

**RESOLUTION
TOWNSHIP OF ANDOVER
LAND USE BOARD
IN THE MATTER OF PAT BARONE
DECIDED ON JUNE 13, 2023
MEMORIALIZED ON JULY 18, 2023
APPLICATION NO. A-23-3
INTERPRETATION PURSUANT TO
N.J.S.A. 40:55D-70b REGARDING AGRICULTURAL
LABOR HOUSING AND “c” VARIANCE RELIEF
FOR ACCESSORY STRUCTURES**

WHEREAS, Pat Barone (hereinafter the “Applicant”) has filed an application with the Township of Andover Land Use Board (“Board” or “Land Use Board”) seeking an interpretation pursuant to N.J.S.A. 40:55D-70b that converting an existing garage to agricultural labor housing is a permitted use in the R-3 Zone as well as “c” variance relief for accessory structures. The Subject Property is known and designated as Block 62, Lot 4.04 on the Tax Assessment Map of the Township of Andover which property is located at 41 Kilroy Road, Andover, New Jersey (“Subject Property”) in the R-3 Single Family Residential District (hereinafter “R-3 Zone”); and

WHEREAS, a public hearing was held on June 13, 2023, after the Land Use Board determined it had jurisdiction; and,

WHEREAS, the Applicant was represented by Megan Ward, Esq.

NOW, THEREFORE, the Land Use 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 an interpretation pursuant to N.J.S.A. 40:55D-70b that converting an existing garage to agricultural labor housing is a permitted use in the R-3 Zone, as well as “c” variance relief for accessory structures. The Subject Property is known and designated as Block 62, Lot 4.04 on the Tax Assessment Map of Andover Township which property is located at 41 Kilroy Road, Andover, New Jersey in the R-3 Zone.

Testifying on behalf of the Applicant was Matthew Fox, P.E., L.S. Mr. Fox was qualified as an expert witness as a civil engineer and a land surveyor. Mr. Fox reviewed with the Board plans prepared by his office consisting of three (3) sheets which included Sheet 1- Interpretation Map, Sheet 2 – Area Map, and Sheet 3 – Photograph Location Map.

Mr. Fox provided an overview of the Property. He represented that a significant portion of the Property is covered by Valentines Pond. He also explained how Andover Junction Brook meanders through the site, as well as through adjoining Lots 2.02 and 2.03 and eventually out on to Kilroy Road.

Mr. Fox provided a review of ten (10) photographs of the site and existing structures located thereon as follows:

1. Photo No. 1 – Front elevation view of the existing dwelling with porch.
2. Photo No. 2 – Partial left-side elevation of deck on the back of the existing dwelling.
3. Photo No. 3 – Partial right-side elevation of chimney.
4. Photo No. 4 – Partial right-side elevation view of the existing dwelling with Bilco door.
5. Photo No. 5 – Front side elevation of cabin and porch.
6. Photo No. 6 – Front elevation of Proposed AG Labor Housing – One (1) Story Structure.
7. Photo No. 7 – Front elevation of Proposed Workshop/Storage Area – Two (2) Story Structure.
8. Photo No. 8 – Front elevation of Stable and Coop.
9. Photo No. 9 – Front view of shed for agricultural use.
10. Photo No. 10 – Front view of shed for agricultural use.

Mr. Fox also reviewed with the Board a Flood Hazard Area Permit Plan issued by the NJDEP.

The next witness to testify on behalf of the Board was Mr. Pat Barone. Mr. Barone reviewed with the Board the multiple listing data from the time when he acquired the property. Mr. Barone testified in regard to the existing accessory structures on the Property. Mr. Barone represented that a car port and a coop have been removed from the site. Mr. Barone reviewed with the Board Photograph H-1 which was identified as the garage which he would like to convert to agriculture labor housing. Mr. Barone also reviewed Photographs I-1 and J-1 which are photographs of the cabin on the shoreline of Valentines Pond. Mr. Barone stated that the property is now used for residential and agricultural purposes. He stated part of the property is assessed as qualified farmland. Mr. Barone further testified that it is his intention to rebuild the two-story home which would be occupied by his daughter and grandchildren and the garage would be his residence. Mr. Barone stated that there are two (2) septic systems on the lot and that the systems are properly sized for seven (7) bedrooms.

Mr. Barone testified that the cabin was in such a state of disrepair that it was falling down and that he rebuilt the cabin in order to make it safe. He stated the interior of the cabin has no improvements, only the beams to keep the building from falling down. Mr. Barone testified that Photograph No. 7 depicts a workshop/storage area. Mr. Barone testified that at the present time, there is no bathroom in that workshop/storage area structure and that structure is not used for human habitation.

Mr. Barone also stated that he has a farming operation on Brighton Road where he raises chickens. Mr. Barone would like to also raise chickens on this site and he would like to sell eggs from a farmstand on the site. Mr. Barone agreed to a request from the Board that there would be no

farmstand for the sale of farmland products on Kilroy Road, but that the Applicant could have a farmstand in the interior of the lot for the sale of farm products.

The meeting was opened up to members of the public and the Board was addressed by James Streeter, 36 Kilroy Road. Mr. Streeter stated that Kilroy Road was a narrow road and there is no place to park for vehicles who would like to access a farmstand on Kilroy Road. Thus, he requested that that the Board not allow a farmstand for the sale of products to be located on Kilroy Road.

The Board was next addressed by Cory Tellbuescher, 174 Andover-Mohawk Road. Mr. Tellbuescher was concerned that if the Board were to approve agriculture labor housing in this residential zone, that it would open the doors for future property owners to seek similar relief.

The Board was also addressed by Robert McDonald, 168 Andover-Mohawk Road, Ashraf Salib, 33 Kilroy Road, Glenn Rubin, 37 Kilroy Road, Jouravlev Iaroslav, 35 Kilroy Road, Jim Eskin, 26 Kilroy Road, Suzanne Streeter, 36 Kilroy Road, Mark Fortunato, 21 Kilroy Road and Wayne Grenewicz, 4 Kilroy Road. These members of the public had numerous concerns including but not limited to, accessory structures being constructed on the site without proper permits, the state of disrepair of various accessory structures on the lot, and most importantly, the members of the public objected to the Board approving agricultural labor housing on the property. The members of the public were opposed to having multiple principal buildings for residential use on the property.

There were no other members of the public present who expressed an interest in this application.

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

The application before the Board is a request for an interpretation pursuant to N.J.S.A. 40:55D-70b that converting an existing garage to agricultural labor housing is a permitted use in the

R-3 Zone, as well as “c” variance relief for accessory structures. The Subject Property is known and designated as Block 62, Lot 4.04 on the Tax Assessment Map of Andover Township and located at 41 Kilroy Road, Andover, New Jersey 07821 which premises are located in the R-3 Zone.

The Applicant seeks an interpretation under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70b that agricultural labor housing to be located in a converted garage is a permitted use and would not constitute a second principal use on the site nor require a d(1) use variance.

The Applicant also requires “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c and Andover Township Code Section 190-13 for the following accessory buildings/structures which encroach upon the front yard setback of the principal dwelling unit:

1. The existing garage although setback 450 feet from Kilroy Road is closer to the road than the existing single-family dwelling and is thus, in the front yard setback;
2. The existing agricultural storage/workshop is located within the front yard setback;
3. The existing agricultural shed is located within the front yard setback;
4. The existing agricultural stable is located within the front yard setback; and
5. The existing agricultural coop is located within the front yard setback.

The Applicant requires “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c and Andover Township Code Section 190-34 for a violation of the minimum rear yard and minimum side yard setback requirement of 20 feet in the R-3 Zone as follows:

1. The existing cabin on the shore of Valentines Pond is 14.6 feet from the property line where 20 feet is required (adjoining Lot 3).

The Applicant also requires “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c and Andover Township Code Section 190-42 which requires 150 feet of

separation between all barns, out buildings and accessory buildings, except residence garage and the property line. In this application, the following variances are required:

1. The distance between the garage and the workshop is 14.5 feet;
2. The stable is 9.8 feet to the side property line; and
3. The coop is 5.0 feet to the side property.

The Municipal Land Use Law at N.J.S.A. 40:55D-70b provides the Board with the jurisdiction to hear and to decide requests for interpretation of the Zoning Map or Ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map, ordinance in accordance with this act.

Interpretation

The Board has reviewed the Andover Township Code Section 190-29 Right to Farm, which provides that the right to farm land within the Township of Andover is a permitted use throughout the Township. Further, Section 190-42 Agricultural Farm and Horticultural Uses contains regulations as to minimum lot area, spacing requirements and prohibited uses. The Board also considered Section 190-11 which permits only one (1) principal structure to be erected on a lot used for a single-family residence. The Board also reviewed Section 190-22 Prohibited Uses which provides in relevant part that “any use not specifically permitted in a zoning district is specifically prohibited from that district. The Board also recognizes that agriculture, farm or horticulture uses are a principal permitted use in the R-3 Zone as set forth in the R-3 Zone on the table identified as 190 Attachment 2 of the Township Zoning Ordinance.

