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FILE NO. 57789/00001

September 6, 2016

NOTICE OF APPEAL

Via Hand Delivery and E-mail
Lance Landgraf, Director of Planning
Land Use Hearing Officer
Casino Reinvestment Development Authority
15 South Pennsylvania Avenue
Atlantic City, New Jersey 08401

Re: O&S Management, LLC
181-185 S. South Carolina Avenue and 1243 Boardwalk
Block 59, Lot 2
Application #2016-08-2011

Dear Mr. Landgraf:

I represent O&S Management, LLC ("Applicant") in connection with the above-referenced application for a Certificate of Land Use Compliance ("CLUC"). As explained below, that application was denied on August 17, 2016. This is our formal Notice of Appeal of that denial.

The initial CLUC application was filed May 31, 2016. That application was denied by a letter dated June 13, 2016 from the CRDA's Land Use Regulation Enforcement Officer, Robert L. Reid. The June 13, 2016 letter identified conditions that Mr. Reid felt required abatement or correction.

I met with Mr. Reid at the site on July 22, 2016 to review the cited conditions; a number of which were subsequently corrected. At Mr. Reid's request, on August 3, 2016 I filed a revised CLUC application package, which, like the original application, sought a CLUC for the existing/continuing uses at the property.

The August 3 application was denied by Mr. Reid's letter of August 17, 2016. That denial recited two reasons: The first asserted that there was no evidence that the Applicant had addressed a 9-

28-2007 Administrative Review Deficiency comment regarding off-site parking. The second stated reason was that:

> "The applicant has failed to demonstrate compliance with N.J.S.A. 2C:34-7 regulating sexually oriented businesses."

On August 25, 2016, I sent Mr. Reid a copy of a CLUC issued on October 30, 2007. That CLUC approved the September 19, 2007 application which had generated the 9-28-2007 review comment about parking. The CLUC contained no "conditions of approval" for parking (or anything else). The CLUC is proof that the 9-28-2007 comment was satisfied, and that there are no open conditions from that application or approval. Accordingly, the first of the two bases for the August 17 denial of the present CLUC application, has already been addressed.

The remaining basis is founded on a claimed "failure to demonstrate compliance" with a provision of the New Jersey State Criminal Code, N.J.S.A. 2C:34-7. That provision, in relevant part, makes it a crime of the fourth degree to operate a "sexually oriented business" within 1,000 feet of a church, school, playground or other enumerated buildings and uses. I note initially that in the criminal context, it is the State's burden to prove the criminal violation – it is not a Defendant's duty to prove that he isn't breaking the law. For purposes of this appeal only, though, we will waive the arguments that "Stiletto" – the gentlemen's club which operates at the property – is not within the statutory definition of a sexually–oriented business, or that it is not within the 1,000 foot prohibitory area. The real issue – which is dispositive on this appeal - is that the CRDA simply has no legal authority to base a determination of a property's land-use compliance on an actual or suspected violation of a non-land use regulation or statute.

As a starting point, it is plain that the criminal statutes codified at Title 2C are fundamentally different in purpose and scope, from land use ordinances adopted under the Municipal Land Use Law (N.J.S.A. 40:55D-1 et seq., the "MLUL"). Title 2C is aimed at personal conduct which the State deems to be so unacceptable as to warrant criminal prohibition and prosecution. The MLUL addresses the uses to which real property may be put.

The conduct of the property's owner or occupant is irrelevant to the question of whether the use of the property complies with the MLUL and the local land use ordinance. That an offense under Title 2C includes an element based on proximity to certain other uses, doesn't convert the offense from a criminal act to a land use violation. For example, N.J.S.A. 2C:35 includes a number of drug offenses based on the proximity of the drug activity to schools or public housing...but that fact has nothing to do with the land use of the site where the drug offense occurred.

N.J.S.A. 2C:34-7 is self-evidently a criminal statute. New Jersey's Supreme Court has determined that N.J.S.A. 2C:34-7 is not governed by the Municipal Land Use Law ("MLUL"). See, Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 198-9 (2001).

The 2011 Tourism District legislation empowered the CRDA to impose land use regulations in the District. Pending CRDA's adoption of new land use regulations, the ordinance and regulations adopted by Atlantic City remain in force and effect. N.J.S.A. 5:12-220(a). The CRDA's authority is expressly limited, however, in the same ways that the City's power over land-use matters outside the Tourism District is limited. The provisions of the MLUL control, and the powers granted to the CRDA, do not supersede the "requirements of State or Federal law pertaining to the review and approval of" site plans and development proposals. See, N.J.S.A. 5:12-220(b).

Under the MLUL, "a planning board's authority in reviewing a site plan application is limited to determining whether the plan conforms with the municipality's zoning and site plan ordinances". Saratoga v. Borough of West Paterson, 346 N.J. Super. 569, 581 (App. Div. 2002) citing W.L. Goodfellows & Co. of Turnersville, Inc. v. Washington Township Planning Board, 345 N.J. Super. 109, 116 (App. Div. 2001).

A comparable limitation applies to the scope of a land use agency's authority in reviewing and deciding applications for administrative approvals such as a CLUC. Atlantic City's Land Use Ordinance ("Ordinance"), codified as Chapter 163 of the City Code, remains the operative statement of land use regulations for the Tourism District; although the administration of those regulations is now handled by the CRDA as the statutory successor to the City.

Article VII (Section 38) of the Ordinance creates the office of the Land Use Administrator, whose powers and duties include:

C(1): "... the administration and enforcement of this chapter"; and

C(3): review and approval/disapproval of CLUC applications "...based on compliance or non-compliance with the provisions of this chapter". (emphasis added)

Article XXXVI, Section 211, establishes the procedures for the review of CLUC applications. Paragraph "B" of that section, "Action on Application", states that the Land Use Administrator, upon receipt of a CLUC application, "... shall cause the application and related submissions to be reviewed for compliance with this chapter ...". (emphasis added)

The language in Articles VII and XXXVI is consistent, and unambiguous. It directs that the scope of administrative review on a CLUC application is limited to a determination of compliance with "this Chapter", i.e., the Land Use Ordinance.

The CRDA's CLUC application form specifically highlights the limited nature of the CLUC review and approval. In the "Notice" section of the form, there are the following disclaimers:

1) "This Certification may not be the only approval required ...";

3) "The Certificate will not be issued if violations of Chapter 163 exist." (emphasis added)

The CLUC form also contains this limitation, in bold print:

"Conditions of Approval. Subject to applicant's satisfaction of all applicable requirement of the City of Atlantic City's Land Use Ordinances and regulations and compliance with all Federal, State and Local laws."

That language evidences that a CLUC does not substitute or negate the need for, approvals within the jurisdiction of other agencies. Nor does the CLUC permit or excuse non-compliance with all other applicable laws. But it necessarily follows, that it is outside CRDA's authority in a land-use review, to determine whether a given applicant is or is not compliant with all other potentially applicable regulations. Instead, compliance is flagged as a condition of the land use approval, which is the approach taken by Planning and Zoning Boards in their quasi-judicial review of development applications under the MLUL.

Section 22(b) of the MLUL (N.J.S.A. 40:55D-22(b)) specifically provides that:

"[i]n the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency…".

The Appellate Division has stated: "[i]t is assumed, of course, that there may be other pertinent governmental regulations that control the use and development of the tract. Thus, under N.J.S.A. 40:55D-22b, a planning board 'shall, in appropriate circumstances, condition its approval upon the subsequent approval' of other governmental agencies." Pizzo Mantin v. Twp. of Randolph, 261 N.J. Super. 659, 667 (App. Div. 1993) citing William M. Cox, New Jersey Zoning and Land Use Administration § 16-6, at 261 (11th ed. 1992) (emphasis added). It is clear that the word "subsequent" refers to approvals after the land use approvals thereby making clear that the land use agency must approve an application that is compliant with the land use and zoning requirements – not after the satisfaction of other statutory or regulatory requirements. There is no case law that allows a land use agency to deny an application because of an alleged failure to meet a regulation administered by another governmental authority.

Common sense and the CRDA's own practices lead to that same conclusion. In reviewing a CLUC application for a bar, would CRDA investigate whether the Applicant held a liquor license, or whether the police records indicated a history of criminal activity at the bar? No – CRDA would simply evaluate whether the bar was a permitted use at that site, and whether it met the other applicable standards of the land use ordinance. If it does, it is entitled to a CLUC. There may be people at the site whose conduct violates the criminal code. Those people can be prosecuted by the

appropriate law enforcement agency – but that won't change the fact that the property is being used in accordance with the MLUL.

For all of these reasons we respectfully assert that the denial of the Applicant's CLUC was in error and should be reversed.

Enclosed are two (2) checks made payable to "NJCRDA" in the amounts of $200.00 and $1,500.00 for application and escrow fees, respectively.

Thank you for your prompt attention to this matter.

Very truly yours,

Richard F. DeLucry

RFD/sjw
Attachments:

1. August 3, 2016 CLUC Application
2. August 17, 2016 Letter of Denial
3. October 30, 2007 CLUC

CLAC 3705757.1
cc: Paul Weiss, Esquire (via email)
O&S Management, LLC (via email)