



BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH

LAND USE BOARD RESOLUTION 2023-09

**MEMORIALIZATION OF PRELIMINARY AND FINAL MAJOR SUBDIVISION APPROVAL
WITH ANCILLARY VARIANCE RELIEF**

Approved: February 9, 2023

Memorialized: April 13, 2023

**IN THE MATTER OF BOROUGH OF HIGHLANDS
APPLICATION NO. LUB2022-09**

WHEREAS, an application for preliminary and final major subdivision approval with ancillary variance relief has been made to the Highlands Land Use Board (hereinafter referred to as the "Board") by Borough of Highlands (hereinafter referred to as the "Applicant") on lands known and designated as Block 101, Lot 3, as depicted on the Tax Map of the Borough of Highlands (hereinafter "Borough"), and more commonly known as Locust Street in the WC-2 (Waterfront Commercial 2) 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 February 9, 2023, 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 0.66 acres and is located within the Waterfront Commercial 2 (WC-2) Zone of the Borough. The Applicant currently owns the subject Property by way of a prior foreclosure. The Applicant seeks to subdivide small portions of the subject Property in order to reconcile certain longstanding building encroachments with adjacent neighboring properties. The Applicant intends to ultimately sell these small properties to the affected adjacent owners such that the encroachments will be addressed.

2. The Applicant is proposing to create three (3) new lots and retain a remainder lot for a total of four (4) lots. This number of lots would require classification as a “major” subdivision. While technically a “major” subdivision, the characteristics of the application are more similar to a minor subdivision, because there are no proposed roadways, stormwater basins and lighting improvements.

3. The proposal would result in isolated, land-locked lots identified as Lots 3.02 and 3.04. Proposed Lots 3.01 and 3.03 would technically have ten (10) feet of frontage on Mathews Street, which is identified as having a twenty (20) foot wide right of way. The Applicant is proposing a ten (10) foot wide flag stem connecting Mathews Street to proposed Lot 3.01 (the large remainder lot), but this technically would not be considered a public street. This flag stem would be preserved for access to the lands remaining parcel.

4. Counsel for the Applicant, Andy Ball, Esq., stated that the subject Property contained approximately 29,000 square feet. He stated that the Applicant was seeking have the subject Property preserved as open space and listed on the NJDEP’s Recreation and Open Space Inventory (ROSI). He explained that the Applicant had obtained the subject Property through an

In Rem tax foreclosure action in 2001. Mr. Ball represented that the Applicant was seeking to subdivide the southern portion of the subject Property which abut other residential properties with encroachments onto the subject Property.

5. Mr. Ball represented that the Applicant was seeking to create subdivision lines where the encroachments were located in order to create three (3) small lots and a remainder fourth lot, which would remain Borough property. Mr. Ball stated that the Applicant would then seek to sell each of the small lots to the adjacent property owners at fair market value. He also represented that the encroachments were depicted on a 1977 survey and had been created in the 1940s.

6. Mr. Ball next represented that the Applicant was seeking to have the subject Property listed on NJDEP's ROSI. He explained that one of the requirements to be listed on the ROSI was to be free of all encroachments. He further explained that the proposed subdivision would resolve the encroachment issue. Mr. Ball further represented that the Applicant would maintain the remaining lot as it exists presently.

7. Mr. Ball next stated that the Applicant was seeking variance relief for the proposed Lots 3.01 and 3.03. Mr. Ball also stated that a ten (10) foot wide flag stem to the remaining land was being provided in order to maintain public access. He then explained that NJDEP required public access to the beach in order to be listed on the ROSI. Mr. Ball next stated that subdividing the subject Property was an intermediate step. He explained that the sale of public property would typically be put to an open bid, however, there was an exception for undersized lots and that undersized lots could be sold exclusively to adjacent property owners. Mr. Ball represented

that the Applicant was seeking to utilize this exception and sell the newly subdivided lots to the adjacent property owners. He stated that after the sale, the subdivided lots would be merged with the adjacent property, so there would not be any land locked parcels.

