

The regular meeting of the Delaware Township Board of Adjustment held on the noted date, was called to order by Chair Cline at 7:37 p.m., in Township Hall, Sergeantsville, New Jersey.

PLEDGE OF ALLEGIANCE

STATEMENT

Chair Cline read a statement noting that the requirements of the Open Public Meetings Act had been met.

ROLL CALL

Present: Emmons, Fowler, Gilbreath, Manley, McAuliffe, Szwed, Warren, Cline

Absent: Kenyon

Also present: NO professionals in attendance

MINUTES: June 13, 2019

The Board discussed the minutes, noting changes and typographical errors. It was moved by Member Manley to approve said minutes. Member Emmons seconded the motion. Said motion was approved by voice vote, with an abstention by Members Fowler and McAuliffe.

MEMORIALIZATIONS

Locandro Investments, LLC, Block 32, Lot 24, minor site plan approval and d(2) variance to expand the previously approved non-conforming four (4) residential apartment uses on the first, second, and third floors to permit two (2) additional units in the main building, one being a COAH unit; and two additional units in the barn; carried from March 14, 2019 meeting; April 11, 2019 meeting, and May 9, 2019 meeting. Application amended at meeting of June 13, 2019 to reduce the amount of proposed additional units to two (2), with no units in the accessory structure. Use approved as amended, including NO COAH unit, on June 13, 2019.

The Board discussed the resolution that was prepared by Board Attorney Goodell. Roger and Holly Locandro, applicants, were present.

Board members discussed the memo prepared and submitted by Board Engineer Roseberry of July 11, 2019. One discussion about parking and a banked, handicapped spot resulted in changes for Resolution item #19. There was also a discussion that the RSIS standards should be added to the resolution, which appears under Resolution item #21. Further discussion about design waivers resulted in Resolution item 21(A). Resolution item #20 had language changed from "determined" to "opined".

As discussed, amended, and with some language changes, Member Warren made a motion to approve the passage of the resolution. Member Emmons seconded the motion.

Roll Call Vote

Aye: Emmons, Gilbreath, Szwed, Warren, Cline

Nay: None

Present but ineligible to vote: Fowler, Manley, McAuliffe

Absent: Kenyon

Said resolution follows the minutes.

APPLICATIONS

None submitted for August. A bulk variance request for a building lot has been submitted for September 12, 2019. Applicant is Carlos Moreira, owner of Block 17, Lot 7, Dogwood Drive. Administrative Officer Klink noted that this lot was part of a subdivision finalized prior to November 1, 1976. She noted that per 230-25C(3), this lot does not qualify for an exception from a bulk variance application.

Planning Board Update: Liaison Cline

Liaison Cline reported that there was no July meeting.

Correspondence

Cellco litigation, Block 5, Lot 7

Law Division, order of Disposition, Docket #HNT-L-283-18

Superior Court of New Jersey, Law Division

65 Park Avenue, Flemington, NJ 08822

908-824-9750, ext. 13810

Chair Cline reported that Judge Michael O'Neill, J.S.C. determined that the Board of Adjustment denial was supported by the information in the file. Chair Cline read from the decision about several items on which the Judge reported in his disposition. Following are some of the items that Chair Cline read from the disposition.

From the disposition, "Not every site is suitable for a cell tower". [Disposition page 3]

Judge O'Neill noted that the subject property does not meet current zoning standards in several respects. He also noted that the crowded nature of the site would implicate Section 230-43, the fall zone provision that is important to public safety. [Disp. Page 3]

Judge O'Neill quoted several examples of case law in preparing his disposition, as noted throughout the disposition.

One item of interest concerned "particular suitability", for which Judge O'Neill noted that it is not required that the subject site be the "only" or the "best" location for the use. An applicant must demonstrate that it has made a "reasonable and good faith effort to find an alternative, less-intrusive site." (Ocean County Cellular Tel. Co.v. Lakewood Board of Adjustment, 352 NJ Super.514,528 (App. Div. 2002), certify. denied, 175 NJ 75 (2002) [Disp. page 8]

Judge O'Neill noted that a "communications tower is not entitled to the relief sought just because it demonstrated a gap and capacity issues. He further explained per the Appellate Division case of New York SMSA Ltd. Partnership v. Board of Adjustment of tp. Of Middletown, 324 N.J. Super.166, 175-176 (App. Div. 1999) quoting Cellular Tel. C. v. Zoning Bd. Of Adjustment of Ho-Ho-Kus, 24 F. Supp. 2d, 359, 373 (D.N.J. 1998), as follows:

