BOROUGH OF WESTWOOD
ZONING BOARD OF ADJUSTMENT
REGULAR MEETING
MINUTES
March 4, 2013

APPROVED 4/1/13

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
Christopher Owens, Vice-Chairman
Michael Bieri
Robert Bicocchi
Eric Oakes
Matthew Ceplo
Guy Hartman (Alt #1)
Chris Montana (Alt #2)

ALSO PRESENT: David Rutherford, Esq., Board Attorney
Eve Mancuso, Brooker Engineering
Appeared for Louis Raimondi,
Brooker Engineering,Board Engineer
Steve Lydon, Burgis Associates,
Board Planner
Catherine Gregory, Acting Board Planner
for KMACK North/South

ABSENT: Vernon McCoy (excused absence)

4. MINUTES - The Minutes of the **2/4/13** were approved on motions made by Michael Bieri, seconded by Eric Oakes, and carried unanimously on roll call vote.

5. CORRESPONDENCE:

1. Revised Site Plan dated 12/16/11 by Omland Engineering RE: Van Grouw, 27 Ruckner Road;

2. Letter dated 2/14/13 from James J. D'Elia requesting adjournment RE: Sickinger, 484-486 Fourth Avenue to 5/6/14;

6. VOUCHERS: A motion to approve vouchers totaling **$6,620.00** was made by Robert Bicocchi, seconded by Michael Bieri, and carried unanimously on roll call vote.

7. RESOLUTIONS: NONE

8. PENDING NEW BUSINESS: None

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

SWEARING IN OF BOARD PROFESSIONALS FOR PUBLIC HEARINGS
The Board Professionals were sworn in.

1. KMACK South, 40 Kinderkamack Road, Block 1607, Lots 12, 13 & 14 - Variance & Site Plan Approval - Carried to 4/1/13 at request of applicant, pending completion of KMACK North;

2. Van Grouw, 27 Ruckner Road - Appeal - David Van Grouw, Esq. represented the applicant. William Hamilton from Omland Engineering was present and would be assisting with the presentation. The three issues were the fence, the shed, and the lot coverage. Background information was given, and Mr. Van Grouw noted no neighbors were present. The home was purchased in 1984 by his wife and her ex-husband, and in 1989 they installed an in ground pool, concrete decking area and shed in the back corner of the property; however, the shed is no longer there. All work was done by permit, but there are no records, as they were lost in a flood during that time. In the Borough's files there is a survey showing the outline of the pool and handwritten notations, with a permit number. That is the extent of the information they have.

Exhibit A1 was the survey dated 8/1/86, made by Walter W. Lyon, Jr., PE, and distributed to the Board. Mr. Lydon commented he had a survey in his file, but not by Mr. Lyon. Ms. Mancuso commented there was a copy in the engineering file. The pool was drawn in, 16' off the side yard and 10' off the rear, with an upper patio. Mr. Van Grouw did not have any other records. Mr. Martin commented there is an enormous amount of coverage on this property, and it is over-covered. We do not know how much ground was covered when you had the permit, and you cannot produce the document that you had the permit for. Mr. Van Grouw stated Mr. Hamilton could recreate the square footage. Mr. Martin did say that is not proof of what he received a permit for, and asked what exactly he was present for. The decking around the pool could have been put in at a different time. There is no evidence or proof.

Mr. Van Grouw offered to have his wife testify, but they had no documentation. Mr. Rutherford advised that is proper testimony, and the Board could made a decision on that. Mr. Van Grouw continued. There is a shed that would be moved 6" off the back property line, and a fence to be removed, so they would not need a variance and would remedy an encroachment issue. Mr. Rutherford clarified (3) variances as being the setbacks for the shed and pool and the coverage. They were sent here by the Zoning Officer. Mr. Lydon commented there are wetlands behind this property. Mrs. Van Grouw would testify. Mr. Rutherford stated whether or not there were permits is not for the Board to decide, as it that is beyond the Board's jurisdiction.

Diane Van Grouw, of 27 Ruckner Road, was sworn in and testified. Attorney Van Grouw questioned the witness. She testified the pool was installed in 1989, along with a shed and concrete decking on the upper and lower levels, for which she received a permit. The concrete decking was removed and newer, paver concrete decking was installed. No other concrete decking was installed. In connection with the plan prepared by Omland Engineering, she is familiar with Mr. Hamilton's configuration of the concrete decking. She had given him the survey and photographs. This represents what Mr. Hamilton prepared and accurately reflects the concrete installed in 1989. A permit was obtained in 1989 for the concrete decking. He had no further questions.

Board questions followed. Mr. Owens referred to the plan and asked about installation dates, coverages and asked to see the photos. The pool pump used to be in a shed, but it is now exposed. There is gravel and dirt there. Mr. Martin asked if the shed currently encroaches, and the response was yes, but it was being relocated. They keep lawn and pool equipment in there. The engineer would be questioned as to the plan. Mr. Van Grouw commented when the pool was approved, the fence was over the property line 2-1/2'.

There were no interested parties present for questions of the witness.

William Hamilton, a Principal of Omland Engineering, Cedar Knolls, NJ, was sworn in, qualified and accepted as a Licensed Landscape Architect and Licensed Professional Planner in NJ. Mr. Hamilton's plan was marked Exhibit A2. The plan was colored coded. The orange area showed the additional impervious existing condition. The blue shows fencing to be removed. The green area shows impervious coverage after the original pavement was installed. The impervious coverage is 56%. If they were to look at the elements present, there would be the driveway the dwelling the walkway and the pool itself without decking, that comes out to 45%, and they are already over what the zone allows. There are stairs that bring you to the lower patio and the pool. The decking around the pool is not expansive. The patio itself is fairly not substantial. The access to the shed in the rear does add to the impervious. The purpose advanced would be the enhancement of the site. By placing the pool and lawn equipment in the shed, it takes them off the decking and patio, which is an improvement aesthetically.

Mr. Hamilton continued. There is significant landscaping which would mitigate some of the impervious coverage. There is fencing along the eastern and western borders. These improvements are not visible to the neighbors or from Ruckner Road. They are asking for 6" for the shed off the rear property line. It allows them to push the shed further to the South and the entry to the pool. They are required to have a 5' setback to the neighbor to the left. They believe the variances can be granted without detriment to the public good. There will be no negative impacts and no impact to the neighbors. It is very difficult to install a pool and keep within the 45% coverage allowed. There is a

variance for the setback of the pool. This was in place when the pool was installed.

Ms. Mancuso stated they prepared a brief review letter dated 3/4/13 and distributed to the Board, giving an overview of what was submitted, and they did not receive a letter from the Tax Collector as to what was current. Mr. Lydon asked if a deck was required; Mr. Hamilton did not have knowledge as to this. Mr. Lydon questioned Mr. Hamilton, who stated the landscaping would act as a buffer and improve the aesthetics of the site. Mr. Oakes asked if they would be removing any of the impervious coverage. Mr. Hamilton responded it is not significantly over what was installed in 1989. They are here to ask for the Board's approval and forgiveness, so they are open to it.

Mr. Oakes asked if they could consider removing some of the substantial amount of impervious coverage to come more into compliance or greatly reduce it. Mr. Martin asked how he could do it and maintain the aesthetics. Mr. Hamilton responded they would start with the decking away from the southerly and eastern portions of the pool area. The shed is 10' x 10', he noted. Mr. Oakes commented he would want to see the calculations of the area to be removed. Mr. Ceplo asked about drainage. Mr. Hamilton said they did some calculations and would provide some stormwater management. He would submit this information. Mr. Martin commented the Board Attorney said the fact that it was already in place without documentation is not significant, and the Board is looking at the condition as it is now, and this is significantly over the limit. The reason the zoning is in place is that stormwater management is extremely important. It was testified this was in place for six years. It is significantly excessive coverage, and he recommends they go back and see what they can do to eliminate some of the pavement and areas and get close to the number and increase stormwater management to mitigate the remainder of what is over the limit. Ms. Mancuso commented as to the stormwater management structure, stating they should size it to the increase in runoff.

The matter was carried to the May meeting on 5/6/13 with a time extension granted.

The Board took a recess from 9:15-9:25.

3. KMACK North II, 39 Kinderkamack Road - Site Plan Approval - Mr. Lydon stepped down and departed. Ms. Gregory acted a Substitute Planner for the KMACK North application. Mr. Rutherford reviewed at the last meeting the Board was in the midst of public comment at the 2/4/13 meeting, and there is an expert witness to testify. We did not have a full compliment of seven members at the last meeting. Mr. Ceplo listened to the tape of the 2/4/13 meeting, and Mr. Montana listed to the tapes of the November and December meetings. Therefore, all eight members present were eligible to vote.

The hearing continued with Bruce Meisel, Center Avenue, Westwood, who continued under oath. He requested to have his expert witness testify, and then he would make himself available for questions. Mr. Lafferty stated he was finished with Mr. Meisel. Mr. Steck then was called forward to testify. Peter G. Steck, 80 Maplewood Avenue, Maplewood, NJ, Professional Planner was sworn in, qualified and accepted. Mr. Steck reviewed the Master Plan and Ordinances and Minutes and toured the subject property. He distributed a handout illustrating his review and some of his findings. That was marked Exhibit Steck-1. The exhibit consisted of photos and two pages of text, prepared by Mr. Steck, P-1 through P-4. There were map images from the internet labeled on P-1, photographs of the existing conditions of premises in question on P-2, and excerpts from planning documents were on P-3 and P-4, including the Master Plan Re-Examination Report of 12/1/11 on P-3 and a portion of the Ordinance #12-18 adopted on 9/18/12 for the LB-3 District, and prior zoning regulations for the subject property on P-4.

Mr. Steck continued. He did look at the Master Plan. The Planning Board did a number of studies over time and on P-3 it did recognize in the 2005 Master Plan there was a need to re-evaluate LB-1 through LB-3, and recommended specific uses for the LB-3 zone, which the Governing Body adopted. The retail uses were amended in 2012. Retail uses permitted were retail sale of appliances, furniture, office equipment or similar bulky durable items. Generic retail sales were not premises. Offensive is the basement storage. This is a D1 Medici variance case. Special reasons must be demonstrated by the applicant that the use is specifically suited to this property and makes it unique to the area. There must be specific proof as to how it fits with the zone plan and ordinances. The applicant, he feels, did not meet his burden of proof. He finds this is a zone that has not

allowed retail uses and certain convenience retail use. They tend to permit durable items that generate less activity and not characterized as being open 24 hours per day. This zone has been consistent with the Master Plan and Re-examination Report and does not permit the uses proposed by the applicant. This property is not distinguished from other areas and it has not been demonstrated that it could be used for this use. There is no undue hardship and the property can be used for permitted uses in the zone. The proofs presented are not specific to this property. It is 180 degrees from what the Master Plan wanted. It will produce significant non-signalized traffic. In his opinion it is the applicant's burden of proof and the applicant did not meet his burden of proof. This site is particularly suited for an automotive use. The owner is making substantial modifications to adapt the property to this new use. There is an insufficient amount of parking and substandard setbacks. Most succinctly put, this is dramatically different from what the Master Plan wanted. Approving this application will be substantially detrimental to the Zoning Plan and Zoning Ordinance. The Board should deny the application.

There were no questions of Mr. Steck from the Board. Mr. Lafferty questioned Mr. Steck as to testifying about use variances and variances in general. Mr. Lafferty mentioned he testified for his client in a prior commercial application on Mill Street. He asked if he listened to tape recordings or read the transcripts of these proceedings. He did not. In which zones in the Borough is a convenience store permitted, Mr. Lafferty asked. Mr. Steck stated a convenience store is not defined. The ordinance is not clear as to the merits of this application or in the CBD Zone. Would he testify that in the CBD Zone no use variance is required, Mr. Lafferty inquired. The components of that use appear to be permitted uses in the CBD Zone, Mr. Steck responded.

Mr. Lafferty asked when the most recent revision of the Master Plan was adopted. The last Re-examination was 12/11 was the response. From a planning and zoning perspective the granting of the opening of the hospital was the most recent significant event, which was agreed to. The decision brought about the potential for a substantial change, Mr. Lafferty asked, and Mr. Steck agreed for that property. It was still essentially the same zone, he added. The surrounding zones were rezoned to allow ancillary or

complimentary uses to the hospital, but not this property. Because the applicant is proposing to demolish the building, what was the testimony. Mr. Steck said if someone came in with an automotive use, which is not permitted, they could say it was suitable since it was already built as such. Mr. Lafferty inquired further, keeping the Medici case in view, stating the Courts directing they analyze the site and whether it is particularly suited. Is it your recollection that automobile dealership is not a permitted use he asked. Mr. Steck said he would recall that. Wouldn't it be a bulky retail item. Automobile uses are traditionally in their own category. Mr. Steck did not know when asked when the last time automotive uses were permitted.

Mr. Lafferty noted Mr. Steck included bulky retail items in his exhibit. What is the likelihood of the site being used for the retail sale of appliances, he asked. Mr. Steck did not analyze this. Wouldn't the trend be to sell them at big-box retail stores, and would it be successful. Mr. Steck did not analyze this. Doesn't the application improve the situation with the bulk variances. Mr. Steck agreed it did. Do you agree that Board has the power to impose reasonable conditions if granted tonight, Mr. Lafferty asked, and Mr. Steck agreed.

Mr. Meisel cross-examined Mr. Steck, who read from Site Plans 45D-7 from the MLUL, which included improvements to the property. Mr. Lafferty re-crossed, correcting that Medici refers to "Site" not "Site Plans".

Questions by the Board followed. Mr. Steck was asked if the Master Plan ever listed uses not permitted. Basically it is not a required component, Mr. Steck indicated. Mr. Martin, referring to the 12/11 Master Plan Re-Examination, commented since that time the Planning Board has made recommendations. Could he comment on those recommendations. Mr. Steck did not know the recommendations, but based on the validity of the ordinances, unless there is a specific recommendation that a standard or zone is no longer viable, it is considered viable. There has been no recommendation to change these policies.

Mr. Steck's testimony and cross-examination was complete. Mr. Meisel concluded his case. Not to be disrespectful, Mr. Meisel said, he had to depart.

Mr. Lafferty summed up his case, going over brief points, and thanking the Board for hearing the case and all the courtesies shown. Architecturally he believes they are providing a building as a gateway to Westwood, eliminating an eyesore. The building is going to be significantly smaller - 30%, and they are maximizing green space as one enters into the Borough. They reduced to the extent possible the setbacks and limited exits and would accept signage as conditions. Overall they have done all they could to be good neighbors. They were present for a use variance. If the Master Plan and Zoning Ordinances allowed a convenience store use, they would not be here. It has been vacant for five years, and the reason is because the permitted uses are not feasible. It is not going to be developed according to the current zoning regulations. The automobile industry is dead. We lost two in Westwood in the last ten years. They are not coming back. The trend for the other uses, i.e., big-box stores for appliances and office equipment is to be relocated to the highway. There is a brand new day care center across the street, and it is unlikely another center would locate across the street from them. Medical offices would be much more likely to be located across from the hospital. We are left with a site we want to take advantage of for the location and suitability. Kinderkamack Road will always be a busy road. We want to take advantage of the traffic. It was testified to that it will not add to the current traffic.

7-Eleven is a place to stop on the way for coffee or a sandwich, Mr. Lafferty pointed out, and it is not a destination. It is a place that will serve the community and the immediate surrounding neighborhood as a place to get coffee, milk and bread. The traffic and planner testified. The application can be granted without detriment to the zone, and this site is particularly suited for the proposed use, as set forth by the planner, Ms. Petrow, because it will take advantage of the current traffic and is a transitional use, and will serve the needs of the neighborhood and workers. Approving the application will get the site back on the tax rolls of the Borough.

Mr. Rutherford asked Ms. Gregory to review and outline the "C" variances that would be subsumed in the "D" use variance. Basically, she stated, the parking variance would not be subsumed, and she reviewed the variances, including front, side and rear yard setbacks, impervious coverage,

parking setbacks, size of parking spaces, and sign variances.

Mr. Rutherford addressed the Board. Procedurally the matter is before the Board on remand, and we have established a separate record. He would caution the Board that the decision the Board makes is based on the second application KMACK North II, and the Board is to make its decision on the findings of fact and conclusions of law. We have heard about the standards of proof and law in connection with use variances, which Mr. Rutherford reviewed and read the requirements for "special "reasons", as well as the criteria for "positive criteria" and "negative criteria", and per the Medici case, which requires an enhanced burden of proofs", that the variance is not inconsistent with the intent and purposes of the Zoning Ordinance. We do have the Master Plan Re-examination and amendments. All of this establishes the "D" variance is significant and requires five (5) affirmative votes, as opposed to the "C" variance. This is a succinct understanding of the law as it pertains to use variances, Mr. Rutherford concluded.

Comments by Board Members followed. Mr. Oakes commented they did a positive job on improvements and reducing the size of the building, but felt there were negative points, such as the size of the parking spaces. Also, there was not enough testimony about truck routes in the traffic study. There is a ball field down across the road, and he feels it is a dangerous location. He is trying to offset the negatives with the positives, and it just didn't balance for him. Mr. Bicocchi commented about Kingsberry Lane, and that the traffic expert did not consider it. There is a pretty good population on Crest, and they were not mentioned. It is good to reduce a building in size and add greenery. What the applicant is trying to do is commendable. Mr. Bieri commented there is a convenience store in the vicinity; this use does intensify the use on the site, and he was having difficulty with the enhanced burden of proof. Mr. Owens commented over the years the Planning Board made recommendations, and in the LB Zone, the reason they broke it down into three, is because of the buffer to the residential areas, and to concentrate on the uses in each zone. The Planning Board makes recommendations and did not put this use in. He was having difficulty with rectifying the use, as planning by variance. Mr. Hartman commented they did not hear any positive comments from the neighbors.

Mr. Martin commented the applicant has put on a very good application. The issue does relate back to the "D" variance and reconciling it back to the Master Plan and recommendations that have been implemented, and they have chosen not to include this use. That makes it difficult to reconcile it with the Master Plan. On the other hand, it is using a building that is substantially difficult to reuse. It is a difficult application for the use. He did thank the applicant for trying to reuse the building. Mr. Ceplo commented the applicant did say the Master Plan is updated, but the uses will not work. The question is whether we should try to make decisions on law. Mr. Martin commented we are here to make decisions based on very specific criteria. Mr. Montana commented from his hearing of the application, the applicant has done a very good job in their efforts in trying to improve the community. In looking at what is best for the community, they understood they could include the recommendations in the Master Plan and chose not to, which makes it difficult.

There were no further questions, comments or discussion. The Chairman called for a motion. A motion to deny the application was made by Mr. Bicocchi and seconded by Mr. Oakes. On roll call vote, Mr. Bicocchi, Mr. Bieri, Mr. Oakes, Mr. Owens, Mr. Ceplo, Mr. Hartman, and Mr. Martin voted yes to deny.

4. **A Cleaner City/Nail Salon 711 Broadway - Use Variance** - Scott Berkoben, Esq. represented the applicant and requested an adjournment. The matter was carried to the 4/1/13 meeting with no new notice required.

5. **Sickinger/The Sickinger Family Trust C/O Wayne Henderson, 484 4th Avenue Wash- Variance, Site Plan Application (William Martin recused)** - Carried to 5/6/13 at request of applicant with time extension granted.

6. **Ann Costello, 105 & 108 Fifth Avenue, Section 68 Certificate** - There was no appearance by applicant, and she would be advised to appear on 4/1/13, to publish and serve notice and contact David Rutherford, Esq., Board Attorney.

10. DISCUSSION:

1. **Historic Preservation Program** - Brief discussion by Chairman Martin with Board commentary.

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

Respectfully submitted,

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MARY R. VERDUCCI, Paralegal
Zoning Board Secretary