

# **TOWNSHIP OF BERNARDS** **PLANNING BOARD**

## **MINUTES v2** **REGULAR SESSION** July 20, 2021

Chairwoman Piedici called the meeting to order at 7:33 PM.

### **FLAG SALUTE**

### **OPEN MEETING STATEMENT**

Chairwoman Piedici read the following open meeting and procedural 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 20, 2021 and was electronically mailed to all those people who have requested individual notice.

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 PM."

### **OATH OF OFFICE**

Chairwoman Piedici stated that the Oath of Office had been administered by Ms. Razin to members Andrew McNally (Class III) and John Crane (Class IV) prior to the start of the meeting.

### **ROLL CALL:**

Members Present: Asay, Baumann, Crane, Damurjian, Eorio, Fields, McNally, Manduke, Piedici  
Members Absent: Mastrangelo  
Also Present: Board Attorney, Kathryn Razin, Esq.\*; Township Planner, David Schley, PP, AICP;  
Board Secretary, Cyndi Kiefer

\*Present via telephone ("Facetime")

Moved by Ms. Asay, seconded by Mayor Fields, all eligible in favor and carried, that the absence of Ms. Mastrangelo be excused.

### **APPROVAL OF MINUTES**

June 8, 2021 - Regular Session - On motion made by Ms. Manduke and seconded by Mr. Baumann, all eligible in favor and carried, the minutes were adopted as drafted. Abstentions for Ms. Asay, Mr. McNally and Mr. Eorio (all for absences).

### **APPROVAL OF RESOLUTIONS**

[Shaw, Adriane](#); Block 3301, Lot 3; 490 South Maple Avenue; PB21-002 (approved) - Ms. Asay moved to approve the resolution as revised. Second by Ms. Manduke.

Roll call:	Aye:	Asay, Crane, Damurjian, Fields, McNally, Manduke, Piedici
	Nay:	NONE
	Ineligible:	Baumann (absent), Eorio (did not vote)

Motion carried.

[Distributed Solar Development LLC](#) (on behalf of Verizon Corporate Services Group Inc.); Block 804, Lots 2.01 & 16; 295 North Maple Avenue; PB21-001 (approved) - Ms. Asay moved to approve the resolution as written. Second by Mayor Fields.

Roll call: Aye: Asay, Crane, Eorio, Fields, Piedici  
Nay: NONE  
Ineligible: Damurjian, McNally, Manduke (all absent), Baumann (recused)  
Motion carried.

[Fairmount Cemetery Association of Newark and Somerset Hills](#); Block 2301, Lot 12.01; 95 Mount Airy Road;  
PB21-003 (approved) – Mr. Baumann moved to approve the resolution as revised. Second by Ms. Manduke.

Roll call: Aye: Baumann, Damurjian, Fields, Manduke, Piedici  
Nay: NONE  
Ineligible: Asay, Eorio, McNally (all absent), Crane (recused)  
Motion carried.

### **LANDSCAPE COMMITTEE REPORT**

[Maolucci, Vincent J.](#); Block 11501, Lot 3.03; 48 Kings Ridge Road; Preliminary/Final Subdivision; PB12-009

Mr. Damurjian advised the Board that a condition of approval for this application requires that a Landscape Committee visit the site to ensure that there is adequate landscape screening for both the rain garden and the dwelling on Lot 3.03 from the adjacent dwelling (40 Kings Ridge Road). He stated that after several visits, the Committee felt that the screening for the rain garden is adequate, but that more screening is required between the dwellings. A discussion ensued and it was agreed that three (3) deciduous trees approximately 12' to 16' tall (2.5" to 3" caliper) shall be planted between the two dwellings, subject to the approval of the Engineering Department. Ms. Manduke suggested that moving forward, the Board should be more specific about the types of trees to be planted for screening purposes.

### **MASTER PLAN REVIEW**

Referring to a memo from Board Planner David Banisch, PP, AICP, dated 07/16/2021, Chairwoman Piedici advised that discussion of the Master Plan would be deferred until the August 17, 2021 meeting to allow time for Administration, the Engineering Department and the Environmental Commission to submit information required to update the Community Facilities Plan Element, the Utility Services Plan Element and the Conservation and Open Space Plan Element.

### **COMMENTS FROM MEMBERS OR STAFF**

Chairwoman Piedici advised the Board that the August 3, 2021 meeting will be cancelled.

### **ADJOURN**

Moved by Ms. Asay, seconded by Mr. Crane, all eligible in favor and carried, the meeting was adjourned at 7:56 PM.

Respectfully submitted,

Cyndi Kiefer, Secretary  
Planning Board

*Adopted as drafted 09-21-2021*

07/28/2021 dskpjd

**BERNARDS TOWNSHIP PLANNING BOARD**

**ADRIANE SHAW  
BLOCK 3301, LOT 3  
490 SOUTH MAPLE AVENUE**

**APPLICATION NO. PB21-002**

**RESOLUTION MEMORIALIZING MINOR SUBDIVISION APPROVAL, "C(1)"  
VARIANCES AND AN EXCEPTION TO ALLOW A TWO LOT SUBDIVISION**

**WHEREAS**, Adriane Shaw is the owner of certain property in the Township of Bernards (the "**Township**") which is comprised of a lot having an address of 490 South Maple Avenue and designated on the Township tax maps as Block 3301, Lot 3 (the "**property**"), and the property is situated in the R-4 Residential zone district (the "**R-4 zone**"), and which property is currently developed with a single family residential dwelling (the "**dwelling**"), barn (the "**barn**") and swimming pool (the "**swimming pool**") ( the dwelling, barn and swimming pool are referred to herein as the "**existing improvements**");

**WHEREAS**, one nonconforming condition exists relative to the property, specifically, maximum height of an accessory building, where a maximum of 20 feet in height is permitted and the barn is 27.2 feet tall (the "**existing deviation**");

**WHEREAS**, the applicant submitted an application dated February 9, 2021 (the "**application**") to the Bernards Township Planning Board (the "**Board**") seeking minor subdivision approval and "c(1)" and/or "c(2)" variance relief to allow the subdivision of the property to create a two lots (the "**proposed subdivision**"), proposed Lot 3.01 consisting of a 3.36 acre lot on which the existing improvements will be located (the "**proposed Lot 3.01**"), and proposed Lot 3.02 consisting of a 1.39 acre lot for a proposed dwelling (the "**proposed Lot 3.02**");

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

**WHEREAS**, a number of documents were submitted with regard to the application by the applicants, Board and Township experts and officials, all of which documents are on file with the Board and are part of the record in this matter, and the following are the latest versions of the plans, drawings and documents for which Board approval is sought, which plans, drawings and documents have been on file and available for public inspection for at least 10 days prior to the hearing on the application in accordance with N.J.S.A. 40:55D-10b:

1. Architectural plan set, prepared by Robert E. Coleman, AIA, dated June 4, 2017, consisting of two (2) sheets (the "**architectural plan**"), and

2. Plan set titled "Minor Subdivision of Lot 3, Block 3301," prepared by William G. Hollows, PE, dated May 9, 2019 and last revised February 5, 2021, consisting of eight (8) pages (the "subdivision plan");

**WHEREAS**, the Board held a duly noticed public hearing on the application on April 20, 2021, with proof of publication and service of the notices being submitted to and on file with the Board, thereby conferring procedural jurisdiction over the application with the Board, and during which hearing the applicant was represented by Frederick B. Zelley, Esq. and the Board was represented by Jonathan E. Drill, Esq.;

**WHEREAS**, the following individuals testified during the hearing, were subject to cross examination, and their testimony is part of the record in this matter:

1. William Hollows, PE (applicant's engineering expert),
2. Adriane Shaw (applicant),
3. Larry Plevier, PE (Board engineering expert),
4. David Banisch, PP, AICP (Board planning expert), and
5. David Schley, PP, AICP (Township planner);

**WHEREAS**, the following exhibits were entered into evidence during the hearing, are on file with the Board, and are part of the record in this matter:

A-1 Colored rendered subdivision plan sheet 6, and

A-2 "Site line drawing" consists of 3 sheets dated April 15, 2021 prepared by Murphy & Hollows;

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

**A. FACTUAL FINDINGS**

1. **The Property, Zoning and Existing Conditions.** The property is situated in the R-4 zone. Single family residential dwellings are permitted in the R-4 zone pursuant to ordinance section 21-10.4.a.1. As set forth above, the property is developed with the existing improvements, which consist of the dwelling, barn and swimming pool. The property has one existing deviation from the Township zoning ordinance, specifically, the barn is 27.2-

feet tall where 20 feet is the maximum permitted height of an accessory structure pursuant to ordinance section 21-16.1.a.

2. **The Application and Relief Requested.** As set forth above, the application is for minor subdivision approval to create two lots, proposed lot 3.01, with a lot area of 3.36 acres to contain the existing improvements (the dwelling, barn and swimming pool), and proposed lot 3.02, with a lot area of 1.39 acres to contain the proposed dwelling. In connection with the proposed subdivision, the applicant requires “c” variances from: (a) ordinance section 21-15.1.d.1 (Table 501) as to minimum front yard, where 75 feet is required and 67.4 feet is proposed to the dwelling on lot 3.01 as a result of the proposed street right-of-way dedication required by the Somerset County Planning Board; (b) ordinance section 21-16.1.a as to maximum height of an accessory building, where 20 feet is the maximum permitted height of an accessory structure and the barn, which exists and will be located on lot 3.01, is 27.2 feet tall, and an exception from ordinance section 21-38.1.d as to minimum driveway setback from a side lot line, where 5 feet is required and zero feet is proposed on lots 3.01 and 3.02 as a result of the proposed shared driveway. As part of the application, an existing apartment in the barn which was created without any approvals will be removed as a condition of the grant of the application. If the apartment was not removed, a use variance pursuant to N.J.S.A. 40:55D-70d(1) would have been required to allow the apartment to remain, and that would have divested the Board from subject matter jurisdiction over the application.<sup>1</sup>

3. **Findings as to the “C(1)” Variance from the Building Height Requirement for the Barn.** As set forth above, ordinance section 21-16.1.a provides that the maximum building height for an accessory structure is 20 feet and the existing barn which be located on proposed Lot 3.01 is 27.2 feet in height, thereby requiring a “c” variance. The Board treated this variance as a “c(1)” or so-called “hardship” variance, and the Board’s findings as to the positive and negative criteria of the “c(1)” accessory structure height variance are as follows.<sup>2</sup>

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<sup>1</sup> See N.J.S.A. 40:55D-60, which provides that, whenever a proposed development requires approval of a subdivision “but not a variance pursuant to [N.J.S.A. 40:55D-70d]”, the planning board shall have ancillary jurisdiction over “c” variances which it can grant in accordance with N.J.S.A. 40:55D-70c. In the event that the apartment is not removed in accordance with the condition of the grant of the application, the within approval shall become null and void due to lack of subject matter jurisdiction over the application and the applicant will have to apply to the Township Zoning Board of Adjustment for subdivision approval along with all other related relief, including but not limited to the “d(1)” use variance.

<sup>2</sup> The Board recognizes that the height of the barn is a lawfully created pre-existing non-conforming condition but finds that this lawfully created pre-existing nonconforming condition may be entitled to remain pursuant to the “grandfathering” provisions of the MLUL (N.J.S.A. 40:55D-68) only if no further development application is submitted related to the property at issue. Once an application for development is submitted, the “Time of Application” Law provision of the MLUL (N.J.S.A. 40:55D-10.5) applies, which provides that, “[n]otwithstanding any provision of law to the contrary [which would include the grandfathering provisions of the MLUL], those development regulations which are in effect on the date of submission of the application for development shall govern the review of that application for development.” As such, the Board finds that the above ordinance deviation must be addressed as a new variance.

a. **Positive Criteria of the “C(1)” Variance Accessory Building Height Variance.** As to the positive criteria of the “c(1)” accessory structure height variance, the Board finds as follows. First, the Board finds that there is an accessory building height deviation that currently exists on the property which constitutes an extraordinary and exceptional situation uniquely affecting the property and the barn which is lawfully existing thereon. As such, the existing height deviation is a lawfully created pre-existing nonconformity and the proposed subdivision will not exacerbate this condition. Second, the Board finds that strict application of the height regulation at issue will inhibit the extent to which the property can be used by, in effect, prohibiting the property from being subdivided or used with the accessory barn structure if it has to be torn down merely to meet the height prohibition at issue. The Board finds that this constitutes the sort of hardship that N.J.S.A. 40:55D-70c(1) was intended to relieve.

b. **Negative Criteria of the “C(1)” Accessory Building Height Variance.** As to the negative criteria of the “c(1)” accessory structure height variance, the Board finds as follows. First, the Board finds that the “c(1)” variance can be granted without substantial detriment to the public good, provided that the conditions set forth below are imposed and complied with. The reason is that the deviation at issue has existed for a number of years without causing any detriment and will not be exacerbated by the proposed subdivision provided, however, that the conditions set forth below are imposed and complied with. Second, provided that the conditions set forth below are imposed and complied with, the Board finds that the “c(1)” variance can be granted without substantially impairing the intent and purpose of the master plan and zoning ordinance, particularly because there are no changes proposed for the property as to the existing height deviation condition.

4. **Findings as to the “C(1)” Variance for Minimum Front Yard Setback as to the Dwelling.** As set forth above, ordinance section 21-15.1.d.1 (Table 501) requires a minimum front yard setback of 75 feet and, while the property currently complies with this regulation, the existing dwelling which will be located on Lot 3.01 after subdivision, will have a setback of 67.4 feet due to the street right-of-way dedication required by the Somerset County Planning Board, thereby requiring a “c” variance. The Board treated this variance as a “c(1)” or so-called “hardship” variance, and the Board’s findings as to the positive and negative criteria of the “c(1)” variance are as follows.

a. **Findings as to the Positive Criteria of the “C(1)” Setback Variance.** As to the positive criteria of the “c(1)” setback variance, the Board finds as follows. First, the Board finds that the strict application of the setback regulation at issue in this application will result in peculiar and exceptional difficulties in terms of impacting the extent to which the property may be used because literal enforcement of the setback regulation and the street dedication requirement together will prohibit an otherwise compliant subdivision of the property. Second, the Board finds that requiring the applicant to relocate the dwelling merely to comply with the setback requirement is impracticable. Third, the Board therefore finds that “c(1)” variance relief to allow the dwelling to remain in its current location despite the resulting setback deviation after subdivision is necessary in this particular case in order to relieve the

hardship that would otherwise befall the applicant as a result of the extraordinary and exceptional situation at issue.

b. **Findings as to the Negative Criteria of the “C(1)” Setback**

**Variance.** As to the negative criteria of the “c(1)” setback variance, the Board finds as follows. As to the first prong of the negative criteria, provided that the conditions set forth below are imposed and complied with, the Board finds that the setback deviation by the dwelling will not result in any aesthetic or other detriment so will not result in substantial detriment to the public good. In this regard, the Board finds that, unless the road is widened, the grant of the right-of-way dedication which will cause the setback deviation, will result in absolutely no negative visual impact. Second, even if there is a future road widening, the dwelling will remain setback from the roadway a sufficient distance so that no substantial aesthetic detriment will result, provided that the conditions set forth below are imposed and complied with. Third, the Board finds that no other negative impacts will result from the location of the dwelling and the proposed subdivision. As to the second prong of the negative criteria, provided that the conditions set forth below are imposed and complied with, the Board finds that the “c(1)” variance can be granted without substantial impairment of the intent and purpose of the master plan and zoning ordinance for the following reasons. First, the Board finds that the primary purpose of the setback requirement is to protect neighboring residential lots and maintain aesthetics along neighborhood street frontages. Second, the Board finds that the dwelling in its present location does not detract from the aesthetics of the neighborhood at large, particularly in light of the distance it is setback from roadway.

5. **Findings as to Exception from the Subdivision Ordinance**

**Requirement for Driveway Setback.** As set forth above, the applicant has also requested an exception from ordinance section 21-38.1.d, which requires a minimum five (5) foot setback from any driveway and a side lot line because the applicant proposes zero feet from the shared driveway proposed as part of the proposed subdivision. The Board’s findings as to this exception are as follows. First, the Board finds that granting the requested exception is reasonable and within the intent and purpose of the subdivision ordinance as it makes better planning sense in this particular case to have one shared driveway rather than two separate driveways along this particular street and the way to do that is to provide a shared driveway from and to the street. In this regard, the Board further finds and notes that the Somerset County Planning Board has required as a condition of its approval that only one driveway have access to the road. Second, the Board finds that even if it required each lot to have a separate driveway, the existing driveway to the existing dwelling would violate the five (5) foot setback requirement from the new side lot line and it would be impracticable and imprudent to require the applicant to remove and/or relocate the existing driveway solely for purposes of ordinance compliance. Finally, provided that the conditions set forth below are imposed and complied with, the Board finds that the exception can be granted in this particular case without substantial detriment to the public good and without substantial impairment to the intent and purpose of the zoning ordinance and master plan.

6. **Findings as to Minor Subdivision Review.** In order to create the proposed subdivision, the applicant requires subdivision approval and, as set forth above, the

applicant has requested minor subdivision approval. The Board's findings as to minor subdivision review and approval are as follows. With the exception of the variances and exception that have been requested, and provided that the conditions set forth below are imposed and complied with, the Board finds that the architectural plan and the site plan will comply with all other applicable zoning ordinance regulations and subdivision ordinance requirements.

## **B. CONCLUSIONS OF LAW**

1. **The "C(1)" Variances.** The Board's conclusions as to the "c(1)" variances are as follows:

a. **Standards Applicable to Review of the "C(1)" Variances.** The Board has the power to grant "c(1)" or so-called "hardship" variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(1) where "(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon, the strict application of any regulations...would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property." The "hardship" that the applicant must prove is not inutility, meaning that without the variance the property would be zoned into inutility. Inutility caused by a zoning regulation would require a variance to avoid an unconstitutional taking of the property. The Board may – but is not required to – grant a "c(1)" variance where the hardship at issue is not confiscatory but, rather, inhibits "the extent" to which the property can be used. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). It must be noted that a hardship variance is not available for intentionally created situations as constituting "self-created" hardship. Commons v. Westwood Board of Adj., 81 N.J. 597, 606 (1980); Chirichello v. Monmouth Park Board of Adj., 78 N.J. 544, 553 (1979), and/or for mistakes. Deer-Glen Estates v. Borough of Fort Lee, 39 N.J. Super. 380, 386 (App. Div. 1956). Neither is a hardship variance available to relieve "personal hardship" of the owner, financial or otherwise. Jock v. Wall Township Zoning Board of Adj., 184 N.J. 562, 590 (2005). Finally, the Board may not exercise its power to grant a "c(1)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

b. **Grant of the "C(1)" Variances.** As set forth in the factual findings above, the Board found that due to the exceptional circumstances surrounding the property, strict application of the zoning ordinance regulations at issue would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the applicant. The Board also found that, provided the conditions set forth below are imposed and complied with, the variances to relieve the hardships could be granted without substantial detriment to the



public good and without substantial impairment of the master plan or zoning ordinance. As such, the Board concludes that it can and should grant the “c(1)” variances at issue subject to the conditions set forth below.

2. **Exception from the Subdivision Ordinance Requirements at Issue.**

The Board’s conclusions as to the requested exception from the subdivision ordinance requirements as to the driveway setback are as follows:

a **Standards Applicable to Review of Exceptions from**

**Subdivision Ordinance Requirements.** N.J.S.A. 40:55D-51a and b provide that the Board, when acting upon applications for preliminary subdivision or site plan approval, shall have the power to grant such exceptions from the requirements for subdivision or site plan approval “as may be reasonable and within the general purpose and intent of the provisions for [subdivision or site plan] review and approval . . . if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.” While neither “impracticable” nor “hardship” is defined in the MLUL, “hardship” has been defined in numerous land use and zoning cases in New Jersey. As set forth above to qualify for “c(1)” variance relief, the “hardship” at issue does not have to rise to the level of confiscation. If the ordinance provisions at issue “inhibit . . . the extent” to which the property can be used, our courts have held that “hardship” to warrant a “c(1)” variance exists. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). As such, the Board concludes that an exception can be granted if it is reasonable and within the general purpose and intent of the provisions for subdivision review and if the literal enforcement of the subdivision requirement(s) at issue will exact undue hardship or inhibit the extent to which the property can be used. Unlike “hardship,” however, “impracticable” has not been defined in any land use or zoning case of which the Board is aware. Following the basic rule of construction that legislative language should be given its plain and ordinary meaning, Pennsauken v. Schad, 160 N.J. 156, 170 (1999); DiProspero v. Penn, 183 N.J. 477, 492 (2005), the Board concludes that “impracticability” is derived from the root word “impractical,” which is defined as “not wise to put into or keep in practice or effect”; an inability to deal “sensibly or prudently with practical matters.” See, Merriam-Webster’s Collegiate Dictionary (11th Ed. 2004). As such, the Board concludes that an exception can be granted if it is reasonable and within the general purpose and intent of the provisions for subdivision review and if the literal enforcement of the subdivision requirement(s) at issue would be impractical, unwise or imprudent under the circumstances.

b. **Conclusions to Grant the Exception.** As set forth above in the factual findings, the Board found that it is reasonable and within the intent and purpose of the subdivision ordinance provisions to grant the exception from the subdivision ordinance requirement at issue as to the driveway setback, subject to the conditions set forth below being imposed and complied with. As also set forth above in the factual findings, the Board found that it is impracticable to literally enforce the subdivision ordinance requirement at issue under the circumstances. As such, the Board concludes that it can and should grant the exception at issue subject to the conditions set forth below.

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

a. **Standards Applicable to Minor Subdivision Review.** N.J.S.A. 40:55D-47 is the starting point for consideration of a minor subdivision application and provides that "minor subdivision approval shall be deemed to be final approval of the subdivision." N.J.S.A. 40:55D-50a is thus the focal point for consideration of the minor subdivision as it provides that final approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. As such, if the application complies with all ordinance requirements, the Board must grant approval. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions: The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements. The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan be revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan prior to the Board granting approval. However, the Board cannot grant approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the subdivision review process, approval must be denied. Id.

b. **Grant of Minor Subdivision Approval.** As set forth above in the factual findings, provided that the variances and exception requested in the application are granted and that the conditions set forth below are imposed and complied with, the Board found that the application and plans will comply with all remaining applicable zoning ordinance regulations and all applicable subdivision ordinance requirements. As the Board has concluded that the variances and exception sought in the application can and should be granted, the Board further concludes that minor subdivision approval can and should be granted, subject to the conditions set forth below being imposed and complied with.

4. **Imposition of Conditions.** Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are

required in order for a board to find that the requirements necessary for approval of the application have been met. Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to ensure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to ensure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that “aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances” and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), *aff’d o.b.*, 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions.); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J. 418, 438-439 (2000) (explaining that site plan review “typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping” and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2021), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board’s implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition approval on review and approval of changes to the plans by Board’s experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): “The MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications” and using such professional consultants to review and evaluate revised plans “was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application.” The Board concludes that the conditions set forth below are warranted and should be imposed on all of the above-mentioned bases.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD, BY MOTION DULY MADE AND SECONDED ON APRIL 20, 2021, THAT THE FOLLOWING RELIEF IS GRANTED SUBJECT TO THE CONDITIONS SET FORTH BELOW:**

**C. RELIEF GRANTED**

1. **Grant of “C(1)” Accessory Structure Height Variance.** Subject to the conditions set forth below being imposed and complied with, the Board hereby grants a “c(1)”

variance from ordinance section 21-16.1.a to allow the existing barn height of 27.2 feet where 20 feet is the maximum permitted accessory structure height.

2. **Grant of "C(1)" Variance from Front Yard Setback Requirement.**

Subject to the conditions set forth below being imposed and complied with, the Board hereby grants a "c(1)" variance from ordinance section 21-15.1.d.1 to allow a front yard setback of 67.4 feet to the existing dwelling which will be located on Lot 3.01 after subdivision where 75 feet is required.

3. **Exception from Subdivision Ordinance Requirement as to Driveway Setback.** Subject to the conditions set forth below being imposed and complied with, the Board hereby grants an exception from ordinance section 21-38.1.d. to allow a shared driveway (zero setback), where a five (5) foot setback from the driveway to the side lot line is required.

4. **Grant of Minor Subdivision Approval.** Subject to the conditions set forth below being imposed and complied with, the Board hereby approves the architectural plan and the site plan and grants minor subdivision approval to the proposed development as reflected on those plans to allow the proposed subdivision.

**D. CONDITIONS**

1. **Revisions to Plans.** Revisions to the plans shall be made by notes and/or drawings to the satisfaction of the Township Planner and Board engineering expert by January 20, 2022 (which is within six (6) months of the adoption of the within resolution on July 20, 2021) to incorporate the comments emanating in the following letters and/or memos prepared by the following Board and/or Township professionals and/or as discussed by the Board on the record during the hearing on the application provided below. 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. (The Board notes that, in the absence of the within time limitation condition, it would decline to grant conditional approvals and, instead, would continue the hearing on an application for no more than a six month period to provide the applicant with the opportunity to revise the plat, plans and documents and, failure by the applicant to resubmit same to the Board within that period or submission within that period but failure of the applicant to make all the required revisions, would result in denial of the application.) Any dispute(s) concerning satisfaction of any conditions related to the revisions of the plans/plats may be brought to the Board for resolution by written letter application submitted by the applicant without the necessity for public notice but on written notice to the Township Engineer and Township Planner.

a. **Following comments emanating from the memo to the Board from David Schley, PP, AICP (Township planner) dated February 22, 2021:**

- (1) Intentionally omitted as no revisions are required.

- (2) Intentionally omitted as no revisions are required.
- (3) The list of required approvals on sheet 1 shall be amended to include the Bernards Township Sewerage Authority.
- (4) The Maximum Permitted Lot Yield table on sheet 1 shall be amended to include a breakdown identifying the square footage of each type of constraint (e.g. street of right-of-way, wetlands/wetlands transition area, stream buffer) included in the total areas shown in column C, rows 2 and 4. Also, the inconsistency in row 4 shall be eliminated.
- (5) The stream buffer conservation area and riparian zone shown on sheet 4 shall also be shown on sheets 2 and 3.
- (6) As noted on the plans, the existing and proposed driveways shall be a minimum of 10' wide, in accordance with ordinance section 21-38.1a. Add a note to the plans to this effect. Also, add a note to the plans stating that the widening of the existing driveway necessary to achieve the minimum 10' width on proposed lot 3.01 must be completed prior to the recording of the subdivision map or deeds.
- (7) As noted on the plans, all utility services for the proposed dwelling on proposed lot 3.02 shall be underground and, in the event proposed lot 3.01 is redeveloped with a new dwelling, all existing overhead utility services (wires and poles) shall be removed, and all proposed utility services, shall be underground. As further noted on the plans, all utility services shall be routed to minimize disturbance to existing trees, to the satisfaction of the Township Engineer.
- (8) The locations of the proposed utilities and the limit of disturbance shown on sheets 4 and 6 shall be revised to consistently reflect that connections to South Maple Avenue shall be made through the existing driveway opening.
- (9) The plans shall be revised to show the additional tree clearing necessary to provide clear sight lines as shown on Exhibit A-2, and to show the additional replacement trees required as a result of the additional clearing. The replacement trees shall include 6'-8' high Norway spruce trees as shown on the plans, or equivalent evergreen trees, to provide buffering along the adjoining residential property lines. The plans shall be revised to include a note stating that all trees shown to be planted on proposed lot 3.01 shall be planted prior to the recording of the subdivision map or deeds and all trees to be planted on proposed lot 3.02 shall be planted prior to issuance of a certificate of occupancy for the proposed dwelling.
- (10) to (23) Intentionally omitted as addressed in subsequent conditions.

b. **Following comments emanating from the memo to the Board**

**from David Banisch, PP, AICP (Board planner) dated February 26, 2021 (all comments intentionally omitted unless set forth below)**

(9) Revise the zoning schedule on sheet 1 to indicate the accurate setbacks to the dwelling.

(11) Add a note to sheet 6 (tree plan) that the replacement tree plantings (quantities and locations) shall be subject to inspection and approval by the Board's landscaping committee with the goals of identifying the most impactful locations for buffer plantings following site disturbance to ensure neighbors are adequately buffered. The replacement trees on proposed lot 3.01 shall be subject to inspection and approval by the landscaping committee prior to the recording of the subdivision map and/or deeds. The replacement trees on proposed lot 3.02 shall be subject to inspection and approval by the landscaping committee prior to the issuance of a certificate of occupancy for the proposed dwelling. On each lot, the applicant shall provide additional plantings and/or make other changes to the landscaping as deemed necessary and appropriate by the landscaping committee to achieve adequate buffering. (Any dispute(s) concerning the determinations of the landscaping committee may be brought to the Board for resolution by written letter application submitted by the applicant without the necessity for public notice but on written notice to the Township Engineer and Township Planner.)

(12) Add a note to the plans that all exterior lighting shall be downward directed and shielded from adjoining neighbors and shall be subject to in-service inspections by the Board's lighting committee. The existing exterior lighting on proposed lot 3.01 shall be subject to inspection and approval by the lighting committee, for the purpose of identifying and correcting any nuisance lighting that may exist, prior to the recording of the subdivision map and/or deeds. The proposed exterior lighting on proposed lot 3.02 shall be subject to inspection and approval by the lighting committee prior to the issuance of a certificate of occupancy for the proposed dwelling. On each lot, the applicant shall make changes to the lighting as deemed necessary and appropriate by the lighting committee so that glare, direct light or reflection will not be a nuisance to adjoining properties. Any dispute(s) concerning the determinations of the lighting committee may be brought to the Board for resolution by written letter application submitted by the applicant without the necessity for public notice but on written notice to the Township Engineer and Township Planner.

**c. Following comments emanating from Board Members During the Hearing on the Application:**

(1) Revise the plans to reflect the sight lines, proposed grading and proposed tree removal shown on Exhibit A-2, or as shown on the sight line plans ultimately approved by the Somerset County Planning Board. In the event that the Somerset County Planning Board requires a legal restriction encumbering the portion of clear sight area located outside of the proposed street right-of-way shown on the plans, which is 33 feet from the physical centerline of the street, the applicant shall provide the restriction by way of an easement or similar instrument, and not by expanding the proposed right-of-way beyond what is shown on the plans.

(2) To compensate for the loss of existing roadside vegetation resulting from clearing for the required sight lines, the plans shall be revised to include proposed replacement trees along the street frontage, outside the sight line area.

2. **Review/Approval of Subdivision Map/Deed.** The appropriate subdivision map and/or deeds shall be subject to the review and approval of the Township Engineering Department and the Township Attorney prior to recording with the County Clerk.

3. **Pool Fence Compliance.** The applicant must demonstrate that the fence enclosing the existing swimming pool complies with current construction codes prior to the recording of the subdivision map or deeds. This must be done by applying for a construction permit and obtaining a certificate of approval.

4. **Swimming Pool Water Discharge Process.** The owner of proposed lot 3.01 shall utilize "best management practices" when discharging pool water. The best management practices recommended by the Township Environmental Commission are posted on the Environmental Commission's page on the Township website: <https://www.bernards.org/boards/environmental>.

5. **Easements, Dedications and Conveyances.** Any and all easements, dedications and/or conveyances running to and in favor of the Township which are proposed on the plan and/or subdivision plat and/or required as a condition of the approval resolution shall, in addition to being identified on the applicant's plans, maps and/or plats, be contained in separate documents if required by the Township Attorney to be prepared at the direction of the Township Attorney after the metes and bounds descriptions and maps of the easement, dedication and/or conveyance areas have been reviewed and approved by the Township Engineer. Said documents shall specifically outline the grant of the easement, dedication and/or conveyance and its purpose and shall contain a metes and bounds description and maps of the easement, dedication and/or conveyance area. All such documents shall then be recorded and, upon completion of the recording process, be transmitted to the Township Clerk for maintenance with other title documents of the Township.

6. **Conservation Easement.** The wetlands, wetlands transition areas and stream buffer conservation area on proposed lot 3.01 shall be contained within a conservation easement deeded to the Township, and Township standard markers shall be installed along the easement boundary. The easement shall be prepared by the Township Attorney and must be executed by the applicant and recorded with the Somerset County Clerk prior to or simultaneous with, the recording of the subdivision map or deeds. The easement boundary markers shall be installed prior to recording of the subdivision map or deeds.

7. **Easement(s) Relative to Driveway Use.** The applicant shall record an appropriate declaration or private easement/agreement between the owners of proposed lots 3.01 and 3.02 outlining the terms of use and maintenance responsibilities for the shared driveway and including a deed restriction that prohibits driveway access to/from South Maple Avenue at any location other than the approved existing location. The document shall be subject to the review

and approval of the township Engineering Department and the Township Attorney and must be recorded with the Somerset County Clerk, prior to, or simultaneous with, the recording of the subdivision map or deeds.

8. **Drywell System and Stormwater Management Design.** The proposed drywell system shall satisfy the “minor development” requirements set forth in ordinance section 21-42.11. All aspects of the proposed stormwater management design shall be subject to further review and approval by the Township Engineering Department.

9. **Removal of Apartment in the Barn by Removal of all Cooking facilities, Bathroom facilities and Septic System.** The apartment in the existing barn which will be located on proposed Lot 3.01 shall be removed by removal of all existing cooking facilities, toilets, sinks and bathing facilities in the existing barn, as well as abandonment of the existing septic system serving the barn, all to the satisfaction of the Township Zoning officer and the Township Health Department, and prior to the recording of the subdivision map and/or deeds. To repeat, the removal of these systems shall occur prior to the recording of the subdivision map and/or deeds. In the event that the apartment is not removed in accordance with the within condition, the within approval shall become null and void due to lack of subject matter jurisdiction over the application and the applicant will have to apply to the Township Zoning Board of Adjustment for subdivision approval along with all other related relief, including but not limited to the “d(1)” use variance if it wants to subdivide the property.

