“Crib Sheets” for Determinations that Can Be Made and Relief that Can Be Granted by a Zoning Board of Adjustment

Prepared by Jonathan E. Drill, Esq.
jdrill@sksdlaw.com

Stickel, Koenig, Sullivan & Drill
571 Pompton Avenue
Cedar Grove, NJ 07009
973-239-8800

December 22, 2019

1. Certify and Interpret Nonconforming Uses

The Board has the power pursuant to N.J.S.A. 40:55D-68 to "certify" that a "nonconforming use or structure . . . may be continued upon the lot or in the structure so occupied" if the "use or structure existed before the adoption of the ordinance which rendered the use or structure nonconforming." The Board also has the power pursuant to N.J.S.A. 40:55D-70b to "decide requests for interpretation of the zoning map or zoning regulations or for decisions upon other special questions upon which the board is authorized to pass." The question of whether a use is a lawfully created pre-existing nonconforming use entitled to continue is a special question upon which the Board is authorized to answer. Our courts have held that where there has been a lawfully created pre-existing nonconforming use on a property, the use that is entitled to continue on the property is not limited to the identical use that pre-existed the ordinance which rendered the use nonconforming. Bonaventure Intern., Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 433 (App. Div. 2002). As the Bonaventure court held, a "prior nonconforming use is ordinarily restricted to its character and scope at the time the ordinance making it a nonconforming use was enacted" but, significantly, "[t]he issue is whether the present use is substantially similar to the use which existed at the time of adoption of the zoning ordinance, or whether there has been an illegal expansion of the use." Id. at 432-433.

The factors to consider in determining whether the present use is substantially similar to the use which existed at the time of adoption of the zoning ordinance, or whether there has been an illegal expansion of the use, are the nonconforming use's "character, extent, intensity and incidents." Id. at 433. "If the present use is substantially similar to the use at the time it became nonconforming, it will be permitted to continue." Id. The burden of proving the existence of a nonconforming use is on the party asserting it. Id. at 432. Finally, as to any claim that the nonconforming use or structure has been abandoned, the "traditional" or so-called "subjective" test for abandonment established by our courts requires the concurrence of two factors: (1) an intention to abandon the nonconforming use or structure; and (2) some overt act or failure to act which carries a sufficient implication that the owner neither claims nor retains any interest in maintaining the nonconforming use or structure as a nonconformity entitled to continue. S&S Auto Sales, Inc. v. Stratford Zoning Board of Adj., 373 N.J. Super. 603, 613 (App. Div. 2004). An objector must come forward with sufficient evidence of abandonment and, if and only if he does, then the applicant bears the ultimate burden to prove that the use or structure was not abandoned. Berkeley Square Association v. Trenton Zoning Board of Adj., 410 N.J. Super. 255, 269 (App. Div. 2009). Finally, because a nonconforming use is a valuable property right, abandonment does not occur upon mere temporary non-use, temporary inability to find a new owner or tenant, or transfer of ownership or commencement of a new tenancy. S&S Auto Sales, 373 N.J. Super. at 614. "Mere passage of time during a cessation of active use does not constitute abandonment." Id. at 617.

2. "C(1)" or "Hardship" Variances

1. The Board has the power to grant "c(1)" or so-called "hardship" variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(1) where:

> "(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, (b) or by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or (c) by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structure lawfully existing thereon,
>
> the strict application of any regulations...would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of such property."

Comments: Note that the determination of whether a lot is a "specific piece of property" within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone. If all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. See, Beirn v. Morris, 14 N.J. 529, 535-536 (1954). Further note that the hardship that the applicant must prove is not inutility – that without the variance the property would be zoned into inutility. While inutility caused by a zoning regulation would require a variance to avoid an unconstitutional taking of the property, the Board may (but is not required to) grant a variance where the hardship at issue may inhibit "the extent" to which the property can be used. See, Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). Finally, note that a hardship variance is not available for intentionally created situations as constituting "self-created" hardship, See, Commons v. Westwood Board of Adj., 81 N.J. 597, 606 (1980); Chirichello v. Monmouth Park Board of Adj., 78 N.J. 544, 553 (1979), and/or for mistakes, See, Deer-Glen Estates v. Borough of Fort Lee, 39 N.J. Super. 380, 386 (App. Div. 1956). Neither is a hardship variance available to relieve "personal hardship" of the owner, financial or otherwise. Jock v. Wall Township Zoning Board of Adj., 184 N.J. 562, 590 (2005).

2. The Board may not exercise its power to grant a "c(1)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted

> without substantial detriment to the public good and
>
> will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

3. "C(2)" or "Benefits v. Detriments" Variances

1. The Board has the power to grant "c(2)" or so-called "benefits v. burdens" variances from zoning ordinance regulations pursuant to N.J.S.A. 40:55D-70c(2) where:

> "in an application or appeal relating to a specific piece of property
>
> the purposes of [the MLUL] would be advanced by a deviation from the zoning ordinance requirements and
>
> the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment."

Comments:

Note that the determination of whether a lot is a "specific piece of property" within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone. If all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. Beirn v. Morris, 14 N.J. 529, 535-536 (1954).

Note further that the zoning benefits resulting from permitting the deviation(s) must be for the community ("improved zoning and planning that will benefit the community") and not merely for the private purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). The Appellate Division has held that the zoning benefits resulting from permitting the deviation(s) are not restricted to those directly obtained from permitting the deviation(s) at issue; the benefits of permitting the deviation can be considered in light of benefits resulting from the entire development proposed. Pullen v. South Plainfield Planning Board, 291 N.J. Super. 1,9 (App. Div. 1996). However, the Supreme Court has cautioned boards to consider only those purposes of zoning that are actually implicated by the variance relief sought. Ten Stary Dom v. Mauro, 216 N.J. 16, 32-33 (2013).

Finally, note that, while "c(1)" or so-called hardship variances are not available for self-created situations and/or for mistakes, our courts have not held that an intentionally created situation or a mistake serves to bar a "c(2)" variance because the focus of a "c(2)" variance is not on hardship but, rather, on advancing the purposes of zoning. Ketcherick v. Mountain Lakes Board of Adj., 256 N.J. Super. 647, 656-657 (App. Div. 1992); Green Meadows v. Montville Planning Board, 329 N.J. Super. 12, 22 (App. Div. 2000). Significantly, however, a "c(2)" variance can be denied where it does not provide a benefit to the community and would "merely alleviate a hardship to the applicant which he himself created." Wilson v. Brick Twp. Zoning Board, 405 N.J. Super. 189, 199 (App. Div. 2009).

2. The Board may not exercise its power to grant a "c(2)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted

without substantial detriment to the public good and

will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in N.J.S.A. 40:55D-70 means the master plan. Medici v. BPR Co., 107 N.J. 1,4,21 (1987).

4. "D(1)" Use or Principal Structure Variances

1. The Board has the power to grant "d(1)" variances to permit non-permitted uses and/or non-permitted principal structures pursuant to N.J.S.A. 40:55D-70(1) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(1)" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons."[1] Medici v. BPR Co., 107 N.J. 1 (1987). Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. Id. The benefit to the general welfare from a typical non-inherently beneficial use, however, derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed. Id. Thus, in a typical non-inherently beneficial use application, the standard the Board must employ to determine whether special reasons have been proven is whether the proposed use will promote the general welfare and whether the development of the property is particularly suited for the very use proposed. Our courts held that proof that a site is particularly suited for a proposed use does not require a demonstration that there are no other viable locations for the project. Price v. Himeji, 214 N.J. 263, 292-293 (2013).

2. The Board may not exercise its power to grant a "d(1)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted … without a showing that such variance or other relief can be granted

without substantial detriment to the public good and

will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

Comment: As to the zone plan and zoning ordinance, the Medici court held that the applicant must prove and the Board must find by an "enhanced quality or proof" that there will be no substantial impairment. The applicant must "reconcile" the use proposed with the ordinance's omission of the use from those permitted in the zone. Id.

[1] While the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons," the Medici court held that "economic inutility" can also constitute a special reason under the statute.

5. "D(2)" Expansion of Pre-existing Nonconforming Use Variances

1. The Board has the power to grant "d(2)" variances to permit expansions of lawfully created pre-existing nonconforming uses pursuant to N.J.S.A. 40:55D-70d(2) "in particular cases and for special reasons." This is the so-called positive criteria of a "d(2)" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons." Burbridge v. Mine Hill Board of Adjustment, 117 N.J. 376 (1990). The benefit to the general welfare from a non-inherently beneficial typical commercial use derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed. Id. Significantly, however, an applicant for an expansion of a pre-existing nonconforming use variance need not show that a variance would have been granted to create the use in the first instance. Kohl v. Fair Lawn, 50 N.J. 268, 281 (1967).

Comments:

Note that special reasons warranting a "d(2)" variance may be found in the fact that the variance, if granted, would tend to minimize the nonconformity and make it more acceptable in its particular setting. See, Burbridge, supra. While aesthetic improvement alone was found in Burbridge to be a sufficient special reason to warrant a "d(2)" variance, the Court held that more than "mere beautification" is required. Id. at 391-393. Any such aesthetic improvement must involve the overall visual compatibility of the use and be "inextricably entwined with notions of the general welfare." Id.

Note further that if a proposed development involves the reduction in size of a property on which a lawfully created nonconforming use exists, the reduction in the size of the property (unless a de minimis [2] reduction) constitutes an intensification of the pre-existing nonconformity, thereby requiring a "d(2)" variance. Razberry's, Inc. v. Kingwood Twp., 250 N.J. Super. 324, 327, 329 n.1 (App. Div. 1991).

Finally, it must be noted that "d(2)" variances are proper only for expansions of lawfully created pre-existing nonconforming uses; not for expansions of nonconforming uses permitted by prior "d(1)" use variances. The Municipal Land Use Law ("MLUL") defines a nonconforming use as a use that was lawful prior to adoption, revision or amendment of a zoning ordinance but which fails to conform to the requirements of the zone because of such adoption, revision or amendment. If a use was allowed by "d(1)" use variance, it was never a lawfully permitted use which was thereafter made nonconforming by adoption of an ordinance. The use is therefore not a pre-existing nonconforming use; it is a prohibited use allowed by use variance. The

[2] The de minimis concept in a land use case entails something that is "[t]rifling; minimal or of a fact or thing so insignificant that a court may overlook it in deciding an issue or case." Nuckel v. Little Ferry Planning Board, 208 N.J. 95, 100 n.2 (2011).

significance of this is that further "d(1)" use variance is needed for any expansion of a use permitted by prior "d(1)" variance – not "d(2)" expansion of nonconforming use variance.

