

**VILLAGE OF HARRIMAN ZONING BOARD OF APPEALS**  
**August 2, 2017**  
**7:30pm**

**Public Hearing**

**Right Choice Builders**

**101-2-1.12**

**Interpretation & Area Variances**

**Present:** David Niemotko, Architect

**Motion** was made by Member Schneider to open the Public Hearing.

**Seconded** by Member Sainato.

Chairwoman Miller: One of the reasons that we're re-opening the Public Hearing is so that we can review the information that you recently sent concerning the proposed use of the building.

Mr. Niemotko: We are maintaining the fact that it is not a fabricating shop, an assembly area; it is purely commercial storage. We are not changing at all from the last meeting. In fact, in the letter I used the example that was given to me at the last meeting about the camera. Someone was assembling different parts to make one camera and I had mentioned that is not applicable to this project. We are not proposing the fabrication of anything, the assembly of parts, it's purely commercial storage.

Mr. McKay: We expected that to be your point. In the submission that you made you specifically said this is not to include manufacturing. And you did explain about the camera example where we had another applicant who was taking manufactured products from different places, coupling them together and sending them out. The concern that we had was we saw your example of a fulfillment center; we had another applicant recently that described themselves as a fulfillment center. It was the camera assembly example that you made. Under the Code, these fulfillment centers depending on what they actually do to process these orders, could be considered light processing. Light processing would not be allowed or would be capped at the 10,000 square feet. The response that you gave was there was no change. And what we're saying is that because you gave that example of fulfillment center that we could interpret as light processing then the interpretation would be that that's not a permitted accessory use in this zone. Because of the size, it's capped at 10,000 square feet.

Ms. McCave: The definition of light processing includes packaging. It doesn't just include assembly, manufacturing, so the example that you gave was assembly of parts but packaging also falls under that so I figured that you just didn't understand the full definition of light processing. It does in the Code include packaging.

Mr. Niemotko: Under what market sector would light packaging occur? While we are being very specific in our terms, and I can understand the precedent that was set in the past as you want to continue that to now, that is not the intent of this project, of processing or even light manufacturing.

Mr. McKay: The definition reads “ Light processing is manufacturing, assembly, treatment, processing or packaging products or materials into those of greater value that does not emit objectionable levels of smoke, noise, dust, odor, glare, vibration beyond the property boundaries. But, again as Jen said, it includes treatment, processing, or packaging. So when we got you example of fulfillment centers, we thought that could mean packaging, or repackaging, and that’s what we are trying to clarify.

Mr. Niemotko: Doesn’t that say into a greater component?

Mr. McKay: It does, but speaking for myself, as I read it, I don’t know exactly what the fulfillment centers do. They may take two different things and put them together, we don’t know that with 100% certainty.

Ms. McCave: The document that you attached that describes fulfillment centers, the very first sentence says that it allows e-commerce merchants to outsource their shipping. When you hear that, the thought we had is that you’re taking excess inventory, whether it be returns, overstock, and then they’re going to ship it out but when they have that inventory, an example would be a box of shoes, and somebody orders just one of those, do they take it out of a larger box of all the same items and package that into a smaller box and ship it out from the fulfillment center or is it already individually packaged so they just take it off the shelf at the fulfillment center and drop it in a mailbox? Because if they’re repackaging things from one box into individual shipment boxes, then that is packaging or repackaging which will fall under light processing.

Mr. Niemotko: So the act of putting wrap around the box would be considered packaging?

Ms. McCave: Potentially.

Mr. Niemotko: On the flip side you have a building that is not going to produce any noise, hazardous material, fabrication, not an auto shop, no oil, gas leakage due to a fabrication, manufacturing. We’re talking about cardboard goods. I think the definition even spoke about cardboard packages. That is the intent. On the other hand, what about a party rental place. They want to store their material there for the season, and that is a real possibility.

Mr. McKay: To respond to that, after the fulfillment center example, you gave several other examples. Jen and I had several discussions and based on what face value it seems that the party rental supply, plumbing, fencing, electrical, tile and marble, it seems that those things would fit into the definition of commercial storage.

Member Schneider: Would the plumbing supply, electric supply, antique supplier occupy an office space upstairs? And they would be running their business out of that office?

Mr. Niemotko: Yes, that is the intent. It's a consistent theme. Each commercial storage area has its own corresponding office.

Ms. McCave: The antique storage stood out for me. Wouldn't you have a store that you sell antiques out of? But you can't have a store in this building; you can only have an office with a storage unit so why would they have an office there and a store at a different location?

Mr. Niemotko: This project represents that we are getting away from a throw-away society. They're interested in storing them, reusing them. Antique shops don't have places to store items; they want to have a full display. To have storage space inside a retail shop is a waste of money. They want everything displayed so that they can sell it. It would be more cost effective to store items in a separate location.

Ms. McCave: We're not disputing that they would want storage but I think the concern is what would they use the office for if they could just have a computer at their store. It doesn't sound realistic, is the concern, that they would actually use the office rather than just pay to lease it and leave it empty.

Mr. Niemotko: They would have to comply with those requirements. That would be a constraint of the lease. This is what we represented from the beginning. From my standpoint, we are not proposing something new. From the beginning we have said eleven storage spaces, with direct association with eleven office suites. The leases would be outlined that way, the tenant would have to comply with that. If an antique shop can't comply with that, then someone else will. Apparently they are approaching real time, there is a need in the area. If you want to condition the approval based on the interpretation that taking a large shipment and repackaging them into smaller items would not be allowed, I'm sure that my client would agree.

Mr. McKay: I think that this is the main point that we are trying to bring out. In this particular case this is not a situation where the Board can grant an approval and place conditions on it because we are here rendering an interpretation of the Code. What happened with the supplemental submission all of a sudden we went from interpreting one section of the Code to maybe interpreting another section. I think opening the Hearing for the Board was important to have you clarify. And that's exactly what you did. For us to candidly tell you before a decision comes out, if certain items on your list and the Board doesn't have to determine this, this isn't what we're interpreting, seem to fall into the commercial storage parameters. Some others on your list were more questionable and may not be commercial storage, they may be light processing, which would not be permitted in this zone. That's important to clarify because the Board really is determining what based on your representations whether this use is commercial storage to the extent, I think, if the way you described the fulfillment center would be deemed light processing you are not going to do it. That would clarify the Board's decision. We need to define the question that the Board needs to interpret. And when we slip a little one way or the

other we fall into other definitions, making the decision overboard, meaningless or confusing. You've been here to a lot of meetings, but finding the clarity in defining the question that the Board needs to answer. Defining what they need to interpret, that's the key. That's why I recommended to the Board that they ask their questions on the record so that we can have fully developed record to issue the decision.

