

## **BERNARDS TOWNSHIP ZONING BOARD OF ADJUSTMENT RULES AND REGULATIONS**

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**PART I. ORGANIZATION AND ADMINISTRATION.**

**Rule 1:1. Membership; Office; Annual Organization; Elections; Appointments.**

**1:1-1. Membership.** The Board shall consist of seven (7) regular members and not more than four (4) alternate members, all of whom are residents of the municipality and appointed in accordance the provisions of N.J.S.A. 40:55D-69. Alternate members may participate in discussions of proceedings but may not vote on a matter except in the absence or disqualification of a regular member. The alternate members shall be designated at the time of appointment as “Alternate No. 1,” Alternate No. 2,” etc. In the event a choice must be made as to which alternate member shall vote, the choice shall be in order of their numerical designation.

**1:1-2. Attendance.** If a member or alternate member fails to attend or attends but leaves prior to the conclusion of a Board meeting, the member or alternate can ask the Board to excuse the absence at that meeting or at a subsequent meeting. The Board shall excuse the member or alternate member if a majority of the authorized membership (a minimum of four (4) votes) determines that the absence was caused by legitimate illness, disqualification, or should otherwise be excused. If a member or alternate member fails to attend or participate in four (4) consecutive meetings (both regular and work sessions) or for a period of eight (8) consecutive weeks, whichever shall be of longer duration, the secretary shall notify the governing body of that fact and shall advise the governing body of the stated reason(s) for the absences and whether the absences were excused by the Board.

**1:1-3. Office Location and Location of Meetings and Hearings.** The office of the Board shall be located on the second floor of the Township Engineering Services Building located at 277 South Maple Avenue, Basking Ridge (Bernards Township), New Jersey 07920 Unless otherwise determined by the Board, Board meetings and hearings shall take place in the Warren G. Craft meeting room (commonly referred to as the Courtroom) at the Township Municipal Building located at 1 Collyer Lane, Basking Ridge (Bernards Township), New Jersey 07920. See, Rule 1:3-1 below as to meeting dates. All records of the Board concerning pending applications shall be kept at the Board office which is located on the second floor of the Township Engineering Services Building located at 277 South Maple Avenue, Basking Ridge (Bernards Township), New Jersey 07920 and shall be available for public inspection at this location between the hours of 8:30 a.m. and 4:30 p.m., Monday through Friday, except for legal holidays.

**1:1-4. Organization Meeting.** In or before December of each year, the Board shall select a date in January of the next year on which to convene a meeting for the purpose of organizing the affairs of the Board for the calendar year. If the Board should fail to select such a January date in December, the organizational meeting shall take place on the first Wednesday after the first Monday of January at 7:30 p.m. Such meeting shall be conducted in the presence of the Board Attorney who was appointed for and who served through the preceding calendar year, and who shall serve pro tem until reappointment or replacement.

**1:1-5. Election of Officers.** At the organization meeting, the Board shall elect from its regular members a Chair, Vice-Chair and Vice-Chair pro temp. An alternate member shall not serve as Chair, Vice-Chair or Vice-Chair pro temp of the Board. The Board shall also elect a Secretary from among its members, except that if the Administrator or Administrative Assistant of the Planning and Zoning Department of Bernards Township is available to serve as Secretary, such person(s) may be appointed by

the Board to serve as its Secretary. The Secretary shall be compensated upon agreement and in accordance with the ordinances and/or determinations of the Board and the Governing Body of Bernards Township. A candidate receiving the majority vote of the entire membership of the Board shall be deemed elected to the office for which the vote was taken and shall serve for one year or until he or she is re-elected or his or her successor shall take office. In the event that an office shall become vacant in some factual manner or by operation of law, the office shall be filled as soon as possible by the same election procedure, and the term of such office shall be the unexpired term of the predecessor.

**1:1-6. Board Attorney(s).** The Board shall annually appoint or reappoint, and employ or contract with, an Attorney(s)-at-Law of the State of New Jersey having recognized competence in the law of local governments, land use and zoning. The Board Attorney(s) shall be compensated pursuant to agreement and shall be the legal advisor(s) and representative(s) of the Planning Board. The Board Attorney(s) shall prosecute and defend litigation and appeals on behalf of the Board. In the event the Board elects to appoint or reappoint more than one attorney, the Board shall determine as it sees fit which of the attorneys shall represent it in particular cases and/or at particular meetings. The Township Attorney shall not be the Board Attorney.

**1:1-7. Board Engineer(s).** The Board shall appoint or reappoint a licensed professional engineer(s) of the State of New Jersey who shall review and report on the applications and other matters pending before the Board at the direction of the Board, and who shall attend the meetings of the Board and committees of the Board as instructed by the Board.

**1:1-8. Board Planner(s).** The Board shall appoint or engage a licensed professional planner(s) of the State of New Jersey who shall review applications and land use matters, and who shall attend all meetings of the Board and committees of the Board as instructed by the Board.

**1:1-9. Other Assistance.** The Board may also appoint such other officers and/or assistants and engage such additional experts or staff as it may be deemed necessary from time to time.

## **Rule 1:2. Officers and Duties.**

**1:2-1. Chair.** The Chair shall preside at all meetings and hearings of the Board. Unless otherwise provided in these rules, the Chair shall decide all points of order and matters of procedure governing said meetings or hearings, decide issues of expert qualifications and admission of evidence, appoint committees, and shall perform all the duties normally appertaining to his or her office, as required by law, ordinance, these rules or prevailing parliamentary practice. Unless overruled by a majority vote of members, the Chair's decisions on the aforementioned issues shall be deemed the decision of the Board as a whole.

**1:2-2. Vice-Chair.** The Vice-Chair shall preside at all Board meetings and hearings in the absence or upon the disqualification of the Chair, and shall have all of the powers of the Chair under such circumstances.

**1:2-3. Vice-Chair pro temp.** The Vice-Chair pro temp shall preside at all Board meetings and hearings in the absence or upon the disqualification of the Chair and Vice-Chair, and shall have all of the powers of the Chair under such circumstances.

**1:2-4. Secretary.** The Secretary shall generally perform the secretarial work of the Board, including, but not limited to the following:

- (a) Conduct all official correspondence, compile all required records, keep and maintain all necessary files and indexes with respect to the operation of the Board, cause all notices of meetings required to be given pursuant to the Open Public Meetings Act, the Municipal Land Use Law or any other applicable law or ordinance;
- (b) Attend all meetings of the Board, take and have custody of all records, documents, maps, plans and evidence, and provide for the care and custody of items for which no other

- provision is made by statute or these rules; take or direct the taking of roll call votes, and insure the recordation of affirmative and negative votes as well as abstentions.
- (c) Make a recording of the proceedings of each hearing of the Board in accordance with these rules, keep minutes of the proceedings of each meeting (including work sessions) held by the Board and file them in a book, and sign the resolutions and orders adopted by the Board and file them in a book;
  - (d) Cause to be mailed or otherwise delivered or made available to each member of the Board and professional consultants to the Board true copies of the minutes and all other documents and materials pertaining to the business of the Board.
  - (e) Perform such other duties as normally pertain to the office of Secretary of the Planning Board, or as directed by the Chair.

**Rule 1:3. Meetings.**

**1.3-1. Regular Meetings.** Regular meetings of the Board shall be held at the Municipal Building at 7:30 p.m. on the first Wednesday following the first Monday of each month and the second Thursday following the first Monday of each month or as otherwise determined by the Board. Whenever there are no matters to be considered at any regular meeting other than the organization meeting or the Chair becomes aware that there will not be a quorum of members present other than at the organizational meeting, the Chair may dispense with such meeting by directing the Secretary to provide notice of cancellation to each member of the Board by reasonable means and as soon as possible in advance of the time set for such meeting and by giving notice in accordance with the Open Public Meetings Act or otherwise posting the cancellation for the convenience and interests of the public.

**1.3-2. Special Meetings.** Special meetings may be called by the Chair at any time or upon the written request of two (2) or more members of the Board, provided that notice thereof be mailed or given to each member of the Board and to the public as required or allowed by law. An applicant may request but shall not be entitled to a special meeting. Special meetings at the request of an applicant may be scheduled at the pleasure of the Board provided the public interest is fairly and reasonably served.

**1.3-3. Quorum.** At all meetings of the Board, a quorum to conduct any business of the Board shall consist of four (4) qualified members. In the absence of a quorum, the members present may convene a meeting only for the purpose of adjourning the same to another date. No hearing may proceed without a qualified quorum of the Board for that particular hearing. In the event that the Chair becomes aware that the Board will be unable to provide a quorum for a particular meeting, the Chair may dispense with such meeting by directing the Secretary to provide notice of cancellation to each member of the Board by reasonable means and as soon as possible in advance of the time set for such meeting and by giving notice in accordance with the Open Public Meetings Act or otherwise posting the cancellation for the convenience and interest of the public.

**1.3-4. Open Meetings.** Except as otherwise provided in these rules and regulations, the meetings of the Board shall be open to the public at all times. Nothing herein shall be construed to limit the discretion of the Board to permit, prohibit or regulate the active participation of the public at any meeting. The Board may exclude the public only from those portions of a meeting at which the Board discusses matters within the exclusions provided under N.J.S.A. 10:4-12b and/or N.J.S.A. 40:55D-9b.

**1.3-5. Photography and Video at Meetings.** The Board recognizes the right of persons to take pictures and to video during its meetings provided that the persons taking the pictures or video do so in a manner that is respectful, unobtrusive and not disruptive to the meeting and those attending the meeting. As such, persons wishing to take pictures from hand held cameras or personal communication devices (cellular phones, tablets, laptop computers, and the like) can do so from their seats or, if standing, from the rear of the room adjacent to the exterior wall. Persons wishing to video may do so from their seats if the video equipment is hand held. For video equipment which is shoulder held or on a tripod or uni-pod, persons wishing to video can do so from the rear of the room adjacent to the exterior wall. In all cases, no lights or flash shall be used.

**1.3-6. Order of Business.** Subject to the discretion of the Chair to the contrary, the order of business for all regular sessions of the Board shall be as follows:

- (a) call to order;
- (b) flag salute;
- (c) statement of compliance with Open Public Meetings Act;
- (d) roll call;
- (e) approval of minutes of previous meetings;
- (f) adoption of resolutions;
- (g) adjournments of any scheduled cases and any motions;
- (h) old business (continued hearings);
- (i) new business (new hearings);
- (j) other discussion;
- (k) closed session(s) if needed; and
- (l) adjournment

The Chair may change the order of business to accommodate applicants, witnesses, objectors, or for any other reasonable cause. The Chair will seek to be efficient and judicious of time without infringing on the rights of anyone who wishes to be heard.

**1:3-7. Time Limitations.** The Board shall be under no obligation to consider any old and/or new business after 10:00 p.m. The Board shall take no new testimony beyond 10:30 p.m. This rule may be waived, however, by a majority of the Board members then present and qualified.

**1:3-8. Parliamentary Procedure.** Robert's Rules of Order, latest edition, may be followed whenever a particular procedure or practice is not contemplated by these rules.

## **PART II. PROCEDURES.**

### **Rule 2:1. Applications and Hearings.**

**2:1-1. Application to Zoning Board of Adjustment.** Applications for development and for any other relief shall be commenced by filing the original and sixteen (16) copies of the latest form of application with the Secretary of the Board together with the fee required by ordinance and all other documents and/or items required by the requisite checklist(s) established by ordinance. Upon receipt of the application, the Secretary of the Board shall assign it a case number.

**2:1-2. Scheduling; Transmittals.** Upon a determination of completeness in accordance with the MLUL and the Township ordinance, the Board Secretary shall so notify the applicant, the application shall be assigned a tentative hearing date and the Board Secretary shall forward copies of all application materials and documents to the Board Attorney, the Board Engineer, the Board's planning expert, and any other Board expert(s) whose input is sought. The application materials and documents shall also be forwarded to all Board members prior to the scheduled hearing session. Applications shall be scheduled for hearing in the order in which they are declared complete except that an application may be advanced so as to comply with statutory and ordinance limitations of time but shall otherwise be at the discretion of the Board or its designee(s).

**2:1-3. Filing of Maps and Documents.** At least ten (10) days prior to the date scheduled for the hearing, the applicant shall file with the Board Secretary the maps, plans, plats and/or documents for which approval is sought and/or which the Board required to be filed.

**2:1-4. Notice of Hearing.** Prior to a hearing commencing on an application, the applicant must have given notice of the hearing at least ten (10) days prior to the date set for the hearing in accordance with all requirements of the MLUL and the Township ordinances and must file with the Board an affidavit of proof of service of the notice together with stamped certified proof of mailings (if service was by mail)

and an affidavit of publication of notice in the newspaper. As to the requirement in N.J.S.A. 40:55D-12 that notice of a hearing be given to the owners of all real property as shown on the current tax duplicates, the applicant must send notice to all property owners on a list prepared by the Tax Assessor of each and every municipality involved which is no more than four (4) months old at the time of service of the notices.

**Rule 2:2. Hearing Procedure.**

**2:2-1. Appearance by Parties.** Individuals may either appear on their own behalf before the Board at the time of the hearing or be represented by an attorney authorized to practice law in New Jersey. All attorneys shall submit their New Jersey Supreme Court attorney identification number to the Board in writing. Pursuant to New Jersey Court Rule 1:21-1(c), no business entity (whether a corporation, partnership or any other form), with the sole exception being a sole proprietorship, shall appear before the Board at the time of the hearing except through an attorney authorized to practice law in New Jersey.

**2:2-2. Testimony Under Oath.** The Chair or his or her designee shall duly swear all persons giving testimony at a hearing.

