

Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

EXHIBIT "A" TO RESOLUTION 22- , ADOPTED 9/20/2022

TO: Members of the Authority

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

COPY: Sean Pattwell, Executive Director

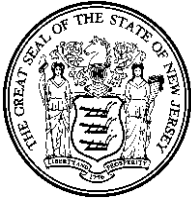
SUBJECT: Hearing Officer's Report and Recommendation
Application #2022-06-3212
MPX New Jersey, LLC
Variance Pursuant to N.J.S.A. 40:55D-70(d) and Waiver of Site Plan
153 S. New York Avenue
Block 52, Lot 7
Resort Commercial (RC) Zoning District

DATE: August 1, 2022

EXECUTIVE SUMMARY

On July 7, 2022, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, MPX New Jersey, LLC (the "Applicant"), seeks a variance pursuant to N.J.S.A. 40:55D-70(d) to permit the operation of a Class 5 micro dispensary for the sale of recreational cannabis at the subject property where such use is not permitted pursuant to the Authority's Tourism District Land Development Rules. The space is currently approved for the sale of medical cannabis. The Applicant is also seeking waiver of site plan as no changes to the building are proposed. The Applicant will be required to obtain all necessary approvals from the State for the sale of recreational cannabis prior to commencement of operations, and be subject to compliance with all laws and regulations governing such operations. There will be no consumption of cannabis permitted on site.

The Applicant demonstrated by evidence and testimony that the grant of the requested variance is warranted, and the grant of waiver of site plan is appropriate. Therefore, for the reasons more fully outlined below, the Hearing Officer recommends that the Application be approved by the Authority.



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

INTRODUCTION

Application Information

MPX New Jersey, LLC
Variance Pursuant to N.J.S.A. 40:55D-70(d) and Waiver of Site Plan
153 S. New York Avenue
Block 52, Lot 7
Resort Commercial (RC) 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.

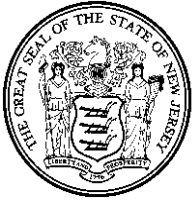
The Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d) to permit the operation of a Class 5 micro dispensary for the sale of recreational cannabis at the subject property where such use is not permitted pursuant to the Authority's Tourism District Land Development Rules. The space is currently approved for the sale of medical cannabis. The Applicant is also seeking waiver of site plan as no changes to the building are proposed. The Applicant will be required to obtain all necessary approvals from the State for the sale of recreational cannabis prior to commencement of operations, and be subject to compliance with all laws and regulations governing such operations. There will be no consumption of cannabis permitted on site.

Evidence List

- A-1 Application Materials
- A-4 Four Photos of Site
- B-1 Letter from Cofone Consulting Group, LLC dated June 16, 2022.

FINDINGS OF FACT

The Applicant seeks a variance pursuant to N.J.S.A. 40:55D-70(d) to permit the operation of a Class 5 micro dispensary for the sale of recreational cannabis at the subject property where such use is not permitted pursuant to the Authority's Tourism District Land Development Rules. The space is currently approved for the sale of medical cannabis. The Applicant is also seeking waiver of site plan as no changes to the building are proposed. The Applicant will be required to obtain all necessary approvals from the State for the sale of recreational cannabis prior to commencement of operations, and be subject to compliance with all laws and regulations governing such operations. There will be no consumption of cannabis permitted on site.



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

The attorney for the Applicant, Nicholas Talvacchia, Esq., introduced the application generally and provided background regarding the specific relief sought by the Applicant. He noted that the Applicant currently operates the subject property for the sale of medical cannabis.

The Applicant presented the testimony of Erin McCarthy, who is the Vice President and General Counsel for the Applicant. Ms. McCarthy gave an overview of the Applicant's cannabis operations throughout the country, and New Jersey specifically. She provided testimony regarding the regulation and licensing of the proposed use.

The Applicant presented the testimony of Shawn Daravecchia, who is the director of compliance and security for the Applicant. He provided extensive testimony regarding the Applicant's business operations, including staffing, hours of operation, product storage, patron access and security. He noted that all of the Applicant's S.O.P.'s have been reviewed and approved by the New Jersey Cannabis Regulatory Commission.

Mr. Daravecchia testified that the property will be outfitted with alarm monitoring for intrusion, panic, silent holdup, duress and motion sensor alarms monitored remotely by a third party at all times. He noted that the New Jersey Cannabis Regulatory Commission will have remote access to the Applicant's surveillance system at all times. A trained security guard will be on location during hours of operation.

The Applicant presented the testimony of Jason Sciuлло, P.E., P.P., who was qualified as an expert in the fields of professional engineering and professional planning. Mr. Sciuлло described the location of the site, existing conditions, development proposal and site layout. He noted that no parking is proposed, but that the lack of parking is a pre-existing nonconforming condition. Moreover, he testified, there is adequate public parking in the vicinity of the site to meet parking needs.

Mr. Sciuлло explained that the Applicant is seeking a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the operation of a Class 5 micro dispensary for the sale of recreational cannabis at the subject property where such use is not permitted pursuant to the Authority's Tourism District Land Development Rules.

Mr. Sciuлло testified that the proposed use is supported by public referendum, the City of Atlantic City and recently-enacted State law authorizing the retail sale of recreational cannabis. He noted that the use is similar to other retail uses permitted in the zoning district under the Authority's Tourism District Land Development Rules. Indeed, the Authority previously granted approval for the operation of the site as a medical cannabis dispensary. For these reasons, Mr. Sciuлло opined that the site is particularly suitable for the proposed use.



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

Mr. Sciullo opined that the development proposal will promote the purposes of the Municipal Land Use Law (the “MLUL”). Specifically, he opined that the development proposal will provide sufficient space in appropriate locations for a variety of uses to meet the needs of all New Jersey citizens (Purpose G) because the use is appropriate and in demand. He further opined that the development proposal will promote the more efficient use of land (Purpose M) because the proposed use is consistent with the surrounding uses and will compliment such uses.

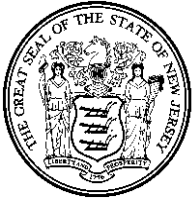
Mr. Sciullo opined that the grant of the variance will not create a substantial detriment to the public good and will not substantially impair the purpose and intent of the Authority’s Tourism District Master Plan and Tourism District Land Development Rules. Indeed, he testified that the development proposal will advance the purposes of the Authority’s Tourism District Master Plan by attracting tourism.

Christine Cofone., P.P., was qualified as an expert in professional planning and provided testimony on behalf of the Authority. Ms. Cofone noted Medici v. BPR Co., 107 N.J. 1, (1987) instructs land use boards to consider whether a particular use may not have been contemplated at the time of enactment of a zoning ordinance, and therefore consider whether the failure to permit the use was in fact an intent to prohibit the use. In this instance, Ms. Cofone opined that the relevant case law supports the grant of the requested variance. Moreover, she opined that the development proposal will promote the public health, safety and general welfare (Purpose A) by providing a service that is legally permitted and in demand in the State. Ms. Cofone testified that the Applicant had provided sufficient testimony to address all issues raised in the review letter and that she supports approval of the Application.

CONCLUSIONS OF LAW

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

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.



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

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 board of adjustment 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 MLUL. 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 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 evidence and testimony demonstrate that special reasons exist for the grant of the requested variance.

The evidence and testimony demonstrate that the proposed use is supported by public referendum, the City of Atlantic City and recently-enacted State law authorizing the retail sale of recreational cannabis. The use is similar to other retail uses permitted in the zoning district under the Authority’s Tourism District Land Development Rules. Indeed, the Authority previously granted approval for the operation of the site as a medical cannabis dispensary. For these reasons, the site is particularly suitable for the proposed use.

The development proposal will promote the purposes of the MLUL . It will provide sufficient space in appropriate locations for a variety of uses to meet the needs of all New Jersey citizens (Purpose G) because the use is appropriate and in demand; it will promote the more efficient use of land (Purpose M) because the proposed use is consistent with the surrounding uses and will compliment such uses; and it will promote the public health,



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

safety and general welfare (Purpose A) by providing a service that is legally permitted and in demand in the State.

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 evidence and testimony demonstrate that the grant of the requested variance will not create any detriment to the public good, and will not create a substantial detriment to the public good and will not substantially impair the purpose and intent of the Authority's Tourism District Master Plan and Tourism District Land Development Rules.

Waiver of Site Plan

A land use agency may waive site plan review for a change of use with de minimis or no physical changes to site features. See Garafolo v. Burlington Tp., 212 N.J. Super. 458 (Law Div. 1985). Here, as the site is being converted from a facility for the sale of medical cannabis to a facility for the sale of recreational cannabis, and no physical changes to existing site features are proposed, Applicant's request for the grant of waiver of site plan is appropriate.

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-70(d) and Waiver of Site Plan 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 Authority's Tourism District Land Development Rules, any applicable 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



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

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

5369102v1