

RESOLUTION

DONALDSON

WHEREAS, Francis T. Donaldson and Joan M. Donaldson, 16 Laurel Mountain Way, Califon, N.J. 07932 and 1051 Barnegat Lane, Mantoloking, N.J. (hereinafter “Applicant”) has made Application to the Planning Board of the Borough of Mantoloking (hereinafter “Board”); and

WHEREAS the Applicant is the owner of the property for which several variances are being requested which is known as Block 24 Lot 17 on the Tax Map of the Borough of Mantoloking, Ocean County, New Jersey which is also known as 1051 Barnegat Lane, Mantoloking, New Jersey (Property); and

WHEREAS, the Applicant requests a variance to deviate from the strict enforcement of the Zoning Ordinance of the Borough of Mantoloking and more specifically from Chapter XXX, Section 30- 6.12 A and B which provides:

A. Building height shall be measured from the elevation of the crown of the road at the center of the lot in question. The building height of corner lots shall be measured from the elevation of the lower of the crowns of the intersecting roads. The building height of lots with front and rear yards abutting streets shall be measured from the elevation of the lower of the crowns of the two streets.

B. Building height shall be limited to the maximums set forth in Appendix B, Bulk Standards; and

WHEREAS, the Property is in the R-6A Zone of the Borough and Appendix B of the Zoning Ordinance provides for a maximum height of the roof to be 32.5 feet; and

WHEREAS, the Applicant proposes a roof height of 34.4' which exceeds the maximum height permitted by 1.9' and thus requires a variance; and

WHEREAS, the Municipal Land Use Law (MLUL) (N.J.S. 40:55D-70d(6)) provides that a special reason or use variance is required where the height of a principal structure exceeds 10 feet or 10% of the maximum height permitted; and

WHEREAS, the variance requested by the Applicant of 1.9' does not exceed the maximum height permitted (32.5') by 10 feet or 10% (3.5') and, therefore, it will be considered to be a "c" variance and determined by N.J.S. 40:55D-70c; and

WHEREAS, the Applicant also requests a variance to deviate from the strict application of Chapter XXX, Section 30-4.2 which provides that:

No buildings shall be erected, no existing building shall be altered, enlarged or rebuilt, nor shall any open space surrounding any building be encroached upon or reduced in any manner except in conformity to the yard, lot area and building location regulations hereinafter designated for the zone in which such building or open space is located. See Appendixes A and B.

WHEREAS, Chapter XXX Section 30-2.2 (Definitions) states in part relating to YARD, FRONT:

....If a lot abuts on more than one (1) street, the front yard shall be the area between any building and the street which runs generally north and south. If a lot abuts Route 35 and either East Avenue, Barnegat Lane, Bay Avenue or Runyon Lane, the front yard of such lot shall be the area between any building on the lot and the Borough Street; and

WHEREAS, the Property's front yard would be Barnegat Lane; and

WHEREAS, Chapter XXX, Section 30-610.c states:

The front yard setback of any new or altered building shall be not less than the average front yard setback of existing buildings on lots of similar depth within two hundred (200) feet of the lot which is the

subject of development, on the same frontage. However, in no event shall the front setback be less than the scheduled minimum front yard setback for the subject lot; and

WHEREAS, the front yard setback in the R6A Zone are fourteen (14) feet and twenty one feet seven inches (21'7") which is the average of the front setbacks within 200 feet of the Property along Barnegat Lane, both of which are exceeded by the 25'2" provided and therefore no variance is required; and

WHEREAS, the Applicant proposes to construct a part of the dwelling in the rear yard (Ocean Avenue side) 17.28' from the rear property line. The R6A Zone Appendix B, Bulk Standards require a 25' foot rear yard setback. Therefore, the Applicant would require a 7.72' rear yard setback variance; and

WHEREAS, Chapter XXX, Section 6.11b.7 provides that "Air conditioning or HVAC Units shall be located within the building envelope" and the Applicant seeks a deviation from this Section in that the plans provide for the location of a "platform for A/C Equipment" at the southeast corner of the house and extending into the rear yard (Ocean Avenue) setback; and

WHEREAS, the Applicant under N.J.S. 40:55D-70c must, if Applicant chooses to proceed under the c1 tests, show whether there is (1) peculiar and exceptional practical difficulties to, or (2) exceptional and undue hardship upon, the Applicant arising out of (a) the exceptional narrowness, shallowness or shape of a specific piece of property, or (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the existing structure thereon; and

WHEREAS, in addition to the above proof, the Applicant must demonstrate that such variance can be granted without substantial detriment to the public good and will not substantially impair the intent of the Master Plan or the Land Use Ordinances of the Borough of Mantoloking (the “negative criteria”) and the Applicant must show that the grant of the variance would promote the purposes of zoning as stated in N.J.S. 40:55D-2 and the undue hardship (the “positive criteria”); and

WHEREAS, the Applicant can also choose to prove his case by N.J.S. 40:55D-70c(2) known as the flexible “c”. The Applicant must show that: 1. the Application applies to a specific piece of property; 2. that the purposes of the MLUL would be advanced by a deviation from the requirements of the zoning ordinance; 3. that the variances can be granted without substantial detriment to the public good; 4. that the benefits of the deviation would substantially outweigh any detriment; 5. that the variance would not substantially impair the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, proof of publication and mailing to owners within 200 feet of the Property was done for the February 4, 2010 hearing on this matter, as is required by the Municipal Land Use Law of New Jersey (N.J.S. 40:55D-1 et.seq.) and the Land Use Ordinance of the Borough of Mantoloking (Chap. XXX, Sections 30-3n.2 and 3n.3) has been furnished; and

WHEREAS, the following Board Members were present at the March 4, 2010 hearing on this matter: Messrs. Henshaw, Hawkings, Witkowski (by telephone), Gillingham, R. McIntyre, T. McIntyre and Ms. Potter, Ms. White, Ms. Nelson and Ms. Boughton. All of those present also acknowledged making a site visit. Ms. Boughton,

not having been present at the February 4, 2010 meeting and who did not read the transcript, did not take part in any of the discussions at this meeting of March 4 and further did not vote on the determination; and

WHEREAS, a meeting on this matter was held on April 1, 2010 at which Messrs. Henshaw, Hawkings, Witkowski, Gillingham, R. McIntyre and Ms. White, Ms. Nelson and Ms. Boughton were present. Mr. T. McIntyre and Ms. Potter were absent; and

WHEREAS, Stephen A. Pardes, Esq., of 1100 Arnold Avenue, Point Pleasant, N.J. 08742, represented the Applicant at the February 4, 2010 meeting and William T. Gage, Esq., 536 Lake Avenue, Bay Head, N.J. 08742 appeared for the Applicant at the March 4, 2010 meeting;

WHEREAS, the following exhibits were marked at the meeting held on February 4, 2010:

1. Correspondence of Vito M. Marinaccio, Land Use Officer dated August 18, 2009 was marked as B-1. Marked as B-2 was the correspondence of the Applicant dated August 7, 2008.
2. Photographs consisting of a collage all taken within the prior two weeks by the Applicant were marked as A-1. The photographs primarily show the existing conditions.
3. A blown up copy of the Mantoloking Tax Map was marked as A-2.
4. A Plot Plan and an Engineers drawing depicting the site were marked as A-3. This also shows the alternative location of the HVAC Units.
5. A board showing various views of the houses directly north and south of the Property was marked as Exhibit A-4.

6. Architectural elevations of the north, east, south and west of the subject were marked as Exhibit A-5.

7. The Applicant kept Exhibits A-1 through A-5; and

WHEREAS, the following exhibits were marked at the meeting held on March 4, 2010:

1. Correspondence of February 23, 2010 of John J. DeVincens, Esq. the Board Attorney, concerning Mr. Witkowski's ability to participate in the March 4, 2010 meeting was marked as B-5: and

WHEREAS, the Board then discussed the Resolution for Denial as requested by the Board to be prepared by Counsel for consideration at the April 1, 2010 meeting; and

WHEREAS, at the meeting of April 1, 2010 the Resolution denying the Applicant's requests for the variances applied for was presented and initially voted on and approved the denial. Upon subsequent discussion the vote was reconsidered based upon the lack of time to review the Resolution in advance and a motion was made and seconded for the attorney to prepare another Resolution denying the Applicants request for the variances applied for.

NOW THEREFORE BE IT RESOLVED that on this 22nd day of April, 2010 the Mantoloking Planning Board does hereby deny the Application of Applicants for deviation from the Zoning Ordinance of the Borough of Mantoloking as applied for and stated more fully herein for the following facts and conclusions:

(1) The Applicants have failed to demonstrate, by competent and persuasive testimony, that the subject lot, by virtue of size, shape or topography, presents any impediment to the construction of a dwelling which is in compliance with the

requirements of the Land Use Ordinance of the Borough. Applicants' testified that the proposed dwelling would, in effect, be more accommodating to the Applicants and more in keeping with their lifestyle than would be possible with development of a conforming residence. Similarly, the Applicants did not demonstrate the existence of peculiar and exceptional practical difficulties to the Applicants, beyond the potential frustration of the Applicants' desire for a dwelling which they deem suitable to their lifestyle. The lot is regular, a rectangle, fronting on two (2) streets and close to uniform level at existing grade. There was no testimony presented which demonstrated that the topography or physical features are unique to this lot.

(2) The Applicants' desire for a higher building, smaller rear yard depth and use of a portion of a yard area for AC equipment does not approach an extraordinary and exceptional situation, which uniquely affects this lot. .

(3) The Applicants have failed to provide convincing proof concerning the negative criteria; that the variances requested would not substantially impair the intent of the Master Plan or the Land Use Ordinance.

(4) The Land Use Ordinance has recently been extensively revised in response to the need to address bulk requirements and the desire to preserve open space, light and air and to lessen the bulk or volume of buildings. The Land Use Ordinance revisions also take implicit cognizance of a goal of the Municipal Land Use Law, to reduce or eliminate non-conforming lots or structures. Grant of the required variances will increase non-conformity.

(5) The requested departure as to height, rear yard depth and placement of

AC equipment (in the shortened rear yard) will increase the impact of the proposed development upon adjoining properties.

(6) The southerly adjoining property in this zone, R-6A (Lot 18), is dimensionally very close to the dimensions of the subject Lot 17. Similarly, Lot 16, north of the subject, is also close dimensionally. All of these lots are bordered on the east by New Jersey Route 35 and on the west by Barnegat Lane. The lots on the westerly side of Barnegat Lane are not of comparable size, although of equal width. They are significantly deeper as they run to the Bay. The adjoining properties which would be most directly impacted by development on Lot 17 are Lots 16 and 18. Lot 16 has a width of 70.08' and a depth of 81'. Lot 18 has width of 70' and depth of 75'. The subject lot, 17, has width of 70' and a depth of 77.63'. These adjoining and close to identical properties will be adversely impacted by the departures sought by the Applicants. At minimum, in these comparatively small lots (smallest permitted in the Borough), any reduction in yards, increase in structure height or placement of equipment in yard areas will adversely impact the adjoining properties as to light, air and open space. The Board rejects the suggestion that the requested departures from Ordinance standards are insubstantial. The Ordinance prohibits placement of AC equipment outside of the building envelope. The Applicants could provide space in the envelope, but have not elected to do so. The proposed rear yard variance is a reduction of 7.72', where 25' is required, a reduction of 31%. Permitted building height is 32.5'. The variance requested, 1.9', is 6% greater than the maximum permitted. Separately, or in the aggregate, the Board finds the potential impact to be adverse to the adjoining properties.

Any intrusion into or reduction of required yard areas constitute a negative impact upon the open space amenity provided by yards.

(7) The Municipal Land Use Law recites that one of the purposes or goals of zoning is to reduce non-conformity. (The Master Plan expresses concern about the size and bulk of buildings). Here, the subject vacant lot is conforming in all respects; construction of the dwelling, as proposed, will increase and will not reduce non-conformity in the Borough. Acquiescence to the Applicants' requests, for reasons of their personal preference or desire, would not be appropriate and would be contrary to law. Attainment of the legislative goal as expressed in the MLUL, reduction in non-conformity, would be rendered illusory.

(8) Relief cannot be granted pursuant to N.J.S. 40:55D-70c(1). The existence of peculiar and exceptional practical difficulties to, or exceptional or undue hardship upon the Applicants, has not been persuasively shown. The lot is regular and "buildable" as presented; the plan to construct the desired residence is not a situation of undue hardship, it is a personal preference.

(9) Finally, as to N.J.S. 40:55D-70c(2), Applicants have not shown the existence of any of the c-2 factors; the existence of an extraordinary and exceptional situation uniquely affecting this specific piece of property; that the purposes of the MLUL would be advanced by a deviation from the Ordinance; that the variances can be granted without substantial detriment to the public good, that the benefits would outweigh any detriments and that the variance would not substantially impair the intent of the zoning plan and zoning ordinance.

Consideration of the Applicants' proofs in the context of N.J.S. 40:55D-70c(2), "the flexible c," will not support grant of the relief requested. At the outset, it is the Applicant's burden to show that the application applies to a specific piece of property. "Specific piece of property" is a term which must take into account the size of the piece of realty in relation to the size, generally, of a piece of realty in the zone. The subject Lot 17, Block 24, has 70' width and a depth of 77.63', where the minimum permitted width is 70' and minimum depth is 70'. Lot area is 5,428 s.f., where 5,000 s.f., is the minimum lot area permitted; the lot is in the R-6A zone. The two (2) lots immediately south of the subject site, Lots 18 and 19, are, respectively, 70 x 75 and 70 x 73. The two (2) lots north of the subject site, Lots 16 and 15, are 70 x 81 and 70 x 84.

The subject lot is not, by reason of its size "uniquely affected" in a manner, which would qualify it for the relief requested. Application of the zone standards upon this regularly shaped conforming lot have not been shown to result in peculiar and exceptional practical difficulties for the developer/applicant. The Applicants have not provided proof that (a) the variances can be granted without substantial detriment to the public good; (b) that the benefits would outweigh any detriment; and (c) that the variances would not substantially impair the intent of the zoning plan and zoning ordinance. This Board is not persuaded that the development of this lot presents any hardship.

In addition to the failure of persuasive testimony that the application relates to a "specific piece of property", the Board is not persuaded that the Applicants have sustained their burden to show that the requested deviations from Ordinance requirements would advance the purposes of the MLUL. To permit a new structure which

unjustifiably deviates from Ordinance requirements would be to disregard the purposes of both the MLUL and the Land Use Ordinances of the Borough particularly in the context of achieving the desired and essentially mandated goal, the reduction in non-conformity.

The Applicants have not demonstrated that grant of the variances would not be a substantial detriment to the public good. Departure from the Ordinance merely to accommodate Applicants' preference is detrimental to the public good. The standards, if relaxed for reasons not legally justified are not warranted.

(10) The Applicants' have not provided persuasive testimony which would support their obligation to show that the benefits of the proposed deviations would not substantially impair the intent of the Master Plan and Zoning Ordinance. The only benefit is the construction of a residence which suits the Applicants' preference and creates an unnecessary, entirely avoidable non-conformity. The better use for this conforming, regular lot, would be to construct a dwelling which conforms to Ordinance requirements. The benefit would be strictly personal.

(11) The testimony of the Planner, Andrew Thomas, introduced by the Board, was the only expert testimony presented in the course of this Application. He related his efforts to evaluate alternative orientation of the proposed dwelling and moving the location 4' closer to Barnegat Lane. He concluded that to do so would lessen the required rear yard variance, but would diminish parking utilization. He noted that moving toward Barnegat Lane, 21' front yard (to edge of pavement) would necessitate elimination of 2 to 3 feet in the depth of the proposed structure. He also noted that to do so would also yield a conforming rear yard, 25 feet.

