SCHILLER, PITTENGER & GALVIN, P.C.
ATTORNEYS AT LAW

SCOTCH PLAINS MORRISTOWN NEW YORK

JAY B. BOHN, ESQ.
jbohn@schiller.law

1771 Front Street
Scotch Plains, NJ 07076
t (908) 490-0444
f (908) 490-0425

VIA E-MAIL: mvautin@warrennj.org

SP&G FILE 17191

December 4, 2020

Ms. Maryellen Vautin, Land Use Coordinator
Warren Township Board of Adjustment
46 Mountain Boulevard
Warren New Jersey 07059

RE: Maddy Realty LLC -- Stone House Hotel
50 Stirling Road
Block 212, Lot 20.01
Warren, NJ 07059

Dear Ms. Vautin:

This firm represents the Applicant in the above-referenced matter, whose long-delayed application is scheduled for a public hearing before the Board on December 7, 2020. Please allow this letter to serve as a response to Mr. Simon's letter of December 2, 2020 (the "Objection Letter"), which objects to the hearing's proceeding as scheduled. For consistency of reference, capitalized terms defined in the Objection Letter will have the same meaning in this response, and I will respond to the Objection Letter's points in the same order as it presents them.

I. THE PUBLIC NOTICE GIVEN BY THE APPLICANT COMPLIES WITH THE MLUL AND THEREFORE THE BOARD HAS JURISDICTION TO CONSIDER THE APPLICATION.

The Applicant does not dispute that public notice of the hearing on the Application is required by N.J.S.A. 40:55D-12(a) or that proper notice is jurisdictional. The Applicant does, however, strongly contest the assertion that the Notice given was inadequate under the MLUL.

The Objection Letter asserts that the Notice is deficient for a number of reasons, none of which has any merit.

1. The Objection Letter asserts that the Notice fails to mention an outdoor pool or whether retail food service or bar operations are available for hotel guests. This argument requires a far greater degree of detail in a notice than does the MLUL.

Public notice should provide "a common sense description of the nature of the application, such that the ordinary layperson could understand its potential impact upon him or her" and "inform the public of the nature of the application in a common sense manner such that the ordinary layperson could intelligently determine whether to object or seek further information". *Perlmart of Lacey, Inc. v. Lacey Tp. Planning Bd.*, 295 N.J. Super. 234, 239 (App. Div. 1996), but "[t]he notice need not be 'exhaustive' to satisfy this standard." *Shakoor Supermarkets, Inc. v. Old Bridge Twp. Planning Bd.*, 420 N.J. Super. 193, 201 (App. Div. 2011) (citing *Perlmart*, 295 N.J. Super. at 239).

Notice under the MLUL need not go into the same detail as the Board's ultimate memorializing resolution to be adequate.

In any event, the "pool" is a reflecting pond which already exists on the site; not a swimming pool proposed for hotel guests.

2. The Objection Letter incorrectly asserts that the existing catering use at the site is not a permitted use. Among the permitted uses in the Neighborhood Business (NB) Zone are "[r]estaurants *and other eating establishments* wherein food and drink are consumed within the principal building." Revised General Ordinances of the Township of Warren, 1972 ("RGO") §16-15.2(c) (emphasis added). The catering facility was approved by the Planning Board and the prior application to the Board was to authorize outdoor dining. Thus, the catering use is not a pre-existing nonconforming use, so the "intensification" thereof, even if it would occur by reason of this application, does not of itself require additional use variance relief.

   While not citing the case, the Objection Letter is undoubtedly relying upon *Razberry's, Inc. v. Kingwood Tp. Planning Board*, 250 N.J. Super. 324 (App. Div. 1990), which found that the subdivision of a lot upon which a nonconforming use was conducted constituted an intensification of the use (because the use was no longer being conducted upon *the* lot where it was protected). Here, the catering use (which, as noted, is permitted and not a nonconforming use anyway) is still to be conducted on the very same lot.

   Furthermore, the Applicant is seeking variance relief under N.J.S.A. 40:55D-70(d)(1) for a use not permitted in the zone, which relief would subsume any relief required under N.J.S.A. 40:55D-70(d)(2).

