

Gentlemen, you have presented an interesting issue with regard to the pending Webster Property Management, LLC application as to whether the application should be bifurcated pursuant to N.J.S.A. 40:55D-76b. Mr. King argues that bifurcation is not appropriate because (i) only a single application has been filed and is pending seeking the required “d” variances, subdivision approval, site plan approval and possible “c” variances; (ii) the lot in question does not technically exist as it must be subdivided from the Church lot; and (iii) the variance and site plan issues are highly interrelated. Mr. Gemmel has argued that bifurcation of this application is appropriate since it will allow the Board to first hear and resolve the use variance issue. If the use variance is denied, the remainder of application would then become unnecessary and academic.

I have reviewed the cases cited in Mr. King’s letter, Cox treatise and the MLUL. It is certainly undisputed that the applicant has the right, pursuant to MLUL Section 76b, to bifurcate its applications to first request the required “d1” use variance before submitting for a required site plan and/or subdivision approval. While the statute does specify that this is to be accomplished by separate applications, I believe this could be remedied in the pending zoning matter by Mr. Gemmel withdrawing the portion of his application relating to site plan and subdivision approval, thereby leaving only the “d” variance request pending. I do not see this as an insurmountable hurdle to the matter proceeding forward on a bifurcated basis.

Nor does the fact that the actual lot for which the “d1” variance is requested not yet exist cause a roadblock to bifurcation. As the statute provides and contemplates, “The separate approval of the variance shall be conditioned upon the grant of all required subsequent approvals by the board of adjustment.” In other words, the use variance could be granted for the proposed lot subject to the Board granting subsequent site plan, subdivision and other required variances.

However, the case law cited by Mr. King in his letter does call into question whether the site plan and the use variance are so interrelated that both applications should be considered in a single administrative proceeding at which the Board would decide the negative criteria based upon the plan submitted. The case of House of Fire Christian Church v. Zoning Board of Clifton found that bifurcation was inappropriate and “problematic where factors such as traffic flow, traffic congestion, ingress and egress, building orientation, and the nature of the surrounding properties are highly relevant to both the determination of whether to grant a use variance and the later decision to approve the site plan. Thus, bifurcation “may not be appropriate if the board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding...” Cox clearly differentiates between the situation where buildings already exist on the property in question and the situation where the application seeks an entirely new building as requiring different degrees of detail to support the bifurcated approach.

In my opinion, upon review of all information presented, whether to allow bifurcation of this application is a decision to be made by the Board. I will instruct the Board Chair that we should deal with this issue first when the Webster application is called this Thursday evening. You can both make your respective arguments for and against bifurcation and the Board can vote on how the application is to proceed.

Please feel free to call me if you wish to discuss this matter further.

Thank you.

Regards,

Joel

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