

**RESOLUTION
BOROUGH OF BUTLER
PLANNING BOARD
IN THE MATTER OF ANGRY OSTRICH HOLDINGS, LLC
DECIDED ON DECEMBER 12, 2024
MEMORIALIZED ON JANUARY 16, 2025
APPLICATION NO. 24-003
APPROVAL OF MINOR SUBDIVISION APPLICATION
WITH ANCILLARY “C” VARIANCE RELIEF**

WHEREAS, Angry Ostrich Holdings, LLC (hereinafter “Applicant”) has made application to the Borough of Butler Planning Board, (hereinafter “Board” or “Planning Board”), for property known and designated as Block 37.01, Lot 21, on the Tax Assessment Map of the Borough of Butler, (hereinafter “Borough”), which premises are located at 39 Elm Street, Butler, New Jersey and located in the R-3 Residential Zone District, (hereinafter “R-3 Zone”); and

WHEREAS, a public hearing was held on December 12, 2024 after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by Sophy Sedarat, Esq.

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

The application before the Planning Board is a request for minor subdivision approval with ancillary “c” variance relief for property known and designated as Block 37.01, Lot 21 as shown on the Tax Assessment Map of the Borough of Butler, which premises are located at 39 Elm Street, Butler, New Jersey. The subject site is located in the R-3 Zone District. The purpose of the application is to subdivide the existing lot in order to create one (1) additional building lot, thus resulting in a two-lot subdivision.

Surveyor's Testimony

Robert L. Cigol, N.J.P.L.S., a Licensed Land Surveyor in the State of New Jersey testified before the Planning Board. Mr. Cigol was accepted as an expert witness as a Land Surveyor. Mr. Cigol testified that the subject Property is located at 39 Elm Street. The Property has frontage along Elm Street and Cedar Street. The Property is also located within the R-3 Zone District. Mr. Cigol represented that the only existing non-conformity is in regard to the front yard setback for the existing dwelling at 39 Elm Street. The minimum front yard setback in the R-3 Zone is 35 feet and the front yard setback to the existing dwelling at 39 Elm Street is 19.33 feet. This variance will not be exacerbated or changed as a result of the proposed subdivision.

Mr. Cigol reviewed the bulk requirements in the R-3 Zone. The existing single-family dwelling is currently designated as Lot 21. The new lot to be created would be designated as Lot 21.01. The remainder lot is proposed to be designated as Lot 21.02 and would contain the existing single-family dwelling. The minimum lot area requirement in the R-3 Zone is 10,250 square feet. Proposed Lot 21.01 has a lot area of 11,893 square feet (0.273 acres) and Proposed Lot 21.02 has a lot area of 18,229 square feet (0.418 acres). Mr. Cigol reviewed the bulk requirements in the R-3 Zone relative to lot frontage, lot width, lot depth and building height and confirmed that the Applicant would comply with all bulk requirements in the R-3 Zone. The Applicant agreed to provide a 10-foot roadway easement along Elm Street to ensure there is sufficient room for roadway improvements and utility poles. The Applicant also represented that the existing dwelling on Lot 21 which is proposed to remain on new Lot 21.02 has been in existence since on or about 1915.

The Applicant also introduced into evidence Exhibit A-1, a letter of exemption from the Morris County Planning Board in regard to this minor subdivision application. The Applicant also introduced into evidence Exhibit A-2 which is a letter to the neighbor on Lot 22, Block 37.01, 43

Elm Street requesting that the neighbor remove its shed and fence from encroaching onto the Applicant's property.

Engineering Testimony

Testifying on behalf of the Applicant was Cory Vandervalk, P.E., a licensed Professional Engineer in the State of New Jersey. Mr. Vandervalk was accepted as an expert witness in the field of civil engineering. Mr. Vandervalk testified in regard to the request for variance relief from steep slope disturbance. The Applicant requires steep slope variance relief from four (4) steep slope categories.

- A. In the steep slope category 15% to 19.99% where a maximum disturbance of 50% is permitted, 90% is proposed.
- B. In the slope category 20% to 24.99% where a maximum disturbance of 30% is permitted, 82% is proposed.
- C. In the slope category of 25% to 29.99% where a maximum disturbance of 15% is permitted, 39% is proposed.
- D. In the slope category greater than 30% where 0% maximum disturbance is permitted, 11% is proposed.

Mr. Vandervalk testified that the proposed Lot 21.01 would be an irregularly shaped lot narrow in width although exceeding the minimum lot width in the R-3 Zone where 65 feet is required and 75.09 feet is proposed. There are existing topographic features which requires steep slope disturbance for development of the lot. Mr. Vandervalk characterized the proposed development of a single-family house on proposed Lot 21.01 as being reasonable. He stated the site could be developed with a single-family dwelling with a footprint of 1,400 square feet that would translate to a 2,000 to 2,200 square feet single-family home being built on the site. Mr. Vandervalk testified that constructing a single-family dwelling as indicated would fit in with other homes in the neighborhood. Mr. Vandervalk also testified that the proposed single-family dwelling on Lot 21.01

would be served by utilities that would come in from Cedar Street. The Applicant also agreed to provide a lot development plan in accordance with the Board Engineer's Review Report.

Public Portion

The meeting was opened up to members of the public and the Board was addressed by George Logan. Mr. Logan had questions in regard to the Applicant providing an easement along Elm Street for roadway improvements.

The next member of the public to address the Board was Dominick Napoli. Mr. Napoli indicated he had concerns about additional development on a vacant lot. He indicated that in his opinion, the proposed development would change the nature of the neighborhood. Mr. Napoli also expressed his concern about stormwater runoff onto his property.

There were no further members of the public present who expressed an interest in this application.

NOW, THEREFORE, the Planning Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The application before the Board is a request for minor subdivision approval and ancillary "c" variance relief for property known and designated as Block 37.01, Lot 21 on the Tax Assessment Map of the Borough of Butler, and which premises are located at 39 Elm Street, Butler, New Jersey in the R-3 Zone.

The Applicant seeks minor subdivision approval in order to allow for the creation of one (1) new lot from one (1) existing lot currently known as Lot 21 in Block 37.01. The new lot would be designated as Lot 21.01 and would conform to the minimum bulk requirements in the R-3 Zone. The remainder lot is proposed to be designated as Lot 21.02 and the existing single-family dwelling would remain. The Applicant requires variance relief for an existing front yard setback of 19.3 feet where a minimum of 35 feet is required. This existing front yard setback variance is not being

aggravated or exacerbated as a result of the proposed minor subdivision. Proposed Lot 21.01 conforms to the bulk requirements in the R-3 Zone, however, relief is sought from the steep slope ordinance requirements.

Ancillary “c” Variance Relief

The Board finds that the Applicant requires “c” variance relief in regard to this development application.

As to proposed Lot 21.02 (existing single-family dwelling), the Applicant requires the following variances:

1. Front yard setback 35 feet is required, and 19.3 feet is existing and proposed.

As to proposed Lot 21.01, the Applicant requires the following “c” variance relief for steep slope disturbance:

1. In the steep slope category 15% to 19.99% where a maximum disturbance of 50% is permitted, 90% is proposed.
2. In the slope category 20% to 24.99% where a maximum disturbance of 30% is permitted, 82% is proposed.
3. In the slope category of 25% to 29.99% where a maximum disturbance of 15% is permitted, 39% is proposed.
4. In the slope category greater than 30% where 0% maximum disturbance is permitted, 11% is proposed.

The Board finds that the Applicant is proposing a permitted use in the Zone but does, however require 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 it is appropriate to grant variance relief for steep slope disturbance under N.J.S.A. 40:55D-70c(1)(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property; and (b) by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property. The Board finds that the proposed Lot 21.01 is irregularly shaped and is impacted by topographic conditions including, but not limited to, the existence of steep slopes on the property. The Board, therefore, finds that under N.J.S.A. 40:55D-70c(1)(a) and (b) that it is appropriate to grant variance relief for steep slope disturbance.

The Board also reviewed the granting of ancillary “c” variance relief under the c(2) analysis. In Kaufman v. Planning Board for Warren Borough, 110 N.J. 551, 563 (1988), the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

The Board, in its review of the application under the c(2) criteria, analyzed the proofs provided by the Applicant relative to the positive criteria under the MLUL pursuant to N.J.S.A. 40:55D-2 and its subparts. The Board finds that the intent and the purpose of the MLUL would be advanced pursuant to N.J.S.A. 40:55D-2(a) to encourage municipal action to guide the appropriate use or development of all lands in the State of New Jersey, in a manner which will promote the public health, safety, morals and general welfare. The Board further finds that purpose 2(c) is advanced which is to provide adequate light, air and open space. The Board also determines that purpose 2(e) is satisfied by promoting the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions. The Board further finds that the Applicant have satisfied purpose 2(g) which is to provide sufficient space in appropriate locations for a variety of residential uses. The Board also finds that purpose 2(i) is satisfied because the proposed development promotes a desirable visual environment through creative development techniques and good civic design and arrangement. The Board also finds that purpose 2(m) is satisfied because the proposed development results in more efficient use of land.

The Board accepts the representations of the Applicant's witnesses that the proposed subdivision is consistent with the surrounding neighborhood and is reflective of the existing development pattern notwithstanding the deviations from the Zoning Ordinance. The Board finds that several goals of the Butler Master Plan are advanced by the approval of this application including, but not limited to, maintaining the character of the existing residential area and maintaining the overall quality of the neighborhood. The Board also finds that the approval of this application would be reflective of the neighborhood with respect to the proposed lot sizes which are more consistent with the minimum lot area in the R-3 Zone. The Board also finds that the Applicant is proposing, with the granting of minimum variance relief, substantially conforming lots pursuant to the R-3 Zone requirements.

The Board finds that in regard to the front yard setback variance for proposed Lot 21.02, this is an existing condition and one that will not be aggravated or exacerbated as a result of the granting of minor subdivision approval. Next as to granting relief for steep slope disturbance, the Board finds that the Applicant will be able to provide for reasonable control of development within the steep slope areas of the site and will minimize any adverse impact caused by the development of steep slope areas. The Board further finds that the Applicant will be able to provide development in such a manner that will be able to address erosion, siltation, flooding and surface water runoff with an appropriate engineering design so as not to be detrimental to adjoining properties.

Having found that the Applicant has satisfied the positive criteria granting bulk or "c" variance relief, the Board then turns to the negative criteria. For the reasons set forth herein, the Board concludes that ancillary "c" or bulk variance relief may be granted without substantial detriment to the public good. The Board finds that "c" or bulk variance relief may be granted without a substantial adverse impact upon or detriment to the adjoining properties, nor will it cause such damage to the character of the neighborhood as to constitute substantial detriment to the public

good. The Board reaches these conclusions based on the proofs presented and the nature of the relief sought in this matter. The Board also finds that “c” or bulk variance relief may be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance.

Based upon all of these conclusions, the Board finds that the purposes of the MLUL would be advanced by a deviation from the zoning ordinance requirements, and the benefits of any deviation substantially outweigh any detriment and, thus, ancillary “c” or bulk variance relief may be granted. The Board therefore concludes that both the positive and negative criteria were met by the Applicant and thus, the granting of ancillary “c” or bulk variance relief set forth herein is appropriate to be granted under the MLUL pursuant to N.J.S.A. 40:55D-70c(2).

Upon consideration of the plans, testimony and application, the Board determines that the Applicant has met the minimum requirements of the MLUL, case law and Borough ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will not adversely impact or impair the use and enjoyment of adjacent properties.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of Butler with regard to the application of Angry Ostrich Holdings, LLC for property known and designated as Block 37.01, Lot 21 on the Tax Assessment Map of the Borough of Butler, located at 39 Elm Street, Butler, New Jersey, and located in the R-3 Zone requesting land use relief is determined as follows:

- A. Minor Subdivision approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-47; and
- B. Ancillary “c” or bulk variance relief is granted in accordance with the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(1) and (2) for minimum front yard setback (Lot 21.02), steep slope disturbance (Lot 21.01) .

IT IS FURTHER RESOLVED that the aforementioned relief is granted subject to the following terms and conditions:

1. The development of this parcel shall be implemented in accordance with the plans submitted and approved, as well as any further amendments required by the Planning Board or the Board's professionals as a result of the hearing process.

2. The granting of this application is subject to and conditioned upon all of the representations and stipulations being made by or on behalf of the Applicant to the Borough of Butler Planning Board being true and accurate. The Planning Board notes that it specifically relied upon said stipulations in the Board's granting of approval. If any representation or stipulation is false, this approval is subject to revocation.

3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Planning Board at the time of the public hearing on December 12, 2024.

4. The granting of this application is subject to and conditioned upon the Applicant complying with all terms and conditions contained in the report of the Board Engineer, Thomas A. Boorady, P.E., P.P., C.M.E., C.F.M., Engineer to the Borough of Butler Planning Board dated October 17, 2024 and as testified to during the hearing.

5. The Deed recorded memorializing this subdivision shall specifically refer to this resolution and shall be subject to the review and approval of the Board Engineer, Borough Surveyor and Board Attorney. The Applicant shall record the subdivision deed within 190 days of the memorializing resolution being adopted. Failure to do so shall render this approval null and void unless an extension of time is granted.

6. The granting of this application is subject to and conditioned upon the Applicant obtaining confirmation from the Borough of Butler Tax Assessor regarding the lot numbers for the lots created as a result of this subdivision approval.

7. The Applicant shall undertake all reasonable efforts and contact the owner of property known and designated as Lot 22, Block 37.01 on the Tax Assessment Map of the Borough of Butler and located at 43 Elm Street in order to have the property owner remove its shed and fence from the subject Property.

8. The Applicant shall provide sight triangle easements for the corner of Elm Street and Cedar Street and at the southeasterly corner of the subject Property which sight triangle easements shall be dedicated to the Borough of Butler. After the sight triangle easement design has been approved, the metes and bounds shall be shown on the subdivision plans by the Applicant's Surveyor and cited in the new property Deed.

9. The Applicant shall grant an easement to the Borough of Butler for additional right-of-way to be provided along Elm Street to ensure there is sufficient room for roadway improvements and utility poles.

10. The Applicant and any successor owner shall supply a detailed lot development plan to the office of the Board Engineer for review and approval prior to any site work being performed on the subject Property and prior to the issuance of any tree removal permits, construction permits, utility permits, road opening permits and any other required permits.

11. The granting of this application is subject to and conditioned upon Morris County Planning Board approval or a Letter of No-Interest.

12. The granting of this application is subject to and conditioned upon Morris County Soil Conservation District approval, if required.

13. The granting of this application is subject to and conditioned upon New Jersey Department of Environmental Protection approval, if required.

14. The granting of this application is subject to and conditioned upon the Borough of Butler Board of Health approval, if required.

15. The following conditions shall be satisfied prior to the Butler Planning Board Chair and Board Secretary signature of minor subdivision deeds for recording:

- a. If required, the minor subdivision plans shall be revised as may be recommended by the Butler Planning Board, Board Engineer, Board Attorney, and Borough Surveyor;
- b. The minor subdivision plan shall be accompanied by deeds for effective lots, including new legal descriptions for each lot and any required language reciting easements, conservation areas, etc. for review and approval by the Board Engineer, Board Attorney, and Borough Surveyor;
- c. Prior to approving the deeds for recording, the Butler Board Secretary must first receive a status report from the Borough Tax Collector and Finance Officer confirming all escrow fees and property taxes of both properties are current.

16. The granting of this application is subject to and conditioned upon the submission of revised plans, if required, which shall be reviewed and approved by the Board Engineer. The plans shall not be signed by the Board Secretary and Chairman until the revised plans have been reviewed and approved by the Board Engineer. An appropriate escrow shall also be established and maintained by the Applicant to cover the cost of professional review and inspection fees.

17. This approval is subject to the payment in full by the Applicant of all taxes, fees, escrows, assessments and other amounts due and owing to the Borough and/or any other agency. Any monies are to be paid by the Applicant within twenty (20) days of said request by the Board Secretary.

18. Certification that taxes are paid to date of approval.

19. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Butler, County of Morris, State of New Jersey, or any other agency having jurisdiction hereunder.

VOTE ON APPLICATION
DECEMBER 12, 2024

Motion Introduced By: Brown

Seconded By: Veneziano

In Favor: Roche, Veneziano, Brown, Finelli, Vath, Hough, Reger and Nargiso

Opposed:

VOTE TO APPROVE RESOLUTION
JANUARY 16, 2024

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Butler Planning Board

William Budesheim, Board Secretary

, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Butler Planning Board on December 12, 2024 and memorialized herein pursuant to N.J.S.A 40:55D-10(g) on January 16, 2025.

William Budesheim, Board Secretary