

ORDER

AND NOW, this 6th day of June, 2019, the Board of Supervisors of East Brandywine Township approves the following:

- 1) Preliminary/final land development plan approval for the Plans, titled, "Carlino/Giant" consisting of 34 sheets, prepared by ARNA Engineering, Inc. dated June 27, 2018, last revised October 16, 2018, as such plans are further revised to comply with the conditions set forth hereinbelow.
- 2) Approval of the landscaping plans filed with the Plan pursuant to the authority in Section 399-79.B(2) of the Zoning Ordinance which allows the Board to approve modifications to the minimum planting guidelines and landscape design guidelines set forth in Section 399-79. The Board finds that the landscaping proposed by Applicant on the landscaping plans achieves comparable results and provides effective buffering and screening for the Shopping Center.
- 3) Approval of the 22 small car parking spaces on the western side of Retail A building as depicted on the Plans pursuant to the authority in Section 399-105.C of the Zoning Ordinance.
- 4) Approval of the use of porous paving in the areas shown on the Plans pursuant to the authority in Section 399-106.B(1) of the Zoning Ordinance. The Board finds the use of porous paving is acceptable provided that Applicant complies with condition number 8 set forth below.
- 5) Approval of the following waivers from the SALDO:
 - (i) Section 350-13 which requires the submission of preliminary plans for proposed land development. The Board finds that the Plans may be approved as preliminary/final land development plans given the level of detail that Applicant has provided on the Plans and the numerous and extensive reviews that the Township consultants and Planning Commission have completed for the Application and Plans.

- (ii) Section 350–24.B(2)(a) which requires a four step design process to be used to the maximum extent feasible for subdivisions or land development where no common open space is to be designated. The Board finds that this section is primarily applicable to residential cluster development. Moreover, because there is no common open space proposed for the Development and Applicant shall be required to pay a fee in lieu of providing open space and recreational land, the Board finds that a waiver from this section is appropriate. The Board does not believe that requiring Applicant to utilize the four step design process would achieve any benefit. The Board recognizes that the SALDO favors the payment of a fee in lieu of recreational land for non-recreational development. See Section 350-50.B(3)(b) (The Township's general policy shall be to require a fee in lieu of on-site recreational lands for nonresidential development.)
- (iii) A partial waiver from Section 350-24.B(3)(i) which requires locations and dimensions of certain features within the property or within 300 feet of any part of the property proposed to be developed to be included on the land development plans. The Board finds that all information required by this section is included on the Plans for the Development Property, as well as existing streets and their dimensions; existing buildings, the topography of the general area and utilities within the right-of-way within 300 feet. The Board finds that Applicant has provided sufficient information required by this section and has submitted sufficient justification as to why it cannot produce the other information on private properties within 300 feet which Applicant does not own or have permission to enter.
- (iv) Section 350–24.B(3)(o) which requires the submission of a shadow analysis showing the location of existing and new trees and screening and shadows cast by proposed structures and mature landscaping at 9:00 a.m, noon and 3:00 p.m. on the date of the winter solstice. Because of the nature of the one-story buildings proposed to be built and the distance they are proposed to be situate from property lines, the Board finds that a shadow analysis would not be useful in the Board's review of the Plans as there is no possibility that a shadow would be cast on any building on any adjacent property. The size of the property being developed and the nature of the buildings being developed thereon support a waiver from this section. The Board also recognizes that in

many land development applications, this requirement was waived. Thus, the Board finds a waiver from this section is appropriate.

- (v) Section 350–33.B which requires the minimum centerline radii for horizontal curves to be 750 feet for collector streets. The Board finds that a waiver is appropriate given the limited area available within the Condemned Property to fit the Connector Road and the physical constraints associated with the existing artificial pond, wetlands and proximity of existing Quail Hill Lane. The Board recognizes that Applicant did not propose the construction of the Connector Road with its Development. Instead, as evidenced by the MOU, the Township required Applicant to build the Connector Road as part of its development. The Board then condemned land necessary to build the Connector Road and facilities necessary for the road. Mr. Heinrich consulted with Applicant's design engineers on the best location of the Connector Road looking at a variety of Code requirements, PennDOT requirements and developments on property in and around the Watters Property. The reconfiguration and relocation of the Connector Road might not fit within the Condemned Property. N.T. at p. 76. While Applicant could have revised the design of the Connector Road to meet certain SALDO sections, redesigning the Connector Road would present other difficulties and may cause other SALDO and stormwater regulations to be violated. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Heinrich credible and sufficient justification to support the grant of a waiver.
- (vi) Section 350- 33.C which requires tangents of at least 100 feet between reverse curves. The Board finds that a waiver is appropriate given the limited area available within the Condemned Property to fit the Connector Road and the physical constraints associated with the existing artificial pond, wetlands and proximity of existing Quail Hill Lane. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Heinrich credible and sufficient justification to support the grant of a waiver. The Board incorporates the response in (v) above.
- (vii) Section 350–35.D to allow the intersection of the Collector Road and N. Guthriesville Rd. to be 133 feet from the intersection of Quail Hill Lane and N. Guthriesville Rd. The Board finds that this waiver is necessary in order for the

Connector Road to intersect N. Guthriesville Road as close to a 90° angle as possible and because there is limited property area available to reconfigure the Connector Road. The Board finds that the existing pond and wetlands that are located on the Condemned Property restrict different configurations of the Connector Road at its intersection with N. Guthriesville Rd. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Heinrich credible and sufficient justification to support the grant of a waiver. The Board incorporates the response in (v) above.

- (viii) Section 350–36.B to allow the right turn lane off of Horseshoe Pike to be 200 feet long at the approach of the signalized intersection at the Connector Road and Horseshoe Pike. The Board finds that the lane proposed along the frontage of the BVA Property is a right turn lane and therefore the minimum length required in Section 350–36.B(3) is not applicable. However, even if the Board were to find this lane is a deceleration lane, it finds that the waiver is warranted because there is limited space available between the proposed Connector Road and the existing right in, right out driveway to the BVA Property. The Board also notes that Mr. Heinrich had no objection to this waiver and because Horseshoe Pike is a state road, PennDOT will determine the appropriate length of this right turn lane.
- (ix) Section 350–40.C to allow the maximum grade for the right-out only driveway from the parking lot onto Horseshoe Pike to be 9.3%. The Board finds that a waiver is appropriate given the difference in elevation between the front parking lot and Horseshoe Pike. The Board finds the testimony and evidence presented by Mr. Thakkar credible and sufficient justification for this waiver.
- (x) Section 350–40.N(2) to allow a 25-foot radius on the front entrance from the BVA Property turning right onto the Connector Road and the rear entrance drive from the BVA Property turning right onto the Connector Road. The Board finds that the waiver is needed because a 30-foot minimum radius cannot be provided without encroaching onto BVA's Property and without moving the location of the Connector Road. The Board incorporates the response in (v) above.
- (xi) Section 350–47.B(2) to allow the effluent from the Shopping Center to be treated at the Applecross Plant consistent with the approved Planning Module and without the need for land

areas for storage of treated sewage effluent on the site. The Board previously approved a Sewage Facilities Planning Module for a development proposed by the Applicant similar to the Shopping Center now proposed by Applicant. In fact, the Planning Module approved a flow of 7,280 gallons per day; and the Shopping Center subject of this Application proposes a lesser flow of 7,030 gallons per day. The Planning Module was approved by PaDEP by correspondence dated June 30, 2017. (Exhibit B-13). By correspondence dated January 25, 2019, PaDEP advised the Township that no additional sewage planning was required for the Shopping Center (Exhibit B-55). No appeals were filed from the Planning Module approval. In accordance with the approved Planning Module, the Shopping Center's sanitary sewage will be conveyed to the Applecross Wastewater Treatment Plant, owned and operated by the Municipal Authority, for treatment, storage and disposal. The treated effluent is to be disposed of in drip disposal facilities owned and operated by the Authority. Applicant and the Authority have entered into an agreement whereby the Authority agreed to reserve the capacity, treat the sewage and store and dispose of the treated effluent. Exhibit B-14.

