

25 INDEPENDENCE BOULEVARD
WARREN, NEW JERSEY 07059-6747

HEROLD LAW
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

TEL 908 • 647 • 1022
FAX 908 • 647 • 7721
www.heroldlaw.com

EMAIL: rsimon@heroldlaw.com
Extension: 113

March 10, 2021

VIA FEDERAL EXPRESS and EMAIL

Kathy Klink, Board of Adjustment Secretary
Delaware Township Board of Adjustment
570 Rosemont Ringoes Road
Sergeantsville, NJ 08557

Re: Application (the “Application”) of Brant Switzler (the “Applicant”) before the Delaware Township Board of Adjustment (the “Board”)

Hearing Date: March 11, 2021
Property: Block 55, Lot 2, 30 Sandy Ridge Road
Delaware Township, NJ (the “Property”)

Dear Ms. Klink:

This office has been retained to represent Valerie Tucci, owner of property located at 21 Sandy Ridge Road, Stockton, NJ (“Client”). We are in receipt of the public notice provided by the Applicant for the Application and understand that the Board is currently scheduled to hear this Application on Thursday, March 11, 2021 as a Zoom hearing.

On behalf of our client, we respectfully contend that the Application should not proceed as currently scheduled for the following reasons:

- 1. THE APPLICANT FAILED TO PROVIDE ADEQUATE PUBLIC NOTICE IN ACCORDANCE WITH THE REQUIREMENTS OF THE MUNICIPAL LAND USE LAW (“MLUL”); THEREFORE, THE BOARD LACKS THE JURISDICTION TO CONSIDER THE APPLICATION AT THE MARCH 11, 2021 MEETING OF THE BOARD.**

One of the fundamental requirements of the MLUL is that the public must be fairly apprised of the application and any related hearings to consider it. See N.J.S.A. 40:55D-11. This public notice requirement: ensure[s] that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing, or at the least, look more closely at the plans and other documents on file. Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 237 (App. Div. 1996).

The required public notice must be provided at least 10 days prior to the scheduled hearing date and must contain: (a) the date, time and place of the hearing; (b) the nature of the matters considered; (c) an accurate identification of the property proposed for development by street address; and (d) the location and times at which any maps and documents for which approval is sought are available. N.J.S.A. 40:55D-11; Perlmart, supra at 236-37. The Court in Perlmart observed, “[w]e have recognized the importance of the public notice requirement of the Municipal Land Use Law (MLUL) and the fact that such notice is jurisdictional.” Id. at 237. To properly put the general public on notice of the nature and character of a proposed development, it is imperative that the notice of hearing contain an “accurate description of what the property will be used for under the application.” Id. at 238. Where the notice fails to give a reasonably accurate description, adjacent landowners may be misled. Id. at 239 (citing Appeal of Booz, 111 Pa. Commw. 330, 335 (1987)). Notice is fundamental to the Board's jurisdiction, and an applicant's failure to comply with the appropriate notice provision deprives the reviewing board of jurisdiction and is fatal to that board's approval of an application. See Oliva v. City of Garfield, 1 N.J. 184, 190 (1948); Township of Stafford v. Stafford Township Zoning Board of Adjustment, 299 N.J. Super. 188, 196 (App. Div. 1997), aff'd 154 N.J. 62, 79 (1998); Perlmart of Lacey, Inc. v. Lacey Township Planning Board, 295 N.J. Super. 234, 241 (App. Div. 1996); Broir Development Corp. v. Planning Board of the Township of Clinton, 255 N.J. Super. 262, 269-70 (App. Div. 1992) (noting “notice requirements evidence ‘legislative solicitude for the public interest.’”).

The public notice provided by the Applicant (the “Notice”) is woefully inadequate and deficient as a matter of law, and falls far short of compliance with the New Jersey Municipal Land Use Law’s (“MLUL’s”) public notice requirements. Further, the Application should not be deemed complete for failure to include requests for “use” relief required pursuant to N.J.S.A. 40:55D-70d or certain information necessary for the Board to assess the relief requested and required. These deficiencies include the following:

1. The Notice fails to mention that the proposed “tennis training facility” will include two indoor tennis courts, a viewing area, an office, pro shop, exercise gym, a commercial parking lot containing 48 non-residential parking spaces and related curbing and driveway improvements, and an apartment for a manager; whether the “tennis training facility” is for the individual Applicant’s own private use or is to be used as a business with classes; or that court time may be available to the public;
2. The Notice fails to state that a variance is required pursuant to N.J.S.A. 40:55D-70d1 to permit a new residential apartment on the property, nor has an application been made for said “D” use variance (required if the Applicant intends to proceed as a bifurcated application pursuant to N.J.S.A. 40:55D-76b);
3. The Notice fails to state that a variance is required pursuant to N.J.S.A. 40:55D-70d1 and Ordinance Section 230-12K to permit a use on a lot that does not have frontage on a public street, nor has an application been made for said “D” use variance (required if the Applicant intends to proceed as a bifurcated application pursuant to N.J.S.A. 40:55D-76b);

4. The Notice fails to state that a variance is required pursuant to N.J.S.A. 40:55D-70d6 for the stated height of the indoor facility (40 feet proposed vs. 35 feet maximum height permitted) nor has an application been made for said “D” use variance (required if the Applicant intends to proceed as a bifurcated application pursuant to N.J.S.A. 40:55D-76b);
5. The Notice fails to state that the Application is to be bifurcated, pursuant to N.J.S.A. 40:55D-76b or otherwise;
6. No architectural elevations or floor plans were submitted with the Application. In Cicchino v. Berkeley Heights Township, 237 N.J. Super. 175, 183 (App. Div. 1989), the Appellate Division noted that for a planning or zoning board to properly analyze a variance request under N.J.S.A. 40:55D-70(c)(2) and the extent of any detrimental effect upon a neighborhood, the applicant needs to produce evidence regarding the size and appearance of the proposed homes that will be violative of the Ordinance’s front yard setback requirement so to not deprive the Board of essential data necessary to make its factual evaluation regarding detrimental impact (in Cicchino, the Court determined that the applicant failed to demonstrate that their proposed subdivision could be granted without impairing the zone plan of Berkeley Heights as it failed to provide any architectural plans). Similarly, for the Board to analyze the aforementioned relief required by the Applicant pursuant to N.J.S.A. 40:55D-70d1 and d6, architectural plans and elevations need to be submitted;
7. The Notice fails to identify the correct common address for the property at issue (notice states 28 Sandy Ridge Road but the Township tax records state that the property’s common address is 30 Sandy Ridge Road);
8. Under N.J.A.C. 5:39-1.4, Minimum Technological and Procedural Requirements for Remote Public Meetings Necessitated by a Declared Emergency, subsection (e) states in relevant part as follows: “If a document would be made available to individual members of the public in hard copy while physically attending the meeting, the document shall be made available in advance of the meeting for download through an internet link appearing either on the meeting notice, or near the posting of the meeting notice both on the website and at the building where the meeting would otherwise be held.” Upon information and belief, the Applicant failed to make arrangements for same;
9. The submitted Variance Application Checklist requires submissions as to foundations limitations; septic system limitations; required landscaping; utility layouts; and areas to be paved or graveled, and type of surface. For an application requiring two forms of use variance relief, these submission requirements should not be waived by the Board for purposes of completeness; and
10. The Application is not signed by the Applicant or the owner of the subject property.

We suggest that these deficiencies and defects, presently divesting the Board of jurisdiction, be corrected so that the Application can proceed at a future date in accordance with applicable law.

2. THE APPLICATION SHOULD NOT PROCEED AS BIFURCATED FROM THE REQUIRED SITE PLAN AND SUBDIVISION APPLICATION, ESPECIALLY WITHOUT ARCHITECTURAL, LANDSCAPING, LIGHTING, OR TRAFFIC PLANS OR STUDIES, AND ESPECIALLY WHERE THE APPLICATION CONTEMPLATES THE CREATION OF A LANDLOCKED PARCEL REQUIRING RELIEF FROM SECTION 230-12k OF THE ORDINANCE.

The Application should not be permitted to be bifurcated. Where site plan and subdivision issues are central to the proofs required to satisfy the negative criteria for use variance relief, the variance application and the site plan/subdivision application should not be bifurcated. See Scholastic Bus Company v. Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). Stated differently, negative criteria concerns can be “so intertwined” in the variance and subsequent site plan application “as to render bifurcation improvident.” *Id.* Bifurcation is not appropriate where the “D” variances and site plan/subdivision issues are highly interrelated. See House of Fire v. Zoning Board, 379 N.J. Super. 526, 539-540 (App. Div. 2005).

Site plan and subdivision details relating to factors such as aesthetics, excessive building height, traffic flow, buffers, lighting, “ingress and egress, drainage, building orientation, the nature of surrounding properties, and other factors may be significant in deciding whether the use variances may be granted without substantial detriment to the surrounding neighborhood and the public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance.” Meridian Quality Care v. Wall Twp. Board of Adjust., 355 N.J. Super 328, 340-341 (App. Div. 2002). The proposed tennis training facility use and the proposed related uses (including but not limited to two indoor tennis courts, a viewing area, an office, pro shop, exercise gym, a commercial parking lot containing 48 non-residential parking spaces with related curbing and driveway improvements, and an apartment for a manager), jointly and severally requiring use variance relief, certainly cannot be looked at in isolation – especially without full architectural plans and elevations – and that is precisely why a full site plan and major subdivision review (with full compliance with the applicable site plan and subdivision application submission checklists) is necessary to concurrently accompany the Application. The need for an additional use variance to create via subdivision a landlocked parcel only exacerbates the problem. The Board should not permit the bifurcation of the Application.

This letter is not to be deemed a waiver of our client’s rights and remedies, all of which are hereby reserved. The above is based on an initial review of the Application, and we reserve the right to supplement and amend same at any time. Kindly place this correspondence in the Board’s file, and forward an electronic copy of this correspondence to all Board members and professionals as soon as possible. As indicated below, we have sent a copy of this submission to the Applicant’s counsel, Ms. Edwards, *via* email, and respectfully request that all future documents, letters, emails,

Delaware Township Board of Adjustment
Page 5
March 10, 2021

reports and submissions of the Applicant or the Board be sent to us at the time transmitted/sent (if necessary, we will pay for the reasonable costs of duplication of all such submissions).

We thank the Board for its consideration, and anticipate hearing from it as to the issues set forth above. Once this matter is appropriately rescheduled, we look forward to participating before the Board in connection with the Application.

Very truly yours,

A handwritten signature in black ink, appearing to read 'RFS', with a stylized flourish at the end.

Robert F. Simon

RFS:kas

cc: Erica Edwards, Esq. (*via email only*)
Steven Goodell, Esq. (*via email only*)
Client (*via email only*)