Lauletta Birnbaum
ATTORNEYS AT LAW

MEMORANDUM

TO: MONROE TOWNSHIP ZONING BOARD OF ADJUSTMENT

FROM: EDWARD J. HOVATTER, ESQ.

RE: RES JUDICATA

DATE: JANUARY 25, 2021

Please accept this memorandum on behalf of Applicants Smith Fred Orchards, Inc. ("SFO"), Wood Management, LLC ("Wood") and Loring, Inc. ("Loring", and together with SFO and Wood hereinafter collectively referred to as the "Applicants") addressing Objectors Jerry Lodge's and Glenn Groves' (the "Objectors") memorandum regarding the application of the doctrine of *res judicata*.[1]

Below is a summary of the lots involved, the owners of the lots at issue, whether they were involved in both applications, and a summary of both proposed applications.

Application	**Lots**	**Applicant(s)**	**Request**
1	Lots 8 and 9	Wood (Lot 8) and SFO (Lot 9)	Use variance approval for Lots 8 and 9 for eight contractor storage/warehouse four of which will be 50' x 240' (12,000 s.f. each) and four (4) will be 30' x 240' (7,240 s.f. each) for a total of 78,000 s.f.
2	Lots 4, 7, 8, 9 and 10	Wood (Lot 8), SFO (Lots 9 and 10) and Loring (Lots 4 and 7)	(1) Subdivision of Lot 7 into proposed Lot 7.01 to remain a residential dwelling unit and proposed Lot 7.02 for vehicle parking and storage; (2) to develop and construct eight (8) self-storage buildings on Lots 8 & 9 and to propose consolidation of these lots; (3) to construct an access drive that extends from the existing retail garden center on Lot 10 through the entirety of the parcels and site to an access easement through Lot 4 and Airport Drive (to the North) which will provide access to the proposed vehicle parking and self-storage areas; (4) to continue farming and allow composting operations on Lot 4; and (5) mulching operations and manufacturing on Lot 10 including two (2) existing water storage holding tanks, together with the requested variances and/or waivers.

[1] The remainder of the Objectors' memorandum contains Objectors' counsel's opinion regarding, *inter alia*, environmental, planning, and zoning issues. However, Objectors' counsel is not qualified to give such opinions. See State v. Summers, 176 N.J. 280, 290 (2003) (Witness offered as an expert must be suitably qualified and possessed of sufficient specialized knowledge to be able to express such an opinion and to explain basis of that opinion).

I. *Res Judicata* Is Not Applicable to the Second Application

Res judicata is designed to support finality of decisions and prevent re-litigation of issues that have already been decided. Bressman v. Gash, 131 N.J. 517, 527 (1993). 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). An adjudicative decision of an administrative agency, such as a planning board, "should be accorded the same finality that is accorded the judgment of a court." Bressman, supra, 131 N.J. at 526 (quoting Restatement (Second) of Judgments § 83 cmt. b (Am. Law Inst. 1982)).

Res judicata applies to a second land use application where the same parties and same property are involved in the application and there is no sufficient change in the application itself or in the conditions surrounding the property to warrant consideration of the application. Russell v. Bd. of Adjustment, 31 N.J. 58, 65 (1959). In making a determination as to whether res judicata applies, the planning board's analysis should be "liberally construed in favor of the applicant[.]" Id. at 66.

As set forth below, the Objectors have failed to meet their burden to demonstrate that the current application involves the same parties and/or the same property and that the application is substantially similar to the prior application.

a. The Second Application Does Not Involve the Same Properties

First, Lots 4, 7 and 10 were not part the initial application, but they are involved in the current application. In fact, the Objectors acknowledge the fact that in their memorandum stating that "[t]he applicant's overall proposal is the same as before, ***just on different lots (with larger buildings and a larger parking area)***[.]" While the same properties are not sufficient to bar a second application, they are necessary and such requisite is absent here.

b. The Second Application Does Not Involve the Same Parties

Relatedly, the same owners are not involved in both applications. The same parties are involved in the application where the applicants are in privity. "Privity within the view of the rule of res judicata ordinarily means identity of interest, through succession to the same right of property involved in the prior litigation.... Privity in the sense of this principle connotes such connection in interest with the litigation and the subject matter as in reason and justice precludes a relitigation of the issue[.]" L.L. Constantin & Co. v. R. P. Holding Corp., 56 N.J. Super. 411, 417-18 (1959) (quoting Hudson Transit Corp. v. Antonucci, 137 N.J.L. 704 (E. & A. 1948); Restatement (First) of Judgments § 83 (1942)).

The first application, which involved Lots 8 and 9, are owned by Wood and SFO, respectively. Lots 4 and 7 are owned by Loring who was not a party to the initial application but is a party to the current application. While the Objectors appear to indicate that the same parties are involved because the Applicants are "affiliated", the Applicants are distinct juridical entities who must be treated as such. Again, the requisite of the same parties is absent here. Moreover, Loring and SFO, through its ownership in Lot 10, are not in privity with Wood, as they did not

make their application through succession to the same right of the property involved in the first application.

c. The Second Applications Is Substantially Different

While the absence of the same parties and the same properties requires the Board to deny the application of *res judicata* to the second application, the current application is not substantially similar to the first application. The Objectors rely on Pieretti v. Bloomfield, 35 N.J. 382 (1961) in support of their contention that the applications are substantially similar. In Pieretti, the Supreme Court concluded the second application made **by the same applicant** for variance relief for minimum lot area and depth filed by the same parties regarding the same property was barred by *res judicata* where the second application proposed a more intense use. Id. at 287. Specifically, the differences between the applications were as follows: "[t]he proposed building is larger and would have two stories, containing more than three times the amount of floor space as set forth in the 1944 application. In addition to the extra size of the building, there was to be a 32 car parking lot, new water facilities installed, and an apparent reduction in the buffer zone between it and the residential properties in the area." Id. at 388-89.

Here, not only does the current application not involve the same parties and property, the changes in the second application are significant. As set forth above, the first application sought a use variance approval for Lots 8 and 9 for eight contractor storage/warehouse units of 6,000 square feet each (for a total of 48,000 square feet) with overnight parking. However, the current application seeks the following: (1) subdivision of Lot 7 into proposed Lot 7.01 to remain a residential dwelling unit and proposed Lot 7.02 for vehicle parking and storage; (2) to develop and construct eight (8) self-storage buildings on Lots 8 & 9 and to propose consolidation of these lots; (3) to construct an access drive that extends from the existing retail garden center on Lot 10 through the entirety of the parcels and site to an access easement through Lot 4 and Airport Drive (to the North) which will provide access to the proposed vehicle parking and self-storage areas; (4) to continue farming and allow composting operations on Lot 4; and (5) mulching operations and manufacturing on Lot 10 including two (2) existing water storage holding tanks, together with the requested variances and/or waivers.

Moreover, unlike Pieretti the current application does not propose a more intense use. Specifically, while the vehicle parking area is approximately the same (3.1 acres versus 3.2 acres), it is on a total project area that is nearly double the original application. Similarly, the percentage of the building coverage of the self-storage facility has decreased from 12.4% of the original application to 11% of the current application. Finally, the current application proposes two points of access to both Airport and Tuckahoe Roads while the prior application only included one point of access on Tuckahoe Road. All of the foregoing changes are both substantial and render the current application less intense than the initial application.

II. Conclusion

For the foregoing reasons, the Board's analysis should be liberally construed in favor of the Applicants to find that *res judicata* does not bar the current application.