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August 8, 2019

VIA PROCESS SERVER

The Planning Board of the Borough of Red Bank
c/o Pamela Borghi
Clerk, Borough of Red Bank
90 Monmouth Street
Red Bank, NJ 07701

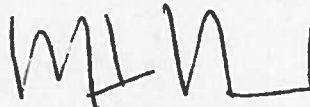
Re: *RBank Capital LLC v. The Planning Board of the
Borough of Red Bank*
Docket No.: MON-L-2766-19
Our File No.: 022310.014061

Dear Ms. Borghi :

Our firm represents Plaintiff, RBank Capital, LLC, in the above matter. We hereby serve upon the Planning Board of The Borough of Red Bank the following: Summons, Complaint (In Lieu of Prerogative Writ), and Civil Case Information Statement.

Thank you.

Very truly yours,



Martin Newmark, Esq.

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ATTORNEYS AT LAW

MAN:afd

cc: Michael Leckstein, Esq. (via regular mail)

PORZIO, BROMBERG & NEWMAN, P.C.
Martin A. Newmark (218871965)
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Plaintiff, RBank Capital, LLC

RBANK CAPITAL, LLC,

Plaintiff,

v.

THE PLANNING BOARD OF THE BOROUGH
OF RED BANK,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

DOCKET NO. : MON-L-2766-19

CIVIL ACTION

SUMMONS

From The State of New Jersey To The Defendant(s) Named Above:

THE PLANNING BOARD OF THE BOROUGH OF RED BANK

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The Complaint (In Lieu of Prerogative Writ) attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information

Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of \$175.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.njcourts.gov/forms/10153_deptyclerklawref.pdf.

s/ Michelle Smith

Clerk of the Superior Court

DATED: August 8, 2019

Name of Defendant to Be Served:

The Planning Board of the Borough of Red Bank
c/o Clerk, Borough of Red Bank

Address of Defendant to Be Served:

90 Monmouth Street, Red Bank, NJ 07701

PORZIO, BROMBERG & NEWMAN, P.C.

Martin A. Newmark (218871965)

100 Southgate Parkway

Morristown, NJ 07962-1997

(973) 538-4006

Attorneys for Plaintiff, RBank Capital, LLC

RBANK CAPITAL, LLC,

Plaintiff,

v.

THE PLANNING BOARD OF THE
BOROUGH OF RED BANK,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

DOCKET NO. : MON-L-

CIVIL ACTION

COMPLAINT

[IN LIEU OF PREROGATIVE WRIT]

RBANK Capital, LLC, [herein the "Plaintiff"] by way of Complaint says:

FACTS COMMON TO ALL COUNTS

1. The Plaintiff is the owner of property situate in the Borough of Red Bank, Monmouth County, New Jersey, located at 80 Rector Pl. [herein the "Property"] and is shown on the Official Tax Map of the Borough of Red Bank as Block 1, Lot 1.

2. Plaintiff applied to the Planning Board of the Borough of Red Bank [herein the "Board"] for permission to construct a 76-room, six story hotel with associated amenities on the Property.

3. The Property is in the WD Waterfront Development Zone District [herein the "Zone District"] having frontage on both New Jersey State Highway 35 and Rector Place.

4. The Property consists of approximately 45,385 square feet whereas the Zoning District requires only 30,000 square feet for the proposed Hotel Use.

5. The Zone District requires a minimum frontage of only 200 feet whereas the Property provides 428 feet of frontage along State Highway 35 and Rector Place.

6. The site is encumbered by a public access easement along the riverfront which would be improved as part of the Application.

7. The hotel proposed by the Plaintiff is a permitted use in the Zone District.

8. In due course the Application was deemed Complete and scheduled for a Public hearing.

9. The first public hearing by the Board on the Application took place on November 21, 2016.

10. The Plaintiff presented six witnesses: Larry Cohen, a principal of the Plaintiff regarding hotel operations, expert testimony from Jason Fichter, P.E., a civil engineer, expert testimony from Gary Dean, P.E., regarding traffic, expert testimony from Lewis Silverstein regarding architecture, expert testimony from Peter Ritching regarding environmental issues and expert testimony from Roy

DeBoer, P.P., regarding planning. The Board found all of the Plaintiff's witnesses to be credible.

11. Public hearings on the Application were also conducted by the Board on December 9, 2016 and February 6, 2017.

12. The Plaintiff presented extensive testimony regarding the proposed hotel and the limitations of the proposed site which generated the need for several Bulk Variances.

13. Testimony was also presented that showed that the Property was burdened by environmental contamination which occurred because of petroleum leakage during the time the nonconforming gasoline station was being operated by a former owner.

14. Based upon the testimony presented by the Plaintiff, the Board determined that the Application substantially complied with the Site Plan Ordinance and granted the requested design waivers due to the constraints imposed upon the property by its size, shape and the location of existing conditions.

15. The Board reviewed the Site Plan and determined, based upon the testimony of the Plaintiff's witnesses, that due to the configuration of the site, the environmental constraints and the topography, the Applicant was confronted with exceptional practical difficulties or hardships in complying with the Ordinance.

16. In addition, the Board found that the approval of the Application would result in substantial public benefits in that the Plaintiff would be eliminating a pre-existing nonconforming use, i.e., a gasoline station, which has been boarded

up for years and has served as an eyesore at a major intersection on the North side of the Borough as one enters the Borough from State Highway 35 and presents an unsightly condition to the adjoining residential neighborhood.

17. The Board concluded that the Plaintiff had established, by a preponderance of evidence, sufficient proofs supporting the requested Bulk Variances under *N.J.S.A. 40:55D-70* (c)(1) and (c)(2) and, based upon its assessment of the testimony, the Board concluded that the purposes of the Municipal Land Use Law would be advanced by the requested deviations from the zoning requirements and those benefits substantially outweighed any resultant detriments.

18. The Board also found that the approval of the Plaintiff's Application would eliminate a pre-existing nonconforming use; therefore, providing an opportunity for the development of the Property with a use expressly permitted in the Zone District.

19. In addition, the Board concluded that developing the site as proposed by the Applicant would benefit the Borough in that an existing public access easement along the Navesink River would be turned into a boardwalk for public access purposes and provide an area for passive recreation for Borough residents.

20. Finally, the Board found that a deteriorated bulkhead along the waterfront would be replaced with a new bulkhead or similar type structure that would create a safer and more pleasing environment and would stop the erosion of soil into the Navesink River.

21. Based upon the facts found by the Board as set forth above, on

February 6, 2017, the Board voted in favor of approving the Plaintiff's Application for Preliminary and Final Site Plan Approval together with Bulk Variances, a Height Variance and Design Waivers as more particularly memorialized in a Resolution adopted [almost three (3) months after the Board had voted in favor of the Site Plan] on May 1, 2017. A copy of that Resolution is annexed as **Exhibit A**.

22. The Resolution of Approval was subject to several conditions requiring that the Plaintiff obtain all necessary outside agency approvals and State permits.

23. Among the State permits required were an Upland Waterfront Development Individual Permit from the New Jersey Department of Environmental Protection (hereafter "NJDEP") and a Major Access Permit from the New Jersey Department of Transportation (hereafter "NJDOT").

24. Shortly after the Board voted in favor of the requested Site Plan, the Plaintiff began its pursuit of the required State permits. Soon after the Resolution was adopted, a competitor of the Plaintiff filed a frivolous lawsuit challenging the Plaintiff's Approval.

25. As a result of the objector's appeal, the Plaintiff was required to turn its attention and resources away from pursuing the permits and to the defense of the lawsuit which was ultimately dismissed more than three (3) months after the Resolution of approval was adopted by the Board.

26. From the beginning of the approval process to the Board's denial of its Application for an Extension on April 15, 2019, the Plaintiff spent in excess of **Five Hundred Thousand Dollars** [\$500,000.00] processing the required Applications

to the Planning Board, the NJDEP and the NJDOT.

