

Minor subdivision, use variance and bulk variance for rear yard impervious coverage.

**RESOLUTION  
LEONIA PLANNING BOARD  
APPLICATION OF HIGH JUMP REALTY, LLC  
CALENDAR NO. 2023-06**

WHEREAS, High Jump Realty, LLC (hereinafter referred to as the “Applicant”) applied for minor subdivision and bulk variances for rear yard impervious coverage and accessory structure setback on September 14, 2023 to authorize the redivision of the subject properties into three lots to permit the construction of a new single-family dwelling on the resulting lot (hereinafter referred to as the “Application”), as further described herein; and

WHEREAS, the properties subject of the Application are identified on the Tax Map of the Borough of Leonia as Block 504, Lots 1 and 2, and are more commonly known as 515-517 Grand Avenue, Leonia, New Jersey (the “Property”); and

WHEREAS, the Property is located in the A-3 Zone; and

WHEREAS, each of the lots comprising the Property is improved with a two-family dwelling, which as the Board finds below, are pre-existing nonconforming uses; and

WHEREAS, the application was called for public hearings on October 25, 2023 and January 24, 2024, at which time the Applicant was represented by Rebecca Maioriello, Esq. and Gregory Asadurian, Esq. of DeCotiis, FitzPatrick, Cole & Giblin, LLP, 61 South Paramus Road, Paramus, New Jersey; and

WHEREAS, the following witnesses testified under oath in support of the application: (1) John Obecny, 219 Oxford Avenue, Fair Haven, New Jersey, who is the managing member of the Applicant; (2) Bruce D. Rigg, P.E., P.L.S., 1000 Maple Avenue, Glen Rock, New Jersey, who

was sworn and qualified as an expert in the field of civil engineering; and (3) Steven Lydon, P.P., 25 Westwood Avenue, Westwood, New Jersey, who was sworn and qualified as an expert in the field of professional planning; and

WHEREAS, a resident of the Borough of Leonia, Ji Won Kim, 185 Harrison Street, offered sworn testimony in opposition to the Application; and

WHEREAS, the following exhibits were marked into evidence at the hearing:

- A-1 Subdivision Plat prepared by Bruce D. Rigg, P.E., P.L.S., last revised November 1, 2023
- A-2 Borough of Leonia Zoning Map (1930s)
- A-3 Borough of Leonia Zoning Ordinance, adopted 1934
- A-4 Borough of Leonia Land Use Map, 1974

WHEREAS, the Board was assisted in the hearing by its planner, Sanyogita Chavan, P.P., and its engineer, Drew DiSessa, P.E., and received and reviewed their review letters dated October 24, 2023 (Engineering and Planning), January 19, 2024 (Engineering) and January 23, 2024 (Planning); and

WHEREAS, the Applicant failed to disclose in the Application that the Property is improved with non-conforming two-family dwellings, which are not permitted in the A-3 Zone. The hearing conducted on October 25, 2023 commenced with then Class III Member Pasquale Fusco on the dais, but upon the Applicant disclosing in testimony that the Property was improved with a non-conforming use that was potentially being intensified, Councilman Fusco left the dais and up to that point, had not spoken during the hearing; and

WHEREAS, the Applicant provided new notice prior to the hearing conducted on January 25, 2024 that advertised to the public that it was seeking a variance to intensify the pre-

existing non-conforming uses on the Property through the subdivision of the Property, and returned all of its witnesses to testify anew at the hearing conducted on that date; and

WHEREAS, neither the Board's new Class III Member, Christoph Hesterbrink, nor its Class I Member, Mayor Bill Ziegler, participated in the hearing; and

WHEREAS, the minority of the Board has carefully considered the testimony of the Applicant; and

WHEREAS, the minority of the Board has made certain findings of fact and conclusions with respect to this Application.

