Res. #2018-05

BOROUGH OF NEW PROVIDENCE
PLANNING BOARD
33 COUNTRYSIDE, LLC

RESOLUTION

WHEREAS, **33 COUNTRYSIDE, LLC** (the "Applicant") has applied to the Planning Board of the Borough of New Providence (the "Board"), for minor subdivision approval and bulk variance relief, in connection with the construction of two new single-family residential dwellings, one on each proposed lot (Lots 9-A and 9-B), to be situated on vacant property identified as Lot 9, Block 290, more commonly known as 33 Countryside Drive (the "Property"):

1. As to Proposed Lot 9-A: A proposed lot width of 75.65 feet at the setback line, whereas the existing lot width is 160.13 feet at the setback line, and whereas the minimum lot width at the setback line is 120 feet, pursuant to Section 310-13 and Schedule II of the Zoning Ordinance;

2. As to Proposed Lot 9-A: A proposed lot width of between 68 feet and 75.65 feet from the setback line for an additional 40 feet toward the rear lot line, whereas the minimum lot width from the setback line and for an additional 40 feet toward the rear lot line is 120 feet, pursuant to Section 310-13 and Schedule II of the Zoning Ordinance;

3. As to Proposed Lot 9-B: A proposed lot width of 84.48 feet at the setback line, whereas the existing lot width is 160.13 feet at the setback line, and whereas the minimum lot width at the setback line is 120 feet, pursuant to Section 310-13 and Schedule II of the Zoning Ordinance;

4. As to Proposed Lot 9-B: A proposed lot width of between 78 feet and 84.48 feet from the setback line for an additional 40 feet toward the rear lot line, whereas the minimum lot width from the setback line and for an additional 40 feet toward the rear lot line is 120 feet, pursuant to Section 310-13 and Schedule II of the Zoning Ordinance;

5. A proposed shared driveway of a length of approximately 98.25 feet, whereas access drives or driveways for one- and two-family dwellings shall be located entirely on the lot with the principal building, pursuant to Section 310-20.D.2 of the Zoning Ordinance; and

6. A proposed shared driveway width of 25 feet, whereas access drives or driveways for one- and two-family dwellings shall not be more than 16 feet wide at the curb line for a double driveway, pursuant to Section 310-20.D.2 of the Zoning Ordinance; and

WHEREAS, public hearings on notice were held on such application on January 8 (carried), March 6, May 1 (carried), June 12, and July 10, 2018, at which times interested citizens were afforded an opportunity to be heard; and

WHEREAS, the Board Engineer, Michael J. O'Krepky, P.E., P.P., C.M.E., Board Planners, M. McKinley Mertz, P.P., A.I.C.P., and Elena Gable, P.P., A.I.C.P., and the Zoning Officer, Keith Lynch, all were duly sworn according to law; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant, the neighboring objectors and other members of the public, the reports from consultants and reviewing agencies, and the submissions on behalf of the Applicants and the neighboring objectors, has made the following factual findings and conclusions:

1. The Property is a fully conforming lot that is trapezoidal in shape and situated on Countryside Drive near the intersection with Club Lane. The Property consists of 42,132 square feet in total area and is primarily located in the Borough of New Providence in the R-1 Zone. Approximately 4,675 square feet of the southeastern portion of the Property is located in the Township of Berkeley Heights (Block 3903, Lot 31) in the R-20 Zone. The Property is presently undeveloped and has wetlands in the northeast and southeast portions, along with an unnamed tributary that flows through the eastern portion of the Property. The Property is surrounded by other single-family dwellings on lots varying in size.

2. The Applicant proposes to subdivide the Property into two (2) lots, with Proposed Lot 9-A containing 20,400 square feet and Proposed Lot 9-B containing 21,732 square feet. On each of the proposed lots, the Applicant proposes to construct one (1) single-family dwelling and

the associated appurtenances for each. The dwellings will be accessed from a single, shared driveway off Countryside Drive. The proposed dwellings will each be two stories tall, with a basement level and a two-car attached garage. The Applicant also proposes to construct a four-foot tall brick retaining wall around a portion of the wetlands located on the Property.

3. The Applicant's proposal is depicted on engineering plans prepared by William S. Scott, P.E., and Nancy J. Scott, P.L.S., of Ensurplan, Inc., dated September 17, 2017, unrevised, same consisting of four (4) sheets, and architectural plans for both Proposed Lot 9-A and Proposed Lot 9-B, both of which were prepared by Wellisch Architects, LLC, dated September 15, 2017, unrevised, and both of which consist of five (5) pages.

4. Bartholomew A. Sheehan, Jr., Esq., of Dempsey, Dempsey & Sheehan, entered his appearance on behalf of the Applicant. Mr. Sheehan represented that the Property is encumbered by a riparian zone and is partially located in the Township of Berkeley Heights. He further represented that, because the majority of the Property is located in New Providence, a protective application was filed in Berkeley Heights, and that Berkeley Heights had agreed to await the decision of the Board. In the event that the Board approves the application, Berkeley Heights will consider the Applicant's request for waiver relief and/or hear the application filed by the Applicant therein. Mr. Sheehan conceded that both New Providence and Berkeley Heights had to approve the proposal in order for the proposed subdivision and development to proceed. Mr. Sheehan provided a proffer as to the relief requested, the nature of the Property, and the proofs that would be provided on behalf of the Applicant.

5. Carl Woodward, Esq., of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., entered his appearance on behalf of the neighboring objectors Joseph and Marlene Gabriele and Michael and Michele Leoni (the "Neighboring Objectors").

The Applicant's Direct Case:

6. Christopher Maier, a managing member of 33 Countryside, LLC, having an address of 119 Butler Parkway, Summit, was duly sworn according to law. Mr. Maier testified that he has 35 years of building experience as a developer. He described the Property and the variance relief requested. Mr. Maier testified that the Property is trapezoidal and irregular in shape. He further testified that the Property was constrained by a riparian zone, both to the north and to the south of the existing driveway, such that the driveway could not be expanded or relocated, and, thus, both dwellings would share one driveway.

7. Mr. Maier introduced the following exhibits:

- **Exhibit A-1**: Colorized rendering of Lot 9-A;
- **Exhibit A-2**: Colorized rendering of Lot 9-B; and
- **Exhibit A-3**: Photographic essay.

8. Referencing Exhibit A-1, Mr. Maier described the proposed dwelling to be located on Proposed Lot 9-A as a Georgian colonial with double front doors, a front porch, a large window in the foyer, and a front-loading garage. Referencing Exhibit A-2, he described the proposed dwelling to be located on Lot 9-B as a classic colonial with stone accents around the foundation, clapboard, a large bay window, and a side-loading garage. Mr. Maier testified that each of the dwellings would have four bedrooms and three-and-one-half baths. He opined that the proposed dwellings would be in character with the neighborhood, which he described as being known for its rural ambience. Mr. Maier further testified that he could construct conforming dwellings with greater than 4,200 square feet of livable area each, but the dwellings on Proposed Lots 9-A and 9-B are proposed to have a livable area of only 3,583 square feet and 3,255 square feet, respectively.

9. Mr. Maier testified that, if the Property were not subdivided, a single 8,000 square foot dwelling could be located on same, but he would have to get a purchase price of $2.75 million to justify it and he opined that the area would not support his getting such a high price. On questioning by the Board, he responded that he was looking for approximately $1.2 to $1.3 million per proposed dwelling.

10. On questioning by the Board as to how the shared driveway would appear from the right-of-way, Mr. Maier referenced Exhibit A-3, a photographic essay. He testified that Mr. Tobia had taken the photographs and that they accurately depict the Property as it presently exists. Mr. Maier testified that the location and size of the driveway are limited by environmental constraints and that the New Jersey Department of Environmental Protection ("NJDEP") would not grant any relief that would allow the Applicant to construct two separate driveways of an appropriate width. On questioning by the Board regarding the maintenance of the shared driveway, Mr. Maier testified that the neighbors would have to work together to figure out how to do so and who would bear what costs.

11. On questioning by the Board, Mr. Maier testified that, originally, he intended to construct a 5,000 square foot dwelling on the Property for his business partner, but ultimately circumstances changed. He also conceded that there would be a market for a single-family dwelling on the Property with between 5,000 and 6,000 square feet of livable space.

12. Members of the public inquired as follows:

a. Thomas Gavenda, 96 Club Drive, Summit, NJ, questioned whether there would be sufficient parking for both dwellings, particularly given the shared driveway.

b. Marlene Gabriele, 23 Countryside Drive, Summit, NJ, inquired whether the proposal would be consistent with the neighborhood.

c. Karen Luongo Kapuscinski, 83 Club Drive, Summit, NJ, questioned the nature of the proposed shared driveway.

d. Michael Leoni, 55 Countryside Drive, Summit, NJ, inquired whether a shared driveway was in character with the neighborhood and was advised that Mr. Maier was not aware of any other shared driveways on Countryside Drive.

e. Patrice Healey, 18 Countryside Drive, Summit, NJ, questioned the relief requested, what the selling price would be and whether it was viable.

f. Cynthia Gavenda, 96 Club Drive, Summit, NJ, inquired why the Applicant decided against constructing one larger house and, instead, sought the requested subdivision.

g. Zhiping Pang, 122 Gallinson Drive, New Providence, NJ, questioned the size of the proposed lots.

h. Joanne Bonacci, 62 Middle Way, Summit, NJ inquired whether Mr. Maier was familiar with another lot that has been subdivided into two lots in a similar way to what he was proposing and was advised that he is not. She further inquired about the potential risk of not obtaining the purchase price Mr. Maier desired for each dwelling.

i. Russell Hovland, 147 Countryside Drive, Summit, NJ, questioned the proposed lot sizes and frontages, and whether the proposal was consistent with the neighborhood.

j. Charles Rizzo, 128 Gallinson Drive, Murray Hill, NJ, questioned how many trees would be removed and whether additional trees would be planted to serve as a landscape buffer between his lot and the Property.

k. Arpad and Yi Szechenyi, 184 Mountain Avenue, New Providence, NJ, inquired whether the Applicant would commit to a sales price of 1.2 million dollars per dwelling.

13. William S. Scott, P.E., having a business address of Ensureplan, Inc., 172 Washington Valley Road, Suite One, Warren, New Jersey, was duly sworn according to law, provided his credentials and was accepted by the Board, without objection, as an expert in the field of civil engineering. Mr. Scott described the topography and environmental constraints of the Property. He further described the location of the riparian zones and testified that the

Applicant believed it needed to obtain two permits from the NJDEP in order to reconstruct the existing driveway and provide utilities crossing a waterway. On questioning by the Board as to whether the NJDEP would allow an additional or wider driveway, Mr. Scott opined that it would not.

14. Mr. Scott introduced into evidence, as **Exhibit A-4**, a Limited Landscape Plan. Referencing same, Mr. Scott testified that the Applicant was proposing to remove seven of the existing trees. He further testified that the Applicant intended to install additional Norway Spruce trees, flowering trees, and foundation plantings. On questioning by the Board, Mr. Scott stated that the Applicant did not intend to provide any buffering between the two proposed dwellings.

15. Mr. Scott testified that electricity would come in overhead to a pole and then underground to the dwellings through conduits. He explained that, for sanitary sewer, the Applicant would use the existing sanitary sewer easement to the north of the Property. Mr. Lynch stated that the existing sanitary lateral uses a four-inch main, that the Borough Sewer Authority has no way of maintaining such a small main capacity, and that the Applicant would have to replace the four-inch main with a six-inch main.

16. Mr. Scott testified that the Applicant was proposing two drywell systems for stormwater management and that the calculations reflected that there would be a small net reduction of stormwater runoff. He further testified that the Applicant's proposal was compliant with the Residential Site Improvement Standards ("RSIS") standards.

17. On questioning by the Board, Mr. Scott testified that the driveway would remain 22.4 feet wide at the curb cut, but taper down to approximately 10 or 11 feet near the stream crossing. He further testified that two cars could not pass each other along the shared driveway, and that the NJDEP was unlikely to allow for any deviation to accommodate same. Members of

the Board questioned whether the NJDEP provided comments as to the proposed subdivision or as to the initially proposed single dwelling on the Property. Mr. Scott testified that the NJDEP had only reviewed the initial proposal, not the current proposal. Notwithstanding same, he opined that the Applicant could not go to NJDEP and obtain another stream crossing approval for a new driveway.

18. On questioning by the Board as to whether the Applicant had conducted percolation testing to assess whether the proposed drywell system would function, Mr. Scott advised that such percolation testing had not yet been done. He further advised that if the Applicant encountered ground water, the system could be made wider, or shallower, or an alternative retention system could be proposed. As to the engineering review memo prepared by Mr. O'Krepky, the Applicant stipulated to complying with all of the comments contained in same.

19. Members of the public inquired as follows:

a. Karen Luongo Kapuscinski, 83 Club Drive, Summit, NJ, questioned whether the Applicant would be required to submit a new application to the NJDEP and whether the Applicant would accurately map the waterways on the Property so as to ensure that the proposed setbacks are compliant as measured from the center of the stream. Mr. O'Krepky advised that any approval issued by the Board would be subject to the approval of the requested permits from the NJDJEP, and that if the NJDEP did not approve the plan, the approval from the Board would no longer be valid. Ms. Kapuscinski also questioned the dimensions of the proposed dwelling (70 feet, end to end) and whether there were other dwellings with a depth of 70 feet in the neighborhood (none).

b. Patrice Healey, 18 Countryside Drive, Summit, NJ, inquired about the proposed retaining wall and whether same would be visible from the street. Mr. Scott opined that he would be surprised if anyone would notice the wall.

c. Michael Leoni, 55 Countryside Drive, Summit, NJ, questioned the location of the proposed dwellings in relation to the existing dwellings.

d. Cynthia Gavenda, 96 Club Drive, Summit, NJ, inquired whether the Applicant's proposal would have a detrimental impact on her property and whether the stormwater runoff conditions would be worsened given the existing chronic water issues in the neighborhood. Mr. Scott opined that the proposal would not make the existing stormwater management runoff conditions any worse.

e. Joe Schickel, 16 Lee Lane, Summit, NJ, questioned what the development would look like as viewed from the street, and the Applicant agreed to provide a rendering of same at the next meeting.

f. Marlene Gabriele, 23 Countryside Drive, Summit, NJ, inquired about the width of the sewer lateral and whether a wider pipe would be used given the existing difficulty with cleaning it out. She further inquired as to what her recourse would be if the proposed stormwater management facility failed. Mr. Scott advised that the Applicant's stormwater management system utilized an existing gully crossing the driveway. Ms. Gabriele questioned the proposed stormwater management system and whether the gully could be redirected such that stormwater runoff would not flow onto her property. The Applicant stipulated to removing any piping that is not connected to the stormwater management plan and to complying with the requirements of the Borough and the NJDEP as to stormwater management.

20. The hearing on May 1, 2018 was carried for counsel for the Applicant and for the Neighboring Objectors to brief the legal issue regarding whether Lot 31 in Berkeley Heights should be included in the calculation of the dimensional variances at issue. Both counsel, as well as the Board Attorney, subsequently agreed that the calculations were done correctly by including the lot area of the Berkeley Heights portion of the parcel, for the reasons set forth in their respective submissions and stated on the record.

21. Michael Tobia, P.P., having a business address of 546 Van Beuren Road, Morristown, New Jersey, was duly sworn according to law, provided his credentials and was accepted by the Board, without objection, as an expert in professional planning. Mr. Tobia entered into evidence, as **Exhibit A-5**, a colored rendering of the lot coverage and plantings proposed for the Property.

22. Mr. Tobia opined that the proposal was for a simple subdivision and that the only physical features on the lot are the curb cut and the remains of the driveway. He testified that the shared driveway is required because of the flood hazard area on the easterly side of the Property and that the NJDEP would not allow a second driveway or the removal of any vegetation in the riparian zone. Mr. Tobia further testified that the lot area of Proposed Lot 9-A and Proposed Lot 9-B exceeded the minimum required lot size by 13% and 20%, respectively, and that the proposed dwellings were smaller than the maximum permitted for the lot area (3,200 square feet proposed; approximately 4,200 square feet permitted). He stated that the proposed lots met all of the bulk regulations, except for lot width at both the setback line and for an additional 40 feet to the rear of the setback line. Mr. Tobia explained that, in addition to the lot width variances, the Applicant's proposal required a variance for the shared driveway itself and a variance for the width of the shared driveway.

23. On questioning by the Board as to the shared driveway use and circulation on the lots, Mr. Tobia testified that parking at the throat of the driveway would not be permitted because it would impede emergency personnel access to the Property. When asked how such prohibited parking could be prevented, Mr. Tobia suggested that the homeowners come to an agreement as to same. He explained that the proposed curb cut is required by the NJDEP for safety reasons, and that the shared driveway would be 14 feet wide at the right-of-way, 25 feet at the curb, and then taper to 12 feet for the remaining 80 foot portion of the driveway leading to the dwellings. Mr. Tobia conceded that the only place where two vehicles can pass each other in the driveway is at the curb cut.

24. As to the lot width deviations, Mr. Tobia testified that the Property is more than twice the minimum size for the zone. He opined that the Board should consider two factors: the

shape of the lot (trapezoidal) and the depth of the lot. Mr. Tobia explained that the proposed dwellings were designed to be long and narrow so as to work with the size and shape of the lots. He opined that the Applicant could satisfy the criteria for variance relief pursuant to N.J.S.A. 40:55D-70(c)(1) given the existence of the 4,500 square foot riparian zone. Moreover, he opined that the Applicant's proposal would be more in character with the existing neighborhood than one, large, 5,000 plus square foot dwelling.

25. On questioning by the Board Planner as to whether the undue hardship that would be incurred by the Applicant if the zoning regulations were to be strictly enforced would be a self-created hardship, Mr. Tobia opined that it would not be so. He contended that the hardship would not be self-created because the variance is based on the physical characteristics of the Property, not what the Applicant seeks to do (here, subdivide a conforming lot into two nonconforming lots). He further opined that the Board could consider the proposal to be a better zoning alternative in adjudicating the application. In this regard, Mr. Tobia opined that the proposed subdivided lots were more in character with the neighborhood than a single large dwelling. On questioning by the Board, Mr. Tobia conceded that the construction of one large dwelling would require less trees to be removed. On further questioning by the Board, Mr. Tobia conceded that the existing Property is a conforming lot and that no variance relief would be required if the Applicant were to build one dwelling on the Property as it exists, rather than seeking to subdivide the Property and build two dwellings, one on each subdivided lot.

26. Mr. Woodward, on behalf of the Neighboring Objectors, cross-examined Mr. Tobia as to the magnitude of the variance relief requested. Mr. Tobia conceded that the lot width at the setback line for Proposed Lot 9-A is only 75.56 feet, or only 63% of the lot width required at the setback line, and only 56% of the lot width required for a distance of 40 feet to the rear of

the setback line. Mr. Tobia further conceded that the lot width at the setback line for Proposed Lot 9-B is only 84.8 feet, or only 70% of the lot width required at the setback line, and only 62% of the lot width required for a distance of 40 feet to the rear of the setback line. Mr. Woodward questioned whether there were any other lots in the neighborhood that have the long axis of the dwelling thereon perpendicular, rather than parallel, to Countryside Drive, and Mr. Tobia conceded that he had not studied the other dwellings along Countryside Drive in that regard.

27. Mr. Woodward inquired whether two cars could traverse the shared driveway at the same time. Mr. Tobia advised that, with care, two cars could pass each other going in opposite directions, notwithstanding a proposed driveway width of only 12 feet at certain points. Mr. Woodward inquired of Mr. Tobia as to the lot widths of other lots in the neighborhood and Mr. Tobia conceded that he had not studied same. Mr. Tobia also conceded that he was unaware of the size of the prior dwelling on the Property, because it had been demolished prior to the filing of the application.

28. Karen Luongo Kapuscinski, 83 Club Drive, Summit, New Jersey, questioned whether the rendering introduced into evidence as Exhibit A-5, was accurate as to the grading and topographical features of the Property, and Mr. Tobia conceded that it was not accurate. She further inquired as to the extent of foundation wall that would be exposed, and Mr. Tobia conceded that a seven-foot exposure of a foundation wall below the slab would be atypical.

29. Natalie Schickel, 16 Lee Lane, Summit, New Jersey, questioned how tall the dwellings would appear given the grading on the Property. Mr. Lynch explained that building height is measured from the average existing grade around the perimeter of the proposed dwelling. On further questioning, Mr. Tobia conceded that, in certain areas, the dwelling will appear taller than the measured height.

The Neighboring Objectors' Opposition Case:

30. The Neighboring Objectors, through their counsel, Mr. Woodward, presented Peter G. Steck, P.P., as an expert witness. Mr. Steck, having an address of 80 Maplewood Avenue, Maplewood, was duly sworn according to law, provided his credentials, and was accepted by the Board, without objection, as an expert in the field of professional planning. Mr. Woodward introduced into evidence, as **Exhibit O-1**, Mr. Steck's curriculum vitae.

31. Mr. Steck introduced into evidence, as **Exhibit O-2**, a three page (double sided) compendium that he prepared, containing the following:

(1) A 2002 satellite infrared photograph from NJDEP taken prior to the demolition of the 80' wide house and existing driveway with the proposed subdivision superimposed;

(2) An excerpt from site plan showing the proposed lot widths for each lot with red lines indicating the lot widths at the setback and 40' back from the setback;

(3) Schedule II of the New Providence Requirements with the Lot and Yard Requirements for the R-1 Zone;

(4) A photograph of the property looking west from Countryside Drive;

(5) A photograph of the interior of the property looking south toward Countryside Drive;

(6) A photograph of the stream looking north;

(7) A photograph of the stream crossing on the Property;

(8) Tax Map of Countryside Drive with photographs of the existing dwellings in the neighborhood;

(9) A 2002 aerial photograph from NJDEP with lot widths at the building setback superimposed thereon;

(10) Portions of New Providence and Berkeley Heights Zoning Maps, and

(11) Select objectives of the May 2, 2017 Master Plan Re-Examination Report and Statement of Problems Reduced or Increased in the 2017 Master Plan Re-Examination Plan.

32. Mr. Steck testified that the Property as it presently exists is fully conforming to the zoning requirements, but that the proposed subdivision of the Property requires six separate variances: two for the lot widths at the setback line (one for each lot), two for the lot widths from the setback line for a distance of 40 feet toward the rear lot line (one for each lot), one for the shared driveway and one for the excessive width (25 feet wide) of the curb cut. He further testified that the required lot width at the setback is 120 feet in New Providence and 100 feet in Berkeley Heights.

33. Mr. Steck opined that the Applicant's proposal does not preserve the unique character of the existing neighborhood at issue, nor does it protect sensitive ecological areas in the Borough. He further opined that the excessive depth of the Property was less important than the deficient lot width, because lot width at the right-of-way is easily visible, whereas lot depth is not so visible since, generally, people do not look into their neighbors' rear yards. Mr. Steck stated that, typically, there is one driveway per dwelling, and here, there is a shared driveway. He opined that shared driveways are associated with peculiar development problems, particularly problems with property safety and maintenance.

