

**BERNARDS TOWNSHIP
BOARD OF ADJUSTMENT
MINUTES
Regular Meeting
July 6, 2011**

The Chairman called the regular meeting to order at 7:30 p.m.

ROLL CALL:

Members present: Lasko, Orr, Plaza, Viola, Vogt, Harabedian, Piedici

Members absent: Ross

Members late: Rhatican (7:45 p.m.)

Board Attorney Steven Warner, Esq., and Board Planner David Schley were also present.

OPEN MEETING STATEMENT

“In accordance with the requirements of the Open Public Meetings Law, notice of this regular meeting of the Board of Adjustment of the Township of Bernards was posted on the bulletin board in the reception hall of the Municipal Building, Collyer Lane, Basking Ridge, New Jersey, was sent to the Bernardsville News, Bernardsville, NJ, the Courier News, Bridgewater, NJ, and the Star-Ledger, Newark, NJ and was filed with the Township Clerk all on January 10, 2011. We received no requests for individual notice.

“The following procedure has been adopted by the Bernards Township Board of Adjustment. There will be no new cases heard after 10:00 p.m. and no new witnesses or testimony heard after 10:30 p.m.”

Swearing-In of Kathleen (Kippy) Piedici, Alternate #2, filling the unexpired term of Robert Skea, two-year term expiring December 31, 2012.

Mr. Warner swore in Ms. Piedici. Mr. Orr welcomed her to the Board.

APPROVAL OF CHARGES AGAINST ESCROW ACCOUNTS

The motion was made by Mr. Lasko and seconded by Mr. Viola to approve the charges submitted by David Schley for June 2011, by Steven Warner, Esq. for May 2011, and by John Belardo, Esq. for May 2011

Roll call:

Aye: Lasko, Plaza, Viola, Vogt, Harabedian, Piedici, Orr

Motion carried

APPROVAL OF RESOLUTIONS

RESOLUTION – T-Mobile Northeast, LLC – Block 3604, Lot 4 – Use Variance, Preliminary and Final Site Plan Approval and Bulk Variances (denial)

The motion was made by Mr. Plaza and seconded by Mr. Harabedian to approve the resolution as drafted.

Roll call:

Aye: Plaza, Harabedian, Orr
(Mr. Lasko, Mr. Vogt, Mr. Harabedian and Ms. Piedici were ineligible to vote)

Motion carried

RESOLUTION – Jaworski, Jeanette & John – Block 4501, Lot 5 – Bulk Variance (denial)

The motion was made by Mr. Plaza and seconded by Mr. Vogt to approve the resolution as drafted.

Roll call:

Aye: Plaza, Viola, Vogt, Orr
(Mr. Lasko, Mr. Harabedian, and Ms. Piedici were ineligible to vote)

Motion carried

COMPLETENESS & PUBLIC HEARING – LIBERTY CORNER PRESBYTERIAN CHURCH – Block 9301, Lot 12 – 58 Church Street – Bulk Variances (Manse)

Vincent Bisogno, Esq. represented the applicant. He explained that the church has owned 58 Church Street for approximately 100 years and used it as a manse for their senior pastor. He stated that they want to demolish the house and build a new residence. He noted that the applicant had met with members of the Historical Society of Somerset Hills (HSSH) and with neighbors. He said Somerset County Planning Board requested a right-of-way (ROW) dedication of 30 ft on Church Street but the church preferred to grant the County an easement.

Mr. Rhatican joined the meeting.

Jim Helpinstill, Bernardsville, member of Liberty Corner Presbyterian Church Board of Trustees, and Mr. Schley were sworn in. He said that their new pastor needs a house with room for his three children and his mother who is handicapped. The Church looked for a house but could not find one that met his needs. He said the Church met with the HSSH Historical Preservation Committee and held a meeting with neighbors in October 2010. He presented as Exhibit A-1a and A-1b copies of two late 19th century photographs of a building they think is the manse. He also presented Exhibit A-2, an amended site plan with architectural drawings, revised since the application was filed.

The Board took a ten minute recess to look at these plans.

When the Board reconvened, Board members asked why the roof lines were changed on the revised plans and how certain they were that the photographs were of this building. Mr. Helpinstill said the photographs were found in the Church archives recently. He said the architectural revisions were based on these photographs.

Public hearing was opened for questions of this witness. The following residents spoke:

- Ann Parsekian, 11 Berta Place, asked about the number of church members who reside in Liberty Corner. She asked if the Church membership had been informed of these plans. She asked how the first floor bed room would be used when it was no longer needed for the current pastor's mother. She asked about the frequency of Church meetings to be held at the manse. She asked if the attic would be used for anything other storage. Mr. Helpinstill said he did not know how many Church members lived in Liberty Corner. He said a meeting was held in June 2010 to discuss the pastor's needs for a new manse and that a quorum of the church membership attended. He said the pastor anticipated holding monthly meetings at the manse. He said the attic would be used for storage and not as additional bedrooms.
- Thomas DeFeo, 54 Church Street, asked why the Church was proposing a new house when the existing house had been renovated so recently. Mr. DeFeo asked if the parking area behind the manse would be used for additional church parking as it had in the past. Mr. Helpinstill was unaware that it was used for parking. Mr. DeFeo asked if Mr. Helpinstill was aware of the Township's Master Plan.
- Lorraine Staples, 509 Lyons Road, asked about the size of the proposed manse, the date of the photograph (Exhibit A-1), the architectural style of the amended plans, and the current occupancy of the manse as well as the two homes the Church owns on Lyons Road. Mr. Helpinstill said the Church acquired 58 Church Street in 1900, the proposed architectural style was 1890s, and that 58 Church Street was currently vacant as was one of the houses on Lyons Road.
- Linda Arnold, 75 Church Street, said that she is a member of the Presbyterian Church in Liberty Corner and she had not been informed of the June 2010 meeting.
- Keri Samuels, 67 Church Street, asked if a new manse was part of the new pastor's job offer and if the Church had considered selling the current manse. Mr. Helpinstill said they could not find a house that met the pastor's needs.
- Thomas DeFeo, 54 Church Street, asked if a house for the pastor was part of the job offer.

Hearing no further questions, the public portion of this hearing on this testimony was closed.

Ken Szabo, Trak Associates, 137 Cambridge Lane, Bridgewater, NJ, was sworn in. He said he is a member of the Church's Board of Trustees and the principal of a construction renovation company. The Board accepted his testimony as fact testimony on the condition of the current manse.

Mr. Szabo said that he would be the contractor for the project. He stated that he is donating his time. He described the condition of the existing manse and said there was evidence of fire damage. He said there was a 1960s addition to the rear but there was no insulation in the walls or ceilings.

He stated that the cost to renovate was close to the cost to build a new house. Board members asked about the condition of the 1960s addition, the date of the fire damage, the amount of investigation he conducted, and if the Church had considered building an addition to the existing structure. Mr. Szabo said he did not open up walls and could not provide engineering testimony on the structural integrity of the house. He said an addition could not be built easily. It was noted that a variance would be required for such a project.

