

BERNARDS TOWNSHIP **ZONING BOARD OF ADJUSTMENT**

MINUTES v2
Regular Meeting
October 6, 2021

CALL TO ORDER

Chairman Breslin called the meeting to order at 7:37 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: Breslin, Baumann, Cambria, Genirs, Kraus, Pochtar, Tancredi

Members Absent: Pavlosky

Also Present: Board Attorney, Steven K. Warner, Esq.; Township/Board Planner, David Schley, PP, AICP;
Board Engineer, Thomas Quinn, PE, CME; Board Secretary, Cyndi Kiefer

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

APPROVAL OF MINUTES

September 8, 2021 – Regular Session - On motion by Ms. Pochtar, seconded by Mr. Tancredi, all eligible in favor and carried, the minutes were adopted as drafted. Ineligible: Breslin (recused)

September 16, 2021 – Special Session - On motion by Ms. Baumann, seconded by Ms. Genirs, all eligible in favor and carried, the minutes were adopted as drafted.

APPROVAL OF RESOLUTION

Kenken LLC; Block 1805, Lot 42; 1 Brownlee Place; ZB21-014 (approved) – Mr. Tancredi moved approval of the resolution as drafted. Ms. Pochtar seconded.

Roll call:	Aye:	Baumann, Cambria, Genirs, Kraus, Pochtar, Tancredi
	Nay:	NONE
	Ineligible:	Breslin (recused)

PUBLIC HEARING (continued from 09/16/2021)

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

Present:	Frederick B. Zelle, Esq., Attorney for the Applicant
	Jeffrey C. Martinson, RA, Architect for the Applicant
	Catherine Mueller, PE, CME, Engineer for the Applicant
	John Corak, PE, Traffic Engineer for the Applicant
	Jim Mazzucco, LLA, Landscape Architect for the Applicant
	Michael J. Tobia, PP, Professional Planner for the Applicant
	Afrim Berisha, Applicant

Frederick B. Zelley, Esq., attorney with the firm of *Bisogno, Loeffler & Zelley LLC*, Basking Ridge, NJ, entered his appearance on behalf of the Applicant. He gave a brief overview of the proposed project (demolition of an existing restaurant and construction of a new California-style Mexican restaurant) and the relief required, adding that although the property is located in a residential zone, it has been the site of various restaurants since the 1930's.

The following exhibits were submitted into evidence:

- **Exhibit A-9** – Generac Generator Specs – Guardian Series, 20 kw, 3-phase, standby generator
- **Exhibit A-10** – Building Elevations, pg. 2 of 2, last revised 09/23/2021, prepared by The Martinson Grp.
- **Exhibit A-11** – Landscape Plan with Aerial Photo revised 10/06/2021, prepared by Bosenberg & Co. Inc.
- **Exhibit A-12** – Power Point presentation dated 09/22/2021, prepared by M. Tobia, PP

Mr. Warner stated that the application was carried from the 09/16/2021 meeting with no further notice, therefore the Board had jurisdiction to hear it. He reminded the Board's professionals, the Applicant and the Applicant's professionals that they were still under oath.

Jim Mazzucco, LLA, landscape architect with the firm of *Bosenberg & Co. Inc.*, Far Hills, NJ, was accepted by the Board as an expert in the field of landscape architecture. He provided testimony about the existing landscape buffers and how they will be augmented with other plantings, especially evergreens, to enhance the vegetative screening. In addition, a solid fence will be installed along the existing residences to the rear of the site in order to further supplement the buffer. Referring to **Exhibit A-11**, he explained that the aerial photo was updated from the **Exhibit A-8** aerial photo (submitted at a previous meeting) and that it had been taken in July of 2021. In response to the Environmental Commission's memo dated 05/25/2021, Mr. Mazzucco stated that the Applicant would be willing to incorporate more native plant species in the buffer, should the Board request it. Noting that the overhead screen which is used to display exhibits in the courtroom was not operational at the moment, Mr. Zelley suggested that Mr. Mazzucco continue his testimony after that issue was remedied.

John Corak, PE, engineer with the firm of *Stonefield Engineering & Design LLC*, Rutherford, NJ, was accepted by the Board as an expert in the field of traffic engineering. He discussed the findings of the egress/ingress traffic study and parking assessment which were conducted for the subject property and noted that, since there had been a restaurant on this property for many years, he had not only looked at the impact the new restaurant would have but also made a comparison of the proposed project to what had existed previously. He concluded that there will not be any change in traffic intensity since the seating capacity in the new restaurant will remain unchanged from the previous restaurant. He added that the New Jersey Department of Transportation had also stated in writing that there will be no appreciable increase in traffic. Mr. Zelley confirmed that no written report containing Mr. Corak's findings had been submitted with the application because there were no actual trip counts or level of service evaluations performed since no increase in traffic is anticipated.

Mr. Corak testified that the revised parking area will create better circulation and increase the number of parking stalls. He opined that using the total gross floor area/square footage to determine the required number of parking stalls is out of sync with the actual need because using that calculation would require just under 200 parking stalls for the 215 seats proposed. In addition, that would generate a significant increase in impervious coverage and most, if not all, of the existing vegetation would have to be removed. He opined that since the previous restaurants had operated without any parking issues in the past, the proposed restaurant, although larger in floor area, would have no issues with the proposed number of parking stalls. Finally, he stated that the Applicant is providing three (3) "make-ready" parking stalls for electric vehicles as required by the State.

Mr. Zelley stipulated that all parking for the restaurant, either by individual patron or by valet parking, would remain onsite and if that could not be accommodated, the Applicant would return to the Board.

