

**RESOLUTION
BOROUGH OF BUTLER
PLANNING BOARD
IN THE MATTER OF HILLVIEW MED, INC.
DECIDED ON JUNE 15, 2023
MEMORIALIZED ON JULY 20, 2023
APPLICATION NO. SP22-85
DENIAL OF d(3) CONDITIONAL USE APPLICATION WITH
PRELIMINARY AND FINAL SITE PLAN APPLICATION
AND “c” VARIANCE RELIEF REGARDING A
CANNABIS RETAIL FACILITY**

WHEREAS, Hillview Med, Inc. (hereinafter “Hillview” or the “Applicant”) is the Applicant for tenant space at an existing shopping center known and designated as Block 54, Lot 1.03 on the Tax Assessment Map of the Borough of Butler which premises are located at 1481 Route 23 South (Units 3 and 4), Butler, New Jersey in the Highway Commercial Zone District (hereinafter “HC Zone”); and

WHEREAS, the Applicant has filed an application with the Borough of Butler Planning Board (“Board” or “Planning Board”) seeking preliminary and final site plan approval, “c” variance relief and “d(3)” conditional use variance relief from the Borough of Butler Code Section 143-123.5 and Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment; and

WHEREAS, public hearings were held on April 20, 2023, May 18, 2023 and June 15, 2023, after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by Thomas J. Molica, Esq.

NOW, THEREFORE, the Planning Board makes the following findings of fact based on evidence presented at its public hearing, at which time a record was made.

The application before the Board is a request for preliminary and final site plan approval, “c” variance relief and “d(3)” conditional use variance relief in order to permit a cannabis retail

establishment to be conducted on property known and designated as Block 54, Lot 1.03 on the Tax Assessment Map of the Borough of Butler, which premises are located at 1481 Route 23 South (Units 3 and 4), Butler, New Jersey in the HC Zone.

The following Exhibits were introduced into evidence during the course of the public hearing:

1. Exhibit A-1 –Hillview Med Inc., Existing Conditions;
2. Exhibit A-2 – Exterior Rendering with Signage;
3. Exhibit A-3 – Interior Floor Plan;
4. Exhibit A-4 – Resolution from Kinnelon Planning Board (March 22, 2023);
5. Exhibit A-5 – Front Façade of Tenant Space;
6. Exhibit A-6 – 1481 Route 23 Land Use Aerial Photographs (July 1, 2022);
7. Exhibit A-7 – Aerial of Base Map with Delineation of Zone Boundaries;
8. Exhibit A-8 – Base Map-Unique Features Map;
9. Exhibit A-9 – Existing Conditions (September 20, 2022) with Four (4) Photographs Located on the Exhibit;
10. Exhibit A-10 – Leaf On (September 19, 2022) and Leaf Off (April 12, 2023).

The April 20, 2023 Hearing

Thomas Molica, Esq., attorney for the Applicant provided an overview of the project. Mr. Molica represented that there were existing non-conformities in regard to the site and that the Applicant also seeks preliminary and final site plan approval as well as d(3) variance relief regarding two (2) deviations from the Conditional Use Ordinance. Mr. Molica represented that the Applicant does not meet the 1,000 linear foot setback requirement for a cannabis retail

establishment in regard to the Church of the Nazarene, which is a distance of approximately 470 linear feet away from the proposed use as well as from the Butler Raceway Public Park which is a distance of approximately 750 linear feet away from the proposed use.

Engineering Testimony

Testifying on behalf of the Applicant was Christopher Szalay, P.E., a licensed Professional Engineer in the State of New Jersey. Mr. Szalay was accepted as an expert witness in the field of civil engineering. Mr. Szalay oriented the Board to the site. He confirmed the site is located at 1481 Route 23 South. The site is located within the Highway Commercial Zone District in the Borough of Butler. Mr. Szalay also represented that the site measures approximately 1.14 acres in area. Further, the subject Property is located within a shopping center at this location.

Mr. Szalay also represented that there are seven (7) separate tenant spaces in the building in which the Applicant seeks to occupy Units 3 and 4. Mr. Szalay also testified that Units 3 and 4 measure approximately 2,500 square feet of area within which the Applicant seeks to operate a retail cannabis facility.

Mr. Szalay characterized the application as a change of occupancy from the previous tenant to the proposed new tenant.

Mr. Szalay also reviewed with the Board the request for design waiver relief. Mr. Szalay confirmed that the Applicant will have the non-exclusive use of seventeen (17) parking spaces for its proposed business.

Operations Testimony

Susana Short, an Executive with Hillview Med, Inc. was sworn in as the Chief Strategy Officer for the company. Ms. Short represented that the name of the business will be known to the public as “Farm and Flower.” Ms. Short represented that the Applicant currently has a growing

facility for medical marijuana in Pequannock Township, New Jersey. Ms. Short represented that the Applicant also holds a hemp cultivation license. Ms. Short testified that the Applicant has experience in this industry, including but not limited to, operating a cultivation and manufacturing facility in Pequannock Township, New Jersey, as well as operating retail stores in other jurisdictions.

Ms. Short provided additional operations testimony and indicated that based on past experience, it is anticipated that approximately 80% of orders will be online. The hours of operation will be approximately 11 hours per day, 6 days per week. More specifically, it is anticipated that the hours of operation will be Monday through Saturday from 10 a.m. to 9 p.m. The business will be closed to the public on Sunday.

Ms. Short also testified that the Applicant will conform to all local and state regulations. She also represented that there will be nothing on the outside of the building to attract children. Further, Ms. Short represented there will be nothing in the interior of the building that will be visible to anyone who is outside of the building.

Ms. Short also testified that there will be on-site security for the purpose of checking identification, and she also represented that no one under the age of 21 will be permitted access to the store. Ms. Short also confirmed the location of a waiting area within the store. Further, in regard to online orders, a customer will be given a specific pickup time with a 15-minute window. She also confirmed that no more than 6 individuals will be in the store at any one time. Customers will also be given a map of where the customer can only park their vehicle. Thus, she concluded that the average time within the store will be approximately 5 minutes.

Ms. Short also testified that at all times there will be a minimum of two (2) employees on-site, which she identified as the Manager and a trained security person. Ms. Short also represented

that all products sold within the store have been approved by the Cannabis Regulatory Commission. Furthermore, all products are sealed.

Ms. Short addressed the issue of deliveries. She represented that there shall be no deliveries to anyone's home. With respect to receiving deliveries, such deliveries will be received via cargo vans or smaller vehicles. Ms. Short testified that deliveries will be made to a secured delivery area and then the product will be stored in the vault.

Ms. Short addressed the issue of refuse. She represented that refuse is similar to office waste. There will be no cannabis waste at all from this building. Ms. Short testified that there will be no cultivation or manufacturing of cannabis at this site.

Ms. Short also testified that in addition to having a security person and a manager on-site, there will generally be three (3) additional employees on-site for a total of five (5) employees.

Ms. Short represented that the business anticipates receiving one (1) delivery per day which is typically during non-peak hours. She characterized the size of the store at 2,500 square feet as being on the smaller side and very manageable. Ms. Short also represented that employees will park in the seventeen (17) designated parking spaces. In addition, the Applicant will look to incentivize ride sharing or, in the alternative, shuttle employees to the Butler site from the Pequannock site.

Security Testimony

The next witness to testify on behalf of the Applicant was Christopher Carbone. Mr. Carbone testified that he retired as a Kinnelon Police Sergeant after 26 years of service. He identified himself as the Chief Compliance Officer for the Applicant. Mr. Carbone was accepted as an expert witness in the field of security. Mr. Carbone reviewed with the Board Exhibit A-3 which was identified as the interior floor plan. He stated the exterior glass is opaque in order to prevent

people outside of the store from having a line of sight into the store. Mr. Carbone confirmed that security will be provided by either a retired Police Officer or a licensed Security Officer who will report to Christopher Carbone. Mr. Carbone stated that the Security Officer will be checking identification to ensure that no underage individuals access the store. Further, the Security Officer will be checking to ensure parking has been complied with. However, the Security Officer will not go outside to enforce the regulations since the site is not enforceable as a Title 39 site. Mr. Carbone represented that security cameras will be in operation 24-hour days per week, 7 days a week. Mr. Carbone represented that in regard to the security cameras there will be no cameras in the bathrooms and the janitorial closet. However, there will be cameras within the vault area. Mr. Carbone stated that it will be his responsibility to create a security plan which security plan will be submitted to the Cannabis Regulatory Commission (CRC) for approval.

Mr. Carbone testified that the vault area will be constructed of concrete block and there will be security cameras in the area of the vault. Furthermore, the vault will be sheet rocked with a DEA rated 10-gauge cage. Further, there will be 2 doors, one (1) for delivery and the other door will be Dutch doors for a service counter. Mr. Carbone testified that there will be a central dispatch alarm system. Mr. Carbone also testified that the Applicant would install an air filtration system to prevent any odors from emanating outside of the building.

Mr. Carbone represented that the Applicant would contract with a third party for security services. He stated the store will not be open to the public without a third-party Security Officer on-site. Thus, Mr. Carbone represented that if no Security Officer is available, the store will be closed.

Public Portion

The meeting was opened up to members of the public and the Board was addressed by John Donnelly, 4 Cedar Street. Mr. Donnelly questioned the adequacy of parking and the actual number of seventeen (17) parking spaces being available for use by patrons of the cannabis retail store.

Patrick Barton, 1473 Route 23 stated that he operates the vapes store and he was concerned about the location of the cannabis retail facility being in close proximity to the Church of the Nazarene.

There were no other members of the public present who expressed an interest in this application. The public hearing was continued to May 18, 2023.

The May 18, 2023 Hearing

The Property Owner's Representative Testimony

Gary Hillen, Executive Vice-President of Badanco, 141 Route 23, Pompton Plains, New Jersey testified before the Planning Board. Mr. Hillen described his duties on behalf of the property owner. Mr. Hillen represented that he drafts the lease agreements between all tenants and the property owner. He stated this applicant will be required to enter into a lease agreement with the property owner. Mr. Hillen represented that in drafting the lease, he will address issues including, but not limited to, employee parking, customer parking and parking in general. He represented that one (1) space will be designated for deliveries to be made to the retail cannabis facility. He stated the lease would provide that deliveries to the store would occur before and after business hours. He further indicated that non-compliance with the terms of the lease could result in a default of the lease. Mr. Hillen represented that the property owner would exercise direct daily oversight of the business to be operated at this location.

Mr. Hillen stated that the previous tenant, Wayne Pharmacy, vacated the premises. The property owner has been attempting to fill a long-term vacancy. Mr. Hillen also represented that this tenant would provide a less intense use of the site than other permitted tenants that could go into the tenant space that would have a more intense business. Mr. Hillen represented that the property owner would not seek to put a tenant in this vacant space that would have a detrimental impact on existing tenants in the shopping center.

Mr. Hillen also confirmed that the New Jersey Department of Transportation (NJDOT) leases 30 parking spaces on the site which are located within the Borough of Kinnelon.

Continuation of Engineering Testimony

Christopher Szalay continued to provide engineering testimony in regard to this application. Mr. Szalay referred to the overall/change of use plans dated October 25, 2022 and revised May 5, 2023. He stated the revised plans eliminate the loading space from the fire zone. In addition, the Applicant is proposing one (1) 12” by 18” sign with the text “Farm and Flower Employee Parking Only” as well as two (2) signs 12” by 18” with the text “Farm and Flower Customer Parking Only.” Further, there will be two (2) additional signs which will advise the public “Absolutely No Parking For Farm and Flower Beyond This Point.”

Mr. Szalay also testified that employee parking would be located off-site, and the employees will be shuttled to this site. Furthermore, two (2) customer parking spaces will be used for deliveries because deliveries will occur off hours.

Traffic Testimony

Testifying on behalf of the Applicant was Craig Peregoy, P.E., a licensed Professional Engineer in the State of New Jersey. Mr. Peregoy is employed by Dynamic Traffic who prepared a Traffic and Parking Assessment Study dated May 4, 2023, which was submitted to the Planning

Board. Mr. Peregoy was accepted as an expert witness in the field of Traffic Engineering. Mr. Peregoy testified that he had prepared a Traffic Impact Study wherein he compared the former Wayne Pharmacy space to the proposed new retail cannabis use on the site. Mr. Peregoy testified that he used ITE data to project traffic generation. Mr. Peregoy reviewed with the Board existing traffic from the pharmacy versus the proposed traffic generated by the cannabis retail dispensary which was identified in Table 1 in his report. Mr. Peregoy concluded that the difference during the a.m. peak hour would be 18 additional vehicles from that which previously existed with the pharmacy and the p.m. peak would be an increase of 25 vehicles for a total increase of 43 vehicles. Furthermore, on Saturday, Mr. Peregoy calculated an increase of 43 vehicles with the proposed new cannabis retail dispensary as opposed to the former pharmacy tenant. Mr. Peregoy testified that according to the New Jersey Department of Transportation (NJDOT) an increase of less than 100 vehicles per hour is not considered significant. Thus, he concluded that in accordance with the NJDOT standards the increase in traffic does not constitute a significant increase in traffic.

Mr. Peregoy also addressed the sufficiency of on-site parking. Mr. Peregoy testified that in examining the ITE Parking Generation Standards, the average maximum parking demand for a shopping center is 2.91 vehicles rounded up to 3 vehicles per 1,000 square feet of space which equates to 118 parked vehicles for the overall site. Here, he concluded that with approximately 171 parking spaces, there is more than enough on-site parking for the proposed use. Mr. Peregoy also indicated that he has driven through the parking lot at night and there were only 60 cars on-site. He further examined historical aerial photos prior to COVID and found that approximately 100 spaces of the parking lot are typically used, and thus, he concluded there is sufficient on-site parking for the proposed use.

Mr. Peregoy testified that with approximately 80% of the orders being online, customers would be in the store for a very short duration of approximately 5 minutes or less. As a result, this type of scenario results in short-term parking with a quick turnover. Thus, he concluded that in a one-hour period, the same parking space could be used multiple times. Mr. Peregoy concluded that the peak demand would be 168 parking spaces on weekdays and 144 parking spaces on weekends. However, with approximately 201 parking spaces on-site, Mr. Peregoy concluded parking is more than sufficient to accommodate the maximum demand.

Mr. Peregoy also reviewed parking relative to the Dairy Queen tenant space which is located next to the proposed retail cannabis facility. He stated the peak parking demand would occur with 15 cars during the weekday lunch hour and 14 vehicles during Saturday afternoon.

Public Portion

The meeting was opened up to members of the public and the Board was addressed by John Donnelly, 4 Cedar Street. Mr. Donnelly inquired about the location of no parking signs.

There were no other members of the public present who expressed an interest in this application. The public hearing was continued to the June 15, 2023 meeting of the Planning Board.

The June 15, 2023 Hearing

The Planning Board Traffic Engineer Testimony

The Planning Board retained the services of a traffic expert. Testifying before the Planning Board was Gary W. Dean, P.E., P.P., a licensed Professional Engineer and Planner in the State of New Jersey. Mr. Dean is a member of Dolan & Dean Consulting Engineers, LLC. Mr. Dean was accepted as an expert witness in the field of Traffic Engineering. Mr. Dean prepared a report dated June 9, 2023. Mr. Dean's report was essentially broken down into three parts, traffic engineering, parking and site plan. Mr. Dean summarized his report for the Board. Mr. Dean testified that the

re-tenancy of vacant space for a cannabis dispensary will not materially alter traffic conditions within the shopping center. He also stated that he concurs with the Applicant's traffic expert as to traffic counts. However, he was concerned about traffic safety around the existing pylon sign and the Route 23 driveway. In his report, he indicates that circulation around the sign is ill defined and warrants improvement for enhanced safety. During the public hearing, he requested that the Applicant undertake improvements for safety reasons.

Next, Mr. Dean addressed the sufficiency of parking. Mr. Dean represented that a cannabis retail dispensary requires more parking than a general retail unit. Mr. Dean also questioned the practicality of operating a shuttle service from the Hillview Med Pequannock Township site to the Subject Property. He also indicated that a substantial parking field which is located in the Borough of Kinnelon is off-limits for the Applicant as set forth in a Kinnelon Borough Planning Board Resolution recently adopted in regard to this matter. Mr. Dean also questioned whether or not leased documents could address parking in relation to other tenants in this section of the shopping center inclusive of the Dairy Queen and the Bubbakoos Burritos stores.

Mr. Dean next addressed comments regarding the site plan. Mr. Dean reiterated his concern and recommended that the site engineer revise the plans for improved safety, lighting, landscaping and circulation around the existing ID sign.

Mr. Dean also had a question regarding the 30 parking spaces allocated to the NJDOT. He once again referenced the fact that Kinnelon has prohibited parking within the Borough of Kinnelon for the proposed cannabis retail dispensary use. Mr. Dean also stated that Sign C is shown to be located on the Kinnelon portion of the site. Mr. Dean then questioned whether or not this is permissible based upon Kinnelon's recent Resolution.

Cannabis Operations Testimony

Susana Short continued her testimony before the Planning Board. Ms. Short previously testified at the April 20, 2023 hearing of the Board. Ms. Short confirmed that the hours of operation would be Monday through Saturday 10:00 a.m. to 9:00 p.m. and that the business would be closed on Sunday. Ms. Short also confirmed that there will be a minimum of two (2) employees on-site with a maximum of five (5) employees on-site. She identified the employees as being a security employee, a managerial person, as well as additional staff to assist customers with kiosk purchases.

Ms. Short also represented to the Board that the Applicant currently operates a cultivation and manufacturing facility in Pequannock Township. She further represented that Hillview Med has customers who have retail cannabis dispensaries. Further, she represented that Hillview Med is proposing shuttle service for employees from the Applicant's Pequannock Township facility.

Ms. Short provided additional information regarding online and in-store purchases. She stated that for an online purchase, the software completes the entire process such that a customer would just need to arrive at the store, show identification and pick up their product. She estimated such a transaction would be very brief at 1-2 minutes. In the alternative, she stated a customer can order from a kiosk and an employee would fill the order, and the customer would pay and leave the facility. She estimated this process to be between 3-5 minutes. Ms. Short also stated that for online deliveries the customer would be given a 15-minute window within which to pick up the product. Ms. Short also confirmed that the proposed facility is an adult only retail establishment, and it is not a medical dispensary. Ms. Short also testified that she has observed other dispensaries and there is not a lot of waiting in line. Ms. Short also stated that in her opinion, the site is particularly suited for a cannabis retail dispensary use.

Continuation of Traffic Engineering Testimony

Craig Peregoy continued his engineering testimony before the Planning Board. Mr. Peregoy testified that there are other higher traffic generator uses than the proposed retail cannabis use for the site. He also agreed to work with the Board Engineer regarding a satisfactory striping plan regarding the pylon sign. Mr. Peregoy also represented that there is sufficient parking based upon the shared parking analysis. He also confirmed that deliveries would be made during hours when the cannabis retail dispensary is closed to the public and, thus deliveries would not occupy parking spaces allocated for use by customers of the cannabis retail dispensary.

Continuation of Operation Testimony

Susana Short continued her testimony before the Planning Board. She once again confirmed that deliveries would occur outside of the hours when the store is open to the public. She further confirmed that employees and security personnel would be shuttled to the site.

Continuation of Security Testimony

Chris Carbone continued his testimony before the Board. He once again identified himself as the Chief Compliance Officer from Hillview Med. He stated the facility would have a panic alarm and an armed security guard.

Planning Testimony

Testifying on behalf of the Applicant was Donna Holmqvist, P.P., a licensed Professional Planner in the State of New Jersey. Ms. Holmqvist was accepted as an expert witness in the field of land use planning. Ms. Holmqvist provided an overview of the site and the surrounding area.

Ms. Holmqvist introduced into evidence and reviewed with the Planning Board Exhibits A-6 through A-10 as follows:

1. Exhibit A-6 – 1481 Route 23 Land Use Aerial Photographs (July 1, 2022);

2. Exhibit A-7 – Aerial of Base Map with Delineation of Zone Boundaries;
3. Exhibit A-8 – Base Map-Unique Features Map;
4. Exhibit A-9 – Existing Conditions (September 20, 2022) with Four (4) Photographs Located on the Exhibit;
5. Exhibit A-10 – Leaf On (September 19, 2022) and Leaf Off (April 12, 2023)

Ms. Holmqvist testified that pursuant to Butler Code Section 143-173, a cannabis retail establishment is a conditionally permitted use in the HC Zone District. She further represented that the Applicant does not comply with Section 143-173F which states that no cannabis retail establishment shall be located within 1,000 linear feet of a church or a public park among other designated uses. In this instance, the proposed cannabis retail facility would be located at a distance of approximately 450 feet from the Church of the Nazarene and a distance of approximately 750 feet from the Butler Raceway Public Park.

Ms. Holmqvist characterized these two sites as sensitive sites. She further indicated that it was her opinion that the requirement of a 1,000-foot separation from a cannabis retail establishment to the designated sensitive sites is for visual impact purposes. Ms. Holmqvist provided testimony in regard to the location of the Church of the Nazarene as it relates to the Subject Property. She further testified in regard to topography of the site and the location of the Church of the Nazarene to this site. Ms. Holmqvist addressed the physical features of the site. Ms. Holmqvist testified that the Applicant seeks to fill in space formerly occupied by Wayne Pharmacy. Thus, the tenant space formerly occupied as a pharmacy would now operate as a retail cannabis dispensary.

Ms. Holmqvist reviewed the purposes of the Municipal Land Use Law that would be advanced by the approval of this application. She stated that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-2(a) the approval of this application would promote public health and

safety; 2(i) would be advanced by promoting a desirable visual environment and 2(g) would be advanced by providing sufficient space in appropriate locations for commercial uses in order to meet the needs of New Jersey residents.

Ms. Holmqvist also testified in regard to the negative criteria. She stated that there would be no substantially detrimental impact to the Church of the Nazarene nor to Butler Raceway Park based upon the approval of this application. Next, she addressed the second prong of the negative criteria and represented that the approval of this application would satisfy one of the goals of the Borough of Butler Master Plan which is to advance a tax ratable base. Ms. Holmqvist stated that the site is adjacent to Route 23 and there is no sidewalk on the Route 23 south side of the highway.

Ms. Holmqvist also stated that she relied upon the testimony of Ms. Short regarding transaction times with which she agrees. Ms. Holmqvist also testified that there is no prohibition about locating a cannabis retail dispensary in a strip mall. In fact, she represented that a strip mall location is a benefit to the public.

Ms. Holmqvist reviewed pre-existing non-conformities including, but not limited to, minimum front yard setback where 50 feet is required and 47.4 feet is existing and proposed, side yard setback where 25 feet is required and 9.9 feet is existing and proposed; rear yard setback where 50 feet is required and 0 feet is proposed; maximum building coverage where 20% is permitted and 23.1% is existing and proposed; and the number of on-site parking spaces where 232 spaces are required and 201 spaces are existing and proposed.

Ms. Holmqvist testified that the Applicant meets the Coventry standard for granting a conditional use that does not meet the conditions of the Conditional Use Ordinance. Ms. Holmqvist also acknowledged that the Church of the Nazarene hosts Narcotics Anonymous meetings on-site.

Ms. Holmqvist characterized the Church of the Nazarene and the Butler Raceway Park as sensitive receptors.

Public Portion

The meeting was opened up the members of the public and the Board was addressed by John Giarruso. Mr. Giarruso testified that he owns the fitness gym in the shopping center, and he supports the application. There were no other members of the public present who expressed an interest in the application.

NOW, THEREFORE, the Planning Board makes the following conclusions of law based upon the foregoing findings of fact.

The application before the Board is a request for “d(3)” conditional use variance relief, preliminary and final site plan approval and “c” variance relief in order to permit cannabis retail sales to be conducted on property known and designated as Block 54, Lot 1.03 on the Tax Assessment Map of the Borough of Butler which premises are located at 1481 Route 23 South, Butler, New Jersey in the HC Zone.

The Board notes that the site is currently developed with a shopping center and the Applicant seeks to occupy space formerly occupied by Wayne Pharmacy in order to permit the operation of a cannabis retail dispensary. The Board further determines that the Applicant seeks approval in order to occupy approximately 2,500 square feet of space which is further identified as units 3 and 4 in this multi-tenant building.

Cannabis Retail Establishments Are Conditionally Permitted Uses Under the Butler Ordinance

The Board notes the Butler Ordinance 2021-16 created a new section 143-123.5 to the Butler Code titled Cannabis Retail and Medical Cannabis Dispensary Conditional Use in the HC

Zone. Thus Section 143-123.5 codifies cannabis retail and medical cannabis dispensary uses as conditional uses in the HC Zone.

Section 143-173 titled Cannabis Retail and Medical Cannabis Dispensary Establishment lists the various conditions as a conditional use in the HC Zone. More specifically, Section 143-173 provides the objective standards to meet the conditional use requirements as follows:

A. Cannabis Retail Establishments and Medical Cannabis Dispensaries shall only be permitted in the HC Zone-Highway Commercial District.

B. Minimum setback and bulk requirements shall be as set forth in §143-118 Schedule D, except as to existing structures.

C. No drive-through window shall be permitted.

D. Minimum useable floor area of 1,200 square feet.

E. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 2,000 linear feet of another Cannabis Retail Establishment or medical cannabis dispensary as measured from the property lines.

F. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship center, public park, library or a licensed substance abuse disorder clinic or facility, as measured from the property lines.

G. Hours of Operation shall be limited to 7 a.m. through 11 p.m. daily.

d(3) Conditional Use Variance Pursuant to the Municipal Land Use Law

A conditional use is defined under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-3. Conditional use means a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the

location or operation of such use as contained in the Zoning Ordinance and upon the issuance of an authorization therefore by the Planning Board. Jurisdiction is vested in the Planning Board pursuant to N.J.S.A. 40:55D-67 when all of the conditions of the conditional use ordinance have been complied with by the Applicant.

If the Applicant is unable to comply with all of the conditions of the conditional use ordinance, jurisdiction vests in the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70d(3). The Butler Planning Board as a combined board exercises the powers and duties of a board of Adjustment.

A d(3) conditional use variance has a lesser burden of proof than a d(1) prohibited use variance in the zone. It is because the municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. Therefore, the proofs necessary to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the Ordinance. The standard of proof in a conditional use case was established by the New Jersey Supreme Court in 1994 in the case of Coventry Square Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994). The standard of proof of special reasons to support a variance from one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance. Proofs to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

That standard of proof will focus both the applicant's and the Board's attention on the specific deviation from conditions imposed by the ordinance and will permit the Board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use. Thus, a d(3) conditional

use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. Coventry Square, *supra*. 138 N.J. at 298, 299.

With respect to the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good, N.J.S.A 40:55D-70(d). The focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance. The Board of Adjustment must evaluate the impact of the proposed “conditional” use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good.

In addition, the applicant must also prove that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, N.J.S.A. 40:55D-70(d). The Board of Adjustment must be satisfied that the grant of the conditional use variance for the specific project at the designated site is reconcilable with the municipality’s legislative determination that the condition should be imposed on all conditional uses in that zoning district. Coventry Square, *supra*. 138 N.J. at 299.

This application is governed by the Borough of Butler Code Section 143-123.5 Cannabis Retail and Medical Cannabis Dispensary Conditional Use in the HC Zone as well as Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment (Conditional Use Conditions).

Upon review of the Conditional Use Ordinance, the Board finds the Applicant complies with all sections of the Conditional Use Ordinance with two (2) exceptions. The Applicant requires relief from Section 143-173 F. which reads “No Cannabis Retail Establishment or medical cannabis

dispensary shall be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship center, public park, library or a licensed substance abuse disorder clinic or facility, as measured from the property lines”. In this instance, the proposed facility on the subject Property is located a distance of approximately 450 feet away from the lot line of the Church of the Nazarene located at 188 Kiel Ave., Butler, New Jersey. Furthermore, the proposed cannabis retail facility on the Subject Property is located a distance of approximately 750 linear feet away from the Butler Raceway Park. Thus, the Applicant does not comply with Section 143-173F because the proposed use of a cannabis retail dispensary establishment violates the minimum setback requirements related to Church and park uses.

The Board has carefully considered all of the evidence in this case, and in particular, the proofs set forth on the record by the Applicant’s Planner, Donna Holmqvist, P.P. Ms. Holmqvist testified that the approval of this application would promote several goals or purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-2. More specifically, she stated 2(a) would be advanced which is to promote public health and safety; 2(i) would be advanced by promoting a desirable visual environment; and 2(g) would be met because the proposed use as a cannabis retail dispensary would meet the needs of New Jersey residents. She further concluded that the negative criteria were also met and that the location of the proposed cannabis retail dispensary would not be substantially detrimental to the Church of the Nazarene and Butler Raceway Park, nor would it substantially impair the intent and purpose of the zone plan and zoning ordinance.

Ms. Holmqvist also stated the conditions in the conditional use ordinance requiring a separation distance of 1,000 linear feet from certain delineated uses including a church or a public park was based upon addressing the visual impact to those uses.

The Board has carefully reviewed this application in connection with Coventry Square, Inc. v. Westwood Zoning Bd. of Adjustment, 138 N.J. Super. 285 (1994). In that opinion, the Court held:

“generally a conditional use is ‘suitable to a zoning district but not to every location within that district.’...citations omitted. Conditional uses are ‘uses ordinarily requiring special standards relating to traffic patterns, street access, parking and the like in order to assure their functional and physical compatibility with the district as a whole and their appropriate integration into the district.’” Citations omitted. Id. at 294.

The Board notes that Ms. Holmqvist characterized the types of uses identified in Section 143-173F as being “sensitive receptors”. The Board has carefully considered the ordinance requirement that a cannabis retail establishment shall not be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship centers, public park, library or a licensed substance abuse disorder, clinic or facility as measured from the property lines. The Board finds that when a cannabis retail facility is in close proximity to any of the uses outlined in §143-173F of the Ordinance, the Board must carefully evaluate whether or not the proposed cannabis retail dispensary at this location is a suitable location within the HC Zone for that use. The Board must keep in mind the impact that a cannabis retail dispensary could have on the sensitive uses such as the parishioners and other attendees at the Church of the Nazarene and the Butler Raceway Park. The Board also notes that the Church of the Nazarene provides at its location Narcotics Anonymous meetings and Alcoholics Anonymous meetings. Therefore, allowing a cannabis retail dispensary to be located within such close proximity to the Church could have a detrimental impact on the Narcotics and Alcoholics Anonymous meetings that are held at the Church. The Board finds that these programs run by the Church are similar to the Ordinance

requirement under §143-173F that no cannabis retail facility shall be located within 1,000 feet of a licensed substance abuse disorder clinic or facility.

The location of a cannabis retail dispensary in the tenant space formerly occupied by Wayne Pharmacy would allow a cannabis retail dispensary to operate within a location which is less than half of the required distance at 450 feet away from the property line of the community Church of the Nazarene. Further, there is no physical or geographic barrier existing or proposed to mitigate this situation. The close proximity of the Church property and the property upon which the retail cannabis dispensary is located can be easily traversed. Further, the Church building is directly viewed from the property lines of the subject premises. In addition, Route 23 has a traffic signal controlled intersection with pedestrian crosswalks which would allow safe access between pedestrians accessing the Subject Property and the Church of the Nazarene. Therefore, access to the Church of the Nazarene from the proposed cannabis retail dispensary is very reasonable.

In regard to the Butler Raceway Public Park, the proposed cannabis retail dispensary is within 1,000 feet of the Park and more specifically, a distance of 750 feet away which is a deficiency of approximately $\frac{1}{4}$ of the minimum required distance.

In applying the analysis set forth in Coventry Square, Inc., the Board finds that a conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. The Board finds that the Church of the Nazarene and the Butler Raceway Park are sensitive sites that are open to members of the public inclusive of children. The Board finds that the 1,000 foot separation requirement is necessary to protect the public inclusive of vulnerable members of the public such as children from cannabis activities. The Board also finds that the reason for the significant separation requirement between a cannabis retail facility and other

sensitive uses as set forth in the Ordinance is not based upon a perceived visual impact to these uses as indicated on the record by the Applicant's planner. The Board rejects the Applicant's Planners testimony as to visual impact. Rather, the Board finds that the governing body has imposed conditions for this use due to the highly regulated nature of the cannabis industry in order to protect the public inclusive of the most vulnerable and sensitive members of the public inclusive of children and to promote the public safety and general welfare by imposing these conditions.

The Board finds that it has evaluated the impact of the retail cannabis dispensary use on the surrounding properties and has determined that approval of this application will constitute a substantial detriment to the public good. Further, the Board finds that the variance cannot be granted without substantial impairment of the zone plan and zoning ordinance. The Board concludes that the grant of a d(3) conditional use variance to permit a retail cannabis dispensary at this location is not appropriate. The Board further finds that the grant of a d(3) variance is not reconcilable with Butler's legislative determination that "no cannabis retail establishment...shall be located within 1,000 linear feet in any direction of a...church...public park" or of any of the other delineated uses set forth in Section 143-173F. In this case, the Board finds that the Applicant violates the 1,000 linear feet setback from a church and a public park. The Board finds that granting d(3) variance relief is not appropriate and these conditions should continue to be imposed on the proposed retail cannabis dispensary use. The Board further finds that the Applicant has not met its proofs in order to demonstrate that variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) is warranted can be granted in satisfaction of the requirements of the Municipal Land Use Law and cases interpreting same relative to granting d(3) conditional use variance relief.

Kinnelon Planning Board Resolution

The Planning Board further notes that the Applicant obtained a waiver of site plan approval from the Kinnelon Planning Board, which matter was decided on March 2, 2023 and memorialized in a Resolution adopted on April 6, 2023. The Kinnelon Planning Board Resolution provides the following:

1. Future employees and patrons of any retail cannabis establishment located at the Butler Plaza be directed to park their motor vehicles only within portions of the subject Property lying within the Borough of Butler and to avoid parking their motor vehicles within portions of the subject Property lying within the Borough of Kinnelon;
2. Suitable parking lot mapping and other way finding information be provided to allow compliance with the aforementioned parking area limitations; and
3. They will instruct future customers that cannabis products purchased from Applicant's establishments not be consumed anywhere within the Subject Property, including within parked or moving motor vehicles.

Based upon the restrictions in the Kinnelon Planning Board Resolution which restricts all activities related to the cannabis retail dispensary to Butler, the Board finds it would be an untenable situation to monitor this situation to ensure that patrons of the retail cannabis dispensary only park in designated parking spaces in Butler and that the patrons do not either park or consume cannabis products either in or outside a vehicle within the Borough of Kinnelon.

Ancillary "c" Variance Relief

The Municipal Land Use Law at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or

extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the Applicant to establish these criteria.

In connection with the proposed development, the Applicant requires the following variance relief:

1. Minimum front yard setback (Section 143-118) where 50 feet is required and 47.4 feet to the building corner is existing and proposed;
2. Minimum side yard 25 feet each is required, and 9.9 feet/59.5 feet is existing non-conforming;
3. Minimum rear yard where a minimum of 50 feet is required and 0 feet to the lot line Township and zone boundary is existing and proposed.

4. Maximum building coverage where 20% is permitted and 23.1% is existing and proposed;
5. Section 143-86A Minimum driveway setback to a property line where 20 feet is required, 0 feet to a shared driveway is existing and proposed;
6. Section 143-87F Off-street parking landscape area required 300 square feet/30 parking spaces required, none provided which is existing and proposed;
7. Total required parking spaces where 232 spaces are required and 201 spaces are existing and proposed. However, 30 spaces are at least to New Jersey Transit and thus, 173 parking spaces are existing thereby requiring variance relief.
8. Section 183-87G required Off-street loading space, 1 off-street space required and none provided existing and proposed.

The Board finds that the request for variance relief primarily concerns existing non-conforming conditions. However, with respect to the required number of on-site parking spaces, where 232 spaces are required and 173 spaces are provided and with the restrictions imposed by the Kinnelon Planning Board, the Board has concerns regarding the operational practice for shared customer and employee parking and enforcement to ensure that customers of the cannabis retail store park in the designated parking areas in Butler and not in Kinnelon. The Board also questions the efficacy of having employees shuttled to the property from the Hillview Med facility in Pompton Plains, New Jersey.

The Board finds that variance relief cannot be granted without substantial detriment to the public good and without substantial impairment of the zone plan and zoning ordinance. The Board further finds that the benefits of the deviation would not substantially outweigh the detriments, and thus, “c” variance relief is denied.

Preliminary & Final Site Plan Approval

The Board finds that with the denial of variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) for conditional use approval, the application as to preliminary and final site plan approval has been rendered moot.

Conclusion

Upon consideration of the plans, testimony and application, the Board determines that the request for “d(3)” conditional use variance relief and “c” variance relief has not met the minimum requirements of the Municipal Land Use Law, case law and Borough Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will adversely impact or impair the use and enjoyment of adjacent properties. Thus, the Board concludes that it is appropriate to deny the request for “d(3)” conditional use variance relief and “c” variance relief from Ordinance No. 2021-16 and the Borough of Butler Code Sections 143-123.5 and 143-173 to permit a cannabis retail establishment in the tenant space formerly occupied by Wayne Pharmacy in premises located at 1481 Route 23 South, Butler, New Jersey is hereby denied.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board that the application of Hillview Med, Inc. in regard to property known and designated as Block 54, Lot 1.03 as shown on the Tax Assessment Map of the Borough of Butler, and located at 1481 Route 23 South, Butler, New Jersey in the HC Zone District, requesting land use relief is determined as follows:

- (1) “d(3)” conditional use variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) is hereby denied;
- (2) Ancillary “c” variance relief under Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) and (2) is hereby denied;
- (3) Preliminary site plan approval under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46 and final site plan approval

under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-50 is hereby rendered moot as a result of the denial of conditional use variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3).

VOTE TO DENY APPLICATION
JUNE 15, 2023

Motion Introduced By: Brown

Seconded By: Donza

In Favor: Veneziano, Brown, Vath, Hough, Reger, Nargiso

Opposed: Donza

VOTE TO APPROVE RESOLUTION
JULY 20, 2023

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Butler Planning Board

William Budesheim, Board Secretary

James Nargiso, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Butler Planning Board on June 15, 2023 and memorialized herein pursuant to N.J.S.A 40:55D-10(g) on July 20, 2023.

William Budesheim, Board Secretary

2768581.1 BUTBPB-005E Hillview Med, Inc. Resolution of Denial of Conditional Use Approval, Preliminary & Final Site Plan App. (SP22-85) 7.20.23