10. **Street Address Assignment.** The street address for proposed Lot 3.02 shall be assigned by the Township Engineering Department and must be indicated on the subdivision plans and on the proposed subdivision map or deeds.

11. **Pre-Construction Meeting.** The applicant shall attend a pre-construction meeting with the Township Engineering Department prior to the start of any construction activity.

12. **Development Fees.** The applicant shall be responsible for development fees in accordance with ordinance section 21-86.

13. **Silt Fencing.** In light of the close proximity of the property to the Passaic River, the applicant shall provide a double row of silt fencing during the entire construction period.

14. **Use of Native Plant Species.** To the extent practicable, the proposed replacement trees shall be native species. Recognizing that a non-native species may be more effective as buffering along the adjoining properties, the Board specifically approves the proposed Norway spruce for buffer planting purposes.

15. **Perpetual Maintenance of Replacement Trees.** The applicant shall be responsible for the perpetual maintenance of the replacement trees planted along the easterly side and northerly (rear) property lines of Lot 3.01, and along the westerly side and northerly (rear) property lines of Lot 3.02. The maintenance is subject to a deed restriction to be recorded for each lot. The finalized tree planting plans showing specific trees and/or areas to be perpetually



maintained shall be subject to review and approval by the Board's landscaping committee, and shall be attached to the deed restrictions, all subject to the review and approval of the township Engineering Department and the Township Attorney. The deed restriction on lot 3.01 shall be recorded with the Somerset County Clerk, prior to, or simultaneous with, the recording of the subdivision map or deeds. The deed restriction on lot 3.02 shall be recorded prior to the issuance of a certificate of occupancy for the proposed dwelling.

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

17. **Perfection of Subdivision.** The subdivision shall be perfected by recording of the subdivision map or deeds within 190 days of the date of adoption of the Board's resolution.

18. **Time to Obtain Construction Permits, Commence and Complete Construction, and Obtain Certificates of Occupancy.** The applicant shall apply for and obtain a construction permit for the new dwelling to be located on proposed Lot 3.02 by July 20, 2023 (which is within two years of the adoption of the within resolution on July 20, 2021). 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 have one year from the date of issuance of the construction permit to commence construction and obtain a permanent certificate of occupancy for the new dwelling to be located on proposed Lot 3.02. 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.

19. **Escrow Fees.** Any and all outstanding escrow fees shall be paid in full and the escrow account replenished to the level required by ordinance within 10 days of the adoption of a resolution, within 10 days of written notice that a deficiency exists in the escrow account, prior to signing the plans, prior to the issuance of any permits, and prior to the issuance of a temporary and/or permanent certificate of occupancy, completion or compliance (whichever is applicable). Failure to abide by this condition after receiving written notice and a 5-day period in which to cure the deficiency shall result in the relief granted terminating and becoming null and void. All written notices shall be sent to the applicant directly. The Township may elect to send a courtesy copy to the applicant's attorney but any such courtesy copy shall have no legal effect.

20. **Specific Approvals and Permits.** The within approval shall be conditioned upon the applicant obtaining permits and/or approvals from all applicable agencies and/or departments including (if applicable) but not necessarily limited to the following municipal, county and/or state agencies and/or departments:

- a. Township Board of Health;
- b. Somerset County Department of Health;

- c. Bernards Township Sewerage Authority;
- d. Somerset - Union Soil Conservation District certification / approval as to the soil erosion and sediment control plan;
- e. Somerset County Planning Board unconditional approval (including as to the County imposed sight line requirements), and
- f. NJDEP approval of any aspect of the proposed development within its jurisdiction.

21. **Subject to Other Approvals and Laws.** The within approval and the use of the property remains subject to all conditions of prior Board approvals not eliminated or modified by the within approval. The within approval and the use of the property are also conditioned upon and made subject to any and all laws, ordinances, requirements and/or regulations of and/or by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. The within approval and the use of the property are also conditioned upon and made subject to any and all approvals by and/or required by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. In the event of any inconsistency(ies) between the terms and conditions of the within approval and any approval(s) required above, the terms and/or conditions of the within approval shall prevail unless and until changed by the Board upon proper application.

\*\*\*\*\*

**VOTE ON MOTION DULY MADE AND SECONDED ON APRIL 20, 2021:**

**THOSE IN FAVOR: ASAY, FIELDS, ESPOSITO, CRANE, DAMURJIAN, McNALLY, MANDUKE, MASTRANGELO & PIEDICI.**

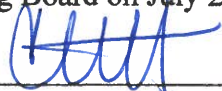
**THOSE OPPOSED: NONE.**

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The above memorializing resolution was adopted on July 20, 2021 by the following vote of eligible Board members:

<u>Members</u>	<u>Yes</u>	<u>No</u>	<u>Abstain</u>	<u>Absent</u>
ASAY	X			
FIELDS	X			
ESPOSITO			(No longer a member)	
CRANE	X			
DAMURJIAN	X			
McNALLY	X			
MANDUKE	X			
MASTRANGELO				X
PIEDICI	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 memorializing resolution duly adopted by the said Planning Board on July 20, 2021.

  
 \_\_\_\_\_  
 CYNDI KIEFER, Board Secretary

**BERNARDS TOWNSHIP PLANNING BOARD**

**DISTRIBUTED SOLAR DEVELOPMENT, LLC  
ON BEHALF OF VERIZON CORPORATE SERVICES GROUP, INC.,  
BLOCK 804, LOTS 2.01 & 16  
ONE VERIZON WAY (295 NORTH MAPLE AVENUE)**

**APPLICATION NO. PB 21-001**

**RESOLUTION MEMORIALIZING GRANT OF “C(2)” VARIANCES, DESIGN  
EXCEPTIONS AND PRELIMINARY AND FINAL MAJOR SITE PLAN APPROVAL  
TO ALLOW INSTALLATION OF A SOLAR CANOPY ON THE PARKING DECK OF  
THE VERIZON CORPORATE HEADQUARTERS SITE**

**WHEREAS**, 295 North Maple LLC c/o Verizon Corp. (the “**Owner**”) is the owner of a 139.4 acres of land comprised of three lots, two of which lots are located in Bernards Township (the “**Township**”), designated on the Township tax maps as Block 804, Lots 2.01 and 16, known as One Verizon Way a.k.a. 295 North Maple Avenue, and the third lot located in Harding Township and designated as Block 46, Lot 14 on the Harding Township tax maps (all three lots together are referred to as the “**Property**”), and the Property is developed with a building complex serving as the operational headquarters for Verizon (the “**Verizon complex**”) and related parking areas, a residential structure used for office purposes and other improvements used in connection with the Verizon complex (the “**Verizon uses**”), with the portion of the property located in the Township (Lots 2.01 and 16 in Block 804 referred to as the “**Site**”) being situated in the E-1 Office zoning district (the “**E-1 zone**”) in which zone the Verizon complex and Verizon uses are principally permitted;

**WHEREAS**, the Site has been the subject of certain prior approvals which have resulted in certain nonconforming conditions being approved via the grant of certain variance relief, including approvals granted by the Bernards Township Board of Adjustment in 2017, as amended in 2018, to allow construction of a parking deck (the “**Parking Deck**”), surface parking areas and recreation improvements, which approvals included a “d(4)” floor area ratio variance and a “d(6)” height variance to permit the floor area ratio to exceed the maximum permitted by ordinance and to permit the principal building height to exceed by more than 10-feet and/or 10 percent the maximum permitted height, and variances were also previously granted to allow deviations as to floor area, side yard, building setback from a residential zone, internal illumination of signs, sign setback, fence height, number of parking spaces and parking setback from a residential zone, along with certain exceptions from the site plan ordinance requirements, and the grant of site plan approval by the Bernards Township Planning Board (the “**Board**”) for the installation of ground mounted solar panels in 2009 (collectively, all prior approvals are referred to herein as the “**Prior Approvals**”);

**WHEREAS**, Distributed Solar Development, LLC (the “**Applicant**”), on behalf of Verizon Corporate Services Group, Inc., and with the consent of the Owner, submitted an application to the Board on January 26, 2021, seeking preliminary and final major site plan approval with “c(2)” variances and certain design exceptions enumerated below (the

"**Application**") to allow installation of a solar canopy on the Parking Deck (the "**Proposed Development**");

**WHEREAS**, the Board has exclusive subject matter jurisdiction over the Application pursuant to N.J.S.A. 40:55D-10 by application of N.J.S.A. 40:55D-46, -50, -60a, and -70c, and, more specifically, for the following reasons: (1) the proposed development, which is a solar canopy on the Parking Deck, is a permitted accessory use, (2) the Applicant proposes no changes to the previously approved FAR or the previously approved principal building height so does not require a "d(4)" or a "d(6)" variance; (3) the Applicant does not require and does not seek any other "d" type variance relief as part of the Application which would remove subject matter jurisdiction from the Board and place same with the Bernards Township Board of Adjustment; (4) despite the prior grant of "d" variances by the Bernards Township Board of Adjustment through the prior approvals, the Application is distinguishable from a bifurcated application due to the nature of the relief requested so is distinguishable from Puleo v. North Brunswick Board of Adj., 375 N.J. Super. 613, 621-623 (App. Div. 2005), certif. denied, 184 N.J. 212 (2005) (holding that a board of adjustment has subject matter jurisdiction over a subsequently submitted site plan application where an underlying "d" variance was granted by the board because N.J.S.A. 40:55D-76b not only applies to expressly bifurcated applications but also applies to subsequently submitted site plan and subdivision applications where prior relief involved a "d" variance; and (5) jurisdiction was not retained by the Bernards Township Board of Adjustment in any of the prior approvals;

**WHEREAS**, a number of documents were submitted with regard to the Application, all of which documents are on file with the Board and are part of the record in this matter, and the following are the latest versions of the plans, drawings and documents for which Board approval is sought, which plans, drawings and documents have been on file and available for public inspection for at least 10 days prior to the hearing on the application in accordance with N.J.S.A. 40:55D-10b:

1. Preliminary and Final Major Site Development Plans dated January 15, 2021, prepared by Gladstone Design Inc. (12 sheets), with attached Supplemental Drawings (the "**Site Plans**"),
2. Preliminary Planning Set Canopy Design dated January 15, 2021 (5 sheets), prepared by Parasol Structures (the "**Design Plans**"),
3. Stormwater Management Report with Drainage Area Maps and Calculations dated January 15, 2021, prepared by Gladstone Design Inc. (the "**Stormwater Report**"), and
4. Environmental Impact Assessment and Project Report prepared by Gladstone Design Inc. dated January 15, 2021 (the "**EIA**"); and

**WHEREAS**, the Board held a duly noticed public hearing on the application on May 4, 2021, with an affidavit of service of notices on all lot owners within 200-feet of the property, an acknowledgment of service and waiver of 10 day notice from the Clerk of Harding Township,

and an affidavit of publication of notice all being submitted to and being on file with the Board, thereby conferring procedural jurisdiction over the application with the Board, during which hearing the Applicant was represented by Gerald R. Salerno, Esq. and the Board was represented by Jonathan E. Drill, Esq.;

**WHEREAS**, the following witnesses testified during the hearing on the Application, were subject to cross examination and questions, and their testimony is part of the record in this matter:

1. Michael Sandford, (Manager of the Verizon, Global Real Estate, Energy Management team),
2. Rob Moschello, PE of Gladstone Design, Inc., (Applicant's engineering expert),
3. Brian Cuff of Parasol Structures, (Applicant's fact witness regarding solar canopy design),
4. John McDonough, PP, AICP, CLA (Applicant's planning expert),
5. Larry Plevier, PE, CME (Board's engineering expert),
6. David Schley, PP, AICP (Township Planner), and
7. David Banisch, PP, AICP (Board's planning expert);

**WHEREAS**, the following exhibit was submitted into the record as evidence during the hearing, is on file with the Board, and is part of the record in this matter:

- A-1 PowerPoint slideshow regarding Verizon's goals in promoting environmental conservation through solar power; and

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

**A. FACTUAL FINDINGS**

1. **The Property, Existing Improvements and Zoning.** The Property is comprised of three contiguous lots totaling 139.4 acres. The majority of the existing development is located on the Site, including the Verizon complex which serves as Verizon's operational headquarters as well as related parking areas, and those improvements are located on Lot 2.01, which contains 133.1 acres in the E-1 zone. Lot 16 contains 4.4 acres in the southeast corner of the property and is occupied by a residential structure used for office purposes and various other improvements associated with the Verizon complex. Lot 14 is a vacant 1.9-acre lot located along the Passaic River in Harding Township and is not part of the Application. Pursuant to ordinance section 21-10.5.a.1, the E-1 zone permits as principal uses a number of non-residential uses including administrative, business and office buildings, research laboratories and data processing centers,

among others. The Verizon complex and the Verizon uses are principal permitted uses and buildings. Permitted accessory uses include those customarily incidental to the permitted principal uses in the zone pursuant to ordinance section 21-10.5.a.2.

