

BERNARDS TOWNSHIP

ZONING BOARD OF ADJUSTMENT

MINUTES v3
Regular Meeting
April 7, 2021

CALL TO ORDER

Chairman Breslin called the meeting to order at 7:34 PM.

FLAG SALUTE

OPEN PUBLIC MEETINGS STATEMENT – Chairman Breslin read the following statement:

"In accordance with the requirements of the Open Public Meetings Law, notice of this meeting of the Board of Adjustment of the Township of Bernards was posted on the bulletin Board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, New Jersey, was sent to the Bernardsville News, Whippany, NJ, and the Courier News, Bridgewater, NJ, and was filed with the Township Clerk, all on January 7, 2021 and was electronically mailed to all those people who have requested individual notice.

The following procedure has been adopted by the Bernards Township Board of Adjustment. There will be no new cases heard after 10:00 PM and no new witnesses or testimony heard after 10:30 PM.

ROLL CALL:

Members Present: Baumann, Breslin, Cambria, Genirs, Kraus, Pavlosky, Pochtar, Tancredi
Members Absent: Agarwal
Also Present: Board Attorneys, Steven K. Warner, Esq., Amanda C. Wolfe, Esq.; Township/Board Planner, David Schley, PP, AICP; Board Engineer, Thomas Quinn, PE, CME; Board Secretary, Cyndi Kiefer

On motion by Ms. Genirs and seconded by Mr. Kraus, all in favor and carried, the absence of Mr. Agarwal was excused.

APPROVAL OF MINUTES

March 3, 2021 – Regular Session – On motion by Ms. Pochtar, seconded by Mr. Cambria, all eligible in favor and carried, the minutes were adopted as drafted.

March 11, 2021 – Special Session - On motion by Ms. Genirs, seconded by Mr. Cambria, all eligible in favor and carried, the minutes were adopted as drafted. Abstention: Breslin

APPROVAL OF RESOLUTIONS

[Roti, Joseph S. & Lori Scerbo](#); Block 11102, Lot 1; 10 Pacer Court; ZB21-002 (approved) – Mr. Tancredi moved approval of the resolution as drafted. Mr. Kraus seconded.

Roll call: Aye: Baumann, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi
Nay: NONE
Abstain: Pavlosky (not eligible)

Motion carried.

[Rosenblatt, Marc & Rachel](#); Block 5001, Lot 21; 30 Cameron Court; ZB21-006 (approved) – Ms. Baumann moved approval of the resolution as drafted. Ms. Pochtar seconded.

Roll call: Aye: Baumann, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi
Nay: NONE
Abstain: Pavlosky (not eligible)

Motion carried.

Silver Living LLC; Block 1607, Lot 2; 14 North Maple Avenue; ZB20-015 (denied) – Mr. Kraus moved approval of the resolution as drafted. Ms. Baumann seconded.

Roll call: Aye: Baumann, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi
Nay: NONE
Abstain: Pavlosky (not eligible)

Motion carried.

Burcat, Joseph & Adrienne; Block 2701, Lot 32; 153 Spencer Road; ZB21-005 (approved) – Ms. Genirs moved approval of the resolution as drafted. Mr. Cambria seconded.

Roll call: Aye: Baumann, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi
Nay: NONE
Abstain: Pavlosky (not eligible)

Motion carried.

Verizon Corporate Services Group Inc.; Block 803, Lots 2, 3, 5, 6, 23; 300 North Maple Avenue; ZB21-001 (approved) – The resolution was withdrawn and rescheduled for a vote during the 05/05/2021 meeting.

COMPLETENESS HEARING

Baston 95, LLC; Block 704, Lot 1.01; 95 Morristown Road; Preliminary/Final Site Plan, D(2) Use Variance, Bulk Variances; ZB21-015

Present: Frederick B. Zelle, Esq., Attorney for the Applicant

Mr. Zelle advised the Board that he was present on behalf of the Applicant. Referring to Mr. Schley's memo dated 03/18/2021 which listed eight (8) items that had not been submitted but are required for completeness, he stated that the Applicant would supply seven (7) of the items a minimum and requested a waiver for the last item, a Letter of Interpretation (LOI) from the NJDEP.

Ms. Pochtar moved to grant the submission waiver request and to deem the application *incomplete until the remaining seven (7) items are submitted*. Mr. Cambria seconded.

Roll call: Aye: Baumann, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi
Nay: NONE
Abstain: Pavlosky (not eligible)

Motion carried.

Chairman Breslin recused himself from the following completeness hearing and left the room.

COMPLETENESS HEARING

Kenken LLC; Block 1805, Lot 42; 1 Brownlee Place; Preliminary/Final Site Plan, D(4) Floor-Area Ratio, Bulk Variances; ZB21-014

Mr. Schley advised the Board that the Applicant was unable to appear at this hearing and that two (2) submission waivers are requested: (1) a project report/environmental impact assessment due to the limited scope of the project and the fact that the site is essentially built out/pre-existing and (2) photos of the property in the location of the proposed improvements. He stated that the Applicant plans on submitting the photos at the public hearing and that waiving the report for completeness purposes does not preclude the Board from asking for it during the hearing if it becomes material.

A public hearing date of 06/09/2021 was confirmed and an extension of time to act to 06/30/2021 was previously granted by the Applicant.

Mr. Tancredi moved to grant the submission waiver requests and to deem the application complete. Mr. Kraus seconded.

Roll call: Aye: Baumann, Cambria, Genirs, Kraus, Pavlosky, Pochtar, Tancredi
Nay: NONE

Motion carried.

Chairman Breslin returned to the dais. Mr. Tancredi recused himself from the following application and left the building.

PUBLIC HEARING

Braemar Partners; Block 8201, Lots 22, & 23; 3066-3074 Valley Road; Preliminary/Final Site Plan, D(3) Conditional Use Variance, Bulk Variances; ZB20-027

Present: Jeffrey B. Lehrer, Esq., Attorney for the Applicant
Cliff Stanfield, Principal for the Applicant
Daniel G. Reeves, PE, Engineer for the Applicant
Lauren K. Venin, LLA, RLA, CFM, Landscape Architect for the Applicant
Dan King, AIA, Architect for the Applicant
John Harter, PE, Traffic Engineer for the Applicant
Paul Phillips, PP, AICP, Planner for the Applicant

Jeffrey B. Lehrer, Esq., attorney with the firm of *DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum PC*, Warren, NJ, entered his appearance on behalf of the Applicant. He offered a summary of the relief requested for the proposed project: an 80-unit (100 beds) assisted living facility (ALF) which is a permitted conditional use in the R-6 Residential Zone. Mr. Lehrer stated that the proposal could not comply with two (2) of the conditional use standards (fronting on King George Road and minimum lot frontage/width) since the ALF would be located on Valley Road and there is no property available for purchase to cure the frontage/width deficiencies of the proposed lot (currently two lots which will be merged into one). The Applicant is also requesting an 8-foot-high fence (where 6-feet is permitted) around the Memory Care Courtyard in the rear of the facility to provide a safe environment for those residents. Finally, he stated that three (3) exceptions for lighting and one (1) exception for fire lane width/location are being sought.

Exhibit A-1, a colorized rendering of the front of the proposed facility, undated, prepared by Meyer Design Inc., was entered into evidence.

Mr. Warner stated that notice was sufficient and timely therefore the Board had jurisdiction to hear this application. Mr. Stanfield, Mr. Reeves, Ms. Venin, Mr. King, Mr. Harter, Mr. Phillips, Mr. Schley and Mr. Quinn, were duly sworn.

Cliff Stanfield, principal of *Braemar Partners*, Marietta, GA, described the building, the staffing requirements and the amenities that would be offered, noting that the Applicant would partner with The Arbor Company to conduct the day-to-day operations of the facility. Finally, he testified that after reviewing the memos from the Board's professionals, there is nothing operational that the Applicant could not comply with.

Responding to questions from the Board as to whether this area already has an adequate number of ALF's, Mr. Stanfield asserted that, after conducting a thorough analysis, the Applicant felt that the proposed facility would be a successful addition in part because it would offer options such as one and two-bedroom apartments and multiple on-site restaurants that are not available in sufficient numbers locally.

In response to a question about ambulance service, Mr. Stanfield testified that the Applicant plans to contract with *Atlantic Ambulance* for medical transportation services and agreed to submit the proposal that was provided.

Mr. Stanfield confirmed that Braemar would be required to reserve 10 beds for Medicaid residents in the proposed facility.

Mr. Quinn questioned whether the .5 cars/unit standard for calculating the required number of parking spaces for such a facility would be sufficient for staff, residents and visitors. Noting that this standard had been used without

issue for all the other facilities they had built, Mr. Stanfield opined that there was no reason to believe that there would not be sufficient parking at this facility.

Chairman Breslin opened the hearing to the public, either present or via telephone, for questions of the witness.

Yongmei (Stella) Jia, residing at 3080 Valley Road, a property adjacent to the site, questioned potential traffic and construction issues.

Hearing no further questions, that portion of the hearing was closed.

* * * *The Open Session was recessed at 8:50 PM and reconvened at 8:55 PM.* * * *

Ms. Kiefer conducted a roll call.

Exhibit A-2, a colorized version of Sheet C-301 of plans prepared by Daniel G. Reeves, PE, of Dresdner Robin, last revised 02/22/2021 was entered into evidence.

Daniel G. Reeves, PE, engineer with *Dresdner Robin*, Jersey City, NJ, was accepted by the Board as an expert in the field of civil engineering and gave an overview of the existing topographical conditions on the proposed site. He testified that the building has been situated to the front of property because of the significant environmental constraints in the rear but that it still meets all the setback requirements and is fully compliant in number of stories and in height. In reference to parking, he added that the project meets or exceeds the number of parking stalls, ADA compliant parking stalls and loading spaces required. He then testified that there would be one (1) externally lit sign which would be compliant with the conditional use standards. Finally, he explained that the driveway is serpentine in design because of the topography and since the project would disturb approximately four (4) acres, it is classified as a major development and must meet the appropriate storm water system standards.

A discussion ensued about the location of the loading docks, dumpsters and the noise associated with refuse/recycling pickup and delivery of supplies. The Applicant stipulated to limiting the hours of pickup and delivery to between 10:00 AM and 3:00 PM.

Mr. Lehrer stated that the Applicant would comply with the pertinent comments in Mr. Schley's memo dated 04/01/2021. He then addressed the comments in Mr. Quinn's memo of 04/01/2021 to his satisfaction. In reference to the Environmental Commission's memo dated 03/26/2021, Mr. Lehrer asserted that because of the date the application was deemed complete, it is not required to meet the more stringent standards of the Township's newly revised stormwater management ordinances. He added that even though Norway Spruce is not a native tree in New Jersey, it grows faster and would provide a better buffer. Mr. Lehrer stated additional materials would be supplied to the Liberty Corner First Aid Squad and the Liberty Corner Fire Company to address the concerns presented in their memos dated 03/30/2021 and 03/09/2021 respectively in time to allow for their comments prior to the next meeting.

A discussion ensued about the location of the emergency generator and the impact the noise might have on the neighbors. Mr. Lehrer offered to submit the noise specifications for review prior to the next meeting.

A discussion ensued about the exception for the width of the fire lane (24 feet where a minimum of 25 feet is required). Mr. Reeves testified that he would submit further documentation for review prior to the next meeting. In reference to the fire lane being located closer than the required minimum of 20 feet from the structure, Mr. Schley noted that the Board had approved a similar situation in a previous application.

Chairman Breslin opened the hearing to the public either present or via telephone, for questions of the witness.

In response to a question from Todd Edelstein, 172 Riverside Drive, Mr. Stanfield testified that a maximum of 15 employees would be working during any one shift.

