

March 17, 2022

Incorporated Village of Westhampton Beach held its Board of Zoning Appeals meeting on Thursday, March 17, 2022, at 5:00 p.m. in the Municipal Building, located at 165 Mill Road, Westhampton Beach, New York.

PRESENT: Gerard Piering, Chairman
Joe Musnicki
John Wittschen

ABSENT: Jim Badzik
Ellen Cea

Anthony C. Pasca, Esq., Village Attorney
Brad Hammond, Building & Zoning Administrator

Maeghan Mackie, Building Permits Examiner / Board Secretary

Motion was made by Mr. Piering to adopt the minutes; seconded by JW and unanimously carried 3 ayes, 0 nays, 2 absent.

DECISIONS:

1. WHB Development Partners LLC, 107 Old Riverhead Road (905-002-01-019.05)
Applicant requests variances from §197-1 to construct a proposed automotive service station accessory convenience store building of 4,872 square feet in gross floor area where the maximum permitted is 3,000 square feet, and from §197-17.1 for a proposed rear yard setback of 30 feet where the minimum required is 50 feet.

James N. Hulme, Esq., appeared on behalf of the application. Mr. Piering stated there was a determination, and the reading was waived.

VILLAGE OF WESTHAMPTON BEACH
ZONING BOARD OF APPEALS
-----X
In the Matter of Application of

WHB Development Partners, LLC. **DETERMINATION**

Address: 107 Old Riverhead Road
SCTM #: 905-2-2-19.5
-----X

I. REQUEST FOR RELIEF

The applicant, WHB Development Partners, LLC., is the owner of a parcel of real property located at 107 Old Riverhead Road. The property is vacant land, located wholly within the B3 Zoning District.

Section 197-1 of the Village Code defines an automotive service station as including an accessory mini-market or convenience store, which may be permitted by special exception with a gross floor area no greater than 350 square feet per fueling station up to a maximum of 3,000 square feet, and in accordance with the dimensional requirements of the zoning district.

Section 197-17.1 of the Village Code provides for a table of dimensional regulations, which, in the B3 Zoning District, requires a rear yard depth of 50 feet.

As depicted on the site plan prepared by the Stonefield Engineering, last dated 2/1/22, the applicant seeks to construct an automotive service station with a 3,999 square foot accessory convenience store, with a minimum rear yard setback of 41.9'. The applicant has therefore requested the necessary variances from the 3,000 square-foot limit in Section 197-1 and from the 50-foot rear yard depth in the table of dimensional regulations.

II. SEQRA

The applicant submitted an Environmental Assessment Form Part I pursuant to the State Environmental Quality Review Act (SEQRA).

Since this is a request for an area variance for non-residential structures under 4,000 square feet, the application is classified as a Type II action under 6 NYCRR § 617.5(c)(9). Accordingly, no further SEQRA review is required.

III. ZBA PROCEEDINGS

This application was duly noticed for a public hearing, which was opened on August 19, 2021. Originally, the application sought larger variances, i.e., a building of 4,872 sf and setback of 30'.

The applicant's attorney, James N. Hulme, and applicant Irwin Krasnow, appeared on behalf of the application. No other persons appeared in support or in opposition of the application.

During the course of the public hearing, the applicant also initiated site plan review with the Planning Board.

As a result of both the site plan and variance review processes, the applicant reduced the scope of the project and size of the requested variances to those described above.

The hearing was closed at the February 17, 2022, meeting for a determination.

IV. GOVERNING LAW

The Zoning Board is empowered to grant area variances pursuant to Section 7-712-b of the N.Y. Village Law and Section 197-75 of the Village Code.

In considering applications for area variances, the Board is required to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the community, while considering the following five factors: (1) whether the variance will cause an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) whether the benefit can be achieved by a feasible alternative; (3) whether the variance is substantial; (4) whether the variance will have any adverse physical or environmental impacts; and (5) whether the alleged difficulty was self-created (which shall be relevant but shall not necessarily preclude the variance).

The Board is charged to grant only the minimum variance necessary and to preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

Finally, the Board is empowered to impose reasonable conditions to minimize any adverse impacts from the variance.