**2:2-3. Order of Presentation.** Generally, each application shall be considered in accordance with the following order of presentation:

- (a) The applicant or, if the applicant is represented by an attorney, the attorney shall enter an appearance on the record. If counsel represents the applicant, the attorney shall enter his or her appearance, identifying the name and location of his or her firm, identifying the client who is represented.
- (b) All of the applicant's witnesses shall then be sworn, as well as any Board experts who have filed reports concerning the application and/or who have not filed reports but may provide input on the application during the hearing.
- (c) The applicant or, if the applicant is represented by an attorney, the applicant's attorney shall then proceed to make opening remarks, if any, present testimony and any other evidence, documentary or otherwise, upon which the applicant intends to rely in order to establish a basis for the relief sought.
- (d) At the commencement of a witness' testimony and/or at the introduction of other evidence, the Board shall rule on qualifications and admissibility and at the conclusion of a witness's testimony, the Chair shall allow Board members, Board experts, objectors and interested parties to ask questions of such witness, and shall permit reasonable cross-examination by counsel representing an objector or interested party. An attorney representing objectors or interested parties shall submit to the Board a written list of the full names and addresses of all persons represented by such attorney, including full names and addresses of all members of any group represented by such attorney, and shall submit a copy of the same to the applicant or the attorney for the applicant. Such persons shall cross examine witnesses in the proceedings only through the attorney.
- (e) Upon the conclusion of the presentation of the application, any objector(s) wishing to present a case in objection to the relief sought may do so in such order as may be recognized by the Chair. The objector(s) may call witnesses for relevant testimony and introduce any relevant documentary or other relevant evidence subject to reasonable cross-examination by the applicant or his or her attorney and the Board, and the Chair shall allow a reasonable opportunity for interested parties to ask questions of such witnesses. The Chair shall first recognize presentations of counsel for objectors and those presentations involving expert testimony in the order that the Chair shall determine upon the exercise of reasonable discretion. Such presentations shall be subject generally to the procedure set forth in the above subparagraphs, affording the attorney for the applicant and an applicant pro se a reasonable opportunity for cross-examination and questions. The applicant may thereafter present rebuttal evidence subject generally to the procedure set forth in the above subparagraphs.

- (f) The Board shall thereafter recognize public comments by interested parties, provided that those making comments are sworn and each such interested party is subject to cross-examination and questioning. All rebuttal testimony or evidence shall be considered in such order as the Chair shall designate. The Board shall consider only relevant objections. The Board may exclude irrelevant, immaterial, unduly repetitious evidence and/or disorderly testimony. The Board shall have the power to limit comments to those expressed by interested parties as the term is defined in the MLUL and construed by the courts of this State.
- (g) Any member of the Board may place evidence before the Board as to any relevant matter of which he or she has personal or official knowledge for the purpose of amplifying the record, including facts ascertained from a viewing of the premises in question subject to these rules. See, Rule 2:2-8 as to the procedures to be followed in this regard.
- (h) The Board shall have the right to rely upon the expertise of its attorneys as well as the expertise of its engineering and planning experts and any and all other Board experts that have testified during the hearing. The Board may also call, as witnesses, other municipal officials such as police officers, municipal engineers, the tax assessor, municipal employees managing municipal utilities, etc., to testify as to particular facts pertinent to the application. The Board shall also have the power to acquire additional evidence consistent with these rules.

**2:2-4. Reports from Officers or Agencies.** The Board may refer an application to another person or agency for a report provided that such reference shall not extend the time within which the Board must act. Such reports from other persons or agencies shall be made available to the applicant and to other interested parties for examination and refutation. The applicant and interested parties shall have the right to subpoena the officer making the report for purposes of cross-examination as to its contents and the basis for conclusions. The Board shall either obtain such reports prior to the hearing, giving all interested parties the right to examine the same, or the hearing may be adjourned to a specific time and place for the purpose of receiving the reports and recommendations of public officials or agencies involved.

**2:2-5. Continuances.** All cases may be continued to another date certain, which shall be the next regularly scheduled Board meeting unless otherwise determined by the Board. The Chair shall announce to all those present the date, time and place to which the hearing on the matter is continued. The applicant need give no further notice in that event. However, if the matter is continued to a special meeting, notice required under the Open Public Meetings Act shall be given. The Board reserves the right to continue a hearing on its own motion for purposes of further consideration, subject to limitations of time as provided in the Township Ordinances and the MLUL. The Board may also grant reasonable requests of interested parties to continue a matter in order to afford such parties sufficient time to prepare, engage counsel, obtain witnesses or for other good cause. However, the Board shall do so only to the extent that the applicant's interests are not unduly compromised or prejudiced with respect to the applicant's protected interests pursuant to prevailing law. Where adjournment for a continuance would extend the statutory period within which the Board is required to act, the consent of the applicant thereto shall be evidenced in writing or shall be made on the record.

**2:2-6. Refusal to Consent to Continuance.** Where an applicant refuses to consent to a continuance so that objectors can be heard or the Board has insufficient opportunity to consider the matter, such refusal by the applicant may be deemed arbitrary and unreasonable by the Board. Should the applicant move the Board to decide the matter without granting a continuance under those circumstances, the applicant shall be at risk of a denial of the application for failure to sustain the burden of proof and/or failure to afford the Board an opportunity to reach a sufficiently informed decision.

**2:2-7. Testimony from Expert Witnesses.** The Board may require expert witnesses and/or reports from applicants if the Board believes same is/are necessary in order to make an informed decision on an application. Experts shall be qualified to the satisfaction of the Board. In addition to experts for the applicant, the Board shall have the power to engage its own independent experts to provide their opinions



on issues raised in the application and/or on the testimony of experts produced by an applicant or other party. The Board shall not be bound to accept the testimony of any expert. Where there is conflicting testimony of experts, the Board shall decide which to accept. These rules shall not be construed as requiring expert testimony to sustain a Board finding. The Board may permit its experts to confer with the experts of the applicant where appropriate and, where appropriate, with experts hired by objectors or the Board in order to expedite consideration of the application. Informal communications between the Board's experts and those for the applicant shall be permitted outside the context of public meetings but any information as a result of those communications that any party wishes the Board to rely upon or that the Board wishes to rely upon shall be made part of the record. The applicant shall reimburse the municipality for the expenses incurred by the municipality in having Board professionals and experts participate in such communications.

**2:2-8. Site Visits by Board Members; Personal Knowledge of Board Members.** The Board may make site visit(s) of the property that is the subject of an application upon reasonable notice to the parties and subject to the Open Public Meetings Act and prevailing New Jersey case law. In that event, or in the event that individual Board members visit the subject property or are well acquainted with the subject property, knowledge acquired of any particular fact or facts by way of a site visit or personal knowledge of the site may be used in making a decision if such member or members expresses such facts on the record at the time of the hearing. The applicant, any objector, or any interested party shall have an opportunity to refute such facts and the right to question the member(s) on the circumstances of acquiring the knowledge. In the event that Board members visit the subject property or have historical or other knowledge of the subject property and no reference is made to the same on the record, it will be presumed that such facts were not necessary to reach an informed decision and merely helped such members to understand the evidence presented to them at the hearing. The absence of site visits, references to site visits and impressions shall not vitiate any decision otherwise reached by the Board.

**2:2-9. Evidence; Exhibits.** The formal rules of evidence adopted by the courts of the State of New Jersey shall not apply in the proceedings before the Board. However, no decision shall be based upon any facts not proved or on matters which are not part of the record unless they are items of which the Board is entitled to take judicial notice in accordance with Rule 2:4-6 below. The Board shall follow case law precedent as to admission of evidence in administrative proceedings. When any documents or exhibits are admitted into evidence during or for purposes of a hearing, they shall be marked and shall be retained by the Board as part of the permanent file unless the applicant agrees to take responsibility for safe keeping of such items. After the Board has rendered its decision and the time for filing an appeal has expired, the Board Secretary may return any such exhibits or documents to the person who offered them upon request, may keep them in the permanent file or may discard them. Any evidence presented, whether by testimony or by documents and exhibits presented for the purpose of the hearing(s), which are not questioned or controverted by any other party or by any member of the Board, may be deemed to be true by the Board for purposes of its decision. The Board may exclude irrelevant, immaterial, unduly repetitious evidence and/or disorderly testimony.

**2:2-10. Effect of Restrictive Covenants and Deed Restrictions.** The Board is established for the sole purpose of exercising the powers conferred upon it by the MLUL. The Board is authorized by local ordinance only to hear matters within the purview of the ordinance. A restrictive covenant or deed restriction shall be construed as being in the nature of a private contract which may be enforceable either by a Grantor or other protected party by a proceeding in the Superior Court of New Jersey. Such a restriction shall not affect the jurisdiction of the Board, and the grant of relief by the Board shall not affect the validity of any restrictive covenant or deed restriction. The existence of a restriction shall generally have no bearing on the Board's determination, unless the Board, the Planning Board or the Township Committee imposed the restriction as a condition of prior approval.

**2:2-11. Letters and Petitions in Objection.** Letters of objection and petitions relating to an application for development shall not be admissible and, if submitted to the Board Secretary, shall be returned by the Secretary to the author or sender with a cover letter citing this rule and advising the author or sender that he or she can appear before the Board to testify regarding the application for development

but cannot submit a letter or a petition of objection. This shall not bar the author of a letter or the signer of a petition from appearing and testifying under oath and, as part of such sworn testimony, reading a prepared statement, provided, however, that such person is subject to cross-examination and questioning.

**2:2-12. Burden of Proof.** The applicant shall have the burden of proof which is by the preponderance of the evidence, and it is the applicant's responsibility to supply competent and credible evidence in order that the Board might determine the nature and degree of the relief sought by the applicant. The applicant must establish, to the Board's satisfaction, that pursuant to statutory and ordinance criteria, the applicant is entitled to the relief sought. If an applicant refuses to produce someone within its control who may have information relevant to an application, the Board may draw any reasonable adverse inference from such refusal. If a Board member is not convinced that the applicant has satisfied its burden of proof, the Board should deny the application rather than abstain in the absence of a compelling reason to the contrary.

**Rule 2:3. Voting.**

**2:3-1. Voting Procedure.** The Board shall vote on all applications and matters by motion(s) made by qualified member(s). If a Board member is not qualified to vote, that Board member shall not abstain from the vote but, rather, that Board member shall not be considered eligible to vote. All motions shall require a second. In the absence of a second, the motion shall be deemed defeated. The Chair shall allow discussion on any motion made and duly seconded. The Board shall have the right, but not the obligation, to conduct a deliberation on any application or matter prior to any motion being made. All votes on substantive matters shall be taken by roll call, and the vote and name of the member casting the vote shall be recorded in the minutes.

**2:3-2. Voting Margin and Effect.** Once a quorum of the Board is present (which is at least four (4) members pursuant to Rule 1:3-3 above), an affirmative vote of a majority of up to seven (7) members present is required for any decision, determination or official action of the Board except that applications for a variance under N.J.S.A. 40:55D-70(d) must be approved by at least five (5) affirmative votes. If a motion to approve an application for development fails to receive the number of required votes, such failure shall be deemed an action denying the application. Similarly, a tie vote shall be deemed an action denying the application.

**2:3-3. Abstentions.** Abstentions are disfavored except for good cause. An abstention shall be regarded as an assent to the vote of the majority. Thus, if the majority of those voting would affirm a measure, abstentions would be counted toward affirmance; if the majority would defeat a measure, abstentions will be counted toward defeat. A disqualified member shall not be counted as an abstention and shall, instead, be considered as not qualified to vote. Such a member shall be deemed to have removed himself or herself from the panel and not be involved in the consideration of the application. If the Board is evenly split in its decision, no majority exists with whom an abstaining member can be said to vote and, accordingly, abstentions shall not be assigned to either voting block. As set forth above, a tie vote shall be deemed an action denying the application. In no event shall an abstention be construed to approve an application; nor shall abstentions be used to create a tie.

**2:3-4. Voting Eligibility; Review of Record.** When any hearing before the Board has been continued, a member of the Board who was absent for one or more hearing sessions shall be eligible to vote on the matter upon which the hearing is conducted notwithstanding the member's prior absence provided that such member certifies in writing to the Board that he or she has read a transcript or listened to a recording of the entire session for which he or she was absent. This rule shall not be construed as authorizing any hearing to be held whenever less than a quorum of the Board is present.

**Rule 2:4. Other Hearing Requirements and Procedures.**

**2:4-1. The Record.** The record shall mean the application form, any plans, plats or maps submitted by the applicant, any other admissible documents submitted by the applicant, an objector, an

interested party and/or any Board expert(s), any exhibits submitted during the hearing, the verbatim recording of the hearing by stenographic, tape and or other electronic means, the resolutions adopted by the Board containing the Board's decision on the application, all Township ordinance provisions as well as all provisions of the Master Plan, any and all prior Planning Board, Board of Adjustment or Township Committee resolutions relevant to the application and/or to the property, and any and all other matters or documents of which the Board may take judicial notice in accordance with Rule 2:4-6 below. The minutes of the meeting shall be considered both a summary of the record and part thereof but only a transcript of a hearing session or a recording of a hearing session shall constitute a verbatim record of the hearing session.

**2:4-2. Transcripts.** The Board shall furnish a transcript of the hearing or duplicate recording in lieu thereof to any interested party by electronic mail if available, or by hard copy if requested, at his or her expense. The option as to whether to furnish either a duplicate recording or a transcript lies entirely with the Board. Interested parties shall not be charged more than the maximum permitted in N.J.S.A. 2A:11-15.

**2:4-3. Inability to Make Verbatim Record.** If, at the time set for hearing, a verbatim record cannot be made for good reason, as where recording equipment is inoperable and no certified stenographer is present, the Board shall, if time is not a factor, continue the hearing to another date. However, if time is a factor, and if all interested parties present agree, the Board may proceed with the hearing on the understanding that in the event of an appeal or further review, an agreed statement of facts will be supplied to the reviewing body. In the absence of such agreement, where time is a factor and the applicant refuses to consent to extend the time within which the Board has to make a decision, the Board shall be entitled to deny the relief sought in order to prevent statutory automatic approval by reason of the Board's failure to make a decision within the required time.

**2:4-4. Oaths; Subpoenas; Contempt.** The Chair shall have power to provide for oaths to be administered to all witnesses in cases before the Board and may designate individual(s) to actually administer oaths. The Chair shall also have the power to issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties. The provisions of the County and Municipal Investigations Law, N.J.S.A. 2A:67A-1 et seq. shall apply. Any person under subpoena who refuses or fails to appear or refuses to be examined or answer any proper questions or to produce any books, papers, documents or tangible things in accordance with the subpoena, shall be subject to the proceedings in the Superior Court for an order to compel him or her to do so. If a person subject to subpoena shall engage in contemptuous conduct at any hearing, the Board may apply to the court to compel such person to refrain therefrom, and may seek costs and fees in connection therewith.

**2:4-5. Perjury.** Any person who shall knowingly and willfully give false testimony under oath in the course of any hearing held before the Board shall, in accordance with the provisions of the County and Municipal Investigations Law (N.J.S.A. 2A:67A-1 et seq.), be guilty of perjury.

**2:4-6. Judicial Notice.** The Board may take judicial notice of matters which are not the subject of reasonable dispute, including but not limited to matters of common knowledge, provisions of law, provisions of the Township Ordinances, resolutions adopted by the Planning Board, Board of Adjustment and Township Committee, and the contents of municipal, county, state and federal government documents and publications (including internet published documents).

**2:4-7. Dismissal of Applications.** The Board, on its own motion, may dismiss any action without prejudice if neither the applicant nor anyone on his or her behalf appears at the time set for the hearing of said application. The Board may also dismiss any action without prejudice if neither the applicant nor anyone on his or her behalf actively prosecutes the application. Further, the Board, on its own motion, may dismiss any action, without prejudice, for failure to comply with these rules. Any applicant may, at any time before the commencement of the hearing, voluntarily withdraw his or her application, in which case, the application shall be dismissed without prejudice. After commencement of a hearing, a voluntary dismissal may be had only with the approval of the Board, in which case the Board shall dismiss the action with or without prejudice depending on the circumstances of the particular case.

The Board reserves the power to impose reasonable terms and conditions on the dismissal of any application where the request for the dismissal is made after the commencement of the hearing on the application.

**2:4-8. Amended Applications.** An applicant may, prior to the commencement of a hearing, amend his or her application without leave of the Board and in all such cases new notice shall be given as in the case of the original application and the amended application shall be subject to a completeness determination as is the case with the original application. After commencement of a hearing, an application may be amended only by leave of the Board. If the amendment after commencement of hearing is for the purpose of reducing the nature or extent of the relief sought, no new notice will be required. Otherwise, new notice shall be given. In either event, the time within which the Board has to act on the amended application shall be deemed to start to run from the day the amended application is determined to be or deemed to be complete.

**2:4-9. Conditions.** The Board shall have plenary power and discretion to impose conditions. The right to impose conditions is an inherent power of the Board that exists regardless of whether the ordinance grants such a right to the Board. Such conditions shall not be deemed exclusive, and the applicant shall be subject to terms and conditions of approval that are expressed and implied at law, including those imposed pursuant to ordinance as applied uniformly to every development application. The Board shall have the power to require that conditions be fulfilled within a stated period of time. The Board may require that some or all conditions of approval, or the resolution itself, be recorded with the County Clerk along with any maps for filing. Unless good cause exists, the Board shall impose the following conditions as a minimum, which the Board deems as its “standard” conditions, and in the event the Board neglects to include any of the following conditions in a resolution approving an application for development the following conditions shall be deemed to have been imposed by the Board:

1. **Revisions to Plans/Plats.** The applicant shall be required to make revisions to the plan(s) and/or the plat(s) in accordance with Board’s experts’ reports and testimony 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. For site plan and subdivision approvals, the Board shall impose as a further condition a time within which to make the revisions which shall be six (6) months unless the Board determines another time period is more appropriate depending on the circumstances of the case before it. And, the condition shall also provide that, in the event that the applicant fails to revise the plans as required and/or fails to obtain signatures on the plan as required, 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 the plans/plats 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.

2. **Design, Construction and Location of Improvements.** The applicant shall be required to design, construct and locate the proposed development in substantial conformity with the plans and the plats approved and signed by, and conditions imposed by, the Board as well as to the exhibits submitted into evidence during the hearing.

3. **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 and, in cases where the Board grants site plan and/or subdivision approval, a two (2) year maintenance guaranty in a form acceptable to

the Township Attorney and in an amount acceptable to the Township Engineer, shall be posted with the Township. 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 and further, in cases where the Board grants site plan and/or subdivision approval, guaranteeing the subsequent posting of a two (2) year maintenance guaranty. If required by the Board, the installed landscaping shall be subject to inspection by a Board appointed landscaping committee. Unless otherwise specified in the Board's written resolution of approval, the applicant shall notify the Township Engineer and Township Planner upon completion of the landscaping to initiate scheduling of the inspection. The applicant shall provide additional plantings and/or make other changes to the landscaping as deemed necessary and appropriate by the landscaping committee to better achieve the purposes of the landscaping as set forth in the Board's written resolution of approval. 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. 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.

4. **Enforcement and Maintenance of Parking.** 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.

5. **Night-Light Test.** All lighting, as installed, shall conform to and be in accordance with the lighting plan approved and signed by the Board, and which lighting plan shall include any and all the lighting changes required by condition #1 above. If required by the Board, there shall be a night-light test conducted by a Board appointed lighting committee. Unless otherwise specified in the Board's written resolution of approval, the applicant shall notify the Township Engineer and Township Planner upon completion of the lighting to initiate scheduling of the night-light test, which shall take place prior to the issuance of a certificate of occupancy, compliance or completion (whichever is applicable). The purpose of the night-light test is to assure adequate lighting throughout the site for safety purposes while safeguarding neighboring property owners and the traveling public from glare, unnecessary brightness and glow as well as to ensure that lighting shall be extinguished at hours established by the Board or by ordinance. As a result of the night-light test, and prior to the issuance of a certificate of occupancy, compliance or completion (whichever is applicable), the applicant shall make changes to the lighting as deemed necessary and appropriate by the lighting committee to better achieve the purposes of the lighting and/or mitigate negative impacts of the lighting as set forth in the Board's written resolution of approval. Any dispute(s) concerning the determinations of the lighting 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. The applicant shall have a continuing obligation to maintain all lighting in perpetuity for its intended purpose (i.e., for safety and/or security as well as to avoid night glow and light trespass), which shall include but not be limited to repairing and/or installing new fixtures and/or bulbs to the satisfaction of the Township Planning / Engineering Department. (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. a lighting 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.

