

RESOLUTION
Borough of Union Beach
Land Use Board
In the Matter of Robert Burlew
334 Front Street
Block 5, Lot 9
Decided on June 26, 2019
Memorialized on August 28, 2019
Application for (c) and (d) Variances

WHEREAS, Robert Burlew, (the “Applicant”) has made an application to the Borough of Union Beach Land Use Board for a use variance and numerous bulk (c) variances, located at 334 Front Street, also known as Block 5, Lot 9 as shown on the tax map of the Borough, located in the R-8 Residential Zone; and

WHEREAS, the Applicant was represented by Paul Mirabelli Esq.; and

WHEREAS, public hearings were conducted on this application on April 24, 2019, May 29, 2019 and June 26, 2019 after the Board (configured as a board of adjustment for this particular application) 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 originally sought to have the property found to be a pre-existing non-conforming use, or in the alternative sought a (d)(1) use variance approval, since a two-family house is not a permitted use in the R-8 zone. In addition to needing a use variance, the Applicant also requires bulk variance relief as follows:

1. To permit a two-family residential use for a two-family residential is not permitted on a lot that is 50 x 100 sq. ft., which is the Lot in question, where 75 x 100 sq. ft. is required;
2. Bulk Variance Relief is also needed to permit 50 ft. wide lot frontage where 75 ft. is required;

3. Lot coverage of 56.4% is proposed where 25% is required “this is a pre-existing condition”;
4. Minimum front yard setback of 13.1 ft. is proposed where 20 ft. is required; and
5. Side Yard setback of 2.7 ft. and 8 ft. for a total of 20 ft. is required by Borough Ordinance.

Before formal testimony proceeded on the application Mr. Tim Davis, Union Beach Construction Official, appeared before the Board requesting an adjournment due to matters pending with the County Construction Board of Appeals concerning alleged violations on the Property. The Board was also advised by the Applicant at this time that there is other litigation concerning other Properties involved naming the Applicant and the Borough which does not involve the Property in question. After deliberation by the Board it was decided by the Chair that the Application will be carried. There were no members of the public present wishing to comment or ask questions regarding the Application; at that point the Board, with consent of the Applicant, agreed to an adjournment of the Application until May 29, 2019 meeting with the Board without requiring further notice of the Applicant.

Hearings on this Application resumed at the May 29, 2019 meeting of the Board. Mr. Paul Mirabelli, appearing on behalf of the Applicant, again summarized the use and bulk variance relief that is required that is being sought by the Applicant. He noted that the prior meetings discussion regarding the Construction Board of Appeals and the hearing took place in March of 2019.

At this point Mr. Robert Burlew was sworn in and testified before the Board. He proceeded to describe the layout of the interior and exterior at the Property in question. He noted that there were separate ingress and egress points for both units. He testified that the layout of

the building is the same as when he purchased it. He testified the only renovations had been interior in nature. In response to questions from the Board he testified that the Property had only been vacant for approximately one year. At this point counsel for the Applicant introduced a series of documents, Exhibits A-1 through A-15. Most of these exhibits, as well as others subsequently admitted into the record, are listed in Exhibit A, which is attached to this Resolution. Counsel for the Board inquired as to counsel of the Applicant if he had received a copy of the report from T&M Associates of June 5, 2018 and a letter from the Borough Attorney, John Lane, dated January 11, 2019 concerning the history of the Property. It was noted that the letter from Mr. Martin P. Truscott of T&M Associates stated that there was no proof in Borough records that this structure had been previously given formal approval as a two-family residence by this Board.

Testimony was then heard from Mr. Marc Leber, who was sworn in and accepted as an expert in field of professional planning. Mr. Leber testified that he reviewed the Master Plan in preparing for his presentation, had visited the site, and checked the history of the Property reviewing various tax records and information regarding prior owners dating back to 1960. He testified that based upon his review of these documents, (see Exhibit A), he noted that it had been a two-family residence according to various Borough records over that time period. He testified that there is no access from one apartment to the other; each unit has separate entry doors and separate utilities. He testified that there is parking available for up to six vehicles. With regard to the issue of abandonment, Mr. Leber testified that there had to be not only an actual abandonment but there also had to be intent by the person to whom abandoned the Property. It is his opinion that there had been no intention to abandon in this particular instance by either the current owner or prior owners. He noted that the house had not been expanded, that

the driveway was in the same location as it had been as shown on prior records that he referred to in the course of his testimony.

He testified that the setbacks and bulk variances that would be needed for other properties of this nature are similar in nature with this particular Property. He testified that in his professional opinion he saw no negative impact to the use and enjoyment of the surrounding properties. He saw it as nothing further than a decades long continuation of an existing two-family residence, noting that it is directly next door to another two-family residence.

At this point counsel for the Board requested that counsel for the Applicant provide copies of Exhibits A-1 through A-15 with the Board secretary for distribution to the Board members to assist them in making their decision with regard to this Application. At that point the Applicant agreed to do so and to carry the Application to the June meeting without the need for additional notice. Before returning the floor was open to members of the public. Mr. Joseph McGrath, Union Beach Code Enforcement Official, stated that Mr. Davis was not able to appear and was recusing himself of matters concerning the Applicant due to the ongoing court proceedings concerning other properties that are not the subject of this Application. Mr. Harry Hoff, of 342 Front Street, testified that he had lived in the area of the house that is the subject of this Application and that to the best of his knowledge that it has always been a two-family residence. At this point the Board voted to carry the hearing on this application to the June 26 hearing of the Board.

At the outset of the resumption of hearings on June 26, 2019, counsel for the Applicant elected to proceed, despite the fact that only six Board members were eligible to participate in the hearing and vote on the application. At the outset, Mr. Mirabelli presented additional exhibits as follows added to the record: A-16 Letter to Dennis Dayback asking to reconsider

original denial; A-17 Application for building permits to take down a chimney; A-18 Certificate of Occupancy dated October 26, 2018; elevation certificate marked Exhibit A-20. There were also two exhibits marked in as previously identified, namely the June 5, 2018 report from Mr. Dayback of T&M Associates as B-1 and the correspondence from Borough Attorney John Lane as Exhibit B-2.

At the outset, Mr. Mirabelli then responded to Mr. Lane's correspondence, stating that the nature of preexisting use is that there may not have been an ordinance at the time to be complied with when the house was first constructed. Following these remarks, he offered no other witnesses for additional testimony.

At this point, Mr. Martin Truscott, Professional Planner with T&M Associates was sworn in and qualified as an expert.

At this point, there were a series of questions asked of the Applicant and its counsel regarding the history of the building. Based upon the documentary evidence, it appears that the structures originally designed as a single-family house and was carried forward on the Borough's tax records until 1976, at which point there were extensive renovations made which showed on the appraisal card as two units, 334 and 334A. Mr. Steiner, Board Chairman, noted that the majority of the Municipal Land Use Ordinance started in May of 1962. At this point, the Board marked as Exhibit B-3 Tax Record accompanying the letter from the Borough Attorney, which had handwritten notes on it indicating the change to reflect two units dating back to 1976.

The Board then asked for an explanation by the Board Counsel with regard to the provisions of Section 68 of the Municipal Land Use Law dealing with non-conforming structures and uses. Board Counsel advised that non-conformity uses or structures exist prior to the time and passage of the ordinance may continue upon the lot or in the structure occupied and such

structure may be restored and repaired in the event of a partial destruction. The Board was advised that the focus should be on the first sub-section of the statute that says any non-conforming use or structure at the time of passage of ordinance may continue in the event of partial destruction. Mr. Burlew then responded to questions from the Board with regard to the work that had been done on the structure both before and after Hurricane Sandy.