Hearing nothing further, that portion of the hearing was closed.

Exhibit A-3, a colorized version of Sheet L-601 of landscape plans prepared by Mark A. Vizzini, LLA, of Dresdner Robin last revised 02/22/2021, was entered into evidence.

Lauren K. Venin, LLA, RLA, CFM, landscape architect with the firm of *Dresdner Robin*, Jersey City, NJ, was accepted by the Board as an expert in the field of landscape architecture. Noting that **Exhibit A-3** is focused on the buffering that will be provided for the neighbors, she described the various plantings and the reasons for their use.

Exhibit A-4, a colorized "Landscape Sections Exhibit" (Sheet L601A) prepared by Mark A. Vizzini, LLA of Dresdner Robin last revised 03/22/2021 was entered into evidence. Ms. Venin used this exhibit which illustrated the elevations of the building, drive aisle and Valley Road looking towards the easterly adjacent property and then towards the westerly adjacent property, to show the elevation of the light poles noting that if the poles were placed at the required spacing, there would be too much light. The lights would come on at dusk, then dim from 10:00 PM to dawn, a schedule which could be adjusted as needed. She discussed the requested other exceptions for maximum illumination in residential vehicular and sidewalk areas, opining that the higher levels requested would be more appropriate for those who would be driving or walking at night. Ms. Venin testified that the lighting for the sign would cause no disruption to drivers on Valley Road. Referring to a comment in Mr. Schley's memo, she stated that there would be no lights in the buffer areas and that the location of drainage improvements in the buffer area would not in any way inhibit the provision of adequate screening along the adjoining residential properties. She stipulated to the remainder of the comments under her purview in Mr. Schley's and Mr. Quinn's memos.

Again using **Exhibit A-4**, Ms. Venin testified that the headlights from the cars driving east and west along the serpentine driveway would not be seen from the two (2) adjacent residential properties because those lights will fall below the grade of those residences. Once cars get to the same grade (close to Valley Road), the proposed landscape buffering would screen the headlights from shining onto those properties. After substantial discussion about the potential impact of the lighting on the adjacent residences, Mr. Lehrer stipulated to the inspection by a landscape committee upon completion of the project. In addition, he stipulated that the owners of the two adjacent properties would be notified so that they can attend the inspection and voice any concerns.

Chairman Breslin opened the hearing to the public, either present or via telephone, for questions of the witness.

Yongmei (Stella) Jia, residing at 3080 Valley Road, asked if there would be any additional lighting around the holidays or special days. Mr. Stanfield responded that around Christmas there could be some "tasteful" holiday lights.

Xiaojun Steve Lu, residing at 3080 Valley Road, asked for confirmation that the proposed building would be lower than Valley Road and the adjacent residences. Ms. Venin confirmed that it would be.

Hearing no further questions, that portion of the hearing was closed.

Chairman Breslin stated that the application would be carried to the 05/13/2021 meeting *with no further notice required* and Mr. Lehrer agreed to email an extension of time to act through 05/31/2021 to Ms. Kiefer.

COMMENTS FROM MEMBERS OR STAFF – Chairman Breslin cancelled the 04/15/2021 special meeting.

ADJOURN

Moved by Mr. Kraus, seconded by Ms. Genirs, all in favor and carried, the meeting was adjourned at 11:20 PM.

Respectfully submitted,

Cyndi Kiefer, Secretary
Zoning Board of Adjustment

Adopted as drafted 05-05-2021

04/20/2021 dsswaw

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**JOSEPH S. ROTI and LORI SCERBO-ROTI
Case No. ZB21-002**

RESOLUTION

WHEREAS, **JOSEPH S. ROTI and LORI SCERBO-ROTI** (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”), for the following variance relief, in connection with the construction of a 12 foot by 18 foot shed and an existing 6 foot high decorative black aluminum fence, both of which are located in the front yard (along Rickey Lane), on property identified as Block 11102, Lot 1 on the Tax Map, more commonly known as 10 Pacer Court (the “Property”):

1. A variance for the location of an accessory building (shed) in the front-yard (along Rickey Lane), whereas accessory buildings shall not be located in a front yard, pursuant to Section 21-16.1.b of the Land Development Ordinance; and
2. A variance for an existing six (6) foot high decorative fence located in the front yard (along Rickey Lane), whereas fences may be in the front yard, provided that they shall not exceed four (4) feet in height, pursuant to Section 21-16.2.a of the Land Development Ordinance; and

WHEREAS, a public hearing on notice was held on such application on March 3, 2021, at which time interested citizens were afforded an opportunity to appear and be heard; and

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

1. The Board reviewed the application and deemed it to be complete.
2. The Property is a triangular, corner lot, containing front yards along both Pacer Court (the “primary” front yard) and Rickey Lane (the “secondary” front yard).
3. The requested relief for the front-yard setback and fence height deviations is

governed by the criteria of N.J.S.A. 40:55D-70(c).

4. The Property is presently improved with a two-story, single-family residential dwelling, porch, deck, inground pool with surround, paver patio with pergola, and paved driveway.

5. The Applicants' proposal is depicted on a Survey prepared by Dana J. Behre, P.L.S., dated November 2, 1995, unrevised, same consisting of one (1) sheet. The Applicants also submitted a compendium of five (5) photographs.

6. David Schley, P.P., A.I.C.P, the Board Planner, and Sam Koutsouris, P.E., the Substitute Board Engineer, both were duly sworn according to law.

7. Joseph S. Roti, one of the Applicants, having an address of 10 Pacer Court, was duly sworn according to law. He described the Property and explained that the only portion of the Property that can be improved is the section of the lot along Rickey Lane and technically constitutes a front yard. Mr. Roti further explained that the Applicants are seeking variance relief for the existing 6-foot-high pool fence and the proposed 12 foot by 18 foot storage shed. He testified that the proposed shed will be set back 70 feet from Rickey Lane, 135 feet from the existing pool fence, and approximately 262 feet from the existing dwelling.

8. On questioning, Mr. Roti testified that he had taken the photographs submitted with the application materials in December of 2020 and that same constitute an accurate depiction of the Property as it presently exists. On further questioning, Mr. Roti testified that the proposed shed is approximately ten (10) feet in height and likely cannot be seen from Rickey Lane, given the existing significantly wooded area. Mr. Roti explained that he intends to plant additional landscaping to make the Property more aesthetically pleasing. He further explained that the shed cannot be relocated to the rear of the dwelling, because the septic tank, pump tank, and leach field are located in the rear yard, and that, even if there were space for the shed, which there is not, the

topography of the rear yard is such that the Applicants would have to import soil onto the Property.

9. On questioning as to tree removal, Mr. Roti testified that the Applicants intend to remove a few high weeds, but no trees. He explained that the proposed location for the shed is relatively level and, therefore, will not require the importation of soil or cause significant soil disturbance. On questioning, Mr. Roti testified that the shed will be used for storage and will not have water or electricity. On questioning as to the appearance of the shed, Mr. Roti explained that the Applicants submitted a specification sheet with a rendering of the shed. He further explained that the shed will be located approximately 262 feet from the dwelling and that the front of the shed will face the dwelling.

10. No member of the public commented on, or objected to, the Applicants' proposal.

DECISION

11. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicants have satisfied their burden of proving an entitlement to the requested variance relief for the location of the proposed accessory structure in the front yard, as well as the continuation of the existing nonconforming fence, pursuant to both N.J.S.A. 40:55D-70(c)(1) and (c)(2).

12. As to the positive criteria for the "c(1)" or "hardship" variance for the requested relief, the Board finds that, by reason of exceptional topographic conditions and physical features uniquely affecting the Property, the strict application of the zoning regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the Applicants. The Board finds that the exceptionally unique physical features affecting the Property include the layout and configuration of Property, particularly its irregular shape, frontage on both Pacer Court and Rickey Lane, the location of the septic pumps and leach field, and the steep slopes. In this regard, given the multiple frontages, the Board recognizes that 90% of the Property

constitutes a front yard and that the proposed improvements are not in the “primary” front yard along Pacer Court, but rather the “secondary” front yard along Rickey Lane. Given the limited conforming areas in which the shed and fence could be located, the Board determines that the requested variance from such strict application of the regulations is warranted so as to relieve the Applicants from such exceptional difficulties or undue hardship. As such, the Board finds that the Applicants have satisfied the positive criteria for variance relief pursuant to N.J.S.A. 40:55D-70(c)(1).

13. As to the positive criteria for “c(2)” or “flexible c” variance relief, the Board finds that the Applicants have satisfied their burden of demonstrating that the purposes of the Municipal Land Use Law will be advanced by the requested deviations from the zoning requirements and that the benefits to be derived therefrom will substantially outweigh any detriments associated therewith. The Board notes that if the portion of the Property along Rickey Lane were considered a side yard, rather than a “secondary” front yard, the Applicant’s shed and fence would not require variance relief. The Board further notes that the view of the Property from Rickey Lane is significantly obscured by the existing mature vegetation such that it will be difficult for passersby to observe the proposed shed and fencing. The Board also recognizes that the proposed shed is located such that it is a significant distance from the nearest neighboring dwelling, whereas placing the shed in a conforming location would result in the shed being located closer to the neighbors. As to the fence height, the Board recognizes that the fence is approximately 217 feet from Rickey Lane, surrounds an inground pool and that the increased height of the fence will provide additional safety benefits both to the Applicants and their adjacent neighbors. As such, the Board finds that the proposal promotes a desirable visual environment, and otherwise promotes the general welfare. The Board further finds that the benefits of the proposal substantially outweigh the relatively

modest detriment associated therewith, particularly given the stipulated to conditions set forth below. As such, the Board finds that the Applicants have satisfied the positive criteria for variance relief pursuant to N.J.S.A. 40:55D-70(c)(2).

14. As to the negative criteria required for variance relief pursuant to both subsections c(1) and c(2), the Board finds that the Applicants have demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the Master Plan and Zoning Ordinance. As to the substantial detriment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal will be in character with the existing neighborhood and will not have a negative impact on the surrounding properties. In this regard, the Board recognizes that the shed and associated improvements should be sufficiently screened by the existing and proposed landscaping, and that the conditions stipulated to by the Applicants should further reduce the detrimental impact of the proposed improvements on adjacent properties. The Board also notes, in this regard, that no member of the public objected to the Applicants' proposal. As to the substantial impairment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal is not inconsistent with the Master Plan or Zoning Ordinance, particularly since sheds and fences are permitted accessory structures. The Board finds in this regard that the requested deviations are relatively modest in nature and certainly do not rise to the level of constituting a rezoning of the Property. As such, the Board finds that the Applicants have satisfied the negative criteria for variance relief pursuant to both N.J.S.A. 40:55D-70(c)(1) and (c)(2).

15. Based upon the foregoing, the Board finds that the Applicants have demonstrated both the positive and negative criteria for the requested bulk variance relief pursuant to both of the alternative bases for bulk variance relief set forth in N.J.S.A. 40:55D-70(c)(1) and (c)(2).