Public hearing was opened for questions of this testimony. The following residents spoke:

- Tom DeFeo, 54 Church Street, asked about the historic status of the manse since it is located in the Liberty Corner Historic District, the extent of fire damage, and what would be done to ameliorate existing water problems on the lot.
- John Morrell, 62 Church Street, asked if the Church had considered saving the house.
- Ann Parsekian, 11 Berta Place, asked Mr. Szabo about other projects he had worked on, the particular situation of this house, whether drawings for an addition had been produced, and the cost of removing lead paint in the house.
- Lorraine Staples, 509 Lyons Road, asked about the room height issues Mr. Szabo had mentioned, the relative costs of renovations versus new construction, and whether the new house would comply with the current front yard setback.
- Tom DeFeo, 54 Church Street, asked about building an addition to the house.
- Ann Parsekian, 11 Berta Place, asked about the condition of the siding, noting that it appeared to be cedar clapboard or cedar shakes in good condition.

Hearing no further questions, the public portion of this hearing on this witness' testimony was closed.

Mr. Orr announced that the applications filed by Millington Quarry for 43, 37, and 21 Keystone Court would be carried to August 3, 2011, no further notice required.
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Mr. Orr asked Mr. Bisogno if either of the two houses that the Church owns on Lyons Road had been considered for use as a manse. Mr. Bisogno said that 43 Lyons Road is occupied and the Church has not decided what to do with 511 Lyons Road.

William Hollows, P.E., Murphy and Hollows, Stirling, NJ, was sworn in. He presented Exhibit A-3, a rendered drawing of the variance plan. Mr. Hollows said the current site plan complied with the current front yard setback requirement of 75 ft but the house could be moved to fit with the existing 55 ft setback of most of the houses on Church Street. He said a drywell would be installed. He said the applicant would comply with the tree ordinance. He stated that the parking area provided space for two vehicles.

Mr. Hollows said the applicant received a letter on February 17, 2011 from Somerset County Planning Board requesting a ROW dedication of 30 ft along the entire frontage of

the lot. The applicant does not want to grant a dedication of land but will propose an easement to the County.

Mr. Hollows said the applicant would comply with Comments 3 to 13 of Mr. Schley's June 14, 2011 memo. Mr. Hollows said the proposed lot coverage would be 15.32% but noted that if the house was moved forward the lot coverage would be reduced. Mr. Schley noted that a new variance for front yard setback would be required; he also noted that an attached garage would create less coverage but a detached garage was consistent with the neighborhood.

Public hearing was opened for questions of this testimony.

- Dale Kelly, 50 Church Street, asked about building height.
- Tom DeFeo, 54 Church Street, asked about storm water management.
- Ann Parsekian, 11 Berta Place, asked about the variances requested and if planning testimony would be presented. She asked if Mr. Hollows was familiar with the Master Plan goals for historic preservation.
- Tom DeFeo, 54 Church Street, asked about other work Mr. Hollows had done in Liberty Corner.

Hearing no further questions, the public portion of this hearing on this testimony was closed.

Due to the lateness of the hour, the applicant agreed to carry the application to September 7, 2011 and granted an extension of time to act to September 30, 2011.

Comments by Members

Mr. Orr noted that the Township Committee has indicated that they do not want to revisit the Board's request to establish a Historic Preservation Committee.

The public meeting was adjourned at 10:38 p.m., there being no further business to discuss.

Respectfully submitted,

Frances Florio
Secretary to the Board

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

T-MOBILE NORTHEAST, LLC

Case No. ZB09-022

RESOLUTION

WHEREAS, T-MOBILE NORTHEAST, LLC (“T-Mobile” or the “Applicant”) has applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) for preliminary and final site plan approval and the following variances in connection with the proposed construction and installation of a wireless telecommunications facility, including a 120 foot high monopole designed as a flag pole and several equipment cabinets located within a 18 foot by 28 foot fenced lease area, on property designated as Block 3604, Lot 4 on the Official Tax Map of the Township of Bernards, more commonly known as 25 Stonehouse Road:

- (1) a d(1) use variance pursuant to Sections 21-10.6.a.1 and 21-17A.6.i.1 of the Land Development Ordinance, since the location of a wireless telecommunications facility is not a permitted use in a B-2 neighborhood business zone;
- (2) a d(6) variance for a proposed height of a wireless telecommunications facility of 120 feet, whereas the maximum height permitted for a principal structure in a B-2 neighborhood business zone is 35 feet, pursuant to Section 21-10.6.b and Table 402 of the Land Development Ordinance;
- (3) A variance for a proposed tower setback from any adjoining lot line of approximately 13 feet to the east side lot line and approximately 123 feet to the west side lot line, whereas

the required minimum tower setback is 144 feet, pursuant to Section 21-17A.6.d.1 of the Land Development Ordinance;

- (4) A variance for a proposed tower setback from a nonappurtenant building of approximately 15 feet to the north, approximately 17 feet to the south, and approximately 80 feet to the west, whereas the required minimum tower setback from a nonappurtenant building is 144 feet, pursuant to Section 21-17A.6.d.1 of the Land Development Ordinance;
- (5) A variance for a proposed distance between the tower and a residential use, measured to the residential lot line, of approximately 130 feet to the nearest residential use, which is Lot 10, Block 3604 (21 Columbia Road) to the northeast, whereas the required minimum distance between a tower and a residential use is 500 feet, pursuant to Section 21-17A.6.e.1(b) of the Land Development Ordinance;
- (6) A variance for a proposed distance between the tower and a municipal building, measured to the municipal lot line, of approximately 13 feet to Lot 5, Block 3604 (Bernards Township Community Service Building, 31 Stonehouse Road) to the east, whereas the required minimum distance between a tower and a municipal building is 500 feet, pursuant to Section 21-17A.6.e.1(b) of the Land Development Ordinance;
- (7) A variance for a proposed distance between the tower and vacant residentially zoned land of approximately 280 feet to the nearest vacant residentially zoned land, which is Lot 1, Block 3603 (18 Columbia Road) to the east, whereas the required minimum distance between a tower and vacant residentially zoned land is 500 feet, pursuant to Section 21-17A.6.e.1(b) of the Land Development Ordinance;

- (8) A variance for a proposed distance between the tower and nonresidentially zoned lands/uses of approximately 90 feet to the nearest nonresidential use, which is Lot 9, Block 3604 (17 Columbia Road) to the east, whereas the required minimum distance between a tower and nonresidentially zoned lands/uses is 144 feet, pursuant to Section 21-17A.6.e.1(b) of the Land Development Ordinance; and
- (9) A variance for a proposed tower height for a single user of 120 feet, whereas the maximum permitted tower height for a single user is 100 feet, pursuant to Section 21-17A.6.h.1 of the Land Development Ordinance; and

WHEREAS, three (3) public hearings were held on public notice on such application on November 11, 2010, February 17, 2011 and June 8, 2011, at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant and all objectors, the reports from consultants and reviewing agencies and all comment from the public, has made the following factual findings and conclusions:

1. The Applicant proposes to construct a wireless telecommunications facility in the rear yard of property presently occupied by Basking Ridge Electric and SavATree. The proposed facility includes a 120 foot high monopole designed to look like a flag pole, with six antennas located within the pole. The pole and several equipment cabinets are to be within an 18' x 28' fenced lease area located between two existing garage buildings. This rear portion of the property is presently used by the commercial occupants for vehicle maintenance, parking, and storage.

