



BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH

LAND USE BOARD RESOLUTION 2022-14

MEMORIALIZATION MINOR SITE PLAN WITH ANCILLARY VARIANCE RELIEF DENIAL

Denied: May 12, 2022
Memorialized: July 14, 2022

IN THE MATTER OF KERRY M. FARRELL
APPLICATION NO. LUB 2021-07

WHEREAS, an application for minor site plan approval with ancillary variance relief has been made to the Highlands Land Use Board (hereinafter referred to as the “Board”) by Kerry M. Farrell (hereinafter referred to as the “Applicant”) on lands known and designated as Block 43, Lot 7, as depicted on the Tax Map of the Borough of Highlands (hereinafter “Borough”), and more commonly known as 32 Shrewsbury Avenue in the WT-R (Waterfront Transition-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 May 12, 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 7,180 s.f. with 47.5 feet of frontage on Shrewsbury Avenue and is improved with an existing single-family, two-story dwelling. The subject Property is located within the WT-R (Waterfront Transition Residential) Zone.

2. The Applicant is seeking minor site plan approval along with ancillary variance relief to reconstruct a one-story wood framed garage located in the side yard.

3. In accordance with Section 21-93 of the Ordinance existing/proposed bulk deficiencies are noted as follows. The minimum lot frontage allowed is 50 feet, whereas 47.5 feet is existing and is proposed. The minimum front yard setback for an accessory structure is 55 feet, whereas 54.8 feet is existing and is proposed. The minimum side yard setback for an accessory structure is 3 feet, whereas 0.90 feet is existing and is proposed.

4. The Board had initially heard testimony and approved this application at its March 9, 2022 meeting. It was later found that notice was defective, and the Board lacked jurisdiction. The hearing and vote held by the Board on March 9, 2022 is therefore null and void.

5. Counsel for the Applicant, Thomas Hirsch, Esq. appeared on behalf of the Applicant. He stated that this application had previously been heard by the Board, but due to an issue with noticing, the Applicant had returned to conduct a new hearing. He stated that the Applicant was seeking setback variance relief to rebuild a 212 square foot garage that was destroyed in Hurricane Sandy.

6. The Applicant, Dr. Kerry Farrell, testified that she has owned the subject Property since 2012 and it had been owned by members of her family prior to that time. She stated that the house was built in 1904 and that the garage was built in the 1940s. Dr. Farrell noted that

members of her family had purchased the subject Property in 1954 and it has been in her family since.

7. Dr. Farrell then testified that Hurricane Sandy had punched a hole in the rear wall of the garage. After Sandy, Dr. Farrell removed some of the damaged walls and roof that were in danger of collapse. She stated that the concrete foundation, two (2) walls and beams of the roof remained.

8. Dr. Farrell also stated that she prepared plans with an architect to rebuild the garage in June 2016, and obtained construction and electrical permits from the Borough in July 2016. Dr. Farrell offered additional testimony that upon receipt of those permits, she proceeded to commence construction on the garage consistent with the plans that were approved and ordered materials and framed out the first level of the garage prior to receiving a stop work order in 2018.

9. Dr. Farrell further testified that after her permits were issued, the Borough Construction Official informed her that after Hurricane Sandy, FEMA had changed the flood designation of the surrounding area such that the subject Property was located in the V-zone, which did not permit garages.

10. Dr. Farrell provided additional testimony that again in 2018, FEMA changed the flood designation for the subject Property, designating it as being located in the AE Zone, such that garages were permitted so long as they were constructed to V-zone standards. At the same time, the Borough Construction Official issued a stop-work order because too much (more than 50%) of the original garage had been torn down.

11. Dr. Farrell testified that she was now seeking variance relief from the side yard setback and front yard setback requirements. She explained that variance relief was required because more than 50% of the original structure was taken down and the conditions are not considered “pre-existing”. Dr. Farrell then confirmed that the residential use is not being changed.

