

**BOROUGH OF WESTWOOD
ZONING BOARD OF ADJUSTMENT
REGULAR MEETING
MINUTES
May 7, 2012**

APPROVED 6/11/12

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 Regular Meeting of the Westwood Zoning Board.

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

2. PLEDGE OF ALLEGIANCE

3. ROLL CALL:

PRESENT: Raymond Arroyo, Vice-Chairman
William Martin, Chairman
Michael Bieri
Vernon McCoy
Guy Hartman (Alt #2)
Eric Oakes
Christopher Owens
Matthew Ceplo (Alt #1)

ALSO PRESENT: David Rutherford, Esq., Board Attorney
Louis Raimondi, Brooker Engineering,
Board Engineer
Steve Lydon, Burgis Associates,
Board Planner
Kathryn Gregory appeared as Board
Planner for KMACK North & South only

ABSENT: Robert Bicocchi (excused absence)

4. MINUTES - The **Minutes of the 2/27/12, 3/5/12, 3/29/12, and 4/2/12 meetings** were approved on motions made seconded and carried.

5. CORRESPONDENCE:

1. Memo from Burgis Associates dated 5/3/12 RE: Niarra, LLC;

6. VOUCHERS: A motion to approve vouchers totaling \$14,252. was made by Mr. Oakes, seconded by Mr. Bieri, and carried unanimously on roll call vote.

7. RESOLUTIONS:

1. Morrison, 24 Clinton Avenue - Variance - The Board Attorney gave an overview of the Resolution for the record. A motion for approval was made by Mr. Owens and seconded by Mr. Oakes. There were no further questions, comments or discussion. On roll call vote, Mr. Arroyo, Mr. Oakes, Mr. Owens, Mr. Ceplo and Mr. Martin voted yes. Mr. Bieri, Mr. McKoy and Mr. Hartman were not eligible to vote.

8. PENDING NEW BUSINESS:

1. Van Grouw, 27 Ruckner Road - Appeal- incomplete/carried;

2. Niarra, 312 Kinderkamack Road - Variance - incomplete/carried;

3. Snyder, 73 Lyons Place - Variance Application - the matter still incomplete; the matter was reverted back to be listed under Pending New Business until being declared complete.

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

SWEARING IN OF BOARD PROFESSIONALS FOR PUBLIC HEARINGS

The Board Professionals were sworn in.

Chairman Martin announced there was an escrow deficiency reported by the Finance Department of almost \$12,000. Mr. Rutherford advised the Board has the option of putting the matter off until the escrow is satisfied. The

applicant advised he could go to his office, which is a short distance away and bring back a check. Mr. Lafferty requested they be permitted to resolve the issue and proceed tonight. The balance on KMACK North was \$8,638.75 and on KMACK South was \$4,091.25. The Board continued hearing other matters while applicant departed to obtain the checks.

1. Metro PCS New York, 182 Third Avenue - Variance and Site Plan Approval - Carried to 6/4/12;

2. Care One at Valley, 300 Old Hook Road - Variance & Site Plan Approval, Block 2001, Lots 51 and 64 - Mr. Martin announced that applicant requested a Special Meeting on 5/30 or 6/11. The Board set 6/11/12. Mr. Rutherford would advise the applicant accordingly.

3. Kowal, 98 Cypress Street - Appeal - Mr. Kowal, the applicant, and Mr. Klymenko, applicant's architect, continued under oath. New architectural plans were submitted. Mr. Klymenko described the changes to the plan. They replaced the deck with a patio as suggested. Mr. Martin commented the drawing states it complies with floor area ratio. Mr. Lydon stated it did not comply. Applicant used the deck in calculating the floor area ratio and reduced impervious coverage. Mr. Lydon stated a variance was necessary. The Chairman explained floor area ratio and building coverage are different calculations. Mr. Kowal stated they have all the rooms planned out.

Chairman Martin explained there is a much higher burden of proof for hardship in a floor area ratio variance. He suggested amending the plan, seeking a regular "C" variance. Mr. Kowal said he did not think he could afford to come back to another meeting. Mr. Martin stated the Board could consider it if the calculations were correct, but they were not. Mr. Lydon gave the calculations. Mr. Martin stated the applicant should give the floor area ratio figures. A discussion ensued. Mr. Raimondi explained they need to provide exterior dimensions of the building. All information would be confirmed. Mr. Martin announced applicant would provide the dimensional information and variances being requested. The matter was carried to the 6/4/12 meeting.

The Board took a recess from 9:10-9:22 pm.

4. KMACK North, 39 Kinderkamack Road, Block 1805, Lot 39- Variance & Site Plan Approval;

Kathryn Gregory acted as Board Planner for the application. David Lafferty, Esq. represented the applicant.

Upon reconvening, Mr. Lafferty remitted a check for \$8,638.75, representing satisfaction of the escrow requirements for KMACK North and a check in the amount of \$4,091.25 for KMACK South.

The matter continued with the thorough overview and summation of Mr. Lafferty, who in essence stated all concerns of the Board were addressed to the best of their ability. The Borough already lost its last two auto dealers, and there is only room for one appliance store, which the town already has. This would be an enhancement, returning the site to active use and providing a tax ratable. They acquiesced on the bulk variances and would have a nice welcoming sign coming into Westwood.

Chairman Martin called for deliberations. The Board Attorney set forth the members eligible to vote. Mr. Oakes listened to the C/D of the 3/5/12 meeting, and Mr. Bieri listened to the C/D of the 4/2/12 meeting. Mr. Martin and Mr. Arroyo were present at all 4 meetings. Mr. Hartman was absent on 4/30/12 and 5/2/12 meetings and was ineligible to vote. Mr. MCKoy listened to the C/D's of 2/27/12 and 4/2/12. Mr. Martin, Mr. Arroyo, Mr. Oakes, Mr. Owens, Mr. Bieri, Mr. McCoy, and Mr. Ceplo were present and eligible to vote.

The Board Members deliberated and gave their individual comments. Mr. Oakes asked for definition of convenience store use. It was indicated they are asking for general retail use and are planning for a convenience store. Mr. Arroyo did not see that the Board would grant an open-ended general retail use in the LB zone. Ms. Gregory commented on the positives of developing the site, and limiting the use. Mr. Martin commented the purpose of the LB3 districts is for limited integrated uses. Mr. Bieri had a conflict with the limited part and not knowing what the rest of the building will be used for. He was also troubled with the fact that it was identified in 2005 as an area that needed to be looked at, and the applicant stated he was before the Planning Board, but this is not in the Master Plan. Mr. Bieri commented it is a good site plan, but he is bothered by the use.

Mr. Martin commented the reuse of the building has a very positive effect. Shifting it towards the cemetery was also a positive, but the request for general retail is a concern. He does not see how it can be reconciled with the language in the Master Plan. The intent of the Master Plan does not seem to be headed toward a general retail zone. Instead it has added several uses to the list of permitted uses. Mr. Arroyo commented whatever personal feeling the Board members have about the accuracy of the Master Plan, it guides us and all the proofs must be presented with the guidelines of the Master Plan. We have to reconcile with that plan. Mr. Martin added the Master Plan tells us the direction the Planning Board is moving in. He finds it difficult in reconciling the very new Master Plan with the arguments that were made regarding the planning aspects of this application. The application did a very good job dealing with the building itself. How it was altered and reused is a tremendous positive, but it must reconcile with the Master Plan and the Governing Body through the ordinance. Mr. Arroyo noted 7-Eleven has this lease that restricts the uses, but again, just approaching planning/zoning, we are surrendering to unknown uses per 7-Eleven. Chairman Martin stated that is why he hoped the applicant would have given a list of uses they would adhere to.

Mr. Oakes inquired about the Board's options as to the different variances requested and whether they could be broken down. To give an overall blanket response is difficult. He also asked if they could be voted on separately. Mr. Rutherford did not recommend this. Continued discussion by the Board would lead to some sort of consensus he advised. There is case law that supports the position that when an applicant requests a use variance, the bulk variance is subsumed in the use. You look at the detriment, and the nature and extent of zone plan. Mr. Rutherford advised the Board needs to be mindful of how it reconciles the use variance. It is based on the proposition that zoning is by ordinance, not by variance. Granting the variance is not supposed to usurp the Governing Body. Also, there have to be special reasons.

Mr. Arroyo asked for clarification as to whether there was a specific request for the convenience store or just a general retail use. Mr. Rutherford advised it was a request for general retail use, as indicated by Ms. Gregory and Mr. Lafferty, with a disclosure that the anchor tenant is a 7-

Eleven convenience store. This makes it difficult for the Board, because Board Members cannot say specifically whether they like the use and the hours. The Board has to make a decision whether the retail ordinance is right for this site. We end up not focusing on the principals of zoning and we do not know what the other uses will be. The Board needs to reevaluate it.

Ms. Gregory asked if it was proper to separate out the use variance and site plan. She has seen this done in other towns. Mr. Rutherford advised the essential thrust of this entire application was the use variance. The applicant did not choose to bifurcate the application, and he would not recommend it. Mr. Martin added the applicant decided to make an application for a use variance. The applicant elected not to go to the Governing Body to present a request for a zone change. There were several avenues they could have taken, but the applicant chose to bring it to the Zoning Board for a use variance. Mr. Rutherford advised the applicant has the absolute right to come before the Zoning Board and put forth his case, and as to your comments, yes there are a number of options.

Mr. Martin commented we pay great respect to the Master Plan, our guiding document, when reviewing the applications. It sees the future development of the Borough.

Mr. Bieri commented it would be good for the town, but his stumbling block is the general retail

Mr. Hartman could not vote, but commented there is quite a bit of retail a stone's throw away, and in his opinion there are great improvements, but on the Westwood side there are small storefronts. He did not know what qualifies their business for the use. There is business activity within Westwood on the other side. What is being proposed here is really not all that different in those respects. There is a convenience store and a strip mall down the road. There really will not be much of a difference.

Mr. Oakes asked if the Board could formulate some language to eliminate general retail. Chairman Martin responded the applicant did not ask for that. He would be reluctant in the function of the Board deciding on the use based on neutral principals of zoning.

Mr. Lafferty said he had to object to the advice the Board was given, and the Board is always free to put restrictions on the limitation of use and listening to the deliberations, they would accept limitations. He strongly objects to Mr. Rutherford's advice. Mr. R said he understood Mr. Oakes questions as to decide on a use, and that is the function of the Mayor and Council. Mr. Lafferty s correct, and so that the record is clear, if the comments was which retail use was acceptable and which is not, he would not go down that route. If the Board decided to impose conditions on general retail use, then that is something the Board can do. It must advance the purposes of zoning and not be adverse to the intent of the Master Plan. Mr. Oakes can we put a condition that in a general retail, that if anything other than that is put in they would have to come back for the use. Mr. Martin understood the applicant wanted general retail use and no other options. Mr. McKoy felt we had the conversations and it did not go.

There were no further questions or comments.

A motion to approve requires five affirmative votes, Mr. Rutherford advised. If there are less than five, the application is denied.

A motion to deny the application was made by Mr. Oakes who stated the general retail request was a little too undefined, and he did not think the Planning Board would have overlooked that as a use for this zone. The motion was seconded by Mr. McKoy. Mr. Rutherford said this would be a simple majority vote. On roll call vote, all members voted yes for the motion to deny. The application was denied. Mr. Martin said he felt sorry it was not reconciled.

Mr. Lafferty commented he respects the Board's actions and asked if the Board would consider convenience store use only. The main tenant would be 7-Eleven, and the other tenants would either be permitted uses or come for a variance. It would be limited convenience store use. Mr. Martin asked if it would change the nature of the application. Mr. Rutherford advised it is a significantly different application requiring a new notice. At this point there is no application before the Board, and it would have to be renoticed and republished.

Board Members asked if that would be considered *res judicata*. Mr. Rutherford advised the applicant would be

devoting a portion of the building to a non permitted use. Mr. Rutherford then explained the *Doctrine of Res Judicata*, meaning an applicant cannot file an application the seeking same relief absent a change. He would think *res judicata* is a recognized doctrine of the law. Applicant should have the right to bring others for review. The Board per discussion tonight thought it was a significant factor. The application would not be considered *res judicata*.

Mr. Lafferty asked that the Resolution contain his request which was denied.

The Chairman announced that KMACK South would be carried to 6/4/12 with an extension of time. Mr. Lafferty would not grant an extension of time. The Board prepared to hear the application.

The Board took a five minute recess to allow for Mr. Lafferty to prepare the witnesses.

5. KMACK South, 40 Kinderkamack Road, Block 1607, Lots 12, 13 & 14 - Variance & Site Plan Approval - Kathryn Gregory acted as Board Planner for the application. David Lafferty, Esq. represented the applicant.

David Lafferty presented KMACK South application seeking parking variances. Scott Lurie, Licensed NJ Architect, was sworn in, qualified and accepted. The architectural plans were last revised 2/14/12 and marked Exhibit A1. Mr. Lurie had a colorized mark-up of the drawing, marked A2, prepared by him, depicting the front and side elevations.

Questions of the architect followed. Chairman Martin asked about loading. All loading will be in the front, with no activity in the rear, Mr. Lurie responded. There were no exits out the side. There are all small spaces. The lighting would be low and decorative. Mr. Raimondi asked if the adjoining buildings to the West overlook the roof of this building. Mr. Lurie responded they would not. There were no further questions of the architect and no public present.

Richard Adelsohn, Engineer, was sworn in, qualified and accepted. The Site Plans were marked Exhibit A3. The Survey, revised to 8/11/11 and submitted with the application, was marked A4. It is actually three lots, located on the West side of Kinderkamack Road. It is an

irregularly shaped lot. The total area is 32,070 sq. ft. This is the LB3 Zone. What is proposed is a 58,062 sq. ft. building located on the western portion of the lot. The plan shows 29 parking spaces in two rows. Spaces 21 and 22 were shifted for a dumpster and loading area. They need a variance for parking spaces. They have three front yards and a side yard.

Mr. Adelson continued. There is 43.5% of landscaping. He illustrated the drainage, with a reduction in runoff. Mr. Martin commented there should be a substantial improvement to drainage. Sheet 4 was a colored version of the Landscaping/Lighting Plan, which was marked Exhibit 5 and described. There is a large variety of plants to create seasonal interest. There are five fixtures, as shown on Sheet A4, all inside the property.

It was 11:05 p.m., and the matter was carried to the 6/4/11 meeting with time extension granted.

10. DISCUSSION: None

11. ADJOURNMENT - On motions, made seconded and carried, the meeting was adjourned at approx. 11:07 p.m.

Respectfully submitted,

MARY R. VERDUCCI, Paralegal
Zoning Board Secretary