

**RESOLUTION OF THE ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF LIVINGSTON, NEW JERSEY**

Case # 2011-5-PFSPV

Motions by: Mr. Ozarow

Second by: Mr. Silverman

WHEREAS, the applicant is the Wigder Chevrolet, Inc. (referred to herein as the “applicant”);

WHEREAS, the applicant filed an application from the conditional use standards for new auto dealerships, bulk variances and preliminary and final site plan approval to expand an existing auto dealership facility in the C-1 Zone;

WHEREAS, the Applicant was represented by Barry Evenchick, Esq. of the firm of Walder Hayden & Brogan, PA;

WHEREAS, the property is located on Lot 19 in Block 102 and is known as 606 West Mount Pleasant Avenue;

WHEREAS, the applicant has satisfied the statutory procedural requirements of service and publication of notice, and there are no taxes or assessments due or arrearages;

WHEREAS, hearings were held on the within application before the Board on May 26, 2011, and

WHEREAS, the Zoning Board of Adjustment of the Township of Livingston has heard evidence presented and testimony of witnesses and has considered the numerous exhibits introduced into evidence, and has heard the arguments of counsel on behalf of the applicant;

NOW THEREFORE, be it resolved by the Zoning Board of Adjustment of the Township of Livingston as follows:

Case Summary

1. The applicant’s application proposes to modify the site plan approval granted in 1997 by removing an existing 1800 sq. ft. glass-enclosed showroom in the front of the building and constructing a new showroom addition of about 4,400 sq. ft. in floor area. Also the applicant proposes to construct a new car prep/service center addition of 1,840 sq. ft. on the front portion of the building. The applicant will reconfigure its existing parking and loading areas to provide 144 parking spaces, intended to accommodate customer/service parking, inventory parking and employee parking and to add 128 stacked parking spaces to be used for inventory and displace of

vehicles. This includes an area for 56 vehicle display spaces in the south easterly corner of the site, approximately 37.8 feet from the front of the property next to Route 10, West Mount Pleasant Avenue. The applicant will also remove four employee parking spaces on the westerly side of the site and widen the top portion of the one way existing driveway from Route 10 to provide striping for an auto carrier delivery and unloading area. The applicant proposes to install directional signage, remove an existing monument sign and provide 15 trees to the site as well as ground cover, grass and bush plantings between the front yard parking areas and the front and side property lines.

2. The proposed use is a conditional use permitted in the C-1 zone under the Livingston Ordinance; however, the applicant does not meet the conditions in Ordinance as follows:

(1) Section 170-88(H)(3)(a) that provides the improvements have at least a 100 foot setback from the street. The applicant proposes the building setback to be 93.2 feet from the front of the property.

(2) Ordinance Section 170-88(H)(3)(c) provides that the improvements have at least a 50 foot setback from the side yard. The applicant proposes a 33 foot side set back.

(3) Ordinance Section 170-88(H)(8) requires garage access to face the side or rear and the applicant proposes that garage access face the street or front yard.

(4) Ordinance Section 170-88(H)(10) requires that the setback for the location of parking spaces be 75 feet from Route 10 and 50 feet from Regent Street while the applicant proposes a distance of 37.8 feet from Route 10 and 1.8 feet from Regent Street.

(5) Ordinance Section 170-88(H)(11) permits only one wall sign per wall and can only state the name of the business, franchise and logo, while the applicant wants three wall signs, one of which says "Certified Service."

Based on the foregoing, the applicant requires a D(3) use variance for not meeting various conditional use standards.

3. The applicant also requires the following bulk variances:

(1) 170-118C(2)(a)(2). Minimum distance from parking area to building. 10 feet required, 0 feet proposed, 10 foot variance requested.

(2) 170-118C(2)(a)(3). Minimum distance from parking area to side street ROW line for corner lots. 50 feet required, 1.8 and 8.3 feet proposed, 48.2 and 41.7 foot variances requested.

(3) 170-118C(2)(b). Minimum distance of building to Route 10 ROW. 100 feet required, 93.2 feet proposed, 6.8 foot variance requested.

(4) 170-118C(2)(a)(2). Minimum distance from parking lot to ROW of Route 10. 100 feet required, 25 feet proposed, 75 foot variance requested.

(5) 170-118C(3). Minimum side yard building setback. 40 feet required, 21 and 33 feet proposed, 19 and 7 foot variances requested.

(6) 170-94B(10). Minimum aisle width for parking at 90 degrees. 24 feet required, 19 feet proposed for employee parking area, 5 foot variance requested.

