

Ordinance Interpretation
The Kamson Corporation
1568 Route 88
Block 1171, Lot 2
Zone: H-S (Hospital Support) Zone
Application No. BA-2965-INT.-11/15

RESOLUTION OF MEMORIALIZATION
BRICK TOWNSHIP ZONING BOARD OF ADJUSTMENT
APPLICATION NO. BA-2965-INT.-11/15
April 6, 2016

WHEREAS, The Kamson Corporation (the "Applicant") has applied to the Brick Township Zoning Board of Adjustment (the "Board") for an interpretation of a zoning ordinance pursuant to N.J.S.A. 40:55D-70b, for lands known and designated as Block 1171, Lot 2, on the official tax map of the Township of Brick and more specifically known as 1568 Route 88, Brick, NJ 08724 (the "Property"); and

WHEREAS, a complete application has been filed, the fees as required by Township ordinance have been paid, proof of service and publication of notice as required by law has been furnished and determined to be in proper order, and it otherwise appears that the jurisdiction and powers for the Board have been properly invoked and exercised; and

WHEREAS, a public hearing was held on December 9, 2015, in the municipal building, at which time testimony and exhibits were presented on behalf of the Applicant and all interested parties having an opportunity to be heard.

NOW, THEREFORE, the Board makes the following findings of fact based on evidence presented at its public hearing at which a record was made:

1. The Kamson Corporation ("Applicant") has filed an Application with the Township of Brick Planning Board (Application No. PB-2756)(the "Application") for

Kamson Corp.
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PolICASTRO
CME
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Zoning

preliminary and final site plan approval along with ancillary variance relief to construct a mixed used development consisting of a 103 room business hotel, 66 apartment units along with 39,475 square feet of retail use. The Applicant is now seeking an interpretation of the Brick Township Land Use Regulations as to whether the Application is a “conditional use” under the Mixed Use Overlay (MU) Zone Ordinance (§245-298.1 of the Township Land Use Ordinance) and more specifically whether deviation from the parking requirements contained therein require variance relief pursuant to N.J.S.A. 40:55D-70d(3) or merely relief from the general parking requirements pursuant to N.J.S.A. 40:55D-70c.

2. Marc D. Policastro, Esq. appeared on behalf of the Applicant. Bernard Reilly, Esq. appeared on behalf of objector 545 Brick Blvd., LLC.

3. Testimony was taken from Christine Nazzaro Cofone, PP, AICP. Ms. Cofone testified that the Applicant has appeared before the Township of Brick Planning Board for multiple public hearings on Application PB-2756. Ms. Cofone stated that as part of that Application, the Applicant requested certain “c” variance relief regarding parking. She testified that the parking regulations for the Mixed Use Overlay Zone are cited in Section 245-298.1E(4)(a) of the Mixed Use Overlay Ordinance and explained that this section provides that “for parking requirements, refer to Section 245-312, Parking”. Ms. Cofone added that it was her belief that the section cite is actually a typo and the correct section should be Section 245-311.

4. Ms. Cofone testified that the Applicant has “3 non-compliances” with Section 245-311 and opined that these parking requirements are not included in the conditional use section of the Mixed Use Overlay Ordinance. Rather, because she believed the parking requirements set forth in the Mixed Use Overlay Ordinance are only references to parking

requirements found in Section 245-311 of the Land Use Ordinance, only “c” variance relief would be necessary.

5. Ms. Cofone testified that such “c” variance relief was granted to New Horizons, LLC by the Brick Planning Board in 2009 for a mixed use project. She further argued that there were two New Jersey cases, Pretto v. Berkeley Heights and Lincoln Heights v. Cranford, which support this argument.

6. Upon questioning from Mr. Riley, Ms. Cofone testified that if the parking requirements, which are referenced in the Mixed Use Overlay Ordinance, were actually stated (and not simply referenced) in the Ordinance, and the Applicant did not comply with any one of those parking standards, then the Applicant would require “d” variance relief.

7. Upon questioning from Mr. Riley, Ms. Cofone stated that the Applicant requires 3 parking variances, a variance for location of the detention basin and a variance for failure to provide a buffer from the proposed commercial use on the portion of the Property which abuts a residential zone.

8. Mr. Policastro entered a copy of a Nobility Crest Resolution of Approval memorialized in 1999 by the Township of Brick Planning Board into evidence in support of this Application.

9. Other than the interested party represented by Mr. Riley, there were no members of the public expressing an interest in this Application.

NOW, THEREFORE, the Board makes the following conclusions of law based upon the foregoing findings of fact:

1. This application before the Board requests an Ordinance Interpretation as to whether the proposed mixed use is a “conditional use” under the Mixed Use Overlay Ordinance and whether relief from any of the conditions is required pursuant to N.J.S.A. 40:55D-70d(3).

2. The Municipal Land Use Law vests exclusive jurisdiction with the zoning board of adjustment to hear and decide requests for interpretations of the zoning ordinance or zoning map. N.J.S.A. 40:55D-70b. The principles governing interpretation of zoning ordinances is the same as any other type of general legislation. The goal of ordinance interpretation is to discover and effectuate the legislative intent. This intent is derived from the plain language of the ordinance.

3. A general discussion of the nature of a “conditional use” is appropriate prior to analyzing this particular ordinance. A conditional use is a use that is permitted in a zone district only if it satisfies specific conditions stated in the ordinance. If the conditions are not satisfied, the use requires variance relief and must proceed before the zoning board. A conditional use is considered a permitted use where all conditions are satisfied and jurisdiction is vested with the planning board without need for any variance relief.

4. None of the parties in the instant matter dispute that the Mixed Use Overlay Zone (Section 245-298.1) is codified as a conditional use. The sole issue presented to the Board is to determine whether the parking standards codified at Section 245-298.1E(4)- Parking are conditional use standards or rather are general standards. This distinction is significant. If deviation from the parking requirement is not considered non-compliance with a condition, the application would require variance relief pursuant to N.J.S.A. 40:55D-70c and perhaps proceed to the Planning Board (This Board has not been provided a complete plan for review and is not rendering any decision concerning compliance with all conditions). If the parking standard is

considered one of the conditions of the Mixed Use Overlay Zone, then non-compliance would require variance relief pursuant to N.J.S.A. 40:55D-70d(3), vesting this Board with jurisdiction.

5. The Applicant has advanced two arguments to support its belief that the parking standard is not part of the conditional use requirements and is rather a general requirement. The Applicant first relies on the unreported Appellate Division decision in Pretto v. Tp. of Berkeley Heights, 2009 N.J. Super. (unpublished App. Div. 2009) as well as Lincoln Heights Ass'n v. Tp. of Cranford Planning Board, 314 N.J. Super. 366 (Law Div. 1998), *aff'd* 321 N.J. Super 355 (App. Div. 1999), *certif. den.* 162 N.J. 131 (1999). The Applicant also claims to have support for its position flowing from a prior Planning Board Resolution.

6. The Board finds the Applicant's reliance on Pretto is misplaced. There, the ordinance established a "suite hotel" as a conditional use. The parking requirement in the conditional use ordinance required 1.1 parking spaces for each guest room. The Court held that "The amended provision also specifies that all other parking requirements shall be governed by other, more general provisions of the MLUO (Berkeley Heights Municipal Land Use Ordinance) **and shall not be considered terms of the conditional use.**" (emphasis added). The plain language of the ordinance therefore explicitly stated that reference to other ordinances was not to be considered part of the conditional use standards. In the instant matter, the text of the parking requirement in the Mixed Use Overlay Zone contains seven (7) requirements. Unlike Pretto, the section is completely devoid of any statement that reference to the parking requirements contained in Section 245-311 was meant to not be considered a conditional use standard. The most critical element in Pretto therefore does not exist in the instant matter. The Board therefore rejects the Applicant's arguments which rely on Pretto.

7. The Applicant's reliance on Lincoln Heights is similarly misplaced. There an applicant sought site plan approval permitting the construction of a grocery store. Grocery stores were a conditional use under the Cranford ordinance. The ordinance contained five (5) conditions. This included parking standards. The parking standards, however, were merely a reference to a separate section of the ordinance. The Court found that those parking standards applied to all uses in all zones and did not pertain solely to conditional uses. Deviations from those parking requirements were therefore not found to require variance relief pursuant to N.J.S.A. 40:55D-70d(3).

8. The Board finds that the instant matter is distinguishable from Lincoln Heights. Unlike Lincoln Heights, the Mixed Use Overlay Zone ordinance contains a section on parking which contains seven (7) requirements. See Section 245-298.1E(4)(a)-(g). While the first requirement is a reference to the standards of the parking ordinance, the remaining six (6) requirements are specific to the conditional use. Lincoln Heights only had a reference to the general parking standards without any other more specific requirements. Unlike the Cranford ordinance, the Brick general parking ordinance also does not specifically address mixed uses. This is precisely why the additional unique criteria are included within the conditional use ordinance. Section (d) even addresses requests for relief from the conditional use standards in certain situations. The interpretation urged by the Applicant would not permit the entire ordinance to be read *in para materia*. This is because the Applicant argues that relief from the parking requirements is cognizable as a bulk variance under N.J.S.A. 40:55D-70c, while the conditional use ordinance provides standards for relief pursuant to N.J.S.A. 40:55D-70d.

9. The Conditional Use Ordinance here provides a comprehensive set of standards which are unique to the mixed uses enumerated in the Mixed Use Overlay Zone. It is not simply

a reference to a general parking ordinance requirement, nor is there a provision which provides that the standards contained in the general parking ordinance should not be considered conditional use standards. The Board therefore determines that the deviations from the parking standard in the instant matter would require variance relief pursuant to N.J.S.A. 40:55D-70d(3).

10. The Board also finds the Applicant's reference to a single Planning Board decision unpersuasive. As an initial matter, the Planning Board itself was not confident that the deviations from the parking standard did not require conditional use variance relief. That is the reason this matter was placed before this Board in the first place. This single decision, which the Planning Board itself did not find dispositive, therefore does not constitute any kind of history of informal interpretation entitled to deference. Further, the Municipal Land Use Law places exclusive authority to definitively interpret ordinances with a zoning board. N.J.S.A. 40:55D-70b. To the extent the previous Planning Board Resolution even directly addresses this particular issue, this Board is not bound by such interpretation. In fact, it works the other way around and all boards, as well as the municipality itself, are bound by this interpretation.

NOW, THEREFORE, BE IT RESOLVED, by the Brick Township Zoning Board of Adjustment on this 6th day of April, 2016, that the action of the Board taken on December 9, 2015 concerning Application No. BA-2965-INT.-11/15 of The Kamson Corporation to determine whether the proposed use is a conditional use, pursuant to N.J.S.A. 40:55D-70b, and whether deviation from the parking standards require variance relief pursuant to N.J.S.A. 40:55D-70d(3) is hereby memorialized, subject to the following conditions:

1. Applicants shall comply with standard Zoning Board of Adjustment conditions as set forth in attached Schedule "A", where applicable.

BA-2695-INT.-11/15
The Kamson Corporation

April 6, 2016

VOTE ON MEMORIALIZATION

MOVED BY: D. White

SECONDED BY: S. Leitner

VOTING IN THE AFFIRMATIVE: D. White, J. Schneider, E. Della Volle,
F. Mizer, S. Leitner, H. Langer

VOTING IN THE NEGATIVE:

INELIGIBLE: L. Sorrentino, C. Anderson

IN-CONFLICT:

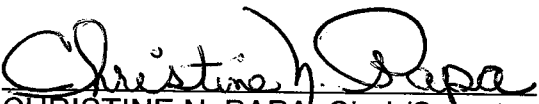
Absent: D. Raftery

ABSTAINING:

PRESENT BUT NOT VOTING :

CERTIFICATION

I, CHRISTINE N. PAPA, Clerk/Secretary to the Board of Adjustment of the Township of Brick, County of Ocean, State of New Jersey, do hereby certify that I am duly authorized to certify Resolutions. I certify that the foregoing Resolution was adopted by the Board of Adjustment of the Township of Brick at a regular meeting held on the 6th day of April, 2016.


CHRISTINE N. PAPA, Clerk/Secretary
Planning Board/Zoning Board