

**Borough of Highlands
Zoning Board of Adjustment
Regular Meeting
February 6, 2014**

Meeting Location: Highlands Elementary School, 360 Navesink Ave., Highlands

Mr. Gallagher called the meeting to order at 7:35.

Mr. Gallagher asked all to stand for the Pledge of Allegiance.

Mrs. Cummins made the following statement: As per requirement of P.L. 1975, Chapter 231, notice is hereby given that this is a Regular Meeting of the Borough of Highlands Zoning Board of Adjustment and all requirements have been met. Notice has been transmitted to the Asbury Park Press and the Two River Times. Notice has been posted on the public bulletin board.

ROLL CALL:

Present: Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. Fox; Mr. O'Neil; Ms. Pezzullo, Ms. Ziembra

Absent: Mr. Braswell

Late Arrival: None

**Also Present: Carolyn Cummins, Board Secretary
Greg Baxter, Esq., Board Attorney
Robert Keady, P.E., Board Engineer**

New Business

**ZB#2014-2 Yaroli, Steven
32 Cornwall St., Block 52 Lot 14**

Mr. Baxter stated the following:

1. Change taxes paid through 12/13 not 12/14.
2. Need to get zoning denial.
3. This is not going on same footprint.
4. Give plot plan to scale.
5. The survey is not to scale.
6. The zoning chart and side yards would be good enough if to scale.
7. 2 fronts and 1 rear – revise chart.
8. Need to provide existing house survey.
9. Need photos of site and surrounding areas.
10. Need front setback of adjoining properties.

Mr. Gallagher moved to have the matter put on the March 6, 2014 calendar, seconded by Mr. Kutosh and approved on the following roll call vote:

ROLL CALL:

**AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil,
Ms. Pezzullo, Ms. Ziembra**

NAYES: None

ABSTAIN: None

**ZB#2014-13 Kijiji, Shama
15 Seadrift Ave., Block 72 Lot 34**

The Board reviewed the application.

1. There is a non-conforming structure, deck, which will be enclosed.
2. Need the architectural plan to show deck location and elevations
3. The deck will be closed in.
4. There needs to be a public notice.
5. Need photos of existing home and surrounding homes.
6. There will be a deck on the flat roof.

Mr. Gallagher moved to have the matter put on the March 6, 2014 calendar, seconded by Mr. Knox and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo

NAYES: None

ABSTAIN: None

Public Hearings on Unfinished Business

**ZB#2013-11 Davis, James & Patricia
139 Bay Ave., Block 46 Lot 5**

Mr. Baxter stated the history of the case. Applicant requested one month postponement to make sure they get letter from Engineer stating they do not need variances. They will then withdraw the application.

Mr. Gallagher offered a motion to carry this matter to March, 2014, seconded by Mr. O'Neil and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo

NAYES: None

ABSTAIN: None

New Business

**ZB#2014-1 Castillitto, Anthony
361 Shore Dr., Block 103 Lot 10**

Mr. Baxter stated that there is a problem with the notices. This is supposed to be the first hearing tonight, Mr. Castillitto is not present. The notice sent and publication were correct, but the problem is there are four problems with the property owner notices. The Bayshore Outfall Authority, the O'Leary's, Steiner and Taylor all have defects regarding where the notices were sent. And they were not sent certified/return receipt, they were sent certified. There needs to be proof. Mr. Baxter recommends adjourning the matter to March, with the understanding that the applicant does not have to re-notice everyone, just the four mentioned above and provide proof of notification.

Mr. Gallagher offered a motion to carry this matter to March, 2014, seconded by Mr. Mullen and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo

NAYES: None

ABSTAIN: None

Mr. Baxter gave status with regard to Canco. There currently is no case pending. The applicant asked if he would have to start over or just continue the case. Mr. Baxter explained to the Board the contents of a letter to the applicant.

Mr. Gallagher offered approval of Mr. Keady's contract, seconded by Mr. Kutosh and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo

NAYES: None

ABSTAIN: None

Mr. Kutosh offered a motion to approve the January 2, 2014 meeting minutes. Seconded by Mr. Gallagher and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher

NAYES: None

ABSTAIN: None

Mr. Kutosh offered a motion to approve Zoning Board Annual Report. Seconded by Mr. Gallagher and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo

NAYES: None

ABSTAIN: None

Mr. Gallagher offered a motion for a brief recess. Seconded by Mr. Mullen and all were in favor.