"Were courts to hold that merely because there are some gaps in wireless service in an area (or even if service is basically unavailable as in the case of Nextel), the public interest necessarily tips the balance in favor of allowing a variance, local boards would be obliged to approve virtually every application which would improve service, without regard to its impact on the surrounding areas. That simply cannot be the case. Such a result would vitiate state land use law and render irrelevant the factors considered in a variance application." [Disp. page 9]

Judge O'Neill noted that the Board's resolution reflected the information provided "that the proposed facility would not address other gaps within the coverage area and there was no testimony citing the need for increased service for emergency services purposes". Judge O'Neill noted that the resolution concluded that "the Salerno property is uniquely *unsuited* for a monopoly." [Disp. page 11]

Judge O'Neill discussed properties rejected by Cellco:

The testimony before the Board establishes that Verizon immediately rejected three of the sites and noted that the applicant failed to provide expert testimony explaining why those three properties did not meet radio frequency needs. One of the three owners, Sonya Miller, testified that she would be willing to host a monopoly. The only explanation concerning these three sites was testimony from Verizon's site acquisition expert who offered only hearsay testimony that he had spoken about these sites to the radio frequency team.

The Board argues that Verizon's proofs on this issue were insufficient to demonstrate that another site within the search area was not available. [Disp. page 11]

Judge O'Neill also noted that "the Board points out that Verizon offered no expert testimony as to why the Salerno property was preferable to the Mundy property from a radio frequency perspective. [Disp. page 12]

Judge O'Neill found that "the Board submits that it weighed the partial satisfaction of the positive criteria against its findings with respect to the negative criteria. The benefit of improving cellular coverage in this remote area was outweighed by the unsuitability of the site, as well as the negative impacts on the surrounding properties and the zone plan. [Disp. page 17]

In conclusion, Judge O'Neill noted that "proofs notwithstanding, in light of the significant credible evidence cited by the Board in support of its finding, the court cannot conclude that plaintiff has satisfied the criteria for overturning the Board's discretionary decision. Having carefully reviewed the record before the Board, and having considered the factual and legal contentions of both parties, the court is satisfied that plaintiff has not sustained its burden of proving that the Board's decision was 'arbitrary, capricious, or unreasonable.'" [Disp. page 18]

Judge O'Neill, "notwithstanding Verizon's claims to the contrary, in the final analysis the Board was presented with conflicting, credible testimony addressing both the "positive" and "negative" criteria. On balance, it found the evidence presented on behalf of the objectors to be more persuasive." [Disp. page 19]

In concluding, Judge O'Neill noted the following:

"Unlike some of the cases cited by Verizon, the evidence presented at the hearings did not establish an overriding need for increased cellular service in the area to be served by the proposed monopole. Thus, for the foregoing reasons, the court cannot overturn the Board's conclusion that the gap in cellular coverage in this remote rural community was not sufficiently 'significant' to mandate that a 130-foot monopole be erected on a nonconforming lot in a residential zone, some 80 feet or more above the existing tree line, directly across the street from a number of residential properties." [Disp. page 23-24]

Member Gilbreath asked about the difference between with prejudice and without prejudice. It was noted that with prejudice means the application must be changed from the original; without prejudice means that the same application can come back.

It was noted that Cellco has 45 days to appeal to the appellate court.

Bill List

Bill List: Attorney Services – Parker McCay P.A.

Escrow Charges

32/24, Locandro Investments, LLC, #3093665	\$592.00
--	----------

Member Gilbreath made a motion to approve payment of this voucher from its respective escrow account. Member Emmons seconded the motion that was approved by voice vote.

ADJOURNMENT: 8:10 p.m.

It was moved, seconded, and unanimously carried to adjourn at the noted time.

