

A REGULAR MEETING OF THE PLANNING/ZONING BOARD OF THE BOROUGH OF ANDOVER, COUNTY OF SUSSEX, AND STATE OF NEW JERSEY WAS HELD ON MONDAY, AUGUST 21, 2023 AT THE BOROUGH HALL BEGINNING AT 7:00 P.M.

PRESENT: Pearson, Breitz, Brothman, King, Wojcik, Daschko and Mayor Morgan.

ABSENT: Walter, DiRenzo and Smith

Vice Chairperson Daschko called the meeting to order with a salute to the flag and in accordance with the Open Public Meetings Act by advertising notice of meeting in the N.J. Herald, posting copy of notice in the Borough Hall and on the Borough website.

MINUTES:

A MOTION was made by Mayor Morgan, seconded by Mr. Pearson to approve the minutes of the meeting held on July 17, 2023. Opened to discussion and closed without comment. Upon roll call the following votes were cast: AYES: Pearson, Breitz, Brothman, King, Wojcik, and Mayor Morgan. NAYS: None. ABSTAIN: Daschko. Motion carried.

AUDIENCE PARTICIPATION: None.

CORRESPONDENCE: None.

FORMAL APPLICATIONS: None.

OLD BUSINESS:

The Mayor reported that the Municipal Clerk contacted the government liaison with the NJCRC to find the status of approved cannabis applications. The process after municipal approves seems slow going and could take many months. The Mayor asked Mrs. Brothman to contact the District 24 Legislatures for help to try to help the applicants move forward in their process.

The Mayor reported that the restaurant at 136 Main Street was very busy last Saturday which was good to see since its been reported as unopened more often than not.

The Mayor asked for a report on the denial of a flower pot at 141 Main Street by the zoning officer. The board secretary advised that the "flower planter" traversed the entire road frontage of the property and setback cannot be met. The alteration needs planning board approval as its more of a wall then "flower planter". The property owner will need to seek site plan amendment and has an engineer working on it.

NEW BUSINESS: The secretary reported that the next meeting is scheduled for 9/18/23 and she expects a formal application on the agenda. Members should let her know if they will not be able to attend when email is sent.

AUDIENCE PARTICIPATION: None.

RESOLUTION:

A MOTION was made by Mayor Morgan, seconded by Mr. Breitz to memorialize a **Resolution for application PZ 03-2023 for Carmen Pio Costa / SGP Century LLC – Site Plan Amendment – 5 Lenape Road - block 24 lot 47 - Zone C1 – for Outdoor Dining - approved on July 17, 2023.** Upon roll call the following votes were cast: AYES: Pearson, Breitz, Brothman, King, and Wojcik. NAYS: None. ABSTAIN: Daschko and Morgan. Motion carried.

**In the Matter of SPG Century, LLC
Application #PZ-03-2023
Decided on July 17, 2023
Memorialized on August 21, 2023
Minor Site Plan Approval**

WHEREAS, SPG Century, LLC (“Applicant”) has made application to the Andover Borough Planning/Zoning Board (“Board”) for minor site plan approval to permit outdoor dining and construct nine new concrete parking spaces at the property known as Block 24, Lot 47 as shown on the Tax Map of the Borough of Andover, located at 5 Lenape Road Gristmill Plaza, Andover Borough, New Jersey (“Premises”), and situated in the C-1 Zone; and

WHEREAS, a public hearing was conducted on July 17, 2023, after the Board determined it had jurisdiction; and

WHEREAS, the Applicant’s principal, Carmen Piocosta, appeared along with Ryan J. Windels, Esq., of King, Moench & Collins LLP, legal counsel to Applicant.

NOW, THEREFORE, the Board makes the following findings of fact, based on evidence presented at its public hearing, at which a record was made.

Mr. Windels indicated that his client was seeking minor site plan approval to add 26 outdoor dining seats on the parking lot of the Premises, as more particularly set forth in the submitted site plan.

The Board Attorney swore in Frank Matarazzo, who testified as the professional engineer in support of the application. The Board questioned Mr. Matarazzo regarding the plan to add outdoor seating, including logistics, planning and seasonal operation. Mr. Matarazzo testified that the proposed outdoor seating is to be placed on an existing concrete parking lot, along with nine new concrete parking spaces.

The Board Attorney swore in Carmen Piocosta, who testified as the managing member of the Applicant in support of the application. Mr. Piocosta testified regarding the nature of the proposed concrete parking spaces and testified that the hours of operation will be the same as the hours of operation set forth in the existing resolution for the Premises.

The Applicant provided testimony that outdoor seating will be provided in accordance with the timeframe and other restrictions of all applicable Borough resolutions.

The meeting was opened to the public. No members of the public provided comments.

NOW, THEREFORE, the Andover Borough Planning Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The Municipal Land Use Law provides that minor site plan approval shall be deemed final approval by the Board. The Board finds that the detailed drawings, specifications and other evidence submitted by the applicant conform to the standards established by ordinance for approval as well as the conditions of approval. (N.J.S.A. 40:55D-46.1).

NOW, THEREFORE, BE IT RESOLVED by the Board that the Application is granted subject to the following terms and conditions:

1. The above recitals, representations and testimony are incorporated herein and made a requirement of this Resolution.
2. The Applicant is bound to comply with the representations made to the Board by the Applicant as recited herein and more specifically detailed on the record of the hearing.
3. The Applicant must submit updated specifications indicating that 3000 PSI concrete will be used for all proposed concrete installations.
4. The Applicant must submit updated plans, for the review and approval of the Board Engineer, showing lighting and signage and ADA compliance.
5. The Applicant must provide 2x6x2 concrete blocks to stabilize and secure traffic on the Premises.
6. The Applicant must provide aesthetically appealing direction for pedestrians during construction, subject to the judgment of the Board Engineer.
7. The Applicant must repair the defects in the existing parking lot, subject to the review and approval of the Board Engineer.
8. The conditions set forth in numbered paragraphs 3-7 above must be satisfied within 30 days of the memorialization of this resolution.
9. The Applicant must submit good payment of all fees, costs and escrows when due or when they become due. All monies are to be paid within 20 days of any request by the Board's Secretary.
10. The Applicant must submit a certificate that taxes are paid up to the date of approval.
11. The Applicant must not exceed the proposed number of seats without approval from the Board of Health and any other agency or body with jurisdiction.
12. Any condition without a specific time limit shall be complied with within six months of the date of this resolution's memorialization.

13. This approval is subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Andover, County of Sussex, State of New Jersey, or any other jurisdiction.

A MOTION was made by Mayor Morgan, seconded by Mr. Pearson to memorialize **a Resolution for application PZ 06-2022 for North Jersey Cannabis Club – Site Plan – 118 Main Street – block 11 lot 10 - Zone C1 – for Cannabis Dispensary Class 5 – denied on June 19, 2023**. Upon roll call the following votes were cast: AYES: Pearson, Breitz, Brothman, King, Wojcik, and Daschko. NAYS: None. ABSTAIN: Morgan. Motion carried.

**In the Matter of North Jersey Cannabis Club LLC
Application # PZ-06-2022
Decided on June 19, 2023
Memorialized on August 21, 2023
Preliminary and Final Site Plan and “D(3)” Variance Denial**

WHEREAS, North Jersey Cannabis Club LLC (the “Applicant”) has made application to the Andover Borough Planning/Zoning Board (the “Board”) for preliminary and final site plan and “D(3)” variance approval for property known as Block 11, Lot 10, as shown on the Tax Map of the Borough of Andover, located on 118 Main Street (US Route 206) in the C-1 commercial zone (the “Premises”);

WHEREAS, pursuant to N.J.S.A. 40:55D-25, the Borough of Andover has by ordinance established the Board which has dual powers of planning and zoning;

WHEREAS, a public hearings were conducted on April 17, 2023, May 15, 2023 and June 19, 2023, after the Board determined it had jurisdiction;

WHEREAS, Board Members Morgan and Smith disqualified themselves from this application and took no part in the hearings; and

WHEREAS, the Applicant was represented by John Williams, Esq..

NOW, THEREFORE, the Andover Borough Planning/Zoning Board makes the following findings of fact, based on evidence presented at its public hearing, at which a record was made.

The Applicant sought preliminary and final site plan approval and a conditional use variance to permit a proposed use of a cannabis dispensary on the Premises.

First Hearing: April 17, 2023

- Attorney John Williams introduced his client’s principals, Charles Robinson and Tucker Kunkel, and their professional witnesses.
- Concerns were raised about parking and vehicle movement, especially with larger vehicles like trucks. Discussions centered around the safety and adequacy of the

parking space and the distance to the road. Discrepancies emerged between required parking spaces and the actual number available.

- Questions arose about the number of employees and parking provision for them. Mr. Robinson confirmed a higher number of employees than parking spaces.
- Professional Planner, Donna Holmqvist, provided insights and clarifications.
- The Applicant testified that its proposed front-yard setback fails to satisfy the 50-foot setback requirement of Ord. § 134-67.1, necessitating the Applicant's request for a D(3) conditional-use variance. Related parking and traffic concerns were discussed.

Second Hearing: May 17, 2023

- Discussions continued on the parking matters, with Mr. Robinson emphasizing testing with full-sized trucks. He mentioned the possibility of using the shoulder of the road for additional space.
- Mr. Golden recommended modifications to the parking setup and clarified dimensions related to parking space and distance to the road.
- The prior use of the building as an antique shop was discussed, and Mr. Robinson confirmed the increased intensity of the proposed business.
- An agreement to allow employee parking at the nearby Bike Shop was mentioned.
- The property's septic and sewer services were discussed.

Third Hearing: June 21, 2023

- Mr. Williams reiterated state licensing operation requirements and emphasized the intention to maintain a safe distance between children and the cannabis business.
- Public Comment: Katrina Kunkel and local business owner, Ariel Holver, presented a petition in support of the North Jersey Cannabis project.
- Various variances and waivers, including parking, unloading/loading, curbing, and shade tree, were discussed. A motion to approve the applications was made but did not pass due to concerns about parking and traffic.

NOW, THEREFORE, the Andover Borough Planning/Zoning Board hereby makes the following conclusions of law, based upon the foregoing findings of fact.

The Board has the power to grant "d(3)" conditional use variances pursuant to N.J.S.A. 40:55D-70d(3) "in particular cases and for special reasons." This is the so-called "positive criteria" of a "d(3)" variance. As pertains to the positive criteria of a "d(3)" variance, the Board's focus must be on whether the site remains appropriate for the conditional use despite the failure to conform to all of the ordinance's conditions. Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285, 298-299 (1994). The standard does not

require a finding that the site is particularly suitable for the use, as is the case with a “d(1)” use variance. Id. at 297. This is so because the use is permitted (albeit conditionally) and it is the conditions attached to the use from which deviations are sought. Id. The Board may not exercise its power to grant a “d(3)” 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 to the negative criteria of a “d(3)” conditional use variance, the Coventry Square Court held that the strict requirements applicable to “d(1)” use variances do not apply to the first prong of the negative criteria of a “d(3)” variance (whether the variance can be granted without substantial detriment to the public good). Coventry Square, 138 N.J. at 299. Instead, the Board’s focus in a “d(3)” conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial detriment to the public good. Id.

In TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), the Court held that the strict requirements applicable to “d(1)” use variances do not apply to the second prong of the negative criteria of a “d(3)” variance (whether granting a variance would substantially impair the intent and purpose of the zone plan and zoning ordinance). Instead, the Board’s focus in a “d(3)” conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial impairment of the intent and purpose of the master plan and zoning ordinance, i.e., whether the proposal was “reconcilable with the zone.” Id.

In the matter before the Board, the proposed setback fails to satisfy Ord. § 134-67.1, which mandates that a Cannabis Class 5 Retailer be situated in a building compliant with the 50-foot front yard setback requirement. This deviation from the ordinance's conditions, when combined with the associated traffic and parking concerns presented during the hearings, brings into question the suitability of the site for its intended use. The Board acknowledges its authority under N.J.S.A. 40:55D-70d(3) to grant conditional use variances in specific cases and for special reasons. However, based on the evidence and

testimonies presented, it is determined that granting this particular variance would lead to a substantial detriment to the public good. Further, the deviation would impair the intent and purpose of the master plan and zoning ordinance. The Board concludes that the deviations, in this case, are not merely reconcilable deviations but ones that threaten the core objectives of the zoning ordinance and master plan. As such, the applicant's failure to meet the conditional-use variance criteria, as delineated in Ord. § 134-67.1, combined with the significant traffic and parking concerns, renders the site inappropriate for the proposed use.

NOW, THEREFORE, BE IT RESOLVED by the Andover Borough Planning/Zoning Board, that the application of North Jersey Cannabis Club LLC for preliminary and final site plan and "D(3)" variance approval for the property known as Block 11, Lot 10, as shown on the Tax Map of the Borough of Andover, located on 118 Main Street (US Route 206) in the C-1 commercial zone, is denied for the reasons state in the above findings of fact and law.

ADJOURN:

A MOTION was made by Mayor Morgan, seconded by Mr. Pearson to adjourn the meeting. AYES: All in favor. NAYS: None. Motion carried.


Beth Brothman
Board Secretary