MONARCH COMMUNITIES, LLC, a Limited Liability Company of the State of Delaware, Plaintiff, v. TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant, And JMC INVESTMENTS, LLC, a New Jersey Limited Liability Company, Plaintiff-Respondent, v. TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE NO.: A-000929-23T4 SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO.: MRS-L-1986-21 AND MRS-L-1995-21 Sat Below: Hon. Stephan C. Hansbury Civil Action

DEFENDANT-APPELLANT MONTVILLE ZONING BOARD BRIEF ON APPEAL

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street – Suite 200
Hackensack, NJ 07601
(201) 488-8200
Attorneys for Defendant-Appellant Township of Montville Zoning Board of Adjustment

On The Brief: Bruce J. Ackerman
Kelly M. Carey

Table of Contents

PROCEDURAL HISTORY……..…… 1

STATEMENT OF FACTS……..….. 2

A. The Application…….……. 2

B. The 2018 Rezoning Request, the 2019 Township Master Plan Re-Examination and 2019 Land Use Element Update…….…….. 4

C. The Hearing…….…… 8

D. Trial Court Decision……..... 19

LEGAL ARGUMENT……...…… 20

I. THE TRIAL COURT DECISION REVERSING ZONING BOARD'S DENIAL SHOULD BE OVERTURNED, BECAUSE THE BOARD DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE. (Montville Zoning Board Trial Brief for Prerogative Writ Hearing Da316-335) ……..…….. 20

A. The Standard of Review……20

B. The Power to Zone is Granted to Municipalities by Statute and Re-Zoning Should Be Accomplished by Ordinance - Not Variance……..…… 22

C. The Board Correctly Applied the Sica Balancing Test in Denying the D Variances…. …… 25

D. The Board Properly Denied the C Variances and Design Exceptions Requested Where Applicant Did Not Satisfy its Burden to Establish the Negative Criteria…….…….…. 34

E. The Zoning Board Was Within Its Discretion to Reject Some or All of Monarch's Expert Witness Opinions Even Where No Contradictory Expert Witness Testified……... 36

II. THE TRIAL COURT ERRED IN RESTRICTING THE BOARD'S ABILITY ON REMAND TO CONSIDER ANY AND ALL CONDITIONS TO ADDRESS THE NEGATIVE IMPACTS OF THE DEVELOPMENT. (Order Da349)……. 38

III. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE NEGATIVE CRITERIA IN SICA AND NOT GIVING DUE DEFERENCE TO THE IMPORTANCE OF THE MASTER PLAN TO MUNICIPAL ZONING REGULATION. (Statement of Reasons Da356, Zoning Board Brief in Prerogative Writ Da319.)…..……. 42

CONCLUSION……..……..... 48

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Allen v. Hopewell Tp. Zoning Bd. of Adj.,
227 N.J.Super. 574, 581, 548 *A.*2d 220 (App.Div.), certif. denied,
113 *N.J.* 655 (1988)..... 36,38

Dunkin Donuts v. Tp. North Brunswick,
193 N.J. Super. 513 (App. Div. 1984)..... 41

Eagle Group v Zoning Bd.,
274 N.J. Super. 551, 564-565 (App. Div. 1994)..... 39

El Shaer vs. Lawrence Tp. Planning Bd.,
249 N.J.Super. 323, 329 (App.Div. 1991), certif. denied, 127 N.J. 546
(1992) 36,38

Feiler v. Fort Lee Bd. of Adj.,
240 N.J.Super. 250, 255 (App.Div.1990) 24

Leimann v. Bd. of Adj. of Cranford,
9 N.J. 336, 340, (1952)), certif. denied, 127 N.J 325(1991) 23,24

Hawrylo v. Bd. of Adj., Harding Twp.,
249 N.J.Super. 568, 579 (App.Div. 1991)..... 38

Kaufmann v. Planning Bd., Warren Tp., 110 N.J. 551, 558 (1988)..... 21

Kramer v. Bd. of Adjustment, Sea Girt,
45 N.J. 268, 296-97, (1965) 21

Leimann v. Bd. of Adj., Cranford,
9 N.J. 336, 340 (1952)..... 24

Lionshead Woods v. Kaplan Bros.,
243 N.J. Super 678 (1990)..... 46

Leon N. Weiner & Asso., Inc., v. Zoning Bd. of Glassboro,
144 509, 514 (App. Div. 1976)..... 30

Manalapan Realty v. Township Comm.,
140 N.J 366, 378 (1995)..... 20

Medical Realty v. Board of Adj., Summit,
228 N.J.Super. 226, 233 (App.Div.1988) ……. 21

Medici v. BPR Co., 107 N.J. 1, 20-21 (1987)…….24,25, 47

New York SMSA L.P. v. Board of Adj. of Bernards Tp.,
324 N.J.Super. 149, 163 (App.Div.), cert. denied, 162 N.J. 488 (1999)…… 21

North Plainfield v Perone,
54 N.J. Super. 1, 8-9 (App. Div.) certif. denied, 29 N.J. 507 (1959)……. 39

O'Donnell v. Koch, 197 N.J. Super. 134, 145 (App. Div. 1984)……..…….. 34

Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus,
47 N.J. 211, 221 (1966)……40

Salt & Light Co. v. Willingboro Zoning Bd.,
423 N.J.Super. 282, 291 n.2 (App.Div. 2011)…… 30,32

Scully-Bozart Post #1817 vs. Planning Bd. of Burlington,
362 N.J.Super. 296, 314 (App.Div.); cert. denied, 178 N.J. 34 (2003) ……... 21

Shepard v. Woodland Tp. Comm., 71 N.J. 230, 248 (1976)……. …..30

Sica v. Bd. of Adjustment of Twp. of Wall,
127 N.J. 152, 165-66, (1992)…….25,30,40, 42

Sunrise Development v. Princeton Zoning Bd.,
2020 WL 3442856 at 3-4 (2020)……..…. 38

United Property Owners v. Belmar,
343 N.J. Super. 1, 14 (App. Div.), certif. denied 170 N.J. 390 (2001)……20

Urban v Planning Bd.,
124 NJ 651 (1991)……..……... 41

Victor Recchia Residential Constr., Inc. v. Zoning Bd., Cedar Grove,
338 N.J.Super. 242, 253 (App.Div. 2001)……23

Vidal v. Lisanti Foods, Inc.,
292 N.J.Super. 555, 561 (App.Div. 1996)……... 24,46

Village of Euclid v Ambler Realty Co.,
272 U.S. 365 (1926)..... 45

Whispering Woods v. Middletown Tp,
220 N.J. Super. 161 (App. Div. 1987)..... 20

Northeast Towers, Inc. v. Zoning Bd. of Adj., W. Paterson,
327 N.J.Super. 476, 494 (App.Div. 2000)..... 21

Statutes

N.J.S.A. 40:55D-40.1 and N.J.A.C. 5:21-1.1 et seq., 2T 80:1-14..... 12

N.J.S.A. 40:55D-2 15

N.J.S.A. 40:55D-62..... 23

N.J.S.A. 40:55D-89c..... 23

N.J.S.A. 40:55D-70C(1), (2)..... 34,45

TABLE OF ORDERS AND DECISIONS ON APPEAL

Trial Court Decision and Order Judge Hansbury 12/23/2022 …… Da 348-358

PROCEDURAL HISTORY

Monarch Communities, LLC, as applicant ("Monarch" or "Applicant"), and JMC Investments, LLC, as contract purchaser ("JMC" or "Appellee") of the property at 205/207 Changebridge Road in Montville Township (the "Property"), filed complaints as to the Montville Zoning Board of Adjustment's ("Appellant" or "Board") denial of an application for d variances, multiple c variances, waivers and site plan approval for a 165 unit, three-story, senior mixed-use facility in the R-20 zone, where the use is not permitted[1]. The complaints included several other claims against the Board, the Township, and the Mayor and Council. The two individual complaints, which are nearly identical, were consolidated by the trial court under Docket # MRS-L-1986-21 by Order dated February 2, 2022.Da273.

By Case Management Order ("CMO") of April 11, 2022, the matter was bifurcated, so that the first two counts (Prerogative Writ action) would be tried first. Da277. This appeal is taken from the Order and Statement of Reasons dated December 23, 2022, ("Order" or "Statement of Reasons") issued after that trial on October 27, 2022. Da348.

The Order reversed the Board decision and remanded to the Board to consider conditions to attach to the approval, but prohibited the Board from denying the use variances, any c variances or requiring any reduction in the number of units. That remand hearing was concluded and a resolution dated March 1, 2023, included the conditions approved by the Board. Da359. There was no challenge to any conditions filed.

[1] Appellant shall refer to the transcripts of the hearings before the Board as follows: "*1T*" – September 30, 2020; "2T" – November 19, 2020; "3T" – January 20, 2021; "4T" – April 7, 2021; "5T" – May 20, 2021; "6T" – June 2, 2021; and "7T" – July 7, 2021, and the transcript from the Prerogative Writ Trial as follows "8T" – October 27, 2022.

The parties stipulated that the case was not ripe for appeal until the adjudication of the remaining counts of the complaints. Da377. A CMO dated July 21, 2023, set timelines for discovery on the remaining counts. Da375. The Board propounded discovery, and on October 17, 2023, Monarch and JMC stipulated to the dismissal with prejudice as to all remaining counts. Da382. This appeal was then filed by the Board seeking to overturn the trial court's reversal of the Board's denial of the Monarch application for development.

On December 19, 2023, Monarch and JMC advised that Monarch's contract to purchase the property from JMC had expired, that Monarch would no longer be a party to this action, but that JMC would assume Monarch's role and continue as Appellee herein.

STATEMENT OF FACTS

A. The Application.

Over the course of seven nights between September 30, 2020, and June 7, 2021, the Board heard Monarch's application to construct a 165 unit, three-story, senior housing mixed-use facility, on the Property located in the R-20 zone district.[2] The application for this project was before the zoning board, because it required two (2) d variances – a use variance because the proposed use for senior mixed-use housing is not permitted in the R-20 zone, and a density variance since one unit per 20,000 sq. ft. was permitted, or approximately two units per acre, and Monarch requested 20.4 units per acre. Although Monarch presented several versions of its plans during the hearings, the revised plans

[2] The dedication and service of the Zoning Board members should also be noted given the extraordinary circumstances under which they conducted these hearings, and many others, for the Township during the course of the pandemic under unprecedented circumstances. The first six hearings of this application were conducted virtually, with the final hearing being conducted in person. Throughout the proceedings, the Board conducted itself professionally, maintained decorum appropriate for a quasi-judicial tribunal, and worked tirelessly to ensure that the applicant and the public were provided the ability to fully participate in the process.

never changed the density from 165 units as initially proposed, nor did Monarch provide better parking or setbacks, or reduce the number of stories to comply with the ordinance.

The Property is currently a farm with a single-family residence. The surrounding uses include single-family homes to the south, townhomes to the west, a pre-existing bus storage facility on an R-20A lot to the north, and residential uses across Changebridge Road to the east. Burgis Report April 1, 2021, Da18. The Property remains part of the R-20A zone which primarily permits single-family homes, government buildings, schools, farms, and in-home childcare facilities. Montville Township Land Use and Development Regulations ("MTLUDR") §230, Schedule C. Da401.

Monarch's proposal required the two (2) d variances above and several c variances, including excess height, number of stories, excess impervious and building coverage, side yard setbacks, parking setback within 15 feet of a building, parking within the front yard setback, number of parking spaces, fence height, a monument sign, and design waivers for steep slope disturbance and not providing a bike lane. 1T 43-53. The Property also has four areas of isolated wetlands with one being of intermediate resource value. 1T 40:19-41:25[3] Monarch's plan required an easement to permit its stormwater and sanitary sewer to discharge through the neighboring property of the Meadows Condominium to the rear (west). Both the Township and Meadows Condominium would need to grant, but had not

[3] Monarch and JMC made a new argument during the prerogative writ hearing that parking setbacks are only design exceptions and should be viewed under a lesser standard. That was not briefed below, nor is such a bulk setback deviation ever just a design issue. Moreover, Monarch had presented the parking setbacks from street and from building as "c" variances during the board hearings, which were confirmed as variances by the Township Planner. Da61.

granted (and have still not granted), the right to use at all, much less to expand, the existing Township sanitary sewer easement to permit both stormwater and sewer discharge by Monarch (or JMC). 1T 89:24-92:13, 4T 97:14-98:7, 4T 98-99, Da12.

B. The 2018 Rezoning Request, the 2019 Township Master Plan Re-Examination and 2019 Land Use Element Update

In 2018, a predecessor to Monarch filed a request with Montville Township to rezone this same property to allow precisely the same uses -- congregate care senior apartments, assisted living units and memory care. The applicant was Allegro Development, LLC ("Allegro"), which was the contract purchaser of the Property at that time and proposed to construct a mix of 150 units. The Township Planner issued a report on August 9, 2018, which included the following as to the Master Plan:

> Based on the above review of Montville's 2010 Land Use Plan, it appears that a zoning amendment to permit a senior residential health care facility on the applicant's property may promote some of the Township's land use goals and objectives – namely the encouragement of senior citizen community housing construction – **but that it may be incompatible with other goals outlined in the Plan – namely allowing for attached residential uses in locations not specifically prescribed for in the Plan**. Therefore, the Township will need to weigh the benefits of the proposal against factors such as site suitability, traffic generation, environmental impacts, etc….[4] (emphasis added).

The Township Planner reviewed each aspect of the proposed use, including impacts such as traffic, aesthetics, environmental, and fire and safety. As to aesthetics and buffers, the Township Planner noted that "the Township's 2010 Land Use Plan includes a number of goals and objectives regarding aesthetics and buffers, including encouraging new

[4] Planning Memo, Request for Zoning Modification – 201, 205 and 207 Changebridge Rd, Application # PC18-09, Da41, included as attachment "1" to Burgis Planning Memo of Nov. 12, 2020, Da18 and also including attachment "2" thereto, Planning Board Minutes on adoption of Land Use Plan Amendment, Da47.

development to enhance the aesthetic appearance of the community and provide buffer zones to separate incompatible land uses." Da45. Although the proposal at that time included various buffers, the height of the development, just as with Monarch, presented an incongruity with the existing zoning limitations. The Township Planner commented:

> It is noted that the proposed maximum height of 3 stories and 35 feet is somewhat higher than the Township Code currently permits for assisted living and residential health care facilities in the OB and I Zones (which permit a maximum of 30 feet, but no limit on the number of floors). In addition, the proposed maximum height is somewhat higher than is currently permitted in the R-20A and R-20B Zones (which permit a maximum of 35 feet and 2½ stories for single-family dwellings, and a maximum of 30 feet and 2½ stories for townhouse development). Da46.

Finally, the Township Planner concluded as follows:

> Based on the above analysis, it appears that there is sufficient merit to the applicant's rezoning request to warrant the request being referred to the Planning Board for their review and comment. As set forth herein, there are clear benefits to rezoning the subject properties to allow for senior residential health care facilities, such as providing additional opportunities for the aging Montville community to age in place …. Da46.
>
> **However, the Township should weigh these benefits against the apparent conflict with the master plan goal of limiting higher density residential uses to the locations prescribed in the plan.** If the Township ultimately finds that rezoning the site is in the best interest of the community, it would also be appropriate for the Planning Board to adopt a master plan amendment so as to be consistent with the zoning on-site. **In addition, the Township should also consider whether the scale of the project is suitable for the area in question**. **The appropriate number of units and other factors of scale and bulk will need to be explored….** Da46. (emphasis added).

Thus, the Township Planner saw merit to a discussion on the rezoning request, but was also concerned about the conflict with the Master Plan and the bulk of the three story facility ("scale of the project") in that residential area, as well as the appropriate number of units (Allegro sought 150 total units, and Monarch applied for 165 units).

In 2018 and now, the zoning plan in Montville Township already included assisted living and nursing homes as permitted uses in all office building and industrial zones, and senior citizen housing in all affordable housing zones, totaling well more than 1,225 acres or 10% of the Township.[5] Da401.

As to the Allegro rezoning request, the Township Committee did not refer the subject property to the Planning Board for further review, thereby denying the rezoning request. Instead, shortly afterwards, the Township Planning Board re-examined its Master Plan and adopted a new Land Use Element with particular attention to these senior citizen types of uses. On December 12, 2019, the Planning Board approved an update to the Land Use Element of the Master Plan, but voted to exclude the subject property from its new senior housing overlay zone. Da49-50.

The 2019 Periodic Reexamination of the Master Plan, together with its revised Land Use Element, included the recognition of appropriate designations for these types of senior housing uses and recited those goals in the following update:

4. *Goal 20:* To encourage a variety of senior housing opportunities in order to allow aging residents to remain in the community.

Policy Statement: In recognition of the Township's aging population, the Township seeks to provide a variety of senior housing opportunities in order to allow Montville's aging residents to "age in place" and continue living and participating in the community. **The Township should consider identifying appropriate locations for active adult and age-restricted independent living developments, as well as assisted living and memory care facilities, within the Township….** The Township should consider preparing a Land Use Plan amendment which designates specific locations for future development of senior housing. Da77. (emphasis added).

---

[5] Although its complaint below included challenges to the Montville zoning ordinance in this regard, those claims were voluntarily dismissed by Appellee. Appellee is, therefore, barred from arguing that the ordinance does not properly provide enough senior citizen housing elsewhere or in more appropriate locations.

To meet that goal, the 2019 Land Use Element added several new properties to be specifically designated for senior citizen housing, including the three uses sought by Monarch. However, Monarch ignored those designations and by its application sought to have the Board, and now the Court, rezone this Property. In fact, the subject property was included in the review by the Master Plan Subcommittee and the Planning Board in leading up to this Master Plan amendment, but ultimately, two other properties were included and this Property was specifically excluded by the Planning Board. Da78.

The 2019 Land Use Plan Element was updated to include a recommendation for the following new Senior Housing Overlay zone (in addition to other zones where permitted):

4. *Senior Housing Overlay.* A new Senior Housing Overlay designation is hereby created to encompass two sites that have been identified as appropriate locations for future development of senior housing. These two sites are identified as follows:

a. A 30.7-acre site located at Route 202, Interstate 287 and River Road. The site consists of seven parcels …. The existing land use designation for these parcels is Medium Density Residential [and in the R-27A zone].

b. A 7.9-acre site located at the northeast corner of Route 202 and Twaits Road (462, 464, 470 and 478 Route 202). The site consists of four parcels …. Whereas the existing land use designation for Lots 68, 69, 70 and the front of 67.2 is Local Business, the existing land use designation for the rear of Lot 67.2 is Medium Density Residential [and 59% in the R-27A zone, 41% in the B-2 zone].

The purpose of the Senior Housing Overlay designation is to allow developers to have the option of redeveloping these sites for various types of senior housing (including active adult and age-restricted independent living developments in townhouse or multifamily-type structures, as well as **assisted living, memory care, and continuing care retirement communities**) …. Da86. (emphasis added).

This 2019 Land Use Plan Element update also incorporated a new category of medium density residential with a health care option as follows:

1. Medium Density Residential – Residential Health Care Facility Option. The property at 181 Pine Brook Road, identified by municipal tax records as Block 125.6 Lot 1, shall be designated for a new land use category entitled "Medium Density Residential – Residential Health Care Facility Option." This replaces the property's previous land use plan designation of Medium Density Residential, which corresponds to the R-27A Residential Zone District. Da78.

This new zone permits residential health care facilities use of up to 65 bedrooms in up to three principal buildings. The new Senior Housing Overlay designation is reflected on the aerial map attached to the update and in the zoning code. Da79, 114.

In summary, just prior to the Monarch application, the Montville Planning Board thoroughly considered the need for additional senior citizen housing. The subject Property was considered for such uses, as well as other large sites in residential areas, for a new Senior Overlay Zone. This Property was considered and rejected. The Master Plan update that was adopted selected two other large areas for those uses, determining that those two sites were more appropriate for those uses, but not the subject site. The Planning Board's Master Plan update recommended the establishment of a new Medium Density Residential zone that specifically targeted larger residential health care development, but it has not yet been adopted by the Township Committee. Having so recently spoken on this subject, the intent of the Master Plan and the governing body was and is clear – the subject site is not to be developed for mixed use senior citizen housing. The Master Plan update indicates that there are two other sites that are more appropriate, as well as the entirety of the office building and industrial zones in the Township.

C. The Hearing.

Monarch presented several witnesses, on multiple dates with multiple reports, including; Michael Glynn- Monarch's director, Brad Bohler P.E.- professional engineer, Eric Anderson - architect, David Shropshire P.E. - traffic engineer, Jon Brody - appraiser, James Graber - a marketing analysist, and Richard Priess, P.P.- professional planner.

The Board also had its own professionals who provided reports and assisted the Board in its review and questioning of Monarch's witnesses. The Board's experts included John Sabo, P.P. - professional planner, Stanley Omland, P.E. - professional engineer, and Tom Behrens, P.P. - professional planner.

Monarch proposed one building with 165 units on three floors with three levels of care -- 81 apartment units, 58 assisted living units, and 26 memory care units. 1T 20-21, 28. The proposed facility was 170,000 SF in one building, 1T 43:21-44:7, the recycling, trash and generator area are to the north side, 1T 53:21-54:12, and the sanitary sewer was proposed to discharge to an existing easement piped to the Meadows Condominiums. 1T 59:7-12. As proposed, the stormwater would also discharge through that easement, although the easement was designated as being for sanitary sewer only. 1T 42:14-23.

The Board Engineer questioned the handling of emergency calls (1T 76 :10-15), the use and storage of the transport van for residents (1T 777:15-19), and the placement of the recycling, garbage and generator to the north side adjacent to R-20 residential sites (1T 78:8-17). He questioned the mass, length and scale of this building as completely different than a single-family home and that simply complying with a 15-feet setback designed for a single-family home was not adequate for the proposed facility (1T 80:11 -81:22).

Mr. Omland also questioned the parking provided and the failure to meet the Residential Site Improvement Standards ("RSIS"). See N.J.S.A. 40:55D-40.1 et seq. There was never any change to the number of parking spaces to meet the RSIS. 1T 82.

Mr. Omland questioned the trash compactor shown, but none of Monarch's witnesses had mentioned the trash compactor or its noise. 1T 85:1-7. The Board did not find the noise issues to be adequately addressed at all, except for a promise to test the equipment after installation. No proof of noise levels was provided. 1T 85:17-87:8.

Mr. Omland testified as to the issue of the stormwater pipe and sewer line easement. Monarch's stormwater discharge was proposed to be located in the existing sanitary sewer easement running through the adjacent townhome development. However, the easement as agreed to does not permit stormwater discharge. 1T 89:24- 92:13.

The Board members also questioned Monarch's experts, including how many room air conditioning units, 1T 117:3-9, comparing this project visually to the setbacks that would be used for senior housing zones rather than its use of single-family setbacks, questioning the actual parking needed for this facility. The Board asked for more detail on grading to understand the actual impact of the height and mass of the building. The Board requested an alternative to the 8-feet high fence proposed. They also questioned the noise and smell of the diesel generator, 1T 119, and if there are any other three-story buildings in town. 1T 120. Many of these questioned areas were never adequately addressed by Monarch. The Board also questioned the design impact on the height and the variances needed for height. Monarch's architect testified as follows as to the flat versus gabled roof:

> Um, as far as the height of the building, because this -- because we want this to feel residential, **we did not think that this is an appropriate place for a flat roof.** 2T 37:2-19. (emphasis added).

Although he conceded that the building could be reduced to 2 stories, he believed that the owner would not then consider the project to be "viable." 2T 63:3-6. Again, he testified that by using a flat roof, they could comply with the height requirements of the zone. 2T 68:23- 69:3. However, he again testified, "**I think it would detract, I don't think it would be appropriate for this neighborhood.**"2T 68:9-11 (emphasis added). He also testified that the highest peak is 43 feet 7 inches from grade. 2T 70:6-8.

Monarch's architect eventually presented revised roof lines that reduced the height to 35 feet from 38 feet, but still requested 3 stories. 3T 8:7-21. The Board asked about the visual impact from the road, 3T 22:2-19, but notably he did not testify that the new roof line, although height compliant, was appropriate for the neighborhood or the zone, nor did he recant his testimony from the prior hearings that a flat roof was inappropriate there. Mr. Omland questioned the need for a covered entry to protect residents in bad weather. 2T 43:23-44:7. Monarch's answer was that they planned to use snowmelt. 2T 44:13. When questioned why photo exhibits of the vegetation were not as dense in real life, the architect conceded that they were simulations, not photographs. 2T 46:9-25.

Monarch's traffic expert recited that the parking required is 194 spaces, while providing 117 spaces, acknowledging that the relevant parking standard is RSIS per the state statute.[6] N.J.S.A. 40:55D-40.1 and N.J.A.C. 5:21-1.1 et seq., 2T 80:1-14. Mr. Omland

[6] Mr. Schropshire later asserted that the RSIS guidance on parking had changed to .5 spaces per unit and would now equate to 83 parking spaces required, 3T 40:2:10. Mr. Omland questioned using the assisted living definition and parking count for the congregate care component in

asked if he had studied sight distances on Changebridge Road, and if he could give an opinion that they are safe, but he had not done so. 3T 48:17-49:7.

After questioning the handling of visitors, Monarch stipulated that a shuttle and off-site parking arrangements would be made, 3T 45:4-46:11, although no plan was presented.

As to sanitary sewer, Monarch's engineer offered to maintain the first 150 feet into the Meadows condo development. 4T 95:4-11. However, the Board Engineer cautioned that the Township and the Meadows controlled that easement, which was only for sanitary sewer, yet Monarch was proposing to also use it for stormwater. 4T 97:14-98:7. The Board could not approve a change to an easement between the Meadows and the Township. 4T 98-99. Clearly, Monarch had not presented a stormwater and sanitary sewer plan that it had a right to construct.

Monarch's planner endeavored to fit the application within the four-part Sica test. He concluded that the multilevel facility satisfied the public interest as inherently beneficial. 6T13:15-17. He recognized that the Township already has two existing senior care facilities, but dismissed them for comparison because they were built in the 80's and 90's and reasoned that this new one is better. 6T 14:9-13.

As to the second prong of the Sica test -- "the impact on the public good as well as the impact on the zoning, uh, ordinance and master plan**,**" 6T 17:11-22, he summarily concluded that the use would not have substantial impact on the surrounding land uses with

---

addition to the assisted living units. Mr. Omland did not agree that they were the same or that the same calculation should be used, testifying, "**there is a distinct difference in activity level and trip generation from independent living to assisted living**." 3T 43:17-25 (emphasis added). Mr. Shropshire's response was, "I do believe we've got sufficient parking on site, regardless of, uh, what the interpretation would be of the RSIS." 3T 44:15-17.

regard to aesthetics, visual impact or architecture, even though more than ¾ of the surrounding properties are strictly residential. 6T 20:5-9. As to the negative criteria and the 2019 amendment to the Master Plan and Land Use Element, 6T 28:12-18, he acknowledged that "Montville has provided in its zoning opportunities to allow for assisted living facilities and senior housing in – in various locations." 6T 34:13-17. He dismissed many locations that the Township has zoned for senior living, and a Board member objected, stating that he needed to actually look at some locations, they were studied by the Township and they are scenic, near open space, and/or located near shopping in many instances. 6T 40:6-20. Although its planner reviewed the bulk zoning requirements where senior and assisted living uses are permitted, he admitted that the proposed project does not fit within the floor area ratio even in the zones where permitted. 6T 50:5-20. The proposed project was testified to be at 20.4 units per acre, whereas the OB-1A zone permits a maximum of 9 units per acre. 6T 51:18-25. Monarch's planner excluded from his analysis the three senior living facilities in Montville as being too old or small to be comparable. 6T 61:16-24, 65:12-21.[7] In the view of the Board and its professionals, his analysis lacked the most relevant properties. Despite his omission of local comparable properties and the intentional decision of the Township to exclude this Property for senior living in 2019, Monarch's planner blindly concluded that the proposed facility "is very appropriate for the location and… would not have a substantial impact, um, on your zoning ordinance." 6T

[7] Even in his updated report, Mr. Preiss again failed to include the other senior living facilities closest to Montville -- Cedar Crest, Sunrise at Randolph and Sunrise at Mountain Lakes, (7T 12:8-15) -- he determined they did not have the same three levels of care (7T 11:11-13) or were not the same market and therefore, continued to exclude them from the comparison. 7T 10:21-23.

67:3-8. The Board members did not believe that his analysis was complete without including the local facilities and did not believe the Monarch proposal properly addressed the Planning Board decision not to include this site in the 2019 update to the Land Use Element of the Master Plan. 6T 120 15- 121:19, 135:20-136:8; 7T 95:6-12.

Monarch's planner addressed the third point of the Sica test, being conditions to be imposed to address any negative effects of the application, 6T 75:14-19, but he testified that he did not see any negatives, so he did not believe that any conditions were needed. 6T 76:12-15. Nonetheless, at trial, Monarch argued that the Board did not impose additional conditions, though its own expert testified that there was nothing else to impose. It was clear that there were other changes that could have been made to the application, including a reduction in the number of units (which would reduce the building size, parking needed, and increases setbacks), or a reduction to two stories (again, reducing the building size and parking needs), but Monarch declined to make those changes. By denying the application, the Board was never provided the opportunity to consider the conditions required if approved. Then the trial court reversed and barred the consideration of any such changes.

The Board's planner questioned how the application impacted other purposes of the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. (the "MLUL"), such as (a.) to encourage municipal action to guide the appropriate use of land, given that it was requesting that the Board go against municipal action, or purpose (c.) to provide adequate light, air and open space, given the size and scale of the project, and purpose (e.) to promote the establishment of appropriate population densities, given the density proposed. 6T 81:9-82:11, N.J.S.A. 40:55D-2. He also questioned the negative impact on municipal

services and asked about the impact of police, ambulance and first responders versus a single-family home development. 6T 86:20-87:2. Mr. Behrens questioned the land use impacts in the following testimony:

> **I think this is one of the most important points probably that we need to reiterate is that, again, the almost an identical project was proposed for a rezoning at the governing body level which was ultimately, uh, not passed along to the Planning Board for further consideration. And the planning Board subsequently reviewed the project separately and concluded not to move the project any further.** 6T 88:5-14 (emphasis supplied).

He testified that a nearly identical project was rejected by the governing body for rezoning and considered and rejected by the Planning Board for inclusion in the Land Use Element updated in 2019, yet Monarch requested that the Board grant a variance for a larger same use on the same property. 6T 88:15-24. Mr. Behrens testified, "[U]ltimately all land use decisions are up to the governing body and planning board and that, as you know, sovereign municipal entities functioning as the MLUL intended." 6T 90:19-22.

Mr. Behrens challenged their failure to include in their analysis the sites in Montville that were zoned for senior living, 6T 95:3-8, and testified that Montville has been very proactive in its zoning 6T 95:16-25. Mr. Behrens testified that there are both an active application before the Planning Board for one of those newly approved sites and others are in the review stage, so developers have found value in these sites. 6T 97:22-98:2.

Mr. Behrens also addressed the conditions that might be imposed under the Sica standards and suggested lowering the stories, FAR (number of units) and the density would be conditions that could make a difference. 6T 106:11-20. Mr. Omland criticized the facilities/locations used by Monarch's experts by cherry picking different facilities to

compare and removing senior living facilities in closer towns. 6T 11:24-112:16. Each of Monarch's professionals used different properties to justify their conclusions.

The Board questioned the densities permitted in Montville and how to determine what is too dense. Mr. Behrens advised that the highest density permitted in Montville is 14 units per acre, but Monarch's proposed facility is over 20 units per acre. 6T 127:4-14. The Board questioned the burden on community services and requested more detail on emergency responder services and weather disaster planning. 6T 131:10-25.

At the final hearing, Monarch reduced the footprint of the building very slightly, 7T 3:1-3, 7T 3-4; however, there was no change in the number of stories, the setbacks from Changebridge Road or from the building to parking, or the number of units or density. 7T 5:9-17. As finally submitted, the variances sought included two d variances for use and density, several c variances: (1) 39% impervious coverage where 30% is permitted, (3) three stories where 2.5 are permitted, (4) 4.6' parking separation from the building where 15' is required, (5) 29.3' parking setback from the road where 50' is required, (6) 117 parking spaces where 194 are required, and (7) a monument sign where none is permitted. 7T 36-40, 42-43, 44, 45, 49, 51, and design exceptions for steep slope disturbance, including where no disturbance is allowed, and for not providing a bike lane. 7T 55,56.

At the final hearing, the Board Planner concluded, "I don't necessarily agree that this is a detriment free application." 7T 61:8-9. He noted detriments related to traffic, height of the building, scale of the project and the setback to Changebridge Road. 7T 61:10-15. He also cited the 18 months of construction disturbance, the issue of light, air and open space, the time for landscape buffers to fill in, the environmental impacts to steep slopes, excess

impervious coverage, as well as municipal service demands. 7T 61:16-23. He opined that facilities in the report with over 8 acres generally had a density less than 20 units per acre. 7T 66:1-3. Mr. Behrens testified that the variance for number of stories is impactful. A 2.5 story building would allow for steeper roof pitches to give it more character and better fit its surroundings. 7T 72:4-13. He also testified that the character of Changebridge Road is rural, and most properties have excess setbacks, so the parking within the set back is a significant impact. 7T 72:18-25. He testified that the use is inherently beneficial, so the Board's task is to consider "the negative criteria and whether or not the negative impacts outweigh the, uh, positive or public benefits here." 7T 75:3-6.

