

2006 WL 2844414

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UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of New Jersey,  
Appellate Division.

David M. and Rebecca GOODMAN, Penny  
Baskerville, Lorie Roth, Daniel and Yolande  
G. Osherson, Chad Goerner, Kathleen Tracey,  
Kathleen K. Hutchins, Peter Kaminski, and  
Owen G. Leach, III, Plaintiffs-Appellants,

v.

TOWNSHIP OF PRINCETON ZONING  
BOARD OF ADJUSTMENT and Steven  
Distler, Defendants-Respondents.

Argued Sept. 26, 2006. Decided Oct. 6, 2006.

On appeal from the Superior Court of New Jersey, Law  
Division, Mercer County, L-1928-04.

**Attorneys and Law Firms**

[Lawrence C. Wohl](#) argued the cause for appellants (Archer &  
Greiner, attorneys; Mr. Wohl, on the brief).

[Robert P. Casey](#) argued the cause for respondent Township  
of Princeton Zoning Board of Adjustment (Lenox, Socey,  
Wilgus, Formidoni, Brown, Giordano & Casey, attorneys;  
Mr. Casey, on the brief).

[Nathan M. Edelstein](#) argued the cause for respondent Stephen  
Distler.

Before Judges [AXELRAD](#), [COLEMAN](#) and [GILROY](#).

**Opinion**

PER CURIAM.

*\*I* Plaintiffs, a group of residents of Princeton Township,  
appeal from an Order for Judgment of the Law Division  
dismissing with prejudice their complaint in lieu of  
prerogative writs, challenging the Township of Princeton  
Zoning Board of Adjustment's grant of a use variance  
pursuant to *N.J.S.A. 40:55D-70d* for Stephen Distler to  
operate a jazz club in the S-2 (service) and R-9 (residential)  
zones. The court determined: (1) the Board had jurisdiction

to entertain the use variance pursuant to the bifurcation  
provisions of the Municipal Land Use Law, *N.J.S.A.*  
*40:55D-76b*; (2) the property owners within 200 feet of a  
possible off-site parking lot, which might be the subject  
of a subsequent site plan application and which was later  
abandoned, were not entitled to notice of the bifurcated use  
variance application and hearing under *N.J.S.A. 40:55D-12*;  
and (3) plaintiffs' complaint was filed beyond the forty-five  
day time limit prescribed by *Rule 4:69-6(a)*, and no legitimate  
reason for an extension was established under *Rule 4:69-6(c)*.

In light of the finding that plaintiffs' complaint was untimely,  
the trial court did not address the merits of the substantive  
findings by the Board, and provided in the order that  
"plaintiffs reserve the right, in a separate action, to challenge  
any decision by the Board regarding preliminary and/or final  
site plan approval."

Plaintiffs assert the same issues on appeal as were argued  
and rejected by the trial court, more particularly set forth as  
follows:

*POINT I*

A REVERSAL IS WARRANTED, AS THE  
RESPONDENT'S BIFURCATED USE VARIANCE  
APPLICATION CONTAINED AN OFF-SITE PARKING  
COMPONENT WHICH REQUIRED NOTICE TO  
ADJACENT PROPERTY OWNERS UNDER *N.J.S.A.*  
*40:55D-12*. AS NOTICE WAS NOT PROVIDED, THE  
BOARD WAS WITHOUT JURISDICTION AND THE  
APPROVAL IS A NULLITY.

*POINT II*

A REVERSAL IS WARRANTED AS RESPONDENT  
DISTLER FAILED TO SHOW THE REQUIRED  
SPECIAL REASONS, OR SATISFY THE POSITIVE  
OR NEGATIVE CRITERIA FOR THE GRANT  
OF A USE VARIANCE AS REQUIRED BY  
*N.J.S.A. 40:55D-70*. THE BOARD'S APPROVAL IS  
ARBITRARY, CAPRICIOUS AND UNREASONABLE.

*POINT III*

IF PLAINTIFFS ARE FOUND TO HAVE FILED  
THEIR COMPLAINT IN LIEU OF PREROGATIVE  
WRITS BEYOND THE FORTY-FIVE (45) DAY TIME  
LIMIT EXPRESSED IN *R. 4:69-6(a)*, THE TIME LIMIT  
MUST BE RELAXED PURSUANT TO *R. 4:69-6(c)* AS

EXPANSION IS REQUIRED IN THE INTEREST OF JUSTICE.

We are not persuaded by the arguments advanced by appellants in Points I and III, and affirm substantially for the reasons set forth in Judge Feinberg's comprehensive written opinion of March 1, 2005. We add the following brief comments. *Brower Dev. Corp. v. Planning Bd. of Township of Clinton*, 255 N.J.Super. 262 (App.Div.1992), is distinguishable and we discern no basis to extend its holding to the facts of the present case. Moreover, appellants missed the forty-five day period for challenging the Board's grant

of the use variance following publication of the decision by both the applicant and thereafter by the Board. Thus, this case does not have the equitable considerations we recognized in *Cohen v. Thoft*, 368 N.J.Super. 338, 342-47 (App.Div.2004), for enlarging the filing date "in the interest of justice."

\*2 In view of our affirmance of the dismissal of plaintiffs' complaint as untimely, we need not address the merits of the substantive findings of the Board challenged by appellant in Point II.

Affirmed.

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