The Board then exchanged with the Applicant with regard to the most recent tenancies in the existing building. Counsel for the Applicant and the Applicant himself stated that at the time the last tenant occupied the premises, the building was owned by the bank. In response to questions, there were concerns raised as to the historical information being provided on the record regarding the pre-dating of the use of this building to the Borough Land Use Ordinance. Mr. Mirabelli requested that even if the Board could not find it with a pre-existing non-conforming structure, this application before the Board was to request that the Board grant a D-1 use variance. Counsel for the Applicant asserted that the documentation that had been presented to the Board clearly indicated that the property had been utilized as a two-family residence for several decades.

At this point, Mr. Truscott responded to the questions raised by the Board. One of the issues he raised concerned the bulk standards and that a two-family house would be better suited on a 75 x 100-foot lot and that this was oversized according to the zoning for a one-family home. He raised questions also with regard to adequacy of parking for the house. He also raised the point that the proposed use is not consistent with the zoning ordinance and master plan. He stated his opinion that he thought the proposed use was detrimental to the zoning plan and zoning ordinance, and that the request cannot be reconciled with the master plan. In response to questions from Board Members with regard to density and noting that a one-family four bedroom

home on the same property would have the same density as two units with two bedrooms, Mr. Truscott noted that it may not be in the same intensity of use, but that a single four bedroom was more in character with the neighborhood.

At this point, counsel for the Applicant recalled their planner, Mr. Marc Leber. Mr. Leber proceeded to testify that this was not a vacant lot and they were not coming before the Board seeking to turn a single-family house into a two-family house. He stated that in his professional opinion there is no detriment to the neighborhood since nothing was changing, noting that the information available had shown that it had been a two-family residence for over 40 years. He also testified that most of the house sizes in the area of the subject property are similar with similar setbacks and other non-conforming lot sizes. At this point, the Board asked for guidance from the Board Counsel whether this would be a D-1 variance or a continuation of a pre-existing non-conforming use. The Board Counsel advised that if the Board was to move this as a (d)(1) use variance, the use and bulk variances if granted would run with the land and would eliminate any questions in the future as to whether or not this use was permitted or not. It would also eliminate the need to consider whether it should be found to be a pre-existing non-conforming use. Board Counsel also noted that the (d)(1) use variance would require five affirmative votes. Following that, additional discussion occurred between members of the Board as to the merits of whether the D-1 variance should be granted in this particular instance.

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 bulk variance relief, as described above, in order to legalize a two-family dwelling on the property at 334 Front Street.

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, when considering a typical (d) variance, a land use 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)(1) 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 package, testimony, and expert testimony presented before the Board, the Board finds that the Applicant has met the minimum requirement under the Municipal Land Use Law, Case Law and Borough Ordinances sought to grant the relief by way of way of granting a (d)(1) use variance and bulk variance relief as noted herein. The Board finds that in this particular instance, based upon the evidence before and the unique circumstances involved with this application, the evidence before the Board indicates that granting the (d)(1) variance relief will not create an undue burden on surrounding properties. The evidence before the Board indicates that the property in question has been used as a two-family residence, albeit with potential interruption, dating back in excess of forty years. As the whether the property is particularly suited to the property in question, given the period of time it has been occupied as a two-family house, and the availability of off-street parking, the Applicant has also satisfied this criteria. Based upon the evidence presented by the Applicant's planner, the evidence before the Board further indicates that there will not be significant or substantial impact of the use and enjoyment of the surrounding properties. The evidence before the Board indicates

that there is no such impact historically and should not be an impact going forward. The Board finds that the proofs offered by the Applicant are sufficient, in this particular circumstance, to grant the relief sought by the Applicant. The bulk variance relief being sought by the Applicant is primarily pre-existing in nature. There is no evidence before the Board indicating that the Applicant is seeking to exacerbate any of this bulk variance relief related to this particular property.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Board of the Borough of Union Beach that the application of Robert Burlew for use variance and bulk variance rely as described above for property located at 334 Front Street is approved as follows:

1. (d)(1) use variance to permit a two-family residence is approved pursuant to N.J.S.A. 40:55D-70(d)(1);
2. Bulk variance relief as described herein, is approved pursuant to N.J.S.A. 40:55D-70(c)(2).

