S.A. 40:55D-47d, the applicant shall perfect the subdivision by April 7, 2022 (which is within 190 days from October 19, 2021, the date the within resolution is adopted) unless otherwise extended pursuant to N.J.S.A. 40:55D-47f or -47g, in which case the subdivision shall be perfected by the extended date. In the event that the subdivision is not perfected within the time limitations provided, the within approvals shall automatically expire and become null and void.”

**WHEREAS**, the applicant failed to perfect the proposed subdivision by April 7, 2022 and does not qualify for an extension of the time within which to perfect the proposed subdivision pursuant to N.J.S.A. 40:55D-47f or -47g so the prior approvals automatically expired and became null and void on April 8, 2022;

**WHEREAS**, the applicant submitted a new application to the Board seeking anew a “c(2)” variance and minor subdivision approval to create the proposed subdivision (the “**new application**”);

**WHEREAS**, the Board has exclusive subject matter jurisdiction over the new application pursuant to N.J.S.A. 40:55D-20 by virtue of N.J.S.A. 40:455D-47, -60 and -70c;

**WHEREAS**, a number of documents were submitted with regard to the application by the applicant, as well as by the Board's and Township's experts and officials, 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. Plan set, titled "Minor Subdivision – Lot 11, Block 11401 -11 Mountain Road", prepared by Stephen E. Parker, PE of Parker Engineering & Surveying, PC, dated November 16, 2016, last revised March 9, 2022, consisting of five (5) sheets (the "**subdivision plans**");

**WHEREAS**, the Board held a duly noticed public hearing on the application on May 3, 2022, during which hearing the applicant appeared pro se and the Board was represented by Jonathan E. Drill, Esq.;

**WHEREAS**, the following individuals were sworn under oath and made available to testify during the hearing, were also subject to cross examination, and some of the witnesses testified and were asked questions during the hearing, which testimony is part of the record in this matter:

1. William Moye (applicant),
2. Steve Parker, PE (applicant's engineering expert),
3. David Schley, PP, AICP (Township planner), and
4. David Banisch, PP, AICP (Board planning expert);

**WHEREAS**, no exhibits were entered into the record;

**WHEREAS, AFTER CONSIDERING THE APPLICATION, DOCUMENTS ON FILE WITH THE BOARD, AND AFTER TAKING QUASI-JUDICIAL NOTICE OF ITS PRIOR APPROVAL RESOLUTION AND THE TESTIMONY REFERENCED ABOVE AS WELL AS THE TESTIMONY REFERENCED IN THE PRIOR APPROVAL RESOLUTION, AND GIVING APPROPRIATE WEIGHT TO ALL OF SAME, AND BASED ON ITS UNDERSTANDING OF THE APPLICABLE LAW, THE BOARD MAKES THE FOLLOWING FACTUAL FINDINGS AND LEGAL CONCLUSIONS FOR THE PURPOSE OF MEMORIALIZING IN A WRITTEN RESOLUTION IN ACCORDANCE WITH N.J.S.A. 40:55D-10g(2) ITS ACTION IN GRANTING THE NEW APPLICATION SUBJECT TO CONDITIONS AS SET FORTH BELOW:**

A. **FACTUAL FINDINGS**

1. **The Property, Surrounding Area and Zoning.** The property is an approximately 400 feet by 650 feet generally rectangular shaped lot situated on the northwest corner of Mountain Road and Martinsville Road, consisting of approximately 5.89-acres and situated in the R-3 zone. Mountain Park is located across Mountain Road from the property to the south, and Warren Township is located across Martinsville Road from the property to the east. The existing improvements are located on the northerly portion of the property with driveway access to Martinsville Road. The southerly portion of the property is predominately open field, much of which consists of wetlands and wetlands transition areas. The property is situated in the R-3 zone which allows residential development pursuant to ordinance section 21-10.4.a.

