

RAMSEY ZONING BOARD OF ADJUSTMENT
Minutes of the Special Meeting
April 29, 2021

REGULAR MEETING

Chairwoman Strollo called the regular meeting of the Board of Adjustment of the Borough of Ramsey to order at or about 7:30 P.M. **Chairwoman Strollo** announced that the meeting is being conducted via teleconferencing due to the COVID-19 restrictions.

PLEDGE OF ALLEGIANCE

Chairwoman Strollo led the Pledge of Allegiance.

Chairwoman Strollo read the Open Public Meetings Law notice.

ATTENDANCE	PRESENT	ABSENT
Ms. Boone, Alt. #1	X	
Mr. Crimmins	X	
Ms. Fisher Poppe	X	
Mr. FitzPatrick	X	
Ms. Jarvis	X	
Mr. Mooradian		X
Mr. Scuderi	X	
Chairwoman Strollo	X	
Mr. Rogers Esq., Board Attorney	X	
Mr. Hals, Board Engineer		X
Mr. Burgis, Board Planner	X	
Ms. Lupo, Board Admin. Secretary	X	

BOARD COMMENTS - None

PUBLIC COMMENTS - None

PUBLIC HEARING:

Thomas Ashbahian. Notice of Appeal of Zoning Determination Made on August 20, 2020 Relating to 24 Grant Street, Ramsey, N.J. - Continuation

James J. Delia, Esq. of Wells, Jaworski & Liebman, LLP, 12 Route 17 North, Paramus, N.J. appeared on behalf of the applicant.

David L. Rutherford, Esq. of 131 Dayton Street, Ridgewood, N.J. appeared on behalf of

Alejandro and Andrea Frezza who are the owners of property located at 24 Grant Street.

TESTIMONY OF JOSEPH H. BURGIS

Mr. Joseph H. Burgis of 25 Westwood Ave., Westwood, N.J. was sworn in and deemed an expert witness in the area of Professional Planning appeared on behalf of the Zoning Board. Mr. Burgis confirmed that he reviewed the December 16, 2020 minutes, the January 20, 2021 transcript and listened to the audio of the March 17, 2021 meeting. Mr. Burgis said he reviewed the documents filed. Mr. Burgis said he reviewed the Borough's zoning ordinances and master plan. Mr. Burgis said that the site is located in the B-3 Highway Commercial District Zone. Mr. Burgis said that it permits any use permitted in the B-1 Central Business District Zone, except residential use of any kind other than single-family use, which is permitted. Mr. Burgis said that other permitted B-1 uses include business uses of a strictly retail and service type conducted entirely within the confines of a building, clubs, and fraternal organizations, public garage and service stations, and drive-in windows. In addition to that, critical to this application, is the fact that the ordinance for the B-3 zone permits outdoor storage. Unfortunately, the zoning ordinance does not define outdoor storage. Mr. Burgis said that Harvey Moskowitz book is a standard planner's book that they all turn to when there isn't an ordinance definition. Mr. Burgis said that the book does define outdoor storage as keeping of any kind of goods (as per a list), junk material, merchandise, or vehicles in the same place for more than 24 hours. Mr. Burgis said that reading the material that was submitted, there's basically four grounds for the appeal. The first is that the proposed commercial landscaper yard is not permitted in the B-3 zone. The second is there are both residential and commercial uses operating simultaneously. The third is the accessory garage is in fact a principal structure prohibited by ordinance. The fourth the garage height exceeds the permitted height by more than 10 feet or 10 percent. Mr. Burgis said a review of the ordinance reveals the code does not permit multiple uses where there is a permitted single family dwelling on the property. At present, the site contains within the building a residential tenant, and the applicant's office (a very small space in the basement according to Mr. Frezza's testimony). However, Mr. Frezza testified that the tenant shall be vacating this space. Mr. Ashbahian indicated in testimony that the applicant required a D-3 variance since it violated the code's minimum required 300 foot setback from another such use, as set forth in Section 34-29.1i. This section, however, applies to car washes and lube stations in the B-3 zone. There was also reference to a 300 foot distance requirement for service stations which is set forth in Section 34-8.2d. Mr. Burgis said that a review of the ordinance and standard planning reference books reveals that these sections are not applicable to this particular use. Mr. Burgis said that the Ramsey ordinance does not define these terms. In such instances, planners typically first turn to the Moskowitz and Lindbloom Complete Illustrated Book of Development Definitions, the most recent publication being a 2015 document. Mr. Burgis said the book defines a service station as "a retail station for servicing automobiles and other motor vehicles, especially with gas and oil". Clearly, the landscape contractor's yard does not fit this description. Mr. Burgis said

when reviewing the definition of outdoor storage, the Moskowitz's book defines it amongst other things, material and vehicles as being an allowed outdoor storage component. Mr. Burgis references a letter from the zoning officer to Mr. Rutherford, dated December 18, 2020, that there will be no material stored on site, that there will be trucks stored on site. Since the ordinance doesn't define it and there's one definition that includes vehicles, you can conclude that the use is permitted. Mr. Burgis said that Mr. Ashbahian referenced a Planning Board resolution denying this kind of use at this location in 1989. The Planning Board has found that the proposed primary use of the property was storage of vehicles and not an office use. However, the ordinance has since been amended to permit outdoor storage only in the B-3 zone and the industrial zone.

QUESTIONS FROM MR. DELIA

Mr. Delia referenced the Kelly resolution of 1989. Mr. Delia asked Mr. Burgis if that application is similar in nature in terms of the types of vehicles proposed on site. Mr. Burgis said yes in some instances. Mr. Delia references the definition of domestic service as defined in the Moskowitz's book. Mr. Delia references the B-1 Central Business District. Mr. Delia asked Mr. Burgis if vehicles stored on site less than 24 hours would still be considered as vehicles storage. Mr. Burgis said it could be storage. Mr. Delia asked Mr. Burgis if the outdoor storage ordinance identifies a principle use or accessory use. Mr. Burgis said that the ordinance does not identify principle uses. In this section, for example, Ordinance 34-29.1 identifies permitted uses. Ordinance 34-29.2 simply says "Outdoor Storage". It's under the heading of the B-3 Highway Commercial District so it's safe to say that it's also a permitted use. The Ordinance doesn't define principal use versus something else. Mr. Delia asked Mr. Burgis if by virtue of that analysis, can you have strictly outdoor storage use with no building, no office, no nothing. Mr. Burgis said the way this section is worded that would be correct.

BOARD QUESTIONS

Chairwoman Strollo inquired about the definition of personal services in the Moskowitz book. Mr. Burgis responded to her inquires. Chairwoman Strollo inquired about the definition in Ordinance 34.3 for Public Garage and Service Station. Mr. Burgis said that's not what this application is now and didn't take that definition into consideration for the proposed use. Chairwoman Strollo asked Mr. Burgis as it relates to the Kelly application, if he would consider asphalt a petroleum product. Mr. Burgis said yes. Mr. FitzPatrick asked Mr. Burgis to explain the B-3 and B-1 zones. Mr. Burgis did so. Mr. Burgis continued that the Master Plan is very specific when it talks about the Central Business District. It talks about uses that encourage pedestrian safety and are pedestrian friendly. It encourages more pedestrian activity along Main Street. That is one of the reasons why the Ordinance specifically prohibited outdoor storage in the B-1 zone because that's not a pedestrian friendly activity. Mr. FitzPatrick asked Mr. Burgis if you can have outdoor storage in the B-1 zone. Mr. Burgis said no. It's only allowed in the B-3 zone. Mr. Scuderi asked Mr. Burgis if the proposed use a permitted use. Mr. Burgis

said yes. Mr. Scuderi had a concern about the current tenant. Mr. Burgis said that was the one troublesome aspect of the application because of the mixed uses. Mr. Burgis said that Mr. Frezza testified that the tenant will be vacating. Mr. Rogers continued that the proposal as per Mr. Rutherford's December 17, 2020 letter is for the removal of the single family residential use and to bring in an office with storage of equipment and vehicles. The Board should make their decision on that the proposed use. Mr. Rogers asked Mr. Burgis if there have been any changes to the Ordinances since the 1989 Kelly Resolution. Mr. Burgis said yes. The outdoor storage provision was amended a number of times and the Master Plan was adopted a few times. Chairwoman Strollo asked Mr. Burgis if Ordinance 34-40.1 Prohibited Uses, prohibits any business conducted outside the confines of a building. Mr. Burgis said yes. Ms. Boone asked Mr. Burgis if he would agree that the look of Grant Street was very different in 1989 when the Kelly application was denied. Mr. Burgis said that is something that is considered in terms of the issue of res judicata. Mr. Burgis said that the change in the character of the neighborhood and how the proposed use would impact the neighborhood.

PUBLIC QUESTIONS - None

PUBLIC COMMENTS - None

SUMMATION FROM DAVID L. RUTHERFORD, ESQ.

Mr. Rutherford addressed the issue of res judicata. Mr. Rutherford said that the Cox Land Use treatise, specifically Section 19-3.2, addresses the concept of res judicata in the context of land use proceedings, and makes clear that a number of required elements are needed in order for that doctrine to be applicable, several of which are lacking in this particular case. First of all, this matter comes before the Board on an appeal of the decision of the zoning officer, something over which this Board has jurisdiction. This is not an application for development. It is not an application for a use variance or for bulk variance relief. The applicants in the Kelly Resolution sought site plan approval. Mr. Ashbahian seeks to overturn a decision of the zoning officer as to whether my client's use is permitted. So, the nature of the matter being considered by the Board is quite different. Secondly, the Board has no way of knowing the exact nature of the application presented in 1989. Admittedly, the resolution does provide some of the factual context. Mr. Rutherford said that we do know that the Kelly Resolution related to an asphalt business and what the Board found based upon the testimony to be the storage of vehicles falling within the purview of a public garage or service station, of which Mr. Burgis has found not to be applicable here. No one knows exactly what the actual testimony was, which caused the Board to reach its conclusions and therefore, Mr. Rutherford thinks that it would be perilous for the Board to determine that the matter is dispositive of the issue before the Board this evening. Third, in order for res judicata to be applicable, there must be no substantial change in the application or conditions surrounding the property. Mr. Rutherford said that this Board doesn't know the exact nature of that application. Mr. Rutherford said that there

have been changes to the property and the neighborhood over the last 30 years. Mr. Rutherford said that in the Kelly Resolution the Board found that storage was not permitted in the B-3 zone except in the context of a service station or public garage, but as previously noted, the ordinance was amended in 2007. The ordinance does now permit outdoor storage subject to site plan approval from the planning board. Mr. Rutherford said that not only have there been changes in the past 30 years to the neighborhood, but the ordinance has changed and the prohibition of outdoor storage except in the context of a service station is no longer the case. Mr. Rutherford said that the issues presented were different, and the relief sought was different so he doesn't think that the concept of res judicata applies. Mr. Rutherford said that there are two issues. The first issue is the landscaping use that his clients proposed which was set forth in his letter of December 17, 2020. The second issue relates to the dual use. Mr. Rutherford said that from the first time his client purchased the property it was never an issue before the Planning Board. Mr. Rutherford said they had two hearings before the Planning Board and the third was stopped fairly quickly because Mr. Ashbahian had raised the issue with respect to the use. Mr. Rutherford said that he was advised by his client that the tenant would be out in the next couple of months. Mr. Rutherford said that he expects that the Board will render a decision based upon the specific use that's being proposed by Mr. Frezza as outlined in his letter from December and his testimony in March without residential use. Mr. Rutherford hopes that the Board would uphold Mr. D'Agostaro's decision that the landscaping use is permitted. Mr. Rutherford said that his clients must still satisfy the Planning Board's Site Plan approval which will enable them to complete the project.

SUMMATION FROM JAMES J. DELIA, ESQ.

Mr. Delia addressed the issue of res judicata. Mr. Delia said that his letter dated August 18, 2020 spelled out the elements of res judicata. The first question is, was the Planning Board's ruling definitive. The prior resolutions decisively conclude that the properties are located in the B-3 zone. In the July 18, 1989 Kelly Resolution, the applicant proposes to use the property for repair service and storage of equipment and vehicles. The use was classified as a public garage or service station which is a conditional use. In the December 1989 Resolution, the applicant proposes to operate an asphalt contracting business at the premises with trucks, cars, tandems and backhoes. The Planning Board finds that the primary use on the site is not an office use, but rather use for storage of construction vehicles and a staging area for the asphalt construction business. In this instance, we do not have an asphalt business, but we have the same trappings of the same type of construction use. These are both contractors, one in asphalt business and the other in the landscaping business, which includes laying down cement block, and building walls, having heavy equipment on site, which is turned on, brought off site and returned on a daily basis. It's more than just parking of vehicles and storage. There are other activities that occurring there and business is being conducted on site. The Board made a definitive ruling that the asphalt use did constitute the repair service as defined under public garages or service station. They are both looking to use vehicles for a

contracting business. This property was purchased directly from the Kelly's, the same applicants who were denied in 1989. There's a successor in interest that meets the requirements of res judicata of theory. Mr. Delia doesn't think there's a substantial change in the application. Mr. Delia said that both seek and sought to allow a contractor's yard with outdoor operations which are specifically prohibited. Mr. Delia said that the Board made a decision based on merits. Although the applications were dismissed without prejudice, the Board made definitive rulings which continue to apply. Namely that deals with the identification of the business as a public garage and that the office use being held out as the principal use. Mr. Delia said what happened with the use is a mistake. We all make mistakes. Mr. Delia said that we are aware of the prohibition to have two uses. Mr. Delia doesn't agree with Mr. Burgis and Mr. D'Agostaro's interpretation of the B-1 and B-3 zones. Mr. Delia said that if you don't meet the full definition, you don't have a permitted use. Mr. Delia said that now you have to look at storage and whether storage of itself is a permitted use. Mr. Delia said that Mr. Burgis testified that was a bad idea. Mr. Delia agreed and said it is a bad idea for a variety of reasons. First the fact that you have no parameters that you can attach to outdoor storage, you have no zoning perimeter. Mr. Delia said that you do not have situations where outdoor storage in and of itself is there, or is shown as a principal use. Mr. Delia said that the Board will be creating precedence if you rule in that manner. Mr. D'Agostaro has made a ruling that outdoor storage is permitted. Mr. Delia said that when you reference Ordinance 34-40 Prohibited Uses, it prohibits any business conducted outside the confines of a building. Mr. Delia said that there's no way that you can get around the fact that any business conducted outside the confines of a building is prohibited. Mr. Delia said you have a business that is operating on a day to day basis and trucks coming in and out. All their activities are outdoors. The only activity that occurs indoors in a very small office is rarely used. Mr. Delia said that the outdoor use is primary and there's part of the zoning code that prohibits business conducted outside the confines of a building. Mr. Delia said that when you take two of those together, there is no way that they add up to allowing this use as it is proposed. Mr. Delia said that you get back to the question of service type uses and the question of domestic service. Mr. Delia said that even that definition doesn't add up to what is being proposed which leaves outdoor storage. Mr. Delia said that one of the primary functions of the Board is to interpret the Ordinance. Mr. Delia said that this use is not permitted.

BOARD COMMENTS

Doctrine of Res Judicata

Chairwoman Strollo said this hearing is appealing the decision of the zoning official. Chairwoman Strollo said that we are interpreting the code as to uphold or oppose a decision that the zoning official made on this use. Chairwoman Strollo said that she believes that the applicant is intending to use the property to run an office in the building and have a landscape business on that property to store materials and equipment related to that landscape business. She understands that no mixed use is

conducted entirely within the confines of a building, such as stores, shops and offices, and involving the rendering of service or sale of goods directly to the ultimate consumer. Chairwoman Strollo said that she believes that an office is permitted. She also believes that a landscape business is a service of a good that is supplied directly to the consumer. Chairwoman Strollo said that the rest of the Ordinance says that the use shall not include any process manufacture, fabrication, assembly, treatment, conversion or alteration unless clearly incidental to the operation of the permitted business use and which will not create any dangerous, injurious, noxious, or otherwise objectionable or offensive condition as would tend to impair or hinder the most appropriate use of land in the vicinity. Chairwoman Strollo thinks that the landscape business fits that definition. Chairwoman Strollo continued that the landscape service is provided to the consumer at their location. There is no work being conducted outside the confines of the building, and again, the landscaping service activity is not conducted on this lot. Chairwoman Strollo said that the office portion of the business would be conducted inside the building and fits the Ordinance as well. Chairwoman Strollo said that the outdoor storage is permitted in this district, however, that all outdoor storage must be screened by special planting and/or a fence six feet in height, as required by the Shade Tree and Planning Board, so that said storage, in the opinion of the Planning Board, will over a period of time not be visible from any residence zone district. For the purposes of this subsection, the visibility will be determined from any point measured 25 feet. Chairwoman Strollo said that there is care taken by the municipality to address outdoor storage when it is permitted. Chairwoman Strollo said that Site Plan approval is required for an application that has outdoor storage. Chairwoman Strollo said that the landscaping business is proposing some materials, equipment and vehicles that are strictly to support the business. They are not storing vehicles for hire. Chairwoman Strollo said that she wouldn't put this in the definition of a public garage or service station. Chairwoman Strollo said that the definition of a public garage or service station refers to an establishment that would be devoted primarily to the business of supplying that storage. Chairwoman Strollo referenced some examples such as Big Tows who take other people's vehicles and store them on site for repair. Chairwoman Strollo doesn't believe that the landscape business is in the business of storing vehicles. Chairwoman Strollo said that one of the things that were mentioned during the hearing was the definition of a trailer. Chairwoman Strollo said that there's a difference between a storage or recreational camping trailer and one that is open and carries equipment. Chairwoman Strollo said that every application is unique, but we do have Brown Dog LLC or aka Green Belt Landscaping, doing the exact same thing that this applicant is requesting to do. In summary, I would deny this appeal and uphold Mr. D'Agostaro's interpretation that a landscape business falls under the service type business that delivers a service off site directly to the consumer. Chairwoman Strollo said that it's a permitted use and that outdoor materials and equipment are permitted in the zone. Chairwoman Strollo also understands Mr. Ashbahian's point and she empathizes with him over the frustration over the years of the owner's disregard for compliance, and the changes of use and the existence of several zoning violations.

ADJOURNMENT

A motion was made by **Ms. Fisher Poppe**, seconded by **Ms. Boone** to adjourn the regular meeting at 10:30 pm. All voted in favor. **Carried.**