Respectfully submitted,

Kathleen E. Klink,
Administrative Officer, Secretary

**BOARD OF ADJUSTMENT
TOWNSHIP OF DELAWARE**

RESOLUTION 32/24 (2019)

Locandro Investments Limited, LLC
Block 32, Lot 24

WHEREAS, Locandro Investments Limited, LLC (“Applicant”), of 186 Sandy Ridge Mt. Airy Road, Stockton, New Jersey 08559, applied to the Delaware Township Zoning Board of Adjustment (the “Board”) for use and bulk variances to construct additional apartments on a lot in the V-2 Village Residential/Commercial Zone; and

WHEREAS, the Board held hearings on March 14, 2019; April 11, 2019; May 9, 2019; and June 13, 2019; and

WHEREAS, in Applicant’s original application, it sought permission to construct two additional apartments on the first floor of the principal structure (the former Rosemont Café) and two apartments in the adjacent barn; and

WHEREAS, before the Board voted on the application, Applicant amended its application to withdraw the request for two apartments in the barn and proceeded with its request for two additional apartments in the principal structure; and

WHEREAS, the Board considered the evidence presented at the hearings and made the following findings and conclusions:

Background

1. The property in question is an 18,260-square-foot (0.419 acre) tract located at 88 Kingwood Stockton Road (County Road 519) (Block 32, Lot 24 on the Delaware Township Tax Map), in the V-2, Village Residential/Commercial Zoning District, in the historic village of Rosemont.
2. The property contains a two-and-one-half story principal structure, a two story barn structure, a parking area and an alleyway.
3. Uses in the principal structure have evolved over time. The first floor has been a general store and most recently housed the Rosemont Café, until it was burned in a fire in May 2016. The second and third floors have housed apartments and office suites.
4. After the May, 2016 fire, the principal structure was rebuilt and currently contains four apartments.
5. The property is nonconforming with respect to the lot area requirements of the V-2 Village Residential/Commercial Zone. Minimum lot area in the zone is three acres.

6. The property is nonconforming with respect to the use requirements of the V-2 Village Residential/Commercial Zone. Single-family, attached dwellings are permitted, but not apartments.
7. In addition, the Township Land Use Ordinance allows just one principal dwelling and one principal use per lot. See LDO Section 230-13A(1) (“there shall be no more than one principal building or use erected or established on any one lot in any agricultural/residential or commercial/residential zone”).
8. Accordingly, the Applicant requires use and bulk variances to expand the existing nonconforming nature of the property.

Jurisdiction

9. The Board has jurisdiction over use variances pursuant to N.J.S.A. 40:55D-70d and LDO Section 230-63d.
10. The Applicant published timely notice and served notice by certified mail on neighbors within 200 feet of the subject property.
11. The Board Engineer found that the use variance application could be deemed “complete.” See, February 3, 2019 report.
12. The Applicant is the owner of the property.

Hearing

13. The Board hearings were held on March 14, 2019; April 11, 2019; May 9, 2019; and June 13, 2019.
14. The applicant was represented by George M. Dilts, Esq., Dilts and Koester, 167 Main Street, Flemington, New Jersey 08822.
15. The Board considered testimony from:
 - Board Planner James T. Kyle, PP, AICP.
 - Board Engineer C. Richard Roseberry, PE, AICP.
 - Applicant’s Engineer and Planner, Wayne J. Ingram, PE, PP, Engineering & Land Planning Associates, Inc., High Bridge, New Jersey.
 - Roger Locandro, applicant.
 - Members of the Public and Objectors:

- Peter Sudano – 102 Kingwood Stockton Road
 - Steve Jaques – 86 Kingwood Stockton Road
 - Rosemarie Brenner – 85 Kingwood Stockton Road
 - Tim Davis – 79 Kingwood Stockton Road
 - Ken and Joann Vieth – 84 Kingwood Stockton Road
 - Andrew Devennie – 82 Kingwood Stockton Road
 - Richard Garret – 80 Kingwood Stockton Road
 - George Berkowitz – 51 Raven Rock Road
 - Terese and Copeland Kell – 124 Dunkard Church Road
 - Allison Koterba – 82 Kingwood Stockton Road
16. In general, the Objectors were concerned with issues related to drainage, parking, traffic and aesthetics. The Board found that these concerns were allayed by Applicant's amendment to its application to remove the request to build two apartments in the barn.
17. The Board considered the following documents and exhibits:
- Application, with attachments.
 - Report dated February 3, 2019, prepared by Board Engineer C. Richard Roseberry, PE, AICP.
 - Report dated March 13, 2019, prepared by Board Planner James. T. Kyle, PP, AICP.
 - Photographs of the property marked A-1 through A-5, A-9, A-10, O-2 and O-3.
 - Google images of the property, marked O-4 and O-5.
 - Minor Site Plans, prepared by Applicant's Engineer and Planner, Wayne J. Ingram, PE, PP, dated March 8, 2019, and May 9, 2019, marked A-6 and A-13 respectively.
 - Report on historical uses and variances on Block 34, Lot 32, prepared by Applicant, marked A-7.
 - Summary of testimony of Roger Locandro, prepared by Applicant, marked A-8.
 - Memorandum from Board Engineer Roseberry in communication with Hunterdon County Engineer Thomas Mathews, dated April 15, 2019, marked A-11.
 - Concept Plan, prepared by Applicant's Engineer and Planner Ingram, dated by May 9, 2019, marked A-12.

