

7/6/06

Mr. Duncan offered the following Resolution and moved on its adoption:

**RESOLUTION APPROVING USE AND BULK VARIANCES
AND GRANTING SITE PLAN APPROVAL FOR
KNOX 400, LLC AT
460 STATE HIGHWAY 36**

WHEREAS, the applicant, KNOX 400, LLC is the contract purchaser of property at 460 State Highway 36, Highlands, New Jersey (Block 108, Lots 2.01); and

WHEREAS, the applicant filed an application to construct a health fitness center, and to continue the existing uses of an upstairs apartment and a cellular telephone monopole and structure; and

WHEREAS, all jurisdictional requirements have been met, and proper notice has been given pursuant to the Municipal Land Use Law and Borough Ordinances, and the Board has jurisdiction to hear this application; and

WHEREAS, the Board considered the application at public hearings on February 2, March 2, April 6, May 4 and June 1, 2006; and

WHEREAS, the Board heard the testimony of the applicant, ROBERT KNOX; the owner of the property, JOSEPH NATALE; ERIK RUPNARIAN, Licensed Engineer with Goldenbaum Bail Associates; and CATHERINE FRANCO, Planner and Architect, all of which witnesses testified on behalf of the applicant; and

WHEREAS, PAUL MAZZELLA, a competing objector was represented by MICHAEL LECKSTEIN, ESQ., and the following witnesses testified on behalf of the objector: TERRY VANDERMARK, Health and Fitness Club Consultant; VICTOR FURMANEC, Professional Planner; and AL LITWORNIA, Traffic Engineer and Planner; and

WHEREAS, the following members of the public testified/commented on their views of the application: ELAINE HOFFMAN, SEAN JOHNSON, WILLIAM JONES, LORI ANN BODNAR and THOMAS O'NEIL; and

WHEREAS, the applicant submitted the following documents in evidence:

- A-1: Variance application (3 pages);
- A-2: Zoning permit denial with chart by Zoning Officer dated 8/10/05;
- A-2a: Supplemental memo by Zoning Officer dated 11/21/05;
- A-3: Preliminary Major Site Plan dated 9/14/05 and last revised on 1/18/06 by ERIC RUPNARIAN, of Goldenbaum Baill Associates (8 pages);
- A-4: Architectural drawings by CATHERINE FRANCO dated 12/20/05, last revised 1/16/06 (5 pages);
- A-5: Site plan review application (7 pages);
- A-6: Article written by ROBERT KNOX in *Chloe* entitled "In the Beginning";
- A-7: Article written by ROBERT KNOX in *Chloe* entitled "You, Your Family and Fitness";

- A-8: Article written by ROBERT KNOX in *Chloe* without title on page captioned "Myths and Tips";
- A-9: CBS News website printout dated 1/6/05 entitled "Fat Kids Become Fat Adults";
- A-10: CBS News website printout dated 11/2/05 entitled "Kids Need Help Fighting Fat";
- A-11: US Department of Health & Human Services website posting of 1/6/04 entitled "Overweight and Obesity: Health Consequences";
- A-12: CNN website posting dated 1/6/04 entitled "International Survey: Fattest Teens in US";
- A-13: US Department of Health & Human Services website posting of 11/2/05 entitled "Overweight and Obesity: What Can You Do";
- A-14: 11/7/05 *New York Daily News* article entitled "Fat Kids - Diabetes Link";
- A-15: Colored rendering of proposed project;
- A-16: Illustrated Sheet #3 of Exhibit A-3;
- A-17: 2/8/06 letter from KEVIN E. KENNEDY, ESQ. (applicant's attorney) with ITE definitions (10 pages);
- A-18: 8 photographs with drawing and 2 maps, all on board;
- A-19: Parking calculations by CATHERINE FRANCO (9 pages);
- A-20: Amended architectural plans by CATHERINE FRANCO, revised 3/27/06, showing 4 elevations; this exhibit replaces Exhibit A-4; and

WHEREAS, the Board marked into evidence the following exhibits:

- B-1: Highlands Division of Fire Prevention Approval form dated 11/29/05;
- B-2: 2/2/06 review letter of Board Engineer;

- B-2a: 11/7/05 planning board review letter by DONALD NORBUT, of T&M Associates;
- B-2b: 11/10/05 supplemental letter by DONALD NORBUT, of T&M Associates;
- B-3: 5/7/98 resolution granting preliminary and final site plan approval;
- B-4: 2/24/06 site plan requirements list from Highlands Division of Fire Prevention;
- B-5: Review letter by JAIME SUNYAK, Planner, of Board Engineer's office;
- B-6: Board Engineer review letter dated 4/28/06; and

WHEREAS, the Board, after considering the evidence and testimony, has made the following factual findings and conclusions:

1. The applicant is the contract purchaser of property located in the B-1 Zone.
2. The site currently contains a 2,410 square foot two-story Stewarts drive-in root beer restaurant with upstairs apartment, plus a free-standing cellular monopole and service building in the left rear corner of the property.
3. The Stewarts building is quite old, and not very well maintained.
4. The property is approximately .64 acres, and fronts on New Jersey State Highway 36. The rear of the property is along Ocean Avenue.

5. Current access to the site is provided via 47-foot wide and 50-foot wide curb cuts along State Highway 36, as well as from the rear (Ocean Avenue).

6. The applicant proposes a two-story addition to the existing building, which would result in an addition of 3,124 square feet.

7. The applicant proposes the entire first floor, as well as a portion of the second floor, as a health fitness club. The applicant further proposes to use approximately 1,044 square feet of the second floor as a renovated two-bedroom apartment.

8. The applicant proposes that the southeasterly driveway along Route 36 be closed, and that curbing be provided along the existing southwesterly driveway. A 24-foot wide ingress/egress drive is proposed. An additional 24-foot wide ingress/egress driveway is proposed along Ocean Avenue.

9. The applicant proposes a total of 39 parking spaces. Two of those spaces have been previously designated/allocated for use by the cellular monopole (pursuant to this Board's resolution dated May 7, 1998). Another two spaces are required for the apartment; resulting in the remaining 35 spaces being

designated for use by the proposed health fitness club.

10. Health fitness clubs are not permitted uses within the B-1 Zone. Article XVII (Ordinance 21-90) of the Highlands Zoning Ordinances provides that the following principal uses are permitted in the B-1 Zone:

"Retail, business and personal service establishments which are clearly of a neighborhood service character, such as but not limited to the following:

Stores selling groceries, meats, baked goods and other such food items.

Drug and pharmaceutical stores.

Package liquor stores.

Stationery, tobacco and newspaper stores.

Restaurants.

Bars and taverns.

Barber and beauty shops.

Shoe repair shops.

Tailor shops, dry cleaners and self-service laundries.

Banks and fiduciary institutions.

Professional, administrative and business offices.

Parking.

Public uses operated by the borough.

In the overlay area only, uses will be limited to: Professional, administrative and business offices."

11. When this application was first submitted to the Borough's Zoning Officer, the use was deemed an approved use under the borough ordinance. Subsequently, the Zoning Officer revisited the issue, and determined that, in the Zoning Officer's opinion, the proposed use was not permitted in the B-1 Zone, and that Zoning Board approval would be required.

12. The Board finds that the proposed deletion of the Stewarts restaurant, and its replacement, albeit in an enlarged structure, with a health and fitness club, is the type of use intended for the Highway Business District. The Board determines that the proposed use is either a personal service establishment or, certainly, akin to a personal service establishment. The proposed use is very much in character with the examples of permitted uses listed in Ordinance 21-90.

13. In the immediate vicinity of this site is a strip mall, a car wash and an ice cream store.

14. The permitted uses in the zone, as set forth in the ordinance, are not a comprehensive list, but,

rather, are designed, as the ordinance itself states, to provide the Borough with the type of commercial uses to be permitted in the B-1 Zone. The proposed use here fits well into those characteristics. The Board specifically finds that the health and fitness center was not a use which was purposefully omitted from the examples of permitted uses in the ordinance.

15. Since the borough's current parking requirements do not address fitness centers, the issue of parking received considerable attention from the Board during the various hearings. Much time was spent, by both the applicant and the objector, in testimony regarding what type of facility this was, vis-à-vis the definitional requirements pertaining to "health fitness clubs" and "athletic clubs" by the I.T.E. (Institute of Traffic Engineers). The I.T.E. offers illustrations of parking requirements based upon different use groups, and should be used as a reference, since its sampling may reflect a much different size and location for such facilities (i.e. Midwestern state samplings).

16. The primary B-1 Zones in the Borough are in the downtown section of Bay Avenue and on Route 36 (a/k/a Navesink Avenue). The downtown area, however,

is comprised of relatively small lots with little, if any, off-street parking, and certainly is not conducive to larger parking areas or uses that would attract a larger number of cars.

17. The subject site is particularly suited for a use such as the proposed one, not only from a parking and traffic standpoint, but also from a "fit" with the other uses on the highway and as permitted in the B-1 Zone.

18. Testimony was given by the experts for both sides concerning the requirements for a use variance under the New Jersey Supreme Court's holding in the case of Medici v. B.P.R. Co. and Bd. of Adj. of South Plainfield, 107 NJ 1 (1987). Medici is the seminal case in New Jersey, and stands for the proposition that, in order to obtain use variance approval for a use that is not inherently beneficial, the applicant must prove that the proposed use promotes the general welfare and that the proposed site is particularly suitable for the proposed use. This is often referred to as the "enhanced proof" criteria for use variances.

19. The Board does not find the proposed use to be an inherently beneficial use. Though the proposed use does not inherently serve the public good, the use

of the location for exercise and exercises by youth, adults and senior citizens does promote the general welfare.

20. The Board does not find the proposed use to be inconsistent with the intent and purpose of the master plan or the zoning ordinance (as specifically referred to earlier herein). In fact, the proposed use is consistent with the intent and purpose of the master plan and is further consistent with the examples of permitted uses within the B-1 Zone. The applicant, therefore, has met the "enhanced proof" standard required by Medici.

21. The Borough does not have an ordinance to which it can refer to compute the parking requirements for this type of use, or mixed use. As such, the Board has taken testimony and has referred to other municipalities and other sources of information regarding reasonable parking requirements for this type of proposed use.

22. The most compelling information submitted to the Board regarding parking requirements was provided by the Board Planner, who provided examples of parking ordinances in the municipalities of Middletown, Marlboro and East Brunswick, the first two of which

are in Monmouth County and, interestingly, have a lower parking requirement than the third municipality (i.e., East Brunswick), which is in Middlesex County. The Board finds the Middletown and Marlboro formulas both reasonable and instructive. Mathematically, the required number of parking stalls for the proposed health and fitness club use only would be 42, using the Middletown and Marlboro formulas. In addition thereto, two parking stalls would be required for the existing/continued apartment, bringing the total required to 44 parking stalls. This number does not include any number of spaces for the cellular monopole facility (currently, two are required by the Board's resolution; Exhibit B-3).

23. This applicant proposes a total of 39 on-site parking stalls, which is no more than 7 less than would be required under the Middletown and Marlboro formulas.

24. The applicant's current business is located approximately one mile north/west on State Highway 36. He proposes to move from that facility to this one. Most, if not all, board members were familiar with the strip mall shopping center layout in which the applicant's current business operates.

25. The Board is of the opinion that the proposed total of 39 parking stalls on site is adequate and sufficient for the intended uses (the health and fitness club, the apartment, and the cellular monopole). Though the Board is acutely aware of the parking difficulties within the Borough, most of those difficulties arise out of the lack of parking in the downtown business and residential areas. This property is quite a distance from the downtown area, and fronts on a 4-lane state highway.

26. The Board heard testimony from the objector's expert regarding the number of members needed to sustain a viable health and fitness club. Based on the entirety of the testimony heard by the Board, the Board rejects the numbers provided by the objector's witness, TERRY VANDERMARK, as being inordinately high.

27. Though the testimony was not finite on this issue, the applicant did testify to the availability of off-site parking, should he require the same. This would be provided by a neighboring commercial property owner.

28. The objector's witness, AL LITWORNIA, testified regarding access to the site and the use of

two jug handles---one at Orchard Avenue (leading to Buttermilk Valley), and the other at Linden Avenue. There are actually four maneuvers to arrive at the subject site, depending on where you are coming from. Two paths are provided for eastbound traffic on Route 36, and two paths are provided for traffic heading westbound on Route 36 (one by entering from Route 36, and the other by entering from Ocean Avenue). The Board does not find the access to the site to be difficult or problematic, and certainly does not see it having any effect on the traffic on Route 36. The Board specifically rejects the testimony of the objector's witness, AL LITWORNIA, opining that traffic problems would be created. The Board finds to the contrary.

29. The master plan envisions highway-oriented businesses being operated on the highway. This is just such a business as the master plan envisioned.

30. The proposed use is one that will likely be less intense than either the existing use or many of the other permitted uses in this zone.

31. The ordinance permits lot coverage of 80%, which condition this applicant meets.

32. The FAR (Floor Area Ratio) in the ordinance is maximized at .65. The applicant proposes only .36.

33. The ordinance provides a maximum building coverage of 35%. This applicant proposes only 21%, which is certainly not an overwhelming use of the site.

34. The applicant proposes improvements to on-site circulation and to the overall appearance of the site, which will effectively serve as a "gateway" into the Borough of Highlands.

35. The Board was favorably impacted by the proposed renovations and improvements to the property and was further favorably impacted by the testimony of LORI ANN BODNAR, of the Highlands Business Partnership, regarding the need in the Borough for more businesses just like the applicant, and that this business in particular would be a welcome addition to the town.

36. The Board could find no negative features of the application and, therefore, finds that there will be no adverse impact on the Borough's zone plan or its master plan. Rather, the proposed use fits well within the Borough's zone plan and master plan.

37. The proposed use will not be a substantial impairment to the intent and purpose of the zone plan and zoning ordinance. To the contrary, the proposed use will fit in well with the character of the neighborhood and the types of uses permitted in the zoning ordinance for the B-1 Zone; and

WHEREAS, the application was heard by the Board at its meetings on February 2, March 2, April 6, May 4 and June 1, 2006, and this resolution shall memorialize the Board's action taken at the meeting on June 1, 2006;

NOW, THEREFORE, BE IT RESOLVED by the Zoning Board of Adjustment of the Borough of Highlands that the application of KNOX 400, LLC for the proposed two-story addition to the existing building, the creation of a health fitness club on the entire first floor and a portion of the second floor, the continued use of a renovated two-bedroom apartment upstairs, and the continued use of the cellular monopole facility in the left rear of the property is hereby approved. Variances are specifically granted for rear yard setback, side yard setback, parking, outdoor living space, height for the freestanding sign, and the area of the freestanding sign, all as set forth in the applicant's exhibits. Final site plan approval is hereby approved, subject to the conditions below. This approval, therefore, is subject to the following conditions:

1. Applicant must seek and obtain approval for the adding of grass within the Ocean Avenue right-of-way.

2. A fire hydrant shall be installed pursuant to the Highlands Fire Department's directions.

3. There will be an ADA curb cut at the building sidewalk, which shall be shown on the plan.

4. DOT approval shall be obtained regarding access and curbing.

5. All requirements as set forth in the Board Engineer's review letter dated February 2, 2006 (Exhibit B-2), in sections 2, 3, 4 and 5 shall be met.

6. The applicant will not sell prepared food. There shall be no oven and no restaurant on the premises.

7. The premises will not be used for parties, overnight functions (such as lock downs) or proms.

8. There will be no live music or bands.

9. The applicant shall make the contribution required by the Borough's municipal parking ordinance (Ordinance O-02-10, and any amendments thereto) for the deficiency of seven parking spaces.

Seconded by Mr. Francy and adopted on the following roll call vote:

ROLL CALL:

AYES: Mr. Duncan, Mr. Braswell, Mr. Mintzer, Mr. Francy, Ms. Ryan,
Mr. Mullen, Mr. Fox

NAYES: None

ABSTAIN: None

DATE: July 6, 2006

CAROLYN CUMMINS, BOARD SECRETARY

I hereby certify this to be a true copy of the Resolution adopted by the Borough of Highlands Zoning Board of Adjustment on July 6, 2006.

BOARD SECRETARY