



Casino Reinvestment Development Authority Land Use Regulation and Enforcement Division

EXHIBIT "A" TO RESOLUTION 23- , ADOPTED 10/17/2023

TO: Members of the Authority

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

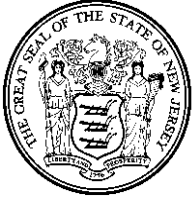
COPY: Sean Pattwell, Executive Director

SUBJECT: Hearing Officer's Report and Recommendation
Application #2023-08-3512
107 S. Kentucky Ave. LLC
Preliminary and Final Site Plan Approval with Variance Pursuant to
N.J.S.A. 40:55D-70(d)(1)
105, 107, 117, 123, 125, 127 & 177 S. New Hampshire Avenue
105, 107 & 109 Westminster Avenue
1514, 1514RR, 1516 and 1520 Pacific Avenue
Block 50, Lots 1-4
Kentucky Avenue Renaissance (KAR) Zoning District
Block 51, Lots 1-10
Resort Commercial (RC) Zoning District

DATE: October 25, 2023

EXECUTIVE SUMMARY

On October 5, 2023, the Casino Reinvestment Development Authority (the "Authority") heard testimony and public comment on the above-subject application. The Applicant, 107 S. Kentucky Avenue LLC (the "Applicant"), seeks Preliminary and Final Site Plan Approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of 29 single-family attached townhouses on the subject properties. Although high-rise multi-family residential uses are permitted in the zoning districts, single-family attached townhouses are not permitted pursuant to the Authority's Tourism District Land Development Rules. A variance pursuant to N.J.S.A. 40:55D-70(d)(1) is required to permit single-family attached townhouses. Variances pursuant to N.J.S.A. 40:55D-70(c) are subsumed by the variance pursuant to N.J.S.A. 40:55D-70(d)(1).



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The Applicant demonstrated by evidence and testimony that the development proposal generally conforms to the site plan 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 variance is warranted. Therefore, for the reasons more fully outlined below, the Hearing Officer recommends that the Application be approved by the Authority.

INTRODUCTION

Application Information

107 S. Kentucky Ave. LLC
Preliminary and Final Site Plan Approval with Variance Pursuant to N.J.S.A. 40:55D-70(d)(1)
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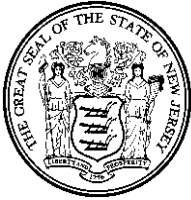
A hearing on the Application was conducted in accordance with the requirements of the Open Public Meetings Act, the Municipal Land Use Law and P.L. 2011, c. 18.

The Applicant seeks Preliminary and Final Site Plan Approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of 29 single-family attached townhouses on the subject properties. Although high-rise multi-family residential uses are permitted in the zoning districts, single-family attached townhouses are not permitted pursuant to the Authority's Tourism District Land Development Rules. A variance pursuant to N.J.S.A. 40:55D-70(d)(1) is required to permit single-family attached townhouses. Variances pursuant to N.J.S.A. 40:55D-70(c) are subsumed by the variance pursuant to N.J.S.A. 40:55D-70(d)(1).

Evidence List

- A-1 Application Materials
- A-2 Architectural Rendering consisting of 13 pages
- A-3 Revised Site Plan

- B-1 Letter from ARH Associates dated October 2, 2023.



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FINDINGS OF FACT

The Applicant seeks Preliminary and Final Site Plan Approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of 29 single-family attached townhouses on the subject properties. Although high-rise multi-family residential uses are permitted in the zoning districts, single-family attached townhouses are not permitted pursuant to the Authority's Tourism District Land Development Rules. A variance pursuant to N.J.S.A. 40:55D-70(d)(1) is required to permit single-family attached townhouses. Variances pursuant to N.J.S.A. 40:55D-70(c) are subsumed by the variance pursuant to N.J.S.A. 40:55D-70(d)(1).

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

The Applicant presented the testimony of Brian Zoubek, who is an owner of the properties. Mr. Zoubek testified as to his experience in residential developments in the area generally and the Atlantic City specifically. He testified that the Applicant's goal is the construct long-term rental units that will "put lights and eyes on the street" and create a vibrant and safe residential community that supports nearby commercial uses. Finally, he opined that it would be difficult for any developer to construct commercial uses on the subject properties due to location, access and visibility.

The Applicant presented the testimony of Brett Harman, R.A., who was qualified as an expert in the field of architecture and prepared the architectural plans for the development proposal. The Applicant presented the testimony of Rustin Ohler, who assisted in the preparation of the architectural plans. Mr. Ohler described the location of the site, development proposal and site layout. He testified as to architectural features of the proposed improvements, building materials, floor-plans, parking, operational features and signage. Mr. Ohler opined that the development proposal constitutes good civic design and arrangement.

The Applicant presented the testimony of Jason Sciuillo, P.E., P.P., who was qualified as an expert in the fields of professional engineering and professional planning. Mr. Sciuillo described the location of the site, existing conditions, development proposal and site layout and circulation. He noted that the proposed parking exceeds IRIS requirements and that all trash will be stored within the garages of the individual units. Mr. Sciuillo identified several bulk deficiencies associated with the application that are subsumed into the "(d)(1)" variance.

With respect to the variance pursuant to N.J.S.A. 40:55D-70(d)(1), Mr. Sciuillo explained that the RC Zoning District permits multi-family high-rise uses and mixed use buildings,



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and the KAR Zoning District permits mixed use buildings. However, single-family attached townhouses are not permitted pursuant to the Authority's Tourism District Land Development Rules. Mr. Sciullo opined that the opportunity for commercial development on the subject properties is limited by location, access and visibility, making the properties particularly suitable for the development proposal. Moreover, he opined that residential development at the proposed intensity would constitute a better planning alternative to strict compliance with the Authority's Tourism District Land Development Rules and would meet market demand.

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 promote the public health, safety and welfare (Purpose A) by creating a safe and vibrant walkable neighborhood; secure safety from fire. Flood and natural disaster (Purpose B) by providing housing built above flood hazard standards; provide adequate air, light and open space (Purpose C) by creating a neighborhood on a less intense scale and height than permitted under the Authority's Tourism District Land Development Rules; provide appropriate population densities for a variety of uses (Purpose E) by providing residential uses that are in demand; provide sufficient space for a variety of uses (Purpose G) by providing a use that will compliment existing and proposed commercial uses in the neighborhood; and create a desirable visual environment (Purpose I) through the use of creative techniques.

Mr. Sciullo opined that the grant of the variances 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.

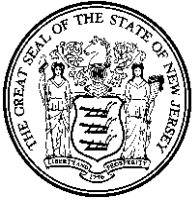
Christine Cofone, P.P., was qualified as an expert in professional planning and provided testimony on behalf of the Authority. Ms. Cofone testified that the proposed density is consistent with the way that the neighborhood is developing and that she supports approval of the Application.

Christopher Morris, P.E., was qualified as an expert in professional engineering and provided testimony on behalf of the Authority. Mr. Morris testified that he supports approval of the Application.

CONCLUSIONS OF LAW

Preliminary and Final Major Site Plan Approval

A land use agency's authority in reviewing an application for site plan approval is limited to determining whether the development plan conforms to the zoning ordinance and the



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applicable provisions of the site plan ordinance. See Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216 (1994).

Here, based on the evidence and testimony, the Applicant has demonstrated that development plan generally conforms to the site plan standards and technical requirements of the Tourism District Land Development Rules.

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. 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



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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 seeks a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of 29 single-family attached townhouses on the subject properties. Although high-rise multi-family residential uses are permitted in the zoning districts, single-family attached townhouses are not permitted pursuant to the Authority’s Tourism District Land Development Rules. The evidence and testimony demonstrate that special reasons exist for the grant of the requested variance. The property is particularly suitable for the proposed use because the density is appropriate to the size of the property and meets market demand.

The development proposal will promote the purposes of the Municipal Land Use Law (the “MLUL”). Specifically, the development proposal will promote the public health, safety and welfare (Purpose A) by creating an safe and vibrant walkable neighborhood; secure safety from fire. Flood and natural disaster (Purpose B) by providing housing built above flood hazard standards; provide adequate air, light and open space (Purpose C) by creating a neighborhood on a less intense scale and height than permitted under the Authority’s Tourism District Land Development Rules; provide appropriate population densities for a variety of uses (Purpose E) by providing residential uses that are in demand; provide sufficient space for a variety of uses (Purpose G) by providing a use that will compliment existing and proposed commercial uses in the neighborhood; and create a desirable visual environment (Purpose I) through the use of creative techniques.

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.



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RECOMMENDATION

For all of the foregoing reasons, the Hearing Officer recommends that the Application for Preliminary and Final Site Plan Approval with a variance pursuant to N.J.S.A. 40:55D-70(d)(1) to permit the construction of 29 single-family attached townhouses on the subject property where single-family attached townhouses are not permitted in the zoning districts 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 Applicant obtaining all other necessary governmental approvals, and compliance with all Federal, State and local laws.

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