

RESOLUTION

**BOARD OF ADJUSTMENT
BOROUGH OF HAWTHORNE
COUNTY OF PASSAIC, STATE OF NEW JERSEY**

**LUIS A. FRANCISCO & NICOLE M. FILLIPPELLI
D(2) Variance & Variances for Building Height (Stories),
Rear Yard Setback, Right Side Yard Setback, & Lot Coverage**

WHEREAS, LUIS A. FRANCISCO & NICOLE M. FILLIPPELLI (collectively, “Applicant”), having an address of 66 Tilt Street, Haledon, New Jersey, 07508 has made application to the Board of Adjustment of the Borough of Hawthorne (“Board”) seeking variance relief, hereinafter more fully described, from provisions of the Hawthorne Borough Ordinances, for property located at 132 Rock Road, Hawthorne, New Jersey, 07506 (“Property”) also known as Block 230, Lot 1 on the Tax Assessment Map of the Borough of Hawthorne; and

WHEREAS, public hearing(s) were held upon the application on December 16, 2024, and February 24, 2025, and the Applicant having shown, to the satisfaction of this Board, that proper notice was served upon all interested parties as required by Statute; and

WHEREAS, the Board having considered its own local knowledge and having inspected the property and the surrounding neighborhood, and having had opportunity to receive testimony from and question the Applicant, and opportunity was provided for any interested parties and the general public to be heard, and having carefully considered the application together with all testimony and evidence presented, and any reports, comments and recommendations provided by any applicable Borough and County departments and/or other agencies, hereby makes the following findings of fact and conclusions of law:

I. PRELIMINARY INFORMATION

1. The Applicant has been represented in this matter by Frederick Roughgarden, Esq. At hearing, the Applicant appeared and testified and also presented the testimony of:
 - a) Michael D. Kauker, PP, AICP, professional planner, of Kauker & Kauker, LLC; and,
 - b) Christopher O. Dougherty, RA, AIA, registered architect, of Christopher O. Dougherty, RA, AIA, LLC.

2. The owner of the Property is Cornerstone Heating and Cooling, LLC; the Applicant is the sole owner/member of this LLC.
3. The subject Property is an interior lot, located in the R-1 Zone of the Borough of Hawthorne ("Borough") and is currently developed with a two-family dwelling with accompanying asphalt driveway, shed, decks, sidewalks, patio and retaining walls.
4. The Applicant proposes to expand the top floor of the existing two-family dwelling.
5. In the R-1 Zone, Section 540-148 and Chapter 540, Attachment 1 of the Borough Code dictate the Borough zoning requirements.
6. In support of the application, the Applicant has submitted the following items, each of which is expressly made a part of the application and is the basis of any Board decision unless otherwise specifically excepted herein:
 - a) Borough of Hawthorne Zoning Board of Adjustment, Application for Variance, dated October 11, 2024.
 - b) Borough Checklist for Required Submissions, to the Planning Board or the Zoning Board of Adjustment, dated August 2, 2024.
 - c) Deed between Angel M. Machado Sn. and Cornerstone Heating & Cooling, LLC, dated March 13, 2023.
 - d) Architectural Plans (12 sheets) entitled, "Proposed Owner Unit Addition & Alterations, Two Family Duplex Residence, 132 Rock Road, Hawthorne, NJ 07506, Owner: Luis Francisco", prepared by Christopher O. Dougherty, RA, AIA, LLC, dated February 21, 2024, last revised July 22, 2024.
 - e) Survey (1 sheet) entitled, "Boundary Survey, Tax Lot 1 - Block 230, 132 Rock Road, Borough of Hawthorne, Passaic County, New Jersey", prepared by Andrew A. Schmidt PLS, dated August 15, 2023.
 - f) Letter correspondence to Joan Herve from Frederick Roughgarden, Esq., dated February 10, 2025.
7. The Board received the following reports and memos from Borough departments and from its professionals, all of which are incorporated herein by reference:
 - a) Memorandum from the Borough Zoning Official, dated April 16, 2024, advising of the issuance of a permit denial to the Applicant.
 - b) Engineering Review Letter, dated October 4, 2024, prepared by John G. Yakimik, PE, of Boswell Engineering, Board engineer.
 - c) Planning Review Letter, dated February 18, 2025, prepared by John. P. Szabo, Jr., PP, AICP, of Burgis Associates, Inc., Board planner.
8. At hearing, the Applicant relied upon and entered the following items into the record as evidentiary, each of which is expressly made a part of this application and is the basis of any Board decision unless otherwise specifically excepted herein:

