

TOWNSHIP OF BERNARDS

PLANNING BOARD

MINUTES

REGULAR SESSION v2

February 22, 2022

Chairwoman Piedici called the meeting to order at 7:30 PM.

FLAG SALUTE

Chairwoman Piedici read the following open meeting and procedural statements:

OPEN MEETING STATEMENT

"In accordance with the requirements of the Open Public Meetings Law of 1975, notice of this meeting of the Planning Board of the Township of Bernards was posted on the bulletin board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, NJ, was mailed to the Bernardsville News, Whippany, and to the Courier News, Bridgewater on January 19, 2022 and was mailed to all those people who have requested individual notice and paid the required fee."

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

ROLL CALL

Members Present: Baumann, Crane*, Eorio, McNally, Mallach, Mastrangelo, Piedici, Seville
Members Absent: Damurjian, Manduke
Also Present: Board Attorney, Katie Razin, Esq.; Township Planner, David Schley, PP, AICP;
Board Planner, David Banisch, PP, AICP; Board Secretary, Cyndi Kiefer

*via telephone

APPROVAL OF MINUTES

January 18, 2022 – Reorganization and Regular Sessions - On motion made by Ms. Mastrangelo and seconded by Mr. Seville, all eligible in favor and carried, the minutes were adopted as drafted.

Mr. Crane recused himself from participating in the following hearing.

HEARING – Modification of Condition (Extension of Time to Record Certain Documents)

[Emerald Valley Homeowners Association Inc.](#); Block 11401, Lots 37.01 & 42; 16 Harvest Way & 181 Mountain Road; Modification of Condition; PB20-001A & PB20-001B

Frederick B. Zelley, Esq., attorney with Bisogno, Loeffler & Zelley LLC, Basking Ridge, NJ, entered his appearance on behalf of the Applicant. He advised the Board that the Applicant required a second extension to August 18, 2022, of the time within which the Applicant must record certain documents.

Moved by Mr. Baumann and seconded by Ms. Mastrangelo that both extensions be granted.

Roll Call: Aye: Baumann, Eorio, McNally, Mallach, Mastrangelo, Piedici, Seville
Nay: NONE

Motion carried.

APPROVAL OF RESOLUTION

[Emerald Valley Homeowners Association Inc.](#); Block 11401, Lots 37.01 & 42; 16 Harvest Way & 181 Mountain Road; Modification of Condition; PB20-001A & PB20-001B

Moved by Mr. Seville and seconded by Ms. Mastrangelo that the resolution granting both extensions be approved.

Roll Call: Aye: Baumann, Eorio, McNally, Mallach, Mastrangelo, Piedici, Seville
Nay: NONE
Motion carried.

Mr. Crane rejoined the discussion.

MASTER PLAN REVIEW – Chapter VIII – Conservation and Open Space Plan Element

The Board offered several revisions to the draft element prepared by Mr. Banisch including consolidating information from multiple sources onto a single map and also discussed the addition of topics such as invasive insects (spotted lantern fly), light pollution, electric vehicle charging stations and the Great Swamp. With a focus on fire safety, the Board instructed Mr. Banisch to contact the local fire companies to ascertain which ponds they rely on for service and then to incorporate that information in the appropriate map. Mr. Banisch agreed to incorporate the changes agreed upon by the Board and present the final draft at the next meeting.

Hearing no further discussion from the Board, Chairwoman Piedici invited members of the public to comment.

Todd Edelstein, 172 Riverside Drive, requested that the agenda specify which Master Plan chapter is to be discussed during the meeting and commented on light pollution and the spotted lantern fly.

Chairwoman Piedici advised the Board that at the March 22, 2022, the Circulation Plan Element (Chapter V), would be discussed.

COMMENTS FROM MEMBERS OR STAFF

Deputy Mayor McNally agreed that the agenda should specify which Master Plan element will be discussed.

ADJOURN

Moved by Ms. Mastrangelo, seconded by Deputy Mayor McNally, all eligible in favor and carried, the meeting was adjourned at 8:16 PM.

Respectfully submitted,

Cyndi Kiefer

Cyndi Kiefer, Secretary
Planning Board

Adopted as written 04/05/2022.