2. The Applicant proposes two antenna arrays, each consisting of three antennas, located at the 120 foot and 110 foot levels of the tower. The plans show space available for two potential additional arrays to be added at the 100 foot and 90 foot levels in the future.

3. A wireless telecommunications facility involving a new tower is a permitted use when located on property owned, leased or otherwise controlled by the Township. It is a conditional use when located in one of the five E (office) zones. A use variance is required to permit the proposed facility on non-Township-controlled property in a B-2 zone.

4. In zones where a tower is permitted, the maximum permitted height for one user is 100 feet. The proposed height of 120 feet would be permitted if the proposal was for two users. The Applicant proposed one user, with space provided for at least one additional user in the future.

5. The Township Environmental Commission by Memorandum, dated August 11, 2010, noted that it had no environmental concerns at this time.

6. The Applicant submitted a Radio Frequency (“RF”) report, dated March 1, 2010, prepared by Naeem Asghar. The Applicant previously had submitted an RF report prepared by Ben Shidfar (RF Engineer), dated August 27, 2009.

7. The Applicant submitted an RF Compliance Assessment and Report dated May 13, 2009, prepared by Pinnacle Telecom Group.

8. The Applicant submitted an Environmental Impact Assessment prepared by French & Parrello Associates, P.A., dated June 4, 2010.

9. The Applicant submitted a Freshwater Wetlands Preliminary Assessment Report also prepared by French & Parrello, dated June 11, 2010, opining that the construction of the

proposed wireless telecommunications facility will not be impacted by the regulatory requirements of the Freshwater Wetland Protection Act.

10. The Applicant submitted a Title Report for the subject premises prepared by Trans-County Title Agency, dated March 25, 2009.

11. The Applicant submitted a Survey of the subject premises prepared by French & Parrello, dated May 14, 2009.

12. The Applicant submitted a Site Plan also prepared by French & Parrello, dated May 12, 2009, and last revised July 21, 2010, same consisting of a cover sheet (C-01), a site map with elevations and details (A-01 through A-07, inclusive), and a landscape plan with details (LP-1 and LP-2).

13. The Board's professionals, Peter A. Messina, P.E., P.P., the Board Engineer, and David Schley, A.I.C.P./P.P., the Board Planner, both were duly sworn according to law.

14. Dr. Bruce Eisenstein, the RF expert retained by the Board, was duly sworn according to law. The Applicant stipulated on the record as to Dr. Eisenstein's qualifications as an expert in RF engineering.

15. Joseph Sullivan, 3228 Mattapan Avenue, Point Pleasant Boro, New Jersey, was duly sworn according to law, provided his background and credentials and was accepted by the Board as an expert professional engineer. Mr. Sullivan testified that he was the project engineer for the wireless telecommunication facility at issue. He referenced sheet A-01 of the Site Plan and testified regarding the description of the subject property and its surrounding area. Mr. Sullivan referenced sheet A-02 of the Site Plan and testified regarding a description of the site and the proposed wireless telecommunication facility installation. He testified that the utilities

would be run underground and that there would not be a generator, but rather just a backup battery for one hour capability.

16. Mr. Sullivan further testified that the facility would be unmanned and would require site visits by technicians approximately every 4 to 6 weeks for routine maintenance. He testified that there would be lighting recessed in the ground that would be directed upward to the flag portion of the monopole and that the light would be on a timer with an on/off switch so that it would not be on all night. Mr. Sullivan testified that there would be no vibration, noise, odor or any kind of noxious influences that would be elicited from the facility. He also testified at the tower would be sufficient to co-locate one or possibly two other carriers' facilities.

17. On questioning by Board Members, Mr. Sullivan estimated the pole width as approximately 42 inches at the base and approximately 20 inches at the top. He testified regarding the proposed tower setbacks. Finally, Mr. Sullivan, on behalf of the Applicant, stipulated to all of the engineering items in the Board Planner's November 10, 2010 memo as conditions of approval should the Board so desire.

18. Daniel Penesso, 4 Sylvan Way, Parsippany, New Jersey, was duly sworn according to law, provided his background and credentials and was accepted by the Board as an expert in radio frequency engineering. Mr. Penesso introduced into evidence as Exhibit A-1, a colorized map dated November 11, 2010 entitled "Coverage Provided from the Existing T-Mobile On Air Sites". He testified that Exhibit A-1 shows T-Mobile's existing coverage in and around Bernards Township. Mr. Penesso also testified that he presented to Dr. Eisenstein actual drive-test data based upon a continuous wave (CW) drive-test performed by the Applicant's representatives.

19. Mr. Penesso introduced into evidence as Exhibit A-2, a 7 page compendium of propagation maps containing the results of the CW drive-test with a comparison requested by Dr. Eisenstein between the coverage at -85 versus -95 dBm. Mr. Penesso testified that -76 dBm constitutes reliable in building coverage and -84 dBm is the threshold for reliable in-car coverage. The Applicant clarified that it was designing the network for in-car coverage (i.e., at -84 dBm) rather than in-building coverage (i.e., at -76 dBm).

20. Mr. Penesso testified that the Applicant is licensed by the FCC to operate within New Jersey, New York and Connecticut and that the FCC has allocated to it two bands, the 1,900 megahertz band, which is its GSM (global system for mobile) band and a higher frequency band at 2,100 megahertz, which is utilized for its UMTS (universal mobile telephone service) network. The Applicant testified that the coverage maps show the gap at 1,900 megahertz and that, had the Applicant shown the coverage at 2,100 megahertz, the gap in coverage would have been even greater.

21. The Board RF expert, Dr. Eisenstein, testified that the FCC standard for coverage as set forth in the 1999 Telecommunications Act is that the Applicant should maintain a level of service that is “substantially better than mediocre”. He explained that, in his experience, in this part of New Jersey and the other areas that he has been in, a power level of -85 dBm accomplishes this standard.

22. Mr. Penesso, with reference to the coverage maps, identified the existing on-air sites (green dots) and the proposed future sites (blue dots). He then identified the existing coverage gaps (white area) and the coverage anticipated by the installation of the proposed facility.

23. Mr. Penesso testified that the Applicant would install its antennae at the 110 foot and 120 foot levels. On questioning by the Board, Mr. Penesso conceded that it was questionable whether even one co-locator could install its antennas below the Applicant's antennas on the monopole. Mr. Penesso further testified that, to his knowledge, there was no potential co-locator who had approached T-Mobile.

24. The Applicant conceded that it would be reasonable for the Board to require the Applicant to establish that it is at least viable that a second carrier could co-locate on the facility. Dr. Eisenstein suggested that the Applicant could design the foundation and base of the monopole so as to accommodate a height of 140 feet, but only build to 120 feet as proposed, such that the base of the facility will be structurally sufficient to support the additional height and additional co-locator at a later date. The Board Planner, Mr. Schley, testified that the Board had followed such a procedure in the past and then granted variance relief to subsequent co-locators under such circumstances. The Applicant stipulated accordingly.

25. Mr. Penesso testified that there were no nearby structures of sufficient height on which the Applicant could co-locate its facility and still provide the necessary coverage to satisfy the existing coverage gap, nor could it do so from an installation in any one of the "E" office zones, since no such zone was within sufficiently close proximity to the existing coverage gap to satisfy same. Mr. Penesso testified that he had no concern with the proposed antennas interfering with any of the electronic devices that may be operating in the immediate area. He testified that all of the Applicant's equipment and power levels will be FCC compliant.

26. Dr. Eisenstein concurred with the opinions of the Applicant's experts that a gap exists for T-Mobile coverage due primarily to the topography of the area and that the proposed

facility would alleviate a portion of the coverage gap, with the Applicant proposing at least four additional sites to satisfy the rest of the existing coverage gap. Mr. Penesso testified that the Applicant designed the site to maximize coverage and thereby minimize the number of additional sites that the Applicant would need in the future.

27. Marc Harris, 14 Ridgedale Avenue, Cedar Knolls, New Jersey, was duly sworn according to law, provided his background and credentials and was accepted by the Board as an expert in the field of RF compliance. Mr. Harris testified that the anticipated RF emissions from the proposed facility would be less than 1/10th of 1% of the maximum permitted RF emissions by the FCC. He further testified that the addition of 4 to 5 co-locators on the proposed facility would result in a cumulative RF emission that still would be less than 3% of the FCC's maximum, and Dr. Eisenstein opined that it probably would be approximately one-half of even that amount.

28. The Applicant, through its counsel, introduced into evidence as Exhibit A-4 (the designation Exhibit A-3 was skipped inadvertently) a copy of a letter dated January 5, 2011 from Township CFO/Administrator Bruce D. McArthur to the Applicant's counsel responding to the Applicant's inquiry if the Township was interested in leasing the adjacent (to the west of the subject lot) property owned by the municipality to the Applicant to construct a wireless telecommunication facility. The lot immediately adjacent to the west of the subject lot is owned by the Township of Bernards, with an address of 31 Stonehouse Road (Block 3604, Lot 5), at which is located the Township's Community Service Center (the "Community Service Center Property"). The relevant portion of Exhibit A-4 containing the Township's response reads

“Because there is a pending application before the Zoning Board, the Township does not feel it is appropriate to entertain your request at this time.”

29. Joseph Sullivan, remaining duly sworn, testified regarding the availability of sufficient space within the proposed equipment compound for a co-locator’s equipment and further that the proposed tower could be extended higher in the event that a co-locator could not mount its antennas below the T-Mobile antennas.

30. Mr. Sullivan identified an approximately 20 foot by 10 foot area immediately adjacent and to the north of the proposed equipment compound for the location of an additional equipment shelter, or pad for outdoor equipment cabinets, of a co-locator. Mr. Sullivan introduced into evidence as Exhibit A-5 a revised version of Exhibit A-1, showing the 20 foot extension of the proposed monopole and the change in the diameter of the base from 2 ½ to 3 feet. Mr. Sullivan further testified that the Applicant received a letter of interpretation (LOI) from DEP indicating an absence of wetlands and wetland buffers within the proposed limits of disturbance.

31. Ronald Reinertsen, P.P., was duly sworn according to law, provided his background and credentials and was accepted by the Board as an expert in land use planning. Mr. Reinertsen testified that he had reviewed and was familiar with the Township Land Use Ordinances and visited the proposed wireless telecommunication facility site. He described the site as primarily residential, north of the New Jersey Transit right-of-way and located in the B-2 neighborhood business zone. He characterized it as a mixed-use area with residences to the north and the south and a train station with transit-oriented development along Stonehouse Road and Lyons Corner.

32. Mr. Reinertsen further testified that there were 4 or 5 similar lots adjacent to the subject lot, including the Community Service Center Property. He recognized that, since the proposed lot is not owned by the municipality, the Applicant requires a d(1) use variance, whereas the same would not be required if the Applicant sought to install the proposed facility on the adjacent Community Service Center Property.

33. On questioning by the Board Attorney, Mr. Reinertsen conceded that the Community Service Center Property was almost indistinguishable from the subject lot, such that the Community Service Center Property was at least as suitable a site for the proposed facility as the subject lot. He conceded that the Community Service Center Property was even more suitable than the subject lot, since the Applicant did not require a variance for the Community Service Center Property, assuming that it was available and further assuming the validity of the ordinance excluding it from the requirement of obtaining variance relief.

34. Mr. Reinertsen opined that the Applicant had satisfied both the “positive” and “negative” criteria for d(1) use and d(6) height variance relief for the proposed facility.

35. Mr. Reinertsen referenced a Visual Impact Study, dated January 3, 2011, prepared by Pennoni Associates, Inc. and submitted to the Board more than 10 days prior to the hearing date. Mr. Reinertsen testified regarding a balloon test conducted by Pennoni on October 1, 2009 in order to create the prior visual impact exhibits. He then testified that the Applicant conducted a crane test on December 4, 2010 as a result of the recommendation for same by the Board during the November 11, 2010 public hearings. He testified that the crane test provided the opportunity to supplement the original visual impact study with additional photographs contained within this exhibit. Mr. Reinertsen compared side-by-side the photo simulations from

the October 1, 2009 balloon test with those created from the December 4, 2010 crane test, taken from various locations at various distances from the proposed facility. He concluded that there was no difference between the new photo simulations based upon the crane test and the old photo simulations based upon the balloon test.

36. On questioning by a Board Member, Mr. Reinertsen conceded that all of his opinions with respect to the “positive” and “negative” criteria would be the same for the adjacent Community Service Center Property.

37. Mr. Reinertsen introduced into evidence as Exhibit A-6, a series of 3 photographs that he took on December 4, 2010 during the crane test from the new Rock Ridge Court cul-de-sac. He testified that the photographs indicate that the proposed facility would not be visible therefrom.

38. A member of the public introduced into evidence as Exhibit O-1, a printout of a coverage chart from T-Mobile’s website, indicating that there is coverage in the subject gap area. Dr. Eisenstein explained that these websites are “sales sites” and the maps therein often significantly overstate the amount of coverage for a particular area as compared to what an engineer would want to design a network for. He explained that the Exhibit O-1 map had quite a large scale as compared to the detailed coverage area set forth in Exhibit A-1, and that the Exhibit O-1 map did not contain graduated power levels such that it is difficult, if not impossible, to utilize such a map for anything other than a “sales pitch”.

39. Reinertsen testified that there would be absolutely no difference from a RF point of view whether the proposed facility were located on the subject lot or the immediately adjacent Community Service Center Property.

40. Keith Coppins, New Haven, CT, was duly sworn according to law. Mr. Coppins testified that he works for Phoenix Partnership, LLC and has worked for T-Mobile as a consultant for site acquisition for approximately 14 years. He testified that he began the search for the site for the subject facility in late 2007 or early 2008.

41. Mr. Coppins testified that he recalled coming to the Township municipal building during that timeframe with the intention of inquiring whether the Township would be interested in leasing the Community Service Center Property for the location of the subject facility. He could not recall the date or location of his visit, but did recall that it was during the day time. He testified that he spoke with the tax assessor who directed him to another male municipal employee whose name he could not recall. He testified that this unnamed employee told him that he was not the first person to inquire of the Township's interest in leasing the Community Service Center Property and the Township was not interested in doing so. He testified that as a result, the Applicant decided to pursue adjacent Lot 4 owned by Basking Ridge Electric.

42. On questioning by Board Members, Mr. Coppins conceded that he had no written communication either to, or from, the Township regarding this alleged inquiry or response, nor could he provide even the title of the employee of whom he allegedly verbally inquired. He conceded that it would be his normal business practice to make a written request and/or obtain a written reply, but that in this case he had neither, nor did he even have a memo or note in the file.

43. Two nearby residential property owners testified in opposition to the application.

DECISION

44. After reviewing the evidence submitted, the Board finds that the Applicant has failed to satisfy the “particular site suitability” prong of the “positive” criteria for the requested variance relief pursuant to N.J.S.A. 40:55D-70d.

45. N.J.S.A. 40:55D-70d governs use variances and provides, in relevant part, that a land use board may:

(d) In particular cases for special reasons, grant a variance to allow departure from regulations...

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

46. An applicant for variance relief must prove both the “positive” and “negative” criteria. Sica v. Board of Adjustment of Twp. of Wall, 127 N.J. 152, 156 (1992). The positive criteria require proof of “special reasons,” and the negative criteria require proof that the variance will not cause “substantial detriment” to the public good or “impair the intent and the purpose of the zone plan.” N.J.S.A. 40:55D-70d; Sica, supra, 127 N.J. at 156.

The d(1) Use Variance – Positive Criteria:

47. In Smart SMR v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 329 (1998), the New Jersey Supreme Court held that a wireless telecommunications facility does not constitute an inherently beneficial use, since some sites are better suited than others for the location of towers and monopoles. See also Cell South of N.J. v. Zoning Bd. of Adjustment of West Windsor Twp., 172 N.J. 75, 84, 90 (2002) (reaffirming Smart SMR). Therefore, an

applicant seeking to install a wireless telecommunication facility must, in order to satisfy the positive criteria, show both that the use promotes the general welfare and that the site is particularly suited for the use. Smart, supra, 152 N.J. at 331-32.

48. The Smart Court held that the issuance of an FCC license should suffice for a carrier to establish that the use promotes the general welfare. Smart, supra. 152 N.J. at 336. To demonstrate that a site is “particularly suited” for the installation of the telecommunication facility, an applicant must first show need for the facility at that location by establishing that (1) the existing capacity is inadequate and (2) the proposed facility will redress the lack of capacity. An applicant must also demonstrate that it made reasonably diligent efforts to find the least intrusive (from a zoning and planning perspective) site and means for filling the coverage gap with a reasonable level of service.

49. First, it was not disputed that the Applicant is an FCC licensed wireless telecommunication provider and, thus, the Board finds that the proposed facility promotes the general welfare. Second, the Board finds that the Applicant has demonstrated both that (1) there exists a sufficient gap in coverage and (2) the proposed facility will redress the existing coverage gap. However, the Board finds that the Applicant has not met its burden of proving that it made sufficiently diligent and good faith efforts to ensure that the site chosen was the least intrusive site from a zoning and planning perspective for redressing the existing coverage gap with a reasonable level of service.

50. To establish a “gap” in coverage, an applicant must prove that users of the wireless service at issue are unable to either connect with the land based national telephone network or are unable to maintain a connection capable of supporting “reasonably uninterrupted

communication.” Cellular Tel. Co. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj., 197 F.3d 64, 70 (3d Cir. 1999). Moreover, a “gap” in service must be more than merely *de minimis* dead spots in coverage within a larger area. New York SMSA v. Mendham Zoning Bd. of Adj., 366 N.J. Super. 141, 161 (App. Div.), *aff’d o.b.*, 181 N.J. 387 (2004).

51. The Board finds that the unrefuted expert evidence, including the testimony of its own RF expert, demonstrated that both (1) there exists a sufficient gap in T-Mobile’s wireless telecommunications coverage and (2) the proposed facility would fill the gap in service.

52. The Board finds, however, that the Applicant has failed to demonstrate that there does not exist an RF viable, alternative location that is less intrusive than the subject site from a zoning and planning perspective. In Cellular Tel. v. Ho-Ho-Kus Board of Adj., *supra*, 197 F.3d at 70, the court explained that a cellular provider has the “burden of proving that the proposed facility is the least intrusive means of filling [a] gap with a reasonable level of service.” Moreover, in Northeast Towers, Inc. v. Zoning Bd. of Adj., 327 N.J. Super. 476, 497-498 (App. Div. 2000), the court recognized that site suitability is to be determined from the point of view of both the applicant and the municipality. Thus, the Applicant was obligated to make a good faith, reasonable investigation and undertake diligent efforts to exhaust possible alternative locations for siting the proposed wireless telecommunication facility. See NY SMSA v. Bd. of Adj. of Bernards, 324 N.J. Super. 149 (App. Div. 1999) (upholding board’s denial of variance for installation of cell tower, in part, for failure to demonstrate that there was no other suitable or adequate site that could meet the applicant’s needs despite that the applicant had examined 27 other sites). See also, New York SMSA v. Zoning Bd. of Adj. of Tenafly, 2010 N.J. Super.

Unpub. LEXIS 1104 (App. Div. 2010) (upholding board's denial of variance for installation of cell tower for failure to diligently investigate and exclude alternative location).

53. Pursuant to the Township Land Development Ordinance, wireless telecommunications facilities are permitted uses on property owned or leased by the Township. Specifically, Section 21-17A.5.b.1 of the Land Development Ordinance, relating to the siting of wireless telecommunication towers and antennas, provides as follows:

b. Permitted Uses. The following uses are specifically permitted:

1. Antennas or towers located on property owned, leased or otherwise controlled by the Township of Bernards, provided that a license or lease authorizing such antenna or tower has been approved by the Township of Bernards. However, the Township may, as a condition of such lease, require site plan approval. The decision to extend such leases to an applicant shall be vested solely with the municipality; shall not be governed by this section and shall, to the extent applicable, be subject to the bidding requirements of the Local Public Contracts Law of the State of New Jersey. The Township, in its absolute discretion, reserves the express right to deny all use of its property for antennas or towers. Preexisting towers and antennas are exempt from the application of this subsection.

54. The site proposed by the Applicant at 25 Stonehouse Road is immediately adjacent to the west of the Community Service Center Property. Based upon the radio frequency engineering testimony provided by the Applicant's own RF experts, and as referenced on page 8 of the Radio Frequency Report submitted by the Applicant, the Community Service Center Property has been RF approved as a viable candidate for the location of the proposed wireless telecommunications facility. Moreover, the Applicant's own planner was constrained to concede that the Community Service Center Property was at least as suitable a site as the subject lot, and by virtue of it not requiring variance relief an even less intrusive site.

55. Based upon the evidence presented, the Board concludes that the Applicant failed to prove that the Community Service Center Property was not available as an alternative location that is less intrusive than the subject lot. The Board finds that the December 2, 2010 inquiry by the Applicant's counsel and the January 5, 2011 response from the Township Administrator (Exhibit A-4) did not satisfy the Applicant's obligation to make reasonably diligent efforts to exclude the Community Service Center Property as a viable alternative location. The Board finds that the Township's response was not an expression of a lack of interest in leasing the Community Service Center Property to the Applicant, but rather an expression that the Township could not entertain the request in light of the pendency of the application before the Board to construct the facility on the subject Lot 4 after the Applicant had negotiated a lease agreement with the owner thereof. The Township Committee likely decided that it should not consider the request due to, among other things, concerns with a potential claim by the owner of subject Lot 4 alleging tortious interference with its lease agreement with the Applicant.

56. The Board further finds that the vague and unsupported testimony of fact witness Mr. Coppins regarding an effort in late 2007 or early 2008 to communicate an interest in the Community Service Center Property to someone at the Township's municipal offices was not sufficient to satisfy the Applicant's burden of proving reasonably diligent efforts to exhaust this admittedly less intrusive alternative site. The Board recognizes that, *inter alia*, the Applicant's inquiry would have had to have been made to the Township Committee (i.e., municipal governing body) and Mr. Coppins could not have spoken with a member thereof (*i.e.*, someone with the authority to respond to the request on behalf of the Township) since the Committee

Members are volunteers who only meet in the evenings in open public meetings and not municipal employees who work out of the municipal building during the daytime hours.

57. In sum, the Board finds that the Applicant has failed to meet its burden of proving that it made a good faith, reasonable investigation and undertook reasonably diligent efforts to ensure that the subject site was the least intrusive location from a zoning and planning perspective for filling the existing coverage gap with a reasonable level of service.

The d(6) Height Variance - Positive Criteria:

58. With respect to the d(6) height variance, the Board finds that the Applicant has demonstrated “special reasons” sufficient to warrant a grant of the requested variance relief.

59. Zoning boards of adjustment are given exclusive jurisdiction over applications for height variances where the height of a proposed structure exceeds by either 10 feet or 10% the maximum height permitted in the district for a principal structure. N.J.S.A. 40:55D-70(d)(6). Height restrictions, like restrictions on density, bulk or building size, can be techniques for limiting the intensity of a property’s use. See N.J.S.A. 40:55D-65(d) (zoning ordinance may regulate bulk, height, building size, lot coverage, lot size, floor area ratios and employ “other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air”). The primary purpose of the subject height limit is to provide adequate light, air, and open space, and to promote a desirable visual environment, all of which are legitimate purposes of land use regulation. See N.J.S.A. 40:55D-2(c) and (i).

60. The New Jersey Supreme Court has recognized, in the context of cellular towers and monopoles, that an excessively tall structure can aesthetically impair a municipality. See Smart SMR, *supra.*, 153 N.J. at 331 (because of their excessive height, radio transmission towers

and monopoles can be a “cause of concern”). To establish the requisite “special reasons” for a height variance pursuant to d(6), an applicant must demonstrate that the taller than permitted structure would nonetheless be consistent with the surrounding neighborhood and not offend any of the purposes of the height limitation. The appellate court in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41, 53 (App. Div. 2004), analogized the standard of proof to that required for d(3) conditional use and d(4) Floor Area Ratio (FAR) variances, thus requiring a showing that the site will accommodate the problems associated with a greater structure height than that permitted by the applicable zoning ordinance provision.

61. The Board finds that the Applicant has met its burden of demonstrating “special reasons” sufficient to entitle it to d(6) height variance for the proposed 120 foot tall monopole at the subject site. Accordingly, the Board finds that the subject site can accommodate the detriments associated with the excessive height of the proposed wireless telecommunication facility. As such, the Board finds that the Applicant has proven the requisite “special reasons” for d(6) height variance relief.

The Negative Criteria:

62. The Board finds that the Applicant has proven the “negative” criteria.

63. The focus of the “substantial detriment” prong of the negative criteria is on the impact of the variance on nearby properties. The focus of the “substantial impairment” prong of the negative criteria is the extent to which a grant of the requested variance would constitute an arrogation of the governing body and planning board authority to zone property by legislation rather than through exceptions.

64. The Board must weigh the factors outlined in Sica, supra, 127 N.J. at 166, and reiterated in Smart SMR, supra, 152 N.J. at 332, to determine whether “on balance, the grant of a variance would cause a substantial detriment to the public good.” See generally, New York SMSA Ltd. Pshp. v. Board of Adj. of Twp. of Bernards, 324 N.J. Super. 149, 161 (App. Div.), certif. denied, 162 N.J. 488 (1999).

65. The Sica “balancing test” requires the following analysis:

First, the Board should identify the public interest at stake... Second, the Board should identify the detrimental effect that will ensue from the grant of the variance... Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use... Fourth, the [b]oard should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

66. First, the Board identifies the public interest at stake as “effective coverage for one of several cellular telephone providers operating in the municipality”. The Board finds that such public interest is sufficiently compelling.

67. Second, the Board finds that the location of the proposed monopole and antennae facilities in the area of the subject lot constitutes an intrusion of a commercial project in a mixed-use, partially residential neighborhood. The Board finds that the anticipated detriments associated with this installation will be primarily aesthetic in nature.

68. Third, the Board finds that reasonable conditions can be imposed to sufficiently alleviate the negative aesthetic effects of the proposed tower and equipment compound in the area of the subject lot. See New York SMSA v. Board of Adj. of Bernards, supra., 324 N.J. Super. at 160 (finding that a cellular provider was not entitled to use variance relief for the installation of a cell tower where the proposed location’s topography precluded effective

screening and made unavoidable the negative effect of the unsightly tower on nearby residences).

69. Fourth, and finally, in weighing the benefits and the detriments, the Board finds that the public interest at stake is sufficiently compelling and there are available adequate mitigating conditions such that the benefits to be derived from the subject facility outweigh the detriments associated therewith. Accordingly, the Board finds that the Applicant has proven the requisite “negative” criteria.

The Bulk Variances:

70. As to the requisite bulk variances for the proposed tower setbacks and single user tower height, the Board finds that these “c” variances are subsumed within, and ancillary to, the “d” variance relief sought by the Applicant. As such, the Board need not make independent findings as to whether the Applicant would be entitled to such relief separate and apart from the “d” variance relief sought.

The Site Plan Approval:

71. Finally, the Board concludes that the Applicant’s request for preliminary and final site plan approval should be denied, for the reasons set forth above.

WHEREAS, the Board took action on this application at its meeting on June 8, 2011, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g).

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 8th day of June, 2011, that the application of T-Mobile Northeast,

LLC, for variance relief and preliminary and final site plan approval, as aforesaid, be and is hereby denied.

ROLL CALL VOTE:

Those in Favor: Lasko, Rhatican, Vogt

Those Opposed: Plaza, Harabedian, Orr

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards, at its meeting on July 6, 2011, as copied from the Minutes of said meeting.

FRANCES FLORIO, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: _____, 2011

**ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF BERNARDS**

**JOHN AND JEANETTE JAWORSKI
Case No. ZB11-005**

RESOLUTION

WHEREAS, JOHN AND JEANETTE JAWORSKI (the “Applicants”) have applied to the Zoning Board of Adjustment of the Township of Bernards (the “Board”) for the following variance in connection with the construction of an approximately 800 square foot, irregularly shaped inground swimming pool with attached 50 foot spa and 1,900 square foot patio in the rear yard of property identified as Block 4501, Lot 5 on the Tax Map, more commonly known as 93 Emily Road:

A variance for locating an inground swimming pool in front of the rear building line of existing residential structures on adjoining lots, in violation of Section 21-18.1 of the Land Development Ordinance; and

WHEREAS, a public hearing on notice was held on such application on June 8, 2011 at which time interested citizens were afforded an opportunity to appear and be heard; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicants and the reports from consultants and reviewing agencies, has made the following factual findings and conclusions;

1. The Board reviewed the application and deemed it to be complete.

2. The subject property is located on the corner of Emily Road and Chapin Lane and is an approximately 2.41 acre undersized (3 acre minimum) lot. There presently exists on the property a two-story, single-family dwelling with associated pavers/patio/decking and driveways and a children's play area.

3. The Applicants propose constructing an approximately 800 square foot, irregularly shaped inground swimming pool, with attached 50 foot spa and related patio in the rear yard, but not behind the rear building line of multiple dwellings on lots adjacent to the subject lot.

4. The Applicants' proposal is depicted on a Pool Grading Plan (one (1) sheet) prepared by Richard A. Nusser, P.E., dated December 16, 2010.

5. The Environmental Commission submitted a Memorandum, dated April 20, 2011, wherein the Commission commented that (1) due to the wetlands on this property, the Commission would like to see a wetlands delineation report, and would also like the Board to know that according to the Bernards Township 2003/2004 Natural Resource Inventory, this property is an area for endangered species; specifically critical area Rank III for the wood turtle and Rank IV for the red shoulder hawk, and (2) Township residents should use the Best Management Practices available when discharging pool water, same being found on the N.J.D.E.P website referenced therein.

6. The subject lot is located in the R-1 (3 acre) residential zone. The pool location variance falls within the purview of N.J.S.A. 40:55D-70(c).

7. David Schley, A.I.C.P./P.P., the Board Planner, was duly sworn according to law.

8. John Jaworski, 93 Emily Road, one of the Applicants, was duly sworn according to law.

9. Charles Iuliano, the Applicants' landscape architect and planner, was duly sworn according to law. Mr. Iuliano provided his qualifications and credentials and was accepted by the Board as an expert in landscape architecture and planning.

10. Mr. Jaworski identified what he contended to be four (4) bases for the Board to grant the requested pool location variance relief. First, Mr. Jaworski testified that his two sons have been diagnosed as "high functioning autistic" and are classified accordingly in the Bernards Township school system. He argued that if he and his wife were required to locate the pool further to the rear of the dwelling this would have a negative impact on their children's safety since it would be more difficult for them to supervise their activities. Second, Mr. Jaworski testified that several neighbors have pools, all of which are located close to the rear of their dwellings, such that if the Applicants were constrained to locate the pool in the middle of their rear-yard, this would negatively impact their property value. Third, Mr. Jaworski testified that there is an existing drainage easement running along the left side of the property and a conservation easement running along the rear-yard. He contended that these constraints on his property restrict, to some degree, the area within which the proposed pool can be located. Fourth, Mr. Jaworski opined that the proposed pool location would afford his neighbors more quiet enjoyment of their property since the subject lot is widest and, in his opinion, has greater landscape buffering at the proposed location versus further to the rear of the property.

11. Mr. Jaworski testified that he met and discussed the proposal with his adjoining neighbors and that the Hills, who own Lot 6 immediately adjacent to the east of the subject property, had no objection. By contrast, Mr. Jaworski testified that he had

two meetings with the Darbys, owners of Lot 4 immediately adjacent to the west of the subject property, and despite negotiations the Darbys remain opposed to the proposal.

12. Susan Rubright, Esq. entered her appearance as counsel for Thomas and Brenda Curnin, the owners of Lot 8 immediately adjacent to the south and rear of the subject property. On cross-examination, Mr. Jaworski conceded that he was aware that the constraints existed on his property when he purchased it but he contended that he did not know all of the implications of same.

13. Mr. Iuliano, introduced into evidence as Exhibit A-1 a three (3) sheet compendium constituting a conceptual landscape plan to provide screening for the Darbys at adjacent Lot 4. Mr. Iuliano testified that the subject lot is particularly narrow and is constrained by a 20-foot wide drainage easement along the easterly property line, and that 40% of the rear-yard is subject to an existing conservation easement. He further testified that, due to questions regarding the extent of the wetlands and wetlands buffer, the subject property may be further constrained.

14. The Applicants stipulated, as a condition of approval, to installing landscape buffering consistent with the conceptual plan submitted as Exhibit A-1 and providing the same level of landscape buffering on the east side property line for the benefit of the Hills as owners of Lot 6 as well.

