

**RESOLUTION
BOROUGH OF BUTLER
PLANNING BOARD
IN THE MATTER OF KRZYSTOF KAMINSKI
DECIDED ON SEPTEMBER 19, 2024
MEMORIALIZED ON OCTOBER 17, 2024
APPLICATION NO. 24-004
d(1) USE VARIANCE TO PERMIT A
THREE-FAMILY DWELLING**

WHEREAS, Krzystof Kaminski (hereinafter the “Applicant”) has made application to the Borough of Butler Planning Board (hereinafter “Board” or “Planning Board”) seeking a certification that the property is a valid pre-existing non-conforming use under N.J.S.A. 40:55D-68, and in the alternative a use variance pursuant to N.J.S.A. 40:55D-70d(1) for property known and designated as Block 22, Lot 3 as shown on the Tax Assessment Map of the Borough of Butler and located at 27 High Street, Butler, New Jersey (hereinafter the “Property”) in the R-5 Residential Zone (hereinafter “R-5 Zone”); and

WHEREAS, a public hearing was held on September 19, 2024, after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by Richard J. Clemack, Esq.

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 certification that the property is a valid pre-existing nonconforming use under N.J.S.A. 40:55D-68 and in the alternative a use variance under N.J.S.A. 40:55D-70d(1) for property known and designated as Block 22, Lot 3 as shown on the Tax Map of the Borough of Butler and located at 27 High Street, Butler, New Jersey in the R-5 Zone.

Overview of Application

Richard J. Clemack, Esq., attorney for the Applicant, provided an overview of the application. Mr. Clemack represented that there is an existing multifamily dwelling located at 27 High Street. He stated this multifamily dwelling has been in existence for approximately 100 years. He also represented that there are three (3) separate and distinct apartments on site, however, only two (2) of the apartments are presently occupied while the third apartment has been unoccupied for many years and is in need of substantial repairs. Mr. Clemack represented that the R-5 Ordinance permits one and two-family dwellings.

Mr. Clemack stated that Apartment 1 is a two-bedroom one-bathroom apartment and contains 1,721 square feet which unit is currently occupied. Apartment 1 is a one-story unit. Mr. Clemack also represented that Apartment 2 is also occupied and is located on the second level. Apartment 2 contains two (2) bedrooms and one (1) bathroom. Apartment 2 is 1,150 square feet in area. Apartment 3, which is the subject of this application, is a one-bedroom one-bathroom dwelling unit which occupies two-stories and consists of 1,360 square feet of area. Further, Apartment 3 has its own basement area. Mr. Clemack testified that Mr. Kaminski purchased the property in 1992 and at that time Apartment 3 did exist but was in a state of disrepair.

Owner's Testimony

Testifying on behalf of the Applicant was Krzysztof Kaminski. Mr. Kaminski testified that he acquired the property in 1992. Mr. Kaminski confirmed that there exists on the property two (2) two-bedroom, one (1) bathroom apartments and a one-bedroom one (1) bathroom apartment which is the apartment for which he is seeking approval from the Planning Board.

Mr. Kaminski addressed utilities and stated there are two (2) gas meters, three (3) separate electric meters, but only one (1) water meter for the entire house.

Mr. Kaminski testified that he has applied for and received building permits for internal improvements to the building such as sheetrock and siding. He also confirmed that several building

permits had been issued since the 1950s to permit improvements to be made to the existing apartments.

Mr. Kaminski addressed on-site parking, and he testified that the two (2) existing apartments park in the front yard with access to High Street. Mr. Kaminski stated that the two (2) existing apartments have a total of three (3) cars. He stated the third apartment, if approved, would need to construct a new driveway on Central Avenue that would provide access to the site and would accommodate parking for two (2) cars.

Planning Testimony

Donna Holmqvist, P.P., a licensed professional planner in the State of New Jersey, provided planning testimony in support of the granting of this application. Ms. Holmqvist testified that she has visited the site on numerous occasions and has walked through the two (2) occupied apartments which she characterized as being safe and sanitary. Ms. Holmqvist also testified that she walked through the third apartment and indicated there were no furnishings in the apartment and that the basement is for storage purposes only.

Ms. Holmqvist introduced into evidence Exhibit A-1 which was identified as Land Use Figure 1 and Exhibit A-2 which was identified as Zoning Figure 2. Ms. Holmqvist described Exhibit A-1 which highlighted the existence of single-family homes located along High Street which were delineated in yellow in color, 2-family dwellings which were delineated in green in color, 3 or more dwelling units which were delineated in purple in color with commercial units delineated in red in color and Borough property in blue in color.

Ms. Holmqvist next reviewed Exhibit A-2 and reviewed with the Planning Board the various zoning districts in the vicinity of the subject Property inclusive of the R-5 Residence District and the CBD Central Business District.

Ms. Holmqvist characterized the Central Business District Zone as having commercial structures, as well as multiple dwelling units inclusive of some single-family dwellings. Ms. Holmqvist also stated that some of the single-family dwellings are on lots that do not meet the minimum lot area requirement.

Next in regard to the R-5 Zone, Ms. Holmqvist testified that a broader variety of housing and a corresponding increase in housing density would be a benefit to the CBD Zone. Ms. Holmqvist also characterized the size of the subject Property at 12,066 square feet as being oversized for the Zone District in which the property is located.

Ms. Holmqvist testified there is an existing nonconformity in regard to the front yard setback from High Street where a minimum of 35 feet is required and 26.3 feet is existing and will continue. Ms. Holmqvist testified that with the exception of the pre-existing nonconformity for the front yard setback on High Street, the Applicant complies with all other bulk requirements in the R-5 Zone.

Ms. Holmqvist testified that even with the addition of the third apartment, there is sufficient room on site to provide parking for all three (3) units which parking would conform to the requirements of the Residential Site Improvement Standards (“RSIS”).

Ms. Holmqvist characterized the subject Property as being one of the largest properties in the area and is an oversized parcel of property. She further stated that the subject Property is in close proximity to the CBD Zone which she represented to be separated from the R-5 Zone by only 120 feet.

Ms. Holmqvist also testified that there is a transit stop on High Street and Park Place. She stated that the proposed apartment would be ideal for a single person or a senior couple as the Property is located within walking distance of the downtown area of Butler.

Ms. Holmqvist testified in regard to the proposed density, she compared the density along the south side of High Street and in the surrounding neighborhood and found that the density was typically between 10 to 12 dwelling units per acre. In this instance, the density is approximately 3 dwelling units per acre. Thus, she concluded that the density is appropriate for the area in which the property is located.

Ms. Holmqvist next addressed the purposes of zoning that would be advanced by the approval of this application in accordance with the Municipal Land Use Law under N.J.S.A. 40:55D-2. She stated that 2.a. would be advanced with is the approval of this application would promote the general welfare and 2.g. would be advanced which is to provide sufficient space in appropriate locations for a variety of residential uses.

Ms. Holmqvist next addressed the negative criteria for granting “d(1)” variance relief and stated that variance relief can be granted without substantial detriment to the public good. She stated the area in the vicinity of the subject Property has other multifamily homes. She stated the approval of this application would result in smart growth. Ms. Holmqvist further characterized the neighborhood as being a compact walkable neighborhood and that a multi-family residential dwelling would benefit the Central Business District.

Next as to the second prong of the negative criteria, Ms. Holmqvist stated that variance relief can be granted without substantial impairment of the zone plan and zoning ordinance. She stated the proposed density is less than the densities in the area. She confirmed that there are other multifamily dwellings in the area. Ms. Holmqvist also testified that the location of the subject Property is in close proximity to the Central Business District which promotes walkability to the commercial enterprises in that area. Ms. Holmqvist also stated that the proposed housing in this area is also close to a transit stop.

Ms. Holmqvist stated that the site is particularly suitable for the proposed use of a multifamily dwelling as the multifamily dwelling fits on the site and also fits within the neighborhood and community in which it is located.

Public Portion

The meeting was opened up to the members of the public and there were no members of the public present expressing an interest in this application.

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

The application before the Planning Board is a request for certification that the property is a valid pre-existing nonconforming use under N.J.S.A. 40:55D-68, and in the alternative a use variance under N.J.S.A. 40:55D-70d(1) for property known and designated as Block 22, Lot 3 on the Tax Assessment Map of the Borough of Butler, and located at 27 High Street, Butler, New Jersey in the R-5 Zone.

Pre-existing Nonconforming Use Under the MLUL Pursuant to N.J.S.A. 40:55D-68

Under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-5, a non-conforming use is defined as a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reason of such adoption, revision or amendment.

Furthermore, under N.J.S.A. 40:55D-68:

“any non-conforming use or structure existing at the time of the passage of an Ordinance may be continued upon the lot or in the structure so occupied and any such structure may be restored or repaired in the event of partial destruction thereof.”

The Board finds that the Applicant acquired title to the Property on or about 1992. The Board also notes that based upon the proofs presented on behalf of the Applicant that building

permits were issued commencing during the 1950s thereby permitting improvements to be made to the property. The Board also accepts the representations of the Applicant's professionals that the building is approximately 100 years old. However, the Board finds that insufficient information has been presented to confirm that 3 dwelling units were constructed at such time that a 3-dwelling unit structure was lawful prior to the adoption, revision or amendment of a Zoning Ordinance which does not permit 3 dwelling units on a property in the R-5 Zone. The Board does respect the fact that the Applicant has made a diligent search of records but has been unable to produce records to substantiate such a claim. The Board is, therefore, satisfied that based upon the proofs presented by the Applicant that no credible documentation was available to the Applicant that would support the fact that the 3-family dwelling came into being lawfully either as a result of being a pre-existing nonconforming use or as a result of receiving zoning approvals from the appropriate Land Use Board exercising jurisdiction over this matter. Therefore, the Board finds that the Applicant has not satisfied the proofs necessary to permit the Board to find that a 3-family dwelling at this location satisfies the requirements to be determined a pre-existing nonconforming use under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-5 and N.J.S.A. 40:55D-68.

d(1) Use Variance Relief

The Applicant requires variance relief under the MLUL pursuant to N.J.S.A. 40:55D-70d(1) in order to permit the construction of improvements to a structure in order to create a three-family dwelling.

Under the MLUL, a Board of Adjustment¹, when considering a “d” variance, cannot grant relief unless sufficient special reasons are shown and there is no substantial impairment of the intent and purpose of the zone scheme and Zoning Ordinance. In addition, the burden of proof is upon the applicant to establish the above criteria. It is the Board’s responsibility, acting in a quasi-judicial manner, to weigh all the evidence presented before it by both the applicant and all objectors, and reach a decision which is based upon findings of fact and conclusions of law and is not arbitrary, unreasonable or capricious.

The New Jersey Courts have been willing to accept a showing of extreme hardship as sufficient to constitute a special reason. The courts have indicated that there is no precise formula as to what constitutes special reasons unless the use is determined to be inherently beneficial, and that each case must be heard on its own circumstances. Yet, for the most part, hardship is usually an insufficient criterion upon which the Board can grant a variance. In addition, special reasons have been found where a variance would serve any of the purposes of zoning as set forth in N.J.S.A. 40:55D-2. However, in the last analysis, a variance should only be granted if the Board, on the basis of the evidence presented before it, feels that the public interest, as distinguished from the

purely private interests of the applicant, would be best served by permitting the proposed use. In these instances, the Board must also find that the granting of the variance will not create an undue burden on the owners of the surrounding properties. The Board also notes the special reasons requirement may be satisfied if the applicant can show that the proposed use is peculiarly suited to the particular piece of property. With regard to the question of public good, the Board’s focus is on the variance’s effect on the surrounding properties and whether such effect will be substantial.

¹ The Planning Board of the Borough of Butler is a Unified Board and, in this matter, exercised the jurisdiction of a

Furthermore, in most “d” variance cases, the applicant must satisfy an enhanced quality of proof and support it by clear and specific findings by this Board that the variance sought is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance. The burden of proof is upon the applicant to establish the above criteria.

The Board has reviewed the application for “d(1)” variance relief under the Municipal Land Use Law, and in particular, N.J.S.A. 40:55D-2 the purposes of the Act. Under the Municipal Land Use Law and the cases interpreting same, there are three recognized categories of circumstances in which the special reasons required for a use variance may be found:

- (a) Where the proposed use inherently serves the public good, such as a school, hospital or public housing facility;
- (b) Where the property owner would suffer undue hardship if compelled to use the property in conformity with the permitted uses in the zone; and
- (c) Where the use would serve the general welfare because the proposed site is particularly suitable for the proposed use.

The Board finds the testimony of the Applicant’s Planner, Donna Holmqvist, P.P., to be persuasive. The Board has reviewed Exhibit A-1 identified as Land Use Figure 1 and Exhibit A-2 Zoning Figure 2 which confirms that in the R-5 Zone in addition to single-family homes, there are multiple two-family, and three or more family dwellings located on High Street which lots back up onto Central Avenue. The Board also finds that the subject Property measures 12,066 square feet in area and is oversized for the R-5 Zone District. The Board also notes that with the exception of a pre-existing non-conforming front yard setback on High Street where a minimum of 35 feet is required and 26.3 feet is existing, the existing multifamily dwelling conforms with every other bulk standard within the R-5 Zone. The Board also finds that the subject Property is in close proximity to the CBD Zone which promotes walkability from the residential area to the CBD Zone.

Based upon the proofs presented, the Board determined that the Applicant satisfied the positive criteria as such that the granting of the application will promote the purposes of the Municipal Land Use Law. More specifically, the Board finds that the purposes of the Act would be advanced under the MLUL pursuant to N.J.S.A. 40:55D-2. The Board finds that 2a) is satisfied because the approval of this application would promote the general welfare by providing multifamily housing in a residential zone where there is a variety of multifamily housing. Also, 2g) would be satisfied because the approval of this application results in providing sufficient space in appropriate locations for a variety of residential uses and finally, 2m) is satisfied because the approval of this application results in a more efficient use of land. The Board finds that the use is particularly suited for the site because the use of a multifamily dwelling with three (3) dwelling units fits on the site and fits within the community especially in light of the fact that there are other multi-family residential dwellings in the area.

The Board also finds that having satisfied the positive criteria and finding the site particularly suitable for the proposed development, the Board next addresses the negative criteria. The Board finds “d(1)” variance relief can be granted without substantial detriment to the public good. The Board finds that the area in which the site is located contains other multifamily dwellings. The Board also finds that the site is located in an area easily walkable to the CBD Zone. The Board also finds permitting the additional dwelling unit to constitute smart growth.

The Board also finds that the Applicant has satisfied the negative criteria in that variance relief can be granted without substantial impairment of the zone plan and zoning ordinance. The proposed density at 3 dwelling units per acre compares very favorably to densities in the area, and/or other multifamily dwellings in the area. Further, the multifamily dwelling is located in close proximity to the CBD Zone which promotes a walkable manner in which to access the commercial

development within the CBD Zone. The Board also finds that multi-family housing is consistent with the existing pattern of development in this area.

The Board, therefore, finds that it is appropriate to grant “d(1)” variance relief to permit the Applicant to restore, repair and utilize a third dwelling unit on the subject Property thus creating a 3-family dwelling.

Site Plan Approval

The Board notes that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-37, one or two-family dwelling units are exempt from site plan approval. However, in this instance, the Applicant is proposing a 3-family dwelling which does trigger site plan approval. Thus, the Applicant has in effect proceeded in a bifurcated manner and having satisfied the proofs necessary to permit the Board to grant d(1) use variance relief, the Applicant shall be required to return to the Board to obtain site plan approval. More specifically, the Applicant must provide additional on-site parking for the third dwelling unit.

Conclusion

Upon consideration of the plans, testimony and application, the Planning Board determines that the request for d(1) use variance relief meets the minimum requirements of the Municipal Land Use Law, Case Law and Borough Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of Butler that the application of Krzysztof Kaminski for premises commonly known and designated as Block 22, Lot 3 on the Tax Assessment Map of the Borough of Butler, and located at 27 High Street, Butler, New Jersey in the R-5 Zone, is determined as follows:

- (1) Variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(1) to permit a third residential dwelling unit to be constructed on the property.

- (2) Nonconforming use under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-5 and 68 is hereby denied in regard to the third residential apartment.

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

1. The development of the site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this Application.

2. The Applicant represents that all representations and stipulations made either by or on behalf of the Applicant to the Borough of Butler Planning Board are true and accurate, and acknowledges that the Planning Board specifically relied upon the Applicant's stipulations in the Board's granting of approval. If any representation or stipulation is false, this approval is subject to revocation.

3. 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 hearing on September 19, 2024.

4. The granting of this application is subject to Butler Borough Construction Department approval.

5. The granting of this application is subject to Butler Borough Fire Subcode Official approval.

6. The granting of this application is subject to and conditioned upon the Applicant returning to the Butler Planning Board with an application for site plan approval.

7. There shall be no occupancy of the third dwelling unit until such time as the Applicant receives site plan approval and satisfies all conditions of the memorializing Resolutions issued by the Butler Planning Board.

8. The granting of this application is subject to and conditioned upon the Applicant opening and maintaining an escrow account with the Borough of Butler and keeping the account

current with sufficient funds for professional review and inspection fees.

9. This approval is subject to the payment in full by the Applicant of all taxes, fees, escrows, assessments and other amounts due and owing to the Township. Any monies are to be paid by the Applicant within twenty (20) days of said request by the Board Secretary.

10. Certification that taxes are paid to date of approval.

11. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Butler, County of Morris, State of New Jersey, or any other agency having jurisdiction hereunder.

VOTE ON APPLICATION
SEPTEMBER 19, 2024

Motion Introduced By: Brown

Seconded By: Finelli

In Favor: Veneziano, Brown, Finelli, Hough, Nargiso

Opposed:

VOTE TO APPROVE RESOLUTION
OCTOBER 17, 2024

Motion Introduced By:

Motion Seconded By:


In Favor

Opposed

Butler Planning Board




William Budesheim, Board Secretary



James Nargiso, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Butler Planning Board on September 19, 2024 and memorialized herein pursuant to N.J.S.A 40:55D-10(g) on October 17, 2024.



William Budesheim, Board Secretary