34. As to the alleged uniqueness of the Property, Mr. Steck testified that most of the lots in the neighborhood also exceed the minimum required lot width and are impacted by the stream. He further testified that other properties had been improved notwithstanding the existence of the stream and, therefore, the Property was not unique. Mr. Steck testified that the stream was an environmental feature that should be preserved in accordance with the 2003 Master Plan and 2017 Master Plan Re-examination. Mr. Steck opined that the Property as it

exists is conforming, it is similar to the other lots in the area, and it could be improved with one single-family dwelling, rather than two dwellings on subdivided lots as proposed. He confirmed that the proposed lots would have significantly substandard lot widths at the setback line and for a span of 40 feet from the setback line toward the rear lot line. Mr. Steck further opined that the Applicant had not demonstrated that the hardship that would be incurred by the Applicant, if the lot width requirements were strictly enforced, would not be a self-created hardship. He explained that it is immaterial that the lot is irregular in shape because it is conforming in all respects and it could sustain a conforming single-family dwelling being constructed on it.

35. As to the negative criteria, Mr. Steck reminded the Board that the existing neighborhood consists of dwellings with the length of the dwelling parallel (not perpendicular) to Countryside Drive, and lots that are not long (or deep) and narrow like the lots that the Applicant was proposing. He opined that the proposal was substantially detrimental to the character of the neighborhood and forced the construction of a non-permitted shared driveway and dwellings that are uncharacteristic for the neighborhood. Mr. Steck contended that a single dwelling would not require the same magnitude of tree removal and regrading on the Property. He opined that, even with the proposed landscaping, the proposal represented a substantial detriment to the public good and a substantial impairment of the zoning ordinance.

36. Mr. Steck opined that there were no public benefits that could substantially outweigh the significant detriments associated with the proposal. He submitted that the Applicant had not proposed a basis for variance relief pursuant to N.J.S.A. 40:55D-70(c)(2). He further opined that, even if such a basis was proposed, it does not exist. He testified that, in his opinion, the proposal would be substantially detrimental to the public good and would substantially impair the intent and purpose of the zone plan and zoning ordinance. Mr. Steck concluded that

the Applicant failed to satisfy the burden of demonstrating that the statutory criteria had been met and he did not believe that the Applicant presented sufficient evidence to allow the Board to grant the approval. On questioning by the Board, Mr. Steck opined that the Applicant had demonstrated neither the positive, nor either of the two prongs of the negative, criteria, for either subsection c(1) or subsection c(2) bulk variance relief, for any, let alone all six (6), of the variances requested.

37. Ms. Mertz, the Board Planner, concurred with Mr. Steck's testimony that the historic pattern of development in the neighborhood has been a separation between dwellings of greater than that proposed by the Applicant. She advised the Board that her office had performed an informal analysis of the separation distances between the dwellings in the neighborhood. She explained that, based on the analysis, the distance between dwellings ranged from approximately 45 feet to more than 100 feet, whereas the Applicant was proposing a distance of only 36 feet between the two dwellings it proposed for Lots 9-A and 9-B.

38. On cross-examination by Mr. Sheehan, Mr. Steck testified that the rendering produced by the Applicant was inaccurate and included an ornamental tree that would be blocking the driveway and likely could not be planted in that location. Mr. Steck opined that the proposal did not preserve the natural landscape, because artificial fill was needed both to access the Property and to construct the dwellings and additional trees needed to be removed. He further opined that the proposed dwellings have front-facing garages that are a prominent architectural feature, unlike the existing dwellings in the neighborhood, and that such an architectural feature could not be satisfactorily mitigated with landscape plantings. Mr. Steck concluded that the proposed 98 foot setback, grade changes, riparian zone, and shared driveway do not substantially mitigate the significant negative impact of the deficient lot widths, both at the setback line and

for a distance of 40 feet to the rear thereof, because the proposed dwellings will be very visible from the street.

39. Mr. Woodward next called Marlene Gabriele, having an address of 23 Countryside Drive, Summit, New Jersey, as a fact witness. Ms. Gabriele was duly sworn according to law and introduced into evidence, as **Exhibit O-3**, 24 photographs, that she had taken recently, of the twenty (20) dwellings located within the neighborhood. She opined that the photographs demonstrated that the dwellings in the neighborhood are consistent as to setbacks, landscape screening, and general style.

40. Ms. Gabriele testified that she and her husband sold the Property to the Applicant. She testified that when she and her husband had first purchased the Property, they originally intended to renovate the existing dwelling and then sell it. However, they realized that the dwelling had structural damage and was infested by insects, so they decided they had to demolish it and construct a new dwelling on the Property. She and her husband decided at that point that they wanted to reside in the proposed new dwelling themselves. Ms. Gabriele testified that after they had plans drafted for same, they ultimately decided they did not want to leave their existing home and they put the Property up for sale.

41. Ms. Gabriele testified when she sold the Property to the Applicant LLC, she and her husband were led to believe that one of the LLC members was going to live there with his family, in one dwelling without subdividing the Property. She explained that she only learned of the subdivision when she called the Applicant to advise that she had received a call from her engineer saying that their DEP approvals were only good for five years. Ms. Gabriele testified that she could not believe that the Applicant intended to subdivide the Property, since, despite that many of the lots in the neighborhood were large enough to be subdivided, no one in the

neighborhood ever did so. She further explained that the neighborhood already has an issue with stormwater runoff and sewer capacity. Ms. Gabriele contended that the development proposal was not in character with the neighborhood.

42. On cross-examination by the Applicant's counsel, Ms. Gabriele testified that once she and her husband realized that they had to demolish the existing dwelling on the Property and construct a new dwelling, they intended to reside in the dwelling, and that they never intended to construct a new dwelling and then "flip" the Property.

Public Comment:

43. Members of the public were given the opportunity to make public comments and, after being duly sworn, did so as follows:

a. Cynthia Gavenda, 96 Club Drive, Summit, New Jersey, testified that she had concerns about the shared driveway and whether there would be sufficient parking available for the future residents and their guests. She explained that she grew up with a shared driveway and that it was difficult to back out of the driveway because cars were often parked at the bottom of the driveway. Moreover, the relationship between the homeowners sharing the driveway became contentious. Ms. Gavenda testified that people do not park on the street in the neighborhood. She expressed further concern that the shared driveway would not be appropriately maintained, particularly if the homeowners sharing the driveway did not agree as to what should be done and who should pay for it.

b. Patrice Healey, 18 Countryside Drive, Summit, New Jersey, contended that the proposal was not in character with the neighborhood. Ms. Healey testified that she shared Ms. Gavenda's concerns about parking on the street and overall safety.

c. Elizabeth Carlson, 139 Countryside Drive, Summit, New Jersey, questioned whether the Applicant was proposing a flag lot and asked if flag lots were permitted in New Providence. Ms. Carlson testified that the neighborhood has stormwater runoff issues and opined that the Applicant should be responsible to improve the existing stormwater runoff conditions. She further testified that many of the dwellings in the neighborhood have springs that run underneath the dwellings which results in flooding problems. Ms. Carlson commented that, while the Applicant was hopeful he could make a

profit on the dwellings, there are presently eight houses on the market in the Countryside neighborhood.

d. Karen Luongo Kapuscinski, 83 Club Drive, Summit, New Jersey, opined that the purported hardship that would befall the Applicant would be self-created. She explained that a conforming dwelling could be constructed on the Property and that same would be more consistent with the neighborhood. Ms. Kapuscinski explained that, while other neighborhoods were in transition, the Countryside neighborhood was not, because people like the architecture in the neighborhood, the sense of privacy, and the community atmosphere. She recognized that a conforming dwelling could be constructed on the Property as it presently exists, and she opined that the Applicant had not demonstrated entitlement to variance relief under N.J.S.A. 40:55D-70(c)(1).

e. Charles Rizzo, 128 Gallinson Drive, Berkeley Heights, New Jersey, testified that he was the one who would suffer a hardship from the proposal because the proposal would eliminate his privacy by locating a dwelling (on Proposed Lot 9-A) only 18 feet from his backyard with his deck and pool. He opined that the only hardship incurred by the Applicant would be a financial hardship that is not related to the Property itself. Mr. Rizzo contended that the regulations are intended to protect the citizens and that it was unfair to allow someone who was fully aware of the limitations on a property go ahead with a plan that would be detrimental to all of the immediate neighbors and to the neighborhood in general.

