

RESOLUTION
Borough of Union Beach
Planning Board
In the Matter of Shawn Spanier
411 Bayview Avenue
Block 153, Lot 19.01
Decided on November 30, 2022
Memorialized on December 19, 2022
Denial of Application for (c) Variances

WHEREAS, Shawn Spanier (the “Applicant”) has made an application to the Borough of Union Beach Planning Board for minor subdivision and numerous bulk (c) variances, located at 411 Bayview Avenue, also known as Block 153, Lot 19.01 as shown on the tax map of the Borough, located in the R-8 Residential Zone; and

WHEREAS, the Applicant appeared pro se; and

WHEREAS, a public hearing was conducted on this application at Borough Hall in the Council Chambers on November 30, 2022, 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 hearing, at which a record was made. The Applicant before the Board seeks approval for four bulk variances needed as follows:

1. Section 13-10.4 f. 1. (b)-Minimum lot area of 5,000 sqft where 7,500 sqft is required *pre-existing
2. Section 13-10.4 f.2.(b) -Minimum lot width of 50 feet where 75 feet is required *pre-existing
3. Section 13-10.4 f.3.(b) -Minimum lot frontage of 50 feet where 75 feet is required *pre-existing
4. Section 13-10.4 f.4.(e)l -Minimum side yard setback of 0 feet where 5 feet is required and Minimum rear yard setback of 0 feet where 5 feet is required.

The Board had before it an April 20, 2018 letter from Dennis M. Dayback, Zoning Official. The letter identified the proposed four bulk variances that would be needed by the Applicant. The hearing on this application took place before the Board at its regular meeting on November 30, 2022.

The only witness was the Applicant, who appeared without counsel. He testified that he is trying to sell his home. He stated that the deck was installed a number of years ago and it was his impression that permits had been secured by the general contractor who did the work. He purchased the home in 2016 and hired a local contractor to build both the pool and at a later time the deck. There were no permits issued for the construction of the deck around the pool. He is now putting the house up for sale, which triggered the review resulting in the Applicant having to appear before this Board. He testified that the contractor was located out of Keansburg and has since retired. He said he was not familiar with the zoning process and that the proposed sale was lost due to this issue.

At this point the Board reviewed a letter dated April 20, 2018 from T&M Associates, Dennis Dayback, acting zoning official, where the Applicant proposed to construct a deck and was told that bulk variance relief was needed, as was recited in this letter. Apparently, neither the Applicant nor his contractor made any effort to proceed to get the requisite bulk variance relief necessary in order to proceed. However, that apparently did not stop the Applicant from proceeding to construct the deck in question. Several questions were raised about the deck because of it not complying with code requirements, noting that in certain areas the deck was literally up to fence posts and the property line. Several Board members expressed their concern that the deck was way too close to the adjacent properties. Several members of the Board noted that it took until last September when the Applicant was selling trying to sell the house to

proceed to get the necessary permits and approvals. Several other members of the Board cited it as a safety hazard, noting that the permitting had not been done in a proper manner and could pose a safety hazard to not only the occupants of this house, but adjacent homes given the location of the deck on the property.

There were no members of the public coming forward wishing to express an opinion for or against the subject application or wishing to speak to the Board or ask questions of its professionals. At this point the public hearing was closed and the Board took the opportunity to further express its concerns.

Several members of the Board expressed repeated concerns that the 2018 letter from the zoning officer had been effectively ignored by the Applicant. The Applicant claimed that he signed paperwork presented to him by his contractor and never received another letter from the Borough, so he thought it was okay to proceed with the work being done to install the deck. Several members of the Board noted that if the Applicant had paid \$20,000.00 to his contractor, he should have paid more attention to the permitting and approvals that were needed. Several members of the Board expressed their concerns regarding the safety in terms of both the occupants of the house and adjacent property owners. Furthermore, given that the deck for the pool was located in an area where the deck was right on the property line, this was unacceptable, and that the way why this was handled by the Applicant was inappropriate.