**ZB#2013-2 Hennessey, E.
75 Bay Ave., Block 41 Lot 8**

Kevin Kennedy, Esq. put appearance on the record.

Mr. Baxter stated that this case began when the applicant filed a pro se' application in March of 2013. The applicant was advised that he needed counsel because he was an LLC. The application remained the same from March of 2013 until two weeks ago, when applicant sent revised application seeking alternative relief. Initial relief was to have the Board over-rule the Zoning Officer's denial of zoning permit, saying it was not a permitted use in the zone. The prior permitted use under the 1990 approval resolution was abandoned.

Review was scheduled for May 2 meeting for hearing, adjourned to July 18 at applicant's request, then adjourned to September 5 at applicant's request, adjourned to October 3 at applicant's request and then adjourned to November 7 at applicant's request, finally adjourned to February 6.

Meanwhile, there was a summons issued in Municipal Court for not having a mercantile license. The case was withdrawn after location of the 1990 approval resolution. There have been a few other summons issued, and have not yet been heard.

- A-1 Amended use variance application
- A-2 1/23/14 Mr. Kennedy letter
- A-3 1/23/14 Mr. Kennedy letter to Board
- A-4 1/22/14 Mr. Kennedy letter to Mr. Leubner
- A-5 1/31/14 Mr. Kennedy letter to Mr. Leubner
- A-6 4/5/1990 Zoning Board minutes containing 1990 resolution
- B-1 1/30/14 Zoning Officer letter to Mr. Kennedy
- B-2 9/13/13 Mr. Baxter letter

Mr. Baxter read on the record from A-6:

Mr. Yacker read the following resolution memorializing it as well:

WHEREAS, Robert Hennessy has applied to the Board of Adjustment of the Borough of Highlands for a variance to conduct an automotive repair shop with some marine engine repair, and;

WHEREAS, the Board of Adjustment, after carefully considering the evidence has made the following findings and conclusions:

1. The property is in the B2 zone where the proposed use is not permitted;
2. If the variance is granted, it will reinstitute a use which has previously existed on the property;
3. The community has a need for a facility of this type;

4. The requested relief can granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zoning ordinance;
5. No site plan approval shall be required because of the existing facility;

NOW THEREFORE BE IT RESOLVED by the Board of Adjustment of the Borough of Highlands on this 5th day of April 1990 that the application be granted subject however to the following conditions:

- a. That the variance shall expire in nine (9) months unless the applicant complies with the requirements in Section 19-2.8 of the Land Use Procedure Ordinance;
- b. That absolutely no auto body repair work be done on the site;
- c. That all work and all storage of vehicles and equipment be conducted inside the building;
- d. All towing be restricted to the hours of operation except emergency towing for customers only, Monday through Friday, 7:30 a.m. to 6:30 p.m., Saturday 9:00 a.m. to 2:00 p.m., no Sundays;
- e. That the building be properly vented as to prevent an undue concentration of fumes;
- f. That the left property line (facing the building from the street) be screened with a six (6) foot stockade fence.

Mr. Baxter continued, stating that it is his understanding from reading the revised application that the applicant seeks relief. First is to appeal the zoning officer's denial saying they have an approved use and therefore do not need any further relief from the zoning officer and the permit should be issued. Second, interpreting the resolution and interpreting the zoning officers decision, the end result of which sought by the applicant is that they do not need a use variance because they already have one.

The next items of relief are if the Board disagrees with either of those reliefs sought, then they are requesting a use variance with any ancillary bulk variances that go with it.

Mr. Kennedy stated in a letter that he wanted to bifurcate the application and deal with the first two issues first. In other words, appealing the zoning officer's denial and interpreting whether or not the use variance was necessary rather than actually having a use variance hearing.

The Board is in the position of making an initial determination as to whether or not the 1990 resolution is still valid, and can the applicant rely on it. The issue that prompts the Board's consideration of that is whether or not the variance in 1990 has been since abandoned.

Mr. Gallagher wants applicant to address the conditions in Mr. Leubner's letter.

Opening Statement:

Mr. Kennedy: I am here tonight on behalf of James Swanton and Sea Bright Service Center with regard to the property located at 75 Bay Ave., Block 41 Lot 8. I am here tonight in a very unusual case. Applicants typically come before you seeking some type of variance relief, a use variance, bulk variance, etc., so that some type of use can be approved, created, established at a particular site.

