

John McDonough Associates, LLC

Land Use Planning · Landscape Architecture

PLANNING REPORT

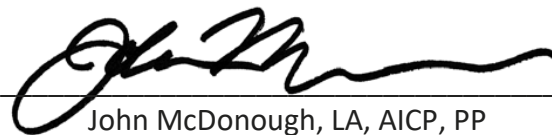
PREPARED FOR

ZINNIA HEALTH, LLC

FOR PROPERTY LOCATED AT

**33 MOUNT PLEASANT AVENUE
BLOCK 88 LOT 26
TOWNSHIP OF WEST ORANGE
ESSEX COUNTY, NJ**

(November 8, 2024)



John McDonough, LA, AICP, PP
NJPP License #33LI00518900

The original of this report was appropriately signed and sealed in accordance with laws and regulations pertaining to the practice of Professional Planning in New Jersey (NJSA 45:14A and NJAC 13:41-1.3(b))

Overview and Project Description

This planning report is submitted in support of an application filed by Zinnia Health, LLC for adaptive reuse of the former Canterbury nursing home as a residential mental health care facility. The application includes a rider which describes the nature of the proposed facility's operations, which is attached to this report as **Appendix A**. In general, people receiving treatment at the facility will reside on the premises for approximately 30 to 60 days. Substance abuse treatment is included.

The subject site consists of a single tax lot identified as Block 88 Lot 26 with an address of 33 Mount Pleasant Avenue. The property is currently developed with a one-story building that was formerly utilized as a nursing home (Canterbury Village) and related parking. The site is located near West Orange town hall and police station, and Route 280. Surrounding land uses are varied and include residential, commercial, and civic. The area is transforming with new construction across the street from the site. Maps and photographs are provided below.

Zoning Considerations

The site is in the OB-2 Office Business District. The zone “nests” permitted uses in the R-1 and OB-1 zones. Permitted principal uses include office buildings; single-family detached dwellings; water reservoir; well tower; filter bed; federal, state, county or township buildings; golf courses and clubhouses; farm, nursery, greenhouse and similar uses; and hospitals. Permitted conditional uses include, among other uses, nursing homes; congregate care facilities; assisted living facilities; and long-term care residential health care facilities.

The application includes a request that the board consider an interpretation pursuant to N.J.S.A. 40:55D-70.b. to establish which use category (and associated statutory test) should be applied to the proposed facility. To assist the board in its interpretation, below is a summary of the uses that may be considered. Notwithstanding the ultimate interpretation of the actual use category, it is the position of this report that the application meets any or all the statutory tests that would apply for approval.

- *Hospital.* The board may find that the use is a hospital because it meets New Jersey Department of Health definitions provided by the zoning officer and applicant's attorney that, *in para*, the facility provides treatment or care of individuals suffering from illness for periods exceeding 24 hours. If the board determines that the application aligns with this use category, then the use may be treated as a permitted principal use in the OB-2 zone.
- *Long term-residential health care facility.* The application includes a summary of prior approvals for the site and at least one of the approvals (ZB-95-16 in 1995) concluded that a licensed residential healthcare facility was a permitted use in the OB-2 zone. The board's former planner rendered the same conclusion in this regard. The current planner has rendered a conclusion that the application may be adjudicated by the board on the basis of it being a permitted conditional use as a long term-residential health care facility. There are eleven (11) conditional use standards that apply to this use, they are all bulk conditions, and to the extent the existing build-out does not meet any of those standard, then conditional use relief pursuant to N.J.S.A. 40:55D-70.d.(3) would be required.

- *Non-permitted use.* To the extent the board interprets that the application does not align with the use category of hospital or long term-residential health care facility, or any of the permitted uses in the OB-2 zone, then use relief pursuant to N.J.S.A. 40:55D-70.d.(1) would be required.

As stated above, notwithstanding the ultimate interpretation of the actual use category, it is the position of this report that the application meets any or all of the statutory tests that could apply, whether the board ultimately determines that the use is a permitted principal use (hospital), or permitted conditional use (long term-residential health care facility), or requires “d(1)” use relief or “d(3)” conditional use relief. The practical reasoning is that the zone allows a wide variety of medical uses and the proposed use is clearly a medical use. Therefore the use, if not a permitted use per se, is certainly akin to permitted uses.

Planning Justifications for Relief

Land use planning operates within a legal framework. The statute recognizes that land use regulation is not meant to be rigid and inflexible and gives zoning boards authority to grant “adjustments” if specific criteria are met, commonly referred to as the statutory positive criteria and the statutory negative criteria.

“d(1)” Use Relief

If the board interprets that “d(1)” use relief is required for a non-permitted use, the application satisfies the statutory criteria for grant of such relief as established by N.J.S.A. 40:55D-70.d.(1) and Medici v. BPR Co., 107 N.J. 1 (1987). The statutory positive criteria are satisfied because the site is particularly suited for the use, by virtue of its condition as a former nursing home readily able to accommodate adaptive reuse with minimal site alterations, and its context which includes a nicely comingled mix of uses including residential, commercial, civic, and transportation. The project further satisfies the statutory positive criteria because it advances one or more fundamental purposes of the municipal land use law at N.J.S.A. 40:55D-2, including:

- Purpose (a), the promotion of the general welfare, because it delivers a beneficial use that caters to persons suffering from mental illness. The board may also find that the use is “inherently beneficial” which means the positive criteria are automatically satisfied and the simplified Sica standard applies. Case law on this point is discussed later in the report.
- Purpose (g) to provide for a variety of uses in appropriate locations according to the needs of all New Jersey citizens because the site is particularly suited for the use for the reasons set forth above and because the use caters to persons in need.
- Purpose (i) to promote a desirable visual environment because the project is for adaptive reuse of an attractive building and attractive site and the application retains that which is already there and familiar in the public eye.
- Purpose (m) efficient use of land because the project involves adaptive reuse of a former nursing home as opposed to new construction, and no tree removal or earthwork.

The project satisfies the statutory negative criteria for grant of “d(1)” relief because such relief can be granted without substantial detriment to the public. The applicant will provide testimony as to operational and site management aspects of the use, to affirm that the site will flow, function, and operate safely, securely, efficiently, and comfortably, in accordance with regulatory requirements, health codes, and building codes. The use is compatible with the mixed character of the area since it retains the existing build-out and delivers a health care use on a site that has historically been associated with health care use. In addition to the above, relief can be granted without substantial impairment to the zone plan because the use is akin to many of the medical uses that are permitted in the OB-2 zone. The degree of departure from the zone plan is not substantial.

“d(3)” Conditional Use Relief

If the board interprets that “d(3)” conditional use relief is required because the application does not meet one or more conditional use standards for a long term-residential health care facility, the application satisfies the statutory criteria for such relief established by N.J.S.A. 40:55D-70.d.(3) and the New Jersey Supreme Court in Coventry Square, Inc. v. Westwood Zoning Bd. Of Adjustment, 138 N.J. 285 (1994) and TSI East Brunswick v. Zoning Bd., 215 N.J. 26, 45-46 (2013).

The standard of proof for conditional use relief is distinctly different than for a non-permitted use. The court in Coventry clarified the statutory positive criteria, such that the use per se is not at issue and the more stringent Medici standard of site suitability does not apply. The court in TSI clarified the negative criteria, to the extent the enhanced Medici burden of proof as to reconciliation of the omission of the use from the zone does not apply, since it has already been established that the use is appropriate for the zone. Thus, the focus is on the impact of the deviations, not the use, and the statutory test for “d(3)” conditional use relief is significantly more relaxed than “d(1)” relief.

The statutory positive criteria are satisfied for the same reasons as the “d(1)” relief set forth above, i.e. the project delivers a beneficial use that serves the general welfare and entails efficient adaptive reuse of a former nursing home. The statutory negative criteria are satisfied because all the conditional use standards are bulk controls and the application is taking the site “as is” so any bulk deviations are existing conditions that are not changing or worsening as a result of the application. Therefore, conditional use relief can be granted without substantial detriment to the public and without substantial impairment to the zone plan.

Permitted Use

If the board interprets that the use is a permitted use or a permitted conditional use, then the application only requires site plan approval if it is not exempt from site plan approval altogether. The site is an established approved site which implies that it has been designed in accordance with sound site planning and design standards in terms of access, circulation, parking, utilities, grading, drainage, erosion control, landscaping, lighting, and signage, and in terms of building design, orientation, and positioning.

Legal Considerations

The following excerpts from the Cox treatise on land use (2024 edition) are provided to assist the board in its consideration of the interpretation and adjudication of the application. This is by no means intended as legal opinion or legal brief since this author is not a lawyer, and thus these cases and excerpts are simply offered for reference, guidance, and assistance in helping the board render its decisions.

- In L & L Clinics, Inc. v. Irvington, 189 N.J. Super. 332 (App. Div. 1983), cert. den. 94 N.J. 540 (1983), the Town of Irvington in its zoning ordinance permitted in the B-1 Primary Business District "retail outlet and personal service uses as, or similar in nature to: ... business and professional offices." Id. at 335. The plaintiff sought to put a methadone clinic in this district contending that it was a "professional office." The municipality said that it was a "hospital" and thus not permitted. The court made much of the fact that a facility of this type requires a certificate of need from the State Department of Health and that when the certificate is issued it indicates that the proposed facility is "necessary to provide required health care and service in the area to be served..." Id. at 339. The court then said "when, as in this case, the need for a health care facility has been demonstrated and a certificate of need issued, public policy supports a reasonable interpretation of a municipal zoning ordinance which permits the use," Id., pointing out that a zoning regulation like any other police power enactment must promote public health, safety, morals or general welfare. The court stated, at 340: "We reject as unreasonably rigid the exclusionary interpretation which the Town of Irvington has placed on the words 'personal service uses...; similar in nature to ... professional offices' in its prime business zone in this situation". Subsequently, the Legislature adopted N.J.S. 40:55D-66.10 permitting a municipality by ordinance to limit the placement of methadone clinics to business and commercial districts.
- Hospitals are also uses which have been held inherently to promote the public good. Kunzler v. Hoffman, 48 N.J. 277 (1966), permitted a private hospital for the emotionally disturbed in a residential district. See also Med. Ctr. v. Princeton Tp. Zoning, 343 N.J. Super. 177, 201 (App. Div. 2001) (hospitals are indisputably inherently beneficial uses). Hospitals have been confirmed as inherently beneficial by the legislature in its definition of inherently beneficial use at N.J.S. 40:55D-4 adopted by L. 2009, c. 146, §1.
- It has been held that a residential narcotic rehabilitation and treatment center under the supervision of the Commissioner of Health was a "hospital" and qualified as an "institutional use" under a local zoning ordinance. Scerbo v. Orange Bd. of Adj., 121 N.J. Super. 378 (Law Div. 1972). However, it is likely that such centers not supervised by the Commissioner will not so easily qualify as either a hospital or an inherently beneficial use. Important proofs in such cases would include substantial evidence of a community need for a detoxification facility.

- It was also held that nursing homes and hospitals are uses which are so similar, both physically and functionally, that their disparate classification for zoning purposes cannot be justified. Urban Farms, Inc. v. Franklin Lakes, 179 N.J. Super. 203 (App. Div. 1981), cert. den. 87 N.J. 428 (1981). See also P.D.M. Constr. Corp. v. Welsh, 89 N.J. Super. 460, 464 (Law Div. 1965), aff'd 91 N.J. Super. 125 (App. Div. 1966), noting that there was no question but that private nursing homes served the general welfare as much as public. And see Mercurio v. Delvecchio, 285 N.J. Super. 328, 336-337 (App. Div. 1995), cert. den. 144 N.J. 377 (1996) noting that nursing homes are inherently beneficial uses.
- Because medical and nursing home facilities tend to involve very intensive use of property, there has been a great deal of focus on the negative criteria when applications for such facilities come before boards. The negative criteria are discussed at 8-2. For purposes of this discussion it is important to note that in reviewing board denials of such applications, courts have emphasized the positive criteria, that is, the particularly great benefits to the community at large inherent in these uses. In Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152 (1992) the Court reinstated Law Division approval of a variance to permit a 40 bed residential facility for the rehabilitation of head trauma victims in a residential district.
- In Meridian Hosps. v. Point Pleasant, 325 N.J. Super. 490 (App. Div. 1999), cert. den. 163 N.J. 80 (2000), the court set aside the denial of a variance for a nursing home on the 3rd and 4th floors of an existing hospital. There the Board had erroneously linked the arrival of the nursing home to the departure of acute care facilities from the hospital. The court found that the two were not linked and moreover that it was beyond the zoning power to attempt to control hospital resources that were entirely under the regulatory control of the DHSS.
- In Jayber, Inc. v. Municipal Council, 238 N.J. Super. 165 (App. Div.), cert. den. 122 N.J. 142 (1990), where the governing body reversed the grant of a variance for a congregate care housing facility for senior citizens on a tract of land upon which a nursing home, hospital and sanitarium already existed, the decision was reversed by the Appellate Division and the variance granted by the board of adjustment was reinstated. Although the congregate care facility was to be operated as a profit making enterprise the court pointed out that the Supreme Court in Medici v. BPR Co., 107 N.J. 1, 18 (1987) recognized that there are some commercial uses which do "inherently serve the general welfare." The Jayber court found that the proposed use would in fact promote the general welfare as had been determined by the board of adjustment.
- The Supreme Court in Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152, 160 (1992), has held that the site suitability test does not apply to inherently beneficial uses. The designation of a use as inherently beneficial has been characterized as an "analytic short-cut", i.e. a "convenient shorthand in clear-cut cases for the analysis of positive criteria that would otherwise be required." Bell Atlantic v. Riverdale Zoning, 352 N.J. Super. 407, 411 n.2 (App. Div. 2002).

Based on the above cases and excerpts, the board may find that, if use relief is required, the use can be considered “inherently beneficial” and the simplified Sica standard may be applied in lieu of the more stringent Medici or Coventry standard. The court in House of Fire v. Clifton Bd. of Adj., 379 N.J. Super. 526, 535 (App. Div. 2005) clarified that when an application involves a conditional use that is also inherently beneficial, then the Sica standard should apply over Coventry. The board planner outlines the simplified 4-prong balancing test, below:

1. The board should identify the public interest at stake.
2. The Board should identify the detrimental effect that will ensue from the grant of the variance.
3. In some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use.
4. The Board 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.

Based on all the information provided above and for all the same positive and negative reasons set forth elsewhere in this report, the four prongs of the Sica balancing test are met. Even if the more stringent Medici or Coventry standards are deemed to be required, those tests are also met.

Conclusion

The application is for adaptive reuse and conversion of a former nursing home to a mental health facility. The adaptive reuse will serve a beneficial purpose and have minimal if any impacts. The statutory criteria for grant of any or all relief are met, and approval is warranted.

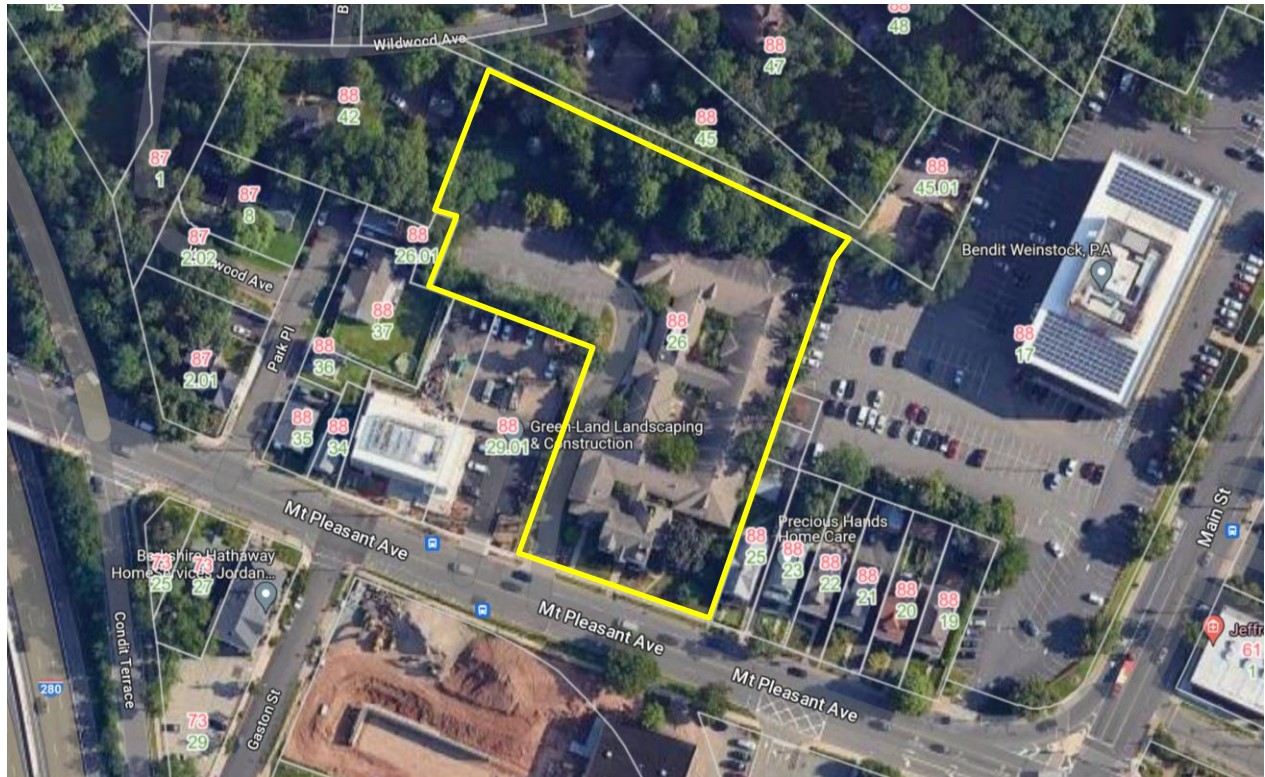


Figure 1 ~ Aerial satellite imagery of subject site (Block 88 Lot 26) and surroundings. The site is developed with a one-story building formerly utilized as an assisted living facility (Canterbury Nursing Home) and related parking lot.



Figure 2 ~ Aerial drone photograph of subject site and surroundings – the site is near town hall, the police station, and Route 280 with new construction across the street (taken by John McDonough Associates on October 14, 2024)

Qualifications of Preparer

John McDonough Associates, LLC is a land use planning and landscape architecture consulting firm with office location in Parsippany, New Jersey.

John McDonough, LA, PP, AICP is a licensed professional planner and landscape architect in the State of New Jersey. Both licenses are current and in good standing. He is also a member of the American Institute of Certified Planners.

All licenses have been obtained through requisite showing of educational and experience requirements and passing of license examinations (none have been achieved through reciprocity). All licenses have been maintained through participation in mandatory continuing education courses.

Mr. McDonough has been practicing as a land use consultant for over 37 years. He has been recognized as an expert in land use matters before hundreds of boards and commissions throughout the State of New Jersey, and in Superior Courts.

He has been a regular speaker at the League of Municipalities annual conference and at Rutgers University Bloustein School of Planning and Public Policy. The last two years he was a speaker at the national conference of the American Institute of Architects (AIA) in San Francisco and Chicago.

Appendix A – Application Rider

RIDER TO APPLICATION FOR INTERPRETATION/USE VARIANCE

33 MT. PLEASANT AVENUE, BLOCK 88 LOT 26

Applicant LS SB Canterbury LLC ("Applicant") is the owner of property located at 33 Mount Pleasant Avenue, Block 88 Lot 26 on the West Orange Tax Map. Applicant proposes to lease the property to Zinnia Health LLC, for the purpose of operating a residential behavioral health facility for the treatment of mental health disorders and other, often co-occurring disorders like substance abuse. The facility would operate as an extended stay facility where patients would typically remain for a period of approximately 30 – 60 days. For many years, the property was used for the Canterbury Assisted Living facility, which closed in 2023 and has been vacant since.

Interpretation Request

The property is located in the OB-2 zone, in which "hospitals" are a permitted use. By letter of July 25, 2024, the West Orange Zoning Officer, Geniece Gary- Adams, concluded that the proposed use is not a "hospital." As explained in her correspondence, the Ordinance does not define "hospital." Therefore, Ms. Gary-Adams defaults to a definition from the New Jersey Department of Health ("NJDOH"), as follows:

Facilities for the diagnosis, treatment or care of individuals suffering from illness, injury or deformity and where emergency, outpatient, surgical, obstetrical, convalescent or other medical and nursing care is rendered for periods exceeding 24 hours.

Our research revealed a slightly different definition found in the NJDOH Hospital Licensing Standards, as follows:

An institution, whether operated for profit or not, whether maintained, supervised or controlled by an agency of the government of the State or any county or municipality or not, which maintains and operates facilities for the diagnosis, treatment or care of two or more non-related individuals suffering from illness, injury or deformity and where emergency, outpatient, surgical, obstetrical, convalescent or other medical and nursing care is rendered for periods exceeding 24 hours.

N.J.A.C. 8:43G-1.2

By letter of August 6, 2024, we explained our position to Ms. Gary-Adams. By letter of August 15, 2024, she responded, stating that because the Ordinance is silent on the definition of "hospital" and there are two different definitions in the NJDOH regulations, we should seek an interpretation from this Board. Therefore, we are filing this application for an interpretation and, if the Board upholds Ms. Gary-Adams' interpretation, we are applying for a use variance so that the Applicant can move promptly to a decision on the project.

We submit that the proposed facility is a "hospital" under either of the two NJDOH definitions. It will provide for "the diagnosis, treatment or care of individuals suffering from illness ..." and it will provide for "other medical and nursing care" for "periods exceeding 24 hours." While it will not provide for "emergency, outpatient, surgical, obstetrical," or convalescent care, the definition is not limited to those services and also includes "other medical and nursing care" where provided for periods exceeding 24 hours.

Therefore, we submit that the proposed use is a permitted use and ask the Board to make this determination as well.

Use Variance

In the event that the Board upholds Ms. Gary-Adams' determination, then the Applicant requests a use variance. The proposed operator will use the existing structure without any exterior improvements that would trigger the need for site plan approval. The existing conditions also provide sufficient parking under the Ordinance. Therefore, we submit that the only relief required from this Board is a use variance, should it uphold the Zoning Officer's interpretation.

As the Board is well aware, it's jurisdiction includes the authority to grant a variance, "for special reasons," to permit a use in a district restricted against such use. The proofs for demonstrating special reasons, generally referred to as the positive criteria, are substantially reduced when the use proposed is an inherently beneficial use, which is defined as follows:

A use which is universally considered a value to the community because it fundamentally serves the public good and promotes the general welfare. Such a use includes, but is not limited to, a hospital, school, childcare center, group home, or a wind, solar or photovoltaic energy facility or structure.

N.J.S.A. 40:55D-4. See also Med Ctr. v. Princeton Tp. Zoning, 343 N.J. Super 177, 201 (App. Div. 2001); Kunzler v. Hoffman, 48 N.J. 277 (1966)(hospitals are inherently beneficial uses, including a private hospital for the emotionally disturbed in a residential district).

See also Scerbo v. Orange Bd. of Adj., 121 N.J. Super. 378 (Law. Div. 1972)(residential narcotic rehabilitation and treatment center under the supervision of the commissioner of Health was a "hospital" and qualified as an "institutional use" under a municipal zoning ordinance)(decided prior to adoption of "inherently beneficial use" provisions to the MLUL); Sica v. Board of Adjustment of Tp. of Wall, 127 N.J.152 (1992) (use variance upheld to permit 40-bed residential facility for the rehabilitation of head trauma victims in a residential district).

Whether the proposed use qualifies as a "hospital" or not, it is abundantly clear that this facility is inherently beneficial. Our community and region, like the rest of the country, are greatly in need of facilities that will provide care for those suffering with mental illness and co-occurring disorders like substance abuse. The proposed facility will bridge a gap in the chain of services available to these individuals. Some individuals may find themselves at times in a condition, on a temporary basis, that prohibits them from living at home or in other residential settings, like a group home, but

medical professionals have concluded that this condition can be improved with a limited stay in a residential setting not requiring long term treatment.

Without facilities like the one proposed, clients who are experiencing one of these periods of short term crisis would be remain in their current living situation, which could exacerbate their condition and or create safety concerns for themselves, their families and the community. Therefore, the proposed facility will clearly address an important health care need in our community and region and qualifies as an inherently beneficial use.

Where a use is deemed to be inherently beneficial, that use presumptively satisfies the positive criteria required for a use variance, because such uses are assumed to promote the general welfare. Burbridge v Mine Hill Tp., 117 NJ 376, 386 (1990).

In addition, an applicant seeking this relief, including an application involving an inherently beneficial use, must demonstrate that granting this relief can be accomplished without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance. N.J.S.A.40:55D-70(d).

To meet this burden, the Sica court identified a four-step balancing test including the following elements. First, the board must identify the public interest at stake. Second, the board must identify the detrimental effects that would ensue from the granting of a variance. Third, the board must determine whether it can reduce any detrimental effect by imposing reasonable conditions on the use and, if so, the weight accorded the adverse effect reduced by the anticipated effect of those restrictions. Fourth, the board should weigh the positive and negative criteria; that is, the public interest against the public detriment, and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

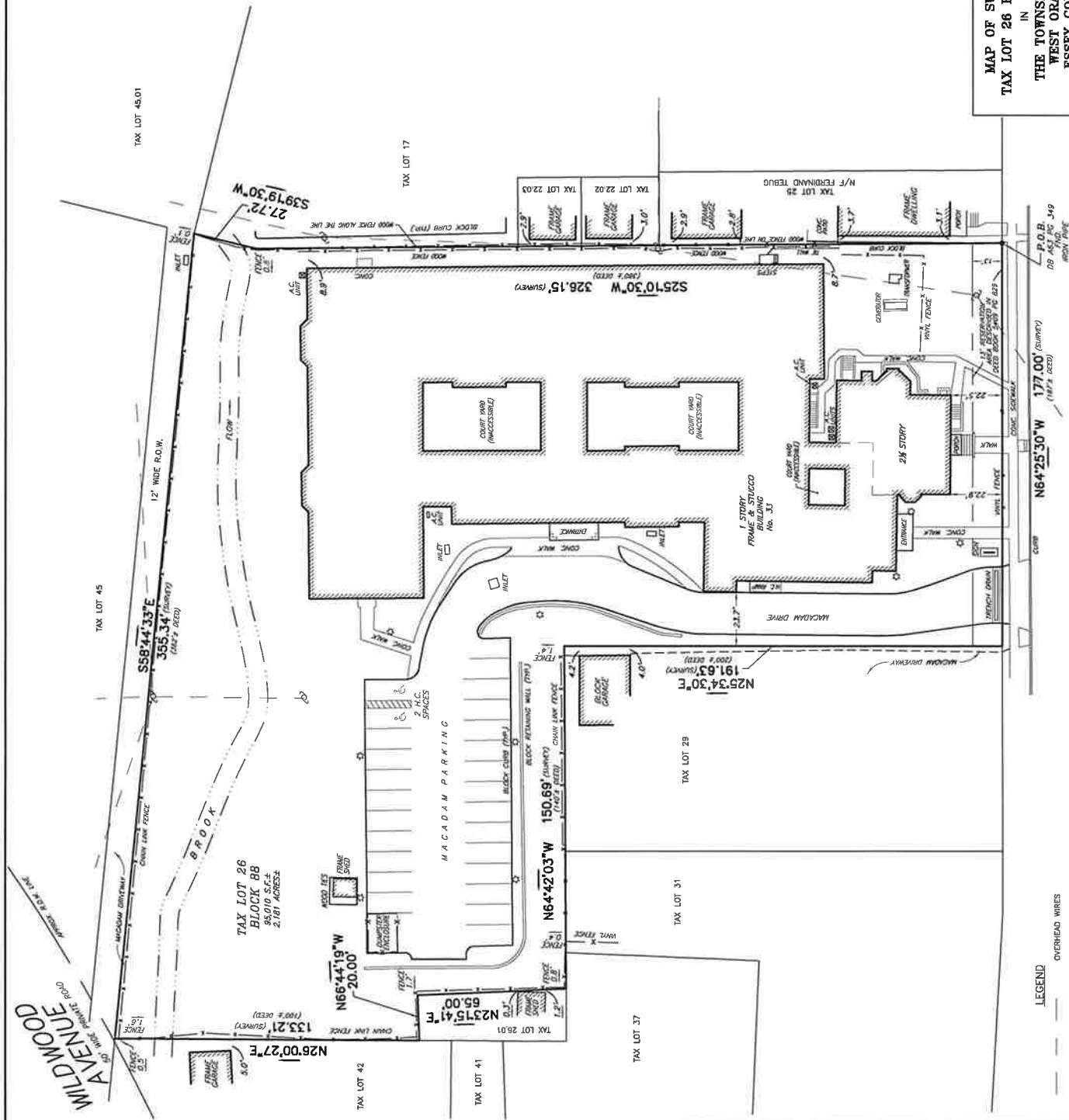
At the hearing on this application, we will present operational testimony and planning testimony to justify the conclusion that this proposed use meets the Sica test. First, as explained above, this facility will meet a critical public need. Second, granting the variance will not result in any detrimental effects. To the neighbors and the surrounding community, the use will not appear any different than the assisted living facility that occupied this property for decades. The only traffic and parking associated with the proposed use will be employees and deliveries. Because no exterior changes are proposed, there will be no detrimental environmental impacts. The existing facility is well landscaped and screened from neighboring properties.

Third, while the Applicant will entertain any suggested reasonable conditions, we do not believe any such conditions are required because we do not identify any detrimental effects. Finally, balancing the important public purpose of this use against any conceivable negative impacts, we submit that granting of the variance will not cause a substantial detriment to the public good.

Furthermore, granting the relief will not result in a substantial impairment of the intent and purpose of the zone plan or zoning ordinance. It is our position that the use is permitted in the zone.

However, as our planner will explain, in the event a use variance is required, this type of use is very consistent with the zoning and current uses in this vicinity and, in fact, it continues the residential care use that operated on this facility for decades.

For these reasons, we respectfully submit that a use variance is appropriate and we look forward to presenting our testimony at a forthcoming meeting.



REFERENCE:

NOTE:

THIS SURVEY IS CERTIFIED ONLY TO:
THE HOUSE OF THE HOLY COMFORTER, INC.
d/b/a CANTERBURY VILLAGE
BROSCIOUS, FISCHER & ZAITER, ESQUIRES
PLS TITLE & SETTLEMENT OF WASHINGTON, N
SUSSIX BANK, ITS SUCCESSORS AND/OR AS
MAY APPEAR, 33 MOUNT PLEASANT AVE.,

MAP OF SURVEY
TAX LOT 26 BLOCK 88
IN
THE TOWNSHIP OF
WEST ORANGE
ESSEX COUNTY
NEW JERSEY

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DAVID B. SWANSON
PROFESSIONAL LAND SURVEYOR

Signature of Notary Public

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