Crib Sheets for Relief that Can Be Granted by a Planning Board

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

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

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

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

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

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

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

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

2. **Minor Subdivision Approval for PB**

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

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

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

3. **Preliminary and Final Site Plan Approval for PB**

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

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

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

4. **Amended Preliminary and Final Site Plan Approval for PB**

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

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

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

5. **Preliminary and Final Subdivision Approval for PB**

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

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

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

6. **Amended Preliminary and Final Subdivision Approval for PB**

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

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

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

7. **Exceptions from Site Plan or Subdivision Requirements for PB**

1. N.J.S.A. 40:55D-51a and b provide that the Board, "when acting upon applications for preliminary subdivision or site plan approval shall have the power to grant such exceptions from the requirements for subdivision or site plan approval

a. as may be reasonable and within the general purpose and intent of the provisions for site plan review and approval . . .

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

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

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

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

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

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

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

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

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

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

3. While not containing a definition of de minimis, N.J.A.C. 5:21-3.1(f) provides four examples of de minimis exceptions, which "include, but are not limited to, the following": (a) Reducing the minimum number of parking spaces and the minimum size of parking stalls; (b) Reducing the minimum geometrics of street design, such as curb radii, horizontal and vertical curves, intersection angles, centerline radii, and others; (c) Reducing cartway width; and (d) Any changes in standards necessary to implement traffic calming devices. As noted in Cox and Koenig, New Jersey Land Use Administration (Gann 2014), §15-8(c), "de minimis exceptions are limited exceptions of minor nature and, where an applicant wishes to deviate from other requirements of the RSIS which cannot be considered a minor design variation as characterized in the examples set forth in the regulation," an applicant must seek a waiver from the RSIS from the Site Improvement Advisory Board.

9. **Conditional Use Approval for PB**

1. N.J.S.A. 40:55D-67a provides that a zoning ordinance may provide for conditional uses which shall be granted by the Board if the applicant meets "definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness…" in the ordinance. A "conditional use" is a "use permitted in a particular zone, but only upon certain conditions." Omnipoint v. Bedminster Board of Adjustment, 337 N.J. Super. 398, 413 (App. Div. 2001), certif. denied, 169 N.J. 607 (2001). The Board must thus determine whether the proposed conditionally permitted use complies with all conditional use requirements set forth in the ordinance. N.J.S.A. 40:55D-67b provides that the "review by the planning board of a conditional use shall include any required site plan review." N.J.S.A. 40:55D-46b and 50a are the focal points for consideration of the preliminary and final site plan applications. N.J.S.A. 40:55D-46b provides that the Board "shall" grant preliminary site plan approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval.

a. As such, if the application complies with all ordinance regulations and requirements, the Board must grant site plan approval as well as conditional use approval.

b. Conversely, if the application does not comply with all ordinance requirements, the Board must deny approval. CBS Outdoor, Inc. v. Lebanon Planning Board / Board of Adjustment, 414 N.J. Super. 563, 582 (App. Div. 2010). Unlike a site plan or subdivision application where the Board can under certain circumstances grant an approval conditioned on changes to comply with ordinance requirements, if a conditional use application does not comply with all conditional use ordinance standards, a condition cannot be imposed providing for subsequent compliance. As the court explained in CBS Outdoor, Inc., 414 N.J. Super. at 582, a "promise from an applicant about its future potential compliance with a conditional use standard or specification is not permitted" under either the MLUL or case law. If the application does not comply with all conditional use ordinance standards, the Board must deny conditional use approval. Id.

2. Finally, if the proposed conditional use does not meet all of the conditions for the use, the applicant can apply for a "d(3)" conditional use variance, but any such variance application must go to the Board of Adjustment pursuant to N.J.S.A. 40:55D-70d(3). Coventry Square, Inc. v. Westwood Zoning Board of Adj., 138 N.J. 285, 295 (1994). The Planning Board does not have jurisdiction to hear or decide conditional use variance applications. Id.

10. **Conditional Use Approval for Wireless Telecommunications Towers in Clinton Twp**

1. N.J.S.A. 40:55D-67a provides that a zoning ordinance may provide for conditional uses which shall be granted by the Board if the applicant meets "definite specifications and standards which shall be clearly set forth with sufficient certainty and definiteness…" in the ordinance. The Board must determine whether the proposed conditionally permitted telecommunications tower use complies with all conditional use specifications and standards set forth in the ordinance. The Clinton Township telecommunications ordinance is found at ordinance section 165-113 and contains the specifications and standards governing telecommunications towers, antennae and equipment. This crib sheet is focused on the ordinance's requirements applicable to conditional use approval of a tower and only briefly refers to the requirements for telecommunications antennae and equipment as well as required site plan approval.

2. Ordinance section 165-113.C contains the conditional use specifications governing "visual compatibility" of towers, antennae and equipment. Ordinance section 165-113.C(1) requires that "wireless telecommunications towers shall be designed, located and screened to blend with and into the existing natural or built surroundings so as to eliminate, to the maximum extent practicable, without regard to cost, adverse visual impacts through the use of color and camouflaging, architectural treatment, landscaping, and other appropriate means which shall cause the visual impact of such . . . towers to be compatible with neighboring residences and the character of the community as a whole." It should be noted that locating a tower on an alternate site situated in a carrier's search area would be included as an "other appropriate means" to cause the visual impact of a tower "to be compatible with neighboring residences and the character of the community" if locating the tower on the alternate site is more aesthetically pleasing than locating it on the proposed site. Site suitability is to be determined both from the point of view of the applicant and the municipality. Northeast v. Zoning Board of Adjustment, 327 N.J. Super. 476, 497-498 (App. Div. 2000).

3. Ordinance section 165-113.D contains the conditional use standards governing the "location of wireless telecommunications antennas and towers." Ordinance section 165-113.D(1) provides that an "applicant desiring to construct wireless telecommunications . . . towers in any nonresidential zone shall demonstrate to the satisfaction of the Planning Board . . . each of the following:

(a) First, ordinance section 165-113.D(1)(a) provides that the applicant must demonstrate "the need for wireless telecommunications antennas at the proposed location" and the "evidence presented . . . shall describe in detail" the following: (1) "the wireless telecommunications network layout and its coverage area requirements;" and (2) "the need for new wireless telecommunications facilities at a specific location within the Township." Ordinance section 165-113.D(1)(a) requires that the "applicant shall also provide evidence to the satisfaction of the Planning Board of all alternate wireless network plan designs which would not require the applicant to construct a wireless telecommunications tower at the proposed location." It should be noted that the requirement that the applicant demonstrate "its coverage area requirements" would include not only its geographic requirements but also its level of service requirements. It should also be noted that the requirement that the applicant prove that "the need for new wireless telecommunications facilities at a specific location within the Township" would include not only that the particular site is needed (as

compared to any other sites in a carrier's search ring) but also that the antennas are needed at the specific height proposed by the applicant.

(1) As to geographic requirements, the applicant must prove that a "gap" in service exists. To establish a "gap" in service, the applicant must prove that users of the service at issue are unable to either connect with the land based national telephone network or are unable to maintain a connection capable of supporting "reasonably interrupted communication." Cellular Tel. Co. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj., 197 F.3d 64, 70 (3rd Cir. 1999). A "gap" in service is not merely de minimis dead spots in coverage within a larger area. NY SMSA v. Mendham Board of Adj., 366 N.J. Super. 141, 161 (App. Div.), aff'd o.b., 181 N.J. 387 (2004). However, the applicant is not required to show that there is a "significant gap" in service. NY SMSA v. Weehawkin Board of Adj., 370 N.J. Super. 319, 336 (App. Div. 2004); Omnipoint v. Easttown Township Zoning Hearing Board, 331 F. 3d 386, 398 (3rd Cir. 2003), cert. den., 540 U.S. 1108 (2004).

(2) As to level of service requirements, neither the Telecommunications Act of 1996 (the "TCA"), 47 U.S.C.A. section 332, nor the regulations adopted by the Federal Communications Commission (the "FCC"), 47 C.F.R. section 22.940, mandate any particular minimum signal strength. In fact, the TCA requires wireless telecommunications carriers to provide "substantially above a level of mediocre" service. Id. Further, in NY SMSA v. Middletown Board of Adj., 324 N.J. Super. 166, 175 (App. Div.), certif. den., 162 N.J. 488 (1999), the court held that the Federal Communications Commission (the "FCC"), through its regulations, "does not mandate optimal service but only sound, favorable and substantially above a level of mediocre service." (emphasis added). The court in Sprint Spectrum v. Upper Saddle River Board of Adj., 352 N.J. Super. 575, 604 (App. Div. 2002) quoted Board radio frequency engineering expert Charles Hecht as describing the test as whether service is "substantially better than average." It appears that, under the law, wireless telecommunications providers are required to provide "reasonably reliable service," defined as "substantially above a level of mediocre service," and not "99% reliable," "optimal," or "seamless" service.

(3) Some carriers have taken the position that a local land use board does not have the authority under the TCA or FCC regulations to determine and/or is implicitly pre-empted from determining the minimum required signal strength necessary to fill a gap in service or that the carrier is entitled to choose whatever signal it wishes to fill the gap as a matter of corporate policy. This position is contrary to law. First, Cellular Telephone v. Ho-Ho-Kus Board of Adj., 197 F.3d 64, 75-76 (3rd Cir. 1999) held that "the Board was not barred from considering the quality of existing personal wireless service" in determining whether or not to grant an application. (emphasis added) Further, the court specifically noted that the TCA "does not abrogate local zoning authority in favor of the commercial desire to offer optimal service to all current and potential customers." (emphasis added) Id. at 76. Second, Cellular Tel. Co. v. Harrington Park Zoning Board of Adj., 90 F. Supp. 2d 557, 563 (D.N.J. 2000) held that "the TCA establishes the procedural requirements that local boards must follow in evaluating cell site applications, but leaves intact the state and local law which the boards must apply in arriving at their decision." (emphasis added) Third, the court in NY SMSA v. Middletown Board of Adj., 324 N.J. Super. 166, 176 (App. Div. 1999), certif. den. 162 N.J. 488 (1999), held that a cellular carrier was not entitled to a variance to accommodate a signal level of negative 75 dBm simply because that service level was "desirable as a

matter of company policy." Finally, while in the context of examining a "significant gap" in service, the court in Omnipoint v. Easttown Zoning Hearing Board, 331 F. 3d 386, 398 (3rd Cir. 2003), cert. den. 540 U.S. 1108 (2004), held that a board does not have to accommodate a signal level of negative 85 dBm if the cellular provider does not "establish a correlation between the negative 85 dBm standard and users' actual ability to access the national telephone network."

(4) As to mounting height requirements, the cellular carrier has the "burden of proving that the proposed facility is the least intrusive means of filling [a] gap with a reasonable level of service." Cellular Tel. d/b/a AT&T Wireless v. Ho-Ho-Kus Board of Adj., 197 F. 3d. at 70 (emphasis added).

(b) Second, ordinance section 165-113.D(1)(b) provides that the applicant use "its best efforts to locate wireless telecommunication antennas on existing buildings or structures within the carrier's search area" and "the failure of the applicant to present proof" that of use of its best efforts to so co-locate "shall constitute a rebuttable presumption that the applicant has not exercised its best efforts as required."

(c) Third, ordinance section 165-113.D(1)(c) requires that the applicant demonstrate the "locations of all existing communications towers and other structures of not more than 140-feet in height within the applicant's search area and provided competent testimony by a radio frequency engineer regarding the suitability of each location so identified by the applicant in light of the design of the wireless telecommunications network, and the alternate network designs identified pursuant to subsection D(1)(a) above."

(d) Fourth, ordinance section 165-113.D(1)(d) provides that, "where a suitable location on an existing tower or other structure is found to exist, but the applicant is unable to secure an agreement to co-locate its equipment on such tower or other structure, the applicant shall provide sufficient and credible written evidence of its attempt or attempts to co-locate."

(e) Fifth, ordinance section 165-113.D(1)(e) requires that the applicant provide a "full, complete description of all alternative technologies not requiring the use of towers or other structures to provide services to be provided by the applicant through the use of the proposed tower."

(f) Sixth, ordinance section 165-113.D(1)(f) requires that the applicant use "its best efforts to site new wireless . . . towers within the applicant's search area according to [a] priority schedule" listed in the ordinance, with priority locations 1 to 8 consisting of co-locating antennas on existing towers or structures in commercial zones within transportation corridors, in commercial zones, in residential zones within a transportation corridor, and in residential zones, in descending order of priority. Priority location 9 is for a tower in a commercial zone within a transportation corridor, and priority location 10 is for a tower in a commercial zone.

(g) Finally, ordinance section 165-113.D(1)(g) requires that the applicant prove compliance with all FCC, FAA and other governmental regulations and requirements.

11. **"C(1)" or "Hardship" Variances**

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

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

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

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

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

12. **"C(2)" or "Benefits v. Detriments" Variances**

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

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

Comments:

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

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

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

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

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

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

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

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

14. **"Planning" Variance and Direction to Issue a Permit for Building or Structure Not Abutting an Official and Fully Improved Street Pursuant to §34**

1. If a proposed development requires approval by the Planning Board of a subdivision, site plan or conditional use as well seeks the issuance of a permit pursuant to N.J.S.A. 40:55D-35, the Planning Board may grant a "planning" variance pursuant to N.J.S.A. 40:55D-36 from the requirement in N.J.S.A. 40:55D-35 that no permit be issued for the construction of a building unless the lot on which the building will be constructed abuts an official and fully improved street, and for direction to issue a permit for a building not related to an official and fully improved street pursuant to N.J.S.A 40:55D-36 where:

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

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

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

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

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

15. **Authority to Impose Conditions**

Boards have inherent authority to impose conditions on any approval it grants. North Plainfield v. Perone, 54 N.J. Super. 1, 8-9 (App. Div. 1959), certif. denied, 29 N.J. 507 (1959). Further, conditions may be imposed where they are required in order for a board to find that the requirements necessary for approval of the application have been met. See, Alperin v. Mayor and Tp. Committee of Middletown Tp., 91 N.J. Super. 190 (Ch. Div. 1966) (holding that a board is required to impose conditions to insure that the positive criteria is satisfied); Eagle Group v. Zoning Board, 274 N.J. Super. 551, 564-565 (App. Div. 1994) (holding that a board is required to impose conditions to insure that the negative criteria is satisfied). Moreover, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Township of Randolph, 137 N.J. 216, 232-233 (1994). See, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that "aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances" and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff'd o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions.); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J 418, 438-439 (2000) (explaining that site plan review "typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping" and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties). Further, municipal ordinances and Board rules also provide a source of authority for a board to impose conditions upon a developmental approval. See, Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2014), sections 13-2.2 and 13-2.3 (discussing conditions limiting the life of a variance being imposed on the basis of the Board's implicit authority versus by virtue of Board rule or municipal ordinance). Finally, boards have authority to condition site plan and subdivision approval on review and approval of changes to the plans by Board's experts so long as the delegation of authority for review and approval is not a grant of unbridled power to the expert to approve or deny approval. Lionel Appliance Center, Inc. v. Citta, 156 N.J. Super. 257, 270 (Law Div. 1978). As held by the court in Shakoor Supermarkets, Inc. v. Old Bridge Tp. Planning Board, 420 N.J. Super. 193, 205-206 (App. Div. 2011): "The MLUL contemplates that a land use board will retain professional consultants to assist in reviewing and evaluating development applications" and using such professional consultants to review and evaluate revised plans "was well within the scope of service anticipated by the applicable statutes. It was the Board, and not any consultant, that exercised the authority to approve the application."

Comments:

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

16. **Modification of Prior Condition(s) for PB**

1. Our courts have held that a Board has the power to modify and/or amend prior approval conditions if "enforcement of the restrictions would frustrate an appropriate purpose", upon a "proper showing of changed circumstances", or upon "other good cause" warranting modification and/or amendment. See, Allied Realty v. Upper Saddle River, 221 N.J. Super. 407, 414 (App. Div. 1987), certif. denied 110 N.J. 304 (1988); Sherman v. Harvey Cedars Board of Adjustment, 242 N.J. Super. 421, 429 (App. Div. 1990). N.J.S.A. 40:55D-12a recognizes the authority of a board to modify previously imposed conditions and requires that public notice be given "for modification or elimination of a significant condition or conditions in a memorializing resolution in any situation wherein the application for development for which the memorializing resolution is proposed for adoption required public notice."

a. As to changed circumstances, our courts have held that the Board should consider whether there have been changes in the neighborhood and, if so, the effect of those changes in terms of the condition under consideration. See, Russell v. Tenafly Board of Adj., 31 N.J. 58, 66 (1959). While no court has expressly so stated, I believe of equal importance is considering whether circumstances may have changed in the Township over the life of the condition, either in favor of or against the requested modification at issue.

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

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

2. Where the condition to be modified is related to a variance, however, even if the modification is otherwise warranted it cannot be granted pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70 unless such relief 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 so-called "negative criteria."

3. Finally, our courts have held that modification of a condition imposed by a land use board may be granted only by the board that imposed the condition. Amato v. Randolph Planning Board, 188 N.J. Super. 439, 447 (App. Div. 1982).

17. **Changes in Plans – Field Changes v. Amended Applications**

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

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

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

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

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

18. **Evidentiary Matters**

Boards are often called upon to decide evidentiary matters. The starting point for a discussion of evidence in board hearings is the MLUL, specifically, N.J.S.A. 40:55D-10e, which provides that the "technical rules of evidence shall not apply" to Board hearings on applications "but the agency may exclude irrelevant, immaterial or unduly repetitious evidence." Our courts, however, have also weighed in on the issue of evidence in a Board hearing. While the MLUL provides that the strict rules of evidence do not apply in a Board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009). [1] Moreover, it is long established law in New Jersey that in a proceeding before a municipal board it is the Board's obligation to consider only competent evidence. Tomko v. Vissers, 21 N.J. 226, 238 (1956). Our Supreme Court in Gallenthin Realty v. Bor. of Paulsboro, 191 N.J. 344, 373 (2004) held that local municipal decisions must be supported by sufficient evidence in the record, and that standard is not met if the decision is based on an expert's "net opinion." The "net opinion" rule prohibits admission into evidence of an expert's conclusions if they are not supported by factual evidence or other data. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). As explained in Polzo, "the net opinion rule requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." Id. If the expert provides no explanation for his or her conclusions, those conclusions are deemed to be "net opinions" and must be excluded. Id. As held by the Appellate Division of the Superior Court in Koruba v. American Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007), for experts' conclusions to pass muster under the net opinion rule, the experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." With that as a backdrop, land use boards should base their evidentiary rulings on both N.J.S.A. 40:55D-10e and applicable case law.

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

19. **Expert Testimony**

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

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

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

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

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

20. **Dismissal based on Mootness and Grant of Alternate Relief**

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

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

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