Hearing no further questions from the Board, Chairman Breslin opened the hearing to the public for questions. The following residents questioned Mr. Corak concerning his testimony:

- Rose A. Salaki, 114 Morristown Road – seating capacity
- John Salaki, 114 Morristown Road – total number of cars if valets are used

- Terrence Gunning, 22 Lone Oak Road – patron parking on nearby residential streets
- Jean Marie Dour, 28 Franklin Drive – patron parking on nearby residential streets
- Frederick Dour, 28 Franklin Drive – impact/safety of traffic on Morristown Road
- Sugandha Yogesh Chadha, 22 Franklin Drive – policing of patron parking on nearby residential streets
- Thomas Callari, 19 Franklin Drive – curbside pick ups and maximum number of employees
- Terrence Breidigan, 69 Morristown Road – patron parking in front of his house
- Ajay Hira, 89 Morristown Road – is it safer from a traffic perspective because the building is farther back
- Fernando Moreira, 37 Parkview Avenue – parking-to-seating ratio for bar areas vs. restaurant

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

** * * The Open Session was recessed at 9:30 PM and reconvened at 9:37 PM. * * **

Mr. Warner noted that all seven (7) members had returned to the dais.

Mr. Mazzucco returned to the podium and addressed the comments under his purview in Mr. Quinn's memo dated 06/16/2021, Mr. Schley's memo dated 06/15/2021 and the Environmental Commission's memo dated 05/25/2021 to the satisfaction of the Board.

Hearing no further questions from the Board, the hearing was opened to the public for questions. The following residents questioned Mr. Mazzucco concerning his testimony:

- Stacy Molinari, 27 Franklin Drive – options for alternate buffer plantings such as evergreens
- Rose A. Salaki, 114 Morristown Road – tree removal and landscaping for the front of the building
- Lisa Wagner, 32 Franklin Drive – size of the arborvitae and junipers being planted, material for fence

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

** * * The Open Session was recessed at 9:58 PM and reconvened at 10:02 PM. * * **

Mr. Warner noted that all seven (7) members had returned to the dais.

Michael J. Tobia, PP, with a business address of Morristown, NJ, was accepted by the Board as an expert in the field of professional planning. Using **Exhibit A-12**, he outlined the variance relief required. He opined that the project qualifies for "d-2" variance ("expansion of a nonconforming use") rather than a "d-1" variance ("use or principal structure in a district restricted against such a use or principal structure variance,") however he provided testimony to satisfy the statutory requirements for both along with the remainder of the requested relief.

Hearing no further questions from the Board, the hearing was opened to the public for questions. The following residents questioned Mr. Tobia concerning his testimony:

- Ruchika Hira, 89 Morristown Road – date of aerials, residential vs. commercial area
- Rose A. Salaki, 114 Morristown Road – handicapped bathroom on second floor
- John Salaki, 114 Morristown Road – possible removal of existing sheds
- Lisa Wagner, 32 Franklin Drive – tree removal, appropriateness of proposal in a residential area
- Vijay P. Rao, 31 Franklin Drive – 1:00 AM closing time
- Jean Marie Dour, 28 Franklin Drive – 1:00 AM closing time
- Rohit Chadha, 22 Franklin Drive – parking

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

Mr. Zellely advised the Board that he had no further witnesses to present.

On motion by Ms. Genirs, seconded by Ms. Pochtar, the Board agreed by a roll call vote of 5-1 to extend the hearing to midnight.

Chairman Breslin opened the hearing to the public for comments. The following residents voiced concerns and opposed approval of the project as proposed:

- John Salaki, 114 Morristown Road
- Rose A. Salaki, 114 Morristown Road
- Stacy Molinari, 27 Franklin Drive
- Thomas Callari, 19 Franklin Drive
- Ruchika Hira, 89 Morristown Road
- Frederick Dour, 28 Franklin Drive

Noting the late hour and that several more members of the public wished to make comments, Mr. Warner stated that the application would be carried *with no further notice* to the November 3, 2021 meeting. Mr. Zelley agreed to provide an extension of time to act to November 30, 2021.

2020 ANNUAL REPORT AND RECOMMENDATIONS

After a brief discussion, it was agreed that there would be no recommendations made in this report and that a second draft would be available for passage at the next meeting.

COMMENTS FROM MEMBERS OR STAFF

Chairman Breslin cancelled the special meeting scheduled for October 14, 2021. He also informed the Board that because he was relocating to another township, he would have to resign from the Board.

Ms. Kiefer reminded the members that they must respond to the Statement of Interest memo emailed to them.

ADJOURN

Moved by Ms. Baumann, seconded by Ms. Pochtar, all in favor and carried, the meeting was adjourned at 12:23 AM.

Respectfully submitted,

Cyndi Kiefer, Secretary
Zoning Board of Adjustment

Adopted as drafted 11/03/2021

10/22/2021 dssw

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**KENKEN LLC
Case No. ZB21-014**

RESOLUTION

WHEREAS, KENKEN LLC (the “Applicant”) has applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”), for preliminary and final site plan approval and the following variance and site plan exception relief, in connection with the construction of a two-story, 486 square foot addition to the existing commercial building, to be occupied by a pizza delivery restaurant, on property identified as Block 1805, Lot 42 on the Tax Map, more commonly known as 1 Brownlee Place (the “Property” or the “Site”):

1. A d(1) use variance for a proposed “delivery restaurant” use in the B-1 Village Business Zone, whereas such use is not permitted in the B-1 Village Zone, pursuant to Section 21-10.6.a.1 of the Land Development Ordinance¹;
2. A d(4) variance for a proposed floor area ratio (FAR) of 28.31%, whereas the existing FAR is 23.78%, and the maximum permitted FAR for a building or structure in the B-1 Village Business Zone is 25%, pursuant to Section 21-10.6.b of the Land Development Ordinance;
3. A variance for a proposed front-yard setback for the westerly building of approximately 0.9 feet, whereas the existing front-yard setback is 4.9 feet, and the minimum required front-yard setback in the B-1 Village Business Zone is 10 feet, pursuant to Section 21-15.2.d and Table 506 of the Land Development Ordinance;
4. A variance for 13 parking spaces² within the “upper” and “lower” parking areas, whereas the minimum required number of parking spaces is 18

¹ The Board subsequently determined, based on the testimonial and documentary evidence presented by the Applicant and its experts, that the proposed use does not constitute a “delivery restaurant” as defined in the Ordinance at Section 21-3.1.

