2019-11-06-v4

**RARITAN TOWNSHIP BOARD OF ADJUSTMENT**

**RARITAN PARTNERS, LLC**
**(PROPOSED WAWA)**

**BLOCK 15, LOTS 20 AND 20.01 38**
**CORNER OF ROUTE 31 AND NEWCASTLE WAY**

**APPLICATION NO. BOA-07-2018**

**RESOLUTION MEMORIALIZING:**
**(1) DENIAL OF THE REQUESTED "D(1)", "D(3)", "C(1)" AND "C(2)" VARIANCES ON THE MERTIS; (2) DENIAL OF THE REQUESTED CONDITIONAL USE APPROVAL AND PRELIMINARY AND FINAL SITE PLAN APPROVAL ON THE MERITS; AND (3) DENIAL OF THE REQUESTED EXCEPTIONS AS MOOT**

**RESOLUTION NO. 2019-16**

**WHEREAS,** Raritan Partners, LLC (the "**applicant**") is the contract purchaser of property located at the corner of Route 31 and New Castle Way and designated on the Raritan Township (the "**Township**") tax map as Block 15, Lots 20 and 20.01 (the "**property**"), which property is situated in the B-2 zoning district (the "**B-2 zone**"), and the applicant, with the property's owners consent, submitted an application with supporting documentation (the application forms and all supporting documentation are together referred to as the "**application**") to the Raritan Township Board of Adjustment (the "**Board**") for various relief to construct and operate a combined Wawa convenience store and gas station with related site improvements (the "**proposed development**"), and the application as ultimately presented to the Board seeks the following specific relief:

1. One (1) "d(1)" variance from ordinance section 16.26.B.020.A to allow two principal uses on the property – a convenience store as a principally permitted "retail use", and a gas station which is expressly not a permitted principal "retail or service use" pursuant to ordinance section 16.26B.020.A but is a conditionally permitted use pursuant to ordinance section 16.26B.040.E – where ordinance section 16.02.30 defines "principal use" as "the main purpose for which any lot and/or building is used" – not multiple uses – so only one principal use is permitted on a lot in the B-2 zone (the applicant applied for this relief without prejudice to its position that this relief is not required and reserved its rights on this issue);
2. Five (5) "d(3)" variances from ordinance sections 16.68.050.A, B, C, D and E to allow the construction and operation of the conditionally permitted gas station where the proposed gas station will deviate from certain of the conditional use standards as specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution;
3. Nine (9) "c(1)" and/or "c(2)" variances to allow the following deviations from the following zoning ordinance regulations which are specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution but which are listed here for purposes of explaining the specific relief

sought: Encroachment of buildings / structures into the minimum 75-feet front yard setback required by the Schedule of Area, Yard and Building Requirements which is incorporated by reference into and by ordinance section 16.64.010 (canopy over gas station located 40.5-feet from the front property line along Route 31, canopy over gas station located 62.8-feet from the front property line along New Castle Way, convenience store located 73.8-feet from the front yard along New Castle Way, and trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way); Deviation from the maximum hard surface coverage allowed on the property where the Schedule of Area, Yard and Building Requirements prohibits more than 55% hard surface coverage on lots in the B-2 zone and ordinance section 16.64.130.B prohibits more than 50% of the hard coverage otherwise permitted in a zone in steep slope areas containing slopes from 13% to 19% (51.3% hard surface coverage is proposed on the property where 49.6% hard surface coverage is the maximum permitted when the reducing the total hard surface coverage otherwise permitted due to the presence of hard surface coverage in steep slope areas on the property which contain slopes from 13% to 19%); Encroachment of petroleum tanks into the front yard setback required by the Schedule of Area, Yard and Building Requirements (tanks as close as 41.0-feet to the front yard along Route 31, and tanks as close as 14.4-feet to the front yard along New Castle Way); [1] Disturbance of land within the 75-foot from a stream non-disturbance area established by ordinance section 16.64.110.A.1; and Buildings / structurers within 100-feet of a stream established in ordinance section 16.64.110.A.1,

4. Eleven (11) exceptions to allow the following deviations from the following site plan ordinance requirements which are specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution but which are listed here for purposes of explaining the specific relief sought: 6.4 footcandles of lighting of walkways where the maximum illumination of walkways is 0.5 footcandles pursuant to ordinance section 16.20.010.G.(6); 9.8-feet setback of light fixtures from property line where the minimum required setback for the light fixtures from the property line is 36-feet pursuant to ordinance section 16.20.010.G.(10); 38.7-foot landscape buffer yard depth adjacent to neighboring residential Lot 22 where a 75-foot landscape buffer yard is required adjacent to a residential use pursuant to ordinance section 16.20.040.E.(3); Use of HDPE (high density polyethylene) flexible plastic pipe instead of RCP (reinforced concrete pipe), with the RDP required by ordinance section 16.20.040.M.(11); No planting of certain shade trees along Route 31 where ordinance section 16.20.040.D.(4)(W) requires planting of shade trees along all adjacent streets; No on-site planting of trees to replace the trees which would be removed to construct the proposed development in accordance with ordinance section 16.20.040.T; No provision of 3-foot overhang beyond curbs for vehicles for the parking spaces adjacent to the convenience store, contrary to ordinance section 16.20.040.C.(2)(c); 10-foot parking setback from Route 31 where ordinance section 16.20.040.C.(2)(i) requires a minimum of 20-foot parking setback

[1] While there are three (3) tanks and they all encroach into the front yard setbacks along each of the two (2) streets, the Board agrees with the applicant that this situation requires two (2) variances, not six (6) variances as argued by the objectors, because each of the two (2) front yard setback variances are for all of the tanks as a group.

from street right of way lines; 14.3-foot parking setback from New Castle Way where ordinance section 16.20.040.C.(2)(i) requires a minimum of 20-foot parking setback from street right of way lines; Sidewalk around convenience store is flush with the adjacent parking areas where ordinance section 16.20.040.C.(3)(e) requires sidewalks between parking areas and principal structures to be raised a minimum of 6-inches of the parking area surface; and Driveway on Route 31 located 28.2-feet from existing driveway on neighboring residential Lot 22 where ordinance section 16.20.040.C.(10)(g) requires a minimum 40-feet separation,

5. Conditional use approval to allow operation of the conditionally permitted gas station; and
6. Preliminary and Final Site Plan approval to allow construction of the principally permitted convenience store and the conditionally permitted gas station;

**WHEREAS,** the "d(1)" and "d(3)" variances confer exclusive subject matter jurisdiction over the application with the Board pursuant to N.J.S.A. 40:55D-20, -70d and -76b (and if the application did not involve any "d" variances, the Raritan Township Planning Board would have exclusive jurisdiction over the application as the application would then involve requests for conditional use approval, preliminary and final site plan approval, "c" variances and exceptions, which would be within the exclusive jurisdiction of the Planning Board pursuant to N.J.S.A. 40:55D-20, -46, -48, -51 and -60);

**WHEREAS,** a number of documents were submitted to the Board by the applicant and/or the applicant's professionals in support of the application, all of which documents are on file with the Board and are part of the record in this matter, and the following are the latest versions of the plans, drawings and documents for which Board approval is necessary for approval of the application, which plans, drawings and documents were on file and available for public inspection for at least 10 days prior to the last hearing session on the application in accordance with N.J.S.A. 40:55D-10b:

1. "Preliminary and Final Major Site Plan" for "Raritan Partners, LLC" titled "Proposed Convenience Store with Fuel Sales" prepared Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised May 20, 2019, consisting of 24 sheets (sheets C-1 through C-24), which include landscaping and lighting plans (together referred to as the "**Site Plans**"),

2. Architectural plans consisting of the following two (2) drawings: Elevations and Floor Plan of the proposed "Wawa store", and Elevations of the proposed "Gas Canopy Stacked w/3 Kiosks" and "Trash Compound", prepared by Richard W. Luke, Architect dated January 11, 2018 (both drawings together referred to as the **Architectural Pla**ns"),

3. "Stormwater Management Report" for "Proposed Convenience Store with Fuel Sales" prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised May 15, 2019, (referred to as the "**Stormwater Management Report**"),

4. "Stormwater Operations & Maintenance Plan with Field Manuals" for Proposed Convenience Store with Fuel Sales" prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised May 20, 2019, (referred to as the "**Stormwater O&M Manuals**"),

5. "75 Ft Buffer Disturbance Exhibit" identified as drawing B-1 prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised April 22, 2019, (referred to as the "**75-foot Buffer Disturbance Exhibit**"), and

6. "100 Ft Buffer Structure Setback Exhibit" identified as drawing B-2 prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised "April 22, 2019, (referred to as the "**100-foot Buffer Structure Setback Exhibit**");

**WHEREAS,** a number of documents were submitted in opposition to the application by the following attorneys representing objectors to the application: Steven P. Gruenberg, Esq. on behalf of objector 31 Food and Fuel, LLC d/b/a US Fuel (operating a US Fuel gas station and convenience store – the "**US Fuel facility**") ("**objector US Fuel**"), and Kevin P. Benbrook, Esq. on behalf of three objecting families residing in the Wellington Hills subdivision development (Joseph and Meghan Magee, residing at 3 Thames Lane, Daniel and Suzanne Crimmins, residing at 6 Thames Lane, and John and Tanya Dawson, residing at 1 Windsor Way) (the "**Wellington Hills objectors**"), [2] all of which documents are on file with the Board and are part of the record in this matter (Edward Groh, Esq. also represented objectors to the application – he represented himself pro se as well as his wife Patricia Groh ("**objector Groh**") , residing at 7 Windsor Way in the Wellington Hills subdivision development – but Mr. Groh did not submit any documents);

**WHEREAS,** a number of review and response documents were submitted by the Board's professionals and/or Township agencies / departments reviewing and/or responding to the application and/or to documents submitted by the applicant and/or the objectors, including a "jury charge" prepared by Board attorney Jonathan E. Drill on August 27, 2019, containing legal advice for use by the Board in its deliberation and vote on the application, and "deliberation tally sheets" prepared by Board attorney Jonathan E. Drill on August 28, 2019, for use by the Board members during the deliberation and vote on the application, all of which documents are on file with the Board and are part of the record in this matter;

**WHEREAS,** a duly noticed public hearing was held on the application over the course of twelve (12) evenings, with the hearing commencing on September 6, 2018, and continuing on October 4, 2018, October 18, 2018, November 1, 2018, December 6, 2018, January 17, 2019, March 7, 2019, April 18, 2019, May 16, 2019, June 6, 2019, July 18, 2019, and concluding on September 19, 2019, [3] with the Board deliberating and then voting on the application on September 19, 2019, with affidavits of service of notices and publication of notices of the hearing being submitted to the Board and being on file with the Board, thereby conferring procedural jurisdiction over the application with the Board;

[2] There were also a number of individual residents of the Wellington Hills subdivision development who objected to the application but they were not represented by counsel. While some of the individual objectors submitted exhibits into the record during the hearing, none of the individual objectors submitted non-exhibit documents to the Board.

[3] The concluding hearing session had been scheduled for September 5, 2019 but was continued without need for further notice to September 19, 2019.

**WHEREAS,** the applicant was represented by Timothy Prime, Esq., objector US Fuel was represented by Steven P. Gruenberg, Esq., the Wellington Hills objectors were represented by Kevin P. Benbrook, Esq., objector Groh were represented by Edward Groh, Esq., pro se, and the Board was represented by Jonathan E. Drill, Esq.; [4]

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

1. Michael Redel (applicant's representative and fact witness),
2. Jeffrey Martell, PE (applicant's engineering expert),
3. Gary Dean, PE (applicant's traffic engineering expert),
4. Tomlinson Fort, PG (applicant's underground storage tank expert and environmental compliance and safety expert),
5. Paul Phillips, PP, AICP (applicant's planning expert),
6. Antoine "Tony" Hajjar, PE, PLS, CME (Board's engineering expert),
7. Judd Rocciola, PE (Board's traffic engineering expert),
8. John M. Thomas, LLA (Board's landscape architectural expert),
9. Jessica Caldwell, PP, AICP (Board's planning expert),
10. David Manhardt, PP, AICP (Board's planning expert),
11. Carl Peters, PE & PP (Wellington Hills Objectors' engineering and planning expert),
12. Michael J. Pessolano, PP (Objector US Fuel's planning expert),
13. Pamela Parker (Objector residing at 14 New Castle Way in the Wellington Hills subdivision development),
14. Matthew Dawson (Objector residing at 23 New Castle Way in the Wellington Hills subdivision development),
15. Tanya Dawson (Objector residing at 23 New Castle Way in the Wellington Hills subdivision development),
16. Pamela Saus (Objector residing at 20 New Castle Way in the Wellington Hills subdivision development),
17. Lisa Ziv (Objector residing at 3 Windsor Way in the Wellington Hills subdivision development),
18. Richard Post (Objector residing at 11 Windsor Way in the Wellington Hills subdivision development),
19. Edward Groh, Esq. (Objector residing at 7 Windsor Way in the Wellington Hills subdivision development),
20. Danielle Coppola (Objector residing at 5 Chamberlain Court in the Wellington Hills subdivision development), and
21. Vern Ainslie (Objector residing on neighboring Lot 22 which fronts on Route 31);

[4] As set forth above in footnote 2, there were also a number of individual residents of the Wellington Hills subdivision development who objected to the application but they were not represented by counsel. Where reference is made in the within resolution to any of the individual non-represented objectors it will be by their first and/or last name.

**WHEREAS,** the following exhibits were entered into evidence during the hearing, are on file with the Board, and are part of the record in this matter, [5] all of which exhibits were considered the Board in determining whether to grant or deny the application (with the exceptions of exhibits OPP-1, OPP-2 and OPP-3, which are police reports from the Flemington Police Department, and which the Board deems to be irrelevant to the issues involved in the application so were not considered in determining whether to grant or deny the application [6] ):

A-1 Color rendered site plan exhibit (sheet C-5 of the Site Plans last revised August 17, 2018), prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design) on September 5, 2018,

A-2 Color rendered overall aerial exhibit (drawing A-2 last revised September 5, 2018), prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design) on September 5, 2018,

A-3 Color rendered site plan sheet C-5 last revised September 26, 2018, prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design) on October 17, 2018,

A-4 "NJDOT Composite Plan Exhibit", last revised September 26, 2018, prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design),

A-5 CV of Tomlinson Fort,

A-6 Paper copy of PowerPoint presentation prepared and narrated by Tomlinson Fort,

A-7 "100 Ft Buffer Structure Setback Exhibit" identified as drawing B-2 prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised February 12, 2019,

A-8 "75 Ft Buffer Disturbance Exhibit identified" as drawing B-1 prepared by Jeffrey A. Martell, PE (of Stonefield Engineering & Design), last revised February 12, 2019,

A-9 75-foot Buffer Disturbance Exhibit referenced above (identified as drawing B-1 prepared by Jeffrey A. Martell, PE, last revised April 22, 2019),

A-10 100-foot Buffer Structure Setback Exhibit referenced above (identified as drawing B-2 prepared by Jeffrey A. Martell, PE, last revised April 22, 2019),

[5] The "A" exhibits were submitted by the applicant, the "O" exhibits were submitted by various objectors, and the "G" exhibit did not have to be entered into evidence as the Board took judicial notice of it as it is a Raritan Township Planning Board resolution, but one of the objector's attorneys wanted it entered into evidence and it was entered into evidence as an exhibit because the applicant did not object to its admission.

[6] The only reason that exhibits OPP-1, OPP-2 and OPP-3 were admitted into evidence was because the applicant did not object to their admission.

A-11 Plan titled "Access Driveway for MR Development Corporation, et als, Block 15, Lot 70, Raritan Township" dated July 9, 2001, signed by Robert B. Zederbaum, PE, which shows the emergency access lane across Block 15, Lot 70 which is referenced in Planning Board Resolution No. 22-99 which memorializes the preliminary major subdivision approval granted to create the Wellington Hills subdivision development (and of which resolution the Board takes judicial notice as set forth below),

G-1 Raritan Township Planning Board Resolution No. 11-2015 adopted on December 9, 2015 which memorializes the grant of minor subdivision approval and preliminary and final site plan approval to allow construction of a 28,000 square foot warehouse addition to the Flemington Department Store (and of which resolution the Board takes judicial notice as set forth below),

OG-1 Aerial exhibit prepared by Carl Peters, PP, comprised of a Google Earth aerial image with a Township zoning map overlay and the 75-foot setback line along the westerly side of Route 31 in the B-2 zone,

OG-2 "Site Restriction Diagram" prepared by Carl Peters, PP,

OG-3 "Building Setback Compliance Diagram" prepared by Carl Peters, PP,

OG-4 "Site Work Setback Compliance Diagram" prepared by Carl Peters, PP,

OG-5 "Proposed Convenience Store" schematic exhibit prepared by Carl Peters, PP,

OG-6 Rough schematic exhibit of a fueling station prepared by Carl Peters, PP,

OB-1 Definition of and comment regarding a "gasoline station and convenience center" facility as set forth on pages 226 and 227 of The Complete Illustrated Book of Development Definitions ($4^{th}$ Ed. 2015) by Moskowitz, et al.,

OP-1 Thumb drive containing a PowerPoint presentation prepared by objector Pamela Parker,

OP-2 Paper copy of the PowerPoint presentation prepared by objector Pamela Parker,

OP-3 Document titled "Level of Service in North America", defining levels of service "A" through "F" as established in the Highway Capacity Manual (HCM) and AASHTO's Geometric Design of Highways and Streets presented by objector Pamela Parker,

OD-1 NJDOT "Statewide Transportation Improvement Program" for fiscal years 2008 to 2017, which the applicant's attorney agreed states that the improvements at Route 31 southbound at County Route 523 (the intersection where the property is located) were supposed to have the design started in 2018, with right-of-way acquisition occurring in 2019, and construction to begin in 2021,

OPP-1 Flemington Police Department Incident Report of a dumpster fire occurring on October 6, 2016 at the Wawa located on Church Street in Flemington Borough,

OPP-2 Flemington Police Department Incident Report of an employee of the Wawa located on Church Street in Flemington Borough using heroin in the restroom occurring on September 6, 2016,

OPP-3 Flemington Police Department Incident Report of two people asleep in a vehicle at the Wawa located on Church Street in Flemington Borough and evidence of drug use by the two individuals in the vehicle occurring on April 8, 2017, and

OS-1 List of gasoline stations on Route 31 and on Route 12 prepared by objector Pamela Saus;

**WHEREAS,** the Board takes judicial notice of the following documents, without said documents having had to be submitted into evidence as exhibits, with all said documents being on file in the Township Planning Department and being part of the record in this matter:

1. Raritan Township Planning Board Resolution No. 22-99 adopted on July 13, 1999 which memorializes the grant of preliminary major subdivision approval to create the Wellington Hills subdivision development, and which states (among other things) that "[t]here is a second emergency access lane which crosses to a portion of the property of the Flemington Department Store, Block 15, Lot 71",

2. Raritan Township Planning Board Resolution No. 22-2001 adopted on April 10, 2001 which memorializes the approval on Lot 4 in Block 32 situated in the B-2 zone of a Citgo gasoline filling station and convenience store (the predecessor to the US Fuel facility on that lot) as a conditionally permitted use where all of the conditional use standards had been met and a convenience store which, while not specified, could have been treated by the Planning Board as an accessory use to the gasoline filling station, and where the applicant agreed to cut down the number of gasoline dispensers from 12 to 8 to eliminate a variance that would otherwise have been necessary for the gasoline fueling islands and canopy encroaching into the area within 75-feet of a stream,

3. Raritan Township Planning Board Resolution No. 11-2015 adopted on December 9, 2015 which memorializes the grant of minor subdivision approval and preliminary and final site plan approval to allow construction of a 28,000 square foot warehouse addition to the Flemington Department Store,

4. Raritan Township Planning Board Resolution No. 15-2017 adopted on October 11, 2017 which memorializes the denial of preliminary and final site plan approval to an application for a Wawa gasoline station with a food market on Lot 1 in Block 66, and the food market, while not specified, could have been treated by the Planning Board as an accessory use to the gasoline filling station since there is no reference in the resolution to the food market being a principally

permitted use and the resolution states that the applicant's attorney referenced the "Wawa food market and fueling station . . . operation" as a "conditional use in the B-1 zone" and the applicant's planning expert referenced the "proposed use" as "a conditional use",

5. 2008 Master Plan prepared by James Humphries, PP, AICP and adopted by the Raritan Township Planning Board on February 12, 2008,

6. 2019 Master Plan Reexamination Report prepared by Jessica C. Caldwell, PP, AICP and dated and adopted by the Raritan Township Planning Board on February 27, 2019, and

7. Title 16 (Land Development Ordinances) of the Code of the Township of Raritan republished 2018, amended through September 18, 2018;

**WHEREAS, AFTER CONSIDERING THE APPLICATION, ALL DOCUMENTS SUBMITTED REGARDING THE APPLICATION, THE TESTIMONY OF THE WITNESSES, THE EXHIBITS ADMITTED INTO EVIDENCE (WITH THE EXCEPTION OF THE OPP EXHIBITS WHICH WERE NOT CONSIDERED), AND THE DOCUMENTS OF WHICH JUDICIAL NOTICE WAS TAKEN, AND GIVING APPROPRIATE WEIGHT TO ALL OF SAME, AND BASED ON ITS UNDER-STANDING 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) THE ACTION IT TOOK IN: (1) DENYING THE REQUESTED "D(1)", "D(3)", "C(1)" AND "C(2)" VARIANCES ON THE MERITS; (2) DENYING THE REQUESTED CONDITIONAL USE AND PRELIMINARY AND FINAL SITE PLAN APPROVAL ON THE MERITS; AND (3) DENYING THE REQUESTED EXCEPTIONS AS MOOT:**

## A. FACTUAL FINDINGS AND LEGAL CONCLUSIONS

1. **The Property, Existing Development, Zoning and Surrounding Development.** The property consists of the proposed merger of two lots in Block 15, Lot 20 which is a corner lot having frontage on New Castle Way and Route 31, and Lot 20.01 which is adjacent to Lot 20 and fronts on New Castle Way. Both lots are situated in the B-2 zone. The combined property will be a 2.54-acre lot located at the northwesterly intersection of New Castle Way and Route 31. There is an existing principally permitted commercial building on Lot 20 which is a two-story masonry building containing establishments providing retail and service uses. See, ordinance section 16.26B.020.A which allows establishments providing retail and service uses as principally permitted uses in the B-2 zone. There are also accessory parking spaces and other related site improvements on Lot 20. There is a two-story wood frame residential dwelling on Lot 20.01 along with driveways and an accessory wood frame barn and four (4) accessory sheds. These residential buildings are nonconforming uses and structures as residential uses and dwellings are not permitted in the B-2 zone so are prohibited by virtue of ordinance section 16.64.010.B.1 which provides: "Any use not designated as a principally permitted use, a permitted accessory use or a conditional use if specifically prohibited . . . ." (While lawfully

created pre-existing nonconforming uses and structures are entitled to remain as "grandfathered" pursuant to N.J.S.A. 40:55D-68, no findings or conclusions are made in that regard as no evidence was submitted to establish whether or not the residential dwelling and accessory buildings on Lot 20.01 were lawfully created prior to the adoption of the ordinance which prohibited them.) Adjacent to the property along its westerly boundary is the Hunterdon County Medical Center which is located on Lot 14 in Block 15 and situated in the H (Hospital) zone. Adjacent to the property along its northerly boundary is Lot 22 in Block 15 which is situated in the B-2 zone and contains a residential dwelling. (As with the residential dwelling located on the property, no findings or conclusions are made as to whether the residential dwelling on Lot 22 is a lawfully created pre-existing nonconforming use and structure entitled to remain.) Across New Castle Way from the property to the south is Flemington Subaru which is an automobile dealership located on Lot 23 in Block 15 and situated in the B-2 zone where same is a conditionally permitted use pursuant to ordinance section 16.26B.040.F.

2. **The Proposed Development.** As set forth above, the applicant proposes to construct and operate the proposed development, which is a combined Wawa convenience store and gas station with related site improvements. Specifically, the applicant proposes to demolish and remove all buildings and structures on the property and construct the following: (a) a 5,585 square foot Wawa convenience store; (b) a Wawa gasoline filling station consisting of six (6) gasoline pumps with a total of twelve (12) filling dispensers, and also consisting of three (3) employee kiosks and a 4,740 square foot weather protection canopy over the filling stations and kiosks; (c) three (3) underground gasoline storage tanks which are part and parcel of the gasoline filling station; (d) paved parking areas for employees of the convenience store and the gasoline station as well as for customers of the convenience store; (e) enclosure(s) for trash and recycling receptacles for both the convenience store and gasoline station; (f) stormwater facilities for stormwater management on the property; and (g) other related site improvements.

3. **The Application and Required and Requested Relief.** As set forth above, the proposed Wawa convenience store is a principally permitted "retail use" in the B-2 zone pursuant to pursuant to ordinance section 16.26B.020.A, and the proposed Wawa gasoline filling station is a conditionally permitted use in the B-2 zone pursuant to ordinance section 16.26B.040.E. However, as will be explained in more detail below, the Board determined that a "d(1)" variance from ordinance section 16.26.B.020.A is required to allow two principal uses on the property – the convenience store as a principally permitted "retail use", and the gas station which is expressly not a permitted principal "retail or service use" pursuant to ordinance section 16.26B.020.A but is a conditionally permitted use pursuant to ordinance section 16.26B.040.E – where ordinance section 16.02.30 defines "principal use" as "the main purpose for which any lot and/or building is used" – not multiple uses – so only one principal use is permitted on a lot in the B-2 zone. (As set forth above, the applicant applied for this relief without prejudice to its position that this relief is not required and reserved its rights on this issue.) As also set forth above, the applicant requires and requested five (5) "d(3)" variances from ordinance sections 16.68.050.A, B, C, D and E to allow the construction and operation of the conditionally permitted gas station where the proposed gas station will deviate from certain of the conditional use standards as specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution. While the application requires and requests other relief, the Board's exclusive subject matter jurisdiction over the application has been invoked because of the "d(1)" and "d(3)" variances pursuant to N.J.S.A. 40:55D-70d, -76b and

20. In the absence of "d" variances, the application would be within the exclusive subject matter jurisdiction of the Raritan Township Planning Board. All of the required and requested relief is not listed here in detail for the sake of brevity but will be addressed in detail in the Board's findings and conclusions below. In summary, the application seeks a "d(1)" variance, "d(3)" variances, "c(1)" and/or "c(2)" variances, site plan ordinance exceptions, conditional use approval, and preliminary and final site plan approval to construct and operate the proposed development. The Board's findings and conclusions as to the applicant's requests for the relief are set forth below.

4. **Interpretation that "D(1)" Variance is Required for the Wawa Convenience Store and Wawa Gas Station on the Property.** A threshold issue in the application is whether a "d(1)" variance is required to allow the proposed Wawa convenience store and the proposed Wawa gas station to be constructed and operated on the property, which is proposed to be one lot after merger. The Board has authority to decide such issues and, as will be set forth in detail below, the Board determined that a "d(1)" variance was required. The Board's findings and conclusions on this issue are as follows:

N.J.S.A. 40:55D-70b expressly authorizes a zoning board of adjustment to issue interpretations of the zoning ordinance. N.J.S.A. 40:55D-10g requires all land use boards to make findings of fact as well as conclusions in each decision on an application for development, and our courts have made it clear that the "conclusions" referenced in that statutory provision include legal conclusions on relevant points of law at issue in the application. Centennial Land & Dev. Co. v. Tp. of Medford, 165 N.J. Super. 220, 232 (Law Div. 1979); Pagano v. Edison Board of Adjustment, 257 N.J. Super. 382, 399-401 (Law Div. 1992). Thus, the MLUL as well as case law authorizes the Board to make the determination at issue.

The applicant did not apply for any "d" type variance relief for the convenience store on the basis that a convenience store is a principally permitted retail use in the B-2 zone. The applicant did, however, notice "in the alternative" for a "d(1)" variance to allow two principal uses on the property in the event the Board interpreted the ordinance as prohibiting two principal uses on property in the B-2 zone and in the event that the Board interpreted the proposed Wawa as two principal uses. Based on letter briefs submitted by the applicant and some of the objectors, the Board determined during the October 4, 2018 hearing session that a "d(1)" variance was required to allow the proposed Wawa because ordinance section 16.020.30 defines principal use as the main purpose – in the singular and not in the plural – not multiple purposes or uses, and the proposed gasoline station and the proposed convenience store were each primary uses – neither was accessory to the other. See, 10/4/18T4-10 to 13-1.

By letter from the applicant's attorney dated June 24, 2019, the applicant requested reconsideration of the Board's prior determination that a "d(1)" variance was required to allow the proposed Wawa convenience store and the proposed Wawa gasoline station. The applicant took the position that the Board should consider new evidence consisting of the testimony of its planning expert who also cited two (2) Raritan Township Planning Board applications which decided applications for combined gasoline stations and convenience stores and which the applicant's planning expert alleged did not treat them as prohibited multiple

principal or primary uses on the lots at issue. [7] The applicant also took the position that the Board should consider additional new evidence consisting of the definition in The Complete Illustrated Book of Development Definitions (4th Ed. 2015) by the Moskowitz et al. of "gasoline station and convenience center". [8] The applicant argued that the Board, on reconsideration, should determine that it does not need a "d(1)" variance on the basis that the proposed convenience store and gasoline station uses "is a single permitted use." Specifically, the applicant contended that the proposed use is a conditionally permitted "gasoline station and convenience center" which is defined in the Moskowitz book as "a retail facility combining a gasoline station and a convenience store." The applicant also contended that the Board's treatment of this issue should be consistent with what the applicant alleged is the Planning Board's treatment of the issue.

During its deliberations on the application on September 19, 2019, the Board reconsidered its prior October 4, 2018 determination and determined to reaffirm that a "d(1)" variance is required to allow two principal or primary uses on the property, one being the proposed Wawa gasoline station and one being the proposed Wawa convenience store. The Board's findings and conclusions on this issue are as follows.

As to the issue of the Planning Board's alleged prior treatment of this issue, our courts have recognized that planning boards have implicit authority to interpret ordinances if required to decide applications pending before them. See, Fallone Properties v. Bethlehem Planning Board, 369 N.J. Super. 552, 566-567 (App. Div. 2004); Terner v. Spyco, Inc., 226 N.J. Super. 532 (App. Div. 1988); Galanter v. Howell Planning Board, 211 N.J. Super. 218 (App. Div. 1986). That said, it is undisputed that the Planning Board did not interpret the ordinances at issue and did not make a determination in either of the resolutions at issue that a combined gasoline station and convenience store was a singular use or that multiple principal uses are permitted in the B-2 zone.

The applicant's planning expert opined that by accepting jurisdiction over two applications submitted for gas stations with convenience stores, the Raritan Township Planning Board implicitly determined that those two principal uses were permitted on one lot. 5/16/2019T52-22 to 53-14. The Board disagrees for the following reasons.

First, the Board notes and finds that, unlike the Wawa application here, no objectors argued to the Planning Board in the two applications cited by the applicant that the

[7] The two Planning Board applications are: (1) application submitted to and approved by the Planning Board in 2001 to allow construction and operation of a Citgo gas station and convenience store on Lot 4 in Block 32 (which is the predecessor facility to the US Fuel facility which exists on that lot); and (2) application submitted to but denied by the Planning Board in 2017 for a proposed Wawa gasoline station and convenience store on Block 66, Lot 1.

[8] The applicant's planning expert had opined in his testimony during the May 16, 2019 hearing session that the planning field now considers combined gas stations and convenience stores at one use, but he based this opinion on non-planning literature, and he testified that he did not know of any planning literature or any planning book or textbook contained any such statement, including the Moskowitz book. 05/16/2019T49-14 to 50-25. The applicant's attorney thereafter relied on the Moskowitz book definition at issue without recalling its planning expert back to testify. The Board finds this was more likely than not to protect the planning expert from further cross examination.

combined uses were prohibited multiple uses on the lots in question. Thus, the issue was never raised so the Planning Board accepting jurisdiction over the applications does not imply anything. The Board believes that the Planning Board was not aware of the issue. As to the prior Wawa Planning Board application, the applicant's planning expert believed– but not to 100% certainty – that no objector raised the issue. 5/16/2019T53-22 to 54-1. As to Planning Board Resolution No. 22-2001 adopted on April 10, 2001, which memorializes the approval on Lot 4 in Block 32 situated in the B-2 zone of a Citgo gasoline filling station as a conditionally permitted use where all of the conditional use standards had been met, there is no reference in the resolution to any objectors and, further, it is possible that the Planning Board could have treated the convenience store as an accessory use to the gasoline filling station. As to the Planning Board's treatment of the prior Wawa application in 2017, while the applicant's planning expert testified based on his recollection of certain things which supported his opinion, he could not recall a host of other things that would not have supported his opinion. See, 5/16/2019T52-14 to 61-5. Moreover, Planning Board Resolution No. 15-2017 which was adopted on October 11, 2017 (and which memorializes the denial of preliminary and final site plan approval of the application for the Wawa gasoline station with a food market on Lot 1 in Block 66) can be read as the Planning Board treating the food market as an accessory use to the gasoline filling station since there is no reference in the resolution to the food market being a principally permitted use, the resolution states that the applicant's attorney referenced the "Wawa food market and fueling station . . . operation" as a "conditional use in the B-1 zone," and the resolution reflects that the applicant's planning expert referenced the "proposed use" as "a conditional use". For all of these reasons, the Board will not rely on the applicant's planning expert's recollection of the 2017 Planning Board Wawa application. The burden of proof on this issue is on the applicant and the applicant did not provide the Board with any transcripts or minutes of the Planning Board hearings on the Citgo or Wawa applications. The Board finds on the evidence submitted that the Planning Board did not implicitly, let alone explicitly, make a finding in either the Planning Board Citgo application or the Planning Board Wawa application that combined gas station and convenience store principal uses are permitted on one lot. The Board's ultimate finding and conclusion on this issue is that the Planning Board applications cited by the applicant do not evidence how the Planning Board has treated this issue.

Further, assuming for argument's sake only that the fact that the Planning Board accepted jurisdiction of the two prior gas station applications evidences that the Planning Board treated the applications as involving combined principal uses that were permitted in the B-2 zone, planning board interpretations and jurisdictional rulings are not binding on boards of adjustment. Just the opposite is the case. As set forth above, the MLUL expressly authorizes boards of adjustment to issue interpretations. And, significantly, New Jersey case law provides that a municipality's board of adjustment's interpretations and jurisdictional rulings are binding on the municipality's planning boards. Specifically, the Board has the power pursuant to N.J.S.A. 40:55D-70b to "decide requests for interpretation of . . . zoning regulations or for decisions upon other special questions . . . ." The Planning Board has no such power. Because the MLUL grants to boards of adjustment – not to planning boards – the express power to interpret ordinances and decide special questions, once a board of adjustment exercises that power, the decision becomes final and binding on the zoning officer, other enforcement officials, and on the planning board of the municipality. See, Colts Run Civic Ass'n v. Colts Neck Board of Adj., 315 N.J. Super. 240, 246 (Law Div. 1998).

Moreover, again assuming for argument's sake only that the fact that the Planning Board accepted jurisdiction of the two prior gas station applications evidences how the Planning Board has treated this issue, the Board determines that the Planning Board's jurisdictional ruling would be erroneous. Significantly, our Supreme Court held in Citizens v. NJDEP, 126 N.J. 391, 396 (1991) that government has a duty to correct itself. [9] The Board of Adjustment, as a governmental agency, concludes that it has a duty to correct erroneous interpretations and/or jurisdictional determinations of the Planning Board. As such, the Board determines that, assuming for argument's sake only that the fact that the Planning Board accepted jurisdiction of the two prior gas station applications evidences how the Planning Board has treated this issue, the Planning Board's jurisdictional ruling is erroneous.

Second, as to the applicant's contention that the proposed Wawa convenience store and gas station is a principally permitted "retail use" in the B-2 zone in accordance with ordinance section 16.26B.020.A as a "gasoline station and convenience center" which is defined in Moskowitz, et al., The Complete Illustrated Book of Development Definitions (4th Ed. 2015), as "a retail facility combining a gasoline station and a convenience store," the Board disagrees and determines that such a retail facility is not expressly and/or implicitly permitted by the Township ordinances for the following reasons.

To begin with, gasoline stations are expressly allowed as conditionally permitted uses pursuant to ordinance section 16.26B.030 and convenience stores are implicitly permitted as a principally permitted retail use pursuant to ordinance section 16.26B.020. By reason of the express allowance as a conditionally permitted use in the B-2 zone under ordinance 16.26B.030, gasoline stations cannot be treated as a permitted retail or part of a permitted retail use under ordinance section 16.26B.020.

Moreover, while the Moskowitz book provides a definition of a "gasoline station and convenience center" as a "retail facility combining a gasoline station and a convenience store," the book then explains that only where "the size of the parcel of land can accommodate both [gas station and convenience store] and land use regulations permit them" are they "now almost always provided together" (emphasis added). Significantly, the Township land use regulations here do not mention or reference a combined "gasoline station and convenience center" as a permitted retail use so the Township land use regulations do not permit the combined use. Further, ordinance section 16.020.30 defines principal use as the main purpose – in the singular and not in the plural – not multiple purposes or uses, and the proposed Wawa gasoline station and the proposed Wawa convenience store are both primary uses – neither is accessory to the other.

In fact, the Township zoning ordinance expressly excludes "gasoline service stations" from the list of permitted "retail and service uses" in the B-2 zone. Specifically, ordinance section 16.26B.020 lists under "Principal Permitted Uses" in subsection A: "Retail and services uses, excluding those uses listed under section 16.26B.040" (emphasis added). And, ordinance 16.26B.040 contains the list of conditionally permitted uses, with subsection E of that this ordinance section listing "Gasoline filling stations and public and repair garages" as one of

[9] The applicant, through its planning expert, agreed with this proposition. See, 5/16/2019T56-4 to 7.

the permitted conditional uses. Aa such, a gasoline station is not a permitted retail use under the Township zoning ordinance and, further, cannot be deemed to be a part of a permitted retail use in the Township, whether considered as a second principal use or an accessory use. In fact, the applicant conceded that the gasoline station is not an accessory use.

Finally, the Moskowitz book's explanation of when a gasoline station and a convenience store are "almost always provided together" is not only where the "land use regulations permit them" but where "the size of the parcel of land can accommodate both" (emphasis added). The Board finds that, in this case, the size of the property will not accommodate both uses as too much development is being proposed on the property, as is evidenced by the large number of "c" variances and site plan exceptions that are required.

For all of the foregoing reasons, the Board rejects the new reasons urged by the applicant and re-affirms its previously issued interpretation and ruling that a "d(1)" variance is required to allow two principal or primary uses on the property, one being the proposed Wawa gasoline station and one being the proposed Wawa convenience store.

5. **Consideration of the "D(1)" Variance.** The standards that the Board must consider in deciding whether or not to grant the "d(1)" variance consist of the following "positive" and the "negative" criteria [10]:

a. **Positive Criteria Standard for the "D(1)" Variance.** The Board has the power to grant "d(1)" variances to permit non-permitted uses and/or non-permitted principal structures pursuant to N.J.S.A. 40:55D-70(1) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(1)" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons." [11] Medici v. BPR Co., 107 N.J. 1 (1987). 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 typical non-inherently beneficial uses – such as are at issue here – however, derive not from the uses themselves but from the development of a site in the community that is particularly suited for the very uses proposed. Id. Thus, in this non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed uses will promote the purposes of the MLUL and, as to the general welfare purpose, whether the development of the property is particularly suited for the very uses proposed.

[10] While the applicant reserved its rights to challenge the Board's determination that a "d(1)" variance is required, the applicant agreed that the standards that the Board attorney set forth in the "jury charge" he prepared were correct. The standards set forth above in the text are substantially similar to those set forth in the jury charge. See, email from applicant's attorney dated August 27, 2019 agreeing to the jury charge that the Board attorney had prepared and reserving the applicant's rights to contest only one issue, namely, that a "d(1)" variance was required.

[11] While the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons," the Medici court held that "economic inutility" can also constitute a special reason under the statute. The applicant has not argued economic inutility in this application.

In this particular application it is imperative to understand what is and what is not at issue. The proposed convenience store is not a prohibited use in the B-2 zone, it is an implicitly principally permitted "retail" use. And, the proposed gas station is not per se a prohibited use in the B-2 zone. It is a conditionally permitted use. [12] Thus, whether or not there is a need in the community for another gas station or another convenience store is not at issue and the Board considers it irrelevant to its determination of whether to grant or deny the "d(1)" variance. What is at issue is whether granting the "d(1)" variance will promote purposes of the MLUL and, as to the general welfare purpose of the MLUL, whether the property is particularly suited for the two uses proposed – the proposed Wawa gasoline station and the proposed Wawa convenience store.

Our Supreme Court has 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 proposed use in the community. Price v. Himeji, 214 N.J. 263, 292-293 (2013). As such, the applicant here does not have to prove that the property is uniquely suited for the proposed Wawa two principal use facility or that the property is the only site which is particularly suited for the proposed Wawa two principal use facility. What the applicant has to prove is that the property is particularly suited for the proposed Wawa two principal use facility. The inquiry that the Board must make and answer is whether the property is particularly well-suited for the two uses proposed, in spite of the fact that the two uses are not permitted in the zone. Id. In the context of a specific property, the Court in Price explained that particular suitability "means that strict adherence to the established zoning requirements would be less beneficial to the general welfare." Id. at 287 (citing Kramer v. Sea Girt Board of Adj., 45 N.J. 268, 290-291 (1965)).

Finally, the "burden of proving the right to relief sought in an application rests at all times upon the applicant." Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), section 18-4.1, page 371 (citing Ten Stary Dom v. Mauro, 216 N.J. 16, 30 (2013). See also, Toll Bros., Inc. v. Burlington County Freeholders, 194 N.J. 223, 255 (2008) (quoting Cox and Koenig). If the applicant does not meet its burden of proof, "the board has no alternative but to deny the application." Cox and Koenig, section 18-4.1, page 371 (citing Toll Bros., Inc. v. Burlington County Freeholders, 194 N.J. at 255. Significantly, an applicant is required to prove entitlement to an approval at the time of the hearing on the application.

[12] However, as a conditionally permitted use, the proposed gas station is not per se permitted in the B-2 zone either. As defined in the MLUL in N.J.S.A. 40:55D-3, a conditional use is "a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards of the location and operation of such as contained in the zoning ordinance . . . ." As held by our Supreme Court in Coventry Square, Inc. v. Westwood Zoning Board of Adj., 138 N.J. 285,287 (1994), "a conditional use is neither prohibited throughout the zone nor permitted at every location in the zone; rather, it is permitted at those locations in the zone where the use meets the conditions set forth in the zoning ordinance." As the Coventry Square Court explained, in the case of conditional uses, the "municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied." Id. at 297. Where a site plan for a conditionally permitted use complies with all of the conditional use conditions and standards that apply to the conditionally permitted use, the application is within the exclusive subject matter jurisdiction of the Planning Board pursuant to N.J.S.A. 40:55D-67a. Where the site plan for a conditionally permitted use deviates from one or more of the conditional use conditions and/or standards, the application is within the exclusive subject matter jurisdiction of the Board of Adjustment which may grant or deny a variance or variances to allow or prohibit a deviation of deviations pursuant to N.J.S.A. 40:55D-70d(3). If the Board denies the requested "d(3)" variances here, the conditionally permitted gas station use will be prohibited on the property.

Promises from an applicant about future potential compliance is not permitted under the Municipal Land Use Law (the "MLUL"). See, CBS Outdoor, Inc. v. Lebanon Planning Board, 414 N.J. Super. 563, 582 (App. Div. 2010). With the exception of the negative criteria of a "d(1)" variance which the applicant must prove and the Board must find satisfied by an "enhanced quality of proof" (this will be explained below in the discussion of the negative criteria of the "d(1)" variance), the level of proof that the applicant must meet and Board must find on all issues is the so-called preponderance of the evidence standard, which means that the applicant must prove and Board must find that it is more likely than not that each element of the required relief has been proven. In this application, the applicant is required to meet its burden of proving that granting the "d(1)" variance will promote purposes of the MLUL and, as to the general welfare purpose, the applicant is required to prove that the property is particularly suited for the two uses proposed, the proposed Wawa gasoline station and the proposed Wawa convenience store. [13]

b. **Negative Criteria Standard for the "D(1)" Variance.** The Board may not exercise its power to grant a "d(1)" variance otherwise warranted unless the so-called "negative criteria" has been satisfied. Specifically, the last unlettered paragraph of N.J.S.A. 40:55D-70 provides: "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 [the first prong of the negative criteria] and will not substantially impair the intent and purpose of the zone plan and zoning ordinance [the second prong of the negative criteria]." 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 to the burden of proof relating to the negative criteria, the applicant must prove and the Board must find that it is more likely than not that the "d(1)" variance can be granted without substantial detriment to the public good [the first prong] but, as to the second prong of the negative criteria, the Medici Court held that the applicant must prove and the Board must find by an "enhanced quality or proof" that the "d(1)" variance can be granted without substantial impairment of the intent and purpose of the master plan and zoning ordinance. Id. As part of meeting this enhanced burden, the applicant must "reconcile" the proposal to place two uses on the property with the ordinance's prohibition of having more than one use on property in the B-2 zone. Id.

6. **Findings and Conclusions as to the Requested "D(1)" Variance.** The Board's findings and conclusions as to the positive and negative criteria of the requested "d(1)" variance is as follows:

[13] Under the preponderance of the evidence standard, "if the evidence presented is in equipoise [equally split in favor and against proving a particular fact or issue], the burden of proof has not been met." Weissbard and Zegas, New Jersey Rules of Evidence (Gann 2019), comment 5.a to N.J.R.E. 101(b)(1), page 39. While N.J.S.A. 40:55D-10e provides that the strict rules of evidence do not apply in a board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009). See e.g., Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 607 (1980) where our Supreme Court observed in a "c" variance application that the applicant must prove its case "by a fair preponderance of the evidence."

a. **Positive Criteria of the "D(1)" Variance.** As to the positive criteria of the "d(1)" variance, the applicant's planning expert opined that granting the variance would promote various purposes of the MLUL and that the property was particularly suited for the proposed two uses. The applicant's proofs and the Board's findings and conclusions as to those proofs are as follows:

(1) The applicant's planning expert opined that the following purposes of the MLUL would be promoted by granting the "d(1)" use variance: (a) N.J.S.A. 40:55D-2a by guiding development "in a manner that promotes the public welfare" by eliminating the nonconforming residential use on Lot 20.01 and bringing the property "more in line with the intent of the [B-2 zone]", 5/16/2019T31-24 to 32-7; (b) N.J.S.A. 40:55D-2g by providing "sufficient space in appropriate locations" for the proposed uses for the same reasons urged in support of the preceding purpose of the MLUL, 5/16/2019T32-8 to 12; and (c) N.J.S.A. 40:55D-2i by promoting "a desirable visual environment" by not only eliminating the nonconforming residential use but also the "dilapidated residential buildings which presently occupy a portion of the site." 5/16/2019T32-13 to 18. [14]

(2) The Board finds that the applicant has failed to meet its burden of proving of proving by a preponderance of the evidence that any of the above stated purposes of the MLUL would be promoted by granting the "d(1)" use variance for the following reasons:

First, the Board rejects applicant's planning expert's opinion that the "public welfare" purposes of the MLUL as set forth in N.J.S.A. 40:55D-2a will be promoted by granting the "d(1)" variance to allow the two proposed uses on the property. The Board finds and notes that, other than the fact that there is a nonconforming residential dwelling on Lot 20.01, no evidence whatsoever was presented to show that there was any problem arising out of this fact. And, it is undisputed that there is a conforming commercial building on Lot 20. The Board is not persuaded that demolishing the nonconforming residential dwelling on Lot 20.01 and the conforming commercial building on Lot 20 to make way for the proposed two Wawa uses will bring the property "more in line" with the intent of the B-2 zone. Ordinance section 16.26B.010 states that the purpose of the B-2 zone is to "define and provide controls for the major shopping and business areas of the Township, serving the needs of both Township residents and the regional population, and transient highway users." The Board finds that the existing commercial building on Lot 20, which fronts on the highway, serves this purpose. The Board finds that the nonconforming residential dwelling on Lot 20.01 does not front on the highway. Further, the Board finds that part of the defining and providing controls for the B-2 zone is that gasoline stations are not principally permitted but are conditionally permitted and that the proposed Wawa gas station does not comply with all of the conditional use standards. Further, the Board finds that part of the controls for the B-2 zone is that only one principal or conditional use is allowed on a lot. For all of these reasons, the Board thus rejects the applicant's

[14] The applicant's planning expert also testified that the fact that the site was not adjacent to a residential zone is "especially important because a convenience store with fuel sales is [] a 24-hour operation." 5/16/2019T31-9 to 12. The Board considers this to go to the negative criteria of the "d(1)" variance, not the positive criteria of the "d(1)" variance. In any event, while the property is not adjacent to a residential zone, it is adjacent to Lot 22 in Block 15 on which is situated a residential dwelling.

planning expert's opinion that the "public welfare" purposes of zoning set forth in N.J.S.A. 40:55D-2a would be promoted by granting the "d(1)" variance.

Second, the Board cannot find based on the evidence submitted that granting the "d(1)" variance will promote the purposes of zoning set forth in N.J.S.A. 40:55D-2g. To begin with, the applicant's planning expert testified that the purpose of the MLUL set forth in N.J.S.A. 40:55D-2g is providing "sufficient space in appropriate locations" for the proposed two Wawa uses. The planning expert failed to reference the full purpose established in N.J.S.A. 40:55D-2g. The full purpose of the MLUL set forth in N.J.S.A. 40:55D-2g is to "provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space . . . according to their respective environmental requirements in order to meet the needs of all New Jersey citizens." (emphasis added) The Board finds that the applicant did not prove that the "respective environmental requirements" would be advanced by granting the "d(1)" variance to allow the two proposed uses. The Board finds based on the evidence presented that the property does not provide sufficient space in an appropriate location for the proposed development due to the sheer number of "c" variances required. Further, the Board finds based on the evidence presented that the property does not provide sufficient space an appropriate location for the proposed development according to the applicable environmental requirements because of the "c" variances required from the hard surface coverage requirement, the 75-foot non-disturbance area deviation, and the 100-foot building setback from the stream requirement. [15] As the planning expert conceded under cross examination, the entirety of the 75-foot non-disturbance area will be disturbed as part of the application. 5/16/2019T76-72-3 to 73-13. As the planning expert further conceded, the property currently has approximately 21,000 square feet of structures in the 75-foot non-disturbance area which will increase by approximately 6,000 square feet to approximately 27,000 square feet of structures in the non-disturbance area as part of the application. 5/16/2019T74-16 to 75-7. For all of these reasons, the Board thus rejects the applicant's planning expert's opinion that the "sufficient space in appropriate locations" purpose of zoning set forth in N.J.S.A. 40:55D-2g would be promoted by granting the "d(1)" variance. [16]

[15] The Board recognizes that the planning expert testified that he thought that "the proposed development can achieve the purposes of protecting the stream and the associated natural resources despite the deviations" from the 75-foot non-disturbance requirement and the 100-foot setback from stream requirement. 5/16/2019T18-3 to 7. The Board, however, rejects his reasoning which was: (1) there will be no disturbance of the physical bank of the stream; (2) the existing wood line along the stream bank would be preserved; and (3) additional landscaping would be provided within the buffer area. 5/16/2019T18-8 to 14. The Board notes and finds that the ordinance requirements at issue are not simply intended to protect the stream bank. Ordinance section 16.64.110.A.1 is intended to "preserve the existing environmental and natural features of the Township." The ordinance by its terms defines these features as including all features within 75-feet of a stream bank, not just the stream bank and/or the stream. The Board further notes and finds that the ordinance requirement used to be a 50-foot non-disturbance area but this was increased to 75-feet to provide additional protection of the existing environmental and natural features of the Township. Finally, landscaping is a separate requirement under ordinance section 16.20.040.D and the provision of landscaping and buffers is no substitute for preserving the existing environmental and natural features which are proposed to be entirely disturbed as part of the proposed development.

[16] The Board notes that it is possible that it would have found differently if a smaller development had been proposed, perhaps one with the convenience store being reduced in size, the number of gasoline pumps being reduced in number, and the weather protection canopy being reduced in size. In this regard, the applicant's planning expert conceded on cross examination that "the Wawa store itself, in terms of size, is larger than many if not most of the existing convenience stores that are part of a combined use that I have seen out on Route 31." 5/21/2019T36-17

Third, the Board rejects the applicant's planning expert's opinion that granting the "d(1)" variance would promote the purpose of the MLUL as set forth in N.J.S.A. 40:55D-2i by promoting "a desirable visual environment." The Board rejects this opinion for three reasons. First, the Board notes and finds that any redevelopment of the property would eliminate the "dilapidated residential buildings which presently occupy a portion of the site" if the development included Lot 20.01, not just Lot 20. Thus, any redevelopment of the property, according to the planner's opinion, would promote a desirable visual environment. The Board does not believe that encouraging redevelopment is the intended purpose of N.J.S.A. 40:55D-2i. Second, there is no evidence in the record that the existing permitted commercial building on Lot 20, which is the only building visible from the highway, is an eyesore or somehow aesthetically displeasing. No evidence was presented to how that the proposed Wawa gas station and the proposed Wawa convenience store would be aesthetically more pleasing than the existing commercial building. Third, the purpose of the MLUL as set forth in N.J.S.A. 40:55D-2i is not simply to promote a "desirable visual environment"; it is "to promote a desirable visual environment through creative development techniques and good civic design and arrangement." (emphasis added) The Board notes and finds that the applicant's planning expert did not mention what "creative development techniques" and/or "good civic design and arrangement" were proposed to provide the alleged "desirable visual environment" and why granting variances were necessary to accomplish this. For all of these reasons, the Board thus rejects the applicant's planning expert's opinion that the "desirable visual environment" purpose of zoning set forth in N.J.S.A. 40:55D-2i would be promoted by granting the "d(1)" variance.

(3) As set forth above, the Medici Court held that the promotion of the general welfare (which is one of the purposes of the MLUL as enunciated in N.J.S.A. 40:55D-2a) is the zoning purpose that most clearly amplifies the meaning of "special reasons" in terms of the positive criteria of a "d(1)" variance. As to particular suitability, the applicant's planning expert testified that the property's location on a State highway and at a signalized intersection was key. 5/16/2019T29-11 to 17. He explained that most of the customers of the facility would be "pass-by" traffic, people in vehicles already on the highway who would be passing by the facility during the morning and evening rush hour commutes. 5/16/2019T29-20 to 24. As the applicant's representative explained in his testimony, the Wawa business model is to choose a location on a major traffic corridor to primarily capture pass-by traffic from the "two rushes, morning and evening." 11/1/2018T70-12 to 22. As he explained: "That is really the driving factor in our decision on where to locate our stores." 11/1/2018T70-22 to 24. [17] While these

to22. Further, the Board notes that one of the Planning Board applications noted by the applicant's planning expert, the Citgo application, involved an initial proposal for 12 gasoline filling dispensers (from 6 pumps) which was reduced to 8 filling dispensers (from 4 pumps) in order to eliminate an environmental protection setback variance. See, Raritan Township Planning Board Resolution No. 22-2001 adopted on April 10, 2001, which memorializes the approval on Lot 4 in Block 32 situated in the B-2 zone of the Citgo gasoline filling station and convenience store (the predecessor to the US Fuel facility on that lot) as a conditionally permitted use where all of the conditional use standards had been met and a convenience store which, while not specified, could have been treated by the Planning Board as an accessory use to the gasoline filling station, states that the applicant agreed to cut down the number of gasoline dispensers from 12 to 8 to eliminate a variance that would otherwise have been necessary for the gasoline fueling islands and canopy encroaching into the area within 75-feet of a stream.

[17] It should be noted that the applicant's representative testified that lunchtime traffic to the convenience store would not be limited to pass-by traffic and, to the contrary, "is more of a destination than the rest of the day." 11/1/2018T

reasons explain why the applicant's business and financial interests would be promoted by allowing the Wawa gas station and a Wawa convenience store to operate on the property, the Board does not accept these reasons as proving that the property is particularly suited for the two uses proposed for the following reasons.

First, the Board finds and concludes that such personal and financial interests do not rise to the level of promoting the general welfare. See, e.g., Beirn v. Morris, 14 N.J. 529, 535 (1954) ("The zoning power may not be exerted in the service of private interests under the cloak of the public good"); Bow & Arrow Manor v. Town of West Orange, 63 N.J. 355, 346 (1973) (the purpose of zoning is "not to encourage the most appropriate use of [a particular owner's] property but rather to consider, among other things, . . . encouraging the most appropriate use of land throughout the municipality." See also, Degnan v. Monetti, 210 N.J. Super. 174, 184 (App. Div. 1986) (noting the "general reluctance of the courts to consider economics in reviewing applications for special reasons use variances"); and Jock v. Wall Township Zoning Board of Adj., 184 N.J. 562, 590 (2005) (while addressing a "c" variance, and not a "d" variance, and with the sole exception being for economic inutility, holding that personal hardship to the owner – financial or otherwise – cannot be the basis to grant a variance).

Second, the Board does not accept as a reason proving particular suitability in this case the fact that the property is located on a highway. See, e.g., Medici v. BPR Co., 107 N.J. 1, 24 (1987), where the Supreme Court reversed the finding of a board of adjustment that a site was particularly suited for a hotel use because it was near an interstate highway. The Medici Court held that "the fact that the site is near an interstate highway does not distinguish it from any other property in the vicinity of the highway." Id.

Third, while the Board recognizes that proof that a site is particularly suited for a proposed use does not require proof that the property is the only possible location for the proposed project, Price v. Himeji, 214 N.J. 263, 290-293 (2013), the Price Court recognized that, in the context of a specific property, particular suitability "means that strict adherence to the established zoning requirements would be less beneficial to the general welfare." Id. at 287 (citing Kramer v. Sea Girt Board of Adj., 45 N.J. 268, 290-291 (1965)). The applicant's planning expert did not explain why strict adherence to the zoning requirements (proposing one use for the property or on Lot 20 alone – a Wawa convenience store or a Wawa gas station) would be less beneficial to the general welfare than allowing by the grant of a "d(1)" variance two uses on the property. As the Price Court also explained, "we have recognized that almost all lawful uses of property can be said to promote the general welfare to some degree, with the result that if general societal benefits alone constituted an adequate special reason, a special reason almost always would exist for a use variance." 214 N.J. at 288 (citing Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 280 (1967). The Board finds that the applicant has introduced no evidence showing, let alone proving, that granting the "d(1)" use variance to allow the two uses proposed would be more beneficial to the general welfare than by allowing just one use.

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70-9 to 12. This testimony further supports the Board's determination set forth above that the Wawa gas station and the Wawa convenience store are two separate principal uses proposed on the property; neither use is accessory to the other.

Fourth, the Board finds that rather than being particularly suited, the property is particularly unsuited for the proposed development due to the over-size nature of the proposed development and the sheer number of "c" variances required to allow the proposed development on the property. See, Cellular Telephone Company v. Ho-Ho-Kus Board of Adj., 24 F. Supp. 2d 359, 368 (D.N.J. 1998), aff'd in part, rev'd in part, and remanded, 197 F.3d 64 (3d Cir. 1999) (upholding a board of adjustment's denial of a cell tower application where the board found that the "site is simply too small, and not appropriate, a finding supported by the "sheer number" of variances required). [18]

Focusing on the zoning ordinance deviations at issue, the applicant has requested nine (9) "c" variances to allow the following categories of deviations from the following zoning ordinance regulations which are specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution:

(a) Encroachment of buildings / structures into the minimum 75-feet front yard setback required by the Schedule of Area, Yard and Building Requirements which is incorporated by reference into and by ordinance section 16.64.010 (canopy over gas station located 40.5-feet from the front property line along Route 31, canopy over gas station located 62.8-feet from the front property line along New Castle Way, convenience store located 73.8-feet from the front yard along New Castle Way, and trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way);

(b) Deviation from the maximum hard surface coverage allowed on the property where the Schedule of Area, Yard and Building Requirements prohibits more than 55% hard surface coverage on lots in the B-2 zone and ordinance section 16.64.130.B prohibits more than 50% of the hard coverage otherwise permitted in a zone in steep slope areas containing slopes from 13% to 19% (51.3% hard surface coverage is proposed on the property where 49.6% hard surface coverage is the maximum permitted when the reducing the total hard surface coverage otherwise permitted due to the presence of hard surface coverage in steep slope areas on the property which contain slopes from 13% to 19%);

(c) Encroachment of petroleum tanks into the front yard setback required by the Schedule of Area, Yard and Building Requirements (tanks as close as 41.0-feet to the front yard along Route 31, and tanks as close as 14.4-feet to the front yard along New Castle Way);

(d) Disturbance of land within the 75-foot from a stream non-disturbance area established by ordinance section 16.64.110.A.1; and

(e) Buildings / structurers within 100-feet of a stream established in ordinance section 16.64.110.A.1.

[18] The applicant's planning expert acknowledged that the sheer number of "c" variances required to allow the proposed development is a factor that the Board should consider, although he stated that it is not the only consideration. 05/16/2019T76-12 to 18.

As to the last two variances identified above, the applicant's planning expert conceded under cross examination that the entirety of the 75-foot non-disturbance area will be disturbed as part of the application. 5/16/2019T76-72-3 to 73-13. As the planning expert further conceded, the property currently has approximately 21,000 square feet of structures in the 75-foot non-disturbance area which will increase by approximately 6,000 square feet to approximately 27,000 square feet of structures in the non-disturbance area as part of the application. 5/16/2019T74-16 to 75-7. The Board finds that not only do the sheer number of "c" variances requested evidence the fact that the proposed development is simply too large for the property but the two variances to permit the proposed development to significantly encroach into the 75-foot non-disturbance area and the 100-foot of a stream setback area evidence that the applicant is attempting to force a square peg (the proposed development) into a round hole (the property with its environmental constraints).

Further, the Board notes and finds that the applicant could have proposed either a convenience store or a gasoline station on the property or just on Lot 20 and did not have to propose both a convenience store and a gasoline station on the property. Had one or the other (but not both) been proposed, the "d(1)" variance would have been eliminated and the number of "c" variances would have been reduced as well as the extent of the "c" variance relief that would be required to approve such a development. The Board bases these findings on two exhibits prepared by objector US Fuel's engineering and planning expert – exhibit OG-5 (a schematic of a proposed convenience store without a fueling operation on the property) and exhibit OG-6 (a schematic of a fueling facility without a convenience store on the property).

Finally, as noted above in a footnote, it is possible that the Board would have found differently if a smaller development had been proposed, perhaps one with the convenience store being reduced in size, the number of gasoline pumps being reduced in number, and the weather protection canopy being reduced in size. In this regard, the applicant's planning expert conceded on cross examination that "the Wawa store itself, in terms of size, is larger than many if not most of the existing convenience stores that are part of a combined use that I have seen out on Route 31." 5/21/2019T36-17 to22. Further, the Board notes that one of the Planning Board applications noted by the applicant's planning expert, the Citgo application, involved an initial proposal for 12 gasoline filling dispensers (from 6 pumps) which was reduced to 8 filling dispensers (from 4 pumps) in order to eliminate an environmental protection setback variance. See, Raritan Township Planning Board Resolution No. 22-2001 adopted on April 10, 2001, which memorializes the approval on Lot 4 in Block 32 situated in the B-2 zone of the Citgo gasoline filling station and convenience store (the predecessor to the US Fuel facility on that lot) as a conditionally permitted use where all of the conditional use standards had been met and a convenience store which, while not specified, could have been treated by the Planning Board as an accessory use to the gasoline filling station, states that the applicant agreed to cut down the number of gasoline dispensers from 12 to 8 to eliminate a variance that would otherwise have been necessary for the gasoline fueling islands and canopy encroaching into the area within 75-feet of a stream.

(4) For all of the foregoing reasons, the Board finds that the applicant failed to prove: (a) that any purposes of the MLUL would be promoted by granting the "d(1)" variance; and (b) that the property is particularly suited for the two uses proposed. As such, the

Board concludes that the applicant failed to prove: (c) the positive criteria of the "d(1)" variance; and (d) that special reasons exist to warrant the grant of the "d(1) variance.

b. **Negative Criteria of the "D(1)" Variance.** As to the negative criteria of the "d(1)" variance, the applicant's planning expert opined that the "d(1)" use variance could 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 applicant's proofs and the Board's findings and conclusions as to those proofs are as follows:

(1) As to the first prong of the negative criteria, the applicant's planning expert identified traffic impacts as the focus of his opinion. The planning expert opined that the "d(1)" use variance could be granted without substantial detriment to the public good in terms of not resulting in "substantially impairing traffic conditions in the area." 5/16/2019T26-16 to 18. That said, the planning expert stated that his opinion on this issue relied on the traffic engineering expert's testimony. 5/16/2019T38-19 to 39-3. For the reasons that follow, the Board did not believe the testimony of the applicant's traffic engineering expert so finds that the applicant did not prove that the "d(1)" variance can be granted without substantial detriment to the public good in terms of impaired traffic conditions in the area.

First, the Board finds that the applicant's traffic engineering expert testified untruthfully on an issue of critical importance to the Board's consideration of the first prong of the negative criteria of the "d(1)" variance. Specifically, the traffic engineering expert refused to acknowledge that the amount of traffic on Route 31 in the Township increased from 2008 to 2018. Even after the applicant's attorney agreed to stipulate that the amount of traffic on Route 31 had increased over this 10-year period, the traffic expert obstinately stated: "That is not what my testimony was." 10/4/2018T114-15 to 115-4. In fact, the traffic expert testified tried to dodge the question by testifying that "since 2008 traffic has stagnated in many portions of the State." 10/4/2018T115-4 to 6. Finally, in direct answer to whether he had "noticed an increase in traffic during peak hours in Raritan Township and Flemington Borough over the past ten years" the traffic expert stated: "No." 10/4/2018T115-9 to 12. Based on Board members' knowledge of the area, the Board finds and concludes that the applicant's traffic expert's answer was untruthful. The Board further finds and concludes based on the expert's testimony that he was intentionally untruthful as to this issue because he had earlier admitted that if the proposed development involved only a gas filling station, without a convenience store, or just a convenience store without a gas filling station, the amount of traffic coming onto and going off the property would be less. 10/4/2018T96-21 to 97-16. In other words, if the traffic volumes at the intersection where the property is located had increased over the years, the proposed two uses would be expected to negatively impair traffic conditions in the area more than if a single use was proposed on the property. [19] In fact, while the traffic expert had stated on page 7 of his

[19]This was subsequently confirmed by the applicant's traffic expert on November 21, 2018 on a chart comparing vehicle trip generation expected from a 5,585 square foot convenience market, a 12-dispenser gasoline station, and a "Super Convenience Market / Gas Station" consisting of a 5,585 square foot market and 12 dispensers. According to the chart, based on data published in the Institute of Transportation Engineers (ITE) Trip Generation Manual (10th Ed. September 2017), the applicant's traffic expert estimated that the total number of trips expected during the morning rush hour for the market alone would be 349, for the gas station alone would be 123, and for the combined market and gas station would be 502. According to the chart, the total number of trips expected during the evening

initial traffic impact analysis dated February 27, 2018 that the addition of traffic from the development of the property "will have minimal effect on the levels of service at the signalized intersection," that sentence was removed from the traffic expert's revised September 13, 2018 traffic impact analysis. 1/17/2019T37-23 to 39-4. The Board did not believe that the applicant's traffic engineering expert's testimony based on his untruthful testimony on an issue of critical importance to the Board's consideration of the "d(1)" variance, namely, traffic volumes in the area of the property. [20]

Second, of great concern to the Board was the applicant's traffic engineering expert's testimony about how the underlying traffic counts were taken. To begin with, one of the objectors was trying to question the expert on whether the expert's employee who actually performed all of the underlying traffic counts was paid by the job or by the hour to determine whether there was any incentive to rush while taking the counts. The expert was obstinate and tried to dodge answering the question. The following transpired (1/17/2019T-13-5 to 9):

Mr. Groh: He wasn't paid hourly"
Witness: No.
Mr. Drill: He was paid for his time but not paid hourly?
Witness: Quarter hourly.

Later, the objector was trying to question the expert on what standards of practice were utilized in taking and recording the counts and the following transpired (1/17/2019T14-21 to 15-14):

Mr. Groh: Do you know how those standards were communicated to him . . . .?
Witness: Yes, verbally.
Mr. Groh: So you communicated to Mr. Seibel about the standards of practice in conducting this study?
Witness: Not this study, all of our studies.
Mr. Groh: And when did you do that?
Witness: During his employment.
Mr. Groh: Can you tell me when that happened?
Witness: No I can't.

Still later the following transpired (1/17/2019T16-16 to 18-11):

Mr. Groh: What tools was Mr. Siebel given to gather the data that is in his report?
Witness: You mean like a hammer?
Mr. Groh: What kind of devise did you give him to help him in conducting his study . . . .?
Witness: Oh, he used an electronic count board for the data . . . .

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rush hour for the market alone would be 274, for the gas station alone would be 168, and for the combined market and gas station would be 387.

[20] See, State v. Fleckstein, 60 N.J. Super. 399, 408 (App. Div. 1960), certif. denied, 33 N.J. 109 (1960) (holding that a fact finder may draw an inference that a witness is testifying untruthfully under the "false in one, false in all" rule when the fact finder is convinced that an attempt has been made by a witness to intentionally mislead them in some material respect.

* * *

Mr. Groh: It requires some human input, however?
Witness: Yes.

* * *

Mr. Groh: How do you know the information he gathered was accurate?
Witness: Because we have been collecting data at this intersection for 15 if not 20 years, and it is consistent with other traffic counts that we have done for a variety of other projects at that location.
Mr. Groh: Is that fact outlined in your December 2, 2017 study?
Witness: No.

Finally, the objector questioned the traffic engineering expert on how, physically, Mr. Seibel collected the traffic count data, and the following transpired (1/17/2019T19-10 to 21-2):

Mr. Groh: Where was Mr. Seibel expected to be, physically, as he was collecting data?
Witness: At a location at the intersection where he would be able to observe all of the traffic movements.

* * *

Mr. Groh: Did you expect Mr. Seibel to be standing outside or was he inside of a vehicle collecting data?
Witness: That is left to his discretion.
Mr. Groh: You don't know?
Witness: In that it was November 28th, I would assume he was in his vehicle.
Mr. Groh: And one of he . . . times that Mr. Seibel collected data was November 28, 2017 from 4:00 pm to 6:00 pm, correct?
Witness: Yes.

* * *

Mr. Groh: Were you concerned that the sunset was at 4:17 pm and twilight at 5:15 pm?
Witness: I am not aware of that specifically, no.
Mr. Groh: Did you factor in any human error in the data that Mr. Seibel collected?
Witness: No.
Mr. Groh: You just assumed that everything he did was a hundred percent perfect, correct?
Witness: Correct.

Based on the applicant's traffic engineering expert's testimony outlined above, the Board lost whatever confidence it had left that the applicant's traffic engineering expert's report was reliable and truthful.

While the applicant's attorney after the close of the hearing but before the Board's deliberations advised the Board in a September 3, 2019 letter that the applicant would accept a condition of an approval of the proposed development that no construction would take place on the property until the pending NJDOT improvements to Route 31 were made, the Board finds that the traffic engineer's testimony and traffic study are not credible so the applicant's acceptance of such a condition does not resolve to the satisfaction of the Board the negative impairment on traffic conditions in the area that the Board believes will result from granting a "d(1)" variance to allow the two uses proposed at the size and scale proposed.

(2) As to the second prong of the negative criteria, the essence of the applicant's planning expert testimony that the "d(1)" variance could be granted without substantially impairing the intent and purpose of the master plan and zoning ordinance was his opinions that: (a) the proposed uses were "consistent with at least two of the goals of the updated land use goals of the 2019 Reexamination Report, which basically targets growth to existing roadway corridors," 5/16/2019T33-8 to 11; and (b) "the B-2 zone already allows the uses at the very least separately." 5/16/2019T33-15 to 19. For the reasons that follow, the Board finds that the applicant did not prove that "d(1)" variance can be granted without substantial impairment of the intent and purpose of the master plan and zoning ordinance.

First, the Board finds that the planning expert's opinion that granting the "d(1)" variance will not substantially impair the intent and purpose of the zoning ordinance because "the B-2 zone already allows the uses at the very least separately" entirely missed the point. It is undisputed that the proposed convenience store is an implicitly principally permitted use as a principally permitted "retail" use and that the gas station is a conditionally permitted use. The ordinance prohibition at issue here is not on either of those uses. The ordinance prohibition here is on having two principal uses on one lot. The Board finds and stresses that the applicant failed to reconcile the grant of "d(1)" variance to establish the proposed two uses with the prohibition on more than one use per lot in the B-2 zone.

Second, as to the planning expert's opinion that the proposed uses are "consistent with at least two of the goals of the updated land use goals of the 2019 Reexamination Report, which basically targets growth to existing roadway corridors," the Board assumes that the two "updated" goals and objectives of the Master Plan that the planning expert references (as he never specifically referenced them in his testimony) are included in the "Land Use" goals and objectives on page 27 of the Reexamination Report and are: (a) "Limit growth to existing roadway capacities"; and (b) "Permit additional non-residential development."

As to the first goal and objective, the Board finds that the grant of a "d(1)" variance to allow the proposed two uses on the property is <u>not</u> consistent with it and, to the contrary, <u>is inconsistent</u> with the goal and objective of "limiting" growth to "existing roadway capacities." The goal and objective spelled out by the Planning Board in its Reexamination Report is not to promote growth, it is to "<u>limit</u>" growth. And, as significantly, any such growth is to be "limited" to "existing roadway capacities." As evidenced by exhibits OP-1 (the thumb drive containing the PowerPoint prepared by objector Pamela Parker) and OP-2 (the paper copy of the PowerPoint presentation prepared by objector Pamela Parker), the Board finds that Route 31 in the area of the property has reached its functional, if not its actual, capacity at this time. The Board believes that the existing traffic congestion of the Route 31 in the area of the property is the primary reason that the NJDOT has proposed the roadway improvement as is refenced in exhibit OD-1, the NJDOT "Statewide Transportation Improvement Program" for fiscal years 2008 to 2017, which the applicant's attorney agreed states that the improvements at Route 31 southbound at County Route 523 (the intersection where the property is located) were supposed to have the design started in 2018, with right-of-way acquisition occurring in 2019, and construction to begin in 2021.

As to the second goal and objective of permitting additional non-residential development, any application for non-residential development could be argued to be consistent with this goal. The Board doubts that is what the Planning Board had in mind when it included this goal and objective in the Reexamination Report. This is especially so in light of the prior goal and objective of "limiting" growth to existing roadway capacities.

Third, more significant than the above two goals and objectives cited by the applicant's planning expert are what the Reexamination Report does not say or recommend. Specifically, Reexamination Report lists eight (8) specific changes which it recommends to the Township's Land Use ordinances (lettered "a" to "h" on page 30 of the Reexamination Report). What is not on this list is a change to the definition of "principal use" set forth in ordinance section 16.02.30 from "the main purpose for which any lot and/or building is used" to defining principal use in terms of allowing multiple uses. What is not on the list is a change to the principally permitted use section of ordinance 16.26B.020 which governs the B-2 zone to specifically allow more than one principally permitted use on a lot. Thus, the Board finds that the intent and purpose of the master plan and zoning ordinance to prohibit two uses on one lot remains unchanged with the adoption of the 2019 Reexamination Report. While the applicant's planning expert testified that he had "no idea" and would "not speculate" as to whether the Planning Board knew about the Wawa application pending before the Board at the time it adopted the Reexamination Report, the facts reflect to the Board that the Planning Board did, in fact, know about it and apparently did not recommend any ordinance changes to reverse the way the Board was treating the issue. The facts are as follows.

The first hearing session on the application before the Board commenced on September 6, 2018 and, at that time, the Board's planning expert, Jessica C. Caldwell, PP, AICP, had not noted that a "d(1)" variance was required for two principal uses on the property. See, August 20, 2018 review memorandum prepared by Board planning expert Caldwell. After the issue was raised by an objector and briefed by the objector and the applicant, the Board determined by motion duly made and unanimously adopted during the second hearing session on October 4, 2018 that a "d(1)" variance was required. Thereafter, Board planning expert Caldwell submitted a second review memorandum dated October 11, 2018 which stated that "two principal uses and therefore two principal structures" are proposed which "is not specifically permitted in the B-2 zone," thereby requiring a "d(1)" variance. This is the same Jessica C. Caldwell who is the Planning Board's planning expert and who prepared and signed the Planning Board Reexamination Report dated and adopted on February 27, 2019. The Board also notes that its engineering expert Tony Hajjar, PE is also the Planning Board's engineering expert. The Board finds on these facts that it is more likely than not that the Planning Board was aware of the Wawa application pending before the Board as well as aware of the issue of the two principal uses requiring a "d(1)" variance. In any event, the burden is on the applicant to prove that the Reexamination Report somehow is not reflective of the intent and purpose of the master plan and zoning ordinance to prohibit two principal uses on one lot. And, the Board finds that by not including a recommendation in the Reexamination Report to make any ordinance changes to reverse the way the Board was treating the issue, the intent and purpose of the master plan and zoning ordinance remained to prohibit two principal uses on one lot. As such, the Board finds that the applicant failed to prove by a preponderance of the evidence, let alone by the required "enhanced quality of proof," that a "d(1)" variance to allow the two uses could be granted without substantially impairing the intent and purpose of the master plan and zoning ordinance.

Finally, the Board finds that the applicant failed under either burden of proof to reconcile the proposal to allow two uses on the property with the ordinance prohibition on two uses on one lot.

(3) For all of the foregoing reasons, the Board finds that the applicant did not satisfy its burden of proving the first prong of the negative criteria by a preponderance of the evidence and the second prong of the negative criteria by a preponderance of the evidence, let alone by an enhanced burden of proof.

c. **Ultimate Conclusion to Deny the "D(1)" Variance.** For all of the foregoing reasons, the Board finds that it must deny the requested "d(1)" variance.

7. **Consideration of the "D(3)" Variances.** Regardless of whether the "d(1)" variance is required or is granted or denied, the Board must determine whether to grant "d(3)" conditional use variances from ordinance sections 16.68.050.A, B, C, D and E as more specifically listed on the attached Zoning Relief Table (prepared by the applicant and attached to this resolution) to allow the conditionally permitted proposed gasoline station. Objector US Fuel argued that the applicant needed multiple "d(3)" variance, one (1) "d(3)" variance for each and every zoning ordinance bulk deviation at issue and each and every site plan ordinance deviation at issue. The applicant argued that it needed only one (1) "d(3)" variance from each category of deviation so that there was a total of no more than five (5) "d(3)" variances (one "d(3)" variance from the following each of the following five conditional use standards: ordinance sections 16.68.050.A, B, C, D and E). At the commencement of the December 6, 2018 hearing session the Board rejected objector US Fuel's argument and ruled in favor of the applicant, determining that the applicant did not require one (1) "d(3)" variance for each and every deviation from the zoning ordinance bulk regulations and site plan ordinance requirements but needed only one (1) "d(3)" variance from each category of deviation. See, 12/6/2018T5-1 to 18-14. [21] Before discussing the standards that the Board must consider in deciding whether or not to grant the "d(3)" variances, it is critical that the nature of a conditional use is discussed. As defined in the MLUL in N.J.S.A. 40:55D-3, a conditional use is "a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards of the location and operation of such as contained in the zoning ordinance . . . ." As held by our Supreme Court in Coventry Square, Inc. v. Westwood Zoning Board of Adj., 138 N.J. 285,287 (1994), "a conditional use is neither prohibited throughout the zone nor permitted at every location in the zone; rather, it is permitted at those locations in the zone where the use

[21] The applicant's planning expert subsequently took the position during the May 16, 2019 hearing session that the applicant did not need any "d(3)" variances for deviations from the zoning ordinance bulk regulations and for deviations from the site plan ordinance requirements and only required "c" variances and exceptions (which he referred to as design waivers). 5/16/2019T14-7 to 16. However, the applicant through its attorney agreed during the June 6, 2019 hearing session that the applicant needed a number of "d(3)" variances for deviations from the "general conditions" applicable to all conditional uses under the ordinance. 6/6/2019T80-10 to 15. The applicant further agreed through its attorney during his closing argument that "d(3)" variances from the ordinance regulations and requirements at issue were required. 7/18/2019T146-22 to 147-10. Additionally, the applicant's attorney agreed with the "jury charge" that the Board attorney had prepared, reserving the applicant's rights to contest only one issue, namely, that a "d(1)" variance was required. See, email from applicant's attorney dated August 27, 2019. The Board notes that if a "d(1)" variance was not required and, additionally, no "d(3)" variances were required, the Board would not have had subject matter jurisdiction over the application as, without a "d" variance, exclusive subject matter jurisdiction over the application would be with the Planning Board. See, N.J.S.A. 40:55D-60.

meets the conditions set forth in the zoning ordinance." As the Coventry Square Court explained, in the case of conditional uses, the "municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied." Id. at 297. Where a site plan for a conditionally permitted use complies with all of the conditional use conditions and standards that apply to the conditionally permitted use, the application is within the exclusive subject matter jurisdiction of the Planning Board pursuant to N.J.S.A. 40:55D-67a. Where the site plan for a conditionally permitted use deviates from one or more of the conditional use conditions and/or standards, the application is within the exclusive subject matter jurisdiction of the Board of Adjustment which may grant or deny a variance or variances to allow or prohibit a deviation of deviations pursuant to N.J.S.A. 40:55D-70d(3). If the Board denies a "d(3)" variance or "d(3)" variances, the conditionally permitted use is prohibited on the property. The standards that the Board must consider in deciding whether or not to grant "d(3)" variances consist of the following "positive" and the "negative" criteria [22]:

a. **Positive Criteria Standard for the "D(3)" Variances.** The Board has the power to grant "d(3)" conditional use variances pursuant to N.J.S.A. 40:55D-70d(3) "in particular cases and for special reasons." This is the so-called "positive criteria" of a "d(3)" variance. While the statutory language is identical regarding "d(3)" and "d(1)" variances, our courts have created different standards that apply to each. As pertains to the positive criteria of a "d(3)" variance, the applicant must prove and the Board must find "that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be appropriate for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance." Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285, 298 (1994). Under this standard, the "focus" of both the applicant and the Board must be on the "specific deviation from the conditions imposed by the ordinance." Id. As held by the Coventry Square Court, this standard "will focus both the applicant's and the board's attention on the specific deviation from conditions imposed by the ordinance, and will permit the board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does affect the suitability of the site for the conditional use." Id. at 298-299. This standard does not require a finding that the site is particularly suitable for the use, as is the case with a "d(1)" use variance. Id. at 297.

b. **Negative Criteria Standard for the "D(3)" Variances.** Similar to a "d(1)" variance, the Board may not exercise its power to grant a "d(3)" conditional use variance otherwise warranted 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 to the negative criteria of a "d(3)" conditional use variance, however, 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

[22] As set forth above, the applicant's attorney agreed with the "jury charge" that the Board attorney had prepared, reserving the applicant's rights to contest only one issue, namely, that a "d(1)" variance was required. See, email from applicant's attorney dated August 27, 2019.

to the negative criteria of a "d(3)" variance. The Coventry Square Court held that, "[i]n respect of the first prong of the negative criteria, that the variance can be granted without substantial detriment to the public good, (citation omitted), the focus is on the effect in surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance." 138 N.J. at 299. "In respect of the second prong, that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, (citation omitted), the board . . . must be satisfied that the grant of the conditional use variance for the specific project at the designated site is reconcilable with the municipality's legislative determination that the condition[s] should be imposed on all conditional uses in that zoning district." Id. Further 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. Thus, the preponderance of the evidence standard applies to proving satisfaction of both prongs of the negative criteria of the "d(3)" variances.

8. **Findings and Conclusions as to the Requested "D(3)" Variances.** As set forth above, the applicant requires and requested five (5) "d(3)" variances from the conditional use standards established in ordinance sections 16.68.050.A, B, C, D and E. The specific deviations from the conditional use standards at issue are set forth below. Also set forth below are the Board's findings and conclusions as to the positive and negative criteria of the requested "d(3)" variances.

a. **Specific Deviations from the Conditional Use Standards.** The applicant has applied for "d(3)" variances to allow the following specific deviations from the conditional use standards at issue:

The first "d(3)" variance is from ordinance section 16.68.050.A, which requires that the conditional use "conform to applicable regulations and standards governing the zone in which it is [conditionally] permitted" to allow the following deviations from the following zoning ordinance regulations applicable to the B-2 zone: **(a)** Encroachment of buildings / structures into the minimum 75-feet front yard setback required by the Schedule of Area, Yard and Building Requirements which is incorporated by reference into and by ordinance section 16.64.010 (canopy over gas station located 40.5-feet from the front property line along Route 31, canopy over gas station located 62.8-feet from the front property line along New Castle Way, convenience store located 73.8-feet from the front yard along New Castle Way, and trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way); **(b)** Deviation from the maximum hard surface coverage allowed on the property where the Schedule of Area, Yard and Building Requirements prohibits more than 55% hard surface coverage on lots in the B-2 zone and ordinance section 16.64.130.B prohibits more than 50% of the hard coverage otherwise permitted in a zone in steep slope areas containing slopes from 13% to 19% (51.3% hard surface coverage is proposed on the property where 49.6% hard surface coverage is the maximum permitted when the reducing the total hard surface coverage otherwise permitted due to the presence of hard surface coverage in steep slope areas on the property which contain slopes from 13% to 19%); **(c)** Encroachment of petroleum tanks into the front yard setback required by the Schedule of Area, Yard and Building Requirements (tanks as close as 41.0-feet to the front yard along Route 31, and tanks as close as 14.4-feet to the front yard along New Castle Way); **(d)** Disturbance of land within the 75-foot from a stream non-disturbance

area established by ordinance section 16.64.110.A.1; and **(e)** Buildings / structurers within 100-feet of a stream established in ordinance section 16.64.110.A.1.

The second "d(3)" variance is from ordinance section 16.68.050.B, which requires compliance with all site plan ordinance requirements to allow the following deviations from the following site plan ordinance requirements: **(a)** 6.4 footcandles of lighting of walkways where the maximum illumination of walkways is 0.5 footcandles pursuant to ordinance section 16.20.010.G.(6); **(b)** 9.8-feet setback of light fixtures from property line where the minimum required setback for the light fixtures from the property line is 36-feet pursuant to ordinance section 16.20.010.G.(10); **(c)** 38.7-foot landscape buffer yard depth adjacent to neighboring residential Lot 22 where a 75-foot landscape buffer yard is required adjacent to a residential use pursuant to ordinance section 16.20.040.E.(3); **(d)** Use of HDPE (high density polyethylene) flexible plastic pipe instead of RCP (reinforced concrete pipe), with the RDP required by ordinance section 16.20.040.M.(11); **(e)** No planting of certain shade trees along Route 31 where ordinance section 16.20.040.D.(4)(W) requires planting of shade trees along all adjacent streets; **(f)** No on-site planting of trees to replace the trees which would be removed to construct the proposed development in accordance with ordinance section 16.20.040.T; **(g)** No provision of 3-foot overhang beyond curbs for vehicles for the parking spaces adjacent to the convenience store, contrary to ordinance section 16.20.040.C.(2)(c); **(h)** 10-foot parking setback from Route 31 where ordinance section 16.20.040.C.(2)(i) requires a minimum of 20-foot parking setback from street right of way lines; **(i)** 14.3-foot parking setback from New Castle Way where ordinance section 16.20.040.C.(2)(i) requires a minimum of 20-foot parking setback from street right of way lines; **(j)** Sidewalk around convenience store is flush with the adjacent parking areas where ordinance section 16.20.040.C.(3)(e) requires sidewalks between parking areas and principal structures to be raised a minimum of 6-inches of the parking area surface; and **(k)** Driveway on Route 31 located 28.2-feet from existing driveway on neighboring residential Lot 22 where ordinance section 16.20.040.C.(10)(g) requires a minimum 40-feet separation.

The third "d(3)" variance is from ordinance section 16.68.050.C, which requires compliance with the off-street parking and loading / unloading requirements of ordinance section 16.70 to allow a deviation from ordinance section 16.70.030 to allow the unloading space for tanker truck fuel deliveries to the gas station to be in the two front yard setback areas which is not permitted in accordance with ordinance section 16.20.040.C.6.b.

The fourth "d(3)" variance is from ordinance section 16.68.050.D, which requires compliance with all applicable performance standards set forth in ordinance section 16.74 to allow the following deviations from ordinance section 16.74.120 which requires buffers in accordance with ordinance section 16.20.040.E, which requires new non-residentials uses or a change from an existing non-residential use to a more intensive non-residential use on property adjoining a lot containing a less intensive use to provide "transitional buffer yard and screening meeting the requirements of this section," where ordinance section 16.20.040.E.3 requires a 75-foot landscaped buffer yard to screen the neighboring residential dwelling on Lot 22 and the applicant proposes a variable width landscaped buffer which is as little as 23-feet wide by the east driveway entrance to the site, which is approximately one-third of the required buffer width.

The fifth "d(3)" variance is from ordinance section 16.68.050.E, which requires compliance with all applicable provisions of Articles IV and V of Title 16 of the

Township ordinances which contain the soil erosion (ordinance sections 16.80 and 16.82) and stormwater control and flood plain control (ordinance sections 16.84 and 16.85) regulations. It is unclear from the application and the site plans what the actual deviation(s) are and the applicant's planning expert did not address this variance at all in his testimony. The Board will not include any findings or conclusions on this issue as, for the reasons set forth below, it finds and concludes based on the other "d(3)" variances sought to allow the numerous deviations set forth below that the property will not remain appropriate for the conditionally permitted gas station use.

b. **Findings and Conclusions as to the Positive Criteria of the "D(3)" Variances.** As to the positive criteria of the "d(3)" variances, the applicant's planning expert testified that "the applicant can prove that the site can accommodate any problems associated with the proposed development and uses." 5/16/2019T15-5 to 20. The planning expert then proceeded to address the deviations from the zoning ordinance bulk regulations required to be complied with by conditional use ordinance section 16.68.050.A, 5/16/2019T15-18 to 21-16, and the deviations from the site plan ordinance requirements required to be complied with by conditional use ordinance section 16.68.050.B. 5/16/2019T21-17 to 25-13. The applicant's planning expert did not directly address the deviations from the conditional use standards established in conditional use ordinance sections 16.68.050.C, D and E, but the Board will nonetheless address the conditional use standards established in ordinance sections 16.68.050.C and D since the planning expert indirectly addressed them. For the following reason, the Board finds and concludes that the applicant failed to meet its burden of proving by a preponderance of the evidence that the property will remain appropriate for the conditionally permitted gas station despite the deviations from the conditional use standards at issue.

(1) The applicant's planning expert's testimony in support of the "d(3)" variance from ordinance section 16.68.050.A and the Board's findings and conclusions as to the testimony are as follows:

First, the applicant's planning expert testified regarding the need for a variance for hard surface coverage. Although he noted that the 51.5% hard surface coverage proposed for the property complied with the 55% maximum permitted in the B-2 zone, he agreed that the Township steep slope ordinance reduced the maximum permitted hard surface coverage on the property from 55% to 49.6%. The applicant's planning expert opined that the proposed 51.5% coverage was "minimal" and, because the steep slopes that would be impacted were "manmade," the proposal to exceed the maximum 49.6% coverage on the property would not "cause a serious concern." 5/16/2019T20 to 16-16. The Board disagrees. First, the Board does not agree that manmade steep slopes are treated differently under the Township ordinance than naturally occurring steep slopes and/or should be treated differently than naturally occurring steep slopes. Second, the Board finds it highly significant that the applicant could have eliminated a pump station or two (reducing the fueling dispensers from 12 to 10 or 8) which the Board finds would most likely reduce the amount of hard surface coverage so as to comply with the ordinance requirement. The fact that the applicant's business model does not allow for the reduction of the number of these structures to reduce the hard surface to comply with the ordinance leads the Board to find that the size of the proposed gas station is simply too large for the property. The finds that the applicant is simply trying to force a square peg (the gas station it wants) into a round hole (the property with its constraints).

Second, the applicant's planning expert testified regarding the need for variances to allow the deviations from the 100-foot no structure setback requirement and the 75-foot no disturbance area. The planning expert testified that he believed that the need for variance relief from both of these requirements was "not related to this specific development proposal, but [was] a function of the unique characteristics and constraints of the site itself." 5/16/2019T17-17 to 21. Further, the planning expert testified that he thought "the proposed development can achieve the purposes of protecting the stream and the associated natural resources despite the deviations." 5/16/2019T18-3 to 7. The reasons he cited in support of this opinion were that (1) "there is no disturbance proposed on the physical bank of the stream," (2) the "existing wood line along the bank would be preserved," and (3) "additional landscape plantings would be provided within the buffer zone . . . ." 5/16/2019T18-8 to 12. The Board disagrees with all of the planning expert's opinions in these regards for the following reasons.

The Board finds that the requested variance relief from the applicable ordinance requirements is directly related to the specific proposed development. While a smaller gas station might not eliminate the necessity for the variances altogether, the Board finds that eliminating a pump station or two (reducing the fueling dispensers from 12 to 10 or 8) would most likely reduce the square footage of structures in the 100-foot structure setback and the square footage of disturbance in the 75-foot no-disturbance area. The fact that the applicant's business model does not allow for the reduction of the number of these structures to reduce the extent of the deviations and variances at issue leads the Board to not only find that requested variance relief from the applicable ordinance requirements is directly related to the specific proposed development but also to the find that the size of the proposed gas station is simply too large for the property. Again, the Board finds that the applicant is simply trying to force a square peg into a round hole.

Further, the Board cannot find that the proposed development will achieve the purposes of protecting the stream and the associated natural resources unless the applicant proposed some sort of stream enhancement, enhanced stream protection and enhanced natural resource protection over and above that required by the existing Township ordinance provisions, and the Board finds that no such enhancement has been proposed. The fact that "there is no disturbance proposed on the physical bank of the stream" the "existing wood line along the bank would be preserved" misses the point of the ordinance requirements at issue. The Board notes and finds that the ordinance requirements at issue are not simply intended to protect the stream bank and trees along the stream bank. Ordinance section 16.64.110.A.1 is intended to "preserve the existing environmental and natural features of the Township." The ordinance by its terms defines these features as including all features within 75-feet of a stream bank, not just the stream bank and/or the stream. The Board is not persuaded that granting variances to allow more disturbance than permitted in the 75-foot non-disturbance area and more structures than permitted in the 100-foot setback area can be considered protecting the natural resources at issue more than the ordinance provisions from which the variances are sought. The Board further notes and finds that the ordinance requirement used to be a 50-foot non-disturbance area but this was increased to 75-feet to provide additional protection of the existing environmental and natural features of the Township.

Finally, as to the planning expert's testimony that landscaping and trees in this area are proposed to be planted, the Board notes and finds that landscaping and reforestation are separate requirements under ordinance sections 16.20.040.E.(3) and 16.20.040.T(5) and the provision of ordinance required landscaping and trees is no substitute for preserving the existing natural woodlands and vegetation which are proposed to be entirely removed as part of the proposed development. Moreover, the applicant actually requires and has requested exception relief from the landscaping and reforestation requirements at issue. The applicant has requested an exception from site plan ordinance section 16.20.040.E.(3) to allow it to provide 38.7-feet of landscape buffer adjacent to the neighboring Lot 22 containing the residential dwelling, which is approximately half of the 75-feet of landscape buffer required under the ordinance. The applicant has also requested an exception from site plan ordinance section 16.20.040.T to allow it to plant the replacement trees on some off-site location(s).

Before moving on, an additional issue must be addressed, namely the planning expert's testimony that the existing commercial building on the property is almost entirely within the 100-foot setback area and the proposed development would remove the building from that area, which the planning expert opined provides a benefit. 5/16/2019T18-15 to 22. While the Board agrees the existing commercial building is almost entirely within the 100-foot setback, it is not within the 75-foot non-disturbance area and the fact is that the proposed development will result in pavement in the area of the former building and more structures and hard surface coverage than currently exists in the 75-foot non-disturbance area. As the planning expert conceded under cross examination, the entirety of the 75-foot non-disturbance area will be disturbed as part of the application. 5/16/2019T76-72-3 to 73-13. As the planning expert further conceded, the property currently has approximately 21,000 square feet of structures in the 75-foot non-disturbance area which will increase by approximately 6,000 square feet to approximately 27,000 square feet of structures in the non-disturbance area as part of the application. 5/16/2019T74-16 to 75-7.

Third, the applicant's planning expert opined that variances were warranted for the following setback deviations / encroachments proposed in the minimum 75-feet front yard setback area for the following buildings and structures: (1) canopy over gas station located 40.5-feet from the front property line along Route 31, (2) canopy over gas station located 62.8-feet from the front property line along New Castle Way, (3) convenience store located 73.8-feet from the front yard along New Castle Way, (4) trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way, (5) tanks as close as 41.0-feet to the front yard along Route 31, and (6) tanks as close as 14.4-feet to the front yard along New Castle Way.

In an attempt to justify the canopy encroachments into the setback areas, the planning expert testified that the canopy encroachments do not have the same impact as a building encroachment would because there is not as much mass or surface footprint generated by a canopy as compared to a building. 5/16/2019T19-19 to 24. Additionally, the planning expert testified that the canopy provides benefits to the public by affording weather protection. 5/16/2019T19-25 to 20-3. The Board finds that the planning expert's focus misses the point. While the Board agrees that a canopy provides benefits to the public by affording weather protection, that has nothing to do with whether the activities under the canopy should or should not be placed in such locations so that the canopy can comply with the setback

regulations. In fact, the evidence reflects that 91% of the canopy is located within the front yard setback along New Castle Way. 6/6/2019T75-4 to 8. Similarly, while the Board agrees that, because the canopy itself does not have walls, it does have less mass than a building, the activities that take place under the canopy have more of an adverse impact than activities that take place within a building because they are visible from the roads. The Board finds that the activities that will take place under the canopy here will take place much closer to the roads than if the canopy complied with the 75-foot minimum setback requirement.

In an attempt to justify the variance to allow the trash enclosures to encroach into the front yard setback areas (it is proposed to be located 35.5-feet from the front property line along New Castle Way where the required minimum front yard setback is 75-feet), and in an attempt to justify the variances to allow the gasoline storage tanks to encroach into the front yard setback areas (tanks as close as 41.0-feet to the front yard along Route 31 and tanks as close as 14.4-feet to the front yard along New Castle Way, where the required minimum front yard setback is 75-feet), the planning expert testified that the enclosures were located "in the most logical portion of the site, given the layout," 5/16/2019T20-13 to 14, and "the tanks are located in the most appropriate portion of the site, given the layout of the operation." 5/16/2019T21-6 to 8. The Board finds that these reasons do not support granting the variances sought. This reasoning begs the question. In essence, the planning expert's opinion is that because there is no room on the property to place the enclosures and the tanks in a compliant location due to the layout of the proposed convenience store and gas station, the location chosen to place them is where they encroach into the front yard setback. The Board finds that the requested variances from the applicable ordinance requirement at issue are not related to the size and shape of the property but are directly related to the size of the proposed gas station being simply too large for the property. Again, the Board finds that the applicant is simply trying to force a square peg into a round hole.

For all of the foregoing reasons, the Board finds that the applicant failed to prove the positive criteria of the "d(3)" variance from ordinance section 16.68.050.A by a preponderance of the evidence. The Board is not persuaded that the property will remain appropriate for the conditionally permitted gas station despite the deviations from the zoning ordinance regulations discussed above.

(2) The applicant's planning expert's testimony in support of the "d(3)" variance from ordinance section 16.68.050.B and the Board's findings and conclusions as to the testimony are as follows:

To begin with, while the applicant requires one (1) "d(3)" variance to allow the proposed development to deviate from eleven (11) site plan ordinance requirements, the Board finds that only two (2) of the site plan ordinance deviations preclude the property from remaining appropriate for the conditionally permitted gas station. The ordinance deviations at issue are from the landscaping and the replacement planting / reforestation requirements established in site plan ordinance sections 16.20.040.E.(3) and 16.20.040.T(5). [23]

[23] As to the deficient driveway setback from neighboring Lot 22, the lack of parking overhang along the convenience store, parking space setback and access drive setback deviations, and failure of curbs to be raised 6-inches above the parking surface, the Board finds that these deficiencies do not make the property inappropriate for

As set forth above, the applicant has requested an exception from site plan ordinance section 16.20.040.E.(3) to allow it to provide 38.7-feet of landscape buffer adjacent to the neighboring Lot 22 containing the residential dwelling, which is approximately half of the 75-feet of landscape buffer required under the ordinance, and the applicant has requested an exception from site plan ordinance section 16.20.040.T to allow it to plant the required number of reforestation trees off site in lieu of planting replacement the trees on-site due to the lack of available area on the property for such replacement planting / reforestation.

As to the landscape buffer deviation from ordinance section 16.20.040.E.(3), the applicant's planning expert testified that he thought that the landscape buffer proposed "provides an effective visual screen to Lot 22 under the circumstances." 5/16/2019T22-10 to 12. The "circumstances" he referred to are the "site constraints in terms of buildable envelope," 5/16/2019T22-12 to 13, "as well as the fact that the residence on Lot 22 is nonconforming." 5/16/2019T22-14 to 15. The Board disagrees with his opinions in these regards for the following reasons.

First, the Board finds that the nonconforming nature of the residential dwelling on Lot 22 is irrelevant to the issue of whether or not the applicant on an adjacent property should be granted a "d(3)" variance from the conditional use standard at issue to allow a significant landscape buffer deviation and whether or not the property remains appropriate for the conditionally permitted gas station despite the significant landscape buffer deviation. While there is a general principal of planning and land use law that nonconforming uses and structures should be replaced with conforming uses and structures "as quickly as possible as is compatible with justice," Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980), there is no principal of planning or of land use law of which the Board is aware whereby adjoining nonconforming uses or structures should not be protected to the same extent as conforming uses and structures from proposed deviations in landscape buffer requirements and standards. "In dealing with nonconforming uses and structures, the legislature and municipal boards must continually balance the important goal of bringing such uses and structures into conformity, with the equally compelling interest in protecting property rights from being unfairly restricted." Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), section 27-1.1, page 578. "Moreover, land use regulation is widely viewed as an important factor in preserving health, safety, beauty, natural resources and overall quality of life in communities." Id. Thus, owners of nonconforming uses and structures, such as the owner of Lot 22, deserve to be treated equitably and fairly and have no less protection from a new adjoining use, especially a conditionally permitted use where conditional use standards intended to protect against aesthetic detriment are at issue.

Second, the Board does not agree that the "buildable envelope" on the property constitutes a proper "circumstance" in this application to warrant granting a "d(3)" variance from the conditional use standard at issue. The Board finds that the proposed gas

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the conditionally permitted gas station. The Board generally agrees with the opinions rendered by the applicant's planning expert as to these deviations. See, 5/16/2019T22-17 to 25-13. The planning expert did not address the remaining deviations sought from the site plan ordinance requirements so the Board will not address them, especially in light of the fact that the Board has found that two (2) of the site plan ordinance deviations preclude the property from remaining appropriate for the conditionally permitted gas station.

station and proposed development are simply too large for the property. The Board finds that if the size of the gas station was decreased, the extent of the landscape buffer deviation could be significantly reduced. Further, the Board find that if the convenience store was eliminated and the gas station relocated towards the area that the convenience store is now proposed, the applicant could comply with the landscape buffer requirement. The Board finds that the "circumstance" driving the need for the variance is not the "buildable envelope" due to the size, shape or constraints on the property but, rather, the large size of the proposed development and the large size gas station proposed on the property. Again, the Board finds that the applicant is trying to force a square peg into a round hole.

As to the reforestation requirements under ordinance section 16.20.040.T, it is telling that the applicant' planning expert did not address this at all in his testimony. Neither did the applicant's attorney. Quite simply, the fact that there is insufficient area on the property to plant replacement trees to reforest the site after removing all trees other than those directly adjacent to the stream bank is evidence to the Board that the property will not remain appropriate for the conditionally permitted gas station, and precisely because of this deviation. Once again, the Board finds that the applicant is trying to force a square peg into a round hole.

For all of the foregoing reasons, the Board finds that the applicant failed to prove the positive criteria of the "d(3)" variance from ordinance section 16.68.050.B by a preponderance of the evidence. The Board is not persuaded that the property will remain appropriate for the conditionally permitted gas station despite the deviations from the site plan landscaping and replanting / reforestation ordinance requirements discussed above.

(3) The applicant's planning expert's testimony in support of the "d(3)" variance from ordinance section 16.68.050.C and the Board's findings and conclusions as to the testimony are as follows:

To begin with, conditional use ordinance section 16.68.050.C requires that off-street parking and loading facilities shall be provided as required by ordinance sections 16.18 (governing subdivisions, so not applicable here) and 16.70 (governing off-street parking and loading, and applicable here). Ordinance section 16.70.030 requires that all non-residential uses comply with the off-street parking and loading and unloading area requirements contained in site plan ordinance section 16.20.040. Site plan ordinance section 16.20.040.C.3.c governs loading and unloading areas and prohibits loading and unloading areas in front yard setback areas. While there is no designated unloading area on the site plans for tanker trucks to unload gasoline into the underground gasoline storage tanks, the underground tanks are located in the front yard setback areas of the property. As such, tanker trucks will be unloading gasoline into these tanks directly over the tanks so in the front yard setback areas which is contrary to the requirement established in ordinance section 16.20.040.C.3.c so requires a "d(3)" variance from conditional use ordinance section 16.68.050.C.

While the applicant's planning expert did not directly address this deviation, he did address the variance required to allow the underground tanks in the front yard setback areas and testified that the "tanks are located in the most appropriate portion of the site, given the layout of the operation." 5/16/2019T21-6 to 8. He further testified that the fueling

unloading operation would not "impede or disturb vehicular flow or circulation for that matter on nearby properties." 5/16/2019T21-8 to 11. Finally, he testified that the location in the front yard setback areas "is also pretty typical for these types of facilities." 5/16/2019T21-12 to 13. The Board disagrees that all of these reasons justify the grant of a "d(3)" variance to allow the unloading area to be located within the front yard setbacks for the following reasons.

First, the Board repeats its finding from above as to the requested variance to allow the tanks to be located in the front yard setback areas. In essence, the planning expert's opinion was that because there is no room on the property to place the tanks in a compliant location due to the layout of the proposed convenience store and gas station, the location chosen to place them is where they encroach into the front yard setback. The Board found that the requested variance from the ordinance requirement to allow the tanks to be located in the front yard setback areas "given the layout of the operation" was not related to the size and shape of the property but was directly related to the size of the proposed gas station being simply too large for the property. The Board makes the same finding as to the variance to locate the fuel unloading area in the front yard setback areas.

As to the planning expert's testimony that the fuel unloading operation would not disturb vehicular traffic flow or circulation on nearby lots, that goes to the negative criteria and, in any event, misses the point of the ordinance prohibition on having loading and unloading areas located in front yard setback areas. The Board believes that the intent and purpose of this prohibition is not to ensure on-site traffic flow and off-site circulation but is similar to and/or the same as the intent and purpose of having front yard setback requirements for building and structures in the first instance: aesthetics. As the Wellington Hills objectors' planning expert opined, "this is an important issue because in a community that cares about space around its buildings, and this Board and the Planning Board work very hard to make sites look nice with landscaping and setbacks and building designs, to encourage and allow a tanker (sp) truck to be parked . . . on the site, in a very prominent location in the from most portion of the site . . . is extremely disharmonizing with the intent and purpose of the zone plan and zoning ordinance." 6/6/2019T100-11 to 21. The Board finds that allowing tanker trucks to unload gasoline in the front yard setback areas is aesthetically displeasing and because, if a variance is granted to allow this deviation, the property will not remain appropriate for the conditionally permitted gas station.

For all of the foregoing reasons, the Board finds that the applicant failed to prove the positive criteria of the "d(3)" variance from ordinance section 16.68.050.C by a preponderance of the evidence. The Board is not persuaded that the property will remain appropriate for the conditionally permitted gas station despite the deviations from the ordinance prohibition on locating an unloading area in a front yard setback area.

(4) The applicant's planning expert's testimony in support of the "d(3)" variance from ordinance section 16.68.050.D and the Board's findings and conclusions as to the testimony are as follows:

To begin with, conditional use ordinance section 16.68.050.D requires that all performance standards set forth in ordinance section 16.74 be complied with. Ordinance section 16.74.120 provides that where buffers are required, they must comply with the

"bufferyard" standards established in site plan ordinance section 16.20.040.E, which requires new non-residentials uses or a change from an existing non-residential use to a more intensive non-residential use on property adjoining a lot containing a less intensive use to provide "transitional buffer yard and screening meeting the requirements of this section." Ordinance section 16.20.040.E.3 requires a 75-foot landscaped buffer yard to screen the neighboring residential dwelling on Lot 22 and the applicant proposes a variable width landscaped buffer which is as little as 23-feet wide by the east driveway entrance to the site, which is approximately one-third of the required buffer width.

To repeat from above, the applicant's planning expert testified that he thought that the landscape buffer proposed "provides an effective visual screen to Lot 22 under the circumstances." 5/16/2019T22-10 to 12. And, the "circumstances" he referred to was the "site constraints in terms of buildable envelope," 5/16/2019T22-12 to 13, "as well as the fact that the residence on Lot 22 is nonconforming." 5/16/2019T22-14 to 15. To also repeat from above, the Board disagrees with his opinions in these regards for the following reasons.

First, the Board finds that the nonconforming nature of the residential dwelling on Lot 22 is irrelevant to the issue of whether or not the applicant on an adjacent property should be granted a "d(3)" variance from the conditional use standard at issue to allow a significant landscape buffer deviation and whether or not the property remains appropriate for the conditionally permitted gas station despite the significant landscape buffer deviation. While there is a general principal of planning and land use law that nonconforming uses and structures should be replaced with conforming uses and structures "as quickly as possible as is compatible with justice," Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980), there is no principal of planning or of land use law of which the Board is aware whereby adjoining nonconforming uses or structures should not be protected to the same extent as conforming uses and structures from proposed deviations in landscape buffer requirements and standards. "In dealing with nonconforming uses and structures, the legislature and municipal boards must continually balance the important goal of bringing such uses and structures into conformity, with the equally compelling interest in protecting property rights from being unfairly restricted." Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), section 27-1.1, page 578. "Moreover, land use regulation is widely viewed as an important factor in preserving health, safety, beauty, natural resources and overall quality of life in communities." Id. Thus, owners of nonconforming uses and structures, such as the owner of Lot 22, deserve to be treated equitably and fairly and have no less protection from a new adjoining use, especially a conditionally permitted use where conditional use standards intended to protect against aesthetic detriment are at issue.

Second, the Board does not agree that the "buildable envelope" on the property constitutes a proper "circumstance" in this application to warrant granting a "d(3)" variance from the conditional use standard at issue. The Board finds that the proposed gas station and proposed development are simply too large for the property. The Board finds that if the size of the gas station was decreased, the extent of the landscape buffer deviation could be significantly reduced. Further, the Board find that if the convenience store was eliminated and the gas station relocated towards the area that the convenience store is now proposed, the applicant could comply with the landscape buffer requirement. The Board finds that the "circumstance" driving the need for the variance is not the "buildable envelope" due to the size,

shape or constraints on the property but, rather, the large size of the proposed development and the large size gas station proposed on the property. Again, the Board finds that the applicant is trying to force a square peg into a round hole.

For all of the foregoing reasons, the Board finds that the applicant failed to prove the positive criteria of the "d(3)" variance from ordinance section 16.68.050.D by a preponderance of the evidence. The Board is not persuaded that the property will remain appropriate for the conditionally permitted gas station despite the deviations from the site plan replanting / reforestation ordinance requirement discussed above.

(5) The final "d(3)" variance sought is from ordinance section 16.68.050.E, which requires compliance with all applicable provisions of Articles IV and V of Title 16 of the Township ordinances which contain the soil erosion (ordinance sections 16.80 and 16.82) and stormwater control and flood plain control (ordinance sections 16.84 and 16.85) regulations. It is unclear from the application and the site plans what the actual deviation(s) are and the applicant's planning expert did not address this variance at all in his testimony. The Board will not include and findings or conclusions on this issue as, for the reasons set forth below, it finds and concludes based on the other "d(3)" variances sought to allow the numerous deviations set forth below that the property will not remain appropriate for the conditionally permitted gas station use.

c. **Findings and Conclusions as to the Negative Criteria of the "D(3)" Variances.** As to the negative criteria of the "d(3)" variances, the applicant's planning expert opined that the "d(3)" variances would have minimal impact on the B-2 zone because the "gas filling [station] and convenience store are permitted." 5/16/2019T25-22 to 25. Further, he testified that the gas station use "meets the requirements set forth in the . . . the specific conditional use standards for the gas station component, and the deviation sought from the bulk and site design can be accommodated." 5/16/2019T28-1 to 6. He also testified that the applicant is providing a buffer to the "nonconforming residence, so I would see no substantial impact [on Lot 22] again under these circumstances." 5/16/2019T25-4 to 7. Relying on the testimony of the applicant's traffic engineering expert (who the Board believes testified untruthfully as explained in detail above in the discussion of the negative criteria of the "d(1)" variance), the planning expert further testified that the traffic generated from the proposed development "would not substantially impair traffic conditions in the area." 5/16/2019T26-16 to 18.

The applicant's planning expert's testimony regarding the negative criteria completely misses the point of the inquiry that the Board must undertake pursuant to Coventry Square.

As to the first prong of the negative criteria, that the variance can be granted without substantial detriment to the public good, Coventry Square held that the applicant's and Board's focus must be on the effect that the grant of the "d(3)" variance(s) will have on surrounding properties regarding the specific deviation(s) from the conditions imposed by the applicable ordinance(s). 138 N.J. at 299. As to the second prong of the negative criteria, that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, Coventry Square held that the Board must be satisfied that the grant of the conditional use variance for the specific project at the designated site is reconcilable with the municipality's

legislative determination that the condition(s) should be imposed on all conditional uses in that zone. Id. The applicant's planning expert utterly failed to address these issues, let alone focus on them.

Addressing the second prong of the negative criteria first, the applicant's planning expert testified that the "d(3)" variances would have minimal impact on the B-2 zone because the "gas filling [station] and convenience store are permitted." This testimony is not only legally incorrect but is irrelevant to the inquiry that must be made under Coventry Square. While the planning expert was correct in testifying that the proposed convenience store is a permitted use on the property, he was incorrect in testifying that the proposed gas station is also permitted on the property. The proposed gas station is a conditionally permitted use in the B-2 zone but, as set forth above, the Coventry Square Court held that "a conditional use is neither prohibited throughout the zone nor permitted at every location in the zone; rather, it is permitted at those locations in the zone where the use meets the conditions set forth in the zoning ordinance." In this case, where the site plan reflects deviations from a number of conditions and standards applicable to the conditionally permitted use, the proposed gas station is not permitted on the property unless the Board grants "d(3)" variances to allow the deviations. More significantly, the focus of the second prong of the negative criteria must be on the conditions and standards established by ordinance from which the site plan deviates. The fact that the gas station use complies with the requirements set forth in the specific conditional use standards applicable to the gas station is beside the point. The inquiry that the Board must undertake under Coventry Square is whether granting the requested "d(3)" variances to allow the deviations from the ordinance standards applicable to all conditional uses is reconcilable with the municipality's legislative determination that the conditions should be imposed on all conditional uses in the B-2 zone.

Assuming that the planning expert's testimony that the traffic generated from the proposed development "would not substantially impair traffic conditions in the area" was intended to address the first prong of the negative criteria, and while the Board agrees that off-site traffic conditions are absolutely an issue with respect to the "d(1)" variance (since that relief is to allow more than one use on the property where no more than one (1) use is permitted under the ordinance at issue), the Board believes that off-site traffic conditions are not an issue with respect to the "d(3)" variances sought in the application here because there are no conditional use standards regarding off-site traffic from which the proposed gas station deviates. In any event, as set forth above in the discussion of the negative criteria of the "d(1)" variance, the Board rejects the applicant's traffic engineering expert's testimony and report.

Assuming that the planning expert's testimony that the provision of some landscape buffering will result in no substantial impact to the neighboring dwelling on Lot 22 was intended to address the first prong of the negative criteria, the Board agrees that its focus should be on the effect that the grant of a "d(3)" variance will have on a neighboring lot and, significantly, regarding the specific deviation from the conditions imposed by the applicable ordinance. That said, the Board disagrees that the "d(3)" variance at issue can be granted without substantial detriment to the public good in terms of the negative impact on the residents of the dwelling on neighboring Lot 22 in light of the meager amount of landscape buffer proposed. Specifically, as set forth above, conditional use ordinance section 16.68.050.D requires that all performance standards set forth in ordinance section 16.74 be complied with and

ordinance section 16.74.120 provides that where buffers are required, they must comply with the "bufferyard" standards established in site plan ordinance section 16.20.040.E, which requires new non-residentials uses or a change from an existing non-residential use to a more intensive non-residential use on property adjoining a lot containing a less intensive use to provide "transitional buffer yard and screening meeting the requirements of this section." Ordinance section 16.20.040.E.3 requires a 75-foot landscaped buffer yard to screen the neighboring residential dwelling on Lot 22 and the applicant proposes a variable width landscaped buffer which is as little as 23-feet wide by the east driveway entrance to the site, which is approximately one-third of the required buffer width. The Board finds that this proposed landscape buffer is grossly inadequate.

To repeat from above, the applicant's planning expert testified that he thought that the landscape buffer proposed "provides an effective visual screen to Lot 22 under the circumstances." 5/16/2019T22-10 to 12. And, the "circumstances" he referred to was the "site constraints in terms of buildable envelope," 5/16/2019T22-12 to 13, "as well as the fact that the residence on Lot 22 is nonconforming." 5/16/2019T22-14 to 15. To also repeat from above, the Board disagrees with his opinions in these regards for the following reasons.

First, the Board found that the nonconforming nature of the residential dwelling on Lot 22 is irrelevant to the issue of whether or not the applicant on an adjacent property should be granted a "d(3)" variance from the conditional use standard at issue to allow a significant landscape buffer deviation. While there is a general principal of planning and land use law that nonconforming uses and structures should be replaced with conforming uses and structures "as quickly as possible as is compatible with justice," Belleville v. Parrillo's, Inc., 83 N.J. 309, 315 (1980), there is no principal of planning or of land use law of which the Board is aware whereby adjoining nonconforming uses or structures should not be protected to the same extent as conforming uses and structures from proposed deviations in landscape buffer requirements and standards. "In dealing with nonconforming uses and structures, the legislature and municipal boards must continually balance the important goal of bringing such uses and structures into conformity, with the equally compelling interest in protecting property rights from being unfairly restricted." Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), section 27-1.1, page 578. "Moreover, land use regulation is widely viewed as an important factor in preserving health, safety, beauty, natural resources and overall quality of life in communities." Id. Thus, owners of nonconforming uses and structures, such as the owner of Lot 22, deserve to be treated equitably and fairly and have no less protection from a new adjoining use, especially a conditionally permitted use where conditional use standards intended to protect against aesthetic detriment are at issue.

Second, the Board does not agree that the "buildable envelope" on the property constitutes a proper "circumstance" in this application to warrant granting a "d(3)" variance from the conditional use standard at issue. The Board found that the proposed gas station and proposed development are simply too large for the property. The Board found that if the size of the gas station was decreased, the extent of the landscape buffer deviation could be significantly reduced. Further, the Board found that if the convenience store was eliminated and the gas station relocated towards the area that the convenience store is now proposed, the applicant could comply with the landscape buffer requirement. The Board found that the "circumstance" driving the need for the variance is not the "buildable envelope" due to the size,

shape or constraints on the property but, rather, the large size of the proposed development and the large size gas station proposed on the property. Again, the Board found that the applicant is trying to force a square peg into a round hole.

Finally, the Board finds and notes that the applicant did not persuade it that granting all of the requested "d(3)" variances to allow the specific project shown on the site plan on the property is reconcilable with the Township's legislative determination that all zoning ordinance bulk regulations and two of the site plan ordinance requirements must be complied with as to all conditional uses in the B-2 zone. In fact, the Board finds that the only circumstances that it believes would ensure that the approval of the conditionally permitted gas station would not result in substantial detriment to the public good and substantial impairment of the intent and purpose of the master plan and zoning ordinance would be either the convenience store being eliminated from the proposed development and the gas station relocated to comply with most, if not all of the zoning ordinance bulk regulations and the two site plan ordinance requirements at issue, or the convenience store and gas station being reduced in size so as to substantially reduce the number and/or extent of the deviations proposed. The Board notes the applicant's representative made it clear that the applicant has a business model that it intends to adhere to and that model includes both the large convenience store and large gas station that have been proposed in this application. [24]

For all of the foregoing reasons, the Board finds and concludes that the applicant has failed to prove by a preponderance of the evidence that the "d(3)" 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.

d. **Ultimate Conclusion to Deny the "D(3)" Variances.** For all of the foregoing reasons, the Board finds that it must deny the requested "d(3)" variances.

[24] The applicant's representative testified that Wawa stores have evolved from providing a convenience store only to also providing a gas filling station "largely in response to the fuel industry . . . offering convenience stores" with their gas stations. 11/1/2018T8-16 to 19. As he explained, because Wawa felt like the fuel industry was "playing in [their] sandbox", Wawa got into the business of providing gas filling stations with its convenience stores. 11/1/2018T8-20 to 23. As he further explained: "Now it is a staple of our business." Id. at 8-24. As he later explained, the Wawa "business model" is to provide on a major traffic corridor both a gas filling station and a convenience store, both of which are "driven by impulse" to attract primarily pass-by motor vehicle traffic during the "two rushes, morning and evening." 11/1/2018T70-9 to 21. The applicant's representative also explained that the site plan for the proposed development was "a very prototypical layout". 11/1/2018T58-22 to 23. He testified that Wawa has over 600 convenience stores with gas stations and "this is a configuration we would have for 95 percent of them." 11/12018T-59-1 to 3. In fact, the applicant's representative explained that the underground tanks and fuel unloading area which encroaches into both the Route 31 front yard setback area and the New Castle Way front yard setback area "can't move . . . based on our prototypical layout." 11/1/2018T55-11 to 12. He later testified that Wawa does have a smaller sized footprint but it is rare that they propose it. 11/1/2018T-94-12 to 6. He explained that the footprint of the proposed development here is the "default size" which Wawa "would like to use." Id. at 94-18 to 20. The applicant's representative did not give any indication that the applicant was at all interested in proposing a smaller convenience store and/or a smaller gas station. In fact, the applicant's representative testified that he did not even analyze using Wawa's smaller size footprint for the convenience store and Wawa's smaller size canopy for the gas station for this application. 11/1/2018T96-6 to 12.

9. **Consideration of the Requested "C" Variances.** As set forth above, the applicant requested nine (9) "c" variances from various zoning ordinance regulations as more specifically listed on the attached Zoning Relief Table. Although the Board has denied the requested "d(1)" variance and the requested "d(3)" variances, so the requested "c" variances are technically moot, [25] the Board deliberated and voted on the "c" variances for purposes of providing a more complete record. The standards that the Board must consider in deciding whether or not to grant the "c" variances consist of the following "positive" and the "negative" criteria:

a. **Positive Criteria Standard for a "C" Variance.** The Board has the power to grant "c(1)" or so-called "hardship" variances and/or "c(2)" or so-called benefits v. detriments variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(1) and N.J.S.A. 40:55D-70c(2), as is more particularly discussed below.

(1) The Board has the power to grant "c(1)" or "hardship" variances pursuant to N.J.S.A. 40:55D-70c(1) where "(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon, the strict application of any regulations...would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property." This is the positive criteria of a "c(1)" variance and the applicant bears the burden of proving the positive criteria by a preponderance of the evidence. The determination of whether a lot is a "specific piece of property" within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone because, if all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. See, Beirn v. Morris, 14 N.J. 529, 535-536 (1954). 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. See, Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). Finally, a hardship variance is not available for intentionally created situations as constituting "self-created" hardship, See, Commons v. Westwood Board of Adj., 81 N.J. 597, 606 (1980); Chirichello v. Monmouth Park Board of Adj., 78 N.J. 544, 553 (1979), and/or for mistakes, See, 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).

[25] A request for relief becomes "moot" when the relief sought, if granted, can have no practical effect. N.Y. Susquehanna & Western Railway v. State, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd o.b., 204 N.J. Super. 630 (App. Div. 1985); Greenfield v. N.J. Dept. of Corrections, 382 N.J. Super. 254, 257-258 (App. Div. 2006) ("An issue is 'moot' when the decision sought in the matter, when rendered, can have no practical effect on the existing controversy"). Requests for relief that become moot should ordinarily be dismissed. Cinque v. Dept. of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993).

(2) The Board has the power to grant "c(2)" or "benefits v. burdens" 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 positive criteria of a "c(2)" variance and the applicant bears the burden of proving the positive criteria by a preponderance of the evidence. The determination of whether a lot is a "specific piece of property" within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone because, if all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. See, Beirn v. Morris, 14 N.J. 529, 535-536 (1954). Significantly, 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, while "c(1)" or so-called hardship variances are not available for self-created situations and/or for mistakes, our courts have not held that an intentionally created situation or a mistake serves to bar a "c(2)" variance because the focus of a "c(2)" variance is not on hardship but, rather, on advancing the purposes of zoning. Ketcherick v. Mountain Lakes Board of Adj., 256 N.J. Super. 647, 656-657 (App. Div. 1992); Green Meadows v. Montville Planning Board, 329 N.J. Super. 12, 22 (App. Div. 2000). Significantly, however, a "c(2)" variance can be denied where it does not provide a benefit to the community and would "merely alleviate a hardship to the applicant which he himself created." Wilson v. Brick Twp. Zoning Board, 405 N.J. Super. 189, 199 (App. Div. 2009).

b. **Negative Criteria Standard for a "C" Variance.** Even if an applicant proves the positive criteria of a "c(1)" or "c(2)" variance, the Board may not exercise its power to grant the variance otherwise warranted 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). Similar to the burden of proof that must be met to prove the positive criteria of a "c(1)" or "c(2)" variance, the applicant must satisfy the negative criteria of a "c" variance by a preponderance of the evidence.

10. **Findings and Conclusions as to the Requested "C" Variances.** As set forth above, the applicant requested nine (9) "c" variances to allow various deviations from various zoning ordinance regulations. The deviations from the zoning ordinance regulations and the Board's findings and conclusions as to the requested "c" variances are set forth below.

a. **Specific "C" Variances Requested.** The "c" variances requested are to allow the following five (5) categories of deviations:

(1) Encroachment of buildings / structures into the minimum 75-feet front yard setback required by the Schedule of Area, Yard and Building Requirements which is incorporated by reference into and by ordinance section 16.64.010 (canopy over gas station located 40.5-feet from the front property line along Route 31, canopy over gas station located 62.8-feet from the front property line along New Castle Way, convenience store located 73.8-feet from the front yard along New Castle Way, and trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way);

(2) Deviation from the maximum hard surface coverage allowed on the property where the Schedule of Area, Yard and Building Requirements prohibits more than 55% hard surface coverage on lots in the B-2 zone and ordinance section 16.64.130.B prohibits more than 50% of the hard coverage otherwise permitted in a zone in steep slope areas containing slopes from 13% to 19% (51.3% hard surface coverage is proposed on the property where 49.6% hard surface coverage is the maximum permitted when the reducing the total hard surface coverage otherwise permitted due to the presence of hard surface coverage in steep slope areas on the property which contain slopes from 13% to 19%);

(3) Encroachment of petroleum tanks into the front yard setback required by the Schedule of Area, Yard and Building Requirements (tanks as close as 41.0-feet to the front yard along Route 31, and tanks as close as 14.4-feet to the front yard along New Castle Way);

(4) Disturbance of land within the 75-foot from a stream non-disturbance area established by ordinance section 16.64.110.A.1; and

(5) Buildings / structurers within 100-feet of a stream established in ordinance section 16.64.110.A.1.

b. **Findings and Conclusions as to the Positive and Negative Criteria of the Requested "C" Variances.** While the applicant's planning expert did not specifically address the requested "c" variances in his testimony, the Board will treat his testimony in support of the requested "d(3)" variances as testimony in support of the "c" variances because the planning expert addressed the deviations from the zoning ordinance bulk regulations required to be complied with by conditional use ordinance section 16.68.050.A, 5/16/2019T15-18 to 21-16. The planning expert's testimony as to each deviation and the Board's findings and conclusions as to those deviations in relation to the positive and negative criteria applicable to the "c" variances requested are as follows.

First, the applicant's planning expert testified regarding the need for a variance for hard surface coverage. Although he noted that the 51.5% hard surface coverage proposed for the property complied with the 55% maximum permitted in the B-2 zone, he agreed that the Township steep slope ordinance reduced the maximum permitted hard surface coverage on the property from 55% to 49.6%. The applicant's planning expert opined that the proposed 51.5% coverage was "minimal" and, because the steep slopes that would be impacted were

"manmade," the proposal to exceed the maximum 49.6% coverage on the property would not "cause a serious concern." 5/16/2019T20 to 16-16. The Board not only disagrees with this testimony but notes that this testimony addresses only the negative criteria of the requested "c" variance for hard surface coverage, not the positive criteria.

To begin with, the Board does not agree that manmade steep slopes are treated differently under the Township ordinance than naturally occurring steep slopes and/or should be treated differently than naturally occurring steep slopes. As such, the Board finds that the fact that the steep slopes at issue are manmade does not constitute a reason proving the positive criteria of a "c(1)" or "c(2)" variance for the hard surface coverage deviation, and also does not constitute a reason satisfying the negative criteria of a "c(1)" or "c(2)" variance for the hard surface coverage deviation.

Further, the Board finds it highly significant that the applicant could have eliminated a pump station or two (reducing the fueling dispensers from 12 to 10 or 8) which the Board finds would most likely reduce the amount of hard surface coverage so as to comply with the ordinance requirement. The fact that the applicant's business model does not allow for the reduction of the number of structures on the property to reduce the hard surface to comply with the ordinance leads the Board to find that the size of the proposed gas station is simply too large for the property, not that the property is undersized so as to warrant "c(1)" hardship variance relief. Moreover, the Board finds that any alleged "hardship" in complying with the ordinance requirement is entirely self-created so does not warrant "c(1)" variance relief. Further, the Board cannot find that any purpose of the MLUL will be advanced by granting a "c(2)" variance to allow the hard surface coverage deviation. As far as the Board can determine form the evidence submitted, the only interests that will be advanced by the grant of a hard surface coverage variance are the private interests of the applicant.

Second, the applicant's planning expert testified regarding the need for the two variances to allow the deviations from (a) the 100-foot no structure setback requirement and (2) the 75-foot no disturbance area. The planning expert testified that he believed that the need for variance relief from both of these zoning ordinance requirements was "not related to this specific development proposal, but [was] a function of the unique characteristics and constraints of the site itself." 5/16/2019T17-17 to 21. Further, the planning expert testified that he thought "the proposed development can achieve the purposes of protecting the stream and the associated natural resources despite the deviations." 5/16/2019T18-3 to 7. The reasons he cited in support of this opinion were that (1) "there is no disturbance proposed on the physical bank of the stream," (2) the "existing wood line along the bank would be preserved," and (3) "additional landscape plantings would be provided within the buffer zone . . . ." 5/16/2019T18-8 to 12. The Board disagrees with all of the planning expert's opinions in these regards for the following reasons.

To begin with, the Board finds that the requested "c" variances from the 75-foot non-disturbance area and the 100-foot structure setback ordinance requirements are directly related to the specific proposed development. While a smaller gas station might not eliminate the necessity for the variances altogether, the Board finds that eliminating a pump station or two (reducing the fueling dispensers from 12 to 10 or 8) would more likely than not reduce the square footage of structures in the 100-foot structure setback and the square footage

of disturbance in the 75-foot no-disturbance area. The fact that the applicant's business model does not allow for the reduction of the number of these structures to reduce the extent of the deviations and variances at issue leads the Board to not only find that requested variance relief from the applicable ordinance requirements is directly related to the specific proposed development but also to the find that the size of the proposed gas station is simply too large for the property, not that the property is undersized so as to warrant "c(1)" hardship variance relief. Moreover, the Board finds that any alleged "hardship" in complying with the ordinance requirement is entirely self-created so does not warrant "c(1)" variance relief. Further, the Board cannot find that any purpose of the MLUL will be advanced by granting a "c(2)" variance to allow the disturbance of the 75-foot non-disturbance area and the encroachment into the 100-foot setback area. As far as the Board can determine from the evidence submitted, the only interests that will be advanced by the grant of the two variances are the private interests of the applicant.

Further, the Board cannot find that the proposed development will achieve the purposes of protecting the stream and the associated natural resources unless the applicant proposed some sort of stream enhancement, enhanced stream protection and enhanced natural resource protection over and above that required by the existing Township ordinance provisions, and the Board finds that no such enhancement has been proposed. The Board is at a loss to understand how granting a variance to allow more disturbance in the non-disturbance area than is permitted by ordinance and more structures in the setback area than are permitted by ordinance can be considered a public benefit justifying the grant of "c(2)" variances from the ordinance protecting those areas from disturbance and structures.

Finally, the Board is not persuaded that the fact that "there is no disturbance proposed on the physical bank of the stream" and that the "existing wood line along the bank would be preserved" in any way, shape or form satisfies the negative criteria. The Board notes and finds that the ordinance requirements at issue are not simply intended to protect the stream bank and trees along the stream bank. Ordinance section 16.64.110.A.1 is intended to "preserve the existing environmental and natural features of the Township." The ordinance by its terms defines these features as including all features within 75-feet of a stream bank, not just the stream bank and/or the stream. The Board is not persuaded that the variances can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the master plan and zoning ordinance where granting the variances will allow more disturbance than permitted in the 75-foot non-disturbance area and more structures than permitted in the 100-foot setback area, directly contrary to the intent and purpose of the ordinance provisions at issue which are to protect the natural resources at issue.

As to the planning expert's testimony that landscaping and trees are proposed to be planted in this area (presumably attempting to address the negative criteria), the Board notes and finds that landscaping and reforestation are separate requirements under ordinance sections 16.20.040.E.(3) and 16.20.040.T(5). Further, the Board notes and finds that providing landscaping and trees which are required by the aforementioned ordinance provisions is no substitute for preserving the existing natural woodlands and vegetation which are proposed to be entirely removed as part of the proposed development, which preservation is required by ordinance sections 16.64.110.A.1. Moreover, the applicant actually requires and has requested exception relief from the landscaping and reforestation requirements at issue. The applicant has requested an exception from site plan ordinance section 16.20.040.E.(3) to allow it to provide

38.7-feet of landscape buffer adjacent to the neighboring Lot 22 containing the residential dwelling, which is approximately half of the 75-feet of landscape buffer required under the ordinance. The applicant has also requested an exception from site plan ordinance section 16.20.040.T to allow it to plant the replacement trees on some off-site location(s). For these reasons, the Board is not persuaded that the landscaping and trees proposed to be planted in this area mitigate, let alone eliminate, the substantial detriment to the public good and the substantial impairment of the intent and purpose of the master plan and zoning ordinance that will result from granting the requested "c" variances at issue.

Third, the applicant's planning expert opined that variances were warranted for the following six (6) setback deviations / encroachments proposed in the minimum 75-feet front yard setback area for the following buildings and structures: (1) canopy over gas station located 40.5-feet from the front property line along Route 31, (2) canopy over gas station located 62.8-feet from the front property line along New Castle Way, (3) convenience store located 73.8-feet from the front yard along New Castle Way, (4) trash enclosure for both uses located 35.5-feet from the front property line along New Castle Way, (5) tanks as close as 41.0-feet to the front yard along Route 31, and (6) tanks as close as 14.4-feet to the front yard along New Castle Way. The Board is not persuaded that any of these variances are warranted under the "c(1)" and/or "c(2)" variance criteria.

In an attempt to justify the canopy encroachments into the setback areas, the planning expert testified that the canopy encroachments do not have the same impact as a building encroachment would because there is not as much mass or surface footprint generated by a canopy as compared to a building. 5/16/2019T19-19 to 24. Additionally, the planning expert testified that the canopy provides benefits to the public by affording weather protection. 5/16/2019T19-25 to 20-3. The Board finds that the planning expert's focus misses the point. While the Board agrees that a canopy provides benefits to the public by affording weather protection, that has nothing to do with whether the activities under the canopy should or should not be placed in such locations so that the canopy can comply with the setback regulations. In fact, the evidence reflects that 91% of the canopy is located within the front yard setback along New Castle Way. 6/6/2019T75-4 to 8. Similarly, while the Board agrees that, because the canopy itself does not have walls, it does have less mass than a building, the activities that take place under the canopy have more of an adverse impact than activities that take place within a building because they are visible from the roads. The Board finds that the activities that will take place under the canopy here will take place much closer to the roads than if the canopy complied with the 75-foot minimum setback requirement. The Board finds that the applicant failed to meet its burden of proving that the setback variances for the gas station canopy should be granted under the positive criteria applicable to "c(1)" and/or "c(2)" variances. The Board also finds that the applicant failed to meet its burden of proving that any such variances could be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the master plan and zoning ordinance.

In an attempt to justify the variance to allow the trash enclosures to encroach into the front yard setback areas (it is proposed to be located 35.5-feet from the front property line along New Castle Way where the required minimum front yard setback is 75-feet), and in an attempt to justify the variances to allow the gasoline storage tanks to encroach into the front yard setback areas (tanks as close as 41.0-feet to the front yard along Route 31 and tanks as

close as 14.4-feet to the front yard along New Castle Way, where the required minimum front yard setback is 75-feet), the planning expert testified that the enclosures were located "in the most logical portion of the site, given the layout," 5/16/2019T20-13 to 14, and "the tanks are located in the most appropriate portion of the site, given the layout of the operation." 5/16/2019T21-6 to 8. The Board is not persuaded that these reasons satisfy the positive criteria to support granting "c(1)" and/or "c(2)" variances. Moreover, the Board notes that this reasoning begs the question. In essence, the planning expert's opinion is that because there is no room on the property to place the enclosures and the tanks in compliant locations due to the layout of the proposed convenience store and gas station, the location chosen to place them where they encroach into the front yard setback is justified. This is circular reasoning. The Board finds that the requested variances from the applicable ordinance requirement at issue are not related to the size and shape of the property but are directly related to the size of the proposed gas station being simply too large for the property. The Board finds that any alleged hardship is thus entirely self-created. And, the Board finds that no purposes of the MLUL will be advanced by trying to shoehorn an oversized development onto the constrained lot.

For all of the foregoing reasons, the Board finds that the applicant failed to prove by a preponderance of the evidence the positive and negative criteria of "c(1)" and/or "c(2)" variances from the zoning ordinance regulations at issue.

c. **Ultimate Conclusion to Deny the "C" Variances.** For all of the foregoing reasons, the Board finds that it must deny the requested "c" variances.

10. **Denial of the Requested Site Plan Ordinance Exceptions as Moot.** As set forth above, the applicant requested eleven (11) exceptions to allow deviations from the site plan ordinance requirements as are specifically identified in the "Zoning Relief Table" prepared by the applicant and attached to and made part of this resolution (and which are listed above on page 2 of this resolution). While the Board made findings and conclusions as to the requested "c" variances even though they were technically moot [26] for purposes of providing a more complete record, the Board declined to make findings and conclusions as to the requested exceptions because the Board did not believe it should consider and/or approve any exceptions in the absence of approval of all of the "d(1)", "d(3)" and "c" variances. The Board thus denies the requested exceptions because they are moot.

11. **Standards for Conditional Use Approval and Preliminary and Final Site Plan Approval.** The last items of relief requested by the applicant are conditional use approval and preliminary and final site plan approval. N.J.S.A. 40:55D-67a provides that a zoning ordinance may provide for conditional uses which shall be granted by the Board if the applicant meets the "specifications and standards" set forth in the ordinance. The Board must thus determine whether the proposed conditionally permitted use complies with all conditional use requirements set forth in the ordinance. N.J.S.A. 40:55D-67b provides that the "review by the

[26] As set forth above, a request for relief becomes moot when the relief sought, if granted, can have no practical effect. N.Y. Susquehanna & Western Railway v. State, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd o.b., 204 N.J. Super. 630 (App. Div. 1985); Greenfield v. N.J. Dept. of Corrections, 382 N.J. Super. 254, 257-258 (App. Div. 2006) ("An issue is 'moot' when the decision sought in the matter, when rendered, can have no practical effect on the existing controversy"). Requests for relief that become moot should ordinarily be dismissed. Cinque v. Dept. of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993).

planning board of a conditional use shall include any required site plan review." N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of the preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that the Board "shall" grant preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

As such, if the application complies with all zoning ordinance regulations and all site plan ordinance requirements, the Board must grant conditional use approval as well as preliminary and final site plan approval. Conversely, if the application does not comply with all ordinance regulations and requirements, the Board must deny approval. CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010) (as to conditional use approval); Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010) (as to site plan approval).

However, there are exceptions:

In the case of a conditional use application, there is one exception. Where a conditional use application does not comply with all conditional use ordinance standards but the Board grants relief in terms of a "d(3)" conditional use variance, the Board then must review the application against all remaining zoning ordinance regulations and site plan ordinance requirements and grant conditional use approval if the application complies with all such remaining regulations and requirements. Unlike a site plan or subdivision ordinance application, if the conditional use application does not comply with all conditional use ordinance standards, a condition cannot be imposed providing for subsequent compliance. As the court explained in CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010), if an application for conditional use approval does not comply with all conditional use ordinance standards, the Board must deny conditional use approval unless it has granted a "d(3)" conditional use variance from the conditional use standard at issue. Id.

In the case of a site plan application, there are two exceptions. The first exception is where a site plan application does not comply with all ordinance regulations and requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance regulations and requirements and grant approval if the application complies with all such remaining regulations and requirements. The second exception is where a site plan application does not comply with all ordinance regulations and requirements but a condition can be imposed requiring a change that will satisfy the ordinance regulations and/or requirements. In that case, the Board can either grant site plan approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance regulations and/or requirements prior to the Board granting site plan approval.

Notwithstanding the two exceptions set forth above, and notwithstanding that N.J.S.A. 40:55D-46a allows site plan and related engineering documents to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant site plan preliminary

approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary site plan review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, approval must be denied. Id. And, the Board cannot grant final site plan approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

Finally, because conditional use approval and preliminary and final site plan approval in this application are connected to a "d" variance, an approval that would otherwise be 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 v. BPR Co., 107 N.J. 1, 4, 21 (1987).

12. **Findings and Conclusions as to Requests for Conditional Use Approval and Preliminary and Final Site Plan Approval.** The Board's findings and conclusions as to the requests for conditional use approval and preliminary and final site plan approval are that approval should be denied because the Board has denied the "d(1)" variance, the "d(3)" variances, and the "c" variances. As such, the Site Plans do not comply with all applicable zoning ordinance regulations so conditional use approval and preliminary and final site plan approval must be denied. See, CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010) (as to conditional use approval); Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010) (as to site plan approval). Further, the Board finds that conditional use approval and preliminary and final site plan approval cannot be granted in this case without substantial detriment to the public good and without substantial impairment of the intent and purpose of the master plan and zoning ordinance. In this regard, the Board repeats its finding from above that the applicant is trying to force a square peg into a round hole. The only circumstances that the Board believes would ensure that the approval of the conditionally permitted gas station and the proposed site plan would not result in substantial detriment to the public good and substantial impairment of the intent and purpose of the master plan and zoning ordinance would be either the convenience store being eliminated from the proposed development and the gas station relocated to comply with most, if not all of the zoning ordinance bulk regulations and the two site plan ordinance requirements at issue, or the convenience store and gas station being reduced in size so as to substantially reduce the number and/or extent of the deviations proposed. Finally, the Board again notes the applicant's representative made it clear that the applicant has a business model that it intends to adhere to and that model includes both the large convenience store and large gas station that have been proposed in this application.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD BY MOTION DULY MADE AND SECONDED ON SEPTEMBER 19, 2019 AS FOLLOWS:**

**B. RELIEF DENIED**

1. **Denial of "D(1)" Variance on the Merits.** The Board hereby denies the requested "d(1)" variance on the merits as more specifically set forth above in this resolution.

2. **Denial of "D(3)" Variances on the Merits.** The Board hereby denies the requested "d(3)" variances on the merits as more specifically set forth above in this resolution.

3. **Denial of "C" Variances on the Merits.** The Board hereby denies the requested "c" variances on the merits as more specifically set forth above in this resolution.

4. **Denial of the Exceptions as Moot.** The Board hereby denies the requested exceptions as moot as more specifically set forth above in this resolution.

5. **Denial of Conditional Use Approval and Preliminary and Final Site Plan Approval on the Merits.** The Board hereby denies on the merits the requested conditional use approval and the requested preliminary and final site plan approval as more specifically set forth above in this resolution.

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**VOTE ON MOTION MADE AND SECONDED ON SEPTEMBER 19, 2019:**

**THOSE IN FAVOR OF DENIAL: KUHL, SCHAEFER, DOMINGUEZ, FARSIOU, BLOCK, AHRENS & FERRARO.**

**THOSE OPPOSED TO DENIAL: NONE.**

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The above memorializing resolution was adopted on November 7, 2019 by the following vote of eligible Board members:

| Member | Yes | No | Abstain | Absent |
|---|---|---|---|---|
| KUHL | X | | | |
| SCHAEFER | X | | | |
| DOMINGUEZ | X | | | |
| FARSIOU | | | | X |
| BLOCK | X | | | |
| AHRENS | X | | | |
| FERRARO | X | | | |

**ATTEST:** _____

**AMY FLEMING**
**Board Secretary**

## ZONING RELIEF TABLE

| CODE SECTION | REQUIRED | PROPOSED |
|---|---|---|
| § 16.68.050.A CONDITIONAL USE REQUIREMENTS | THE USE SHALL BE A CONDITIONAL USE AS SET FORTH IN SCHEDULE IV SET OUT IN THE APPENDIX FOLLOWING THIS TITLE AND SHALL CONFORM TO ALL APPLICABLE REGULATIONS AND STANDARDS GOVERNING THE ZONE IN WHICH IT IS PERMITTED, EXCEPT AS MAY BE MODIFIED BY THIS CHAPTER. | DOES NOT COMPLY; SEE TABLE OF LAND USE AND ZONING (V) |
| § 16.68.050.B CONDITIONAL USE REQUIREMENTS | ALL DESIGN STANDARDS AND REQUIREMENTS OF CHAPTER 16.18 AND SITE PLAN REVIEW STANDARDS, CHAPTER 16.20 SHALL APPLY AS APPROPRIATE. | DOES NOT COMPLY; SEE OFF-STREET PARKING AND LOADING TABLE AND BUFFER REQUIREMENTS TABLE (V) |
| § 16.68.050.C CONDITIONAL USE REQUIREMENTS | OFF-STREET PARKING AND LOADING FACILITIES SHALL, BE PROVIDED AS REQUIRED IN CHAPTER 16.70 AND THE DESIGN STANDARDS FOR SITE PLAN REVIEW AND INGRESS AND EGRESS SHALL BE SO DESIGNED AS TO CAUSE MINIMUM INTERFERENCE WITH TRAFFIC OR ABUTTING STREETS. | DOES NOT COMPLY (V) |
| § 16.68.050.D CONDITIONAL USE REQUIREMENTS | ALL APPLICABLE PERFORMANCE STANDARDS AS SET FORTH IN CHAPTER 16.74 SHALL BE MET AND DOCUMENTED AS TO COMPLIANCE. | DOES NOT COMPLY (V) |
| § 16.68.050.E CONDITIONAL USE REQUIREMENTS | ALL APPLICABLE PROVISIONS OF ARTICLES IV AND V OF THIS TITLE, AND OTHER APPROPRIATE CHAPTERS OF THE TOWNSHIP CODE SHALL BE MET. | DOES NOT COMPLY (V) |

## ZONING RELIEF TABLE (CONTINUED)

| CODE SECTION | REQUIRED | PROPOSED |
|---|---|---|
| § 16.64.010 SCHEDULE OF AREA, YARD AND BUILDING REQUIREMENTS | MIN. FRONT YARD SETBACK 75 FT | NJSH ROUTE 31 CANOPY: 40.5 FT (V)<br><br>NEW CASTLE CANOPY: 62.8 FT<br>STORE: 73.8 FT<br>TRASH: 35.5 FT (V) |
| §16.64.130.B STEEP SLOPE PROVISIONS | MAXIMUM ALLOWABLE HARD SURFACE AREA: 54,809 SF (49.6%) | 51.3% (56,747.1 SF) (V) |
| § 16.64.100.C.3 PETROLEUM CAPACITIES | MIN. FRONT YARD SETBACK FOR TANKS: 75 FT | NJSH ROUTE 31 TANK: 41.0 FT (V)<br><br>NEW CASTLE WAY<br><br>TANK: 14.4 FT (V) |
| § 16.64.110(A)(1) PRESERVATION OF NATURAL FEATURES | NO STRUCTURE SHALL BE BUILT WITHIN ONE HUNDRED (100) FEET AND NO DISTURBANCE OF SOIL OR VEGETATION SHALL OCCUR WITHIN SEVENTY-FIVE (75) FEET OF THE TOP OF THE BANK OF AN EXISTING STREAM | DOES NOT COMPLY; DISTURBANCE WITHIN 75 FT AND STRUCTURE WITHIN 100 FT |
| § 16.20.010 (G)(6) LIGHTING REQUIREMENTS | LIGHTING OF WALKWAYS<br><br>MAXIMUM ILLUMINATION: 0.5 FOOT-CANDLES. | 6.4 FOOTCANDLES (W) |
| § 16.20.010 (G)(10) LIGHTING REQUIREMENTS | GENERAL LIGHTING DESIGN<br><br>MINIMUM SETBACK TO PROPERTY LINE: THREE (3) TIMES THE FIXTURE'S MOUNTING HEIGHT ABOVE GRADE AT THE PROPERTY LINE (36 FT) | 9.8 FT (W) |
| § 16.20.040.E.3 BUFFERS, FENCES AND BUFFERYARDS | REQUIRED BUFFERYARD DEPTH:<br><br>PORTION OF PROPERTY LINE ADJACENT TO LOT 22 (PROPOSED MEDIUM INTENSITY NON-RESIDENTIAL USE ADJACENT TO AN EXISTING LOWER INTENSITY RESIDENTIAL USE) = 75 FT OF TYPE A OPAQUE SCREEN (OPAQUE YEAR ROUND FROM GROUND HEIGHT TO HEIGHT OF AT LEAST 10 FT WITH INTERMITTENT VISUAL OBSTRUCTION FROM THE OPAQUE PORTION TO A HEIGHT OF AT LEAST 20 FT) | DOES NOT COMPLY; 38.7 FT (W) |

## ZONING RELIEF TABLE (CONTINUED)

| CODE SECTION | REQUIRED | PROPOSED |
|---|---|---|
| § 16.20.040.E.3 BUFFERS, FENCES AND BUFFERYARDS | REQUIRED BUFFERYARD DEPTH:<br><br>PORTION OF PROPERTY LINE ADJACENT TO LOT 22 (PROPOSED MEDIUM INTENSITY NON-RESIDENTIAL USE ADJACENT TO AN EXISTING LOWER INTENSITY RESIDENTIAL USE) = 75 FT OF TYPE A OPAQUE SCREEN (OPAQUE YEAR ROUND FROM GROUND HEIGHT TO HEIGHT OF AT LEAST 10 FT WITH INTERMITTENT VISUAL OBSTRUCTION FROM THE OPAQUE PORTION TO A HEIGHT OF AT LEAST 20 FT) | DOES NOT COMPLY; 38.7 FT (W) |
| § 16.20.040.T(5) | FEE REQUIRED IN LIEU OF PLANTING REPLACEMENT TREES | PLANT REQUIRED NUMBER OF TREES OFF-SITE IN LIEU OF ON-SITE (W) |
| § 16.20.040.M(11) | 15" RCP REQUIRED FOR PIPES | 15" HDPE (W) |
| § 16.20.040.D.4(W) | SHADE TREES SHALL BE LOCATED ALONG ALL STREETS AND DRIVES BUT OUTSIDE ALL PUBLIC ROAD RIGHTS-OF-WAY WHERE POSSIBLE. | DOES NOT COMPLY ALONG ROUTE 31 (W) |
| § 16.20.040.C.2.c CIRCULATION AND PARKING DESIGN STANDARDS | CURBS MAY BE USED AS WHEEL STOPS, PROVIDED THAT A 3 FT OVERHANG IS PROVIDED. THE LENGTH DIMENSIONS OF PARKING SPACES MAY BE ADJUSTED BY 2 FT WHEN OVERHANGS ARE UTILIZED. | DOES NOT COMPLY; NO OVERHANG PROVIDED FOR PARKING ALONG CONVENIENCE STORE (W) |
| § 16.20.040.C.2.i CIRCULATION AND PARKING DESIGN STANDARDS | MIN. PARKING LOTS AND ACCESS DRIVE SETBACKS:<br>ROW LINES = 20 FT | ROW LINES = 10.0 FT (RT 31) / 14.3 FT (NEW CASTLE) (W) |
| § 16.20.040.C.3.a CIRCULATION AND PARKING DESIGN STANDARDS | SIDEWALKS BETWEEN PARKING AREAS AND PRINCIPAL STRUCTURES SHALL BE PROVIDED AT A MINIMUM WIDTH OF 4 FT AND SHALL BE RAISED 6 INCHES | DOES NOT COMPLY, SIDEWALK AROUND CONVENIENCE STORE IS FLUSH (W) |
| §16.20.040.C.10.g CIRCULATION AND PARKING DESIGN STANDARDS | DRIVEWAYS FOR USES ON ADJACENT LOTS SHALL BE NO CLOSER THAN 40 FT AT THE CLOSEST EDGES OF THE DRIVEWAYS AS MEASURED AT THE ROW LINE | DOES NOT COMPLY; 28.2FT (W) |

(W) WAVIER
(V) VARIANCE