

**RESOLUTION**  
**Borough of Union Beach**  
**Planning Board**  
**In the Matter of Harry Hoff**  
**430 Aumack Avenue**  
**Block 165, Lot 4.01**  
**Decided on April 27, 2022**  
**Memorialized on August 31, 2022**  
**Denial of Application for Bulk (c) Variances**

**WHEREAS**, Harry Hoff (the “Applicant”) has made an application to the Borough of Union Beach Planning Board for several bulk (c)(1) hardship variances, located at 430 Aumack Avenue, also known as Block 165, Lot 4.01 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 January 26, 2022, March 30, 2022, and April 27, 2022; 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 Applicant before the Board seeks approval for (c)(1) hardship variances, since this is an undersized lot for the R-8 Zone. As for the bulk variances needed for a three-story single family residence, they are as follows:

1. Section 13-10.4 f.1.(a) – Minimum lot area of 4,000 sq. ft. were 7,500 sq. ft. is required. *\*pre-existing*
2. Section 13-10.4 f.2.(a) – Minimum lot width of 40 feet on Aumack Avenue where 75 feet is required. *\*pre-existing*
3. Section 13-10.4 f.3.(a) – Minimum lot frontage of 40 feet of Florence Avenue where 75 feet is required. *\*pre-existing*

- (1) The Applicant is proposing to build a three-story building (2 living floors over ground level garage total building height not to exceed 30 feet) for the permitted use of a single family home. The proposal is for 1,000 sq. ft. building foot print, building coverage of 25%, total lot coverage – 49%, front yard 20 ft, right side yard 12 ft, left side yard 8 ft, rear yard 30 ft; all these meet the zone requirements. A Architectural sketches and photographs of the proposed dwelling were submitted in the November 17, 2021 Zoning Application.
- (2) Lot 4.01 has a long and tortured procedural history as well as a long and tortured history through the Superior Court. That history is summarized accurately in the letter briefs dated February 16, 1999, September 1, 1999 and December 3, 1999 of Robert McLeod, the former Board Attorney. Those extensive proceedings and factual history are adopted and incorporated herein as if set forth at length herein. (23 pages)
- (3) The Board has received and reviewed the following documents: <sup>1</sup>

Exhibits from March 30, 2022 Hearing

- C-1. Email to Tax Assessor
- C-2. Email from Tax Assessor
- C-3. Email from Tax Assessor, March 10, 2022
- C-4. Schedule A – Descriptions of Property
- C-5. Document showing Tierney as heir to McCarthy
- C-6. 9 Deeds for two parcels of land

---

<sup>1</sup> Pleadings in prior litigation between the same parties were judicially noticed by the Appellate Division in Schweizer v. MacPhee, 130 N.J. Super. 123,125 n.2 (App. Div. 1974). See also Raab v. Raab, 99 N.J. Super. 265, 269 (Ch. Div. 1968). A trial court may rely on a reciting of the history of the controversy found in prior reported opinions that dealt with the matter. City of New Brunswick v. Borough of Milltown, 191 N.J. Super. 467, 469 (Ch. Div. 1983). See also, LoBiondo v. Schwartz, 323 N.J. Super, 391, 403 (App. Div.) certify. Den. 162 N.J. 488 (1988) where the Appellate Division took judicial notice of the oral decision in a prerogative writ case providing background for the defamation case being heard.

C-7. Applicant's Board Booklet of various documents

Exhibits from January 26, 2022 Hearing

- A. Judge Lawson decision – November 27, 2001
- B. Mirabelli Letter – December 1, 2021
- C. Mirabelli Letter – December 17, 2021
- D. Planning Board Resolution – April 25, 2001
- E. McLeod Brief – November 15, 1999
- F. Duplicate tax list
- G. Email with Tax Assessor
- H. Finnigan Letter
- I. Green cards, letters to neighbors
- J. Tax Maps

Other Documents

Zoning Official Letter, October 22, 2021 to Applicant

Zoning Application by Harry Hoff, November 17, 2021

(4) The most important facts summarized from the McCleod briefs regarding these four 20 foot x 100 foot lots are:

- A. In 1963 when the R-8 zone was created, the minimum lot size was 7,500 square feet with minimum lot width of 75 feet. Therefore, unless all four of these 20 foot lots were combined, the lots were non-conforming as to size and frontage. The two titled owners each with 40 foot frontage had non-conforming lots which were almost half sized lots according to the zone requirements and master plan for this

neighborhood in Union Beach. Those bulk sizes in this R-8 zone have remained unchanged since 1963.

- B. Robert W. McCarthy and Mary McCarthy were deeded Lots 63 and 64 (Deed Book 1727, Page 356). This was vacant land and has never been developed. Edward and Gertrude Zahn, the owners of the adjacent home on Lots 62 and 61, were assigned a tax sale certificate in 1941. They paid the taxes on their home and these two adjacent vacant lots for many years.
- C. In 1957 the Zahns deeded their interests by two separate deeds to all four lots to John A. Kurimsky and Anna E. Kurimsky. The tax sale certificate was also at that time assigned from the Zahns to the Kurimskys, who thereafter continued to pay taxes on all four lots.
- D. In 1962 a new tax map was adopted by the Borough and all four lots were designated as one lot: Lot 4, Block 165.
- E. In 1995 widow Kurimsky tried to sell all four lots designated as one lot: Lot 4, Block 165. She and her late husband had paid the taxes on all four lots for many years. Her home on Lots 61 and 62 was in need of repair. Applicant Harry Hoff offered her \$50-55,000 for all four lots, but instead S&S Contracting entered into a contract for sale for \$62,500 on January 31, 1995. However, the contract purchaser, represented by Thomas J. Dichiara of Drazin & Warshaw, P.C. cancelled the contract because Mrs. Kurimsky only had legal title to two lots, 61 and 62, where her home was located.
- F. Another contractor, Bird Dogs Inc., in September agreed to acquire “part of Lot 4” and such interest that Mrs. Kurimsky had in Lots 63 and 64 by way of two

deeds. Bird Dogs Inc. then repaired the home and sold lots 61 and 62 to James Okpych on November 8, 1995.

- G. Before the sale of her home, Mrs. Kurimsky approached the tax assessor, Francis H. Halitois in July 1995 about the problems discovered in selling these two lots 61 and 62. By letter dated July 14, 1995, the tax assessor agreed to change the tax map effective for 1996 tax year by designating lots 63 and 64 as Lot 4.01 (40x100). Mrs. Kurimsky's lots (61 and 62) remained as lot 4 on the tax map (40x100).
- H. The Zahns and Kurminskys never foreclosed on their tax lien rights on the two lots 63 and 64 (now Lot 4.01) even though they could have done so by virtue of all the taxes they paid on this vacant land for 54 years.
- I. Title to Lot 4.01 (Lots 63 and 64) was quieted in an action brought in the Chancery Part of the Superior Court by Bird Dogs, Inc. Judgment was entered on June 30, 1998, in favor of another corporate entity 446 Hillside, LLC which received an assignment from Bird Dog, Inc. before judgment was entered.
- J. Applicant's father and mother acquired the title to Lot 4.01 from 446 Hillside, LLC. Applicant acquired the title to Lot 4.01 from his mother.
- K. All of the prior applications for development of Lots 63 and 64 required the same bulk variances – lot size, lot frontage and lot width. The R-8 zone requirements for these lots have remained the same since 1963 for lot size, lot frontage and lot width. While the prior applications may have had an “aesthetically different” concept for the single home to be developed on these vacant lots, Judge Lawson's opinion on November 27, 2001, ruled that Lot 4.01 was “illegally created”

thereby justifying this Board to deny any variances. All of the factual information about the history of these four lots that Applicant provided in this application was available to Judge Lawson in 2001 who affirmed the action of this Board denying any variances for Lot 4.01.

**NOW THEREFORE**, the Board making the following conclusions of law based upon the evidence presented at the aforesaid public hearings together with the documents received in evidence and the Board's records from prior applications for these same lots.

- (1) The legal doctrines of res judicata and collateral estoppel apply to municipal administrative proceedings such as municipal land use cases. Allied Realty, Ltd. v. Borough of Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987) (citing Russell v. Tenafly Bd. of Adjustment, 31 N.J. 58, 65 (1959); Home Builders Assn. of Northern N.J. v. Paramus Bor., 7 N.J. 335, 342 (1951)).
- (2) The doctrine of res judicata does not bar the making of a new application or if there are "changed circumstances" or "other good cause" if the "continued enforcement" of a zoning restriction would "frustrate an appropriate" land use "purpose." Cohen v. Fair Lawn, 85 N.J. Super. 234, 237 (App. Div. 1964).
- (3) The issue for the municipal land use board on a second or subsequent application focuses on "whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment" of the matter again. Russell v. Tenafly Bd., supra, 31 N.J. at 66.
- (4) Under the doctrine of res judicata "if the same parties or their privies seek the same relief in the same factual setting" the case should be dismissed on the grounds that it has already been decided. Bressmall v. Gasb, 131 N.J. 517, 526 (1993).

- (5) The doctrine of res judicata should apply where it is demonstrated that (1) the second application is substantially similar to the first; (2) the same parties or their privies are involved; (3) there are no substantial changes in the prior applications or in the conditions surrounding the property; (4) there was an adjudication on the merits in the first case; (5) both applications must involve the same cause of action. Cox, New Jersey Zoning and Land Use Administration Sec. 19-3.2 at 402 (2021).
- (6) The opinion of Assignment Judge Lawrence M. Lawson dated November 27, 2001, in Linda Hoff v. Union Beach Planning Board (Docket No. MON-L-2630-01) meets all of the requirements to apply the doctrine of res judicata to this application.
- (7) Judge Lawson determined, just as Judge Robert W. O'Hagan had previously ruled in Bor. Of Union Beach v. Bird Dogs Inc., MON-L-5960-99 (Law Div. 2000) (Tr. at 10) that lot 4.01 was an "illegally created lot." (Opinion at 8). Judge Lawson held that the applicant's lot 4.01 was "illegally created without proper subdivision approval." (Opinion at 10).
- (8) While the Board understands and appreciates the legal contentions raised by the Applicant here that the four "lots could have never been illegally subdivided as they had never merged," the Applicant has cited no legal authority which would allow this Board to overrule two prior rulings of the Superior Court by two different judges that Lot 4.01 was "illegally created without a proper subdivision."
- (9) Apparently both judges were convinced from the briefs from the Board's then attorney that because the O'Briens had abandoned the two vacant lots 63 and 64 and then as a result of tax sale certificates, the next-door neighbors, the Zahns, and then the Kirminskys for many years paid the taxes on these vacant lots, they effectively

“owned” these lots by virtue of their equitable conduct in paying all municipal real estate taxes.

(10) Judge Lawson in 2001 did not have the benefit of Jock v. Zoning Bd of Adjustment, 184 N.J. 562, 584-585, 587 (2005) which applies the doctrine of merger under Loechner v. Campoli, 49 N.J. 504 (1967) only to lots with common legal title but not to lots of equitable or constructive ownership. Yet no appeals were taken from the decisions of these two judges who declared that Lot 4.01 was “illegally created.” Under these circumstances, this Board lacks legal authority to reverse those judicial rulings. The Applicant’s only remedy therefore is to seek relief in the Superior Court to allow this Board to consider this application.

(11) No appeal was taken from any of the decisions by Superior Court Judges O’Hagan and Lawson. At the time of their decisions, the case law applying the court created doctrine of merger appeared to support the concept of equitable ownership to merger of lots fronting along the same street. See Jock v. Zoning Bd. of Adjustment, 371 N.J. Super. 574, 551, 555-558 (App. Div. 2004).

(12) If the Applicant’s privities in these lots had appealed those decisions, perhaps the courts would have changed the doctrine then but that change in the case law did not occur until 2005 when the New Jersey Supreme Court ruled that lots in Wall Township which had the same equitable owners but not the same legally titled owners did not merge. Id., 184 N.J. at 584, 587. At this point, only the courts have the legal authority to change the prior rulings of Judges O’Hagan and Lawson that Lot 4.01 was “illegally subdivided.”



(13) Because of the previous rulings by Judges O’Hagan and Lawson, this Board has no jurisdiction or power to grant any variances on an “illegally” subdivided lot, so the Board cannot at this time determine the merits of the (c)(1) hardship variances by applying the case law of Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597 (1980); Cox, supra, Sec 30-1, 30-2 at 663-677. Only a Superior Court ruling can overturn the previous rulings of the Superior Court. This Board has no such authority. The Applicant has failed to establish any legal authority of this Board to overturn or disregard the previous rulings of the Superior Court as to Lot 4.01.

**NOW THEREFORE, BE IT RESOLVED** by the Planning Board that the application by Harry Hoff, for property located at 430 Aumack Avenue in the Borough of Union Beach requesting (c)(1) hardship bulk variances is denied for the reasons set forth herein.

The undersigned secretary certifies the within resolution was adopted by this Board on August 31, 2022 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on August 31, 2022.

\_\_\_\_\_  
Laurette Wade, Planning Board

TO DENY THE APPLICATION

FOR: ( )

AGAINST: ( )

ABSTAIN: ( )