Resolution prepared by:
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RESOLUTION
APPEAL AND REVERSAL OF ZONING OFFICER DECISION
BROUGHT BY
DENISE NELLIS, JEREMY ARTISOROST, KRISTEN STAFORD, RAYMOND JANWICH, LINDA KLAWUNN, CHRISTINE AND MICHAEL MATARESE, DIANE MARIE PATRICK

UNIFIED PLANNING BOARD
BOROUGH OF KEYPORT

BLOCK 14, LOT 8
Application # 24-04
171 THERESE STREET

WHEREAS, Denise Nellis[1], Jeremy Artisorost, Kristen Staford, Raymond Janwich, Linda Klawunn, Christine and Michael Matarese and Diane Marie Patrick have all filed an appeal pursuant to the provisions of N.J.S.A. 40:55D-70(a) seeking to reverse the decision of the Borough Zoning Officer dated December 8, 2023 granting permission to an entity known as A1 Railing to allow a pre-existing non-conforming marine boat repair business located at 171 Therese Street and officially known as Block 14, Lot 8 on the tax map of the Borough, to engage in a "change of business", as of right and without any variance relief, into a business producing gates, railings and other iron works which are completely unrelated to boat repairs;

WHEREAS, the owners of the property at 171 Therese Street, Douglas Stout and Mark D. Wasco, the entity which sought the zoning application, A1 Railing, as well as the Borough's Zoning Officer David Olsen, were all provided with notice of the appeal hearing and given every opportunity to be heard; and

WHEREAS, a public hearing on the appeal was conducted during a regularly scheduled meeting of the Unified Planning Board held on March 28, 2024;

NOW THEREFORE, be it Resolved by the Unified Planning Board of the Borough of Keyport that the following findings of facts are made:

1. The property located at 171 Therese Street, which is officially known as Block 14, Lot 8 on the official tax map of the Borough, is located within the Borough's RA Single Family Zoning District.
2. The subject location is a the site of a marine boat repair business. Such a use is not permitted within the aforesaid RA Zoning District. Nevertheless, the current use has long existed at the location and is therefore a pre-existing non-conforming use which is entitled to continue pursuant to the provisions of N.J.S.A. 40:55D-68.

[1] The Board acknowledges that the appellant, Denise Nellis, is also the Planning Board Secretary. As such, Ms. Nellis recused herself from all aspects of this appeal. All Secretary duties associated with this appeal were instead performed by the Borough Clerk, Michele Clark.

3. On November 22, 2023, an applicant known as A1 Railing of 399 Locust Street, Keyport, New Jersey, applied to the Borough's Zoning Officer, by way of Application # ZA-23-297, for a "Change of Business" so as to allow the business at 171 Therese Avenue to not only engage in marine/boat repairs, but also perform work on "railings, gates and misc ironworks". This request was granted by the Zoning Officer, David Olsen, on December 8, 2023 as Permit Number ZP-23-0248. The reason given for the approval on the permit was that the proposed change of business was "permitted by ordinance". The work approved by the Zoning Officer was thereafter commenced at the site.

4. The appellants in this matter, Denise Nellis, Jeremy Artisorost, Kristen Staford, Raymond Janwich, Linda Klawunn, Christine and Michael Matarese and Diane Marie Patrick, all neighbors of 171 Therese Avenue, filed the subject appeal within twenty (20) days of learning of the commencement of the "change of business" at the site. Each concede that a Marine/Boat Repair business has long existed at the site. Their complaint is that the changing of that business into one which also performs work on "railing, gates and misc ironworks" goes well beyond the type of work which would be performed by a "marine/boat repair" business. As such, they argue the "change of business" request made to the Zoning Officer should have been denied and the applicant should have been sent to the Planning Board to seek use variance relief pursuant to the provisions of either N.J.S.A. 40:55D-70(d)(1) or at the very least, N.J.S.A. 40:55D-70(d)(2) in order to seek an expansion of the pre-existing non-conforming use.[2]

5. During the hearing, Mr. Olsen testified that his indication on the zoning permit that the "railing, gates and misc. ironworks" business was "permitted by ordinance" was a typographical error on his behalf. He fully acknowledged this was not the case since such a use is clearly not permitted within the Borough's RA Zoning District. Instead, Mr. Olsen indicated he had found the proposed "change of business" to be permitted because in his view the fact that a marine/boat repair use was operating at the site somehow "re-zoned" the property from a RA Zoning District into a Light Industrial Zone. He indicated that the existing building was not conducive to residential use, so therefore any light industrial type use should be permitted there as of right.

6. Douglas Stout, one of the property owners of 171 Therese Avenue, and Dennis Terwilliger a principal of the applicant, A1 Railing, were both present at the hearing. They explained the

[2] During the course of the hearing it was indicated that the owners of 171 Therese Avenue also engage in automobile repairs at the site. This use was not appealed by the appellants and therefore is not being dealt with in this Resolution. However, it was also revealed during the hearing by the Zoning Officer, David Olsen, that he is unaware of when said use commenced as he had never approved it. It was believed the Zoning Department would be conducting a further investigation into whether such work is also pre-existing non-conforming and nothing in this Resolution should be read as permitting such.

type of work being performed at the site, and confirmed that some of it was not related at all to marine/boat repairs. Mr. Terwilliger specifically confirmed that he works with railings for residential homes.

7. Other residents of the Borough did speak at the hearing, both in favor and against the use which is currently being performed at the site.

CONCLUSIONS

8. In considering this appeal, the Board wishes to make clear that it is not making a decision on whether the work currently being performed at the site is appropriate. That is not the question before the Board at the moment and nothing in this Resolution should be read as indicating whether or not such uses would be approved if either the property owners or the applicant, A1 Railing, were to seek use variance relief from the Board.

9. The sole issue before the Board at this time is whether the Zoning Officer's decision to issue Permit ZP-23-0248 and thereby allow a "Change of Business" to occur at 171 Therese Avenue without the need for any variance relief whatsoever, and without the giving of any public notice, was appropriate or not.

10. The Board has no choice but to reject the Zoning Officer's indication that he appropriately granted the requested "Change of Business" because the portion of the RA Zoning District where the property in question was located had somehow been transformed into a Light Industrial Zone simply because a pre-existing non-conforming Marine/Boat Repair business had long existed at the site and the existing building was not conducive to being a residence. The Board rejects this argument because it is simply not how the zoning laws of the State of New Jersey work.

11. The Board finds that pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et. seq., and all known judicial precedent dealing with such, changes in zoning are to be made by the governing body of a municipality by way of enacting ordinances. It cannot be left to the Zoning Officer to determine what the zoning for a given site should or should not be.

12. While use variance relief from a zoning ordinance may be obtained from a Planning Board, such may only be granted upon the finding of certain criteria set forth within the provisions of N.J.S.A. 40:55D-70(d). Absent an applicant's ability to meet the required criteria for the use variance relief being sought, a Planning Board is required to deny the requested relief.

13. It is certainly true that an owner of property who commences a use prior to the date on which the municipality's governing body enacts an ordinance prohibiting that use may continue to operate as a pre-existing non-conforming use. Such a right is clearly established pursuant

to the provisions of N.J.S.A. 40:55D-68. That right is a limited one however.

14. If one wishes to expand a pre-existing non-conforming use beyond its current operations, they must apply to the Planning Board and seek relief pursuant to N.J.S.A. 40:55D-70(d)(2) in order to expand that use. That statute reads: "In particular cases for special reasons, [a board may] grant a variance to allow departure from regulations pursuant to article 8 of this act to permit .... (2) an expansion of a nonconforming use."

15. The idea put forward by the zoning officer that the property on which the non-conforming use is being performed somehow transforms the zoning district on that site into a zone which fits that use is simply not true. If it were the case, there would be no need for the provisions of N.J.S.A. 40:55D-70(d)(2) since the property owner would automatically be able to perform, as of right, whatever use he wished that fit the revised zoning definition, without any need for the Board to review same. The argument advanced by the Zoning Officer in this instance is simply not legally accurate as a result.

16. For the above reasons, the Board has no choice but to reverse the decision of the Zoning Officer in this matter. Zoning Permit ZP-23-0248 is therefore reversed and is now null and void.

17. As previously noted, if the property owner or applicant wishes to seek approval to conduct "a change of business" at the subject site beyond the pre-existing non-conforming marine/boat repair operation, they are free to apply to the Planning Board for a use variance. At that time a public hearing, with notice to the public, will occur and whether variance relief should be granted can be determined in the appropriate setting with a full record being established.

18. The Board does wish to make very clear that it is not making a determination at this time whether a use variance pursuant to N.J.S.A. 40:55D-70(d)(2) or one pursuant to N.J.S.A. 40:55D-70(d)(1), seeking relief to operate a use prohibited by the ordinance, is required in this situation. Further review may in fact find that the new uses being proposed by the applicant for the site go well beyond those which could be considered a mere expansion of the existing nonconforming use. That determination cannot be made however until a proper application is made to the Board and its specifics can be properly analyzed by the Board's Professionals.

NOW THEREFORE, be it resolved by the Unified Planning Board of the Borough of Keyport that for all of the reasons stated, the appeal brought by the appellants in this matter is hereby granted and zoning permit ZP-23-0248 is accordingly reversed and declared null and void.

NOW THEREFORE, be it further resolved, that the acting board secretary for this matter is hereby directed to publish adequate notice of this Resolution in the official newspaper of the

Borough of Keyport at the cost of the appellants, within ten days, and provide a copy of this Resolution, along with proof of publication to the appellants, the zoning officer, the property owners and the applicant, A1 Railing.

The foregoing was Moved by Chairman Merla, second by Mayor Araneo
and on Roll Call, the following vote was recorded:

Affirmative: Mayor Araneo, Chairman Merla, H. Aumack, M. Sessa
Negative:
Abstentions:

The foregoing is a true copy of a Resolution adopted by the Unified Planning Board of the Borough of Keyport as copied from the Minutes of its meeting on May 23, 2024.

Michele Clark

Michele Clark, Acting Secretary of the Board