MONTGOMERY TOWNSHIP

PLANNING BOARD

A GUIDE TO THE MUNICIPAL LAND USE LAW

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Presented by

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Introduction

It is the purpose of this *Guide* to provide an outline on the legal principles and standards that are applicable when the Planning Board and the Zoning Board of Adjustment consider applications for Land Use Development.

Generally the Planning Board considers applications for Site Plan and for Subdivision approval and will consider variances for setback, lot frontage and other bulk requirements in conjunction with those approvals. The Planning Board does not consider any requests for variances from the "use" requirements established by the Zoning Ordinance of the municipality.

Most applications to the Zoning Board of Adjustment will be for variances from the provisions of the Zoning Ordinance. There are, however, occasions when the Zoning Board of Adjustment will consider applications for Subdivision or Site Plan approval when an application also involves a request for a use variance. The Zoning Board of Adjustment also considers other land use related matters, and this *Guide* will address those particular issues as well.

While this *Guide* will provide basic information, it is important to remember that each application must be judged on an individual basis and that each application stands or falls on its own merits. This *Guide* is intended to provide a general overview of the principles involved and is not intended to provide legal advice with respect to any specific issue or application. Specific advice must be based on the unique facts of each situation and on the application of both statutes and judicial decisions that are in a continuous state of development.

No public body can be arbitrary, capricious or unreasonable in making a decision, but that does not mean that the relative merits of each application should not be fairly considered. It would be arbitrary to simply approve an application without fairly considering the facts that weigh against the application, just as it would be arbitrary to simply reject an application without fairly considering the facts and arguments that weigh in favor of the application.

The Municipal Land Use Law

The basic authority for land use regulation in New Jersey is found in the **Municipal Land Use Law**.[1]

Municipalities implement the Municipal Land Use Law by the adoption of the Master Plan, the Zoning Ordinance, the Site Plan and Subdivision Review Ordinance, and the administrative ordinances establishing the Zoning Board of Adjustment and the Planning Board. Sometimes all of the ordinances will be included in a comprehensive the Land Development Ordinance that provides a convenient source of information for all land development applications. In other communities the land use ordinances consist of several chapters of the codified ordinances.

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1 *N.J.S.A.* 40:55D-1 et seq.

Whenever there is a conflict between the language of the ordinance and the specific provisions of the Municipal Land Use Law, the provisions of the Municipal Land Use Law are controlling. For instance, where the Municipal Land Use law provides a definition of a term, the municipality may not change that definition by enacting an ordinance. For instance, the Municipal Land Use Law defines a "Quorum" as "the majority of the full authorized membership of a municipal agency." The ordinance could not provide a different definition that might allow for a lower or higher number to constitute a quorum.

The Governing Body

The power to adopt and amend zoning ordinances relating to the nature and extent of the uses of land and of buildings and structures is reserved to the Governing Body, whether it is a Township Committee, a City Council, a Commission, a Borough Mayor and Council, or a Township Council. The Governing Body is an elected body vested with legislative powers for the municipality.

In the case of *Willoughby v. Planning Board of the Township of Deptford*, 306 N.J. Super. 266 (App. Div. 1997), the Appellate Division of the New Jersey Superior Court had to rule on a situation where the Planning Board rushed through an approval for an applicant in order to avoid the impact of an amendment to the Land Use Ordinance being adopted by the municipal Governing Body.

The Court was very clear in its opinion to address the preeminent role of the Governing Body in the establishment of land use policy.

> Finally, we consider it necessary to comment upon the Planning Board's role in this matter. The Municipal Land Use Law confers the responsibility for determining a municipality's land use plan upon the governing body, composed of the people's elected representatives. N.J.S.A. 40:55D-62. A planning board is a subordinate municipal agency whose role is limited "to effectuat[ing] the goals of the community as expressed through its zoning and planning ordinances." Kaufman v. Planning Bd. for Township of Warren, 110 N.J. 551, 564 (1988); see also PRB Enters., Inc. v. South Brunswick Planning Bd., 105 N.J. 1, 7-8 (1987). Consequently, when a governing body proposes to amend a zoning ordinance, a planning board should not rush to grant development approvals under existing zoning before the amendments to the municipality's land use ordinance can take effect. In this case the Planning Board easily could have deferred hearings on Wolfson's site plan application for a brief period to determine whether the proposed ordinance rezoning Wolfson's property would be adopted. Instead, it attempted to preempt the proposed rezoning by completing its review of Wolfson's application before the Township Council could act and by subsequently granting site plan approval after the amendment to the zoning ordinance had been adopted but before it became effective. Therefore, we note our disapproval of the Planning Board's attempt to usurp the Township Council's preeminent role in determining the municipality's land use plan.

The Planning Board

The Planning Board is structured in a manner, which combines elected and appointed officials and citizen members. In establishing the Planning Board, the governing body, by ordinance determines whether it shall consist of seven or nine members. The Planning Board has four specific categories of members with the manner of appointment specified by the Municipal Land Use Law, *N.J.S.A.* 40:55D-23.

Class I	the mayor or the mayor's designee in the absence of the mayor or, in the case of the council-manager form of government the manager, if so provided by the ordinance.
Class II	One of the officials of the municipality other than a member of the governing body, to be appointed by the mayor.
Class III	A member of the governing body to be appointed by the governing body, except that no member for Class III shall be appointed to the planning board if the governing body consists of only three members.
Class IV	Either four [4] or six [6] citizens of the municipality, depending on whether the Planning Board total membership is fixed at seven or nine members. The Class IV members are to be appointed by the mayor or, in the case of the council-manager form of government, by the council, if so provided by the ordinance.

The members of Class IV may hold no other municipal office, position or employment,[2] except that in the case of nine-member boards, one member may be a member of the zoning board of adjustment or historic preservation commission. No member of the board of education may be a Class IV member of the planning board, except in the case of a nine-member board, where one Class IV member may be a member of the board of education. If there is a municipal environmental commission, a member of the environmental commission shall also be a Class IV member of the planning board,[3] unless there is among the Class IV or alternate members of the planning board both a member of the zoning board of adjustment or historic preservation commission and a member of the board of education, in which case the member common to the planning board and municipal environmental commission shall be deemed a Class II member of the planning board.

No member of either the planning board or the zoning board of adjustment is permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.[4]

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2 This provision has been held to prohibit a member of a regional Sewerage Authority or a Municipal Utilities Authority from serving on the Planning Board of any municipality which has the power to appoint members of the Authority. Under the provisions of *N.J.S.A.* 40:55D-23, membership on a municipal board or commission whose function is advisory in nature, and the establishment of which is discretionary and not required by statute, shall not be considered the holding of municipal office.

3 *N.J.S.A.* 40:56A-1

4 *McNamara v. Saddle River Borough*, 64 *N.J. Super.* 426 (App.Div. 1960) held that a public official who resides within 200 feet of the subject property has a disqualifying interest in a matter relating to that property. The standard is substantially expanded by the *Local Government Ethics Law* which prohibits

The Planning Board does play a role in the enactment of zoning ordinances and amendments because of its responsibility to adopt a master plan and the requirement that zoning ordinances must be consistent with the master plan.[5] The statute does permit the Governing Body to adopt a provision that is not consistent with the master plan, but only by the affirmative vote of the majority of the entire membership of the Governing Body and after the Governing Body states its reasons for so acting.

The Planning Board is established by ordinance.

Planning Board members are appointed for specific terms of office. When a vacancy is created by the resignation or death of a member, the position is filled for the balance of the unexpired term only. When the term of office is completed, the member no longer has the authority to act as a member of the Planning Board. There is no provision for the holding over of a Planning Board member once the term of appointment has expired. In the case of *City of Hoboken v. City of Jersey City, et als.* 347 *N.J. Super*. 279 (Law Div. 2001) the court invalidated a major land use approval on the grounds that a majority of the members of the Jersey City Planning Board had not been given new appointments once their original appointments had expired and the Court declined to treat them as *de facto* or “holdover” Planning Board members.

The Zoning Board of Adjustment

The Governing Body is required to create a Zoning Board of Adjustment consisting of seven (7) members and not more than two (2) alternates, who shall be designated as "Alternate No. 1" and "Alternate No. 2". The Zoning Board of Adjustment is established by ordinance.

The role of the Zoning Board of Adjustment is to function as a quasi-judicial body to review and act upon applications for exceptions or variances to the terms of the zoning ordinance. The Municipal Land Use Law recognizes that the Master Plan and the Zoning Ordinance deal with planning concepts and with regulations that are applicable to a particular geographic zone, but that there are circumstances that relate to a particular property that may justify exceptions to the general standards.

It is the function of the Zoning Board of Adjustment to hear cases where the applicant believes that he or she is entitled to an exception to the regulations that apply to a particular district due to those unique circumstances.

In making its decision on the application, the Zoning Board of Adjustment must be guided by the intent and purpose of the zoning ordinance and by standards that have been established by the Municipal Land Use Law, by the zoning ordinance and by litigated cases interpreting the law.

"direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment."

5 *N.J.S.A.* 40:55D-62

The Zoning Board of Adjustment is required, at least once a year, to review its decisions on applications and appeals and to prepare a report on its findings on zoning ordinance provisions that were the subject of variance applications and its recommendations, if any, for zoning ordinance amendment or revision. The report is to be adopted by resolution and submitted to the governing body and the planning board for their consideration.[6]

Where the planning board and the governing body do not respond affirmatively to any recommendations for changes in the zoning ordinance, the Zoning Board of Adjustment must draw the conclusion that the existing zoning requirements have been reaffirmed and that the Zoning Board of Adjustment should not be using the variance power to effectively rewrite the provisions of the zoning ordinance.

Just as Planning Board members are appointed for specific terms of office, the same principle applies to members of the Zoning Board of Adjustment. Vacancies occurring during a term of appointment are filled for the unexpired term only. When the term of appointment expires, so does the authority of that member of the Board. The principle derived from the *City of Hoboken v. City of Jersey City* case, mentioned above, applies equally to the Zoning Board of Adjustment.

The Combined Board

When the Municipal Land Use Law was initially drafted, there was considerable discussion over whether there should be a separate Planning Board and a Zoning Board of Adjustment, or whether there should be a single land use board to consider all applications.

The debate, at that time, was resolved in favor of separate boards. In communities with high levels of activity, it has been necessary to have the separate boards with their separate powers. Otherwise the "single board" would be meeting several times per month and it would become very difficult to find the citizens who were able to commit to the time required to consider all of the applications.

In many communities, however, they have found that, because of their size or the fact that they are fully developed, there are a very limited number of applications, that it has been difficult to obtain enough citizen volunteer members and that it would be more efficient and cost effective to have a single board.

In 1985 the Municipal Land Use Law was amended to allow municipalities with populations under 2,500 to provide that the Planning Board would exercise all of the powers of both the Planning Board and the Zoning Board of Adjustment. If the municipality decided to have the Planning Board exercise those powers, it was required to establish a nine (9) member Planning Board.

Additionally, whenever the Board considers a variance under *N.J.S.A.* 40:55D-70 d, i.e., a use variance, the Class I member [Mayor, Mayor's designee or Manager] and the Class III member [governing body member] shall not participate in the consideration of the application. In that manner the Planning Board would have the same seven [7] voting members to consider

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6 *N.J.S.A.* 40:55D-71.

the application that would have existed on a Zoning Board of Adjustment. Additionally, by excluding the Class I and Class III members, their independence is preserved in the event of an appeal of the grant of a use variance to the governing body.

By additional amendments to the Municipal Land Use Law, the population level has been modified to allow more municipalities to take advantage of the single board approach to the consideration of land development applications. Municipalities with a population of 10,000 or less may enact an ordinance to provide for the nine (9) member Planning Board to exercise all of the powers of the Zoning Board of Adjustment. Municipalities with a population in excess of 10,000 may also establish a single Planning Board to review the applications, but the ordinance is subject to approval by the voters of the municipality in a referendum.

Additional amendments are expected to be enacted to gradually increase the population level so that more municipalities may enact ordinances to have a single board. Legislation is currently pending to increase the population level to 15,000.

No municipality is required to have a single board. It is a matter for local decision by the governing body.

In order to provide additional options to municipalities, an amendment was enacted in 1991 which would allow the Planning Board in a municipality with a population of 2,500 or less, if so provided by ordinance, to exercise the powers of a Historic Preservation Commission, provided that the Planning Board included at least one member with the qualifications of a Class A member and one member meeting the qualifications of a Class B member of the Historic Preservation Commission.[7]

The Historic Preservation Commission

Under the provisions of the Municipal Land Use Law, the governing body may create an Historic Preservation Commission consisting of five, seven or nine regular members and may have not more than two alternate members.[8]

The duties of the Historic Preservation Commission are, a set forth in the Municipal Land Use Law, as follows:

The historic preservation commission shall have the responsibility to:[9]

a. Prepare a survey of historic sites of the municipality pursuant to criteria identified in the survey report.

b. Make recommendations to the planning board on the historic preservation plan element of the master plan and on the implications for preservation of historic sites of any other master plan elements.

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7 *N.J.S.A.* 40:55D-25 (d)

8 *N.J.S.A.* 40:55D-107

9 *N.J.S.A.* 40:55D-109

c. Advise the planning board on the inclusion of historic sites in the recommended capital improvement program;

d. Advise the planning board and board of adjustment on applications for development pursuant to section 24 [40:55D-110] of this amendatory and supplementary act;

e. Provide written reports pursuant to section 25 [40:55D-111] of this amendatory and supplementary act on the application of the zoning ordinance provisions concerning historic preservation; and

f. Carry out such other advisory, educational and informational functions as will promote historic preservation in the municipality.

Whenever an application for a permit is filed with the administrative officer relating to a property in the Historic Preservation District, that application is to be referred to the Historic Preservation Commission for its review and recommendations. Those recommendations are binding on the administrative officer and any permit issued by the administrative officer must be conditioned on the compliance with the recommendations of the Historic Preservation Commission. The failure of the Historic Preservation Commission to submit its report to the administrative officer within 45 days after the referral of the matter to it is deemed to be a favorable recommendation on the permit.

If the applicant is not willing to accept the conditions imposed, the applicant may appeal the decision to the Zoning Board of Adjustment.

If an application is filed with the Planning Board or the Zoning Board of Adjustment with respect to a property located in the Historic Preservation District, the Planning Board or the Zoning Board of Adjustment shall refer the application to the Historic Preservation Commission for its report and recommendations.

The referral is made when the application before the Planning Board or the Zoning Board of Adjustment is deemed complete or is scheduled for a hearing. The failure to refer the application to the Historic Preservation Commission does not invalidate any hearing or proceeding before the Planning Board or the Zoning Board of Adjustment.

The report of the Historic Preservation Commission may be submitted in writing or may be presented in the form or oral testimony before the Planning Board or the Zoning Board of Adjustment by one of its members or a staff member designated for that purpose. If the report is to be presented in the form of testimony, that should be done by a member or staff member other than the member of the Historic Preservation Commission who serves as a member of the Planning Board or the Zoning Board of Adjustment.[10]

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10 *N.J.S.A.* 40:55D-110, which provides that:
The planning board and board of adjustment refer to the historic preservation commission every application for development submitted to either board for development in historic zoning districts or on historic sites designated on the zoning or official map or identified in any component element of the master plan. This referral shall be made when the application for development is deemed complete or is scheduled for a hearing, whichever occurs sooner. Failure to refer the application as required shall not invalidate any hearing or proceeding. The historic preservation commission may provide its advice

In carrying out the duties provided by the Municipal Land Use Law, the Ordinance establishing the Historic Preservation Commission should require the Commission to report at least annually to the Planning Board and the Governing Body on the state of historic preservation in the municipality and to make any recommendations that it believes should be considered by the Planning Board or the Governing Body.

The Master Plan

The development and adoption of the Master Plan is one of the most important duties of the Planning Board. The Master Plan is the guide for the future development of the municipality. It must contain at least two [2] elements.

The first required element is the statement of the objectives, principles, assumptions, policies and standards on which proposals for the physical, economic and social development of the municipality are based.

The second required element is the "land use element" which shows existing and proposed zone development, the relationship to existing and proposed zone plans and ordinances, and a statement of the standards of population density and development density recommended for the municipality.

The specific statutory provisions relating to the Master Plan are [11]

a. The planning board may prepare and, after public hearing, adopt or amend a master plan or component parts thereof, to guide the use of lands within the municipality in a manner which protects public health and safety and promotes the general welfare.

b. The master plan shall generally comprise a report or statement and land use and development proposals, with maps, diagrams and text, presenting, at least the following elements (1) and (2) and, where appropriate, the following elements (3) through (12).:

(1) A statement of objectives, principles, assumptions, policies and standards upon which the constituent proposals for the physical, economic and social development of the municipality are based;

(2) A land use element (a) taking into account and stating its relationship to the statement provided for in subsection (1) hereof, and other master plan elements provided for in subsection (3) through (12) hereof and natural conditions, including, but not necessarily limited to, topography, soil conditions, water supply, drainage, flood plain areas, marshes, and woodlands; (b) showing the existing and proposed location, extent and intensity of

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which shall be conveyed through its delegation of one of its members or staff to testify orally at the hearing on the application and to explain any written report which may have been submitted.

11 *N.J.S.A.* 40:55D-28

development of land to be used in the future for varying types of residential, commercial, industrial, agricultural, recreational, educational and other public and private purposes or combination of purposes; and stating the relationship thereof to the existing and any proposed zone plan and any proposed zone plan and zoning ordinance; and (c) showing the existing and proposed location of any airports and the boundaries of any airport hazard areas delineated pursuant to the "Air Safety and Hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C. 6:1-80 et seq.); and intensity recommended for the municipality;

(3) A housing plan element pursuant to section 10 of P.L. 1985, c. 222 (C. 52:27D-310), including, but not limited to, residential standards and proposals for the construction and improvement of housing;[12]

(4) A circulation plan element showing the location and types of facilities for all modes of transportation required for the efficient movement of people and goods into, about, and through the municipality, taking into account the functional highway classification system of the Federal Highway Administration and the types, locations, conditions and availability of existing and proposed transportation facilities, including air, water, road and rail;[13]

(5) A utility service plan element analyzing the need for and showing the future general location of water supply and distribution facilities, drainage and flood control facilities, sewerage and waste treatment, solid waste disposal and provision for other related utilities, and including any storm water management plan required pursuant to the provisions of P.L. 1981, c. 32 (C. 40:55D-93 et seq.);

(6) A community facilities plan element showing the existing and proposal location and type of educational or cultural facilities, historic sites, libraries, hospitals, firehouses, police stations and other related facilities, including their relation to the surrounding areas;

(7) A recreation plan element showing a comprehensive system of areas and public sites for recreation;

(8) A conservation plan element providing for the preservation, conservation, and utilization of natural resources, including, to the

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12 A municipality is legally required to take whatever action is necessary, beyond rezoning, to provide a reasonable opportunity for construction of its fair share of low and moderate income housing. *Allan-Deane Corp. v. Bedminster Township*, 205 *N.J. Super.* 87 (Law Div. 1985).

13 A municipality may adopt an ordinance fixing particular land areas for airports or heliports, or may ban them, but they may not exercise their zoning powers in a manner that will conflict with the policy goals of the State or the final decision making authority of the Commissioner of Transportation. *Garden State Farms, Inc. v. Bay*, 77 *N.J.* 439 (1978).

extent appropriate, energy, open space, water supply, forests, soil, marshes, wetlands, harbors, rivers and other waters, fisheries, endangered or threatened species wildlife and other resources, and which systematically analyzes the impact of each other component and element of the master plan on the present and future presentation, conservation and utilization of those resources;

(9) An economic plan element considering all aspects of economic development and sustained economic vitality, including (a) a comparison of the types of employment expected to be provided by the economic development to be promoted with the characteristics of the labor pool resident in the municipality and nearby areas and (b) an analysis of the stability and diversity of the economic development to be promoted;

(10) A historic preservation plan element (a) indicating the location and significance of historic sites and historic districts; (b) identifying the standards used to assess worthiness for historic site or district identification; and (c) analyzing the impact of each component and element of the master plan on the preservation of historic sites and districts;

(11) Appendices or separate reports containing the technical foundation for the master plan and its constituent elements; and

(12) A recycling plan element which incorporates the State Recycling Plan goals, including provisions for the collection, disposition and recycling of recyclable materials designated in the municipal recycling ordinance, and for the collection, disposition and recycling of recyclable materials within any development proposal for the construction of 50 or more units of single-family residential housing or 25 or more units of multi-family residential housing and any commercial or industrial development proposal for the utilization of 1,000 square feet or more of land.

c. The master plan and its plan elements may be divided into subplans and subplan elements projected according to periods of time or staging sequences.

d. The master plan shall include a specific policy statement indicating the relationship of the proposed development of the municipality as developed in the master plan to (1) the master plans of contiguous municipalities, (2) the master plan of the county in which the municipality is located, (3) the State Development and Redevelopment Plan adopted pursuant to the "State Planning Act, " sections 1 through 12 of P.L. 1985, c. 398 (C. 52:18A-196 et seq.) and (4) the district solid waste management plan required pursuant to the provisions of the "Solid Waste Management Act," P.L. 1970, c. 39 (C. 13:1E-1 et seq.) of the county in which the municipality is located.