² There are currently ten (10) parking spaces on the Property, but, as testified to by the Applicant and its experts, although the upper parking lot only has three (3) designated parking spaces, approximately seven (7) vehicles can be accommodated when tandem parked. The Applicant requested the variance and exception relief associated with the tandem parking arrangement, such that the additional three (3) parking spaces gained through the existing layout can be counted towards the total number of parking spaces being

spaces³, pursuant to Section 21-22.1.a.1 of the Land Development Ordinance;

5. A variance for a minimum parking setback of 2 feet at the northerly property line (Post Office), whereas the minimum required parking setback is 5 feet, pursuant to Section 21-22.1.b.3(b) of the Land Development Ordinance;
6. A variance for no parking setback at the easterly property line (Brownlee Place), whereas the minimum required parking setback is 10 feet, pursuant to Section 21-22.1.b.3(b) of the Land Development Ordinance;
7. A variance for more than one principal building on a single lot in the B-1 or B-3 Zones, whereas the Property currently has two (2) principal buildings on a single lot, which is a pre-existing, non-conforming condition as memorialized in that certain Resolution for Preliminary and Final Site Plan Approval of the Planning Board on October 26, 1982, pursuant to Section 21-15.2 a. of the Land Development Ordinance;
8. An exception for no off-street loading spaces proposed, whereas the required number of off-street loading spaces is one (1) space, pursuant to Section 21-39.2.a of the Land Development Ordinance;
9. An exception for a proposed width of a parking aisle for 90° parking spaces of 20 feet in the “lower parking area”, whereas the minimum width of a parking aisle for 90° spaces is 24 feet, pursuant to Section 21-39.3.a.5 of the Land Development Ordinance; and
10. An exception for a proposed width of a parking aisle for 90° parking spaces of 0 feet for the “upper parking area”, whereas the minimum width of a parking aisle for 90° spaces is 24 feet, pursuant to Section 21-39.3.a.5 of the Land Development Ordinance; and

WHEREAS, public hearings on notice were held on such application on June 9, and September 8, 2021, at which times interested citizens were afforded an opportunity to appear and be heard; and

supplied, thereby increasing the number of existing spaces from 10 parking spaces to 13 parking spaces.

³ The Board, based on the proposed use of the westerly building as a “delivery restaurant” with unrelated office space, initially utilized a parking demand of 11 parking spaces for the restaurant, one parking space for the office space, and 12 parking spaces for the salon, resulting in a total parking demand of 24 spaces for the Site. However, once it was determined that the proposed pizzeria constituted a permitted, “retail sales and services” use and the Applicant stipulated that the office space would only be used by the pizzeria and would not be leased to a third party, the number of parking spaces required for the westerly building was reduced to 6 spaces, thus the total parking demand for the Site was reduced to 18 spaces.

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 Property is a 13,008.5 square foot corner lot on the northwest corner of Brownlee Place and West Henry Street, adjoining the Basking Ridge Post Office to the north and Oak Street School to the west. The Planning Board granted site plan approval and various parking area design exceptions in 1982, when the use of the easterly building changed from a nursery school to a beauty parlor and the existing seven (7) space parking lot was constructed. The existing site conditions are generally consistent with the site plan approved in 1982, although the limits of the parking lot have changed.

2. The Property is improved with a two-story, 2,402 square foot building occupied by Atelier Salon and Spa (identified on the plans as principal structure #1), located on the east side of the Property near the street intersection, and a 1½-story, 692 square foot retail building, recently occupied by Ava's Ice Cream (principal structure #2), located on the west side of the Property. Existing on-site parking includes three (3) parking spaces accessed directly from Brownlee Place (the "upper parking area", and a seven (7) space parking lot accessed from West Henry Street (the "lower parking area"), for a total of ten (10) parking spaces.

3. The proposed construction involves only the westerly building, i.e. principal structure #2. At the rear (north end) of the building, the Applicant proposes a two-story, 486 square foot addition, including 189 square feet on the first floor and 297 square feet on the second floor. At the front (south end) of the building, the Applicant proposes to raise the roof, which creates an additional 102 square feet of floor area from existing space that presently is not "floor area" (as defined by the Ordinance), because it has less than 5

feet of clear headroom. The proposal increases the total floor area of the westerly building by 588 square feet, from 692 square feet to 1,280 square feet, and increases the total square footage of both buildings from 3,094 square feet to 3,682 square feet.

4. The proposed addition includes an approximately 5-foot by 5-foot uncovered platform with steps, at a new rear/north building entrance. The proposal also includes an approximately 25-foot long ramp, providing barrier-free access from a proposed paved handicapped parking space to an existing deck, which adjoins the new/relocated east side building entrance. The Applicant also proposes to construct an 8-foot by 16-foot trash/recycling enclosure at the existing dumpster location, install concrete wheel stops in the seven (7) parking spaces off West Henry Street, and six (6) red maple trees to compensate for the removal of two (2) existing trees. An existing shed that encroaches on the adjoining properties is to be removed.

5. The Applicant's proposal is depicted on a Proposed Site Layout Plan prepared by Kenneth J. Fox, A.I.A., P.P., dated December 16, 2020, last revised August 13, 2021, same consisting of three (3) sheets; Proposed Delivery Restaurant Interior Plan also prepared by Mr. Fox, dated September 7, 2021, unrevised, same consisting of one (1) sheet; and a Survey prepared by Jeffrey S. Grunn, P.L.S., dated November 18, 2019, unrevised, same consisting of one (1) sheet. The Applicant also submitted a copy of the January 14, 2021 Letter from the County of Somerset Planning Board approving the project.

