

25-002

**RESOLUTION OF MEMORIALIZATION REJECTING APPLICANT'S APPEAL OF ZONING OFFICER'S DENIAL OF A ZONING PERMIT TO ALLOW A PRE-EXISTING TWO-FAMILY DWELLING TO CONTINUE TO OPERATE AND DENYING APPLICANT'S REQUEST FOR A USE VARIANCE TO PERMIT SAID DWELLING TO CONTINUE TO BE OCCUPIED AS A TWO-FAMILY DWELLING ON LOT 23, BLOCK 39**

Approved: December 18, 2024  
Memorialized: January 22, 2025

**WHEREAS**, Travis James ("Applicant") is the owner of Lot 23 in Block 39 as noted on Tax Map for the Borough of Mount Arlington and having a street address of 20 Oak Street ("Property"); and

**WHEREAS**, on or about November 1, the Applicant filed a Zoning Permit application with the Zoning Officer for the Borough of Mount Arlington seeking a permit confirming that the pre-existing dwelling located on the Property could continue to be used as a lawful two-family dwelling; and

**WHEREAS**, on or about November 8, 2024, the Zoning Officer denied the zoning permit, finding that she could not grant an approval that the dwelling was a lawful pre-existing two-family dwelling and that the Applicant would require use variance approval from the Borough's Land Use Board ("Board"); and

**WHEREAS**, on or about November 13, 2024, the Applicant by and through his attorney, Robert J. Greenbaum, submitted a Notice of Appeal of the Zoning Officer's determination by through his attorney. The Notice included copies of the Applicant's Zoning Permit Application, Letter dated August 28, 2006, from then Zoning Officer, various Applications for Certificates of Habitability and the Certificates issues, Email Exchange dated October 23, 2015 between then Zoning Officer and the Applicant, and Applications for Certificates of Registration and Certificates issued to Applicant; and

**WHEREAS**, the Applicant submitted with his application the appropriate fees and escrow deposits; and

**WHEREAS**, the Board scheduled a public hearing for the appeal on December 18, 2024;

**WHEREAS**, prior to the public hearing the Applicant amended his Application to further

include a request a use variance to allow the dwelling to be use a two-family dwelling in the event that the Board denied the Appeal; and

**WHEREAS**, prior to the Application being heard, the Borough's Planner, Jessica Caldwell, P.P. issued a report dated December 12, 2024; and

**WHEREAS**, the Board conducted a public hearing on December 18, 2024, notice being required and lawfully provided; and

**WHEREAS**, the Applicant appeared by and through his attorney Mr. Greenbaum; and

**WHEREAS**, at the conclusion of the public hearing, the Board rendered a decision on the application in accordance with the requirements set forth in N.J.S.A. 40:55D-10(g); and

**WHEREAS**, the Board received as part of the hearing process the following testimony and documentary evidence:

The Applicant first argued in support of the appeal. He testified that he bought the Property in 2006. He explained at the time of the purchase, there was a 2-family dwelling on the Property with both units being leased.

Prior to the purchase, the Applicant said he did he due diligence to confirm that the dwelling could be used as a two-family rental property. He referenced the letter he received from the Zoning Officer dated August 28, 2006, wherein the Zoning Officer at that time determined that the Property was a "legal and registered two family structure" and that the "structure complies with existing zoning regulations ...". After purchasing the Property, it continued to be treated as a two-family dwelling. The Applicant stated that when he refinanced his mortgage in 2015 his lender wanted confirmation that the dwelling was a lawful two-family structure. He explained that he emailed the zoning officer at the time who reiterated that the home was a lawful two-family. The Applicant produced copies of that email exchange. He also produced copies of the ten applications and certificates of habitability forms dated September 30, 2006, April 19, 2013, June 24, 2010, December 21, 2016, July 5, 2011, July 24, 2017, February 1, 2013, July 16, 2019, February 18, 2013 and October 22, 2019.

The Applicant testified that recently he decided to sell the Property and asked the current zoning officer to confirm that the dwelling was a permitted two-family home. He was advised by the zoning officer that he would need to apply for a zoning permit which he did. After a review by the Zoning Officer, it was denied because it did not qualify as a lawful pre-existing

nonconforming use nor was there any record of a prior approval.

Mr. Greenbaum asked the Applicant if he had ever received any complaints about the dwelling being used as a two-family rental. He replied “no” although he had received a few complaints about some of the actions of his tenants. He did testify that there had not been any complaints about traffic or parking in the immediate neighborhood. The Applicant was not sure if the Property was taxed as a two-family property or not.

Mr. Greenbaum argued that the evidence and testimony offered by the Applicant demonstrated that the Borough was equitably estopped from denying the Applicant use of the Property as a two-family home. The Board attorney maintained that the Board did not have the legal authority to overturn the Zoning Officer’s denial of the permit on the basis of equitable estoppel. The Board Planner also opined that the prior issuance of Certificates of Habitability do not demonstrate that a use is permitted.

After some deliberation, the Board voted to not reverse the decision of the zoning officer and instructed the Applicant to proceed with its use variance application.

The Applicant once again returned to testify. He offered a description of the Property and the dwelling. He stated that the home is a raised ranch on a double lot. He represented that it was larger than most of the lots in the neighborhood. He testified that the home has two separate entrances from the outside and there is no interior access between the 2 units. He indicated that the utilities are shared by the tenants and there is enough parking for five vehicles.

The Applicant acknowledged that he has had numerous tenants since buying the Property. He admitted that some tenants were better than others. He informed the Board that neighbors would contact him when issues arose with any tenant. The Applicant testified that they had his mobile telephone number. He said that he responds to these complaints promptly and within the parameters of the law. For instance, he informed the Board that he did have to evict a tenant which took more than a year. Other times he indicated that tenants left garbage on the Property after they vacated and he had to remove it from the Property.

The Applicant described the two rental apartments. He stated that each unit has two bedrooms and 1 bathroom. He claimed that one unit was approximately 1000 square feet and the other was about 700 square feet. One unit was located in the downstairs portion of the property. He said that this was the same arrangement when he first purchased the Property. The Applicant

noted that this was the same configuration when he purchased the Property. In fact, he said that he lived in the lower unit after he buying the Property. He affirmed that there were no common areas inside the dwelling and each unit had its own dedicated entrance. He noted that the entrance for the upper unit was located in the front of the dwelling and there was an entrance to the rear for the lower unit.

The Applicant advised that garbage, sewer and water charges were billed to him. He could not recall how the Property was taxed. He explained that there were no designated parking spaces. Since buying the Property, the Applicant testified that he has updated the windows, siding, roof, sidewalk and retaining wall. He indicated that he only needed a permit from the Borough for the retaining wall which he applied for and received.

When asked what prompted his application, the Applicant explained that he was trying to sell the Property and was under contract. He indicated he needed the zoning permit as part of his contractual obligations to the buyer. He also applied for the Certificate of Habitability and the smoke certification which have been granted in the past since no Borough Official in the past ever questioned the lawfulness of the residence.

The hearing was then opened for questions from the public. Darlene Newberry who lived at 117 North Bertrand Road asked if there are two mailboxes. The Applicant responded affirmatively. She also asked if his insurance cover the multi-family use which the Applicant said it did. Mrs. Newberry also questioned if the dwelling was assessed as a two-family and the Applicant said that he did not know.

Joseph Marotta who lived at 14 Oak Street asked the Applicant about the utilities and how they were billed. He also asked the Applicant if he knew the difference between the of appraised value of a single-family home and a two-family. The Applicant did not know although he claimed that the Property was under appraised in 2015 when he refinanced.

The matter was closed to the public and Applicant introduced his planner, Katherine Gregory, P.P., AICP. Mrs. Gregory introduced Exhibit A-1 which were three photographs taken by a drone on December 18, 2024. She stated that the first photo showed the dwelling in the center of the Property with parking spaces shown on both sides of it. She said that the second photo showed the rear of the dwelling with the door from the walk out basement. The third photo was an aerial view of the Property and those in the immediate area.

Ms. Gregory stated that the Property is suitable for a dual residential use by virtue of its context and its condition. She stated that the Property is zoned RA-7.5 which does allow single-family homes and is adjacent to the RPRD zone which also allows residential uses at a much higher density. She noted that the Property is larger than others in the immediate vicinity and has sufficient parking. She opined that the Property was a transitional lot between attached and detached dwellings.

According to Ms. Gregory believed that the use variance was appropriate because the Property was particularly suited for the two-family dwelling. She believed that the use for the past 18 years demonstrated site suitability. She testified that the use promoted several purposes of zoning. She cited Purpose A which advocates for the promotion of the general welfare. She said the use did so by providing a transitional use between the single-family zoned and the adjacent multi-family zone. She argued that Purpose G which seeks to promote a variety of uses was met by offering a multi-family use. She also maintained that Purpose I which seeks to promote a desirable visual impact was met by allowing Property to remain unchanged as it has for over 18 years. Finally, she observed that the use would promote Purpose M by providing an efficient use of the Property.

Ms. Gregory also testified that the use would not be a substantial detriment to the public good, because the dwelling complied with all building code requirements and does not look out of place in the neighborhood. She also believed that it would not be a substantial detriment to Borough's Master Plan. She said that she did not believe the granting of the use variance would reconstitute a rezoning of the Property. She also believed that the grant of the use variance incorporates the nonconforming bulk standards that the Board Planner noted.

The matter was open to the public for questions of Ms. Gregory. Frank Sarinelli, a resident at 53 West Bertrand Road, asked if she examined other properties to see if they would be suitable for a two-family use if this application were approved. The Board attorney said that each application on stood on its own merits and what happened with this application would not become precedence. Mr. Sarinelli also asked the Applicant how much he bought the Property for and what he was selling for. The Applicant stated that he purchased the Property for at approximately \$300,000.00 and has it listed at \$620,000.00.

Daren Phil who resides at 105 North Bertrand Road asked if it would be a hardship to convert back to a single family.

The matter was then closed to the public for questions and open to the public for testimony. Nancy Abselon who lived at 15 Oak Street alleged that the deed to the Property did not refer to it as having a two-family dwelling on it. She was also concerned that other properties could be converted to a two-family use if this application was approved.

Rich Herbison from 23 Oak Street testified that prior to buying his home 23 years ago, he looked at the Property. He claimed that the house was only being used as a single family dwelling. He observed a staircase that led downstairs. After he bought his home at 23 Oak Street, he noticed work being done at 20 Oak Street. and spoke with the Borough's Code Official at that time. The Code Official said there was only one mailbox and one service connection and it was listed as a single-family residence. Mr. Herbison stated that the following year one of the tenants moved out and he again questioned the Code Official again who gave him the same response.

Ryan Cassidy, who resides at 16 Oak Street, discussed the issues he has had over the years with the tenants and his discussions with the Applicant about same. He argued that that Bertrands Island is a small community with narrow roads and he did not believe the use was appropriate for the community.

Joseph Marotta, a resident at 14 Oak Street, questioned why there was no evidence of taxes paid and was grateful that this issue was being addressed after all these years.

Darren Phil, who lives at 105 Noth Bertrand Road, was accepted to testify as both a professional engineer and a professional planner. He testified that he was the Borough engineer was familiar with the municipality's ordinances. He said that the Property was in the RA-7.5 zone which did not allow multi-family uses. He questioned what standards should be applied to the development and use. He argued that there was not sufficient parking and buffering. He acknowledged that it was an unfortunate situation but that a use variance was not warranted.

Mr. Phil was cross-examined by the Applicant's attorney. Mr. Phil did agree that some of the Certificates of Habitability that indicated the dwelling was a multi-family use were issued by his office when he served as the Borough engineer. He also admitted that the buffer standards

he claimed were applicable were not particularly relevant to the dwelling on the Property given its overall height.

The public hearing concluded.

**WHEREAS**, the Board after hearing the testimony and documentary evidence provided, made the following findings of fact and conclusions of law:

1. The Board finds that the Applicant purchased the Property in 2006. It further concludes that prior to the purchase, the Applicant was advised in writing by Borough Officials that the dwelling could be lawfully used as a two-family structure. After his purchase, the Board finds that ten Certificates of Habitability were issued to the Applicant again indicating that the dwelling was lawfully being used as a two-family structure. The Board also finds that in 2015, the Zoning Officer reiterated this in an email exchange with the Applicant.
2. The Board finds that there is no evidence that the conversion of the dwelling into a two-family structure was eligible to be treated as a lawful pre-existing nonconforming use as per N.J.S.A. 40:55D-68 nor was a use variance ever granted. Therefore, the Board concludes that the use can only be supported if it is found that the Borough is equitably estopped from holding otherwise.
3. The Board finds that while there may be evidence to support equitable estoppel, it does not have the jurisdiction to rule on such matters and must therefore deny the Applicant's appeal because there is no other basis to reverse the denial issued by the Zoning Officer.
4. The Board further finds that its decision to uphold the decision of its Zoning Officer means that the Applicant's use can only be permitted if use variance approval is granted. The Board finds the Applicant in support of his use variance application presented evidence that demonstrated that at the time he purchased the Property, he was advised that the Property had a lawfully existing two-family dwelling on it. The Board further finds that the Borough reinforced this conclusion when it subsequently issued ten Certificates of Habitability and its Zoning Official advised as much in an email exchange in 2015. The Board finds however there was no legal basis to support the representations made by Borough officials over the relevant time period.

5. The Board finds that the Applicant in reliance on these mistaken representations purchased the Property thinking that he could use the dwelling as a lawful pre-existing two-family dwelling and the Applicant did in fact do so. The Board finds that the Applicant since his purchase has in fact so used the dwelling.
6. The Board finds that these facts do not support the grant of a use variance. The Board did not believe that the Applicant demonstrated that the use is particularly suited for the Property. The Board does not think that merely using the dwelling improperly for an extended period of time does not satisfy site suitability analysis. The Board finds that the Property was similar to many others in the immediate vicinity and not so unique as to be considered particularly suited for the use. The Board found no evidence to warrant a finding that any of the purposes of zoning were advanced by the use in the RA-7.5 zone.
7. The Board finds that there is a substantial detriment to the public good despite the length of time that the dwelling had been improperly used as a two-family dwelling. The Board finds that there had been complaints made by neighbors about some of the tenants in the past strongly suggest that there has been a substantial detriment to the public good. The Board further finds that any time a use is improperly allowed to exist without approvals, there is a substantial impairment to the applicable zoning ordinances and the Master Plan. Here the Board concludes that permitting two dwelling units on a lot consisting of 8,012 square feet substantially impairs the Borough's ordinances which requires a minimum lot size of 7500 square feet for just one dwelling.
8. For these reasons, the Board finds that the Applicant is not entitled to use variance relief allowing the dwelling on the Property to be used as a two-family structure.

**NOW, THEREFORE, BE IT RESOLVED** that the Land Use Board of the Borough of Mount Arlington, County of Morris, State of New Jersey, does reject the Applicant's appeal of the Zoning Officer's determination dated November 8, 2024, that the dwelling on Lot 23 in Block 39 is a lawfully existing two-family structure; and

**BE IT FURTHER RESOLVED** that the Land Use Board of the Borough of Mount Arlington, County of Morris, State of New Jersey denied the Applicant's application seeking use variance

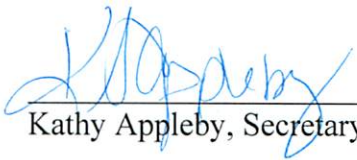


approval to allow the existing dwelling on Lot 23 in Block 39 to be used as a two-family structure; and

**BE IT FURTHER RESOLVED** that the Secretary of the Board shall file a copy of this Resolution with all governmental bodies, agencies, and commissions as shall be deemed necessary and appropriate.

ATTEST:

BOROUGH OF MOUNT ARLINGTON  
LAND USE BOARD

  
Kathy Appleby, Secretary

By:   
Melissa Foster, Vice Chairwoman

DATED: 1/22/25

THE VOTE:

IN FAVOR: 3  
OPPOSED: 0  
ABSTENTIONS: 0

I hereby certify that the above is a true copy of the Resolution adopted by the Borough of Mount Arlington Land Use Board at its meeting on January 22, 2025.

  
Kathy Appleby, Board Secretary