BE IT FURTHER RESOLVED by the Land Use Board of the Borough of Union Beach that the application approved herein is subject to the following terms and conditions.

1. Certificate that taxes are paid to date of approval.
2. Prior to the issuance of any construction permit, the Applicant shall file with the Board and with the Borough construction official or his designee an affidavit verifying the Applicant is in receipt of all necessary agency approvals other than the municipal agency having land use jurisdiction over the application and supply copy of any approvals received.
3. The Applicant shall see to the payment of all fees, costs and escrows due or to become due; any and all monies are to be paid within 20 days of said request by the Secretary to the Planning Board.

4. The Applicant shall prepare and submit to the Board for the Borough Engineer's review and approval legal metes and bounds descriptions of any roadway dedications, utility easements and or any drainage easement grants that are necessitated by this approval.

5. Monmouth County Soil Conservation District approval (if required).

6. The Applicant shall take appropriate dust control and vermin control measures during any additional construction on the site.

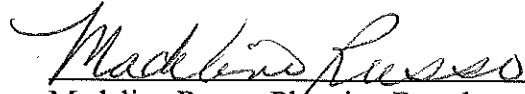
7. At least one week before any construction, a pre-construction meeting shall be held including municipal representatives, the Applicant, its engineers and contractors. The meeting shall be held only after the engineer's opinion of probable cost has been submitted to the municipality for computation of engineering and inspection fees, the form of which is to be approved by the City Engineer.

8. The Applicant shall comply with all directives of the Borough Fire and Construction Officials, or their designees.

9. The Applicant must post performance guarantees and inspection fees with the Borough prior to the beginning of any additional onsite activities.

10. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Union Beach, County of Monmouth, State of New Jersey or any other jurisdiction.

The undersigned secretary certifies the within resolution was adopted by this Board on June 26, 2019 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on August 28, 2019.



Madeline Russo, Planning Board

FOR: *Wells, Coffey, Deriso and Wade*
AGAINST: *None*
ABSTAIN: *Morin, Andreuzzi, Casallo and Hallam*

EXHIBIT LIST

- A1 - Decision of the Construction Board of Appeals
- A2 - Schematic drawings by Robert Burlew depicting the interior of the property
- A3 - Certificate of Occupancy dated 6/12/18
- A4 - Certificate of Occupancy dated 4/14/09
- A5 - Certificate of Occupancy dated 5/3/11
- A6 - Certificate of Occupancy dated 3/22/12
- A7 - Certificate of Occupancy dated 1/30/15
- A8 - Tax Records
- A9 - Letter from Barbara Florentine dated 5/15/17
- A10 - Application for Certificate of Occupancy dated 6/11/18
- A11 - Certificate of Occupancy dated 7/12/18
- A12 - Electrical Subcode Approval
- A13 - Certificate of Occupancy dated 9/27/18
- A14 - Letter from Tim Davis dated 9/28/18
- A15 - Non-Substantial Damage Detection letter dated 4/4/14
- A16 - Letter from Paul Mirabelli, Esq. to Mr. Dayback dated 12/12/18 with attachments
- A17 - Application for building permit to remove chimney
- A18 - CO issued October 26, 2018
- A19 - CO issued on June 12, 2019
- A20 - Elevation Certificate

- B-1 - June 5, 2018 elevation letter from Dennis Dayback
- B-2 - January 11, 2019 letter from Borough Attorney
- B-3 - Tax record attached to letter from Borough Attorney
- B-4 - Letter from Martin Truscott, PP.