From:	Jonathan Drill
To:	Cheryl Chrusz
Cc:	cmurphy@murphyllp.com
Subject:	MTBOA - Renard Mng Application for Self Storage - Crib Sheets for D1, D4 & D6 Varianes
Date:	Wednesday, January 24, 2024 1:55:09 PM
Attachments:	D1_Variance_2024-01-24.pdf D4_Variance_2024-01-24.pdf D6_Variance_2024-01-24.pdf

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Ms. Chrusz:

Attached are my so-called "crib sheets" for the following "d" variance relief requested in the above application.

I revised them this morning to accurately reflect the advice I gave during last night's hearing regarding the standards I believe the Board must utilize to determine whether or not to grant said relief.

I ask you to please upload a copy of this email with these three attached crib sheets to the Township website so members of the public as well as Board members and the applicant's team can have easy access to them.

I am also providing these crib sheets to the applicant's attorney by copy of this email and ask him to forward them to his client's team.

Finally, I ask you to forward this email with attachments to all Board members.

I will at some point in the future email out my crib sheets for the "c" variance and exception relief as well as the preliminary and final site plan approval sought by the applicant but wanted to get the "d" variance crib sheets out now in as much as the issue came up last night.

Thanks,

Jon

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"D(1)" Use or Principal Structure Variances

1. The Board has the power to grant "d(1)" variances to permit non-permitted uses and/or non-permitted principal structures pursuant to N.J.S.A. 40:55D-70(1) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(1)" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons."[1] Medici v. BPR Co., 107 N.J. 1, 18 (1987). Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. Id. The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed. Id. Thus, in a typical non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed. Our courts held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013).

2. The Board may not exercise its power to grant a "d(1)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted … without a showing that such variance or other relief 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." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

Comment: As to the zone plan and zoning ordinance, the Medici court held that the applicant must prove and the Board must find by an "enhanced quality or proof" that there will be no substantial impairment. The applicant must "reconcile" the use proposed with the ordinance's omission of the use from those permitted in the zone. Id.

[1] While the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons," the Medici court held that "economic inutility" can also constitute a special reason under the statute.

"D(4)" FAR Variances

1. The Board has the power to grant "d(4)" variances to permit an increase in the permitted floor area ratio ("FAR") pursuant to N.J.S.A. 40:55D-70d(4) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(4)" FAR variance. At present, there are two standards that apply to the determination of whether the positive criteria of a "d(4)" variance is satisfied.

a. The first standard is the traditional "d(1)" use variance standard enunciated in Medici v. BPR Co., 107 N.J. 1 (1987) and that standard would apply if the use at issue is prohibited in the zone. Simply stated, if the use at issue is prohibited in the zone, the applicant would have to prove that some benefit to the general welfare would result from the proposed FAR and that the site is particularly suited to the proposed FAR. As held by Medici, the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons."[1] 107 N.J. at 18. Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. Id. The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed. Id. Thus, in a typical non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed. Our courts held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013).

b. The second standard is the "d(3)" conditional use standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285 (1994) and that standard would apply if the use at issue is permitted in the zone. See, Randolph Town Center v. Randolph, 324 N.J. Super. 412, 416 (App. Div. 1999) (holding that the standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285, 298-299 (1994) pertaining to "d(3)" conditional use variances applies to "d(4)" FAR variances). An applicant for a "d(4)" FAR variance for a permitted use need not show that the site is particularly suited for more intensive development; the applicant must show that the site can accommodate the problems associated with the proposed permitted use but with FAR greater than permitted by the ordinance. To repeat and stress, in the context of a "d(4)" FAR variance for a permitted use, the Board's focus must be on whether the site will accommodate the problems associated with the proposed permitted use but with FAR greater than permitted by the ordinance.

[1] While the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons," the Medici court held that "economic inutility" can also constitute a special reason under the statute.

2. The Board may not exercise its power to grant a "d(4)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief 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." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987). As with the positive criteria, at present, there are two standards that apply to the determination of whether the negative criteria of a "d(4)" variance is satisfied.

a. The first standard is the traditional "d(1)" use variance standard enunciated in Medici, and that standard would apply if the use at issue is prohibited in the zone. Under that standard, the applicant must prove and the Board must find by an "enhanced quality of proof" that there will be no substantial impairment of the intent and purpose of the zoning ordinance and zone plan. 107 N.J. at 21-22. Under that standard, the applicant would have to "reconcile" the FAR proposed with the ordinance's limitation on FAR. Id. As the Medici court held, reconciliation "becomes increasingly difficult when the governing body has been made aware of prior applications for the same variance but has declined to revise the zoning ordinance." Id.

b. Where the "d(4)' FAR variance involves a permitted use, however, the Medici rational pertaining to the negative criteria would not apply. Thus, there would be no requirement for an enhanced quality of proof and no requirement to reconcile the variance with the ordinance's prohibition of the proposed FAR. In the context of a "d(4)" FAR variance for a permitted use, the "d(3)" conditional use variance test enunciated in Coventry Square would apply. See, Randolph Town Center, 324 N.J. Super. at 416 (holding that the standard enunciated in Coventry Square pertaining to "d(3)" conditional use variances applies to "d(4)" FAR variances). The Supreme Court in Coventry Square, 138 N.J. at 299, and in a subsequently decided case, TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), held that the stricter requirements applicable to a "d(1)" variance do not apply to the negative criteria of a "d(3)" variance. Thus, the Board's focus must determine whether the FAR variance can be granted without substantial detriment to the public good (the first prong of the negative criteria), with the Board's focus on the effect on surrounding properties of the grant of the FAR variance. See Coventry Square, 138 N.J. at 299. In respect of the second prong of the negative criteria, that the FAR variance can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance, the Board must be satisfied that the grant of the FAR variance for the proposed permitted use at the designated site is reconcilable with the municipality's legislative determination limiting FAR on all permitted uses in that zoning district. Id. Significantly, and to repeat from above, the Court in TSI East Brunswick, 215 N.J. at 43-46, held that the "enhanced quality of proof" burden applicable to the second prong of the negative criteria of a "d(1)" use variance does not apply to the second prong of the negative criteria of a "d(3)" variance, so the enhanced quality of proof standard does not apply to the second prong of the negative criteria of a "d(4)" FAR variance.

"D(6)" Height Variances

1. The Board has the power to grant "d(6)" variances to permit the height of a principal structure to exceed by 10 feet or 10% the maximum height permitted in the zoning district for a principal structure[1] pursuant to N.J.S.A. 40:55D-70d(6) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(6)" variance. At present, there are two standards that apply to the determination of whether the positive criteria of a "d(6)" variance is satisfied.

a. The first standard is the traditional "d(1)" use variance standard enunciated in Medici v. BPR Co., 107 N.J. 1 (1987) and that standard would apply if the use or principal structure were prohibited in the zone. As held by Medici, the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons."[2] 107 N.J. at 18. Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. Id. The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed. Id. Thus, in a typical non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed. Our courts held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013). Applied to a "d(6)" height variance case, if the use or principal structure at issue is prohibited in the zone, the applicant would have to prove that some benefit to the general welfare would result from the proposed height of the principal structure and that the site is particularly suited to the location and height of the structure. Under these circumstances, it appears that our courts would treat the situation similar to how non-permitted cell towers are treated and require the Board to: (a) consider whether the placement of the structure at the proposed non-permitted height at the subject location is necessary in order that the structure achieve its permitted purpose; and (b) consider whether the same result could be achieved by erecting the structure in a location where the height of the structure could be lessened or by erecting the permitted structure at a lower height at the proposed location. See, Smart SMR v. Fair Lawn Board of Adjustment, 152 N.J. 309 (1998). Our courts have held that site suitability is to be determined both from the point of view of the applicant and the municipality. See, Northeast Towers, Inc. v. Zoning Board of Adjustment, 327 N.J. Super. 476, 497-498 (App. Div. 2000).

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[1] If the proposed height of an accessory structure is at issue or if the proposed height of a principal structure does not exceed by 10 feet or 10% the maximum height permitted for a principal structure in the zone, a "c" variance, and not a "d(6)" variance, is required pursuant to N.J.S.A. 40:55D-70d(6).

[2] While the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons," the Medici court held that "economic inutility" can also constitute a special reason under the statute.

b. The second standard is the "d(3)" conditional use standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285 (1994) and that standard would apply if the use and principal structure were permitted in the zone. See, Grasso v. Spring Lakes Heights, 375 N.J. Super. 41 (App. Div. 2004). Simply stated, if the use and principal structure at issue are permitted in the zone and the only deviation is its height, the Board's focus would be on whether the site would accommodate the problems associated with the permitted principal structure but at a height higher than permitted by the ordinance. Id.

2. Regardless of the standard employed to determine the positive criteria of the "d(6)" height variance, the Board may not exercise its power to grant a "d(6)" height variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted... without a showing that such variance or other relief 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." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987). As with the positive criteria of a "d(6)" variance, there are two standards that apply to determination of the negative criteria of a "d(6)" variance, again, depending upon whether or not the use and principal structure at issue is permitted or not.

a. The first standard is the traditional "d(1)" use variance standard enunciated in Medici and that standard would apply if the principal structure at issue is prohibited in the zone. Under that standard, the applicant must prove and the Board must find by an "enhanced quality of proof" that there will be no substantial impairment of the intent and purpose of the zoning ordinance and zone plan. Medici. at 21-22. Under that standard, the applicant would have to "reconcile" the height proposed with the ordinance's prohibition of that height in the zone at issue. Id. As the Medici court held, reconciliation "becomes increasingly difficult when the governing body has been made aware of prior applications for the same variance but has declined to revise the zoning ordinance." Id.

b. Where the "d(6)" variance involves a permitted principal structure, the Medici rational pertaining the negative criteria would not apply. Thus, there would be no requirement for an enhanced quality of proof and no requirement to reconcile the variance with the ordinance's prohibition of the proposed height. In the context of a "d(6)" height variance for a permitted principal structure, the "d(3)" conditional use variance test enunciated in Coventry Square would appear to apply. The Supreme Court in Coventry Square, 138 N.J. at 299, and in a subsequently decided case, TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), held that the stricter requirements applicable to a "d(1)" variance do not apply to the negative criteria of a "d(3)" variance. Thus, the Board's focus must determine whether the height variance can be granted without substantial detriment to the public good (the first prong of the negative criteria), with the Board's focus on the effect on surrounding properties of

the grant of the height variance. See Coventry Square, 138 N.J. at 299. In respect of the second prong of the negative criteria, that the height variance can be granted without substantially impairing the intent and purpose of the zone plan and zoning ordinance, the Board must be satisfied that the grant of the height variance for the proposed permitted principal structure at the designated site is reconcilable with the municipality's legislative determination limiting height on all permitted principal structures in that zoning district. Id. Significantly, and to repeat from above, the Court in TSI East Brunswick, 215 N.J. at 43-46, held that the "enhanced quality of proof" burden applicable to the second prong of the negative criteria of a "d(1)" use variance does not apply to the second prong of the negative criteria of a "d(3)" variance, so the enhanced quality of proof standard does not apply to the second prong of the negative criteria of a "d(6)" height variance.

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