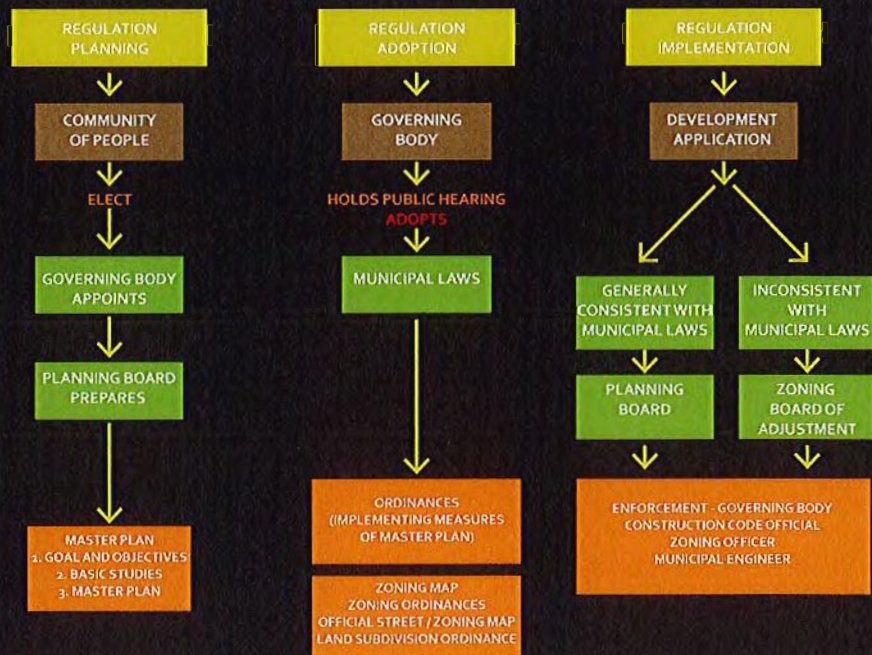


PLANNING & ZONING BOARDS OVERVIEW

OVERVIEW OF MUNICIPAL LAND USE LAW: PLANNING & ZONING REGULATIONS



PLANNING AND ZONING BOARDS OVERVIEW

The Responsibilities of and Differences Between, The:

- Planning Board (legislative/policy);
- Zoning Board of Adjustment ("BOA") (quasi-judicial); and
- "Combined" or "Consolidated" or "Joint" Board (Planning Board with the additional powers of a BOA).
- The Land Use Boards (PB/BOA/Jt Bd) all are autonomous/independent boards and the governing body (TC) has no control over either of them – (just PB has class 1 & 3 (mayor and TC member) who sit on it)

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PLANNING AND ZONING BOARDS OVERVIEW

Board Members –Generally

- Volunteers.
- Residents of the municipality – except Class 2 Planning Board member.
- Successful completion of required course within 18 months of appointment – except Mayor/Class 1 and Class 3/Governing Body Member of Planning Board.

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PLANNING AND ZONING BOARDS OVERVIEW

General Principles

"Bring property into conformity as quickly as is compatible with justice." - Competing principles of an individual's right to use property as they wish and the neighboring public's interest in enjoying the use of their own property without unnecessary interference.

All Applicants have a right to file applications before the BOA and PB and a right to be heard by the Board – regardless of the merit/details of the application.

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PLANNING BOARD

Board of "Permitted Uses" (policy making)

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PLANNING BOARD

Organization and Membership (Per MLUL §23)

7 or 9 regular members and up to 4 alternates - all appointed by the Mayor (except Class 3 member is appointed by governing body)

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PLANNING BOARD

- Class 1 - Mayor or Mayor's designee (act on behalf of Mayor)
(Term - mayor's tenure)
- Class 2 - Municipal Official other than governing body member (does not have to be resident of municipality) – Broad interpretation of "official" includes members of any board or commission, as well as municipal engineer, construction official, tax assessor, etc.
(Term - lesser of 1 year or term of office)
- Class 3 - Governing Body member
(Term - lesser of 1 year or term of office)
- Class 4 - Other citizens of the municipality not holding public office.
(Term - 4 years)

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PLANNING BOARD

- **Officers:** Chair and Vice Chair must be selected from Class 4 regular (not alternate) members only
- **Board Secretary:** Board member or municipal employee
- **Board Attorney:** Other than the municipal attorney
- **Other Staff:** Planners, Engineers, Traffic Consultants
- **Board Rules/Bylaws:** Per MLUL §8, adopt rules not inconsistent with the MLUL

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PLANNING BOARD

Meetings:

- At least 1 meeting per month
- Special meetings may be called by the Chair or any 2 members
- Annual schedule published in 2 designated official newspapers
- All meetings must be publicly noticed per Public Meetings Act (OPMA)

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PLANNING BOARD

Quorum:

- 4 members for a 7 member board and 5 members for a 9 member board
- If no quorum can only adjourn to new specified date/time
- Minutes of all meeting kept (taped often and/or stenographer)

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PLANNING BOARD RESPONSIBILITIES: ADOPTION OF MASTER PLAN

Master Plan

Serves as the basis for the Zoning Ordinance and all development regulations must be consistent with the Master Plan. N.J.S.A. 40:55D-28 (MLUL §28)

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PLANNING BOARD RESPONSIBILITIES: ADOPTION OF MASTER PLAN

Mandatory Elements:

- **Statement of Objectives** - principles/assumptions/policies and standards upon which proposals for physical, economic and social development of municipality are based.
- **Land Use Element** - shows existing and proposed development and the relationship of this development to existing and proposed zone plans, zoning ordinances and state standards for population density and intensity, together with the policy and objectives. Must include a statement of strategy concerning smart growth; storm resiliency and environmental sustainability.
- **Housing Plan Element** - includes appropriate sites for low and moderate income housing.

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PLANNING BOARD RESPONSIBILITIES: ADOPTION OF MASTER PLAN

Optional Elements Include:

- Circulation Plan element (roads and transportation facilities)
- Utility Service Plan
- Community Facilities Plan (educational and cultural facilities, libraries, hospitals, fire departments, etc.)
- Recreation Plan
- Conservation Plan (including an existing resource inventory)
- Economic Plan
- Historic Preservation Plan
- Green Plan
- Recycling Plan
- Farmland Preservation Plan
- Educational Facilities Plan

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PLANNING BOARD RESPONSIBILITIES: ADOPTION OF MASTER PLAN

Procedure for Adoption:

- Planning Board proposes and adopts at publicly noticed hearing, per MLUL §10 and 13.
- Notice of adoption published and mailed to County Planning Board, State Office of Planning Advocacy and clerks of adjoining municipalities.
- Periodic re-examination of master plan – at least once every 10 years, per MLUL §89

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PLANNING BOARD RESPONSIBILITIES: SITE PLAN REVIEW OF PERMITTED USES

Site Plan

Plan of development generally for any developer other than one- or two-family dwelling units.

Site Plan generally contains the following:

- key map
- 200 foot property owners
- lot line dimensions
- location of all existing and proposed buildings, streets, easements, driveways, etc.
- existing features within a 200 foot radius of perimeter of subject property
- topographic conditions
- parking and loading spaces
- landscaping
- lighting

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PLANNING BOARD RESPONSIBILITIES: SITE PLAN REVIEW OF PERMITTED USES

County Planning Board has approval powers (in addition to the municipality's authority) regarding site plans for commercial or industrial facilities, multi-family structures containing 5 or more units, or other land development requiring off-street parking area or providing surface run off in excess of certain standards for properties located along a county road.