WHEREAS, the Board took action on this application at its meeting on March 3, 2021, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 7th day of April, 2021, that the application of **JOSEPH S. ROTI and LORI-SCERBO-ROTI**, for variance relief, as aforesaid, be and is hereby granted, subject to the following conditions:

- (1) The Applicants shall post sufficient funds with the Township to satisfy any deficiency in the Applicants' escrow account;
- (2) The Applicants shall pay all outstanding property taxes and other municipal obligations prior to issuance of any zoning or building permits;
- (3) The Applicants shall not remove any trees in connection with the proposed construction or, in the alternative, the Applicants shall submit a tree protection, removal and replacement plan, same to be subject to the review and approval of the Township Engineering Department prior to any land disturbance;
- (4) The proposed shed shall be consistent with the shed depicted on the application materials and testified to by the Applicant;
- (5) The exterior of the proposed shed shall be substantially similar in architectural design, materials, and color to the exterior of the existing single-family dwelling;
- (6) The Applicants shall install landscaping around the proposed shed to soften the view of same from Rickey Lane and Pacer Court, such landscaping to be subject to the review and approval of the Township Planner;
- (7) The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, including, but not limited to, the Resolution of approval in case no. ZB16-021, dated January 4, 2017, to the extent same are not inconsistent with the terms and conditions set forth herein;
- (8) The Applicants shall comply with all Federal, State, County and Township statutes, ordinances, rules, regulations and requirements affecting development in the Township, County and State; and
- (9) Pursuant to Section 21-5.10 of the Land Development Ordinance, the variances

granted herein shall expire unless such construction or alteration permitted by the variance has actually commenced within one year of the date of this Resolution.

ROLL CALL VOTE:

Those in Favor: Bauman, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi

Those Opposed: NONE

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting of April 7, 2021.



Cyndi Kiefer, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: April 7, 2021

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**MARC and RACHEL ROSENBLATT
Case No. ZB21-006**

RESOLUTION

WHEREAS, **MARC and RACHEL ROSENBLATT** (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”), for the following variance relief in connection with (1) the construction of an irregularly shaped, 871 square foot inground swimming pool/spa with adjoining patio to the rear of the existing dwelling and (2) the reconstruction/expansion of the existing driveway to include a parking area in front of the dwelling, same to be located on property identified as Block 5001, Lot 21 on the Tax Map, more commonly known as 30 Cameron Court (the “Property”):

1. A variance for a proposed lot coverage of 15.46%, whereas the existing lot coverage is 11.43%, and the maximum permitted lot coverage in the R-4 (1 acre) Residential Zone is 15%, pursuant to Section 21-15.1.d.1 and Table 501 of the Land Development Ordinance; and
2. A variance to locate an in-ground swimming pool such that it is not behind the rear building line of an adjacent dwelling, in violation of Section 21-18.1 of the Land Development Ordinance¹; and

WHEREAS, a public hearing on notice was held on such application on March 3, 2021, at which time interested citizens were afforded an opportunity to appear and be heard; and

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

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

¹ The Applicants subsequently modified their proposal such that the proposed pool would be located to the rear of the adjacent dwelling on Lot 20 (57 Annin Road), thereby eliminating the need for the requested relief.

2. The Property is an irregularly shaped, narrow, through lot, having frontage on both Cameron Court and Annin Road. The Property is presently improved with a two-story, single-family residential dwelling, wood deck, and asphalt driveway. Of note, a 354 square foot portion of the Cameron Court cul-de-sac is located within a temporary easement on the Property.

3. The Applicants propose to construct an irregularly shaped, 871 square foot inground swimming pool/spa with an adjoining 958 square foot patio to the rear of the existing dwelling. The Applicants also propose to reconstruct/expand the existing driveway to include a parking area in front of the dwelling.

4. The Applicants' proposal is depicted on Engineering Plans prepared by David E. Fantina, P.E., dated December 28, 2020, last revised January 18, 2021, same consisting of five (5) sheets. The Applicants also submitted a Survey prepared by John C. Ritt, P.L.S., dated July 25, 2012, unrevised, same consisting of one (1) sheet and a compendium of two (2) photographs and (2) renderings of the Property and the proposed improvements.

5. The requested variance relief is governed by the criteria of N.J.S.A. 40:55D-70(c).

6. David Schley, P.P., A.I.C.P, the Board Planner, and Sam Koutsouris, P.E., the Substitute Board Engineer, both were duly sworn according to law.

7. Frederick Zelley, Esq., of Bisogno, Loeffler and Zelley, P.C., entered his appearance on behalf of the Applicants. Mr. Zelley advised that the Applicants had modified their proposal, such that the proposed pool is now located in a conforming location. He explained that the Applicants are now only seeking variance relief for the proposed lot coverage.

8. Marc Rosenblatt, one of the Applicants, having an address of 30 Cameron Court, was duly sworn according to law. He explained that he and his wife reside at the Property with their two children. Mr. Rosenblatt testified that the Applicants are seeking approval to install a

pool with patio surround in the rear yard of their Property. He further testified that the Applicants are also proposing to reconstruct the current driveway and install additional landscaping.

9. On questioning about the driveway reconstruction, Mr. Rosenblatt explained that the current driveway is very narrow, with a steep hill on one side and a retaining wall on the other side. He further explained that, as a result of the current design, motorists often veer off of the driveway. Mr. Rosenblatt testified that the new driveway design includes a pull off area to accommodate additional off-street parking, and a turnaround area.

10. On questioning as to whether any additional lighting is proposed for the pool area, Mr. Rosenblatt testified that the Applicants are planning to install modest lighting, but that same will be downward directed and/or appropriately shielded so as to eliminate light spillage onto the adjacent properties. On questioning as to whether the Applicants had spoken to their neighbors, Mr. Rosenblatt testified that they had done so and that they had not received any objections. He explained that two of the most affected neighbors also have pools. On questioning, he contended that the proposed pool would not render the Property out of character with the existing neighborhood.

11. David E. Fantina, P.E., having a business address of 15 Sunset Drive, Bernardsville, New Jersey, was duly sworn according to law, provided his qualifications, and was accepted by the Board as an expert in the field of civil engineering. Mr. Fantina described the existing and proposed conditions and testified that the Property is not encumbered by wetlands, open waters, or other environmental constraints. He confirmed that the Applicants had revised their proposal so as to relocate the pool to a conforming location such that the originally requested pool location variance relief is no longer necessary. Mr. Fantina explained that the Applicants are also reconfiguring their driveway, which is currently rutted and in disrepair, to provide additional off-

street parking and a turnaround area.

12. Mr. Fantina testified that the Applicant is proposing a lot coverage of 15.46%, which is 281 square feet greater than the permitted lot coverage of 15%.

13. Mr. Fantina explained that a 354 square foot portion of the Cameron Court cul-de-sac is located on the Property, and that if the same were not present, the Applicant's proposal would not require variance relief.

14. Mr. Fantina further explained that, while the pool itself increases the proposed coverage, pool water surface is stormwater neutral and that, if the proposed pool water surface (871 square feet) were not considered impervious coverage, the Applicants' proposal would not require variance relief.

15. Mr. Fantina further contended that the proposed excess coverage is de minimis.

16. On discussion of the proposed stormwater management system, Mr. Fantina testified that the pool will be located in a fill area and that the Applicants are proposing to install two drywells – one in the front of the Property and one in the rear of the Property – to capture stormwater runoff associated with the driveway and the pool and pool surround, respectively. On questioning by the Board Engineer, the Applicants stipulated, as a condition of approval, to working with the Engineering Department to modify the proposed stormwater management measures, same to be subject to its review and approval. On questioning as to whether the proposal would result in additional runoff onto the adjacent properties, Mr. Fantina testified that it would not and that the stormwater management measures are designed to capture the increased runoff. On questioning as to whether any tree removal is proposed, Mr. Fantina advised that trees are being removed in the rear of the Property and the Applicants stipulated, as a condition of approval, to complying with the tree removal and replacement requirements.

17. On discussion of the March 1, 2021 Review Memorandum prepared by the Board Planner, Mr. Schley, the Applicants stipulated, as a condition of approval, to complying with all of the comments and recommendations set forth therein. The Applicants further stipulated to complying with the comments and recommendations set forth in the February 24, 2021 Review Letter prepared by the Board Engineer, Mr. Quinn, as well as those set forth in the Review Letter submitted by the Bernards Township Environmental Commission.

18. On questioning, Mr. Fantina testified that the existing driveway is approximately 9 feet wide and will be expanded to 12 feet wide. On questioning as to how much impervious coverage is associated with the proposed improvements, Mr. Fantina testified that the driveway would be expanded from 2,798 square feet to 3,350 square feet (an increase of 552 square feet), the pool patio/surround adds 958 square feet, the pool water surface adds 871 square feet, the pool coping adds 164 square feet, and the pool equipment adds 28 square feet of coverage. On questioning, Mr. Fantina testified that the width of the pool surround ranges from 6 to 10 feet.

19. On questioning as to whether the owners of adjacent Lot 22 had sought and obtained variance relief for their pool, Mr. Schley advised that they had and noted that, here, the Property is a conforming size and the requested relief is of a lesser magnitude than the relief requested by the owners of Lot 22. Mr. Schley further advised that, like the Applicants' lot, a portion of the Cameron Court cul-de-sac is located on Lot 22. However, in that case, the exclusion of the coverage associated with the cul-de-sac would not result in a conforming lot coverage, whereas here, if the 354 square feet associated with same was excluded, the Applicants' proposed 2,434 square foot increase in coverage would not require variance relief. On discussion, the Applicants stipulated that, if the cul-de-sac were to be removed, the area would be replaced with grass or another natural, permeable surface.

20. On discussion of the photographs and renderings submitted with the application materials, Mr. Fantina explained that the area between the fire pit and the pool will be pervious, and he confirmed that same was not included in the impervious coverage calculations.

21. William Matuoizzi, having an address of 14 Cedar Creek Drive, questioned whether the Applicants' proposal would result in additional stormwater runoff onto his neighboring property. Mr. Fantina explained that the rear-yard is being regraded, but that the drainage patterns in the front yard will remain the same. He further explained that any increased runoff will be captured by the proposed drywells. Mr. Matuoizzi further questioned how the Applicants would discharge the pool water and whether that would runoff onto his property, and Mr. Fantina advised that, if necessary, the pool water can be discharged into the drywell.

22. No other member of the public commented on, or objected to, the Applicants' proposal.

DECISION

23. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicants have satisfied their burden of proving an entitlement to the requested variance relief for the proposed impervious coverage exceedance, under both of the alternative bases pursuant to N.J.S.A. 40:55D-70(c)(1) and (c)(2).

24. As to the positive criteria for the "c(1)" or "hardship" variance for the requested 281 square feet of excess impervious coverage, the Board finds that, by reason of exceptional topographic conditions and physical features uniquely affecting the Property, the strict application of the zoning regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the Applicants. The Board finds that the exceptionally unique physical features affecting the Property include the layout and configuration of Property,

particularly such that a 354 square foot portion of the Cameron Court cul-de-sac is located within a temporary easement, contributing 0.59% toward the proposed lot coverage. The Board recognizes that if the cul-de-sac were to be excluded from the lot coverage calculation, the proposed lot coverage would be a conforming 14.88% (rather than 15.46% as proposed). Therefore, the Board finds that the requested variance from such strict application of the regulations is warranted, so as to relieve the Applicants from such exceptional difficulties or undue hardship that would be incurred by the Applicants if the zoning regulations were to be strictly enforced. The Board further finds that the hardship that would result from the strict application of the zoning ordinance provision would not be by virtue of a condition that was “self-created” by the Applicants or any predecessor-in-title. As such, the Board finds that the Applicants have satisfied the positive criteria for variance relief pursuant to N.J.S.A. 40:55D-70(c)(1).

25. As to the positive criteria for “c(2)” or “flexible c” variance relief for the excessive lot coverage, the Board finds that the Applicants have satisfied their burden of demonstrating that the purposes of the Municipal Land Use Law will be advanced by the requested deviation from the zoning requirements and that the benefits to be derived therefrom will substantially outweigh any detriments associated therewith. The Board finds that the proposal promotes a desirable visual environment, and otherwise promotes the general welfare. In this regard, the Board recognizes that the Applicants are proposing two drywells that the Applicants’ engineer testified will capture the additional runoff associated with the proposed pool and the reconfigured driveway. Further, the Board finds that the benefits of the proposal substantially outweigh the relatively modest detriment associated therewith, particularly given the stipulated to conditions set forth below, and the fact that the expanded driveway would be safer than the existing narrow driveway which is in poor condition. As such, the Board finds that the Applicants have satisfied the positive criteria pursuant

to N.J.S.A. 40:55D-70(c)(2).

26. As to the negative criteria for all of the requested variance relief, the Board finds that the Applicants have demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the Master Plan and Zoning Ordinance. As to the substantial detriment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal will not be substantially out of character with the existing neighborhood and will not have a substantial negative impact on the surrounding properties. In this regard, the Board finds that the Applicants have demonstrated that the proposed improvements will be sufficiently screened, both by the existing vegetation and the dwelling itself, and that the conditions stipulated to by the Applicants will further alleviate any detrimental impact of the proposed improvements on adjacent properties. The Board also recognizes, in this regard, that no member of the public objected to the Applicants' proposal. As to the substantial impairment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal is not inconsistent with the Master Plan or Zoning Ordinance, particularly since pools are permitted accessory structures. The Board finds in this regard that the requested deviations are relatively modest in nature and certainly do not rise to the level of constituting a rezoning of the Property. As such, the Board finds that the Applicants have satisfied the negative criteria for variance relief pursuant to both N.J.S.A. 40:55D-70(c)(1) and (c)(2).

27. Based upon the foregoing, the Board finds that the Applicants have demonstrated both the positive and negative criteria for the requested lot coverage variance relief under both subsection (c)(1) and subsection (c)(2).

WHEREAS, the Board took action on this application at its meeting on March 3, 2021, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with

N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 7th day of April, 2021, that the application of **MARC and RACHEL ROSENBLATT**, for variance relief, as aforesaid, be and is hereby granted, subject to the following conditions:

- (1) The Applicants shall post sufficient funds with the Township to satisfy any deficiency in the Applicants' escrow account;
- (2) The Applicants shall satisfy all outstanding municipal tax and other municipal obligations to date;
- (3) If the existing Cameron Court cul-de-sac is removed or vacated, the Applicants shall restore the area of the Property previously encumbered by said cul-de-sac to grass or another natural pervious surface;
- (4) The Applicants shall submit a tree protection, removal and replacement plan, same to be subject to the review and approval of the Township Engineering Department prior to any land disturbance;
- (5) Stormwater infiltration measures shall be provided in accordance with Section 21-42.11.b of the Ordinance. The measures shown on the plans shall be subject to further review and approval by the Township Engineering Department prior to the issuance of a construction permit. Perc test results in support of the proposed stormwater infiltration measures shall be provided at that time;
- (6) Soil from the pool excavation shall be removed from the Property unless the Applicants submit a grading plan showing where the soil will be used on the Property, subject to review and approval by the Township Engineering Department prior to any land disturbance;
- (7) Prior to the issuance of a construction permit, the label on the plans that presently specifies a proposed fence height of 54 inches shall be revised to specify a proposed fence height of 48 inches and same shall be subject to the review and approval of the Township Engineering Department;
- (8) The Applicants shall obtain certification from the Somerset-Union Soil Conservation District, same shall be noted on the plans and a copy of said certification shall be submitted to the Township prior to the Applicants initiating construction activities;
- (9) The Applicants shall use the "best management practices" available when

discharging pool water, consistent with the recommendations of the Environmental Commission attached to the March 1, 2021 Review Memorandum of the Township Planner;

- (10) The Applicants shall revise the engineering plans to reference the source of topography shown as the submitted Survey does not contain topographic information and same shall be subject to the review and approval of the Township Engineering Department;
- (11) The Applicants shall submit a revised Grading and Drainage Plan that captures all of the runoff generated by the new impervious surfaces in the rear yard, same to be subject to the review and approval of the Township Engineering Department;
- (12) The Applicants shall revise the engineering plans to include the slope and size of the proposed pipe penetration through the proposed retaining wall from one of the 1 foot by 1 foot inlets adjacent to the spa area as it appears that the shallow depth of the inlet will present a conflict for the pipe penetrating through the retaining wall, and same shall be subject to the review and approval of the Township Engineering Department;
- (13) The Applicants shall provide a minimum cover of 6 inches over the top of the drywell, and same shall be subject to the review and approval of the Township Engineering Department;
- (14) The Applicants shall revise the engineering plans to note that all land grading shall provide a minimum of 2% slope for proper drainage;
- (15) The Applicants shall revise the engineering plans to reflect that the pipe size for the driveway conveyance system is 6 inch pipe throughout, including in the French drain, and same shall be subject to the review and approval of the Township Engineering Department;
- (16) The Applicants shall revise the detail for the PVC Yard Inlet Detail. It is recommended that the stone at the bottom of the inlet extend down to 30 inches to prevent frost heave of the plastic inlet currently depicted and same shall be subject to the review and approval of the Township Engineering Department;
- (17) The Applicants shall revise the engineering plans to note that a soil log and permeability testing shall be required in the drywell area to confirm the adequacy of the in-situ soils and to ensure that the system will comply with the New Jersey Best Management Practices manual regarding separation from groundwater and evacuation time. If the in-situ soils prove to be inadequate for the current design, the system shall be modified in accordance with the recommendations of the Township Engineering Department;
- (18) Any lighting in the pool area shall be downward directed or appropriately

shielded or recessed and shall comply with all applicable ordinance requirements so as not to be a nuisance to adjoining properties;

- (19) The Applicants shall revise the engineering plans to comply with the pool location requirement (Section 21-18.1) as it relates to the dwelling on adjoining lot 20 (57 Annin Road), which requires shifting the proposed pool approximately ten feet to the southeast;
- (20) The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein;
- (21) The Applicants shall comply with all Federal, State, County and Township statutes, ordinances, rules, regulations and requirements affecting development in the Township, County and State; and
- (22) Pursuant to Section 21-5.10 of the Land Development Ordinance, the variances granted herein shall expire unless such construction or alteration permitted by the variance has actually commenced within one year of the date of this Resolution.

ROLL CALL VOTE:

Those in Favor: Bauman, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi

Those Opposed: NONE

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting of April 7, 2021.



Cyndi Kiefer, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: April 7, 2021.

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**SILVER LIVING LLC
Case No. ZB20-015**

RESOLUTION

WHEREAS, **SILVER LIVING, LLC** (the “Applicant”) has applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”), seeking the following variance relief, in connection with the removal of an existing 2.5 story dwelling and replacement of same with a new 2.5 story dwelling with an attached two-car garage, on property identified as Block 1607, Lot 2 on the Township Tax Map, more commonly known as 14 North Maple Avenue (the “Property”):

- (1) A variance for a proposed lot area of 8,416 square feet, whereas the minimum required lot area in the R-7 (1/2 acre) Zone is 21,780 square feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Land Development Ordinance (the “Ordinance”);
- (2) A variance for no improvable lot area, whereas the minimum required improvable lot area is 5,000 square feet in the R-7 Zone, pursuant to Section 21-10.4.b and Table 401-A of the Ordinance;
- (3) A variance for a lot width along North Maple Avenue of 72 feet, whereas the minimum required lot width is 125 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance;
- (4) A variance for a lot width along East Allen Street of 115.89 feet, whereas the minimum required lot width is 156.25 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance;
- (5) A variance for a front-yard setback of approximately 32.6 feet¹ from North Maple Avenue, whereas the minimum required front-yard setback is 40 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance;
- (6) A variance for a front-yard setback of approximately 5.9 feet from East Allen Street, whereas the existing front-yard setback is 8.9 feet, and the

¹ The Applicant subsequently shifted the proposed dwelling closer to North Maple Avenue, thereby reducing the proposed front-yard setback from 32.6 feet to 28 feet.

minimum required front-yard setback is 40 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance;

- (7) A variance for a side-yard setback (west) of 18.7 feet², whereas the existing side-yard setback is 40.6 feet, and the minimum required side-yard setback is 20 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance;
- (8) A variance for a rear-yard setback (south) of approximately 14.1 feet to the deck and 18.5 feet to the dwelling³, whereas the existing rear-yard setback is approximately 28 feet, and the minimum required rear-yard setback is 40 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance; and
- (9) A variance for a proposed lot coverage of 37.4%⁴, whereas the existing lot coverage is 19.3%, and the maximum permitted lot coverage is 20%, pursuant to Section 21-15.1.d.1 and Table 501 of the Ordinance; and

WHEREAS, public hearings on notice were held on this application on October 7, 2020, and March 3, 2021, at which time interested citizens were afforded an opportunity to be heard; and

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

- 1. The Board previously reviewed the application and deemed it complete.
- 2. The Property is a significantly undersized, shallow corner lot at the intersection of North Maple Avenue and East Allen Street.

² The Applicant subsequently shifted the proposed dwelling closer to North Maple Avenue, resulting in an increase of the proposed side-yard setback from 18.7 feet to 22.1 feet, whereas 20 feet is required, thereby eliminating the need for the requested relief.

³ The Applicant subsequently reduced the size of the proposed dwelling, resulting in an increase of the proposed rear-yard setback to the dwelling from 18.5 feet to 23.8 feet.

⁴ The Applicant subsequently modified the proposal to reduce the size of the proposed dwelling and associated improvements, thereby reducing the proposed coverage by a total of 409 square feet, resulting in a reduction of the proposed lot coverage from 37.4% to 32.5%.

3. The Applicant proposes to remove an existing 2.5 story dwelling and to replace same with a new 2.5 story dwelling with an attached two-car garage. The Applicant proposes to retain the existing foundation if feasible.⁵

4. The Applicant submitted a Variance Plan prepared by William G. Hollows, P.E., P.P., P.L.S., dated November 1, 2019, last revised January 25, 2021, same consisting of three (3) sheets and Architectural plans prepared by Douglas G. Battersby, R.A., dated February 24, 2020, last revised January 27, 2021, same consisting of six (6) sheets. The Applicant also submitted a Survey prepared by William G. Hollows, P.E., P.P., P.L.S., dated November 8, 2019, last revised November 15, 2019, same consisting of one (1) sheet and a compendium of six (6) photographs of the Property.

5. The Applicant seeks nine (9) bulk variances, pursuant to N.J.S.A. 40:55D-70(c).

6. David Schley, P.P., A.I.C.P., the Township/Board Planner, and Thomas J. Quinn, P.E., C.M.E., the Board Engineer, were duly sworn according to law.

7. Frederick B. Zelley, Esq., of Bisogno, Loeffler & Zelley, LLC, entered his appearance on behalf of the Applicant. Mr. Zelley described the existing and proposed conditions and summarized the requested variance relief. Mr. Zelley introduced into evidence, as **Exhibit A-1**, a compendium of photographs of the existing dwelling that he had taken on October 7, 2020, and, as **Exhibit A-2**, a compendium of six (6) photographs submitted to the Board with the application materials.

8. Michael Osterman, Esq., of Osterman Law LLC, entered his appearance on behalf of neighboring objector, Kathleen Grant, the owner of 17 East Allen Street, located to the

⁵ The Applicant's initial proposal, which was presented to the Board on October 7, 2020, included retaining a portion of the existing dwelling foundation. However, the Applicant subsequently modified the proposal, such that the proposed dwelling will now be entirely new and will not use any portion of the existing foundation.

immediate northwest of the Property.

9. Marco Scarabaggio, having an address of 32 West 26th Street, Bayonne, New Jersey, was duly sworn according to law. Mr. Scarabaggio testified that he is the principal of the Applicant, Silver Living LLC, and that he purchased the Property in 2019. Referencing Exhibit A-1, Mr. Scarabaggio testified that the existing dwelling is dilapidated and beyond repair, due to years of neglect. Referencing Exhibit A-2, Mr. Scarabaggio explained what he considered to be the significant level of deterioration of the dwelling. On questioning as to whether the Applicant could restore the dwelling, rather than demolish it, Mr. Scarabaggio contended that it could not be restored given the poor condition of the dwelling, the deflection of flooring beams and joists, deterioration of the foundation, the wood rot around the soffits, the extensive roof leaks and the evidence of termite damage. On questioning as to the condition of the exterior of the dwelling, Mr. Scarabaggio explained that the roof has a major opening that the Applicant has been trying to seal but has been unable to do so, given the deterioration of the structure due to years of neglect, as well as weatherization/oxidation. He further explained that a tree had fallen onto the dwelling and destroyed the porch.

10. On questioning, Mr. Scarabaggio confirmed that that all of the photographs submitted with the application, and introduced into evidence, accurately depict the Property as it presently exists.

11. On questioning, Mr. Scarabaggio conceded that a structural engineer had not reviewed the condition of the dwelling and that he was not yet certain whether portions of the foundation could be retained.

12. Mr. Osterman, on behalf of neighboring objector Ms. Grant, questioned the design of the landscape wall. Mr. Scarabaggio advised that the proposed landscape wall will be

constructed of decorative rock or façade stone.

13. Todd Edelstein, having an address of 172 Riverside Drive, questioned whether the Applicant had tested for asbestos and lead paint, and Mr. Scarabaggio advised that no such testing would be conducted, but that air monitoring equipment would be set up during demolition.

14. Douglas B. Battersby, R.A., having an address of 4 Ramapo Valley Road, P.O. Box 370, Oakland, New Jersey, was duly sworn according to law, provided his qualifications, and was accepted by the Board as an expert in the field of architecture. Mr. Battersby described the condition of the existing dwelling and stated that, judging by the materials used and the style of the dwelling, it was probably built in the late 1800's. He opined that, due to the deteriorated condition of the structure, restoring the dwelling, rather than demolishing it, is not feasible. Mr. Battersby testified that the new dwelling would be energy efficient and provide a floor plan with amenities that would appeal to prospective buyers. He opined that, by using a classic center hall colonial layout and architectural detailing, the proposed dwelling will be consistent with the historic character of the neighborhood. Mr. Battersby testified that the two-car garage will be set back to provide off-street parking in the driveway for two additional vehicles, which he opined is a better planning alternative than parking vehicles on the street as the previous owner had done.

15. On discussion of whether the dwelling could be restored, Mr. Battersby explained that the stone piers supporting the porch are not salvageable, because there are a number of missing stones and cracks, and the foundation is only 6 to 8 inches thick and would need to be reinforced with a concrete wall. He further explained that a portion of the northwest corner of the foundation has lime in it, which makes the foundation soft and unsuitable for construction. Mr. Battersby testified that the basement is only 6'6" and current code requires a height of 7 feet. He further testified that the first floor has joists without ledger beams and that utilizing same would require

the Applicant to add additional structural supports. Mr. Battersby explained that the stairs will also have to be rebuilt because they do not provide the proper head clearance and the windows lack window headers and would have to be reframed. He reminded the Board that the first floor has water damage and rot. Mr. Battersby testified that the second floor has significant sagging and the Applicant would have to reinforce all of the joists to accommodate additional weight. He further testified that the attic has leaks and water damage.

16. On questioning as to whether the dwelling should be razed or restored, Mr. Battersby testified that it should be razed in order to comply with the new code and energy requirements. He explained that the dwelling is not insulated and that adding insulation may prevent the water damage from drying out. Mr. Battersby further explained that the configuration of the interior does not meet current demand because the kitchen is small, the first floor is not open, and the existing bedrooms are small. He testified that it would be difficult to insulate the roof of the existing dwelling because the building code requires a ventilation channel and the dwelling has hips, valleys, and dormers, which would make constructing same difficult.

17. Referencing the Architectural plans submitted with the application, Mr. Battersby opined that the proposed dwelling will have a historic element and will be consistent with the existing neighborhood. He explained that the proposed porch will be similar to the existing porch and, as viewed from East Allen Street, will appear to be a classic center hall colonial style dwelling. On questioning as to the prior use of the dwelling, Mr. Battersby testified that the dwelling was designated as permitting two-family occupancy according to the prior tax records, but that only one family actually resided there until recently. He described the proposed construction materials as including circular columns, white fiber cement shingles with black elements, gables with details, double hung windows with grills, and transom windows.

18. Mr. Battersby opined that the Property could accommodate the size of the proposed dwelling because there would still be sufficient outdoor space and greenery. He opined that it is unlikely that a future purchaser/resident would increase the overall coverage lot because, aside from a deck, there are no other impervious items that a buyer would want to install.

19. At the March 3, 2021 hearing, Mr. Zelley advised that, in response to the comments received from the Board and the concerns expressed by the neighboring objector, the Applicant had made changes to the site design and the size of the proposed dwelling.

20. Mr. Battersby, having been previously sworn, testified that the Applicant initially proposed to reuse a portion of the existing foundation, but now proposes to demolish the dwelling and the foundation entirely, so that the Applicant can construct a full-height finished basement. As to the first floor, he explained that the dwelling was reduced in size by a 5-foot-wide strip running from left to right in the dining room, which resulted in the relocation of the butler's pantry and a powder room. As to the second floor, he explained that same 5-foot-wide strip was also removed from the second floor, which reduced the size of the proposed master bedroom and the other proposed bedrooms. As to the third floor/attic, Mr. Battersby explained that the square footage of the attic had been reduced, but that it would maintain the same design elements. He testified that, overall, the Applicant had reduced the dwelling footprint by 292 square feet and reduced the driveway and walkways by 117 square feet, for a total reduction in lot coverage of 409 square feet. Mr. Battersby further testified that the Applicant had also added a rear deck to the proposed dwelling and reduced the size of the garage. He explained that the garage can still accommodate two vehicles, but that one of the spaces is 18 feet in length and the other is 22 feet in length. Mr. Battersby noted that a standard medium sized SUV has a length of 15.5 feet and could be accommodated in either garage space.

21. Mr. Battersby testified that the proposed dwelling will still be a classic center hall colonial with clapboard siding, PVC trim and historic details/profiles. He explained that the proposed dwelling will be similar in architectural style to the existing dwelling, but will utilize modern materials that mimic the historic materials used on the existing dwelling. Mr. Battersby opined that the proposed dwelling will be consistent with the historic nature of the neighborhood.

22. On discussion of the foundation, Mr. Battersby testified that the Applicant determined that it could not be reused, because the Applicant has reduced the size of the dwelling, as well as shifted it such that the existing foundation would need to be rebuilt and reset. He explained that a new foundation would allow the Applicant to better use the basement area. As to the attic, Mr. Battersby testified that same will be accessed by an open stairway and will consist of an open recreational room space, an additional bedroom and bathroom, and mechanical units. He explained that the Applicant does not intend to finish the attic space at this time.

23. On questioning as to whether the existing dwelling could be restored, Mr. Battersby testified that the exterior of the existing dwelling is beyond repair and that the siding, roofing, and trim would need to be replaced. As to the interior, he explained that there are multiple reasons the dwelling cannot be restored, particularly the location of the existing stairs (which limit the potential layout options), the non-conforming construction (i.e., undersized joists), water damage, and the overall poor condition of the structure itself. Mr. Battersby explained that a new dwelling will be more modern and will comply with current building code standards and market demand.

24. The Board entertained significant discussion about whether the proposed attached garage could be either reduced in size or relocated such that it would be a detached garage, similar to the historic character of the area. Mr. Battersby contended that modern purchasers generally prefer an attached garage, and he explained that, if the garage were reduced in size, the master

bedroom suite proposed to be above it also would have to be reduced. Mr. Battersby conceded that reducing the size of the garage would reduce the overall coverage, but he opined that such a reduction would result in the proposed dwelling being less desirable to potential purchasers. However, on questioning, Mr. Battersby conceded that constructing a smaller dwelling would not render the project economically futile.

25. Mr. Osterman, on behalf of the neighboring objector, questioned the size of the dwelling and the number of bedrooms in the proposed dwelling as compared to the existing dwelling, whether the proposed dwelling would have more mass than the existing dwelling and the distance between the dwelling and the historic stone cemetery wall (30 feet).

26. William G. Hollows, P.E., P.P., P.L.S., having a business address of 192 Central Avenue, Stirling, New Jersey, was duly sworn according to law, provided his qualifications, and was accepted, without objection from Mr. Osterman, by the Board as an expert in the field of civil engineering. Mr. Hollows confirmed that the existing dwelling is 30 feet from the cemetery wall and the proposed dwelling will be 23.8 feet from the wall as measured to the chimney, and 25.8 feet as measured from the dwelling itself. He testified that the distance between the proposed deck and the cemetery wall is 14.6 feet and the distance between the landscape wall and the cemetery wall is 6 feet.

27. The Applicant stipulated, as a condition of approval, to complying with the comments and recommendations set forth in the September 29, 2020 and March 1, 2021 Review Memoranda prepared by the Board Planner, Mr. Schley; the October 5, 2020 and February 24, 2021 Review Letters prepared by the Board Engineer, Mr. Quinn; and the September 20, 2020 and February 24, 2021 Review Memoranda prepared by the Township Environmental Commission.

28. Mr. Hollows described the existing and proposed conditions, as well as the location

of the Property. He introduced into evidence, as Exhibit A-3, a colorized rendering of Sheet 2 of the Plans, depicting the existing conditions, and, as Exhibit A-4, a colorized rendering of Sheet 2 of the Plans, depicting the proposed conditions. Referencing Exhibit A-3, Mr. Hollows described the existing dwelling, the layout of the Property, and the topography. Referencing Exhibit A-4, Mr. Hollows described the location of the proposed two car garage (west side, 22 feet from adjacent Lot 3), the proposed driveway, the covered stoop on East Allen and newly proposed deck.

29. Mr. Hollows summarized the requested relief and explained that a significant number of the deviations are a function of the proposed garage and the location and size of the driveway. On discussion of whether the garage could be reduced in size or converted to a detached garage, Mr. Hollows explained that relocating the garage would require the Applicant to remove additional trees and would result in the garage being closer to the adjacent neighbor. He further explained that the Applicant had made significant efforts to preserve the trees and did not want those efforts to have been futile. Mr. Hollows testified that he may be able to reduce the height of the dwelling by changing the grading.

30. On discussion of whether any aspect of the proposal could be modified to reduce the magnitude of the requested relief, Mr. Hollows testified that the size of the dwelling already has been reduced and the proposed attached garage and driveway will allow for off-street parking (which does not currently exist), and he opined that the proposal is a better planning alternative than what presently exists. On questioning as to whether tree removal would be necessary, Mr. Hollows testified that the Applicant intends to remove the vegetation/trees along North Maple Avenue because they are located in the sight easement, as well as a 24" tree at the southeast corner of the Property near North Maple Avenue.

31. On discussion of Mr. Schley's Review Memoranda, Mr. Hollows stipulated, on

behalf of the Applicant, that the deck will remain an open deck and the trees near the northwest corner of the Property/garage corner will be protected by at least a snow fence (i.e., wooden slats with wires) to ensure that construction materials are not stored next to the trees. On discussion of the September 29, 2021 Review Memorandum prepared by the Environmental Commission, Mr. Hollows testified that he was not aware of any inground tanks and that the Applicant would have to conduct a scan of the Property. He further testified that he did not believe there were any unmarked graves on the Property, but he stipulated that, if any are discovered, the Applicant would address same in accordance with State law.