27. For example, and not by way of limitation, in an effort to satisfy the NJDEP, the Plaintiff's professionals, in good faith and with reasonable diligence, took the following action:

A. On February 16, 2017, only ten (10) days following the favorable vote on the Application and two and a half (2 ½) months before the Board adopted its Resolution of approval, Plaintiff's environmental consultant began the process by sending a letter to the NJDEP requesting a Pre-Application Meeting.

B. More than a month later, on March 20, 2017, a telephone call was received from the NJDEP advising that Vivian Fanelli had been assigned to handle the requested meeting.

C. Almost a month after that, on April 14, 2017, Vivian Fanelli called the Plaintiff's consultant requesting that the meeting take place after May 1, 2017.

D. On April 19, 2017, Vivian Fanelli confirmed that the meeting would take place on May 2, 2017 [*As typical of the NJDEP, it took the NJDEP well over two months to schedule the Plaintiff's requested Pre-Application Meeting*].

E. As requested by Ms. Fanelli at the May 2, 2017 meeting, on July 19, 2017 a letter was sent to Ms. Fanelli regarding her request for an alternative analysis.

F. On August 25, 2017, Ms. Fanelli advised that the alternative analysis review had been assigned to Kara Turner of the NJDEP. *[It took over two months for the NJDEP to assign someone to review the requested alternative analysis.]*

G. On September 18, 2017, the Plaintiff's engineering consultant communicated with the Monmouth County Parks Commission regarding a possible Riparian Mitigation Site.

H. On September 19, 2017, Plaintiff's environmental consultant received a communication from Kara Turner of the NJDEP regarding riparian vegetation.

I. On September 26, 2017, a memo was prepared regarding the Monmouth Park System meeting regarding the proposed mitigation site.

J. On January 11, 2018, the draft environmental impact statement required by the NJDEP was completed.

K. On March 2, 2018, a draft application to the NJDEP for an Upland Waterfront Development Permit was completed.

L. On June 4, 2018, the application for the Upland Waterfront Permit was submitted to the NJDEP.

M. On June 8, 2018, a response was provided to the NJDEP regarding its Natural Heritage Data request.

N. On July 6, 2018, Kara Turner of the NJDEP, for the first time, requested architectural plans.

O. On August 6, 2018, an email was received from Stephen Reid, a lobbyist engaged by the Plaintiff to assist in getting better cooperation from the NJDEP, setting a meeting with the New Jersey Business Action Center of the Governor's office.

P. On August 9, 2018, an e-mail summary of the Coastal Zone Management Rules was received and reviewed.

Q. On August 14, 2018, e-mail correspondence was sent to Joe Constance of the New Jersey Business Action Center.

R. On August 15, 2018, Peter Ritchings, Plaintiff's environmental consultant, forwarded a follow up email to Joe Constance.

S. On September 4, 2018, Peter Ritchings spoke with Kara Turner regarding the status of the NJDEP application.

T. On September 5, 2018, a request was made to the NJDEP for a 30-day extension of the application review.

U. On September 5, 2018, e-mail confirmation was received from the NJDEP granting the extension request.

V. On October 4, 2018, Ritchings once again followed-up with Kara Turner of the NJDEP regarding the status of the application.

W. On October 4, 2018, an e-mail was received from Stephen Reid regarding a meeting with a NJDEP representative.

X. On October 11, 2018, a letter of withdrawal of the Upland Waterfront Permit application was made to the NJDEP due to feedback received from the Agency and the related need for substantial design changes.

Y. Plaintiff's decision to withdrawal the pending NJDEP application without prejudice would protect the Plaintiff from forfeiting the substantial application fee and allow the Plaintiff to utilized those resources for the additional engineering work requested by the NJDEP.

Z. On October 16, 2018, the NJDEP accepted Plaintiff's letter of withdrawal.

AA. On November 1, 2018, an email was received from the NJDEP administrative assistant setting up a meeting with the NJDEP.

BB. On November 8, 2018, the Plaintiff's representatives met with the NJDEP representative.

CC. On November 30, 2018, Peter Ritchings sent a follow-up letter to Kara Turner of the NJDEP regarding the November 8, 2018 meeting.

DD. On December 10, 2018, Peter Richings e-mailed the NJDEP confirming a conversation with Ryan Anderson, the new NJDEP project manager.

EE. On December 13, 2018, Peter Ritchings prepared a memo regarding a telephone call with Ryan Anderson.

FF. On February 18, 2019, Peter Ritchings transmitted requested information to the NJDEP.

GG. On March 7, 2019, a request was made for signature for the resubmission to the NJDEP.

HH. On April 8, 2019, an e-mail submittal of the revised Permit application was made to the NJDEP.

II. On April 9, 2019, an email was received from the NJDEP advising that the revised Permit application had been assigned to Jan Arnett.

JJ. On April 24, 2019, Stephen Reid sent an e-mail to the NJDEP regarding administrative issues.

KK. On May 14, 2019, Ryan Anderson from the NJDEP called the Plaintiff's consultant regarding the Permit application.

28. As of April 30, 2019, the statutory protection afforded to Final Site Plan Approval pursuant to *N.J.S.A. 40:55D-52* (a), subject to tolling by *N.J.S.A. 40:55D-21*, was about to expire.

29. Despite its diligent efforts and the expenditure of hundreds of thousands of dollars including but not limited to, application fees, litigation expenses, Escrow Deposits [to reimburse the Borough for the expenses of their professionals], engineering fees, architectural fees, legal fees, traffic engineering fees and expert witness fees, Plaintiff had not yet received the final NJDOT Permit or the required NJDEP permits and approvals.

30. Within the time permitted by the MLUL, Plaintiff applied to the Board

requesting a one year extension of the May 1, 2017 Final Site Plan Approval as provided for in *N.J.S.A. 40:55D-52* (a) and (d).

31. The Board considered Plaintiff's extension request at the April 15, 2019 Planning Board meeting.

32. At the meeting, the Plaintiff informed the Board that despite having to devote his time and resources to defend a frivolous lawsuit challenging the approved Site Plan for more than three (3) months following the adoption of the Board's Resolution, the Plaintiff continued the process of pursuing the required State permits.

33. The Plaintiff also informed the Board that as a result of the preliminary discussions and meetings with the NJDEP, Plaintiff was instructed by the NJDEP that before it could approve the application, Plaintiff would first need to apply for the required permits from the NJDOT.

34. The Plaintiff's testimony to the Board also included a summary of Plaintiff's application to the NJDOT which involved the usual submission of reports and detailed plans along with the back and forth review by the agency and resubmission of requested revisions.

35. The Plaintiff advised the Board that in good faith and with reasonable diligence, the Plaintiff had been continuously pursuing the required NJDOT and NJDEP Permits.

36. On April 15, 2019, despite the credible testimony provided to the Board by the Plaintiff, the Board denied the Plaintiff's Extension request and on June 17,

2019, [more than two months after having voted to deny the Application] the Board adopted a Resolution memorializing the denial. A copy of the Resolution is annexed as **Exhibit B**.

COUNT ONE
[The denial is contrary to *N.J.S.A. 40:55D-52(a)*]

1. Under the circumstances described above, the Board's denial of the Extension request violates *N.J.S.A. 40:55D-52(a)* which authorizes a Planning Board to exercise its discretion to extend the period of protection afforded Final Site Plan Approvals for one year provided no more than three one-year extensions are to be granted.

2. The discretion to grant or deny extensions requires a board to exercise reasonable discretion; arbitrary, capricious and unreasonable discretion is not permitted.

3. The Plaintiff satisfied the requirements of *N.J.S.A. 40:55D-52(a)*. The denial of the requested extension under the circumstances presented was therefore arbitrary, capricious and unreasonable as demonstrated by the following which is submitted by way of example and not by way of limitation:

A. Plaintiff established that it was delayed in proceeding with the satisfaction of the conditions of the Resolution of Approval by having to defend a frivolous lawsuit filed by competitor. As a result, the Plaintiff lost time from May 1, 2017 until August of 2017 [over three months] at which

time [and at substantial expense to the Plaintiff] the lawsuit was dismissed.

B. Accordingly, the time limits of Plaintiff's approval protection was tolled while the lawsuit was in process as provided for in *N.J.S.A.* 40:55D-21. The Board should have, but did not, properly consider that delay and the statutorily authorized tolling.

C. The Board Planner confirmed that the Plaintiff's plan had not changed since it was initially approved in May of 2017.

D. Nor had the Zoning Ordinance regulating the Zone District changed since the Plaintiff's Application was approved in May of 2017.

E. At the April 15, 2019 Hearing, Board member Barbara Boar complained about the condition of the property. The Mayor also commented on the unsightly condition of the property.

F. As reflected in the findings and conclusions in the Resolution of Denial at Paragraph 15, the Board's action was based in part on the Plaintiff's alleged poor maintenance of the Property following the approval of the Application on May 1, 2017.

G. However, no competent evidence regarding the condition of the Property was presented at the hearing. Moreover, the upkeep of the Property was neither within the jurisdiction of the Planning Board, nor relevant to the Plaintiff's request for an extension. Rather, property maintenance is governed by the local property maintenance Code and its enforcement is delegated to the Borough's Code Enforcement Officer.

H. The consideration of the condition of the Property by the Board in the context of the Plaintiff's Extension request, was improper, and, as result, the denial of the Extension was arbitrary, capricious and unreasonable.

I. At the April 15, 2019 Hearing, Board member Michael Ballard stated "he never liked the project because it was too big and a bad spot for accidents and congestion".

J. This "reason" to deny the Application for the requested Extension is arbitrary, capricious and unreasonable because a request for an Extension is not a referendum on whether the underlying Application should or should not have been approved. Ballard's expressed concern regarding traffic was not based on anything in the record and merely constituted his unqualified net opinion. His opinion was in conflict with the contrary findings and conclusions of the Board in its May 1, 2017 Resolution in Paragraphs 26-29. In addition, as reflected in Paragraph 74 of the May 1, 2017 Resolution the Board *rejected* the testimony of the Objector's traffic expert who voiced the same concerns as Board Member Ballard.

K. As reflected in Paragraph 16 of the June 17, 2019 Resolution, the denial of the requested extension was based, in part, because "... the Borough is in the process... to reconsider and **possibly** adopting redevelopment proposals for the northern portion of the Borough along the Navesink River". [emphasis added]

L. The Board's consideration of and reliance on a "possible" change to the zoning of the Property in the context of the Extension request was also arbitrary, capricious and unreasonable and not legally justified.

5. Because the Plaintiff's Extension request met the requirements of *N.J.S.A. 40:55D-52(a)* and should have been approved, the Board's denial was arbitrary, capricious and unreasonable and should be set aside.

WHEREFORE, the Plaintiff Demands Judgment on this Count:

1. Declaring the denial of the Plaintiff's Application for an Extension of time to complete the perfection of the Site Plan Application and thus extend the protection against superseding zoning changes provided for in the M.L.U.L. is invalid and of no further force or effect.

2. Directing the Board to grant the Extension Application for a period of one year from the date of the Judgment.

3. For such other relief as the Court may find to be appropriate.

COUNT TWO

**[The denial of the requested extension was
in violation of *N.J.S.A. 40:55D-52(d)*]**

1. The denial of the Extension request was also contrary to the directive in *N.J.S.A. 40:55D-52(d)* which *requires* the Planning Board to grant an extension of Final Site Plan Approval for up to one year:

"...if the developer proves to the reasonable satisfaction of the Board that the developer was barred or prevented, directly or indirectly, from

proceeding with the development because of delays in obtaining required approvals from other governmental entities and that the developer applied promptly for and diligently pursued these approvals."

2. As set forth above, the Plaintiff was delayed in the pursuit of the necessary State permits because it was necessary to devote its attention and resources to defending a frivolous lawsuit by a competitor for over three months.

3. As set forth above, following the dismissal of the lawsuit in August of 2017, Plaintiff was informed that before the required NJDEP Permit could be approved, an application for the required NJDOT Permit would have to be processed.

4. Plaintiff, in good faith and with reasonable diligence, pursued the NJDOT Permit which was finally approved in May of 2019.

5. As set forth above, the Plaintiff, in good faith and with reasonable diligence, has continuously pursued the required NJDEP at substantial cost and expense.

6. As stated above, after having spent over **Five Hundred Thousand Dollars [\$500,000.00]** pursuing the Final Site Plan Approval from the Planning Board and in pursuit of the State approvals required by the Planning Board, the refusal of the Board to grant the requested Extension was arbitrary, capricious and unreasonable and violated the dictates of *N.J.S.A. 40:55D-52(d)*.

7. The Board's conclusory statement in its June 17, 2019 Resolution of Denial that the Plaintiff did not diligently pursue the required Permits efforts is not

supported by the record. Sufficient proof of reasonable diligence was presented and the Board's contrary finding was arbitrary, capricious and unreasonable.

8. As more particularly set forth in Count One above, the reasons given by the Board for denying the requested extension were legally insufficient.

9. The Plaintiff did demonstrate reasonable diligence in the pursuit of the required State permits thus satisfying the requirements of *N.J.S.A. 40:55D-52(d)* which *requires* the Board to grant a reasonable extension of time to perfect the Site Plan Approval and get the benefit of the protection afforded a developer by *N.J.S.A. 40:55D-52(d)*.

10. Under the circumstances the Plaintiff was entitled to the requested Extension and the Board's denial of the Extension was arbitrary, capricious and unreasonable and should be set aside.

WHEREFORE, Plaintiff demands Judgment on this Count:

1. Declaring that the denial of Plaintiff's Application for an extension of time to complete the perfection of its Final Site Plan Application and thus extend the protection against superseding zoning changes provided for in the M.L.U.L. is invalid and of no further force or effect.

2. Directing the Board to grant the Application for a period of one year from the date of the Judgment.

3. If the Court determines that the proofs presented did not adequately demonstrate reasonable diligence, the Court is requested, in the interest of justice, to remand the matter to the Board for the presentation of additional proofs

including the facts and circumstance set forth herein, and directing the Board to reconsider Plaintiff's Application based upon the additional proofs.

4. For such other relief as the Court may find to be appropriate.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for the Plaintiff

By: s/ Martin Newmark
Martin Newmark, Esq.

Dated: August 7, 2019

CERTIFICATION PURSUANT R. 4:5-1

I hereby certify that I know of no other party who should be joined in this action, that the controversy is not the subject of any other action pending in any other court or arbitration proceeding and that no other action or arbitration is contemplated against these parties.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for the Plaintiff

By: s/ Martin Newmark
Martin Newmark, Esq.

Dated: August 7, 2019

CERTIFICATION REQUIRED BY R. 4:69-4

I hereby certify that I have made arrangements to provide the court and counsel the transcripts of the proceedings before the Planning Board of the Borough of Red Bank. I understand that if this certification is willfully false I am subject to punishment.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for the Plaintiff

By: s/ Martin Newmark
Martin Newmark, Esq.