6. The requested relief for the excessive FAR is governed by N.J.S.A. 40:55D-70(d)(4). The Applicant's proposal also requires site plan approval, bulk variance and exception relief, as set forth above.

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

8. Jason R. Rittie, Esq., of Einhorn, Barbarito, Frost & Botwinick P.C., entered his appearance on behalf of the Applicant. Mr. Rittie provided an overview of the existing and proposed conditions, as well as the relief requested.

9. Kenneth J. Fox, A.I.A., P.P., having a business address of 546 State Route 10 West, Ledgewood, New Jersey, was duly sworn according to law, provided his qualifications, and was accepted by the Board as an expert in the fields of both architecture and professional planning.

10. Mr. Fox described the proposal and testified that no construction or modifications are planned for the front building (Atelier's Salon), which is on the corner of Brownlee Place and West Henry Street. He explained that, as to the two-story building to the rear, which faces West Henry Street and currently houses an ice cream parlor (Ava's Ice Cream), the Applicant is seeking to construct a two-story addition to provide more usable space on the second story, to upgrade the first floor area, and to replace the existing staircase which is very steep and narrow.

11. Mr. Fox introduced into evidence, as **Exhibit A-1**, a revised version of Sheet A-1 of the Architectural Plans, dated June 7, 2021. Referencing same, Mr. Fox explained that revisions were made to the exterior of the building to address concerns regarding the façade raised by the Historical Preservation Advisory Committee of the Historical Society of Somerset Hills (by letter dated March 23, 2021), and the Environmental Commission (by letter dated May 25, 2021). He testified that the stone portion of the exterior had been replaced with clapboard siding that is similar to the exterior of the other building on the Site, as well as buildings in the surrounding area, and is more

historically appropriate. Mr. Fox explained that, although the first floor is currently Americans with Disabilities Act (“ADA”) accessible, in response to comments made, the new floor plan includes ADA accessible bathrooms on both the first and second floors. Finally, he further explained that, although the first floor is currently depicted on the plans as a sit-down restaurant, the Applicant seeks to convert it to a take-out and delivery pizza business, which is similar to the current usage in that there is no interior seating.

12. Regarding whether the Applicant could provide an ADA accessible parking stall, Mr. Fox stated that an area could be designated as such with signage, but not with striping, since it is located within a gravel parking lot. Mr. Quinn, the Board Engineer, advised that the surface area for an ADA parking stall and the route to the restaurant must be constructed out of material that is hard and smooth. On discussion, the Applicant acknowledged that there are encroachments onto the adjacent property that will need to be removed or otherwise addressed. The Applicant requested that the matter be carried, with further notice, to September 8, 2021.

13. At the September 8, 2021 hearing, the Board Attorney confirmed that all seven (7) of the Board members at the hearing had been qualified and were eligible to vote. Mr. Rittie explained that the Applicant modified the proposal to include a 103 square foot addition and provided an overview of the amended requested relief.

14. Ricky C. Pennisi, managing member of the Applicant LLC, having a business address of 1 Brownlee Place, was duly sworn according to law. Mr. Pennisi testified that he has owned and operated Atelier Salon and Spa (Principal Structure 1) for the past 21 years, and he had previously owned and operated Ava’s Ice Cream (Principal Structure 2) for thirteen (13) years. He explained that he is seeking to convert the Ava’s Ice Cream space into a family run pizzeria with both takeout and delivery service, but no

on-site seating. On questioning, Mr. Pennisi testified that he anticipates having four (4) to six (6) employees, and initially operating between the hours of 11:00 AM to 11:00 PM, seven days per week. He explained that the hours of operation may change once he has determined the hours of peak demand for the pizzeria.

15. On questioning, Mr. Pennisi testified that he anticipates selling individual slices of pizza and small, individual sized pizzas to accommodate students, as well as whole pizza pies and other typical Italian foods found with similar restaurants. He explained that there will be an exterior walk-up window through which orders can be placed and picked up, together with an inside pick up area. Mr. Pennisi confirmed that no seating is proposed inside the restaurant, and that there is no formal outdoor dining area, aside from some nearby benches. On questioning as to the sufficiency of the existing parking for the ice cream sales use, Mr. Pennisi advised that many of the customers walk, rather than drive, and that he has not experienced any issues with the number of parking spaces, particularly given the availability of on-street parking. He noted that, currently, the Washington House restaurant across the street is utilizing its parking area for outdoor dining and that, he anticipates, once that parking lot is clear, more on-street parking spaces will be available to his customers.

16. On discussion of the current parking arrangements for Atelier Salon, Mr. Pennisi testified that the Salon is open from 6:30 AM to 7:30 PM during the week, and between 6:30 AM and 1:30 PM on Saturdays. He explained that there are seven (7) stylists, but that all seven are only there at the same time on Saturdays and, generally, during the week, there are just 5 stylists. He confirmed that each stylist has one client at a time, for a maximum total of 14 stylists and customers. On questioning, Mr. Pennisi testified that, in addition to the stylists and customers, there is also one (1) receptionist, for a total maximum

of 15 people at the salon during peak hours. He explained that the stylists all park in the upper parking area, which has three (3) striped parking spaces, but that the upper parking area can accommodate seven (7) vehicles because employees park behind each other (tandem parking).

17. On discussion, Mr. Pennisi requested that the Board grant the necessary relief to allow the Applicant to utilize tandem parking, which would result in the provision of another three (3) parking spaces for a total of 13 parking spaces between the upper and lower parking areas. On questioning, Mr. Quinn confirmed that granting said relief would not create an issue of health or safety. On questioning, the Applicant stipulated, as a condition of approval, to restricting the tandem parking spaces to employees, as well as installing appropriate signage to accomplish same.

