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Via Electronic Mail & Lawyers Service

Planning Board
Township of Verona
600 Bloomfield Avenue
Verona, New Jersey 07044
c/o Ashley Neale

**Re: Request for Reconsideration of Extension
176-200 Bloomfield Avenue
Block 8, Lots 1 & 23
Resolution No. 5-2015**

Dear Chairman Lonergan and Planning Board Members:

This firm has been retained by DMH2, LLC (the “Applicant”) with regard to the above-referenced matter. As you will recall, the Board denied the Applicant’s request to extend the approvals granted by the Board via Resolution No. 5-2015 at its meeting on March 24, 2022. By way of this correspondence, the Applicant respectfully requests that: (i) the Board procedurally reconsider its denial and re-open the hearing on this matter; and (ii) the Board substantively grant the Applicant’s request for a one-year extension of the approvals issued under Resolution No. 5-2015 pursuant to N.J.S.A. 40:55(D)-52.

**I. THE BOARD SHOULD GRANT THE APPLICANT’S
PROCEDURAL REQUEST FOR RECONSIDERATION.**

Planning Boards have the inherent power to reconsider their decision, prior to the adoption of a memorializing resolution. In fact, the Appellate Division expressly recognized this procedure in Lambert v. Borough of Beach Haven, 2020 WL 2550019 (N.J. Super. Ct. App. Div. 2020). In the Lambert matter, *supra*, an unsuccessful applicant before the Joint Land Use Board of Beach Haven Borough filed a letter requesting reconsideration of the Board’s denial of its site plan application approximately 17 days after the Board denied the application, but prior to Board’s issuance of the written resolution memorializing its denial. *Id.* at *1-2. The applicant’s

request for reconsideration was evaluated by the Joint Land Use Board procedurally and substantively, and this time approved. Ibid.

On appeal, the Appellate Division expressly upheld the reconsideration request submitted by the applicant and the Board's authority to grant reconsideration both procedurally and substantively. In salient part, the Appellate Division held:

With respect to a Board's ability to reconsider its decisions, an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer. Although the exercise of an agency's authority through inherent or implied powers is not boundless, our courts have long recognized that an administrative agency has inherent power to reconsider, reopen and rehear prior decisions in the absence of any legislative restriction to the contrary.

[Id. at *5 (emphasis added) (internal citations omitted).]

Thus, the Applicant's request for reconsideration can appropriately be considered by the Board and, we respectfully submit, granted.

With regard to procedural reconsideration, it is clear that an applicant requesting reconsideration is not required to demonstrate fraud, a material change in fact, or a change in law in order for the Board to grant reconsideration. Instead, the Board should be guided by considerations of "reasonableness, fairness and good cause." Ibid. (citing In re 1982 Final Reconciliation Adjustment for Jersey Shore Med. Ctr., 209 N.J. Super. 79, 92 (App. Div. 1986)). "Good cause" may be established by showing that reopened proceedings would "serve the ends of essential justice and the policy of the law." Ibid. (citing In re Van Orden, 383 N.J. Super. 410, 421 (App. Div. 2006)).

In the case at bar, this reconsideration request is being filed within days of the Board's denial of the extension, well prior to the expiration of the 45-day time period for the Board to memorialize its final decision in a resolution. Moreover, the Applicant, who was unrepresented by counsel at the Board's March 24, 2022 hearing, was not aware that the Board required an appearance by counsel in connection with a request for the extension of a Board approval. Indeed, many planning and zoning boards do not require counsel to appear in connection with a request to extend an approval. The Board nevertheless denied the extension request in lieu of formally notifying the Applicant that an appearance was required, when it could have carried the request to another meeting and so notified the Applicant. As such, the Board was deprived of testimony and evidence that the Applicant would have presented in support of its extension

request. The Applicant has an unambiguous right to be heard, particularly when this right to be heard is tied to the Applicant's property rights. See Harz v. Borough of Spring Lake, 234 N.J. Super. 317, 335 (2018) (citing Tumpson v. Farina, 218 N.J. 450 (2014)). Under these circumstances, we respectfully submit that procedural reconsideration of the Board's denial is warranted, and that such reconsideration would serve both justice and public policy by permitting the Applicant to present its proofs.

II. THE BOARD SHOULD GRANT THE APPLICANT'S SUBSTANTIVE REQUEST FOR RECONSIDERATION.

Assuming that the Board grants the Applicant's procedural request for reconsideration, and permits the Applicant to re-open the proceedings, we also submit that the Board should grant the Applicant's substantive request to extend its approvals for one year in accordance with N.J.S.A. 40:55(D)-52(a) and/or (d). Prior to then, we first set forth the lengthy history concerning the approvals for this Property.

As the Board will undoubtedly recall, the approvals for which the Applicant seeks an extension were only obtained following: (i) 11 exhaustive hearings before the Board; (ii) a Superior Court prerogative writ trial on December 8, 2016, wherein the Applicant and the Board successfully defended the approval; (iii) Appellate Division oral argument on April 30, 2018, which resulted in a February 4, 2019 decision remanding the matter for a plenary hearing before the trial court; (iv) a two-day plenary hearing in Superior Court (concluding on July 8, 2019), resulting in another successful defense by the Applicant and the Board of the approval; and (v) an April 2, 2020 decision by the Appellate Division affirming the 2015 approval granted by the Board. Additionally, in 2016, the Applicant also successfully defeated a third-party claim seeking to enforce an 1893 deed restriction against the Property which would have otherwise precluded commercial usage of the Property.

There are two subsets of N.J.S.A. 40:55D-52 which are applicable to the Applicant's request for an extension, and we respectfully submit that the Board should grant our request under both criteria. Pursuant to N.J.S.A. 40:55(D)-52(a), the Board is permitted to extend the statutory two-year period of protection for DMH2's final site plan approval by up to three years, in one-year increments. Under this section of the statute, the planning board is to engage in a balancing test to determine whether a developer should be granted an extension of protections from zoning changes. Toll Bros. v. Planning Bd. of Twp. Of Mt. Olive, 2006 WL 1085771, at *12 (N.J. Super. Ct. App. Div. Apr. 26, 2006) (citing Jordan Developers v. Planning Bd. of Brigantine, 256 N.J. Super. 676, 679-80 (App. Div. 1992)). In determining whether to grant an extension under subsection (a) of the statute, "[t]here must be a balancing process, in which the board weighs the public interest in the implementation of the zoning change, the developer's interest in extending protection and the circumstances in which the need for extension arose."

Jordan Developers, supra, N.J. Super. at 680. Critically, an intervening zoning change does not require a denial of the extension, although it may be factor for the Board to consider. Ibid.

In the case at bar, the Applicant's approvals were subject to 5 years of exhaustive litigation, in multiple forums. As a matter of law, it is clear that the two-year period of protection did not begin to run until April 2, 2020 (excluding the potential for an appeal to the Supreme Court). In the five years that elapsed from the Board's approval, the Township of Verona (the "Township") has revised its ordinances in areas of stormwater management, steep slopes, tree removal and blasting, and affordable housing. At present time, it is not entirely known how these ordinances would impact the development, but the Applicant believes that its site plan would have to be significantly reworked in order to meet these requirements, which would effectively vitiate the approvals granted by the Board, which, again, were fiercely defended by the Board and the Applicant for 5 years.

Additionally, as the Board is aware, the entire world was impacted by the sudden onset of the COVID-19 pandemic. In New Jersey, on March 9, 2020, Governor Murphy signed Executive Order No. 103, which declared a public health emergency and state of emergency in New Jersey. On March 11, 2020, COVID-19 was declared to be global pandemic by the World Health Organization. On the same date, the undersigned argued the final appeal of this matter before an Appellate Panel in Hudson County Superior Court. On March 13, 2020, the President of the United States declared a national emergency under Sections 201 and 301 of the National Emergencies Act (50 U.S.C. Section 1601, et seq.). On March 16, 2020, Governor Murphy issued Executive Order No. 104 which, as we are all aware, closed schools, casinos, racetracks, gyms, entertainment centers, and essentially all other forums of social interactions excluding essential businesses. On March 21, 2020, Governor Murphy issued Executive Order No. 107 (the "Stay At Home Order"), which directed the closure of all non-essential businesses and directed State residents to remain at home, with limited exceptions. On April 8, 2020, Governor Murphy issued Executive Order No. 122, which directed the cessation of all non-essential construction projects, which would include the approvals granted by the Board to the Applicant had construction commenced.

All said, the state of emergency was in effect from March 9, 2020 through March 7, 2022 (Executive Order No. 292). In that intervening time period, we New Jerseyans have lost 33,278 of our friends and relatives to COVID-19, while 1,905,347 of us have tested positive for this insidious disease.¹ In short, the circumstances in which the Applicant's need for an extension arose are clear – our entire State was on lockdown and the real estate market had entirely collapsed due to never-before-seen global pandemic. Performance under the two-year approval

¹ See

https://covid19.nj.gov/?_gl=1*1f1t1ls*_ga*MzQxNDMxNTMuMTY0OTI5MTIyMA..*_ga_5PWJG6642*MTY0OTI5MTIyOS4xLjAuMTY0OTI5MTIyOS4w#live-updates (last viewed April 4, 2022).

period was not only impractical, but frankly impossible. As such, the Applicant respectfully submits that it is entitled to the flexible extension under N.J.S.A. 40:55D-52(a).

With regard to the second prong of the extension statute, N.J.S.A. 40:55D-52(d) provides that the planning board “**shall** grant an extension of final approval . . . if the developer proves to the **reasonable** satisfaction of the board that the developer was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals from other governmental entities and that the developer applied promptly for and diligently pursued these approvals.” (emphasis added). If an applicant makes these factual showings, the grant of an extension under this subsection is mandatory, and a board’s discretion is limited to determining the length of the extension. Knowlton Riverside Estates, Inc. v. Planning Board of Twp. of Twp of Knowlton, 347 N.J. Super. 362, 369 (App. Div. 2002).

In this regard, the Applicant submits the following:

- The COVID-19 pandemic and associated state of emergency, which began subsequent to the Appellate Division’s April 2, 2020 affirmation of the approvals, effectively prevented the Applicant from pursuing its outside agency approvals;
- Nevertheless, since that time, the Applicant has diligently undertaken the following steps to prosecute its approvals:
 - January 28, 2022 – obtained recertification of plan certification by the Hudson-Essex-Passaic Soil Conservation District;
 - March 10, 2022 – submitted revised plans for resolution compliance, including:
 - Preliminary and Final Site Plans, prepared by Stonefield Engineering & Design, dated March 10, 2022;
 - Stormwater Management Statement, prepared by Stonefield Engineering & Design, dated March 9, 2022;
 - Stormwater Operations and Maintenance Manual, prepared by Stonefield Engineering & Design, dated February 16, 2022; and
 - Construction Drawings of the aforementioned items.
 - March 31, 2022 – Board Engineer issues letter confirming that the Applicant has met the conditions of the resolution of approval and recommending that the Board Chairman and Secretary sign the revised plans.

Critically, as noted above, the Applicant has satisfied the conditions precedent to the signing of its plans by the Board. Thus, the Applicant has made significant progress under the resolution of approval. As such, the Applicant respectfully submits that it has satisfied the requirements under N.J.S.A. 40:55D-52(d) for a mandatory extension, and requests that the Board grant its request.

Please note that the Applicant intends to present testimony from Michael Harrison, the Applicant's representative, in support of its request.

III. CONCLUSION

The sheer amount of litigation concerning this Property, and the resources that both the Board and the Applicant had to expend to defend the 2015 approval is, frankly, staggering. The Board's denial of the Applicant's straightforward request to extend the approval, particularly in light of the fact that the State shut down due to the COVID-19 pandemic approximately one week following Appellate Division oral argument in March 2020, did not take into account the extraordinary delays and litigation which have hamstrung this development. In light of the foregoing, we respectfully request that the Board: (i) grant procedural reconsideration; and (ii) grant the Applicant's request to extend its approvals for a one-year time period.

We thank the Board for its consideration of this request.

Respectfully submitted,

/s/ Derek W. Orth
DEREK W. ORTH

cc: DMH2, LLC (via e-mail)