

Franklin Borough Zoning Board of Adjustment
Meeting Minutes for
May 1, 2013

The meeting was called to order at 7:30 PM by Chairman Richard Kell, who then led the assembly in the flag salute.

Mr. Kell read the Statement of Compliance pursuant to the "Open Public Meetings Act, Chapter 231, PL 1975."

ROLL CALL OF MEMBERS PRESENT: Mr. Correal, Mrs. Bonis, Mr. Gardell
Mr. Kopcsó, Mr. Swiss, Mr. Martinez,
Mr. Lermond

ABSENT: Mrs. Murphy, Mr. Kell, Mrs. Alexander

ALSO PRESENT: Mr. Thomas G. Knutelsky, P.E.
Mr. Ken Nelson, Planner
Mr. David Brady, Esq.

Mrs. Bonis advised Vice Chair Murphy and Chairman Kell (and Mrs. Alexander) stepped down from the application. Therefore, she will be the chairperson and Mr. Lermond from the Planning Board will sit in on the application.

APPROVAL OF MINUTES:

There were no minutes to approve

APPROVAL OF RESOLUTIONS:

There were no resolutions to approve

APPLICATIONS FOR COMPLETENESS:

There were no applications for completeness

ADJOURNED CASES:

There were no adjourned cases

APPLICATIONS TO BE HEARD:

ZB-09-12-1 Eden Franklin LLC, Preliminary and Final Site Plan, C Variances, Conditional Use Variance; Block 1401, Lots 12, 13 and 14.

Mrs. Bonis advised application testimony was given at the last meeting and this meeting is for counsel summation.

Mr. McDermott said he'd present his thoughts regarding the application and why the (Board) should not approve it. Mrs. Bonis asked if its remarks in summary of what he's already stated or is he providing new testimony. Mr. McDermott said no, and will only refer to things on record.

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Mr. McDermott emphasized his clients are not against Walgreen's but its size and location. He said the applicant submitted an application with an explanation of exceptional conditions and positive criterion, and no negative criterion explanation.

Mr. McDermott said their Variance and Design Waiver Summary touches on some things and their (client's) key position why (the Board) should deny it is within (Walgreen's) documentation found in three places to which he discussed. He also said, (Walgreen's) said if Variance is not granted the property would be rendered undevelopable. Mr. McDermott said the developed property refutes that and there's no hardship if the application is denied and further explained.

Mr. McDermott said further on they address minimum buffer widths saying compliance would impact the ability to provide required amount of off-street parking stalls and on-site circulation. He said it's because the property is too small for the building, necessary parking spaces, and other things required by (town) ordinance. Based on their documentation, it's his position it should be denied. He mentioned the daily 700 vehicles in/out of the site and of no factual evidence requiring a 24 hour pharmacy.

Mr. McDermott said the applicant's engineer indicated there will be 75 vehicles in/out per hour during weekday peak hours and 60 in/out on Saturday and multiple small vendor daily trips. The State of NJ study indicates 20,000 vehicles daily pass through this intersection. He wanted to point out (to the Board); confirming what Mr. Brady explained to them on April 3, 2013 was an article in the paper. He wanted to re-affirm Mr. Brady said ratables are not a proper issue for them to consider on this application and should have no bearing in their decision.

Mr. McDermott addressed statements from the applicant's planner, Michael Kauker, for the Board to determine. Mr. McDermott talked about Mr. Kauker's statements along with his (Mr. McDermott's) contestation regarding: Variances not representing serious deviations; granting C2 variance producing significant benefits; 24 hour pharmacy providing multiple product applications; variance grant inures benefit to the 2009 Master Plan; economic development; granting a variance protects surrounding adjacent residential area and of excess buffers; the application substantially compliant with the Master Plan and Zoning and the ability to comply with the 1.5 acre size provides for limited uses. He also responded to Mr. Kauker's statement of compliant use can be higher than the height of this building.

Mr. McDermott said (Mr. Kauker) presented A-16 at the 3/6/13 meeting trying to show how compliant the application was and submits it's not. He referred to the following excerpts from sources as noted below with his respective remarks to application denial.

- 2009 Master Plan Re-examination Report dated October 6, 2009: Page 6; Land Use; 1st Bullet;

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- Same Report: Page 14; N^o: 3; Zoning Map And/Or Land Development Regulation Issues; Buffer Issues; 6th Bullet;
- Same Report; Page 24; Land Development Regulation Issues; No. 3;
- Same Report; Page 25; ¶3, 4th sentence;
- (Land Development Chapter 161) § 161-34; Conditional Uses; A.;
- Ken Nelson Report dated 10/26/12; ¶3, 1st sentence;
- Same report; ¶2, 1st sentence;
- Ken Nelson Report dated January 28, 2013 Page 1; ¶3, 3rd sentence;
- (Franklin Borough) Transportation Vision Plan, Page 6; Environmental Framework; ¶4, 4th sentence;
- Same Plan; Page 7; ¶2, 3rd sentence;
- Same Plan; Page 9; Vision Plan; Table 2; (Automatic Traffic Recorder (ATR) Data); 4th Row: Rt. 23 between Washington & Rutherford
- (Chapter 161 Schedule B); 161 Attachment 3:1; Zoning District; HC

Mr. McDermott requested the Board consider its intrusion into the residential zone while referring and indicating so on a subdivision map. He hoped the (Board) viewed the site for a better picture showing why it should be denied. He made reference to Exhibits D-2 and D-3 indicative of the residential neighborhood's character. Mr. McDermott further said there's been no other commercial intrusion and then referred to the aerial exhibit while describing the neighborhood's aspects.

Mr. McDermott talked about the applicant's lack of mentioning the gas station and single family residence removal and explained landscaped surroundings acting as a buffer. Mr. McDermott referred to an exhibit dated 3/6/13 saying the depicted trees are disproportioned; the building is higher and won't shield the neighborhood from tractor trailers, 700 vehicles or vendors to the site. He talked about and requested the Board consider smaller children's safety regarding their path to school, fence opening, the sidewalk and parking lot as hazardous if the application is granted.

Mr. McDermott asked they consider the gas station's size being smaller than the proposed building. He talked about potential noise factors; fences and evergreens won't guard the neighborhood from noise and referred to two superior court cases as the basis for denial. Mr. McDermott said the applicant has been inflexible and explained. He spoke about vehicle, tractor/trailer and small vendor intrusion into the neighborhood. He said big noise is to the rear, and if you go into the neighborhood, the Shop Rite mall, Wal-Mart or commercial activity cannot be seen-further indicating it's a bowl whose topography warrants preserving.

Mr. McDermott commented he's a 37 year resident of Sussex County, never lived in Franklin, gone through it, and knowledge of Route 23's commercial activity is from what he's seen. He talked about what's seen in the neighborhood and believes it embodies and exhibits a residential neighborhood Franklin should be proud of. Mr. McDermott said to preserve that on behalf of his clients and other people; it doesn't warrant this application and respectfully requested its denial.

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Ms. Nicholson expressed thanks for time and consideration throughout the hearings, formulation of a less intrusive plan and of collaborative efforts.

Ms. Nicholson addressed Mr. McDermott's remarks of net opinion, misunderstanding of what this application is, what Land Use Law is and exact nature of variance relief sought relates to. She talked about the decision made from the Planning Board's commercial zoning review and recommendation considering the 1.59 acre site.

Ms. Nicholson said they are not required, nor does Land Use Law require they demonstrate the community necessitating Walgreen's and is not the legal standard. The property is zoned for it and Walgreen's determined it a good purpose to come to the community and, is not for Board determination if they can go there or is the use they want to have.

Ms. Nicholson responded to Mr. McDermott's remarks about the gas station, court case citations and non acceptance of their planner's testimony; Route 23 being the economic engine; HC Zone lot size by town fathers; his reference to impacts; Board Planner's January 28th report and the subsequent report which assisted in revised plans addressing concerns and; connectivity. She said high crash rates, Route 23 issues and the transportation study are all good. However, the DOT and the applicant put forth these issues, have been resolved and jurisdictionally are not before this Board. She responded to children safety including the (town) engineer's recommendations, and about noise.

Ms. Nicholson said Mr. McDermott repeatedly submitted denial reasons which are counter-intuitive to what the Planning Board and Town Council approved for the site. She commented on mutual county residency, nice neighborhoods, and noted her appreciation of a Planning Board member deliberating on the panel.

Ms. Nicholson said Walgreen's is seeking construction permission in the HC zone with three road frontages and primary orientation along Route 23. She said testimony was heard from their Developers, Engineer, Planner, Community Operations Leader and Traffic Expert with no others to controvert their testimonies. It's up to the (Board) to evaluate as their credentials, expertise and licenses were heard. They're entitled to rely on the credibility of their testimony that wasn't controverted and in instances were agreed to by (the town's) engineer and planner, and some resident support above 24 hour accessibility benefits and Walgreen's product offerings. From an economic perspective, they will pay over \$123,000.00 in annual taxes.

Ms. Nicholson talked about the misunderstanding of D-3 Variances, why it's before this Board and therein cited Square v. Westwood Zoning Board of Adjustment. She also discussed the drive-thru component testified to by Walgreens' experts, deviation from variance needed under 161-34 B (6) (d) which she read and

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explained, of testimony provided with rationale, and drainage and safety issues not comprised with the proposed grading also confirmed by (the town's) engineer.

Ms. Nicholson talked about banked parking spaces, impervious coverage, drive-thru conditions met, triggered D-3 Variance and, affirmative votes. She submitted the applicant provided necessary proofs to satisfy the Board, met legal requirements, positive and negative criteria and the Board is empowered to grant the variance as they are in fact, minor deviations.

Ms. Nicholson said 10 variances were eliminated and concessions were made to other C Variances bringing them closer to Ordinance compliance. She talked about their planner's testimony regarding the drive-thru conundrum, proofs demonstrating proportionality, Walgreens' testimony regarding acreage business model apropos needs based on 8500 national and international stores.

Ms. Nicholson said their Planner's analysis was very informative, part of testimony, evidence that went in and the chart. She also spoke about the Reader Board and its withdrawal; neighborhood abutment; buffer and landscape increase; building relocation; evergreen height increase; additional plantings at construction under municipal engineer guidance; further visual buffering to immediate neighbors; sidewalks construction; truck deliveries; trash pick-up; vehicle idling enforcement; pedestrian crossing signal; delivery times; Developer's Agreement and; banked parking. She further discussed the Auche Drive connectivity issue; Route 23 orientation sheltering; dimensional variances with proofs and; the gas station's enhancement by the applicant's project. She said the town fathers wanted to facilitate its redevelopment and accomplish commercial ratables on the Route 23 corridor to which this application does.

Ms. Nicholson said 23 exhibits evidenced to assist the Board to fully understand the plans, design feature, visual aspects from adjoining neighbors and how they're mitigated; also, D-2 proofs addressing service to the public and enhance Route 23's economic development; redevelopment of a gentrified building; site suited based on Walgreens' criteria and; proposed project height scales to the neighborhood. She also referred to Mr. Nelson's statements about their planner's analysis and cases; other uses impacted; significant parcel portion zoned commercial demonstrates co-existence with the residential uses; addition of buffering; Route 23 corridor being the community's economic engine and; Franklin's planning policy allows commercial development on this site which includes previously zoned residential portions.

Ms. Nicholson said testimony was heard why the building can't be made 900sf smaller and Walgreen's established business model is operationally based not solely profit as inferred by objectors. She talked about Walgreen's clinical, mini clinic and pharmacist consultation, aged baby boomer generation requiring medical services and efficient, cost-effective deliverance which led to their evolving business model. Ms. Nicholson talked about the pharmacies of yesteryear, society's evolvement of

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one-stop shopping and other stores' accommodation. Walgreen's understands and have designed their stores via expert utilization to provide those needs. Information was submitted for consideration and approval.

Ms. Nicholson talked about existing noise, light, visual impacts, and traffic occurring on the Route 23 corridor; expert testimony of minimal traffic impact, light and noise at the proposed location and testimony on existing impacts already in place. She talked about the public giving statements and their unfamiliarity with processes forms, a property owner not on the 200' property retaining an attorney, connectivity which was resolved, Ms. Stecher's expressed concerns which were addressed by the applicant, and of Mr. Patel's testimony.

Ms. Nicholson commented on the public's remarks and misperception of the variance quantity equating denial. She addressed and explained the application's initial number of variances requested through the current variances sought. Therein, she explained Land Use Law authorizes and empowers the Board to grant the variances when both, proofs have been submitted and criteria have been satisfied. It is her legal position the applicant has done so, Land Use Law provides for variances to be granted by the Board, no two properties are alike and different applications require different configurations. Ms. Nicholson said when all the information is taken as a whole, the Board sees the building can be constructed, the site plan implemented and the public can benefit by the project.

Ms. Nicholson respectfully requested the Board vote to approve by at least five affirmative votes, drive-thru deviations can be accommodated, will not constitute a substantial detriment to the public good and will not substantially impair zoning after that determination has been made. By a majority affirmative vote, she respectfully request approval of the C Variances based on the applicant having met its burden on the unique property's physical characteristics causing an undue hardship without any substantial impairment to the Zone Plan. She said you could reach this conclusion by knowing the governing body knew they were enabling a 1.59 acre property in a 5 acre zone be created in the hopes of redevelopment and further amended the Ordinance to permit drive-thru uses on one acre parcels.

Mr. McDermott addressed Madame Chair saying he thinks there's a significant difference in one aspect of what he said whether ratable can be the subject. Mrs. Bonis said they understand what he said. Mr. McDermott said he doesn't want the Board to be misled and requested Mr. Brady address that for the Board.

Mr. Brady said while the development of the Route 23 corridor is a proper consideration from Planning, economic development is proper, the town and Council implement through its zoning ordinances. That's not the same as saying ratables are an appropriate consideration; they're separate. One may go along with the other and there is some correlation; but considering the money the taxes generate to the town is not a threat to consideration. Considering whether this furthers the

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economic development of the town and the economic development of the Route 23 corridor which the Board might consider to be a goal of Zoning, that's correct.

Mrs. Bonis advised the Board is at a point of deliberation and professionals are present to ask questions. Mr. Brady said perhaps Mr. Knutelsky or Mr. Nelson can go prior to Board discussion. He said there are two different types of variances with two different voting requirements and requested the Board first concentrate on the D-3 Variance, vote, and then go on to the next group of C Variances as they have to consider they have different standards in terms of proofs and voting.

Mr. Nelson said summations touched on a number of things he would have commented on. Mr. Nelson said he wanted to comment on C Variances, existing C Variances and other C Variances dealing with building coverage and setbacks. He said the governing body and Planning Board are aware of the 5 acre zone and that many properties aren't 5 acres. Mr. Nelson said he presumes that requirement can't be met in many cases and variances will be needed in connection with setbacks and then what's reasonable in terms of associated deviations.

Mr. Nelson talked about the maximum allowed coverage and the objector's attorney suggestion of 900sf reduction to meet setbacks is not the case and would still have significant setbacks requiring variances not only for this application but virtually any retail use proposed for this site for the Board's consideration. He said the first issue is, if the requested coverage variance is reasonable, is matter of judgment. Mr. Nelson said some municipalities would consider it a De Minimis and others don't. He discussed percentage maximum and setback deviations and said if the applicant is forced to meet all setback requirements, the building envelope will be reduced to virtually nothing.

Mr. Nelson thinks in terms of whether an approval would impair the intent and purpose of the Master Plan, is a judgment call. It's not a D-1 Variance, is not as if a commercial use was being proposed for a residential zone, it's a commercial zone. As the applicant's attorney said, it's the municipality's planning policy that this property be redeveloped commercially. The question is, whether this is the proper commercial use for this site.

Mr. Nelson said if the Board were proceeding toward approval, conditions would have to be attached including the drive-in speaker volume and additional landscaping to maximize buffering between the commercial use and the residential neighborhood. He said the residential neighborhood has legitimate concerns and there will be some impact. The question is whether those impacts in your opinion can be mitigated where this commercial use can co-exist with that residential neighborhood.

Mrs. Bonis asked if he wanted to speak about D-3 Drive-thru. Mr. Nelson said that becomes a judgment call. He said he was very involved with the Planning Board in

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amending the Ordinance so commercial uses with drive-in's wouldn't automatically go before the Board of Adjustment and talked about what was happening in the past.

He said the Planning Board recommended the Ordinance be amended to Council and was, but discovered it wasn't amended as well as it should have. In his opinion, this application should be before the Planning Board but is not. It doesn't meet three conditions he considers to be relatively minor deviations. He believes they're minor or could be mitigated to the extent the drive-thru can be accommodated on the site without a substantial detriment to the neighborhood. He says that from the viewpoint of its history and his understanding and dealing with the Planning Board, they really didn't want drive-thru's triggering D Variances in most instances. He knows the drive-thru has been an issue and concessions made, from the applicant. Mr. Nelson said one outstanding matter involving condition would be the speaker volume.

Mr. Lermond asked Mr. Nelson if there's guidance about drive-thru noise and of starting and stopping circulation.

Mr. Nelson said in his view, the main issue was speaker volume. When they were dealing with that they were mainly thinking of fast food operations where the volume can be loud. He said this drive-thru is different and less onerous than a fast food operation. Mr. Nelson said traffic will be going through there and will create some noise, thinks landscaping is substantial enough to mitigate those impacts and as vegetation matures, those impacts would be further mitigated. In summary, his understanding or concern about any drive-thru is volume noise associated with the speaker; not so much the traffic.

Mr. Correal asked if the drive-in taking up more parking lot area impairs the use. Mr. Nelson said in his opinion no, it would be before the Planning Board if the drive-thru wasn't associated with the application, doubts site design would change, may have additional landscaping, building placement be as proposed and the drive-thru wouldn't have much of an impact if eliminated. Mr. Correal commented it wouldn't be more room to have the buffer. Mr. Nelson said there may be a little more landscaping area but would still need about the same number of parking spaces.

Mr. Lermond commented he's clear on setbacks, needs additional information on buffers. Mr. Knutelsky said the buffer requirement is a 10' requirement from non-residential uses and further explained. Mr. Lermond asked if the buffer is the property line to the development and about where setback starts. Mr. Knutelsky explained. Mr. Lermond asked what is the 10' and if it applies to the other three front yards. Mr. Knutelsky said the three front yards. Mr. Brady advised Mr. Knutelsky, his office believed it was 20' of difference under 161:24 C (7) ([b]) and read it. Mr. Knutelsky reviewed and agreed with the front lot line as 20'. At this time it was further discussed.

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Mr. Knutelsky said this is in summary to the application. The Board knew an original plan was submitted as part of Completeness Review and original Site Plan Review comments were made for the applicant to address certain issues from standpoint of paved surface reduction. He said they reduced their parking lot size, individual stalls and driveway aisle widths; moved the building and the parking area away from the residential zone as per our request and requirements to reduce on-site impervious coverage.

Mr. Knutelsky said the applicant met Storm Water Management Rules and addresses intent to meet low impact development techniques by reducing paved surfaces and moved the site at our request to increase the buffer width. He discussed the egress/ingress regarding Auché Drive issue, connectivity and also referred to the comment made of the applicant being "inflexible" to which the applicant accommodated to requests made and the Board should consider actions made by the applicant during this application.

Mr. Knutelsky said the applicant has met Storm Water Management burden, and Sewer and Water won't be taxing to the Borough's infrastructure. It will be a future separate application. Regarding access, the applicant has provided safe ingress and egress throughout the entire site and further explained. Therein, he mentioned NJDOT's role. He said they added comments requested of the applicant which DOT added to their review process. Mr. Knutelsky talked about the applicant's provision for sidewalks as requested for safe pedestrian access to the site. He also discussed buffering and recommends imposing a condition to which Mr. Brady can clarify regarding buffering review upon its actual construction, as what's on the plan may not work out in the field.

Mr. Brady thinks they could impose that condition, and believes the applicant indicated they consent. Mr. Knutelsky said, with that said, another condition the Board may recommend is what Mr. Nelson just touched on about noise. The applicant testified they'd meet all Borough and State statutes related to sound at the property line at all times. He talked about a condition to have a sound inspection by a licensed individual ensure emitted sound level standards are met and; a condition it's been conducted prior to final approval. He advised Madame Chair other than that, the plan has been modified to satisfaction. Mrs. Bonis asked if he had comments to add about the D-3 Variance to which he said he doesn't. Mrs. Bonis asked if any other members have questions for Mr. Knutelsky or Mr. Brady.

Mr. Gardell inquired if they approve, is there anything they can do that would require the drive-thru remain the same; not turn into a Burger King. Mr. Brady said they could make sure they don't let the drive-thru (have) this configuration. This issue was further discussed.

Mr. Knutelsky said Mr. Gardell originally brought up buffering of the parking stalls. He asked if there was an issue about when and if those parking stalls were ever

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constructed, whether they have to come back to the Board. Mr. Brady said you're actually giving approval for the banked stalls and a design that shows they're engineeringly feasible. He doesn't think they have to come back to this Board for that. At this time it was further discussed. Mr. Nelson suggested the Board revisit the parking expansion. Mr. Brady said Mr. Nelsons' suggestion is that the applicant be made to come back specifically to address the buffering situation. Mr. Nelson agreed. The Board continued discussion on banked parking spaces and buffer.

