

September 22, 2022

Philip D. Neuer, Chairman, and Members
Township of West Orange Zoning Board of Adjustment
66 Main Street
West Orange, New Jersey 07052

**Re: ZB-21-21
Daughters of Israel, Inc.
Block 171, Lot 12
1155 Pleasant Valley Way
Application for Preliminary & Final Major Site Plan Approval,
Use Variances and Bulk Variances**

Dear Chairman Neuer and Board Members:

During the initial public hearing concerning this matter held on September 15, 2022, the applicant was asked to review and address two legal issues: (i) the request for an approval having a period of statutory protection and a duration of ten (10) years, and (ii) the possibility of serving alcoholic beverages in the pub. This submission is intended to address both of those issues.

Period of Statutory Protection and Duration of Approval

The document titled "Proposal," dated revised May 20, 2022, and submitted previously in response to Section G. of the Application Form – Requirements for Variances, Item 4A), contained a section at the end concerning the applicant's request for an approval with ten (10) years of statutory protection which would remain valid for ten (10) years. This confirms and restates that request.

Since the project is to be built in phases, it is difficult to predict with precision how long it will take from initial groundbreaking to project completion. If the project is approved by the Zoning Board of Adjustment (the "Board"), Daughters estimates that it will require approximately eight (8) years from the date of approval to the completion of Phase Three (i.e., until sometime in 2029). If Phase Four is constructed, total project completion would likely be several years after that.

Period of Statutory Protection

The Municipal Land Use Law ("MLUL") recognizes that an applicant should be accorded a reasonable period of time to build out its project once approval has been granted, without having to be concerned with changes in zoning regulations. Therefore, it provides that the zoning requirements and all other rights conferred on the developer when approval is granted "shall not be changed for a period of two years after the date on which the resolution of final approval is adopted." N.J.S.A. 40:55D-52.a. That statutory protection may be extended for extensions of one

Philip D. Neuer, Chairman, and Members
Township of West Orange Zoning Board of Adjustment
September 22, 2022
Page 2

year, not to exceed three extensions in total. In a project with multiple phases, however, that provides a potential for only five years of statutory protection, and also requires that the applicant return to the Board for extensions year after year.

To avoid that and provide a reasonable period of statutory protection from zoning changes that is more in keeping with the size and phasing of the project, the MLUL also provides that “[i]n the case of a site plan for a development consisting of not less than 150,000 square feet of nonresidential floor area or not less than 100 residential dwelling units” the Board may approve a statutory protective period “for such period of time beyond two years, as shall be determined by the [Board] to be reasonable taking into consideration (1) the number of dwelling units and nonresidential floor area permissible under final approval, (2) economic conditions, and (3) the comprehensiveness of the development.” N.J.S.A. 40:55D-52.e. The developer may apply thereafter for extensions which may be granted based on these considerations as well as the amount of the project remaining to be developed.

The project proposes 182 independent living units, which exceeds the statutory threshold of 100 residential units. Therefore, in view of the foregoing statutory factors, the nature of the project and the need for construction of each phase to proceed in a manner that allows for occupancy by existing residents, Daughters requests that the Board grant a statutory protective period whereby the rights conferred by N.J.S.A. 40:55D-52.a. would be for a duration of ten (10) years in accordance with N.J.S.A. 40:55D-52.e.

Duration of Approval

Similarly, Chapter XXV of the Township Code (the “Land Use Regulations”) contains a provision which requires that in the case of a conditional use, variance, or final site plan, “the building or construction permit sought shall be secured and issued or the authorized action taken within two years and one day after the date of the granting of the conditional use, variance or site plan in question.” § 25-48.10.a. If the applicant does not comply with these time limits, which the Board may extend for good cause shown upon written application, “the approval shall be deemed null and void and of no further force or effect” and the applicant must then reapply for approval as if it were an initial application. § 25-48.10.a. To avoid the need for recurring extension requests where it is known that the project will not be completed in the initial two year period, the Board may initially fix a longer period of time for appropriate actions which are in excess of the minimum two years. § 25-48.10.e.

In view of these ordinance considerations, the nature of the project and the need for construction of each phase to proceed in a manner that allows for occupancy by existing residents, Daughters requests that the Board initially establish the period within which “the building or construction permit sought shall be secured and issued or the authorized action taken” in accordance with § 25-48.10.a., to be ten (10) years after the date of the granting of the variance and site plan approval as authorized by § 25-48.10.e.

Philip D. Neuer, Chairman, and Members
Township of West Orange Zoning Board of Adjustment
September 22, 2022
Page 3

Service of Alcoholic Beverages in the Pub

The document titled "Proposal," dated revised May 20, 2022, and submitted previously in response to Section G. of the Application Form – Requirements for Variances, Item 4A), indicated that the proposed CCRC would include a community center serving the independent living and assisted living components of the project. It further indicated that the amenities provided would include "a pub serving alcoholic beverages (subject to obtaining a liquor license)." As will be set forth in testimony at a subsequent hearing, the pub will be utilized by residents and their guests only. Thus, in the same way that a guest accompanied by a resident might order a sandwich in the pub, that same guest would also have the ability to order an alcoholic beverage — subject to a liquor license first being obtained.

Club License

CCRCs that serve alcoholic beverages typically operate using what is known as a "club license" to authorize the sale of alcoholic beverages for on-premises consumption. A club license entitles the licensee "to sell any alcoholic beverages but only for immediate consumption on the licensed premises and only to bona fide club members and their guests." N.J.S.A. 33:1-12, Section 5; N.J.A.C. 13:2-8.8. "Club licenses may be issued only to such corporations, associations and organizations as are operated for benevolent, charitable, fraternal, social, religious, recreational, athletic, or similar purposes, and not for private gain, and which comply with all conditions which may be imposed by the Director of the Division of Alcoholic Beverage Control by rules and regulations." N.J.S.A. 33:1-12.

