

RESOLUTION #2017-12

**RESOLUTION OF THE BOARD OF ADJUSTMENT
OF THE BOROUGH OF HAWTHORNE
(the "BOARD")**

In the matter of:

**Royal Realty LLC (the "Applicant")
15-27 Royal Avenue
Block 29, Lots 4,5,6 & 7
Hawthorne, New Jersey (the "Property" or the "Premises")**

WHEREAS, Applicant made application to the Board for Site Plan, Minor Subdivision, "d" Variance and "c" Variance relief; and

WHEREAS, Applicant also requested this Board to render an interpretation regarding the following question:

Whether Applicant's request for variance relief from Borough of Hawthorne Zoning Code provision 540-18, dictating the maximum number of two bedroom units in a multi family structure, is a "c" variance or a "d" variance ?; and

WHEREAS, Applicant first commenced with its entire presentation on all issues at the Board's September 18, 2017 and October 16, 2017 meetings; and

WHEREAS, a group of neighbors represented by Counsel, has appeared in opposition to the development application; and

WHEREAS, Applicant thereafter modified its application and withdrew all d variance requests; and

WHEREAS, The only issue before this Board (and the only item giving this Board jurisdiction) is the interpretation request as set forth above; and

WHEREAS, The Board entertained arguments and testimony at its November 20, 2017 hearing only as it pertained to the interpretation.

NOW THEREFORE, based on all of the arguments and evidence presented, the Board finds as follows:

1. Applicant, among the relief sought, seeks permission to have 28 two bedroom units constructed in its proposed 32 unit residential structure;

2. This results in 87.5% percent of the units proposed as two bedroom units;

3. Borough of Hawthorne Zoning Code: 540-18 reads in its entirety as follows:

§540-18. Density. The maximum density permitted shall not exceed 24 dwelling units per net acre, excluding streets and interior driveways. There shall be no apartments with more than two bedrooms, and the number of two bedrooms apartments shall not exceed 10% of the total number of units. A “bedroom” shall be interpreted to mean any room other than one intended and used exclusively as a kitchen, living room, dining room or bathroom. Uses of rooms or sleeping purposes when not so designated on submitted plans shall be considered a violation of any certificate of occupancy issued pursuant to such plans.

4. N.J.S.A. 40:55D-70(d) provides in pertinent part that the Board of Adjustment may “...[i]n particular cases, grant a variance to allow departure from ... an increase in the permitted density as defined in ...[N.J.S.A.]40:55D-4” (emphasis supplied). Also “If an application for development requests one or more variances but not a variance for a purpose enumerated in subsection d of this section, the decision on the requested variance or variances shall be rendered under subsection c of this section” (N.J.S.A. 40:55S-70(d)).

5. N.J.S.A 40:55d-4 defines “Density” as “...the permitted number of dwelling units per gross area of land that is the subject of an application for development...”

The Board specifically notes that the MLUL definition of “density” is devoid of any reference to the number of bedrooms in a unit.

6. The Board entertained the legal arguments of counsel, Mr. Vogel and Ms. Rubright, as well as testimony from Anthony Gallerano and David Novak, both licensed professional planners.

7. Mr. Gallerano was called on behalf of the neighboring objector’s represented by Ms. Rubright. In essence, Mr. Gallerano testified that the two bedroom maximum in the code is the “equivalent” of creating higher density requiring d variance relief.

8. Mr. Novak is the Board’s Planner. He testified that the excess two bedroom variance is to be viewed as a question of unit distribution, not density.


9. Essentially, the question becomes whether this Board should adopt the plain meaning of the MLUL. This Board concludes it is the proper analysis. The plain language is clear: a density variance is directly tied into the number of units and not the bedrooms in a unit.

10. We note that no binding or persuasive authority has been cited which would require this Board to consider the two bedroom deviation as a “d” variance. On the contrary, persuasive authority is found in Cox; New Jersey Zoning and Land Use Administration, 2017, at page 754 which reads:

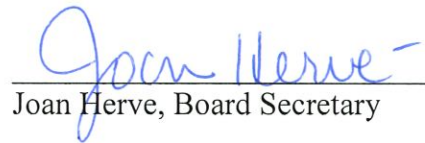
It should also be noted that the permitted number of dwelling units per gross acre may be arrived at indirectly. For example, some ordinances seek to control density in terms of the number of “bedrooms per acre.” The obvious effect of such a provision is to limit the number of dwelling units per acre, but exceeding the number of bedrooms per acre would not require a d(4) variance because density is not defined in terms of bedrooms per acre.

11. For all the foregoing reasons we conclude that the variance from §540-18, capping the number of two bedroom units at 10%, is “C” Variance.

The undersigned certifies that the within Resolution was adopted by the Board and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on December 18, 2017.



David Schroter, Acting Chairman



Joan Herve, Board Secretary

OFFERED BY: Chamberlin
SECONDED BY: Cottitta
VOTE: Ayes 4
Nays 0