

Use Variance Relief, Minor Subdivision
Joseph T. Gass, III
1765 Forge Pond Road
Block 853, Lot 1
Zone: R-10
Application No. BA-2912-C-D-RA-12/19

**RESOLUTION OF APPROVAL
BRICK TOWNSHIP ZONING BOARD OF ADJUSTMENT
APPLICATION NO. BA-2912-C-D-RA-12/19
May 20, 2020**

WHEREAS, Joseph T. Gass, III (the “Applicant”) has applied to the Brick Township Zoning Board of Adjustment (the “Board”) for use variance relief pursuant to N.J.S.A. 40:55D-70d(1), and minor subdivision approval pursuant to N.J.S.A. 40:55D-47, with respect to property designated as Block 853, Lot 1 on the official Tax Map of the Township of Brick (the “Property”), located at 1765 Forge Pond Road in the R-10 (Single-Family Residential) Zone; and

WHEREAS, a complete application has been filed, the fees as required by Township Ordinance have been paid, proof of service and publication of notice as required by law has been furnished and determined to be in proper order, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised; and

WHEREAS, a public hearing was held on April 29, 2020 virtually via the Zoom platform at which time testimony was presented on behalf of the Applicant and all interested parties having had an opportunity to be heard; and

NOW, THEREFORE, the Board makes the following findings of fact based on evidence presented at its public hearing at which a record was made:

1. The Applicant is seeking use variance relief pursuant to N.J.S.A. 40:55D-70d(1) along with minor subdivision approval pursuant to N.J.S.A. 40:55D-47. The Applicant proposes to subdivide the existing 32,600 s.f. (0.75 acre) Property into two (2) lots for single-family residential use. The proposed new lots, Lot 1.02 and Lot 1.03, will contain 17,984 s.f. and 13,780 s.f., respectively with frontages of 79.51 feet and 83.71 feet, respectively along the southerly side of Forge Pond Road. The Applicant does not propose any site improvements at this time, except for the monuments and survey markers required to perfect the subdivision.

2. The Property contains 12,600 s.f. with 164.42 feet of frontage along the southerly side of Forge Pond Road and is approximately 150.20 feet west of NJ State Highway Route 70 within the R-10 (Single Family Residential) Zone. The properties located to the southeast and across Forge Pond Road to the northeast, which contain a furniture store and an office building with parking lot, are located within the B-3 Highway Development Zone. The parcel to the northwest is improved with a residential use and is within the R-10 Zone. The Property is bounded to the southwest by the Metedeconk River. The Property is currently vacant and wooded. The FEMA Preliminary Work Map identifies the westerly portion of the Property as being located within the AE-8 coastal flood hazard area. The westerly portion of the Property is also encumbered by wetlands. The entire Property is located within the CAFRA Zone.

3. The Applicant was previously granted use variance relief and minor subdivision approval in a Resolution memorialized on April 29, 2015 permitting the creation of two (2) new lots (proposed Lot 1.02: 18,445 s.f.; proposed Lot 1.03: 14,155 s.f.) for the single-family residential development. The Applicant never perfected the prior minor subdivision approval.

4. The Applicant has requested the following bulk variance relief:

	<u>Permitted</u>	<u>Existing</u>	<u>Proposed</u>
Minimum Lot Width	90	164.42 feet	79.51 feet (Lot 1.02) 83.71 feet (Lot 1.03)

5. The Applicant was represented by John J. Jackson, III, Esq.

6. The Applicant's Engineer and Planner, Ray Carpenter, P.E., P.P. testified that the Applicant was seeking use variance relief along with minor subdivision approval to permit the creation of two (2) residential lots. He stated that the Applicant had previously obtained use variance relief and minor subdivision approval from this Board for a similar subdivision on the Property in 2015 (Application No. BA-2912-C-D-11/14). Mr. Carpenter explained the Property was located in the B-3 Highway Development Zone in 2015 but has since been re-zoned and is now located in the R-10 Single Family Residential Zone.

7. Mr. Carpenter further testified that a coastal bluff was located on the Property and that the Applicant was now required to obtain NJDEP approval permitting the construction of residential homes. He then explained that the Applicant was finally granted a CAFRA permit in March 2019 which limited disturbance on the Property to 7,000 s.f.. He added that the coastal bluff area would be retained in its entirety. Mr. Carpenter opined that the Property is particularly suited to residential use due to the topography, size and frontage on Forge Pond Road which is primarily developed with residential uses. He then testified that the proposed residential uses would be significantly less intense than any commercial development.

