

**BOROUGH OF MIDLAND PARK
ZONING BOARD OF ADJUSTMENT**

James DeLucia
Block 10.27, Lot 1
330-336 Prospect Avenue, Midland Park, New Jersey 07432

RESOLUTION

WHEREAS, James DeLucia (“Applicant”), owner of the property located at 330-336 Prospect Avenue, Midland Park, New Jersey, known and designated as Block 10.27, Lot 1 (the “Property”) on the Tax maps of the Borough of Midland Park (the “Borough”), which Property is located in the R-1 Residential Zone, applied to the Midland Park Zoning Board of Adjustment (“Board”) for a (d)(1) “use” variance to permit the dwelling located on the Property to be used as a two-family dwelling where the R-1 zone permits only one-family dwelling; and

WHEREAS, a duly noticed public hearing was held on this application on February 14, 2024 in compliance with the Open Public Meetings Act and the Municipal Land Use Law (“MLUL”), at which time any interested parties and members of the public were afforded the opportunity to appear and be heard; and

WHEREAS, the Applicant was represented by Andrew Kohut, Esq. of Wells, Jaworski & Liebman.

WHEREAS, in 1985 the Property was the subject of an application before the Board, brought by the Applicant’s predecessor in title, requesting a (d)(1) “use” variance to permit the dwelling located on the Property to be used as a two-family dwelling (the “1985 Use Variance Application”); and

WHEREAS, the Applicant presented evidence and testimony that the application pending before the Board is not substantially similar to the 1985 Use Variance Application and, therefore, should not be barred by the doctrine of Res Judicata; and

WHEREAS, the Board, after carefully considering the evidence presented by the Applicant with respect to the question of whether the application was barred by the doctrine of Res Judicata, has hereby made the following findings of fact:

1. Mr. Kohut explained that the 1985 Use Variance Application proposed a two-family dwelling where the second unit would be used for rental purposes and that the current application proposes what Mr. Kohut called “generational housing” or a “mother-daughter” layout.

Mr. Kohut explained that the Applicant intends for the second dwelling unit to be occupied by his mother, and that it is not intended to be a two family dwelling. He offered that he would place a deed restriction on record that limited the use of the second dwelling unit to an immediate, linear family member.

2. The Applicant then called Brigitte Bogart, P.P., to present planning testimony in support of the Res Judicata issue. Ms. Bogart was duly sworn according to law and the Board accepted her credentials in the field of planning. She testified that there have been socio-economic changes since the time of the 1985 Use Variance Application that from a planning perspective make the Applicant's proposal for "generational housing" different than a typical two-family dwelling and that, together with the offer of a deed notice, make this application different than the previously proposed two family which had been denied. In addition, the current application has a different layout, proposing only one bedroom in the second dwelling unit as opposed to the two bedrooms previously proposed in the 1985 Use Variance Application.

3. The Board found that the Application was not substantially similar to the 1985 Use Variance Application and should not be barred by the doctrine of Res Judicata.

WHEREAS, after the Board's finding that the application was not barred by the doctrine of res Judicata, the Applicant presented evidence and testimony in support of the requested use variance; and

WHEREAS, the Board, after carefully considering the evidence and testimony presented by the Applicant with respect to the requested use variance, any interested parties, the general public, and its own professionals, has hereby made the following findings of fact and conclusions of law:

4. As part of the application, the Applicant submitted a rendering of the proposed dwelling, marked as Exhibit A-1, and a two page photo planning exhibit, marked as Exhibit A-2.

5. Mr. Kohut called the Applicant, Mr. DeLucia, as a witness and ask him to explain to the Board why he is asking for the requested relief. Mr. DeLucia described his desire to have his mother live with him as she ages so that he can take care of her, but still allow her to have a sense of independence by living in her own distinct dwelling unit. He stated that he recently purchased the Property with this in mind because of its existing configuration and did not make any changes to the dwelling other than upgrades and improvements to improve the condition of the Property which was is disrepair. He stated that none of the work he performed was structural.

There are separate entrances from the exterior into each side (or proposed unit) of the dwelling, as well as a connection inside the dwelling between the two proposed units, in addition to separate full kitchen area in each unit. Mr. DeLucia agreed that he would record a deed notice against the Property that stated only immediate family could reside in the second dwelling unit and that it would not be rented to unrelated persons.

6. In response to questioning, Mr. DeLucia acknowledged that he received a certificate of occupancy for the dwelling which stated that it was a one-family dwelling. He indicated that he did not intend to use the dwelling as a two-family dwelling but rather for a “mother-daughter.” The Board also questioned what the proposed deed notice would entail and how it could be enforced. The Board inquired as to what work would be need to make the dwelling comply with the Borough’s Land Development Ordinance (“LDO”) as a single family dwelling.

7. The Applicant then recalled Ms. Bogart to testify with respect to the use variance. She testified that the property was particularly suited for generational housing because it already has a natural internal separation due to the fact that one “unit” was previously used as a home office. There are also separate driveways, parking and utilities. The Property is located along Prospect Avenue, a busy street, near the local high school and across the street from a church. She acknowledged that generational housing is unique and not permitted by the Borough LDO.

8. Mr. Bogart testified that the Application promoted purposes (a), (e) and (g) of zoning. She stated the proposed use is the most appropriate use of the Property based upon the historical use of the Property as a one family dwelling with a home occupation. The proposed “generational housing” use did not exist in 1985 when the Board denied the requested use variance. This type of housing that may not otherwise be affordable to the elderly, disabled and younger generation. She went on to testify that she believes the proposed use would further certain of Borough’s Master Plan goals and that it would not result in substantial detriment to the public good.

9. In response to questioning from the Board, Ms. Bogart acknowledged that the Property could reasonably be used for the use permitted by the zoning ordinance, which is a one-family dwelling. She was unaware of whether the there are any two-family dwellings in the surrounding area and acknowledged that a goal of the Borough’s Master Plan is preserving the single family nature of the community, however, she stated that she believes that goal of was intended to prevent commercial uses from intruding into the residential zones.

10. Rich Wostbrock, the Board's Engineer noted that the driveway immediately in front of the dwelling was excessive and should be reduced to be more in character with the surrounding area.

11. David Novak, the Board's Planner, referenced his memorandum to the Board, dated, January 4, 2024 and questioned Ms. Bogart regarding how to reconcile the Applicant's proposed use with the applicable definitions in the zoning ordinance.

12. The Board then requested that Mark Berninger, the Borough zoning official and construction official, come forward to address the Application. Mr. Berninger was sworn and answered questions from the Board concerning the history of the Property, its use and the Applicant's renovations. Mr. Berninger testified to the difficulty in enforcing a deed notice or similar restriction. He was cross-examined by Mr. Kohut who objected to the tone and appropriateness of a memo that Mr. Berninger had previously submitted to the Board regarding the Application.

13. The Property is located in the R-1 residential zone which permits single family dwellings. The Property, as currently configured, does not comply with the definition of a one family dwelling in the Borough LDO. The Borough LDO does not permit "generational housing" or "mother-daughter" housing.

14. The Board expressed concerns that the two dwelling units could, in fact, be utilized independently and not by a single family unit and such use would negatively change the character of the neighborhood, and be a significant and substantial detriment to the neighbors and on the surrounding community.

15. At the conclusion of the meeting, the Board heard public comment from Melissa Gowers, on behalf of her mother-in-law who lives next door to the Property, concerning the issues related to the illegal use of the Property as a two family prior to the Applicant's ownership.

WHEREAS, the Applicant requires an affirmative vote of at least five (5) members of the Board in order to be granted a variance pursuant to N.J.S.A. 40:55D-70(d); and

WHEREAS, after reviewing the evidence submitted and the testimony presented, the Board failed to find that the Applicant has demonstrated an entitlement to a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a two-family dwelling in the R-1 zone; and

WHEREAS, the Board concluded that the Applicant did not provide sufficient proof in support of the positive or negative criteria for the grant of the variance. The Board determined that

the Property could be reasonably used as a permitted one-family dwelling. The existing separate unit type of configuration resulted from a prior permitted home occupation use and did not make the Property particularly suited for the use; and

WHEREAS, the Board also determined that a two family use in this location would have a substantial detriment upon the surrounding properties and impair the intent of both the zoning ordinance and the Master Plan. The “generational housing” or “mother daughter” type uses that the Applicant described is not recognized by the LDO and cannot be reasonably enforced through the proposed deed notice; and

WHEREAS, a motion was made to deny the requested use variance which motion was carried by a vote of six in favor and one against; and

WHEREAS, the Board took action on this application at its meeting on October 11, 2023, and this Resolution constitutes a Resolution of Memorialization of such action taken in accordance with N.J.S.A. 40:55D-10(g).

NOW, THEREFORE, BE IT RESOLVED, by the Zoning Board of Adjustment of the Borough of Midland Park, that the application filed by James DeLucia, for a (d)(1) “use” variance be and is hereby **DENIED**.

I hereby certify that this is a true copy of a resolution of the Midland Park Zoning Board of Adjustment duly adopted at a regular public meeting held on March 13, 2024. This Resolution memorializes an action of the Board taken on February 14, 2024.

Richard Formicola, Secretary

Les Andersen, Chairman