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February 18, 2021

Zoning Board of Adjustment
Borough of Woodcliff Lake
188 Pascack Road
Woodcliff Lake, NJ 07677

Attention: Robin Malley, Chairwoman
and Members of the Board

Re: **Second Application for Preliminary
and Final Major Site Plan Application of
188 Broadway LP
188 Broadway
Block 2701, Lot 3
Woodcliff Lake, NJ**

Dear Ms. Malley & Members of the Board:

A new application has been filed by 188 Broadway LP to renovate the existing building into a multi-family dwelling structure with 36 residential units and to construct a new 3-story structure behind the existing building which will contain 24 residential units for a total of 60 residential units on site. The cover letter with the application states that the application contains the same information as the prior application.

The first application in this matter was decided by the Board on August 27, 2019. A copy of the prior resolution is attached hereto. In its resolution of denial, the Board found among other things:

1. That the applicant did not establish peculiar and exceptional practical difficulties or exceptional or undue hardship arising out of the property to grant the variances.
2. The applicant did not satisfy the positive criteria by establishing that the benefits to the Borough outweigh the negatives.
3. The proposal did not promote the Master Plan goals.
4. The proposed density was not justified by a comparison to 100% affordable housing sites.
5. The applicant's proofs did not establish the required special reasons.
6. The applicant did not prove that the property was particularly suited for the use by distinguishing the subject property from surrounding sites.
7. The applicant did not establish that the proposed use was consistent with the Master Plan and the applicant failed to meet the burden of proof with regard to the Medici reconciliation as set forth in the case of Medici v. BPR Co., 107 N.J. 1 (1987) which requires the applicant to reconcile the fact that the Mayor

MARCUS & LEVY
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Zoning Board of Adjustment
February 18, 2021
Page 2

and Council through its zoning has prohibited the use in the zone.

The Board also considered the testimony of the Board's Planner Richard Preiss who provided a summary of the Mayor and Council's consideration of the Broadway corridor which is set forth on an exhibit marked as Exhibit ZBA-8 at the hearing (copy also attached hereto).

Since the application is virtually the same as the prior application except for perhaps addressing some comments raised by the Borough's fire department, Board planner and Board engineer which have no impact on the number of units, and the variances and waivers requested, this raises the issue of "*res judicata*" which is a Latin phrase which means something that has been decided. The concept of *res judicata* is a legal ground that has evolved over time to prevent the same case from being heard again with the purpose of avoiding duplication, unnecessary burdens of time and expense, confusion, uncertainty and in the interest of basic fairness. Bressman v. Gosh, 131 N.J. 517, 526 (1993).

In order to determine whether the doctrine of *res judicata* applies, one must determine whether or not the five elements exist that are necessary for the doctrine to apply which are as follows:

1. The second application is substantially similar to the first;
2. The same parties or their privies are involved;
3. There must be no substantial change in the application itself or conditions surrounding the property;
4. There must have been an adjudication on the merits in the first case;
5. Both applications must involve the same cause of action.

Here, the applicant contends that the Covid-19 virus has had a dramatic impact on the world as well as state and local municipalities and reduced the demand for and utility of office space and cites the case of Medici v. BPR Co., 107 N.J. 1, 17 n.9 (1987) that economic inutility is a special reason for a use variance; however, even assuming that a pandemic could be a factor suggesting economic inutility, and I wish to make it clear that I am not suggesting that it would, the applicant must also address not only the special reasons for the granting of the variance but the other reasons for the denial of the application as set forth above. The Board decision was not based only on finding of that special reasons weren't established but also that the applicant failed to meet the requirements of the Medici v. BPR Co. case which requires the applicant to reconcile the fact that the Mayor and Council through its zoning has prohibited the use in the zone and the applicant must provide a clear rationale why the use should be allowed when the zoning says it is a prohibited use at the site. Medici v. BPR Co., 107 N.J. 1 (1987). As reflected on the exhibit prepared by Richard Preiss, the Mayor and Council has examined the Broadway corridor over the years and although most recently (February 8, 2021 Ordinance approved) the Mayor and Council determined to update the Master Plan that process has not been completed. It can also be argued that this application is premature because the Honorable Gregg A. Padovano, J.S.C. has not rendered his final decision on the pending appeal.

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Zoning Board of Adjustment
February 18, 2021
Page 3

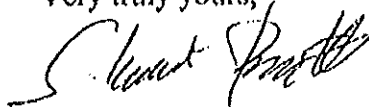
It is for the Board to determine whether or not to reject the application on the ground of *res judicata* and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness as set forth in the cases of Mazza v. Linden Bd. of Adjust., 83 N.J. Super. 494, 496 (App. Div. 1964) and Gruber v. Mayor and Tpp. Comm. of Raritan Tp., 39 N.J. 1, 12 (1962). If the Board determines to proceed with the application on the merits without invoking the Doctrine of *Res Judicata*, it will be assumed that the Board did not find the Doctrine applicable. St. Cassian's Catholic Church v. Allen, 77 N.J. Super. 99, 109 (Law Div. 1962) reversed on other grounds 40 N.J. 46 (1963).

The Board should initially determine whether or not to invoke the Doctrine of *Res Judicata* by vote of the Board but before it does so, the applicant should be afforded an opportunity to show reasons why the prior action should not be considered preclusive Allied Realty v. Upper Saddle River, 221 N.J. Super. 407 (App. Div. 1987). Typically, the applicant must show that there is a sufficient change in the application (which is not the case here) or in the conditions surrounding the property to warrant entertainment of the matter again. There are no cases determining that a pandemic is a changed circumstance that should be considered a special reason based upon economic inutility. Many businesses and uses suffer economic inutility during a pandemic.

CONCLUSION

Before hearing any testimony with regard to the revisions to the site plan and any other testimony, the Board should hear the applicant's basis for changed circumstances and whether or not the applicant contends that there are conditions surrounding the property to warrant a reconsideration of the matter (Russell v. Tenafly Bd. of Adjust. 31 N.J. 58 (Sup. Ct. 1959) and in particular whether or not there are any changed circumstances that would warrant the Board's reconsideration. A vote should be taken on whether or not to invoke the Doctrine of *Res Judicata*.

Very truly yours,



S. ROBERT PRINCIOTTO

SRP:amr

Enclosures

cc: Paul Kaufman, Esq. w/encs. (via email)
Richard Preiss, w/encs. (via email)