

**ZONING BOARD OF ADJUSTMENT
BOROUGH OF DEMAREST**

FILE NO.

ZB 2024-002

IN THE MATTER OF THE APPLICATION OF:

AUSTIN & DOREEN SIBONI, FOR VARIANCES RELATING
TO BLOCK 74; LOT 8 ALSO KNOWN AS
63 CENTRAL AVENUE, DEMAREST, NEW JERSEY

BE IT RESOLVED, by the Zoning Board of Adjustment of the Borough of Demarest that the following Procedural History, Findings of Fact, Conclusions of Law and Conclusion/Determination be and are hereby adopted:

PROCEDURAL HISTORY

The within application was commenced by the filing of an application for variances, as follows:

Variance	Permitted/Required	Existing	Sought	Deviation
Side Yard Setback	10'	9.6'	9.6'* Existing Condition	
Total % Improved Lot Coverage	30%	36.9%	34.9%*	
Maximum % Improved Coverage	25%	27.6%	27.6%*	
Accessory Side Setback - East	10'	3' to shed**	3' to wall	
Accessory Side Setback - West	10'	10'**	6.5' to new wall	
Accessory Rear Setback	10'	22.9'**	5'	

*Reduces or maintains existing non-conformity.

**Existing conditions for accessory structure setbacks do not include various retaining walls constructed without a permit.

FINDINGS OF FACT

The "public hearing" in the within matter was made up of meetings held, at the Demarest Municipal Building, on the following dates: April 16, 2024; May 21, 2024; June 18, 2024; and July 16, 2024 (collectively, "the Hearing" or the "Public Hearing").

The following documents were considered by the Zoning Board in review of this matter:

1. Application for Variances;
2. Exhibit A-1, Retaining Wall & Soil Erosion Control Plan, prepared by Azzolina & Feury Engineering, Inc., dated August 8, 2023, revised through June 6, 2024.
3. Exhibit A-2, On Site Retention Design, prepared by Azzolina & Feury Engineering, Inc., dated April 30, 2024, revised through June 6, 2024.
4. Exhibit A-3, Boundary Survey, prepared by Azzolina & Feury Engineering, Inc., dated May 2, 2023.
5. Exhibit A-4, Survey of Existing Conditions (with calculations) prepared by Azzolina & Feury Engineering, Inc., dated June 5, 2024.
6. Exhibit A-5 Survey of Proposed Conditions, with calculations) prepared by Azzolina & Feury Engineering, Inc., dated June 5, 2024.
7. Exhibit B-1, Engineering Report, dated March 26, 2024, prepared by Nick Chelius, PE, of Colliers Engineering and Design.

The following witnesses appeared and offered sworn testimony on behalf of the Applicants or Board:

1. Austin Siboni ("Siboni" or "the Applicant");
2. Perry E. Frenzel, PE, ("Frenzel");
3. Paul Azzolina, PE, ("Azzolina");
4. Nick Chelius, PE, ("Chelius").

The subject property is located in the Residence Zone D within the municipality. The address of the Property is 63 Central Avenue and is also designated as Block 74; Lot 8 on the Borough's Tax Assessment Map of the Borough (hereinafter, "the Property")

The Applicant was at all times represented by Paul Haberman, Esq., of Counsel to the Muller Law Group ("Haberman"). Haberman provided an overview of existing conditions on the Property and the basis for the Applicants' appearance before the Board.

Existing Conditions

It appears that the Applicant - without benefit of permit or approval - constructed various improvements, retaining walls (both on and off the Property) and imported soil. The actions of the Applicant resulted in the issuance of a "Stop Work" order and the need for the Applicant to appear before the Board and seek variance relief for construction that did not comply with the Zoning Code. The Board notes that the way the Applicant proceeded with construction makes it extremely difficult to establish with certainty the conditions which existing prior to the work which resulted in the issuance of the Stop Work order. Additionally, this resulted in the Applicant - at least initially - referring to "existing conditions" as conditions that were actually already modified without a permit. The Board further notes that the initial public hearing dates included significant efforts on the part of Frenzel, Azzolina, Haberman, and the Board to determine what conditions constituted existing non-conforming conditions - rather than non-conforming conditions that were created by the Applicant as the result of construction that took place without a permit.

Moreover, **A-3**, as a Boundary Survey, did not provide insight into these conditions and did not clarify - during those initial meeting dates - the Board's understanding of what could reasonably be considered "existing conditions". A far better understanding of existing conditions, conditions modified by the Applicant, and proposed conditions was presented by Frenzel in Exhibits **A-1**, **A-4** and **A-5** as prepared by his offices. The difficulty in establishing the "existing conditions" (those prior to any modification) was also noted by Chelius in testimony and in **B-1**. The lack of clarity as to "existing" conditions was further exacerbated by the Applicant having previously undertaken construction (with a Permit) wherein the plans and Permit Application appeared to depict measurements and calculations that were inconsistent with the present Application.

Existing Conditions - the Retaining Wall

The most egregious construction, done without the benefit of a Permit, was the Applicant's construction of approximately 135' of "Keystone" retaining wall along the length of the southern property line (with lesser "returns" extending northward along the eastern and western property lines) for the purpose of permitting the Applicant to import soil and "level" the rear yard. In addition to not obtaining a permit, this retaining wall was not conforming as to location and height as required by the zoning code, it also was - for many linear feet - constructed outside the boundary of the

Property and on the property of an adjoining Property owner. It is unclear if this Keystone wall was originally intended to replace - or supplement - a long existing, natural stone, demising wall that runs the length of the southern property line approximately 10' into the Property and returns on both the western property line (approximately 10' into the Property) and eastern property line (between 0' and 3' into the Property).

Subsequent to the Borough's issuance of a "Stop Work Order", the Applicant's contractor continued to deposit soil on the Property significantly altering grades. Construction by the Applicant, without benefit of a permit, also served to channel surface and driveway water onto a neighbor's property. Testimony presented also indicated that the Applicant's construction resulted in litter and construction debris on adjoining properties.

Variances for Existing Conditions

During the course of public hearing, Frenzel ultimately presented the 5th iteration of **A-1**, as supplemented by **A-4** and **A-5**. He testified that these Exhibits demonstrated that the deviation for Side Yard Setback (9.6') was clearly an existing condition. Frenzel also provided credible testimony that, ultimately and subsequent to revisions, **A-1** also accurately represented the existing conditions as to Total Improved Lot Coverage (slightly reduced as a result of the Application from 36.9% to 34.6%) and Maximum Improved Lot Coverage (maintained at 27.6%) were non-conformities that were not altered by the Applicant during his ownership of the Property. As to the aforesaid deviations, testimony was provided that these existing - or slightly reduced - deviations, could be granted by the Board and such grant was not detrimental to the purpose and intent of the zoning code and the Municipal Land Use Law.

The Proposed Retaining Wall System

Frenzel also testified as the Applicant's plan to construct a retaining wall system to permit leveling of the rear yard. Frenzel testified that first, the improperly constructed retaining wall would be removed as well as the existing natural stone wall.

Frenzel testified that, thereafter, the proposed retaining wall system would include 2 retaining wall structures. The southernmost retaining wall would run nearly the length of the southern property line and - including its' returns - would be setback 5' from the

rear property line and 6.5' and 3.0' from the western and eastern property lines, respectively. This wall would be maintained at a height of 2' or less (hereinafter, the "Outer Wall")

An additional retaining wall would be placed northward of the aforesaid wall a distance of 5' along the southern property line. This "Inner Wall" would be setback from the "Outer Wall" a distance of 2.5' along the western side of the Property and 3' along the eastern side of the Property. This wall would also be maintained at a height of 2' or less.

This wall system described by Frenzel, would contain proper drainage and permit planting in front of both wall faces to lessen their combined visual impact. The aforesaid walls constitute "structures" under Borough Code and variances are required for their location in the eastern and western side yard setbacks as well as the rear yard setback. The applicable permitted setback is 10' and the proposed setbacks are: eastern - 3'; western - 6.5'; rear - 5'.