Dated: August 7, 2019

EXHIBIT A

Resolution No. 2017 - 08

**RESOLUTION OF THE PLANNING BOARD
OF THE BOROUGH OF RED BANK
COUNTY OF MONMOUTH, STATE OF NEW JERSEY**

**(Granting Preliminary & Final Major Site Plan
Approval with Bulk C Variances)**

**Block 1, Lots 1
80 Rector Place
Application Number P 10489
RBank Capital, LLC
(Hampton Inn & Suites)**

WHEREAS, the Planning Board of the Borough of Red Bank is empowered, pursuant to the Municipal Land Use Law, *N.J.S.A. 40:55D-1*, et seq., to hear and determine applications for development and variances under certain specific conditions; and

WHEREAS, the applicant, RBank Capital, LLC, (Hampton Inn & Suites) has filed with the Planning Board Secretary an application for preliminary and final major site plan approval with Bulk C variances, for premises commonly known as 80 Rector Place, Red Bank, New Jersey, also known as Block 1, Lot 1 on the official tax map of the Borough of Red Bank, in order to construct a 76 room, 6 story hotel along with associated uses site improvements; and

WHEREAS, the applicant has provided due notice to the public and all surrounding property owners as required by law and has caused publication in a newspaper in general circulation in the Red Bank area in accordance with the requirements of the Municipal Land Use Law, *N.J.S.A. 40:55D-1 et. seq.*, this Board gaining jurisdiction thereunder; and

WHEREAS, the within matter was heard at regularly scheduled public hearings of the Planning Board and all interested parties wishing to be heard were given an opportunity to be heard; and

WHEREAS, the Planning Board, having considered the application, testimony of the applicant, exhibits submitted and the opinions of the Planning Board Engineer, makes the following findings of facts and conclusions:

1. The subject property is located in the WD Waterfront Development Zone, containing frontage along NJ State Highway Route 35 and Rector Place, bordered on the north and the west by the Navesink River and to the south by a residential one-family home situated in a different zoning district.
2. The subject property consists of lot area 45,385 sq. ft. where the zone requires 30,000 sq. ft. for the proposed use.
3. Additionally, the zoning requirements necessitate a minimum frontage of 200 feet where 428 feet of frontage exists along State Highway 35 and Rector Place
4. The site is encumbered with a public access easement along the riverfront which will be improved as part of the application. The existing site contains three (3) ingress and egress points situated along its frontage due to its historical use as a gasoline station.

5. The application is for a hotel which is permitted in the WD Zone.
6. The applicant proposes to construct a 76 room, six story Hampton Inn and Suites Hotel with associated amenities which will include an outdoor swimming pool, deck area, breakfast area, conference rooms, on-site parking and boardwalk along the riverfront also open to the public.
7. The Board reviewed the nature of the hotel use, being a business traveler use, which amenities do not include a restaurant or bar, nor accessory uses such as banquet facilities or large conference rooms. This hotel is essentially a business traveler orientated hotel serving a buffet breakfast in the morning, providing modest size meeting rooms on site to be utilized only by the hotel guests and not to be made available for non-guest functions. The Board also considered the testimony of the applicant stating that the typical occupancy rate for this type of hotel is somewhere between 70% to 80% of the total guest rooms.
8. The application initially required variances for the following deficiencies: parking spaces where 78 spaces are required and 75 are proposed; minimum required front yard setback of 35 feet where .05 feet are proposed; minimum required rear yard setback of 25 feet where 16.25 feet is provided; minimum required distance from a flood hazard area of 35 feet where 24.13 feet is proposed; maximum permitted height of 75 feet where 82.4 feet is proposed; maximum number of wall signs where 1 sign is permitted and 2 signs are proposed; maximum permitted sign height of 20 feet where 71 feet is proposed; shape, height, length and graphic content and area of proposed ground sign; internal illumination of ground sign is proposed where internal illumination is not permitted; off-street loading space is required by Ordinance but not provided/proposed by the applicant.
9. This application was presented in 2011, but no further action was taken on the original application due to litigation by objectors and various revisions that took place in the Red Bank Zoning Ordinance. As a result, the application was subsequently submitted to the Board as a new application based upon current Ordinances and new testimony.
10. The applicant produced the following witnesses: Larry A. Cohen, a principal of the applicant, as to hotel operations, and expert testimony from Jason L. Fichter, PE, as to civil engineering, Gary Dean, PP, as to traffic engineering, Lewis Silverstein, as to architecture, Peter Ritching, as to environmental conditions, and Roy DeBoer, as to planning testimony.
11. Public hearings were conducted; in this matter before the Planning Board on November 21, 2016, December 19, 2016 and February 6, 2017.
12. Questions were raised by the applicant's attorney concerning the standing of an objector which the applicant characterized as a competitor to the Hampton Inns & Suites. This issue was raised at several hearings and the objector's attorney produced a Lease indicating that the objector had leased an office on Broad Street in Red Bank. Although questions were raised as to the genuineness of the objector's 'Red Bank location', the Board determined that it was not in a position to rule on the merits of the objectors' standing, it being the focus of the Planning Board to resolve and rule on zoning and planning issues rather than the motives and purpose of an objector.

13. The applicant presented extension testimony as to the design of the proposed hotel and the limitations of the proposed site that generated the need for several variances.
14. Testimony was presented that decades prior to the current Zoning Ordinance the site contained a modest hotel. In more recent times, the property was developed as an Exxon gas station and functioned as such for several years before it was closed. As of the time of the hearings the site remains a vacant gasoline and service station and has remained in such a vacant state for many years.
15. Testimony was produced that there was certain environmental contamination which occurred as a result of leakage during the time that the gasoline station was in operation. As a result, remediation took place and the owners of the subject property, Exxon, entered into certain agreements including the imposition of a deed restriction prohibiting the use of the property for residential development.
16. The applicant's engineer, Jason L Fichter, testified that the premises was approximately one acre in size and that the proposed building would consist of six floors with floors one and two utilized primarily for public space with guest rooms located on floors three through six. A canopy and drop off area would be located in front of the building, and the height of the canopy would be 13.5 feet in accordance with the request of the Fire Department in order to pass emergency and fire equipment under the canopy.
17. Testimony was produced that the Hampton Inns organization requires franchisees to provide a minimum of 76 rooms and therefore to accomplish that number of rooms, a six floor hotel would be necessary.
18. Mr. Fichter indicated that although 75 feet of height is permitted by the Ordinance the method of measurement results in the building being 82.4 feet in height.
19. The Ordinance also requires 78 parking spaces where 75 are proposed, 51 of those spaces are 9' x 18' whereas 24 are 8' x 16' for compact cars.
20. Testimony was produced that the maximum number of employees would be six with only two members working the midnight shift. The parking calculation required one parking space per three employees but it was expected that the occupancy rate would be no more than 80% thereby requiring no more than 64 parking spaces on site.
21. The applicant is proposing twenty-four (24) compact stalls or approximately thirty-two (32%) percent of the total parking stalls provided on-site, which the Board found adequate under the circumstances, due to the nature of the use and the applicant's willingness to provide appropriate signage designating the compact vehicle parking. The Board also found that the majority of the parking stalls, being forty-seven (47), were full-size stalls in compliance with the Ordinance.
22. Questions by the Board members concerning the possibility of underground parking were answered by the applicant by indicating that the Exxon deed restriction dictated that no underground parking was permissible and therefore the applicant is proposing surface parking spaces.

23. The Board determined that, based upon the above and the concurrence of the Board Engineer of such existing study as set forth in his review letter of September 30, 2016, there was adequate parking on site as proposed by the Applicant, and the resulting three (3) parking space deficiency (75 spaces provided where 78 spaces required) was minor in nature, and the resulting deficiency of three (3) spaces would not have a substantial negative impact upon the hotel site or present any negative vehicle parking issues offsite.

24. The Applicant also provided the required Americans with Disabilities Act "ADA" parking requirements for the site, where there would be four (4) barrier free stalls for purposes of compliance with "ADA" regulations.
25. Discussions were held concerning the boardwalk which would be located in the public easement and the possibility of extending the boardwalk to the end of the applicant's property. The applicant indicated that there were some issues with the adjoining neighbor who was not in favor of extending the boardwalk to his property which continues to be a traditional residential use.
26. Gary Dean, PE, PP, was sworn in as the applicant's traffic expert. The Board and the public were concerned with the movements onto Route 35 as the location is immediately after the Navesink River (Coopers) Bridge which as a matter of practice results in relatively high speed traffic coming off the bridge into Red Bank heading south. This is further complicated by a traffic light located at the southern part of the applicant's property; said traffic light often causes back up traffic along the Route 35 frontage of the applicant's property.
27. The left turn into the property was questioned repeatedly by a number of the members of the Planning Board, it being their experience and local knowledge that such a proposal would be dangerous and inappropriate. The applicant did provide that there would be no left turn out of the property and patrons and activity existing the property intending to head north on Route 35 would be forced to head south and go through a number of left turns and circulation onto other streets in Red Bank.
28. A great deal of discussion took place concerning left turns into the subject property by cars heading north on Route 35 towards Middletown. The applicant and the applicant's expert testified that such movement would be appropriate by the creation of a painted left turn stacking lane in the north bound lane of Route 35 right before the Cooper Bridge.
29. A question arose as to whether the Board could prohibit the left turn into the property if Route 35 was under the jurisdiction of the New Jersey DOT. The Board took the position that the design would ultimately be subject to the approval of the DOT, but that the Board did have jurisdiction to question, on the basis of safety and design access, the issue of whether a left turn into the premises from Route 35 heading north was appropriate and a safe design.
30. Pete Ritching was sworn in as the applicant's environmental consultant. Mr. Ritching explained that the site had been remediated and that such remediation had been completed and that the soil was clean. He further testified that there was approximately 5,000 sf of ground water contamination still remaining but that the cleanup would occur over a period of roughly 21 years. There are currently four wells on the property which, because of the design of the hotel would have to be relocated. Testimony revealed that Exxon commonly placed restrictions on the use of property through deed restrictions although they were not necessarily required by the DEP or the projections as to any damage remaining after remediation.
31. Lewis Silverstein, the architect for the applicant testified as to various features inside the hotel and noted that the parking garage would be located at elevation 20 feet and

that the building measured 61.3 feet, but there is a 30 inch parapet. For these reasons, and the location, the building required an additional variance for height as it could not meet the 75 maximum allowable height and still contain six stories and the Fire Department's requirement for a 13.5 foot clearance at the canopy and drop off area. The variance remained a C variance as it remained under the 10% limitation, which had it been exceeded, would have required the applicant to apply to the Board of Adjustment for a variance under *N.J.S.A. 40:55-70(d)*.

32. The Applicant also addressed as part of its site plan application, demolition of existing structures, relocation of ground water monitoring wells, ingress and egress to the site, internal circulation, emergency services access to the site, improvements to the waterfront area and public access easement area, landscaping, lighting, signage, storm water management issues, soil disturbance, sanitary sewerage, drinking water, trash removal, off- site and off-track improvements.
33. The Board finds that the property is bordered by State Highway 35 and Rector Place and the Navesink River and is of a unique shape being triangular and constrained by environmental conditions both from the standpoint of prior contamination due to the prior operations of Exxon Mobil and environmental issues associated with its location in close proximity to the Navesink River flood hazard area and slopes.
34. In light of the above, the Board determines that the applicant has substantially complied with the Site Plan Ordinance and the design waivers requested by the applicant associated with the site plan are reasonable due to the constraints imposed upon the property by its shape, size, location and existing conditions, to present a hardship and practical difficulties in the development of site for this permitted purpose.
35. The Borough Development Ordinance in this Zoning District does not provide for architectural design criteria. However, the Board did request the Applicant provide more brick face to the northern façade of the building to provide more architectural elements to the building which the Applicant agreed to comply therewith. The Board reasoned that the architectural design and floor plan is atypical of a business traveler orientated hotel of this nature and the design of the building was in part fostered by the requirement that the first level above the parking surface be a height of 13'6", based upon the recommendation of the Fire Marshal, the unique shape of the property and the design of the hotel plaza area took advantage of the waterfront location of the subject property and provides a passive recreational area for the hotel guests. The open area under the building where the parking is situation provides a venue of openness to the river.
36. The Applicant sought the following design waivers:
 - a. Where a commercial pool should be located not less than 50 feet from the side property line, whereas the Applicant proposed 16.5 feet from the property line. The reasons associated for the granting of design waiver was that this was not necessarily a commercial pool; it is, in fact, a private pool limited to guests staying at the hotel. The pool is not large, it is essentially a lap pool with a small spa area and it is elevated above the street level and, therefore, the Board found that it would not have substantial negative impact upon

neighboring properties in light of its location adjacent to the Navesink River and the proposed buffering of the neighbor's property to the South, which neighbor John Mulvihill, owner of lot 2, appeared before the Board and did not object to the location of the pool. A literal enforcement of the Ordinance due to the size, shape and configuration of the parcel in relation to the proposed building would be impractical or exact undue hardship upon the Applicant due to the particular conditions relating to the subject property.

- b. Applicant sought a design waiver associated with the size of parking stalls, where same are to be 9' wide x 18' long, wherein the Applicant proposed 24 compact parking stalls. The Board reasoned that the number of compact parking spaces is reasonable in light of the nature and extent of the hotel operations in that there would not be a lot of daily movement in and out of the parking spaces due to the nature of the operations unlike, for example, a food store. Furthermore, the Board found that it would be more beneficial to have more parking spaces on site than less parking spaces based upon the required size of the parking stalls. The Board further considered the testimony of the Applicant's witnesses in relationship to the projected percentage of occupancy associated with the 76 room hotel, where in it projected same to be in the area of 70% to 80% which would avail to a significant amount of parking on site. For reasons stated the Board found a literal enforcement of the provisions of this ordinance would be impractical or exact undue hardship upon the Applicant because of the particular conditions pertaining to the land in question.
 - c. The Applicant seeks a design waiver for vehicle parking within the front yard area. The Board in consideration of the testimony and exhibits brought forth by the Applicant determines that parking on-site is essential and the ordinance does require 78 parking spaces. Due to the shape of the site and the inability to provide underground parking garage due to the existing environmental constraints on the site the Board determines that the Applicant is confronted with exceptional practical difficulties or a hardship in the design of the parking area and therefore it is necessary to have parking located in the front setback. The Board further finds that there will be landscaping between the State Highway 35 and the parking area which will mitigate the effect of the parking in the front setback area.
 - d. The Applicant also seeks a design waiver associated with the minimum distance of a parking stall to an entrance drive.
37. The Ordinance requires all entrance drives to extend a minimum distance of 60 feet back from the street curb or to a major access aisle. The Applicant in this instance is providing 35.34 feet from the curb line to the access aisles or the ingress/egress drive.
38. The Board has reviewed the site plan in this matter and has considered the testimony of the Applicant's witnesses. The Board finds that due to the configuration of the site, the environmental constraints and the topography and the requirement to provide adequate parking on-site that the Applicant is confronted with exceptional practical difficulties or hardship in the design of the site and therefore, literal enforcement of the ordinance would exact undue hardship on the Applicant. Furthermore, there is

nothing in the record to indicate that location of the parking stalls vis-à-vis the access drive from the highway would create a safety concern or issue. Therefore, the Board grants the design waiver set forth herein.

39. The Applicant sought the following Bulk or "C" variances from the zoning ordinance criteria:
 - a. The Applicant sought a variance from minimum front yard setback of 35 feet were Applicant was proposing .5 feet to the marquee of the building.
 - b. The Board found that the existing site contains a large canopy over the existing gasoline pumps and the canopy is located very close to the front property line. The proposed marquee will essentially be a cover over the drive-through area and would be situated also close to the property line. However, a mitigating circumstance is the fact that the actual building is set back 52.61 from the front property line which far exceeds the requirement of 35 feet. The Board found that the setback to the building from State Highway 35 of 52 feet is a benefit due to the mass of the building and the volume of traffic on the State Highway and the noise associated with such traffic volume. Therefore, the intrusion of the marquee into the front setback line is not as massive as if the mass of the building violated the front setback. Furthermore, the Board found that the marquee provides a shelter for hotel guests against inclement weather conditions and is a benefit to the overall hotel project. Lastly, the Board found that the shape and topography of the site provides practical difficulties in situating a contemporary hotel building on this unique piece of property.
 - c. The Applicant sought a variance from the required minimum rear yard setback of 25 feet for a principal structure, whereas the Applicant is providing 16.25 feet to the southwesterly lot line adjacent to lot two (2).
40. The Board finds that the property has a unique triangular shape and is bordered by public roadways being State Highway 35 and Rector Place and significant topography changes exist on the site as it slopes to the Navesink River. The Board finds that, by reason of same, the Applicant is confronted with a hardship or practical difficulties in the development of the site. The Board further finds that there is adequate buffering between the proposed hotel and the adjoining property and the property owner did not pose any objections to same. Also, the Board considered that the closest portion of the hotel building was not necessarily adjacent to the property owner's home but situated towards the open space of the adjoining lot 2.
41. The Board finds that there would be substantial benefits derived from a deviation from the zoning ordinance as the Applicant was eliminating a pre-existing nonconforming use, being a gas station which has been boarded up for many years and is, essentially, an eyesore as one enters the Borough from the north on State Highway 35 and also presents a unsightly condition to the adjoining residential neighbors.
42. The Applicant also sought variances regarding the minimal rear yard setback of 35 feet for any structure from the Navesink River flood hazard area line, whereas the

plaza level of the building is located approximately 24.13 feet within the limits of the flood hazard area line.

43. The Board finds that the relief sought herein is appropriate based upon the shape and topography of the property, which is unique in both respects.
44. The building structure as proposed contains a first level lobby area, which contains a very small surface footprint, being only 540 sq. ft., and its proposed construction is at elevation twenty (20) above mean sea level. The plaza area and a small portion of the building is approximately 13.6 feet above proposed grade which extends into the flood hazard area. The plaza area and a small portion of the building is, therefore, elevated above the ground level and does provide for adequate air, light and open space, due to the nature of the building design.
45. Additionally, by reason of the proposed building elevation, it does not subject same to potential flooding even in light of its close proximity to the Navesink River. Lastly, the Board considered the property's unique shape, topography and the impact of the flood hazard line upon the ability of the Applicant to reasonably utilize the property for a permitted use, together with the accessory structures which are required as to vehicle parking areas, and the development of the Borough public access easement area along the waterfront with a boardwalk. The Board also recognizes that the flood hazard area line does not only run through subject property but many of the properties along the Navesink River which have been developed in the past. So this is not necessarily a specific issue caused by this development but many of the properties along the river already developed have encountered conflicts between their development and the flood area hazard line. Therefore, the Board finds the relief requested by the Applicant is reasonable under the circumstances and it can be granted.
46. The hotel building structure exceeds the maximum height elevation of 75 feet to a height of 82.4-MSL; 81.3-NAVD 88, based upon the ordinance measurements from the USC&GS Datum Mean Sea Level "MSL" = 0, as opposed from the area surrounding the building that the actual height of the building structure is 62.4 feet as measured from the ground area around the building, which mitigates the effects of the height variance. Additionally, based upon the Borough's Fire Marshall's requirement that the first level or plaza level be raised to a height of 13'6" above the ground level for purposes of emergency access, the height of the building was increased to reflect the Fire Marshall's request, thus creating the height variance as so requested by the Applicant.
47. Lastly, due to the uniqueness of the site as to its shape, environmental constraints and topography, the Applicant does have limited buildable area to construct the hotel. Consequently, as a result of the constraints on the buildable area, despite the gross square footage area of the lot substantially exceeding the ordinance requirements, the Applicant had to increase the height of the building in order to make the project feasible, in light of the constraints on the property.
48. The Applicant sought further relief as to the proposed signage to be utilized at the site.

- a. The development application entailed utilization of three (3) building signs or façade signs and one (1) freestanding or a monument sign located adjacent to the entrance and exit off of State Highway 35.
- b. Consequently, the Applicant sought relief under the existing ordinances as it pertains to commercial signage.
- c. The Applicant requested relief from eight (8) areas of the sign ordinance as follows:
 - d. The ordinance permits only one (1) building sign or wall sign fronting on a public roadway, whereas the Applicant proposed a wall sign fronting on Route 35 and a second site facing the Navesink River, a third sign located on the North side of the building and a fourth sign mounted on the front of the marque facing State Highway 35.
 - e. The Applicant sought relief from the sign ordinance which requires that the permitted sign height to be within the signable area. In this case, a maximum height of signable area is 20 feet, whereas the Applicant proposed one sign on

the north facade of the building at 71.17 feet and one sign on the rear facade of the building at a height of 65.33 feet. These signs are building signs or façade signs.
 - f. The Applicant proposes a ground or highway sign known as a type G4 sign. The G4 under the ordinance must be rectangular in shape. The Applicant's sign is in the shape of an irregular hexagon (6 sides or angles) which the ordinance does not permit.
 - g. The Applicant's proposed highway sign or type G4 sign contains a proposed 40 square feet, whereas the ordinance only permits a maximum area 12.5 square feet.
 - h. The Applicant's highway sign or type G4 sign is proposed to be at the height of ten (10) feet, whereas the ordinance permits a maximum height of four (4) feet where landscaping will be used at the base of the sign.
 - i. The Applicant proposes a highway or type G4 sign of 7.75 feet in length, whereas the ordinance permits a length of five (5) feet.
 - j. The Applicant proposes internal illumination of the highway or type G4 sign, whereas internal illumination is not permitted.
 - k. The Applicant proposes a maximum sign coverage greater than 60%, whereas the ordinance permits or limits the maximum coverage of any sign face to 60%.
 - l. The Board finds that the Applicant's request for relief as to the building or façade signs is reasonable under the circumstances.

- m. As to the building or façade signs, the Board finds that the sign on the marquee facing State Highway 35 conforms with the ordinance as to the shape, size, and height of the sign.
 - n. The Board finds that the building or facade signs are at a higher elevation than the permitted signage area. However, due to the fact that there are no buildings either commercial or residential located in close proximity of the building on the west side of the property which faces the Navesink River, the sign is appropriate in light of the significant distance from the building across the river to the adjoining Municipality.
 - o. The sign does help direct motorists traveling from the Garden State Parkway through the River Plaza area of Middletown to the hotel.
 - p. The Board further the finds that the signage on the building facing southbound traffic on State Highway 35 does alert motorists to the location of the Hotel from a significant distance as a motorist would approach the State Highway 35 Bridge. It is essential at that point that the motorist maneuvers his/her vehicle to the right lane so that it may exit the Highway at a reduced speed and enter the hotel parking lot. Therefore, the Board finds that, for safety reasons, it is important that motorists be alerted early enough to make the proper vehicle movements into the site.
 - q. As to the Monument sign or the highway sign G4 sign located at the Hotel entrance, the Board finds that the sign exceeds the maximum square foot area the height and width of same and is internally illuminated. However, the Board finds that, due to the location of the proposed Hotel and the fact it is located on a highway where the speed limits are significant, there be appropriate signage to alert motorists early enough as to the location of the site to make the proper vehicle movements. The Board does note that the property is somewhat offset or skewed and therefore some visibility issues exist as one drives southbound on the bridge due to the alignment of the bridge and highway. This is an existing condition of the bridge and highway as so situated.
 - r. The Board further finds that the shape of the sign and internal illumination of the highway sign is an insignificant deviation from the Ordinance and is aesthetically pleasing and provides proper identification of the location of the site in the evening hours.
 - s. The Applicant sought further relief as to the ordinance requirement to provide off street loading spaces. The Applicant does not pose any offstreet loading due to the nature of the operations.
49. The Board considered the testimony of the operations representative regarding the nature of deliveries to the site and the pickup of trash at the site.
50. The Applicant testified through its operations manager Lawrence Cohen that the site contains 76 sleeping rooms and not contain a restaurant, bar or banquet facility. The restaurant will serve guests a buffet breakfast. Deliveries to the site by trucks will

essentially be for delivery of breakfast food items in the morning and the pickup of trash. There is a laundry service on site in-house and the only time laundry would be delivered would be when new linens or towels would be ordered.

51. Due to the nature of the business traveler type hotel there would not be large trucks traveling to the site. Furthermore, the trash is located in an interior storage room, where the staff will roll out the dumpsters for pick up to a private trash hauler.
52. In light of the testimony and review of the plans, the Board determines that there is no necessity for an off- street -loading area and, therefore, sees no negative impact to the site or to neighbors by reason of not having a offstreet loading area and therefore determines that same is not necessary.
53. For the reasons set forth above, the Board finds that the Applicant has established by the preponderance of evidence sufficient proofs for the granting of the variances under and NJSA 40:55D-70.c.(1). The property is triangular in shape and bounded by two public roadways being Rector Place and State Highway 35. The site is also bounded by the Navesink River and a residential parcel of property to the south.
54. The site also is constrained due to environmental conditions associated with slopes and floodplain.
55. The site further contains constraints associated with environmental conditions due to the site's prior utilization as an active gasoline service station.
56. By reason of the above the Board finds that the strict application of the ordinances will result in peculiar and exceptional practical difficulties to, or exceptional undue hardship upon the developer of the property and grants the variances to relieve such difficulties or hardships.
57. The Board also finds that the Applicant demonstrated by the preponderance of the evidence sufficient proofs to meet the criteria under NJSA 40:55D-70.c.(2).
58. The Board finds the purposes of the Municipal Land Use Law will be advanced by deviation from the zoning requirements and that the benefits derived will substantially outweigh any detriment.
59. The Board finds that this application will eliminated a pre-existing nonconforming use, being a gas station, and, therefore, provides an opportunity for the Borough to have a use that is a permitted use in the zone.
60. The development of the property will also eliminate a long-standing eyesore, (a boarded up gas station) which has existed for many years situated at a major intersection on the north side of the Borough.
61. The development of the site will be a benefit to the Borough in that the public access easement along the Navesink River will be developed into a boardwalk for public access purposes and provide area for passive recreation for Borough residents.

62. Furthermore, the deteriorated bulkhead along the waterfront will be replaced with a new bulkhead or similar type structure that's creating a safer and pleasing environment and will stop the erosion of soil into the Navesink River.
63. The development of the site will eliminate three (3) existing ingress and egress points off the highway to the site which present safety concerns to the Board.
64. The Applicant proposes elimination of the three (3) ingress and egress points replacing same with one ingress and egress point on the north side of property which the Board believes is the safest point for ingress and egress to and from the site.
65. The Board further finds that this approval will not substantially impair the intent and purpose of the zone plan and zoning ordinance in that the proposed use is a permitted use and that the variances requested by the Applicant are not substantial in light of the constraints imposed on the property by its location, shape, topography, and existing environmental conditions. The Board further notes that the majority of the variance relief requested was signage to be utilized at the site, that the parking variance was de minimus in nature, the height variance was driven by the inability to provide underground parking at the site and request by the fire marshal that the first level be raised to a height of 13' 6" which resulted in the height of the building being increased, necessitating the variances.
66. The Board also considered in its deliberation the objections imposed by CT95-CT07 200 Park Avenue LLC, located at 57 Board Street, Red Bank, New Jersey, represented by Ronald Gasiorowski, Esq.
67. As represented by Ronald Gasiorowski, Esq., the Objector leases a business office at 54 Board Street, Red Bank, and is in the hotel business located outside the Municipality of Red Bank. The Board afforded the Objector standing.
68. The Objector produced Alexander Litwornia, P.E., who specializes in the area of traffic engineering.
69. Mr. Litwornia's testimony encompassed various points associated with ingress and egress to the site, traffic volume, and site circulation.
70. The Objector's engineer's testimony surrounded concerns regarding left-hand turns into the site as being unsafe.
71. However, the issue became moot when the Applicant agreed not to seek a left-hand turn into the site for northbound traffic on Highway 35.
72. The Objector's engineer also cited the fact that the traffic volume counts for State Highway 35 collected by the Applicant's Traffic engineer Gary Dean, PE, were several years old and, therefore, should not be considered by the Board as accurate. However, the Objector's engineer failed to account for or review the Applicant's amended traffic study dated December 16, 2016 being a current study analysis, showing consistent traffic volume during peak hours from 2009 to December, 2016

73. Lastly, the Objector's engineer testified as to the on-site vehicle circulation as being unsafe and the on-site parking was inadequate based upon the three (3) space deficiency and the number of compact spaces. However, the Objector's expert did not offer any specifics other than, in his opinion, that the first several parking spaces as one entered into the site would cause conflict with vehicles entering off the highway. Furthermore, the study of the Objector's engineer referenced as to adequate parking on site was an antiquated study conducted many years ago and did not convince the Board that the Institute of Transportation Engineers study as cited by both the Board Engineer and the Applicant's Traffic Engineer was flawed as to the suggested vehicle parking spaces necessary for a hotel of this nature.
74. The Board considered the Objector's engineer's testimony and rejects same and determines that the site substantially complies with the Borough Site Plan Ordinance and the design takes into consideration adequate safety measures for site ingress and egress, and on-site vehicle and pedestrian circulation.
75. The Objector also produced Peter Steck, a Professional Planner who was retained by the Objector and testified that the adjoining residential properties to the south are in the same zoning district as the hotel site. The Board finds this is not accurate, although some maps wrongly indicated the Zone. He further testified that the lights provided on site cause pollution. However, the Board finds Applicant meets the Borough's lighting standard as to the required foot-candle for the parking lot area.
76. Mr. Steck further opined that the site could be better used for other permitted uses, like an office building. However, he failed to offer any evidence, nor was there any traffic engineer's testimony offered by the Objector as to the volume of traffic at peak hours which would be generated by an office building or what the size of the office building would be, if so proposed. Furthermore, this hotel use is a permitted use, which the Governing Body has during contemplation of preparation of the zoning ordinance considered the location of the property and the surrounding road network in formulating the permitted uses for this zoning district.
77. The Objector's Planner determined that parking garages are troublesome and highly visible. However, he did not acknowledge that accessory parking garages are permitted in the zone.
78. Furthermore, the Objector's Planner testified that the height of the building exceeded the permitted height and that it was substantial. However, the height variance sought is a "C" or bulk variance and not a use or d.6 under NJSA 40:55D-70.d.6 variance which is essential how the Municipal Land Use Law "MLUL" differentiates height variances being either "c" variances or "d" variances. It is the Board's findings that the height variance is not a substantial deviation from the ordinance and is justified under the circumstances as expressed elsewhere herein.
79. The Objector's expert also opined that the signage as proposed by the Applicant was not appropriate for the site. However, the Objector's expert did not consider the location of the site in relationship to the road network and surrounding areas. The Board considered the expert's testimony; however, the Board rejects same and finds the signage under the circumstances appropriate.

80. The Objector's Planner also rendered his opinion that the variances as to setback were not justifiable as the lot greatly exceeds the lot size required by the Ordinance. However, he did not adequately take into consideration the property's unique constraints as to shape, location, topography or the substantial benefits the Borough will receive by reason of this development and, therefore, the Board considered the expert's testimony but rejects same regarding the granting of the "c" variances.

NOW THEREFORE BE IT RESOLVED BY the Planning Board of the Borough of Red Bank that the application of RBank Capital, LLC to construct a Hampton Inn business hotel be approved. subject to the following conditions:

1. A left turn entrance for vehicles traveling north on Route 35 shall be prohibited and the entrance design to the hotel on Route 35 shall be revised so as to prohibit the left turn in movement.
2. Subject to compliance with the recommendations of the Board Engineer's letter of September 30, 2016 and subsequent revisions which are incorporated herein by reference
3. Subject into the applicant's entering into a Developer's Agreement with the Borough of Red Bank concerning, but limited to, issues of construction, maintenance and control of the public right of way along the river.
4. Subject to the revision of the architectural plans to show the additional brick face to the northern facade of the building to provide more architectural elements to the building.
5. The action of the Planning Board in approving this application shall not relieve the applicant of responsibility for any damage caused by this project, nor does the Planning Board of Red Bank or its reviewing professionals and agencies accept any responsibility for the structural design of the proposed improvements or for any damage that may be caused by the development.
6. All representations made under oath by the applicant or his agents shall be deemed conditions of this approval, and any misrepresentations or actions by the applicant contrary to the representations made before the Board shall be deemed a violation of this approval.
7. This application is granted only in conjunction with the conditions noted herein and but for the existence of the same, the within application would not be approved.
8. The applicant shall comply with the Planning and Development Regulations of the Borough of Red Bank, to the extent that it is consistent with this Resolution, and shall comply with the requirements of the Construction Code and the Fire and Health Code Officials.
9. If applicable the applicant shall be required to comply with and/or provide an Affordable Housing Growth Share requirement in accordance with Borough Ordinances 2005-45 and 2005-46 and any other related/associated Borough Ordinances.

10. Subject to any and all other Municipal, County, State or Federal regulations as they may apply.
11. Subject to the payment of any and all taxes and professional fees.
12. The applicant must publish adequate notice of this Resolution in the official newspaper of the Borough of Red Bank at their sole cost, within thirty days of this Resolution and provide proof of publication.

NOW THEREFORE, BE IT FURTHER RESOLVED that the Board Secretary attend to the publication of the within Resolution by reference in the local official newspaper within 10 days of the Board adopting said Resolution.

The foregoing was Moved by Barbara Boas

Seconded by Councilman Whelan and on Roll Call, the following vote was

recorded:

Affirmative: Barbara Boas, Juanita Lewis and Councilman Whelan

Abstentions: None

I, Dina Anastasio, Secretary to the Planning Board of the Borough of Red Bank, do hereby certify that the foregoing is a true copy of a Resolution adopted by the Planning Board of Borough of Red Bank at its regular meeting held on May 1, 2017.



Dina Anastasio, Secretary
Planning Board

EXHIBIT B

Resolution No. 2019 - 13

RESOLUTION OF THE PLANNING BOARD
OF THE BOROUGH OF RED BANK
COUNTY OF MONMOUTH, STATE OF NEW JERSEY

(Denial of Application for Extension)

Block 1, Lot 1
80 Rector Place
Application Number P10489
RBank Capital, LLC

WHEREAS, the Planning Board of the Borough of Red Bank is empowered, pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq., to hear and determine applications for development and variances under certain specific conditions; and

WHEREAS, the applicant, RBank Capital, LLC, has filed with the Planning Board Secretary an application to extend the statutory time period for a major site plan approval with bulk C variances, for premises commonly known as 80 Rector Place, Red Bank, New Jersey, also known as Block 1, Lot 1 on the official tax map of the Borough of Red Bank, in order to construct a 76 room, 6 story hotel; and

WHEREAS, the application for extension was heard at the regular April public meeting of the Planning Board where testimony was taken and any interested party was given the opportunity to be heard; and

WHEREAS, the Planning Board having considered the application and testimony makes the following findings of fact and conclusions;

1. The Applicant initially proposed to build a six story hotel on the subject site as far back as December, 2010.
2. The subject site is at the northern entrance to the Borough of Red Bank and has been occupied for over a decade by an abandoned gasoline service station and as such continues to be an unsightly and unkempt eyesore at the Borough entrance.
- 3, The application encountered numerous difficulties as there were questions concerning whether or not the hotel use was permitted at the subject sight.
4. The Applicant was accommodated through ordinance revisions to clarify the proposed use both as to the hotel use and the questions concerning building height.
5. The basic site plan and proposal has in concept remained unchanged for almost 9 years.
6. The application was delayed by litigation concerning the ordinance revisions, but the ordinances were upheld by the Superior Court.

7. Preliminary and final site plans were submitted dated July 12, 2016.
8. After full hearings the application was approved although the proposal represented difficult traffic issues and impacted environmentally sensitive areas since the site was along-side the Navesink River.
9. The approval by Resolution of May 1, 2017 required the further approval of the New Jersey Department of Transportation as the site was located on State Highway Route 35 and the New Jersey Department of Environmental Protection as it impacted the Navesink River and its banks.
10. Throughout the hearings and prior to the passage of the application, testimony was presented by the Applicant to the Board indicating that issues with the Department of Transportation and the DEP had been on going and the impression was left that generally speaking the proposed site plan as proposed would shortly receive approvals from said agencies.
11. Many of the reasons for granting the variances required for this site plan passage centered on the need to remove a serious eyesore from the site, at the northern entrance to the Borough.
12. Throughout the 2-year statutory protection period afforded by N.J S.A. the Applicant was given substantial opportunity to seek the approvals of the outside State Agencies. The general outline of the project was known to the Applicant for a period of almost 7 years prior to the May 1, 2017 approval.
13. The public hearing at the April, 2019 Planning Board Hearing revealed that the Applicant had not been diligent in pursuing its DEP and DOT approvals. In fact, it was revealed that after almost 2 years of waiting the Applicant was first applying again to the agencies for approval after determining that the original applications were being denied.
14. The Applicant presented no testimony to demonstrate that it had been diligent in pursuing the necessary outside approvals.
15. It was revealed that throughout the process involving the subject lot going back to the initial proposal in 2010 that the site was poorly maintained and in fact remained in an unsightly condition throughout the approval process. Even on the eve of the Applicants request for an extension the property remained overgrown and unsightly,
16. The Borough is presently in the process, due in part to the slow movement of the Applicant in meeting the conditions of the approval, to reconsider and possibly adopt redevelopment proposals for the northern portions of the Borough along and near the Navesink River. Redevelopment is necessary due to the conditions of the subject site as well as to fulfill other Borough obligations for affordable housing and redevelop recently vacated structures in the same zoning districts.

17. It is the Planning Boards conclusion that the Applicant has had a substantial period of time to complete the application process and the Borough should not and cannot continually delay the upgrading of the entire area due to conditions that existed 10 years ago but now have changed.
18. For the reasons set forth above and for good planning considerations the application for an extension of the time period under N.J.S.A. 40:551)-52 must be denied.

NOW THEREFORE, BE IT RESOLVED by the Planning Board of the Borough of Red Bank on this 6th day of May, 2019, that the application of RBank Capital, LLC be denied.

NOW THEREFORE, BE IT FURTHER RESOLVED that the Board Secretary attend to the publication of the within Resolution by reference in the local official newspaper within 10 days of the Board adopting said Resolution.

The foregoing was Moved by Barbara Boas

Seconded by Lou DiMento

and on Roll Call, the following vote was
recorded:

Affirmative: Mike Ballard, Lou DiMento, Barbara Boas and Dave Cassidy.

Negative: None

Abstentions: None

I, Dina Anastasio, Secretary to the Planning Board of the Borough of Red Bank, do hereby certify that the foregoing is a true copy of a Resolution adopted by the Planning Board of Borough of Red Bank at its regular meeting held on June 17, 2019.


Dina Anastasio, Secretary
Planning Board

Civil Case Information Statement

Case Details: MONMOUTH | Civil Part Docket# L-002766-19

Case Caption: RBANK CAPITAL, LLC VS PLANNING
BOARD OF RE D BA

Case Initiation Date: 08/07/2019

Attorney Name: MARTIN M NEWMARK

Firm Name: PORZIO BROMBERG & NEWMAN PC

Address: 100 SOUTHGATE PKWY PO BOX 1997
MORRISTOWN NJ 079621997

Phone: 9735384006

Name of Party: PLAINTIFF : RBank Capital, LLC

Name of Defendant's Primary Insurance Company
(if known): None

Case Type: ACTIONS IN LIEU OF PREROGATIVE WRITS

Document Type: Complaint

Jury Demand: NONE

Is this a professional malpractice case? NO

Related cases pending: NO

If yes, list docket numbers:

**Do you anticipate adding any parties (arising out of same
transaction or occurrence)?** NO

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

Do parties have a current, past, or recurrent relationship? NO

If yes, is that relationship:

Does the statute governing this case provide for payment of fees by the losing party? NO

**Use this space to alert the court to any special case characteristics that may warrant individual
management or accelerated disposition:**

Do you or your client need any disability accommodations? NO

If yes, please identify the requested accommodation:

Will an interpreter be needed? NO

If yes, for what language:

Please check off each applicable category: Putative Class Action? NO

Title 59? NO

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with *Rule 1:38-7(b)*

08/07/2019
Dated

/s/ MARTIN M NEWMARK
Signed