18. Mr. Pennisi testified that he anticipates having four to six employees at the pizzeria, four (4) of whom would be on-site and two (2) of whom would be delivering food.

19. On questioning as to deliveries and whether an off-street loading space is necessary, Mr. Pennisi explained that he schedules all deliveries in the morning between 7:00 AM and 9:30 AM and, therefore, a loading space is not required, because the delivery vehicles can park in the parking lot. He further testified that waste removal occurs at 7:00 AM on Friday mornings and, therefore, it does not impact the functionality of the parking lot. On questioning as to whether additional parking spaces could be leased from one of the nearby businesses, Mr. Pennisi testified that he had discussions with the adjacent Wells Fargo bank and, if necessary, he could make a good faith effort to secure a formal agreement as to same.

20. Todd Edelstein, having an address of 172 Riverside Drive, questioned how snow would be removed from the Property, and Mr. Pennisi advised that the adjacent school does a good job removing the snow with front-loaders.

21. Mr. Fox, having been previously sworn, referenced the plans he prepared that were submitted with the application materials (last revised August 13, 2021), and provided an overview of the proposal. Mr. Fox explained that, as part of the proposal, the Applicant is constructing an ADA parking spot and ramp leading to the building from the parking lot. On questioning by Mr. Quinn, the Applicant stipulated to relocating the proposed ramp to eliminate the intrusion of the ramp into the ADA compliant parking stall, and to providing additional spot grades to demonstrate that the parking space and ramp comply with ADA requirements. He confirmed that the Applicant will eliminate the existing shed and parking area that encroach on the adjacent lot, and he stipulated to same. Mr. Fox further explained that the Applicant also is expanding the existing trash enclosure and installing concrete wheel stops to demarcate each of the parking spaces.

22. As to the proposed building addition, Mr. Fox testified that the Applicant originally proposed to square off the northerly portion of the building, but now the Applicant was proposing to extend the building by 150 square feet, so that the building will have two-stories, rather than 1.5 stories.

23. On further discussion of the number of off-street parking spaces, Mr. Fox contended that, if the lower parking area were to be expanded, the Applicant could likely construct three (3) additional parking spaces. However, he explained that doing so would be prohibitively costly and would require extensive earth work and tree removal and the reconstruction of the existing pathway.

24. Referencing Sheet A-1 of the Architectural Plans/Elevations, last revised August 13, 2021, Mr. Fox testified that, based on the comments received from the Historic Preservation Advisory Committee, the Applicant now proposed clapboard siding, double hung windows, and other aesthetic details to make the building more consistent with the historic downtown character of the Village of Basking Ridge.

25. Mr. Fox introduced into evidence, as Exhibit A-2, a revised interior layout, labeled as Sheet EX-1, dated September 7, 2021. He explained that the second floor will be used as an extension of the kitchen and will also have a 7-foot by 14-foot office and ADA accessible bathroom. The Applicant stipulated that no portion of the space would be leased or rented to a third party, and that the small office space would be used solely by the owner/operator of the pizzeria. Mr. Fox described the proposed first floor layout, and he confirmed that there are no seating areas proposed inside the pizzeria and stipulated to same as a condition of approval.

26. Mr. Fox introduced into evidence, as Exhibit A-3, a lot coverage calculation sheet setting forth how the amount of lot coverage was determined. He confirmed that the proposed lot coverage is 68.79% and, therefore, it does not exceed the maximum permitted coverage of 75%.

27. The Applicant stipulated, as a condition of approval, to complying with the comments and requirements set forth in the September 1, 2021 Review Memorandum prepared by the Board Planner, Mr. Schley, and the September 7, 2021 Review Letter prepared by the Board Engineer, Mr. Quinn. The Applicant further stipulated to complying with the requests set forth in the September 1, 2021 Letter from Fire Chief Peter von der Linde on behalf of the Basking Ridge Fire Company #1 and the August 25, 2021 Letter from Acting Fire Official Russell Nydegger on behalf of the Fire Prevention Bureau. On

questioning by Mr. Quinn, the Applicant confirmed that the picket fencing shown on the plans, but not on the survey, was removed, and it is not currently on the Property. On discussion, the Applicant stipulated to installing a bicycle rack, if the Board so requested.

28. As to the nature of the business and whether the Applicant anticipated primarily delivery or primarily take-out of food, after significant discussion, the Board concluded that the proposed pizza delivery restaurant did not constitute a “delivery restaurant” as defined in the Ordinance, because the number of deliveries would not constitute 75% or more of the number of orders, quantity of goods, or sales revenue for the business.⁴ Correspondingly, “take-out” is anticipated to be more than 25% of the businesses of the restaurant. As such, the Board determined that the proposed use constituted a “retail sales and services” use, rather than a “delivery restaurant” (or a “restaurant”) use.

29. On questioning by the Board as to whether the Domino’s Pizza Restaurant in the Township constitutes a “delivery restaurant”, Mr. Schley advised that it does not as deliveries reportedly (by Domino’s) only constitute 50% to 60% of the total business – not 75% or more as required by the “delivery restaurant” definition. The Board questioned whether orders placed through services such as DoorDash and UberEats constituted ‘deliveries’ under the Ordinance definition and concluded that such services do constitute delivery “on behalf of the establishment,” notwithstanding that DoorDash and UberEats drivers are not employees of the subject pizzeria.

⁴ Section 21-3.1 of the Ordinance provides that “delivery restaurant shall mean any establishment, however designated, from which food and/or beverages are sold in a form ready for consumption, primarily for consumption off the premises, and for which 75% or more of the number of orders and/or 75% or more of the quantity of goods sold and/or 75% or more of the sales revenues are intended to be by way of deliveries, to be made by a limited number of motor vehicles owned or being used on behalf of the establishment.”