(7) 170-94A(8). Minimum shade trees in paved area of parking area. 14 trees required, 2 trees proposed in parking area, 12 trees variance requested.

(8) 170-94F(2). Location of loading area. Side or rear yard required, front yard proposed, variance requested.

(9) 170-90(3)(b). Location of new monument sign. This is supposed to be 50 feet from Route 10, 38.6 feet is proposed, an 11.4 foot variance is required.

(10) 170-90(2)(c). Walls signs shall be no wider than 20 feet, and one sign is 25 feet seven inches requiring a variance.

(11) 170-94(F)(2). Unloading only permitted in the side or rear yard. Applicant proposes to unload cars in the front yard.

(12) 170-94(B)(10) Parking space dimensions required to be 8.5 feet by 20 feet. Applicant proposes spaces that are 8 feet by 18 feet.

4. The applicant called George James, PE of Keller & Kirkpatrick Engineering as its first witness. The Board accepted Mr. James as an expert in engineering. Mr. James described the use of the site as a new car dealer. They sell new and used cars, have a body shop and service department. There are 48 employees and annually 3,000 potential buyers visit the site, with 50% of buyers coming on Saturday. The dealership is closed on Sunday and operates from 7:30 AM to 9 PM during the week and from 9 AM to 6 PM on Saturday. On average 28 customers visit on Saturday and 6 or 7 on each weekday. About 30 to 35 cars are serviced of which 80% are by appointment. New cars arrive by auto carriers of two sizes, 75 feet in length

is the longest. The site sells about 1,000 cars a year. General Motors has mandated that the site be upgraded and has provided plans, signs and materials to be used in the upgrade of the dealership. He discussed the location of the unloading zone for new car deliveries and claimed that although directly off the Route 10 entrance there never has been any problem or accident with this location. He reviewed the site plan and went over various requested variances. He stated that the Livingston Environmental Commission recommended that an Environmental Impact Statement be waived as this is an existing site. A second waiver for off site conditions is no longer required as the applicant will provide that. As to parking, he stated that 135 spaces were required and there were 144 spaces on the site excluding inventory and display parking spaces that are stacked parking.

5. The next witness was Paul Szmaida, a landscape architect, who testified about the new landscaping proposed to be installed at the site. The Board accepted Mr. Szmaida as an expert in landscape architecture. He described the view from Route 10 of the various plantings, the trees to be removed and the trees and other plantings to be installed. He took questions from Peter Shofel of the Regent Street Office Park which is to the east of the site.

6. The applicant called Louis Barbieri, AIA, an architect as its witness who testified about the proposed improved building and its new look in conformity with General Motors requirements. The Board recognized Mr. Barbieri as an expert in architectural matters.

7. The applicant called Peter Steck, PP, testified. The Board accepted him as an expert in professional planning. Mr. Steck went through the background of the use, formerly an interior lot, now a corner lot due to the creation of Regent Street. He also went through the purposes of the conditional use standards and noted that landscaping is required but the applicant is providing more landscaping and excellent architecture to compensate for being closer to the street. He made the point that the drafters of the Ordinance were aware that new vehicle dealers needed to have their inventory visible from Route 10 so the plan was in accord with that concept. He went through the variances and the D(3) conditional use standards applicable. He noted that the standard is whether notwithstanding not meeting all the conditional use standards, the use of the site is appropriate for the zone. He emphasized that this case did not require the Medici analysis. With that limited standard in mind, he concluded that the changes, most mandated by General Motors, were a definite upgrade and enhancement for the community. He also noted the loss of many retail businesses in the corridor due to economic conditions emphasized the

importance of the Master Plan's goal of economic development and that this use would continue if the Board voted against the application. He pointed to the hardships that justify the bulk variance including the current conditions, the creation of Regent Street and if the setback were complied with, there would not be sufficient room to park and store inventory on the lot.

Findings and Conclusions of the Board

1. The Board applied the ruling in Coventry Square vs. Westwood, 138 NJ 285 (1994) that the Board must find that the site proposed continues to be an appropriate site for the conditional use, notwithstanding the deviations from the one or more conditions imposed by the Ordinance.
2. The Board found that additional landscaping provided buffering adequate to determine that the revised Site Plan would not be a substantial detriment to the public good.
3. The Board found that any negative impacts on the surrounding neighborhood were effectively dealt with by the site plan.
4. The Board found that the application would not substantially impair the zone plan or the Master Plan of the Township.
5. On the conditional use variance application and preliminary and final site plan and parking bulk variance, the applicant has satisfied the statutory requirements of N.J.S.A. 40:55D-70(d)(3) for a use variance from the conditional use standards. The Board voted unanimously five in favor and none opposed for the use and bulk variance and other relief requested including the waiver of the environmental impact statement and for preliminary and final site plan approval.

Based on the foregoing, after weighing the equities of the matter and considering the various factors referred to herein, the Board determined that the grant of the variances and site plan approval will not be a substantial detriment to the public good and there will not be an impairment of the zoning plan or municipal zoning ordinance and the granting of preliminary and final site plan approval are consistent with good planning standards.

Now, therefore, be it **RESOLVED** for the reasons set forth above and on the record of testimony, by the members of the **ZONING BOARD OF ADJUSTMENT** of the Township of Livingston, that the amended conditional use variance, bulk variance and preliminary and final site plan approval under the Board's ancillary jurisdiction under N.J.S.A. 40:55D-76b be and hereby are granted subject to the terms and conditions set

forth herein and as are reasonably consistent with the plans submitted and as testified to at the hearings before the Board.

The following standard conditions will apply to this application and grant of variances: 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, and 14. The full list of standard conditions is attached hereto. In addition, the Applicant shall satisfy all the concerns of the Township Engineer to his satisfaction in his report dated April 18, 2011.

This Resolution is a memorialization of the action of the Board of Adjustment of the Township of Livingston taken on May 26, 2011 in which Board members voted to approve the Application.

CHAIRMAN:



Alan Ozarow, Chairman

Dated: June 28, 2011

Prepared by: Herbert S. Ford, Esq.

ZONING BOARD, TOWNSHIP OF LIVINGSTON

Model Conditions of Approval

Every application turns on its own facts and is judged on its own merits. Listed below are models of conditions which may be considered "standard". A standard can be tailored to specific circumstances, and need not always apply. Other or additional conditions may be tailored for any application.

1. Architecture

- a. Rooftop ancillary structures and equipment shall be screened by material compatible with the exterior finish of the building and matching the exterior color of the building as closely as possible.
- b. Enclosures of trash bins or dumpsters shall be of the same type of materials and the same color as the exterior finish of the building.

2. **Blasting.** In the event that blasting be necessary on the Site, the following conditions shall apply in addition to all requirements of federal law or regulations:

- a. All blasting operations shall be performed in strict compliance with N.J.S.A. 21:1A-128 *et seq.* and N.J.A.C. 12:190-1.1 *et seq.*, or superseding requirements.
- b. A pre-blast inspection of all structures on all properties adjacent to the Site or within 200 feet of the blasting (whichever is the greater distance) shall be conducted at Applicant's expense.
- c. Blasting shall occur only between 10:00 a.m. and 3:00 p.m. on Monday through Friday. Blasting during other hours may be permitted, temporarily, by the Township Engineer upon his finding that a condition constituting an emergency exists and necessitates such permission.
- d. Applicant shall coordinate all blasting with the Livingston Police and Fire Departments. If traffic control is required, it shall be provided at Applicant's expense.
- e. Applicant shall give the Township Engineer, the Chief of Police, the Fire Chief, and all owners of structures required to be inspected under "b" above, written notice of scheduled blasting operations to be received not less than 20 days, nor more than 40 days, prior to their commencement. If scheduled blasting operations are delayed or suspended they shall not be resumed until new notice has been given and received. All notices shall include the name and telephone number of Applicant's representative for purposes of receiving and responding to questions and comments.

- f. These conditions do not supersede any requirements of law or regulation that are more strict or restrictive.

3. Cleanliness

- a. At the close of each work day the Site shall be thoroughly cleaned and all trash and construction debris, including that within buildings under construction, shall be placed in covered dumpsters which shall be removed from the Site, and replaced, before they overflow.
- b. Not less often than weekly, and whenever else required by the Construction Official or the Township Engineer, the public streets adjacent to the Site, and within 500 feet of the Site, shall be manually or mechanically broom swept to remove dirt, mud or debris originating from the Site.
- c. Dust suppression methods acceptable to the Construction Official and the Township Engineer shall be utilized on the Site.

- 4. Deeds & Easements.** All deeds, easements, dedications or restrictions required by this approval shall be subject to review and approval by the Board Attorney prior to signing and filing for recordation.

5. Detention Basins

- a. Stormwater management basins shall be established on lots created for that purpose only. No structures that are not an approved part of the stormwater management system shall be erected on any such lot.
- b. If the approval of the Application calls for title to such a lot to be transferred to the Township; at such time as the Township accepts any new streets or roads on the Site, title to the lot shall be conveyed to the Township provided that the Township Engineer is then satisfied that the basin has been constructed in full compliance with all applicable requirements. The deed conveying such title shall be subject to prior approval by both the Board Attorney and the Township Attorney.
- c. A maintenance plan meeting the requirements of the Residential Site Improvement Standards or the Township's Stormwater Control Ordinance, or both, as applicable shall be prepared by Applicant in terms receiving the approval of the Township Engineer, the Board Attorney and Township Attorney. If the responsibility for maintenance is assumed by the Township, the plan shall be prepared by the Applicant and shall be subject to the approval of Township Engineer. If the responsibility for maintenance is not the direct responsibility of a public agency, the maintenance plan and any future revisions shall be recorded upon the deed of record for the property in terms approved in advance by both the Board Attorney and the Township Attorney.

6. Final Plans

- a. The full text of all of the conditions of this approval shall be set out on the final plans which shall be submitted to the Construction Official, the Township Engineer and the Board Secretary prior to the issuance of any Township permit in respect of demolition, preparation of the Site or construction of any improvement.
- b. Such final plans shall also include all changes agreed to in the course of the hearing, and shall have been reviewed by the Board Secretary or the Board's Planning Consultant for determination of whether the plans conform to the Board's approvals.

7. Flood Hazards

- a. Insert on the final subdivision map a metes and bounds description of all flood hazard areas located on the Site.
- b. Insert in all deeds for individual lots that contain or are adjacent to flood hazard areas, and on the preliminary and final subdivision maps or plats, the following covenant: "The lands designated herein contain flood hazard areas. There shall be no disturbance of any kind as to any flood hazard area unless permitted by N.J.D.E.P. pursuant to the Flood Hazard Control Act, N.J.S.A. 58:16A-50 *et. seq.* or superseding requirements."

8. Guarantees

- a. The approval of this Application is subject to the posting of any and all required performance guarantees, soil erosion and sediment control approvals, and any other requirements of Township ordinances prior to the commencement of Site preparation or construction.
- b. This approval is also conditioned upon the Applicant providing, prior to issuance of the first certificate of occupancy, a performance guarantee for any aspects of the approved landscaping or fencing that has not been completed by the time of issuance of such certificate.

9. Landscaping & Environmental Protection

- a. All deciduous trees planted shall have a caliper of 3.5 to 4.0 inches measured at a height of 4.0 feet above the root ball. All evergreen trees planted shall have a height of 8.0 to 9.0 feet.
- b. Street shade trees shall be planted in front yards and outside the right-of-way.
- c. Any tree or other planting installed in accordance with the plans which dies shall be replaced, within the current or next planting season, in kind and at the same size as it had reached at the time of death; except that if it died more than three years after planting its replacement need not be larger than the size it had reached

three years after planting. The same replacement requirements shall apply to a tree or other planting removed because of damage or disease.

- d. No tree existing on the Site at the time of filing of the application shall be removed except as identified for removal on an approved plan. Every existing tree to be preserved shall be tagged and shall be shown on the Site Plan or Subdivision Plan. During site preparation and during construction, each such tree shall be protected by snow fencing or a more substantial means approved by the Construction Official. No soils, excavated materials, or any construction equipment or building materials, shall be stored or operated within a root protection zone that shall be the greater distance of (i) the crown drip line, or (ii) a distance equal to caliper multiplied by one (1) foot, (but never less than eight (8) feet from the trunk of a tree to be preserved), or anywhere else where such soil or materials can adversely affect the health of trees to be preserved. All work done within the root protection zone shall be accomplished with hand tools.
- e. The grade of land located within the root protection zone shall not be raised or lowered more than three (3) inches unless compensated for by welling or retaining wall methods; but in no event shall welling or retaining walls be installed less than eight (8) feet from the trunk of a tree.
- f. During site preparation or construction, no fuel storage, and no refueling, maintenance, repair or wash down of construction equipment, shall occur within fifty (50) feet of any tree to be preserved.
- g. Any provision of the Trees Ordinance, § 170-53 et seq. of the Code of the Township of Livingston, that establishes a higher or more restrictive standard or requirement shall control.
- h. No mulch shall be placed, or allowed to accumulate, within six inches of the trunk of any tree or shrub planted on the Site in compliance with this resolution. Mulch shall not be applied, or allowed to accumulate, elsewhere within the drip line of the tree or shrub to a depth in excess of four inches.

10. Noise

- a. No site preparation, demolition or construction activity shall be performed on the Site on Sundays, or before 7:30 a.m. or after 5:00 p.m. on weekdays, or before 9:00 a.m. or after 5:00 p.m. on Saturdays or federal holidays.
- b. No machinery or heavy equipment shall be operated on Site on Saturdays, Sundays or federal holidays.
- c. All vehicles and motorized machinery operated on the Site shall be equipped with properly operating mufflers.

- d. No site preparation, demolition or construction activity (other than authorized blasting) shall produce, at the property line, (i) continuous airborne sound at a sound level in excess of 65 dBA, or which has an octave band sound pressure level in decibels which exceeds the standards provided in 32 N.J.R. 2230 et. seq., or (ii) impulsive sound in air which has a peak sound pressure level in excess of 80 decibels, or (iii) impulsive sound in air which repeats more than four times in any hour and has a peak sound pressure level in excess of 50 decibels.
- e. Relief from these noise conditions may be permitted, temporarily, by the Township Engineer upon his finding that a circumstance constituting an emergency exists and necessitates such permission.

11. Other Governmental Approvals

- a. Applicant shall comply with all applicable Federal, State and local laws and Regulations and obtain any other governmental approvals required for implementation of this application as approved. If any other governmental agency or authority grants a waiver of or variance from any law, rule or regulation, or imposes any condition or requirement, which affects this approval or any of the conditions contained herein, then this Board shall have the right to review such action as it relates to this Board's approval or conditions and to modify, amend or revoke its approval and/or conditions.
- b. No Township permit in respect of preparation of the Site or construction of any improvement shall be issued until proof of request for such approvals, and any action thereupon, shall have been presented to the Construction Official.

12. Paving and Sidewalks

- a. Applicant shall install the top course of street paving not later than the earlier of six (6) months after issuance of the last certificate of occupancy or three (3) years after the issuance of the first certificate of occupancy.
- b. All manholes, catch basins, and driveway curbs shall be ramped until the top course of street paving has been installed.
- c. All sidewalks shall be constructed of concrete or of non-asphalt pavers and shall be not less than four feet wide in a residence district or five feet wide in the Business Improvement District.

13. Signs. The Board shall retain jurisdiction over any and all signs until the final certificate of occupancy has been issued.

14. Traffic and Parking Enforcement

- a. The Applicant shall comply with Township Ordinances Chapter 29, Article 26, regarding handicapped parking and shall maintain such spaces and all the traffic and parking signage and markings on the Site in good order and repair.

- b. At the time of applying for a building permit the Applicant shall submit proof of having filed a written request pursuant to, and in accordance with, N.J.S.A. 39:5A-1, requesting that N.J.S.A. 39:1-1 *et seq.* be made applicable to the roads, streets, driveways, parking areas, etc. within the Site. The Applicant shall provide proof of the governmental action on such request to the Construction Official prior to issuance of the final certificate of occupancy.

15. Utilities for Site Plans and Major Subdivisions. Applicant will construct all utilities underground as required by law, and shall submit to the Building Department a written instrument from each serving utility evidencing full compliance with this condition and with Section 16-69(a)(17) of the Land Use Ordinance before issuance of any certificate of occupancy.

16. Wetlands

- a. Applicant will insert on the final subdivision map a metes and bounds description of all wetlands, wetlands transition areas, and buffers on the Site.
- b. Where applicable, each deed for a lot, and the subdivision plat, shall contain the following language:

“The lands designated herein contain wetlands and Wetlands transition areas. There shall be no disturbance of any kind as to any wetlands or wetlands transition areas unless permitted by N.J.D.E.P. pursuant to law, and Best Management Practices (as defined in N.J.A.C. 7:7A-1.4 or superseding requirements) for prevention or reduction of adverse impacts upon or pollution of wetlands, wetlands transition areas and buffers shall be followed at all times. This restrictive covenant shall run with the land and be binding upon the grantees, their heirs and successors and assigns.”

17. Developer’s Agreement. Prior to issuance of any permit for demolition, site preparation, or construction, the Applicant shall have entered into a Developer’s Agreement with the Township.

18. Compliance With Conditions

- a. The within Condition(s) numbered 2(b), 6, 8, and 14 shall be complied with prior to issuance of any permit for demolition, site preparation or construction.
- b. The within Condition(s) numbered 2(a), 2(c) to 2(f), 3, 9, 10 and 12(b) shall be complied with prior to issuance of any certificate of occupancy.
- c. The within Condition(s) numbered 9 (c) and 13 shall be continuing conditions.