Member Schneider: When I went on line to fulfillment centers all of them referenced back to taking orders, picking, packaging and shipping to customers. I took your term and went on line.

Ms. McCave: To your point about it not emitting any pollution that's what really differentiates by definition in the Code between light processing and manufacturing. That's why on the small scale light processing is permitted in a B-2 zone rather than saying that you can only do it in an industrial zone. It's good to hear but that's not enough to satisfy. It's really the size, if you were doing a small fulfillment center, under 10,000 square feet, then it would be okay as an accessory use. The problem is this building is huge; it exceeds the square footage limit.

Mr. Niemotko: We have been trying to navigate our way through the definition of commercial storage, it's not in your zoning Code. Given that handicap, we are here before you; I believe this project complies with commercial storage, whatever that definition may be. We were completely straight forward with the use of the building. This is the intent of the client. Yes, I used the term fulfillment center. Yes, boxed goods that are returned go out as the boxed good itself. They are not intending to assemble, manufacture, or repackage.

Member Schneider: For example, I buy a tv at Walmart and I have to return it. Are you telling me that this may be directed to your commercial storage unit to accumulate returns for Walmart?

Mr. Niemotko: Having asked a few questions myself, this is what I understand. It wouldn't be cost effective for Walmart to take one item that's been returned and bring it there. There would be an accumulation of items. I don't know what the threshold is. Using the tv example, 15-20 tvs are returned and they're sitting in the back of this area in Walmart, they can't store it there anymore so those 15-20 boxed tvs would come to this commercial storage space. They would sit there until someone calls and says they want that tv and it would be shipped out.

Ms. McCave: Who is occupying the corresponding office? Someone from the retailer or a middle man in the fulfillment center?

Mr. Niemotko: I'm not envisioning all eleven suites to be fulfillment centers.

Ms. McCave: Let's say 2-3 storage units are fulfillment centers, who is going to staff that office?

Mr. Niemotko: I don't have an answer for that. I would imagine they would need some liaison, maybe the landlord provides that, I'm not sure. I don't know if Kohls of Walmart would actually

man the office from their own company but I could see where some consultant or someone representing them would be there to manage it.

Ms. McCave: Someone would have to actually be there in the office; otherwise this isn't an accessory use.

Mr. Niemotko: I agree, and that would have to be part of the lease term agreement.

Member Schneider: In the beginning we said there would be 30' trucks pulling into the docks. When they pull in they would be delivering products? On pallets? Overstock from various vendors?

Mr. Niemotko: I'm seeing each commercial storage unit dedicated to that specific client; I'm not seeing these storage units as mixed or with multiple tenants in one commercial storage space. Let's say ABC Plumbing, for example, they store all of their parts in this location. All of the parts would be for that particular leasee.

Member Schneider: So ABC Plumbing could order supplies and have them delivered to their storage unit and then as they need them, they would relieve that inventory. There would be somebody in the upstairs office running this. But you're not necessarily saying that ABC Plumbing has its own employee upstairs in the suite.

Mr. Niemotko: We live in a world where a lot of things are subcontracted out, so I couldn't say for certainty that it would be an employee of ABC Plumbing but it would be someone that has to represent them.

Member Schneider: Or it could be the landlord, which would mean the office isn't being used, just the storage space. That's the way it sounds to me.

Mr. Niemotko: Both would need to be in the lease agreement. The office could not be used for storage. The offices would not be that big.

Member Sainato: What is the square footage of the offices? And about 4000 square feet for the storage downstairs?

Mr. Niemotko: Yes. Two, three offices, a little conference area, probably around 1500 square feet.

Member Schneider: So ABC Plumbing has their supplies in the storage unit, and paying rent for the upstairs office unit that could be only represented by the landlord; the landlord representing ABC Plumbing downstairs for that suite.

Mr. Niemotko: Could ABC Plumbing hire someone to occupy that office for them? Yes. Could it be the landlord? Yes. I doubt it because the landlord is not obsessed with wanting to be there.

There would need to be some arrangement. I don't know what that would be. I don't know if it would be a direct employee of ABC Plumbing, a sub consultant, I don't know. The lease agreement would be the commercial storage space along with the office suite. Let's say ABC Plumbing came along and another company went out of business and they wanted to sell a multitude of pipe, ABC could get a really great deal. Party rental place wanted to store their tables and chairs until the next party, that's where it would be stored.

Member Schneider: The ABC Plumbing company gets the deal on the supplies and brings them there; his intent would be to go take what he needs as he needed it. The plumbing company,. In my mind, still isn't sitting upstairs and occupying an office. They're paying rent for it, maybe, but they're not occupying it.

Mr. Niemotko: They may, that may be their main headquarters. The same thing with an electrician, Fence Company. They may want the office, need it, their present facilities are outdated or not available any more. This would become a viable option.

Chairwoman Miller: Is it cost effective for them to have an office upstairs and have supplies downstairs? Some of these businesses are seasonal?

Mr. Niemotko: Actually I think that's probably more applicable. If they don't have a place somewhere else. If you go online and hire a party rental company, it's my experience, I have never gone to a showroom to look at their things, and it's all online. They come show up and set everything up. That particular client would most definitely use the office.

Chairwoman Miller: And a customer could go into the unit and see whatever they want?

Mr. Niemotko: No, the commercial storage space is only to store the items; it's not a retail space, display area, or showroom, at all. That is not the intent. The party rental tenant would be the most optimal use of the space.

Ms. McCave: Could you clarify the layout again? You would enter the office but you would have to go back outside in order to get into the storage unit? You can't walk down the stairs directly into the storage unit? You would actually exit the building and re-enter?