2. The Board may not exercise its power to grant a "d(2)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted … without a showing that such variance or other relief can be granted

without substantial detriment to the public good and

will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

Comments:

As to the zoning ordinance and zone plan, it appears that the "enhanced quality of proof" requirement applicable to "d(1)" variances does not apply to "d(2)" variances for limited expansions of pre-existing non-conforming uses as that is less likely to involve substantial impairment as would the creation of a new non-permitted use. See, Grundlehner v. Dangler, 29 N.J. 256 (1959). Grundlehner, however, involved an expansion in such a manner to minimize the nonconformity and increase its compatibility with the zone. If something other than a limited expansion that would minimize the nonconforming use is involved, the "enhanced quality of proof" requirement would appear to apply. And, the Board must nonetheless be satisfied on these issues.

6. "D(3)" Conditional Use Variances

As defined in the MLUL in N.J.S.A. 40:55D-3, a conditional use is "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 of the location and operation of such as contained in the zoning ordinance . . . ." As held by our Supreme Court in Coventry Square, Inc. v. Westwood Zoning Board of Adj., 138 N.J. 285,287 (1994), "a conditional use is neither prohibited throughout the zone nor permitted at every location in the zone; rather, it is permitted at those locations in the zone where the use meets the conditions set forth in the zoning ordinance." As the Coventry Square Court explained, in the case of conditional uses, the "municipality has determined that the use is allowable in the zoning district but has imposed conditions that must be satisfied." Id. at 297. Where a site plan for a conditionally permitted use complies with all of the conditional use conditions and standards that apply to the conditionally permitted use, the application is within the exclusive subject matter jurisdiction of the Planning Board pursuant to N.J.S.A. 40:55D-67a. Where the site plan for a conditionally permitted use deviates from one or more of the conditional use conditions and/or standards, the application is within the exclusive subject matter jurisdiction of the Board of Adjustment which may grant or deny a variance or variances to allow or prohibit a deviation of deviations pursuant to N.J.S.A. 40:55D-70d(3). If the Board of Adjustment denies a "d(3)" variance or "d(3)" variances, the conditionally permitted use is prohibited on the property. The standards that the Board of Adjustment must consider in deciding whether or not to grant "d(3)" variances consist of the following "positive" and the "negative" criteria:

1. The Board has the power to grant "d(3)" conditional use variances pursuant to N.J.S.A. 40:55D-70d(3) "in particular cases and for special reasons." This is the so-called "positive criteria" of a "d(3)" variance. While the statutory language is identical regarding "d(3)" and "d(1)" variances, our courts have created different standards that apply to each. As pertains to the positive criteria of a "d(3)" variance, the applicant must prove and the Board must find "that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be appropriate for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance." Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285, 298 (1994). Under this standard, the "focus" of both the applicant and the Board must be on the "specific deviation from the conditions imposed by the ordinance." Id. As held by the Coventry Square Court, this standard "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 affect the suitability of the site for the conditional use." Id. at 298-299. This standard does not require a finding that the site is particularly suitable for the use, as is the case with a "d(1)" use variance. Id. at 297.

2. The Board may not exercise its power to grant a "d(3)" conditional use variance otherwise warranted unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted … without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987). As to the negative criteria of a "d(3)" conditional use variance, however, the Supreme Court in Coventry Square, 138 N.J. at 299, and in a subsequently decided case, TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), held that the stricter requirements applicable to a "d(1)" variance do not apply to the negative criteria of a "d(3)" variance. The Coventry Square Court held that, "[i]n respect of the first prong of the negative criteria, that the variance can be granted without substantial detriment to the public good, (citation omitted), the focus is on the effect in surrounding properties of the grant of the variance for the specific deviations from the conditions imposed by ordinance." 138 N.J. at 299. "In respect of the second prong, that the variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance, (citation omitted), the board . . . 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[s] should be imposed on all conditional uses in that zoning district." Id. Further the Court in TSI East Brunswick, 215 N.J. at 43-46, held that the "enhanced quality of proof" burden applicable to the second prong of the negative criteria of a "d(1)" use variance does not apply to the second prong of the negative criteria of a "d(3)" variance.

7. "D(4)" F.A.R. Variances

1. The Board has the power to grant "d(4)" variances to permit an increase in the permitted floor area ratio ("FAR") pursuant to N.J.S.A. 40:55D-70d(4) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(4)" FAR variance.

Comments: As pertains to the positive criteria, the Appellate Division has held that a "d(4)" FAR variance is more akin to a "d(3)" conditional use variance than a "d(1)" use variance so that the Board's focus must be on whether the site will accommodate the problems associated with the proposed permitted use but with a larger floor area than permitted by the ordinance. Randolph Town Center v. Randolph, 324 N.J. Super. 412, 416 (App. Div. 1999) (holding that the standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285, 298-299 (1994) pertaining to "d(3)" conditional use variances applies to "d(4)" FAR variances). A "d(4)" FAR variance applicant need not show that the property is particularly suited for more intensive development. Id.

2. The Board may not exercise its power to grant a "d(4)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

Comments: Under the Randolph Town Center rationale, the Board's focus regarding the negative criteria in a "d(4)" FAR variance case is identical to a "d(3)" conditional use variance case, namely, determining whether conditions can be imposed in its approval to ensure that the deviations from the FAR requirements do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The Coventry Square Court held that the strict requirements applicable to "d(1)" use variances do not apply to the first prong of the negative criteria of a "d(3)" variance (whether the variance can be granted without substantial detriment to the public good). Coventry Square, 138 N.J. at 299. Instead, the Board's focus in a "d(3)" conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial detriment to the public good. Id. In TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), the Court held that the strict requirements applicable to "d(1)" use variances do not apply to the second prong of the negative criteria of a "d(3)" variance (whether granting a variance would substantially impair the intent and purpose of the zone plan and zoning ordinance). Instead, the Board's focus in a "d(3)" conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial impairment of the intent and purpose of the master plan and zoning ordinance, i.e., whether the proposal was "reconcilable with the zone." Id.

8. "D(5)" Density Variances

1. The Board has the power to grant "d(5)" variances to permit an increase in the permitted density (which means the permitted number of dwellings per gross acre of land to be developed) [3] pursuant to N.J.S.A. 40:55D-70d(5) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(5)" variance.

Comments: While our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons" and that benefit to the general welfare from the typical commercial use derives not from the use itself but from the development of a site in the community that is particularly suited for the very enterprise proposed, Medici v. BPR Co., 107 N.J. 1 (1987), our courts have held that a "d(5)" density variance is more akin to a "d(3)" conditional use variance than a "d(1)" use variance so that the Board's focus should be on whether the site will accommodate the problems associated with the proposed higher density than permitted by the ordinance. Grubbs v. Slothower, 389 N.J. Super. 377, 386-388 (App. Div. 2007) (holding that a "d(5)" variance is more akin to a "d(3)" variance than a "d(1)" variance and, as such, the standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285 (1994) pertaining to "d(3)" conditional use variances applies to "d(4)" FAR variances). This is so because the use, in a "d(5)" variance context, is permitted and it is the density conditions from which the deviations is sought. As such, a "d(5)" density variance applicant need not show that the property is particularly suited for more intensive development.

[3] An increase in the permitted density as applied to the required lot area for a lot or lots for detached one or two dwelling unit buildings, which lot or lots are either an isolated undersized lot or lot resulting from a minor subdivision, is an express exception from N.J.S.A. 40:55D-70d(5), so would require a "c" variance and not a "d(5)" variance.

2. The Board may not exercise its power to grant a "d(5)" variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted ... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

Comments: Under the Coventry Square rationale, the Board's focus regarding the negative criteria in a "d(5)" density variance case should be identical to a "d(3)" conditional use variance case, namely, determining whether conditions can be imposed in its approval to ensure that the deviations from the density requirements do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The Coventry Square Court held that the strict requirements applicable to "d(1)" use variances do not apply to the first prong of the negative criteria of a "d(3)" variance (whether the variance can be granted without substantial detriment to the public good). Coventry Square, 138 N.J. at 299. Instead, the Board's focus in a "d(3)" conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial detriment to the public good. Id. In TSI East Brunswick v. East Brunswick Board of Adj., 215 N.J. 26, 43-46 (2013), the Court held that the strict requirements applicable to "d(1)" use variances do not apply to the second prong of the negative criteria of a "d(3)" variance (whether granting a variance would substantially impair the intent and purpose of the zone plan and zoning ordinance). Instead, the Board's focus in a "d(3)" conditional use variance case must be on whether conditions can be imposed in its approval to ensure that the deviations from the conditional use requirements do not cause substantial impairment of the intent and purpose of the master plan and zoning ordinance, i.e., whether the proposal was "reconcilable with the zone." Id. As the Grubbs court held, a "d(5)" variance applicant must "demonstrate that the increase in density would not have a more detrimental effect on the neighborhood than construction of the project in a manner consistent with the zone's density restrictions." Grubbs, supra. at 390.

9. "D(6)" Height Variances

1. The Board has the power to grant "d(6)" variances to permit the height of a principal structure to exceed by 10 feet or 10% the maximum height permitted in the zoning district for a principal structure[4] pursuant to N.J.S.A. 40:55D-70d(6) "in particular cases and for "special reasons." This is the so-called positive criteria of a "d(6)" variance. At present, there are two standards that apply to the determination of whether the positive criteria of a "d(6)" variance is satisfied.

a. The first standard is the traditional "d(1)" use variance standard enunciated in Medici v. BPR Co., 107 N.J. 1 (1987) and that standard would apply if the use or principal structure were prohibited in the zone. Simply stated, if the use or principal structure at issue is prohibited in the zone, the applicant would have to prove that some benefit to the general welfare would result from the proposed height of the principal structure and that the site is particularly suited to the location and height of the structure. Under these circumstances, the Board believes that our courts would treat the situation similar to how non-permitted cell towers are treated and require the Board to: (a) consider whether the placement of the structure at the proposed non-permitted height at the subject location is necessary in order that the structure achieve its permitted purpose; and (b) consider whether the same result could be achieved by erecting the structure in a location where the height of the structure could be lessened or by erecting the permitted structure at a lower height at the proposed location. Smart SMR v. Fair Lawn Board of Adjustment, 152 N.J. 309 (1998). Our courts have held that site suitability is to be determined both from the point of view of the applicant and the municipality. Northeast Towers, Inc. v. Zoning Board of Adjustment, 327 N.J. Super. 476, 497-498 (App. Div. 2000).

b. The second standard is the "d(3)" conditional use standard enunciated in Coventry Square v. Westwood Board of Adjustment, 138 N.J. 285 (1994) and that standard would apply if the use and principal structure were permitted in the zone. See, Grasso v. Spring Lakes Heights, 375 N.J. Super. 41 (App. Div. 2004). Simply stated, if the use and principal structure at issue are permitted in the zone and the only deviation is its height, the Board's focus would be on whether the site would accommodate the problems associated with the permitted principal structure but at a height higher than permitted by the ordinance. Id.