What we have here tonight is the almost unheard of case wherein agents of the Borough are taking the position that a use variance previously granted by this Board has expired or otherwise abandoned. That is an extraordinary statement and an extraordinary claim with potentially extraordinarily devastating financial and emotional consequences for my client.

The general concept of abandonment is a somewhat unique issue for you as a Board to tackle at least in this instant capacity. I am sure the issue of abandonment has come up before you all before, but I would imagine that it typically comes up in the context of a preexisting non-confirming use which may have been abandoned.

For instance, some applicant might come here to this Board and say that he or she owns and operates a preexisting three family home in a zone where such three family use is not permitted, and where no variance relief was ever granted to operate a three family home. In those situations where the zoning officer rules that three family use has been abandoned, the applicant typically comes before this Board and says, listen, even though there was no specific variance approval for this particular three family use, the three family use existed long before the Borough of Highlands even had a zoning board prohibiting it.

Typically, in such a case, the applicant would say things like three family use always existed at the site, it was always like that, all we wanted to do was continue with and continue that existing

three family use. In those scenarios, typically the proof would involve testimony as to when a structure was built, how the structure was historically used, whether certificates of occupancy were issued, whether leases existed for the various tenants, how many water meters existed on the site, how the property was historically taxed and assessed by municipal officials, etc.

But that is not what we are dealing with tonight. Tonight we have an extraordinary situation where this Board previously granted a use variance for an automotive repair shop use at the site. And now agents of the Borough are claiming that that previously granted use variance has been abandoned. That is, there is an extraordinary request to essentially undo an approval which this zoning board previously granted. I could be wrong, but I can't imagine that anything like this has come before this Board. I still don't fully understand how or why this issue or alleged issue is being created or perpetrated, but we'll deal with that.

That notwithstanding, my client is here, and because of the significant expenses associated with this process, because of the significant financial implications associated with an adverse determination from this Board, because of the pending Municipal Court summonses that Mr. Baxter referenced, and we'll get into that momentarily, and because of the stress and costs and risk of my client potentially losing his business and/or a portion of rent at the site, and just because of the general stress associated with the matter, my client is here tonight, hopeful that the issue might be finally resolved tonight, or at least get on the road to being finally resolved.

I will ultimately discuss what I believe are the exact items that you as a Board need to voter on tonight. And they are very consistent with what Mr. Baxter just referenced. But first with the chair's consent, I want to give a brief synopsis of the factual circumstances so that you will know where I am trying to go with the testimony and evidence to be presented.

My client will provide, when he testifies, a much more detailed and precise presentation. But given the uniqueness and extraordinary nature of this application, I wanted to give a brief presentation which I feel might be helpful in your overall analysis.

Initially, as I would imagine, most long time Highlands residents are aware, the 75 Bay Ave., property has historically been used for multiple automotive repair shop types of purposes. Over the years, the site was used side by side for businesses such as Eastern Fleet Garage, Bay Transmission, A and L Auto Body, etc.

We then come to 1990 when Robert Arragone, or actually his tenant, Mr. Hennessy, (no relationship to current applicant) they submitted an application to this very governing board of adjustment and sought approval to utilize the property as an automotive repair shop, with marine engine repair use as well. And there's no magic here, no trickery, no deceit, a use variance was in fact granted.

In conjunction with that 1990 approval, the site was used as an automotive repair shop and a marine engine repair use. As the building is physically set up, there have historically been two simultaneous uses at the site. Namely, one use on one side of the building and another use on the other side of the building. Specifically, Swanton Fuel operates on one side and the other side has had a couple of different uses over the years.

That has historically been the case, and for various reasons, sometimes for brief periods of time, portions of the site or building were not utilized, not used for automotive repair shop purposes. And sometimes half the building was empty because there was no tenant.

Specifically, when my client purchased the property, in or about 2003, one existing tenant on one side of the building was a lobster/seafood retail type of operation, which my client terminated the tenant almost immediately after acquiring ownership interest. The seafood retail places was a little bit too messy, a little bit too smelly.

Additionally, for about three years from about 2007 to 2010, my client leased a portion of the site to his nephew in-law, as a favor, so that the young nephew could basically start his business career. That nephew in-law's name was Ted Shred, and he utilized a portion of the property as a candle warehouse. Ted Shred's candle surface wax.