Based on the Board's prior approval of the Planning Module, we conclude that the provisions of Section 350-47.B(3) of the Township Code have been waived; and we hereby confirm the granting of that waiver. We find, based on the Township's and PaDEP's approval of the Planning Module, that disposal at the Authority drip fields is an alternative that provides results equal to the standard of Section 350-47.B(2).

Moreover, we conclude that literal enforcement of Section 350-47.B(2) will frustrate the effect of the improvements designed to implement other requirements, specifically the Connector Road. The land area consumed by the Connector Road, which was required by the Township, is not available for disposal of treated sewage effluent. The condition was not caused by Applicant; on the contrary it results from the Township's requirement that Applicant build the Connector Road.

It is also noteworthy that Applicant has entered into an agreement with the Authority that requires Applicant to pay a fee to the Authority in lieu of providing land disposal area. Exhibit B-14. This is further support for our conclusion that disposal at the Authority drip fields is an acceptable alternative which justifies the granting of the waiver. The waiver will not be contrary to the public interest and the purpose and intent of Section 350-47.B(2) is observed by land application of the treated effluent in the Authority drip fields.

- (xii) The Board does not believe that Applicant requires a waiver from Section 350-34.E which requires "the grade of any street at the approach to an intersection" that exceeds 4% to have a leveling area not greater than 4% grade for a distance of 40 feet measured from the nearest right-of-way line in the intersecting street because the driveway leading from the parking lot to Horseshoe Pike is a driveway and not a street.¹ However, in the alternative, if a court were to find the Board's interpretation erroneous, the Board grants a waiver given the difference in grade between the parking lot and Horseshoe Pike.
 - (xiii) The Board also does not find that Section 350-54.B is applicable because it requires the "subdivider" to plant street trees outside the right-of-way and Applicant does not meet the definition of a "subdivider" as defined in Chapter 300 of the East Brandywine Code. Moreover, no subdivision is proposed on the Plans.
- 6) The Board grants waivers from the following sections of the Stormwater Ordinance:
- (i) Section 345-311.A(3) to allow open channel slopes at 1 foot vertical for every 2 feet horizontal. The Board finds that this waiver is justified because there is limited right-of-way available within the Condemned Property to provide a swale at a 4:1 slope and still maintain the geometry of the Connector Road. The Board also finds that a 2:1 slope is preferred and a safer design along the southern side of the Connector Road adjacent to the BVA Property.

¹ BVA agrees with Applicant that Section 350-34.E is not applicable and that no waiver is required. N.T. at p. 745-746.

- (ii) Section 345-311.B(1) to allow proposed storm water pipe to be installed within the bed of N. Guthriesville Rd. The Board finds that a waiver is appropriate because storm pipe cannot be placed in the shoulder because of the wetlands on the south side of N. Guthriesville Road adjacent to the edge of the road and an existing sanitary sewer force main on the north side of N. Guthriesville Road.
- (iii) Section 345-311.B(2) to allow the installation of two 12 inch RCP pipes under the Connector Road. The Board finds that this waiver is appropriate because of the existing grades and topography of the land where the stormwater is flowing from and the limited land area within the Connector Road. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Cline credible and sufficient justification to support the grant of a waiver.
- (iv) Section 345-311.B(10) to allow the stormwater system to not meet the minimum velocity of 3.0 feet per second ("fps") when flowing full and maximum permissible velocity to be 10 fps. The Board recognizes that this waiver request is de minimus in that there are only two instances where the velocity of the pipe is slightly in excess of 10 fps. Moreover, the Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Cline credible and sufficient justification to support the grant of a waiver.
- (v) Section 345-311.B(12) to allow the storm water pipe that crosses under the proposed Connector Road to be buried to a depth of less than one foot. The Board finds that the existing topography and the limited amount of right-of-way in the Condemned Property makes it impossible to meet this section. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Cline credible and sufficient justification to support the grant of a waiver.
- (vi) Section 345-311.B(7) to allow inlets along the curb radii to reduce the spread of flow encroaching on the roadway of the Connector Road. The Board finds that the geometry of the Connector Road causes a hardship which requires inlets to be placed along the radius of the curb. The Board finds the testimony and evidence presented by Mr. Thakkar and Mr. Cline credible and sufficient justification to support the grant of a waiver.

- (vii) Section 345-311.D(12) to allow the emergency spillway, dam breast areas, and water storage area of the detention basin to be located less than 75 feet from the original property line of the parcel being developed or any new property lines that are created. The Board finds that a waiver is justified because there are wetlands and an artificial pond on the east side of N. Guthriesville Rd. where the stormwater is directed to flow which make it physically impossible to provide a 75 foot buffer or separation between the lot lines associated with the Connector Road and Boiretention Stormwater Basin 2. The Board finds Mr. Thakkar's testimony credible and sufficient justification of physical constraints of the Developed Property justify this waiver.

The approvals and waivers granted above are subject to Applicant's strict compliance with the following conditions of approval.

CONDITIONS OF APPROVAL

1. The development of the Development Property shall comply with all relevant terms and provisions of the Zoning Ordinance, the SALDO, the Stormwater Ordinance, the Transportation Impact Fee Ordinance and all other applicable regulations, except as otherwise modified and/or waived by the Board through this Decision and Order.
2. Prior to the release of the Plans for recording, Applicant shall comply with and resolve any outstanding comments in Mr. Cline's review letters dated November 2, 2018 (Exhibit B-22) and December 7, 2018 (Exhibit B-32) to the satisfaction of Mr. Cline.
3. Prior to the release of the Plans for recording, Applicant shall provide evidence that it provided revised final land development and post construction stormwater plans to CCCD and obtained CCCD's approval of such revised final plans.
4. Prior to the release of the Plans for recording, Applicant shall comply with and resolve any outstanding comments in Mr. Heinrich's review letters dated November 5, 2018 (Exhibit B-23) and December 7, 2018 (Exhibit B-31) to the satisfaction of Mr. Heinrich.

5. Applicant shall restrict deliveries to the Shopping Center from WB-67 and WB-68 semi-trailers to off-peak hours between 10:00 p.m. and 6:00 a.m. Applicant shall include this restriction in all leases for all uses in the Shopping Center. The language in the leases that memorializes this restriction shall be approved by the Township Solicitor prior to release of the Plans for recording.
6. Prior to the release of the Plans for recording, Applicant shall comply with and resolve any outstanding comments in Hydraterra Professionals, LLC review letter dated August 31, 2018 to the satisfaction of the Authority engineer.
7. Applicant shall adhere to the terms of the Sewer Connection and Reservation Agreement executed with the Authority (Exhibit B-14) or enter a new agreement with the Authority, if deemed necessary by the Authority, to provide sufficient sewer capacity for the Shopping Center. Applicant shall pay all applicable fees owed to the Authority in order to connect the buildings in the Shopping Center to the Authority's public sewer system.
8. Applicant shall revise the Plans to accomplish the following:
 - a. Remove the sewer easement and any sewer manholes or sewer lines located within such sewer easement which is located behind Retail Building A and travels in an easterly direction across the Watters Property as such proposed sewer line is no longer necessary to service the residential development on the property located to the west of the Watters Property which is referred to as "Mapleview".
 - b. Eliminate the 4 X 4 landscape diamonds at the top of the 21 small parking spaces in the center parking area. These parking spaces must have the dimension of 10 feet by 20 feet.
 - c. Minimize the areas of porous paving to the extent feasible and relocate areas of porous paving to areas of low traffic volume.
 - d. Install a different species of landscaping in the area adjacent to bioretention stormwater basin number 2 to minimize future maintenance issues. The revised landscaping species shall be approved by the Township engineer or landscape consultant.

- e. Relocate the 10 foot wide easement labeled as "10' wide easement for future potential pedestrian connection" between the Watters residential property on the west to the location recommended by the Township Trails Committee to make a connection to the trail on the adjacent Mapleview property. A sketch of the revised location for the trail connection is attached hereto. Applicant shall construct the trail connection and the cost of the same shall be credited against the fee in lieu of on-site recreational lands that is required to be paid pursuant to Section 350-50.B(3)(b) of the SALDO and condition 14 below. Applicant shall submit cost estimates for the cost to construct such trail connection to the Township engineer who shall determine the appropriate credit to be provided to Applicant based on such cost estimate.
9. Applicant shall grant a blanket easement to the Township for pedestrian and bicycle use by the general public of the parking lot, sidewalks and crosswalks leading from the western property line of the Watters Property to the sidewalk on the Connector Road.
10. Prior to the construction of the retaining wall depicted on the Plans, Applicant shall provide engineered drawings prepared by a structural engineer licensed in the Commonwealth of Pennsylvania that approves the design of the retaining wall. The Township engineer shall review such plans and confirm that have been properly certified and sealed by a structural engineer licensed in the Commonwealth of Pennsylvania.
11. Applicant shall prepare, execute and record simultaneously with the Plans an operation and maintenance agreement for the areas of porous paving shown on the Plans which the Board has approved pursuant to the authority in Section 399-106.B of the Zoning Ordinance. The terms of the operation and maintenance agreement shall be approved by the Township engineer and shall require Applicant and its successors and assigns to perform routine maintenance of the porous paving so that the areas remain porous. The agreement shall specify that the Township will have enforcement rights if Applicant or its successors and assigns fail to properly maintain the area in a porous state.
12. Applicant shall execute a development agreement and financial security agreement and post financial security in an amount approved by the Township engineer and in form and substance acceptable to the Township, the Township Engineer and the

Township Solicitor prior to the Plans being released by the Board of Supervisors for recording.

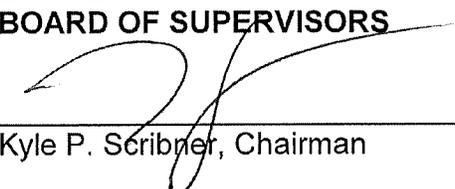
13. Prior to the release of the Plans for recording, Applicant shall reimburse the Township for all outstanding reasonable engineering, administrative, legal and other review fees associated with the Township's review of the Plans, attendance at hearings and preparation of this Decision and Order and which Applicant owes to the Township pursuant to the MOU.
14. Pursuant to SALDO Section 350-50.B(3)(b), prior to the release of the Plans for recording, Applicant shall pay a fee in lieu of on-site recreational lands. The amount of the fee shall be determined by the Board on the basis of \$500 per projected full time or equivalent full-time employee for the uses in the Shopping Center. The number of full time or equivalent full-time employees shall be presented by Applicant and subject to review and approval by the Board. The fee shall be paid or otherwise secured in a manner deemed acceptable by the Board prior to recording of the Plans and a note shall be added to the Plans which identifies compliance with this condition.
15. Applicant shall obtain the necessary highway occupancy permit in order to construct the Connector Road as depicted on the Plans, subject to modifications required or approved by PennDOT in order to obtain such permit.
16. Applicant shall construct all roadway improvements and related improvements (e.g., signs, medians, pavement markings) including the traffic signal, depicted on the Plans and ultimately approved by PennDOT through the issuance of a highway occupancy permit and signal permit.
17. Applicant shall pay a traffic impact fee equal to \$1,410,031.08 as required by the Township's Transportation Impact Fee Ordinance. Applicant shall be entitled to a credit in the amount of actual construction costs for the Connector Road that Applicant incurs, as approved by the Township engineer. The amount of the credit for the construction of the Connector Road will be determined based upon actual costs and expenses paid by Applicant from its funds as submitted by Applicant to the Township upon completion of the Connector Road. The Township shall determine what categories of costs and expenses are subject to the credit. Applicant shall submit to the Township all information requested by the Township to verify the costs and expenses. This Decision does not determine the

amount of the credit; some of the Impact Fee may be due from Applicant after the final determination of the amount of the credit. Moreover, if Applicant is eligible for and is awarded grant funding (or other award, donation, contribution or subsidy of any kind) which may be used to offset its soft and hard costs and expenses in constructing the Connector Road, Applicant shall accept said award and the amount of credit that Applicant is entitled to shall be reduced by the amount of said grant, award, donation, contribution or subsidy.

18. Applicant shall complete an updated traffic count at the intersection of the Connector Road and Horseshoe Pike twelve months after a use and occupancy certificate is issued for the supermarket in the Shopping Center. The Township traffic engineer shall evaluate this updated traffic study and determine whether the traffic signal installed at Connector Road needs to be re-timed as a result of traffic generated at the Shopping Center. If the Township traffic engineer determines that the signal timing shall be adjusted, Applicant shall obtain all necessary permits to perform the retiming and complete the retiming within six months of written approval from PennDOT.
19. Applicant shall adhere to all conditions in the MOU that have not been satisfied including but not limited to conditions relating to the design, permitting and construction of the Connector Road and payment for the Condemned Property to be used in the construction of the Connector Road. If a court finds that any terms in the MOU are illegal or unenforceable, such terms shall be severable and Applicant shall adhere to all other remaining terms.
20. Applicant shall obtain all regulatory permits that are necessary to develop the Developed Property consistent with the Plans, including but not limited to highway occupancy permits from PennDOT for the road improvements and stormwater management improvements located in the state roads and approval of the traffic signal permit plans from PennDOT.
21. Prior to the release of the Plans for recording, Applicant shall execute in a form acceptable to the Township Solicitor a stormwater management operations and maintenance agreement which agreement shall be recorded simultaneously with the Plans. This agreement shall require Applicant and its successor and assigns to maintain all stormwater facilities that it builds pursuant to the Plans whether located on the Watters Property or the Condemned Property.

22. Applicant shall enter a Drainage Improvement Operations and Maintenance Agreement for any stormwater facilities that are installed in the right of way of roads owned by PennDOT. This agreement shall require Applicant and its successors and assigns in title to the Property to maintain these stormwater facilities. The Agreement shall be executed by Applicant and recorded simultaneously with the Plans.
23. It is noted that no signage plans have been reviewed or approved as part of the Application. Any future signs to be installed on the Property shall be required to receive the appropriate approvals and permits.
24. To the extent that any of the above conditions are determined to be invalid, the invalid condition(s) are severable and the invalidity shall not affect the validity of the remaining conditions imposed.
25. This Decision and conditions contained herein are binding on Applicant, its successors and assigns, for the benefit of the Township in general and the ultimate users/property owners of the subject Property.
26. This Decision shall be accepted in writing by Applicant within fifteen (15) days of receipt thereof, failing which the application shall be deemed denied by the Board of Supervisors as failing to comply with the provisions of the Township's SALDO referenced and described hereinabove.

**EAST BRANDYWINE TOWNSHIP
BOARD OF SUPERVISORS**



Kyle P. Scribner, Chairman



Jay G. Fischer, Vice-Chairman

Jason R. Winters, Member