



Casino Reinvestment Development Authority
Land Use Regulation and Enforcement
Division

EXHIBIT "A" TO RESOLUTION - , ADOPTED / /2017

TO: Members of the Authority

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

COPY: Christopher M. Howard, Executive Director
Scott G. Collins, Esq.

SUBJECT: Hearing Officer's Report and Recommendation -
T-Mobile Northeast, LLC
Block 259, Lot 13
3501 Ventnor Avenue, Atlantic City, New Jersey
Application 2017-01-2121
Variances Pursuant to N.J.S.A. 40:55D-70(d) (1) and (6)

DATE: April 3, 2017

EXECUTIVE SUMMARY AND RECOMMENDATION

On February 16, 2017, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, T-Mobile Northeast, L.L.C. (the "Applicant"), seeks variances pursuant to N.J.S.A. 40:55D-70(d)(1) and (6) for the location of a wireless telecommunications facility on the roof of an existing structure located at 3501 Ventnor Avenue in the City of Atlantic City. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d) (1) because wireless communications facilities are not a permitted use in the zoning district and N.J.S.A. 40:55D-70(d) (6) because the overall height of the proposed wireless telecommunications facility exceeds to permissible height by more than 10 percent.

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



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Specifically, the development proposal generally conforms to the land use regulations applicable throughout the zoning district, and the requested variances can be granted.

Therefore, as more fully outlined below, the Applicant has met its burden for the relief requested under the Municipal Land Use Law and the Hearing Officer recommends that the application be approved by the Authority.

INTRODUCTION

Application Information

T-Mobile Northeast, LLC
Block 259, Lot 13
3501 Ventnor Avenue, Atlantic City, New Jersey
RS-C Resort Commercial 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 variances pursuant to N.J.S.A. 40:55D-70(d)(1) and (6) for the location of a wireless telecommunications facility on the roof of an existing structure located at 3501 Ventnor Avenue in the City of Atlantic City. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d) (1) because wireless communications facilities are not a permitted use in the zoning district and N.J.S.A. 40:55D-70(d) (6) because the overall height of the proposed wireless telecommunications facility exceeds to permissible height by more than 10 percent.

Relief Requested

Variances pursuant to N.J.S.A. 40:55D-70(d) (1) and (6)

Evidence List

A-1 Casino Reinvestment Development Authority application dated December 22, 2016
A-2 Confirmation of no outstanding taxes
A-3 Affidavit of Notice Packet
A-4 Aerial view of subject property

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- A-5 Lease Agreement
 - A-6 Curriculum Vitae of Radio Frequency Expert
 - A-7 FCC License
 - A-8 Capacity Offload Site Report
 - A-9 Electromagnetic Emission Site Compliance Report
 - A-10 Radio Frequency Non-Interference Letter
 - A-11 Curriculum Vitae of Petros Tsoukalas, P.E.
 - A-12 Site Plans prepared by Maser Consulting
 - A-13 Structural Certification Letter prepared by Maser Consulting
 - A-14 Curriculum Vitae of James T. Kyle, P.P./AICP
 - A-15 Completeness Review Letter with Applicant's Responses
- B-1 Letter dated February 15, 2017 from InSite Engineering, LLC

FINDINGS OF FACT

The Applicant seeks variances pursuant to N.J.S.A. 40:55D-70(d)(1) and (6) for the location of a wireless telecommunications facility on the roof of an existing structure located at 3501 Ventnor Avenue in the City of Atlantic City. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d) (1) because wireless communications facilities are not a permitted use in the zoning district and N.J.S.A. 40:55D-70(d) (6) because the overall height of the proposed wireless telecommunications facility exceeds to permissible height by more than 10 percent. The attorney for the Applicant, Debra A. Shulski, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant.

The Applicant presented the testimony of Robert Heath Williams, who is employed by SmartLink and contracted by the Applicant for the selection of the site of the wireless telecommunications facility. He noted that the wireless telecommunications facility will be located on the roof of an existing building. Mr. Williams explained the site selection process and the Applicant's goals with respect to this specific site. He noted that the Applicant provides existing wireless communications service in the area, and that the proposed wireless communications facility will provide additional capacity to handle increased volume of usage.

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The Applicant presented the testimony of Madan Belgode, who was qualified as an expert radio frequency engineer. Mr. Belgode testified that the Applicant is licensed by the Federal Communications Commission (the "FCC"), and that the FCC license requires the Applicant to provide reliable coverage. He testified that the Applicant provides existing wireless communications service in the area and that the purpose of the proposed wireless communications facility will be to off-load traffic from existing wireless communications facilities and provide additional capacity to handle increased volume of usage.

Mr. Belgode testified that the proposed antenna heights are the minimum height necessary to off-load existing capacity and provide additional capacity. He noted that an Electromagnetic Emissions Analysis Report prepared on behalf of the Applicant indicates that the antennas will transmit at power levels far below those permitted by FCC regulations. Finally, Mr. Belgode testified that the antennas will not cause any interference with existing wireless communications service in the area.