**NOW THEREFORE BE IT RESOLVED** by the minority of the Planning Board of the Borough of Leonia that the following facts are made and determined:

1. All of the recitals set forth above are incorporated herein by reference.
2. The Applicant is the owner of the Property.
3. The Property is located in the Borough of Leonia's A-3 Zone. While the A-3 Zone permits the proposed single-family dwelling on the proposed new lot to be created by the minor subdivision, the A-3 Zone does not list two-family dwellings as a permitted use, and because § 290-7 permits "only" the uses that are enumerated therein, it is prohibited. In particular, the Borough's A Districts permit single-family, detached dwellings, used as a residence by not more than one family and not to exceed one such dwelling unit on each lot.
4. The Property is located at the southeast corner of the intersection of Grand Avenue and Christie Heights Street. The lots immediately abutting the Property are all improved with single family dwellings, as are the lots located on the west side of Grand Avenue. The vast majority of the north side of Christie Heights Street is developed with single family dwellings, though the lot located directly across the street at the northeast corner of the intersection of

Christie Heights Street and Grand Avenue is developed with a garden apartment building. There is also another garden apartment development further to the north on Grand Avenue that has a driveway on Christie Heights Street to the east of the Property. Further east on Christie Heights Street are single family dwellings, though the Leonia Middle School is located one block to the north.

5. As disclosed during the October 25, 2023 hearing, the Property is improved with two two-family dwellings. Each dwelling fronts upon and faces the east side of Grand Avenue. These dwellings were constructed more than 100 years ago when Leonia permitted multiple family dwellings and apartment houses on the Property, as the Applicant's planner demonstrated through the introduction of Exhibits A-2, A-3 and A-4. Based upon Lydon's testimony, the Board finds that the two-family dwellings on the Property constitute Nonconforming uses as defined by the Municipal Land Use Law, *N.J.S.A. 40:55D-6* ("a use or activity which was lawful prior to the adoption, revision or amendment of a zoning ordinance, which fails to conform to the requirements of the zone district in which it is located by reasons of such adoption, revision or amendment").

6. The area of the two lots, both of which are oversized compared to the minimum area requirement for the A-3 Zone, comprising the Property are 35,151 square feet. Existing Lot 1 is 18,042 square feet while existing Lot 2 is 17,109 square feet.

7. The Applicant proposes, based upon the revised Subdivision Plat, to subdivide the Property by removing an area of approximately 76 feet in width from the rear of both Lots 1 and 2 (representing 13,378 square feet of area) for the purpose of creating a new building lot upon which a new single family dwelling may be constructed. The newly created single family lot will comply with all requirements of the Borough of Leonia Zoning Code. Proposed Lot 2.01,

which is the lot located at the corner of Grand Avenue and Christie Heights Street, will comply with all requirements of the Borough's Code with the exception of the rear yard impervious coverage limit, where the maximum rear yard impervious coverage limit is 25% and the Applicant seeks approval for a rear yard impervious coverage of 43.4%. Although the Board was not provided with the existing rear yard impervious coverage, because the portion of the existing lot that is proposed to be removed and included into the new building lot is presently undeveloped and has no coverage, the Board finds that that area does not contribute to the percentage of existing rear yard impervious coverage. Since the existing area of that lot is 17,109 square feet and the proposed area is 11,198 square feet, the area to be removed from that lot is 5,911 square feet. Page 3 of the Subdivision Plat contains the rear yard impervious coverage calculation for proposed Lot 2.01, and indicates that there is 1,819 square feet of impervious area and that the rear yard is 4,189 square feet. However, not all of the area of the existing lot that is to be removed is located in its rear yard, since the rear yard on this corner lot is the area located southeast of a line extending out from the building wall (i.e., an extension of the line measuring the proposed rear yard setback for the dwelling on page 3 of the Subdivision Plat). If only slightly less than half of the 5,911 square feet that is proposed to be removed from this lot was considered part of the front yard – though, the area is clearly substantially less than half – the existing rear yard impervious coverage is compliant. Thus, while the Applicant's Subdivision Plan indicates that the rear yard impervious coverage is a "previously approved variance condition" there is no evidence of same, the facts presented do not support same, and the Board has no record of ever considering an application for same. In particular, the minority of the Board finds that such a representation is inconsistent with the testimony of the Applicant's planner, who confirmed that the structures on the Property likely predate zoning, and therefore,

the Borough's adoption of § 290-45(A)(7), which limits the area of the rear yard that may be devoted to accessory structures, was not in effect at the time these improvements were constructed, and therefore, it is the proposed subdivision that creates the need for variance relief as Lot 2 conforms to the requirement under existing conditions.

8. The Applicant's planner testified that there was a planning rationale for the rear yard impervious coverage variance, upon the supposition that the Board would approve the subdivision. He reasoned that Proposed Lot 2.01, located on a corner, had two front yards and therefore had a much smaller rear yard than would be anticipated for a lot containing more than two times the minimum area required in the A-3 Zone. Moreover, since Lot 2.01 is developed with a two-family dwelling, there were extra parking needs for the residents in the dwelling units in the structure on that lot, as compared to if the structure was only a conforming single-family dwelling (i.e., there was a need to park four cars rather than two). The Applicant's planner offered an opinion that the variance was a paper exercise and that there would be no change in activity since there is no new impervious area proposed and the use of the existing impervious area is unchanged. In his testimony, the Applicant's planner disclaimed any effort to seek relief pursuant to *N.J.S.A. 40:55D-70(c)(2)*.

9. The Applicant's planner testified that he believed that the Board should grant a use variance to allow for the intensification of the two Nonconforming two-family dwellings on the Property through a reduction in the lot areas attributable to each Nonconforming use. Citing to the New Jersey Supreme Court's decision in *Burbridge v. Mine Hill Twp.*, 117 N.J. 376 (1990), the Applicant's planner offered an opinion that there were special reasons to grant the variance, pursuant to *N.J.S.A. 40:55D-70(d)(2)*, because it would advance several purposes of the Municipal Land Use Law. The principal reasons he identified were that granting approval (1)

would produce a “more efficient use of land” through the subdivision of two very large lots into three oversized lots, (2) would establish appropriate population densities and concentrations contributing to the wellbeing of persons, neighborhoods and communities because it would allow for the construction of a new single family dwelling in a zone where that use is permitted, (3) the new single family home on the newly created Lot 2.02 would create a more desirable visual environment, and (4) would promote the general welfare by creating oversized lots.

10. The Applicant’s planner also testified concerning the negative criteria. He commented that it was his opinion that the Application furthered the 2022 Master Plan’s goals of maintaining the character of existing neighborhoods of the Borough, designing bulk standards for those districts, and providing a greater diversity of housing options. He testified that by maintaining the two-family dwellings on oversized lots and producing a new dwelling on a large lot, it was his opinion that this goal was not being undermined. He noted that one of the goals in the 2022 Master Plan calls for consideration of greater densities west of Grand Avenue (though the Board minority notes that the Property is not located west of Grand Avenue, and therefore, this recommendation in the 2022 Master Plan is simply irrelevant to the Application), and he indicated that by maintaining the two-family dwellings, the Applicant was furthering that planning goal set forth in the Master Plan. Finally, the Applicant’s planner commented that the current zoning may not be achieving the goals set out in the Master Plan, but did not otherwise offer an opinion on the intent and purpose of the zoning ordinance or the reasons why the Borough has not chosen to permit multifamily residential uses in its single family zoning districts.

**NOW THEREFORE BE IT FURTHER RESOLVED** by the minority of the Planning Board of the Borough of Leonia that based upon the above findings of fact and the testimony and evidence in the hearing record, the following conclusions of law are made and determined:

1. The reduction in area - 5,911 square feet from existing Lot 2 and 7,467 square feet from existing Lot 1 – to effectuate the subdivision to create a new building lot that complies with the Borough’s “large lot” ordinance (i.e., maintains a compliant width of 75 feet) is not *de minimis*. Existing Lot 1 is to be reduced in area by 41.3% while existing Lot 2 is to be reduced by 34.5%. These lots are each occupied by two-family dwellings that front of Grand Avenue, which in addition to being one of the Borough’s busiest streets, is also a State Highway. The loss of the rear yard area associated with each constitutes a significant impact to the residents of the four dwelling units on the Property that the Board believes must be considered through the lens of *N.J.S.A. 40:55D-70(d)*. The Board reaches this specific conclusion because there was initial disagreement at the October 25, 2023 hearing about whether a use variance was required, and while the Applicant presented proofs in furtherance of same on January 24, 2024, the Board’s minority deems it necessary to set forth its conclusion that the Appellate Division’s holding in *Razberry's, Inc. v. Kingwood Township Planning Board*, 250 N.J. Super. 324 (App. Div. 1991), is applicable to this application.

2. The Board’s minority was unconvinced by the testimony presented in support of the Applicant’s claim that there were special reasons to allow it to intensify the Nonconforming use on the Property. As the Applicant’s planner noted in his testimony, the Supreme Court’s decision in *Burbridge* is the leading authority for the proofs required for an expansion of a Nonconforming use. As Justice Clifford described in the second paragraph of the *Burbridge* decision, the applicant sought approval to expand the boundaries of an automobile junkyard



storage area, which was one component of the applicant's auto salvage, repair and sale business, and as a trade-off for the expansion of the storage area, the applicant proposed to relocate all of the nonconforming aspects of the business and move the auto repair and sale activities from the front of the property to the back so that they were out of view from the street, which would clear up a sprawling and unsightly mess, and the board approved the application based upon the aesthetic benefits of the proposed plan and the societal benefits associated with increased recycling of automobile parts. The Board's minority does not believe that the basis for special reasons offered by the Applicant here is any way remotely similar to the circumstances described in the *Burbridge* decision. Indeed, *Burbridge* highlighted that the benefits associated with the project were not "mere beautification" of the site, but rather, that the overall improvements to the site improved the general welfare by improving conditions for nearby residential uses in the surrounding area. Here, the Applicant offers nothing to benefit the surrounding community, and while the only person from the public to speak on the Application expressed concern that the subdivision would exacerbate congestion and parking problems associated with the Leonia Middle School because the curb cut for the single-family dwelling eliminates an on-street parking space, the Board notes the absence of community support for the project in the way that was the case in *Burbridge* where at least some neighbors testified that they were in support of that project because they believed that there were benefits to their interests.

3. The only effect that the proposed subdivision will have upon the two two-family dwellings is that the rear yards for each of them will be smaller. Residents of the units, whom Mr. Obecny testified would be renters, will have less outdoor space of their own, particularly those who live at existing Lot 2 (proposed Lot 2.01), because the backyard of that lot is significantly occupied by a 589 square foot detached garage and a very large vehicle parking

area for the tenants. No aesthetic reorganization of a problematic business, activity or use, as was proposed in *Burbridge*, is sought, contemplated or proposed here. Indeed, Mr. Obecny testified that renovations to the existing structures on the Property were commenced several years prior to the filing of the Application and are almost complete. Accordingly, because there is no change whatsoever proposed as it relates to the Nonconforming use, the fact that a new and what appears to be very large (based upon the architectural plans submitted with the Application but for which no testimony was presented, and the building coverage percentage listed on the Subdivision Plat) dwelling could be constructed on proposed Lot 2.01 does not, in the Board minority's opinion, "promote a desirable visual environment through creative development techniques and good civic design and arrangement." No testimony or evidence was presented to support this conclusion, and when the Applicant's planner mentioned this basis, the Applicant's attorney reminded him that the Applicant was not seeking site plan approval.

4. The Board's minority rejects the Applicant's other planning testimony in support of its special reasons proofs. *N.J.S.A. 40:55D-2(m)* states that it is a purpose of zoning to "To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land." No coordination of public and private procedures were identified, and while it may be "more efficient" for the Applicant to subdivide the Property, the Board's minority does not believe that this justifies an intensification of two Nonconforming uses.

5. While the Board's minority agrees with the Applicant's planner that there is no issue with the "density" associated with the proposed development, since the Borough Council established the appropriate density (i.e., the permitted number of dwelling units per gross acre of land) in the A-3 Zone when it set the minimum lot area at 5,000 square feet, the concern with the

Application is the “use” of the Property for two two-family dwellings, which are not permitted. The Borough Council made a zoning policy determination in how it regulated residential uses in the A Zones; it did not simply allow single-family residential uses. Instead, § 290-7(A) provides as follows: “Single-family, detached dwelling, used as a residence by not more than one family and not to exceed one such dwelling unit on each lot.” The Borough Council determined, irrespective of the density associated with a particular development, that the number of families in dwellings in the A Zones, was a matter to be regulated. Accordingly, the mere fact that the proposed lots comply with the minimum area standard for the A-3 Zone is irrelevant to the issue of whether there are special reasons to permit the intensification of the Nonconforming use.

6. Finally, the Board does not believe that the proposal advances the general welfare. There was no testimony or evidence whatsoever presented about why the reduction in area attributable to the Nonconforming uses would benefit the community.

7. As noted above, the Board does believe that there will be an impact to the residents of the Nonconforming uses. These four families live on the busiest street in the Borough. It also happens to be the busiest part of Grand Avenue because the Leonia Middle School is located due east of the Property and the Leonia High School is located just north of the Property on the west side of Grand Avenue. The loss of outdoor open space is significant to these families, who are left with minimal backyard space, which the Applicant proposed be transferred to the large single-family dwelling to be constructed on proposed Lot 2.02. The Board’s minority notes that the Architectural Plans submitted with the Application depicted a 5-bedroom, 4-and-a-half bathroom dwelling, and that the Subdivision Plat shows existing fencing along the eastern and southern property lines of proposed Lot 2.02, so it is highly likely that Lot 2.02 would be fenced off, in its entirety from the balance of the Property. Indeed, the Applicant

proposed a brand new single family dwelling covering 21.9% of the proposed 13,378 square feet of area that proposed Lot 2.02 was to occupy, representing a building footprint of nearly 3,000 square feet inclusive of a garage, meaning that the living area of the dwelling would exceed 5,000 square feet, and would likely be a significant expense and any homeowner that purchased such a dwelling would likely want to separate his/her property from the Nonconforming uses on the adjacent lots and the significant amount of impervious coverage immediately across the common lot line on proposed Lot 2.01. The Board's minority concludes that while the Nonconforming uses have existed on the Property for more than 100 years, confining them to a smaller area will cause significant negative impacts to their residents, and thus, by extension, the community at large.

8. The Board also declines to accept the Applicant's planner's formulation concerning the second prong of the negative criteria, which amounts to an opinion that the Borough's 2022 Master Plan takes priority over the Borough's Zoning Ordinance. The Board, which is a combined land use board, prepared the 2022 Master Plan and did not, under any circumstances, make, suggest or ever contemplate any recommendation that the Borough's A Zones be amended to permit any residential use other than single-family dwellings. And while the only new construction proposed by the Application is for a new single-family dwelling that is permitted in the A-3 Zone, the effect of the requested variance functionally undermines one of the pillars of zoning, which is that while Nonconforming uses are permitted to remain, they should be abated to conformity as quickly as possible. By authorizing a subdivision, the Board would be complicit in the opposite through an incentivization in the maintenance of the Nonconforming uses by legalizing them through the grant of a use variance pursuant to *Puleio v. Twp. of North Brunswick Bd. of Adj.*, 375 N.J. Super. 613 (App. Div. 2005), where upon the

grant of the variance, the Nonconforming uses are no long Nonconforming, and could then be expanded.

9. Moreover, while the 2022 Master Plan does recommend that the Grand Avenue corridor be rezoned, the Borough Council has not taken this suggestion up even though it has taken up other recommendations in the 2022 Master Plan. Ultimately, it was the Applicant's failure to address the Borough Council's decision to rezone the Property from its original zoning classification (based upon Exhibits A-2, A-3 and A-4), which permitted two-family use, into the A-3 Zone, which prohibits two-family use, that rendered the Board's minority unable to conclude that the Applicant had met its burden of demonstrating that the grant of relief could be achieved without substantial impairment to the intent and purpose of the zoning ordinance. In particular, as the Applicant's planner recognized, one of the Borough's paramount goals is the preservation of the character of its residential neighborhoods. The Applicant did not explain how discordant uses on smaller lots than what existed previously would square with the Borough Council's zoning determination to limit the use of the lots comprising the Property not just to single-family dwellings but to residences used by not more than one family and not to exceed one such dwelling unit on each lot. In the absence of such explanation, the Applicant failed to carry its burden of proof to justify the relief sought.

10. The Board's minority also makes findings concerning the rear yard impervious coverage variance sought on proposed Lot 2.01. Initially, the Board's minority must note that § 290-45(A) pertains to accessory structures in the A Districts, where two-family dwellings are not permitted, and thus, where the standards are therefore designed for one-family dwellings. The Applicant argued it would suffer a hardship or practical difficulties in the absence of relief because of the existence of the oversized detached garage and large driveway that occupied

almost half of the rear yard (which is the area of the Property between a point south of the rear building wall closest to Christie Heights Street and the rear property line). But as the Board's minority found above, the Property is in conformance today, and without the subdivision, there is no need for a variance. Thus, it is the Applicant's desire to intensify the Nonconforming uses that necessitates the rear yard impervious coverage variances, not some condition of the Property. Indeed, because the Board's minority has refused to authorize an intensification of the Nonconforming uses through a subdivision, the Applicant's request for a rear yard impervious coverage variance is functionally moot because if the Applicant cannot create proposed Lot 2.02, it cannot reduce the area of existing Lot 2, and therefore cannot reduce the size of the rear yard on that lot and create a condition that requires variance relief. The request for a rear yard impervious coverage variance is denied for this reason.

**NOW THEREFORE, BE IT RESOLVED** the Application of High Jump Realty, LLC for minor subdivision approval with a use variance to expand a preexisting nonconforming use and for a rear yard impervious coverage variance is hereby denied.

The Board rendered its decision at the meeting prior to the adoption of this Resolution based upon a motion to approve the application:

Moved by: Mr. Botten  
 Seconded by: Mr. Ford

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Michael DeGidio, Chairman		X			
Mayor Ziegler					X
Councilman Hesterbrink					X
Ira Gold, Vice Chairman		X			
William Russell	X				
Ron Wolf		X			
Patrick Botten	X				
Timothy Ford	X				
Sean Thompson	X				
Haesok Ko					X
Damee Choi					X

Because this Application sought variance relief pursuant to *N.J.S.A. 40:55D-70(d)*, the variance could only be granted by affirmative vote of at least five members, and since only four members voted in favor of the motion, the Board's minority has an obligation to prepare a resolution setting forth their findings and conclusions.

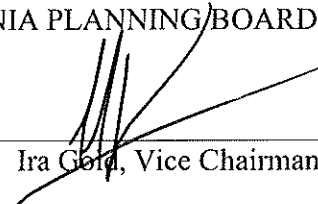
Said Resolution was adopted by the following vote:

Moved by: VICECHAIR GOLD  
 Seconded by: Mr. Wolf


	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Michael DeGidio, Chairman				✓	
Mayor Ziegler					X
Councilman Hesterbrink					X
Ira Gold, Vice Chairman	✓				
William Russell					X
Ron Wolf	✓				
Patrick Botten					X
Timothy Ford					X
Sean Thompson					X
Haesok Ko					X
Damee Choi					X

Dated: February 28, 2024

LEONIA PLANNING BOARD

By:   
 Ira Gold, Vice Chairman

CERTIFIED TO BE A TRUE COPY

By:   
 Michael Greco, Administrative Secretary to  
 the Planning Board