6. **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

7. **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.

8. **Time to Obtain Construction Permits and Commence and Complete Construction.**

a. In cases where the Board grants preliminary site plan and/or preliminary subdivision approval, the Board shall impose a time limitation within which to file an application for final approval. Unless the Board determines that some other time periods are more appropriate based upon the unique circumstances of the case before it, the standard time limitation condition shall be as follows: "The applicant shall file an application for final site plan and/or subdivision approval within three (3) years of the date of the adoption of the resolution granting preliminary approval. If an application for final site plan and/or final subdivision approval is not filed within said three (3) year period, or extension thereof as granted by the Board, the within preliminary approval shall automatically expire and become null and void."

b. In cases where the Board grants final site plan and/or subdivision approval, the Board shall impose a time limitation within which to obtain construction permits, commence construction and complete construction. Unless the Board determines that some other time periods are more appropriate, based upon the unique circumstances of the case before it, the standard time limitation condition in cases involving final site plan and/or subdivision approval shall be as follows: "The applicant shall apply for and obtain a construction permit within two (2) years of the date the resolution granting final site plan and/or subdivision approval is adopted. 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 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."

c. In cases where the Board grants variance approval without site plan or subdivision approval, time limitations shall be as set forth in Township ordinance subsection 21-5.10, unless otherwise specified in the Board's written resolution of approval.

9. **Specific Approvals and Permits.** The 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 approval of any aspect of the development within its jurisdiction,
- b. Somerset County Department of Health approval of any aspect of the development within its jurisdiction,
- c. Bernards Township Sewerage Authority approval of any aspect of the development within its jurisdiction,
- d. Somerset / Union County Soil conservation Service certification of the soil erosion and sediment control plan,
- e. Somerset County Planning Board approval of any aspect of the proposed development within its jurisdiction,
- f. NJDOT highway access permit if the proposed development is on a road within NJDOT's jurisdiction, and
- g. NJDEP approval of any aspect of the proposed development within its jurisdiction.

10. **Subject to Other Laws and Approvals.** All resolutions shall contain the following "catch-all" condition: "The within approval and the use of all property subject to the within approval are 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 all property subject to the within approval 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 the use of the property. In the event of any inconsistency(ies) between the terms and/or conditions of the within approval and any approval(s) required by the above, the terms and conditions of the within approval shall prevail unless and until changed by the Board upon proper application."

### **PART III. TAKING ACTION ON APPLICATIONS.**

#### **Rule 3:1. Decisions; Resolution of the Board.**

**3:1-1. Time of Decision.** Unless the applicant has consented in writing or on the record to an extension of time, the Board shall render a decision on an application for development not later than within the following time periods:

- a. 95 days after the date of completeness of an application for general development plan approval;
- b. 45 days after the date of completeness of an application for minor site plan approval, whether or not including a request for site plan exception(s);
- c. 45 days after the date of completeness of an application for preliminary site plan approval involving 10 acres of land or less and 10 dwelling units or less, whether or not including a request for site plan exception(s);

- d. 95 days after the date of completeness of an application for preliminary site plan approval involving more than 10 acres or more than 10 dwelling units, whether or not including a request for site plan exception(s);
- e. 45 days after the date of completeness of an application for final site plan approval, whether or not including a request for site plan exception(s);
- f. 45 days after the date of completeness of an application for minor subdivision approval, whether or not including a request for subdivision exception(s);
- g. 45 days after the date of completeness of an application for preliminary subdivision approval involving 10 dwelling units or less, whether or not including a request for subdivision exception(s);
- h. 95 days after the date of completeness of an application for preliminary subdivision approval involving more than 10 dwelling units, whether or not including a request for subdivision exception(s);
- i. 45 days after the date of completeness of an application for final subdivision approval, whether or not including a request for subdivision exception(s);
- j. 95 days after the date of completeness of an application for conditional use approval;
- k. 120 days after the date of completeness of an application for subdivision, site plan and/or conditional use approval when any or all of those applications include or require a request or application for the following relief: a variance pursuant to N.J.S.A. 40:55D-70c and/or -70d, issuance of a permit pursuant to N.J.S.A. 40:55D-34 and/or direction pursuant to N.J.S.A. 40:55D-36.

**3:1-2. Failure to Decide within Prescribed Time.** Failure of the Board to render a decision within the period prescribed or within such further time as may be consented to by the applicant shall constitute a decision favorable to the applicant but only if the Board intentionally fails to render the decision within said time periods and acts in bad faith.

**3:1-3. Form of Decision – Written Resolution.** All decisions of the Board shall be in the form of a written resolution containing findings and conclusions and conditions, which resolution shall be adopted either on the date of the meeting at which the Board grants or denies approval, or, within 45 days of such meeting by the adoption of a resolution of memorialization setting forth the decision, findings, conclusions and conditions of the Board. An action resulting from failure of a motion to approve an application shall likewise be memorialized by resolution regardless of the time at which such action occurs within the time period for rendering a decision. Whenever a resolution of memorialization is adopted in accordance with the provisions of N.J.S.A. 40:55D-10, the date of such adoption shall constitute the date of the decision for purposes of the mailings, filings and publications required by statute. A copy of the Board's resolution shall be furnished to the applicant or his attorney within 10 days from the date of adoption thereof and a copy of the resolution shall also be made available to any person who has requested it and has paid the fee established therefor.

**3:1-4. Effect of Resolution.** Once the Board votes to adopt a resolution, the findings of fact, conclusions of law and conditions contained in the resolution become the findings, conclusions and conditions of the Board in the matter. It shall be immaterial that at the time of voting certain Board members may have given other reasons or discussed matters not addressed in the resolution. Nor shall it be necessary that Board members articulate particular reasons for reaching a decision at all, it being sufficient that the application be either approved or disapproved by a voice vote and that thereafter a resolution (of memorialization or otherwise) is adopted. The resolution shall be drafted in such a way as to give the greatest possible support to the decision that has been made by the Board. Once the resolution has been voted on favorably by the requisite number of Board members and is signed by the Board Secretary, it shall become the resolution of the decision of the Board regardless of who drafted it.

**3:1-5. Nature of Resolution Drafts.** A draft or proposed form of resolution, regardless of who prepared it (i.e., a Board member, the Board Attorney, or an attorney for an applicant or objector), shall be considered a privileged document and shall not become a matter of public record unless the Board attorney intentionally transmits the draft or proposed form of resolution to a third party. Transmittal of a draft or proposed form of resolution to individual Board members, the Board Secretary and/or Board experts for



review, comment and/or consideration shall be deemed to be within the attorney-client privilege and the deliberative-process privilege and any and all comments and/or revisions made to the resolution as a result of such review and consideration shall also be deemed to be within the attorney-client privilege and the deliberative-process privilege. Only the form of resolution that is ultimately adopted by the Board shall be a matter of public record unless the Board attorney or Board Secretary intentionally transmits a draft or proposed form of resolution to a third party and, in such case, only the draft or proposed form of resolution that is so transmitted to a third party shall be a matter of public record. Only the form of the resolution that has been voted on favorably by the requisite number of Board members and signed by the Board Secretary shall constitute the decision of the Board.