Mr. Niemotko: The offices are on the third floor, I'm not sure yet, we haven't gotten to that point of the design. Both ends of the building have egress stairs and there would be some sort of vertical conveyance, an elevator maybe. We haven't designed the inside, so I don't know how that's going to evolve. Carol had a great idea with the man doors leading out from the loading dock areas and we incorporated that. Each storage area you will be able to egress out to the exterior through the overhead door. I haven't designed how the interior environment is going to be yet. And it will be ADA accessible. Everything seems to have focused on the fulfillment center and I'm really led to believe that's not going to be the main commercial storage space of this building. One or two, possibly but there are so many other businesses in the 50 miles radius that are very interested in this type of arrangement. This building is not

going to be eleven commercial storage spaces as defined as fulfillment centers, it was just one possible option.

Mr. Hager: It sounds like it may be an opportunity for a small business that's expanding that might be working out of their home, with their kitchen table for an office and their garage for storage. They're not ready for a big building yet but looking for an office space upstairs and storage.

Member Sainato; But it is a great big building, 4500 square feet of storage with 1500 square feet for an office.

Mr. Niemotko: It's an industry. For example pipes are 20' long, duct work, everything takes up space. If a company is going to grow, from out of their house into a space, this provides a great opportunity.

Member Schneider: Will there be racks for storage? Forklifts to move things around?

Mr. Niemotko: There won't be racks that go to the ceiling, there's building code concerns with that. I would think there would be racks for storage, that would be typical storage arrangement.

Member Sainato: What is the ceiling height in the storage area?

Mr. Niemotko: Probably around 14'. It won't have racks to the ceiling, we are proposing a sprinkler system throughout the building.

Member Schneider: Has your client surveyed any of these local companies to see if they had any interest. You said he had a business plan.

Mr. Niemotko: Happily two of those scenarios are real. That's what I'm being told, and I believe it, I've worked with this client in the past, successfully on two other projects.

Mr. McKay: In the definition of light processing because you just said possibly two in these categories could be potential tenants, includes processing, or packaging products from materials into those of greater value. I'm not sure what that really means exactly, it's not what you've asked the Board to interpret. If there's some type of fulfillment center which packages products or materials and the result are those of greater value than that wouldn't be permitted. Just to try to be clear, it's the clarity of the decision. There may be one or two tenants who are under the 10,000 square foot and you come back for an interpretation of whether this is proper packaging or not. That might be for a future day. The issue now is to determine what constitutes commercial storage. We will leave what constitutes light packaging for another day with the caveat that some of the things on your list may constitute light packaging which would not be permissible in this commercial storage space.

Mr. Niemotko: We agree.

Ms. McCave: Then you would have to come back for another approval. If you don't want to come back, the point is, if we issue an interpretation that these uses fall under commercial storage, just tell your clients not to allow anybody to rent the storage and office spaces if they are doing any type of packaging. Then you can guarantee, we haven't determined at this time into greater value means that would require a new interpretation. Just to be completely safe, don't allow any packaging then you definitely won't fall in light processing.

Mr. Niemotko: I agree. We will stick with this interpretation, no other light processing.

Mr. McKay: Then you can come back if you are faced that question; you can come back for an interpretation.

Member Schneider: It's fair to say, there will be no packaging and what you're storing there is not going to be available to the general public.

Mr. Niemotko: That's absolutely true. It's not a showroom, display area, or open to the public.

Mr. Hager: That's even a separate specification in the Building Code; mercantile use versus storage use.

Mr. Niemotko: And we're not doing a mercantile use.

Member Sainato: So fulfillment center are off the table? What is defined as processing? If something is coming in, it's being processed.

Ms. McCave: If they involve packaging. Packaging is in the definition of light processing. So if the fulfillment center actually involved any kind of packaging or repackaging. That's not going to fall under commercial storage.

Mr. McKay: That's really the discussion that I wanted the Board to have with the applicant. To clarify that the packaging was falling into light processing so the fulfillment centers would likely be light processing. But you can always come back for another interpretation.

Ms. McCave: I think that David wants to avoid having us even make an interpretation of the light processing definition by just not allowing any packaging to happen.

Mr. Niemotko: At this moment in time we are not going to allow light processing as defined by the Village of Harriman Zoning Code and if that were to happen, we would have to come back. So going back to Carol's example of a tv in a box. The tv comes in a box and is stored there, it stays in the box, and then it get shipped out. How is that processed?

Member Sainato: It came in, changed direction, and is going back out. Isn't that considered processing it?

Ms. McCave: I think it's where you draw the line between processing and strictly storage. The nature of storage is that you are going to have things come in and things that go back out to other locations. Like when you rent party equipment, it comes in from one place then goes back out to another.

Mr. Niemotko: I thought the camera analogy made everything so clear. Bringing in other items to make one camera, that's a process. And that adds greater value.

Mr. McKay: That's a clearer example.

Ms. McCave: We're acknowledging that the definition of light processing needs some clarification which is why I'm saying you would have to ask for a separate interpretation if you were planning on doing anything other than storage.

Mr. Niemotko: I'm not ignoring that possibility. What I am saying right now is that we will suspend that. We will just stick to your interpretation, if that changes then I will have to come back. I am going to make it very clear to my client, he'll be given copies of the minutes, they know exactly what's going on.

Mr. Hager: Another example if I were to do an inspection of the property, as the Code Enforcer, I can interpret Code. As with the plumber example, the pipe comes in and the pipe goes out, but if they brought pipe in 20' lengths, cutting them to 5' lengths, and sending them back out, that would be a red flag to me saying now you're processing. Bringing them in and out, I don't consider that processing. Part of it would come down to enforcement, what is observed when the inspections are done.

Ms. McCave: Another aspect of enforcement, you have to keep in mind, is checking to see if the offices are really being used by those tenants.

All agree.

Mr. Hager: At the Planning Board level, I am going to be very adamant in my suggestion to the Planning Board that they make it very clear on the site plan what is and isn't allowed to go on in this site. I don't want to be pulling out Planning Board resolutions to figure out what was decided and what restrictions were put on the site. I want it on the site plan so if I find a violation, I can easily point it out to the applicant.

