

**MINUTES OF THE
MENDHAM BOROUGH JOINT LAND USE BOARD
REGULAR MEETING
Tuesday, July 18, 2023 - 7:30PM
West Morris Mendham High School Auditorium, 65 East Main Street, Mendham, NJ.**

CALL TO ORDER/FLAG SALUTE

The regular meeting of the Mendham Borough Joint Land Use Board was called to order at 7:30 p.m. and the open public meeting statement was read into the record.

ROLL CALL

Mayor Glassner – Present	Mr. Egerter – Present
Ms. Bushman – Absent	Ms. Garbacz – Present
Councilman Andrew – Present	Mr. Molnar – Alternate 1 - Present
Mr. Ritger – Present	Mr. Kay- Alternate 2- Present
Mr. Smith – Present	Mr. Barker – Alternate 3 - Absent
Mr. Sprandel – Absent	Mr. Pace – Alternate 4 – Absent
Mr. D’Urso– Present	

Also Present: Mr. Ferriero – Board Engineer
Mr. Germinario – Board Attorney
Ms. Kopsco - Board Planner

APPROVAL OF REGULAR MEETING MINUTES

Mr. Ritger noted that “in the” should be added to the first page in the completeness portion of the minutes. Motion by Mr. Smith, seconded by Mr. Molnar and unanimously carried by voice vote to adopt the Minutes of the May 16, 2023 Joint Land Use Board Regular Meeting, as revised.

Roll Call:

In Favor: Mr. Ritger, Mr. Smith, Mr. D’Urso, Mr. Egerter, Ms. Garbacz, Mr. Molnar, and Mr. Kay

Opposed:

Abstain: Mayor Glassner and Councilman Andrew

Motion Carried

APPROVAL OF EXECUTIVE SESSION MINUTES

Motion by Mr. D’Urso, seconded by Mr. Egerter and unanimously carried by voice vote to adopt the Executive Session Minutes of the May 16, 2023 Joint Land Use Board Regular Meeting, as presented.

Roll Call:

In Favor: Mayor Glassner, Councilman Andrew, Mr. Ritger, Mr. Smith, Mr. D’Urso, Mr. Egerter, Ms. Garbacz, Mr. Molnar, and Mr. Kay.

Opposed:

Abstain:

Motion Carried

PUBLIC COMMENT

Chairman Ritger opened the meeting to the public for questions and comments on items not included on the agenda or any pending applications.

Mr. Steeneck from 39 Franklin Rd. explained that there was water main work done on Franklin, Drake, Babbitt, Leddell, Ogden and Dayton and would like to know when the roads will be repaved. Mr. Ferriero explained that paving is not under the purview of this Board and can attend the next Council meeting to discuss his concerns. Mayor Glassner stated that the next Council meeting is August 24th or the concerns can be called into the office.

Mr. Lupo, 17 Dean Rd. asked if the Joint Land Use Board is responsible for overseeing the zoning regulations for wireless communication. Mr. Germinario explained that the Joint Land Use Board does enforce the regulations through development applications. Mr. Lupo stated that he has requested through OPRA how the significant modification occurred at the Kings Shopping Center. Mr. Ritger explained that the applicant would go to the zoning officer where the zoning officer would approve or deny the application. If the application is denied, it would come to the Joint Land Use Board but if it is approved the Board would not know about it. Mr. Lupo asked why the Day Top facility wasn't chosen as the first priority based on the site requirements. According to the ordinance east business zone is the third priority. Mr. Germinario asked Mr. Lupo if he had information that a zoning permit was issued. Mr. Lupo stated that the zoning permit number is ZP22144 issued on 9/21/22. Mr. Ritger asked if the question was, why not raise the tower on the other locations as opposed to the one at Kings. Mr. Lupo stated that that was correct and would like transparency and to have a meeting to ask who Dish wireless is. Mr. Lupo stated that this was not a modification, it is adding a new provider. Mr. Ritger explained that part of the approval for the tower at Kings was that 4 providers were allowed, which were Verizon, T-Mobile and Omni point. Mr. Lupo stated that AT&T was added which would make the 4 allowed. Mr. Ferriero stated that this is a complicated issue as it relates to state and federal law that modified the municipalities jurisdiction and there is an appeal process that is available to appeal the zoning officer's approval. Mr. Lupo asked how they would know the actual height of the tower. Mr. Ferriero stated that there has been someone hired to do the measurement. Mr. Ritger asked what would be done if the tower was in fact over the allowed. Mr. Ferriero answered by saying that they would be in zoning violation.