Fast forward to October 2012 when Superstorm Sandy made landfall in NJ and cause devastating damage to the Jersey Shore area, particularly hard hitting to our Borough and to Sea Bright. My client's son-in-law, Rick Hennessy, owns and operates Sea Bright Service Center. Sea Bright Service Center, as the name implies, was operating out of Sea Bright, right at the foot of the Rumson/Sea Bright bridge.

Superstorm Sandy arrives, destroys the Sea Bright site where Sea Bright Service Center was operating, and Rick Hennessy is in a jam and needs a place to operate. In a pinch, he approaches his father-in-law, James Swanton, and they decide to let Sea Bright Service Center operate at this 75 Bay Ave. site.

Mr. Swanton and Rick Hennessy know that the 75 Bay Ave. has always historically been utilized for automotive repair shop purposes. The space was available and it was a nice fit and a nice way to alleviate and otherwise compromise or minimize some of the issues associated with the storms displacement of Rick Hennessey's place of business.

That is what is at the heart of this controversy. Because the site has historically been utilized for automotive repair shop purposes, my client and Rick Hennessy were unaware that they needed to obtain a mercantile license from the Borough of Highlands.

Now, should they have known that a mercantile license was necessary? Perhaps so, but they didn't. So they are told to apply for a mercantile license, as Mr. Baxter alluded to. They applied for a mercantile license and municipal officials say we cannot give you a mercantile license until such time as you have zoning approval.

So time goes by, no mercantile license was issued, and a Municipal Court summons was issued. As Mr. Baxter indicated, the summons was for the failure to obtain a mercantile license.

It is then subsequently realized that in 1990 the Highlands Zoning Board of Adjustment granted use variance approval for an automotive repair shop use to operate at the site. We think, great, that's the end of the story, that's the end of the problem and that's the end of the controversy. Confirming letters were submitted, a letter was sent to the Zoning Board say let's withdraw our application, and the Municipal Court case was withdrawn. We think all is good. All was not good, it was not over.

The mercantile license was not issued and new and multiple Municipal Court summonses were issued for the exact same charge or operating a business without a mercantile license. So there's new Municipal Court appearances required. Municipal officials have essentially threatened my client with thousands and thousands of dollars worth of fines. And everybody is totally stressed out about the situation. My client is wondering what's going on and where is this coming from.

So thereafter, we get the September 13th, 2013 letter from the Board attorney that was marked into evidence as B2. I am paraphrasing here, it says, "It has been brought to my attention that there have been some intervening uses at the site over the years. And that because of the same, the previously granted use variance approval may have expired or otherwise been abandoned."

This opinion was essentially reaffirmed by the Zoning Officer in his written decision dated January 30th, 2014. As indicated, among other things, the Zoning Officer indicated that the previously approved use variance was abandoned because, and he adds in there, per prevailing a Borough ordinance that says because automotive repair use was voluntarily discontinued for a period of 24 consecutive months, and thus the same is automatically abandoned. I have many legal issues with that opinion.

My first reaction, respectfully, was, are you kidding me, a variance once granted is permanent and it runs with the land. That's basic zoning law 101. And I also then said that the concept of abandonment traditionally arises in the scenario in those preexisting non-conforming uses.

So the Board attorney indicated that he has been directed, or has been made aware of, certain cases which, although from 1958 or 59, stand for the proposition that in some circumstances, if the Zoning Board approved use is affirmatively abandoned, the previously granted use variance might be abandoned as well.

Like I said, I don't know why these issues are created or pursued or noted, and I think it's an extremely dangerous precedent for all individuals and applicants who have previously obtained use variances from the Board, that is the scenario and issue presented today.

So here we are tonight, the September 13th, 2013 correspondence from the Board attorney provides that intervening uses at the site over the years may have caused the automotive repair use approval to have been abandoned. An opinion subsequently affirmed by the zoning officer. Per the attorney's direction, we need to come here and prove that abandonment has not occurred.

So now, our position is quite clear, namely, the previously approved automotive repair use variance approval has not been abandoned. And against this exhaustive and extensive and complicated and precedent setting backdrop, we come here tonight seeking a variety form of alternative relief.

There's a complicated and complex issues with corresponding chart of what we need to vote on. And as Mr. Baxter indicated, if the first vote goes a certain way, you don't need to go to vote number two. And if you lose and there's a no vote, you're going to have to go to option number 2 and option number 3, etc.

So our requested relief generally includes an appeal of the determination of the zoning officer that the proposed automotive repair shop use is not permitted, notwithstanding the prior granted use variance, a reversal of the zoning officer's decision, finding an automatic abandonment because there was a two year period when the automotive repair shop use was not used, essentially an interpretation that the previously granted use variance for this site runs with the land and remains in full force and effect, and interpretation of finding that the automotive repair shop use was not abandoned. If all those issues are not successful, subject to appeal and all those other things, we would come to the issue of would we apply or do we get a new use variance to operate an automotive repair shop at the site and/or site plan approval and/or waiver of site plan approval.

Now, let me address some legal issues, and I certainly defer to your board attorney to provide you with legal guidance on this issue as well. As indicated in my opinion, the central and first and paramount question presented tonight that you all as a Board will decide, is, has the previously approved automotive repair use at the site been abandoned because of some prior and/or brief intervening uses.

In order to address that question, I want to give you some legal references and guidelines as to what NJ law says abandonment is and what it says abandonments is not.

Generally speaking, in order for there to be a finding of abandonment, case law is quite clear that there must be two things, one, and intent to abandon, and two, some physical manifestation evidencing that intent to abandon.

Additionally, every single case on the matter, every single case on the matter, basically contains a provision that says "near non-use does not equal abandonment". And for obvious reasons, near non-use, does not equal abandonment that argument is going to be a very strong part of our case.

Mr. Baxter: I agree with Mr. Kennedy's legal position that mere non-use is not abandonment, in my mind, there's no legal issue there. So I don't think you need to address that part of it.

Mr. Kennedy: By way of example, let's look at the somewhat common or typical scenario involving an abandonment issue. And let's just for purposes of ease, let's return to my three family home scenario referenced at the beginning of my presentation.

Suppose you have an individual who says, I have a three family home, however, you might have the Borough zoning officer saying that's not a legal three family home, and that use at the site is single family home, which is permitted. In those situations, the zoning office might rule that the preexisting three family use was abandoned in favor of the single family use. And if there's an appeal of that decision, that argument, that appeal comes to you all as the zoning board. And in general, you as board members will look at all the facts and all the circumstances pertaining to that case.

In that scenario, you might look at things like the owners' intent, did he or she intend to abandon single family use at the site. Was there some type of physical manifestation of the intent to abandon that three family use. For instance, were certificates of occupancy issued, evidencing that the home was a single family home. Were the tax assessments and tax records prepared indicating that the house is taxed as and assessed as a single family home.

Were the two upstairs kitchens physically removed from the premises so there's only one kitchen in the structure, again indicating that it's a single family use. Were there three water meters at the site, which have been removed, and now only one water meter. Would have three mailboxes and now only one mailbox. Were interior walls, which had been separating the structure into three units, were they removed so that there was just one large unit. Were three separate exterior outside doors eliminated and replaced with one entrance.

And based upon and depending upon those circumstances presented, you all as Board members would be asked to determine that based upon the totality of the circumstances there has been an abandonment and you would issue your ruling, determination based upon the totality of those circumstances.

So tonight's assignment, in my opinion, will be no different. Through the testimony of my client you will hear that the building at 75 Bay Ave. essentially exists today as it did in 1990 when the use variance approval was approved, except for some cosmetic and esthetic upgrades.

You're going to hear that the building is designed for automotive repair shop use. And the brief use of one half of the site as a lobster fishing business, and the brief use as a candle warehouse use, did not change that. You're going to hear testimony about the huge garage doors and garage bays which still exist at the site and in fact that they are indicative and synonymous with automotive repair use.

You're going to hear testimony about the interior layout of the existing building, with its' big open spaces and concrete floors where one can work on automobiles, and you're going to hear that that's consistent with and synonymous with automotive repair use at the site.

You're going to hear that there still exists at the site the tire air compressor machine which is used in most automotive repairs shops so you can fill the tires with air and also for some of the tools. You're going to hear testimony that the footings for the car lifts still exist at the site. You're going to hear testimony and see pictures of the tall ceilings that exist in the building to accommodate the fact that the car lifts are going to lift up the cars and people are going to be working on them underneath.

You're going to see pictures and hear testimony about the expansive curb cut in driveway at the site which facilitates cars entering and exiting the facility, consistent with an automotive repair use. And you're going to hear testimony about the fact that the interior of the building was not fitted with dividing partitions, office suites were not created there, there's not wood floors or tile floors, everything there says automotive repair use. Most importantly, you're going to hear my client say never ever did he have any intention to abandon the automotive repair use at the site.

All these things are important factors, which taken together were evidence that my client never intended to abandon automotive repair use at the site, and certainly never effectuated any improvements or physical changes at the site, which would even remotely suggest that automotive repair use was abandoned.

Simply stated, the outside of the building looks like it is for automotive repair use, the inside of the building looks like it is an automotive repair use. That is how the building was designed, that is how the building has been historically utilized, and that is how the applicant wants to continue to utilize half of the building.

After reviewing all the evidence presented and after considering the totality of the circumstances, I would suggest that you all as Board members go with your gut, and keep in mind the testimony presented, and your knowledge and familiarity with the site, and the uses which existed at the site, over the many many years of you all being involved with the Borough of Highlands.

After such an analysis, it is my sincere hope that the majority of this Board will find that there has been no abandonment of the previously approved automotive repair use.

In conclusion, I want to mention what the preliminary aspect of this case is not about, in my opinion. In determining the abandonment issue, in my opinion, this case is not about whether you think the Zoning Board was right in 1990 to approve an automotive repair use at the site, respectfully that ship has sailed, unless we might have to come back and visit that, hopefully not. This case is not about whether you think automotive repair use should be permitted in the zone under today's zoning regulations and it's not about whether you think automotive repair use is a good fit for the site. It's not about whether or not a mercantile license should have been issued.

So in my opinion, the threshold question that you all need to address, is whether there has been an abandonment of the automotive repair use approval as a result of intervening uses at the site over the years. That is, do you believe that the automotive repair use for the site, and all the rights associated therewith, were abandoned simply because the lobster/sea food retail use previously occupied half of the site, and/or simply because the candle warehouse use briefly occupied half of the site, and/or simply because half of the site at times remained vacant.

As indicated, I hope and trust you will find there has been no such advantage. If you find that there has been no abandonment and you vote to reverse the decision of the zoning officer, it would be my opinion that the other forms of alternative relief would not be necessary. Parenthetically, as Mr. Baxter indicated, if you find that there has been abandonment and within the confines of any appeal procedures, we would need to come back seeking use variance approval. We are not prepared to do that tonight as Mr. Baxter indicated.

Mr. Chairman, I truly thank you for allowing me to take a long time for my introduction. I know this is not standard, but given the procedural complexities of the case, given the multiple Municipal Court summonses which were previously dismissed, and now currently pending, and the financially devastating effect an adverse decision has, and given the uniqueness of this application, and the various forms of relief requested, I thought it would be appropriate and necessary to go into a long introduction.

For the record, the obvious benefit of my long introduction is that when it comes time for my conclusion, will be correspondingly shorter. With that said, unless you have questions, I have one witness, Mr. Swanton.

Mr. Baxter: I agree with Mr. Kennedy's analysis that there is ultimately one question to the Board at this juncture, and that is whether the property has been abandoned as a matter of law. And then of course we have to hear the testimony so the Board can make that decision. If you decide at the end that it has not been abandoned, then the reverse the Zoning Officer's decision and the property could continue to be operated for the use permitted in the 1990 resolution under the conditions of the 1990 resolution. That would be the end under that scenario, unless the applicant wanted to expand on the conditions.

Conversely, if the Board finds that the use has been abandoned, unless there is an appeal of that part of it, the applicant would go forward with the use variance application. This is not a use variance application at this juncture.

Mr. Gallagher questions meeting the conditions in Mr. Leubner's letter.

Mr. Baxter: The conditions still apply. If the Board determines the use has not been abandoned, then the 1990 resolution remains in effect as do all of the conditions.

Mr. Gallagher: So the variance was granted subject to conditions, and if there conditions are not met, that becomes a code violation.

Mr. Baxter: That is an enforcement issue.

The Board discussed the resolution.

Mr. Baxter explained abandonment opinion. He gave examples of overt act and intention of the property owner.

James Swanton, 214 Sleepy Hollow Rd, Middletown, was sworn in and gave the following testimony:

He has been the owner of the property for 11 years.
The property was in shambles at the time of purchase. He made improvements.
He described the condition of the property at the time of purchase.
The property was a lobster pound and marine repair.

Mr. Kennedy: For the record regarding the mercantile, the clerk's files were lost in the flood.

Mr. Swanton continued:

He re-stuccoed the building and further described the repairs.
The neighbors were happy with the repairs.
The footings and car lifts were still there.
Currently the building is 1 storage building, 7,000 square feet, 14 foot ceilings. 1 side is auto repair and the other side HVAC storage shop.
Sea Bright Service Center started one month after Superstorm Sandy.
Some of the surrounding uses are seafood establishment, Tinker, a hobby shop, single family home, the American Legion, a marina, Bahrs' landing, truck parking lot, Lusty Lobster.
He has knowledge of prior owners and uses.
1949 to 1978 the property was owned by Philip Gerimeta.

Other owners or uses were Als Fleet garage, Laytons transmission repair and body shop, A&L Auto Body, Aragon, 75 Bay Ave., LLC. Used as a marine engine repair and lobster pound. From 2003 to present he is the owner.

A-7 – title history

The property had 2 sides and still has 2 sides.
While Teds Shreds had flooring, the car lifts are on the other side.
The prior use was a factor in purchasing the site.
1990 was when the use variance was granted for auto repair.
Site was used as automotive after 1990 resolution.
Municipal Court summons issued for operating without a mercantile license.
He was told that it was dismissed.
He received letter from Mr. Baxter dated 9/13.
Then received another summons.
The Court matter is on hold pending zoning board decision.

Mr. Kennedy read the abandonment definition on the record.

There was no intent to abandon use.

A-8 6 photos

Mr. Swanton continued:

There is a large interior work space, which is typical of auto repair.
If use was abandoned, he would not keep large interior.
There has been flooding at the site at least three times.
If the site was for other use, the floor would not have been raised.
There is a 1 story tall ceiling for the car lifts.
If use was abandoned, he would have changed the layout of the building.
There is an air hose at the site, and an air compressor.
The permitted use in the zone would not need any of the building functions for any of the permitted uses.
It is not his intent to do anything other than keep up the building.
When he purchased the building he was told it was good for auto repair use, use as income, retirement property.
He chose his side because of access to the attic.

Public questions:

Doug Card, 28 Shrewsbury – has there been any complaints since Rick Hennessy started?

Mr. Swanton stated that there have been no complaints.

The Board opened the matter for public comments.

Dan Shields, 55 Shrewsbury Ave. – he stated that if the Board denies Mr. Swanton the opportunity to operate in a time of need, it is sending a poor message to the community. Mr. Swanton is a local, a friend to community and police. He is an asset to the community.

Doug Douty, Lusty Lobster – he is a neighbor to the site in question and is happy with the use at the site.

Joe Branior, 172 Linden Ave. – he stated that prior uses at the site in question were similar in nature.

Mike Kovic, 3 Woodland St. – he stated that Bay Ave. is suffering and this is a start. He spoke favorably of this business. Bay Ave. needs businesses.

Scott Seafert, 3 Prospect St. – he reiterated the previous uses, and stated that the use was never abandoned.

Paige Quast – This is a great family who runs two great businesses.

Public comment portion is closed.

Mr. Kennedy offered a closing statement:

The zoning officer's letter indicates that it should be abandoned because it violated the two year timeframe set forth in the ordinance. It is my opinion that it is overwhelmingly clear that a remote reliance on a two year timeframe in an ordinance to find abandonment, regardless of the facts of the case, absent finding intent to abandon and absent an overt physical act evidencing the intent to abandon is just wrong and impermissible. That is one of the reasons that we are seeking to reverse this decision.

Also, his letter references the fact that the ordinance is based on a two year limitation for preexisting, non-conforming uses. This is not a preexisting, non-conforming use, this is a use for which variance approval was granted.

In conclusion, my client comes here tonight in an extraordinary situation, essentially requesting that this Board does not undo what it affirmatively did in 1990. This is a very unique situation, unique application we were forced to make, a very unique set of circumstances, a very unique set of facts, when you consider that there was a 1990 use variance approval on point that agents of the Borough are now attempting to essentially undo.

If this type of scenario can engulf my client, it can engulf any other owner or any other applicant who previously obtained use variance approval. There are strange and unique legal issues involved here and I must admit that as a lawyer, elements of them are interesting and novel and something I wouldn't mind addressing in the friendly confines of a classroom.

I have a client, James Swanton, a real good guy, real good businessman, he is an individual who quietly goes about his business and does not try to stir up or otherwise invite trouble. He's a real good guy who just wants to run his business in a legally compliant fashion. He takes pride in the appearance of the building and made significant improvements.

I'm representing a guy who just wants to run a nice place, a nice operation. He's not really involved in municipal politics, but just wants to successfully run his business. A guy who is incredibly stressed by this whole application. I'm representing a guy who is facing multiple, still pending Municipal Court summonses where agents of the Borough have outwardly told us that we are facing thousands and thousands of dollars in fines associated with this site.

I'm representing a guy who is facing potential financial devastation with an adverse ruling or determination from this Board. A guy who is not regularly engaged in the practice of public speaking but is nonetheless forced to come here before you in this very public setting and to lay his financial life and story and business life on the line. I think he did an awfully good job.

We're dealing with real life, real people, real consequences associated with an adverse ruling. He's not a bad guy at all. The only thing we did wrong was we didn't get the mercantile license. We will deal with that. When this case is over, Mr. Swanton still has to deal with the Municipal Court summonses and the fines that are threatening. Hopefully this will be the end.

So basically, against those circumstances, all these circumstances and the totality of the circumstances, and again there happen to be an intent and evidence, we just don't think those factors are here tonight.

You heard my client, I asked him, did you have any intent to abandon this automotive repair use, he stated absolutely not. I asked if he did any physical change to abandon the automotive repair use, he stated absolutely not. For those reasons, I am respectfully requesting that the Board reverse the Zoning Officer's decision and find that there has been no abandonment.

Thank you.

Mr. Gallagher offered a motion to close the hearing, seconded by Mr. Knox and all were in favor.

The Board deliberated.

Mr. Gallagher: Mr. Kennedy and Mr. Swanton have made their case. There was no intent to abandon and to physical abandonment. Regarding Mr. Shields' testimony, not only would it be sending a terrible message about the community that we put them through this. He had a variance, records were destroyed in the flood, but put someone who was legally operating out of the property, who made an oversight, during a stressful time in the State's history where so many of us were devastated he forgot to get the mercantile license. I will gladly move that we find that they have proved their case in the 1990 variance.

Mr. Mullen: I would concur. I think that the case for abandonment has been well made by the applicant. I think that the original Zoning Board that head this case put appropriate restraints on the operation that took into consideration the environment, much like we would do if we had a full hearing. In that case, I would approve.

Mr. Kutoch: I do not feel it was abandoned. The applicant did a lot of improvements. I do not see any reason why we shouldn't continue it, as long as he follows whatever conditions were put on in 1990. I don't see any reason why they can't continue.

Mr. Knox: It seems to me that this has always been what it is right now, an automotive place. It almost seems odd that in the 90's there had to be a variance to begin with. We heard it was an automotive place 30/40 years prior to the 90's. I see no problem with it going forward as an automotive place.

Ms. Ziemba: This is my very first Zoning Board meeting. I think there were a lot of legal subtleties that were discussed here, very complex. I don't think there was a solid decision either way, but I agree that it is the right thing to do, to keep the business and keep the town healthy.

Ms. Pezzullo: I do agree with the majority that we need something in Highlands. Whether Sandy was a curse or a blessing in your case, because if it wasn't for the storm, the towing would not be in Highlands, it would still be in Sea Bright. Based on the need of the business in Highlands and the fact that throughout all the years, there has been testimony that there have been a repair in that building one way or another.

Mr. O'Neil: I concur.

Mr. Fox: Thank you for presenting a good strong case and making our job easier. I agree.

Mr. Gallagher offered approval of the application, seconded by Mr. Kutosh and approved on the following roll call vote:

ROLL CALL:

AYES: Mr. Fox, Mr. Kutosh, Mr. Knox, Mr. Gallagher, Mr. Mullen, Mr. O'Neil, Ms. Pezzullo
NAYES: None
ABSTAIN: None

Mr. Gallagher offered a motion to adjourn the meeting. Seconded by Mr. Kutosh and all were in favor.

The Meeting adjourned at 10:32 P.M.

Carolyn Cummins, Board Secretary

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