12. The Applicant’s Architect, Robert Adler, P.A. testified that the proposed garage would be built upon the existing foundation. The mean height of the roof of an accessory structure in the zone is 15 feet, which the proposed garage meets and does not exceed (and, thus, no variance relief is required). The garage would have vinyl siding. The garage is close to the property line, which will be factored in during construction so as to not trespass on the neighbors’ properties.

13. Mr. Adler further testified that the garage would have breakaway walls as required for the zone. The walls would be comprised of two (2) levels, so the entire wall will not breakaway during a flood. He then stated that only the lower half would breakaway during a flood, with the upper portion only breaking away if the water level rises to that height. The two-level walls help reduce debris during a flood event.

14. Mr. Adler also testified that flood vents would also be included for water events that are more typical and, thus, do not require use of the breakaway walls.

15. Mr. Adler further stated that the garage is setback eleven (11) inches from the side yard property line. The roof eaves overhangs are six (6) inches, so the roof overhang stays on the subject Property by five (5) inches.

16. Mr. Adler provided additional testimony confirming that low maintenance materials will be used; vinyl siding and Azek trim. The garage will have a traditional aesthetic, which fits with the neighborhood and the primary house.

17. The hearing was then opened to the public, at which time Annemarie Tierney asked if the garage next to the house is consistent with the neighborhood. Mr. Adler testified that other houses have attached garages, some detached garages that are spaced further from their respective houses, but this proposal is consistent with what existed prior to Hurricane Sandy.

18. Ms. Tierney further asked if any houses in the neighborhood have a detached garage on the side of the house like this proposal. Mr. Adler testified that he did not know of any.

19. Kathy Campbell appeared before the Board and asked how high the roofline of the proposed garage will be. Mr. Adler stated that the mean height of the garage is 14 feet 10 inches, where 15 feet is the maximum mean allowed for accessory structures. She further asked how high the roofline of the original garage was. Mr. Adler did not know how high the original roofline was, but stated that the proposed height of the garage is consistent with the zone requirements.

20. Gerald (Jay) Beyer asked why the proposed garage is larger than the original garage. Mr. Adler testified that the purpose of the changed roof is to be more consistent with the zone. The proposed roofline is better aesthetically than the original.

21. Mr. Beyer further asked if the Applicant required a variance for the roof. Mr. Adler stated that variance relief was not required for the roof. He added that the Applicant was not

proposing to rebuild the original garage, just proposing to build a garage that fits within the neighborhood.

22. Frank Barbara asked for clarification that the variance for the side yard setback is eleven (11) inches from the property line and the overhang is six (6) inches closer to the property line. Mr. Barbara further asked if the overhang makes the setback five (5) inches. Mr. Adler explained that variances for setbacks are measured at the base of the structure. The Board Engineer explained that the Uniform Construction Code (“UCC”) provisions that are incorporated into the Zoning ordinance measure the setbacks from the structure itself. The UCC provisions has ancillary allowances for overhangs, cantilevers, etc. up to two (2) feet from the structure.

23. In response to a question about whether she intended to lift her home because it was located in the AE Flood Zone, Dr. Farrell testified that although she did not know the exact base flood elevation, she had been advised that she did not have to lift the house because the dwelling had not been deemed substantially damaged, such that it was required to be lifted.

24. In response to a question from the Board, Dr. Farrell testified that fencing will exist along the adjoining property where the proposed garage is to be located.

25. The hearing was then opened to the public for comment, at which time Ms. Tierney testified that the original garage had a flat roof and was knocked out by Hurricane Sandy. She testified that the proposed garage will impede the view of the neighbors. She stated that setbacks exist for a reason and that the current swelling is not at a flood elevation. Ms. Tierney further testified that the house is not occupied or rented, therefore she does not understand the need for a garage.

26. Ms. Tierney continued testifying that the garage will have a substantial impact on the view. She did not believe that variances should be given for an accessory building that is not necessary. She concluded by testifying that although a newly-constructed garage would be good, it does not outweigh the value of her view.