The Board has carefully reviewed all of these ordinances and concludes that none of the aforesaid ordinances permits agricultural labor housing. The Board accepts the representations of Mr. Barone that he will live on the subject property in a structure and that his daughter and grandchildren

will reside on the subject property in a separate structure. However, there is no provision under the Ordinances referenced herein that permits agriculture labor housing as a permitted use in the R-3 Zone, nor are two (2) principal residential structures permitted on a lot in the R-3 Zone. As a result, the Board finds that agricultural labor housing in a separate structure would constitute a second principal use on the site and would thus require a d(1) use variance. Therefore, if the Applicant wants to pursue having agricultural labor housing as a second principal use on the property, the Applicant must return to the Board and seek d(1) use variance approval.

“c” Variance Relief

The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the Applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the Applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An Applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further the Applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the Applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or “c” variance relief. Finally, an Applicant must also show that the proposed variance relief sought will not be substantially detrimental to the public good and, further, it will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the Applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the Applicant to establish these criteria.

The Board reviewed the request for “c” variance relief for all of the structures identified herein under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1). The Board finds that under the MLUL pursuant to N.J.S.A. 40:55D-70c(1)(b) that by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property and pursuant to N.J.S.A. 40:55D-70c(1)(c) that by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon, the strict application of the zone requirements would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the Applicant.

The Board notes that the existing lot has environmental constraints inclusive of Valentines Pond and Andover Junction Brook which meanders through the lot as well as adjoining properties on Lot 2.03 and 2.02. The Board also notes that the existing structures including but not limited to, the storage workshop, shed, stable, coop and existing garage are all structures which currently exist on the subject property and have been in existence on the lot since the time Mr. Barone acquired title to the property. The Board finds that it would constitute an undue hardship to require the Applicant to relocate the many accessory structures on the lot that is used for residential and agricultural purposes. Thus, the Board finds that the Applicant has satisfied the positive criteria under the Municipal Land Use Law. Further, the Board finds that the Applicant has satisfied the negative criteria for the reasons

stated herein and that variance relief can be granted under “c(1)” without substantial detriment to the public good and without substantial impairment of the zone plan and zoning ordinance.

The Zoning Board has also reviewed the request for ancillary c or bulk variance relief under the c(2) criteria. In Kaufman v. Zoning Board for Twp of Warren, 110 N.J. 551, 563 (1988) the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

The Board notes that it has reviewed the interpretation map, area map and photograph location map submitted on behalf of the Applicant. The Board further notes that it has reviewed all of the photographs submitted into evidence by the Applicant. The Board finds that the minimum lot area requirement in the R-3 Zone is 130,700 square feet and that the existing property is 349,469 square feet which is almost three times the minimum lot area permitted in the zone. The Board also notes that the site is encumbered by Valentines Pond and Andover Junction Brook. The Board finds that granting variance relief for the existing garage, agricultural storage/workshop building, agricultural shed, agricultural stable, agricultural coop, the existing cabin and the distance between the accessory structures on the site all can be granted without substantial detriment to the public good and without substantial impairment of the zone plan and zoning ordinance. The Board notes there are no structures located on the adjoining lots in close proximity to where the accessory structures are located on the Subject Property. The Board finds that allowing these accessory structures to remain in their existing location would not be substantially detrimental to the adjoining property owners. The Board finds

that these accessory structures have been in existence on the lot for many years without any adverse impact on adjoining property owners.

The Board finds that the Applicant has satisfied the positive criteria. The Board finds that the Applicant has satisfied the purposes of the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-2a. First, because the approval of this application guides the appropriate use or development of land in this State in a manner which promotes the public health, safety, morals and general welfare. Second, N.J.S.A. 40:55D-2(e) is satisfied because the approval will promote the establishment of appropriate population densities and will contribute to the well-being of persons and neighborhoods. Third, N.J.S.A. 40:55D-2(g) is satisfied because the approval of this application provides sufficient space in appropriate locations for residential and agricultural uses and continues to provide open space. Fourth, N.J.S.A. 40:55D-2(m) is satisfied because the approval of this application results in more efficient use of land for residential and agricultural uses.

The Board finds that the approval of this application will enable the Applicant to upgrade an existing residential and agricultural property which results in responsible development or smart growth which is in conformance with the Andover Township Master Plan and Zoning Ordinance. Therefore, the Board determines that the Applicant has satisfied the positive criteria in regard to the granting of ancillary “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2). Then the Board next addressed the negative criteria. The Board finds that the existing accessory structures on the lot are typical for a residential/agricultural use on the property. The Board finds that there will be no substantial detriment to the public by approving these variances.

The Board finds that the Applicant has satisfied the negative criteria and that the approval of this application can be granted without substantial detriment to the public good. Furthermore,

ancillary “c” or bulk variance relief can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance. The Board finds that the approval of this application is consistent with the Andover Township Master Plan goals as set forth herein. The Board thus finds that the purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. The Board, therefore, finds that the negative criteria has also been satisfied and that it is appropriate to grant ancillary “c” or bulk variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

The Board, therefore, concludes that both the positive and negative criteria were met by the Applicant to grant ancillary “c” or bulk variance relief as set forth herein is appropriate to be granted under the MLUL pursuant to N.J.S.A. 40:55D-70c(1) and c(2).

Conclusion

Upon consideration of the plans, testimony and application, the Board determines that the request for “c” variance relief has met the minimum requirements of the MLUL, case law and Township Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will not adversely impact or impair the use and enjoyment of adjacent properties. Thus, the Board concludes that it is appropriate to grant “c” variance relief as set forth herein.

NOW, THEREFORE, BE IT RESOLVED by the Land Use Board that the application of Pat Barone in regard to property designated as Block 62, Lot 4.04 on the Tax Assessment Map of Andover Township which premises are commonly known as 41 Kilroy Road, Andover, New Jersey in the R-3 Zone, and bearing Application No. A-23-3 requesting Land Use relief is determined as follows:

1. Pursuant to N.J.S.A. 40:55D-70b, the Board has interpreted the Andover Township Code and finds that agricultural labor housing is not a lawfully permitted use in the R-3 Zone and that such a use would constitute a second principal use on the site which would require variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(1).
2. Pursuant to N.J.S.A. 40:55D-70c(1) and (2), variance relief is granted to permit all of the accessory structures as set forth on the record during the hearing to remain on the property as identified in this Resolution.

IT IS FURTHER RESOLVED:

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 Andover Township Land Use Board are true and accurate, and acknowledges that the Planning Board specifically relied upon the Applicant's stipulations in the Board's granting of this approval. If any representation or stipulation is false, this approval is subject to revocation.
3. The Applicant shall comply with any recommendations set forth on the record by the Land Use Board at the time of the public hearing on June 13, 2023.
4. The Applicant shall comply with all terms and conditions set forth in the review report of Cory L. Stoner, P.E., P.P., C.M.E., Land Use Board Engineer dated March 30, 2023 and as further represented on the record.
5. The Applicant shall obtain inspections from the Andover Township Building Department for all structures that have been erected without proper building permits.
6. The Applicant shall obtain Sussex County Health Department approval for the septic system to service the property.

7. The Applicant is permitted to sell farm products from a farmstand from the interior of the lot, but there shall be no sale of farm products on Kilroy Road.
8. The Applicant shall obtain NJDEP approval, if required.
9. The Applicant shall open and maintain an escrow account with Andover Township and keeping the account current with sufficient funds for professional inspection and review fees.
10. Payment of all fees, costs, escrows due or to become due. Any monies are to be paid within twenty (20) days of the request by the Board's Secretary.
11. Certification that taxes are paid to date of approval.
12. Subject to all other applicable rules, regulations, ordinances and statutes of the Township of Andover, County of Sussex, State of New Jersey, or any other agency having jurisdiction hereunder.

**VOTE ON INTERPRETATION THAT AGRICULTURAL
LABOR HOUSING IS A PERMITTED USE IN THE R-3 ZONE**
JUNE 13, 2023

Motion Introduced By: Olsen

Motion Seconded By: Skewes

In Favor: Olsen, Gilchrist, Skewes

Opposed: Karr, Vice Chair Howell, Ordile, Chairman Messerschmidt, Carafello

The motion failed by a vote of 5 to 3 abstain the motion.

VOTE TO APPROVE "c" VARIANCE RELIEF
JUNE 13, 2023

Motion Introduced By: Vice Chair Howell

Seconded By: Karr

In Favor: Chairman Messerschmidt, Vice-Chair Howell, Board Members Ordile, Olsen, Skewes, Gilchrist, Carafello, Karr

Opposed: None

MEMORIALIZATION OF RESOLUTION
JULY 18, 2023

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Andover Township Land Use Board

Stephanie Pizzulo, Board Secretary

Paul Messerschmidt, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Land Use Board on June 13, 2023 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on July 18, 2023.

Stephanie Pizzulo
Board Secretary