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January 23, 2023

VIA EMAIL ONLY
Scott Najarian, Chairman
Zoning Board of Adjustment
95 West Veterans Highway
Jackson Township, New Jersey 08527

RE: 26 Whitesville Road, LLC
26 Whitesville Road, Block 19501, Lots 21 & a portion of Lot 22
Zoning Board Application #853
Request for Motion for Reconsideration

Dear Chairman Najarian:

As you are aware, our office represents applicant 26 Whitesville Road, LLC ("Applicant") with respect to its bifurcated application for a conditional use variance to deviate from several standards set forth in the conditional use ordinance in order to construct a shul with an accessory mikvah on property located at 26 Whitesville Road and identified as Block 19501, Lot 21 and a small portion of Lot 22 on the Township's tax maps (the "Property"). The Property consists of 2.63 acres and is located in the Regional Growth ("RG-2") Zone, where places of worship are listed as a conditional use. See Ordinance § 244-90(A)(1); 244-87(A)(3); 244-115(D).

During its December 21, 2022 public hearing, the Zoning Board denied Applicant's application 4 to 3, despite numerous revisions to the proposed site plan, concessions made during the public hearing, and our office's December 20, 2022 letter summarizing the applicable legal standard and clearly explaining why Applicant has satisfied its burden to permit the conditional use variance relief sought in this case. Applicant therefore respectfully asks that the Board approve a motion to reconsider the Application at the Board's January 25, 2023 public hearing on the grounds the Board's decision was based on clear mistakes of law and fact.

I. THE BOARD SHOULD RECONSIDER ITS DECEMBER 21, 2022 DENIAL INSOFAR AS THE DECISION WAS BASED ON MISTAKE OF LAW AND FACT.

It is well-settled that administrative tribunals, including municipal land use boards, have the "inherent power comparable to that possessed by the courts . . . to rehear and reconsider." Cohen v. Fair Lawn, 85 N.J. Super. 234, 237 (App. Div. 1964). In fact, the Board has a right to correct errors in its decisions caused by mistake or inadvertence, and may reopen and rehear a proceeding in such instances. *See* Morton v. Mayor and Council of Clark Twp., 102 N.J. Super. 84, 97 (Law. Div. 1968).

a. Although the Zoning Board recognized the inherently beneficial nature of the proposed house of worship, it failed to properly analyze the negative criteria under the Sica balancing test.

It is clear that houses of worship are considered inherently beneficial and therefore satisfy the positive criteria as a matter of law. *See generally* Coventry Square, 138 N.J. at 298; TSI E. Brunswick, 215 N.J. at 26; *see also* House of Fire Christian Church v. Zoning Bd. Of Adjustment of City Of Clifton, 379 N.J. Super. 526, 535 (App. Div. 2005). During the Board's deliberations, Board Member Book immediately recognized this rule of law when he correctly concluded that "I think this is definitely an inherently beneficial use. So check that one off." [12/21/22 Hearing Transcript at p.52]. Board Member Hurley also chimed in "I have a tendency to agree with Mr. Book on this application . . . It is presumed that a house of worship satisfies a positive criteria." [Id. at p.53].

Although the Board properly recognized the inherently beneficial nature of the proposed use and concluded that the Applicant satisfied the positive criteria as a matter of a law, it failed to properly analyze the negative criteria. The negative criteria consist of two elements: No relief may ever be granted unless it can be done (1) without substantial detriment to the public good, and (2) without substantially impairing the intent and purpose of the zone plan and zoning ordinance. *See* Medici v. BPR Co., 107 N.J. 1, 4, (1987). Because the proposed shul is an inherently beneficial use, the four part balancing test set forth in Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152, 162-166 (1992) comes into play. That is, the Board was required to first identify the public interest at stake, identify any detrimental effect that will ensue from the grant of the variance, and, if necessary to reduce such detrimental effects, the Board could have imposed **reasonable conditions** on the use. However, upon weighing the positive and negative criteria and determining whether the grant of the variance would cause a substantial detriment to the public good, the Board came to the groundless conclusion that this inherently beneficial use should not be permitted on the Property. 127 N.J. 152, 165-67 (1992); House of Fire Christian Church, 379 N.J. Super. at 535–36 (App. Div. 2005).

b. Board Member Hurley sought to impose as a condition for his affirmative vote that the Applicant agree to the unreasonable condition that the Lots 21 and 22 be merged and some of the parking spaces be relocated to Lot 22.

