

**RESOLUTION
BOROUGH OF BUTLER
PLANNING BOARD
IN THE MATTER OF 1333 RT. 23, LLC
DECIDED ON MARCH 16, 2023
MEMORIALIZED ON APRIL 20, 2023
APPLICATION NO. SP22-84
GRANTING OF PRELIMINARY AND FINAL SITE PLAN
APPROVAL, “d(3) CONDITIONAL USE VARIANCE APPROVAL
AND “c” VARIANCE RELIEF TO PERMIT A
CANNABIS RETAIL FACILITY**

WHEREAS, 1333 Rt. 23, LLC (hereinafter the “Applicant”) is the owner of real property known and designated as Block 83.08, Lot 5 on the Tax Assessment Map of the Borough of Butler which premises are located at 1333 Route 23 South, 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 preliminary and final site plan approval, “c” variance relief and “d(3)” conditional use variance relief from the Borough of Butler Code Section 143-123.5 and Section 143-173 Cannabis Retail and Medical Cannabis Dispensary Establishment; and

WHEREAS, public hearings were held on February 16, 2023 and March 16, 2023, after the Planning Board determined it had jurisdiction; and

WHEREAS, the Applicant was represented by Richard Clemack, Esq.

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 preliminary and final site plan approval, “c” variance relief and “d(3)” conditional use variance relief in order to permit a cannabis retail establishment to be conducted on property known and designated as Block 83.08, Lot 5 on the Tax

Assessment Map of the Borough of Butler, which premises are located at 1333 Route 23 South, Butler, New Jersey in the HC Zone.

The following Exhibits were introduced into evidence during the course of the public hearing:

1. Exhibit A-1 – Street View Rendering of 1333 Route 23;
2. Exhibit A-2 – Aerial View of 1333 Route 23;
3. Exhibit A-3 – Photograph of Route 23 Butler depicting 4 lanes of traffic pre-1980;
4. Exhibit A-4 – Engineering Plans Sheet C04 revision 1;
5. Exhibit A-5 – Figure 3 Aerial Land Use;
6. Exhibit A-6 – Figure 3 Aerial Zoning.

The February 16, 2023 Hearing

Richard Clemack, Esq., attorney for the Applicant provided an overview of the project. Mr. Clemack represented that the Applicant intends to remove the dwelling unit on the second floor and to install cathedral ceilings in its place. Thus, the only use and occupancy of the premises would be as a cannabis retail facility. Mr. Clemack also represented that the footprint of the building is not being expanded.

Operations Testimony

Jeff Montemarano is an owner of the property and he presented the history of the property. Mr. Montemarano testified that prior uses of the property included a furrier business, as well as a dental office. However, Mr. Montemarano operates his real estate office at this location.

Mr. Montemarano also testified that the existing pylon sign in the front yard has been in the same location as it currently exists since before he purchased the property. Mr. Montemarano also

represented that when Route 23 was widened, it resulted in the sign being located in the State right-of-way. Mr. Montemarano also represented that the New Jersey State Department of Transportation (NJDOT) has no problem with the sign remaining in its current location.

Mr. Montemarano testified in regard to the elimination of the second floor apartment. He stated it is his intention to eliminate the staircase inside which formerly led to the second floor. In its place, the Applicant will have a vaulted ceiling about 15 feet in height. Mr. Montemarano also testified that the Applicant would have a security vault and the business would have security cameras. Mr. Montemarano also represented that the proposed facility would measure approximately 1,500 square feet in area and he anticipates having one (1) employee.

Engineering Testimony

Testifying on behalf of the Applicant was Thomas Ott, P.E., a licensed professional engineer in the State of New Jersey. Mr. Ott was accepted as an expert witness in the field of civil engineering. Mr. Ott provided a brief overview of the project and confirmed the entire application is now restricted to the Applicant's lot and block. He represented that the Applicant is moving all parking onto the subject Property, Lot 5.

Mr. Ott testified that the second floor is to be removed and replaced with a cathedral ceiling. He further represented that the Applicant is installing an EV charging station. He further represented that the Applicant is moving the dumpster onto the subject Property, adding a loading zone, adding a new ADA chair lift and reconstructing the retaining wall. The landing steps are going to be removed from the adjoining lot and restored on the Applicant's lot.

Mr. Ott confirmed that the Applicant is not disturbing any wetlands. Mr. Ott stipulated that the Applicant would add a guide rail in front of parking stalls 1 and 2. Mr. Ott also stipulated that the Applicant would add an ADA sign in front of the ADA space.

Mr. Ott represented that adequate lighting is provided with the installation of a light pole with a maximum height of 15 feet. The light pole is located between parking stalls 4 and 5.

In regard to the condition of the parking lot, Mr. Ott testified that the original intent was to repave approximately 80% of the parking lot. However, the Applicant has now stipulated that it will repave the entire parking lot.

Mr. Ott also stipulated that the Applicant would include recycling to go along with the refuse within the dumpster enclosure area and that the Applicant would increase the size of the dumpster from a two (2) cubic yard dumpster to a four (4) cubic yard container for both refuse and recycling.

Traffic Testimony

Testifying on behalf of the Applicant was Corey Chase, P.E., a licensed professional engineer in the State of New Jersey. Mr. Chase is employed by Dynamic Traffic who prepared a Traffic Impact Study dated February 3, 2023, which was submitted to the Planning Board. Mr. Chase was accepted as an expert witness in the field of traffic engineering. Mr. Chase provided an overview of the Traffic Impact Study prepared by his office. Specifically, Mr. Chase reviewed Table IV on page 5 of the Traffic Impact Study. That table indicates that with a 1,500 square foot cannabis dispensary, the trip generation during a weekday p.m. peak hour would be 14 incoming trips and 14 outgoing trips for a total of 28 trips. In regard to the peak hour on a Saturday, there would be 22 incoming trips and 21 outgoing trips for a total of 43 trips during the Saturday peak hour.

Mr. Chase reviewed the sufficiency of on-site parking. Mr. Chase represented that the Borough parking ordinance requires 8 on-site parking spaces. However, by including 1 electric car

charging station, the Applicant gets credit for 2 parking spaces. Here 7 parking spaces are provided and no variance relief is therefore necessary.

Mr. Chase represented that on Table V on page 6 of the Traffic Impact Study that 24 additional trips are anticipated during the weekday evening peak hour and 42 additional trips are anticipated during the Saturday midday peak hour to access the site from the adjacent roadway network with the proposed redevelopment.

Mr. Chase testified in regard to loading zone access which would be through the northerly driveway. He stated the loading zone should be adequate for a delivery van.

Public Portion

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. The public hearing was continued to the March 16, 2023 hearing of the Planning Board.

The March 16, 2023 Hearing

Continuation of Engineering Testimony

Thomas Ott, P.E. continued to provide engineering testimony in regard to this application. Mr. Ott addressed the issue of refuse and recycling. Mr. Ott represented that as a result of conversations that he had with waste haulers, the Applicant is proposing two (2) 96 gallon lid receptacles of which one would be for refuse and one would be for recycling.

Mr. Ott also indicated that the Applicant would install a green vinyl fence to help the refuse enclosure area to blend in with the natural vegetation on the site.

Cannabis Operations Testimony

Blake Costa presented testimony before the Planning Board. Mr. Costa testified that he is a partner in the cannabis business. Mr. Costa also represented that he has an interest in a medical

dispensary in Voorhees, New Jersey. Mr. Costa testified that he also founded a cannabis retail business in Rhode Island approximately 5 years ago. Mr. Costa also testified in regard to security based upon his past military experience.

Mr. Costa testified that based on his prior experience in cannabis retail establishments, a typical transaction time is between 2 to 4 minutes. He also represented that efficiency in transactions helps to mitigate traffic impacts. He estimated that the average transaction time is approximately 4 minutes but with online ordering in advance, the transaction time can be reduced to approximately 2 minutes. Mr. Costa testified that product would be delivered to the site approximately 2-3 times per week and the delivery vehicles would be either a sedan or a small delivery truck.

Mr. Costa testified that the Applicant is in the process of obtaining a classified retail license from the State of New Jersey. He also indicated that a license is conditional as the license goes along with the approved site.

Mr. Costa next addressed the issue of odor. He represented that the Applicant is not a cannabis cultivator or manufacturer, but a retailer. Nevertheless, he stated the Applicant still has to control odor. He represented that cannabis comes in sealed packages. Mr. Costa also explained that the Applicant will have an activated carbon filtration system in order to control air and odor within the building. Mr. Costa also discussed preventive maintenance service as well as the schedule of maintenance. He stated typically the manufacturer recommends maintenance generally one time per month in terms of checking the system and checking the filters. He stated that filters would be replaced as necessary and that there would be backup filters on site.

Planning Testimony

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 provided an overview of the site and the surrounding area. She further testified that the Applicant will eliminate the second floor living area and there would be an open area cathedral ceiling in its place. The Applicant will also repave the parking area and relocate the refuse area to the north of the site and the Applicant will provide screening of the refuse area in order to comply with the ordinance.

Ms. Holmqvist reviewed with the Planning Board Exhibits A-5 - Figure 3 Aerial Land Use and Exhibit A-6 – Figure 3 Aerial Zoning. She stated the property is unique and that it is approximately half the size of the lot area in the HC Zone. Ms. Holmqvist also testified that the Applicant is improving the site by providing ADA access as well as by installing an EV parking space. Further, the Applicant is making the parking lot better by repaving the lot, making the parking lot more defined and delineating parking spaces.

Ms. Holmqvist testified that the Applicant requires “d(3)” conditional use variance relief to permit the operation of a retail cannabis establishment at this location. She stated that under Butler Code Section 143-73, the Applicant complies with all of the conditions of the conditional use ordinance with the exception of item f which prohibits a cannabis retail establishment from being located within a 1,000 linear feet in any direction of a licensed day care facility. In this instance, Ms. Holmqvist testified that the Kidoodle Learning Center is located at 1360 Route 23, Butler, New Jersey. The Kidoodle Learning Center is located at the intersection of Roosevelt Avenue and Route 23. The Kidoodle Learning Center is a licensed childcare facility. As a result, the proposed

cannabis facility is located approximately 848 feet away from a licensed daycare facility in contravention of the conditional use ordinance.

Ms. Holmqvist testified that the intent of the conditional use ordinances relative to the requirement to be located 1,000 linear feet away from a licensed daycare center is to shield children from this adult recreational use. However, she stated that Kidoodle is in the rear of the building and in addition, there is a play area in the rear. She also stated that this is a multi-tenant building and the tenants in the front of the building include a Dominos pizzeria, a nail salon and a tobacco and gift shop.

Ms. Holmqvist also addressed the vertical and horizontal curvature of Route 23 from the subject Property to the Kidoodle site in the rear of 1360 Route 23 north. She also indicated that there is 36% slope from the highway to the rear of the Kidoodle site.

Ms. Holmqvist addressed the need for “c” variance relief. She stated the Applicant requires three (3) “c” variances. First in regard to lighting, Section 143-189 of the Butler Borough Code requires a minimum of 0.3 foot candles in the parking area and in this instance, some portions of the parking area have less than 0.3 foot candles of lighting. Secondly, the Applicant requires “c” variance relief in regard to signage. The Applicant proposes an 11 foot 6-1/2 by 2 foot sign to be located on the front lower tier of the roof of the building and Section 143-174m prohibits roof mounted signs. Thirdly, the Applicant requires “c” variance relief in regard to the location of the loading space which is proposed in the front yard on the subject site. Under Section 143-86D(2), loading spaces are only allowed in the side or rear yard.

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 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.

Ms. Holmqvist next addressed the negative criteria in regard to both the “d(3)” variance relief and “c” variance relief. Ms. Holmqvist, therefore, testified that variance relief 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 except for the distance from the subject Property to the Kidoodle Learning Center, which she characterized as being appropriate to be granted due to the distance, vertical and horizontal curvature of the road as well as the slope of the highway from the subject Property to the Kidoodle daycare center located in the rear of a multi-tenant building at the intersection of Route 23 and Roosevelt Avenue. Ms. Holmqvist also testified that the benefits of granting the deviation substantially outweigh the detriments. Therefore, she concluded that it is appropriate to grant both “d(3)” and “c” variance relief.

Public Portion

The meeting was opened up the 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 “d(3)” conditional use variance relief, preliminary and final site plan approval and “c” variance relief in order to permit cannabis retail sales to be conducted on property known and designated as Block 83.08, Lot 5 on the Tax Assessment Map of the Borough of Butler which premises are located at 1333 Route 23 South, Butler, New Jersey in the HC Zone.

The Board notes that the subject Property is currently improved with a two-story building and parking lot with a present use of a real estate brokerage firm. The Applicant proposes modifications to the existing two-story building to accommodate a cannabis retail establishment. The proposed site improvements include, but are not limited to, parking area striping, signage, lighting and building access. All site improvements are restricted to the Applicant’s lot. The Board further finds that the second floor is to be removed and the Applicant will have a cathedral ceiling in its place. All parking and the dumpster enclosure will now be located on the Applicant’s lot.

Cannabis Retail Establishments Are Conditionally Permitted Uses Under the Butler Ordinance

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.

d(3) Conditional Use Variance Pursuant to the Municipal Land Use Law

A conditional use is defined under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(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 d(3) 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 reconcilable 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 Board finds the Applicant complies with all sections of the Conditional Use Ordinance with one (1) exception. 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 848 feet away from the Kidoodle Learning Center which is located at 1360 Route 23, Butler, New Jersey. The Kidoodle Learning Center is located in a multi-tenant building, but occupies space in the rear of the building. The Board finds that the Kidoodle Learning Center is a licensed childcare facility and, as such, the

Applicant is required to maintain a 1,000 foot separation from the proposed retail cannabis establishment to the Kidoodle licensed daycare facility.

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 deviation from Condition F of the Ordinance requirements.

The Board accepts the representations of the Applicant's expert that there are vertical and horizontal curvature issues of Route 23 as well as a significant grade changes between the subject Property and the daycare center that make reasonable access between the childcare center and the subject Property unlikely. Furthermore, the subject Property is located on Route 23 south, and thus has a highway orientation. The Board also finds that the distance between the Kidoodle Learning Center and the subject Property is approximately 848 feet away, which the Board considers to be a substantial distance. In addition, the Board finds that the Kidoodle Learning Center is located in the rear of the building at 1360 Route 23 north which further increases the separation between the subject Property and the Kidoodle Learning Center. The Board also finds that the childcare center being located in the rear of the multi-tenant building makes reasonable access from the subject Property to the child care center unlikely.

Based on these factors, the Board finds that the site will accommodate the problems associated with the use even though the proposal does not comply with one condition of the Conditional Use Ordinance established to address that problem.

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 one of the conditions of the ordinance established.

Ancillary “c” Variance Relief

The Municipal Land Use Law at N.J.S.A. 40:55D-70c provides Boards with the power to grant variances from strict bulk and other non-use related issues when the applicant satisfies certain specific proofs which are enunciated in the Statute. Specifically, the applicant may be entitled to relief if the specific parcel is limited by exceptional narrowness, shallowness or shape. An applicant may show that exceptional topographic conditions or physical features exist which uniquely affect a specific piece of property. Further, the applicant may also supply evidence that exceptional or extraordinary circumstances exist which uniquely affect a specific piece of property or any structure lawfully existing thereon and the strict application of any regulation contained in the Zoning Ordinance would result in a peculiar and exceptional practical difficulty or exceptional and undue hardship upon the developer of that property. Additionally, under the c(2) criteria, the applicant has the option of showing that in a particular instance relating to a specific piece of property, the purpose of the act would be advanced by allowing a deviation from the Zoning Ordinance requirements and the benefits of any deviation will substantially outweigh any detriment. In those instances, a variance may be granted to allow departure from regulations adopted, pursuant to the Zoning Ordinance.

Those categories specifically enumerated above constitute the affirmative proofs necessary in order to obtain “bulk” or (c) variance relief. Finally, an applicant must also show that the proposed variance relief sought will not have a substantial detriment to the public good and, further, will not substantially impair the intent and purpose of the zone plan and Zoning Ordinance. It is

only in those instances when the applicant has satisfied both these tests, that a Board, acting pursuant to the Statute and case law, can grant relief. The burden of proof is upon the Applicant to establish these criteria.

In connection with the proposed development, the Applicant requires the following variance relief:

1. The Applicant requires “c” variance relief in regard to lighting, Section 143-189 of the Butler Borough Code requires a minimum of 0.3 foot candles in the parking area and in this instance, some portions of the parking area have less than 0.3 foot candles of lighting.
2. The Applicant requires “c” variance relief in regard to signage. The Applicant proposes an 11 foot 6-1/2 by 2 foot sign to be located on the front lower tier of the roof of the building and Section 143-174m prohibits roof mounted signs.
3. The Applicant requires “c” variance relief in regard to the location of the loading space which is proposed in the front yard on the subject site. Under Section 143-86D(2), loading spaces are only allowed in the side or rear yard.

The Board has examined the request for variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2). In Kaufman v. Planning Board for Warren Township, 110 N.J. 551, 563 (1988), the New Jersey Supreme Court held:

“By definition then no c(2) variance should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning alternative for the property. The focus of a c(2) case, then, will be not on the characteristics of the land that, in light of current zoning requirements, create a hardship on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.”

The Board finds that it is appropriate to grant variance relief in regard to lighting where some portions of the parking area have less lighting than 0.3 foot candles. The Board finds that the Applicant is proposing a pole mounted light between parking spaces 4 and 5 and the majority of the

site is suitably illuminated to eliminate any hazardous conditions and thus, it is appropriate to grant “c” variance relief for lighting.

Next, the Board finds that it is appropriate to grant variance relief to permit the sign to be located on the front lower tier of the roof of the building. The Board finds that the sign conforms to the size requirements of the Ordinance and based on the setback of the building from Route 23 and the fact that Route 23 is a State highway with vehicles traveling at a higher rate of speed, the location of the proposed sign is appropriate for roadside recognition.

Finally, in regard to the loading space which is located in the front yard where loading spaces are only permitted in the side or rear yard, the Board finds that it is appropriate to grant “c” variance relief because of existing conditions on the lot which preclude the loading space from being located in the rear or side yard. The Board also finds that it makes better planning sense to grant a variance to allow a loading space in the front yard as opposed to not having a loading space because it could not be suitably located in the side or rear yard.

The Board, in its review of the application under the c(2) criteria, analyzed the proofs provided by the Applicant relative to the positive criteria under the MLUL pursuant to N.J.S.A. 40:55D-2 and its subparts. The Board finds that several purposes of the MLUL would be advanced by the approval of this application including 2(a) by promoting the general welfare; 2(c) by continuing to provide adequate light, air and open space; 2(g) to provide sufficient space in appropriate locations for a variety of commercial uses; 2(i) to promote a desirable visual environment; and 2(m) the purposes of the Municipal Land Use Law would be advanced by its approval of this application resulting in more efficient use of land.

The Board finds that the approval of this application will result in the preservation and improvement of a commercial property located within the HC Zone within the Borough of

Butler. Furthermore, the approval of this application will result in responsible development which is a further goal of the MLUL. Therefore, the Board determines that the Applicant has satisfied the positive criteria in regard to the granting of ancillary “c” variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

Next, as to the negative criteria, the Board finds that the improvements will not interfere with the provision of adequate light and air between commercial/residential properties. The Applicant is also providing an aesthetic improvement to promote a desirable visual environment.

The Board finds there will be no detriment to the public good by approving the request for variance relief. Furthermore, ancillary “c” or bulk variance relief can be granted without substantially impairing the intent and purpose of the Zone Plan and Zoning Ordinance. The Board also finds that the purposes of the Municipal Land Use Law under N.J.S.A. 40:55D-70c(2) would be advanced by a deviation from the Zoning Ordinance requirements and the benefits of the deviation substantially outweigh any detriment. The Board therefore finds that both the positive and negative criteria have also been satisfied and that it is appropriate to grant ancillary “c” or bulk variance relief under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2).

Preliminary & Final Site Plan Approval

The Board’s authority in reviewing an application for site plan approval is limited to determining whether the development plan conforms with the zoning and the applicable provisions of the Site Plan Ordinance. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 228, 229 (1994); Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 581-582 (App. Div. 2002), certif. denied, 172 N.J. 357 (2002). Thus, ordinarily a denial of a site plan application would be a drastic action when the pertinent ordinance standards are met. Shim v.

Wash. Tp. Planning Bd., 298 N.J. Super. 395, 411 (App. Div. 1997). The project's site driveways and internal circulation have been designed to provide for safe and efficient movement of automobiles. Further, the proposed parking supply and design is sufficient to support the projected demand and meets the ordinance requirements.

Conclusion

Upon consideration of the plans, testimony and application, the Board determines that the request for preliminary and final site plan approval, "d(3)" conditional use variance relief and "c" 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 preliminary and final site plan approval, "d(3)" conditional use variance relief and "c" variance relief as well from Ordinance No. 2021-16 and the Borough of Butler Code Sections 143-123.5 and 143-173 to permit cannabis retail establishment in the building at 1333 Route 23 South, Butler, New Jersey.

NOW, THEREFORE, BE IT RESOLVED by the Planning Board that the application of 1333 Rt. 23, LLC in regard to property known and designated as Block 83.08, Lot 5 as shown on the Tax Assessment Map of the Borough of Butler, and located at 1333 Route 23 South, Butler, New Jersey in the HC Zone District, requesting land use relief is determined as follows:

- (1) Preliminary site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-46.
- (2) Final site plan approval is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-50.
- (3) Ancillary "c" variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70c(2) for lighting, roof mounted sign and loading space.

- (4) “d(3)” conditional use variance relief is granted under the Municipal Land Use Law pursuant to N.J.S.A. 40:55D-70d(3).

IT IS FURTHER RESOLVED that the above land use relief is granted subject to the following terms and conditions:

1. The development of the site shall take place in strict conformance with the testimony, plans and drawings which have been submitted to the Board with this Application.

2. The Applicant represents that all representations and stipulations made either by or on behalf of the Applicant to the Butler Planning Board are true and accurate, and acknowledges that the Planning Board specifically relied upon the Applicant’s 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 hearings on February 16, 2023 and March 16, 2023.

4. The Applicant shall comply with all terms and conditions set forth in the Board Planner’s Report prepared by Thomas Behrens, Jr., P.P., A.I.C.P. of Burgis Associates, Inc. dated February 10, 2023 to the Borough of Butler Planning Board and as testified to during the hearing process.

5. The Applicant shall comply with all terms and conditions set forth in the Board Engineer’s Review Report prepared by Thomas E. Donohue, P.E. of Donohue Engineering, LLC dated January 24, 2023 and as testified to during the hearing process.

6. The Applicant shall submit a lighting “as-built” plan prior to final occupancy which shall be subject to the review and approval of the Board Engineer.

7. The Applicant shall install one make-ready parking space or install electric vehicle supply equipment in satisfaction of N.J.S.A. 40:55D-66.18 et. seq., which shall be subject to the review and approval of the Board Engineer.

8. The Applicant shall submit a fire truck/emergency vehicle access template the nature and sufficiency of which shall be subject to the review and approval of the Board Engineer.

9. The granting of this application is subject to and conditioned upon Morris County Planning Board approval, if required.

10. The granting of this application is subject to and conditioned upon Soil Erosion and Sediment Control (SESC) Certification from the Morris County Soil Conservation District prior to construction.

11. A guide rail shall be installed in front of the northern two (2) parking spaces and the reconstructed step platform, which shall be subject to the review and approval of the Board Engineer. An ADA sign shall be installed in front of the ADA parking space.

12. The Zoning Officer shall not issue a Certificate of Occupancy to the Applicant until such time as the Applicant receives any and all required licenses from the Borough of Butler and the Cannabis Regulatory Commission.

13. The granting of this application is subject to and conditioned upon New Jersey Department of Transportation (NJDOT) approval, if required.

14. The granting of this application is subject to and conditioned upon the Applicant opening and maintaining an escrow account with the Borough of Butler and keeping the account current with sufficient funds for professional inspection and review fees.

15. This approval is subject to the payment in full by the Applicant of all taxes, fees, escrows, assessments and other amounts due and owing to the Borough. Any monies are to be paid by the Applicant within twenty (20) days of said requests by the Board Secretary.

16. Certificate that taxes are paid to date of approval.

17. 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
MARCH 16, 2023

Motion Introduced By: Brown

Seconded By: Finelli

In Favor: Brown, Finelli, Donza, Veneziano, Hough, Vath and Chairman Nargiso

Opposed:

VOTE TO APPROVE RESOLUTION
APRIL 20, 2023

Motion Introduced By:

Motion Seconded By:

In Favor

Opposed

Butler Planning Board

William Budesheim, Board Secretary

James Nargiso, Chairman

The undersigned secretary certifies that the within Resolution was adopted by the Butler Planning Board on March 16, 2023 and memorialized herein pursuant to N.J.S.A 40:55D-10(g) on April 20, 2023.

William Budesheim, Board Secretary

2640060_2 BUTBPB-006E 1333 Rt. 23, LLC Resolution Granting Preliminary & Final Site Plan., "c" Variance & Conditional Use for Cannabis Retail (SP22-84) 4.20.23