

NEILL W. CLARK, ESQ.
224 Springbrook Trail
Sparta, New Jersey 07871
Nclark526@gmail.com
Tel. (215) 432-0164

ANAND DASH, ESQ.
17 Ponderosa Trail
Sparta, New Jersey 07871
Adash00@gmail.com
Tel. (862) 266-2067

May 11, 2022

VIA ELECTRONIC MAIL

Diana Katzenstein, Secretary
Sparta Township Planning Board
1 Main Street
Sparta, New Jersey 07871

**Re: N.J.S.A. 40:55D-70(b)- Application for Interpretation
33 Demarest Road, Block 12008, Lot 23
Diamond Chip Realty LLC, Planning Board App. No. 689**

Dear Ms. Katzenstein:

Pursuant to N.J.S.A. 40:55D-70(b), we have filed an application for interpretation with the Sparta Township Zoning Board of Adjustment (“Zoning Board” or “ZBA”) as to whether the use proposed by Diamond Chip Realty LLC, in connection with its preliminary major site plan application pending before the Planning Board, is a “warehouse” or “truck terminal” as these terms are defined in the Sparta Township Comprehensive Land Management Code (the “Application”). We write in response to the May 6, 2022 letter filed by Diamond Chip with the Zoning Board and in further support of the Application.

Diamond Chip asserts in its letter that the Zoning Board does not have jurisdiction to hear the Application as presented and that the Application improperly requests the Board to interpret the Diamond Chip site plan application. These assertions are baseless. The Zoning Board has authority to determine an application for interpretation within the context of a pending site plan application. Recognizing that the viability of its purported fully conforming site plan has been called into serious question, Diamond Chip now seeks to confound a straightforward interpretation request made by the Application. That request, as stated within the Application, is as follows:

Whether the proposed application by Diamond Chip Realty, LLC, pending before the Sparta Township Planning Board, Application No. 689, is for the use of a premises for the temporary parking of motor vehicles between trips and for the transfer of freight between trucks or between trucks and rail facilities for shipment elsewhere and where the storage of freight or cargo is only temporary and is

therefore a conditional use under ED Economic Development District, § 18-4.29 of the Sparta Comprehensive Land Management Code and Ordinance 21-01, or alternatively whether the proposed application is for the use of a building used for the temporary storage of goods, materials, or merchandise for later or subsequent distribution or delivery elsewhere for purposes of processing or sale and is therefore a permitted use within the ED Economic Development District, § 18-4.29 of the Sparta Comprehensive Land Management Code and Ordinance 21-01. or is otherwise for a use not permitted in the ED Economic Development District.¹

It is well settled that only a zoning board of adjustment has the authority to decide this question, namely, whether the proposed use by Diamond Chip is expressly permitted or conditionally permitted. The authority to decide this question is fundamental to a zoning board's inherent powers and duties. In DePetro v. Township of Wayne Planning Bd., 367 N.J. Super. 161, 169 (App. Div. 2004), the Court ruled that **“if plaintiffs sought a determination as to whether the use proposed by SUSA was permitted in a “b” zone they should have filed a request for interpretation with the Board of Adjustment and established a record in that forum.”** Not only does *DePetro* instruct that the Zoning Board has the authority to determine whether a particular land use is permitted in a zone but it also provides that in making that determination the Zoning Board examines the use proposed by the applicant. In *DePetro*, as part of its interpretation decision as to whether the proposed use was permitted or prohibited, the trial court analyzed the specific facts of the underlying site plan application and discussed what percentage of the use was devoted to commercial versus non-commercial use. *Id.* at 168.

Thus, the legal question of interpretation of an ordinance and the nature of a permitted use cannot be decided by a planning board. These issues must be decided by the Zoning Board of Adjustment. DePetro, 367 N.J. Super. 161, 169 (App. Div. 2004); see also, William M. Cox, New Jersey Zoning and Land Use Administration, §16-4.2 (Gann 2021). The Cox treatise notes that “the power to make the initial determination on jurisdiction lies exclusively with the Board of Adjustment pursuant either to its authority to review zoning determinations made by administrative officers pursuant to N.J.S. 40:55D-70a or to interpret the zoning ordinance pursuant to N.J.S. 40:55D-70b”). Further, the *DePetro* Court observed that the functions of a municipal Planning Board are enumerated and legislatively limited. See Cox, New Jersey Zoning and Land Use Administration § 4-3 (2021). These functions do not include the resolution of a request for an interpretation of an ordinance within the context of a site plan application. *DePetro*, supra, 367 N.J. Super. at 169. A township board of adjustment, rather than the township planning board, is the proper forum for a request for interpretation of a zoning

