3. MUNICIPAL LAND USE LAW

Updated by:

William F. Harrison, Esq.
Genova, Burns & Vernoia, Attorneys at Law

Lisa A. John, Esq.
Genova, Burns & Vernoia, Attorneys at Law

Act Adopted: *1975*
Statute: *NJSA 40:55D-1 et seq*

New Jersey was a founder of land use law in the U.S. and is attributable for several of the early landmark cases dealing with land use law. Land use law in New Jersey has its earliest roots in colonial times, where the law dealt primarily with what we would call site engineering. Today, New Jersey's land use law is codified at NJSA 40:55D-1 et seq. of the New Jersey statutes and is known as the Municipal Land Use Law (MLUL).

The MLUL was first enacted in 1975 and has been amended numerous times throughout the years. It is the legal vehicle that grants municipalities the power to regulate land use on behalf of the State. A key tenant of the United States and New Jersey Constitution is that unless a municipality is specifically granted a regulatory power by the Legislature, that power is reserved for the State, and the municipality may not engage in that activity. In the event that a municipality engages in a regulatory action that is not specifically authorized by the MLUL, the municipality's action will be deemed *ultra vires* or illegal by a court of competent jurisdiction. While the MLUL assigns planning and regulatory authority primarily to municipalities, there is a separate enabling legislation for counties (i.e. the County Planning Act, *NJSA 40:27-1 et seq).*

The MLUL regulates land use by establishing the broad content and procedural framework for how municipalities enact local zoning laws, review and authorize development projects, and integrate private development with public capital improvement programs. More specifically, the MLUL establishes regulations for creating and enacting the following:

- a comprehensive master plan;
- a capital improvement program;
- an official map;
- subdivision and site plan ordinance(s);
- zoning ordinances; and
- development application submission and review procedures.

Purposes of the MLUL

The MLUL serves a number of purposes, which are set forth in *NJSA 40:55D-2.* All of the purposes of the MLUL are based on protecting the public health, safety, morals and general welfare. The intent and purpose of the law is to:

- encourage municipal action to guide the appropriate *use and development* of all land in the State, in a manner that will promote the public health, safety, morals, and general welfare;

- secure safety from fire, flood, panic, and other natural and manmade disasters;
- provide adequate light, air and open space;
- ensure that individual municipal development does not conflict with development of neighboring municipalities;
- promote establishment of appropriate population densities and distribution;
- encourage the expenditure of public funds on appropriate projects by coordinating capital programming with land development;
- provide appropriate lands for all types of uses, in accordance with environmental capacities and meeting the needs of all residents;
- encourage the appropriate development of transportation facilities and routes that will enhance movement of goods and people;
- promote a desirable visual environment;
- promote conservation of historic resources, open space, energy resources, natural resources, and to prevent urban sprawl and degradation of the environment through improper use of land;
- encourage planned unit developments;
- encourage development of senior housing;
- reduce the cost of development by streamlining the procedures of public and private development;
- promote the use of renewable energy sources; and
- promote recovery and recycling of recyclable materials.

It must be stressed that each of the provisions of the MLUL are based *directly* on these goals.

Comprehensive Master Plan

The comprehensive master plan or *master plan* is a proposal for development of the municipality. It guides the use of land throughout the municipality in order to protect the public health and safety and to promote the general welfare. It is comprised of a report or statement on development proposals, along with maps, diagrams and texts, all designed to guide future development of the municipality.

The MLUL sets forth mandatory and discretionary components of the master plan. The master plan must contain: (1) a statement of objectives, principles, assumptions and standards upon which the proposals for the physical, economic and social development as set forth in the master plan are based; and (2) a land use element. The discretionary components that *may* be included in the master plan, are: (1) a housing element; (2) circulation plan; (3) utility service plan; (4) community facility plan; (5) recreation plan; (6) conservation plan; (7) economic plan; (8) historic preservation plan; (9) appendices or separate reports containing the technical foundation for the master plan; (10) a recycling plan; (11) farmland preservation plan; (12) development transfer plan; or (13) an educational facility plan. A municipality may include one or all of the discretionary components as part of its master plan depending on the municipality's needs and appetite.

Land Use Plan Element: The land use plan element is the plan for physical development of the municipality. In short, it is the heart of the comprehensive master plan, bringing together and summarizing all of the other elements. There are four (4) required parts to the land use plan element, which include:

- a statement setting forth the land use plan element's relationship to the comprehensive master plan's overall goals and policies and the components thereof;
- maps showing extent and intensity of each type of land use planned in the municipality and an explanation of how the land plan relates to the existing and/or proposed zoning ordinance and zoning map;
- the location of any existing and/or proposed airports and airport safety zones; and
- an explanation of the population density and development intensity recommended for the municipality.

Housing Element: The housing element is technically a discretionary component, however, it is a required component of the master plan in order for a municipality to enact its zoning ordinance (see *NJSA 40:55D-62a*), and it is also required in order to enter into the Council on Affordable Housing (COAH) process. Since the adoption of the Fair Housing Act of 1985 (*NJSA 52:27D-301 et seq*), the housing plan element has been a required part of the comprehensive master plan if the municipality elects to seek protection from exclusionary zoning litigation through the COAH process even though it is not a mandatory component of the plan pursuant to the MLUL. As described in the Fair Housing Act, the housing element is meant to broaden the accessibility of affordable housing, with particular emphasis on low- and moderate-income housing. The Fair Housing Act established required parts to the housing element, which have been supplemented by COAH rules (*NJAC 5:93-5.1*). These parts include:

- a detailed housing inventory by age, condition, value, characteristics and type, including the number of units affordable to low- and moderate-households and the number of substandard units capable of being rehabilitated;
- a six-year projection of anticipated residential construction, including low- and moderate-income housing, and the municipality's capacity to accommodate present and prospective housing needs, including those for affordable housing;
- an analysis of the municipality's present demographic characteristics, including at least household size, income levels, and age;
- an analysis of present and probable future municipal employment conditions;
- a determination of the municipality's present and prospective "Fair Share" for low- and moderate-income housing and its capacity to accommodate its present and prospective housing needs, including its "Fair Share" for low- and moderate-income housing. "Fair Share" is discussed more extensively in the chapter on the Fair Housing Act; and
- an analysis of the most appropriate locations for development of low- and moderate-income housing.
- a map of all sites designated by the municipality reserved for low and moderate-income housing and a listing of the owner, acreage, lot and block number of each site.
- location and capacity of existing and proposed water and sewer infrastructure for these sites;
- copies of New Jersey Department of Environmental Protection approvals and appropriate sewer-service designations in area water-quality management plans;

- New Jersey Freshwater Wetlands or National Wetlands Inventory maps, as appropriate;
- U.S. Geological Society quadrangles including all designated sites; and
- any other documentation deemed necessary by the council to review the municipal housing element.

Circulation Element: The circulation plan element should describe the location and type of all existing and proposed transportation facilities within the municipality. Specific reference is made to the use of the Federal Highway Administration (FHWA) highway classification system and to the depiction of air, water and rail transportation facilities for the movement of both goods and people.

Utility Service Plan: The utility service plan element analyzes the need for and depicts the location of water supply and distribution facilities, drainage and flood-control facilities, sewerage- and waste-treatment facilities, and solid-waste disposal facilities. The intent of this element is to conduct an infrastructure-capacity and constraints analysis in order to give direction to the municipality's capital improvement program.

A stormwater management plan shall also be included as part of the utility service plan only if a grant for the preparation of the stormwater management plan has been made available to the municipality *(NJSA 40:55D-93)*. Despite the fact that the stormwater management plan requirement was enacted in the early 1980s, these grants have never been available.

Community Facilities Plan: The community facilities plan element is intended to depict existing and proposed public, educational, and cultural sites and facilities.

Recreation Plan: The recreation plan element is closely related to the community facilities plan element but envisions "a comprehensive system of areas and public sites for recreation" clearly focusing on parklands, exercise facilities, and other uses not necessarily involving structures.

Conservation Plan: The conservation plan element is intended to "systematically analyze the impact of each of the other components and elements of the Master Plan" with respect to energy, water supply, and a wide range of natural resources and features.

Economic Plan: The economic plan element envisions a comprehensive look at the existing economic diversity, vitality, and stability of the municipality and a municipality's prospects for economic growth. A clear nexus between the municipality's labor pool and the economic-development activities of the municipality is expected.

Historic Preservation Plan: The historic preservation plan element requires identification of the location and significance of historic sites and districts along with identifying standards for determining the worthiness of a particular site or district as historic. An analysis of the impact of each element of the comprehensive master plan on historic sites and districts is also required.

Recycling Plan: The recycling plan element incorporates the State's recycling plan goals and requires that municipal recycling ordinances correlate to those goals. Recycling programs are required for all single-family developments of 50 or more units, all multi-family residential developments involving 25 or more units and commercial or industrial developments on more than 1,000 square feet of *land* (not floor) area.

Farmland Preservation Plan: The farmland preservation plan element must include a map illustrating significant areas of agricultural land and an inventory of

farm properties; a statement showing that municipal ordinances support and promote agriculture as a business; and a plan for preserving as much farmland as possible in the short term by leveraging farmland-preservation monies through option agreements, installment purchases and donations of permanent development easements.

Development Transfer Plan: The development transfer plan sets forth the public purposes, the locations of sending and receiving zones and the technical details of a development transfer program based on the provisions of *NJSA 40:55D-113 et al and NJSA 40:55D-137* et al related to the establishment of a Transfer of Development Rights program.