The Board planner Caroline Reiter was sworn in and qualified. She testified that it would be extremely difficult to sustain any type of bulk variance relief. She stated that there would be a negative impact on several of the surrounding neighbors. She agreed that there were serious concerns with regard to safety for users of the pool and adjacent property owners. Given where

this was located, it would be virtually impossible to do any repair work on sections of the deck without going on neighbor's property.

NOW THEREFORE, the Board hereby makes the following conclusions of law based upon the foregoing findings of fact. The Applicant is seeking approval of bulk variances as described above in order to retroactively approve the installation of a deck around a swimming pool on the property at 411 Bayway Avenue in the R-8 Zone.

With respect to the bulk variances, the Municipal Land Use Law, at N.J.S.A. 40:55D-70(c) provides Boards with the power to grant variances from bulk and other non-use related Ordinance requirements 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; physical features, or other extraordinary circumstances exist which uniquely affect the specific piece of property and limit its development potential in conformance with Ordinance requirements, such that the strict application of a 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. Alternatively, 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 purposes of the Act would be advanced by allowing a deviation from the Zoning Ordinance requirements and that the benefits of any deviation will substantially outweigh any detriment. These tests specifically enumerated above constitute the affirmative proofs necessary in order to obtain "bulk" or (c) variance relief. Finally, an Applicant for these variances must also show that the proposed relief sought will not cause a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan

and Zoning Ordinance. The burden of proof is upon the Applicant to establish that these criteria have been met.

Based upon the application, plans, reports and testimony before it, the Board finds that in this particular instance 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 (c) variance relief by installing the deck without any permits, thus triggering the need for numerous 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). The evidence before the Board indicates that in this particular circumstance, (c) variance relief cannot be granted to “grandfather in” the installation of the deck area and utilities.

The Applicant has not supplied sufficient evidence that exceptional or extraordinary circumstances exist which uniquely affect this 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).

This Board concludes that the Applicant has failed to present sufficiently persuasive testimony to justify the numerous bulk variance relief sought in this application. There are no

exceptional or extraordinary circumstances uniquely affecting this piece of property. The strict application of the zoning ordinance would not result in peculiar or exceptional practical difficulty or undue hardship being visited upon the proposed developer of the property. The Applicant does not meet the “special reasons” test to justify the relief being sought.

The Board finds that the testimony offered cannot justify the Board voting in favor of the Applicant, since the evidence before the Board failed to demonstrate that the need for the bulk variances sought would not have a substantial detriment to the public safety 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 bulk variance relief requested by the Applicant in order to retroactively approve the deck met the required proofs so as to grant the relief sought. The proofs offered by the Applicant do not meet the requisite standard. No professional planner testified for the Applicant. 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). In this case the Board finds the testimony not persuasive, and finds the issues raised by Ms. Reiter to be right on point.

More importantly, with regard to the (c)(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 bulk variances to retroactively approve this deck installation and in its current location outweighs any benefit to the Borough. The Board finds that the testimony offered by the Applicant highlighted the direct inconsistency between the relief sought by the Applicant and how it runs contrary to the Borough

Zoning Ordinance. The Applicant has failed to offer persuasive testimony that the proposed deviations from the prevailing standards for the numerous 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 numerous 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 and Master Plan. The benefit to the Applicant cannot outweigh the detriment of work being done without permits to install the deck. The Applicant has not met the burden of proof with regard to satisfying the positive and negative criteria as required to secure the numerous (c) bulk variances sought in this application as set forth above.

NOW THEREFORE, BE IT RESOLVED by the Planning Board that the application by Shawn Spanier, for property located at 411 Bayway Avenue in the Borough of Union Beach requesting numerous (c) bulk variances as set forth above, is denied for the reasons set forth herein. The Applicant shall proceed to secure the necessary permits to remove the deck in

question. This work shall be done under the direct supervision of the Borough Construction Official, to be completed no later than 45 calendar days after the date of adoption of this resolution.

The undersigned secretary certifies the within resolution was adopted by this Board on November 30, 2022, and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on December 19, 2022.

Laurette Wade, Secretary, Planning Board

FOR:

AGAINST:

ABSTAIN:

Board Member(s) Eligible to Vote:

Sweeney Cavallo Andreuzzi Connors Wells

Coffey Hoadley Devino Hallam Murray