

**RESOLUTION
BOROUGH OF BUTLER
PLANNING BOARD
IN THE MATTER OF BARBARULA REALTY
DECIDED ON SEPTEMBER 16, 2021
MEMORIALIZED ON OCTOBER _____, 2021
APPLICATION NO. 21-207V
GRANTING OF CONDITIONAL USE APPROVAL FOR
CANNABIS RETAIL SALES AND OFFICE**

WHEREAS, Barbarula Realty (hereinafter the “Applicant”) is the owner of real property known and designated as Block 76.08, Lot 57.01 on the Tax Assessment Map of the Borough of Butler which premises are located at 1242 Route 23 North, Butler, New Jersey in the Highway Commercial Zone District (hereinafter “HC Zone”); and

WHEREAS, the Applicant has filed an application with the Borough of Butler Planning Board (“Board” or “Planning Board”) seeking “d(3)” conditional use variance relief from the Borough of Butler Ordinance 2021-16 and more specifically Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment; and

WHEREAS, a public hearing was held on September 16, 2021, after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by John Barbarula, Esq.¹

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

The application before the Board is a request for d(3) conditional use variance relief in order to permit cannabis retail sales and offices to be conducted on property known and designated as

¹ John Barbarula, Esq. is the attorney for the Borough of Butler Planning Board. He recused himself from representing the Planning Board in this matter. The Planning Board was represented by Conflict Counsel, Richard Briigliodoro, Esq. Mr. Barbarula represented Barbarula Realty in this matter before the Board.

Block 76.08, Lot 57.01 on the Tax Assessment Map of the Borough of Butler, which premises are located at 1242 Route 23 North, Butler, New Jersey in the HC Zone.

John Barbarula, Esq. provided an overview of the project. Mr. Barbarula confirmed that the members of Barbarula Realty are himself and his wife, Joan. Mr. Barbarula confirmed that they have owned the property at 1242 Route 23 in Butler since approximately 1978. There are a total of four (4) tenant spaces in the building. Mr. Barbarula introduced into evidence Exhibit A-1 which was identified as a video providing an aerial view of the subject property and the surrounding area. Mr. Barbarula indicated that his building is located between two (2) commercial buildings and abuts a cemetery to the rear. The cemetery separates the subject property from the Butler High School football field. Mr. Barbarula indicated that the only condition of the Conditional Use Ordinance that is not met or from which there is a deviation is that no cannabis retail establishment or medical cannabis dispensary shall be located within 1,000 linear feet in any direction of a school.... Mr. Barbarula confirmed that the subject property meets all the requirements of the Conditional Use Ordinance except for the extreme rear of the property being 500 feet away from the football field of Butler High School. The Barbarula building is over 200 feet away from the rear lot line.

Mr. Barbarula also demonstrated that the cemetery which is located behind the subject property is at a lower grade than the subject property. Furthermore, Mr. Barbarula represented that the ballfield is at an even lower grade. Mr. Barbarula also showed a video (A-1) which depicts the wooded area between the cemetery and the ballfields. Mr. Barbarula represented that this wooded buffer area contains trees that are approximately 25 feet high. Mr. Barbarula also represented that in order for any students to get to his property they would have to travel through the ballfield, the cemetery and the wooded area to reach the rear of his lot.

Testifying on behalf of the Applicant was Donna Holmqvist, P.P., a licensed professional planner in the State of New Jersey. Ms. Holmqvist was accepted as an expert witness in the field of land use planning. Ms. Holmqvist indicated that she previously worked for Burgis Associates, Inc. and in that capacity, she worked on and actually signed the Borough of Butler Master Plan. Ms. Holmqvist also testified that she has reviewed the Cannabis Ordinance recently adopted in Butler. Ms. Holmqvist introduced into evidence Exhibit A-2 which was identified as “Site Features” for the property at 1242 Route 23 North. Ms. Holmqvist also introduced into evidence Exhibit A-3 which was identified as photographs depicting site suitability for 1242 Route 23 North. In regard to Exhibit A-2, Ms. Holmqvist indicated that the aerial photo contains a green circle indicating a radius of 1,000 feet. Ms. Holmqvist then testified that the Richard Butler School which is located on Pearl Avenue and Butler High School are located a significant distance away from the subject site and are located in excess of 1,000 feet away from the subject property.

Ms. Holmqvist testified in regard to unique features including visual separation, topography, buffer and highway orientation. She represented that the Richard Butler School has an elevation of about 400 feet which is approximately 100 feet lower than the elevation of the subject property which is at approximately 500 feet. She further testified there is a wooded buffer and a stand of trees. Furthermore, there is a baseball diamond which is located a significant distance away from the HC Zone. She also represented that there is a 270-foot-wide buffer between school property and the subject property. Ms. Holmqvist also testified that there is a stand of mature trees approximately 25 foot in height at the rear of the subject property as well as a 6-foot high chain link fence separating the subject property from adjoining properties. Thus, she concluded that there is no reasonable pedestrian access to the subject property. She further testified that there is a very substantial incline as well as a very substantial topographic boundary from the subject property to

the school building. Further, there is a significant distance from the school building to the subject property of approximately 1,500 feet.

Ms. Holmqvist also reviewed Exhibit A-3 with the Board. Exhibit A-3 contains an aerial of the subject property and the surrounding area. Exhibit A-3 also contains an insert of six (6) photographs identified as follows:

- A. Existing buffer,
- B. Existing building,
- C. View from cemetery,
- D. Cemetery topography,
- E. View from field to parking lot, and
- F. Richard Butler School.

The photographs depict the stand of trees and buffer area as well as the topography of the adjoining properties as well as confirming that students at the Richard Butler School would have no visual observation of the subject property or any other properties on Route 23.

In regard to on-site parking, Ms. Holmqvist testified that there are 20 parking spaces on site which meets or exceeds the parking requirement for a retail store. The proposed use would require the State to issue a Class 5 License. Ms. Holmqvist confirmed that the entire building would be used for cannabis retail sales and office space. There would be no comingling of other uses not related to the cannabis business.

Ms. Holmqvist reviewed with the Planning Board Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment Conditions as follows:

- A. Cannabis Retail Establishments and Medical Cannabis Dispensaries shall only be permitted in the HC Zone-Highway Commercial District.

B. Minimum setback and bulk requirements shall be as set forth in §143-118 Schedule D, except as to existing structures.

C. No drive-through window shall be permitted.

D. Minimum useable floor area of 1,200 square feet.

E. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 2,000 linear feet of another Cannabis Retail Establishment or medical cannabis dispensary as measure from the property lines.

F. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship center, public park, library or a licensed substance abuse disorder clinic or facility, as measured from the property lines.

G. Hours of Operation shall be limited to 7 a.m. through 11 p.m. daily.

Ms. Holmqvist confirmed that through a search, the Applicant has found that there are no deviations from the 1,000 foot requirement other than that of the Butler Board of Education property connected to the existence of the Richard Butler School. She further indicated that the Applicant took a conservative view and the deviation is with respect to the school facility ballfield. She also confirmed that there is no public park within 1,000 feet of the subject property.

Ms. Holmqvist testified in regard to the Borough of Butler Master Plan and 2015 Reexamination Report as to goals and objectives that would be satisfied by approval of this application. First, Ms. Holmqvist testified that the approval of this application would encourage a viable commercial development on the Route 23 corridor. Secondly, she confirmed that the Route 23 corridor has regional connections to other roadways including, but not limited to, Route 287 and Route 80. Third, approval of the application would maintain adequate separation between

commercial and residential uses. She highlighted the fact that the cemetery is 10 acres in area. While the fields for the school total approximately 20 acres.

Ms. Holmqvist also testified that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) the governing body has determined that the use is permitted subject to the Applicant meeting the conditions of the Ordinance. Ms. Holmqvist also testified that a d(3) variance has a lesser standard of proof as set forth in the Coventry case.

Ms. Holmqvist also indicated that there are four (4) reasons why the site is an appropriate site for the proposed use. She stated from a visual perspective, topographic perspective, the existence of extensive buffering and the property's highway orientation all make the site appropriate for the proposed use. The approval of the application would be consistent with commercial redevelopment along the Route 23 corridor. She also represented that the proposed use is not an overly intense use of the site and that the proposed use is not a high traffic generator.

Ms. Holmqvist also testified that under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-2 various purposes of the Municipal Land Use Law would be advanced by the approval of this application. First, she indicated that 2(a) would be advanced which is to encourage municipal action to guide the appropriate use or development of all lands in this State in a manner which will promote the public health, safety, morals and general welfare. Secondly, 2(i) would be advanced which is to promote a desirable visual environment through creative development techniques and good civic design and arrangement.

In regard to the negative criteria, Ms. Holmqvist testified that a conditional use variance can be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance. Ms. Holmqvist represented that the Applicant is able to comply with all of the conditions of the Conditional Use Ordinance for

Cannabis Retail and Medical Cannabis Dispensary Establishment with the exception of not being able to meet the 1,000 linear feet distance of a school. Although the school building is approximately 1,700 feet away, the subject property is only 500 feet away from the Butler High School football field. Further, the approval of this application will improve the ratable tax base of the Borough of Butler and due to the topographic conditions existing in the area, the extensive buffering and the highway orientation of the building, the site would continue to be an appropriate site for the proposed use notwithstanding the deviation from the Conditional Use Ordinance.

During the course of the presentation it was discovered that Stoneybrook Park is located a distance of approximately 880 feet away from the subject property which would also require relief. As a result, the Applicant requested that the Applicant also be granted relief from the 1,000 foot requirement to Stoneybrook Park as well as from Butler School property.

The meeting was opened up to members of the public and there were no members of the public present expressing an interest in this application.

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

The application before the Board is a request for conditional use d(3) variance relief relative to the use of the property for cannabis retail sales and offices to be used throughout the entire building for property known and designated as Block 76.08, Lot 57.01 on the Tax Assessment Map of the Borough of Butler which premises are located at 1242 Route 23 North, Butler, New Jersey in the HC Zone. The Applicant requires conditional use variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3).

The Board notes the Butler Ordinance 2021-16 created a new section 143-123.5 to the Butler Code titled Cannabis Retail and Medical Cannabis Dispensary Conditional Use in the HC

Zone. Thus Section 143-123.5 codifies cannabis retail and medical cannabis dispensary uses as conditional uses in the HC Zone.

Section 143-173 titled Cannabis Retail and Medical Cannabis Dispensary Establishment lists the various conditions as a conditional use in the HC Zone. More specifically, Section 143-173 provides the objective standards to meet the conditional use requirements as follows:

A. Cannabis Retail Establishments and Medical Cannabis Dispensaries shall only be permitted in the HC Zone-Highway Commercial District.

B. Minimum setback and bulk requirements shall be as set forth in §143-118 Schedule D, except as to existing structures.

C. No drive-through window shall be permitted.

D. Minimum useable floor area of 1,200 square feet.

E. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 2,000 linear feet of another Cannabis Retail Establishment or medical cannabis dispensary as measure from the property lines.

F. No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship center, public park, library or a licensed substance abuse disorder clinic or facility, as measured from the property lines.

G. Hours of Operation shall be limited to 7 a.m. through 11 p.m. daily.

A conditional use is defined under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-3. Conditional use means a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the

location or operation of such use as contained in the Zoning Ordinance and upon the issuance of an authorization therefore by the Planning Board.

A d(3) conditional use variance has a lesser burden of proof than a d(1) prohibited use variance in the zone. It is because the municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied. Therefore, the proofs necessary to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the Ordinance. The standard of proof in a conditional use case was established by the New Jersey Supreme Court in 1994 in the case of Coventry Square Inc. v. Westwood Zoning Board of Adjustment, 138 N.J. 285 (1994).

The New Jersey Supreme in Coventry Square established a standard of proof in conditional use cases. The standard of proof of special reasons to support a variance from one or more conditions imposed on a conditional use should be relevant to the nature of the deviation from the ordinance. Proofs to support a conditional use variance need only justify the municipality's continued permission for a use notwithstanding a deviation from one or more conditions of the ordinance.

That standard of proof will focus both the applicant's and the Board's attention on the specific deviation from conditions imposed by the ordinance, and will permit the Board to find special reasons to support the variance only if it is persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use. Thus, a conditional use variance applicant must show that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established to address those problems. Coventry Square, *supra*. 138 N.J. at 298, 299.

With respect to the negative criteria, an applicant must demonstrate that the variance can be granted without substantial detriment to the public good, N.J.S.A. 40:55D-70(d). The focus is on the effect on surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance. The Board of Adjustment must evaluate the impact of the proposed “conditional” use variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute substantial detriment to the public good.

In addition, the applicant must also prove that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, N.J.S.A. 40:55D-70(d). The Board of Adjustment must be satisfied that the grant of the conditional use variance for the specific project at the designated site is irreconcilable with the municipality’s legislative determination that the condition should be imposed on all conditional uses in that zoning district. Coventry Square, supra. 138 N.J. at 299.

This application is governed by the Borough of Butler Code Section 143-123.5 Cannabis Retail and Medical Cannabis Dispensary Conditional Use in the HC Zone as well as Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment (Conditional Use Conditions).

Upon review of the Conditional Use Ordinance, the Applicant complies with all sections of the Conditional Use Ordinance with two (2) exceptions. The Applicant requires relief from Section 143-173 F. which reads “No Cannabis Retail Establishment or medical cannabis dispensary shall be located within 1,000 linear feet in any direction of a school, licensed daycare facility, church, synagogue, or religious worship center, public park, library or a licensed substance abuse disorder clinic or facility, as measured from the property lines.”. In this instance, the proposed facility on the

subject property is located approximately 500 feet away from the property line of the Richard Butler School and approximately 880 feet from Stoneybrook Park. The Board has carefully reviewed this application and accepts the representations of the Applicant's expert that notwithstanding the Applicant's inability to conform to all of the conditions of the Conditional Use Ordinance the site continues to be an appropriate site for the conditional use notwithstanding the deviations from Condition F. of the Ordinance requirements.

The Board accepts the representations of the Applicant's expert that there is a visual impediment from the school and park to the subject property. There are extreme topographic issues including significant changes in grade of the property that make reasonable access from the school or park to the subject property unlikely. Furthermore, there is an extensive vegetative buffer with a stand of trees 25 feet high that separates the subject property from the school. Furthermore, the subject property is located on Route 23 North and thus has a highway orientation. The Board also finds that there is a very substantial grade change and very substantial topographic conditions existing from the subject property boundary to the boundary of the Richard Butler School. The Richard Butler School is located approximately 1,700 feet away from the subject property. The Board also finds that the rear of the subject property contains a 6-foot high chain link fence.

The Board thus finds that notwithstanding the deficiencies in the linear physical distance between the Richard Butler School property and Stoneybrook Park and the subject property, the Applicant meets the functional equivalent and intent of the Ordinance due to the substantial wooded buffer and stand of trees approximately 25 feet in height, the topographic changes from the subject property through the cemetery and onto the Board of Education ballfield which is at much lower grade than the cemetery and subject property. The physical separation of the school property by the cemetery property which is approximately 10 acres in area and the fact that there is no reasonable

vehicular or pedestrian access to the site other than vehicular access off of Route 23 satisfies the Board that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions of the conditional use ordinance established to address those problems.

The Board, therefore, finds that the approval of this application will not cause such damage to the character of the neighborhood so as to constitute substantial detriment to the public good. Furthermore, the Board is satisfied that the approval of this application will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Thus, the Board determines that the site will accommodate the problems associated with the use even though the proposal does not comply with the conditions the ordinance established.

Upon consideration of the plans, testimony and application, the Board determines that the request for conditional use, d(3) variance relief has met the minimum requirements of the Municipal Land Use Law, case law and Borough Ordinances to a sufficient degree so as to enable the Board to grant the relief being requested. The Board further finds that the granting of this application will not adversely impact or impair the use and enjoyment of adjacent properties. Thus, the Board concludes that it is appropriate to grant d(3) conditional use variance relief from Ordinance No. 2021-16 and the Borough of Butler Code Sections 143-123.5 and 143-173 to permit cannabis retail sales and offices in the building at 1242 Route 23 North, Butler, New Jersey.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board that the application of Barbarula Realty for property designated as Block 76.08, Lot 57.01 on the Tax Assessment Map of the Borough of Butler which premises are located at 1242 Route 23 North, Butler, New Jersey in the HC Zone, and bearing Application No. 21-207V, requesting conditional use, d(3) variance relief

is granted under the Borough of Butler Code Sections 143-123.5 and 143-173 and the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3) subject to the following terms and conditions:

1. The development of this parcel shall be implemented in accordance with the plans submitted and approved, as well as any further amendments required by the Board or the Board's Engineer during the hearing process.

2. The granting of this application is subject to and conditioned upon any representation or stipulation being made by or on behalf of the Applicant to the Borough of Butler Planning Board being true and accurate. The Board notes that it specifically relied upon said stipulations in the Board's granting of approval. If any representation or stipulation is false, this approval is subject to revocation.

3. This approval is granted strictly in accordance with any recommendations set forth on the record by the Planning Board at the time of the public hearing on September 16, 2021.

4. The granting of this application is subject to and conditioned upon the Applicant complying with all terms and conditions of Ordinance 2021-15 and 2021-16 as well as obtaining and retaining any and all licenses, permits or approvals from the State of New Jersey, County of Morris or borough of Butler to operate a Cannabis Retail establishment and/or a medical cannabis dispensary.

5. The granting of this application is subject to and conditioned upon the Applicant agreeing to open and maintain an escrow account with the Borough of Butler and to keep the account current with sufficient funds for inspection and review fees.

6. Certification that taxes are paid to date of approval.

7. Subject to all other applicable rules, regulations, ordinances and statutes of the Borough of Butler, County of Morris, State of New Jersey, or any other agency having jurisdiction hereunder.

VOTE ON APPLICATION

Motion Introduced By:

Seconded By:

In Favor:

Opposed:

VOTE TO APPROVE RESOLUTION

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Butler Planning Board

_____, Board Secretary

_____, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Butler Planning Board on September 16, 2021 and memorialized herein pursuant to N.J.S.A 40:55D-10(g) on October ____, 2021.

_____, Board Secretary