

**Planner's Report for April 20, 2023 - Daughter's of Israel
Zoning Board Meeting for
Block(s) 171, Lot(s) 12 (1155 Pleasant Valley Way/ County Route 636)
West Orange Township, Essex County, New Jersey**

1. **Introduction of Professional**

2. **Materials/ Documents Reviewed**

- Current and Previous (2022) Applications
- Plans, Application, Professional Reports
- Zoning Ordinances
- Master Plan (1982) and Master Plan Re-Examination Reports (2004, 2010, 2019) & OSPR June 2010 and Circulation Element (2016)
- Municipal Land Use Law

3. **Location** – Block(s) 171, Lot(s) 12 – 1155 Pleasant Valley Way (County Route 636). Site is located to the northwest of Pleasant Valley Way.

4. **Present Use** – Lot is currently utilized for an existing non-conforming use – a 303 bed skilled nursing facility. Other site improvements include 236 off-street parking spaces, two (2) off-street loading spaces, signage, and internal site circulation.

- **Surrounding Neighborhood** – consists of residential uses to north and west, the Kessler Institute of Rehabilitation and residential uses to the south/ southwest, and a golf course and other residential uses to the south and east of the site (across Pleasant Valley Way).

5. **Proposed Use** – Applicant is seeking a Use Variance for a use not permitted, type of structure not permitted, more than one principal use / structure on a lot, a d-5 density variance, and a d-6 height variance, as well as several other variances and waivers. Proposed improvements will include removing the existing structure and constructing a new building with up to five (5) stories containing:

- 163 independent age-restricted market rate dwelling units
- 84 skilled nursing beds
- 64 beds for assisted living with 40 of those beds dedicated to memory care.
- 11,352 square feet of administrative support for the 158 beds (administrative staff, human resources, kitchens, laundry, etc.)
- 31,648 square feet consisting of a community center, fitness center (with pool), auditorium, library reading lounge, game room, art studio, salon, medication center, formal dining room, café, pub (20 seats), and a small retail operation for residents. There are additional areas for physical and occupational therapy, physician offices, and resident support services.
- 376 (419 with EV credit) off-street parking spaces, infrastructure for EV charging stations, one (1) off-street loading spaces, and multiple signs.
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6. **Zoning** – Property is split zoned between 2 (R-2) zone.

- There is no stated purpose of R-2 zoning district in the Zoning Ordinance or Master Planning documents.

- Permitted Uses – Principal, Conditional, and Accessory

PART A: PERMITTED USES TABLE OF DISTRICT REGULATIONS

(Subsection 25-7.1)

West Orange Land Use Regulations

[Amended 9-22-2020 by Ord. No. 2617-20]

ZONE	PERMITTED PRINCIPAL USES	PERMITTED ACCESSORY USES	PERMITTED CONDITIONAL USES
R-1	One family, detached dwelling Water reservoir, well tower, filter bed Federal, state, county or township building Golf course and golf club house Farm, nursery, greenhouse and similar uses Hospital	Required accessory parking Private garage Horticultural or agricultural building Customary accessory building or structure Private swimming pool Private recreation facility Home occupation Home professional office Signs Fences and dividing walls Farm produce stand for produce grown on premises Private storage shed Greenhouses	Commercial recreation Public school Private school Library Museum Park or playground Public utility building or structure Telephone exchange Private club, other than a golf club House of worship
R-2	SAME AS R-1 AND in addition Senior citizens housing project (Sen. C.H.) as defined in § 25-4	SAME AS R-1	SAME AS R-1