There being no further comments, the public session was closed.

RESOLUTION

03-23 V-Fee Mendham Apartments, LLC - Interpretation
84-86-88 East Main St
Block 801 Lot 20

Mr. Germinario summarized the V-Fee Mendham Apartments, LLC – Interpretation application and the conditions outlined in the resolution. Mr. Smith made a motion to memorialize the resolution and Mr. Kay seconded.

Roll Call:

In Favor: Mr. Ritger, Mr. Smith, Mr. Egerter, Ms. Garbacz, and Mr. Kay.

Opposed:

Abstain: Mayor Glassner, Councilman Andrew, Mr. D'Urso, and Mr. Molnar.

Motion Carried. The resolution follows.

BOROUGH OF MENDHAM JOINT LAND USE BOARD

RESOLUTION OF MEMORIALIZATION

Decided: May 16, 2023

Memorialized: July 18, 2023

IN THE MATTER OF V-FEE MENDHAM APARTMENTS, LLC

**REQUEST FOR ORDINANCE INTERPRETATION PURSUANT TO
N.J.S.A. 40:55D-70b
BLOCK 801, LOT 26
APPLICATION NO. JLUB-23-22**

WHEREAS, V-Fee Mendham Apartments, LLC (hereinafter the "Applicant") applied to the Borough of Mendham Joint Land Use Board (hereinafter the "Board") for an ordinance interpretation pursuant to N.J.S.A. 40:55D-70b (hereinafter the "Request for Interpretation") by application dated 4/19/23; and

WHEREAS, the application was deemed complete by the Board, and a public hearing was held on 4/16/23; and

WHEREAS, the Board has determined that the Applicant has complied with all land use procedural requirements of Chapter 124 of the Ordinance of the Borough of Mendham, and has complied with the procedural requirements of the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq., including without limitation, public notice pursuant to N.J.S.A. 40:55D-12; and

WHEREAS, the Board makes the following findings and conclusions, based on the documents, testimony and other evidence comprising the hearing record:

1. The property which is the subject of the application consists of 13.27 acres (577,865 sq. ft.) located in the EB-AH East Business/Affordable Housing Zone. The site is currently developed with a functioning retail shopping center with a supermarket anchor, tennis/fitness club which appears to be closed, and a wireless telecommunications tower.

2. The Applicant has a pending application, resubmitted 2/15/23, seeking major preliminary and final site plan approval with variance relief to demolish the existing tennis/fitness club and associated improvements and construct a mixed use "barn-style" building consisting of an automobile service sales and service business, and a four (4) story (over parking), seventy five (75) unit multifamily residential building which will contain a 20-percent set aside for affordable housing, associated site improvements such as a parking garage, surface parking, a recreation facility including an outdoor swimming pool, landscaping, utilities, site lighting and stormwater management facilities.

3. Following a completeness hearing scheduled on 3/21/23, the Board found the initial development application incomplete due to two (2) identified use variances pursuant to N.J.S.A. 40:55D-70d(1) and d(3) that the Applicant had not applied for. The first identified use variance was a d(1) use variance related to the proposed automobile service sales and service business that in the original submitted application included "climate-controlled automobile storage" available to the general public. The Board made the determination that this use was not a permitted principal or accessory use in the zone and that a use variance pursuant to N.J.S.A. 40:55D-70d(1) was required. Further, the Board made a determination that the proposal to locate a residential structure adjacent to an existing cell tower on the site, which is the same site as the proposed application, creates a variance pursuant to N.J.S.A. 40:55D-70d(3) because it violates at least one of the conditions of the conditional use approval for the cell tower. The Board determined that the application was incomplete until it was amended to include the variances listed above.

4. By letter dated 4/13/23 from Applicant's counsel John P. Inglesino, Esq., and application received 4/19/23, the Applicant has requested interpretation of Borough Ordinance §215-73, as it pertains to the d(1) use variance for automobile storage, and §§215-12.6B(7) & (8), as they pertain to the d(3) conditional use variance pertaining to the setback of the existing telecommunications tower from the proposed 75-unit residential building. By letter dated 5/2/2023, the Board's attorney Thomas J. Germinario, Esq., responded to the legal arguments presented in Mr. Inglesino's letter of 4/13/23.

5. In addition to the testimony and exhibits presented at the public hearing of 5/16/23, the hearing record consists of the following:

- (a) the Inglesino letter of 4/13/23
- (b) the Germinario letter of 5/2/23
- (c) the Land Use Development Application received 4/19/23, with supporting documents
- (d) the transcript of the Board's 3/21/23 Completeness Hearing
- (e) Planning Report for 84-88 East Main Street, prepared by Philip Abramson, AICP/PP and Golda Speyer, AICP/PP of Topology, dated 11/10/22, and revised 3/8/23
- (f) Twenty-eight (28) sheets of site plans entitled "Preliminary and Final Site Plan for V-Fee Mendham Apartments, LLC Proposed Multi-Family Residential Development Block 801, Lot 20 84-90 East Main Street Borough of Mendham Morris County, New Jersey" prepared by Stonefield Engineering & Design, dated 10/20/22
- (g) Eleven (11) sheets of architectural plans entitled "Preliminary & Final Site Plan 84-90 East Main Street Borough of Mendham, Morris County, New Jersey V-Fee Mendham Apartments, LLC Proposed Multi-Family Residential Development Block 801; Lot 20" Prepared by Marchetto, Higgins, Stieve Architects and dated 10/24/22
- (h) Planner Report #1, prepared by Jessica Caldwell Dykstra, PP, AICP, dated 5/5/23

6. In the course of the public hearings, the following exhibits were marked and are part of the hearing record:

A-1 Affordable Housing Settlement Agreement between the Borough of Mendham and V-Fee Realty Investments, LLC, dated 12/23/19 (pre-marked)

A-2 Borough of Mendham Ordinance #09-2020, adopted 8/11/20 (pre-marked)

A-3 Borough of Mendham Board of Adjustment Resolution IMO T-Mobile Northeast, LLC, Preliminary and Final Site Plan and Conditional Use Variance Approval, memorialized 9/12/17 (pre-marked)

A-4 Overview of V-Fee Mendham Apartments, LLC, pending major preliminary and final site plan application, dated 5/16/12 (identified by witness Bruce Stieve, AIA)

A-5 Planning Exhibit - Front Setback and Cell Tower Buffer, undated (identified by witness Phil Abramson, PP)

7. In the course of the public hearings, the Applicant was represented by Derek Orth, Esq., and the Applicant presented the testimony of the following witnesses, which testimony is part of the hearing record:

Bruce Stieve, AIA, Applicant's architect
Phil Abramson, PP, Applicant's planner

8. Based on the hearing record, the Board makes the following findings of fact:

(a) With respect to the question of the d(1) use variance pertaining to automobile storage, the Board finds that the Topology Planning Report as revised on 3/8/23 modifies the original version of that Report dated 11/10/22, so as to state that all proposed automobile storage will be accessory to permitted multi-family residential use and/or the permitted automobile sales/service use. The Board particularly relies upon the revised Report's representation on page 4, that "No third-party vehicle storage will be provided on the site." The Board further finds that the Applicant has formally revised its pending major preliminary/final site plan application to replace the Planning Report dated 11/10/22 with the one dated 3/8/23.

(b) With respect to the question of the d(3) conditional use variance pertaining to the setback of the existing telecommunications tower from the proposed residential building, the Board finds that the subject property contains within a single undivided lot, Lot 20, Block 801, the shopping center, the tennis/fitness club and a telecommunications tower. The tower was approved in 2017 as a conditional use, based in part on its compliance with a 250-foot setback from the nearest residential dwellings, as required by Ordinance §215-12.6B(7) and (8). The Applicant is now proposing to add to Lot 20 a 75-unit residential building that will replace the tennis/fitness club and stand within 250 feet of the cell tower.

9. Based on the foregoing findings of fact, the Board has reached the following conclusions:

(a) Based on the representation made in the Topology Planning Report as revised on 3/8/23 and submitted by the Applicant as a formal amendment to its pending major preliminary/final site plan application, a d(1) use variance for non-accessory automobile storage is no longer required.

(b) With respect to the d(3) conditional use variance, the Board concludes that said variance is required in connection with the Applicant's pending major preliminary/final site plan application. In reaching this conclusion, the Board adopts the reasoning of the Board attorney:

"It goes without saying that a conditional use approval would be futile if the property owner were entitled to subsequently develop it so as to materially change the conditions under which the approval was granted. Logically, it would be necessary for the granting board to revisit the conditional use approval to determine if the basis for its prior approval had been significantly altered. This principle was recognized by the Appellate Division in *Macedonian Church v. Planning Bd.*, 269 N.J. Super. 562 (App. Div. 1994). In that case, the Church obtained conditional use approval for an all-purpose building in 1978, but was denied in 1991 when it proposed a substantial expansion of the building and its parking area. Under these circumstances, the Court held that the Board was justified in revisiting the conditional use approval, stating:

Based on the changes in the proposal, the Planning Board acted within the bounds of its discretion in deciding to review the application anew under the conditional use ordinance. (269 N.J. Super. at 573).

The Macedonian Church precedent applies a fortiori in the case before the JLUB, since here we are dealing with a change in the development of Lot 20 which not only affects a previously-granted conditional use, but which creates a new non-compliance with the conditional use standards."

(c) With respect to the arguments advanced by Applicant's counsel Mr. Orth and planner Mr. Abramson, the Board finds them unconvincing in overcoming the position of the Board attorney. Specifically, the Board finds no basis for concluding that the Settlement Agreement (A-1) and/or Ordinance #09-2020 (A-2) were intended to excise the 250-foot residential setback conditional use requirement in the Borough's Wireless Telecommunications Ordinance §215-12.6B(7) and (8). The language of the Settlement Agreement adverted to by Mr. Orth states that the Ordinance to be adopted pursuant thereto would "permit the existing uses on the Property to remain as a permitted use" (emphasis supplied), which indicates that the use status of existing uses on the site would not be changed by the Ordinance. In his testimony, Mr. Abramson acknowledged that the status of the cell tower at the time of the Settlement Agreement and the implementing Ordinance was that of a conditionally permitted use. He further agreed that neither the Agreement nor the Ordinance altered that status. Furthermore, the language of Ordinance §215-73 clearly states that the permitted uses in the East Business Affordable Housing Zone would include "any use permitted in the Historic Business Zone" in addition to the uses being added under §215-73. Since the Historic Business Zone, Ordinance §215-17, does not permit cell towers, it follows that Ordinance §215-73 does not even refer to the existing cell tower on the site, much less altering its status as a conditional use. Therefore, the current use status of the tower in the East Business District is conferred solely on the basis of the Wireless Telecommunications Ordinance §215-12.6, which defines it as a conditional use, subject to the residential setback requirements which Applicant's proposed development would violate. It goes without saying, moreover, that the §215-12.6 is no way inconsistent with Ordinance #09-2020 and is not subject to its implied repeal provision.

(d) With regard to Mr. Abramson's argument that, once a conditional use is approved, the conditional use standards under which it was approved become inoperative, the Board notes that Mr. Abramson cited neither a statutory nor a judicial basis for this proposition, but merely asserted the lack of any judicial opinions that address this issue. But the Board disagrees, insofar as the Macedonian Church decision cited by the Board's attorney holds that the conditional use requirement of Randolph Township Ordinance §33-23(a) remained operative 13 years after the original conditional use approval. 269 N.J. Super. 562, 568, 571-573.

NOW, THEREFORE, BE IT RESOLVED, that pursuant to N.J.S.A. 40:55D-70b, the Board, based on the Applicant's revised major preliminary and final site plan application that incorporates the representations contained in the Topology Planning Report dated 3/8/23, interprets Ordinance §215-73 as not requiring a d(1) use variance in the pending application for automobile storage; and

BE IT FURTHER RESOLVED, that, pursuant to N.J.S.A. 40:55D-70b, the Board interprets Ordinance §§215-12.6B(7) & (8) as requiring a d(3) conditional use variance in the pending application with respect to the construction of 75 residential units within 250 feet of the existing telecommunications tower, which is contrary to the basis upon which the tower was approved as a conditional use in 2017.

The undersigned does hereby certify that the foregoing is a true copy of the Resolution adopted by the Borough of Mendham Joint Land Use Board memorializing the action taken by the Board at its meeting of 5/16/23.

Lisa Smith
Board Secretary

HEARING

02-23 Kuchinski
24 Franklin Rd
Block 1706 Lot 10
Present: Mr. & Mrs. Kuchinski – Applicant
Mr. Encin – Architect

Mr. Kuchinski and Mr. Encin were sworn in. Mr. Germinario asked if Mr. Encin's were in good order and Mr. Encin stated that they are.

Mr. Kuchinski summarized the reasoning for the proposed addition.

Mr. Germinario stated that he has reviewed the public notices and they are in order and the Board has jurisdiction to hear this application.

Mr. Encin gave an overview of the existing and proposed conditions. Mr. Encin explained that the reason for the need for a variance is impervious coverage, of which the maximum for the zone is 8929sq ft. The existing is 9854sq ft and proposed is 10137sq ft. Mr. Encin stated that item #1 in the Engineer's report dated July 7, 2023, asks for the breakout of each project which was on the copies submitted for the hearing. Mr. Encin stated that regarding item #2, where additional structures are on the property that are not shown on the survey would need to be calculated. Mr. Encin submitted a GIS map of the structure in question which was marked as Exhibit A1. Mr. Encin also submitted a photo of the swing set that was marked as A2 and explained that the swing set does not increase the impervious coverage. Mr. Encin explained that item #3 where the resolution in 2005 allowed for the in-law suite over the detached garage was from a different applicant and was never constructed. Mr. Encin stated that the space above the garage is a game room and office and does not have a full bath or kitchen. Mr. Encin stated that the current owner is willing to abandon what was allowed in that resolution. Mr. Ferriero stated that if there is an existing in-law suite on the floor that is not in the location it was approved. Mr. Encin explained that the term in-law suite as he used it means just a separate bedroom space on the first floor that is used by in-laws. It does not have a separate kitchen usages or separate entrance. Mr. Ferriero stated that on sheet A2 of the floor plan it shows a kitchenette, bedroom, full bath, and doors to the outside. Mr. Encin stated that it is a first-floor bedroom, a full bathroom, an open space adjacent to the existing family room. Mr. Encin stated that there is a refrigerator and a sink but is not a full kitchen. Mr. Encin stated that he had done other plans like this, and a D variance was not needed and wanted to note that this was preexisting when the Kuchinski's purchased the home. Mr. Ritger gave his opinion that the application is an expansion of a non-conforming use and would need a variance. Mr. D'Urso gave his opinion that it is separate because it has its own entrance and a door separating it from the rest of the house, which is the definition of a stand-alone unit. Mr. Ritger suggested a condition that the additional dwelling unit could never be rented out and could only be used by a family member. Mr. Ferriero stated that the question is, does the expansion of the dwelling increase the intensity of the non-conforming use therefore requiring a D2 variance. Mr. Germinario stated that since variance relief is being applied for in a general sense in the noticing, the Board would have jurisdiction. Mr. Germinario explained that the D2 variance would be a Board of Adjustment matter and the Mayor and Councilman will have to step down and Mr. Encin will have to make his case for the D2 variance.

Mr. Encin stated that there is no change in the focus of the existing non conformance and the variance being requested. Mr. Encin explained that on the site plan there is a deck and patio that extends out of the rear of the house and the detached garage sits off to the left. Mr. Encin stated that what is proposed is to extend the existing rear wall of the living room by 9'1" and the expansion of the kitchen area. The mudroom, laundry space and hall will be used to connect the existing house to the detached garage which would make it part of the principle structure. Mr. Encin noted that there is a new wood deck proposed behind the addition and the existing deck will be demolished and removed and the existing patio will be removed to offset the increase in impervious coverage. Mr. Encin stated that with regards to the drainage in the rear of the house, there are a number of inlets and a strip drain in the back of the house, all of which go around the house and drain into the storm drain on the street. Mr. Encin noted that all of the improvements being made are behind the house and are not visible from any of the neighboring homes. Mr. Ferriero stated that in order to make the proof for the expansion of the non-conforming use, you would have to demonstrate that the site can still handle the use. Mr. Encin stated that there is no change to the usage of the site and the spaces that are being added are preexisting uses and spaces on the house that are small for house of that size. Mr. Encin noted that there is no expansion of the number of people living in the home and feels the space can handle what is proposed. Mr. Germinario summarized what Mr. Encin explained by saying that the way the in-law suite functions now is not going to be different after the proposed additions are made to the property. Mr. Encin agreed and stated that the proposed is for the existing area of the family room and main kitchen of the house in the same location, only allowing them to be slightly larger to allow the family to use the space better. Mr. Germinario summarized Mr. Encin's explanation stating that the impact, if any, that this nonconformity has on the residential site is minimal to none and Mr. Encin agreed. Mr. Encin stated that the changes proposed pose no detriment to anything within the code or what is trying to be accomplished within the code. Mr. Encin explained that there are inlets and drains that drain to the street to answer Mr. Ferriero's comment #4 in his report. Mr. Ferriero explained in the past the Board has used the

increase in impervious coverage to get some stormwater management. Mr. Ferriero stated that the proposed is well below the threshold and is only adding a couple hundred square feet, but the overall lot is approximately 1200 square feet over what is permitted. Mr. D'Urso stated that the additional should be treated onsite and not draining out to the street. Mr. Encin asked if the drainage would have to be treated on site if there is already drainage on site. Mr. Ferriero stated that sending the runoff off site is not management it is directing it off site and the purpose of dry wells is to recharge and reduce the amount that runs off site. Mr. Ritger stated that he feels not all of the impervious is in the calculations. Mr. Ritger noted the top of a wall and Mr. Ferriero stated that the plain area of the top of the wall is not considered impervious coverage. Mr. Molar asked if there was any effect to the neighbors with this, is there sloping? Mr. Encin stated that the property to the right is a little lower by the wall and the inlet drains in the back handle the drainage. Mr. Ferriero asked if all of the building area connected to the drainage system. Mr. Encin stated that all of the gutters drain into that drainage system. After discussion, Mr. Encin agreed to submit a sketch of the drainage on the property and will implement any improvements required by Mr. Ferriero to address the increased impervious coverage as a condition of approval. Mr. Ferriero stated that the Board should make a finding of fact that there is an in-law suite there in a specific location, but it is not in the location that was previously approved and note that it is ok where it is. Mr. Ferriero also noted that there was a deed restriction with the prior approval and a copy should be supplied to the Board and if the restriction is not in the deed, one should be filed.

Mr. Ritger asked if there was any public comments or questions. There being none, public comment was closed.

Mr. Egerter made a motion to approve the application with conditions as outlined in the Resolution and was seconded by Mr. Smith.

ROLL CALL: The result of the roll call was 9 to 0 as follows:

Roll Call:

In Favor: Mayor Glassner, Councilman Andrew, Mr. Ritger, Mr. Smith, Mr. D'Urso, Mr. Egerter, Ms. Garbacz, Mr. Molnar, and Mr. Kay.

Opposed:

Abstain:

Motion Carried

DISCUSSION

Ms. Smith stated that V-Fee and Accordia will not be on the agenda for the next meeting and would like to change the venue back to the Garabrant Center if the Board approves.

ADJOURNMENT

There being no additional business to come before the Board, Motion was made by Mayor Glassner, seconded by Mr. Smith. On a voice vote, all were in favor. Chairman Ritger adjourned the meeting at 8:55PM. The next scheduled regular meeting of the Joint Land Use Board is Tuesday, August 15, 2023 at 7:30PM in the Garabrant Center, 4 Wilson St. , Mendham, NJ.

Respectfully submitted,

Lisa J. Smith

Lisa Smith

Land Use Coordinator