



# Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

## EXHIBIT "A" TO RESOLUTION 14- , ADOPTED 1/20/2014

**TO:** Members of the Authority

**FROM:** Lance B. Landgraf, Jr., Land Use Hearing Officer

**COPY:** John F. Palmieri, Executive Director

**SUBJECT:** Hearing Officer's Report and Recommendation  
Application 2015-06-1550  
Dock's Oyster House, Inc.  
Block 279, Lots 45, 46, 48 through 52  
2405 Atlantic Avenue  
Preliminary and Final Site Plan with Variances Pursuant to N.J.S.A.  
40:55D-70(c) and (d)

**DATE:** August 10, 2015

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### EXECUTIVE SUMMARY

On July 16, 2015, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, Dock's Oyster House, Inc. (the "Applicant"), seeks preliminary and final site plan approval with variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to renovate and expand the existing Dock's Oyster House restaurant located at 2405 Atlantic Avenue in the city of Atlantic City. Specifically, the Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the location of a commercial parking lot in the R-3 zoning district where commercial parking lots are prohibited, and a variance pursuant to N.J.S.A. 40:55D-70(c) to exceed the maximum height for a projecting wall sign.

During the hearing, the Applicant presented adequate evidence and testimony to satisfy the requirements of the Municipal Land Use Law for the grant of the requested relief.

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Specifically, the evidence and testimony demonstrated that the development proposal generally conforms to the site plan standards and technical requirements of the land use ordinances of the city of Atlantic City. In addition, the Applicant demonstrated by evidence and testimony that the grant of the requested variances is warranted. Therefore, for the reasons more fully outlined below, the Hearing Officer recommends that the Application be approved by the Authority.

### INTRODUCTION

#### Application Information

Dock's Oyster House, Inc.  
Block 279, Lots 45, 46, 48 through 52  
2405 Atlantic Avenue  
NC-2 and R-3 Zoning Districts

A hearing on the Application was conducted in accordance with the requirements of the Open Public Meetings Act, the Municipal Land Use Law and P.L. 2011, c. 18.

The Applicant seeks preliminary and final site plan approval with variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to renovate and expand the existing Dock's Oyster House restaurant located at 2405 Atlantic Avenue in the city of Atlantic City.

#### Evidence List

- A-1 Photograph of building façade circa 1950
- A-2 Aerial photo
- A-3 Site Plan Sheet C-3

B-1 Letter from Adams, Rehmann & Heggan Associates, Inc. dated July 10, 2015

### FINDINGS OF FACT

The Applicant seeks preliminary and final site plan approval with variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to renovate and expand the existing Dock's Oyster House restaurant located at 2405 Atlantic Avenue in the city of Atlantic

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City. The attorney for the Applicant, Joseph Dougherty, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant.

The Applicant presented the testimony of Christopher M. Menchin, a licensed architect, who was qualified as an expert in architecture. Mr. Menchin testified as to the architectural features of the development proposal, including interior layout, exterior elevations and signage.

Mr. Menchin testified the development proposal will allow the Applicant to significantly expand the bar area and add seats to the first floor dining area. He noted that it will also add dining space and private dining space opportunities on the second and third floor. Significantly, he testified that the development proposal will include the renovation of the entire kitchen, which was last fully upgraded in the 1960's.

The Applicant presented the testimony of Jon Barnhart, P.E., P.P., who was qualified as an expert in the field of professional planning. Mr. Barnhart described the location of the site, existing conditions and development proposal. He explained that development proposal essentially seeks to redevelop a portion of the existing facility, and also make use of adjacent property that the Applicant has acquired to expand parking and improve site circulation. He also testified regarding drainage.

Mr. Barnhart identified the variance relief sought in connection with the application. Specifically, the Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the location of a commercial parking lot in the R-3 zoning district where commercial parking lots are prohibited, and a variance pursuant to N.J.S.A. 40:55D-70(c) to exceed the maximum height for a projecting wall sign.

With respect to the variance pursuant to N.J.S.A. 40:55D-70(d)(1), Mr. Barnhart testified that the property is located along the zoning district boundary line separating commercial and residential uses. He noted that the property for which the variance is sought was previously developed with a commercial use. He testified that the proposed use of the property for a commercial parking lot advances the purposes of the Municipal Land Use Law (MLUL) by promoting the general welfare by demolishing a blighted building and providing an enhancement to an iconic use in the city of Atlantic City. He further testified that the grant of the variance would advance the purposes of the MLUL promoting the free flow of traffic by providing additional parking on site with two-way access on both Atlantic Avenue and Georgia Avenue. Finally, he testified that the grant

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of the variance will advance the purposes of the MLUL creating a desirable visual environment through creative design techniques by expanding and maintaining a historic Atlantic City landmark in a tasteful fashion.

Mr. Barnhart testified that the site is particularly suited for the proposed parking use because it is adjacent to existing parking uses. He also noted that the parking use will create a buffer between the residential zone district and the rear of the commercial zone district along Atlantic Avenue. Mr. Barnhart testified that the application will not impair the purpose and intent of the zone plan or zoning ordinance, or result in any substantial detriment to the public good.

With respect to the variance pursuant to N.J.S.A. 40:55D-70(c) to exceed the maximum height for a projecting wall sign, Mr. Barnhart testified that the sign is 25.75 feet in height where the zoning ordinance does not permit sign height greater than 20 feet. Mr. Barnhart testified that the sign feature is a recreation of a historical sign that was once located on the building, and is more of an architectural feature and integral part of the building design. He testified that with sign feature will assist motorists in identifying the site.

Mr. Barnhart noted that the proposed sign will overhang the city right of way and therefore requires a conditional use permit, which was requested as part of the application. Finally, Mr. Barnhart agreed that the Applicant will comply with all comments in the letter from Adams, Rehmann & Heggan Associates, Inc. dated July 10, 2015.

William M. England, P.E., P.P., C.M.E., C.P.W.M was qualified as an expert in professional engineering and planning and provided testimony on behalf of the Authority. Christine Cofone, P.P., A.I.C.P. was qualified as an expert in professional planning and provided testimony on behalf of the Authority. Both Mr. England and Ms. Cofone supported approval of the application.

### CONCLUSIONS OF LAW

#### **Preliminary and Final Site Plan Approval**

A land use agency's authority in reviewing an application for site plan approval is limited to determining whether the development plan conforms to the zoning ordinance and the

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applicable provisions of the site plan ordinance. See Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216 (1994).

Here, based on the evidence and testimony, the Applicant has demonstrated that development proposal generally conforms to the site plan standards and technical requirements of the land use ordinances of the city of Atlantic City.

### Variances

#### Variance Pursuant to N.J.S.A. 40:55D-70(d)(1)

The Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the location of a commercial parking lot in the R-3 zoning district where commercial parking lots are prohibited. It is well-established that “[v]ariations to allow new nonconforming uses should be granted only sparingly and with great caution since they tend to impair sound zoning.” Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 385 (1990) (quoting Kohl v. Mayor & Council of Fair Lawn, 50 N.J. 268, 275 (1967)). Consequently, although deference must be given to any decision by a board of adjustment, a reviewing court gives less deference to a grant than to a denial of a use variance. Funeral Home Mgmt., Inc. v. Basralian, 319 N.J. Super. 200, 208 (App. Div. 1999). In reviewing the grant of a use variance, a court must consider whether a board of adjustment “in the guise of a variance proceeding, [has] usurp[ed] the legislative power reserved to the governing body of the municipality to amend or revise the [zoning] plan . . . .” Vidal v. Lisanti Foods, Inc., 292 N.J. Super. 555, 561 (App. Div. 1996) (quoting Feiler v. Fort Lee Bd. of Adjustment, 240 N.J. Super. 250, 255 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991)) (internal quotations omitted). To sustain a use variance, a reviewing court must find both that the “Board’s decision comports with the statutory criteria and is founded on adequate evidence.” Burbridge, supra, 117 N.J. at 385.

A land use board is authorized to grant a use variance only “[i]n particular cases and for special reasons.” N.J.S.A. 40:55D-70(d). This is sometimes referred to as the positive criteria for the grant of a use variance. Smart SMR of New York, Inc. v. Borough of Fair Lawn Bd. of Adjustment, 152 N.J. 309, 323 (1998). “Special reasons” is not specifically defined, but has been broadly interpreted to mean reasons which advance the purposes of the Municipal Land Use Law. New Jersey case law recognizes three categories of circumstances in which the “special reasons” required for a use variance may be found: (1) where the proposed use inherently serves the public good, such as a school, hospital

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or public housing facility, see Sica v. Bd. of Adjustment of Wall, 127 N.J. 152, 159-60 (1992); (2) where the property owner would suffer “undue hardship” if compelled to use the property in conformity with the permitted uses in the zone, see Medici v. BPR Co., 107 N.J. 1, 17 n.9 (1987), and (3) where the use would serve the general welfare because “the proposed site is particularly suitable for the proposed use.” Smart SMR, supra, 152 N.J. at 323 (quoting Medici, supra, 107 N.J. at 4).

In addition, an applicant for a use variance must show 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.” N.J.S.A. 40:55D-70. This is sometimes referred to as one of the “negative” criteria for the grant of a variance. Smart SMR, supra, 152 N.J. at 323.

### Positive Criteria

In this case, the Applicant must demonstrate that the use would serve the general welfare because “the proposed site is particularly suitable for the proposed use.” The test is whether the public benefits because of the community’s need for the use itself. See Funeral Home Mgmt., Inc., supra, at 210.

In considering whether the purposes of the Municipal Land Use Law are advanced by a showing of special reasons, the Hearing Officer concludes that the Applicant has demonstrated that the application advances the purposes of the MLUL by promoting the general welfare, promoting the free flow of traffic and creating a desirable visual environment through creative design techniques.

### Negative Criteria

To assure that a land use agency does not usurp the governing body’s statutory authority to determine the municipality’s zoning, 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 [,]” and the Board must make “clear and specific findings” that this showing has been made, Medici, 107 N.J. at 21. “The applicant’s proofs and the board’s findings . . . must reconcile the proposed use variance with the zoning ordinance’s omission of the use from those permitted in the zoning district.” Ibid.

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Here, the Hearing Officer concludes, based on the evidence and testimony, that the grant of the requested variance will not result in any substantial detriment to the public good is not inconsistent with the intent and purpose of the master plan and zoning ordinance.

### **Variance Pursuant to N.J.S.A. 40:55D-70(c)**

For variances requested pursuant to N.J.S.A. 40:55D-70(c)(2), an applicant must demonstrate through evidence and testimony that the positive and negative criteria of the statutory requirements have been met.

#### Positive Criteria

The positive criteria for variances requested pursuant to N.J.S.A. 40:55D-70(c)(2) is satisfied if one or more purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements and the benefits of that deviation would substantially out-weigh any detriment to the public good. Ketcherick v. Bor. Mountain Lakes, 256 N.J. Super. 646 (App. Div. 1992); Green Meadows v. Planning Board, 329 N.J. Super. 12 (App. Div. 2000).

The Applicant seeks a "C" bulk variances to permit a sign height of 25.75 feet where a maximum sign height of 20 feet is permitted in connection with the application as set forth herein. Based on the evidence and testimony demonstrates that the requested variance can be justified because the grant of the variances will promote the purposes of the Municipal Land Use Law.

#### Negative Criteria

Relief under N.J.S.A. 40:55D-70(c)(2) cannot be granted unless the negative criteria is satisfied. The negative criteria required for all "C" variances is that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and the zoning ordinance.

The evidence and testimony demonstrate that the grant of the requested variance will not create any detriment to the public good, and will not substantially impair the purpose and intent of the zone plan and zoning ordinance.

### **RECOMMENDATION**

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For all of the foregoing reasons, the Hearing Officer recommends that the Application for preliminary and final site plan approval with variances pursuant to N.J.S.A. 40:44D-70(c) and (d) be approved. The grant of approval of this Application shall be expressly conditioned upon the Applicant complying with all conditions of prior approvals, satisfying all representations made by the Applicant or by others on its behalf during the course of the hearing on this matter before the Hearing Officer.

The grant of approval shall be further conditioned upon compliance with all applicable requirements of the city of Atlantic City Land Use Ordinances, or other City Ordinances, and the requirements of any City agency, board or authority. Any approval granted in accordance herewith shall be further expressly conditioned upon the Applicant obtaining all other necessary governmental approvals, and compliance with all Federal, State and local laws.

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