32. The Board entertained significant discussion as to whether it would be possible for the Applicant to convert the proposed two-car attached garage into a detached one- or two-car garage, and also whether same could be done without impacting the trees that the Applicant intended to preserve. Mr. Hollows explained that the Applicant would have to comply with the requirements as to the distance between buildings (10 feet) and the required accessory structure setbacks (10 feet) and that doing so would further reduce the size of the dwelling, thereby reducing the value of the dwelling. On questioning, Mr. Hollows conceded that the only unique feature affecting the Property is that it is significantly undersized.

33. On cross-examination by Mr. Osterman as to whether a detached garage could be constructed and, if so, whether the trees could be preserved, Mr. Hollows responded that he would have to look into it. Mr. Hollows conceded that a one-story, single-car detached garage would appear less massive than the proposed two-story, two-car attached garage. Mr. Osterman questioned the height of the proposed landscape wall and Mr. Hollows testified that it is shown on the plans as being 3.5 feet, but that he believed he could reduce the height by one-half foot. On questioning, Mr. Hollows advised that soil would be removed from the Property. On questioning

as to whether the Applicant would screen for historical artifacts, Mr. Hollows advised that the Applicant had stipulated to complying with the conditions set forth in the Environmental Commission's Review Letter regarding unmarked slave graves.

34. Dennis Milton, having an address of 20 North Maple Avenue, questioned whether the proposal would increase stormwater runoff onto his property, and Mr. Hollows advised that the Applicant is installing a stormwater management system to collect the additional stormwater runoff associated with the proposal. He further advised that, based on the topography, he did not believe that the stormwater runoff patterns would change as a result of the proposed development.

35. Mr. Osterman called his client, Kathleen Grant, having an address of 17 East Allen Street, who was duly sworn according to law, to testify as a fact witness. Ms. Grant testified regarding the size of the proposed dwelling and its anticipated impact on her property. She testified that she takes great care to preserve the historic nature of her property and that the proposed dwelling will not be consistent therewith.

36. Mr. Osterman introduced into evidence, as **Exhibit O-1**, a copy of the 2004 approval Ms. Grant obtained. Ms. Grant explained that she had been before the Board seeking variance approval to increase the proposed coverage on her property from 28.2% to 33%, but that she had only been approved for an increase from 28.2% coverage to 29.1% coverage. She further explained that the Board ultimately requested that she reduce the proposed increase in coverage from 380 square feet to 98 square feet – a significant reduction – that resulted in the elimination of a proposed porch addition and a requirement that she eliminate the one-foot overhang on the rear second floor of the southerly side of her dwelling. Ms. Grant explained that she also had to consult with the Historic Preservation Society and questioned whether the Applicant was obligated to do the same.

37. On cross-examination by Mr. Zelley, Ms. Grant testified that she only has a one-car detached garage with no other off-street parking and that a larger dwelling, particularly one with four or five bedrooms, would require more than one parking space. On further questioning by Mr. Zelley as to the anticipated impact on her property, Ms. Grant testified that, in her opinion, the proposed dwelling will obscure her view, reduce her enjoyment of her own property, and otherwise detract from the historic nature of the Property and the character of the neighborhood.

38. On redirect by Mr. Osterman, Ms. Grant explained that the proposed landscape wall will alter her view of the historic cemetery wall in a very negative way. On cross-examination by Mr. Zelley, Ms. Grant explained that, even if the landscape wall were to be reduced in size or converted to a decorative wall, the wall still would have a detrimental impact on her view and the aesthetics of the overall area because now she would be looking at two walls located close to each other.

39. Dennis Milton, having an address of 20 North Maple Avenue, was duly sworn according to law. Mr. Milton reiterated his concerns about the impact that the Applicant's proposal would have on the volume and rate of stormwater runoff onto his property. He expressed further concern that the proposed dwelling is too large for the lot, particularly given the historic nature of the Property and the area.

40. Ms. Osterman provided a summation on behalf of neighboring objector, Ms. Grant, and contended that the Applicant had not satisfied either the positive or the negative criteria for the requested variance relief. He reminded the Board that the Applicant's proposal would increase the lot coverage by 70% and permit an approximately 5,000 square foot dwelling on a lot that is less than one-fifth of an acre. As such, he contended that the proposal constitutes the overdevelopment of the Property and it will have a detrimental impact on his client's property and

the historic district. Mr. Osterman explained that the proposed dwelling would be 50 to 70 percent larger than the existing dwelling and he contended that it would be out of character with the historic district and the immediate neighborhood, which consists of smaller dwellings on proportionately small lots.

41. Mr. Osterman contended that the proposal was not consistent with the Master Plan, because the Master Plan includes the goals and objectives of retaining and improving an attractive streetscape, protecting the character of the neighborhood, maintaining and enhancing community character, encouraging historic preservation, discouraging the unnecessary destruction of historic resources and, generally, encouraging good planning and conservation of historic sites. Mr. Osterman advised that his client is not against development, but she is against the proposed dwelling as it constitutes overdevelopment and it is inconsistent with the neighborhood and the overall Historic District. He contended that a smaller dwelling with a one-car garage could be constructed, and that same would be more in character with the neighborhood, however the Applicant refused to construct a smaller dwelling solely to maximize his profit at the expense of the immediately adjacent neighbors and the community itself.

42. On summation, Mr. Zelle, the Applicant's counsel, contended that Ms. Grant's objection is simply that the dwelling is too large. He contended that the dwelling is not inconsistent with the neighborhood or the Historic District, and the dwelling will be consistent with the architectural style of the prior dwelling. Mr. Zelle further contended that the proposed dwelling constitutes a better planning alternative than the existing dwelling, which is in poor condition and is not aesthetically pleasing. Mr. Zelle noted that the Applicant had reduced the size of the proposed dwelling from the original proposal, and he noted that the proposed lot coverage had been reduced from 37.4% to 32.5%.

43. Mr. Zelley contended that the Applicant had demonstrated both the positive and negative criteria, under both N.J.S.A. 40:55D-70(c)(1) and (c)(2). He reminded the Board that the Property is significantly undersized and that the lot area is only 40% of what is required in the zone. He contended that the proposal advances the purposes of the Municipal Land Use Law (“MLUL”). Mr. Zelley concluded with the contention that the proposal would not result in substantial detriment to the public good or substantial impairment of the Master Plan or the Zoning Ordinance.

DECISION

44. The Board finds, by a vote of 7 to 0, that the Applicant has failed to prove the positive criteria under either N.J.S.A. 40:55D-70(c)(1) or (c)(2), and also failed to prove the first of the requisite two prongs of the negative criteria. As such, the Board is constrained to deny the application of the development as presented.

45. As in all variance cases, the Applicant bears the burden of proving both the positive and the negative criteria for all of the requisite variance relief. See, Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013); Nash v. Board of Adjustment of Morris Tp., 96 N.J. 97 (1984); Cohen v. Borough of Rumson, 396 N.J. Super. 608, 615 (App. Div. 2007); Kogene Bldg. & Dev. v. Edison Tp., 249 N.J. Super. 445, 449 (App. Div. 1991). Here, the Board finds that the Applicant failed to meet its burden of proof as to four (4) of the eight (8) total bulk variances that relate specifically to the proposed development of the Property, i.e., the two front-yard setback deviations, rear-yard setback deviation and the lot coverage deviation.

Property-Specific Pre-Existing Nonconformities – Positive Criteria for (c)(1) Variance Relief is Satisfied:

46. As to the four (4) property-specific pre-existing nonconformities, specifically the non-conforming lot area, improvable lot area, and two (2) lot width deviations, the Board finds that the Applicant has demonstrated an entitlement to subsection c(1) “undue hardship” relief, and that the undue hardship that would be incurred by the Applicant if the zoning regulations were to be strictly enforced would not be self-created by the Applicant or any predecessor-in-title. The Board further finds that the Applicant is not required to obtain additional adjacent property to reduce the magnitude of these pre-existing non-conforming conditions, since the adjacent properties already are developed. As such, the Board finds that the Applicant has demonstrated an entitlement to the requested bulk variance relief for the pre-existing non-conforming lot area, improvable lot area, and lot widths, pursuant to N.J.S.A. 40:55D-70(c)(1).

Development-Specific Proposed Deviations – Positive Criteria for (c)(1) Variance Relief is Not Satisfied:

47. By contrast, as to the positive criteria for “(c)(1)” or “undue hardship” variance relief for the development-specific proposed deviations, specifically the two (2) front-yard and the rear-yard setback deviations and the excess lot coverage, the Board finds that the Applicant has not satisfied its burden of demonstrating that strict application of the zoning regulations will result in peculiar and exceptional difficulties to, or exceptional and undue hardship upon, it as the owner of the Property, as a result of an exceptional or unique condition of the Property or the dwelling lawfully constructed thereon.

48. A predicate issue for the grant of subsection (c)(1) variance relief is that the Applicant must prove that the need for the variance relief “arises out of” (a) the exceptional narrowness, shallowness or shape of the specific property, (b) unique topographic conditions or physical features uniquely affecting the specific property, or (c) an extraordinary and exceptional

situation uniquely affecting a specific property or the structures existing thereon. The Board recognizes that a variance under subsection c(1) must be grounded in conditions peculiar to the particular lot, as distinguished from other properties in the zone. If all properties in the area are subject to the same hardships, the remedy is through a revision of the general rule of the ordinance by the governing body, not by variance relief from the land use board. See, Beirn v. Morris, 14 N.J. 529, 535-36 (1954). The term "undue hardship" has been variously interpreted, but in Lang v. Zoning Board of Adjustment, 160 N.J. 41, 53, 55-56 (1999), the Court made clear that "undue hardship" refers solely to particular physical conditions of the property as those are described in subsection (c)(1) of the statute, and that it does not refer to personal hardship, financial or otherwise. See, Ten Stary Dom Ptp. v. Mauro, 216 N.J. at 29; Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 590 (2005) and Smith v. Fair Haven Zoning Bd., 335 N.J. Super. 111, 122 (App. Div. 2000), both citing Isko v. Planning Bd. of Tp. of Livingston, 51 N.J. 162, 174 (1968).

49. Here, the Board finds that the Applicant has failed to demonstrate that the hardship is grounded in a condition peculiar to the particular lot, given that many of the neighboring lots are also deficient as to lot area and lot width, and these undersized lots are nevertheless able to sustain smaller sized dwellings without attached two-car garages. The Board further finds that the Applicant has not proven that constructing a smaller dwelling in a conforming, or at least more conforming, location would constitute an undue hardship upon it. In fact, the Board recognizes that the Applicant conceded that a smaller, yet still habitable, dwelling could be situated on the Property with lesser, if any, zoning deviations. Indeed, the Applicant concedes that the only hardship that would be suffered by it if the zoning regulations were to be strictly enforced would be of a personal and financial nature, because the Property would be less marketable and the Applicant would derive less profit on its sale.

Failure to Prove the Positive Criteria for (c)(2) Variance Relief:

50. As to the “positive criteria” for the “c(2)” or “flexible c” variances for all of the requested relief, both the pre-existing property-specific nonconformities and the development-specific proposed zoning deviations, the Board finds that the Applicant has not satisfied its burden of demonstrating that the purposes of the MLUL will be advanced by the requested deviations from the zoning requirements, and that the benefits to be derived therefrom will substantially outweigh any detriments associated therewith. While the Board recognizes that the removal of the existing dwelling, which is in disrepair, provides a modest benefit to the public, the Board does not find that this modest benefit substantially outweighs the detriments associated with the magnitude of the variance relief sought.

51. The Board considers the governing case law standing for the proposition that a c(2) variance request should be denied where only the applicant’s personal interests, rather than the purposes of zoning, would be advanced by the grant of the variance. For example, in Wilson v. Brick Twp. Zoning Bd., 405 N.J. Super. 189, 199 (App.Div.2009), 405 N.J. Super. at 199, the appellate court upheld the denial of a c(2) variance for lot coverage and pool and deck setbacks where only the applicant’s interests would be advanced by the grant of the variance. Similarly, in Loscalzo v. Pini, 228 N.J. Super. 291 (App. Div. 1988), certif. den., 118 N.J. 216 (1989), the appellate court upheld the board’s denial of variances to applicants who had “substantially completed an expensive addition to their building, relying on an invalid permit, where the addition blocked light, air and possible emergency vehicle access to a neighbor and thus advanced none of the purposes of zoning”. Further, in Cicchino v. Berkeley Heights Planning Bd., 237 N.J. Super. 175, 181-83 (App. Div. 1989), the appellate court upheld the planning board’s denial of a proposed subdivision which would have created three (3) non-conforming lots out of two (2) conforming

lots, holding that a c(2) variance would not be appropriate, in light of the Kaufmann decision, since there was no evidence of community benefit from the proposal, and, instead, the variance relief “would primarily advance the purposes of the owners by creating a new building lot and permitting them to construct a new dwelling on it.”

52. The Board considers that, in Kaufmann v. Planning Bd. of Warren Twp., 110 N.J. 551, 560-61 (1988), the Supreme Court recognized that a subsection c(2) variance was intended to affect “a very narrow band of cases in which the standard fell somewhere between the traditional standards of hardship on the one hand, and ‘special reasons’ on the other.” Further, in Kaufman, the Supreme Court was clear that the grant of approval of a c(2) variance must “actually benefit the community in that it represents a better zoning alternative for the property.” Id. at 563 (emphasis added). In the case sub judice, based upon the proofs submitted by the Applicant, the Board concludes that, rather than advancing any benefit to the community, the subject development proposal primarily, if not exclusively, would serve to provide the Applicant with a personal financial benefit.

53. The Board also finds that, given the magnitude of the deviations sought and the proposed mass and scale of the dwelling as compared to the size of the Property, the proposal does not advance the purposes of the MLUL, and, in fact, would have a detrimental impact on the neighborhood and, particularly, the objecting neighbor’s enjoyment of her property. The Board notes that the Applicant failed to prove that a small lot, such as the Property, could support such a significantly large dwelling, and that same would not be out of character with the neighborhood. In fact, the Applicant failed to provide any planning testimony as to the size of the adjacent lots and the dwellings located thereon. The Board further finds that, due to the size and location of the proposed dwelling, the development would, at most, provide only a relatively modest public

benefit, which benefit would not substantially outweigh the relatively significant detriments associated therewith.

54. In sum, the Board finds that the Applicant has failed to demonstrate the positive criteria, pursuant to either N.J.S.A. 40:55D-70(c)(1) and (c)(2), for the development specific proposed zoning deviations, i.e., the two front-yard deviations, the rear-yard deviation and the excessive lot coverage.

The Negative Criteria for “c(1)” and “c(2)” Variance Relief:

55. The Board recognizes that the burden is on the Applicant to prove the negative criteria, just as it is on the Applicant to prove the positive criteria. See, Dallmeyer vs. Lacey Township Bd. of Adjustment, 219 N.J. Super. 134 (Law Div. 1987). As the appellate court stated in Leon N. Weiner vs. Zoning Board of Adjustment, 144 N.J. Super. 509, 516 (App. Div. 1976), certif. den. 73 N.J. 55 (1977), “[i]t was not the burden of the board to find affirmatively that the plan would be substantially impaired (although it did so in the instant case), it was, rather, the burden of the applicant to prove the converse.”

56. The Board recognizes that the “negative criteria” consist of two elements, both of which a variance applicant must prove; that is, that the proposed development can be accomplished (1) without substantial detriment to the public good and (2) without substantially impairing the intent and purpose of the zone plan and zoning ordinance. See, Medici v. BPR Co., 107 N.J. 1, 4 (1987). The former focuses on balancing the positive and negative aspects of a variance request against the purposes of zoning set forth in N.J.S.A. 40:55D-2, whereas the latter is more concerned with establishing the bounds of zoning board action.

57. As to the “negative criteria” for the requested variance relief for the property-specific pre-existing nonconformities, specifically the non-conforming lot area, improvable lot

area, and two lot width deviations, the Board finds that the Applicant has demonstrated that the requested relief 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. In this regard, the Board recognizes that the Property is improved with a single-family dwelling that has existed without detriment to the neighborhood and finds that the continuation of the non-conforming lot area, improvable lot area, and two lot width deviations will not result in substantial detriment to the public good, as long as the proposed dwelling located thereon either is conforming with the Zoning regulations or, alternatively, is not so large and otherwise detrimental from a zoning and planning perspective that it cannot justify the requisite zoning relief. The Board further recognizes that granting the requested property-specific relief, under such circumstances, would not rise to the level of rezoning the Property, such that same would not substantially impair the intent of the Master Plan and Zoning Ordinances. As such, the Board finds that the Applicant can satisfy the negative criteria for the requested lot area, improvable lot area, and two lot width deviations.

58. By contrast, as to the requested variance relief for the development-specific proposed zoning deviations, specifically the two (2) front-yard setback deviations, rear-yard setback deviation and the excessive lot coverage, the Board finds that the Applicant has not demonstrated that the requested relief 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.

The First Prong (Substantial Detriment) of the Negative Criteria is Not Satisfied:

59. The Board recognizes that the focus of the “substantial detriment” prong of the negative criteria is on the impact of the variance on nearby properties. In Medici v. BPR Co., 107

N.J. at 22-23 n.12 (emphasis added), the Supreme Court explained the substantial detriment phrase as follows:

The first prong of the negative criteria [requires] that the variance can be granted “without substantial detriment to the public good.” In this respect the statutory focus is on the variance’s effect on the surrounding properties. The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute “substantial detriment to the public good.”

60. Here, the Board finds that the proposal results in the reduction in the light, air, and open space, and has a substantial negative aesthetic impact on the historic character of the existing neighborhood. In this regard, the Board recognizes, as testified to by Ms. Grant, the neighboring objector, that the proposed lot coverage is increased by 70% and the proposed dwelling itself is 50 to 70% larger than the existing dwelling. Moreover, the Board finds, and, in fact, the Applicant conceded, that the Applicant could reduce the size, mass and scale of the proposed dwelling, and could replace the proposed two-car attached garage with a one-car detached garage, or even a one-car attached garage, and that doing either, let alone all, of the aforementioned would result in less of a detrimental impact on the public good and the historic character of the existing neighborhood.

61. In this regard, the Board notes that a single-story, one-car garage would be less massive and more in character with the architectural style of the historic district and the surrounding neighborhood. Additionally, the Board recognizes that the Applicant conceded that East Allen Street is a very narrow street and that it is already difficult to navigate given the amount of on street parking. The Board finds that the Applicant’s proposal will exacerbate this condition if the purchaser of the Property has multiple vehicles as would be expected with a dwelling of the size proposed by the Applicant, even if the purchaser is afforded the benefit of the two-car garage. The Board recognizes that granting the requested relief could further exacerbate the existing traffic

and parking conditions, potentially creating unsafe conditions not only for the Applicant, but also for the adjacent property owners constrained to use East Allen Street to access their dwellings. As such, the Board finds that the proposal will result in detriment to the public good that, on balance, rises to the level of being substantial. In sum, the Board finds that the Applicant has failed to satisfy the requisite first prong of the negative criteria for the development-specific proposed zoning deviations.

The Second (Substantial Impairment) Prong of the Negative Criteria is Satisfied:

62. The Board recognizes that the focus of the “substantial impairment” prong of the negative criteria is the extent to which a grant of the variance would constitute an arrogation of the governing body and planning board authority. The Supreme Court in Medici v. BPR Co., 107 at 5, has made it clear that municipalities should make zoning decisions by ordinance rather than by variance. The Court stated that “[t]he added requirement that boards of adjustment must reconcile a proposed use variance with the provisions of the master plan and zoning ordinance will reinforce the conviction expressed in [Ward v. Scott, 11 N.J. 117 (1952)], that the negative criteria constitute an essential ‘safeguard’ to prevent the improper exercise of the variance power.” Id. at 22.

63. As to the second prong of the negative criteria, the Board finds that the Applicant has demonstrated that the relief can be granted without substantial impairment of the Master Plan and the Zoning Ordinance. Here, while the Board concurs with the testimony provided by Ms. Grant that the Applicant’s proposal is not entirely consistent with the Master Plan, given the Master Plan goals and objectives of preserving the character of the neighborhood, encouraging historic preservation and the conservation of historic sites, the Board nevertheless finds that the Applicant’s proposal does not rise to the level of substantially impairing the Master Plan or the Zoning Ordinance. The Board finds that the Applicant’s proposal, even given its magnitude in

comparison to the size of the Property, would not constitute a rezoning of the Property. In sum, the Board finds that the Applicant has satisfied the second prong of the negative criteria for both the property-specific pre-existing nonconformities and the development-specific proposed zoning deviations.

64. Based on the foregoing, the Board finds that the Applicant has failed to demonstrate the positive criteria for the development-specific proposed zoning deviations, specifically the requested front- and rear-setback and lot coverage deviations, under either N.J.S.A. 40:55D-70(c)(1) or (c)(2), and the Applicant has further failed to satisfy the first of the two requisite prongs of the negative criteria for such development-specific proposed zoning deviations. As such, the Board is constrained to deny the application for development, since the Applicant was required to prove both the positive and the negative criteria for all of the variance relief associated therewith.

WHEREAS, the Board took action on this application at its meeting on March 3, 2021, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 7th day of April, 2021, that the application of **SILVER LIVING, LLC**, for bulk variance relief, be, and is hereby, **DENIED**.

ROLL CALL VOTE:

Those in Favor: Bauman, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi

Those Opposed: NONE

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting of April 7, 2021.



CYNTHIA KIEFER, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: April 7, 2021

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**JOSEPH and ADRIENNE BURCAT
Case No. ZB21-005**

RESOLUTION

WHEREAS, **JOSEPH and ADRIENNE BURCAT** (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”), for the following variance relief in connection with the construction of (1) an 871 square foot second floor addition on top of the existing first floor, (2) a 480 square foot carport, and (3) an 808 square foot oval-shaped partially inground swimming pool with deck, same to be located on property identified as Block 2701, Lot 32 on the Tax Map, more commonly known as 153 Spencer Road (the “Property”):

1. A variance for a proposed front-yard setback of 75.7 feet to the addition and approximately 81 feet to the proposed carport, whereas the existing front-yard setback is approximately 74 feet, and the minimum required front-yard setback in the R-2 (2 acre) Residential Zone is 100 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Land Development Ordinance;
2. A variance for a proposed side-yard setback (east) of 42 feet to the addition, whereas the existing side-yard setback (east) is 25.2 feet, and the minimum required side-yard setback in the R-2 (2 acre) Residential Zone is 50 feet, pursuant to Section 21-15.1.d.1 and Table 501 of the Land Development Ordinance; and
3. A variance to locate a partially in-ground swimming pool such that it is not behind the rear building line of an adjacent dwelling, in violation of Section 21-18.1 of the Land Development Ordinance; and

WHEREAS, a public hearing on notice was held on such application on March 11, 2021, at which time interested citizens were afforded an opportunity to appear and be heard; and

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

factual findings and conclusions:

1. The Board reviewed the application and deemed it to be complete.
2. The Property is a narrow, undersized, irregularly shaped lot consisting of 1.83 acres, located in the R-2 (2 acre) Residential Zone, with frontage on Spencer Road. It is presently improved with a one story, single-family dwelling, wood deck, wood shed, generator, stone drive, paved drive and associated other improvements.
3. The Applicants propose to construct (1) an approximately 26 foot by 33.5 foot (871 square feet) second floor addition on top of the existing first floor of the existing one-story dwelling; (2) a 20 foot by 24 foot (480 square feet) carport comprised of a gable roof supported by columns, attached to the west side of the dwelling over an existing driveway; and (3) a 21 foot by 43 foot (808 square feet) oval-shaped above ground (partially inground) swimming pool to the rear of the existing dwelling. The second-floor addition includes two bedrooms, a study, a bathroom, and a laundry room. The Applicants also propose to construct an approximately 430 square foot deck to provide access to the pool from the existing deck. The proposed deck will include a 49 square foot hot tub/spa.
4. The proposed pool location requires a variance because it does not comply with Section 21-18.1 of the Land Development Ordinance, which states “the pool shall be located behind the rear building line of existing residential structures on adjoining lots.” The proposed pool is not to the rear of the adjoining dwelling to the southwest on Lot 31 (161 Spencer Road).
5. The Applicants’ proposal is depicted on a Variance Plan prepared by Ann R.P. Sears, R.A., dated November 2, 2020, unrevised, same consisting of one (1) sheet. The Applicants also submitted a Survey prepared by Max V. Raffaele, P.L.S., dated May 14, 2009, unrevised, same consisting of one (1) sheet and a compendium of eight (8) photographs and plan views.

6. The front- and side-yard setback and pool location variance relief is governed by the criteria of N.J.S.A. 40:55D-70(c).

7. David Schley, P.P., A.I.C.P, the Board Planner, and Thomas J. Quinn, P.E., C.M.E., the Board Engineer, both were duly sworn according to law.

8. Joseph Burcat, one of the Applicants, having an address of 153 Spencer Road, was duly sworn according to law. Mr. Burcat explained that the Applicants are seeking approval to construct two small additions and install a partially inground pool. He further explained that the proposed construction of the second story addition and carport requires variance relief for the proposed side- and front-yard setbacks. Mr. Burcat explained that the dwelling was constructed before 1999 and that, under the prior zoning standards, both the addition and the carport would not have required variance relief. However, since the front- and side-yard setback requirements were increased in 1999, variance relief for the Applicants' proposal is necessary. Mr. Burcat explained that the Applicants also are seeking approval for the proposed location of a partially inground pool, because same is not located to the rear of the dwelling located on adjacent Lot 31 (161 Spencer Road). He further explained that the Applicants' dwelling and the dwelling located on adjacent Lot 31 are angled towards each other (both face the outside curve of Spencer Road), and that the only conforming location for a pool would be much farther from his house and closer to the dwelling on adjacent Lot 31.

9. Mr. Burcat stipulated, as conditions of approval, to complying with all applicable comments made in both the Board Planner, Mr. Schley's, Review Memorandum, dated March 9, 2021, and the Board Engineer, Mr. Quinn's, Review Letter, dated March 10, 2021. Mr. Burcat further stipulated to complying with the comments set forth in the Environmental Commission's Review Memorandum, dated February 24, 2021.

10. On questioning as to the coverage associated with the existing generator, Mr. Burcat testified that the generator is not on a concrete pad, but rather a rubber pad with stone underneath. He stipulated, as a condition of approval, to adding the generator pad to the plans, if deemed necessary by the Township Engineering Department.

11. On questioning, Mr. Burcat testified that he had taken the photographs submitted with the application shortly before application submission (i.e., January 2021), and that they accurately depict the Property as it presently exists. He further testified that he had not heard any concerns about the proposed project from surrounding neighbors. On questioning as to the materials for the proposed addition and carport, Mr. Burcat testified that same would be substantially similar in architectural style, materials, and color to the exterior of the balance of the existing dwelling. On questioning as to whether any landscaping is proposed, Mr. Burcat testified that there is a significant number of trees and that he intends to install a privacy hedge. He noted that the pool would be built into the slope and that he planned to install some evergreen bushes around the portion of the pool that would still be visible to the neighbors.

12. No member of the public commented on, or objected to, the Applicants' proposal.

DECISION

13. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicants have satisfied their burden of proving an entitlement to the requested variance relief as to the front- and side-yard setback deviations and proposed pool location, both under N.J.S.A. 40:55D-70(c)(1) and (c)(2).

14. As to the positive criteria for the "c(1)" or "hardship" variance for the requested setback and pool location deviations, the Board finds that, by reason of exceptional topographic conditions and physical features uniquely affecting the Property, the strict application of the zoning

regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the Applicants. The Board finds that the exceptionally unique physical features affecting the Property include the layout and configuration of the Property, particularly such that, after the minimum required front-yard setback increased from 75 feet to 100 feet and the minimum required side-yard setback increased from 20 feet to 50 feet in 1999, the majority of the existing dwelling became located within the required front- and side-yard setbacks.

15. As to the proposed pool location, the proposed pool is not to the rear of the adjoining dwelling on Lot 31 (161 Spencer Road) to the southwest. To comply with the pool location requirement, the proposed pool would have to be moved at least 100 feet to the west of the proposed location (i.e., to the area beyond the Applicants' shed), and locating the pool in said location would result in additional disturbance, tree removal, and safety concerns due to limited visibility of the pool from the dwelling. Additionally, locating the pool in a conforming location would result in the pool being closer to the adjacent dwelling on Lot 31, whereas, as proposed, the pool is approximately 250 feet from said dwelling. The Board recognizes that the legislative intent underlying the pool location ordinance was to locate more active uses in rear yards and to "line up" rear yard uses for adjacent neighbors. The Board concludes that requiring the Applicants to comply with the pool location requirement would not serve the intent of the pool location ordinance any better than it would be served by locating the pool in the location proposed by the Applicants.

16. The Board finds that the hardship that would result from the strict application of the zoning ordinance provisions would not be the result of conditions that were "self-created" by the Applicants or any predecessor-in-title. As such, the Board finds the Applicants have satisfied the positive criteria, pursuant to N.J.S.A. 40:55D-70(c)(1), for the requisite front- and side-yard

setback and pool location variance relief.

17. As to the positive criteria for “c(2)” or “flexible c” variance relief for the front- and side-yard setback and pool location deviations, the Board finds that the Applicants have satisfied their burden of demonstrating that the purposes of the Municipal Land Use Law will be advanced by the requested deviations from the zoning requirements and that the benefits to be derived therefrom will substantially outweigh any detriments associated therewith. The Board finds that the proposal promotes a desirable visual environment, and otherwise promotes the general welfare. In this regard, the Board recognizes that the proposed addition will provide the Applicants with two additional bedrooms, a study, a bathroom, and a laundry room, thereby increasing the Applicants’ ability to utilize the Property. The Board further recognizes that locating the proposed pool in a conforming location would require additional disturbance and would result in the pool being even closer to the adjacent neighbor than proposed. As such, the Board further finds that the benefits of the proposal substantially outweigh the relatively modest detriment associated therewith, particularly given the stipulated conditions set forth below. Accordingly, the Board finds the Applicants have satisfied the positive criteria, pursuant to N.J.S.A. 40:55D-70(c)(2), for the requisite front- and side-yard setback and pool location variance relief.

18. As to the negative criteria required for all of the variance relief, pursuant to subsections c(1) and c(2), the Board finds that the Applicants have demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. As to the substantial detriment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal will not be out of character with the existing neighborhood, and will not have a significant detrimental impact on the surrounding properties. In this regard, the Board recognizes

that many of the adjacent neighboring properties are also improved with pools, that the pool will be sufficiently screened by both the existing and proposed landscaping, and that the conditions stipulated to by the Applicants will further reduce the impact of the proposed improvements on the adjacent properties. The Board further recognizes that no member of the public objected to the Applicants' proposal.

19. As to the substantial impairment prong of the negative criteria, the Board finds that the Applicants have demonstrated that the proposal is not inconsistent with the zone plan or zoning ordinances, particularly since carports and pools are permitted structures. The Board finds in this regard that the requested deviations are relatively modest in nature and certainly do not rise to the level of constituting a rezoning of the Property. As such, the Board finds that the Applicants have satisfied the negative criteria, pursuant to N.J.S.A. 40:55D-70(c)(1) and (c)(2), for the front- and side-yard setback and pool location variance relief.

20. Based upon the foregoing, the Board finds that the Applicants have demonstrated both the positive and the negative criteria for all of the requested bulk variance relief, under both of the alternative bases for such relief under N.J.S.A. 40:55D-70(c).

WHEREAS, the Board took action on this application at its meeting on March 11, 2021, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 7th day of April, 2021, that the application of **JOSEPH and ADRIENNE BURCAT**, for variance relief, as aforesaid, be and is hereby granted, subject to the following conditions:

- (1) The Applicants shall post sufficient funds with the Township to satisfy any deficiency in the Applicants' escrow account;

- (2) The Applicants shall pay all outstanding property taxes and other municipal obligations prior to issuance of any zoning or building permits;
- (3) Since the existing and proposed decks are not included in the lot coverage calculations, the Applicants shall ensure that the existing and proposed decks remain “open”, i.e., a raised platform not enclosed by walls, glass, screens, roofing or otherwise, except for railings which are no less than 50% open as defined in Section 21-18A.1 of the Ordinance. In the event the Applicants choose to alter the decks to the extent they are no longer “open”, all applicable Ordinance requirements, including those relating to lot coverage and stormwater management, shall be complied with;
- (4) Any lighting in the pool/patio area shall be downward directed or appropriately shielded or recessed and shall comply with all applicable ordinance requirements so as not to be a nuisance to adjoining properties;
- (5) The Applicants shall submit a tree protection plan (and tree removal and replacement plan, if applicable), same to be subject to the review and approval of the Township Engineering Department prior to any land disturbance;
- (6) The Applicants shall, prior to the issuance of a construction permit, submit a steep slopes map demonstrating compliance with the Township’s Steep Slope Ordinance (Section 21-14.2);
- (7) The Applicants shall provide soil erosion and sediment control measures in accordance with Section 21-42.11.b.2 of the Ordinance and same shall be subject to the review and approval of the Township Engineering Department prior to issuance of a construction permit;
- (8) Soil from the pool excavation shall be removed from the Property unless the Applicants submit a grading plan showing where the soil will be used on the Property, subject to review and approval by the Township Engineering Department prior to any land disturbance;
- (9) The Applicants shall revise the plans to depict a conforming pool equipment location and code-compliant pool safety barrier/fence, prior to the issuance of a construction permit;
- (10) The Applicants shall use the “best management practices” available when discharging pool water, consistent with the recommendations of the Environmental Commission attached to the March 9, 2021 Review Memorandum of the Township Planner;
- (11) The Applicants shall revise the plans to show the existing generator and generator pad;

- (12) The Applicants are advised that the Township Engineering Department may require additional grading information prior to the issuance of a permit;
- (13) The exterior of the addition and the carport shall be substantially similar as to the architectural design, materials, and color of the balance of the exterior of the existing dwelling;
- (14) The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein;
- (15) The Applicants shall comply with all Federal, State, County and Township statutes, ordinances, rules, regulations and requirements affecting development in the Township, County and State; and
- (16) Pursuant to Section 21-5.10 of the Land Development Ordinance, the variances granted herein shall expire unless such construction or alteration permitted by the variance has actually commenced within one year of the date of this Resolution.

ROLL CALL VOTE:

Those in Favor: Bauman, Breslin, Cambria, Genirs, Kraus, Pochtar, Tancredi

Those Opposed: NONE

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting of April 7, 2021.



Cyndi Kiefer, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: April 7, 2021