

**RESOLUTION 2021-14
BOROUGH OF HIGHLANDS LAND USE BOARD
RESOLUTION OF MEMORIALIZATION
MONMOUTH COUNTY, NEW JERSEY
FLOOR AREA RATIO VARIANCE RELIEF WITH PRELIMINARY AND
FINAL SITE PLAN APPROVAL
WITH ANCILLARY VARIANCE RELIEF**

**Approved: May 6, 2021
Memorialized: June 3, 2021**

IN THE MATTER OF 210 BAY AVENUE, LLC.

APPLICATION NO. LUB-2019-05

WHEREAS, an application for (d)(4) Floor Area Ratio (“FAR”) variance relief with preliminary and final site plan approval along with ancillary variance relief has been made to the Highlands Land Use Board (hereinafter referred to as the “Board”) by 210 Bay Avenue, LLC (hereinafter referred to as the “Applicant”) on lands known and designated as Block 64, Lot 25, as depicted on the Tax Map of the Borough of Highlands (hereinafter “Borough”), and more commonly known as 210 Bay Avenue in the CBD (Central Business District) Zone; and

WHEREAS, a complete application has been filed, the fees as required by Borough Ordinance have been paid, proof of service and publication of notice as required by law has been furnished and determined to be in proper order, and it otherwise appears that the jurisdiction and powers of the Board have been properly invoked and exercised; and

WHEREAS, public hearings were held on March 4, 2021 and May 6, 2021, via the Zoom platform, at which time testimony and exhibits were presented on behalf of the Applicant and all interested parties were provided with an opportunity to be heard; and

NOW, THEREFORE, does the Highlands Land Use Board make the following findings of fact and conclusions of law with regard to this application:

1. The subject Property contains 2,500 s.f with twenty-five (25) feet of frontage along Bay Avenue within the CBD Zone. The subject Property is currently vacant.

2. The Applicant is seeking (d)(4) FAR variance relief along with preliminary and final site plan approval with ancillary bulk variance relief to permit the construction of a three-story mixed-use building containing 5,526 s.f. of floor area. The Applicant proposes a restaurant on the first floor with the second and third floors proposed as two, two-bedroom apartments (for a total of two residential units). The proposed mixed-use development is a permitted use in the CBD Zone.

3. The Applicant proposes five (5) parking spaces, three (3) of which are to be located on Lot 24 for the benefit of the subject Property. The existing driveway on Lot 24 will be used as access to Lot 25.

4. Based upon the application and plans submitted, any amendments or modifications thereto and the testimony of the Applicant's experts, the Applicant requires (d)(4) FAR variance relief because the maximum floor area ratio for the CBD Zone is .65 whereas the Applicant proposes a maximum floor area ratio of 2.21. The following bulk variance relief is also required:

<u>CBD Zone</u>	<u>Required</u>	<u>Existing Lot 25</u>	<u>Proposed Lot 25</u>
Max Lot Coverage (%)	80	N/A	100
Max Building Coverage (%)	35	N/A	73.7

5. Counsel for the Applicant, Richard Sciria, Esq. explained that the Applicant was seeking approval for a mixed-used development which would include residential and commercial uses.

6. Testimony was taken from Yong Huang who identified himself as a principal of the Applicant. Mr. Huang described the subject application and advised that he is the owner of

Lot 25 as well as Lot 24. Although the listed owner of Lot 24 is YHH Realty, LLC and the listed owner of Lot 25 is 210 Bay Avenue, LLC, Mr. Huang stated that he is the principal owner of both entities.

7. Mr. Huang testified that Lot 25 is currently vacant and Lot 24 is improved with a three-story mixed use building with the first floor operating as a Chinese Restaurant and the second and third floors comprised of four (4), one-bedroom apartments.

8. The Architect, Catherine Franco, P.A. described the proposed structure and the parking plan. She testified that there would be two (2) parking spaces located behind the newly-constructed building with three (3) additional spaces alongside of the building (between Lots 24 and 25). The first floor would include one commercial unit and the residential units (on the second and third floors) would have two bedrooms each with a balcony in the rear and a stairway providing separate access from the commercial unit.

9. Ms. Franco then testified that the air conditioning units could be located on the roof and that the plans were ADA compliant. She stated that the proposal exceeds the permitted maximum floor area ratio due to the size of the subject Property. Ms. Franco added that the parking had been maximized as much as possible.

10. The Applicant's Engineer, A.J. Garito, Jr., P.E. testified that the Applicant required (d)(4) FAR variance relief. He stated that the proposed use is permitted but that the Applicant must demonstrate that the site remains suitable despite an increase in the floor area ratio beyond that which is permitted in the CBD Zone. Mr. Garito testified that it was impossible for the Applicant to comply with the floor area ratio due to the size of the subject Property and that the absence of relief renders the parcel undevelopable.

11. Mr. Garito then stated that three (3) of the proposed parking spaces would be located on Lot 24 with two (2) being located on Lot 25. Access to all proposed parking would be via the driveway located on Lot 24.

12. The Board inquired whether an easement was needed from Lot 24 to access the three (3) parking spaces located on Lot 24. The Applicant stated that an easement would be required and submitted to the Board professionals for review and approval.

13. The Board's Engineer, Edward Herman, PE testified that there were different parking requirements for residential and commercial uses. He stated that if the subject Property were developed solely as residential, nine (9) on-site parking spaces would be required, whereas by constructing a mixed-use project (with commercial space), sixteen (16) on-site parking spaces are required.

14. Mr. Herman questioned whether the Lot 24 driveway was wide enough for emergency vehicles.

15. Mr. Hung then testified that he had never observed vehicles parking on the side for the restaurant located at 214 Bay Avenue (Lot 24) and that most patrons simply park on the street.

16. The Applicant returned to the May 6, 2021 meeting at which time Mr. Garito provided additional testimony and evidence demonstrating that sufficient space existed to permit a vehicle to perform a "k-turn" in order to exit from Lot 25 using the driveway on Lot 24. He then stated that an emergency vehicle would need to back out of the driveway because there was not enough space to turn around. Mr. Garito acknowledged that the tree in the rear of the subject Property would have to be removed.

17. Mr. Garito further testified that the project would improve the aesthetics of the neighborhood by eliminating a vacant lot and constructing a new, mixed-use structure which is a permitted use in the CBD Zone thereby making the best use of a very narrow and small property. He opined that a mixed-use development is consistent with the Master Plan, which promotes the development of commercial uses in the CBD Zone. Mr. Garito stated that the proposed use represents the best use of the Property and, thus, the positives outweigh the negatives.

18. The Board once again recognized that the Applicant would need to enter into a Cross-Access Easement running with the land, subject to review and approval by the Board Engineer and Board Attorney. Mr. Garito testified that Lot 24 already had a *de minimis* exception from the Residential Site Improvement Standards (“R.S.I.S.”) from parking requirements and, thus, any use of Lot 24’s parking would increase that exception.

19. The Board inquired whether the Applicant had spoken to the owner of Lot 26 to see about sharing parking with same. The Applicant responded that he had spoken to the owner of Lot 26 but never received a definitive response and, thus, would again ask the owner of Lot 26 for access to his parking.

20. The hearing was then opened to the public at which time, Paul Arura, 7 Marine Place, expressed his support for the project and that an approval would be good for the Borough and consistent with the Master Plan.

21. Joseph Nardone, 196 Bay Avenue, testified that Mr. Huang is a good businessman and that he supported the application. It was his opinion that approving the application would send a strong message that projects consistent with the Master Plan would be looked upon favorably.

22. Chief Burton described the neighborhood surrounding the subject Property and noted that of the twelve (12) properties on the same side of the street as the subject Property, three (3) were vacant and six (6) developed with driveways (five of which have driveways and garages), while another property has a surface parking lot and the adjacent Chinese restaurant would share parking with the Applicant. He added that if the three (3) properties were developed, they too would have off-street parking.

23. Chief Burton further observed that at 1:45 p.m. on May 6, 2021 from Valley Street to Cedar Avenue there were only nine (9) cars parked on the street and that another observation during the evening of the same day found ten (10) cars parked on that stretch of the street. Chief Burton opined that, based on the Borough repaving and lining that stretch of roadway, there would be on-street parking for twenty-three (23) vehicles.

24. Chief Burton then noted that the opposite side of the street has twelve (12) properties and that nine (9) of those properties have driveways, whereas three (3) properties do not. He observed there was ample parking in the neighborhood and, thus, no parking concerns for the subject Property.

25. There were no other members of the public expressing an interest in this application.

WHEREAS, the Highlands Land Use Board, having reviewed the proposed application and having considered the impact of the proposed application on the Borough and its residents to determine whether it is in furtherance of the Municipal Land Use Law; and having considered whether the proposal is conducive to the orderly development of the site and the general area in which it is located pursuant to the land use and zoning ordinances of the Borough of Highlands; and upon the

imposition of specific conditions to be fulfilled, hereby determines that the Applicant's request for floor area ratio relief pursuant to N.J.S.A. 40:55D-70d(4) with along with preliminary site plan approval pursuant to N.J.S.A. 40:55D-46 and final Site plan approval pursuant to N.J.S.A. 40:55D-50 along with ancillary variance relief pursuant to N.J.S.A. 40:55D-70c(2) and a *de minimis* exception from the R.S.I.S. should be granted in this instance.

The Applicant requires (d)(4) FAR variance relief in order to permit the construction of a three-story, mixed-use structure, comprised of a commercial use on the first floor and residential use on the second and third floors. A proposed restaurant will be located on the first floor, with the second and third floors improved by two, two-bedroom apartments. The standard of review for a FAR variance is the same for that of a conditional use variance pursuant to N.J.S.A. 40:55D-70d(3). The New Jersey Supreme Court, in Coventry Square v. Westwood, 138 N.J. 285, 297 (1994), established a standard of proof in such cases. Proof to support a FAR variance, therefore, need only justify the municipalities continued permission for a use notwithstanding a deviation from the required FAR.

That standard of proof will focus both on the Applicant's and the Board's attention to the specific deviation from the FAR imposed by the ordinance, and will permit the Board to find special reasons to support the variance only if it is persuaded that the noncompliance with the FAR does not affect the suitability of the site for the use. Thus, a FAR variance applicant must show that the site will accommodate the problems associated with the floor area ratio even though the proposal does not comply with the ordinance established to address those problems.

With respect to the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good. N.J.S.A. 40:55D-70d. The focus is on the effect to the surrounding properties of the grant of the variance for the specific deviations from the floor area ratio imposed by the ordinance. The Board of Adjustment must evaluate the impact of the

proposed FAR variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute a substantial detriment to the public good.

In addition, the applicant must also prove that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, N.J.S.A. 40:55D-70d. The Board of Adjustment must be satisfied that the grant of the FAR variance for the specific project at the designated site is not irreconcilable with the municipality's legislative determination that the standard should be imposed on all densities in that zoning district.

The Board finds the Applicant has satisfied the positive criteria. The Applicant has demonstrated that despite exceeding the Borough's maximum floor area ratio requirements, the subject Property remains suitable for the permitted use. The Applicant has provided uncontroverted proofs that the subject Property is distinguishable from others in the Zone. It is located in a flood zone which makes construction more difficult. The size, shape, and topography of the subject Property are distinguishable due to the small size of the lot. Any improvement would likely necessitate variance relief from the maximum floor area ratio requirements. These factors in totality distinguish the subject Property from others in the Zone. The Applicant has also proposed a development which will take a vacant underutilized lot and replace same with a visually desirable mixed-use project which is permitted by the Zoning Ordinance. The improved aesthetics will benefit the entire neighborhood and therefore promote the goals of planning as enumerated in N.J.S.A. 40:55D-2. These goals of planning are specifically being advanced on the subject Property due to the previously enumerated distinguishing factors. The Board also finds that sufficient parking exists along the street to accommodate both residential and commercial vehicles. The location of parking on the adjacent lot further provides enough space for the mixed

use development. The Board finds that the subject Property remains suitable despite the floor area ratio measurement. The positive criteria has therefore been satisfied.

The Board also finds that the negative criteria has been satisfied. The Board is persuaded that the traffic increase associated with the proposed development is not appreciably different from the traffic increase which would be created with any other type of permitted use on the subject Property. Although on-site parking is less than what is required, thereby necessitating a cross-access easement with Lot 24, the Board finds that any development of the Property would result in the Applicant seeking relief from the R.S.I.S. parking space requirements. The Board therefore concludes that the proposed development will not result in a substantial impairment to the zone plan and zoning ordinance, and no substantial detriment to the public welfare. The negative criteria has therefore been satisfied and the Board further finds that the Master Plan encourages mixed-use and commercial development in the CBD Zone.

The Board further concludes that the positive criteria substantially outweighs the negative criteria and that the floor area ratio variance relief may be granted pursuant to N.J.S.A. 40:55D-70d(4).

The Board further finds that the Applicant requires bulk variance relief. The Municipal Land Use Law, at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully

existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the applicant to establish these criteria.

The Board finds that the Applicant has satisfied the positive criteria with regard to the previously enumerated requests for variance relief from maximum lot coverage and maximum building coverage. The Board will address the required variances collectively. The Board finds that the proposed development eliminates a vacant lot and will create a mixed-use building with commercial and residential uses, consistent with the prevailing neighborhood scheme. The uses are also permitted by Ordinance. The mixed-use building proposed to be constructed thereon would be a permitted use and one which is consistent with the Master Plan. The Board finds that the application advances the goals of planning contained in the Municipal Land Use Law as

enumerated at N.J.S.A. 40:55D-2 by contributing to the wellbeing of the neighborhoods and preservation of the environment; promoting adequate air, light and open space; and promoting to a desirable visual environment through creative development techniques and civic design/arrangements. The Board specifically finds that the Applicant has proposed an attractive mixed-use development. The Board therefore finds that the positive criteria has been satisfied.

The Board also finds that the negative criteria has been satisfied. The proposed development of the existing vacant lot into a mixed use building with commercial and residential uses is consistent with the prevailing neighborhood scheme. As previously stated, the community will also benefit from the elimination of the vacant lot which would be replaced by a mixed-use development. The Board finds that any development of the Property would result in the Applicant seeking relief from the R.S.I.S. parking space requirements and, even with this relief, the application also will not result in any perceptible increase in noise or traffic. The Board therefore finds that the proposed variance relief does not result in a substantial impairment to the zone plan or the zoning ordinance and no substantial detriment to the public good. The Applicant has therefore satisfied the negative criteria.

The Board further finds that the positive criteria substantially outweighs the negative criteria and that variance relief can be granted pursuant to N.J.S.A. 40:55D-70c(2) in this instance.

The Applicant also requires a *de minimis* exception from the R.S.I.S. where sixteen (16) parking spaces are required and five (5) are being proposed with three (3) of the proposed spaces being provided by Lot 24 by way of a to-be-entered-into cross-access easement between Lot 24 and Lot 25. Relief from the R.S.I.S. is not subsumed by the grant of a FAR variance relief because it is a State regulation. The Board finds the Applicant provided persuasive professional testimony that the proposed exception is reasonable considering the limitations of the subject property and is

limited in scope due to the previously enumerated distinguishing characteristics of the subject Property. The Applicant also identified available parking in the area. This decision is based upon an understanding of the existing infrastructure and the impact on public health and safety, the Board finds that a *de minimis* exception from the R.S.I.S. is appropriate pursuant to N.J.A.C. 5:21-3.1.

With the exception of the above relief, the Applicant has complied with all other zoning, site plan, and design ordinance requirements. The Board therefore finds that preliminary site plan approval pursuant to N.J.S.A. 40:55D-46 and final site plan approval pursuant to N.J.S.A. 40:55D-50 are appropriate in this instance.

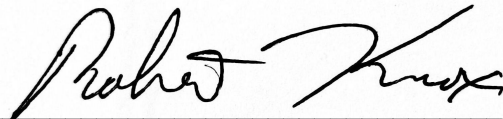
NOW, THEREFORE, BE IT RESOLVED by the Land Use Board of the Borough of Highlands on this 3rd day of June 2021, that the action of the Land Use Board taken on May 6, 2021, granting Application No. LUB 2019-05, for (d)(4) FAR variance relief pursuant to N.J.S.A. 40:55D-70d(4) along with preliminary site plan approval pursuant to N.J.S.A. 40:55D-46 and final site plan approval pursuant to N.J.S.A. 40:55D-50 along with ancillary variance relief pursuant to N.J.S.A. 40:55D-70c(2) and a *de minimis* exception from the R.S.I.S. as follows:

The application is granted subject to the following conditions:

1. All site improvement shall take place in the strict compliance with the testimony and with the plans and drawings which have been submitted to the Board with this application, or to be revised.
2. Except where specifically modified by the terms of this resolution, the Applicant shall comply with all recommendations contained in the reports of the Board professionals.
3. The Applicant shall enter into a cross-access easement with Block 64, Lot 24 for parking and ingress/egress subject to review and approval of the Board Engineer and Board Attorney.

4. The Applicant shall make a good faith effort to ask the property owner of Katz Grill, located at 208 Bay Avenue (Block 64, Lot 28.01) to use his/her parking lot.
5. All air conditioning units shall be located on the roof top and be appropriately screened pursuant to the review and approval of the Board Engineer.
6. All outdoor non-security lighting shall either be turned off, dimmed or subject to motion detectors after dusk.
7. Any future modifications to this approved plan must be submitted to the Board for approval.
8. The Applicant shall provide a certificate that taxes are paid to date of approval.
9. Payment of all fees, costs, escrows due and to become due. Any monies are to be paid within twenty (20) days of said request by the Board Secretary.
10. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Highlands, County of Monmouth, State of New Jersey or any other jurisdiction.

BE IT FURTHER RESOLVED that the Board secretary is hereby authorized and directed to cause a notice of this decision to be published in the official newspaper at the Applicant's expense and to send a certified copy of this Resolution to the Applicant and to the Borough Clerk, Engineer, Attorney and Tax Assessor, and shall make same available to all other interested parties.



Robert Knox, Chairman
Borough of Highlands Land Use Board

ON MOTION OF: Laurie LaRussa

SECONDED BY: Chief Robert Burton

ROLL CALL:

YES: Chief Robert Burton, Laurie LaRussa, Christian Lee, Frank Montecalvo, Jacklyn Walsh

BOROUGH OF HIGHLANDS LAND USE BOARD

EXHIBITS

Case No. LUB-2019-05/210 Bay Avenue, LLC
(d)(4) Floor Area Ratio Variance Relief with Preliminary and
Final Site Plan Approval
With Ancillary Variance Relief
March 4, 2021 & May 6, 2021
June 3, 2021

- A-1 Land Use Board Application, dated April 10, 2019.
- A-2 Affidavit of Applicant, dated February 26, 2019.
- A-3 Denial of Development Permit, dated January 30, 2019.
- A-4 Tax Account Data from Borough of Highlands.
- A-5 Survey of Block 64, Lot 24 (214 Bay Avenue) prepared by Michael S. Lynch, P.L.S., dated March 14, 2019.
- A-6 Architectural Plans prepared by Catherine Franco, A.I.A., consisting of two (2) sheets, dated September 1, 2019.
- A-7 Site Plan prepared by A.J. Garito, Jr., P.E., consisting of four (4) sheets, dated December 1, 2019.
- A-8 Passenger Car Turning Template prepared by A.J. Garito, Jr., P.E., consisting of one (1) sheet, dated April 26, 2021.

INTEROFFICE REPORTS

- B-1 Board Engineer's Review Letter of Site Plat Requirements (Completeness), dated April 26, 2019.
- B-2 Board Engineer's Fee and Escrow Calculation Letter, dated April 26, 2020.
- B-3 Board Engineer's Amended Review of Site Plan Plat Requirements (Completeness), Revised March 4, 2019.
- B-4 Board Engineer's First Engineering Review Letter, dated November 17, 2020.