To satisfy statutory requirements concerning service only to bona fide club members and their guests, the usual arrangement is for the CCRC to set up a separate "club" entity operated by the club members. Residents of the CCRC apply for membership, and once admitted, would become club members. Clubs must have been in continuous operation for a period of three years immediately prior to application for a license, N.J.A.C. 13:2-8.3, and have been in exclusive possession and use of a clubhouse or club quarters during the entirety of that time period. N.J.A.C. 13:2-8.4. The Director of Alcoholic Beverage Control (the "Director") may waive this provision upon a showing of special cause, N.J.A.C. 13:2-8.5(b), and often does so in the case of CCRCs.

Officers of the club and members of its governing body may not have been convicted of a disqualifying offense pursuant to the alcoholic beverage control laws (Title 33 of New Jersey statutes) unless the statutory disqualification resulting from such conviction has been removed by order of the Director. They also must otherwise be qualified in accordance with Title 33, the regulations promulgated thereunder, and municipal ordinance. N.J.A.C. 13:2-8.6.

Among other requirements, a list of club members must be maintained. N.J.A.C. 13:2-8.7. A minimum three-day waiting period applies to admission into the club so that members cannot be granted instant membership. N.J.A.C. 13:2-8.1. Persons holding limited or auxiliary

Philip D. Neuer, Chairman, and Members
Township of West Orange Zoning Board of Adjustment
September 22, 2022
Page 4

club membership shall not be deemed to be club members. Id. All alcoholic beverages must be consumed on the licensed premises; no sales for off-premises consumption are permitted. N.J.A.C. 13:2-8.9.

As the foregoing illustrates, licensing is highly regulated and, by definition, a club license prohibits sale of alcoholic beverages to the general public. Only club members and their bona fide guests can be served.

Land Use Regulations

The Land Use Regulations do not regulate uses based on whether or not sale or consumption of alcoholic beverage occurs, or whether an alcoholic beverage license is obtained. Thus, there is no requirement than an existing restaurant, for example, which seeks to obtain an alcoholic beverage license, apply for or obtain approval from the Planning Board or Zoning Board of Adjustment. Similarly, there would be no requirement for an existing CCRC, which seeks to obtain a club license, to apply for or obtain approval from the Planning Board or Zoning Board of Adjustment.

Here, since a newly constructed facility is proposed which will include a number of amenities, the proposed pub and the possibility of it serving alcohol subject to obtaining a liquor license, was specifically referenced in the application documents to provide full disclosure. Similarly, the applicant's public notice indicated that the project would include among the proposed amenities a "pub serving alcoholic beverages (subject to obtaining a liquor license)." This is consistent with the holding in Pond Run Watershed v. Hamilton Tp. Zoning Bd. of Adjustment, 397 N.J. Super. 335 (App. Div. 2008) (finding notice to be deficient where it did not specifically indicate that a restaurant with liquor license was included in the application).

Under the Land Use Regulations, the proposed pub would constitute an "accessory use" which is defined as a "use naturally and normally incident and subordinate to the principal use of the premises or lot." § 25-4.b. By contrast, "principal use" is defined as "the primary use and purpose of a lot or structure." § 25-4.b. Although to be conservative, the applicant sought a use variance from § 25-8.12 to permit multiple principal uses on a lot in the event that independent living, assisted living and skilled nursing were characterized as separate uses even though comprising a single CCRC facility, the pub would not appropriately be classified as a principal use because (i) it meets the definition of "accessory use," (ii) it does not meet the definition of "principal use," (iii) it is not open to members of the public unaccompanied by one or more residents, and so therefore is wholly dependent on the existence of the principal CCRC use and its independent living and assisted living components, and could not independently function as a standalone establishment, and (iv) it consists of 1,000 square feet, representing a mere 4.3% of the 43,296 square foot community center. See First Floor Plan (Sheet A1.1) prepared by KDA Architects, dated October 21, 2021, revised May 20, 2022.

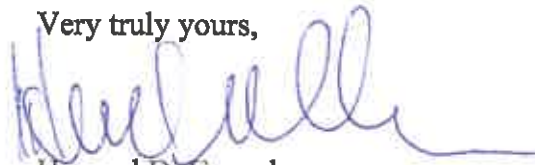
GIBBONS P.C.

Philip D. Neuer, Chairman, and Members
Township of West Orange Zoning Board of Adjustment
September 22, 2022
Page 5

Finally, it is not certain that a club license will be obtained. It is merely being considered, and therefore was included as part of the application. If it is ultimately decided to seek a club license, that will not occur for at least several years (until at least the completion of Phase 2).

For the foregoing reasons, it is respectfully submitted that the possibility of obtaining a club license to permit service of alcoholic beverages to members and their guests is properly presented in the application and public notice as an amenity/accessory use, and does not rise to the level of a principal use or require a use variance. The pub, with or without an alcoholic beverage license, would – like the other elements of the community center – be a component of the principal CCRC use and be subsumed within the grant of use variance relief. Price v. Himeji LLC, 214 N.J. 263, 299-302.

Very truly yours,



Howard D. Geneslaw
Director

HDG

cc: Daughters of Israel
Petry Engineering, LLC
KDA Architects
Banisch Associates
Eventus Strategic Partners