



**LEBANON BOROUGH  
LAND USE BOARD  
MINUTES  
Tuesday, May 14, 2024**

The Regular meeting of the Lebanon Borough Land Use Board was called to order by Chairman Saharic at 7:00 P.M.

The meeting was convened in compliance with the Open Public Meetings Act of 1975. Three local newspapers were notified, and a notice is posted at Borough Hall.

**PLEDGE OF ALLEGIANCE**

The Pledge of Allegiance was recited by all.

**ROLL CALL:**

Members Present: Alexander Saharic, Dr. Chris Urchin, Joseph Hauck, Ron Lapacyski, Jim Newman, Rob Weingart, Marianne Mathewson and Councilman Sam Berger  
Absent: David Abeles, Mayor James J. Pittinger, Brad Wetzel  
Also present: Karen M Romano, Secretary, Jonathan Drill Esq., Brett Harris PA and Bob Brightly PE

**GIORDANO 161 MAIN STREET BLOCK 13.02 LOT 50  
ACCESSORY APARTMENT**

**Chairman Saharic called for a motion to approve the request by applicant to carry June 11<sup>th</sup> without further notice.**

**Motion was approved by the following vote:**

**Aye: Saharic, Lapacyski, Hauck, Abeles, Berger, Weingart, Mathewson**

**Nay:**

**Absent: Dr. Uchrin, Newman, Pittinger Wetzel**

**OPSD CENTER, LLC 148-152 MAIN STREET BLOCK 5, LOT 35**

Board Attorney Jon Drill Esq. swore in the applicant's experts:

John Beattie Architect

Christopher Melick Engineer and Planner

Applicant Attorney Michael Silbert Esq. explained the nature of the application and summarized the proposed project.

Oasis Commons, LLC c/o Arun Goyle is the owner (the "**owner**") of a 2.411 acre lot located at 148-152 Main Street on the southeast corner of Main Street and Clark Road, designated on the Borough of Lebanon (the "**Borough**") tax maps as Block 5, Lot 35 (the "**property**"), which property is located in the Commercial, Research, Office and Manufacturing 100,000 zoning district (the "**C-ROM-1 Zone**"), and is currently developed with four (4) buildings (the buildings are referred to as "**existing Building A**", "**existing Building B**", "**existing Building C**", and "**existing Building D**" with existing building A, existing building B, existing building C and existing building D together referred to as the "**existing buildings**"), and a covered walkway/porch (the "**existing walkway**") between existing building A, existing building B and existing building C and the property is additionally developed with parking areas, driveways and related improvements (the "**existing improvements**");

OPSD Center, LLC (the "**applicant**"), with the consent of the owner, made application to the Lebanon Borough Land Use Board (the "**Board**") for a "d(6)" height in feet and stories variance, various "c(1)" bulk variances, a site plan ordinance exception and preliminary and final site plan approval (the "**application**") to allow the demolition of existing Building C, the construction of a new building (the "**proposed Building C**") in the footprint of existing Building C, and to enclose the existing walkway so as to connect existing Building A, existing Building B and proposed Building C (Building A, Building B, and Building C as connected, along with stand-alone existing Building D are referred to as the "**proposed buildings**," with the proposed buildings and all of the proposed improvements referred to as the "**proposed development**") and the proposed development will be used by the applicant for a manufacturing operation (the "**proposed manufacturing use**") which is a permitted use in the C-ROM-1 zone;

The "d(6)" variance confers exclusive subject matter jurisdiction over the application with the Board, exercising the powers of a zoning board of adjustment, 1 pursuant to N.J.S.A. 40:55D-20;

Because the Board is exercising its powers as a zoning board of adjustment in considering "d(6)" height variance, the Class I and Class III members of the Board did not participate in the

---

proceedings in accordance with N.J.S.A. 40:55D-25c;

A number of documents were submitted with regard to the application by the applicant, the Board's professionals, various Township departments and professionals, 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 the applicant seeks Board approval, which plans, drawings and documents have been on file and available for public inspection for at least ten (10) days prior to the hearing on the application in accordance with N.J.S.A. 40:55D-10b:

“Preliminary & Final Major Site Plan” prepared by Christopher A. Melick, LS, PP dated February 8, 2024 and revised through March 24, 2024 consisting of two (2) sheets (the “**site plans**”), and

“Architecture Plans” prepared by John A. Beattie, RA dated February 10, 2024 and revised through March 26, 2024 consisting of three (3) sheets (the “**architectural drawings**”)

The application was deemed to be complete;

