

**BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH**

**LAND USE BOARD RESOLUTION 2022-10
RESOLUTION OF MEMORIALIZATION
MINOR SUBDIVISION APPROVAL
WITH ANCILLARY VARIANCE RELIEF**

**Approved: March 10, 2022
Memorialized: April 14, 2022**

IN THE MATTER OF THOMAS J. FAHEY

APPLICATION NO. LUB2021-06

WHEREAS, an application for minor subdivision approval with ancillary variance relief has been made to the Highlands Land Use Board (hereinafter referred to as the “Board”) by Thomas J. Fahey (hereinafter referred to as the “Applicant”) on lands known and designated as Block 14, Lot 6, as depicted on the Tax Map of the Borough of Highlands (hereinafter “Borough”), and more commonly known as 38 Grand Tour in the R-1.01 (Single Family Residential) Zone; and

WHEREAS, a complete application has been filed, the fees as required by Borough Ordinance have been paid, proof of service and publication of notice as required by law has been furnished and determined to be in proper order, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised; and

WHEREAS, a live public hearing was held on March 10, 2022, at which time testimony and exhibits were presented on behalf of the Applicant and all interested parties were provided with an opportunity to be heard; and

NOW, THEREFORE, the Highlands Land Use Board makes the following findings of fact and conclusions of law with regard to this application:

1. The subject Property contains a total of 14,375 s.f. and is improved with a single-family, two-story dwelling. The subject Property is located within the R-1.01 Single-Family Residential Zone with frontage on Grand Tour

2. The Applicant is seeking minor subdivision approval along with ancillary variance relief to subdivide Lot 6 and create two (2) lots; Proposed Lot 6.01 and Proposed Lot 6.02. Proposed Lot 6.01 will contain 8,719 s.f. with frontage along Grand Tour and is improved with the existing single-family dwelling. Proposed Lot 6.02 will contain 5,656 s.f. with frontage along Grand Tour. The Applicant proposes a new parking area on Proposed Lot 6.01 along Grand Tour. The Applicant's plans depicted a new single-family dwelling, along with a driveway and a rear wooden deck on Proposed Lot 6.02, but that depiction was solely for purposes of an example of what might be built in a conforming building envelope with an exempt plot plan.

3. Counsel for the Applicant, John B. Anderson, III, Esq. stated that the Public Notice indicated that the hearing would start at 7:30 p.m. whereas the hearing was called to order at 7:00 p.m. (which is the start time for Highlands Land Use Board meetings).

4. Mr. Anderson noted that the application was intentionally not commenced prior to 7:30 p.m. to afford all interested parties an opportunity to appear and be heard. The Board and the Board attorney agreed that waiting to commence the application until after 7:30 p.m. afforded all interest parties an opportunity to appear and be heard, thus, any alleged deficiency with the Public Notice had been cured and that the Board had jurisdiction.

5. Mr. Anderson next stated that the Applicant was seeking minor subdivision approval with ancillary variance relief from the minimum front yard setback requirements for a

pre-existing condition. He described the subject Property, Lot 6, as oversized for the neighborhood.

6. The Applicant testified that he purchased the subject Property in July of 2021 and intends to subdivide the parcel into Proposed Lots 6.01 and 6.02. The Applicant further testified that he intends to make minor improvements to the existing single-family dwelling on Proposed Lot 6.01 and to sell that property, and possibly sell Proposed Lot 6.02 as well (either as a vacant lot for development as a single-family home or as a lot improved with a single-family home).

7. Although the application depicts a proposed dwelling on Proposed Lot 6.02, the Applicant testified that he may not build a dwelling thereon and that the plans provided depict such a dwelling as an example for illustrative purposes. The Applicant further testified that (in the event he builds a home on Lot 6.02), his intention would be to comply with all Borough Zoning Ordinances as to any proposed development on Proposed Lot 6.02.

8. The Applicant testified that the dwelling on Proposed Lot 6.01 has a pre-existing non-compliant condition with an existing 28.9 ft. front yard setback where 35 ft. is required. This pre-existing non-compliant condition will remain unchanged.

