



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 60, Lot 14
1121-1133 Boardwalk, Atlantic City, New Jersey
Application 2017-01-2121
Variance Pursuant to N.J.S.A. 40:55D-70(d)(1)

DATE: April 5, 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 a variance pursuant to N.J.S.A. 40:55D-70(d)(1) for the location of a wireless telecommunications facility on the roof of the existing structure located at 1121-1133 Boardwalk (Resorts Casino and Hotel) in the City of Atlantic City. The development proposal consists of the installation of a single GPS antenna to support an interior Distributor Antenna System (DAS) providing improved wireless telecommunications service within the building. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d)(1) because wireless telecommunications facilities are not a permitted use in the zoning district.

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 variance 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 60, Lot 14
1121-1133 Boardwalk, 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 a variance pursuant to N.J.S.A. 40:55D-70(d)(1) for the location of a wireless telecommunications facility on the roof of the existing structure located at 1121-1133 Boardwalk (Resorts Casino and Hotel) in the City of Atlantic City. The development proposal consists of the installation of a single GPS antenna to support an interior Distributor Antenna System (DAS) providing improved wireless telecommunications service within the building. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d)(1) because wireless telecommunications facilities are not a permitted use in the zoning district.

Relief Requested

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

Evidence List

- A-1 Casino Reinvestment Development Authority application dated January 27, 2017
- A-2 Confirmation of no outstanding taxes
- A-3 Affidavit of Notice Packet

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- A-4 Aerial view of subject property
 - A-5 Lease Agreement and Master Lease
 - A-6 Curriculum Vitae of Radio Frequency Expert
 - A-7 FCC License
 - A-8 Curriculum Vitae of Richard Peterman, P.E
 - A-9 Site Plans prepared by Velocitel
 - A-10 Curriculum Vitae of Brian Seidel, P.P./AICP
 - A-11 Completeness Review Letter with Applicant's Responses
- B-1 Letter dated February 15, 2017 from InSite Engineering, LLC

FINDINGS OF FACT

The Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d)(1) for the location of a wireless telecommunications facility on the roof of the existing structure located at 1121-1133 Boardwalk (Resorts Casino and Hotel) in the City of Atlantic City. The development proposal consists of the installation of a single GPS antenna to support an interior Distributor Antenna System (DAS) providing improved wireless telecommunications service within the building. The Applicant requires a variance pursuant to N.J.S.A. 40:55D-70(d)(1) because wireless telecommunications facilities are not a permitted use in the zoning district. 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 Michael Fahey, who is employed by Velocitel and contracted by the Applicant for the location and installation of the rooftop wireless telecommunications facility. He noted that the GPS antenna will be located on the roof of the existing building, and the remainder of the system will be located within the building. He explained that the remainder of the system consists of a series of small antennas located throughout the building and connected to an equipment cabinet and the GPS antenna on the roof with fiber optic cable to improve wireless telecommunications service throughout the building.

The Applicant presented the testimony of Hansraj Rana, who was qualified as an expert radio frequency engineer. Mr. Rana testified that the Applicant is licensed by the Federal Communications Commission (the "FCC"), and that the FCC license requires the

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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 telecommunications facility will be to improve wireless telecommunications service throughout this particular building. Mr. Rana explained that the roof-mounted GPS antenna is necessary to provide precise location information to emergency responders to 911 calls from within the building. Finally, Mr. Rana testified that the antenna will transmit at power level far below those permitted by FCC regulations and will not cause any interference with existing wireless communications service in the area.

The Applicant presented the testimony of Richard Peterman, P.E., who was qualified as an expert in the field of professional engineering. Mr. Peterman described the location of the site, existing conditions, development proposal, site layout and design. He noted that the GPS antenna will be located on the top of the parking garage and will be approximately two inches in diameter and approximately five inches in height. He testified that the antenna requires an unobstructed view of the sky to be effective.

The Applicant presented the testimony of Brian Seidel, P.P., who was qualified as an expert in the field of professional planning and offered testimony in support of the requested variance. With respect to the positive criteria necessary for the grant of the variance, Mr. Seidel noted the Applicant's obligation to provide reliable coverage under a license granted by the FCC and opined that the development proposal promotes the public welfare. He testified that the site is particularly suitable for the development proposal because the GPS antenna requires an unobstructed view of the sky to be effective, and therefore a rooftop installation is appropriate. Finally, he noted that the GPS antenna will not be as tall as existing light poles on the roof of the structure, is similar to existing GPS antennas on the roof of the structure and will have a negligible visual impact. With respect to the negative criteria, Mr. Seidel testified that the development proposal is a relatively benign land use and will have 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 variance.

CONCLUSIONS OF LAW

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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.” 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 the development proposal promotes the Applicant’s obligation to provide reliable under a license granted by the FCC and therefore promotes the public welfare. In addition, the site is particularly suitable for the development proposal because the GPS antenna requires an unobstructed view of the sky to be effective, and therefore the rooftop installation is appropriate. Finally, the GPS antenna will not be as tall as existing light poles on the roof of the structure, is similar to existing GPS antennas on the roof of the structure and will have a negligible visual impact. 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).

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

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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 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 a variance pursuant to N.J.S.A. 40:55D(1) for the location of a wireless telecommunications facility on the roof of the existing structure located at 1121-1133 Boardwalk (Resorts Casino and Hotel) 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 all other necessary governmental approvals, and compliance with all Federal, State and local laws.

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