The Applicant's Rebuttal Case:

44. At the July 10 hearing, Mr. Sheehan advised that the Applicant would stipulate to widening the throat of the driveway, subject to the Fire Department's review and approval, to provide additional area for emergency personnel. He explained that the driveway at the right-of-way is 25 feet wide and tapers to 12 feet at the throat, and that the Applicant proposed to widen the throat to 25 feet for a distance of 4 feet on the south side of the driveway of Proposed Lot 9-A. He explained that the additional 4 foot by 25 foot area would create a pull-over area with a stabilized base and that the area would appear to be grass.

45. On direct questioning by Mr. Sheehan on the Applicant's rebuttal case, Mr. Tobia testified that there are larger and smaller lots in the neighborhood, but that New Providence does

not have a lot size averaging provision. He explained that the only averaging ordinance relates to front-yard setbacks within 200 feet of the proposed development. Mr. Tobia further explained that the proposed 98 foot front-yard setback was calculated based on such averaging. On questioning as to whether the proposal advanced the purposes of the Municipal Land Use Law ("MLUL"), Mr. Tobia opined that, as to purpose (e) regarding density, the proposal was not too dense because both proposed lots exceeded the minimum lot area. He opined that density is generally established by the zoning regulations and the lot size, not the characteristics of the neighborhood.

46. On further direct questioning by Mr. Sheehan, Mr. Tobia contended that the Board could not invent zoning standards, but, rather, it must apply the standards set forth in the ordinances. He testified that, here, the proposed lots and dwellings comply with all of the bulk regulations, except for the lot width regulations. Mr. Tobia opined that the proposal would not result in substantial detriment to the public good or substantial impairment of the zone plan and zoning ordinance, because the lot depth, in his opinion, allowed the Applicant to construct an appropriate dwelling that utilizes the unique features of the lots. He contended that the excessive lot size and lot depth would compensate for the deficient lot width.

47. On cross-examination by Mr. Woodward, Mr. Tobia conceded that he was unfamiliar with the exact size of the other lots in the neighborhood, but he opined that most of the lots are larger, and some are smaller, than the subject Property. Mr. Tobia also admitted that he was not aware how many lots in the neighborhood had a lot width similar to those proposed by the Applicant, but he conceded that there likely were none.

48. On questioning by the Board, Mr. Tobia opined that the Applicant had sufficient lot area to subdivide the Property horizontally, rather than vertically, if there were a street at the

rear of the Property. On questioning as to whether lot depth was a material issue, since it cannot be observed from the street, Mr. Tobia conceded that most people perceive the neighborhood as viewed from the street. He contended, however, that the Applicant's proposal would provide a 98 foot front-yard setback and landscape buffering that would result in the frontage of the Property looking consistent with the other adjacent lots.

49. On questioning by the Board Attorney, Mr. Tobia conceded that the Applicant had not attempted to purchase additional land from, or to sell the Property to, an adjacent neighbor, in order to reduce the magnitude of, if not eliminate altogether the need for, the lot width variances if the Property were subdivided. On questioning by Mr. Sheehan, Mr. Tobia testified that it did not appear that there were any other lots as deep as the Property. He contended that constructing only a single dwelling on the Property would result in substantial underutilization of the lot area, since the Property could be divided into two conforming sized lots. On questioning by the Board Attorney as to whether there were lots in the neighborhood with less lot area than that proposed for the subdivided lots, Mr. Tobia contended that there were two lots that "might" be "close" in size.

Public Comment:

50. Members of the public were given the opportunity to make public comments and, after being duly sworn, did so as follows:

a. Karen Luongo Kapuscinski, 83 Club Drive, Summit, New Jersey, introduced into evidence, as **Exhibit O-4**, a compilation of the lot areas of lots located within New Providence within 200 feet of the Property. She testified that she obtained the information from the Borough website on May 1, 2018. Ms. Kapuscinski testified that all of the lots in the neighborhood are significantly larger than required, and she contended that the neighborhood pattern was larger lots, similar to the entirety of the Property, rather than smaller lots as proposed by the Applicant. She further contended that the Applicant's proposal would have a detrimental impact on the neighborhood.

b. Natalie Schickel, 16 Lee Lane, Summit, New Jersey, inquired whether the attorneys would be giving advice on self-created hardship and was advised that they would be doing so. She contended that it made no sense to divide the Property into irregular shapes. Ms. Schickel further contended that the Applicant had not satisfied the negative criteria because the proposal would result in a substantial detriment.

c. Charles Rizzo, 128 Gallinson Drive, Berkeley Heights, read the standard for variance relief pursuant to N.J.S.A. 40:55D-70(c)(1) into the record and contended that the only hardship the Applicant would face would be a financial hardship if the application were denied.

The Neighboring Objectors' Counsel's Closing Remarks:

51. Mr. Woodward made his closing remarks on behalf of the Neighboring Objectors. He contended that the variances requested are substantial in number (6) and significant in magnitude. In this regard, he explained that there are enormous differences between the lot widths required and the lot widths proposed, both at the setback line and for a distance of 40 feet beyond the setback line. Mr. Woodward remarked that the lot width variances were not the only variances required by the Applicant, because the Applicant proposed an excessively wide shared driveway, which, he contended, could create conflict between the neighboring property owners. He reminded the Board that the Property was previously improved with one single-family dwelling, and that one single-family dwelling on the Property as it exists (i.e., not subdivided) would not be out of character with the neighborhood.

52. Referencing Exhibit O-2, Mr. Woodward explained that the proposed dwellings would be the only dwellings in the neighborhood that are perpendicular, rather than parallel, to Countryside Drive, and further that the proposed lots would be narrower than the vast majority, if not all, of the lots in the neighborhood. He further explained that most of the dwellings in the neighborhood are older. As to the negative criteria, Mr. Woodward contended that the Applicant had failed to demonstrate that the proposal would not result in substantial detriment to the public

good or substantial impairment of the zone plan and zoning ordinance. As to the first prong of the negative criteria, he contended that the dwellings would be out of character with the neighborhood, and he contended that there was no testimony supporting the Applicant's position to the contrary. As to the second prong of the negative criteria, Mr. Woodward contended that the ordinance provision regarding lot width is very clear, as is the Master Plan, and that the Applicant's proposal substantially violated the ordinances, particularly as to lot width and lot shape. He further explained that the 2003 Master Plan and the 2017 Master Plan Re-Examination report state clear objectives of preserving the unique character of existing neighborhoods and protecting sensitive areas of the Borough, and he contended that the Applicant's proposal did not advance either of the objectives, but rather substantially conflicted with both of them.

53. As to whether the hardship that would be incurred by the Applicant, if the zoning regulation were to be strictly enforced, would be a self-created hardship, Mr. Woodward contended that there is no hardship in the first place. He further contended that the Applicant had not demonstrated either, let alone both, the positive or negative criteria, under either N.J.S.A. 40:55D-70(c)(1) or (c)(2).

The Applicant's Counsel's Closing Remarks:

54. Mr. Sheehan provided his closing remarks on behalf of the Applicant. He contended that the hardship that the Applicant would incur would not be self-created, because the Property appears on the 1941 Tax Map, revised in 1963, as an irregularly shaped lot with a front yard of 201.5 feet, and the Property was conforming even in 1975, when the current zoning ordinances were adopted. He further contended that it was the unusual shape of the Property and the enactment of the zoning ordinance that would create the hardship, not anything that was done by the Applicant or any predecessor-in-title.

55. Mr. Sheehan contended that the application could be granted under N.J.S.A. 40:55D-70(c)(1), because the unique characteristics of the Property inhibit the extent to which it can be developed. He explained that both proposed lots had more than the required lot area and that the proposed dwellings conformed with the side-yard requirements. Mr. Sheehan contended that the irregular geometric shape of the lot, the lot size, and the 4,500 square feet of riparian zone gave rise to the hardship. He explained that the hardship in this case is the substantial underutilization of the Property if the ordinance is strictly enforced.

56. As to the negative criteria, Mr. Sheehan contended that any visual detriments would be mitigated by the substantial setbacks of the dwellings and the appearance of a wider lot given the location of the driveway. He further contended that the focus of the statutory language is whether the detriment and impairment is "substantial." Mr. Sheehan advised that the proposal would not result in a development that is substantially out of character with the neighborhood.

57. The Board Attorney provided a summary of the relief requested and advised the Board of the legal criteria that the Applicant was required to have satisfied for an approval of the requested minor subdivision and bulk variance relief.

DECISION

58. After hearing and reviewing the testimonial and documentary evidence presented, and based thereon, the Board, by a unanimous vote of 7 to 0, finds that the Applicant has failed to satisfy its burden of proving either, let alone both, the requisite positive and negative criteria for the six (6) variances at issue, to wit, the lot width at the setback line of each of the two proposed lots, the lot width from the setback line for an additional 40 feet toward the rear lot line for each of the two proposed lots, the excessive driveway width, and the shared driveway

variance, under either N.J.S.A. 40:55D-70(c)(1) or (c)(2). The Board, accordingly, denied the application for minor subdivision approval and bulk variance relief.

59. The Board recognizes that, as in all variance cases, the Applicant bears the burden of proving both the positive and the negative criteria for the relief requested herein. See, Ten Stary Dom Ptp. v. Mauro, 216 N.J. 16, 30 (2013); Nash v. Board of Adjustment of Morris Tp., 96 N.J. 97 (1984); Cohen v. Borough of Rumson, 396 N.J. Super. 608, 615 (App. Div. 2007); Kogene Bldg. & Dev. v. Edison Tp., 249 N.J. Super. 445, 449 (App. Div. 1991). Moreover, the Board recognizes that the burden of proving the right to the variance relief sought in the application rests at all times with the Applicant. This means that the Applicant has the responsibility to present to the Board the evidence necessary for it to decide, in light of the statutory requirements, the right to the relief sought, and if the Applicant does not do so, the Board has no alternative but to deny the application. Toll v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 255 (2008); Tomko v. Vissers, 21 N.J. 226, 238 (1956); Chirichello v. Zoning Board of Adj. Monmouth Beach, 78 N.J. 544 (1979).

Failure to Satisfy the Positive Criteria for (c)(1) Variance Relief:

60. As to the positive criteria for "(c)(1)" or "hardship" variance relief for the six (6) bulk variances, the Board initially finds that the Applicant has not satisfied its burden of demonstrating either (1) the existence of an "undue hardship" or (2) that the hardship alleged by the Applicant to exist, if the lot width and driveway regulations were to be strictly enforced was the product of a unique condition of the Property, despite that both factors are required to be established for c(1) variance relief.

The Applicant Would Suffer No Undue Hardship and the Property is Not Unique:

61. A predicate issue is that the Applicant must prove that the need for the variance relief "arises out of" (a) the exceptional narrowness, shallowness or shape of the specific property, (b) unique topographic conditions or physical features uniquely affecting the specific property, or (c) an extraordinary and exceptional situation uniquely affecting a specific property or the structures existing thereon. The Board recognizes that a variance under c(1) must be grounded in conditions peculiar to the particular lot as distinguished from other properties in the zone. If all properties in the area are subject to the same hardships, the remedy is through a revision of the general rule of the ordinance by the governing body, not by variance relief from the land use board. See, Beirn v. Morris, 14 N.J. 529, 535-36 (1954).

62. Here, all of the neighboring lots on the same side of Countryside Drive are encumbered by the watercourse and associated buffer areas. Further, the unrefuted expert testimony of Mr. Steck, the Neighboring Objector's professional planner, demonstrates that most, if not all, of the lots in the neighborhood are wider than required. The Board notes that, since that the Property is similar in size (lot area) and environmental constraints (riparian buffers) to most of the neighboring properties, all of which have been improved and none of which have been subdivided, belies the Applicant's argument of "uniqueness," that the enforcement of the zoning regulations rendering the Property "substantially underutilized." Indeed, the Applicant's own professionals conceded that a fully conforming and marketable 5,000 to 6,000 square foot dwelling could be constructed on the Property. In fact, the Applicant's principal testified that this was the original intention when the Applicant purchased the Property. As such, the Board concludes that the purported "substantial underutilization" of the Property testified to by the Applicant could describe the vast majority, if not all, of the lots in the neighborhood.

63. While the Board recognizes that there can be circumstances where a lot in the shape of a trapezoid and other odd shaped parcels can create practical difficulties with respect to the location of the proposed dwellings thereon, the evidence revealed that here the trapezoidal shape and riparian zones did not preclude the Applicant from constructing a fully conforming and marketable 5,000 to 6,000 square foot dwellings on the Property, as conceded to by the Applicant's representatives. As such, the Applicant has failed to demonstrate that even the alleged hardship would be the product of one or more unique conditions of the Property.

64. Moreover, the Applicant also failed to prove the existence of a hardship in the first place. The evidence revealed that the primary, if not only, hardship that the Applicant would suffer by virtue of the strict application of the zoning regulations herein, would be a personal financial hardship, by virtue of profiting less from the sale of one 5,000 to 6,000 square foot dwelling than from the sale of two approximately 3,000 square foot dwellings.

Any Even Alleged Undue Hardship Would Constitute a Self-Created Hardship:

65. In addition to the Property not being "unique" and the Applicant suffering no "hardship" by virtue of any even alleged "uniqueness" of the Property, the Board finds that the alleged undue hardship that would be incurred by the Applicant if the zoning regulations were to be strictly enforced would, nevertheless, constitute a self-created hardship. Where the hardship complained of by the applicant has been created by him, that circumstance may be considered by the municipal agency and may be a proper basis for finding that the positive criteria have not been proved, and, thus, for denying relief. Jock v. Zoning Bd. of Adjustment, 184 N.J. 562, 591 (2005); Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 606 (1980); Chirichello, supra, 78 N.J. 544; Jacoby v. Englewood Cliffs Zon. Bd. of Adjustment, 442 N.J. Super. 450, 470 (App. Div. 2015).

66. Here, the Board recognizes that, as Applicant's own representatives conceded, a fully conforming, and marketable, 5,000 to 6,000 square foot dwelling can be constructed on the existing, and fully conforming, Property. As such, while the trapezoidal shape of, and riparian zones on, the Property might be contributing factors to reducing the profitability of the Property, the proximate cause of the need for all of the variance relief would be the Applicant's affirmative act of subdividing the Property, in order to maximize personal financial profits by constructing and selling two dwellings, rather than just one.

67. The Board recognizes that the applicant has the burden of demonstrating what is creating the hardship. Dallmeyer v. Lacey Tp. Bd. of Adj., 219 N.J. Super. 134, 140 (Law Div. 1987). Related to this, in certain circumstances, may be efforts made to bring the property into conformance with zoning ordinance specifications. Jock, supra, 184 N.J. at 594; Commons, supra, 81 N.J. at 606; Somol v. Morris Plains Bd. of Adj., 277 N.J. Super. 220, 232 (Law Div. 1994). In this regard, the Board considers that, as conceded by the Applicant's own professionals, the Applicant made no attempt to acquire any adjacent land from a neighboring property owner, in order to reduce, if not eliminate altogether, the need for the significant lot width variance relief to subdivide the Property into two lots and construct a dwelling on each.

68. The Board, by way of clarification, states that, even assuming, arguendo, that the undue hardship alleged by the Applicant would not constitute a self-created hardship, the Board, nevertheless, still would find the lack of any undue hardship and the lack of uniqueness of the Property themselves, to be fatal to the Applicant's request for any of the requisite variance relief under the "(c)(1)" or "undue hardship" standard.