03/09/2022 dsjdkp

BERNARDS TOWNSHIP PLANNING BOARD

**EMERALD VALLEY HOMEOWNERS ASSOCIATION, INC.
EASEMENT OVER BLOCK 11401, LOTS 37.01 AND 42
16 HARVEST WAY AND 181 MOUNTAIN ROAD**

**APPLICATION #PB20-001A and
APPLICATION #PB20-001B**

**RESOLUTION MODIFYING CONDITION #1 OF THE RESOLUTION
MEMORIALIZING THE GRANT OF AMENDED PRELIMINARY AND FINAL
SUBDIVISION APPROVAL, WHICH ELIMINATED CERTAIN CONDITIONS OF
PRIOR APPROVALS TO ELIMINATE THE REQUIREMENT THAT THE
APPLICANT MAINTAIN AN EMERGENCY ACCESS EASEMENT AND
EMERGENCY ACCESS ROADWAY OVER THE EASEMENT, TO EXTEND THE
TIME WITHIN WHICH THE APPLICANT HAS TO RECORD ALL REQUIRED
AMENDMENTS TO THE PREVIOUSLY RECORDED DOCUMENTS FROM
FEBRUARY 18, 2021 TO AUGUST 18, 2022**

WHEREAS, Emerald Valley Homeowners Association, Inc. (the “**applicant**” or “**HOA**”) owns an emergency access easement (the “**emergency access easement**”) over certain property in the Township of Bernards (the “**Township**”) designated on the Township tax maps as Block 11401, Lots 37.01 and 42 (the “**property**”), and an emergency access roadway was constructed over the emergency access easement (the “**emergency access roadway**”) to serve homes located in a residential subdivision known as Emerald Valley Estates consisting of 22 single family detached residential lots located on Emerald Valley Lane and Harvest Way (the “**Subdivision**”), and conditions set forth in the underlying approval resolutions granting subdivision approval to create the Subdivision require that the applicant maintain the emergency access easement and the emergency access roadway;

WHEREAS, the applicant applied to and obtained from the Board amended preliminary and final subdivision approval to eliminate the conditions set forth in the underlying approval resolutions to eliminate the requirement that the applicant maintain the emergency access easement and the emergency access roadway (the “**amended approval**”) as memorialized in a resolution adopted by the Board on August 18, 2020 (the “**amended approval resolution**”);

WHEREAS, the amended approval resolution contains a number of conditions, and condition #1 is relevant here and provides as follows:

1. **Recording Amendments to the Previously Recorded Documents.** The applicant shall record amendments to the previously recorded documents identified below which govern the applicant’s responsibilities for maintenance of the emergency access roadway and emergency access easement, with the preparation of the amendments being done in accordance with condition #2 below. All amendments shall be recorded within 6 months of the adoption of the within resolution. Any amendments that have not been recorded within 6 months of the adoption of the within resolution shall be null and void unless the applicant applies to and

obtains from the Board an extension of the time within which to record the amendment(s). The previously recorded documents that shall be amended are the following:

- a. “Declaration of Covenants and Restrictions for Emerald Valley Homeowners Association, Inc.” recorded on January 18, 2001;
- b. “Emergency Road Easement Agreement” (which includes the Township of Bernards as a grantee) recorded on March 8, 2001; and
- c. “Amendment and Supplement to Declaration of Covenants and Restrictions for Emerald Valley Homeowners Association, Inc.” recorded on August 27, 2003;

WHEREAS, in as much as the amended approval resolution was adopted on August 18, 2020, condition #1 of the amended approval resolution required the applicant to record amendments to the above listed documents (the amendments to these documents are hereafter referred to as the “**Amended Documents**”) by February 18, 2021;

WHEREAS, the applicant through letters from its attorney, Frederick B. Zelle, Esq., dated September 13, 2021 and January 19, 2022, requested that the Board modify Condition #1 of the amended approval resolution to extend the time within the applicant must record the Amended Documents (the “**applications**”), with the first letter requesting an extension to October 31, 2021 (Application No. PB-20-001A), and the second letter requesting an extension to August 18, 2022 (Application No. PB-20-001B);

WHEREAS, the Board has exclusive subject matter jurisdiction over the applications pursuant to N.J.S.A. 40:55D-20 and 52;

WHEREAS, the Board considered the first application at a non-noticed public hearing conducted on October 19, 2021, during which the applicant was not represented by counsel and the Board was represented by Jonathan E. Drill, Esq., and the Board considered the second application at a further non-noticed public hearing conducted on February 22, 2022, during which the applicant was represented by Frederick B. Zelle, Esq. and the Board was represented by Kathryn J. Razin, Esq.;

WHEREAS, AFTER CONSIDERING THE APPLICATIONS AND REASONS OFFERED IN SUPPORT OF THE APPLICATIONS, AND HAVING GIVEN APPROPRIATE WEIGHT TO SAME, AND BASED ON THE BOARD’S UNDERSTANDING OF THE APPLICABLE LAW, THE BOARD MAKES THE FOLLOWING FACTUAL FINDINGS AND LEGAL CONCLUSIONS FOR THE PURPOSE OF ADOPTING A WRITTEN RESOLUTION IN ACCORDANCE WITH N.J.S.A. 40:55D-10g(1) WHICH GRANTS THE APPLICATIONS SUBJECT TO CONDITIONS AS SET FORTH BELOW:

A. **FACTUAL FINDINGS AND LEGAL CONCLUSIONS**

1. **MLUL Grounds for Extensions Not Applicable.** The traditional sources of authority for extensions of the time of preliminary and final subdivision approvals based on N.J.S.A. 40:55D-49 (extensions of preliminary approvals) and N.J.S.A. 40:55D-52 (extensions of final approvals) do not apply here for three reasons. First, the preliminary and final protection periods against changes in zoning are not at issue here. What is at issue is the fact that the Amended Documents were not recorded within six (6) months of the passage of the amended approval resolution. Second, the delay in recording the Amended Documents has nothing to do with delay on the part of another governmental or quasi-governmental agency. Third, although the applicant has technically requested an “extension” of the time within which to record the Amended Documents, what the applicant is really requesting is a modification of condition #1 set forth in the amended approval resolution. Requests for modifications of conditions are governed by standards that, while similar to, are not limited to the MLUL standards applicable to extensions of approvals.

2. **Grounds for Modification of Approval Condition.** Our courts have held that land use boards have the power to modify and/or eliminate prior approval conditions upon a “proper showing of changed circumstances”, or upon “other good cause” warranting modification and/or amendment, or if “enforcement of the restrictions would frustrate an appropriate purpose.” Cohen v. Fair Lawn, 85 N.J. Super. 234, 237 (App. Div. 1964); Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987), cert. denied 110 N.J. 304 (1988); Sherman v. Harvey Cedars Board of Adjustment, 242 N.J. Super. 421, 429 (App. Div. 1990). As to the “good cause” grounds, our courts have held that a board should consider what its intent was in imposing the condition in the first instance and whether the proposal to modify or eliminate the condition is consistent with or contrary to that intent. See, Sherman, 242 N.J. Super. at 430. As to the “frustration of an appropriate purpose” grounds referred to in Allied, 221 N.J. Super. at 414, the Board should consider whether the proposed modification or proposed use of the property is appropriate and, if so, whether the restrictive condition frustrates that appropriate purpose without modification or amendment.

3. **Findings and Conclusions as to the Modification of Condition #1 of the Amended Approval Resolution to Allow Additional Time Within Which to Record the Amended Documents.** The Board’s findings and conclusions as to the applications to modify condition #1 of the amended approval resolution to allow additional time within which the applicant has to record the Amended Documents are as follows. The Board’s intent in imposing the time limitation at issue was to foster the timely preparation and recording of the Amended Documents to bring about closure of the vacation of the Emergency Access Easement. While that goal was not achieved here, the Board finds that no purpose would be served by allowing the amended approval to be voided because the applicant would presumably re-apply for the amended approval which would take up Board hearing time and presumably result in new amended approval being granted. The Board finds and stresses that its desire and goal is to incentivize the applicant to complete the process of recording the Amended Documents to bring about closure of the vacation of the Emergency Access Easement. The goal is not to waste resources by requiring a new application. For these reasons, the Board finds that (1) good cause exists to warrant modification of the condition at issue to extend the time within which the

applicant has to record the Amended Documents because such modification is consistent with the intent and purpose of the underlying condition at issue, and (2) denying the application and enforcing the time limitation condition at issue as written will frustrate the underlying purpose of the time limitation condition. As such, the Board finds and concludes that the application – treated as a request to modify condition #1 of the amended approval resolution – can and should be granted, and the Board further finds that the appropriate extension of the expiration date of the amendment period is from February 18, 2021 to August 18, 2022.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD BY MOTIONS DULY MADE AND SECONDED ON OCTOBER 19, 2021 AND FEBRUARY 22, 2022 THAT THE APPLICATIONS ARE GRANTED SUBJECT TO THE FOLLOWING CONDITIONS AS SET FORTH BELOW:

B. RELIEF GRANTED

1. **Modification of Condition #1 of the Resolution for Amendment.** Subject to the conditions set forth below, the applications are granted and condition #1 of the amended approval resolution, which requires that the Amended Documents be recorded by February 18, 2021 is hereby modified to extend the said date to August 18, 2022.

C. CONDITIONS

1. **All Other Conditions of the Amended Approval Resolution Remain in Full Force and Effect.** Other than condition #1 of the amended approval resolution which has been modified as set forth above, all other conditions set forth in the amended approval resolution shall remain in full force and effect.

The above approval resolution was adopted by motion duly made and seconded on February 22, 2022 by the following vote of Board members:

<u>Members</u>	<u>Yes</u>	<u>No</u>	<u>Abstain</u>	<u>Absent</u>
Baumann	X			
Damurjian				X
Eorio	X			
McNally	X			
Mallach	X			
Manduke				X
Mastrangelo	X			
Piedici	X			
Seville	X			

I, Cyndi Kiefer, Secretary to the Planning Board of the Township of Bernards in the County of Somerset, do hereby certify that the foregoing is a true and correct copy of the approval resolution duly adopted by the said Planning Board on February 22, 2022.

Cyndi Kiefer

CYNDI KIEFER, Board Secretary