In addition to the wall system, Frenzel testified as to a proper, fully curbed, driveway on the east side of the Property with proper drainage and water retention. There was little testimony about the non-conforming accessory shed and the current and proposed variance condition for the shed. There was no testimony as to why the shed could not be moved and rendered conforming.

Numerous neighbors testified as to the conditions on the Property prior to the Applicant altering those conditions and the problematic construction on the Property that included improper fill; failure to obtain a permit; water runoff onto adjoining and nearby properties; garbage and construction debris onto adjoining properties. The Board accepted this testimony in an effort to understand the conditions prior to the Applicant's work on the Property and to assure that the neighbor's concerns were addressed before, and during, construction.

FINDINGS AND CONCLUSIONS OF LAW

The Board makes the following findings:

Existing conditions as to Side Yard Setback (9.6'-existing); Total Improved Lot Coverage (slightly reduced from 36.9% to 34.6%) and Maximum Improved Lot Coverage (maintained at 27.6%) were non-conformities that were not altered by the Applicant during his ownership of the Property or, if altered, have been returned to their

original condition. As to the aforesaid deviations, testimony was provided that these existing - or slightly reduced - deviations, could be granted by the Board and such grant was not detrimental to the purpose and intent of the zoning code, the zone plan, and the Municipal Land Use Law. The Board so finds, and to the extent necessary, determines that these variances can be granted pursuant to NJSA 40:55D-70(c)(2) and that the approval of these existing, or slightly reduced, deviations advances the purposes of the Municipal Land Use Law and the benefits of the deviation would substantially outweigh any detriment.

There is no code provision which prohibits the construction of the retaining walls proposed by the Applicant. The proposed retaining walls are an Accessory structure and must conform to the 10' setback requirements for such a structure. The entire "Inner Wall" - which is placed in approximately the same location as the existing, natural, stone wall is completely conforming when constructed at a height of 2' or less as proposed by the Applicant. At all points, it complies with the rear and side yard setback requirements for Accessory structures. Were this the only wall on the Property - no variances would be required.

Notwithstanding the foregoing, the "Outer Wall" requires variances for its' location in the eastern and western side yard setbacks, as well as the rear yard setback. Borough Code requires these improvements to be setback a distance of 10' and the actual, proposed setbacks are: eastern - 3'; western - 6.5'; rear - 5'. The Applicant proposes a height of 2' or less for this, outer wall as well.

In reviewing this matter, the Board had considered numerous factors: First, the Applicant could place a single, higher wall at the location of the Inner Wall. This would create a single, taller, more visually intrusive wall.

The Board finds that the proposed "tiered walls" provide an opportunity for planting in front of both the Outer Wall and Inner Wall that would serve to soften the visual impact of the wall and create a condition that is an improvement over a single, higher, wall. The Board also considered whether these 2 retaining walls should be considered a single structure for the purposes of review. Based on the facts presented, the Board finds that the tiered walls are the best possible zoning alternative, provide the best visual appearance and are preferential than a single, taller, wall. The Board finds that, regardless of whether regarded as a single

structure or two separate structures, the Outer Wall represents a structure that is located within required side and rear yard setbacks. The Board finds and determines that the variances required for Accessory structure setback - as to the walls - can be granted pursuant to NJSA 40:55D-70(c)(2) and that the approval of the proposed tiered retaining walls advances the purposes of the Municipal Land Use Law and the benefits of the deviation would substantially outweigh any detriment. The Board finds there is no negative or detrimental impact of this proposal.

The Board finds that the Applicant has adduced no testimony whatsoever as to why a setback variance should be granted as to the shed located within the setback for Accessory structures. In fact, the Applicant simply refused requests to move this shed to a conforming location without any basis for that refusal and without any evidence as to why it was entitled to variances so that it might remain in its' current, non-conforming, location. The Board finds that the Applicant has failed to meet the burden of proof for any variance as to the shed and determines that the shed should be moved to a conforming location. The Applicant's request for a variance as to the shed location is denied.

CONDITIONS OF APPROVAL

The Board determines that the Approvals herein are conditioned on the following:

1. The Applicant shall comply with all requirements set forth in B-1, or any future directives of the Board Engineer.
2. The Applicant shall obtain all necessary approvals from all applicable municipal, county or state agencies. This shall include, if applicable, approvals for soil movement and tree removal. In the event that work has been done without the benefit of a permit, the permits shall be obtained retroactively. In the event that fines or fees are due in connection with the failure to obtain a permit, they shall be paid prior to the lifting of the Stop Work Order.
3. The Applicant shall repair all curbing on the street frontage of the Property.
4. The Applicant shall repair all curbing on the property driveway and properly maintain same to assure that no water runs off the driveway onto any adjoining property and that all surface water on the driveway enters the detention system as designed.

5. No fence shall be permitted on top of either the Inner or Outer retaining walls unless the failure to provide same would be a violation of Building Code and, in that event, only with necessary permits and approvals.
6. Immediately upon the lifting of the "Stop Work" order, the Applicant shall remove the Keystone Retaining wall that was constructed without a permit and is located along, and across, the southern property line (with returns along the western and eastern property lines) and return that area - both on and off the Property - to its original condition and in a good and clean manner in the discretion of the Board Engineer. No other work shall be permitted until this is accomplished and any permit issued shall be for this limited purpose only until such time as it is complete. In the event of any dispute as to accomplishing this, the Board Engineer shall render all final and necessary determinations.
7. Immediately upon the lifting of the "Stop Work" order, the Applicant shall seek in writing, and obtain, the consent of property owners to the west, east and south of the Property to enter upon their properties and remove all construction debris, garbage, damaged trees and otherwise fix any damages created by prior construction on the Property. In the event of any dispute as to accomplishing this, the Board Engineer shall render all final and necessary determinations. No other work shall be permitted until this is accomplished and any permit issued shall be for this limited purpose only until such time as it is complete.
8. Immediately upon the lifting of the "Stop Work" order, the Applicant shall relocate the non-conforming shed. No other work shall be permitted until this is accomplished and any permit issued shall be for this limited purpose only until such time as it is complete. In the event of any dispute as to accomplishing this, the Board Engineer shall render all final and necessary determinations. The shed is presently setback from the eastern property line 3', and the Applicant shall relocate the shed, in approximately the same location where it exists a distance of 5' from the Property line. The shed shall not be permitted at any alternate location unless approved by the Board Engineer.
9. Immediately upon the lifting of the "Stop Work" order, the Applicant shall remove excess, unnecessary and otherwise "dumped" soil that was placed on the Property before - and during - the applicability of the Stop Work order. No other work shall be permitted until this is accomplished and any permit issued shall be for this limited

purpose only until such time as it is complete. In the event of any dispute as to accomplishing this, the Board Engineer shall render all final and necessary determinations.

10. All finished grades shall be in compliance with A-1, unless otherwise modified by the Board Engineer.
11. The Applicant shall provide plantings in front of both the "Outer Wall" and the "Inner Wall" as directed by the Board Engineer. It is intended that this landscaping shall be generous and designed to lessen the visual impact of the retaining walls and is a specific condition of the granting of the variances related to the retaining walls.

Accordingly, a majority of the Board voted to grant (in part) and deny (in part) the Application as presented.

Motion was made by: *Mr. McLain*
 Motion was seconded by: *Vice Chair Woods*

Roll Call to Approve:

	YES	NO	ABSENT	OTHER
Vice Chair Woods	X			
Mr. Davis	X			
Mr. Corrado				<i>Not Eligible</i>
Mr. McLain	X			
Mr. Park	X			
Mr. Adelman			X	
Chair Hayden	X			
Mr. Hirsch A#1				<i>Not Eligible</i>
Ms. Pavlova A#2	X			

I hereby certify that the foregoing is a true copy of the Resolution adopted by the Zoning Board of Adjustment at its meeting held on

Dorothy Hayden

 Dorothy Hayden, Board Chair

Michael Greco

 Michael Greco, Board Secretary