

**BOROUGH OF WESTWOOD
ZONING BOARD OF ADJUSTMENT
SPECIAL MEETING
MINUTES
March 16, 2015**

APPROVED 4/6/15

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 **Special 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: Eric Oakes, Vice Chair (Chaired Meeting)
Guy Hartman
Matthew Ceplo
H. Wayne Harper
Marc Truscio
George James
Cynthia Waneck (Alt #1)

ALSO PRESENT:

Louis A. Raimondi, Board Engineer
Steve Lydon, Burgis Associates,
Board Planner
Michele S. Austin, Esq. Substitute Board
Attorney for MedExpress Application

ABSENT:

Michael Klein (Alt #2) (excused absence)
William Martin, Chairman (Recused)
David Rutherford, Esq., Board Attorney
(Recused)

4. MINUTES: A motion to approve the Minutes of 1/12/15 Reorganization/Regular Meeting was made by Eric Oakes, seconded by Wayne Harper, and carried unanimously on roll call vote.

5. CORRESPONDENCE: None

6. VOUCHERS: None

7. RESOLUTIONS: None

8. PENDING NEW BUSINESS:

1. VRS 40 Kinderkamack, LLC and MedExpress Urgent Care-New Jersey, P.C., 40 Kinderkamack Road, Block 1607, Lots 12, 13 and 14 - Use Variance/Site Plan - Not heard; carried;

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

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

1. VRS 40 Kinderkamack, LLC and MedExpress Urgent Care-New Jersey, P.C., 40 Kinderkamack Road, Block 1607, Lots 12, 13 and 14 - Appeal of Zoning Officer's Decision - Michele S. Austin, Esq. acted as Board Attorney for this application. David Rutherford, Esq. and William Martin were recused on the application.

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 objector, Westwood Taxpayers Alliance.

Ms. Austin addressed Mr. Lamb's letter of 3/11/15, requesting more information as to MedExpress. Mr. Alampi advised he provided a comprehensive set of documents and submissions that clearly set forth the breakdown of the organization of MedExpress. It is a medical practice, chartered as a professional corporation. Dr. Ferrell is the physician of record and one of the owners. Counsel is raising the issue of hedge funds. Mr. Alampi advised further that is not an issue, and everything has been broken down. The Certificate of Incorporation, among other documents, states it is engaged in the practice of medicine. There was nothing

more. They went well beyond what the statute requires, and it is time to move on with the application.

Mr. Lamb stated he raised this because a review of the documents submitted raised various issues. He was referring to a newspaper article stating two hedge funds purchased MedExpress. Mr. Lamb hired a financial reporting company to see if it was correct. He was prepared to give a copy of the financial records indicating the hedge funds are the owners. It is okay to be a hedge fund, but it cannot own more than 10%, by law. Mr. Lamb said he asked a simple question—who owns the stock. If he didn't have the information, he would assume the documents submitted were correct. He didn't receive a stock certificate but various documents. He was hoping to have the stock certificate and ledger. The documents are inconsistent, stating 500 shares, then 1,000 shares. The other thing that struck him as unusual, was if Dr. Ferrell is the sole owner, why does the agreement say he cannot transfer the shares. He questioned why there was an owner's consent authorizing the architect to sign the application, dated in 2013. This also said he was authorized only on various locations in NJ, but this site was acquired in 2014. He found this to be unusual. Accordingly, he prepared a subpoena requesting the stock and stock ledger, to disclose if there are any other shares. He is not satisfied it is a one-owner company. Mr. Lamb stating he wants to continue with the special meeting, but the Board should issue the subpoena and obtain the documents.

Ms. Austin advised the subpoena would come from the Board. Mr. Lamb crafted the language. The Board needs some more information on this. She would not be opposed to the Board issuing the subpoena moving forward. If Mr. Alampi feels it is not necessary..... Mr. Alampi stated the Board has subpoena power, but it must be careful as to what the subpoena says. The Board cannot extract proprietary information. That may be the goal of the objector. Unless the Board can issue the subpoena in a proper manner, they will respect it if it is carefully crafted so the proprietary information is not extracted. There is no secret here that two hedge funds have taken ownership of the MedExpress, the doctor is licensed to practice.

Ms. Austin advised although the language was proposed by Mr. Lamb, she must take it back to her office to review the language.

Mr. Oakes stated this would not affect the appeal on the use, and he was questioning whether this was necessary to move forward. Mr. Lamb compared it to a Board Member having stock in a company that is an applicant. This is to bring out who the owners are, so we know there is no conflict. The Chairman issues the subpoena. They tried to limit the list of items. If there is dollar information, they can cross it out.

Mr. Alampi addressed the issue of Mr. Marini not appearing. Ms. Austin was ill and didn't issue the subpoena. Mr. Lamb defended his absence. It is possible she will issue it for 3/30/15, Mr. Alampi stated. Ms. Austin affirmed.

Mr. Harper asked if they closed the previous issue. Ms. Austin advised no and inquired if the Board wanted to take action. Mr. James commented the Board should have the information of who the shareholders are. Mr. Harper commented the application should be complete and accurate to the extent possible. He questioned why this issue was coming up now. Dr. Ferrell or the hedge funds are not present. So why are we talking about this.

Mr. Lamb advised the MLUL prescribes that ownership of 10% or more must be disclosed, The Board is prohibited from making a decision on the application. Mr. Oakes pointed out this is an appeal. If the Board Attorney agrees with the interpretation, he is in favor of the subpoena.

Chairman Oakes called for a motion. A motion to obtain ownership information, not financial, of the applicant was made by George James, seconded by Wayne Harper, and carried unanimously on roll call vote.

Ms. Austin advised Mr. Alampi asked for information about the Westwood Taxpayers Association. She does believe, that although there is no statutory requirement that this information be provide to the applicant, the applicant is entitled to have this information. Mr. Alampi stated their list was given three years ago. Mr. Lamb stated the members are Messrs. Gross, Hampton, Volant, and Goldberg. Mr. Alampi asked for Mr. Lamb to forward this information in writing tomorrow. The members have been emailed on the proceedings. Mr. Alampi requested Mr. Lamb provide incorporation documents and that this is a real entity and not a front for an organization. We have the right to know who is objecting to the application. Mr. Lamb stated there can be an organization

that is not incorporated. They now have a non-profit corporation, and he would be happy to put that in writing.

Mr. Alampi stated at the 3/2/15 meeting, Mr. Lamb requested a new notice, and he provided notice and publication with proofs. Now we are ready to go, he added.

Mr. Lamb questioned what ordinances apply to this hearing. He quoted Mr. Lydon in his review letter dated 11/3/14 regarding consulting Mr. Rutherford as to the time of decision rule. The law was modified to provide for a time of application law. The MLUL states it only applies to applications for development. The Zoning Board "A" Appeal was not included on the list. That means the Board should apply the ordinances on the books right now, as the new ordinance applies, he added.

Mr. Alampi asked how can you appeal a Zoning Officer's decision on a certain date if the decision was made on a certain law. What he put into writing was his criteria. The state of the law at that time is controlling. He responded to this issue as precisely as he could. Mr. Lamb is trying to convince the Board the new statute is limited to eight types of proceedings. The original law was likewise. The time of decision rule never applied to the "A" appeal. If that never applied, the relief rule did not apply either. The appeal is from a specific date on what the law was. The "A" appeal was never part of the process. The statute or ordinance in Westwood, at the time of the filing the appeal and application is controlling. You can have a medical office, even a veterinarian office. Mr. Lamb commented.

Mr. Oakes asked if it was ever allowed before or after. Mr. Lydon stated applications under "A" or "B" are very rare. He cannot recall what the statute said earlier and cannot doubt Mr. Alampi's research. Mr. Oakes asked if this particular use was allowed in the LB-3 zone. Mr. Lydon responded the LB-3 zone is of recent origin. The list of permitted uses were not enumerated, but rather certain types of uses were excluded. The only thing the recent ordinance did was not change the list of permitted usages or prohibited usages, but defined the specific terms in the ordinance in general. Mr. Alampi commented the ordinance stated the issues not permitted. There is due process and to rule otherwise, would deny him due process. Mr. Lamb stated the Mayor and Council have the right to change or define the ordinance, and

the applicant goes through the process. The Mayor and Council should govern this.

Mr. Oakes called for this to proceed. Ms. Austin offered her legal opinion. She read over the letter of Mr. Lamb quite diligently. Both attorneys have made very good points and are right in different ways. She does not think the time of application law applies to appeals. There are eight specifically enumerated instances where the law states you should take the time of application and whatever law in effect at that time is what you look at. This goes back a little further. In this instance on 9/17/14, the letter was issued to the applicant stating that urgent care facilities were not a permitted use. At that time she does not think it was relevant when the Council adopted the law. The date of Mr. Marini's decision when he determined urgent care was not permitted is the law you should look at, not the law on the date the appeal was filed, and not the date the new ordinance was adopted, but the date Mr. Marini made his determination that this was not a permitted use.

Ms. Austin continued. If you determine that Mr. Marini was incorrect, then you can direct him to review the matter, and if you determine he was correct, then Mr. Alampi proceeds with the use variance. Mr. Alampi may demonstrate this is not an urgent care facility, which may cause another wrinkle. She feels the time of application rule is not applicable, but the time of decision applies. It should be the state of the law on 9/17/14. Mr. Harper commented it seems logical to him. It is the date when the Zoning Official gave his determination. Ms. Waneck agreed it should be based on the 9/17/14 date. Ms. Austin advised the municipal ordinance was not voted on until 9/30/14. She gave the sequence of events.

Mr. Alampi agreed it was the 9/17/14 date, which was the ordinance before the changes. Mr. Lamb reviewed the time line in his letter. If you decide the ordinances are in effect only when Mr. Marini makes a decision, you are taking away the powers of the Council. The Board should give credence to the Mayor and Council before rushing to a decision. Mr. Alampi commented.

Mr. James commented he believes Mr. Marini had sufficient reason to come to a conclusion, and he thinks he is right. Ms. Austin asked him to hold off on his opinion until after the attorneys have presented their case, testimony and evidence.

Mr. Harper inquired as to whether the Board should vote on the criteria of which law applies. Mr. Oakes commented the Board should hear the case. Ms. Austin advised we could hear the testimony. It does not have to be an official vote at this time. Ms. Waneck commented we are deciding whether the appeal is going forward. Mr. Ceplo commented Mr. Marini is not here, but if he is setting his decision on a particular criteria, then time elapses, would it be wrong to think that if the Council changed its views, would he have changed his views. Would he write another letter since there were changes. Ms. Austin advised that would not have been unheard of, but the change of ordinance made it more restrictive, and there would not have been a change in the denial letter. Ms. Waneck stated we either agree or over rule.

Mr. Lamb stated the new ordinance backs his opinion. We are going to hold off on the decision while Mr. Alampi presents his case to show Mr. Marini was wrong. Mr. Lamb introduced emails. Mr. Oakes requested the emails to mark as an exhibit before they are addressed. Mr. Alampi distributed eight (8) emails from dates ranging from 8/29/14 to 10/20/14, marked Exhibit A.

The Board took a recess to read the emails at 9:10 p.m. Mr. Lamb made his objection in the meantime. The Board reconvened at 9:25 p.m.

Mr. Alampi reviewed the eight emails and their relevance, discussing the change to the ordinance. There was an ordinance that established medical office in the LB-3 zone. Medical office was not defined in any great specificity. It did not have any limit. With that, the importance of this correspondence, by Mr. Snieckus, of Burgis Associates, representing the Borough as Planners, were engaged to draft language and circulate it, specifically to Mr. Marini, the Zoning Officer, who makes a decision. He can seek guidance, but he did not seek guidance, although you can see a number of people offering guidance. It ends on 10/20/14, with an email from Mr. Marino to Mr. Alampi saying urgent care/walk-in clinics are not the same as a doctor's office. This establishes a time frame of activity and correspondence. At one of our earlier meetings, your Clerk appeared to advise how the Open Public Meetings Act applies and the email discussions. Mr. Marini did not get into any licensing or staff. He based it on walk-in clinics. These emails were obtained through an OPRAH request by his client.

Mr. Lamb asked if Mr. Marini saw these, and if we can wait to ask him when he appears. Mr. Alampi said he thinks we can. Some of the content is repeated in the chain of emails. There were 35 or so emails, but these are the ones that went straight to the point. Brigette Bogart, Planner will be present at the next meeting to go through the Master Plan and Ordinance, as will Armand Marini.

Mr. Alampi introduced Todd Sexton, as a witness, who was sworn in as Regional Manager of Clinical Operations of MedExpress. It was acknowledged the Board Professionals were previously sworn and remain under oath.

Mr. Alampi questioned Mr. Sexton as to his position, which includes overseeing the day-to-day operation of the clinical staff, medication, policy and procedures. Mr. Sexton gave his educational background. He has been associated with MedExpress ten years and six years. He is associated with various MedExpress entities and described the typical facility, which is usually about 4,000 sq. ft., free-standing or located in strip malls, with similar layouts being square or rectangular.

Mr. Alampi continued with questioning of the witness. Extensive details of the layout, operations, examination rooms, staffing, and treatment were given. The lab section was described. There is no anesthesia administered. A typical hospital has a board-certified emergency room doctor. Applicant does not. In trauma situations, Mr. Alampi asked how the staff handles trauma. The staff would see they had appropriate care. They typically would not receive a patient in a car accident by ambulance direct from an accident scene. They also do not perform surgery, but if someone came in with a fracture, they would x-ray it and splinter it, and then refer them to another doctor. They do not have a neurologist and do not perform cat scans. A review of the statistics show less than 10% are emergencies. The majority of the types of situations they treat are sinus infections, strep throat and household injuries. If there's a fire department burn situation, they would not handle that. They would provide DOT-type physicals for trucking companies. No blood work or cardiograms are provided. Basic height, weight and minor vision testing may be done for pre-employment, including drug testing. They do not do any work for school districts or institutions.

Mr. Alampi asked Mr. Sexton how he would evaluate the MedExpress examination rooms compared to a doctor's office. Mr. Sexton said they are very similar. They have a waiting room and similar examination rooms. Health records are kept electronically. No dental work is performed. What does the registered nurse do, Mr. Alampi asked. Vital signs and minor testing, Mr. Sexton responded. The manager manages the office. The hours of operation are twelve hours, and the philosophy is to accommodate the patient that cannot get in to see a primary physician. They do not perform physical therapy. The facility will operate seven days a week as do the other 14 facilities in NJ. People usually do not make appointments and wait for a doctor to be available. They try to get them in and out in a timely manner. They would give treatment and do refer patients out. Doctors outside will establish a relationship. Managers reach out to other health care professionals and organizations to generate business and support health care in the community.

Do you have hospitals within 10 miles, Mr. Alampi asked. They rely heavily on the hospitals for lab work, radiology, referring patients, etc. They have a facility near Hackensack University Medical Center on Essex Street in Lodi, NJ. They also have MedExpress facilities in Totowa, Ledgewood, Watchung, Springfield, among other towns. They do not have a fleet of emergency vehicles. Generally they treat the patient one time, and they go on to their primary care physician. They accept credit cards in lieu of insurance. How many of the patients are adolescents. Mr. Sexton stated 20% or less. The witness was completed. Cross-examination would follow.

The Board took a brief recess from 10:25 p.m. to 10:30 p.m.

Mr. Lamb cross-examined Mr. Sexton. He asked the exact name of the entity. MedExpress Urgent Care-NJ, LLC, Mr. Sexton responded. He also works for the same entity in PA. He is from Colorado, but currently lives in PA. Mr. Sexton was asked if this operation is an urgent care center, and he responded no, it is a doctor's office. The name has urgent care in it Mr. Lamb noted and asked for the definition of urgent care, and Mr. Sexton responded a place that supports life-threatening situations.

Mr. Lamb asked Mr. Sexton if he reviewed the site plan, which he asked to mark O2. Mr. Sexton had not reviewed the

plan. Mr. Lamb withheld the question. Another witness may be better suited to answer. Mr. Alampi noted it was his plan. Mr. Lamb asked him about the other facilities and number of patients per day. Mr. Sexton said about 50 per day, in the twelve hours per day. That facility has reached maturity. The number of doctors was noted. Mr. Lamb reviewed the list of facilities and asked if any can do more than 50 per day. They could, he responded. Every facility has a triage room. The number of employees was about seven. Mr. Lamb asked if it was a hospital, and the response was no. Was it like what an emergency room would treat, he further asked, and the response was no. Would it be fair to say typical medical offices are not open Sundays or evenings. Mr. Sexton agreed. Mr. Lamb asked if any rooms have hospital beds. Mr. Sexton said no. All facilities have a license for a lab.

Mr. Lamb showed Exhibit O3, which he distributed. The exhibit was the clinical laboratory license issued to Dr. Ferrell for a MedExpress facility in Cinnaminson, NJ. Mr. Lamb asked if it is a for-profit company. The answer was yes. He asked if they did any charity work. Mr. Sexton did not know. They do community outreach. They do not handle serious or chronic injuries.

Due to the time being 10:55 p.m., the cross-examination would end for the evening. The witness would remain on recall, Mr. Alampi offered.

The next special meeting would be on 3/30/15. Two members would be unavailable. Mr. Alampi would provide the transcripts. Witnesses were discussed. Mr. Marini would start as the first witness. Mr. Alampi advised they would extend time through the month of April, 2015. The attorneys would provide their available dates in April to Ms. Austin.

10. DISCUSSION: NONE

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