

**RESOLUTION**  
**Borough of Union Beach**  
**Planning Board**  
**In the Matter of 60 Creek Road, LLC**  
**Block 149 Lot 16**  
**Decided on March 29, 2023**  
**Memorialized on April 26, 2023**  
**Application for Section 68 Approval of Pre-Existing Non-Conforming Use**

**WHEREAS**, 60 Creed Road, LLC (the “applicant”) has made an application to the Borough of Union Beach Planning Board for Section 68 approval of a pre-existing non-conforming use for property located at the corner of Spruce Street and Lorillard Avenue, also known as Block 149, Lot 16 as shown on the tax map of the Borough, located in the R-8 Residential Zone; and

**WHEREAS**, a public hearing was conducted on this application on March 29, 2023.

**WHEREAS**, the Applicant was represented by Paul Mirabelli, Esq.; and

**WHEREAS**, the Board determined it had jurisdiction to hear this application.

**NOW THEREFORE**, the Board makes the following findings of fact based upon evidence presented at the aforesaid public hearings, at which a record was made. The application before the Board seeks an approval under N.J.S.A. 40:55D-68. The property in question currently contains two (2) dwelling units on the single lot. The Applicant is before the Board seeking a Certificate of Prior Non-conformance under Section 68 of the Municipal Land Use Law (“MLUL”). The property is located at 354 Lorillard Avenue and 401 Spruce Street, also known as Block 149, Lot 16. The subject property is a non-conforming, pre-existing corner lot. It is located in the R-8 Residential Zone and contains a raised single-family residence, and a smaller residence that has not been occupied in recent years. The property is located in the R-8 Residential Zone, which permits single family dwellings but not two dwellings on the same lot.

By way of background, in February 2018, the applicant sought approval to elevate the pre-existing two-story single-family dwelling on the property. In a hand-written note provided with

the submission of February 5, 2018, the applicant indicated that he was looking to elevate the two-story structure as shown on page 2 of 8 on plans submitted to the Zoning Officer. The Acting Zoning Official approved the elevation of the existing two-story dwelling in correspondence dated February 8, 2018.

Subsequently, the applicant, contrary to the representation in the aforesaid letter, proceeded to submit an application for a minor subdivision approval of the property in question. The application for a minor subdivision which was denied by this Board, and that denial was upheld by the Superior Court of New Jersey, Law Division in March 4, 2022. The Board now has in front of it this Application under Section 68 of the MLUL to allow two single-family dwelling units to exist on this lot.

Section 68 of the MLUL applies to such properties fail to conform to the requirements of the zoning district for which it is located by reason of such adoption, revision or amendment. The prospective purchaser, mortgaging or any person interested in any land upon which a pre-existing nonconforming uses or structure exists is allowed to apply in writing for the issuance of a certification that the uses or structure existed before the adoption of the ordinance which render the use or structure non-conforming. In this instance that would be 1963. The Applicant carries the entire burden of proof before the Board.

Board counsel reminded the Board of the prior issue involving the proposed minor subdivision that had been denied and subsequent ruling by Judge Grosso Jones, affirming the denial of the minor subdivision by the Board. The Applicant is not here to relitigate that matter. The hearing is solely for the Applicant seeking relief pursuant to Section 68 of the MLUL dealing with pre-existing nonconforming uses. Under this process the application is heard by the Board as

a Board of Adjustment, as required by statute. At this point the Board engineer Mr. Dennis Dayback and Ms. Caroline Reiter, Board Planner were both sworn in and qualified.

Counsel for the Applicant, Paul Mirabelli, introduced Mr. Dominic Mastrocola of 1009 Harris Avenue Union Beach. Mr. Mastrocola was sworn in. Mr. Mirabelli introduced two exhibits into the record, Exhibit A-1 is the T&M Associates letter of June 21, 2022 and Exhibit A-2, a letter from Mr. Mirabelli dated May 23, 2022 correcting the lot and blocks for the property in question. Mr. Mirabelli stated the Applicant is seeking a certificate of non-conforming use. He noted that these were separate structures located on the property. Mr. Mirabelli provided the Board with a copy of the court ruling of Keansburg which he asserted set the standard to review for such matters pending before a Zoning Board of Adjustment. Mr. Mirabelli argued that a non-conforming use is permitted to exist; the existence is predicated on the continued maintenance of the non-conforming use. The right of the owner to continue to exercise that non-conforming uses of property as part of land title that can only be distinguished by an act or omission indicating an attempt to abandon.

With respect to the proofs required, Mr. Mirabelli then provided some additional documentation regarding an assessment from 1957 and calling out two separate lots at the time and aerial photo from that time. He then introduced Exhibits A-3 and A-4, A-3 being a tax map showing the property in question and Exhibit A-4 is series of ordinances dating back to 1930. The Board planner Ms. Reiter asked about the date of the letter. Mr. Mirabelli stated that originally was instructed to submit to the Board which he did with the date of May 27, 2022. There was a subsequent resubmission made and Ms. Reiter noted that there had been ongoing correspondence including a September 29, 2022 letter as well. Mr. Mirabelli provided a copy of the May 27, 2022, letter and copies were distributed to members of the Board. Exhibit A-5 was then introduced regarding a 1947 ordinance by Mr. Mirabelli.

Mr. Mirabelli then introduced Exhibit A-6 which is the 1963 ordinance and specifically page four regarding non-conforming uses and how they may continue as otherwise provided in the ordinance. There was an issue at that time as to whether the non-conforming lot was further reduced in size and not enlarged, extended or increased unless such would reduce the degree of non-conformity. Mr. Mirabelli stated that up to 1963 there was a pre-existing non-conforming legal use and predated the ordinance in his opinion. He then introduced Exhibit A-7 pre-Sandy Certificate of Occupancy from 2006 to 2011 and an Exhibit A-8, a Certificate of Occupancy for 2014 to 2019. There was also related correspondence regarding property maintenance.

Mr. Mastrocola testified that he purchased the property from Bank of America out of foreclosure in June of 2017. Mr. Murray asked if there was a CO between 2011 and 2017. Mr. Mirabelli answered that all he had was what was received in response to his Open Public Records Act request from the Borough. Mr. Mirabelli did not believe that someone had been a resident there for a period of six years. Ms. Reiter noted that the June 2017 CO stated that this was a title change only and did not explicitly describe the building as being occupied. Mr. Murray again asked the applicant as to why he did not, if he wanted to continue to use the property, maintain the property. Mr. Mastrocola claimed that the Town was not enamored of the idea of continuing to utilize the property in question. He then introduced Exhibit A-9 letter dated May 19, 2019, regarding the 401 Spruce Street residence. This residence had been elevated and renovated. Mr. Mirabelli asserted that he believed the proofs that have been offered showed that the two structures were legally pre-existing on the property prior to the ordinance.

After a brief recess the hearing resumed with the introduction of Exhibit A-10 to the property provided by Mr. Mirabelli. At that point council for the Board briefly reviewed provisions regarding the prior non-conformity and the burden of proof required by the applicant as set out in

Chapter 27 of Cox and Konig on Land Use Administration. Through the Board planner, Board counsel then introduced three exhibits, Exhibit B-1, dated March 15, 2019 letter from T&M to Mr. Mastrocola, zoning approval letter for the demolition of the pre-existing one-story dwelling at 354 Lorillard Avenue, Exhibit B-2, March 20, 2019 zoning application No. 2375 for Mr. Mastrocola to demolish the Sandy damaged home on the property, and Exhibit B-3 February 5, 2018 handwritten note from Mr. Mastrocola to Mr. Dayback who was the zoning official stating that the Applicant would demolish the smaller house if the Board does not approve the proposed subdivision of the property. Mr. Mirabelli stated the resolution denying the subdivision application was dated February 27, 2019.

Ms. Reiter then referred to sections of the Union Beach Ordinance 13-4.2 regarding abandonment or non-conforming use or building that will presume to be abandoned when the cessation of the use of activity by an apparent act or failure on the part of the tenant or owner to reinstate the use/or occupancy in a period of one year from the day up to when occupancy ceases or is discontinued. Ms. Reiter stated that the handwritten letter from the applicant and the demolition permit that had been filled out by him and submitted to the Borough in her opinion showed his intent to abandon. The single-story house on Lorillard has not been lived in for a number of years. It has been abandoned exceeding the time frame that the ordinance allows. She testified as to planning principles that the situation conflicts with from zoning to the Master Plan and the related documents that has been proffered show pattern of not using the building. She also raised several issues regarding some fundamental provisions of Section 2 of the MLUL, particularly with regard to general welfare; well-being of neighborhoods; light air and open space; and desirable visual impact. She noted that the applicant is not requesting any type of bulk variance relief.

Mr. Mastrocola claimed in rebuttal that he was in financial distress and needed to consider razing one of the houses. He claimed that he wrote the letter and then later changed his mind. Ms. Reiter then asked the Board engineer Mr. Dayback if he would have issued the zoning board permit to raise the two-story building if Mr. Mastrocola stated that he would change his mind. Mr. Dayback stated that was not the case. Mr. Dayback testified that the applicant did not mention any type of financial problems in the course of their discussions. Mr. Dayback questioned when Mr. Mastrocola put in a zoning application to demolish the smaller structure after the subdivision had been denied.

Three members of the public addressed the Board and raised concerns. Mr. Robert Carhart of 235 Front Street, Keyport said he was Mr. Mastrocola's partner and that they should be allowed to resuscitate use of the property. Mr. Harry Hoff of Front Street, Union Beach raised questions as to whether the Sandy Law would apply in this instance. Mr. Joe Savi, 117 Henry Street said the neighborhood has been under stress and needs the lots like this to be rebuilt, noting that there was similar setup of houses across the street.

**NOW THEREFORE** be it resolved by the Planning Board of Union Beach and it makes the following conclusions of law based upon the foregoing findings of fact. The applicant is seeking relief under Section 68 of the MLUL to have a single-family structure that has been on the property for a significant amount of time deemed a pre-existing nonconforming use.

Based upon the record before the Board and testimony by the applicant and its witnesses, as well as taking into account the testimony provided by the various fact witnesses and expert witnesses, the Board finds that in this particular instance that it can grant the relief being sought by the applicant pursuant to Section 68 of the MLUL. The proofs presented before the Board by the Applicant show that the property has two dwellings on it prior to 1963, when the zoning

ordinances of the Board were first established. The proofs before the Board show the two dwellings on the property predate 1963.

Granting this approval shall not be considered as relieving the Applicant from properly maintaining this dwelling. Any work to be done cannot proceed until all of the required permits have been secured by the Borough.

**BE IT FURTHER RESOLVED** by the Planning Board of the Borough of Union Beach that the application approved herein is subject to the following terms and conditions.

1. Certificate that taxes are paid to date of approval. All escrow accounts are to be kept current.

2. The Applicant shall see to the payment of all fees, costs and escrows due or to become due; any and all monies are to be paid within 20 days of said request by the Secretary to the Planning Board. All escrow accounts must remain current and all property taxes are to be kept paid.

3. The Applicant shall comply with all directives of the Borough Fire, Health and Construction Officials, or their designees to properly maintain the dwelling.

4. The Applicant shall take appropriate dust control, noise control and vermin control measures at all times to maintain the property in accordance with law.

5. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Union Beach, County of Monmouth, State of New Jersey or any other jurisdiction.

The undersigned secretary certifies the within resolution was adopted by this Board on March 29, 2023, and memorialized herein pursuant to N.J.S.A. 40:55D-10(g) on April 26, 2023.

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Laurette Wade, Secretary, Planning Board

FOR: 4

AGAINST: 3

ABSTAIN: 0

Board Member(s) Eligible to Vote:

Wells     Coffey     Devino     Hallam

Conners     Murphy     Sweeney