Educational Facility Plan: The educational facility plan is required to incorporate the purposes and goals of the "long-range facilities plan" required to be submitted to the Commissioner of Education by a school district pursuant to *NJSA 18A:7g-4.* The long-range facilities plan sets forth the school district's needs and how those needs will be addressed in the ensuing 5 years.

With the passage of the Educational Facilities Construction and Financing Act in 2000, the MLUL was amended to require that any long-range school-facilities plan be reviewed by the planning board. The board is required to make findings that the school-facilities plan is "informed by, and consistent with, at least the (comprehensive master plan) land use plan element and the housing element...and such other elements of the municipal master plan as the planning board deems necessary to determine whether the prospective sites for school facilities contained in the long-range facilities plan promote more effective and efficient coordination of school construction with the development efforts of the municipality." The planning board must devote at least one full meeting to the presentation and review of the long-range facilities plan prior to making these findings.

Relationship to Other Planning Activities: The comprehensive master plan *must* include statements indicating how it relates to:

- the comprehensive master plans of contiguous municipalities;
- the county master plan in which the municipality is located;
- the State Development and Redevelopment Plan; and
- the county or district solid-waste management plan.

It should be noted that the courts have increasingly focused on the nexus between the comprehensive master plan and implementing regulations. There is a considerable body of law that demonstrates that courts will not second-guess the intent of a community's planners in establishing sound planning policy unless land use and development regulations are not based on sound policy (or there is no linkage to planning policy), in which case those regulations may be overturned.

Reexamination

At least every six years the planning board is required to reexamine the municipality's comprehensive master plan and development regulations. If the planning board fails to conduct a reexamination within six years, that failure creates a rebuttal resumption that the development regulations are no longer reasonable (*NJSA 40:550-89.1).*

Official Map: The official map must reflect the appropriate provisions of the municipal comprehensive master plan, but its primary function is to officially delineate the location of streets, drainage ways,

flood-control basins, and other public facilities, whether in place or planned. The delineation of these structures on the official map will be deemed conclusive. (*NJSA 40:55D-32*).

The official map is adopted by ordinance of the municipality's governing body. Prior to a public hearing on the adoption, however, the official map must be referred to the municipal planning board for review and comment. The planning board's role is to review the official map for consistency with the comprehensive management plan and make its recommendations to the governing body with regard to adoption of the official map. The governing body may adopt an official map that is in whole or in part inconsistent with the comprehensive management plan but only upon a majority vote of its full authorized membership and stating the reasons for so acting.

To preserve the integrity of the official map, the municipality's administrative officials cannot issue permits for buildings or structures that would encroach on mapped streets and facilities (*NJSA 40:55D-34*). However, the zoning board of adjustment may direct that the permit be issued if a majority of its full authorized board finds that the specific parcel of land in question "cannot yield a reasonable return to the owner unless a building permit is granted." Where the board directs that the permit be issued, it will generally impose conditions on the granting of the permit so as to promote the health, morals, safety and general welfare of the public.

Where a mapped street or other facility is situated within, or partially within, a proposed development, the municipality may "reserve" the use of that land for public acquisition and use for the mapped purpose. A reservation of up to one year is provided by statute and can be extended with the approval of the developer. In addition, the developer is entitled to compensation for any "actual loss" caused by the temporary reservation. For the purposes of this section, "just" compensation is defined as "the fair market value of an option to purchase the land reserved for the period of reservation including, at least consideration of the real property taxes apportioned to the land reserved for the period of reservation and the reasonable increased cost of obtaining subdivision approval or site plan approval...caused by the reservation" (*NJSA 40:55D-44*).

The Capital Improvement Program

The Capital Improvement Program (CIP) is another key link between the comprehensive master plan and actual developments in the field. It serves as the municipality's action plan for development of the municipal infrastructure. Here, too, there must be a clear nexus between a municipality's planning policies, as established in the master plan, and "day-to-day" community development activities and practices.

The MLUL authorizes the governing body to direct the planning board to prepare a CIP with at least a six-year planning horizon, the first year of which functions as the municipality's capital budget (*NJSA 40:55D-29*). The CIP is prepared by gathering information from various agencies and departments in the municipality and taking into account the need for public facilities based on potential development, as indicated in the comprehensive management plan and/or as permitted by the municipality's land use regulations.

After conferring with the mayor, chief financial officer, other municipal officers and agencies and the local school board(s), the planning board completes the draft CIP

and sends it with a recommendation for adoption to the governing body. The governing body may modify the CIP before adoption but must state the reasons for doing so and approve the changes by an affirmative vote of the full membership.

Where any portion of the comprehensive master plan has been adopted by the municipality, the governing body or public agency seeking to undertake a capital improvement project necessitating the expenditure of public funds must first submit the project to the municipal planning board for review and recommendation. The planning board shall review the project for consistency with the comprehensive master plan and make a recommendation to the governing body or public agency regarding the project. The governing body or public agency may not take action in furtherance of the project without receiving the planning board's recommendation or until 45 days have passed, after the project was submitted to the planning board for review and a recommendation has not been received (*NJSA 40:55D-31a*).

Zoning Ordinance

The municipal body charged with the adoption of a zoning ordinance is the governing body. The municipal zoning ordinance regulates the nature and extent of uses of land and buildings and structures thereon. All zoning ordinances must be consistent with the land use plan element and the housing element of the master plan. There is a requirement that prior to the adoption of any zoning ordinance, the governing body must refer the ordinance to the planning board for a consistency determination as to these elements and make a recommendation to the governing body whether it should adopt the ordinance. After this recommendation, the governing body may adopt a zoning ordinance that is inconsistent with the land use element and/or housing element after stating its reasons for doing so and only upon an affirmative vote of the majority of the full authorized membership of the governing body.

Note that adoption of a zoning ordinance by the governing body is *permitted* by the MLUL but not *required* (*NJSA 40:55D-62*). Although virtually all do so, a municipality need not use zoning as a tool to control land uses. Thus, virtually all of the contents of a zoning ordinance are permissive. There are two exceptions: if the municipality adopts a zoning ordinance, it *must* regulate land uses within any delineated airport safety zones, and it *must* provide for the regulation of land adjacent to state highways, county highways, and municipal streets and highways if access management codes apply to such roadways within the municipality.

It is important to remember that the state grants municipalities the power to zone through the specifically enumerated provisions of the MLUL. Therefore, any zoning power that is not specifically granted to a municipality through the MLUL is reserved for the state and the municipality does not have the power or authority to regulate such aspect of zoning.

In enacting or amending a zoning ordinance, the municipality must base the provisions of the zoning ordinance on the protection of the public *health, safety, welfare,* and *morals.* If a zoning provision cannot be tied directly to furthering one of these four standards, it is arguably illegal. A zoning ordinance (*NJSA 40:55D-65*) may:

- regulate the nature and extent of land devoted to various land uses by creating specific districts, regulate land uses within those districts, and limit and restrict the use of buildings and structures to permitted uses;
- regulate the height, bulk, orientation, and other particulars of buildings and structures, lot coverage, and lot sizes and dimensions;

- provide for planned development in a subdivision and site plan ordinance;
- establish standards of performance and adequate physical improvement for parking, loading, circulation, and utility infrastructure;
- designate and control areas subject to flooding;
- provide for conditional uses;
- provide for "senior citizen community housing";
- require currency in property taxes and assessments before processing development applications;
- provide for historic districts and associated design guidelines if an historic preservation plan element has been adopted as part of the comprehensive master plan (*NJSA 40:55D-65.1*); and
- provide for sending and receiving zones for a development transfer program established pursuant to *NJSA 40:55D-137.*

Adoption of or Amendment of Land Use Ordinance

The governing body of a municipality may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. However, prior to adoption of the ordinance, the governing body must refer the ordinance to the planning board for the board to make a determination on the ordinance's consistency with the land use element and the housing plan element of the master plan *(NJSA 40:55D-64)*. The governing body may adopt a zoning ordinance, which is, in whole or in part, inconsistent with the land use element and housing plan element of the master plan, however, it must do so by an affirmative vote of the majority of its full authorized membership, with the reasons for so acting set forth in a resolution and recorded in the minutes when adopting the ordinance.

Municipalities are subject to the general notice provisions of *NJSA 40:49-1* and *NJSA 40:49-2.1,* which requires public notice to be provided for the governing body's hearings on a proposed adoption, revision or amendment of a municipal ordinance. In certain circumstances, however, personal notice is also required to be provided to affected property owners. Notice of a hearing on an amendment to the zoning ordinance proposing a change to the classification or boundaries of a zoning district, exclusive of classification or boundary changes recommended in a periodic general reexamination of the master plan by the planning board, must be given personally to affected property owners. In the case of a classification change, notice must be given to all property owners within the affected district and within the State within 200 feet in all directions of the boundaries of the district. In the case of a boundary change, notice must be given to all property owners in the state within 200 feet in all directions of the proposed new boundaries of the district, which is the subject of the hearing. In both cases notice must be given by the municipal clerk at least ten days prior to the hearing date *(NJSA 40:55D-62.1)*.

The notice must state the date, time and place of the hearing, the nature of the matter to be considered and an identification of the affected zoning districts and proposed boundary changes, if any, by street names, common names or other identifiable landmarks, and by reference to lot and block numbers as shown on the municipal tax map *(NJSA 40:55D-62.1)*.