In public comments, Mr. Lewis testified that the Township had updated its Land Use Element in 2019 to include a recommendation to add an assisted living site "in a residential zone for assisted living facility." 7T 105:19-24. Monarch's planner was not aware of that site. 7T 106:3-5.

The Board Chairman reviewed the relevant history of zoning along Changebridge Road, his acceptance of the project as inherently beneficial, and his concern that the project was stacking 165 people into this facility. 7T 145-150. Mr. Moore also accepted that the use was inherently beneficial, but was concerned about the density proposed. 7T 150:20-151:22. He described the unit density as **"way too high for this particular site… it changes the character of the zone which is, you know R-R20 residential."** 7T 151:17-20 (emphasis added). Mr. Shirkey stated that the governing body considered this use for this lot and decided not to rezone it. 7T 156:2-10. He continued:

> … we have an inherent—an inherently beneficial use in an area in which our governing body gave consideration to it in our reexamination in 2019, and did nothing on it. It came up in conversation, and that's not where they moved this.
>
> So, uh one of the comments was, you know, um are we in – then by not moving this forward, are we violating rules, or policies or procedures, or such?
>
> **I-I believe if my governing body has looked at this with their reexamination of the master plan, and they have embraced senior housing in an addendum to that master plan, and this piece of land isn't it, I-I-I still have to go with what would have been expected in the R-20 zone.** 7T 157:13-17 (emphasis added).

The Board then voted 5-2 on July 7, 2021, to deny the application, and on August 4, 2021, adopted the memorializing resolution denying the application. Da118, 405.

The resolution of denial enumerates that Monarch had not satisfied its burden of proof for the relief requested. In particular, Monarch had not established that the use variances could 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." N.J.S.A. 40:55D-70. Da131-138. The proposed three story, 165-unit facility proposed a use in a zone that primarily permitted single family homes. Further, it also required a density variance based upon the zone allowing one unit per 20,000 SF (approximately 2 units per acre), but Monarch sought 20.4 units per acre. The resolution referred to the 2018 application by Allegro to rezone the same property for an assisted living facility with 150 units, which equated to 18.6 units per acre, and the Township Committee, having the power to legislate and enact zoning changes, decided not to change the zoning for these uses on this Property. Da129. The Board knows that its powers are limited under State Law, N.J.S.A. 40:55D-62 and 70, and do not include the power to legislate. The Board, therefore, correctly decided not to grant a use and density variance for a use and larger

density than the governing body had just recently addressed and rejected for the Property. Monarch had failed to meet its burden to prove that the variances would not substantially impair the intent and purpose of the zone plan and zoning ordinance. The Board denied Monarch's request to amend the zoning ordinance and permit a use which the Township Committee and Planning Board had specifically declined. Da143, 7T 157:2-19. The Board, understanding that zoning should be done by ordinance, not variance, denied the application and now appeals from the trial court's reversal of that denial.

D. Trial Court Decision.

After briefing and oral argument, a bench trial was held on the prerogative writ counts of the consolidated complaints in this matter based on the record at the Board hearing. The trial court issued an Order and Statement of Reasons reversing the August 4, 2021, decision of the Board and remanding the matter to the Board to consider "in good faith reasonable conditions" that might be imposed on the applicant. However, the Order also directed that "the proposed number of units may not be reduced below 165." Da349. The trial court retained jurisdiction to resolve disputes regarding conditions and the enforcement of its decision. The Order prevented the Board from applying conditions that would have provided the most relief from the negative impact caused by the approval of the use variance, a reduction in the number of units, thereby reducing the density, coverage, parking, and setbacks, and achieving better compliance with zoning and aesthetics. By granting approval of all variances requested, and not just the d variances, the trial court also prohibited the Board from addressing any conditions relating to other variances that were part of the application, and deprived the Board of its inherent power

and responsibility to address the negative effects of variances by imposing conditions as provided in the Sica standards.

The Board conducted the remand hearing on February 16, 2023, in accordance with the process developed in the Whispering Woods v Middletown Tp., 220 N.J. Super. 161 (App. Div. 1987). On March 1, 2023, a resolution imposing certain conditions was adopted by the Board. Da359. No objection to any condition was filed. All other Counts of the complaints were eventually dismissed by Monarch and JMC.

Legal Argument

Point I
THE TRIAL COURT DECISION REVERSING ZONING BOARD'S DENIAL SHOULD BE OVERTURNED, BECAUSE THE BOARD DECISION WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE.
(Montville Zoning Board Trial Brief for Prerogative Writ Hearing Da316-335)

A. The Standard of Review

An appellate review of a municipal action has the same standard of review as the trial court. The appellate court is not required to give deference to the trial court's interpretation of the law and the legal consequences that flow from established facts. Manalapan Realty v. Township Comm., 140 N.J 366, 378 (1995), United Property Owners v. Belmar, 343 N.J. Super. 1, 14 (App. Div.), certif. denied 170 N.J. 390 (2001).

Every land use board decision is entitled to a presumption of validity. In Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-97, (1965), the New Jersey Supreme Court recognized that Board members are uniquely qualified to make findings of facts, saying:

> Such public bodies, because of their peculiar knowledge of local conditions must be allowed wide latitude in the exercise of delegated discretion. ***Courts cannot substitute an independent judgment for that of the boards in areas of***

> ***factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere.*** A local zoning determination will be set aside only when it is arbitrary, capricious or unreasonable. **Even when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.** (citations omitted)(emphasis added).

"The role of a court in reviewing the decision of a local board's land use decision is very narrowly circumscribed." Scully-Bozart Post #1817 vs. Planning Bd. of Burlington, 362 N.J.Super. 296, 314 (App.Div.); cert. denied, 178 N.J. 34 (2003). "A local board's action is presumed valid, and the challenger has the burden of proving otherwise. New York SMSA L.P. v. Board of Adj. of Bernards Tp., 324 N.J.Super. 149, 163 (App.Div.), cert. denied, 162 N.J. 488 (1999). The law presumes that local boards will act fairly, with proper motives, and for valid reasons. Kramer, supra, 45 N.J. at 296." Id. at 314.

Fundamentally, a reviewing court may not substitute its judgment for that of local officials. Id. It is not the role of a reviewing court to determine whether the decision of a local board was wise or unwise. Kaufmann v. Planning Bd., Warren Tp., 110 N.J. 551, 558 (1988). Finally, it is important that **"[a] local board's denial of a variance is entitled to greater judicial deference than a decision to grant a variance**." 362 N.J.Super. at 314, citing Northeast Towers, Inc. v. Zoning Bd. of Adj., W. Paterson, 327 N.J.Super. 476, 494 (App.Div. 2000)(emphasis added). Thus, a party seeking to overturn the denial of a variance must prove that the evidence before the local board was "overwhelmingly in favor of the applicant." Id. (quoting Medical Realty v. Board of Adj., Summit, 228 N.J.Super. 226, 233 (App.Div.1988)). The conclusion from the above is that Boards that are

deliberate, that articulate the facts and apply them to the law, are never found to be arbitrary, unreasonable and capricious.

In this matter, the Board's factual findings and its application of the facts to the law are a model of how a Board should deliberate and how *quasi-judicial* bodies should render a ruling. Where the Board does not have the statutory authority to change zoning ordinances, and the court holds that the Board should make a determination that is contrary to the express determination of the governing body with that authority, such a decision constitutes a mistake in the application of the law. Similarly, the application of the Sica test and a determination of whether or not the negative criteria have been met are both legal conclusions and should be reviewed de novo by the appellate court.

B. The Power to Zone is Granted to Municipalities by Statute and Re-Zoning Should Be Accomplished by Ordinance - Not Variance.

The power to zone is delegated to municipalities in the MLUL, which specifies how a zoning ordinance is created and what it may contain. It requires to first establish a planning board, which adopts the land use plan element and housing plan element of the master plan before zoning is permitted. Further, all of the provisions of such a zoning ordinance, or any amendment or revision thereto, shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate its elements. N.J.S.A. 40:55D-62. The MLUL also requires that "at least every 10 years", the governing body shall require the planning board to reexamine its master plan and development regulations. The master plan must address six areas of the land use ordinances, including N.J.S.A. 40:55D-89c, which provides:

> The extent to which there have been significant changes in the assumptions, policies and objectives forming the basis for the master plan or development regulations last revised, **with particular regard to the density and distribution of population and land uses**, housing conditions, circulation, conservation of natural resources, energy conservation, collection, disposition and recycling of designated recyclable materials, and changes in State, County and municipal policies and objectives. (emphasis added).

Thus, the state grants municipalities the power to zone and requires them to keep their land use planning current as support for their zoning scheme.[8]

In Montville Township, the governing body strictly followed the requirements of the MLUL and both the zoning ordinances and the Master Plan elements have been updated many times. In addition, in 2018 the governing body denied a rezoning of this Property for the same use, and in 2019 the Planning Board studied and re-examined the Land Use Element as discussed in detail above in Statement of Facts subsection (B.).

The zoning board of adjustment has the power to grant variances under N.J.S.A. 40:55D-70.c and d, but it is not given any power to adopt or amend a master plan or zoning ordinance. Therefore, the Board must look to the Land Use Element of the Master Plan for guidance when an applicant requests a variance. As held by the Court in Leimann v. Bd. of Adj., Cranford, 9 N.J. 336, 340 (1952):

> The power [to issue a variance] must be exercised consonant with the duty laid upon the local board to protect the integrity of the general scheme from substantial impairment. **A grant of variance which has the effect of frustrating the general scheme and is tantamount to a usurpation of the legislative power reserved to the governing body of the municipality to amend or revise the plan cannot be sustained.** (emphasis added).

See also Victor Recchia Residential Constr., Inc. v. Zoning Bd., Cedar Grove, 338

[8] There was no claim in this matter that Montville Township has not kept its land use planning current.

N.J.Super. 242, 253 (App.Div. 2001)("The Zoning Board may not utilize its power to grant variances to usurp the legislative power delegated to the governing body to effect the zoning scheme."); Vidal v. Lisanti Foods, Inc., 292 N.J.Super. 555, 561 (App.Div. 1996)("a board of adjustment 'may not, in the guise of a variance proceeding, usurp the legislative power reserved to the governing body … to amend or revise the plan.... Feiler v. Fort Lee Bd. of Adj., 240 N.J.Super. 250, 255 (App.Div.1990) (quoting Leimann v. Bd. of Adj. of Cranford, 9 N.J. 336, 340, (1952)), certif. denied, 127 N.J. 325 (1991)").

In interpreting the local ordinance, the local board shall determine the legislative direction given by the governing body. The Supreme Court described this deliberative process in Medici v. BPR Co., 107 N.J. 1, 20-21 (1987), as follows:

> **When an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate.** Our role is to give effect to these legislative policies. In the use-variance context, we believe this can best be achieved by requiring, in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. The applicant's proofs and the board's findings that the variance will not "substantially impair the intent and purpose of the zone plan and zoning ordinance," *N.J.S.A.* 40:55D–70(d), must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district. For example, proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance may demonstrate that a variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed. **Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance**. (footnote omitted)(emphasis added).

In Medici, although not as to an inherently beneficial use, the Supreme Court acknowledged the history of several of the same motel use applications, yet the governing

body declined to authorize that use in the zone. As in the case at hand, the Supreme Court held that proof that the proposed use was not inconsistent with the zone plan was impossible for applicant, and the zoning board could not have found otherwise, as follows:

> In this context, the applicant had the formidable burden of proving that the grant of another use variance for a motel at this site was not inconsistent with the intent and purpose of the zoning ordinance as reflected by the governing body's failure to authorize motels as a permitted use in the zone. No such proof was offered. **No such finding was made, or could have been made, by the Board of Adjustment**. Id. at 25-26 (emphasis added).

As shown in the Statement of Facts subsection (B.) above, there is no question that the governing body had been requested to allow this use on this site and declined it, and also that the Montville Master Plan was updated as recently as 2019 and the Planning Board intentionally omitted the subject property from the same use requested by Monarch. As in Medici, the appellant Board could not have found that this application was not substantially inconsistent with the intent and purpose of the zone plan and zoning ordinance. The trial court determination to the contrary should be reversed.

C. The Board Correctly Applied the Sica Balancing Test in Denying the D Variances.

The Board reviewed the Monarch application and analyzed the proofs and surrounding facts based upon the Sica standard. The Board found the proposed use to be inherently beneficial (despite including independent senior apartments) and treated the Monarch application based upon it being fully inherently beneficial. This four part test is set forth in Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152, 165-66, (1992):

> We suggest the following procedure as a general guide to municipal boards when balancing the positive and negative criteria. ***First, the board should identify the public interest at stake. Some uses are more compelling than others***.

* * * *

> ***Second, the Board should identify the detrimental effect that will ensue from the grant of the variance….***
> ***Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use….*** (citations omitted) (emphasis added). ***Fourth, the Board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.*** This balancing, "[w]hile properly making it more difficult for municipalities to exclude inherently beneficial uses… ***permits such exclusion when the negative impact of the use is significant.*** It also preserves the right of the municipality to impose appropriate conditions upon such uses." (citations omitted) (emphasis added).

(1.) The Board identified the public interest at stake.

First, the Board reviewed the 81 senior citizen apartments as inherently beneficial based upon the testimony that they were independent apartments where special services were offered but not required, that most occupants would have cars, and that they offered amenities such as meal services, but the use of the amenities was not required for occupancy. Despite there being questions as to the senior apartments versus the label as "congregate care", the Board determined to treat the entire application as if inherently beneficial and found in its Resolution:

> 21. Since the inherently beneficial uses are to be considered under the less intensive *Sica* criteria, that will be addressed and will apply to both those uses [assisted living and memory care] as well as the 81 senior apartments, if they are to be considered part of an overall inherently beneficial use. Da132.

(2.) ***The Board identified the detrimental effects that will ensue from the project.***

The Board reviewed a number of detrimental effects that this project presented and thoroughly covered each in its Resolution. These included excessive density far beyond what is normal both for comparable facilities within the Township and for comparable

facilities nearby.[9] The Board also concluded that the applicant's experts specifically omitted several comparable projects in their analysis in order to avoid a justification for less units than Monarch was seeking. Da137-138.

The Board found that a facility with identical uses was located just one-half mile from the Property and had two stories with a density of 14.2 units per acre, which would equate to a total of 115 units for the Monarch project. However, throughout the proceedings when the Board questioned the higher number of units, Monarch's witnesses dismissed it as making the project "not viable", without further explanation. Those were not planning responses, but were tied to whatever the developer was paying for the land and its desired profitability. Monarch never provided the Board with any facts why the development could not be reduced to two stories with less units.

In its Resolution, the Board did the following analysis of comparable zones in Montville and the appropriate density that would be permitted, as follows:

> 32. By way of further comparison, the zoning ordinance provides for adult community housing in more than one zone, either limited to a density of 9 units per acre and not more than 12, or not more than 15, habitable rooms, depending on the zone, other than a living room, dining room or kitchen, per acre. MTLUDR §230-145(B), 145(A). In the affordable housing districts, senior citizen housing is limited to between 8 and 10 units per acre. MTLUDR §230-179(A). … Other similar uses in the Township have much lower densities than the 20.1 units per acre sought by applicant, and nowhere in the Montville Township zoning ordinance is found the density of units proposed by applicant for a similar use permitted. The one multi-family use that is adjacent to the immediate west of the applicant's property is The Meadows townhouse development. This development contains 144 attached residential units on

[9] According to the Board Planner, **the highest density allowed in any zone in the Township was 14 units per acre**. 6T 127:4-14 As to density, the Board found that **the Monarch application for 165 housing units on 8.1 acres resulted in a density of 20.1 units per acre**. Da137. (emphasis added).

> roughly 44 acres, representing a density of approximately 3 units per acre. Da137.

Separately, the Board found that having a three-story facility in a residential zone was detrimental, that applicant failed to explain why it could not design it within 2½ stories, and that a nearby facility was on two floors, as follows:

> 33. Moreover, the ordinance only provides for 2½ story buildings, while applicant proposes a three story building. Therefore, it is the applicant that has failed to show how this combination of uses cannot be designed in a 2½ story building with fewer units. … The Chelsea facility nearby … provides substantially the same congregate care and support services, including semi-independent living, assisted living and memory care as proposed by applicant, but on two floors. Da137-138.

As a result of the excessive bulk and density requested, the Board found that the proposal was detrimental to several purposes of the MLUL.[10] Da138.

The Board enumerated other detrimental effects, including "the visual, noise and traffic created by this high density multi-family for-profit use directly adjacent to a private residential development of single family homes and a townhome development", "how this facility would deal with evacuation in the event of flooding, a fire, or a power outage that lasted beyond the capacity of its generator on site", "the excess impervious coverage being proposed", and the substantially undersized parking at 117 spaces where the Board professionals determined that 194 spaces are required. The Board noted that the excess

---

[10] These included the failure of the Monarch proposal "to provide adequate light, air and open space" (*see* N.J.S.A. 40:55D-2(c)); "to promote … appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods," etc. (*see* N.J.S.A. 40:55D-2(e)); "to properly locate transportation and traffic routes which will promote the free flow of traffic" (*see* N.J.S.A. 40:55D-2(h)); and to promote a desirable visual environment (*see* N.J.S.A. 40:55D-2(i))." Da139.

parking needed, the excess impervious coverage, and bulk and density all related to the excessive number of units being sought. See Da138-139. As noted by the Board as to the parking and density requested: "That parking determination is driven by the numbers of units, so **if** the number of units was reduced, the building and parking and, therefore, the impervious coverage would also be reduced." Da138-139. Since the application remained at 165 units throughout, the Board was compelled to determine the application as proposed.

(3.) ***In some situations, the board may reduce the detriments by imposing conditions.***

The majority of the detrimental impacts of the development proposed by Monarch were tied to the intensity of the proposal (i.e., excess units, excessive coverage, deficient parking, deficient parking setbacks, and negative visual/aesthetic impacts). Because Monarch determined not to reduce the overall project, despite Board questions as to the project size, the Board found that there were no "reasonable conditions" that it could propose to lessen those detriments. Clearly, the Board and Monarch recognized that having less units in a smaller building could have conforming impervious coverage, conforming 2½ stories, conforming parking, and proper setbacks. Neither Monarch nor any of its experts provided information from which the Board could know how many less units were required in order to meet any of the zoning requirements. Therefore, in the same manner that the Courts have interpreted the third factor in the Sica test, the Board determined that the detriments of the proposed project to the zone plan were so pervasive that the Board could not devise conditions to reduce or eliminate those detriments. See Da140.

Again, the Board appropriately considered that granting the application would place a use in this residential zone that the governing body specifically just excluded from this

zone. See Salt & Light Co. v. Willingboro Zoning Bd., 423 N.J.Super. 282, 291 n.2 (App.Div. 2011) (holding the third factor in the Sica test inapplicable when the proposed use would significantly undermine the zoning plan). The Board also properly considered that there were no conditions that it could devise to reduce the bulk and density.[11]

(4.) ***The Board weighed the positive and negative criteria and determined whether the grant of the variance would cause a substantial detriment to the public good.***

It is undisputed that this governing body has spoken on where it is appropriate for this senior citizen cluster housing. With the denial of the Allegro rezoning application for the same use in 2018, the Master Plan re-examination in 2019, and the revised Land Use Element later in 2019, which included a new Senior Housing Overlay Zone that intentionally excluded the subject Property, their intentions were clear. As noted by our Supreme Court in Shepard v. Woodland Tp. Comm., 71 N.J. 230, 248 (1976):

> [I]t is a major question to decide whether the aged should live in special segregated areas, or scattered among the general population; a decision on this is likely to be phrased in terms of a land-use decision. Why should the courts invoke judge-made policy to preclude responsible local officials from implementing such policies? (*citing* (Williams, American Planning Law: Land Use and the Police Power, s 1.11 at 22 (1974))

Much like the instant matter, in Leon N. Weiner & Asso., Inc., v. Zoning Bd. of Glassboro, 144 509, 514 (App. Div. 1976), the Court had before it an application for senior citizen cluster housing and the issue whether "the applicant failed to bear the burden of proving compliance with the negative criteria so far as the bulk variances affect the district selected by appellee to construct this development." The Court made clear

[11] As the Supreme Court noted in Sica, only "**in some situations**, the local board may reduce the detrimental effect by imposing reasonable conditions on the use." 127 N.J. at 166 (emphasis added).

> that the absence of evidence in support of the denial does not in itself mean that the Board's determination is arbitrary. Since the burden rests with the applicant to establish the criteria for the grant of the variance, it must demonstrate that the affirmative evidence in the record dictates the conclusion that the denial was arbitrary." Id. at 515.

Although noting the inherently beneficial nature of the proposed use, the Weiner Court analyzed the Board determination of the negative impact on the zone plan as follows:

> This finding reflects the opinion of the board that the applicant failed to prove that the proposed use of construction in this district met the negative criteria of N.J.S.A. 40:55-39, namely, that 'the intent and purpose of the zone plan and zoning ordinance' will not be substantially impaired. It 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. (citations omitted). Id. at 516.

As in the current case, applicant in the Weiner case sought bulk and density changes from the zoning requirements, such as 10 four-family dwellings and a community recreational building instead of the maximum of 2 dwelling units per structure, an area of 3,000 square feet per dwelling unit, a waiver of the 50-feet frontage requirement, and a reduction in the requisite parking. In the current case, Monarch was seeking one immense three-story building with excess impervious coverage, reduced parking setbacks, undersized parking, and far more density than allowed in the zone or even in any other zones where these uses are permitted. As in this case, there were other zones where the proposed use would be acceptable and similar bulk and density more nearly conforming.

In concluding that the board had not acted in an arbitrary or exclusionary manner in the denial of the variances, the Weiner Court held that

> Plaintiff and the housing authority can construct their senior housing project on the proposed site if they reduce the density proposal to accord with that particular district, or they can select a site in one of the R-5 districts where the proposed

> project is legally permissible in whole without the necessity of variances. **They have no absolute right to construct a project of any size or shape in a district selected by them, merely on the thesis that senior housing promotes the public welfare.**" Id. at 517-18 (emphasis added).

Stated another way, the Court in Price vs. Strategic Capital Partners, LLC, 404 N.J.Super. 295, 306 (App.Div. 2008) held that,

> in addressing the so-called negative criteria, the applicant would need to demonstrate that the increase in density would not have a more detrimental effect on the neighborhood than construction of the project in a manner consistent with the zone's restrictions. For example, the applicant might demonstrate that the increased proposed density was only minimally greater than the permitted density in the zone or in adjacent areas.

Comparing those elements to this case, the permitted density in the zone is for lots of 20,000 square feet, so generally not more than two units per acre. The Monarch proposal was for more than 20 units per acre, which was greater than permitted in any zone in the Township. Therefore, as noted by the Court in Price, applicant could **never** prove that the increased density proposed was only minimally greater than permitted, or that the increase would not be substantially detrimental to the nearby residences.

In comparison to the case of Salt & Light, supra, to the matter at hand, the applicant was requesting approval for one "duplex to provide transitional housing for two homeless families in a neighborhood zoned exclusively for single-family residences." 423 N.J.Super. at 284. The Court acknowledged the use as inherently beneficial, but found as follows as to the Board's denial to change just one home to a duplex unit:

> The Board determined that the public benefit to be derived from the replacement of a single four-bedroom residence with two, two-bedroom residences for the homeless was outweighed by the detrimental effect upon the integrity of the zoning plan for exclusively single-family residences that would result from construction of a duplex. In making this determination, the Board

> found that … plaintiff's proposed duplex would be located "in the middle of a block containing only single-family homes," and that its proposed use for two families "would constitute a substantial detriment to the neighborhood." We are satisfied that this determination was not "arbitrary, capricious, and unreasonable[,] and therefore must be sustained." Id. at 292 (citations omitted).

In the case at hand, Monarch was proposing to replace a maximum of 16 one-family homes (2 per acre), adjacent to numerous existing single-family homes and townhomes, with one large three-story structure housing 165 living units. Since all sides of the Property are zoned for lower density residential uses, and three sides are already built out residentially, and since the governing body specifically excluded this lot from any change in its present zoning, the Board made its findings and then carefully weighed the positive and negative criteria per Sica in the following conclusions:

> 42. The Board will weigh the positive and negative criteria and determine whether, on balance, the grant of the use variance would cause a substantial detriment to the public good. Based on the above, the Board notes the public benefit derived by having this type of senior citizen housing in the Township. However, the proposal as presented and designed for this application before the Board presents a significant detriment to the zone plan and zoning ordinance. This is an area predominated by single family residences, and this site is similarly zoned. If developed as proposed, this site would isolate each of the adjacent residential uses and make the single family home zone to the north and south each into an island unto itself. Moreover, the Township has affirmatively removed the proposed uses from the zoning of this property. The Board notes that the applicant focused its proofs on the lack of a negative impact upon the property values of the neighboring residences, but lacked credible proofs on the other overall detrimental impacts noted herein.
>
> Based upon the above, there are several other detrimental elements noted for which conditions cannot be reasonably imposed to lessen those detriments. These include the density of the project, the number of stories, the impervious coverage, the drainage facilities as presented, and the parking limitations. Separate and apart, although there are visual and aesthetic elements for which conditions can be imposed to ameliorate these detriments, the items noted cannot be ameliorated by imposing conditions.

> …The Board determines that the public benefits to be derived from having this combined senior citizen facility at this site are substantially outweighed by the detrimental effects upon the integrity of the zoning plan aimed at having exclusively single family residences on this site and specifically omitting this use, as well as all of the other detrimental effects detailed above. Therefore, the Board cannot grant the use in the configuration proposed. Moreover, the proposal as configured puts the Board in the position to rezone the property, which is not the role of the Board of Adjustment and which rezoning request was denied for this very use. Da140.

The Board's evaluation of the fourth factor in the Sica test, by weighing the positive and negative criteria, cannot be said to have been arbitrary, capricious or unreasonable.

D. The Board Properly Denied the C Variances and Design Exceptions Requested Where Applicant Did Not Satisfy its Burden to Establish the Negative Criteria.

Monarch also requested seven c variances enumerated above. Da18. Little, if any, proofs to support the c variances and design waivers were provided, and it is undeniable that they were related to the size and density of the facility requested, not related to the size or shape of the lot, or to existing structures thereon, or that these variances represented a better zoning alternative because of the benefits from these changes. See N.J.S.A. 40:55D-70C(1), (2). Although Monarch seeks to have all of the variances and design exceptions subsumed in the inherently beneficial use presented, they must stand on their own and require justification by proofs showing why they are needed.

While c variances and design exceptions may arguably be subsumed in an approval for a d variance where a Board's findings also support such approvals, that is not the case universally. See O'Donnell v. Koch, 197 N.J. Super. 134, 145 (App. Div. 1984)("we do not hold that in every use variance application the bulk requirements of the ordinance are subsumed in the grant of a use variance"). In O'Donnell, supra, the passive use approval for a

funeral home parking lot in a residential zone subsumed far lesser bulk variances for curb cuts, privacy fencing, and separation distances from curb cuts to residences. Id. at 145. Where, as here, the d variance was denied, the Board engaged in separate findings as to the merits of those aspects of the application, keeping in mind that the same detriments to the zone plan and zoning ordinance and other detriments of the project applied to the c variances.

Based on the above, the Board considered these requests and determined as follows:

> 43. ….[T]he Board is not convinced that these variances are reasonably required due to any hardship. Neither the size of this conforming lot nor the location of the structures already existing thereon dictate these variance conditions. There were little or no proofs provided to establish that applicant could not meet the ordinance requirements for these elements if the design of the development were altered. Moreover, the Board does not find, nor has applicant met its burden of proof, that the benefits of these deviations would substantially outweigh the detriments….
>
> 44. There is no proof that the variances sought would conform to a neighborhood scheme, and, in fact, this proposal would be detrimental to the neighborhood scheme. In addition, there was not any benefit shown to the community or any improved zoning or planning by the variances proposed. Thus, the purposes of the Municipal Land Use Law would not be advanced by these deviations from the zoning ordinance requirements as proposed, and the benefits of these deviations would be substantially outweighed by the detriments resulting from this proposal if approved.
>
> * * * *
>
> 46. The Board also finds that applicant lacks the proofs to meet its burden in order to grant the design exceptions detailed above. … [A]pplicant failed to prove that the disturbance of steep slopes as presented could not be lessened by design changes to the project. Applicant failed to provide adequate proofs to establish that compliance with this ordinance provision (or, at least to achieve some level of compliance as each slope category has disturbance at 100%) would be impractical or would exact undue hardship because of specific conditions pertaining to this property. Da140-143.

In the face of the Board's findings of the substantial negative effects of the proposed development, both as to the zone plan and zoning ordinance, as well as the excessive

bulk and density without adequate justification, the Board's determinations on these c variances and design exceptions were neither arbitrary, capricious nor unreasonable.

E. The Zoning Board Was Within Its Discretion to Reject Some or All of Monarch's Expert Witness Opinions Even Where No Contradictory Expert Witness Testified.

Appellees argued before the trial court that the Board had to accept all of Monarch's expert testimony and compelled the Board to approve their application. However, that proposition ignores the law on the subject.

The law is clear in holding that a zoning or planning board need not accept the testimony of any particular expert. In El Shaer vs. Lawrence Tp. Planning Bd., 249 N.J.Super. 323, 329 (App.Div. 1991), certif. denied, 127 N.J. 546 (1992), the Court held:

> [The applicant's expert] did not address the Board's overall concern that increased volumes of water created by the development may cause additional flooding on contiguous properties and Route 206. Moreover, the Board was not bound by appellee's expert's testimony. See Allen v. Hopewell Tp. Zoning Bd. of Adj., 227 N.J.Super. 574, 581, 548 *A*.2d 220 (App.Div.), certif. denied, 113 *N.J.* 655 (1988).

As to traffic, the testimony was questioned by the Board in El Shaer, as follows:

> [T]he Board had requested appellee to submit to the expert a "gap analysis" study to determine the gaps in traffic … to enable the Board to gauge how much delay would be involved in getting in and out of the development, and no such study was presented…. The Board was therefore entitled to give little weight to the expert's conclusion on this point and instead rely upon its members' own personal knowledge of traffic conditions contiguous to the development site. Id. at 330.

In this matter, the testimony of each expert presented by Monarch was questioned and the responses to Board members and Board expert questioning were less than persuasive to the Board Members, even disappointing at times. A few examples follow:

1. The engineer failed to answer how the noise from the trash compactor, recycling and generator was to be attenuated while facing a residentially zoned lot. 1T 77:2-79:2.

2. Management had no input or approval by local emergency services to meet the demands of the project. 1T 74:15-75:22. Board Planner and Member questioned planner's conclusion as to the absence of material effect on municipal services. 6T 86:20-87, 6T 131:5-25.

3. The architect (i) admitted that the safety concern caused by omitting a front canopy for covered access was simply an owner decision. 2T 43:- 44:16 and 44:23- 45:5;

(ii) sight-line simulation was not from actual photos, and not of the view from Changebridge Road, but an augmented simulation. T2 44:6-45:8;

(iii) never showed the detail (or noise testimony) for the actual unit a/c units, despite several requests. 1T 117:3-10, 2T 49:8-19;

(iv) could not provide the requested maximum height of the building to assess the visual impact. 1T 70:2- 71:7; 2T 51:2-9; 2T71:17-21; and

(v) was asked to compare the impact of the mass/ height variance for this one large building versus single family homes at that height, but failed to do so. 3T 21:12-22:21.

4. The appraiser's conclusions were questioned, without adequate response, as to the size and location of his comparables, the validity of how homes have appreciated more or less without the senior facility nearby, and the timing of such sales. 3T 74:20 -75:9, 3T 87:5-90:3, 3T 100:8- 101:13.

5. The market analyst failed to properly support the comparables he relied upon and did not examine sites zoned for this use in Montville. 4T 35:-13- 38:15, 4T 39:14 -40:6.

6. The Board Engineer criticized Monarch's planner, marketing expert, and appraiser for using differing comparables to reach the conclusions sought and omitted many other comparable projects. 6T 110:24-119:4 "[T]here's, uh, at least 10 other projects in the Morris County area that may not be of the exact same constituency of -- of the Monarch project but are close." 6T 114:21-24 See other comps omitted as well. 7T 12:3-14:6. See Da405.

7. Monarch experts had not properly addressed the parking standard and the Board Planner disagreed with their interpretation. 4T 99:22-100:11, 5T 45:6- 50:1, 7T 85:25-87:6.

8. Board Planner (i) clarifies their expert's statements on the Township's affordable housing status and the effect of this project on the zone plan. 5T 45:6-50:1 "**If the township ultimately finds that rezoning the site is in the best interest of the community, it would also be appropriate for the planning board to adopt a master**

plan amendment so as to be consistent with the zoning onsite. In addition, the township should also consider whether the scale of the project is suitable for the area in question. The appropriate number of units, and other factors of scale and bulk will need to be explored as part of the planning board's review." 5T48:6-15 (emphasis added);

(ii) controverted applicant's planner as to the effect of the rezoning denial and omission from the zone plan amendment. "**[T]he use, as proposed, … was flawed and did have negative impacts in terms of its scale, its height, its density, FAR, etc.**" 6T 91:1-3 (emphasis added); and

(iii) rejected applicant's planning opinion on the appropriateness of other zones where this type of use is permitted. 6T 93:22-98:23.