2. **Prior Approvals.** As set forth above, the Site has been the subject of certain prior approvals which have resulted in certain nonconforming conditions being approved via the grant of certain variance relief. In 2009, the Board granted site plan approval to allow for the installation of a ground mounted solar panel power system. The Bernards Township Board of Adjustment in 2017, as amended in 2018, granted approval to allow construction of the Parking Deck, surface parking areas and recreation improvements, which approvals involved “d(4)” and “d(6)” variance relief to permit floor area ratio and principal building height deviations. Variances were also previously granted to allow deviations as to floor area, side yard, building setback from a residential zone, internal illumination of signs, sign setback, fence height, number of parking spaces and parking setback from a residential zone. Exceptions were also previously granted to allow noncompliant size of parking spaces, height of light poles, and illumination in vehicle and sidewalk areas.

3. **The Application and Proposed Development.** As set forth above, the Application seeks approval to permit the installation of a solar canopy on top of the existing Parking Deck. Specifically, the Applicant proposes to install and maintain a canopy of approximately 100,000 SF consisting of approximately 4,300 solar panels, generating 1.8 megawatts of electricity to be utilized onsite by Verizon. The Proposed Development will not result in the loss of any parking onsite, and the Applicant is proposing to add landscaping. No construction is proposed on Lot 16 (situated in the Township) or Lot 14 (situated in Harding Township).

4. **Relief Requested.** The Applicant has requested preliminary and final site plan approval of the Site Plan and the other documents which have been submitted for approval as referenced above to allow construction of the Proposed Development. The Applicant has also requested the following “c” variances and exception relief which is required if the Proposed Development is to be allowed:

a. A “c(2)” variance from ordinance section 21-15.2.d (Table 506), to allow a setback of 136.8’ between the overhang of the proposed canopy and the westerly residential property line where 150’ is the minimum required setback;

b. A “c(2)” variance from Ordinance section 21-16.2.b, to permit a fence 7’ in height around the utility pad housing high voltage equipment where 6’ is the maximum height permitted;

c. An exception from site plan ordinance section 21-41.2 to permit a light mounting height of 47 feet above ground level where a maximum of 12 feet is permitted within 250 feet of a residential zone and where a maximum height of 20 feet is allowed beyond 250 feet of a residential zone; and

d. An exception from site plan ordinance section 21.41.3 to permit an average

illumination of 2.9 foot-candles in the proposed fixtures mounted in the vehicular areas (under solar canopy) where a maximum average of 0.9 foot-candles is permitted.

**5. Findings as to “C(2)” Setback Variance to Allow the Overhang of the Proposed Canopy to be as Close as 136.8 Feet from the Westerly Residential Property Line.**

The overhang of the solar canopy is proposed to be 136.8’ from the westerly residential property line. Ordinance 21-15.2.d (Table 506) requires a setback distance of 150 feet from a residential zone. The Board’s findings as to the positive and negative criteria of the “c(2)” variance as to the distance between the overhang of the proposed solar canopy and the westerly residential property line are as follows:

**a. Findings as to the Positive Criteria of the “C(2)” Variance for Distance Between the Proposed Solar Canopy and the Westerly Residential Property Line.**

The Board’s findings as to the positive criteria of the “c(2)” variance are as follows. First the relief sought only relates to the canopy overhanging the walls of the parking structure. The existing parking deck is currently 150.9 from the westerly property line. The canopy remains substantially remote from the nearest home which is over 1,000 feet away. The proposed setback relates to 2 residential lots (Lots 3.01 & 4.01) which are vacant and under Verizon’s control. Second, the Board finds that granting a “c(2)” variance to allow the solar canopy promotes the public welfare with renewable energy utilization and environmental conservation. Alternative energy sources such as solar & photovoltaic are considered “inherently beneficial,” and the project promotes a desirable visual environment with no physical change to the Verizon Uses. The Proposed Development advances the Master Plan goals for green buildings & environmental sustainability, and will promote the purposes of the MLUL as enunciated in N.J.S.A. 40:55D-2 a (guiding the development of land in a manner which will promote public health and the general welfare), j (promoting conservation of energy resources) and n (promoting utilization of renewable energy resources). The Board finds that the zoning benefits resulting from the grant of the “c(2)” variance will substantially outweigh any resulting detriment.

**b. Findings as to the Negative Criteria of the “C(2)” Variance for Distance Between the Proposed Solar Canopy and the Westerly Residential Property Line.** The Board finds that the “c(2)” variance as to the distance requirement between the overhang of the proposed solar canopy and the westerly residential property line 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 for the following reasons. First, the Board finds that the distance deviation will not be discernable from neighboring properties and will not create any negative visual impacts. As such, the Board finds that the “c(2)” variance can be granted to allow the deviation without substantial detriment to the public good and without substantial impairment to the intent or purpose of the master plan and zoning ordinance.

**6. Findings as to the “C(2)” Variance for the height of the Fence around the Electrical Equipment.** The height of the fence around the utility pad which will house high voltage electrical equipment is proposed at 7 feet when 6 feet is the maximum fence height permitted. The National Electric Code requires that when equipment rated over 1,000 volts is installed outdoors, a wall, screen or fence of a height at least 7 feet must be installed to deter access by people who are not qualified. The Board’s findings as to the positive and negative



criteria of the “c(2)” variance as to the height of the fence are as follows.

a. **Findings as to the Positive Criteria of the “C(2)” Variance to Allow the 7-foot-high fence.** The Board’s findings as to the positive criteria of the “c(2)” variance are as follows. First, the Board finds that the National Electric Code requires that the Applicant install the 7-foot-high fence for safety reasons. Second, the Board finds that the visibility of the electrical equipment would have more of a visual impact than the additional 1 foot in height of fencing, which beneficially will provide more screening. As set forth above, the Board finds that the granting a “c(2)” variance to allow the Proposed Development advances the Master Plan goals for green buildings & environmental sustainability, and will promote the purposes of the MLUL as enunciated in N.J.S.A. 40:55D-2 a (guiding the development of land in a manner which will promote public health and the general welfare), j (promoting conservation of energy resources) and n (promoting utilization of renewable energy resources). The Board finds that the zoning benefits resulting from the grant of the “c(2)” variance will substantially outweigh any resulting detriment.

b. **Findings as to the Negative Criteria of the “C(2)” Variance to Allow the 7-foot-high fence.** The Board finds that the “c(2)” variance can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the master plan and zoning ordinance for the following reasons. First, as set forth above, the 7-foot-high fence is specifically required for safety reasons to protect the public. Second, the Board finds and notes that the fence will be located over 1,000 feet away from the nearest residential homes, which is a significant distance, and that the location of the fence at such a distance will avoid negative impacts to neighboring properties. Finally, the Board finds that allowing the additional fence height to screen the electrical equipment is less detrimental than the shorter fence, which would result in a greater impairment of the intent or purpose of the master plan and zoning ordinance.

7. **Findings as to the Light Height Exception.** An exception from site plan ordinance Section 21-41.2 is sought by the Applicant to permit approximately 29 light fixtures to be mounted at a height of 47 feet where a maximum of 12 feet is permitted within 250 feet of a residential zone and where a maximum height of 20 feet is allowed beyond 250 feet of a residential zone. Here, the Applicant seeks an exception to permit light fixtures to be mounted at the proposed height which are located on the underside of the proposed solar canopy to illuminate the parking area below. The Board’s findings as to the requested exception are as follows. First, the Board finds that 26 existing previously approved light fixtures are pole mounted at a height of 46 feet above the ground in the open level of the parking deck. The proposed lights are to be mounted under the canopy at only 1 foot higher and are reasonably necessary for the safety and the visibility of those parking in the parking deck. Second, the Board finds that the lights from the adjacent Verizon building are more visible than the proposed light fixtures which are to be mounted on the underside of the canopy and will be even less visible from neighboring properties. The Board finds and concludes that strict or literal enforcement of this provision is impracticable, and serves no practical planning purpose under these circumstances.

8. **Findings as to the Light Illumination Exception.** An exception from site plan

ordinance Section 21.41.3 is sought by the Applicant to permit an average illumination of 2.9 foot-candles in vehicular areas (under the solar canopy) where a maximum average of 0.9 foot-candles is permitted. As noted hereinabove, the existing lighting is on the upper level of the parking deck which is open. The proposed lighting fixtures will be mounted to the underside of the solar canopy and are reasonably necessary for the safety and the visibility of those parking in the parking deck. Second, the lights from the adjacent Verizon building are more visible than the proposed lights which are located on the underside of the canopy and will be minimally visible from neighboring properties. Under these circumstances, the Board finds that the strict or literal enforcement of this provision is impracticable and will exact undue hardship on the Applicant and the ability to appropriately provide lighting to the parking deck.

9. **Findings as to Preliminary and Final Site Plan Review.** The Board's findings as to preliminary and final site plan review are as follows:

a. **Ordinance Compliance in General.** With the exception of (1) the variances the Applicant seeks from the provisions of the zoning ordinance and (2) the exceptions the Applicant seeks from the provisions of the site plan ordinance, the Board finds that the site plans, and other documents referenced above for which Board approval is sought will comply with all other applicable zoning ordinance regulations and site plan ordinance requirements provided, however, that the conditions set forth below are imposed and complied with.

b. **Compliance with Matters Vital to Public Health.** Provided that the conditions set forth below are imposed and complied with, the Board finds that matters vital to the public health (water supply, sewage disposal, stormwater drainage and traffic circulation) will be adequately provided for and appropriately designed as part of the proposed development.

c. **Ultimate Finding.** For all of the foregoing reasons, the Board's ultimate finding is that preliminary and final site plan approval of the site plans and other documents for which approval is sought is warranted.

## **B. LEGAL CONCLUSIONS**

1. **"C (2)" Variances.** The Board's conclusions as to the requested "c (2)" variances are as follows:

a. **Standards for Considering the "C (2)" Variances.** The Board has the power to grant "c" or so-called "bulk" variances from zoning ordinance requirements pursuant to N.J.S.A. 40:55D-70c(2) under the following standards, which are commonly referred to as the "positive criteria" of a "c" variance:

(1) **Positive Criteria of "C(2)" or "Benefits v. Detriments" Variances.** The Board may grant "c(2)" or so-called "benefits v. detriments" variances pursuant to N.J.S.A. 40:55D-70c(2) where, in an application or appeal relating to a specific piece of property, the purposes of [the MLUL] would be advanced by a deviation from the zoning ordinance requirements, and the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment. This is the so-called "positive" criteria of a "c(2)" variance.

The zoning benefits resulting from permitting the deviation(s) must be public benefits (“improved zoning and planning that will benefit the community”) and not merely benefits for the private purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). The zoning benefits resulting from permitting the deviation(s) are not restricted to those directly obtained from permitting the deviation(s) at issue; the benefits of permitting the deviation can be considered in light of benefits resulting from the entire development proposed. Pullen v. South Plainfield Planning Board, 291 N.J. Super. 1,9 (App. Div. 1996). Finally, while “c(1)” hardship variances are not available for self-created situations and/or for mistakes, an intentionally created situation or mistake does not serve to bar a “c(2)” variance because the focus of a “c(2)” variance is not on hardship but, rather, on advancing the purposes of zoning. Ketcherick v. Mountain Lakes Board of Adj., 256 N.J. Super. 647, 656-657 (App. Div. 1992); Green Meadows v. Montville Planning Board, 329 N.J. Super. 12, 22 (App. Div. 2000).

(2) **Negative Criteria of “C(2)” Variances.** Even if an Applicant proves the “positive” criteria of a “c(2)” variance, the Board may not exercise its power to grant the variance unless the so-called “negative criteria” has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70, “no variance or other relief ... may be granted ... unless such variance or other relief ... can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.” The phrase “zone plan” as used in the N.J.S.A. 40:55D-70 means the Township “master plan.” Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

b. **Conclusions to Grant the “C(2)” Variances.** As set forth above in the factual findings, the Board found that granting “c(2)” variances would advance the purposes of the MLUL and that the resulting zoning benefits were public, community wide benefits. As also set forth above in the factual findings, the Board also found that, provided that the conditions set forth below are imposed and complied with, the zoning benefits arising from the grant of the variances would substantially outweigh any detriment. As further set forth above in the factual findings, provided again that the conditions set forth below are imposed and complied with, the Board found that the “c(2)” variances could be granted without substantial detriment to the public good and without substantially impairing the intent and purposes of the master plan and zoning ordinance. As such, the Board concludes that it can and should grant the “c(2)” variances subject to the conditions set forth below being imposed and complied with.

2. **Exceptions.** The Board’s conclusions as to the requested exceptions are as follows:

a. **Standards Applicable to Review of the Exceptions.** The Board may grant the design exceptions requested in accordance with N.J.S.A. 40:55D-51.b as follows: “The Planning Board when acting upon applications for preliminary site plan approval shall have the power to grant such exceptions from the requirements for site plan approval as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval ... if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question.”

b. **Conclusions as to the Grant of the Exceptions.** As set forth above in the factual findings, the Board found as follows. First, the Board found that the proposed lighting is

necessary for the visibility and safety of those utilizing the parking deck. Second, the Board found that the existing lighting fixtures that were previously approved are located at 46 feet high and are mounted on the upper level of the deck which is open. The proposed lighting fixtures are to be mounted on the underside of the solar canopy at 47 feet high and will be less visible than the lighting from the adjacent Verizon building. The Board found that this proposed lighting will have minimal if any negative impacts. As such, the Board concludes that it can and should grant the light fixture height and illumination exceptions at issue since enforcement of these provisions is impracticable under these circumstances.

3. **Preliminary and Final Site Plan Review.** The Board's conclusions as to preliminary and final site plan review are as follows:

a. **Standards Applicable to Preliminary and Final Site Plan Review.** N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of the preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that the Board "shall" grant preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. As such, if the application complies with all ordinance requirements, the Board must grant approval. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance provisions and grant approval if the application complies with all such remaining provisions.

(2) The second exception is where the application does not comply with all ordinance requirements, but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the Applicant the opportunity to revise the plans to comply with the ordinance requirement prior to the Board granting approval.

Finally, while N.J.S.A. 40:55D-46a allows the site plan and engineering documents required to be submitted to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for

review and approval as part of the site plan review process, approval must be denied. *Id.* And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines “final approval” as the action of the Board taken “after all conditions, engineering plans and other requirements of have been completed or fulfilled....”

b. **Conclusions to Grant Preliminary and Final Site Plan Approval.** As set forth in the factual findings above, with the exception of (1) the variances from the provisions of the zoning ordinance and (2) the exceptions requested for light mounting height and average illumination, the Board found that the site plans and other documents for which approval is sought will comply with all other applicable zoning ordinance regulations and site plan ordinance requirements provided that the conditions set forth below are imposed and complied with. And, as set forth in the conclusions above, the Board determined that the variances and exceptions should be granted, subject to the conditions set forth below. Finally, as set forth above in the factual findings, the Board found that matters vital to the public health and welfare will be adequately provided for. As such, the Board concludes that preliminary and final site plan approval is warranted and should be granted subject to the conditions set forth below being imposed and complied with.

4. **Imposition of Conditions.** Boards have inherent authority to impose conditions on any approval they grant. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to ensure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to ensure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See also, Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J. 418, 438-439 (2000) (explaining that site plan review “typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping” and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board’s implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by board experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center,

Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): “The MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications” and using such professional consultants to review and evaluate revised plans “was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application.” The conditions set forth below have been imposed on all of the foregoing bases.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD, BY MOTION DULY MADE AND SECONDED ON MAY 4, 2021, AS FOLLOWS:**

**C. RELIEF GRANTED**

1. **“C(2)” Variance from Ordinance Section 21-15.2.d (Table 506) For Residential Zone Setback Deviation.** Subject to the conditions set forth below, a “c(2)” variance is granted from zoning ordinance section 21-15.2.d (Table 506) to allow a setback of 136.8 feet from the solar canopy overhang to the westerly residential property line where a 150-foot setback is required.

2. **“C(2)” Variance from Ordinance Section 21-16.2.b, For Fence Height Deviation.** Subject to the conditions set forth below, a “c(2)” variance is granted from zoning ordinance section 21-16.2.b, which permits a fence at a maximum height of 6 feet and the Applicant proposes a 7-foot-high fence around the utility pad housing the electrical equipment.

3. **Exception from Site Plan Ordinance Section 21.41.3 For Maximum Light Illumination.** Subject to the conditions set forth below, an exception is granted from site plan ordinance section 21.41.3 to permit a maximum average illumination of 2.9 foot-candles in vehicular areas (under solar canopy) where a maximum average illumination of 0.9 foot-candles is permitted.

4. **Exception from Site Plan Ordinance Section 21-41.2 For Light Mounting Height.** Subject to the conditions set forth below, an exception is granted from site plan ordinance section 21-41.2 to permit a light mounting height of 47 feet where a maximum height of 12 feet is permitted within 250 feet of a residential zone and where a maximum height of 20 feet is allowed beyond 250 feet of a residential zone.

5. **Preliminary and Final Site Plan Approval.** Subject to the conditions set forth below, preliminary and final site plan approval is granted as to the site plans and other documents for which approval is sought.

**D. CONDITIONS**

1. **Revisions to Site Plans and Related Documents.** The Applicant shall revise the site plans and obtain signatures on same by January 20, 2022, (which is within six (6) months of the adoption of the within resolution on July 20, 2021) in accordance with the following Board’s

experts' reports and Board member comments to the satisfaction of the Township Engineer and Township Planner and any other expert that the Engineer and/or Planner directs (The Board notes that, in the absence of the within time limitation condition, it would decline to grant conditional approvals and, instead, would continue the hearing on an application for no more than a six month period to provide the Applicant with the opportunity to revise the site plans and documents and, failure by the Applicant to resubmit same to the Board within that period or submission within that period but failure of the Applicant to make all the required revisions, would result in denial of the application):

a. **Following comments emanating in the memo to the Board from David Schley, PP, AICP (Township Planner), dated April 20, 2021:**

(1) Sheet 1 – Revise the zoning tables and lists of requested relief to reflect that the proposed solar canopy, while considered an “accessory structure,” is subject to the height and setback requirements applicable to the principal structure, and that a variance is required to permit the proposed 136.8’ setback from the residential zone boundary to the west.

(2) Sheet 1 – Revise general note 29 to be consistent with general note 1 on sheets 5 and 6.

(3) Sheet 8 – Adjust the routing of the proposed underground electrical conduits and show tree protection to be installed along the drip line and not less than 6’ from the trunk of each existing tree. Also, show tree protection details.

(4) Sheet 10 – Show a line that represents a distance of 250’ from the westerly residential zone boundary, to illustrate which light fixtures are subject to a maximum permitted height of 12 feet and which are subject to a maximum permitted height of 20 feet.

(5) Sheets 10 & 12 – Amend the lighting notes and the light fixture detail to specify the proposed hours of illumination and to show how the proposed light fixtures will be shielded to minimize light spillage outside the parking deck. The proposed lights shall be controlled by motion sensors, and not more than two lights shall remain on after 10:00 PM. The proposed light fixtures shall be shielded by the solar canopy girders / framing in the same manner as the light fixtures on the lower levels of the parking deck are shielded by the parking deck’s spandrel panels.

b. **Following comments emanating in the memo to the Board from Larry Plevier, PE, CME (Board’s engineering expert), dated April 20, 2021:**

(1) Project Data Vicinity Plan, Sheet 1 of 12: revise the Board Engineer name to Larry Plevier, P.E.

(2) Overall Proposed Site Plan, Sheet 4 of 12: the proposed landscaping location as shown on the inset view on the Landscaping Plan, Sheet 9 of 12, shall be identified on the Overall Proposed Site Plan.

(3) Grading and Utility Plan, Sheet 8 of 12: The site plans shall be revised to depict any proposed fencing for the proposed utility pads located on the north side of the parking garage. General Note 9 shall be revised to including language indicating that the Contractor shall not use areas within conservation areas, freshwater wetlands, and/or wetlands buffers for staging, storage, or for the laydown of materials.

(4) Construction Details, Sheet 12 of 12:

(a) A detail for the concrete utility pad for the proposed transformer and switch gear shall be provided.

(b) A detail for the downspout connections from the solar canopy to the existing parking garage floor drains shall be provided.

(c) Details for the potential restoration and repairs for the existing concrete curb, sidewalks, and asphalt pavements as indicated in General Notes 8 and 10 on the Site Dimension Plan (Sheet 5 of 12), shall be provided.

(d) A detail for the casing pipe to be horizontally directionally drilled with the proposed seven (7) - 4" conduits shall be provided.

c. **Following recommendation in the memo to the Board from Fire Official Mark Sylvester dated March 31, 2021:**

(1) Install the appropriate Photovoltaic fire code complaint signage on the entrances to the parking deck.

d. **Following recommendation in the memo to the Board from Chief Peter von der Linde of Basking Ridge Fire Company No. 1 dated April 22, 2021:**

(1) The Applicant shall provide further information by way of letter or memo to the Chief on the effect on structural integrity of the installation in the event that there is a car fire on the top level, including the duration of flame impingement necessary to cause structural collapse and the weight of the material that is likely to collapse.

2. **Construction Traffic.** The Applicant shall develop a construction traffic plan to ensure deliveries of construction materials occur only during off-peak traffic hours (i.e. 9:00 AM to 3:00 PM) and construction traffic shall not utilize Madisonville Road.

3. **Pre-Construction Meeting.** The Applicant shall attend a pre-construction meeting with the Township Engineering Department prior to the start of any construction activity.



4. **Digital Form.** The Applicant shall submit copies of all plans and documents in digital form as acceptable to the Township Engineering Department.

5. **Development Fees.** The Applicant shall be subject to all development fees per ordinance section 21-86, as deemed applicable.

6. **Time to Obtain Construction Permits, Commence and Complete Construction, and Obtain Certificates of Occupancy for the Proposed Development.** The Applicant shall apply for and obtain zoning and construction permits by July 20, 2023 (which is within two (2) years of the adoption of the within resolution on July 20, 2021). If during said two (2) year period, or extension thereof as granted by the Board, the Applicant fails to obtain zoning and construction permits, the within approvals shall automatically expire and become null and void. The Applicant shall have one (1) year from the date of issuance of the first construction permit to commence construction and obtain a permanent certificate of approval or completion for the proposed development. If during said one-year period, or extension thereof as granted by the Board, work is not completed and/or a permanent certificate of approval or completion is not obtained, the within approvals shall automatically expire and become null and void.

7. **Escrow Fees.** Any and all outstanding escrow fees shall be paid in full and the escrow account replenished to the level required by ordinance within 30 days of the adoption of the within resolution, within 30 days of written notice that a deficiency exists in the escrow account, prior to review of any and all compliance documents by any of the Board or Township professionals, and prior to signing the Site Plans. Failure to abide by this condition shall result in the within approvals automatically terminating and becoming null and void.

8. **Outside Agency Approvals and Permits.** The within approvals shall be conditioned upon the Applicant obtaining permits and/or approvals from all applicable outside agencies and/or departments including (if and as applicable) but not necessarily limited to the following municipal, county and/or state agencies and/or departments:

- a. Somerset - Union Soil Conservation District certification / approval; and
- b. Somerset County Planning Board approval of any aspect of the proposed development within its jurisdiction.

9. **As-Built Survey.** A signed and sealed as-built survey, prepared by a licensed land surveyor, for the proposed improvements, final grading, and electric utilities, shall be provided prior to issuance of a certificate of approval or completion for the proposed development.

10. **Subject to Prior Approvals.** All conditions of the prior approvals shall remain in full force and effect unless herein modified.

11. **Modification of Conditions.** The conditions of the within approvals and the conditions of the prior approvals shall not be modified or not complied with unless the Applicant first applies for and obtains Board approval of the modification of the condition(s).

12. **Subject to Other Approvals and Laws.** The within approvals and the use of the property are conditioned upon and made subject to any and all laws, ordinances, requirements and/or regulations of and/or by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. The within approval and the use of the property are also conditioned upon and made subject to any and all approvals by and/or required by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. In the event of any inconsistency(ies) between the terms and conditions of the within approval and any approval(s) required above, the terms and/or conditions of the within approval shall prevail unless and until changed by the Board upon proper application.

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**VOTE ON MOTION DULY MADE AND SECONDED ON MAY 4, 2021:**

**THOSE IN FAVOR: ASAY, CRANE, EORIO, ESPOSITO, FIELDS, MASTRANGELO & PIEDICI.**

**THOSE AGAINST: NONE.**

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The within resolution memorializing the Board action in granting the approvals set forth above was adopted on July 20, 2021 by the following vote of eligible Board members:

<b><u>Member</u></b>	<b><u>Yes</u></b>	<b><u>No</u></b>	<b><u>Abstain</u></b>	<b><u>Absent</u></b>
ASAY	X			
CRANE	X			
ESPOSITO			(No longer a member)	
MASTRANGELO				X
FIELDS	X			
PIEDICI	X			
EORIO	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 memorializing resolution duly adopted by the said Planning Board on July 20, 2021.

  
**CYNDI KIEFER, Board Secretary**

**BERNARDS TOWNSHIP PLANNING BOARD**

**FAIRMOUNT CEMETERY ASSOCIATION OF NEWARK AND SOMERSET HILLS  
(SOMERSET HILLS MEMORIAL PARK)**

**BLOCK 2301, LOT 12.01  
95 MOUNT AIRY ROAD**

**APPLICATION #21-003**

**RESOLUTION MEMORIALIZING GRANT OF PRELIMINARY AND FINAL SITE  
PLAN APPROVAL TO ALLOW CREMATORY ADDITION TO EXISTING  
MAUSOLEUM BUILDING**

**WHEREAS**, Fairmount Cemetery Association of Newark and Somerset Hills (the “**applicant**”) is the owner of certain property commonly known as Somerset Hills Memorial Park, which is located in the Township of Bernards (the “**Township**”) and is designated on the Township tax maps as Block 2301, Lot 12.01, and known as 95 Mount Airy Road (the “**property**”), which property is approximately 68 acres in size<sup>1</sup> and is situated in the R-4 Residential zoning district (“**R-4 zone**”), and the property is occupied by an existing cemetery, mausoleums (the “**mausoleums**”), one of which is the main mausoleum (the “**main mausoleum**”) and a maintenance building (the “**maintenance building**”) and also contains wooded areas including a stream corridor and wetlands (collectively, the “**existing development**” or “**cemetery use**”);

**WHEREAS**, the applicant previously obtained approvals from the Bernards Township Planning Board (the “**Board**”) in 2003 and 2009 relative to expansion of the mausoleums (the “**2003 and 2009 approvals**”) and during the course of the such hearings on the applications, the Board found and determined that, even though the Land Development Ordinance does not identify cemeteries and mausoleums as permitted uses in the R-4 zone (or any other zone in the Township), the Township had previously consented to the cemetery use on the subject property in 1930 and therefore the Board found the cemetery use on the property to be a permitted use by operation of law;<sup>2</sup>

**WHEREAS**, in 2020, the applicant obtained preliminary and final site plan approval, a “c(2)” variance as to buffer width, and exceptions from the site plan ordinance provisions relative to parking area design requirements to allow replacement of the maintenance building and related improvements including reconfiguration of the driveways and parking areas, installation of a 1,000 gallon concrete pump tank for sanitary sewer, concrete pads and a new water line for the building, and planting of additional landscaping to be added to the southwest along the adjoining residence (the “**2020 approvals**”, and the 2003 and 2009 approvals along with the 2020 approvals are referred to herein as the “**prior approvals**”);

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<sup>1</sup> The applicant also owns an adjacent 3.47 acre lot located in Bernardsville.

<sup>2</sup> Specifically, the New Jersey Cemetery Act (N.J.S.A. 45:27-1 et seq), as will be discussed further below.

**WHEREAS**, the applicant has applied to the Board (the “**application**”) for preliminary and final site plan approval to allow construction of a one-story, 1,724 square foot addition to the north side of the main mausoleum situated in the northeasterly portion of the property over 600 feet from Mount Airy Road (the “**proposed addition**”), which proposed addition includes three new cremators and a space for a fourth (for a total of five cremators plus space for a future/sixth cremator);

**WHEREAS**, the Board has exclusive subject matter jurisdiction over the application in accordance with N.J.S.A. 40:55D-20, 46, 50, 60 and the New Jersey Cemetery Act, N.J.S.A. 45:27-1 et seq., which regulates cemeteries on a state-wide basis, because the cemetery use is a permitted use by operation of law and the application does not require any “d” type variances;

**WHEREAS**, a number of documents were submitted by the applicant, Board and Township experts and officials with regard to the application, all of which documents are on file with the Board and are part of the record in this matter, and the following are the latest versions of the plans, drawings and documents for which Board approval is sought, which plans, drawings and documents have been on file and available for public inspection for at least 10 days prior to the hearing on the application in accordance with N.J.S.A. 40:55D-10b:

1. “Preliminary & Final Site Plan – Proposed Crematory Expansion, Somerset Hills Memorial Park”, prepared by Apgar Associates, dated March 26, 2021, consisting of three (3) sheets (the “**site plans**”),
2. Boundary, Topography and Wetlands Delineation Survey, prepared by Apgar Associates, dated March 28, 2002 consisting of two (2) sheets (the “**survey**”),
3. Architectural Plans titled, Somerset Hills Crematory, prepared by D. Macartney Wilson, AIA, Architects & Associates, P.A., dated March 22, 2021, consisting of three (3) sheets (the “**architectural plans**”),
4. Project Report and Environmental Impact Assessment, prepared by Apgar Associates, dated March 26, 2021 (the “**EIA**”), and
5. Wetlands Absence Assessment – Crematory Expansion Project report, prepared by PK Environmental Planning & Engineering, dated April 8, 2021, consisting of two pages (the “**wetlands absence assessment**”);

**WHEREAS**, the Board considered the application at a duly noticed public hearing on June 8, 2021, with affidavits of publication and service of notice being submitted to the Board and being on file with the Board, thereby conferring procedural jurisdiction over the application with the Board, during which hearing the applicant was represented by Michael Osterman, Esq. and the Board was represented by Jonathan E. Drill, Esq.;

**WHEREAS**, the following individuals testified under oath during the hearing, were subject to cross-examination, and their testimony is part of the record in this matter:

1. Rich Gilman (Superintendent of Somerset Hills Memorial Park),
2. James Madsen, PE (applicant's engineer),
3. David Schley, PP (Township planner),
4. Larry Plevier, PE (Board's engineering expert), and
5. David Banisch, PP (Board's planning expert);

hearing; **WHEREAS**, the following exhibits were entered into the record during the

A-1 Color rendered Sheet A200,

A-2 Photo of Roof Screening for HVAC,

A-3 Photo of existing 50' wide tree easement on the northerly property line adjacent to the neighbor,

A-4 Photo of same thing but during winter,

A-5 Photo taken from roof of mausoleum looking north at 50-foot-wide tree easement;

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

**A. FACTUAL FINDINGS**

1. **The Property, Existing Development & Prior Approvals.** As set forth above, the property is 68 acres in size (within the Township) and is located at 95 Mount Airy Road within the R-4 zone. The site is occupied by an existing cemetery, mausoleums, including the main mausoleum, and the maintenance building, and also contains wooded areas, including a stream corridor and wetlands. The property was most recently before the Board in 2020, when the Board granted site plan approval to allow replacement of the prior maintenance building, along with other improvements on the property contemplated under the 2020 approvals, which project is nearly completed. Prior additions to the main mausoleum were constructed in accordance with the 2003 and 2009 approvals.

2. **Zoning.** The Land Development Ordinance does not identify cemeteries or mausoleums as permitted uses in the R-4 zone (or any other zone in the Township). However, cemeteries are regulated on a state-wide basis by the New Jersey Cemetery Act (N.J.S.A. 45:27-1 et seq) and, under that law, once a municipality consents by resolution to the creation of a cemetery, it becomes permitted by law and may not subsequently be prohibited by local ordinance. Further, the law provides that the construction/expansion of a mausoleum in a cemetery cannot be prohibited by local ordinance, although a municipality may apply reasonable height and setback requirements. As part of the prior approvals, the Board previously found that the cemetery use on the subject property was permitted since it determined that the Township had consented to the use on the property back in 1930, leading the Board to conclude that the cemetery is a permitted use on the property. The existing main mausoleum and the proposed addition comply with the height and setback requirements of the R-4 zone. As such, no variances are required for the proposed addition.

3. **The Application and Proposed Addition.** As set forth above, the application is for preliminary and final site plan approval to allow construction of the proposed addition which includes a one-story, 1,724 square foot addition to the north side of the main mausoleum situated in the northeasterly portion of the property, over 600 feet from Mount Airy Road. The proposed addition includes three new cremators and a space for a fourth. Since two of the four existing cremators are to be removed, the proposed expanded crematory will contain five cremators plus space for a future/sixth cremator. The proposed addition will be constructed in an area of existing asphalt pavement and concrete pad adjoining an existing parking area. No changes are proposed to the existing parking areas, vehicle circulation, stormwater management systems or public water and sanitary sewer connections.

4. **Findings as to Preliminary and Final Site Plan Review for the Proposed Addition.** The Board's findings as to preliminary and final site plan review for the proposed addition are as follows:

a. **Compliance with Ordinance Provisions.** Provided that the conditions set forth below are imposed and complied with, the Board finds that the application, site plans and associated documents will comply with all applicable zoning ordinance regulations and all applicable site plan ordinance requirements.

b. **Compliance with Matters Vital to Public Health.** Provided that the conditions set forth below are imposed and complied with, the Board finds that all matters vital to the public health (water supply, sewage disposal, stormwater drainage, and traffic circulation) will be adequately provided for and appropriately designed as part of the proposed addition.

## **B. LEGAL CONCLUSIONS**

1. **Preliminary and Final Site Plan Review.** The Board's conclusions as to preliminary and final site plan review are as follows:

a. **Standards for Preliminary and Final Site Plan Review.**

N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of the preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that the Board “shall” grant preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval “shall” be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. As such, if the application complies with all ordinance requirements, the Board must grant approval. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions: (1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements. (2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance requirement prior to the Board granting approval. While N.J.S.A. 40:55D-46a allows the site plan and engineering documents required to be submitted to be in “tentative form for discussion purposes for preliminary approval,” the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D’Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, approval must be denied. Id. And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines “final approval” as the action of the Board taken “after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . .”

b. **Conclusions to Grant Preliminary and Final Site Plan**

**Approval.** As set forth above in the factual findings, provided that the conditions set forth below are imposed and complied with, the Board found that the application and site plans will comply with all applicable zoning ordinance regulations and all applicable site plan ordinance requirements. As such, the Board concludes that preliminary and final site plan approval to allow construction of the proposed addition can and should be granted, subject to the conditions set forth below being imposed and complied with.

2. **Imposition of Conditions.** Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. See, Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to ensure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to ensure that the negative criteria is satisfied). See also, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that “aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances” and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff’d o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions.); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J. 418, 438-439 (2000) (explaining that site plan review “typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping” and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Martin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2021), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board’s implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by Board’s experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): “The MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications” and using such professional consultants to review and evaluate revised plans “was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application.” The conditions set forth below have been imposed on all of the above bases.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD BY MOTION DULY MADE AND SECONDED ON JUNE 8, 2021 THAT THE FOLLOWING RELIEF IS GRANTED SUBJECT TO THE CONDITIONS SET FORTH BELOW:**

**C. RELIEF GRANTED**



1. **Grant of Preliminary and Final Site Plan Approval.** Subject to the conditions set forth below, the Board hereby grants preliminary and final site plan approval for the proposed addition.

**D. CONDITIONS**

1. **Revisions to Plans.** Revisions to the site plans and related documents shall be made by notes and/or drawings to the satisfaction of the Township Planner and Board engineering expert by January 20, 2022 (which is within six (6) months of the adoption of the within resolution on July 20, 2021) to incorporate the comments emanating in the following letters and/or memos prepared by the following Board and/or Township professionals and/or as discussed by the Board on the record during the hearing on the application provided below. 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.

a. **Comments in the memo to the Board from David Schley, PP, AICP, Township Planner, dated May 25, 2021 to the site plans:**

1. On sheet 1, amend the index of drawings to reflect that only three architectural sheets (A000, A200 and A500) are included with the Board submission.

2. On sheet 2, revise the northerly row of parking spaces to reflect conforming 18' deep spaces and revise the southerly row of parking spaces to reflect that there are three existing spaces. Show typical dimensions of parking spaces and driveway aisles.

3. On sheet 2, show where the existing air conditioning units will be relocated to, and show existing/proposed locations of the existing generator, roof ladder and pavement striping. Show a proposed landscaped area replacing unnecessary pavement between the addition and the existing parking areas to be consistent with that shown on Exhibit A-1.

4. On sheet A500, identify the color/finish of the proposed exterior building materials, including the cremator stacks.

5. On sheet A500, show proposed roof-mounted utility equipment, with means of screening to be consistent with that shown on Exhibit A-2.

6. Revise the appropriate plan sheet to show any proposed exterior lighting to be consistent with that shown on Exhibit A-1.

7. Intentionally omitted as addressed with Exhibits A-3 through A-5.

8-12 Intentionally omitted as addressed in subsequent conditions.

b. **Comments in the memo to the Board from Fire Official Mark Sylvester, dated June 2, 2021:**

1. Install the appropriate Truss roof sign on the main entrance to the building and a second one on the exterior of the crematory expansion as per N.J.A.C. 5:70-2.20.

c. **Comments in the memo to the Board from Larry Plevier, PE, Board Engineer, dated May 28, 2021 to the site plans and related documents:**

1. Preliminary and final site plan, Sheet 2 of 3

a. The plan shall be revised to depict the proposed locations of the two (2) existing A/C condenser units which are proposed to be relocated.

b. The existing cleanout not shown as a sanitary sewer cleanout within the footprint of the proposed building addition shall be identified on the plan (potentially a roof drain cleanout), and any proposed relocation, reconstruction and abandonment of the existing cleanout shall be noted on the plan.

c. The proposed roof gutter downspout locations shall be provided on the plan.

d. The proposed sanitary lateral improvements for relocation of the existing lateral and for the connection of the new bathroom shall be provided on the plans.

e. A new cleanout assembly within a cast iron access frame and cover box for the sanitary sewer lateral shall be provided outside the face of the new building addition's exterior wall within the pavement area. The plan shall be revised accordingly.

2. Preliminary and final site plan, sheet 3 of 3

a. A detail for a sanitary sewer cleanout assembly shall be provided.

b. A detail for an access frame and cover box for a sanitary sewer cleanout within a pavement area shall be provided.

2. **Design, Construction and Location of Improvements.** The applicant shall be required to design, construct and locate the proposed addition in substantial conformity with the site plans and architectural plans referenced above after they have been revised in

accordance with condition #1 above. Any substantial deviations, including façade and color changes, shall receive amended site plan approval prior to implementation in the field.

3. **As-Built Survey.** A signed and sealed as-built survey, prepared by a licensed professional land surveyor for the proposed site improvements, final grading, sanitary lateral with cleanouts and building addition shall be provided prior to recommendation for project competition and the release of any unspent escrow fees.

4. **Conditions of Prior Approvals.** All conditions of the prior approvals, including the 2003 and 2009 approvals and the 2020 approvals, shall remain in full force and effect unless specifically altered by the within conditions.

5. **Pre-Construction Meeting.** The applicant shall attend a preconstruction meeting with the Township Engineering Department prior to the start of any construction activity.

6. **Engineering Escrow.** The applicant shall post the required engineering escrow fees in accordance with N.J.S.A. 40:55D-53.h.

7. **Development Fees.** The applicant shall pay any development fees as required by ordinance section 21-86.

8. **Submission of Digital Plans.** The applicant shall submit digital copies of all plans and documents in formats acceptable to the Township Engineering Department. The Fire Official shall also be provided with a copy of as-built plans regarding fire protection systems (both active and passive) for the buildings in both hard copy and digital format.

9. **Time to Obtain Construction Permits, Commence and Complete Construction, and Obtain Certificates of Occupancy.** The applicant shall apply for and obtain a construction permit by July 20, 2023, which is within two years of the adoption of the Board's resolution on July 20, 2021. 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.

10. **Easements, Dedications and Conveyances.** Any and all easements, dedications and/or conveyances which are proposed on the plans and/or required by the preceding conditions shall, in addition to being identified on the plans, be contained in separate documents, if required, satisfactory to the Township Attorney and Township Engineer. The documents shall be prepared or reviewed by the Township Attorney or the applicant's attorney, at the discretion of the Township Attorney. Said documents shall specifically outline the grant of the easement, dedication and/or conveyance and its purpose and shall contain a metes and bounds description and a map of the easement, dedication and/or conveyance area. All such

documents shall be recorded prior to issuance of any permits and, upon completion of the recording process, be transmitted to the Township Clerk for maintenance with other title documents of the Township.

11. **Escrow Fees.** Any and all outstanding escrow fees shall be paid in full and the escrow account replenished to the level required by ordinance within 30 days of the adoption of the within resolution, within 30 days of written notice that a deficiency exists in the escrow account, prior to review of any and all compliance documents by any of the Board or Township professionals, and prior to signing the site plans. Failure to abide by this condition shall result in the within approvals automatically terminating and becoming null and void.

12. **Specific Approvals and Permits.** The within approval shall be conditioned upon the applicant obtaining permits and/or approvals from all applicable agencies and/or departments including (if applicable) but not necessarily limited to the following municipal, county and/or state agencies and/or departments:

- a. Township Board of Health;
- b. Somerset County Department of Health;
- c. Bernards Township Sewerage Authority;
- d. Somerset - Union Soil Conservation District certification /  
approval;
- e. Somerset County Planning Board approval of any aspect of the  
proposed development within its jurisdiction, and
- f. NJDEP approval of any aspect of the proposed development within  
its jurisdiction.

13. **Subject to Other Approvals and Laws.** The within approval and the use of the property remains subject to all conditions of prior Board approvals not eliminated or modified by the within approval. The within approval and the use of the property are also conditioned upon and made subject to any and all laws, ordinances, requirements and/or regulations of and/or by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. The within approval and the use of the property are also conditioned upon and made subject to any and all approvals by and/or required by any and all municipal, county, State and/or Federal governments and their agencies and/or departments having jurisdiction over any aspect of the property and/or use of the property. In the event of any inconsistency(ies) between the terms and conditions of the within approval and any approval(s) required above, the terms and/or conditions of the within approval shall prevail unless and until changed by the Board upon proper application.

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**VOTE ON MOTION DULY MADE AND SECONDED ON JUNE 8, 2021:**

**THOSE IN FAVOR: FIELDS, DAMURJIAN, MANDUKE, MASTRANGELO, BAUMANN & PIEDICI.**

**THOSE OPPOSED: NONE.**

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The above memorializing resolution was adopted on July 20, 2021 by the following vote of eligible Board members:

<u>Members</u>	<u>Yes</u>	<u>No</u>	<u>Abstain</u>	<u>Absent</u>
<b>FIELDS</b>	<b>X</b>			
<b>DAMURJIAN</b>	<b>X</b>			
<b>MANDUKE</b>	<b>X</b>			
<b>MASTRANGELO</b>				<b>X</b>
<b>BAUMANN</b>	<b>X</b>			
<b>PIEDICI</b>	<b>X</b>			

I, Cyndi Kiefer, Secretary to the Planning Board of the Township of Bernards in the County of Somerset, do hereby certify that the foregoing is a true and correct copy of the memorializing resolution duly adopted by the said Planning Board on July 20, 2021.

  
\_\_\_\_\_  
**CYNDI KIEFER, Board Secretary**