

February 23, 2024

VIA EMAIL AND FEDEX

Ms. Jamilet Baquerizo Vite, Planning Board Clerk
Township of West Orange
66 Main Street
West Orange, NJ 07052

**Re: Essex County Country Club
Amended Site Plan Application Half-way House – Letter Brief Accessory Use Cases
350 Mt. Pleasant Avenue - Block 156, Lot 1**

Dear Ms. Baquerizo:

As you are aware, this office represents the Essex County Country Club (the “Applicant”) in connection with an application for amended final site plan approval for construction of a 620 square foot half-way house building on its existing golf course (the “Application”) located at 350 Mt. Pleasant Avenue and designated as Block 156, Lot 1 on the Tax Maps of the Township of West Orange (the “Property”). The Application was considered at a public hearing of the Township of West Orange Planning Board (the “Planning Board” or the “Board”) held on February 7, 2024, and is due to be continued on March 6, 2024.

At the February hearing, the Applicant presented and concluded its affirmative case on the Application demonstrating, among other things: (a) the Property is located in the Township’s R-5 Zoning District (the “District”) which expressly permits golf courses and golf club houses as principal uses, as well as customary accessory buildings and structures thereto as accessory uses, within the District; (b) the construction of the half-way house satisfied and exceeded all the required bulk standards for development within the District; and (c) the Application does not require any type of variance relief.

Following the conclusion of the Applicant’s case, an objector was afforded an opportunity to present her own case in opposition to the Application. To that end, she presented the expert testimony from a professional planner, Mr. Peter Steck. Mr. Steck conceded that the Applicant adequately demonstrated that the proposed half-way house was a bona fide customary accessory building/use to the golf course use. Yet, Mr. Steck advised that the Board’s inquiry should not stop there and urged the Board to further consider the half-way house’s land use impacts on the surrounding residential area, inclusive of its proposed location on Property. Mr. Steck purportedly relied on his interpretation of Tanis v. Tp. of Hampton, 306 N.J. Super. 588 (App. Div. 1997) for this position and the Board’s authority to do so.

On behalf of the Applicant, please accept this letter brief to clarify the well-established law on a municipal planning board's jurisdiction and to address some of the arguments and misrepresentations of law presented by Mr. Peter Steck, P.P. at the Board's February hearing.

A. Power to Zone Reserved for Municipal Governing Body

The power to zone and regulate land use has been delegated to municipalities by the Legislature through the enactment of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (the "MLUL") As such, in exercising its power to zone, a municipality or any subdivision thereof, must act within the confines of such delegated powers and may not adopt any other method or procedures for zoning. Warner Co. v. Sutton, 274 N.J. Super. 464 (App. Div. 1994). When a municipality or subdivision thereof acts outside of its delegated powers, its actions will be considered ultra vires and void. See New Jersey Shore Builders Ass'n v. Twp. of Jackson, 199 N.J. 449, 452 (2009); Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 216, 223 (1994).

Among the powers that the MLUL specifically reserved for the municipal governing body is the power to zone, including the power to regulate the nature and extent of the uses of land and of buildings and structures thereon, as well as the power to adopt appropriate development regulations regulating the bulk, size, and orientation of buildings. N.J.S.A. 40:55D-62 and -65.

The power of a municipal planning board, on the other hand, is limited to determining whether the development proposal conforms with the municipal zoning ordinance and the applicable provisions of the site plan ordinance. N.J.S.A. 40:55D-25. The MLUL directs that "[t]he planning board **shall**, if the proposed development complies with the ordinance and this act, grant preliminary site plan approval." N.J.S.A. 40D-46b.

Based on the statutory construct of the MLUL, our courts have consistently held that the planning board's site plan review was never intended to include the power to prohibit a permitted use, or for the board to consider off-site factors that the permitted use may on the surrounding area.

In Shim v. Washington Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997), a similar accessory use case, the Appellate Division reviewed the relevant case law and astutely articulated the municipal planning board's jurisdiction as follows:

A planning board's role in considering a site plan application is circumscribed. The object of site plan review is to assure compliance with the standards under the municipality's site plan and land use ordinances. Generally, the Board concerns itself with on-site conditions. See N.J.S.A. 40:55D-38, -39 and -41. But see N.J.S.A. 40:55D-42 (municipality may, by ordinance, require applicant to pay pro-rata share of off-site improvements necessitated by site plan). Thus, ordinarily, the denial of a site plan application would be a "drastic action" when the pertinent ordinance standards are met. Cox, supra, at § 15-10 at 289, see also Dunkin' Donuts of New Jersey, Inc. v. Township of North Brunswick, 193 N.J. Super. 513, 515, 475 A.2d 71 (App. Div. 1984) (when applicant meets site plan ordinance standards, application may not be denied because of off-site conditions); Lionel's Appliance Ctr., Inc. v. Citta, 156 N.J. Super. 257, 269, 383 A.2d 773 (Law Div. 1978) (same). While site plan review gives the Board wide

discretion to assure compliance with the objectives and requirements of the site plan ordinance, “it ‘was never intended to include the legislative or quasi-judicial power to prohibit a permitted use.’” PRB Enter., Inc. v. South Brunswick Planning Board, 105 N.J. 1, 7, 518 A.2d 1099 (1987) (quoting *supra*, 156 N.J. Super. at 264, 383 A.2d 773).

Shim held that once the planning board determined a daycare center was a permitted accessory use to the principal church use located on the same property, its authority was limited to relevant on-site site plan considerations such as safe ingress and egress to the property and not off-site impacts generated by the use itself, in this case off-site traffic impacts. Id.

B. Accessory Customary Incidental Use Considerations

The New Jersey Courts have articulated two factors for the board to consider when determining whether a use is customarily incidental to the permitted use. First, is the use incidental to the main use. Does the use bear a close resemblance and obvious relation to the main use to which the premises is put? State v. P.T. & L Constr. Co., 77 N.J. 20, 26-27 (1978). Second, it must be determined whether a use which is found to be incidental to the permitted principal use is also a customary use. The fact that a use is not customarily indulged in, however, is not conclusive, and even if the use in question is found in a small percentage of similar main uses, the use may still be found to be “customary”. Id. See also, Charlie Brown of Chatham, Inc. v. Bd. of Adj. of Tp. of Chatham, 202 N.J. Super. 312, (App. Div. 1985); Shim, 298 N.J. Super. 395 (App. Div. 1997); Tanis 306 N.J. Super. 588; Stochel v. Planning Bd. of Edison Tp., 348 N.J. Super. 636 (Law Div. 2000). As part of this second prong analysis an appropriate factor in determining whether the use is “so necessary and commonly to be expected that it cannot be supposed that the ordinance intended to prevent it...” is the impact of the proposed accessory use upon the surrounding area. Tanis, 306 N.J. Super. at 13, quoting P.T. & L, 77 N.J. at 27.

The standard of review is not disputed by the parties. Where the Applicant disagrees with Mr. Steck’s interpretation of the law, is that after a board has concluded that a use is customary and incidental to the principal use on the property, the board’s consideration of the accessory use’s impact on the surrounding area must stop.

In Tanis, cited by Mr. Steck, the board rejected a landowner’s argument that a private airplane landing strip was a customary accessory use incidental to the principal farm use of the property. Applying the two-prong test above, the Tanis Court upheld the board’s determination as valid. The record established beyond question that private airplane landing strips were exceptionally unusual based on New Jersey Department of Transportation data demonstrating that only 60-80 private landing strips existed in the entire State. Id. at 605. Further, the board appropriately concluded that aircraft landing areas present legitimate noise and safety concerns that are likely to impact the surrounding area by flying at relatively low levels over adjacent properties to a degree that such use cannot be implied as an accessory use. Id. at 607.

With respect to this Application, it is submitted that the Applicant affirmatively established that the proposed half-way house is customary and incidental to the existing golf course located on the Property. The Applicant filed empirical data with the Board demonstrating the customary nature of the use with its Application and presented expert testimony in support of its position during the February hearing. The Board's Planner also agreed with the nature of the use referring to it as a "customary accessory feature for a golf course" in his January 22, 2024 planning memorandum to the Board. Perhaps most importantly, Mr. Steck himself, testified that the Applicant adequately demonstrated that the half-way house was a bona fide accessory use to the golf course. As such, the two-part test of Tanis has been satisfied, and the Board's jurisdiction is now limited to site plan review discussed in detail in Point A above.

The position proffered by Mr. Steck that the Board has the continuing authority to consider the accessory use's impacts on the surrounding area was considered and rejected in Stochel, 348 N.J. Super. 636. In that case, the planning board made a determination that drive-thru windows were customary accessory uses to a drugstore. Notwithstanding that determination, objectors relying on Tanis, argued that the board was required to assess the drive-thru's impact on the township's master plan as well as on the neighboring uses when evaluating the site plan application. Id. at 652. The Court flatly rejected the objectors' argument. Holding, "[i]nasmuch as the pharmacy is a permitted use, its impact on the zone plan, or the neighborhood for that matter, would be legally improper and would constitute an impermissible encroachment into the local legislative domain. Id. at 652-652.

C. Wetlands Considerations and Deferral Until Outside Agency Approvals Obtained

It is worth mentioning that in Stochel, as in the present matter, the objectors challenged the board's a the site plan on other grounds, alleging that the board failed to consider potential wetlands impacts, and further that the board should have deferred its consideration of the application until other outside agency approvals were obtained, which the Court rejected.

As to potential wetlands impacts, the Court ruled that any potential impact to the pond or wetlands on the subject property fell within the exclusive jurisdiction of the New Jersey Department of Environmental Protection ("NJDEP") pursuant to the Freshwater Wetlands Protection Act, N.J.S.A. 13:9b-1 et seq., which preempts all local ordinances that seek to regulate freshwater wetlands. Id. at 647. Accordingly, the applicant was not required to produce its environmental expert during the local board proceedings to answer questions on the impacts the development may have on the existing pond and dismissed the objectors' arguments on this issue as being without merit.

The Court similarly dismissed the objectors' claim that the planning board should have deferred its consideration of the application until county approvals were obtained. To that end, it quoted the Supreme Court's ruling in Manalapan Holding Co. v. Planning Bd. of the Township of Hamilton, 92 N.J. 466, 457 (1983) and noted that the board must act within the statutory timeframes prescribed by the MLUL at N.J.S.A. 40:55D-48(c). A board is not free to defer its decision on an application pending resolution of development issues within the jurisdiction of other agencies when the deferral would unilaterally extend the statutory time period to act on the application. Id. at 648.

D. Conclusion

For the reasons articulated herein, at this juncture the Planning Board's role in evaluating the Applicant's proposal for a half-way house is limited to site plan review. The Board may not consider off-site factors related to the use and may not impose greater restrictions on the use or its location than those enacted by the Governing Body of the Township of West Orange in the zoning ordinance. Likewise, the Board may properly grant the Application conditioned upon the Applicant's receipt of a Letter of Interpretation from the NJDEP to determine the extent that the development proposal may impact any wetlands that may be on the Property and should not defer action on the Application pending receipt of such letter. To the extent objectors or their experts make arguments to the contrary, the Planning Board should reject same.

Very truly yours

/s/ Lisa A. John-Basta

Lisa A. John-Basta
Member

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