

**Township of South Hackensack
BOARD OF ADJUSTMENT
October 25, 2010
MINUTES**

At 7:40 p.m. the meeting was called to Order. Pursuant to the Open Public Meetings Act, adequate notice of this meeting was advertised in The Record and the Herald News and by posting a copy of the meeting notice on the bulletin board in the clerk's office where notices are customarily posted.

The Chairman led the flag salute.
The Secretary called the roll.

Member Present

Lou LoPiccolo Bill Regan
Angelo Marrella John Falato
Greg Padovano, Esq. Brian Veprek

Members Absent

James Diraimondo Luis Perdomo
Victor Santos
Jamie DiPiazza
Boswell Engineering

MINUTES:

LoPiccolo **motioned**; Regan **seconded** to approve the **Minutes** of the September 27, 2010 meetings. All in favor.

OLD BUSINESS

BOA 2010-05 - Memorialize Resolution – Dismissal of application based upon principal of res judicata.

Marianinfa Zito

77 Calicooneck Road

Block: 7.05 Lot: 29

REVISED ARCHITECTURAL DRAWINGS - New two (2) dwelling units and variances.

Veprek **Motioned**; Regan **seconded** to accept the Resolution dismissing the application (res judicata) for Zito, 77 Calicooneck Road.

Vote: 5 Yes Votes: Veprek; Regan; LoPiccolo; Falato, Marrella.

Not Qualified to Vote: Diraimondo, DiPiazza, Santos

Absent: Diraimondo, Santos; DiPiazza, Perdomo

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BOA 2010-04 - Memorialize Resolution

Dio Mas LLP

D/b/a Diosa Super Club

378 Route 46 West

Block: 1.02 Lot: 1.02

Appeal action of Zoning Officer; "D" use variance.

Veprek **Motioned**; LoPiccolo seconded to accept the Resolution denying a use variance, 77 Calicooneck Road.

Vote: 5 Yes Votes: Veprek; Regan; LoPiccolo; Falato, Marrella.

Not Qualified to Vote: Diraimondo, DiPiazza, Santos

Absent: Diraimondo, Santos; DiPiazza, Perdomo

NEW BUSINESS

BOA 2010-06 - "D" Use Variance – Live DJ

Dio Mas LLP

D/b/a Diosa Super Club

378 Route 46 West

Block: 1.02 Lot: 1.02

Applicant's public notice was not within the required 10 days prior to meeting.

Applicant to be heard on November 22, 2010 with new newspaper notification to the public with the minimum 10 days prior to meeting.

Veprek **Motioned**; Regan seconded to accept to continue application subject to the record of advertised notice, until November 11, 2010 meeting, 378 Route 46 West.

Vote: 5 Yes Votes: Veprek; Regan; LoPiccolo; Falato, Marrella.

Absent: Diraimondo, Santos; DiPiazza, Perdomo

BOA 2010-07 - "C" Variance and "D" Use Variance

Ted Weiland, Jr. Asphalt & Concrete Construction, LLC

25 Grove Street

Block: 2.01 Lot: 12.02

John Carbone, Attorney

401 Goffle Road

Ridgewood, New Jersey

Padovano advised Carbone that John Falato will be stepping down leaving only four members. Five members are required to hear a use variance.

Carbone felt that it probably would not come to the use variance. Carbone stated that property is located in the C-industrial district. The proposed use is for interior storage and office use. No exterior storage of any kind. Section of Ordinance they seek to

Appeal the Zoning Denial regarding South Hackensack Code 208-7. C, District - Industrial Zone, A. Permitted Uses. The business operation will constitute a business office and a warehousing of equipment. They seek an interpretation of the ordinance and a use variance.

Padovano swore in Michael Sylvestri, 20 Grove Street, South Hackensack, and Property Owner.

Sylvestri testified that the property, 25 Grove Street, 17,424 sq. ft, 16' ceiling indoors entrances on the side concrete slab industrial building formerly Grace China. The building has always been industrial building located in an industrial area with only one residential home on the north side. The property is located next to John Falato's building which is a commercial building. Last use of building was for food preparation

Carbone stated that property is 99' w x 107 deep.

Vepek asked how much of the side driveway belongs to the property owner and Falato?

Falato stated that he has approximately 13' and Sylvestri has 10'. The driveway is wider than on the survey because there is a fire lane.

Sylvestri stated that John and he have been using the driveway for over 25 years.

Vepek asked if the trucks could get into the back.

Sylvestri stated that they will be putting garage doors in the back of the building for the entrance for the trucks. Back along building and a truck could turn around. No outside storage of any kind.

Padovano asked if you will have to go onto the other person's property to enter the building.

Carbone stated that this is a common driveway

Padovano swore in Marie Weiland, 24 Greenish Ave, Central Valley, NY.

Weiland stated that her husband owns Weiland Construction and installs driveways, paver driveways. All equipment will be stored inside of building nothing outside. There exists an office now. It is a family owned and operated business.

Vepek asked if there will be any physical changes of building beside the garage door.

Weiland stated that it would be just the garage doors.

Meeting opened to the public

Padovano sworn in John Falato, Chestnut Avenue.

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Falato stated that there is a small utility easement. If he were to sell the building and the new owner wanted up a guard rail or fence in that drive to have that clear.

Sylvestri stated he only used the property to store trailers.

Carbone stated that Falato should refer to an attorney.

Padovano stated that we are here tonight on the interpretation on the use issue. If in fact there is no easement and someone wanted to put up a wall it is up to applicant/owner to use the property that they say they are going to use it. With no outside storage. They are proposing no outside storage and they are stating to the board because of that this should fall into one of the permitted categories of the C zone.

Close meeting to the public

Carbone remarked that the initial denial by DeRiso, the Zoning Officer was appropriate on what Mr. Wieland. Because of the accident Mr. Wieland is not sometimes clear. Ray did nothing wrong. I just wanted to explain that my good friend Ray did nothing wrong.

Veprek questioned to the hours of operation.

Weiland stated 7 AM TO 6:30, closed from Christmas until April.

Padovano stated that at this point they are looking for an interpretation or appeal of DeRiso's denial stating they are actually proposing and with testimony actually comply with the requirements of the permitted C Zone. And that no variance will be necessary for a use.

Padovano swore in Ray DeRiso, Zoning Officer of South Hackensack.

DeRiso stated that when he got the application he spoke to Greg about it. There was no use we saw that was actually a permitted use. But the way the client is presenting it if the board agrees that it should be under the permitted use. My denial was based upon that I did not see a permitted use for it.

Motion that the use be permitted and the current zoning ordinance that the storage will be inside with the two garage doors installed to the rear of the building and maintaining the same structure of the building the way it is only changing the two rear garage doors subject to the Building Department. All vehicles to be stored inside the building. No material outside of building.

Veprek Motioned; LoPiccolo seconded to accept the application for 25 Grove Street;
Vote: 5 Yes Votes: Veprek; Regan; LoPiccolo; Marrella. **Abstain:** Falato
Absent: Diraimondo, Santos; DiPiazza, Perdomo

Carbone: withdraw the application for the "D" variance.

Meeting Open to the Public

Maria Vito owner of 77 Calicooneck Road

She has appeared before the board previously for a variance regarding the square footage of the house. She would like the board to give her an exact percentage allowed for building variance.

Padovano stated the board can only hear applications that come before them. The board has to look at every application that comes before them and weight the evidence before they could make a determination. The board cannot render a decision unless it has an application before them or cannot give an opinion when it does not have an applicaton before it. He advised that the board could not answer for legal issue.

Meeting closed to the public

BOARD DISCUSSION

DeRiso indicated that in the packet was some information about Teggiano Restaurant. I gave that information because the attorney had indicated that he would be coming to the board for another interpretation.

Padovano stated that he did receive a letter directly to his office from the architect requesting an appeal. Obviously they are not here; they may be here next time. This is a split lot property and portion of that property is actually in the B Zone, portion in the C Zone and it abuts the A Zone. They are seeking to use the property for a convenience store type of use and the zoning officer issued a denial which was based upon a couple of things. Portion of it is in the C Zone which does not permit any kind of retail or sales as proposed. The zoning officer interpretation's is that the B Zone does permit sales it does not necessarily mean the proposed retail sales here fall into the category of the permitted retail sales use.

DeRiso stated that he drew a distinctive between a convenience store and retail sales. I believe that that a convenience store is not exactly retail sales it is little more intense than retail sales, because you have the food prep, food sales. The applicant might be here for the public portion of the meeting and just wanted to give the Board a heads up

Padovano stated that the C zone issue is clear. What may happen here is the property owner may subdivide because it is a very tiny piece of the property that falls into the C Zone.

Falato stated that in review of last application on Grove Street if these trailers start parking equipment outside what is going to happen then.

Padovano said it is a zoning enforcement because outside storage is not permitted.

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LoPiccolo stated that nothing is to be stored outside, no trucks, materials, etc.
Falato stated that there is a small 2 foot utility easement that runs through that has not
been grandfathered.

At 8:30 p.m. the meeting was **adjourned**. Veprek **motioned** to adjourn the meeting;
second by LoPiccolo. All in favor.

Respectfully Submitted,



Lydia Heinzelman
Planning/Zoning Board Secretary

October 25, 2010

RESOLUTION

**TOWNSHIP OF SOUTH HACKENSACK
ZONING BOARD OF ADJUSTMENT**

**APPLICATION OF MARIANINFA ZITO
77 Calicooneck Road
Block 7.05, Lot 29**

Application No. 2010-05

WHEREAS, Marianinfa Zito (hereinafter referred to as the "Applicant"), 27 Paroubek Street, Little Ferry, New Jersey, applied to the Township of South Hackensack Zoning Board of Adjustment (the "Board") for variances in connection with the proposed construction of a two family dwelling with detached garage, as further described herein; and; and

WHEREAS, the property subject of the application is identified on the Tax Map of the Township of South Hackensack as Block 7.05, Lot 29 and is more commonly known as 77 Calicooneck Road, Hackensack, New Jersey (hereinafter the "Property"); and

WHEREAS, the Property is located in the A One and Two Family Residential Zone; and

WHEREAS, the Property is comprised of 15,190 s.f. and is currently vacant or unimproved; and

WHEREAS, the Applicant sought a variance from the maximum permitted gross building area of the building and maximum driveway width permitted under the Township Zoning Ordinance. Specifically, the Applicant sought a variance to permit construction of a two family dwelling with a total of 4,587 s.f. where a maximum of 3,750 is permitted. The Applicant also sought a variance to permit a driveway width of 31 feet where a maximum of 40% of the width of the lot or 24.8 feet for the Property is permitted; and

WHEREAS, the Applicant submitted architectural renderings prepared by V.C.A. Group, Vassilio Cocoros, AIA, 467 Sylvan Avenue, Englewood Cliffs, New Jersey, dated February 12, 2009 with last revision date of September 8, 2010 as part of the application; and

WHEREAS, after due notice and publication, the matter was called for a public hearing on September 27, 2010 at which time the Applicant was represented by Matthew P. DeMaria, Esqs., 550 Boulevard, Elmwood Park, New Jersey; and

WHEREAS, Vassilio Cocoros, 467 Sylvan Avenue, Englewood Cliffs, New Jersey, testified as an expert in the field of architecture on behalf of the Applicant; and

WHEREAS, Ray DeRiso, South Hackensack Zoning Office, testified during the public hearing regarding this matter; and

WHEREAS, the Board made a physical inspection of the Property during such times as the Board members may have indicated; and

WHEREAS, the Board has carefully considered the exhibits introduced into evidence and the testimony of the Applicant; and

WHEREAS, the current application represents a second application by the same Applicant concerning the same Property; and.

WHEREAS, it is necessary for the Board to determine as a threshold or jurisdictional issue whether to even consider the current application and determine whether the application, on the merits, is precluded by the application of the doctrine of res judicata; and

WHEREAS, the Board has carefully reviewed the issue of res judicata as applied to this second application. In reviewing whether res judicata will bar the Board's ability to hear the application, the Board carefully considered the following five factors:

1. Whether the second application is substantially similar to the Prior Application;

2. Whether the same applicants or parties are involved in both the current application and Prior Application;
3. Whether there is a substantial change in the current application from the Prior Application itself or conditions surrounding the subject Property;
4. Whether there has been an adjudication on the merits in the Prior Application; and
5. Whether both the current application and Prior Application involve the same cause of action; and

WHEREAS, the Board takes notice that the New Jersey Supreme Court in Russell v. Tenafly Board of Adjustment, 31 N.J. 58 (1959) held that where the same property owner and the same parcel of property are involved in a subsequent application, the matter is not barred on the grounds of res judicata unless the second application is shown to be “substantially similar to the first, both as to the application itself and the circumstances of the property involved.” Russell, 31 N.J. at 65 (citation omitted) (emphasis supplied). The Court in Russell went on to hold that “[t]he question for the [Board] on a second application for a variance concerning the same property, is whether there has occurred a sufficient change in the application itself or the conditions surrounding the property to warrant entertainment of the application.” Russell, 31 N.J. at 66. (Citations omitted); and

WHEREAS, the Board also notes that the New Jersey Supreme Court's decision in Gruber v. Mayor and Township Committee of Rarriton Township, 39 N.J. 1, 12 (1962), held that although a subsequent application may be similar to the previous one, surrounding circumstances may have changed such that the prior denial would be an error. The Court also held that a zoning board possesses the discretion of whether to reject an application on the ground of res judicata and that exercise of discretion may not be overturned on appeal absence the showing of “unreasonableness.” Id.; and

WHEREAS, the Board notes that the New Jersey courts have held that res judicata does not bar the making of a new application for a variance or for modification or enlargement of one already granted or for lifting of conditions previously imposed in the connection with the grant of a variance, upon “a proper showing of a change of circumstance or other good cause warranting a reconsideration by the local authorities. . . . to hold differently would offend public policy by countenancing restraint upon the future exercise of municipal action in the absence of sound reason for such restraint.” [Springsteel v. Town of West Orange, 149 N.J. Super. 107, 113 (App. Div. 1977), cert. denied, 75 N.J. 10 (1977) (emphasis added)]

WHEREAS, the Applicant previously applied to the Board for a variance to construct a two-family home on the Property, after several amendments to the application, and sought variance approval to permit 4,587 gross square feet of the structure and after several amendments to the application a variance to permit a driveway width of 31.67 feet; and

WHEREAS, the Board has carefully reviewed the issue of res judicata as applied to this current application. In reviewing whether res judicata should prevent the Board from hearing the current application, the Board carefully considered whether the current application is substantially similar to the Prior Application denied by the Board and hereby makes the following findings with regard to the issue of res judicata; and

A. Marianinfa Zito submitted the current application to the Board and certified that she is the owner of the Property commonly known as 77 Calicooneck Road, South Hackensack, New Jersey which Property is also identified as Block 7.05, Lot 29 on the current Tax Map of the Township of South Hackensack. The Property is located within the A One and Two Family Residential Zone.

B. The Property is comprised of 15,190 square feet and is 62 feet wide and 245 feet deep. The existing Property is vacant and unimproved.

C. The Applicant testified that she proposed to construct a two family dwelling on the Property with detached garage located in the rear portion of the Property. The Applicant testified that she intended to occupy the primary dwelling unit on the Property.

D. The Applicant initially sought two variances as part of the current application including variance for maximum gross building area and a variance to exceed the maximum permitted driveway width, as follows:

SOUTH HACKENSACK ORDINANCE PROVISION	PROPOSED	PERMITTED UNDER ZONING ORDINANCE
Maximum Gross Area of Entire Dwelling	4,487 s.f.	3,750 s.f.
Maximum Driveway Width	31 ft.	40% of lot width (24.8 ft. for subject Property)

E. No member of the public or interested party appeared or spoke regarding the issue of res judicata.

F. The Applicant previously sought variance approval from this Board under Application No. 2010-01. Under that Prior Application the Applicant initially sought several variances in connection with the development of the Property. However, during the public hearings, the Applicant amended the application several times and ultimately sought two variances under the Prior Application. Specifically, the Applicant sought a variance to permit the a total gross building area of 4,587 s.f. and a driveway width of 31.67 s.f. under the amended Prior Application.

G. During the public hearing, the Applicant's witness testified that the calculation of the proposed building's total gross area as shown on the plans submitted to the Board included 119 +/- s.f. of open space on the second floor above the front foyer of the primary residence portion of the dwelling. The witness further testified that this open area above the first floor foyer should not be included in the gross area and that, based upon that

assumption, the Applicant was actually seeking a variance to permit a total building gross area of 4,367 +/-s.f. where a maximum of 3,750 s.f. is permitted under the current Township Zoning Ordinance.

H. The following is a comparison of the variance sought under the current application and Prior Application:

SOUTH HACKENSACK ORDINANCE PROVISION	PROPOSED (Prior Application)	PROPOSED (Current Application Based upon witness' testimony)	Difference
Maximum Gross Area of Entire Dwelling	4,587 s.f.	4,387 s.f.	(200 s.f.)
Maximum Driveway Width	31.67 ft.	31 ft.	(0.67 ft.)

I. The Board makes the following findings regarding the issue of res judicata:

- (1) The current application is substantially similar to the Prior Application submitted under Application No. 2010-01 in that the current application involves the same Applicant, same piece of parcel of property and same proposal of development.

Specifically, the Applicant under the current application is seeking the same two variances as under the Prior Application. The Applicant is seeking a variance from the total building gross area which, under the Zoning Ordinance permits a maximum of 3,750 s.f. and the Applicant is also seeking a variance for driveway width, as was denied by the Board under the Prior Application with very limited changes to each variance.

In fact, based upon the testimony from the Applicant's witness, the Applicant is merely seeking 119 +/- s.f. less of gross building area than was sought under the Prior Application. The Applicant is also seeking approximately 0.67 +/- feet of less of driveway width than was denied under the Prior Application.

- (2) Marianinfa Zito was the applicant under the Prior Application and is the Applicant under the current application.
- (3) There has been no substantial change in the application itself or the conditions surrounding the Property. The prior application was denied by the Board on September 27, 2010, the same day in which the Applicant appeared for a public hearing on the current application.

There has been no change in the zoning of the Township which would impact this Property any differently which was the case under the Prior Application.

There has been no changes in the development of the surrounding neighborhood or surrounding area since the Prior Application was adjudicated.
- (4) The Prior Application was heard by this Board during the course of three public hearings and a formal decision was rendered by this Board on August 23, 2010, which decision of the Board was memorialized by a written resolution adopted by the Board on September 27, 2010.
- (5) Based on the factual facts identified within this Resolution, it is clear that both the Prior Application and current application involve the same cause of action, bulk variances pursuant to N.J.S.A. 40:55D-70(c).

J. Clearly, the current application involves the same property owner/applicant and variances. The Applicant has merely proposed a de minimus charge in the current application as compared to the Prior Application denied by the Board. The proposed driveway width under the current application represents a total reduction of 0.67 ft. from the Prior Application. The proposed gross building area, even considering the Applicant's witnesses testimony regarding the second floor open foyer space, represents a total of 220 +/- s.f. reduction of gross building area from the Prior Application.

K. The current Applicant and Prior Application are substantially similar. In fact, the Board determines, based upon its review of the Application, the testimony of the witnesses, argument of counsel and Board's knowledge of the Prior Application and Resolution

of the Board dated September 27, 2010 memorializing the Board's denial of the Prior Application, that the current application is, for practical purposes, the same application, the current application is barred by the principle of res judicata.

L. Based upon the facts presented under the current application, the Board finds that the Applicant is seeking the same relief under the same factual setting, there has not been any change in zoning or surrounding circumstances impacting the Property since a decision was rendered in the Prior Application. Therefore, the current application must be dismissed based upon the principle of res judicata.

M. The Board, having made the determination that the current application is based on the grounds of res judicata, need not proceed further to hear additional testimony from the Applicant or her witnesses regarding the current application.

N. The Board further relies upon and incorporate the findings and conclusions noted within the Resolution of the Board in application 2010-1 which memorializes the denial of the Prior Application.

NOW THEREFORE, BE IT RESOLVED that the current Application of Marianinfa Zito under Calendar 2010-5 which seeks variance approval to permit excess gross building area of a two family dwelling of 4,367 s.f. and excess driveway width of 31 ft., as shown on the plans submitted to the Board, as amended, and as testified by Applicant and witness during the public hearing, be and the same hereby is dismissed based upon the doctrine of res judicata.

1. **Legal and Engineering Fees:** The Applicant shall be responsible for all legal and engineering fees of the Zoning Board of Adjustment.

2. **Other Fees:** All additional fees, if any, required by the Township Ordinances shall be paid.

3. **Appeal Period:** The Applicant has been advised that there is an appeal period for the relief denied herein for a period of forty-five (45) days from the date of publication of notice of the relief granted pursuant to this Resolution in a newspaper of general circulation approved by the Zoning Board of Adjustment and/or Governing Body of the Township of South Hackensack.

A motion to dismiss the application, based upon the principal of res judicata for the reasons set forth herein, was proposed by the following vote at the meeting prior to adoption of the memorializing Resolution:

Moved by: Lou LoPiccolo
 Seconded by: Brian Veprek

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson	X				
James Diramondo				X	
John Falato	X				
Jamie DiPiazza				X	
Lou LoPiccolo	X				
Luis Perdomo	X				
Victor Santos, Alt. #1				X	
Michangelo Marrella, Alt. #2	X				

Dated: September 27, 2010

Said Resolution was memorialized at the meeting after the Resolution was adopted (as set forth above), by the following vote:

Moved by: *Veprek*
 Seconded by: *Regan*

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson	X				
James Diramondo X					X
John Falato	X				
Jamie DiPiazza X					X
Lou LoPiccolo	X				
Luis Perdomo				X	
Victor Santos, Alt. #1 X					X
Michangelo Marrella, Alt. #2	X				

Dated: October 25, 2010

SOUTH HACKENSACK ZONING BOARD

By: *Brian B Veprek*
 Brian Veprek, Chairperson

CERTIFIED TO BE A TRUE COPY

By: *Lydia Heinzelman*
 Lydia Heinzelman
 Secretary to the Zoning Board of Adjustment

The newspapers of **New Jersey** make public notices from their printed pages available electronically in a single database for the benefit of the public. This enhances the legislative intent of public notice - keeping a free and independent public informed about activities of their government and business activities that may affect them. Importantly, Public Notices now are in one place on the web (www.PublicNoticeAds.com), not scattered among thousands of government web pages.

County: Bergen

Printed In: The Record, Hackensack

Printed On: 2010/10/28

**SOUTH HACKENSACK BOARD OF ADJUSTMENT
PUBLIC NOTICE**

NOTICE is hereby given that the Board of Adjustment of the Township of South Hackensack, by resolution duly adopted on October 25, 2010 for reasons set forth in its resolution of that date, dismissal of the application for variances; premises owned by Marianinfa Zito and designated as Block 7.05 and Lot 29 and more commonly known as 77 Calicooneck Road, South Hackensack, New Jersey, for variances in connection with the proposed construction of a two family dwelling and a detached garage. A copy of that resolution is on file in the office of the Township Clerk, 227 Phillips Avenue, South Hackensack, New Jersey, and is available for inspection by member of the public during the regular business hours of that office.

Lydia Heinzelman

Board of Adjustment Secretary

Oct 28, 2010-fee:\$23.63 (25) 2961891

Public Notice ID:

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RESOLUTION

**TOWNSHIP OF SOUTH HACKENSACK
ZONING BOARD OF ADJUSTMENT**

APPLICATION OF DIO MAS LLP, d/b/a DIOS SUPER CLUB

APPLICATION NO. 2010-04

WHEREAS, Dio Mas, LLP d/b/a Diosa Super Club, 115 Union Avenue, Little Ferry, New Jersey (hereinafter the "Applicant"), appealed a decision of the South Hackensack Zoning Officer to the Zoning Board of Adjustment of the Township of South Hackensack (the "Board") pursuant to N.J.S.A. 40:55D-70(a) and simultaneously applied for a use variance pursuant to N.J.S.A. 40:55D-70(d) to permit use of the subject property for disc jockey entertainment and patron dancing, as further described herein; and

WHEREAS, the property subject of the application is designated on the Tax Map of the Township of South Hackensack as Block 1.02, Lot 1.02 and is more commonly known as 378 Route 46 West, South Hackensack, New Jersey (the "Property"); and

WHEREAS, the Property is owned by Mr. Ramesh Thota, 370 Route 46 West, South Hackensack, New Jersey, who has consented to the application; and

WHEREAS, the Property is comprised of 77,536.8 s.f. (1.78 acres) and is located within the M-Mixed Use Zone; and

WHEREAS, the Property is currently improved with a motel use comprised of 3 two story detached buildings, a single detached building used as an office accessory to the motel use

and accessory motel inground swimming pool with on-site parking. The Property is also improved with a detached single story building which the Applicant proposes to utilize pursuant to this application. The existing motel use and its accessory uses are not part of the subject application and are not proposed to be utilized by the Applicant in connection with the proposed use; and

WHEREAS, Mr. Angelo Karlos, 115 Union Avenue, Little Ferry, New Jersey, was sworn in as a fact-witness on behalf of the Applicant; and

WHEREAS, Mr. Ray DeRiso, Zoning Officer for the Township of South Hackensack testified regarding the matter during the public hearing; and

WHEREAS, the Applicant filed an appeal of the decision of the Administrative Officer/Zoning Officer of the Township of South Hackensack in accordance with N.J.S.A. 40:55D-70(a) challenging the rescinding of Zoning Permit Z10-042 issued to the Applicant on May 27, 2010; and

WHEREAS, the Applicant sought to utilize a disc jockey ("D.J.") for "dancing and dinner accompaniment" on the Property; and

WHEREAS, the Property was subject of use variance approval recently granted by the Board under Application 2009-2010 on February 22, 2010, which approval was memorialized by resolution of the Board dated March 22, 2010 (hereafter the "Prior Approval"), a copy of which is attached hereto as Exhibit "A"; and

WHEREAS, after due notice and publication, the matter was called for a public hearing on August 23, 2010 at which time the Applicant was represented by Francis L. Miglorino, Esq., 384 Liberty Street, Little Ferry, New Jersey; and

WHEREAS, the Board made a physical inspection of the Property at such times as the Board members have indicated; and

WHEREAS, Mr. DeRiso submitted an exhibit marked as "ZO-1, 8/23/10" consisting of approximately 26 pages as part of his testimony during the public hearing; and

WHEREAS, the Board has carefully considered the exhibits introduced into evidence, the testimony of the witnesses, the prior approval, testimony of the South Hackensack Building / Zoning Code Enforcement Officer; and

WHEREAS, the South Hackensack Zoning Board of Adjustment hereby makes the following findings of fact with regard to the application.

A. Dio Mas, d/b/a Diosa Super Club, is the tenant of a portion of Property commonly known as 378 Route 46 West, South Hackensack, New Jersey, which Property is also identified as Block 1.02, Lot 1.02 on the Tax Map of the Township of South Hackensack. The Property is located entirely within the M-Mixed Use Zone.

B. The Property is owned by Mr. Ramesh Thota, 370 Route 46 West, South Hackensack, New Jersey, who has consented to the application.

C. The Property is comprised of 77,536 square feet (1.78 acres) and is currently improved with four freestanding buildings which are utilized as a motel and accessory motel office with accessory swimming pool uses and a fifth detached building the Applicant's proposes to utilize. The Property also maintains approximately 134 total on-site parking spaces.

D. The subject building was previously utilized as a gentlemen's club/strip club by an unrelated entity, a use prohibited under the current zoning ordinance. The Property was recently the subject of a use variance application filed during 2009 and heard and approved by the Board on February 22, 2010 under application number 2009-10 (the "Prior Approval"). The

Board's approval permitted restaurant use of the Property with limited accessory live entertainment use, as further identified within the Board's resolution memorializing the Prior Approval, which resolution is dated March 22, 2010 and is attached hereto as Exhibit "A".

E. The Applicant, with counsel, previously appeared before the Board on July 26, 2010 during an informal hearing as part of the public session. Albeit not appearing under oath, the witness, Angelo Karlos, and counsel indicated that he was proposing a "dance club" where the primary use would be D.J. with dancing.

F. In the matter now before the Board, the witness testified that the Applicant is proposing to utilize the relevant portion of the Property for a D.J. with dancing use along with restaurant use. The Applicant, however, admitted during the public hearing that a D.J. and dancing use would continue when the kitchen/restaurant use is not operating on the Property.

G. The Applicant did not address how, if at all, on-site parking would be impacted under the proposed use. The Board spent a considerable amount of time under the Prior Approval, (see Exhibit "A") discussing on-site parking, which is limited, due to the mixed use of the Property and the existing buildings and configuration of the Property.

H. The South Hackensack Zoning Officer, Ray DeRiso, presented an exhibit during the public hearing, which was marked as "ZO-1, 8/23/10" and which consists of 26 pages including the following documents:

- Newspaper advertisement placed by Applicant of Township of South Hackensack, Zoning Board of Adjustment, Meeting 8/23/2010 @ 7:30 noticing the hearing of Diosa Restaurant.
- Letter dated 7/29/10, from DeRiso (Zoning Officer), Letter of Denial and rescinding of Zoning Permit Z10-042.

- Portion of chapter 10 from treatise by William M. Cox, New Jersey Zoning and Land Use Administration (GANN) regarding Accessory Structures and Uses, Page 241, 10-1 Nature of Accessory Uses and Structures.
- Code of The Township of South Hackensack, Page 208:27, 208-8 M District – Mixed Use Zone, A-3.
- Code of The Township of South Hackensack, Page 208:28.
- Code of The Township of South Hackensack, Page 208:29.
- Code of The Township of South Hackensack, Page 208:30.
- Letter dated 8/11/2010, Frank Migliorino, Esq. appealing to the Zoning Board of Adjustment.
- Copy of a brochure/flyer for Grand Opening of Diosa at the Property.
- Copy of approved minutes of the July 26, 2010 meeting of the South Hackensack Township Zoning Board of Adjustment.
- Copy of Zoning Permit, dated 5/27/10 Approval of Restaurant Use.
- Copy of Resolution for GM 360, LLC, Application No. 2009-10, dated March 22, 2010.

I. Mr. DeRiso provided testimony as to the basis of his issuance of a letter dated July 29, 2010 rescinding Zoning Permit No. Z10-042 previously issued to Applicant on May 27, 2010. A copy of Mr. DeRiso's July 29, 2010 letter is attached hereto as Exhibit "B".

J. The witness testified that although there typically is a fee cover charge to enter the subject Property there could be a procedure to waive any cover charge.

K. Mr. DeRiso provided testimony that it was his interpretation that the Applicant was proposing to operate a "dance club" in which the primary use at the location would be dancing and D.J. use with accessory or ancillary restaurant use.

L. Mr. DeRiso testified that he rescinded zoning permit Z10-042 based upon his determination that the Applicant, although initially indicating it would comply with the zoning ordinance and/or conditions of the Prior Approval, the Applicant was, in fact, not proposing to utilize the subject Property in accordance with the Prior Approval and was not proposing to utilize the Property in accordance with the permitted uses of the M Zone.

M. By the witness' own admission during the public hearing, it was revealed that dancing in connection with the D.J. use and would be the primary use of the Property and not necessarily the restaurant use of the Property and that he was expanding the prior use variance granted under the Prior Approval.

N. The Applicant, through counsel, argued that a dance club, as proposed by the Applicant, are not specifically prohibited from the M Zone and that a food establishment that allows dancing "is the same as a dance establishment that provides food and should be considered accordingly."

O. Section 208-8 of the Township of South Hackensack Zoning Ordinance enumerates the permitted uses in the M Zone as follows:

- a. Permitted uses. No building or premises shall be used and no building or part of a building shall be erected, constructed or altered which shall be arranged, intended or designed to be used for any purpose other than the following uses:
 - (1) Hotels.
 - (2) Professional Business and Government Offices, banks, savings and loans, mortgage offices, brokerage houses or other investment-related offices and post offices.
 - (3) Eating and drinking places, including fast-food restaurants.

- (4) Public utilities within right-of-way or other easements granted therefore together with the necessary connections thereto, pursuant to and to the extent permitted by grants or franchises of the Township.
- (5) Digital data communication radio units no larger than two cubic feet in size, excluding the electric line and any attached antenna, each of which having an antenna no longer than 3 feet, installed upon an existing utility pole at a point therein no closer than 20 feet to the ground and which such radio unit shall be no closer to any other radio unit in this zoning district within 1,000 feet to any other such radio unit.
- (6) Retail sale of goods and services except as prohibited herein.
- (7) Offices for commercial, financial or executive purposes.
- (8) Barbershops, beauty parlors and similar services establishments.
- (9) Stores, shops, department stores and other similar uses for retail merchandising.
- (10) Printing and publishing.

P. Section 208-8(C) of the Township Zoning Ordinance provides for the prohibited uses within the M District as follows:

- (1) Go-go lounge, which is an establishment or premises wherein a scantily-clad person or persons are permitted to dance or otherwise move and perform in a suggestive manner.

- (2) Any "cabaret" or "nightclub" which, for the purposes hereof, is defined as a commercial establishment open to the public providing food and/or drink which also provides entertainment in the form of dancing by live performers other than the patrons thereof.
- (3) Any sexually oriented adult entertainment as the same is defined in Section 208-1 of this chapter as a principal use or as an accessory to any permitted use that is open to the public.
- (4) Massage parlors.
- (5) Used or new car dealerships.
- (6) Entertainment or amusement establishments.
- (7) Gasoline service stations.
- (8) Pool rooms, billiard rooms or parlors.

Q. Exhibit ZO-1 provided by Mr. DeRiso during the public hearing included a brochure for the grand opening of the Applicant's business at the Property. A copy of the brochure is attached hereto as Exhibit "C". The Board determines that the use proposed in the brochure indicates that the primary use of the Property would be D.J. and dancing.

R. Mr. DeRiso testified that the zoning permit previously issued to the Applicant, a copy of which is attached hereto as Exhibit "D", was issued with a specific condition that the Applicant operate in accordance with the Prior Approval granted by the Zoning Board of Adjustment on February 22, 2010 or in accordance with the uses permitted in the M-Zone.

S. The witness' testimony clearly revealed that the use proposed is substantially different from that previously approved from the Board of Prior Approval in that the proposed primary use of the Property is not restaurant use (a permitted use), but rather will be D.J. with dancing use.

T. Section 208-8(C)(2) of the Zoning Ordinance specifically prohibits:

[a]ny “cabaret” or “nightclub” which, for purposes hereof, is defined as a commercial establishment open to the public providing food and/or drink which also provides entertainment in the form of dancing by live performers other than patrons thereof.

Based upon the language of Section 208-8(C)(2) of the Ordinance, the Applicant argued that “dancing”, as a primary use, is a *permitted* use in the M Zone, so long as it is done by patrons of the establishment.

U. The Board is familiar with Section 208-8(C)(2) of the Zoning Ordinance. In fact, the language of this particular provision of the Ordinance appears in several other sections of the Township Code. The Board finds that mere reference to a prohibited cabaret or nightclub use does not acknowledge that dancing as a *primary* use is permitted simply because the dancers are presumed to be patrons of the dance club establishment. The Board acknowledges that the likely intent of the specific prohibition language of this ordinance against cabarets or nightclubs is to limit or eliminate strip clubs where persons who are not necessarily patrons but are rather employees and dance at a facility where patrons attend to observe the dancer such as a “strip club.”

However, the Board notes that although the Applicant is not proposing a strip club, the proposed D.J. and patron dancing use is a “dance club” and such use is not permitted in the M-Zone as a primary use. Furthermore, the Board finds that the prohibition of cabaret and nightclub uses under Section 208-8C(2) does not mean that a D.J. with patron dancing or dance clubs uses are permitted as a primary use.

Based upon the application/appeal, exhibits submitted to the Board and the testimony of the witnesses, it is clear that the Applicant is proposing a primary dance club use and is merely maintaining accessory restaurant use under this application.

V. The Board recognizes, based upon the witness' testimony and the testimony given under the Prior Approval, that D.J. type uses generate large parking demands and will result in late night utilization of the Property. The volume of patrons and parking demand does not necessarily occur when dancing is permitted as an accessory use to a restaurant use since patrons typically travel in less vehicles for restaurant use and a restaurant use by its nature utilizes tables which account for floor space where with an open floor dance club, more patrons can physically fit within the building, as was evidenced under Prior Approval.

Under the Prior Approval, the Board was provided testimony and evidence that a valet service would be utilized in connection with the previously approved restaurant use so that patron's can be efficiently parked on and off-site due to existing condition of the Property which limit on-site parking. The Applicant did not provide any testimony regarding parking or valet service under this application.

W. The Applicant did not provide any site plan of the parking area or architectural renderings of the interior of the building subject of the application as part of the application.

X. The Applicant did not provide any expert testimony or reports by way of professional architect, planner, engineer, traffic consultant, etc. and merely relied upon the factual testimony of the single witness, Angelo Karlos, who is the operator of the proposed business.

Y. The witness did not provide testimony regarding proposed hours of operation, number of employees or parking/traffic uses.

Z. With regard to the Applicant's appeal of the decision of the Zoning Officer pursuant to N.J.S.A. 40:55D-70(a), the Board has determined that the actions of the Zoning Officer, as memorialized in his July 29, 2010 letter (a copy of which is attached hereto as Exhibit "B") were proper and are hereby affirmed.

A motion was made by the following vote to uphold or affirm the determination of the Township Zoning Officer in accordance with his letter dated July 29, 2010 (a copy of which is attached hereto as Exhibit "B".)

Moved by: Lou LoPiccolo
 Seconded by: Brian Veprek

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson	X				
James Diramondo				X	
John Falato	X				
Jamie DiPiazza	X				
Lou LoPiccolo	X				
Luis Perdomo	X				
Victor Santos, Alt. #1				X	
Michangelo Marrella, Alt. #2	X				

Dated: August 23, 2010

WHEREAS, subsequent to the Board's vote regarding the appeal of the Zoning Officer's determination as reflected in the July 29, 2010 letter attached hereto as Exhibit "B" pursuant to N.J.S.A. 40:55D-70(a), the Applicant provided limited additional testimony from the fact witness and did not seek to produce any expert testimony. The applicant sought a vote regarding the alternative application for use variance approval pursuant to N.J.S.A. 40:55D-70(d) based upon the testimony provided by the single fact witness; and

WHEREAS, with regard to the application for use variance approval to permit a dance club with patron dancing along with accessory restaurant use as described by the Applicant's witness, the Board adopts the findings previously noted herein and continues with additional findings as follows:

AA. The Applicant has failed to supply any testimony regarding the proposed use in connection with the permitted uses in the M District. The Applicant's failure to provide any expert or factual testimony regarding the proposed use and its impact upon the Property, the traffic and parking in the area and on the Property, its impact upon other uses in the surrounding M District and the Master Plan and Zoning Ordinances of the Township of South Hackensack leaves the Board with the sole conclusion that the Applicant has not provided sufficient evidence to satisfy the burden of proof required to permit granting of a variance pursuant to N.J.S.A. 40:55D-70(d).

BB. The Board is familiar with and has considered the Supreme Court's holding set forth in Sica v. Board of Adjustment of Township of Wall, 127 N.J. 152 (1992) regarding the "special reasons" required for granting use variances pursuant to N.J.S.A. 40:55D-70(d) when it made its findings of fact and reached its conclusions.

CC. The Board acknowledges that the dance club use, as proposed, is not “inherently beneficial” and thus there must be a finding of evidence substantiating that the general welfare is promoted because the proposed uses, “particularly suited” to the location. Stop & Shop Supermarket Co. v. Board of Adjustment of Tp. of Springfield, 162 N.J. 418 (2000).

DD. The Applicant has not satisfied its burden of proof with respect to both positive criteria and negative criteria with regard to dance club use with D.J. use as required pursuant to the Municipal Land Use Law and relevant case law.

EE. The Applicant has not provided any testimony regarding the proposed use’s impact upon parking and the traffic/parking demands of the Property and surrounding area and failed to provide any testimony regarding how, if at all, the current parking plan permitted under the Prior Approval would be maintained or impacted under the current application.

FF. The application is detrimental to the public and will have a detrimental effect on the surrounding neighborhood, existing traffic conditions or characteristics of the surrounding area. There has been no testimony regarding the proposed uses impact upon the goals and recommendations of the Master Plan or the Township Zoning Ordinance.

GG. The Applicant did not provide any testimony regarding whether the Property is particularly suited for a D.J. with dancing or dance club use as proposed.

HH. The Applicant did not present any testimony regarding the proposed use and its relationship to the South Hackensack Master Plan. It is not the function of the Board, nor is it within its authority, to arrogate the zoning power from the governing body that has not chosen to permit dance clubs where the primary use of the Property is for D.J. with dancing use on the Property.

II. The Applicant has not shown and has not put forth sufficient evidence before the Board to show that the proposed use (which significantly deviates from use permitted under the Prior Approval as memorialized by Resolution attached as Exhibit "A"), can be granted without detriment to the Zone Plan or Zone Ordinances of the Township of South Hackensack or surrounding properties, which exist in conformance with the applicable use standards of the M-Zone.

JJ. The Applicant did not provide sufficient proof regarding the advancement of the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. and did not provide evidence that any benefit which would substantially outweigh the detriment of the proposed use. In fact, the Applicant's request for variance cannot be granted without substantial detriment to the Master Plan and Zoning Ordinances of the Township of South Hackensack.

KK. The Board finds that the Applicant has failed to meet the required demonstration by "an enhanced quality of proof" that variances for the proposed use are not inconsistent with the intent and purposes of the Master Plan and Zoning Ordinances as required by Medici v. BPR Co., 107 N.J. 1 (1987) to support the approval of the instant application. The testimony provided by the fact witness did not adequately address how the proposed use is particularly suited for the Property and how its impact upon the surround area would be a benefit not outweighed by the detriment of increased potential parking and traffic impact or residual impact or a dance club.

LL. The Board finds that, based upon the testimony of the Applicant's fact witness and review of the exhibits and application, the testimony of the Township Zoning Officer, the Applicant has failed to meet the required demonstration that variance for the proposed use is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinance in accordance with Sica, supra, to support the approval of the instant application. The Board finds that, based

upon the testimony of the Applicant and in light of the above findings, the Applicant has failed to meet the required demonstration that the proposed three family use is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinances or that there was an irrefutable presumption that the site suitability as required by Sica, supra, and its progeny to support the approval of the instant application.

MM. The Board finds that based upon the testimony of the Applicant's witness and testimony of the South Hackensack Zoning Officer and in light of the above findings, the Applicant has failed to satisfy the negative criteria as required by Sica, supra, to support the approval of the instant application and the application cannot be granted without creating a substantial detriment to the public good where the proposed use is not permitted under the Zoning Ordinance.

NN. The Board finds, based upon the testimony of the Applicant's witness and in light of the above findings, that the Applicant has not met the requisite demonstration that the use variance is not inconsistent with the intent and purpose of the Master Plan and Zoning Ordinances as required by Kaufman v. Planning Board for the Township of Warren, 110 N.J. 551 (1988) to support the approval of the instant application. The testimony of the Applicant did not demonstrate that the goals enumerated under the Master Plan would be satisfied or addressed under the application.

OO. The Applicant has not met its burden to prove the existence of "special reasons" for the proposed use. The proposed use, in its location, does not benefit the general public welfare and does not adequately promote any proposal of zoning under N.J.S.A. 40:55D-2 to justify granting of the use variance sought.

PP. The Board finds that the application cannot be granted without causing substantial detriment to the public good and that the proposed use will substantially impair the intent and purposes of the Master Plan and Zoning Ordinances that have designated the subject Property and surrounding parcels to be within the M-Zone by creating an increase in traffic and on site parking demand and exceeding the scope of uses specifically permitted in this Zone.

QQ. No members of the public appeared or spoke regarding this Application.

RR. The Board incorporates by reference, all transcripts, minutes, exhibits, reports and other documents submitted and/or referred to by the Board into this Resolution.

NOW THEREFORE, BE IT RESOLVED the Application of Dio Mas, LLP, d/b/a Diosa Super Club for a use variance to permit D.J. use with dancing be and the same is hereby denied.

1. **Reliance by Board on Testimony and Application:** The application is denied based upon the testimony of the Applicant's witness, the exhibits, the application, and any amendments to same, submitted to the Board as well as the testimony of the Board's expert and fact witness, and review memorandum and letters, all of which have been relied upon by the Board in making its determination as further identified within this Resolution. The Applicant did not meet the burden of proof required pursuant to South Hackensack Ordinance, N.J.S.A. 40:55D-70(d), et seq. and all other applicable provisions of the Municipal Land Use Law and N.J.S.A. 40:55D-1, et seq. regarding use variance approval and/or other relief sought by the Applicant.

2. **Professional Fees:** The Applicant shall be responsible for all legal, engineering and planning fees of the South Hackensack Zoning Board of Adjustment in connection with this application.

3. **Other Fees:** All additional fees, if any, required by the Township Ordinances shall be paid in connection with this application.

4. **Appeal Period:** The Applicant has been advised that there is an appeal period for the action of the Board herein for a period of forty-five (45) days from the date of publication of notice of the Resolution in a newspaper of general circulation approved by the Zoning Board of Adjustment and/or Township of South Hackensack governing body.

A motion to deny the application for use variance was adopted by the following vote at the meeting prior to adoption of the memorializing Resolution:

Moved by: Brian Veprek
 Seconded by: Lou LoPiccolo

Not Qualified
 To Vote

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson	X				
James Diramondo				X	
John Falato	X				
Jamie DiPiazza	X				
Lou LoPiccolo	X				
Luis Perdomo			X		
Victor Santos, Alt. #1				X	
Michangelo Marrella, Alt. #2	X				

Dated: August 23, 2010

Said Resolution was memorialized at the meeting after the Resolution was adopted (as set forth above), by the following vote:

Moved by: *Veprek*
 Seconded by: *LoPiccolo*

For Against Abstain Absent Not Qualified To Vote

Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson	X				
James Diramondo				X	X
John Falato	X				
Jamie DiPiazza				X	
Lou LoPiccolo	X				
Luis Perdomo				X	X
Victor Santos, Alt. #1				X	X
Michangelo Marrella, Alt. #2	X				

Dated: October 25, 2010

SOUTH HACKENSACK ZONING BOARD

By: *Brian B Veprek*
 Brian Veprek, Chairperson

CERTIFIED TO BE A TRUE COPY

By: *Lydia Heinzelman*
 Lydia Heinzelman
 Secretary to the Zoning Board of Adjustment

EXHIBIT “A”

RESOLUTION
TOWNSHIP OF SOUTH HACKENSACK
ZONING BOARD OF ADJUSTMENT

APPLICATION OF GM 360, L.L.C.

APPLICATION NO. 2009-10

WHEREAS, GM 360 L.L.C., d/b/a Athena Restaurant, 119 Gillette Road, Gillette, New Jersey (hereinafter the "Applicant"), applied to the Zoning Board of Adjustment of the Township of South Hackensack (the "Board") for Parking Variance and Use Variance approval to permit restaurant use with accessory live entertainment use in connection with utilization use of a portion of the subject property, as further described herein; and

WHEREAS, the property subject of the application is designated on the Tax Map of the Township of South Hackensack as Block 1.02, Lot 1.02 and is more commonly known as 370 Route 46 West, South Hackensack, New Jersey (the "Property"); and

WHEREAS, the Property is owned by Mount Laurel, L.L.C., which has consented to the application; and

WHEREAS, the Property is comprised of 77,536.8 s.f. (1.78 acres) and is located within the M-Mixed Use Zone; and

WHEREAS, the Applicant is a tenant on the Property and proposes to utilize live entertainment as an accessory use to the primary restaurant use of the Property; and

WHEREAS, the Property is currently improved with a motel use comprised of 3 two story detached buildings, a detached building used as an accessory motel office and accessory

motel inground swimming pool with on-site parking and a single story building to be utilized by the Applicant as a restaurant with on-site parking, subject of this application. The existing motel use is not part of the subject application and will not be utilized by the Applicant in connection with the proposed restaurant use; and

WHEREAS, the Applicant submitted a site survey prepared by Koestner Associates, Steven L. Koestner, P.E. & L.S., Hackensack, New Jersey, entitled "Survey of Lot 1.02 in Block 1.02 on the Tax Map of the Township of South Hackensack, Bergen County, New Jersey" consisting of 1 sheet dated April 25, 2002 which survey was also edited by VCA Group, LLC, Vassilios Cocoros Architect, 467 Sylvan Avenue, Englewood Cliffs, New Jersey dated January 11, 2010 to identify the on-site parking and restaurant use which editing to the survey is dated January 10, 2010; and

WHEREAS, Vassilios Cocoros, AIA, of VCA Group, 467 Sylvan Avenue, Englewood Cliffs, New Jersey, testified as an expert architect on behalf of the Applicant; and

WHEREAS, George Filippatos, 119 Gillette Road, Gillette, New Jersey, was sworn in as a fact-witness on behalf of the Applicant, regarding the proposed restaurant and live entertainment use; and

WHEREAS, Section 208-8(C) of the Township of South Hackensack Zoning Ordinance specifically prohibits "Cabaret" or "nightclub" use as proposed by the Applicant; and

WHEREAS, after due notice and publication, the matter was called for a public hearing on February 22, 2010 at which time the Applicant was represented by Paul Speziale, Esq. and Francis Miglorino, Esq.; and

WHEREAS, the Board made a physical inspection of the Property at such times as the Board members have indicated; and

WHEREAS, the Applicant proposed to utilize an existing building and existing site as an Greek themed restaurant with accessory live entertainment including bands/singers, patron dance floor, ethnic Greek belly dancing and recorded music entertainment and proposed to utilize 34 existing on-site parking stalls as shown on the Plan submitted to the Board; and

WHEREAS, the Board has carefully considered the exhibits introduced into evidence, the testimony of the witnesses and review reports/letters from the South Hackensack Police Department and the South Hackensack Building / Zoning Code Enforcement Department; and

WHEREAS, the South Hackensack Zoning Board of Adjustment hereby makes the following findings of fact with regard to the application.

A. GM 360, L.L.C., d/b/a Athena Restaurant, is the tenant of a portion of Property commonly known as 370 Route 46 West, South Hackensack, New Jersey, which Property is also identified as Block 1.02, Lot 1.02 on the Tax Map of the Township of South Hackensack. The Property is located entirely within the M-Mixed Use Zone.

B. The Property is owned by Mount Laurel, L.L.C., which has consented to the application.

C. The Property is comprised of 77,536 square feet (1.78 acres) and is currently improved with multiple freestanding buildings utilized as mixed use as a motel and the Applicant's proposed restaurant use with approximately 134 total on-site parking spaces.

D. The restaurant building subject of this application was previously utilized as a gentlemen's club/strip club by an unrelated entity, a use prohibited under the current zoning ordinance. The witnesses testified that the proposed restaurant use, with accessory live entertainment, is less intense than the prior use and will generate less of a parking demand than the prior use of the Property.

E. The witnesses testified that the Applicant proposes to utilize existing single story building located on the southeasterly corner of the Property in connection with the restaurant use. The witnesses also testified that the proposed restaurant use, with proposed accessory live entertainment use, is not associated with the existing motel use of the remainder of the Property.

F. The witnesses further testified that the Applicant is a tenant on the Property and currently is permitted to utilize 34 of the 134 existing on-site parking spaces in connection with the proposed restaurant and accessory live entertainment use. The remaining 100 parking spaces are to be utilized for the existing motel use on the Property.

The witnesses also testified that the current building to be used as the subject restaurant maintains a maximum capacity of approximately 300 patrons. The minimum number of parking stalls required for the restaurant proposed use under the Township Ordinance is 100 (1 space per 3 restaurant seats). Therefore, a variance is necessary to permit 34 parking spaces where 100 are required.

G. The witnesses further testified that the Applicant is proposing to utilize accessory live entertainment comprised of singers, bands, patron dancing and live dancing in the form of tradition Greek belly dancing in connection with the primary Greek themed restaurant use.

H. Section 208-8(C)(2) of the South Hackensack Zoning Code prohibits "Cabaret" or "nightclub" use in the M-Zone which includes the accessory live entertainment proposed by the Applicant. Accordingly, a use variance is necessary to permit the accessory live entertainment proposed.

I. The Applicant and witness testified that the proposed restaurant use with accessory live entertainment will utilize an existing single story building located on the Property

and no other exterior addition or expansion of the subject existing building on the Property is proposed under the application, as further shown on the Plan submitted to the Board.

J. The witnesses testified that the proposed hours of operation of the restaurant, inclusive of the proposed accessory live entertainment, is 5:00 p.m. through 2:00 a.m. - Wednesday and Thursday; 5:00 p.m. through 3:00 a.m. - Friday and Saturday; and 5:00 p.m. through 2:00 a.m. - Sunday. The witnesses testified that the restaurant will be closed to the general public on Monday and Tuesday, however the witnesses also testified that the restaurant business may be opened during other such times for catered private parties only.

The witnesses further testified that the Applicant will employ approximately 18-22 employees on-site at any given time.

K. The witnesses testified that the Applicant's existing lease of the Property includes a provision (which the Applicant stipulated will be complied with under this application regardless of its existence in the lease) which states, in pertinent part, that

Under no circumstance whatsoever shall the Tenant [GM 360, L.L.C.] permit the operation of a gentlemen's club, strip club, topless dancing or go-go dancing establishment, or any establishment which would not be conducive to guests under the age of 21 and families, EXCEPT that Tenant shall be permitted to provide entertainment suitable for minors and families, only so long as said uses do not in any manner whatsoever interfere with (1) the operation of the Landlord's motel and motel property, (2) the guests and employees of the motel, (3) the parking lot and parking spaces of the motel, (4) ingress and egress to the motel property and does not cause public nuisance. Said uses shall be restricted to the interior of the demised premises.

The witnesses also testified that the proposed accessory live entertainment will be a use that is suitable for families and minors or persons under the age of 18.

L. The witnesses testified that the Applicant will utilize an independently owned/operated valet service in connection with the restaurant use so that patron's vehicles can be efficiently parked on and off-site. The witnesses further testified that patrons of the restaurant will not be permitted to self-park at any time and that an independent paid valet service will be utilized at all times when the restaurant is open for either private functions or public dining.

The witnesses specifically testified that the Applicant currently maintains a lease for utilization of 15 off-site parking spaces within the Borough of Little Ferry, as further evidenced by the lease agreement submitted as part of the application between Shahin Rad and the Applicant for use of parcel identified as 307-309 Route 46 East, Little Ferry, New Jersey Tuesdays through Sundays, 6:00 p.m. to 3:00 a.m. for a term of 60 months commencing January 1, 2010 and expiring December 31, 2014.

M. The witnesses testified that proposed accessory live entertainment will be comprised of musical band/singing and that a D.J. (the playing of recorded music by a live person or persons) is proposed as an accessory use for on-site catered events only. The witnesses specifically testified that the D.J. use (as described herein) will not be utilized for non-catered events on the Property or in connection with the general restaurant use of the Property.

The witnesses also testified that the Applicant is proposing a dance floor of approximately 17 feet by 16 feet for use by patrons as accessory use to the primary restaurant use of the Property and that the dance floor, or any other portion of the building subject of this application, will not be permitted to be utilized by scantily dressed or suggestive dancers for hire or other such entertainers (i.e. go-go dancing, strip club/gentlemen's type dancing or entertainment).

N. The Township of South Hackensack Police Department, Patrolman Robert Chinchar, issued a Review Report letter dated January 26, 2010 regarding the designation of on-site pedestrian cross-walk areas. The Applicant stipulated to comply with all conditions of the report of Officer Chinchar during the public hearing.

O. Mr. Gary Brugger, 26 Jackson Avenue, South Hackensack, appeared in favor of the proposed restaurant use and expressed a need for the Board to use caution and restriction when granting variances to permit live entertainment. No other members of the public appeared or spoke regarding this application during the public hearing.

P. The witnesses testified that all activities of the restaurant use would be family oriented and type of use wherein minors (those under 18 years of age) would be customarily witness within a family restaurant. The witnesses further testified that the live entertainment use proposed would be specifically accessory to the primary restaurant use of the subject building and all use would be within the building with no outdoor activities proposed as part of this application.

Q. The Applicant has satisfied the burden of proof with respect to both positive criteria and negative criteria with regard to restaurant use with accessory live entertainment consisting solely of live bands or music including singing, dance area for use by patrons only and live D.J. use (which is to be limited solely to private parties or catered functions). In no event shall live dancing by non-patrons (i.e., paid dancers/performers, belly dancing, go-go dancing, nude dancing or scantily clad men or women dancing which violates the spirit of Section 208-8C(2) of the Township of South Hackensack Zoning Code) be permitted on the Property in connection with the restaurant use approved herein. To that extent, the Applicant has shown special reasons to permit the proposed use and has satisfied the enhanced burden since the

Property is located within a commercial area and will have a minimal, if any, impact upon adjacent commercial, industrial in the area or the existing on-site motel use.

However, the Applicant has not satisfied its burden of proof regarding the request to permit live dancers such as belly dancers as such use specifically violates Section 208-8C(2) of the Township Code and such use is not be permitted under this approval.

R. The Application for Parking Variance and Use Variance is not detrimental to the public, surrounding neighborhood, existing traffic conditions or characteristics of the surrounding area. The restaurant use, inclusive limited accessory live entertainment, as approved herein, is not detrimental to the M-Zone.

S. The benefits of the proposed Parking Variance and Use Variance to permit restaurant use, with limited accessory live entertainment, as approved herein, outweighs any detrimental effect.

T. The application, as approved, is not detrimental to the public and will not have a detrimental affect on the surrounding neighborhood, existing traffic conditions or characteristics of the surrounding area by exclusive use of valet service for patrons and limited type of entertainment use to live bands and signing and patron dancing which is customarily associated with accessory live entertainment type uses available for restaurant patrons including minors (those under the age of 18). The goals and recommendations of the Master Plan will be advanced by promoting the health and general welfare of the Township citizens and citizens of the surrounding area. The granting of the required parking variance portion of the waiver of formal preliminary and final site plan requirement will not result in a substantial detriment to the public.

NOW THEREFORE, BE IT RESOLVED the Application of GM 360 L.L.C., d/b/a Athena Restaurant, for Parking Variance and Use Variance Approval be and the same is hereby approved as follows:

1. Location, Use and Type: a. general use: The Applicant shall be permitted to utilize an existing single story building located at the south west portion of the Property, as shown on the Plan submitted to the Board, for the proposed restaurant use with limited accessory live entertainment, as further described herein.

The Applicant is not permitted under this application to expand the footprint of the existing single story building located on the Property utilized as a restaurant or otherwise expand the existing building subject of this application without further approval of this Board or a Board of similar jurisdiction.

b. accessory live entertainment: The Applicant shall be entitled to utilize the Property in accordance with the restaurant use with limited accessory live entertainment which includes a dance floor available for patrons of the restaurant, as further described herein and as testified by the witnesses during the public hearing. The Applicant shall also be permitted to utilize live entertainment which shall be limited to live musical band and singers for entertainment of restaurant patrons only.

The Applicant shall also be permitted to utilize a live D.J. (that is live person(s) playing recorded music) for catered or private events only, as further described by the witnesses during the public hearing. In no event shall a live D.J., as described herein, be permitted for entertainment of general patrons of the subject restaurant during non-catered or private party events. The Applicant may utilize background type music accessory use to the primary general

restaurant use of the Property without interaction from a live D.J., as further described by the witnesses during the public hearing.

In no event shall the Applicant be permitted to permit live entertainment on the Property in the form of go-go dancing, cabaret, scantily clad men or women, strip-tease type dancing or other dancing by live performers who are not general patrons of the restaurant use. This restriction specifically includes prohibition of belly dancing or other "ethnic style dancing," as further described by the witnesses during the public hearing and further discussed by the Board during the public hearing.

The live entertainment permitted herein shall be accessory to the primary restaurant use of the Property by the Applicant, as described by the witnesses during the public hearing. In no event shall the live entertainment described herein be permitted during times in which the primary restaurant use of the Property is not operating on the Property.

c. **Hours of Operation / Number of Employees:** The Applicant shall be permitted to maintain the following general hours of operation, as further described during the public hearing: (5:00 p.m. through 2:00 a.m. - Wednesday and Thursday; 5:00 p.m. through 3:00 a.m. - Friday and Saturday; and 5:00 p.m. through 2:00 a.m. - Sunday. The restaurant use is to be closed on Monday and Tuesday with the exception that private or on-site catered functions may take place at other such times.) The Applicant shall comply with all regulations of the Township of South Hackensack regarding permitted hours of operation which shall supersede any approval granted herein.

The Applicant shall be permitted to maintain no more than 22 employees associated with the restaurant use (exclusive of any independently contracted valet service) on the Property at any given time, as testified by the witnesses.

2. On-Site Parking Area: a. Parking Spaces: The Applicant shall maintain a total of 34 on-site parking stalls on the Property, as identified on the Plan submitted to the Board and as testified by the witnesses during the public hearing, for its exclusive use in connection with the restaurant use described herein.

b. Valet Service: The Applicant shall utilize a valet service at all times when the restaurant and/or catering/private party uses are utilized on the Property. The valet service shall be independent of the Applicant and shall not utilize employees of the Applicant or Applicant's restaurant use, as further testified by the witnesses during the public hearing. The patrons of the restaurant shall not be permitted to self-park any vehicles on-site under any circumstances at any time. The Applicant shall maintain a minimum of 15 off-site parking spaces for its sole use during times when the restaurant use is active on the Property, as further described during the public hearing and as reflected in the exhibits submitted as part of the application.

All on-site parking stalls to be located on the Premises shall be of a size and designation as required under the Township Ordinance, as shown on the Plan submitted to the Board, with the exception of any handicap accessible parking stall identified therein which shall comply with the requirements of the Americans with Disability Act.

d. Compliance with Report of South Hackensack Police Department: The Applicant shall comply with the requirements and recommendations of the South Hackensack Police Department, as further identified in the January 26, 2010 Review Report prepared by Officer Chinchar and as referenced during the public hearing.

3. Termination of Restaurant Use by the Applicant: In the event that the Applicant no longer operates the restaurant use as proposed and approved under this application, there shall be no form of live entertainment permitted on the Property without further approval of this Board or a Board of similar jurisdiction.

4. Revised Site Plan: The Applicant shall submit to the Zoning Board of Adjustment, a revised Plan indicating all amendments, additions or deletions in accordance with the revisions and comments of the Board, Applicant and witnesses during the public hearing and/or as further identified under this resolution, which shall specifically include the incorporation of all items identified in the January 26, 2010 review letter of the South Hackensack Police Department as stipulated by the Applicant during the public hearing.

The Applicant shall submit the revised plan prior to the issuance of any permit by the Township of South Hackensack Building/Zoning office associated with this application.

5. County of Bergen / New Jersey Department of Transportation: The variances approved herein are subject to and specifically conditioned upon the approval of the County of Bergen Department of Planning and Economic Development and/or the New Jersey Department of Transportation, to the extent deemed to be applicable by said agencies.

6. Legal and Engineering Fees: The Applicant shall be responsible for all legal and engineering fees of the Zoning Board of Adjustment associated with this application.

7. Other Fees: All additional fees, if any, required by the Township Ordinances shall be paid.

8. Reliance by Board on Testimony and Application: The Parking Variance and Use Variance approval are specifically granted based upon the testimony of the Applicant, witness, the exhibits, the application, and any amendments to same, and as shown on the Plan submitted to the Zoning Board of Adjustment, as amended, all of which have been relied upon by the Board herein.

9. Compliance with Laws: The Applicant shall comply with all Township Ordinances, and any and all State and Federal laws and applicable regulations.

10. Non-Severability of Conditions: The relief granted to the Applicant is specifically made subject to the conditions referred to herein. In the event any condition is held to be invalid, unenforceable, or unlawful, the Parking Variance and Use Variance approval shall be unenforceable. It is the intent of the Board that the Parking Variance and Use Variance approval not be approved if any condition is invalid, and that the conditions are not severable from any variances or relief granted herein.

11. Publication of Resolution: The Applicant shall publish notice of the Board's decision in an official newspaper of the municipality or in a newspaper of general circulation in the municipality at the Applicant's own expense pursuant to *N.J.S.A. 40:55D-10(I)*.

12. Appeal Period: The Applicant has been advised that there is an appeal period for the relief granted herein for a period of forty-five (45) days from the date of publication of notice of the relief granted pursuant to this Resolution in a newspaper of general circulation approved by the Zoning Board of Adjustment. Accordingly, any work or construction done prior to the expiration of the appeal period is accomplished at the sole risk of the Applicant.

8. Reliance by Board on Testimony and Application: The Parking Variance and Use Variance approval are specifically granted based upon the testimony of the Applicant, witness, the exhibits, the application, and any amendments to same, and as shown on the Plan submitted to the Zoning Board of Adjustment, as amended, all of which have been relied upon by the Board herein.

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12. Appeal Period: The Applicant has been advised that there is an appeal period for the relief granted herein for a period of forty-five (45) days from the date of publication of notice of the relief granted pursuant to this Resolution in a newspaper of general circulation approved by the Zoning Board of Adjustment. Accordingly, any work or construction done prior to the expiration of the appeal period is accomplished at the sole risk of the Applicant.

Said Resolution was adopted by the following vote at the meeting prior to adoption of the memorializing Resolution:

Moved by: Lou LoPiccolo
 Seconded by: James Diramondo

	<u>For</u>	<u>Against</u>	<u>Abstain</u>	<u>Absent</u>	<u>Not Qualified To Vote</u>
Brian Veprek, Chairperson	X				
Bill Regan, Vice Chairperson				X	
James Diramondo	X				
John Falato	X				
Blase Coppola				X	
Lou LoPiccolo	X				
Luis Perdomo	X				
Victor Santos, Alt. #1	X				
Michangelo Marrella, Alt. #2				X	

Dated: February 22, 2010

Said Resolution was memorialized at the meeting after the Resolution was adopted (as set forth above), by the following vote:

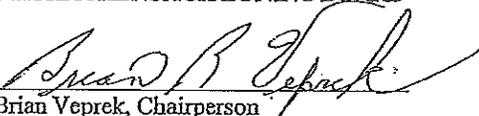
Moved by:
Seconded by:

For Against Abstain Absent Not Qualified To Vote

Brian Veprek, Chairperson	✓				
Bill Regan, Vice Chairperson	—				X
James Diramondo	✓				
John Falato	✓				
Blase Coppola	—				X
Lou LoPiccolo	✓				
Luis Perdoma	—				
Victor Santos, Alt. #1	✓				
Michangelo Marrella, Alt. #2	—				X

Dated: March 22, 2010

SOUTH HACKENSACK ZONING BOARD

By: 
Brian Veprek, Chairperson

CERTIFIED TO BE A TRUE COPY

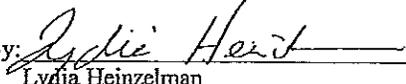
By: 
Lydia Heinzelman
Secretary to the Zoning Board of Adjustment

EXHIBIT “B”



TOWNSHIP OF SOUTH HACKENSACK

227 PHILLIPS AVENUE
SOUTH HACKENSACK, N. J. 07606
BERGEN COUNTY

BUILDING DEPARTMENT

Construction Official
JAMES RILEY

July 29, 2010

Dios Mas Partnership LLP
Angelo Karlos
115 Unio Avenue
Little Ferry, NJ 07643

RE: Property located at 378 Route 46 West
Lot 1.02 in Block 1.02

Dear Mr Karlos:

On July 26, 2010, you and your attorney Frank Miglirino addressed the members of the Zoning Board of Adjustment during the public portion of the meeting. You were seeking a modification to resolution 2009-10 which had been previously approved for the above referenced property. At that time both you and your attorney stated that you will be operating a "Dance Club" at that location.

This is to advise you that a Dance Club is not a permitted use within the M-Mixed Use zone. On May 27, 2010 a Zoning Permit, Z10-042 was issued to you to allow use of the above premises as approved by resolution dated March 22, 2010 for Zoning Board of Adjustment application number 2009-10 by Athena Restaurant and a Dance Club was not what that resolution approved.

You are further advised that Zoning Permit Z10-042 issued to you on 5/27/10 is hereby rescinded.

Therefore you will be in violation of the Zoning Ordinance of the Township of South Hackensack if you occupy the premises without a valid Zoning Permit.

You have the right to appeal my decision to the Board of Adjustments within 20 days by filing a written notice with me at the above address specifying the grounds for the appeal.

Ray DeRiso
Zoning Enforcement Officer

MUNICIPAL BUILDING
(201) 440-1895

Building Sub-Code Official
JAMES RILEY

Plumbing Sub-Code Official
RICHARD VANATTA

Electrical Sub-Code Official
MICHAEL DALESSIO

Fire Sub-Code Official
WILLIAM LYNN

Zoning Official
RAYMOND DeRISO

EXHIBIT “C”

EXHIBIT “D”

Township of South Hackensack
227 Phillips Avenue
South Hackensack, NJ 07606

ZONING PERMIT

Date: 5/27/2010

Application No. Z10-042

Applicant Identification

Name: Dios Mas Partnership LLP, Angelo Karlos

Address: 115 Union Avenue

City: Little Ferry

State: NJ

Zip: 07073

Property Identification

Address: 378 Route 46 West, aka 370 Route 46 West

Block: 1.02 Lot(s): 1.02 Zone: M

This is to certify that the above described premises together with any building thereon, are used or proposed to be used as or for:

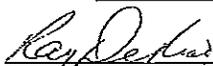
To be operated under the name Diosa Super Club and used as approved by resolution dated March 22, 2010 for Zoning Board of Adjustment application number 2009-10 by Athena Restaurant.
which is a:

Use permitted by Ordinance

Use permitted by variance approved and subject to any special conditions attached to the grant thereof.

Valid nonconforming use as established by ___ finding of the Zoning Board of Adjustment, or ___ by the undersigned zoning officer on the basis of evidence supplied by applicant as specified on the reverse hereof. Also specified on the reverse hereof is a detailed statement of all aspects of the nonconforming use.

There is a nonconforming structure on the premises by reason of insufficient ___ set-back, ___ side yards, ___ rear yard, ___ other (specify)



Ray DeRiso
Zoning Officer

The newspapers of **New Jersey** make public notices from their printed pages available electronically in a single database for the benefit of the public. This enhances the legislative intent of public notice - keeping a free and independent public informed about activities of their government and business activities that may affect them. Importantly, Public Notices now are in one place on the web (www.PublicNoticeAds.com), not scattered among thousands of government web pages.

County: Bergen

Printed In: The Record, Hackensack

Printed On: 2010/10/28

**SOUTH HACKENSACK BOARD OF ADJUSTMENT
PUBLIC NOTICE**

NOTICE is hereby given that the Board of Adjustment of the Township of South Hackensack, by resolution duly adopted on October 25, 2010 for the reasons set forth in its resolution of that date, denied the application of Dios Super Club as to premises owned by Dio Mas LLP and designated as Block 1.02 Lot 1.02 and more commonly known as 370 Route 46 West, South Hackensack, New Jersey, appealing a decision of the South Hackensack Zoning Officer to the Zoning Board of Adjustment of the Township of South Hackensack and a use variance to permit use of the subject property for disc jockey entertainment and patron dancing. A copy of that resolution is on file in the office of the Township Clerk, 227 Phillips Avenue, South Hackensack, New Jersey, and is available for inspection by member of the public during the regular business hours of that office.

Judith Heinzelman

Board of Adjustment Secretary

Oct 28, 2010-fee:\$26.46 (28) 2961880

Public Notice ID:

**Township of South Hackensack
BOARD OF ADJUSTMENT
November 29, 2010
MINUTES**

At 7:34 p.m. the meeting was Called to Order. Pursuant to the Open Public Meetings Act, adequate notice of this meeting was advertised in The Record and the Herald News and by posting a copy of the meeting notice on the bulletin board in the clerk's office where notices are customarily posted.

The Chairman led the flag salute.
The Secretary called the roll.

Member Present

Lou LoPiccolo	Bill Regan
Angelo Marrella	John Falato
Greg Padovano, Esq.	Brian Vepek
Kevin Tichacek, Boswell Engineering	

Members Absent

James Diraimondo	Luis Perdomo
Victor Santos	Jamie DiPiazza

MINUTES:

Regan **motioned**; LoPiccolo **seconded** to approve the Minutes of the September 27, 2010 meetings. **All in favor.**

CORRESPONDENCE:

Vepek **motioned**; Falato **seconded** to accept the **Correspondence** listed and place them in the appropriate files. **All in favor.**

OLD BUSINESS

BOA 2010-07 - Memorialize Resolution

Ted Weiland, Jr. Asphalt & Concrete Construction, LLC
25 Grove Street
Block: 2.01 Lot: 12.02
"C" Variance and "D" Use Variance

Vepek **Motioned**; Regan **seconded** to accept the Resolution for Weiland, 25 Grove St.
Vote: 4 Yes Votes: Vepek; Regan; LoPiccolo; Marrella.

Abstain: Falato

Absent: Diraimondo, Santos; DiPiazza, Perdomo

November 29, 2010