[4] If the proposed height of an accessory structure is at issue or if the proposed height of a principal structure does not exceed by 10 feet or 10% the maximum height permitted for a principal structure in the zone, a "c" variance, and not a "d(6)" variance, is required pursuant to N.J.S.A. 40:55D-70d(6).

2. Regardless of the standard employed to determine the positive criteria of the "d(6)" height variance, the Board may not exercise its power to grant a "d(6)" height variance otherwise warranted, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted... without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987). As with the positive criteria of a "d(6)" variance, there are two standards that apply to determination of the negative criteria of a "d(6)" variance, again, depending upon whether or not the use and principal structure at issue is permitted or not.

a. If the variance were for the height of a non-permitted principal structure, the standard enunciated in Medici would apply. Under that standard, the applicant must prove and the Board must find by an "enhanced quality of proof" that there will be no substantial impairment of the intent and purpose of the zoning ordinance and zone plan. Medici. at 21-22. Under that standard, the applicant would have to "reconcile" the height proposed with the ordinance's prohibition of that height in the zone at issue. Id. As the Medici court held, reconciliation "becomes increasingly difficult when the governing body has been made aware of prior applications for the same variance but has declined to revise the zoning ordinance." Id.

b. Where the variance is for the height of a permitted principal structure, the Medici rational pertaining the negative criteria would not apply. Thus, there would no requirement for an enhanced quality of proof and to reconcile the variance with the ordinance's prohibition of the proposed height. In the permitted principal structure situation, the "d(3)" conditional use variance test enunciated in Coventry Square applies. Under Coventry, the Board's focus must be on whether the Board can impose conditions in its approval to ensure that the deviations do not cause substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The Board must determine whether and, if so, what conditions can be imposed to mitigate the negative effects of the proposed deviation which, in this case, involves height in excess of 10 feet or 10% of the maximum permitted in the zone.

10. "D" Variances for Inherently Beneficial Uses

1. The Board has the power to grant "d" variances pursuant to N.J.S.A. 40:55D-70d "in particular cases and for special reasons." This is the so-called positive criteria of a "d" variance. Our courts have held that the promotion of the general welfare is the zoning purpose that most clearly amplifies the meaning of "special reasons." Sica v. Wall Township Board of Adjustment, 127 N.J. 152 (1992). Our courts have held that certain uses are deemed "inherently beneficial" which essentially means that, by definition, the use per se promotes the general welfare. Id. N.J.S.A. 40:55D-4 was amended in 2009 to add a definition of "inherently beneficial use" to mean "a use which is universally considered of value to the community because it fundamentally serves the public good and promotes the general welfare." The definition further provides that "[s]uch a use includes, but is not limited to, a hospital, school, child care center, group home, or a wind, solar or photovoltaic energy facility or structure." Where a proposed use is determined to be "inherently beneficial" there is no requirement that the site be particularly suitable for the use proposed. Sica, supra. Obviously, the uses listed in N.J.S.A. 40:55D-4 have been legislatively determined to be "inherently beneficial." The determination of whether any other uses are inherently beneficial is a legal determination which should be made only after consulting the Board attorney for guidance and advice.

2. The Board may not exercise its power to grant "d" variances otherwise warranted, however, even if the use is "inherently beneficial", unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted under the terms of this section, including a variance or other relief involving an inherently beneficial use, without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance." (emphasis added). The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

That said, however, the Sica Court held that applicant's burden of proof with respect to satisfying the negative criteria for an inherently beneficial use is significantly less than with respect to a typical non-inherently beneficial commercial use, and that a "balancing test" must be employed. [5] There is no "enhanced quality of proof" requirement. Instead, the Board must balance the positive and negative criteria and determine whether, on balance, the "d" variance can be granted without causing substantial detriment to the public good and substantial impairment to the intent and purpose of the zone plan and zoning ordinance. The Sica court held that in undertaking this balancing the Board should:

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

(a) First, identify the public interest at stake and make a finding on how compelling the public interest in the proposed use at issue actually is as compared to other inherently beneficial uses. Sica makes clear that not all inherently beneficial uses are equal, stating expressly that "[s]ome uses are more compelling than others." Sica, supra at 165. See, Children's Institute v. Verona Board of Adj., 290 N.J. Super. 350, 356 (App. Div. 1996) (viewing the requirement for identifying the public interest at stake as requiring the proposed use to be ranked on the "scale" of inherently beneficial uses); New Brunswick Cellular Telephone v. South Plainfield Board of Adj., 305 N.J. Super. 151, 168 (App. Div. 1997), opinion after remand, 314 N.J. Super. 102 (App. Div. 1998), rev'd on other grounds, 160 N.J. 1 (1999) (affirming the board's conclusion in that case that the inherently beneficial aspects of the use in that case were "significantly less compelling than other types of inherently beneficial uses"); Clifton Board of Education v. Clifton Board of Adj., 409 N.J. Super. 389, 422 (App. Div. 2009) (affirming the trial court's ranking of a school as "among the highest of all inherently beneficial uses"); The Salt & Light Co. v. Willingboro Board of Adj., 423 N.J. Super. 282, 291 (App. Div. 2011) (focusing on the public benefit flowing from the proposed inherently beneficial use as compared to another inherently beneficial use in determining how compelling the public interest at stake was in the proposed inherently beneficial use).

(b) Second, identify the detrimental effects that will ensue from the grant of the variance.

(c) Third, determine whether any legitimate detrimental effects can be reduced by imposing reasonable conditions on the use.

(d) Fourth and last, balance the positive and negative criteria and determine whether, on balance, the "d" variance can be granted without causing substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance.

11. "D" Variances for Mobile Wireless Communications Facilities

1. **Positive Criteria of "D" Variances for Mobile Wireless Communication Facilities.** The Board has the power to grant "d" variances to permit "d(1)" non-permitted mobile wireless communication facilities and "d(6)" height variances for mobile wireless communications facilities in excess of 10 feet or 10% of that permitted for principal structures in the zone [6] pursuant to N.J.S.A. 40:55D-70d "in particular cases and for special reasons." This is the so-called positive criteria of the "d" variances. Our Supreme Court in Smart SMR v. Fair Lawn Board of Adjustment, 152 N.J. 309, 329-331 (1998) refused to accept mobile wireless communications towers as "inherently beneficial" uses as some sites are better suited than others for towers. Thus, while having a FCC license satisfies the requirement that the proposed facility promotes the general welfare, the applicant must prove and the Board must find that the proposed site is particularly suitable for the proposed mobile wireless communications tower in order to satisfy the positive criteria and warrant a "d(1)" and "d(6)" variance. Id. at 336. In considering the issue of particular suitability, (a) the applicant must prove that there is a gap in service or inadequate existing capacity, (b) the applicant must prove the signal strength level required to fill the gap in service or to remedy the inadequate existing capacity, (c) the applicant must prove that the placement of the antennas at the subject location and at the proposed height will improve mobile wireless communications by filling the gap in service or remedying the inadequate existing capacity by providing "sound, favorable and substantially above a level of mediocre service" or "substantially better than average" service, and (d) the applicant must prove whether the same result could be achieved by placing the antennas on some other existing structure, by erecting the tower in a more suitable location, and/or by placing the antennas on the tower at a lower height. The specific elements that the applicant must address to prove particular suitability are as follows:

a. **Establish a Gap in Wireless Service Coverage.** First, the applicant must establish that there is a gap in the mobile wireless service coverage at issue, and the equivalent of a gap can also be created by an existing capacity deficiency. New Brunswick Cellular Tel. Co. v. South Plainfield Board of Adj., 160 N.J. 1, 14 (1999). To do this, the applicant must prove that users of the mobile wireless service at issue are unable to either connect with the land based national telephone network or are unable to maintain a connection capable of supporting "reasonably uninterrupted communication." Cellular Tel. Co. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj., 197 F.3d 64, 70 (3rd Cir. 1999). A "gap" in service is not merely de minimis dead spots in service within a larger area. NY SMSA v. Mendham Board of Adj., 366 N.J. Super. 141, 161 (App. Div.), aff'd o.b., 181 N.J. 387 (2004). However, the applicant is not required to show that there is a "significant gap" in service. NY SMSA v. Weehawken Board of Adj., 370 N.J. Super. 319, 336 (App. Div. 2004); Omnipoint v. Easttown Township Zoning Hearing Board, 331 F. 3d 386, 398 (3rd Cir. 2003), cert. den., 540 U.S. 1108 (2004). While the applicant may wish to provide "optimal" or "seamless" service to its customers, the minimum requirement in order for a mobile wireless communications carrier to retain its FCC license is that the carrier provide "substantially

[6] A wireless communications tower and the attached wireless communications antennae are principal structures even if another principal structure exists on the property. Northeast Tower v. West Paterson Board of Adj., 327 N.J. Super. 476, 486 (App. Div. 2000).

above a level of mediocre" service. See, 47 C.F.R. sections 24.103 (applicable to narrowband PCS) and 24.203 (applicable to broadband PCS). In fact, the court in NY SMSA v. Middletown Board of Adj., 324 N.J. Super. 166, 175 (App. Div.), certif. den., 162 N.J. 488 (1999) held that the FCC, through its regulations, does not mandate optimal service but only "sound, favorable and substantially above a level of mediocre service." (emphasis added). The court in Sprint Spectrum v. Upper Saddle River Board of Adj., 352 N.J. Super. 575, 604 (App. Div. 2002) quoted radio frequency engineering expert Charles Hecht as describing the test as whether service is "substantially better than average." As such, the Board concludes that the standard it must employ to determine whether the applicant has proved a gap in service is whether the mobile wireless service customers experience "substantially above a level of mediocre service" or "substantially better than average" service. It must be noted that an inability to make, receive or maintain cellular calls within a building can also be a gap that a carrier must be permitted to redress. T-Mobile Central, LLC v. Unified Government of Wyandotte County, 528 F. Supp. 2d 1128 (D. Kan. 2007) (noting that in-building coverage may appropriately be considered as part of a "significant gap" in service analysis); Am. Cellular Network Co. v. Upper Dublin Twp., 203 F. Supp. 2d 383, 391 (E.D. PA 2002) (evidence of coverage gap included in-building coverage).

b. **Establish Minimum Required Signal Strength.** As part of establishing a gap in service and establishing the requirements to fill the gap and/or to remedy a deficiency in existing capacity, the mobile wireless communication carrier must establish the minimum required signal strength for service in the area at issue. [7] Certain carriers have taken the position that a local land use board does not have the authority under the TCA or FCC regulations to determine and/or is implicitly pre-empted from determining the minimum required signal strength necessary to fill a gap in service and that the carrier is entitled to choose whatever signal it wishes to fill the gap as a matter of corporate policy. These positions are contrary to law. First, Cellular Telephone v. Ho-Ho-Kus Board of Adj., 197 F.3d 64, 75-76 (3rd Cir. 1999) held that "the Board was not barred from considering the quality of existing personal wireless service" in determining whether or not to grant an application. (emphasis added) Further, the court specifically noted that the TCA "does not abrogate local zoning authority in favor of the commercial desire to offer optimal service to all current and potential customers." (emphasis added) Id. at 76. Second, Cellular Tel. Co. v. Harrington Park Zoning Board of Adj., 90 F. Supp. 2d 557, 563 (D.N.J. 2000) held that "the TCA establishes the procedural requirements that local boards must follow in evaluating cell site applications, but leaves intact the state and local law which the boards must apply in arriving at their decision." (emphasis added) Third, the court in NY SMSA v. Middletown Board of Adj., 324 N.J. Super. 166, 176 (App. Div. 1999), certif. denied, 162 N.J. 488 (1999), held that a cellular carrier was not entitled to a variance to accommodate a signal level of negative 75 dBm simply because that service level was "desirable as a matter of company policy." (emphasis added) Finally, while in the context of examining a "significant gap" in service, the court in Omnipoint v. Easttown Zoning Hearing Board, 331 F. 3d 386, 398 (3rd Cir. 2003), cert.

