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May 24, 2021

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

Attention: Robin Malley, Chariwoman

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

Dear Ms. Malley and Members of the Board:

A second application was filed in the above referenced matter by 188 Broadway, LP and I issued a review letter dated February 18, 2021 (copy attached hereto). The second application sought to renovate the existing building into a multi-family dwelling structure with 36 residential units and to construct a new 3-story structure on the existing building with 24 residential units for a total of 60 residential units and the cover letter for the application stated the application contained the same information as the prior application.

The applicant has revised the application as noted in the Neglia Engineering technical review letter (revised April 5, 2021) which notes that the applicant now proposes to construct two 2-story multi-family residential buildings, with the proposed residential buildings containing a total of 53 units as follows:

- Building 1: The 1-bedroom units were increased from 28 to 33 and the 2-bedroom units were reduced from 8 to 4 for a total of 37.
- Building 2: The 1-bedroom units were reduced from 18 to 12 and the 2-bedroom units were reduced from 6 to 4 for a total of 16.

All the variances previously requested including the use variance are still required; except the height variance. The applicant revised the plans reducing the building height to two stories and therefore, this variance is no longer required.

Although the application has changed, the determination as to whether or not to invoke *res judicata* must be made by the Board. A determination must be made as to whether or not the five elements exist for the doctrine to apply including whether the revised application is substantially similar to the first. (See my review letter of February 18, 2021)

The consideration of the factors in Medici v. BPR Co., 107 N.J. 1 (1987) as set forth in my prior review letter also still apply.

There's also an issue with regard to whether or not the Board has jurisdiction to hear the revised the application based on the pending appeal of the first application. The matter is being heard by the Honorable Greg Padovano, J.S.C, Superior Court, Bergen County. Although a motion for Summary Judgement was

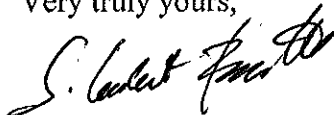
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filed by the applicant and a Cross-Motion was filed on behalf of the Board, Judge Padovano denied both motions. Subsequent to his denial of the motions both parties filed Motions for Reconsideration which were argued however, Judge Padovano still to date has not rendered his decision. The case law is split on this issue. In Cicchine v. Township of Woodbridge, 413 N.J. Super 393 (2010) the Plaintiff filed an application with the Planning Board for a subdivision with bulk variance approval which was denied by the Planning Board. The Plaintiff filed a complaint in lieu of prerogative writs. During the pendency of the appeal the Plaintiff filed a second application however the Board determined that it would hear the application without prejudice to it's position that it lacked jurisdiction however the Plaintiff refused to proceed and the Plaintiff withdrew from the meeting and then sought an automatic approval based upon the failure of the Board to decide the application within the time limits by the Municipal Land Use Law. Ultimately the Court held that upon the filing of the Complaint the Board is divested of jurisdiction to modify a prior action that is the subject of the appeal. This decision is a law division case which means that it is not binding on a trial court. In Pawlynsky v. Princeton Planning Board, 214 N.J. Super, unpub. Lexis 378 another law division case, the Plaintiff's filed an application for approval for development of 280 residential units which was rejected by the Board and the Plaintiff filed an action in lieu of prerogative writs. As the case proceeded the Plaintiff and municipal Defendant's agreed to a Consent Order which provided that a new development application would be filed. The revised application was approved by the Board. The Court noted that in the Cicchine case the Court had concluded that the Board was divested of jurisdiction because Plaintiff's were pursuing both applications without a remand and in the Court's rationale issues would arise if the denial of the first application was reversed by the Court and the separate application was approved by the Board there would be two approved applications and that would be a waste of not only the Court's time but that of the Board. The Court in Pawlynsky distinguished the Cicchine case because in Cicchine the Plaintiff's themselves had initiated both Complaints. The second factor considered by the Pawlynsky court was that there was no automatic approval being requested. The Court noted that although there was a possibility that the applicant (Avalon Bay) could obtain two approvals for two distinct applications it noted that there is nothing in the Municipal Land Use law that prevents a developer from making separate applications to a municipal board for related projects and there is no inherent harm if a developer chooses between pursuing two plans that have been approved as long as each approval was entered in compliance with the procedural guarantees of the municipal land use law which are designed to allow public involvement in land use decision making. Finally the Court noted that Avalon Bay had represented to the Court that Avalon Bay had no intention of resuming the first litigation should Avalon Bay timely prevail in the second litigation.

The applicant should address the jurisdiction issue and particularly state whether or not it will withdraw the pending lawsuit in the event of approval of the revised application. The applicant will also run the risk that an appeal could be filed contending that the Board lacks jurisdiction. It is to be noted that this application is not part of a proposed settlement or remand.

Very truly yours,



S. ROBERT PRINCIOTTO

SRP/yp
Enc.