- Minimum Bulk and Area Requirements

EXISTING USE: 303 BED NURSING HOME		PROPOSED USE: CONTINUING CARE RETIREMENT COMMUNITY*		
LOT SIZE REQUIREMENTS				
DESCRIPTION	CODE (R-2)	EXISTING	PROPOSED	COMPLIANCE
§25-7.1 BULK STANDARDS TABLE OF DISTRICT REGULATIONS				
MAX. HEIGHT	2 1/2 STORIES/35'	2 STORIES	5 STORIES/57.7'	NO *
MIN. LOT AREA	40,000 SF	784,099 SF	NO CHANGE	YES
MIN. LOT WIDTH	125 FT.	676.43 FT.	NO CHANGE	YES
MIN. FRONT YARD	35 FT.	100.45 FT.	117.63 FT	YES
MIN. SIDE YARD	20 + 20 FT.	80.97 + 87.07 FT.	82.90 + 100.27 FT.	YES
MIN. REAR YARD	45 FT.	131.33 FT.	166.96 FT.	YES
MAX. BUILDING COVERAGE	20%	16.17%	15.63%	YES
MAX. LOT COVERAGE	30%	38.53%	37.25% ⁽¹⁾	NO *
§ 25-11.2 MIN. NON-RESIDENTIAL SIDE YARD	75 FT.	80.97 FT.	82.90 FT.	YES
§25-28.8 STEEP SLOPES CALCULATIONS				
MIN. EFFECTIVE LOT AREA	40,000 SF	493,760 SF	NO CHANGE	YES
MAX. EFFECTIVE BUILDING COVERAGE	20%	26.15%	24.82%	NO *
MAX. EFFECTIVE IMPERVIOUS COVERAGE	30%	61.19%	59.16% ⁽¹⁾	NO *
RETAINING WALL REQUIREMENTS				
MAX. RETAINING WALL HEIGHT	4 FT.	4 FT.	10 FT.	NO *
PARKING AND LOADING REQUIREMENTS				
MIN. NUMBER OF TREES WITHIN PARKING AREA	1 TREE PER 10 SPACES (27 TREES)	18 TREES	27 TREES	YES
MIN. REQUIRED PARKING	440 SPACES	236 SPACES	292 ⁽¹⁾ + 34 FUTURE SPACES	NO *
STALL SIZE	9' X 18'	9' X 18'	9' X 18'	YES
aisle width	24 FT.	24 FT.	24 FT.	YES
MIN. NUMBER OF LOADING SPACES	13 SPACES	2 SPACES	1 SPACE	NO *
LOADING SPACE SIZE	10' X 40'	10' X 40'	12' X 40'	YES

The following variances will be required as part of this development application:

“d” Variances

Section	Description	Required/Permitted	Existing	Proposed
§ 25-7.1	Permitted Principal Uses	Single-family dwellings, hospital, government buildings, farm, nursery	Nursing home	Continuum of care facility including independent living, assisted living and skilled nursing components, together with accessory uses
§ 25-7.1	Maximum height	2½ stories / 35 feet	2 stories	6 stories / 69.22 feet
§ 25-8.12	Number of principal uses on a lot	1	1 (nursing home)	3 (if component uses are characterized individually)

Also requires additional d(1) type use variance for type of structure not permitted and d (5) density variance where 1.09 du/acre (based on 40,000 sq. ft. lot size) is permitted and 9.05 du/ac is proposed for the 163 dwelling units and does not include the “beds” for the assisted living and skilled nursing.

Section	Description	Required/Permitted	Existing	Proposed
§ 25-15.3.b.	Number of signs per lot	1	1 monument sign	5 facade signs 1 monument sign (existing) 1 freestanding identification sign (assisted living) 2 internal freestanding signs 3 freestanding directional signs
§ 25-15.3.b.	Maximum sign area	1 s.f. for a nameplate 2 s.f. for a professional office	56 s.f. monument sign (variance granted under Case #ZB-11-06)	Ranges from 8.75 s.f. to 56 s.f.
§ 25-28.8.d.; § 25-7.1-Table	Maximum effective building coverage	20%	29.64%	30.02%
§ 25-28.8.d.; § 25-7.1-Table	Maximum effective impervious coverage	30%	69.35%	69.26%
¹ Applicant seeks a variance from the Township Land Use Regulations with respect to the required number of parking spaces for the skilled nursing component, and a de minimis exception from the Residential Site Improvement Standards (RSIS), pursuant to N.J.A.C. 5:21-3.1, with respect to the required number of parking spaces for the independent living and assisted living components.				
			some having a double axle and/or exceeding size limit	some having a double axle and/or exceeding size limit

7. Issues with the Application

- Requires several d type variances – Multiple uses not permitted, more than one (1) use on a lot, density variance, and height variance. Also requires several other bulk variances.
- Question of Inherently Beneficial Use. I do not believe that it meets the burden of proof.
- “Planned obsolescence” for the type of facility.
- Not enough off-street parking spaces
- Not enough off-street loading spaces (not proposing to have EV charging capability)
- There will be an increase in the number of vehicle trips.
- Excessive amounts of signage being proposed.
- Noise generated will be detrimental to elderly population and the segment of the population with dementia.
- Existing non-conforming use of property – site contains an ENC – a 303 bed skilled nursing facility. The courts have determined that “(t)here is a judicial tendency to strictly limit the scope of the nonconforming use and to reduce it ‘to conformity as quickly as possible.’ ” The applicant is proposing to add entirely new components to this existing use and will expand and extend use of site.

8. Is the Proposed Use an Inherently Beneficial Use? Inherently beneficial uses are those that are relatively narrow in scope. In other words, the use is limited in nature and so necessary that there is not only a local, but regional need for these types of uses. When the (regional) need for this type of inherently beneficial use is satisfied, then the use is no longer considered as an inherently beneficial use.

Based on the information obtained from the State of New Jersey – Department of Community Affairs, there are a total of 63 similarly licensed facilities in Essex County. (15 of the facilities are licensed for “adult day care” which means there would be a total of 48 licensed facilities.) There

are also an additional 58 similar licensed facilities in Morris County. (There are a total of seven 7 of these facilities which means that there would be a total of 51 additional facilities.) This is a total of 121 (99) facilities in the immediate region. This does not include three (3) other sites within the Township and immediate area that are approved or may be approved for additional age-restricted dwelling units – Mayfair Farms (450 units), “The Manor”, and Regency Caterers facility in Verona.

These units are more than sufficient for this type of use. Therefore the proposed use does not qualify as an inherently beneficial use.

Jayber Case cannot be taken to stand for the proposition that a variance for a senior housing complex MUST be granted by the zoning board of adjustment in all cases.

9. Justification of Requested Variances

- Use Variance and Other “d” Variances – Proposed use is not inherently beneficial. The applicant is required to demonstrate three (3) things to the Board in order to support the variances requested.
 - First, the applicant is required to show the purposes of zoning (“special reasons”) or positive criteria in support of the application.
 - Second, the applicant must demonstrate that the use variance 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.
 - Third, the applicant must also demonstrate that the use promotes the general welfare because the proposed site is particularly suited for the proposed use. The courts have held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013).
- (#1) Special Reasons or Positive Criteria. (Positive criteria are found in NJSA 40:55D-2.) The purposes of the MLUL are to generally allow for development while protecting the general welfare and public good. 16 purposes (18 total) are listed in the MLUL. The applicant has offered the _____ of the following purposes. I do not believe that the application meets the special reasons or positive criteria for the following reasons. This application is contrary to the positive criteria for the following reasons: Contradicts 8 purposes (9 total) of zoning

SMALL LETTERS a, b, c, e, g, h, i, and j & preservation of neighborhood character

1. *(a) To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the health, safety, morals, and general welfare.*
2. *(b) To secure safety from fire, flood, panic, and other natural and manmade disasters.*
3. *(c) To provide adequate light, air, and open space.*
4. *(e) To promote appropriate population densities.*
5. *(g) To provide sufficient space in appropriate locations for a variety of uses ... “The Land Use and Management Plan provides for a mixture of residential, commercial, industrial, and resort development and open space and conservation districts.”*
6. *(h) To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight.*

7. *(i) To promote a desirable visual environment ...*
8. *(j) To promote the conservation of historic sites and districts, open space, energy resources, and valuable natural resources ... and degradation of the environment through improper use of land*
9. *Preservation of neighborhood character.*

- (#2) Applicant must demonstrate that the use variance 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.

- The applicant must meet an enhanced quality of proof as established in *Medici v. BPR Co.*, 107 N.J. 1, 4, 21-23 (1987) that requires the applicant to demonstrate that the use variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance, proof which must reconcile the proposed use variance with the Zoning Ordinance's omission of use from those permitted in the district. In the Medici case, the Courts "... found that this proof is necessary to carry out the legislative intent manifested by amendment to the MLUL in N.J.S. 40:55D-89 and 89.1, requiring periodic review of zoning ordinances and master plans by the governing body, and in N.J.S. 40:55C-70.1, requiring annual reports by boards of adjustment of variance requests and recommendations for ordinance revisions."

• Violates these planning documents

- **No Recommendations in Any Master Plan Documents to Amend Zoning Ordinances to Permit the Proposed Uses.**

Original Master Plan was crafted in 1962. The first significant amendment was in 1982. Subsequent MPRR were authored in 2004, 2010, and 2019. The use has existed in this location for over 50 years. The municipality could have amended their master plans to recommend making this use a permitted use. This has never been accomplished.

There are also several principles, goals, and objectives that the proposed development contradicts.

- **"Suitable Densities"**

- Objective (13) Improve and maintain residential neighborhoods by encouraging rehabilitation of existing dwellings and new residential construction at suitable densities (p. 4 of 2004 MPRR)
- Principal (1) Encourage residential development in locations and at densities which are compatible with existing development patterns and which can be properly served by public roadways, utilities, and services. (p. 4 of 2004 MPRR)
- Principal (4) Maintain community scale by limiting the intensity of commercial and residential development to assure compatibility with existing neighborhood character. (p. 4 of 2004 MPRR)
- Principle 1 - Encourage Appropriate Residential Development The 2010 Reexamination Report stated the overall principle of encouraging appropriate residential development in locations and densities that are consistent with existing zoning and development patterns ... remained valid

Higher density multifamily residential development is also appropriate **in limited locations adequately served by transit stations**, ... transportation networks and other infrastructure. Senior and specialized housing options should be supported as well, as long as potential development impacts are addressed. This principle should not be construed, however, as supporting increased densities and out-of-scale development in established residential neighborhoods. (p. 12 of 2019 MPRR)

- Principle 2. Properly Locate Public, Commercial/Retail, Industrial, Residential and Service Uses The 2010 document continued to emphasize the need to locate public, commercial/retail, industrial, residential and service uses at sites and locations which are suitable for their use environmentally, economically, and geographically, and can be adequately serviced by public infrastructure. This principle is listed as being still valid. (p. 12 of 2019 MPRR)
- Land Use - The character of these areas and their suitability for particular uses can best be provided for by maintaining established residential and commercial land use patterns and through the prudent application of regulations which assure that future development, redevelopment, or expansion occurs at reasonable levels of intensity.

Standards compatible with the existing character of development are needed to restrict the coverage of lots of buildings, impervious surfaces, driveways, and parking areas. (p. 6 of 2004 MPRR)

- Objective (13) - Improve and maintain residential neighborhoods by encouraging rehabilitation of existing dwellings and new residential construction at suitable densities. (p. 8 of 2004 MPRR) Also Principle 4, p. 9 of 2004 MPRR) and 2010 / Principle 13 of 2019 MPRR p. 10)
- Objective (16) Encourage economic development and redevelopment compatible with the suburban character of the town and with particular sensitivity to existing residential neighborhoods. (p. 8 of 2004 MPRR, 2010 and 2019 MPRR, p. 11)

■ **Environment & Open Space / Steep Slopes** (Open Space & Recreation)

- Identify and protect at-risk natural resources, such as stream corridors, core forests, wetlands, steep slopes, and water features from disturbance and future development; (p. 3 of 2010 OSPR Plan Update)
- Revise the Township's natural features ordinance to provide maximal protection to steep slopes (2004 OSRP)
- Principal 3 Protect natural and environmental resources including floodplains, wetlands, woodlands, steep slopes, and areas valuable as scenic, historical, cultural, or recreational resources. (p. 4 of 2004 MPRR, 2010 MPRR, and stated as still valid as principle 3 on page 12 of 2019 MRPP)
- Moreover, remaining undeveloped lands contain areas of steep slopes, woodlands, ridgelines, wetlands, and flood hazard areas whose disturbance should be discouraged. ... Site design standards should limit the disturbance of natural and environmentally critical features. (p. 11 of 2004 MPRR)
- For development ... reasonable levels of intensity. (p. 11 of 2004 MPRR)

■ **Viewsheds**

- Preserve viewsheds within the Township ... especially along the ridgelines of the Second Watchung Mountains (p. 3 of 2010 OSPR Plan Update)

- I have previously discussed the Township's litany of planning documents – 1994, 2002, 2009 & 2015 Master Plans & Master Plan Re-examination Reports, Natural Resources Plan, as well as the Plan Endorsement process and Centers Designation Process. The proposed development contradicts these planning documents. It represents intense growth in the municipality's "environs" rather than the "centers", as envisioned by this community and the State.

- As further noted in the Medici case, the continued failure by the municipality to permit the use represents a decision that the use is contrary / detrimental to the zone scheme. There has been no recommendation to include these types of uses as permitted uses in any of the recent master plans or master plan re-examination reports.

Reduce / eliminate non-conforming use, not intensify site with additional uses not permitted as well

Additionally, one (1) of the recommendations contained in the 1994 and 2012 Master Plan was “to promote resort-related development as a major local component of the resort economy of the county.” The campgrounds and other local recreational (both passive and active) uses are the chief components of the “resort economy” in the Township. The proposed use will increase the intensity of activities that are not permitted uses on a site located in close proximity to 3 campgrounds.

- While there may be other non-conforming uses in the area, this does not in and of itself constitute the existence of a special reason for granting the use variance. (*Ward v. Scott, 11 N.J. 117 (1952.)*) In fact, where they are of the same type as the use presently reason for NOT granting the variance. (*Medici v. BPR Co. 18-22*). Again, there are several other light industrial / industrial uses located along Oceanview-Woodbine Road. These uses were permitted by use variance exceptions granted by the Zoning Board of Adjustment.
- (#3) Applicant has not demonstrated that site is particularly suited to proposed use. (Site suitability is to be viewed not only from the applicant’s prospective but from the municipalities’ as well.) Again, the courts have held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. *Price v. Himeji, 214 N.J. 263, 292-293 (2013)*.
- The existing site already contains an existing non-conforming use – a resource extraction industry. This is not a permitted use in this zoning district. The applicant is proposing to add an additional use – a concrete redi-mix plant. This use is also not permitted in this zone and will only increase the intensity of activity and use at this site.
- The applicant has stated that the proposed use will meet a “regional need”. Currently there are 5 other concrete manufacturing plants in the immediate region. All of these facilities are operating at less than ½ of their capacity. On the average, these plants are operating at roughly 20% of the total projected capacity. (Total of less than 16% of capacity for all facilities)
- The applicant has not demonstrated if there other sites located in the Township / region that are more appropriate for the proposed use – zoning, etc.
- Applicant is required to demonstrate public benefit in granting bulk variances. The applicant has not demonstrated the public benefit for granting the variances. If the public benefit cannot be demonstrated, then the Board should concur that the variances cannot be reasonably granted. (*Kaufmann v Planning Board for Warren Twp.*) There will be a substantial detriment to the public.

10. Conditionally Permitted Use Where One of the Conditions is Not Met (d-3), Increase in Permitted Floor Area Ratio (d-4), Increase in permitted density (d-5), and Height – Principal Structure (d-6)

The applicant is required to demonstrate two (2) things to the Board in order to support the variances requested.

- First, the applicant is required to show the impact of the proposed deviation upon the adjacent properties and that it will not cause such damage to the character of the neighborhood as to constitute “substantial detriment to the public good”.
- Second, the applicant must demonstrate that the variance will not “substantially impair the intent and purpose of the zone plan and zoning ordinance.”

Proposed application fails to meet the minimum required burden of proof.

11. Justification of Requested Variances (c-2 criteria - NJSA 40:55D-70 c(2))

- Relating to the (c)(2) variances the seminal case is Kaufmann v. Planning Board for Warren Twp., 110 N.J. 551 (1988). That case states that “By definition, then, **no c(2) variance should be granted when merely the purposes of the owner will be advanced.** The grant of approval must actually benefit the community in that it represents a better or preferred zoning alternative. The focus of a c(2) case, then, will be not in 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 and planning that will benefit the community.”
- For the c-2 type variances, these variances can also be granted where there is no substantial detriment to the public good, the purposes of the MLUL would be advanced by the requested deviation from requirements of the zoning ordinance, and the benefits of the deviation would substantially outweigh any possible detriment. Particularly, the purposes of the MLUL must be advanced by the requested deviation from the requirements of the zoning ordinance, and the benefits of the deviation would substantially outweigh any possible detriment. Particularly, the purposes of the Municipal Land Use Law (MLUL) would be advanced by a deviation from the literal requirements of the zoning ordinance. As stated previously this application contradicts 8 of the 16 (18 total) purposes listed in the MLUL.
- *SMALL LETTERS a, b, c, e, g, h, i, and j & preservation of neighborhood character
For the reasons previously stated.*

12. Negative Impacts of Development

Applicant is seeking deviation from requirements of Zoning Ordinance for multiple use variances – use not permitted, a second principal use, height, and other variances and waivers for setbacks for an industrial use in the minimum required setback and buffer areas. The requested deviations will have the following impact on the surrounding properties.

- Level of activity and intensity on site will be increased over what would be expected / generated by a permitted use in this zone. Applicant is actually seeking permission to introduce new uses to the site that are not permitted. (This is in addition to the existing non-conforming use already existing on the site.)
- There will be a substantial increase in the volume of traffic generated by proposed development.

Again, previously stated:

- “Planned obsolescence” for the type of facility.
- Not enough off-street parking spaces
- Not enough off-street loading spaces (not proposing to have EV charging capability)
- There will be an increase in the number of vehicle trips.
- Excessive amounts of signage being proposed.
- Noise generated will be detrimental to elderly population and the segment of the population with dementia.

13. Conclusion

The applicant is requesting a total of 4 use variance and other bulk variances/ waivers as part of the proposed development. The applicant has failed to demonstrate the burden of proof necessary to grant to the use variance – the purposes of zoning or positive criteria; that the use variance 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; and that the site is particularly suited to the proposed use. The applicant has also failed to prove any public

benefit or gain by the Board granting the requested bulk variances (buffers, height, etc.) and waivers.

The Zoning Ordinance is consistent with the Master Plan and Master Plan Re-Examination Report. This development is not consistent with the Zoning Ordinance, Master Plan, or Master Plan Re-Examination Report, Cape May County Master Plan, State Plan, and U.S. Fish & Wildlife Master Plan for the Great Cedar Swamp for the reasons that I have previously stated, including:

- The proposed development contradicts the goals and recommendations of the Master Plan / Master Plan Re-Examination Reports.
- Proposed uses are not permitted in this zoning district and were not recommended as permitted uses in both the 1962, 1982, 2004, 2010, 2019, MP and MPRR,
- The proposed development will generate an increase in the level and intensity of activity on the site over what is anticipated and expected at this location.

The requested variances will substantially impair the intent and purpose of the zone plan and zoning ordinance. The benefit of granting of the requested variances will not outweigh the negative impacts associated with the proposed development.