The Applicant presented the testimony of Petros Tsoukalas, P.E., who was qualified as an expert in the field of professional engineering. Mr. Tsoukalas described the location of the site, existing conditions, development proposal, site layout and design. He testified that the development proposal will be an unmanned installation consisting of a screened equipment cabinet and 12 antennas. Maintenance visits will be conducted every four to six weeks.

Mr. Tsoukalas noted that the building is 60 feet tall, and has a roof-mounted television antenna that extends to 73.1 feet. He testified that the proposed antennas will extend to 68.5 feet. He noted that the sizes of the individual wireless communications antennas vary in size from four to eight feet based on frequency. Mr. Tsoukalas testified that the development proposal will be implemented in accordance with all applicable codes and structural standards.

The Applicant presented the testimony of James Kyle, P.P., who was qualified as an expert in the field of professional planning. Mr. Kyle offered extensive testimony in support of the requested variances, and indicated that the proofs set forth in his testimony are applicable to all requested variances.

With respect to the positive criteria necessary for the grant of the variances, Mr. Kyle testified that the fact that the Applicant is pursuing the development proposal in

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furtherance of a license granted by the FCC demonstrates that the development proposal promotes the public welfare. He noted that the provision of wireless services to the public is crucial because it supports 911 calls and approximately 50% of Americans do not have land lines. He testified that the need for additional capacity to fill a gap in coverage in the area demonstrates that the site is particularly suitable for the development proposal, and the existing structure is sufficient to support the development proposal.

With respect to the negative criteria, Mr. Kyle testified that the development proposal is a relatively benign land use that does not require any municipal services and will have limited visual impact. He noted that the Applicant is proposing to paint the antennas and screen the equipment to mitigate any visual impacts. Mr. Kyle noted that the Tourism District Master Plan encourages the expansion of wireless telecommunications facilities to serve the residents and visitors to Atlantic City.

Finally, Mr. Kyle noted that a variance pursuant to N.J.S.A. 40:55D-70(c) may be required for front-yard setbacks as four of the antennas will extend to the lot line where a 15 foot setback is required. Mr. Kyle testified that the grant of the variance will promote the public health safety with limited visual impact.

Jason L. Fichter, P.E, P.P., was qualified as an expert in the fields of professional engineering and professional planning and his review letter dated February 15, 2017 was marked into evidence. He testified that all issues raised in their review letter have been satisfied through testimony of the Applicant supported the approval of the application and the grant of the variances.

CONCLUSIONS OF LAW

The Applicant seeks variances pursuant to N.J.S.A. 40:44D-70(d)(1) and (6) for the location of a wireless telecommunications facility on the roof of an existing structure located at 3501 Ventnor Avenue in the City of Atlantic City. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d) (1) because wireless communications facilities are not a permitted use in the zoning district and N.J.S.A. 40:55D-70(d) (6) because the overall height of the proposed wireless telecommunications facility exceeds to permissible height by more than 10 percent.

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.”

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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 “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.

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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.” See Funeral Home Mgmt., Inc., supra, at 210. The test is whether the public benefits because of the community’ s need for the use itself. See id.

In considering whether the purposes of the Municipal Land Use Law are advanced by a showing of special reasons, the Hearing Officer concludes that fact that the Applicant is pursuing the development proposal in furtherance of a license granted by the FCC demonstrates that the development proposal promotes the public welfare. In addition, the provision of wireless services to the public is crucial because supports 911 calls and approximately 50% of Americans do not have land lines. Finally, the need for additional capacity to fill a gap in coverage in the area demonstrates that the site is particularly suitable for the development proposal. Thus, the Hearing Officer concludes that the Applicant has established special reasons for the grant of the variance pursuant to N.J.S.A. 40:44D-70(d)(1).

With respect to the variance pursuant to N.J.S.A. 40:44D-70(d)(6) to exceed the overall permissible height of the structure by more than 10 percent, the Hearing Officer concludes that the Applicant has established special reasons for the grant of the variance as set forth above. In addition, the Hearing Officer concludes that the site continues to be suitable for the proposed development despite the nonconformity because an existing roof-mounted television antenna extends beyond the height of the proposed antennas.

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 variances will not result in any substantial detriment to the public good and is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Indeed, the development proposal is consistent with the Tourism District Master Plan, which encourages the expansion of wireless telecommunications facilities.

During the course of the hearing on this matter, the Applicant indicated that a variance pursuant to N.J.S.A. 40:55D-70(c) may be required for front-yard setbacks as four of the antennas will extend to the lot line where a 15 foot setback is required. 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.

The positive criteria 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 negative criteria is satisfied if the requested relief can be granted without substantial detriment to the public good and without substantially impairing to the intent and purpose of the zone plan and the zoning ordinance.

Here, we conclude based on the evidence and testimony that the Applicant has demonstrated that development proposal advances Purposes "A" (promoting the general welfare) and of the Municipal Land Use Law and is not inconsistent with the intent and purpose of the master plan and zoning ordinance.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Officer recommends that the application for variances pursuant to N.J.S.A. 40:55D(1) and (6) for the location of a wireless telecommunications facility on the roof of an existing structure located at 3501 Ventnor Avenue in the City of Atlantic City be granted. The grant of approval of this Application shall be expressly conditioned upon the Applicant satisfying 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

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all other necessary governmental approvals, and compliance with all Federal, State and local laws.

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