Based upon the record, the Board Members considered all the expert testimony and determined to reject various conclusions reached, in particular as to the negative effect upon the zone plan and zoning ordinance. See Da127-131, Da133-139. The Board had the right to consider the expert testimony but not accept it. See El Shaer, supra, 249 N.J.Super. at 329; Hawrylo v. Bd. of Adj., Harding Twp., 249 N.J.Super. 568, 579 (App.Div. 1991); Allen v. Hopewell Twp. Zoning Bd. of Adj., 227 N.J.Super. 574, 581 (App.Div.), certif. denied, 113 N.J. 655 (1988); Sunrise Development v. Princeton Zoning Bd., 2020 WL 3442856 at 3-4 (2020). Da387. As shown above, those determinations were well reasoned and within the Board's discretion.

POINT II
THE TRIAL COURT ERRED IN RESTRICTING THE BOARD'S ABILITY ON REMAND TO CONSIDER ANY AND ALL CONDITIONS TO ADDRESS THE NEGATIVE IMPACTS OF THE DEVELOPMENT.
(Order Da349)

In its Order, the trial court directed that the application be approved, that the d and c variances be granted, and that the 165 units shall not be reduced. The only discretion allowed to the Board was to impose reasonable conditions on the application, but not conditions related to the variances sought. The Board conducted the remand hearing and

adopted a resolution with conditions that were severely limited by the trial court.[12] While these are important conditions, and Appellee may have difficulty satisfying some of them, none of the conditions the Board was permitted to impose was able to address the bulk and density of the use as envisioned by the Sica standards for use variances.

The Board has the "inherent" power to impose conditions upon the grant of a variance. North Plainfield v Perone, 54 N.J. Super. 1, 8-9 (App. Div.) certif. denied, 29 N.J. 507 (1959). Where variances are granted, a Board is required to provide adequate protections in the form of conditions to safeguard the objectives of zoning from the grant of the variance. Eagle Group v Zoning Bd., 274 N.J. Super. 551, 564-565 (App. Div. 1994). The law allows the Board to exercise discretion in imposing conditions, but the trial court's prohibition removed this essential function from the Board to the detriment of the public and the zone plan. The court in Sica reasoned that, "**just because an institution is thought to be a good thing for the community is no reason to exempt it completely from restrictions designed to alleviate any baneful physical impact it may nonetheless**

---

[12] The conditions included:

g. The Applicant shall enter into and maintain in effect at all times a contract with an offsite location for the provision of overflow parking ….

h. The Applicant shall provide, and maintain in effect at all times, a contract for private ambulance services …

j. The Applicant shall work with the Township Police, Fire, EMS and Building Department to provide plans for emergency evacuations of residents ….

m. The Applicant shall own, install, and maintain the sanitary sewer line from its facility through the existing sanitary sewer main,… The Applicant is responsible for obtaining all required permissions and approvals for its sanitary sewer plan ….

n. The Applicant will be responsible for addressing all of the issues required for the design and installation of its stormwater and sanitary sewer systems and for entering the appropriate agreements and or easements for its stormwater and sanitary sewer systems….Da367-370.

exert in the interest of another aspect of the public good" Sica v Board of Adjustment Tp. of Wall, 127 N.J. 152 (1992) citing Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 47 N.J. 211, 221 (1966)(emphasis added). The court recognized that, even in inherently beneficial cases, "the local board may reduce the detrimental effect by imposing reasonable conditions on the use." Sica at 166, citing Ho-HoKus, supra, 47 N.J. at 217.

The primary condition that would have potentially addressed the main negative effects of this project, a reduction in units (which would also reduce impervious coverage, setbacks, parking, etc.), was prohibited by the trial court. The trial court, having determined that the use of this residential property for senior congregate housing must be approved, should not have barred the Board from considering all conditions that would reduce the negative effects on the zone plan and the neighborhood. Even if the trial court decided that the Board had been wrong on the law and the way it applied the Sica test to this application, the Board should still have been permitted to exercise its delegated powers, apply its knowledge of the town and the local land use patterns, and impose reasonable conditions for this use in this zone where it is not permitted to lessen the negative impacts. The density of the proposed use at 20+ units per acre was significantly higher than permitted for these uses in all other districts in the Township.[13] It would have been eminently reasonable to allow the Board to impose a lower density on the project, commensurate with the standard for similar zones, even while compelling the use. The

[13] During the hearing, Mr. Behrens, the Board's planner testified that the highest density permitted in Montville is 14 units per acre and the proposed facility is 20 units per acre. 6T 127:4-14.

Board should have been permitted to consider a density reduction as an appropriate mitigating factor after the trial court mandated the approval of the use variance.

A reduction in density would have also achieved a reduction in impervious coverage and lessened or removed the setback and parking variances required. The removal or lessening of these c variances would have mitigated the impact on the zone and zone plan, but again the Board was barred by the trial court from considering these issues on remand.

In reviewing the ability of courts to remand matters to a land use board, having additional findings by the Board is generally appropriate. In Dunkin Donuts v. Tp. North Brunswick, 193 N.J. Super. 513 (App. Div. 1984), the Appellate Division affirmed the reversal of the denial of the site plan, but conditioned the approval on the applicant withdrawing the request for bulk variances, or obtaining the required bulk variances from the Board on remand. The trial court in that case had directed approval of the entire application without remand, and the appellate court remanded the matter to the Board for approval of the site plan, while specifically preserving the Board's ability to grant or deny the c variances requested. In Urban v Planning Bd., 124 NJ 651 (1991), the Supreme Court affirmed that the Board had applied prior case law incorrectly and remanded the application to the Board to reconsider the subdivision application and variances. Similarly, if the trial court found that the inherently beneficial use must be approved, it should have limited the decision to that legal finding and then remanded the case to the Board to consider the imposition of all appropriate mitigating conditions as required by Sica. The Board has the local knowledge needed to appropriately craft conditions to address the negatives created by a use variance. The local Board, not the court, is best suited to do the

weighing and determine which conditions will balance the positive and negative impacts. By so restricting the Board on remand, the trial court improperly removed its ability to appropriately apply the last prong of the Sica test by the imposition of conditions.

Point III
THE TRIAL COURT ERRED IN ITS APPLICATION OF THE NEGATIVE CRITERIA IN SICA AND NOT GIVING DUE DEFERENCE TO THE IMPORTANCE OF THE MASTER PLAN TO MUNICIPAL ZONING.
(Statement of Reasons Da356, Zoning Board Brief in Prerogative Writ Da319.)

Although the trial court cited the Sica case as the reason for the remand to consider conditions, the outright granting of the application with a prohibition on reducing the number of units did not leave much, if anything, for the Board to consider under Sica. The trial court reasoned that the Board's decision should be overturned because the Board based its decision on a conclusion that "essentially the project is too big, too noisy and will create too much traffic." Da355. First, this over-simplifies the concerns of the Board as clearly identified in the hearing and in its resolution. As to size, it was related to the zone and surroundings. As to traffic impacts due to inadequate parking, that was a significant safety and zone concern, and the applicant failed to address the concern. Since there is no parking permitted on Changebridge Road, all overflow parking would either illegally park on that road or end up on the neighboring residential streets. The lack of adequate parking would create a significant impact on the town, the neighborhood, and the police.

The Court's opinion also includes the statement, "The building itself would not be larger than a single-family home were it to be built on the site." Statement of Reasons Da355. This statement shows that the court did not fully understand the mass and scale of the proposed development. The property is over 500 feet wide and over 850 feet deep with

the building being proposed as one massively long, deep building. This is clearly not the same mass and scale as 16 single family homes constructed on these 8 acres (before reducing that number for the land required to build streets and stormwater systems). Each such home would have conforming front, rear and side yard setbacks providing for light and open space between buildings and a maximum of 2½ stories. Such single-family homes would have a completely different impact on the zone than one single, continuous, mass of a building with 3 stories covering much of this lot. The Board members were concerned with the mass and scale of having one 3-story building and continually asked for assistance in understanding exactly how large this would appear. Applicant's witnesses were unwilling to answer many of the questions about the mass, scale, and view of the building, especially from Changebridge Road. 2T 71:21-25; 6T127:4-14; 7T 72:18-25.

The trial court also failed to appreciate how the Applicant's own architect testified that the flatter roof design that Monarch proposed in order to meet the 35 feet height requirement, while keeping 3 stories, was not compatible with this residential area and contradicted its own architect, who conceded, **"I think it would detract, I don't think it would be appropriate for this neighborhood."**2T 68:9-11 also 2T 37:2-19 (emphasis added).

Second, that summary by the trial court of the Board's position misses a major point made by the Board and is central to weighing the positive and negative impacts.[14] The Board gave significant weight to the fact that this Property had recently been considered

[14] The trial court mistook the Board vote as well, calling it 4-3 while needing 5 votes to approve (Da354), whereas the actual vote was a motion to deny the variances approved by 5-2 to deny. Da409.

for a zone change to allow the same mix of senior housing, and the Township determined not to change the zoning. The court below dismissed this concern with a statement that shows how it did not fully appreciate the history of the Property, the MLUL or the master plan process. The trial court's reasoning was,

> [r]ecently the governing body rejected a zone change to make this proposal a permitted use. The governing body did designate several parcels for this purpose. But the zoning was not changed to reflect this. This fact is not relevant and is not a basis to deny this application." Da356.

It was plain error to conclude that the governing body's denial of a rezoning request for the same use (and even less intensive) on this site and the exclusion of this site from the Master Plan update are not relevant to a use application to the Board of Adjustment for the exact same use on the same Property.

The material fact that the trial court also overlooked was the Planning Board's consideration of where additional senior housing should be permitted in the Township and its master plan reexamination designated additional properties for senior housing, but intentionally omitted this Property, even after receiving a planning memo discussing its possible inclusion. The fact that the Township had not yet adopted the implementing ordinance creating the new senior housing zones recommended by the master plan is not determinative, because the Property at issue would in no event be included in the new zone. The trial court erred by mistaking the significance of the Master Plan update and its weight as a planning document in creating the long term zoning plan for a municipality, and the updated Land Use Element adopted by the Planning Board specifically omitting these uses for this Property.

The trial decision fails to consider the history of zoning and the mandates of the MLUL statute. Village of Euclid v Ambler Realty Co., 272 U.S. 365 (1926), firmly established zoning as a valid police power reserved to the states. In New Jersey, that power was delegated to municipalities in the MLUL. The trial court did not adequately consider the mandates of the state law in its summary dismissal of the Appellant's arguments and the Board's reliance on the outcome of the master plan process and the adopted Master Plan update for Montville. As set forth in the MLUL,

> No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance of 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. N.J.S.A. 40:55D-70.

The zone plan must be created, in the first instance, by the master plan and then kept up with periodic reexaminations of that plan. The fact that the implementing update ordinance has not been enacted, is immaterial. Based on the Master Plan update, the ordinance that would flow from the update would not permit senior housing at the Property, and that is the point. The master plan is the device the MLUL provides for creating and updating the "zone plan" for a municipality. The recently reexamined Master Plan does not call for a change in zoning to this property even after a formal request was made and after the Planning Board specifically considered where senior housing should be added. If the Board were to grant by variance what the Master Plan specifically declined to plan for, that is by definition a substantial detriment to the zone plan and to the statutory scheme requiring the creation of master plans, as a pre-requisite to enacting a zoning ordinance, and the periodic updating of a master plan as a pre-requisite to the continuing

viability of a municipal zoning ordinance. The MLUL specifically provides at N.J.S.A. 40:55D-62:

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and buildings and structures thereon**. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of the master plan,** and all of the provisions of such zoning ordinance or any amendment or revision thereto **shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements;**….[15]

New Jersey courts have recognized that these statutory provisions speak to the importance the state legislature places in the master plan, the municipal planning and review process. See Lionshead Woods v. Kaplan Bros., 243 N.J. Super 678 (1990). In Vidal v. Lisanti Foods, Inc., 292 N.J. Super 555 (App. Div. 1996), the appellate court reversed the grant of a use variance and chastised the Board for the "arrogation of the power to rezone" and called the approval "an impermissible de facto rezoning of the tract." Id. at 564. The appellate court characterized its reversal as "serv[ing] to effectuate the legislative 'objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance.' " Id. at 567, citing Medici, 107 N.J.1, 5. In fact, the court in Medici went further and made it clear that the master plan is the basis for land use

[15] N.J.S.A. 40:55D-89 further provides, " The governing body shall, at least every 10 years, provide for a general reexamination of its master plan and development regulations by the planning board, which shall prepare and adopt by resolution a report of the findings of such reexamination…" The MLUL further emphasizes the pivotal importance of the master plan to the regulation of zoning and land use by municipalities by providing that "[t]he absence of the adoption by the planning board of a reexamination report pursuant to section 76 of P.L. 1975, c 291 (C40:55D-89) shall constitute a rebuttable presumption that the municipal development regulations are no longer reasonable." N.J.S.A. 40:55D-89.1. Montville's Planning Board adopted the resolution updating the Master Plan.

decisions and use variances cannot be granted unless consistent with the master plan. Medici required "clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of **the master plan and zoning ordinance**" as the basis for satisfying the negative criteria. Id. at 4 (emphasis added). It viewed this requirement as a mechanism that would "narrow to some extent the discretion of boards of adjustment in reviewing use variance appeals for uses that are deliberately excluded by the governing body from those permitted in the zoning ordinance." Id. at 5.

The Board recognized that this is an inherently beneficial use, but correctly also recognized that the importance of the master plan in the balancing of the negative criteria does not change with an inherently beneficial use. Only the positive criteria changes.

The trial court completely missed the significance of the rezoning denial and the master plan and the central role it plays under the statute. This is a case where, if the Board were to grant the variance, it would be usurping the planning role of the Planning Board and the legislative role of the governing body, by granting a variance that had been denied through planning and the legislative process required under the MLUL. A granting of the variance for the proposed use would clearly substantially impair the zone plan and the zone ordinance which had recently been confirmed, both in the governing body's denial of the rezoning of this Property and the updated 2019 Master Plan and Land Use Element update confirming the zoning for this property to remain as R-20.

The appellate court should reverse the decision of the trial court and reinstate the Board's decision -- a decision which appropriately weights the derogation of the recently

updated master plan as a significant negative impact under the Sica test, a negative impact that the Monarch's application did not overcome.

In the alternative, should the appellate court determine that the senior housing use outweighs the significant negative impact to the zone plan and zoning ordinance, then the matter should be again remanded to the Board for a full consideration of the d variance for density, the c variances, design waivers, and the implementation of other conditions to address the negative impacts of permitting this use in a zone where it is not permitted.

CONCLUSION

For the foregoing reasons presented, it is respectfully submitted that the decision of the trial court in this matter should be reversed and the denial of the Monarch use variance application should be confirmed. Failing such a reversal, the court should remand the matter for the Board to impose reasonable conditions that would address the negative effects of this development proposal on the public, the zone plan and zoning ordinance.

Respectfully submitted,
Pashman Stein Walder Hayden, PC
By: s/*Bruce J. Ackerman*
Bruce J. Ackerman

Beattie Padovano, LLC
200 Market, Suite 401
Montvale, NJ 07645
201-573-1810
Co-Counsel for Plaintiff-Respondent
JMC Investments, LLC

Giordano Halleran & Ciesla, PC
125 Half Mile Road, Suite 300
Red Bank, NJ 07701
732-741-3900
Co-Counsel for Plaintiff-Respondent
JMC Investments, LLC

MONARCH COMMUNITIES, LLC A Limited Liability Company of the State of Delaware Plaintiff, vs. TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-00929-23T4 CIVIL ACTION On Appeal from A Final Order of the Superior Court of New Jersey, Morris County, Law Division
JMC INVESTMENTS, LLC, a New Jersey Limited Liability Company Plaintiff-Respondent, vs. THE TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant.	Docket Nos. Below: MRS-L-1986-21 MRS-L-1991-21 Sat Below: Hon. Stephan C. Hansbury, J.S.C. **BRIEF OF PLAINTIFF-RESPONDENT JMC INVESTMENTS, LLC**

Antimo A. Del Vecchio, Esq. (015191989)
Paul H. Schneider, Esq. (024601978)
Of counsel

Daniel L. Steinhagen, Esq. (018622005)
On the brief

June 7, 2024

Table of Contents

Table of Orders, Judgments and Rulings ii

Table of Authorities iii

Index to Appendix vi

Preliminary Statement 1

Procedural History 2

Statement of Facts 3

Legal Argument 19

Standard of Review 19

I. THE BOARD'S DECISION TO DENY MONARCH'S INHERENTLY BENEFICIAL USE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE; THE COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION. [DA348] 21

A. The Board Improperly Evaluated the Public Interest at Stake 22

B. The Board Improperly Evaluated the Detrimental Effects that Would Arise if the Project Were Approved 25

C. The Board Failed to Consider Reasonable Conditions 35

D. Because the Board Improperly Evaluated the Public Interest at Stake, Unreasonably Considered Detriments That Were Not Substantial and Did Not Impose any Conditions, the Board's Balancing Analysis was Flawed from Inception 39

II. BULK VARIANCES FROM THE REQUIREMENTS FOR THE ZONE WERE SUBSUMED WITHIN THE USE VARIANCE; MONARCH PRESENTED SUFFICIENT PROOFS FOR THE TWO DESIGN EXCEPTIONS IT NEEDED. [DA348] 43

Conclusion 50

Table of Orders, Judgments and Rulings

Order and Opinion of Hon. Stephan C. Hansbury, J.S.C.,
dated December 23, 2022 ..... Da348

Stipulation of Dismissal, dated October 23, 2023..... Da382

Table of Authorities

Cases

Anatasio v. Planning Bd., 209 *N.J. Super.* 499 (App. Div.), *certif. denied*, 109 *N.J.* 46 (1986) 20

Baptist Home of S. Jersey v. Bo. of Riverton, 201 *N.J. Super.* 226 (Law Div. 1984)..... 39

CBS Outdoor v. Lebanon Planning Bd., 414 *N.J. Super.* 563 (App. Div. 2010)..... 20

Cell South of N.J. v. Bd. of Adj., 172 *N.J.* 75 (2002) 20

Chou v. Rutgers, State University, 283 *N.J. Super.* 524 (App. Div. 1995), *certif. denied*, 345 *N.J.* 374 (1996) 20

Dunbar Homes, Inc. v. Bd. of Adj., 233 *N.J.* 546 (2018)..... 48

Field v. Franklin Twp. Planning Bd., 190 *N.J. Super.* 326 (App. Div. 1983)..... 35

Grubbs v. Slothower, 389 *N.J. Super.* 377 (App. Div. 2007) 27

Jayber v. Mun. Council, 238 *N.J. Super.* 165 (App. Div.), *certif. denied* 122 *N.J.* 142 (1990)..... 23

Kensington Senior Development, LLC v. Twp. of Verona, slip op., A-1010-19 (App. Div. Dec. 1, 2021) 34

Kramer v. Sea Girt Board of Adj., 45 *N.J.* 268 (1965)..... 19

Med. Ctr. v. Princeton Twp. Zoning Bd., 343 *N.J. Super.* 177 (App. Div. 2001)..... 33

Medici v. BPR Co., Inc., 107 *N.J.* 1 (1987) 15, 22

N.Y. SMSA v. Bd. of Adj., 370 *N.J. Super.* 319 (App. Div. 2004)..... 42

O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am., 361 *N.J. Super.* 264 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004) 48

Price v. Himeji, LLC, 214 *N.J.* 263 (2013).....20, 24, 43

Puleio v. Bd. of Adj., 375 *N.J. Super.* 613 (App. Div.) *certif. denied,* 184 *N.J.* 212 (2005) 44

Regency Gardens v. Bd. of Adj., *slip op.*, A-2283-13 (App. Div. Aug. 27, 2015) 28

Reich v. Fort Lee Board of Adj., 414 *N.J. Super.* 483 (App. Div. 2009) 19

Rocky Hill Citizens v. Planning Board, 406 *N.J. Super.* 384 (App. Div. 2009) 20

Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, 47 *N.J.* 211 (1966) 32

Salt & Light Co. v. Willingboro, 423 *N.J. Super.* 282 (App. Div. 2011), *certif. denied*, 210 *N.J.* 108 (2012) 22, 37

Sica v. Wall Twp. Bd. of Adj., 127 *N.J.* 158 (1992) ..... passim

Sunrise Dev., Inc. v. Princeton Bd. of Adj., *slip op.,* A-5717-18 (App. Div. June 24, 2020) 34

Taxpayers Assn. v. Weymouth Twp., 80 *N.J.* 6 (1976) 22

Wawa Food Market v. Ship Bottom Planning Bd., 227 *N.J. Super.* 29 (App. Div. 1988) 47

Statutes

N.J.S.A. 26:2H-12.79 28

N.J.S.A. 40:55D-2 23

N.J.S.A. 40:55D-10.5 48

N.J.S.A. 40:55D-22 36

N.J.S.A. 40:55D-37 36

N.J.S.A. 40:55D-40.5 8

N.J.S.A. 40:55D-51 47

N.J.S.A. 40:55D-67 36

Regulations

N.J.A.C. 5:23-4.14 ..... 8, 11, 28, 46

N.J.A.C. 8:36-1.3 ..... 29, 46

Treatises

Cox, William M., N.J. Zoning and Land Use Administration, (Gann 2024 Ed.) 20

MONARCH COMMUNITIES, LLC v. TOWNSHIP OF MONTVILLE, et als.
and
JMC INVESTMENTS, LLC v. TOWNSHIP OF MONTVILLE, et als

A-00929-23

Index to Appendix

Montville Land Development Application,
dated February 20, 2020 ..... Pa1

Schedule "A" - Checklist.....Pa11

Rider "A" – Corporate Information Pa25

Rider "B" – Contract Purchaser's Consent.....Pa27

Rider "C" – Variances and Waivers.....Pa28

Rider "D" – Justification for Variances.....Pa29

Rider "E" – Resumes.....Pa31

Rider "F" – Tax Certification and Property Owners List Pa36

Montville Design Review Committee Memorandum,
dated October 13, 2020.....Pa48

Hearing Exhibit A-2 - Site Plan (excerpt) prepared by Bohler Engineering,
last revised February 12, 2020 .....Pa49

Hearing Exhibit A-11 – Morris County Planning Board Site Plan Reports,
dated July 27, 2020 and September 8, 2020 .....Pa52

Hearing Exhibit A-16 – Traffic Report prepared by Shropshire
Associates LLC, dated February 19, 2020 .....Pa56

Hearing Exhibit A-22 – Traffic Report Addendum, prepared by Shropshire Associates LLC, dated June 16, 2020 .....Pa114

Hearing Exhibit A-25 – Market Study Report prepared by CBRE Valuation & Advisory Services, dated November 5, 2020 .....Pa120

Addendum A – Appraiser Qualifications.....Pa 151

Addendum B – CBRE Specialty Practice Brochure.....Pa156

Hearing Exhibit A-27 – Emergency Generator and Trash Compactor Sound Study prepared by Cavanaugh Tocci, dated September 15, 2020.....Pa161

Appendix A – Sound Measurement Technology Pa166

Appendix B – Manufacturer's Sound Data.....Pa170

Hearing Exhibit A-33 – Revised Architectural Plans prepared by JAL Architects, dated March 12, 2021 .....Pa172

Hearing Exhibit A-40 – Revised Planning Report prepared by Phillips Preiss Grygiel Leheny Hughes, LLC, last revised May 10, 2021 .....Pa180

Hearing Exhibit A-45 – Richard Preiss Powerpoint Presentation Pa226

Hearing Exhibit A-46 – Revised Site Plan Layout C-301, prepared by Bohler Engineering, last revised June 29, 2021 .....Pa256

Board Engineer Review Letter, dated April 17, 2020.....Pa257

Board Engineer Review Letter, dated July 28, 2020 .....Pa265

Board Engineer Review Letter, dated April 3, 2021 .....Pa272

Township of Montville Land Use and Development Ordinance (excerpt) Pa278

Letter of Bruce J. Ackerman, dated July 9, 2022 .....Pa348

Complaint in Lieu of Prerogative Writs filed by
Monarch Communities, LLC, September 17, 2022 ..... Pa349

Regency Gardens v. Bd. of Adj., *slip op.*, A-2283-13
(App. Div. Aug. 27, 2015) Pa389

Kensington Senior Development, LLC v. Twp. of Verona,
slip op., A-1010-19 (App. Div. Dec. 1, 2021) Pa394

Certification of Matthew N. Fiorovanti, Esq.,
filed June 3, 2022 ..... Pa402

Ex. "A" – Sunrise Development, Inc. v. Bd. of
Adj., slip op., A-6120-97 (App. Div. July 8, 1999) Pa405

Ex. "B" – Transcript of Montville Township Planning
Board Meeting, December 12, 2019[1] Pa423

Notice of Assignment Letter, dated December 14, 2023 ..... Pa453

[1] This December 12, 2022 Transcript is included in this Appendix because that transcript was appended to the Certification of Matthew Fiorovanti, Esq., filed on June 3, 2022. That Certification must be included in this Appendix pursuant to *R.* 2:6-1(a)(1) because it is an underlying pleading in this action. Furthermore, the transcript is in quad format because that is the format that was submitted to the Law Division and it cannot be manipulated to provide single or duplex pagination.

PRELIMINARY STATEMENT

In this appeal, the Montville Board of Adjustment ("Board") seeks to reinstate its arbitrary, capricious and unreasonable denial of a site plan and use variance application for a multi-level senior living facility, an inherently beneficial use, located between a school bus depot, a townhouse development, and a residential neighborhood. The reason: it believed the proposed building that the applicant, Monarch Communities, LLC, sought to develop, which complied with all building setbacks, the building coverage, and the building height (in feet) required for single-family development in Montville's R-20A Zone, was too big for the neighborhood, had too many units, and was in the wrong location. The trial court rejected the Board's baseless reasons for denial, and this Court should too.

In support of its wrongful decision, the Board points to made-up detriments, such as claims that the building proposed by Monarch Communities, LLC ("Monarch") was too tall, but it fails to alert the Court to the fact that what it really means is that Monarch's building complies with the height restriction in the zoning district, but there would be 3 stories inside Monarch's building rather than the 2.5 stories Montville allows inside single-family dwellings. Likewise, the Board argues that Monarch's site plan did not have enough parking under the Borough's ordinance, even its own engineer determined Monarch proposed more parking spaces than it actually needs and the Borough's ordinances are

preempted by State law. The Board claimed that Monarch's plan had too much impervious coverage even though Montville's ordinance allowed more coverage for other uses here.

But the Board's biggest error was its decision that senior housing in this location was a detriment. In doing so, the Board engrafted a legal standard that is inapplicable to inherently beneficial uses into its analysis of the use variance that Monarch sought. This was a fundamental and fatal flaw in its decision-making process, and one that rendered its denial arbitrary, capricious and unreasonable. The Court should affirm the Law Division's decision.

PROCEDURAL HISTORY

Monarch filed its application for development on March 20, 2020. [Application]. The Board held seven hearings[2] between September 30, 2020 and July 7, 2021 when it voted to deny the application. [7T 159-17 to 161-11]. The Board adopted a resolution on August 4, 2021. [Da359].

Monarch filed a Complaint on September 17, 2021 challenging the Board's decision that it amended on September 21, 2021. [Pa349; Da146]. Monarch also alleged the Board and the Township of Montville discriminated against the

[2] The transcripts of the proceedings below are referred to herein as:
September 30, 2020 – "1T" November 19, 2020 – "2T"
January 20, 2021 – "3T" April 7, 2021 – "4T"
May 20, 2021 – "5T" June 2, 2021 – "6T"
July 7, 2021 – "7T" October 27, 2022 Trial Transcript – "8T"

elderly, and challenged the Township's ordinances. The case was subsequently consolidated by consent with a similar action filed by JMC Investments, LLC, the contract purchaser of the property in question that had contracted to sell the property to Monarch. [Da186, Da273].

The Law Division set a briefing and trial schedule [Da277], and conducted a bench trial on the prerogative writ counts of the complaints on October 27, 2022 ("8T"). The court reversed the Board's denial of Monarch's application on December 23, 2022 and remanded the application back to the Board for the imposition of conditions. [Da348]. The Board imposed conditions in a resolution adopted on March 1, 2023. [Da359]. The parties filed a stipulation dismissing the remaining counts with prejudice on October 17, 2023 and then the Board filed this appeal on November 28, 2023. [Da382, 391].

Monarch terminated its contract to purchase the subject property after the Law Division reversed the Board's decision, and JMC has elected to vindicate the Law Division's decision and maintain the court-ordered approval on appeal. [Da452].

STATEMENT OF FACTS

A. The Property

Monarch was the contract purchaser of Block 131.2, Lot 6 and 7 on Montville's Tax Map (the "Property"), located at 205-207 Changebridge Road. [Da19]. Lot 6 is used as a farm and Lot 7 has a small dwelling.

The Property is 8.077 acres in size, has approximately 510 feet of frontage on Changebridge Road and is 850 feet deep. [Pa256]. Immediately north of the Property is a bus depot, and further north is Montville's municipal complex. [Da19]. South of the Property are single-family dwellings, and further south are a childcare facility, gas station and shopping centers. [Da19]. Single-family dwellings are east of the Property across Changebridge Road, while a townhouse development abuts the Property to the west. [Da19].

According to the Township's planner, the neighborhood is characterized by a variety of uses, and notably, the west side of Changebridge Road where the Property is located is predominantly non-residential. [Pa38].

B. The Zoning

The Property is located in Montville's R-20A Zone, which permits single-family dwellings, municipal buildings, farms and child-care uses. [Da18]. Schools are conditionally permitted in the R-20A Zone, with a maximum impervious limit of 55% pursuant to § 230-162 of the Township's Land Use and Development Ordinance ("LUDO"). [Pa328]. None of Montville's zoning districts permit multi-level senior housing that contains independent living, assisted living and memory care within a single development. The only zoning districts that permit assisted living uses are the OB-1, OB-3, OB-1A, OB-2A, OB-4, I-1A, I-1B, I-2 and I-4 Zones; those same zones also permit nursing home uses. [Da401]. As their acronyms suggest, the OB Zones are primarily designed

for office buildings, while the I Zones are primarily designed for industrial uses. [Pa322].

C. The Application

Monarch's application sought approval for a 165-unit, multi-level senior housing community in a three-story building. [Pa3]. The project proposed 81 independent living units, 58 assisted living units and 26 memory care units. [Pa186-187]. Monarch proposed to provide 25 units of affordable housing, representing a 15% set-aside. [5T 29-15 to 31-11; Pa191-192]. The initial iteration of the plan deviated from the zoning standards for single-family development in the R-20A Zone for (1) building height (38.5 feet proposed); (2) stories (3 proposed); (3) combined side yard setback (165.1 proposed); (4) building coverage (17.9% proposed); and impervious coverage (41.3% proposed). [Pa50]. During the hearings, the height of the building in feet, the side yard setback and the building coverage were brought into conformity with the R-20A requirements. The building height remained at 3 stories but conformed to the 35-foot limit. Impervious coverage was reduced to 39%. [Pa256]. The application required a variance for fence height that Monarch agreed to eliminate. [1T 34-13 to 35-5]. It also required relief from standards contained in Montville's Site Plan Design Standards Ordinance for parking in the front yard and disturbance of steep slopes, though Montville eliminated its steep slope design criteria from its

Site Plan Design Standard Ordinance in March of 2021, and so Monarch did not require a design exception anymore.

D. The Hearings

At the initial hearing, held on September 30, 2020, Monarch presented the testimony of its principal, Michael Glynn, and its civil engineer, Brad Bohler. Glynn explained that the most significant factor in determining where a prospective resident of a multi-level senior housing community chose to reside was the location where their adult children lived. [1T 26-15 to 27-6]. Glynn noted that in Monarch's other communities, "very few independent living residents . . . actually bring a vehicle and those that do . . . don't typical use it and eventually . . . get rid of it . . . because it's really an all-inclusive environment . . ." [1T 29-2 to 29-10]. He explained that as residents progress to need more intensive, higher level of care to help with their activities of daily living (i.e., dressing, grooming, medication disbursement – typically in their mid-80s), they would move into the assisted living wing where their medical frailties can be accommodated with dignity. [1T 29-20 to 30-12]. Finally, the memory care wing was designed as a secure environment for residents with Alzheimer's Disease, dementia and other forms of memory loss to provide these residents with a safe living environment without the risks that might typically arise when living at their home or at the home of a child or other caregiver. [1T 30-13 to 31-

7]. The community differed from nursing homes as staff provides general health and wellness support but not medical care. [1T 33-22 to 34-3].

Monarch projected 30 employees daytime and 10 nighttime employees. [1T 32-4 to 32-10]. Glynn confirmed that no residents in the memory care wing would drive and only 2% of the assisted living residents would have their own vehicles. [1T 32-13 to 33-1]. He indicated that approximately 30% of the independent living residents would arrive with vehicles but that they would typically get rid of them within a year due to disuse. [1T 33-1 to 33-12]. Later, he confirmed that 100 parking spaces would be more than sufficient for the type of community proposed, but if necessary, Monarch would find an off-site location and shuttle visitors to the Property, noting that the bus depot immediately to the north of the Property would be an obvious first call. [1T 82-1 to 83-13]. Monarch later agreed to a condition of approval in this regard. [3T 45-20 to 46-11]. Glynn also testified the community could expect up to two weekly ambulance calls – handled by a private provider – to transport residents to the hospital. [1T 34-9 to 34-25]. Garbage would be picked up 2-3 times per week, and Glynn testified that it was in its financial interest minimize noise and other impacts to make the community livable. [1T 35-4 to 36-17].

