

RESOLUTION
Township of West Orange
Planning Board
PB 24-12 Estate of Rita Berman/17 Fairway Avenue
Block: 179.03 Lot: 9; Zone: R-6
Decided on October 9, 2024
Memorialized on October 30, 2024
Application for Minor Subdivision Approval with Bulk Variances

WHEREAS, the Estate of Rita Berman (Hereinafter the “Applicant”) has made an application for Minor Subdivision approval with Variance to subdivide the subject property into two lots at property located at 17 Fairway Avenue, also known as Block: 170.03; Lot 9 (the “Property”), in the R-6 residential zone; and

WHEREAS, a properly noticed public hearing was conducted on October 9, 2024; and

WHEREAS, the Applicant was represented by Alan G. Trembulak, Esq.; and

WHEREAS, the Applicant provided testimony from Robert Berman, executor of the estate owner, and Matthew Flynn, PP of John McDonough and Associates, as a professional planner; and

WHEREAS, the Applicant submitted the following documents to the Board in the form of the application package:

ITEM	SIGNED BY	DATE/REVISION
Subdivision Plan (1 page)	Richard J. Hingos, Jr.	3/4/2024

WHEREAS, representatives of the public were provided with an opportunity to pose questions of the Witnesses and also had an opportunity to offer statements in regard to the Application; and

WHEREAS, the Board reviewed and considered the Application and the documents submitted therewith, the testimony of the Witnesses and members of the public; and

WHEREAS, the Board also considered the testimony and filed review letters of its professionals at the hearing, including review memos dated June 11, 2024 from John J. Hess, P.E., PP, CME (Township Engineer) and a Planner's Report by Gerard M. Haizel, PP, AICP, Principal of Nishaune Group, Township Planning Consultant dated July 15, 2024.

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

1. The Applicant is requesting approval for Minor Subdivision approval with c variances to subdivide the existing lot 9, with a single family dwelling, into two (2) new lots designated as Lots 9.01 and 9.02.
2. New lot 9.01 will contain the existing single family dwelling while lot 9.02 will be vacant.
3. The existing single family dwelling is permitted in the R-6 District; however the proposed subdivision will create a condition that does not meet the bulk and design requirements for the District- specifically, the existing house on proposed Lot 9.01 will have a 17.94 rear yard setback that does not meet the 30 foot minimum rear yard setback that is required.
4. The current Lot 9 is oversized at 16,000 square feet where the zone requires a minimum of 6,000 square feet.
5. The proposed subdivision will create a completely conforming lot at proposed lot 9.02 and will have greater lot area of 6,480 square feet (more than the 6,000 square feet

minimum required in the zone) and will have a width of 60 feet (which is the minimum required in the zone).

6. The new lot (Lot 9.02) will face Barbara Avenue while the new Lot 9.01 which contains the existing one-family dwelling will continue to face Forest Avenue.
7. Applicant testified that most likely at least one large tree will be removed for the construction of a new dwelling on the vacant lot and the confirmed that they would comply with all the requirements of the Township's tree ordinance.
8. The current patio in the rear of the existing dwelling will be removed entirely and the chain link fence that is currently located in the rear of Lot 9 will be removed.
9. There are no current specifications for a new dwelling on proposed Lot 9.02; however, the testimony was that it will be designed to comply with all the requirements of the zoning ordinance.
10. The Application requires the following variance relief from the Board:

SECTION/REQUIREMENT	PERMITTED/REQUIRED	PROPOSED
25.71B Minimum year yard	30 feet	17.94 feet

11. N.J.S.A. 40:55D-47 a. and b. and N.J.S.A. 40:55D-50a. govern the Board's review of the preliminary and final subdivision application. N.J.S.A. 40:55D-47a. provides that an "ordinance requiring approval of subdivisions by the planning board may authorize the planning board to waive notice and public hearing for an application for development if the planning board ... finds that the application for development conforms to the definition of 'minor subdivision'" and "Minor subdivision of approval shall be deemed to be final approval of the subdivision by the board; provided that the board ... may condition such approval on terms ensuing the provision of improvements

pursuant to N.J.S.A. 40:55D-38, N.J.S.A. 40:55D-39, N.J.S.A. 40:55D-40 and N.J.S.A. 40:55D-53. N.J.S.A. 40:55D-46a further provides that “The site plan and any engineering documents to be submitted shall be required in tentative form for discussion purposes for preliminary approval. If any architectural plans are required to be submitted for site plan approval, the preliminary plans and elevations shall be sufficient.” N.J.S.A. 40:55D-50a. provides that final approval of major subdivisions “shall” be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. As such if the applicant meets the standards set forth in the ordinances, the planning board lacks the authority to deny approval of the subdivision. N.J.S.A. 40:55D-50a; PRB Enters., Inc. v. S. Brunswick Planning Bd., 105 N.J. 1, 7 (1987); Dunkin' Donuts of N.J., Inc. v. Twp. of N. Brunswick Planning Bd., 193 N.J. Super. 513, 515 (App. Div. 1984).

Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions: (1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

12. N.J.S.A. 40:55D-60 permits a planning board to grant variances from the bulk regulations of a zoning ordinance and other zoning deviations that do not require a “d” variance as part of site plan or subdivision review. The variance proofs are the same as

for “c” variances as set forth in N.J.S.A. 40:55D-70. A c (2) variance may be granted when the purposes of zoning are advanced and the benefits of deviating from the ordinance requirements outweigh any detriments. The benefits derived from granting a “c (2)” variance must include benefits to the community as a whole, not just the applicant or property owner. A “c” variance must address the “negative criteria,” and affirmatively demonstrate that the variance can be granted “without substantial detriment to the public good” and “without substantial impairment to the intent and purpose of the zone plan and zoning ordinance” of the municipality.

13. Applicant’s planner testified that the variance for the rear yard setback of 17.94 feet on proposed Lot 9.01 can be granted as a c(2) variance as the proposed subdivision and resulting variance satisfies several of the purposes of the MLUL.
14. Specifically, Applicant’s planner testified that Applicant satisfies N.J.S.A. 40:55D-2a.(promotes the general welfare) because the existing lot is oversized and the open area on Barbara Avenue (which will become the new vacant lot) appears as a void in the neighborhood and the proposed subdivision will continue to maintain required building separation; g. (providing sufficient space in appropriate locations for a variety of residential uses and open space) because the existing house is maintained while also creating a conforming lot; i. (desirable visual environment) because the new house will remove a large open void while creating a new and attractive one-family dwelling; and m. (efficient use of land) by utilizing a large open space that is disproportionate to the remainder of the neighborhood.

15. Applicant's planner also testified that the negative criteria for a c(2) variance was satisfied because the subdivision is substantially compliant with the zone requirements and will not create an overly developed or "crammed" look.
16. The Planner also testified that the variance might also be considered as a c(1) hardship variance due to the fact that the property is a corner lot.
17. Applicant testified that the subdivision will be perfected by the filing of a deed.

NOW, THEREFORE, based upon the foregoing findings of fact, the Board reaches the following conclusions of law:

1. The use at the site is a permitted use.
2. The requested variance for minimum rear yard setback satisfies the c(2) criteria because the project as a whole advances the purpose of the MLUL as it advances the purposes set forth in N.J.S.A. 40:55D-2a., g., i., and m., presents no negative impact and has benefits that substantially outweigh any detriment.
3. The benefits of the subdivision and rear yard setback variance outweigh any negatives.

NOW THEREFORE BE IT RESOLVED by the Planning Board of the Township of West Orange that approval for minor subdivision approval with c(2) variance for a rear yard setback of 17.94 feet is granted; and

IT IS FURTHER RESOLVED that the approval granted to the Estate of Rita Berman, is subject to the following terms and conditions:

1. The Applicant shall comply with all applicable Township, County, State and Federal laws, ordinances, regulations, and directives, including without limitation, obtaining all applicable local, state, and federal approvals, or permits. If another governmental entity

or agency grants a waiver or a variance affecting the plans and/or exhibits submitted by the Applicant, this approval or the conditions attached to it, then the Applicant shall re-apply to this Board respecting the same and this Board shall have the right to view that issue as it relates to this approval and these conditions and modify and amend same, if appropriate.

2. In the event that any other required regulatory approval conflicts with the terms and conditions hereof, or materially alters the same, or the terms and conditions hereof are materially altered by any change in applicable law or regulation other than those municipal regulations for which change is prohibited by the Municipal Land Use Law (MLUL), or in the event Applicant or its successor or assigns construct or attempt to construct any improvement in conflict with or in violation of the terms of this approval, the Board hereby reserves the right to withdraw, amend or supplant the instant approval.
3. All construction, use and development of the property shall be in conformance with the plans approved herein, all representations of the Applicant and its witnesses during the public hearing, all exhibits introduced by the Applicant, and all terms and conditions of this resolution.
4. The Applicant shall pay all outstanding application fees and technical review fees, board attorney fees for preparation of the resolution, as well as any inspection fees that may be required hereunder. The Applicant shall pay any additional fees or escrow deposits which may be due and owing within thirty (30) days of the notification or this approval shall be deemed withdrawn.

5. All notes included in the approved plans, including notes required by this Resolution, shall be deemed conditions of approval having the same force and effect as conditions expressly set forth in this Resolution.
6. Applicant agrees to abide by all of the suggestions and directives set forth in the Hess report dated June 11, 2024.
7. Applicant will abide by and comply with all the requirements of the Township Tree Ordinance.
8. Applicant's deed of subdivision must include a reduced copy of the subdivision plan as an attachment.
9. Applicant will submit a grading and drainage plan of the new lot (9.02) to the office of the municipal engineer for their review and approval at the time of obtaining building permits.

The undersigned secretary certifies the decision set forth herein was made by this Board on October 9, 2024, and memorialized herein pursuant to N.J.S.A. 40:55D10(g) on October 30, 2024.



Jamilet Baquerizo Vite
Planning Board Secretary

Vote Action Taken by the Board on October 9, 2024:

Board Member	Motion	Second	Aye	Nay	Abstain	Absent
K. Alper			X			
J. Guarino		X	X			
L.Klein			X			
S. McCartney			X			
C. Morgan						----
B. Rutherford			X			
P. Smeraldo			X			
W. Wilkes			X			
J. Cardoza			X			
L. Kapferer						----
R. Bagoff	X		X			

Vote on Memorialization on October 30, 2024:

Board Member	Motion	Second	Aye	Nay	Abstain	Absent
K. Alper			X			
J. Guarino		X	X			
L.Klein			X			
S. McCartney			X			
C. Morgan						---
B. Rutherford			X			
P. Smeraldo						---
W. Wilkes			X			
J. Cardoza			X			
L. Kapferer						---
R. Bagoff	X		X			