



**TOWNSHIP of HOPEWELL
MERCER COUNTY**

**201 WASHINGTON CROSSING – PENNINGTON ROAD
TITUSVILLE, NEW JERSEY 08560-1410**

PROJECT / APPLICATION

BLOCK:

LOT:

ADDRESS:

PROJECT NAME:

CORRESPONDENCE

July 20, 2023


Legal Memorandum prepared by:
Kevin A. Van Hise, Esq.

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MEMORANDUM

To: Hopewell Township Zoning Board of Adjustment

From: Kevin A. Van Hise, Esq., Board Attorney 

Date: July 20, 2023

Re: Application No. 22-11 – Matthew Stern & Margo Stern
Project – "The Hopewell"
29 Fiddlers Creek Road, Block 133, Lot 14.01

With the conclusion of testimony in the above matter rapidly approaching, the Board will soon be in a position to consider this application and render its decision. To assist you in your deliberations, I wanted to provide you with some basic instructions and the legal framework to help guide you in your decision.

The Application.

Currently before the Board is an application filed by Matthew and Margo Stern ("Applicants") seeking to convert an existing single family residence and its associated site improvements (historically known as "Hollystone Manor") into a 27-room "boutique hotel" with associated amenities including a gym, spa, pool, yoga studio, coffee bar, tennis / pickle ball court, small gift shop, and a 60-seat restaurant¹ open to hotel guests and the general public. The subject property is located at 29 Fiddlers Creek Road and is designated as Lot 14.01 in Block 133 on the Hopewell Township Tax Map (the "subject property"). It is approximately 23.76± acres in size and

¹ Pursuant to the testimony provided during the hearing, the restaurant will have 30 - 35 indoor seats and up to 30 outdoor seats (weather permitting), up to a maximum of 60 total seats.

MASON, GRIFFIN & PIERSON

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July 20, 2023

Page 2

is located in the Mountain Resource Conservation ("MRC") zoning district. Approximately 14.61± acres of the property is subject to a conservation easement held by the Friends of Hopewell Valley Open Space.

Because hotels and restaurants are not permitted uses in the MRC zoning district, Applicants are seeking a "d(1) use variance"² to permit the proposed hotel and restaurant use. Pursuant to N.J.S.A. 40:55D-76b, Applicants have bifurcated the application and are seeking only the necessary use variance at this time. Should the Board approve this application, Applicants will be required to return to the Board on a separate future application for site plan approval (with any other relief that may be necessary). Because the statute specifically requires Applicant to obtain the "grant of all required subsequent approvals," the failure to obtain site plan approval would render the use variance null and void.

Legal Standards.

As the Board is well aware, the Municipal Land Use Law, N.J.S.A. 40:55D-1, *et seq.* ("MLUL") provides that the "board of adjustment shall have the power to ... [i]n particular cases for special reasons, grant a variance to allow departure from regulations ... to permit: (1) a use or principal structure in a district restricted against such use or principal structure."³ The law further specifies that "[n]o variance or other relief may be granted under the terms of this section ... without a showing that such variance or other relief can be granted without substantial detriment to the public

² N.J.S.A. 40:55D-70d(1).

³ N.J.S.A. 40:55D-70d.

MASON, GRIFFIN & PIERSON

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July 20, 2023

Page 3

good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."⁴

To obtain variance relief pursuant to N.J.S.A. 40:55D-70d, commonly known as a "d" or "use" variance, the applicant must prove to the Board's satisfaction that: (a) special reasons exist to justify the deviation from the ordinance requirements (traditionally referred to as the "positive" criteria), and (b) even if special reasons do exist, that the variance "can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance" (referred to as the "negative criteria").⁵

The courts have recognized three categories of circumstances in which "special reasons" may be found to satisfy the positive criteria necessary for a use variance: "(1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because 'the proposed site is particularly suitable for the proposed use.'"⁶ Where the proposed use is not inherently beneficial, generally, the applicant must demonstrate, by an enhanced quality of proof, that

⁴ *Id.*

⁵ N.J.S.A. 40:55D-70d. *See also* Medici v. BPR Co., 107 N.J. 1, 10 (1987) and Sica v. Bd. of Adj. of Twp. of Wall, 127 N.J. 152, 156 (1992).

⁶ Saddle Brook Realty, LLC v. Twp. of Saddle Brook Zoning Bd. of Adj., 388 N.J.Super. 67, 76 (App. Div. 2006) (*citing* Sica, 127 N.J. at 159-60, Medici, 107 N.J. at 17 n. 9, and Smart SMR v. Fair Lawn Bd. of Adj., 152 N.J. 309, 323 (1998))

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 4

the proposed site is particularly suitable for the proposed use.⁷ Additionally, "[t]o assure that the board of adjustment does not usurp the governing body's statutory authority to determine the municipality's zoning, the Court in Medici held that, in addition to establishing special reasons, an applicant for a use variance must show by 'an enhanced quality of proof... that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.'"⁸ "The burden of proving the right to relief sought in the application rests at all times upon the applicant."⁹

The Role of the Board.

In its considering an application for a use variance, the Board acts in a "quasi-judicial capacity" – meaning it acts like a court. It receives evidence, hears sworn testimony, ascertains the facts based on the evidence provided in the hearing and on the record, applies the relevant law to the facts, and then within the bounds of its judicial discretion, must render a decision on the application.¹⁰ The Board's decision must be based only on evidence produced at the hearing and in the record.¹¹ Outside information, such as social media postings, news reports, petitions, other opinions or facts that are not part of the record before the Board, may not and cannot play any role

⁷ Northeast Towers, Inc. v. Zoning Bd. of Adj. of Borough of West Paterson, 327 N.J.Super. 476, 487 (App. Div. 2000)(quoting Smart SMR, 152 N.J. at 323).

⁸ Saddle Brook, 388 N.J.Super. at 79 (quoting Medici, 107 N.J. at 21).

⁹ Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann, 2023), §18-4.1, citing Ten Stary Dom Ptp. vs. Mauro, 216 N.J. 16, 30 (2013).

¹⁰ Cox & Koenig, §15-1.2.

¹¹ Id. See also Kramer vs. Sea Girt Bd. of Adj., 45 N.J. 268, 280, 284 (1965).

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 5

in the Board's decision making.

Evidence and Testimony.

In addition to the application submissions, municipal reports, and the exhibits admitted into evidence during the hearing, the majority of evidence presented to the Board in this matter has come in the form of witness testimony. Generally, witnesses may only testify about facts within their knowledge and are not permitted to give opinions (commonly known as "lay" witnesses). These witnesses will traditionally be the applicant(s), fact witnesses, and members of the public.

An exception to this rule exists in the case of an "expert witness." An expert witness may give an opinion on a matter in which the witness has some special knowledge, education, skill, experience or training. These witnesses will traditionally be consultants retained by the applicants, consultants retained by counsel, or consultants retained by members of the public, along with the Board's professionals.

An expert witness may be able to assist you in understanding the evidence in this application, or in performing your duties as a fact finder. Notwithstanding whether or not a witness qualifies as an expert, the determination of the facts in this application rests solely with you as Board members.

As part of your task in evaluating the evidence, you will have to decide which witnesses to believe and which witnesses not to believe. Regardless of whether the witness is a lay person or expert, you may believe everything a witness said, only part of it, or none of it.

In deciding what testimony to believe, you may take into consideration:

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 6

1. the witness' interest, if any in the outcome of this case;
2. the accuracy of the witness' recollection;
3. the witness' ability to know what he/she is talking about;
4. the reasonableness of the testimony;
5. the witness' demeanor on the stand;
6. the witness' candor or evasion;
7. the witness' willingness or reluctance to answer;
8. the inherent believability of the testimony;
9. the presence of any inconsistent or contradictory statements.

Additionally, in examining each expert's opinion(s), you may consider the person's reasons for testifying, if any. You may also consider the qualifications of the individual(s) and the believability of the expert, including all the considerations that generally apply when you are deciding whether or not to believe a witness' testimony. The weight of the expert's opinion depends on the facts on which the expert bases his/her opinion. You must also decide whether the facts relied upon by the expert actually exist. You are not bound by the testimony of an expert. You may give it whatever weight you deem is appropriate. You may accept or reject all or part of an expert's opinion(s). Again, regardless of whether the witness is a lay person or expert, you may believe everything a witness said, only part of it, or none of it.

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 7

Closing Summations.

Based upon the latest representations of counsel, there are no further witnesses being offered by Applicants or counsel for residents who oppose this application. As such, the next step will be to receive the testimony of interested parties and the public. At the conclusion of the public comment period, the final step before the Board's consideration and action on the application will be to hear the closing summations of counsel.

Throughout the hearing, the Board has heard the statements and arguments of Applicants' counsel, as well as objectors' counsel. As we approach the conclusion of the application, the attorneys will have a final opportunity to provide their closing statements. As the burden of proof is on Applicants, Mr. Ridolfi (Applicants' counsel) will go last.

It is important to note that the lawyers are here as advocates for their clients. In their presentations and in their summations, they have and will give you their views of the evidence and their arguments in favor of their clients' position. While you may consider their comments, nothing that the attorneys say is evidence and their comments are not binding upon you.

Motion on the Application.

Following the summations of counsel, the Board will (at last) be in a position to consider this application and render its decision to grant or deny the requested variance. While the Board may publicly deliberate and discuss the merits of this application before it renders its decision, there is

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 8

no requirement mandating that it do so.¹² Rather, the Board may proceed, with or without deliberation, on a motion to grant or deny the application.

In considering the application, it is important to remember that the Board's decision must be based on the evidence submitted in the application materials and presented during the hearing, viewed against the statutory requirements for the relief sought.¹³ The number of proponents supporting an application, or number of objectors appearing and speaking out against the application, are immaterial.¹⁴ Rather, the Board's function "is to apply the facts adduced at the hearing to the legal requirements of the statute and ordinance and to decide on this basis whether the requested relief can be legally granted or not."¹⁵

Should the Board find that Applicants have not met their burden in meeting the positive and negative criteria for the requested variance, then a motion to deny the application would be appropriate. *A majority vote on such a motion would prevail.* Alternatively, should the Board find that Applicants have met their burden, a motion to approve the application (with conditions) would be appropriate. *For a "use variance," five (5) affirmative "yes" votes would be required to grant the approval.* Again, as a bifurcated application, the MLUL requires any approval(s) granted by the Board to be conditioned upon Applicants obtaining all required subsequent approvals necessary from

¹² Cox & Koenig, §19-1, *citing Scully-Bozarth Post vs. Burlington Planning Bd.*, 362 N.J.Super. 296, 312 (App. Div. 2003), *certif. den.* 178 N.J. 34 (2003).

¹³ *Kramer*, 45 N.J. at 280, 284.

¹⁴ Cox & Koenig, §19-3.1 ("Decision making is not a matter of head counting.").

¹⁵ *Id.*

MASON, GRIFFIN & PIERSON

A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

July 20, 2023

Page 9

the Board.¹⁶ Thus, should the Board find an approval is warranted, Applicants will be required to meet any conditions imposed by the Board as part of the use variance approval, AND return to the Board on a separate site plan application. A failure by Applicant to meet the conditions of approval and obtain site plan approval would render the variance null and void.

Once the appropriate motion to grant or deny the application is made and seconded, the Board may discuss the motion. When the discussion, if any, has ended, the Board shall call the question and a roll call vote recorded. Again, there is no requirement that a Board member articulate his or her rationale for their vote, but they are certainly welcome to do so if desired. Following the vote, a resolution of memorialization will be prepared within forty-five days, setting forth the Board's findings of fact, conclusions of law, and memorializing the actions taken by it. Upon adoption, that resolution will serve as the Board's final decision on the application.

¹⁶ N.J.S.A. 40:55D-76.b.