



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

EXHIBIT "A" TO RESOLUTION 18-___, ADOPTED 5/15/2018

TO: Members of the Authority

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

COPY: Christopher M. Howard, Executive Director

SUBJECT: Hearing Officer's Report and Recommendation
Application #2018-04-2365
Boardwalk Regency, LLC
Minor Subdivision with Use and Bulk Variances
2100 Pacific Avenue
Block 157, Lots 1 through 6, 9 through 15, and 21.02 through 39
RC-Resort Commercial Zoning District

DATE: May 9, 2018

EXECUTIVE SUMMARY

On April 19, 2018, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, Boardwalk Regency, LLC (the "Applicant"), seeks Minor Subdivision Approval with use and bulk variances to realign and consolidate multiple parcels into two tracts located at Pacific Avenue and Indiana Avenue in the city of Atlantic City. The properties are currently used for surface parking and no new development is proposed. Some of the lots comprising the overall property are owned by the Authority.

The Applicant demonstrated by evidence and testimony that the development proposal generally conforms to the site plan standards and technical requirements of the Authority's Tourism District Land Development Rules. In addition, the Applicant demonstrated by evidence and testimony that the grant of the requested variances is warranted. Therefore,

Page 1 of 7

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Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

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

INTRODUCTION

Application Information

Boardwalk Regency, LLC
Minor Subdivision and Bulk Variances
2100 Pacific Avenue
Block 157, Lots 1 through 6, 9 through 15, and 21.02 through 39
RC-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 Minor Subdivision Approval with use and bulk variances to realign and consolidate multiple parcels into two tracts located at Pacific Avenue and Indiana Avenue in the city of Atlantic City. The properties are currently used for surface parking and no new development is proposed. Some of the lots comprising the overall property are owned by the Authority.

Evidence List

- A-1 Application Materials
- B-1 Letter from Environmental Resolutions, Inc. dated April 16, 2018

FINDINGS OF FACT

The Applicant seeks Minor Subdivision Approval with use and bulk variances to realign and consolidate multiple parcels into two tracts located at Pacific Avenue and Indiana Avenue in the city of Atlantic City. The properties are currently used for surface parking and no new development is proposed. Some of the lots comprising the overall property are owned by the Authority.

Page 2 of 7

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The attorney for the Applicant, Joseph Dougherty, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant.

The Applicant 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 testified that the purpose of the application is to realign and consolidate multiple parcels into two tracts that will be more regularly shaped.

With respect to the variance to pursuant to N.J.S.A. 40:55D-70(c) to permit impervious coverage of 85% where a maximum of 80% is permitted, Mr. Barnhart explained that the condition is existing and no new development is proposed. In addition, the lot is nicely landscaped. With respect to the variance to pursuant to N.J.S.A. 40:55D-70(d)(1) to permit free-standing parking where free-standing parking is prohibited, Mr. Barnhart testified that the use is a lawful pre-existing non-conformity.

Mr. Barnhart testified that the approval of the application for development would advance the purposes of the Municipal Land Use Law by promoting the public health, safety, morals and general welfare (Purpose A) by serving as parking for surrounding commercial uses. He further testified that the development proposal will promote the free flow of traffic and discourage congestion (Purpose H) by serving existing needs.

With respect to the negative criteria for both requested variances, Mr. Barnhart testified that the grant of the variances would advance the purposes of the Tourism District Master Plan and would not have any substantial detriment to the Tourism District Master Plan or Tourism District Land Development Rules.

Jeffrey Hanson, P.E. was qualified as an expert in professional engineering and provided testimony on behalf of the Authority. The Applicant presented testimony that comply with all comments in the Environmental Resolutions, Inc. review letter dated April 16, 2018, with the exception of the two requested waivers. **Lots 16, 17, 18, 19 and 20 were deeded back to Harrah's/Ballys via prior Authority action and are not part of the subdivision. Harrah's/Ballys will continue to own Lot 21.01 which contains their Human Resources offices.** Mr. Hanson supported the grant of the requested relief.

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Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

CONCLUSIONS OF LAW

Subdivision Approval

A land use agency's authority in reviewing an application for subdivision 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).

The Applicant presented sufficient evidence and testimony to establish that development proposal generally conforms to the subdivision standards and technical requirements of the Authority's Tourism District Land Development Rules.

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

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.

Positive Criteria

The positive criteria for variances requested pursuant to N.J.S.A. 40:55D-70(c)(2) 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).

Here, the Applicant seeks variances pursuant to N.J.S.A. 40:55D-70(c) to permit impervious coverage of 85% where a maximum of 80% is permitted. The Applicant presented sufficient evidence and testimony to establish that the application would advance the purposes of the Municipal Land Use Law by promoting the public health, safety, morals and general welfare (Purpose A) by serving as parking for surrounding commercial uses and promote the free flow of traffic and discourage congestion (Purpose H) by serving existing needs.

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Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

Negative Criteria

Relief under N.J.S.A. 40:55D-70(c)(2) cannot be granted unless the negative criteria is satisfied. The negative criteria required for all “C” variances is that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and the zoning ordinance.

The Applicant presented sufficient evidence and testimony to establish that the grant of the requested variances will not create any detriment to the public good, and will not substantially impair the purpose and intent of the Tourism District Mast Plan and the Tourism District Land Development Rules.

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

The Applicant seeks a variance pursuant to N.J.S.A. 40:44D-70(d)(1) to permit a free-standing parking use where free-standing parking is 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)

Page 5 of 7

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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

The Applicant presented sufficient evidence and testimony to establish that the application will advance the purposes of the Municipal Land Use Law by promoting the public health, safety, morals and general welfare (Purpose A) by serving as parking for surrounding commercial uses and promote the free flow of traffic and discourage congestion (Purpose H) by serving existing needs.

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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Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

The Applicant presented sufficient evidence and testimony to establish that the grant of the variance would advance the purposes of the Tourism District Master Plan and would not have any substantial detriment to the Tourism District Master Plan or Tourism District Land Development Rules.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Officer recommends that the Application for Minor Subdivision Approval with bulk and use variances, 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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