There were no Public Comments.

Ms. McCave: Before we go into Executive Session, David is there anything you would like to add regarding the area variances, anything that you haven't already shared with the Board, any changes?

Mr. Niemotko: No, I'm ready to discuss them. If there are any questions, I can answer them.

**Motion** was made by Member Schneider to enter Executive Session.

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato  
**Nay:** -0-

**Motion** was made by Chairwoman Miller to close the Executive Session.

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato  
**Nay:** -0-

**Motion** was made by Member Schneider to open the portion of the Public Hearing concerning the variances.

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato  
**Nay:** -0-

Mr. McKay: The applicant is seeking three variances, one for height, one for the number of stories, the third for the parking. With respect to each variance the Board would be applying the five factors, as stated on the application, would granting the variance produce an undesirable change, could the benefit be achieved by some other method, whether the variance is substantial, will it have an adverse impact on the physical environment, and whether it was self-created. With respect to each variance we will go through the five factors. So if I can suggest, we'll take them one at a time. The first being the height variance.

Mr. Niemotko: Due to the physical characteristic of the site we have to dig down into the ground to do an underground storm water management system. We are going to be digging down in the back of the property that would allow us to create an underground story. It will be completely submerged in the portion that faces Route 17M, except for 4'. On the 2 sides, it would slope down from that grade down to the back and the back would be fully open, it's approximately 18' drop down. That would create a third story, the lowest level. In so doing, we are asking for a height variance because the two are related, of 9'. When you take the average of the 4 corners of the project and subtract it from the allowable height it comes out to a 9' variance. We think that this is a reasonable request based on the fact that the FEMA line does exclude a large portion, about 33%, of the land to develop. In doing that it would allow us to have the third story which helps to offset a lot of the land that is unusable. It has no impact on the surrounding area, hidden for the most part. It allows for the cantilevered design that we talked about in the back for the trucks to go underneath. The second floor, the floor facing Route 17M, would be almost on grade with Route 17M. The lowest level, which we are asking the variance for, would only be open in the back, and the third floor is on top.

Ms. McCave: Are you going to have to excavate any soil in order to achieve that sloping or is that already naturally sloped like that?

Mr. Niemotko: Both, we are going to have to do some cut and fill. One part of the side is good, the other we're going to have to excavate. The back we are going to be taking out a portion of land. We'll be taking out about 14' in depth.

Member Sainato: Then back of the building all three stories will be visible, and the front only two stories with the exception of the 4'?

Mr. Niemotko: Correct, the 4' is for the truck to load/unload at the dock, the second floor. The second floor loading dock will be visible from Route 17M. A lot of the building will be hidden by either the car wash or the natural slope of the land.

Ms. McCave: The FEMA lines cuts off a little over one acre of the property? And that makes it unusable?

Mr. Niemotko: Correct, approximately 48,000 square feet. There are three parking spaces in the front of the building which will be restricted because at the current time we won't make the radiuses, to less than 30'. There are 5 in the back that are 30'.

Member Schneider: Let's assume all of those bays are filled with trucks; can you still get a firetruck around that building?

Mr. Niemotko: Yes, I did a plan showing the turn radius for emergency vehicles and their access. Preliminarily, everything works. Beyond the FEMA line, it's all heavily wooded.

Discussion broke out.

Mr. Niemotko: The Planning Board engineer has seen this, he is aware of my calculations. I believe them to be correct.

Member Sainato: This going so far down, is this going to affect the flood plain?

Mr. Niemotko: No, actually the flood plain is down already. The history of the property; that was filled. What you see there is approximately 14-15' of fill that we are going to be removing so that we can get down to virgin ground for the foundation and for our storm water management, it won't be exposed, we are going to submerge it. We did the hole excavations for the Planning Board, test hole pits they're called and it was witnessed by the Planning Board's engineer to start our storm water design. We performed them, we had the test results, we dug down to virgin ground and it was probably a good 16' if not more. The FEMA line elevation is still below that (meaning its downhill from it). We are impacting it, or coming across it with the excavation at all.

Ms. McCave: Have they analyzed the impact of excavating such a large amount of soil and how that can affect drainage near a flood plain? Environmental impacts are one of the five factors.

Mr. Niemotko: No, we stopped completely because while we were proceeding with the engineering plans, we were recommended to the Zoning Board so at that point we stopped doing design work until we got these variances. The excavation allows us to do an underground storm water management system, being an environmental benefit.

Ms. McCave: There was a neighboring property owner here at the last Public Hearing; do you remember what concerns, if any, they had?

Mr. Hagopian Jr: That was my father; I don't think he had too many concerns. He wanted to see what the side of the building was going to look like. I don't know how much of a concern it was, I don't want to speak for him.

Mr. Niemotko: There's the car wash and it would be at the elevation of the second floor. At the first Public Hearing we had the building owners on the other side of us and I don't remember any comments from them.

Ms. McCave: So you haven't experienced any objections to the project? Beyond what's in the minutes.

Mr. Niemotko: No, it's in the minutes what they said, they had no problem with the project. We discussed all of the variances at that meeting. I understand Mike Hagopian's comments regarding the West side, which will be a sloping side and on the conceptual design right now this is the amount of building that would be exposed. In the front it's approximately 36' high and in the back it's 54' high.

Member Schneider: The only thing that's in the minutes regarding Mr. Hagopian Sr., is "the elevation of that building right now, the dirt is higher than my parking. I will see that building."

Ms. McCave: I was just curious if beyond what was stated at the meeting, if you had had any interactions with the community where you had to alter the design because people were objecting, that kind of thing. Have you shared this with neighboring property owners outside of this meeting?

Mr. Niemotko: No, there were no negative comments. The design that's showed here hasn't changed since February. The only other neighbor that I think would be impacted would be the car wash and have I interacted with them, specifically or personally, no.

Ms. McCave: We haven't received any comments other than what was stated at the last meeting.

Member Schneider: Ms. D'Amico stated at the last meeting that bring in merchandise and ship it out and she wanted to know if they were limiting the merchandise. There were no other comments, but we did leave 10 days for any written comments.

Mr. Niemotko: She said that she had a similar type use in her building.

Mr. Hager: Both of her buildings are under the 10,000 square foot threshold.

Ms. McCave: David, why did you decide to create this slope on the property so that you would end up having the first floor be ground level in the back and then the second floor be ground level in the front? Why not increase the square footage along the ground rather than making it higher?

Mr. Niemotko: It just evolved. Once we were able to delineate the FEMA line and see how much that impacted the property and found out about the fill on the site, the design process started to evolve that way. We have an engineer on board talking about the storm water management being underground. We could not make the building bigger on the ground with the constraints on the sides and partially in the front would not allow for that. On the west side we have the constraint from the edge of the building to the FEMA line, not the property line, which will all remain wooded. The building is probably 100' away from the property line but yet it's only 50' or more from the FEMA line.

Ms. McCave: So you had a certain square footage for this project and the only way that you could achieve that then would be to excavate so you could have a third floor. Instead of doing a wider building with two floors. The reason that I'm asking this is for the variances one of the factor is can the benefit be achieved by some other feasible method other than a variance.

Mr. Niemotko: Yes had a square footage in mind, and we even decreased the amount of the original square footage on the first floor by 30' by 200' to make that overhang to allow for the trucks. We're not even meeting that because we had to eliminate that square footage. We could not achieve the square footage needed; we are going through a great expense just to achieve the square footage that we are now with the cantilevered construction. The owner is prepared to do that. We had constraints on the East and West side of the property, the southeast corner due to the front line property line. We reduced the square footage by eliminating that from the first floor and creating a second and third floor overhang. We have made quite a few major decisions in this short design period.

Ms. McCave: In response to the question, how substantial is the variance that you are requesting and you wrote low impact. Can you clarify that, briefly.

Mr. Niemotko: The variance that we're requesting regarding the height of the building and the number of stories is low impact in that it maintains a low profile on the site. It's not impacting the site of the surrounding area in a negative way. It relates to Route 17M, the car wash, the FEMA line, it's not creating an eyesore to the area. It's consistent and contextual with the

buildings surrounding it and front of it. It's not out of context in design, it remains in the character of the area, and it's not a variance in a residential neighborhood but in a commercial type area.

Ms. McCave: What' the outside of the building going to look like?

Mr. Niemotko: We haven't gotten to that at all. Our definite considerations are: it will be a steel structure inside, it will have concrete floors, it will have a sprinkler system, and those things are definite. On the conceptual end, I have talked to the owner about glass on the corner of the building, I favor blue glass, and I think that's a nice aesthetic. It will not be along the commercial storage units. On two sides I have to have entrances to the building so within those portions of the building there will be stairs for vertical conveyance, an elevator, and that in itself is going to create a little bit of a waiting area, I have talked to the owner about doing some sort of glass wall construction there. They are definitely in agreement on that, making it an attractive looking building. I do have that track record with them on two other projects.

Mr. McKay: You have to consider when you're talking about the hardship that they have to overcome is self-created, it's not always readily apparent. If they purchase the property and there was a large portion of the property that's undevelopable due to a federal regulation that is essentially a constraint that was placed upon the property when they purchased it. On the one hand, they knew that when they purchased it, you can consider that a pre-existing constraint that they did not create. As opposed to when someone buys a home and built a 25' deck without a permit and then comes in for a 10' variance on the deck that they build; that's kind of a clear example that they created their own hardship. That's a simple example. You need to consider whether the applicant has created the reason for the variance.

Ms. McCave: Will you also, for the exterior appearance, be putting in some landscaping. Trees and bushes?

Mr. Niemotko: Absolutely. But referring to the west part of the property will probably remain undeveloped. So the trees in that area that provide a physical barrier from the car dealership will remain. Our access line is 50' away from that property line. It's my intent to keep that screened. We would like to do screening between the car wash and this building, we haven't designed it but that would be my intent. We would also like to do some vegetation and screening on the east side of the property.

Member Schneider: Which level of your building is going to be at the same level as the dealership's parking lot?

Mr. Niemotko: The height from the ground in the front would be approximately 36' from the ground level to the top of the building. According to this map it seems that the car dealership's parking lot is 8' below the lower level of our building. What else is acting as a constraint which will not allow us to go below that is the FEMA line. And that traverses from the east to the west, comes north and then out. The height of the back is 54' and the front is 36' from the

ground. I know that the Zoning Code is different from the Building Code, but the Building Code does allow three stories, it's not completely out of the norm.

Mr. Hager: According to the Zoning Code even if your bottom floor is completely backfilled it still constitutes as a story.

Mr. Niemotko: If it was a full basement, yes. If we labeled this as a basement to the building according to your Zoning Code it would be a third floor.

Mr. McKay: If there are no other questions regarding the height and number of stories, we'll move on to the parking.

Member Schneider: Each office suite will have four employees, right?

Mr. Niemotko: Yes.

Mr. McKay: Can you verify something for me on the parking? The way that I understand it, since the Code itself directs you to the Code on the B-2 regulations, you propose that this is a commercial storage use, such a use is not listed on that column. Under that circumstance the Planning Board determines what the closest approximate calculations to use.

Mr. Niemotko: There is a Zoning Code regulation that says in the absence of something else, go to the closest use.

Mr. McKay: And that Code section says that that's determined by the Planning Board. So my question, you asked for a variance, what did the Planning Board determine?

Mr. Niemotko: It's been a while, so please correct me if I'm wrong, we were before the Planning Board twice, met the municipal engineer once at his office, and we reviewed it. They know about the 50 parking spaces and the 11 spaces for trucks. I don't have any other observation or anything else to say about that.

Mr. McKay: It states on the plan, 50 parking spaces, 11 truck spaces?

Mr. Niemotko: Yes.

Mr. McKay: The way that I understand it, that one potential calculation would be for office use which would result in approximately 128 spaces. If the calculations for warehousing were appropriate, that could result in a parking calculation of 58 spaces. Could you point me to the document or something that says the Planning Board said this calculation should apply? Let me ask this rhetorical question, if you don't have a stated calculation from the Planning Board, how do we know the variances that you'd be seeking?

Mr. Niemotko: We presented this and we were told we needed to get a variance for the parking. At that Planning Board meeting, did I talk about our needing 50 spaces and 11 truck spaces? Yes, that was known to everybody.