9. The Applicant further testified that the existing dwelling has two (2) bedrooms and two (2) bathrooms. The Applicant proposes adding a front parking area.

10. The Applicant testified that the owner of Block 14 Lot 7 had expressed concern over the lack of landscaping at the subject Property. The Applicant agreed to plant six (6)

arborvitaes at a height of eight (8) ft. on the north side of Proposed Lot 6.02 between Lot 7 and Proposed Lot 6.02.

11. The Applicant's Land Surveyor, Ron Trinidad, PLS, testified that the subject Property is sloped and improved with an existing dwelling. He further stated that the subject Property is oversized for the neighborhood and that the proposed lots will be of a similar size and shape as those in the surrounding community. Mr. Trinidad continued that only the existing 28.9 ft. front yard setback required variance relief, but that this condition was an existing condition that was not proposed to change. Otherwise, the minor subdivision complied in all regards with the prevailing bulk and lot criteria for the R 1.01 zone.

12. The Applicant's Engineer and Licensed Professional Planner, Andrew R. Stockton, P.E., PP testified that the Applicant proposed constructing a parking area on Proposed Lot 6.01. He stated that the parking area on Proposed Lot 6.01 and Lot 6.02 would satisfy the RSIS off-street, parking requirements.

13. Mr. Stockton further testified that the subject Property is serviced entirely by public utilities. He also stated that the Applicant would agree to a condition of approval requiring the submission of a Storm Water Management, Drainage, & Grading Plan to the Zoning Officer prior to any construction on Proposed Lot 6.02. Provided that the Storm Water Management, Drainage & Grading Plan met the prevailing ordinance requirements for bulk criteria and lot area, the plan would be reviewed and approved by the Borough Engineer in the exempt plot plan approval process without any requirement for further hearings. Given that the Applicant may subdivide and sell the lots without building a home and given that the Applicant's planned

renovations to Lot 6.01 are entirely within the footprint of the existing structure, this condition is not a condition of approval for perfection of the subdivision or for the issuance of any building permits for Lot 6.01, but a condition of approval for issuance of building permits and commencement of construction on Lot 6.02 (only).

14. Mr. Stockton provided additional testimony as to the landscaping plan, noting that the arborvitaes would be planted along the lot lines of Proposed Lot 6.02 and Lot 7.

15. Mr. Stockton next testified regarding the subject Property's front-yard setback. Relying on the exhibits presented (including aerial photos and historical aerial photos), Mr. Stockton testified that the homes in the neighborhood have similar front yard setbacks as the subject Property, and that the subject Property's front yard setback had not changed since the 1970s.

16. Mr. Stockton also addressed the required variance relief, noting that for Proposed Lot 6.01, a Minimum Front Yard Setback of 35 ft. is required and 28.9 ft. is proposed. This non-compliant condition is pre-existing and will remain unchanged in the application.

17. Mr. Stockton further provided testimony that, but for the pre-existing non-conforming front setback, the Applicant would not need to obtain variance relief at all in connection with the subdivision. He continued that, given that the front-yard setback is not changing, the variance can be granted without a substantial detriment and/or impairment to the Zoning Ordinances.

18. Mr. Stockton provided additional testimony that the application promotes the goals of planning identified at N.J.S.A. 40:55D-2 and benefits the entire community by promoting goals (c), (g), and (i) of the MLUL. Mr. Stockton opined that goal (e) would also be promoted because the Proposed Lots were more in conformity with the neighborhood scheme and, thus, would promote the establishment of appropriate population densities and concentrations. Mr. Stockton testified that the benefits of the application substantially outweighed any detriments associated with maintaining the existing front setback unchanged.

19. The Board asked whether the proposed lot frontage of 50 ft. for Proposed Lot 6.02 would be commensurate with the neighborhood, to which Mr. Stockton replied that it was not undersized when compared to others.