At the Board's December 21, 2022 meeting, Board Member Hurley expressed concern with twenty-four (24) parking spaces along the county right-of-way, Whitesville Road. 55:9-18. However, these concerns were unfounded, and by Board Member Hurley's own admission, would not become a safety issue until far into the future, if ever: "obviously, we know they're not allowed to park on

Whitesville Road. I don't expect in the immediate future that that parking lot will be so jammed up and full. And I accept Mr. Hirsch's testimony in that regard." 56:7-11. The Applicant, Rabbi Mordechai Hirsch, testified that the existing congregation membership would only "fill a fraction of the [64-space parking lot]," and many congregants would walk from nearby residences on the sidewalk to be constructed, or use another synagogue closer their place of work during weekdays. 35:6-14, 38:21-39:15. Applicant's professional planner, Ian Borden, had opined earlier that Applicant had endeavored to reduce any detrimental effects through enhanced landscaping as required to satisfy the Sica balancing test.

Despite Applicant's efforts to mitigate any potential detrimental effect to the surrounding neighborhood, Board Member Hurley requested that Applicant place twenty-four of its sixty-four parking spaces from the front of the lot "and put them on the side of the house of worship" on adjoining Lot 22.

> There should be plenty of room. Each lot is over two acres . . . . But now they have elected to move into the adjoining property which is under common ownership. And I think that what they can do is take the bottom parking, those 24 spaces. Remove those. You can put them as green whatever they like on that. It takes away the conflict of going in and out so close to Whitesville Road. Put those parking spaces somewhere on lot 22 . . . . They've already indicated they're willing to use lot 22 by virtue of the landscape area in order to provide the buffer zone. So it is up for grabs. It is subject to consideration by this Board.
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> [58:4-59:21.]

Contrary to Board Member Hurley's assertion, the Applicant's attempt to mitigate any negative detriment to the surrounding neighborhood by providing an enhanced, four-season landscape buffer does not place the entirety of Lot 22 "up for grabs." That Lots 21 and 22 are under common ownership is not an issue for the Board to consider under the Sica balancing test. Further, and perhaps more importantly, Board Member Hurley misapplies the merger doctrine.

The merger doctrine applies only to adjacent, undersized lots held in common title.[1] See Jock v. Zoning Bd. of Adjustment of Twp. of Wall, 184 N.J. 562, 597 (2005). As the Board is aware, the minimum lot size required in the RG-2 Zone is two (2) acres; the Property is 2.44 acres and Lot 22 is approximately 2.5 acres. Where there was no substantial detriment to the public good, Board Member Hurley still tried to impose a condition on the use to reduce any detrimental effects. Unfortunately, this condition would result in a single lot, nearly two and a half times the minimum lot size required in the Zone and therefore was an unreasonable overstep of the Board's powers.

The proposed condition requiring the merger of both lots ignored the typical hardship analysis used to determine if bulk ("c") variance relief from certain standards is appropriate. N.J.S.A. 40:55D-

[1] "The term 'merger' is used in zoning law to describe the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation." Jock, 184 N.J. at 578 (2005).

70(c)(1). Undue hardship exists by reason of (a) exceptional narrowness, shallowness or shape; (b) exceptional topographic conditions or physical features; or (c) by reason of an extraordinary and exceptional situation" affecting a specific piece of property". Id. To be granted a hardship variance, an applicant must satisfy the positive criteria by demonstrating undue hardship will be suffered if the variance is denied, as well as the negative criteria by showing the grant of the variance will not result in substantial detriment to the public good or zoning plan. Cohen v. Bd. of Adjustment of Borough of Rumson, 396 N.J. Super. 608, 615 (App. Div. 2007). For example, in Ten Stary Dom Partnership v. Mauro, the Board found the applicant satisfied the positive and negative criteria for variance relief for substantial deviation in the frontage requirements due to unique configuration and exceptional character of the property, including wetlands that would require filling. 216 N.J. 16, 35-37 (2013). Here, due to the unique shape of the lot (e.g. triangular), the wetlands constraints and conservation easement the ability to place the parking elsewhere on the Lot 21 was impracticable – thus, creating a hardship.

Alternatively, the Applicant was entitled to relief based on the flexible c-2 analysis. In Green Meadows at Montville, LLC v. Planning Board of Montville, the developer sought to create eight (8) lots on an 8.5 acre parcel which would result in deviations from bulk requirements on two (2) of the proposed lots. 329 N.J. Super. 12, 21-22 (App. Div. 2000). The Board denied the application finding that the applicant could create a 7 lot subdivision variance free. However, in that instance, one lot would be substantially larger than required by Ordinance. The Court, in reversing the denial, found that the variances could be granted under the flexible c-2 analysis because same would substantially advance one of the purposes of the MLUL – promotion of appropriate population densities.

Board Member Hurley's proposition essentially conditioned his vote for approval on Applicant's consent to merge two oversized lots, creating a single lot nearly two and a half times the minimum lot size required in the Zone. Not only was this inappropriate as Lot 21 is already significantly oversized, but it is inconsistent with the lot area requirements set forth in the Township's Ordinance which mandates a two acre minimum. If the Board had simply granted the few requested deviations, the MLUL's purpose of promoting the more efficient use of land would have been advanced. By refusing to recognize that granting the variances would cause no substantial detriment and would substantially advance the purposes of the MLUL, and instead trying to impose a condition inconsistent with the MLUL and the Township's own Ordinance, the Board's denial was arbitrary, capricious and unreasonable and must be reconsidered.

c. **Several Board Members wrongfully focused on site plan issues when denying this bifurcated conditional use variance application.**

The application before the Zoning Board was limited to weighing whether the Applicant was entitled to relief from several of the conditional use standards. Instead of simply focusing on the use variance request before it, several board members improperly delved into site plan issues despite the Board's very consultants advising that:

> [B]ased on those supplemental plans, again, this is not [a] site plan application but the Applicant has submitted additional information to support their variance request. And those plans and the testimony and what we're looking

> at tonight demonstrates that the site can accommodate what they're proposing, obviously, though with the variance relief that they requested. [29:16 to 23].
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> The plan can get better, further better at a site plan and a subdivision application in the future. The only way that that's going to occur is if they get the variance first, then they'll come back with the site plan." [30:7 to 10].

Instead both Board Member Hurley and Lovacco focused on the location of the parking spaces within the front yard, the landscaping along the right of way, the fence around the detention basin, the alleged unsafe ingress and egress drives, and requested a secondary access drive as reasons to deny this bifurcated conditional use variance application. Interestingly, Board Member Hurley even acknowledged "I've heard Mr. Hill tell us that that's a site plan issue. Well, in my mind it's not really a site plan issue . . ." [59:6 to 8]. Likewise, Mr. Lovacco acknowledged that "I understand Mr. Hill's point that, you know, that's a site plan." Astonishingly, both board members acknowledged that they heard and understood Mr. Hill's commentary – yet both choose to ignore their own consultant's sage advice.

Additionally, the Board attorney specifically cautioned the Board when he opined "We're getting – in my opinion – we are encroaching on site plan considerations that are not currently before the Board. Again, this is a bifurcated application as to the use only. I do understand that we're considering safety precautions and things of [that] nature, but I would urge the Board to consider the use itself." [66:11 to 16]. Again, sound advice given and ignored.

d. **The Board considered evidence outside the record.**

When a Board renders a decision it is limited to the evidence produced at the hearing and in the record. *See* Tomko v. Vissers, 21 NJ 226, 239-240(1956). Of note, is that the Applicant's Traffic Engineer, Scott Kennel, was known to be present for the duration of the hearing yet Board members Hurley and Lovacco in particular, and the entirety of the Board in general did not pose even one question to him whatsoever. However, during deliberations, Board members Hurley and Lovacco cited traffic and parking related concerns as reasons to deny the application. Incredulously, Board Member Hurley – without any evidence in the record to support same – wrongfully concluded that '[w]e have a conflict with cars that may be parked to the right, to the left of the access trying to exit the access. . . . They're going to slow down waiting to clear that area because of people that may be coming out. . .. So that to me creates a safety issue." [55:20 to 56:4]. His conclusion is pure conjecture – a net opinion – without any substantial testimony in the record to back same and so must be rejected. *See generally* Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)(finding "Opinions that lack a foundation are worthless.").

II. THE BOARD'S VOTE SHOULD BE RECONSIDERED TO PROTECT THE PUBLIC INTEREST AND TO SERVE THE ENDS OF ESSENTIAL JUSTICE.

Even in the absence of mistake, the power to reconsider, to rehear and to revise determinations is regarded as inherent in all municipal agencies. See Mackler v. Camden Bd. of Educ., 16 N.J. 362, 369 (1954); In re Plainfield-Union Water Co., 14 N.J. 296, 305 (1954). This power to reappraise and modify prior determinations may be invoked by administrative agencies to protect the public interest and thereby to serve the ends of essential justice." See Handlon v. Belleville, 4 N.J. 99, 104-07 (1950); Trap Rock Indus., Inc. v. Kohl, 63 N.J. 1, 4-5 (1973).

a. Board Member Hurley's No vote on the grounds that he didn't' believe the Applicant had a claim under the Religious Land Use and Institutionalized Persons Act of 2000 was in error and should be reversed.

During the Board's vote on the Application, Board Member Hurley stated:

> Without the Applicant accepting the condition that I had placed on the record. And with that condition I can see it's not a substantial interference with the practice of their religion. And therefore, [R]LUIPA is not going to be a viable complaint for them. I'm voting no. [12/21/22 Hearing Transcript at p.70].