¹ Should the ZBA decide not to consider the Diamond Chip Application in the context of this Application for Interpretation then the ZBA can still proceed by determining: whether an inter-modal logistics facility which uses the premises for the temporary parking of motor vehicles between trips and for the transfer of freight between trucks or between trucks and rail facilities for shipment elsewhere and where the storage of freight or cargo is only temporary is a permitted or conditional use under ED Economic Development District, § 18-4.29 of the Sparta Comprehensive Land Management Code and Ordinance 21-01.

ordinance within the context of a site plan application. *Id.* at 169. See also, Rocky Top, LLC v. City of S. Amboy, No. A-3382-09T2, 2012 WL 3930371, at *1 (N.J. Super. Ct. App. Div. Sept. 11, 2012) (where Plaintiff-intervenors filed an application with the Zoning Board for an interpretation pursuant to N.J.S.A. 40:55D-70(b). The application sought an interpretation that their proposed “residential drug and alcohol rehabilitation facility,” which they viewed as “long term healthcare,” would be considered a permitted use under the Redevelopment Plan that controlled the site.)

Here, like in DePetro and Rocky Top, we are seeking a determination as to whether the use as proposed by Diamond Chip is permitted in Sparta Township’s ED Zone. Instructed by DePetro, we have duly filed a request for interpretation with the Board of Adjustment as to that determination.² The cases cited by Diamond Chip are inapposite and do not stand for the proposition that a planning board can decide the nature of a proposed use that is expressly challenged by objectors.³ Instead, DePetro governs that issue.

No one is questioning whether warehouses are permitted in the ED Zone. Instead, the question is whether the use proposed by Diamond Chip-not just the label it attaches to its use-, when viewed in totality, is a permitted or conditional use within the Economic Development Zone. In making that determination, the Zoning Board must compare the definition of warehouse in Sparta’s Municipal Land Use Code with Diamond Chip’s actual description of its use as an multi-modal industrial park⁴ and determine whether that use fits the definition of warehouse, trucking terminal or neither of those uses.⁵ Diamond Chip does not have the right to unilaterally decide whether its proposed use is permitted. That decision falls squarely within the domain of the Zoning Board’s powers. The Zoning Board is not bound by the label Diamond Chip attaches to its site application.

For the foregoing reasons, the Application for interpretation is properly before the Zoning Board of Adjustment. Diamond Chip’s contention that that this Board does not have jurisdiction to hear the Application is without merit and must be rejected.

² Curiously, no reference is made by Diamond Chip to the DePetro decision which is controlling on the issues presented.

³ Pizzo Mantin Group v. Tp. of Randolph, 137 N.J. 216 (1994), Saratoga v. Borough of W. Paterson, 346 N.J. Super. 569 (App. Div. 2002), and Fallone Prop. v. Bethlehem Planning Bd., 369 N.J. Super. 552 (App. Div. 2014) are distinguishable as they do not arise in the context of an application for interpretation filed by objectors under N.J.S.A. 40:55D-70(b)

⁴ See e.g. Preliminary Site Plan Application Submittal, Diamond Chip Logistics Park, at 173 (“Diamond Chip Realty, LLC, seeks approval for construction of a multi-modal industrial park”.)

⁵ Under Sparta Municipal Land Use Code §18-4.5 (h) “[a]ll uses not specifically permitted in the zone district are prohibited.”

Diana Katzenstein, Secretary
Sparta Township Planning Board
May 11, 2022
Page 4

As always, we thank the Board for its continued attention and courtesies. We look forward to appearing before the Board this evening.

Very truly yours,

A handwritten signature in black ink, appearing to read "Anand Dash Neill W. Clark". The signature is fluid and cursive, with the names written in a single line.

Neill W. Clark and Anand Dash

Enclosure

cc: Diana Katzenstein, Secretary, Zoning Board of Adjustment, Sparta Township
Thomas F. Collins, Jr., Esq., Planning Board Attorney, via e-mail
Thomas N. Ryan, Esq., Sparta Township Attorney, via e-mail
Peter Steck, Professional Planner, via e-mail
Steven P. Gouin, Esq., Attorney for Diamond Chip Realty, LLC
Larry Cohen, Esq., via e-mail