V. FINDINGS AND CONCLUSIONS

With respect to the statutory requirements for a variance, the Board finds as follows:

1. *Character of the Neighborhood:* The applicant has demonstrated that the granting of the variances will not have a material adverse impact on the character of the neighborhood. With respect to the rear yard setback variance, the unique condition of this property is that it was created as a result of a subdivision that resulted in "back to back" lots, with the rear yard of the subject property being the front yard of the adjacent parcel to the west. That adjacent parcel is improved with a large self-storage building. The rear yard setback variance will have no

appreciable impact on that property. With respect to the square-footage variance, the Board notes the following unique considerations that support a finding of no adverse impact on the character of the neighborhood:

- a. The property is a large parcel capable of being developed with multiple primary uses. The applicant is only seeking to develop the parcel with one primary use (the service station) and one accessory use (the convenience store).
- b. When the Board of Trustees amended the code in 2019 to allow convenience stores accessory to service stations, the Board placed the 3,000 square foot limit on convenience stores because, above that size, there was more risk that the accessory convenience store would become more akin to a small grocery store, because it would have the capacity to stock more products.
- c. However, in 2021, the Board of Trustees amended the permitted uses in the B3 district to allow small grocery stores up to 5,000 sf with a special exception permit.
- d. In other words, the risks associated with a large convenience store (that it could take on the character of a small grocery store) became ameliorated by the code's change to allow small grocery stores in this district.
- e. The size of the convenience store also fits within the larger size of the subject property, and conforms to the 350 sf/fueling station ratio of the code.
- f. The location of the convenience store also minimizes its impacts on the character of the neighborhood, because it is situated adjacent to the railroad tracks (to the north) and the storage facility (to the west).
- g. The convenience store will still be subject to special exception review by the Board of Trustees and site plan review by the Planning Board, thus insuring that its impacts will be adequately contained and minimized.

2. *Alternatives:* The applicant has demonstrated that it cannot achieve the benefit sought (a larger convenience store) without the requested variances.

3. *Substantiality:* The variance is substantial.

4. *Physical/Environmental Impacts:* No physical or environmental impacts have been identified.

5. *Self-Created Difficulty:* The difficulty is self-created

6. *Benefit vs. Detriment:* The benefits outweigh the detriments, if any, by the requested variances.

7. *Minimum Variance:* The variances are the minimum necessary to achieve the benefit sought.

The Zoning Board therefore grants the requested variances as described above and as shown on the site plan drawn by Stonefield Engineering and Design, last dated 2/1/22, subject to the following conditions to minimize any adverse impacts from the variance:

VI. CONDITIONS

1. The variances granted herein are limited to the relief set forth in this decision, and pertain only to the plans approved in this decision, and shall not be construed as creating conforming dimensions. There shall be no further extension (horizontally or vertically), increase, alteration or modification to the structure or any other structure located on the property that has non-conforming dimensions, without further approval of this Board.

March 17, 2022

2. No outdoor accessory structures or equipment (including but not limited to air conditioning condensers, HVAC equipment, above-ground utilities, generators, pool equipment, solar panels, garbage/storage bins, etc.) may be located within a required front, side, or rear yard, except as depicted on the approved plans, without further approval of the Board.

3. The variances granted herein shall terminate unless a building permit and certificate of occupancy are issued within one year from the date hereof.

Dated: March 17, 2022

Village of Westhampton Beach
Zoning Board of Appeals

Motion was made by Mr. Piering to adopt the determination of **WHB Development Partners, LLC., 107 Old Riverhead Road (905-2-1-19.5)** as written; seconded by Mr. Wittschen and unanimously carried 3 ayes, 0 nays, 2 absent.

HOLDOVER:

2. **Egret Dune Corporation, 95 Dune Road (905-021-04-002)** Applicant requests variances from §197-8 D for proposed side yard setbacks of 6 & 10 feet where the minimum required is 20 feet with a proposed combined side yard setback of 16 feet where the minimum required is 50 feet, from §197-35 C for proposed accessory deck with setbacks of 6 & 10 feet where the minimum required is 20 feet, and also from §197-35 C for proposed accessory pool with setbacks of 10 feet where the minimum required is 20 feet.