2. **The Proposed Subdivision and Requested “C(2)” Maximum Lot Yield Variance.** As set forth above, the proposed subdivision would subdivide the property to create two lots, a 2.70-acre lot on which the existing improvements would be located, and a 3.19-acre lot on which the proposed improvements would be located, consisting of the proposed dwelling and associated improvements. The property contains 2.77 acres of wetlands and wetlands transition areas, leaving 3.123 areas of unconstrained land. During the course of the hearings on the prior application, the applicant revised certain details of the proposed subdivision to relocate the proposed dwelling closer to the street intersection, with a larger dwelling footprint and greater usable rear yard space between the proposed dwelling and the proposed wetlands boundary / conservation easement that also is proposed to be located on the property. Prior to submitting the new application, the applicant further revised the subdivision plans to address various conditions of the prior approval resolution. In connection with the proposed subdivision, the applicant has requested a “c(2)” variance from ordinance section 21-10.4b / Table 401-A, which permits a maximum lot yield of one lot on the property. Because the unconstrained area of the property is only 3.123 acres, and the minimum required lot area in the R-3 zone is two acres, the maximum lot yield on the 3.123 unconstrained acres of the property is one lot, whereas the applicant proposes two lots, thereby triggering the requirement for a “c” lot yield variance.

3. **Findings as to the “C(2)” Maximum Lot Yield Variance.** The Board’s findings as to positive and negative criteria of the requested “c(2)” maximum lot yield variance are as follows.

a. **Findings as to the Positive Criteria of the “C(2)” Maximum Lot Yield Variance.** The Board’s findings as to the positive criteria of the “c(2)” maximum lot yield variance are as follows. First, the Board finds that the deviation has been created as a result of a design which minimizes the fill of wetlands on the property. The Board notes and finds that the applicant could have proposed a design which resulted in greater fill under NJDEP rules, which design would have resulted in the applicant not requiring a maximum lot yield variance relief under the ordinance. As such, the Board finds that granting the proposed variance to allow the proposed subdivision will result in the division of the property in such a manner that preserves wetlands on the property which the Board finds promotes the purposes of zoning set forth in the Municipal Land Use Law (MLUL) as enunciated in: N.J.S.A. 40:55D-2a (promoting the general welfare); - 2e (promoting the preservation of the environment); and -2m (encouraging coordination of the various public and private procedures and activities shaping land development to provide a more efficient use of the land). Further, the Board finds that these zoning benefits are community wide

benefits and not simply a private benefit to the applicant. Finally, provided that the conditions set forth below are imposed and complied with, the Board finds that the zoning benefits resulting from the grant of the “c(2)” variance will substantially outweigh any detriment.

b. **Findings as to the Negative Criteria of the “C(2)” Maximum Lot Yield Variance.** The Board’s findings as to the negative criteria of the “c(2)” maximum lot yield variance are as follows. As to the first prong of the negative criteria, the Board finds that there will be no negative aesthetic impacts resulting from exceeding the maximum permitted lot yield because, from a visual perspective, the property does not appear to be less than 5.9-acres in size which complies with the minimum lot size requirement for the R-3 zone and the property after subdivision as well as the existing and proposed dwellings will not appear overcrowded or overdeveloped from a visual standpoint. As to the second prong of the negative criteria, the Board finds that the grant of the variance will not impair the intent or purpose of the master plan and zoning ordinance because the proposed design conserves wetlands areas and provides a more environmentally sound means of dividing the property and ultimately developing same with the proposed dwelling. For the foregoing reasons, and provided that the conditions set forth below are imposed and complied with, the Board finds that the “c(2)” maximum lot yield variance can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the master plan and zoning ordinance.

4. **Findings as to Minor Subdivision Review.** The Board’s findings as to minor subdivision review and approval are as follows. With the exception of the variance that the Board has determined can and should be granted, the Board finds that the subdivision plans will comply with all other applicable zoning ordinance regulations and all subdivision ordinance requirements, provided that the conditions set forth below are imposed and complied with. This includes the Board being satisfied as to the level of detail of the subdivision plans. The Board finds that approval of the subdivision plans, subject to the revisions required below being made, is appropriate in this particular application because, as revised, the subdivision plans will comply with all applicable ordinance regulations and requirements (other than from the ordinance provision from which the Board has determined that a variance can and should be granted). For the foregoing reasons, the Board’s ultimate finding is that minor subdivision approval is warranted provided that the conditions set forth below are imposed and complied with.

