

**RESOLUTION
TOWNSHIP OF PEQUANNOCK PLANNING BOARD
IN THE MATTER OF MORRIS HABITAT FOR HUMANITY
DECIDED ON AUGUST 16, 2010
MEMORIALIZED ON SEPTEMBER 20, 2010
MINOR SUBDIVISION APPROVAL AND
ANCILLARY "C" VARIANCE RELIEF**

WHEREAS, Morris Habitat for Humanity (hereinafter "Morris Habitat" or "Applicant") has filed an application with the Pequannock Township Planning Board, (hereinafter "Planning Board" or "Board"), seeking minor subdivision approval and ancillary "c" variance relief for property known as Block 1404 Lots 20-23 on the Tax and Assessment Map of the Township of Pequannock and located at 8 Highland Avenue, Pompton Plains, New Jersey in the R-11 Residential Zone District (R-11 Zone); and

WHEREAS, public hearings were held on July 19, 2010 and August 16, 2010, after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by James Mullen, Esq. (hereinafter "Mullen").

NOW, THEREFORE, the Planning Board makes the following findings of fact, based on evidence presented at its public hearing, at which time a record was made.

The application before the Board is a request for minor subdivision approval and ancillary "c" variance relief for property known as Block 1404 Lots 20-23 on the Tax and Assessment Map of the Township of Pequannock, which premises are located at 8 Highland Avenue, Pompton Plains, New Jersey in the R-11 Zone.

Testifying on behalf of the Applicant during the course of the hearing process were Liz DeCoursey, Program Director, Morris Habitat (hereinafter "DeCoursey"); Eric Keller, P.E. (hereinafter "Keller"); Bruce Katona, Professional Planner (hereinafter "Katona"); and Alfred Stewart, P.E., L.S. (hereinafter "Stewart").

The Application as originally filed required the Applicant to seek preliminary and final major subdivision approval and bulk variance relief in regard to the realignment of lot lines for existing Lots 20, 21, 22 and 23. The properties are under single ownership and are owned by Eleanor Bogert, 581 Route 23, Pompton Plains, New Jersey. Lots 20, 21 and 23 are vacant, but Lot 22 contains a single family residential dwelling which is being donated to Morris Habitat for use as affordable housing. The property is serviced by municipal water and an individual on site septic system. At this time, there are no additional homes proposed for construction. This case also involves the issue of lot merger because despite separate designations on an old Tax Map, these adjacent undersized lots which, are owned in common title, are by law considered part of a larger tract or parcel for zoning purposes pursuant to Loechner v. Campoli, 49 N.J. 504 (1967).

The Applicant originally filed an application seeking relief from the Planning Board in order to create a four (4) lot subdivision. However, during the course of the hearing process, the Applicant amended the plans in order to eliminate one (1) of the lots thereby resulting in this application becoming a minor subdivision as opposed to a major subdivision. The application as amended seeks to create proposed Lot 20.01 with a lot area of 15,754.30 square feet, proposed Lot 22.01 with a lot area of 11,250 square feet and proposed Lot 23.01 with a lot area of 11,250 square feet. Proposed Lot 22.01 which contains an existing single family residential dwelling will be donated to Morris Habitat.

DeCoursey testified that she has been employed by Morris Habitat for 4½ years and she is currently the Program and Property Acquisition Director. Her primary responsibility is obtaining properties and shepherding the properties through the

approval process to closing. DeCoursey also testified in regard to the methodology of selecting homeowners and the process that follows. DeCoursey stated that homeowners are selected by lottery and must meet resource and income limits to meet Council on Affordable Housing (hereinafter "COAH") requirements. All homeowners must invest 300 hours of "sweat equity" into the building of their own home. She further testified that Morris Habitat is the holder of the mortgage for all selected homeowners. DeCoursey further indicated that typically the mortgage is a thirty (30) year 0% interest mortgage. She represented that the Township would receive one (1) COAH credit for the unit. DeCoursey also testified that the property owner, Eleanor Bogert is willing to donate her home to Morris Habitat, which house has been vacant for five (5) years but has been used as a rental home since 1951.