30. The Board requested that the Applicant provide biannual reports to the Township Zoning Officer, for a period of two years, providing a breakdown of the proportion of the business dedicated to “deliveries” versus “take-out” or otherwise, and the Applicant stipulated, as a condition of approval, to same. Based on the explanations provided by Mr. Schley and Mr. Pennisi, the Board determined, by a 7 to 0 straw poll, that a d(1) use variance was not necessary because, given the anticipated business model, the pizzeria would, instead, constitute a “retail sales and services” use, which is a permitted use in the B-1 Village Business Zone. On discussion, the Applicant acknowledged that if the business model were to change such that the higher proportion of the business that constitutes “deliveries” increased to the 75% maximum threshold in the definition, then he would have to return to the Board for d(1) use variance relief, as well as bulk variance relief for proposed number of parking spaces as a “delivery restaurant” requires the provision of more parking spaces than does a “retail sales and services” use.

31. Having determined that a d(1) use variance is not required for the proposed use, the Board reviewed the balance of the requested relief. Mr. Fox, as to his professional planning testimony, opined that the Applicant had demonstrated an entitlement to same. He explained that the Applicant is seeking d(4) FAR variance relief, bulk variance relief for multiple setback deviations and for the insufficient number of parking spaces, and exception relief for insufficient drive aisle width and lack of a loading space.

32. As to the d(4) FAR variance relief, Mr. Fox opined that the Applicant had demonstrated that the Site can accommodate the problems associated with a floor area ratio greater than the maximum permitted FAR of 25%. He explained that the exceedance is less than 4% (28.31% proposed) and noted that the lot is an undersized corner lot with two principal uses on it. Mr. Fox opined that the “take-out” pizzeria use is not significantly

different than the existing ice cream parlor use and, as such, could certainly function without substantial detriment to the public good or substantial impairment of the Master Plan and Zoning Ordinance.

33. As to the requested bulk variance relief, Mr. Fox opined that the lot and the configuration of the lawfully constructed structures thereon render it exceptionally difficult, if not impossible, for the Applicant to comply with the setback and parking requirements. He again explained that the Property has two principal buildings, as well as environmental constraints, that limit the Applicant's ability to comply with the Ordinance requirements. Mr. Fox noted that the Applicant could potentially construct three (3) additional parking spaces, but that doing so would require tree removal and disturbance of environmentally constrained land (steep slopes). He contended that granting the requested bulk variance relief, almost all of which relates to existing non-conforming conditions, would not result in substantial detriment to the public good or substantial impairment of the Master Plan and Zoning Ordinance. As to the requested design exceptions for the lack of an off-street loading space and the insufficient width of the parking aisle in two locations, Mr. Fox contended that the literal enforcement of the requirements is impracticable and will exact undue hardship because of peculiar conditions pertaining to the land in question.

34. Todd Edelstein, having an address of 172 Riverside Drive, was duly sworn according to law. Mr. Edelstein expressed concern that the proposed pizzeria would be a more intense use than the existing ice cream parlor and suggested that the Applicant work with an adjacent property owner to obtain additional parking. Despite his concerns, Mr. Edelstein expressed his support for the Applicant's proposal.

35. No other member of the public commented on, or objected to, the Applicant's proposal.

DECISION

36. After reviewing the evidence submitted, the Board, by a vote of 7 to 0, finds that the Applicant has satisfied its burden of proving an entitlement to preliminary and final major site plan approval, d(4) FAR variance relief, and the requested bulk variance and site plan exception relief.

The d(1) Use Variance Relief Not Required:

37. The Board notes that, although the Applicant initially requested that the Board grant use variance relief pursuant to N.J.S.A. 40:55D-70(d)(1) for the proposed use of the building as a "delivery restaurant", the Board subsequently determined, based on the testimonial and documentary evidence, that the proposed use does not constitute a "delivery restaurant" because 75% or more of the number of orders, or quantity of goods, or sales revenue will not be by way of delivery to be made by a limited number of motor vehicles owned or being used on behalf of the establishment. As such, the proposed use does not constitute a "delivery restaurant" but rather, the use constitutes a "retail sales and services" use, and d(1) use variance relief is not required.

The d(4) FAR Variance Relief – Positive Criteria:

38. The Board finds that the Applicant has met its burden of establishing an entitlement to the requested FAR variance relief, pursuant to N.J.S.A. 40:55D-70(d)(4), by demonstrating that the Site will accommodate the problems associated with a floor area ratio greater than that permitted by the Land Development Ordinance. See, Randolph Town Center v. Township of Randolph, 324 N.J. Super. 412, 417 (App. Div. 1999). Here, the Property is an undersized, corner lot with two legally constructed principal structures.

The Board notes that the proposed expansion is located so as to minimize the amount of disturbance required by constructing a portion of the addition above an existing first floor. The Board recognizes that the proposed increase in floor area is relatively modest, and the increased floor area will allow the Applicant to utilize the existing building more effectively. The Board further recognizes that the Applicant demonstrated that there will be little detrimental impact associated with the increased FAR on the Site, as a whole, particularly since the increase does not result in an additional parking demand, and the Applicant has stipulated to restricting certain areas of the parking lot as “employee only” and further stipulated to restricting the number of delivery drivers (and, therefore, delivery vehicles) to two (2) at any given time. As such, the Board finds that the Applicant has satisfied the positive criteria for the requested d(4) FAR variance relief.

The d(4) FAR Variance Relief – Negative Criteria:

39. As to the negative criteria for the requested d(4) FAR variance relief, the Board finds that the increased FAR will not result in substantial detriment to the public good, nor substantial impairment to the Master Plan or Zoning Ordinance. As to the substantial detriment prong, the Board finds that the Applicant has demonstrated that the relatively modest detriment associated with the increased FAR is mitigated by the Applicant’s stipulations restricting on-site employee parking, limiting the number of delivery drivers and prohibiting indoor seating, and the submission of reports every six months to ensure that the establishment is operating as approved. The Board further notes that no members of the public objected to the Applicant’s proposed use of the Property or any aspect of the application. As to the substantial impairment prong, the Board finds that the use is permitted and granting the requested relief certainly does not rise to the level of a rezoning of the Property. Therefore, the Board finds that the proposed development does

not substantially impair the intent of the Master Plan or Zoning Ordinance. As such, the Board finds that the Applicant has satisfied both the positive and the negative criteria for the requested FAR variance relief, pursuant to N.J.S.A. 40:55D-70(d)(4).

The Subsection c(1) Bulk Variance Relief – Positive Criteria:

40. As to the positive criteria for subsection “(c)(1)” or “hardship” variance relief for the front-yard setback, number of parking spaces, and two (2) parking setback deviations, the Board finds that the Applicant has 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. The Board recognizes that the deviations relating to parking are the product of the undersized nature of the Property, its corner lot location with frontage on both Brownlee Place and West Henry Street, and the nature and location of the existing lawfully constructed structures thereon (including that the Property has two principal structures). The Board recognizes that all of the deviations as to the number of parking spaces and parking setbacks relate to pre-existing conditions that were not self-created by the Applicant or any predecessor-in-title, and, moreover, these deviations were approved in conjunction with site plan approval and various parking area design exceptions granted by the Planning Board in 1982, when the use of the easterly building was converted from a nursery school to the existing beauty parlor use and the existing seven-space parking lot was constructed.

41. As to the requested relief for the minimum front-yard setback for the westerly building, the Board recognizes that the deviation is associated with the proposed take-out window to be located along West Henry Street. The Board finds that the Applicant has demonstrated that, given the layout of the building, there is no other functional location in which to locate the window. The Board further recognizes that the proposed

encroachment is not for the entire length of the building along West Henry Street, but, rather, just a small portion of the building where the take-out window overhang is located.

42. The Board further finds that the Applicant has established that no additional land is available for purchase which would bring any of the pre-existing nonconforming conditions into, or significantly closer to, conformity with the district standards of the Land Development Ordinance. The evidence revealed that all of the adjacent properties are currently developed. As such, the Board finds that the Applicant has satisfied the positive criteria for subsection c(1) variance relief pursuant to N.J.S.A. 40:55D-70(c)(1).

The Subsection c(1) Bulk Variance Relief - Negative Criteria:

43. As to the negative criteria for the subsection c(1) bulk variance relief, the Board finds that the Applicant has satisfied the negative criteria for primarily the same reasons set forth above relating to the negative criteria for the requested d(4) variance relief, particularly the stipulated to conditions relating to the parking restrictions, the availability of on-street parking, and the nature of the use. The Board also recognizes that the Applicant has modified the exterior of the pizzeria to make it more consistent with the Basking Ridge Historic District and has made improvements both to the existing building and the exterior site design in order to make the Site more accessible. As such, the Board finds that the Applicant has satisfied both the positive and negative criteria for the c(1) variance relief pursuant to N.J.S.A. 40:55D-70(c)(1).

The Site Plan Exception Relief:

44. As to the requested site plan exception relief for the lack of a loading space and the insufficient parking aisle width deviations, the Board finds that the Applicant is entitled to the requested exception relief from the Development Regulations of the Land Development Ordinance, because the requested relief is reasonable and within the general

purpose and intent of the provisions of the Ordinance and literal enforcement of these provisions would be impracticable or would exact undue hardship because of peculiar conditions pertaining to the Property.

45. In this regard, the Board recognizes that, given the nature of the business and the size of the Property, an off-street loading space would be unnecessary, particularly since the Applicant's testimony was that all deliveries take place prior to business hours. The Board further recognizes that the parking aisle width deviations relate primarily to the existing tandem parking arrangement utilized by the Applicant to maximize the number of parking spaces available to customers. As such, the Board finds that redesigning the Site to accommodate a loading space and additional parking aisle width would result in undue hardship upon the Applicant, particularly given the location and nature of the existing uses on the Site and the layout of the structures and improvements thereon.

Preliminary and Final Site Plan Approval:

46. The Board further finds that the Applicant has complied with the requirements set forth in Section 21-54 of the Land Development Ordinance and N.J.S.A.40:55D-46 and 50. As such, the Board finds that good cause exists for granting the requested preliminary and final site plan approval, subject to the conditions of approval set forth below.

WHEREAS, the Board took action on this application at its meeting on September 8, 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 6th day of October, 2021, that the application of **KENKEN, LLC**, for preliminary and final site plan approval, subsection d(4) FAR and

bulk variance relief, as well as the site plan design exception relief, as aforesaid, be and is hereby granted, subject to the following conditions:

1. The Applicant shall post sufficient funds with the Township to satisfy any deficiency in the Applicant's escrow account;
2. The Applicant shall designate the six parking spaces in the upper lot as "employee only" parking and shall install appropriate signage advising of the restriction, and the plans shall be revised to reflect same;
3. The Applicant shall not lease any portion of the pizza establishment (Principal Structure 2) to a third party (i.e., the entirety of the building shall be utilized by the owner/operator of the approved pizzeria use);
4. The Applicant shall not install any interior seating and any changes to the interior layout shall be subject to the review and approval of the Township Engineering Department;
5. The Applicant shall revise the plans to eliminate the picket fence in accordance with the Applicant's testimony that same has been removed;
6. Every six months, for a period of two years after issuance of a certificate of occupancy, the Applicant shall submit to the Zoning Officer a breakdown of the proportion of the pizzeria business attributable to delivery and non-delivery (e.g. take-out) sales, to demonstrate that the use does not constitute a "delivery restaurant" as defined in Section 21-3.1 of the Ordinance. After the initial two-year period, the Applicant shall be required to submit said breakdown only if requested by the Zoning Officer in the event the Zoning Officer, in his or her reasonable discretion, determines that the submission is necessary to demonstrate that the use does not constitute a "delivery restaurant." Orders placed through DoorDash, UberEats or any other third-party delivery service shall be considered deliveries includable in the delivery portion of the business for purposes of post-approval compliance with the definition of delivery restaurant and the need to not constitute same. If the Applicant and/or Zoning Officer determines that the 'delivery' portion of the business comprises 75% or more of orders, goods, or sales revenues, the Applicant shall return to the Board for approval of same and the Board shall retain jurisdiction;
7. The Applicant shall not employ or utilize more than two (2) delivery drivers during any shift;
8. The Applicant shall revise the site layout plan to show that the width of the driveway access near the pizzeria establishment off West Henry Street shall not be less than 20 feet;

9. The Applicant shall revise the site layout plan to specify whether the ground surface of the trash enclosure will be gravel or concrete, and to show the locations of the proposed trash enclosure bollards or delete the trash enclosure bollard detail;
10. The Applicant shall revise the site layout plan to indicate the proposed disposition of the existing manhole and cleanouts that are located within the footprint of the proposed building addition (these features were identified in testimony as being related to an existing grease trap);
11. The Applicant shall revise the site layout plan, including the various tables and notes shown thereon, to include breakdowns of existing and proposed lot coverage, to reflect that the pizzeria is a retail sales use, and to reflect the approved variance and exception relief as set forth herein;
12. The Applicant shall amend the Site Layout Plan and Sign Requirements to include all of the proposed signage depicted on the building elevations;
13. The Applicant shall amend the Site Layout Plan to include a note stating all construction activity shall comply with the tree removal and protection standards of Section 21-45;
14. The Applicant shall revise the planting plan to increase the spacing of the red maple trees or replace the proposed red maple trees with some other species of tree that will not grow as large, so as to provide adequate space for canopy growth;
15. The Applicant shall revise the floor plans to include a note stating that there is no basement/cellar;
16. The Applicant shall revise the building elevations to show how the proposed hood vents on the west side of the building will be designed/finished to minimize visual obtrusiveness;
17. The Applicant shall, in accordance with the comments from the Environmental Commission and the Historic Preservation Advisory Committee of the Historical Society of the Somerset Hills, revise the building elevations to include details as to the proposed exterior materials and colors and proposed signage;
18. The Applicant shall install a bicycle rack at the location as reflected in the testimony, i.e. on the west side of the Site, and the plans shall be amended to reflect the location and details of same;
19. The Applicant shall remove the shed and the gravel parking area encroaching onto the adjacent lot, and same shall be reflected on the plans;

20. The Applicant shall revise the layout of the ADA parking stall and associated ramp to ensure that the proposed ramp does not encroach into the 5-foot wide access aisle, since there can be no above grade structures located within the overall 16-foot wide ADA stall footprint, and to provide additional spot grades demonstrating that the parking stall and ramp are ADA compliant;
21. The Applicant shall, in accordance with the comments from Basking Ridge Fire Company #1, tie the Kitchen Ansul System into a monitored fire alarm system;
22. The Applicant shall, prior to issuance of a certificate of occupancy, obtain a Type 1 permit for cooking suppression from the Bernards Township Fire Prevention Bureau in accordance with N.J.A.C. 5:70-2.7(3XI);
23. The Applicant shall install a Knox box to the left of the main entrance. The Knox box shall be ordered through the Fire Official prior to the completion of construction and keys to all outside doors and interior locked spaces, as well as any codes for door locks or other systems, shall be contained within the Knox box;
24. The Applicant shall attend a pre-construction meeting with the Township Engineering Department prior to the start of any construction activity;
25. The Applicant shall submit digital copies of all plans and documents in formats acceptable to the Township Engineering Department;
26. The Applicant shall pay the development fee required pursuant to Section 21-86 of the Land Development Ordinance;
27. The project shall be subject to review and approval by the Bernards Township Health Department and the Bernards Township Sewerage Authority prior to issuance of any permit;
28. The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, including conditions set forth in prior Board of Adjustment and Planning Board approvals, to the extent same are not inconsistent with the terms and conditions set forth herein;
29. The aforementioned approval shall be subject to all State, County and Township statutes, ordinances, rules and regulations affecting development in the Township, County and State; and
30. Pursuant to the Board's Rules and Regulations, the following time limitation conditions shall apply:


- a. Revisions to Plans. Revisions to the submitted plans and other documents, as may be required as conditions of approval, shall be made, and the plans signed by the Board Secretary, within six months of the adoption of the Board's resolution. In the event that the Applicant fails to make the revisions as required and/or fails to obtain signatures on the plans as required, all within said time period, or extension thereof as granted by the Board, the approval shall expire and become automatically null and void.
- b. Time to Obtain Construction Permits, Commence and Complete Construction, and Obtain Certificates of Occupancy. The Applicant shall apply for and obtain a construction permit within two years of the adoption of the Board's resolution. If during said two year period, or extension thereof as granted by the Board, the Applicant fails to obtain a construction permit, the approval shall automatically expire and become null and void. The Applicant shall also have one year from the date of issuance of the construction permit to commence construction and obtain a permanent certificate of occupancy. If during said one year period, or extension thereof as granted by the Board, work is not commenced and/or a permanent certificate of occupancy is not obtained, the approval shall automatically expire and become null and void.

ROLL CALL VOTE:

Those in Favor: Baumann, 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 October 6, 2021.



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

Dated: October 6, 2021