

**AN OUTLINE OF THE FUNDAMENTALS OF
ZONING AND PLANNING
FOR LAND USE BOARDS**

Michael W. Herbert, Esq.
Parker McCay, P.A.

I. THE MUNICIPAL PLANNING STRUCTURE

New Jersey's Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1, et seq., gives municipalities the power to zone, and establishes the governmental and legal structure for municipal planning (a 3-part separation of power).

- A. The **Planning Board** reviews permitted site and subdivision plans as to how they comply with local zoning and prepares the Master Plan, and revises it every ten years.
- B. The **Township Governing Body** enacts zoning ordinances and adopts an official map based on the Master Plan.
- C. The **Zoning Board of Adjustment** decides disputes that arise under the zoning ordinances, and grants variances from the strict application of the ordinances. The Zoning Board issues an annual report to the Township Committee describing areas in which it has granted relief and recommends changes to the ordinances.

II. ZONING OVERVIEW

- A. Zoning is an inherent police power to regulate affairs for health, safety and welfare pursuant to the New Jersey Constitution.
- B. The State, through the MLUL, delegates zoning power to municipalities.
- C. Zoning ordinances adopted by municipal governing body.
 - 1. Must advance a zoning purpose;
 - 2. Must be consistent with MLUL;
 - 3. Cannot be unconstitutional;
 - 4. May be preempted by state or federal legislation;
- D. The Planning Board adopts the master plan as a planning tool, reviews proposed ordinances and hears generally compliant applications, as well as hearing allowed site and subdivision applications.
- E. The Zoning Board reviews variance applications based upon the requirements of Township ordinances.

III. DETERMINING WHICH BOARD HAS JURISDICTION

- A. The Zoning Board has jurisdiction under N.J.S.A. 4:55D-70(d) if the application has one or more of the following:
1. a use not permitted in the zone;
 2. a principal structure not permitted in the zone;
 3. an expansion of a nonconforming use;
 4. a deviation from a conditional use standard;
 5. a floor area ratio in excess of the maximum permitted;
 6. a density in excess of the maximum permitted;
 7. a height of principal structure which exceeds the maximum height permitted by 10 feet or 10%.
- B. If jurisdiction is found, the Zoning Board then hears the entire application, including site plan, subdivision and bulk variances. (NOT A PERMITTED "USE").
- C. If not, then the entire case goes to the Planning Board if the application includes a subdivision or site plan. (PERMITTED USE). If there is no subdivision or site plan (say, a bulk variance to add on to a house in a residential zone), jurisdiction is with the Zoning Board.

IV. ORGANIZATION OF BOARDS

A. Planning Boards

1. Seven or nine members; up to two alternates (2-year terms).
2. Class I - Mayor or designee (one-year term).
3. Class II - a municipal official usually appointed by mayor (one-year term).
4. Class III - a member of governing body - appointed by it (one-year term).
5. Class IV - citizens of municipality usually appointed by the mayor (4-year terms).
 - a. must contain an environmental commission member.
 - b. may contain a Board of Education member.
 - c. may contain a Zoning Board member.

B. Zoning Boards

1. Seven members and up to two alternates (must be residents).
2. Appointed pursuant to ordinance by the Township Governing Body.
3. Four-year term (2 years for alternates).
4. Cannot hold elective office in municipality.

C. Single board (Zoning and Planning together)

1. Nine member board.
2. Mayor and governing body member step down if “use” variance. (see N.J.S.A. 40:55D-25c)
3. If municipality’s population is 5,000 people or less, created by ordinance.
4. If municipality’s population is over 15,000 people, need voter referendum.