- List of Objector's concerns, marked O-1.

Findings

18. As noted above, the property is located at 88 Kingwood Stockton Road (southeast corner of the intersection of County Route 519 and County Route 604). Totaling .419 acres, the site contains a two-and-one-half story frame structure (2,558 sq. ft. footprint), a two story barn structure (1,214 sq. ft. footprint), a parking area and an alleyway.
19. Applicant initially proposed 12 on-site parking spaces with additional three on-street parking spaces. Hunterdon County requested the applicant to provide three (3) additional off-street parking spaces. The applicant subsequently amended the application to provided three (3) additional on-site spaces for a total of 15 on-site spaces and three (3) on-street spaces. With the withdrawal of the two (2) apartments in the garage, the plan will be revised to reduce the parking to twelve spaces that will be accommodated on-site and one (1) additional banked handicapped spaces with access from County Route 519.
20. The Board opined that because of the undersized nature of the lot, it could not accommodate four additional apartments – two in the principal structure and two in the barn. On the other hand, the property could accommodate two additional apartments in the principal structure. These two new apartments would essentially take the place of the café use which was destroyed by a fire.
21. Four additional apartments would have required a special exception from the RSIS standards for parking, but the site can accommodate parking for two additional apartments without a special exception. Following are the RSIS waivers requested:
 - (1) 5:21-4.16(B) – adequate provision for ingress and egress from all parking spaces to ensure ease of mobility, ample clearance, and safety of vehicles and pedestrians;
 - (2) 5:21-4.16(C) – the proposed parking lot provides 20-foot aisles due to site constraints;
 - (3) 5:21-4.16(E)(1) – fires lanes a minimum of 18 feet in width shall be required
- 21(A). Design waivers requested for off street parking and loading requirements, as follows:
230-107V – variance requested for paving with five (5) feet of the property line, due to site constraints
230-107X – variance requested for curbing or landscaping separating parking areas, due to site constraints
23. The Objectors raised concern about the adequacy of the septic system. Applicant agreed to submit the plan to the New Jersey Department of Environmental Protection and/or the County Board for approval, and the additional apartments cannot be approved without acknowledgment from the regulatory authority that the septic system is adequate.

22. There is a need for residential apartments in the area.
23. The site can accommodate two additional apartments, but not four.
24. Of the six total apartments in the principal structure, five should be one-bedroom and one may be two-bedroom, totaling seven bedrooms.
25. Allowing additional apartments in the principal structure is an adaptive reuse of the building that had been damaged by a fire.
26. The purpose of the V-2 Zone is to “maintain the existing village environment of Rosemont, which is a mix of small lot residential and commercial uses. It is intended that the existing village shall continue as a well-confined identifiable unit without sprawling into the surrounding rural lands.” See LDO Section 230-21(A).
27. Hunterdon County has requested an easement to allow for future road widening. As a result, the Applicant requires hardship variances to reflect the diminished setbacks. Specifically, the following relief is required, assuming the right-of-way will be dedicated to Hunterdon County:
 - Bulk variance for minimum lot area, where three acres is required and .419 acres exists.
 - Bulk variance for minimum front yard setback, where 25 feet is required and .46 feet is proposed, where 7.3 feet currently exists.
 - Bulk variance for minimum side yard setback, where 25 feet is required and 3.83 feet is proposed where 8.96 feet currently exists.
 - Bulk variance for minimum rear yard setback, where 75 feet is required and 59.89 feet currently exists.
 - Bulk variance for minimum front yard setback for an accessory structure, where 25 feet is required and 1.79 feet is proposed to the existing shed.
 - Bulk variance for minimum rear yard setback for an accessory structure, where 75 feet is required for the existing barn where 9.27 currently exists.
28. The alleyway along the side of the property provides access to the subject property, as well as approximately eight other properties in Rosemont.
29. The alleyway is privately owned and is not a Township obligation.
30. The Applicant is obligated to maintain the alleyway on its lot, both to allow access to the parking areas on the Applicant’s lot and to allow continuing access for the other properties that utilize the alleyway.