- a) A-1: Two (2) pages, consisting of seven (7) photographs, taken by Michael D. Kauker, PP, AICP, on February 14, 2025.
- b) A-2: One (1) page, aerial map, taken from "Near Map" (online service).
- c) A-3: One (1) page, 1953 historic aerial photograph, generated by an online service.
- d) A-4: Tax assessment card for the subject Property, from the Borough Tax Office.

II. VARIANCE(S)/RELIEF SOUGHT

- 9. N.J.S.A. 40:55D-70(d)(2), Expansion of a Nonconforming Use. Pursuant to Borough Code Section 540-148, two-family homes are not a use permitted in the R-1 Zone of the Borough. The existing dwelling on the Lot is a two-family dwelling – a lawfully existing nonconforming use (see Findings of Fact, below). The Applicant is proposing to expand this use and therefore, variance relief pursuant to N.J.S.A. 40:55D-70(d)(2), a so-called "d(2) variance," is required from the Board and requested by the Applicant.
- 10. The Applicant's proposal additionally requires, and the Applicant is requesting, relief from the Borough of Hawthorne Zoning Code by way of the following variances:
 - a) Chapter 540, Attachment 1: Building Height (Stories). The maximum permitted number of stories for dwellings within the R-1 Zone is 2 ½. The existing and proposed number of stories for the dwelling is 3; therefore, the Applicant requires and requests a variance in this regard.
 - b) Chapter 540, Attachment 1: Rear Yard Setback. The required minimum rear yard setback in the R-1 Zone is 25 ft. The existing and proposed rear yard setback is 9.6 ft.; therefore, the Applicant requires and requests a variance in this regard.
 - c) Chapter 540, Attachment 1: Side Yard Setback. The required minimum side yard setback in the R-1 Zone is 10 ft. The existing and proposed right side yard setback is 6 ft.; therefore, the Applicant requires and requests a variance in this regard.
 - d) Chapter 540, Attachment 1: Lot Coverage. The maximum permitted lot coverage in the R-1 Zone is 35%. The existing and proposed lot coverage is 50.2%; therefore, the Applicant requires and requests a variance in this regard.

III. FINDINGS OF FACT

- 11. Michael D. Kauker, PP, AICP, professional planner, appeared and offered testimony of behalf of the Applicant.

12. Mr. Kauker described the Property and indicated that thereon exists a two-family dwelling with related improvements. Acknowledging that the R-1 Zone, wherein the Property lies, does not include two-family homes as a permitted use, Mr. Kauker opined that the existing dwelling is a lawfully existing nonconforming use, which the Applicant seeks to expand. Mr. Kauker further opined that, as such, a d(2) variance with the presentation of the related proofs is appropriate.
13. In support of the above opinion, Mr. Kauker testified as to the history of the Property, introducing Exhibits A-1 through A-4 into the record (referenced herein at paragraph 8). Mr. Kauker testified that the existing dwelling predates the Borough Zoning Code, where the dwelling was built in 1928 and the Code was introduced in the 1950s.
14. Board planner, John. P. Szabo, Jr., PP, AICP, agreed with Mr. Kauker's conclusion based on the testimony and evidentiary items presented related thereto, and advised it was appropriate to assess the application as a request for a d(2) variance, as the record established that the proposal is an expansion of a lawfully existing nonconforming use.
15. Mr. Kauker testified that the 2011 Borough Reexamination Report and the 2022 Reexamination Report both contain goals which are not substantially impaired by the proposal at bar. Specifically, Mr. Kauker opined as to the following goals within said Reports, indicating that said goals are met by the proposal:
 - a) *To maintain and enhance existing areas of stability in the community:* Mr. Kauker testified that although there are two units within the existing/proposed dwelling on the Lot, the dwelling is consistent with the density within the R-1 Zone and neighboring zones, due in large part to the oversized nature of the subject Lot (15,030 sf, where a minimum of 6,500 sf is required in the Zone);
 - b) *To provide a variety of housing types:* Mr. Kauker testified that the inclusion of a two-family home within the neighborhood furthers this goal.
 - c) *To preserve and maintain existing high quality one and two-family homes:* Mr. Kauker testified that the existing dwelling will be significantly renovated, resulting in a two-family dwelling that is Code compliant, aesthetically pleasing, and in conformance with modern-day building standards.
 - d) *To create buffer zones to marry incompatible uses:* Mr. Kauker testified that the existing/proposed use is transitional in nature, as the Lot is flanked by a multi-unit apartment building and a single-family residential zone, with additional 3-story homes nearby.
16. Mr. Kauker testified that the expansion of the nonconforming use and the request for a d(2) variance is statutorily justified. Namely, as to the positive criteria required to be fulfilled under the statute, Mr. Kauker testified that the Applicant meets the burden of proof because:

- a) The proposed addition results in an aesthetic improvement, which is a benefit to the Borough, and the Property helps to “harmonize” the use with surrounding uses;
 - b) The proposal presents a more functional use of the interior space of the existing dwelling, which includes an aesthetic and functional modernization;
 - c) The proposal does not increase intensity of the existing use, as the dwelling would remain a two-family home (noting the exceptionally oversized nature of the Lot, which could conceivably otherwise be developed in a more intense way);
 - d) The proposal is restricted to the building footprint and there will be no expansion of same; and
 - e) The existing/proposed use, although not a specifically permitted use, provides a desirable transition between the diverse surrounding uses which vary in density/intensity.
17. As to the satisfaction of negative criteria required for the requested d(2) variance, Mr. Kauker testified there is no impairment to the Zone Plan/Ordinance because the proposal furthers the goals of the Reexamination Reports (discussed above). Mr. Kauker further testified that there is no substantial detriment to the public good and the Applicant meets the burden in this regard because:
- a) The two-family dwelling has existed on the Lot for many years and has consequently been proven to be appropriately incorporated into the neighborhood with no detriment;
 - b) The Lot is “on the edge” of the R-1 Zone and, again, is transitional in nature, immediately adjacent to an apartment complex, single family dwellings, and other 3-story dwellings; and
 - c) The Lot is significantly set back from the street and is heavily wooded.
18. Mr. Kauker testified, and Mr. Szabo agreed, that the requested bulk variances (referenced in paragraphs 10b, 10c and 10d herein) are subsumed by the d variance and that if the Board accepts the proofs for and approves the d(2) variance request, granting the bulk variance relief is appropriate and supported by established case law.
19. Christopher O. Dougherty, RA, AIA, registered architect, appeared and offered testimony on behalf of the Applicant.
20. Mr. Dougherty explained the nature of the expansion of the existing dwelling. Mr. Dougherty indicated that only one unit of the two-family dwelling will be expanded, and the other unit will be renovated but not expanded. Mr. Dougherty testified that all construction is within the building footprint, and there will be no expansion of the existing footprint.

21. Mr. Dougherty testified that the existing dwelling is a 3-story dwelling, and the proposal seeks to expand the top story of the dwelling, creating more livable space in accordance with a modern standard of living.
22. Mr. Dougherty testified that although the existing/resulting dwelling will be nonconforming as to the height in stories, it will be fully conforming to the Zone height requirements as to feet, with the dwelling being no more than 35 ft., the maximum permitted in the Zone; a stipulation as to same was placed on the record.
23. Mr. Dougherty was questioned about the conflicting information in the plans presented as to the ceiling height of the third floor. A stipulation was placed on the record that the ceiling height would be at least 7 ft.
24. Mr. Dougherty testified that the third floor, which is being expanded, will not include any bedrooms, bathrooms, or a kitchen; the Applicant stipulated to same. Further, the Applicant stipulated to a deed restriction being recorded as to this condition of approval.
25. John G. Yakimik, PE, Board engineer questioned Mr. Dougherty regarding the resulting drainage conditions onsite and mitigation of same. Mr. Dougherty testified that stormwater runoff from the roof would be directed to a new, onsite seepage pit. Mr. Yakimik required, and the Applicant stipulated to, Mr. Dougherty submitting drainage calculations and a proposed drainage mitigation system to Mr. Yakimik for his review and approval.
26. Lastly, the Applicant appeared and offered testimony. The Applicant testified that they are the sole owners/members of the Property owner, Cornerstone Heating and Cooling, LLC.
27. The Applicant was questioned about the status of construction onsite, acknowledging that construction commenced without a permit, a stop-work order was issued, and that, in accordance with said stop-work order, there has been no additional construction onsite for approximately one year. The Applicant stipulated to a strict prohibition on any construction whatsoever until all conditions of approval herein are met, and all necessary permits are obtained from the appropriate Borough departments.
28. The Applicant was questioned about the substantial encroachment of various improvements related to the subject dwelling onto the neighboring property to the west of the subject Lot. Mr. Yakimik advised that said encroachment includes a deck, patio and driveway. The Applicant stipulated to remedying this unlawful encroachment within three (3) months of adoption of this Resolution, by way of

removal, and/or easement or licensing agreement signed, executed, and recorded by mutual consent with the neighboring property owner.

29. At the conclusion of the testimony and after the public had an opportunity to be heard and considered, the Board voted to approve the application.

IV. LEGAL DISCUSSION, CONCLUSIONS OF LAW

D(2) Variance:

30. The Applicant proposes an expansion of the lawfully existing nonconforming two-family dwelling on the Lot (where two-family dwellings are not a permissible use in the R-1 Zone). Therefore, variance relief pursuant to N.J.S.A. 40:55D-70(d)(2), aka a d(2) variance, is required from the Board and requested by the Applicant.

31. N.J.S.A. 40:55D-70(d) provides in pertinent part the following:

The board of adjustment shall have the power to [...] **In particular cases for special reasons**, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: ... (2) an expansion of a nonconforming use[...] ... A variance under this subsection shall be granted only by affirmative vote of at least five members...[.]

No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted **without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.** (*Emphasis added*).

32. The Board has the power to grant d(2) variances to permit expansions of lawfully created pre-existing nonconforming uses pursuant to N.J.S.A. 40:55D-70d(2) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(2)" variance. To satisfy the positive criteria, the applicant bears the burden of proof in demonstrating "special reasons" for the grant of the variance. The standard of "special reasons" for the grant of d variances has been defined as those which advance the purposes of zoning listed in N.J.S.A. 40:55D-2. [Kohl v. Mayor and Council of Borough of Fair Lawn, 50 N.J. 268 (1967).] Special reasons are deemed satisfied as a matter of law if the proposed use is one which inherently benefits the general welfare. [Sica v. Board of Adjust. of the Twp. of Wall, 127 N.J. 152 (1992).] For a use that is inherently beneficial (i.e., a church or a school), an applicant is not required to demonstrate that the site is particularly suitable for the proposed use, Kohl, supra, 50 N.J. at 279, or that it may not be used for a permitted use (the latter known as the "hardship test" for a use variance). [DeSimone v. Greater Englewood Housing Corp., 56 N.J. 428, 440 (1992).] If the use is not one that inherently serves the public good, then special reasons must be based on particular site suitability [Medici v. BPR Co., 107 N.J. 1, 18 (1987).] "Particular

suitability" does not require proof that the site be the only possible location for the particular project. [Price v. Himeji, LLC, 214 N.J. 263 (2013).] For d(2) variances, special reasons can also be shown by demonstrating aesthetic improvements that create better conformity of the existing use within the surrounding area. [Burbridge v. Mine Hill Borough, 117 N.J. 376 (1990).] However, in such instances, more than "mere beautification" is required and any such aesthetic improvement must involve the overall visual compatibility of the use and be "inextricably entwined with notions of the general welfare." [Ibid]. In addition to satisfying the aforementioned positive criteria, the applicant must also satisfy the negative criteria. The negative criteria require proof that the variance "can be granted without substantial detriment to the public good" and that the variance "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." [N.J.S.A. 40:55D-70(d).] For a use that is not inherently beneficial, the applicant must offer "an enhanced quality of proof" that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance, proof which must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the district. [Medici, supra, at 4.]

33. As to the positive and negative criteria, the Board finds that the Applicant has satisfied the burden of proof and relies on and accepts the testimony of Applicant's professional planner, Mr. Kauker, as described herein and contained on the record.

Bulk Variances:

34. The Applicant has requested bulk variance relief (otherwise known as "c variances" under N.J.S.A. 40:55D-70(c)) as to height (stories), rear yard setback, right side yard setback, and lot coverage (more specifically stated in paragraphs 10b, 10c and 10d herein).
35. With respect to applications involving use/ d variances, the New Jersey Appellate Court has established that the c variances are subsumed with the grant of the d variance: "Generally application for a 'c' variance and a 'd' variance cannot coexist. [...] A Zoning Board, in considering a 'use' variance, must then consider the overall site design. In essence, the 'c' variances are subsumed in the 'd' variance." Puleio v. North Brunswick Township Board of Adjustment, 375 N.J. Super. 613, 621 (App. Div. 2005).
36. In short, the Appellate Court in Puleio (and later, the New Jersey Supreme Court in Price v. Himeji, LLC, 214 N.J. 263 (2013)) held that c variances (bulk variances) are considered subsumed within d variances (use variances) - meaning that when evaluating a d variance application, the zoning board must consider the overall site design, effectively incorporating any c variance considerations within the d variance analysis, thereby obviating the need for the presentation of statutory proofs related to c variance relief.

37. As such, in granting the Applicant's request for d(2) variance relief, the Board finds that the overall site design and proposal as presented to be acceptable and grants the Applicant's bulk variance relief requests.

WHEREAS, the Board of Adjustment of the Borough of Hawthorne has considered the application and plans submitted with reference to the objectives, requirements and restrictions set forth in the Zoning Ordinance of the Borough of Hawthorne and Land Use Statutes of the State of New Jersey.

NOW THEREFORE, BE IT RESOLVED that the Board of Adjustment of the Borough of Hawthorne, for good cause shown and by reason of the findings and conclusions as set forth herein and/or otherwise on the record at aforementioned public hearing(s), hereby **grants and approves** the Applicant's request variance relief, as delineated above, specifically for:

- 1) N.J.S.A. 40:55D-70(d)(2), Expansion of a Nonconforming Use. To allow an expansion of the existing two-family dwelling, where two-family dwellings are not a permitted use within the R-1 Zone.
- 2) Chapter 540, Attachment 1: Building Height (Stories). To allow a building height of 3 stories, where the maximum permitted number of stories for dwellings within the R-1 Zone is 2 ½.
- 3) Chapter 540, Attachment 1: Rear Yard Setback. To allow a rear yard setback of 9.6 ft., where the required minimum rear yard setback in the R-1 Zone is 25 ft.
- 4) Chapter 540, Attachment 1: Side Yard Setback. To allow a right side yard setback of 6 ft., where the required minimum side yard setback in the R-1 Zone is 10 ft.
- 5) Chapter 540, Attachment 1: Lot Coverage. To allow a lot coverage of 50.2%, where the maximum permitted lot coverage in the R-1 Zone is 35%.

Such relief is granted in accordance with the plans, exhibits, and reports submitted and above referenced, subject to the following **terms and conditions**:

- a. All construction must be compliant with all building codes and, specifically, the ceiling height of the third floor must be at least 7 ft. high.
- b. The resulting dwelling shall be no more than 35 ft. in height, in accordance with Borough Code requirements.
- c. There shall be a strict prohibition on any bedrooms, bathrooms, or kitchens being located on the third floor of the dwelling. A deed restriction as to same must be prepared by the Applicant, presented to and approved by the Board attorney, and upon approval, recorded by the Applicant, with proof of same being submitted to the Board attorney.

- d. As to the encroachment of various improvements onto the neighboring property (as depicted on the plans and Property survey submitted in connection with the application), the Applicant must, within three (3) months of adoption of this Resolution, remove all such encroachments or, alternatively, present a duly executed legal instrument (i.e. licensing agreement or easement), rendering the encroachments lawful. Such instrument must be recorded by the Applicant, with proof of same being submitted to the Board attorney.
- e. There shall be a strict prohibition on onsite construction unless and until all appropriate permits are obtained by the Applicant.
- f. Drainage calculations and an onsite drainage mitigation system plan must be submitted to the Board engineer for his review and approval prior to the commencement of any construction. Plans shall be revised and submitted to include same.
- g. There shall be no adverse drainage directed to any neighboring properties during construction or upon completion of construction.
- h. The Property shall be kept in clean and tidy condition during the course of construction.
- i. The Applicant shall comply with all self-imposed terms, conditions and limitations that are a part of the Applicant's application, including, but not limited to any modifications and/or supplements at public hearing.
- j. The Applicant shall comply with all applicable ordinances of the Borough of Hawthorne, and all applicable federal, state and county laws, rules, and requirements.
- k. This Resolution is specifically conditioned upon the Applicant paying all required application fees, escrow fees, Borough professional fees, and related fees required by this municipality and this Resolution of Approval.
- l. The Board and this Resolution incorporate by reference, as if recited verbatim, the content of the Board's transcript and minutes of the Applicant's Board hearing(s). Omission herein of any condition and/or stipulation which was otherwise stated on the record of hearing(s), does not constitute waiver and shall be fully enforceable.

FRANCISCO & FILLIPPELLI: 230, Lot 1
132 Rock Road

BE IT FURTHER RESOLVED that this approval shall not constitute a recommendation or approval of any application or variance not specifically delineated herein.

BE IT FURTHER RESOLVED that the Administrative Officer shall forward a copy of this Resolution to the Borough Engineer, Construction Official and the Applicant.

MOTION was made at hearing of **February 24, 2025** to request and authorize the Board's attorney, Sophy Sedarat, Esq., to draft an appropriate Resolution reflecting the Board's determination as aforesaid.

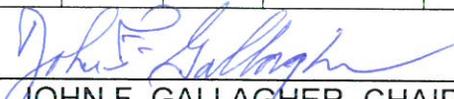
ROLL CALL VOTE UPON MOTION

Name	Motion	Second	Yes	No	Abstain	Absent
John F. Gallagher			X			
David A. Schroter			X			
Victor Cuttitta, Jr.			X			
Jodi DeMarco						X
Lyle Hatch						X
Marco A. Totaro	X		X			
Eleanor Conley Wenzke		X	X			
ALTERNATES	----	----	----	----	----	----
Brian J. Lind			X			
Danilo Ramirez			X			
TOTAL	----	----	X		----	----

MOTION was made at the Board's public hearing on **April 21, 2025** to approve and adopt the foregoing Resolution as drafted by Sophy Sedarat, Esq.

ROLL CALL VOTE UPON FORM OF RESOLUTION

Name	Motion	Second	Yes	No	Abstain	Absent
John F. Gallagher						X
David A. Schroter			X			
Victor Cuttitta, Jr.	X		X			
Jodi DeMarco					X	
Lyle Hatch			X			
Marco A. Totaro		X	X			
Eleanor Conley Wenzke						X
ALTERNATES	----	----	----	----	----	----
Brian J. Lind			X			
Danilo Ramirez						X
TOTAL	----	----	X		----	X


JOHN F. GALLAGHER, CHAIRMAN


JOAN HERVE, BOARD SECRETARY