IN THE MATTER OF
APPLICATION NO. PB19-11
OF KATHY JASONTEK &
AUGUST ZILINCAR
BLOCK 9 LOT 5.03

RESOLUTION DISMISSING
APPLICATION WITHOUT
PREJUDICE

WHEREAS, KATHY JASONTEK & AUGUST ZILINCAR, hereinafter the "Applicant", has proposed the development of property located at 254 East Highland Avenue, in the Borough of Atlantic Highlands, County of Monmouth, and State of New Jersey which property is further known and designated as Block 9, Lot 5.03 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 construct a 24 ft. by 22.67 ft. detached garage requiring variances for building coverage, building height and floor area ratio on a lot with a lot area less than that required in the R-3 District. The foregoing are contrary to the provisions of Chapter 150 Articles V & VII Sections 150-29 & 150-49 of the Development Regulations of the Borough of Atlantic Highlands; and

WHEREAS, the subject property is located in the R-3 Residential Zone District and single family residential homes with associated accessory structures are a permitted use in the Zone; and

WHEREAS, the Applicant was scheduled for hearing before the Planning Board of Atlantic Highlands on November 14, 2019; and
WHEREAS, the proposed garage will be within 10 ft. of the westerly property line; and

WHEREAS, it was brought to the attention of the Planning Board that the subject lot was created by the Planning Board’s grant of subdivision approval with variances on December 11, 2008. The Resolution granting approval imposed Special Condition No. 5 requiring that the Applicant maintain a minimum side yard setback along the westerly property line of 33 ft. for all structures. Special Condition #5 also required that the condition be formalized by recording of a Deed with the Monmouth County Clerk; and

WHEREAS, on June 4, 2009, the subdivision deed perfecting the aforesaid subdivision was recorded in the office of the Monmouth County Clerk. The Deed includes a restrictive covenant that states that the covenant shall run with the land as a condition of the subdivision approval granted by the Planning Board. The neighboring property owners challenged the jurisdiction of the Planning Board to hear this application contending that the Planning Board does not have authority to relieve the property from the restrictive covenant; and

WHEREAS, the Planning Board has received a Memorandum from it’s attorney. That Memorandum advised the Planning Board of the general rule of law that the imposition of conditions upon approval does not bar the making of a new application for a variance, or for modification or enlargement of an approval previously granted, or for lifting conditions previously imposed in connection with the grant of an approval. The Memorandum further advised the Planning Board that the general rule does
not apply in the case of a recorded restriction of a covenant that is placed upon a property for the benefit of the public. The Planning Board has been advised that the Superior Court Appellate Division in the case **Sousa v. Denville Township Planning Board**, 238 N.J. Super. 66, 68 (App. Div. 1990) found that the imposition of a covenant recorded in a Deed restriction required by Resolution of the Planning Board to provide protection to the public demonstrates the intention that members of the public are third-party beneficiaries. Thus, members of the public are entitled to maintain an action to enforce the covenant/restriction; and

**WHEREAS**, the Court in **Sousa** further found that the members of the public, for whose benefit the covenant/restriction was imposed, are necessary parties to an action to lift the restriction. More importantly, the Court in Sousa held that neither the Planning Board nor the Governing Body of the municipality has the power, separately or together, to eliminate the covenant in the Deed. Instead, the Court found that an Applicant must apply to the Court to remove the restriction. Thus, the Planning Board does not have the authority to grant the relief that the Applicant is requesting in this case; and

**WHEREAS**, the Planning Board notes that the Resolution expressly stated that the purpose of the restrictive covenant is to minimize the obstruction views of the Sandy Hook Bay and the New York city skyline from the subject property and adjacent properties; and

**WHEREAS**, insofar as the Resolution and recorded restrictive covenant demonstrate that the covenant was imposed for the
benefit of the adjacent property owners, they are third-party beneficiaries of the covenant. Therefore, as determined by the Court in *Sousa*, neither the Planning Board nor the Governing Body of Atlantic Highlands has the power, separately or together, to eliminate the covenant in the Deed.

**NOW THEREFORE, BE IT RESOLVED** by the Planning Board of the Borough of Atlantic Highlands on this 12th day of December, 2019 that the Application of KATHY JASONTEK & AUGUST ZILLINCAR be and is hereby dismissed without prejudice due to the lack of authority of the Planning Board to grant the relief requested lifting the condition of the subdivision approval and recorded deed of restrictive covenant.

**BE IT FURTHER RESOLVED**, that nothing herein shall excuse compliance by the Applicant with any and all 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:       Mr. McGoldrick
SECONDED BY:      Ms. Drew

ROLL CALL:

YES:      Mr. Caccamo, Mr. Neff, Mr. Colangelo, Mr. Dougherty, Ms. Drew, Mr. McGoldrick
NO:       None
ABSTAIN:None
ABSENT:   Dr. Kloby, Mr. Murphy, Mr. Hawley, Dr. Cetron, Mr. Pepe, Mrs. Murray, Mr. Illiano

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 December 12, 2019.

Secretary, Planning Board
Borough of Atlantic Highlands