The Applicant's attorney, James Mullen, Esq. stated that the homes are deed restricted to a certain price and, therefore, the owner is not allowed to sell the house for any more than what the state mandates. DeCoursey stated there is a 2 or 3 percent cap for resale. DeCoursey represented that the home must remain affordable for thirty (30) years. Therefore, if a home is sold within that time frame, it must be sold to another affordable family. Mullen informed the Board that after thirty (30) years the COAH rules allow for the municipality to purchase the home and keep it in the affordable housing inventory.

Keller testified at the July 19, 2010 hearing. At that time, the Applicant was proposing a four (4) lot major subdivision. Subsequently, the Applicant amended the application to seek approval for a three (3) lot subdivision which was presented to the Board on August 16, 2010. Nevertheless, Keller stated that water service and utility services are already provided to the existing home. Keller represented that test pits

were done and a letter was received from the Health Department stating the proposed septic system can be constructed on the property in place of the old septic facility. Keller also represented to the Planning Board that the Applicant has received approval from the Morris County Planning Board. Keller testified that the site was inspected and there is no evidence of wetlands on the site.

Bruce Katona, the Applicant's planner testified at the July 19, 2010 hearing in regard to the application for a four (4) lot subdivision as well as at the August 16, 2010 hearing after the Applicant had amended the application to seek a three (3) lot subdivision. Furthermore, during the course of the hearing on July 19, 2010, the Planning Board requested that Mr. Katona provide a planning report in regard to this matter which would be presented at the hearing on August 16, 2010. Mr. Katona did in fact prepare such a report and presented it at the August 16, 2010 hearing and addressed the amended application.

The Applicant now seeks approval for a three (3) lot minor subdivision. Katona testified that the site is located on Highland Avenue near the intersection of Cedar Avenue. The site has 383 feet of frontage on Highland Avenue and 100 feet of frontage on Cedar Avenue. The total site area is 38,254 square feet spread over four (4) tax lots. Existing Lot 22 in Block 1404 is 4,994 square feet in size and contains an existing residential structure which will be rehabilitated by Morris Habitat. There is also an abandoned shed on existing Lot 23 in Block 1404. He further testified that the site is partially wooded along the exterior boundary with several large trees located adjacent to the existing residences. The site is very flat and typical of the surrounding neighborhood which, in his opinion, presents no challenge to the development of the site. The Applicant now seeks approval for a three (3) lot minor subdivision with

proposed Lot 20.01 consisting of 15,754.30 square feet; proposed Lot 22.01 consisting of 11,250 square feet and proposed Lot 23.01 consisting of 11,250 square feet.

Katona also testified in regard to the surrounding land uses and the existing zoning. Katona testified that the Applicant requires ancillary "c" variance relief relative to the minimum lot depth where 125 feet is required and 99.88 feet is existing. Katona also testified in regard to the minimum front yard setback where, pursuant to Section 189.03.050(B)(4), the minimum front yard setback in the R-11 Zone is 50 feet. However, the Ordinance also provides that where the average setback is less than 50 feet, the average setback will apply. Katona agreed with the testimony provided by Alfred A. Stewart, Jr. P.E. who previously testified that the Applicant examined front yard setback distances on all of the lots within 200 feet of the subject property and concluded that the average front yard setback is approximately 29 feet. Therefore, since the average minimum front yard setback is 29 feet, which the Applicant will meet, there is no requirement to obtain ancillary "c" variance relief for front yard setback in regard to this application for proposed Lots 20.01 and 23.01. The existing dwelling on proposed Lot 22.01 has an existing non-conforming front yard setback of 18.0 feet, requiring ancillary "c" variance relief.

Katona provided planning analysis relative to the granting of variances in this application. Katona testified that it would be appropriate for the Planning Board to grant C1 hardship variance relief due to the exceptional narrowness, shallowness or shape of this specific piece of property and that the strict application of the regulations would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the developer of such property. Katona also testified in regard to the negative criteria. Katona stated that the granting of a variance will not substantially

impair the intent and purpose of the zone plan or zoning ordinance and there will be no substantial detriment to the public good. Katona stated that the proposed development will visually match the existing residential neighborhood in lot size, front yard setback and lot depth. He further testified that the relief requested for lot depth is a pre-existing nonconforming condition which cannot be alleviated.

During the course of the public hearings, this matter was opened up to the public and the public appeared at both the July 19, 2010 and August 16, 2010 hearing. The July 19, 2010 hearing, the Board was addressed by Chris Taormina 7 Highland Avenue; Gabe Carpinelli, 11 Highland Avenue; Lonnie Siemonsma, 22 May Avenue; and Roberta Zwier, 20 Highland Avenue. These members of the public testified at the July 19, 2010 hearing. At the time that they testified before the Board, the application was for a four (4) lot subdivision and had not yet been amended to a three (3) lot subdivision. Thus, the comments of the members of the public generally concerned having fewer lots but with larger minimum lot areas. Eleanor Bogert, the owner of the property also presented testimony to the Planning Board at this time. At the August 16, 2010 hearing the only member of the public to testify was Chris Taormina. He indicated that he supported the application for a three (3) lot subdivision as now proposed by the Applicant. He also stressed that he would not like to see any further subdivision of these parcels. The Board explained that any further subdivision would be highly unlikely because any new lots would be greatly undersized and would not meet the minimum lot area requirements in the R-11 Zone.

NOW, THEREFORE, the Planning Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The application before the Board is a request for minor subdivision approval and ancillary "c" variance relief for property known and designated as Tax Block 1404 Lots 20, 21, 22 and 23 as shown on the Tax and Assessment Map of the Township of Pequannock and located at 8 Highland Avenue, Pompton Plains, New Jersey in the R-11 Zone.

The Applicant originally submitted an application seeking preliminary and final major subdivision approval in order to create four (4) new single family residential lots from existing lots that merged. The application has now been revised in order to seek approval for a three (3) lot minor subdivision. The subject site is located in the R-11 Residential District of the Township. The proposed subdivision is permitted in the R-11 District. A small, two story single family residence with a detached garage is located on existing Lot 22 and will be located on proposed Lot 22.01. This lot and structure is to be donated to Morris Habitat as an affordable housing site.

All of the proposed new lots will have a nonconforming lot depth of 99.88 feet where 125 feet is required. This is an existing condition. The new lots will all meet the minimum requirements in the R-11 Zone for lot area. More specifically, proposed Lot 20.01 will have a lot area of 15,754.30 square feet; proposed Lot 22.01 will have a lot area of 11,250 square feet; and proposed Lot 23.01 will have a lot area of 11,250 square feet. In addition, proposed Lot 22.01 will contain the existing single family residence with a detached garage and the existing nonconforming 18 feet front yard setback will remain.

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c 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. 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 in order 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.

With respect to the request for ancillary "c" variance relief, the Applicant requires ancillary "c" variance relief for to proposed Lots 20.01, 22.01 and 23.01 in regard to lot depth where the minimum lot depth of 125 feet is required and 99.88 feet is proposed.

The Board notes that this is an existing condition. The Board also notes that it is not reasonable for the Applicant to acquire additional property in order to meet the lot depth requirements in the R-11 Zone. There is also an existing nonconforming 18 feet front yard setback relative to proposed Lot 22.01. The Board concludes that this setback deficiency is an existing condition and that since this structure will be rehabilitated in order to be used for affordable housing purposes, it makes better planning sense to permit the existing nonconformity to continue. Thus, the Board concludes that it is appropriate to grant ancillary "c" variance relief in regard to the front yard set back for proposed Lot 22.01. In addition, the Board notes that with respect to proposed Lot 22.01, the reconfiguration of the lot area which will be greatly increased from the existing lot size of 4,993.89 square feet to 11,250 square feet will also benefit the public. The new lot will eliminate the existing nonconforming conditions related to lot width, lot frontage and building coverage. In addition, the existing nonconforming side yard setback of the detached garage will be eliminated. Thus, the developed lot, with its increase in lot size and width will meet all of the requirements in the R-11 Zone with the exception of lot depth and front yard setback as previously indicated herein.

