

ZB-21-21
Daughters of Israel, Inc.
1155 Pleasant Valley Way
West Orange, New Jersey
Block 171, Lot 12

Reasons for Relief

Application Form, Section G. – Requirements for Variances, Item 4B)
Revised May 20, 2022

Background

The project seeks preliminary and final major site plan approval, use and bulk variances to redevelop the existing skilled nursing facility into a continuing care retirement community which offers independent living, assisted living and skilled nursing components. This requires d(1) use variance relief to permit uses not permitted in the R-2 District, and to permit more than one principal use on a lot which the R-2 District also does not allow. The project also requires a d(6) height variance and various “c” bulk variances which are described in more detail below.

Use

The project is inherently beneficial, whether viewed as a group of component uses, or as a single collective use:

- Nursing Homes. Nursing homes have been recognized as inherently beneficial, whether for-profit or not-for-profit. Urban Farms, Inc. v. Borough of Franklin Lakes, 179 N.J. Super. 203, 212 (App. Div. 1981), certif. denied, 87 N.J. 428 (1981) (“We have no doubt that a nursing home, whether or not nonprofit, comes within the inherently beneficial use category, particularly where, as here, a certificate of need has been granted and more than a third of its beds have been committed to Medicaid recipients.”)
- Assisted Living. Assisted living facilities, as well as congregate care facilities, have been recognized as inherently beneficial, whether for-profit or not-for-profit. Jayber, Inc. v. Municipal Council of Township of West Orange, 238 N.J. Super. 165 (App. Div. 1989), certif. denied, 122 N.J. 142 (1990) (congregate care facilities); Sunrise Development, Inc., v. Zoning Board of Adjustment of the Borough of Madison, A-6120-97T5 (App. Div. July 8, 1999)¹ (a true copy of which is annexed as Exhibit A) (assisted living facilities).

¹ This and the other unpublished decision of the Appellate Division cited herein are not precedential and are not binding authority on the Zoning Board of Adjustment. They are cited here because the applicant believes they are properly decided and represent the correct application of the law, and therefore, the Zoning Board of Adjustment should independently

- Senior Housing. Housing for senior citizens has been recognized as inherently serving the public good. Borough of Roselle Park v. Township of Union, 113 N.J. Super. 87, 98 (Law Div. 1970) (three-story senior citizens' housing project "is designed to promote the general welfare of the community in that it inherently serves the public good, regardless of whether the use is peculiarly fitted to the particular location for which the variance is sought"). Additionally, independent living units for senior citizens directly address the zoning purpose "[t]o encourage senior citizen community housing construction." N.J.S.A. 40:55D-2.1. In fact, the zoning purpose in the MLUL of encouraging housing construction for seniors is the only one which encourages development of a specific land use.
- Continuing Care Retirement Community. A continuum of care facility, consisting of skilled nursing, assisted living and independent living senior housing components, in this instance operating as a continuing care retirement community or CCRC, has been determined to be an inherently beneficial use. American Baptist Estates of Red Bank, t/a Navesink House v. Borough of Red Bank Zoning Board of Adjustment, A-2613-01T3 (App. Div. June 27, 2002) (a true copy of which is annexed as Exhibit B) ("It is beyond debate that this type of housing promotes the general welfare and advances the purposes of the MLUL," referring to N.J.S.A. 40:55D-2.1.).

Designation as an inherently beneficial use constitutes the special reason necessary to justify the grant of a d(1) use variance pursuant to N.J.S.A. 40:55D-70.d.(1). Additionally, given the R-2 zoning of the tract which has been engaged in skilled nursing use for decades, the applicant would encounter substantial hardship were the use variance not granted to enable a modernization of the facility to meet the needs of an aging population. Finally, the existence of a substantially similar facility on the property demonstrates its particular suitability for a use which provides services to senior citizens and their changing needs. The project also promotes the concept of providing opportunities for seniors to age in place which the Township Master Plan Re-Examination recognizes and supports.

Having satisfied the positive criteria, the applicant must then satisfy the negative criteria in accordance with the balancing test in Sica v. Board of Adjustment of the Township of Wall, 127 N.J. 152 (1992). It requires that the Board first "identify the public interest at stake." Facilities serving the elderly and providing living arrangements and for their healthcare are "the kind of uses that may outweigh the negative criteria." Id. at 165-66. Second, the Board "should identify the detrimental effect that will ensue from the grant of the variance." The accompanying Environmental Impact Statement, Traffic Impact Study, Planner's Report and other materials submitted in support of this application

utilize the same rationale in determining that the applicant has met its burden of proof in support of the variance relief for which it has applied.

demonstrate that detrimental effects of the proposal will be minimal. Third, the Board “in some situations...may reduce the detrimental effect by imposing reasonable conditions on the use.” Having designed the project to minimize negative impacts, it is the applicant’s view that no such conditions are necessary. Fourth, “the Board should then weigh the positive and negative criteria and determine, on balance, whether the grant of the variance would cause a substantial detriment to the public good.” Here, that balancing strongly supports the grant of relief, and therefore the d(1) variances should be granted.

Height

The proposed facility has a height of 5 stories above a parking garage, or nearly 70 feet, whereas the R-2 District permits a maximum building height of 2½ stories or 35 feet. The court in Grasso v. Borough of Spring Lake Heights, 375 N.J. Super. 41 (App. Div. 2004), established that “the special reasons necessary to establish a height variance must be tailored to the purpose for imposing height restrictions in the zoning ordinance.” Id. at 52. Thus, an applicant can prove special reasons supporting the grant of a height variance if the applicant can “persuade the Board that a taller structure than permitted by ordinance would nonetheless be consistent with the surrounding neighborhood” and would not offend any of the purposes of the height limitation in the zoning ordinance. Id. at 53. As established in the Planner’s Report, the surrounding neighborhood although zoned residential, contains relatively few residential uses. Instead, there are many existing compatible uses of a similar nature to what the applicant proposes. Additionally, given the substantial grade change between the subject property and the adjacent properties, the proposed facility will be compatible with both the adjacent Kessler Institute (which will appear taller) and the adjacent residential homes along Parson Drive and Skyline Drive (which will be at a higher elevation than the roof of the proposed continuum of care facility), thereby respecting the purpose of light, air and open space underlying the height limitation in the zoning ordinance.

The negative criteria, for the reasons described above and in the Planner’s Report, can also be satisfied with respect to the proposed height variance.

Bulk or “c” Variances

The bulk or “c” variances required by the project pertain to maximum lot coverage, maximum height of retaining wall, maximum length of continuous parking row without landscaped island, number of parking and loading spaces, parking of vehicles with dual rear axles and parking of commercial vehicles outdoors within an R-2 District, light pole height, signage, and effective maximum building and impervious coverage. Applicant seeks relief both under the hardship standard, where applicable, as well as under the benefits outweigh the detriments or “flexible c” criteria.

In large measure, the variances necessitated by the application are a function of the fact that the zone does not permit the use, and therefore, some of the zoning standards are not intended for the type of use here proposed. These include maximum lot coverage, signage, restrictions on parking of dual-axle or commercial vehicles in a residential zone, and maximum effective coverage due to steep slopes. Thus, they are largely subsumed within the use variance. Price v. Himeji, LLC, 214 N.J. 263, 299-302.

Retaining wall height is required because of the steep topography in parts of the site, which necessitate greater height than what the zoning regulations would allow on a less steeply sloped site. The parking and loading requirements in the Township's Land Development Regulations are fairly high for a use of this nature. The Parking Study presents suitable industry standards and demonstrates that the amount of parking proposed by the applicant is more than adequate to meet anticipated demand, thereby warranting relief in the form of a variance from the zoning regulations (relative to the skilled nursing component) and a de minimis exception from RSIS (relative to the independent living and assisted living components).² The continuous parking row is only slightly longer than permitted (2 spaces) without having an intervening island, and is suitably landscaped at either end.

Finally, the steep slope requirements reduce effective building coverage and effective impervious coverage. The applicant has sought to avoid disturbing steep slopes to the greatest extent possible, while still providing the inherent benefits which accrue from the proposed use. This is largely an existing condition which will be virtually unchanged as a result of the project. Still, as a result of comments offered by the Site Plan Review Advisory Board ("SPRAB"), the applicant was able further to reduce both disturbance of steep slopes as well as removal of trees.

The negative criteria tie into the justification in support of the d(1) variance relief. Grant of the bulk variances requested will not be a substantial detriment to the public good and will not substantially impair the zone plan or zoning ordinance.

Additional justification in support of the required relief is detailed in the Planner's Report submitted in support of this application, and will be provided in testimony at the public hearing.

² See accompanying Request for De Minimis Exception from Residential Site Improvement Standards (RSIS) for the reasons supporting that relief.