69. Based upon the foregoing, the Board finds that the Applicant has not demonstrated the positive criteria for "(c)(1)" or "hardship" relief for any of the six (6) requested variances.

Failure to Satisfy the Positive Criteria for (c)(2) Variance Relief:

70. The Board recognizes that N.J.S.A. 40:55D-70(c)(2) authorizes a land use board to grant variance relief "where, in an application or an appeal relating to a specific piece of property, the purposes of this act...would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment...". The enactment of subparagraph c(2) of the statute was found, by the Supreme Court in Kaufmann vs. Planning Bd. for Warren, 110 N.J. 551, 560-561 (1988) (emphasis added), to apply to "a very narrow band of cases in which the standard would fall somewhere between the traditional standards of 'hardship' on the one hand, and 'special reasons' on the other."

71. As to the positive criteria for "(c)(2)" or "flexible c" variance relief for all six of the variances sought by the Applicant, the Board finds that the Applicant did not satisfy its burden of demonstrating that the purposes of the MLUL will be advanced by the requested deviations from the zoning requirements and that the benefits to be derived therefrom will substantially outweigh any detriments associated therewith. In Kaufmann, 110 N.J. at 563 (emphasis added), the Supreme Court, speaking to the general concept of the c(2) variance, stated that:

> By definition, then, no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case,

> then, will be not on the characteristics of the land that, in light of current zoning requirements, create a "hardship" on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.

72. The Board considers the governing case law standing for the proposition that a c(2) variance request should be denied where only the applicant's personal interests, rather than the purposes of zoning, would be advanced by the grant of the variance. For example, in Wilson v. Brick Twp. Zoning Bd., 405 N.J. Super. 189, 199 (App. Div. 2009), 405 N.J. Super. at 199, the appellate court upheld the denial of a c(2) variance for lot coverage and pool and deck setbacks where only the applicant's interests would be advanced by the grant of the variance. Similarly, in Loscalzo v. Pini, 228 N.J. Super. 291 (App. Div. 1988), certif. den., 118 N.J. 216 (1989), the appellate court upheld the board's denial of variances to applicants who had "substantially completed an expensive addition to their building, relying on an invalid permit, where the addition blocked light, air and possible emergency vehicle access to a neighbor and thus advanced none of the purposes of zoning". Further, in Cicchino v. Berkeley Heights Planning Bd., 237 N.J. Super. 175, 181-83 (App. Div. 1989), the appellate court upheld the planning board's denial of a proposed subdivision which would have created three (3) non-conforming lots out of two (2) conforming lots, holding that a c(2) variance would not be appropriate, in light of the Kaufmann decision, since there was no evidence of community benefit from the proposal, and, instead, the variance relief "would primarily advance the purposes of the owners by creating a new building lot and permitting them to construct a new dwelling on it."

73. The Board considers that, in Kaufmann, supra, the Supreme Court was clear that the grant of approval of a c(2) variance must "actually benefit the community in that it represents

a better zoning alternative for the property." Id. at 563 (emphasis added). In the case sub judice, based upon the proofs submitted by the Applicant, the Board concludes that, rather than advancing any benefit to the community, the subject development proposal primarily, if not exclusively, would serve to provide the developer Applicant with a personal financial benefit.

74. The Board recognizes that a c(2) variance applicant must show that (1) the application relates to a specific piece of property, and (2) the purposes of the MLUL would be advanced by a deviation from the zoning ordinance requirements. The Board concurs with the Neighboring Objector's professional planner, Mr. Steck, that the proposal does not advance the purposes of the MLUL. The Board finds that the development, as proposed, fails to advance the goals set forth in N.J.S.A. 40:55D-2. The Board further finds that, due to the size, location, and orientation of the proposed dwellings on the proposed subdivided lots, the development as a whole would, at most, provide only relatively modest public benefits, which benefits would not substantially outweigh the very significant detriments associated therewith. Here, the proposed lot widths would be the smallest in the neighborhood and the proposed dwellings would be the only dwellings that are perpendicular (rather than parallel) to Countryside Drive.

75. The evidence before the Board further revealed that the proposed dwellings on Proposed Lots 9-A and 9-B would be only 36 feet apart, whereas the range of distances between dwellings in the Countryside Drive neighborhood was between 45 feet and greater than 100 feet, and, therefore, on average, the separation between dwellings in the neighborhood is likely twice that which was proposed by the Applicant, who also did not propose landscape buffering between the two dwellings. Moreover, the proposal required substantially more regrading and tree removal than would the construction of a fully conforming, single-family dwelling on the existing fully conforming lot. Additionally, the evidence revealed that the proposed dwellings

would by far be both the narrowest, and the deepest, dwellings in the Countryside Drive neighborhood, and that seven (7) feet of foundation wall would be visible from the street, something the Applicant's planner conceded was "atypical."

76. As to mitigation, the Board concurs with the Neighboring Objectors' planner, and conceded to by the Applicant's own planner, that the excessive depth of the Property is much less important than the deficient width, because the deficient lot width and narrowness of the dwellings are visible from the street, but the excessive lot depth and deep dwellings are not visible and people do not look into the rear yards.

77. As such, the Board finds that the Applicant has not met its burden of proving the requisite positive criteria for "c(2)" or "flexible c" relief for any of the six (6) requested variances.

Failure to Satisfy the Negative Criteria for Either "c(1)" or "c(2)" Variance Relief:

78. The Board considers that the burden is on the applicant to demonstrate the negative criteria, just as it is on the applicant to satisfy the positive criteria. See, Dallmeyer vs. Lacey Township Bd. of Adjustment, 219 N.J. Super. 134 (Law Div. 1987). As the appellate court stated in Leon N. Weiner vs. Zoning Board of Adjustment, 144 N.J. Super. 509, 516 (App. Div. 1976), certif. den. 73 N.J. 55 (1977), "[i]t was not the burden of the board to find affirmatively that the plan would be substantially impaired (although it did so in the instant case), it was, rather, the burden of the applicant to prove the converse."

79. The Board recognizes that the "negative criteria" consist of two elements, both of which a variance applicant must prove; that is, that the proposed development can be accomplished (1) without substantial detriment to the public good and (2) without substantially impairing the intent and purpose of the zone plan and zoning ordinance. See, Medici v. BPR

Co., 107 N.J. 1, 4 (1987). The former focuses on balancing the positive and negative aspects of a variance request against the purposes of zoning set forth in N.J.S.A. 40:55D-2, whereas the latter is more concerned with establishing the bounds of zoning board action.

80. The Board recognizes that the focus of the "substantial detriment" prong of the negative criteria is on the impact of the variance on nearby properties. In Medici v. BPR Co., 107 N.J. at 22-23 n.12 (emphasis added), the Supreme Court explained the substantial detriment phrase as follows:

> The first prong of the negative criteria [requires] that the variance can be granted "without substantial detriment to the public good." In this respect the statutory focus is on the variance's effect on the surrounding properties. The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute "substantial detriment to the public good."

81. The Board further recognizes that the focus of the "substantial impairment" prong of the negative criteria is the extent to which a grant of the variance would constitute an arrogation of the governing body and planning board authority. The Supreme Court in Medici v. BPR Co., 107 at 5, has made it clear that municipalities should make zoning decisions by ordinance rather than by variance. The Court stated that "[t]he added requirement that boards of adjustment must reconcile a proposed use variance with the provisions of the master plan and zoning ordinance will reinforce the conviction expressed in [Ward v. Scott, 11 N.J. 117 (1952)], that the negative criteria constitute an essential 'safeguard' to prevent the improper exercise of the variance power." Id. at 22.