3. The Objection Letter asserts that the instructions on how to access the application materials found in the *agenda* for the hearing are inaccurate. This objection does not relate to the Notice and its inclusion amongst the attacks on the Notice is

misleading. The Notice does provide accurate instructions for accessing the application materials.

4. The Objection Letter states that the Notice fails to identify the zone in which the Property is located but cites no authority to establish that such specificity is required. An ordinary member of the public would not be dissuaded from seeking further information about a proposal to build a hotel based upon the zoning designation of the property.

5. The Objection Letter states that the Notice does not identify the particular sections of the Ordinance from which relief is requested but cites no authority to establish that such specificity is required. This requirement would be contrary to *Perlmart*'s rejection of the need for technical labeling of the relief sought.

6. The Objection Letter complains that the plans submitted do not include architectural elevations with measurements or even a scale. This complaint does not fairly relate to the adequacy of the Notice and the fact that the notice, as it must, refers to the Applicant's plans does not make the alleged inadequacy of those plans a notice issue. Whether the architectural renderings are sufficient for the Board's consideration of the use variance application may be a matter to be considered at the public hearing, but it is not a notice issue depriving the Board of jurisdiction.

7. Similarly, the Objection Letter asserts that the Application itself incomplete. The Application has been deemed to be complete. If the Board determines at the public hearing that it needs additional information to render its decision, it can request the applicant to provide same.

8. The Objection letter complains that the Notice does not identify a variance from the parking requirements and also asserts that that calculated requirement is inaccurate. The present application seeks only variances pursuant to N.J.S.A. 40:55D-70(d)(1) & (6). If those variances are granted, the Applicant will have to prosecute a subsequent application for site plan approval. The calculation of the required parking and whether variances therefor should be granted will be considered at the site plan phase of the matter if it gets that far.

9. The Objection Letter also complains that the Notice does not mention the need for steep slope disturbance. This is another matter that would be part of a subsequent site plan application.

10. Finally, the Objection Letter makes the silly argument that the Notice's description of the proposed hotel's having "units" rather than "rooms" and the bifurcated use variance application as a "phase" of the larger application process is "vague and confusing."

Therefore, the Notice is adequate, and the Board has jurisdiction to conduct the scheduled public hearing on the Application.

II. THE CONDUCT OF THE PUBLIC HEARING AS AN EXCLUSIVELY REMOTE MEETING IS ENTIRELY PROPER UNDER THE CURRENT CIRCUMSTANCES.

Although supposedly recognizing the need for flexibility during the current circumstances brought about by the COVID-19 pandemic, the Objection Letter takes the inflexible position that "[m]embers of the public should not have to participate in a use variance hearing by telephone or video." Indeed, the expressed concerns about the modification of the way in-person hearings are conducted suggests that the objectors believe that the entire land use hearing process should be halted indefinitely. The entire due process discussion is bereft of citation to any authority.

It may be worthwhile to recall that at the time that the governor's initial say at home order was issued in mid-March, the was no widespread expectation that the pandemic would cause such long-lasting disruption to the ability of people to gather. It is one thing to seek to limit the conduct of public business at meetings to that which is absolutely essential if the situation is going to continue for a week or two, but now we are faced with the prospect that severe limits to public gathering will "blead meaningfully into" 2021.

In response to the severe limitation on public assembly but recognizing the local government could not just shut down, the Division of Local Government Services ("DLGS") within the Department of Community Affairs ("DCA") issued operational guidance documents: "Guidance for Remote Public Meetings in New Jersey," and "Recommendations for Land Use Public Meetings in New Jersey." With the assistance of these documents, land use boards throughout the State undertook to conduct their public meetings using various technologies such as conference calls and various video-conferencing platforms in lieu of, or in addition to, traditional in-person meetings. Indeed, the DCA's operation guidance for land use public meetings cites N.J.S.A. 40:55D-9, which requires monthly meetings by land use agencies, and other sections of the MLUL which require decisions on applications for development be made within specified timeframes as making it "imperative that local units continue to assure public hearings are conducted timely and without procedural defect."