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PLANNING BOARD RESPONSIBILITIES: SITE PLAN REVIEW OF PERMITTED USES

Site Plan Approval

- **Minor** - specifically defined by ordinance as "minor" and does not involve planned development, any new street, or extension of an off tract improvement (MLUL §5)
- **Major** - other than minor site plan
- **Preliminary Major Site Plan Approval** - locks in terms (protection) for 3 years post approval
- **Final Major Site Plan Approval**
 - locks in protection for 2 years post approval
 - no issuance of a building permit until final site plan approval

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PLANNING BOARD RESPONSIBILITIES: SITE PLAN REVIEW OF PERMITTED USES

Conditions of Approval

Must be derived from provisions in the site plan or subdivision ordinance or the zoning ordinance, and should have a “nexus” or relationship to the detriment caused by the deviation from the ordinance (mitigation).

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PLANNING BOARD RESPONSIBILITIES: SUBDIVISION REVIEW OF PERMITTED USES

Subdivision

the division of a parcel of land into 2 or more parts (lots) for sale or development purposes

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PLANNING BOARD RESPONSIBILITIES: SUBDIVISION REVIEW OF PERMITTED USES

- Subdivision regulations generally ensure safe water supplies, adequate sewerage capacity, emergency vehicle access, etc.
- All subdivision applications are submitted to the County Planning Board for review but, if the application affects a county road or drainage facility, then County Planning Board approval is necessary in addition to municipal subdivision approval

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PLANNING BOARD RESPONSIBILITIES: SUBDIVISION REVIEW OF PERMITTED USES

Subdivision

- Minor - creation of 3 or less lots, as long as they front on an existing street
- Major - creation of more than 3 lots or 2 or more lots not fronting on an existing street
- Preliminary Major Subdivision Approval
 - 3 year lock-in of protection
 - final subdivision approval is required prior to issuance of a building permit or sale of lot
- Final Major Subdivision Approval
 - 2 year lock-in of protection
 - signed subdivision plat must be recorded within 95 days of signature

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PLANNING BOARD RESPONSIBILITIES: SUBDIVISION REVIEW OF PERMITTED USES

Denial

If an application for site plan or subdivision approval meets all the requirements of the site plan or subdivision and zoning ordinances, then the applicant generally is entitled to approval. See, Pizzo Mantin Group v. Randolph Twp., 261 N.J. Super. 659 (App. Div. 1993), aff'd as modified, 137 N.J. 216 (1994).

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PLANNING BOARD RESPONSIBILITIES: SITE PLAN/SUBDIVISION REVIEW OF PERMITTED USES

Site Plan/Subdivision Exceptions

Board can grant exceptions from the site plan or subdivision ordinance where reasonable and with a general purpose and intent and if literal enforcement of the ordinance provision is impracticable or would exact undue hardship because of peculiar conditions pertaining to the land in question.

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PLANNING BOARD RESPONSIBILITIES: CONDITIONAL USE APPLICATIONS

Conditional Use Applications

For conditionally permitted uses, if the use meets all of the conditions required so that the use is considered a permitted use, then the application for a conforming conditional use approval goes to the Planning Board; otherwise, subsection d(3) variance relief is required from the Zoning Board of Adjustment.

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PLANNING BOARD RESPONSIBILITIES: RECOMMENDATIONS AS TO ZONING ORDINANCES AND AMENDMENTS

Recommendations as to Zoning Ordinances and Amendments

Per MLUL §26a, the governing body **must** refer to the Planning Board for review, and the Planning Board must submit a report within 35 days of the referral, as to whether the development regulations (e.g., Zoning Ordinances, Site Plan Ordinances, Subdivision Ordinances) are consistent with the Master Plan.

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PLANNING BOARD RESPONSIBILITIES: THE CAPITAL IMPROVEMENTS PROGRAM

The Capital Improvements Program

Per MLUL §29 and §30, the governing body may authorize the Planning Board to develop a program of municipal capital improvements for a minimum of 6 years to take into account future public facility needs based on potential development identified in the Master Plan or permitted by municipal ordinance. Also, per MLUL § 31, all capital projects involving expenditures of any public funds incidental to the location, character or extent of development must be referred to the Planning Board for master plan consistency review and approval. This applies to expenditures by a housing, parking, or highway authority, a special district, a redevelopment agency or school board. As to school board expenditures, the Planning Board's role is strictly recommendatory ("courtesy review").

