

The regular meeting of the Delaware Township Board of Adjustment held on the noted date, was called to order by Chair Cline at 7:30 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.

Members Warren and Kenyon were sworn in by Attorney Goodell.

ROLL CALL

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

Absent: Szwed

Also present: Attorney Goodell, Engineer O'Brien, Planner Kyle

MINUTES: January 28, 2021

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

MEMORIALIZATIONS - None

APPLICATIONS

Walter Ross, Block 17, Lot 33.04, use and bulk variances requested for accessory apartment in existing garage, to be expanded.

James Miller, John Hanson, and Walter Ross were sworn in.

Mr. Miller gave his background as a planner. He stated that he owns his own business and has been licensed in NJ. He further noted that he has certification as a Planner, as well as a Masters in Planning from Rutgers University. He noted that he has appeared before approximately 250 municipalities in Pennsylvania and New Jersey. He stated that he has appeared before state and federal courts. He stated that he has appeared before many Boards in Hunterdon County. Board Engineer Kyle stated that he is familiar with Mr. Miller and has no questions of him. Member Gilbreath made a motion to accept Mr. Miller as an expert in Planning. Member Emmons seconded the motion that was adopted by voice vote.

Mr. Hanson was similarly qualified. He stated that he is Vice President of E&LP of High Bridge, NJ. He stated that he has 27 years of experience and has been an engineer for 21 years. He stated that he has appeared before approximately 100 municipalities in New Jersey, with many of them in Hunterdon County. He stated that he has also done work for towns in Hunterdon County. Board Engineer O'Brien stated that he knows Mr. Hanson and has no questions of him.

Mr. Ross began by thanking the Board members and professionals for their time. He stated that he and his family moved to Delaware Township in early 1992. He stated that his family has loved living in Delaware Township. He stated that he was involved with many youth sports programs when his children were young. He noted that his wife was a teacher in Frenchtown. Mr. Ross stated that his wife passed in 2015 and that his wife's sister's husband passed at the same time. He noted that it is his desire to have his sister-in-law live with his family, by providing the proposed accessory apartment.

Mr. Ross noted that he has an existing two-car garage and would like to expand it to provide an apartment for his sister-in-law.

Member Gilbreath questioned the ability of Mr. Ross to provide this living space within his home. Mr. Ross stated that he currently shares his house with his son's family, including a wife and two children.

Member Manley asked about using an ECHO unit and following the provisions that go with that permitted use. Mr. Miller stated that ECHO housing is a uniquely permitted conditional use, section §230-40. Mr. Miller noted that there are several requirements including the size of 720 square feet. He referenced the removal of the unit, once the occupant has ceased to live in the ECHO unit.

Mr. Miller noted that Mr. Ross wishes to provide a slightly larger space for his sister-in-law, which could accommodate more amenities. Mr. Miller noted that the proposal requires a d-1 variance. Mr. Miller noted that the existing garage would allow the creation of an accessory unit with more room, more amenities, and a fuller kitchen, thus a more comfortable living arrangement.

Mr. Miller stated that he has read Board Planner Kyle's report. He agreed with the summarization that the property is in the A-1 zone with a lot of 3.2 acres. He noted that the unit will be built over the garage. Mr. Miller referenced the aerial photo attached to Mr. Kyle's report.

Mr. Miller noted he feels that this proposal on this site serves Purposes A and D of the NJ MLUL, 40:55D-2, as follows:

40:55D-2. Purpose of the act

Purpose of the act. It is the intent and purpose of this act:

a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;

d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;

Mr. Miller stated that he feels that this site is particularly suited, as follows:

Property includes a single-family dwelling, a permitted use.

Property includes a circular driveway providing adequate access for all of the family members.

The garage has a deep setback, lessening the visibility of the use, similar to the requirement that an ECHO unit be located in places where not visible.

The existing garage means that there will be limited disturbance, minimizing potential impact.

The proposal does not increase impervious surface.

Mr. Miller stated that this proposal has little intensity increase, and that it would be similar to the increase if the proposed unit was done as an addition to the house. He noted that the occupant is a member of the household, expanding the household by one person. Mr. Miller noted that the use does not become more intense because it is not a separate household. He noted that there are no direct impacts on the municipality, such as parking.