V. POWERS OF THE PLANNING BOARD

A. General Planning Powers

1. Prepares, adopts and amends the Master Plan (N.J.S.A. 40:55D-28).
 - a. Elements.
 1. Statement of objectives (required)
 2. Land Use Plan (required)
 3. Housing plan (required)
 4. Circulation plan
 5. Utility Service Plan
 6. Communities facilities Plan
 7. Recreation Plan
 8. Conservation Plan
 9. Economic Plan
 10. Historic Preservation Plan
 11. Recycling Plan
 12. Farmland Preservation Plan
 13. Development Transfer Plan
 14. Educational Facilities Plan
 15. Green Buildings and Environmental Sustainability Plan
 16. Public Access Plan
 - b. Adoption.
 1. Public hearing required
 2. Notice to the public affected by the land use ordinance
 3. Newspaper publication
 4. Adjoining clerks - notice
 5. County Planning Board
2. Renders advice to the Township Governing Body regarding new zoning ordinances (N.J.S.A. 40:55D-26 and 64) and regarding the Master Plan (N.J.S.A. 40:55D-32).
 - a. 35 days to review.
 - b. Governing body can override recommendation by Resolution explaining reasons for adoption.
3. Prepares a municipal capital improvements program (N.J.S.A. 40:55D-29).

B. Powers to Review Specific Applications

1. Approves subdivision, site plan and conditional use applications (N.J.S.A. 40:55D-37 and 67A).

- a. Minor subdivision.
 - 1) Number of lots defined by ordinance.
 - 2) 190 days from resolution to file map or deed.
- b. Major subdivision.
 - 1) Streets, improvements.
 - 2) Plan required.
- c. Residential Site Improvement Standards N.J.A.C. 5:2 1.1 et seq.
 - 1) De minimus exception by board.
 - 2) Waiver by DCA (danger to public safety if standard is adhered to).
- d. Bulk Variances.
 - 1) variance can be granted if there is an undue hardship.
 - 2) c(2) variance can be granted if the benefits substantially outweigh detriments. (Flexible "c ").
 - 3) No substantial detriment to public good.
 - 4) No substantial impairment of zone plan and zoning ordinance.
- e. Design exceptions.
 - 1) There is an undue hardship because of peculiar conditions related to the land in question.
- f. Effect of preliminary subdivision approval (outside of the permit extension act).
 - 1) Three-year period of protection (to obtain final).
 - 2) Two one-year extensions permitted.
 - 3) "Health, Safety and welfare" amendments supersede any previous approvals granted.
- g. Effect of final subdivision approval.
 - 1) Two-year period of protection (to file map or deed).
 - 2) Three one-year extensions permitted (if map or deed filed).
 - 3) Performance guarantees for on-track improvements.
 - 4) Maintenance guarantee.
- h. Off- tract improvement contributions.
 - 1) Pro rata share of reasonable and necessary improvements.

- i. Affordable Housing Development Fee (COAH) — N.J.A.C. 5:97.
 - 1) One and one half percent of equalized assessed value for residential development, provided no increased density is permitted.
 - 2) Non-residential development fee of 2.5 percent for equalized value of the project.

Conditioned on other governmental approvals.

- 1) DEP wetlands.
- 2) CAFRA.
- 3) DEP utility extensions.
- 4) DOT.
- 5) County Planning Board.
- 6) Soil conservation.
- 7) Board of Health.

- 2. Planning Board approves ‘c’ variances ancillary to subdivision, site plan and conditional use applications (N.J.S.A. 40:55D-60a).

- a. Minor site plan or major site plan.
- b. Bulk variances.
- c. Design exceptions.
- d. Effect or preliminary approval.
- e. Effect of final approval.
- f. Off tract improvements.
- g. Affordable Housing Development Fee.
- h. Other governmental approvals.

C. Conditional Uses

- 1. If conditions met – Planning Board has jurisdiction.
- 2. If conditions not met – “d” variance in front of Zoning Board.

D. Planned Developments

- 1. Residential, commercial, industrial or mixed.
- 2. Ordinance can impose requirements.
- 3. Specific findings required.
- 4. General Development Plan approval.
 - a. permitted if 100 acres or more.
 - b. permitted under 100 acres if not less than 150,000 sq. ft. of non-residential floor area to one residential unit. See N.J.S.A. 55D-45.3

VI. POWERS OF THE ZONING BOARD

- A. Hears and decides appeals from decisions of the Zoning Officer (N.J.S.A. 40:55D-70a).
- B. Interprets the zoning ordinance (N.J.S.A. 40:55D-70b).
- C. Grants the following variances:
 - 1. Hardship variances (N.J.S.A. 40:55D-70c(1)).
 - 2. “Flexible c” variances (N.J.S.A. 40:55D-70c(2)).
 - 3. “Special reasons” variances, sometimes called “use” variances or “d” variances (N.J.S.A. 40:55D-70d).
- D. Grants subdivision, site plan and conditional use approval ancillary to applications for “d” variances (N.J.S.A. 40:55D-76b).
- E. Issues development permits for certain restricted areas (N.J.S.A. 40:55D-34, 36 and 76a).
- F. Grants waivers from site plan design specifications.
- G. The Board must grant or deny an application within 45 days after the developer has submitted a complete application.
- H. Reviews site plan applications, much like a planning board, if it is given jurisdiction by the above statutes. (See Planning Board review on previous pages.)

VII. HEARING PROCEDURES FOR LAND USE BOARDS

- A. Meetings must comply with the Open Public Meetings Act (or Sunshine Law) (N.J.S.A. 10:4-1, et seq.), which requires that meetings be advertised and open to the public. The Board may hold “closed” or “executive” sessions in limited situations to discuss personnel, privileged matters falling within the attorney-client privilege, or pending or anticipated litigation.
- B. Board members must make their decisions based on evidence in the record before them. If board members make decisions based on personal knowledge of the site, they must put their observations on the record during the public hearing so that the applicant may have an opportunity to rebut them.
- C. If a board member misses a portion of a hearing, they must certify in writing that they have listened to tapes, or reviewed a complete transcript of the hearing to be eligible to vote. In the alternative, an alternate member can be assigned to vote on the application.
- D. A quorum (four board members for Boards of Adjustment), (five board members for Planning Boards) is required for the Board to do business. Actions can be taken by a majority vote of members present at the meeting with exceptions (N.J.S.A. 40:55D-9a). For instance, five votes are required to approve a “d” variance.

VIII. ETHICS AND CONFLICTS FOR ALL LAND USE BOARDS

- A. Local Government Ethics Law — N.J.S.A. 40A:9-22.1. Annual financial disclosure statement.
- B. MLUL provisions.
 - 1. Direct or indirect: personal or pecuniary interest.
 - 2. Appearance of conflict.
- C. If conflicted out, member must step down and leave the room.
- D. Members from the other board can then sit in for the missing members if there is a quorum issue.
- E. Rule of Necessity, Gunthner v. Bayhead – Planning Board members may sit on the Zoning Board where there is a need because of conflict. If everyone has a conflict, the whole board may hear the application.
- F. Board members cannot vote on matters in which they have a conflict of interest. N.J.S.A. 40:55D-23(b) and most Township Ordinances say that “no member of the planning board or zoning board shall act on any matter in which he has, either directly or indirectly, any personal or financial interest.” Conflicts must be decided on a case-by-case basis, however the following represent absolute conflicts:
 - 1. If the board member owns property within 200 feet of the subject property.
 - 2. If the board member is related to the applicant.
 - 3. If the board member is an employer or employee of the applicant or shareholder or holder of other financial interest in the applicant or applicant's company.
 - 4. If the board member has other personal or pecuniary interest in the application.

IX. APPLICATION AND REVIEW PROCESS; COMPLETENESS

- A. Informal pre-application concept review by Township professional staff.
- B. Application forms.
 - 1. Disclosure of Ownership form for owners greater than 10%.
 - 2. Proof of payment of taxes.
- C. Application checklist.
 - 1. Must be adopted by ordinance.
 - 2. Creates submission requirements.
 - 3. Submission must be made or waiver requested.
 - 4. 45 days to deem complete by Board or authorized committee or authorized designee.
 - 5. 45 days to grant submission waiver request by Board, or authorized committee.
 - 6. Resubmission restarts the clock.
 - 7. Pursuant to MLUL, more information can be requested if reasonably required by the Board to make a decision.
- D. Time for decision after being deemed complete.
 - 1. Minor subdivision or site plan - 45 days.
 - 2. Preliminary major subdivision - 10 lots or more - 45 days.
 - 3. Preliminary major subdivision - 11 lots or more - 95 days.
 - 4. Preliminary site plan - 10 acres or 10 units or less - 45 days, over 10 acres or units - 95 days.
 - 5. Final subdivision or site plan - 45 days.
 - 6. Variance - 120 days.
 - 7. Approval can be granted by the Court if action is not taken by the Board within the required time.
 - 8. Extensions should be in writing or stated on the record.
 - 9. If escrow fees are insufficient – “In order for work to continue on the development or the application, the applicant shall within a reasonable time period post a deposit in the account.”

X. NOTICES

- A. Required by MLUL except for minor subdivisions, site plans or final approvals. Municipal ordinance can require notice for conventional site plans. Municipal ordinance can, and usually does, require notice for site plans.
- B. Contents of notice: date, time, nature of application, property address, lot and block.
- C. Publication at least 10 days prior to the hearing in an official newspaper of the municipality.
 - 1. Affidavit of Publication.
- D. Service to property owners within 200 feet.
 - 1.. List obtained from administrative officer from tax duplicates.
 - 2. Only certified mail and an Affidavit of Service are required.
- E. If within 200 feet of municipal boundaries, service to Clerk of adjoining municipality, County Planning Board, and owners in the other municipality.
- F. Service to County Planning Board if on or near a county road.
- G. Service to Department of Transportation if located on a state highway or utilizes state drainage system.
- H. Service to State Planning Commission if 150 acres or more, or if 500 residential units

or more.
- I. Service to others requesting notice.

XI. DECISIONS AND RESOLUTIONS

- A. Time of Application Rule.
 - 1. Ordinance changes during pendency of application do not govern that application. The application is governed by the form of ordinance at the time it is filed and deemed complete.
- B. Decision must be based on the facts within the record.
- C. Findings of fact and conclusions of law required for all decisions and resolutions.
- D. Decision on application by voting on a prepared resolution,
-or-
Decision on application first and memorialization by resolution later.
 - 1. Only those deciding the action can vote on the memorializing resolution.
- E. Resolution required within 45 days of decision, unless there is consent from the applicant.
- F. Notice of decision published in official newspaper by Board or by applicant.
 - 1. Need affidavit of publication.
 - 2. 45-day appeal period for suit in Superior Court, by way of prerogative writ.
- G. Appeals to the Superior Court must be filed within 45 days of the publication.
 - 1. Based on record below (Trial de Novo).
- H. Appeals of use variances to the governing body, if permitted by ordinance, must be filed within 10 days of publication.
- I. The Board must make findings of fact and conclusions based on the record. Findings are set forth in a Resolution of Memorialization, which must be approved by a majority of those who voted in favor of the original resolution.
- J. Decisions of the Board are presumed to be valid. A reviewing court will defer to the Board's discretion in granting or rejecting an application, as long as the Board has not acted in an arbitrary, capricious or unreasonable manner. The court will not substitute its judgment for the Board's.
- K. Settlement.
 - 1. Once an appeal has been made of a board decision to the Superior Court, the board divested of jurisdiction. However, matters that have been appealed from a municipal board to the Court can be settled by the parties while the matter is pending.
 - 2. If a settlement is achieved, it will have to meet the "Whispering Woods" requirements whereby the board holds a public hearing to discuss the proposed settlement and any changes that may result in the settlement. It is always important for the public to have some type of participation in the hearing.

XII. TYPES OF VARIANCES

- A. Hardship variance, also known as a bulk variance (N.J.S.A. 40:55D-70c(1)).
- Can be proven if it can be shown that by reason of: (1) exceptional narrowness, (2) conditions, (3) shape of a piece of property, (4) by reason of exceptional topographical conditions, (5) physical features uniquely affecting a specific piece of property, (6) by reason of an extraordinary and exception situation uniquely affecting a specific piece of property, or (7) the structures lawfully existing thereon, the strict application of the ordinance would result in peculiar and exceptional practical difficulties to and/or hardship upon the applicant.
- B. C(2), also known as "flexible c" variances (N.J.S.A. 40:55D-70c(2)).
- Is granted where an applicant proves that a specific piece of property deviates from the zoning ordinance and that the benefits of the deviation would substantially outweigh any detriment granting of the variance would cause, provided, however, that the proposed use is an inherently beneficial use.
- C. "D" variances, also known as "special reasons" variances (N.J.S.A. 40:55D-70d). The following are the six different types of "d" variances:
1. Use variances.
 2. Variances granting an expansion of a non-conforming use.
 3. Variances granting a deviation from a specification pertaining to a conditional use.
 4. Variances for an increase in floor area ratio.
 5. Variances for an increase in the permitted density.
 6. Variances for height of a principal structure which exceeds by 10 feet or 10% the maximum height permitted in the district.
- D. A bulk variance is a variance from a dimensional requirement of the zoning ordinance, while a use variance is a variance from the use the ordinance allows for a given property.
- E. The applicant always has the burden of proof to establish elements of a variance, expressed as the positive and negative criteria.
- F. The positive criteria differs for each type of variance, as described below.
- G. The negative criteria is the same for all variances. No variance may be granted unless the Board finds that it can be granted (a) without substantial detriment to the public good, and

(b) it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

[T]he statutory mandate that the grant of the variance occur “without substantial detriment to the public good” focuses on the impact the variance will have on the specific adjacent properties affected by the permitted deviations from the ordinance. The requirement that the grant of the variance not “substantially impair the intent and the purpose of the zone plan and zoning ordinance” focuses on whether the grant of the variance can be reconciled with the zoning restriction from which the applicant intends to deviate.

Lang v ZBA of the Borough of North Caldwell, 160 N.J. 41, 57 (1999).

XIII. PROOFS REQUIRED FOR HARDSHIP VARIANCES

A. Positive Criteria.

1. Where peculiar and exceptional practical difficulties, or exceptional and undue hardship exist, based on:
 - a. the exceptional narrowness, shallowness or shape of a specific piece of property,
 - b. exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or
 - c. extraordinary and exceptional situations uniquely affecting a specific piece of property or the structures existing thereon, the Board may grant a variance to relieve the difficulties or hardship. (N.J.S.A. 40:55D-70c(1)).

B. Negative Criteria.

No variance may be granted unless the Board finds that it can be granted:

- a. Without substantial detriment to the public good.
- b. It will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

C. Legal Interpretation.

1. According to the New Jersey Supreme Court in Davis Enterprises v. Karpf, 105 N.J. 476, 493 (1987, Stein J. concurring):

[A] lot with unusual topography may provide a basis for a variance from restrictions as to maximum height. A narrow lot may in some instances justify a side yard variance. The existence of a non-conforming structure may justify a variance from maximum land-coverage requirements. The availability of public parking on adjacent property may be a factor that would support a variance from parking requirements. In each of these examples, the claimed hardship need not result in the inability to make any use of the property. Typically, the contention is that the strict enforcement of the zoning ordinance, in view of that property's unique characteristics imposes a hardship which may inhibit the extent to which the property can be used. (Emphasis added.)

XIV. PROOFS REQUIRED FOR C(2), OR FLEXIBLE C VARIANCES

A. Positive Criteria.

1. A “flexible c” variance may be granted when the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. (N.J.S.A. 40:55D-70c(2)).

B. Negative Criteria.

1. No variance may be granted unless the Board finds that it can be granted:
 - a. Without substantial detriment to the public good.
 - b. It will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

C. Legal Interpretation.

1. Introduced in 1984, the c(2) variance was intended to liberalize the Board's power to grant c variances. The applicant must prove that the purposes of the MLUL will be advanced by the proposed deviation from the zoning ordinances, and that the benefits of the deviation substantially outweigh any detriment. The purposes of the MLUL are found at N.J.S.A. 40:55D-2. The most commonly cited purposes of the MLUL are that:
 - a. the application *enhances the safety or general welfare* of the municipality (N.J.S.A. 40:55D-2a).
 - b. the application *provides adequate light, air and open space* (N.J.S.A. 40:55D-2c).
 - c. the application *promotes the establishment of appropriate population densities and concentrations* (N.J.S.A. 40:55D-2e).
 - d. the application would *provide sufficient space in appropriate locations* for a variety of residential or recreational uses in order to meet the needs of all New Jersey citizens (N.J.S.A. 40:55D-2g).
 - e. the application *promotes a desirable visual environment* (aesthetics) (N.J.S.A. 40:55D-2i).
2. According to the New Jersey Superior Court in Kaufman v. Planning Board, 110 N.J. 551, 563 (1988):

By definition, then, no c(2) variances should be granted when merely the purposes of the owner will be advanced. The grant of approval must actually benefit the community in that it represents a better zoning opportunity for the property. The

focus of a c(2) case, then, will not be on the characteristics of the land that, in light of current zoning requirements, create a “hardship” on the owner warranting a relaxation of standards, but on the characteristics of the land that present an opportunity for improved zoning and planning that will benefit the community.

XV. PROOFS FOR SPECIAL REASONS OR "D" VARIANCES

- A. Positive Criteria.
1. In particular cases and for special reasons, the Board may grant a variance to permit a use or structure in a district which restricts such uses or structures; to permit expansion of a non-conforming use; to change a conditional use standard; and to permit an increase in floor area ratio, density or height (N.J.S.A. 40:55D- 70d). “Special reasons” are generally described as the purposes of zoning set forth in the Municipal Land Use Law. Just as with a c2 variance, the Board should identify which of the purposes of zoning are promoted by the application.
- B. Negative Criteria.
1. No variance may be granted unless the Board finds that it can be granted:
 - a. Without substantial detriment to the public good.
 - b. It will not substantially impair the intent and purpose of the zone plan and zoning ordinance.
- C. Special requirement: all “d” variances require five affirmative votes.
- D. Use Variances (N.J.S.A. 40:55D-70d(1)).
1. In the context of a use variance application, court decisions emphasize that the “promotion of the general welfare” is the zoning purpose which most clearly amplifies the meaning of special reasons.
 2. Hardship can be considered a special reason when the applicant's land cannot reasonably be developed with a conforming use.
 3. The New Jersey Supreme Court has said,
 - a. [I]f the use for which a variance is sought is not one that inherently serves the public good, the applicant must prove and the board must specifically find that the use promotes the general welfare because the proposed site is particularly suitable for the proposed use. Medici v. BPR Co., 107 N.J. 14 (1987). (Emphasis added.)
 - b. For a use variance, the requirement that the variance will not substantially impair the intent and purpose of the zone plan and the zoning ordinance must be proven with an “enhanced quality of proof.”
 - c. For a use variance, the Board must make clear and specific findings that the relief sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.

- E. Variance to Permit Expansion of a Non-Conforming Use (N.J.S.A. 40:55D-70d(2)).
1. Existing uses which predate new zoning ordinances are called “non-conforming uses” and are grandfathered. Non-conforming uses run with the land, not with the landowner. The goal of the MLUL is to eventually bring non-conforming uses into compliance with the Master Plan, without overriding property rights and due process.
 2. As a result, non-conforming uses may not be expanded or extended without a variance, and new uses may only be allowed if they are the same as or substantially similar to the existing non-conforming use. Any expansion of a nonconforming use requires a d(2) variance. The Supreme Court has explained the law regarding non-conforming uses as follows:

[O]ur courts have held that an existing non-conforming use will be permitted to continue only if it is a continuance of substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance. [*Citations omitted.*] In that regard, non-conforming uses may not be enlarged as of right except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference. [*Citations omitted*] Where there is doubt as to whether an enlargement is substantial rather than insubstantial, the courts have consistently declared that it is to be resolved against the enlargement or change. [*Citations omitted*] [Emphasis added.]

Belleville v. Perrillo’s, 83 N.J. 309, 316 (1980).

- F. Variance to Change a Conditional Use Standard (N.J.S.A. 40:55D-70d(3)).
1. Conditional uses are uses that are allowed in the zone as long as the applicant meets certain specified conditions. If the applicant can meet the conditions, he or she applies to the Planning Board. If not, (the application must be to the Zoning Board for a d(3) variance. Because a conditional use is not a prohibited use, the applicant need not meet the stringent standards required for a use variance. The focus should be on the condition and the need for the condition, rather than on the use. According to the Supreme Court,
 - a. Proof of special reasons involves proof that the site proposed for the conditional use, in the context of the applicant's proposed site plan, continues to be an appropriate site for the conditional use notwithstanding the deviations from one or more conditions imposed by the ordinance. The Board must be persuaded that the non-compliance with conditions does not affect the suitability of the site for the conditional use.
 - b. To satisfy the first prong of the negative criteria, the Board must determine whether the deviation from the condition causes such damage to the character of the neighborhood as to constitute substantial detriment to the public good.

- c. To satisfy the second prong of the negative criteria, the Board must determine whether the variance is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district.

Coventry Square v. Westwood Zoning Bd. of Adjustment, 138 N.J. 285, 298-299 (1994).

G. Variances Involving Inherently Beneficial Uses.

1. The positive criteria for a “d” variance is automatically fulfilled when the proposed use is inherently beneficial to the community, such as a school, medical facility or nursing home. Inherently beneficial uses require a special analysis. The Board must weigh the proposed use against the positive and negative criteria. According to the New Jersey Supreme Court, this balancing will make it more difficult for municipalities to exclude inherently beneficial uses, but permit such exclusion when the negative impact of the use is significant. The weighing process involves four steps:
 - a. First, the Board should identify the public interest at stake (i.e. identify the beneficial use).
 - b. Second, the Board should identify the detrimental effect that will ensue from the grant of the variance (i.e. identify the facts underlying the negative criteria).
 - c. Third, in some situations, the local Board may reduce the detrimental effect by imposing reasonable conditions on the use.
 - d. Fourth, the Board should weigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good.

Sica v. Board of Adjustment of Tp. of Wall, 127 N.J. 152,165-166 (1992).

2. Because courts and boards were consistently ignoring the negative criteria when deciding cases involving inherently beneficial uses, the Legislature amended the MLUL in 1997 to explicitly require that the negative criteria be considered in such cases.

H. Legal Standards for Granting Waivers for Applications:

1. The standard for waivers is as follows, as stated by Judge Feinberg is Vardakis v. Washington Township Zoning Bd. of Adj., Docket No. MER-L-I 154-07, page 2527. The court stated that in order to grant a design waiver, the Board must understand that a waiver is no more than an acknowledgment by it that a condition of the property is satisfactory and meets the requirements of the local ordinance. The right of the Board to grant an exception from the provisions of a site plan or

subdivision approval can be found at N.J.S.A. 40:55D-51(a) and (b), which provides, in part, that:

The planning board when acting upon an application for preliminary or minor subdivision approval shall have the power to grant such exceptions from the requirements for subdivision (site plan) approval as may be reasonable within the general purposes and intent of the provisions for subdivision (site plan) review and approval of an ordinance adopted pursuant to this article, **if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of particular conditions pertaining to the land in question.**

The court went on to state that whenever a waiver is sought, the board must consider the request and make findings and conclusions with respect thereto.