

**RESOLUTION  
ANDOVER TOWNSHIP LAND USE BOARD  
IN THE MATTER OF PUFF CITY PROPERTY, LLC  
APPLICATION NO. A23-2  
DECIDED ON NOVEMBER 21, 2023  
MEMORIALIZED ON JANUARY 9, 2024  
PRELIMINARY & FINAL SITE PLAN APPROVAL  
WITH “c” VARIANCE RELIEF AND DESIGN WAIVER RELIEF**

**WHEREAS**, Puff City Property, LLC (hereinafter the “Applicant”) has made application to the Township of Andover Land Use Board hereinafter (“Board”) for preliminary and final site plan approval, “c” variance relief and design waiver relief for property known and designated as Block 134, Lot 17.06, as shown on the Tax Map of the Township of Andover and located at 515 New Jersey State Highway Route 206, Andover, New Jersey (“the Property”). The Property is also located in the Route 206 Redevelopment Zone District (hereinafter “Route 206 Redevelopment Zone”); and

**WHEREAS**, a public hearing was held on November 21, 2023 after the Board determined it had jurisdiction; and

**WHEREAS**, the Applicant was represented by Michael S. Selvaggi, Esq.; and

**NOW, THEREFORE**, the Land Use Board makes the following findings of fact, based upon evidence presented at its public hearing, at which time a record was made.

The application before the Board seeks preliminary and final site plan approval, “c” variance relief and design waiver relief for property known and designated as Block 134, Lot 17.06 on the Tax Assessment Map of Andover Township, which Property is located at 515 New Jersey State Highway Route 206, Andover, New Jersey. The Property is also located in the Route 206 Redevelopment Zone.

Mr. Selvaggi provided a brief overview of the project. The Applicant seeks approval in order to construct a new 6,120 square foot retail commercial building.

The following Exhibits were introduced into evidence during the hearing process:

1. **Exhibit A-1** – Photograph of freestanding sign which was taken by Daniel Davies, P.E., C.M.E.;
2. **Exhibit A-2** – Three-dimensional rendering of the proposed building prepared Aydan Kalcan, R.A. of Fineline Architectural Design, LLC;
3. **Exhibit A-3** – Architectural Plan Sheet A-200 revised November 21, 2023 to depict the location of signage over each of the four retail stores.

### **Engineering Testimony**

Testifying on behalf of the Applicant was Daniel Davies, P.E., C.M.E., a licensed professional engineer in the State of New Jersey. Mr. Davies was qualified as an expert witness in the field of civil engineering. Mr. Davies provided an overview of the existing conditions. The property has a total area of approximately 49,078 square feet with frontage along New Jersey State Highway Route 206. The Property is bordered by Route 206 to the west and a car dealership to the north on Lot 17.12. In addition, farmland is located to the east of the site on Lot 17.15 and the Harmony Lodge is located to the south of the property on Lot 17.02. The Property was previously occupied by the closed Smokehouse Barbecue Restaurant.

The Property currently is serviced by two driveways. The first driveway is located at the northern edge of the Property and located approximately 19.5 feet from Lot 17.12 and is approximately 72.5 feet wide at the edge of pavement. The second driveway is located at the southern edge of the Property and located approximately 25.6 feet from Lot 17.02 and is approximately 53.3 feet wide at the edge of pavement. Both driveways provide dual access to and from New Jersey State Highway Route 206 and are spaced apart a distance which measures approximately 104 feet. Mr. Davies testified that the Applicant would be applying to the New Jersey Department of Transportation (“NJDOT”) for a permit to clean up the two (2) driveway access points.

Mr. Davies reviewed the environmental conditions existing on the site and represented that wetlands are located offsite along the eastern or rear property line with a 150-foot buffer. Furthermore, wetland buffers cover approximately 30,849 square feet or approximately 62.9% of the Property. Mr. Davies reviewed with the Board various permits inclusive of a letter of interpretation (“LOI”), that would be applied for from the New Jersey Department of Environmental Protection (“NJDEP”).

Mr. Davies further testified that the proposed development will consist of a 6,120 square foot single-story retail commercial building. The Applicant is also proposing an 18 space parking area with 17 parking spaces 10 feet in width by 20 feet in length and one (1) handicap parking space which is 8 feet in width by 20 feet in length. In addition, the Applicant is proposing a 15-foot by 15-foot dumpster enclosure consisting of six (6) foot high board-on-board fencing and a 12-foot-wide swing gate which is located adjacent to the south side of the proposed building. Furthermore, Mr. Davies represented that the Applicant is proposing a 15-foot by 40-foot loading area which will be located in front of the dumpster enclosure on the south side of the proposed building. He further indicated that the dumpster enclosure and loading area will be accessible by a 5-foot-wide concrete sidewalk along the front, rear and south side of the proposed building.

Mr. Davies reviewed topographic conditions and steep slopes which exist on the site. Mr. Davies provided an overview of the steep slope calculations. In the steep slope category of 15% to 24.99% the maximum allowable disturbance is 15% and the Applicant proposes 15% disturbance. In the steep slope category of 25% to 34.99%, the maximum allowable disturbance is 3% and the Applicant is proposing 0.2% disturbance. In the steep slope category greater than 35%, the maximum allowable disturbance is 0% and the Applicant is not proposing any disturbance in the steep slope category greater than 35% and thus complies with the Ordinance requirements.

Mr. Davies represented that the existing well will be decommissioned and a new onsite water supply well will be drilled to accommodate the proposed development.

Mr. Davies also testified that the Applicant would install a bike rack.

Mr. Davies testified in regard to an increase in impervious coverage. Mr. Davies represented that there will be an increase in impervious coverage of 693 square feet from 16,516 square feet to 17,209 square feet. Mr. Davies represented that even though there is a slight increase in the impervious coverage it will result in cleaner stormwater runoff from the roof of the building. The proposed development will improve clean stormwater runoff by 9.6% and reduce dirty stormwater runoff by 8.4%.

Mr. Davies testified in regard to vernal pools. He represented that the closest vernal pool is located approximately 800 feet to the south on Block 134, Lot 17.17. He further testified that no buffers associated with documented vernal pools impact the Property.

Mr. Davies testified in regard to the existing freestanding sign. He stated that the Applicant intends to remove the arrow and the light fixture on the top of the sign. He indicated that the sign measures approximately 20 feet in height and that there is approximately 6½ feet of clearance from the ground to the bottom of the sign. Mr. Davies stated that the sign is currently located approximately two (2) feet from the road and the existing sign face is 48 square feet (6 ft. by 8 ft). The Ordinance permits a freestanding sign face not to exceed 32 square feet per sign face and the sign must be set back a minimum of 12 feet from the right-of-way. Mr. Davis indicated that the Applicant intends to keep the pole and the Applicant also intends to replace the sign face with a new sign face with the same 48 square feet sign area.

The Board and the Applicant reviewed the request for variance relief. The Applicant requires the following ancillary “c” variances in regard to this development application:

1. In accordance with the Route 206 Redevelopment Plan, 65% of off street parking shall be located on the side or the rear of the building. Here, all parking is proposed in the front of the building;
2. In accordance with the Route 206 Redevelopment Plan, all loading areas are to be screened and the Applicant is not proposing any screening;

3. In accordance with the Route 206 Redevelopment Plan, street lighting is required along street frontages and the Applicant is not providing any street lights;
4. In accordance with the Andover Township Code §190-93, the Applicant requires variance relief for signage where a maximum of one (1) building façade sign is permitted and the Applicant proposes four (4) building façade signs (one (1) façade sign for each proposed tenant space). Furthermore, a façade sign shall not exceed, in area, 15% of the total area of the story or level of building on which is it erected or 64 feet, whichever is lesser, and shall be designed to be architecturally compatible with the building.
5. Variance relief is required to permit the Applicant to keep the freestanding sign pole in the same location and to permit a sign face which measures 48 square feet, where the Ordinance requires a 12-foot setback from the right-of-way and limits the sign face area to 32 square feet.

The Applicant also requires a design waiver from Andover Township Code §131-37L which requires all parking areas to be curbed. The Applicant is proposing curb stops instead of curbing the parking area.

Mr. Davies testified that the reason why the Applicant is not able to screen the loading area is due to existing onsite environmental conditions and the proposed loading area is in the best place for it on the site.

Mr. Davies also testified that the Applicant is requesting relief from the requirement for street lighting, because the street lighting would be within the State Right-of-Way.

Mr. Davies testified in support of the granting of variance relief, he represented that in order to put parking in the rear of the Property the Applicant would be required to disturb more steep slopes and also disturb the wetlands. He characterized the proposed development of the site as being a unique situation due to existing environmental conditions including, but not limited to the existence of trees in the rear of the Property and the Applicant's desire to preserve the mature vegetation on the Property. Mr. Davies then concluded that it makes better planning sense to put parking in the front of the building. He further highlighted the fact that the

Applicant was not proposing landscaping in the rear in order to prevent additional steep slope disturbance.

### **Owner's Testimony**

Testifying on behalf of the Applicant was Ismail Alptekin. Mr. Alptekin was identified as the property owner. Mr. Alptekin reviewed the proposed signage. He stated that the Applicant seeks approval for four (4) building façade signs such that each tenant space would have its own individual façade sign. He also confirmed that the Applicant is not proposing to install a generator on the site at this time.

### **Architectural Testimony**

The next witness to testify on behalf of the Applicant was Aydan Kalkan, R.A., a licensed architect in the State of New Jersey. Ms. Kalkan was qualified as an expert witness in the field of architecture. Ms. Kalkan is employed by Fineline Architectural Design, LLC. Ms. Kalkan provided an overview of the proposed building. She stated the building has two (2) staircases with one (1) on each side of the building. The Applicant is proposing four (4) retail spaces with each space measuring approximately 1,400 square feet. Ms. Kalkan also testified that each tenant space will have a main entrance in the front and there will also be one (1) door in the rear of the building for each tenant space.

Ms. Kalkan reviewed with the Board Exhibit A-2 which was characterized as a 3D rendering of the building. Ms. Kalkan highlighted the relevant features and design aspects of the proposed building. The Applicant is proposing a flat roof with parapets. She stated the height of the lower parapets measures approximately 19 feet and the height of the higher parapets measures approximately 23 feet. Ms. Kalkan confirmed that there is no second floor in the building. Ms. Kalkan further addressed the proposed four (4) building façade signs.

Ms. Kalkan also confirmed that the basement space would only be utilized by the existing tenants at the building.

**Public Portion**

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application.

**NOW, THEREFORE**, the Land Use Board hereby makes the following conclusions of law, based upon the foregoing findings of fact. The application before the Board is a request for preliminary and final site plan approval, “c” variance relief and design waiver relief for property known and designated as Block 134, Lot 17.06 on the Tax Assessment Map of Andover Township and located at 515 New Jersey State Highway Route 206, Andover, New Jersey. The Property is located within the Route 206 Redevelopment Zone.

The proposed development will consist of a 6,120 square foot, single-story retail commercial building. Four (4) tenant spaces are proposed with each tenant space measuring approximately 1,400 square feet. An eighteen (18) space employee and customer parking area is proposed inclusive of seventeen (17) parking stalls which measure 10 feet in width by 20 feet in length as well as one (1) handicap parking stall which measures 8 feet in width by 20 feet in length. The Applicant is also proposing a 15 foot by 15-foot dumpster enclosure consisting of 6-foot-high board-on-board fencing and a 12-foot wide swing gate. A 15-foot by 40-foot loading area is located in front of the dumpster enclosure on the south side of the proposed building. The dumpster enclosure and loading area are accessible by a 5-foot-wide concrete sidewalk along the front, rear and south side of the proposed building. Additional site improvements include lighting, landscaping, an upgraded septic disposal system and new on-site well. The Applicant has also stipulated that the basement space could not be rented to or occupied by any third party but shall only be rented to or occupied by an existing tenant of the building.

### **Ancillary “c” Variance Relief**

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the applicant to establish these criteria.



The Applicant requires ancillary “c” variance relief. More specifically, the Applicant requires variance relief from the following:

1. In accordance with the Route 206 Redevelopment Plan, 65% of off street parking shall be located on the side or the rear of the building. Here, all parking is proposed in the front of the building;
2. In accordance with the Route 206 Redevelopment Plan, all loading areas are to be screened and the Applicant is not proposing any screening;
3. In accordance with the Route 206 Redevelopment Plan, street lighting is required along street frontages and the Applicant is not providing any street lights;
4. In accordance with the Andover Township Code §190-93, the Applicant requires variance relief for signage where a maximum of one (1) building façade sign is permitted and the Applicant proposes four (4) building façade signs (one (1) façade sign for each proposed tenant space). Furthermore, a façade sign shall not exceed, in area, 15% of the total area of the story or level of building on which is it erected or 64 feet, whichever is lesser, and shall be designed to be architecturally compatible with the building.
5. Variance relief is required to permit the Applicant to keep the freestanding sign pole in the same location and to permit a sign face which measures 48 square feet, where the Ordinance requires a 12-foot setback from the right-of-way and limits the sign face area to 32 square feet.

The Board has considered the request for variance relief under the Municipal Land Use Law under the c(1) analysis. The Board finds that there are exceptional topographic conditions and/or physical features which uniquely affect the Property. The Board finds that the Property is impacted by steep slopes. The Board notes that steep slopes in the category of 15% or greater occupy approximately 9,174 square feet of the Property. More specifically, approximately 7,390 square feet are within the 15% to 24.99% slope category, approximately 1,396 square feet are in the slope category of 25% to 34.99% and slopes that are in the greater than 35% slope category measure approximately 388 square feet.

The Board also notes that wetland buffers cover approximately 30,849 square feet or approximately 62.9% of the Property. The Board further notes that the Applicant will be required to obtain permits from the NJDEP including, but not limited to, a Letter of Interpretation

("LOP"), Freshwater Wetlands—Transition Area Waiver—Averaging Plan, Freshwater Wetlands, Special Activities, Transition Area Waiver for Redevelopment and Flood Hazard Area Permit.

The Board notes that as a result of these environmental features and conditions, it makes better planning sense and preserves the environment by allowing the Applicant to put parking in the front of the building as opposed to in the rear or side of the building as is required under the Route 206 Redevelopment Plan.

The Board also accepts the representations of the Applicant that the loading area cannot be screened so as not to be visible from the road and the loading area is in the most efficient location on the site considering all of the topographic and environmental features, as well as the ability to provide safe and efficient access and circulation in regard to the loading area. Further, the Board accepts the representations of the Applicant in regard to the request for variance relief for not providing street lighting because the street lighting would be located within the State Right-of-Way.

In regard to the request for variance relief for signage, this matter is governed under the Andover Township Code §190-93, (b) and (c) under Section (b), only one (1) façade sign shall be permitted on each establishment. Under subsection (c), a façade sign shall not exceed, in area, 15% of the total area of the story or level of building on which it is erected or 64 feet, whichever is lesser, and shall be designed to be architecturally compatible with the building. In this instance, the Applicant is proposing four (4) tenant spaces and is requesting one (1) building façade sign for each tenant space. The Board finds that it makes better planning sense to grant variance relief to permit each tenant space to have its own individual sign with the Applicant complying with the sign area requirement that the signage shall not exceed 15% of the total area of the story or level of the building on which it is erected or 64 feet, whichever is less.

The Board finds that in regard to the existing freestanding sign that the Applicant will be permitted to maintain the sign pole in the existing location as there has been no showing of a detriment to the public based upon its existing location. The Board further finds that the Applicant has agreed to remove the arrow and the light fixture from the top of the sign. The Board finds that permitting the Applicant to continue to have a sign face which measures 48 square feet to be appropriate to permit viewing from the road both by persons in vehicles and on foot. The board finds that permitting a sign face which measures 48 square feet to be reasonable based upon the facts in this case and the larger sign will be more legible and visible to the public, thus promoting public safety.

The Board finds that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) that the Applicant has met both the positive and negative criteria for the granting of c(1) variance relief. Thus the Board finds that c(1) variance relief can be granted without substantial detriment to the public good without substantial impairment of the Zone Plan and Zoning Ordinances.

The Board has examined the request for variance relief under the Municipal Land Use Law under the c(2) analysis. In Kaufman v. Planning Board for Warren Township, 110 N.J. 551, 563 (1988), the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

The Board finds that the site measures approximately 1.127 acres in area. The Applicant further complies with all other bulk requirements in the Route 206 Redevelopment Zone. The Board also finds that the proposed development is consistent with the Route 206 Redevelopment Plan and enables the

Applicant to properly development the Property while respecting existing topographic and environmental features that exist on the Property.

Based upon the proofs presented, the Board determined that the Applicant satisfied the positive criteria such that the granting of the application will promote the purposes of the Municipal Land Use Law. More specifically, the Board finds that the purposes of the Act would be advanced under the MLUL pursuant to N.J.S.A. 40:55D-2. More specifically, 2a) is satisfied because the approval of this application would promote the general welfare by providing a development that respects the existing topographic and environmental features on the site. Further, the approval of this application will promote the general welfare by providing a development that conforms to the Route 206 Redevelopment Zone requirements in all major categories. Further, 2i) is satisfied by providing a desirable visual environment with respect to the proposed building through creative development techniques. Also, 2g) is satisfied because the approval of this application results in providing sufficient space in appropriate locations for a variety of commercial uses and finally, 2m) is satisfied because the approval of this application results in a more efficient use of land.

In addition, the Board finds that the goals of the Andover Township Master Plan were met and the approval of this application will result in the preservation and improvement of properties within the Route 206 Redevelopment Zone. More specifically, the Board finds that the approval of this application does not conflict with the Master Plan Goal to protect and maintain the prevailing rural character and unique sense of place of the Township with attractive non-residential uses. The approval of this application also satisfies the Master Plan Goal of establishing development densities and intensities at levels that do not exceed the carrying capacity of the natural environment and available infrastructure both existing and planned. Further, the approval of this application now enables the Township to provide for a reasonable

balance among various land uses that respect or reflect upon the interaction and synergy of community life. Thus, the Board finds that the Applicant has satisfied the positive criteria in regard to the granting of ancillary “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

The Board finds that the proposed development of this site will present an opportunity for infill development. The Board further notes that the approval of this application will enable the Applicant to take a piece of property that is currently not being utilized and return it to a productive land use with multiple tenant spaces for commercial use and thus restore the property to a productive use. Furthermore, viable business development in the Township’s Route 206 Redevelopment Zone is vital to the overall welfare of the community.

Next, as to the negative criteria, the Board finds that variance relief can be granted without substantial detriment to the public good. Furthermore, ancillary “c” or bulk variance relief can be granted without substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance. The Board also finds that the purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. The Board therefore finds that the negative criteria has also been satisfied and that it is appropriate to grant ancillary “c” or bulk variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

#### **Design Waiver Relief**

The Board finds that it is appropriate to grant design waiver relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-51 in regard to Township Code Section 131-37L where all parking areas are to be curbed and the Applicant is proposing curb stops in lieu thereof.

The Board finds that the site is located in the Route 206 Redevelopment Zone. The Board finds that it is appropriate to grant design waiver relief.

The Board finds that the Applicant is proposing curb stops which mitigates any negative detriment for not having curbing. Therefore, the Board concludes that the literal enforcement of the provisions of the Ordinance would be impracticable or will exact undue hardship upon the Applicant because of peculiar conditions pertaining to the land in question and thus design waiver relief can be granted.

### **Site Plan Approval**

The Board's authority in reviewing an application for site plan approval is limited to determining whether the development plan conforms with the zoning and the applicable provisions of the Site Plan Ordinance. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 228, 229 (1994); Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 581-582 (App. Div. 2002), certif. denied, 172 N.J. 357 (2002). Thus, ordinarily a denial of a site plan application would be a drastic action when the pertinent ordinance standards are met. Shim v. Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997).

### **Conclusion**

Upon consideration of the plans, testimony and application the Planning Board determines that the request for preliminary and final site plan approval, ancillary "c" variance relief, and design waiver relief meet the minimum requirements of the Municipal Land Use Law, case law and Borough ordinances to a sufficient degree so as to enable the Board to grant the relief being requested.

**NOW, THEREFORE, BE IT RESOLVED** by the Land Use Board of the Township of Andover, that the application of Puff City Property, LLC, for premises commonly known and designated as Block 134, Lot 17.06, as shown on the Tax Assessment Map of the Township of Andover, and located

at 515 New Jersey State Highway 206, Andover, NJ in the Route 206 Redevelopment Zone, is determined as follows:

1. Preliminary site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46.
2. Final site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-50.
3. Ancillary “c” variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2) for parking in front of building, lack of screening for loading area, no street lighting along street frontage, building façade signage and to permit a freestanding sign that does not conform to the setback and sign area requirements.
4. Design waiver relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-51 for parking areas that are not curbed.

**IT IS FURTHER RESOLVED** that the above land use relief is granted subject to the following terms and conditions:

1. The development of the site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this Application.

2. The Applicant represents that all representations and stipulations made either by or on behalf of the Applicant to the Andover Township Land Use Board are true and accurate, and acknowledges that the Land Use Board specifically relied upon the Applicant’s stipulations in the Board’s granting of approval. If any representation or stipulation is false, this approval is subject to revocation.

3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Land Use Board at the time of the public hearing on November 21, 2023 and December 6, 2022.

4. The Applicant shall comply with all terms and conditions set forth in the Board Engineer’s Review Report prepared by Cory L. Stoner, P.E., C.M.E. of Harold E. Pellow & Associates, Inc. dated September 29, 2023 and as testified to during the hearing process.

5. The Applicant shall revise the grading plan to depict the pipe sizes and inverts regarding the roof drainage which shall be subject to the review and approval of the Board Engineer.

6. The Applicant shall submit a stormwater maintenance plan prepared in accordance with Chapter 8 of the NJDEP Best Management Practices Manual which shall be subject to the review and approval of the Board Engineer. Further, the maintenance plan shall be recorded with the deed for this Property and a copy of the recorded deed shall be provided to the Board Secretary for inclusion in the Board's file.

7. The Applicant shall obtain Sussex County Health Department Approval in regard to the septic system.

8. The Applicant shall obtain the approval of the Sussex County Health Department in regard to constructing a new well onsite.

9. Any shade trees that are planted shall be a minimum of 2½ inches in caliper in size in accordance with the Route 206 Redevelopment Plan.

10. 10% of the parking lot shall be green in accordance with the Route 206 Redevelopment Plan.

11. The perimeter edge of the parking lot shall be planted with an evergreen hedge pursuant to the Route 206 Redevelopment Plan which shall be subject to the review and approval of the Board Engineer.

12. The Applicant shall submit to the Land Use Board a lighting plan, the nature and sufficiency of which shall be subject to the review and approval of Board Engineer.

13. The architect shall submit revised architectural plans which plans shall depict a color pallet relative to the exterior of the building as well as labeling the plans with the appropriate construction materials to be utilized.



14. The basement space shall not be rented to or occupied by any third party but shall only be rented to or occupied by an existing tenant of the building.

15. The granting of this application is subject to and conditioned upon Andover Township Construction Department approval.

16. The granting of this application is subject to and conditioned upon Andover Township Fire Subcode Official approval.

17. The granting of this application is subject to Andover Township Soil Erosion and Sediment Control approval.

18. The granting of this application is subject to Sussex County Planning Board approval.

19. The granting of this application is subject to New Jersey Department of Transportation approval or a letter of no interest.

20. The granting of this application is subject to New Jersey Department of Environmental Protection (“NJDEP”) approval regarding any and all appropriate permits including, but not limited to; a Letter of Interpretation (“LOI”), Freshwater Wetlands—Transition Area Waiver—Averaging Plan, Freshwater Wetlands—Special Activities Transition Area Waiver for Redevelopment, and Flood Hazard Area Permit.

21. The granting of this application is subject to and conditioned upon the Applicant opening and maintaining an escrow account with the Township of Andover and keeping the account current with sufficient funds for professional review and inspection fees.

22. This approval is subject to the payment in full by the Applicant of all taxes, fees, escrows, assessments and other amounts due and owing to the Township. Any monies are to be paid by the Applicant within twenty (20) days of said requests by the Board Secretary.

23. Certification that taxes are paid to date of approval.

24. Payment of all fees, costs, escrows due or to become due. Any monies are to be paid by the Applicant within twenty (20) days of said request by the Board Secretary.

25. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Andover, County of Sussex, State of New Jersey, or any other agency or entity having jurisdiction hereunder.

**VOTE ON APPLICATION**

Motion Introduced By: Howell

Seconded By: Karr

In Favor: Skewes, Karr, Degan, Olsen, Carafello, Howell, Ordile, Messerschmidt, and Gilchrist

Opposed: None

**VOTE TO APPROVE RESOLUTION**

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Andover Township Land Use Board

\_\_\_\_\_  
Stephanie Pizzulo, Board Secretary

\_\_\_\_\_  
Paul Messerschmidt, Chairman

The undersigned Secretary certifies that the within Resolution was adopted by the Land Use Board of the Township of Andover on November 21, 2023, and memorialized herein pursuant to N.J.S.A. 40:55D-10g on January 9, 2024.

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Stephanie Pizzulo  
Land Use Administrator and  
Board Secretary

3432027.1 AND-094E Puff City Resolution Granting Preliminary Final Site Plan & "c" Variance Relief and Design Waiver Relief (A23-2) 1.19.24



**RESOLUTION  
TOWNSHIP OF ANDOVER  
LAND USE BOARD  
IN THE MATTER OF STEPHEN DePINHO  
DECIDED ON DECEMBER 5, 2023  
MEMORIALIZED ON JANUARY 9, 2024  
APPLICATION NO. A-23-6  
“c” VARIANCE RELIEF TO PERMIT THE CONSTRUCTION  
OF A SINGLE-FAMILY DWELLING**

**WHEREAS**, Stephen DePinho (hereinafter the “Applicant”) has filed an application with the Andover Township Land Use Board (“Board” or “Land Use Board”) seeking “c” variance relief in regard to real property known and designated as Block 71, Lot 3.29 on the Tax Assessment Map of the Township of Andover which premises are located at 76 Skytop Road, Andover, New Jersey (hereinafter the “Property”) in the R-2 Single-Family Residential District (hereinafter “R-2 Zone”); and

**WHEREAS**, a public hearing was held on December 5, 2023, after the Land Use Board determined it had jurisdiction; and,

**WHEREAS**, the Applicant was represented by Daniel Benkendorf, Esq.

**NOW, THEREFORE**, the Land Use Board makes the following findings of fact based on evidence presented at its public hearing, at which time a record was made.

The application before the Board is a request for “c” variance relief in order to permit the construction of a single-family dwelling for premises known and designated as Block 71, Lot 3.29 on the Tax Assessment Map of Andover Township which premises are located at 76 Skytop Road, Andover, New Jersey in the R-2 Zone.

Stephen DePinho and Cara Tullai confirmed that the Applicant is seeking variance approval in order to construct a four-bedroom single-family house on this unimproved lot.

### Engineering Testimony

Testifying on behalf of the Applicant was Thomas F. Graham, P.E., a licensed professional engineer in the State of New Jersey. Mr. Graham was qualified as an expert witness in the field of civil engineering. Mr. Graham reviewed with the Land Use Board the proposed development on the lot. Mr. Graham testified that the Property is an irregularly shaped parcel of property with a width of approximately 650 feet and the lot measures approximately three (3) acres in area. Mr. Graham testified that the Property abuts Hidden Valley Lake to the south and that there is an existing conservation easement that was created in the early 2000's which conservation easement encumbers a portion of the Property.

Mr. Graham also testified that the proposed residence on the Property will be serviced by a well and a septic system which septic system has been approved for five (5) bedrooms, but the Applicant is only constructing a four-bedroom dwelling.

Mr. Graham testified that the majority of the site is encumbered by steep slopes. He also testified that a single-family dwelling was previously approved for development on the Property, but the house was never constructed. Mr. Graham represented that the Applicant has now reoriented the house on the Property and reduced the length of the driveway. Mr. Graham also represented that the application conforms to all bulk standards in the R-2 Zone.

Mr. Graham confirmed that the required sight distance of 315 feet has been complied with regarding the driveway that provides ingress to and egress from the Property on Skytop Road.

The Applicant stipulated that he would comply with the grading area as shown on Sheet 5 of 6 of the Lot Development Plans regarding sight distance profiles at 1+50 and 2+50 as indicated on the Plans. The Applicant also confirmed that they would preserve the sight lines at all times and would record a sight triangle easement such that no hedge, fence or wall higher than 2-1/2 feet above curb level would be constructed so as to keep the sight lines clear. It was also stipulated on behalf of

the Applicant that in connection with the Sight Triangle Easement, if the Applicant fails to maintain the easement area, Andover Township would have the right to enter upon the easement area and to maintain the easement area. Further, any cost incurred by Andover Township in maintaining the easement area shall be paid by the property owner.

Mr. Graham also testified that the Applicant is proposing to construct the single-family dwelling within the 300-foot riparian buffer zone of Hidden Valley Lake which is a Category 1 water source pursuant to New Jersey Department of Environmental Protection (“NJDEP”) regulations. Mr. Graham represented that the Applicant anticipates obtaining the appropriate permit to permit such activity from the NJDEP on or about December 27, 2023. Mr. Graham further discussed steep slope disturbance on the site. The Applicant is disturbing steep slopes in the category between 25% and 34.99% where 3% disturbance is permitted, and 35% disturbance is proposed. Further, the Applicant will be disturbing steep slopes greater than 35% where disturbance of steep slopes in the 35% category is not permitted and 14% disturbance is being proposed. Mr. Graham further reviewed with the Land Use Board the areas of the site where steep slopes exist and where steep slopes will be disturbed.

Mr. Graham testified that the Applicant will be constructing retaining walls. The purpose of constructing retaining walls is to create plateaus on the site which will enable the Applicant to control the area of disturbance.

Mr. Graham also reviewed with the Land Use Board Sheet 2 of 6 of the plan set and he identified areas on the plan where the retaining walls would range in height from approximately 3 feet to 6 feet. The Applicant, therefore, requires variance relief in regard to having a retaining wall on-site that exceeds a height of 4 feet. The Board indicated that it would consider granting variance relief for a retaining wall not to exceed a height of 7 feet. Mr. Graham represented that the Applicant is only increasing impervious coverage on the site by approximately 800 square feet.

### **Architectural Testimony**

Kenneth J. Fox, AIA, P.P. testified on behalf of the Applicant. Mr. Fox was qualified as an expert witness in the field of Architecture, although, Mr. Fox also indicated that he is a licensed Architect and Planner. Mr. Fox confirmed that his testimony would be limited to architectural testimony.

Mr. Fox introduced into evidence Exhibit A-1 which he identified as a three-dimensional rendering of the street view of the proposed ranch style home within an exposed basement which was dated December 5, 2023. In addition, Mr. Fox introduced into evidence Exhibit A-2 which depicts four (4) color elevations of the proposed dwelling on the Property. Mr. Fox reviewed with the Land Use Board the three (3) plan sheets that he prepared in connection with this lot development application. Mr. Fox reviewed each level of living space. Mr. Fox also reviewed with the Land Use Board the exterior construction materials as well as the view of Hidden Valley Lake from the rear of the Property. Mr. Fox highlighted the fact that there is a deck on the second floor in the rear and that there are multiple glass doors in the rear of the Property. The Applicant has also proposed a patio underneath the deck.

Mr. Fox also represented that there is approximately 2,016 square feet of habitable space on each level of the dwelling.

### **Public Portion**

The meeting was opened up to members of the public and the Board was addressed by Michael Lensak. Mr. Lensak stated that he is in support of the Board granting the application. He stated that the Property has been vacant for many years and that the Applicant is proposing an attractive house. Mr. Lensak also complimented the Board on improving the sight triangle easement area.



There were no additional members of the public present expressing an interest in this application.

**NOW, THEREFORE,** the Andover Township Land Use Board makes the following conclusions of law based upon the foregoing findings of fact.

The application before the Board is a request for “c” variance relief in order to permit the construction of a single-family dwelling on property designated as Block 71, Lot 3.29 on the Tax Assessment Map of Andover Township and located at 76 Skytop Road, Andover, New Jersey 07821 in the R-2 Zone.

The Applicant is proposing the construction of a four-bedroom dwelling on a vacant lot with an existing well and a five-bedroom septic system approved. The Board also notes that the Applicant complies with all of the bulk standards in the R-2 Zone. However, the Applicant does require the following “c” variance relief under the Municipal Land Use Law, at N.J.S.A. 40:55D-70c(1):

1. Steep slope disturbance under Section 190-32.3 of the Andover Township Code where slopes between 25% and 34.99% are permitted to have a maximum 3% disturbance and in this instance 35% disturbance is proposed. Further, the disturbance of steep slopes greater than 35% is not permitted and in this instance, the Applicant proposes to disturb 14% of the steep slopes in the steep slope category greater than 35%.
2. The Applicant also requires variance relief from the Andover Township Code in regard to the height of retaining walls where the Applicant proposes a range of retaining walls at a height of between 3 feet and 6 feet. Retaining walls that exceed 4 feet in height are required to seek variance relief.

#### **“c” Variance Relief**

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the Applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the Applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An Applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a

specific piece of property. Further the Applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the Applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or “c” variance relief. Finally, an Applicant must also show that the proposed variance relief sought will not be substantially detrimental to the public good and, further, it will not substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance. It is only in those instances when the Applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the Applicant to establish these criteria.

The Board has examined the request for “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1). The Applicant requires “c” variance relief for steep slope disturbance. In the slope category of 25% to 34.99%, the Applicant will disturb an area which measures approximately 5,791 square feet or 0.133 acres. Thus, the Applicant is proposing a disturbance of 35% within that slope category where a maximum disturbance of 3% is allowed. Furthermore, in the slope category greater than 35%, the Applicant is disturbing an area that measures 4,884 square feet. Thus, the proposed disturbance in the slope category that exceeds 35% is 14% of that area where steep slopes are not permitted to be disturbed in that category.

The Board finds that the lot is irregular in shape. The Board finds pursuant to N.J.S.A. 40:55D-70c(1)(a) that by reason of exceptional narrowness, shallowness, or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, the strict application of the zone requirements would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the developer of the property and thus the Board determines it is appropriate to grant variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1)(a) and (b). The Board reaches this conclusion based on the nature and extent of steep slopes existing on the site as well as the fact that there is a conservation easement on a portion of the Property which abuts Hidden Valley Lake. The Board further finds that the minimum lot area in the R-2 Zone is 87,000 square feet and this lot measures approximately 123,966 square feet which greatly exceeds the minimum lot area in the R-2 Zone. The Board finds that the lot area which greatly exceeds the minimum lot area in the R-2 Zone serves to mitigate any conceivable negative detriment from the Applicant's disturbance of steep slopes. The Board also finds that a single-family dwelling was previously approved for development of this lot which single-family dwelling was larger in size than the proposed dwelling. The Board finds that dwelling was never constructed. The Board finds that having the dwelling reduced in size from that which was previously approved serves to ameliorate any negative detriment from steep slope disturbance. The Board also notes that from the previous approval, the location of the house has shifted, and the length of the driveway has decreased in connection with the proposed development.

In regard to the request for variance relief for retaining wall height which exceeds 4 feet, the Board finds that the use of retaining walls is appropriate in order to create plateaus on the site and to control the area of disturbance. The Board finds that the proposed steep slope disturbance along with the use of retaining walls provides for reasonable control of development within steep slope areas of

the Property and serves to minimize the adverse impact, if any, caused by the proposed development. Furthermore, the purposes of the Steep Slope Ordinance which include but are not limited to, controlling erosion, siltation, flooding, surface water runoff and alteration of natural drainage patterns are not negatively impacted as a result of the proposed development of the Property.

The Board has also reviewed the request for variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2). In Kaufman v. Zoning Board for Twp of Warren, 110 N.J. 551, 563 (1988) the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

The Board finds that the Applicant has satisfied the positive criteria. The Board finds that the Applicant has satisfied the purposes of the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-2a because the approval of this application guides the appropriate use or development of land in this State in a manner which promotes the public health, safety, morals and general welfare. Secondly, N.J.S.A. 40:55D-2(e) is satisfied because the approval will promote the establishment of appropriate population densities and will contribute to the well-being of persons and neighborhoods. Thirdly, N.J.S.A. 40:55D-2(g) is satisfied because the approval of this application provides sufficient space in appropriate locations for residential uses and continues to provide open space. Fourthly, N.J.S.A. 40:55D-2(m) is satisfied because the approval of this application results in more efficient use of land.

In addition, the Board finds that the goals of the Andover Township Master Plan were met and the approval of this application will preserve the residential character of the R-2 Zone and will enable the Applicant to construct a new residential dwelling which results in responsible development

or smart growth which is a further goal of the Andover Township Master Plan. Therefore, the Board determines that the Applicant has satisfied the positive criteria in regard to the granting of ancillary “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55d-70c(2).

The Board next addressed the negative criteria. The Board finds that the approval of this application with the proposed improvements will provide the Applicant with functional living space for a single-family residential dwelling. Thus, the Board finds that the proposed development of the site for a single-family residential dwelling is appropriate in size and scale for the size of the property and in regard to the R-2 Zone in which the property is located.

The Board finds that the Applicant has satisfied the negative criteria and that the approval of this application can be granted without substantial detriment to the public good. Furthermore, ancillary “c” or bulk variance relief can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance. The Board concludes that the use of the property for development of a single-family dwelling is a permitted use in the R-2 Zone. The Board finds that the approval of this application is consistent with the Andover Township Master Plan goals as set forth herein. The Board thus finds that the purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. The Board, therefore, finds that the negative criteria has also been satisfied and that it is appropriate to grant ancillary “c” or bulk variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

Based upon all of these conclusions, the Board finds that the purposes of the MLUL would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of any deviation substantially outweigh any detriment and, therefore, “c” or bulk variance relief may be granted. The Board, therefore, concludes that both the positive and negative criteria were met by the Applicant and

thus, the granting of ancillary “c” or bulk variance relief as set forth herein is appropriate to be granted under the MLUL pursuant to N.J.S.A. 40:55D-70c(1) and c(2).

### **Conclusion**

Upon consideration of the plans, testimony and application, the Board determines that the request for “c” variance relief has met the minimum requirements of the MLUL, case law and Township Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will not adversely impact or impair the use and enjoyment of adjacent properties. Thus, the Board concludes that it is appropriate to grant “c” variance relief for the height of retaining walls and for steep slope disturbance.

**NOW, THEREFORE, BE IT RESOLVED** by the Land Use Board that the application of Stephen DePinho in regard to property designated as Block 71, Lot 3.29 on the Tax Assessment Map of Andover Township which premises are commonly known as 76 Skytop Road, Andover, New Jersey in the R-2 Zone, and bearing application no. A-23-6 requesting land use relief is determined as follows:

1. Ancillary “c” variance relief is granted under the MLUL pursuant to N.J.S.A. 40:55D-70c(1) and c(2) for the height of retaining walls and for steep slope disturbance.

**IT IS FURTHER RESOLVED** that the application is granted subject to the following terms and conditions:

1. The development of the site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this application.
2. The Applicant represents that all representations and stipulations made either by or on behalf of the Applicant to the Andover Township Land Use Board are true and accurate, and acknowledges that the Planning Board specifically relied upon the Applicant’s stipulations in the

Board's granting of this approval. If any representation or stipulation is false, this approval is subject to revocation.

3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Land Use Board at the time of the public hearing on December 5, 2023.

4. The granting of this application is subject to and conditioned upon the Applicant complying with all terms and conditions set forth in the Review Reports of Cory L. Stoner, P.E., C.M.E., Land Use Board Engineer dated September 15, 2023 and November 17, 2023 and as further represented on the record.

5. The Applicant shall record a Sight Triangle Easement as indicated on the Engineering Plans prepared by Dykstra Walker Design Group dated January 3, 2022 with revisions through October 6, 2023 and consisting of six (6) sheets and any additional amendments thereto as required by the Board Engineer or the Land Use Board. The Applicant shall be responsible to maintain the easement area to ensure proper sight distance in regard to the area of the site identified on sheet 5 of 6 Sight Distance Profile 1+50-2+50 and if the Applicant fails to adequately maintain the easement area, Andover Township has the right to come onto the Property and to maintain the easement area. Further, any cost incurred by Andover Township in maintaining the easement area shall be paid by the property owner to Andover Township. The Sight Triangle Easement is subject to the review and approval of the Board Attorney and Board Engineer prior to recording. A copy of the recorded Sight Triangle Easement shall be provided to the Land Use Board Secretary for inclusion in the Board's file.

6. The granting of this application is subject to Andover Township Construction Department approval.

7. The granting of this application is subject to Andover Township Fire Subcode Official approval.

8. The granting of this application is subject to Andover Township Soil Erosion and Sediment Control approval.

9. The granting of this application is subject to Sussex County Health Department approval regarding the well.

10. The granting of this application is subject to New Jersey Department of Environmental Protection approval regarding the septic system.

11. The granting of this application is subject to and conditioned upon the Applicant opening and maintaining an escrow account with Andover Township and keeping the account current with sufficient funds for professional inspection and review fees.

12. Payment of all fees, costs, escrows due or to become due. Any monies are to be paid within twenty (20) days of the request by the Board's Secretary.

13. Certification that taxes are paid to date of approval.

14. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Andover, County of Sussex, State of New Jersey, or any other agency having jurisdiction hereunder.

This application was approved by the Andover Township Land Use Board at a duly constituted public meeting held on December 5, 2023, by a vote of 6 to 1 in favor of approval.

**VOTE TO APPROVE APPLICATION**  
**DECEMBER 5, 2023**

Motion Introduced By: Howell

Seconded By: Olsen

In Favor: Chairman Messerschmidt, Vice-Chair Howell, Board Members Degan, Olsen, Ordile and Carafello

Opposed: Skewes



**MEMORIALIZATION OF RESOLUTION**  
**JANUARY 9, 2024**

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Andover Township Land Use Board

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Stephanie Pizzulo, Board Secretary

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Paul Messerschmidt, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Land Use Board on December 5, 2023 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on January 9, 2024.

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Stephanie Pizzulo, Board Secretary



**RESOLUTION  
ANDOVER TOWNSHIP LAND USE BOARD  
IN THE MATTER OF ANDOVER MUNSEE REALTY, LLC  
APPLICATION NO. A23-9  
DECIDED ON DECEMBER 19, 2023  
MEMORIALIZED ON JANUARY 16, 2024  
PRELIMINARY & FINAL SITE PLAN APPROVAL  
“d(1)” USE VARIANCE APPROVAL, PRE-EXISTING NON-CONFORMING  
USE APPROVAL UNDER N.J.S.A. 40:55D-68, “c” VARIANCE RELIEF  
AND DESIGN WAIVER RELIEF**

**WHEREAS**, Andover Munsee Realty, LLC (hereinafter the “Applicant”) has made application to the Township of Andover Land Use Board hereinafter (“Board”) for preliminary and final site plan approval, “d(1)” use variance approval, “c” variance relief, approval for a pre-existing non-conforming use and design waiver relief for property known and designated as Block 134, Lot 26, as shown on the Tax Map of the Township of Andover and located at 667 New Jersey State Highway Route 206, Andover, New Jersey (“the Property”). The Property is also located in the Route 206 Redevelopment Zone District (hereinafter “Route 206 Redevelopment Zone”); and

**WHEREAS**, a public hearing was held on December 5, 2023 and December 19, 2023 after the Board determined it had jurisdiction; and

**WHEREAS**, the Applicant was represented by Michael S. Selvaggi, Esq.; and

**NOW, THEREFORE**, the Land Use Board makes the following findings of fact, based upon evidence presented at its public hearing, at which time a record was made.

**Exhibits**

1. **Exhibit A-1** September 12, 2022 Final Agency Conditional License;
2. **Exhibit A-2** Resolution 2023-69 Andover Township Governing Body;
3. **Exhibit A-3** Property tax card for garage apartment constructed 1957;

4. **Exhibit A-4** Current layout of garage apartment dated January 1975 Andover Township Building Department;
5. **Exhibit A-5** Plans and Elevations consisting of two (2) sheets prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through November 30, 2023 and in response to Board Engineer's Review Report dated November 20, 2023;
6. **Exhibit A-6** Rendering of Proposed Signage;
7. **Exhibit A-7** Sheet A-1 Floor Plan Elevations of Retail Building prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through December 19, 2023;
8. **Exhibit A-8** Sheet A-2 prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through December 19, 2023;
9. **Exhibit A-9** Sheet A-3 prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through December 19, 2023;
10. **Exhibit A-10** Redline Plans prepared by Davies Engineering, LLC dated August 31, 2023 with revisions through December 19, 2023;
11. **Exhibit A-11** Planning Exhibits for Andover Munsee Realty, LLC, 667 Route 206, Township of Andover, New Jersey prepared by John McDonough Associates with the cover sheet dated November 2023 and consisting of five (5) sheets.

#### **December 5, 2023 Hearing**

The application before the Board seeks preliminary and final site plan approval, "d(1) use variance approval, pre-existing non-conforming use approval, "c" variance relief and design waiver relief for property known and designated as Block 134, Lot 26 on the Tax Assessment Map of Andover Township, which Property is located at 667 New Jersey State Highway Route 206, Andover, New Jersey. The Property is also located in the Route 206 Redevelopment Zone.

Mr. Selvaggi provided a brief overview of the project.

#### **Operations Testimony**

Testifying on behalf of the Applicant was Chief Vince Mann. Mr. Mann identified himself as a member of Andover Munsee Realty, LLC, who is the owner of the Property. He

stated the Applicant is finalizing the lease with Munsee 3 Sisters Medicinal Farm in order to permit the operation of a cannabis retail dispensary on the Property. Mr. Mann represented that the Applicant obtained a Resolution from the Andover Township Committee approving the application for a Class 5 Cannabis Retail Facility at this location.

Mr. Mann provided an overview of the proposed operation of the cannabis retail dispensary. Mr. Mann represented that the Applicant needs to obtain all appropriate licensing in order to operate the facility. He stated that customers must be 21 years of age or older to enter the cannabis retail dispensary. Mr. Mann testified that customers will have to prove their identity which will be scanned and then the customer will be permitted to enter an area of the facility where the sales occur. Mr. Mann stated that there will be no drive-thru at this facility.

Mr. Mann represented that the hours of operation will be 9:30 a.m. to 9:00 p.m. seven (7) days per week. It is anticipated that there will be five (5) employees on-site not including the owner. Mr. Mann described the activities of the employees as being responsible for cleaning the store, restocking the shelves and assisting customers with their purchases. Mr. Mann also testified that the Applicant has adopted standard operating procedures which are regulated by the New Jersey Cannabis Regulatory Control Commission. Mr. Mann confirmed that the Standard Operating Procedure Manual has been filed with both Andover Township as well as the State of New Jersey.

Mr. Mann represented that one (1) employee would be devoted to security, which is a state requirement. Mr. Mann identified the employees in the store as being bud tenders. He stated the employees are there to help the customers. Mr. Mann explained the process of placing orders regarding the use of iPads within the store. Mr. Mann described the process of accepting deliveries. Mr. Mann represented that the product is delivered to the store in a van. Deliveries will typically occur either before 9:30 a.m. when the store opens to the public or after 9:00 p.m.

when the store is closed to the public. Mr. Mann also testified that the delivery vans are not labeled. Mr. Mann identified the side door as being the area where deliveries will be made into the building. Mr. Mann also represented that there is a vault area with a double door that will be locked.

Mr. Mann also represented that there will be no consumption of cannabis products from within the store, nor will consumption of cannabis products be permitted in vehicles while they are on the Property. Mr. Mann described the anticipated refuse from the site. He stated any cannabis waste would be placed in a padded bag and that the other refuse would consist of typical food waste from workers on the site.

Mr. Mann addressed the issue of the existing one-bedroom dwelling unit above the garage which is located in a separate building. Mr. Mann stipulated that the apartment above the garage would be occupied by an individual associated with the cannabis retail dispensary. This will enable the Applicant to provide 24 hour/7 day per week presence on the site. Mr. Mann described surveillance on the property. Mr. Mann also stated that there will be a cloud-based information technology system employed.

Mr. Mann represented that the garage would not be converted to habitable living space. He stated that half of the garage would be available for the tenant for storage purposes and the additional half of the garage would be used to store typical items for maintenance of the property such as a lawn mower. Mr. Mann confirmed that the apartment above the garage would consist of one bedroom and one bathroom.

Mr. Mann confirmed that a typical transaction takes between 5 to 10 minutes in time. He further represented that the apartment will not be rented out to anyone not associated with the cannabis business on-site.

Mr. Mann also testified that cannabis and CBD products will be sold in the store. Mr.

Mann also represented that a customer can only purchase a maximum quantity of the product not to exceed one (1) ounce. Mr. Mann also confirmed that in addition to the state license from the Cannabis Regulatory Commission, the Applicant must also obtain a license from Andover Township.

### **Architectural Testimony**

The next witness to testify on behalf of the Applicant was Raymond O'Brien, R.A., a licensed Architect in the State of New Jersey. Mr. O'Brien was qualified as an expert witness in the field of architecture. Mr. O'Brien reviewed with the Board Exhibit A-5 which consists of two (2) sheets identified as A-1 and A-2. Mr. O'Brien testified that there are two (2) means of access to the cannabis retail dispensary. A customer can either walk up the stairs or utilize the ramp. Mr. O'Brien also identified the location of the delivery area and indicated that upon entering the building, the delivery area would lead to the vault area.

Mr. O'Brien reviewed the interior of the building and testified that the waiting area consists of six (6) seats. A customer would then go through security in order to enter the retail area. There is a delivery area where customers are not allowed and there is a secure vault area as well. Mr. O'Brien represented that the main body of the basement would be used strictly for storage purposes.

Mr. O'Brien testified in regard to the use of exterior construction materials. Mr. O'Brien represented that the Applicant is proposing a stone veneer with vertical siding to better identify the front of the building. Mr. O'Brien reviewed side elevation no. 7 and indicated that the overhang will be removed as well as the support beams that hold up the overhang.

Mr. O'Brien reviewed the proposed building façade sign. He stated the area of the façade is 450 square feet, thus a building mounted sign could not exceed 64 square feet or 15% of the area of the façade.

Mr. O'Brien testified that the Applicant is installing a new railing with ramp access which will be compliant with the Americans with Disabilities' Act (ADA).

Mr. O'Brien addressed the freestanding pylon sign and indicated that there would be a solar light to illuminate the sign.

The Board and the Applicant engaged in a discussion regarding odor from the cannabis retail dispensary and how the exhaust system would work. Mr. O'Brien stated that the Applicant would monitor odors in accordance with Cannabis Regulatory Commission regulations and there would be an Operations and Maintenance Manual that would address the replacement of filters.

### **Public Portion**

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application. The matter was continued to the December 19, 2023 hearing of the Land Use Board.

### **December 19, 2023 Hearing**

#### **Continuation of Architectural Testimony**

Raymond O'Brien continued his testimony before the Land Use Board. Mr. O'Brien reviewed with the Land Use Board Exhibit A-7, A-8 and A-9. Exhibit A-7 was identified as Sheet A-1 prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through December 19, 2023. Mr. O'Brien referenced Item 2 Proposed Plan and represented that there will be four (4) cameras on-site and he identified the locations of the cameras as indicated on Exhibit A-7.

Mr. O'Brien next reviewed Item No. 6 Side Elevation and confirmed that the Applicant is going to remove the existing overhang and support posts which are reflected on the Side Elevation.



Next, he reviewed Item No. 5 Rear Elevation and identified the area in the rear of the building where there will be wall mounted condenser unit as well as the fact that there are two (2) existing propane tanks which are located one behind the other.

Mr. O'Brien also reviewed Item No. 4 Side Elevation and highlighted access to the building as well as identifying what sections of the exterior of the building will be replaced and which will remain. Finally, Mr. O'Brien indicated that a no entry sign will be applied to one of the doors adjacent to the ramp access.

Mr. O'Brien also addressed Item No. 3 Street Elevation and Mr. O'Brien testified that the Applicant will be utilizing stone veneer as part of the exterior construction materials as well as the installation of new siding which will be installed in a vertical manner on the façade of the building. The Applicant has also indicated that it is proposing a façade sign that will measure 45 square feet in area where the Applicant is permitted to install signage not to exceed 15% of the façade area which in this case indicates that the building mounted sign can be no larger than 65 square feet. Thus, Mr. O'Brien stated the sign area of the proposed sign is within the sign area limits imposed under the Ordinance.

Mr. O'Brien reviewed Exhibit A-8 which is Sheet A-2 prepared by O'Brien Architects, Inc. dated August 23, 2023 with revisions through December 19, 2023. Mr. O'Brien reviewed Item No. 2 Pylon Sign and the details reflect that the logo design would measure 13 square feet. Mr. O'Brien also reviewed with the Board Item No. 1 Existing Apartment Building inclusive of the garage space.

Mr. O'Brien next reviewed Exhibit A-9 which was identified as Sheet A-8 O'Brien Architects, Inc. dated August 23, 2023 and revised December 19, 2023. Mr. O'Brien reviewed the proposed exterior construction materials as well as the proposed color pallet. Mr. O'Brien

indicated that the Applicant would be using a color for the new siding that would be in conformance with the color pallet set forth in the Route 206 Redevelopment Plan. He identified the color for the new siding as being HC-156. He also confirmed that the trim color would be HC-71. The colors are Benjamin Moore approved colors as set forth in the Route 206 Redevelopment Plan. Some of the Board Members voiced their concerns about the weathered look of the building, identified as 667-B. In response thereto, the Applicant confirmed that it would stain the cedar shakes by utilizing the color pallet substantially consistent with HC-71. Although Mr. O'Brien anticipates that the color may be a little lighter than HC-71.

### **Engineering Testimony**

Testifying on behalf of the Applicant was Daniel Davies, P.E., C.M.E., a licensed Professional Engineer in the State of New Jersey. Mr. Davies was qualified as an expert witness in the field of civil engineering. Mr. Davies provided an overview of the existing conditions. The Property has a total area which measures approximately 59,826 square feet or approximately 1.3734 acres with frontage along New Jersey State Highway Route 206. The Property is bordered by vacation lands to the north and west in Sussex County, as well as the Andover Township garage to the east.

The Property is currently occupied by a one-story single-family home, one-bedroom apartment over a two-car garage and a large shed. The proposed structure that will contain the cannabis retail dispensary is not being expanded in size.

Mr. Davies reviewed Exhibit A-10 which was identified as a Preliminary and Final Site Plan prepared by his office dated August 31, 2023 with revisions through December 19, 2023 which were highlighted in red. Mr. Davies provided the Board with a review of the location of steep slopes on the Property and confirmed that steep slopes within the slope category of 15% to 24.99% would result in a disturbance of 18.5% where a maximum allowable disturbance of 15%

is permitted. Also, in steep slope category 25% to 34.99%, 3.3% of the slope area will be disturbed where a maximum of 3% of disturbance is allowed. Also, in steep slope category greater than 35%, 0.07% of the slope area will be disturbed where a maximum of 0% of disturbance is allowed,

Mr. Davies represented that mature vegetation and trees which is the area outside of the rock outcrop area occupies approximately 17% of the subject Property which accounts for approximately 20% of the open space which he identified as being located along the northern and eastern property lines. Furthermore, there are no vernal pools within 1,000 feet of the property and there are no wetlands on the Property.

Mr. Davies testified that the Applicant would apply to the New Jersey Department of Transportation (“NJDOT”) for permits in order to improve the driveway to Township standards which driveway would have a width of 25 feet.

Mr. Davies addressed the sufficiency of on-site parking. He stated that deliveries would occur outside of the hours of operation which he stated would be 9:30 a.m. to 9:00 p.m. Thus, deliveries would occur either before 9:30 a.m. or after 9:00 p.m. when the public will not be present on-site. He also stated that transactions from the customers will be less than 15 minutes in duration. He, thus, concluded that four (4) parking spaces can accommodate parking for customers. Mr. Davies also identified changes to the site plan highlighted in red on Sheet C-3 of Exhibit A-10. Mr. Davies also referenced the steep slope calculations contained on Sheet C-3 of Exhibit A-10.

Mr. Davies also reviewed with the Board Sheet C-5 of Exhibit A-10 and confirmed that the turning templates for both passenger vehicles and delivery vans can function at a safe and efficient manner on the Property.

Mr. Davies reviewed Sheet C-4 of Exhibit A-10 and reviewed the Lighting and

Landscaping Plan with the Land Use Board. Mr. Davies explained that the Applicant seeks a variance from the Route 206 Redevelopment Plan which requires sidewalks to be provided along all street frontages and no sidewalks are proposed here. Mr. Davies stated that the sidewalk would be a 40-foot section and in his opinion, it just doesn't work because there are no other sidewalks in the area to which the sidewalk on the property would connect.

The Applicant and the Board engaged in a discussion in regard to the location of the pylon sign which originally the Applicant agreed to move in order to comply with the 12-foot setback from the right-of-way line and to have a sign area of 32 square feet all of which would conform to the Ordinance requirements. However, the Board offered its opinion that if the sign were set back 8 feet from the right-of-way line thereby requiring variance relief, the sign would be more visible to motorists and pedestrians, if any and would be more of a public safety benefit even though it would require variance relief.

Mr. Davies also addressed the request for design waivers from Section 131-37H which requires loading spaces to be 15 feet in width by 40 feet in length and in this instance, the Applicant is proposing a loading space of 10 feet in width by 20 feet in length. Mr. Davies stated that the Applicant will only use vans for deliveries and thus, the larger loading spaces are not required and the smaller loading space can adequately serve the needs of the Applicant.

Mr. Davies also addressed the need for a design waiver from Section 131-37C which requires all parking areas to be curbed and no curbing is proposed. By not installing curbing, the Applicant would be able to maintain the existing stormwater drainage patterns which at this time funnel storm water to catch basins. Generally, curbing would control the direction of stormwater flow which is not necessary under the present conditions existing on the site. In regard to curbing of the parking area, this would necessitate adding drainage structures. Normally curbing of the parking area is necessary to control stormwater runoff. Here, the net

increase of impervious coverage is minor. The Applicant contends that it is better to control drainage on the site without curbing.

Mr. Davies also confirmed that the Applicant seeks variance relief under the Route 206 Redevelopment Plan which requires sidewalks to be provided along all street frontages and no sidewalks are proposed here. As previously addressed, the sidewalks would lead to nowhere.

Mr. Davies addressed the area of screening of the loading area. He stated that there is partial screening of the loading area. However, box trucks or WB-50 trucks are not going to come to the site and, therefore, the Applicant does not need a larger loading area. The Applicant stated this is an appropriate justification for lack of screening because only vans would be utilized for deliveries.

The Applicant also stipulated that it would comply with Cannabis Regulatory Commission Regulations as to signage.

### **Planning Testimony**

Testifying on behalf of the Applicant was John McDonough, P.P., L.A. Mr. McDonough represented that he is both a licensed Land Use Planner and a Landscape Architect but that his testimony before the Board would only be as a Professional Planner. Mr. McDonough was qualified as an expert witness in the field of land use planning. Mr. McDonough reviewed with the Board Exhibit A-11, which was identified as Planning Exhibits for Andover Munsee Realty, LLC-667 Route 206, Township of Andover, New Jersey, consisting of five (5) sheets. Mr. McDonough reviewed each of the five (5) sheets. Sheet 1 was identified as an Aerial Drone View of the subject site looking to the east; Sheet 2 was identified as a Ground View of the subject site looking to the east; Sheet 3 was identified as a view of the entry access to Building No. 667-B; Sheet 4 was identified as a view of the kitchen inside Building No. 667-B; and Sheet

5 was identified as a view of woodlands from the deck of Building No. 667-B.

In regard to Sheet 1 of Exhibit A-11, Mr. McDonough testified that the Property measures slightly less than 1.5 acres in area and that Kittatinny State Park is located behind the Property. Mr. McDonough also stated that the Property has environmental constraints on it. Mr. McDonough stated that the lot is non-conforming in lot area and the Applicant is unable to purchase additional land to make the lot area conforming or more conforming. Mr. McDonough also represented that there are three (3) existing buildings on the lot. Mr. McDonough provided an overview of Sheets 2 through 5 of Exhibit A-11. Mr. McDonough characterized the proposed development of the Property as the adaptive re-use of the main building at 667 Route 206. He stated that the sufficiency of on-site parking has been addressed. Furthermore, a Class 5 Cannabis Retail Dispensary is a conforming use pursuant to the Route 206 Redevelopment Plan. Mr. McDonough also testified that the Applicant is retaining the existing detached garage with the one-bedroom apartment above it located in Building No. 667-B.

Mr. McDonough stated that the Route 206 Redevelopment Plan was recently updated in June 2023 wherein a Class 5 Cannabis Retail Dispensary was allowed as a permitted use in certain designated sections along the Route 206 corridor. Mr. McDonough stated that one of the goals of the Route 206 Redevelopment Plan was to promote economic vitality along the Route 206 corridor. He stated that the proposed plan supports that goal. He further stated that the Route 206 Redevelopment Plan permits multiple principal uses on the site. In that regard, the single-family residence was in existence prior to 2021. Also, the one-bedroom apartment above the garage has been in existence since on or about 1957. Thus, the residential structures pre-date the Route 206 Redevelopment Plan.

Mr. McDonough testified that steep slope disturbance is necessary for proper

redevelopment of the site.

Mr. McDonough reviewed the proofs necessary under the Municipal Land Use Law to obtain d(1) use variance relief. Mr. McDonough stated that the Applicant has to comply with the standards set forth in the Medici case. Mr. McDonough testified that the application satisfies the positive criteria as well as the particular suitability of the site for the proposed use in order to be granted d(1) variance relief. Mr. McDonough testified that the residence has existed since approximately 1957-1958. The nature of the application seeks an adaptive re-use for what is already on the Property. The Applicant seeks to renovate and fix up the existing structures. He stated several purposes of the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-2 would be advanced by the approval of this application. Mr. McDonough stated that pursuant to 2a) the general welfare would be advanced; 2g) would be advanced which is to provide sufficient space in appropriate locations for a variety of residential and commercial uses; 2i) would be advanced which is to promote a desirable visual environment; and 2m) would be advanced which is the proposed development would result in more efficient use of land. He further stated that the Applicant is repurposing the land and providing a diversified mix of housing options in the Route 206 Redevelopment Zone.

Having satisfied the positive criteria, Mr. McDonough next addressed the negative criteria. Mr. McDonough relied upon the architectural testimony provided by Mr. O'Brien as well the engineering testimony provided by Mr. Davies. He stated that the proposed development of the site would result in the effective co-mingling of uses on the site. He stated the degree of the departure from the Zone Plan and Zoning Ordinance is not severe. Mr. McDonough also testified that the approval of this application would result in the adaptive re-use of existing structures. He also stated that the site requires disturbance of steep slopes and

thus, the hardship standards under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) are also met. The disturbance of steep slopes is necessary to properly develop the site, thus, relief from the steep slope categories is appropriate.

Mr. McDonough also testified that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2) are also met. Thus, variance relief can be granted without substantial detriment to the public good and without substantial impairment of the Zone Plan and Zoning Ordinance. Mr. McDonough found that under the c(2) criteria, the purposes of the Act would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, thus allowing the Board to grant c(2) variance relief to develop the Property.

Mr. McDonough also addressed the location of the pylon sign. Mr. McDonough represented that by having the sign located closer to the road, approximately 8 feet from the right-of-way would actually benefit public safety because even though it requires a variance, the sign would be more legible and visible to motorists and pedestrians, thus resulting in clear and safe sight identification as well as clear and safe access to the Property. All of these factors result in providing a public safety benefit even though the Applicant requires variance relief for the sign setback area. Mr. McDonough also added that this is an existing lot with three (3) principal existing structures on the lot and the Applicant seeks an adaptive re-use of the Property.

### **Public Portion**

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application.

**NOW, THEREFORE**, the Land Use Board hereby makes the following conclusions of law, based upon the foregoing findings of fact. The application before the Board is a request for



preliminary and final site plan approval, non-conforming use approval pursuant to N.J.S.A. 40:55D-68, use variance approval pursuant to N.J.S.A. 40:55D-70d(1), “c” variance relief pursuant to N.J.S.A. 40:55D-70c and design waiver relief pursuant to N.J.S.A. 40:55D-51 for property known and designated as Block 134, Lot 26 on the Tax Assessment Map of Andover Township and located at 667 New Jersey State Highway Route 206, Andover, New Jersey. The Property is located within the Route 206 Redevelopment Zone.

The Property has a total area which measures approximately 59,826 square feet or 1.3734 acres with frontage along New Jersey State Highway Route 206. The Property is currently occupied with a one-story single-family home, a one-bedroom apartment over a two-car garage and a large shed. The Property currently has two (2) driveways. The first driveway is located at the western edge of the Property and the second driveway is located at the eastern side of the single-family house. The Property has an existing on-site well and a subsurface sewage disposal system.

The Applicant seeks approval in order to renovate the existing single-family home into a Class 5 Cannabis retail establishment. The Applicant proposes a new handicapped accessible ramp, stair access, a loading access and a reconfiguration of the first floor with a waiting area, retail space, delivery room, vault and a security area. Further, the existing one-bedroom apartment over the two-car garage will remain.

The existing 1,550 square foot shed at the eastern edge of the Property will be maintained and used for storage as required. The Applicant intends to eliminate and remove the existing western driveway. The eastern driveway will be upgraded to comply with Township standards for a 25 feet wide drive aisle and a new parking area with 10 feet by 20 feet parking spaces. The parking area will consist of two (2) parking spaces for the apartment and eight (8) parking spaces for the retail use, one (1) handicapped parking space and a van loading/unloading space. The

Applicant will also provide a 10 feet by 20 feet van loading area. The existing well will be maintained but a new septic disposal system is proposed.

**d(1) Use Variance**

Under the Municipal Land Use Law, a Land Use Board acting as a Board of Adjustment, when considering a “d” variance, cannot grant relief unless sufficient special reasons are shown and there is no substantial impairment of the intent and purpose of the zone scheme and Zoning Ordinance. In addition, the burden of proof is upon the applicant to establish the above criteria. It is the Board’s responsibility, acting in a quasi-judicial manner, to weigh all the evidence presented before it by both the applicant and all objectors, and reach a decision which is based upon findings of fact and conclusions of law and is not arbitrary, unreasonable or capricious.

The New Jersey Courts have been willing to accept a showing of extreme hardship as sufficient to constitute a special reason. The courts have indicated that there is no precise formula as to what constitutes special reasons unless the use is determined to be inherently beneficial, and that each case must be heard on its own circumstances. Yet, for the most part, hardship is usually an insufficient criteria upon which the Board can grant a variance. In addition, special reasons have been found where a variance would serve any of the purposes of zoning as set forth in N.J.S.A. 40:55D-2. However, in the last analysis, a variance should only be granted if the Board, on the basis of the evidence presented before it, feels that the public interest, as distinguished from the purely private interests of the applicant, would be best served by permitting the proposed use. In these instances, the Board must also find that the granting of the variance will not create an undue burden on the owners of the surrounding properties. The Board also notes the special reasons requirement may be satisfied if the applicant can show that the proposed use is peculiarly suited to the particular piece of property. With regard to the question

of public good, the Board's focus is on the variance's effect on the surrounding properties and whether such effect will be substantial. Furthermore, in most "d" variance cases, the applicant must satisfy an enhanced quality of proof and support it by clear and specific findings by this Board that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The burden of proof is upon the applicant to establish the above criteria.

The proposed cannabis retail use is a permitted use in the Route 206 Redevelopment Zone. Residential apartments are not permitted in the Route 206 Redevelopment Zone and thus requires d(1) use variance approval.

Based upon the proofs presented, the Board determined that the Applicant satisfied the positive criteria and that the granting of the application will promote the purposes of the Municipal Land Use Law. More specifically, the Board finds that the purposes of the Act would be advanced under the MLUL pursuant to N.J.S.A. 40:55D-2a) general welfare is being promoted due to the adaptive re-use of the site which includes the renovation and general upgrading of the site; 2g) is being advanced which is to provide sufficient space in appropriate locations for a variety of residential and commercial uses, which in this instance is promoting a diversified mix of housing options with an apartment above the garage; and 2m) is advanced by proposing development with view of lessening the cost of development resulting in more efficient use of land.

The Board finds that this site is particularly suitable for the proposed use. The Board notes that the residential apartment above the garage has been in existence since approximately 1957. The Applicant intends to continue the use of that apartment which has been uninterrupted. The Board also finds that the one-bedroom apartment above the garage is not being expanded as a result of this application. Further, the Board finds that the approval of permitting the one-bedroom apartment over the garage would serve to continue the existing use of a one-bedroom

residential apartment above the garage which has existed for approximately 60 years without any negative detriment to the public.

The Board also finds that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use.

The New Jersey Supreme Court in Price v. Himeji, 214 N.J. 263 (2013) clarified the meaning and intent of the particularly suitable standard under N.J.S.A. 40:55D-70d(1). In Price, the court held “although the availability of alternative locations is relevant to the analysis, demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use nor does it demand evidence that the project must be built in a particular location, rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the Zone.” In addition, in Northeast Towers Inc. v. Zoning Board of Adjustment of the Borough of West Paterson, 327 N.J. Super. 476, 497 (App. Div. 2000), the court held: “The concept expressed in Kohl as to the peculiar suitability of the location requires, however, that the use fits well within the surrounding area . . .” The Board finds that the proposed use is particularly suitable for the site for several reasons including, but not limited to, the approval of this application will also provide for a more productive use of the site. The Board finds that the d(1) variance is in regard to the existing one-bedroom residential apartment above the garage which the Board finds to be a continuation of a use which has existed for approximately 60 years and was originally permitted when the use was created.

The Board next conducted an analysis of the application under the negative criteria. In addition to the positive criteria, an applicant for a use variance must also satisfy the negative criteria. Under the MLUL pursuant to N.J.S.A. 40:55D-70d, the statute provides 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 a variance or such 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.

To satisfy the first prong in the negative criteria, a Board must evaluate the impact of the proposed use variance upon adjacent properties to determine whether the use will cause such damage to the character of the neighborhood to constitute substantial detriment to the public good. In this matter, the Board finds that the approval of this application will not be substantially detrimental to the public good. The Board finds that this is an existing one-bedroom apartment above a garage which has been in existence for over 60 years with no discernible detriment to the public. The Board further finds that the underutilization of this property constitutes economic waste and thus continuing the apartment use would provide an economic benefit to permit the readaptation and reuse of the site.

The Applicant also satisfied the second prong of the negative criteria. The Applicant has amply demonstrated that the proposed use would not substantially impair the intent and purpose of the Zone Planning and Zoning Ordinance. The Board notes that the site was recently rezoned to the Route 206 Redevelopment Plan. The Board also finds that the approval of this application will enable Andover Township to continue to be a stable and diverse community through the provision of a balanced land use pattern inclusive of diversity of housing types.

The Applicant's proofs and the Board's findings reflect the reconciliation analysis as required by Medici v. BPR Co., 107 N.J. 1, 21 (1987) and the Board concludes that the approval of this application will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

**Pre-Existing Non-Conforming Use Under The MLUL Pursuant to N.J.S.A. 40:55D-68**

Under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-5, a non-conforming use is defined as a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reason of such adoption, revision or amendment.

Furthermore, under N.J.S.A. 40:55D-68:

“any non-conforming use or structure existing at the time of the passage of an Ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”

The Applicant has provided proof, Exhibit A-3 in the form of an Andover Township property tax card that indicates that the apartment was lawfully constructed in 1957 which precedes the adoption of the Andover Township Zoning Ordinance. In addition, the documentation confirms renovation of the apartment in 1975. Thus, the apartment over the garage qualifies as a pre-existing non-conforming use which is entitled to continue as long as the use is not being expanded or enlarged. The Board is satisfied based on the proofs presented that the existing single-family apartment above the garage is not being expanded or enlarged.

The Board notes that it has granted d(1) use variance approval because residential apartments are not permitted in the Route 206 Redevelopment Zone. However, to the extent necessary, the Board also approves the apartment above the garage as a pre-existing non-conforming use under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-68.

**Ancillary “c” Variance Relief**

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power

to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the applicant to establish these criteria.

The Applicant requires ancillary “c” variance relief. More specifically, the Applicant requires variance relief from the following:

1. In accordance with the Route 206 Redevelopment Plan, the minimum side yard setback is 10 feet for each side, 5 feet is existing, and 9.6 feet is proposed.

2. Steep slope disturbance where in the steep slope category 15% to 24.99% a maximum disturbance of 15% is allowed and 18.5% is proposed and in slope category 25% to 34.99% the maximum disturbance allowed is 3% and 3.3% is proposed and in slope category greater than 35% the maximum disturbance allowed is 0% and 0.07% is proposed.
3. In accordance with the Andover Township Code a freestanding sign is required to be setback 12 feet from any lot line and the Applicant has agreed to an 8-foot setback from the lot line as requested by the Land Use Board.
4. In accordance with the Route 206 Redevelopment Plan, all loading areas are to be screened and the Applicant is not proposing any screening.
5. In accordance with the Route 206 Redevelopment Plan, sidewalks must be provided along all street frontages and no sidewalks are proposed.
6. In accordance with the Route 206 Redevelopment Plan, street lighting is required along street frontages and the Applicant is not providing any street lighting.

The Board has considered the request for variance relief under the Municipal Land Use Law under the c(1) analysis. The Board finds that there are exceptional topographic conditions and/or physical features which uniquely affect the Property. The Board finds that the Property is impacted by steep slopes. The Board finds that with respect to steep slope category between 15% and 24.99%, 15% maximum disturbance is allowed and 18.5% is proposed. Further, in regard to slope category 25% to 34.99%, the maximum disturbance allowed is 3% and 3.3% is proposed. The Board finds that the areas of impact are generally related to the steep slopes created by the existing septic disposal field and the construction of the proposed septic disposal field. The Board further finds the exceedance of the slope categories to be *de minimis* in this application and will pose no significant negative detriment to the public by permitting the steep slope disturbance as proposed.

The Board finds that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) that the Applicant has met both the positive and negative criteria for the granting of c(1) variance relief. The Board finds that due to the exceptional topographic conditions or physical



features existing which uniquely affect the property and the structures existing thereon that hardship has been proven which warrants the granting of c(1) variance relief. Thus, the Board finds that c(1) variance relief can be granted without substantial detriment to the public good and without substantial impairment of the Zone Plan and Zoning Ordinance.

The Board has examined the request for variance relief under the Municipal Land Use Law under the c(2) analysis. In Kaufman v. Planning Board for Warren Township, 110 N.J. 551, 563 (1988), the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

In regard to the request for variance relief for minimum side yard setback where 10 feet is required and 9.6 feet is proposed which is in regard to the newly renovated building and new side entry, the Board finds that the deficiency is *de minimis* and will be imperceptible to the public. In regard to the setback for the location of the freestanding sign, the Board finds that the minimum setback is 12 feet from the lot line and in this instance, the Applicant was willing to conform to the setback requirement. However, the Board felt that it made better planning sense to have the Applicant have an 8-foot setback for the freestanding sign which although would trigger variance relief would make the sign more visible to motorists traveling along Route 206 and would present a better public safety benefit. Thus, at the Board's request, the Applicant agreed to an 8-foot setback from the lot line in regard to the freestanding sign.

The Applicant seeks relief from the Route 206 Redevelopment Plan due to the loading area not being screened. The Applicant is not proposing screening of the loading area. The Board is satisfied that the deliveries will be made by delivery van and the deliveries will be made

during off work hours. The Class 5 Retail Establishment has proposed hours of operation of 9:30 a.m. to 9:00 p.m. The Board finds that under the circumstances with deliveries being made off-hours, the fact that deliveries are being made by vans and not much larger trucks, and the fact that the time of the deliveries will be short in duration, that it is appropriate to grant variance relief for the lack of screening of the loading area.

The Applicant requires variance relief in regard to sidewalks which are required to be provided along all-street frontages in the Route 206 Redevelopment Plan. Here, the Applicant is not proposing sidewalks. The Board finds that requiring the installation of sidewalks in this area would not facilitate or generate pedestrian traffic as the sidewalks would lead to nowhere and thus, permits the Board to grant “c” variance relief.

The Board also finds that the Applicant is not proposing street lighting which is unnecessary because the Applicant is proposing building mounted lights.

Based upon the proofs presented, the Board determined that the Applicant satisfied the positive criteria such that the granting of the application will promote the purposes of the Municipal Land Use Law. More specifically, the Board finds that the purposes of the Act would be advanced under the MLUL pursuant to N.J.S.A. 40:55D-2. More specifically, 2a) is satisfied because the approval of this application would promote the general welfare by providing a development that respects the existing topographic and environmental features on the site. Further, the approval of this application will promote the general welfare by providing a development that conforms to the Route 206 Redevelopment Zone requirements in all major categories. Further, 2i) is satisfied by providing a desirable visual environment with respect to the proposed building through creative development techniques. Also, 2g) is satisfied because the approval of this application results in providing sufficient space in appropriate locations for a variety of commercial uses and finally, 2m) is satisfied because the approval of this

application results in a more efficient use of land.

In addition, the Board finds that the goals of the Andover Township Master Plan were met and the approval of this application will result in the preservation and improvement of properties within the Route 206 Redevelopment Zone. More specifically, the Board finds that the approval of this application does not conflict with the Master Plan Goal to protect and maintain the prevailing rural character and unique sense of place of the Township with attractive non-residential uses. The approval of this application also satisfies the Master Plan Goal of establishing development densities and intensities at levels that do not exceed the carrying capacity of the natural environment and available infrastructure both existing and planned. Further, the approval of this application now enables the Township to provide for a reasonable balance among various land uses that respect or reflect upon the interaction and synergy of community life. Thus, the Board finds that the Applicant has satisfied the positive criteria in regard to the granting of ancillary “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

The Board finds that the proposed development of this site will present an opportunity for an adaptive reuse of the Property. The Board further notes that the approval of this application will enable the Applicant to take a piece of property that is currently underutilized and return it to a productive land use for a Class 5 Cannabis retail facility along with continuing the use of a one-bedroom apartment above the existing garage, thus, restoring the property to a more fully productive use. Furthermore, viable business development in the Township’s Route 206 Redevelopment Zone is vital to the overall welfare of the community.

Next, as to the negative criteria, the Board finds that variance relief can be granted without substantial detriment to the public good. Furthermore, ancillary “c” or bulk variance relief can be granted without substantially impairing the intent and purpose of the Zone Plan and

Zoning Ordinance. The Board also finds that the purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. The Board therefore finds that the negative criteria has also been satisfied and that it is appropriate to grant ancillary “c” or bulk variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

**Design Waiver Relief**

The Applicant requires design waiver relief from Section 131-37H of the Route 206 Redevelopment Plan which requires that a loading space shall have dimensions of 15 feet in width by 40 feet in length and in this instance, the Applicant is proposing a loading space of 10 feet in width by 20 feet in length. The Applicant has requested a much smaller loading space because the Applicant will receive deliveries from vans and not larger truck type vehicles. Further, the length of time for deliveries will be short in duration. Also, the deliveries will be made off times that is prior to the business commencing operation at 9:30 a.m. and after the business closes at 9:00 p.m.

The Applicant also requires design waiver relief from Section 131-37C of the Route 206 Redevelopment Plan which requires all parking areas to be curbed and no curbing is proposed.

The Board finds that it is appropriate to grant design waiver relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-51 in regard to Township Code Section 131-37L where all parking areas are to be curbed and the Applicant is proposing curb stops in lieu thereof. The Board finds that the Applicant is proposing curb stops which mitigates any negative detriment for not having curbing. The Board finds that the site is located in the Route 206 Redevelopment Zone. The Board finds that it is appropriate to grant design waiver relief.

Therefore, the Board concludes that the literal enforcement of the provisions of the

Ordinance would be impracticable or will exact undue hardship upon the Applicant because of peculiar conditions pertaining to the land in question and thus design waiver relief can be granted with respect to the size of the loading space and in regard to no curbing of the parking area.

### **Site Plan Approval**

The Board's authority in reviewing an application for site plan approval is limited to determining whether the development plan conforms with the zoning and the applicable provisions of the Site Plan Ordinance. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 228, 229 (1994); Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 581-582 (App. Div. 2002), certif. denied, 172 N.J. 357 (2002). Thus, ordinarily a denial of a site plan application would be a drastic action when the pertinent ordinance standards are met. Shim v. Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997).

### **Conclusion**

Upon consideration of the plans, testimony and application the Planning Board determines that the request for preliminary and final site plan approval, d(1) variance relief, Section 68 non-conforming use approval, ancillary "c" variance relief, and design waiver relief meet the minimum requirements of the Municipal Land Use Law, case law and Township Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested.

**NOW, THEREFORE, BE IT RESOLVED** by the Land Use Board of the Township of Andover, that the application of Andover Munsee Realty, LLC, for premises commonly known and designated as Block 134, Lot 26, as shown on the Tax Assessment Map of the Township of Andover, and located at 667 New Jersey State Highway 206, Andover, NJ in the Route 206 Redevelopment Zone, is determined as follows:

1. Preliminary site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46.

2. Final site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-50.
3. Variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(1) to permit a residential apartment above the garage.
4. Non-conforming use approval under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-68 in regard to the residential apartment above the garage.
5. Ancillary “c” variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) for steep slope disturbance and pursuant to N.J.S.A. 40:55D-70c(2) for minimum side yard setback for Cannabis Retail Facility and the freestanding sign, lack of screening for loading area, no street lighting along street frontage and no sidewalks along street frontage.
6. Design waiver relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-51 for parking areas that are not curbed and size of the loading space.

**IT IS FURTHER RESOLVED** that the above land use relief is granted subject to the following terms and conditions:

1. The development of the site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this Application.
2. The Applicant represents that all representations and stipulations made either by or on behalf of the Applicant to the Andover Township Land Use Board are true and accurate, and acknowledges that the Land Use Board specifically relied upon the Applicant’s stipulations in the Board’s granting of approval. If any representation or stipulation is false, this approval is subject to revocation.
3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Land Use Board at the time of the public hearing on December 5, 2023 and December 19, 2023.
4. The Applicant shall comply with all terms and conditions set forth in the Board

Engineer's Review Reports prepared by Cory L. Stoner, P.E., C.M.E. of Harold E. Pellow & Associates, Inc. dated November 20, 2023 and December 4, 2023. and as testified to during the hearing process.

5. The Applicant shall comply with the color pallets permitted in the Route 206 Redevelopment Plan in regard to staining of the cedar shakes which the Applicant has stipulated will be in substantial conformance with color pallet HC-71 of the Route 206 Redevelopment Plan.

6. The Applicant shall comply with Cannabis Regulatory Commission Regulations as well as any Township Regulations in regard to signage on the premises.

7. The Applicant shall comply with all licensing requirements of Andover Township and the State of New Jersey Cannabis Regulatory Commission.

8. The apartment above the garage shall not be rented out to anyone not associated with the Cannabis Retail Establishment.

9. The granting of this application is subject to Andover Township Construction Department approval.

10. The granting of this application is subject to Andover Township Fire Subcode Official approval.

11. The granting of this application is subject to Andover Township Soil Erosion and Sediment Control approval.

12. The granting of this application is subject to Sussex County Health Department Approval in regard to the septic system.

13. The granting of this application is subject to Sussex County Planning Board approval.

14. The granting of this application is subject to New Jersey Department of

Transportation approval.

15. The Applicant shall submit a Landscaping Plan the nature and sufficiency of which shall be subject to the review and approval of the Board Engineer and the Applicant shall use indigenous plants and shrubs.

16. The Applicant shall obtain, if required, a Road Opening Permit from Sussex County.

17. The Applicant shall submit updated plans as indicated on the record before the Land Use Board which shall be subject to the review and approval of the Board Engineer.

18. The existing large shed (yellow building) shall be repainted in accordance with the color pallet permitted under the Route 206 Redevelopment Plan and as represented on the record before the Land Use Board.

19. The Applicant shall provide one make Ready EV parking space.

20. The granting of this application is subject to and conditioned upon the Applicant opening and maintaining an escrow account with the Township of Andover and keeping the account current with sufficient funds for professional review and inspection fees.

21. This approval is subject to the payment in full by the Applicant of all taxes, fees, escrows, assessments and other amounts due and owing to the Township. Any monies are to be paid by the Applicant within twenty (20) days of said requests by the Board Secretary.

22. Certification that taxes are paid to date of approval.

23. Payment of all fees, costs, escrows due or to become due. Any monies are to be paid by the Applicant within twenty (20) days of said request by the Board Secretary.

24. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Andover, County of Sussex, State of New Jersey, or any other agency or entity having jurisdiction hereunder.



**VOTE ON APPLICATION**

Motion Introduced By: Olsen

Seconded By: Howell

In Favor: Skewes, Degan, Gilchrist, Olsen, Messerschmidt, Howell and Ordile

Opposed: None

**VOTE TO APPROVE RESOLUTION**

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Andover Township Land Use Board

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Stephanie Pizzulo, Board Secretary

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Paul Messerschmidt, Chairman

The undersigned Secretary certifies that the within Resolution was adopted by the Land Use Board of the Township of Andover on December 19, 2023, and memorialized herein pursuant to N.J.S.A. 40:55D-10g on January 16, 2024.

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Stephanie Pizzulo  
Land Use Administrator and  
Board Secretary

3450157.1 AND-103E Andover Munsee Realty, LLC Resolution Granting Preliminary & Final Site Plan Approval, "c" Variance Relief (A23-9) 1.16.24