

**RESOLUTION**  
**Borough of Union Beach**  
**Planning Board**  
**In the Matter of John Thompson/Thompson Builders**  
**915 Union Avenue**  
**Block 190, Lot 11**  
**Decided on May 29, 2019**  
**Memorialized on June 26, 2019**  
**Denial of Application for**  
**(c) and (d) Variances**

**WHEREAS**, John Thompson, a/k/a Thompson Builders, LLC (the “applicant”) has made an application to the Borough of Union Beach Planning Board for a use variance and numerous bulk (c) variances, located at 915 Union Avenue, also known as Block 190, Lot 11 as shown on the tax map of the Borough, located in the B-1 Neighborhood Commercial Zone; and

**WHEREAS**, the applicant was represented by Richard Thompson, Esq.; and

**WHEREAS**, public hearings were conducted on this application on April 24, 2019, May 29, 2019 after the Board determined it had jurisdiction; and

**NOW THEREFORE**, the Board makes the following findings of fact based upon evidence presented at the aforesaid public hearings, at which a record was made. The application before the Board seeks (d)(1) use variance approval, along with five (5) bulk variances which are as follows:

1. Section 13-10.5.e.1 – Minimum lot area of  $\pm 4,120$  square feet is proposed, where 15,000 square feet is required; this is a pre-existing condition.
2. Section 13-10.5.e.2 – Minimum lot width of 40 feet is proposed, where 100 feet is required; this is a pre-existing condition.
3. Section 13-10.5.e.3 – Minimum lot frontage of 40 feet is proposed, where 100 feet is required; this is a pre-existing condition.

4. Section 13-10.5.e.4 – Minimum lot depth of ±103 feet is proposed, where 150 feet is required; this is a pre-existing condition.
5. Section 10-10.5.e.5 – Minimum front yard setback of 30.4 feet is proposed, where 35 feet is required; this is a pre-existing condition.

In addition to the application, the Board had before it the May 3, 2019 letter from Dennis M. Dayback, Zoning Official, with T&M Associates. The Board also had before it a January 15, 2019 letter from Mr. Dayback indicating the initial application was being denied and required (d)(1) use variance relief from the Board. The subsequent letter of May 3, 2019 identified the five (5) bulk variances that would be needed in addition to the (d)(1) use variance relief.

The first hearing on this application took place before the Board at its regular meeting on April 24, 2019. The first witness to be sworn in on behalf of the applicant was Mr. Jason Graff, Construction Foreman for Thompson Builders. Mr. Graff proceeded to describe the property noting that it is currently an empty lot, with residential dwellings flanking the empty lot in question. Testimony was also heard from Bonnie Heard who was sworn in and qualified and Professional Engineering and a Professional Planner on behalf of the Board. Ms. Heard noted that the Commercial Corridor Plan as part of the Borough Master Plan is designed to promote businesses in this particular zone.

At this time, it was brought to the attention of the applicant that there was only five (5) eligible Board members participating in the hearing; at this point Mr. Thompson, on behalf of the applicant, announced that the applicant would take an adjournment and proceed at the May hearing of the Board.

Testimony on the application resumed before the Board at its hearing on May 29, 2019. Mr. John Thompson was sworn in and qualified before the Board. He testified regarding the

plans that had been prepared by Lou Tomasello describing the proposed single family four-bedroom home, with a full garage on the first floor, kitchen, living and dining room with two and a half baths. He noted it would also have front and rear decks. In response to questions from the Board Chairman, he acknowledged that he was not aware of how the property was zoned prior to its acquisition and did not realize he would need use and bulk variance relief until meeting with Mr. Dayback. At this point no one sought to cross-examine Mr. Thompson from the public.

The next witness to testify on behalf of the applicant was Mr. Paul Ricci, Licensed Professional Planner, who was sworn in and qualified as an expert in his field. He testified that he was one of the participating authors in the prior Master Plan that was done for the Borough. He testified that in his professional opinion that a residential use was the only reasonable use of the property. He noted that there were single family dwellings on the adjacent lots and they were of similar lot dimensions. Referring to the Sica four-part test, he stated that the variance relief for the five (5) bulk variances should be subsumed with the proofs for the (d)(1) use variance. He testified in his opinion that if the lot was not developed for a single-family home, it would be left useless. He noted that close to half of the lots in the B-1 Zone have homes on them. He testified in his opinion he did not believe having a residential dwelling would create a negative impact on adjacent homes and the size of the proposed residential dwelling is appropriate in the zone. It was pointed out to the witness by members of the Board that a 2016 Master Plan re-examination continue to affirm that this should be a commercial corridor and not residential.

The next witness to testify was Martin P. Truscott, Licensed Professional Planner employed by T&M Associates, serving the Board; Mr. Truscott was sworn in and qualified. He noted in his testimony that the Master Plan in 2016 reaffirmed the commercial corridor resiliency plan and was consistent with the Master Plan re-examination with regards to the determination

that the zoning for this property be for a business-related use. Questions were also raised by the members of the Board about adding residential uses when there is a large bar and restaurant directly across the street from the property. Questions were also raised by the Board as to whether a small business could be placed on the property in lieu of a residential dwelling.

At this point of the proceedings, the floor was open to the public for comments with regard to the pending application. Ms. Pat Klick spoke in favor of the application, saying that she is the prospective purchaser of the proposed house that the applicant is seeking to construct. She stated she is a resident of Union Beach and wishes to stay in the community. Susan Ellison of 909 Union Avenue lives next door to the property and is opposed to any commercial development, since there will be no off-street parking. Mr. Michael Ervin of 919 Union Avenue also spoke saying at one time the property was a lawyer's office; he does not want a commercial building since there will be no off-street parking.

**NOW THEREFORE**, the Board hereby makes the following conclusions of law based upon the foregoing findings of fact. The applicant is seeking a (d)(1) use variance and extensive bulk variance relief, as described above, in order to construct a single-family dwelling on the property at 915 Union Avenue in the B-1 Neighborhood Commercial Zone.

The Municipal Land Use Law, at N.J.S.A. 40:55D-70(c) 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 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. Undue hardship refers solely to particular physical conditions of the property and does not refer to personal hardship, financial or otherwise. Commercial Realty v. First Atlantic, 122 N.J. 526 (1991); Smith v. Fair Haven Zoning Bd., 335 N.J. Super 111, 122 (App. Div. 2000).

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 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.

Under the Municipal Land Use Law, a Zoning Board of Adjustment, when considering a typical (d) variance, cannot grant relief unless sufficient special reasons are shown, there is no substantial detriment to the public good and there is no substantial impairment of the intent and purpose of the zone scheme and zoning ordinance. The burden of proof is on the applicant to establish that these criteria have been met. It is the Board's responsibility, acting in a quasi-

judicial manner, to weigh all the evidence presented before it by both the applicant and all objectors, and reach a decision which is based upon findings of fact and conclusions of law, and is not arbitrary, unreasonable or capricious.

The New Jersey Courts have been willing to accept the showing of extreme hardship as sufficient to constitute a special reason. Courts have indicated that there is no precise formula as to what constitutes special reasons unless the use is determined to be inherently beneficial, and that each case must be heard on its own circumstances. Yet, for the most part, hardship is usually an insufficient criteria under which the Board can grant a (d) variance. In addition, special reasons have been found where a variance would serve any other purposes of zoning set forth in N.J.S.A. 40:55D-2. However, in the final analysis, a (d) variance should only be granted if the Board, on the basis of the evidence presented before it, feels that the public interest as distinguished from the purely private interest of the applicant, would be best served by permitting the proposed use. In these instances, the Board must also find that the granting of the (d) variance will not create an undue burden on the zone or the surrounding properties. The Board also notes the special reasons requirement may be satisfied if the applicant can show that the proposed use is peculiarly suited to the particular piece of property. With regard to the impact of the proposal on the public good, the Board's focus is on the variance's effect on the surrounding properties and whether such effect would be substantial. Furthermore, in most (d) variance cases, the applicant must satisfy an enhanced quality of proof and support by clear and specific findings by this Board that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The burden of proof is upon the applicant to establish the above criteria.

Based upon the application, plans, reports and testimony before it, the Board finds that the applicant has not met the minimum requirements of the Municipal Land Use Law, case law and Borough ordinances, and as such must deny the application. In this particular instance the applicant, by the very nature of the application itself, is creating the need for the (d)(1) use variance and the five (5) bulk variances. This runs contrary to established case law which determines that self-created hardship may be considered by a land use board reviewing an application as a proper basis for denial of such relief. Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 606 (1980); Chirichello v. Zoning Board of Adjustment of Monmouth Park, 78 N.J. 544 (1979).

This Board concludes that the applicant has failed to present sufficiently persuasive testimony to justify the (d)(1) use variance and the numerous bulk variances relief sought in this application. There are no exceptional or extraordinary circumstances uniquely affecting this piece of property or that the strict application of the zoning ordinance would result in peculiar or exceptional practical difficulty or undue hardship being visited upon the proposed developer of the property. The presence of single-family homes does not in and of itself meet the “special reasons” to justify the (d)(1) use variance and five (5) bulk variances.

The Board finds that the testimony offered cannot allow the Board to rule in favor of the applicant, since the evidence before the Board failed to demonstrate that the need for the (d)(1) use variance and the five (5) bulk variances sought would not have a substantial detriment to the public good or, more importantly, substantially impair the intent and purpose of the Master Plan and zoning ordinance of the Borough. The testimony offered before the Board did not demonstrate that the use and bulk variance relief requested by the applicant in order to proceed with the development met the required proofs so as to grant the relief sought. The proofs offered

by the applicant do not meet the requisite standard. The Board has the choice of accepting or rejecting the testimony of witnesses where reasonably made. Kramer v. Bd. Of Adjust., Sea Girt, 45 N.J. 268, 288 (1965); Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2014), Chapter 27-7.2 and cases cited therein. In this case the Board finds Ms. Heard and Mr. Truscott's testimony to be more persuasive than that of the applicant's expert.

More importantly, with regard to the (d)(1) and (c)(2) criteria, the Board specifically finds that the applicant has not met the appropriate burden of proof necessary to demonstrate that the overall purposes of the Municipal Land Use Law will be advanced by allowing the bulk variances sought. The Board finds that the detriment requiring the granting of the (d)(1) use variance and the five (5) bulk variances clearly outweighs any benefit to the Borough. The Board finds that the testimony offered by Mr. Truscott highlighted the direct inconsistency between the relief sought by the applicant and how it ran contrary to the Borough Master Plan as well as the Commercial Corridor Plan. To the contrary, the applicant has failed to offer a persuasive testimony that the numerous proposed deviations from the prevailing standards for the (d)(1) and five (5) bulk variances sought can be justified.

As has been stated by the New Jersey Supreme Court,

“by definition, then, no (c)(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a (c)(2) case, then, will not be on the characteristics of the land that, in light of current zoning requirements, create a ‘hardship’ on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

Kaufman v. Planning Board for Warren Township, 110 N.J. 551, 563 (1988).



As has been noted by the courts, “generally speaking, more is to be feared from a breakdown of a zoning plan by ill-advised grants of variances than by refusals thereof.” Cummins v. Board of Adjustment of Leonia, 39 N.J. Super 452, 460 (App. Div.) certif. denied, 21 N.J. 550 (1956). In the case before the Board, the applicant has not demonstrated that the proposed (d)(1) and five (5) bulk variances present an opportunity for improved zoning and planning that will benefit the Borough or would effectuate the goals of the Borough as reflected in its zoning ordinance, the Commercial Corridor Plan and Master Plan. To the contrary, the evidence clearly shows the applicant failed to do any zoning due diligence before purchasing the property. Any economic benefit to the applicant cannot outweigh the detriment by this application in a manner that would adversely affect the community as a whole. The applicant has not met the burden of proof with regard to satisfying the positive and negative criteria as required to secure the use and bulk variances sought in this application as set forth above. The request for the use and bulk variance is denied.

**NOW THEREFORE, BE IT RESOLVED** by the Planning Board that the application for property located at 915 Union Avenue in the Borough of Union Beach requesting (d)(1) use variance relief and five (5) bulk variances, as set forth above, is denied for the reasons set forth herein.

The undersigned secretary certifies the within resolution was adopted by this Board on May 29, 2019 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on June 26, 2019.

  
Madeline Russo, Planning Board

FOR: *Wade, Steiner, Morin, Connors*

AGAINST:

ABSTAIN: