



BOROUGH OF HIGHLANDS
COUNTY OF MONMOUTH

LAND USE BOARD RESOLUTION 2024-10

MEMORIALIZATION OF APPEAL OF BOROUGH ENGINEER'S DETERMINATION

Approved: January 11, 2024
Memorialized: February 8, 2024

**MATTER OF KIM KELLY & KEVIN HALL
APPLICATION NO. LUB-2023-07**

WHEREAS, an application for an appeal of the Borough Engineer's Land Use Ordinance determination has been made to the Highlands Land Use Board (hereinafter referred to as the "Board") by Kim Kelly and Kevin Hall (hereinafter referred to as the "Applicants") on lands known and designated as Block 14, Lot 6.02 as depicted on the Tax Map of the Borough of Highlands (hereinafter "Borough"), more commonly known as 40 Grand Tour in the R-1.01 (Single Family Residential) Zone (hereinafter "Property"); and

WHEREAS, a public hearing was held before the Board on January 11, 2024 with regard to this application; and

WHEREAS, the Board has heard testimony and comments from the Applicants 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 Township Ordinance have been paid, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised; and

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

I. Procedural History

1. The subject Property contains 5,656 square feet is currently vacant and was created as a new lot by minor subdivision approval in April of 2022. The subject Property is located in the Single Family Residential (R-1.01) Zone of the Borough with frontage along Grand

Tour. The Applicant proposes to construct a new 2.5-story single family dwelling on the subject Property along with an asphalt driveway, a rear deck, and two underground stormwater management tanks. As depicted on the FEMA Effective Flood Insurance Rate Map (FIRM), the subject Property is not located within a special flood hazard zone. Based upon the NJDEP NJ-GeoWeb online resource, the subject Property is located in a CAFRA zone but no wetlands are identified on or in the immediate proximity of the site.

2. The subject Property is located within the Steep Slope area of the Borough. A slope area permit is required for the proposed work. The Applicant was directed to submit a grading plan to the Borough Engineer pursuant to the Steep Slope Ordinance found at Section 21-84B. The Borough Engineer determined that the subject Property did not contain any steep slopes pursuant to Section 21-8, however, as part of the grading plan and slope area permit review, the Borough Engineer determined that the scope of the proposed development did not meet the criteria outlined in Section 21-84B. E.3 pertaining to the maximum amount of permitted impervious surface area and Section 21-84B.E.4 pertaining to the maximum amount of permitted lot disturbance.

3. Pursuant to Section 21-84N.J, the Applicants are seeking an interpretation/appeal of the Borough Engineer's decision regarding the Borough's Steep Slope requirement under Land Use Ordinance Section 21-84B.

II. Jurisdiction of the Zoning Board

4. The Municipal and Use Law vests exclusive jurisdiction with unified land use boards to consider appeals from a decision concerning the enforcement of land use ordinances. N.J.S.A. 40:55D-25 and 70a.

III. Standard of Review

5. The principles governing the interpretation of a zoning ordinance or Resolution are the same as those for interpreting legislation in general. *Tp. of Pennsauken v. Schad*, 160 N.J. 156, 170 (1999). Those principles require that an ordinance should be interpreted to "'effectuate the legislative intent in light of the language used and the objects sought to be achieved.'" *Merin v. Maqlaki*, 126 N.J. 430, 435 (1992). See also *State Dep't of Law & Public Safety v. Gonzalez*, 142 N.J. 618, 627 (1995). The first step of statutory construction requires an examination of the language of the ordinance. *Bergen Comm'l Bank v. Sisler*, 157 N.J. 188, 202 (1999). The meaning

derived from that language controls if it is clear and unambiguous. Id. If the text, however, is susceptible to different interpretations, a board should consider extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the legislature's intent. Wingate v. Estate of Ryan, 149 N.J. 227, 236 (1997); Lesniak v. Budzash, 133 N.J. 1, 8 (1993).

6. Above all, a board must seek to effectuate the "fundamental purpose for which the legislation was enacted." New Jersey Builders, Owners and Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972). Thus, for example, where a statute or ordinance does not expressly address a specific situation, a board will interpret it "consonant with the probable intent of the draftsman 'had he anticipated the matter at hand.'" AMN, Inc., supra, 93 N.J. at 525. In that regard, "[i]t is axiomatic that an ordinance will not be construed to lead to absurd results." State v. Provenzano, 34 N.J. 318, 322, (1961).

IV. Analysis

7. First, the Board addresses the definition of "Steep Slopes" in Section 21-8. Section 21-8 provides: "Slopes greater than twenty (20%) percent, to be developed in accordance with subsection 21-65.21." The Board finds that Section 21-65.21 had been replaced by Section 21-84B. The Board is unsure when the definition of "Steep Slopes" was last amended by the Governing Body, however, it does find that the definition contained in Section, 21-8, was last amended by the Governing Body in 2017. The Board also finds that Section 21-84B was last amended by the Governing Body in 2022. Section 21-84B contains its own definition of "Steep Slopes" for the purpose of the Slope Area Permit. Pursuant to the doctrine of statutory construction, the newer ordinance invalidates the older definition as set forth in Section 21-8. The Board therefore finds that Section 21-8 is not applicable to this Application.

8. The Board next addresses the applicability of Section 21-84B. The Board finds that Section 21-84B established an overlay zone which the subject Property is located within. Section 21-84B.A. Section 21-84B subjects all properties within the overlay zone to the requirement of a Slope Area Permit issued by the Borough Engineer. Section 21-84B.B established exceptions to the permit requirement. The permit requirement exceptions are as follows:

A slope area permit is required for any work or disturbance affecting a slope area, except when the area of the proposed work or disturbance:

1. Contains no slopes greater than 10%, nor any slope greater than 15% within 100 feet, and the work or disturbance is:
 - a. Soil disturbance of five cubic yards or less;
 - b. Change in impervious ground cover of 200 square feet or less;
 - c. Removal of five trees or less, having a circumference of up to 20 inches each, measured at four feet above the ground;
 - d. Removal or disturbance of vegetation covering 200 square feet or less.

2. Contains no slopes greater than 15%, nor any slope greater than 20% within 100 feet; and the work or disturbance is:
 - a. Soil disturbance of three cubic yards or less;
 - b. Change in impervious ground cover of 100 square feet or less;
 - c. Removal of three trees or less, having a circumference of up to 20 inches each, measured at four feet above the ground;
 - d. Removal or disturbance of vegetation covering 100 square feet or less.

3. Contains slopes greater than 15% and the work or disturbance is:
 - a. Soil disturbance of one cubic yard or less;
 - b. Change in impervious ground cover of 25 square feet or less;
 - c. Removal of one tree, having a circumference of up to 20 inches measured at four feet above the ground;
 - d. Removal or disturbance of vegetation covering 25 square feet or less.
 - e. All items described in Subsection B1, 2 and 3 above represent a cumulative total per lot, per calendar year.

9. The Board finds that the Applicant's Engineer, Andrew Stockton, P.E., testified that the slopes on the subject Property ranged from 9% to 11%. The Board's Engineer, Edward Herman, P.E., P.P., also testified that the subject Property failed to qualify for an exception to the Slope Area permit.

10. The Board next addresses the applicability of Section 21-84B.E. The opening paragraph of Section 21-84B.E provides:

- a. Lot size, development density, lot coverage and disturbance. To meet the purposes, goals and standards set forth in this section, **in areas of slopes greater than 15%**, the applicable provisions of this chapter relating to minimum lot sizes and density of development, and maximum percentage of lot coverage, shall be modified, and limitations including maximum impervious surfaces and maximum lot disturbance shall be added as follows.

The Board finds that Section 21-84B.E offered adjustments to minimum lot size, maximum lot coverage, maximum lot coverage per slope category, and maximum lot disturbance. Mr. Herman testified that it was his opinion that the entire Section is qualified by the opening paragraph noted above, and since the subject Property did not contain any slopes that exceeded 15%, the Section did not apply. The Board also finds that the Section 21-84B.E.3 and 21-84B.E.4 provide limits on the maximum impervious surface area and maximum lot disturbance, respectively. The limits are depicted in charts included within the Ordinance as percentages. The Board finds that a percentage limit for properties with less than 15% slopes exists within these charts.

11. Considering the opening paragraph of Section 21-84B.E seeks to impose limits on properties with slopes greater than 15% but then includes charts depicting limitations for properties with slopes less than 15%, the Board finds that the plain language of the Ordinance is ambiguous. Therefore, the Board considers extrinsic factors to ascertain the legislature's intent. See *Wingate v. Estate of Ryan*, 149 N.J. 227, 236 (1997); *Lesniak v. Budzash*, 133 N.J. 1, 8 (1993). The Board finds Mr. Herman's testimony that the Governing Body did not intend to impose limits on properties with slopes less than 15% to be compelling. The Board finds that all slopes contained on the subject Property are less than 15%. The Board finds that the Borough Engineer understandably relied upon the charts and the limitations within the charts in his decision to deny the Slope Area Permit. The Board disagrees with the Borough Engineer's application of the Ordinance. The Board, therefore, reversed the decision and directs that the Slope Area Permit be issued.

12. The Board further notes that there were no members of the public expressing an interest in this application.

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 8th day of February 2024 that the action of the Board taken on January 11, 2024, overturning

the decision of the Borough Engineer pursuant to N.J.S.A. 40:55D-70a in Application No. LUB 2023-07 of Kim Kelly and Kevin Hall 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.

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 Borough of Highlands Land Use Board, Monmouth County, New Jersey, at a public meeting held on February 8, 2024.

Nancy Tran, Secretary
Borough of Highlands Land Use Board