

**RESOLUTION OF THE BOARD OF ADJUSTMENT
TOWNSHIP OF LONG HILL
MORRIS COUNTY, NEW JERSEY**

RESOLUTION 2018- 12- ZBA

**JONATHAN ROCKER
44 PLAINFIELD ROAD
GILLETTE, NEW JERSEY 07933
BLOCK 10515, LOT 7
APPLICATION NO.: 18-16Z**

**Hearing Dates: October 2, 2018
 October 16, 2018
Board Action: October 16, 2018
Memorialization: December 4, 2018**

WHEREAS, Jonathan Rocker (the "Applicant") is the owner of property located at 44 Plainfield Road in Gillette, identified as Block 10515, Lot 7 (the "Property") on the Long Hill Township Tax Map; and

WHEREAS, the Property is located in the B-D Downtown Valley Commercial Zone District (the "B-D Zone") and is currently improved with a retail pet supply store, a residential dwelling unit, and an accessory garage and parking areas used as a landscaper's storage yard, as more fully described in the Applicant's testimony and referenced herein; and

WHEREAS, the Applicant applied to the Board of Adjustment of the Township of Long Hill (the "Board") with its bifurcated Application requesting relief, as more fully set forth below, in order to construct a thirty unit residential apartment building with parking on the Property in a zone that does not permit residential uses of any type; and

WHEREAS, the Applicant requested relief from the Board in the form of a use variance and a bulk variance (the "Relief Requested"), as follows:

Use variance from Section 122.6.a and Section 123.1 of the Township of Long Hill Land Use Ordinance, 1996 (the "Ordinance") for the construction of a thirty (30) unit apartment building with associated parking, a use not permitted in the B-D zone, in accordance with N.J.S.A. 40:55D-70d(1);

Bulk variance from Section 131 of the Ordinance for exceeding the permitted number of stories for the proposed apartment building in the B-D zoning district where two (2) stories are permitted and three (3) stories are proposed, in accordance with N.J.S.A. 40:55D-70c;

WHEREAS, the Applicant submitted the following plans and documents in support of the Application, which plans and documents were made a part of the record before the Board,

as follows:

Application Packet dated June 12, 2018, with addendum, dated June 27, 2018;

Application Checklist, dated May 2, 2018;

Checklist Waiver Request Form dated June 27, 2018;

“Use Variance Site Plan”, prepared by Page-Mueller Engineering Consultants, PC, dated June 26, 2018, revised September 11, 2018, consisting of three (3) sheets;

“New 3 Story Multi-Family Village Residences at Long Hill”, prepared by Architecture Plus, PC, dated June 2, 2017, revised September 11, 2018, consisting of four (4) sheets;

“Boundary and Topographic Survey”, prepared by Murphy & Hollows Associates, LLC, dated November 27, 2017, revised August 20, 2018;

Color rendering of Village Residences at Long Hill, prepared by Architecture Plus, PC

Four (4) site photographs taken by Page-Mueller Engineering dated May 3, 2018;

Morris County Planning Board Land Development Application dated April 27, 2018;

Long Hill Township Soil Erosion & Sediment Control Certification, dated May 2, 2018;

Morris County Planning Board Application, dated June 27, 2018; and

WHEREAS, the Applicant met all jurisdictional requirements enabling the Board to hear and act on the Application and appeared before the Board on the Hearing Dates, as specified above; and

WHEREAS, during the public hearing on the Application on the Hearing Dates (the “Hearing”), the Applicant, represented by attorney Frederick B. Zelle, Esq., was given the opportunity to present testimony and legal argument, and members of the public were given an opportunity to comment on the Application; and

WHEREAS, the Board considered the following reports prepared by its professionals:

Reports prepared by Thomas R. Lemanowicz, PE, PP, CME, CFM, Board Engineer, dated July 23, 2018 and September 26, 2018;

Report prepared by Kevin O’Brien, PP, Board Planner, dated September 28, 2018, revised on October 8, 2018; and

WHEREAS, the Applicant introduced the following exhibits during the Hearings in support of its Application:

Exhibit A-1: 2015 Aerial Photo and Morris County Tax Parcel Basemap; and

WHEREAS, the Applicant presented testimony from the following individuals:

1. Kevin G. Page, P.E., Applicant's Engineer;
2. Douglas J. Polyniak, P.E., Applicant's Traffic Engineer;
2. Rocco Campanella, RA, PP, CID, Applicant's Architect;
3. James T. Kyle, PP, AICP, Applicant's Planner; and

WHEREAS, the Applicant's attorney introduced the Application and the Applicant's witnesses presented testimony to the Board, as more fully set forth on the record, as follows:

1. Kevin G. Page testified regarding his qualifications as a professional engineer and his qualifications were accepted by the Board. Mr. Page testified that he had visited the site and prepared the Applicant's plan. Mr. Page testified describing a previous Planning Board application for a 10,000 square foot office building on the Property indicating that the property owner had decided not to construct the approved commercial development. The area of development that is currently being proposed is the same as that which had been contemplated by the previous application for the office building. Mr. Page described the Property in its current state and the dimensions of the Property. Mr. Page testified indicating that the proposed development complies with all bulk standards except the height because while the building will not exceed 35 feet, it is proposed to be three stories. Mr. Page described the uses surrounding the Property and noted the commercial uses across the street and the residential uses in close proximity to the Property.

Mr. Page testified that the current driveway will be relocated to correspond with the Valley Mall driveway. Mr. Page described the proposed site plan and the parking that is proposed to be under the building. Mr. Page described the building as being a building on stilts. The front of the proposed building will contain two apartment units, a lobby, elevator and a utility room. Sixty five parking spaces will be provided and that will include handicap accessible spaces. Mr. Page described the refuse and recycling enclosure stating that the refuse would be picked up by a private hauler. With regard to the wetlands, although the Letter of Interpretation from the Department of Environmental Protection ("LOI") for the Property has expired, the wetlands are self contained and the delineation will likely not changed once a new LOI is obtained.

Mr. Page testified regarding the landscape plan stating that existing vegetation will be maintained and supplemented. The Applicant will provide buffering for the neighboring properties fronting on Metzler Place. The dirt mound in the front of the Property will be reduced. Storm sewers and drains will be cleaned and the connections will be determined. Runoff will be routed to a drainage basin. Mr. Page testified that by placing the parking under the building, the majority of water runoff will be roof runoff and will be cleaner than water runoff from a parking lot.