No one appeared on behalf of the application. Marc Sheiffert submitted a written request to holdover the application to April 21, 2022.

Motion was made by Mr. Piering to holdover the application of **Egret Dune Corporation, 95 Dune Road (905-021-04-002)** to April 21, 2022; seconded by Mr. Wittschen and unanimously carried 3 ayes, 0 nays, 2 absent.

NEW APPLICATIONS:

3. **Westhampton Beach Fire District, 92 Sunset Avenue (905-012-04-006.02)** Applicant requests variances from §197-30 C(9)(a) to erect a digital ground sign with a setback of 7 feet where the minimum required is 10 feet, §197-30 C(9)(c) for a proposed sign area of 31.17 square feet where the maximum permitted is 12 square feet, §197-30 D(4) for a proposed sign capable of displaying animated images where specifically prohibited, and from §197-30 D(14) for a proposed sign that is internally illuminated where also specifically prohibited.

Eric Cherches, Esq., appeared on behalf of the application, of counsel to William Glass. You read the application, and we're seeking the permission to put up a sign similar to what is at the High School. It's an LED sign, tastefully done and customary and standard size for these displays and we're seeking relief to erect it. You have seen them around Long Island and many schools and fire departments have them and they're used to convey critical information to the public and public safety reminders, fire prevention tips, and memorials. Also, community spirit and good will, like congratulations to graduates, fourth of July and recently the fire department had a drive for Ukraine Aide to send them materials and that was successful and the sign would be used for that and recruitment and COVID vaccine which was used as a central location to administer the vaccines. In order to have these signs reach their full potential and functionality they have to be visible and illuminated and they moved it back to 7' and to move it back further it would render it not visible and useful so it is 7' from the sidewalk itself which is 9' from the center of the sidewalk so it's a little less than the 10'. I know you're familiar with the Monroe Balancing test and that was applied in 2016 by this Board. We're not seeking a variance per say, rather it's a balancing of the public interest.

Mr. Pasca said they did acknowledge it existed, but they did not apply the balancing test.

Mr. Cherches agreed with Mr. Pasca. This is a governmental entity exempting another for purposes of this sign. We meet all 9 criteria of the Monroe Balancing Test which says as its own

March 17, 2022

Municipality it's not required to comply as a private industry would the zoning ordinances. So the 9 factors of that test, apply are the nature and scope of the instrumentality seeking immunity; the encroaching governments legislative grant; the land use function; the effect it would have; alternative locations for this facility in less restrictive zoning areas; the impact on legitimate local interest; alternative methods; the extent of the public interest to be served; which is self-evident and inter-governmental and opportunity to be heard. With that being said, the district is tasked with public safety and we'd like to use this LED sign, which as I said you see them all over to help us communicate further.

Mr. Musnicki said I am sympathetic to what you said, and a community member here and business owner but I don't see anything in my packet as far as what it'll look like or perhaps a picture of it and in fairness that should be in your presentation. Referring to other districts, and the school won't be too far to us or you or the fire district.

Mr. Cherches said okay.

Mr. Musnicki said I don't have anything in my packet.

Mr. Cherches said my only response is that they are cookie cutter and done across Long Island and very similar to the one at the high school. It has a brick base, its internally illuminated and when there's no message it'll be black and blank.

Mr. Musnicki said there's a sign ordinance in the Village that restricts those things so we have to see something.

Mr. Cherches said we're not requesting a variance, we're saying the ordinance isn't applied to the Fire District, we're seeking an exemption under the Monroe Balancing Test.

Mr. Pasca asked if they're seeking a variance?

Mr. Cherches said yes, it's for a variance but that's not the standard I see under the Monore Balancing Test, we're exempt in the alternative.

Mr. Piering said you are aware these are not allowed at all?

Mr. Cherches said yes.

Mr. Piering said they were amortized and had to be removed in the Village period. The School we have no idea how that came to be, they did not come to this Board for it and I am looking at this and I'm seeing something that's prohibited. When the fire district had to be built they wanted interior parking, a height variance, and setback variances and they needed variances for the signs and this is a case where you have an application before us for something that is prohibited in the Code. And you point the School has one, and we don't have a permit for it.

Mr. Cherches said we should be commended for asking for permission. Not to be too heavy handed, ongoing back to the Monroe Balancing Test; it has been since 1988 and well settled law in NYS as set forth in the Court of Appeals as a Fire District and its own municipality the local ordinances should not be applied for this sign which is designed to communicate vital information.

Mr. Piering asked how they get it out now?

Mr. Cherches said we're trying to bring the fire district into the 21st Century; there's the internet but not everyone uses it. It's a great way to convey information to the Fire District.

Mr. Piering asked if anyone has spoken to the Mayor or the Board of Trustees, they created a law to not have these signs.

Mr. Cherches said I don't think the Fire District was contemplated in this.

Mr. Piering said you're referencing the school and we aren't enforcement, but you reference that and they don't have a permit for it. The Library will want one, and the Ambulance and then it'll snowball how do you differentiate yourself from them?

March 17, 2022

Mr. Cherches said how do you differentiate the fire district from the Library that's easy.

Mr. Piering asked about the ambulance?

Mr. Cherches said the fire district is its own municipality, the interest outweighs the zoning regulation.

Mr. Musnicki said that may be true, but I have difficulty understanding how you arrived at the size of the sign. Would you say using this Monroe Balancing Test would allow a fire district to name any size sign they felt necessary?

Mr. Cherches said the Monroe Balancing Test is that the Zoning Ordinances from one governmental entity should not be strictly applied to another; obviously there are considerations taken into consideration in size and I think the ZBA would have grounds to say that's not reasonable but the LED sign conforms with industry standards. I drove here from Patchogue, and I saw Hagerstown Fire District sign that was nice.

Mr. Musnicki said I don't know that we all know the standards, you have to be fair to us and I'm sympathetic to what you're seeking but we need something to work with. LED, animated figures, and things like that I know what that means, but I don't.

Mr. Cherches asked to speak to his client. He said procedurally, would it help the Board to see the prototype to see what it is and would it make sense to hold it over to the next hearing so we can provide that?

Mr. Musnicki said you do have that option.

Mr. Cherches said let me do that.

Mr. Pasca said there's also two Board Members that aren't present, and next month you need three votes.

Mr. Cherches said if you need a prototype, it's prudent to ask to hold it over to the next meeting and provide that.

Mr. Pasca said I can make a suggestion, you identified the nine factors but you haven't gone through why you feel they fit and weigh in your favor and you can do so in writing if you wish, you should explain your position on each factor.

Mr. Cherches said okay, I'd like to hold this over to April.

Mr. Piering said we will hold it over, and it's not a problem. While they are here, if there's anyone who has any comments, it will be on the record and we welcome that.

Mr. Cherches said they'll submit a prototype.

Dean Culver, Liberty Street, Fire Commissioner said that the other Fire Districts including Quogue and there's is similar, Riverhead has one on Roanoke Avenue and it's not obnoxious and it's a useful tool and many more fire departments use them.

Patricia DiBenedetto, Adam Lane, and I have sat on that dais and I'm here on behalf on supporting the fire department and I'm sorry if I'm going to double talk with the lawyer, but a few things from what I've prepared. The WHB Fire District was established in 2003 by splitting from the Village of Westhampton Beach and they own and maintain and control their district. The purpose of section 197-30 pertains to businesses, property's, landmarks, restaurants and doesn't pertain or make reference to EMS or Fire and the purpose of the sign is to educate and inform the public on recruitment, emergency alerts, demonstrations, and fundraisers. As such the signs can constitute as informational which is permitted in 197-30.13 however it's restricted in size. The purpose of the sign code is to promote and protect public health and this sign should be allowed and permitted.

March 17, 2022

William Dalton Oneck Road, Ex-Chief and said this past weekend the Village had an electronic sign out front to tell the parade was canceled. We have quality information that has to go out to the community and share pertinent information. Did everyone change their batteries last weekend, probably not but that's what the signs for. If we save one life with this sign that should do it.

There were no other questions or comments

Motion was made by Mr. Piering to holdover the application of **Westhampton Beach Fire District, 92 Sunset Avenue (905-012-04-006.02)** to April 14, 2022; seconded by Mr. Musnicki and unanimously carried 3 ayes, 0 nays 2 absent.

4. Denise Breger, 28 Meadow Lane (905-010-03-021) Applicant requests variance from §197-6 E A(1) to legalize a finished attic that represents a third story where the maximum stories permitted is two.

James N. Hulme, Esq., appeared on behalf of the application. His clients purchased this house in 2003 and there was a CO and the third story space was an attic but when they purchased the home the attic was converted. Even though it was converted there were no changes to the exterior and the dormers were part of the original appearance. There are stairs that go from the room on the second floor to the attic and as you can see there are tables and chairs and storage area and no closets and one area identified as storage and I looked in and the air handler is in there. There's no plumbing or bathroom.

Mr. Pasca asked if its sprinkled?

Mr. Hulme said there are none.

Mr. Pasca said then you'll need a state variance?

Mr. Hulme said if we get a variance from you we have to meet the Code or get a state variance, but this is the first step.

Mr. Piering said it looks like an attic with lights and painted. But it looks like storage.

Mr. Hulme said some is storage, but a table and chairs there's an extra space and it's characterized as a play area or family room with a tv there too.

Mr. Piering asked if there's a bathroom?

Mr. Hulme said there is not. We recognize we need to address the third story state building code requirement.

Mr. Pasca asked if the state code is only sprinklered?

Mr. Hammond said egress is in there too but there's three ways to deal with it. And we did discuss sprinklering it regardless of this Boards decision, unless they do not get relief. If it's a true third story the space, the stairs and I have to look at the windows to see if there's a second form of egress needed.

Mr. Piering asked if 1/3 of the space below it has to be considered as a mezzanine? How big is this room?

Mr. Hulme said it's a fraction of the existing space below, I think it's 1/3.

Mr. Hammond said the height restriction, this is in a flood zone if the roof ridge is at 40' above sea level or less they could have a mezzanine, beyond that is a different section of relief. I am not sure if we did that because the size is well over. The relief is only for a third story.

Mr. Musnicki asked how this application came about.

Mr. Hulme said the clients knew it wasn't legal and talked to Mr. Hammond and wanted to legalize it, I don't know what motivated them to want to.

March 17, 2022

Mr. Musnicki said when I first saw the application, it's a playroom in an attic space and I was thinking one way but when I see these pictures, it's clearly a living space that's conditioned and makes it's little more difficult.

Mr. Hulme said to eliminate it would be more costly, and if it has to be reverted into attic space it has to be unconditioned and remove the lights and stairs and replaced.

Mr. Musnicki asked him to go through the balancing test for this Board.

Mr. Hulme said it's neutral to the outside world so as far as character of the neighborhood no one knows its there; it doesn't create an impact on the neighborhood any different than if it wasn't there.

Mr. Pasca said there's a precedent, what's unique about this so it doesn't become a precedent for everyone with an attic.

Mr. Hulme said its hard to say, one of the unique factors is that his client did not construct this and it was done before they purchased the home and wasn't brought to their attention and if you had someone that did this and I was seeking the relief that would be hard.

Mr. Pasca asked when they purchased it?

Mr. Hulme said in 2003.

Mr. Hammond said the updated CO provisions were only enacted around 2003 and the builder built the house and was living there and he provided them with the CO.

Mr. Musnicki said they have along the way, when other permits were needed they applied for them?

Mr. Hulme said as far as he knows, yes.

Mr. Piering asked if there are plans to show it was like that when they bought it?

Mr. Hulme said I can get a sworn affidavit but I don't know if they have plans. They do have pictures. I wanted to get the pictures, and they are in Florida and the pictures are in the house but I will get them.

Mr. Musnicki said he'd like to finish up on the balancing test.

Mr. Hulme said they'd like to keep the third story and they can only do so by way of a variance.

Mr. Musnicki said if this is going to be held over, why don't you get an idea of what it will cost to restore it back to unfinished attic.

Mr. Hulme said okay. Substantial nature, it's a third story when those are not allowed.

Mr. Musnicki said that third story, when it was constructed that's substantial with headroom and in some fashion that was going to be used from the get-go.

Mr. Hulme said that could be, a builder built this and maybe he wanted to convert it after obtaining a CO which was done and then my client purchased it. It doesn't change the environmental impact of the property at all. Arguably it's not self-created.

Mr. Musnicki said if you get something from your client to show us it was sold to them that way that will help. That will go a long way.

Mr. Pasca said the cost as well. Maybe something you should think about if it costs \$30,000.00 to sprinkle it, and \$20,000.00 to restore it that may be tougher but what will it cost to legalize it. We should assume the state will require it to be legalized.

March 17, 2022

Mr. Hulme agreed. My clients know they will have to sprinkle it and if you can hold it over I will present the information Mr. Musnicki is asking for.

Motion was made by Mr. Piering to hold over the application of **Denise Breger, 28 Meadow Lane (905-010-03-021)** seconded by Mr. Wittschen and unanimously carried 3 ayes, 0 nays, 2 absent.

5. Eric S Miller, 13 Stacy Drive (905-010-05-028) Applicant request variance from §197-35 A to construct a pickleball court in the front yard where accessory structures are specifically prohibited from being located.

James N. Hulme, Esq., appeared on behalf of the application. He said this property received a variance for its tennis court in its same location and that expired and we're back for a smaller use in the same location. The tennis court was 20' from the lot line and 20' from the street and this is proposed 25' and we have to keep it as far from the wetlands as possible.

Mr. Piering said the tennis court was a lot bigger and you can move it back.

Mr. Hulme said we moved it back 5'.

Mr. Piering asked if he could move it further?

Mr. Hulme said the tennis court was much closer.

Mr. Piering said the tennis courts a lot bigger.

Mr. Hulme said we'd like it in this location, and if we move it back it's closer to the clients house and neighbors houses and if we maximize the 20' it will be closer.

Mr. Piering said it's a much smaller court.

Mr. Hulme agreed with Mr. Piering.

Mr. Pasca asked him to explain the dash, you're running right up on to the flood zone? There's two labels.

Mr. Hulme said the DEC is the dashed line and the other line is the flood plain. The one labeled "W" is a watermain.

Mr. Hammond said it's the X Shaded Zone, it's within a flood plain but doesn't require an elevation and doesn't really apply to this type of structure.

Mr. Pasca said he's trying to understand the DEC line and flood plain line.

Mr. Hammond said the area of jurisdiction for DEC is 300' from tidal wetland; with a functional dwelling it goes down to 75' and its from wetland vegetation and some of the lines, what you suggest could it move further and not trigger DEC.

Mr. Pasca aid that may be a justification for their claim.

Mr. Hulme said it keeps it further from the neighbors, moving it back moves it closer to the house next door.

Mr. Musnicki said he is sure the lot coverage is within the allowable but it's not noted. He asked the dimensions.

Mr. Hulme said its 20' x 45'.

Mr. Musnicki asked about the fencing, traditionally the court is 30 x 60 with fencing. He said tennis courts would be recessed 2 feet.

Mr. Hulme said I don't have to do it in this zone.

March 17, 2022

Mr. Musnicki said he doesn't think that matters. He'd like to see screening and a site plan for what you're doing.

Mr. Hulme said okay, he will submit that.

Motion was made by Mr. Piering to holdover the application of **Eric S Miller, 13 Stacy Drive (905-010-05-028)**; seconded by Mr. Musnicki and unanimously carried 3 ayes, 0 nays, 2 absent.

Motion was made by Mr. Piering to adjourn the meeting at **5:50 p.m.** seconded by Mr. Wittschen and unanimously carried 3 ayes, 0 nays, 2 absent.