

**IN THE MATTER OF
APPLICATION NO. PB22-20
OF EMILIO VICENS MARQUEZ
D/B/A ZOE'S & EMILIO'S KITCHEN
BLOCK 127 LOT 10**

**RESOLUTION GRANTING
VARIANCE APPROVAL**

WHEREAS, EMILIO VICENS MARQUEZ, D/B/A ZOE'S & EMILIO'S KITCHEN, hereinafter the "Applicant", has proposed the development of property located at 77 Center Avenue, in the Borough of Atlantic Highlands, County of Monmouth, and State of New Jersey which property is further known and designated as Block 127, Lot 10 on the Tax Map of the Borough of Atlantic Highlands; and

WHEREAS, the Applicant has applied to the Planning Board of the Borough of Atlantic Highlands for Variance approval to permit the expansion of an existing breakfast/lunch restaurant to expand its hours to accommodate dinner meals, closing by 9:00 p.m. contrary to the provisions Section 150-49 C. of the Development Regulations of the Borough of Atlantic Highlands; and

WHEREAS, the subject property is located in the R-1 Residential Zone District and restaurants are not a permitted use in the zone; and

WHEREAS, the Applicant appeared before the Planning Board of the Borough of Atlantic Highlands on April 6, 2023, due Notice of said meeting having been given in accordance with New Jersey Statutes, the Open Public Meetings Act, and the Municipal Land Use Law and a quorum of the Planning Board being present the application was heard; and

WHEREAS, the Applicant's witnesses were sworn and the Planning Board having heard the testimony of the Applicant's witnesses and having examined the Exhibits submitted by the Applicant and having considered all of the evidence presented in favor of or in opposition to the application, the Planning Board has made the following findings of fact:

1. The Planning Board has received and reviewed the following documents, exhibits and reports:

1.1 Review of Zoning Officer Michelle Clark, dated May 10, 2022, marked as Exhibit A-1 in evidence.

1.2 Application of Emilio's Restaurant, dated May 17, 2022, marked as Exhibit A-2 in evidence.

1.3 Restaurant Layout undated, marked as Exhibit A-3 in evidence.

1.4 Survey prepared by Ronald Trinidad, dated December 12, 2022, marked as Exhibit A-4 in evidence.

1.5 Review #1 of CME Associates, dated January 30, 2023, marked as Exhibit A-5 in evidence.

1.6 License Agreement with St. Agnes Parish, dated June 16, 2022, marked as Exhibit A-6 in evidence.

1.7 Photograph of outside dining area, marked as Exhibit A-7 in evidence.

1.8 Email from Citizen Smith, dated April 6, 2023, marked as Exhibit IC-1 in evidence.

2. The premises in question are located at 77 Center Avenue, in the Borough of Atlantic Highlands, County of Monmouth and State of New Jersey which property is further known and designated as block 127, lot 10 on the Tax Map of the Borough of Atlantic Highlands.

3. The subject property is located in the R-1 Residential Zone District and restaurants are not a permitted use in the zone.

4. The subject property has approximate dimensions of 50.00 ft. x 90.00 ft. x 50.00 ft. x 90.00 ft. with an approximate area of 4,500 square feet. The property is a corner lot at the intersection of Avenue B and Center Avenue and is presently developed with an existing masonry building with a height of two stories on one portion and one story on another portion along with the paver patio area, concrete patio, woodshed and asphalt parking area. The first floor contains the existing breakfast/lunch restaurant and a jewelry store. The upper floor is a residential apartment. The downstairs restaurant is a nonconforming element that has been in business for a substantial period of time serving breakfast and lunch to patrons. The Applicant now wishes to expand the restaurant hours to include serving dinner and being open until 9:00 p.m. This is an expansion to nonconforming use requiring Use Variance approval. The Applicant is not proposing any interior renovations to the building or grading modifications or site work outside the building. The surrounding area consists principally of single-family residential homes and the St. Agnes Church property.

5. The Applicant was represented by Kevin Kennedy, Esq. who presented the testimony of Mr. Marquez, the restaurant owner. He testified that the restaurant facility has six (6) employees at any given time and that that number will not increase as a result of the expanded hours. The restaurant does not have on-site parking. Patrons have to park on the street. The Applicant also has an agreement with St. Agnes Church to utilize church parking areas during the hours of 4pm to 9pm. Mr. Marquez testified that he has not received any complaints from neighbors with respect to street parking. He further testified that trash is picked up two times a week by the municipality, and that trash is stored in containers by the shed structure. Recyclables are kept inside the building until the recycling day arrives. Food deliveries occur three times per week between 6 and 7 o'clock a.m. and take approximately fifteen minutes. The restaurant does not offer entertainment and does not have outside audio. During warmer months food is served outside in the patio area for breakfast and lunch. The Applicant was

proposing to also serve dinner outside but withdrew that aspect of the proposal so that the restaurant will only be open for dinner in its interior. The Applicant agreed to provide containment and screening around the outdoor trash area in accordance with the recommendations of the Planning Board Engineer which will be a condition of this approval.

6. Several citizens expressed concern about the outdoor dining in the evening and the parking situation on the street. As noted previously the Applicant withdrew the request for outdoor dinner dining to remove potential noise impact upon neighbors and provided its agreement to utilize parking in the Church parking lot to eliminate concern regarding patrons taking street parking spaces. Other neighbors expressed their support for the application indicating that the facility does not negatively impact the neighborhood.

7. The Planning Board finds that the Applicant has satisfied the positive criteria for the grant of the requested variance relief. This restaurant has been in operation for a number of years and has operated successfully at this location demonstrating that the subject property is uniquely suited to this use. The Planning Board finds that the facility will operate in the evening in a similar manner as it does during the breakfast and lunch periods. The planning Board finds that the success of the restaurant demonstrates that it provides sufficient space in an appropriate location for this type of use and therefore promotes the purposes of the Municipal Land Use Law.

8. The Planning Board further finds that the Applicant has satisfied the negative criteria for the grant of the requested Variance relief. The Planning Board finds that the grant of the requested variance relief will not result in any substantial detriment to the public good. The restaurant establishment has been located in this site for a substantial period of time and has functioned in harmony with the neighborhood and surrounding properties. The proposal of the Applicant here will extend the hours of the restaurant which will continue to operate in the same manner as currently. Thus, any impacts upon the surrounding neighborhood will be insubstantial and diminimis. The Planning Board notes that the Applicant has withdrawn the request for outside evening dining. All evening activities will be confined to indoors and have only minimal

impacts upon the surrounding neighborhood. It has also provided for off-site parking to minimize street parking congestion.

9. The Planning Board further finds that the grant of the requested Variance relief will not result in any substantial impairment of the Zone Plan or Zoning Ordinance. Although the restaurant is not a permitted use, the Planning Board notes that it has been in existence for a significant period of time and has, in part, set the character of the area. As noted previously, the addition of hours of operation will be for indoor seating only and will have minimal impacts upon the surrounding neighborhood and the Zone Scheme.

10. As a result of all of the foregoing, the Planning Board finds that the Applicant has satisfied the positive and negative criteria for the grant of the requested Variance relief and that the Variances can and should be granted at this time.

11. The Planning Board further finds that the Applicant has not proposed any exterior renovations to the existing building, grading modifications or site work insofar as there are no improvements proposed for the subject property. The Application does not trigger those items set forth in Section 150-21 of the Ordinance requiring a Site Plan Approval. Consequently, the Planning Board finds that Site plan approval may be waived in this instance.

12. The Planning Board further finds that all property owners within 200 feet of the premises in question were given proper Notice of the hearing of this application and were provided with an opportunity present evidence in favor of, or in opposition to, the appeal.