Mr. Lermond commented he doesn't think it's sufficient; looking at it in the field, making it efficient and may be stuck with an approval with the constraint and compromise at that point. He said the whole thing works together; site, buffering, intrusion, separation, circulation and it's too tight. It needs to be more separation.

Mrs. Bonis asked if he's specifically concerned about one side of the building regarding buffering. Mr. Lermond said his biggest concerns are the Auche Drive side and the back equally. Mrs. Bonis provided Auche Drive and Washington's setbacks and inquired if Mr. Lermond wanted more. Mr. Lermond said it's not just the setback it's enough room to build, buffer, security, privacy, visual and noise. Mr. Nelson asked Mr. Lermond if it's landscape area or along Auche Drive and talked about planting material and would like another look at the final plan for that. At this time the Board further discussed this. Therein, Mr. Nelson said he would like a last look at the landscape plan, make adjustments and a field opportunity for further adjustments if needed. He also talked about a visual impact would be had that's unpreventable even if the standards were fully complied with.

Mr. Brady advised they're at a point where the Board will no longer discuss but someone will make a motion and take action. He said you have two different standards to apply to the D-3 Variance and to the C Variances not only in terms of the standards, burdens of proof but also in terms of voting requirements. If the Board is going to act, I ask that it first act on and consider granting the D-3 Variance and the consideration there is whether the deviations on the details of the parking lot, the percentage of landscaping, things of that nature. There are three things where it doesn't comply. Whether that is something that cannot be accommodated on this site; that's the basic phraseology that's used in the case law. You have to concentrate on them whether if not it can be accommodated on the site. The other condition the Board should think about is the noise issue. The applicant has indicated it has complied with that condition by saying we will comply. I'm not sure if the Board necessarily has to accept that at face value; I don't know that I would call it a deviation or a variance that has to be voted on yes or no, but certainly I think if the Board is going to say okay, the applicant said it will comply, hence it does not need a variance than there must be a condition that says, "and it will prove compliance once the building's up and we'll continue to comply at all times." Mr. Lermond said so you need those conditions in the proposed motion. Mr. Brady said in the proposed motion with regard to the D-3 variance whether it's an approval or non-approval of that D-3 Variance; we need that motion first and once we vote on

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that, then we go on to the rest of it cause there's if separate proofs and they can be granted separate from each other or denied separate from each other.

Mr. Lermond questioned if there was an approval how the development progress would take place which Mr. Correal asked at a previous meeting regarding security and fencing. Mr. Lermond thinks they should be considering when development can begin and of placing landscape buffers beforehand.

Mr. Correal was unsure if it can be put in a Resolution or have the authority. He addressed his concern about demolition and construction and if it could be included as well. Mr. Brady advised it's typically addressed in a Developer's Agreement and will note it and ensure to mention that in the Developer's Agreement if there is a Resolution of approval which may actually be in his standard boiler plate conditions.

Mr. Lermond asked who sets the Developer's Agreement or those conditions. Mr. Brady said those conditions go usually between John Ursin's office as the attorney for the Municipality, Mr. Knutelsky overseeing it from construction point of view, and the attorney for the applicant. Mr. Knutelsky said it breaks down the contractor and applicant's responsibilities through the course of construction, dust, safety, fencing, corridors, pedestrian ways, school building and walking around.

Mr. Correal asked if the Police Department and Fire Department are brought in if needed. Mr. Knutelsky said there is a pre-construction review. Mr. Correal asked if it would be in place in this situation specifically. Mr. Knutelsky said as part of the Developer's Agreement it would certainly be an item. Mr. Lermond commented about getting the landscape and hardscape in place. Mr. Knutelsky said it wouldn't be a Developer's Agreement. A discussion on this issue was had.

Mr. Knutelsky wanted to convey to the Board what activities are typically done at the project's beginning and could possibly see landscaping towards the back done. Mrs. Bonis asked Mr. Lermond what he thinks about fencing. Mr. Lermond said he would make it a condition. If something dies, you could replace and plan for it. Mrs. Bonis asked if there were any thoughts from other Board members.

Mr. Martinez said he agrees with Mr. Lermond regarding minimizing impact to the residents if it gets approved. Mrs. Bonis asked if he's suggesting they follow through with their total landscape plan or their Auché Drive landscape plan. Mr. Lermond said their Auché plan and western end. Mr. Brady asked, landscape plan and the fence? Mrs. Bonis said behind. Mr. Lermond said he would put the fence.

Mr. Knutelsky said as part of that, one thing that may have to be done prior to the fence being put in is the curb line and further explained. Mr. Lermond commented about minimizing it, the neighborhood stigma and endurance of the development to which Mr. Martinez agreed. Mr. Brady inquired if he was looking for a condition on the fence and landscape along Auché Drive and the rear of the property being part

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of the initial construction together with other things such as curbing or sidewalks integral to placing the fencing and the landscape. Mr. Lermond said you don't have to put the fence and landscape, you could put something temporary; something to minimize the whole impact.

Mrs. Bonis suggested taking a straw poll on that particular issue to see if it's a condition they want to put in place. Mrs. Bonis said five out of seven say it's something they'd like them to consider. It was asked if that's the D-3. Mr. Brady said what he envisioned are they work on the D-3, move and vote on it. Consider the D-3 first then go on to the rest of the site plan and the rest of the site. He said he'd like the D-3 first only because it's got a very discreet issue. The discreet issue being those variations from the conditions; can they be reasonably accommodated on this site? Then go on to the rest of the site.

Mr. Lermond asked what the noise condition is at the property line. Mr. Brady said the condition is it will be inaudible. Mr. Lermond asked if it has any guidance about traffic related to the drive-thru. Mr. Brady said the conditions associated with the drive-thru do not address traffic. It says the maximum volume of any exterior speaker shall meet the decibel levels that will make the sound associated with them inaudible at the property line. Mr. Knutelsky said vehicular would need to meet Borough noise standards; the speaker would be inaudible.

It was asked to summarize the D-3 Variance again. Mr. Brady said the D-3 Variance is the conditional use variance. It's the request to allow the drive-thru to be constructed even though it does not meet every one of the five conditions. Specifically, it doesn't meet the portion of the condition that say you're going to meet all those off-street loading and parking because when we go to the specifics of off-street loading and parking the percentage of the parking landscaped area is not met. The number of parking lot shade trees is not met and the maximum parking lot grade is not met. Those are the deviations. So the question then is can the impact of those deviations be reasonably accommodated on this site.

Mr. Martinez asked if this is where they would also discuss tractor trailer idling. Mr. Brady said that's more appropriate for the second part because as we get into the second part and deal with things like buffers, setbacks and general overall site plan approval, then we could start putting all those sorts of conditions about noise and agreed to Mr. Martinez saying trash compactor.

Mr. Lermond asked if they're putting this first because if that's not approved, there's no need to proceed. Mr. Brady said no, because if you don't approve it, you can still proceed; they don't get approval of their drive-thru but the rest of the building remains under consideration by the Board. It seems to me let's deal with this first issue first particularly since it only deals with whether the site can reasonably accommodate those three parking lot variations. It's a very discreet sort of analysis the Board has to do.

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Mr. Kopsco said, didn't Walgreen's say they require and want the drive-thru. Mr. Brady said if you approve it great, then they've got it. If you disapprove it, then they can file an appeal or they can decide to build it without a drive-thru or they can walk away from the whole project because they didn't get the drive-thru. That doesn't affect this Board's consideration as to whether they've met the requirements. Mr. Kopsco inquired of it being done first. Mr. Brady said because it's not essential to the rest of the consideration and it's a discreet small issue that requires five votes.

Mr. Lermond asked if it would be appropriate to have a condition of hours of operation of the drive-thru. Mr. Brady said when you get to putting condition, this is not a D-1 Variance; so your ability, authority, your power to impose conditions to mitigate impacts, it's less than in a broad D-1 Variance application. Mr. Brady said the conditions you put on have to be aimed at mitigating the deviations. Any conditions you put on this with regard to the drive-thru have to be aimed at mitigating the effects of not quite meeting the percentage of parking lot landscaping, not meeting the number of parking lot shade trees and not meeting the parking lot grade and told Mr. Lermond he doesn't see how there's a connection between hours of the drive-thru and those three deviations. Mr. Lermond said he understood.

Mr. Lermond said he thought there were more/less physical kinds of things and some more detriment and that stuff to do with the D-3. Mr. Brady said D-3 has requirements: minimum lot area of one acre that's met; minimum for area of the building to which the drive-thru is attached shall be 1,000sf that's met; traffic and pedestrian circulation will allow for safe and convenient movement of vehicles using best engineering practices, aisles, widths, curb radii, placement of driveway openings, fire lanes, sidewalks and all meet requirements of the ordinance or alternative standards specifically related to drive-thru, connectivity related to vehicular and pedestrian circulation shall be achieved on the site and as the site relates to adjoining properties for the satisfaction of the Board engineer and Board. The sidewalks shall be incorporated into the site; those appear to be met. Off street parking and loading shall conform to this chapter and it doesn't and three criteria and then minimize the impact on the residential zone, structures, fencing, screening shall be provided and the maximum volume of exterior speaker shall meet decibel levels that will make the sound associated with them inaudible. Those are the five criteria.

Mr. Lermond thinks it doesn't meet circulation. Mr. Brady asked in general? Mr. Lermond said in general, doesn't think circulation back around the back side and past loading is good design and doesn't like it. Mr. Knutelsky said the truck driving templates show how they move around and the widths of the aisle meet Borough standards and that's why he indicated it met the standards. Mr. Lermond said we're not at a point where we can re-do site plans. If the drive-thru had to stay on the back corner, then traffic should go back around the other way, maybe you need more turning radius and you got to go through those banked spaces. We're not here to talk about that, it's either whether we like it or we don't. Mr. Brady said he raised

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a question as to whether it meets criteria C. Mr. Lermond thinks it doesn't to his standard. Mr. Brady said so you think it doesn't allow for safe and convenient movement of vehicles based on best engineering practices. Mr. Lermond said he may not be able to say that; you're the expert that can say that. Mr. Brady said that's why he's asking. Mr. Lermond said but he's the guy that can vote. He doesn't know how to get to the bottom of that when they're not there to debate the site plan anymore and is out of his element.

Mr. Brady asked if someone wants to make a motion to approve the D-3 Variance requested with the conditions talked about that there's going to be a noise test, after construction and perhaps a limit on the adjustability of the volume or is inaudible at the line, can't go to a remote board without it coming back to the Board of Adjustment. All the rest can relate to other aspects of the application.

Mr. Kopsco made a motion to **approve the D Variance with the sound conditions.** Seconded by Mr. Correal.

Upon Roll Call Vote:

AYES: Correal, Gardell, Alt #2 Martinzez, Bonis

NAYS: Kopsco, Swiss, Lermond ABSTENTIONS: None

Mr. Brady said that motion is not carried because five affirmative votes were needed. The drive-thru is not approved because the D-3 Variance is not approved. Now the issue is to go on to the remainder of the site plan and remainder of Variances with things like buffers, Mr. Nelson checking the screening and all other things that might mitigate and impact.

Mrs. Bonis said they talked in detail about the C Variances. Mr. Brady said and it's beyond, Madame Chair, the C Variances, the site plan in general-anything about the site plan you think requires. For example, the idea it could be done in phases with the landscaping put in first. Anything else you think is appropriate to put in here. Mrs. Bonis said let's have that conversation. I think we agree we want to put some condition in that before actual construction begins, fencing and some landscaping will be put in along Auché Drive and the rear of the property. Mr. Brady said if there is a motion for approval, list the conditions. He said it doesn't mean you necessarily approve just like there was non-approval of the D-3 but went through some conditions; the same exercise.

Mrs. Bonis said another condition they want added was that Mr. Nelson can participate in the landscape plan and post-construction landscape and practice. Mr. Lermond thinks there was a condition Mr. Knutelsky added that if landscape isn't sufficient they would look at more engineering to do something. Mr. Nelson said additional buffering. Mrs. Bonis said more landscaping. Mr. Brady said his notes indicate Mr. Nelson wants to look at the plan one more time and be able to have input so as to reach final plan and then once construction starts, Mr. Nelson and Mr.

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Knutelsky will take a look in the field to see if there is something we didn't quite anticipate and how can we fix it.

Mr. Brady said he has a notation that one of the conditions would be if the DOT permits it, the applicant will install the pedestrian signals and the crosswalks; condition of deliveries, truck pick-ups being scheduled for appropriate times and he'll think more of what Mr. Knutelsky and Mr. Nelson look at what those times are, applicant's going to maintain the sidewalks at the applicant's cost, we had that whole conversation of banked parking and the zoning officer triggering the installation for the owner/operator and when that occurs, they have to come back here to have a re-look at the landscaping buffer of banked parking.

Mr. Martinez said we also had trucks idling, trash compactor and time usage we need to look at. Also talked about rooftop covering how they were going to shade that down so they won't have exposed equipment. Mr. Nelson said they were going to put up screens. Mr. Brady said screens for rooftop units. It was said mechanical equipment hasn't been designed yet. Mr. Martinez said another thing talked about that Mr. Nelson touched on was truck deliveries to use it as designed and explained. They are considerations we want put in to use as designed. Mr. Brady noted it.

Mr. Lermond said to Mr. Knutelsky at the last meeting they discussed snow removal and storm water maintenance, retention and maintenance; those are part of. Mr. Knutelsky said the Storm Water Management and Storm Water rapport has a maintenance mangle attached to it that was reviewed and approved. Mr. Brady said he had a note from last time on snow. Mr. Lermond added that the applicant will provide the snow removal plan to be approved by Mr. Knutelsky. Mr. Knutelsky said usually that will get during the Developer's Agreement as well. Mr. Lermond said so that's just a condition to which Mr. Knutelsky agreed.

Mr. Lermond said earlier we talked about we couldn't make the condition of the drive-thru to 24 hours but we could at the site plan entertain that condition. Mr. Brady said he didn't say that; 24 hour use is permitted in the HC Zone. Presumably, the applicant is entitled to have a 24 hour use like any other business operating in that zone. If you had a D-1 Variance where you had a use not permitted and had some unusual or had industrial use with jack hammers going, you may say that can't be 24 hours a day because we have to mitigate that adverse impact, the D Variance. Here, all you're left with are C Variances and I would question whether a 24 hour use is related to a C Variance. Mr. Nelson said he doesn't think so.

Mr. Lermond said you have a lot of development in an area, granted what we wanted to do; I'm not disputing that's not an area and a corner that needed development was suited for that and was partially highway. He thinks this particular development is a lot, there are ways they can scale it down, sculpt it, bring it more relative to what they do see along the Route 23's western side and we would be developing or planning or setting precedence. You have heavy development, the

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larger sites on the eastern side and western is more suited to the neighborhood. He will be a component and proponent of limiting hours, building height reduction and scaling things down to make it more suitable.

Mr. Brady said he doesn't think from a legal perspective, he can tie the bulk variances to a limitation. It's never been suggested by the applicant and gave an example. He said he doesn't see it as something and that's why he asked Mr. Nelson to weigh in as he may be missing something. Mr. Lermond said if it gets agreed it gets into the resolution. Mr. Brady said yes, if it's agreed by the applicant. Mr. Lermond said by both, the Board, town, applicant and becomes part of the resolution. Mr. Brady said if it's all agreed to it's easy to get into the resolution; if it's not agreed to he doesn't see the basis, it's a legal issue. Mr. Lermond said he understands and are at a point where he just has a vote.

Mr. Brady said he had a note Walgreen consented when the store operations person testified to using all commercially reasonable efforts to follow the circulation patterns around the site causing engines to be shut off, coordinating and timing deliveries and will use language to that effect. Mrs. Bonis said they agreed to some signage where trucks will be parking and engines must be turned off. Mr. Martinez said they agreed to any deliveries will have no truck idling and if causing a disturbance, will be held accountable by the resolution.

Mr. Brady reviewed his notes saying they'll put up a no-idling sign subject to a developer's agreement, if requested by the town, police will be provided for traffic/pedestrian safety during demolition that's in the developer's agreement and will put it in. There will be a pre-construction meeting regarding traffic etc., His note of no external displays and unsure if its window signs. Mrs. Bonis asked if it was the LED. Mr. Brady said or externals, something on the sidewalk around the building. Ms. Nicholson said that was outdoor sales. Mr. Brady said no outdoor sales. Mr. Brady said we can have a motion to approve the site plan and all the C Variances that go with it, you could have a motion to deny the site plan and the C Variances, you got a motion to approve the site plan and all the C Variances except for one particular Variance that the Board is having a problem with in which they don't believe the applicant proved the basis for it; it's up to the Board as to what it believes based upon all the testimony. What it thinks was proved and what's appropriate here and what is the appropriate development scheme for the site. If they're going to have a motion to approve the site plan and the C Variances with the conditions listed or to deny or any combination in between.

Mr. Lermond asked if they fall back on that motion if it's over turned in court, where it falls back to. Mr. Brady said it will fall back to the resolution that's eventually prepared and approved by the Board. The Resolution is the touch stone of what the board did and what the requirements are. Mr. Lermond said there'll be a resolution whether approved or denied. Mr. Brady agreed. Mr. Lermond said anything over turned later on would go back to those conditions and discussion in the resolution.

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Mr. Brady asked what he meant by anything that's overturned. Mr. Lermond said if the applicant didn't agree with the Board's vote and proceeded to escalate it to next level of legal action. Mr. Brady said, they challenged us to start a Prerogative Writ case. He said if that happens, we go to court, talk to Judge Weisenbek, briefed by each side and oral argument on it, am unsure of what the challenges would be, but typically the challenges that the Board acted arbitrary, capriciously and unreasonable in denying. The judge then has a wide range of approving what we did, disapproving and reversing what we did, and somewhere in between or even sending it back to us to reconsider what we did. It would all be based on the record made before the Board, the testimony, exhibits, transcripts have to be made of testimonies submitted and the resolution which documents and embodies the Board's decision and reasoning. Mr. Lermond said he's careful to ensure it's all spelled out, part of the record, our intentions, areas addressed, so any next power to be could be privy of what we were thinking. Mr. Brady said that's why the resolutions my office prepares are always so detailed. We try to make sure everybody can read them, understand what they mean and why we did it. Mr. Lermond said so it has nothing to do with the motion, but it has to do with the resolution. If we were just to say, I make a motion to deny, it doesn't cut all that other. Mr. Brady said it doesn't cut all the rest out. Mr. Lermond said but we already have a motion to approve. Mr. Brady said I don't know what we have; I think Mr. Kopsco was about to make a motion.

Mr. Kopsco made a **motion to not approve this application**. Mr. Brady said, not approve. Mr. Kopsco agreed. **Seconded by Mr. Lermond**. Mr. Brady said we have a motion to not approve. So everybody is clear, it's a blanket denial of the application Mr. Kopsco is what you moved to. Mr. Kopsco said it's a true statement. Mr. Brady said a vote yes means to blanketly deny the application in total. Vote no, means you're not voting for that it doesn't mean you're voting yes, it means you're not voting for that.

Upon Roll Call Vote:

AYES: Kopsco, Swiss, Lermond,

NAYS: Correal, Gardell, Martinez, Bonis ABSTENTIONS: None

Mr. Brady said the 4/7 motion does not pass and now are back to where we were. Mr. Lermond said now you need a new motion. It was said to approve. Mr. Lermond said to try to explain it, finalize it and hand in. Mr. Brady said it's like a negative negating a negative. Mr. Kopsco's motion was to deny in total and that motion did not pass; it does not mean that it was approved it just means the motion denying did not pass. So we're back to now if there's anybody that wanted to make a motion to approve, all the variances or some of the variances.

Mr. Gardell **made a motion to approve with all the variances**. Mr. Brady said and all the conditions. **Mr. Kopsco said and with all the conditions, yes**. Mr. Nelson said Mr. Brady, this includes the site plan, do we need a revised site plan to

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eliminate the drive-thru from the plan. Mr. Brady said he guessed that would be one of the conditions, yes that there be a revised site plan to eliminate the drive-thru and that is a condition. **Seconded by Mr. Correal.**

Mr. Brady said there's now a motion to approve the site plan and the variances. With the additional condition that the drive-thru be eliminated because it was turned down and there's been a second so now there's a vote on that. A yes at this point means approval.

Upon Roll Call Vote:

AYES: Correal, Gardell, Martinez, Bonis

NAYS: Kopcsó, Swiss, Lermond ABSTENTIONS: None

Mr. Brady said it's approved with the conditions and the revised site plan to take out the drive-thru. He will work on putting together a resolution and circulate it.

Mrs. Bonis requested a **motion for a five minute recess** before conducting the remainder of business. Mr. Lermond made that motion. **Seconded by Mr. Correal.** All were in favor.

Mr. Martinez made a **motion to reconvene.** **Seconded by Mr. Lermond.** All were in favor

PAYMENT OF BILLS:

Mr. Martinez made a motion to approve the **Franklin Borough Zoning Board Escrow Report for May 1, 2013.** **Seconded by Mr. Correal.** All were in favor.

OTHER BUSINESS:

DISCUSSION:

CORRESPONDENCE:

ADJOURNMENT: There being no further business Mr. Lermond made a motion to adjourn the meeting of the Franklin Borough Zoning Board of Adjustment. **Seconded by Mr. Martinez.** All were in favor. Meeting was adjourned at 10:21 PM. Mrs. Bonis said next meeting is June 5, 2013.

Respectfully Submitted,



Ruth Nunez
Secretary