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March 5, 2024

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

**RE: Essex County Country Club—Alcohol-Serving Halfway House —Planning Board Application
Bennett Objector Reply Letter in Opposition to Applicant's Letter Brief**

Dear Ms. Baquerizo-Vite:

Please accept and include this reply to Ms. John Basta's February 23, 2024 letter brief in the official record to be considered tomorrow night and at any future hearing on the matter.

Site Plan Considerations:

First, Ms. John-Basta completely ignores that the Applicant is required to secure site plan approval from the West Orange Planning Board before any proposed work concerning the application can take place. Ms. John-Basta's client is presently conducting work that is not included in any site plan that has been presented to this Planning Board. Digging of the wetlands, vernal pools and areas surrounding those protected spaces should cease immediately via a "Stop Work" order issued by the Township. Any expansion of work beyond what was already approved by this Board necessitates a postponement of this hearing, an investigation and sanctions. Over the past several weeks, the Applicant has dug deep culverts and trenches to divert water that flows into the protected wetlands and vernal pools in violation of the *The Freshwater Wetlands Protection Act* (N.J.S.A. 13:9B-1, 1994). Additionally, over the past week, multiple trees were removed that were neither depicted on the tree removal plan nor approved for removal by the Township. The Applicant should be made to produce permits for the trees that were removed over the past week and if the Applicant is unable to do so, it should be required to submit a new site plan application which includes all the activities in which the Applicant is engaged.

While Attorney John-Basta's letter seeks to focus exclusively on the accessory use issue, she contends that the Planning Board must approve the application as filed. Supporting that position would eviscerate the statutory site plan approval powers of the Planning Board. Aside from determining whether the proposed halfway house is an accessory use or whether the sale

of alcoholic beverages is relevant, the Planning Board has the authority to condition its approval on the Applicant's relocation of the halfway house to a more suitable location distant from neighboring homes. Conditioning approval on moving the proposed halfway house to a more appropriate location would necessitate removal of fewer trees, would diminish impacts on the environment and on nearby homes, is squarely within the Planning Board's powers and, at the same time, is likely to solve the issue of whether the halfway house in its current location is a valid accessory use.

Valid Accessory Use:

The courts in *Tanis* (306 N.J. Super. 588 (App. Div. 1997)) found that in determining whether a use is a valid accessory use, land use boards must apply a two-pronged analysis. The first prong is that the proposed halfway house must be a use that is customarily incidental to the permitted use. The second prong is that the Board must consider the impact of the proposed accessory use on the surrounding area. Every residential neighbor within three hundred feet of the Essex County Country Club's proposed halfway house has spoken at the Planning Board hearings on this application and has expressed opposition to the building's location, its proximity to their homes, and the impact it will have upon the peaceful enjoyment of their properties. These residential neighbors are concerned about their children playing in close proximity to the sale and consumption of alcohol. Some neighbors have raised concerns about vermin, break-ins and emergencies such as medical events, fires and flooding. The specific location of the halfway house can exacerbate or mitigate those concerns depending on its proximity to the residential neighbors. The documentation submitted into evidence by the Applicant unequivocally demonstrates that where halfway houses exist on golf courses to provide alcohol and bathrooms for members, in every instance, they are placed far away from residential neighborhoods, homes, yards and children. Additionally, in each of the seven examples that the Applicant provided to show accessory use, the halfway house was placed in the center of the golf course, away from perimeter trees, wetlands and other protected environmental features. However, the West Orange Planning Board is being asked to consider departing from that acceptable practice and approve a halfway house within 100 feet of homes, residential properties, their yards, protected wetlands, vernal pools and trees.

The undersigned retained Professional Planner Peter Steck. Mr. Steck appeared for the first application when the Applicant did not present a planner. Mr. Steck testified that the Applicant's submission failed to depict protected wetlands, trees, and other environmental conditions that would be impacted by the proposed comfort station. Mr. Steck also suggested a better location for the building and opined that the Applicant hadn't met its burden of proving that a comfort station was a legitimate accessory use of golf courses. The Applicant decided to bifurcate its application, seek approval for the parts of the plan that the community didn't object to, and then apply at a later date to address the proposed building that would sell alcohol and offer bathrooms to golfers. When the Applicant returned, it was with a completely new Application, a professional planner and testimony that seven other nearby golf courses sell

alcohol from halfway houses. Mr. Steck's direct testimony was not completed. Mr. Steck is prepared to complete his testimony and any cross-examination at the next hearing that he is able to attend.

As the court in *Tanis* explained, "This court long ago observed that "[u]se by a family of a home under our customs includes more than simple use of a house and grounds for food and shelter. It also includes its use for private religious, educational, cultural and recreational advantages of the family. Borough of Chatham v. Donaldson, 69 N.J. Super. 277 , 282, 174 A.2d 213 (App.Div. 1961). While the NJ Appellate Court held that parking four automobiles in a residential driveway was a permitted accessory use, we limited implicitly permitted activities to those 'not of such a nature, or to such an extent, as [would] impair the residential character of the neighborhood.'" Id.

The impact of a proposed accessory use upon the surrounding area is thus recognized as a critical factor in determining whether the use is "so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it. . . ." P.T. L., supra, 77 N.J. at 27, 389 A.2d 448. See also 2 Edward H. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning, § 23.05[2], [3] (1991) (discussing the negative impact of unusual animals, or an unusually tall radio or television antenna, on neighboring residents); Note, Zoning: Accessory Uses and the Meaning of the "Customary" Requirement, 56 B.U.L.Rev. 542, 556 (1976) (citing *City of Newark v. Daly*, 85 N.J. Super. 555, 558, 205 A.2d 459 (App.Div. 1964)), aff'd per curiam, 46 N.J. 48 , 214 A.2d 410 (1965) (milk vending machine in basement of apartment house found not to disturb residential character of neighborhood and therefore to be a permitted accessory use).

Applicant's memorandum draws conclusions without a factual or legal basis. This is not the first time in this matter that Applicant has made assertions of fact that were totally erroneous. Applicant's witness and attorney averred to this Board that the ECCC may serve alcohol anywhere on the 177-acre property. Applicant's attorney has yet to correct that misstatement.

While Applicant has failed the two-pronged test of *Tanis*, that case is important for an entirely different reason. *Tanis* found that the Board's procedure was improper because Board members prejudged plaintiff's application and therefore the Board could not render an impartial decision. Similarly, in the present case, the West Orange Planning Board has permitted the Applicant multiple opportunities to cure defects to the application while limiting objector's access, inquiry and cross-examination. The commentary, inquiry and cross-examination of multiple interested parties has also been curtailed.

While courts have concluded that the sale of alcohol was such a significant land use consideration to an application that it required specific notice, (Lakewood Realty Associates, LLC v Lakewood Zoning Board of Adjustments, et.al. (Unpublished, 2019)), this Board, at the last hearing, consistently denied the questions and opinions regarding the sale of alcohol from the halfway house when raised by the objectors and interested neighbors. However, this Board

permitted the Applicant to introduce evidence of halfway houses selling alcohol at other golf courses. To permit evidence but limit inquiry and cross examination is improper. Worse, on multiple occasions this Board's Chair, Co-Chair and Attorney have stated that the Planning Board "cannot consider the applicant's plan to sell alcohol from the proposed halfway house and its impact on the neighbors" if it received permission to do so. Co-Chair Guarino even went so far as to state that the issue of the sale of alcohol is not before this Board and can't be considered. That prejudgment, articulated multiple times at the last meeting, is precisely what caused the trial court in *Tanis* to hear the case *de novo*. Tanis claimed that his application had been prejudged and argued that the Board's final decision on his application was not "entitled to the presumption of correctness that [it] would otherwise have" and both the trial judge and Appellate Court agreed. *Tanis* is an important cautionary tale to municipal land use boards regarding impartiality, prejudging and the procedural rights of applicants, objectors and interested parties.

As an attorney and a super interested objector who's retained a Planning expert who hasn't completed his testimony, I am objecting to Ms. John-Basta's letter brief's premature arguments and conclusions. Additionally, I'm objecting to the Planning Board's limitations on evidence and testimony about the sale of alcohol from the proposed halfway house since it is an integral land use consideration with this application and raising the question as to whether this Board has prejudged this matter based on observations of and comments from Chair Bagoff, Co-Chair Guarino and Board Attorney McGovern, who have all suggested that future alcohol sales from the halfway house can't be considered and that the Planning Board must approve this application. Both assertions are not only incorrect but also evidence of *Tanis*-type prejudgment. The objectors and interested parties to this application cannot possibly receive a fair opportunity to present experts, evidence and testimony when the Board and its counsel prevent the creation of a record that lacks sufficient information as to the intention of the Applicant to sell alcohol from the proposed halfway house.

Stochel:

Applicant misapplies and misstates *Stochel* (348 N.J. Super. 636.). First, *Stochel* is a Superior Court, Law Division case that Applicant's counsel seeks to use to counter the Appellate Division decision in *Tanis*. Plainly, the Appellate Division matter is the case that is controlling.

Conclusion:

While the Applicant has been afforded every opportunity to amend, postpone, re-submit and put forth their application before the Planning Board, objectors have not been admitted as panelists, have been cut off, were incorrectly stopped from raising inquiry about alcohol sales from the proposed building and interrupted, they were not afforded the opportunity to make motions and their questions and requests have been ignored. Has the Planning Board prejudged this application?

Before the Planning Board can render its determination, the objectors and interested members of the community must be afforded a level playing field and the opportunity to complete the direct examination of their retained expert, Mr. Peter Steck, provide testimony as to the impact the proposed building will have upon the neighborhood, its families and the environment. Mr. Steck explained his availability at the prior hearing, namely that he was scheduled in person in Clifton at 7PM.

This matter should be postponed until the next opportunity that Mr. Steck has to be prepared and present for testimony. Adjourning to a future date will also afford the Township and NJ Department of Environmental Protection the opportunity to fully investigate the multiple complaints lodged regarding the dredging, digging and destruction of protected land.

Additionally, my neighbors and I are preparing to retain Mr. James Turteltaub in the event that an appeal of the Planning Board's determination is necessary. A short adjournment may allow for him to be prepared and present to represent us for the remainder of the Planning Board hearing on this Application.

However, in the event that the Planning Board decides to proceed, it must consider the impact of selling alcohol from this proposed halfway house, its proximity to homes and permit the objectors and interested parties the opportunity to present their expert and concerns. It is a reversible error to not do so. The Board must apply the two-pronged analysis described in *Tanis*, it must consider the impact of the sale of alcohol and the location of the proposed building and its immediate proximity to homes, yards, children and the environment. It would be a reversible error to not do so. The Planning Board is expected to review site plans and when appropriate expect and condition approvals on sensible modifications that protect people and the environment. That is fully within its authority. To suggest otherwise or guide this body differently is reversible error.

There is not one example in all of the evidence that the Applicant has provided that a halfway house, intended to sell alcohol, should be placed in close proximity to homes, families and environmentally protected locations and this Planning Board should not set that precedent with the present Application.

Respectfully submitted,

/s/ Micaela P. Bennett

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Pro Se Objector