NOW THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of Atlantic Highlands on this 4th day of May, 2023, that the Application of **EMILIO VICENS MARQUEZ, D/B/A ZOE'S & EMILIO'S KITCHEN** be and is hereby approved which approval is expressly conditioned upon compliance with the following terms and conditions:

GENERAL CONDITIONS –

- 1) This approval is subject to the accuracy and completeness of the submissions, statements, exhibits and other testimony filed with, or offered to, the Board in connection with this application, all of which are incorporated herein by reference and specifically relied upon by the Board in granting this approval. This condition shall be a continuing condition subsequent which shall be deemed satisfied unless and until the Board determines (on Notice to the Applicant) that a breach hereof has occurred.

- 2) In the event that any documents require execution in connection with the within approval, such documents will not be released until all of the conditions of this approval have been satisfied unless otherwise expressly noted.

- 3) No taxes or assessments for local improvements shall be due or delinquent on the subject property.

- 4) The Applicant shall pay to the municipality any and all sums outstanding for fees incurred by the municipality for services rendered by the municipality's professionals for review of the application for development, review and preparation of documents, inspections of improvement and other purposes authorized by the Municipal Land Use Law. The Applicant shall provide such further escrow deposits with the municipality as are necessary to fund anticipated continuing municipal expenses for such professional services, if any, in connection with the Application for Development as may be authorized by the Municipal Land Use Law.

- 5) The Applicant shall furnish such Performance Guarantees, Temporary Certificate of Occupancy Guarantees, Safety and Stabilization Guarantees, Maintenance Guarantees, Inspection Fees and such other Guarantees or fees as may be required pursuant to the Municipal Land Use Law and the Ordinances of this Municipality for the purpose of

assuring the installation and maintenance of on-tract/off-tract and private site improvements.

6) No site work shall be commenced or plans signed or released or any work performed with respect to this approval until such time as all conditions of the approval have been satisfied or otherwise waived by the Board.

7) Any and all notes, drawings or other information contained on any approved plans shall be conditions of this approval.

8) Nothing herein shall excuse compliance by the Applicant with any and all other requirements of this municipality or any other governmental entity. This approval is conditioned upon compliance by the Applicant with all Ordinances and Regulations of this Municipality.

9) In the event any de minimis exception has been granted from the Residential Site Improvement Standards Regulations in connection with this application, a copy of this resolution shall be sent to the New Jersey Department of Community Affairs, Division of Codes and Standards, 101 South Board Street, CN 802, Trenton, New Jersey 08625-0802 within thirty (30) days of the date hereof. Said copy of this resolution shall be clearly marked on its face with the words "SITE IMPROVEMENT EXCEPTIONS".

10) In the event that the Applicant and the approving authority have agreed that exceeding a standard of the Residential Site Improvement Standards is desirable under the specific circumstances of the proposed development, such Agreement to Exceed RSIS Standards shall be placed, in writing, by the developer and transmitted forthwith to the New Jersey Department of Community Affairs, Division of Codes and Standards, 101 South Broad Street, CN 802, Trenton, New Jersey 08625-0802.

11) The Applicant shall comply with the contribution requirements of the Municipal Affordable Housing Fund as applicable to this application.

12) In the event that this Application involves a subdivision or site plan, such subdivision or site plan shall expire at the conclusion of the period of protection from zoning changes provided for in N.J.S.A. 40:55D-49 or 40:55D-52.a, as applicable, and in no event shall extend beyond the fifth anniversary of the date of adoption of this resolution.

13) In the event that this approval involves the approval of a subdivision, the Applicant shall provide to the Board Engineer and attorney for review and approval, deeds for each of the lots created and shall file such deeds simultaneously with the recording of any subdivision plat.

14) All special conditions shall be included as notes on the plans.

15) All general and special conditions set forth in this Resolution shall be placed as notes on the approved plans as a Resolution compliance requirement.

16) The Applicant shall comply with the requirements of the Municipal Ordinances with respect to its Affordable Housing obligation by either providing the required affordable housing on-site, providing affordable housing off-site or making a contribution of an Affordable Housing fee pursuant to the applicable Municipal Ordinances. This approval is subject to the Applicant paying all applicable fees, including any fee due and owing to the Municipality's Affordable Housing Trust Fund.

Affordable units in inclusionary developments shall have at least 50% low-income units (of which at least 13% are very low income). The remaining affordable units shall be

moderate income units. The bedroom distribution for affordable units shall be a minimum of 20% three-bedroom units and a maximum of 20% one- bedroom units.

17) This Resolution does not constitute a permit for the construction of the approved improvements. The Applicant shall be responsible for obtaining any and all permits and approvals required **prior to** the commencement of **any** development activities including, but not limited to, N.J.D.O.T., N.J.D.E.P., Monmouth County Planning Board, Freehold Soil Conservation District, Regional and/or Municipal Utility Authority approval, in addition to any and all building and construction permits, required by the Municipality. All work performed shall be in accordance with, and shall not deviate from, the approved plans and all applicable Federal, State, County and Local laws, rules and regulations.

18) As an essential and non-severable condition of this approval, the Applicant shall comply with all Mount Laurel obligations and shall comply with the Municipality's approved Housing Element and Fair Share Plan including but not limited to, any associated implementing Ordinances.

19) The scope of the review of this application is necessarily limited to planning, zoning and land use review of the site as compared to the requirements of the Municipality. The grant of this approval and of any permit or approval in connection therewith shall not constitute a representation, guarantee or warranty of any kind or nature by the Municipality or by any Municipal official or employee thereof with respect to the practicability or safety of any structure, use or other plan proposed and shall create no liability upon or cause of action against the Board, the Municipality or any officials or employees of the Municipality for any damage or injury that result from the construction of the improvements for which this Zoning approval is granted.

SPECIAL CONDITIONS –

1) The approvals granted in connection with this application are a Use Variance to expand an existing, nonconforming use extending the hours of operation through 9 o'clock pm (Section 150-49.C)

2) The following existing nonconformities will continue:

A. Lot area of 4,500 square feet where 7,500 square feet is required.

B. Lot frontage and width of 50 feet where 75 feet is required.

C. Lot shape diameter of 20 feet where 45 feet is required.

D. Front yard setbacks of 0.7 feet and 0.2 feet where 20 feet is required.

E. Accessory building rear yard setback of 2.5 feet where 5 feet is required.

F. Building coverage of 41.7% where 25% is permitted.

G. Lot coverage of 69.7% where 50% is permitted.

H. Floor area ratio of 0.67 where .040 is permitted.

I. Wood fence within front yard along Avenue B in excess of 48 inches where 48 inches is the maximum height permitted.

3) The expanded hours will permit indoor dining only and will not permit outdoor dining in the evening hours.

4) The Applicant shall provide containment and screening around the outdoor trash area in accordance with the recommendations of the Planning Board Engineer.

BE IT FURTHER RESOLVED that nothing herein shall excuse compliance by the Applicant with any and all other requirements of this Municipality or any other governmental entity.

BE IT FURTHER RESOLVED that a written copy of this Resolution, certified by the Secretary of the Planning Board to be a true copy, be forwarded to the Applicant, the Code Enforcement Official of the Borough of Atlantic Highlands, and the Construction Code Official of the Borough of Atlantic Highlands. A written copy of the certified Resolution shall also be filed in the office of the Administrative Officer of the municipality, which copy shall be made available to any interested party and available for public inspection during normal business hours.

BE IT FURTHER RESOLVED that a proper notice of this decision be published once in the official newspaper of the municipality or in a newspaper in general circulation within the Borough.

OFFERED BY:

SECONDED BY:

ROLL CALL:

YES:

NO:

ABSTAIN:

ABSENT:

**Chairperson, Planning Board
Borough of Atlantic Highlands**

I certify that the above is a true and exact copy of the Resolution passed by the Planning Board of the Borough of Atlantic Highlands at its meeting held on May 4, 2023.

**Secretary, Planning Board
Borough of Atlantic Highlands**