Conditional Uses

A municipality may include conditional uses in its zoning ordinance. This is a use that is only "permitted" in a particular zone district provided the proposal satisfies the definite specifications and standards set

forth in the zoning ordinance that qualify it as a conditional use. Where the proposal satisfies each of the specifications and standards set forth in the zoning ordinance, the planning board has jurisdiction to review the application since it is considered a "permitted use". Where the proposal does not satisfy each and every one of the specifications and standards set forth in the ordinance, the use will not be considered a "permitted use". Thus, the applicant must seek a "d" variance in order to construct a use in a district restricted against such use pursuant to *NJSA 40:55D-70d* and must submit its application to the zoning board of adjustment for review and approval. The board, in which a conditional use application is submitted, has 95 days from the date the application is deemed complete to make a determination on the application.

Zoning Variances

A variance is permission to depart from the literal requirements of a zoning ordinance *(NJSA 40:55D-7)*. In general, a variance is granted only because the provisions of the zoning ordinance cannot be applied to a particular piece of property due to conditions *pertaining to the property* that are not applicable to other properties in the same zone. A developer is not entitled to variance relief due to personal hardships but only for conditions relating to the land itself. Additionally, no variance may be granted if the general health, safety welfare or the public good would be compromised, with is commonly referred to as "negative criteria".

There are three types of variances that may be sought and granted. (i) c(1) hardship variances; (ii) c(2) special exception variances, both types of "c" variances are sometimes referred to as bulk variances; and (iii) "d" variances also referred to as "use variances".

A c(1) hardship variances may be granted if strict adherence to zoning provisions is impractical because of:

- an exceptionally narrow, shallow, or oddly shaped parcel;
- exceptional topographic features or conditions of the property; or
- other exceptional or extraordinary situations or circumstances that uniquely affect the property or legally existing structures located thereon.

A c(2) special exception variances may be granted if the applicant can show that (1) the purposes of the MLUL, set forth at *NJSA 40:55D-2* and set forth earlier in this chapter, would be advanced by a deviation from the zoning ordinance requirements; and (2) the benefits of the deviation would substantially outweigh any detriment if the variance were granted.

While d variances are sometimes referred to as "use variances", there are several types of d variances that may be granted other than to depart from a permitted use in a particular zone. D variances may be sought and granted for the following:

- to permit a use or principal structure not otherwise allowed in that zone district (however, a "d" variance cannot create a nonconforming use in an airport safety zone);
- to permit expansion of a nonconforming use;
- to permit deviation from standards pertaining to a conditional use;
- to increase the floor-area-ratio (FAR) beyond that allowed by the zone;
- to increase the permitted density beyond that allowed by the zone; and
- to increase the height of a principal structure more than ten feet or ten percent beyond that permitted by the zone.

The standards for review of "d" variances are somewhat higher than those for "c" variances. The applicant for a "d" variance

must demonstrate "special reasons" to depart from the zoning requirements. It is an enhanced quality of proof that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance. A "d" variance may only be granted by the zoning board of adjustment and only upon an affirmative vote of at least five members of the board.

The "special reasons" standard is a different burden of proof dependent upon the type of "d" variance that is being requested.

D(1) – Use Variance: With regard to use variances, it has been held that where the purposed use is an inherently beneficial use, such as a hospital, school, church, etc., "special reasons" is presumptively satisfied. Inherently beneficial uses are assumed to serve the zoning purpose of promoting the general welfare. Where a use is not considered an inherently beneficial use, the applicant must demonstrate that the use promotes the general welfare because the proposed site is particularly suited for the proposed use. Refer to **Medici v. BPR Co.,** *107 N.J. 1 (1987).*

D(2) – Expansion of Nonconforming Use: "Special reasons" is not applicable to expansions of nonconforming uses because the nonconforming use already has an impact on the area and an expansion of the use is likely to have less of an impact than the establishment of a use which is not permitted. Refer to ***Burbridge V. Mine Hill,*** *117 N.J. 376 (1990).* For example, a board could rely on aesthetic considerations alone to grant a (d)(2) variance for a minor expansion of a nonconforming use, even though such considerations would rarely justify a variance for a new nonconforming use.

D(3) – Deviation from Conditional Use Standards: Where an applicant cannot satisfy a condition of a conditional use standard, the applicant must demonstrate that the negative impacts from not meeting the conditional use standard can be mitigated in satisfaction of the negative criteria. Refer to ***Coventry Square Inc. v. Westwood Zoning Board of Adjustment.,*** *138 N.J. 285 (1994).*

D(4) – Increase in Floor Area: Where an applicant seeks to increase the permitted floor area, the applicant must demonstrate that the site will accommodate the problems associated with a larger floor area than that permitted by ordinance. Refer to ***Randolph Town Center v. Township of Randolph,*** *324 N.J. Super. 412 (App. Div. 1999).*

D(5) – Increase in Density: Where an applicant seeks to increase the permitted density, the applicant must demonstrate that the site will accommodate the problems associated with a greater density than that permitted by ordinance. Refer to ***Grubbs v. Slothower,*** *389 N.J. Super. 377 (App. Div. 2007).*

D(6) – Exceeding Height: Where an applicant seeks to exceed the permitted height by ten feet or ten percent of the permitted height, the applicant must demonstrate that the negative impacts from exceeding the height can be mitigated in satisfaction of the negative criteria. Refer to ***Grasso v. Boro of Spring Lake Heights,*** *375 N.J. Super. 41 (App. Div. 2004).*

In addition to satisfying the criteria specific to each type of variance as listed above, also known as the positive criteria, all variance applicants must also satisfy the "negative criteria" in order to be granted variance relief. The negative criteria is established by demonstrating that the relief requested may be granted without causing a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

Subdivision and Site Plan Ordinances

Subdivision and site plan review are different but closely related processes. It is important to understand the distinctions between the two.

Generally, a "subdivision" is the division of a tract of land into two or more lots for development or sale. Exceptions to this definition include:

- divisions of land for agricultural purposes, where each of the resulting parcels is at least five acres;
- divisions by testamentary or intestate provisions;
- divisions ordered by the courts, including judgments of foreclosure;
- consolidation of lots by recorded instrument; and
- conveyance of one or more adjoining lots owned by the same person that are certified to conform to the municipal development regulations and are designated as separate lots on the municipal tax maps to another person.

It should be noted that a division of land by testamentary or intestate provisions may not be used to circumvent the applicable zoning provisions where the property is located. *In **Egeland v. Colts Nexk Zoning Board of Adjustment**, 405 N.J. Super. 329 (App. Div. 2009)*, the court held that although a property owner is legally permitted to transfer their land by testamentary devise, the use of the devised land must conform to applicable zoning. In addition, a nonconforming lot created through a testamentary devise will be considered a self-created hardship and an applicant seeking a variance in order to utilize the lot may not demonstrate variance proofs pursuant to the c(1) criteria.

There are two types of subdivisions that a municipality may adopt regulations for by ordinance. They are minor subdivisions and major subdivisions. A minor subdivision is defined by the MLUL as a subdivision of land for the creation of a number of lots specifically permitted by ordinance as a minor subdivision, provided that such subdivision does not involve any of the following: (1) a planned development; (2) any new street; or (3) the extension of any off-tract improvements (*NJSA 40:55D-5*). A major subdivision is defined as any subdivision of land that is not classified as a minor subdivision. In other words, a municipality is granted considerable discretion by the MLUL on how it may define a minor subdivision versus a major subdivision. For example, one municipality may define a major subdivision as the division on land into three or more lots, whereas another municipality may define a major subdivision as the division of land into four or more lots. The distinction is important for various reasons relating to application review and processing. Typically, major subdivision applications will be required to satisfy more criteria in order to receive approval than minor subdivision applications, and the review process will be more cumbersome.

In contrast to subdivision review, "site plan review" refers to the process of reviewing and approving proposed onsite improvements on one or more parcels of land once they have been created. Site plan review can be, and frequently is, done simultaneously with subdivision review, if both are required.

As with subdivisions, the MLUL permits municipalities to adopt regulations for minor and major site plans by ordinance. A minor site plan is defined by the MLUL as a development plan of one or more lots within the scope of development specifically permitted by ordinance as a minor site plan and does not include any of the following: (1) planned development; (2) any new street; or (3) the extension of

prorated off-tract improvements. Interestingly, the MLUL does not provide a definition for major site plan. However, many municipalities parrot the definition for major subdivision and define a major site plan as any site plan that is not classified as a minor site plan.

In order to distinguish between subdivision and site plan regulations, it is useful to think of subdivision regulations as regulations for the creation of buildable lots and site plan regulations as regulations for the detailed layout of lots after they have been created.

Required Contents of Subdivision and Site Plan Ordinances: It is no accident that the authority to adopt subdivision and site plan ordinances are codified together with master planning requirements in the same body of law known as the MLUL. Regulations for the creation and development of individual lots should flow from and be entirely consistent with a municipality's broader planning and development policies.

The MLUL sets forth a number of *required* provisions that must be contained in any subdivision or site plan ordinance adopted by the municipality (*NJSA 40:55D-38*). The ordinance must contain provisions for the following:

- procedures for submission and processing of development applications;
- approving staged development;
- ensuring consistency of the subdivision or layout of land with the requirements of the zoning ordinance;
- ensuring suitable street layout to accommodate prospective traffic and firefighting equipment consistent with the official map and circulation element of the comprehensive master plan, if any;
- ensuring adequate utilities and shade trees to serve residents and occupants;
- ensuring suitably sized and situated areas for public uses and open space;
- ensuring reservation of open space to be set aside for residents of planned developments;
- ensuring building controls in areas subject to flooding to avoid danger to life or property;
- ensuring protection and conservation against soil erosion;
- ensuring conformity with provisions of the Air Safety and Hazardous Zoning Act of 1983 (*NJSA 6:1-80 et seq.*);
- ensuring conformity with a municipal recycling ordinance;
- ensuring conformity with the State Highway Access Management Act (SHAMA: *NJSA 27:7-91 et seq*);
- ensuring conformity with any county access management codes with respect to county roads within the municipality;
- ensuring conformity with any municipal access management codes with respect to municipal streets;
- ensuring protection of potable water supplies;
- ensuring conformity with stormwater management plans and ordinances;
- ensuring conformity with the model ordinance promulgated by the New Jersey Department of Environmental Protection (NJDEP: *NJSA 13:1E-99.13 et al.*) concerning recycling within new multifamily developments;
- ensuring performance in substantial conformity with the approved development;
- standards for grading;
- standards for improvement and construction of streets or drives;

- standards for walkways;
- standards for curbs;
- standards for gutters;
- standards for streetlights;
- standards for shade trees ;
- standards for fire hydrants and water;
- standards for drainage facilities;
- standards for sewerage facilities; and
- standards for other improvements that may be deemed necessary by the municipality.

Discretionary Contents of Subdivision and Site Plan Ordinances: In addition to the required provisions, which must be set forth in any subdivision or site plan ordinance, the MLUL also sets forth discretionary provisions that **may be included** in the ordinance. They are provisions for the following:

- off-tract infrastructure improvements (water, sewer, drainage, and street) necessitated by the proposed development (*NJSA 40:55-39*); and
- standards for planned development.

Off-tract improvements and Off-site improvements: *Off-tract* means not located on the property which is the subject of a development application nor on the closest half of an abutting street or right-of-way" while *off-site* means an area located outside of the lot lines of the lot in question but within the property, of which the lot is a part, that is subject to a development application or the closest half of the street or right-of-way of which the lot is a part. (*NJSA 40:55D-5).*

The distinction is important in multi-lot developments where each lot is considered a site. The developer may be required to provide or pay for all the cost of *off-site* improvements but only the *pro rata* share of "reasonable and necessary" *off-tract* improvements (N*JSA 40:55D-42*), so it is important to clearly determine where the tract boundary lies. While there is no single method of apportioning the cost of off-tract improvements, the *pro rata* share is considered to be that portion which bears a rational nexus to the needs created by and benefits conferred upon the development. Where a developer contests the pro rata share assessed against it for development, it may pay the assessment under protest and institute a legal action challenging the assessment. The legal challenge, however, must be brought within one year of the date of payment in order to preserve the right to contest the assessment.

Residential Site Improvement Standards (RSIS): It is important to recognize that there is another body of law that will supersede local development standards for residential construction that may be contained within a municipality's subdivision and/or site plan ordinance. It is known as the Residential Site Improvements Standards (RSIS: *NJAC 5:21-1 et seq*). Where a local standard is in conflict with the RSIS, the RSIS will supersede the local standard. Where an applicant seeks to deviate from the RSIS or where a board would rather have the proposed development comply with its local standard, the applicant may seek a *de minimis* exception or waiver from the RSIS. The local review board may grant *de minimis* exceptions from RSIS for standards which are minor in nature upon specific findings that (1) the deviation is consistent with the intent of RSIS, (2) the deviation is reasonable, limited and not unduly burdensome, (3) the deviation meets the needs of public health and safety, and (4) the deviation takes into account existing infrastructure and possible surrounding future development. In the event the local review board approves the *de minimis* exception, it must forward the approval to the Department of Community Affairs (DCA).

An applicant may also seek a waiver from RSIS for standards that are not *de minimis* in nature. A request for a waiver must be made directly to DCA. In order to receive a waiver from RSIS, the need for the waiver must be based on danger to public health and safety that would be caused by adherence to the RSIS standard.

For more information on *de minimis* exceptions and waivers refer to *NJAC 5:21-3.2* through *3.4.*

Planned Development: Subdivision and site plan ordinances *may include* provisions for planned development, including planned unit development, planned residential development, planned commercial development and residential clusters (*NJSA 40:55-39*). A *Planned Unit Development* must have a minimum of 10 acres of contiguous or noncontiguous land and must be developed as a single entity within an overall plan. It must include *both* residential and quasi-public, public, commercial, or industrial areas (*NJSA 40:55D-6*). A *Planned Unit Residential Development* must have a minimum area of five acres of contiguous or noncontiguous land must be developed as a single entity in accordance with a plan for one or more residential clusters and *may* include nonresidential uses for the benefit of the residential development.

A Planned Commercial Development must be developed in accordance with a single plan containing one or more structures for commercial or office use along with common areas for those uses and incidental residential or other uses. There is no minimum area requirement defined by the MLUL for planned commercial development. A *Residential Cluster* does not have a minimum area requirement but must be developed in accordance with a plan containing residential housing units and ancillary common or public open space. Planned developments are seen as a way of improving the quality of developments obtained and providing both the developer and planning board some flexibility in processing applications. The planning board is authorized to grant density or intensity increases for portions of the development and to allow more intensive uses to proceed ahead of other phases of a development.

Planned development implies clustering of uses and the creation of open space for active or passive recreation. Resulting open spaces are to be improved and maintained to benefit owners or residents of the development. The municipality cannot *require* that the resulting open space be dedicated for public use but may *accept* such dedications (*NJSA 40:55D-43*). If open space is to be retained by the developer, an "open space organization" must be created to own and maintain that space. In the event of a failure of the open space organization to appropriately maintain the open space, the municipality can take over maintenance and charge the costs of such maintenance back to the underlying or "benefitted" owners. To do so, the municipality must first make a written demand that the "deficiencies of maintenance" be cured and allow 35 days for that to occur. A public hearing on the matter is required. If the deficiencies are not cured, the municipality can take over maintenance for up to one year. Before the expiration of the year period, the governing body or open space organization may request a public hearing, at which hearing the open space organization may show cause why maintenance by the municipality should not continue for the succeeding years. If the open space organization is found incompetent, municipal jurisdiction will be extended for an additional year.

General Development Plan Approval: A developer proposing a planned development for 100 acres or greater may submit an application for general development plan approval to the planning board for review and approval prior to submission for preliminary approval. The greatest benefit for submitting for general

development plan approval is that the approval is good for a period of up to 20 years. Therefore, the project will be protected from zoning changes for a much greater time period than if preliminary site plan approval was received.

A general development plan may include, but is not limited to, the following:

- a general land use plan indicating the tract area, the land uses proposed and the location of those uses. The total number of dwelling units should be indicated along with floor area of nonresidential uses. The overall residential density and floor-area ratio for nonresidential uses should also be set forth;
- a circulation plan showing all related vehicular transportation facilities and pedestrian access;
- an open space plan including the location of parks and lands set aside for conservation and recreation purposes, together with any proposed improvements, including a plan operation and maintenance of those areas;
- a utility plan for water, sewer, and drainage lines, solid waste disposal, and a plan for their operation and maintenance;
- a stormwater management plan;
- an environmental inventory providing a general description of site conditions, including vegetation, soils, topography, geology, hydrology, climate and cultural resources, as well as manmade structures, and the probable impact of development on the environment;
- a community facility plan describing public and quasi-public uses associated with the development;
- a housing plan that shows the general development plan's relationship to the municipality's need for low- and moderate-income housing;
- a local service plan that described public services to be provided as an internal part of the development;
- a fiscal report describing the anticipated demand on services provided by the municipality and other bodies, such as school districts;
- a proposed schedule for phased projects; and
- the actual "municipal development agreement" which is the contract between the developer and municipality for the planned development.

From the date a general development plan application is deemed complete by the planning board, the planning board shall have 95 days to make a decision on the application, unless the applicant consents to an extension of time for the board to act on the application. To approve the general development plan the planning board must find that (*NJSA 40:55D-45*):

- departures from standard zoning provisions conform with the local planned development ordinance (*NJSA 40:55D-65c*);
- proposed common and open space is adequate in size, location and purpose and will be maintained and conserved;
- provisions for light and air, public services, traffic circulation and control, recreation, and visual enjoyment are adequate;
- the proposed planned development will not have an unreasonable or adverse impact on the surrounding area; and
- where the planned development is proposed over a period of years that the terms and conditions intended to protect the interests of the public,

residents and occupants of the development are adequate.

Once a general development plan receives approval by the planning board, the developer may only modify the location of uses within the development, the density of residential uses, or the floor area ratio of nonresidential uses upon application and approval by the planning board. The modifications shall be approved by the board if such modifications were the result of Pinelands or NJDEP review of the application. The developer is permitted, however, to reduce the size, the density or floor area ratio up to 15 percent without receiving planning board approval, provided that the number of low or moderate income housing units within the development are not reduced (*NJSA 40:55D-45.6*). The developer must also seek planning board approval in the event it wishes to deviate from the approved timing schedule of the development. In deciding whether or not to grant the modification, the planning board shall consider economic and market conditions and the actual need for the use proposed, as well as the ability for public facilities to accommodate the use. (*NJSA 40:55D-45.4*).

Where a municipality believes that a developer has failed to complete any section of the development by more than eight months, the municipality shall notify the developer in writing, and the developer shall have ten days to submit evidence that it has fulfilled its obligations with regard to completion. Thereafter, the municipality shall conduct a hearing on the alleged violation, and if the municipality finds that the developer has failed to satisfy its obligations, it may terminate the approval. The municipality may also terminate a general development plan approval if the developer does not submit an application for preliminary site plan approval to the planning board within five years of the date it received general development plan approval.

Discretionary Contents of a Subdivision Ordinance: A municipality may also include provisions in its subdivision ordinance that permit the following (*NJSA 40:55D-40*):

- review and approval of *minor* subdivisions (as previously stated, a minor subdivision cannot involve any planned development, new street or extension of any off-tract improvements (*NJSA 40:55D-5*), but the number of lots and/or land area involved is otherwise left to the discretion of the municipality in adopting the local ordinance); and
- lot averaging.

Additional Contents of a Site Plan Ordinance: The MLUL requires municipal site plan ordinances to contain additional provisions than those set forth above, which are required for both subdivision and site plan ordinance. Any site plan ordinance adopted by a municipality must contain provisions for the following (*NJSA 40:55D-41*):

- preservation of existing natural resources on the site;
- safe and efficient vehicular and pedestrians circulation, parking, and loading;
- screening, landscaping and the location of structures;
- exterior safety lighting and street lighting;
- conservation of energy and the use of renewable energy sources; and
- recycling.

Exceptions from subdivision and site plan ordinances: When acting upon an application for subdivision or site plan approval, the planning board may grant deviations (exceptions) from the provisions of the subdivision or site plan ordinance as may be reasonable where the general purpose and intent of the provision

is satisfied, if the literal enforcement of the provision is impractical or would exact an undue hardship upon the developer due to the peculiar conditions pertaining to the subject property (*NJSA 40:55D-51*).

Review of subdivision and site plan applications by board: Subdivision and site plan applications are "permitted" applications as opposed to "contested" applications. The MLUL provides that where a subdivision or site plan application conforms to the standards established by ordinance, the board **shall** approve the application. (*NJSA 40:55D-50*). Compare this to board review of variance applications where an applicant must demonstrate specific proofs in order to deviate from the zoning standards.

Development Application Process

Completeness Determination

When any type of development application is submitted to the planning board or zoning board of adjustment, the board is required to make a completeness determination on the application. A completeness determination is made by determining whether the application satisfies or does not satisfy the checklist requirements for the type of application that is submitted. Checklists are adopted by ordinance of the municipality and set forth the technical requirements that must be set forth on the plans for submission or required as part of the application. Where an applicant cannot satisfy a checklist requirement, it may request that the board waive the requirement.

For all types of development applications, the reviewing board is required to make a completeness determination within 45 days of the date of submission. In the event that the board determinations that the application is not complete, it must notify the applicant in writing of the deficiencies of the application before the expiration of the review period. In the event that the board deems the application complete, it shall set a hearing date for the application to be heard before the board. Where the board fails to make a completeness determination on the application within the 45 day period, the application shall be deemed statutorily complete and the applicant shall be entitled to a hearing date. (*NJSA 40:55D-10.3*).

Escrow Fees: In addition to satisfying the checklist requirements, a municipality may also require the developer to pay an escrow fee in order to have the application deemed complete and reviewed. An escrow fee is payment to the various experts involved in the review of the application, the review and preparation of documents, inspection of improvements, or for any other purposes related to the application for development (*NJSA 40:55D-53.2*). Deposits of more than $5,000 are interest bearing, and interest in excess of $100 per year must be refunded or applied to the developer's costs. The municipality may retain up to one-third of the interest for "administrative expenses." In certain cases, staged deposits are permitted, and as funds are paid out of the account, replenishment of the fund is required.

Public Notice

Generally, notice to the public must be provided, via newspaper notice and personal notice, before a development application may be heard before the planning board or zoning board of adjustment. The party responsible for providing notice is the applicant unless the municipality designates a particular municipal official to undertake notification by ordinance. When notice is required, it must be given in the same manner for all types of development applications.

Personal notice: Personal notice is required to be given to property owners within a 200 foot radius of the site. An

applicant may obtain a list of property owners from the administrative officer authorized to provide the list. Upon written request, the administrative officer must provide a certified list of names and addresses of whom must be notified within seven days. The applicant is entitled to rely on the list provided by the administrative officer, and failure to give notice to any property owner or entity not included on the certified list, shall not invalidate the hearing or proceedings.

In addition to providing personal notice to property owners within a 200 foot radius of the site, personal notice must also be served on the following entities:

- the adjoining municipality if the municipal border is within the 200-foot boundary;
- the county, if the property is adjacent to an existing or proposed county road shown on the official county map or on the county master plan, adjoins any other county land, or is within 200 feet of a municipal border;
- the commissioner of Transportation if the property adjoins a state highway;
- the State Planning Commission for properties exceeding 150 acres or 500 dwelling units; and
- any public utility, cable television company, or local utility that has an easement within the municipality and has registered with the municipality requesting such notice.

Personal notice is typically sent by certified mail, return receipt requested, rather than through personal service, which is also permitted under the MLUL.

Newspaper notice: Notice of the hearing must also be published in the official newspaper of the municipality prior to the hearing.

Contents of notice: The notice provided must state the date, time and place of the hearing and the nature of the matter to be discussed. It must also identify the subject property by street address, if any, or by lot and block number as shown on the municipal tax maps. The notice must further provide the location and times at which the plans and documents on file for the application may be reviewed by the public (*NJSA 40:55D-11*).

The courts have interpreted this statutory requirement to mean that notice must fairly apprise members of the public of the nature and character of the proposed development so that those who may be affected by the development may make an informed decision as to whether they should participate in the hearing. Refer to ***Perlmart of Lacy, Inc. v. Lacey Township Planning Board***, *295 N.J. Super. 234, 239 (App. Div. 1996)*. Notice need only convey a common sense description of the nature of the application and is not required to be exhaustive.

Timing: Personal notice must be mailed or served, and newspaper notice must be published, at least ten days prior to the hearing date for the application.

Jurisdiction: It is critical the proper notice be given for any development application that requires notice. Notice is a jurisdictional issue. This means that if any part of the required notice process is flawed, the board will not have jurisdiction to hear the application and any proceedings conducted on an application with flawed notice will be void.

Hearings: In addition to the materials required to be on file for the application, the applicant may also bring additional supporting materials to the public hearing itself. The additional materials will become part of the official record and marked into evidence as exhibits.

At the hearing, the applicant will present its experts and witnesses in support of the application and the public will have an opportunity to cross-examine such

witnesses and present its own witnesses in opposition or in support of the application. Technical rules of evidence do not apply to the proceedings, although all testimony is required to be taken under oath. However, because applicants and objectors have the right to cross-examine all testimony and evidence produced, petitions and/or letters and the like offered into evidence without the signer of such document being present for cross-examination will not be accepted into evidence by the board. A verbatim record of the proceedings must also be kept and provided to interested parties upon request.

Application Procedures

Procedures for Minor Subdivision Review: Once a minor subdivision application is deemed complete by the planning board, the board has 45 days to make a determination on the application unless the applicant grants an extension of time for the board to act. In the event that the board fails to make a decision within the 45 day time period, absent the consent of the applicant to extend the time to act, the application shall be deemed statutorily approved (*NJSA 40:55D-47b*).

It is within the discretion of the municipality to determine whether a public hearing by the planning board is required in connection with a minor subdivision. This is because the MLUL permits municipalities to adopt minor subdivision ordinances that waive the notice and public hearing requirements typically associated with development applications. In such cases, the planning board or subcommittee of the planning board, appointed by the chairman of the board to review subdivision applications, may grant the application if it finds that the application satisfies the provisions of the minor subdivision ordinance. Whether a minor subdivision application is approved with or without a public hearing, the board/subcommittee may impose conditions on the approval to ensure compliance with the ordinance and the construction of the improvements necessary to support the subdivision.

All minor subdivision approvals are considered "final approvals". Once approval is received, a plat or subdivision deed describing the subdivision must be filed by the developer with the county recording office, municipal engineer, and municipal tax assessor. If the subdivision is not recorded within 190 days of the date of the planning board's resolution granting the subdivision, the subdivision approval shall expire (*NJSA 40:55D-47d*). The time period may be extended by the Board, however, if the developer proves to the Board's reasonable satisfaction that: (1) it was barred or prevented, directly or indirectly, from filing because of delays in receiving legally required approvals, and (2) that it applied promptly for and diligently pursued the required approvals. The length of the extension shall be equal to the period of delay. This extension may be applied for either before or after the expiration of the 190 day period.

Once recorded, the minor subdivision is protected from changes in the zoning requirements and general terms and conditions upon which the application was granted for a period of two years. The two-year period runs from the date of the board's resolution approving the subdivision and not from the date it was recorded. If development has not commenced within that period, new regulations may control development of the property. The planning board may, however, grant an extension of minor subdivision approval for a period not to exceed one year if: (1) the developer was barred or prevented, directly or indirectly, from proceeding with development because of delays in receiving legally required approvals, and (2) the developer applied promptly for and diligently pursued the required approvals. This extension must be applied for before the

expiration of the two-year approval period or before the 91st day after the developer received the last legally required approval from other governmental entities, whichever is later (*NJSA 40:55D-47g*). This provision allows the developer to concentrate on obtaining the required approvals but may causes confusion for the municipality as to what approvals are still in effect.

Procedures for Minor Site Plan Review: As with minor subdivisions, minor site plan approvals shall be granted or denied within 45 days of the date of submission of a complete application. In the event that the application is not decided within the 45 day time period, without the consent of the application to extend such time to act, the application shall be deemed statutorily approved (*NJSA 40:55D-46.1a*). In addition, as with minor subdivision applications, the requirement for a public hearing may be waived for minor site plans (*NJSA 40:55D-46.1*). The planning board chairperson may appoint a board subcommittee to review minor site plans. The initial review of the board or subcommittee is the only review necessary for final approval. Approval of the minor site plan protects the developer from changes in zoning regulations for a period of two years. Although the board is not authorized to grant other extensions, the extension for governmental delay is available.

Procedures for Preliminary Major Subdivision Review: Procedures for approval of major subdivisions are understandably more complex, involving more detailed applications and both preliminary and final reviews. Matters are further complicated by different processing times, requirements, and vesting periods for what might be called "small major subdivisions" and "large major subdivisions." These distinctions are important to understand.

All applications for major subdivisions are required to file a plat and such other information as is reasonably necessary for the board to make an informed decision as to whether the requirements necessary for preliminary approval have been met. (*NJSA 40:55D-48*). The "other information", as may be deemed reasonably necessary to make a decision, will be set forth in the preliminary subdivision ordinance and checklist.

Unlike minor subdivision applications, public notice is required and a public hearing on a major subdivision application may not be waived and is required by the MLUL (*NJSA 40:55D-10a*). The board is required to conduct a public hearing(s) and make a determination on a major subdivision application proposing to create ten or fewer lots ("small major subdivision application") within 45 days of the date the application is deemed complete. The board is required to conduct a public hearing(s) and to make a determination on a major subdivision application proposing to create more than ten lots ("large major subdivision application") within 95 days of the date the application is deemed complete (*NJSA 40:55D-48*). There are, however, exceptions to these time periods. Where a subdivision application is joined with another type of development proposal, such as site plan or variance review and approval, the longest applicable review period governs (*NJSA 40:55D-51c*). An applicant, of course, may grant the board an extension of time to act on the application, however, the board may not unilaterally extend the period to act without the applicant's consent. Where the board fails to act within the required time period, and the applicant has not consented to an extension of that time period, the application shall be deemed statutorily approved (*NJSA 40:55D-48c*).

Procedures for Preliminary Major Site Plan Review: The procedures for the processing of preliminary site plans are essentially identical to those for major subdivisions, except for a slight variation in

the permitted review time. Once the application is deemed complete, the review period for approval of site plans is 45 days for applications involving up to ten acres of land and up to ten dwelling units and 95 days for site plans involving more than ten acres or more or more than ten dwelling units (*NJSA 40:55D-46c*). Again, where the board fails to act within the specified timeframe, without the applicant's consent to extend such time, the application will be deemed statutorily approved (*NJSA 40:55D-46c*). Since an approved site plan is not filed with the county recorder, the filing provisions applicable to major subdivisions do not apply.

Effect of Preliminary Subdivision or Site Plan Approval: Where preliminary major subdivision approval is received for property comprising less than 50 acres of land, the property will be protected from zoning changes for a period of three years from the date of approval. This period may be extended, however, upon the request of the applicant to the board which reviewed the application. The board may grant a maximum of two one-year extensions, at its discretion.

Where preliminary major subdivision approval is received for property comprising 50 or more acres, the board may provide for a longer protection period than three years. The period shall be as long as the board deems necessary taking into consideration:

- the number of dwelling units proposed or floor area for nonresidential uses;
- economic conditions; and
- the comprehensiveness of the development.

The initial protection period received for property comprising 50 or more acres may also be extended, at the board's discretion, upon application. The extension period may be for an additional period of time as the board deems reasonably necessary taking into account the above factors. However, if the design standards have changed in the interim, the development may be forced to comply with the revised standards.

The developer may actually apply for an extension *after* the protection period has expired. However, if subdivision standards have changed in the interim, the new standards will be applied to the extension.

In both cases, the board is also required to grant an extension of preliminary approval for a period not exceeding one year from what would otherwise be the expiration date of preliminary approval where the developer can prove that it was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals. This type of extension is *in addition* to the extensions described above and may be applied for up to 91 days after the developer receives the last legally required approval from other governmental agencies.

The zoning changes that a development is protected from, provided the approval is valid, include use requirements, layout and design for streets and related improvements, lot sizes, yard dimensions and off-tract infrastructure requirements. Development projects will not be protected from modifications to these standards, however, when the modifications are made for "public health and safety" reasons. The development is not protected from changes in state regulations affecting development of the land.

If the developer is otherwise ready, willing and able to proceed with development, but is directly or indirectly barred from doing so by a legal action or directive placed "to protect the public health and welfare", the running time of the approval is suspended for the duration of that legal action or directive (*NJSA 40:55D-21*).

Final subdivision approval: The developer may apply for final subdivision

or site plan approval at any time before the expiration of the preliminary approval or simultaneous with preliminary approval. Staged final approval is also permitted. The planning board must act on the final subdivision and/or site plan application within 45 days after the application has been deemed complete. The board's discretion in granting final approval is limited only to ascertaining if the final drawings, specifications, and estimates submitted conform to the terms of the preliminary approval, the terms of the ordinance relating to final approval, and the standards of the Map Filing Act, in the case of subdivision approval (*NJSA 46:23-9.9 et seq*). If the planning board does not act on the application for final approval within the 45-day period (or any extension consented to by the applicant), the application shall be deemed statutorily approved (*NJSA 40:55D-50b*).

When the planning board approves an application for final subdivision approval, the applicant has 95 days from the date the plat is signed to file the signed plats with the county recording officer. The planning board may extend that period for up to 95 additional days if the developer demonstrates that it was barred or prevented, directly or indirectly, from filing because of delays in obtaining legally required approvals for other governmental agencies and that it applied promptly for and diligently pursued the approvals. The board may grant an extension for the length of the delay. The applicant may apply for this extension before or after the original expiration date (*NJSA 40:55D-54*).

Once the plat is properly recorded, in the case of a subdivision, the applicant's rights, as conferred by the preliminary approval, are vested and the applicant is protected from any changes in zoning for a period of two years from the date the board approved the application (*NJSA 40:55D-52a*). There is no similar recordation requirement for site plan approval, and therefore, the two-year period begins to run on the date the board adopts its resolution granting the approval. In addition, the planning board may grant up to three one-year extensions of this protection period. The applicant may file for these extensions either before or after the actual expiration of the approval. For planned developments of 50 acres or more and for conventional subdivisions or site plans of 150 acres or more, the planning board may set a longer protection period (*NJSA 40:55D-52b*).

Variance Approval: The MLUL does not offer detailed procedures for processing variance applications, as it does for subdivisions and site plans, but a variance is considered an application for development (*NJSA 40:55D-3*) and a hearing is required. At the hearing, the applicant is required to demonstrate the appropriate criteria for the type of variance requested, as discussed prior.

The board must make a determination on all types of variance applications within 120 days of the application being deemed complete (*NJSA 40:55D-61*). If the variance application is filed concurrently with another type of application (e.g., a subdivision), the longest of the applicable time periods applies and the 120-day review period would apply.

Where more than one type of application is required for a development project (e.g., variance and subdivision approval), the applicant, at its discretion, may apply for both types of approval separately or concurrently. If the developer elected to file the applications separately, it would apply for the variance approval first. This is because variance applications are disfavored, whereas subdivision and site plan applications must be approved by the board if the application satisfies the subdivision or site plan ordinance. Filing separate applications allows the developer the opportunity to "test the waters" on the variance issue without going to the considerable expense of preparing various

planning and engineering analyses associated with the other applications.

Conclusion of Hearings: At the conclusion of a hearing on any type of development application, the board essentially has three choices. It can (1) approve the application without conditions; (2) approve the application with conditions; or (3) deny the application. Conditions are typically imposed to ensure that the applicant follows through with any representations that it makes during the course of the hearings. In the case of variance application, conditions are generally imposed to minimize any detriment that may be caused from granting a deviation from the zoning requirements. In the case of major subdivision and site plan approvals, it is likely that the board will impose a condition on any approval that the developer post a performance bond and maintenance guarantee.

Performance Bonds and Maintenance Guarantees: The planning board may require the deposit of performance and maintenance guarantees for *on-tract* improvements prior to the recording of the subdivision plat or as a condition of final site plan approval (*NJSA 40:55D-53a*). The performance bond is to ensure construction of improvements deemed necessary as a result of the development, such as streets, grading, pavement curbs, gutters, sidewalks, street lighting, shade trees, drainage, sewers, erosion control and public improvements of open spaces. The maintenance guarantee is posted with the governing body. The amount of the maintenance guarantee is calculated by the municipal engineer and the amount may not exceed 120% of the cost of installation of the improvements. When the improvements have been substantially completed, the developer may request a statement of its remaining obligations to the municipality. The engineer will prepare a statement as to the completeness of each improvement for the governing body's review. The governing body must accept or reject the improvements by resolution and reduce the performance bond accordingly. The engineer has 45 days to prepare his report following the developer's request and the governing body has 45 days to adopt a resolution either accepting or rejecting the improvements within 45 days of receiving the report. Where either body does not act within the prescribed timeframe, the developer may institute an action in Superior Court to compel action. If the improvements are not ultimately completed in accordance with the performance guarantee, the municipality may complete the improvements and the developer will be liable to the municipality for the cost.

Following acceptance of the improvements by the governing body, the governing body may require a maintenance fee be posted by the developer for a period not to exceed two years. The maintenance fee shall not exceed 15 percent of the cost of the improvement.