Mr. McKay: This is the Board's problem; the Code says that the Planning Board has to determine which calculations to use. I understand what you need, so you're saying my application is for a variance that I only need 11 truck spaces and 50 additional parking spaces. But you can't actually say that the Planning Board said that we would require 128 or the Planning Board said we would only need 58, or did they have a comment? I came to 58 because it was my understanding that under industrial zone the calculations would require only 58 spaces.

Ms. McCave: According to the schedule of district in an I district which is where warehouse would be listed, Industrial District, it says off street parking, it would be either "2 per 3 employees of the 2 largest successive shifts" but that would be more for manufacturing and the other calculation is for "1 per employee and 1 additional space for each 100 square feet of floor area". Did you do your own calculations based on that? I was almost thinking that we would want to calculate the parking in two pieces where we look at the office part, based on what's required for office space in the B-2 which would be 1 parking space per 200 square feet of floor area and then for the storage part use the calculation based on warehouse parking use. It's just an idea that I had. Mr. McKay is talking about alternative calculations where you calculate the whole building as either an office or as a warehouse but what I'm saying is that do a combo where you split the number up. Where did the conversation leave off with the Planning Board?

Mr. Niemotko: The discussion didn't go that way. Actually it left off with this calculation here, based on offices, one per 200 square feet of office, 128 parking spaces were needed, based on the fact of 25,500 square feet divided by 200 equals 128.

Mr. McKay: My understanding is that the discussion with the Planning Board was that we were going to use dual calculations, an office portion and an industrial portion.

Mr. Niemotko: We never went as far as the industrial. What I'm going to have to base my knowledge on are the plans that we submitted. The plans that we submitted, we only did the offices.

Discussion broke out.

Ms. McCave: There are two ways that you can calculate the number of parking spaces for a warehouse in the Code. There's one per employee and one additional space for each 100 square feet of floor area, or there's two spaces per three employees of the two largest successive shifts.

Mr. Hager: The one per employee and one additional space is for the adult book store use. The manufacturing and warehouse both have the two per three employees of the two largest successive shifts.

Mr. McKay: The way I read the Code, the Planning Board has to make a determination as to what the best approximate use calculation is. Did the Planning Board determine that the office space calculations were appropriate and the number is 128 or did they decide something else? We're not here to calculate and determine what formula should be applied or what the total number of spaces should be.

Mr. Hager: The total number of spaces needed was determined to be 150. The variance that is being requested is 100. If 128 were for the office than the rest of them would be for the storage area. I don't recall how they came up with the number of employees but I remember some discussion regarding how many occupants are allowed in that space, which came from the Building Code, which I believe was 1 per 500 square feet. If my memory is correct, the number got back in to how many employees would occupy this space in the warehouse/storage area and that number was applied. I did ask at one of the Planning Board meetings for them to state that they were accepting that. It comes down to a Catch 22, they zeroed in at 150 spaces, zeroed in that he was providing 50. Originally he was here without a referral, went back to the Planning Board to get a referral, and they hesitated to refer him for exactly 100 parking spaces because the engineer brought up the fact that he may lose a few due to the column locations. David can't provide the information and where these columns are going to be until he does more hard design on the building and he can't do more hard design on the building until he gets further in to the process here. My memory is that you were going to accept that and go for 100 parking space variance and if you needed a couple more, you would come back.

Mr. Niemotko: That's all true. The Planning Board engineer had concerns regarding the columns supporting that large overhang. And he asked what if they impacted the parking spaces then you would have to go back to the Zoning Board and ask for another variance. I will have to work around it but I can't start designing before we come up with some sort of variance.

Mr. McKay: However the Planning Board chose to make the calculations is it at least clear that the total number of required spaces is 150?

All agree.

Ms. McCave: Where did the calculation come from that's on that site plan? You calculated out 89 for the office, parking variance and then you had eleven. How did you come up with the 22 spaces for the storage part of the building? There's a calculation on the plan and I'm wondering who came up with that. There's that dual calculation that we were talking about, that's what John and I were just discussing about the industrial district, warehouse parking it says 2 spaces per 3 employees. So I was wondering what number of employees did you assume to get the number 22.

Mr. Niemotko: I came up with the calculations and my plan doesn't account for those 22 spaces. That was a subsequent discussion with the Planning Board. Let's say we assumed 2 employees per commercial storage area, that's 22 spaces.

Mr. McKay: Based on all that it appears to me that the Planning Board equated the office space portion at 128 and this hybrid type calculation where it seems like they applied the industrial to the commercial units, they came up with the additional 22.

Mr. Hager: The applicant did the calculations and the Planning Board engineer reviewed it. I believe that they were all in agreement on the required number of spaces on the site; the question was whether or not the actual 50 being shown were all going to be able to be used due to the columns.

Mr. Niemotko: We are asking to commit to the 50 spaces. If you grant the variance the onus is on me to make the 50 spaces work.

Mr. McKay: You're saying that there will be a minimum of 11 truck spaces and you're asking the Board to vary from the 150 parking spaces to 50 parking spaces. The question is whether it's actually approved by the Planning Board or not. The Building Inspector seems to think that there was a consensus that was the number.

Ms. McCave: To me the part of the calculations based on the storage part of the building if we're running off the assumption of two employees per storage unit, 11 units that's 22 employees, that doesn't lead to 22 spaces. It's my understanding of the language in here because it's supposed to be 2 parking spaces per 3 employees; it's not actually a 1:1 ratio, so you would have to have less than 22 spaces,  $2/3$  of 22. So 22 is more than what's required if you do the calculations based on what's in the industrial district regulations in the warehouse. The office space area is easier, it's more clear cut.

Mr. Hager: The only thing that we really have to go by on occupancy is the Fire Code which tells you what the maximum safe occupancy is and that's not a reality number either, it's never going to be occupied to the maximum extent although it could be but is it fair to back that number into parking, probably not. ( $3 \text{ employees per unit} = 33 \times 2/3 = 22$ )

Mr. McKay: To the extent that the record seems to be that the Planning Board would require 150 spaces, the applicant is proposing 50 and seeking a variance for the other 100. The Planning Board actually calculated it; it's really not for us to decide. If the Planning Board has determined that 150 spaces are applicable, whatever method they came to, he's simply asking for the difference of 100 spaces.

