

AN OUTLINE OF THE FUNDAMENTALS OF ZONING AND PLANNING
FOR THE PLANNING AND ZONING BOARDS

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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** prepares the Master Plan, and revises it every ten years.
- B. The **Township Committee** enacts zoning ordinances and adopts an official map based on the Master Plan. The Township Committee also reviews appeals from the Zoning Board regarding the granting of "use" variances by the Zoning Board.
- 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 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. Planning Board adopts master plan as a planning tool; reviews proposed ordinances and hears generally compliant applications.
- E. 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 Council.
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.
3. If 5,000 population or less, created by ordinance.
4. If over 15,000 population, 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
 - 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 Committee 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 majority of full membership.
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 67 A).

- 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) c (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 detriments 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 unit of affordable housing for every 16 jobs created by the application.
 - 2) One unit for every four regular residential units to be provided as part of any residential approval.
 - 3) No more Regional Contribution Agreements (RCAs).
 - 4) Non-residential development fee of 2.5 percent for equalized value of the project.

- j. 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 jurisdiction.
- 2. If not- "d" variance for 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.

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 20 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 of previous pages.)

VII. HEARING PROCEDURES FOR ZONING AND PLANNING 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, he must certify in writing that he has 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 members) 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.
- D. A quorum (four board members) is required for the Board to do business. Actions can be taken by 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-I. Annual financial disclosure statement.
- B. MLUL provisions.
 - 1. Direct or indirect: personal or pecuniary interest.
 - 2. Appearance of conflict.
- D. If conflicted out- member must step down and leave the room.
- E. 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. Local Ordinances typically state 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 Submissions:
 - 1. Certification by Administrative Officer of list of property owners following applicant's request – 7 days.
 - 2. Time during which plans are to be on file prior to a hearing – 10 days.
 - 3. Publication & mailing of notice of public hearing – 10 days.
 - 4. Copy of Board decision to be mailed to applicant or attorney after decision – 10 days.
 - 5. Time to appeal decision to governing body – 10 days.
 - 6. Certification of complete application – 45 days.
 - 7. Time for governing body to conclude review of record on appeal – 95 days.
- C. Time for Board to act once the application is deemed complete:
 - 1. Minor Subdivision application – 45 days.
 - 2. Preliminary Subdivision application of 10 or fewer lots – 45 days.
 - 3. Preliminary Subdivision application of more than 10 lots – 95 days.
 - 4. Preliminary Site Plan approval where Plan involves 10 acres of land or less, or 10 dwelling units or less – 45 days.
 - 5. Minor Site Plan – 45 days.
 - 6. Preliminary Site Plan approval where plan involves more than 10 acres or more than 10 dwelling units – 95 days.
 - 7. Time of protection of an approved Minor Site Plan – 2 years.
 - 8. Time of protection against Zoning changes for a Minor Subdivision – 2 years.
 - 9. Planning Board approval for application seeking variances or relief – 120 days.
 - 10. Time period during which a Planning Board shall grant or deny an application for conditional use – 95 days.
 - 11. Maximum number of days for Zoning Board of Adjustment to decide on an application that has been certified complete where a variance is coupled with another form of development – 120 days.
 - 12. Time of approval of a General Development Plan – 95 days.
 - 13. Maximum term for the approval of a General Development Plan – 20 years.
- D. Approvals:
 - 1. Time during which statutory rights exist under a Preliminary Major Subdivision or Site Plan approval – 3 years.
 - 2. Maximum number of 1-year extensions to a Preliminary approval that may be granted by a reviewing board.
 - 3. Time during which statutory rights exist under a Final Major Subdivision or Site Plan approval - 2 years.

4. Maximum number of 1-year extensions to a final approval that may be granted by a reviewing board.
5. Variance once granted runs with the land.

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 a county road.
- G. Service to Department of Transportation if located on a state highway or utilize state drainage system.
- H. Service to State Planning Commission if 150 acres or more, or if 500 units or more.
- I. Service to other requesting notice.

XI. DECISIONS AND RESOLUTIONS

- A. Time of Decision 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.
- 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. On record below (Trial de Novo).
- H. Appeals of use variances to the governing body, 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 (Whispering Woods)
 - 1. Once an appeal by way of a Prerogative Write action, has been filed contesting a board decision to the Superior Court, Land Use boards are divested of jurisdiction. However, matters that have been appealed from a Land Use 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 to the application that may result in the settlement. It is always important for the public to have some type of participation in the hearing.

3. In Whispering Woods v. Middletown Tp. 220 N.J. Super 161 (Law Div. 1987), a developer who had been denied approval, filed suit against the Planning Board. The parties then agreed to settle the case with the developer, making certain changes to the Site Plan application in order to achieve approval. The Planning Board conducted negotiations during a closed session. The matter was then noticed to the public and reviewed in an open session at the Board. The settlement was approved and then memorialized.
4. The Whispering Woods, Court found that the Board's actions were proper and distinguished them from Kramer v. Bd. of Adjust Sea Girt., 80 N.J. Super 454 (Law Div. 1963) aff. As to another issue, 45 N.J. 268 (1965) where the Board tried to ratify a vote settlement, previously done illegally in a closed session. The Court also distinguished Morton v. Clark 102 N.J. Super 84 (Law Div. 1968) affd. 108 N.J. Super 74 (App. Div. 1969) where the governing body, which had adopted the recommendations of the Zoning Board, sought to rescind approval, while the matter was pending in the Court.
5. The Whispering Woods Court held that there was no violation of the Open Public Meetings Act (OPMA), which permitted closed session discussions and open meeting adoption of settlement, as long as there is notice and an opportunity for the public to be heard. This method of settlement can also be used to settle affordable housing matters.
6. The Court went on to state that the closed session did not undermine the validity of the public meeting, where the substance of the Court approved settlement was granted by the board, followed by the ratification of a resolution. The Court also pointed out that the public was protected by the adversary process, where all parties can participate in the Prerogative Writ action.

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) shallowness, (3) shape of a piece of property, (4) by reason of exceptional topographic 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 (NJ.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. 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.

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 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. 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. 1,4 (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 Ed of Ad.*, Docket No. MER-L-1154-07, page 25-27. 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.* 40:55-51A 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.

XVI. CELL TOWERS

- A. On January 26, 1998, the New Jersey Supreme Court issued an opinion that altered the way local zoning boards will handle applications to construct cellular towers. In the past, courts had declared cellular towers to be "inherently beneficial uses," subject to zoning requirements that were less restrictive than requirements in other variance cases. In the new case, however, *Smart SMR of New York, Inc. v. The Borough of Fairlawn Board of Adjustment*, 152 N.J. 309 (1998), the Supreme Court said that it was not prepared to declare cell towers to be inherently beneficial uses at this time, although it held out the possibility of finding them to be inherently beneficial at some later date.
- B. The Supreme Court made the following points in the *Smart SMR* case.
1. To obtain a use variance for a cell tower, an applicant must satisfy the positive and negative criteria. The positive criteria require the applicant to establish "special reasons" for granting the variance. The negative criteria require proof that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and purpose of the zone plan and zoning ordinance.
 2. To satisfy the positive criteria, an applicant must prove that "the use promotes the general welfare because the proposed site is particularly suitable for the proposed use.
 3. In a use variance, the applicant must prove the second aspect of the negative criteria - that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance - through "an enhanced quality of proof" 4.
 4. As with all use variances, five votes are required to grant the variance.
 5. The Telecommunications Act, 47 U.S.C.A. §332 (West Supp.) (1997), an act passed by the U.S. Congress, also regulates the role a municipality may play in regulating the placement of cell towers and similar facilities. Under the Act, a municipal zoning board shall not unreasonably discriminate among providers of functionally equivalent services, nor shall it prohibit or have the effect of prohibiting the provision of personal wireless services. In other words, a municipality cannot keep all cell towers out of a town, nor can it give preferential treatment to one telecommunications company over another.
 6. Because the Telecommunications Act is a federal act, applicants for telecommunications facilities now have the right to appeal adverse zoning board determinations to Federal Court.
 7. A cell tower may not be suitable at every site for which an applicant applies. Some sites are better suited than others for towers or monopoles. Whether a tower will

substantially impair the character of a neighborhood will depend on the circumstances of each case.

8. Generally, the issuance of an FCC license should suffice for a carrier to establish that the use serves the general welfare. Nonetheless, if a telecommunications facility requires construction of a tower or monopole, the applicant must prove that the site is particularly suited for that use.
9. The fact that a cell tower may emit electromagnetic radiation cannot be considered by a zoning board when it considers the negative criteria. Radiation emissions are regulated by other state and federal laws.
10. Proof of an adverse effect on adjacent properties and on the municipal land use plan generally will require qualified expert testimony. Bare allegations that the construction of a tower or monopole will cause a decline in property values rarely will suffice.
11. Telecommunications earners should be permitted to erect needed telecommunications facilities on suitable sites.

XVII. Religious Land Use & Institutionalized Persons Act (“RLUIPA”)

Land use regulations can impede the ability of religious institutions to carry out their mission of serving the religious needs of their members. The Federal government has acknowledged this issue through the adoption of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 USC 21c, et seq.

RLUIPA bars imposition of land use regulations that create a “substantial burden” on the religious exercise of a person or institution, unless the government can show that it has a compelling interest for imposing the regulation *and* that the regulation is the least restrictive way for the government to further that interest. A mere inconvenience to the person or religious institution is not sufficient, but a burden which could be considered substantial may violate RLUIPA:

42 USC 21c. Protection of land use as religious exercise

(a) Substantial burdens

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

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

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

(2) Scope of application. This subsection applies in any case in which--

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

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

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

(b) Discrimination and exclusion

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

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

(3) Exclusions and limits. No government shall impose or implement a land use regulation that—

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

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

The protections of RLUIPA extend to a land use board's denial of a variance if the denial substantially burdens the exercise of religion. The burden of proof rests on the government to demonstrate that it does have a compelling governmental interest for effectuating the denial and is using the least restrictive means of furthering the interest.