The Board has examined the request for variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(c)(1) and the Board concludes that the Applicant is entitled to C1 variance relief due to the features existing which uniquely affect this specific piece of property and due to peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property.

The Board also reviewed the granting of ancillary "c" variance relief under the C2 analysis. In Kaufman v. Planning Bd. for Warren Tp. 110 N.J. 551, 563 (1988) the New Jersey Supreme Court held:

“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 be not 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.”

The Board recognizes that the subject site is located in the R-11 Zone, wherein the minimum required lot size is 11,250 square feet. The Board also recognizes that at one time there were four (4) individual lots with a total lot area of approximately 38,254 square feet. The Board also notes that pursuant to the merger doctrine as set forth in within Loechner v. Campoli 49 N.J. 504 (1967) and other related cases, adjacent undersized lots in common title are merged as part of a larger tract or parcel for zoning purposes. Therefore, although at one time there were four (4) separate lots, the lots have merged and are now one (1) lot. The Board also recognizes that the existing site at 38,254 square feet currently exceeds the minimum lot area in the R-11 Zone. Thus, the Board concludes that by granting the minor subdivision in order to create three (3) lots with proposed Lot 20.01 having a lot area of 15,754.30 square feet, proposed Lot 22.01 with a lot area of 11,250 square feet and proposed Lot 23.01 with a lot area of 11,250 square feet this will result in the lot areas of the newly created lots being more in conformance with the ordinance requirements and more in conformance with the lot sizes in the neighborhood.

The Board also concludes and accepts the representations of the Applicant's experts that as to the front yard set back for proposed lots 20.01 and 23.01 that the average front yard setback is approximately 29 feet and the application as proposed will comply with the average front yard setbacks in the R-11 Zone in general and this

neighborhood in particular. The Board determines that approval of this application represents a better zoning alternative for the property which benefits the community. The Board also points out that the application as originally presented sought a subdivision of four (4) lots and as a result of comments from members of the public and the Board, the Applicant agreed to eliminate one (1) lot, thus creating a three (3) lot subdivision. The Board determined that having fewer lots with a larger lot area makes better planning sense and will not be in conflict with the nature and character of the R-11 Zone as presently developed. Therefore, under the C2 analysis the Board determined that the positive and negative criteria were met by the Applicant and the granting of "c" variance relief as set forth herein is appropriate.

The Board also concludes that it is not necessary to grant a variance for front yard setback for proposed lots 20.01 and 23.01 because the ordinance provides an alternative to the minimum 50 feet front yard setback, wherein the average setback in the zone is less than 50 feet, the Applicant can meet that minimum requirement and not seek variance relief. In this case, the Applicant does in fact meet the 29 feet front yard setback which is the average in the area. Thus, no variance relief is required.

The Board finds that the proposed subdivision would have no negative impact on the neighborhood or the public good. As a result, the Board concludes that the granting of minor subdivision approval and ancillary "c" variance relief as set forth herein may be granted under the C2 criteria because it will not be substantially detrimental to the public good and further, the approval will not substantially impair the intent and purpose of the zone plan and zoning ordinance. The Board also concludes that the benefits of the approval would outweigh any conceivable negative detriment. Under these circumstances, it is appropriate for the Board to grant ancillary "c" variance relief.

Upon consideration of the plans, testimony and application, the Board determines that the proposed minor subdivision plan approval has met the minimum requirements of the Municipal Land Use Law, case law and Township ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will not adversely impact or impair the use and enjoyment of adjacent properties.

The Planning Board clearly recognizes that at the time of this application, the only proposed development is in regard to Lot 22.01 which is the Morris Habitat lot. It is the intention of the Planning Board that as to any future residential development on proposed Lots 20.01 and 23.01, there should be no additional bulk variance relief granted in the future that would permit development to extend beyond the building envelope.

NOW, THEREFORE, BE IT RESOLVED, by the Planning Board of the Township of Pequannock that the application of Morris Habitat for Humanity for premises commonly known and designated as Tax Block 1404, Lots 20, 21, 22 and 23 on the Tax and Assessment Map of the Township of Pequannock, located at 8 Highland Avenue, Pompton Plains, New Jersey in the R-11 requesting minor subdivision approval and ancillary "c" variance relief is determined as follows:

1. Minor subdivision approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-47 as well as the land development ordinances of the Township of Pequannock.
2. Ancillary "c" variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70(c)(1) and (2) as well as the land development ordinances of the Township of

Pequannock in regard to lot depth for proposed Lots 20.01, 22.01 and 23.01 where the minimum lot depth required is 125 feet and 99.88 feet is proposed and in regard to proposed Lot 22.01 where the front yard setback is 18 feet which is currently existing.

IT IS FURTHER RESOLVED that the above land use relief is granted subject to the following terms and conditions:

1. The subdivision of this parcel shall be implemented in accordance with a subdivision plan prepared by Alfred A. Stewart, Jr., P.E., dated January 8, 2010 with revisions through August 3 2010 and any subsequent revisions thereto as directed by the Planning Board or the Board's professionals.
2. The Applicant represents that all of its representations and stipulations made by it or on its behalf to the Township of Pequannock Planning Board are true and accurate, and acknowledges that the Planning Board specifically relied upon said stipulations in the Board's granting of approval. If said representations and stipulations are false, this approval is subject to revocation.
5. This approval is granted strictly in accordance with any recommendations set forth on the record by the Planning Board at the time of the public hearings on July 19, 2010 and August 16, 2010.

6. The Deed recorded memorializing the minor subdivision shall specifically refer to this Resolution and shall be subject to the review and approval of the Board engineer and Board attorney. The Applicant shall record the Deed within 190 days of the memorializing Resolution being adopted. Failure to do so shall render the approval null and void.
7. The Applicant shall comply with all terms and conditions set forth in the Board planner's review report dated August 16, 2010, to the satisfaction of the Board planner.
8. The Applicant shall comply with all terms and conditions set forth in the Board engineer's review report dated July 12, 2010 to the satisfaction of the Board engineer.
9. The granting of this application is subject to and conditioned upon the Township of Pequannock Tax Assessor assigning appropriate lot numbers in connection with this approval.
10. The granting of this application is subject to and conditioned upon Morris County Soil Conservation District approval, if required.
11. The granting of this application is subject to and conditioned upon New Jersey Department of Environmental Protection (NJDEP) approval, if required.
12. The granting of this application is subject to and conditioned upon Morris County Planning Board approval, if required.

13. The granting of this application is subject to and conditioned upon the Township of Pequannock Health Department approval of the septic systems, if required.
14. The granting of this application is subject to and conditioned upon the submission by the Applicant to the Township of Pequannock Construction Code Official's Department of plot plans for each proposed residence, which shall include stormwater management reports and any other reports that are required prior to the issuance of any building permits. The submission of these plans and reports shall be subject to the review and approval of the Board engineer and Board planner, if required.
15. The granting of this application is subject to and conditioned upon the Applicant providing appropriate restrictions in the Deed for the Morris Habitat home located on proposed Lot 22.01. The deed restriction shall place affordability controls and other appropriate restrictions, consistent with COAH regulations upon this dwelling unit in order to ensure that this dwelling unit will remain an affordable housing unit in the future for at least thirty (30) years as required by COAH and in order to ensure that the affordable unit shall qualify as a unit of affordable housing under the COAH regulations in effect at the time of sale to the low or moderate income eligible household.

16. Payment of all fees, costs and escrows due or to become due. Any monies are to be paid within twenty (20) days of said request by the Board Secretary.
17. Certificate that taxes are paid current to date of approval.
18. The existing shed on proposed Lot 23.01 will be removed during renovation activities at proposed Lot 22.01.
19. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Pequannock, County of Morris, State of New Jersey or any other jurisdiction.

The undersigned secretary certifies the within Resolution was adopted by this Planning Board on August 16, 2010 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on September 20, 2010



Roger Imfeld, Board Secretary

In favor:

Against:

Abstained:

Board Members Eligible to Vote: