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Via Electronic Mail Only
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Thomas J. Molica Jr., Esq.
Vogel, Chait, Collins & Schneider
25 Lindsley Drive, Suite 200
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RE: BHT Properties
Andover Township Land Use Board
248 Stickles Pond Road
Block 151, Lot 21

Dear Mr. Molica:

I have previously written in regard to the classification of the Amended Application.

As stated, my client is willing to pay the fees associated with filing of a new application and will provide notification of hearing. My client has consented to an adjournment of the hearing while the issue concerning whether the application would be deemed a new application or amended application is resolved.

The case of Ten Stary DOM Partnership v. T. Brent Mauro, 216 N.J. 16 (2003), has been cited. That case involved an application to a planning board seeking bulk variance approval to authorize construction of a single-family home on a vacant lot. The planning board granted the variance approval, and an interested party filed an appeal through an action in lieu of prerogative writ challenging the board's decision. A board member who participated had not attended all the meetings and had not read all the transcripts. The matter was remanded for a new vote on the record. The planning board then voted "5 to 4" against approval. The denial of the variance approval was appealed, and the planning board's denial was affirmed without prejudice as set forth

in an order from the Appellate Division which provided that the applicant shall have the right to file a new application with the planning board seeking the same or amended relief.

The matter eventually was heard by the New Jersey Supreme Court which determined the principal of res judicata barred the Appellate Division's dismissal of the application without prejudice which authorized the refiling of the same application. The principal of *res judicata* barred such an action. In the Ten Stary case there was a prior adjudication on the merits of the application unlike the Application now presented to the Andover Township Land Use Board. The Supreme Court held it was improper to authorize the applicant to present an identical application to the planning board. The Supreme Court determined that the Appellate Division had to either affirm, reverse, or modify the decision of the planning board rather than permit the presentation of the same application.

It is submitted that the Ten Stary matter does not address the current issue now presented to the Andover Township Land Board as to whether a "modified" application may be considered an "amended" application where there has been no prior decision on the application by a Land Use Board.

The case of Lake Shore Estates, Inc. v. Denville Twsp Planning Board, 255 N.J. Super. 580 (1991) (App. Div. 1991), however, does address the issue. In the Lake Shore Estates case, an applicant was seeking preliminary and major approval. The case has a long procedural history which involves ordinances changes following the initial filing of the application including a "steep slopes ordinance" and the re-zoning of the property reducing the density. The time of decision would apply wherein ordinance changes could be made following the termination of completeness of an application.

Lake Shore Estates filed a revised application which removed 28 acres which had been included in the initial application. The court determined that the application presented would constitute a new application because 28 less acres were contained in the most recent submission to the land use board and therefore, the ordinances adopted after the re-submission of the application would apply.

In the Application filed by my client, there have not been changes in the area of the site, in ingress or egress, and the proposed area of disturbance would remain consistent with the Application submitted by BHT Properties Group in December 2019. The "change" is essentially that a less intense, permitted use is involved in the proposal now before the Andover Township Land Use Board. It may be noted that the New Jersey Supreme Court in reviewing the decision Lake Shore Estates, determined that the revised ordinance should not be applied to the application in the interest of fairness.

The case of Thomas Davis v. Planning Board of City of Somers Point, 327 N.J. Super. 535 (1999) (App. Div. 2000), discusses modification of a plan following major site plan approval. In the Davis case, a McDonald's restaurant was approved requiring several variances and waivers.

The approval included a 4,200 square foot building with a capacity of 89 seats and parking for 55 vehicles. After the preliminary approval, the applicant sought an amendment to reduce the size of the building from 4,200 square feet to 3,200 square feet. The number of seats was also reduced from 89 seats to 84 seats and the number of parking spaces was decreased from 55 spaces to 37 spaces. The length and height of the building was also reduced and access changes were made.

An objection was raised that the board could not consider the approval for final site plan, contending that this would constitute a new project requiring new preliminary approval. The Appellate Division found that the construction proposed did not contain any substantial or material changes from the preliminary site plan since the proposal was for a reduction in size and therefore, the planning board had jurisdiction to consider the final site plan approval.

It is submitted that the Davis case is analogous to the Application before the Andover Township Land Use Board. My client's proposed use is less intense than the original proposal and the use is permitted. The improvements of the property, including ingress and egress, and stormwater management, are the same.

In the case of Elisabeth Schmidhausler v. Planning Board of Borough of Lake Como, 408 N.J. Super. 1 (App. Div. 2009), the court found that an application for a three-lot residential subdivision following the filing of the application, was changed after it was discovered that a road which was assumed to be an unimproved public street was a private street. The change from a public street to a private street required modified variance relief and was different than the application as originally filed since the property would no longer front on a public street. It was contended that the modifications, including creation of a flag lot, was a new application. The planning board held that although the application had changed in many ways, the proposal was still for a three-lot subdivision and therefore was not substantially a new application.

Very truly yours,

DOLAN & DOLAN, PA

William T. Haggerty

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