



# Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

## EXHIBIT "A" TO RESOLUTION 16- , ADOPTED 11/15/2016

**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 2016-08-2029  
Estate of AC  
Block 74, Lot 3  
206 South Vermont Avenue  
Variances Pursuant to N.J.S.A. 40:55D-70(c) and (d)

**DATE:** November 7, 2016

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### EXECUTIVE SUMMARY

On October 6, 2016, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, Estate of AC (the "Applicant"), seeks variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to construct a new 3.5-story residential duplex on the property located at 206 South Vermont 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 residential duplex in the RS-C zoning district where such use is not permitted, and bulk variances pursuant to N.J.S.A. 40:55D-70(c).

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 technical requirements of the land use ordinances of the city of Atlantic City and that the grant of the requested variances is warranted. Therefore, for

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

### INTRODUCTION

#### Application Information

Estate of AC  
Block 74, Lot 3  
206 South Vermont 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 Applicants seeks variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to construct a new 3.5-story residential duplex on the property located at 206 South Vermont 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 residential duplex in the RS-C zoning district where such use is not permitted, and bulk variances pursuant to N.J.S.A. 40:55D-70(c).

#### Evidence List

A-1 Application materials  
A-2 Electronic exhibits

B-1 Letter from Cofone Consulting Group, LLC dated September 27, 2016

### FINDINGS OF FACT

The Applicants seeks variances pursuant to N.J.S.A. 40:44D-70(c) and (d) for its proposal to construct a new 3.5-story residential duplex on the property located at 206 South Vermont 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 residential

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duplex in the RS-C zoning district where such use is not permitted, and bulk variances pursuant to N.J.S.A. 40:55D-70(c).

The attorney for the Applicants, Brian J. Callaghan, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant. He noted that multi-family residential uses are permitted within the zoning district, but that residential duplexes are not.

The Applicants presented the testimony of Jon Barnhart, P.E., P.P., who was qualified as an expert in the fields of professional engineering and professional planning. Mr. Barnhart described the location of the site, existing conditions and development proposal. He explained that development proposal seeks to construct a new 3.5-story residential duplex on the property. He noted that the development proposal will comply with all applicable FEMA flood hazard regulations.

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 residential duplex in the RS-C zoning district where such use is not permitted, and variances pursuant to N.J.S.A. 40:55D-70(c) from Ordinance Section 163 (Attachment 4) Schedule I as follows:

- Minimum lot area: 30,000 square feet required; 2,100 square feet existing and proposed.
- Minimum lot width: 150 feet required; 28 feet existing and proposed
- Setbacks:
  - Front yard: 20 feet required; 7 feet proposed
  - Side yard: 30 feet required; 3 feet proposed
  - Rear yard: 30 feet required; 12 feet proposed
  - Lot coverage: 40% permitted; 58% proposed

With respect to the variance pursuant to N.J.S.A. 40:55D-70(d)(1), Mr. Barnhart testified that the type of development envisioned under the RS-C zoning district has not materialized in this particular area of the zoning district, and that the residential nature of the neighborhood has persisted in the area for decades. He noted that an Urban Land Institute report commissioned by the Authority noted that the vision for the southeast inlet neighborhood is a 'return to Atlantic City's roots as members of a middle income diverse community who want to experience the ocean environment while entertaining themselves and their families'" and opined that the development application seeks to

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realize that vision. He further noted that the report states that in planning future development of this area of Atlantic City, “it will be critical for the development to adapt the reality of what’s there, to remove what should not stay and rebuild in a carefully thought out and strategic way.”

With respect to the positive criteria necessary for the grant of a variance pursuant to N.J.S.A. 40:55D-70(d)(1), Mr. Barnhart opined that the property is particularly suited for the type of development envisioned in the Urban Land Institute report, the Atlantic City Master Plan and the Authority’s Tourism District Master Plan. He further opined that the development proposal will advance the purposes of the MLUL by promoting the public health, safety and welfare by providing a FEMA-compliant structure (Purpose A of the MLUL), by establishing appropriate population densities (Purpose E of the MLUL), and creating a desirable visual environment (Purpose I of the MLUL) and . With respect to the negative criteria, Mr. Barnhart testified that the development proposal will not impair the purpose or intent of the zone plan or zoning ordinance, and actually advances the purposes of the zone plan and the Authority’s Master Plan. Finally, 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 as the surrounding properties are vacant.

With respect to variances pursuant to N.J.S.A. 40:55D-70(c), Mr. Barnhart testified that the zone’s bulk requirements are not applicable to the prohibited use and that the proofs for such variances are subsumed into the proofs presented for the variance pursuant to N.J.S.A. 40:55D-70(d)(1).

The Applicant presented to testimony of Michael Kolchins, a licensed architect, to respond to questions raised by the Authority and its consultants.

Christine Cofone, P.P. was qualified as an expert in professional planning and provided testimony on behalf of the Authority. Ms. Cofone opined that the Applicants had presented sufficient testimony to support the grant of approval of the application, and further opined that the application will provide sufficient space in appropriate locations to support a variety of uses in order to meet the needs of all of New Jersey’s citizens (Purpose G of the MLUL). Ms. Cofone noted that the property could not be developed for any permitted use without variances based on the size and shape of the lot and supported approval of the application.

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## CONCLUSIONS OF LAW

### Variations

#### 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 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

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“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 the development proposal will advance the purposes of the MLUL by promoting the public health, safety and welfare by providing a FEMA-compliant structure (Purpose A of the MLUL), by establishing appropriate population densities (Purpose E of the MLUL), and creating a desirable visual environment (Purpose I of the MLUL) and .

### 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

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not inconsistent with the intent and purpose of the master plan and zoning ordinance. Indeed, the development proposal will advance the purposes of the Authority's Master Plan.

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

The Hearing Officer concludes that the zone's bulk requirements are not applicable to the prohibited use and that the proofs for such variances are subsumed into the proofs presented for the variance pursuant to N.J.S.A. 40:55D-70(d)(1). See Price v. Himeji, LLC, 214 N.J. 263, 274 (2013) (citing Puleio v. N. Brunswick Twp. Bd. of Adjustment, 375 N.J.Super. 613, 868 A.2d 1114 (App.Div.), *certif. denied*, 184 N.J. 212, 876 A.2d 285 (2005)).

### **RECOMMENDATION**

For all of the foregoing reasons, the Hearing Officer recommends that the Application for 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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