Mr. Page responded to the Board's professionals' comments in the reports and agreed to amend plans in accordance with the requests for clarification and corrections. Mr. Page described the parking lot and the proposed cut through and defended the dead-end aisles indicating it is a suitable configuration in a residential development. Mr. Page addressed curbing within the parking area. Mr. Page testified that curbed islands in the parking area will not work with the columns under the building. However, after discussion with the Board Engineer, Mr. Page agreed that

curbing could be provided for the currently striped area leading from the building toward the accessible parking spaces. Mr. Page testified with regard to the traffic patterns on the site stating that the previously approved commercial plan had the same configuration and contained between 40 and 50 parking spaces. Mr. Page, while conceding that he was not a traffic engineer, indicated that, in his experience, a business use would have higher volume of traffic than residential during off peak hours while a residential would have higher volume during peak times.

2. Douglas J. Polyniak testified regarding his qualifications as a professional engineer specializing in traffic engineering and his qualifications were accepted by the Board. Mr. Polyniak testified that he had reviewed the Ordinance pertaining to the Property and proceeded to compare the traffic impact of the proposed use to some of the permitted uses, specifically, convenience stores, retail, medical offices, restaurants, daycare centers, health clubs, and movie theatres. Mr. Polyniak concluded that permitted uses tend to generate more trips in the peak morning and evening hours. The proposed use would be an opportunity to reduce the peak hour trips. Mr. Polyniak indicated that traffic counts had not been performed on Plainfield Road. Mr. Polyniak cited to the Institute of Traffic Engineers Trip Generation Manual for the proposition that 30 apartments would generate 15 peak hour trips, 3 entering and 12 exiting. Mr. Polyniak identified the peak hours as being 7:30 and 8:30 am and 5:30 and 6:30 pm. Mr. Polyniak then proceeded to cite the manual generally to illustrate the trips that might be generated by some of the permitted uses. A convenience store of about 2,000 to 3,000 square feet will generate 150 trips during peak hours, a 10,000 to 12,000 square foot retail establishment will generate 115 trips in the evening. A restaurant will generate 60 or 70 peak hour trips and, finally, a daycare center will generate 100 to 115 peak hour trips. Mr. Polyniak testified that the housing is being advertised as senior housing and senior citizens may be entering or leaving the Property at times other than peak times.

With regard to the driveway, Mr. Polyniak testified that the proposed driveway will be positioned directly across from the mall driveway. Mr. Polyniak opined that this positioning allows for efficient flow; if the driveway were off center, it would not allow for appropriate left turns out of the proposed development and out of the Valley Mall. The driveway's position will allow a straight course into the Valley Mall although the mall driveway and the development's driveway will be slightly offset by the double yellow line. With regard to a question regarding the prohibition of left turns, Mr. Polyniak indicated that another problem might be created by such a prohibition further on Plainfield Road with cars turning around or cars entering the Valley Mall to turn around.

Mr. Polyniak testified with regard to onsite vehicle movement stating that there is an efficient two-way flow except in the dead end areas of the parking lot. Mr. Polyniak stated that the fact that a car cannot turn around at the end of a parking aisle is not problematic in a residential development where residents know the parking area well and the aisles are not very long.

With regard to a question related to school buses, Mr. Polyniak indicated that although traffic regulations regarding school buses must be adhered to by motorists, the Property's frontage may not be the most ideal location for a school bus to stop. There may be a better location further north on Plainfield Road but there are no sidewalks. Mr. Polyniak testified that no traffic counts were performed on Plainfield Road but opined that the proposed use will have

less of an impact than any permitted uses. Mr. Polyniak referenced an NJDOT count from 2015 which showed that the number of trips in the peak hours on Plainfield Road is about 1,000. Following the testimony of Mr. Polyniak, the Board Engineer indicated that no written traffic report was made available for review and comment prior to the hearing, but that the information presented seemed to generally follow industry norms

3. Rocco Campanella testified regarding his qualifications as a licensed architect and his qualifications were accepted by the Board. Mr. Campanella testified describing the building plans indicating that the proposed apartment building will contain thirty residential units, the second and third floors will contain fourteen units each and the first floor will contain two units, which will both be designated as affordable units. The second and third floors are full stories and are very similar to each other with a center corridor connecting two stairwells and both will contain an elevator, small utility room and a common area. The parking is designed to fit under the building. Two apartments on the first floor comprise the small footprint of the first floor together with a mechanical room, elevator and a lobby. The egress and ingress point in the building is the lobby. The outdoor walkway will connect the parking area and the lobby. Mr. Campanella indicated that two stairwells at opposite ends of the building are to be used for egress during an emergency. The building and the units are proposed to be handicap accessible. The finishes and materials to be used in the units are proposed to be high end, hallway finishes will be hard floors and laminates for easy maintenance with an upscale image. The units designated as affordable housing apartments will be smaller but the finishes will be the same as in the other units. Each unit will have control of its own HVAC system and each unit will contain a hot water heater and an electric panel.

Mr. Campanella described the façade facing Plainfield Road as well as the appearance of the building elevations. The exterior of the building will contain a traditional design. Mr. Campanella described the traditional elements of the design including the soffits, trim, and gables and described the building's presence on the street and its entrance way. People on the sidewalk will be able to walk into the building through an archway that is a focal point. In terms of height, Mr. Campanella testified that the building is slightly below 35' as measured from average grade but has three stories. The roof is designed to look like part of the building effectively creating a building that looks like a two rather than a three-story building. The building will be clad in real brick and grout and architectural grade concrete will be used. The roof itself is lower than the parapet in order to make the mechanical units that will be located in the center of the roof less visible. Mr. Campanella testified that the mechanical units on the roof would not cause the total building height to exceed 35'. With regard to parking, Mr. Campanella testified that the site contains nineteen outdoor parking spaces as well as parking spaces under the building. The parking under the building will be constructed with an acoustical ceiling designed to absorb sound. Mr. Campanella did not respond to a question regarding the number of parking spaces needed if the building were to be reduced by one floor.