Since conditions in a municipality change as development takes place, both within the municipality and in the surrounding municipalities, the Municipal Land Use Law requires that there be a periodic re-examination of the Master Plan at least every six (6) years.[14]

The failure to conduct the periodic re-examination and to adopt either a new Master Plan or a Re-examination Report means that the presumption of validity of he municipal ordinances can be lost. The burden is placed on the municipality to prove that its development regulations are still reasonable.[15]

The failure to re-examine the master plan and zoning and development regulations does not, however, operate to expand the power of the Zoning Board of Adjustment to grant a use variance.[16]

Since the costs of the re-examination can be significant, there has been statewide discussion about modifying the time within which the re-examination must be conducted. The discussions have focused on changing the re-examination requirement to a ten (10) year cycle instead of the currently mandated six (6) year cycle. The use of a 10-year cycle would enable the municipality to make better and more timely use of the demographic information that becomes available after every Federal census.

The Zoning Ordinance

The Master Plan is not the same as the Zoning Ordinance. The Master Plan provides the framework and the conceptual approach to local land use regulation, but it is the Zoning Ordnance that ultimately establishes the land use policy for the municipality.

It is the governing body, i.e., the elected officials of the municipality, which has the power to enact, amend or repeal ordinances. The Governing Body adopts a zoning ordinance in order to implement the master plan.

When the adopts a zoning ordinance, it is required to submit the proposed ordinance to the Planning Board so that the Planning Board can report on whether the ordinance is consistent with the Master Plan. If the Planning Board finds the proposed ordinance to be consistent with the Master Plan, then the governing Body can adopt the ordinance by a simple majority vote.

While it is generally expected that there will be consistency between the Master Plan and the Zoning Ordinance, the governing body retains the authority to enact a zoning ordinance, which is not consistent with the Master Plan. In order to do so, the ordinance must be enacted by a majority of the entire membership of the governing body and the governing body must set forth its reasons for adopting the ordinance in a Resolution that is recorded in its minutes.[17] As was

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14 *N.J.S.A.* 40:55D-89

15 *Lionshead Woods v. Kaplan Bros.* 243 *N.J. Super.* 678 (Law Div. 1990)

16 *Vidal v. Lisanti Foods, Inc.*, 292 *N.J. Super.* 555 (App. Div. 1996)

17 *N.J.S.A.* 40:55D-62

noted previously, the ultimate responsibility for the establishment of land use policy rests with the governing body.

Conflicts of Interest and the Local Government Ethics Law

The *Municipal Land Use Law* specifically provides that no member is permitted to act on any matter in which he or she has, either directly or indirectly, any personal or financial interest.[18]

No member of the Board of Adjustment may hold **elective office under the municipality** and no member shall be permitted to act on any matter in which he or she has, either directly or indirectly, any personal or financial interest.[19]

It is clear that the issue of a "conflict of interest" is something that must be considered specifically by each member of the Planning Board or the Zoning Board of Adjustment or the Historic Preservation Commission with respect to each matter that comes before them. At the outset, the individual member involved must address the question of whether a conflict of interest exists.

The enactment of the *Local Government Ethics Law* provides some additional guidance and some standards by which members of the Planning Board and the Zoning Board of Adjustment, the Historic Preservation Commission and any other public body must conduct themselves.[20]

The goals and intentions of the *Local Government Ethics Law* are set forth in the statement of purpose.[21]

a. Public office and employment are a public trust;

b. The vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives;

c. Whenever the public perceives a conflict between the private interests and the public duties of a government officer or employee, that confidence is imperiled;

d. Governments have the duty both to provide their citizens with standards by which they may determine whether public duties are being faithfully performed, and to apprise their officers and employees of the behavior which is expected of them while conducting their public duties; and

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18 *N.J.S.A.* 40:55D-23.b.

19 *N.J.S.A.* 40:55D-69. It should be noted that this provision as to the Zoning Board of Adjustment is significantly different from the corresponding provision applicable to the Planning Board. The key phrase as to the Zoning Board of Adjustment is limited to elective office.

20 *N.J.S.A.* 40A:9-22.1, et seq.

21 *N.J.S.A.* 40A:9-22.2.

e. It is the purpose of this act to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a statewide basis, and to provide local officers or employees with advice and information concerning possible conflicts of interests which might arise in the conduct of their public duties.

The ethical standards established by the law draw on common sense and on general standards that have been in practice by public officials with a concern for maintaining the appearance as well as the actuality of impartial decision making.[22]

a. No local government officer or employee or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

b. No independent local authority shall, for a period of one year next subsequent to the termination of office of a member of that authority:

   (1) award any contract which is not publicly bid to a former member of that authority;

   (2) allow a former member of that authority to represent, appear for or negotiate on behalf of any other party before that authority; or

   (3) employ for compensation, except pursuant to open competitive examination in accordance with Title 11A of the New Jersey Statutes and the rules and regulations promulgated pursuant thereto, any former member of that authority.

   The restrictions contained in this subsection shall also apply to any business organization in which the former authority member holds an interest.

c. No local government officer or employee shall use or attempt to use his official position to secure unwarranted privileges or advantages for himself or others;

d. No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence or judgement;

e. No local government officer or employee shall undertake any employment or service, whether compensated or not which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

f. No local government officer or employee, member of his immediate family, or business organization in which he has an interest, shall solicit or

22 *N.J.S.A.* 40A:9-22.5.

accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the local government officer has no knowledge or reason to believe that the campaign contribution, if accepted ,was given with the intent to influence the local government officer in the discharge of his official duties;

g. No local government officer or employee shall use, or allow to be used, his public office or employment, or any information, not generally available to the members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, or any business organization with which he is associated;

h. No local government officer or employee or business organization in which he has an interest shall represent any person or party other than the local government in connection with any cause, proceeding, application or other matter pending before any agency in the local government in which he serves. This provision shall not be deemed to prohibit one local government employee from representing another local government employee where the local government agency is the employer and the representation is within the context of official labor union or similar representational responsibilities;

i. No local government officer shall be deemed in conflict with these provisions if, by reason of his participation in the enactment of any ordinance, resolution or other matter required to be voted upon or which is subject to executive approval or veto, no material or monetary gain accrues to him as a member of any business, profession, occupation or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of such business, profession, occupation or group;

j. No elected local government officer shall be prohibited from making an inquiry for information on behalf of a constituent, if no fee, reward or other thing of value is promised to, given to or accepted by the officer or a member of his immediate family, whether directly or indirectly, in return therefor; and

k. Nothing shall prohibit any local government officer or employee, or members of his immediate family, from representing himself or themselves, in negotiations or proceedings concerning his, or their, own interests.

A conflict does not arise simply because the Board member knows the applicant, but would depend on the nature of the relationship and whether the member can objectively hear and

decide the issue presented by the application. Certainly, if a member were to decide that he or she could not be objective on a particular application, then the member should disqualify himself or herself from participation on that application.

In a similar manner, the fact that a member of the Planning Board may own property in the community would not automatically disqualify that member from voting on a Master Plan or on whether to recommend adoption of a Zoning Ordinance. The first question would be whether the impact of the Master Plan or the Zoning Ordinance would affect the member in a manner no greater than any other citizen of the community or whether the provisions had a disproportionate impact on the member.

Sometimes, an issue might arise where a member might truly feel that he or she could be objective, but the nature of the relationship might be such that the public would perceive that the member could not be objective. In that case, a member should consider the "appearance" that is presented to the public, for it is important that the public believe that the Planning Board and the Zoning Board of Adjustment are both objective and fair.

There are times when Board members may be tempted to abstain or to disqualify themselves on a particular application, not because there is an actual conflict of interest, but because the application may be controversial or because they are simply "uncomfortable" in making a decision on the application, because their decision might be unpopular or might offend someone. A member of a Board is a public official and has a sworn obligation to carry out the duties of the position and to decide on the merits of an application and the applicable law. A member who abstains or who disqualifies himself or herself where there is no actual conflict of interest deprives both the applicant and the public of the right to a fair hearing.

There are times when an entire Board or a majority of the Board might think that they should be disqualified from an application, in which case the application could not be properly considered. The primary consideration to keep in mind is that the Board must be able to function. An applicant is entitled to a hearing and is entitled to have a full Board to hear the application.

An example might occur if a member of the Governing Body were to apply for a site plan approval and for certain setback variances.

It would certainly be possible for all, or a substantial number, of the members of the Board to disqualify themselves on the ground that they were appointed by the Governing Body. The public might believe that the Board members could not be truly objective with respect to an application submitted by a member of the Governing Body. However, it must also be considered that the applicant is entitled to a hearing and to a fair consideration of the application, even it the applicant holds a position in the municipality. If the Board members, or even a substantial number of them, disqualify themselves, then the applicant is being denied his or her rights under the law.

In that case the Board members should proceed to hear the matter but should be careful to afford members of the public the full opportunity to be heard. The basis for the decision should be fully set forth and explained, so that the public can understand the basis for the action of the Board.

A case involving such a circumstance was *Wyzykowski v. Rizas*, 132 *N.J.* 509 (1993). In this case the Supreme Court reversed the Appellate Division ruling and held that a Mayor who was an applicant before the Planning Board was not barred from presenting his application and that members of the Board who were appointed by the Mayor were not disqualified from sitting on the application — with the exception of one official who held three **salaried** positions appointed by the Mayor. While the Mayor serves as a statutory member of the Planning Board, he did not participate in the consideration of his own application. An objection was raised, however, on the basis that the Mayor appointed the various members of the Planning Board and, as a member of the Board, participated in the selection of the professional consultants to the Board. The allegation was that those members had a conflict of interest in considering the application presented by the Mayor.

It is instructive to read the decision of the Supreme Court in the case, as it addressed the issues relating to the potential conflicts arising from the fact that Mayor Rizas was the applicant, even though it is rather lengthy:

> The Board approved the application by a vote of three to two, out of nine regular members. Three of the members (including Rizas) who could have participated disqualified themselves. The Mayor had appointed the three members who approved the application. Plaintiffs then amended their prerogative-writ action. They renewed their jurisdictional challenge and asserted various other claims, including the deficiency of notice concerning the revised application and conflict-of-interest issues that they had raised before the Board. Specifically, they contested the participation by Board members appointed by the Mayor, and particularly objected to the participation of one building official. Rizas had moved that the official be appointed to three positions, Building Inspector, Code Enforcement Supervisor and Construction Official, at a combined salary of $37,500. The Mayor also cast the deciding vote in favor of the building official's appointment to the three positions. The official's term on the Board was to have run from January 1, 1989, to December 31, 1989. Plaintiffs also challenged the participation of the professional staff of the Board. As a member of the Board, the Mayor had been involved in their hiring.
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> Although Rizas no longer serves as mayor of the community, we believe that the issue of his status is important and recurring and requires our review. We believe that the principle of decision articulated by the courts below may have been too broadly stated insofar as it might bar any municipal mayor or appointing authority from the conduct of any business or transaction that might require local licensure or permitting.
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> The Municipal Land Use Law, *N.J.S.A.* 40:55D-1 to -129, provides that any interested party may obtain review of a final decision of a planning board or board of adjustment by any court of competent jurisdiction, according to law. *N.J.S.A.* 40:55D-17.h. The general nature of that review is to determine "whether the board below followed the statutory guidelines and properly exercised its discretion." William M. Cox, *New Jersey Zoning and Land Use Administration* 470 (1993) (hereinafter Cox, *New Jersey Zoning*) (citing Burbridge v. Mine Hill Township, 117 N.J. 376, 568 A.2d 527 (1990)).

The jurisdiction that we exercise with respect to the status and involvement of the appointees of the mayor or the role of the mayor himself derives from a source other than the Municipal Land Use Law. Our judicial system is historically vested with a comprehensive prerogative-writ jurisdiction, which it inherited from the King's Bench. We have frequently exercised that jurisdiction in the supervision of governmental tribunals, including administrative agencies. *Avant v. Clifford,* 67 N.J. 496, 520, 341 A.2d 629 (1975). That common-law jurisdiction is guaranteed under *N.J. Constitution* article VI, section 5, paragraph 4. The oft-cited function of the common-law writ of *certiorari* is "to bring before the superior court for inspection the record of the proceedings of the inferior tribunal, to determine whether the latter had jurisdiction and had proceeded according to law." *State v. Court of Common Pleas,* 1 *N.J.* 14, 19, 61 *A.2*d 503 (1948). Among the guarantees of the common law is the entitlement to a fair and impartial tribunal.

> These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people who are its sovereign. [Driscoll v. Burlington- Bristol Bridge Co., 8 N.J. 433, 476, 86 A.2d 201, cert. denied, 344 U.S. 838, 73 S.Ct. 25, 97 L.Ed. 652 (1952).]

Thus, common-law principles concerning the participation of public officials in matters in which they have a personal interest primarily govern this dispute. At common law "[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen, 251 N.J.Super. 566, 568, 598 A.2d 1232 (App.Div.1991). The Municipal Land Use Law codified the common-law principles, expressly prohibiting a planning board member from acting "on any matter in which [the member] has, either directly or indirectly, any personal or financial interest." *N.J.S.A.* 40:55D-23.b.

We repeat the general guidelines for determining whether a particular interest is sufficient to disqualify. "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." Van Itallie v. Franklin Lakes, 28 N.J. 258, 268, 146 A.2d 111 (1958) (citing Aldom v. Borough of Roseland, 42 N.J.Super. 495, 503, 127 A.2d 190 (App.Div.1956)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie, supra, 28 N.J. at 268, 146 A.2d 111.

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything

which indicates the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency." Graham v. United States, 231 U.S. 474, 480, 34 S.Ct. 148, 151, 58 L.Ed. 319, 324 (1913); see also Ward v. Scott (II), 16 N.J. 16 [105 A.2d 851] (1954).

Actual proof of dishonesty need not be shown. Aldom, supra, 42 N.J.Super. at 503, 127 A.2d 190. An actual conflict of interest is not the decisive factor, nor is "whether the public servant succumbs to the temptation," but rather whether there is a potential for conflict. Griggs v. Borough of Princeton, 33 N.J. 207, 219, 162 A.2d 862 (1960) (citing Aldom, supra, 42 N.J.Super. at 502, 127 A.2d 190). A conflicting interest arises when the public official has an interest not shared in common with the other members of the public. Id. 33 N.J. at 220-21, 162 A.2d 862. Another way of analyzing the issue is to understand that "[t]here cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions." LaRue v. Township of East Brunswick, 68 N.J.Super. 435, 448, 172 A.2d 691 (App.Div.1961).

Our courts have invoked the application of the test under varied circumstances. See Griggs, supra, 33 N.J. 207, 162 A.2d 862 (invalidating determination of "blighted" area by borough council where two participating councilmen were professors of university benefitted by designation); Pyatt v. Mayor of Dunellen, 9 N.J. 548, 89 A.2d 1 (1952) (voiding vote for ordinance where councilmen were employees of corporation that substantially benefitted); Barrett v. Union Township Comm., 230 N.J.Super. 195, 553 A.2d 62 (App.Div.1989) (voiding vote where councilman's mother resided in nursing home favored by zoning amendment); Sokolinski v. Woodbridge Township Mun. Council, 192 N.J.Super. 101, 469 A.2d 96 (App.Div.1983) (enjoining vote of board of adjustment members employed by or related to employees of board of education who benefitted by variance); Marlboro Manor, Inc. v. Board of Comm'rs, 187 N.J.Super. 359, 454 A.2d 905 (App.Div.1982) (voiding vote where councilmen were members of church opposed to transfer of liquor license); S & L Assocs., Inc. v. Township of Washington, 61 N.J.Super. 312, 160 A.2d 635 (App.Div.1960) (invalidating zoning amendment enhancing value of property owned by certain voting members of Governing Body), *aff'd in part, rev'd in part,* 35 N.J. 224, 172 A.2d 657 (1961); Aldom, supra, 42 N.J.Super. 495, 127 A.2d 190 (voiding zoning ordinance where employer of councilman who voted for enactment would be benefitted); Hochberg v. Borough of Freehold, 40 N.J.Super. 276, 123 A.2d 46 (App.Div.) (voiding zoning amendment permitting enlargement of horse track at which participating councilman operated horsemen's kitchen), *certif. denied,* 22 N.J. 223, 125 A.2d 235 (1956); Bracey v. City of Long Branch, 73 N.J.Super. 91, 179 A.2d 63 (Law Div.1962) (voiding ordinance where architect-member of planning board stood to gain by urban renewal ordinance

benefitting his client-agency). *But see V*an Itallie, supra, 28 N.J. 258, 146 A.2d 111 (upholding zoning amendment although participating councilman's brother held a "lower echelon" position in benefitted corporation).

A commentator has distilled those varying circumstances into four types of situations that require disqualification: (1) "Direct pecuniary interests," when an official votes on a matter benefitting the official's own property or affording a direct financial gain; (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance, as in the case of a councilman's mother being in the nursing home subject to the zoning issue; and (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies. See Michael A. Pane, *Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities,* March 1980, at 8, 9.

The status of planning board members appointed by the mayor does not fit within any of those categories. Neither of the courts below perceived that the fact of the Mayor's appointment of the Board members in and of itself created a conflict of interest on their part in the outcome of the proceedings. Rather, those courts perceived an appearance of impropriety that existed while the Mayor was seated in office. Both courts believed that in a remand proceeding the Board members would not be tainted by virtue of their appointments. Although the courts below did not invalidate the approvals because the building official participated, we find that he should have been disqualified. As noted, he held salaried positions achieved by the Mayor's appointment or with the Mayor's involvement. He may be seen as one in Pane's second category, *supra* (voting on a matter that benefits an employer) in that the Mayor was an agent of the employer that brought about the hiring. Of course, the mayor of a community will almost always be involved in the initial appointment of one in the building official's position. (Under *N.J.S.A.* 52:27D-126.b. a Construction Official, one of the positions held by this official, may obtain tenure of office from such an appointment.) Although we may agree that the law would not contemplate the disqualification of a building official in every circumstance, as, for example, if a mayor were putting an addition on his home or redoing a business office, in this case the official was acting in a quasi-judicial capacity. It asks too much of the official that he deny that "realistically, contradictory desires tug[ ] the official in opposite directions." LaRue, supra, 68 N.J.Super. at 448, 172 A.2d 691. Because the members of the professional staff of the Board do not act in the same quasi-judicial capacity, we do not think that they are disqualified.

The remaining issue, undoubtedly of great concern to the public, is the appearance of the Mayor before the Board on an application of this nature. The issue is disturbing because of the intuitive concern that citizens in the community may fear a betrayal of the public trust. Is there a principle of law that disqualifies the public official from the regular pursuits of business in his or her community? For although this application is controversial, a wide variety of circumstances

exists in which a mayor will need to submit his or her personal affairs to the jurisdiction of community boards. Some examples would be: if the public official needs to sell farm acreage to send a child to college and needs a subdivision; another might need site plan approval to expand a fish-processing plant; another owning a restaurant in the community might need to transfer the liquor license from place to place. The nearness of the expiration of the official's term will not offer a principle for decision in most such circumstances. (The basic term of a mayor's office is four years, unless otherwise provided by law. *N.J.S.A.* 40A:9-130.) Some mayors have served their communities for as long as forty years.

We tend to think of the issues in this case in terms of the big-city mayors who derive their income from holding office. In reality, most New Jersey communities are not governed by professional politicians but by citizens of other callings who devote only part of their lives to the service of their communities. For the most part, we believe our five hundred or more communities have part-time mayors. Many serve with no compensation whatsoever. One who engages in such activity is not thereby deprived of the ordinary rights of citizenship.

Place v. Board of Adjustment, 42 N.J. 324, 200 A.2d 601 (1964), will not control every circumstance. That case concerned a mayor whose appearance as private counsel to an adjoining property owner in a variance dispute before the municipal board of adjustment could be seen as "influence peddling." In accepting the retainer of the private client, he "voluntarily created a pecuniary personal interest which conflicted with the fiduciary duty he owed to all members of the public." Id. at 332-33, 200 A.2d 601. Public officials who are required by law to submit their private affairs to the jurisdiction of the body that they serve do not thereby traduce their fiduciary relationship in the same way as ones who sell their services to others. For example, a member of a freeholder board owning property on a county road might need approval of the county planning board to make changes at the site. For that official to submit site plans to the planning board would not constitute a breach of fiduciary duty but a necessary obligation attendant to the private status of the official. So too here the Mayor cannot be disqualified from submitting to the jurisdiction of the Board, as all other citizens of the community are required to do. What is troubling in this case to us, and our concurring and dissenting members, is the discretionary nature of the exercise of jurisdiction, not the jurisdiction itself. Unlike a mayor who is just making a change in an existing business property, such as the addition of an office or a relocation of parking spaces, a mayor who initiates a project like Rizas' may be perceived, like the mayor in Place, as having "voluntarily created a pecuniary personal interest which conflicted with the fiduciary duty he owed to all members of the public." Ibid.

Although we find inapplicable the doctrine of necessity for purposes of constituting a quorum when "the body is unable to act without the members in conflict taking part," Allen v. Toms River Regional Bd. of Educ., 233 N.J.Super. 642, 651, 559 A.2d 883 (Law Div.1989), we note that the problems that arose in this case are more easily resolved now than they would have been before. The Municipal Land Use Law currently permits appointment of additional members to adjustment and planning boards "until there are the minimum number of members

necessary to constitute a quorum" otherwise lacking because of disqualification of members due to conflicts of interest. *See N.J.S.A.* 40:55D-69.1; *N.J.S.A.* 40:55D-23.2. In Rizas' case, two members, besides himself, did disqualify themselves.

Of course, for a person in public office to appear to seek to take advantage of the office will invariably be the worst politics. The public will rightly cease to support those who appear to pursue their private interests at the expense of the public good. In this case the public skepticism and disillusionment were heightened by the timing and nature of the application, involving, as it did, the close questions of interpretation of the ordinance as well as the acquisition of land that had once belonged to the local water utility.

The common-law doctrines that attend the office of the local public official will be influenced by the recent enactment in 1991 of the Local Government Ethics Law, *N.J.S.A.* 40A:9-22.1 to -22.25 ("the Ethics Law"). The Ethics Law requires all local government officers, including those such as the Mayor, members of planning boards, zoning boards of adjustment, governing bodies, and others, to file a financial statement annually in the municipality or county in which they serve and with the Local Finance Board in the Division of Local Government Services in the Department of Community Affairs. *N.J.S.A.* 40A:9-22.6. That statement must include disclosure of every source of (1) income exceeding $2,000, (2) fees and honoraria exceeding $250 from any one source, and (3) gifts exceeding $400 from any one source that the officer or a member of his or her immediate family receives. *N.J.S.A.* 40A:9-22.6. (1)-(3). The Ethics Law has refined the definition of conflict of interest and provides that

> [n]o local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment[.] [*N.J.S.A.* 40A:9-22.5.d.]

Cox interprets the use of the word "involvement" instead of "interest" to broaden the areas of disqualification to include perhaps even personal friendships. Cox, *New Jersey Zoning, supra,* at 30. He anticipates "a large number of appeals to the local ethics boards authorized to be established by municipalities and counties as well as an increased volume of litigation with respect to conflict issues until the courts have construed the meaning of the statute." *Ibid.*

The Ethics Law does state, however: "Nothing [herein] shall prohibit any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." *N.J.S.A.* 40A:9-22.5.k. Under the Municipal Land Use Law the mayor appoints almost all planning board members. *N.J.S.A.* 40:55D-23. To rule categorically that mayors are disqualified from appearing before boards composed at least in part of their appointees would appear to produce an inconsistency in the provisions of the Municipal Land Use Law and the Ethics Law. The Assembly State Government Committee Statement accompanying the Ethics Law makes clear that local governing bodies have the authority to adopt higher standards of ethics for local officials. By the same token, officials who act under *N.J.S.A.* 40A:9-22.5.k to represent their own

interests should not be automatically viewed as attempting to use their official positions to obtain "unwarranted privileges or advantages" forbidden by *N.J.S.A.* 40A:9-22.5.c. Quite possibly--although we need not decide the point--a local Governing Body could require its officials to forego the statutory right to the pursuit of their own interests before local bodies.

To sum up, courts review the actions of local government to ensure that their proceedings have been in accordance with law or constitutional mandate. This case arose before the Legislature enacted the Ethics Law. Future decisions should be consistent with the principles of that Act. The Legislature has for the first time created a comprehensive code of ethics for local government. For example, the Ethics Law specifically proscribes the kind of representation that this Court had declared invalid in Place v. Board of Adjustment, supra, 42 N.J. 324, 200 A.2d 601: N.J.S.A. 40A:9-22.5.h. bars a local government officer from representing "any person or party other than the local government" in connection with any matter pending before an agency in the local government in which the official serves. At the same time, the Ethics Law does not prohibit "any local government officer or employee, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." *N.J.S.A.* 40A:9-22.5.k. Rizas' case involves a particularly troubling exercise of that representation because a reasonably-informed citizen could see him as seeking a favor or special treatment. However, many cases will arise in which a part-time elected official will have to appear before a local government agency regarding his or her own interest that may be less discretionary but no less controversial. Hence, the holding below that a mayor may not "pursue planning and zoning approvals for his own private development and commercial rental businesses," Rizas, supra, 254 N.J.Super. at 41-42, 603 A.2d 53, without possible invalidation may go too far, given the provisions of the Ethics Law.

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The "appearance of impropriety" standard suggested by our concurring and dissenting members, *post* at 534, 626 *A.2*d at 418, is one that we have generally applied to regulate the conduct of lawyers, particularly lawyers in public employment. ... We there act not in the exercise of our limited prerogative-writ power but in the exercise of our plenary power to regulate lawyers. The Legislature has plenary power to regulate local officials. That body has not yet declared categorically that citizens serving as public officials may not continue to engage in their private affairs in their communities. What limits or restraints it might intend or impose are not clear. Our colleagues suggest that because Rizas' was a "lucrative business venture," he would be obliged to refrain from engaging in such private affairs so long as he were mayor. The sad fact of life is that no one is ever certain that a business venture will be lucrative. Nothing in the record establishes that Rizas' venture was any less uncertain than those of countless small businessmen and women who serve our communities. Hence, we will have to seek a principle of decision that has consistent application. The Legislature could have enacted, but did not, a provision that a local government officer could represent his or her own interests so long as the matter did not become controversial. See *N.J.S.A.* 40A:9-22.2. The Ethics Law represents the

> Legislature's most recent efforts to balance the respective interests of the public and its officeholders throughout the state's 500 or more municipalities. As the thoughtful opinion of our concurring and dissenting members suggests, the statute's applications will raise close questions of public policy. It may be that the Legislature will provide more definitive resolution of the issues.
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> For now, the Legislature has reaffirmed that "[p]ublic office and employment are a public trust." *N.J.S.A.* 40A:9-22.2.a. Given the very substantial reporting requirements under the Ethics Law, see *supra* at 529, 626 *A.2*d at 416, an informed public will be able to evaluate whether the conduct of any public official exceeds the bounds of the public trust. The disclosure provisions of the law will enable the public to decide whether the official shall continue to represent them.

Clearly, however, a member of the Board **must** be disqualified if the member has a direct or indirect financial interest in the application or the applicant.

If the member or someone in the member's immediate family is the applicant or will financially gain if the application is approved, disqualification is the only way to handle that situation.

In the case of *Barrett v. Union Township Committee* the alleged conflict was that the council member who voted on an amendment to a land use ordinance had a relative [his mother] who resided in a nursing home owned by individuals who would have been favorably affected by the passage of the ordinance amendments. The Court held that the relationship between the council member and his mother was sufficiently close so as to constitute an interest on the part of the council member in the outcome of the ordinance amendment. The Court said:

> It would strain credulity to conclude that [the governing body member] did not have an interest in seeing that his invalid mother was properly cared for in the facility that was owned and operated by [the applicant]. The fact that this was not a direct personal or financial interest is not dispositive of the issue. The question is whether there existed an interest creating a potential conflict and not whether [the governing body member] yielded to the temptation of it.[23]

Contrast that decision with the specific prohibition in the Local Government Ethics Law which bars a public official from acting in any matter involving a member of his or her immediate family, which term specifically includes a spouse or a dependent child residing with the official, but does not specifically include other relatives. It is important to know that the ethical principles are derived from case law as well as from the specific provisions of the Local Government Ethics Law.

The case of *Care of Tenafly v. Tenafly Zoning Board of Adjustment* involved an application before a Zoning Board of Adjustment, which granted approval for a supermarket. The approval was challenged on the basis that one member of the Zoning Board of Adjustment had a disqualifying conflict of interest. That member's mother owned commercial property

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[23] *Barrett v. Union Township Committee*, 230 *N.J.Super*. 195 (App.Div. 1989)

approximately 50 feet from the subject property. The Board's attorney had advised the member that he did not have a conflict of interest and the member participated in the discussion and the decision to grant the variance. The use variance was approved by a 5-2 vote, the minimum number of affirmative votes required for the approval of a use variance under the provisions of *N.J.S.A.* 40:55D-70. The case provides a significant analysis of the law of conflicts of interest and was decided after the enactment of the Local Government Ethics Law and after the *Wyzykowski v. Rizas* decision.

The court, in *Care of Tenafly,* said that:

> Moreover, as a general proposition, a public official "should not participate in a municipal matter ... where he might be reasonably expected to favor or promote a relative's interest of a substantial character." *Van Itallie, supra,* 28 *N.J.* at 268, 146 *A.*2d 111. Armaniaco's interest in an application involving a supermarket/shopping center directly across from his mother's commercial property cannot seriously be questioned. He acknowledged that his mother depended on the income derived from her commercial enterprise "to live on." The value of his mother's property, and consequently the income generated therefrom, would no doubt be affected by the Board's decision to grant A & P's special reasons and site plan applications. Clearly, this circumstance was not one that Armaniaco held "in common with members of the public." *Aldom, supra,* 42 *N.J.Super.* at 507, 127 *A.*2d 190. This "potential for psychological influences cannot be ignored." *Township of Lafayette v. Board of Chosen Freeholders,* 208 *N.J.Super.* 468, 473, 506 *A.*2d 359 (App.Div.1986). [24]

Likewise, if the member's employer is the applicant, the member should disqualify himself or herself, even if the member has no direct or indirect financial interest in the application itself, since the appearance would be that the member could not be truly objective on an application submitted by his or her employer.

It has been held that any member who resides or owns property within 200 feet of the property, which is the subject of an application, automatically has an "interest" in the application and should be disqualified from hearing the application.[25]

In a very interesting case[26] where certain members of the Township Committee and Planning Board members accepted an invitation to a dinner, held at a local restaurant and hosted by the corporation which was seeking amendments to the zoning ordinance relative to multiple dwelling units, the Court held that not every relationship created a disqualification. The developer in that case used the dinner meeting as a means of expressing its views as to the type of ordinance that would be economically feasible to a builder and as a means of reaching out to the Township Committee, the Planning Board and the Board of Education at one time, rather than at three separate meetings.

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24 *Care of Tenafly v. Tenafly Zoning Board of Adjustment*, 307 *N.J. Super.* 362 (App. Div. 1998)

25 *Rose v. Chaiken*, 187 *N.J. Super.* 210 (Ch. Div. 1982).

26 *Larue v. East Brunswick*, 68 *N.J. Super.* 435 (App.Div. 1961)

Those challenging the municipal action contended that the dinner was a "gratuity" which created undue influence and tainted the proceedings leading to the enactment of the ordinance. It was urged that the dinner itself warranted a finding of misconduct or appearance of misconduct sufficient to void the enactment.

The Court held that even though the acceptance of the dinner may have been evidence of "extremely poor judgment" it did not constitute a conflict or self-interest so as to void the ordinance.

> Our determination of this issue must be prefaced by a statement of complete condemnation of the officials' conduct in accepting the business-oriented dinner gift of one with whom their public duties brought them into official contact. The social role of the public servant is necessarily circumscribed by the power and influence of his position; this is a sacrifice he must be taken to have incurred voluntarily. Natural public suspicion of official wrongdoing, born of the rightful publicity showered upon those who occasionally deviate from their oath of office, demands that the legislator and administrator, as the judge, take all essential steps not only to maintain his conduct free of impropriety, but also to avoid scrupulously even the appearance of impropriety. See *Canons of Judicial Ethics*, *Canons*, 4, 13, 32. There is no question that the action of the township officials in attending the dinner sponsored by Rasac was, at the very least, a display of extremely poor judgment.
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> ... On the other hand, **whether a particular interest justifies disqualification is necessarily a factual question, for not every interest, no matter how remote and infinitesimal, may be said to possess the likely capacity to tempt the public official to depart from his sworn duty**. As emphasized by the Supreme Court in *Van Itallie v. Franklin Lakes*, 28 *N.J.* 258, 269 (1958):
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> > "Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicated the likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, 'Universal distrust creates universal incompetency.'"
>
> The alleged interests of the officials herein, as indicated by the proofs, are extremely nebulous and highly speculative. They would appear to ensue solely from the dinner, and to demand an inference on our part that because of the meal lavished upon them by an obviously prejudiced party, Rasac, the Committeemen

> and Planning Board members were no longer equipped to act primarily in the public interest. Since we have already resolved the issue of undue influence against plaintiffs, the notion that the officials were somehow relieved of their independent judgment must fall of its own weight. **There cannot be a conflict of interest where there do not exist, realistically, contradictory desires tugging the official in opposite directions.** [Emphasis added]

There is, accordingly, a difference between what might be regarded, with the benefit of hindsight, as poor judgment and what constitutes a real conflict of interest that impacts on the integrity of the hearing process. Board members should be aware of the fact, however, that even where a Court might ultimately determine that the allegations of conflict were insufficient to set aside the action taken by the Board, a lack of sensitivity to conflict of interest issues, including the real issues and the issues that are raised only by the appearance presented to the public, can draw the Board, the municipality and even the Board members into unnecessary litigation.

On the other side of the issue is the fact that an applicant or an objector can significantly influence the outcome of Board action with allegations of conflict of interest that may cause a member to step down from consideration of a matter without a real conflict of interest existing.

There are always unusual and exceptional circumstances where even a clear conflict of interest may exist, but the members are allowed to participate because of the “doctrine of necessity,” i.e., the Board would be unable to function if the members were all disqualified. The case of *Gunthner v. Planning Board of the Borough of Bay Head*, 225 *N.J. Super*. 452 (Law Div. 2000) involved an application before a Planning Board, which served as a consolidated board with all of the powers of a Zoning Board of Adjustment. The application was for the residential development of a lot adjacent to the Bay Head Yacht Club. The Bay Head Yacht Club opposed the application. Seven members of the Planning Board were members of the Bay Head Yacht Club and the complaint sought the disqualification of those members. The disqualification would have meant that the Planning Board could not consider the application for the residential development. The applicant wanted just such a result and contended that he should receive a default approval of his application because the Planning Board would not be able to act on the application within the time required by the Municipal Land Use Law. The court held that the members did have a conflict, but that they would be allowed to act under the doctrine of necessity so as to provide the opportunity for the local review of the application. This case presents a relatively unique set of circumstances with the disqualification applying to so many members of the Board.

It is not always sufficient for a Board member to simply disqualify himself or herself from participation or voting. It has been held that it is improper for the disqualified member to testify on the application. In *Jock v. Shire Realty, Inc.*, 295 *N.J.Super.* 67 (App Div 1996) a zoning board member's act of testifying before the zoning board on behalf of a corporation in which the member held controlling interest and which sought "hardship" variance in order to construct residence on property created potential conflict of interest under Local Government Ethics Law and thus invalidated board's grant of the variance.

Meetings and Procedures

While the Planning Board and the Zoning Board of Adjustment have the right to adopt Rules of Procedure, to a substantial extent the basic procedures to be followed are either established by the Municipal Land Use Law or are incorporated into municipal ordinance establishing the boards and the procedures to be followed for reviewing applications for site plan, subdivision or variance approval.

The Planning Board elects a chairman and vice-chairman from its Class IV members, selects a secretary, who may or may not be a member of the board or a municipal employee, employs or contracts for an attorney, who may not be the municipal attorney, and other experts and staff as it deems necessary, within the limits of the appropriations approved by the Governing Body.[27]

The Zoning Board of Adjustment elects a chairman and vice-chairman from its members, selects a secretary, who may or may not be a member of the board or a municipal employee, employs or contracts for an attorney, who may not be the municipal attorney, and other experts and staff as it deems necessary, within the limits of the appropriations approved by the Governing Body.[28]

The Municipal Land Use Law requires that the Planning Board and the Zoning Board of Adjustment hold monthly meetings, unless the meeting is canceled for a lack of applications.[29] Special meetings may be called by the Chairman or on the request of any two (2) Board members. Notice is required to the members and there must be compliance with the Open Public Meetings Act.[30] A quorum is defined as a majority of the full membership of the board and no action may be taken without a quorum being present.

All actions are by majority vote of the members present,[31] except that a majority of the full membership of the Board is required to approve the issuance of a permit for a building or structure in the bed of a mapped street, drainage way, flood control basin or reserved public area.[32] For "use" variances before the Zoning Board of Adjustment, five (5) affirmative votes are required for approval.[33] The failure of a motion to receive the number of votes required for approval is deemed an action denying the application.

An applicant is required to give notice of any application for development except for minor site plan or subdivision approval or for final site plan or subdivision approval.[34] The

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27 *N.J.S.A.* 40:55D-24

28 *N.J.S.A.* 40:55D-69.

29 *N.J.S.A.* 40:55D-9.

30 *N.J.S.A.* 40:55D-6, et seq..

31 *N.J.S.A.* 40:55D-9.

32 *N.J.S.A.* 40:55D-34.

33 *N.J.S.A.* 40:55D-70 d.

34 *N.J.S.A.* 40:55D-12.

municipality may, by ordinance, require notice to be given on applications where the *Municipal Land Use Law* does not specifically require notice.

Where notice is required, it must be given by publication in the official newspaper of the municipality, if there is one, or in a newspaper of general circulation in the municipality.[35] In addition, notice must be given personally or by certified mail to all owners of all real property located within 200' of the subject property, which may include a requirement for notice to the Clerk of an adjoining municipality or to the Commissioner of Transportation of the State of New Jersey, if the property is adjacent to a State highway or to a public utility or cable television company which has registered with the municipality its wish to receive that notice.

Any maps or documents for which approval is sought must be on file with the administrative officer at least 10 days before the date of the hearing and must be available for inspection during normal business hours.[36]

The officer presiding at the hearing, or a person designated by the presiding officer, has the power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties.[37]

The testimony of all witnesses shall be taken under oath or affirmation and the right of cross-examination shall be permitted to all interested parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations as to time and number of witnesses.

Technical rules of evidence are not applicable to hearings before the Board, but the Board may exclude irrelevant, immaterial or unduly repetitious evidence.[38] Notwithstanding the provision that the technical rules of evidence are not applicable, it has been held that the requirement that testimony be under oath and that witnesses be subject to cross-examination bars the admission of a petition signed by 200 individuals into evidence.[39]

An important provision deals with a member voting on a matter presented in his or her absence:

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35 *N.J.S.A.* 40:55D-12 a.

36 *N.J.S.A.* 40:55D-10 b. There is only one reported case in which the failure to comply with the requirement that documents be filed with the Board at least 10 days before the date of the hearing was involved. In that case, an application for subdivision approval had been submitted. The plans were filed on the same date as the meeting at which the application was approved. There had been absolutely nothing filed in advance of that meeting. The court held that the failure to comply with the requirements of *N.J.S.A.* 40:55D-10 b meant that the approval of the subdivision had no effect. *Township Committee of Edgewater Park Township v. Edgewater Park Housing Authority*, 187 *N.J. Super.* 578 (Law Div. 1982). There is some debate among land use attorneys as to whether the 10 day requirement also applies to revised plans submitted during the course of consideration of the application. The substantial majority opinion appears to be that the 10 day requirement applies only to the initial set of plans filed with the Board. *See*: Cox, *New Jersey Zoning and Land Use Administration*, §27-1.2 (1995).

37 *N.J.S.A.* 40:55D-10 c.

38 *N.J.S.A.* 40:55D-10 e.

39 *Seibert v. Dover Township Board of Adjustment*, 174 *N.J. Super.* 548 (Law Div. 1980).

> A member of a municipal agency who was absent for one or more of the meetings at which a hearing was held shall be eligible to vote on the matter upon which the hearing was conducted, notwithstanding his absence from one or more of the meetings; provided, however, that such board member has available to him the transcript or recording of all of the hearing from which he was absent, and certifies in writing to the Board that he has read such transcript or listened to such recording.[40]

It should be noted that a mere reading of minutes will be insufficient, unless the minutes are actually a verbatim transcript of the meeting. Where no transcript is available, the member would have to listen to the recording of the hearings where the member was absent.

The minutes of the meetings must include the name of each person appearing and addressing the Board and of any person represented by an attorney, the specific action taken, the findings made by the Board, and the reasons for the decision.[41] The local ordinance may further require that the address of each person appearing and addressing the Board or represented by an attorney be included in the record. That would be a useful provision in the event that any need were to arise later to give notice to the persons appearing in support of or in opposition to a particular application.

The decision, findings and reasons are usually incorporated in the Resolution adopted by the Board memorializing the action taken, so the language of the Resolution should be carefully examined by the members of the Board to ensure that it accurately reflects both the action taken and the reasons for that action. The Resolution must be adopted within the time period required for action on the application or at a meeting held not later than 45 days after the date of the meeting at which the action was taken.[42]

When the members of the Board vote on a matter in the normal course of procedure, they are making a decision, and for that reason only those who voted on the prevailing side are entitled to vote on the memorializing resolution and the vote of a majority of those members present at the meeting at which the resolution is presented for adoption is sufficient to adopt the resolution.[43]

Alternate members may participate in all discussions, but alternate members may not vote, except in the absence or disqualification of a regular member. A vote shall not be delayed in order that a regular member may vote instead of an alternate member. In the event that a choice must be made as to which alternate shall vote, Alternate No. 1 shall vote.[44]

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40 *N.J.S.A.* 40:55D-10.2

41 *N.J.S.A.* 40:55D-9 c. In addition, the minutes must meet the requirements of the *Open Public Meetings Act*, discussed later in this *Guide*.

42 *N.J.S.A.* 40:55D-10.

43 *N.J.S.A.* 40:55D-10 g (2).

44 *N.J.S.A.* 40:55D-69.

Open Public Meetings Act

Another item to be reviewed is the requirement that there be compliance with the provisions of the Open Public Meetings Act,[45] as it applies to the Planning Board and the Zoning Board of Adjustment.

It is the purpose of the Open Public Meetings Act to protect the right of the public to be present at meetings where the public business is being conducted. The legislature has determined that secrecy in the conduct of the public business tends to undermine the faith of the public in government, so the legislation limits matters that may be considered in meetings closed to the public, often called "Executive Sessions".

The Open Public Meetings Act is intended to cover public bodies that are established by law and are collectively empowered to expend public funds or affect person's rights. Informal or purely advisory bodies with no effective authority are not covered, nor are staff meetings of public officials with subordinates or advisors who are not empowered to act by vote.

The Township Council, Planning Board, Zoning Board of Adjustment and Historic Preservation Commission are all "public bodies" under the Act since they are voting bodies empowered to conduct a governmental function that would affect the rights, duties and legal relations of people.[46]

Regular and special meetings of the public body are covered by the Act as they are open to all members of the body with the intent of discussing or acting on the public business that is brought before the body. A gathering without the intent to discuss or act on the public business or which is attended by less than a majority of the members or which is open to members of three or more similar bodies at a convention are not covered by the Act. Thus, even if a majority of the members were to be present at a social gathering, the members need not be concerned about violations of the Act, as that would not be a gathering where members were present for the purpose of discussing or acting on the public business.[47]

Where there is agreement exhibited by the affirmative vote of three quarters of the members present, the public body may hold a meeting notwithstanding the failure to provide adequate notice if (1) the meeting is required to deal with matters of such urgency and importance that a delay for the purpose of giving adequate notice would be likely to result in substantial harm to the public interest and (2) the meeting is limited to the discussion of an action with respect to that matter of urgency and importance and (3) notice is provided as soon as possible after the calling of the meeting and (4) the public body could not reasonably have foreseen the need for such a meeting at a time when adequate notice could have been provided or even if it could have been foreseen notice was not actually given.[48]

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45 *N.J.S.A.* 10:4-6, et seq.

46 *N.J.S.A.* 10:4-8 a.

47 *N.J.S.A.* 10:4-8.

48 *N.J.S.A.* 10:4-9.

The exception for an emergency meeting is primarily addressed to the Governing Body and is generally not applicable to the Planning Board, Zoning Board of Adjustment, the Historic Commission or an Environmental Commission. Where an application is made for a variance or for an interpretation or a major subdivision or major site plan, public notice is required by the Municipal Land Use Law at least 10 days in advance of the public hearing. There would no basis, therefore, for an emergency meeting that did not provide the notice required by the Open Public Meetings Act.

There are certain items that the Act permits to be discussed at a meeting not open to the public, but only those items may be discussed at such a closed meeting. The specific items are:

(1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded (from the provision of the Act);

(2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States;

(3) Any material of the disclosure of which constitutes an unwarranted invasion of individual privacy ... unless the individual concerned shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigation of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiations other than in subsection (4) ... in which the public body is or may become a party.

Any matters falling within the attorney-client privilege, to the extent that confidentiality is required for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.[49]

For the Planning Board, Zoning Board of Adjustment, Historic Preservation Commission or for virtually any municipal body other than the Township Council, most of the specific exceptions do not apply. They will usually have occasion to deal with a closed session only on items of litigation, employment of the staff appointed by the Board or Commission, or items that may involve information that is confidential by statute or which may involve the invasion of personal privacy.

On the occasions when the Board does hold a closed session, it is necessary for the Board to adopt a Resolution stating the nature of the item to be discussed and the circumstances when the discussion in closed session can be disclosed to the public.[50]

The effect of the Open Public Meetings Act is that the discussion of applications and the decision must be reached in a public meeting. It is not permissible to "excuse the applicant" or to go into a "closed session" to discuss the merits of an application. While there is an exception that allows a body to consult with its attorney in a closed session, that exception should be generally limited to matters of litigation, contract negotiations or matters where "confidentiality is required for the attorney to exercise his ethical duties as a lawyer."

In 1987 litigation between NWL Transformers and the Zoning Board of Adjustment of the Township of Bordentown over the application to expand the Bordentown Junction Truck Stop, the Plaintiff contended that arbitrariness had been shown by the discussion that took place among the Zoning Board members when they were discussing the limit to be placed on the number of trucks as a condition of approval. It is true that a number of levels were suggested and discussed, but that discussion was nothing more than the collective decision making process that takes place when a Board consisting of several individuals must reach a determination.

If a judge were to be placed in the position of making that decision, the weighing of the numbers of trucks would take place in the privacy of the judge's mind until the judge determined the number of trucks that could be permitted without a substantial detriment to the public good. If the decision were to be made by a jury, the deliberations would take place in the privacy of the jury room until the jury reached a determination as to the number of trucks that could be permitted without a substantial detriment to the public good.

In this situation the decision is made by a Zoning Board of Adjustment which is required to conduct its deliberations in public in furtherance of the legislative policy that it is the right of the public "to be present at all meetings of public bodies, and to witness in full detail all phases

49 *N.J.S.A.* 10:4-12.

50 *N.J.S.A.* 10:4-13

of the deliberation" of those bodies.[51] A Zoning Board of Adjustment is a "public body" within the coverage of the law.[52]

It would not be reasonable to conclude that the very discussions and deliberations in which the members of the public body must engage in order to reach the collective decision are arbitrary simply because those deliberations take place in public, while the same deliberations that take place in the mind of the judge or in the privacy of the jury room are accepted as part of the decision making process.

The Expert Witness

It is not unusual for questions to be raised at meetings of a Planning Board or a Zoning Board of Adjustment, or even at a meeting of the Historic Preservation Commission, regarding the qualifications of a witness offered by the applicant and whether that witness could testify on a point within the expertise of another licensed professional.

It may be useful, therefore, to review the standards applicable to "expert" witnesses and the qualification of an individual as an "expert" witness, as well as the distinction between an "expert" witness and a "fact" witness.

Boards are frequently presented with "expert" testimony in support of an application, and, on occasion, in opposition to a particular application. In most instances there is no dispute over the qualifications of the expert, since the expert is often the engineer who prepared the plan or the architect who designed the building or the surveyor who surveyed the property.

In each of those instances the plan submitted contains the information as to who prepared the plan and the appropriate information on whether the individual is licensed to practice their particular profession in New Jersey.

In other instances an expert may be offered on some other aspect of the application, such as issues regarding traffic design and flow; environmental issues; and similar subjects that may be appropriately addressed by experts.

It is not unusual that a challenge is presented with respect to the qualifications of a proposed expert witness, either from those in opposition to the party presenting the witness, or by a member of the Board who has a concern regarding the qualifications of the witness to testify regarding a particular point.

It is important that the members of the Board have an understanding of the standards to be applied in determining whether a particular witness should be recognized as an expert.

What is the Difference Between an Expert Witness and Other Witnesses?

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51 *N.J.S.A.* 10:4-7

52 *Accardi v. Mayor and Council of City of North Wildwood,* 145 *N.J.Super.* 532 (Law Div. 1976)

There are basically two types of witnesses that are presented in cases, whether that case is in a court or in an administrative proceeding or in a hearing before a zoning or planning board.

There are fact witnesses who present testimony based on facts within their own personal knowledge. An example of a fact witness would be the person who saw a car run a red light and hit another car. Another example would be an individual who testified before a Planning Board or a Zoning Board of Adjustment that the patrons of a restaurant were constantly parking on the street and on grass areas not intended for parking.

The other type of witness is the expert witness who, because of his or her training or experience, is entitled to offer opinion testimony.

The fact witness cannot offer opinion testimony, but the expert witness is expected to offer opinion testimony. An example would be the witness who operated an automobile body repair shop and who testified that the damage to the car would require $2136.43 to repair. That witness would be drawing on his or her training and/or experience in the field of automobile repairs to examine the damage and to give an opinion as to the cost of repairs. Another example is the engineer who testifies that the proposed site plan would provide an additional 18 off-street parking spaces and that those additional spaces would relieve the parking problem at the restaurant. That witness would be drawing on his or her professional experience to offer an opinion based on that training and/or experience.

The difference between the two types of witnesses was set forth rather clearly in the case of *Glen Wall Associates v. Wall Township*:[53]

> An observer is qualified to testify because he has firsthand knowledge which the trier of the facts does not have of the situation or transaction in issue. An expert has something different to contribute. His is the power to draw inferences from the facts which a trier of the facts would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth... The mere qualifying of a witness as an expert does not permit him to give unsupported opinions. The witness; expertise qualifies him to take facts and to conclude from those facts and to conclude from those facts an opinion relevant to the issue before the court which a non-expert, with the same data, could not do. The evidence, data and the totality of the facts on the basis of which the opinion is arrived at must be made known to the court so that it may evaluate the validity of the opinion and conclude what weight, if any, is to be given to that opinion.

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[53] *Glen Wall Associates v. Wall Township*, 6 *N.J. Tax* 24 (1983)

How is it Decided that a Witness is an "Expert"?

Experts are called upon to offer opinion testimony on subjects where the Board members, or the members of a jury, do not have the technical training or experience necessary to evaluate the case and cannot, without such assistance, form a valid judgment on the issue presented.

The test of whether a particular witness is competent to testify as an expert is whether the witness has sufficient knowledge of standards applicable to the situation to justify his expression of an opinion. That knowledge may by based upon formal educational experience, degrees received, licenses granted or upon experience in a particular field of endeavor. Qualification as an "expert" witness does not require that the witness be the best person to testify on a particular point, but only that the person has the level of experience, knowledge or training to enable the witness to offer opinion testimony.

It is the normal procedure for a proposed expert witness to first present a brief outline of his or her qualifications to enable the Judge, or the Board, to determine whether the person qualifies as an expert witness. That outline of qualifications might include information on formal education, degrees received, graduate work done, experience in the field, lectures given, articles or treatises written, professional recognition received, etc. There is then a ruling on whether the person will be recognized as an expert. If the person does not qualify as an expert, then they cannot offer any opinion testimony, although they can testify to facts that are within their personal knowledge.

It is established law that the qualifications of experts are left to the discretion of the trial court, or, in cases before a Planning Board or a Zoning Board of Adjustment, to the discretion of the Board. The decision is conclusive unless it is clearly shown to be erroneous as a matter of law.[54] The test of expert testimony is whether the witnesses offered as experts have peculiar knowledge or experience not common to the world, which renders their opinions, founded on that knowledge or experience an aid in determining the questions at issue.

The standard is broad and not precise. The Board may recognize a witness as an expert if it concludes that the witness has the knowledge or experience that will enable that witness to offer an opinion that will assist the Board in determining the issue presented.

The examination of the qualifications of the witness need not be so detailed or precise so as to consume an extended period of time, but it should be sufficient so that the Board will have an understanding of the background of the witness and will be able to evaluate the opinions rendered by the witness. Understanding the background qualifications of the witness will enable the Board to determine the weight to be given to the testimony, in relation to other witnesses with either more or less extensive qualifications.

In determining the qualification of a witness the question is often asked as to whether the witness has testified as an expert before other boards or before this Board. Certainly, if the witness has previously testified as an expert before this Board, it does not require extensive examination for the Board to again accept that person as qualified to give expert testimony. Likewise, if a witness has given expert testimony before other Boards, agencies or in courts, that

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54 *Rempfer v. Deerfield Packing Corp.* 4 *N.J.* 135, 141 (1950)

is certainly persuasive that the person has the appropriate knowledge or experience to be recognized as an expert again. It is not, however, conclusive if the witness has not previously testified as an expert witness. There are many individuals who have the knowledge or experience to enable them to offer expert, opinion testimony, who have just not been previously called upon to do so. An example would be a pilot with years of experience in handling a certain type of airplane who was called upon to testify and give opinion on how certain conditions should be handled and how the airplane should react in those conditions.

It should also be noted that experts are normally offered for their knowledge in a particular field and their qualification would be in the field in which they have exhibited that knowledge. But, some witnesses may qualify in several fields, especially where the fields overlap. For example, it would not be uncommon for an individual to qualify as a professional engineer, as a land surveyor, as a professional planner and as an architect.

Must We Accept and Rely on the Expert Testimony?

The testimony of an expert is offered to assist the Board in making a decision, but is not binding on the Board. In some cases the Board may be confronted with conflicting testimony from several expert witnesses. Since expert witnesses are offering opinion, it is not unusual to find experts disagreeing with each other. It is the function of the Board, as in a trial it is the function of a jury, to consider all of the testimony in making a determination.

In evaluating the testimony, the Board may be influenced by the background and qualifications of the various experts, by their apparent understanding of the facts on which they have based their testimony, by the thoroughness with which the expert has considered the factors that enter into the formation of the opinion, and by simple common sense.

By common sense I mean that the Board certainly has a right to apply its collective common sense to the case before it. For example, if a proposed parking area is adjacent to an area intended for grass and landscaping, the Board can conclude that if there is no curb or device used to stop cars, then cars will intrude from the designated parking area onto the grass and that there will be a deterioration of the grassed area at the edges. An expert might offer an opinion that curbing is not necessary or appropriate and the Board might justifiably decline to be convinced by that expert testimony.

The Board is in the same position as a jury or a judge hearing a case without a jury. Once all of the testimony has been offered, including possibly conflicting expert testimony, the Board may accept that testimony which appears to be sound and reliable, may reject all of the testimony or may accept all of it.

The factfinder in not bound by the expert testimony presented by either side in a case.[55] That is especially true where the expert testimony is conflicting on important points.

On the other hand, the expert testimony is offered to assist the Board in making a determination of an issue or subject matter that calls for an evaluation that is beyond the knowledge or experience of the average person. Where expert testimony is uncontradicted, the

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55 *County of Middlesex v. Clearwater Village, Inc.* 163 *N.J.Super* 166, 174 (App. Div. 1978)

Board must exercise caution in disregarding that testimony. It must be noted, however, that expert testimony is offered by experts retained by applicants or by experts retained by objectors and that the testimony is offered in order to convince the Board of the correctness of the particular position being presented.

For that reason, the Board has available to it the assistance of its own "experts" including the Municipal Engineer and the Municipal Planner and those "experts" who are obtained to advise the Board on a particular subject and in a particular case. Normally, the consultants for the Municipality review the materials presented by applicants and objectors and advise the Board on the basis of that review.

Must the Proposed Expert Witness be Licensed in New Jersey?

While it is generally held that an expert witness must be a licensed member of the profession whose standards he professes to know, that is not a firm rule. Sometimes the expert may well be offering testimony in a field where there is no licensing requirement. When the subject matter on which the expert is to testify falls distinctly within the province of a particular profession, such as medicine, the license to practice is evidence of the minimal technical training and knowledge essential to the expression of a meaningful and reliable opinion.[56]

That, however, is not an absolute rule. In the case of *Hudgins v. Serrano*[57] it was held that a proposed expert witness in a medical malpractice case who was not licensed as a physician in New Jersey or in any other jurisdiction was still qualified to testify as an expert. In that case the witness had his degree as a doctor of medicine and had his Ph.D. in experimental pathology. He had been on the faculty of two medical schools, had taught medical students, interns and residents, had published papers in medical journals and had served as a consultant to medical staff members. It was held that "the absence of a license from the walls of his office does not diminish those qualifications."

Where the members of a profession are licensed, the fact that the proposed expert witness has the license creates a presumption that the individual is qualified to offer testimony on subject matter that falls within the province of that profession.

It must be noted, however, that some subjects fall within the province of more than one profession and that witnesses on the same case may be qualified to offer expert testimony, although they have different professional backgrounds. One example would be in a case involving the construction of a building where one expert might be a structural engineer who would testify on construction materials used in a building, while another expert might be the architect who designed the building and specified the materials to be used. Both individuals could qualify as experts and could offer their opinions to assist in the decision to be made in the matter. Depending on the particular issue presented, another expert might be a contractor experienced in constructing buildings, even if he is not licensed as an engineer or architect.

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56 *Sanzari v. Rosenfeld*, 34 *N.J.* 128 (1961)

57 *Hudgins v. Serrano,* 186 *N.J. Super.* 465 (App. Div., 1982)

As will be discussed later, there are specific licensing requirements in New Jersey applicable to engineers, architects, land surveyors and planners.

No plan or specification shall be accepted by a public body unless there is affixed to the plan the seal of the professional engineer, registered architect or land surveyor who has been licensed in accordance with the statute.[58]

Certainly no one can hold himself or herself out as a professional engineer, architect, surveyor or planner unless they have met the specific licensing requirements applicable to their profession.

It should be noted, however, that there are certain exemptions from the engineering licensing requirement for a person not a resident of and having no established place of business in New Jersey when his or her practice of professional engineering or land surveying in this State "does not exceed in the aggregate 30 consecutive days in any calendar year; provided such person is legally qualified by license to practice said professional engineering or land surveying in any State or country in which the requirements and qualifications for a certificate of license are at least comparable to those specified" in the statute. The statute, however, specifically provides that "no final plans or reports may be submitted under this provision."[59]

There is an additional exemption for an engineer not a resident of New Jersey and having no established place of business in New Jersey but who has recently become a resident of this State. If the new resident has applied for licensing in New Jersey but the appropriate board has not yet acted on the license application, the exemption applies. The exemption in that case continues only for such time as the board requires for the consideration of the application for licensing.[60]

There are other exemptions that will not be generally applicable to matters that come before zoning or planning boards.

It would appear, therefore, that an individual who is licensed as a professional engineer in another jurisdiction and who has certified, or given sworn testimony, that he has not appeared as a professional engineer in New Jersey for more than 30 consecutive days in the current calendar year may appear before the Board as a professional engineer.

It may be helpful to review the statutory provisions relating to the licensing of the various types of professionals who might appear before the Board as expert witnesses. The statutory provisions define the specific aspects of the particular professional and the areas of expertise that lead to their licensing.

Architects

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58 *N.J.S.A.* 45:8-45

59 *N.J.S.A.* 45:8-40 (1)

60 *N.J.S.A.* 45:8-40 (2)

Architects are required to be licensed in New Jersey.[61] The term "architecture" is defined to mean

> ... the art and science of building design and particularly the design of any structure for human use or habitation. Architecture, further, is the art of applying human values and aesthetic principles to the science and technology of building methods, materials and engineering systems, required to comprise a total building project with a coherent and comprehensive unity of structure and site.[62]

The term "practice of architecture" is defined as

> ... the rendering of services in connection with the design, construction, enlargement or alteration of a building or group of buildings and the space within or surrounding those buildings, which have as their principle purpose human use or habitations. These services include site planning, providing preliminary studies, architectural designs, drawings, specifications, other technical documentation, and administration of construction for the purpose of determining compliance with drawings and specifications.[63]

Any licensed professional engineer who has a college degree in an engineering program or curriculum of four years or more is entitled to engage in the practice of architecture and may be registered to practice architecture upon passing the parts of the examination relating to site and building design.[64]

Engineers

Professional Engineers (PE) are required to be licensed in New Jersey.[65]

The terms "practice of engineering" or "professional engineering" are defined to mean

> ... any service or creative work the adequate performance of which requires engineering education, training and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of land and water, engineering studies, and the administration of construction for the purpose of determining compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any engineering project including: utilities, structures, buildings, machines, equipment, processes, work systems, projects, telecommunications, or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life,

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61 *N.J.S.A.* 45:3-1

62 *N.J.S.A.* 45:3-1.1 c

63 *N.J.S.A.* 45:3-1.1 k

64 *N.J.S.A.* 45:3-5.1

65 *N.J.S.A.* 45:8-27

> health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. The design of buildings by professional engineers shall be consistent with section 7 of the "Building Design Services Act,"[66]

An architect who has a college degree in a program or curriculum of four years or more may be licensed to engage in the practice of professional engineering upon satisfactorily passing that part of the examination limited to the specialized training of engineers.[67]

It is interesting to note that there is a requirement that the clerk of any political subdivision of the State is required to file with the secretary-director of the State Board of Professional Engineers and Land Surveyors the name of any engineer "designated, appointed or employed, within 30 days after appointment."[68]

Certified Landscape Architects

Certified Landscape Architects (CLA) are required to be licensed in New Jersey.[69] The term "certified landscape architect" means

> ... an individual who, by reason of his knowledge of natural, physical and mathematical sciences, and the principles and methodology of landscape architecture and landscape architectural design acquired by professional education, practical experience, or both, is qualified to engage in the practice of landscape architecture and is certified by the board as a landscape architect.[70]

The term "practice of landscape architecture" is defined as

> ... any service in which the principles and methodology of landscape architecture are applied in consultation, evaluation and planning, including the preparation and filing of sketches, drawings, plans and specifications, and responsible administration of contracts relative to projects principally directed at the functional and aesthetic use of land.[71]

The statute specifically provides that any person or corporation may engage in the practice of landscape architecture, but may not hold himself or herself out as or use the title "certified landscape architect" unless certified under the provisions of the statute.[72]

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66 *N.J.S.A.* 45:8-28 (b)
67 *N.J.S.A.* 45:8-35.1
68 *N.J.S.A.* 45:8-43
69 *N.J.S.A.* 45:3A-1
70 *N.J.S.A.* 45:3A-2 a
71 *N.J.S.A.* 45:3A-2 b
72 *N.J.S.A.* 45:3A-2 b

Nothing in the provisions for the licensing of certified landscape architects is to be construed so as to prevent the practice of architecture, engineering, land surveying or professional planning by those properly licensed in those professions, but they may not use the term "landscape architect" unless certified under the provisions of the statute.[73]

Land Surveyors

Land Surveyors (LS) are required to be licensed in New Jersey.[74]

The practice of land surveying includes

> ... surveying of areas for their correct determination and description and for conveyancing, and for the establishment or reestablishment of land boundaries and the plotting of lands and subdivisions thereof, and such topographical survey and land development as is incident to the land survey.[75]

A land surveyor has the authority to go on, over and upon the lands of others during reasonable hours when necessary to make land surveys, provided that there has been a reasonable attempt to notify the land owner or lessee and has given written notice within 7 days to the police department of the municipality in which the land is located.[76]

Professional Planners

Professional Planners (PP) are required to be licensed in New Jersey[77] and the term "practice of professional planning" is defined to mean the

> administration, advising, consultation or performance of professional work in the development of master plans ... and other professional planning services related thereto intended primarily to guide governmental policy for the assurance of the orderly and coordinated development of municipal, county, regional, and metropolitan land areas, and the State or portions thereof. The work of the professional planner shall not include or supersede any of the duties of an attorney at law, a licensed professional engineer, land surveyor or registered architect of the State of New Jersey.[78]

It is further provided that any licensed professional engineer, land surveyor or registered architect may engage in any or all of the functions of a professional planner, except that they shall not hold themselves out as professional planners.[79] Additionally, a duly licensed

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73 *N.J.S.A.* 45:3A-3

74 *N.J.S.A.* 45:8-27

75 *N.J.S.A.* 45:8-28 (e)

76 *N.J.S.A.* 45:8-44.1

77 *N.J.S.A.* 45:14A-1

78 *N.J.S.A.* 45:14A-2 (c)

79 *N.J.S.A.* 45:14A-3

professional engineer, land surveyor or registered architect may be licensed as a Professional Planner without meeting the other licensing requirements, including the examination requirement.[80]

While an engineer or surveyor who has a license as a professional planner may certainly qualify as an "expert" for the purpose of offering opinion testimony, the Board is entitled to request information on the experience of the individual in the field of professional planning in order to determine the weight to be accorded the testimony.

In addition, a professional designation to look for on any resume or statement of professional qualifications is AICP, the indication of membership in the American Institute of Certified Planners. In order to achieve the designation, a planner must qualify by passing an examination - in addition to meeting the state licensing requirements.

It has been held that a landscape architect may not properly use the terms "land planner" in reference to himself and "land planning" to describe the activities of himself or his firm.[81]

Who Does What?

With respect to land use applications, the determination of which professional is authorized to perform the work is made on the basis of the statutory provisions discussed above and the regulations enacted under the authority of the statutes and found in the *New Jersey Administrative Code*.

Site Plans

The survey depiction of existing conditions and the exact location of physical features, including metes and bounds, drainage, waterways, utility locations and easements must be prepared by a land surveyor. The information on the survey may be transposed to the site plan, however, provided that the date of the survey and by whom and for whom it was prepared is shown on the site plan. Vegetation, general flood plain determinations or general location of existing utilities, buildings or structures and landscaping, signs, lighting, screening and other information not specified in the regulations may be shown by an architect, certified landscape architect, planner, engineer, land surveyor or other person acceptable to the Board.[82]

Either an engineer, planner, architect or certified landscape architect may prepare the plan showing the location of proposed buildings and their relationship to the site and immediate environs.[83]

An architect, certified landscape architect, engineer or planner may prepare the general layout of a preliminary site plan for a multiple building project showing the development

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80 *N.J.S.A.* 45:14A-11; *N.J. Chapter, American Institute of Planners v. N.J. State Board of Professional Planners*, 48 *N.J.* 581 (1967).

81 *State v. Bradley*, 174 *N.J. Super.* 154 (App.Div. 1980)

82 *N.J.A.C.* 13:40-7.2 (b); *N.J.A.C.* 13:40-7.3 (i); *N.J.A.C.* 13:27-6.2 (b); *N.J.A.C.* 13:41-4.2 (b)

83 *N.J.A.C.* 13:40-7.3 (j); *N.J.A.C.* 13:27-6.3 (j); *N.J.A.C.* 13:41-4.2 (j)

elements and may prepare a plan showing the location of drives, parking layout, pedestrian circulation and means of ingress and egress.[84]

Drainage facilities for site plans of 10 acres or more or involving storm water detention facilities or transversed by a water course may be prepared only by an engineer. Other drainage facilities may be prepared by an architect or an engineer.[85]

Utility connections and on-tract extensions may be prepared by an architect or an engineer, but only an engineer may prepare off-tract utility extensions or on-site sanitary sewage disposal or flow equalization facilities.[86]

An architect may prepare preliminary floor plans and elevation views of buildings, illustrating the architectural design of a project, except when the building is part of an engineering or industrial project, when the floor plans and elevation views may be prepared by an engineer.[87]

Subdivisions

The regulations contained in the *New Jersey Administrative Code* provide that the general location of facilities, site improvements and lot layouts may be prepared by an architect, certified landscape architect, engineer, land surveyor or planner. The design and construction details of all public improvements, including street pavements, curbs, sidewalks, sanitary sewage and storm drainage are the exclusive province of the professional engineer. A land surveyor is required for the preparation of final subdivision maps with metes and bounds.[88]

There is a pre-emption of local authority to define what work may be performed by which licensed professional. The provisions in the *New Jersey Administrative Code* applicable to Architects, Certified Landscape Architects, Professional Engineers, Land Surveyors and Professional Planners all contain identical provisions that

> No municipal or county ordinance, policy or action purporting to define the scope of professional activity of architects, engineers, land surveyors, planners or certified landscape architects in the preparation of site plans or major subdivisions shall reduce or expand the scope of professional practice recognized by the boards.[89]

While the statutory and regulatory schemes define the responsibilities of the various professionals who address different aspects of a plan which may be reviewed by a Planning

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84 *N.J.A.C.* 13:40-7.3 (b), (j).; *N.J.A.C.* 13:27-6.2 (b) (i) and (j); *N.J.A.C.* 13:41-4.2 (j)

85 *N.J.A.C.* 13:40-7.3 c, d

86 *N.J.A.C.* 13:40-7.3 e, f, g

87 *N.J.A.C.* 13:40-7.3 h.

88 *N.J.A.C.* 13:40-7.4 (a); *N.J.A.C.* 13:27-6.6 (a); *N.J.A.C.* 13:41-4.4 (a)

89 *N.J.A.C.* 13:40-7.5 (b); *N.J.A.C.* 13:27-6.5 (b); *N.J.A.C.* 13:41-4.5 (b))

Board or Zoning Board of Adjustment, it must be noted that the standard discussed above for the qualification of expert witnesses does allow some flexibility in the presentation of testimony.

Obviously, an engineer or architect who has prepared a site plan in reliance on the survey prepared by a land surveyor is qualified by education, training and experience to testify as an expert on the plan, including the aspects which were prepared by the surveyor. The Board could determine, however, that the weight to be given to the testimony of the engineer or architect would be less credible on a point involving a metes and bounds question than the weight which would be given to the testimony of a land surveyor.

The determination of the weight to be given to the testimony of an expert must be decided by the members of the Board, just as the members must weight the credibility and weight to be given to any testimony received. The issue of the weight to be accorded to particular testimony is separate and distinct from the determination as to whether a particular witness qualifies as an expert.

In a courtroom setting, the general rule is that the "best evidence" must be presented and a surveyor would be required to offer the testimony on matters falling within his or her particular specialized knowledge and experience.

Proceedings before an administrative agency, such as a Planning Board or a Zoning Board of Adjustment, however, are not bound by the formal rules of evidence and the *Municipal Land Use Law* specifically provides that the "Technical rules of evidence shall not be applicable to the hearing, but the agency may exclude irrelevant, immaterial or unduly repetitious evidence."[90]

There are occasions when there may be testimony offered from other professionals, such as witnesses who may have experience with a particular type of business or those with special educational qualifications in environmental and air quality evaluations, or from specialized areas of the licensed professions, such as traffic engineers. On those occasions, the Board may well want some testimony on the particular experience, education or training which would qualify the person to testify as an "expert" in the particular field.

The determination as to whether a witness is an "expert" should not be so narrowly or strictly applied that useful testimony is not received, but the Board should always remember that the evaluation of the testimony and ultimate acceptance or rejection of the opinions offered must be made by the Board.

While the Board cannot arbitrarily or unreasonably ignore the "expert" testimony, the Board members should always have the freedom to reject the expert testimony that they determine to be weak or not credible. In that instance it would be useful for the Board members to include in their statements on the record the reasons why the testimony was not persuasive, so that a reviewing Court will be able to understand the reasons for rejecting what might initially appear to be "expert" testimony entitled to substantial deference.

90 *N.J.S.A.* 40:55D-10 e.

Where, however, there is conflicting testimony, the Board must decide whether to accept all or part of the testimony offered. Where the choice made by the Board is reasonably made, that decision is generally conclusive and will not be overturned on appeal.[91]

Powers of the Zoning Board of Adjustment

The Zoning Board of Adjustment has the power under the Municipal Land Use Law to:[92]

a. Hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by an administrative officer based on or made in the enforcement of the zoning ordinance;

b. Hear and decide requests for interpretation of the zoning map or ordinance or for decisions upon other special questions upon which such board is authorized to pass by any zoning or official map ordinance, in accordance with this act;[93]

c.[94](1) Where:

(a) by reason of exceptional narrowness, shallowness or shape of a specific piece of property, or

(b) 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 structures lawfully existing thereon,

the strict application of any regulation pursuant to article 8 of this act [40:55D-62 et seq.] would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the developer of such property, grant, upon an application or an appeal relating to such property, a variance from such strict application of such regulation so as to relieve such difficulties or hardship;

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91 *Kramer v. Board of Adjustment of Sea Girt*, 45 *N.J.* 268 (1965; *Allen v. Hopewell Township Zoning Board of Adjustment*, 227 *N.J. Super.* 574 (App.Div. 1988)

92 *N.J.S.A.* 40:55D-70.

93 *Grancagnola v. Planning Board of the Borough of Verona*, 221 *N.J. Super.* 71, Fn 5 at 75-76 (App.Div. 1987) rejects the argument that the court must defer to the determination of the Zoning Board of Adjustment on the matter of a legal interpretation. The Court specifically overruled the holding in *Alston v. Englewood Board of Adjustment*, 216 *N.J.Super*. 221 (Law Div. 1986) that judicial review of a board of adjustment's interpretation is limited to whether the action was arbitrary, capricious or unreasonable. The Court in *Grancagnola* specifically adopted the ruling of Jantausch *v. Borough of Verona*, 41 *N.J.Super.* 89, 96 (Law Div. 1956) that "... the interpretation of an ordinance is purely a legal matter as to which an administrative agency has no peculiar skill superior to the courts," as the applicable standard.

94 Variances from height restrictions for a permitted use are properly considered as "c" variances except where the variance is for more than 10' or for an increase of more than 10% in the permitted height, in which case they are considered as "d" variances.

(2) where in an application or appeal relating to a specific piece of property the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment, grant a variance to allow departure from regulations pursuant to article 8 of this act; provided, however, that no variance from those departures enumerated in subsection d. of this section shall be granted under this subsection; and provided further that the proposed development does not require approval by the planning board of a subdivision, site plan or conditional use, in conjunction with which the planning board has power to review a request for a variance pursuant to subsection 47a. of this act [40:55D-60]; and

d. In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit:

(1) a use of principal structure in a district restricted against such use[95] or principal structure,

(2) an expansion of a nonconforming use,

(3) deviation from a specification or standard pursuant to section 54 of P.L. 1975, c. 291 (C. 40:55D-67) pertaining solely to a conditional use,

(4) an increase in the permitted floor area ratio as defined in section 3.1 of P.L. 1975, c. 291 (C. 40:55D-4)[96],

(5) an increase in the permitted density as defined in section 3.1 of P.L. 1975, c. 291 (C. 40:55D-4), except 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 lots resulting from a minor subdivision or

(6) a height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district for a principal structure.

A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board, or 2/3 of the full authorized membership, in the case of a regional board, pursuant to article 10 of this act [40:55D-77 to 40:55D-88].

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

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[95] The fact that the granting of a use variance might result in additional tax revenue and the surrounding property values would be enhanced is not sufficient to justify the granting of the variance, *Loscalzo v. Pini*, 228 *N.J.Super*. 291 (App.Div. 1988). Note also the case of *Michelotti Realty v. Zoning Board of Adjustment of Saddle Brook Township*, 191 *N.J. Super.* 568 (App.Div. 1983), in which it was held that a bulk variance could be considered by the Zoning Board of Adjustment under the "special reasons" standard of *N.J.S.A.* 40:55D-70 d.

[96] Density and floor area ratio variances may only be heard before the Zoning Board of Adjustment, *Commercial Realty and Resources Corp. v. First Atlantic Properties Co.*, 122 *N.J.* 546 (1991).

> zoning ordinance.[97] In respect of any airport hazard areas delineated under the "Air safety and hazardous Zoning Act of 1983," P.L. 1983, c. 260 (C. 6:1-80 et seq.), no variance or other relief may be granted under the terms of this section, permitting the creation or establishment of a nonconforming use which would be prohibited under the standards promulgated pursuant to that act, except upon issuance of a permit by the Commissioner of Transportation.
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> An application under this section may be referred to any appropriate person or agency for its report; provided that such reference shall not extend the period of time within which the zoning board of adjustment shall act.

The applications that come most often before the Board of Adjustment are those seeking a "use" variance under *N.J.S.A.* 40:55D-70 (d). The most troublesome question facing the members of the Board is the determination of "special reasons" in the particular case presented to them for decision.

In any case involving a "use" variance, all proceedings will be before the Zoning Board of Adjustment, even if subdivision or site plan approvals are also required.

If no "use" variance is involved but the application requires either site plan approval or subdivision approval, then the entire proceeding must be submitted to the Planning Board, even if "bulk" variances are needed. The applicant in that case cannot go to the Zoning Board for the bulk variances and then to the Planning Board for the site plan or subdivision approval. The reason for this change is that the review of the "bulk" variances in those cases are essential to a proper review of the site plan or subdivision application and should be reviewed in one comprehensive application. The "legislative intent" or "public policy" expressed throughout the Municipal Land Use Law is that applicants should have their entire application heard before one Board and should not be bounced back and forth from Board to Board.

The "use" variances permitted under subsection d are major deviations from the provisions of the zoning ordinance. For that reason the granting of such a variance requires the extraordinary approval of five (5) affirmative votes.

By easing the requirements for the "hardship" variance under subsection c, it is anticipated that there will be some categories of variance that will be shifted from the five (5) vote requirement to a majority vote requirement.

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97 The negative criteria must be satisfied before the grant of a variance can be sustained. With regard to a "use" variance the satisfaction of the second prong of the negative criteria requires, "in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. *Medici v. BPR Co.*, 107 *N.J.* 1, 21 (1987). It has been held that the "enhanced quality of proof" is not applicable to a use determined to be inherently beneficial *Sica v. Board of Adjustment, Wall Township*, 127 *N.J.* 152 (1992) , but that holding has effectively been reversed by an amendment to the statute in 1997 to clearly provide that variances, including those involving an inherently beneficial use, must show that the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purposes of the zone plan and zoning ordinance. While the "enhanced quality of proof does not generally apply to bulk variances, the greater the disparity between the variance and the ordinance standard, the more compelling and specific must be the proofs supporting the variance, *North Bergen Action Group v. North Bergen Township Planning Board*, 122 *N.J.* 567 (1991).

One example might be the proposed storage shed as an accessory use on a lot. If such a structure were not permitted under the ordinance or if it did not meet the size requirements established in the ordinance, a variance application would be presented. Since the structure was not permitted, it would fall under the "use" variance requirements and would require the five (5) votes for approval. With the 1984 amendments, however, that would become a "hardship" variance under subsection c, since the building is not the principal structure, and would require a majority vote for approval.

While the requirements have been changed and in some instances eased, that does not mean that applications should be approved as a matter of routine. The function of the Zoning Board is to serve in a quasi-judicial capacity and to review and pass upon the exceptional case.

Any applicant before the Board will suggest reasons for requesting a variance and the variance may well be beneficial to the applicant. The issue for the Board is whether the variance is compatible with good land use planning and whether the applicant is able to meet the standards required by law for the granting of a variance.

The Zoning Board of Adjustment has the power to direct the issuance of a permit for a building or structure in the bed of a mapped street or public drainage way, floor control basin or public area; and for a building or structure not related to a street.[98]

The Zoning Board of Adjustment also has the power to certify the existence of a non-conforming structure or use and the application must be made to the Zoning Board of Adjustment where the application for the certification is made more than one year after the adoption of the ordinance.[99]

Variance or Re-Zoning

A variance is an exception to the zoning ordinance, and it must be noted that the Zoning Board of Adjustment does not have the authority to re-zone the municipality. The power of zoning is legislative in nature and is, accordingly, reserved to the Governing Body.

In the case of *Messer v. Township of Burlington*[100] the court held that the statutory powers granted to Boards of Adjustment "… do not include any authority to hear matters related to the amendment of the Zoning Ordinance." In that case, the court was reviewing the denial of a variance for 92.5 acres of land on which the applicant wished to construct townhouses and single-family homes on lots smaller than permitted under the ordinance.

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98 *N.J.S.A.* 40:55D-34, 36 and 76.

99 *N.J.S.A.* 40:55D-68.

100 *Messer v. Township of Burlington*, 172 *N.J. Super.* 479 (Law Div., 1980).

A leading case on the subject is *Township of Dover v. Board of Adjustment of the Township of Dover*[101] In that case the Governing Body of Dover Township brought the action against the Board of Adjustment, claiming that the Board had infringed on the Governing Body's exclusive statutory power to zone and re-zone. In that matter, the Board of Adjustment had granted a variance to a developer for an 81-acre tract, subjecting that tract in a rural zone to zoning limitations applicable to cluster development in another zone.

In deciding the *Dover* case, the court attempted to provide broad guidelines on the question of jurisdiction and set forth the statutory allocation of function between the Governing Body and the Board of Adjustment:

> ...It is the governing body's ultimate responsibility to establish, by the adoption of its zoning ordinances and amendments thereto, the essential land character of the municipality. This it does by the geographical delineation of its districts and the uniformity within each district, the delineation of the uses permitted therein and the limitation schedules applicable thereto in terms of lot size, lot coverage, height restrictions and the like. ...The variance power of the board of adjustment is, on the other hand, intended to accommodate individual situations which for a statutory stated reason, require relief from the restrictions and regulations otherwise uniformly applicable to the district as a whole.[102]

While the Zoning Board of Adjustment has no formal role to play in the process of adopting or amending zoning ordinances, it is certainly appropriate for the Board to bring to the attention of the Governing Body particular problems that may come to the attention of the Zoning Board. For example, if the Board were continually presented with requests for variances to accommodate above ground swimming pools because the commercial pools were only available in a certain size that could not comply with the requirements of the Ordinance, it would be appropriate for the Board to bring that information to the attention of the Governing Body for their review. Likewise, conditions which exist throughout a neighborhood and which were not unique to a particular property would be appropriate for review by the Planning board and the Governing Body in the process of amending the zoning ordinance.

Variances are designed to deal with specific and exceptional cases and can be granted only when the Zoning Board of Adjustment determines that the legal conditions are found to exist that permit the granting of the relief sought.

Who May Apply for a Variance?

Generally, the applicant for a variance must be the owner of the property, as an applicant must have some right of ownership and possession of the property. The variance relates to the property not to the individual applicant, so ownership is important.

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101 *Township of Dover v. Board of Adjustment of the Township of Dover*, 158 *N.J. Super.* 401 (App. Div., 1978)

102 *Township of Dover v. Board of Adjustment of the Township of Dover*, 158 *N.J. Super.* 401 (App. Div., 1978)

Applications are frequently submitted on behalf of the purchaser of the property under an agreement of sale. A tenant could submit an application, if the owner has consented to the application and authorized the tenant to pursue the application.

In either case, the owner will be bound by the decision reached on the application, since a variance is given because of the nature of the property and not the circumstances of the owner or applicant.

If the applicant is a corporation or a limited liability company, it may appear before the Board only through an attorney-at-law and not through one of its officers or agents.[103]

All applicants have the right to have their attorney present and participating in the presentation of the application. Objectors also have the right to be represented by counsel and to have their attorney participate in the proceedings.

Special Reasons for the Use Variance

In dealing with an application for a "use" variance it is necessary that "special reasons" exist to justify the granting of the variance. A "special reason" is generally described as one that advances the purpose of zoning, including the promotion of safety and health, the appropriate use of property and the promotion of a desirable visual environment.[104] The statutory purposes of zoning include the following:[105]

a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;[106]

b. To secure safety from fire, flood, panic and other natural and man-made disasters;

c. To provide adequate light, air and open space;

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103 Representation of corporations by architects, engineers or its representative officials has been held to constitute the unauthorized practice of law. Opinion #13, Committee on Unauthorized Practice of Law. Accordingly, a corporation can be represented only by an attorney at law admitted to practice in the State of New Jersey. With respect to individual applicants, it has been held that the presentation of the applicant's case by a realtor constitutes the unlawful practice of law. *Slimm v. Yates*, 236 *N.J. Super.* 558 (Ch. Div. 1989). The same rationale would apply to engineers and architects. There is no problem where the applicant is actually present and the testimony is being presented by witnesses. The problem arises when the applicant is not present. In cases where the applicant is not present due to illness, absence from the State or other compelling reason, the practice has generally been to allow a family member to act as the "agent" for the individual applicant.

104 *Kessler v. Bowker*, 174 *N.J. Super.* 478 (App.Div. 1979), *certification denied*, 85 *N.J.* 99 (1980).

105 *N.J.S.A.* 40:55D-2.

106 The preservation of family-style living, the "blessings of quiet seclusion" and "refreshment of repose and tranquility of solitude" are legitimate goals. *State v. Miller*, 83 *N.J.* 402 (1980); the preservation of the character of a neighborhood and the conservation of neighborhood values are proper zoning purposes. *Home Builders League of South Jersey, Inc. v. Berlin Township*, 81 *N.J.* 127 (1979).

d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial[107] and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;[108]

i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement;[109]

j. To promote the conservation of historic sites and districts, open space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;

k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;

l. To encourage senior citizen community housing construction;[110]

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107 An ordinance provision which limited coin-operated amusement or entertainment devices to not more than two machines incidental to some other principal use was invalid as there was no reasonable relationship to the legitimate purposes of zoning, *Supercade Cherry Hill, Inc. v. Borough of Eatontown*, 178 *N.J. Super.* 152 (App.Div. 1981); *America on Wheels, Eatontown, Inc. v. Board of Adjustment, Borough of Eatontown*, 178 *N.J. Super.* 155 (App.Div. 1981).

108 An ordinance requirement that residential properties have a minimum of two off-street parking spaces, with one in a garage was upheld as a valid municipal effort to decrease traffic congestion and blight, *Zilinsky v. Zoning Board of Adjustment, Borough of Verona*, 105 *N.J.* 363 (1987); traffic impact may be considered on application for a variance and the reduction of congestion may provide support for the variance, *O'Donnell v. Koch*, 197 *N.J.Super.* 134 (App.Div. 1984)

109 Planning Board required landscaping on approved site plan was upheld as promoting a desirable visual environment, *Commercial Realty & Resources Corp. v. First Atlantic Properties Co.*, 235 *N.J. Super.* 577 (App.Div. 1989); where Zoning Board determines that variance to permit construction of a residence on an undersized lot will adversely affect the character of the surrounding properties, the variance should be denied, *Dallmeyer v. Lacey Township Board of Adjustment*, 219 *N.J. Super*. 134 (Law Div. 1987); *Commons v. Westwood Zoning Board of Adjustment*, 81 *N.J.* 597 (1980).

110 Senior citizen housing is an inherently beneficial use. *Jayber, Inc. v. Municipal of the Township of West Orange*, 238 *N.J. Super.* 165 (App.Div. 1990).

m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;

n. To promote utilization of renewable energy resources; and

o. To promote the maximum practicable recovery and recycling of recyclable materials from municipal solid waste through the use of planning practices designed to incorporate the State Recycling Plan goals and to complement municipal recycling programs.

The enumerated reasons are for the guidance of the Zoning Board of Adjustment and are not absolutes. The Municipal Land Use Law must be considered as a whole and no single phrase takes on a greater meaning than another phrase. The judgment to be made is within the sound discretion of the Zoning Board of Adjustment, provided that the decision is not arbitrary, capricious or unreasonable.

The decision of the New Jersey Supreme Court in the matter of *Medici, et al. v. BPR Company*[111] makes particular note of the standards that should be applied by Zoning Boards of Adjustment in determining whether "special reasons" exist for the granting of a "use" variance and the obligation of the Zoning Board of Adjustment to consider changes in the character of the community since the last review of the master plan and zoning ordinance.

> Although certain commercial uses may inherently serve the general welfare in a particular community, the typical commercial use can better be described as a convenience to its patrons than as an inherent benefit to the general welfare. For such uses, any benefit to the general welfare derives not from the use itself but from the development of a site in the community that is particularly appropriate for that very enterprise.

The court further noted the importance of the Master Plan in the deliberations of the Zoning Board of Adjustment

> Also pertinent to the issues before us are the provisions of the MLUL [Municipal Land Use Law] requiring the zoning ordinance to be substantially consistent with the land use and housing elements of the master plan, *N.J.S.A.* 40:55D-62(A), and the requirement that the planning board re-examine the master plan and zoning ordinance at least once every six years and report its findings and recommendations for revision. *N.J.S.A.* 40:55D-89. Failure of a municipality to conduct the required review creates a rebuttable presumption that the zoning ordinance is "no longer reasonable." *N.J.S.A.* 40:55D-89.1 (enacted L.1985, c.516). Another recent amendment to the MLUL requires all boards of adjustment to conduct an annual review of their decisions on variances and other appeals. *N.J.S.A.* 40:55D-70.1 (enacted L.1985, c.516). The boards must report to the governing body and planning board on those provisions of the ordinance

[111] *Medici, et al. v. BPR Company, et als.*, 107 *N.J.* 1 (1987)

that were the subject of variance appeals, and offer recommendations for amendments to or revisions of the zoning ordinance. Id.

* * *

The specific legislative changes in our statutes regulating land use and zoning reflect significant policy decisions by the legislature concerning the proper relationship between use variances and zoning ordinances. The power to grant use variances has been shifted from the governing body, whose responsibilities include enactment of the zoning ordinance, to the board of adjustment. This shift of authority undoubtably reflects the legislature's determination that boards of adjustment possess special competence to decide use variance applications, and that absent an appeal no participation by the governing body is necessary. However, delegation of the authority to grant use variances to boards of adjustment increases the likelihood that such variances may conflict with the intent of the master plan and zoning ordinance to a greater extent than was the case when the power to grant them was vested in the governing body. Tension between use variances and the zoning ordinance and master plan is less likely in those municipalities that authorize appeals from the use variances to the governing body. *N.J.S.A.* 40:55D-17 (a).

The legislative enactments requiring periodic re-evaluation of municipal master plans and zoning ordinances, *N.J.S.A.* 40:55D-89, 89.1, and annual reports and recommendations from boards of adjustment, *N.J.S.A.* 40:55D-70.1, reflect a legislative policy intended to insure that a municipality's master plan and zoning ordinance reflect contemporary needs and conditions, and that the governing body is kept informed of provisions of the zoning ordinance that generate variance requests. Thus, the mandatory re-examination by the planning board of the master plan and zoning ordinance, at least every six years, is intended to inform the governing body of the need for revisions in the plan and ordinance based on significant changes in the community since the last such re-examination. Similarly, the annual reports by boards of adjustment summarizing variance requests throughout the year and recommending amendments to the zoning ordinance are designed to avoid successive appeals for the same types of variance by encouraging the governing body to amend the ordinance so that such appeals will be unnecessary. When an informed governing body does not change the ordinance, a board of adjustment may reasonably infer that its inaction was deliberate.

Our role is to give effect to these legislative policies. In the use variance context, we believe that this can best be achieved by requiring, in addition to proof of special reasons, an enhanced quality of proof and clear and specific findings by the board of adjustment that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. The applicant's proofs and the board's findings that the variance will not "substantially impair the intent and purpose of the zone plan and zoning ordinance," *N.J.S.A.* 40:55D-70(d), must reconcile the proposed use variance with the zoning ordinance's omission of the use from those permitted in the zoning district. For example, proof that the character of a community has changed substantially since the adoption of the master plan and zoning ordinance may demonstrate that a

variance for a use omitted from the ordinance is not incompatible with the intent and purpose of the governing body when the ordinance was passed. Reconciliation on this basis becomes increasingly difficult when the governing body has been made aware of prior applications for the same use variance but has declined to revise the zoning ordinance.

Since "use" variances represent the most significant departure from the zoning plan of the municipality, they require the most careful review before they are granted. The granting of a "use" variance is not intended to become a convenient method of amending a zoning ordinance and the courts generally look unfavorably on "use" variances where the "special reasons" are not clearly set forth in the record before the Zoning Board of Adjustment. Where the standards are met however and the variance addresses the circumstances unique to a particular property, the courts will generally defer to the "expertise" of the local officials and their determination.

The fact that the municipality might gain additional tax revenues by allowing a structure or use not permitted by the zoning ordinance and that surrounding property values would be enhanced is not sufficient to justify the granting of a use variance.[112]

Inherently Beneficial Uses

In reviewing applications for use variances, there are certain categories of potential uses which have been considered to be inherently beneficial and which therefore are considered to have provided "special reasons" by nature of the proposed use and they are not required to show that the proposed use is particularly appropriate for the proposed location.

While many applicants would like to argue that their proposed use is "inherently beneficial," the term is actually not as broad as some applicants would wish, and is broader than most municipal officials are willing to acknowledge.

Most of the uses that are considered to be inherently promoting the public good are non-commercial, non-profit service oriented institutions. But, not all non-commercial or non-profit institutions will qualify as inherently beneficial.

Schools are inherently beneficial, although the mere fact that instruction is given to individuals or groups does not make a facility a school. Child care centers have been considered to be inherently beneficial and the Municipal Land Use Law provides that child care centers shall be a permitted use in all nonresidential districts of a municipality[113]. Additionally, family day care homes are permitted uses in all residential districts, although that is defined as accommodating not more than 5 children.[114]

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112 *Loscalzo v. Pini*, 228 *N.J. Super.* 291 (App.Div. 1988)

113 *N.J.S.A.* 40:55D-66.6

114 *N.J.S.A.* 40:55D-65b.

Medical facilities, hospitals and nursing homes have been held to inherently promote the public good, as have churches and places of worship.[115] Cellular telephone towers have been held to be inherently beneficial.[116]

It should be understood, however, that while an inherently beneficial use may be considered to have meet the "special reason" standard, that does not mean that every such use must be permitted in all zoning districts. The applicant must still satisfy the "negative criteria" and demonstrate that the proposed use will not substantially impair the zoning plan or be substantially detrimental to the public good. The "negative criteria" is further discussed below.

Non-Conforming Uses or Structures

The Zoning Board of Adjustment is frequently presented with applications where a property owner seeks to expand a use or structure that already exists and that does not conform to the provisions of the zoning ordinance. These uses or structures existed before the adoption of the zoning ordinance so they are legal, but the Ordinance does not permit the expansion of the non-conforming uses or structures.

The eventual goal of the zoning ordinance is the elimination of non-conforming uses, so there is a serious question as to whether any enlargement of the non-conformity should be permitted. If it is to be enlarged or extended it is necessary to obtain a variance, just as if a "use" variance were required.

There is no automatic right to a variance for an enlargement and it must be remembered that any substantial enlargement of the non-conformity is directly contrary to the plan for community development as expressed in the zoning ordinance.

The decision must be based on the individual case before the Board. For instance, where the structure is to be expanded but the extent of the non-conformity of the use is to be reduced, the Board could determine that the variance should be granted in order to bring the property into substantially greater compliance with the provisions of the ordinance. However, an argument that an applicant needed to expand the non-conforming structure in order to make a greater profit for the business being conducted would be insufficient to justify the expansion of the non-conformity.

There are, however, significant differences in acting on an application to expand a non-conforming use and in acting on a use that has been previously allowed by the grant of a variance.

A non-conforming use is created where a use exists that was permitted at one time, but became non-conforming as the result of changes in the zoning ordinances. The general policy is

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115 *Urban Farms, Inc. v. Franklin Lakes*, 179 *N.J. Super.* 203 (App.Div. 1981); *Kali Bari Temple v. Board of Adjustment*, 271 *N.J.Super.* 241 (App.Div. 1994).

116 *NYNEX Mobile Communications Co. v. Hazlet Township*, 276 *N.J. Super.* 598 (App.Div. 1994); *Kingwood v. Board of Adjustment*, 272 *N.J. Super.* 498 (Law Div. 1993); *New Brunswick v. Old Bridge*, 270 *N.J. Super.* 122 (Law Div. 1993).

that those non-conforming uses should be brought into compliance with the regulations applicable to the particular zoning district. Non-conforming uses, as a matter of sound planning, should not normally be encouraged to continue and should generally not be allowed to expand.

There are times when non-conforming uses are allowed to expand. For instance, the court upheld the granting of a variance by the Westampton Township Committee, on appeal from the denial by the Zoning Board of Adjustment, to permit the expansion of a commercial use in an area zoned for residential use only.[117] That case arose at a time when Zoning Boards could only make recommendations to the Governing Body. Under the Municipal Land Use Law in effect now, the Zoning Board actually makes the decision. In granting the variance, the Township Committee found special reasons in that the applicant would be required to enclose an unsightly open storage area, that the addition approved was smaller than the applicant requested, and that the approval would promote aesthetics and the health, safety and welfare of the residents. The court held that the determination of the Township Committee was sufficient to constitute "special reasons" for the variance.

It should be noted, however, that the standard applied by the court was whether the actions of the Township Committee were so arbitrary, capricious and unreasonable as to be overturned by the court. There is a strong policy that the court should defer to the judgment made by the local officials in cases of this nature. It is for this reason that it is important that the determination of the Zoning Board of Adjustment should be supported by specific findings and reasons for the action taken.

Where a prior variance has been granted to permit a particular use, however, what appears to be a non-conforming use has actually developed as the result of one or more variances granted over the years. A variance is an official determination that the use is not offensive to the ordinance. A use allowed by variance effectively becomes a conforming use as to that particular property.[118]

The issue thus presented to the Zoning Board of Adjustment was not whether there is a substantial expansion of a non-conforming use, but is more particularly whether the proposed use was within the scope of the variance previously granted.

That, of course, is a matter that the Board must address. If the Board determines that the scope of the original variance was sufficiently broad to encompass the proposed use, then the issues presented do not involve the granting of a further use variance and the only issues to be determined might involve the changes in the site plan and whatever bulk variances have been requested. If, however, the Board determines that currently proposed use is beyond the scope of the original variance, then the applicant would have to meet the standards for the grant of a use variance in order to proceed with the use as proposed in the application.

It should be noted that even if the Board determines that there is no need for a "use" variance, the remaining issues of bulk variances and site plan review would remain before the Zoning Board of Adjustment. The statutory provision which enables the Zoning Board of

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117 *Kessler v. Bowker*, 174 *N.J. Super.* 478 (App. Div. 1979)

118 *Industrial Lessors, Inc. v. City of Garfield*, 119 *N.J. Super.* 181 (App. Div. 1972)

Adjustment to consider site plan and subdivision applications[119] enables an applicant to submit a joint application or to submit separate applications and provides that "The separate approval of the variance shall be conditioned upon grant of all required subsequent approvals by the board of adjustment. No such subsequent approval shall be granted 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 vote on the subsequent approvals does not require the five affirmative votes that are needed for approval of a use variance.

The issue of the jurisdiction of the Zoning Board to act on site plan review of an application that does not require a "use" variance appears to have been addressed in only one reported case[120] where the court held that the Zoning Board of Adjustment could proceed to act upon bulk variances and site plan review, even where the Zoning Board of Adjustment determined that no "use" variance was required. The Court noted the policy expressed in the Municipal Land Use Law that an applicant would be able to obtain relief from a single Board and should not be required to move back and forth between the Planning and Zoning Boards. The court held that "bulk" variances could be granted for "special reasons", even if the structure or use was permitted in the zoning district.

Hardship and Bulk Variances

The other category of variance applications to come before the Board are request for relief from the provisions of the zoning ordinance establishing minimum lot size, area coverage, frontage, front-side-rear yard setbacks and similar "bulk" restrictions. With commercial properties those requirements are usually best reviewed in conjunction with the site plan for a particular lot. With residential properties the Board usually reviews the variance application based on a sketch of the property or a survey showing the location of the existing structure and the proposed addition that triggers the need for a variance.

The standard for a "bulk" or "hardship" variance under the Municipal Land Use Law[121] is substantially different from the "use" variance where the Board only has to find a special reason to justify the variance. The bulk variance is based on a finding of certain conditions **relating to the property**.

The statute specifically states "by reason of exceptional narrowness, shallowness or shape of a specific property", or "by reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property" or "by reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon" as the basis for relief where those conditions create "peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer of the property" as the basis for the granting of a variance.

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119 *N.J.S.A.* 40:55D-76 (b).

120 *Michelotti Realty v. Saddle Brook Township Zoning Board of Adjustment,* 191 *N.J. Super.* 568 (App. Div. 1983)

121 *N.J.S.A.* 40:55D-70 c.

A second category was added in 1984, permitting the granting of a variance where "the purposes of this act would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment".

It is not a hardship sufficient for the granting of a variance for the applicant to argue that the variance would increase the value of the property. A variance should not be based upon the profit that might result to the applicant.

There are situations in which members of the Zoning Board of Adjustment may feel considerable sympathy for a particular applicant, but which do not constitute a basis for the granting of a variance. Illness, physical disability and personal financial considerations may all deserve sympathy, but it must be remembered that a variance is not limited to the present applicant and the variance will apply to the next owner who may not have the same personal reasons for the variance. The power to grant variances was created to address the peculiar situations of particular pieces of property.

A further restriction is that the standards permissible for the granting of a "c" variance may not be used to permit the granting of a "use" variance which is provided for in *N.J.S.A.* 40:55D-70 d. Note the distinction that a "hardship" or "c" variance is granted by majority vote, while the "use" or "d" variance requires five (5) affirmative votes to be granted. Additionally, the Zoning Board of Adjustment does not have jurisdiction to grant a "hardship" or "bulk" variance if Planning Board action is required for a subdivision, site plan or conditional use. In those cases the Planning Board must be the forum for the variance.

There is a specific statutory provision that empowers the Zoning Board of Adjustment

> ... to grant to the same extent and subject to the same restrictions the planning board subdivision or site plan approval ... or conditional use approval ... whenever the proposed development requires approval by the board of adjustment of a variance pursuant to subsection d ...[122]

Since the Planning Board cannot act on a "use" variance, the applications come to the Zoning Board of Adjustment on the request for the "use" variance. When a "use" variance is acted upon by the Zoning Board of Adjustment, any approval of the variance must be conditioned upon "... a grant of all required subsequent approvals by the Zoning Board of Adjustment."[123]

In reviewing these applications the "hardship" must relate to or uniquely affect the specific property and cannot be conditions common to the neighborhood. If the condition is one that is widespread then the proper course of action is for the Governing Body to consider an amendment to the Ordinance to deal with the problem in the particular zone.

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122 *N.J.S.A.* 40:55D-76 (b).

123 *N.J.S.A.* 40:55D-76.

Self-Created Hardships

Some conditions are not sufficient to justify the granting of a variance. For instance, a situation where the applicant has created the hardship would not be sufficient to justify the variance. Certainly someone who creates the hardship is not in a position to then ask for a variance from the ordinance to obtain relief from the hardship. Likewise, someone who purchases a property is presumed to take it with knowledge of the condition of the property and the applicable zoning, so that the hardship would have to result from some change after the purchase of the property.

There are two separate, but clearly overlapping, standards of "hardship" set forth in the statute. The first is that of "peculiar and exceptional difficulties" and the second is that of "exceptional and undue hardship".

There are two cases decided by the New Jersey Supreme Court that help to provide some guidance on the issue of "hardship".

The first case[124] involved the denial of a variance to construct a house on an undersized lot. In that case the owner had at one time owned several lots that would have met the space requirements if combined, but then sold off two of the lots. The remaining lot was significantly undersized. Additionally, the owner had received and declined a reasonable offer for the lot from an adjoining property owner.

The court held that the hardship was self created when the lots that had been in common ownership had been sold and that the owner had compounded the self created hardship by refusing a reasonable offer for the remaining lot.

In the ruling, the Court held:

> To obtain such a variance … the applicant must show a physical peculiarity of the property or some other extraordinary or exceptional situation or condition of the land, which due the zoning ordinance causes the imposition of peculiar and exceptional practical difficulties or undue hardship on the owner. Although the language would seem to indicate two different standards, difficulties or hardship, the two in large measure are overlapping and complementary. …
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> Normally a property owner has no unusual obstacle in showing that some extraordinary or exceptional situation or condition of the land stands in the path of compliance with the ordinance. In this case the impediments are insufficient frontage and acreage. A more significant element which was determinative here concerned plaintiff's demonstration of undue hardship.
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> In determining whether undue hardship has been shown, it is always appropriate to consider whether the situation was self-created. For example, if the property had a 100-foot front ... with the same depth and therefore the necessary total area, and the owner sold one-half so that the remaining land did not meet the minimum requirements, we would say the owner created the condition and

124 *Chirichello v. Zoning Board of Adjustment of Monmouth Beach,* 78 *N.J.* 544 (1979)

therefore relief would not be warranted. ... Or, if the owner of a 50-foot front lot had purchased the adjoining 50-foot lot so that the entire piece was conforming, then the owner would be in the same position as if he had always owned land with a 100-foot frontage. Upon such an acquisition it may be said absent unusual circumstances that for the purpose of the zoning ordinance there had been a merger and that a later sale of a part of the tract which caused nonconformity would result in a hardship of his own doing. …

* * *

Another element to be appraised in determining hardship is whether the property owner bought his land knowing either in fact or constructively, of the disablement. If is now settled that for this purpose the property owner is deemed to stand in the shoes of predecessors in title. …

Another yardstick by which undue hardship is to be measured is the salability of the land. ... It would certainly be consonant with the interest of all parties to deny a variance conditioned on the purchase of the land by adjoining property owners at a fair price. The immediate benefit to the adjoining property owners of maintenance of the zoning scheme and aesthetic enjoyment of surrounding vacant land adjacent to their homes is self-evident. The owner of the odd lot would suffer no monetary damage having received the fair value of the land. Of course, if the owner refused to sell, then he would have no cause for complaint. Or if the adjoining owners would not agree to purchase, then perhaps the variance should be granted, less weight being given to their position particularly when the land in question will have been rendered useless. In either even the use of a conditional variance, the condition bearing an overall reasonable relationship to the purposes of the zoning ordinances, may lead to a satisfactory solution. …

Hearings before the board of adjustment serve as the focal point for resolution of conflicting interests between public restraints on the use of private property and the owner's right to utilize his land as he wishes. A third interest which frequently makes its appearance is represented by other property owners in the immediate vicinity whose major objective is the more limited self-interest of taking whatever position they believe will enhance the value of their property or coincide with their personal preferences. The board of adjustment must settle these disputes by engaging in a "discretionary weighting," a function inherent in the variance process. ... Justice Heher characterized the differing positions in the following manner:

"A "variance" * * * is the means of relief to the individual lot owner where, due to circumstances peculiar to the particular lot, adherence to the zone regulation would constitute interference with the fundamental right of private property greatly disproportionate to the common good attending the literal enforcement of the general rule, such as would entail hardship unnecessary to the service of the public interest in the exertion of the zoning power and so would be arbitrary and unreasonable."

In the case of *Commons v. Westwood Zoning Board of Adjustment*[125] the New Jersey Supreme Court held that

> "Undue hardship" involves the underlying notion that no effective use can be made of the property in the event the variance is denied. Use of the property may of course be subject to reasonable restraint. As Justice Pashman observed in *Taxpayers Association of Weymouth Tp., Inc. v. Weymouth Tp.,* 80 *N.J.* 6, 20 (1976) ..., "zoning is inherently an exercise of the State's police power" and the property owner's use of the land is subject to regulation "which will promote the public health, safety, morals and general welfare ... ." *N.J.S.A.* 40:55D-2(a). Put another way an "owner is not entitled to have his property zoned for its most profitable use." ... However, when the regulation renders the property unusable for any purpose, the analysis calls for further inquiries which may lead to a conclusion that the property owner would suffer an undue hardship.
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> ... If the property owner or his predecessors in title created the nonconforming condition, the hardship may be deemed to be self-imposed. To measure this type of impact it is necessary to know when the zoning ordinance limitations were adopted and the status of the property at that time. ...
>
> Related to a determination of undue hardship are the efforts which the property owner has made to bring the property into compliance with the ordinance's specifications. Attempts to acquire additional land would be significant if it is feasible to purchase property from adjoining property owners. Endeavors to sell the property to the adjoining landowners, the negotiations between and among the parties, and the reasonableness of the prices demanded and offered are also relevant considerations. ... if an owner of land refused to sell at a "fair and reasonable" price he would not be considered to be suffering an "undue hardship." If on the other hand the owner is willing to sell at a "fair and reasonable" price and the adjoining property owners refuse to make a reasonable offer, then "undue hardship" would exist.

It is important to note that **a nonconformity created by the enactment of the zoning ordinance** would not constitute a self-created hardship by the property owner. In that instance the nonconformity would have been created by an action not under the control of the property owner at a time after the property owner held title to the property. If, however, after the enactment of the ordinance the property were sold, the new owner would be presumed to have acquired the property with knowledge of the zoning restriction.

The Negative Criteria

Aside from the requirement of "special reasons" or "hardship", the statutory authority to grant any variance, whether under section c (bulk and set back variances with a "hardship" standard) or under section d (use variances with a "special reasons" standard), also must meet the following requirements:

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125 *Commons v. Westwood Zoning Board of Adjustment,* 81 *N.J.* 597 (1980)

> 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.[126]

The Board must find that the granting of the variance can be accomplished without substantially impairing the zoning plan of the municipality and that the granting of the variance will not be substantially detrimental to the public good.

The issue as to impairing the zoning plan is not just whether there is **any** impairment of the zoning plan. Any variance constitutes **some** impairment of the zoning plan, but the issue is whether the impairment rises to the level of **substantial**. That is an issue for the Board to decide as it evaluates all of the evidence.

The other of the negative factors is whether the granting of the variance could be accomplished without a substantial detriment to the public good. Again the criteria involves the word **substantial**, since it can be argued that any variance might have some detrimental effect on the public good, but only a substantial detriment to the public good will defeat a variance that would otherwise have qualified for approval.

There is no statutory guidance as to the meaning intended by the key word "substantial".

In the case of *Baptist Home of South Jersey v. Borough of Riverton*[127] the court addressed the specific issue of the "Negative Criteria". The court there attempted to fashion a balancing test. The dilemma confronting the court on a review of municipal action with regard to the negative criteria was expressed by the court as,

> Establishing the absence of negative criteria may present a difficult hurdle. Under the statute, such criteria will not defeat an application unless they are "substantial". However, that word, intentionally or unintentionally, may be interpreted subjectively. It has not been defined by the courts. Since municipal action has presumptive validity and will not be upset by the courts unless it is shown to have been arbitrary, ... a municipal conclusion that the detriment is "substantial" may be unassailable. As a consequence, a variance for an inherently beneficial use may be impossible to obtain, notwithstanding a significant public need for the undertaking. This is the problem raised in these proceedings.

The New Jersey Supreme Court has cited the *Baptist Home* approach to the balancing test with approval, in a case where it was addressing an inherently beneficial use and the need to

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126 *N.J.S.A.* 40:55D-70.

127 *Baptist Home of South Jersey v. Borough of Riverton*, 201 *N.J. Super* 226 (Law Div. 1984)

consider the negative criteria in relation to that use. In addition, the Court set forth the standards to be applied in the balancing process:[128]

> Some balancing of benefits and burdens necessarily occurs when one considers whether a use variance will have a substantial detrimental effect on the public good and the zone plan. Without any balancing, a local board's finding that an applicant has not satisfied the negative criteria would always defeat an inherently beneficial use, no matter how compelling the need for that use. Baptist Home, supra, 201 N.J.Super. at 245, 492 A.2d 1100.
>
> Although *N.J.S.A.* 40:55D-70d does not expressly require a balancing of the positive and negative criteria, the need for balancing is implicit in the statutory requirement that the grant of a variance must be "without substantial detriment to the public good." See Medici, supra, 107 N.J. at 22 n.12, 526 A.2d 109. Under the legislative scheme, not every detriment will support the denial of a use variance. Only one that is "substantial" will suffice. Id. at 22-23 n.12, 526 A.2d 109. Fairly read, the requirement that a detriment be substantial necessitates a balancing of positive and negative criteria. Ibid.; *Y*ahnel, supra, 79 N.J.Super. at 519, 192 A.2d 177.
>
> The facts of each case will demonstrate the extent to which an inherently beneficial use compensates for its adverse effect on the neighborhood. Any non-residential use is bound to produce some adverse effect. Yahnel, supra, 79 N.J.Super. at 519, 192 A.2d 177. When the impact of that effect is significant, the balance may tip toward denial. Baptist Home, supra, 201 N.J.Super. at 247, 492 A.2d 1100. Because of an inherently beneficial use's satisfaction of positive criteria, a minimal effect, however, would support a finding that the detriment is not substantial.
>
> We suggest the following procedure as a general guide to municipal boards when balancing the positive and negative criteria. First, the board should identify the public interest at stake. Some uses are more compelling than others. For example, community residences for the developmentally disabled, *N.J.S.A.* 40:55D-66.1; community shelters for victims of domestic violence, *ibid;* and child care centers, *N.J.S.A.* 40:55D-66.6, are so beneficial that the Legislature has permitted them in every residential zone in the state. The Legislature has deemed others, such as family day-care centers, as "home occupations" that may not be subject to more stringent restrictions than other such occupations in the residential zone in which the home is located. *N.J.S.A.* 40:55D-66.4. Thus, the Legislature has removed some uses from the power of local land use boards to preclude them from residential zones. Courts have recognized other uses as sufficiently beneficial to satisfy the positive criteria: low- and moderate-income housing, DeSimone, supra, 56 N.J. at 442, 267 A.2d 31; housing for the poor and homeless, Homes of Hope, supra, 236 N.J.Super. at 588, 566 A.2d 575; senior citizen congregate housing, Jayber, supra, 238 N.J.Super. at 177, 569 A.2d 304; a health-care facility for the elderly, Baptist Home, supra, 201 N.J.Super. at 240, 492 A.2d 1100; a commercial radio transmission tower, Alpine Tower Co. v.

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[128] *Sica v. Board of Adjustment, Township of Wall*, 127 *N.J.* 152 (1992).

Mayor of Alpine, 231 N.J.Super. 239, 555 A.2d 657 (App.Div.1989); and a dial telephone service center, Yahnel, supra, 79 N.J.Super. at 518, 192 A.2d 177. Although that list may be incomplete, it suffices to identify the kind of use that may outweigh the negative criteria.

Second, the Board should identify the detrimental effect that will ensue from the grant of the variance. Certain effects, such as an increase in traffic, Baptist Home, supra, 201 N.J.Super. at 246, 492 A.2d 1100, or "some tendency to impair residential character, utility or value," Yahnel, supra, 79 N.J.Super. at 519, 192 A.2d 177, will usually attend any non-residential use in a residential zone. When minimal, such an effect need not outweigh an inherently beneficial use that satisfies the positive criteria.

Third, in some situations, the local board may reduce the detrimental effect by imposing reasonable conditions on the use. Ho-Ho-Kus II, supra, 47 N.J. at 224, 220 A.2d 97 (Hall, J., concurring); Baptist Home, supra, 201 N.J.Super. at 247, 492 A.2d 1100. If so, the weight accorded the adverse effect should be reduced by the anticipated effect of those restrictions. Baptist Home, supra, 201 N.J.Super. at 246-47, 492 A.2d 1100.

Fourth, the Board should then weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good. This balancing, "[w]hile properly making it more difficult for municipalities to exclude inherently beneficial uses * * * permits such exclusion when the negative impact of the use is significant. It also preserves the right of the municipality to impose appropriate conditions upon such uses." Id. at 247, 492 A.2d 1100.

Review of the decision of a board of adjustment denying such a variance because of the failure to satisfy the negative criteria, like the review of decisions of local land use agencies generally, begins with the recognition that the board's decision is presumptively valid, and is reversible only if arbitrary, capricious, and unreasonable. *See R*owatti v. Gonchar, 101 N.J. 46, 51-52, 500 A.2d 381 (1985); Kramer v. Board of Adjustment, 45 N.J. 268, 296, 212 A.2d 153 (1965); Ward v. Scott, 16 N.J. 16, 23, 105 A.2d 851 (1954). Underlying the presumption is the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion. Kramer, supra, 45 N.J. at 296-97, 212 A.2d 153.

Burden of Proof

The burden is on the applicant to present evidence to the Board sufficient to enable the Board to make the necessary findings and to support the relief that the applicant has requested. The applicant must show that there are "special reasons" for a use variance. With respect to any other variances the applicant must show that there would be "peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon the developer" of the property (a) "by reason of exceptional narrowness, shallowness or shape of a specific property" or (b) "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".

The applicant must also satisfy the Board that the granting of the variance will not substantially impair the zoning plan of the municipality and that the granting of the variance will not be substantially detrimental to the public good. These last two findings are generally referred to as the "negative criteria" and have been discussed previously in this *Guide*.

There is no presumption that an applicant is entitled to a variance, and it must be remembered that a variance is a deviation from the provisions of the zoning ordinance. The Board has the authority to permit the deviation, but only under certain circumstances that justify the relief being requested.

The Board must look to the character of the neighborhood as an important factor. The variance may be granted only if the spirit of the ordinance and general welfare are observed. Attention must be directed to the manner in which and the extent to which the variance will impact on the character of the area.[129]

Enhanced Standard of Proof for Use Variances

Since use variances represent the most significant deviation from the provisions of the zoning regulations adopted by ordinance, it has been held that the approval of a use variance calls for an enhanced standard of proof.

In the case of *Medici, et al. v. BPR Company, et als.*, 107 *N.J.* 1 (1987) the New Jersey Supreme Court reviewed the requirement for the regular review of zoning ordinances and the master plan and the requirement that the Zoning Board of Adjustment submit an annual report to the Planning Board and to the Governing Body and held that:

> In addition, in view of the 1985 amendments to the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D-1 to -112, set forth in *N.J.S.A.* 40:55D-89, -89.1 (requiring periodic review by the governing body of master plans and zoning ordinances and establishing a presumption of unreasonableness for ordinances not so reviewed) and *N.J.S.A.* 40:55D-70.1 (requiring annual reports by boards of adjustment of variance requests and recommendations for ordinance revisions), we deem it appropriate to require an enhanced quality of proof, as well as clear and specific findings by the board of adjustment, that the grant of a use variance is not inconsistent with the intent and purpose of the master plan and zoning ordinance. Such proofs and findings must satisfactorily reconcile the grant of a use variance with the ordinance's continued omission of the proposed use from those permitted in the zone, and thereby provide a more substantive basis for the typically conclusory determination that the variance "will not substantially impair the intent and purpose of the zone plan and zoning ordinance." *N.J.S.A.* 40:55D-70(d). **This added requirement will apply in all use-variance cases. We anticipate that its application will not significantly limit the use-variance**

129 *Commons v. Westwood Zoning Board of Adjustment,* 81 *N.J.* 597 (1980)

> **mechanism, but will narrow to some extent the discretion of boards of adjustment in reviewing use-variance appeals for uses that are deliberately excluded by the governing body from those permitted by the zoning ordinance**. It will also effectuate the legislature's apparent objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance. [**Emphasis added**]

Site Plan and Subdivision Approvals

As noted previously, when the Zoning Board of Adjustment is acting on a use variance and the applicant also requires subdivision or site plan approval or conditional use approval, then the Board of Adjustment shall have the same power to grant that relief as would the Planning Board, subject to the same requirements that would be applicable before the Planning Board.

In that event, the separate grant of the variance must be conditioned on the applicant also obtaining approval for the site plan or subdivision, as the case may be, by the Zoning Board of Adjustment.

While the vote on the "use" variance requires the affirmative vote of five (5) of the members of the Board, the subsequent action on the subdivision or site plan requires only a majority vote.[130]

The review of a site plan requires significant input from the municipal Engineer and, in some cases, from the municipal Planner, as the Board is reviewing specifics of driveways, off-street parking areas, lighting plans, loading areas, screening from adjacent properties, location of structures, compliance with handicapped access requirements, the achievement of good overall design standards and the like. In dealing with Site Plan and Subdivision applications, these factors may well be of more importance than the legal issues that are normally addressed on variance applications.

There should be no hesitancy in obtaining reports from professional consultants to assist the Board in the review process, since the impact of approval of a poor plan will affect the community for many years. The professional review fees on Site Plan and Subdivision applications are paid out of an escrow account established by the applicant.

Site Plan approval is required for all except detached one and two dwelling structures. The use of any principal or accessory building for a "home occupation" will require minor site plan approval before the issuance of any construction permit or certificate of occupancy. The consideration of traffic problems, aesthetics, and the effect on neighboring properties are properly considered in this process.

Subdivision plans and Site plans must be prepared by a professional engineer or land surveyor licensed to practice in the State of New Jersey. The engineering data must be signed by an engineer and the surveying data must be signed by the professional land surveyor.

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130 *N.J.S.A.* 40:55D-76 (b).

In reviewing Site Plan and Subdivision applications, it would be useful for the members of the Board to review the Development Application Review Procedures set forth in the municipal ordinance.

In reviewing Site Plans and Subdivision applications the Zoning Board of Adjustment is bound by the same standards as if the application had been submitted to the Planning Board.

Time Limits for Action

The Zoning Board of Adjustment is required to act within 120 days after the appeal is received from the decision of an administrative officer of the municipality or after receiving a complete application for development under any of its powers.[131]

It is worth noting that there are different time limits established by the Municipal Land Use Law for applications before the Planning Board. An application for minor subdivision approval or for minor site plan approval must be acted upon within 45 days after a completed application is submitted to the administrative officer. If an application for preliminary major subdivision approval involves 10 or fewer lots, action must be taken within 45 days; if the application is for preliminary major subdivision approval for more than 10 lots, action is required within 95 days. Applications for preliminary site plan approval involving not more than 10 acres of land or not more than 10 dwelling units, must be acted upon within 45 days after the submission of a completed application. On applications for preliminary site plan approval involving more than 10 acres of land or more than 10 dwelling units, the Planning Board will have 95 days within which to act.[132] Whenever the application for subdivision or site plan requires the granting of a variance, however, the time limit for action by the Planning Board is 120 days after the submission of a complete application.[133]

Where the appeal to the Zoning Board of Adjustment is by any interested party affected by a decision of an administrative officer of the municipality, based on or in enforcement of the zoning ordinance or official map, the appeal must be filed within 20 days after the decision is rendered. The notice of appeal is filed with the administrative officer and must specify the grounds for the appeal.[134]

The case law is not clear on what constitutes a complete application or at which point in time the application is actually complete. That uncertainty led to a number of litigated cases over the issue of when the 120 day time period began to run. Certainly an application that was submitted to a hearing and consideration by the Board of Adjustment is complete at a point no later then the date of the hearing. It is possible that the application is complete as of the date that it is filed with the appropriate township officials, so long as it contains the items required by statute or ordinance. A request by the Board for additional information not required by the ordinance does not render an otherwise complete application to be deemed incomplete.

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131 *N.J.S.A.* 40:55D-73.

132 *N.J.S.A.* 40:55D-46, 46.1, 47, 48.

133 *N.J.S.A.* 40:55D-61.

134 *N.J.S.A.* 40:55D-72.

The Municipal Land Use Law provides that the Board, or its authorized committee or designee, shall certify an application to be complete or incomplete within 45 days after its submission to the designated official. If the Board or its authorized committee or designee, fails to take action to certify an application as complete within 45 days of its submission, it is deemed complete, as a matter of law, upon the expiration of the 45 day time period. The statutory exception is where the application lacks the information required on a checklist adopted by ordinance and provided to the applicant **and** the applicant has been notified **in writing** of the deficiencies in the application within the 45-day time period.[135]

Failure of the Board to act within the statutory time period will result in an automatic statutory grant of the relief sought to the applicant.[136] The purpose of the rather severe penalty for failure to act within the statutory time limit is to prevent situations where a Board continuously delays acting on an application. It was to address abuses by Boards that the legislature enacted the statutory time limits and automatic approvals into the Municipal Land Use Law.[137] An applicant can consent to the extension of time within which the Board must act. It is recommended that a formal written extension be made part of the record.

The applicant can always consent to additional time for the Board to consider a particular application, and such extensions are not unusual on especially difficult or complex applications. That extension, however, must come from the applicant and cannot result solely by action of the Board to postpone a matter. For that reason, it is advisable to require that the applicant sign a written consent to an extension, so there will be no dispute as to whether an extension has been granted and for what period of time.

Caution should be the rule whenever the time period is close to expiration. If the applicant has not provided the Board with sufficient evidence to justify the granting of the relief sought and the applicant does not consent to an extension of time, the Board must act on the application and either grant it or deny it on the basis of the evidence that is then before the Board.

While the Board must act within certain time limitations, the Board is not required to act at the first meeting at which the application is presented. If the Board has questions and needs additional information in order to decide the matter, then the Board has the right to raise the questions and to continue the matter until a later date.

Imposition of Conditions

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135 *N.J.S.A.* 40:55D-10.3.

136 *Gridco v. Zoning Board of the Township of Hillside*, 167 *N.J. Super.* 348 (Law Div., 1979). If, however, the Board did not have the jurisdiction to grant the relief sought, then the failure to act will not result in an automatic approval. *Chesterbrooke Ltd. v. Planning Board*, 237 *N.J.Super.* 118 (App.Div. 1989). An applicant may not take unfair advantage of the automatic approval provisions. In the case of *Star Enterprise v. Wilder*, 268 *N.J.Super.* 371 (App.Div. 1993), the Court barred the use of the automatic approval provision where the applicant had impliedly consented to an extension of time.

137 An automatic approval is still subject to appeal to the New Jersey Superior Court, or to the governing body if it involves a use variance and the ordinance permits such an appeal.

Among the powers that may be exercised by the Zoning Board of Adjustment is the establishment of reasonable conditions that will attach to any approval. This applies to variance applications as well as to site plan and subdivision applications.

In many cases that come before the Board, the discussion that takes place at the hearing results in the applicant making certain changes to proposed plans to respond to concerns raised by the Board members, by the Engineer, by the Planner, or by members of the public.

The Board also has granted approvals conditioned upon the applicant making changes in plans, obtaining other approvals, or providing additional information satisfactory to the Township Engineer or Planner.

Conditions imposed on any approval should relate to considerations that relate to the proposed use or the plan and the impact on the community. They might relate to traffic planning, parking area design, lighting, connection to public water or sewerage lines, methods of addressing environmental issues (such as noise, odor, air quality issues, drainage, or trash disposal), hours of operation of a particular use, landscape screening to benefit neighboring properties, sign placements, among other issues.

Any conditions must be reasonable and should bear a relationship to the purposes of land use planning.

If conditions are imposed, it is important that the record reflect the specific details of the conditions and the reasons for those conditions, so that any review of the record will show that the conditions were not arbitrary, capricious or unreasonable.

Res Judicata

There is an additional issue that is sometimes presented to the Board: whether an applicant who has been denied a variance may reapply for the same or substantially the same variance again. The principle involved concerns the doctrine of *res judicata*, that is, a matter already decided.

It is appropriate to specifically consider the issue of *res judicata* here, since there is a principle that once a decision has been rendered in a case before the Board it is not subject to a new application for the same proposal.

The policy behind that principle is that once a matter has been presented and a decision has been made on the merits of the application, the Board should not have to "waste" time and effort in reviewing the same matter again and again.

Whether an application is to be rejected on the grounds of *res judicata* is to be determined by the Zoning Board of Adjustment in the first instance. The doctrine of *res judicata* would not be applicable if the application were significantly different or if the first application had not been decided on the merits, i.e., where it had been rejected on a technical basis, such as the failure to give proper notice to property owners within 200 feet.

In the case of *Mazza v. Board of Adjustment of Linden*[138] the Court held that

> ... Even if the application is closely similar to a previous one, or identical with it but it is alleged that the surrounding circumstances have changed or that experience has shown the prior denial was error, it is within the discretion of the board whether to reject the application on the ground of *res judicata,* and the exercise of that discretion may not be overturned on appeal in the absence of a showing of unreasonableness.

In that case, the Court held that *res judicata* did not apply as the new application was substantially different from the previous application. Additionally, it was noted that *res judicata* had not been raised as an issue before the Zoning Board of Adjustment, that there was no opposition to the new application by anyone, and that neighbors supported the application.

In another case[139] the Court held that the rule of *res judicata* does not bar the making of a new application for a variance, or for the modification or enlargement of one already granted, or for the lifting of conditions previously imposed **"...upon a proper showing of changed circumstances or other good cause warranting a reconsideration by the local authorities."** In that case the previous ruling had been ten years earlier and certain conditions had been imposed on a variance that had been granted. The argument was raised that the condition could not be modified or eliminated because of the doctrine of *res judicata*. The Court noted that the doctrine of *res judicata* was well established and that it did apply to actions of a Board of Adjustment, but went on to note that the actions of the municipal officials in relieving the applicant of burdensome and unsupportable conditions previously imposed could be sustained. The court noted that

> ...the Courts ought not lightly to interfere with determinations of zoning matters made by municipal Boards, especially where the local judgment and discretion do not transgress the statutory limitations and are not based upon arbitrary or unreasonable considerations.

Additional guidance is found in the decision of the New Jersey Supreme Court in *Pieretti v. Bloomfield*[140] where the Court held the doctrine of *res judicata* applicable where an application for a variance to erect a new industrial building in a residential zone had been denied and then fourteen (14) years later the owners applied for a variance for the same property to erect a larger building. The Court noted that the fact that the same owner and the same property were involved was in itself not sufficient to invoke the doctrine of *res judicata* but that it must also be shown that the second application was substantially similar to the first.

It is essential, therefore, that the Board first address the issue of whether the application before the Board is substantially similar to the application that was denied earlier. The burden is on the applicant to prove that the application is actually different. The Board should certainly be

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138 *Mazza v. Board of Adjustment of Linden,* 83 *N.J. Super* 494 (App. Div., 1964)

139 *Cohen v. Fair Lawn* 85 *N.J. Super* 234 (App. Div. 1964)

140 *Pieretti v. Bloomfield* 35 *N.J.* 382 (1961)

open to situations where the applicant makes significant changes in the application so that the Board is actually reviewing a different proposal from that previously acted upon by it.

Re-Opening a Matter

There is a similar issue that occurs when an applicant who has received a negative decision requests that the matter be re-opened to permit the applicant to provide the Board with additional information. Any request for re-opening of a matter would logically have to occur fairly promptly after the initial decision by the Board, and it would be up to the Board on a case-by-case basis to decide whether the applicant should be given an additional opportunity to provide information to the Board. The results on the initial determination might be a guide as to whether the applicant would have any realistic possibility of changing the determination if the matter were re-opened.

If the vote after the initial presentation and public hearing were to show six or seven members of the Board strongly against the variance application, then the request to re-open the matter might require some strong showing by the applicant that the "new" information to be provided to the Board was truly significant.

If, however, the initial vote had been four in favor of the variance, one opposed and two members [and the alternates] absent, and the variance therefore failed only because it did not receive the five affirmative votes required for a use variance, the request to re-open might be viewed more liberally. A willingness to re-open an application might be appropriate where there was some apparent confusion over a particular issue before the Board that could be clarified with new or additional testimony. It should not be a reason to "re-open" a matter where the application was defeated with the votes of alternate board members and the applicant

There is a basic consideration that the applicant is entitled to a fair opportunity to present the application to the Board. Normally, the applicant is expected to be fully prepared to proceed when the public hearing is scheduled on the matter. If, however, questions are raised at the initial hearing, which the applicant is not able to reasonably answer, fairness would require that the hearing be continued to afford the applicant a reasonable opportunity to respond.

Where a particular application has been seriously contested before the Board, caution should be the rule in addressing any request to re-open the matter. An applicant who had been granted approval would certainly argue, with substantial justification, that he or she had acquired rights with respect to the approval that had been granted and that to re-open the application because the objectors had developed additional arguments against the application would be unjust. The reverse situation is equally applicable and objectors would find it difficult to understand an action to re-open and approve an application that had been rejected after a full public hearing.

Certainly, if an applicant requests that a matter be re-opened, the Board would be justified in conditioning any re-opening on the applicant consenting to an extension of the time within which the Board must act, and on requiring the applicant to provide additional public notice that the matter is being reconsidered. The additional public notice would at least provide

any objectors with a further opportunity to be present and to challenge the "new" evidence that the applicant was presenting to the Board.

Appeals to the Governing Body

The Municipal Land Use Law,[141] provides that certain land use decisions can be appealed to the Governing Body, but those appeals are limited to situations where the Zoning Board of Adjustment has granted a "use" variance and where there has been an Ordinance authorizing such an appeal.

The granting of a "use" variance might have a serious effect on the over-all zoning plan of the municipality, and it is appropriate, therefore, for the Governing Body to have the right to review the action of the Zoning Board of Adjustment in granting a "use" variance, provided that an objector brings the matter to the Governing Body by way of appeal.

The party objecting to the granting of a "use" variance has the choice of appealing the decision of the Zoning Board of Adjustment to the Governing Body or going directly into the New Jersey Superior Court to seek to have the variance declared invalid.

Any other actions of the Zoning Board of Adjustment, or of the Planning Board (such as denial of a use variance; granting or denial of a "hardship" variance; interpretations of the zoning ordinance; or action on a site plan or subdivision application) can only be challenged by taking the matter to the New Jersey Superior Court.

The reason for this distinction is that the denial of a variance does not constitute an action contrary to the zoning ordinance or the master plan. The granting of a "hardship" or "bulk" variance is usually accomplished in conjunction with a site plan review and the variance is usually relatively minor, so the law now provides that any challenge to that grant of a variance would take place in the Court.

An appeal must be made within 10 days of the date of publication of the final decision of the Board and any interested party may make the appeal. While it might appear unusual, the "interested party" could even be a dissenting member of the Zoning Board that approved the variance.

It is the obligation of the appellant to provide the Governing Body with a transcript of the proceedings before the Zoning Board of Adjustment for review.

Notice of the meeting to review the record must be given by the Governing Body to the appellant, the Zoning Board, the applicant and any individual who has requested a copy of the decision and paid the required fee. That notice must be given by personal service or certified mail at least ten (10) days prior to the meeting at which the Governing Body will review the record. The parties to the appeal may submit oral and written argument on the record at the meeting and the Governing Body shall provide for verbatim recording and transcripts of the meeting.

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141 *N.J.S.A.* 40:55D-17

The Governing Body must make its decision within 95 days from the publication of the notice of the decision of the Zoning Board of Adjustment. The Governing Body must base its decision on the record developed before the Zoning Board of Adjustment and may reverse, remand, or affirm, with or without the imposition of conditions, the decision of the Zoning Board of Adjustment. The affirmative vote of a majority of the full authorized membership of the Governing Body is required.

It is possible that litigation could take place between the Governing Body and the Zoning Board of Adjustment or the Planning Board if an approval were granted that the Governing Body determined was contrary to the zoning plan and against the best interests of the community. That type of conflict is rare and can usually be avoided by improving the level of communications between the elected officials and the boards dealing with land use applications.

Appeals to the New Jersey Superior Court

An applicant or an interested party who is aggrieved by a decision of the Planning Board or the Zoning Board of Adjustment may take their case to the New Jersey Superior Court.

Judicial review is intended to be a determination of the validity of the action being appealed and is not intended for the court to substitute its judgment for that of the local officials.[142]

In reviewing the ordinance, it is not for the courts to substitute their conception of what the public welfare requires by way of zoning ordinance regulations for the views of those in whom the legislature and the local electorate have vested that authority and responsibility.[143]

The Court cannot substitute its judgment concerning the reasonableness of a community's proposed ordinance to comply with the obligation to provide a realistic opportunity for low and moderate income housing for that of a well-reasoned and soundly conceived municipal plan where more than one reasonable alternative exists.[144]

Pre-Emption

It is important to have some understanding of the limits that are placed on municipal power in the area of land use regulation by the principle or pre-emption. By that we mean that where a higher level of government has comprehensively addressed a certain area of regulation, then the municipality may be without the authority to act or to adopt its local regulations.

142 *Carbone v. Planning Board of Weehawken Township*, 175 *N.J. Super.* 584 (Law Div. 1980).

143 *Pascack Ass'n Ltd. v. Mayor and Council of Washington Twp, Bergen County*, 74 *N.J.* 470 (1977).

144 *Allan-Deane Corp. v. Bedminster Township*, 205 *N.J. Super.* 87 (Law Div. 1985).

That pre-emption may arise by action of either the State or the Federal governments and may be the result of specific legislation or even by regulations adopted by a State or Federal Agency.

A prime example arises from the Regulation of Satellite Dish Antennas. Many communities have regulated the size and placement of satellite dish antennas in residential zones, and to some extent in commercial and industrial zones. Those regulations have been based on a number of factors, including aesthetics, secure installation, etc. Most of the regulations have attempted to keep the antennas in the rear yards of properties or on the back slope of rooflines.

The Federal Communications Commission [FCC] has adopted[145] an Order which specifically pre-empts all local zoning regulation of satellite earth stations and establishes presumptions that satellite earth stations which measure one [1] meter or less in diameter are permitted without regard to any local zoning regulations. Satellite earth stations measuring two [2] meters or less are presumed to be permitted in any area where commercial or industrial uses are generally permitted. Large antennas, i.e., those over two [2] meters in diameter are not entitled to any presumption.

Enforcement of local regulations is prohibited until the local municipality demonstrates that the regulation is in compliance with the FCC rule. Specific regulations for areas such as historic districts may be permitted upon application to the FCC for a waiver of the pre-emption rule.

Additionally, the costs for permits cannot be "more than minimal" with respect to large antennas and "any costs imposed on users of small antennas ... are presumed to be unreasonable and therefore preempted unless the imposing authority affirmatively rebuts the presumption" b demonstrating that it is necessary "to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself" and "is no more burdensome to satellite users than is necessary to achieve the health or safety objective..."

Making a Federal Case Out of it

Throughout the history of the United States zoning has been treated as a local issue to be determined by municipal ordinances in accordance with State law.

In recent years, however, cases have been brought before the Federal Courts or issues under the United States Constitution have been raised in State Courts where developers have claimed that local zoning regulations and State or local environmental regulations have violated the rights of the property owner under the 5th Amendment to the United States Constitution. The 5th Amendment provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

145 FCC Order 96-78 , adopted February 29, 1996. The full text of the Order is available via the FCC home page on the World Wide Web <http://www.fcc.gov/Bureaus/International/Orders/index.html>

public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

It is the very last portion that is applicable to land use cases, i.e., the prohibition against taking private property without just compensation. While the current body of law holds that there is not a taking of property by regulation where the property is still able to be developed and used for some viable purpose, there is more and more litigation taking place where property owners and developers are claiming that zoning and environmental regulations reduce the value of the property and that it constitutes an unconstitutional taking of the property.

There has been "takings" legislation introduced in Congress which would define a taking as any substantial diminishing of the value of the property and, of even greater concern, would allow a developer to take the case into the Federal Courts as soon as there was one regulatory denial of the development of the property. It would change the current rules, which require the property owner, or developer to exhaust the State based review process, i.e., through the State Courts. Having those cases in the Federal Courts would substantially increase the litigation costs of municipalities and municipal agencies. While that legislation did pass in the House of Representatives in 2000, the US Senate did not approve it because the President made it clear that he would veto the legislation. The legislation has been reintroduced in Congress this year. It is being strongly opposed by the National League of Cities, the National Association of Counties, the International Municipal Lawyers Association and State Municipal Leagues. It has strong support from the National Association of Home Builders and other developer oriented groups.

Recently the United States Congress has enacted legislation which would place churches and religious organizations in a position where local land use regulations would either not apply to them or would be of very limited application.

In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 [RFRA] to prohibit government from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." RFRA's mandate applied to any branch of Federal or State Government, to all officials, and to other persons acting under color of law. Its universal coverage includes "all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA's enactment].

In the case of *City of Boerne v. Flores*, the United States Supreme Court held that RFRA was unconstitutional. In that case the City of Boerne, Texas, had denied a building permit to the Catholic Archbishop of San Antonio who sought to enlarge a church located within the City of Boerne Historical District. The United States Supreme Court held that RFRA was not a proper exercise of Congress' power because it contradicted vital principles necessary to maintain separation of powers and the federal-state balance.

After that case was decided, there was a strong lobbying effort by religious organizations, joined by other groups, to again have Federal legislation which would provide strong protections for religious organizations against land use regulations imposed by local municipalities.

In 2000 the United States Congress, by unanimous voice vote in the Senate and in the House of Representatives, adopted the Religious Land Use and Institutionalized Persons Act [RLUIPA]. It was not surprising that the President signed RLUIPA into law.

RLUIPA provides that:

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

While many of the attorneys who were involved in the litigation over the RFRA resulting in the *City of Boerne v. Flores* decision believe that RLUIPA suffers from the same basic constitutional problems as did RFRA, there have not yet been enough cases actually litigated through the Appellate Courts to reach a firm conclusion on that issue. There have been a number of situations where RLUIPA has been raised in proceedings before Governing Bodies or Planning Boards or Zoning Boards, but it is too early to tell how those issues will ultimately be determined.

One of the very critical factors that arises when applicants and developers raise issues under the United States Constitution is that they bring those claims as alleged violations of their civil rights. Those claims are brought under 42 USC § 1983 and are commonly referred to as "1983 claims" because of the statute number. That law was enacted in the late 1800's to protect citizens against the actions of government officials who were preventing minority citizens from voting, from obtaining government services, etc. One of the provisions in the statute is that a successful claimant can recover from the government all of the legal fees that were involved in pursuing the claim against the government. So, if a claimant is successful, the government entity winds up paying both its own defense costs and has to pay the fees of the claimant. The fees are determined by the Court and are routinely awarded at hourly rates many times that charged by the attorneys representing the government.

As a result, many local governments have gone to great extremes to avoid the cost of litigation, simply because of the time and expense involved in litigation.

Conclusion

It is hoped that this *Guide* will provide some basic assistance in understanding the Municipal Land Use Law, although specific questions related to individual applications must be reviewed by the Board and by the consultants serving the Board as those applications are considered.

It is important that, on each application, the Board must be satisfied as to the factors that are set forth in the purposes of the Municipal Land Use Law and that any variances are considered under both the positive and the negative criteria which govern those applications.

While this *Guide* has attempted to provide an overview of the applicable law, it cannot become a substitute for the advice received from the Board attorney, since both the statutory and case law are constantly changing. The Legislature adopts many laws that have an impact on local zoning and the Courts are constantly rendering decisions that interpret land use issues.

The Planning Board and the Zoning Board of Adjustment serve a vital roles in the development of the community. Those roles are not isolated from the activities of other municipal officials or bodies and are not totally independent of the other municipal bodies and officials. The Boards are part of the municipal "team" seeking to provide an orderly, planned development of the land within the municipality.

The Governing Body and the Planning Board work together to develop and adopt a master plan and the zoning ordinance and the land development ordinances designed to implement the master plan. Other officials are charged with the administration and enforcement of those ordinances.

The Zoning Board of Adjustment deals with specific cases and individual properties that require and can justify exceptions to the ordinance in order for the land to be reasonably developed and used. Once the ordinance is adopted, the Governing Body does not, and should not, amend the ordinance to deal with specific parcels, for the ordinance is meant to deal with zoning districts and an overall development plan. Any requests as to specific parcels go to the Zoning Board of Adjustment, and the Zoning Board of Adjustment should consider the application on its individual merits and in light of the development plan for the community.

It is virtually impossible to cover every issue that could come before the Planning Board or the Zoning Board of Adjustment and all aspects of each of those issues. It has, therefore, been necessary to cover only the major points in this *Guide* and the issues most frequently presented to the Boards.

As individual applications for land use development are presented, the specific issues related to that application must be addressed on an individual basis.

The Environmental Commission

Under the provisions of *N.J.S.A.* 40:56A, municipalities are authorized to create an Environmental Commission to provide research and planning related to the preservation of the environment. Under the Municipal Land Use Law, the Environmental Commission has a potential role in the review of applications for development.

Where an Environmental Commission is established, the Municipal Land Use Law provides that "if there be a municipal one of its members must also be a member of the Planning Board. The Environmental Commission, accordingly, has an opportunity to have input to the Master Plan and to the consideration of applications by recommendations to the Planning Board".

Where the Environmental Commission has prepared and submitted to the Planning Board and the Zoning Board of Adjustment an index of the natural resources of the municipality, the Planning Board of the Zoning Board of Adjustment are to make available to the Environmental Commission an informational copy of every application for development submitted to either Board.[1]

The Environmental Commission may submit recommendations to the Planning Board or to the Zoning Board of Adjustment on a pending application. The time within which the Planning Board or the Zoning Board must act on an application is not delayed by the failure or delay in the submission of any recommendations by the Environmental Commission. Any recommendations submitted are advisory only and are not binding on the Planning Board or the Board of Adjustment.

The failure to make an informational copy available to the environmental commission does not invalidate any hearing or proceeding before the Planning Board or the Zoning Board of Adjustment. The Environmental Commission is required to keep records of its meetings and activities and to make an annual report to the Governing Body. The Environmental Commission is subject to the Open Public Meetings Act and the members are subject to the Local Government Ethics Law.

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[1] *N.J.S.A.* 40:55D-27