In the beginning this process lacked clear legislative authorization and procedures. On May 15, 2020, the Governor approved L. 2020, c. 34, section 8 of which is codified at N.J.S.A. 52:27D-18.11 and which specifically authorizes a local public body to conduct a public meeting remotely by electronic means during certain emergencies, provided that reasonable public notice and provision for public input is made under the circumstances. The law does not restrict the business that can be done at a remote meeting to only that which is absolutely essential. This specific authority completely undercuts the Objection Letter's assertion that the land use application process should be shut down for the duration of the emergency.

On September 23, 2020, the DLGS adopted as an emergency regulation its "Emergency Remote Meeting Protocol for Local Public Bodies," codified at N.J.A.C. 5:39-1 *et seq.* (the "Emergency Meeting Protocol"). The Objection Letter cites a portion of the Emergency Meeting Protocol and of Local Finance Notice 2020-21 which announced its adoption. In fact, the objection letter quotes from the Local Finance Note's commentary that in-person meetings remain the default (that is, when there is no public health emergency) and that exclusively remote meetings are to be held in limited circumstances rather than from the actual regulations: "[A] local public body may hold a remote public meeting to conduct public business during a declared emergency if the emergency reasonably prevents a local public body from safely conducting public business at a physical location with members of the public present." N.J.A.C. 5:39-1.3(a).

The one section of the regulations that the Objection Letter does cite is N.J.A.C. 5:39-1.7(a), which provides:

> Before holding a public hearing on an application for development during a remote public meeting, a land use board shall determine whether electronic communication technology can sufficiently facilitate due process of the applicant and any interested party, including the ability to examine exhibits, transcribe testimony and cross-examine witnesses, as well as the ability of the public to comment upon the application. Factors in making this determination shall include, at minimum, the scale of the project, the number of approvals requested, the degree of public interest, and the number of potential objectors.

The Objection Letter's arguments that this application should not proceed via a remote meeting is entirely conclusory. It does not identify any difficulty in examining exhibits (other than the assertion that the Board's agenda provides incorrect direction to their location), transcribing testimony (presumably the entire meeting, audio and video will be recorded, thus making the ability to review the hearing even more available) or cross-examine witnesses (under the Emergency Meeting Protocol all witnesses must appear by video as well as audio) or the receipt of public comment (preserved and potentially increased by the provisions of the Emergency Meeting Protocol). Only two approvals are requested at this time. Calling the application "significant" does not mean that it is of such scale that it cannot fairly be considered as part of a remote meeting. The regulation does not limit the factors to be considered to those listed and another is the potential for the Applicant to claim a default approval if the hearing does not proceed.

Moreover, it is the Board that is to make this determination, so the public hearing must proceed at least to the consideration of this point.

Therefore, there is no basis to preclude the public hearing on the application from proceeding via an entirely remote meeting.

III. THERE IS NO LEGITIMATE BASIS TO DEPRIVE THE APPLICANT OF THE RIGHT TO BIFURCATE THE APPLICATION UNDER N.J.S.A. 40:55D-76.

N.J.S.A. 40:55D-76(b) is the source of authority for the Board to pass upon applications for site plan approval where the development requires a variance pursuant to N.J.S.A. 40:55D-70(d). That same section permits the developer to elect to "to submit a separate application requesting approval of the variance and a subsequent application for any required approval of a subdivision, site plan or conditional use." Although, as the Objection Letter points out, there are a few cases in which a reviewing court found that the separate consideration of use variance and site plan applications was "improvident," these cases do not provide much in the way of guidance but that limitation on the developer's right to choose to proceed in that manner must be the exception rather than the rule.

Therefore, there is no reason to deny the Applicant's right to proceed via a bifurcated application.

For the foregoing reasons, the Applicant respectfully submits that the public hearing should proceed as scheduled.

Respectfully submitted,

SCHILLER, PITTENGER & GALVIN, P.C.

Jay B. Bohn

Jay B. Bohn

cc: Steven K. Warner, Esq. (via e-mail: swarner@summitlawyers.net)
Robert F. Simon, Esq. (via e-mail: rsimon@heroldlaw.com)