8. In response to questions from the Board Engineer, Mr. Ball represented that if the adjacent property owners chose not to purchase, the Applicant would retain ownership of the undersized lots.

9. In response to questions from the Board, Mr. Ball clarified that the flag stem was not an easement. He stated that the ten (10) foot width of the flag stem was less than the right-of-way of Mathews Street. Mr. Ball explained that the width of the right-of-way of Mathews Street was twenty (20) feet. He then clarified that the flag stem was not a road and was not part of the right-of-way of Mathews Street. He clarified that it was only to provide to public access. The Board was still uncertain as to why the flag stem was only ten (10) feet wide and not as wide as the right-of-way.

10. In response to further questions from the Board, Mr. Ball stated that the encroachments of the buildings were approximately ten (10) feet. He stated that one (1) property has a deck that encroaches further than ten (10) feet.

11. Mr. Ball next introduced the Outbound Survey dated August 2, 2022 as Exhibit A-1. He introduced a Google Earth Aerial as Exhibit A-2. He also introduced an Amended Subdivision Plat with an original date of January 16, 2023 and amended date of January 20, 2023 as Exhibit A-3.

12. The Applicant's Engineer, Ben Matlack, P.E., CME, CFM, testified that the encroachments on the subject Property included buildings, decks, patios, and fencing. Mr. Matlack stated that the encroachments had existed for decades. He stated that the purpose of the application was to resolve the encroachments and confirmed that fifty-two (52) feet of encroachments exist.

13. Mr. Matlack next testified that the Mathews Street terminated prior to the subject Property and the proposed access flag stem. He stated that the access was a ten (10) foot wide gravel path to the beach.

14. In response to questions from the Board, Mr. Matlack testified that it was not necessary for a fire truck to be able to access the property through the gravel access path. He also explained that there was no right-of-way being given away. Mr. Matlack stated that the encroachments required the flag stem to be only ten (10) feet wide. He also testified that the proposed lots would not be stand alone lots. He explained that two (2) were approximately 1,800 square feet and the third was approximately 1,300 square feet and that they would not be buildable. Mr. Matlack also testified that the proposed property lines were one (1) foot beyond the encroaching concrete patio.

15. Mr. Matlack next testified that there was a discrepancy regarding the property line with the adjacent Bayview Condominiums. He explained that he had examined documents dating as far back as 1907 to find the correct property line. Mr. Matlack testified that the discrepancy with Bayview Condominiums regarding its bulkhead had now been resolved and that there was no longer an issue.

16. Mr. Matlack next testified in regard to the variance relief the Applicant was seeking. He stated that the Applicant was seeking variance relief from the lot size, minimum frontage, minimum width, and minimum depth. He stated that the frontages on Lots 3.01 and 3.03 were on Mathews Street. He also stated that the minimum width of Lots 3.01 and 3.03 were non-compliant. Mr. Matlack testified that Lot 3.01 had a width of 99.77 feet and Lot 3.03 had a width of 35 feet, both where a minimum width of 100 feet was required. He further explained that proposed Lots 3.02 and 3.04 would not have any frontage. Mr. Matlack further testified that proposed Lot 3.03 required variance relief for minimum lot depth where a minimum of 150 feet was required, whereas 51.37 feet was proposed.

17. In response to further questions from the Board, Mr. Matlack confirmed that proposed Lot 3.04 had encroachments from two (2) adjacent properties, one (1) a building and the other a concrete patio. Mr. Ball in response, represented that the concrete patio would be removed. Mr. Matlack, in response to further questions, testified that this was the best approach to resolve the encroachment issues and advance the Applicant's goal of including the subject Property on the ROSI. Mr. Matlack further testified that forcing the property owners to remove the encroachments would be more difficult and likely involve litigation. He also stated that the Borough Council was drafting an Ordinance restricting parking on the access pathway.

18. Mr. Ball next argued that the proposal advanced the purposes of the MLUL. He stated that specifically, the proposal advanced purpose "a" because it was an appropriate use of land that promoted the general welfare. He argued that the proposal also advanced purpose "g" by providing sufficient space for residential uses and preserving open space. Mr. Ball further

argued that there were no negative impact to the surrounding area or the master plan because the proposal was just to recognized the existing way the land is used.

19. In response to further questions from the Board, Mr. Ball stated that the Applicant had not considered leasing the subdivided lots if the adjacent property owner chose not to purchase. He stated that the Applicant could take enforcement action against the encroachments, but the Applicant preferred to work out a solution with the adjacent property owners.

20. The Board Engineer advised that the proposal made sense and was the best way to achieve the Borough's goals. He explained that the subdivision as proposed was only a temporary situation. He recommended that the Board vote favorably to the application.

21. The hearing was then opened to the public for questions, at which time Robert Munck, 338 Shore Drive, asked how parking was regulated on the access driveway and why the Applicant was giving ten (10) feet of it to the adjacent property and where there were no encroachments. Mr. Matlack clarified that the access was not a right-of-way. Mr. Matlack also stated that the proposed property lines would eliminate encroachments. He explained that encroachments were not just buildings, but also fences and walkways. Mr. Munck further asked if the Applicant would force the adjacent property owners to remove the encroachments and why were some of the proposed lots landlocked.

22. Mr. Ball wanted to clarify that the Applicant was not "giving away" the properties, but would be selling the properties at fair market value.

23. In response to follow up questions from the Board, Mr. Matlack testified that fences existed on either side of the access pathway. He measured the distance between the fences and found the distance to be fourteen (14) feet and the proposed access flag stem would be ten (10) of those feet. The Board asked why the Applicant was not keeping the full fourteen (14) feet for the access. Mr. Ball represented that four (4) feet of the existing access was part of an easement conveyed to Lot 4, which was created prior to the Applicant's acquisition of the subject Property. Mr. Ball stated that the easement was to permit the owner of Lot 4 to access the deck, etc. for maintenance. Mr. Ball represented that the proposed property line was based upon the location of the easement. Mr. Ball argued that it was his position that the easement survived the In Rem foreclosure action and was still in force.

24. The Board Attorney informed the Board that the easement was dated December 10, 1999 and was conveyed from previous owner to the adjacent property. The Board Attorney stated that the easement consisted of a ten (10) foot perimeter around the deck and patio. She stated that the easement should be on the subdivision plat. The Board Attorney asked if the Applicant could move the easement. Mr. Ball, in response, stated that the Applicant was seeking to maintain the easement and the adjacent property owner was in agreement. Mr. Ball represented that the proposed access was sufficient to satisfy NJDEP's standards for the subject Property to be listed on the ROSI.

25. Gerald Gates, 20 Cornwall Terrace, asked how access to the public property was guaranteed. The Board stated that enforcing access was a matter for code enforcement and the police department to keep cars from being parked within the access pathway.

26. Robert Munck, 338 Shore Drive, asked for further clarification on the easement. Mr. Ball reiterated that the easement existed before the Applicant acquired the subject Property.

27. In response to questions from the Board, Mr. Ball represented that if an adjacent property owner could not build on the smaller lot, but could once the smaller lot was merged. He stated that if the property owner wanted to build, then the property owner would have to come before the Board.

28. In response to further questions from the Board, Mr. Ball represented that there was a Memorandum of Understanding (MOU) in place between the Applicant and property owners. He stated that the Borough Council would sell the subdivided lots to the adjacent property owners, which would be before the Borough Council at a public hearing at that time.

29. John Caruso, 24 Gravelly Point Road, asked if the Applicant had any appraisals done on the subdivided lots. Mr. Ball explained that the adjacent property owner made an offer, which the Applicant had rejected. Mr. Ball further explained that the Borough Tax Assessor then appraised the proposed lot and presented the counteroffer to the property owner. Mr. Ball explained that after some negotiation, it was agreed upon on a value of \$20,000 for Lot 3.03. Mr. Ball stated that the other lots had yet to be appraised, but they would be appraised the Borough Tax Assessor in the same fashion as Lot 3.03. Mr. Caruso asked if the subdivision and sale of the lots could set a precedent. The Board informed the public that each application is considered separately on its own merits and without any consideration of previous or future applications.

30. Martin Kiely, 39 Shore Drive, asked if the Borough Tax Assessor accepted the property owner's offer. Mr. Ball clarified that the property owner's offer was rejected. Mr. Kiely

further asked why the Applicant did not use a private third-party appraiser. Mr. Ball stated that that was the decision made by the Borough Council.

31. In response to request for clarification from the Board, Mr. Ball confirmed that the purpose for seeking this subdivision was to obtain grants for the Borough. He stated that the subject Property could not be eligible for the ROSI grants from NJDEP with the encroachments.

32. The hearing was then opened to the public for comment, at which time Robert Munck, 338 Shore Drive, testified that he was still unclear about the ten (10) foot perimeter easement. He stated that the Board should look further into the easement. He also stated that the access should be maintained. Mr. Munck also stated that he did not trust that the Applicant would actually seek the grants or the Applicant may chose to sell the subject Property.

33. Mr. Ball, in response, represented that the Applicant was seeking to preserve the subject Property as open space and have it registered on the NJDEP's ROSI. Mr. Ball stated that it was almost impossible to reverse the designation once property was registered on the ROSI.

34. 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 preliminary and final major subdivision approval pursuant to N.J.S.A. 40:55D-48 and 50 along with ancillary variance relief pursuant to N.J.S.A. 40:55D-70c should be granted in this instance.

The Board finds that the Applicant has proposed a preliminary and final major 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 will address the variance relief collectively. The Board finds that the proposed subdivision has the purpose of eliminating multiple existing encroachments onto public land. The elimination of these encroachments is critical because the Borough seeks to include the proposed remainder lot on its ROSI list. As previously stated, NJDEP regulations require all encroachments to be eliminated in order for this preservation to occur. The preservation of open space is a goal of planning enumerated in N.J.S.A. 40:55D-2. The positive criteria has therefore been satisfied.

The Board also finds that the negative criteria has been satisfied. As an initial matter, it is anticipated that the creation of the three (3) new lots will be temporary and that the lots will ultimately be sold to the adjoining property owners and merged into their lots. Even if the intended lot mergers do not occur, the proposed subdivision will not create any buildable lots, will not increase traffic, noise, odors or population density and will remain in public ownership. The Board therefore finds that the grant of variance relief will not result in substantial detriment to the public good or substantial impairment to 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).

The Board also finds that the Applicant requires a Planning Variance because two (2) of the proposed lots will be landlocked. See N.J.S.A. 40:55D-34,35. The Board once again recognizes that the landlocked lots will likely be temporary. These lots will also remain under municipal ownership until such sale and merger and emergency vehicles and personnel have appropriate access. Planning Variance relief is therefore granted.

With the exception of the above relief, the Applicant complies with all other zoning, subdivision and design criteria ordinance requirements. Preliminary and final major subdivision approval pursuant to N.J.S.A. 40:55D-48 and 50 is therefore appropriate.

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 13th day of April 2023, that the action of the Land Use Board taken on February 9, 2023 granting Application No. LUB2022-09, for preliminary and final major subdivision approval pursuant to N.J.S.A. 40:55D-48 and 50 along with ancillary bulk variance relief pursuant to N.J.S.A. 40:55D-70c(2) along with planning variance relief pursuant to N.J.S.A. 40:55D-35, 36 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 Applicant shall comply with the Map Filing Law.
4. All easements shall be depicted on the Subdivision Plan.
5. The concrete patio shall be removed.
6. 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.
7. 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 13, 2023.

Nancy Tran, Secretary
Borough of Highlands Land Use Board

BOROUGH OF HIGHLANDS LAND USE BOARD

EXHIBITS

Case No. LUB2022-09/BOROUGH OF HIGHLANDS
Preliminary and Final Major Subdivision with Ancillary Variance Relief
April 13, 2023

- A-1 Outbound Survey dated August 2, 2022
- A-2 Google Earth Aerial
- A-3 Amended Subdivision Plat, originally dated January 16, 2023, amended date January 20, 2023.