Ms. McCave: Where I was going with my comment was that the Planning Board actually assumed, it seems to me, more spaces than were actually required by the Zoning regulations in which case, if we grant the 100 space variance then he probably won't have to come back because he'll be needing less than that anyway.

Mr. McKay: He would need 14.56 parking spaces instead of 22. Based on 2 employees per unit =  $22 \times 2/3 = 14.56$ .

Discussion broke out.

Chairwoman Miller: Regarding the parking variance, one of the five factors: Is there an undesirable change in the character of the neighborhood or nearby property?

Mr. Niemotko: No, the least amount of blacktop, the better.

Chairwoman Miller: Would the benefit be achieved by some other method?

Mr. Niemotko: No. Based on our discussions, based on the way the building has evolved up to this point with the interpretation of the Code, the height, the number of stories, we feel that the 50 spaces will be more than adequate to service the project. We don't need 150 spaces. I reviewed these plans with the Planning Board. I had a specific meeting at the Planning Board engineer's office and he gave me a written review of this project. They know the overall concept, the location of the truck spaces, the number of spaces, this is nothing new. I am coming from the vantage point that I need a variance for the parking for this project to continue.

Mr. McKay: The Planning Board engineer didn't have any objections, per say, to the 50 spaces?

Mr. Niemotko: No, except for the location of the columns that support the 2<sup>nd</sup> and 3<sup>rd</sup> floor, if they would impact those 50 spaces. But I'm telling you if you grant the variance the onus is on me. I'll make sure that we supply 50 parking spaces and 11 truck spaces.

Chairwoman Miller: By granting this variance, does it have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?

Mr. Niemotko: No, because we are decreasing the amount of asphalt. We're not creating parking spaces that won't be used. Allowing us to have more landscaped areas with vegetation.

Member Schneider: Those 50 spaces are for office and warehouse workers?

Mr. Niemotko: Yes, they are one and the same. Do I see people occupying the storage unit? No, I see merchandise going in and then shutting the door. Do I see people occupying the office suites? Yes. The employees from the office suite would come downstairs and get the merchandise from the storage unit and leave.

Member Sainato: We have to decide with the 50 parking spaces is adequate?

Mr. McKay: What you have to determine is whether the variance is substantial, the hardship

was self-created, and the impact that this is going to have, that's the analysis. The one obvious question is it is numerically or statistically, it's a significant variance. What you could look at as well is qualitatively, and you know the area, that's why local people are on the ZBA, is there adequate parking nearby, is there other off-street parking or another commercial lot that might be available, seems like the proposed use is not one where you would have customers. It seems self-contained, only the people working in the building, truckers coming in and out. Looking at it qualitatively would 50 parking spaces be enough for this use. It might be quantitatively substantial but if you wanted to approve it, you could just say. In other words, you don't have to have 5 for 5 or 4 for 5 but overall, in context, after you've gone through all of the factors, whether on balance the variance should be approved or not. If the Planning Board had a document that said our calculations say that we apply the commercial to this and get this number, we think the industrial is proper and we get this, and said ok that's our calculation. This is less than clear. There's no other thing for this Board to do but accept the 150 as the calculation, however they did it, and whether the variance of 100 spaces is in the overall context of the application, is something whether the variance should be approved or not.

Ms. McCave: One of the factors is the impact on the environment so they said that they were going to put in an underground storm water management system, that somewhat offsets the effect of all of the pavement. We understand that you didn't come up with the number, that the Planning Board did and that you would prefer to have it be 50 parking spaces. But you have to comply with whatever the Planning Board decides. This Board needs to make a decision based on what the Planning Board's number is. This is basically the worst case scenario for the parking variance.

Mr. Niemotko: Correct. If the pavement isn't needed, why introduce the material to the site? I would rather see more grass, more vegetation.

Chairwoman Miller: The last factor is the alleged difficulty self-created?

Mr. Niemotko: No, the FEMA delineation really excludes quite a bit of the property from development. We are constrained to that area. And being constrained to that area, with the footprint of the building, it is flagpole type lot, we have a 50' wide access for approximately 200', and we feel that the difficulty was not self-created.

Mr. McKay: I don't know if that's exactly a direct response to the whether or not the number of parking spaces was self-created. What you're saying is if the Planning Board wanted 150 spaces I could have covered every square inch of the property with asphalt and put in, maybe 150. But based upon the FEMA/wetland constraints and the use of the building.

Member Schneider: If the building was smaller than he would have more parking spaces.

Ms. McCave: Although if the entire building was office space, you would need more parking spaces.

Chairwoman Miller: Are there any other questions?

Mr. McKay: The Board can deliberate over the variances; we can take your deliberations and prepare a draft decision. I have a question about SEQRA and Lead Agency status and whether or not we would be able to issue a decision but at least we would be continuing the process.

Ms. McCave: I have a question about the height variance; you said that the 9' was based on the average of the four corners of the building. If the front is 36' and the back is 54', doubling them to 72' and 108' together is 180' divided by 4 is 45' minus 35' is 10'. That's consistent with the front being 36' and the back being 54' because the maximum height is 35'. This was one of the questions from the last meeting that we needed to verify the height variance number with the engineer. We have to nail down is it 9' or 10'.

Mr. Hager: It's a sloped roof. You're showing 56' at the back to the peak of the roof. The eave of the roof would be at 54' so the mean would be 55'. The way that I'm looking at your drawing is that you're showing an elevation of the peak of the roof at the back of the building at 56' and the peak is 4' higher than the eave. The eave is 52', the peak is 56' and you used 54', the mean. The front the eave is at 32', the peak at 36', so you'd use 34'. Making it a 9' variance.

**Motion** was made by Member Schneider to close the Public Hearing.

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato

**Nay:** -0-

Mr. McKay: It's up to the Board if they want to vote tonight or if they want to draft a review.

Member Sainato: I want to draft a review.

Mr. McKay: If you want to issue a decision tonight, then we're going to have to go through this grid analysis and come to some consensus about the parking and five factors, height and the five factors, and stories and the five factors.

