

## SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") dated this 14<sup>th</sup> day of June, 2024 is made by and between Oz Custom Builders, LLC, 725 Mountain Avenue, Berkeley Heights, NJ, Block 2006, Lot 32 (R-15 Zone) (the "Plaintiff" or the "Applicant") and the Township of Berkeley Heights Zoning Board of Adjustment, 25 Park Avenue, Berkeley Heights, NJ (the "Defendant" or "Board"). Plaintiff and Defendant are individually a "Party" and collectively referred to herein as the "Parties".

### RECITALS

**WHEREAS**, Plaintiff submitted an application for preliminary and final major subdivision approval and variance and design waiver relief relating to the proposed subdivision of the existing property into five (5) lots, with four (4) of the lots to be developed with four (4) new detached single-family dwellings and a new public right of way to provide access for the new dwellings off of Plainfield Avenue (the "Application"), on property designated as Block 2006 Lot 32 on the Township Tax Map and more commonly known as 725 Mountain Avenue which is located in the R-15 Residential Zone (the "Property" or the "Site"); and

**WHEREAS**, the Site currently consists of the Westminster Presbyterian Church (the "Church"); its associated parking lot; a 1.5 story residential dwelling; a memory garden; a playground area, and a garage; and

**WHEREAS**, The Plaintiff's proposal is to demolish the existing residential dwelling and garage and subdivide the Property into five lots with the existing church and parking lot to remain on proposed Lot 32.01 and single-family residential dwellings to be constructed on proposed lots 32.02, 32.03, 32.04 and 32.05; and

**WHEREAS**, preliminary major subdivision approval as contemplated by the Application was previously granted by the Berkeley Heights Planning Board, which has since expired; and

**WHEREAS**, on September 28, 2023, the Board denied the Application; and

**WHEREAS**, on November 16, 2023, the Board adopted a resolution memorializing its denial of the Application (the “Resolution”);

**WHEREAS**, on or about January 10, 2024, Plaintiff filed a complaint (the “Complaint”) against the Defendant seeking to invalidate the Board’s Resolution in the Superior Court of New Jersey captioned Oz Custom Builders, LLC v. Township of Berkeley Heights Zoning Board of Adjustment, Docket No. UNN-L-000131-24 (the “Litigation”); and

**WHEREAS**, Defendant filed an Answer to the Complaint denying all liability for the claims asserted by the Plaintiff; and

**WHEREAS**, the Parties desire to resolve the Litigation without further litigation, controversy, and inconvenience related to the subject matter of the Litigation, and desire to settle, fully and finally, all claims among them.

**NOW THEREFORE**, in consideration of the foregoing and of the mutual covenants contained herein, and intending to be legally bound, it is hereby AGREED as follows:

1. RECITALS. The above recitals are hereby referred to and incorporated by reference.

2. SCOPE OF AGREEMENT. This Agreement sets forth the terms and conditions under which the Parties mutually agree to resolve and settle all claims as between them in the Litigation as set forth in the Complaint (the “Claims”). For the avoidance of doubt, this Agreement shall also resolve all Claims as between the Parties related to acts or omissions by the Parties (including through their officials, agents, representatives, and employees) with respect to

the Application that occurred up until and through the date of the execution of this Agreement, including any and all Claims for reimbursement for costs for Litigation expenses, attorneys' fees and Litigation costs up to and through the date of this Agreement.

3. UNDERSTANDING OF THE PARTIES. In full and final satisfaction and accord of the Claims above, and in consideration for the Release as more fully set forth in Paragraph 4, below, the Parties agree as follows:

a. Plaintiff's Application is approved, including the following relief:

- i. A d(2) variance for the expansion of a pre-existing non-conforming use (church use) because the existing church use is technically being intensified given the reduction in the size of Lot 32, pursuant to Section 6.3.1 of the Land Use Procedures Ordinance of the Township of Berkeley Heights (the "Ordinance");
- ii. Bulk variance relief for a proposed "other" coverage of 27.9% (Proposed Lot 32.01), whereas the existing "other" coverage is 15.5%, and the maximum permitted "other" coverage is 10%, pursuant to Section 6.1.1 of the Ordinance;
- iii. Bulk variance relief for a proposed impervious coverage of 33.9% (Proposed Lot 32.01), whereas the existing impervious coverage is 19.1%, and the maximum permitted impervious coverage is 25%, pursuant to Section 6.1.1 of the Ordinance;
- iv. Bulk variance relief for the disturbance of steep slopes of 25% or greater, whereas on slopes of 25% or greater, no development, re-grading or stripping of vegetation shall be permitted unless the disturbance is for

roadway crossings or utility construction, pursuant to Section 3.1.11.C.1 of the Ordinance; and

v. Design waiver relief for groundwater recharge due to impermeable soils, whereas groundwater recharge is required pursuant to Section 12.3.3. of the Ordinance.

b. The approval of Plaintiff's Application shall be conditioned on the following:

i. The Applicant shall reorient the home on proposed Lot 32.02 to face on Plainfield Avenue with a side loaded garage, also obviating the need for the previously requested bulk variance relief for a proposed rear-yard setback (proposed Lot 32.02) of 15 feet.

ii. Left-hand turn movements onto Plainfield Avenue shall be restricted between 7:00 a.m. to 9:00 a.m. and 2:30 p.m. to 4:30 p.m. Monday – Friday, with signage installed to indicate said restriction.

iii. Applicant shall comply with the review memoranda prepared by the Board Planner, Board Engineer, Environmental Commission, Wastewater Treatment, Fire Department, Zoning Officer, and Police Department.

iv. Applicant shall submit lot grading plans and tree replacement plans for each individual lot, same to be subject to the review and approval of the Township Engineer;

v. Applicant shall submit HOA documents including maintenance requirements for the proposed bioretention basins;

- vi. Applicant shall submit a Stormwater Management and Operations Manual and same shall be subject to the review and approval of the Township Engineer and, once approved, a copy of same shall be recorded with the County Clerk's Office
- vii. Applicant shall comply with the requirements of any outside agency approval including but not limited to the Union County Soil Conservation District;
- viii. Applicant shall design the interior roadways to comply with the Residential Site Improvement Standards, including 40' wide cartway and 29' radius of cul-de-sac bulb;
- ix. Applicant shall construct a sidewalk along Plainfield Avenue frontage or shall make an appropriate contribution to the sidewalk fund in lieu thereof;
- x. Applicant shall submit all Union County drainage reports and approval documents;
- xi. Applicant shall comply with Union County sign easement requirements at the Plainfield Avenue intersection;
- xii. Applicant shall locate the fire hydrants in accordance with the direction from the Fire Official and same shall provide adequate water pressure for firefighting;
- xiii. Applicant shall relocate/shift the underground drainage pipe from the north to the south side of Plainfield Avenue to minimize disturbance to trees;

- xiv. Applicant shall landscape and fence the area around and along the retaining wall adjacent to Lot 33/566 Plainfield Avenue (Ms. Sonnenberg) to soften up its appearance and/or screen it completely;
- xv. Applicant shall landscape the rear yard of Lot 31 with green giants for a length of 31 feet including at least 5-6 trees, 6' to 7' tall at planting, same to be subject to the review and approval of the Township Engineer and Zoning Officer;
- xvi. Applicant shall comply with all Soil Erosion and Sediment Control requirements including, but not limited to, silt fencing during the construction process and same shall be subject to the review and approval of the Township Engineer;
- xvii. Applicant shall enter into a Developer's Agreement, same to be subject to the review and approval of the Township Engineer and Township Attorney;
- xviii. Applicant shall comply with height requirements for all of the proposed dwellings and structures;
- xix. Applicant shall comply with combined side yard setback requirements for all lots;
- xx. Applicant shall submit tree removal and replacement plans, same to be subject to the review and approval of the Township Planner and Environmental Commission;

- xxi. Applicant shall comply with wastewater treatment requirements, particularly as to anticipated flow calculations and available capacity for the receiving collection system;
  - xxii. Applicant shall ensure sufficient site clearing to provide appropriate sight distances required by Union County and ASHTO (400') for view to the south;
  - xxiii. Applicant shall replace any trees damaged by construction related activities;
  - xxiv. Applicant shall ensure that Ms. Sonnenberg is protected against liability resulting from any work on, or immediately adjacent to, her property, including naming her as an additional insured.
- c. No later than 30 days after the Applicant's submission to the Board of any revisions to the Applicant's latest subdivision plan (but only to the extent necessitated by the above-referenced settlement terms and conditions, the Board will convene a duly-noticed special meeting at which it will conduct a hearing regarding the Parties' agreement to settle this Litigation. This special meeting to be held to consider these matters shall be conducted in compliance with the requirements of Whispering Woods at Bamm Hollow v. Middletown Planning Bd., 220 N.J. Super. 161 (Law Div. 1987). No unrelated business will be included in the agenda for the Whispering Woods hearing, which will consist only of a Whispering Woods hearing for purposes of considering any revisions to the Applicant's latest subdivision plan and/or conditions of approval of the Application as may be contemplated by the above settlement terms and

conditions. Should the Board vote in favor of the Application at the conclusion of the Whispering Woods hearing, the Board will adopt a resolution memorializing its decision within thirty (30) days of said hearing and publish notice of its decision no later than ten (10) days following the adoption of said memorializing resolution. In the event there is an appeal of the Board's approval of the Application as memorialized by resolution, the Plaintiff has the right to declare this Agreement as null and void, in which case the Litigation would continue.

- d. In connection with the Whispering Woods hearing, the Board will waive any required application fees and request its professionals to review any subdivision plan revisions necessitated by the above-referenced terms and conditions without the requirement of any escrow fees.
- e. The Court shall retain jurisdiction to enforce the terms of this Agreement. In the event that the Court finds that a Party has breached this Agreement, the Court will have the power to enforce this Agreement at equity, including through the issuance of injunctive relief. The Parties further agree that Plaintiff may seek an order of the Court acknowledging its retention of jurisdiction over this Agreement ("Retention Order"). The Parties preserve all remedies at law, equity or otherwise in connection with any proceeding to enforce the provisions herein. The parties agree that a violation of this Agreement and/or the covenants herein may cause substantial and irreparable harm to the injured Party. Therefore, if any of the Parties and/or their agents, officials, attorneys, successors, or assigns breaches this Agreement, the injured Party may seek with the Court immediate injunctive relief.



f. Should the Board grant approval of the Application at the Whispering Woods hearing and thereafter adopt and publish a memorializing resolution of approval that is not appealed within 45 days of publication, the Plaintiff agrees to thereafter apply for dismissal of the Litigation with prejudice and with each Party to bear their or its own respective litigation costs and attorneys' fees. Dismissal with prejudice shall not impact the Court's retention of jurisdiction to hear any claim or proceeding brought to enforce this Agreement, including but not limited to the continuation of the Litigation in the event this agreement becomes null and void in accordance with its terms.

4. RELEASE AND EXTINCTION OF ALL CLAIMS.

a. Plaintiff agrees to and hereby releases and gives up the Claims as against Defendant. This releases all claims or potential claims resulting from any conduct with respect to the Application that occurred up until and through the date of the execution of this Agreement.

b. Defendant agrees to and hereby releases and gives up any claims as against Plaintiff. This releases all claims or potential claims resulting from any conduct with respect to the Application that occurred up until and through the date of the execution of this Agreement.

5. NO ADMISSION OF LIABILITY.

a. It is expressly understood and agreed that nothing contained in this Agreement shall be construed as, nor shall be represented by any Party, their attorneys or their agents to be, an admission or determination of liability by such Party.

- b. Additionally, it is further agreed that this Agreement shall not be used by a Party as evidence in any proceeding against the other Party, except for any action arising from the breach of this Agreement.

6. NO RIGHTS CONFERRED UPON NON-PARTIES.

- a. The Parties further agree that they are bound by this Agreement to the end of time. Anyone who succeeds to Plaintiff's rights and responsibilities is also bound in the same manner. This Agreement shall also be binding upon each of Defendant's subsequently elected or appointed officials, agents, employees, representatives and all other successors and/or assigns who succeed to the Defendant's rights and responsibilities hereunder.
- b. Accordingly, this Agreement is intended to confer rights and benefits only upon the Parties (including their respective officials, agents, employees, representatives, successors and assigns) and is not intended to confer any right or benefit upon any other person or entity. No person or entity other than the Parties shall have any legally enforceable rights under this Agreement. All rights of action to enforce this Agreement are hereby reserved to the Parties.

7. MATERIALITY. The Parties agree that each paragraph and subsection of this Agreement is material. In the event that any portion of this Agreement is determined to be illegal, the Parties agree, in advance, to reform this Agreement in good faith to provide each Party with the full benefit of the settlement memorialized by this Agreement to the extent permitted by law.

8. FULL UNDERSTANDING. This Agreement sets forth the complete understanding and entire Agreement between the Parties and supersedes any and all prior

agreements or understandings between the Parties. This Agreement may not be modified, altered, changed, discharged, terminated or waived except upon express written consent of the Parties wherein specific reference is made to this Agreement. By executing this Agreement, the Parties represent and acknowledge that they have not relied upon any representation or statement not set forth in this Agreement with regard to the Claims.

9. SERVICES OF COUNSEL. The Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of the Litigation and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

10. AUTHORITY OF SIGNATORIES. Each signatory represents that she, he or it is a Party or has been duly authorized by the applicable Party to sign on that Party's behalf and that, in the case of the Board, all procedural and/or legal formalities attendant or precedent to the execution of this Agreement have been satisfied. The signatory for the Board further covenants that she/he is duly empowered by the Board to sign this Agreement and that nothing prevents the Board from completely performing its obligations under this Agreement.

11. LAW GOVERNING. This Agreement shall be governed by the laws of the State of New Jersey without regard to the conflicts of laws principles thereof, and any dispute arising out of this Agreement or action to enforce this Agreement shall be subject to the exclusive jurisdiction of the Superior Court of New Jersey, Union County Vicinage.

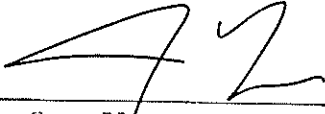
12. SEVERABILITY. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or

provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be part of this Agreement.

13. EXECUTION IN COUNTERPARTS. The Parties agree that this Agreement may be signed in counterparts and that facsimiles or emailed copies of signatures will have the same force and effect as original signatures.

*Signatures On Next Page*

Oz Custom Builders, LLC



By: Ozzy Yaseen

Dated: June 14<sup>th</sup>, 2024

Zoning Board of Adjustment of the Township of Berkeley Heights

By: \_\_\_\_\_  
[NAME/TITLE]

Dated: June \_\_\_\_, 2024