Decisions

Any action the board takes with regard to an application must be set forth in a resolution. Typically, the Board will vote on an application at the conclusion of the hearing and adopt a resolution memorializing its action at a subsequent hearing. Although not the standard practice, a board may also vote on an application and adopt a memorializing resolution at the same hearing. The MLUL requires that adoption of the resolution memorializing the board's action must be done not later than 45 days after the Board voted on the application (*NJSA 40:55D-10g*). If the board does not act within the required timeframe, any interested party may apply to Superior Court in a summary manner in order to compel the board to reduce its findings to writing and the cost

of the application to the court, including attorneys fees, shall be assessed against the municipality.

After a memorializing resolution is adopted by the board, notice of the board's decision must be published in the official newspaper. The publication must be arranged by the applicant unless the municipality designates a particular municipal officer to publish by ordinance. Publication of the board's decision is of great importance because the appeal period begins to run from the date of publication (*NJSA 40:55D-10i*). Rule 4:69 provides that any interested party must file an appeal of a municipal planning board or zoning board of adjustment determination in Superior Court within 45 days of the date of publication of the board's decision in the official newspaper. While there is no time limit in which to publish, the sooner notice is published, the sooner the appeal period will expire. The Court will make its decision based on the record made before the board whose decision is being appealed.

In the case of a "d" variance, a municipality may adopt an ordinance authorizing an appeal to the governing body of a decision to *grant* such a variance by any interested party (*NJSA 40:55D-17*). Such appeal must be made within ten days of publication of the decision and is limited to a review of the record of the earlier hearing(s). Notice of the hearing is provided to all parties by certified mail at least ten days prior to the hearing. The appellant is responsible for arranging for transcripts, and failure to do so may result in dismissal of the appeal. Oral and written arguments may be submitted at the appeal hearing. The governing body must conclude its review of the record and render a decision within 95 days of publication of the earlier decision, unless the applicant consents to a longer period. Failure to render a decision constitutes affirmation of the decision.

The governing body may affirm, alter (including the imposition of additional conditions), or reverse the action of the board of adjustment, or it may remand the matter for further consideration. Any action other than affirmation requires an affirmative vote of the full majority of the governing body. A tie vote on a motion to alter, reverse, or remand constitutes affirmation. Within ten days, the final decision of the governing body must be published in the newspaper, mailed free to the appellant and, for a reasonable charge, to any other interested person.

Powers and Duties of Boards, and Relationships between Boards: At the municipal level, powers and duties related to planning and the review of development applications are generally divided among three bodies: the elected governing body, the planning board and the zoning board of adjustment. There may also be other *ad hoc* or permanent boards dealing with issue areas such as historic preservation, housing, parks and recreation, and water, etc.

The Governing Body: The governing body of the municipality is its legislative body and consists of the elected officials of the government. The mayor or his designee also serves as a Class I member of the planning board and another member of the governing body is also appointed as the Class III member of the planning board (*NJSA 40:55D-23a*). The governing body generally is responsible for adopting the *laws* that regulate development, including:

- the official map (*NJSA 40:55D-32* and *-33*);
- the zoning ordinance (*NJSA 40:55D-62a*);
- the subdivision and site plan ordinance (*NJSA 40:55D-37a*);
- the capital improvement program (*NJSA 40:55D-30*);
- the off-tract improvements ordinance (*NJSA 40:55D-39a*);

- the fee ordinance (*NJSA 40:55D-8b*); and
- the application "checklist" (*NJSA 40:55D-10.3*).

The Planning Board: The planning board has been characterized as the "board of permitted uses." It has authority over a full range of land use matters in the municipality, including:

- adoption of the comprehensive master plan (*NJSA 40:55D-28*);
- review of subdivision, site plan (*NJSA 40:55D-46*) and conditional use applications (*NJSA 40:55D-67*) ;
- review of "c" variances where the application is ancillary to subdivision, site plan or conditional use review;
- review of permits for a building or structure located in a mapped street, public drainage-way, flood control basin or public area.
- review of landlocked structure permits associated with subdivisions, site plans and conditional uses (*NJSA 40:55D-60*);
- preparation of the capital improvement programs (*NJSA 40:55D-29*);
- review and comment on the official map (*NJSA 40:55D-32*); and
- review and findings on any long-range-facilities plan prepared pursuant to the Educational Facilities Construction and Financing Act of 2000 (*NJSA 40:55D-31b*).

In municipalities with populations of 2,500 or less, the planning board (of any size) may also serve as the historic preservation commission, provided that at least one member meets the qualifications of each of the Class A and Class B member of that commission (*NJSA 40:55D-25d*).

The planning board has either seven or nine members, and there are four classes of membership (*NJSA 40:55D-23*). These are:

Class I: A single individual who is the municipality's mayor or his designee or, in the case of the municipal manager form of governmental law, the municipal manager. The Class I member's term on the planning board is the same as his or her official tenure in office.

Class II: A municipal official other than a member of the governing body. The Class II member is appointed by the mayor. The term of the Class II member is the earliest of the completion of one year or the individual's tenure in office (except in the case of the joint membership of an environmental commissioner, whose term is the earliest of three years or office tenure).

Class III: a member of the governing body and appointed by that body to the planning board. The term of the Class III member is one year.

Class IV: Residents of the municipality who hold no other municipal office and are appointed by the mayor or municipal manager. However, in the case of nine-member planning boards, one member may be drawn from the zoning board of adjustment or the historic preservation commission and one member also may be a member of the board of education. In the event that a member of the municipal environmental commission is required to be a member of the planning board pursuant to *NJSA 40:56A-1*, that member is a Class IV member of the planning board, *unless* there are also Class IV members drawn from the zoning board of adjustment or historic preservation commission *and* the board of education, in which case the environmental commission member is considered as a Class II member. The term of Class IV members is four years, except in the case where they have joint membership on the planning board and on another board or commission. In

that case, a shorter tenure of membership on the other board or commission limits membership on the planning board. The ordinance establishing the planning board is required to "distribute evenly" the term expiration of the Class IV members so that there is not a wholesale turnover in membership at any given time.

There also are alternate members of the planning board, appointed by the mayor, called "Alternate 1" and "Alternate 2" members (*NJSA 40:55D-23.1*). They also are considered Class IV members, but their terms run only two years and their terms expire in alternating years. Alternate members participate in all activities of the planning board except may not vote unless there is a conflict or absence of another board member. A conflict is "any matter in which [a member] has, either directly or indirectly, any personal or financial interest." (*NJSA 40:55D-23c*). Alternate members may not serve as chair or vice-chair of the planning board, but may serve as secretary or other Board officer (*NJSA 40:55D-24*).

Situations may arise where the planning board lacks a quorum due to multiple members having recused themselves due to a conflict. In such situations, members of the zoning board of adjustment, in order of their seniority of service, are empowered to serve as substitute members (*NJSA 40:55D-23.2*). All planning board members, except Class II members, must be municipal residents (*NJSA 40:55D-23a*).

The Zoning Board of Adjustment: If a municipality uses zoning as a tool for regulating land use activities, it also must adopt an ordinance establishing a zoning board of adjustment (*NJSA 40:55D-69*). While the planning board generally hears applications for *permitted* activities, the zoning board of adjustment reviews petitions for *interpretation and adjustment* of the zoning regulations to fit a particular set of circumstances.

The board of adjustment hears and decides:

- appeals from decisions of the municipal administrative officer with regard to the enforcement of the zoning ordinance (*NJSA 40:55D-70a*) or official map (*NJSA 40:55D-72a*);
- appeals from decisions of the administrative officer with regard to the designation and regulation of historic sites or districts (*NJSA 40:55D-70.2*);
- requests for interpretation of the zoning map or ordinance (*NJSA 40:55D-70b*);
- applications for "c" variances (*NJSA 40:55D-70c*), except where such an application is ancillary to an application for a subdivision, site plan review or a conditional use permit (*NJSA 40:55D-60*);
- applications for "d" variances (*NJSA 40:55D-70d*) *and* any associated subdivision or site plan review application (*NJSA 40:55D-76b*);
- direct issuance of a permit for a building or structure within a mapped street, drainage way, flood-control basin, or other reserved public area (*NJSA 40:55D-76a(1)*); and
- direct issuance of a permit for a structure not having street access (*NJSA 40:55D-76a(2)*).

The board of adjustment is required to report annually to the planning board and governing body on its activities, including any areas of the zoning ordinance and related codes, that it feels require study for possible amendment or update (*NJSA 40:55D-70.1*).

The zoning board of adjustment has seven members and may have up to four

alternate members (Alternates 1 through 4). Members serve terms of four years and alternates serve for two years (*NJSA 40:55D-69*). There are no restrictions on membership except that members and alternates must be residents of the municipality and may not otherwise serve as officers of the municipality. If, by reason of conflict of interest, there is a lack of a quorum for the zoning board of adjustment, Class IV members of the planning board may be called to serve as substitute members, in order of their seniority on the board.

Combined Boards

In 1996, MLUL section *NJSA 40:55D-25(c)* was amended to provide that *any* municipality may establish a nine-member planning board and designate the planning board as the zoning board of adjustment as well; but, unlike all other provisions for approving municipal zoning ordinances, the ordinance adopted pursuant to this subsection is subject to voter referendum. However, in municipalities with a population of less than 15,000) a nine-member planning board may be designated to serve as the zoning board of adjustment (*NJSA 40:55D-25*) without a voter referendum.

Where a municipality has a combined Board, Class I and Class III members may not participate in consideration of or voting on applications for "d" variances (*NJSA 40:55D-25(c)*). In the case of a combined Board, up to four alternate members may be designated and shall serve as Class IV members (*NJSA 40:55D-23.1*).

A Word about Combined Boards: A municipality considering whether or not to consolidate the functions of the planning board and zoning board of adjustment must carefully consider a number of factors. An obvious benefit of consolidation is the potential for much stronger linkage between long range planning and the day-to-day planning implementation.

The positive impact of fully integrating decisions on the comprehensive master plan; the capital improvement program; and zoning, subdivision, and site plan ordinances closely with decisions on proposed development projects cannot be overstated. Another benefit is that the consolidated board hears all types of applications and has a better understanding of the range of land-development issues facing the municipality.

A third benefit, at least from an administrative perspective, is that staff has fewer people to contact and coordinate. It is unlikely, however, that either direct or indirect costs are significantly reduced.

Potential disincentives include the very real possibility that members of a consolidated board could "burn out" as the result of a hectic meeting schedule. It is possible, indeed likely, that board members in a municipality with an active planning agenda would have to dedicate one evening each week to regular meetings and hearings. It is important to keep in mind that board members are volunteers, and that four years is a long time in which to serve. Midterm resignations and high turnover of board members quickly unravels the benefits of closely linking long-range and current planning functions.

There is little to be gained from consolidating boards if the organizational memory of the board is lost through rapid turnover of members. Furthermore, developing a board that works well together, learning from and respecting the views of individual members, takes considerable time and effort. A well-functioning board is not something to be lightly discarded!

Municipalities considering a consolidation should approach the issue by first considering the old adage, "*If it ain't broke,*

don't fix it." Are the individual boards working well in their respective roles? Is there adequate communication between the planning board and the zoning board of adjustment? If not, how may communication be increased? What are the specific *planning* objectives (as opposed to political objectives) that the consolidation would address? Are these sufficient capable people willing to serve on both boards?

If consolidation is the route chosen, for whatever reasons, make sure to clearly establish in the ordinance the planning issues and objectives that require consolidation. Consider making the consolidation effective at least six months (preferably a year) in the future so that "pipeline" projects can be handled without undue turmoil. Finally, create a detailed transition plan that considers every aspect of the planning program for the next two years, including both long-range planning efforts and anticipated development applications.

Citizen Advisory Boards

After the appointment of a planning board, the mayor may appoint one or more persons as a citizens' advisory committee to assist the planning board in its duties. Persons appointed to an advisory committee do not have the power to vote on an application or to take other action that is vested with the planning board. There is no term limit for advisory boards. Advisory board's serve at the pleasure of the mayor (*NJSA 40:55D-27*).

Environmental Commission

An environmental commission is a municipal advisory body created by ordinance of the governing body for the protection, development or use of natural resources, including water resources, located within its limits. The commission must consist of not less than five and not more than seven members with no more than two alternates, which are all appointed by the mayor. One of the members must also serve on the planning board and all members must be residents of the municipality. The environmental commission has the power to study and make recommendations concerning open space preservation, water resources management, air pollution control, solid waste management, noise control, soil and landscape protection, environmental appearance, marine resources and protection of flora and fauna. The environmental commission must keep an index of all open areas, publicly and privately owned, including open marshlands, swamps and other wetlands, in order to obtain information on the proper use of such areas, and may recommend to the planning board plans and programs for inclusion in a municipal master plan and the development and use of such areas.

Miscellaneous Matters: Following are several miscellaneous items addressed by the MLUL:

1. The municipality *may* exempt 501c and 501d nonprofit organizations from fees (*NJSA 40:55D-8a*) and *must* exempt Boards of Education from fees (*NJSA 40:55D-8d*).
2. In all matters, if a motion to approve an application fails due to a lack of votes, the application is deemed denied (*NJSA 40:55D-9a*).
3. Any member of a governing body, planning board, or board of adjustment who was not present or not a member for one or more meetings at which a hearing on an application was conducted, may vote on the application, provided that transcripts and/or tapes have been made available and he or she certifies in writing that he or she has read or listened to those records (*NJSA 40:55D-10.2*).

4. The county planning board must receive notice on all hearings related to amendments to development regulations at least ten days prior to the hearing (30 days for the capital improvement program and official map) (*NJSA 40:55D-15b*).

5. Development regulations, except for the official map, must be filed with the county planning board in order to take effect (*NJSA 40:55D-16)*. The official map of the municipality does not take effect until it is filed with the county recording officer (*NJSA 40:55D-16*). A provision of the zoning ordinance not conforming with the master plan does not take effect until the governing body's resolution stating the reasons for adoption is filed with the county planning board.

6. Public utilities may appeal planning and zoning board decisions directly to the State Board of Public Utilities, without first filing any appeal with the municipality (*NJSA 40:55D-19*).

7. If a protest against proposed zoning ordinance amendments is signed by the owners of either 20 percent or more of the affected area or by 20 percent or more of the owners within 200 feet of the affected area (regardless of municipal boundaries), the governing body must adopt the amendment by a two-thirds majority vote of all the members of the governing body (*NJSA 40:55D-63*).

8. Model homes and related sales offices are not considered a business use for the time necessary to sell the new homes in the subdivision (*NJSA 40:55D-66a*).

9. Accredited non-profit private day schools must be treated exactly the same way as public schools for zoning purposes (*NJSA 40:55D-66b*).

10. Foster and group homes with up to 12 children are regulated as single-family homes (*NJSA 40:55D-66c*).

11. A senior citizen (any person who has reached age 62, or the spouse or surviving spouse of that person, if the surviving spouse is 55 years or older) may rent one or more rooms in a single-family dwelling that is his or her primary residence, together with the general use of that dwelling, to any one unrelated person, with no additional requirements of any kind (*NJSA 40:55D-68.4*).

12. "Community Residences for the Developmentally Disabled", "Community Shelters for Victims of Domestic Violence", "Community Residences for the Terminally Ill" and "Community Residences for Persons With Head Injuries" are required to be permitted in all residential districts and treated the same as single-family dwellings (e.g., the same setback requirements). Note that this makes community residences an "of right" use, not subject to conditional use permit or site plan review requirements, unless single-family homes also are subject to those requirements (*NJSA 40:55D-66.1*).

13. Each of these four permitted uses are defined in the MLUL amendment as facilities licensed according to state law and permitting up to 15 persons under care. "Community residence" specifically includes "group homes, halfway houses, intermediate-care facilities, supervised-apartment living arrangements and hostels." "Mentally Ill" persons are specifically allowed in a community residence, provided that the facility is approved by the Division of Mental Health and Hospitals of the New Jersey Department of Human Services for a purchase-of-service contract or an affiliation agreement and that "mentally ill person" does not include a person who has been committed after having been found not guilty of a criminal offense by reason of

insanity or having been found unfit to be tried on a criminal charge (*NJSA 40:55D-66.2*).

14. Adjoining municipalities and/or counties may form a joint or regional planning board and/or zoning board of adjustment upon adoption of "substantially the same" ordinances or resolutions (*NJSA 40:55D-77*). Joint officials, e.g., zoning officer, may be named (*NJSA 40:55D-86*) and administrative functions combined (*NJSA 40:55D-87*). Municipal and county representatives to the joint board are appointed by the mayor and/or board of freeholders (*NJSA 40:55D-79*). Additional members representing the Division of Parks and Forestry and local citizens are optional. The regional planning board is empowered to adopt a regional master plan (*NJSA 40:55D-84*). A regional board of adjustment consists of seven members that serve four-year terms and terminates the municipal boards of adjustment (*NJSA 40:55D-85*). Their review of development applications supersedes any local review. Appeals of decisions of regional boards are made to the municipal governing body in the municipality where the land in question is situated but only appeals of *approvals* may be heard by the municipal governing body and only to the extent authorized by ordinance (*NJSA 40:55D-85.1).*

15. The comprehensive master plan and development regulations (e.g., subdivision and zoning ordinances) must be reexamined every six years to ensure currency (*NJSA 40:55D-89*). A resolution setting forth the findings of the review must be filed with the county planning board and each adjoining municipality. Where a municipality fails to adopt a reexamination report of its master plan and development regulations, such failure will constitute a rebuttable presumption that the municipal development regulations are no longer reasonable (*NJSA 40:55D-89.1*).

16. Development moratoria are not permitted, except for public health reasons, and then for a maximum of six months (*NJSA 40:55D-90*).

17. The Federal Telecommunications Act of 1996 became effective on February. 8, 1996 and pre-empted most, if not all, state and local land use regulations that in any way impair installation, maintenance, or use of satellite dishes in commercial and industrial areas, and most such regulation of dishes in residential areas. The Federal Communications Commission (FCC) has exempted restrictions promulgated for safety reasons (e.g., fire codes, power-line setbacks, and structural requirements, etc.) or if the regulation is necessary to preserve a property listed on the National Register or within an eligible historic district.

Additional Resources:

New Jersey Department of Community Affairs
www.nj.gov/dcal/

New Jersey Office of Smart Growth
www.nj.gov/dcal/osg/

New Jersey Planning Officials
www.njpo.org/

New Jersey State League of Municipalities
www.njslom.org

New Jersey State Legislature
www.nileg.state.nj.us/default.asp

New Jersey State Planning Commission
www.nj.gov/dca/osg/commissions/spc/index.shtml