

Memorandum

To: Independence Township Land Use Board

From: David J. Banisch, PP/AICP

Date: April 15, 2021

Re: Coladarci, Joseph Jr.
206 Route 46
Block 17, Lot 8
R-1/2 Residential Zoning District
Application for Use, Density and Bulk Variances for 3-Family Townhouse Development
Min. Lot. Required: 20,000 sq. ft. vs. 14,667 sq. ft. (existing and proposed)

1. In 2019, the applicant sought and obtained a use variance for mixed-use medical office and two-family apartments in a single building with non-residential use on the ground floor and residential use above. A density variance was granted for the residential use and bulk variances were granted for lot size and setbacks to construct a mixed-use building on the subject parcel.
2. Applicant is apparently abandoning the prior approval and now returns to the Board for use variance relief for a 3-family townhouse development, which requires use, density, and bulk variances for required yards, height and for lot coverage, as follows:
 - a. Use Variance, R-1/2 Zone (Section 255-102): Single-family detached dwellings permitted; multi-family townhouse not permitted.
 - b. Density Variance (Schedule of Area and Yard Requirements):
Permitted: .46 units per acre – note, the dwelling formerly existing has been removed
Existing: 2.97 units per acre
Proposed: 8.91 units per acre
 - c. Lot Area Variance (Schedule of Area and Yard Requirements)
20,000 sq. ft. required
14,667 sq. ft. existing and proposed
 - d. Height Variance (Schedule of Area and Yard Requirements)
35' permitted vs. 37.5' proposed
 - e. Setback Variances (Schedule of Area and Yard Requirements)
Side yard: 25' required vs. 12' proposed (southeast side with neighbor)
Rear yard: 30' required vs. 10' proposed (north side without neighbor)

- f. Coverage: 15% permitted vs. 36.4% proposed

Note: If the one townhouse proposed on the southeasterly side of the lot were eliminated, and the townhouse development reduced to two units instead of the proposed three units, it appears that:

- a) *the extent of the proposed nonconforming use could be lessened (reduce 3-units to 2-units, which is closer to the zoning standard);*
 - b) *proposed density could be made more conforming;*
 - c) *the degree of overcrowding the lot area standard could be lessened and made more conforming;*
 - d) *the height variance could be eliminated;*
 - e) *proposed coverage could be made more conforming; and*
 - f) *proposed side yard variance could be eliminated.*
3. Each proposed townhouse is a 2-bedroom unit with the front door and a garage at ground level; living, dining and kitchen area on the second floor and two (2) bedrooms on the third floor. A second story deck is proposed on the second floor of each unit. The building is 64' wide by 31'-6" deep with an additional 10' deep deck on the rear of each unit.
 4. The lot adjoining to the southeast is developed with a detached single-family dwelling.
 5. The landscaping plan shows 3 proposed trees and 30 foundation planting shrubs.
 6. It appears that no fence or landscaping hedge is proposed along the common property line with adjoining Lot 2.
 - a. We recommend both a 6' high wooden stockade fence and landscaping, such as a row of arborvitae along the common property line with Lot 2.
 7. Exterior lighting should be identified and explained to the Board. Lighting details should be provided. Any lighting installed should be downward directed and shielded from view from all nearby residences.

Use Variance

8. The Board has the power to grant "d(1)" variances to permit non-permitted uses or principal structures pursuant to N.J.S.A. 40:55D-70(1) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(1)" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons." Special reasons are derived from the purposes of the Municipal Land Use Law (attached).

Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. ***The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the***

development of a site in the community that is particularly suited for the very enterprise proposed. The standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed.

The Board may not exercise its power to grant a "d(1)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70- 70: "No variance or other relief may be granted without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

Comment: As to the zone plan and zoning ordinance, the applicant must prove and the Board must find by an "enhanced quality or proof" that there will be no substantial impairment. The applicant must "reconcile" the use proposed with the ordinance's omission of the use from those permitted in the zone.

Density Variance

9. The Board has the power to grant "d(5)" variances to permit an increase in the permitted density (which means the permitted number of dwellings per gross acre of land to be developed) pursuant to N.J.S.A. 40:55D-70d(5) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(5)" variance.

The Board's focus should be on whether the site will accommodate the problems associated with the proposed higher density than permitted by the ordinance but permitted use. This is so because the use, in a "d(5)" variance context, the use (residential) is permitted and it is the density conditions from which the deviations is sought. As such, a "d(5)" density variance applicant need not show that the property is particularly suited for more intensive development.

The Board may not exercise its power to grant a "d(5)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance."

The Board's focus regarding the negative criteria should be determining whether conditions can be imposed in its approval to ensure that the deviations from the density requirements do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. In this context, the public good should be viewed by the Board as impacts on the neighborhood.

Unlike a "d(1)" use variance, *this standard does not require an "enhanced quality of proof" and does not require the applicant to reconcile the grant of the variance to allow the higher than permitted density with the ordinance's restriction on density. A "d(5)" density variance applicant must "demonstrate that the increase in density would not have a more detrimental effect on the*

neighborhood than construction of the project in a manner consistent with the zone's density restrictions." Grubbs, supra. at 390.

In this case, however, the "d(5)" density variance is sought in connection with a use that is not permitted in the Zone, thus, the Board's consideration should take into account the proofs involved in granting the Use Variance in its consideration of whether the property in question can support the non-permitted use as well as whether the proposed development will not have a detrimental effect on the neighborhood.

10. In deciding the Use Variance question, we recommend that the Board consider the potential impacts of the proposed development on the surrounding area, which is primarily comprised of single-family detached dwelling residential uses.
11. In considering whether the proposed use will result in substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance, we recommend that the Board give substantial weight of evidence to the potential impact of the proposed use to the surrounding area.

We trust that these comments will be useful in consideration of this matter.

- c. Alfia Schemm
Michael Finelli, P.E., P.P., C.M.E.
Eric Bernstein, Esq.
Joseph Coladarci
Alfred A. Stewart, Jr. P.E. L.S.