

Resolution No.: 8-2023

RESOLUTION OF THE BOROUGH OF CLAYTON LAND USE BOARD

GRANTING BULK VARIANCE

FOR BLOCK 2001.05, LOT 11 (521 Coleman Drive)

APPLICANT- JULIO AND MARIA AVILES

WHEREAS, Julio and Maria Aviles (the “Applicants”), of 521 Coleman Drive, Clayton, New Jersey, 08312, submitted an application for bulk variance relief for a backyard pergola and appeared before the Clayton Land Use Board (the “Board”) on Monday, February 27, 2023; and

WHEREAS, the subject property, Block 2001.05, Lot 11, is a rectangular lot located at 521 Coleman Drive, bordered by a residential property on each side, and East Academy Street to the rear (the “Property”). The Property is approximately 0.38 acres, and contains a single-family dwelling, a partially built pergola, an in-ground swimming pool, a detached wood shed, fencing and other related improvements. A 50-foot wide utility easement owned by South Jersey Gas Company constrains the right side yard and backyard of the Property, a 26-foot wide landscape easement constrains the rear, and a 10-foot wide utility easement constrains the front of the Property. The Property is located in the R-AB Medium Density Residential Zone; and

WHEREAS, the Applicants seek a bulk variance under N.J.S.A. 40:55D-70c(1) to complete construction on a partially-built pergola, measuring 36 feet long, 8 feet and 5 inches wide, and 10 feet in height, located within the required side yard setback, and within 10 feet of the in-ground swimming pool; and

WHEREAS, the Board’s engineer and planner, Wayne Roorda, Jr., PE, PP, CME, was present and duly sworn; and

WHEREAS, the Borough of Clayton’s Zoning Official and Code Enforcement Officer, Rose Ann Lafferty was present and duly sworn; and

WHEREAS, Applicant Mr. Julio Aviles (“Mr. Aviles”) was present and duly sworn to testify on behalf of the application; and

WHEREAS, three of the Applicants’ neighbors, Mr. Frank Francese, Mr. Ralph Sizer, and Mr. Justin Walker, were present and duly sworn to testify in support of the application; and

WHEREAS, during the public hearing, the Applicants were given the opportunity to present testimony and legal argument, and the Board’s professionals and members of the public were given an opportunity to comment on the application; and

WHEREAS, the Applicants met all jurisdictional requirements enabling the Board to hear and act on the application, and appeared before the Board on the Hearing Dates, as specified above; and

WHEREAS, the following reports prepared by the Board's professionals were considered by the Board:

(1) Memorandum of the Board's engineer and planner, Wayne Roorda, Jr., PE, PP, CME, dated February 16, 2023; and

WHEREAS, Mr. Aviles showed the Board the following exhibits, which were marked into evidence during the Hearing:

Exhibit A: A digital photograph of the pergola.

WHEREAS, Mr. Aviles, the Applicant and property owner, presented the application to the Board. Mr. Aviles testified that he sought a "C(1)" hardship variance for his partially constructed pergola in his backyard since it is located within the mandatory 5 feet side yard setback. Mr. Aviles explained that he was before the Board to seek a bulk variance because his zoning permit application was denied for the structure being within the mandatory setback and within 10 feet of the in-ground pool. Mr. Aviles testified that the pergola consisted of eight posts and a roof, which was intended to provide shade for his backyard. Mr. Aviles explained that the current location of the pergola, on the left-side of the pool, abutting the fence, is the only potential site since the right side of the backyard is constrained by the South Jersey Gas Company easement. Mr. Aviles testified that that one of the eight posts is within 8 feet and 6 inches of the in-ground pool.

WHEREAS, the Zoning Official, Rose Ann Lafferty ("Ms. Lafferty"), denied Mr. Aviles' zoning permit application because the structure is located on the property line, when the Borough's Zoning Code requires a 5 feet setback. Ms. Lafferty also testified that she denied the zoning permit application because the pergola is within 10 feet of the in-ground pool, a violation of the New Jersey Uniform Construction Code. Even if the Board were to grant the requested bulk variance relief, she testified that the structure would still be within 10 feet of the in-ground pool, a state requirement that the Board cannot grant relief from.

WHEREAS, Board Chairman, Joe Abate, questioned Mr. Aviles about the structure's sloped roof, and how stormwater will drain off the roof and onto the neighbor's property. To prevent any issues with future neighbors, the Chairman asked if Mr. Aviles would be amendable to adding a gutter and downspout to the structure to direct stormwater away from the neighbor's property. Mr. Aviles agreed to the proposed condition.

WHEREAS, several of the Applicants' neighbors were present to testify on behalf of the application. Mr. Aviles sought permission from the Board to have his neighbors testify in regards to the requested relief; the Board granted Mr. Aviles' request. Three neighbors were duly sworn and testified before the Board:

1. Mr. Frank Francese, 519 Coleman Drive. Mr. Francese testified that he helped Mr. Aviles build the pergola, and he believes the structure meets building codes. Mr. Francese also testified that he did not believe that the pergola presented any issues for his property or the neighborhood.

2. Mr. Ralph Sizer, 515 Coleman Drive. Mr. Sizer testified that Mr. Aviles had a nice property and understood why it needed shade. He went on to explain that the Applicants are responsible neighbors and there are no issues in the neighborhood. Mr. Sizer testified that in his opinion, the structure was well-built. Mr. Sizer also voiced concerns about inspections for other properties in the Borough.
3. Mr. Justin Walker, 516 Coleman Drive. Mr. Walker testified that he never noticed the setback violation, and the pergola does not negatively affect the neighborhood.

WHEREAS, the Board's engineer and planner, Wayne Roorda, Jr., PE, PP, CME, reviewed his report with the Board. Mr. Roorda testified that the Applicants provided two surveys; one from 1998 and an updated survey. The updated survey satisfied the first comment in his report. Mr. Roorda also testified that the Applicants sought a "C(1)" hardship variance. Mr. Roorda reviewed the relevant testimony presented by Mr. Aviles, including why the pergola's location was chosen, the proximity to the pool, and the constraints from the easements.

WHEREAS, the application was open to public comment during the aforesaid hearing, and no additional members spoke in support of or against the application, with the exception of Mr. Aviles' neighbors who spoke during the application; and

WHEREAS, the Board has considered and incorporates herein the review letter submitted by Board engineer and planner, Wayne Roorda, Jr., PE, PP, CME, dated February 16, 2023, and the Board has carefully considered all the documents submitted and the testimony of all the witnesses; and

WHEREAS, the Board has made the following findings of fact and conclusions of law:

1. Located in the R-AB Zoning District, the Property is a rectangular lot located at 521 Coleman Drive, bordered by a residential property on each side, and East Academy Street to the rear. The Property, identified as Block 2001.05, Lot 11, is approximately 0.38 acres, and contains a single-family dwelling, a partially built pergola, an in-ground swimming pool, a detached wood shed, fencing and other related improvements. Three easements constrain the Property, including a 50-foot wide utility easement owned by South Jersey Gas Company that severely limits use of the right side yard and backyard. The Applicants sought a "C(1)" hardship variance under N.J.S.A. 40:55D-70c(1) to complete construction of the partially built pergola, as the structure is located within the 5 foot side yard setback requirement. The partially built pergola has eight posts and a sloped roof, and currently has no gutters or downspouts. One post is located 8 feet and 6 inches from the in-ground swimming pool, inside the 10-foot buffer required by the New Jersey Uniform Commercial Code.
2. An applicant seeking a bulk variance under N.J.S.A. 40:55D-70c(1) must establish the positive and negative criteria. To establish positive criteria for a hardship variance, an applicant must establish an undue hardship, either by way of the specific shape, topographic or unique physical features, or extraordinary situation uniquely affecting the property. To establish the negative criteria, an applicant must establish

that a variance can be granted without substantial detriment to the public good, and without substantial impairment of the zone plan and zoning ordinance.

3. The Board finds that Mr. Aviles met his burden and established the positive and negative criteria for the pergola. For the positive criteria, a sufficient hardship exists as most of the right side of the backyard is constrained by the South Jersey Gas Company utility easement. As a result of this easement, the already-existing in-ground pool, detached wood shed, pavers, and flagged stone, there is no other appropriate location for the pergola. The Board also finds that the pergola must be placed within the 5-foot side yard setback to avoid being within the required 10-foot buffer between the structure and the in-ground swimming pool. As for the negative criteria, the Board finds that there would be no substantial detriment to the public good, and the structure will not substantially impair the intent and purpose of the zone plan and ordinance since many of the Applicants' neighbors support construction of the pergola, Mr. Aviles agreed to install gutters and a downspout to prevent stormwater from running onto the adjacent property, and a condition of approval requires that the Applicants obtain a building permit, construction permit, and undergo the proper inspections to insure safety of the structure.

WHEREAS, after deliberation, a motion was made to grant approval of the Relief Requested, subject to certain conditions, as set forth herein, and was approved by a 6 yes to 0 no vote.

NOW, THEREFORE, BE IT RESOLVED by the Borough of Clayton Planning Board, that it hereby approves the application for a "C(1)" hardship variance under N.J.S.A. 40:55D-70c(1) to allow Mr. Aviles to keep, and continue to construct, the pergola as a detached accessory structure, located within the 5-foot side yard setback, contingent upon the following conditions:

1. Applicants must install a gutter and downspout on the roof of the structure to prevent storm water from running onto to adjacent property.
2. Applicants must comply with the New Jersey Uniform Construction Code requirement of providing 10 feet of separation between a structure and in-ground swimming pool, by moving the structure away from the pool or making the necessary alterations.
3. Applicants must obtain a building permit, construction permit, and undergo the proper inspections.
4. The structure must be compliant with applicable all building, construction, and Borough Codes.
5. The Applicants shall comply in all respects with the review letters submitted by the Board's professionals with the exception of waivers and/or variances granted.
6. The Applicants shall obtain the approvals of all other necessary governmental agencies having appropriate jurisdiction.


7. The Applicants shall post all performance bonds and inspection escrows, as applicable, and pay in full all review escrows prior to the approvals taking effect.


BE IT FURTHER RESOLVED, that certified copies of this Resolution shall be forwarded to the Applicants, Borough Clerk, Borough Construction Official, Borough Tax Assessor, and the Borough Zoning Officer.

THIS RESOLUTION DULY ADOPTED at a regular meeting of the Borough of Clayton Planning Board held on Monday, March 27, 2023.

Attest:

**Borough of Clayton Combined Planning
Board and Zoning Board of Adjustment**


Debbie A. Schlosser, Secretary

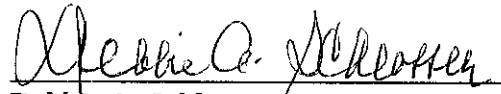

By: Joe Abate, Chairman

ROLL CALL VOTE

THOSE IN FAVOR	<u>7</u>
THOSE OPPOSED	<u>0</u>
THOSE ABSTAINED	<u>3</u>

CERTIFICATION

I hereby certify that the foregoing Resolution is a true copy of a Resolution adopted by the Borough of Clayton Combined Planning Board and Zoning Board of Adjustment at a regularly scheduled meeting of the Board held on March 27, 2023 at the Borough of Clayton Municipal Building, 125 Delsea Drive, Clayton, New Jersey 08312 at 7:00 p.m. and memorializes the decision reached by said Board on the herein application at the Board's February 27, 2023 meeting and public hearing.


Debbie A. Schlosser, Secretary

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