The Board held a duly noticed public hearing on the application on May 14, 2024, with affidavits of service and publication of notices of the hearing being submitted to and on file with the Board, thereby conferring procedural jurisdiction over the application with the Board, during which hearing the applicant was represented by Michael Silbert, Esq. (of Kunzman, Davis, Lehrer & Flaum, P.C.) and the Board was represented by Jonathan E. Drill, Esq. (of Stickel, Koenig, Sullivan & Drill, LLC);

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

1. Dr. David Burden (applicant’s president),
2. Chris Melick, PLS, PP (applicant’s land surveying and planning expert),
3. John Beattie, RA (applicant’s architectural expert),
4. Brett Harris, PP (Board’s planning expert), and
5. Bob Brightly, PE (Board’s engineering expert);

The following exhibit was entered into evidence during the hearing, is on file with the Board, and is part of the record in this matter:

A-1 “Existing Conditions and Site Plan for OPSD Center, LLC” marked up to show new dumpster pad;

**After considering the application, documents, testimony and exhibit 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:**

Factual findings and legal conclusions

1. **The Property, Zoning, Existing Improvements and Surrounding Area.** The property is a 2.8-acre corner lot situated on Main Street and Clark Road, just south of Route 22. The property resembles a flag lot because Clark Road encircles the lot, connects to Main Street and extends out to Route 22. The Property is situated in the C-ROM-1 Zone in which the proposed manufacturing use is a principally permitted use. The property is developed with the existing buildings, associated parking lots, associated lighting, and landscape improvements. Existing bulk deviations on the property include a lot coverage of 72.9% where a maximum lot coverage of 40% is permitted, a front yard setback from Clark Road of 10.1 feet and a front yard setback from Main Street of 30.5 feet where a minimum front yard setback of 75 feet is required, and an impervious coverage of 61% where a maximum impervious coverage of 20% is permitted. Development around the property includes commercial uses to the north of the property, residential single-family homes to the east and south of the property, and commercial uses in residential single-family home type buildings farther east and west of the property. Across Clark Road to the west are residential uses known as Grist Mill Village.
2. **The Proposed Development and Requested Relief.** As set forth above, the applicant proposes to demolish existing Building C and to construct a new building in its footprint, proposed Building C. The applicant also proposes to enclose the existing walkway to connect existing Building A, existing Building B and proposed Building C. To construct the proposed development, the applicant requires and requests bulk variance and exception relief along with preliminary and final site plan approval. The specific variances and exceptions sought are as follows:

- a. Four “d(6)” height variances from ordinance section 165-152.E and the requirements of the C-ROM-1 Zone as set forth in the Schedule of Zoning Requirements (the “**Schedule**”), which is incorporated by reference and into ordinance section 165-86 to allow: (1) a combined building height of 40.55 feet, (2) a combined building height of three (3) stories, (3) proposed Building A to be a height of 39.13 feet, and (4) proposed Building A to be 3 stories high, where a maximum of two (2) stories are permitted in the C-ROM-1 Zone and both 40.55 feet (the proposed combined building height) and 39.13 feet (the proposed height of Building A) are in excess of 10% of the maximum height of 35 feet permitted in the C-ROM-1 Zone, 2

---

1.If the proposed height of an accessory structure is at issue, or if the proposed height of a principal structure does not exceed by 10 feet or 10% of the maximum height in feet or stories

- b. A “c(1)” bulk variance from the Schedule to allow a lot coverage of 72.4% where the maximum lot coverage permitted is 40%,
- c. A “c(1)” bulk variance from the Schedule to allow a front yard setback of 10.1 feet from Clark Road where a 75 foot setback is required,
- d. A “c(1)” bulk variance from the Schedule to allow a front yard setback of 30.5 feet from Main Street where a 75 foot setback is required,
- e. A “c(1)” bulk variance from the Schedule to allow an impervious coverage of 61% where the maximum impervious coverage allowed is 20%,
- f. An exception from site plan ordinance section 165-77G.5.a to allow fencing to replace the buffer at the loading dock at the northeast portion of proposed building C, and
- g. Preliminary and final site plan approval.

**Standards for Consideration of the “D(6)” Height Variance.** The Board’s conclusions as to the “d(6)” height variance at issue are as follows:

**Standards for Considering the Positive Criteria of the “D(6)” Height Variance.** The Board has the power to grant “d(6)” variances to permit the height of a principal structure to exceed by 10 feet or 10% the maximum height permitted in the zoning district for a principal structure pursuant to N.J.S.A. 40:55D-70d(6) “in particular cases and for “special reasons.” This is the so-called positive criteria of a “d(6)” variance. At present, there are two standards that apply to the determination of whether the positive criteria of a “d(6)” variance is satisfied depending upon whether or not the use and principal structure at issue is permitted or not.

**“D(6)” Positive Criteria Prohibited Use.** The first standard is the traditional “d(1)” use variance standard enunciated in Medici v. BPR Co., 107 N.J. 1 (1987), and that standard would apply if the use or principal structure were prohibited in the zone. As held by Medici, the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of “special reasons.” 3 107 N.J. at 18. Our courts have held that certain uses are deemed “inherently beneficial” which essentially means that, by definition, the use per se promotes the general welfare. Id. The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the development of a site in the

---

permitted for a principal structure in the zone, a “c” variance, and not a “d(6)” variance, is required pursuant to N.J.S.A. 40:55D-70d(6). These height variances are “d(6)” variances because the buildings at issue are principal structures and exceed in feet and stories 10% of the maximum height in feet and stories permitted in the zone.

community that is particularly suited for the very enterprise proposed. Id. Thus, in a typical non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed. Our courts held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013). Applied to a “d(6)” height variance case, if the use or principal structure at issue is prohibited in the zone, the applicant would have to prove that some benefit to the general welfare would result from the proposed height of the principal structure and that the site is particularly suited to the location and height of the structure. Under these circumstances, it appears that our courts would treat the situation similar to how non-permitted cell towers are treated and require the Board to: (a) consider whether the placement of the structure at the proposed non-permitted height at the subject location is necessary in order that the structure achieve its permitted purpose; and (b) consider whether the same result could be achieved by erecting the structure in a location where the height of the structure could be lessened or by erecting the permitted structure at a lower height at the proposed location. See, Smart SMR v. Fair Lawn Board of Adjustment, 152 N.J. 309 (1998). Our courts have held that site suitability is to be determined both from the point of view of the applicant and the municipality. See, Northeast Towers, Inc. v. Zoning Board of Adjustment, 327 N.J. Super. 476, 497-498 (App. Div. 2000).

**“D(6)” Positive Criteria Permitted Use.** The second standard is the “d(3)” conditional use standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285 (1994) and that standard would apply if the use and principal structure were permitted in the zone. See, Grasso v. Spring Lakes Heights, 375 N.J. Super. 41 (App. Div. 2004). Simply stated, if the use and principal structure at issue are permitted in the zone and the only deviation is its height, the Board’s focus would be on whether the site would accommodate the problems associated with the permitted principal structure but at a height higher than permitted by the ordinance. Id.

**Standards for Considering the Negative Criteria of the “D(6)” Height Variance.** Regardless of the standard employed to determine the positive criteria of the “d(6)” height variance, the Board may not exercise its power to grant a “d(6)” height 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). As with the positive criteria of a “d(6)” variance, there are two standards that apply to determination of the negative criteria of a “d(6)” variance, again, depending upon whether or not the use and principal structure at issue is permitted or not.

**“D(6)” Negative Criteria Prohibited Use.** The first standard is the traditional “d(1)” use variance standard enunciated in Medici and that standard would apply if the principal structure at issue is prohibited in the zone. Under that standard, the applicant must prove and the Board must

find by an “enhanced quality of proof” that there will be no substantial impairment of the intent and purpose of the zoning ordinance and zone plan. Medici. at 21-22. Under that standard, the applicant would have to “reconcile” the height proposed with the ordinance’s prohibition of that height in the zone at issue. Id. As the Medici court held, reconciliation “becomes increasingly difficult when the governing body has been made aware of prior applications for the same variance but has declined to revise the zoning ordinance.” Id.

**“D(6)” Negative Criteria Permitted Use.** Where the “d(6)” variance involves a permitted principal structure, the Medici rationale pertaining to the negative criteria would not apply. Thus, there would be no requirement for an enhanced quality of proof and no requirement to reconcile the variance with the ordinance’s prohibition of the proposed height. In the context of a “d(6)” height variance for a permitted principal structure, the “d(3)” conditional use variance test enunciated in Coventry Square would appear to apply. The Supreme Court in Coventry Square, 138 N.J. at 299, and in a subsequently decided case, TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), held that the stricter requirements applicable to a “d(1)” variance do not apply to the negative criteria of a “d(3)” variance. Thus, the Board’s focus must determine whether the height variance can be granted without substantial detriment to the public good (the first prong of the negative criteria), with the Board’s focus on the effect on surrounding properties of the grant of the height variance. See Coventry Square, 138 N.J. at 299. In respect of the second prong of the negative criteria, that the height variance can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance, the Board must be satisfied that the grant of the height variance for the proposed permitted principal structure at the designated site is reconcilable with the municipality’s legislative determination limiting height on all permitted principal structures in that zoning district. Id. Significantly, and to repeat from above, the Court in TSI East Brunswick, 215 N.J. at 43-46, held that the “enhanced quality of proof” burden applicable to the second prong of the negative criteria of a “d(1)” use variance does not apply to the second prong of the negative criteria of a “d(3)” variance, so the enhanced quality of proof standard does not apply to the second prong of the negative criteria of a “d(6)” height variance.

