



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

EXHIBIT "A" TO RESOLUTION 16- , ADOPTED 8/ /2016

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 2016-05-1913
Cory Parking, LLC
Block 47, Lots 1-18
1746 Pacific Avenue
Preliminary and Final Site Plan Approval with a Variance Pursuant to
N.J.S.A. 40:55D-70(d)(1)

DATE: July 29, 2016

EXECUTIVE SUMMARY

On July 7, 2016, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, Cory Parking, LLC (the "Applicant"), seeks preliminary and final site plan approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a stand-alone parking facility in the RS-C zoning district where such use is not permitted.

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. 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 variance is warranted. Therefore,

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for the reasons more fully outlined below, the Hearing Officer recommends that the Application be approved by the Authority.

INTRODUCTION

Application Information

Cory Parking, LLC
Block 47, Lots 1-18
1746 Pacific Avenue
RS-C Zoning District

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 a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a stand-alone parking facility in the RS-C zoning district where such use is not permitted.

Evidence List

- A-1 Application Materials
- A-2 Electronic Exhibits
- B-1 Letter from Adams, Rehmann & Heggan Associates, Inc. dated June 22, 2016

FINDINGS OF FACT

The Applicant seeks preliminary and final site plan approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a stand-alone parking facility in the RS-C zoning district where such use is not permitted. The attorney for the Applicant, Brian Callaghan, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant. Mr. Callaghan noted that stand-alone parking facility is proposed to be located on the site of the former Sands Hotel and Casino.

The Applicant presented the testimony of Jon Barnhart, P.E., P.P., who was qualified as an expert in the field of professional engineering and professional planning. Mr. Barnhart described the location of the site, existing conditions and development proposal.

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He testified that the stand-alone parking facility will have 703 19' bx 9' parking spaces. He explained that it will have two forms of ingress and egress off of Martin Luther King Boulevard and two forms of ingress and egress off of Indiana Avenue. He testified that stormwater management facilities will be located around the perimeter of the site, and the existing chain-link fence will remain. Landscaping will be incorporated into the perimeter of the site.

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 the proposed stand-alone parking facility in the RS-C zoning district where such use is not permitted. Mr. Barnhart testified that the proposal conforms to the zoning ordinance with respect to dimensional and bulk requirements. He testified that the proposal advances the purposes of the Municipal Land Use Law (MLUL") to promote the general welfare by supporting tourism-related activities in the Tourism District and the city of Atlantic City. In addition, he testified that it will promote the free flow of traffic within the most heavily traveled portions of the city.

Mr. Barnhart testified that the site is particularly suited for the proposed use because a parking facility was previously located at the site for many years. In addition, he testified that there is a need for the parking facility in the area. 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. He testified that the development proposal advances the purposes of the zone plan and the Tourism District as it will support tourism-related events and activities.

Mr. Barnhart testified as to the requested design waivers to permit 32 street trees where 71 are required, and for reduced pavement thickness. Mr. Barnhart testified that street trees in the beach block are difficult to maintain due to salt and wind conditions. He explained that the applicant proposes to focus its resources on the maintenance of fewer trees and landscaping in order to further the purposes of the zoning ordinance. He noted that the proposed pavement thickness is adequate to support the proposed use, and that it is likely that the site will be redeveloped prior to any significant maintenance is necessary.

Finally, Mr. Barnhart requested that the Applicant be granted the option to construct the project in phases.

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William England, P.E. was qualified as an expert in professional planning and provided testimony on behalf of the Authority. His planning report dated June 22, 2016 was marked into evidence. In response to comments made by Mr. England, the Applicant agreed that all access points will be gated and locked when the facility is not operating. Mr. England testified that he generally supports approval of the application.

Christine Cofone, P.P., A.I.C.P. was qualified as an expert in professional planning and provided testimony on behalf of the Authority. Ms. Cofone testified that she testified that she generally supports 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 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.

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

The Applicant seeks preliminary and final site plan approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit a stand-alone parking facility in the RS-C zoning district where such use is not permitted. 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 .

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...” 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 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

An 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

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general welfare by supporting tourism-related activities in the Tourism District and the city of Atlantic City. In addition, the proposed use will promote the free flow of traffic within the most heavily traveled portions of the city.

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.

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. In addition, the development proposal advances the purposes of the zone plan and the Tourism District as it will support tourism-related events and activities.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Officer recommends that the Application for preliminary and final site plan approval with a variance pursuant to N.J.S.A. 40:44D-70(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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