27. Ms. Campbell testified that she agreed with Ms. Tierney that the proposed garage would negatively impact the view. She stated that she lives directly across the street from the subject Property. She explained that she once had a better view, but a house was built on the property immediately next to the subject Property.

28. Carl Glickstein, 23 Shrewsbury Avenue, testified that he agreed that the view would be negatively impacted. He testified that he lives diagonally across the street from the subject Property.

29. Jay Beyer, 27 Shrewsbury Avenue testified that the original garage had existed for over 60 years, and that the proposed garage is different. He testified that he had no issue with rebuilding the garage after Hurricane Sandy, but the Applicant should not be able to build a garage that is larger than the original. The height of the garage is his concern and the variance should not be granted.

30. Frank Barbara, 30 Shrewsbury Avenue, testified that the proposed garage would be located right on the property line, which he shares with Dr. Farrell. He referenced page 57 of the application packet, which shows an image of the subject Property, the current two-story dwelling, and existing garage structure. The garage is located right on top of the property line.

31. Mr. Barbara continued testifying that the purpose of setbacks is for safety. Granting the variance in this instance, Mr. Barbara testified would create a safety risk without reward. He is concerned that in case of fire, there is an increased risk of damage to his property.

32. Jake Kimmelman, 34 Shrewsbury Avenue, testified that it was his understanding that setbacks exist for fire safety and uniformity throughout town. The proposal is to build directly on the property line, which will be the only garage of its kind in the neighborhood and would have a negative affect on the neighborhood.

33. Mr. Kimmelman further testified that he was concerned with the fire hazard the proposal may create. He testified that he never has seen anyone stay at the house overnight and that the house is vacant. He was concerned that if a fire breaks out at night, there is no one at the house to respond to the fire. He recommended that the Board deny the application and require the Applicant take down the remaining parts of the garage.

34. Dr. Farrell then testified that Hurricane Sandy had destroyed the original garage and that the proposed garage is slightly taller than the original structure. Dr. Farrell further testified that there would be a very small change in the view that the neighbors had previously enjoyed. She further testified that she did consider the neighbors' view when developing these plans. She conceded that some views may be diminished, also stated that some of the testimony from the public was inaccurate. She further testified that the extra height is crucial for the design element and improves the aesthetics. The extra height is also for parking and storage.

35. In response to questions from the Board, Mr. Adler testified that the house could be higher than base flood elevation, but the garage cannot. If the garage complied with the

setback of three (3) feet, then the Applicant would not have to be before the Board as the height complies with the zone.

36. Mr. Adler provided additional testimony that, within the setback area, there is only about two (2) feet of the garage that blocks the view. He reiterated that the zone allows the height proposed. The Applicant is only before the Board seeking variance for the setbacks, which is the focus of this hearing.

37. In response to concerns from the public, Mr. Adler testified that safety is not a purpose of setbacks and that structures are built on property lines all the time. The setback does not make the garage any more or less likely to catch fire. Whether a person is at the subject Property overnight does not increase the likelihood of a fire.

38. Mr. Adler also testified that the fire code addresses fire concerns, not the setbacks. He further testified that the proposed garage would be built according to the fire building code.

39. The Board commented that there was a fire March 3, 2011, that started at 28 Shrewsbury Avenue and spread to 30 Shrewsbury Avenue, and that the distance between those houses was greater than the proposed distance between the subject Property and 30 Shrewsbury Avenue. In response thereto and from Board member questions, Mr. Adler testified that the homes involved in the fire had been built many years ago and may not have been built to code, whereas the proposed garage would be built to current fire code standards.

40. Ms. Tierney reappeared before the Board to provide further testimony. She showed a picture of the original garage and again testified that garage used to have a flat roof.

41. Ms. Tierney asked what the height of the peak of the proposed roof is. Mr. Adler testified that the peak is 16 feet. Ms. Tierney stated that the proposed garage is six (6) feet higher than the original garage and that setbacks are to preserve sight views.

42. Ms. Tierney testified that there are no other garages like this on Shrewsbury Avenue. There are some detached garages at the rear of properties, but none on the side. She further asked how far the garage would be located from the dwelling, to which Mr. Adler testified that the garage is six (6) inches from the house.

43. Ms. Tierney testified that the proposed garage with the house effectively blocks the view along the entire front of the property, which is a substantial change to the neighbors' views. She testified that she does not support building something this tall and will lose view from the first and second floors of her home.

44. Mr. Adler responded testifying that the roof height complies with the zone requirements. The roof where the variance for the setback is needed is much lower than the peak. The highest point and dormer are within the setback.

45. In response to questions from the Board, Dr. Farrell testified that putting the garage in the backyard would have a worse impact on the views of the neighbors and created a great obstruction for the neighbors to either side of the subject Property.

46. In response to the concern of the Board regarding fire safety, Mr. Adler testified that the fire code is what makes structure safe, not the setbacks. He also addressed the public's concern of the view stating that moving the garage to the backyard would have a more negative effect on views.

47. Dr. Farrell further testified that the proposed garage does not block neighbors' views any more than their current views as the house blocks the view. The height of the garage does not change the current view. She testified that there are other single car garages in the neighborhood that are close to property lines, just this proposed garage faces the road.

48. The Applicant's Attorney, Mr. Hirsch, argued that the Applicant was seeking the variance as a hardship, c(1) variance. The New Jersey courts have recognized that a hardship does not have to be caused by the physical land, but can also be caused by an existing permitted structure. He argued this application meets that hardship because of the existing foundation of the garage and the location of the house on the subject Property. He argued that the roof height is standard for the zone and is based on the percentage of the peak, which the proposal complies. It will be a small section of the roof that is higher. The proposed garage is more aesthetically pleasing. There are structures all over town that are fire hazards. This will be built to the latest fire code, thereby reducing fire hazards. The lot is 2.5 feet narrower than permitted in the zone, so if the lot width complied with the zone, the garage could fit on the subject Property without a need for a variance. The house was built long before the zoning ordinances and the original garage was built not too long after. The house takes up most of the land creating the hardship for c(1). The c(1) variance should be granted because of the existing house, the narrow lot, and the existing foundation of the garage.

49. Mr. Hirsch further argued that the negative impact will be minimal. Fire risk is based on how the structure is built, not how close the structure is to other structures. The setback makes no impact on fire risk. The fire risk is addressed by the fire code, which this proposal will follow thereby mitigating the negative impact of fire risk. He argued the neighbors are not

entitled to the views, but even if they were, there are no changes to their views. The zone allows this height.

50. The Board discussed the merits of granting the c(1) variance, and observed that there was testimony that the garage could be built elsewhere on the subject Property without variance relief. The Board further discussed how Hurricane Sandy created the situation but that the Applicant proposes more than just rebuilding the original garage from Hurricane Sandy. The proposed garage would have a higher roof and the public is concerned with the height of the structure, although no variance was needed or requested for the height of the proposed garage.

51. In response to further questions from the Board, Mr. Adler testified that the garage is six (6) inches from the existing home. The roof lines are not causing the setback issues and there will not be any overhang by the house as there is no room. The garage cannot be moved closer to the house.

52. Mr. Adler further testified that the roof design could be modified as a condition of approval. The Applicant agreed to lower the proposed garage height by two (2) feet to make the total height fifteen (15) feet instead of the mean height of fifteen (15) feet. The dormer would be removed. The roof design would remain with those modifications and Mr. Adler offered additional testimony that these modifications should allay the public's concerns.

53. There were no other members of the public expressing an interest in the application, at which time the public portion was closed.

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 site plan approval pursuant to N.J.S.A. 40:55D-46.1 along with variance relief pursuant to N.J.S.A. 40:55D-70c should be denied in this instance.

The Board finds that the Applicant has proposed a minor site plan which requires 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.

The Board finds that the Applicant has failed to satisfy the positive criteria. The Board first addresses the Applicant's request for a hardship variance pursuant to N.J.S.A. 40:55D-70c(1). The Applicant's testimony could be interpreted to allege that the garage structure lawfully existed prior to its destruction in Hurricane Sandy. The Applicant, however, never applied for or obtained a certification of pre-existing non-conforming structure pursuant to N.J.S.A. 40:55D-68. Such an application also has public noticing requirements. Accordingly, to the extent the Applicant's

testimony could be interpreted to allege that the garage structure lawfully existed prior to its destruction in Hurricane Sandy, the Board is therefore constrained to find that the structure was lawfully pre-existing. The Board further finds that the Applicant is not merely seeking to reconstruct the garage at the same dimensions. Rather, the new proposed garage will be larger. The Board also recognizes the testimony which demonstrated that a new garage could be constructed in conformance with Ordinance requirements. The Board also acknowledges the testimony from the Applicant's professional that although constructing a garage in the rear yard could have a negative impact to the neighbors, the garage could be so constructed in conformance with the zoning requirements. The Board therefore does not find a hardship.

The Board also does not find that the positive criteria has been satisfied under the "flexible" variance standard at N.J.S.A. 40:55D-70c(2). The Applicant has not demonstrated that any of the goals of planning enumerated at N.J.S.A. 40:55D-2 would be advanced in the public interest. The Applicant's Architect testified that the grant of variance relief would create a desirable visual environment. The Board, however, finds that variance relief is not required in order achieve this goal. The structure could be rebuilt at the same dimensions and still be visually attractive. It could also be rebuilt in compliance with Ordinance requirements and achieve a desirable visual environment.

Based upon the foregoing, the Board finds that the Applicant has failed to satisfy the positive criteria under either the c(1) or c(2) criteria.

The Board also finds that the Applicant has failed to satisfy the negative criteria. The Board finds that the proposed detached garage design is out of character with the other garages in the neighborhood and would be inconsistent and detrimental to the prevailing neighborhood

scheme. The purpose of the set back is also to maintain adequate light, air and open space between lots. The proposed setbacks are virtually on top of the property line and do not achieve any of these critical goals of the Ordinance. While the Ordinance does not require a “view corridor”, the required bulk standards result in open space and attractive views. Both would be frustrated by the proposed plan. The Board therefore finds that the grant of variance relief would result in substantial detriment to the public good and substantial impairment of the zone ordinance and the zone plan. The Applicant has therefore failed to satisfy the negative criteria.

The Board finds that the failure to satisfy either the positive or the negative criteria results in denial of variance relief pursuant to N.J.S.A. 40:55D-70c(1) and (2).

To the extent that minor site plan approval is required in connection with an application regarding a single family home pursuant to N.J.S.A. 40:55D-46.1, such request has been rendered moot by the denial of variance relief.

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 9th day of June 2022, that the action of the Land Use Board taken on May 12, 2022 denying Application No. LUB2021-07, for minor site plan approval pursuant to N.J.S.A. 40:55D-46.1 along with ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c(1) and (2) is as follows:

The application for variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) and (2) and minor site plan approval pursuant to N.J.S.A. 40:55D-46.1 as well as the Land Use of ordinance of the Borough of Highlands is hereby denied.

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 June 9, 2022.

Nancy Tran, Secretary
Borough of Highlands Land Use Board

BOROUGH OF HIGHLANDS LAND USE BOARD

EXHIBITS

Case No. LUB 2021-07/KERRY FARRELL

Minor Site Plan Approval with Ancillary Variance Relief

June 9, 2022

- A-1 Land Use Board Application, dated December 8, 2021.
- A-2 Architectural Plans prepared by Robert W. Adler & Associates, PA, dated November 11, 2021.
- A-3 Engineering Review Letter prepared by Edward W. Herrman, P.E., dated March 6, 2022.
- A-4 Undated photograph of old garage.