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PLANNING BOARD RESPONSIBILITIES: PLANNING VARIANCES

Planning Variances

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

- a) refusal to issue the permit would entail practical difficulty or unnecessary hardship" or
- b) "the circumstances of the case do not require the building or structure to be related to a street."

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PLANNING BOARD RESPONSIBILITIES: PLANNING VARIANCES

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

- a) provide adequate access for firefighting equipment, ambulances and other emergency vehicles necessary for the protection of health and safety, and
- b) protect any future street layout shown on the official map or on a general circulation plan element of the municipal master plan...."

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ZONING BOARD OF ADJUSTMENT

Board of "Non Permitted Uses"

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ZONING BOARD OF ADJUSTMENT

Board Membership/Organization:

Appointment

The governing body or the mayor appoints BOA members
(method of appointment established by ordinance)

Terms

Regular member - 4 years

Alternate member - 2 years

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ZONING BOARD OF ADJUSTMENT

Meetings:

- At least 1 meeting per month
- Special meetings may be called by the Chair or any 2 members
- Annual schedule published in 2 designated official newspapers
- All meetings must be publicly noticed per Open Public Meetings Act (OPMA)

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ZONING BOARD OF ADJUSTMENT

Quorum:

- 4 members (majority of 7 regular members)
- If no quorum can only adjourn to new specified date/time
- Work session must be open to the public
- Minutes of all meeting kept (taped often and/or stenographer)

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: APPEALS

MLUL §70(a)

- Appeals of zoning officer decision (e.g., denial of building permit)
- Appeal alleging error in any order, requirement, decision or refusal made by an administrative officer (usually alternative relief requested)

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: INTERPRETATIONS

MLUL §70(b)

- Interpretation of zoning ordinance or special question upon which BOA is authorized to pass by zoning ordinance.
- Board members must employ the principles of statutory construction. An example would be whether a certain use is permitted under the zoning ordinance.

NOTE: MLUL notice is not required for subsection (a) appeals or subsection (b) interpretations, unless the municipal ordinance requires such notice.

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: "c" BULK VARIANCES

MLUL §70(c) or "bulk" variances

Usually dimensional variances (e.g., yard setbacks; building/impervious coverage)

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: "D" USE VARIANCES

MLUL §70(d) variances

"more significant" deviations – requires super majority vote of 5 out of 7 members for passage

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: "D" USE VARIANCES

- **d(1) Use** Not Permitted in the Zone
- **d(2) Expansion of a Preexisting Nonconforming Use**
- **d(3) Nonconforming Conditional Use**
Deviation from the condition(s) without which deviation it would be a permitted use
- **d(4) Floor Area Ratio** Exceeds FAR maximum
- **d(5) Density** Exceeds density maximum
- **d(6) Height** Only if principal structure exceeds maximum permitted height by either 10 feet or 10%

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ZONING BOARD OF ADJUSTMENT RESPONSIBILITIES: ANNUAL REPORT

Annual Report

MLUL §70.1 requires all zoning boards to at least annually review their decisions and appeals and adopt by resolution a report thereon, including any recommendations for zoning ordinance amendments. Provide copies to governing body and planning board. The purpose is for the zoning board to bring to the governing body and planning board's attention particular provisions of the zoning ordinance which created problems for the zoning board during the preceding year, or areas where there may have been many unnecessary applications.

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VARIANCES

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VARIANCES, GENERALLY

- Variances are exceptions to the rules and generally zoning should be done through ordinance rather than by variance.
- The burden of proof is always on the applicant to satisfy both the positive and the negative criteria.
- Variances run with the land = They continue in effect post sale or other change of ownership.
- Usually zoning ordinances require the applicant to commence construction within 1 year of variance approval.

