

Mr. Gallagher offered the following Resolution and moved on its adoption:

3/6/14

**RESOLUTION REVERSING DECISION OF ZONING OFFICIAL  
IN SEA SHORE TOWING, INC. (HENNESSEY)**

WHEREAS, ERIC HENNESSEY initially filed an application with the Highlands Zoning Board of Adjustment for use variance approval to operate an auto repair center at 75 Bay Avenue (Block 41, Lot 8) in the Borough of Highlands; and

WHEREAS, as the result of a further review of the borough's records and municipal court actions instituted by the borough, it was later determined that there was a resolution adopted by the Highlands Zoning Board of Adjustment in 1990 which granted use variance approval for this property; and

WHEREAS, the Board initially scheduled a hearing in this case for April 14, 2013, which hearing date was subsequently adjourned on five occasions, and ultimately heard on February 6, 2014; and

WHEREAS, the application was subsequently amended by the applicant's attorney, KEVIN E. KENNEDY, ESQ., to seek reversal of the Zoning Officer's decision that the proposed use was not permitted on the site; interpreting the 1990 resolution and borough ordinances to determine whether the auto repair use is currently permitted or whether variance approval may be

necessary; and use and bulk variance relief, depending on the Board's determination of the first two issues; and

WHEREAS, the applicant requested to bifurcate the matter, and have the Board first hear and determine whether or not the aforesaid 1990 board resolution was still valid or whether the resolution-approved use had been abandoned as a matter of law; and, depending on the Board's responses to those issues, to proceed at a later time on the use and bulk variance requests; and

WHEREAS, all jurisdictional requirements have been met, and proper notice has been given pursuant to the Municipal Land Use Law and borough ordinances, and the borough has jurisdiction to hear this application; and

WHEREAS, the Board considered the application at a public hearing on February 6, 2014; and

WHEREAS, the Board heard the testimony of the owner of the property, JAMES SWANTON; and

WHEREAS, several members of the public (DAN SHIELDS, DOUG DOUTY, JOE BRANIN, MIKE KOVIC, SCOTT SEUFFERT and PAGE FLOSS) testified, all of whom were in support of the Board reaching a determination that the approved use in the 1990 resolution had not been abandoned; and

WHEREAS, the applicant submitted the following documents in evidence:

- A-1 Amended use variance application (5 pages);
- A-2 1/23/14 Letter from KEVIN KENNEDY, ESQ. to Highlands Zoning Board of Adjustment (3 pages);
- A-3 1/23/14 Letter memorandum from KEVIN KENNEDY, ESQ. to Highlands Zoning Board of Adjustment (4 pages);
- A-4 1/22/14 Letter from KEVIN KENNEDY, ESQ. to DALE LEUBNER, Highlands Zoning Official (2 pages, with 3 pages of attachments);
- A-5 1/31/14 Letter from KEVIN KENNEDY, ESQ. to DALE LEUBNER, Zoning Officer, appealing his decision (2 pages);
- A-6 4/5/90 Minutes/decision of Highlands Zoning Board of Adjustment regarding the same property (begins on page 3);
- A-7 Title history prepared by Trident Abstract Co.
- A-8A through I Various photographs taken by KEVIN KENNEDY, ESQ. on 1/21/14;

AND, WHEREAS, the following exhibit were marked into evidence as Board exhibits:

- B-1 1/30/14 Letter from DALE LEUBNER, Highlands Zoning Official, denying zoning permit (2 pages);
- B-2 9/13/13 Letter memo from Zoning Board Attorney;

AND, WHEREAS, the Board, after considering the evidence and testimony, has made the following factual findings and conclusions:

1. JAMES SWANTON and his wife are the owners of property located at 75 Bay Avenue (Block 41, Lot 8) in the B-2-0 Zone.
2. This zone does not permit auto repair shops.

3. On April 5, 1990, the Zoning Board of Adjustment heard an application by ROBERT HENNESSEY, who applied for a variance to conduct an automotive repair shop with some marine engine repair, as a result of which the Board rendered the following resolution:

"1. The property is in the B-2 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 the need for a facility of this type.

4. The requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the Zoning Ordinance and Zone Plan.

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 5<sup>th</sup> day of April 1990 that the application be granted; subject, however, to the following conditions:

A. That the variance shall expire in nine months unless the applicant complies with the requirements of 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.-6:30 p.m.

Saturdays-9:00 a.m.-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 6' stockade fence."

4. Such resolution was adopted by a 6-0 vote of the Board.

5. The current owners purchased the property in 2003, at which time one side of the building was used for lobster/seafood sales, and the other side had been used for auto repairs. Shortly after taking title the owners evicted the lobster/seafood use.

6. In 2007 through 2010 part of the property was leased to the owners' nephew-in-law, TED SCHRED, and used as a candle warehouse.

7. Historically, and prior to the acquisition of the property by the SWANTONS, the property had been

used by AL ADAMS as a diesel mechanic shop, where he did diesel engine work for seven or eight years; by ARTIE LAYTON, who did auto body work, and his brother did auto mechanic work; and subsequently by ROBERT ARAGON, who took title of the property and did a variety of repair work, including engine repairs and boat repairs. During the 1950's and 1960's borough garbage trucks were parked in the structure.

8. Immediately following Superstorm Sandy in late October 2012 the SWANTONS' son-in-law, RICK HENNESSEY, who operates Sea Bright Service Center, had been displaced from Sea Bright and was looking for an alternate location. "In a pinch", the SWANTONS permitted MR. HENNESSEY to operate his auto repair and towing business from this site, thinking that, since the property had been used for the same or similar uses historically, there would be no problem in doing the same again.

9. The property owners did not obtain a mercantile license, though they now realize they needed to do so.

10. The failure to obtain a mercantile license resulted in the borough issuing the first of a series of summonses for failing to obtain such a license.

The initial summons was ultimately withdrawn by the town or dismissed by the municipal court (it was not clear from the testimony). Subsequently, the same charges were filed against the property owners, which summonses remain open today but have been transferred to the Rumson Municipal Court for hearing because of a conflict in the Highlands Municipal Court.

11. Currently the SWANTONS operate a HVAC shop for furnaces and boilers and storage of same, plus repairs, on the right-hand side of the building; and Sea Bright Service Center (HENNESSEY) operates an automotive repair business on the left-hand side.

12. The inside of the structure has not changed much since at least the late 1970's, if not before. It has always been a large open space, conducive to operating an automotive repair business. It also had a below-ground foundation for lifts, plus lifts for vehicles inside.

13. The interior of the structure is one floor, and the ceiling is quite high, allowing for the raising of vehicles so that work can be done underneath them. That design has remained for well upwards of 35 years.

14. The interior layout of the structure, as well as the large garage doors and the extremely wide curb cut, is conducive to vehicles driving into the building, and not conducive to operating a different type of commercial use, such as a store or office.

15. The SWANTONS have undertaken substantial repairs to the property, both inside and out. The inside repairs primarily involved re-flooring and covering up the underground portion of the lifts, which remain on the SWANTON side of the building.

16. The former owner, ROBERT ARAGON, is deceased and not available for testimony.

17. The Borough Clerk/Board Secretary made an effort to locate prior Certificates of Occupancy or mercantile licenses for this property; however, none of those records were able to be found, undoubtedly because of the damage to the municipal building caused by Superstorm Sandy.

18. MR. SWANTON testified, and the Board accepts his testimony as true, that he never intended to abandon the automotive repair use on the property, and that the configuration of both the exterior and interior of the building support that position.



19. In addition, with the building being located in an area which has flooded in the past, it would not be conducive to have the type of floor that is in this building used for something other than automotive repairs, since it would be subject to flooding for any type of retail or office use.

20. Both the Board Attorney and the applicant's attorney gave a lengthy introduction to the Board and the public, describing the history of the case as it reached the hearing before the Board, and further outlined the factual and legal issues to be determined by the Board. The Board Attorney advised, and the applicant's attorney agreed, that the only issue to be determined by the Board at this juncture was whether or not the 1990-approved automotive repair shop use has been abandoned as a matter of law, such determination to be based upon facts heard by the Board.

21. The Board finds that the applicant has clearly proven that there was neither an intent to abandon the automotive repair shop use nor any overt act done which would imply an intent to abandon the automotive repair shop use.

WHEREAS, the appeal from the Zoning Officer's decision, and interpretation, issues were heard by the Board at its meeting on February 6, 2014, and this resolution shall memorialize the Board's action taken at that meeting;

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Borough of Highlands that the Zoning Official's determination that the automotive repair shop use is not permitted on the premises is hereby reversed. The Board further finds that the automotive repair shop use was not abandoned. As a result, the Zoning Official shall issue a zoning permit to the property owner which allows the property owner or his tenant(s) to operate an automotive repair shop in accordance with the terms of this Board's April 5, 1990, resolution, the particulars of which are set forth earlier in this resolution;

AND BE IT FURTHER RESOLVED that, unless the Board is advised by the applicant's attorney that any other form of relief is requested as to this property, this matter has now been concluded before the Highlands Zoning Board of Adjustment. Seconded by Mr. Fox and adopted on the following roll call vote:

ROLL CALL:

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

NAYES: None

ABSTAIN: None

DATE: March 6, 2014

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Carolyn Cummins, Board Secretary

I hereby certify this to be a true copy of the Resolution adopted by the Borough of Highlands Zoning Board on March 6, 2014.

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Board Secretary