82. The Board considers that every variance constitutes, by definition, a departure from, and impairment of, the zone plan. The negative criteria asks whether such departure is "substantial." Substantiality, however, cannot be judged in a vacuum. The greater the benefits

of a project, the greater the detriments must be to achieve the quality of being substantial, and vice versa. In the case of a c(2) variance, since the benefits of the project already will have been considered as part of the "positive criteria", another way to state the balancing test is that the determination of detriment to the public good is of necessity proportional to the degree to which the "positive criteria" have been satisfied.

83. The Board finds that the Applicant has not demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. In fact, the Board finds that the Applicant has failed to prove either of the two requisite prongs of the negative criteria

Failure to Satisfy the First Prong (Substantial Detriment) of the Negative Criteria:

84. As to the first prong of the negative criteria, the Board finds that the Applicant has not demonstrated that the requested relief can be granted without substantial detriment to the public good. The focus of the "substantial detriment" prong of the negative criteria is on the impact of the variance on nearby properties. In this regard, the Board finds that the proposed development, given the combination of the subdivided lot sizes and the location, size, shape, and orientation of the proposed dwellings thereon, is so substantially out of character as to constitute substantial detriment to the public good. Moreover, the Board considers the concerns expressed by the public, almost all of whom live in the immediate neighborhood, and recognizes that these are the individuals most familiar with the neighborhood. The Board also concurs with, and adopts, the expert testimonial and documentary evidence submitted by Mr. Steck, the Neighboring Objectors' professional planner, who opined that the combination of the narrow and elongated dwellings on the resultant narrow "bowling alley" type lots, together with the

perpendicular orientation of the dwellings with front loading garages, would render the development substantially out of character with the existing neighborhood.

85. The Board also concurs with Mr. Steck that the proposal results in substantial detriment to the public good because, unlike the existing properties in the neighborhood, the dwellings Proposed Lots 9-A and 9-B, would be accessed by a non-permitted and non-conforming (excessively wide at the curb cut) shared driveway. The evidence before the Board indicated, in fact the Applicant's professionals conceded, that no other lots in the neighborhood had shared driveways, two cars could not safely pass along the proposed shared driveway, the NJDEP would not allow a second, separate driveway, and shared driveways were associated with safety and maintenance problems. Overall, the Board finds that the orientation and elongated shape of the dwellings, the proposed shared driveway, and the excessive driveway width would result in a reduction of light, air and open space, as well as the removal of a significantly greater number of trees – all of which result in substantial detriment to the neighborhood. Finally, the Board recognizes that the subdivision of the Property will result in narrow, trapezoidal lots and, because of the resultant lot shapes, any proposed dwelling would be oriented differently than the other dwellings in the neighborhood.

86. The Board also notes the increased density, the reduction in the light, air, and open space, and the significantly negative aesthetic impact of the proposed development. The Board also concurs with the Neighboring Objectors' Planner, Mr. Steck, that a developer could build an approximately 5,000 plus square foot, single dwelling on the existing and conforming Property, and that same would be a conforming dwelling and significantly more preferable from a zoning and planning perspective than the nonconforming subdivision and related development proposed by the Applicant. Additionally, the evidence revealed that the Countryside Drive

neighborhood is not a neighborhood "in transition," but rather an established neighborhood, characterized by larger lots and older dwellings, occupied by homeowners who value a sense of privacy and community atmosphere.

87. Moreover, the Board recognizes that, although the Applicant contends that the deviations in lot widths are modest, the Board is permitted to consider the cumulative negative impact of the proposal on the neighborhood. In the Appellate Division's recent unpublished, but materially analogous, decision in Walsh v. City of Cape May Planning Bd., No. A-0170-16T4, 2017 N.J. Super. Unpub. LEXIS 2602 (App. Div. Oct. 17, 2017), the appellate court considered whether a land use board acted improperly by finding that a deviation of "no more than four percent from the minimum lot size requirement" resulted in substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. In reversing the trial court's finding that the applicant's proposal created "only a de minimis four percent deviation" and, therefore, the applicant had satisfied the negative criteria, the appellate court in Walsh held that the board was not "obligated to treat the shortfall as negligible" and was "entitled to consider the cumulative negative impact of creating additional undersized lots [i]n the neighborhood in light of the master plan's goal of controlling population density." The appellate court overturned the trial court's decision and reinstated the board's denial. The appellate court agreed with the planning board that the construction of two new homes did not fit into the character of the neighborhood and "would not result in a more harmonious condition in the neighborhood and would be contrary to the master plan."

88. Here, the deviations in the four (4) lot width calculations are significantly greater than even those at issue in the Walsh case. In fact, the Applicant's own planner conceded as much. Mr. Tobia conceded that the lot width at the setback line for Proposed Lot 9-A is only

75.56 feet, or only 63% of the lot width required at the setback line, and only 56% of the lot width required for a distance of 40 feet to the rear of the setback line. Mr. Tobia similarly conceded that the lot width at the setback line for Proposed Lot 9-B is only 84.8 feet, or only 70% of the lot width required at the setback line, and only 62% of the lot width required for a distance of 40 feet to the rear of the setback line.

89. In sum, the Board finds that the Applicant has failed to prove that the cumulative impact on the neighborhood of the Applicant's development proposal would not result in substantial detriment to the public good.

Failure to Satisfy the Second (Substantial Impairment) Prong of the Negative Criteria:

90. As to the second prong of the negative criteria, the Board finds that the Applicant has not demonstrated that the relief can be granted without substantial impairment of the zone plan and the zoning ordinances. The focus of the "substantial impairment" prong of the negative criteria is the extent to which a grant of the variance would constitute an arrogation of the governing body and planning board authority to zone. In this regard, the Board recognizes that the first, and primary, goal of the Master Plan is to preserve the residential character of the community with low density, infill development. The Board concurs with, and adopts by reference, Mr. Steck's professional planning testimony that the subdivision would result in a reduction in open space, the removal of additional trees, and the construction of the only shared driveway in the neighborhood, each of which is not consistent with the first Master Plan's goals. Additionally, the Board finds that the Applicant's proposal does not result in infill development that respects the context and established scale and character of the existing neighborhood and homes. The Board concludes, in this regard, that one larger dwelling on a conforming sized lot, rather than two smaller dwellings on two undersized lots, is significantly more consistent with

the zone plan. Specifically, the Board concurs with Mr. Steck's expert testimony that the better zoning and planning alternative is to preserve the Property as one lot and improve same with a single, albeit perhaps larger, single-family dwelling.

91. The Board notes, as to the second prong of the negative criteria, that the appellate court in the Walsh case agreed with the planning board therein that the construction of two new houses on undersized lots "would not result in a more harmonious condition in the neighborhood and would be contrary to the master plan." As such, the Board finds that the Applicant has failed to prove that the proposed development would not substantially impair the intent and purpose of the zone plan and the zoning ordinances.

92. The Board's decision herein should not be misconstrued to constitute a finding that the Property cannot be developed at all. Instead, the Board simply finds that the Applicant has failed to meet its burden of proving both the requisite positive and negative criteria for the variance relief sought, given the specific development proposed by the Applicant herein. Accordingly, the Applicant's minor subdivision application must be denied, since its approval is contingent on the requisite variance relief being granted, which it is not.

WHEREAS, the Board took action on this application at its meeting on July 10, 2018, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of New Providence, on the 14th day of Aug., 2018, that the application of **33 COUNTRYSIDE, LLC** for minor subdivision approval and bulk variance relief, as aforesaid, be, and is hereby, **DENIED**.

ROLL CALL VOTE:

Those in Favor: Mr. Cumiskey, Mr. Hoefling, Mayor Morgan and Chairman Lesnewich

Those Opposed: ----------

The foregoing is a true copy of a Resolution adopted by the Planning Board of the Borough of New Providence at its meeting of August 14, 2018.

Approved this 14th day of August, 2018.

Margaret Koontz

Margaret Koontz, Secretary

Robert K. Lesnewich, Chairman

Date of Decision: July 10, 2018

Date of Adoption of Resolution: August 14, 2018

Date of Publication: August 30, 2018

Place of Publication: Courier News