**Findings and Conclusions as to the “D(6)” Height Variance.** As set forth above, the applicant requests four “d(6)” height variances from the Schedule to allow: (1) a combined building height of 40.55 feet, (2) a combined building height of three (3) stories, (3) proposed building A to be a height of 39.13 feet, and (4) proposed Building A to be 3 stories high, where a maximum of two (2) stories are permitted in the C-ROM-1 Zone and both 40.55 feet (the proposed combined building height) and 39.13 feet (the proposed height of Building A) are in excess of 10% of the maximum height of 35 feet permitted in the C-ROM-1 Zone. To determine which of the two “d(6)” height variance standards applies the Board must make a threshold determination, namely, whether the proposed use is a principal permitted use in the C-ROM-1 zone or if prohibited. The Board notes and finds that pursuant to ordinance section 165-152.A the proposed manufacturing use is a principal permitted use in the C-ROM-1 Zone. As such, with regard to the positive criteria of the requested “d(6)” variance, the Board’s focus will be on whether the property will accommodate the problems associated with the permitted principal structure but at a height higher than permitted by the ordinance. With respect to the negative criteria, the Board’s focus will be on the effect on surrounding properties of the grant of the height variance and whether

the height variance can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

**Findings as to the Positive Criteria of the “D(6)” Height Variance.** As to the positive criteria of the requested “d(6)” height variances, the Board finds that the property will accommodate the proposed buildings at the heights proposed for the following reasons. First, the Board recognizes that, in an effort to create an aesthetically pleasing building, the applicant proposes to construct a cupola (the “**proposed cupola**”) atop proposed Building C and to connect existing Building A and existing Building B to proposed Building C by enclosing the existing covered walkway. The Board finds and notes that the 10% height deviation could be eliminated by installing a flat roof atop proposed Building C but, through its review of the architectural drawings submitted by the applicant, the Board finds that the proposed cupola adds character and visual interest to the proposed development overall. The Board finds that the proposed development will be more aesthetically pleasing with the proposed cupola than it would be without it. That said, even without the proposed cupola, the applicant would require a “c” variance for the height deviation. This is because without the proposed cupola, the height of proposed Building C would still be higher, but not more than 10% higher, than the maximum permitted height 35 feet. That said, the Board finds that the proposed development, including the proposed cupola and the enclosed buildings is more aesthetically pleasing overall than the existing development on the property. The Board additionally finds that there will be no problems to accommodate by virtue of the height deviation so there is nothing that the property must “accommodate” in terms of the proposed height of the building. Second, even though the applicant does not have to prove that granting the requested “d(6)” height variances will promote any purposes of the MLUL, the Board finds that granting the requested “d(6)” height variances here will promote the purposes of the MLUL as enunciated in N.J.S.A. 40:55D-2i because it will “promote a desirable visual environment” through the “creative development technique” of incorporating an aesthetically pleasing roof. For all of the foregoing reasons, the Board finds that the site remains appropriate for the manufacturing use despite the height deviations and that the applicant has proved the positive criteria of the requested “d(6)” height variances.

**Findings as to the Negative Criteria of the “D(6)” Height Variance.** As to the negative criteria of the “d(6)” height variances, the Board finds that, on balance, but provided that the conditions set forth below are complied with, the “d(6)” height variances can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the master plan and zoning ordinance. Specifically, the Board finds that so long as conditions are imposed requiring that the proposed development be constructed to be substantially similar in aesthetics as depicted in the architectural drawings, the deviation from the permitted height will have no negative impact on the surrounding community or the public good and will not impair the intent and purpose of the master plan or zoning ordinance. The Board finds that the applicant has proved the negative criteria of the requested “d(6)” height variances.

**Conclusion as to the Grant of the Requested “D(6)” Height Variances.** For all of the foregoing reasons set forth above, the Board concludes that it can and should grant the requested “d(6)” height variances provided that the conditions set forth below are imposed and complied with.

**Standards for Consideration of the “C” Variances.** The Board has the power to grant “c” variances under two sets of criteria: the “c(1)” or so-called “hardship” criteria and/or “c(2)” or so-called “benefits v. burdens” criteria. While the applicant seeks “c(1)” variances, the Board will address the standards for Board consideration both types of “c” variances, which are as follows:

**Standards for Consideration of “C(1)” Variances.** The Board has the power to grant “c(1)” variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(1) where: (1) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (2) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (3) 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.” This is the so-called “positive criteria of a “c(1)” variance. Significantly, the hardship that the applicant must prove is not inutility – that without the variance the property would be zoned into inutility. While 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 variance where the hardship at issue may inhibit “the extent” to which the property can be used. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). 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). Neither is a hardship variance available to accommodate 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 N.J.S.A. 40:55D-70 means the master plan. Medici, 107 N.J. at 4, 21.