Bohler testified about site design and confirmed the project had received approval from the Morris County Planning Board (1T 48-24 to 49-4; Morris County Planning Board report, October 13, 2020) and that Monarch agreed to

incorporate Montville's Fire Department requests concerning its access to the building. [1T 50-8 to 51-11]. Monarch's plan contained 117 off-street parking spaces, which Bohler explained was less than what the Township's ordinance required, if the independent living units were treated as typical garden apartments but significantly more than the operational demands Monarch identified. [1T 51-12 to 52-13]. Later, testimony confirmed the Residential Site Improvement Standards ("RSIS"), *N.J.A.C.* 5:23-4.14, Table 4.4(d), which require 83 spaces at a ratio of 0.5 spaces per unit, preempted the LUDO's off-street parking requirements. *See N.J.S.A.* 40:55D-40.5 ("the standards set forth in the regulations . . . shall supersede any site improvement standards incorporated within the development ordinance . . ."). [5T 71-22 to 72-15].

Bohler testified to the stormwater management plans that Monarch intended to implement. Under current conditions, stormwater falling at the rear of the Property exits via an existing drainage pipe from the wetlands on the west side of the Property. Because Monarch was detaining significant amounts of water in an on-site system, it would reduce the amount of water in the pipe during design storm events even more than required by NJDEP. [1T 54-23 to 57-24]. According to Bohler, the construction of the multi-level senior housing community would be better from a stormwater management standpoint for the flow of water into the wetlands on the west of the Property. [1T 57-25 to 58-5]. Later, there was a question about whether Monarch's design was permitted under

the terms of an easement agreement, which counsel for Monarch confirmed it was, subject to approval by the Township Committee. [4T 98-11 to 98-23]. Monarch offered to take over the maintenance of that easement from the Township, and the Board Engineer confirmed that that arrangement was acceptable. [4T 97-14 to 98-7]. The Board Engineer's review letters initially indicated that Monarch's stormwater design was a concern, but after several plan reviews he confirmed that the final design complied with the LUDO and was appropriate. [Pa260, ¶ 21; Pa267, ¶ 6; Pa273, ¶ 4].

Bohler described the landscape buffering Monarch intended to install. Noting that Monarch had worked with the neighbors to address their concerns, Bohler explained that the plan proposed hundreds of trees, shrubs and other plantings creating visual buffer and an attractive environment for the senior housing community. [1T 62-10 to 64-20]. The Board's Engineer later commented favorably about the landscape buffer that Monarch proposed, noting that the plan was "about as good as I've seen" and was a "very significant effort." [1T 82-83 to 84-4]. It is shown on the last version of the site plan. [Pa256].

Monarch's architect, Erik Anderson, initially testified on November 19, 2020. At that hearing, the Board Planner inquired about the reasons why the building exceeded the 35-foot height limit imposed by the ordinance. [2T 36-17 to 37-1]. Anderson explained that Monarch added design elements to its plan at the suggestion of Montville's Design Review Committee. [2T 37-2 to 37-9].

However, because the Board was concerned with the proposal to exceed the 35-foot height limit to allow for those ornamental features, Monarch revised the plans to comply with the 35-foot limit in the R-20A Zone. [Pa176-179]. The revised plan still sought relief from the 2.5-story limitation imposed on single-family dwellings in the R-20A Zone. Notably, other several zones in Montville permit buildings between 40 and 75 feet, and 3 to 4.5 stories. [Pa329, 331, 333, 339, 341, 343, 345, 347]. Additionally, the Board's Planner noted that there were other three story residential buildings on Changebridge Road. [2T 39-12 to 40-4].

According to Monarch's architect, it was possible to reduce the building to two stories but doing so would make the project non-viable. [2T 62-24 to 63-6]. This is because, as Monarch's planner, Richard Preiss, P.P., later noted, multi-level senior housing communities need to have a smaller footprint so that the frail, elderly residents who inhabit them do not have to walk significant distances to dining, communal facilities, and other services; a building with fewer floors would need to make up the lost units from the third floor to keep it financially viable, which meant a bigger linear footprint. [6T 123-2 to 124-15].

Monarch's traffic engineer, David Shropshire, P.E., also testified on November 19, 2020. He explained that the proposed multi-level senior housing community would generate minimal traffic and no changes to the levels of service at the intersections on Changebridge road nearest to the Property. [2T 77-23 to 79-25]. He also noted that a school, which is conditionally permitted in the

R-20A Zone, would generate the same overall level of traffic. [2T 84-4 to 84-9]. He also provided testimony that based upon real-life studies that the independent living units themselves would actually need 0.67 spaces per unit, or 55 spaces in total. [2T 80-15 to 81-4]. Based upon data and the operational information provided earlier, Shropshire concluded that the overall project would need 106 spaces, and thus the 117 proposed parking spaces would be more than sufficient. [2T 81-9 to 83-19]. Later, testimony confirmed 117 spaces exceeded the number required by the RSIS, *N.J.A.C.* 5:23-4.14, Table 4.4. [5T 71-22 to 72-15].

Monarch also presented the testimony and unrebutted report of James Graber, an expert in senior housing market study and needs analysis. [3T 120-21 to 122-19; Pa120]. Graber explained 70-80% of residents of a particular multi-level senior housing community lived within 15 minutes of the site, which in this case, translated to a 7-mile circle around the Property that he called the primary market area (the "PMA"). [3T 124-14 to 130-16; 4T 32-3 to 33-21]. Graber examined the supply of the types of housing Monarch intended to provide in the PMA and determined a significant (and growing) undersupply with 401 independent living units, 542 assisted living units and 302 memory care units existing within the PMA but a net demand (i.e., unfulfilled) of 1,001 units for independent living, 588 units for assisted living and 261 units for memory care in the PMA that is currently not being met. [Pa147; 3T 136-1 to 141-20; 4T 12-7 to 12-13]. Even in the future, with potential construction of developments in nearby

municipalities, Graber projected a multi-hundred unit annual shortfall between what the market would need and what would be constructed. [Pa147].

Monarch's planner, Richard Preiss, P.P., testified at multiple hearings. He differentiated the type of independent living that Monarch sought to provide with ordinary senior housing or adult active communities, which he noted could be called independent living, but where the residents did not need assistance with daily living activities. [5T 16-25 to 22-23]. He testified that the proposed use was an inherently beneficial use. [5T 23-19 to 26-4]. He also indicated that the community would bring a great benefit to its prospective residents and their families, whether in Montville or in the surrounding PMA. [5T 26-5 to 26-9; 5T 59-6 to 60-12]. In addition, because the project proposed 25 affordable units, it would make a sizeable contribution to satisfying the unmet need component of Montville's affordable housing obligation. [5T 39-5 to 42-17].

Preiss identified the relief that Monarch sought beyond the use variance. He noted that the project was approximately 10% over the impervious coverage permitted for single-family dwellings in the R-20A Zone (but much less than permitted on a school). [5T 67-2 to 67-13]. Monarch also sought a variance for number of stories. [5T 70-20 to 71-15]. He initially noted that Monarch required relief from the prohibition against monument signs in the R-20A Zone, but later indicated that the signage was either conforming or subsumed within the use variance. [5T 71-16 to 71-21; 7T 49-12 to 50-4; Pa335 (monument signs for

institutional uses permitted in R-20A Zone up to 20 square feet)]. He also confirmed that based upon a recent amendment to the RSIS, no relief for the number of off-street parking spaces was required. [5T 71-22 to 72-15].

Preiss described the balancing test for inherently beneficial uses that require use variance relief under the Supreme Court's decision in *Sica v. Wall Twp. Bd. of Adj.*, 127 *N.J.* 158 (1992). [6T 7-22 to 9-19]. He testified that the use ranks very high on the scale of inherently beneficial uses, noting that senior citizen housing construction is listed as a purpose of zoning in *N.J.S.A.* 40:55D-2(l), a goal of Montville's Master Plan, and because there is a significant unmet need for this type of housing in Montville. [6T 12-17 to 15-21]. He also noted the significant benefit of providing 25 units of income-restricted housing towards the Township's significant unmet affordable housing obligation. [6T 16-13 to 17-1].

For negative impacts, Preiss indicated he focuses on impacts to nearby land uses, aesthetics, traffic and parking, the environment, and municipal services when evaluating inherently beneficial uses. [6T 17-16 to 17-24]. The impacts from this use on adjacent properties was entirely benign, because most of the activities associated with the community are not visible, and the amenities and residents themselves are generally confined to the inside of the building. [6T 18-11 to 18-21]. The project would not generate substantial traffic, noise, odors or glare, nor be obnoxious to surrounding uses. [6T 18-21 to 19-10, 24-2 to 25-9]. The building was well-screened, and would serve as a good transition between

the single-family uses to the south and the townhouses west of the Property and the bus depot located on the north side of the Property. [6T 19-11 to 19-22]. He noted that the building was designed to be compatible with the character of the surrounding properties and that in addition to the substantial setbacks Monarch was proposing an extensive landscape buffer so that there were no visual or other aesthetic impacts from the project. [6T 20-24 to 23-19; Pa256]. Based on these facts, Preiss opined that there would be no substantial impact to the public good. [6T 28-6 to 28-11].

After determining that there would not be substantial detriments to the public good, Preiss turned to the second prong of the negative criteria – whether the relief Monarch sought would cause substantial impairment to the intent and purposes of the zone plan and zoning ordinance. [6T 28-12 to 28-17]. He noted that the project advanced several specific goals of the Montville's Master Plan, including that the project was responsive to the environmental issues, preserves the physical characteristics of the Property, considered and was compatible with the aesthetic character of the neighborhood, and provides additional housing choices to Montville's residents, particularly the frail elderly. [6T 28-24 to 32-9]. He offered an opinion that the Montville Planning Board's decision not to recommend the Property for multi-level senior housing in a recent Amendment to the Township's Master Plan (the "MPA")(Da71) was irrelevant to the Board's consideration of the use variance because the use is inherently beneficial and the

enhanced quality of proof under *Medici v. BPR Co., Inc.*, 107 *N.J.* 1 (1987), did not apply. [6T 32-13 to 33-5, 88-2 to 91-10].

Preiss also compared the proposal favorably to zoning in other locations in Montville that permitted certain components of the multi-level senior housing community. He noted that those zones are typically industrial or non-residential in character. [6T 34-13 to 39-15, 49-5 to 52-12; Pa231-245]. In response to questions, Preiss noted that while there are other zones in Montville that allow assisted living uses, the zoning standards in the LUDO prevented development. Pointedly, he commented,

> The density and the FAR and . . . the coverage is . . . low. And that's . . . the reason why . . . it hasn't been developed and why in this particular case if you look at the . . . other multi-level senior facilities and you look at the height and the density and the . . . other requirements, that gives you the notion of what is needed to make facilities like this appropriate. And your density or – you know, 14 units to the acre, less than 10 units to the acre is – it simply doesn't allow this kind of facility to be developed.
> [6T 101-4 to 101-15]

Preiss later explained that even though the Township had zoned for assisted living uses elsewhere, the bulk standards in those zones made it impossible to develop the use in those locations, and those bulk standards were likely a reason why no development of that use had occurred in Montville. [7T 25-1 to 27-23]. The effect of this, as was confirmed by Graber's earlier testimony was a large (and growing) unmet need for the services that Monarch sought to provide. Nevertheless, when asked if Monarch would make the building smaller,

Preiss indicated that Monarch was willing to listen to consider such requests if the Board could articulate why the size of the building was a problem as it had done with other issues that the Board identified (such as the height of the building). [6T 106-11 to 109-12]. It never did.

Although Preiss concluded that the project would not cause a substantial impairment to the intent and purposes of the zone plan and zoning ordinance (6T 66-12 to 67-8), he continued with the proofs required by *Sica*. In this regard, he noted the evolution of the design to mitigate the impacts perceived by the Board and how Monarch had revised its plans accordingly. [6T 75-14 to 75-15]. However, he confirmed that Monarch would agree to further conditions or modifications if the Board had additional concerns. [6T 76-16 to 76-25]. But, since none had been identified or requested at that point, Preiss offered an opinion that the significant need for Monarch's multi-level senior housing community far outweighed the limited impacts to the neighborhood and to the Township's zone plan and zoning ordinance. [6T 77-1 to 77-14].

At the final hearing on July 7, 2021, Monarch presented a revised site plan (Pa256) that eliminated most of the remaining bulk variances In particular, Monarch eliminated the building coverage and combined side yard setback variances. [7T 3-10 to 4-11]. Monarch's planner provided further testimony in support of the use variance, noting, among other things that the impacts from 165 units in a multi-level senior housing community was not even remotely similar to

the impacts of a 165-unit apartment or townhouse development because the types of housing (and how they were used) were not the same. [7T 18-10 to 19-15, 36-21 to 37-12].

Although Preiss opined that the deviations from the bulk zoning standards for the R-20A Zone were subsumed within the use variance request, he provided testimony anyway to support the variances. [7T 36-8 to 36-17, 39-19 to 50-18]. He also provided testimony on the number of off-street parking spaces, which he explained did not require any relief due to a recent change in the RSIS, and justified the site plan design waivers that the plan required. [7T 50-19 to 57-19]. In a summation, counsel for Monarch reminded the Board that if there were concerns about detrimental impacts, the Board should engage in a discussion with Monarch about conditions to mitigate those impacts, even though none had been identified. [7T 142-10 to 144-3].

The Board did not accept that offer and voted 5-2 to deny the application without considering any conditions. [7T 159-17 to 161-11].

E. The Resolution

The Board adopted a 27-page written resolution on August 4, 2021. [Da118]. The Resolution reluctantly found the proposed development to be inherently beneficial (Da131), but does not discuss the nature and extent of the benefits it would engender. The Resolution identified detriments, but does not identify specific facts upon which those alleged detriments are based. Those

findings are discussed below. The Board declined to identify any mitigating conditions on the purported detriments, and the majority of the Board's analysis in its Resolution concerns its conclusion that the Property is an inappropriate location for the proposed development as the Township had declined to rezone the Property. Only four pages of the resolution are devoted to the testimony of Monarch's witnesses, while the majority of the Resolution tries to conjure perceived negative impacts from the project. [Da126-129]. The Resolution is substantively deficient because it does not properly reflect the testimony and evidence presented at the hearing, and did not undertake the balancing test required by *Sica, supra.* Its defects are discussed in the legal argument, *infra.*

F. The Trial Court Decision and Remand

Monarch, and its contract seller, JMC, appealed the Board's decision. The trial court rejected the Board's analysis and found that the alleged detrimental impacts that served as the basis for the denial were entirely unjustified. [Da348]. It found undisputed that the proposed use is inherently beneficial, and that the record did not support the Board's findings that the project would be "too big, too noisy and [would] create too much traffic." [Da354-355]. For each of the categories of harm that the Board claimed, the trial court swiftly rejected the Board's contrived claims because there was no factual basis for the Board's findings and conclusions.

In addition to the Board's baseless factual findings, Judge Hansbury also rejected the Board's legal analysis. He found the Board's analysis under *Sica, supra,* to be legally unsound, because the Board did not properly analyze the detriments of the application, identify conditions to mitigate any detriments took place, nor undertake the weighing function the Supreme Court required. [Da357]. As a result, the trial court reversed and remanded the application back to the Board for the imposition of conditions, other than a reduction in the number of units. [Da357]. The Board adopted conditions of approval on March 1, 2023. [Da359]. These conditions included, among others, requiring Monarch to provide for off-site, overflow parking on holidays and special occasions, private ambulance service, that the generator and trash compactor comply with applicable noise regulations and that Monarch prove same through noise testing, that Monarch obtain an assignment of an existing easement, or a new easement, from the Township for a sanitary sewer line that it was to install and maintain. [Da367-373].

LEGAL ARGUMENT

Standard of Review

On appeal, this court must apply the same standard of review as the trial court – it defers to the Board's factual findings if there is substantial credible evidence to support them, *Kramer v. Bd. of Adj.*, 45 *N.J.* 268, 285 (1965), but give no deference legal conclusions. *See, Reich v. Bd. of Adj.*, 414 *N.J. Super.*

483, 517 (App. Div. 2009). The focus must be on whether the Board's exercise of its discretionary authority is arbitrary and capricious or unreasonable. *Price v. Himeji*, *LLC,* 214 *N.J.* 263, 284 (2013). The Board's decision can be affirmed only if it exercised its discretionary authority properly. *Id.* If not, the Board acted in an arbitrary and capricious manner mandating a reversal. *See Cell South of N.J. v. Bd. of Adj*., 172 *N.J.* 75, 89 (2002).

"While the words 'arbitrary and capricious' may sound harsh, they are simply the standard of appellate review in particular cases." *Anatasio v. Planning Bd.*, 209 *N.J. Super.* 499 (App. Div.), *certif. denied*, 109 *N.J.* 46 (1986). The standard is "simply a finding of error." *Cox, William M.*, *N.J. Zoning and Land Use Administration,* § 42-2.1 at p. 619 (Gann 2024 Ed.).

And while the court should not substitute its judgment for the board's, *Rocky Hill Citizens v. Planning Board,* 406 *N.J. Super.* 384, 411-412 (App. Div. 2009), the court's review is "not simply a pro forma exercise in which [the court] rubber stamp[s] findings that are not reasonably supported by the evidence." *CBS Outdoor v. Lebanon Planning Bd.*, 414 *N.J. Super.* 563, 578 *(*App. Div. 2010), *quoting Chou v. Rutgers, State University*, 283 *N.J. Super.* 524, 539 (App. Div. 1995), *certif. den.*, 345 *N.J.* 374 (1996). In simple terms, the court must determine whether the board has followed the statutory guidelines and properly exercised its discretion. *Id.* Any urge to gloss over the glaring problems in the name of deference to the local board would be wrong.

I. THE BOARD'S DECISION TO DENY MONARCH'S INHERENTLY BENEFICIAL USE WAS ARBITRARY, CAPRICIOUS AND UNREASONABLE; THE COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION. [DA348].

The Board's review of Monarch's use variance application for an inherently beneficial multi-level senior housing community was entirely backward. Instead of evaluating the evidence and trying to fit the development to the Property, the Board began with an unreasonable position – outright denial – and worked backwards through the balancing test under *Sica, supra,* to cherry-pick and misrepresent facts to reach its predetermined outcome. Three points crystalize the Board's errors. First, the Board botched its analysis of the positive aspects of the development and all but disregarded the gigantic need for this use. Second, the Board conjured up the purported detriments of the project to justify its denial. Third, and perhaps the biggest failing on the part of the Board was that it utterly failed to even try to mitigate the any impacts of the development as it did not even try to identify mitigating conditions. These defects undermined the required balancing of the positives and negatives of the project.

Pursuant to the Supreme Court's decision in *Sica,* a board reviewing a use variance application for an inherently beneficial use must: (1) identify the public interest at stake; (2) identify the detrimental effect that will ensue from the grant of the variance; (3) seek to reduce the detrimental effect by imposing reasonable conditions on the use; and (4) weigh the positive and negative criteria, and

determine, on balance whether the grant of the variance would cause a substantial detriment to the public good. 127 *N.J.* at 165-166. The Legislature later amended the MLUL to ensure the *Sica* balancing test included consideration of the second prong of the negative criteria. *See, e.g., Salt & Light Co. v. Willingboro*, 423 *N.J. Super.* 282 (App. Div. 2011), *certif. den.* 210 *N.J.* 108 (2012). Inherently beneficial uses are exempt from the enhanced standard of proof required for the second prong of the negative criteria under *Medici, supra*. *See Sica, supra,* 127 *N.J.* at 160-161.

A. The Board Improperly Evaluated the Public Interest at Stake

The Board's identification of the public interest at stake in Monarch's application is confined to a few sentences on two pages of the Resolution. [Da133, ¶ 23; Da140, ¶ 42]. It paid no attention to the detailed, specific and critical testimony of Monarch's needs expert, James Graber and undertook no analysis of Monarch's voluminous planning testimony that stretched over multiple hearings with numerous exhibits. It bears mentioning that Monarch's proposed community was not simply a senior housing development. Instead, it was designed specifically for the frail elderly who need assistance with activities of daily living and, in the case of the memory care component, who are cognitively disabled. Caselaw established the critical need for senior housing decades ago. *See, e.g., Taxpayers Assn. v. Weymouth Twp.*, 80 *N.J.* 6, 23 (1976); *Jayber v. Mun. Council,* 238 *N.J. Super.* 165 (App. Div.), *certif. denied* 122 *N.J.*

142 (1990). James Graber, highlighted that the unmet demand for these types of housing units in the PMA was, at the time of his testimony, 1,000 units for independent living, 588 units for assisted living and 261 units for memory care in the PMA that is currently not being met. [4T 12-7 to 12-13]. Moreover, the shortfall in the area grows by about 400, or 2% of the PMA's population, each year. [3T 136-1 to 137-2]. The cascading effects of that choice have profound impacts on society, because those that are unable to find care in the location of their choice must either go without, depend on family members or other person to provide care (which has its own problems), or move away. The only way to ensure that these parents, friends and neighbors get to stay in their communities or close to loved ones and get the services that they need is to build more housing that is specifically designed to serve their needs. That was the public interest at stake. The Resolution disregarded the public interest at stake in its entirety.

The Board also ignored the only planning testimony, which built upon Graber's earlier testimony. Monarch's planner, Richard Preiss, testified that providing housing for senior citizens, particularly the frail elderly, ranked extremely high on the list of inherently beneficial uses. He reached that conclusion in part on the unrebutted factual presentation of the extent of Montville's need, but also in part on *N.J.S.A.* 40:55D-2(l), which makes it a purpose of zoning to provide senior housing. On appeal, the Board suggests that the trial court improperly failed to credit the Township's determination to place

these uses elsewhere. But the Board fails to tell this Court it recanted that same argument below when it admitted to the trial court that the recommendations in the MPA had never been implemented. [Pa348].

Moreover, the essence of an inherently beneficial use is that it will serve the public good no matter where it is located. Paragraph 23 of the Resolution seeks to turn this maxim on its head by suggesting that "there is a public interest in providing adequate senior housing living units *in appropriate locations* . . ." [Da133, ¶ 23; emphasis added]. The Board does not base its conclusion on any facts in the record that substantiate its conclusion that the general welfare is advanced only if the location where the senior housing is proposed is "appropriate" nor explain why such a showing is required. *Sica, supra*, holds that no such showing is required. 127 *N.J.* at 160. Indeed, there is nothing in the record, or case law[3], to suggest that this inherently beneficial use – which, by definition promotes the general welfare and is universally considered of value to the community – did not do so because Monarch sought to develop the use at the Property. What the phrase in Paragraph 23 does highlight was the Board's predetermined mindset – it did not want the Property developed with the proposed use. Its predetermined outcome infected the entirety of its analysis

[3] The standard that the Board seeks to impose – that the site must be appropriate for the use – is actually the one that is applicable to uses that are not inherently beneficial. *See, e.g., Price, supra,* 214 *N.J.* at 293.

going forward and ultimately led it to the arbitrary conclusion because it ignored the glaring need for this type of housing.

B. The Board Improperly Evaluated the Detrimental Effects that Would Arise if the Project Were Approved

The Board identifies eight alleged detriments in its brief that justified its decision: the density of the proposed development; the number of stories proposed; visual impacts from the development; noise; traffic; lack of an evacuation plan; the amount of impervious coverage and an insufficient number of parking spaces. But as the trial court found, none of these purported impacts were substantial, and none justified the Board's decision to reject the application. Neither the Board's brief nor its Resolution identified any basis why any of those items are substantial.

The claim that the building's height creates a negative impact is unavailing. Monarch's proposed building was 35 feet tall. That is height limit in the R-20A zone. The project deviated from the 2.5-story limit because three floors inside the building are proposed, but the Board does not explain how an extra half-story inside the building causes any impact. Instead, the Board made a baseless finding in Paragraph 33 of the Resolution that ignored Monarch's testimony about why the use could not be accommodated in a 2.5-story design without significantly increasing the building footprint or making the project financially nonviable. [Da137-138; 2T 62-24 to 63-6; 6T 123-2 to 124-15]. But

Monarch did not need to prove why it could not construct its building in a 2.5-story design as part of its proofs for an inherently beneficial use variance.

In a similar fashion, the Board's arguments concerning the proposed density are not significant detriments either. First, in its Resolution, the Board sought to compare Monarch's proposed development to other types of senior housing (namely, adult community housing) permitted in other zoning districts in the Township, which is 55+ age-restricted housing allowable at 8-10 units per acre. [Da137]. In footnote 9 of its brief, the Board argues that the highest density permitted anywhere in Montville is 14 units per acre, which is far less than the 20.1 units per acre that Monarch proposed. The Board misrepresents the LUDO's provisions to this Court. Montville's AHR-2 Zone permits 22 units per acre and the Route 202 Overlay allows 15.7 units per acre. [Pa333, 342].

Second, the type of housing that Monarch seeks to provide is qualitatively different than apartment-style housing permitted in those zones. Assisted living, memory care and congregate care units are significantly smaller than the multifamily developments used for comparison by the Board. Nearly all of the residents will not drive, so the traffic generated by the Property will be substantially less than apartments available. The development will not impact municipal services to nearly the same degree, particularly because (i) the project will not generate school children; (ii) the full-time staffing for the community will diminish the need for the services that the Township's Police Department

provide; (iii) Monarch offered to utilize a private ambulance service; and (iv) Monarch will provide private pickup for waste and recycling. The on-site activity will be drastically lower than unrestricted housing, since the testimony confirmed residents are in their mid-80s or older, and are neither exceptionally mobile nor the type to generate a lot of noise or other impacts.

The Board ignored the actual attributes of a multi-level senior housing unit when comparing the number of units per acre is a significant mistake. The Board could have just as easily compared Monarch's proposed community to a hotel, with which it shares many characteristics (small rooms, restaurant, meeting rooms, etc.), though the proposed use would generate much less traffic than a hotel. *See* §230-247(B) of the LUDO. [Pa340]. And in this regard, it is noteworthy that Montville *requires* a minimum of 120 hotel rooms on 5 acres (i.e., 24 rooms per acre). [Pa341]. If density was really an issue, the Board should have been able to articulate how the number of units proposed created problems, rather than simply claiming that there were too many units, since that is how density is supposed to be evaluated. *See Grubbs v. Slothower,* 389 *N.J. Super.* 377 (App. Div. 2007).

The Board's claims about detriments from noise, a purported lack of evacuation plan should Monarch's generator run out of fuel, traffic, parking, impervious surfaces, and visual impacts are canards not worthy of much attention. The Board did not identify any particular noise concerns in its

Resolution, and the only sources of noise on the Site Plan are Monarch's generator and trash compactor, which are located on the north side of its building. Monarch stipulated that these structures, which are set back more than 100 feet from the property line and are well screened, would comply with the State Noise Code, which the Board's own Engineer confirmed was sufficient after Monarch updated the plans to show noise attenuation. [1T at 86-14 to 87-15; 2T at 42-3 to 43-2]. And there should be no concern about who might be impacted by the generator and trash compactor, since the lot adjacent to those items is used as a parking depot for school buses. [Pa256]. The Board's feigned concerns about Monarch's evacuation plan cause no impacts to adjacent properties and are not lawfully within the Board's purview as this subject is exclusively regulated by the Department of Health. *N.J.S.A.* 26:2H-12.79. The Board made no findings that there would be significant impacts from traffic; to the contrary, the evidence confirmed no significant traffic impacts. [Pa59-60; Pa114-115]. So did the testimony. [2T 77-23 to 79-25]. A conditionally permitted use would generate the same amount of traffic (2T 84-4 to 84-9), which pursuant to this Court's decision in *Regency Gardens v. Bd. of Adj.*, *slip op.*, A-2283-13 (App. Div. Aug. 27, 2015)(Pa389), demonstrates that the traffic from the proposed use "can hardly be characterized as substantial . . ." *Id.* at *6. [Pa393].

As for parking, the project complies with the RSIS. *N.J.A.C.* 5:23-4.14, Table 4.4, note (d) defines "Assisted Living" by cross-referencing *N.J.A.C.* 8:36-

1.3; all of the units in the proposed development, including the independent living units met the definition and therefore require 0.5 spaces per unit. Thus, the 165 units require 83 spaces; Monarch proposed 117, and the uncontested expert testimony confirmed that this was sufficient to meet the needs of the community. [2T 81-9 to 83-19]. In fact, the Board's Engineer confirmed that Monarch's site was actually *overparked*, and recommended reducing the number of parking spaces proposed because 34 more than were required were proposed. [7T 133-25 to 136-2; Pa274, ¶ 7]. The Board disregarded this testimony, found there was insufficient parking but too much impervious area without any explanation about why that was the case. Perhaps it was because Monarch slightly exceeded the impervious coverage limit in the R-20A Zone for single-family dwellings, but is substantially below the 55% limit for conditionally permitted school uses in the R-20A Zone. If Monarch's building had school children inside rather than the frail elderly, there would be no variance needed, so this cannot be a significant detriment of the use variance.

Finally, the Board's conclusion that the project would cause a visual impact is a red herring. The Resolution concludes that the height of the building, which is proposed to be 3 stories, rather than 2.5 stories as permitted for single-family residential dwellings in the zone, was problematic. [Da139, ¶ 39]. But as noted above, the Resolution provides no explanation for how exceeding the limit on the number of stories applicable to a single-family dwelling impacts nearby

uses when the building meets the height limit in feet imposed by the zoning code for those uses. Indeed, the visual impacts associated with a 3-story, 35 foot tall building are identical to those of a 2.5- story, 35-foot tall building, as the number of stories in a building is an internal feature, not an external one. Moreover, the Board's own planner confirmed that there was a nearby apartment building located on Changebridge Road that was three stories in height, and the LUDO contains numerous zones that permit buildings more than 2.5 stories and taller than 35 feet, so the Board's conclusion that Monarch's project would negatively impact the neighborhood is not based upon any evidence in the record.

The fact that there is a partial additional floor level inside the building has no impact on adjacent properties; the only substantive visual difference from the boundaries of the Property is that there might be more windows[4] on the façade, since the exterior of the building complied with the height limit imposed by the ordinance. And that façade received approval from the body of experts charged by Montville with undertaking a review of the design pursuant to § 230-34 and -35 of the LUDO. [Da48]. Moreover, as trial court noted, a single-family dwelling of exactly the same size could have been constructed on the Property, as the proposed building does not exceed the permitted building coverage in the R-20A

[4] Of course, the LUDO does not regulate the placement of windows on a building façade, and it is conceivable that there would be no difference in the placement of windows on a 2.5-story building.

Zone and Montville does not regulate floor area ratio in the R-20A Zone. [Da356]. Why a building housing a multi-level senior housing community would create greater visual impacts than a dwelling with the same building configuration is not explained by the Board. In light of this and the absence of any basis as to why the third story inside the building will create visual impacts, the conclusion to draw is that the Board's post-hoc rationalization is simply in service of supporting an arbitrary, capricious and unreasonable decision.

The Board also improperly elevated and analyzed cherry-picked language from the MPA to justify its decision. After first acknowledging the need for senior housing (without any quantification), the Board claimed that the recommendation that other sites in the Township be rezoned for senior housing precludes the approval of Monarch's project. There are numerous problems with its analysis. First, it is important to note that while the MPA recommended several sites be rezoned into a Senior Housing Overlay Zone as the Board confirmed to the Law Division – after having made the same argument[5] below –

[5] *See* Da 319-322. The Board improperly included its trial brief in its Appendix, despite the prohibition against doing so as set forth in *R.* 2:6-1(a)(2). There, as here, the Board misleadingly claimed that the Township had "updated" its zoning ordinance "as recently as 2019 and intentionally omitted the subject property" based upon the MPA. [Da322]. As the Board Attorney confirmed to the trial court *only two days after filing the Board's brief below,* what actually happened was that the Township took no action whatsoever on the MPA. [Pa348].

the Township did not rezone them. [Pa348]. The Board failed to provide that letter to this Court.

This Court should ignore this argument in its entirety. First, the intent and purposes of MPA, at least for the argument that the Board makes, is at odds with the LUDO. Second, because the proposed use is inherently beneficial, reference to the MPA for guidance as to the appropriate location is improper because the proposed use automatically satisfies the positive criteria and does not need to demonstrate that the proposed location is more suited to the proposed use than another location. *See, e.g., Sica, supra,* 127 *N.J. at* 162-163 *quoting Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus,* 47 *N.J.* 211, 223 (1966)(Hall, J., concurring)(recognizing the problem of preventing needed regional facilities through imposition of onerous municipal legislation "enacted for the sake of preserving the established or proposed character of a community or some portion of it"). Third, because inherently beneficial uses are not required to reconcile the omission of the proposed use from the zoning district, a board of adjustment cannot rely upon a statement in the master plan that calls for the proposed use to be located elsewhere because doing so would give unelected planning boards veto power over such uses through the master plan process. Fourth, and perhaps most importantly, Monarch's project does not actually contravene anything in the MPA – while the Planning Board *considered* whether to recommend the Property for inclusion in the Senior Housing Overlay rezoning

by the Township – the final document it adopted does not mention the Property at all. From reading the Resolution, the Court could have the impression that the MPA specifically rejects the proposed use on the Property. It does not, so there is no impairment to begin with, let alone anything substantial.

To the contrary, the record of the proceedings before Montville's Planning Board confirms that the Property *was* to be recommended for the proposed use, and more importantly, the Township's planner deemed the Property "appropriate" for the proposed use at that time. [Pa447 at 100-7 to 100-21]. But residents had presented a petition with 600 signatures demanding its removal from the plan because they wanted the Township to acquire it for open space, and as they recognized, a rezoning could increase the Property's value. [Pa434 at 43-18 to 48-12]. The decision not to recommend the rezoning of the Property in the MPA was not about Montville's zoning, it was simply about extra money that the Township did not want to spend to acquire the Property. [Pa448 at 101-1 to 102-13]. But the Township never sought to acquire the Property in any event. The Board's decision to "hang its hat" on the MPA's lack of recommendation for the Property – when compared against what actually happened – highlights a glaring deficiency in its analysis. The Court should disregard it entirely.

It bears mentioning that in *Sica*, *supra,* the municipal governing body down-zoned the property that was the subject of that case to make the proposed use a prohibited use during the application. 127 *N.J.* at 156-157. In *Med. Ctr. v.*

Princeton Twp. Zoning Bd., 343 *N.J. Super*. 177 (App. Div. 2001), the municipal master plan specifically recommended the properties in question be used for residential purposes rather than in connection with the hospital, which owned them. *Id.* at 197. Neither instance was held to be a bar to the approval of a use variance for an inherently beneficial use. The situation here is less stark – rather than a rezoning that prohibits the proposed use, or a specific statement in the municipal master plan that the Property should not be used for multi-level senior housing, the Planning Board removed the recommendation for the Property in the MPA so that the Township could pay less for it. And while the Resolution catalogues various statements in the MPA, it points to nothing in the MPA that comes close to proscribing Monarch's multi-level senior housing community on the Property, or a recommendation[6] about how the Property should be used.

Sica makes clear that detrimental effects that are minimal are insufficient to outweigh the positive attributes of inherently beneficial uses and that a board should be concerned about detriments that are substantial. *Sica, supra,* 127 *N.J.*

---

[6] Contrast is drawn between the instant facts and this Court's decisions in *Kensington Senior Development, LLC v. Twp. of Verona, slip op.*, A-1010-19 (App. Div. Dec. 1, 2021)(Pa393), where the master plan contained a specific vision for the property and the board concluded that the variance application was at odds with that vision, *id.* at *9-10 (Pa399-400), and *Sunrise Dev., Inc. v. Princeton Bd. of Adj.*, *slip op.,* A-5717-18 (App. Div. June 24, 2020)(Da387), where the property in question comprised the entirety of the zoning district and the board concluded that a grant of the requested variance would constitute a de facto rezoning. Here, there is no expressed zoning vision for the Property in the MPA. And the Property is one of many that are zoned R-20A. [Pa231].

at 164-165. The Board's recitation of its laundry list of perceived impacts does not include any analysis of why it deemed the impacts of the proposed development to be substantial. These net conclusions, without explanation or support in the record, should be afforded no weight.

C. The Board Failed to Consider Reasonable Conditions

The Board's "efforts" to impose conditions to mitigate the alleged negative impacts of the project fell flat. [Da139-140]. The Board claimed it would be improper to impose a condition requiring Monarch to reduce the size of the building, but that was because it had already decided that the Property was inappropriate for the use in derogation of its obligations under *Sica*. The thrust of the Board's determination was that the building was too big and its mass would impact adjacent properties, but as noted above, it failed to explain how. But because Monarch's building conformed to the building coverage requirement and all building setbacks in the R-20A Zone, such a finding was baseless since the visual impact of the building is unrelated to the use that occurs within it.

Paragraph 40 of the Resolution claims that the amount of impervious coverage Monarch proposes cannot be mitigated. But the Board did not even try. [Da140]. The only discussion there about imposition of conditions relates to Monarch's purported failure to demonstrate it can utilize its proposed drainage

design is an unmitigable condition[7]. But that is not an attempt to mitigate a potential detriment associated with the grant of the use variance. The appropriate condition, as the Board's own engineer pointed out, would be to require Monarch to obtain authorization from the Township to utilize the drainage easement as required by *N.J.S.A.* 40:55D-22(b)(land use boards to condition approval on any approvals required from other governmental authorities). [4T 99-6 to 99-19]. But the Board simply ignored that possibility. Moreover, the Resolution notes that Monarch "proposes to take over the maintenance of that easement of the sewer line along this property[,]" so it is apparent that this "concern" was addressed anyway[8]. [Da126, ¶ 10]. Also, the Board's claim that Monarch's proposal to develop the Property with 39% of it covered with impervious surface creates an unmitigable impact is arbitrary because in all other circumstances, the impacts from impervious surfaces are addressed via compliance with Montville's stormwater management ordinance as part of site plan review. The only instance where this does not occur is when a single-family dwelling is constructed because that type of use is exempt from site plan review under *N.J.S.A.* 40:55D-

[7] The ability to lawfully construct/utilize the stormwater management infrastructure is clearly different than whether the drainage plan is feasible. *See, e.g., Field v. Franklin Twp. Planning Bd.*, 190 *N.J. Super.* 326 (App. Div. 1983).
[8] On April 3, 2021, the Board Engineer wrote, "The overall approach to stormwater management for the project appears to conform to our ordinance." [Pa273, ¶ 4]. At the final hearing, the Board Engineer testified that he was satisfied with the engineering aspects of the design. [7T 136-9 to 137-7].

37(a). And that explains the low coverage limit for single-family uses in the R-20A Zone compared to conditional uses in the R-20A Zone that must obtain site plan approval under *N.J.S.A.* 40:55D-67(b).

The Board's commentary that it could not mitigate the impacts to the MPA through the imposition of conditions is at odds with the requirements of *Sica*. The third prong of *Sica* requires land use boards to mitigate *detrimental* effects of the variance. 127 *N.J.* at 166. But as noted previously, the application did not cause any detrimental effects to the Master Plan because the MPA made no recommendations concerning the Property or the proposed use. The Board's reasoning is, at its core, that because the Planning Board did not recommend, and the Township Council did not rezone the Property for the proposed use, the use variance is inappropriate. But that is not the standard for relief. There must be an un-mitigatable impact that undermines intent and purposes of the zone plan and zoning ordinance. Here there was none.

The Board's citation to *Salt & Light, supra,* is misplaced because the facts are entirely different. There, the applicant sought to construct a two-family transitional home for homeless families "in a neighborhood zoned exclusively for single-family residences" and "located . . . in the middle of a block containing only single-family homes." 423 *N.J. Super.* at 285-86. The court noted that the neighborhood "has been completely built-out in conformity with this zoning with single-family houses on relatively small lots. . ." *Id.* at 292. Here, although zoned

R-20A, the Property is not an island located within a sea of conforming single-family homes. Instead, there are homes abutting only on the south side of the Property. To the west is a large townhome development. To the north is a bus depot, and further north is the municipal complex, and to the east is a high-speed, highly-trafficked county road. [3T at 83-18 to 83-25]. The approval of the project would not undermine the integrity of the neighborhood – like it would have in *Salt & Light* – because the existing land use pattern is anything but consistent. [Da38]. Moreover, unlike in Willingboro, this zone is not reserved exclusively for single-family dwellings; the R-20A Zone also permits (in addition to single-family homes): (1) parks; (2) municipal buildings; (3) farms and agricultural activities; (4) family child-care homes; (5) places of worship; (6) schools; and (7) community shelters. [Da400]. The conclusion in *Salt & Light* was unreachable here because of what Montville's LUDO does allow to be built on the Property.

The foregoing demonstrates that the Board did not follow the third prong of *Sica.* The reason the Board could not impose conditions was that there are no significant detrimental effects requiring mitigation. That does not mean the Board may deny the application; instead, it should have recognized the absence of significant impacts on adjacent properties was the product of careful and thoughtful design responsive to legitimate concerns raised during the hearing making significant conditions unnecessary. Instead, it should have done what it did at the remand – impose the reasonable operational limits on things like

holiday overflow parking, maintaining the sewer line, obtaining other agency approvals, etc. that are customary. [Da368-372].

And the trial court was right to prohibit the Board from requiring a unit count reduction on remand. [Da357]. As discussed in Point I.B, *supra,* there were no significant impacts from the project that eliminating units would solve. In particular, the number of units impacted only the parking requirement and traffic generation, and the development complied with the RSIS' parking requirement and caused no traffic impact. While the Board claims that if it were able to reduce the number of units, it could have reduced the amount of impervious coverage proposed, but was unable to do so. But the trial court did not restrict the Board's ability to impose a condition limiting the amount of impervious coverage on the Property. The Board's failure to realize that is not a reason to reverse the decision below. And substantively, the Board can point to no impacts that the 4% increase in impervious coverage above what the LUDO allows for single-family dwellings in the R-20A Zone will cause. *See* Point II*, infra.*

D. Because the Board Improperly Evaluated the Public Interest at Stake, Unreasonably Considered Detriments That Were Not Substantial and Did Not Impose any Conditions, the Board's Balancing Analysis was Flawed from Inception

Baptist Home of S. Jersey v. Bo. of Riverton, 201 *N.J. Super.* 226 (Law Div. 1984), recognized that without a reasonable effort to balance the positive attributes of the development (i.e., the special reasons that justify the variance)

against the negatives, a board's finding that there were any negative impacts associated with a proposed inherently beneficial use would always permit a denial of the application. *Id.* at 245; *see also Sica, supra,* 127 *N.J.* at 164. Yet that is what the Board did here. Paragraph 42 of the Resolution contains exceptionally limited discussion of the beneficial aspects of the project. [Da140]. Nowhere in the Resolution is there any discussion of the hundreds of senior citizens in Montville and the surrounding community who are in need of the services. Likewise, there is no discussion of how provision of these services will benefit the residents who live there or their family members or how this development will facilitate constitutional compliance with Mt. Laurel. A proper evaluation of the use variance should have given consideration to these matters before undertaking the balancing test required by *Sica.*

The only testimony offered on the balancing required by *Sica* came from Monarch's planner. He offered uncontradicted testimony that there were significant benefits to the public good. [6T 12-17 to 17-8]. He then confirmed that there were limited detriments associated with the project and explained, in detail, why he reached that conclusion. [6T 17-10 to 67-13]. He further noted that the project had been revised on several occasions to account for concerns raised by the Board, and that Monarch had stipulated to numerous conditions on the record to address those issues, which he believed were minor in scope, and that if there were additional concerns, Monarch would mitigate them as well. [6T 75-14

to 76-21]. Finally, he compared the positive aspects of the design against the negative impacts and concluded that not only was there not a substantial detriment to the public good nor a substantial impairment to the intent and purposes of the zone plan and zoning ordinance, but that the positive attributes of the project substantially outweighed any detriments. [6T 76-21 to 77-14].

No witness contradicted Preiss' expert testimony. The Resolution does not even reject Preiss' testimony. All the Resolution did was brush Preiss' testimony aside and conclude, without foundation, that the benefits are minimal (they are not), the detriments substantial (they are not), and the Board was unable to mitigate the detriments associated with the project, and therefore, finds that the benefits do not outweigh the detriments.

The Board's efforts to discount Preiss' testimony were, frankly, outrageous. Paragraph 15 of the Resolution contains the Board's only attempt to make credibility determinations, where the Board concluded that Preiss was not credible because he allegedly "sometimes incorrectly referr[ed] to Montvale Township." [Da128-129, ¶ 15]. There is not a single instance of this in the certified transcript, and perhaps reflects the Resolution's scrivener's difficulty understanding Preiss' South African accent over Zoom. As for the Board's commentary in the same paragraph about the senior overlay zone, there is no such zone in Montville's LUDO, as the only overlay zones are identified in § 230-116(B). [Pa322-323]. Preiss' testimony about where the LUDO permits

assisted living as of right (i.e., in the OB and I Zones, which the Zoning Map confirms are located on the borders of the Township or along major highways) is entirely distinct from where "senior living" may be permitted or where such uses may exist. [*See* Pa231]. And the term "senior living" is not found anywhere in the LUDO. Notably, the LUDO defines "Assisted Living Facility", "Adult Community Housing" and "Senior Citizen Housing" as separate uses to highlight they are different. [Pa287, 289, 311]. Conflating them is entirely improper, particularly as an attempt to denigrate the credibility of Monarch's expert. His testimony on the non-viability of a 2-story project was in reliance on Monarch's architectural expert, who was surely qualified to render that opinion, which the Board fails to even mention. [2T 62-24 to 63-6].

In their totality, these credibility "findings" do little to mask the Board's true intent – to denigrate the merits of the application, undercut the unrebutted *Sica* proofs, and deny it without justification. A land use board is permitted to reject expert testimony, but must do so reasonably, rather than on bare and unsubstantiated allegations. *See, e.g., N.Y. SMSA v. Bd. of Adj.,* 370 *N.J. Super.* 319, 338 (App. Div. 2004). Pretending the LUDO contains things it does not, and mishearing testimony is not reasonable.

The evidence in the record confirms significant public benefits and limited, if any, actual detriments. To the extent there were actual detriments arising from the grant of a use variance, Monarch addressed them during the hearings through

plan revisions and stipulations/conditions. The only rational conclusion that the Board could have reached was, as Preiss testified, that the benefits of the project substantially outweighed any detrimental effect of the variance. Its failure to do so was arbitrary, capricious and unreasonable.

II. BULK VARIANCES FROM THE REQUIREMENTS FOR THE R-20A ZONE WERE SUBSUMED WITHIN THE USE VARIANCE; MONARCH PRESENTED SUFFICIENT PROOFS FOR THE TWO DESIGN EXCEPTIONS IT NEEDED. [DA348].

In Point I.D of its brief, the Board argues, without any detail whatsoever, that it properly denied certain "c" variances and design exceptions because Monarch failed to address the negative criteria. It refers to Paragraph 43 of its Resolution, which identifies variances for combined side yard[9], impervious coverage, number of stories, number and location of parking spaces, and signage. [Da141]. With regard to the deviations from the requirements for single-family dwellings in the R-20A Zone for impervious coverage, and number of stories, the Supreme Court has held that an applicant seeking a use variance was proposing not to comply with the zoning ordinance, and that the bulk zoning

[9] The Resolution wrongly claims that Monarch's site plan showed a 178.6-foot combined side yard, which is 0.01 feet short of the requirement. [Da118-119]. The plan actually shows side yards of 103.6 and 76.5 feet, respectively, for a combined side yard of 180.1 feet, which exceeds the required 178.7-foot requirement. [Pa256]. The resolution wrongly utilizes a 102.1-foot side yard setback on the north side, which is measured to a roof overhang. But § 230-130(D)(1) of the LUDO expressly permits a 2-foot roof overhang into a required yard, so the roof overhang cannot be included, as the combined side yard is only 1.4 feet more than required. [Pa325].

standards designed for permitted uses may not be applicable. *Price, supra,* 214 *N.J.* at 299 ("There is little doubt about the fact that a use variance, by its nature, carries with it the implication that the ordinary bulk and density requirements of the zone will not be applied"); *see also, Kramer, supra,* 45 *N.J.* at 295 ("it is obvious that the height and front yard restrictions are intended to apply to single-family residences"); *Puleio v. Bd. of Adj.*, 375 *N.J. Super.* 613, 621 (App. Div.) *certif. den.* 184 *N.J.* 212 (2005)(bulk variances "subsumed" within use variance). Moreover, Monarch's last iteration of the site plan eliminated the combined side yard setback deviation, so no variance was required, even if it was not subsumed within the use variance. [Pa256]. Signs are prohibited for single-family uses, but not for non-residential uses in the zone, so they would be subsumed within the use variance too, and the relief required for location of parking spaces was a design waiver, not a variance. Monarch complied with the RSIS so it did not need a parking variance. The only other relief Monarch required related to steep slope disturbance, which was also a design exception because that section of the LUDO, like the front yard parking requirement, is a site plan design standard.

The Board does not explain why Monarch's site plan must adhere to the 35% impervious coverage limit mandated for single-family dwellings in the R-20A Zone, but there is a good reason why it need not do so. Single-family dwellings are exempt from site plan review, and the general obligation to comport with stormwater management requirements associated therewith. The

same is not true for the proposed development, which complied with the Borough's stormwater requirements. [Pa273]. It should be no surprise that this is the reason that single-family residential structures are limited in their impervious coverage in Montville, while non-residential uses are not. [Da114-115]. Even in the R-20A Zone, conditionally-permitted schools and houses of worship are allowed 55% and 50% impervious coverage, respectively, because they too require storm drainage as part of site plan review. [Da401; Pa328]. The 4% that Monarch proposed on the Property in excess of what is allowed for single-family dwellings, but 11% and 16% less than what those other institutional uses could construct on the Property as of right, highlights why the limit should be subsumed within the use variance Monarch sought.

Neither should the building story height limit. 2.5-story height limits on dwellings are imposed for fire safety and because most homes have attics for storage, which increases the physical height in feet of the home. Here, Monarch's building has an extra level of floor beams, but none of the problems associated with 3-story homes, such as physical height exceeding the limit in the zone or a potentially dangerous firefighting condition. In the case of the former, the building comported with the physical height limitation in the R-20A Zone, and in the latter, it would obviously need to be sprinklered and have fire stairs as required by the Uniform Construction Code.

With respect to the monument sign that Monarch proposed, that too was, at worst, subsumed within the use variance request because signs are permitted for institutional uses, just not for single-family residential uses. [7T 49-12 to 50-4; Pa335]. The sign, which is 19.65 square feet in area, was designed to be similar to the signage permitted elsewhere in the Township and actually conforms to the requirements in the R-20A Zone under § 230-214(F)(2) of the LUDO, thereby eliminating the need for a variance. [7T 50-4 to 50-7]. Monarch's planner testified that the signage was necessary for wayfaring and traffic safety, and that the benefits of having signage were greater than the negative impacts. [7T 50-8 to 50-18]. But the Board reached the contrived conclusion that, on one hand, there was nothing presented aside from a desire to maximize visibility for a commercial use, but that if a commercial use had been sought, a modest sign would have been approved. [Pa142, ¶ 45]. Monarch did not need a variance, but justified relief for one anyway.

Monarch did not require relief regarding the number of off-street parking spaces. This issue is governed by the RSIS. The RSIS defines an "assisted living" unit as "As defined by the New Jersey Department of Health at *N.J.A.C.* 8:36-1.3, as a facility with apartment-style housing and congregate dining, and other assisted living services available when needed. At a minimum, apartment units have one room, a private bathroom, a kitchenette, and a lockable entrance door." *N.J.A.C.* 5:23-4.14, Table 4.4, note (d). Monarch's witnesses testified that this

definition meant that its project complied with the parking requirements, as 83 spaces were required. [3T 38-7 to 40-10]. The Board ignored this testimony and the definitional change to the RSIS and concluded, wrongly, that Monarch needed far more parking than required by State law. The Board's conclusion that Monarch needed a parking variance is preempted by *N.J.S.A.* 40:55D-40.5.

Although the Board concluded that Monarch required variances from § 230-90(H) related to parking setback from the building and the street, that conclusion is wrong. § 230-90 of the LUDO – which are the design standards for multifamily development – is found in Article X, which is entitled, "Design Standards for Site Plans." [Pa279]. By contrast, the Township's zoning regulations are found in Articles XIV-XXXIV. Accordingly, relief from § 230-90(H) required a design exception pursuant to *N.J.S.A.* 40:55D-51, not a variance. *See, e.g., Wawa Food Market v. Ship Bottom Planning Bd.*, 227 *N.J. Super.* 29, 34 (App. Div. 1988). There is good reason for this design – it makes little sense to require frail elderly residents to walk more than they need to just to get into the building. [6T 123-2 to 124-15; 7T 44-10 to 45-18]. The same thing is true with respect to the 17 parking spaces that were proposed in the southeast corner of the Property along the Changebridge Road frontage. [Pa256]. Those spaces could have been relocated to the south or west sides of the Property, but doing so would be impractical since it would bring site activity closer to the single-family dwellings to the south or the protected wetlands to the west, and

would push residents and employees further from the entrance to the building. [7T 45-18 to 46-22]. Monarch's site plan regarding location of off-street parking met the standard for design relief, which requires a showing that the enforcement of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question. *N.J.S.A.* 40:55D-51(b). The Board's determination that a variance was required demonstrates its legal error.

As for relief from Montville steep slope ordinance, Monarch required none. The Resolution claims Monarch needed relief from § 230-101(B) of the LUDO. [Da120]. But Montville repealed § 230-101 on March 9, 2021 – three months before the Board's vote, so the Board could not enforce it. [Pa320]. And the new ordinance that transferred steep slopes regulations to Part 4 of the LUDO, which are Montville's Zoning Regulations, was ineffective as to Monarch under the Time of Application Rule, *N.J.S.A.* 40:55D-10.5, because Montville could not apply the heightened standard after the filing of the application. *See Dunbar Homes, Inc. v. Bd. of Adj.*, 233 *N.J.* 546 (2018). [Pa 281, 326].[10]

Even if the Court considered the original ordinance to remain in effect for the purpose of Monarch's site plan after the Township repealed it, it is clear that

[10] Respondent did not become aware of this change until recently and did not argue below that it did not need any relief. However, pursuant to *O'Brien (Newark) Cogeneration, Inc. v. Automatic Sprinkler Corp. of Am.*, 361 *N.J. Super.* 264, 271 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004), it may argue any alternative basis for affirmance of the trial court's decision.

relief was justified. Monarch's site plan shows that there are a total of 3,401 square feet of constrained slopes, of which Monarch could lawfully disturb 1,387 square feet of the 292,795 square feet of the Property. [Pa51; Pa256]. Regulated slopes thus account for 1.1% of its area. Those areas are in the front yard in precisely the location where Monarch needs to disturb soil to locate its proposed driveway and vehicle circulation area. [7T 56-7 to 56-22].

The only findings with respect to the design waiver for steep slope disturbance is found in Paragraph 46 of the Resolution where the Board concluded that Monarch failed to prove that compliance was impractical. [Pa142-143]. That finding ignores the testimony Preiss had presented on this issue. To be sure, Monarch could have relocated the site driveway to the south side of the Property to avoid these sloped areas, but doing so was impractical because that would place vehicular traffic closer to the homes to the south. Instead, Monarch placed its driveway and the vast majority of parking on the north side of the Property, and in the process needed to disturb an insignificant percentage of the total area of the Property that happened to have a slope. The waiver was justified and the Board should have granted it.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Law Division that found the Montville Zoning Board of Adjustment's July 7, 2021 decision and August 4, 2021 resolution arbitrary, capricious and unreasonable.

Respectfully submitted,

BEATTIE PADOVANO, LLC
Co-counsel for JMC Investments, LLC

By: */s/ Antimo A. Del Vecchio*
Antimo A. Del Vecchio, Esq

GIORDANO HALLERAN & CIESLA, PC
Co-counsel for JMC Investments, LLC

By: */s/ Paul H. Schneider*
Paul H. Schneider, Esq.

Dated: June 7, 2024

MONARCH COMMUNITIES, LLC, a Limited Liability Company of the State of Delaware, Plaintiff, v. TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant, And JMC INVESTMENTS, LLC, a New Jersey Limited Liability Company, Plaintiff-Respondent, v. TOWNSHIP OF MONTVILLE; MAYOR AND COUNCIL OF THE TOWNSHIP OF MONTVILLE; and TOWNSHIP OF MONTVILLE ZONING BOARD OF ADJUSTMENT, Defendants-Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE NO.: A-000929-23T4 SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO.: MRS-L-1986-21 AND MRS-L-1995-21 Sat Below: Hon. Stephan C. Hansbury Civil Action

DEFENDANT-APPELLANT MONTVILLE ZONING BOARD OF ADJUSTMENT REPLY BRIEF ON APPEAL AND REPLY APPENDIX

PASHMAN STEIN WALDER HAYDEN
A Professional Corporation
Court Plaza South
21 Main Street – Suite 200
Hackensack, NJ 07601
(201) 488-8200
Attorneys for Defendant-Appellant Township of Montville Zoning Board of Adjustment

On The Brief: *Bruce J. Ackerman*
Kelly M. Carey

Table of Contents

COUNTERSTATEMENT OF FACTS……...…1

LEGAL ARGUMENT …… ……4

POINT I. THE TRIAL COURT FAILED TO GIVE DUE DEFERENCE TO THE STATUTORY REQUIREMENTS FOR MUNICIPAL ZONING AND IGNORED APPLICANT'S INABILITY TO SATISFY THE NEGATIVE CRITERIA..... 4

POINT II. THE ZONING BOARD CORRECTLY APPLIED THE SICA TEST AND APPROPRIATELY DETERMINED THAT THE APPLICANT FAILED TO SATISFY THE NEGATIVE CRITERIA.
……. 7

POINT III. RESPONDENT ATTEMPTS TO DISTRACT FROM ITS FAILURE TO SATISFY THE LEGAL CRITERIA FOR VARIANCES WITH SPURIOUS ARGUMENTS THAT DO NOT CORRECT THE DEFICIENCIES NOTED BY THE
BOARD……. 8

POINT IV. THE BULK VARIANCES REQUIRED FOR A MULTI-LEVEL SENIOR MIXED-USE FACILITY IN A SINGLE-FAMILY RESIDENTIAL ZONE ARE NOT "SUBSUMED"……..……...13

CONCLUSION ……..……..... 15

TABLE OF AUTHORITIES

CASES	**PAGE(S)**
Kaufman v Planning Bd. Warren Tp., 101 N.J. 551, 558 (1988). ……	15
Medici v. BPR Co., 107 N.J. 1, 20 (1987)……..	5,8
Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 51-54, (1998) …….	6
Price v. Himeji, LLC, 214 N.J. 263, 286 (N.J. 2013)…….	8, 14
Salt & Light Co v. Willingboro, 423 N.J. Super. 282 (App Div 2011), cert. den., 210 NJ 108 (2012)……	8
Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152, 165-66, (1992)……	6,7,8
Twp. of Dover v. Bd. of Adj. of Dover, 158 N.J.Super. 401, 411-12, (App.Div. 1978). ……..	6
Township of No. Brunswick v. Zoning Bd. of Adj., 378 N.J. Super. 485, 490 (App. Div. 2005)……	6
Vidal v. Lisanti Foods, Inc., 292 N.J.Super. 555, 561 (App.Div. 1996)……..	5

Statutes

N.J.S.A. 40:55D-70 5,8

N.J.S.A. 40:55D-70d. 8

N.J.S.A. 40:55D-89 …… 9

DEFENDANT'S REPLY APPENDIX **PAGES**

TOWNSHIP OF MONTVILLE ORDINANCE NO. 2021-03 -

AN ORDINANCE OF THE TOWNSHIP OF MONTVILLE, COUNTY OF MORRIS, AND STATE OF NEW JERSEY AMENDING CHAPTER 230 "LAND USE AND DEVELOPMENT REGULATIONS" AND CHAPTER 169 "FEE SCHEDULE" OF THE CODE OF THE TOWNSHIP OF MONTVILLE, NEW JERSEY……Dra001

COUNTERSTATEMENT OF FACTS

This section will be limited to areas where Respondent JMC Investment, LLC's ("JMC"[1]) Brief misstates the facts or misinterprets the testimony, or both, in order to give the Court the misimpression that the subject application was more forceful than as actually presented to the Zoning Board of Adjustment ("ZBA").

1. JMC misstates the subject property ("Property) location as being in a mixed use area. Pb4. The Property is currently a farm with a single-family residence, surrounded only by a fully developed single-family residential neighborhood to the south, townhomes to the west, a pre-existing bus storage facility on one R-20A lot to the north, and only single- family residential homes to the east. Da18. It is a clearly a well-defined residential single-family area, contrary to JMC's mischaracterization. Da57.

2. JMC ignores the recent zoning history for the Property and its impact. JMC's Brief never even mentions the rezoning application just prior to this identical application. In 2018, Allegro Development, LLC ("Allegro") applied to rezone this site for 150 units for the identical tripartite uses, namely 150 senior independent living, assisted living and memory care units, whereas JMC seeks 165 units of the same. Da34. The Township Committee denied Allegro's request, just prior to this application for the same. Instead, JMC criticizes the proposed amendments to the Master Plan adopted by the Planning Board whereby they specifically voted to omit this Property from a special zone for these uses, and suggests it was done solely as a negotiation tactic for the Township to purchase the Property.

[1] Although Monarch was the nominal applicant, JMC opposes this appeal as the contract seller.

In fact, the removal of the Property from the Master Plan Amendment served to bolster the R-20A zoning for this property. See Planning Board minutes at Da50.

3. JMC largely ignores the second of the two "d" variances it required.
There was the use variance for senior mixed-use housing not permitted in the R-20A zone, but also a density variance since one unit per 20,000 sq. ft. was permitted, or approximately two units per acre, yet Respondent sought 20.4 units per acre or ten times that which is permitted in that zone. The Board Planner detailed the excessiveness of this proposal in the zone plan.[2]

4. JMC misstates that "[n]one of Montville's zoning districts permit multi-level senior housing that contains independent living, assisted living and memory care within a single development." Pb4.
The following zones in Montville Township include these uses, and some include all:

Adult community housing	Zones R-27 ABCDEF, OB 1A,
Senior citizen housing	Zones AH-1 -2, -4
Assisted Living facilities	Zones OB1-3, OB1A, OB2A-4, OB-5, I, IA,A-1B, I-2,I-2A
Nursing homes	Zones same as assisted living
Residential health care facilities	Zones R-27 ABCDEF,
Elder care centers	Zones R-27 ABCDEF, TC1, TC2,
Hospitals	Zones I, IA, I-1B, I-2, I-2A
Apartments multi family	Zones AH-1, -2, -4, AHR-1,-2, TH/MFD, TC1,TC2, Rt 202 Stiles See Da 400-01.

Overlaps are:
OB 1A = adult community housing, assisted living and nursing homes
R-27 ABCDEF= adult community housing and elder care centers
AH-1, -2, -4 = senior citizen housing and apartments multi family
OB 2A-4, OB 1-3, OB-5 = assisted living and nursing homes

[2] "Although the zone standards applicable to the various existing and proposed senior housing zones are not applicable to the applicant's property, and are provided for comparison purposes only, …the intensity of the proposed development – both in terms of density (dwelling units per acre) and floor area ratio (total gross floor area divided by total site area) – is substantially higher than the maximum permitted densities and floor area ratios where same are regulated for senior housing facilities. Whereas the current maximum density permitted for senior housing is 10 units per acre (in the AH-1 Zone) and the maximum recommended density for the proposed Senior Housing Overlay Zones is 14.3 units per acre (in the Senior Housing Overlay – 2 Zone), the applicant is proposing a density of 20.4 units per acre. Also, whereas the current maximum floor area ratio permitted for senior housing is 30% (in the OB-4 Zone), the applicant is proposing a floor area ratio of 48.2%." Da30-31.

I, IA, I-1B, I-2, I-2A = assisted living and nursing homes and hospitals[3]

5. JMC argues that its project's parking setback violations are not bulk requirements. The Board Planner reported that the proposal requires parking setback variances of 15 ft. from the building, 25 ft. from the property line, and 50 ft. from the street. Da23 at ¶8. Clearly, if the development were better sized to the Property, these setbacks could have been easily satisfied. Instead, applicant insisted on having the most units possible, causing too much structure and inadequate setbacks to parking.

6. JMC severely undersized its parking plan. JMC proposed 83 spaces, although the Board Planner calculated the requirement at 193 spaces. Da22, ¶7.[4]
JMC's expert incorrectly used only the ratio for assisted living units, rather than the higher standard for the senior apartments proposed. As noted by the Board Engineer, "there is a distinct difference in activity level and trip generation from independent living to assisted living." 3T 43:17-25. JMC's expert's response was, "I do believe we've got sufficient parking on site, regardless of, uh, what the interpretation would be of the RSIS." 3T 44:15-17. The Board rejected that response, as should the Court.

7. JMC's Planner asserted that the Planning Board exclusion of this Property from the new zone plan was "irrelevant" to the negative criteria. Pb14. [6T 32-13 to 33-5, 88-2 to 91-10].
The Board Planner clearly disagreed and reported the Allegro rezoning denial and the Planning Board's review and rejection of these uses at this location. Da28-32, 34-46.

---

[3] By definition, a "nursing home" includes housing for those "who, because of their physical or mental condition, require continuous nursing care and services above the level of room and board." Definitions: Land Use Sect 230-54. Pa305 Therefore, the Township zoning already fully provides for such mixed uses in many zone districts, but not in the R-20A zone where single family homes predominate.

[4] "We continue to opine, however, that there is a distinction between the congregate apartments and the assisted living/memory care units and that the parking standard for assisted living units is not appropriate for congregate apartments. It is our opinion that the RSIS parking standards for garden apartments are the most appropriate standards to apply to the congregate apartments, resulting in a total requirement of 194 parking spaces."

8. JMC's architect opined that, by lowering the unit count or stories, the project would not be considered "viable." 2T 63:3-6.
JMC never contradicted him or offered to provide further details so that the ZBA could provide an alternate design as a condition.

9. JMC raises an argument not raised below that the request for steep slopes was a void regulation under the time of decision rule -- another baseless argument.[5]
The removal and adoption were in the same ordinance and there was no gap as claimed. See Dra6, 10.

Legal Argument

Point I

THE TRIAL COURT FAILED TO GIVE DUE DEFERENCE TO THE STATUTORY REQUIREMENTS FOR MUNICIPAL ZONING AND IGNORED APPLICANT'S INABILITY TO SATISFY THE NEGATIVE CRITERIA.

The Applicant's request for use variances for a senior housing mixed-use facility and density had a clear and substantial negative impact on the zoning plan and zoning ordinance of the Township. In 2018, the Property was considered by the Township and rejected for rezoning for the same uses.[6] Similarly, in 2019 the Planning Board adopted an update to the Land Use Element of the Master Plan, including a recommendation for a new senior housing overlay district, but this Property was considered and then excluded.[7]

JMC cannot refute that this Property had been considered and rejected as recently as 2018-19 for the same uses by both the Township and its Planning Board, the two bodies having the jurisdiction to adopt ordinances and create the zoning Master Plan. The ZBA does

---

[5] In fact, the very same Ordinance number 2021-03, 3/9/21, in §5 deleted §230-101 "regulation of slopes" and in §9 added the same new §230-143.1 "regulation of slopes" (moving it from design standards to the zoning ordinance). The steep slope provisions were moved from Article XI Environmentally Sensitive Areas, Section 230-101 to Article XV General Provisions, Section 230-143.1 of the Land Use and Development Regulations of Chapter 230 of the Monville Code. The provision itself did not change, and the change of location within the Land Use Code was done in one singular ordinance. The Township was never without a steep slope ordinance.