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc, et seq. ("RLUIPA"), as a preliminary matter, relates to land use regulations and rights of institutionalized persons. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253. 261 (3rd Cir. 2007). Further, it is the "latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burden, consistent with [Supreme Court] precedent." Ibid.

Importantly, Subsection (a)(1) provides that

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

Additionally, Subsection (b)(1) states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."

Here, the Board's denial of the use variance for the proposed shul and accessory mikvah was improper and actionable under RLUIPA as the Township Ordinance's conditional use standards

violate the Applicant's constitutional rights under both the Equal Terms Clause of RLUIPA[2] and the Equal Protection Clause of the United States Constitution, not as Board Member Hurley concluded did the Applicant claim a "substantial burden" on its religious practice .[3] At no time did the Applicant indicate that its RLUIPA claim would be based on a substantial burden claim. Instead the entire focus of Applicant's RLUIPA argument was based on Subsection (b)(1) as it relates to the Equal Terms Clause and the Equal Protection Clause of the United States Constitution. Board Member Hurley's "no" vote based on a substantial burden argument was erroneous and should be reversed.

More specifically, the Ordinance's conditional use standards unconstitutionally treat religious uses less favorably than non-religious assembly uses. See 42 U.S.C. § 2000cc (2)(b)(1); U.S. Const. art. XIV, § 1.

The Applicant laid out clearly in its letter of December 20, 2022 that the Ordinance treated nonreligious assembly uses, such as schools, parks, playgrounds, municipal buildings, clubhouses and community recreation centers, which are as intense, if not more intense than the proposed shul, more favorably than religious uses. Specifically, the Township is overtly treating religious uses differently than non-religious uses by:

(1) Imposing a 100 foot front yard setback requirement under Ordinance § 244-115(D), where all other institutional uses in the RG-2 Zone require only an 80 foot front yard setback. See § 244-90(C). Applicant would comply with this requirement but for the stringent conditional use standards set forth under the Ordinance for houses of worship;
(2) Imposing a 50 foot buffer requirement where a 25 foot buffer is provided. See § 244-115(J)(1). A house of worship is the only conditional use in the Ordinance that is required to provide a 50 foot buffer from a residential use or district. Applicant would satisfy the buffer requirement if the requirement was only 25 feet as imposed on other assembly uses in the RG-2 Zone; and
(3) Imposing a 100 foot front yard parking setback under Ordinance § 244-115(J)(3) where a 30 foot front yard parking setback is proposed. All other applicants seeking to construct nonreligious assembly uses permitted in the RG-2 Zone would only need to request bulk variance relief to provide parking in the front yard setback pursuant to Ordinance § 244-197(I)(1) which provides, "[p]arking areas in residential zones for uses other than single-family and two-family dwellings may be located in the rear or side yard *but shall not be located in any required front yard setback.*" Only houses of worship are required to seek a (d)(3) conditional use variance to park in the front yard.

With respect to minimum front yard setback where 100 feet is required and 80 feet is proposed—again, if any other institutional use were developed on this lot, only an 80 foot front yard

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[2] The Equal Terms provision provides, "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

[3] The Equal Protection Clause explains, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

setback would be required. Only a house of worship in the RG-2 Zone requires a 100 foot setback – evidencing the Township's clear inconsistent treatment of religious and non-religious uses. With proper landscaping the setback of 80 feet for the proposed shul is no more offensive than another permitted use in the zone set back only 80 feet. In addition, any added landscaping is an improvement over current site conditions where no landscaping exists.

Finally, with respect to parking within the front yard due to the unique shape of the lot and other site constraints (e.g., wetlands and a conservation easement) a hardship exists permitting relief from imposition of this condition. Moreover, other nonreligious assembly uses are permitted to park within 30 feet of the front yard setback as proposed here so it is hard to fathom how a car parked within the front yard setback to attend a religious event is more offensive to the zone plan and zoning ordinance than a car parked within the front yard setback to attend a nonreligious assembly use.

Thus, the "no" vote cast by Board Member Hurley based on a "substantial burden" claim was made in error and should be reversed on reconsideration.

CONCLUSION

Based on the foregoing, it is clear that the Applicant satisfied both the positive and negative criteria for the granting of the requested conditional use variances. Likewise, it is clear that the Township's zoning ordinance violates the Equal Terms provision of RLUIPA and the Equal Protection Clause of the United States Constitution for imposing land use standards that are more stringent on religious uses (like the current Application) than nonreligious uses. See 42 U.S.C. § 2000cc (b)(3)(B); (b)(1); (a)(1).

For all of these reasons, the Applicant respectfully requests that the Board grant this motion for reconsideration of the Application. If you have any questions or require any further information, I'll be happy to address same at the upcoming public hearing.

Very truly yours,

Donna M. Jennings, Esq.

cc: 26 Whitesville Road, LLC
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