## **B. CONCLUSIONS OF LAW**

1. **Conclusions as to the “C(2)” Maximum Lot Yield Variance.** The Board’s conclusions as to the “c(2)” maximum lot yield variance are as follows:

a. **Standards for Considering the “C(2)” Variance.** The Board has the power to grant “c(2)” or so-called “benefits v. detriments” variances 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. This is the so-called “positive” criteria of a “c(2)” variance. The zoning benefits resulting from permitting the deviation(s) must be public benefits (“improved zoning and planning that will benefit the community”) and not merely benefits for the private

purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). 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). Finally, while “c(1)” hardship variances are not available for self-created situations and/or for mistakes, an intentionally created situation or mistake does not serve 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). 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 Town “master plan.” Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

b. **Grant of the “C(2)” Variance.** As set forth in the factual findings above, the Board found that granting the “c(2)” maximum lot yield variance would advance the purposes of the MLUL provided that the conditions set forth below are imposed and complied with. The Board further found that the zoning benefits were community wide, and not solely for the benefit of the applicant. The Board also found that the benefits of the deviation would substantially outweigh any detriments provided, again, that the conditions set forth below are imposed and complied with. Finally, provided that the conditions set forth below are imposed and complied with, the Board found that the grant of the “c(2)” variance would not result in substantial detriment to the public good or substantial impairment of the intent or purpose of the master plan or zoning ordinance. As such, the Board concludes that it can and should grant the “c(2)” variance at issue subject to the conditions set forth below.

2. **Minor Subdivision Review.** The Board’s conclusions as to minor subdivision review are as follows:

a. **Standards Applicable to Minor Subdivision Review.** N.J.S.A. 40:55D-47 is the starting point for consideration of a minor subdivision application and provides that “minor subdivision approval shall be deemed to be final approval of the subdivision.” N.J.S.A. 40:55D-50a is thus the focal point for consideration of the minor subdivision as it provides that final site plan 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. As such, 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 two exceptions: The first exception is where an application does not comply with all ordinance provisions 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 provisions and grant approval if the application

complies with all such remaining provisions. The second exception is where the application does not comply with all ordinance provisions 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 or plan 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 application or plan prior to the Board granting approval. However, the Board cannot grant 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 and drainage, sewage disposal, water supply, and traffic circulation safety. 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). 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. **Grant of Minor Subdivision Approval.** As set forth above in the factual findings, since the variance requested was granted and provided that the conditions set forth below are imposed and complied with, the Board found that the application and subdivision plans will comply with all remaining applicable zoning ordinance regulations and all applicable subdivision ordinance requirements. As set forth above, this includes the Board being satisfied as to the level of detail of the subdivision plans. As the Board has concluded that the variance can and should be granted, the Board further concludes that minor subdivision approval can and should be granted, subject to the conditions set forth below being imposed and complied with.

3. **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. 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 ensure 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 ensure 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, 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 2021), 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 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 Board concludes that the conditions set forth below are warranted and should be imposed on all of the above-mentioned bases.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD, BY MOTION DULY MADE AND SECONDED ON MAY 3, 2022, THAT THE NEW APPLICATION IS GRANTED, SUBJECT TO CONDITIONS AS FOLLOWS:**

**C. RELIEF GRANTED**

1. **Grant of “C(2)” Maximum Lot Yield Variance.** Subject to the conditions set forth below being imposed and complied with, the Board hereby grants a “c(2)” variance from ordinance section 21-10.4.b / Table 401-A to allow a lot yield of two lots where one lot is permitted based on the usable/unconstrained acreage of the property.
2. **Grant of Minor Subdivision Approval.** Subject to the conditions set forth below being imposed and complied with, the Board hereby grants minor subdivision approval for the subdivision plans to allow the division of the property into two lots as proposed.

**D. CONDITIONS**

1. **Revisions to the Subdivision Plans.** Revisions to the subdivision plans shall be made, if not already 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 subdivision plans signed by the Board Secretary by December 7, 2022 (which is six months from the date the within resolution was adopted on June 7, 2022). In the event that the applicant fails to revise the subdivision plans as required by the within condition and/or fails to obtain signatures on the subdivision 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 the approvals subject to conditions 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 subdivision plans 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 the subdivision plans 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 from reports submitted by Board and Township experts prior to the hearing and/or Board member comments made during the hearing:**

(1) Revise the subdivision plans, including the zoning schedule and building setback lines, to show the proposed dwelling is required to be located with a front yard setback of 100-103 feet from Martinsville Road.

(2) Revise the subdivision plans, including the zoning schedule and building setback lines, to show the proposed dwelling is required to be located with a front yard setback of 120-140 feet from Mountain Road.

(3) Revise the subdivision plans to include a note that the applicant shall maintain hedgerows along the two roads.

(4) Revise the subdivision plans to show a 30-foot wide scenic corridor conservation easement along both roads.

(5) Add a note to the subdivision plans that all utilities shall avoid the hedgerows.

(6) Add a note to the subdivision plans that the proposed stormwater management design shall be subject to further review and approval by the Township Engineering Department prior to issuance of a construction permit.

2. **Limit on Fill.** The proposed 10,126 square feet wetland fill as shown on the plans shall be the limit of wetland fill for the property as proposed.

3. **Compliance with Master Plan Setback Recommendations.** The applicant shall comply with Land Use Plan of the 2010 Township Master Plan recommendations as to “scenic corridor” setbacks for new construction within the CR-1 Conservation Residential District. Specifically, the proposed dwelling shall have front yard setbacks of 100-103 feet from Martinsville Road and 120-140 feet from Mountain Road.

4. **Scenic Corridor Conservation Easement.** A 30-foot wide scenic corridor conservation easement shall be established along the frontages of Martinsville Road and Mountain Road, with gaps in the easement to accommodate the existing and proposed driveways. The easement shall primarily provide for preservation of the existing hedgerow, including trees and understory vegetation. The easement shall permit water line and other utility connections in accordance with the conditions set forth herein, and shall also permit continued maintenance of existing lawn areas, planting of supplemental landscaping, and selective replacement of existing vegetation, subject to approval by the Township Engineer. The scenic corridor conservation easement shall not overlap the proposed wetlands conservation easement or reserve septic system easement.

5. **Field Location of Design Elements.** To ensure impacts to the existing streetscape will be minimized, the proposed driveway, water line and other utility connections shall be field located and subject to further review and approval by the Township Planner and Township Engineer prior to any land disturbance.

6. **Driveway Location.** The proposed driveway location shall be subject to further review and approval by the Township Engineer, prior to any land disturbance, to ensure adequate sight distances along Mountain Road.

7. **Septic Field Design.** If the proposed septic field on Lot 11.02 will be raised above the existing ground level, supplemental landscaping buffering shall be provided to the extent necessary to adequately screen the septic field from Mountain Road and Martinsville Road, and such supplemental landscaping buffering shall be to the satisfaction of the Township Planner.

8. **Deed Restriction.** There shall be a deed restriction recorded on both of the lots which shall include notification of the stormwater management requirements for a major development. The purpose of this deed restriction is to notify any potential developer of the property that, based on the amount of land disturbance and new impervious surface shown on the subdivision plans, the proposed improvements are classified as a “minor development,” requiring stormwater infiltration measures as conceptually shown on the plans. In the event a developer chooses to increase the amount of land disturbance or new impervious surface, to the extent that the proposed improvements would be classified as a “major development,” a more comprehensive stormwater management design would be required.

9. **Wetlands Conservation Easement Marker Review.** The locations of the proposed wetlands conservation easement boundary markers shall be subject to further review and approval by the Township Engineering Department (the quantity of markers shown on the plans is adequate but some markers must be relocated). The markers on Lot 11.01 must be installed prior to recording of the subdivision map or deeds. The markers on Lot 11.02 must be bonded prior to issuance of a construction permit and installed prior to issuance of a certificate of occupancy.

10. **Subdivision Document Review.** The proposed subdivision map or deeds shall be subject to review and approval by the Township Engineering Department and the Township Attorney prior to recording with the Somerset County Clerk.

11. **Document Preparation/Recordation.** The proposed wetlands conservation easements, reserve septic system easements, scenic corridor conservation easements, any other required easement, and the proposed Mountain Road right-of-way dedication, shall be prepared by the Township Attorney and must be executed by the applicant and recorded with the Somerset County Clerk prior to or simultaneous with, the recording of the subdivision map or deeds.

12. **Street Addresses for Lots.** The proposed street addresses shown on the subdivision plans for the existing dwelling on Lot 11.01 and for the proposed dwelling on Lot 11.02 shall be subject to review and approval by the Township. The approved addresses must be shown on the subdivision map or deeds prior to recording.

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. **Engineering Permit – ROW.** An engineering permit must be obtained from the Township prior to any work within the Mountain Road right-of-way.

15. **Development Fee.** A development fee must be submitted for Lot 11.02 in accordance with Section 21-86 of the Land Development Ordinance.

16. **Digital Plans.** The applicant shall submit digital copies of all plans and documents in formats acceptable to the Township Engineering Department.

17. **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 a resolution, within 10 days of written notice that a deficiency exists in the escrow account, prior to signing the site plan and/or subdivision plat, 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). Failure to abide by this condition shall result in the relief granted automatically terminating and becoming null and void.

18. **Easements, Dedications and Conveyances.** Any and all easements, dedications and/or conveyances running to and in favor of the Township which are proposed on the site plan and/or subdivision plat and/or required as a condition of the approval resolution shall, in addition to being identified on the applicant's plans, maps and/or plats, be contained in separate documents if required by the Township Attorney to be prepared at the direction of the Township Attorney after the metes and bounds descriptions and maps of the easement, dedication and/or conveyance areas have been reviewed and approved by the Township Engineer. 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 maps of the easement, dedication and/or conveyance area. All such documents shall then be recorded and,

upon completion of the recording process, be transmitted to the Township Clerk for maintenance with other title documents of the Township.

19. **Time to Perfect Subdivision.** In accordance with N.J.S.A. 40:55D-47d, the applicant shall perfect the subdivision by December 17, 2022 (which is within 190 days from June 7, 2022, the date the within resolution is adopted) unless otherwise extended pursuant to N.J.S.A. 40:55D-47f or -47g, in which case the subdivision shall be perfected by the extended date. In the event that the subdivision is not perfected within the time limitations provided, the within approvals shall automatically expire and become null and void.

20. **Time to Obtain Construction Permits, Commence and Complete Construction, and Obtain Certificates of Occupancy.** In accordance with Board Rule 2:4-9.8, the applicant shall apply for and obtain a construction permit for the proposed dwelling on lot 11.02 by June 7, 2024 (which is within two years of the adoption of the Board's resolution on June 7, 2022). If during said two-year period, or extension thereof as granted by the Board, the applicant fails to obtain a construction permit, the approval shall automatically expire and become null and void. The applicant shall also have one year from the date of issuance of the construction permit to commence construction and obtain a permanent certificate of occupancy. If during said one 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 approvals shall automatically expire and become null and void.

21. **Outside Agency Approvals and Permits.** The within approvals shall be conditioned upon the applicant obtaining permits and/or approvals from all applicable outside 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;
- b. Somerset County Department of Health;
- c. Somerset - Union Soil Conservation District certification /  
approval;
- d. Somerset County Planning Board approval of any aspect of the  
proposed development within its jurisdiction, and
- e. NJDEP approval of any aspect of the proposed development within  
its jurisdiction.

22. **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.

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**VOTE ON MOTION DULY MADE AND SECONDED ON MAY 3, 2022:**

**THOSE IN FAVOR: BAUMANN, CRANE, DAMURJIAN, SEVILLE, EORIO, MALLACH & PIEDICI.**

**THOSE OPPOSED: NONE.**

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The within resolution memorializing the Board action in granting the approvals set forth above was adopted on June 7, 2022 by the following vote of eligible Board members:

<b><u>Member</u></b>	<b><u>Yes</u></b>	<b><u>No</u></b>	<b><u>Abstain</u></b>	<b><u>Absent</u></b>
<b>BAUMANN</b>	<b>X</b>			
<b>CRANE</b>				<b>X</b>
<b>DAMURJIAN</b>	<b>X</b>			
<b>SEVILLE</b>	<b>X</b>			
<b>EORIO</b>	<b>X</b>			
<b>MALLACH</b>	<b>X</b>			
<b>PIEDICI</b>	<b>X</b>			

I, Cyndi Kiefer, 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 June 7, 2022.

*Cyndi Kiefer*

**CYNDI KIEFER, Board Secretary**