

Resolution No.: 2021-10

RESOLUTION OF THE COMBINED PLANNING/ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF ELK, COUNTY OF GLOUCESTER, STATE OF NEW JERSEY, GRANTING A “D(3)” USE VARIANCE TO THE VINEYARDS AT SILVER LAKE-ELK, LLC, AND RUSSO HOMES, LLC, REGARDING PROPERTY LOCATED BUCK ROAD AND CEDAR LANE, AND BEING FURTHER SHOWN AS BLOCKS 56.01 AND 56.02, ON THE TAX MAPS OF THE TOWNSHIP OF ELK, APPLICATION NO.: ZB-20-07

WHEREAS, Application No.: ZB-20-07 (the “Application”) was submitted before the Combined Planning/Zoning Board Adjustment of the Township of Elk, County of Gloucester, State of New Jersey (the “Board”) by The Vineyards at Silver Lake-Elk, LLC, 188 Tamarack Circle, Skillman, N.J. 08558 (the “Vineyards”); and Russo Homes, LLC, 403 Helms Avenue, Swedesboro, N.J. 08085 (“Russo), for a “D(3)” use variance to permit six (6) of forty-one (41) lots to have a head of household for 50 years old, as opposed to 55 years old, for initial sale of certain age-restricted homes within a 41 lot “55 and older” age-restricted subdivision, with 16 units built and occupied, pursuant to the Board’s prior Resolution # 2005-12; and

WHEREAS, the Applicants did appear at a meeting and public hearing, held virtually by the Board due to the Covid-19 Pandemic, on the Application on January 20, 2021 at 7:00 P.M., time prevailing, at which time was the following present on behalf of the Applicants: Jack Plackter, Esquire, Fox Rothschild, 1301 Atlantic Avenue, Suite 200, Atlantic City, N.J. 08401-7212 (on behalf of the Applicant Vineyards); Nate Russo, Managing Member, Russo Homes, LLC; and Leah Furey Bruder, P.P., A.I.C.P., LFB Land Planning, 22 Coates Street, Medford, N.J. 08055 (the professional planner for the Vineyards); and

WHEREAS, Ms. Bruder provided her background information licensing and education, after which it was stipulated on the record, without objection, that Ms. Bruder was a licensed Professional Planner in the State of New Jersey and was qualified to testify as an expert in the field of planning on behalf of the Applicants for the purposes of the Application; and

WHEREAS, Mr. Russo and Ms. Bruder were sworn and provided testimony on the Application;

NOW, THEREFORE, BE IT RESOLVED by the Combined Planning/Zoning Board of Adjustment of the Township of Elk, County of Gloucester, State of New Jersey, as follows:

FINDINGS OF FACT

1. The Application was deemed to be complete, subject to the Board acting on certain requests for submission waivers. As such, the Board had jurisdiction to hear the Application. Because the Application involves a “D” use variance, Board members Poisker and Nicholson recused themselves and did not attend the hearing. Therefore, the Board was constituted as a seven-member Zoning Board of Adjustment.

2. The Board’s professional planner, Candace Kanaplue, P.P., A.I.C.P., Bach Associates, PC, 304 White Horse Pike, Haddon Heights, NJ 08035, and the Board’s professional engineer, Stan Bitgood, P.E., C.M.E., Federici and Akin, P.A., 307 Greentree Road, Sewell, NJ 08080, were both sworn as to any testimony that they would give on behalf of the Board for the purposes of the Application.

3. The Applicant submitted and the Board entered into the record the following:

A. Application, Application Fee, Application Checklist, Escrow Agreement, Escrow Deposit, Notice of Public Hearing, Certification of Taxes Paid on the Subject Property, Affidavit of Service, Affidavit of Publication, Affidavit of Ownership, and Certified List of Property Owners within 200 ft. of the Subject Property;

B. Copy of prior Plan of Subdivision;

C. Letter dated November 24, 2020 Candace Kanaplue, Bach Associates, the Board’s professional planner, regarding her review of the Application.

D. Letter dated November 3, 2020 from Stan M. Bitgood, P.E., C.M.E., Federici & Akin, P.A., the Board’s professional Engineer, to the Board regarding his review of the Application.