20. The hearing was then opened to the public at which time Richard Sciria, Esq., representing the property owners of Block 14, Lot 7 (Christopher Wallace), expressed his client's concern over the lack of landscaping at the subject Property between Proposed Lot 6.02 and their property (Lot 7).

21. Mr. Sciria continued that he had discussed the matter with the Applicant's attorney and that his client was satisfied with the Applicant's proposed landscaping plan and representations to the Board to plant arborvitae between the properties. Mr. Sciria continued that his clients waived any objection to the form of Notice and as to the application.

22. Kenneth Sedlak of 49 Grand Tour testified that he is a property owner within 200 ft. of the subject Property and that he received Notice of the hearing, but that his neighbor (also a property owner within 200 ft. of the subject Property), did not.

23. The Applicant's attorney responded that his client had relied upon the 200 ft. property list obtained from the Borough dated February 10, 2022, and that his client had submitted an Affidavit of Service, identifying that all property owners within 200 ft. of the subject Property (including those in Middletown) had been mailed a copy of the Notice via certified mail return receipt requested.

24. The Applicant's attorney continued that he could not confirm whether the Notices had been delivered without knowing the name of the neighbor but, could confirm they had been sent by certified mail, return receipt requested to those property owners identified on the 200 ft. property list.

25. Matthew O'Brien of 47 Grand Tour testified that he lives within 200 ft. of the subject Property but did not receive Notice of the application. His neighbor, Mr. Sedlak advised him of the date/time of the hearing. Mr. O'Brien further testified that he purchased and/or moved into the property in July of 2021 (having purchased the property from Dorothy Doherty)

26. The Applicant's attorney responded that he had mailed notice to the record property owners of 47 Grand Tour, as reflected on the 200 ft. list. In this instance, the 200 ft. list (as updated through February of 2022) reflected Dorothy Doherty as the record property owner of 47 Grand Tour and it was to her that notice was provided. He continued that his client was entitled to rely on the accuracy of the 200 ft. list obtained from the Borough.

27. There were no other members of the public expressing an interest in this application.

WHEREAS, the Highlands Land Use Board, having reviewed the proposed application and having considered the impact of the proposed application on the Borough and its residents to determine whether it is in furtherance of the Municipal Land Use Law; and having considered whether the proposal is conducive to the orderly development of the site and the general area in which it is located pursuant to the land use and zoning ordinances of the Borough of Highlands; and upon the imposition of specific conditions to be fulfilled, hereby determines that the Applicant's request for minor subdivision approval pursuant to N.J.S.A. 40:55D-47 along with ancillary variance relief pursuant to N.J.S.A. 40:55D-70c should be granted in this instance.

The Board finds that any alleged deficiency with the Public Notice, as to the time of the hearing, was cured by virtue of the application commencing after 7:30 p.m. The issue has therefore been rendered moot.

The Board also finds that the Applicant relied upon the 200 ft. list provided by the Borough dated February 10, 2022 in mailing individual Notice to the property owners within 200 ft. of the subject Property. The Board further finds that the Applicant had no knowledge that the 200 ft. list was inaccurate. To that end, the Board finds that the Municipal Land Use Law permits the Applicant to rely upon the accuracy of the 200 ft. list, even if the 200 ft. list may not have reflected the current property owner(s) of certain properties. Notice was therefore proper and the Board properly had jurisdiction to hear the application.

The Board finds that the Applicant has proposed a minor subdivision which requires ancillary variance relief. The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict ancillary and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the

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

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

The Board finds that the Applicant has satisfied the positive criteria pursuant to the “flexible” statutory standard. The Board finds that the proposed subdivision promotes

appropriate population densities identified in the Borough Code and also promotes a desirable visual environment, while providing adequate light, air and open space. These attributes both promote the goals of planning identified at N.J.S.A. 40:55D-2 and benefit the entire community. The Applicant has therefore satisfied the positive criteria pursuant to N.J.S.A. 40:55D-70c(2).

