"Crib Sheets" for Determinations that Can Be Made and Relief that Can Be Granted by a Planning Board

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1. **Minor Site Plan Approval for PB**

1. 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 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 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. Minor Subdivision Approval for PB

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.

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(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 . . . ."

3. Preliminary and Final Site Plan Approval for PB

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 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 plans to comply with the ordinance requirement prior to the Board granting approval.

c. 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.

d. 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 . . . ."

4. Amended Preliminary and Final Site Plan Approval for PB

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:

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(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 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 plans to comply with the ordinance requirement prior to the Board granting approval.

c. 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.

d. 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 . . . ."

5. Preliminary and Final Subdivision Approval for PB

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 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 plans to comply with the ordinance requirement prior to the Board granting approval.

c. 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.

d. 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 . . . ."

6. Amended Preliminary and Final Subdivision Approval for PB

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 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 plans 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 . . . ."

7. Exceptions from Site Plan or Subdivision Requirements for PB

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."

a. 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). Thus, the standard for determining whether the literal enforcement of the ordinance requirement is issue is will exact undue hardship should be whether the ordinance requirement at issue is inhibits the extent to which the property can be used.

b. 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 at 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.

8. Exceptions from Residential Site Improvement Standards (RSIS) for PB

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 2019), §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.

9. **Conditional Use Approval for PB**

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 Planning Board must consider in deciding whether or not to grant conditional use approval are as follows:

1. N.J.S.A. 40:55D-67a provides that conditional use approval shall be granted by the Board if the applicant meets the "definite specifications and standards" which have been set forth with certainty and definiteness in the applicable ordinance provisions. The Board must thus determine whether the proposed conditionally permitted use complies with all conditional use requirements set forth in the ordinance. N.J.S.A. 40:55D-67b provides that the "review by the planning board of a conditional use shall include any required site plan review." 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 regulations and requirements, the Board must grant site plan approval as well as conditional use approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010). Unlike a site plan or subdivision application where the Board can under certain circumstances grant an approval conditioned on changes to comply with ordinance requirements, if a 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., 414 N.J. Super. at 582, 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 standards, the Board must deny conditional use approval. Id.

10. “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).

11. “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).

12. Direct Issuance of Permit for Building or Structure Located in Reserved Areas on Official Map Pursuant to §34

1. If a proposed development requires approval by the Planning Board of a subdivision, site plan or conditional use as well seeks the issuance of a construction permit pursuant to N.J.S.A. 40:55D-34, the Planning Board may direct the issuance of such construction permit 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.”

13. "Planning" Variance and Direction to Issue a Permit for Building or Structure Not Abutting an Official and Fully Improved Street Pursuant to §36

1. If a proposed development requires approval by the Planning Board of a subdivision, site plan or conditional use as well seeks the issuance of a permit pursuant to N.J.S.A. 40:55D-35, the Planning 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...."

14. 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" 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).

15. Modification of Prior Conditions

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).

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

1. Applicants occasionally propose change(s) or revision(s) to plans after the plan has received preliminary approval from a local land use board. Questions arise as to whether the proposed change(s) or revision(s) 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 and, if an amended approval is required, whether an amended preliminary or new preliminary approval is necessary or whether an amended final approval will suffice.

2. Where the proposed plan change(s) or revision(s) are minimal or de minimis, they can be accomplished as a field change that can be reviewed and approved by the Township Engineer. Conversely, where the proposed plan change(s) or revision(s) are 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 the proposed change(s) or revision(s) to the preliminarily approved plans are not substantial or significant, they do not require amended 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. Finally, where the proposed plan change(s) or revision(s) to the preliminarily approved plans 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.

17. 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). [1] 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 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

[1] 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.

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.

18. 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.[2] 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 of 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.

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[2] 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).

19. 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", [3] 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."

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

20. 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). 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).

21. 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. [4] 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 1 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 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

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[4] 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.

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.

22. 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. 2019), section 15-1.1 (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.

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). On the issue of easements, the court in Kline v. Bernardsville Ass'n, 267 N.J. Super. 473, 479-480 (App. Div. 1993), held that the MLUL provided no authority to a planning board to rule on or order a change in the character or place of an easement. The Kline court suggested that the board could condition a development approval on the applicant's attempt to seek an agreement and could also "direct it to commence an action in the courts." Id.