

TOWNSHIP OF MIDDLETOWN

Zoning Board of Adjustment and Appeals

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TECHNICAL MEMORANDUM

DATE: November 22, 2022
BOARD: Zoning Board of Adjustment and Appeals
APPLICATION: Almost Home, Inc. (#2022-018)
Request to Appeal Zoning Officer's Determination
Block 1049, Lot 1
276 Sunnyside Road

PROJECT DESCRIPTION

Almost Home, Inc. (hereinafter referred to as "applicant") has formally requested that the Zoning Board hear and decide an appeal of the Zoning Officer's decision that Use Variance approval for an Expansion of a Non-Conforming Use, and bulk variance approval for deficient number of off-street parking is required to expand the existing business to include tables and seating for 18 patrons while maintaining the residence on the second floor; and to determine whether the Zoning Officer's decision was consistent or inconsistent with ordinance requirements.

PROJECT HISTORY AND TIMELINE

In September 2019, a Temporary Certificate of Occupancy was issued related to issues with the septic system. The Temporary Certificate of Occupancy is for a convenience store / deli / apartment.

In 2021, the subject property was cited for the following code violations.

March 2021 – A Notice of Violation was sent to the property owner advising that the business was operating without a valid Certificate of Occupancy.

April 7, 2021-The subject property owner and tenants received two summons for conducting outdoor construction including but not limited to canopies, patio, and fence, without proper permits or inspections; and indoor construction including the installation and electrical connections for a walk-in freezer without proper permits or inspections.

June 15, 2021-Code Enforcement Officer(s) conducted an inspection on June 15, 2021 and issued a summons for converting the approved deli offering food as a take-away product to a restaurant with an on premises dining without proper approvals or inspections.

On June 18, 2021 a building permit was issued for the walk-in cooler. *This office conducted a zoning review for the walk in cooler, and the cooler violates the rear- and side- yard setbacks where 50' is required for rear yard and 10' exists; and 50' is required for side yard and 20' exists.*

July 21, 2021-Code Enforcement Officer(s) conducted an inspection on July 21, 2021 and issued a summons to the owner and tenant that the subject property continues to operate as a full service restaurant with an on premises dining without proper approvals or inspections. The building has approval only for a cash and carry delicatessen.

August 2021-Letter issued from Construction Official citing no action from the owner to abate the violations listed above has been taken, and therefore the owner is responsible for all penalties incurred. Also, the existing rear stairs leading to the apartment were found to be non-compliant and must be corrected.

On September 7, 2021, in correspondence to Gregory Vella, Zoning Board Attorney, the applicant expressed intent to submit an application to the Zoning Board for a Certificate of Pre-Existing Non-Conforming Use.

On March 28, 2022 and June 27, 2022 the applicant's request for a Certificate of Pre-Existing Non-Conforming Use was heard by the Zoning Board.

On August 22, 2022, the applicant withdrew the application for a Certificate of Pre-Existing Non-Conforming Use.

On September 7, 2022, the applicant filed an Application for Development Permit for tables and seating for 18 patrons in a pre-existing non-conforming food establishment.

On September 23, 2022, the Zoning Officer issued a Denial of Development Permit to the applicant indicating the property was always primarily a to-go establishment, and changing use to a dine in restaurant requires a variance.

On October 12, 2022, in a letter to the Zoning Officer, the applicant filed an Application for an Appeal of the Zoning Officer's decision that their proposal to add 18 seats in the existing space constitutes an expansion of the use.

On October 18, 2022, in the event that the Zoning Board takes jurisdiction on the appeal, and concurs with the Zoning Officer's determination, the applicant continued with their use variance application and submitted documents to complete their application and obtain a hearing date.

On November 3, 2022, the application for a Use Variance and parking variance; *and* the Appeal was deemed complete by the Planning Department and assigned a hearing date of December 12, 2022.

LOCATION

276 Sunnyside Road
Block 1049, Lot 1 – Residential (R-130) Zone

HEAR AND DECIDE APPEALS

The Municipal Land Use Law empowers the Zoning Board to hear and decide appeals per N.J.S.A. 40:55D-70.a.

The Municipal Land Use Law permits appeals of an administrative officer's decision to the Zoning Board provided such appeals are filed within 20 days from said officer's determination per N.J.S.A. 40:55D-72.a, or from the date an interested party knew or should have known of the decision.

COMMENTS ON JURISDICTION

The Zoning Board must first decide whether they have jurisdiction or not to hear this matter. As per N.J.S.A. 40:55D-72.a, the Municipal Land Use Law permits appeals to the Zoning Board to be filed within 20 days from the Zoning Officer's determination or from the date an interested party knew or should have known of the decision. Accordingly, the Zoning Board has two alternatives:

1. **Take jurisdiction on the matter** by finding that the appellant filed a timely Appeal, and proceed to hear the merits of the appellant's position.

The applicant filed an Application for an Appeal of the Zoning Officer's decision within 20 days from said officer's determination per N.J.S.A. 40:55D-72.a.

2. **Take no jurisdiction on the matter** and dismiss the applicant's Appeal.

COMMENTS ON THE MERITS

If the Zoning Board decides to hear the matter, the Board must determine if the Zoning Officer's decision to require Use Variance approval for an Expansion of a Non-Conforming Use, and bulk variance approval for deficient number of off-street parking is required to expand the existing business to include tables and seating for 18 patrons while maintaining the residence on the second floor was (1) consistent, or (2) inconsistent with zoning ordinance requirements. If the Board rules that these approvals are not required, the basis for that shall be specified.

The Zoning Officer's determination to require a Use Variance approval to expand the Non-Conforming Use and parking variance was based on 1) the many code violations cited for the subject property; 2) the testimony presented by Mr. Robert Doran, a shareholder of Almost Home General, at the March 28, 2022 and June 27, 2022 Zoning Board hearings for their application for a Certificate of Pre-Existing Non-Conforming Use; and 3) the zoning ordinance requirements.

- 1) The code violations were associated with canopies, patios, fences, and walk in freezers to accommodate an expanded business model to provide new dine-in seating.
- 2) Mr. Doran's testimony indicated that his current business "Almost Home General" is a coffee house, bakery, serves lunch and breakfast, and his current business model is to "increase comfort to dine-in" and be able to have private events (Source: June 27, 2022 Zoning Board hearing testimony).

3) The Permitted Use Table in the zoning ordinance permits Restaurants and Delicatessens as separate uses, inferring a difference between the two. It is in the Zoning Officer's opinion, and the Planning Department concurs, that deli's operate primarily as a cash and carry business and do not primarily offer a dine-in experience. The code violations and testimony confirm that the pre-existing non-conforming deli is no longer operating as a deli typically does.

Further, to briefly respond to the applicant's main argument that there was no physical addition to the structure therefore how could there be an expansion of use – There are other factors, not just structural additions, that can intensify or expand a use such as increased hours of operation, increased number of employees, addition of patron seating, and increase in types of services offered to patrons.

*The parking variance was called out by the Zoning Officer as part of the approval because there is a severe deficiency in the number of off-street parking provided on-site for the current expanded use. In addition, Mr. Doran's June 27, 2022 testimony indicated that his current business model utilizes adjacent property at 274 Sunnyside for employee parking. It is appropriate to identify parking variances as part of a Use Variance hearing. Further, the need for off-site employee parking requires Board Approval and strengthens the argument that the proposal is in fact an expansion (off-site) of the Non-Conforming Use as there is no space on-site for employee parking and must use adjacent property.

Based on the above facts, the Zoning Officer made the appropriate determination that the pre-existing, non-conforming deli expanded its business model to better accommodate its patrons and the in-dining experience, therefore requiring a Use Variance for expansion of a non-conforming use and parking variance.

PROPERTY DESCRIPTION, ZONING AND SURROUNDING LAND USES

The subject property is located on Crawfords Corner-Everett Road and Sunnyside Road, and presently contains a 2-story building, with Almost Home General on the first floor and residential apartment on the second floor; 12-stall parking lot, front porch patio, side patio, detached shed and walk-in refrigerated cooler and refuse enclosure located in the rear yard. Fencing extends along the eastern and southern perimeter. Additional fencing encloses the rear yard. The building is oriented towards Sunnyside Road, and site ingress/egress is from both Crawfords Corner Road and Sunnyside Road.


The subject property is located in the Residential (R-130) Zone. Residential uses in the R-130 Zone are located to the east and south of the site. Vacant land in the R-130 Zone is located to the north of the site across Sunnyside Road, and residential and farm uses in Holmdel Township are located to the west of the site across Crawfords Corner-Everett Road.

DOCUMENTS REVIEWED

- Notice of Appeal, prepared by Michael Steib, Attorney for Almost Home, Inc., dated October 12, 2022;
- Zoning Officer Denial dated September 23, 2022;
- Application for Development Permit, dated September 9, 2022;
- Survey of Property, Block 1049, Lot 1, prepared by Morgan Engineering and Surveying, dated August 11, 2021, last revised August 30, 2021;

- Site work Sunnyside Deli, Floor Plan, prepared by Parallel Architectural Group, Sheet A-100, dated April 7, 2021, last revised August 26, 2021;
- Consent of Owner;
- Disclosure of Ownership; and
- Proof that property taxes are current.

Report Prepared by:


Amy Citrano, PP, AICP
Planning Director

LOCATION MAP

