

**RESOLUTION
TOWNSHIP OF ANDOVER
LAND USE BOARD
IN THE MATTER OF PAT BARONE
DECIDED ON NOVEMBER 21, 2023
MEMORIALIZED ON DECEMBER 19, 2023
APPLICATION NO. A-23-3
(d)1 USE VARIANCE APPROVAL GRANTED TO PERMIT
AGRICULTURAL LABOR HOUSING FOR A FAMILY MEMBER
ENGAGED IN FARMING ON THE SITE**

WHEREAS, Pat Barone (hereinafter the “Applicant”) has filed an application with the Township of Andover Land Use Board (“Board” or “Land Use Board”) seeking use variance approval under the Municipal Land Use Law (“MLUL”) pursuant to N.J.S.A. 40:55D-70d(1) to permit a second dwelling unit to be used for agricultural labor housing for a family member engaged in the family agricultural use on the property. 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 (“the Property”) in the R-3 Single Family Residential Zone District (hereinafter “R-3 Zone”); and

WHEREAS, a public hearing was held on September 5, 2023 and November 21, 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 use variance approval under the MLUL pursuant to N.J.S.A. 40:55D-70d(1) in order to permit the conversion of an existing garage to agricultural labor housing to be occupied by family members engaged in the family agricultural use on the Property. The 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.

Background

The Applicant originally came before the Land Use Board for a public hearing on June 13, 2023. At that time, the Applicant sought an interpretation under the MLUL pursuant to N.J.S.A. 40:55D-70b that agricultural labor housing is a permitted use in the R-3 Zone. At the conclusion of the public hearing process, the Land Use Board determined that agricultural labor housing is not a permitted use in the R-3 Zone. The Board found that having agricultural labor housing in the R-3 Zone in a separate structure would constitute a second principal use on the Property and would require the Applicant to return to the Land Use Board and seek d(1) use variance approval.

The Board however granted ancillary c variance relief for a number of accessory structures existing on the lot including, but not limited to, the following: the location on-site of the existing garage, the location onsite of the agriculture storage/workshop structure, the location onsite of the agricultural shed, the location onsite of the agricultural stable, the location outside of the agricultural coop as well as for the location onsite of the cabin which abuts Valentines Pond.

Therefore, the remaining issue to be determined by the Board is with respect to whether or not to grant d(1) use variance approval to permit agricultural labor housing to be constructed on the site to be utilized by a family member engaged in the family agricultural use on the property.

September 5, 2023 Hearing

Planning Testimony

Testifying on behalf of the Applicant was Mr. Eric Snyder, P.P., a licensed professional planner in the State of New Jersey. Mr. Snyder was qualified as an expert witness as a land use planner in the State of New Jersey. Mr. Snyder testified that the Applicant seeks d(1) use variance

approval in regard to a use which is not permitted in the R-3 Zone. Mr. Synder reviewed the purposes of the MLUL that would be advanced by approving the application. He identified three (3) purposes of the act that would be advanced which include, 1) providing sufficient space in appropriate locations for an agricultural use; 2) efficient use of land; and, 3) approving the new structure would be an aesthetic improvement as a result of converting the garage into a two (2) bedroom cottage.

Mr. Snyder testified that agriculture in New Jersey is the most supported business in the entire State. He further testified that the Andover Township Master Plan Reexamination Report, that was recently adopted, states that Andover recognizes that agricultural uses are an important part of the Township's history and character and that active farms should be preserved. Mr. Snyder also stated that the Master Plan encouraged reactivation of farms. Mr. Snyder characterized the Property as an active farm which is assessed as an active farm by the Andover Township tax assessor. Therefore, he stated the Applicant seeks approval in order to convert the garage into a two (2) bedroom cottage.

Mr. Snyder represented that if Mr. Barone is living on the Property he can more efficiently manage the farm operation on the Property. He further testified that it was the intention of Mr. Barone to fix up the existing house as well as to convert the garage to a two (2) bedroom cottage. Mr. Snyder also represented that the proposed improvements could be accommodated on the Property. Mr. Snyder also testified that the septic system is designed far in excess of what is needed or proposed. Mr. Snyder also represented that the Property is not visible from the road with the only external visibility of the interior of the Property being from across the pond.

