

**RESOLUTION
TOWNSHIP OF LAFAYETTE
LAND USE BOARD
In the Matter of Element Farms, Inc.
Application #21-1
Decided on September 23, 2021
Memorialized on October 28, 2021
Preliminary Site Plan and "C" and "D" Variance Approval**

WHEREAS, Element Farms, Inc. (the "Applicant") has made application to the Lafayette Township Land Use Board for preliminary site plan and "C" and "D" variance approval for property known as Block 5, Lot 7.03, as shown on the Tax Map of the Township of Lafayette, located on 152 Hampton House Road in the R-5.0 residential district (the "Premises");

WHEREAS, pursuant to N.J.S.A. 40:55D-25, the Township of Lafayette has by ordinance established the Lafayette Township Land Use Board which has dual powers of planning and zoning;

WHEREAS, a public hearing was conducted on September 23, 2021, after the Board determined it had jurisdiction;

WHEREAS, Board Members Hughes and O'Leary disqualified themselves from this application and took no part in the hearing; and

WHEREAS, the Applicant was represented by Lawrence A. Calli, Esq. of Calli Law, LLC.

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

The Applicant sought approval to construct a 112,788 square-foot greenhouse within an open field on the Premises next to an existing greenhouse. Preliminary site plan approval was sought, as well as a D-1 use variance, since the permitted principal agricultural use in the R-5.0 residential district does not include greenhouses larger than 500 square feet (Ord. §13-8(b)), and a C-2 variance, since the Applicant proposes to increase lot coverage of the Premises from an existing 11.6% to 30%, and only 10% is allowed in the R-5.0 residential district (Ord. §13-8.6).

The Board Attorney swore in Serdar Mizrakci, the CEO and co-founder of Applicant, and Mr. Mizrakci testified regarding the Applicant's business operations and overall mission, which is to grow pesticide-free vegetables and deliver them to customers within 24 hours of being picked. Mr. Mizrakci testified that Applicant currently has 160 customers, mostly supermarkets, and helped keep food on the shelves of local supermarkets during the COVID-19 pandemic.

After Mr. Mizrakci's initial testimony, the Board, upon the recommendation of the Board Engineer, determined the application was complete, conditioned upon the Land Use Administrator's receipt of the tax payment certificate (Checklist Item No. 5),

The Board Attorney swore in Mark Gimigliano, P.E., who testified as the professional engineer in support of the application and talked through the proposed construction with the Board and produced new Exhibits A-1 (aerial pictures), A-2 (greenhouse plan) and A-3 (aerial sketch of greenhouse). Mr. Gimigliano testified that the application does not require any permits from the New Jersey Department of Transportation. The Board Engineer asked about heating during the winter, and Mr. Gimigliano testified that that Applicant will use a boiler and radiant heat. The Board Engineer asked if greenhouse curtains will shield light from entering the greenhouse and Mr. Gimigliano testified that curtains will help since they do not allow anyone to see in or out of the greenhouse. Mr. Mizrakci testified that the proposed new greenhouse will have two layers of curtain, as opposed to the one layer in the current greenhouse. The Board Engineer recommended, and the Board agreed, that any approval of the application should be conditioned upon the Applicant's submission of the technical specifications for its new greenhouse curtains and the Board Engineer's satisfactory performance of a light evaluation on site.

In response to the Board's concerns regarding parking, Mr. Mizrakci testified that there will be up to 30 employees on the Premises at any given time. The Applicant currently has 42 employees and intends to hire 30 additional employees. The Applicant currently owns and operates two box trucks, a van and two tractor trailers, and will add two more box trucks if the application is approved. The Board was concerned about incoming and outgoing deliveries, and Mr. Mizrakci testified that the box trucks will not be on the Premises during working hours when the employees are present. He further testified that all incoming

deliveries will take place between 8:00 AM and 5:00 PM and all outgoing deliveries will leave the Premises between 5:00 AM and 8:00 AM.

The Board reiterated its parking concerns and the Board Engineer asked the Applicant how it is possible for large bulk trucks to make deliveries on a gravel driveway. Mr. Gimigliano testified that trucks park in the driveway to make deliveries, and Mr. Mizrakci testified that there are no loading docks and deliveries are made by parking in the driveway. In response to the Board's parking concerns, Mr. Gimigliano testified that the Applicant intends to designate an area for parking, and Mr. Mizrakci testified that fewer than 20 people show up to work on site every day and that there are 15-20 cars on the Premises at any given time, and trucks park by the side of the residence or in front of the existing greenhouse. The Board Engineer told the Applicant that expansion of the parking area might be appropriate, and Mr. Gimigliano suggested this could be done by increasing the lot coverage to 30%. Applicant's Counsel asked the Board to permit Applicant to amend its application for a C-2 variance since applicant sought to increase the lot coverage from 11.6% to 24.4%. The Board Engineer supported such an amendment, and the Board approved the amended application seeking an increase of lot coverage to 30%.

Board Member Van Sickle asked if the Applicant had considered landscaping the Premises to protect the neighbors from light disturbance. Mr. Mizrakci testified that he spoke to the neighbor and intends to plant trees along the edge of the Premises to accommodate the neighbor's wishes. This landscaping was not a part of the submitted site plan, and the Board Engineer asked to see a landscaping plan. The Board Engineer recommended that the Board condition any approval upon the submission of a plan and the Borough Engineer's satisfactory review thereof.

Mr. Mizrakci testified that Applicant's current days and hours of operation are Monday through Saturday, 7:00 AM to 6:00 PM. The Applicant wishes to keep the same days but expand its hours of operation to 6:00 AM to 10:00 PM.

The meeting was then opened to the public, at which time Francis J. McGovern, Esq. appeared on behalf of Hampton Township and questioned Mr. Gimigliano regarding the items set forth in Mr. McGovern's letter to the Board dated September 12, 2021. Mr. Gimigliano provided the following testimony in response:

- There is only one access drive for the Premises;

- The Applicant does not need DOT permits since it has existed long enough to be “grandfathered”;
- There is an access easement on the adjacent property for the benefit of Applicant;
- There are no planned improvements to handle increased traffic;
- The access road is wide enough for two vehicles to pass each other;
- There are 25 trips in and 25 trip out per day on the Premises, including all employees, pickups and deliveries;
- Signage will not change; and
- Applicant has not yet consulted the Hampton Township Fire Department, but it plans to do so.

The meeting was then closed for public comment, and the Board Attorney swore in John McDonough, LA, PP, AICP, who testified as a professional planner in support of the application. Mr. McDonough testified that the Premises are particularly suited for the Applicant’s proposed use and that granting Applicant the D-1 and C-2 variance relief it seeks would advance MLUL purposes A, C, G, I & N. Mr. McDonough testified that Applicant’s use of the Premises would benefit established businesses, provide direct and indirect employment, promote healthy living and, as a result of its rain-harvesting system, reduce soil erosion. Mr. McDonough further testified that the application is consistent with the master plan, since it promotes agricultural use, and would not substantially impair the zone plan and zoning ordinance.

The meeting was then again opened to the public, at which time Francis J. McGovern, Esq. continued his appearance on behalf of Hampton Township and asked the Board to condition any approval of the application on Hampton Township Fire Department’s review and approval of the site plan with respect to access by emergency vehicles. Mr. McGovern also asked that a condition of approval be that Applicant is obligated to notify Hampton Township if Applicant ever decides to apply for a cannabis license. The Board discussed Mr. McGovern’s request with the Board Attorney, the Applicant’s Attorney and Mr. McGovern and agreed the Applicant should submit relevant documentation to the Hampton Township Fire Department as a courtesy. The Board did not agree that Applicant should be obligated under an approval resolution to notice Hampton Township regarding potential cannabis activities, and noted the cannabis statute and regulations would govern in any event.

A report from the Board Engineer, Nevitt Duveneck, PE, CME, dated August 7, 2021 was considered by the Board in its deliberations.

The Board Engineer recommended and the Board granted waivers to Checklist Item Numbers 18, 42 a. through l., 50, 52 a. through e., 58, 59, 60, 61, 64, 65, 66, 70, 74, 80, 81, 87, 88 and 95, partial waivers to Checklist Item Numbers 39 and 47 and temporary waivers to Checklist Item No 72.

NOW, THEREFORE, the Lafayette Township Land Use Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The Municipal Land Use Law states that preliminary major site plan approval shall be granted based upon the submission of a "site plan and other such information as is reasonably necessary to make an informed decision as to whether the requirements necessary for preliminary site plan approval have been met." After careful review of the requirements under the site plan ordinance, the engineering plans, testimony and all other submissions, the Board finds that the detailed drawings, specifications and other evidence conform to the standards established by ordinance for preliminary site plan approval to be granted.

The Municipal Land Use Law, at N.J.S.A. 40:55D-70(c) 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, a 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.

Here, the Board is satisfied that the variance related to the increase in lot coverage from 11.6% to 30% can be appropriately granted. The Board Engineer and the Applicant's engineer agreed and opined that the Applicant should expand the parking area on the Premises, and that increasing the lot coverage to 30% was necessary to accomplish this. The existing buildings, topography and conditions of this specific piece of property support the variance relief. The general welfare is benefitted by the productive, safe use of this underutilized piece of property to benefit the community, and the Board is satisfied that strict application of the existing ordinance would cause a hardship.

Under the Municipal Land Use Law, a Municipal Land Use Board, when considering a "d" variance, cannot grant relief unless sufficient special reasons are shown and there is no substantial impairment of the intent and purpose of the zone scheme and Zoning Ordinance. In addition, the burden of proof is upon the applicant to establish the above criteria. It is the Board's responsibility, acting in a quasi-judicial manner, to weigh all the evidence presented before it by both the applicant and all objectors, and reach a decision which is based upon findings of fact and conclusions of law and is not arbitrary, unreasonable or capricious.

The New Jersey Courts have been willing to accept a showing of extreme hardship as sufficient to constitute a special reason. Our courts have indicated that there is no precise formula as to what constitutes special reasons unless the use is determined to be inherently beneficial, and that each case must be heard on its own circumstances. Yet, for the most part, hardship is usually an insufficient criterion upon which the Board can grant a variance.

A use not inherently beneficial may be found to promote the general welfare if it is peculiarly fitted to the particular location for which the variance is sought. In these instances, the use promotes the general welfare because the proposed site is particularly suited for the proposed use. The Board is aware that it need not find that the site is uniquely suited for the

proposed development. In addition, special reasons have been found where a variance would serve any other purposes of zoning set forth in N.J.S.A. 40:55D-2.

A variance can only be granted if the Board, on the basis of the evidence presented before it, finds that the public interest, as distinguished from the purely private interest of the applicant, would be best served by permitting the proposed use. In these instances, the Board must also find that the granting of the variance will not create an undue burden on the owners of the surrounding properties. The Board also notes the special reasons requirement may be satisfied if the applicant can show that the proposed use is peculiarly suited to the particular piece of property. With regard to the question of public good, the Board's focus is on the variance's effect on the surrounding properties and whether such effect will be substantial. Furthermore, in most "d" variance cases, applicant must satisfy an enhanced quality of proof and support it by clear and specific findings by this Board that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The burden of proof is upon the applicant to establish the above criteria.

The Board finds the Applicant has satisfied the positive criteria. The Applicant's proposed use of the Premises would benefit established businesses, provide direct and indirect employment, promote healthy living and, as a result of its rain-harvesting system, reduce soil erosion. The Board also finds that the Premises are particularly suited for the proposed use. The proposed use will benefit the entire community and therefore promote the goals of planning as enumerated in N.J.S.A. 40:55D-2, and the Premises are particularly suited for the proposed use. The Board therefore concludes that the positive criteria has been satisfied.

The Board also finds that the Applicant has satisfied the enhanced criteria. The Township Master Plan identifies the following goals in order to accommodate growth and still maintain the general character of the community: (1) Maintain the rural nature of the Township; (2) Protect the quality of the environment; (3) Provide for safe and convenient traffic circulation; and (4) Provide public facilities to meet the needs of the community. The Board finds that the Master Plan does not have a policy goal which results in the undevelopability of the Premises. The Township Master Plan and proposed development can therefore be reconciled. Further, the Board finds that the Township Master Plan promotes agricultural use, and the proposed development would not substantially impair the zoning

ordinance. The Board therefore finds that the proposed development and the ordinance can be reconciled and that the enhanced criteria has been satisfied.

The Board also finds that the negative criteria has been satisfied. The Board is persuaded that the light emissions associated with the proposed use are not appreciably different from those associated with a permitted use. The Board is also persuaded that the noise generated by vehicles present on the Premises, including those making deliveries, is not appreciably different from the noise associated with a permitted use, and that the view of the new greenhouse will be sufficiently guarded from the surrounding properties and will not disturb the character of the Township. The Board therefore concludes that the proposed development will not result in a substantial detriment to the zone plan, zoning ordinance or public welfare. The negative criteria has therefore been satisfied. The Board further concludes that the positive criteria substantially outweighs the negative criteria and that use variance relief may be granted pursuant to N.J.S.A. 40:55D-70d(1).

A motion was made by Board Member Deller, seconded by Board Member Carlson, to grant Preliminary Site Plan and "C" and "D" Variance approvals.

NOW, THEREFORE, BE IT RESOLVED by the Lafayette Township Land Use Board, that the application of Element Farms, Inc., for Block 7.03, Lot 5, as shown on the Tax Map of the Township of Lafayette, requesting Preliminary Site Plan and "C" and "D" Variance approvals, is granted, pursuant to N.J.S.A. 40:55D- 40:70(c) and 70(d), subject to the following terms and conditions:

1. The development of this parcel shall be implemented in accordance with the plans submitted and approved.
2. The Board recommends to the Governing Body execution of a Developer's Agreement by the applicant and the Governing Body, containing the conditions of approval (including a sequence of construction) which shall be recorded as a lien and notice upon this property of the developer's obligations concerning this approval.
3. This approval is granted strictly in accordance with the plat prepared by Mark Gimigliano, P.E. of Dykstra Walker dated June 2, 2021, as may be amended by this approval.
4. At the specific request of the applicant, the Zoning Official and Construction Department are authorized to issue the appropriate permits prior to the memorialization of this resolution, provided all other requirements have been satisfied.

5. At least 72 hours before any construction, a pre-construction meeting shall be held including the municipal representatives, the applicant and its engineers and contractors. The meeting shall be held only after the Engineer's Opinion of Probable Cost has been submitted to the municipality for computation of engineering and inspection fees, the form of which is to be approved by the Board Engineer. No work shall commence until such fees have been posted with the municipality.

6. As a condition subsequent, submission of revised plans, containing the following, which are conditions of approval:

- A. Landscape Plan.
- B. Map with loading areas indicated thereon.
- C. Map revised to include five additional parking spaces.

The map must be submitted within **60 days**, in the absence of which the approval may be listed at the next month's meeting for dismissal for failure to comply with the conditions of this approval.

Revisions to plans shall be accompanied by a letter from the Applicant's professionals detailing the revisions made to the plan to the Township Engineer's review letter by item number and where on each sheet of the plans the revision(s) was made.

7. A construction permit may be issued based on preliminary site plan approval; however, no certificate of occupancy shall be issued, nor occupancy of the structure permitted, until final site plan approval shall have been granted, based on a final "as built" plan with all required improvements having been installed and conditions of this resolution satisfied.

8. The applicant shall maintain, at applicant's sole cost and expense, a right of way giving access to the property so fire fighting and other emergency equipment shall have access to the property. The applicant shall not look to the municipality at any time for any aid or assistance in maintaining and preserving such access.

9. Applicant shall post performance guarantees or maintenance guarantees in accordance with the Municipal Land Use Law.

10. This variance expires one year from the date of memorialization of this decision, unless a building permit has been obtained, or as otherwise permitted by law.

11. The Applicant is bound to comply with the representations made to the Board by the Applicant and Applicant's professionals.

12. All approved lighting is subject to a night light test conducted by the Board Engineer.

13. Applicant must comply with all applicable sign ordinance requirements.

14. The Board Engineer shall perform a compliance review prior to signing of the plans and deeds for the application.

15. Payment of all fees, costs and escrows due or to become due. Any monies are to be paid within 20 days of any request by the Board's Secretary or Treasurer.

16. Certificate that taxes are paid to date of approval.

17. Prior to the issuance of any construction permit, the Applicant shall file with the Board and Construction Official an affidavit verifying that the Applicant is in receipt of all necessary agency approvals other than the municipal agency having land use jurisdiction over the application and supply a copy of any approvals received.

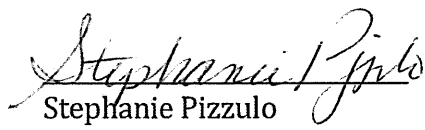
18. Any condition without a specific time limit shall be complied with within six months of the date of this resolution's memorialization.

19. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Lafayette, County of Sussex, State of New Jersey, or any other jurisdiction.

20. Applicant must submit the specifications for the proposed greenhouse curtains to the Board Engineer, and the Board Engineer must be satisfied that such specifications are consistent with the results of the Board Engineer's light test.

21. Applicant must submit a courtesy copy of the site plan to the Hampton Township Fire Department.

The undersigned secretary certifies the within resolution was adopted by this Board on October 28, 2021, and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on October 28, 2021.


Stephanie Pizzulo
Land Use Board Administrator

FOR: George Hutnick, Tamarith Deller, Warren Potter, Susanne Van Sickle,
Robert Taylor.

AGAINST: None.

ABSTAIN: None.

Board Members Eligible to Vote: Taylor, Deller, Hutnick, Leuthe, Potter, Van Sickle, Carlson