4. The Subject Property is an age-restricted community comprised of 42 lots, 41 of which approved for single-family age restricted dwellings. These lots are located in blocks 56.01 and 56.02. Lot 1 of Block 56.01 is used for a stormwater infiltration basin. The neighborhood is bordered by Buck Road (CR 553) to the East, Cedar Lane to the South, and Route 55 to the West. The Applicant is requesting relief from the requirements of Elk Township Code section 96-74.B.(4) which states that occupancy of homes in Age-Restricted Communities be limited to persons 55 years or over. The Applicant requests that an exception be made for 6 lots in the development to allow for the lowering of age from 55 to 50.

5. The Applicant is also requesting that for 15% of the 41 lots, the modified age restriction only apply to the initial sale. Both of the above requests directly conflict with the Township Code and with the Declaration of Covenants for The Vineyards at Silver Lake, an age-restricted community, recorded against the deeds at Book 4580 Page 114, on 09/10/2008. Thus, the herein Application for relief is being made by the Applicant.

6. Standard of Proof for “D” Variances

For “D” variances it is the Applicant’s obligation to present the “Positive” and “Negative” criteria to justify the variance. The Applicant must prove to the satisfaction of the Board that there are “special reasons” for the Board to exercise its jurisdiction to grant the requested relief, demonstrating that the site is particularly suited to the proposed use and that the proposal will advance the purposes of Municipal Land Use Law (N.J.S.A. 40:55D-2) and the Township’s Master Plan and Zoning ordinances (POSITIVE). The Applicant must also show that the variance can be granted without substantial detriment to the public good and that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance (NEGATIVE). The Applicant should provide testimony demonstrating that the proposal will meet the variance criteria.

7. The Applicant was requested the following waivers from submission requirements:

- #8 requires copies of applications to and certification of approvals from all outside agencies with jurisdiction. A waiver is recommended by the Board’s Planner.
- #9 A plat/plan. The Applicant has supplied a landscape and lighting plan from the original submission. A waiver is recommended by the Board’s Planner.
- #11 Source and date of current or re-certified property survey. A waiver is recommended by the Board’s Planner.
- #18 Tax map sheet. A waiver is recommended.
- #25 Plans at minimum scale of 1 inch = 50 feet. A waiver is recommended by the Board’s Planner.
- #35 A schedule of district bulk regulations. A waiver is recommended by the Board’s Planner.
- #38 requires the applicant provide photographs of the site. A waiver is recommended by the Board’s Planner.
- #40 Location design and dimensions of each new and existing structure and wooded areas. A waiver is recommended by the Board’s Planner .
- #41 requires the Applicant provide location of existing wells and septic systems. A waiver is recommended by the Board’s Planner.
- #43 requires the Applicant provide the existing and proposed use of all buildings and structures. A waiver is recommended by the Board’s Planner.

- #53 location of historic features within 200 feet. A waiver is recommended by the Board's Planner.
- #55 requires the applicant to provide contours at 20 foot intervals on the tract and within 100 feet of the tract in accordance with the grading plan requirements. A waiver is recommended by the Board's Planner.
- #67 requires that if on-site sewerage disposal is required, the results and location of all percolation tests and test borings must be provided. A waiver is recommended by the Board's Planner.
- #73 requires the Applicant to submit a NJDEP LOI for wetlands or a statement/certification from an expert stating that there are no wetlands on or in close proximity to the site. A waiver is recommended by the Board's Planner.
- #77 requires the size and location of proposed signs. A waiver is recommended by the Board's Planner.

8. **WHEREUPON**, a motion was made by Board Member White, which was seconded by Board Member Schmidt, to grant the above referenced submission waivers, based on the representations and agreements made by the Applicant as are set forth immediately above, with the following Board members voting in favor of the motion to approve: Clark, McKeever, Shoultz, White, Afflerbach, Schmidt, and Hughes. Richardson (Alternate Member #1) and Swanson (Alternate Member #2) participated in discussion but did not vote.

9. Mr. Plackter provided background information on the Application, consistent with the information set forth above.

10. Ms. Bruder testified as follows:

A A "D(3)" variance is required to permit a deviation from a standard pertaining to a conditional use. For a D(3) conditional use variance, The *Coventry Square* decision requires that the Applicant demonstrate : 1) that the site continues to be appropriate for the proposed use despite the fact that the proposal deviates from a condition imposed on the use, and 2) that any problems that could be brought by the deviation from the standards and conditions can be accommodated by the site.

B. For the positive criteria, the Applicant must demonstrate that up to 6 of the total 41 residential units may be occupied by a head of household aged 50 or older (rather than 55 or older) without undermining the intent and purpose of the ARC Zone standards.

C. For the negative criteria, the Applicant must demonstrate that the proposed deviation will not have a more detrimental effect on the surrounding area than a conforming residential development would have.

D. Ms. Bruder testified that, in her professional opinion, the proposed specific and limited deviation from the occupancy requirements will not fundamentally alter the residential use of the land; it will not have any measurable impact on the neighborhood; it will not be a detriment to the public good; and the variance will not substantially impair the intent and purpose of the zone plan, or zoning ordinance. Ms. Bruder testified that, as for the neighbors and then neighborhood impact, the HOA has approved the proposal and each contract is provided to the HOA for review.

E. Ms. Bruder testified that the proposal advances the goal of the Municipal Land Use Law, specifically N.J.S.A. 40:55D-2,(a), (e), and (i).

F. Ms. Bruder testified that the proposal advances the goals set forth in the Township's Master Plan and does not undermine the intent of the MD Zone District or the ARC standards.

G. Finally, Ms. Bruder testified that, in her professional opinion, there will be not be substantial detriment to the public good resulting from this proposal and, further, the proposal will not have a substantial detrimental impact on the surrounding properties.

11. The Board reviewed Mr. Bitgood's letter of November 3, 2020, with the Board and the Applicants.

A. Elk Township Code Zoning Requirements: The Applicant is requesting relief from the requirements of Elk Township Code section 96-74.B.(4) which reads as follows:

96-74.B.(4) – Occupancy Requirements

Age-Restricted Community (ARC) developments shall be limited to occupancy by persons 55 years of age or over, with the following exceptions:

- a. A husband or wife under the age of 55 years who is residing with his or her spouse, who is of the age of 55 years or over.
- b. Children residing with their parent or parents if the child is 19 years of age or over, and if one of the parents with whom the child or children is residing is 55 years of age or over.
- c. Occupancy other than in accord with the terms of this section shall constitute a violation of the section, and the use, in the event of such violation, shall not be a permitted use so long as the violation continues.
- d. Specifically, the herein Applicant seeks relief from the requirement that the occupancy of persons 55 years of age or over, be amended. The Applicant would like to lower that age from 55 to 50 for 6 of the 41 occupy-able lots.

e. A copy of the proposed actual language for the HOA documents, especially the Restrictions & Covenants provisions, should be provided before a public hearing. The document should make clear whether or not the variances, if approved, will affect 2nd and subsequent owners of the lots. Will the age restriction revert to 55 and over in perpetuity with the second sale/lease of one of these properties? Or will these lots no longer be restricted?

Technical Review

The purpose of the bulk variance application is for relief from code requirements pertaining to the age of the homeowners in this community. There are no engineering concerns that would affect the decision on this application.

Recommendations:

1. The Applicant should provide testimony on and documentation regarding how the variances if approved, will be implemented and enforced. The Applicant provided testimony as to the same.
 2. Justification shall be provided in accordance with the Municipal Land Use Law. The Applicant, through its Planner, addressed such justification.
 3. Any approval should be conditioned upon the Applicant recording approved revisions in each applicable deed of conveyance, consistent with the agreement between the Applicant and the HOAS, which deed and restrictions should be provided to the Board Secretary. The final language should be subject to approval by the Board Solicitor. The Applicant agreed to comply.
12. The hearing on the Application was opened to the public, at which time no member of the public was present.

CONCLUSIONS

The Board concluded that the Applicant has met its burden with regard to both the “positive” and “negative” proofs pursuant to the N.J. Municipal Land Use Law, for use variance approval. In particular, the Board concludes that the Subject Property is uniquely suited for the proposed use in that it provides ample space in an appropriate location to accommodate the proposed uses, and is well situated with regard to local roads and larger highways to serve the senior citizen community. The Board concludes that there would be adequate light, air, and open space in which to conduct the proposed changes and that the Subject Property is particularly suited based on its location, size, and topographical features as well as access to local roads in which to afford a limited lowering of the age-restrictions as are proposed above. The Board also concludes that

there will not be a substantial detriment to the zone plan, the master plan, or the neighboring properties, based on the request made by the Applicant.

CONDITIONS

1. The Board presumes that the Applicant's Application, all maps exhibits, and other documents submitted and relied on by the Applicant, are true and accurate representations of the facts relating to the Applicant's request for relief. In the event that it appears to the Board, on reasonable grounds, that the Application, exhibits, maps, and other documents submitted are not accurate, are materially misleading, or are the result of mistake, and the same had been relied on by the Board as they bear on facts that were essential in the granting of the relief requested by the Applicant, the Board may rescind its approval and rehear the Application, either upon the request or application of an interested party, or on its own motion, when unusual circumstances so require, or where a rehearing is necessary and appropriate in the interests of justice.

2. At any time after the adoption of this resolution of memorialization, should a party on interest appeal to the Board for an order vacating or modifying any term or conditions as set forth herein, upon the proper showing of a materially misleading submission, material misstatement, materially inaccurate information, or a material mistake made by the Applicant, the Board reserves the right to conduct a hearing with the Applicant present, for the purpose of fact-finding regarding the same. Should the fact(s) at said hearing confirm that there had been a material fault in the Application, the Board shall take whatever action it deems to be appropriate at that time, including but not limited to a rescission of its prior approval, a rehearing, a modification of its prior approval, or such other action, as appropriate.

3. The Applicant shall indemnify and hold the Township harmless from any claims whatsoever which may be made as a result of any deficiency in the Application, or as to any representations made by the Applicant, including but not limited to proper service and notice upon interested parties made in reliance upon the certified list of property owners and other parties entitled to notice, said list having been provided to the Applicant by the Township pursuant to N.J.S.A. 40:55D-12.c., and publication of the notice of public hearing in this matter in accordance with law.

4. The relief as granted herein is subject to the discovery of any and all deed restrictions upon the Subject Property which had not been known or had not been disclosed to the Board, but which would have had a materially negative impact upon the Board's decision in this matter had they been so known, or so disclosed.

5. The Applicant must obtain all approvals from any and all other governmental and/or public agencies as required, whether federal, state, county or local, over which the Board has no control but which are necessary in order to finalize and/or implement the relief being granted herein, as well as any construction that may be a part of said relief.

The Applicant is solely responsible for determining which governmental and/or public agencies, if any, such approvals are required of. The Applicant is further required to submit a copy to the Board's Secretary of all approvals and/or denials received from such outside agencies, with a copy thereof to the Board's Attorney, Engineer and Planner.

6. The Applicant must maintain an escrow account with the Township and pay the costs of all professional review and other fees required to act on this Application, pursuant to the applicable sections of the Township's land development ordinances, zone codes and any other applicable municipal codes, and the N.J. Municipal Land Use Law. The Applicant's escrow account must be current prior to any permits being issued, or constructions or other activity commencing on the approved project, or any certificate of occupancy being issued.

7. The Applicant must obtain any and all other construction or municipal permits, inspections, etc., required with respect to the relief as granted herein.

WHEREUPON, a motion was made by Board member Schmidt, which was seconded by Board member Afflerbach, to grant the above referenced Use Variance, subject to the conditions, representations, and agreements as set forth above under Findings of Fact above, and based on the Applicant's testimony at a meeting following a public hearing held on the Application on January 20, 2021, with the following Board members voting in favor of the motion to grant approval: Clark, McKeever, White, Schmidt, Afflerbach, Hughes, and Shoultz. Board members Richardson (Alternate # 1) and Swanson (Alternate # 2) participated in discussion but did not vote. There were no abstentions or votes in the negative. The following Board Members had recused themselves since the Board had configured itself into a seven-member Zoning Board of Adjustment: Poisker, and Nicholson. There were no Board members absent.

THIS RESOLUTION WAS ADOPTED at a regularly scheduled meeting of the Combined Planning/Zoning Board of Adjustment of the Township of Elk, County of Gloucester, State of New Jersey, on February 17, 2021 as a memorialization of the approval granted in the above referenced matter by the Board at its regular meeting held on January 20, 2021 on the above referenced Application.

**COMBINED PLANNING/ZONING
BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF ELK**

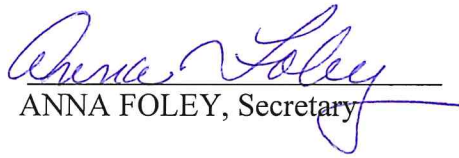
By: 
JEANNE WHITE, Chairperson

ATTEST:

By: 
ANNA FOLEY, Secretary

CERTIFICATION

I hereby certify that the foregoing resolution is a true copy of a resolution adopted at a regularly scheduled meeting of the Elk Township Combined Planning/Zoning Board of Adjustment, County of Gloucester, State of New Jersey held on the 17th day of February 2021 at the Township Municipal Building, 680 Whig Lane, Monroeville, N.J. 08343 at 7:30 PM, time prevailing, as a memorialization of the action taken by the Board at the Board's meeting and public hearing held on January 20, 2021 on the above cited Application.


ANNA FOLEY, Secretary