Mr. Snyder next addressed the negative criteria. He stated that the cottage would not be seen or heard by the public. Further, there would be no increase in traffic. Mr. Snyder also represented that there would be a marginal increase of activity on the site which would not be measurable. He also stated that to the extent there is any impact on the neighborhood or the zone plan, it would be so

small as to be unmeasurable. Mr. Snyder represented that it makes the farm more viable and would contribute to having a more efficient farm operation on the site. Mr. Snyder recommended that the application be approved.

Mr. Snyder confirmed that the nature of the application is to seek approval to convert the garage into a two (2) bedroom cottage in which a Barone family member, operating as part of the agricultural use on the Property will be able to reside. Counsel for the Applicant also stipulated that the Applicant would agree to a deed restriction which would be that occupancy of the proposed two (2) bedroom cottage would be by a family member engaged in the agricultural use of the Property. Further, on behalf of the Applicant, counsel stipulated that the two (2) bedroom cottage would not be a rental unit occupied by a third party. Ms. Ward also stipulated that the Applicant would provide an annual affidavit to the Zoning Officer in order to confirm that the occupancy of the two (2) bedroom cottage is by a family member operating as part of the agricultural use. The Board and the Applicant discussed the seasonal aspect of farming and counsel for the Applicant represented that Mr. Barone would be raising chickens on the site. Mr. Snyder testified that if the agricultural use on the Property ceased to exist, the second residence would be decommissioned.

Public Portion

The meeting was opened up to members of the public and the Board was addressed by Suzanne Streeter. Ms. Streeter sought clarification that the Applicant was seeking to convert an existing garage into a two (2) bedroom dwelling for agricultural labor housing. Ms. Streeter also had questions in regard to the proposed deed restriction.

The Board was also addressed by James Streeter. Mr. Streeter expressed a concern as to why Mr. Barone could not just build a bigger house since the Property was large enough to accommodate an expansion of the existing dwelling. Mr. Streeter was also concerned about the ability of the zoning

officer to monitor any conditions of the approval if granted. Mr. Streeter was concerned that Kilroy Road is a narrow street and that an active farm could increase traffic which, in his estimation, Kilroy Road would not be able to adequately handle any significant increase in traffic.

Mr. Glenn Rubin expressed a concern regarding enforcement of the conditions of any approval. Mr. Rubin also represented that approval of this application would result in creating two (2) residences on a lot in a single family residential zone.

Mr. Laroslav Jouravlev represented that he purchased his property three (3) years ago and he was not aware that the Barone farm was an active farm. Mr. Jouravlev considered the Barone Property to consist of an abandoned house. He also expressed his desire to not live behind a chicken farm which he felt would decrease the value of his home.

Mr. Wayne Grenewicz addressed the Board and stated that Sussex County is the farming capital of the State.

Ms. Cathy Rubin stated that she was in favor of the farming activity.

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.¹

¹ At the September 5, 2023 Hearing, there were only five Board Members present who were eligible to vote on the within application. The Applicant requested that the matter be carried to a future date wherein more Board Members would be present and eligible to vote on the application. The Hearing was closed at that time and the matter was carried to a future hearing date to permit the Board to deliberate and vote on the application. The Board deliberated and voted on the application at the November 21, 2023 Andover Township Land Use Board Meeting.

The application before the Board is a request for d(1) use variance approval for Property 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.

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 Applicant to raze the existing garage and construct in its place a two (2) bedroom cottage for agricultural labor housing for a family member engaged in the agricultural use of the Property. Thus, this two (2) bedroom cottage would not be a rental unit occupied by a third party.

Under the MLUL, a Land Use Board acting as 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.

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. 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 Township Code 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 finds that there is no provision under the ordinances referenced herein that permits agricultural 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 Applicant is required to seek d(1) use variance approval in order to permit agricultural labor housing as a second principal use on the Property.

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. The Board finds that the following purposes of the MLUL would be advanced pursuant to N.J.S.A. 40:55D-2: 2g) would be advanced which is to provide sufficient space in appropriate locations for agricultural uses; 2i) would be advanced which is to provide a desirable visual environment by eliminating the garage which is in a deteriorated condition and constructing in its place a new two (2) bedroom

residential cottage on the property; and 2m) would be advanced which is the approval of this application will result in more efficient use of land.

The Board further finds that this site is particularly suitable for the proposed use. The Board finds that the Master Plan Reexamination report which was recently adopted confirms that Andover Township recognizes that agricultural uses are an important part of the Township's history and character and that active farms should be preserved. Further the Master Plan also recommends that reactivation of farms should be encouraged. The Board finds that the Property is an active farm. 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. The Board also recognizes that agriculture, farm or horticulture uses are principally permitted uses 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.

Having satisfied the positive criteria, the Board next turns to the negative criteria, the Board accepts the representations of the Applicant's expert land use planner, Mr. Snyder that the proposed two (2) bedroom cottage would not be seen or heard by the public and there would be no increase in traffic as a result of the construction of the two (2) bedroom cottage. The Board also accepts the representations of Mr. Snyder that there would be a marginal increase in activity on the site which would not be measurable. The Board further accepts the representations on behalf of the Applicant that the impact on the neighborhood or on the zone plan would be *de minimis*. Further, the approval of this application by allowing family members to reside in the proposed two (2) bedroom cottage would make the farm more viable and provide a more efficient agricultural operation on the Property.

The Board further accepts the representations from the Applicant's representatives that the Applicant will provide a deed restriction that the two (2) bedroom residential dwelling to be

constructed on the site in place of the garage would be occupied by a family member or members engaged in the agricultural use on the Property and it would not be a rental unit occupied by a third party. The Board also accepts the representations of the Applicant's representatives that an annual affidavit would be provided to the Township Zoning Officer. The Board further accepts the representations of the Applicant's representatives that in the event that the agricultural operation ceases to exist on the Property, the second residence would be decommissioned. Further, the Board accepted the representations of the Applicant's representatives that the Applicant as a condition of any approval would provide plans and would apply to the Township Building Department for building permits relative to the construction of the two (2) bedroom cottage. The Board finds that the Application for d(1) use variance relief can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the Zone Plan and Zoning Ordinance.

Conclusion

Upon consideration of the plans, testimony and application, the Board determines that the request for "d(1)" 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 "d(1)" 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. Under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(1) use variance approval is granted to permit the Applicant to construct a two (2) bedroom cottage for agricultural labor housing limited to family members engaged in the agricultural use of the property.

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 hearings on September 5, 2023 and November 21, 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. All terms and conditions of the Board's prior Resolution shall remain in full force and effect except as amended or satisfied and not in conflict with this approval.

6. The use and occupancy of the proposed two (2) bedroom cottage is limited to that of a family member or members engaged in the agricultural use on the Property and the two (2) bedroom cottage shall not be rented to or occupied by a third party.

7. The Applicant shall provide a deed restriction which shall be subject to the review and approval of the Board attorney and Board engineer. The deed restriction shall include, but not be limited to, the two (2) bedroom cottage strictly being used and occupied by a family member or members engaged in the agricultural use on the Property. The two (2) bedroom cottage shall not be occupied or rented to a third party. A copy of the recorded deed with the restrictive language shall be provided to the Land Use Board Secretary for inclusion in the Board's file.

8. The Applicant or any successor in interest shall file an annual affidavit in such form as to be approved by the Board Engineer and Board Attorney that the occupancy of the two (2) bedroom cottage is by a family member or members engaged in the agricultural use on the Property.

9. The Applicant shall provide plans to the Board Engineer and shall apply to the Andover Building Department for building permits regarding the proposed construction of the two (2) bedroom cottage which shall be subject to the review and approval of the Board Engineer and Andover Building Department.

10. In the event that the farming operation ceases to exist on this Property, then the second residence shall be decommissioned and there shall be no second (2nd) dwelling unit on the Property.

11. The Applicant shall obtain NJDEP approval, if required.

12. 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.

13. 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.

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

15. 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 TO APPROVE d(1) VARIANCE APPLICATION
NOVEMBER 21, 2023**

Motion Introduced By: Skewes

Motion Seconded By: Olsen

In Favor: Vice Chair Howell, Board Members Skewes, Olsen, Gilchrist, Degan, Chairman

Messerschmidt

Abstention: Ordile

Opposed:

Opposed: None

**MEMORIALIZATION OF RESOLUTION
DECEMBER 19, 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 November 21, 2023 and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on December 19, 2023.

Stephanie Pizzulo
Board Secretary