It was his opinion that the requested rear yard variance is “reasonable” and presents a better planning alternative, more consistent with the neighborhood. Mr. Thomas did not offer further testimony, or opinion, concerning the requested rear yard variance, either as to its substance or in relation to the necessary standard of proof.

Mr. Thomas then commenced to testify concerning the request for variance relief for HVAC equipment in the building envelope. He suggested that placement of the equipment in the proposed (reduced) rear yard would be better than placement on the Barnegat Lane frontage. He characterized the lot as small. He omitted to note that the lot is entirely conforming as to dimension and, in fact, is in excess of the minimum required area, 5,100 s.f. where 5,000 is minimum.

Mr. Thomas testified that the proposed building height would fit in the neighborhood, approximately 34’, an increase over permitted height of 1’11”, where the adjoining properties are 35 and 33 in height.

Upon completion of his brief conclusory statement concerning height of the proposed structure, Mr. Thomas offered testimony concerning the proof standard for a c(1) height variance; that compliance, with height, could cause practical difficulties. He referred to the testimony of the architect, Mr. Lederer, but did not express his agreement or disagreement with Mr. Lederer’s justification for the height. The Board views this testimony, concerning height, as a net opinion.

(12) At this point, Mr. Thomas concluded his testimony. Mr. Thomas, on at least two (2) occasions, spoke of building “width” when context could suggest that he meant building “depth”. This is evident in the testimony that “the side yard goes into Barnegat Lane” which is the front yard. However, not discussed by Mr. Thomas is the

reality that the front yard of essentially every lot which has frontage on the east side of Barnegat Lane, approximately 80 lots, has its westerly (front) lot line under the pavement of Barnegat Lane. The fact that a portion of the lot is under street paving is a condition which has existed in the area for decades. Certainly, it is the case that the Borough Council was aware of this condition as of the adoption of the Land Use Ordinance. The Board is not persuaded that the subject lot is "small" or that it qualifies as a specific piece of property, unique and presenting the difficulties envisioned under c(1) standards.

(13) The planner and Applicant did not offer any expert testimony or lay testimony in demonstration of or support for the requested standards of proof. Much, if not all of the planner's testimony was lacking in sufficient background or justification. The testimony which, arguably, was intended to provide justification for grant of variances related only to the height variance and was not comprehensive or complete.

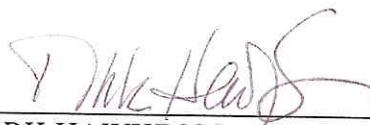
(14) The rear side yard testimony and the HVAC testimony does not meet the statutorily required considerations concerning negative and positive criteria, and the other controlling legal standards under c(1) or c(2).

(15) The planner admitted that the lot could be developed without resort to any variance relief.

(16) The failure of the Applicant to present adequate, competent and complete qualified expert testimony is essentially fatal to this application; more particularly, the rear yard and HVAC location variances were not the subject of any expert testimony concerning application of the relevant statutory criteria. The height variance was addressed, but in a cursory, conclusory fashion. No other witnesses presented addressed compliance with statutory criteria directly or by inference.

CERTIFICATION

I, D. MARK HAWKING, Assistant Secretary of the Planning Board of the Borough of Mantoloking do hereby certify that the foregoing is a true copy of the Resolution duly adopted by the Planning Board on the 22nd day of April, 2010, and memorializes and confirms the actions taken by the Planning Board in denying the request by Applicant for variance relief at the regular meetings held on February 4, 2010, March 4, 2010 and April 1, 2010.



D. MARK HAWKINGS,
Assistant Secretary

MEETING OF APRIL 22, 2010

	Moved	Seconded	Yes	No
G. Russell Henshaw				✓
Richard R. Bradley				
Robert S. McIntyre		✓	✓	
D. Mark Hawkings			✓	
Stanley Witkowski (by telephone)			✓	
Evan S Gillingham	✓		✓	
Thomas McIntyre				
Marilyn Potter				
Jane G. White			✓	
Betsy Nelson (Alt.)			✓	
Denise Boughton (Alt.)(cannot vote)				

Absent: Bradley, T. McIntyre, Potter
 Not Voting or Recused: