



BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH

LAND USE BOARD RESOLUTION 2023-13

MEMORIALIZATION OF INTERPRETATION AND BULK VARIANCE APPROVAL

MATTER OF: NICOLE FLORIT, 357 SHORE DRIVE (BLOCK 103, LOT 8)

APPLICATION NO. LUB2023-04

Approved: September 14, 2023

Memorialized: September 27, 2023

WHEREAS, an application seeking both an interpretation of Borough Code §21-98(F)(2) pursuant to N.J.S.A. 40:55D-70b as well as for bulk variance relief pursuant to N.J.S.A. 40:55D-70c has been made to the Borough of Highlands Land Use Board (hereinafter referred to as the “Board”) by Nicole Florit (hereinafter referred to as the “Applicant”) on lands known and designated as Block 103, Lot 8, as depicted on the Tax Map of the Borough of Highlands (hereinafter “Borough”), and more specifically located at 357 Shore Drive, Highlands, New Jersey, in the R2.03 (Residential) Zone District; and

WHEREAS, a public hearing was held before the Board on September 14, 2023 with regard to this application; and

WHEREAS, the Board has heard testimony and comments from the Applicant and consultants, and with the public having had an opportunity to be heard; and

WHEREAS, a complete application has been filed, the fees as required by Borough Ordinance have been paid, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised.

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

1. The Applicant was represented by Counsel, Salvatore Alfieri, Esq. The Applicant presented testimony of the Applicant, its architect, Antonio Scalise, A.I.A., and its professional planner, Andrew Janiw, P.P.
2. The applicant submitted the following documents in support of this application:
 - a. Land Use Board Application, dated June 28, 2023.

- b. Survey of Property, prepared by David Von Steenburg, P.L.S., of Morgan Engineering dated October 4, 2021.
 - c. Architectural Plans, prepared by Antonio Scalise, A.I.A., of Parallel Architectural Group dated July 20, 2022.
3. The application for bulk variance relief for the proposed additions and pre-existing nonconforming conditions include:
- a. Minimum lot area of 1,811 s.f. where 5,000 s.f. is required (existing condition);
 - b. Lot width of 30 ft. where 50 ft. is required (existing condition);
 - c. Lot depth of 61 ft. where 100 ft. is required (existing condition);
 - d. Front yard setback of 11'9" is proposed where 20 ft. is required;
 - e. Rear yard setback of 6'3.5" ft. is proposed where 20 ft. is required;
 - f. Total side yard setback of 7'10" where 8 ft. is required;
 - g. Side yard setback of 1'7" and 6'3.5" where 6 ft. is required;
 - h. Building coverage of 57% is proposed where 30% is allowed;
 - i. Front yard setback to stairs of 11" is proposed where 3 ft. is required (existing condition);
 - j. Side yard setback of 1" for the soffit on the north side of the home where 3' is required; and
 - k. Side yard setback to stairs of 2'-3.5" on the south side of the home where 3' is required (existing condition).
4. As brief background, a prior application was filed in 2015 by then owner, Sandra Anasoulis, who sought approvals to demolish the existing structure and construct a new one-floor house, elevated to comply with FEMA standards. The Application was approved by Resolution memorialized on October 1, 2015 (the "2015 Resolution").

5. In October 2021, the applicant Ms. Florit acquired the property. Ms. Florit applied for and received a Zoning Permit and Construction Permits to expand the house by constructing an additional second habitable floor over the existing one habitable story residence. After initiating of construction in 2023, complaints were received from a neighboring property owner who argued that variances had not been obtained to allow for the work being undertaken. By letter dated June 8, 2023, Borough Zoning Officer Brian O'Callahan determined that the proposed enlarged structure required an application and variance approval from this Board, issuing a Stop Work Order. The applicant promptly filed this application seeking both an interpretation of Code §21-98(F)(2) and bulk variances as required to allow it to implement her construction plans. The interpretation application was not pursued by the applicant.
6. In support of her application, the Applicant presented testimony of the Applicant, its architect, Antonio Scalise, A.I.A., and its professional planner, Andrew Janiw, P.P. Ms. Florit testified that there was no intention to deceive the Borough since she was unaware that any variances were required and since she relied on the Borough issued zoning permit and construction permits (marked collectively as Exhibit A-1), which the Borough issued without informing her that any variances were required. In her opinion, the house simply could not be put back into its prior form and that it was too late to undo the changes.
7. Architect Scalise provided an overview of his plans, which were marked collectively as Exhibit A-2. Mr. Scalise also acknowledged that he too was unaware that any variance relief was required, particularly since the variances that were later identified as being required were not obvious in any way, since the improvements were over and above existing improvements. There are no changes to the existing setbacks, and the proposed height actually complies with the ordinance when measured consistent with the approach utilized by the ordinance, but the Applicant included a

height variance as part of its application and public notice to be conservative. Moreover, the second floor construction lies entirely within the existing first floor footprint, but the elevated second floor balcony was included as building coverage as required by the ordinance.

8. Finally, Planner Janiw provided the Board with an overview of the property and the surrounding neighboring, testifying that the requested variances satisfied the standards required under the Municipal Land Use Law. Mr. Janiw referred to his own planning exhibits, marked as Exhibits A-3 through A-11, which included annotated maps and photographs depicting the consistency of the subject property and proposed improvements compared with the neighboring properties in particular and the neighborhood in general. Mr. Janiw testified that the existing conditions qualified for variance relief under the C(1) hardship standard, whereas the new proposed variances (building coverage, porch/soffit setback and those variances created by the addition of a second floor) qualified under the C(2) flexible variance standard. Mr. Janiw explained that the proposed improvements were entirely consistent with the Borough becoming a year round residential community rather than seasonal use.
9. Objector, neighboring property owner Neal Taber, 4 Fay Street, was represented by attorney Bernard M. Reilly. Mr. Reilly presented the testimony of the objector as well as professional planner, Andrew Thomas, P.P. Mr. Taber raised three (3) primary objections to the Application: (a) that the proposed improvements were incompatible with the 2015 Approval; (b) that variance relief was prohibited by Code §21-98(F)(2); and (c) the applicant's improvements, if permitted, would result in an intensification of existing nonconformities and create a "substantial adverse impact" on neighboring properties such as his, impacting the "light, air and open space" that his property currently enjoys. Mr. Thomas introduced Exhibits O-1 through O-5 in support of his opinion that the proposed variances were not factually supported and should be denied.

10. When the meeting was opened for public comment, several Borough residents appeared, expressing opinions both in favor and in opposition to the Application, for the same reasons articulated by both the Applicant and the Objector, respectively.

WHEREAS, the Borough of 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 hereby determines that the Applicant may be granted bulk variance relief pursuant to N.J.S.A. 40:55D-70c(1) (preexisting conditions) and c(2) (new bulk variances).

The Board finds that the Applicant has proposed a permitted use on the subject property. The proposal, however, requires bulk variance relief both to confirm numerous preexisting non-conforming conditions as well as the creation of several new conditions triggered by the proposed building improvements. The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the Applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the Applicant may be entitled to relief under the c(1) hardship standard if the specific parcel is limited by exceptional narrowness, shallowness or shape. 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 (“positive criteria”) necessary in order to obtain “bulk” or (c) variance relief. Finally, the 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 (the “negative criteria”). 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. The Board finds that the proposed improvements enhance both the aesthetics and the year-round usefulness and habitability of the subject property and also result in a diversified housing stock. These benefits not only benefit the Applicant, but having year round habitability also advances the interests of the entire community. The Board therefore concludes that the goals of planning as enumerated in N.J.S.A. 40:55D-2 have been advanced. The Applicant has therefore satisfied the positive criteria.

The Board also finds that the negative criteria has been satisfied. The enlarged home will also be consistent and fit in seamlessly with the prevailing neighborhood residential scheme. All flood elevation requirements will be satisfied. The proposal is consistent with the Borough’s overall goals and objectives of providing safe, useful and visually attractive homes. The Board therefore concludes that there is no substantial detriment to the zone plan or the zoning ordinance. There has also been no substantial detriment to the public welfare, such that the negative criteria have been satisfied.

With respect to the new variances proposed, the Board further concludes that the positive criteria substantially outweighs the negative criteria and that bulk variance relief may be granted pursuant to N.J.S.A. 40:55D-70c(2). The Board also finds and concludes that the property is particularly suitable for the proposed improvements, and that the bulk variances granted here will not cause any substantial detriment to the public good and will not substantially impair the intent and purpose of the ordinance of the Borough of Highlands.

Given the objections raised by the Objector and several Borough residents, the Board also makes the following additional findings of fact and conclusions of law. First, the Board finds that neither the Applicant nor her architect sought to deceive the Zoning Officer or the Construction Department, and in fact the Applicant and her architect relied reasonably upon the issuance of zoning and construction permits in the ordinary course.

Second, the Board rejects efforts by the Objector and Borough residents to claim that the 2015 Resolution effectively prohibits the relief sought by this Application. The argument evinces a fundamentally flawed understanding of the approval processes set forth by the Municipal Land Use Law. Single family properties such as the subject property are exempt from site plan approval, but are only required to obtain variance approvals if the application is at variance with the applicable use and/or bulk standards. Such variance requests are heard and decided at public hearings such as that just held by the Board for this Application. As the name implies, public hearings are open to the public and allow members of the public to participate during the Board approval process by either supporting or opposing a variance application. At the conclusion of the public hearing, the Board votes to either approve or deny the application, which decision is then set down in a written resolution to memorialize the action taken at the public hearing. Granted variances, including any conditions, run with the land meaning they are not specific to a particular applicant but will be binding upon all subsequent owners,

occupants or tenants. Here, there is nothing in the 2015 Resolution that even remotely suggests the Board was prohibiting any future variance applications involving the subject property. Nor could a resolution ever have such an effect unless an approval condition explicitly required recordation of a restrictive covenant or other restriction on the property's title that prohibited future development. Whether or not the Applicant or her architect had knowledge of the 2015 Resolution is immaterial as that document is not, nor can it be, interpreted as serving as something akin to a restriction against further development as suggested by the Objector. Instead, the 2015 Resolution, by its own terms, granted the relief sought by a prior owner of the Subject Property, and did not purport to limit future applicants or applications.

Third, the Board categorically rejects the argument that Code §21-98(F)(2) can be read as prohibiting the expansion or enlargement of non-conforming dwellings when located on lots of less than 2,500 square feet. The Board's interpretation of Code §21-98(F)(2) is consistent with that provided by the Board Engineer Edward Hermann at the public hearing, that Code §21-98(F)(2) was intended only to simplify the reconstruction process for non-conforming dwellings on larger lots. The Board further finds that Code §21-98(F)(2) does not now, nor has it ever been interpreted as prohibiting variance applications involving lots under 2,500 square feet.

Lastly, the Board previously found that the Applicant had satisfied its burden of proof by demonstrating that at least one purpose of planning was promoted by the proposed improvements. The objectors argue that the variance proposal should be denied its entirety because in their view the proposed improvements to the subject property would impact the light, air and open space available to a neighboring property owner. The Board rejects that argument for two reasons. First, the photographs presented by the Objector do not support the argument, as the proposed construction was clearly having little to no impact upon the Objector's property, including the landscaping planted

along the shared property line, on the Objector's side of his own fence. Second, because the Board specifically found that the Applicant had satisfied a purpose of planning, the argument that failure to satisfy a separate purpose of planning would require a variance denial is inconsistent with the MLUL.

For these reasons, by granting the variance relief sought, the Board finds it is appropriate in this particular case to allow the Applicant to rely upon the zoning permit and construction permits issued previously for this structure. The Board finds that it is also appropriate to grant pursuant to the C(1) standard all preexisting non-conforming property conditions as well as variances under the C(2) standard to allow for the specific construction permit plans previously approved by the Construction Code Official.

NOW, THEREFORE, BE IT RESOLVED by the Borough of Highlands Combined Land Use Board on this 27th day of September, 2023, that the action of the Board taken on September 14, 2023, granting Application No. LUB2023-04 of Nicole Florit for the interpretation request sought pursuant to N.J.S.A. 40:55D-70b and for bulk variance relief pursuant to N.J.S.A. 40:55D-70c(1) and c(2) is hereby memorialized.

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's 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 September 27, 2023.

Nancy Tran, Secretary
Borough of Highlands Land Use Board