

Settlement Proposal

October 13, 2023

**Daughters of Israel, Inc. v. Zoning Board of Adjustment of the Township of West Orange
Docket No. ESX-L-4045-23**

**Application #ZB-21-21
Daughters of Israel, Inc.
1155 Pleasant Valley Way
West Orange, New Jersey
Block 171, Lot 12**

Daughters of Israel, Inc. (“Daughters”) commenced the above-captioned action in lieu of prerogative writ (the “Litigation”) seeking to reverse the decision of the Township of West Orange Zoning Board of Adjustment (the “Board”) to deny Daughters’ application for preliminary and final major site plan approval, “c” and “d” variances, and other relief to modernize its existing campus at 1155 Pleasant Valley Way (Block 171, Lot 12) into a state-of-the-art “continuing care retirement community,” or “CCRC,” encompassing independent living, assisted living and skilled nursing (the “Application”). For the reasons set forth in the Complaint, Daughters believes that the Board’s denial was arbitrary, capricious, and unreasonable, and will ultimately be reversed by the Superior Court. That being said, and in the spirit of compromise, Daughters believes that a settlement of the Litigation is in the best interests of Daughters and the West Orange community.

Accordingly, Daughters submits the settlement proposal outlined below (the “Settlement Proposal”) for consideration and approval at a public hearing pursuant to Whispering Woods at Bamm Hollow, Inc. v. Twp. of Middletown Planning Bd., 220 N.J. Super. 161 (Law Div. 1987), other applicable case law, and that certain Consent Order in this matter entered by the Superior Court of New Jersey on October 7, 2023. If approved, the Settlement Proposal will (i) eliminate litigation risk and costs for both parties (including the taxpayers of West Orange), (ii) allow Daughters to continue providing much-needed services for seniors in the community for decades to come, and (iii) do so in a manner that best addresses the relevant concerns raised at the Board’s hearings on the Application. The Settlement Proposal is made with reference to the following plans:

- Architectural drawings prepared by KDA Architects, dated October 21, 2021, revised October 13, 2023, consisting of Sheet CS-0; Sheet L1.0 to L3.0; Sheets A1.0 to A1.5; Sheet A2.0 to A2.1; and Sheet A3.0;
- Civil engineering drawings prepared by Petry Engineering, consisting of the following:
 - o Site Plans dated October 29, 2021, revised October 13, 2023, consisting of Sheets SP-1 through SP-22;
 - o Overall Phasing Plan (Sheet P-1) dated May 20, 2022, revised October 13, 2023;
 - o Steep Slopes Map (Sheet SS-1 and SS-2) dated October 13, 2023; and

- o Tree Removal Plan (Sheet TR-1) and Tree Removal List (Sheet TR-2) dated October 29, 2021, revised October 13, 2023.

The terms of the Settlement Proposal are as follows:

1. Plan Revisions. Daughters proposes to modify the project as depicted on the drawings referenced above. The key aspects of the proposed modifications are set forth in the accompanying letter to the Board from Petry Engineering, LLC, dated October 13, 2023.
2. Duration of Construction and Statutory Protective Period.
 - a. The duration of construction, originally proposed to last up to ten years and later reduced to six years, is further reduced by one additional year, to five years. Therefore, the Settlement Proposal seeks statutory protection with respect to the zoning requirements and all other rights conferred on the developer for a period of five years, pursuant to N.J.S.A. 40:55D-52.e., which applies to projects consisting of not less than 100 residential dwelling units. It provides that the Board may approve a statutory protective period “for such period of time beyond two years, as shall be determined by the [Board] to be reasonable taking into consideration (1) the number of dwelling units and nonresidential floor area permissible under final approval, (2) economic conditions, and (3) the comprehensiveness of the development.” *Id.* Also, the Municipal Land Use Law provides that any final site plan receives an initial statutory protective period of two years, which may be extended for extensions of one year, not to exceed three extensions in total. N.J.S.A. 40:55D-52.a. Thus, Daughters is now requesting the same statutory protective period as would be available to any final site plan; it is simply seeking to have the full five-year term granted at the outset, pursuant to N.J.S.A. 40:55D-52.e. which applies to projects consisting of not less than 100 residential dwelling units, since the project is phased and all phases will not be undertaken during the initial two years of statutory protection that would ordinarily be available. A statutory protective period of five years will also avoid the need for the Board to hear successive applications for annual extensions.
 - b. The Land Use Regulations of the Township of West Orange contain a corollary provision which provides that in the case of a variance and a final site plan, “the building or construction permit sought shall be secured and issued or the authorized action taken within two years and one day after the date of the granting of the conditional use, variance or site plan in question.” LUR § 25-48.10.a. To avoid the need for recurring extension requests where it is known that all phases of the project will not be undertaken in the initial two-year period, the Board may initially fix a longer period of time for the building or construction permit to be secured and issued or the authorized action taken which are in excess of the minimum two years. LUR § 25-48.10.e. Therefore, the Settlement Proposals seeks approval for a duration of five years pursuant to LUR § 25-48.10.e.

3. Conditions of Approval. Proposed conditions of approval, as set forth in Schedule A annexed hereto, would encompass both the conditions included in the motion offered by the Board Chairman and voted on at the May 11, 2023 Board meeting (Items #1 through #14 on Schedule A), as well as additional conditions (Items #15 through #21 on Schedule A) which have been crafted specifically to mitigate impacts during construction and address concerns expressed by the Board and members of the public.
4. Approval of Settlement Proposal. If the Board approves the Settlement Proposal, with no additional conditions or limitations (subject only to standard conditions of approval, mutually agreed upon by Daughters and the Board, such as payment of fees and escrows), Daughters would dismiss the Litigation with prejudice. This would ensure certainty of result – i.e., the modifications to the Application as set forth in the Settlement Proposal would be implemented – and achieve significant cost savings to the taxpayers of West Orange in legal fees that otherwise would be incurred in litigating this matter.

Finally, certain extraneous matters came up during the hearings on the Application which are not relevant to the Board's consideration of whether an application for development satisfies the statutory criteria for variance relief. Daughters maintains its view that such matters may not lawfully be considered. Nevertheless, it offers the following stipulations in an effort to address and resolve the concerns on the part of certain Board members regarding these matters:

Stipulation #1 – Payment of Property Taxes: As was stated in testimony during the public hearings on the Application, Daughters expects that the independent living units will not be exempt from real property taxation, but rather, will be subject to real property taxation in an amount to be determined by the Township's tax assessor. Although the taxable value will be determined by the tax assessor, the amount of taxes paid will likely substantially exceed the amount of property tax that Daughters currently pays with respect to the communications facility on the rooftop of the building.

Stipulation #2 – Financing of the Project: As was stated in testimony during the public hearings on the Application, (i) the project will be financed through a combination of debt financing, Daughters' own funds, and fundraising (including a \$20 million initial commitment to the Project from a well-known philanthropist as well as other financial commitments which are in place from other members of the community), and (ii) the project is expected to be financially sustainable upon the completion of the first phase of construction.

Stipulation #3 – Residents' Ability to Pay: Daughters, like all nursing homes, currently conducts a financial assessment before any resident is admitted to the skilled nursing home. If the new facility is approved by the Board, Daughters will continue this practice, regardless of whether the new resident plans on residing in the independent living, assisted living or skilled nursing component. The purpose of the financial assessment is to ensure that incoming residents will have the resources to remain at the facility for the length of their anticipated stay, whether from private funds, private insurance, Medicare or Medicaid. For skilled nursing residents, and in some instances for assisted living residents,

Medicaid becomes the source of payment if the resident exhausts their own resources and becomes eligible for Medicaid payments. For independent living residents, in the event a resident were to exhaust their own resources, they could seek the support of relatives; if they were to transition to the assisted living or skilled nursing component based on the level of care they require, they might qualify for Medicaid; and if they purchased a unit with a refundable entrance fee, those funds may then be available to pay monthly residency expenses.

In conclusion, Daughters believes that its Application presented to the Board during a public hearing spanning 11 meetings – encompassing a new skilled nursing building for long-term care residents (many of whom will be Medicaid beneficiaries with limited income and resources), a new assisted living and memory care unit, and a new independent living component – constitutes an inherently beneficial use of the subject property that satisfied the legal criteria for the relief requested, and therefore should have been approved under New Jersey land use law. But as a compromise and in the spirit of working toward the good of the community, Daughters proposes further to reduce the scope of the project in accordance with this Settlement Proposal to settle the Litigation.

Schedule A

Daughters of Israel, Inc. v. Zoning Board of Adjustment of the Township of West Orange Docket No. ESX-L-4045-23

**Application #ZB-21-21
Daughters of Israel, Inc.
1155 Pleasant Valley Way
West Orange, New Jersey
Block 171, Lot 12**

Proposed Conditions of Approval

The following conditions of the motion which was voted upon on May 11, 2023, would be conditions of the Proposed Settlement:

1. Upon completion of construction, Applicant shall evaluate whether a signal timing adjustment is needed to the traffic signal at the intersection of Pleasant Valley Way and New Jersey State Highway Route 10.
2. Traffic issues along Pleasant Valley Way are subject to approval by the Essex County Planning Board.
3. Phase IV has been eliminated and the time for completion was reduced from ten years to six years. [This would now be revised to a five-year construction period pursuant to the Settlement Proposal].
4. For the independent living component, at least one of the residents of each unit shall be a minimum of 62 years of age.
5. In Review #3 dated February 6, 2023 from Zoning Board Engineer John J. Hess, PE, PP, a copy of which is attached to and incorporated into this Resolution, the Applicant shall comply with Sections B. [Design Comments], Items 4, 5 and 6, except that the design waiver regarding green infrastructure is granted based upon Applicant's testimony that the soils do not provide sufficient permeability for infiltration] and Item C.2. [Landscaping Comments, as clarified by the email from the Town Forester dated February 2, 2023].
6. All Certificates of Need and other licenses or approvals required from the State of New Jersey will be obtained prior to the occupancy of the phase or component to which each pertains, and shall be submitted to the Board's secretary.
7. The area designated as the pub may be used as a dining venue; if, as and when the Applicant seeks to serve alcoholic beverages then the Applicant shall seek to obtain a club license rather than a plenary retail consumption license or another form of license.
8. The final plans shall list the square footages of each component as stated on the record on March 23, 2023. [Square footage of each component has been updated on the final plans in accordance with the Settlement Proposal].

9. As-built landscaping plans are to be submitted upon the completion of each phase of construction.
10. All new equipment to be installed shall meet the limits stated in the West Orange Noise Ordinance.
11. Upon completion of construction there shall be no offsite parking for residents and visitors to this property; all parking shall be onsite.
12. The underground garage shall be used for parking by independent living unit residents.
13. The Applicant is bound by and shall comply with all matters presented in its exhibits and testimony before the Board.
14. These conditions shall be printed prominently on the cover sheet/signature page of the final site plan; it will not be signed by the required town officials unless this condition is satisfied.

The following additional conditions would be implemented as part of the Proposed Settlement:

15. The Applicant shall comply with State and local noise codes and ordinances.
16. Prior to the commencement of construction, the Applicant shall attend a pre-construction meeting with the appropriate Township officials to coordinate construction and to determine construction truck traffic routes.
17. The Applicant shall be prohibited from locating any construction vehicles or equipment on Pleasant Valley Way during construction.
18. Applicant shall provide for traffic control if necessary to facilitate the entry and exit of delivery vehicles.
19. Construction activities shall be conducted between the hours of 7:30 AM and 5:00 PM on weekdays, and 8:00 AM- 5:00 PM on Saturdays.
20. To minimize traffic impacts associated with the timing of deliveries during construction, construction equipment and materials shall arrive or depart the site between the hours of 9:30 AM and 3:00 PM.
21. Applicant shall notify the Township (through the Township Engineer or other designee communicated to the Applicant in writing) and all owners of property within 200 feet of the subject property, of a method by which they can “opt in” to receive notifications and alerts by text or e-mail concerning commencement of construction and construction activities occurring thereon.