

Planning Report

Daughters of Israel

Variance and Site Plan

Prepared by Francis J. Banisch, PP/AICP

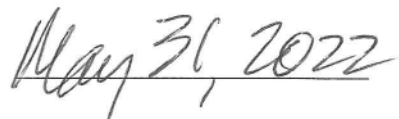
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The original of this document has been signed and sealed in accordance with N.J.S.A. 13:41-1.2.



Francis J. Banisch III, PP/AICP (Lic. No. 1686)


Date

Introduction

The purpose of this report is to analyze the variances and variance criteria regarding redevelopment and expansion of the 303-bed nursing home operated by the Daughters of Israel (DOI) on an 18-acre site at 1155 Pleasant Valley Way in West Orange which is owned by JCF 1155 Pleasant Valley Way, LLC. Applicant DOI proposes to reconstruct and expand the facility to meet the emerging needs of the senior community by modernizing and upgrading the facilities and developing a continuum of care that includes independent living, assisted living including



Memory Care, and skilled nursing.

DOI has operated the Daughters of Israel Home since its development in 1962. In order to deliver an updated facility, appropriate for the 21st century, DOI proposes a multi-phase plan to replace the existing facilities with a modern continuing care retirement community (CCRC).¹

This report provides:

- a description of the proposal and needed variances;
- a description of the site and surrounding area;
- analysis of the West Orange Master Plan and zoning regulations applicable to the DOI campus in the R-2 Single Family Residential Zone; and
- analysis of the statutory requirements for the grant of use and bulk variances for this development.

This report will demonstrate that:

1. Use variance relief under N.J.S.A. 40:55D-70d(1) should be granted because:
 - a. The proposed use(s) provide inherent benefits to the public.
 - b. DOI would suffer undue hardship if compelled to use the property for the permitted residential uses, since it would have to abandon and remove the existing facilities and redevelop the site for large-lot single family homes.

¹ The term “CCRC” is used generically within this report in reference to a continuum of care facility containing independent living, assisted living and skilled nursing components, whether or not the facility is registered with the Department of Community Affairs as a CCRC under the Continuing Care Retirement Community Regulation and Financial Disclosure Act, N.J.S.A. 52:27D-330 et seq.

- c. The continuing care use would also serve the public welfare because the DOI site is particularly suited to the proposed use given that it has been improved with a skilled nursing facility for decades.
2. Height variance relief under N.J.S.A. 40:55D-70d(6) should be granted because special reasons exist whereby the proposed building height is not inconsistent with the surrounding neighborhood and will not offend any of the purposes of the height limitation in the zoning ordinance (light, air, open space).
3. Bulk variance relief under N.J.S.A. 40:55D-70c(2) should be granted because unique site attributes are well adapted to the redevelopment that will substantially expand the inherently beneficial elements with minimal or no detrimental impact. Thus, the project when viewed in its entirety satisfies the variance criteria, both positive and negative.

As a result of the above, special reasons exist that support the use and height variance relief required for this development application. Similarly, justification exists for the grant of the bulk variances required for this development application. Additionally, the proposed development will replace an older nursing home facility with a modern and attractive facilities that will offer a continuum of care for the aging residents. The new facility will be an attractive addition to the community and will replace the older and far less attractive series of buildings in place today. These improvements will be complementary to the neighborhood character, compatible with the Township's land use pattern and offer an expanded range of residential offerings and care for the nursing home residents.

Scope of Proposal and Necessary Variance Relief

DOI proposes to replace the existing nursing home with a comprehensively planned campus including the following:

- 182 independent living units;

- 64 assisted living beds including 36 for memory care;

- 80 skilled nursing beds; and

- ancillary and accessory support facilities including:

 - a community center serving the independent living and assisted living components, consisting of approximately 43,296 square feet at full buildout, which will include amenities such as a fitness center with a pool, an auditorium, library/reading lounge, game room, art studio, salon, meditation center, full kitchen for meal service to assisted living and skilled nursing residents, a formal dining room, a café, a pub serving alcoholic beverages (subject to obtaining a liquor license), a small store selling sundries to residents, and a variety of health and wellness services (this may include physical and occupational therapy, physician visits, and other medical services) together with resident support.

As proposed, the improvements will require variance relief from the following requirements:

“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	5 stories / 57.50 feet
§ 25-8.12	Number of principal uses on a lot	1	1 (nursing home)	3 (if component uses are characterized individually)

“c” Variances

Section	Description	Required/Permitted	Existing	Proposed
§ 25-7.1	Maximum lot coverage	30%	38.53%	37.46%
§ 25-8.4	Maximum height of retaining wall	4'		10'
§ 25-12.1.o.	Maximum length of continuous parking row without landscaped island	20 spaces	>20 spaces	22 spaces (southeast perimeter of parking lot)
§ 25-12.2	Number of parking spaces ¹	479 (project total)	236	381 (429 with EV credit)
§ 25-12.3.a.2.	Number of loading spaces	13	2	1
§ 25-12.4.a.6.	Parking of vehicle with dual rear wheels	Not permitted	Parking of existing shuttle bus	Parking of the same or similar shuttle bus
§ 25-12.4.b.3.	Parking of commercial vehicles	In garage, or if too large, outdoors with commercial markings removed; single axle; maximum 20' long, 7' high and 6,000 gross vehicle weight	Parking of existing shuttle bus and several delivery vans outdoors, with commercial markings, some having a double axle and/or exceeding size limit	Parking of the same or similar shuttle bus and several delivery vans outdoors, with commercial markings, some having a double axle and/or exceeding size limit

Section	Description	Required/Permitted	Existing	Proposed
§ 25-14.1.c.	Light pole height	18'	>18'	25'
§ 25-14.4.a.	Number of signs per linear feet of frontage	8 (4 signs per 250'; 648' of frontage)	1	11
§ 25-15.3	Sign illumination	Illumination not expressly permitted in R-2 District	Externally illuminated with ground-mounted light fixture	Freestanding signs: Externally illuminated with ground-mounted light fixture Building signs: Reverse lit channel letters
§ 25-15.3.b.	Number of signs per lot	1	1 monument sign	5 facade signs 1 monument sign (existing) 1 freestanding identification sign (health center) 4 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%	28.18%
§ 25-28.8.d. § 25-7.1- Table	Maximum effective impervious coverage	30%	69.35%	67.42%

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.

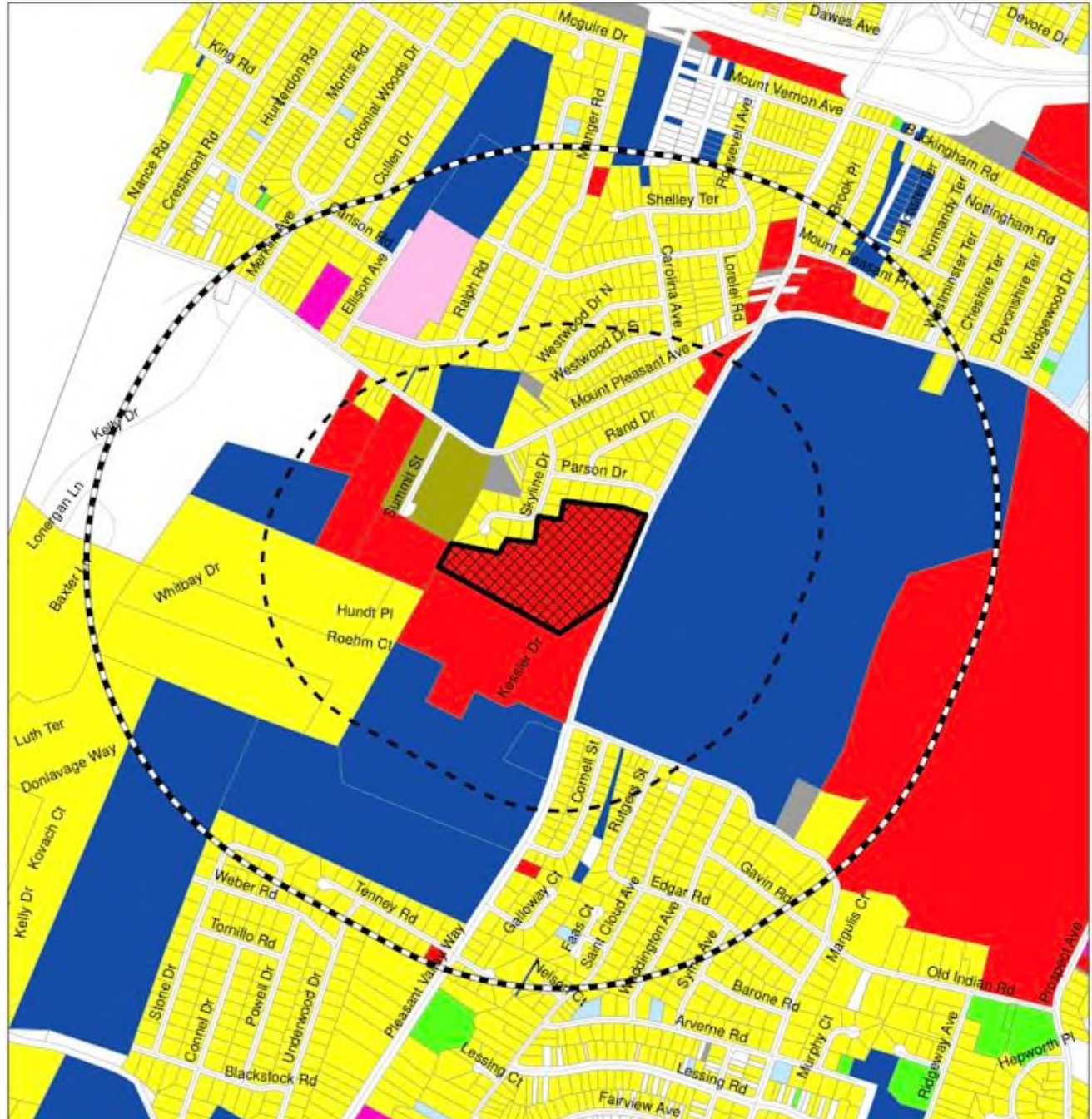
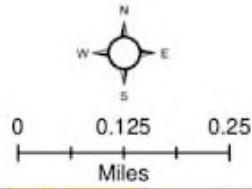
Description of the Site and Surrounding Area

Blessed with a wealth of public lands and public and private open spaces, West Orange is otherwise a largely developed community in central Essex County. While the Township has a

substantial residential ratable base, a mosaic of different land uses is found in the vicinity of the DOI campus, with the adjoining uses including:

- To the west – Complete Care at Summit (skilled nursing and rehabilitation);
- To the north – single family homes on lots of approximately 15,000 square feet along Parson Drive and Skyline Drive;
- To the east – Francis A. Byrne Golf Course and Essex County Country Club; and
- To the south – Kessler Institute for Rehabilitation.

Property Tax Class
Block 171, Lot 12
West Orange,
Essex County
October 2021



- Legend**
- Subject Property
 - 1/4 Mile Buffer
 - 1/2 Mile Buffer

Data Sources:
 NJGIN Parcel Layer 2021

This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been NJDEP verified and is not State authorized.

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 Planners and Designers

The expanded neighborhood, beyond immediate neighbors, includes a mix of uses. Within a ¼ mile radius, exclusive of the DOI site, the following uses are found:

Tax Class	Acres	%
Public Property	105.7	43
Residential	69.9	28
Commercial	60.6	24
Apartment	8.9	4
Vacant	1.7	1
No Data	0.78	0
TOTAL	247.58	100

Public lands dominate the area within ¼ mile of the DOI site, occupying over 40% of the land area. Commercial uses occupy roughly a quarter of the lands in this radius and residential lands account for 28%.

Expanding the circle to ½ mile from the DOI campus includes the following uses:

Tax Class	Acres	%
Public Property	269.1	38
Residential	258.5	37
Commercial	100.9	14
No Data	51.1	7
Public School	10.1	1
Apartment	8.9	1
Vacant	3.6	1
Private School	2.4	0
Other Exempt	0.4	0
TOTAL	705	100

(*totals do not add to 100% due to rounding)

Within this larger radius, public lands still dominate, occupying 38% of the ½ mile radius, while a lesser percentage of commercial land (14%) and a greater percentage of residential lands (37%) are found in the expanded radius.

The DOI site is part of a localized node of nursing and rehabilitation care facilities, including Complete Care at Summit and the Kessler Institute for Rehabilitation. These uses depart from the residential character of the surrounding area, but are arranged in a compact node, with the two largest, DOI and Kessler, fronting on Pleasant Valley Way (County Route 636).

West Orange Master Plan and Zoning

The Planning Board’s “2019 Reexamination Report and Plan Element Amendments”, which amended the Land Use Plan and other plan elements, reaffirmed the goals and objectives from the 2010 Master Plan Update. Revisions to the Land Use Plan in 2019, which included “potential recommendations for changes to portions of the Land Use Regulations Ordinance” affect the planning objectives and policies applicable to this application. Among the key recommendations in the Executive Summary to the 2019 Master Plan Reexamination was the following:

1. *“Provide for a range of appropriate housing types and sizes”*

This recommendation sets the stage for a series of policy and regulatory suggestions included in the document, which reviewed and endorsed, or updated, the planning objectives from the 2010

Master Plan Reexamination. A number of these objectives relate directly to the proposed application, as follows:

Master Plan Objectives

The Township's 2019 Master Plan Reexamination examined the major planning objectives from the 2010 Master Plan Reexamination. Those relevant to the DOI proposal are excerpted from the 2019 Master Plan Reexamination where they were summarized, followed by a discussion of the current status of each:

“3. Provide and Preserve Adequate Light, Air and Open Space

The 2010 Reexamination Report indicated the need to not only provide adequate light, air and open space but also to preserve adequate light, air and open space for its residents.

Current Status: This general objective remains valid.”

“7. Provide Sufficient Space for Balanced Growth and Development

The 2010 Reexamination report re-emphasized the need to provide sufficient space in appropriate locations for residential, recreational, commercial/retail, industrial and open space uses in a manner that would provide balanced growth and development.

Current Status: This general objective remains valid. Given the significant amount of development activity in the Township in recent years and potential additional

redevelopment, it is imperative that adequate open space and community facilities are provided to accommodate residential and business growth”

“9. Promote a Desirable Visual Environment

It was noted that the Township should continue to promote a desirable visual environment through creative development techniques and good civic design and arrangements. The 2010 document included residential design guidelines.

Current Status: This general objective remains valid and should be increased in scope. The Downtown West Orange Alliance recently adopted design standards for the downtown area. Consideration should be given to expanding the application of Downtown design standards — or creating new business/mixed-use district standards — to other commercial areas in the Township which are subject to redevelopment and new development”.

“12. Provide for the Housing Needs of Senior Citizens and Low and Moderate Income Households

The 2010 Reexamination Report stated that the Township should encourage the provision of the housing for senior citizens and low to moderate income households in the Township.

Current Status: This general objective remains valid. The Township has been proactive in addressing its affordable housing obligations, as well as seeking to provide additional

senior housing. West Orange has *other specialized housing, including assisted living and nursing facilities, which provide community benefits to support an aging population.*”

2019 Master Plan Reexamination Principles

The following principles, reaffirmed in the 2019 Master Plan Reexamination are relevant to the DOI proposal:

“1. *Encourage Appropriate Residential Development.* Appropriate residential development can vary in different locations and contexts throughout the Township. In particular, mixed-use development that includes multifamily residential is appropriate in various commercial districts and other developed locations in the Township, while neighborhoods comprised of single-family detached housing at lower densities should remain unchanged, while allowing for upgrading of the housing stock. 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.” (emphasis added)

“2. *Properly Locate Public, Commercial/Retail, Industrial, Residential and Service Uses.* The Master Plan should continue 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*”.

“4. Maintain the Appropriate Scale of the Community. While in many locations keeping existing development patterns intact is appropriate, there are instances where redevelopment may involve larger buildings and/or other more intensive development.

There are locations in West Orange that have experienced changes in population density and development patterns. Some of these areas will continue to change to meet the diversity of demand and trends in commercial and residential development, such as transit oriented and mixed-use development. In such cases, potential development impacts should be mitigated through appropriate site and building design”.

2019 Land Use Plan Recommendations for Land Use Regulations Ordinance

Ordinance amendments affecting nursing homes and senior living were among the updated Land Use Plan recommendations, including the following:

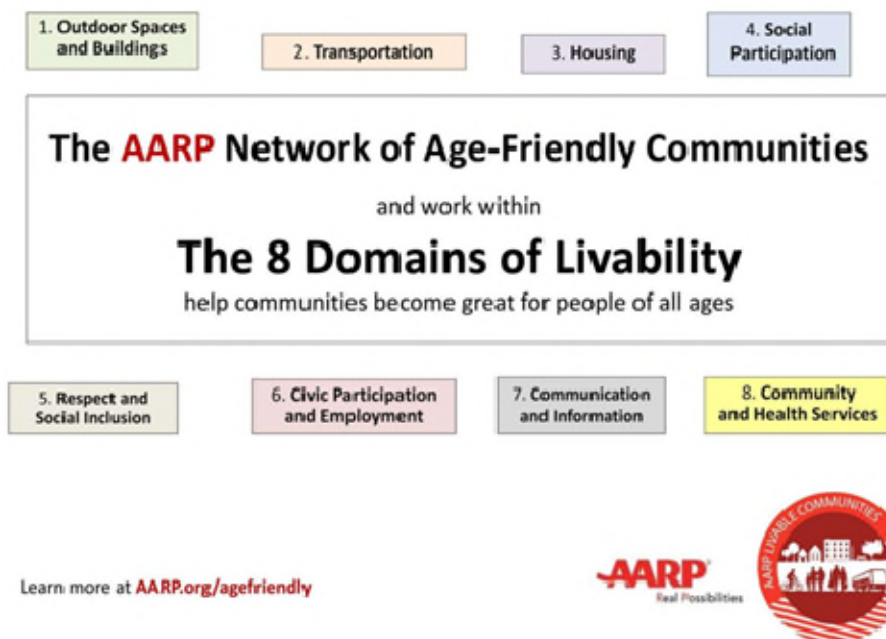
“Support land uses and development design that promote “aging in place” for older adults and undertake other measures that support the Township’s Senior Livability Initiative.”

The West Orange Department of Health received a grant from the Partners for Health Foundation to implement the West Orange Senior Livability Initiative “to help create an age-friendly community in West Orange and a great place to live for senior residents and people of all ages.”

Population growth, demographics and the desire for seniors to “age in place” (that is, to remain in one’s own home and community safely, independently and comfortably for as long as possible), has created the need for greater senior programs and resources. The Senior Livability Initiative seeks to explore and address challenges of the Township’s growing 55-and-over population - 29%, as of 2010.

The Initiative provides greater collaboration among the Township, community partners, funding sources and working groups to connect Seniors with appropriate services and establish additional programs.” The program embraces the concept of “The 8 domains of livability”:

The redevelopment at DOI directly advances the objectives of the Senior Livability Initiative.



Recommended changes to the Land Use Regulations

Among a long list of recommendations was the following:

Look into changes to parking standards:

- *Provide more flexibility in terms of parking ratios, particularly in the downtown.*

Housing

Under the heading “Housing”, the 2019 Master Plan Reexamination noted:

“In terms of general housing objectives, West Orange remains committed to addressing its “fair share” of regional affordable housing needs, as well as providing a range of housing opportunities. These include *specialized housing for senior citizens* and residents with special needs (e.g. group homes for the developmentally disabled), *assisted living and nursing facilities* and a range of for-sale and rental housing, including single-family, two-family and multifamily dwellings.”

The proposed facility will provide, or provide funding for, affordable housing as part of the development. There are several ways in which this could occur. For example, it is expected that the skilled nursing component will provide 40-60 of the 80 beds as Medicaid beds, qualifying them as very low income accommodations. The assisted living component, as required by law, will provide 10% of the 64 beds as Medicaid (7 beds), qualifying them as very low income accommodations. And DOI will comply with applicable State and Township laws and

regulations with respect to affordable housing obligations relating to the 182 independent living units. As a result of these requirements, DOI will be creating a minimum of 75 affordable housing credits, computed as follows:

Minimum skilled nursing Medicaid beds	40
Assisted living Medicaid beds:	7
15% set-aside of 182 units	<u>28</u>
TOTAL	75

Alternatively, if DOI opts to formally license and operate the facility as a CCRC once the independent living units are developed (as is expected), the assisted living Medicaid requirements do not apply, but then the facility would be a “non-residential development” as defined in the Statewide Non-Residential Development Fee Act, N.J.S.A. 40:55D-8.1 et seq., and would be subject to payment of a fee thereunder. DOI intends to work with the Township as the project advances in order to assist with applicable affordable housing obligations.

Master Plan Summary

The “2019 Master Plan Update - Reexamination Report and Plan Element Amendments” recognized changing needs and opportunities as they relate to senior housing and care services for the elderly in West Orange. The 2019 Master Plan Update, which amended the Land Use Plan Element, recognized that “specialized housing, including assisted living and nursing facilities, provide(s) community benefits to support an aging population”. It also acknowledged that “(S)enior and specialized housing options should be supported as well, as long as potential development impacts are addressed.”

The “2019 Master Plan Update - also advocated for “...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”.

The 2019 Master Plan Update provided insight into the intent of the plan as it relates to changing circumstances. While reiterating the Township’s interest in protecting the character of single-family residential neighborhoods, the 2019 Master Plan Update replaced the objective to “Maintain the Existing Scale of the Community”, with “4. Maintain the Appropriate Scale of the Community”, noting that “while in many locations keeping existing development patterns intact is appropriate, there are instances where redevelopment may involve larger buildings and/or other more intensive development” and notes that “potential development impacts should be mitigated through appropriate site and building design”.

Among the most direct references to the intent of the 2019 Master Plan Update toward uses like those proposed is found in the plan’s intent to “Support land uses and development design that promote “aging in place”. Additionally, the plan recognizes a need to “(P)rovide more flexibility in terms of parking ratios”, another recommendation relevant to this application.

Among the important considerations regarding this proposal is the fact that it will help West Orange address its affordable housing obligation, producing at least 75 affordable units/beds.

Zoning of the Site

The table below identifies the principal, accessory and conditional permitted uses in the R-2 district, which requires a 40,000 square foot minimum lot area:

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

In addition to single family homes, water infrastructure, government uses, farms and hospitals, the R-2 zone permits “Senior citizens housing project” as defined in Section 25-4 as a permitted principal use. This use is defined as:

...any Senior Citizens Housing Project, financed by the U.S. Department of Housing and Urban Development under Section 202 program for Housing for the Elderly with

Supportive Service and the applicable Interim Regulations published in the Federal Register, dated June 12, 1991, 24 CFR Part 889.

According to the Department of Housing and Urban Development (HUD), the Section 202 program is described as follows:

Purpose:

The Section 202 program helps expand the supply of affordable housing with supportive services for the elderly. It provides very low-income elderly with options that allow them to live independently but in an environment that provides support activities such as cleaning, cooking, transportation, etc. The program is similar to Supportive Housing for Persons with Disabilities (Section 811).

Type of Assistance:

HUD provides interest-free capital advances to private, nonprofit sponsors to finance the development of supportive housing for the elderly. The capital advance does not have to be repaid as long as the project serves very low-income elderly persons for 40 years.

Project rental assistance funds are provided to cover the difference between the HUD-approved operating cost for the project and the tenants' contribution towards rent. Project rental assistance contracts are approved initially for 3 years and are renewable based on the availability of funds.

Eligible Applicants:

Private nonprofit organizations and nonprofit consumer cooperatives that meet the threshold requirements contained in the General Section and the program. Notice of Funding Availability (NOFA) are the only eligible applicants under this Section 202

program. Neither a public body or tribe nor an instrumentality or agency of a public body or tribe is eligible to participate in the program. Nonprofit entities associated with public bodies or tribes must establish their eligibility by providing an attorney's opinion stating that under state or tribal law the associated entity is not an instrumentality or agency of the public body or tribe and confirming that such entity:

- Meets the definition of “private nonprofit organization” under part 891;
- Has Articles of Incorporation which provide no more than minority control by the public body or tribe; and
- Is not receiving a majority of its operational funding from the public body or tribe.

Eligible Customers:

Occupancy in Section 202 housing is open to any very low-income household comprised of at least one person who is at least 62 years old at the time of initial occupancy.

In West Orange, to qualify as senior citizen housing, Section 202 HUD funding is required by definition. However, senior housing is funded through a variety of government and nonprofit funding sources and private developers. The Municipal Land Use Law (MLUL), in advocating for the construction of “senior citizen community housing construction”, never mandates the use of a specific federal funding program or any income limitation on potential residents.

Statutory Requirements for the Grant of Use and Bulk Variances

The MLUL provides the statutory basis for the grant of use and bulk variances at N.J.S.A. 40:55D-70. While the proposed independent-living senior housing will not be targeted to those of very low income, the senior housing use itself is permitted, since the R-2 Zone currently permits senior housing, albeit for very low-income persons. Thus, this senior independent living use appears to require use variance relief because of the definition tying it to a specific funding program.

In addition, the zone does not expressly include assisted living residences as a permitted use. However, as part of the continuum of care, the proposed assisted living use satisfies a housing need that is targeted to elderly senior citizens who have varying abilities and require varying levels of assistance with the activities of daily living.

This continuum of care housing arrangement offers an opportunity for seniors to "age in place", a concept promoted in the Township Master Plan. The redevelopment of DOI will allow residents to "age in place" in their community, albeit in a different residence. This concept, where aging residents opt to remain in or choose quarters that provide full or partial independence and available supplemental services, reduces the demand on skilled nursing facilities and enriches the lives of elderly residents who generally seek to retain as much independence as can safely be maintained.

The MLUL, since 2000, has included a definition of “inherently beneficial use” (N.J.S.A. 40:55D-4):

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

While the definition references specific uses, it notes these are not an exhaustive list but rather such uses are “not limited to” those named but also include any use which is “universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare”. New Jersey Courts have found CCRC’s, independent living senior apartments, nursing homes and assisted living facilities to be inherently beneficial uses.

Use Variances

The Zoning Board of Adjustment is authorized to grant variances to permit a use or structure in a district that does not permit such use or structure pursuant to N.J.S.A. 40-55D-70d (1). N.J.S.A. 40-55D-70d (6) authorizes the grant of variances where the height of a principal building exceeds the local ordinance by more than 10% or 10’. Additionally, according to the West Orange Code § 25-8.12, only one principal permitted use is allowed on one lot. This application involves use variance relief to allow more than one use as part of a non-permitted CCRC that will exceed the height limit by more than 10% or 10’.

DOI proposes to replace and expand the existing non-conforming nursing home with a new and upgraded skilled nursing facility as part of the proposed continuum of care that will also provide assisted living facilities and independent living senior apartments. The building height proposed requires a variance pursuant to N.J.S.A. 40-55D- 70d(6), since the proposed height is 57.50' and 5 stories where 2 ½ stories and 35' is permitted. The statute permits the grant of use variances when both the positive and negative criteria are met.

Positive Use Variance Criteria – CCRC Use

The positive criteria involve “particular cases” and “special reasons”. As noted in “New Jersey Zoning and Land Use Administration”:

Regarding the positive criteria, the Court has stated that “‘special reasons’ takes its definition and meaning from the general purposes of the zoning laws” enumerated at N.J.S.A. 40:55D–2. *Burbridge v. Twp. of Mine Hill*, 117 N.J. 376, 386, 568 A.2d 527 (1990) (citing *Kohl v. Mayor of Fair Lawn*, 50 N.J. 268, 279, 234 A.2d 385 (1967)). In *Saddle Brook Realty, LLC v. Township of Saddle Brook Zoning Board* *254 of Adjustment, 388 N.J.Super. 67, 76, 906 A.2d 454 (App.Div.2006), we observed three situations in which “special reasons” may be found:

(1) the proposed use inherently serves the public good, such as a school, hospital or public housing facility;

(2) the property owner would suffer “undue hardship” if compelled to use the property in conformity with the permitted uses in the zone; and

(3) the use would serve the general welfare because the proposed site is particularly suitable for the proposed use.

The New Jersey Supreme Court has concluded that facilities which are inherently beneficial satisfy the positive criteria by their very nature, and need not demonstrate particular suitability, hardship or that the property cannot be used for a permitted use. *Sica v. Board of Adjustment of Township of Wall*, 127 N.J. 152 (1992).

In this instance, special reasons can be found in all these situations, as follows:

(1) The proposed uses inherently serve the public good:

All elements of the continuing care community, either separately or in combination, are inherently beneficial because they “fundamentally serve[s] the public good and promote[s] the general welfare.” N.J.S.A. 40:55D-4).

Skilled nursing facilities, whether or not conducted for a profit, are inherently beneficial uses, particularly where a substantial number of their beds are designated for Medicaid recipients. *Urban Farms, Inc. v. Borough of Franklin Lakes*, 179 N.J. Super. 203, 212 (App. Div. 1981) certif. den., 87 N.J. 428 (1981).

Congregate care residential facilities have been found to be of inherent community benefit, even when operated for profit, owing to the substantial public need for such facilities. See *Jayber*.

Inc. v. Municipal Council, 238 N.J. Super. 165 (App. Div. 1990), cert. den. 122 N.J. 142 (1990).

In *Sunrise Development, Inc. v. Zoning Board of Adjustment of the Borough of Madison et al*, an unpublished decision from 1999, the Appellate Division found that housing for the elderly in an assisted living facility is an inherently beneficial use deserving high priority. Additionally, senior housing has also been found to be inherently beneficial (See *Borough of Roselle Park v. Union Tp.*, 113 N.J. Super. 87 (1970)) and it is noted that the provision of independent living units for senior citizens directly addresses purpose 1 of the MLUL:

“1. To encourage senior citizen community housing construction”

Whether viewed independently or together, each element of the CCRC achieves the positive criteria. The nursing and assisted living uses have been found to be inherently beneficial, and the independent living senior housing units inherently support the public good and further the purpose of the MLUL that advances senior housing. It is noted that purpose 1, encouraging senior housing construction, is the only purpose of the MLUL to encourage development of a specific land use.

(2) The property owner would suffer “undue hardship”:

As noted in “New Jersey Zoning & Land Use Administration,” “hardship can be created not only by the physical characteristics of the land, but by reason of the existence of a structure already located on it which may create an “exceptional situation” sufficient to justify a zoning variance.

See *Lang v. Zoning Board of Adjustment*, 160 N.J. 41 (1999); *Wilson v. Brick Twp. Zoning Bd.*, 405 N.J. Super. 189, 200-202 (App. Div. 2009); *Hawrylo v. Board of Adjustment*, 249 N.J. Super. 568 (App. Div. 1991).

The DOI facilities that exist today create an exceptional situation that makes the site unlike any other parcel. If compelled to use the property in conformity with the permitted uses in the zone, DOI would have to demolish and remove the existing facilities and secure subdivision or site plan approvals and building permits for new construction of large lot single family homes. This is an uneconomic proposition, since the value of the site, as developed, is greater than the potential value from subdivision and redevelopment.

(3) The site is particularly suitable for the proposed use:

The requested relief would serve the general welfare. While particular suitability need not be proven for an inherently beneficial use, DOI proposes to reinvest in and expand the range of service at this site, which has long been a skilled nursing facility. Independent living senior housing units will be constructed and assisted living accommodations, providing meals, housing and assistance with activities of daily living, will supplement the skilled nursing and provide a true continuum of care for the aging. Given the history of use at this location, it is an appropriate place to build on the caring tradition with the addition of other elements that aid the aging population.

Negative Use Variance Criteria

The negative criteria require that the Zoning Board of Adjustment find that there will not be substantial detriment to the public good and that the grant of relief will not substantially impair the intent and purposes of the zone plan and zoning ordinance. In this case, the particular suitability of this site for these uses will benefit the community without negative consequences and the requested relief will alleviate the hardship that would be imposed if DOI were required to comply with the residential zoning.

Additionally since senior housing has been found to inherently serve the public good, and since the nursing home and assisted living uses have been found to be inherently beneficial, as has the CCRC, it is generally assumed they pose no substantial detriment to the public good and that they in fact offer public benefits. Nonetheless, the negative criteria require a showing that there will be no substantial detriment to the public good.

A use which is found to be inherently beneficial is determined to have satisfied the positive criteria required for the grant of a use variance under N.J.S.A. 40:55D-70-d(1). Nonetheless, the inherently beneficial use requires further review under *Sica v. Board of Adjustment of the Township of Wall*, 127 N.J. 152 (1992). This case established a four-part balancing test that a Board is to use in evaluating the negative criteria for an inherently beneficial use:

1. Evaluate the public interest served by the inherently beneficial use;
2. Identify any adverse consequences of granting the variance;
3. Consider what conditions might be imposed to mitigate the adverse consequences; and

4. Balance the public interest in granting the variance against any adverse impact, and impose reasonable conditions to mitigate the impact(s).

Because inherently beneficial uses presumptively meet the positive criteria, a site suitability test and a demonstration of need are deemed unnecessary. The inherently beneficial use status is the essential "special reason."

The following analysis is offered with regard to the four-part Sica test:

(1) Public interest to be served

Care of the elderly, whether healthy and independent or sick or infirm, assumes a high value among inherently beneficial uses and such uses are recognized as high order uses. Assisted living facilities respond to a housing need that occurs between when a person leaves home (or another independent living arrangement) and when they need the care provided by a nursing home. The proposed CCRC will combine these progressive levels of care at one location where the residents can age in place and not have to worry about changing circumstances.

(2) Adverse consequences of granting the variance

Impacts on the surrounding area will not be very different in character from those of the current DOI skilled nursing facility. The site is not a generator of air pollution or excessive noise. An increase in staffing and the creation of assisted living and independent living senior housing units

will increase traffic from the site, but the traffic impacts can be adequately managed at this location on a County Road.

The building height variance could be seen as an adverse consequence if it resulted in any situation where the light, air and open space characteristics of the neighborhood were negatively impacted. However, since the highest point of the new buildings will be below the rear yard land elevations of the neighboring homes, access to light and air should remain unhindered. Additionally, the open space element of the DOI site, a dense group of trees on steep slopes, will not be substantially affected by the development.

(3) Conditions that might be imposed to mitigate the adverse consequences

The proposed development will replace the existing skilled nursing home with a new CCRC composed of independent living senior apartments, assisted living and an upgraded skilled nursing facility along with ancillary services and related parking and site amenities. In order to accommodate the CCRC elements, efficient use of this site demands a compact footprint of development, which results in the need for a height variance.

The 57.50' height of portions of the campus nearest Pleasant Valley Way will present a new and modernized appearance, and the overall building height has been reduced by one story, or approximately 15', from the original proposal. As such, there should be no significant adverse consequences that need to be abated.

At the DOI campus, where this nursing home licensed for 303 beds has long been part of the neighborhood dynamic, any adverse impacts will be minor and incremental, as seen in the traffic study prepared as part of the application.

Building Height

The proposed building height exceeds the permitted height by 22.5', and this raises concerns about a possible impact on the public good. If the building height and massing would reduce the extent of light, air and open space available around the residential units adjoining the site, such impact could be deemed detrimental to the interests of the neighbors.

In the instant case, the local topography places the DOI campus at the bottom of the hill with the adjoining single family lots elevated above the campus by a large vertical distance. Rather than looming over and shading the adjoining single-family homes and blocking the breeze from reaching them, the proposed development is essentially at the base of the steep slopes that separate the site from the residences up the hill.

The 35' height limit for single family dwellings in the R-2 zone presumes a 2 ½ story building. However, while the proposed height substantially exceeds the standard, the proposed development will not impair access to light, air and open space of nearby residents. Importantly, the highest roofline elements of the project will be below the grade of nearly all adjoining residents.

As with any “d” variance, a d(6) height variance requires that the applicant satisfy the positive and negative criteria. The foregoing analysis concerning the proposed CCRC use, and the manner in which it satisfies the statutory criteria based on its inherently beneficial nature, undue hardship and particular suitability, also apply to justify the grant of the d(6) height variance.

Additionally, case law precedents specifically pertaining to d(6) height variances further guide the Zoning Board of Adjustment’s review of this matter. In *Grasso v. Borough of Spring Lake Heights*, 375 N.J. Super. 41 (App. Div. 2004), the Court determined that in a d(6) height variance case, special reasons “must be tailored to the purpose for imposing height restrictions in the zoning ordinance.” It further explained that an applicant can prove special reasons supporting the grant of a height variance if the applicant can “persuade the Board that a taller structure than permitted by ordinance would nonetheless be consistent with the surrounding neighborhood” and would not offend any of the purposes of the height limitation in the zoning ordinance. The neighborhood surrounding the DOI property is zoned residential, but contains relatively few residential uses and therefore does not have the same residential character as did the area in *Grasso*. Here, the area is developed with a golf course and other existing compatible uses of a similar nature to what the applicant proposes. Further, because of a substantial grade change, the proposed facility will be compatible with both the adjacent Kessler Institute (which will appear taller) and the adjacent residential homes along Parson Drive and Skyline Drive which will be at a higher elevation than the roof of the proposed facility. This confirms that the purposes of light, air and open space underlying the height limitation in the zoning ordinance will be respected.

In *Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs*, 442 N.J. Super. 450 (App. Div. 2015), LG sought a variance from a 35-foot height limit for a proposed 148.3-foot tall office building complex, where the building's effect on the general landscape, a well-known and heavily-visited historic area, was deemed to result in a substantial negative impact on local and regional scenic resources. In *Jacoby* the Court applied the standard from *Grasso* and looked at whether the height variance would be consistent with the surrounding neighborhood and found that it would not. “Such a large-scale deviation will undoubtedly have a visual effect on the area., especially because of the placement of the building in close proximity to the Palisades Cliffs, a historic, renowned natural and dramatic geological feature on the west side of the Hudson River”.

In the instant matter, the local landscape is not a “well-known and heavily visited historic area”, as was the case in *Englewood Cliffs*, where interstate planning efforts had helped to retain the view of the Palisades Cliffs. Rather the DOI site is situated in a topographic setting where its’ visual prominence will be quite limited.

In *Jacoby*, the Court noted that the Board failed to fully address whether the main building (four times the height limitation imposed by ordinance) would be out of character with other buildings in the B-2 zone. Here, DOI is part of a node of nursing and rehabilitation uses, including buildings at Kessler Rehabilitation Center that achieve a higher relative roof elevation than that proposed for DOI.

In *Jacoby*, the Court concluded that the Board was obliged to consider the reason for the 35' height limitation and make specific findings as to how the proposed variance conforms to the intent and purpose of the zoning plan. The West Orange 2019 Master Plan Reexamination does not provide a rationale for the 35' height limit in the R-2 Zone, leaving the Board to rely upon the protection of light, air and open space, which the Courts have identified as legitimate purposes for such regulations. Here, the terrain features provide a unique setting where the proposed development will not impair the neighborhood character or quality of residential life. The modern high-quality facade will signal both a renewal of purpose and permanence. It will also present the appearance of a prominent and fitting architectural neighbor to the adjoining Kessler facility.

Bulk Variances

Where an application seeks a use variance, as is the case here, the bulk standards often are not established with the use in mind, and therefore the courts have concluded that “[a] Zoning Board, in considering a ‘use’ variance, must then consider the overall site design[,]” with the result that, “the ‘c’ variances are subsumed in the ‘d’ variance.” *Price v. Himeji*, 214 N.J. 263 (2013), citing *Puleio v. N. Brunswick Twp. Bd. of Adjustment*, 375 N.J. Super. 613, 621 (App. Div. 2005), certif. denied, 184 N.J. 212 (2005).

The bulk variances that are being requested will enable DOI to increase the number and types of inherently beneficial uses on the site with a highly efficient layout. As with the “d” variances.

(use and height) are justified under several statutory authorizations, including hardship, particular suitability and a variety of special reasons.

DOI incurs a hardship in the instant case because the structure that is already located on the site, providing an essential service to an increasingly fragile population, creates an “exceptional situation” that makes the site unlike any other. The alternative of demolishing the existing facilities in order to secure subdivision or site plan approvals and building permits for new construction of single family homes is uneconomic. The site is also particularly suitable for the proposed use, not only because it already exists, but more importantly because the site is sufficiently large to permit the redevelopment without negative impacts on residential neighbors.

A number of special reasons support the proposal. The inherently beneficial nature of the proposed uses raises them up into the hierarchy of preferred uses because they clearly advance the public good. The proposal also advances the statutory purpose to promote the production of senior citizen community housing construction which will be enabled by the approval of these bulk variances, which offer benefits that outweigh any substantial detriment. Although subsumed within “d(1)” use variance, we offer the following additional justification in support of the bulk variances necessitated by the application.

Lot Coverage

As noted above, the proposed coverage will be reduced slightly to 37.46% from 38.53%. This reduction, while de minimis, reflects a design ethic that sought to work within the nominal

footprint of existing development. Other relief sought, including building height, will allow the efficiency of a design that does not cover more area than is now covered by the current facility, but which greatly expands the scope of inherently beneficial uses. Given the slight reduction from the existing condition, the Zoning Board of Adjustment may conclude that there is no detriment from this variance.

Retaining Wall Height

According to § 25-8.4, retaining walls shall not exceed 4'. The topographic conditions pose a choice between tree removal and retaining walls. The use of higher retaining walls helps to limit the extent of tree removal necessitated by extensive regrading.

Length of Parking Row Without Landscaped Island

§ 25-12.1.o. requires a landscaped island for every 20 parking spaces, where the proposal provides one landscaped island for every 22 parking spaces in one specific area. This relief is minimal and is not in an area that will be seen from Pleasant Valley Way. In addition to the policy intent related to appearances from a public way, another major purpose of this landscaping requirement is to prevent a sea of asphalt. In this instance, the extent of expensive structured parking will limit the area that must be devoted to surface parking.

Parking

According to § 25-12.2, the number of required parking spaces for this proposal is 479. Based on the parking analysis conducted by Petry Engineering, industry standards and local experience indicates that the proposed 381 spaces (before the electric vehicle bonus is applied) will be more than adequate for the proposed development. Limiting the extent of area devoted to parking avoids unnecessary coverage and has no detrimental impacts.

Loading

According to §25-12.3.a.2, 13 loading spaces are required where 1 is proposed. Given the range in size of vehicles making deliveries, there is less need for full-sized loading spaces because of the increasing use of box trucks and other vehicles that can load and unload from smaller loading spaces with loading needs that are distributed throughout the day.. The absence of one required loading space will not pose any detriment to the operation of the site, nor will it have any adverse impacts on the traffic patterns on the site.

Number of Signs Per Lot

§25-15.3.b permits one sign on the property and is designed for residential uses, not facilities like DOI. In order to meet the wayfinding needs of the campus, more signage needs to be provided. The proposal includes five (5) facade signs on buildings, one (1) monument sign (existing to be renovated), one (1) freestanding site identification sign and four (4) freestanding directional

signs. Only the monument sign will be exposed to view from Pleasant Valley Way. The other signs will assist visitors and others coming to the site to find their way around the campus. Thus, while the number of signs exceeds the ordinance, the approval of the sign package will aid the smooth navigation around the site

Maximum Sign Area

§25-15.3.b limits the area of any sign to 1 square foot for a nameplate sign and 2 square feet for a professional office sign, which is suitable for residential uses but not for facilities like DOI. At present, there is a 56 square foot monument sign, which received a variance granted under Case #ZB-11-06 and will be renovated, and the remaining signs range from 8.75 square feet to 48 square feet. These other signs will assist visitors and others coming to the site to find their way around the campus. Thus, while the area of signs exceeds the ordinance, the approval of the sign package will aid the smooth navigation of visitors, deliveries and other traffic around the site.

Number of Signs Per Linear Feet of Frontage

§25-14.4.a. permits 4 signs per 250' of frontage. The property has 648' of frontage, which would allow 8 signs. There are 11 signs proposed. All 8 permitted signs could be located along the road frontage, but only two signs are designed to show to offsite traffic. The remaining signs are internal to the site and designed to assist visitors, deliveries and others coming to the site to find their way around the campus.

Sign illumination

§25-15.3 does not expressly permit signs in the R-2 District to be illuminated. The existing monument sign to remain is externally illuminated. The project proposes externally illuminated freestanding signs with ground-mounted light fixture, and building signs with reverse lit channel letters. The use of ground-mounted lighting for monument signs provides for clear identification of the uses that would not be possible with only headlight illumination. It also prevents glare otherwise associated with ground mounted lighting for signs with visibility under the sign. The monument extends from the ground up and obscures any glare.

The on-building lighting will be internally illuminated, as this is the most effective way to call attention to these features and their role in wayfinding around the site.

Steep Slope Provisions - Maximum Effective Coverage

The steep slope regulations govern coverage by buildings and impervious surfaces. Under the current conditions, the building coverage limit is exceeded by roughly half, with 20% permitted and 29.64% existing. The building coverage will be reduced by 1.46%, to 28.18%, a slight reduction resulting from the plan revisions that reduce disturbance to steep slope areas.

Impervious coverage, at 69.35%, is currently more than twice the permitted 30% coverage. The historic use of the site has had these coverage impacts, which will be essentially unchanged from the current condition if the relief is granted. The quantitative extent of existing coverage is being

reduced to 67.42% impervious coverage, a slight improvement of 1.93% over the current condition.

Parking of Commercial or Double Axle Vehicles

DOI operates vehicles having a double axle and/or exceeding the permitted size limit. These include the existing shuttle bus and several delivery vans with commercial markings that will be stored outdoors in a dedicated parking area near the rear of the site. These vehicles will not be visible from any public roadway.

These vehicles play important roles in DOI's ability to accomplish its functions in service to older residents and their location will be well screened from public view and as such will have benefits that outweigh any detriments.

Light Pole Height

§25-14.1.c. establishes the maximum height for light poles at 18'. The existing light poles on the property appear to exceed 18', and the project proposes light poles having a height of 25'.

Effective site lighting is important in any setting, since it helps safe nighttime navigation through parking areas and driveways. Lighting is particularly important for the proposed use, where the age of drivers, impaired vision or other infirmities of age can complicate site movements. In a neighborhood setting, the glare associated with light poles increases with height. The 18' limit is

intended to keep the source of illumination relatively low. Of course, with the lower mounting height, more light fixtures are required, adding to the cost of site improvements.

Since nearly all the adjoining residential parcels are at substantially higher elevations than the DOI site, the lighting impacts will be minimal. With downward directed fixtures and buildings considerably higher than the light poles, residential neighbors should not be bothered by glare.

Summary of Positive Criteria for Bulk Variances

The bulk variances are cognizable under N.J.S.A. 40:55D-70c(2) which provides that the Zoning Board of Adjustment may approve a bulk variance on a specific piece of property when the purposes of the MLUL would be “advanced by the deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment”. The statute also provides that “the fact that a proposed use is an inherently beneficial use shall not be dispositive of a decision on a variance”.

Given the existing use of the site and the intended character of use as well as the character of use of nearby lands, which include other skilled nursing and rehabilitation facilities, the redevelopment of the skilled nursing and other inherently beneficial uses to be provided at DOI will continue and expand the recognized benefits from these uses outweighing any detriment. As noted in *Kaufmann v. Planning Board for Warren Tp.*, 110 N.J. 551 (1988), the focus of a c(2) case should be on the characteristics of the land that present an opportunity to improve zoning and planning and which will benefit the community.

Clearly, the undue hardship of having to conform with the residential zoning of the site is a qualifying criterion for relief. Additionally, the particular suitability of this site for these inherently beneficial uses will benefit the community and relief will alleviate the hardship that would be imposed if DOI were required to comply with the residential zoning. In addition, this application presents the opportunity to improve zoning and planning for this site within the R-2 Zone, since the R-2 Zone does not acknowledge the nature and character of the use and the R-2 Zone offers no avenue for improvements to the site or the buildings without the requested variances.

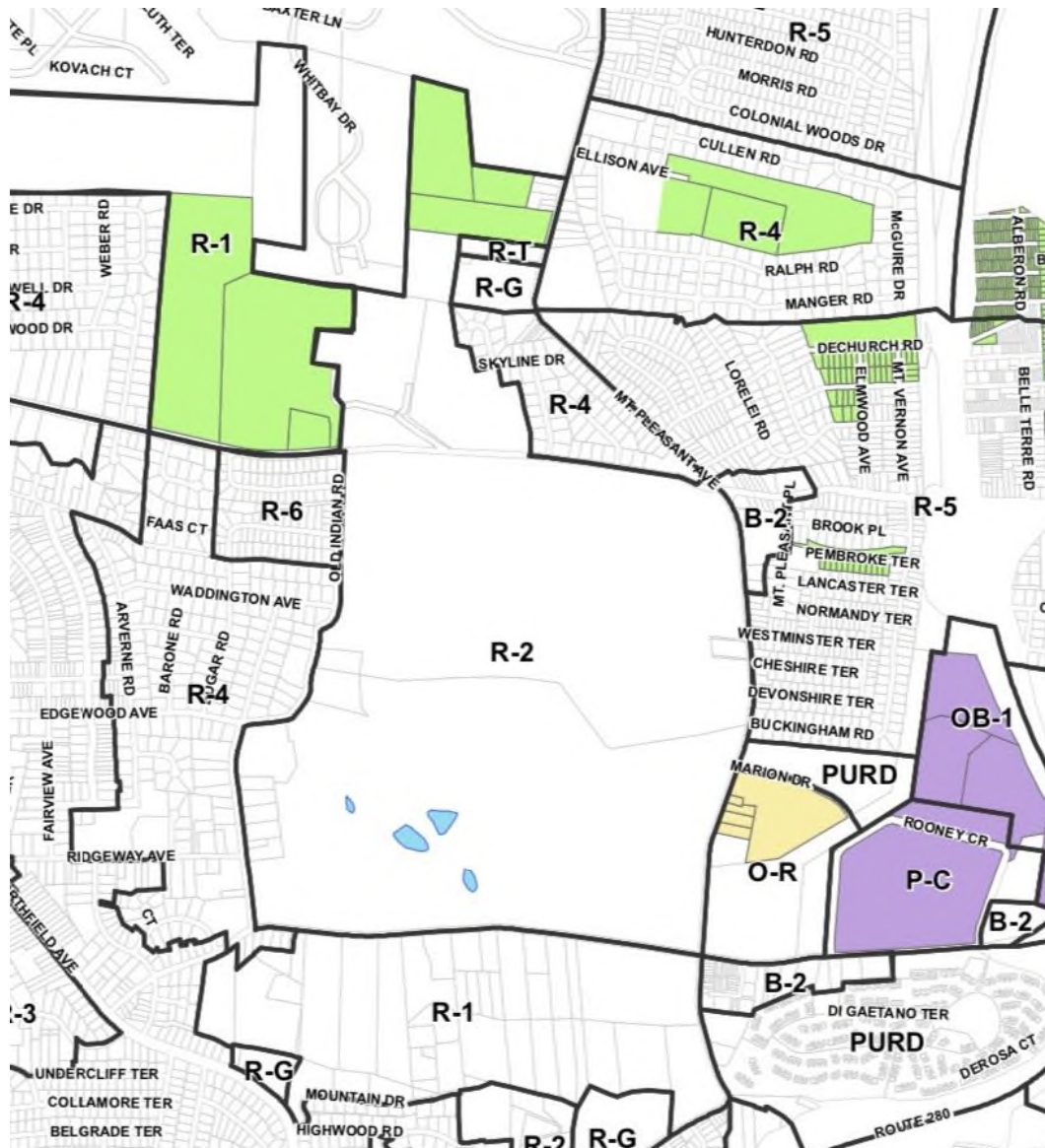
Negative Criteria – Public Good

As noted above, the Sica balancing test is required to address the negative criteria for inherently beneficial uses. The foregoing Sica analysis satisfies the public good aspect of the negative criteria for the bulk variances.

Negative Criteria – Zone Plan and Zoning Ordinance

With regard to impairment of the zone plan, it is important to note that the three (3) non-residential care facilities cited above are all situated within the R-2 Zone, where a minimum lot area of 40,000 square feet per single family home is required. In fact, considering that there are only a handful of single family homes situated in this centrally located R-2 Zone, it is a zone where the intended residential character is barely present, with only 12.4 residential acres of the

434 acres comprising this particular R-2 Zone. Viewed from a broader municipal perspective, the R-2 zone appears to be dominated by non-residential uses, primarily golf courses, with the Montclair Golf Club and Crestmont Country Club each occupying two other large R-2 zones.



The 2019 Master Plan Reexamination does not describe an intent for the R-2 Zone, but the inclusion of lands in the zone carries a presumption that these lands should become single family

homes on 40,000 square foot lots over time. However, this implies that the inherently beneficial nursing and rehabilitation uses should be displaced by large lot single family homes. The lack of any significant residential development in the R-2 Zone and the dominance of these zones by golf and nursing/rehabilitation uses suggests that there is a mismatch between the regulations and the existing uses.

“[A] variance cannot be considered in isolation, but must be considered in the context of its effect on the development proposal, the neighborhood, and the zoning plan.” Pullen v. Tp. of South Plainfield, 291 N.J. Super. 1, 9 (App. Div. 1996). Here, the variances requested by DOI enable the Applicant to develop a modern continuum of care facility to better meet the needs of an aging population, on a property which is already improved with a similar use. The bulk variances which the project requires are appropriate given the size of the property and the nature of the proposed use. Therefore, there is no substantial impairment of the zone plan or zoning ordinance arising from the grant of the bulk variances requested.

Summary

Daughters of Israel has provided quality nursing care to West Orange and the nearby region for nearly 70 years. The instant application would carry forward and broaden this tradition of care to provide a greater range of inherently beneficial housing and health service uses. These facilities have become increasingly important as the baby boom ages into the need for more health housing and housekeeping services.

The use variance to permit the elements of a CCRC, either separately or together, requests a use not permitted in the R-2 Zone. While these uses inherently serve the public interest, DOI would certainly endure undue hardship if required to comply with the residential zoning of the site. Together or separately, all proposed elements in the proposed use(s) qualify for use variance relief. Their value in service to the frail aging population and others whose capacity for independent living is changing has been highly regarded by the Courts and I would suggest that it should be so regarded in this context.

The Sica balancing test reveals no detrimental effects that require amelioration and hence no special conditions of approval are required to ameliorate any harm. Rather, while the future use will be totally reconfigured and rebuilt, it will bear land use similarities to the current use that maximize its compatibility in the neighborhood. The tallest elements will be situated toward the County Road and away from most residences, where they will transform the appearance and create a handsome and prominent new facade. Structured parking will reduce the coverage of the site by asphalt and the new outdoor parking area will be landscaped attractively.

The bulk variances requested will provide the needed tailoring of local zoning to facilitate the removal of the nursing home and reconstruction of the site as a CCRC. As such, they help to achieve the inherent benefits resulting from the grant of the expanded use.

In conclusion, the proposed CCRC development and its component elements provide inherent community benefits, well recognized by New Jersey Courts, and the application meets the positive criteria. Additionally, the Sica balancing test reveals no detriment to the public good

requiring special conditions of approval. As a result, I find that the statutory criteria for the use and bulk variances have been satisfied and the application should be approved.