8. Mr. Carpenter further testified that the Applicant was seeking bulk variance relief for the width of the proposed lots where a minimum 90-foot width was required and lot widths of 79.51 feet (Lot 1.02) and 83.71 feet (Lot 1.03) were proposed. He explained that all other bulk requirements would be satisfied. He further testified that the lot widths of adjacent Lots 4, 5, 6 and 7 were 77, 75, 75 and 81 feet respectively. Mr. Carpenter therefore opined that the proposed two (2) residential lot subdivision would fit with the neighborhood scheme and that there would be no negative impact to the zone plan or zone ordinance. He explained that the coastal bluff located at the rear portion of the Property would limit any development on the site.

9. Mr. Carpenter next stated that the Applicant requested a waiver of the sidewalk installation requirement because no sidewalks presently exist within the residential areas on Forge Pond Road nor on the Forge Pond Road frontage of the adjacent commercial use on Lot 2. He requested that the Applicant be permitted to make an in lieu of financial contribution to the Township's Pedestrian Safety Fund pursuant to Section 245-29.1A of the Township Code.

10. Mr. Carpenter further testified that the proposed residential lots would comply with all requirements for residential uses in the R-10 Residential Zone with the single exception of lot width. He explained that the topography creates a "coastal bluff" at the top of the steeply sloping rear portion of the Property and any building must be set back from the edge of the bluff (i.e., toward the front yard) at least 25 feet. Mr. Carpenter stated that disturbance is prohibited within or near any of the flood hazard areas on the Property and he acknowledged there will be a State-mandated 25-foot buffer area from Forge Pond. He also explained that the existing

wetlands vegetation located on the Property within approximately 20 feet of Forge Pond cannot be disturbed.

11. Mr. Carpenter then stipulated that the Applicant would maintain a minimum 14 ft. side yard adjacent to Lot 2, which contains an existing commercial use, and adjacent to Lot 4, which contains an existing residential use. The Applicant further agreed to plant an evergreen buffer along the side lot line of proposed Lot 1.02 adjacent to Lot 2 to screen the existing commercial use from the proposed residential use, subject to the review and approval of the Board Engineer.

12. There were no members of the public expressing an interest in this application.

13. **NOW, THEREFORE**, the Board makes the following conclusions of law, based on the foregoing findings of fact:

1. The application is seeking use variance relief and minor subdivision approval along with ancillary bulk variance relief permitting the creation of two single-family residential building lots on the Property.

2. The Board recognizes that the zoning for the Property has changed from B-3 Highway Development in 2015 to R-10 Single-Family Residential. The Applicant has decided that use variance relief is still required. In Puleio v. North Brunswick Tp. Bd. of Adjustment, 375 N.J. Super. 613, 621 (App. Div.), certif. den. 184 N.J. 212 (2015), the Appellate Division held that when a use is created by way of variance, a board of adjustment has continuing jurisdiction over future development. See also, *Cox & Koenig, New Jersey Zoning and Land Use*

Administration § 28-1 (GANN, 2020). The Board therefore agrees with the Applicant and concludes that it has jurisdiction to hear the instant application.

3. Under the Municipal Land Use Law, a Board of Adjustment, 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.

4. 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 criteria 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. 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.

5. The New Jersey Supreme Court in Price v. Himeji, 214 N.J. 263 (2013) clarified the meaning and intent of the particularly suitable standard under N.J.S.A. 40:55D-70d(1). In Price, the court held "although the availability of alternative locations is relevant to the analysis, demonstrating that a property is particularly suitable for a use does not require proof that there is no other potential location for the use nor does it demand evidence that the project must be built in a particular location, rather, it is an inquiry into whether the property is particularly suited for the proposed purpose, in the sense that it is especially well-suited for the use, in spite of the fact that the use is not permitted in the Zone." In addition, in Northeast Towers Inc. v. Zoning Board of Adjustment of the Borough of West Paterson, 327 N.J. Super. 476, 497 (App. Div. 2000), the court held: "The concept expressed in Kohl as to the peculiar suitability of the location requires, however, that the use fits well within the surrounding area . . ."