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"c" BULK VARIANCES

Subsection "c" Variances - N.J.S.A. 40:55D-70(c):

- Any variance relief other than 6 specifically designated "d" variances.
- Usually dimensional variances, such as yard setback, lot sizes or building or impervious coverage ratios.

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"c" BULK VARIANCES

Two Alternative Bases for Subsection (c) Variance Relief:

- c(1) Variance also called "hardship variance"
- c(2) Variance also called a "flexible c variance"

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"c" BULK VARIANCES: c(1) "HARDSHIP VARIANCE"

Positive Criteria

Relief is based on hardship or exceptional practical difficulty due to the unique physical characteristics of the land or a structure lawfully existing on the land

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"c" BULK VARIANCES: c(1) "HARDSHIP VARIANCE"

Positive Criteria

The undue hardship or practical difficulty must relate to the physical condition of the property or a lawful structure on it, and may not be a personal hardship, such as a financial hardship, to the property owner.

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"c" BULK VARIANCES: c(1) "HARDSHIP VARIANCE"

Positive Criteria

Examples include lots that are too narrow (i.e., can't meet side-yard setback requirements), too shallow (can't meet front- or rear-yard setback requirements), or encumbered by environmental constraints (steep slopes, wetlands)

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"c" BULK VARIANCES: c(1) "HARDSHIP VARIANCE"

Self-Created Hardship

An applicant is not entitled to c(1) relief if the applicant or a predecessor-in-title created the hardship (e.g., applicant has a conforming sized lot and subdivides and sells a portion of it so that he is left with a nonconforming, undersized lot).

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"c" BULK VARIANCES: c(1) "HARDSHIP VARIANCE"

Successors-In-Interest

Successors-in-interest inherit the same right, or lack thereof, to c(1) variance relief, as had their predecessor (i.e., if a prior owner created the hardship, then the subsequent owner is not entitled to c(1) variance relief, but if a prior owner did not create the hardship, then the subsequent owner is entitled to c(1) variance relief, even if he/she bought the property with knowledge of the hardship).

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"c" BULK VARIANCES: c(2) "FLEXIBLE C"

Positive Criteria

- (1) Whether the variance advances one or more of the purposes of zoning under the MLUL and
- (2) Whether the benefits of granting the variance (allowing the deviation from the zoning standards) substantially outweigh the detriments associated therewith (i.e., a balancing test).

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"c" BULK VARIANCES: c(2) "FLEXIBLE C"

Purposes of Zoning

§2 of the MLUL includes a non-exhaustive list:

- a) Promoting public health, safety, morals, and general welfare;
- b) Securing safety from natural and man-made disasters;
- c) Providing adequate light, air, and open space;
- d) Promoting appropriate population densities and concentrations;
- e) Providing sufficient space for a variety of uses including, commercial, recreational;
- f) Promoting a desirable visual environment (aesthetics);
- g) Promoting conservation of historic districts and energy resources; and
- h) Encouraging senior citizen and community housing.

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"c" BULK VARIANCES: c(2) "FLEXIBLE C"

Negative Criteria

Applicant must prove the negative criteria in all c (and d) variance cases. No variance relief may be granted unless the applicant proves the "2 prongs" of the negative criteria

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"c" BULK VARIANCES: c(2) "FLEXIBLE C"

Negative Criteria

1) No substantial detriment to public good

The focus is on the impact of the variance on nearby properties and will it cause substantial damage to the character of the neighborhood. How is the applicable "neighborhood" defined?

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"c" BULK VARIANCES: c(2) "FLEXIBLE C"

Negative Criteria

2) No substantial impairment of the zone plan/zoning ordinance

The focus is on the extent to which a grant of the variance would constitute an arrogation or usurpation of the authority of the governing body and the planning board to zone (i.e., would it constitute rezoning or spot zoning?).

VOTE - A simple majority is required for passage of a "c" variance (4 out of 6 or 7, 3 out of 4 or 5 members voting).

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"d" USE VARIANCES: d(1) A NON PERMITTED USE/STRUCTURE

Positive Criteria

New Jersey courts recognize three circumstances in which the "special reasons" required for a d(1) use variance may be found: (1) where the proposed use inherently serves the public good, such as a school, hospital or public housing facility; (2) where the property owner would suffer "undue hardship" if compelled to use the property in conformity with the permitted uses in the zone; and (3) where the use would serve the general welfare because "the proposed site is particularly suitable for the proposed use."

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"d" USE VARIANCES: d(1) A NON PERMITTED USE/STRUCTURE

Inherently Beneficial Uses

Certain uses are deemed so inherently beneficial that they presumptively satisfy the positive criteria for (d) use variance relief (e.g., hospitals, schools, senior housing). The applicant, however, still has to satisfy the negative criteria

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"d" USE VARIANCES: d(1) A NON PERMITTED USE/STRUCTURE

"Particular Site Suitability" Standard

Particular site suitability does not equate to unique suitability, and the availability of alternative locations for the proposed use does not bar a finding of particular suitability. Price v. Himeji, LLC, 214 N.J. 263 (2013).

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"d" USE VARIANCES: d(1) A NON PERMITTED USE/STRUCTURE

Negative Criteria

Medici "enhanced quality of proof" - The Board must make clear and specific findings on the negative criteria and reconcile the omission of the proposed use from the list of permitted uses in the zoning ordinance. The reconciliation may be based, for example, on substantial changes to the character of the neighborhood since the adoption of the zoning ordinance as a result of extrinsic factors (such as the proximity to the site of major highway construction or commercial development in an adjoining municipality), or the use could be a new use that was not previously contemplated when the ordinance was last revised but since that time has gained currency.

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"d" USE VARIANCES: d(2) EXPANSION OF A NON-CONFORMING USE/STRUCTURE

"d(2)" - The expansion of a pre-existing non-conforming use

A non-permitted use pre-existed the zoning change or was allowed by variance, but now the applicant is expanding or intensifying it. The applicant must:

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"d" USE VARIANCES: d(2) EXPANSION OF A NON-CONFORMING USE/STRUCTURE

1. Trace the zoning history of the property and show the use existed prior to the zone change prohibiting it, or that relief was previously granted by the zoning board allowing the use.
2. Show that the use has been continuous and not abandoned. Both an objective and a subjective standard
3. Apply the d(1) use variance positive criteria standard, but the "special reasons" analysis only applies to the expansion or intensification of the use, since the applicant does not have to show that he/she/it would have been entitled to variance relief for the initial nonconformity in the use.

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"d" USE VARIANCES: d(3) CONDITIONAL USE VARIANCE

A use is permitted in a particular zone, but only if it meets certain designated conditions. If the use meets all the conditions, then the applicant must request conditional use approval from the Planning Board. However, if the proposal violates one or more of the conditions, then the applicant must obtain a d(3) conditional use variance from the Zoning Board of Adjustment.

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"d" USE VARIANCES: d(3) CONDITIONAL USE VARIANCE

Positive Criteria

Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285 (1994) - The positive criteria for d(3) variances is less exacting than that required for d(1) use variance relief, because the use is permitted but the proposal violates one or more conditions required of the use. The standard is that the Applicant must show that the site can accommodate the problems associated with the deviations from the required conditions for the use in the zoning ordinance.

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"d" USE VARIANCES: d(4) FLOOR AREA RATIO VARIANCE

F.A.R. Variance

The sum of the area of all floor space of a building divided by the total area of the lot (Distinguish from building coverage because coverage is just the building footprint). The F.A.R. controls the intensity of the use on the property.

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"d" USE VARIANCES: d(4) FLOOR AREA RATIO VARIANCE

Positive Criteria

Randolph Town Center Associates, L.P. v. Township of Randolph, 324 N.J. Super. 412 (App. Div. 1999) - The court adopted the Coventry Square standard: The applicant need show only that the site can accommodate the problems associated with an F.A.R. greater than the maximum F.A.R. permitted by the zoning ordinance.

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"d" USE VARIANCES: d(5) DENSITY VARIANCE

Density Variance

The number of dwelling units per gross land area to be developed - Really minimum lot size regulations designed primarily to control intensity of use. Except for minor subdivisions.

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"d" USE VARIANCES: d(5) DENSITY VARIANCE

Positive Criteria

The same Coventry Square standard, thus applicants are required to demonstrate that the site will accommodate the problems associated with a proposed density greater than that permitted by the zoning ordinance. See, Grubbs v. Slothower, 389 N.J. Super. 377 (App. Div. 2007).

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"d" USE VARIANCES: d(6) HEIGHT VARIANCE

Height Variance

Where the height of a principal structure exceeds the maximum height permitted by either 10 feet or 10% (i.e., only for significant height deviations).

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"d" USE VARIANCES: d(6) HEIGHT VARIANCE

Positive Criteria

Grasso v. Bor. of Spring Lake Hgts, 375 N.J. Super. 41 (App. Div. 2004) - The positive criteria test is similar to that adopted in Coventry Square and the applicant must show that the site can accommodate a height that is significantly greater than the maximum height permitted by the zoning ordinance.

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WHICH BOARD?

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WHICH BOARD?

Planning Board

- Subdivisions or site plans or conforming conditional use approvals without variances
- Subdivisions or site plans or conforming conditional use approvals with "c" variances

Zoning Board of Adjustment

- Just variances c, d, or both types
- Subdivisions and/or site plans with "d" variances (including d(3) nonconforming conditional use variances)

NOTE: Planning boards cannot grant "d" variances!

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DEVELOPMENT APPLICATION PROCESS

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DEVELOPMENT APPLICATION PROCESS

Hearings/Notice

Public notice - At least 10 days prior to the hearing - must include the date/time/location and nature of relief – certified mail to 200' property owners per the tax assessors certified list and published in the official newspaper of municipality.

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DEVELOPMENT APPLICATION PROCESS

Representation

- Individual applicants can represent themselves and introduce testimony
- Any "entity" applicant (e.g., corporation, LLC, partnership) must be represented by an
- Attorney admitted to practice law in New Jersey
- Site visits – information derived should be put on the record
- Reports from other agencies should be put on the record

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DEVELOPMENT APPLICATION PROCESS

Procedure

- Applicant witnesses and then cross-examination by the board and the public
- Objector witnesses and then cross-examination by the board and the applicant/public
- Public comment
- Possible rebuttal by Applicant
- Summation by Objector's counsel, then Applicant's counsel
- Board deliberates and votes

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DEVELOPMENT APPLICATION PROCESS

Evidence

- Evidence rules relaxed
- All witnesses including Board professionals should be sworn in
- Experts must be qualified/accepted
- No hearsay/petitions allowed
- The Chair should reasonably limit the time for public comment/question as needed, particularly to avoid duplication or repetition of testimony, testimony regarding irrelevant matters, disruption of the proceedings or obstruction of the ability of witnesses to participate in the hearing.

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DEVELOPMENT APPLICATION PROCESS

Decisions/Voting

The Board should engage in meaningful deliberations. The Board should not be pressured by the public or side with the applicant or an objector because of personal reasons. The Board should decide the application based on the legal criteria and whether or not the Applicant met its burden of proving the legal criteria.

Resolutions

The Board's decision is memorialized in a Resolution containing the Board's findings of fact and conclusions.

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DEVELOPMENT APPLICATION PROCESS

Appeals

The Applicant must commence appeal by complaint within 45 days of publication of adoption of resolution - action in lieu of prerogative writs - single judge/non-jury - appeal based on record below - substantial deference to the decision of the Board and not de novo review. Therefore board decision upheld unless found to be arbitrary, capricious or unreasonable

Settlement

Whispering Woods v. Middletown Planning Board, 220 N.J. Super. 161 (Law Div. 1987) - The Board can settle appeals subject to a duly noticed public hearing and vote.

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LOCAL GOVERNMENT ETHICS LAW/CONFLICTS OF INTEREST

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CONFLICT OF INTEREST

MLUL §69

A board member is prohibited from acting on a matter if the member has a direct or indirect, personal or financial interest in the matter.

1. Direct personal - Should not vote on a matter affecting a blood relative or close friend in non-financial but important way.
2. Indirect personal - Should not vote where the vote may be affected because of the board member's membership in an organization.
3. Direct financial - Should not vote on a matter in which he/she has a direct financial interest in the action.
4. Indirect financial - Should not vote on a matter that financially benefits someone who is closely tied to the board member, such as an employer or family member.

Local Government Ethics Law

Similar language to MLUL §69, but uses the term involvement."

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CONFLICT OF INTEREST

Examples of Potential Conflicts:

- Neighboring property owner who lives within a 200 foot radius of the board member.
- Family member (parent, child, grandparent, uncle, aunt, niece, nephew or spouse of same) of board member.
- Employer, employee, business partner of board member.
- Board member is a member of an organization that is the Applicant or an Objector or located within 200 feet of the subject property. May depend on whether leadership role and/or how active a member.
- If the board member is not certain that he/she can decide the case objectively and impartially purely based on the facts and law, then he/she should recuse himself/herself. ("When in Doubt, Step Out!")

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CONFLICT OF INTEREST

Recusal Procedure

The Chair announces the recusal - it is not necessary to state the reason for the recusal, but the fact of the recusal should be on the record. The recused board member should go to the back of the room or leave the room.

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CONFLICT OF INTEREST

Borrowing Provisions

- If there are not enough board members for a quorum to hear a case due to conflicts of interest then either board may borrow members from the other board up to the number required for a quorum to act (MLUL §23.2 authorizes the Planning Board to borrow from Zoning Board and MLUL §69.1 authorizes the Zoning Board to borrow from the Planning Board, but only Class 4 members and in order of seniority).
- Better practice with "d" variances is for the Zoning Board to borrow at least enough Planning Board members to have 7 members so that the statutory framework of requiring the affirmative vote of 5 out of 7 members for a grant of a "d" variance is preserved.

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CONFLICT OF INTEREST

Can a Board Member Be an Applicant or an Objector?

The board member does not lose his or her right of citizenship therefore, particularly if he or she owns real estate within 200 feet of the applicant's property, he or she has the right to object or speak in support of the application, but the "better view" is to have the board member use an intermediary, such as a family member or an attorney, to speak on his or her behalf, if possible.

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OPEN PUBLIC MEETING ACT ("THE SUNSHINE LAW")

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OPEN PUBLIC MEETING ACT

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

Requires every public body to annually adopt a schedule of its regular meetings.

- Filed with the municipal clerk
- Posted on the municipal bulletin board
- Published in 2 newspapers circulating in the municipality and 1 of which shall be the official newspaper of the municipality
- Special Meetings = similar notice at least 48 hours before the meeting

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OPEN PUBLIC MEETING ACT

Open vs. Closed Meetings/Sessions (9 exceptions)

1. Confidential or exempt from open public requirement pursuant to federal or state law or court rule;
2. Release of information would impair a right to receive funds from the U.S. Government;
3. Unwarranted invasion of personal privacy;
4. Collective bargaining agreement (employee negotiations);
5. Purchase or lease of real estate with public funds;

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OPEN PUBLIC MEETING ACT

Open vs. Closed Meetings/Sessions (9 exceptions)

6. Impair protection of the safety and property of the public;
7. Pending or anticipated litigation or contract negotiations, as well as matters requiring attorney-client privileged conversations;
8. Employment/termination/evaluation/promotion of public officer (personnel matter);
9. After public hearing that may result in imposition of specific civil penalty or loss of license (comparable to a jury deliberation).

QUESTIONS?

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