[7] Neither the Telecommunications Act of 1996 (the "TCA"), 47 U.S.C.A. section 332, nor the Federal Communications Commission (the "FCC") regulations promulgated pursuant to the TCA, require that a wireless communications carrier provide any minimum signal strength.

den. 540 U.S. 1108 (2004), held that a board does not have to accommodate a signal level of negative 85 dBm if the cellular provider does not "establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network." [8]

c. **Alternate Sites and Alternate Heights.** In determining whether the proposed site for the tower with the antennas at the height proposed are particularly suitable for the facility, the applicant must show whether the same result can be achieved by placing the antennas on some other existing structure, by erecting the tower in a more suitable location, or by placing the antennas on the tower at a lower height. As the court explained in Cellular Tel. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj., 197 F.3d. at 70, the cellular provider has the "burden of proving that the proposed facility is the least intrusive means of filling [a] gap with a reasonable level of service." (emphasis added). See also, NY SMSA v. Mendham, 366 N.J. Super. at 149-150; Sprint Spectrum v. Upper Saddle River, 352 N.J. Super. at 604. Significantly, site suitability is to be determined both from the point of view of the applicant and the municipality. Northeast Tower v. West Paterson Board of Adj., 327 N.J. Super. 476, 497-498 (App. Div. 2000). However, cellular carriers cannot be required to disprove the suitability of every possible site in the search area or ring. NY SMSA v. Mendham, 366 N.J. Super. at 163. Further, a carrier need not pursue an alternate site when it has established that further reasonable attempts to build a wireless communication facility to fill a gap in service will likely be fruitless and a waste of time. Id. at 164. In Price v. Himeji, 214 N.J. 263, 292-293 (2013), the Court held that proof that a site is particularly suitable for a proposed use does not require a demonstration that there are no other viable locations for the project. That being said, a carrier's "reasonable and good faith effort to find an alternate, less-intrusive site is clearly relevant to the particular suitability analysis." Ocean County Cellular Telephone Co. v. Lakewood Board of Adj., 352 N.J. Super. 514, 528 (App. Div.), certif. denied, 175 N.J. 75 (2002).

d. **Summary of Positive Criteria for Considering Particular Suitability.** To summarize the positive criteria for considering the issue of particular suitability, (a) the applicant must prove that there is a gap in service or inadequate existing capacity, (b) the applicant must prove the signal strength level required to fill the gap in service or to remedy the inadequate existing capacity, (c) the applicant must prove that the placement of the antennas at the subject location and at the proposed height will improve mobile wireless communications by filling the gap in service or remedying the inadequate existing capacity by providing "sound, favorable and substantially above a level of mediocre service" or "substantially better than average" service, and (d) the applicant must prove whether the same result could be achieved by placing the antennas

[8] Where a cellular provider establishes a correlation between negative 85 dBm and the users' actual ability to access the telephone network, courts have found that the design signal strength of negative 85 dBm is reasonable. See, Sprint Spectrum v. Upper Saddle River, 352 N.J. Super. 575, 611 (App. Div. 2002) (the Board expert in that case, Charles Hecht, agreed with the applicant's expert that negative 85 dBm was a reasonable design to provide service that was "substantially better than average").

on some other existing structure, by erecting the tower in a more suitable location, and/or by placing the antennas on the tower at a lower height, with the understanding that a carrier cannot be required to disprove the suitability of every possible site in the search area or ring.

2. **Negative Criteria of the "D" Variances for Wireless Communication Facilities.** While a "d" variance may be warranted by virtue of the applicant proving the positive criteria, the Board may not exercise its power to grant such a variance, however, unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted . . . without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." This being said, however, the Smart Court, 152 N.J. at 332, incorporated the four step "balancing" test established in Sica v. Wall Township Board of Adjustment, 127 N.J. 152 (1992), so the applicant's burden of proof with respect to satisfying the negative criteria for a mobile wireless communications facility is significantly less than with respect to a typical non-inherently beneficial commercial use. There is no "enhanced quality of proof" requirement. Instead, the Board must balance the positive and negative criteria and determine whether, on balance, "d" variances can be granted without causing substantial detriment to the public good and substantial impairment of the intent and purpose of the zone plan and zoning ordinance. Sica, 127 N.J. at 166. In undertaking this balancing the Board must follow the following four (4) steps:

a. **First Step.** First, identify the public interest at stake and make a finding on how compelling the public interest at issue actually is, which would include but not be limited to determining what type of wireless communications system is being proposed and identifying the proposed users and public benefits flowing from the proposes facility. The first step of the Sica balancing test requires the Board to explore how compelling the public interest in the proposed use is with the focus being on the actual public benefit flowing from the proposed use. See, Children's Institute v. Verona Board of Adj., 290 N.J. Super. 350, 356 (App. Div. 1996); New Brunswick Cellular Telephone v. South Plainfield Board of Adj., 305 N.J. Super. 151, 168 (App. Div. 1997), opinion after remand, 314 N.J. Super. 102 (App. Div. 1998), rev'd on other grounds, 160 N.J. 1 (1999); The Salt & Light Co. v. Willingboro Board of Adj., 423 N.J. Super. 282, 291 (App. Div. 2011).

b. **Second Step.** Second, identify the detrimental effects that may ensue from the grant of the variance. Some issues may not be considered, however. For example, radiation emissions, if complying with state and federal law, cannot be considered detrimental to the public good. See, Smart, 152 N.J. at 336; Cell South v. West Windsor Zoning Board of Adj., 172 N.J. 75, 87-88 (2002). And, without qualified expert testimony, effects on adjacent properties in terms of devaluation of value cannot

be considered detrimental to the public good. Id. Finally, without qualified expert testimony, effects on the intent and purpose of the zoning ordinance and master plan cannot be considered. Id.

c. **Third Step.** Third, determine whether any legitimate detrimental effects can be reduced by imposing reasonable conditions on the use, such as but not limited to concealing the antennas in a "stealth tower" or otherwise making the tower and equipment building / cabinet more aesthetically acceptable. See, Smart, 152 N.J. at 335, recognizing that antennas can be concealed in "stealth towers" and located on existing structures to blend in with the existing structures.

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

12. Bifurcation of Variances

1. Applicants at times apply for bifurcated "d" and/or "c" variances, meaning that they submit a separate application for the variance and a subsequent application for subdivision, site plan or conditional use approval if the initial variance application is granted. While N.J.S.A. 40:55D-76b gives the applicant the right to "elect" to so bifurcate a "d" variance application, the statute does not on its face give the applicant the right to elect to so bifurcate a "c" variance application. A board should, however, have the implicit authority to determine whether to permit bifurcation of a "c" variance in a particular application before it. Further, even though the statute gives the applicant the right to "elect" to bifurcate a "d" variance application, a board has the implicit authority to determine not to permit such bifurcation in a particular application before it. Scholastic Bus Co. v. Fair Lawn Zoning Board of Adj., 326 N.J. Super. 49, 58 (App. Div. 1999).

As the Scholastic Bus court held, negative criteria concerns can be "so intertwined" in the variance and subsequent subdivision, site plan or conditional use application "as to render bifurcation improvident." Id. Expanding on this, the Appellate Division subsequently held in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002) that, "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Significantly, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." (emphasis added) Id. at 340-341.

In any bifurcated "d" variance application, the Board should make a threshold determination as to whether any negative criteria concerns are "so intertwined" with the application that will be subsequently submitted as to render bifurcation improvident. In any bifurcated "c" variance application, the Board should determine whether it would be prudent to proceed on a bifurcated basis to foster quasi-judicial economy and efficiency in the proceedings.

2. On a separate issue related to bifurcation, Puleo v. North Brunswick Board of Adj., 375 N.J. Super. 613, 621-623 (App. Div. 2005), certif. denied, 184 N.J. 212 (2005), holds that N.J.S.A. 40:55D-76 not only applies to expressly bifurcated applications but also applies to all subsequently submitted site plan and subdivision applications where prior relief involved a "d" variance. As such, if between the time a bifurcated "d" variance is granted and a subsequently submitted site plan or subdivision application is filed, there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of site plan review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the site plan application on the basis of failure to satisfy the negative criteria. Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997).

13. Minor Site Plan Approval for BOA

1. N. N.J.S.A. 40:55D-46.1 is the starting point for consideration of a minor site plan application and provides that "minor site plan approval shall be deemed to be final approval of the site plan." N.J.S.A. 40:55D-50a is thus the focal point for consideration of the minor site plan as it provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan be revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan prior to the Board granting approval.

(a) However, the Board cannot grant approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, approval must be denied. Id.

(b) And, the Board cannot grant approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because the Board's consideration of site plan approval is connected to a "d" variance, however, approval of a site plan which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted without substantial detriment to the public good; and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997). There is no reason that this holding should not apply to site plans.

14. Minor Subdivision Approval for BOA

1. N.J.S.A. 40:55D-47 is the starting point for consideration of a minor subdivision application and provides that "minor subdivision approval shall be deemed to be final approval of the subdivision." N.J.S.A. 40:55D-50a is thus the focal point for consideration of the minor subdivision as it provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan be revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan prior to the Board granting approval.

(a) However, the Board cannot grant approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the subdivision review process, approval must be denied. Id.

(b) And, the Board cannot grant approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after

all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because subdivision approval by the Board is connected to a "d" variance, however, approval of a subdivision which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted without substantial detriment to the public good; and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341. There is no reason that these holdings should not apply to subdivisions.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997).

15. Preliminary and Final Site Plan Approval for BOA

1. N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of the preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that the Board "shall" grant preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance requirement prior to the Board granting approval.

(a) While N.J.S.A. 40:55D-46a allows the site plan and engineering documents required to be submitted to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, approval must be denied. Id.

(b) And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also,

N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because the Board's consideration of site plan approval is connected to a "d" variance, however, approval of a site plan which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted

without substantial detriment to the public good; and

without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997). There is no reason this holding should not apply to site plans.

16. Amended Preliminary and Final Site Plan Approval for BOA

1. N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of amended preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that if "any substantial amendment in the layout of improvements proposed by the developer that have been subject of a hearing" is proposed, "an amended application for development shall be submitted and proceeded upon, as in the case of the original application for development." N.J.S.A. 40:55D-46b further provides that the Board "shall" grant amended preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance requirement prior to the Board granting approval.

(a) While N.J.S.A. 40:55D-46a allows the site plan and engineering documents required to be submitted to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant amended preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the site plan review process, approval must be denied. Id.

(b) And, the Board cannot grant amended final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because the Board's consideration of site plan approval is connected to a "d" variance, however, approval of a site plan which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted

without substantial detriment to the public good; and

without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed, there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997). There is no reason this holding should not apply to site plans.

17. Preliminary and Final Subdivision Approval for BOA

1. N.J.S.A. 40:55D-48b and 50a are the focal points for consideration of the preliminary and final subdivision applications. N.J.S.A. 40:55D-48b provides that the Board "shall" grant preliminary subdivision approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final subdivision approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance requirement prior to the Board granting approval.

(a) While N.J.S.A. 40:55D-48a allows the subdivision plan and engineering documents required to be submitted to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the subdivision plan review process, approval must be denied. Id.

(b) And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also,

N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because the Board's consideration of subdivision approval is connected to a "d" variance, however, approval of a subdivision plan which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted

without substantial detriment to the public good; and

without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341. There is no reason these holdings should not apply to subdivision plans.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed, there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997).

18. Amended Preliminary and Final Subdivision Approval for BOA

1. N.J.S.A. 40:55D-48b and 50a are the focal points for consideration of amended preliminary and final subdivision applications. N.J.S.A. 40:55D-48b provides that if "any substantial amendment in the layout of improvements proposed by the developer that have been subject of a hearing" is proposed, "an amended application for development shall be submitted and proceeded upon, as in the case of the original application for development." N.J.S.A. 40:55D-48b further provides that the Board "shall" grant amended preliminary subdivision approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final subdivision approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance requirements, the Board must grant approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. Cortesini v. Hamilton Planning Board, 417 N.J. Super. 201, 215 (App. Div. 2010). However, there are two exceptions:

(1) The first exception is where an application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions. In that case, the Board then must review the application against all remaining ordinance requirements and grant approval if the application complies with all such remaining requirements.

(2) The second exception is where the application does not comply with all ordinance requirements but a condition can be imposed requiring a change that will satisfy the ordinance requirement. In that case, the Board can either grant approval on the condition that the application or plan is revised prior to signing the plan to comply with the ordinance requirement or the Board can adjourn the hearing to permit the applicant the opportunity to revise the application or plan to comply with the ordinance requirement prior to the Board granting approval.

(a) While N.J.S.A. 40:55D-48a allows the subdivision plan and engineering documents required to be submitted to be in "tentative form for discussion purposes for preliminary approval," the Board cannot grant amended preliminary approval subject to later submission of additional information which is fundamental to an essential element of a development plan. The reason for this is because, at the time of preliminary review, the Board is under an obligation to deal with matters vital to the public health and welfare such as stormwater management and drainage, sewage disposal, water supply, and traffic circulation safety. D'Anna v. Washington Twp. Planning Board, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992); Field v. Franklin Twp., 190 N.J. Super. 326 (App. Div.), certif. denied, 95 N.J. 183 (1983). If information and/or plans related to such essential elements of the development plan have not been submitted to the Board in sufficient detail for review and approval as part of the subdivision plan review process, approval must be denied. Id.

(b) And, the Board cannot grant final approval subject to later submission of the required detailed drawings and specifications because they are required to be submitted ahead of time pursuant to N.J.S.A. 40:55D-50a. See also, N.J.S.A. 40:55D-4 which defines "final approval" as the action of the Board taken "after all conditions, engineering plans and other requirements of have been completed or fulfilled . . . ."

2. Because the Board's consideration of subdivision approval is connected to a "d" variance, however, approval of a subdivision plan which would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted

without substantial detriment to the public good; and

without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

Comments:

Although N.J.S.A. 40:55D-76b provides that an applicant "may elect to submit" a bifurcated "d" variance application, seeming to indicate that the Board has no choice but to hear such an application, the Appellate Division has held that where negative criteria concerns are "so intertwined" in a "d" variance and site plan application to "as to render bifurcation improvident", it is "most appropriate" for the Board to consider the applications in a "consolidated proceeding." Scholastic Bus Co. v. Fair Lawn Zoning Board, 326 N.J. Super. 49, 58 (App. Div. 1999). As explained in Meridian Quality Care v. Wall Twp. Board of Adj., 355 N.J. Super. 328, 340 (App. Div. 2002), "while the statute appears to allow the developer to bifurcate without the Board's consent, such a procedure may not be appropriate if the Board considers the use variance and site plan issues so interrelated that both applications should be considered in a single administrative proceeding, at which the Board would decide the negative criteria based on the entire plan submitted." Specifically, the Meridian court explained that site plan details relating to "on-site and even off-site factors such as traffic flow, buffers, ingress and egress, traffic congestion, drainage, building orientation, the nature of the surrounding properties, and other factors may be significant in deciding whether the variance may be granted without substantial detriment to the surrounding neighborhood and public good, and without substantially impairing the intent and purpose of the zone plan and zoning ordinance." Id. at 340-341. There is no reason these holdings should not apply to subdivision plans.

Finally, if between the time a bifurcated "d" variance is granted and a subsequently submitted subdivision application is filed, there are changes in the Township ordinances and/or changes in the land usage in the area, or if certain issues left for the time of subdivision review including but not limited to traffic, buffering, etc. are not resolved to the satisfaction of the Board, it is conceivable that the Board could deny the subdivision application on the basis of failure to satisfy the negative criteria. See, Allocco & Luccarelli v. Holmdel, 299 N.J. Super. 491 (Law Div. 1997).

19. Exceptions from Site Plan or Subdivision Standards for BOA

1. N.J.S.A. 40:55D-51a and b provide that the Board, "when acting upon applications for . . . site plan approval, shall have the power to grant such exceptions from the requirements for . . . site plan approval as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval . . . if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question." While neither "impracticable" nor "undue hardship" is defined in the MLUL, "undue hardship" has been defined in numerous land use and zoning cases in New Jersey. Our courts have held that to qualify for "c(1)" variance relief, the "undue hardship" at issue does not have to rise to the level of confiscation. If the ordinance provisions at issue "inhibit . . . the extent" to which the property can be used, our courts have held that "undue hardship" to warrant a "c(1)" variance exists. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). Unlike "undue hardship," however, "impracticable" has not been defined in any published land use or zoning case. Following the basic rule of construction that legislative language should be given its plain and ordinary meaning, Pennsauken v. Schad, 160 N.J. 156, 170 (1999); DiProspero v. Penn, 183 N.J. 477, 492 (2005), "impracticability" for purposes of considering an exception under the MLUL should focus on the dictionary definition of "impractical," which is the root of "impracticability." The dictionary definition of "impractical" is "not wise to put into or keep in practice or effect"; an inability to deal "sensibly or prudently with practical matters." Merriam-Webster's Collegiate Dictionary (11th Ed. 2004). Thus, the standard for determining whether the literal enforcement of the ordinance requirement is issue is impracticable should be whether it is sensible or prudent or wise to insist on its literal enforcement in light of the peculiar conditions of the land in question.

2. Because the Board's consideration of the exception(s) is connected to a "d" variance, any exception otherwise warranted cannot be granted pursuant to N.J.S.A. 40:55D-76b "unless such approval can be granted:

> without substantial detriment to the public good and
>
> without substantial impairment of the intent and purpose of the zone plan and zoning ordinance."

The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

20. Exceptions from Residential Site Improvement Standards (RSIS) for BOA

1. In accordance with N.J.A.C. 5:21-3.1(a), local land use boards have the power to grant "such de minimis exceptions from the requirements of the [RSIS]

   a. as may be reasonable, and within the general purpose and intent of the standards," but if and only

   b. "if the literal enforcement of one or more provisions of the standards is impracticable, or will exact undue hardship because of peculiar conditions pertaining to the development in question."

2. N.J.A.C. 5:21-3.1(g) further provides that the grant of a request for a de minimis exception "shall be based on a finding that the requested exception meets the following [four] criteria:"

   a. It is consistent with the intent of the Act establishing the RSIS;

   b. It is reasonable, limited, and not unduly burdensome;

   c. It meets the needs of public health and safety; and

   d. It takes into account existing infrastructures and possible surrounding future development.

3. While not containing a definition of de minimis, N.J.A.C. 5:21-3.1(f) provides four examples of de minimis exceptions, which "include, but are not limited to, the following": (a) Reducing the minimum number of parking spaces and the minimum size of parking stalls; (b) Reducing the minimum geometrics of street design, such as curb radii, horizontal and vertical curves, intersection angles, centerline radii, and others; (c) Reducing cartway width; and (d) Any changes in standards necessary to implement traffic calming devices. As noted in Cox and Koenig, New Jersey Land Use Administration (Gann 2016), §23-8(c), "de minimis exceptions are limited exceptions of minor nature and, where an applicant wishes to deviate from other requirements of the RSIS which cannot be considered a minor design variation as characterized in the examples set forth in the regulation," an applicant must seek a waiver from the RSIS from the Site Improvement Advisory Board.

21. Conditional Use Approval for BOA

1. As defined in the MLUL in N.J.S.A. 40:55D-3, a conditional use is "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 of the location and operation of such as contained in the zoning ordinance . . . ." As held by our Supreme Court in Coventry Square, Inc. v. Westwood Zoning Board of Adj., 138 N.J. 285,287 (1994), "a conditional use is neither prohibited throughout the zone nor permitted at every location in the zone; rather, it is permitted at those locations in the zone where the use meets the conditions set forth in the zoning ordinance." N.J.S.A. 40:55D-67a provides that a zoning ordinance may provide for conditional uses which shall be granted by the Board if the applicant meets "definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness…" in the ordinance. Where the Board has jurisdiction of an application because it involves a "d" type variance pursuant to N.J.S.A. 40:55D-70d, the Board has jurisdiction over any conditional use approval related to the application pursuant to N.J.S.A. 40:55D-76b. In such an application, the Board must thus determine whether the proposed conditionally permitted use complies with all conditions and standards set forth in the conditional use ordinance.

a. As such, if the application complies with all of the conditions and standards set forth in the conditional use ordinance, the Board must grant conditional use approval.

b. Conversely, if the application does not comply with all of the conditions and standards set forth in the conditional use ordinance, the Board must deny approval, CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010). However, there is one exception:

(1) Where an application does not comply with all conditional use ordinance conditions and standards but the Board grants relief in terms of a "d(3)" conditional use variance, the Board then must review the application against all remaining ordinance provisions and grant approval if the application complies with all such remaining provisions.

(2) Unlike a site plan or subdivision ordinance application, if the conditional use application does not comply with all conditional use ordinance standards, a condition cannot be imposed providing for subsequent compliance. As the court explained in CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010), a "promise from an applicant about its future potential compliance with a conditional use standard or specification is not permitted" under either the MLUL or case law. If the application does not comply with all conditional use ordinance conditions and standards, the Board must deny conditional use approval unless it has granted a "d(3)" conditional use variance from the conditional use standard at issue. Id.

2. Because an application for conditional use approval pending before the Board is connected to a "d" type variance (if there were no "d" type variance(s) required, the application for conditional use approval would be within the exclusive jurisdiction of the Planning Board), however, an approval that would otherwise be warranted cannot be granted pursuant to N.J.S.A.40:55D-76b "unless such approval can be granted

a. without substantial detriment to the public good and

b. without substantial impairment of the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

22. Direct Issuance of Permit for Building or Structure Located in Reserved Areas on Official Map Per MLUL Section 34

1. The Board may direct the issuance of construction permits pursuant to N.J.S.A. 40:55D-34 for any building or structure located on the official map of a municipality in the bed of any street or public drainage way, flood control basis or public area reserved for future use pursuant to N.J.S.A. 40:55D-32 "whenever one or more parcels of land" upon which such bed or public way, basin or reserved area exists "cannot yield a reasonable return to the owner" in the absence of such permit being issued. This is the "positive criteria" of section 34 relief and, in essence, requires proof of economic inutility.

2. N.J.S.A. 40:55D-34 provides further, however, that before the Board directs the issuance of such a permit:

a) The Board must find that such permit "will as little as practicable increase the cost of opening such street, or tend to cause a minimum change of the official map...." and

b) The Board "shall impose reasonable requirements as a condition of granting the permit so as to promote the health, morals, safety and general welfare of the public."

23. "Planning" Variance and Direct Issuance of Permit for Building or Structure Not Abutting an Official and Fully Improved Street Per MLUL Section 36

1. The Board may grant a "planning" variance pursuant to N.J.S.A. 40:55D-36 from the requirement in N.J.S.A. 40:55D-35 that no permit be issued for the construction of a building unless the lot on which the building will be constructed abuts an official and fully improved street, and for direction to issue a permit for a building not related to an official and fully improved street pursuant to N.J.S.A 40:55D-36 where:

a) refusal to issue the permit "would entail practical difficulty or unnecessary hardship" or

b) "the circumstances of the case do not require the building or structure to be related to a street."

2. N.J.S.A. 40:55D-36 provides further, however, that before the Board directs the issuance of such a permit, the Board must establish and impose "conditions that will:

a) provide adequate access for firefighting equipment, ambulances and other emergency vehicles necessary for the protection of health and safety, and

b) protect any future street layout shown on the official map or on a general circulation plan element of the municipal master plan...."

24. Authority to Impose Conditions

Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. See, Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to ensure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to ensure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that "aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances" and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff'd o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions.); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J 418, 438-439 (2000) (explaining that site plan review "typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping" and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), sections 28-2.2 and 28-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board's implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by Board's experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): "The MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications" and using such professional consultants to review and evaluate revised plans "was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application."

Comments:

Any condition imposed on a land use approval which requires the dedication of property or the granting of an easement over property, however, must comply with the Takings Clause of the Fifth Amendment of the United States Constitution. As explained by the New Jersey Supreme Court in Toll Bros, Inc. v. Board of Freeholders of Burlington County, 194 N.J. 223, 244 n. 2 (2008): (1) There is a "rational nexus" requirement for on-site property exaction conditions under New Jersey case law which is "consistent" with United States Supreme Court case law that any such on-site property exaction be supported by "an essential nexus" between a "legitimate state interest" and the exacted condition, citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); and (2) There is a "pro-rata requirement" for off-site property exactions under New Jersey case law which comports with United States Supreme Court case law requirement that a municipality "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development, that there is "rough proportionality," citing Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). Unless such a "nexus" or "rough proportionality" exists, the local government will be required to pay just compensation for taking the property interest. The United States Supreme Court has most recently extended Nollan and Dolan and held that a local government agency's demand for a property interest from a land-use permit applicant must satisfy the Nollan and Dolan requirements: (1) even if the agency demands the property interest as a requirement for approval rather than as a condition of the approval, and then denies the application by reason of the applicant's refusal to accede to the demand; and (2) even when the demand is for money rather than actual property. Koontz v. St. Johns River Water Management District, ___ U.S. ___, 133 S. Ct. 2586, 186 L.Ed.2d 697 (2013).

25. Modification of Prior Conditions for BOA

1. Our courts have held that a Board has the power to modify and/or eliminate prior approval conditions upon a "proper showing of changed circumstances", or upon "other good cause" warranting modification and/or amendment, or if "enforcement of the restrictions would frustrate an appropriate purpose." Cohen v. Fair Lawn, 85 N.J. Super. 234, 237 (App. Div. 1964); Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987), certif. denied 110 N.J. 304 (1988); Sherman v. Harvey Cedars Board of Adjustment, 242 N.J. Super. 421, 429 (App. Div. 1990). N.J.S.A. 40:55D-12a recognizes the authority of a board to modify or eliminate previously imposed conditions by requiring that public notice be given "for modification or elimination of a significant condition or conditions in a memorializing resolution in any situation wherein the application for development for which the memorializing resolution is proposed for adoption required public notice." The court in Cohen, 85 N.J. Super. at 237-238, noted that even if a condition is agreed to by an applicant, it can be later eliminated if its elimination will not have an adverse effect on public health or safety, and this is especially so where the underlying use serves the general welfare.

a. As to changed circumstances, our courts have held that a board should consider whether there have been changes in the neighborhood and, if so, the effect of those changes in terms of the condition under consideration. Russell v. Tenafly Board of Adj., 31 N.J. 58, 66 (1959). Changed circumstances can also be a change in the law.

b. As to the "good cause" grounds, our courts have held that a board should consider what its intent was in imposing the condition in the first instance and whether the proposal to modify or eliminate the condition is consistent with or contrary to that intent. Sherman, 242 N.J. Super. at 430. In this regard, our courts have held that a board is not limited to the four corners of the resolution to determine intent and can consider Board minutes of the underlying hearing, transcripts if available, and/or expert reports filed with the application. The object is to determine how significant the condition was, meaning whether the underlying approval would not have been granted without the imposition of the condition, or whether the condition was imposed for general welfare purposes only, meaning to advance the general welfare but not critical for the survival of the underlying approval. Id.

c. As to the "frustration of an appropriate purpose" grounds referred to in Allied, 221 N.J. Super. at 414, a board should consider whether the proposed modification or proposed use of the property is appropriate and, if so, whether the restrictive condition frustrates that appropriate purpose without modification or amendment.

2. Where a condition to be modified is related to a variance, however, an applicant has some additional hurdles to overcome. First, if an applicant wishes to modify or eliminate a condition attached to the grant of a variance (as distinguished from a condition attached purely to a site plan or subdivision approval), a further variance is required. Sherman, 242 N.J. Super. at 249 (holding that an applicant seeking relief from a condition of a variance must sustain the burden of proof in terms of a variance from that condition using the conventional statutory criteria and case law applicable to the variance at issue). See also, Aldrich v. Schwartz, 258 N.J. Super. 300, 312 (App. Div. 1992) ("In entertaining an application to strike a variance condition, a board of adjustment should consider all of the criteria ordinarily relevant to a variance application"). Second, even if the modification is otherwise warranted it cannot be granted unless the negative criteria is satisfied pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70 (variance related relief cannot be granted unless it can be done without substantial detriment to the public good and without substantial impairment of the intent and purpose of the master plan and zoning ordinance). See, Cohen, 85 N.J. Super. at 238 (upholding the elimination of a condition attached to a use variance where it would have no adverse impact on public health and safety).

3. Finally, our courts have held that modification of a condition imposed by a land use board should generally be heard by the board that imposed the condition. Amato v. Randolph Planning Board, 188 N.J. Super. 439, 447 (App. Div. 1982); Park Center v. Woodbridge Zoning Board of Adj., 365 N.J. Super. 284, 291 (App. Div. 2004).

26. Changes in Plans – Field Changes v. Amended Applications

1. Applicants occasionally propose change(s) or revision(s) to plans after the plan has received approval from a local land use board. In the case of a change to a plan that has received final approval, questions arise as to whether the proposed change can be treated as a "field change" that can be reviewed and approved by the Township Engineer or whether an amended approval from the local land use board is required. If an amended approval is required, questions arise as to whether an amended preliminary or new preliminary approval is necessary or whether an amended final approval will suffice. In the case of a change or revision to a plan that has obtained preliminary approval only, questions arise as to whether the proposed revision can be approved as part of the final review and approval process or whether an amended preliminary or new preliminary approval is required.

2. Where a proposed plan change to a plan that received final approval is minimal or de minimis, it can be accomplished as a field change that can be reviewed and approved by the Township Engineer. Conversely, where the proposed change to the final plan is not minimal or de minimis, they exceed the scope of a field change that can be approved by the Township Engineer and require an amended approval by the local land use board. The de minimis concept in a land use case entails something that is "[t]rifling; minimal or of a fact or thing so insignificant that a court may overlook it in deciding an issue or case." Nuckel v. Little Ferry Planning Board, 208 N.J. 95, 100 n.2 (2011).

3. Where proposed change(s) or revision(s) to a preliminarily approved plan are more than minimal or de minimis but are not substantial or significant, they do not require amended preliminary or a new preliminary approval. Our courts have held that local land use boards have authority to grant final site plan approval to a plan that includes insubstantial or insignificant changes from the preliminarily approved plan. Davis v. Somers Point Planning Board, 327 N.J. Super. 535, 541 (App. Div. 2000); Macedonian Church v. Randolph Planning Board, 269 N.J. Super. 562, 565-567 (App. Div. 1994). As such, plan change(s) or revision(s) to preliminarily approved plans which do not constitute minimal or de minimis changes but do not constitute substantial and significant changes, do not require amended preliminary approval, nor do they require a new preliminary approval. Schmidhausler v. Lake Como Planning Board, 408 N.J. Super. 1, 10-11 (App. Div. 2009). Amended final approval is required.

4. Where proposed change(s) or revision(s) to a preliminarily approved plan are substantial or significant, they require amended preliminary or a new preliminary approval. As provided in N.J.S.A. 40:55D-46b and 48b, if a proposed change or revision to the plan represents a "substantial amendment in the layout of improvements proposed by the developer that have been subject of a hearing, an amended [preliminary approval] application shall be submitted and proceeded upon, as in the case of the original application for development." As held by Lake Shore Estates v. Denville Tp., 255 N.J. Super. 589, 592 (App. Div. 1991), aff'd o.b. 127 N.J. 394 (1992), where a subsequent

application contains substantial changes from a prior application, the subsequent application must be considered to be a new application.

5. On a separate issue related to applications for amended approvals, unless the local ordinance directs otherwise and/or unless new variances or exceptions are required, no notice of a public hearing is required for a final site plan application, a minor site plan application, nor an application to modify insignificant or insubstantial conditions of prior approvals in accordance with N.J.S.A. 40:55D-12a.

27. Evidentiary Matters

Boards are often called upon to decide evidentiary matters. The starting point for a discussion of evidence in board hearings is the MLUL, specifically, N.J.S.A. 40:55D-10e, which provides that the "technical rules of evidence shall not apply" to Board hearings on applications "but the agency may exclude irrelevant, immaterial or unduly repetitious evidence." Our courts, however, have also weighed in on the issue of evidence in a Board hearing. While the MLUL provides that the strict rules of evidence do not apply in a Board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009).[9] In fact, it is long established law in New Jersey that in a proceeding before a municipal board it is the Board's obligation to consider only competent evidence. Tomko v. Vissers, 21 N.J. 226, 238 (1956).

One evidentiary matter that frequently arises in Board hearings is so-called "hearsay" evidence which, as a general rule, is excluded in court proceedings. In administrative hearings, however, hearsay evidence is not per se prohibited (and a Board hearing is a quasi-judicial administrative hearing), but our courts have held that administrative fact finding cannot be based upon hearsay evidence alone. Weston v. State, 60 N.J. 36, 51 (1972). As the Weston Court explained, hearsay may be employed to corroborate competent proof or competent proof may be supported by or given added probative value by hearsay evidence in an administrative decision. Id. As the Weston Court held, "to sustain an administrative decision, which affects the substantive rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Id. Moreover, our courts have held that fundamental fairness and due process require that all evidence be presented in a Board hearing be in such a fashion that questions can be asked regarding the evidence and that someone can be cross examined as to the evidence. Sander v. Planning Board of Warren Township, 140 N.J. Super. 386 (App. Div. 1976). In fact, the court in Seibert v. Dover Board of Adj., 174 N.J. Super. 548, 552-553 (Law Div. 1980), held that a Board could not rely upon documents in lieu of testimony unless someone with personal knowledge of the documents was present at the hearing to be cross examined about them and answer questions about them under oath.

Another evidentiary matter that frequently arises in Board hearings is so-called "net opinion" testimony by expert witnesses which is excluded in court proceedings. Our Supreme Court in Gallenthin Realty v. Bor. of Paulsboro, 191 N.J. 344, 373 (2004) held that local municipal decisions must be supported by sufficient evidence in the record, and that standard is not met if the decision is based on an expert's "net opinion." The "net opinion" rule prohibits admission into evidence of an expert's

[9] One commentator explains that the language in N.J.S.A. 40:55D-10e stating that the "technical rules of evidence shall not be applicable" is "generally understood" to mean that self proving documents, such as surveys and sets of plans prepared, signed and sealed by a licensed professionals, can be admitted without the professional in attendance without running afoul of having to prove "authentication." 36 New Jersey Practice, Land Use Law (Frizzel 3rd Ed.), section 14.22.

conclusions if they are not supported by factual evidence or other data. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). As explained in Polzo, "the net opinion rule requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." Id. If the expert provides no explanation for his or her conclusions, those conclusions are deemed to be "net opinions" and must be excluded. Id. As held by the Appellate Division of the Superior Court in Koruba v. American Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007), for experts' conclusions to pass muster under the net opinion rule, the experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable."

In summary, land use boards should base their evidentiary rulings on both N.J.S.A. 40:55D-10e and applicable case law.

28. Expert Testimony

Boards are often presented with expert witnesses and have to determine whether to believe the witness' testimony and/or how much weight to give the witness' testimony. The following is offered as general guidance:

1. To begin with, the Board may choose whether or not to believe an expert and his or her opinion. TSI E. Brunswick v. E. Brunswick Board of Adj., 215 N.J. 26, 46 (2013). In fact, the board may choose not to believe an expert and his or her opinion even if there is no contrary expert opinion offered, and even when the expert happens to be the Board's expert, not an expert offered by a party. El Shaer v. Lawrence Tp. Planning Board, 249 N.J. Super. 323, 330 (App. Div. 1991), certif. denied, 127 N.J. 546 (1991). However, to be binding on appeal, the choice to reject an expert's opinion must be reasonably made and, significantly, must be explained. Clifton Board of Ed. v. Clifton Zoning Board of Adj., 409 N.J. Super. at 434.

2. Believability determinations can be made on a number of bases. Perhaps the expert says something that it so unbelievable and so central to the expert's testimony that it calls into question all of his testimony and/or his ultimate opinion. Under such circumstances, Board members could choose to disbelieve the entirety of the expert's testimony and opinion. This would fall under the so-called "false in one, false in all" rule.[10] If a Board member rejects an expert's testimony on this basis it must say so. Keep in mind, however, the subject of the false testimony must be on a highly significant issue, not an insignificant issue, to reject an expert's testimony on this basis.

3. Perhaps the expert says a number things, some of which do not make sense to you, some of which you feel do not logically follow what preceded it, and/or some of which does not seem as strong as an opposing opinion, but some of which does make sense, is logical and/or you feel is stronger than an opposing opinion. Under such circumstances, Board members should specifically explain which aspects of the testimony / opinion they believe and why and which aspects of the testimony / opinion they do not believe and why. To repeat from above, the Board may choose whether or not to believe an expert but, to be binding on appeal, the choice to reject an expert's opinion must be reasonably made and, significantly, must be explained. Clifton Board of Ed. v. Clifton Zoning Board of Adj., 409 N.J. Super. at 434.

[10] See, State v. Fleckstein, 60 N.J. Super. 399, 408 (App. Div. 1960), certif. denied, 33 N.J. 109 (1960) (holding that the "false in one, false in all" rule is not a mandatory rule of evidence but, rather, is discretionary inference that may be drawn when a jury or a judge (in cases not involving juries) is convinced that an attempt has been made by a witness to intentionally mislead them in some material respect).

29. Burden of Proof

The "burden of proving the right to relief sought in an application rests at all times upon the applicant." Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2019), section 18-4.1, page 371 (citing Ten Stary Dom v. Mauro, 216 N.J. 16, 30 (2013). See also, Toll Bros., Inc. v. Burlington County Freeholders, 194 N.J. 223, 255 (2008) (quoting Cox and Koenig). If the applicant does not meet its burden of proof, "the board has no alternative but to deny the application." Cox and Koenig, section 18-4.1, page 371 (citing Toll Bros., Inc. v. Burlington County Freeholders, 194 N.J. at 255. Significantly, an applicant is required to prove entitlement to an approval at the time of the hearing on the application. Promises from an applicant about future potential compliance is not permitted under the Municipal Land Use Law (the "MLUL"). See, CBS Outdoor, Inc. v. Lebanon Planning Board, 414 N.J. Super. 563, 582 (App. Div. 2010). With the exception of the negative criteria of a "d(1)" variance which the applicant must prove and the Board must find satisfied by an "enhanced quality of proof", [11] the level of proof that the applicant must meet and Board must find on all issues is the so-called preponderance of the evidence standard, which means that the applicant must prove and Board must find that it is more likely than not that each element of the required relief has been proven. Under the preponderance of the evidence standard, "if the evidence presented is in equipoise [equally split in favor and against proving a particular fact or issue], the burden of proof has not been met." Weissbard and Zegas, New Jersey Rules of Evidence (Gann 2019), comment 5.a to N.J.R.E. 101(b)(1), page 39. While N.J.S.A. 40:55D-10e provides that the strict rules of evidence do not apply in a board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009). See e.g., Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 607 (1980) where our Supreme Court observed in a "c" variance application that the applicant must prove its case "by a fair preponderance of the evidence."

[11] Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987) held that the burden of proof relating to the negative criteria of a "d(1)" variance requires that the applicant prove and the Board find by an "enhanced quality or proof" that the variance can be granted without substantial impairment of the intent and purpose of the master plan and zoning ordinance.

30. Dismissal based on Mootness and Grant of Alternate Relief

1. A request for relief becomes "moot" when the relief sought, if granted, can have no practical effect. N.Y. Susquehanna & Western Railway v. State, Div. of Taxation, 6 N.J. Tax 575, 582 (Tax Ct. 1984), aff'd o.b., 204 N.J. Super. 630 (App. Div. 1985); Greenfield v. N.J. Dept. of Corrections, 382 N.J. Super. 254, 257-258 (App. Div. 2006) ("An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy"). Requests for relief that become moot should ordinarily be dismissed. Cinque v. Dept. of Corrections, 261 N.J. Super. 242, 243 (App. Div. 1993). As such, in the event that a board was to deny a request for a variance, a request for site plan approval or subdivision approval could be denied as moot rather than be decided on the merits.

2. Of course, if a board has separate reasons to deny a site plan or subdivision application, the board can include them to make a complete record even if the variance has been denied. Or, if the board would have granted the site plan or subdivision application had no variance been requested and denied, the board can indicate that the site plan approval or site plan approval would have been granted had the variance request been withdrawn or not made in the first place.

3. Finally, a board could go one step further and grant the site plan or subdivision approval on the condition that the applicant withdraws the request for the variance. For, a board is not required to either grant or deny the exact relief requested. A board has discretion to grant such relief as it may deem proper under all of the circumstances of the matter before it. Home Builders Ass'n v. Paramus, 7 N.J. 335, 340-342 (1951).

31. Extensions of Approvals

1. The two most common situations in which applicants request extensions of Board approvals are: (a) where the preliminary or final approval protection period against changes in the zoning ordinance will be expiring, and (b) where the Board has imposed as a condition a "sunset" limitation on a variance or site plan approval and "sunset" is approaching.

2. As to the preliminary and final approval protection periods, N.J.S.A. 40:55D-49 provides that preliminary approval of a site plan or subdivision "confers upon the applicant . . . rights for a three-year period from the date on which the resolution of preliminary approval is adopted" which include "that the general terms and conditions on which preliminary approval was granted shall not be changed . . . ." N.J.S.A. 40:55D-52 provides that "the zoning requirements applicable to the preliminary approval first granted and all other rights conferred upon the developer pursuant to N.J.S.A. 40:55D-49, whether conditionally or otherwise, shall not be changed for a period of two years after the date on which the resolution of final approval is adopted. . . ." N.J.S.A. 40:55D-49 provides for extensions of the preliminary approval protection period and N.J.S.A. 40:55D-52 provides for extensions of the final approval protection period. Both statutes provide that extensions may be requested either before or after what would otherwise be the expiration date of the protection period.

3. In determining whether or not to grant a request for an extension of the preliminary and/or final protection periods, the Board must engage in a balancing test in which it must consider factors that weigh in favor of the extensions and factors that weigh against the extensions and then balance the factors to determine whether or not to grant the extensions. Jordan Developers v. Brigantine Planning Board, 256 N.J. Super. 676, 679-680 (App. Div. 1992). While upholding the Brigantine Planning Board's denial of the extension request in that case on the basis of an intervening zoning change, the Jordan court held that the intervening zone change did not require denial of the extension but was a factor the board should weigh as against an extension when it balanced the positive and negative factors in determining whether or not to grant the extension. The Jordan court specifically held that the board must weigh "the public interest in the implementation of [any ordinance] change, the applicant's interest in extended protection, and the circumstances in which the need for the extension arose." Id. at 680. The required balancing test is not an "all or nothing" proposition. Certain factors may weigh against granting an extension except that, if conditions are imposed on the extension, the balance may then be tipped in the direction of granting the extension. Conditions may have to be imposed in the event the Board finds that same are necessary in order to strike the proper balance.

4. As to "sunset" conditions imposed on variances, a noted planning and zoning law commentator explains that the purpose of imposing a time limitation on the grant of a variance is to ensure that, in the event conditions have changed at the expiration of the period prescribed, the board will have the opportunity to re-approve the

proposal by the applicant in light of the then existing facts and circumstances if the latter still desires to proceed. Rathkopf, The Law of Zoning and Planning (4th Edition updated through 1999), section 38.07. Certain attorneys describe this as protection against "sleeping" variances. [12] New Jersey courts have upheld such sunset conditions. In Yahnel v. Jamesburg Board of Adjustment, 76 N.J. Super. 546, 552 (Law Div. 1962), aff'd, 79 N.J. Super. 509, 520 (App. Div. 1962), certif. denied, 41 N.J. 116 (1963), the court notes that one of the conditions of the approval challenged in that case provided that the building was "to be completed within one year from the date hereof and the use initiated within the same time." The basis of the challenge in Yahnel was that the Board's recommendation to the governing body (the case was pre-MLUL) did not contain the condition – the governing body imposed it on its own. The court affirmed the imposition of the condition. In Ramsey v. Bernardsville Board of Adjustment, 119 N.J. Super. 131, 133 (App. Div. 1972), the court upheld an ordinance which provided that any variance or exception granted by a board would expire if no construction had been commenced within a one-year period. In Farrell v. Estell Manor Board of Adjustment, 193 N.J. Super. 554, 558 (Law Div. 1984), the court held that such a time limitation condition can be enforced if contained in the zoning ordinance or if "established in the variance itself."

5. As to "sunset" conditions imposed on site plan approvals, the New Jersey Supreme Court had held that a municipality may affirmatively provide that a preliminary approval expires unless final approval is sought within the three-year statutory protection period plus any extensions granted by the Board beyond the initial period. D.L. Real Estate Holdings v. Point Pleasant Planning Board, 176 N.J. 126, 135-137 (2003). Although there was no provision in the MLUL which authorized such a time limitation, the D.L. Court reasoned that other municipal powers concerning zoning authority have been "inferred" from the MLUL or its predecessor statute without express authorization in the statute, citing Ramsey, 119 N.J. Super. at 133 (App. Div. 1972) (see above). Based on this same reasoning, it would appear that a "sunset" condition can also be imposed on a final approval, wherein the final approval expires unless construction permits are obtained within a one-year period and/or a certificate of occupancy or approval is obtained within a one-year period. See, Palatine I v. Montville Planning Board, 133 N.J. 546, 557 (1993), where the Court upheld a condition imposed in a construction permit that required that work commence within 12 months from the issuance of the permit as authorized under the New Jersey Uniform Construction Code.

6. In determining whether or not to grant a request for an extension of the time periods within which an applicant must obtain (1) final site plan approval for a preliminarily approved development, and (2) construction permits and/or certificates of occupancy or approval for a development which has secured final approval, it would appear that the Jordan factors set forth above would also apply. In other words, in determining whether or not to grant a request for an extension of the time periods within

[12] A "sleeping variance" is a variance that, after being granted, is not exercised for a while and then, when it is subsequently exercised or "wakes up," the property subject to the variance, the neighborhood surrounding the property subject to the variance, and/or the zoning ordinance or master plan has changed to an extent that the Board would not have granted the variance had those conditions existed at the time of the variance was being considered in the first instance.

which an applicant must obtain (1) final site plan approval for a preliminarily approved development, and (2) construction permits and/or certificates of occupancy or approval for a development which has secured final approval, the Board must engage in a balancing test in which it must consider factors that weigh in favor of the extensions and factors that weigh against the extensions and then balance the factors to determine whether or not to grant the extensions. As set forth above, the required balancing test is not an "all or nothing" proposition. Certain factors may weigh against granting an extension except that, if conditions are imposed on the extension, the balance may then be tipped in the direction of granting the extension. Finally, conditions may have to be imposed in the event the Board finds that same are necessary in order to strike the proper balance.

32. Legal Determinations

Zoning boards of adjustment and planning boards are not limited to making only factual determinations. Both boards possess express and implicit power under the MLUL to also determine "certain questions of law." Cox & Koenig, New Jersey Zoning and Land Use Administration (Gann. 2015), section 15-1.1, page 294 (citing Centennial Land & Dev. Co. v. Medford, 165 N.J. Super. 220 (Law Div. 1979)).

N.J.S.A. 40:55D-70b expressly authorizes a zoning board of adjustment to issue interpretations of the zoning ordinance and to hear and decide special questions. Because the MLUL grants to the zoning board of adjustment – not to the planning board – the express power to interpret ordinances and decide special questions, once the zoning board of adjustment exercises that power in a particular case, the decision becomes final and binding on the zoning officer, other enforcement officials, and on the planning board. Colts Run Civic Ass'n v. Colts Neck Board of Adj., 315 N.J. Super. 240, 246 (Law Div. 1998). However, our courts have recognized that planning boards have implicit authority to interpret ordinances if required to decide applications pending before them in a number of cases. See, Fallone Properties v. Bethlehem Planning Board, 369 N.J. Super. 552, 566-567 (App. Div. 2004); Terner v. Spyco, Inc., 226 N.J. Super. 532 (App. Div. 1988); Galanter v. Howell Planning Board, 211 N.J. Super. 218 (App. Div. 1986).

N.J.S.A. 40:55D-10g requires both zoning boards of adjustment and planning boards to make findings of fact as well as conclusions in each decision on an application for development, and our courts have made it clear that the "conclusions" referenced in that statutory provision include legal conclusions on relevant points of law at issue in the application. Centennial Land & Dev. Co. v. Tp. of Medford, 165 N.J. Super. 220, 232 (Law Div. 1979); Pagano v. Edison Board of Adjustment, 257 N.J. Super. 382, 399-401 (Law Div. 1992). Case law thus provides that the MLUL does not just authorize zoning boards of adjustment and planning boards to make legal conclusions but requires them to make legal determinations in deciding applications pending before them.

All that said, while land use boards possess express and implicit power under the MLUL to determine "certain questions of law," Cox & Koenig, supra, the key is determining which "certain questions of law" can be determined by a board because they are land use agencies, not courts of law. Land use boards have jurisdiction to determine only those legal questions dealing with issues related to the use of property. As explained in DeFelice v. Point Pleasant Beach Board of Adj., 216 N.J. Super. 377, 381 (App. Div. 1987), it is a "fundamental principal of zoning that a zoning board is charged with regulation of land use and not with the person who owns or occupies the land." Further, our courts have held that land use boards have no jurisdiction to determine legal issues which are solely within the jurisdiction of the courts to decide, such as: (1) whether equitable estoppel is applicable in a certain case, Springsteel v. West Orange, 149 N.J. Super. 107, 111 (App. Div. 1977), certif. denied 75 N.J. 10 (1977); (2) the legality of an ordinance, Fischer v. Twp. of Bedminster, 5 N.J. 534 (1950); and (3) constitutional questions, Messer v. Burlington Tp., 172 N.J. Super. 479, 487 (Law Div. 1980).

33. Temporary Approvals

1. Our courts have long recognized the authority of a board to grant temporary approvals. In Houdaille Const. Materials v. Tewksbury Board of Adj., 92 N.J. Super. 293, 303-304 (App. Div. 1966), the court upheld a limitation on the duration of a conditional use approval for an industrial operation to five years to coincide with the term of the applicant's lease to use the property. The court in Wilson Coalition v. Mayor and Council of Summit, 245 N.J. Super. 616, 617-618 (Law Div. 1990), noted that the Summit Board of Adjustment had granted temporary use variances to the applicant to coincide with the terms of a lease the applicant had entered into with a tenant. In upholding the trial court's reversal of a board's denial of a use variance to permit parking on the property containing another use – a gas station – the court in Bell Atlantic v. Riverdale Zoning Board of Adj., 352 N.J. Super. 407, 412-413 (App. Div. 2002) commented that the use variance would be for a limited time period – seven years – which would provide assurance that the proposed parking use would not expand or last forever. Thus, depending on the circumstances present in a particular application, the board may find that an approval should be granted for a temporary period of time. It should be further noted that a board is not required to either grant or deny the exact relief requested. A board has discretion to grant such relief as it may deem proper under all of the circumstances of the matter before it. Home Builders Ass'n v. Paramus, 7 N.J. 335, 340-342 (1951).

All that said, approvals run with the land – and are not personal to the applicant – so generally a board cannot limit an approval to apply only so long as a particular applicant owns the property at issue. Stop & Shop v. Springfield Board of Adj., 162 N.J. 418, 431-432 (2000); Berninger v. Midland Park Board of Adj., 254 N.J. Super. 401 (App. Div. 1992), aff'd o.b., 127 N.J. 226 (1992). See, Cox & Koenig, New Jersey Zoning & Land Use Administration (Gann 2015), section 28-2.2, page 597 (expressing "the view of the authors, however, that a variance may legitimately be limited to enjoyment by certain classes of persons, as, for example, in the case of variances granted for the construction of accessory apartments or cottages for occupancy of an aged parent or other dependent relative. . . . Such variances would be of limited duration since they lapse on cessation of the approved occupancy.").