[6] See Db 4-6 for a complete discussion of the Allegro rezoning request.

[7] See Db 6-8 on the 2019 Land Use Element.

not have the jurisdiction to amend zoning ordinances, yet JMC claims that the ZBA should grant a variance where a zone change had been rejected by the bodies having the authority to recommend and enact that change. N.J.S.A. 40:55D-70. As more fully set forth at Db 23-24, the Board may not "usurp the legislative power delegated to the governing body to effect the zoning scheme" Vidal v. Lisanti Foods, Inc., 292 N.J.Super. 555, 561 (App.Div. 1996). And, where "an informed governing body does not change the ordinance; a board of adjustment may reasonably infer that its inaction was deliberate." Medici v. BPR Co., 107 N.J. 1, 20 (1987).

Instead of addressing its failure to meet its burden of proof on the second prong of the negative criteria, JMC avoids addressing the issue by demanding that the ZBA request additional conditions and redesign the facility and unit counts. JMC made minor changes to the application in response to the obvious bulk issues presented, but none of the changes made the use compatible there or placed these uses where any senior housing mixed uses were permitted or even recommended in the Master Plan. Instead, JMC decided to ignore the statutory guidelines for zoning that are provided in the MLUL[8]. The trial court further ignored the MLUL in being swayed by JMC's arguments instead of reviewing the statute and the clear language requiring satisfaction of the negative criteria even for inherently beneficial uses. N.J.S.A. 40:55D-70. Reversing the Board's denial of the use variance in defiance of the Township Committee and the Master Plan determinations is a direct and significant impairment of the established zone plan and zoning ordinance. The MLUL is very clear about

[8] "MLUL" is the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.

the purpose of the zone plan and the way zoning ordinances may be adopted. See Db 42-47, Point III. JMC made no attempt to reconcile the substantial violation of the second portion of the negative criteria in its application to the Board for this recently rejected use. Monarch at the Board hearing, and JMC's brief, focus instead only on the inherently beneficial use and the positive criteria, while ignoring the second prong of the negative criteria it needed to satisfy for a use variance. Sica v. Bd. of Adjustment of Twp. of Wall, 127 N.J. 152, 165-66, (1992). The Board strictly followed the requirements of the law, respected the statutorily required process of creating a zone plan and zoning ordinance, and found the application deficient.

In Township of No. Brunswick v. Zoning Bd. of Adj., 378 N.J. Super. 485, 490 (App. Div. 2005), the court reminds us that

> a municipal governing body is vested with the ultimate responsibility of establishing the essential land use character of the municipality through the adoption of zoning ordinances that divide the municipality into districts, identify the uses permitted in each district, and impose general limitations on construction. Paruszewski v. Twp. of Elsinboro, 154 N.J. 45, 51-54, (1998); Twp. of Dover v. Bd. of Adj. of Dover, 158 N.J.Super. 401, 411-12, (App.Div. 1978).

The North Brunswick case stands for the proposition that, when a zoning board resolution ignores a recent zoning ordinance, it can be considered as evidence that the zoning board failed to satisfy the negative criteria. Id. at 494. Similarly, if a zoning board granted a variance where the municipality denied a zoning change request for the same use, that action would violate the negative criteria, especially where, as here, there was a clear showing that the request for the zone change was denied and that the Board knew of the denial.

Respondent's brief recounts all of the highly paid professionals it presented at the zoning board hearings, and its obvious frustration at being denied by the ZBA after all of that effort and expense. The Applicant should have spent more time doing its due diligence, researching the recent history of the property, the prior attempts at development and the zoning ordinance and master plan prior to signing on as contract purchasers. Board members are required to be residents of the municipality, and the Board members learned this history and were familiar with the master plan and zone plan. Further the Board's professionals have worked in the Township for many years and have institutional knowledge that the Board correctly relies upon and respects. The Board's Professional Planners are also the Professional Planners for the Planning Board and provided the analysis for the Township Committee when they considered the Allegro Re-Zoning request. It is absolutely appropriate for the Board to decide, when given conflicting expert opinions, that the opinion of its own professionals carries more weight.

Point II

THE ZONING BOARD CORRECTLY APPLIED THE SICA TEST AND APPROPRIATELY DETERMINED THAT THE APPLICANT FAILED TO SATISFY THE NEGATIVE CRITERIA.

The Board strictly followed the Sica test in its decision to deny the application. (See Db25-34, Pb 25-34). In summary, the Board, 1) identified the inherently beneficial use, 2) identified the substantial impairment to the zone plan and zoning ordinance, 3) sought to provide conditions, such as a significant reduction in units, but was told that condition would make the use not viable, 4) weighed the positive and negative and determined the substantial impairment of the zone plan and ordinance had not been overcome by the applicant. The

negative impact was contrary to the recent zone change denial and, in essence, a substantial rewriting of the recently reviewed master plan and zone plan, and there were many locations in the Township where the uses were permitted. Sica, supra, 127 N.J. at 165-166, Salt & Light Co v. Willingboro, 423 N.J. Super. 282 (App Div 2011), cert. den., 210 NJ 108 (2012).

> The proof required for the second of the negative criteria must reconcile the grant of the variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance. Medici, supra, 107 N.J. at 21, Price v. Himeji, LLC, 214 N.J. 263, 286 (N.J. 2013).

The Board's analysis of the application recognized the uses proposed as inherently beneficial, but the Board found that applicant failed to meet its burden as to the negative criteria. The applicant did not, and under these facts could not, justify overthrowing the Township's zoning scheme to approve the requested use of this Property. The Township has many zones where senior citizen housing, assisted living, nursing homes, adult community housing, residential health care facilities and elder care centers are permitted uses. Da400-404. JMC's Property is not one of those locations. The contravention of this recent legislative decision not to rezone this Property would be a contrary to the law which requires that

> no variance or other relief may be granted under the terms of this section**, including a variance or other relief involving an inherently beneficial use**, 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 the purpose of the zone plan and the zoning ordinance**. N.J.S.A. 40:55D-70d. (emphasis added).

Point III
RESPONDENT ATTEMPTS TO DISTRACT FROM ITS FAILURE TO SATISFY THE LEGAL CRITERIA FOR VARIANCES WITH SPURIOUS ARGUMENTS THAT DO NOT CORRECT THE DEFICIENCIES NOTED BY THE BOARD.

a. A 3-story building has a greater impact than a 2½-story building and the application required a variance for exceeding the permitted number of stories.

Respondent argues that there is no difference between a 2½-story and 3-story building. This is plainly false and defies common sense, which is the reason for the 2½-story limitation in some districts. Common sense dictates that a three-story building will stack three sets of windows, thereby emitting 50% more light upon neighbors during evening hours than just two sets of windows. JMC's 3-story building plan stacks air-conditioning units under all windows, creating 50% more a/c noise. Additionally, a 3-story building will have many more living units, more residents, require more parking, have more employees and more services than a 2½-story building in the same footprint. JMC's argument that the number of stories does not matter, as long as the height is met, is a red herring, is simply false, and it was clearly reasonable for the Board to so conclude.

b. The Property is not in a mixed-use area.

JMC argues that the Property is appropriate because it is in a mixed-use area. This is factually incorrect as shown above. The lots on all sides of the subject Property are also zoned R-20A. The existing surrounding uses are residential. See Drb1, ¶1, supra.

c. The periodic updating of the Land Use Element of the Master Plan is a required part of a municipality's power to zone.

JMC argues that the 2019 Land Use Element of the Master Plan created by the Planning Board is 'irrelevant' because the Township Committee has not yet, by ordinance, adopted all of those recommendations. However, the MLUL clearly identifies the importance of having a current Master Plan and Land Use Element. The required updating of the Master Plan does not require that a governing body adopt by ordinance all recommendations of that planning document. N.J.S.A. 40:55D-89. The MLUL requires that the Planning Board prepare and adopt a reexamination of the Township Master Plan at least every ten years. It is the process

of reexamining problems, objectives and land use goals on a regular basis in order to inform the actions of the Township that is the focus of this process. The fact that the Township has not yet adopted all of the ordinance changes recommended by the 2019 Land Use Element does not negate the importance of the Master Plan in the zoning scheme, nor does it prevent the Township from adopting additional implementing ordinances in the future. The Board has been very clear in its representations to this court when referencing Township ordinances, the Allegro planning review report, and the 2019 Land Use Element of the Master Plan. Each document is a part of the Townships history of zoning and land use planning, and each has a role to play in establishing the current zoning scheme in the Township.[9]

The Board members and the Board's professionals were well aware of the request by Allegro to rezone the Property and the Planning Board's 2019 Land Use Element recommending senior housing for other locations and not for JMC's Property.[10] Da18-55.

d. The Board could not redesign the project as a condition of an approval.

JMC argues that the Board failed to provide conditions to ameliorate the negative impacts. JMC's architect had testified that less units would make the project unviable (without explanation); therefore, even if the Board could redesign the project, a significantly smaller project was not an option according to applicant. 2T 62:24 to 63:6. Moreover, when the negative impact is substantial impairment of the intent and purpose of the zone plan and zoning ordinance, the only remedy is to locate the use where it fits the zone plan, or at least a

[9] The Board's trial brief was included in the appendix, as stated in the appendix, solely for the procedural purpose of establishing which arguments were made below, since the trial court opinion did not fully identify all of the Board's arguments.

[10] See Da7 for more detail on the 2019 Land Use Element.

zone which permits most of the uses proposed, such as senior citizen housing (in zones AH-1, -2, -4), adult community housing (in zones R-27 A,B,C,D,E,F or OB 1A), or assisted living and nursing homes (in zones OB1-3, OB1A, OB 2A-4, OB-5, I, IA, IA-1B, I-2, or I-2A). To be certain, any of those zones would be a better fit for the senior living mixed-use facility proposed by JMC. See Drb2, ¶4, supra.

JMC continues to attempt to claim the Board's resolution of denial was lacking due to the lack of conditions to address negative effects. This argument fails to recognize the nature of a denial. Where an application is denied resolution compliance conditions are not appropriate. It also fails to be forthright about how the hearings in this matter progressed. Despite questions by the Board that indicated concern with the mass, scale and units count of the project the applicant continued to make adjustments to everything except the unit count and stories of the building. Therefore, the change that might have made a difference -- a significant reduction of units -- was taken off the table by applicant. Further, no testimony was offered that might have informed the Board how to craft a condition related to a reduction in units. The Board could not dictate which of the "multi-uses" to reduce, nor was it privy to how unit reductions in each type of use would affect the number of employees or the overall size of amenity spaces, the parking needs and/or recreation needs. The Board simply could not be expected to make those judgment calls and redesign the project for JMC. Finally, at the trial court's remand, the Board was prevented from imposing a size reduction or asking the applicant to present a revised project with a lower unit count. Da349.

e. Many senior and assisted living type uses are permitted in the Township.

JMC argues that the proposed project would not be permitted anywhere in the Township.

As discussed above on page 2, ¶4, there are numerous uses related to senior living and nursing home use that are recently permitted. Notably, adult community housing, assisted living and nursing homes are all permitted in the OB-1A zone, and adult community housing and elder care centers are permitted in many zones. Any of the zones where senior citizen housing, assisted living or nursing home uses are permitted would have been better choices for the senior living mixed-use project proposed. Even if technically all three uses, as defined by JMC, were not listed as permitted in the same zone in the Township, any of the locations where some of the uses were permitted would be far more conforming with the master plan and zone ordinance. Instead, JMC chose a zone that did not permit any of the uses proposed.

f. Several variances were required in addition to the d(1) use variance and (d)5 density variance requested by the applicant.

During the course of the hearing, many versions of the site plan were presented with slightly different c variance requirements in each one. The Board's planners issued several revised reports during the course of the hearings, which addressed the revisions to the plans. At all times, the Board's professional planners' reports concluded that, in addition to the use variances, c variances were required for the number of stories, the impervious coverage, sideyard setback, the monument sign, steep slope disturbance[11], parking variances for setback from the building and from the street, and for the number of parking spaces. Da 20-23, Da 58-60. In addition, the Board Engineer testified about the failure of the proposal to meet the

[11] JMC failed to raise any issue with the Steep Slope variance below and is therefore barred from bringing the argument now. However, this new argument has no merit. See details above at Drb4, ¶9 and n.5. The moving of the steep slope provisions were accomplished within the same ordinance.

parking requirement under the Residential Site Improvement Standards. 1T 82, 3T 43:17-25. See Drb3, ¶6, supra.

g. A side yard setback variance was required as shown on the zoning chart in Monarch's last site plan submission to the Board.

Exhibit 46, a revised site plan, was submitted at the last hearing on the application to the Board and notably, the Board's professionals were not afforded an opportunity to review the details and comment on the plan prior to that hearing. Pa265. The zoning chart on Exhibit 46 shows the proposed combined side yard setback as 37.93% where 35% is the maximum permitted combined side yard setback. The Board was correct to assume that the number provided in the zoning chart was correct and to take the number at face value as deficient from the ordinance standard. This was especially true since the side yard number did not include any notation regarding the overhang, and the number provided for building coverage did. The number for building coverage included a note explaining that the "eve of roof is not included within the calculations" but no note is provided regarding the overhang, just the percentage. Pa 265. Therefore, the Board was correct in determining that a variance was needed for 37.93% combined side yard setback as stated in the last plan presented by Monarch.

Point IV

THE BULK VARIANCES REQUIRED FOR A MULTI-LEVEL SENIOR MIXED-USE FACILITY IN A SINGLE-FAMILY RESIDENTIAL ZONE ARE NOT "SUBSUMED".

Monarch was required to satisfy the balancing test for approval of the bulk variances requested under the c(1) or c(2) criteria. However, JMC attempts to argue that these variances requested should simply be subsumed under an approval of a use variance and therefore did not need to be proven.

While it is true that where a board determines that a use not permitted in a given zone, would nonetheless be appropriate on a certain property, in a certain location, that determination may come with the recognition that the use granted will not necessarily comply with the bulk requirements in the zone, since the use was not contemplated in that zone when the bulk requirements were drafted. When considering a use variance, a Board must consider not just the use but also the overall site design. Price v. Himeji, 214 NJ 299, 300 (2013). In such circumstances, approving the use also recognizes that certain bulk changes will be necessary to design that use on the property.

> That does not mean that a zoning board can ignore the ordinarily applicable limits on height, for example, when evaluating an application for a use variance. It does mean that the board can, as part of granting a use variance, consider the other requested variances as ancillary to the principal relief being sought." Id. at 300.

The proof required to establish how the nonpermitted use is appropriate at the location will necessarily include proof that the different bulk requirements are also appropriate.

In Price, which is often cited for creating the concept of "subsumed" variances, the Court was careful to specify that both the use and the design and bulk of the project need to be considered when determining if a use variance will be granted.

> As part of the analysis of the use variance, the Board did not focus simply on the use, but on the overall project design, including its height and density. Although both were inconsistent with the ordinarily applicable limitations in the zone, the Board addressed each as part of deciding to grant the use variance. Nor did the Board simply authorize the height and density that Himeji requested. On the contrary, the Board required that the building be lowered in height and reduced in regard to the number of living units, thus limiting the extent to which the project varied from the zone and bringing it into conformity with nearby existing buildings to retain consistency with the overall zone plan. Id.

In the subject application, the Board considered the use and the impact of the proposed facility including the significant increase in density, higher than in any zone in the Township,

together with the other variances which confirmed that the project was too big for this single-family residential zone. Indeed, if a senior living mixed-use project was presented in more typical single-family structures, the Board may not have had any issue with the use. The use and the design of the project are understandably linked, but that does not remove the consideration of additional variances needed from the consideration of a use variance, or the need for the applicant to provide proofs that they should be granted.

CONCLUSION

The Board's decision to deny the application was not arbitrary, capricious, or unreasonable, and a Board's denial is entitled to greater judicial deference than a decision to grant a variance. Kaufman v Planning Bd. Warren Tp., 101 N.J. 551, 558 (1988). Respondent completely ignored and failed to address the second prong of the negative criteria -- the substantial negative impact on the zone plan and zoning ordinance. It was eminently reasonable for the Board to heed the clear direction of the Township and its Planning Board in not zoning this property for these uses. The Board, therefore, correctly, and reasonably, denied the application. The trial court's decision should be overturned, and the Board's denial of the application should be affirmed, or, at the very least the matter should be remanded to the Board to address limiting the unit count and density of the project.

Respectfully submitted,
Pashman Stein Walder Hayden, PC
By: s/Bruce J. Ackerman
Bruce J. Ackerman

TOWNSHIP OF MONTVILLE

ORDINANCE NO. 2021-03

AN ORDINANCE OF THE TOWNSHIP OF MONTVILLE, COUNTY OF MORRIS, AND STATE OF NEW JERSEY AMENDING CHAPTER 230 "LAND USE AND DEVELOPMENT REGULATIONS" AND CHAPTER 169 "FEE SCHEDULE" OF THE CODE OF THE TOWNSHIP OF MONTVILLE, NEW JERSEY

WHEREAS, the Township Code currently sets forth standards, requirements and fees related to development throughout the Township; and

WHEREAS, a review of the Township Code related to these standards, requirements and fees by the Township Planning Board has revealed certain deficiencies and changes that must be addressed; and

WHEREAS, the Township Planning Board has recommended certain amendments to the Code in order to address these matters; and

WHEREAS, the Township Committee has reviewed the proposed changes to the Code and recommends acceptance of the proposed changes.

BE IT ORDAINED, by the Township Committee of the Township of Montville, in the County of Morris, and State of New Jersey, as follows:

SECTION 1. Chapter 230 "Land Use and Development Regulations", Section 230-54 "Terms defined", of the Code of the Township of Montville is hereby amended, for the following terms only, to read as follows:

§§ 230-54 **Terms defined.**

For purposes of this chapter, the following phrases and words shall have the meanings indicated.

AGRICULTURAL ACTIVITIES
The production, principally for the sale to others, of plants, animals or their products, including, but not limited to, forage and sod crops; grain and feed crops; dairy animals and dairy products; livestock and pastoral farm animals and fowl, including dairy and beef cattle; poultry, sheep, horses, ponies, mules and goats; grapes, nuts and berries; vegetables; nursery, floral, ornamental and greenhouse products and other commodities as described in the Standard Industrial Classification for agriculture, forestry, fishing and trapping. Agriculture shall not include intensive poultry or swine production or extensive animal feedlot operations.

ALTERNATIVE TREATMENT CENTER (ATC)
The permitted alternative treatment center authorized to grow and provide registered qualifying patients with medicinal marijuana and related paraphernalia in accordance with the provisions of the Compassionate Use Medical Marijuana Act (CUMMA).

BASEMENT
That portion of a building which is partly or completely below finished grade and where the finished surface of the floor above is less than six (6) feet above finished grade for at least fifty percent (50%) of the total building perimeter. (See also "grade, finished," "story" and "cellar.")

BREWERY
An establishment licensed under N.J.S.A 33:1-10 to manufacture alcoholic beverages and to sell and distribute the products to licensed wholesalers and retailers. Such uses may manufacture, sell and serve alcoholic beverages to consumers on a licensed premise for consumption on site, but only in connection with a tour of the brewery, or for consumption off the premises. Breweries may include warehousing and off-site distribution of alcoholic beverages consistent with state law and applicable licensing from the Township of Montville.

BUFFER
A strip of land containing natural materials, woodlands, earth mounds, and/or other planted vegetation for the purposes of making a physical or visual barrier. No building, structure or parking shall be permitted in this area, with the exception of fences and walls as permitted by this Chapter.

CELLAR
A space having at least 1/2 its height below finished grade and with a floor-to-ceiling height of less than six and one-half (6 ½) feet. (See also "grade, finished," "story" and "basement.")

DOMESTIC FOWL
Includes, but is not necessarily limited to, ducks, geese, swans, turkeys, and chickens.

ELECTRIC VEHICLE CHARGING STATION
An electric component assembly or cluster of component assemblies designed specifically to charge batteries within electric vehicles by permitting the transfer of electric energy to a battery or other storage device in an electric vehicle.

FARM
An area of land made up of single or multiple parcels which is organized as a management unit actively devoted to agricultural or horticultural use, including but not limited to cropland, pasture, idle or fallow land, woodland, wetlands, farm ponds, farm roads and other farm buildings and other enclosures related to agricultural pursuits, which occupies a minimum of five acres, exclusive of the land upon which the farmhouse is located and such additional land as may be used in connection with the farmhouse as provided in the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.3, 54:4-23.4, 54:4-23.5 and 54:4-23.11.

FARM ANIMALS
Grazing or foraging animals including, but not necessarily limited to, horses, cattle, llamas, sheep, goats, and ponies.

FARM MARKET
A facility used for the wholesale or retail marketing of the agricultural output of a farm, and products that contribute to farm income, except that if a farm market is used for retail marketing at least fifty-one percent (51%) of the annual gross sales of the retail farm market shall be generated from sales of agricultural output of the farm, or at least fifty-one percent (51%) of the sales area shall be devoted to the sale of the agricultural output of the farm. (Synonymous with “farm stand.”)

LOT AREA
The area of a lot expressed in square feet or acres. Any portion of a lot included in a street right-of-way shall not be included in calculating lot area. In addition, any portion of a lot or lots dedicated for future roadway use, or by easement, shall not be included in the calculation of the lot area.

MOBILE RETAIL FOOD ESTABLISHMENTS
Any movable restaurant or retail food establishment in or on which food or beverage are transported, stored, or prepared for retail sale or given away at temporary locations. This term does not apply to mobile caterers who are engaged in the business of transporting, in motor vehicles, food and beverages to residential, business and industrial establishments pursuant to prearranged schedules and dispensing from the vehicles the items to and for the convenience of the personnel or occupants of such establishments.

SMALL ANIMALS
Includes, but is not necessarily limited to, dogs, cats, rabbits, gerbils, guinea pigs, hamsters, cage birds, nonvenomous reptiles and amphibians and other similar animals.

STORY
That portion of a building or structure included between the surface of any one floor and the surface of the floor next above it. If there is no floor above such floor, then "story" shall be that portion of the building or structure included between the surface of any floor and the ceiling next above it. The term “story” shall not include an “attic”, “basement” or “cellar” as such terms are defined herein.

STORY, HALF
A space under a sloping roof which has a line of intersection of the roof and wall face not more than three (3) feet above floor level in which space the possible floor area with head room of five (5) feet or less occupies at least thirty-five percent (35%) of the total floor area of the story directly beneath.

All other portions of this Section shall remain unchanged.

SECTION 2. Chapter 230 "Land Use and Development Regulations", Article IX "Design Standards for subdivisions", Section 230-66 "Lots" of the Code of the Township of Montville is hereby amended to add a new subsection I to read as follows:

I. Shape. To the maximum extent practical, odd- or irregularly-shaped lots shall be prohibited.

All other portions of this Section shall remain unchanged.

SECTION 3. Chapter 230 "Land Use and Development Regulations", Article IX "Design Standards for subdivisions" of the Code of the Township of Montville is hereby amended to add a new Section 230-74.1 "Design Standards for Single-Family Development" to read as follows:

§ 230-74.1. Design standards for single-family development.

A. Application. The design standards in this section shall apply to new single-family development approved as part of a major subdivision.

B. Height. Irrespective of the maximum height provisions set forth in Schedule D, Schedule of Area and Bulk Requirements, new single-family dwellings with conforming lot areas and setbacks and a minimum roof pitch of 8/12 shall be permitted a maximum building height not to exceed thirty-eight (38) feet, except that for new single-family dwellings in the R-15 Zone with conforming lot areas and setbacks a minimum roof pitch of 8/12, a maximum building height up to thirty-three (33) feet shall be permitted.

C. Roofs.

(1) Flat roofs are prohibited on single-family dwellings, except on lower tier roofs and shall not occupy more than 20% of the dwelling's total roof coverage (not to be interpreted as total roof area).

(2) All single-family dwellings shall have a minimum roof pitch of 6/12 for a minimum of 80% of the dwelling's total roof coverage (not to be interpreted as total roof area) and shall be fully enclosed to the roof peak.

D. Primary Entrance.

(1) The primary entrance to single-family dwellings shall face the street identified as the property's street address.

E. Garages.

(1) Required Garages. Single-family dwellings of less than 3,000 square feet of habitable floor area shall require a minimum of one (1) enclosed garage space of at least 10 feet by 20 feet and those of 3,000 square feet or greater of habitable floor area shall require a minimum of two (2) enclosed garage spaces of at least 20 feet by 20 feet.

(2) Attached front-facing garages in single-family dwellings may project a maximum of eight (8) feet in the front yard from the front plane of the dwelling to prevent "snout" design configurations and minimize the prominence of garages, as they are intended to be secondary design features consistent with the prevailing character of the Township's existing housing stock. However, in no event shall the garage be permitted to encroach within the required front yard setback.

(3) Attached garages shall have entrances from other than the front (side or rear), except that lots of a width less than ninety (90) feet at the required setback line shall be permitted to have front-facing garages limited to a maximum of twenty-four (24) feet in width to accommodate parking for a maximum of two vehicles.

SECTION 4. Chapter 230 "Land Use and Development Regulations", Article X "Design Standards for Site Plans" of the Code of the Township of Montville is hereby amended to add a new Section 230-98.1 "Design Standards for Non-residential Development" to read as follows:

§ 230-98.1. Design standards for non-residential development.

A. Application. The design standards in this section shall apply to all non-residential development, including the non-residential portion of mixed-use development, approved as part of a major site plan.

B. Building Form and Mass.

(1) Orientation. Buildings shall be oriented with a primary entrance facing at least one (1) adjacent public street. The primary building orientation shall not be toward a parking lot or parking structure.

(2) Horizontal Articulation Between Floors. Each façade shall be designed to have a delineated floor line between the street level and upper floors. This delineation may be in the form of a masonry belt course, concrete lintel or a cornice line delineated by wood detailing.

(3) Vertical Articulation. Each building facade facing a public right-of-way must have elements of vertical articulation comprised of columns, piers, recessed windows or entry designs, overhangs, ornamental projection of the molding, different exterior materials or wall colors, or recessed portions of the main surface of the wall itself. The vertical articulations shall be designed in accordance with the following:

(a) Each vertical articulation shall be no greater than thirty (30) feet apart.

(b) Each vertical articulation shall be a minimum of one (1) foot deep.

(c) Each vertical projection noted above may extend into the required front yard a maximum of eighteen (18) inches in depth.

C. Building Height and roofs.

(1) The top floor of all buildings must be capped by a cornice or sloping roof element.

(2) Flat roofs shall be enclosed with parapets or other acceptable architectural feature.

(3) Cool roofs. Buildings with a flat roof surface area of five hundred (500) square feet or more shall utilize a material that has a solar reflectivity of fifty (50%) percent or greater as certified by the Cool Roof Rating Council.

D. Facades and Fenestrations.

(1) Building entrances accessing a public sidewalk shall be recessed to promote safe pedestrian circulation.

(2) Awnings and canopies are encouraged at the ground floor level.

(3) Facades facing public alleyways shall be treated consistent with the primary front building façade facing the public street(s), including such design elements as building articulation, materials, entranceways and storefronts.

SECTION 5. Chapter 230, Section 230-101 “Regulation of Slopes” shall be deleted in its entirety.

SECTION 6. Chapter 230 “Land Use and Development Regulations”, Section 230-116 “Zoning Districts”, Subsection B “Overlay Districts” of the Code of the Township of Montville is hereby amended to add new paragraphs (6) and (7) to read as follows:

(6) Senior Housing - 1 Overlay District.

(7) Senior Housing - 2 Overlay District.

All other portions of this Section shall remain unchanged.

SECTION 7. Chapter 230 “Land Use and Development Regulations”, Section 230-134 “Commercial Vehicles in Residential Districts”, sub-sections A and B only, of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-134 Commercial vehicles in residential districts.

A. On any residential lot, no person shall park, store or maintain any commercially operated vehicle without first obtaining a parking permit for each permitted vehicle. However, any commercially operated vehicle in connection with construction on the site for which a construction permit has been issued or which is otherwise permitted by Township ordinances shall not be required to obtain a parking permit.

B. Parking permits shall be issued in accordance with the following standards:

(1) Any commercial vehicle, regardless of registry, other than a pickup truck or regulation van, totally or partially used in a commercial capacity, as defined herein, shall require a permit.

(2) Any pickup truck or regulation van, regardless of registry, equipped with commercial and/or industrial racks, permanent structural alterations and/or advertising, consistent with a commercial vehicle usage as defined herein, shall require a permit. A pickup truck or regulation van, regardless of registry, not meeting the commercial vehicle definition contained herein shall be exempt from the permit requirement.

(3) One permit will be issued per residential lot up to three acres.

(4) One additional permit may be issued per each acre over three acres upon proper application and compliance with all requirements.

(5) In the event that the acreage is reduced after a permit has been issued, the permit will be voided and a new application must be submitted.

(6) All vehicles meeting the definitions contained herein must be garaged or screened from view of neighboring properties. Screening must be approved by the Zoning Officer.

(7) All vehicles meeting the definitions contained herein must be owned or used by a resident of the premises.

(8) No vehicle meeting the definitions contained herein shall exceed a gross weight of 10,000 pounds or 25 feet in length, nor shall any such vehicle, equipment or machinery exceed a total height of nine feet.

(9) Permits will be renewed on a yearly basis and conditions reviewed to determine compliance with this section.

(10) Falsification of any question on the application will result in an immediate denial of the request or revocation if the permit has been issued.

(11) Issuance of a permit requires strict compliance with any restrictions set by the Zoning Officer. Any deviation from such restrictions will subject the applicant to revocation of the permit.

All other portions of this Section shall remain unchanged.

SECTION 8. Chapter 230 "Land Use and Development Regulations", Article XV "General Provisions", Section 230-143 "Right to Farm" of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-143 **Right to farm.**

A. Purpose. The purpose of this section is to encourage the continuation and expansion of commercial and home agricultural pursuits by continuing a positive agricultural business climate and protecting the farmer against unjustified private nuisance suits, where recognized methods and techniques of agricultural production are applied and are consistent with relevant federal and state law and nonthreatening to the public health and safety; at the same time, this section acknowledges the need to provide a proper balance among the varied and sometimes conflicting interests of all lawful activities in the State of New Jersey. This Section is not intended to, in whole or in part, supersede any other ordinance of the Township of Montville. The retention of agricultural activities is desirable to all citizens in Morris County because it ensures numerous social, environmental and economic benefits, including the preservation of open space, atmospheric habitat, the preservation of land as a nonreplenishable resource and as a source for agricultural products for this and future generations, and the protection and maintenance of the aesthetic beauty of the countryside and rural character of the community which includes farm and architecture and scenic variety.

B. Right to farm. Farms, as defined herein, shall be permitted in any zone, and it shall be presumed that such uses, agricultural activities and structures in connection therewith shall not constitute a public or private nuisance, provided that such agricultural uses are conducted in conformance with the acceptable agricultural management practices defined herein.

C. Permitted uses. All uses and structures customarily incidental to farms and agricultural activities shall be permitted accessory uses on all farms, as defined herein, including but not limited to:

(1) The storage, processing and sale of farm products where produced.

(2) The use of irrigation pumps and equipment.

(3) The application of manure, chemical fertilizers, insecticides, pesticides and herbicides.

(4) On-site disposal of organic agricultural waste.

(5) Installation of soil and water conservation practices in accordance with a Conservation Plan approved by the Morris County Soil Conservation District.

(6) Transportation of slow-moving equipment over roads within the municipality.

(7) Utilization of tractors and other necessary equipment.

(8) The employment of farm laborers.

(9) The creation of noise, dust, odors and fumes inherently associated with such uses.

(10) The conducting of farm practices at any and all times when necessary.

(11) Recreational use (snowmobiling, off-highway vehicle use, hunting, etc.) as permitted by the farm owner, with the provision that any recreational use of farm land that changes the underlying agricultural nature of the land shall be subject to the usual site plan review, variance application and all permits where otherwise required.

(12) Provisions for the wholesale and retail marketing of the agricultural output of the farm which include the building of temporary and permanent structures, signage and parking areas for said purpose which all must conform with applicable provisions of this chapter, including requirements for accessory structures as set forth in § **230-128**, and design standards for site plans as set forth in Part **2** of this chapter. Notwithstanding any requirements herein to the contrary, the following provisions shall also apply to all farm markets/farm stands:

(a) Parking areas for farm markets/farm stands may be graveled so as to reduce impervious coverage. Additional temporary or seasonal parking may be provided on maintained, grassed areas.

(b) Farm markets/farm stands shall be permitted to be located in a front yard, provided that said structures meet the minimum front yard setback for the zone district in which it is located, and further provided that said structures meet the minimum side and rear yard setbacks set forth for accessory structures in § **230-128A(5)**.

(13) The raising and keeping of farm animals in accordance with §230.161.2 Keeping of Animals.

(14) The raising and keeping of swine shall be prohibited, except as permitted pursuant to Chapter 438 Swine of the Township Code.

D. Notice of farm use.

(1) For the purpose of giving due notice of the within farm rights to new residents of the municipality, the Planning Board shall require an applicant for every major and minor subdivision, as a condition of approval of such application, to provide every purchaser of a lot within said subdivision with a copy of the ordinance codified in this section; and

(2) Whenever a new major or minor subdivision abuts a farm, as defined herein, or a new major or minor subdivision contains space which was not owned by individual homeowners or a homeowners' association, and said space is at least five acres in size, then the following language shall be inserted in the deed of all lots:

Grantee is hereby noticed that there is presently, or may in the future be, farm use near the described premises from which may emanate noise, odors, dust, and fumes associated with agricultural practices permitted under the "Right to Farm" section of the Municipal Zoning Regulations.

All other portions of this Section shall remain unchanged.

SECTION 9. Chapter 230 “Land Use and Development Regulations”, Article XV “General Provisions” of the Code of the Township of Montville is hereby amended to add a new Section 230-143.1 “Regulation of Slopes” to read as follows:

§ 230-143.1 Regulation of slopes.

It is the purpose of this section to protect the health, safety and welfare of people and property within the Township of Montville from improper construction, building and development on steep slope areas, and more particularly, but without limitation, to reduce the hazards which exist with development in steep slope areas by reason of erosion, siltation, flooding, soil slippage, surface water runoff, pollution of potable water supplies from nonpoint sources, destruction of unique and scenic vistas. It is a further purpose of this section to encourage appropriate planning, design and development sites within steep slope areas which preserve and maximize the best use of the natural terrain, and maintain ridgelines and skylines intact. To meet the purpose of this section, all subdivisions, site plans, lot grading plans, and other development plans shall be required to meet the following requirements.

A. The applicant shall prepare a slope map based on two-foot contour intervals which delineates by category the following slope classes:

(1) Slope categories:
0% to 14.9%
15% to 19.9%
20% to 24.9%
25% or greater

(2) The slope map shall include a calculation of the area of proposed disturbance within all existing and/or proposed lots, as well as within any proposed road right-of-way.

B. Disturbance for development, re-grading, and/or stripping of vegetation shall be permitted within the various categories of slope classes to the extent specified below:

Slope Categories	**Maximum Disturbance**
0% to 14.9%	None
15% to 19.9%	50%
20% to 24.9%	33.3%
25% or greater	0%

(1) The reviewing board, when acting on a development application, and the Township Engineer, when acting on a grading permit, shall have the discretion to

waive the maximum disturbance limitations set forth above, provided the proposed disturbance does not exceed such limitations by 25% or 100 square feet, whichever is smaller. Such disturbance may be permitted if it can be determined that the disturbance of the critical slope area is consistent with sound planning and promotes the goals and objectives of the Township's Master Plan; would not substantially impair the purposes of the Township's Zoning and Land Use Ordinances; and would otherwise result in practical difficulties for the applicant. Where it is determined that such pocket or pockets are proximate to other steep slope areas and collectively are of such size to constitute a significant and substantially contiguous area, the Board and/or Township Engineer may determine that the area is subject to the requirements of this section.

C. No land disturbance or construction activity shall be undertaken within any area with slopes exceeding 14.9% unless the developer has first secured a grading permit from the Township Engineer pursuant to § **230-71**, Grading plan. Whenever disturbance is proposed in areas with slopes exceeding 14.9%, a detailed grading plan and architectural plans shall be submitted. The plans shall be designed to ensure that drainage and/or erosion problems will not result from the proposed developments. The architecture of all buildings shall be designed to follow the natural topography to the greatest extent possible in order to minimize disturbance of steep slopes.

D. Whenever any variance or grading permit is sought for any addition to or modification of an existing single-family dwelling, and/or the lot on which it is located, the Board of Adjustment, when acting on a variance, and the Township Engineer, when acting on a grading permit, may waive the requirements of Subsection **A** of this section to the extent they are applicable when it is reasonably clear that there exist no on-site slopes in excess of 14.9%, or that any slopes in excess of 14.9% are remote from the areas of proposed development and/or disturbance.

E. The Township Engineer may, at his/her discretion, waive the requirements of this section for slopes that have been previously altered from their natural state through construction performed under an approved permit, lot grading plan, or altered prior to the adoption of controlling legislation.

SECTION 10. Chapter 230 "Land Use and Development Regulations", Article XV "General Provisions" of the Code of the Township of Montville is hereby amended to add a new Section 230-143.2 "Buffer Requirements" to read as follows:

§ 230-143.2. Buffer requirements.

A When required. Unless specifically regulated otherwise by this Chapter, a buffer shall be provided wherever a nonresidential zone district abuts any of the "R" Residential zone districts along a side or rear lot line.

B Location. The buffer area shall be located in the nonresidential zone district and shall be adjacent to the "R" Residential zone district boundary.

C Buffer depths. The minimum depth of the buffer adjacent to the "R" Residential zone district required by §230-143.2.A shall be as set forth in the following table. The buffer depth shall be measured from and perpendicular to the property line shared with the "R" Residential zone district.

Zone District	Minimum Buffer Depth (From Side Lot Line)	Minimum Buffer Depth (From Rear Lot Line)
B-1	5 ft	15 ft
B-2, B-3, OB-1, OB-1A	10 ft	25 ft
B-4, OB-2A, OB-4, I-2, I-2A	12 ft	25 ft
B-5, OB-3 OB-5, I-1A, I-1B	25 ft	25 ft

D. Buffer design. All buffers required by §230-143.2.A shall be designed as follows:

(1) The buffer area shall be used only as a buffer planting strip on which shall be placed evergreen trees, shrubbery, berms, hedges, fencing and/or other suitable elements sufficient to constitute an effective screen. Buffers shall provide a year-round visual screen to the extent feasible.

(2) No building or impervious surface shall be permitted within the buffer area. Grading and earthwork shall not be permitted within the buffer area except to enhance the integrity of the buffer, such as the creation or supplementing of earthen berms, and to enhance stormwater infiltration within the buffer area. Existing vegetation should be preserved in the buffer area where practical.

(3) Buffer areas shall be maintained and kept clean of all debris, rubbish, weeds and tall grass. Any screen planting shall be maintained permanently, and any plant material that does not live shall be replaced within one (1) year or one (1) growing season, provided all landscape plans as approved shall be continually complied with.

(4) Notwithstanding the foregoing, reasonable areas for easements for utilities, storm drainage pipes or other such infrastructure necessary for the development may be waived, provided that there is no reasonable alternative to locating such utilities, pipes or

infrastructure within the buffer area, all as determined by the Planning Board or Board of Adjustment.

(5) Fences or walls that constitute an effective screen shall be permitted within the required buffer area.

SECTION 11. Chapter 230 "Land Use and Development Regulations", Article XV "General Provisions" of the Code of the Township of Montville is hereby amended to add a new Section 230-143.3 "Special Permits" to read as follows:

§ 230-143.3. Special permits.

A. Temporary tent or parking lot sales. The Zoning Officer may issue a special permit for a temporary tent or parking lot sale subject to the following conditions:

(1) Any person, entity, organization or business seeking to conduct a temporary tent or parking lot sale in the Township of Montville shall first complete an application and obtain a zoning permit from the Zoning Officer. A fee of $150.00 per tent or parking lot sale shall be remitted with the application.

(2) Applications for a special permit shall be made to the Zoning Officer and shall be signed by the applicant. The application shall contain the following information:

(a) Name, address, phone number and email address of person, entity, organization or business making the application.

(b) Name, address, phone number and email address of person owning the premises, if other than the applicant, and notarized consent of the owner of the premises to the tent or parking lot sale application.

(c) Dates and hours of tent or parking lot sale, including start and end dates.

(d) Name, address, phone number and email address of the tent company, size of the tent to be used, and Flame Retardant Certification, when applicable.

(e) Sketch on an accurate site survey indicating the proposed location of the tent on the property. Tent or parking lot sales shall only be permitted within parking lots where the principal use on the property has available parking in excess of the number of parking spaces required pursuant to Chapter 230, Schedule E, Off-Street Parking Requirements. Should the plan not comply with established parking requirements, applications shall be rejected. Applicants may thereafter apply to the Planning Board and/or Board of Adjustment for a site plan amendment.

(f) Statement as to how the applicant proposes to provide adequate sanitary facilities and adequate provision for garbage/recycling collection.

(g) A signage plan.

(h) Proof of comprehensive general liability insurance in an amount of at least $1,000,000.

(3) Upon submission of a complete application, the Zoning Officer shall forward the application to the Montville Police Department as to traffic safety as it relates to the placement of any temporary structure and to the Fire Official for compliance with the Uniform Fire Code.

(4) If approved, applicants must enter into a Hold Harmless Agreement with the Township indemnifying the Township, its elected officials, officers, directors and employees from any and all claims, damages, judgment costs or expenses, including attorney fees, which they or any of them may incur or be required to pay because of any personal injury, death, or any property damage suffered by any person(s) as the result of or related in any way to the operation and maintenance of the sidewalk, tent or parking lot sale for which the permit is issued. Such agreement shall be in a form approved by the Township Attorney or his/her designee.

(5) The number of tent and/or parking lot sales permitted at any one property shall be limited to two (2) per calendar year.

(6) The duration of each tent and/or parking lot sale shall be limited to a maximum of thirty (30) days per calendar year. The thirty (30) day period shall be inclusive of any time for set up and dismantling/removal of any temporary structures prior to the commencement and at the end of any such sale.

(7) Tent and/or parking lot sales may operate from dawn until dusk or during the regular business hours of the principal use of the property, whichever timeframe is more restrictive.

(8) Tent and/or parking lot sales shall be permitted in all non-residential zones and on lots containing a permitted non-residential use within a residential zone, provided the following criteria are met:

(a) Tent and/or parking lot sales shall not be located within one hundred feet (100') of a lot developed with a residential use.

(b) Tent and/or parking lot sales shall not be located within thirty feet (35') of adjacent buildings, property lines; burnable materials, grass or vegetation.

(c) Tent and/or parking lot sales shall not be located within one hundred feet (100') of any gasoline pump or distribution point.

(d) Tent and/or parking lot sales shall not be located within ten feet (10') of any public roadway, or public sidewalk.

(e)

(9) Temporary sales tents shall meet the following design requirements:

(a) Height. Temporary sale tents shall not exceed a maximum height of 20 feet.

(b) Footprint. Temporary sale tents shall not exceed a maximum footprint of 500 square feet.

(c) Lighting. Temporary tents shall not be illuminated by an artificial lighting source.

(10) Temporary signs advertising the temporary tent and/or parking lot sale may be installed in accordance with an approved sign plan as part of the permit. Signs shall be limited to 40 square feet in area, affixed directly to the tent and non-illuminated. One such sign is permitted per street frontage of the lot or site upon which the tent is erected.

(11) In addition to any other penalties or remedies authorized by the State of New Jersey, any person or establishment who violates any provisions of this section shall be subject to a penalty of up to $2,000 for each violation. The Zoning Officer may bring this action in either the Municipal Court or Superior Court, as the summary proceeding under the "Penalty Enforcement Law" of 1999 (N.J.S.A. 2A:58-10, et seq.) and any penalty monies collected shall be paid to the Chief Financial Officer of the Township.

B. Mobile retail food establishments. The Zoning Officer may issue a special permit for a mobile retail food establishment subject to the following conditions:

(1) Any person, entity, organization or business seeking to operate a mobile retail food establishment, as defined in §230-54, on private property in the Township of Montville shall first obtain a zoning permit from the Zoning Officer. Said zoning permit shall be in addition to any and all licenses and/or permits as required from the Township Health Department, pursuant to Chapter 419, Food and Beverages, and/or as required by the State of New Jersey.

(2) Zoning permits shall be required for mobile retail food establishments on an annual basis for year-round vendors or a temporary basis for individual events as determined to be applicable prior to commencing operation within the Township. Permits shall specify the nature, location and extent of the operation. Permits issued pursuant to the provisions of this chapter shall be valid as follows:

(a) Year-round permits shall be valid for a one-year period beginning January 1 and shall not be prorated if obtained after January 1.

(b) Temporary permits shall be valid for not more than ten (10) consecutive days and may be issued up to four (4) times per year.

(3) Mobile retail food establishments shall be permitted to operate on private property in any zone wherein eating and drinking establishments are permitted uses pursuant to this Chapter, subject to the following:

(a) Mobile retail food establishments shall obtain written approval from the owner of the property where their business will be conducted.

(b) Mobile retail food establishments shall not operate within fifty (50) feet of an existing fixed retail food establishment without the prior written consent of the owner or authorized representative of the retail food establishment.

(c) Mobile retail food establishments shall not operate at any one location for more than two (2) hours in one 24-hour period, except if it is in relation to an approved limited special event or private function.

(d) The vendor must setup and operate the mobile retail food establishment unit so as to maintain a minimum five (5) foot clear pedestrian pathway in all directions from the unit.

(4) In zones wherein eating and drinking establishments are not permitted uses pursuant to this Chapter 230, including residential zones, mobile retail food establishments may only be permitted to operate on private property for approved limited special events or private functions.

(5) Zoning permits for limited special events and/or private functions shall only be issued under the following conditions:

(a) The owner of the property where the event will occur shall have invited the mobile retail food establishment to participate and mobile food vending is part of the event activities.

(b) The permit shall be good for a maximum of 10 consecutive days and there shall be at least 90 days between events at the same location.

(c) The mobile retail food establishment unit may not remain at the location for longer than the duration of the special event and while there must be located so as to avoid creating conflicts with pedestrian or motor vehicle traffic or creating other public safety problems.

(d) Mobile retail food establishments which operate for special events and/or functions must have either temporary or year-long permits and must have and maintain all other licenses and approvals necessary to lawfully operate as a mobile retail food establishment within the Township.

(6) Mobile retail food establishments may operate from 7:00 a.m. until 10:00 p.m. Monday through Friday and from 9:00 a.m. until 10:00 p.m. Saturday and Sunday, unless the property is residentially zoned or within one hundred (100) feet of a residential zone, in which case, the hours of operation shall be limited to 9:00 a.m. to 9:00 p.m. Mobile retail food establishments shall not park outdoors overnight on private property, except when part of an event extending for more than one day which has been authorized by the Township and/or except when authorized pursuant to §230-156, Outdoor Storage.

(7) Mobile retail food establishments shall provide trash and recycling receptacles within ten (10) feet of their site and shall collect all trash and debris within twenty-five (25) feet before leaving their site. Collected trash must not be deposited in public trash receptacles.

(8) No mobile retail food establishment shall provide in-truck dining services or sidewalk tables and chairs.

(9) Mobile retail food establishments shall not be used as overflow and/or accessory kitchens for a fixed retail food establishment.

(10) Mobile retail food establishments shall be subject to Chapter 255, “Noise,” Chapter 281, “Peddling and Soliciting,” and Chapter 419, “Food and Beverages.”

SECTION 12. Chapter 230 “Land Use and Development Regulations”, Article XVI “Regulations Governing Certain Principle Permitted Uses” of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-151 Places of worship.

Places of worship shall comply with the following regulations in all zones, wherever permitted in Schedule C:

A. Places of worship may consist of the following primary use, together with a combination of one or more of the following accessory uses:

(1) Primary use. A place of assembly for religious services or worship.

(2) Accessory uses.

(a) A single apartment, group of rooms, or other residence for the facility's religious leader within the same building or structure as the place of assembly for religious services or worship, hereinafter referred to as "cleric's inside residence."

(b) Facilities for religious education and instruction, including but not limited to Sunday school, after-school learning and adult study groups, within the same building or structure as the place of assembly for religious services or worship, hereinafter referred to as "inside educational facilities."

(c) A single apartment, group of rooms, or other residence for the facility's religious leader outside the same building or structure as the place of assembly for religious services or worship, but on the same lot or lots as is situated said place of assembly, hereinafter referred to as "cleric's outside residence."

(d) Facilities for religious education and instruction, including but not limited to Sunday school, after-school learning and adult study groups, outside the same building or structure as the place of assembly for religious services or worship, hereafter referred to as "outside educational facilities."

(e) Facilities for a convent or other housing for members of a religious order, separate and apart from a residence for the facility's religious leader, as referred to in (a) and (c) above.

(f) Facilities for social functions such as, but not limited to, weddings, funerals, bar/bat mitzvahs and other similar events, hereinafter referred to as "social facilities."

B, Private school facilities associated with a place of worship shall only be permitted as conditional uses wherever permitted in Schedule C, and shall be subject to the requirements set forth in § 230-163.

C. For places of worship in the I and O Zones, the following requirements shall be met:

(1) The minimum lot area for a place of worship, consisting solely of the primary use set forth in § 230-151.A(1), shall be not less than two (2) acres.

(2) The minimum lot area for a place of worship consisting of the primary use set forth in § 230-151.A(1) together with any of the accessory uses set forth at § 230-151.A(2)(a) through (f) shall be not less than two (2) acres plus the following additional area, which must be met for each separate accessory use:

(a) A cleric's inside residence, as defined at § 230-151.A(2)(a): no additional lot area is required.

(b) Inside educational facilities, as defined at § 230-151.A(2)(b): no additional lot area is required.

(c) A cleric's outside residence, as defined at § 230-151.A(2)(c): 0.5 acre of additional lot area is required.

(d) Outside educational facilities, as defined at § 230-151.A(2)(d): 1.0 acre of additional lot area is required.

(e) Facilities for a convent or other housing for members of a religious order, separate and apart from a residence for the facility's religious leader: 2.5 acres of additional lot area are required.

(f) Social facilities, as defined at § 230-151.A(2)(f): 2.5 acres of additional lot area are required.

(3) The lot shall front on and have direct access to a public state, county or municipal street or highway which shall be an arterial or collector street as identified in the Township Master Plan, and not primarily a street serving as access to residential properties.

(4) Multiple buildings on a lot shall be permitted and the minimum distance between buildings shall be equal to the height of the taller building, but in no event less than twenty-five (25) feet.

(5) Fencing, landscaping and/or screening shall be provided as required by the Planning Board.

(6) Minimum building setbacks and maximum building and impervious coverages shall be as allowed for the zone in question.

(7) The minimum driveway and parking area setbacks shall be consistent with § 230-80.E. as same applies to the zone in question, unless a transition buffer required pursuant to C(9) below requires a larger setback.

(8) No building shall exceed the height limit of the zone district in question except as provided in § 230-131.

(9) Transition buffers shall be provided wherever a property containing a place of worship in the I or O Zones abuts a residential zone. Such transition buffers shall be provided in accordance with § 230-98.C. Transition buffers shall be required along the front lot line if the property containing the place of worship is across the street from, and within 66 feet of, a lot in a residential zone.

(10) Off-street parking shall be provided as follows:

(a) For a place of worship, consisting solely of the primary use set forth in § 230-151.A(1), parking shall be provided in accordance with Schedule E, Off-Street Parking Requirements, included at the end of this chapter.

(b) For a place of worship consisting of the primary use set forth in § 230-151.A(1) together with any of the accessory uses set forth at § 230-151.A(2)(a) through (f), there shall be provided the following off-street parking in addition to the parking required for the primary use pursuant to Schedule E:

[1] For a cleric's inside residence or outside residence: two parking spaces.

[2] For inside or outside educational facilities: 1.25 parking spaces for every classroom or teaching station for children under the age of 17, and two parking spaces for each three persons age 17 or over participating in the educational program.

[3] For a convent or other housing for members of a religious order, separate and apart from a residence for the facility's religious leader: one parking space for every three beds for members of the religious order.

[4] For social facilities, the required parking shall be one parking space for each three persons based on the maximum capacity of the facility as determined by application of the New Jersey Uniform Construction Code (BOCA Code).

(c) Multiple or shared use of off-street parking areas for places of worship may be allowed by the Planning Board as a condition of site plan approval upon appropriate testimony demonstrating that such multiple or shared use of parking will not result in on- or off-site congestion, restriction of access by police, ambulance or fire vehicles or other traffic safety impediments or hazards.

D. For places of worship in the R Zones, the following requirements shall be met:

(1) The requirements set forth in Subsections C(1) through (5) above shall be met.

(2) Maximum building coverage shall be as allowed for the zone in question.

(3) Maximum impervious coverage shall be fifty percent (50%) of the lot area, regardless of the maximum impervious coverage allowed for the zone in question, except that the maximum impervious coverage shall be forty percent (40%) for property located in the CWR Critical Water Resources District – Prime Aquifer.

(4) All principal and accessory buildings shall be located at least fifty (50) feet from a property line except as follows:

(a) If the setback requirement for the zone in question exceeds fifty (50) feet, the greater setback requirement shall apply.

(b) For those buildings serving a purely residential function and any other accessory building not exceeding two thousand five hundred (2,500) square feet in gross floor area, the setback requirements of the zone in question, if less than fifty (50) feet, shall apply.

(5) Maximum height of all principal and accessory buildings related to a place of worship shall be thirty-five (35) feet and two-and-one-half (2 ½) stories, except as provided in § 230-131, which exempts church spires, belfries, towers designed exclusively for ornamental purposes, chimneys, flues or similar appurtenances not exceeding the height limit by more than ten (10) feet.

(6) Transition buffers shall be provided along any property line which abuts a residential zone. Such transition buffers shall be in accordance with § 230-98.C. Transition buffers shall be required along the front lot line if the property containing the place of worship is across the street from, and within 66 feet of, a lot in a residential zone.

(7) Off-street parking shall be provided in accordance with Subsection C(10) above. All parking areas and associated driveways shall be setback at least twenty-five (25) feet from any property line, unless the transition buffer requirements set forth at D.(6) above would require a larger setback.

SECTION 13. Chapter 230 “Land Use and Development Regulations”, Article XVII “Regulations Governing Certain Accessory Uses”, Section 230-152 “Private Swimming Pools”, sub-section B only, of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-152 Private swimming pools.

The following regulations shall apply to private swimming pools wherever permitted in Part 4:

B. No part of any private swimming pool, including any apron, sidewalk or decking, or equipment, shall be located within 10 feet of a property line. The edge of the water surface area of a private swimming pool shall be no less than ten (10) feet from the edge of the roof of any principal or accessory building or structure.

All other portions of this Section shall remain unchanged.

SECTION 14. Chapter 230 "Land Use and Development Regulations", Article XVII "Regulations Governing Certain Accessory Uses", Section 230-156 "Outdoor Storage" of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-156 Outdoor storage.

Outdoor storage in all zone districts shall be subject to the following provisions:

A. In the I and B Zones, outdoor storage, as defined at §230-54, shall be permitted and limited in accordance with the following provisions:

(1) Outdoor storage shall be restricted to materials and products directly related to the principal permitted use of the premises and normally stored outside a structure.

(2) Outdoor storage on a lot that does not contain a principal building is prohibited.

(3) Outdoor storage shall be restricted to the side and/or rear yard. On corner lots, no outdoor storage shall be permitted between the street line and the building line as extended to the rear and side lot lines.

(4) Outdoor storage shall meet the side and rear yard setback requirements for accessory buildings.

(5) The maximum area of any lot that can be used for outdoor storage shall be equal to the gross floor area of the principal building(s).

(6) No article, material, vehicle, or equipment to be stored outdoors shall exceed the height of the principal building.

(7) All outdoor storage shall be screened by planting, slatted fencing or its equivalent in accordance with §230-159, or both so as to minimize the view of such storage from any adjacent property or any public street. No wall or fence used to screen outdoor storage shall be permitted in any front yard.

(8) No outdoor storage shall be located in a manner that would obstruct parking, loading, or pedestrian circulation.

(9) Outdoor storage shall be placed on a suitable surface such as pavement, crushed stone, or other suitable material, and not on bare earth, grass, mulch, or other similar surface.

(10) No outdoor storage shall be located or stored in a manner that could reasonably be expected to result in littering, spillage, or leakage of material; dispersion of materials by wind, rain, floodwater, or animals; creation of offensive odors; creation of fire or explosion hazards; contamination of air, soil, or water; or other similar adverse effects.

(11) Outdoor storage of any hazardous, toxic, or corrosive substances, as defined in regulations promulgated by the United Stated Environmental Protection Agency or the New Jersey Department of Environmental Protection, is prohibited.

(12) The outdoor storage requirements set forth at Subsection A(1) through (10) above shall not apply to the following:

(a) The outdoor parking in the open of delivery and service vehicles, which parking shall be subject to the requirements provided in § **230-205**.

(b) The parking of trucks and trailers in connection with permitted trucking terminals and moving and storage operations, which parking shall be subject to the location requirements applicable to off-street loading.

(c) The parking of trucks and trailers at loading docks during the course of loading and unloading and temporarily preceding and following the loading or unloading operations.

B. In the TC, OB, PBR and PBO Zones, outdoor storage is prohibited except for the storage of trash and garbage in containers and in locations as approved by the Planning Board. In addition, there shall be no outdoor storage or parking of trucks or trailers, except as follows:

(1) The outdoor parking in the open of delivery and service vehicles, which parking shall be subject to the requirements provided in § **230-205**.

(2) The parking of trucks and trailers at loading docks during the course of loading and unloading and temporarily preceding and following the loading or unloading operations. There shall be no outdoor storage or parking of construction equipment, except during the course of construction on the premises.

C. In all residential zones, outdoor storage is prohibited including any discarded furniture, household appliance or other debris, salvaged materials, junk or wastes of any kind, except trash, garbage, and similar wastes temporarily stored in suitable containers awaiting scavenger collection. This shall not be deemed to prohibit the display and sale of seasonal farm produce or specifically permitted outdoor uses, the outdoor parking of

farm machinery or vehicles in use on a farm nor normal outdoor storage, such as firewood intended for use on the premises. Nor shall this be deemed to prohibit commercial vehicles in residential districts, as authorized pursuant to §230-134 and/or recreational vehicles and equipment, as authorized pursuant to §230-136. In the R Zones only, temporary storage containers shall be permitted to be kept on a developed, single-family residential lot as a temporary structure accessory to the existing dwelling for a period not to exceed 30 days. A permit for said structure shall be obtained from the Zoning Official. The Township Engineer, Zoning Officer or Township Administrator shall reserve the right to extend such period of approved time, upon written request, for a maximum period not to exceed three months for a resident to store the unit on the property given extenuating circumstances including but not limited to, the location of the unit, the impact of the storage of the unit on the neighborhood and/or residents, and the overall condition and maintenance of the property, or fire, flood or other natural disaster that caused displacement A fee as set forth in Chapter **169**, Fee Schedule, shall be charged for the initial permit with an additional fee of the same amount for any extension which may be granted by the Zoning Official. Metal frame structures supporting tarpaulin covers shall not be erected and are specifically prohibited.

D. Outdoor storage for garden centers in the B-5 Zone is regulated in § **230-148**.

E. Outdoor storage in the LR Zone is regulated in Article **XXIV**, LR Lake Recreation District.

SECTION 15. Chapter 230 “Land Use and Development Regulations”, Article XVII “Regulations Governing Certain Accessory Uses”, Section 230-156.1 “Outdoor Display of Merchandise” of the Code of the Township of Montville is hereby amended to add two (2) new subsections to read as follows:

F. Except for the setback requirements provided in Subsection B above, the provisions of this section shall not apply to the outdoor display of vehicles per sale as part of a permitted motor vehicle sales use.

G. The display and/or sale of merchandise from within or under a temporary tent or parking lot shall not be permitted except in accordance with § 230-143.3, Special Permits.

All other portions of this Section shall remain unchanged.

SECTION 16. Chapter 230 “Land Use and Development Regulations”, Article XVII “Regulations Governing Certain Accessory Uses”, Section 230-159 “Fences and Walls”, sub-section L only, of the Code of the Township of Montville is hereby amended to read as follows:

§ 230-159 Fences and walls.

Fences and walls shall be a permitted accessory use in all zone districts, subject to the following provisions:

L. Fencing and walls shall be permitted as an accessory use in all zoning districts in accordance with the following regulations:

(1) Residential districts.

(a) On any lot in any district, no fence or wall, except retaining walls, shall be erected or altered so that said wall or fence shall be over four feet in height in front yard areas and six feet in height anywhere else on the lot, except:

[1] A dog run may have fencing a maximum of seven feet in height, provided that such use is located in rear yard areas only and is set back from any lot line at least 15 feet. Chain link fence may be used, irrespective of any regulations to the contrary.

[2] A deer protection fence consisting of a fence material that shall be an open type wire grid so as to minimize the fence's visual impact on surrounding properties is permitted up to a maximum height of eight feet, shall be permitted in side and rear yard areas and is permitted on lots of three acres or more. Deer and seasonal plant protection fencing shall be constructed of vinyl or vinyl-coated materials, shall be dark green, black or brown in color and shall have openings no smaller than four square inches. Deer fence posts shall be dark green, black or brown in color.

[3] All fencing in connection with the keeping of animals shall be located in accordance with §230-161.2.

[4] A tennis court area, located in rear yard areas only, may be surrounded by a fence a maximum of 15 feet in height; said fence shall be set back at least 10 feet from any lot line. Chain link fence may be used, irrespective of any regulations to the contrary.

[5] No fence or wall shall exceed five feet in height in a rear yard of a through lot.

[6] Gates and pillars shall be permitted in residential districts only in compliance with the lot width, height and setback standards of this subsection:

[a] Gates and pillars shall be located only on the main entry drive to any residential property and in compliance with the following lot width and height requirements:

Minimum Lot Widths At Street Line (feet)	**Maximum Height Including Light Fixtures (feet)**
81 to 104.9	4
105 to 119.9	6
120 and over	8

[b] On lots of three acres or more, entrance gates may be a maximum of 12 feet in height, provided that the length of the gate does not exceed 25 linear feet.

[c] Gates and pillars shall be set back as to sight distance consistent with the requirements of Article **IX** for driveways and parking areas in residential

zones. On lots with minimum widths at the street line of 105 feet and over, they shall be located at least 10 feet from side and rear property lines. On other lots where allowed, they shall be located at least five feet from side and rear property lines. In all residential districts they shall be located at least five feet from the front street right-of-way line. Gates and/or pillars shall be erected and located in a manner that will not block, obstruct or impede access to the property by Township emergency vehicles. A minimum separation of 12 feet shall be maintained between the driveway faces of pillars, including gateposts, hinges and decorative caps.

(2) Nonresidential districts.

(a) In the TC, B, OB and LR Districts, no wall or fence shall exceed a height of six feet above ground level; provided, however, that wherever tennis courts and other court sports are permitted accessory uses, a fence used to enclose said courts may be erected to a height of not more than 15 feet above ground level, and further provided that said fence is located at least 10 feet from a property line. Upon discontinuance of tennis court use, any such fence shall either be reduced to a height of six feet or removed.

(b) In the I Districts, no wall or fence shall exceed a height of eight feet above ground level and shall be permitted in side and rear yards only.

All other portions of this Section shall remain unchanged.

SECTION 17. Chapter 230 “Land Use and Development Regulations”, Article XVII “Regulations Governing Certain Accessory Uses” of the Code of the Township of Montville is hereby amended to add a new Section 230-161.1 “Electric Vehicle Charging Stations” to read as follows:

§230-161.1. Electric vehicle charging stations.

Electric vehicle charging stations shall be a permitted accessory use in all zone districts, subject to the following provisions:

A. Non-retail electric vehicle charging stations.

(1) Non-retail electric vehicle charging stations shall be a permitted accessory use in all zone districts.

(2) In off-street parking facilities of 50 spaces or more, a minimum of seven percent (7%) of such spaces shall contain facilities for electric vehicle charging.

B. Retail electric vehicle charging stations.

(1) Retail electric vehicle charging stations shall be a permitted accessory use in all B, O, I, TC and PBR/PBO zone districts. Retail electric vehicle charging stations shall also be a permitted accessory use on all public property in the Township.

(2) Site plan approval shall be required for all retail electric vehicle charging station applications.

C. Standards for electric vehicle charging stations. Electric vehicle charging stations utilizing parking stalls located in a parking lot or parking garage or in on-street parking spaces shall comply with the following standards:

(1) Except when located in conjunction with single-family residences, electric vehicle charging stations shall be reserved for parking and charging of electric vehicles only.

(2) Electric vehicle charging stations located within parking lots or garages may be included in the calculation of the minimum required parking spaces required pursuant to the Schedule E.

(3) Signage. Each electric vehicle charging station shall be posted with signage indicating the space is only for electric vehicle charging purposes. Retail charging stations shall include information related to voltage and amperage levels; hour of operations if time limits or tow-away provisions are to be enforced by the property owner; usage fees; safety information; contact information for reporting when the equipment is not operating or other problems. In addition, a logo advertising the manufacturer of the electric vehicle charging station equipment shall be permitted on said equipment, provided that said logo does not exceed one (1) square-foot.

(4) Accessibility. The design and location of the electric vehicle charging stations shall comply with the following barrier-free accessibility requirements:

(a) Accessible vehicle charging stations shall be provided based on the following table:

Number of EV Charging Stations	Minimum Accessible EV Charging Stations
0 – 2	0
3 – 50	1
51 – 100	2

(b) Accessible charging stations shall comply with the requirements of §230-80.G.

(5) Lighting. Adequate site lighting shall be provided, which shall also comply with § 230-86.

(6) Screening. All equipment related to electric vehicle charging stations/units shall be screened, except for the electrical dispensing units which connect directly to consumer vehicles via power cords.

(7) Equipment. Equipment for electric vehicle charging stations shall comply with the following standards:

(a) Equipment mounted on pedestals, lighting posts, bollards, or other devices for on-street charging station shall be designed and located as to not impede pedestrian travel or create trip hazards within the right-of-way.

(b) Charging station outlets and connector shall be no less than thirty-six (36) inches and no higher than forty-eight (48) inches from the top of the surface where mounted and shall contain a retraction device or a place to hang cords and connectors above the ground surface.

(c) Equipment shall be protected by wheel stops or concrete-filled bollards.

SECTION 18. Chapter 230 "Land Use and Development Regulations", Article XVII "Regulations Governing Certain Accessory Uses" of the Code of the Township of Montville is hereby amended to add a new Section 230-161.2 "Keeping of Animals" to read as follows:

§ 230-161.2. Keeping of animals.

The keeping of small animals, farm animals, domestic fowl and bees is permitted outright in all zones as an accessory use to any principal use or permitted conditional use, in each case subject to the standards of this section. This section shall not be interpreted to apply to commercial stables and arenas for equestrian activities, which are regulated under §230-164, or to kennels, which are regulated under §230-165.

A. Small animals. Up to three (3) small animals may be kept accessory to each business establishment and up to six (6) small animals may be kept accessory to each dwelling unit on a lot, except as follows:

(1) On permitted single-family lots, up to eight (8) small animals are permitted on lots of at least 20,000 square feet; and one (1) additional small animal is permitted for each 5,000 square feet of lot area in excess of 20,000 square feet. Accessory structures, including fences, for eight (8) or more animals must be at least ten (10) feet from any other lot in a residential zone, unless the Township Code otherwise requires a greater setback for certain types of structures.

B. Domestic fowl. Up to eight (8) domestic fowl may be kept on any lot in addition to the small animals permitted in subsection A. above.

(1) On lots containing farms, as defined herein, one additional fowl is permitted for every 1,000 square feet of lot area over 10,000 square feet in farm use.

(2) Roosters, ostriches, and emus are not permitted, except on properties with a minimum lot size of five (5) acres.

(3) Structures housing domestic fowl must be located at least ten (10) feet away from any property line.

C. Farm animals. Farm animals, as defined herein, are permitted only on lots of at least one (1) acre. The keeping of swine is prohibited, except as permitted per Chapter 438, Swine, of the Township Code.

(1) One farm animal is permitted for every 10,000 square feet of lot area.

(2) Farm animals and structures housing them must be kept at least fifty (50) feet from any other lot in a residential zone.

(3) The keeping of any number of farm animals shall require a permit issued by the Board of Health.

(a) The Board of Health shall establish a reasonable fee for permit applications, inspections and renewals.

(b) Permits shall be in effect for a period of two (2) years from the date of issue, unless sooner revoked; provided, however, that permits shall automatically terminate upon transfer of ownership or occupancy of the subject property.

(c) If the Board finds that the issuance of the requested permit may result in a nuisance or unsanitary conditions or that it will otherwise create a risk of harm to public health, safety or welfare, the Board may deny the application.

(d)

(e) In approving the issuance of a permit, the Board may impose reasonable conditions designed to protect public health, safety and welfare and to prevent nuisance and unsanitary conditions, including but not limited to restricting the number or types of animals that may be kept at any one time or restricting the keeping of animals to only certain locations on the property.

D. Beekeeping. Beekeeping is permitted in accordance with the following:

(1) Bee hives shall be permitted on lots of at least 25,000 square feet in area, limited to two (2) hives per lot.

(2) Beehives shall not be permitted in the front or side yard and shall have minimum required setbacks of fifty (50) feet from all lot lines.

(3) No hive shall be located within one hundred (100) feet of any dwelling unit other than that occupied by the person(s) maintaining the hive(s).

E. General requirements for the keeping of animals.

(1) All animals shall be kept in such a manner so as not to create an unsanitary condition, and so as not to result in unreasonable levels of noise, odor or other conditions which disturb the peace and quiet enjoyment of neighboring properties.

(2)

(3) Manure shall be stored in such a manner and location that it does not create an unsanitary condition and so as to prevent drainage or run-off into any wetland resource area.

(4) No manure storage area shall be located within:

(5)

(a) One hundred (100) feet of wetlands or watercourses.

(b) One hundred (100) feet of wells.

(c) Four hundred (400) feet of public water supply wells.

(d) One hundred (100) feet of property lines.

SECTION 19. Chapter 230 "Land Use and Development Regulations", Article XVIII "Regulations Governing Certain Conditional Uses", Section 230-171 "Retail Uses and Restaurants in 1-2A Industrial District" of the Code of the Township of Montville is hereby amended as to title and sub-section A only, to read as follows:

§230-171 Retail, Service and Restaurant uses in I-2A Industrial District.

A. For retail and personal service establishment uses in the I-2A Industrial District, the following conditions shall be met:

(1) The requirements applicable to the I-2A Industrial District, as contained in Schedule D, Schedule of Area and Bulk Requirements, included at the end of this chapter, shall be complied with, except that the minimum lot area shall be 80,000 square feet.
(2) The maximum size of any building shall be 12,000 square feet. Any individual retail store or shop shall be a maximum of 5,000 square feet of floor area.
(3) In order to discourage conventional strip commercial development, the number of retail tenants per site shall be limited to a maximum of three.
(4) A twenty-five-foot-wide landscaped strip consisting of flowering and ornamental trees, plants and shrubs shall be provided along the street corridor in order to enhance the visual environment and depart from the typical image of strip commercial development.
(5) Cross-access easements among adjacent properties are encouraged to assist in traffic flow and minimize conflicting turning movements along Changebridge Road.

All other portions of this Section shall remain unchanged.

SECTION 20. Chapter 230 "Land Use and Development Regulations", Article XVIII "Regulations Governing Certain Conditional Uses", Section 230-173.1 "Conditional Uses in OB-4 and OB-5 Zones" of the Code of the Township of Montville is hereby amended to read as follows:

§230-173.1 Conditional uses in OB-5 Zone.

A. OB-5 Zone.

(1) Personal service establishments and banks and financial institutions, excluding banks with drive-through facilities, shall be permitted in the OB-5 Zone if the following conditions are met:

(a) A roadway is constructed that provides a linkage from Route 202 at the Route 287 interchange, through the OB-5 Zone, to Changebridge Road, in the manner set forth in the 2010 Land Use Plan Element of the Master Plan. (See page 39 of the Plan.)

(b) A minimum buffer dimension shall be provided along the westerly and southeasterly portions of this zone, as depicted in the 2010 Land Use Plan Element of the Master Plan. (See page 39 of the Plan.)

(2) Where the new road, as set forth in § 230-B(1) above and in the 2010 Land Use Plan Element of the Master Plan, is provided, the OB-5 regulations governing building coverage shall be permitted to be increased from 25% to 32%, and the permitted floor area ratio shall be permitted to be increased from 20% to 30%.

SECTION 21. Chapter 230 "Land Use and Development Regulations", Article XXV "Historic Districts and Historic Sites", Section 230-201 "Procedure" of the Code of the Township of Montville is hereby amended to read as follows:

§230-201 Procedure.

A. Any application for development, including building permits, which is subject to Article **XXV** shall be made by an application for a certificate of appropriateness (see Schedule F). An application for a certificate of appropriateness shall be filed with the Land Use Office to determine administrative completeness. The determination of completeness shall be made within 45 days from submission. Upon determination of completeness by the Land Use Office, the application shall be referred to the Historic Preservation Review Commission for its review.

B. Within 45 days of receipt by the Historic Preservation Review Commission of an application, the Commission shall review the application and shall issue a written report to the Planning Board recommending approval, approval with conditions or denial of the application, based upon recognized standards such as those established by the Secretary of the Interior.

C. The Planning Board shall review the report of the Commission and shall make a final determination as to the disposition of the application within 45 days of receipt of the recommendation of the Commission to approve, approve with conditions or deny the application. If referral of the application to the Historic Preservation Review Commission emanated from the Zoning Officer, the Planning Board shall report its decision to the Zoning Officer.

D. Failure of the Historic Preservation Commission to report in writing to the Planning Board or the failure of the Planning Board to report to the Zoning Officer within 45 days of this referral shall be deemed to constitute a report in favor of issuance of the permit and without the recommendation of conditions to the permit.

E. Upon approval of the application, the Zoning Officer shall issue a certificate of appropriateness. An applicant for a certificate of appropriateness who is dissatisfied with the actions of the Zoning Officer in denying the certificate of appropriateness or in issuing the certificate of appropriateness with objectionable conditions may appeal that action to the Zoning Board of Adjustment within 30 days from the date of the administrative officer's written decision. The hearing on such appeal shall be conducted in the same fashion as any appeal from the administrative officer's determinations. This right of appeal is limited to the applicant only.

SECTION 22. Chapter 230 "Land Use and Development Regulations" of the Code of the Township of Montville is hereby amended to add a new Article XXXV "Senior Housing – 1 Overlay District" to read as follows:

Article XXXV. Senior Housing – 1 Overlay District

§ 230-268. Purpose.

The purpose of the Senior Housing – 1 Overlay District is to allow developers to have the option of redeveloping designated lots for adult community housing in multifamily-type structure(s), while also retaining the developers' option to develop in accordance with the underlying R-27A zone district for the properties. As such, the Senior Housing – 1 Overlay designation does not replace the underlying land use designation for these parcels.

§ 230-269. Permitted uses.

The uses set forth below shall be permitted as a development alternative to the underlying zoned uses allowed by this Chapter but shall not replace the underlying zoning district.

A. Principal Uses. The following principal uses shall be permitted in the Senior Housing – 1 Overlay District:

(1) Adult community housing, as defined at §230-54, in multifamily-type structure(s).

(2) Historical museum or exhibition space, provided that same is open to the public and restricted to historic structures located on any Locally Designated Historic Sites or Districts, as identified on Schedule G, which is included in Chapter 230 as Attachment 9.

B. Accessory Uses. The following accessory uses shall be permitted in the Senior Housing – 1 Overlay District to be used exclusively by the residents of the development and their guests, except as may otherwise be authorized by the Township:

(1) Off-street parking facilities, including surface parking, under-building parking, and parking garages.

(2) Fences and walls.

(3) Signs.

(4) Buildings for storage of maintenance equipment.

(5) Private indoor and outdoor recreation and community buildings and facilities, including a clubhouse, swimming pools, fitness rooms, sport courts, common areas and similar amenities.

(6) Trash and recycling facilities.

(7) Dog park.

(8) Roof-mounted solar panels.

(9) Electric vehicle (EV) charging equipment.

(10) Other accessory uses customarily incidental to principal permitted uses in the Senior Housing – 1 Overlay District.

§ 230-270. Affordable housing requirements.

A. All adult community housing developments constructed in the Senior Housing - 1 Overlay District shall be required to set aside a minimum percentage of units for affordable housing. The minimum set aside shall be fifteen percent (15%) of rental units and twenty percent (20%) of 'for sale' units. When calculating the required number of affordable units, any computation resulting in a fraction of a unit shall be rounded upwards to the next whole number.

B. All affordable units to be produced pursuant to this section shall comply with the Township's Affordable Housing Ordinance at Chapter 73 of the Township Code, as may be amended and supplemented, and the Uniform Housing Affordability Controls ("UHAC")(N.J.A.C. 5:80-26.1 et seq.), or any successor regulation. This includes, but is not limited to, the following requirements for all affordable units:

(1) Low/Moderate Income Split: A maximum of fifty percent (50%) of the affordable units shall be moderate-income units and a minimum of fifty percent (50%) of the affordable units shall be low-income units. At least thirteen percent (13%) of all restricted rental units shall be very low-income units, which shall be counted as part of the required number of low-income units within the development.

(2) Deed Restriction Period: All affordable units shall be deed restricted for a period of at least thirty (30) years from the date of the initial occupancy of each affordable unit (the "Deed-Restriction Period"). The affordability controls shall expire only after they are properly released by the Township and/or the Township's Administrative Agent at the Township's sole option in accordance with N.J.A.C. 5:80-26.11 for rental units or N.J.A.C. 5:80-26.5 for for-sale units.

(3) Administrative Agent: All affordable units shall be administered by a qualified Administrative Agent paid for by the developer.

(4) Other Affordable Housing Unit Requirements: Developers shall also comply with all of the other requirements of the Township's Affordable Housing Ordinance, including, but not limited to, (1) affirmative marketing requirements, (2) candidate qualification and screening requirements, (3) integrating the affordable units amongst the market rate units, and (4) unit phasing requirements. Developers shall ensure that the affordable units are dispersed between all of the buildings on its site and shall identify the exact location of each affordable unit at the time of site plan application.

§ 230-271. Development standards.

A. Area and bulk requirements. The area and bulk requirements for the uses permitted in the Senior Housing - 1 Overlay District are set forth below. The area and bulk regulations of the underlying zoning district shall remain in full force and effect for development devoted exclusively to uses permitted in the underlying zoning district.

Requirement	**Senior Housing - 1 Overlay Zone**
Principal Uses	
Minimum Tract Area	25 acres [a]
Maximum Density	11 units per acre [ab]
Minimum Principal Building Setbacks [c]	
Front Yard	200 feet [ad]
Side Yard Setback (Each)	200 feet [ad]
Rear Yard Setback	200 feet [ad]
Maximum Building Height	60 feet/4 stories [e]
Maximum Building Coverage	20% [a]
Maximum Impervious Coverage	40% [a]
Multiple Principal Buildings Per Lot	Permitted
Minimum Buffers	
Side Yard	100 feet [a]
Rear Yard	100 feet [a]
Accessory Uses	
Location in Front Yard	Permitted
Maximum Height	30 feet/1 story
Minimum Setbacks [c]	
Front Yard	50 feet [d]
Side Yard	100 feet [d]
Rear Yard	100 feet [d]

NOTES:

a. Based on gross tract area.

b. When calculating the maximum permitted number of units, any computation resulting in a fraction of a unit shall be rounded upwards to the next whole number if said fraction is equal to or greater than 0.5 unit, or downwards to the next whole number if said fraction is less than 0.5 unit. However, in no event shall the total number of units to be produced in the Senior Housing – 1 Overlay Zone exceed 275 units.

c. For the purposes of calculating required setbacks, all yards abutting any public right-of-way shall be considered a front yard, the westerly yard parallel to and most opposite the tract's Route 202 frontage shall be considered the rear yard and all other yards shall be considered side yards.

d. Historic structures existing prior to the creation of the Senior Housing – 1 Overlay Zone which do not comply with the zone's minimum setback requirements shall be considered pre-existing nonconforming conditions and shall not require variance relief.

e. Parking structures and garages attached to or under a principal residential building shall be exempt from the calculation of building stories.

B. Buffer requirements.

(1) Natural vegetation and topographic features shall be maintained in required buffer areas and supplemented as necessary to establish a year-round visual screen from adjacent development and public rights-of-way, subject to Board approval. Buffer areas may be disturbed where site improvements are approved by the Board in accordance with setback requirements.

(2) Existing vegetation and topographical features shall be maintained in required buffer areas except as may be authorized by the Township.

(3) Buildings and impervious surfaces shall be prohibited in required side and rear yard buffers, except that paved walking paths, lighting fixtures, walls and fences shall be permitted. Buildings and impervious surfaces shall be prohibited in required front yard buffers, excluding roads, walls, fences, lighting fixtures, utilities, stormwater detention basins, signs, paved walking paths and paved parking areas.

(4) Buffer areas shall be maintained and kept clean of all debris, rubbish, weeds and tall grass. Any screen planting shall be maintained permanently, and any plant material that does not live shall be replaced within one (1) year or one (1) growing season, provided all landscape plans as approved shall be continually complied with.

C. Off-street parking and loading requirements.

(1) The minimum number of off-street parking spaces shall comply with New Jersey Residential Site Improvement Standards (“RSIS”) (N.J.A.C. 5:21-1.1 et seq.) for garden apartment uses.

(2) All off-street parking and drive aisles shall be located a minimum of 10 feet from buildings, except for parking and drive aisles which extend continuously into or under a building from outside the building.

(3) All off-street parking and drive aisles shall be located a minimum of 10 feet from the tract boundary adjacent to the Route 287 right-of-way and a minimum of 200 feet from all other tract boundaries.

(4) Parking areas shall be prohibited within required buffers but are permitted in front yards.

(5) Under-building parking and parking garages shall be permitted and shall not count as a story.

(6) All parking areas shall be designed in accordance with the applicable provisions of Article X of this Chapter; however, adult community housing in the Senior Housing – 1 Overlay District shall be exempt from the multifamily parking design requirements set forth at §230-90.H. In the event of a conflict between Article X and this Article XXXV, this Article XXXV shall govern.

(7) Off-street parking shall not be provided for any use or to any party other than a resident or visitor of the site, nor shall parking areas be used for any purpose other than parking.

(8) Signage shall be provided where parking spaces are to be reserved for residents. Visitor parking shall be signed and painted for each space designated for such a purpose.

(9) Loading shall be provided in accordance with § 230-204.

(10) Overnight parking of commercial vehicles shall be prohibited.

D. Signage. Signage requirements for the Senior Housing - 1 Overlay Zone shall be consistent with the generally applicable sign regulations set forth in Article XXVII, Signs, as well as the specific sign regulations for signs permitted in the AH and PURD Zone Districts as set forth at § 230-215.

E. Historic preservation requirements. Development in any portion of the Senior Housing - 1 Overlay Zone that is identified on Schedule G, Locally Designated Historic Sites and Districts, which is included in Chapter 230 as Attachment 9, shall adhere to the applicable Township regulations relating to historic preservation, including Chapter 8, Article V, Historic Preservation Review Commission, and Article XXV, Historic Districts and Historic Sites, of this Chapter. If a historic structure is to be retained on the site, same shall be limited to a nonresidential use, such as a historical museum or exhibition center open to the public, or a use accessory to the residents of the adult community housing development and their guests. Residential use of any historic structure to remain shall be prohibited.

F. General design requirements.

(1) Design: Building plans and elevations shall show a variation in design to be achieved by the types of roof, heights of eaves and peaks, building materials and architectural treatment of the building facade that is utilized. The following design standards shall be utilized:

(a) Architectural elements such as varied roof forms, articulation of the facade, breaks in the roof, and walls with texture materials and ornamental details should be incorporated to add visual interest.

(b) Roof height, pitch, ridgelines and roof materials should be varied to create visual interest and avoid repetition.

(c) Architectural elements such as fenestrations and recessed planes should be incorporated into façade design. Architectural treatment shall be applied to all elevations of a building.

(d) A variety of building colors, materials and textures are encouraged to achieve a harmonious design theme.

(e) Architectural features that enhance the façade or building form, such as decorative moldings, windows, shutters, dormers, chimneys, balconies and railings, are encouraged.

(2) Equipment: Exterior-mounted mechanical and electrical equipment exposed to the public view shall be architecturally screened. Roof-mounted equipment and projections should be painted the same color as the roof and, where possible, located to the rear of the building, away from the public view.

(3) Accessory buildings and structures: All accessory buildings and structures shall be subject to the standards set forth at § 230-271.A. Architectural design and materials used in the construction of accessory buildings and structures shall conform to those used in the construction of principal buildings.

G. Retaining Walls: Retaining walls shall not exceed 10 feet in height with a minimal horizontal average spacing of 6 feet between walls to allow for plantings and a minimal vertical average spacing of 10 feet between walls.

H. Steep Slopes: Steep slope disturbance in the Senior Housing – 1 District shall comply with the requirements of §230-143.1, Regulation of Slopes.

I. Adult community housing requirements. The adult community housing standards set forth at §230-145 shall not apply to the Senior Housing – 1 Overlay District, except that occupancy shall be as regulated in §230-145.A.

SECTION 23. Chapter 230 "Land Use and Development Regulations" of the Code of the Township of Montville is hereby amended to add a new Article XXXVI "Senior Housing – 2 Overlay District" to read as follows:

Article XXXVI. Senior Housing – 2 Overlay District

§230-272. Purpose.

The purpose of the Senior Housing – 2 Overlay District is to allow developers to have the option of redeveloping designated lots as assisted living, memory care, and continuing care retirement communities, while also retaining the developers' option to develop in accordance with the underlying R-27A and B-2 zone districts for the properties. As such, the Senior Housing – 2 Overlay designation does not replace the underlying land use designation for these parcels.

§ 230-273. Permitted uses.

The uses set forth below shall be permitted as a development alternative to the underlying zoned uses allowed by this Chapter but shall not replace the underlying zoning district.

A. Principal Uses. The following principal uses shall be permitted in the Senior Housing – 2 Overlay District:

(1) Assisted living facility, as defined at §230-54. For the purposes of this Article, the term 'assisted living facility' may also include memory care facilities and/or continuing care retirement communities.

B. Accessory Uses. The following accessory uses shall be permitted in the Senior Housing – 2 Overlay District to be used exclusively by the residents of the development and their guests, except as may otherwise be authorized by the Township:

(1) Off-street parking facilities, including surface parking, under-building parking, and parking garages.

(2) Fences and walls.

(3) Signs.

(4) Patios and gazebos.

(5) Buildings for storage of maintenance equipment.

(6) Private indoor and outdoor recreation and community buildings and facilities, including swimming pools, fitness rooms, sport courts, common areas and similar amenities.

(7) Trash and recycling facilities.

(8) Roof-mounted solar panels.

(9) Electric vehicle (EV) charging equipment.

(10) Other accessory uses customarily incidental to principal permitted uses in the Senior Housing – 2 Overlay District.

§230-274. Affordable housing requirements.

A. If a continuing care retirement community development is constructed in the Senior Housing - 2 Overlay District, same shall be required to set aside a minimum percentage of the senior independent living units for affordable housing. The minimum set aside shall be fifteen percent (15%) of rental units and twenty percent (20%) of 'for sale' units. When calculating the required number of affordable units, any computation resulting in a fraction of a unit shall be rounded upwards to the next whole number.

B. All affordable units to be produced pursuant to this section shall comply with the Township's Affordable Housing Ordinance at Chapter 73 of the Township Code, as may be amended and supplemented, and the Uniform Housing Affordability Controls ("UHAC")(N.J.A.C. 5:80-26.1 et seq.), or any successor regulation. This includes, but is not limited to, the following requirements for all affordable units:

(1) Low/Moderate Income Split: A maximum of fifty percent (50%) of the affordable units shall be moderate-income units and a minimum of fifty

percent (50%) of the affordable units shall be low-income units. At least thirteen percent (13%) of all restricted rental units shall be very low-income units, which shall be counted as part of the required number of low-income units within the development.

(2) Deed Restriction Period: All affordable units shall be deed restricted for a period of at least thirty (30) years from the date of the initial occupancy of each affordable unit (the "Deed-Restriction Period"). The affordability controls shall expire only after they are properly released by the Township and/or the Township's Administrative Agent at the Township's sole option in accordance with N.J.A.C. 5:80-26.11 for rental units or N.J.A.C. 5:80-26.5 for for-sale units.

(3) Administrative Agent: All affordable units shall be administered by a qualified Administrative Agent paid for by the developer.

C. The minimum set-aside for affordable senior independent living units shall be in addition to the minimum 10% of all assisted living and/or memory care beds that are required to be reserved for use by Medicaid-eligible persons pursuant to New Jersey Revised Statutes Title 26 – Health and Vital Statistics, Section 26:2H-12.16.

§ 230-275. Development standards.

A. Area and bulk requirements. The area and bulk requirements for the uses permitted in the Senior Housing - 2 Overlay District are set forth below. The area and bulk regulations of the underlying zoning districts shall remain in full force and effect for development devoted exclusively to uses permitted in the underlying zoning districts.

Requirement	**Senior Housing - 2 Overlay Zone**
Principal Uses	
Minimum Tract Area	7 acres [a]
Maximum Number of Units	100 units [b]
Minimum Principal Building Setbacks	
Front Yard (Route 202)	350 feet [ac]
Side Yard Setback (Each)	75 feet [ac]
Rear Yard Setback	100 feet [ac]
Maximum Building Height	48 feet/4 stories
Maximum Building Coverage	15% [a]
Maximum Impervious Coverage	30% [a]
Minimum Buffers	
Side Yard	25 feet [ac]
Rear Yard	25 feet [ac]
Accessory Uses	
Location in Front Yard	Permitted
Maximum Height	30 feet/1 story
Minimum Setbacks	
Front Yard	100 feet [c]
Side Yard	50 feet [c]

Rear Yard	50 feet [c]

NOTES:

a. Based on gross tract area.
b. Includes single- and double-occupancy units.
c. For purposes of calculating setbacks in the Senior Housing -2 District, the front lot line or tract boundary shall be the line which separates the tract from the Route 202 right-of-way. The rear lot line or tract boundary shall be the line parallel to and furthest from Route 202. All other lot lines or tract boundaries shall be considered side lot lines.

B. Buffer requirements.

(1) A continuous planted buffer area of not less than 30 feet in width shall be planted along side lot lines adjacent to residential development in the R-27A Zone, except that where the tract abuts the Twaits Road right-of-way a planted buffer shall not be required. A continuous buffer of not less than 30 feet in width shall be left undisturbed with natural vegetation and supplemented as determined to be necessary by the Board along side lot lines adjacent to the AH-2 Zone. Planted buffers not less than 25 feet in width shall be planted between any site improvements within 50 feet of the tract boundary and the rear lot line.

(2) Planted buffers shall include a combination of evergreen trees, shrubbery, berms, hedges, fencing and/or other suitable elements sufficient to constitute an effective screen subject to Board approval. Buffers shall provide a year-round visual screen.

(3) Existing vegetation and topographical features shall be maintained in required buffer areas except as may be authorized by the Township.

(4) Retaining walls and fences shall be permitted in required buffer areas.

(5) Buffer areas shall be maintained and kept clean of all debris, rubbish, weeds and tall grass. Any screen planting shall be maintained permanently, and any plant material that does not live shall be replaced within one (1) year or one (1) growing season, provided all landscape plans as approved shall be continually complied with.

C. Off-street parking and loading requirements.

(1) The minimum number of off-street parking spaces shall comply with New Jersey Residential Site Improvement Standards (“RSIS”) (N.J.A.C. 5:21-1.1 et seq.).

(2) All off-street parking and drive aisles shall be located a minimum of 10 feet from buildings, except for a drop-off/pick up driveway at the main building entrance and at loading bays.

(3) All off-street parking and drive aisles shall be located a minimum of 25 feet from property lines, except that such improvements shall be located minimally

100 feet from the Twaits Road right-of-way. Parking areas shall have a minimum setback of 80 feet from the Route 202 right-of-way.

(4) Parking areas shall be prohibited within required buffers.

(5) All parking areas visible from public rights-of-way or adjacent residential development shall be screened with planting minimally 3 feet in height subject to Board approval. Rows of parking with 10 spaces or more shall be separated by a landscaped island not less than 6 feet in width.

(6) All parking areas shall be designed in accordance with the applicable provisions of Article X of this Chapter; however, an assisted living development in the Senior Housing – 2 Overlay District shall be exempt from the multifamily parking design requirements set forth at §230-90.H. In the event of a conflict between Article X and this Article XXXVI, this Article XXXVI shall govern.

(7) Off-street parking shall not be provided for any use or to any party other than a resident or visitor of the site, nor shall parking areas be used for any purpose other than parking.

(8) Signage shall be provided where parking spaces are to be reserved for residents. Visitor parking shall be signed and painted for each space designated for such a purpose.

(9) Loading shall be provided in accordance with § 230-204.

D. Signage. Signage requirements for the Senior Housing - 2 Overlay Zone shall be consistent with the generally applicable sign regulations set forth in Article XXVII, Signs, as well as the specific sign regulations for signs permitted in the AH and PURD Zone Districts as set forth at § 230-215.

E. General design standards.

(1) Design: Building plans and elevations shall show a variation in design to be achieved by the types of roof, heights of eaves and peaks, building materials and architectural treatment of the building facade that is utilized. The following design standards shall be utilized:

(a) Architectural elements such as varied roof forms, articulation of the facade, breaks in the roof, and walls with texture materials and ornamental details should be incorporated to add visual interest.

(b) Roof height, pitch, ridgelines and roof materials should be varied to create visual interest and avoid repetition.

(c) Architectural elements such as fenestrations and recessed planes should be incorporated into façade design. Architectural treatment shall be applied to all elevations of a building.

(d) A variety of building colors, materials and textures are encouraged to achieve a harmonious design theme.

(e) Architectural features that enhance the façade or building form, such as decorative moldings, windows, shutters, dormers, chimneys, balconies and railings, are encouraged.

(2) Equipment: Exterior-mounted mechanical and electrical equipment exposed to the public view shall be architecturally screened or screened with landscaping to provide a year-round visual buffer subject to Board approval. Roof-mounted equipment and projections should be painted the same color as the roof and, where possible, located to the rear of the building, away from the public view.

(3) Accessory buildings and structures: All accessory buildings and structures shall be subject to the standards set forth at § 230-275.A. Architectural design and materials used in the construction of accessory buildings and structures shall conform to those used in the construction of principal buildings.

F. Adult community housing requirements. The adult community housing standards set forth at §230-145 shall not apply to the Senior Housing – 2 Overlay District.

SECTION 24. Chapter 230, Schedule C "Schedule of Permitted Uses" shall be amended as follows (see attached):

- Codify amendments already adopted in 2019 as part of the Housing Element & Fair Share Plan ordinances (AHR-1, AHR-2, R-27F, TH/MFD, Rt. 202 and Stiles Lane Overlays).
- Include new Senior Housing -1 & 2 Overlay District categories and uses permitted therein.
- Include retail, personal service establishments, and banks, including banks with drive-through facilities as permitted principal uses in the OB-4 District, and eliminate same as conditional uses in the OB-4 District.
- Rename "medical clinics and laboratories" as "medical offices."
- Include building materials and contractor's yards as a permitted principal use in the I Districts.
- Include wineries & breweries and Alternative Treatment Centers (ATCs), excluding sales, as permitted principal uses in the I-1A, I-1B, and I-2 Districts.
- Rename "agriculture and farming" as "farms & agricultural activities."
- Include places of worship as a permitted principal use in the R Districts.
- Include personal service establishments as a permitted conditional use in the I-2A Districts.
- Include outdoor storage as a permitted accessory use in the B-3 and B-4 Districts, subject to §230-156.
- Include non-retail electric vehicle charging stations as a permitted accessory use all districts.
- Include retail electric vehicle charging stations as a permitted accessory use the TC, B, OB, I, PBR, and PBO Districts.
- Include keeping of animals as a permitted accessory use in all districts.
- Add new footnotes and references thereto.

SECTION 25. Chapter 230, Schedule D "Schedule of Area and Bulk Requirements" shall be amended as follows (see attached):

- Codify amendments already adopted in 2019 as part of the Housing Element & Fair Share Plan ordinances (AHR-1, AHR-2, R-27F, TH/MFD, Rt. 202 and Stiles Lane Overlays).
- Include new Senior Housing -1 & 2 Overlay District categories and area and bulk standards required therein.

SECTION 26. Chapter 230, Schedule E "Off-Street Parking Requirements" shall be amended as follows (see attached):

- Codify amendment to parking requirement for "residential health care facilities" already adopted in 2019 as part of the Housing Element & Fair Share Plan ordinances (R-27F Zone).
- Rename "medical clinics and laboratories" as "medical offices."
- Amend parking requirement for "building materials and contractor's yards" to refer to "outdoor storage area" instead of "outdoor display area."

SECTION 27. The Township of Montville Zoning Map, included in Chapter 230 as Attachment 7, shall be amended as follows (see attached):

- Include the following zone districts already adopted pursuant to previous ordinances but not yet updated on the Zoning Map: PBR, PBO Overlay, AHR-1, AHR-2, R-27F, TH/MFD, Rt. 202 and Stiles Lane Overlays.
- Eliminate the former B-6 Zone pursuant to the AHR-1 Ordinance adopted in 2019, but not yet updated on the Zoning Map.
- Include Block 59 Lots 13, 15, 17, 18, 19, 20 and 22 in a new Senior Housing – 1 Overlay Zone, while retaining the existing underlying zone designation for these parcels.
- Include Block 39 Lots 67.02, 68, 69 and 70 in a new Senior Housing – 2 Overlay Zone, while retaining the existing underlying zone designations for these parcels.

SECTION 28. Chapter 169 "Fee Schedule," Section 169-5 "Land Use," shall be amended as to the following section only to read as follows, and all remaining provisions of this section remain unchanged:

§169-5 Land use.

A. Application fees.

	Application Fee or Charge	**Initial Escrow Deposit**
Preliminary	$500 plus $10 per 1,000 square feet of lot area plus $10 per 100 square feet of floor area	$750 per acre or part thereof for 2 acres; $100 for each additional acre or part thereof
Final site plan	$250 plus $3 per 1,000 square feet of lot area plus $3 per 100 square feet floor area	$350 per acre or part thereof for first 2 acres plus $50 for each additional acre or part thereof

Zoning Permits

Temporary tent/ parking lot sale $150

Mobile retail food temporary establishment permit Annual permit = $100 = $15 per day

D. Affordable housing administration:

(1) Precertification fee: $250
(2) Resale certification: 1.5% of sales price of unit_fee shall be the responsibility of the seller)

All other portions of this Section shall remain unchanged.

SECTION 29. All Ordinances of the Township of Montville, which are inconsistent with the provisions of this Ordinance, are hereby repealed to the extent of such inconsistency.

SECTION 30. If any section, subsection, sentence, clause of phrase of this Ordinance is for any reason held to be unconstitutional or invalid, such decision shall not affect the remaining portions of this Ordinance.

SECTION 31. This Ordinance may be renumbered for purposes of codification.

SECTION 32. This Ordinance shall take effect immediately upon final passage, approval, and publication as required by law.

TOWNSHIP OF MONTVILLE
COUNTY OF MORRIS
STATE OF NEW JERSEY

ATTEST:

_____
Stacy Sullivan-Gruca, Township Clerk

_____
Frank W. Cooney, Mayor

Introduced: 01/26/2021
Public Hearing: 03/09/2021
Adopted: