

Price, Meese, Shulman & D'Arminio, P.C.
JOHN L. MOLINELLI, Esq. (Attorney ID No. 026391982)
50 Tice Boulevard
Woodcliff Lake, New Jersey 07677
(201) 391-3737
Attorneys for Plaintiff, WCL Broadway Realty Associates LLC

FILED

SEP 25 2020

GREGG A. PADOVANO, J.S.C.

WCL Broadway Realty
Associates LLC,

Plaintiff,

vs.

Zoning Board of Adjustment of the
Borough of Woodcliff Lake

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO.: L-8727-18

CIVIL ACTION

**CONSENT ORDER
OF SETTLEMENT AND REMAND**

WHEREAS, this matter was opened by Plaintiff WCL Broadway Realty Associates, LLC ("Plaintiff" and/or "Applicant") by its attorneys Price, Meese, Shulman & D'Arminio, PC by way of Complaint in Lieu of Prerogative Writs against Defendant Zoning Board of Adjustment of the Borough of Woodcliff Lake (the "Board"); and

WHEREAS, Plaintiff is the owner of the property located at 62 Broadway, Woodcliff Lake, New Jersey and designated as Block 2708, Lot 1 on the Woodcliff Lake Tax Map (the "Property"). The Property is located in the B-1 Business Zone and currently developed with a mixed use building consisting of approximately 8,288 square feet of retail on the first floor and 14 apartments on the second and third floors; and

WHEREAS, Plaintiff submitted an Application to the Board for approval to use 2,077 square feet of the first floor retail space as a pizzeria known as Ray's Pizza (the "Application"). Plaintiff proposed a total of 64 seats, consisting of 48 seats inside in what was called the "pizza store" where the counter space and pickup area would be located, and 16 outdoor seasonal seats; and

WHEREAS, the Application requested a variance pursuant to N.J.S.A. 40:55D-70(d)(1), as restaurants are not a permitted use in the B-1 Zone. The Board also considered the outdoor patio to require a separate variance pursuant to N.J.S.A. 40:55D-70(d)(1), a request the Plaintiff opposed as there is no provision in the Woodcliff Lake Zoning Ordinance (the "Ordinance") or the Municipal Land Use Law (the "MLUL") defining it as a use apart from the restaurant that would require relief; and

WHEREAS, the Application also requested variance relief pursuant to N.J.S.A. 40:55D-70(c)(2) for (1) minimum parking spaces, as 38 spaces are required for a 64 seat restaurant (1

space for 2 seats plus 6 spaces for employees) and 29 spaces are required for the balance of the 5,065 square feet if used for retail space pursuant to the Ordinance, for a total of 67 required spaces wherein 38 spaces are provided; and (2) maximum impervious coverage, as 50% is permitted, 62.89% had been previously approved, and Plaintiff proposed a slight increase to 63.33% as a result of the outdoor seating patio; and

WHEREAS, there are 14 apartment units on the premises that require 27 parking spaces which are provided in the rear of the property; and

WHEREAS, the Board held public hearings on April 24, 2018, May 22, 2018, June 26, 2018, July 24, 2018, August 16, 2018 and September 25, 2018, during which Plaintiff presented testimony by witnesses and introduced the following Exhibits in support of its Application:

Marked Exhibits:

- A-1 Architectural plan dated March 15, 2018
- A-2 Site plan dated March 28, 2018
- A-3(a) Photograph of refuse area
- A-3(b) Photograph of cooking oil drum #2
- A-3(c) Photograph of cooking oil drum #3
- A-4 Parking study, undated
- A-5 Aerial photograph of site dated April 7, 2018
- A-6 Revised parking study dated June 22, 2018
- A-7 Report dated June 8, 2018 from Evan Jacobs of Neglia Engineering Associates
- A-8 Layout plan for outdoor dining area dated March 12, 2018
- A-9 Revised site plan dated July 9, 2018
- A-10 Revised architectural plan dated July 5, 2018

- B-1 Report dated April 18, 2018 from Richard Preiss of Phillips Preiss Grygiel Leheny Hughes LLC
- B-2 Report dated July 23, 2018 from Evan Jacobs of Neglia Engineering Associates
- B-3 E-mail from Zoning Officer Nick Saluzzi
- B-4 Photograph packet dated April 16, 2018 from Richard Preiss of Phillips Preiss Grygiel Leheny Hughes LLC
- B-5 List of conditions for discussion

Additional items not required to be marked into evidence:

1. Prior Resolutions adopted by the Board with respect to the Property
2. Resolution of denial adopted October 23, 2018
3. Resolution of approval of modified application adopted October 23, 2018
4. Applicable sections of Woodcliff Lake Zoning Ordinance
5. Legal memoranda submitted to the Board by Plaintiff's counsel; and

WHEREAS, in order to favorably consider the application, the Board contemplated certain conditions to be imposed in the event the Application were approved, some of which were accepted by Plaintiff and others which were not; and

WHEREAS, at the conclusion of the hearing held on September 25, 2018, a motion was made to approve the Application as proposed, which failed to receive the requisite five (5) affirmative votes, per N.J.S.A. 40:55D-70(d); and

WHEREAS, shortly thereafter, a second motion was made to approve a "modified application", and which eliminated the outdoor patio and reduced the number of interior seats for a total of 36 interior seats; and

WHEREAS, the Board voted to approve the "modified application" and thereafter the Board adopted two separate resolutions: one for denial of the application and one for approval of the "modified application"; and

WHEREAS, on December 5, 2018, the Plaintiff timely filed a Complaint in Lieu of Prerogative Writs (the "Litigation") against the Board, seeking to overturn the Board's September 25, 2018 decision denying its variance application, including for both a use variance and parking variance, alleging in pertinent part that the board's actions were arbitrary and capricious, not based upon the record and further challenging several conditions that had been set forth during the course of the hearings as being contrary to law and/or the facts elicited during the hearing; and

WHEREAS, subsequent to the filing of the Complaint, the Mayor and Council of the Borough of Woodcliff Lake formally adopted ordinance 19 – 08, which made certain amendments to Chapter 380 of the Woodcliff Lake Borough Code entitled "Zoning", specifically Article VI, section 41 which provided, in pertinent part, an amendment to the zoning code so as to permit restaurants and coffee shops, excluding drive-through restaurants within the B – 1 business zone (section G), And an amendment to address outdoor dining as described in section I of the amending ordinance, which permits outdoor dining as a permitted accessory but not Conditional Use based upon the following conditions:

I. Outdoor dining as an accessory use in conjunction with permitted restaurants and coffee shops, but only in conformance with the following supplementary standards:

(1) Outdoor dining uses or outdoor dining areas shall be permitted as accessory uses only in conjunction with a permitted restaurant or coffee shop and shall be required to obtain site plan approval, including outdoor dining areas that are added to existing restaurants.

(2) Outdoor dining area shall be permitted entirely within the front yard of the property containing the restaurants and/or wholly or partially within the side walk or the public right-of-way in front of the restaurant.

(3) Outdoor dining areas shall be set back at least fifteen (15) feet from all residentially zoned property lines and ten (10) feet from all driveways.

(4) Such setback area shall be suitably landscaped and screened as appropriate to block noise, glare, lighting and other potential impacts from adjoining properties and

from vehicular movements within the property.

WHEREAS, the amendments to the zoning permitting restaurants and outdoor dining did not resolve the requested parking variances required and the Mayor and Council in this amendment did not change the parking requirements for restaurants.

WHEREAS, in furtherance of the Court's request for the parties to attempt good faith settlement for the Litigation, the parties, having now determined to amicably resolve this Litigation, desire to execute this Consent Order of Settlement and Remand (the "Consent Order") to memorialize the terms and conditions of the settlement, as well as the respective prospective obligations of the parties thereto.

NOW THEREFORE, it is hereby ORDERED on this 25TH day of SEPTEMBER 2020, ~~2019~~

1. The Board's September 25, 2018 Resolution approving Plaintiff's Application for variance relief be and is hereby modified but contingent upon a public hearing as set forth in paragraph 5 and provided a final nonappealable adjudication is reached.
2. The Application shall be considered a "Revised Application" for purposes of this Settlement and Remand Order. The record below, together with the conditions listed herein at numbers a through q shall be incorporated into the Revised Application:
 - a. The rear parking lot will not be used for staff parking.
 - b. During operation and occupancy of any part of the 2027 sq. ft. space by Ray's Pizzeria or a successor restaurant, a second restaurant use will not be permitted at the Property.
 - c. Hours of refuse pickup will be the same hours of pickup as for Borough residences.
 - d. Wall sconces will be turned off no later than 11:30 p.m. or one half-hour after any store is required to close by ordinance whichever is earlier.
 - e. UV film will be installed on the bollard lights.
 - f. A house-side shield will be installed on the parking lot lights, specification of same as approved by the Borough Engineer.
 - g. No truck parking will be permitted on the premises. All employees of the restaurant and to the extent practical, employees of the other commercial tenants of the property shall use the offsite parking as provided below.

- h. There will be no parking on Columbus Avenue and/or Lincoln Avenue by employees of tenants, staff or trucks servicing the non-residential tenants at the property.
- i. The outdoor patio shall be 7 feet by 35 feet and located in the side yard as shown on Exhibit A-8. The outdoor patio will not be used past 10 P.M.
- j. The basement of the restaurant will be used only for storage and food preparation.
- k. Seating for the restaurant may be increased from a total maximum of 36 indoor seats to a maximum of 48 indoor seats and a maximum of 16 outdoor seats as shown on the submitted plans provided that "plaintiff" and/or "applicant" complies with the conditions as set forth in subparagraph (m) below.
- l. At all times when a restaurant use exists, Plaintiff shall provide a minimum of 5 off-site parking spaces to be used for employee parking for all businesses.
 - (i) For so long as a restaurant use continues to exist at the subject premises and the restaurant contains more than 36 seats total, plaintiff shall provide written documentation of the availability of offsite parking of one space for each two seats over 36 up to the maximum provided for in subparagraph (k) above which is 64 total, 48 inside and 16 outside (hereinafter Off-Site Parking). Plaintiff shall supply satisfactory proof by way of a written lease, license or other legally binding document establishing that it has supplied the Off-Site Parking as required by this agreement (including the minimum 5 off-site parking spaces noted in paragraph 1 above) and file same periodically as necessary to establish that offsite parking is available and is provided under a validly existing lease, license or other legally binding document. Said proof shall be filed with the Borough's Construction Code Official and/or the Zoning Enforcement Officer. If plaintiff is using the maximum 48 indoor seats and the maximum 16 outdoor seats, it shall provide a minimum of 14 offsite parking spaces for the restaurant in addition to the minimum 5 off-site parking spaces noted in paragraph 2(l) above. In the event that plaintiff fails to provide satisfactory of the Off-Site Parking in accordance with this agreement, then in such event plaintiff's restaurant use of the property shall be limited to 36 seats total provided the minimum 5 off-site parking spaces are provided. All off-site parking shall be within one mile of the "property. Any violation of this Order/Settlement shall be subject to the violations and penalties as provided in Chapter 380-105 of the Code of the Borough of Woodcliff Lake or any successor or replacement Ordinance. In addition to the foregoing, plaintiff shall be subject to enforcement of this agreement including equitable and injunctive relief enjoining the use of the property in accordance with this agreement.

(ii) In the event at any time in the future, and absent further approval from the Board, available parking on the Property itself is deemed inadequate to accommodate the restaurant patrons and/or other tenants and their visitors without valet service, Plaintiff shall also undertake the responsibility to hire a valet service to provide transport of customer and tenant employee vehicles to the Off-Site Parking at times and duration sufficient to eliminate any overflow parking on Columbus Avenue or Lincoln Avenue. This obligation shall be triggered upon review and determination by the Woodcliff Lake Construction Code Official's or Zoning Enforcement Officer's independent observation and/or upon his review of complaints filed with the Woodcliff Lake Police Department and/or Borough Engineer. The Construction Code Official or Zoning Enforcement Officer shall provide Plaintiff a reasonable opportunity to cure the issues within 10 days (i.e. if the purported issue was one created by an emergent event). If parking is not cured in 10 days or if there are repeated cures required, the Construction Code Official and/or Zoning Enforcement Officer shall forthwith issue an Order compelling Plaintiff to provide within 30 days a valet parking service to alleviate the overflow parking conditions or plaintiff shall reduce the seating to 36 seats total, outdoor seats shall still be limited to 16 seats and if there are 16 outdoor seats, indoor seating shall be limited to 20 seats. Plaintiff agrees to provide any information reasonably requested by the Construction Code Official and/or Zoning Enforcement Officer to ascertain the nature of the parking overflow and plaintiff shall have the further right to make application to the Board for relief from such Order, which shall be considered an appeal pursuant to N.J.S.A. 40:55D-70(a), as governing law. Once the valet service has been implemented and there is sufficient evidence that it is no longer required, the Zoning Officer may relax the requirement and eliminate the service on a temporary basis provided however, if the Zoning Officer suspends the obligation to provide valet service, it is subject to being re-triggered at any time as set forth above.

(iii) In addition to the Owner's general responsibility to avoid overflow parking at its site, the Owner shall also have a responsibility to anticipate certain occasional events that may be scheduled at the premises and which would give a reasonable person an opportunity to anticipate that overflow parking will be expected. The Owner shall use its best efforts, both by itself and through its restaurant tenant, to anticipate such occurrences and shall take reasonable steps necessary to anticipate the need to avoid overflow parking by the implementation of the valet services elsewhere provided within this settlement, notwithstanding that the local construction code official or zoning official had not previously requested valet parking service as a result of an overflow parking condition.

(iv) In the event 14 off-site parking spaces are not provided for the restaurant use, the restaurant shall not be open to the public between the hours of 8:00 am and 11:00 A.M. without application to and approval from the Borough through its land use board.

- n. During the pendency of any appeal and its final decision, Plaintiff agrees to provide the referenced valet parking service.
- o. Of the 38 front yard parking spaces, and to permit the Zoning Officer to assess future land use permit applications for the balance of the commercial non-restaurant use tenancies, it is agreed that 12 of those spaces shall be attributable to the restaurant and 26 shall be deemed provided for the purpose of determining parking available for the remaining space of 5,065 square feet.
- p. In the event that Plaintiff shall obtain Off-Site parking as defined, above, it shall require not less than five employees from amongst the non-restaurant tenants and the employees of the restaurant to utilize the off-site parking location.
- q. The non-restaurant use of the premises shall not be used for group style uses when more than (10) individuals attend at any one time after 6:30 p.m. for the purpose of participating in such things as yoga classes, a gym, Pilates, Soul Cycle, Orange Theory, Pure Bar health clubs, or similar uses as long as a restaurant occupies the premises.

The site plan and its conditions detailed herein for clarity and agreement of the parties shall be considered approved.

- 3. Within thirty (30) days of the entry of this Order by the Court, Plaintiff shall submit to the Board a Revised Application, to effectuate the agreement of the parties. Such Revised Application shall comply with the terms and agreements set forth herein.
- 4. This matter shall be remanded to the Board for the purpose of conducting a public hearing on the Revised Application pursuant to *Whispering Woods v Middletown Township*, 220 NJ Super 161 (App Div 1987) (“*Whispering Woods*”) and for the purpose of implementing the settlement terms agreed to herein. Board hereby agrees that there shall be no filing fee or escrow fee however, all attorney fees of the Board at municipal rates charged to the Borough shall be paid by the applicant including preparation of a Resolution. No fees shall be payable in the event the Board denies the *Whispering Woods* application. Said hearing shall be on full notice as required by the MLUL for a full hearing before the Board, with notices of such hearing

published in an approved newspaper and served upon all property owners existing within 200' of the subject premises not later than ten (10) days prior to said hearing, and containing a copy of this Stipulation and advising the public that the terms of this Stipulation are to be presented to the Board for final approval. All interested persons shall have the right to be heard and to present witnesses, to ask questions and to make comments in connection with the Board's decision of whether to approve the Revised Application and the provisions of the parties' agreement.

5. The Defendant shall provide Plaintiff with a fast track application process for the Revised Application. ~~No formal application will be.~~ Defendant agrees to schedule and hold a hearing not later than the Board's November 24, 2020 meeting absent unforeseen circumstances.
6. **Defendant agrees that it shall pass upon the merits of the application** during the course of one hearing date, absent unforeseen circumstances which would warrant the adjournment of such hearing to a second and final date, with such circumstances to include only evidence or facts not known by any party or which by due diligence could not be ascertained and introduced at the first schedule hearing date.
7. If the Board approves of the terms of this settlement, it shall adopt by voice vote its approval be further memorialized by resolution as detailed in the MLUL. The Resolution shall be recorded by plaintiff's counsel at plaintiff's cost and expense and shall be binding upon plaintiff's successors and assigns. No Certificate of Occupancy shall be issued until the Resolution is recorded and all professional fees have been paid by the plaintiff.
8. Within thirty (30) days of expiration of any appeal period relative to the Revised Application, Plaintiff will dismiss this Litigation with prejudice and without costs or attorneys fees to Plaintiff.
9. In the event that the Board does not approve the terms of this settlement as part of the Whispering Woods hearing, Plaintiff then shall be entitled to make application to the Superior Court to reinstate the within Prerogative Writ Complaint.
10. If the matter is reinstated, all issues raised in the Litigation shall be deemed preserved by way of this Consent Order and this Litigation may be re-opened to the Court without need for motion, or further consent.
11. If, following approval at the aforementioned Whispering Woods hearing, litigation is commenced by any person or entity seeking to invalidate the Plaintiff's approvals, this entire Consent Order shall be deemed null and *void ab initio* and the matter returned to the trial Court for conclusion through litigation. This shall be at the Plaintiff's option and Plaintiffs may elect to defend the decision of the Board made at the Whispering Woods hearing and seek a dismissal or other disposition of any litigation commenced by any person or entity and, in that event, the Board shall support and defend its actions in any subsequent litigation brought by any person

seeking to invalidate any Board decision made as part of this settlement or the Whispering Woods hearing.

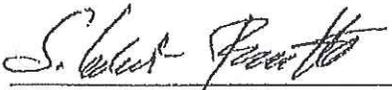
12. If the Board fails to approve the Revised Application at the aforementioned Whispering Woods hearing, this entire Consent Order shall be deemed *void ab initio* and the matter returned to the trial Court for conclusion through litigation.
13. If the Board imposes additional or modified conditions of approval Plaintiff may either accept same or, in its sole discretion, declare the settlement *void ab initio* and return the matter to the court's calendar, as detailed herein and as provided by the Court.
14. The only new evidence that will be subject of the Revised Application is that which addresses the "valet parking" and variances related to the outdoor dining patio. The parties agree that the record shall explicitly be limited to that one issue and its relationship to the overall plan and requisite variance relief and the approval of this Order/Settlement.
15. The Board's consent to this settlement does not indicate that the Board approves the Revised Application, but only gives its consent to the elements set forth in the proposed settlement. The Board cannot take formal action until it has a full public hearing in accordance with Whispering Woods.
16. Plaintiff's counsel shall serve a copy of this Consent Order upon counsel for Defendant within 7 days of receipt of the Order.
17. This Order/Settlement shall be binding on the parties, their successors and assigns.

(see next page for signatures)

CONSENTED TO AND AGREED UPON



John L. Molinelli, Esq.
Rice, Meese, Shulman & D'Arminio, PC
Attorney for Plaintiff



S. Robert Princiolo, Esq.
Marcus & Levy
Attorney for Defendant



Honorable Gregory A. Padovano, J.S.C.
GREGG