New Jersey
Appleseed

March 16, 2017

Via Hand Delivery

City of Newark Zoning Board of Adjustment
City Hall
920 Broad Street
Newark, NJ 07102

Re: ZBA Application 16-73
28-50 McWhorter Street
Block 184, Lots 8 & 28

Dear Members of the Zoning Board of Adjustment:

As you are all aware, this evening's agenda includes the above-referenced application submitted by McWhorter Street, LLC for a d(1) variance to continue operating its surface parking lot located in the R-5 (Residential Mid-Rise Multifamily) Zone in the Ironbound at the corners of McWhorter, Hamilton, and Union Streets. However, in its opinion dated August 19, 2016, the Superior Court of New Jersey, Appellate Division found that the **USE** of a surface parking did not meet the criteria for such a variance and vacated this Board's earlier resolution granting the variances and site plan approval for this lot. Despite this legal and binding decision of the Appellate Division, McWhorter Street, LLC has continued to illegally operate its surface parking lot for the past seven (7) months, ignoring the wishes of the community, deliberately undermining and circumventing the judicial system, and depriving the city of much-needed tax revenue (if this site was appropriately developed). Still not satisfied, and with seemingly endless resources, McWhorter Street LLC is back at another bite at the proverbial apple with the present

New Jersey Appleseed
Public Interest Law Center of New Jersey
50 Park Place, Rm. 1025
Newark, New Jersey 07102

Phone: 973.735.0523; 917-771-8060
Email: steinhagen_pilc@yahoo.com
Website: www.njappleseed.org

application. Fortunately, under our State's case law, you don't get that second bite for the reasons set forth herein.

POINT I

THE LEGAL DOCTRINE OF RES JUDICATA BARS THIS APPLICATION.

The principle of *res judicata* has evolved principally in the judicial system to prevent the same claims involving the same parties from being filed and brought before a court repeatedly. Velasquez v. Franz, 123 N.J. 498, 505 (1991). Simply put, it is a salutary rule that respects the finality of the court's decision, limits the burden of litigation on adverse parties, and removes future, unnecessary litigation from the courts. City of Hackensack v. Winner, 82 N.J. 1, 32 (1980). *Res judicata* is founded on a combination of both efficiency concerns (*i.e*., eliminating the social burden of an indefinite continuation of a dispute) and fairness concerns (*i.e.*, protecting a party from the burden of re-litigating an identical issue with the same party). Parkland Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328-29 (1971)); Restatement (Second) of Judgments, ch. 1, at 11 (1982). Thus, the law of *res judicata* "now reflects an expectation that parties who are given the capacity to present `their entire controversy' shall in fact do so." Id., §24 cmt. a.

Since the United States Supreme Court case of United States v. Utah Construction & Mining Company, it "has been clear that *res judicata* principles extend to administrative determinations," which are adjudicative (as opposed to legislative or managerial). United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422-23 (1966); See also, Stewart E. Sterk and Kimberly J. Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139, 1151 (2011). Nonetheless, already in 1959, the New Jersey Supreme Court in Russell v. Board of Adjustment, explained the basis for applying the principle

of *res judicata*, also known as the preclusion doctrine, in zoning cases, focusing specifically on the creation of a record and the function of boards of adjustment in deciding an application under New Jersey's Municipal Land Use Law ("MLUL") as "essentially fact finding, as opposed to policymaking." Russell v. Bd. of Adjustment, 31 N.J. 58, 65 (1959). The New Jersey Supreme Court held that when a court is faced with the question of whether to bar a second application for a variance brought by the same owner regarding the same property, the weight of authority in New Jersey supports the following rule:

> The question . . . is whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the application. (citations omitted)

Id., 31 N.J. at 66.

Our courts in this State have continually upheld this principle. For example, in Toll Brothers, Inc. v. Board of Chosen Freeholders of the County of Burlington, the New Jersey Supreme Court recognized the right to request a modification of previously approved conditions only where "a sufficient change in the application itself or in the conditions surrounding the property" warrant reconsideration of the application. Toll Bros., Inc. v. Bd. of Chosen Freeholders of the Cnty. of Burlington, 194 N.J. 223 (2008). Likewise, in Stop & Shop Supermarket Co. v. Board of Adjustment of the Township of Springfield, the Court held that the doctrine of *res judicata* applies to the decisions of boards of adjustment. 162 N.J. 418 (2000); see also; Bressman v. Gash, 131 N.J. 517, 526 (1993) (finding that "an adjudicative decision of an administrative agency 'should be accorded the same finality.'" (quoting Restatement (Second) of Judgments § 83 cmt. b (1982)) and Russell v. Bd. of Adjustment of Tenafly, 31 N.J. 58, 65 (1959).

Thus, when a zoning board or planning board has denied a request for a variance an applicant is not permitted to file a new application for exactly the same relief. As explained by Judge Cuff sitting with the New Jersey Supreme Court:

> If an applicant files an application similar or substantially similar to a prior application, the application involves the same parties or parties in privity with them, there are no substantial changes in the current application or conditions affecting the property from the prior application, there was a prior adjudication on the merits of the application, and both applications seek the same relief, the later application may be barred. **It is for the Board to make that determination in the first instance**.

Ten Stary Dom P'ship v. Mauro, 216 N.J. 16, 39 (2013) (emphasis added).

Here, McWhorter Street LLC has submitted nearly the exact same application as previously submitted in 2012. The applicant is requesting the same use variance for a surface parking lot, which is the primary consideration for this Board. The other features are merely secondary, were not at issue in the Appellate Division, and do not detract from the fact that for purposes of determining whether to grant a (d) variance are the same. Notwithstanding this legal conclusion, there is absolutely no difference in the overall layout of the facility and traffic circulation patterns, the number of curb cuts, the number of site trees, the fencing, the paving material, and the control booth. In fact, the only changes in the application before the Board this evening from that presented in 2012 is the number of street trees being provided (an addition of two), the number of lights (an addition of six), and the gall of requesting an additional four (4) parking spaces.[1] A comprehensive comparison of the applications is presented in Exhibit "A."

Thus, the legal doctrine of *res judicata* bars the current application as there are no substantial changes to same.

[1] It is interesting to note that both the site plan and zoning table show 173 spaces, a difference of an additional fifteen (15) parking spaces.

POINT II

THE APPELLATE DIVISION HAS FOUND THAT THE USE OF A SURFACE PARKING LOT AT THIS PARTICULAR LOT DOES NOT WARRANT THE GRANTING OF A D-VARIANCE.

Under the MLUL, zoning boards of adjustment are delegated the power to grant a use variance, a (d) variance, when an applicant has met what is commonly referred to as "positive" and "negative" criteria. Such variances may be granted "[i]n particular cases and for special reasons" —the positive criteria — provided an applicant shows that "such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance" — the negative criteria. N.J.S.A. 40:55D-70(d).

Concerning the positive criteria, New Jersey case law recognizes three categories of circumstances in which the "special reasons" required for a use variance may be found:

(1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility, see Sica v. Bd. of Adjustment of Wall, 127 N.J. 152, 159-60 (1992);
(2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone, see Medici v. BPR Co., 107 N.J. 1, 17 n.9 (1987); and
(3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."

Smart SMR, Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998) (quoting Medici, supra at 4 (1987)); see also Saddle Brook Realty, supra, 388 N.J. Super. at 76.

A zoning board of adjustment's "[d]etailed factual findings that distinguish the property from surrounding sites and demonstrate a need for the proposed use may help to establish that the property is 'particularly suitable' for the proposed use and a lack of such findings may be fatal when tested on review." Price v. Himeji, LLC, 214 N.J. 263, 288 (2013).

To satisfy the "negative criteria," an applicant must demonstrate the variance "can be granted without substantial detriment to the public good," and "the variance will not substantially

impair the intent and the purpose of the zone plan and zoning ordinance." Price v. Himeji, LLC, 214 N.J. at 286 (citing N.J.S.A. 40:55D-70). The first question "focuses on the effect that granting the variance would have on the surrounding properties." Ibid. The second question asks whether it is possible to "reconcile the grant of the variance for the specific project at the designated site with the municipality's contrary determination about the permitted uses as expressed through its zoning ordinance." Ibid. (citing Medici, supra, 107 N.J. at 21). This requires, "in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance." Medici, supra, 107 N.J. at 21.

In the instant matter, the Appellate Division reversed the decision of this Board granting a use variance for a surface parking lot at the same location being presented this evening. In sum, the Court held that the application satisfied neither the positive nor the negative criteria required for the grant of a (d) variance. Specifically, the Court found that the property's use as a surface parking lot "does not inherently serve[] the public good or that [McWhorter Street LLC] will suffer undue hardship if compelled to use the property in conformity with the permitted uses in the zone." Caro v. 28 McWhorter St., LLC, No. A-3648-13T3, 2016 WL 4410100, at *7 (App. Div. Aug. 19, 2016). Attached hereto as Exhibit "B."

As to the positive criteria, the applicant will most likely argue this evening that the use will serve the general welfare because it responds to a demand for parking in the area. However, the Court found that the proximity to major transit hubs in terms of its location did not make the property distinct from other properties in the zone, or more particularly suited for a surface parking lot. See Medici, supra, 107 N.J. at 24; Vidal, supra, 292 N.J. Super. at 565. Thus, the Court found that the application did not satisfy the positive criteria required for the variance.

Caro, supra at 21-22. Rather, "these characteristics would be appropriate for the governing body to consider in determining whether to continue the current zoning but do not provide a basis for the Board to grant use variances." Vidal, supra, 292 N.J. Super. at 565.

More importantly, the Appellate Division found that McWhorter Street, LLC failed to satisfy the negative criteria required for a use variance in that the application "failed to demonstrate the variance could be granted without substantial detriment to the public good, and that the variance would not substantially impair the intent and the purpose of the zone plan and zoning ordinance." Caro, supra at *8. More particularly, the Court noted with respect to the first prong of the negative criteria:

> [T]he statutory focus is on the variance's effect on the surrounding properties. The board of adjustment must evaluate the impact of the proposed use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute "substantial detriment to the public good."

Caro, supra at *8 (citing Medici, supra, 172 N.J. at 22 n.12 (additional citations omitted).

Notably, the Court found that the development of a surface parking lot was directly contrary to the intent of the 2004 Land Use element of the Master Plan which expressly sought, as one of its goals, "[t]o reduce presence of surface parking lots and multi-leveled structured garages by providing incentives for developers to locate parking underground to the extent possible." Caro, supra at *8. In doing so, the Court concluded that the use of the property as a surface parking lot, without "an enhanced standard of proof requiring specificity that the proposed use was not contrary to the intent of the master plan and ordinance," would "substantially impair the intent and purpose of the zone plan and zoning ordinance" as outlined in the 2004 Master Plan for the City of Newark. This is even greater the case with the application

before the Board this evening given the 2012 Master Plan (adopted on September 24, 2012) and Zoning Ordinance §40:4-1 specifically prohibits surface parking lots in the downtown area.

It is expected that McWhorter Street LLC will argue that the area is still experiencing "an economic downturn" and that financing for development for the lot is unavailable. While "undue hardship resulting from the economic inutility of a parcel of land, resulting from the parcel not being reasonably adapted to a conforming use, can constitute grounds for a variance," there is no legal precedent for the proposition that an economic downturn which affects development generally can satisfy the negative criteria for a use variance." Caro, supra at *8 (citing Medici, supra, 107 N.J. at 17 n.9.) Simply put, McWhorter Street, LLC's business decision to landbank to the detriment of the City's residents does not make the property unsuitable, economic or otherwise, for any of the conforming uses in the zone.

In sum, the variance sought is inconsistent with the intent and purpose of the master plan and zoning ordinance. Medici, supra, 107 N.J. at 21. Accordingly, objectors respectfully argue that the Board is compelled to deny the application at bar

POINT III

THE ADOPTION OF THE 2012 MASTER PLAN AND ZONING ORDINANCE CONTINUING TO PROHIBIT SURFACE PARKING LOTS IN THIS ZONE WEIGHS IN FAVOR OF DENYING THE APPLICATION.

"The question for [a] board of adjustment, on a second application for a variance concerning the same property, is whether there has occurred a sufficient change in the application itself or in the conditions surrounding the property to warrant entertainment of the application." Russell v. Bd. of Adjustment of Borough of Tenafly, 31 N.J. 58, 66 (1959). For example, in Bressman v. Gash, 131 N.J. 517 (1993), the New Jersey Supreme Court found that there were sufficient differences in the present application of an owner of residential property to

support its reconsideration so that the doctrine of *res judicata* did not apply even though the prior application was denied.

In the present case, there are no changes in the conditions surrounding the property that weigh in favor of reconsideration of the application. Indeed, the changes in the City of Newark's zoning landscape in terms of the adoption of the 2012 Master Plan and Zoning Ordinance weigh **AGAINST** this application. The original application, heard on September 6, 2012, was granted *before* the City's new zoning regulations took effect. At that time, the property was located in what was zoned as the I-1 (First Industrial) District. In 2015, the City of Newark adopted its new Zoning and Land Development Ordinance which changed the zoning for this location from I-1 to what is now zoned as the R-5 Residential District which permits low-rise and mid-rise multi-family dwellings. Surface parking lots are not permitted in R-5 Residential District. Had the City sought to permit surface parking lots in this zone, it would have done so in the new Zoning Ordinance. Instead, it chose not to allow surface parking lots. This is clear and the intent of the City to prohibit surface parking lots in this zone must be considered by this Board.

In addition, the application for a surface parking lot directly across the street from the present application was denied by this Board just last year. In the application concerning lot 20-26 Bruen Street, this Board denied the application of a surface parking lot based on the 2012 Master Plan and 2015 Zoning and Land Development Ordinance (which was proposed at the time of the hearing), as well as the objection of PLANewark, its experts and the area's residents.

Due the changes in the legal framework concerning this application (i.e., the adoption of a Zoning Ordinance in accord with the 2012 Master Plan and the previous reports associated with that Plan on which the Appellate Court relied) and the factual change on the ground across

the street, the Board must deny this application because there are no "changed circumstances" on which the applicant can justify its second bite at the apple.

POINT IV

SHOULD THE BOARD DECIDE TO HEAR THE APPLICATION, THE TEMPORARY DURATION OF THE APPLICATION DOES NOT BECOME A PERMITTED USE.

As explained above, the Board should not hear this application on the merits: the doctrine of *res judicata* bars this application since the question of whether to grant a D(1) variance to the applicant for this property for use as surface parking lot has already been presented to and decided by the Appellate Division. Furthermore, there are no changed circumstances warranting consideration of this "same" application. Indeed, any changed circumstances (i.e., adoption of the Master Plan and Zoning Ordinance since this Board's initial resolution and denial of an application for a surface parking lot across the street from this property) weigh in favor of denying the application.

Notwithstanding the above, should this Board hear the application on the merits, the objectors wish to note that the fact that the applicant is now requesting a variance for a period of two (2) years does not impact your decision in accord with the positive and negative criteria outlined and discussed in Point II, supra. New Jersey law is very clear: Interim variances are only permissible where there is legal basis for granting a permanant variance. In the seminal case of Lynch v. Hillsdale, 136 N.J.L. 129, 133 (Sup. Ct. 1947), the New Jersey Supreme Court held that "a use which is not the proper subject of a variance lasting and inviolable in character is not permissible for a limited time period." See also Goerke v. Middletown Tp., 85 N.J. Super. 519, 522 (App. Div. 1964).

As such, McWhorter Street, LLC should not be granted any additional flexibility in terms of bearing its burden and proving its case simply because it now claims that it desires to use this

lot as surface parking lot for only a limited time. Either the application meets the statutory criteria, or it does not. We say that it does not, and McWhorter Street, LLC should not be permitted to continue its use that is detrimental to the Master Plan, Zoning Ordinance and residents of Ironbound and all of Newark.

CONCLUSION

For the reasons set forth above, Objector PLANewark requests that the Board deny the application before you tonight on the principle of *res judicata* finding that there are no substantial changes from the application previously presented in 2012 and any changed circumstances, if any, favor the Objector.

Respectfully submitted,
NJ APPLESEED PILC

By: _____
Lisa M. Scorsolini, Esq.
Renee Steinhagen, Esq.

cc: Jennifer M. Carrillo-Perez, Esq. (Attorney for Applicant McWhorter Street LLC)
Angelo Cifelli, Esq. (Attorney for the Zoning Board of Adjustment)