

**BOROUGH OF WESTWOOD
ZONING BOARD OF ADJUSTMENT
REGULAR MEETING
MINUTES
November 10, 2014**

APPROVED 12/1/14

1. OPENING OF THE MEETING:

The meeting was called to order at approximately 8:00 p.m.

Open Public Meetings Law Statement:

This meeting, which conforms with the Open Public Meetings Law, Chapter 231, Public Laws of 1975, is a Regular Meeting of the Westwood Zoning Board of Adjustment.

Notices have been filed with our local official newspapers and posted on the municipal bulletin board.

2. PLEDGE OF ALLEGIANCE:

3. ROLL CALL:

PRESENT: William Martin, Chairman
Eric Oakes, Vice Chairman
Guy Hartman
Matthew Ceplo
Vernon McKoy
Chris Montana
H. Wayne Harper
Marc Truscio (Alt #1)

ALSO PRESENT: David Rutherford, Esq., Board Attorney
Michele S. Austin, Esq., Board Attorney
For MedExpress application/
Louis Raimondi, Board Engineer
Steve M. Lydon, Burgis Associates,
Board Planner

ABSENT: George James (Alt #2) (excused absence)

The meeting of 10/6/14 was canceled due to lack of applications to process.

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4. MINUTES - The Minutes of the **9/8/14 Regular Meeting** was approved on motion made by Eric Oakes, seconded by Wayne Harper, seconded by Mr. Oakes, and carried on roll call vote.

5. CORRESPONDENCE:

1. Letter from Louis A. Raimondi, dated 9/18/14 RE: Ponce;

2. Letter from Louis A. Raimondi, dated 10/3/14 RE: MedExpress;

3. Letter from Steve Lydon, Burgis Associates, dated 10/20/14 RE: Ponce;

4. Letter from Steve Lydon, Burgis Associates, dated 11/3/14 RE: MedExpress;

6. **VOUCHERS:** Upon motion of Eric Oakes, seconded by Chris Montana, all ayes on roll call vote, the Board approved Vouchers totaling **\$9,518.75**.

7. **Open Public Records Act (OPRA)** - See Discussion below

7. RESOLUTIONS:

1. **Polak, 34 Kaufman Drive, Block 2203, Lot 4 - "C" Variance** Board Attorney Rutherford read the Resolution into the record. A motion for approval was made by Eric Oakes and seconded by Mark Truscio. There were no further questions comments or discussions. On roll call vote, Eric Oakes, Chris Montana, Matthew Ceplo, Wayne Harper, Marc Truscio, and William Martin voted yes.

8. PENDING NEW BUSINESS:

Mr. Martin inquired if the following applicants were ready:

1. **Vassallo, 71 Sixth Avenue, Block 902, Lot 5 - "C" Variance** - Not yet complete - Carried to the 12/1/14 meeting; (Notice will be required)

2. **MedExpress Urgent Care-New Jersey, P.C., 40 Kinderkamack Road - use Variance/site Plan Approval** - Mr.

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Lydon will submit a report; to be listed on the 12/1/14 agenda; Carmine R. Alampi, Esq. came forward and advised he believed the 45 days for a review letter have tolled. He received a letter from Mr. Raimondi on 10/3/14, and he believes the 45 days may have run. Mr. Rutherford advised that the MLUL provides that if it is not deemed incomplete in 45 days, it is deemed complete. Mr. Lydon will check the file and advise if it is deemed statutorily complete. 120 days would run from the date it was deemed statutorily complete.

John J. Lamb, Esq. representing the Westwood Taxpayers Alliance, came forward. Mr. Rutherford advised he would recuse himself if we were taking testimony. Mr. Martin stated we were not commencing a hearing, we were only checking on which applicants were ready to be heard.

9. VARIANCES, SUBDIVISIONS AND/OR SITE PLANS, APPEALS, INTERPRETATIONS:

SWEARING IN OF BOARD PROFESSIONALS FOR PUBLIC HEARINGS

The Board Professionals were sworn in.

1. Ponce, 188 Sand Road, Block 1401, Lot 9 - "C" Variance - L. Scott Berkoben, Esq. represented the applicant and gave a brief overview of the application to widen their driveway, which has already been completed. Mr. Ponce and Andrew Fethes, Licensed Architect, were sworn in. Mr. Fethes was accepted. Mr. Rutherford reviewed the proofs and found them to be in order; however, he requested Mr. Berkoben provide an Affidavit of Service.