Chair Cline asked what makes this property particularly suited compared to the next-door neighbor's property. Mr. Miller stated that particular suitability is not unique suitability. Mr. Miller reiterated that the subject property has 3.2 acres, which is lots of space. He noted that the garage already exists and the driveway is already in place. Mr. Miller stated that other lots could also be particularly suited.

Mr. Miller stated that the proposal is accommodating a member of household and that the proposed apartment would only be utilized by the family unit.

Mr. Miller discussed the negative criteria. He reiterated that the proof is not in showing uniquely suitability, but that the property is suited to the proposal.

Mr. Ross stated that an addition to the house was considered, but he and his sister-in-law wanted to make sure there is more privacy.

Mr. Miller discussed the criteria for the proposal. He noted that under general criteria, the proposed use will not have an impact on the surrounding neighborhood because there is enough separation between properties. He noted that there is also a treeline between this structure and the nearest home, which could be supplemented with more plantings. He noted that the applicant is willing to deed restrict the unit for who will reside in the unit. He further noted that the structure is existing and that it will be enlarged.

Mr. Miller opined that the proposal advances the public welfare and that it does not impair the zone plan or the zoning ordinance. He noted that the property is located in the A-1 zone, with a low density. He noted that an ECHO cottage is allowed, but that it is limited in square footage to 720 square feet and is also described as barrier free. Mr. Miller stated that the applicant would like to have a slightly larger structure with some barriers and more amenities. He also noted that the apartment has similar requirements to that of an ECHO unit. He noted that another difference is that the proposed is a permanent structure; using an ECHO unit requires removal once the occupant no longer resides there.

Mr. Miller stated that the proposal does not impair the zone plan as the proposal is residential in character and similar to surrounding houses. He noted that the intensity and impact are consistent with the zone plan. He noted that the accessory use matches what the zone allows. He opined that there would be de minimus impact on the character of the area.

Chair Cline questioned how the proposal promotes the agricultural purpose of the area. Mr. Miller stated that the agricultural area is promoted in not changing the character of the area. Mr. Miller repeated that there is one dwelling per lot in the A-1 zone and that in his opinion, this proposal matches the intent of the zone plan. Chair Cline argued that it is not necessarily the intent of the ordinance to have a garage placed as a second dwelling.

Attorney Goodell discussed a new case just found very recently involving an appellate decision regarding Pt. Pleasant Beach. He noted that this case involved the residents of a duplex. He noted that the case involved the use of a duplex, with a restriction that one of the residents had to be the owner. He noted that in the decision, the judges decided that the zoning regulation applies to the use of the land not to the identity of the owners or users.

Attorney Goodell identified the case further, *Maria I. Tirpak vs. Board of Adjustment of Pt. Pleasant Beach*; 457 NJ Super 441, Superior Court of NJ, Appellate Division; decided in 2019.

Attorney Goodell stated that this zoning board has always deed restricted such uses. He is concerned that now there is a question about the eligibility to enforce this restriction. Attorney Goodell stated that the Board can accept the deed restriction, which the Court can later decide that the Board does not have the authority to regulate who occupies the permitted land use.

Mr. Miller stated that he feels that there is a significant difference between a voluntary restriction and a Board-imposed restriction, by way of a resolution condition. Mr. Miller stated that he feels a voluntary restriction would be of a different category. He stated that the accessory apartment as proposed becomes subordinate to the primary use. He noted that a duplex was designed to be two separate units. He further explained that a single-family dwelling can have elements of the structure that are detached. He gave a breezeway connection as an example of an addition that is detached yet connected. He also gave the example of "summer kitchens". Mr. Miller reiterated that the applicant is not looking for two residential structures. He stated that he sees this proposed apartment as accessory to the principal use. Mr. Miller stated that he sees no impact on the agricultural use of the area, as the property is in an agricultural zone.

Chair Cline stated that he does see a parallel of discrimination. He noted that Mr. Ross will not own this house forever. Chair Cline noted that if sold, a new owner has not volunteered that condition and might seek to overturn it. Mr. Miller stated that the voluntary restriction has a different weight in this manner.

Chair Cline stated that a new buyer has no idea that the original variance was granted with that stipulation. Mr. Miller stated that the information can be placed in the deed.

Chair Cline asked Board Planner Kyle about the opinion that the apartment is an extension of the existing dwelling. Board Planner Kyle stated that Mr. Miller is presenting a unique set of facts. Mr. Kyle stated that he is concerned that such a deed restriction may become unenforceable. Mr. Kyle also stated that he is not sure that the voluntary deed restriction is something to address the negative criteria.

Board Planner Kyle stated that based on the information provided by Attorney Goodell, this accessory apartment could be turned into a rental. He noted that generational units are deemed to be more acceptable.

Attorney Goodell could not state definitely whether or not a municipality can enforce who is living in such an accessory apartment.

Member Kenyon asked for further details from Attorney Goodell. Attorney Goodell stated that this case demonstrates that there can be a difference between ownership and rental. Mr. Goodell gave the opinion that in the decision of the aforementioned case, one cannot regulate who is the habitant; which would also make such a restriction unenforceable.

Board Planner Kyle stated that one cannot mandate affordable housing. Mr. Kyle stated that if the Board feels strongly, specific facts of this case can be put into the findings.

Mr. Miller stated that the A-1 zone has a density of one unit for three 3 acres. He stated that he considers this proposal to be part of the household. He opined if the unit is for someone other than a part of the household, a second residential unit on a property would need a d-1 variance.

Chair Cline noted that there are provisions in the ordinance to permit two houses on one property; 30 acres are needed for a second dwelling in both the A-1 and A-2 zones. Chair Cline opined that for the proposed, the occupant is a member of the primary household which meets the density. He noted that a second household would require density variance.

Mr. Miller stated that if required, they would seek a density variance. He gave his opinion that a density variance is not needed because the proposal is dealing with the same household.

Member Manley asked about the large room on the first floor. It was explained that the extra space provided allows the proposed unit to be on the same floor. Member Manley stated that the allowance for a barrier free space in an ECHO unit may be something that would be needed in the future. Member Manley also expressed his concern that a future occupant might be a household with children. Member Manley further expressed his concern about approving something that may cause the Township to have litigation.

Member Fowler considered the other family that lives in the dwelling unit currently and the ability of that family to move into the proposed space.

Mr. Miller stated that the Board would have to accept Mr. Ross's word. Mr. Miller stated that families are different now and that there are multi generations in one house, which is not undesirable. He noted that the proposed unit is to be designed to be appropriate for the sister-in-law of Mr. Ross. He noted that this is the intent of the proposal.

Chair Cline asked where this sister-in-law now lives. Mr. Ross stated that she is currently living with them after the sale of her house. Chair Cline noted that the proposed unit is fairly large at 1,300 square feet, even with the layout of one bedroom, one bath, and a great room.

Member Fowler asked if there could be an extension added to the main house vs. the proposed separate unit. Mr. Miller stated that the intent makes the difference. He noted that the proposed unit is going to be exclusively occupied by the sister-in-law of Mr. Ross. He further noted that the spirit of the intent makes it a single family.

Member Kenyon asked about the detached garage. Mr. Ross stated that this is the only garage on the property and that he needs to have garage space in that building.

Mr. Hanson was present as the engineer of the site plan. There were no questions of him, or about the site plan.

Public comment – none

Member Gilbreath asked about the septic system. It was noted that the current system will function with the addition of a 1,000-gallon tank and pump to the field from this proposed unit. It was noted that the addition of the kitchen prompted this change. It was noted that the water supply comes from the house.

Board Engineer O'Brien asked if there would be any tree removal. It was noted that one evergreen tree is to be removed.

The existing house has three bedrooms and a study. Board Engineer O'Brien noted that there are numbers on the plan that are missing, such as the height difference between the two structures. It was noted that if there are any outside light fixtures, that they are to shine downward.

It was noted that the sister-in-law of Mr. Ross has been living with them for about 1 ½ months.

There was a discussion about the appellate court case decision. Mr. Miller repeated his argument that if the proposed unit is rented to a non-family member, a second dwelling unit has been created. It was noted that under those conditions two units violate the density standard, resulting in two units per the subject property. Mr. Miller argued that the deed restriction as proposed is voluntary and not Board-conditioned.

Board Attorney Goodell stated his opinion that separate living quarters could be used for another family. He noted that the proposal is a second, physically separated dwelling unit. He opined that a variance is needed for two separate dwelling units and for density. Board Attorney Goodell noted that the applicant is voluntarily agreeing that it is a single-family unit spread between two building. Mr. Goodell stated the proposal may not be for a second dwelling, but that the physical structure presents itself as a second dwelling. Mr. Goodell stated that if the proposed unit is attached to the main structure in some method, it would be one building.

There was a discussion about certificates of occupancy. Mr. Miller stated that similar inspections are needed for the dwelling (if it was new construction) and the proposed unit needs all appropriate inspections and a certificate of occupancy based on those inspections.

Member Fowler questioned if an addition needs a certificate of occupancy. NOTE: Per the Construction Office any living space added to an existing house needs inspections and a resulting certificate of occupancy.

Chair Cline expressed his concern that the variance goes with the property, not the owner. Chair Cline stated that he is also concerned with Township liability, based on this new appellate court decision. Chair Cline stated that there might be other options. He reiterated the density of this zone, one dwelling per three acres.

Member Manley questioned the value of the voluntary deed restriction. Board Attorney Goodell noted that this is a good question, that of being voluntary vs. a Board-granted condition. He further stated that it does not matter if it cannot be enforced. He stated that he is not sure if a future owner could be bound by this voluntary restriction.

Member Emmons stated that voluntary or not, he questioned if this is a condition that the municipality can rely upon.

Member McAuliffe stated that there are two sets of standards about the dwelling and the accessory structure. He questioned the ability to have conditions on the accessory structure to make it something that could not be a dwelling on its own. He noted that in a high-density area, this unit could be desirable. He stated that he is struggling with it being an accessory use/structure.

Member Fowler stated that he has no question about the intent of this proposal from Mr. Ross. Member Fowler expressed his concern about how to enforce this proposal in two or three decades. Member Fowler stated that future occupants would have to be considered family. He stated that he is concerned that this extra building becomes a residence that stands on its own, making the intent problematic.

Mr. Miller asked for a short recess. Prior to the recess, Member Warren noted that in the past the Board has dedicated units such as this as COAH opportunities, once the family member departs. Attorney Goodell stated that the Board has to decide the case on what has been proposed.

Upon return after the recess, Mr. Miller stated that the applicant wishes to withdraw the application and come in with a revised plan and proposal.

The Board decided to adjourn the hearing to allow an amendment of the application. It was noted that the application will be kept open until the May 13 meeting. Attorney Goodell noted that no new notice is needed unless there is substantial change to the variance originally sought.

Member Emmons made a motion to adjourn the application as noted. Member Fowler seconded the motion .

Roll Call Vote

Aye: Emmons, Fowler, Gilbreath, Kenyon, Manley, McAuliffe, Warren, Cline

Concurs: McAuliffe

Nay: None

Absent: Szwed

Mr. Ross thanked the Board for its consideration and input.

NJ Bill 2785

Board Planner Kyle and Attorney Goodell noted that passage of this bill will affect the Master Plan to make inclusion of hazard assessment based on climate change. Board Planner Kyle noted that the bill is aimed more at sea level rise and flooding events. Chair Cline noted that at the last Township Committee, there was a discussion about the erosion on Lower Creek Road due to flooding events and stream erosion.

Board Planner Kyle noted that many of these measures must be incorporated into the Township Master Plan.

Planning Board Update: Liaison Cline

Liaison Cline reported that there was no February meeting.

- Correspondence

New application: Jim Toth, Block 27, Lot 22, bulk variance request for 900 square foot building 15 feet from property line, for which the ordinance requirement is 50 feet. This application is being scheduled for March 11, 2021, prior to the hearing for the tennis school facility, which is expected to start around 8:30 p.m.

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

Zoning Board Matters

Through 01-06-21, #3126812	\$34.00
Through 01-28-21. #3126818	\$234.80

Member Gil made a motion to approve payment of this voucher. Member Emmons seconded the motion.

Roll Call Vote

Aye: Emmons, Fowler, Gilbreath, Kenyon, Manley, McAuliffe, Warren, Cline

Concurs: McAuliffe

Nay: None

Absent: Szwed

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

Escrow Charges

41/1.10, Locandro, #3126820	\$2,988.00
43/20, Skeuse, #3126815	\$51.00
55/2, Switzler, #3126817	\$256.00

Bill List: Planning Services – Kyle Planning and Design, LLC

Escrow Charges

17/33.04, Ross, #2582	\$880.40
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Member Gilbreath made a motion to approve payment of these vouchers from their respective escrow accounts. Member Emmons seconded the motion that was approved by voice vote.

ADJOURNMENT: 9:20 p.m.

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

Respectfully submitted,

Kathleen E. Klink,
Administrative Officer, Secretary