**Standards for Consideration of “C(2) Variances.** The Board has the power to grant “c(2)” variances from zoning ordinance regulations 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 for the community (“improved zoning and planning that will benefit the community”) and not merely for the private purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). The Appellate Division has held that 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). However, the Supreme Court has cautioned boards to consider only those purposes of zoning that are actually implicated by the variance relief sought. Ten Stary Dom v. Mauro, 216 N.J. 16, 32-33 (2013). Finally, the Board may not exercise its power to grant a “c(2)” 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.” Again, the phrase “zone plan” as used in N.J.S.A. 40:55D-70 means the master plan. Medici, 107 N.J. at 4, 21.

**Findings as to the “C(1)” Variances.** As set forth above, there are several existing bulk deviations on the property as follows: (1) a lot coverage of 72.9% where the maximum permitted lot coverage is 40%, (2) a front yard setback from Clark Road of 10.1 feet where a minimum front yard setback of 75 feet is required, (3) a front yard setback from Main Street of 30.5 feet where a minimum front yard setback of 75 feet is required, and (4) an impervious coverage of 61% where the maximum permitted impervious coverage is 20%. The Board’s findings as to the variances for these existing deviations are as follows:

**Findings as to the Positive Criteria of the “C(1)” Variances.** As to the positive criteria the Board finds as follows. First, the Board finds that the lot coverage, front yard setback and impervious coverage are existing conditions on the property. Other than the lot coverage, the applicant does not propose any change to the existing conditions described. As to the lot coverage, the Board recognizes that the applicant proposed a slight reduction in lot coverage from 72.9% to 72.4%. With regard to each of these existing conditions, the Board finds that the property has been developed with the existing buildings for many years. Requiring the applicant to strictly comply with the setback, lot coverage, and impervious coverage regulations would necessitate the demolition of portions of the existing buildings, leading to environmental impacts such as waste, energy consumption, and pollution. The Board finds that preserving and repurposing the existing buildings is a far more favorable zoning alternative than demolishing and removing them and constructing an entirely new development. Second, the Board finds that the fact that the existing buildings have been in their current locations for many years constitutes an extraordinary and exceptional situation uniquely affecting this property, and the strict application of the ordinance regulations at issue would result in exceptional and undue hardship to the applicant in that it would inhibit the extent to which the property can be used. For all of the foregoing reasons, the Board finds that the “c(1)” variances are warranted to relieve the hardship and that applicant has proven the positive criteria of the requested “c(1)” variances.

**Findings as to the Negative Criteria of the “C(1)” Variances.** As to the negative criteria of the “c(1)” variances, the Board finds that allowing the existing deviations to remain will not have a substantial negative impact on the property or the surrounding lots because the property has been developed with the existing buildings for many years without issue to the surrounding community. The Board further finds that, provided the conditions set forth below are imposed and complied with, the requested “c(1)” variances can be granted without substantial detriment

to the public good and without substantially impairing the intent and purpose of the master plan and zoning ordinance. The Board finds that the applicant has proven the negative criteria of the requested “c(1)” variances.

**Conclusions to Grant Each of the Requested “C(1)” Variances.** Based on the above findings, and for all of the above reasons, and provided that the conditions set forth below are imposed and complied with, the Board concludes that the requested “c(1)” variances are warranted to relieve the proven hardship and that the requested “c(1)” variances can and should be granted because the negative criteria has been satisfied.

**Standards for Considering the Exception.** N.J.S.A. 40:55D-51b provides that the Board, “when acting upon applications for . . . 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.” 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 established in New Jersey case law, the “hardship” necessary to warrant the grant of a “c(1)” variance 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). The Board thus concludes that the hardship necessary to warrant the grant of an exception 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, such “hardship” is sufficient to warrant the grant of an exception. 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). The Board thus concludes that impracticability to warrant the grant of an exception includes situations where requiring literal enforcement of the ordinance requirements at issue would be imprudent and/or not sensible. Because the exceptions in this application are connected to a “d” variance, any exception otherwise warranted cannot be granted pursuant to N.J.S.A. 40:55D-76b “unless such approval can be granted without substantial detriment to the public good and without substantial impairment of 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, 107 N.J. at 4, 21.

**Findings as to the Buffer Exception.** As set forth above, the applicant has requested a site plan ordinance exception from ordinance section 165-77G.5.a to allow fencing to replace the required landscape buffer at the loading dock at the northeast portion of proposed Building C where all loading zones shall contain a buffer consisting of 60% evergreen plant material. The Board’s

findings as to the positive and negative criteria as to the exception from the buffer planting requirement are as follows:

**Findings as to the Positive Criteria of the Buffer Exception.** As to the positive criteria of the requested buffer exception, the Board's findings are as follows. First, the Board finds that the space around the loading dock is insufficient to install a buffer composed of 60% evergreen material and that doing so would necessarily interfere with the free flow of traffic in that area of the property. Second, the Board finds that the wooded stream area to the northeast of the property will serve as a buffer for the loading dock so granting the requested exception is reasonable and within the intent and purpose of the site plan ordinance requirement at issue. Third, the Board finds the literal enforcement of the buffer requirement ordinance to be impractical in this particular case because it will serve no purpose and that enforcing the ordinance solely for the sake of compliance makes no practical sense. The Board finds that the applicant proved the positive criteria of the requested buffer exception.

**Findings as to the Negative Criteria of the Buffer Exception.** As to the negative criteria of the requested exception, the Board finds that, provided the conditions set forth below are imposed and complied with, the exception from ordinance section 165-77G.5.a to allow fencing to replace the required landscape buffer at the loading dock at the northeast portion of proposed Building C can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the master plan and zoning ordinance. The Board finds that the applicant proved the negative criteria of the requested exception.

**Standards for Considering Preliminary and Final Site Plan Review.** N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of 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 provisions, the Board must grant approval. Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 219, 232 (1994). If the application does not comply with all ordinance requirements, the Board must engage in the following analysis.

First, where a site plan application does not comply with all ordinance provisions but the Board grants relief in terms of variances or exceptions, the Board then must review the application and site plan against all remaining ordinance provisions and grant approval if there is compliance with all such remaining provisions. If the application complies with all remaining zoning ordinance regulations and site plan ordinance requirements, the Board must grant preliminary and final site plan approval.

Second, where a site plan application does not comply with all ordinance provisions, but a condition can be imposed requiring a change that will satisfy the ordinance provisions, the Board can either (a) grant site plan approval on the

condition that the application and/or plans are revised prior to signing the plans to comply with the ordinance provisions, or (b) adjourn the hearing to permit the applicant the opportunity to revise the application or plans to comply with the ordinance provisions prior to the Board granting preliminary approval.

As the application requires “d” height variances and “c” bulk variances from certain zoning ordinance regulations, and an exception from a site plan ordinance requirement, the Board is not able to find that the application and site plan comply with all zoning and site plan ordinance provisions, so the applicant is not entitled to preliminary and final site plan approval.

However, just because the application does not comply with all ordinance regulations and requirements does not mean the Board must deny approval. The Board must determine, after any variances have been granted from the zoning ordinance regulations at issue and exceptions from the site plan ordinance requirements at issue, whether the application and site plans comply with all remaining zoning and site plan ordinance provisions. If the application and site plans comply with all remaining ordinance provisions, then preliminary and final approval should be granted, subject to the imposition of conditions as will be discussed below. Conversely, if the application and site plans do not comply with all remaining ordinance provisions, the Board must then determine whether any conditions can be imposed to bring the application and site plans into ordinance conformance. Only if the Board determines that no conditions can be imposed to bring the application and site plan into ordinance compliance should the Board deny preliminary and final approval.

Finally, even if all ordinance provisions are complied with by the site plans as submitted, or as will be revised in accordance with conditions, the Board cannot grant site plan approval unless the four essential elements of a development are determined to be feasible, which are the following matters vital to the public health and welfare: 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), subsequently cited with approval in Ten Stary Dom v. Mauro, 216 N.J. 16, 32 (2013). 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. Field; Ten Stary Dom.

**Findings as to Preliminary and Final Site Plan Review for the Proposed Development.** The Board’s findings as to preliminary and final site plan review for the proposed development are as follows. First, provided that the “d(6)” height and “c(1)” bulk variances and the exception requested in the application are granted and that the conditions set forth below are imposed and complied with, the Board finds that the application and site plans will comply with all applicable

remaining zoning ordinance regulations and all applicable remaining site plan ordinance requirements. Second, 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 are appropriately designed as part of the proposed development.

**Ultimate Findings and Conclusions as to the Relief Requested.** For all of the foregoing reasons, the Board's ultimate findings and conclusions are that the requested "d(6)" variance, "c(1)" variances, exception as to the landscape buffer and preliminary and final site plan approval can and should be granted subject to the conditions below being imposed and complied with.

**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. 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 Mantin 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 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'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.

**THE FOLLOWING RELIEF IS GRANTED SUBJECT TO CONDITIONS AS SET FORTH BELOW:**

**A. RELIEF GRANTED**

1. **“D(6)” Combined Building Height in Feet Variance.** Subject to the conditions set forth below, a “d(6)” height variance is hereby granted from the Schedule to allow a combined building height of 40.55 feet, which height is in excess of 10 feet or 10% of the maximum height of 35 feet permitted in the zone.
2. **“D(6)” Combined Building Height in Stories Variance.** Subject to the conditions set forth below, a “d(6)” height variance is hereby granted from the Schedule to allow a combined building height of three (3) stories, which height is in excess of 10 feet or 10% of the maximum height of two (2) stories permitted in the zone.
3. **“D(6)” Proposed Building A Height in Feet Variance.** Subject to the conditions set forth below, a “d(6)” height variance is hereby granted from the Schedule to allow building A to be 39.13 feet in height, which height is in excess of 10 feet or 10% of the maximum height of 35 feet permitted in the zone.
4. **“D(6)” Proposed Building A Height in Stories Variance.** Subject to the conditions set forth below, a “d(6)” height variance is hereby granted from the Schedule to allow building A to be three (3) stories high, which height is in excess of 10 feet or 10% of the maximum height of two (2) stories permitted in the zone.
5. **“C(1)” Lot Coverage Variance.** Subject to the conditions set forth below, a “c(1)” variance from the Schedule is hereby granted to allow a lot coverage of 72.4% where the maximum lot coverage permitted is 40%.
6. **“C(1)” Front Yard Setback Variance (Clark Road).** Subject to the conditions set forth below, a “c(1)” variance from the Schedule is hereby granted to allow a front yard setback of 10.1 feet from Clark Road where a 75 foot setback is required.
7. **“C(1)” Front Yard Setback Variance (Main Street).** Subject to the conditions set forth below, a “c(1)” variance from the Schedule is hereby granted to allow a front yard setback of 30.5 feet from Main Street where a 75 foot setback is required.

8. **“C(1)” Impervious Coverage Variance.** Subject to the conditions set forth below, a “c(1)” variance from the Schedule is hereby granted to allow an impervious coverage of 61% where the maximum impervious coverage allowed is 20%.

9. **Exception from Buffer Planting Requirement.** Subject to the conditions set forth below, an exception from ordinance section 165-77G.5.a is hereby granted to allow fencing to replace the buffer at the loading dock at the northeast portion of proposed building C where all loading zones shall contain a buffer consisting of 60% evergreen plant material.

10. **Preliminary and Final Site Plan Approval.** Subject to the conditions set forth below, preliminary and final major site plan approval is granted to the site plans and architectural drawings referenced above.

### **CONDITIONS**

**Revisions to the Plans.** The applicant shall revise the site plans and architectural drawings by drawings and/or notes to the satisfaction of the Board engineer and Board planner to incorporate the following comments emanating in the memos and/or letters from the following Board experts, as modified and/or supplemented by the Board members during the hearing on the application, and the applicant shall have until January 9, 2025 (within 6 months from the date the within resolution is adopted) to revise the site plans and architectural drawings and obtain the signatures of the Board Chairman and Secretary on the site plans. Compliance with this condition is a condition precedent to the commencement of any construction on the property, including but not limited to site work, and is also a condition precedent to the issuance of zoning and construction permits. In the event that the applicant fails to revise the site plans and architectural drawings within said time period, or extension thereof as granted by the Board, the within 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 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.) The required revisions to the site plans and architectural drawings referenced above are as follows:

**Comments Emanating in the Memo to the Board from Robert C. Brightly, P.E., P.P., C.M.E. (Board Engineering Expert) dated April 8, 2024:**

(Intentionally omitted if not listed herein)

### **Technical Review**

Add the 213.94 elevation to the building height calculation for Building C in the upper left corner of sheet 2 of the site plan drawings. The 220.60 spot grade in the calculation shall be shown on the site plan.

The parking lot striping that is shown on the plan is virtually nonexistent in the main parking area. Historically, there was an area striped for no parking adjacent to the mailboxes. The main parking area shall be completely restriped and a 24 foot wide access aisle shall be provided adjacent to the curb line at the mailboxes. This will eliminate all of the dead-end parking roads and provide for better site circulation. There will be a loss of four parking spaces, while 100 spaces are provided and the proposed use requires 55 spaces. (Note, the cross access agreement does not appear to designate how many of the parking spaces can be utilized by the grist mill residents.)

There appears to be a discrepancy in the proposed floor area between the figures indicated on the site plan for each building and the table. The architectural plans also appear to indicate a different area for the proposed walkway and closure. The floor area calculations shall be clarified. Also note that the proposed enclosure, buildings A, B and C shall be considered a single building. A total floor area shall be provided.

All of the ADA parking signs shall be made conforming. All of the potholes in the parking lot shall be filled in.

Revise the site plan drawings to indicate what is proposed with regard to signage. The plan shall clearly identify all site identification signs.

There is a small ground mounted sign in the northerly curbed island adjacent to Clark Road, labeled only as an existing sign. This sign has the complex name and twelve tenant panels. This sign shall be eliminated.

There appears to be an additional ground mounted sign at the corner of Clark Road and Main Street; the sign panel was removed but the posts remain. The posts shall be removed.

There are two (2) porch roof mounted signs, one at Building A and one at Building C, as well as several building mounted plague signs. All of these signs shall be eliminated.

**Comments Emanating from the Board Members During the Hearing on the Application:**

Landscaping shall be restored to that shown on the 1986 and 1989 site plans as applicable and to the satisfaction of the Board planning expert.

Lighting shall be restored to the intensity shown on the 1986 site plan as applicable and to the satisfaction of the Board engineering expert.

The Board engineering expert shall have jurisdiction over the lighting for one (1) year from the issuance of the Certificate of Occupancy.

The site plans shall be revised to add a new dumpster pad as shown on exhibit A-1.

**Design, Construction and location of Improvements.** The applicant shall be required to design, construct and locate the proposed development to be substantially similar to that reflected on the approved and signed site plans and the approved architectural drawings referenced above. Compliance with this condition is a condition to the issuance of a temporary and permanent certificate of occupancy.

**As-Built Survey.** An as-built survey reflecting the proposed development after construction being substantially similar to that reflected on the approved and signed site plans and the approved architectural plans shall be submitted to the Township Engineer for review and approval as a condition precedent to the issuance of a temporary and permanent certificate of occupancy.

**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 a resolution, within 30 days of written notice that a deficiency exists in the escrow account, prior to signing the site plans, prior to the issuance of a zoning permit, prior to the issuance of construction permits, and prior to the issuance of a temporary and/or permanent certificate of occupancy, completion or compliance (whichever is applicable). Failure to abide by this condition shall result in the relief granted in the within resolution automatically terminating and becoming null and void.

**Outside Agency Approvals and Permits as Condition Precedents to Issuance of Zoning and Construction Permits.** The within approvals are conditioned upon and subject to the applicant obtaining permits and/or approvals from all applicable outside agencies and/or departments, including but not limited to the following, and obtainment of all permits and/or approvals shall be a condition precedent to the issuance of zoning and construction permits:

Hunterdon County Planning Board approval of any aspect of the proposed development within its jurisdiction,

Hunterdon County Department of Health approval of any aspect of the development within its jurisdiction, and

Hunterdon County Soil Conservation District.

**Time Within Which to Obtain Permits, Complete Construction, and Obtain Permanent Certificate of Occupancy and/or Use.** The applicant shall obtain zoning and construction permits for the proposed development by July 9, 2026 (which is two (2) years from the adoption of the within resolution). If during said two (2) year period, or extension thereof as granted by the Board, the applicant fails to obtain a zoning and/or construction permit, the within approval and all relief granted herein shall automatically expire and become null and void. The applicant shall also have two (2) years from the date of issuance of the first construction permit to commence construction and obtain a permanent certificate of occupancy or use for the proposed development. If during said one (2) year period, or extension thereof as granted by the Board, work is not commenced and/or a permanent certificate of occupancy or use is not obtained, the within approval and all relief granted herein, shall automatically expire and become null and void. Any and all extension requests made in accordance with the within condition must be made prior to the expiration of the approvals.

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

**Chairman Saharic request approval on the following:**

- D(6) Combined Building Height in Feet Variance.
- D(6) Combined Building Height in Stories Variance
- D(6) Proposed Building A Height in Feet Variance.
- D(6) Proposed Building A Height in Stories Variance
- C(1) Lot Coverage Variance.
- C(1) Front Yard Setback Variance (Clark Road.
- C(1) Front Yard Setback Variance (Main Street
- C(1) Impervious Coverage Variance.
- Exception from Buffer Planting Requirement.
- Preliminary and Final Site Plan Approval

**Motion was approved by the following vote:**

**Aye: Saharic, Lapacyski, Hauck, Abeles, Berger, Weingart, Mathewson**

**Nay:**

**Absent: Dr. Uchrin, Newman, Pittinger Wetzel**

**OPEN PUBLIC SESSION**

Chairman Saharic opened the floor for public questions. There being no comment the floor was closed.

**MISCELLANEOUS:**

**ADJOURN**

**Mr. Lapacyski moved, Mr. Hauck seconded a motion to adjourn, there being no further business to come before the Board.** The motion was passed by unanimous vote. The meeting was adjourned at 9:15 p.m.

Respectfully submitted,

---

Karen Romano  
Land Use Board Secretary