

**Tiffany A. CuvIELLO, PP, LLC**  
*Community Development and Planning*

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May 12, 2021

Ms. Shelley Lea  
Planning/Zoning Board Secretary  
Township of Upper  
PO Box 205  
2100 Tuckahoe Road  
Tuckahoe, NJ 08250

Re: The Inn at Strathmere  
Block 834, Lot 1  
513 Commonwealth Avenue  
Use Variance and Site Plan

Dear Ms. Lea:

I have reviewed revised plans and listened to the testimony for the above referenced application and have updated my report as follows:

1. The applicant is requesting approval to replace the existing 16-unit motel with a 15-unit hotel. The property consists of 16,000 square feet and is located along Commonwealth Avenue, Sumner Avenue and Sherman Avenue. The property is located within the Resort Commercial (RC) zoning district.
2. The proposed development includes the removal of an older 16-unit motel in favor of a 15-unit hotel with improved amenities and building design. The new hotel is larger than the existing structure.
3. The plans have been revised to reduce the proposed building height from 40'1" to 34'10 1/2". The plans should reflect the height to the top of the roof mounted equipment, elevator and chimney stacks. The ordinance under Section 20-6.3.b. permits these features to exceed the maximum building height by 25%.

It was determined that the roof slope was less than 4:1 for more than 25% of the building, therefore reducing the maximum permitted building height to 31 feet. The plans should identify the roof slope.

The plans continue to require a variance for the height based upon the roof slope of less than 4:1. The maximum permitted height at the proposed roof slope is 31-feet and not 35-feet. The revised plans have a new height of 34'10 1/2" (34.875 feet) which is more than 10% of 31 feet and therefore requires a D(6) variance for height. The deviation making this a "D(6)" variance is 0.775 feet.

4. The plans have also reduced the size of the building allowing for the setbacks along Sherman and Sumner to conform to the code.
5. The revised plans have also reduced the proposed unit sizes in the structure from 709 square feet to 606 square feet and the total building area including balconies has decreased from 19,023 square feet to 15,655 square feet.

The existing 16-unit motel contains a total building area of 6,070 square feet with individual unit sizes ranging from 200 square feet to 575 square feet (owner's living quarters of 650 square feet).

6. A D(1) use variance is required to allow the construction of a 15-unit motel/hotel where the existing 16-unit motel would be demolished as motels/hotels are not a permitted use in the RC district as outlined in more detail herein.
7. The following additional variances are requested from the Township Land Use Ordinance:
  - a. From Section 20-4.5.c.1(a) and Schedule B, to permit a use which is not permitted in the RC district.
  - b. From Section 20-4.5.c.3(a) and (b), to permit a building height of 34'10 1/2", where a maximum height of 31-feet is permitted.
  - c. From Section Section 20-4.5.c.2 and Schedule C, to permit a maximum building coverage of 34.63% where 30% is permitted. The revised plans provide for a building coverage of 26.73%; with the decks the building coverage is 34.63%, requiring a variance.
  - d. From Section Section 20-4.5.c.2 and Schedule C, to permit a front yard setback of 8.64 feet on Commonwealth Avenue where 15 feet is required.
  - e. From Section Section 20-4.5.c.2 and Schedule C, to permit a rear yard setback of 29.44 feet where 30 feet is required. The revised plans provide a setback of 30.83 feet to the building and a setback of 17.35 feet to the stairs. The plans should also show a setback to the deck. The former plans did not include setbacks to the decks and stairs although they were shown on the drawings. A variance remains required.
  - f. From Section 20-5.10.b.2(a), to permit three (3) wall signs where one (1) is permitted.
  - g. From Section 20-5.10.b.2(a), to permit each wall sign at 16 square feet where a maximum sign area for all signs cannot exceed 10% of the wall or 16 square feet whichever is smaller. (Three signs exceed the limitation)

- h. From Section 20-2.1 Definitions. Specifically, the definition of building height which limits properties in the RC zone to two (2) habitable stories above flood elevation except as provided in Section 20-4.5b2(d)(iii). The plans provide for a third habitable story and is not excepted under the referenced ordinance section.
8. 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.” Medici v. BPR Co., 107 N.J. 1 (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).

Please note that 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. In accordance with 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

- a. without substantial detriment to the public good and
- b. 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 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.

9. For the “C” variances, the applicant must demonstrate a hardship due to some unusual characteristic of the property or that the benefits will outweigh the detriments. The applicant must also demonstrate the negative criteria of no substantial detriment to the public or impairment of the zone plan and ordinance must also be evidenced.
10. The applicant contends that the height variance is encompassed with the D(1) variance and that the underlying bulk standards are not specifically applicable for an applicant requesting a use variance. In general this is an appropriate analysis of the statute for a “C” bulk variance, however when the variance is considered a “D” variance the same principle would not apply. The proposed height variance is a “D(6) variance as it exceeds the maximum permitted height by more than 10% of what is permitted.

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 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. Simply stated, 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, the Board believes 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).
- 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.

11. 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. If the variance were for the height of a non-permitted principal structure, the standard enunciated in Medici would apply. 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 variance is for the height of a permitted principal structure, the Medici rationale pertaining the negative criteria would not apply. Thus, there would no requirement for an enhanced quality of proof and to reconcile the variance with the ordinance's prohibition of the proposed height. In the permitted principal structure situation, the "d(3)" conditional use variance test enunciated in Coventry Square applies. Under Coventry, the Board's focus must be on whether the Board can impose conditions in its approval to ensure that the deviations 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 must determine whether and, if so, what

conditions can be imposed to mitigate the negative effects of the proposed deviation which, in this case, involves height in excess of 10 feet or 10% of the maximum permitted in the zone.

12. It is my professional opinion, consistent with the findings of *Price v. Himeji*, that the bulk variances may be subsumed within the use variance request, however that height variance, as a “D(6)” variance, must be addressed separately. The Board may balance the requested bulk variances as part of the negative criteria analysis for both the “D(1) and D(6)” variances.
13. The applicant must demonstrate that site will accommodate the problems associated with the increased height. The applicant must be cognizant of the recent ordinance and master plan amendments for the Strathmere area relative to creating a consistent height limitation throughout the area. Part of this analysis should also include the variance to exceed the number of habitable stories above flood protection elevation. The plans provide for three habitable stories over parking and a rooftop deck access.
14. The ordinance under Schedule C requires a 5-foot landscape buffer for the RC district. The site plan as proposed does not provide a landscape buffer along the rear property line. The ordinance also requires screening of parking lots. Additional landscaping should be provided to adequately screen the parking area. The applicant should provide the landscape buffer, or provide justification otherwise. The adequacy of any buffering can be used by the Board in evaluating the Negative Criteria.

#### **COMMENTS REGARDING TESTIMONY**

15. The Board was presented with testimony that the proposed use promotes the following purposes of zoning as per the Municipal Land Use Law N.J.S.A. 40:55D-2: (See all Purposes of Zoning attached for your reference)
  - a. The development promotes general welfare because the site and the use are particularly suited to one another.
  - b. To secure safety from fire, flood, panic and other natural man-made disasters
  - g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.
  - i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement.

- m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land.
16. The Board should determine if they agree with the benefits as presented by the applicant in terms of the purposes of zoning. This should be balanced with the objector's testimony as to the perceived impacts from the proposed motel/hotel development on the community of Strathmere. The Board should weigh all testimony and measure the credibility of all witnesses in order to determine whether such evidence justifies the relief being sought by the applicant and your rationalizations for your opinion. No matter what your vote, you should be compelled to provide the facts as you believe any how they relate to the law in order to reach your conclusion.
17. There was testimony provided relative to the other zoning districts which allow hotel/motel development. The ordinance permits motels/hotels in the Town Center zones. The applicant explained that the standards for hotels/motels should be reviewed in comparison with the standards in the Town Center districts.

The availability of infrastructure, larger land area, and the State Planning Areas that differentiate the various areas in the Township allow for more intense development in the Town Center districts as opposed to other areas in Upper Township. The Residential Commercial zoning was created in 2006. Prior to 2006 the zoning in Strathmere was C-Commercial and RES-Residential. As part of the 2006 Reexamination of the Master Plan the Township created new zoning for Strathmere, the RR-Resort Residential and RC-Resort Commercial. At that time there was no inclusion of hotels/motels in the new zoning districts. The new zoning differentiated the area in Strathmere from the mainland areas in the Township. In the same 2006 Master Plan the Township also proposed the creation of the Town Center districts and specifically related them to areas that are considered "Centers" in the State Plan, further differentiating the areas.

18. The most recent Master Plan Reexamination Report from 2020 amended the zoning in Strathmere. The Master Plan was focused on the impacts from Residential Development and Building Height. The changes recommended were specific to controls on residential development. The only change to the RC zone was to permit residential uses as a conditional use and require those residential uses to conform to the standards of the RR zoning district. This was in response to residential development in the RC zones requesting variances to conform to the more liberal setback requirements of the RC district. There were no other changes proposed to the permitted land uses in the RC district. The Board should consider carefully the Master Plan and Ordinances surrounding this application and formulate an opinion as to whether the granting of a use variance will or will not substantially impair the intent and purpose of the zone plan and zoning ordinance.



19. The Board should focus on the permissible site development in terms of the building size and scale in comparison to the proposed site development. That means when comparing the building height and scale the Board should not focus on the existing height of the building but on what is otherwise permitted to be developed on the property. It is clear that the proposed development is greater than what currently exists on-site. The Board should balance the negative criteria against allowable development and not existing development.
20. The Board should weigh all the testimony and measure the credibility of all witnesses in order to determine whether such evidence justifies the relief being sought by the applicant and your rationalizations for your opinion. No matter what your vote, you should be compelled to provide the facts as you believe and how they relate to the law in order to reach your conclusion.

**CONDITIONS OF APPROVAL (if approved)**

21. The use of the property should remain consistent with the testimony provided and specifically remain transient in nature as per the Township ordinance definition of "Hotel".
22. If the Board grants a use variance and site plan approval, the site would be subject to the Statewide non-residential affordable housing impact fee.
23. Any approval should be specifically conditioned upon all outside agency approvals.

Please call with any questions.

Yours truly,



Tiffany A. Morrissey, PP, AICP

Cc: Jeff Barnes, Esq  
Paul Dietrich, P.E.  
Strathmere Motel, Inc.  
William C. McLees, Architect  
Lance Landgraf, PP, AICP  
Robert Bruce, PE  
Richard M. King, Jr., Esq.



## **“SPECIAL REASONS” Pursuant to N.J.S. 40:55D-2**

- a. 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;
- b. To secure safety from fire, flood, panic and other natural and manmade disasters;
- c. To provide adequate light, air and open space;
- d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;
- e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;
- f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;
- g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
- h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;
- i. To promote a desirable visual environment through creative development techniques and good civic design and arrangements;
- j. To promote the conservation of historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;
- k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;
- l. To encourage senior citizen community housing construction;
- m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land; and
- n. To promote utilization of renewable energy resources; and
- o. To promote the maximum practicable recovery and recycling of recyclable materials from municipal solid waste through the use of planning practices designed to incorporate the State Recycling Plan goals and to complement municipal recycling programs.
- p. To enable municipalities the flexibility to offer alternatives to traditional development, through the use of equitable and effective planning tools including clustering, transferring development rights, and lot-size averaging in order to concentrate development in areas where growth can best be accommodated