15. The Applicants also stipulated to the following conditions of approval:

(1) The Applicants shall post sufficient funds with the Township to satisfy any deficiency in the Applicants' escrow account;

(2) The Applicants shall submit soil erosion & sediment control measures and stormwater infiltration measures in accordance with Section 21-42.1.f.2, and the measures shown on the plans shall be subject to further review and approval by the Township Engineering Department prior to issuance of a building permit;

(3) The Applicants shall verify the limits of wetlands and wetland buffer shown on the plans by a qualified consultant, and these areas shall be contained within a conservation easement granted to the Township, which easement shall be prepared by the Township Attorney, executed by the Applicants, and recorded with the Somerset County Clerk prior to issuance of a building permit. The easement boundary must be delineated with Township standard markers, which must be installed, or bonded for, prior to issuance of a building permit;

(4) All details relating to the portion of the proposed pool fencing that is located within the existing drainage easement that traverses the rear yard shall be subject to further review and approval by the Township Engineering Department prior to the issuance of a building permit;

(5) The Applicants shall ensure that the westerly corner of the proposed pool fence that extends about 15 feet into the front-yard area is 4 feet high and at least 50% open; and

(6) The Applicants shall utilize the Best Management Practices available when discharging pool water as indicated on the N.J.D.E.P. website designated in the Environmental Commission's Memorandum of April 20, 2011.

16. Both Ms. Rubright, on behalf of the Curnins, and Stephen Darby, one of the owners of Lot 4, cross-examined Mr. Iuliano.

17. Stephen Darby and Paula Darby, 40 Chapin Lane, the owners of Lot 4 immediately adjacent to the west of the subject property, were duly sworn according to law. The Darbys testified that their house was the second house built in the neighborhood and they purchased it because of the neighborhood's rural setting. They testified that they have resided there for more than 17 years and raised their 2 children at the property. The Darbys testified that, despite meeting twice with the Jaworskis, they came to the conclusion that the proposed pool location would have a substantially negative impact on their property and their enjoyment of it. They testified that the proposed location of the pool fence would be only approximately 8 feet from their driveway and that the location of the pool in their front/side-yard would be a substantial visual impairment and cause significant noise.

18. The Darbys introduced into evidence a series of seven (7) photographs, as Exhibits O-1 through O-7, inclusive. Mrs. Darby testified that she took all of the photographs approximately 3 weeks before the hearing. Mrs. Darby explained that the photographs on orange poster board indicated views of the requested or “variance” location of the proposed pool (Exhibits O-1 through O-5, inclusive) and that the photographs on blue poster board indicated views of a “conforming” location of the proposed pool, i.e., to the rear of the adjacent dwelling on Lots 4 and 6 (Exhibits O-6 and O-7). The Darbys testified that there was no amount of landscape buffering that would satisfy them since they did not believe that the proposed pool, spa and related equipment could be sufficiently screened if it were installed at the location sought by the Applicants.

19. Susan Rubright, Esq., on behalf of the Curnins on adjacent Lot 8 to the south/rear, provided a summation on behalf of her objector clients. Ms. Rubright contended that any hardship suffered by the Applicants as a result of locating the pool in a conforming location would constitute a personal, rather than a public, hardship. She contended that there were several “negative externalities” as a result of the proposed pool location, including visual detriments and increased noise and lighting. Ms. Rubright explained that the Curnins own a large lot and they have tried to isolate themselves from such negative externalities, and she commented that she did not believe they should be “punished” by allowing the Applicants to locate a pool where they proposed to do so. She further contended that the Applicants did not have a “right” to a pool, and particularly they should not make their neighbors suffer by locating a pool in front of the neighbors’ rear building lines.

20. Mr. Jaworksi provided a summation on behalf of the Applicants. He reiterated their willingness to work with the Board to alleviate the detriments associated with the proposed pool location.

21. After reviewing the evidence submitted, the Board, by a vote of 4 to 3, finds that the Applicants have not satisfied their burden of proving the “positive criteria” for the requested variance relief under either N.J.S.A. 40:55D-70(c)(1) or N.J.S.A. 40:55D-70(c)(2).

22. First, the Board finds that the Applicants have not proven the “positive criteria” for a c(1) variance. The Board determines that the requested variance from the strict application of the zoning regulations is not warranted and that the Applicants would not suffer peculiar and exceptional practical difficulties, or exceptional and undue hardship, by reason of exceptional topographic conditions and physical features uniquely affecting the subject property. The evidence revealed that the proposed location of the pool would not be to the rear of the dwellings on adjoining Lot 4 to the west side, Lot 6 to the east side, and Lot 8 to the south/rear of the subject property. The Board recognizes that, given the layout of the existing lots and dwellings, it is not possible for the Applicants to comply with the pool location requirement as it relates to the dwelling on Lot 8. The Board further recognizes that the location of the proposed pool and related spa and patio is restricted to some degree by the existing drainage easement and the existing wetlands and wetland buffer area located in the rear-yard. However, the Board finds that the Applicants can install the proposed pool and related facilities in a location that would be conforming as to Lots 4 and 6. The evidence revealed that there was sufficient unconstrained area approximately 45 feet further to the rear of their yard to

locate the pool behind the dwellings on adjacent Lots 4 and 6. The Board concluded that locating the pool and related facilities in this more conforming location would not cause the Applicants to suffer peculiar and exceptional practical difficulties or exceptional and undue hardship. See Wilson v. Brick Twp. Zoning Bd. of Adj., 2011 N.J. Super. Unpub. LEXIS 1167, Dkt. No. A-5735-09T4 (App. Div. May 6, 2011) (unpublished opinion cited as secondary authority pursuant to R. 1:36-3).

23. Second, as to the “positive criteria” for a c(2) variance, the Board finds that the Applicants have not demonstrated that the proposed nonconforming pool location would advance the purposes of the Municipal Land Use Law, nor would the benefits of the requested deviation from the zoning regulations substantially outweigh the detriments associated therewith. The Board finds that the proposed pool location does not actually benefit the community as a better zoning alternative, but rather only would provide personal benefits to the Applicants themselves. The Board finds that, juxtaposed against these personal benefits, the proposed pool location would cause substantial visual, noise and related detriments to neighboring property owners. The Board concludes that, even with the conditions stipulated to by the Applicants, the significant detriments associated with the proposal could not be sufficiently alleviated. See Wilson v. Brick Twp. Zoning Bd. of Adj., 405 N.J. Super. 189 (App. Div. 2009).

24. Third, by contrast to their failure to prove the “positive criteria,” the Board finds that the Applicants have satisfied the negative criteria. The Applicants have demonstrated that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board took action on this application at its meeting on June 8, 2011, and this Resolution constitutes a Resolution of Memorialization of the action taken in accordance with N.J.S.A. 40:55D-10(g);

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Township of Bernards, on the 6th day of July, 2011, that the application of John and Jeanette Jaworski for variance relief, as aforesaid, is hereby denied.

ROLL CALL VOTE:

Those in Favor: Plaza, Viola, Vogt, Orr

Those Opposed: Lasko, Rhatican, Harabedian

The foregoing is a true copy of a Resolution adopted by the Zoning Board of Adjustment of the Township of Bernards at its meeting of July 6, 2011 as copied from the Minutes of said meeting.

FRANCES FLORIO, Secretary
ZONING BOARD OF ADJUSTMENT
OF THE TOWNSHIP OF BERNARDS,
COUNTY OF SOMERSET,
STATE OF NEW JERSEY

Dated: _____, 2011