



Municipality of Princeton
Department of Community Development
Office of Planning

Princeton Municipal Building
400 Witherspoon Street
5366

609-924-

MEMORANDUM

TO: Robert Bruschi, Administrator

FROM: Lee Solow, Director of Planning 

DATE: 11/12/13

SUBJECT: AVALONBAY – LITIGATION FUND
Miller, Porter & Muller, PC – Gerald Muller, Esq.

We have been advised by Mr. Muller that the Association for Planning at Hospital Site has filed a complaint against the Planning Board, Mayor & Council and AvalonBay Communities LLC (a copy of the complaint is included). A resolution and PSA has been prepared based upon Mr. Muller's request.

We are asking that the Mayor and Council enter into a new Professional Services Agreement with Miller, Porter & Muller, PC in the amount not to exceed \$42,500. Attached please find:

11/7/13 Resolution of Planning Board asking Mayor & Council to enter into the PSA
Complaint filed by the Association for Planning at Hospital Site
draft Resolution for Council
draft Professional Services Agreement with Miller, Porter & Muller, PC in the amount of \$42,500

Should you have any questions, please contact me. Thanking you in advance for assistance

cc: Kathryn Monzo, Assistant Administrator & Director of Finance
Sandra Webb, Chief Financial Officer
Robert Kiser, PE; Director of Engineering
Edwin Schmierer, Esq.
Gerald Muller, Esq.

MUNICIPALITY OF PRINCETON
COUNTY OF MERCER, STATE OF NEW JERSEY

RESOLUTION

WHEREAS, there exists a need for legal services to assist the Princeton Planning Board in connection with litigation entitled Association for Planning at Hospital Site vs. Planning Board of Princeton, Docket No. MER-L-2092-13; and

WHEREAS, the New Jersey Local Public Contracts Law, *N.J.S.A. 40A:11-1 et seq.* requires that a Resolution authorizing the award of a Contract for "Professional Services" without competitive bidding must be publically advertised.

NOW, THEREFORE, BE IT RESOLVED by the Council of Princeton as follows:

1. The Mayor and Clerk of the Municipality of Princeton are hereby authorized and directed to enter into an agreement for an amount not to exceed of \$42,500 with Miller, Porter & Muller, P.C., One Palmer Square, Princeton, NJ 08542 to provide for the defense of the Princeton Planning Board in the above-captioned litigation. The Professional Services Agreement authorized by this Resolution is on file in the Office of the Municipal Clerk and may be inspected during regular office hours.
2. This Agreement is being awarded without competitive bidding as a "Professional Services" Contract under the provisions of the New Jersey Local Public Contracts Law because a service will be rendered or performed by a person or persons authorized by law to practice a recognized professional and whose practice is regulated by law.
3. A notice of this action shall be published in the Princeton Packet as required by law within ten (10) days of its passage.

CERTIFICATION

I, Linda S. McDermott, Clerk of the Municipality of Princeton, do hereby certify that the foregoing Resolution was adopted by the Princeton Council at its regular meeting held on the _____ day of November, 2013.

Linda S. McDermott, Clerk
Municipality of Princeton

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT, entered into on this ____ day of _____, 2013, by and between **PRINCETON**, a municipal corporation of the State of New Jersey, 400 Witherspoon Street, Princeton, New Jersey 08540 (hereinafter referred to as "**PRINCETON**") and **MILLER, PORTER & MULLER, PC** , (hereinafter referred to as "**ATTORNEY**").

WITNESSETH:

WHEREAS, the Princeton Planning Board has been named as a Defendant in litigation captioned Association for Planning at Hospital Site, vs. Planning Board of Princeton, Docket No. MER-L-2092-13; and

WHEREAS, **PRINCETON** entered into a professional services agreement on _____, 2013 with its **ATTORNEY** in an amount not to exceed \$42,500; and

WHEREAS, **PRINCETON** pursuant to the New Jersey Local Public Contracts Law, *N.J.S.A. 40A:11-3 et seq.*, authorizing the award of a Contract for Professional Services, in an amount not to exceed \$42,500 without competitive bidding to **ATTORNEY** as permitted by law.

WHEREAS, the **ATTORNEY** has advised the Princeton Planning Board that this law suit has been filed in response to the Planning Board's approval of the new AvalonBay Major Site Plan application and the funds are needed to defend this litigation; and

WHEREAS, **ATTORNEY** has agreed to provide said services; and

WHEREAS, **PRINCETON** has adopted a resolution pursuant to the New Jersey Local Public Contracts Law, *N.J.S.A. 40A:11-3 et seq.*, amending the authorized award of a Contract for Professional Services without competitive bidding to **ATTORNEY** as permitted by law.

NOW, THEREFORE, IT IS AGREED by and between **PRINCETON** and **ATTORNEY**, as follows:

1. **PRINCETON** hereby retains **ATTORNEY** to continue its representation of the Princeton Planning Board in the matter of Association for Planning at Hospital Site, vs. Planning Board of Princeton, Docket No. MER-L-2092-13. The nature, scope of services and fees are set forth in a copy of which is attached hereto and made a part hereof as Exhibit A.

2. **Total amount, revised not to exceed, as \$42,500, at an hourly rate of \$205.** **ATTORNEY** shall notify the Princeton Administrator when eighty (80%) percent of the contract has been spent.

3. All of the work to be undertaken and completed by **ATTORNEY** shall be performed under the direct supervision of the **DIRECTOR OF PLANNING AND**

4. **PRINCETON** and **ATTORNEY** hereby incorporate by reference into this Agreement the affirmative action/non-discrimination requirements as set forth on Exhibit B attached hereto.

5. **ATTORNEY** agrees to comply with the requirements of the New Jersey Business Registration Act in accordance with Exhibit C attached hereto.

6. **ATTORNEY** further agrees to adhere to the requirements of the New Jersey Local Unit Pay-to-Play Act, *N.J.S.A. 19:44A-20.7 et seq.*, as well as the Princeton Pay-to-Play Ordinance No. 2007-11 as set forth on Exhibit D attached hereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and date first written above.

ATTEST:
of

Linda S. McDermott, Clerk

WITNESS:

**PRINCETON, a municipal Corporation
the State of New Jersey**

By: _____
_____, Mayor

MILLER, PORTER & MULLER, PC

By: _____

EXHIBIT A

LAW OFFICES
MILLER PORTER & MULLER, P.C.
Suite 540
One Palmer Square
Princeton, New Jersey 08542

William Miller (1913-1977)
Allen D. Porter
Gerald J. Muller

Telephone (609) 921-6077
Fax (609) 497-1439
e-mail address: gmuller@mpmglaw.com

October 29, 2013

Via electronic transmission

Mr. Lee Solow, Planning Director
Princeton – Department of Planning
400 Witherspoon Street
Princeton, NJ 08540

Re: Proposed budget for new AvalonBay litigation

Dear Lee:

I propose the following budget for the new AvalonBay litigation, Docket No. MAR-L-2092-13:

\$30,000--to defend through the trial court level claims against Planning Board.

This includes answering Complaint; preparing motions to dismiss and for summary judgment with respect to the Fourth and Fifth Counts (seeking invalidation of the Board approval on the grounds of temporary taking because of demolition and of lack of Planning Board jurisdiction because the first suit is still pending) and briefing and attending hearing on motions; briefing, assembling the record, and a hearing on the arbitrary and capricious claims (First and Second Counts); attending case management conference or conferences; motion

practice occasioned by plaintiff; and communications with the court and counsel.

\$12,500—working with Municipal Attorney to defend through the trial court level claims against Princeton and Mayor and Council with respect to ordinance challenge (Third Count) and to the takings issue aspects of the Fourth Count. This includes answering Complaint; preparation of motions to dismiss and for summary judgment with certifications as necessary, briefing, and a hearing on the motions; attending case management conference or conferences; motion practice occasioned by plaintiff; and communications with the court and counsel. This assumes that the claims against Princeton and Mayor and Council are resolved in their favor by dispositive motions and that discovery, trial expert identification and preparation of expert reports, pretrial briefing, and a plenary and trial are not necessary.

\$42,500

Sincerely,

A handwritten signature in cursive script that reads "Gerald J. Muller".

Gerald J. Muller

GJM/dh

cc: Ms. Ilene Cutroneo (via electronic transmission)

EXHIBIT B

AFFIRMATIVE ACTION/ EQUAL EMPLOYMENT GOAL COMPLIANCE
ATTACHMENT

for

PROCUREMENT AND SERVICE CONTRACTS, INCLUDING
PROFESSIONAL SERVICES AGREEMENTS

Pursuant to N.J.A.C. 17:27-3.5(a)1 and 4.3(a)1, each vendor (also referred to herein as “contractor”) shall submit to Princeton (also referred to as “public agency” or “agency”), after notification of award but prior to execution of a goods and services contract with the Princeton, one of the following three documents:

- (1) Appropriate evidence that the contractor is operating under an existing Federally approved or sanctioned affirmative action program; or
- (2) A certificate of employee information report approval, issued in accordance with N.J.A.C. 17:27-4; or
- (3) An employee information report (Form AA302) provided by the Division and distributed to Princeton to be completed by the contractor, in accordance with N.J.A.C. 17:27-4. A contractor shall not be eligible to submit nor shall Princeton accept an employee information report unless the contractor certifies and agrees to the following: The contractor, where appropriate, certifies that he or she has never before applied for a certificate of employee information report in accordance with rules promulgated by the Treasurer pursuant to N.J.S.A. 10:5-31 et seq., as amended and supplemented from time to time; and agrees to submit immediately to the Division a copy of the employee information report.

A contractor shall not enter into a binding subcontract with a subcontractor unless the subcontractor has submitted to said contractor one of the three documents listed above.

During performance of this contract, the contractor agrees as follows:

A. The contractor or subcontractor, where applicable, will not discriminate against any employee or applicant for employment because of age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex. Except with respect to affectional or sexual orientation and gender identity or expression, the contractor will ensure that equal employment opportunity is afforded to such applicants in recruitment and employment, and that all employees are treated during employment, without regard to their age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or

sex. Such equal employment opportunity shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the public agency compliance officer setting forth provisions of this nondiscrimination clause.

B. The contractor or subcontractor, where applicable will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to age, race, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex.

C. The contractor or subcontractor, where applicable, will send to each labor union or representative or workers with which it has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under this act and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

D. The contractor or subcontractor, where applicable, agrees to comply with any regulations promulgated by the Treasurer, pursuant to N.J.S.A. 10:5-31 et seq., as amended and supplemented from time to time and the Americans with Disabilities Act.

E. The contractor or subcontractor agrees to make good faith efforts to afford equal employment opportunities to minority and women workers consistent with:

(1) Good faith efforts to meet targeted county employment goals established in accordance with N.J.A.C. 17:27-5.2; or

(2) Good faith efforts to meet targeted county employment goals determined by the Division, pursuant to N.J.A.C. 17:27-5.2.

F. The contractor or subcontractor agrees to inform in writing its appropriate recruitment agencies including, but not limited to, employment agencies, placement bureaus, colleges, universities, labor unions, that it does not discriminate on the basis of age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex, and that it will discontinue the use of any recruitment agency which engages in direct or indirect discriminatory practices.

G. The contractor or subcontractor agrees to revise any of its testing procedures, if necessary, to assure that all personnel testing conforms with the principles of job-related testing, as established by the statutes and court decisions of the State of New Jersey and as established by applicable Federal law and applicable Federal court decisions;

H. In conforming with the targeted employment goals, the contractor or subcontractor agrees to review all procedures relating to transfer, upgrading, downgrading and layoff to ensure that all such actions are taken without regard to age, creed, color, national origin, ancestry, marital status, affectional or sexual orientation, gender identity or expression, disability, nationality or sex, consistent with the statutes and court decisions of the State of New Jersey, and applicable Federal law and applicable Federal court decisions.

I. The contractor and its subcontractors shall furnish such reports or other documents to the Division of Contract Compliance and EEO as may be requested by the Division from time to time in order to carry out the purposes of these regulations, and public agencies shall furnish such information as may be requested by the Division of Contract Compliance and EEO for conducting a compliance investigation pursuant to Subchapter 10 of the Administrative Code (N.J.A.C. 17:27).

As required by N.J.S.A. 10:2-1 (“Discrimination in employment on public works; contract provisions; set-aside programs”), the contractor agrees as follows:

A. In the hiring of persons for the performance of work under this contract or any subcontract hereunder, or for the procurement, manufacture, assembling or furnishing of any such materials, equipment, supplies or services to be acquired under this contract, no contractor, nor any person acting on behalf of such contractor or subcontractor, shall, by reason of race, creed, color, national origin, ancestry, marital status, gender identity or expression, affectional or sexual orientation or sex, discriminate against any person who is qualified and available to perform the work to which the employment relates;

B. No contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee engaged in the performance of work under this contract or any subcontract hereunder, or engaged in the procurement, manufacture, assembling or furnishing of any such materials, equipment, supplies or services to be acquired under such contract, on account of race, creed, color, national origin, ancestry, marital status, gender identity or expression, affectional or sexual orientation or sex;

C. There may be deducted from the amount payable to the contractor by Princeton, under this contract, a penalty of \$50.00 for each person for each calendar day during which such person is discriminated against or intimidated in violation of the provisions of the contract; and

D. This contract may be canceled or terminated by Princeton, and all money due or to become due hereunder may be forfeited, for any violation of this section of the contract occurring after notice to the contractor from Princeton of any prior violation of this section of the contract.

EXHIBIT C

BUSINESS REGISTRATION & SALES & USE TAX ADDENDUM

P.L. 2004, c.57 (N.J.S.A. 52:32-44) imposes the following requirements on contractors and subcontractors that knowingly provide goods or perform services for a contractor fulfilling this contract:

A. Proof of Contractor's Business Registration

The contractor must provide a copy of its business registration certificate issued by the Department of the Treasury or such other form or verification that the contractor is registered with the Department of the Treasury. Proof of business registration must be submitted no later than at the time of execution of this contract.

B. Proof of Subcontractors' Business Registration

The contractor shall not enter into any contract with a subcontractor under this contract unless the subcontractor first provides proof of valid business registration to the contractor. Also, if the contractor subcontracts any of the work:

1. The contractor shall provide written notice to its subcontractors of the responsibility to submit proof of business registration to the contractor. Subcontractors through all tiers of the project must provide written notice to their subcontractors to submit proof of business registration, and subcontractors shall collect such proofs of business registration.

2. The contractor shall forward copies of proof of the subcontractors' business registrations to the contracting agency.

3. The contractor shall maintain and submit to the contracting agency a list of subcontractors and their addresses that may be updated from time to time during the course of the contract performance.

4. Before final payment is made by the contracting agency under this contract, the contractor shall submit to the contracting agency a complete and an accurate list of all subcontractors, along with their proof of business registration (if not previously provided), used in fulfillment of the contract. If no subcontractors were used, the contractor shall attest to same prior to final payment.

A contractor or subcontractor who fails to provide proof of business registration or provides false information of business registration shall be liable for a penalty of \$25 for each day of violation, not to exceed \$50,000 for each proof of business registration not properly provided under a contract with a contracting agency.

C. Sales and Use Tax

For the term of this contract, the contractor and each of its affiliates shall collect and remit to the Director of the Division of Taxation in the Department of the Treasury the use tax due pursuant to the "Sales and Use Tax Act," P.L. 1966, c.30 (C.54:32B-1 et seq.) on all their sales of tangible personal property delivered into this State.

In the event the contractor subcontracts any of its work, the contractor shall include within its subcontracts the requirement that, for the term of this contract, the subcontractor and each of its affiliates shall collect and remit to the Director of the Division of Taxation in the Department of the Treasury the use tax due pursuant to the "Sales and Use Tax Act," P.L. 1966, c.30 (C.54:32B-1 et seq.) on all their sales of tangible personal property delivered into this State.

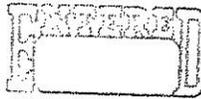
Information on the law and its requirements is available by calling (609) 292-9292.

EXHIBIT D

NEW JERSEY "LOCAL UNIT PAY-TO-PLAY LAW" COMPLIANCE

Political Contribution Disclosure

This Agreement has been awarded to CONTRACTOR/CONSULTANT based on the merits and abilities of CONTRACTOR/CONSULTANT to provide the goods or services as described herein. This Agreement was not awarded through a "fair and open process" as that phrase is defined in *N.J.S.A. 19:44A-20.7*. As such, CONTRACTOR/CONSULTANT hereby certifies that CONTRACTOR/CONSULTANT (including persons and other business entities having an interest in CONTRACT/CONSULTANT as defined by *N.J.S.A. 19:44A-20.7*) has neither made a contribution, that is reportable pursuant to the Election Law Enforcement Commission pursuant to *N.J.S.A. 19:44A-1 et seq. (i.e., in excess of \$300.00)*, in the one (1) year period preceding the award of this Agreement that would, pursuant to P.L. 2004, c.19 affect its eligibility to perform this Agreement, nor will it make a reportable contribution during the term of this Agreement to any municipal committee of a political party if a member of that political party is serving in an elective Princeton public office when the Agreement is awarded, or to any candidate committee of any person serving in an elective Princeton public office when the Agreement is awarded.



REC'D
30 (13)
SEP 27 2013

Roselli Griegel Lozier & Lazzaro, PC
1337 Highway 33
Hamilton Square, New Jersey 08690
Phone: (609) 586-2257
Attorneys for Plaintiff, Association for Planning at Hospital Site, LLC

**ASSOCIATION FOR PLANNING AT
HOSPITAL SITE, LLC,**

Plaintiff,

v.

**PRINCETON PLANNING BOARD,
PRINCETON, a municipal corporation of the
State of New Jersey, PRINCETON MAYOR
AND COUNCIL, the governing body of
Princeton, AVALONBAY COMMUNITIES,
INC.**

Defendants.

Civil Action

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MERCER COUNTY

DOCKET NO. MER-L- 2012-13

COMPLAINT IN
LIEU OF PREROGATIVE WRIT

Plaintiff, Association for Planning at Hospital Site, LLC, with an address at 93 Harris Road, Princeton, New Jersey 08540 (the "Association"), by way of Complaint in Lieu of Prerogative Writ, against the defendants, says:

I. Parties

1. Plaintiff is a New Jersey limited liability company consisting of members residing in Princeton, New Jersey.

2. Princeton Planning Board (the "Planning Board") is the planning board for Princeton, a municipal corporation in the State of New Jersey, Mercer County. The Planning Board is the successor in interest to the Regional Planning Board of Princeton upon the consolidation of Princeton Borough and Princeton Township that became effective on January 1,

2013. The Planning Board has the authority to review and approve development applications seeking site plan approval pursuant to the MLUL.

3. Princeton is a municipal corporation in the State of New Jersey, Mercer County.

4. The Princeton Mayor and Council are the governing body of Princeton.

5. AvalonBay Communities, Inc. is a corporation organized under the laws of the State of Maryland doing business in the State of New Jersey with an office at Woodbridge Place, 517 Route One South, Suite 5500, Iselin, New Jersey 08830.

II. Background

6. In October 2006, by Ordinance No. 2006-19, Princeton Borough rezoned the land more commonly known as Block 21.02, Lot 1, comprising of approximately 5.63 acres (hereinafter "PIQ") from its then existing zoning designation of HMC to MRRO (Mixed Residential, Retail, Office). The PIQ is the only parcel of land located in the MRRO zoning district. The MRRO zoning district is codified at Sec. 17A-355 to 17A-363 of the Code of Princeton (hereinafter sometime referred to as the "MRRO Zone").

7. In addition, by Ordinance No. 2006-20 adopted in October 2006, Princeton Borough created Design Standards for the newly created MRRO Zone which are codified at Sec. 17A-193B (hereinafter sometime referred to as the "Design Standards"). These design standards apply to any application for site plan or subdivision approval in the MRRO Zone.

8. In June 2012, the defendant AvalonBay submitted two development applications, one pertaining to the PIQ, seeking preliminary and final site plan approval for the development of 280 residential units in newly constructed buildings. The related application was for a minor subdivision site plan approval for development activity to be conducted on lands located in the

then Township of Princeton more commonly known as Block 7102, Lots 12, 13, 14 and Lots 8-11. The June 2012 applications are hereinafter referred to as the "First Application."

9. The PIQ is bounded by on the west by Witherspoon Street and the Witherspoon-Jackson neighborhood, consisting of single and two-family homes on small lots; to the south by Franklin Avenue, which includes public housing projects operated by the Princeton Housing Authority; on the east by the rears of single and two-family residences on small lots fronting Harris Street; and on the north by Henry Avenue, on which single family residences on small lots are located.

10. The Planning Board held six hearings regarding the First Application and on December 19, 2012, the Planning Board voted to deny the First Application by a vote of 7 to 3.

11. In voting to deny the First Application, the Planning Board determined in part that AvalonBay failed to meet a number of the Design Standards.

12. Subsequent to the denial of the First Application by the Planning Board, AvalonBay filed a lawsuit entitled AvalonBay Communities, Inc. v. Princeton Planning Board, Princeton, and Princeton Mayor and Council, Docket No. MER-L-374-13, challenging the denial (hereinafter the "Initial Litigation.").

13. During the pendency of the Initial Litigation, the parties negotiated the terms of a Consent Order dated April 18, 2013 executed by the Hon. Mary C. Jacobson, A.J.S.C. (hereinafter the "Consent Order") that provided among other things that AvalonBay would file a completely new development application during the pendency of the Initial Application, established compressed time frames for professional staff and Planning Board review; established meeting dates; allowed AvalonBay to rely upon material submitted in connection

with First Application, in lieu of new submissions and testimony, including environmental contamination, traffic counts and availability of utilities.

14. The Consent Order also expressly reserved its decision on whether the "Court shall permit AvalonBay to simultaneously pursue litigations involving two development applications."

15. Subsequent to the entry of the Consent Order, AvalonBay filed a second application again seeking development of the PIQ and adjoining properties, whereby it proposed to demolish all existing structures on site, except for a parking garage; construct two new apartment buildings along Witherspoon Street and Franklin Street, connected by a 2-story bridge at the third and fourth stories of the apartment buildings (hereinafter the "Second Application").

16. Pursuant to the Consent Order, the Planning Board conducted hearings on June 27, 2013, July 11, 2013, July 18, 2013 and July 25, 2013.

17. On July 25, 2013, the Planning Board voted to approve the Second Application by a vote of 8 to 1, which was memorialized by Resolution of Approval approved by the Planning Board on August 13, 2013 by a vote of 4 to 0. A copy of the Resolution of Approval is attached hereto as Exhibit A.

FIRST COUNT

18. Plaintiff repeats and realleges the prior allegations of the Complaint and incorporates the same herein as if set forth at length.

19. The Board's approval of the Second Application is without any legitimate planning or environmental justification and is otherwise arbitrary, capricious and unreasonable in violation of Plaintiffs' right to substantive due process of law as secured by the Fourteenth Amendment to the

U.S. Constitution and the New Jersey Constitution, Art. 1, par. 1 and 20, as well as Plaintiff' right to fundamental fairness.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Vacating the approval of the Second Application by the Planning Board;
- B. Awarding such other and further relief as the Court deems just and equitable.

SECOND COUNT

20. Plaintiff repeats and realleges the prior allegations of the Complaint and incorporates the same herein as if set forth at length.

21. The Board's approval of the Second Application (a) is contrary to the principles and purposes of the MLUL; (b) is without a real and substantial relationship to the legitimate regulation of land use within Princeton; (c) accomplishes no legitimate purpose; and (d) was not made with reasonable consideration of pertinent information including but not limited to design criteria and standards, sewer impact and capacity, demolition impact, environmental impact, displacement and effect of the development on surrounding neighborhoods and residents.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Vacating the approval of the Second Application by the Planning Board;
- B. Awarding such other and further relief as the Court deems just and equitable.

THIRD COUNT

Plaintiff repeats and realleges the prior allegations of the Complaint and incorporates the same herein as if set forth at length.

21. Ordinance No. 2006-19, codified at Sec. 17A-355 to 17A-363 of the Code of Princeton and the subsequent Second Approval constitutes spot zoning.

22. The PIQ was rezoned to benefit the owner for a use incompatible with surrounding uses and not for the purpose or effect of furthering the Township's comprehensive zoning plan.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Vacating the approval of the Second Application by the Planning Board;
- B. Vacating Ordinance No. 2006-19; and
- B. Awarding such other and further relief as the Court deems just and equitable.

FOURTH COUNT

23. Plaintiff repeats and realleges the prior allegations of the Complaint and incorporates the same herein as if set forth at length.

24. The approval of the Second Application violates the Due Process and Takings Clause of the United States Constitution and New Jersey Constitution in that it deprives the residents of private property without just compensation and proper notice. Upon information and belief, the Second Approval will subject certain residents in the surrounding neighborhoods to demolition that will require them to temporarily vacate their homes and which will have a health and safety impact upon the residents of the surrounding homes. The residents were not provided proper notice of the intended demolition and its consequences during the planning board hearings and were deprived an opportunity to address the issue or object. The board and their residents did not consider the takings and health and safety issues related to the demolition prior to the approval of the Second Application.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Vacating the approval of the Second Application by the Planning Board;
- B. Awarding such other and further relief as the Court deems just and equitable.

FIFTH COUNT

25. Plaintiff repeats and realleges the prior allegations of the Complaint and incorporates the same herein as if set forth at length.

26. The Board's consideration and approval of the Second Application was conducted without jurisdiction and was otherwise in violation of applicable law.

27. The First Application had been submitted and is still on appeal before the Superior Court in the matter, **AvalonBay Communities, Inc. v. Princeton Planning Board et als., MER-L-374-13**. That matter had not been dismissed, adjudicated or remanded to the Planning Board for further consideration.

28. It is a violation of law for the Second Application to be filed and heard by the Planning Board during the pendency of the appeal of the First Application, thereby divesting the Planning Board of jurisdiction to consider the Second Application.

WHEREFORE, Plaintiff demands judgment as follows:

- A. Vacating the approval of the Second Application by the Planning Board;
- B. Awarding such other and further relief as the Court deems just and equitable.

Roselli Griegel Lozier & Lazzaro, PC
Attorneys for Plaintiff

By: _____
Mark Roselli, Esq.

Dated: September 30, 2013

DESIGNATION OF TRIAL COUNSEL

Mark Roselli, Esq. is hereby designated as trial counsel pursuant to R. 4:5-19(c).

Roselli Griegel Lozier & Lazzaro, PC
A Professional Corporation
Attorney for Plaintiff

By: 

Mark Roselli, Esq.

Dated: September 30, 2013

CERTIFICATION

I hereby certify, in accordance with R. 4:5-1 that to the best of my knowledge, information, and belief the instant matter is not the subject of any other action pending in any other Court or of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated except the following: **AvalonBay Communities, Inc. v. Princeton Planning Board et als., MER-L-374-13**

I hereby certify that the foregoing statements made by me are true and that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Mark Roselli, Esq.

Date: September 30, 2013

EXHIBIT

A

PRINCETON PLANNING BOARD

In the Matter of the Application)	FINDINGS OF FACT
AvalonBay Communities, Inc. for)	AND
Preliminary and Final Major Site Plan)	CONCLUSIONS OF LAW
Approval with Variances)	File No. PB1313-047P
)	(Block 21.02, Lot 1 and
)	Block 7101, Lots 8-14)

1. The existing site. The property in question encompasses the site formerly occupied by the University Medical Center at Princeton, a medical arts building (Block 21.02, Lot 1 on the Borough Tax Map), and the parking garage that serviced them (located primarily on Block 7107, Lots 12, 13, and 14 and partly on Lots 8-11 on the Township Tax Map and on Block 21.02, Lot 1 on the Borough Tax Map). A pad and fence for an oxygen tank are also located on Lot 8. The Borough lot constitutes 5.63 acres, and the Township lots (all of Lots 12-14 and the rear portion of Lots 8-11) constitute 2.23 acres. Block 7101, Lot 15, which contains the three-story and two-story medical office buildings at the corner of Witherspoon Street and Henry Avenue and fronting on Witherspoon Street respectively was not included in the application, although improvements to the driveway accessing the parking garage and new sidewalks and use of the driveway and a sidewalk on Lot 15 are proposed. Block 7107, Lot 6, which contains underground storage tanks and a fueling station that served the Medical Center, was also not included.

2. The surrounding neighborhoods. The property in question is bounded on the west by Witherspoon Street and the Witherspoon-Jackson neighborhood, consisting of single- and two-family houses on small lots and historically the locus of Princeton's African-American community and in recent times multi-ethnic in composition; to the south by Franklin Avenue, on which front Franklin Terrace and Maple Terrace, public housing projects operated by the Princeton Housing Authority; on the east by backs of single- and two-family residences on small lots fronting on Harris Road; and on the north by Henry Avenue, on which single-family residences on small lots are located; and the two medical office buildings referred to above.

3. The zoning. The property in question falls within two zones, the former Borough's MRRO zone, which permits a residential development of up to 280 units with a 20 percent affordable housing set aside, among other things, and the former Township's G-1 overlay zone, which permits a parking garage. The zoning was established after proposals from the site owner, Princeton HealthCare System ("PHC"), which owns the Medical Center, and substantial community input after PHC decided to relocate the hospital to Plainsboro.

4. The prior application. In 2012, the applicant submitted a preliminary and final major site plan application for a 280 unit apartment building on Lot 1 and a minor site plan

application for improvements to the existing parking garage on Lots 8-14. The applications were consolidated by the Board. The proposal is more fully set forth in the resolution memorializing the denial of the application (Exhibit PB-3), paragraph 4. That proposal included two interior courts, one of which was accessible by the public, and 56 affordable units. A citizen's group, Princeton Citizens for Sustainable Neighborhoods ("PCSN"), objected to the application, arguing, among other things, that the Board did not have jurisdiction for the reasons set forth in paragraph 5 of Exhibit PB-3. The Board voted to assume jurisdiction and proceeded with the application.

The Board ultimately denied it. It first determined that the design standards set forth in Section 17B-193B of the Princeton Borough Code, which the applicant had contended were not intended to be and were not enforceable, in fact were enforceable. At the same time it recognized that

a number of the design standards have a subjective quality. Given that and given the second sentence of the introductory paragraph to Section 17B-193B providing that they set forth a framework "within which the designer of the site development is free to exercise creativity, invention and innovation," the applicant, as to the more subjective standards, must be given substantial discretion in deciding how the standards should be addressed as their concepts are incorporated into the site design. They cannot, however, be ignored. Exhibit PB-3, paragraph 11B(2).

The Board then found that the applicant had "failed to meet its burden of demonstrating that its design complies with certain design standards." Exhibit PB-3, paragraph 11B(3). It had not satisfied the standards requiring "an internal pedestrian circulation system that connects the project to the surrounding neighborhoods and results in the development being integrated into, rather than standing apart from, the broader community . . ." *Id.* The Board also addressed standards dealing with monolithic structures and relation of the proposed development to the neighborhoods in which the site is located. It did not make a substantive finding that the applicant did not comply with these provisions, but determined that its proofs with respect to them, particularly as to visuals, were insufficient for the Board to determine whether the standards had been complied with.

5. The litigation subsequent to adoption of the resolution of memorialization.
The applicant filed a lawsuit styled *AvalonBay Communities, Inc. v. Princeton Planning Board, Princeton, and Princeton Mayor and Council*, docket number MER-L-374-13, challenging the denial. PCSN was permitted to intervene as a defendant-intervenor, and the Fair Share Housing Center was permitted to appear *amicus*. During the briefing in the case, AvalonBay, the Planning Board, Princeton, and Princeton Mayor and Council negotiated a Consent Order (Exhibit PB-4).

The Consent Order provided, among other things, that AvalonBay intended to submit a new development application; set forth compressed time frames for professional staff and Planning Board review; established meeting dates, all of which the Board complied with; provided that AvalonBay could submit material from the first application, as it has, in lieu of

new submissions and testimony; provided that AvalonBay would not be required to "submit additional testimony or documentary submissions regarding issues not affected by the revised design, that is, environmental contamination, existing traffic counts and the availability of utilities" (Paragraph 2(a)); and stated that "[n]othing in this Consent Order shall require that the Planning Board to approve the Application," AvalonBay being required to comply with the substantive requirements of Princeton's ordinances and the Municipal Land Use Law (Paragraph 6).

The Consent Order also provided that the litigation will be dismissed if the Planning Board approved the new application without conditions or with conditions that AvalonBay did not oppose. If new litigation was filed by a third party or the Planning Board denied the application or approved it with conditions to which AvalonBay was opposed, AvalonBay may at its option continue with the current litigation or file a new lawsuit. The court in approving the Consent Order reserved decision on whether AvalonBay could simultaneously pursue litigation involving the two development applications.

Oral argument on AvalonBay's motion for partial summary judgment and the trial were stayed, except for PCSN's motion to strike counts of the Complaint on the ground that the Planning Board did not have jurisdiction over the application. The court heard argument on that issue and ruled that the Board did have jurisdiction.

6. The new application. The site is still owned by PHC. The applicant is the contract purchaser. The proposal includes the following:

- All of the existing structures on the site will be demolished except for the parking garage and the driveway servicing it.
- Two apartment buildings, one on Witherspoon Street (Building 2) and the second along the Franklin Avenue service drive (Building 1), will be constructed. The two buildings are connected by a two story bridge at the third and fourth levels. A second bridge connects Building 1 to the parking garage.
 - Building 2, an I-shaped structure, contains 83 apartments and a lobby and is approximately 111,105 square feet. It varies in height from five stories (four stories below the roof line plus fifth floor lofts) in the central portion and the wings framing the plaza to two to four stories (three stories below the roof and fourth floor lofts) in the wings facing Witherspoon Street.
 - Building 1, basically square-shape, is five stories (again, the top story, above the roof line, contains only lofts). The building contains 185 apartments and is approximately 219,307 square feet. It has an enclosed courtyard measuring approximately 123 feet by 140 feet, or 17,835 square feet, compared to the previous plan's enclosed courtyard of 33,325 square feet. There will also be a 1,515 square foot leasing area and 6,599 square feet of amenities, including a fitness center, lounge area, community room, and lobby.
- Three townhouse buildings, each with four three and four story townhouses (two and three stories when viewed from Franklin Avenue) fronting on Franklin Avenue, will be constructed

- Among the 280 units, 56 affordable units, including moderate, low, and very low-income units, are to be provided. Objections were raised to the original distribution of the units, which tended to cluster affordable units in certain areas, and the applicant in response thereto more evenly distributed the affordable units throughout the apartment buildings.
- While the prior design did not provide for any through passage for pedestrians or vehicles, the new design provides for a number of them. A roadway between Buildings 1 and 2 and connecting Franklin Avenue and the Henry Avenue driveway is proposed. It will be opened to the public. In addition, a number of publicly-accessible pedestrian passages are to be constructed. They are a pedestrian walk through the park discussed below connecting to the landscaped walk adjacent to the alley at the rear of the townhouses and called The Mews; a sidewalk along the southerly edge of the Witherspoon Street driveway that connects the Witherspoon Street sidewalk to the sidewalks on the through street and the Henry Avenue drive and continues as a landscape walk called The Garden Walk between Building 1 and the parking garage; and sidewalks on both sides of the through street connecting the public sidewalks on Franklin Avenue and Henry Avenue. There are also sidewalks along the Franklin Avenue access road and new ones along Franklin Avenue and Witherspoon Street set in from the curb line so as to provide a landscape strip for street trees.
- In addition to these walks, several other areas of publicly accessible open space have been provided. The most important are the park, enlarged in size from the original design and relocated from the area between the medical office buildings and the development to a more prominent and accessible location at the southwest corner of the site; a piazza with hardscape and landscaped areas on the easterly side of Building 2 and encompassing a shared space with distinctive pavement treatment on a portion of the through street; and the half elliptical and other lawn areas on Witherspoon Street. The piazza, the main Witherspoon Street lawn area, and the park may be the location of the installation of public art. The entire site except for the buildings, the enclosed courtyard within Building 1, and the private patios and gardens for some ground floor units will be publicly accessible.
- The existing garage contains 686 parking spaces. 24 additional spaces will provided in the townhouses' garages and driveways accessible from the alley behind them, and eight surface parking spaces will be provided along the through street and in the piazza area, totaling 715 spaces.

7. Variations required. The Zoning Officer determined that the following variances were necessary:

A.. From Section 17A-356(d)8(i) of the Borough Code, which limits the total sign area of freestanding signs to 10 square feet, while the applicant has proposed a two-faced freestanding sign with 10 square feet on each side or a total of 20 square feet.

B. From Section 17A-356(d)8(ii) of the Borough Code, which limits a freestanding sign's height to four feet, while the applicant had proposed a sign height of four feet three inches, the height overage being attributable to the applicant's logo. The applicant announced during the hearing that it was redesigning the sign so as to eliminate the need for that variance.

C. From Section 17A-358(b)1 of the Borough Code, which requires a yard setback of 25 feet, while the applicant proposed an eight foot setback for the townhouses.

D. From Section 17A-358(b)2 of the Borough Code, which provides for a setback to height ratio of 1:1.35, while the applicant has proposed a setback to height ratio of 1:3.6 for the townhouses.

E. From Section 17A-358(d) of the Borough Code, which requires that buildings be separated by at least 30 feet, while the three townhouse buildings are separated from each other by 23.1 feet.

8. PCSN's jurisdictional contentions and withdrawal of its objection. At the first hearing, Robert F. Simon, Esq., the attorney for PCSN, objected to the Board assuming jurisdiction over the application, summarizing many of the arguments that he had made at the prior hearing. After being advised by the Board attorney that the court in the litigation involving the first application rejected the arguments and ruled that the Board had jurisdiction, the Board assumed jurisdiction and proceeded to hear the application. Mr. Simon subsequently submitted Exhibit O-1, a July 16, 2013 letter to Ilene Cutroneo summarizing some of the jurisdictional arguments and attaching two briefs on the issue that he had previously filed with the court. On July 18, 2013, the applicant responded by letter from its attorney, attaching copies of the February 7, 2013 Planning Board resolution, Exhibit PB-3, and of the May 15, 2013 order from the court rejecting PCSN's arguments (Exhibit A-5).

By July 18, 2013 letter to the Chair, Mr. Simon advised the Board that PCSN was no longer opposing the application. The letter acknowledged "specific improvements in AvalonBay's second proposal," "particularly the idea of townhouses and the relocation of an enlarged park for neighborhood use." PCSN also welcomed AvalonBay's willingness to provide a 20% affordable housing set aside with the distribution among moderate-, low- and very-low income households required by law. During the hearing, the applicant announced that it was increasing the percentage of very low-income units from the 10 percent required by the Uniform Housing Affordability Controls to 13 percent.

9. The hearing. The hearing commenced on June 27, 2013 upon the Board's determination that jurisdiction was proper. The hearing continued on July 11, 2013, July 18, 2013, and July 25, 2013.

10. Staff and advisory body reports and submissions. The following reports by municipal staff and advisory bodies were prepared: memorandum from Lee Solow to the Board dated June 19, 2013 with the following attachments: excerpt from Princeton Community Master Plan; memorandum from John M. West, P.E. and Derek Bridger to the Board dated June 18, 2013; September 14, 2013 letter from Joseph J. Skupien, P.E. (SWM Consulting) to Jack West, P.E.; letter from H. Richard Orth, P.E. and Brian M. Stankus, P.E. to Jack West, P.E. dated June 17, 2013; memorandum from William S. Drake to Jack West, P.E. dated June 19, 2013; memorandum from the Princeton Shade Tree Commission to the Board dated June 19, 2013; memorandum from the Princeton Environmental Commission (PEC) to Princeton Council and Planning Board members dated June 19, 2013; memorandum from Dan Dobromilsky to Jack

West dated June 14, 2013. Memorandum from the Site Plan Review Advisory Board to the Board dated June 24, 2013 with a July 16, 2013 addendum. Memorandum from Lee Solow, Jack West, P.E., and Derek Bridger to the Board dated July 23, 2013. Memorandum from Gerald J. Muller, Esq. to the Board dated December 18, 2012. Memorandum from Gerald J. Muller, Esq. to the Board dated July 25, 2013. Letter from Gerald J. Muller, Esq. to Robert A. Kasuba, Esq. dated July 10, 2013.

11. The plans. The following plans were submitted by the applicant: Preliminary and Final Major Site Plan for Avalon Princeton, Lot 1, Block 21.02 and Lots 8-14, Block 7101, prepared by Jelena Balorda-Barone, P.E. (Maser Consulting), dated May 16, 2013 and revised through July 8, 2013 unless otherwise indicated: Cover Sheet (Sheet 1 of 14); Key and Zoning Map (Sheet 2 of 14), dated May 15, 2013; Existing Conditions Plan (Sheet 3 of 14), dated May 15, 2013; Demolition Plan (Sheet 4 of 14); Dimension Plan (Sheet 5 of 14); Grading Plan (Sheet 6 of 14); Utility Plan (Sheet 7 of 14); Fire Protection Plan (Sheet 8 of 14); Soil Erosion & Sediment Control Plan (Sheet 9 of 14); Soil Erosion & Sediment Control Details (Sheet 10 of 14); Profiles (Sheet 11 of 14); Profiles (Sheet 12 of 14); Construction Details (Sheet 13 of 14); Construction Details (Sheet 14 of 14). Architectural Plans, prepared Perkins Eastman and revised July 8, 2013: Architectural Site Plan (Sheet A-001); Context Plan (Sheet A-002); First Floor Plan (Sheet A-101); Second Floor Plan (Sheet A-102); Third Floor Plan (Sheet A-103); Fourth Floor Plan (Sheet A-104); Loft Level Floor Plan (Sheet A-104A); Roof Plan (Sheet A-105); Exterior Building Elevations (Sheet A-201); Exterior Buildings Elevations; Building 2 & Bridge (Sheet A-202); Exterior Building Elevations; Building 1 (Sheet A-202A); Exterior Building Elevations (Sheet A-203); Enlarged Exterior Building Elevation (Sheet A-204); Building Sections (Sheet A-205); Typical Plans (Sheet A-401); Mechanical Size Plan (Sheet M-001). Landscape Plans, prepared Thomas S. Carman, Licensed Landscape Architect (Melillo & Bauer Associates), dated May 16, 2013 and revised through July 8, 2013 unless otherwise indicated: Cover Sheet; Overall Landscape Plan (Sheet L-1); Detailed Planting Plan (Sheet L-2); Site Details (Sheet L-3); Site Details (Sheet L-4); Site Details (Sheet L-5); Site Details (Sheet L-6), dated July 8, 2013; Lighting Plan (Sheet L-7); Planting Details (Sheet L-8); Tree Inventory Plan (Sheet L-9). Parking Garage Plans, prepared by Timothy Haahs and Associates, Inc. and dated October 19, 2012: Lower Level Plan (Sheet A1.1); Ground Level Plan (Sheet A1.2); Second Level Plan (Sheet A1.3); Roof Level Plan (Sheet A.4).

12. Exhibits and submissions

A. The following are exhibits introduced by the Board or material submitted by Board members:

- Exhibit PB-1 – Colored Sheet 5 of 14 on presentation board
- Exhibit PB-2 – William Wolfe PowerPoint presentation on behalf of SPRAB re roof forms
- Exhibit PB-3 – February 7, 2013 Board resolution denying first application
- Exhibit PB-4 – Consent Order entered on April 18, 2013 in *AvalonBay Communities, Inc. v. Princeton Planning Board, et al.*
- Material entitled “Existing Site Expansion Option,” “Study 2: Year 2025” and “Expanded Site Option: Total Build-Out,” prepared PHC in 2005 and distributed to the Board by Marvin Reed on July 25, 2013

- July 25, 2013 e-mail between Bernie Miller and Robert A. Hough, P.E., Director of Infrastructure and Operations Manager/Engineer – Princeton Sewer Operating Committee partly read into the record on July 25, 2013 by Mr. Miller

B. The following exhibits were introduced by the applicant:

Exhibit A-1 – Hard copy of June 27, 2013 PowerPoint presentation

Exhibit A-2 – Samples of proposed materials for the building facades

Exhibit A-3 – Hard copy of July 13, 2013 PowerPoint presentation

Exhibit A-4 – Responses to staff and advisory body reports as follows: July 10, 2013 letter from Robert A. Kasuba, Esq. to Ilene Cutroneo, Secretary to the Board, responding to the June 19, 2013 Solow memorandum, the June 18, 2013 West and Bridger memorandum, and the June 24, 2013 SPRAB memorandum; July 10, 2013 letter from Robert A. Kasuba, Esq. to Ilene Cutroneo, Secretary to the Board, responding to the June 19, 2013 PEC memorandum; July 9, 2013 letter from Jelena Balorda-Barone, P.E. to Ilene Cutroneo, Secretary to the Board, responding to the June 14, 2013 Skupien, P.E. letter; June 9, 2013 letter from Jelena Balorda-Barone, P.E. to Ilene Cutroneo, Secretary to the Board, responding to the June 19, 2013 Drake memorandum; July 9, 2013 letter from S. Maurice Rached, P.E. (Maser Consulting) to Ilene Cutroneo, Secretary to the Board, responding to the June 17, 2013 Orth-Rodgers & Associates, Inc. letter; July 9, 2013 letter from Thomas S. Carman to Ilene Cutroneo, Secretary to the Board, responding to the June 14, 2013 Dobromilsky memorandum; July 9, 2013 letter from Thomas S. Carman to Ilene Cutroneo, Secretary to the Board, responding to the July 19, 2013 Shade Tree Commission memorandum.

Exhibit A-5 – July 18, 2013 letter from Robert A. Kasuba, Esq. to Ilene Cutroneo, Secretary to the Board, with February 7, 2013 Planning Board resolution and May 15, 2013 order entered by Judge Jacobson attached.

C. The following documents were submitted by the applicant: cover letter from Robert A. Kasuba, Esq. to Ilene Cutroneo, Secretary to the Board, dated May 20, 2013 with the following material that had been submitted during or are related to the hearing on the first application: Phase I Environmental Site Assessment dated September 15, 2011, prepared by Kenneth N. Paul, Executive Vice President and Jeffrey E. Mulligan, Senior Project Manager (EcolSciences) with appendices; October 15, 2012 letter from Kenneth N. Paul to Regional Planning Board of Princeton; October 16, 2012 letter from Mark A. Solomon, Esq. to Jack West, P.E. re environmental contamination and NFAs, with attachments; December 5, 2012 letter from David J. Volz, LSRP (Sovereign Consulting) to Robert Kiser re results of document review and site inspection as to environmental issues; September 12, 2012 letter from Tricia L. Romano, P.E. (Criterium Lockatong Engineers) to James V. Hogle, III, Vice President of Support Services of Princeton HealthCare Systems re historical environmental summary; transcript of December 10, 2012 hearing on first application, the hearing having focused on environmental issues; site plan applications, including application for site review, variance appeal form, variance addendum and project narrative; certificate of ownership, escrow agreement, tax certification, and settlement checklist; ALTA/ACSM Land Title Survey prepared by Van Note Harvey, P.C., dated September 23, 2011 and revised through September 26, 2011; Traffic Impact Study, prepared by S. Maurice Rached, P.E. and dated May 17, 2013; Stormwater Management Report, prepared by Jelena Balorda-Barone, P.E. and dated May 15, 2013; Environmental Impact

Statement, prepared by Maser Consulting and dated May 15, 2013; Fire Protection Narrative, prepared by Maser Consulting and dated May 15, 2013; Green Development Information Statement, dated May 15, 2013; Limited Phase II Site Investigation Report, prepared by Kenneth N. Paul and Jeffrey E. Mulligan and dated November 9, 2011; July 3, 2013 letter from Robert A. Kasuba, Esq. to Gerald J. Muller, Esq. re Nelson conflict issue; July 24, 2013 letter from Robert A. Kasuba, Esq. to Ilene Cutroneo, Secretary to the Board, resubmitting draft Easement for Parking and Reciprocal Access.

D. The following exhibits were introduced by PCSN:
Exhibit O-1 – July 16, 2013 letter from Robert F. Simon, Esq. to Ilene Cutroneo, Secretary to the Board, with briefs on jurisdictional issue attached.

Exhibit O-2 – July 18, 2013 letter from Robert F. Simon, Esq. to Wanda Gunning, Chair of the Board, re withdrawal of PCSN opposition to application.

13. The witnesses.

A. The following Board staff, municipal staff, and representatives of municipal agencies testified: Lee Solow, the Director of Planning; Jack West, P.E., the Land Use Engineer; Derek Bridger, the Zoning Officer; Brian M. Stankus, P.E., the Board's traffic engineer; William Wolfe, Chair of the Site Plan Review Advisory Board; and Wendy Kaczerski, a member of the PEC. Gerald J. Muller, Esq. represented the Board.

B. The applicant's witnesses: Robert A. Kasuba, Esq. represented the applicant. Jon Vogel, the Vice-President of the applicant; Jeromie P. Lange, P.E., P.P., the applicant's civil engineer and planner; Jonathan Metz, its architect; S. Maurice Rached, P.E., its traffic engineer; and Thomas S. Carman, its landscape architect, testified on the applicant's behalf.

14. The public. A total of 42 members of the public testified during the public portion; 22 spoke in opposition to the application, many for reasons relating to the mass and scale of the proposed development. Seven members of the public supported the application, citing the need for rental and affordable housing and stating that the project was consistent with smart growth principles. Others expressed concerns about or addressed discrete elements of the proposed project.

The following speakers presented texts of their statements and/or other material to the Board: Louis F. Slee, Areta Pawlinsky, Antonio Reinerio, Shirley Satterfield, Kim Pimley, Frank Appel, Yoshie Driscoll, Robert Dodge, Jane Buttars, Grace Sinden, Paul Driscoll, Jeff York, Victoria Airgood, Diane Landis, Stephen Griffies, Marco Gottardis, Vincent Giordano, Yaron Inbar, Joseph Weiss, Florence B. DeBardelben, Evan Yasky.

In addition to the members of the public submitting texts of their statements or other materials, the following members of the public testified: Ben Bennett, Allen Hegedus, David Keddie, Barbara Trelsted, Ronald Berlin, Lou Carnevale, Samuel Bunting, John Armonia, Minnie Craig, Dan Shea, Heidi Fichtenbaum, Christina Keddie, Peter Marks, Maria Juega, Frank Rile, Bernadine Hines, Wendy Ludlum, Bill Hare, Paul Kapp, and Mary Clurman.

15. Site plan issues and the Board's action thereon. A number of issues, raised by both the application and by testimony and submissions by members of the public, were addressed during the hearing. The issues and the Board's findings and conclusions with respect to them are as follows.

A. The environmental issues. While there was some live testimony at the hearing about the possibility of environmental contamination, particularly mercury, there was far less presented than was presented at the hearing on the first application. No experts were qualified or testified. In Exhibit PB-3, the resolution memorializing the prior denial, the Board noted that both its own expert, whose report and testimony were included in the record on this application, testified that there was no evidence of contamination, an opinion which PCSN's own expert agreed with in prior testimony that is also part of the record of this application. In addition, the Board expert opined that testing for contaminants prior to demolition would be cost-prohibitive, as it would require drilling through the concrete floors of the existing buildings. There was an open question as to the scope of the Board's authority to require testing for the presence of contaminants, the applicant taking the position that the Board had no jurisdiction over the matter and the Board having concluded that it did have jurisdiction, although not to the extent of monitoring a remediation program. The issue, however, was never joined because there was no evidentiary basis for requiring a comprehensive monitoring program.

The record remains devoid of support for such a program. The Board staff, nevertheless, crafted a robust series of conditions with respect to monitoring, including one requiring monitoring of soils associated with USTs and any septic system remains by the Land Use Engineer or his designee and as required by the applicant's LSRP. The applicant has agreed to all of them, including expansion of the monitoring condition. The environmental conditions are set forth in paragraph 17D.

B. Massing and scale. Much of the opposition to the application was focused on the mass of the buildings and the 280 unit density. The zoning, however, permits up to 280 units. While it was argued that the "up to" language meant that the Board had the power to reduce the density, that is not the case. Densities are usually phrased in terms of maximum permitted so as to avoid a literal requirement that the developer build the specified number of dwelling units. The choice of whether to build at the maximum density or to reduce the density is the developer's, with the only constraints being that the developer must comply with the other bulk standards in the zoning ordinance or secure variance relief from them and with quantitative standards in the site plan ordinance or secure waiver relief from them. The applicant has met all of the bulk standards other than those relating to the variances, discussed in paragraphs 7 and 16, for which it is entitled to relief. The site plan standards are discussed in paragraphs 15 C and D below.

Given this, the argument that the density results in massing that is out of scale with the surrounding one single- and two-family neighborhood is not germane to the Board's decision. The Board must take as a given the decision to permit 280 units on the site made in 2006 by Borough Council and supported by the Princeton Community Master Plan for reasons relating to the existing intensity of development, the availability of parking infrastructure, the need for rental and affordable housing, and a site location embodying smart growth and sustainability

principles. The Board notes that the Borough Fair Share Plan provides for a 280 unit development with 56 affordable units.

C. Compliance with the design standards.

(1) The enforceability of the standards and the scope of review. The design standards set forth in Section 17A-193B for the MRRO District were challenged by the applicant during the first proceeding, in which it argued that they were not intended to be and were not enforceable, and during the now-stayed court proceeding. During the hearing on this application, the applicant did not contest the design standards, although its attorney did note for the record that it was not waiving any challenges with respect thereto. The Board in denying the first application found that the design standards were enforceable for the reasons given by the Board Attorney in his December 18, 2012 memorandum. The introductory paragraph of Section 17A-193B expressly stated that they were to be used by the reviewing agency. Moreover, as the Board concluded, "determining that they were not intended to be enforceable would leave in the ordinance three pages of regulatory provisions that are meaningless." Exhibit PB-3, paragraph 11B(2). At the same time, however, the Board recognized that the subjective quality of some of them and the second sentence of Section 17A-193B's introductory paragraph providing that they set forth a framework "within which the designer of the site is free to exercise creativity, invention and innovation" compels the conclusion that, as to the more subjective standards, the applicant must be given substantial discretion in deciding how they are to be addressed and incorporated into the site design. It noted at the same time, however, that they cannot be ignored.

(2) Design standards findings and conclusions. The Board finds that, given this standard of review in which substantial deference is accorded the applicant, the applicant has met the design standards.

(a) Permeability (Sections 17A-193B(c)(2), (d)(1), (d)(4), and (e)(1)-(4)) The more objective standards, having no subjective elements, deal with permeability of the site. They are the standards set forth in Sections 17A-193B(c)(2), (d)(1), (d)(4), and (e)(1)-(4) and were discussed at length in Exhibit PB-3, the resolution memorializing the December 2012 denial. The substantive reason the Board denied the first application was the proposal's failure to provide an internal pedestrian circulation system through the site that would integrate it into the neighborhood. The development was closed off from rather than open to the broader community.

The applicant redesigned the project so as to open it up and integrate it into the community. Whereas before there was no through passage for either pedestrians or vehicles, now there are many such elements. They include the through street with sidewalks running from Franklin Avenue to Henry Avenue; the pedestrian walkway running from Witherspoon Street along the north side of Building 2 and becoming The Garden Walk connecting to the sidewalk along the Franklin Avenue Service drive, a passage made possible by separating Building 1 from the parking garage; a walkway curving through the relocated park at the corner of Witherspoon Street and Franklin Avenue and connecting to The Mews, which in turn connects to the Franklin Avenue service drive; and two walkways between the three townhouse clusters. What was once closed to and isolated from the broader community is now part of it.

In this regard, the Board notes that the applicant has not violated the design standard barring a gated community. The proposed development is not a gated community in the common understanding of that term, a development that can be entered only through an entry that is gated and often guarded. Building 1, to be sure, has a courtyard that is not available to the public and that has been designed as a backyard for residents, with a small pool, the main portion of which is about the size of a typical backyard pool, and associated outdoor amenities. The zoning ordinance, however, permits an outdoor pool, and the design standards themselves contemplate the possibility, and therefore the permissibility, of some private open space. The permeability standards, accordingly, have been satisfied.

The applicant has satisfied the other design standards as well. Most of the remaining standards are much more subjective in nature, and, given that, the leeway afforded the applicant is broad.

(b) Open space (Section 17A-193B(d)). Open space standards unrelated to permeability require a variety of publicly accessible open spaces encouraging interaction with residents of the neighborhood. The open space design satisfies this requirement. As discussed in paragraph 6, the park that had previously been tucked into an area between the building originally proposed and the medical office buildings to the north has now been relocated to a larger and much more inviting space at the corner of Witherspoon Street and Franklin Avenue. The space is well designed, will include a tot lot, and, the Board expects, will attract residents from the neighborhood as well as from the development itself. The second major open space, the piazza on the easterly side of Building 2, has also been attractively designed, with more green space than originally proposed as per a SPRAB recommendation and, through pavement materials, is intended to extend into the through street, converting a portion of what is expected to be a low-traffic street into shared space for vehicles, bicyclists, and pedestrians. Other well-conceived open space areas are The Mews, The Garden Walk, and the semi-elliptical space along Witherspoon, which may become the location for public art.

Lastly, Section 17A-193B(d)(2) has been satisfactorily addressed. The street furniture has been well selected, with modifications in response to comments by SPRAB. Paving patterns and types will be the subject of further review and approval by the Landscape Subcommittee (see Condition 17A(1)(d)).

(c) Building design and location (Section 17A-193B(a)). There are a range of styles, particularly in terms of townhouses as well as apartments and more formal and less formal architectural elements (Subsection (2)). Unlike at the hearing on the first application, colors, textures, and materials were presented to the Board for review. By use of a variety of materials, many of which reflect those present in the neighborhood, the buildings' appearance is softened and mitigated (Subsection (4)). Notably, the biggest building, at a uniform four stories with a fifth story for lofts, has been placed in the central portion of the site where it is the least visible. In addition, there are a variety of building heights ranging from two stories for some of the townhouse units and portions of the Building 2 wings to the five stories of Building 1 and much of Building 2 (Subsections (5), (7), and (8)). Lastly, the Board is persuaded that a monolithic appearance has been avoided (Subsection 6)). The building proposed in 2012 has now become five buildings; the townhouses are of varying design; the architecture of Buildings 1 and 2

contains a variety of elements and materials; and Building 2 has a recessed central portion with wings that frame interesting open areas, particularly the piazza on the building's easterly side. SPRAB has made a number of design suggestions, some of which, including use of some of the roof designs presented by Mr. Wolfe in Exhibit PB-2, have been incorporated into the design. The Board understands that SPRAB is not satisfied with the design, but at the same time is cognizant of the design standards' directive that the applicant address them using its own architectural judgments. What cannot be denied, the Board believes, is that the applicant has addressed the question of design techniques to avoid a monolithic appearance.

(d) Streetscape (Section 17A-193B(c)). While Subsections (6) and (7) of the streetscape standards relate to open space and pedestrian passage discussed above, several deal with the relation of the development to the neighborhoods. They are Section 17A-193B(c)(1), (2), and (3). The Board does not construe Section 17A-193B(c)(2), which require variable openings in the building facades, as requiring archways or tunnels, matters of architectural design that the ordinance does not impose upon the applicant, instead leaving up to the applicant's professionals to exercise their creativity in designing the project. The development has satisfied the variable openings standard by converting a one-building mass into five buildings with openings between them. There are also doors to the Buildings 1 and 2 lobbies and to entries to individual units. The applicant's design in addition, proposes a large glazed area in the center of Building 2 façade that some SPRAB members had suggested as an alternative to another SPRAB suggestion an archway and tunnel running through the building on the Witherspoon Street side to the piazza.

With respect to the requirements that the building façade relate well in composition and scale to development in the area and that careful consideration be given to the mass and bulk of buildings to ensure that they are harmonious with their surroundings and improve the present conditions (Section 17A-193B(c)(1) and (3)), the Board notes two key factors that constrain its authority and mandate that it not substitute its judgment for that of the applicant. First, there is no avoiding the reality that the zoning permits 35.6 dwelling units per acre including the garage and 50 dwelling units per net acre if the garage is excluded and the surrounding neighborhoods are of an entirely different scale and substantially lower density. It is simply impossible to design a 280 unit complex on 5.63 acres at the same scale as single- and two-family homes. Nor is it possible for apartment buildings to be designed to look like them. The second factor that must be kept in mind is that these are highly qualitative standards. The standard of review that the Board has adopted gives a greater assurance that they will be upheld by a court. That standard provides that substantial leeway must be afforded the applicant's designers and recognizes that their obligation is to address the standards insofar as practicable given the permitted site density. Section 17A-193B(c)(3) largely tracks with this concept, since what it requires is that the designer give "[c]areful consideration" to providing a harmonious relationship.

The applicant's designers have done this in several ways. Most significantly, they have added the townhouse element, which to a significant degree blocks the view of Building 1 from the neighborhood, putting in place a design element that is precisely the kind of scale the applicable design standard sought to achieve. The park will also serve as a transition between the area to the south of the development and Building 2. Notably, PCSN referred to the

townhouses and the relocated park as two elements of particular improvement over the original 2012 design. The applicant has also broken up the massing of Building 2 as seen from Witherspoon through the set back central area, variable roof heights and forms, a variety of materials, and the glazed and arched central opening.

Lastly, it should be emphasized that the harmonious standards looks to an improvement of "the present conditions." The proposed development, much lower in height, significantly reduced in mass, and with much more open space, works a vast improvement to the neighborhood over the looming presence now there.

(e) Circulation and parking (Section 17A-193B(e)). Sections 17A-193B(e)(1)-(4) have been addressed in the Permeability section. The other circulation and parking standards have also been satisfied. A bus stop has been provided for along Witherspoon Street; the traffic studies show reduced traffic being generated from the site; and the permitted uses are supported by the existing parking garage except for a limited number of internal surface parking spaces. All of these spaces are concentrated in the interior of the development.

(f) Reuse and recycling (Section 17A-193B(b)(1)). The applicant must comply with all recycling requirements. See condition 17G(1). While compliance with LEED criteria for a LEED rating is required only "[t]o the extent practical," the applicant has obligated itself to design the development to qualify as a LEED for Homes to a Silver level, although it is not required to undergo the certification process for it, and to obtain certification for Energy Star v3 provided that State incentives remain at current levels for this program.

D. Section 17A-193 standards findings and conclusions. Section 17A-193 sets forth a set of site plan standards that apply to all site plan applications in Princeton. They cover a variety of subject matters, all of which are addressed below.

(1) Ecological considerations (Section 17A-193(a)). The Board has imposed a robust series of conditions, all agreed to by the applicant, that addresses to the extent permitted by the evidence and by the Board's authority matters relating to the environmental conditions on the site. Indeed, conditions go beyond the site itself and require removal of a fueling station and, consistent with N.J.D.E.P. protocols, underground storage tanks on Lot 6.

In addition, there has been a thorough review of matters covered by the Green Buildings checklist. The ordinance establishing it, while not mandating compliance with specified requirements, contemplates securing information from applicants about their intentions with respect to green buildings and other sustainability matters and dialogue between applicants and the Board about them. The ordinance just having recently been passed, AvalonBay became the first applicant subject to it. It thoroughly responded to the checklist requirements by identifying what items it would follow or explore further and by explaining what items in its judgment it could not follow and why. It proposed rain gardens, low flow toilets, shower heads, and faucets, and Energy Star appliances and agreed to implement a substantial bicycle parking and storage program. Items that it agreed to explore further include use of fiberglass windows rather than vinyl windows if doing so made financial sense; further water conservation features; and installation of solar panels in the future when the SREC market improves with a third-party solar

installer as recommended by SPRAB. It redesigned the flat and south-facing roofs of the apartment buildings so that solar panels can be accommodated. It will explore as well using solar hot water for heating certain common areas and the pool. It also indicated that the development could and would accommodate food waste composting should it become required in Princeton or should a sufficient number of residents desire to participate in such a program. In addition, the applicant advised the Board that it will seriously explore the possibility of an emergency generator to power some common areas, an issue of particular importance in the community given the power outages over the last two years.

The Board notes that the PEC recommended the use of calstar brick, but the Board prefers the traditional brick. PEC prepared a detailed and thoughtful set of recommendations for the Board. While the Board understands that, given the Green Buildings Checklist ordinance, it could not have unilaterally imposed any of the recommendations as conditions, it nevertheless found many of them useful as starting points for discussion with the applicant about sustainability and green building ideas. While an issue was raised as to PEC's jurisdiction over such matters and the Board's authority to utilize it as an advisory board, Section 10B-219.1 of the Township Code requires that development applications be sent to the Environmental Commission (as well as the Shade Tree Commission and Traffic Safety Commission) for review and that each commission may prepare a report of its findings and recommendations to be sent to the board of jurisdiction at least 14 days prior to the board's scheduled hearing. In addition, the Consent Order, it should be noted, expressly recognized that the PEC would be submitting a report. PEC is eminently suited to exercise the review function with respect to sustainability issues.

(2) Landscape (Section 17A-193(b)). The landscape plan evolved in response to comments by SPRAB, the Environmental Commission, the Shade Tree Commission and professional staff and has resulted in an exceptionally well designed plan that should result in interesting and attractive landscape settings for community interaction and enjoyment. The park, piazza, The Mews, and The Garden Walk will enrich the neighborhood. The semi-elliptical space should as well, particularly if public art is installed in that location. Other landscaped areas along Witherspoon Street and Franklin Avenue enhance the aesthetic appeal along the periphery.

(3) Relation to proposed structures to the environment (Section 17A-193(c)). This is a redeveloped site in a developed area, and there are no existing environmental features of any import, except for trees that will be retained. As noted in paragraph 15B, the density is significantly higher than that of the surrounding neighborhoods and, as a result, the scale of the development will be quite different than that of the adjacent residential areas. As noted in paragraph 15C (2)(d), however, a number of design features have been proposed that will reduce the scale. In particular, the townhouses and park along Franklin Avenue work as effective transitions from the lower density area to the south to the higher density area more internal to the site. Building 2 along Witherspoon Street is a substantial building that is mostly five stories in height, although only four stories are below the roof line. The two story sections, the setback of the central portion, the lobby area that is visually open from Witherspoon Street, and varying roof forms and materials all work to reduce the sense of mass of the building.

- (4) Scenic, historical, archeological, and landmark issues (Section 17A-193(d)). The proposed site is not located within a historic district and does not contain any State- or Federally-designated sites. There are no known archeological features, nor, as an intensely developed site, are there scenic elements that must be preserved.
- (5) Surface water drainage (Section 17A-193(e)). The Storm Water Management Report indicates that the proposed plan will result in a reduction of a 0.601 acres of impervious surface, resulting in a decrease of storm water runoff for the two, ten, twenty-five, and one hundred year storms. The proposed plan complies with the municipal storm water management ordinance.
- (6) Driveway connections to public streets (Section 17A-193(f)). The development will continue to use the existing Franklin Avenue access point. The existing driveway off Witherspoon Street will be relocated approximately 110 feet to the north and continue as a two-way access with a 24 foot road width. In addition, the Henry Avenue drive, as discussed in paragraphs 6 and 15C (2)(a), will continue through the development, creating another connection to Franklin Avenue. These access points are acceptable distances from the Witherspoon Street-Henry Avenue and Witherspoon Street-Franklin Avenue intersections and will suitably distribute traffic from both the residential development and medical office buildings.
- (7) Traffic effects (Section 17A-193(g)). Both the applicant's and ORA reports and the traffic engineers' testimony establish that the traffic from the site will be significantly reduced from the traffic generated when the hospital was in operation.
- (8) Pedestrian and bicycle safety (Section 17A-193(h)). The existing sidewalks along the project's frontage along Franklin Avenue and Witherspoon Street and extending up to the intersection of Henry Avenue will be replaced with new sidewalks separated from the cartway by landscaped strips. In addition, as discussed in paragraphs 6 and 15C (2)(a), a number of new pedestrian passages have been added, along with the through road. The applicant will also be required to make reasonable efforts to widen the sidewalk running along the easterly side of the medical office buildings to Henry Avenue in the one area where it becomes exceptionally narrow. The additional through street as well as the alley in the area of The Mews will offer bicycle routes as alternatives to busier existing streets, particularly Witherspoon Street, and thereby enhance bicycle safety. A substantial number of bicycle parking and storage areas have been added that could result in spaces for more than 200 bicycles.
- (9) On-site parking and circulation (Section 17A-193(i)). On-site circulation should be improved by virtue of the through street and the alley and should operate efficiently given these circulation elements as well as the existing Franklin Avenue service road, Henry Avenue driveway, and relocated Witherspoon Street driveway. The parking garage will provide parking spaces far in excess of the number required under both the Municipal Code and RSIS. Unused parking garage spaces will be made available to the public under such rules and regulations as the applicant imposes. See Condition 17C (17).
- (10) Utility services (Section 17A-193(j)). All existing utilities (electric, water, telephone, communication, sanitary, and sewer service) will connect to existing services on- and

off-site through underground utilities. Capacity in all such services should be adequate. The fire protection plan is adequate, and lighting for the parking garage will be reviewed and addressed at the professional staff level.

(11) Disposal of wastes (Section 17A-193(k)). Trash and recyclables for the apartments will be stored within the trash compactor/room located in each building. The Building 1 trash and recyclables will be moved to a location near the southeastern corner of that building so that they can be picked up by a trash hauler without the hauler having to back down the service road. Townhouse refuse and recyclables will be stored in individual units, and curbside collection will be handled by a private hauler.

(12) Noise (Section 17A-193(l)). The Board has imposed and the applicant has agreed to a number of conditions dealing with noise. As noted above, the applicant's staff will move the trash and recyclables to a point where a trash hauler can pick them up without a truck having to back down the Franklin Avenue service road, with the concomitant sound warning pedestrians that a truck is backing up. Other conditions recommend a later construction start time than is provided for by ordinance and relate to the two large air vents/blowers on the southwest wall of the garage and the HVAC equipment. See conditions in paragraph 17H.

(13) Advertising features (Section 17A-193(m)). The only item that could be considered an advertising feature is the two-sided freestanding sign located off Witherspoon Street by the drive that runs to the Henry Avenue driveway. As discussed in paragraph 16A below, the Board found that this feature is appropriate.

(14) Special features (Section 17A-193(n)). No special features are proposed other than the public art that should add to the public's and residents' enjoyment.

(15) Impact on adjacent properties (Section 17A-193(o)). None of the environmental impacts specified in this section apply, other than noise, which is addressed in subsection (12) hereof, and dust and vibration, which will occur only during demolition and be the subject in part of the required demolition plan.

(16) Recycling arrangements (Section 17A-193(p)). The applicant will comply with all recycling requirements.

(17) Use of computers (Section 17A-193(q)). This section does not apply as it does not apply to residential uses.

E. Conclusion re site plan approval. With the conditions imposed below, the Board finds that the applicant has satisfied all of the municipal site plan standards for the reasons given above. Preliminary and final major site plan approval, accordingly, is granted.

16. The variances. As set forth in paragraph 7, the application necessitates four variances. The Board's action on them are as follows.

A. Sign square footage variance. A "c" variance for the freestanding sign square footage, 10 square feet on each side, is granted. The sign gives notice of the entry to the apartment complex to motorists travelling in both directions on Witherspoon Street. A smaller sign or a one sided sign would be less effective in doing so and would create the potential for abrupt traffic movements, thereby implicating traffic safety. Given this, the applicant has satisfied purpose "a" of the Municipal Land Use Law, which is to encourage municipal action to guide the appropriate development of land. Since the sign will only be the 10 square feet maximum on each side, there will not be a substantial detriment in that it will not appear to be an oversized sign. Since there will be substantial benefits in terms of traffic safety, the benefits substantially outweigh the detriments. Accordingly, the flexible "c" standards have been met.

The applicant has also satisfied the negative criteria. There will be no substantial impairment of the intent and purpose of the zone plan and zoning ordinance, given that each side of the sign is consistent with Code requirements. Nor will there be substantial detriment of the public good for the reasons given above.

B. The townhouse variances. The "c" variances from the setback, building setback to height ratio, and distance between building requirements are also granted. The applicant could have complied with all of these requirements, but the result would have been a diminished design. Instead of the three buildings of four townhouses each with two walkways between the buildings, there could have been two buildings complying as to building separation and one walkway. This would have resulted in a greater massing and less permeability, while the opposite was sought. In addition, the townhouses could have been moved back to meet both setback requirements. The proposed setback, however, is consistent with the existing setback created by the house at the corner of Franklin Avenue and Harris Road. Even more importantly, pushing the townhouses back would have eliminated the alley, the rear-loaded garages, and The Mews, one of the attractive open space elements that adds to the design's permeability and provides a rich pedestrian passage and opportunities for public and resident interaction. There would be needless front yard open space for the townhouses, front-loaded garages with 12 curb cuts on Franklin Avenue, and cars backing out on to it, all design elements that should be avoided. Given this, the applicant has satisfied purposes "a," "h," and "i" of the Municipal Land Use Law, which respectively encourage municipal action to guide the appropriate development of land, encourage the design of transportation routes that will promote the free flow of traffic, and promote a desirable visual environment through creative development techniques and good civic design and arrangement. Compliance with the ordinance provision will generate little public benefit. Doing so, rather, would be detrimental to the development and the neighborhood. The benefits set forth above therefore substantially outweigh the detriments. The flexible "c" standards have therefore been satisfied.

The negative criteria have been satisfied as well. There is no substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The most appropriate setback has been provided, as have been the pedestrian passages that the site plan ordinance requires. Nor has there been a substantial detriment to the public good for the reasons given about. The public good, instead, has been furthered.

17. Conditions. The following conditions have been imposed:

A. Landscape

(1) Prior to a building permit being issued, the final landscape plan shall be submitted to the Board's Landscape Subcommittee for review and approval of the following:

(a) Adequacy of the screening of all ground floor HVAC units and other ground level equipment.

(b) Selection of the play equipment to be installed in the play area. The play area shall be designed as a tot lot for toddlers.

(c) Selection of the surfacing for the play area.

(d) Color and pattern of the concrete/stamped concrete and pedestrian pavers.

(2) The applicant is encouraged to enter into a dialogue with the Mayor and Council about the possibility of dedication of the park to Princeton on terms satisfactory to Mayor and Council. Should the municipality accept a dedication of the park at the southwest corner of the site, it may make such changes to the park design as it deems appropriate, whether before or after construction.

(3) Any modifications and supplementation to the landscape plans by the applicant shall be reviewed by the Board's Landscape Subcommittee.

(4) The applicant shall continue the evergreen screen along the service drive to the northerly Lot 7 property line if the Lot 7 owner agrees that some of the screen may be installed on Lot 7, since the landscape strip behind Lot 7 is not wide enough for installation of the landscape screening. If the Lot 7 owner does not agree to allow the applicant to plant some of the evergreen screen on Lot 7, the applicant shall install a solid fence along the rear property line of Lot 7.

(5) A note shall be placed on the drawings indicating that all Bamboo will be replaced with native plants.

(6) The 12" caliper Norway Maple on Henry Avenue shall be removed.

(7) The applicant is encouraged to install public art in a suitable location.

B. Stormwater

(1) The applicant shall confirm the quantity of their disturbance within Princeton and note that amount on the Soil Erosion & Sediment Control Plan.

(2) The existing trench drain and inlet within the driveway will require inlet/drainage protection, and this shall be provided on the Soil Erosion & Sediment Control Plan. In addition, the project limits shall be extended to include this area to allow for this treatment.

C. Circulation and parking

(1) The Board Attorney has reviewed and approved the form of a parking and reciprocal access easement regarding the use of the parking garage, access drives and sidewalks. The board attorney shall review and approve any revisions, modifications and amendments to the parking and reciprocal access easement:

(a) to ensure that the owners/operators of Lot 15 continue to have access to the parking garage for the use of their employees and visitors;

(b) to ensure that the employees, residents and visitors of Lot 15 and the AvalonBay development have access to use the access drives and related sidewalks between Witherspoon Street and Henry Avenue;

(c) to ensure that the public has access over the Henry Avenue drive and sidewalk running along the easterly side of the medical office buildings. The applicant shall be permitted to redact any provisions of any such revisions, modifications and amendments that are irrelevant to the issues set forth in the preceding sentence.

(2) Publicly accessible open space, sidewalks and pathways shall be open and available to the public. A note shall be added to the approved site plan which shall be subject to review and approval of the Board's attorney. The note may provide that the applicant may adopt reasonable rules and regulations pertaining to public access to accessible open space subject to approval of the Director of Planning, such approval not to be unreasonably withheld.

(3) The applicant shall make a reasonable effort to obtain approval from the owner of Lot 15, Block 7101 in order to provide a minimum 4' width sidewalk from Henry Avenue to the proposed development as approved by the Land Use Engineer.

(4) The applicant shall provide for up to an additional 75 bicycle storage spaces within the parking garage, if there is demand for such additional bicycle storage, within the development in the reasonable opinion of the Princeton Planning Director and Land Use Engineer. The installation of such additional bicycle storage spaces shall not require additional site plan review.

(5) All handicap sidewalks shall be ADA compliant.

(6) The existing crosswalk crossing Witherspoon Street nearest the Henry Avenue intersection crosses at a 90 degree angle. The matching ramp shall be relocated to accommodate this realignment.

(7) Prior to a building permit being issued, the applicant shall be required to submit the standard Construction Traffic/Hauling Plan for review and approval by the Princeton Police and the Land Use Engineer.

(8) The applicant shall provide additional information regarding the adequacy of the curb radii on both ends of the proposed 12' wide townhome access driveway to provide access for emergency and service vehicles and make such design changes as required by the Land Use Engineer.

- (9) Prior to a certificate of occupancy being issued, a licensed professional engineer shall certify the structural integrity of the existing garage. Such certification shall be provided to the Princeton Land Use Engineer.
- (10) The applicant shall provide a turning template plan depicting emergency vehicle access for review and approval by the Land Use Engineer.
- (11) The applicant shall confirm that the van-accessible parking spaces meet all applicable accessibility requirements, including vertical clearance.
- (12) A note shall be added to the plans indicating that additional lighting will be provided as necessary for the parking structure. Prior to the issuance of a certificate of occupancy, the applicant shall submit additional information to confirm that the parking structure, especially the lower level, will be adequately lit or make such design changes relating to lighting as are required by the Land Use Engineer. Standards established by the Illuminating Engineering Society of North America for parking structures shall be used in determining the appropriate level of lighting.
- (13) A note shall be added to the site plan indicating that the applicant shall not plow snow onto public streets.
- (14) The applicant shall obtain the permission of the owner of Lot 15, Block 7101 for the replacement of sidewalks included in the application.
- (15) The applicant shall post a sign at a location approved by the Land Use Engineer providing notification that there is no elevator service to the basement of the parking garage.
- (16) Prior to the issuance of a certificate of occupancy, a parking plan shall be submitted for review of the Land Use Engineer providing the following information:
- (a) Equipment to be installed to control entrance and exit to the garage.
 - (b) A parking operation plan identifying the technology to be used to permit residents, resident guests, employees of the office buildings, and visitors to the office buildings to enter and exit the garage.
 - (c) How residents with two or more cars will be treated.
 - (d) If general public parking is permitted, how parking spaces for residents and their visitors as well as the office employees and their visitors will be controlled.
 - (e) The plan shall be simplified and streamlined to encourage as much traffic as reasonably possible to use the garage rather than parking on the public streets.
- (17) The applicant has represented that it intends to permit members of the general public to park within the parking garage. It shall allow use of parking spaces within the parking garage by members of the general public to the extent they are available after use of the spaces by the current and future Lots 1 and 15 uses. This public access shall include short term

and long term parking arrangements and shall be subject to the rules and regulations of the applicant. The applicant may also allow the parking garage to be used by business entities such as Zip Car. The parking spaces shall not be used by developers of any new development in the municipality to satisfy their off-tract parking requirement unless agreed to by the Planning Board and the garage owner and subject to the easement rights of Lot 15.

D. Environmental

- (1) Should any environmental contamination or waste be discovered during the redevelopment of the property, the applicant shall be responsible for complying with all applicable laws and regulations.
- (2) All monitoring wells shall be sealed consistent with NJDEP regulations.
- (3) Prior to a certificate of occupancy being issued, all abandoned underground tanks and their associated piping shall be removed. Soil samples should be required to be taken beneath the tanks when they are removed. If any of these samples are found to contain contaminants in concentrations that exceed NJDEP standards, it is recommended that the municipality be notified and appropriate remediation be completed as required by NJDEP with reports provided to the Land Use Engineer and the municipal environmental consultant. A licensed site remediation professional or his designee (LSRP) shall be available to monitor soil conditions for contamination from underground storage tanks and ensure removal follows NJDEP regulations. If required, the LSRP shall issue a Response Action Outcome in accordance with NJDEP regulations.
- (4) If evidence of a potential septic system is discovered during construction, the Land Use Engineer shall be notified, and such condition shall be addressed in accordance with NJDEP guidance.
- (5) The gas filling station and equipment associated with it on Lot 6 shall be removed.
- (6) Any asbestos abatement shall be conducted prior to site demolition in accordance with applicable laws and regulations. A person qualified in the management of asbestos-containing material shall report to the Municipal Land Use Engineer during asbestos removal.
- (7) The existing fence and concrete pad that previously enclosed and supported the above ground oxygen tank on Lot 8, Block 7101 shall be removed and a note added to the plans so providing.
- (8) During construction, the site shall be monitored by the Land Use Engineer or his designee and as required by applicant's LSRP, including soil conditions from contamination from underground storage tanks and any remaining septic system.

(9) The applicant shall exercise reasonable efforts to abide by the contents of its Green Development Information Statement (copy attached), including designing the development to qualify as a LEED for Homes to a silver level and to obtain certification for Energy Star v3 provided that State incentives remain at current levels for this program. The applicant is not required to undergo the certification process for LEED for Homes.

(10) Prior to the issuance of a demolition permit, a site demolition and construction plan shall be submitted for review and approval by the Land Use Engineer including, but not limited to the following:

- (a) A narrative and or a detailed plan indicating how the existing hospital building will be demolished. The applicant shall identify whether the building will be demolished using explosives or other methods and disclose what types of measures will be instituted to safeguard the adjoining residential properties.
- (b) A Truck Hauling Route Plan.
- (c) List measures which will be taken to recycle materials from the demolition of the Hospital.
- (d) Identify where construction vehicles and contractors' employees will park on site.
- (e) The applicant shall make reasonable efforts for contractors' and construction vehicles to park on site.
- (f) Identify a construction staging area.
- (g) Indicate construction traffic routes.
- (h) A plan to insure that all construction and demolition lighting shall be directed away from residences.
- (i) Plans for dust control.
- (j) A fencing plan showing how the site will be secured.
- (k) A plan indicating how pedestrian circulation will be maintained on the public sidewalks abutting the site to insure safe passage of pedestrians, including school aged children.
- (l) The plans show the limit of demolition of existing utilities stopping at the property line. They shall be revised to indicate that demolition will be to the closest manhole or inlet.

E. Fire safety

(1) The applicant shall provide fire flow calculations in accordance with the Insurance Services Office (ISO) guide for each of the proposed buildings on this site in order to prove that adequate fire flows are available.

(2) Turning studies of all entrances from public streets and interior access roadways shall be provided, and design changes made as required.

(3) All entrance doors to the buildings shall be provided with hardware that will allow access (secured) from the exterior portions of the building.

(4) The applicant shall obtain approval from the Fire Department of all five Fire Department Siamese connections.

(5) The applicant shall supply a construction detail for a 5-inch storz-type FDC connection with KNOX locking cap.

(6) A sign detail subject to Fire Department review of the FDC sign shall be provided.

(7) At least one Knox box shall be provided, and all details and location shall be approved by the Fire Department.

(8) A plan for street addressing and building unit numbering shall be provided for approval by Fire Department.

(9) Prior to a building permit being issued, all remote annunciator panels shall be identified on the plans.

(10) Prior to a building permit being issued, a plan showing the truss roof signs as approved by the Fire Department shall be provided.

(11) Construction details for the elevator cab size indicating the elevator can accommodate an 84 inch EMS stretcher.

F. Utility

(1) The utility plans shall be revised to show the location and size of the existing gas main on Franklin Avenue.

G. Disposal of wastes

(1) The applicant shall comply with all existing regulations relating to recycling.

(2) Trash and recyclable collection vehicles are not permitted to back down the east access drive. The applicant shall move trash and recyclables to the southeast corner of Building I immediately prior to trash pickup. The applicant is encouraged to return to the board of jurisdiction with an amended plan to provide a turnaround near the trash room or to relocate the trash compactor room.

(3) The plans shall be revised to indicate waste receptacles at four locations: near the elevator on the first floor, under the connecting bridge to the garage, and near the bridge entry on the second and third floors of the garage.

H. Noise

(1) Due to the close proximity to residential homes, it is recommended that construction work shall be limited to 8:00 a.m. to 6:00 p.m. Monday through Saturday with no work on Sunday.

(2) If either of the two large air vents/blowers on the southeast wall of the garage between the garage and the new building are relocated, the applicant shall address their noise levels at their new location and any potential impacts on nearby residents. The applicant shall provide to the Land Use Engineer a certification that the noise level generated from these units satisfies the municipal noise level requirement. The applicant shall explore relocating the blower closest to 24 Harris Road or modifying it to reduce current noise levels.

(3) All HVAC equipment must comply with the municipal noise ordinance.

I. Other

(1) Within one year of the date of this approval, the applicant shall discuss with Princeton staff the future subdivision of the area of land occupied by the parking garage encroachments onto Lots 9, 10 and 11, Block 7101 into a consolidated lot including Lots 12, 13, 14 in Block 7101 and Lot 1 in Block 21.02. Nothing in this condition shall require the applicant to apply for a development application regarding this matter, and nothing in this condition shall require the board of jurisdiction to approve such a development application.

(2) As per the Municipal Land Use Law, the applicant shall post a performance guarantee with the Municipality of Princeton for the installation of the required on-site improvements along with any required inspection fees.

(3) All curbing internal to the site shall be Belgian block. On-street curbing shall be concrete to match existing conditions.

(4) Setback dimensions on Sheet 3 of 14 are not completely accurate for zones G-1 and R-8. These shall be shown accurately on the plan. It is recommended the applicant meet with staff to make the appropriate corrections.

(5) It is recommended that all water service extensions, including the size and configuration of piping, and number and location of fire hydrants, be approved by N.J. American Water Company, Princeton's Fire Prevention Official, and the Land Use Engineer.

(6) The applicant shall comply with all applicable municipal, COAH and UHAC standards regarding the affordable units, except that 13% of the affordable units shall be for very low income households.

(7) Prior to start of demolition or construction, all roads adjoining the project site are to be videotaped for use in repairing damaged roads from construction equipment.

- (8) The sidewalks on Block 7101, Lot 15 are being replaced as part of this application, and consent from the property owner is required.
- (9) The applicant shall construct the buildings with materials consistent with the building samples provided to the Board. If the applicant intends to modify those materials, any such modifications shall be submitted to the Landscape Subcommittee.
- (10) Final construction plans shall be reviewed and approved by the Land Use Engineer for compliance with the ENGINEERING STANDARDS, DETAILS & DESIGN CRITERIA of Princeton, including but not limited to: location & design of sanitary sewer and storm drainage systems, construction details for improvements to existing and proposed roadways, and all other engineering site improvement items that may be modified or increased. Mr. West has concluded that the criteria have been satisfied except for those items identified in his report, all of which have been satisfied by revisions made by the applicant or will be satisfied by conditions set forth herein.
- (11) The exterior doors of any residential units with stoops or patios and access to the surrounding pathways shall not have a sliding door typically associated with residential backdoors.
- (12) The existing stairs from the Franklin Avenue driveway to Block 7101, Lot 5 shall be removed as part of the application for demolition permits.
- (13) The following details shall be provided:
- (a) A curb detail shall be added to the plans for the curb replacement on Witherspoon Street and Franklin Avenue showing the pavement repair.
 - (b) The detail for the Detectable Warning Surface shall be revised to indicate that a ductile iron Detectable Warning Surface is to be used within the municipal ROW.
 - (c) The detail for the handicap ramp shall be revised to provide a four foot landing at the top of the ramp.
 - (d) The sanitary sewer lateral clean out detail shall be revised to provide a riser cover.
 - (e) A Belgian block curb detail should be added to the construction sheet.
- (15) The elevations shall be revised to show the two gable ends in Building 1 and the two towers of Building 2 on the through street that were shown as part of the PowerPoint presentation presented by Mr. Metz on July 11, 2013 (Exhibit A-3).
- (16) The three bedroom townhouse units may have an additional condenser in order to provide for a two zone air conditioning system.

J. Additional approvals required

(1) The following additional approvals and/or waivers will be required and are conditions of Planning Board approval:

- (a) Mercer County Planning Board Site Plan Approval
- (b) Mercer County Soil Conservation District Soil Erosion and

Sediment Control Plan Certification

- (c) Delaware & Raritan Canal Commission
- (d) Princeton Sewer Operating Committee
- (e) Stony Brook Regional Sewerage Authority
- (f) NJDEP Request for Authorization (RFA)
- (g) NJDEP Treatment Works Approval.
- (h) Developer's agreement with the governing body.
- (i) Affordable housing deed restrictions shall be provided for review

and approval of the Board Attorney or Municipal Attorney.

Adopted: 8/12/13

Vote on motion: 7/25/13

FOR: Capozzoli, Crumiller, Miller, Quinn, Reed, Trotman, Ullman, Gunning

AGAINST: Birge

ABSTAIN: No one

Vote on findings: 8/12/13

FOR: Capozzoli, Miller, Ullman, Gunning

AGAINST: No one

ABSTAIN: No one

RESOLUTION

LEGAL COUNSEL

Miller, Porter, Muller & Gaynor, PC

**Association for Planning at Hospital Site, LLC
vs Princeton Planning Board**

**REGIONAL PLANNING BOARD OF PRINCETON
MERCER COUNTY, NEW JERSEY**

RESOLUTION

WHEREAS, there exists need for services of counsel to the Princeton Planning for representation in matters of litigation by an attorney-at-law in the State of New Jersey, and;

WHEREAS, the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) requires that the resolution authorizing the award of contracts for "Professional Services" without competitive bids and the contract itself must be available for public inspection, and;

NOW THEREFORE, BE IT RESOLVED, by the Regional Planning Board of Princeton, Mercer County as follows:

1. The Princeton Planning Board requests that Borough Council of the Borough of Princeton execute an agreement with Miller, Porter & Muller, PC as counsel to the Board and in connection to sign a contract for professional services, in an amount not to exceed \$42,500.
2. This contract is to be awarded without competitive bidding as a "professional service" under the provisions of the Local Public Contracts Law because the services are performed by a person authorized by law to practice a recognized profession and it is not possible to obtain competitive bids.
3. Payment under this contract shall be charged to the municipal budget. Payment shall be contingent upon certification of available funds.
4. A notice of this action shall be published as required by law.

This 7th day of
November, 2013



Ilene Cutroneo, Secretary



Municipality of Princeton
Department of Community Development
Office of Planning

Princeton Municipal Building
400 Witherspoon Street
5366

609-924-

MEMORANDUM

TO: Robert Bruschi, Administrator

FROM: Lee Solow, Director of Planning 

DATE: 11/12/13

SUBJECT: AVALONBAY – LITIGATION FUND
Miller, Porter & Muller, PC – Gerald Muller, Esq.

We have been advised by Mr. Muller that the Association for Planning at Hospital Site has filed a complaint against the Planning Board, Mayor & Council and AvalonBay Communities LLC (a copy of the complaint is included). A resolution and PSA has been prepared based upon Mr. Muller's request.

We are asking that the Mayor and Council enter into a new Professional Services Agreement with Miller, Porter & Muller, PC in the amount not to exceed \$42,500. Attached please find:

11/7/13 Resolution of Planning Board asking Mayor & Council to enter into the PSA
Complaint filed by the Association for Planning at Hospital Site
draft Resolution for Council
draft Professional Services Agreement with Miller, Porter & Muller, PC in the amount of \$42,500

Should you have any questions, please contact me. Thanking you in advance for assistance

cc: Kathryn Monzo, Assistant Administrator & Director of Finance
Sandra Webb, Chief Financial Officer
Robert Kiser, PE; Director of Engineering
Edwin Schmierer, Esq.
Gerald Muller, Esq.