Mr. Campanella opined that the building is well suited for the site in that a residential multi-unit building is a good transition between smaller houses and Valley Road. The proposed traditional design fits with the Master Plan requirements calling for such.

4. James T. Kyle testified regarding his qualifications as a professional planner and his qualifications were accepted by the Board. Mr. Kyle reviewed the application and testified

describing the surrounding uses; residential uses are to the Property's south, nonresidential to the east including the Valley Mall, residential to the north before the Valley Road corridor, and warehouse and commercial uses further to the west. The Property is currently occupied by a pet supply shop, a residence and storage of landscape equipment on one of the two stone parking areas on site. The existing building is in poor condition and not well maintained. The accessory storage structure to the front of the Property is also in disrepair.

The Applicant proposes to construct a 30 unit multi-family apartment building. Mr. Kyle indicated that 15% or 5 of the apartment units would be set aside for affordable housing thus the request for an increased density is for the purpose of subsidizing the affordable units. The unit distribution will include low and very low-income units. Mr. Kyle stated that the proposed development complies with all coverage and yard requirements, setbacks and intensity controls and that the proposed development is 1,500 square feet larger than that what exists on the Property currently. Mr. Kyle further stated that the design of the site and that which is being presented to the Board will likely remain the same as that which will be presented when the Applicant potentially applies for site plan approval. The Applicant is proposing to provide 65 spaces in accordance with the Residential Site Improvement Standards.

Mr. Kyle noted the uses permitted in the B-D Zone and observed that the Ordinance specifically prohibits detached single-family dwellings and any other residential uses on the first floor. Mr. Kyle opined that he believes that there is a difference between an expressly prohibited use and a use that is merely omitted from the list of permitted uses. Mr. Kyle opined that the prohibition stands on its own.

Mr. Kyle gave testimony with regard to the positive criteria stating that the general welfare is promoted because the site is particularly suited. The Property's location in the B-D Zone is close to existing residences. Mr. Kyle stated that the impact from a residential use is far less than the potential impact of the permitted uses on the surrounding residential uses. The Property's location is within walking distance to services, transit, shopping, and jobs. Mr. Kyle observed that a resident of the Property can walk to a job that would be available within a half mile radius on Valley Road and in the Valley Mall. Mr. Kyle concluded that the site will enable walkability. Mr. Kyle noted that the Master Plan seeks to enliven the Valley Mall corner and believed that the proposed residential development will accomplish this goal.

In addressing the zoning purposes of the Municipal Land Use Law, Mr. Kyle indicated that the provision of affordable housing close to jobs and services serves the general welfare. The proposed development provides for more variety in housing and potentially lower cost rental housing in a multi-family arrangement rather than typical single-family homes or townhomes. Mr. Kyle generally indicated that purpose "e" is satisfied because the development provides for more walkability and therefore a healthier community. Mr. Kyle briefly referenced purpose "g" and stated that the location is appropriate and purpose "m" indicating the increased density signifies an efficient use of land in accordance with that purpose.

With regard to the negative criteria, Mr. Kyle stated that the character of the area is not commercial but mixed use because there is currently a mix of residential and commercial uses surrounding the Property. Mr. Kyle indicated that the proposed use's appearance will not detract from the zoning district as a permitted use could be constructed using the same design and

appear very similar to the proposed use. Mr. Kyle indicated that the Applicant could construct a permitted use on the Property with a similar mass and size but the traffic impact in a conforming use will be far greater than in the proposed residential use. With regard to the second prong of negative criteria, Mr. Kyle stated that the production of affordable housing is important. In Mr. Kyle's opinion, the Board can reconcile the second prong with the fact that affordable units are being provided and 10 rental bonus credits may be applied toward satisfying the Township's unmet need. Mr. Kyle stated that the Township has an unmet need number of about 35 units. Mr. Kyle addressed the Master Plan stating that its overarching goal is to conserve the rural and residential nature within the Township. Mr. Kyle characterized the proposed apartment building as new infill development that respects the surrounding sites and the Master Plan goals. The new residential development provides diverse housing opportunities to allow residents to age in place.

Mr. Kyle stated that the "c" or bulk variance for exceeding the number of stories permitted in the zone is subsumed in the "d" or use variance. The positive criteria for the use variance also applies to the bulk variance.

In sum, Mr. Kyle opined that in his view permitted uses like an office building or restaurant with live entertainment would have a greater impact on the surrounding neighborhood. Additionally, he indicated that full-time residents would respect the surrounding neighborhood while transient customers of businesses such as hotels may not.

In response to a question regarding walkability, Mr. Kyle testified that there are no sidewalks on the Property's side of Plainfield Road. A resident would have to cross Plainfield Road to get to a sidewalk or to the Valley Mall. With regard to recreation, Mr. Kyle conceded that no recreation for children or adults was provided in the Applicant's plans although there may be space on the north side of the Property for some on-site recreation. Mr. Kyle noted, nevertheless, that there are parks within walking distance of the Property.

With regard to density, Mr. Kyle indicated that the proposed density is 16.03 units per acre and conceded that, in other areas of the Township, the density for multi-family development is 12 units per acre at most. Mr. Kyle opined that the proposal is not large scale development but further admitted that the proposed density would not be appropriate in all areas of the Township. Mr. Kyle further stated that the proposed density is appropriate on the Property considering the services and commercial uses in close proximity. Mr. Kyle viewed the proposal as good planning because the proposed use fits better with the existing residential uses.

Mr. Kyle noted that the Valley Road redevelopment area which includes affordable housing is not far from the Property. Mr. Kyle further noted that the proposed development will address the neighbors' drainage problems but conceded that a compliant application could accomplish the same goal.

In response to a question about the appropriateness of a commercial use on the Property, Mr. Kyle stated that although a commercial use would be appropriate given the zoning, it would be difficult to locate a commercial use because of the Property's location and the surrounding commercial uses. Mr. Kyle indicated that he did not observe much commercial activity on the Property on the one occasion that he visited the site. With regard to parking for a commercial

use, Mr. Kyle stated that none of the permitted commercial uses would have parking under the building except on office use. Mr. Kyle further stated that the intensity of the site as a commercial use would be limited by the amount of parking required for the use. With regard to school bus safety, Mr. Kyle opined that the area in front of the Property on Plainfield Road is not an inappropriate place for a school bus to stop because a school bus will be able to stop on an angle to pick up children.

WHEREAS, several members of the public appeared to ask questions about and to speak with regard to the Application, as more fully set forth on the record; and

WHEREAS, the Board has made the following findings of fact and conclusions of law:

1. The Property is comprised of an approximately 1.87 acre lot, designated as Block 10515, Lot 7 on the Long Hill Township Tax Map. The Property is located in the B-D Downtown Valley Commercial Zone District and is located on the west side of Plainfield Road. The Property is predominantly commercial in appearance and contains a sign at the front indicating that it is occupied by the "Purr and Pooch Pet Shop", a retail pet supply store. The Property is proximate to a single-family residential dwelling to its south; warehouse, commercial and flex type uses further to its west; other single-family residential dwellings located on lots fronting on Metzler Place further to its south; and some residential dwellings followed by commercial properties to its north leading toward the Valley Road corridor. The properties to its east, across the street, are all commercial. The driveway leading to the "Valley Mall", a large commercial strip type mall, is directly across the street to the Property's east, as well as the "Goddard School", a childcare provider set back from Plainfield Road, just south of the Valley Mall driveway, and "Cilento", a restaurant and tavern, north of the Valley Mall driveway. The Property is currently improved with the aforesaid retail pet supply store, a residential dwelling unit, a storage garage and two graveled parking areas that are used for storage of landscaper vehicles and equipment.

2. The Applicant seeks to raze the existing structures on the Property and to construct a three (3) story, elevatored, apartment building containing thirty (30) apartment units and associated lobby, mechanical rooms, and parking for sixty-five cars both on site and under the proposed building. The Applicant proposes to deed restrict five (5) of the thirty (30) units as affordable rental units in a configuration and manner that is in accordance with applicable State regulations regarding affordable housing units available to moderate, low and very low income individuals and families.

3. The Applicant recognized that the B-D Zone does not permit residential apartment buildings and, accordingly, applied to the Board for use variance relief in accordance with N.J.S.A. 40:55D-70d(1). The Applicant further recognized that the B-D Zone prohibits the construction of any structure that exceeds 35' and/or two (2) stories in height and applied for variance relief in accordance with N.J.S.A. 40:55D-70c for exceeding the number of permitted stories with the proposed three (3) story building. The Applicant applied to the Board with a bifurcated application seeking the Relief Requested, as specified herein and above, only. The Applicant expressed an intent to file a subsequent application for preliminary and final site plan approval, with any other ancillary relief, at a later date in the event the Board granted approval of the Relief Requested.

4. All threshold and jurisdictional requirements of the Application were met and the Board proceeded to hear the Application on the Hearing Dates and to render its determination which is memorialized herein.

5. As an initial threshold issue during the Hearing on the Application, the Applicant argued that its proposed use, a thirty (30) unit apartment building, was not specifically prohibited by the Ordinance. The Applicant posited that residential apartment buildings containing residential units on any floors above the first floor had merely been omitted from the principal uses permitted in the B-D Zone. The Applicant then attempted to distinguish between uses that are prohibited outright and those that are simply not included in the list of permitted uses indicating that uses that are omitted from a listing of permitted uses are not as unfavorable as those uses that are specifically prohibited. The Applicant's opinion was predicated, partially, on Subsection 122.6(d), cited below, which states that detached single family dwellings and any other residential uses on the first floor are expressly prohibited. These uses appear under the title "Prohibited Uses" therefore, according to the Applicant, those uses must have been specifically disfavored by the legislative body. The Applicant further reasoned that since residential uses on the first floor are expressly prohibited, then uses on second and third floors are impliedly permitted. The Board rejects the Applicant's analysis for the following reasons:

Consistent with the zoning authority vested by the Municipal Land Use Law, particularly N.J.S.A. 40:55D-62 and -65, the Township Committee enacted Ordinance 392-16 which specifies the uses permitted in the B-D Zone. The stated purpose of the comprehensive ordinance, adopted in 2016, was to enact zoning modifications consistent with the Township Planning Board's adoption of the Downtown Valley Commercial District Plan Element ("Valley Element") of the Township's Master Plan in September of 2015. The B-D Zone regulations, as adopted in Ordinance 392-16 and currently codified in Section 122.6 of the Ordinance, provide the following:

- a. Permitted Primary Uses.
 1. Retail trade uses, including: supermarkets, food and convenience stores, home, garden supply and nursery centers, hobby supply stores, florists, bakeries, pharmacies and drug stores, general merchandise, clothing and antique stores, sporting equipment, furniture stores, and wine and liquor stores.
 2. Retail service uses, including barber shops and hair/beauty salons, repair shops, dry cleaners, and tailors.
 3. Business and professional offices.
 4. Medical and dental offices and clinics.
 5. Financial institutions.
 6. Restaurants, including outdoor dining and live entertainment.
 7. Banquet facilities, including outdoor dining and live entertainment.
 8. Child care centers and nursery schools.
 9. Small hotel, inn or bed & breakfast establishments.
 10. Funeral homes.
 11. Health clubs, fitness centers.

12. Recreational uses utilizing the Passaic River that provide water craft that do not require a license.
13. Recreational uses.
14. Non-profit membership organizations and fraternal organizations.
15. Movie theaters of up to six screens and taverns with live music.
16. Arts Centers including live entertainment venues and/or instruction in any of the arts.
17. Art Galleries and studios.
18. Any other use, in the opinion of the approving authority, substantially similar to those identified in this subsection.

b. Permitted Accessory Uses.

1. Signs.
2. Parking facilities.
3. Satellite earth station antennas, in accordance with Section 124.6.
4. Street furniture and other pedestrian amenities.
5. Bicycle parking facilities.
6. Amenities which encourage pedestrian traffic by removing natural or man-made barriers to circulation.
7. Drive up windows for banks and pharmacies.
8. Any other accessory use, which in the opinion of the approving authority is customarily incidental or accessory to a permitted primary use.

c. Permitted Conditional Uses.

1. Public and institutional uses.
2. Public utilities.

d. Prohibited Uses.

Single family detached residences or any other residential uses on the first floor.

