



POLICY
PLANNING
DESIGN

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To: Lawrence Township Zoning Board of Adjustment

From: Elizabeth McManus, PP, AICP, LEED AP 

Re: **RPM Development, LLC - Case No. ZB-3/19, SP-5/20, S-2/20**
Use Variance d(1) - Use, d(4) – Floor Area Ratio, d(6) - Height
Preliminary & Final Site Plan
Preliminary & Final Major Subdivision
2495 Brunswick Pike
Block 2001, Lots 3, 60 through 66, 68
Highway Commercial (HC) & R-4 Residential District

Date: April 23, 2021

1.0 INTRODUCTION

- 1.1 This memorandum is prepared with the intention of assisting the Zoning Board of Adjustment consider the use variance criteria applicable proposed 100% affordable housing development at Block 2001, Lots 3, 60-66, 68.
- 1.2 Beginning with the March meeting, the applicant revised the proposal to address concerns expressed about the proposal. The proposed changes are summarized below:
- Reduction in the number of residential units from 70 to 54.
 - Increase in parking spaces from 102 to 109 spaces. Note also that parking relief is no longer necessary.
 - Addition of a bike rack, pavilion, patio and seating the center of the site where a building (“Building C”) was removed.
 - Addition of a 6’ solid vinyl fence between the rear of the proposed residential use and the existing shopping center.
 - Addition of a sidewalk along the proposed driveway on Texas Avenue.



2.0 D(1) USE VARIANCE CRITERIA

2.1 The Highway Commercial (HC) and Residential (R-4) zoning districts do not permit duplex and multi-family dwellings under §420.B and §407.B, respectively. Consequently, the application requires a use variance pursuant to N.J.S.A. 40:55D-70d(1).

2.2 The Municipal Land Use Law states the Board has the power to grant “d(1)” variances to permit prohibited uses (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.” (Medici v. BPR Co., 107 N.J. 1 (1987))

2.3 The applicant is proposing a 100% affordable housing residential development. This type of use has been found by the courts to be an inherently beneficial use. The Municipal Land Use Law (N.J.S.A. 40:55D-4) defined inherently beneficial uses as “ a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare”. There is no requirement that applicants proposing inherently beneficial uses demonstrate the site is particularly suited for the proposed use.

2.4 While the applicant can satisfy the positive criteria as an inherently beneficial use, it must address the negative criteria. However, the Court has determined the “Sica balancing test” applies to inherently beneficial uses, rather than the typical negative criteria¹. More specifically, this balancing test requires the following considerations:

1. *Identify the public interest at stake and make a finding on how compelling the public interest in the proposed use at issue actually is as compared to other inherently beneficial uses.*

The Board should consider the need for affordable housing in Lawrence Township and the COAH region, which includes Mercer, Monmouth, and Ocean Counties, as well as alignment of the proposal with the Township’s Housing Element and Fair Share Plan. See [Policy Considerations](#) herein for information about the need for affordable housing and the Township’s obligation.

2. *Identify the detrimental effects that will ensue from the grant of the variance.*

The Board should consider any detrimental impacts that result from the proposed development at this site.

¹ In *Smart SMR v. Fair Lawn Board of Adjustment*, 152 N.J. 309, 324 (1998), the Court held that the language in N.J.S.A. 40:55D-70 which specifically states that the negative criteria applies even to inherently beneficial uses merely “codifies the Sica balancing test,” and does not require that a more stringent test be used.



3. *Determine whether any legitimate detrimental effects can be reduced by imposing reasonable conditions on the use.*

The Board should consider what reasonable conditions can be applied to mitigate any detriment impacts identified in step 2 above.

4. *Balance the positive and negative criteria and determine whether, on balance, the “d” variance can be granted without causing substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance.*

The Board should balance any detriment remaining after the imposition of conditions with the public interest in affordable housing identified in step 1 above. See [Policy Considerations](#) here for information on how this proposal relates to the Township’s Master Plan and affordable housing compliance.

3.0 D(4) FAR VARIANCE CRITERIA

- 3.1 Despite the reduction in units, and therefore floor area, the application continues to require a floor area ratio (FAR) variance for proposed Lot 2.02. The applicant proposes .39 where .25 is the maximum permitted in the HC district. Note that the proposal of .39 is a reduction from .47.

- 3.2 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. This D variance is not subject to the typical D use variance positive and negative criteria, instead the Courts have altered the burden of proof which the applicant must meet in order for a variance to be granted.

- 3.3 The Board’s focus for a “d(4)” variance must be on whether the site will accommodate the problems associated with a larger floor area than permitted by the ordinance – This is similar to the “d(3)” variance criteria for conditional uses. (Randolph Town Center v. Randolph, 324 N.J. Super. 412, 416 (App. Div. 1999)). A “d(4)” FAR variance applicant need not show that the property is particularly suited for more intensive development.

The Board should consider what problems are generated by exceeding the HC district’s FAR standard. FAR considerations typically address building architecture and scale, site activity, parking, and traffic.

- 3.4 The Board’s focus regarding the negative criteria in a “d(4)” FAR variance case is whether conditions can be imposed in its approval to ensure that the deviations from the FAR requirements do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance.

The Board should consider how any problems identified above have been already or could be mitigated with conditions. This should include, but may not be limited to, the extent to which the duplexes along



Texas Avenue mitigate the appearance of building mass, the building architecture, recent reduction in units, and compliant parking ratio. See [Policy Considerations](#) here for information on how this proposal relates to the Township’s Master Plan and affordable housing compliance.

4.0 D(6) HEIGHT VARIANCE CRITERIA

4.1 The applicant is proposing a building height of 39.8 feet for the multi-family buildings at the rear of the site, where 35 feet is permitted in the HC district.

4.2 The Board has the power to grant “d(6)” variances to permit an increase in the permitted building height for a principally permitted use 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)” height variance. This D variance is not subject to the typical D use variance positive and negative criteria, instead the Courts have altered the burden of proof which the applicant must meet in order for a variance to be granted.

4.3 The Board’s focus for a “d(6)” variance must be on whether the site will accommodate the problems associated with a taller building height than permitted by the ordinance – This is similar to the “d(3)” variance criteria for conditional uses and “d(4)” variance criteria for FAR variances. A “d(6)” height variance applicant need not show that the property is particularly suited for more intensive development.

The Board should consider what problems are generated by exceeding the HC district’s maximum height. Height considerations typically address building architecture and scale, site activity, parking, and traffic.

4.4 The Board’s focus regarding the negative criteria in a “d(6)” height variance case is whether conditions can be imposed in its approval to ensure that the deviations from the building height requirements do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. Again, this is similar to the “d(3)” variance criteria for conditional uses and “d(4)” variance criteria for FAR variances.

The Board should consider how any problems identified above have been already or could be mitigated with conditions. This should include, but may not be limited to, the extent to which the two-story duplexes along Texas Avenue buffer and mitigate the height of the three-story buildings to the rear, the setback of the three-story buildings to Texas Avenue, the buffer between the three-story buildings to the adjacent shopping center, the building architecture, recent reduction in units, and compliant parking ratio. See [Policy Considerations](#) here for information on how this proposal relates to the Township’s Master Plan and affordable housing compliance.



5.0 POLICY CONSIDERATIONS

- 5.1** This property is a proposed affordable housing site in Lawrence Township’s adopted Housing Element and Fair Share Plan (Housing Plan). As such, the 54 units will satisfy a substantial portion of the 1,100 third round obligation, which is broken down as a 696 unit Realistic Development Potential (RDP) and 414 unit unmet need. In addition to being identified in the Township’s Housing Plan, the site is reflected in the Township’s existing and anticipated amended Settlement Agreement with Fair Share Housing Center, which will require the site’s affordable housing units to contribute toward the unmet need.
- 5.2** This site is also a topic of concern in the Township’s ongoing Declaratory Judgment action, which is the Court process by which the Township seeks to have its Housing Plan reviewed and approved by the Court in order to receive immunity from builder’s remedy litigation. In fact, a reduction in the total number of units from 70 to 54 was discussed with Township professionals prior to submission of the recently revised concept plan to the Board, and this site is addressed in the most recent (April 4, 2021) Court Order issued by the Hon. Mary C. Jacobson, A.J.S.C. Specifically, the order required Township officials and professionals to meet with RPM in order to try to facilitated an amicable resolution to any dispute regarding the site, require submission to the Court a status update regarding the application by April 30th, and scheduled a case management conference on May 5th to address the status of the site, as well as any other outstanding housing issues.
- 5.3** The Township’s 2018 Housing Plan first identified the Lawrence Shopping Center site as holding potential for affordable housing. However, as discussed below, the Township’s subsequent Housing Plan Amendments provided an increased commitment to developing affordable housing at the site. Below is an excerpt from the 2018 Housing Plan.

The Township will work with the owners to develop a redevelopment plan if they are agreeable, with the purpose of creating redevelopment that includes multi-family housing with an affordable housing component. Initial discussion has already occurred.

- 5.4** The 2020 First Amendment to the Housing Plan proposed 69 credits (and 65 bonus credits) for the site. It described the site with 70 total units and committed to rezone the site for 70 units if the Zoning Board did not approve the proposal (pdf page 55). At this time, the site was proposed to meet the RDP. Below is an excerpt from this Housing Plan.

RPM proposes the development of 12 semi-detached single family houses fronting on Texas Avenue and an additional 58 units in a single three-story building in the interior of the site, of which 57 will be affordable units. The extra unit is for a superintendent’s apartment. The company is seeking family rental low income housing tax credits in 2020 for the site.

Typically, municipalities are required to adopt an ordinance to implement any necessary zoning changes to permit the development of the proposed inclusionary housing site on the shopping center property. Because of the tight timing of the application process



between this revision to the housing plan and the Low Income Housing Tax Credit deadline in mid- September 2020, an application for development may be made to the Zoning Board of Adjustment for use variance and preliminary site plan approval. As a 100% affordable housing development, it is considered an inherently beneficial use which means it meets the most difficult prong of the use variance test. Should the timeline not be met, the Township will create a zoning district that allows the use by-right as a condition of any Judgment of Repose.

- 5.5 Due to site constraints identified through this application, the 2020 Second Amendment to the Housing Plan revised how this development would be used to meet the Township’s affordable housing obligation. Rather than contributing toward the RDP, the site will satisfy a portion of the unmet need. Below is an excerpt from this Housing Plan.

The Township is keeping the proposed project in the Plan as a compliance mechanism and the related trust fund expenditure in the adopted spending plan, but is moving the site back to unmet need. At such time as the project is completed, it will provide additional affordable family units towards the Township’s unmet need obligation.

- 5.6 Given the above, it is clear this site is an important component of how the Township proposes to meet its affordable housing obligation. While 70 units was anticipated and proposed in the Township’s First Amendment to the Housing Plan, the Board has the flexibility, through its approval process, to facilitate construction of only 54 units. Further, RPM has advised that should it seek relief from the Court as part of the Township’s ongoing Declaratory Judgment action, it will seek approval for the full 70 units initially proposed and not the reduced plan with 54 units.
- 5.7 Given the fact that the Housing Element and Fair Share Plan identify the property as an appropriate location for affordable housing in the Township and that the Township Council has included the property in the Township’s Third Round Affordable Housing Compliance Plan, the Board should consider the property as a suitable site for the construction of affordable housing. The Board, nevertheless, must be satisfied that the site plan, as revised, appropriately works so that with conditions that the Board may attach to any approval, the result will be that there will be a development of a residential community that is appropriate for the Township and for the residents who will be given an opportunity to live in the Township.

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