**3:1-6. Relief Granted.** With respect to relief requested by an applicant, the Board may grant or deny such relief depending upon whether the applicant has proved entitlement to the relief. Additionally, however, the Board may also grant relief which may be different in kind or degree from that requested in the application, again depending upon the applicant's proofs, as the Board shall have the discretionary power to grant relief other than the precise relief or portion thereof sought by the applicant.

**3:1-7. Retention of Jurisdiction.** The Board may, when deemed necessary to satisfy a Township ordinance requirement and/or to satisfy the positive and/or negative criteria when dealing with relief involving a variance or exception, specifically provide in its resolution for the retention of jurisdiction over the matter or certain aspects of the matter for a reasonable time, as therein specified, for the purposes of enabling it to vary the terms of any condition therein imposed, or for the purpose of imposing additional conditions deemed necessary to satisfy the ordinance requirement and/or positive and/or negative criteria, as the case may be, in the light of then existing circumstances.

**3:1-8. Publishing Notice; Service of Copy of Resolutions.** The Board Secretary shall cause notice of the Board's decisions on applications to be published once in an official newspaper of the Township in accordance with N.J.S.A. 40:55D-10i and shall also cause to be served on the applicant and/or his/her/its attorney, and to all who have requested copies, signed copies of the resolution that the Board has adopted deciding the application in accordance with N.J.S.A. 40:55D-10h.

**Rule 3:2. Rehearing.**

**3:2-1. Rehearing.** An applicant or other interested party may, within 20 days after the publication of notice of the decision, move the Board for a rehearing of the matter or a portion thereof by filing an application in the form of a letter addressed to the Board containing a brief statement of the grounds relied upon. If the Board grants the motion, it shall fix a date for rehearing and shall require the moving party to give notice to all persons who participated in the original hearing or hearings, upon such terms as the Board may deem adequate. The Board may grant a rehearing on its own motion when unusual circumstances so require in the interest of justice.

**PART IV. AVAILABILITY AND ELIGIBILITY OF MEMBERS.**

**Rule 4:1. Alternate Members.**

**4:1-1. Designation.** There shall be up to four alternate members of the Board who shall be designated by the appointing authority as "Alternate No. 1," "Alternate No. 2," etc., and each alternate shall retain said designation during the term for which he or she was appointed.

**4:1-2. Appointment of Alternate to Serve on Case.** During the absence or disqualification of any regular member, the Chair shall recognize one of the alternate members to serve in the place of said regular member; provided, however, that where the alternate member is designated to serve in place of a regular member who is disqualified from participating in the hearing of a particular case, the alternate member shall be designated to serve only with respect to such case unless otherwise needed to fill an absence of a member.

**4:1-3. Alternate to Serve Until Final Disposition.** In the event of disqualification of a regular member for any hearing or matter, an alternate member who has been designated to sit in place of a regular member and who has participated in such hearing or matter coming before the Board shall continue to act in the place of such regular member until the final disposition of said matter by the Board.

**4:1-4. Alternate No. 1 to Vote.** In the event that a choice must be made as to which alternate member is to vote, the choice shall be made in order of the numerical designation of the alternate member.

**4:1-5. Alternate Not to Serve at Adjourned or Continued Hearing Unless Present at Prior Hearings and/or Reviewed Transcript or Recording.** When a member has been present and has participated in the first hearing session on any matter, no alternate member shall be designated to serve during the absence of such member during any adjourned or continued hearing sessions on the same matter unless said alternate member was present at such first hearing session or any prior adjourned or continued hearing sessions on such matter or, if absent, said alternate member certifies in writing to the Board that he or she has read a transcript or listened to a recording of the entire hearing session(s) for which he or she was absent. This rule shall not be construed as authorizing any hearing to be held whenever less than a quorum of the Board is present.

**4:1-6. Rights and Privileges.** An alternate member who has been designated to serve in the place of an absent or disqualified member shall, during the period of service, enjoy all of the rights and privileges and shall be subject to all of the duties and disabilities pertaining to members if the alternate member is eligible in all pertinent respects, provided, however, that no alternate member shall be eligible to serve as Chair or Vice-Chair of the Board and no alternate member shall serve if the requisite number of members are present at the hearing session at which the vote on the application takes place and all such members have attended all hearing sessions or certified in writing to the Board that they have read transcript(s) or listened to recording(s) of all hearing sessions at which they were absent.

**4:1-7. Participation in Discussions; Voting.** Alternate members may participate in discussions of the proceedings, but may not vote except in the absence or disqualification of a regular member, nor shall any vote be delayed in order that a regular member may vote instead of an alternate member.

**Rule 4:2. Borrowing Provision; Rule of Necessity.**

**4:2-1. Appointment of Additional Members.** If the Board lacks a quorum because any of its regular or alternate members are prohibited from acting on a matter due to the member's personal or financial interests therein, whether direct or indirect, or other applicable law, regular Class IV members of the Planning Board shall be called upon to serve, for that matter only, as temporary members of the Zoning Board of Adjustment in order of seniority of continuous service to the Planning Board until there are the minimum number of members necessary to constitute a quorum to act upon the matter without any personal or financial interest therein, whether direct or indirect. If a choice has to be made between regular members of equal seniority, the Chair of the Planning Board shall make the choice. This procedure shall be invoked only when the direct and proximate cause of a lack of quorum is the disqualification and not the mere absence of one or more members of the Board.

In the event the exhaustion of the borrowing of Planning Board members still does not result in a quorum to act upon the matter at issue, the Board may invoke the rule of necessity consistent with governing common law. For purposes of this provision, a quorum to act on any matter involving one or more "d" variance requests shall be five (5) qualified members.

**Rule 4:3. Disqualification.**

**4:3-1. Disqualification Generally.** No member of the Board shall be permitted to act on any matter in which he or she has, either directly or indirectly, any personal or financial interest. No member of the Board shall participate in proceedings in which such member has a conflicting interest that may interfere with the impartial performance of his or her duties as a member of the Board. The decision as to

whether a particular interest is sufficient to disqualify shall depend on the facts and circumstances of the particular case. The test shall be whether the circumstances could reasonably be interpreted by a member of the public to show that they had the likely capacity to tempt the Board member to depart from his or her sworn public duty.

**4:3-2. Local Government Ethics Law.** The members of the Board shall comply with and be bound by the provisions of the Local Government Ethics Law, N.J.S.A. 40A: 9-22.1, et seq. and shall annually file a statement as prepared by the local Finance Board and the Division of Local Government Services, Department of Community Affairs. Pursuant to such law, no Board member shall act in his or her official capacity in any matter where he or she, a member of his or her immediate family or a business organization in which he or she has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his or her objectivity or independence of judgment. Any interest or involvement of the Board member that is not shared in common with other members of the public shall be examined to determine eligibility.

**4:3-3. Examples of Disqualification for Interest.** Any member of the Board shall disqualify himself or herself from sitting on the hearing of any matter in which he or she has a disqualifying interest, such as, but not limited to, the following situations:

- (a) where the member owns property located within two hundred (200) feet of the property affected by the action;
- (b) where the applicant is related within the third degree of consanguinity to the member by blood or is the husband or wife of any person so related;
- (c) where the applicant or his or her attorney is the employer, employee, or partner of the member, or is a corporation in which the member beneficially owns more than 10% of the outstanding shares thereof or has other financial interest;
- (d) where the member has any other personal or pecuniary interest in the proceeding.

**4:3-4 Removal From Panel.** Any member having deemed himself or herself disqualified in any matter by reason of an actual or an appearance of conflict shall recuse himself or herself from participating in the matter, or having deemed by a majority vote of the Board as having a disqualifying interest by reason of an actual or an appearance of conflict, shall be disqualified from participating in the matter, and in all such cases shall not sit with the Board and shall not participate in the consideration of such matter. The nature of any such disqualification may be disclosed at the time of recusal but does not have to be disclosed, especially if doing so would constitute an unwarranted invasion of individual privacy or could adversely affect the public interest. Such member may be heard at the appropriate time as an interested party or applicant, but whenever such member appears before the Board on his or her own behalf or by legal representative, it shall be disclosed that the member's comments are made solely to exercise or protect private rights and are not expressed as a member of the Board. Every effort shall be made by such member to avoid the possible influence of fellow Board members and the appearance of impropriety from the point of view of the general public. While not required, any member subject to disqualification is encouraged to leave the hearing room during the pendency of the application and, if the member wishes to exercise his or her right to appear as an interested party, while not required, the member is encouraged to engage counsel and appear through such counsel.

**4:3-5. Disclosure of Possible Conflicts; Waiver by Parties.** Where conflict is only possible and not probable by virtue of involving, either directly or indirectly, any personal or financial interest or involvement, such conflict or appearance of conflict need not necessarily result in a disqualification but should be disclosed. For purposes of illustration, prior dealings and friendships should be disclosed to the Board attorney so that disqualification can be considered on an informed basis. Disclosure of interest is necessary in order to judge whether a particular interest or involvement warrants disqualification or is too remote and speculative so as not to warrant disqualification. Concern for the impartial exercise of authority, in appearance as well as in fact, requires that where a member of the Board must disqualify himself or herself in a matter because of a conflict of interest, the disqualification is absolute and cannot be waived. However, if a conflict is only potential and is disclosed, the Board may reasonably find that a particular interest is too remote or speculative to warrant disqualification. The Board Attorney shall be

consulted in each such case. In all cases, Board members shall disclose to the Board attorney any and all potential interests and/or involvements that could possibly lead to an actual or an appearance of a conflict so that the Board attorney can render advice to the Board member. And, Board members shall make disclosure to the Board attorney as soon as they recognize the issue, whether that is upon review of an application, commencement of a hearing, or at any time during the hearing. Whenever the Board is called upon to determine that a potential conflict should not result in disqualification, the affected Board member shall disclose the nature of the relationship to the Board and shall satisfy the Board that the relationship would not in any way influence his or her decision and would not reasonably be interpreted by a member of the public to show that the situation had the likely capacity to tempt the Board member to depart from his or her sworn public duty.

**4:3-6. Remedy.** When a member fails to disqualify himself or herself where the circumstances require disqualification, any interested party or any other Board member may move the Board for an order or determination that such member is or was disqualified to act and may, even after decision, seek the vacation of the decision and a rehearing or other appropriate relief. The motion shall contain a statement of the facts upon which it is based, and the Board may thereupon hold a hearing on the matter or take whatever action it may deem appropriate.

## **PART V. MISCELLANEOUS MATTERS.**

### **Rule 5:1. Fees**

**5:1-1. Application Fees.** No application shall be considered which is not accompanied by an application fee in accordance with the schedule of administrative fees for development applications, as amended and in effect at the time application is made.

**5:1-2. Escrow Deposits for Professional Services.** The Board may refuse to process and/or hear an application and/or to adopt a resolution containing the decision on the application where an applicant has failed to comply with the applicable local ordinance or statutory requirements for the payment of escrow deposits toward anticipated municipal expenses for professional services.

### **Rule 5:2. Payment of Taxes.**

**5:2-1. Proof of Payment; Alternative Agreement.** The applicant, at the time of filing the application for development, shall file with the Board a certification of the Tax Collector that municipal taxes and/or assessments have been paid. In the event that taxes and/or assessments on the property affected by the application for development are unpaid, the applicant shall submit, in lieu of the certificate of payment of taxes and/or assessments, a written request that the Board take action, which request shall include a stipulation that any approval shall be subject to the payment of taxes and/or assessments and the Board may suspend post-approval execution and other action until such time as taxes and assessments are paid, subject to applicable law and ordinance.

### **Rule 5:3. Purpose and Source of Authority.**

**5:3-1. Purpose and Source of Authority of Rules.** The within rules are supplementary to the provisions of the Township ordinances as they relate to the Board and are adopted pursuant to N.J.S.A. 40:55D-8a which provides that the Board shall adopt and may amend reasonable rules and regulations not inconsistent with the MLUL or with any applicable ordinances for the administration or its functions, powers and duties and N.J.S.A. 40:55D-10b which provides that every municipal agency shall make rules governing hearings held on applications for development.

### **Rule 5:4. Amendments.**

**5:4-1. Amendments to the Rules.** The Board may, from time to time, amend any part or parts of these rules and regulations at any regular meeting, provided notice of the consideration of any such

amendment has been given in writing to each member of the Board at least three (3) days prior to such meeting. In no case, however, shall any rule, as amended, be applicable to any action commenced prior to the adoption of such amendment, where the application thereof would result in surprise, hardship or injustice to the applicant or any interested parties.

**Rule 5:5. Relaxation of Rules.**

**5:5-1. Where Rules May Be Relaxed.** For good cause shown, or where the strict application of any rule would cause injustice, the Board may relax the requirement of any rule, except where the provision(s) of the rule at issue are non-waivable statutory requirements.

**Rule 5:6. Objections.**

**5:6-1. Objections to Rule Violations.** Anyone and/or any entity who/which objects to any action taken and/or not taken by the Board on the basis of violation of any part or parts of these rules and regulations must present the objection(s) to the Board prior to the Board taking action on the application. Failure to present the objection(s) prior to the Board taking action on the application shall be deemed a waiver of said objection(s).

**Rule 5:7. Severability.**

**5:7-1. Severability.** The various parts, sections, sentences and clauses of these rules and regulations are hereby declared to be severable. If any part, section, sentences and/or clause is adjudged to be unconstitutional or otherwise invalid by a court of competent jurisdiction, the remainder of the rules and regulations shall not be affected thereby and shall remain in full force and effect.