- e. All development in the zone shall conform to the Township architectural standards in Section 152 of this Ordinance, and the landscaping standards of Section 153 of this Ordinance.**

Additionally, Ordinance 392-16 provided that, "...all uses not specifically permitted by this Ordinance are expressly prohibited". This language is currently codified in the Ordinance in Section 123.1.

The Township's Master Plan, specifically the Valley Element's stated purpose is to create "a place where people will come to stroll, shop, work, attend cultural and entertainment events,

enjoy food and drink, and conduct civic and other business activities. Downtown should be planned to strengthen its role as an economically sustainable commercial center that provides many of the goods and services that Township residents need on a daily basis and also be a magnet to people from the surrounding region.” Downtown Valley Commercial District Plan Element September 2015, pages 2-3. The zoning changes that were recommended and memorialized in the Element included ensuring “that land use ordinances permit uses in the B-D zone that are substantially similar to the uses currently permitted in the B-2, B-3 and O zones” and advising the Township to “[r]evis[e] the prohibited uses list of the land use ordinance to ensure that appropriate Downtown business activities are encouraged in the B-D Zone.” Downtown Valley Commercial District Element September 2015, page 4. The former B-2 zone, entitled, “General Commercial” was replaced by the B-D Zone in Ordinance 392-16 and the former B-3 zone, entitled, “Planned Shopping” was repealed by Ordinance 392-16. Neither the B-D Zone nor the current O “Office” zone expressly permit any type of residential use.

Municipal zoning ordinances are construed under the standards applicable to statutory construction. Thus, in order to ascertain legislative intent, attention must be paid to the plain language of the ordinance and the language used must be given its ordinary meaning. See, AMN, Inc. of N.J. v. S. Brunswick Tp. Rent Leveling Board, 93 N.J. 518, 524-25 (1983). The first step in any statutory analysis is to examine the statute's plain language as the clearest indication of its meaning. Bergen Commerce Bank v. Sisler, 157 N.J. 188, 202 (1999). Where the statutory language is clear and unambiguous, the statute should be read as written without resort to interpretation, rules of construction, or extrinsic matters. Id. If some ambiguity exists the intent of the legislative body must be determined in construing a piece of legislation. AMN, supra, 93 N.J. at 525. Moreover, a reading of an ordinance should not “turn on literalisms, technisms[,] or the so-called formal rules of interpretation.” New Jersey Builders, Owners & Managers Assoc. v. Blair, 60 N.J. 330, 339 (1972)(citations omitted). It turns “on the breadth of the objectives of the legislation and the common sense of the situation.” Id.

The Board finds that, based upon the plain language of the B-D Zone, as codified in the Ordinance, and Ordinance 392-16, residential uses are not permitted in the zone. The language in the “Prohibited Use” subsection while specifying a particular prohibition cannot be construed as permitting a use that is not identified in a relatively long list of permitted uses. In fact, not one use on the permitted list is even comparable to a residential multi-family apartment type use. If the addition of the aforementioned subsection creates any type of confusion, then certainly taking the Valley Element and the relatively, currently enacted ordinance 392-16 together, evinces the legislative body’s intent to provide for commercial uses in this zone only. The Board finds that a residential use, whether an apartment building or otherwise, is not permitted in the B-D Zone based upon both the plain language of the Ordinance and the legislative intent. It would be improper for the Board to substitute its judgment for that of the legislative body or to attempt to ascribe an intention on the part of that body that is not stated in the legislative enactment.

6. Since the Applicant’s proposed use is not permitted in the B-D Zone, the Applicant applied for a use variance pursuant to N.J.S.A. 40:55D-70d(1). An applicant seeking a use variance has the burden of proving that it has satisfied the positive and negative statutory criteria in order to support an approval of such a variance. The New Jersey Supreme Court instructs that use variances should only be granted in exceptional cases, since there is a strong

public policy to favor land use planning by ordinance rather than by variance. Medici v. BPR Co., 107 N.J. 1, 21-23 (1987). Consequently, greater deference is ordinarily given to the denial of a variance than to a grant. Medical Center at Princeton v. Township of Princeton Zoning Board of Adjustment, 343 N.J. Super 177, 199 (App Div 2001).

7. In order to satisfy the positive criteria an applicant must prove and the Board must specifically find that either: the proposed use inherently serves the public good; the owner of the property would suffer an "undue hardship" if required to use the property in the manner permitted by the zoning ordinance; or the use would serve the general welfare because the site is particularly suitable for the proposed use. See, Saddle Brook Realty, LLC v. Twp. Of Saddle Brook Zoning Board of Adjustment, 388 N.J. Super 67, 76 (App Div 2006). Here, the Applicant did not maintain that the use was inherently beneficial or that the owner would suffer undue hardship therefore the Applicant's request must be evaluated under the site suitability test of the positive criteria. The Applicant indicated that its proposed use, a residential apartment building, serves the general welfare because it satisfies zoning purpose "a" of the Municipal Land Use Law ("MLUL") at N.J.S.A. 40:55D-2 in that it provides needed housing and an affordable housing component, and further satisfies purposes "e", "g", and "m" of the MLUL.

8. The site suitability test focuses on (1) why the location of the site within the municipality is particularly suited to the use despite the zoning and (2) what unique characteristics of the site itself make it particularly appropriate for the proposed use rather than a permitted use. See, Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 280 (1967). It is not enough to merely demonstrate that the proposed use promotes one or more of the purposes of zoning listed in the MLUL at N.J.S.A. 40:55D-2, an Applicant must demonstrate that the site is peculiarly fitted or particularly suitable for the proposed use. See, Fobe Associates v. Mayor and Council of Demarest, 74 N.J. 519 (1977). New Jersey Courts have found that "peculiar suitability special reasons exist where, generally, the use is one that would fill a need in the general community, where there is no other viable location, and where the property itself is particularly well fitted for the use either in terms of its location, topography or shape." Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. super 200, 210 (App Div 1999).

9. The testimony of the Applicant's professionals, in general, focused on the provision of multi-family housing in purportedly close, walkable proximity to jobs and services as serving the general welfare. The Property is located on a well-traveled main road, Plainfield Road, which is an entrance into the Township and into Morris County from Warren Township in Somerset County. The speed limit on Plainfield Road in the vicinity of the Property is 30 miles per hour. There are commercial properties directly across the street from the Property, in fact, there is a commercial driveway leading to a shopping mall directly across from the Applicant's proposed driveway. No traffic study was performed on the roadway in front of the Property or the mall's driveway. The Applicant could not demonstrate that there were any safe or even accessible pedestrian walkways or sidewalks leading to the jobs and services offered by other commercial uses in close proximity to the Property. The Applicant did not credibly demonstrate that a resident of the proposed development could safely walk to a job in the midst of traffic on Plainfield Road and the Valley Mall driveway, presumably during peak times at the same time motorists are driving to and from work. The Applicant did not address how a pedestrian would navigate the volume of traffic on Plainfield Road or coming into and out of the mall during non-

peak hours or on weekends when a commercial district might be particularly busy. Indeed, the Property's proximity to other commercial uses and potential jobs and services is irrelevant if a resident of the Property cannot safely walk to reach those jobs and services.

10. Further in terms of public safety, although the Applicant claimed that the apartments will be marketed as luxury and predominantly to seniors, there is no mechanism offered by the Applicant by which to restrict families with children from moving into the apartment complex nor does the Board propose that there should be. Thirty (30), largely two-bedroom, apartments present a potential opportunity for a number of school children to live in the complex; children that will likely be required to be bussed to school. The Applicant's witnesses themselves conceded that Plainfield Road, especially the Property's proposed driveway, is not an ideal location for a school bus to stop and pick up and drop off children. The Board's concern is that the volume of automobiles on the road and the Property's proximity to a mall would be unsafe for a school bus to come to a complete stop for what may be a considerable amount of time depending upon the number of children. In addition, the Board is concerned that the Property's location is not conducive to children and families having on-site recreation, for the reasons discussed below, or having access to recreation in close enough proximity to the Property that is safely accessible by sidewalks.

11. The Applicant's witnesses, particularly the Applicant's Planner, indicated that the proposed development, in addition to satisfying the general welfare and purpose "a", also satisfies purposes "e", "g" and "m" of the MLUL. To support this proposition, conclusory testimony was presented to illustrate that the proposed development satisfies purpose "e" because the site provides walkability and a healthier community, purpose "g" because the location is appropriate for a residential use, and purpose "m" because the increased density promotes the efficient use of land. While the Board is entitled to reject any expert testimony that is tantamount to net opinion, the Board considered whether the Applicant's proposed use might satisfy the stated zoning purposes of the MLUL, as follows. See, New Brunswick Cellular v. Board of Adjustment, 160 N.J. 1, 16 (1999).

12. The Applicant did not demonstrate that the proposed use satisfies purpose "e". As indicated above, the Property's location is not conducive to walkability.

13. The Applicant's claim that the Property is an appropriate location and that increased residential density on the site promotes the efficient use of land conflicts with the current physical state of the Property. The Property itself is constrained by wetlands and because of this condition a majority of the parking for the development is proposed to be placed under the proposed building. The number of building stories provided for is caused by the first-floor parking within the building. The limited developable part of the Property coupled with the considerable parking requirement for a sizable thirty (30) apartment unit building leaves the Applicant little option but to construct parking within the building. The Applicant has not yet obtained a Letter of Interpretation from the New Jersey Department of Environmental Protection to delineate the scope of the wetlands and to identify the limits of the developable portion of the site. In fact, the Applicant's "Use Variance Site Plan" indicates that the wetlands buffer and any reduction thereof is "conceptual", yet the proposed development, which the Applicant indicated would likely not change post approval, spanned the entire potentially developable area not

leaving much room for any other amenities. Although the Applicant claims that some on-site recreation and amenities may be provided, the Applicant failed to provide any evidence that it was feasible to do so given the adverse aspects of the location and the site's physical constraints.

14. Additionally, with regard to the efficiency of the increased density and appropriateness of the location, the Applicant's witnesses claimed that the residential development will improve a tired, dilapidated property, however no evidence was provided as to why developing the property with a commercial use would not have the same effect. Clearly, the Property could have been developed with a commercial use because an approval was sought from the Planning Board at some point for an office building but the project was abandoned. If the development's appearance is the reason proffered for its ability to improve the Property, there is evidence in the record that suggests that the Property could be developed with a commercial use that would be substantially similar in appearance and scope to the proposed residential apartment building. In addition, the Applicant claimed that the Property is suitable because additional buffering will be provided between the Property and the homes on Metzler Place that back up to the Property. While additional buffering is beneficial, there is no evidence that a commercial use would not provide the same type of buffering.

15. Further, with regard to the Applicant's satisfaction of purpose "m", the Board finds that the Applicant failed to establish that the increase in density will necessarily result in the efficient use of land based upon the costs that may potentially be borne by the public such as the need for public services as a result of the increased residential density. A large residential development and its functions are very different from that of a commercial use. For example, residents in a residential development will be present on site at all times while commercial uses operate only during business hours and are usually vacant overnight. The requirements for emergency and other municipal services are very different for each use. The demand for such services may be higher for a dense residential development based upon the sheer number of people living full time on the site and the fact that there is only one egress into and out of the site and the parking area is under the residential building. The Applicant provided no testimony reconciling this aspect of the proposed development and demonstrating that the site is particularly suited to accommodate those issues or that the proposed development promotes, not only a cost savings or profit increase for the developer, but the lessening of the cost of such a development and the efficient use of land from the public's standpoint.

16. During the Hearing, the Applicant's witnesses discussed several of the currently permitted uses in the B-D Zone and indicated that the proposed use is less impactful upon the surrounding residential uses than the permitted commercial uses. However, the focus of the Applicant's professionals' testimony concentrated on the more intense uses permitted in the B-D Zone such as convenience stores, large office buildings, restaurants with live entertainment and outdoor dining and hotels. The Applicant never explained why the site is more particularly suited to a large scale residential apartment building rather than a commercial use that is similar to that which already exists on the site, a retail pet store, or another type of retail use permitted by ordinance similar in intensity to a retail pet store such as an antique store, or a sporting goods or furniture store. The Applicant never addressed some of the other uses permitted in the zone such as art galleries or studios, funeral homes, barber shops or beauty salons, or dry cleaning or tailoring establishments, perhaps because these uses tend to be less intense or at least function

differently from the higher intensity commercial uses. The Board will not speculate, however, because no testimony was advanced to demonstrate that the proposed residential use is particularly suited to the site rather than one of the foregoing permitted commercial uses.

17. The proposed residential density will be very high for a residential development on a constrained site at approximately 16 units to the acre. Properties within the Township, even the approved sites in the Township's Affordable Housing Plan, do not call for density greater than 12 units to the acre. The proposed apartment building overtakes the entirety of the developable portion of the Property. It dwarfs the number and scope of the residential dwellings located within its vicinity and adds thirty more households to a commercial area. The Board rejects the notion that the Property is particularly suited to the exceptionally high density despite its immediate vicinity's purported "mixed use" character. The development is too large for the Property and its surroundings and larger than any residential use contemplated in the entire Township. As is discussed further below, the legislative intent is that the properties on Plainfield Road be developed as a commercial center; constructing thirty (30) residential apartments with associated parking in an area deemed to be a gateway and part of a commercial district ensures that the "mixed use" character will persist and the vision for a commercial center will not be realized.

18. In sum, for the reasons stated above, a majority of the Board found that the Applicant had not proven that the site is particularly suited to the proposed use and therefore had not satisfied the positive criteria. Even the minority of the Board which voted in the affirmative to grant approval expressed reservations due to the sheer size of the development. Although the Board finds, in its consideration of the testimony and the record, that the Applicant has failed to satisfy the positive criteria, the Board nonetheless conducted an analysis of the testimony given by the Applicant in order to satisfy the negative criteria, as follows.

19. To satisfy the negative criteria, an applicant must demonstrate that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent and the purpose of the zone plan and zoning ordinance. The applicant for a use variance must establish the negative criteria with an enhanced quality of proof. See, Medici, supra, 107 N.J. at 21. The Applicant's proofs and the Board's findings must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district. Id. at 21-22.

20. The Applicant's Planner testified that the proposed development does not cause substantial detriment to the public good because the surrounding properties are both residential and commercial. With regard to the first prong of the negative criteria, the Applicant claims that the proposed development provides a buffer between the existing residential homes and the commercial properties in the zone because the proposed development is residential. However, the simple fact that the Applicant's use happens to be residential does not, per se, make its impact less than that of a commercial use. The Applicant also described its development as desirable "infill development". Generally, infill development is the process of developing vacant or underutilized parcels in already built areas. However, the infill characterization does not really describe the situation on Plainfield Road. In reality, the existing homes in the zoning district on Plainfield Road are zoned for commercial purposes and the Township's expectation is

that they will be developed in the future with commercial uses. The Board finds that the Applicant did not offer testimony to support the claim that the proposed development will not cause substantial detriment to the public good and the public's expectation that the development of those commercially zoned properties will produce the economic, social and aesthetic benefits that a cohesive town commercial center is designed to generate.

21. Additionally, with regard to the first prong of the negative criteria, the Applicant also stated that the traffic impact will be minimized by the proposed development in the area of the Property. The Applicant argued that a commercial use would have more of a traffic impact but the Applicant provided conflicting testimony and the premise was not explored to the Board's satisfaction. The testimony provided to support this allegation was a recitation of conceptual averages taken from the Institute of Traffic Engineers Trip Generation Manual for the purpose of demonstrating that the permitted uses generated more trips during peak hours. However, during the first Hearing, the Applicant's Engineer offered testimony indicating that a business use would have higher volume of traffic than a residential use during off-peak hours while a residential use would have higher volume during peak-times. This testimony was seemingly contradicted by the Applicant's traffic expert but the conflict in testimony was not addressed by the Applicant. The Board questions whether it is possible that a restaurant or an office building or a hotel would experience a higher level of peak hour traffic than a residential apartment building where the residents would presumably have jobs and would be entering and leaving the site during peak hours. The Applicant did not offer testimony to demonstrate that the apartment building would be less of a traffic burden than the current retail establishment or many of the other perhaps less intense uses permitted in the B-D Zone. The Board does not accept the contradictory and undeveloped conclusions regarding the benefits of the proposed development on traffic volume.

22. With regard to the second prong of the negative criteria that the Applicant's development does not substantially impair the intent and the purpose of the zone plan and zoning ordinance, the Applicant's Planner stated that the Master Plan generally provides that the Township's rural and residential nature should be protected. The Applicant's proposed development purportedly will not substantially impair that intent. The Board rejects the notion that the densest residential development currently proposed in the Township conserves any rural or typical residential character in the Township. In addition, the Applicant's professional did not analyze the Downtown Valley Commercial District Plan Element which speaks directly to the B-D Zone. The zone plan and the zoning ordinance clearly require commercial uses in the zone. The Element undoubtedly envisions the development of a commercial destination that will attract people from not only the Township but from surrounding areas. A commercial destination will be comprised of many commercial uses in order to attract many patrons. Plainfield Road is an important conduit leading to such a commercial area and will likely become the commercial gateway into the zone. In fact, the Element recommends that Plainfield Road be developed from Valley Road to Metzler Place as a commercial area consistent with the vision for the rest of Downtown. The Property is located in this very area and is already improved with a commercial use. The Board finds, in light of the Master Plan's vision for a commercial area and the Township's endorsement of that vision in the enactment of the ordinance establishing the B-D Zone, that the Applicant's proposed dense, all residential development would substantially

impair the intent and the purpose of establishing a purely commercial zone as called for in the zone plan and the zoning ordinance.

23. In addition to the foregoing with regard to the second prong of the negative criteria, the Applicant stressed the importance of providing affordable housing to meet the Township's unmet affordable housing need. The Applicant indicated that the second prong of the negative criteria could be reconciled by the fact that affordable housing units are being provided in the proposed development. While the Board accepts that providing affordable housing is a laudable goal, the Board notes that there are many other residential areas in the Township where affordable housing and, indeed, other types of multi-family housing are far more appropriate. The Township received a Judgment of Compliance and Repose from the Superior Court which indicates that the Township's Housing Element and Fair Share Plan has been adjudged to be constitutionally compliant and to provide for a realistic opportunity that affordable housing will be provided in the Township. In light of the recent developments implicating affordable housing and the fact that the Applicant's site was not included among those chosen to satisfy the Township's obligation nor was any overlay zoning contemplated for the site solidifies the Township's intent to promote the vision of the Downtown Valley Commercial District Plan Element and maintain its strictly commercial designation.

24. The Applicant did not address the analysis undertaken by the Planning Board in establishing the Valley Element of the Township's Master Plan which demonstrated that the Property's location on a main road leading to the Township's commercial center is better suited to commercial uses do to its location, its function as a conduit to commercial uses and the associated and inevitable high vehicular volume. In addressing the Valley Element, the Applicant merely indicated that the residential development will enliven the Valley Mall corner. The Applicant provided no testimony as to why a commercial development would not produce the same result.

25. In sum, the Property does not, in fact, constitute a property particularly suited to the proposed use. Further, the Board concludes that the Applicant has failed to show that the use will not cause substantial detriment to the public good and failed in the required reconciliation of the proposed use with the zone plan and Ordinance of the Township.

26. Since the Applicant does not comply with a bulk standard of the Ordinance as indicated above, the Applicant seeks bulk variance relief from the Board pursuant to N.J.S.A. 40:55D-70c. An applicant requesting a bulk variance under subsection "c" of N.J.S.A. 40:55D-70 must prove that it has satisfied both the positive and negative criteria, as well. The positive criteria in bulk variance cases may be established by the Applicant's showing that it would suffer an undue hardship if a zoning regulation were to be applied strictly because of a peculiar and unique situation relating to the property in accordance with N.J.S.A. 40:55D-70c(1). The positive criteria may also be established by a showing that the application for variance would advance the purposes of the Municipal Land Use Law and the benefits of the deviation would substantially outweigh any detriment in accordance with N.J.S.A. 40:55D-70c(2). In order to establish the positive criteria for a c(2) variance, an applicant must show that the proposed deviation from the zoning ordinance represents a better zoning alternative and advances the purposes of the Municipal Land Use Law, as set forth in N.J.S.A. 40:55D-2. In order to satisfy the negative

criteria for a “c” variance, an applicant must show that the variance can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

27. The Board finds, with regard to the variance for exceeding the number of permitted stories, that the Applicant’s plan to construct the proposed residential apartment building with the required parking under the building gives rise to the need for such a variance. If not for the Applicant’s proposal which requires a use variance, the bulk variance would not be necessary. In such a circumstance, as the Applicant correctly noted, the bulk variance is subsumed under the relief requested for the use variance. See, Price v. Himeji, LLC, 214 N.J. 263, 301 (2013). The Board finds that the bulk variance cannot be granted for the aforesaid reasons pertaining to the use variance.

WHEREAS, a Motion was made by Mr. O’Mullan and seconded by Mr. Malloy to GRANT approval of the Relief Requested as set forth herein; and


WHEREAS, upon completion of the vote on the Motion to GRANT approval of the Relief Requested, the Applicant received three (3) affirmative votes and four (4) negative votes from the Board.

NOW, THEREFORE BE IT RESOLVED by the Board, on the basis of the evidence adduced before it and the aforesaid findings of fact and ultimate findings and conclusions of law, that the Board failed to approve and does hereby statutorily DENY the Relief Requested, by virtue of the failure of the Applicant to receive the requisite five (5) affirmative votes for passage of same.

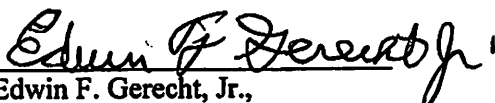
BE IT FURTHER RESOLVED, that this Resolution, adopted on December 4, 2018, memorializes the action of the Board of Adjustment taken on the Hearing Date with the following vote: Yes: O’Mullan, Malloy, Gerecht; No: Aroneo, Grosskopf, Johnson, Verlazza; Recused: None; Not Eligible: None; Absent: Rosenberg, Gianakis.

RESOLUTION DATE: December 4, 2018

ATTEST:



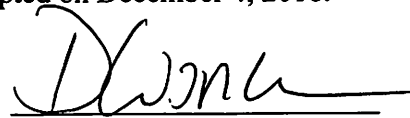
Debra Coonce,
Board Secretary



Edwin F. Gerecht, Jr.,
Chairman

VOTE ON RESOLUTION					
MEMBER	YES	NO	NOT ELIGIBLE	ABSTAINED	ABSENT
CHAIRMAN GERECHT			✓		
VICECHAIR O'MULLAN			✓		
ARONEO	✓				
GROSSKOPF	✓				
JOHNSON	✓				
MALLOY			✓		
ROSENBERG			✓		
GIANAKIS, ALT 1			✓		
VERLAZZA, ALT 2	✓				

I hereby certify this to be a true copy of the Resolution adopted on December 4, 2018.

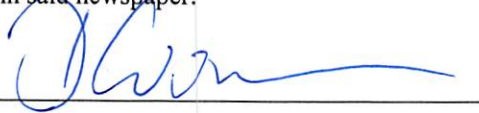


Debra Coonce,
Board Secretary

STATE OF NEW JERSEY
MORRIS COUNTY

SS.

I, Debra Coonce, being of full
age, being duly sworn upon her oath, certifies:
that a notice of which the annexed is a true copy, was
published in the Echoes Sentinel which is a newspaper
published in Morris County, New Jersey;
on the 13th day of December, 2018
in said newspaper.



Long Hill Township
Public Notice
NOTICE OF DECISION OF THE township of LONG HILL
zoning board of adjustment

Public notice is hereby given that the following action was taken by the Township of Long Hill Zoning Board of Adjustment at its meeting on December 4, 2018:

Resolution of Denial Memorialized
Use Variance
Block 10515 / Lot 7 / Zone B-D
44 Plainfield Road
Application No. 18-16Z
Jonathan Rocker


All documents relating to this application may be examined by the public in the Planning & Zoning Office in the Township of Long Hill Municipal Building located at 915 Valley Road, Gillette, NJ. Office Hours are as follows: Monday, Tuesday & Thursday 8:30 AM to 4:30 PM, Wednesday - 8:30 AM to 6:30 PM and Friday - 8:30 AM to 2:30 PM.

Debra Coonce
Planning & Zoning Coordinator
Township of Long Hill

P.F.\$24.99 12/13/18

Sworn and subscribed before me this

13TH day of DECEMBER, 2018



Notary Public of New Jersey