Mr. Fethes submitted architectural plans dated 7/17/14, revised to 10/6/14.

Mr. Lydon reviewed his Memo dated 10/20/14, having previously submitted a Memo on 9/22/14, and advised there were two variances, one for minimum side yard, since they are expanding a non-conforming use, and one for width of the driveway, which has been widened and enlarged. There is no longer a coverage issue, since the applicant removed the gravel walkway and associated curbing. Mr. Fethes testified the applicant widened and repaved the driveway, and a variance was sought. Two surveys were provided, dated 2010 and 2011. Mr. Lydon noted the most recent survey was dated prior to the zoning letter of denial.

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Mr. Martin asked if they researched whether this was a pre-existing condition. Mr. Fethes commented it was pre-existing when their clients purchased the property. Mr. Martin commented they cannot claim it is a pre-existing, non-conforming condition.

Mr. Raimondi reviewed his report dated 9/18/14 and asked for a signed and sealed copy of the later survey. He also stated the tax map still shows Lot 9 & Lot 10. Since it is used as one lot, and the house straddles the lot line, it should be listed as one lot.

Mr. Rutherford advised the fact that the applicant has already made the improvements is irrelevant and should not be held against the applicant.

Mr. Martin asked if Mr. Fethes was a planner; he was not. Mr. Martin advised Mr. Berkoben if he was putting forth planning proofs, he must have a professional planner. Mr. Berkoben stated it would be a hardship to bring in a professional planner on an application of this size.

Mr. Martin asked if the zoning allows or encourages this, and Mr. Fethes responded to his knowledge it did not.

Mr. Lydon commented we did not hear testimony as to how these additions would be used. Mr. Martin noted the driveway was twice the size and questioned why he needed this size driveway.

Mr. Berkoben requested a waiver to submit a site plan. Mr. Raimondi could not confirm the calculations, since dimensions were not provided.

Mr. Oakes asked if the fence shown on the plan was removable, and Mr. Fethes responded yes. It was not shown in the photo.

There were no further questions of Mr. Fethes from the Board. The matter was opened to the public for questions. There were none.

Mr. Ponce testified he purchased the property in June of 2010. He lives in the house with his wife and children, and there are three bedrooms. Mr. Marini came into the house to do the initial C/O inspection. The house has always been a one-family house to his knowledge. He does

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not rent out the house to borders and never received a summons for a two-family house. He has four cars. The reason for the expansion and widening of the driveway is that it was a mess, in very poor condition. They were new homeowners and hired a contractor to fix the driveway. Then they found out they needed a permit. There had been a big concrete block on the side, which they removed and filled in with asphalt. He will look for a photo at home. Mr. Ponce stated he uses the garage for storage not for a car. He put a concrete block in front of the garage, since it floods. The water goes into the garage and basement. He has no drainage. He did not think he could have a shed, per Mr. Marini. Mr. Martin said he could have a shed. The shed was not being requested in this application.

Mr. Martin asked what else was in the basement. Mr. Ponce responded a half bath and computer items. There is no stove or tub. Mr. Martin noted his attorney requested a waiver of plans, but he needs to know what is in the house. There is a full bath with tub on the first floor, and a full bath with shower on the second floor. He has four cars and a truck. Mr. Martin questioned why it was so large, to accommodate 10 cars, and asked why he does not reduce it. Mr. Ponce said they did not think of reducing it, just paving it. When you have too much pavement, the water cannot drain, Mr. Martin stated. Mr. Ponce said there is a drain in the driveway, where the water goes into the ground. Mr. Martin asked if the driveway can be reduced in size. The Board is here to make exceptions where warranted. He does not understand why the Board should grant a variance based on what Mr. Ponce was telling them. Mr. Berkoben asked if it were possible to shorten the driveway, and Mr. Ponce responded yes.

Mr. Fethes commented his testimony was eight vehicles. Mr. Martin stated the applicant will provide dimensional information when he returns at the next meeting. Mr. Raimondi recommended possibly adding a seepage pit.

The matter was opened to the public for comments. Sidney Brown, 180 Sand Road, was sworn in and gave the history of the property. He has lived there for 18 years. The property at 188 was always in trouble, until the Ponce's came in and fixed the property. The driveway and a shed were there. The prior owner took down the shed. The driveway was originally set to go through to the church.

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Mr. Ponce is maintaining the property. There were no further comments.

The matter was carried to the 12/1/14 meeting. Mr. Fethes would get the dimensions from the survey and confirm the calculations. Revised documents are to be submitted 10 days in advance. An extension of time was granted. Mr. Rutherford advised he should be prepared to provide testimony as to the variance relief sought.

Mr. Rutherford advised that he would be recusing himself on the MedExpress application. Michelle Austin, Esq. would serve as Board Counsel for said application.

The Board took a recess from 9:25-9:37 pm.

2. MedExpress Urgent Care-New Jersey, P.C., 40 Kinderkamack Road - Appeal of Zoning Officer's Decision - David Rutherford, Esq. recused. Carmine R. Alampi, Esq., appeared on behalf of the applicant, VRS 40 Kinderkamack, LLC, the contract purchaser, and Med/Express Urgent Care-New Jersey, P.C., the end user.

John J. Lamb, Esq. represented the Westwood Taxpayers Alliance. He commented he did not object to Mr. Rutherford's sitting, although he recused himself. Mr. Lamb distributed a letter to the Board during the break, dated 11/10/14. Mr. Martin asked if the letter was provided to Mr. Alampi. It was faxed at 3:30-4:00 pm that day. It was related to the appeal and other notice.

Attorney Michelle Austin pointed out that on Page 6 of Mr. Lamb's letter, Point #3 requested that Mr. Rutherford or she make a decision prior the public meeting. Further, it was delivered at 4:00 p.m. today and it is improper, as we need to hear from the parties on the notice issues.

Mr. Alampi advised Mr. Lamb called him about the Notice. Mr. Alampi explained they also filed a use variance application simultaneously with the appeal. Mr. Lamb said the notice is insufficient since it is misleading. Mr. Alampi advised he put into the notice the date, time, parties, etc., and that he refers to it as an urgent care clinic, and not a medical office. He is appealing the decision of the zoning officer.

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Mr. Alampi continued, stating he is very detailed in his notices to the public. The letters informed the public to the fact that there is a use variance and site plan that could result based on the disposition of the appeal. They explain to the public they are receiving two notices and why. It would be undermining for him to state in his appeal notice it is urgent care. The notice is in no way defective or deficient. Mr. Alampi advised they renoticed a second time because there was no meeting to say the application was carried to, since the Board canceled the last meeting. He also corrected a lot and block from the first notice. The notices were prepared with a great deal of attention to detail. If the notice is sufficient, then they will present evidence and a hearing, followed by a determination of whether the zoning officer is correct or not.

Mr. Lamb stated he is not suggesting that Mr. Alampi admit or acknowledge whether this is an urgent care facility or not. This is an A appeal, and in this appeal, he disagrees with the zoning officer, who said that urgent care facilities are not permitted in the zone. When you appeal that you put in that the zoning officer says it is not permitted. Mr. Alampi put the application proposes a physicians office by Med/Express, a private medical practice. It has no mention of the denial by Mr. Marini. All he had to say is that he disagrees with the zoning officer's decision. Mr. Alampi disagreed. He is very clear that he is appealing the decision. He gave the date and who it was who rendered the decision. Urgent care facilities are licensed by the State as a medical office. He put Med/Express-Urgent Care-New Jersey P.C. in the use variance, because if it gets to the use variance application, that is the applicant.

Chairman Martin advised this is a legal issue and not something for the Board to decide. Mr. Martin questioned whether this could be fixed by a renotice. Mr. Lamb commented it was. Mr. Alampi commented it was curable.

Mr. Martin deferred to Ms. Austin, questioning whether the two notices going out could be part of the problem. Ms. Austin commented, in her practice she has stopped using legal-ease. She understands Mr. Alampi does not want to make any decisions in his own notice. She read the case of how this appears to the public. Her concern with the notice as it is, is not just for the citizens residing around the

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location and town, but for her client as well. If this were to go forward and they determined there were no jurisdictional issues or notice questions, and whether or not it is a permitted use or a variance down the line, if everything were to proceed, and the applicants were to build and neighbors had concerns, it may open them up to further litigation down the line. She feels it is curable with certain language. This is how the zoning official chose to call the use proposed. Mr. Alampi commented their clients disagree. This is what their clients are proposing.

Ms. Austin continued. Either way there is an ability to put that in the notice without prejudicing your clients, while giving the public sufficient notice as to whether to come to a public meeting. Her advice is that there is a possibility to cure this, by having Mr. Alampi provide a more detailed notice without conceding his argument, while giving the public enough information to decide whether to attend. We could carry this to 12/1/14. She would recommend the Board consider a motion to have this renote to protect not just the Board but the applicant.

Mr. Alampi respected her ability to review this and that the Board will take a vote based on her recommendation. She can accept the direction, but disagrees that it is vague or misleading, especially since the public is provided a separate explanation as to why they are getting two notices. This is in layman's terms, Mr. Alampi explained, saying I am appealing the zoning officer's decision. He may staple Mr. Martini's letter from which he is appealing. This way we don't get into who is saying what, and again, it is wrong to insist on the wording of urgent care.

Ms. Austin advised if they attach the letter, the public sees the text. Mr. Martin says they simply want the notice to be correct, and do not want the applicant to return to the Board on a remand. Mr. Alampi advised he would renote and attach the letter. Ms. Austin said that would be sufficient. Mr. Lamb was asked if he agreed. He felt attaching it would be a problem, but if that's what the Board Attorney rules, he would not come back and challenge the notice. If that's what the attorney recommends, he will not object, even if he disagrees. It is better than what it was. Ms. Austin advised Mr. Lamb's suggestion is one way, and incorporation of the rejection

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letter is another. Mr. Lamb waived any further object to the sufficiency of this notice as amended.

Mr. Alampi advised before voting, why Armand Marini was not present. He was appealing his decision. He should be subpoenaed. Mr. Martin stated they would advise Mr. Marini to attend on 12/1/14. Ms. Austin would look into the proper procedure for Mr. Marini to appear, whether it be via a notice or subpoena.

Mr. Oakes commented in looking at the notice, having the letter attached would have given him more information. Mr. Harper asked for legal clarification.

A motion that renote is to be done with the attachment of Mr. Martini's letter to give the public more information, as agreed to by both parties, was made by Mr. Oakes, seconded by Mr. McKoy, and carried unanimously on roll call vote.

10. DISCUSSION:

1. OPRA instructions - (heard first) Karen Hughes, Borough Clerk, addressed the Board and discussed the Open Public Records Act and how it relates to the Board Members. They received a request a few weeks ago and forwarded it to the Board Members. It appeared they had not ever received an OPRA request before. It is a request to provide government documents. It is a written request that is submitted to either review a file or request documents. It is not a request for information, a fishing expedition or research project. It is a request for a specific document. Other than for the Governing Body the person must do their own research. She must respond within seven (7) days to the requester and charge five cents per page. That essentially is the OPRA - Open Public Records Act. How it applies to the Board Members is in the form of electric correspondence, such as email. An email becomes a government record when it is to or from a public employee, official volunteer or professional. It is a government record when it is a ".gov" email address or to the individual's personal email. If it is a personal greeting, it is not a government document. If the subject is Borough business, it is a government document. A Board Member is a government official. Any government business discussed in an email is a government document. The content of the email determines whether it is a government document. The

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government official is required to provide any government document requested in an OPRAH request. Ms. Hughes gave an example. An OPRAH request was sent requesting documents, emails, etc. from September, October, November 2014. Upon receipt of the documents, the requester did not see emails he believed were exchanged and took further action. The requester can go to the Government Records Council if the requester feels there were additional documents not provided. A fine can be imposed personally for willfully withholding records. The Borough cannot absorb the fine. You do not have to reply by email; you can reply by phone.

Mr. Rutherford advised there should never be any substantive discussion among Board Members outside of open public meetings. Chairman Martin recommended any emails exchanged should be copied to the email address, zoningboard@westwoodnj.gov, so that the Borough has a record. Mr. Raimondi asked if there was a time frame for keeping the emails. Ms. Hughes explained that as long as you copy the above email address, you can then delete them from your email.

11. ADJOURNMENT - On motions, made seconded and carried, the meeting was adjourned at approx. 11:00 p.m.

Respectfully submitted,

MARY R. VERDUCCI, Paralegal
Zoning Board Secretary