Conclusions

31. The Board found that the Applicant had met the legal requirements for a d(1) variance to allow the proposed use of two additional apartments in the principal building.
32. For the positive criteria, the Board found that the proposed use promotes the general welfare because the site is particularly suited to the proposed use. Specifically, additional apartments are appropriate in this building because:
 - it continues a preexisting nonconforming use that fits the village setting;
 - there is sufficient parking on site for two additional apartments; and
 - the apartments are a reasonable adaptive reuse of the historic structure after the café was destroyed by a fire.
33. In addition to promoting the general welfare, the application also promotes other purposes of zoning. The application:
 - provides sufficient space in an appropriate location for the development of a residential use;
 - promotes a desirable visual environment by allowing for the improvement and redevelopment of the site and building; and
 - promotes the efficient use of the land by allowing for the use of unused space in an existing building, thus meeting the Township's need for varied housing, but protecting its open space.
34. For the first element of the negative criteria, the Board found that the variance can be granted without substantial detriment to the public good, because:
 - two additional apartments fit the village setting;
 - the proposed nonconforming use expansion will have characteristics similar to that approved previously; and
 - the proposed nonconforming use expansion will not have a significant impact on traffic in the area, and there is sufficient parking on site.
35. For the second element of the negative criteria, the Board found that the Applicant had proven by an enhanced quality of proof that the variance will not substantially impair the intent and purpose of the Zone Plan and Zoning Ordinances, because:

- The application complies with the purpose of the V-2 Zone. Utilizing the existing vacant structure will “maintain the existing village environment of Rosemont,” and will control sprawl.
 - The application will not result in a significant intensification of the use that had been previously approved. The commercial café use is being replaced by two new residential apartments, a use that has already been approved on the property.
36. Hardship variances, as set forth above, can be granted to recognize the reduced net lot area resulting from dedication of right-of-way to the County. The lot is already undersized, establishing the hardship.

NOW, THEREFORE, BE IT RESOLVED, by the Zoning Board of Adjustment of the Township of Delaware, that Locandro Investments Limited, LLC be and hereby are granted a use variance to permit the principal building located at 88 Kingwood Stockton Road to be used for a total of six apartments, and a hardship variance to recognize the reduced net lot area resulting from dedication of right-of-way to the County.

BE IT FURTHER RESOLVED, that the variance granted herein be subject to the following **CONDITIONS**:

1. Applicant shall dedicate right-of-way requested by Hunterdon County.
2. Applicant shall provide a deed restriction for banked parking for one handicap parking space, with additional space for a turn-around so that the use of the space does not have to back into County Route 519. The deed restriction shall be reviewed and approved by the Board attorney.
3. Applicant will maintain the “alleyway” along the length of the Applicant’s property.
4. Applicant will obtain State and/or County approval for adequacy of the property’s septic system.
5. Of the six total apartments in the principal structure, five shall be one-bedroom and one may be two-bedroom, totaling a maximum of seven bedrooms.
6. The Applicant must submit amended plans reflecting the revised application to Board Engineer Roseberry for his review and approval. If there is any dispute about the amended plans, Applicant must serve notice and return to the Board for determination as to whether the amended plans are sufficient.

ROLL CALL VOTE ON MOTION TO GRANT USE VARIANCE
June 13, 2019

Motion: Gilbreath

Second: Warren

Those in Favor: Emmons, Gilbreath, Szwed, Warren, Cline

Those Opposed: Kenyon, Manley

Present but Ineligible to Vote: Fowler

Those Absent: McAuliffe

ROLL CALL VOTE ON MOTION TO APPROVE
RESOLUTION OF MEMORIALIZATION

July 11, 2019

Motion: Warren

Second: Emmons

Those in Favor: Emmons, Gilbreath, Szwed, Warren, Cline

Those Opposed: None

Present but Ineligible to Vote: Fowler, Manley, McAuliffe

Those Absent: Kenyon

Certified to be a true copy of a Resolution adopted by the Delaware Township Zoning Board at a public meeting held on July 11, 2019. This written Resolution memorializes a Motion to Grant a Use Variance to permit an expanded nonconforming use in the existing structure located at 88 Kingwood Stockton Road, as those uses were defined in the application. The Motion to grant the variance was adopted by the Board on June 13, 2019 and was approved by a vote of 5-2.

Application Approved: June 13, 2019

Resolution adopted: July 11, 2019

Distributed: July 23, 2019

Kathleen E. Klink
Administrative Officer