The Board further finds that the Applicant has also satisfied the negative criteria. The grant of variance relief will not change a pre-existing non-compliant condition that has existed since the 1970s. Moreover, the proposed front-yard setback is similar to other front-yard setbacks in the neighborhood and, thus, granting the proposed subdivision will not result in increased traffic beyond what is contemplated by the Ordinance, increased noise or noxious odors. The Board therefore finds that the grant of variance relief will not result in substantial detriment to the public welfare or substantially impair the zone plan or zoning ordinance. The negative criteria has therefore been satisfied.

The Board concludes that the positive criteria substantially outweighs the negative criteria and that variance relief may be granted pursuant to N.J.S.A. 40:55D-70c(2).

With the exception of the above relief, the Applicant complies with all other zoning, subdivision and design criteria ordinance requirements. Minor subdivision approval pursuant to N.J.S.A. 40:55D-47 is therefore appropriate. The Board notes that the Applicant is required to comply with Borough Zoning Ordinances and file an appropriate Storm Water Management, Drainage, and Grading Plan, prior to constructing a dwelling on Proposed Lot 6.02

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 14th day of April 2022, that the action of the Land Use Board taken on March 10, 2022 granting

Application No. LUB2021-06, for minor subdivision approval pursuant to N.J.S.A. 40:55D-47 along with ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c(2) is as follows:

The application is granted subject to the following conditions:

1. All site improvement shall take place in strict compliance with the testimony and with the plans and drawings which have been submitted to the Board with this application, or to be revised.
2. Except where specifically modified by the terms of this Resolution, the Applicant shall comply with all recommendations contained in the reports of the Board professionals.
3. The Subdivision Plat or Deed recorded memorializing this subdivision shall specifically refer to this Resolution and shall be subject to the review and approval of the Board Engineer and Board Attorney. The Applicant shall record the Subdivision Plat or Deed within 190 days of the memorializing Resolution being adopted. Failure to do so shall render this approval null and void.
4. Prior to developing Proposed Lot 6.02, the Applicant shall provide a Storm Water Management, Drainage & Grading Plan to the Board professionals for review, and shall comply with all relevant stormwater management requirements.
5. Any new construction of single-family dwellings on Proposed Lot 6.01 or Proposed Lot 6.02, shall require plot plan approval.
6. The buffer between Block 14, Lot 7 shall be consisted with the representations made on the record.
7. The Applicant shall provide a certificate that taxes are paid to date of approval.
8. Payment of all fees, costs, escrows due and to become due. Any monies are to be paid within twenty (20) days of said request by the Board Secretary.
9. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Highlands, County of Monmouth, State of New Jersey or any other jurisdiction.

BE IT FURTHER RESOLVED that the Board secretary is hereby authorized and directed to cause a notice of this decision to be published in the official newspaper at the Applicant' expense and to send a certified copy of this Resolution to the Applicant and to the Borough Clerk, Engineer, Attorney and Tax Assessor, and shall make same available to all other interested parties.

Robert Knox, Chairman
Borough of Highlands Land Use Board

ON MOTION OF:

SECONDED BY:

ROLL CALL:

YES:

NO:

ABSTAINED:

ABSENT:

DATED:

I hereby certify this to be a true and accurate copy of the Resolution adopted by the Highlands Land Use Board, Monmouth County, New Jersey at a public meeting held on April 14, 2022.

Nancy Tran, Secretary
Borough of Highlands Land Use Board

BOROUGH OF HIGHLANDS LAND USE BOARD

EXHIBITS

Case No. LUB2021-06/THOMAS J. FAHEY

Minor Subdivision with Ancillary Variance Relief

April 14, 2022

- A-1 Minor Subdivision Plan prepared by Richard E. Stockton & Associates, Inc. dated September 30, 2021.
- A-2 Wetlands Letter Report prepared Eastern Civil Engineering LLC dated February 25, 2022.
- A-3 Photo Board: Consisting of Three Photos of the Existing Home, Proposed New Lot, and Existing Lot.
- A-4 Aerial Photograph of the Subject Area.
- A-5 Historical Photograph of the Subject Area.
- A-6 Jurisdictional Package inclusive of Certified List, Affidavit of Service and White Cards.