Ms. McCave: We did go through the factors regarding the height and stories.

Mr. McKay: The Code requires a 2 story maximum on the height. Generally speaking with the change from 2 stories to 3 stories produce an undesirable change in the character of the neighborhood or create a detriment on the nearby properties?

Member Schneider: I don't think so. We haven't heard anything from the Public regarding that.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Would the applicant be able to achieve the same benefit by some other feasible method?

Member Schneider: I personally don't think so because of the flood plain and the grade of the property.

Member Sainato: I don't believe there's any other way than to make the project smaller.

Chairwoman Miller agrees.

Ms. McCave: The undesirable effect on the neighborhood, could the Board factor in the fact that the applicant is going to make the exterior of the building as attractive as possible.

Mr. McKay: Whether the variance is substantial. Is the difference between 2 stories and 3 stories substantial?

Member Schneider: I don't think so in this case. The first one is going to be underground.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Whether the granting the variance would have an adverse impact on the physical conditions of the environmental conditions in the neighborhood.

Member Schneider: I believe that Ms. McCave already asked these questions.

Ms. McCave: Yes, about the excavation and then the applicant testified that the excavation would allow for an underground storm water system. So it would be beneficial.

Mr. McKay: Was it self-created?

Member Schneider: other than making the building smaller, the lot size that he has to work with really wasn't self-created.

Member Sainato: The size of the building versus the size of the lot you have to work with.

Ms. McCave: Under which factor can we note that the State Building Code allows three stories? Is this something that the Board can consider under these factors?

Mr. McKay: Yes. We have almost unanimity on almost everything. I think that the Board should take a vote on whether or not the variance from two stories to three stories should be granted or denied.

Member Sainato: Does this have to be done tonight?

Mr. McKay: I was just following the Board's lead. You don't have to make a final decision tonight. The Board could have a special meeting instead of waiting the 30 days.

Chairwoman Miller: We don't have to make a final decision tonight.

A special meeting is agreed and a specific date will be decided and confirmed in the next few days.

Mr. McKay: We went through the one variance, if the Board doesn't want to take a formal vote tonight. If the Board wanted to go through an analysis on all three variances. We can draft something preliminary and circulate it to you for discussion before the next meeting. That would mean going through the five factors on the height variance and the parking variance. The 9' variance, the summary that we measured from the ground to the middle of the roof structure, making the total variance 9' height variance, would granting this produce an undesirable change in the character of the neighborhood or create a detriment to nearby properties?

Member Schneider: I do not believe that it would produce an undesirable change or a detriment to another property. As I look at it, it's only 9' and most of the first level is going to be underground, the second level at road level and the third level, by looking at the plan is just slightly higher than the car wash. The sides are not going to be very visible and the back would be covered by the tree line.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Could this be achieved by some other method that's feasible to pursue?

Member Schneider: No, other than shortening the height of the building and making it a 2 story. Due to the fact that he has to dig down so far to get to virgin ground to put the footers in to begin with.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Is this substantial? It's a 20% +/- variance.

Member Schneider: No, not in this case.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Will granting the variance have an adverse impact on the physical conditions of the neighborhood or the environmental conditions?

Everyone says no.

Mr. McKay: Was this self-created?

Member Schneider: No, he could have done 2 stories but not achieved the same square footage because he's constricted on the sides.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Parking, will granting a 100 space parking variance produce an undesirable change in the character of the neighborhood?

Member Schneider: No, you won't even be able to see any of the parking spaces in the back, the front will be visible. In the front we'll be able to see the truck backing in? Because it's at road level?

Mr. Niemotko: It's somewhat at road level, yes.

Member Schneider: I don't know how desirable that is.

Mr. McKay: It is in a commercial zone, it's whether it's going to be undesirable change in the character of the neighborhood. Is it inconsistent with what's around the area?

Member Schneider: It is consistent, with the car dealership next door. It's a like property with the car dealership.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Is there some other feasible method, other than the variance, to get the same relief?

Member Schneider: Not on that piece of property.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Is this substantial? Quantatively or qualitatively context? The benefits of the reduced parking are less impervious surfaces

Member Schneider: Yes.

Chairwoman Miller and Member Sainato agree.

Mr. McKay: Will it have adverse effect physical or environmental conditions?

Member Schneider: I don't think so.

Ms. McCave: Actually it's more beneficial; it's less pavement which means it's better for storm water drainage. Less pollution runoff from vehicles, cars leak oil and like that. More cars, more chemicals leaking. More trees.

Mr. McKay: Was the parking issue self-created?

Member Schneider: Due to the size of the building on the lot, I think that it is. But due to the way that the land is laid out to get the square footage, it's not.

Mr. McKay: That goes back to the property constraints, the wetlands.

Mr. Hager: One suggestion that you might consider as a condition, that if you're going to grant a reduction, that the applicant agree to install "No Parking" signs along the entrance roadway. So we don't end up with a situation of excess parking, making it hard for fire apparatus to get in and out. It's probably a Fire Code requirement anyway. Something that the Planning Board would catch as well, I just thought it would be wise to mention this here too.

### **Right Choice Builders Inc.**

**101-2-1.12**

#### **Discussion**

Present: David Niemotko, Architect

### **Opened the ZBA Meeting with the Pledge of Allegiance**

#### **Roll Call**

The following persons were present:

- Laurine Miller - Chairperson
- Darrin Sainato - Member
- Carol Schneider - Member
- John Hager, Building Inspector
- Barbara Singer, Secretary
- Joseph McKay, Esq.
- Jennifer McCave, Esq.

**Motion** was made by Member Schneider to approve the minutes of July 5, 2017

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato

**Nay:** -0-

**Motion** was made by Chairwoman Miller to have a special meeting on August 15, 2017 at 7:00pm.

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato

**Nay:** -0-

**Motion** was made by Member Schneider to close the regular meeting of August 2, 2017 at 11:10pm

**Second** by Member Sainato.

**Aye:** Member Miller  
Member Schneider  
Member Sainato

**Nay:** -0-

Minutes Respectfully Submitted by:

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Barbara Singer – Secretary