

**MEMORIALIZING RESOLUTION  
OF THE  
BOROUGH OF POINT PLEASANT ZONING BOARD OF ADJUSTMENT  
APPLICATION NO. 20-07**

**RESOLUTION OF THE ZONING BOARD OF  
ADJUSTMENT OF THE BOROUGH OF POINT  
PLEASANT, COUNTY OF OCEAN, STATE OF NEW  
JERSEY DENYING A BIFURCATED REQUEST OF THE  
APPLICANT TO INTERPRET ORDINANCE 19-15C AS  
PART OF APPLICANT'S REQUEST FOR USE  
VARIANCE AND PRELIMINARY AND FINAL SITE  
PLAN APPLICATION FOR PROPERTY LOCATED AT  
2613 ROUTE 88, ALSO KNOWN AND DESIGNATED  
AS BLOCK 45, LOT 1 FOR R2T2, LLC.**

**WHEREAS**, R2T2, LLC, has made application to the Borough of Point Pleasant Zoning Board of Adjustment for use variance along with preliminary and final site plan approval to replace a current motel with 24 multifamily residential units located within 5 buildings and associated parking and utility infrastructure in the CG Zone which is not permitted in the zone. The property is also known as Block 45, Lot 1 as shown on the Point Pleasant Borough Tax Maps; and

**WHEREAS**, the request was bifurcated by the Applicant, seeking an interpretation of Ordinance §19-15C entitled Affordable Housing Overlay Zone; and

**WHEREAS**, the Board agreed with the request of the Applicant as the Board's interpretation the of the Ordinance is required to ascertain the nature and extent of the variance(s) requested of the Applicant; and

**WHEREAS**, the Borough of Point Pleasant Zoning Board of Adjustment conducted a public hearing on said application on August 12, 2020; and

**WHEREAS**, the Applicant was represented by Matthew Ceres, Esquire; and

Sean D. Gertner, Esq.  
740 Bennetts Mills Road  
Jackson, NJ 08527  
732-523-5444

**WHEREAS**, there was adequate public notice; and

**WHEREAS**, Andrew Janiw, P.P. was sworn and his credentials accepted by the Board. Mr. Janiw articulated that the Applicant's ultimate request of the Board was to construct 24 multifamily residential units at the site, by replacing a motel but that the Applicant would not provide Affordable Housing at the site. Mr. Janiw opined that the basis of the Applicant's request was that §19-15C was drafted permissively, such that a plain reading of the Ordinance could only lead to the conclusion that property subject to the Ordinance upon redevelopment need only provide an *opportunity (emphasis added)* to develop affordable housing within the Borough. Mr. Janiw testified and Mr. Ceres argued that should a developer wish to avail itself of the opportunity to provide affordable housing, the Ordinance provided legislative incentives that made multifamily housing a permitted use. Moreover, if density and bulk requirements were met, a project could be developed as of right on a subject parcel, subject only to Planning Board approval; and

**WHEREAS**, there was no debate that the subject property was subject to the jurisdiction of the Ordinance; and

**WHEREAS**, Mr. Janiw further argued that because the Ordinance was to provide merely the opportunity to provide Affordable Housing, an Applicant seeking multi-family housing could seek a variance from the Ordinance, thereby necessitating a D-1 request as no multi-family use was permitted in the zone; and

**WHEREAS**, further supporting the Applicant's argument, Mr. Janiw opined that should the Board agree with its counsel's opinion, the Applicant would be seeking a D-5 variance, not a D-1 variance, a review with arguably relaxed standards requiring applicants

to demonstrate that the site will accommodate problems associated with a proposed use with greater density than permitted (see e.g., Price v. Himeji, LLC, 214 N.J. 263 (2013); and

**WHEREAS**, upon advice of counsel and after hearing from the Board's professionals, the Board rejected the arguments of the Applicant. The Board found that the Overlay zone had been enacted by the Borough's Governing Body as a direct result of a judicial settlement reached by the Borough under Docket No. OCN-1-1858-15; and

**WHEREAS**, after hearing from its professionals, the Board specifically determined that Ordinance 2017-02 as codified particularly in §19-15C.2 provided that the Overlay Zone was placed along the Route 88 corridor because it is the most suitable area of the Borough to accommodate affordable housing development. This determination was bolstered during the hearing as the Board's Planner verified that the Borough is between 90% to 95% developed, such that from a planning perspective, development or redevelopment of sites along the Route 88 commercial corridor are best situated to support the needs of citizens desirous of and who qualify for affordable housing as the nexus of infrastructure, transportation opportunities and the lack of environmental constraints all support multi-family development such as contemplated by the settlement and permitted by the Ordinance; and

**WHEREAS**, the Board further understood that provisions of a text should be interpreted in a way that renders them compatible and not contradictory, leading the Board to understand that while the Applicant may have been arguing that its interpretation would give the Board broader power to weigh the positive criterion against mitigating negative

factors, the fact that a D-5 variance request is reviewed with a more relaxed standard (see, e.g., *New Jersey Zoning & Land Use Administration, 2020 edition at 754*) supported the Board's determination that the paramount purpose of the Ordinance's statutory scheme was to provide constitutionally mandated affordable housing opportunities within the Borough as dictated by the settlement entered in Court. The Board understood that the settlement that led to the enactment of the Ordinance, codified that development inhibiting the provision of Affordable Housing would meet with strict State Constitutional scrutiny such that to permit multi-family housing, even based upon the D-1 standards but not provide an opportunity for affordable units, it and the Borough would likely face a request to aid litigant's rights from the parties to the settlement, exposing the Borough to the potential of fees and costs in light of Mount Laurel jurisprudence; and

**WHEREAS**, therefore, the Board determined that the use of the term "opportunity" in the ordinance was a term of art, qualifying and amplifying the fact that the opportunity to provide affordable housing opportunities within the Borough was to be made within the overlay zone whenever multifamily housing was proposed, particularly where a site, such as the Applicant's, was afforded additional density for such purpose. It is for all these reasons that the Board found that despite this ordinance being found in the Land Use section of the code, the Board was deprived of discretion as to the provision of affordable housing when an applicant seeks multi-family housing in the zone, as it would otherwise not be permitted; and

**WHEREAS**, the Board opined that to render a contrary decision would vitiate the terms and intent of the settlement, placing the Borough in jeopardy of not fulfilling its

constitutional obligation of providing affordable housing opportunities as contemplated by the settlement and the statutory scheme provided for in the ordinance; and

**WHEREAS**, the Borough of Point Pleasant Zoning Board of Adjustment has reviewed the application, documents, plans and exhibits as submitted and having listened to the Applicant's testimony related to its bifurcated request to interpret Ordinance §19-15C entitled Affordable Housing Overlay Zone, and after having received information from its professional staff, the Borough of Point Pleasant Zoning Board of Adjustment does hereby make the following findings of fact and law:

- A. The Applicant proposes 24 multifamily residential units located within 5 buildings and associated parking and utility infrastructure 5-unit apartment complex;
- B. As the Applicant does not intend to provide Affordable Housing opportunities in its request, the Applicant first sought the Board's interpretation of Ordinance §19-15C, the Applicant opining that a D-1 variance would be required for the proposal but that the Board would have jurisdiction to hear that request;
- C. The Board considered the Applicant's argument that it merely be required to provide the opportunity to deliver Affordable Housing opportunities if it constructed multifamily housing and having chosen not to do so, could develop testimony and evidence to support its D-1 variance request to construct the 24 units without affordable housing;
- D. The Board rejected the Applicant's argument finding that a judicial settlement reached under Docket No. OCN-1-1858-15 and codified at §19-15C divested the

Board from considering a D-1 request when an applicant otherwise is requesting multifamily housing in the zone, particularly on a site that was provided an additional density bonus under the ordinance, as there could be no circumstance that the Board could grant such a variance without violating the terms of the settlement. The Board further finding that to do so would not only violate the terms of the settlement but would also run afoul of the Borough's constitutional obligation as present law requires, to provide the opportunity for affordable housing within the Borough; and

Mr. Giordano made a motion to deny the requested interpretation, seconded by Mr. Hutchinson

**E. Roll Call Vote**

Mr. Shrewsberry- Yes      Mr. Hutchinson- Yes      Mrs. Petrillo- Yes  
Mr. Nikola- Yes      Mrs. Masterson- Yes      Mr. Giordano- Yes  
Mr. Coleman- Yes

**NOW, THEREFORE, BE IT RESOLVED** by the Borough of Point Pleasant Zoning Board of Adjustment, on this 12<sup>th</sup> day of August 2020 that the Applicant's request for an interpretation that the Board could grant a D-1 variance for multifamily housing without providing for affordable housing opportunities is hereby denied; and

**BE IT FURTHER RESOLVED** that a copy of this Resolution be forwarded by the Zoning Board of Adjustment secretary, to the Applicant's Attorney, the Borough Clerk and the Building Department.

**BE IT FURTHER RESOLVED** that notification of this denial be published in an official newspaper of the Borough of Point Pleasant Zoning Board of Adjustment by the Zoning Board Secretary within 10 days of its passage.

**BE IT FURTHER RESOLVED** that this denial is subject to the following conditions:

1. The applicant shall comply with all representations made before the Zoning Board of Adjustment, by its attorney and its expert.

2. The applicant shall reimburse the Borough of Point Pleasant Zoning Board of Adjustment for all professional fees extended or expended with regard to this application.

3. The applicant shall comply with all building and applicable codes, ordinances, and law.

4. The applicant shall resubmit this entire proposal for re-approval should there be any deviation from the terms and conditions of this resolution or the documents submitted as part of this application, all of which are made a part hereof and shall be binding on the Applicants.

5. The applicant shall provide a statement from the Borough of Point Pleasant Zoning Board of Adjustment Tax Collector that all taxes are paid in full as of the date of this resolution and as of the date of the fulfillment of any condition(s) of this resolution.

6. Unless specifically modified herein, the applicant shall comply with all terms and conditions of all prior resolutions of the Borough of Point Pleasant Zoning Board of Adjustment regarding this application.

7. The Applicant shall reimburse the Borough of Point Pleasant Zoning Board of Adjustment for all professional fees extended or expended with regard to this application.

**Moved by: Mr. Giordano**

**Seconded by: Mr. Nikola**

**Those in favor: Mr. Nikola                      Mr. Giordano                      Mr. Coleman**

**CERTIFICATION**

I hereby certify that I, the undersigned, am the secretary of the Borough of Point Pleasant Zoning Board of Adjustment, County of Ocean, State of New Jersey and I hereby certify that the foregoing Resolution was adopted by the Zoning Board of Adjustment of the Borough of Point Pleasant at a regular meeting held on the 12<sup>th</sup> day of August, 2020 and memorialized at the meeting held on September 9, 2020.

*Sharon Morgan*  
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**SHARON MORGAN**  
**Borough of Point Pleasant**  
**Zoning Board of Adjustment**