6. The Board first recognizes that it previously determined that the positive criteria had been satisfied. The Board now finds that the Applicant continues to satisfy the positive criteria. The Board again recognizes that the Property is constrained by unique topography which

distinguishes it from nearby parcels. This creates substantial practical difficulty that would make the Property unsuitable to be developed with a commercial use. The Board further acknowledges the substantially residential nature of the surrounding neighborhood as well as the new zoning on Forge Pond Road renders the Property particularly suitable for two (2) residential uses. The Board finds that the proposed use is particularly suitable for the Property for several reasons including, but not limited to, the fact that the environmental constraints limit the scope of development. The approval of this application will also provide for a more productive use. The proposed use is also compatible with nearby residential uses. Furthermore, the proposed development of the Property effectively rehabilitates a long vacant property. The Applicant has therefore demonstrated special reasons for the granting of the requested use variance relief. The Applicant therefore has satisfied the positive criteria.

7. In addition to the positive criteria, an applicant for a use variance must also satisfy the negative criteria. The Board again finds that the negative criteria has been satisfied. The statute provides that “no variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that a variance or such 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.” N.J.S.A. 40:55D-70.

8. The Applicant continues to satisfy the negative criteria. The Board finds that the Property is located within a neighborhood that is primarily developed with residential uses similar to the proposed residential uses. The Board further finds that the Property has been

underutilized for a considerable period of time. The Board further determines that the Property would be aesthetically improved with two (2) new residential homes. As a result, the Board determines that the proposed residential uses are not out of character with the prevailing neighborhood scheme. The Board further finds that the requested use variance relief may be granted without substantial detriment to the public good and without substantial impairment of the zone plan and zoning ordinance. The Board concludes, therefore, the Applicant has satisfied both the positive and negative criteria. The Board once again finds that the positive criteria substantially outweighs the negative criteria and that use variance relief may be granted pursuant to N.J.S.A. 40:55D-70d(1).

9. The Board concludes the bulk variance requested by the Applicant with respect to lot width is subsumed within the granting of the d(1) use variance relief. See Puleio, supra.

10. The Board further finds that there is an absence of sidewalks throughout the residential areas of Forge Pond Road and on the Forge Pond Road frontage of the adjacent commercial use on Lot 2. The Board therefore determines that it is appropriate to grant design waiver relief from the requirement to construct sidewalks on the Property pursuant to N.J.S.A. 40:55D-51. The Applicant shall however, be required to make an in lieu of contribution pursuant to the Township Ordinance §245-29.1A into the Township's Pedestrian Safety Fund.

11. The Board further finds that with the exception of the above-referenced relief, the proposed subdivision complies with all other zoning, subdivision, design guidelines and R.S.I.S. requirements. Minor subdivision approval pursuant to N.J.S.A. 40:55D-47 is appropriate in this instance.

NOW, THEREFORE, BE IT RESOLVED, by the Brick Township Zoning Board of Adjustment on this 20th day of May, 2020, that the action of the Board taken on April 29, 2020 granting Application No. BA-2912-MS-C-D-RA-12/19 of Joseph T. Gass III for use variance relief, pursuant to N.J.S.A. 40:55D-70d(1) and minor subdivision approval, pursuant to N.J.S.A. 40:55D-47, is hereby memorialized, subject to the following conditions:

1. Applicant shall comply with standard Zoning Board of Adjustment conditions as set forth in attached Schedule “A”.
2. The development of this site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this application, as revised by the terms hereof.
3. Except where specifically modified by the terms of this Resolution, the Applicant shall comply with the recommendations contained in the reports of the Board’s professionals.
4. Applicant shall submit a revised subdivision plat as required by the Board’s professionals and as testified by the Applicant at the time of the hearing.
5. Proposed Lot 1.02 shall maintain a minimum 14 ft. side yard adjacent to existing Lot 2 and proposed Lot 1.03 shall maintain a minimum 14 ft. side yard adjacent to existing Lot 4.
6. Applicant shall plant an evergreen landscaped buffer along the side lot line of proposed Lot 1.02 adjacent to existing Lot 2, subject to the review and approval of the Board Engineer.

7. The Applicant shall make an in lieu of contribution into the Brick Township Pedestrian Safety Fund in accordance with Township Ordinance §245-29.1A.
8. The Applicant shall limit the area of disturbance to a 7,000 s.f. maximum.
9. The Applicant shall comply with all NJDEP and CAFRA requirements.
10. The Applicant shall comply with the Map Filing Law.