2023-01-06-v3

"JURY CHARGE" TO THE CRANFORD PLANNING BOARD FOR THE 750 WALNUT AVENUE APPLICATION

APPLICATION PB-22-002 SUBMITTED BY HARTZ FOR PRELIMINARY AND FINAL SUBDIVISION APPROVAL AND SITE PLAN APPROVAL WITH "C" VARIANCES AND EXCEPTIONS TO ALLOW CONSTRUCTION OF AN INCLUSIONARY RESIDENTIAL DEVELOPMENT CONSISTING OF TWO BUILDINGS AS WELL AS A COMMERCIAL DEVELOPMENT CONSISTING OF TWO BUILDINGS TO BE USED AS AN OFFICE DISTRIBUTION CENTER ON PROPERTY CURRENTLY DESIGNATED AS LOT 2 IN BLOCK 541 WHICH IS LOCATED AT 750 WALNUT AVENUE

PREPARED BY CRANFORD PLANNING BOARD ATTORNEY JONATHAN E. DRILL
JANUARY 6, 2023

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I. INTRODUCTION (which I will read into the record during the January 18th hearing)

BOARD MEMBERS HAVE NOW EITHER HEARD IN PERSON, READ TRANSCRIPTS OF AND/OR VIEWED AND LISTENED TO VIDEO RECORDINGS OF THE SEVEN (7) HEARING SESSIONS ON THE 750 WALNUT APPLICATION. THE FIRST HEARING SESSION WAS CONDUCTED ON JULY 20, 2022 AND THE 7TH HEARING SESSION WAS CONDUCTED ON DECEMBER 14, 2022. THE 8TH AND LAST HEARING SESSION IS SCHEDULED FOR JANUARY 18, 2023, AND IS DEVOTED TO THE BOARD DELIBERATING AND VOTING ON THE APPLICATION. AS I SAID I WOULD DURING THE DECEMBER 14TH HEARING SESSION, I HAVE PREPARED THE WITHIN WRITTEN "JURY CHARGE" TO GUIDE THE BOARD IN DELIBERATING AND VOTING ON THE APPLICATION. I HAVE ALSO PREPARED "JURY" DELIBERATION SHEETS TO MAKE IT EASIER FOR BOARD MEMBERS TO ORGANIZE THEIR THOUGHTS IN PREPARATION FOR JANUARY 18TH DELIBERATIONS AND VOTING. THE "JURY CHARGE" CONTAINS MY LEGAL ADVICE TO THE BOARD AS TO THE STANDARDS THAT THE BOARD SHOULD FOLLOW WHEN DELIBERATING AND VOTING ON EACH AND EVERY ITEM OF RELIEF INVOLVED IN THE APPLICATION.

MOST OF THE JURY CHARGE EMANATES FROM MY PLANNING BOARD CRIB SHEETS WHICH ARE AVAILABLE ON MY FIRM'S WEBSITE. RATHER THAN PROVIDING COPIES OF THE APPLICABLE CRIB SHEETS FOR USE IN THIS APPLICATION, I HAVE COPIED FROM PORTIONS OF APPLICABLE CRIB SHEETS AND TRANSFORMED THE COLLECTION OF CRIB SHEETS INTO A COMPREHENSIVE DOCUMENT TAILORED TO THE 750 WALNUT APPLICATION. (I will not read the remainder of this document into the record during the January 18th hearing session as Board members have had the document and have read it prior to this final hearing session.)

II. THE PROPOSED DEVELOPMENT AND REQUIRED RELIEF

The applicant proposes construction on property located in the Township of Cranford ("**Cranford**" or the "**Township**") and currently designated as Lot 2 in Block 541 and has a Post Office address of 750 Walnut Avenue (the "**property**") of an inclusionary residential development consisting of two (2) buildings (the "**residential development**") along with a commercial development consisting of two (2) buildings to be used as an office distribution center (the "**commercial development**") (the proposed residential development together with the proposed commercial development are referred to as the "**proposed development**"). The property is a 30.88-acre triangular shaped lot with its frontage (easterly side of the property) along the southbound side of Walnut Avenue, its southwestern side abutting the Hyatt Hills Golf Complex which is located in both Cranford and Clark, and its northwestern side abutting the Conrail train tracks. To the east, across Walnut Avenue from the property, is a single-family residential area with some commercial development near Walnut Avenue's intersection with Raritan Road. Until recently, the property contained approximately 400,000 square feet of office, lab and industrial facilities. Those facilities have recently been demolished.

The property is situated in the 750 Walnut Avenue Redevelopment Area (the "**750WARA**") which redevelopment area encompasses just one lot – the property – and is subject to the Walnut Avenue Redevelopment Plan (the "**WARP**"). The applicant proposes to subdivide the property into two (2) lots, an approximately 13.5-acre lot for the inclusionary residential development (the "**residential lot**"), and an approximately 17.3-acre lot for the commercial development (the "**commercial lot**"). The inclusionary residential development proposed on the residential lot will contain a total of 250 rental housing units, 38 of which will be set aside for low- and moderate-income households (the "**affordable housing units**"). Multifamily rental housing with a 15% affordable housing unit set aside is a principally

permitted use in the 750WARA by virtue of the WARP. Commercial and office distribution centers are also principally permitted uses in the 750WARA by virtue of the WARP.

For the applicant to construct the proposed development, the following relief is required, and the applicant has applied for the following relief:

1. "C" variance from paragraph 4.2.B.2.c.ii of the WARP, which requires a minimum 100-foot front yard setback for commercial buildings to property lines, to allow a 63.2-foot setback between one of the two commercial buildings and the proposed property line separating the commercial lot from the residential lot. The applicant has sought a "c(2)" or so-called "benefits v. burdens" variance and not a "c(1)" or so-called "hardship" variance.

2. "C" variance from paragraph 4.7.D.12 of the WARP, which requires a full-size (92' x 50') basketball court and equipment with appurtenant parking facilities, to allow the elimination of the basketball court and equipment and appurtenant parking. The applicant has sought a "c(2)" or so-called "benefits v. burdens" variance and not a "c(1)" or so-called "hardship" variance.

3. Exception from paragraph 4.7.F.2 of the WARP, which requires a dedicated pedestrian zone along the sidewalk adjacent to Walnut Avenue be provided with a minimum unobstructed width of 8-feet at all points, to allow 1,268 lineal feet of the sidewalk (62% of the sidewalk) to be 6-feet wide and 785 lineal feet of the sidewalk (38% of the sidewalk) to remain 4-feet wide.

4. Exception from site plan ordinance section 255-26.G(9), which requires lighting in parking areas to be a minimum of 1.5 footcandles, to allow the lighting in the parking areas on the commercial lot to be decreased to 0.5 footcandles.

5. Exception from site plan ordinance section 255-26.G(9), which restricts the height of site lighting fixtures to 16-feet above grade, to allow site lighting fixtures up to 25-feet high on the commercial lot.

6. Exception from site plan ordinance section 255-26.J(4)(b)[3], which prohibits façade mounted signage facing residentially zoned areas within 150-feet of a residentially zoned area, to allow façade mounted signs on the proposed commercial building on the commercial lot which will face the residential zones to the north as close as 100-feet of the residentially zoned area.

7. Exception from paragraph 4.6.C.2.a.ii of the WARP, which requires 35% of the ground level primary façade of the residential buildings to have door and window transparency, to allow the ground level of both of the residential buildings to have 34% of the ground levels of the primary facades to have door and window transparency.

8. De minimis exception from N.J.A.C. 5:21-4.14(b), the RSIS provision which requires more than the 1.8 parking spaces per multifamily unit proposed by the applicant (the RSIS provision at issue requires 1.8 spaces per 1-bedroom unit, 2.0 spaces per 2-bedroom unit, and 2.1 spaces per 3-bedroom unit), to allow the applicant to provide 1.8 spaces per multifamily unit regardless of the number of bedrooms for a total of 450 parking spaces for the residential lot, which is the amount required by paragraph 4.3.A.3 of the WARP.

9. Preliminary and final subdivision approval to divide the property into the commercial lot and the residential lot, and preliminary and final site plan approval to allow construction of the commercial development on the commercial lot and the residential development on the residential lot.

Before addressing the standards the Board must consider in determining whether or not to grant each of the above listed items of relief, two general issues must be addressed. The first is the burden of proof and the second is the believability, acceptance and/or rejection of witness testimony.

III. BURDEN OF PROOF

It is well settled law in New Jersey that the "burden of proving the right to relief sought in an application rests at all times upon the applicant." Ten Stary Dom v. Mauro, 216 N.J. 16, 30 (2013). In fact, if the applicant does not meet its burden of proof, "the board has no alternative but to deny the application." Toll Bros., Inc. v. Burlington County Freeholders, 194 N.J. 223, 255 (2008).

The level of proof that the applicant must satisfy on all issues involved in this application is the so-called preponderance of the evidence standard, which means that the applicant must prove, and Board members must find, that it is more likely than not that each element of the required relief has been proven. [1] Under this standard, and because the burden of proof is always on the applicant, if a Board member is not satisfied that it is more likely than not that each element of the required relief has been proven the Board member should vote to deny the relief. In other words, if a Board member is "on the fence" as to whether or not the applicant has proven entitlement to the required relief, the Board member should vote to deny the relief. Conversely, the preponderance of the evidence standard is the least burdensome of all New Jersey evidence standards to prove and the Board does not have to be "convinced" that all elements have been proven nor does the level of proof have to be beyond a reasonable doubt, meaning that Board members can have some doubt and still find that the applicant has proven that it is more likely than not that each element of the required relief has been proven.

[1] Under the preponderance of the evidence standard, "if the evidence presented is in equipoise [equally split in favor and against proving a particular fact or issue], the burden of proof has not been met." Weissbard and Zegas, New Jersey Rules of Evidence (Gann 2022), comment 5.a to N.J.R.E. 101(b)(1). While N.J.S.A. 40:55D-10e provides that the strict rules of evidence do not apply in a board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009). As our Supreme Court observed in reviewing a "c" variance application in Commons v. Westwood Zoning Board of Adjustment, 81 N.J. 597, 607 (1980), "the applicant carries the burden of establishing the negative criteria by a fair preponderance of the evidence."

IV. BELIEVABILITY, ACCEPTANCE AND/OR REJECTION OF WITNESS TESTIMONY

The Board may choose whether or not to believe a lay witness or an expert witness and, in the case of expert, whether or not to believe the expert's opinion. TSI E. Brunswick v. E. Brunswick Board of Adj., 215 N.J. 26, 46 (2013). In fact, the Board may choose not to believe an expert and his or her opinion even if there is no contrary expert opinion offered, and even when the expert happens to be the Board's expert, not an expert offered by a party. El Shaer v. Lawrence Tp. Planning Board, 249 N.J. Super. 323, 330 (App. Div. 1991), certif. denied, 127 N.J. 546 (1991). However, for a reviewing court to affirm the Board's rejection of testimony or expert opinion, the choice to reject the testimony or the expert's opinion must be reasonably made and, significantly, must be explained. Clifton Board of Ed. v. Clifton Zoning Board of Adj., 409 N.J. Super. at 434. And, the Board cannot consider lay testimony as to effects on adjacent properties in terms of devaluation of value and/or effects on the intent and purpose of the zoning ordinance and master plan. Smart v. Fair Lawn Board of Adj., 152 N.J. 309, 336 (1998); Cell South v. West Windsor Zoning Board of Adj., 172 N.J. 75, 87-88 (2002). Such effects can be considered only if qualified expert testimony is presented. Id.

Believability determinations can be made on several bases. Perhaps the witness says something that it so unbelievable and so central to the witness' testimony that it calls into question all the testimony and/or the expert's ultimate opinion. Under such circumstances, Board members could choose to disbelieve the entirety of the witness' testimony and/or the expert's opinion. This would fall under the so-called "false in one, false in all" rule, which is not a mandatory rule of evidence but, rather, is a discretionary inference that may be drawn when a fact finder is convinced that an attempt has been made by a witness to intentionally mislead them in some material respect. State v. Fleckstein, 60 N.J. Super. 399, 408 (App. Div. 1960), certif. denied, 33 N.J. 109 (1960). If a Board member rejects a witness's testimony and/or an expert's

opinion on this basis it must say so. Keep in mind, however, the subject of the false testimony must be on a highly significant issue, not an insignificant issue, to reject a witness' testimony or an expert's opinion on this basis.

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

Finally, it is long established law in New Jersey that in a proceeding before a municipal land use board it is the Board's obligation to consider only competent evidence. Tomko v. Vissers, 21 N.J. 226, 238 (1956). Testimony may be presented only be witnesses that are sworn, N.J.S.A. 40:55D-10d, and expert opinion testimony may be presented only by witnesses determined by the Board to be experts in the particular field in which they will present testimony. N.J.R.E. 702. [2] Our Supreme Court in Gallenthin Realty v. Bor. of Paulsboro, 191 N.J. 344, 373 (2004) more recently held that local municipal decisions must be supported by sufficient evidence in the record, and that standard is not met if the decision is based on an

[2] As set forth above in footnote 1, while N.J.S.A. 40:55D-10e provides that the strict rules of evidence do not apply in a board hearing, the Appellate Division of the Superior Court has held that, notwithstanding N.J.S.A. 40:55D-10e, "evidentiary concepts are still pertinent" in a land use board hearing. Clifton Board of Education v. Clifton Board of Adjustment, 409 N.J. Super. 389, 430 (App. Div. 2009).

expert's "net opinion." A net opinion is a conclusion that is not supported by factual evidence or other data and must be rejected. Polzo v. County of Essex, 196 N.J. 569, 583 (2008). As explained in Polzo, "the net opinion rule requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion." Id. If an expert provides no explanation for his or her conclusions, those conclusions are deemed to be "net opinions" and must be excluded. Id. As held by the Appellate Division of the Superior Court in Koruba v. American Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007), for experts' conclusions to pass muster under the net opinion rule, the experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are scientifically reliable." The Board must reject an expert's opinion if it is a net opinion.

V. STANDARDS FOR DETERMINING WHETHER TO GRANT THE "C(2)" VARIANCES

The Board is authorized to grant "c(1)" or so-called "hardship" variances and/or "c(2)" or so-called "benefits v. detriments" variances from zoning ordinance requirements pursuant to N.J.S.A. 40:55D-70c(1) and N.J.S.A. 40:55D-70c(2). As set forth above, in this application the applicant seeks "c(2)" variances, not "c(1)" variances. The Board must thus determine whether to grant the two (2) requested "c(2)" variances from the WARP. In my opinion the standards for determining whether to grant the "c(2)" variances are as follows.

The Board is authorized to grant "c(2)" variances from zoning ordinance requirements pursuant to N.J.S.A. 40:55D-70c(2) where "in an application or appeal relating to a specific piece of property the purposes of [the Municipal Land Use Law "MLUL"] would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation from the zoning ordinance requirements would substantially outweigh any detriment." This is the positive criteria of a "c(2)" variance.

The determination of whether a lot is a "specific piece of property" within the meaning of the statute involves consideration of the conditions of the lot as distinguished from other properties in the zone because, if all properties in the area are subject to the same conditions as the lot at issue, the appropriate remedy is revision of the ordinance and not a variance. Beirn v. Morris, 14 N.J. 529, 535-536 (1954). In my opinion, because the property has been determined to be an area in need of redevelopment by the Township Committee and is subject to the WARP requirements, the property is by definition a "specific piece of property" within the meaning of the statute.

The "benefits" resulting from permitting the deviation(s) must be "improved zoning and planning that will benefit the community" and not merely for the private purposes of the owner. Kaufmann v. Warren Township Planning Board, 110 N.J. 551, 563 (1988). That said, the zoning benefits resulting from permitting the deviation(s) are not restricted to those directly obtained from permitting the deviation(s) at issue; the benefits of permitting the deviation can be considered in light of benefits resulting from the entire development proposed. Pullen v. South Plainfield Planning Board, 291 N.J. Super. 1,9 (App. Div. 1996). In this regard, it is my opinion that it is appropriate for the Board to consider the benefits arising from the affordable housing aspect of the entire development proposed when it weights the benefits of the particular variances sought. However, the Supreme Court has cautioned boards to consider only those purposes of zoning that are actually implicated by the variance relief sought. Ten Stary Dom v. Mauro, 216 N.J. 16, 32-33 (2013). As such, the benefits arising from the grant of a variance from the 100-foot front yard setback for commercial buildings to property lines, to allow a 63.2-foot setback between one of the two commercial buildings and the proposed property line separating the commercial lot from the residential, lot could be found to be related to the benefit of providing affordable housing. On the other hand, the zoning benefits from granting a variance to allow elimination of the basketball court would not be related to the benefits of providing

affordable housing but could be found to be related to the benefit of providing additional stormwater management facilities.

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

Finally, even if the Board finds that the positive criteria of a "c(2)" variance has been proven, the Board may not exercise its power to grant the variance unless the so-called "negative criteria" has been satisfied. Pursuant to the last unlettered paragraph of N.J.S.A. 40:55D-70: "No variance or other relief may be granted … without a showing that such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." The phrase "zone plan" as used in the N.J.S.A. 40:55D-70 means master plan. Medici v. BPR Co., 107 N.J. 1, 4, 21 (1987).

If Board members find that the applicant has met its burden of proving the positive and negative criteria of the requested "c(2)" variances by a preponderance of the evidence, they should vote to grant the variances and, if conditions are required for Board members to find that the applicant met its burden of proof, then the Board should vote to grant the variances subject to the imposition and compliance with the conditions. As to conditions, I will be circulating a list of conditions that my notes reflect the applicant has agreed to and/or Board members have indicated should be imposed. If Board members find that the applicant has failed to meet its

burden of proof as to either the positive and/or negative criteria of the "c(2)" variances, it is my opinion that they must vote to deny the particular variances which the Board finds the applicant has failed to prove.

VI. STANDARDS FOR DETERMINING WHETHER TO GRANT THE EXCEPTIONS

As set forth above, in this application the applicant seeks five (5) exceptions from site plan ordinance requirements found in either the WARP or the Township's land development ordinance. The Board must determine whether to grant the five (5) requested exceptions. In my opinion the standards for determining whether to grant the exceptions are as follows.

The Board is authorized to grant exceptions from site plan and subdivision ordinance requirements pursuant to N.J.S.A. 40:55D-51a and b, which provide that the Board, "when acting upon applications for preliminary subdivision approval . . . [or] preliminary site plan approval . . . , shall have the power to grant such exceptions from the requirements for subdivision approval . . . [or] site plan approval . . . as may be reasonable and within the general purpose and intent of the provisions for subdivision review and approval . . . [or] site plan review and approval . . . if the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question." Neither "impracticable" nor "undue hardship" is defined in the MLUL. However, it is my opinion that reference to case law reveals the standards that should apply.

"Undue hardship" has been defined in numerous land use and zoning cases in New Jersey. Our courts have held that to qualify for "c(1)" variance relief, the "undue hardship" at issue does not have to rise to the level of confiscation. If the ordinance provisions at issue "inhibit . . . the extent" to which the property can be used, our courts have held that "undue hardship" to warrant a "c(1)" variance exists. Lang v. North Caldwell Board of Adjustment, 160 N.J. 41, 54-55 (1999). Thus, it is my opinion that the standard for determining whether the

literal enforcement of the ordinance requirement is issue will exact undue hardship should be whether its literal enforcement will inhibit the extent to which the property can be used in light of the peculiar conditions of the land in question.

Unlike "undue hardship," however, "impracticable" has not been defined in any published land use or zoning case. Following the basic rule of construction that legislative language should be given its plain and ordinary meaning, Pennsauken v. Schad, 160 N.J. 156, 170 (1999); DiProspero v. Penn, 183 N.J. 477, 492 (2005), it is my opinion that "impracticability" for purposes of considering an exception under the MLUL should focus on the dictionary definition of "impractical," which is the root of "impracticability." The dictionary definition of "impractical" is "not wise to put into or keep in practice or effect"; an inability to deal "sensibly or prudently with practical matters." Merriam-Webster's Collegiate Dictionary (11th Ed. 2004). Thus, it is my opinion that the standard for determining whether the literal enforcement of the ordinance requirement is issue is impracticable should be whether it is sensible or prudent or wise to insist on its literal enforcement in light of the peculiar conditions of the land in question.

If Board members find that the applicant has met its burden of proving by a preponderance of the evidence that granting the exceptions are reasonable and within the general purpose and intent of the provisions for site plan review and approval and that the literal enforcement of one or more provisions of the ordinance is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question, they should vote to grant the exceptions and, possibly, subject to conditions. As to conditions, if Board members find that conditions need to be imposed in order for the applicant to prove entitlement to the exceptions, then they should vote to grant the exceptions subject to those conditions. On the other hand, if Board members find that the applicant has failed to meet its burden of proof as to the exceptions, it is my opinion that they must vote to deny those exceptions.

VII. STANDARDS FOR DETERMINING WHETHER TO GRANT DI MINIMUS EXCEPTIONS FROM RSIS

As set forth above, in this application the applicant seeks an exception from N.J.A.C. 5:21-4.14(b), the RSIS provision which requires 1.8 spaces per 1-bedroom unit, 2.0 spaces per 2-bedroom unit, and 2.1 spaces per 3-bedroom unit, to allow the applicant to provide only 1.8 spaces per multifamily unit, regardless of the number of bedrooms, for a total of 450 parking spaces for the residential lot which is the amount required by paragraph 4.3.A.3 of the WARP. In accordance with N.J.A.C. 5:21-3.1(a), local land use boards have the power to grant "such de minimis exceptions from the requirements of the [RSIS] (a) as may be reasonable, and within the general purpose and intent of the standards," but if and only (b) "the literal enforcement of one or more provisions of the standards is impracticable, or will exact undue hardship because of peculiar conditions pertaining to the development in question." In my opinion, the standards for determining whether to grant a di minimis exception are similar to the standards for determining whether to grant an exception from a subdivision or site plan ordinance requirement. However, there are some additional findings that a local land use board must make before granting a di minimis exception from a RSIS requirement which are as follows.

N.J.A.C. 5:21-3.1(g) provides that the grant of a request for a de minimis exception by a local land use board "shall" be based on findings by the local land use board that the requested exception meets the following [four] criteria": (a) the de minimis exception must be "consistent with the intent of the Act establishing the RSIS" (which is N.J.S.A. 40:55D-40.1 through -40.7); (b) the de minimis exception must be "reasonable, limited, and not unduly burdensome"; (c) the de minimis exception must "meet the needs of public health and safety"; and (d) the de minimis exception must "take into account existing infrastructures and possible surrounding future development."

The intent of the Act establishing the RSIS is found in N.J.S.A. 40:55D-40.2 and includes (a) eliminating increased costs of construction housing without commensurate gains in protection of public health and safety, (b) avoiding unnecessary cost in the construction process, (c) providing uniform site improvements standards on a statewide basis, (d) providing objective rather than discretionary design standards, (e) streamlining the development process, (f) providing the widest range of design freedom but based on uniform site improvement standards, and (g) separating policymaking development review from technical determinations.

While not containing a definition of "de minimis," N.J.A.C. 5:21-3.1(f) provides four examples of "de minimis exceptions," which "include, but are not limited to, the following": (a) Reducing the minimum number of parking spaces and the minimum size of parking stalls; (b) Reducing the minimum geometrics of street design, such as curb radii, horizontal and vertical curves, intersection angles, centerline radii, and others; (c) Reducing cartway width; and (d) Any changes in standards necessary to implement traffic calming devices. As is evidenced by the above examples, "de minimis" exceptions are limited exceptions of minor nature. Where an applicant wishes to deviate from other requirements of the RSIS which cannot be considered a minor design variation as characterized in the examples set forth above, a land use board cannot grant an exception, and the applicant must seek a "waiver" from the RSIS and only the Site Improvement Advisory Board can grant such a waiver. See, N.J.A.C. 5:21-3.2. Here, the de minimis exception being sought is to reduce the number of parking spaces which is the first of the above four examples of a de minimis exception.

In conclusion, if Board members find that the applicant has met its burden of proving by a preponderance of the evidence that granting the de minimis exception from the RSIS provision at issue is reasonable and within the general purpose and intent of the RSIS, and that the literal enforcement of the RSIS provision at issue is impracticable or will exact undue hardship because of peculiar conditions pertaining to the land in question, the grant of the exception would be

warranted but they should vote to grant the de minimis exception only if the following findings are also made: (a) the de minimis exception must be "consistent with the intent of the Act establishing the RSIS" (which is N.J.S.A. 40:55D-40.1 through -40.7); (b) the de minimis exception must be "reasonable, limited, and not unduly burdensome"; (c) the de minimis exception must "meet the needs of public health and safety"; and (d) the de minimis exception must "take into account existing infrastructures and possible surrounding future development."

Finally, the grant of a de minimis exception can also be made subject to the imposition of conditions if Board members find that conditions need to be imposed in order for the applicant to prove entitlement to the de minimis exception. On the other hand, if Board members find that the applicant has failed to meet its burden of proof as to the de minimis exception, it is my opinion that they must vote to deny the exception.

VIII SPECIAL STANDARDS THAT APPLY TO VARIANCES AND EXCEPTIONS FOR AFFORDABLE HOUSING DEVELOPMENT

All the above said, there are special standards that apply to variances and exceptions involved in affordable housing developments which have been established both by the Council on Affordable Housing "**COAH**") and the courts. In Morris County Fair Housing Council v. Boonton Twp., 220 N.J. Super. 388 (Law Div. 1987), aff'd, 230 N.J. Super. 345 (App. Div. 1989), the court held that a request by an affordable housing applicant for a waiver (technically an exception) had to be reviewed not only in light of the MLUL but also "in light of the Mount Laurel doctrine." Id at 403-404. The court held that "the thrust of the Mount Laurel II opinion" is that "zoning and related provisions should be flexibly applied in the areas zoned for Mount Laurel housing." Id. at 408. Thus, in my opinion, the applicant's requests for variances and exceptions for the residential development only (containing the affordable housing units) need to be reviewed not only in light of the standards set forth above in this memo but the Board must "flexibly" apply the ordinance requirements at issue. That said, the Supreme Court held in

Mount Laurel II, 92 N.J. 158, 258-259 (1983), that "municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety."

COAH's rules also address the issue of variances and exceptions involved in affordable housing developments. [3] COAH's Second Round rules require that municipal land use board review of an affordable housing inclusionary development "shall" be focused on whether "the design of the inclusionary development is consistent with the zoning ordinance and the mandate in the FHA regarding unnecessary cost generating features." N.J.A.C. 5:93-10.1. This rule goes on to require that municipal land use boards reviewing affordable housing developments "shall be expected to cooperate with developers of inclusionary developments in granting reasonable variances necessary to construct the inclusionary development." Id. N.J.A.C. 5:93-10.2 provides further that the standards and requirements governing affordable housing development shall be the residential site improvement standards ("RSIS") and that a list of "excessive requirements" are to be avoided, which list includes but is not limited to the following requirements which are at issue in the pending application: "excessive requirements for sidewalks and paved paths," in as much as the applicant seeks an exception from the 8-foot width requirement for the sidewalk adjacent to Walnut Avenue.

Significantly, however, COAH's Third Round rules revised the list of "excessive requirements" to exclude "excessive requirements for sidewalks and paved path.," The Third Round rules require in N.J.A.C. 5:97-10.3 that the "focus" of municipal land use board review of an affordable housing inclusionary development "shall be whether the design of the affordable housing development is consistent with the municipal zoning, subdivision and site plan

[3] While the New Jersey Supreme Court dissolved the substantive certification process established in the Fair Housing Act of 1985 because it had become a futile administrative remedy due to COH's failure to promulgate valid Third Round affordable housing rules which the Court invalidated, the Court held that COAH's First and Second Round rules should be used in this Third Round of Mount Laurel compliance (the trial courts have been using the Second-Round rules and not the First Round rules), and the Court also held that those aspects of the Third Round rules that it had not invalidated should also be used. Mount Laurel IV, 221 N.J. 1, 30 (2015).

ordinances" and that the land use board "shall cooperate with developers of affordable housing developments in granting reasonable variances and waivers [exceptions] necessary to construct the affordable housing development." The Third Round rules provide in N.J.A.C. 5:97-10.1 that municipalities "shall eliminate development standards and requirements that are not essential to protect the public welfare. . . ." N.J.A.C. 5:97-10.2 is titled "Unnecessary cost generating requirements" and provides that, to "ensure that its municipal ordinances are not detrimental to the production of affordable housing or the financial feasibility of an affordable housing development", a list of unnecessary cost generating requirements are to be avoided, which list does not include "excessive requirements for sidewalks and paved paths" (which was on the list set forth in the Second-Round rules).

In my opinion, because the 8-foot wide sidewalk requirement is a health and safety requirement, and because COAH's Third Round rules do not include sidewalk width as an "unnecessary cost generative requirement," and because the sidewalk runs the entire length of the property, fronting on both the residential lot and the commercial lot, the special rules that apply to variances and exceptions involved in affordable housing developments do not apply to the requested exception from the 8-foot sidewalk width but do apply to all of the other requests for variances and exceptions. By no means does this mean that the requested exception from the 8-foot sidewalk width requirement should be denied; it means that the usual rules governing exceptions apply to the Board's consideration of that particular exception.

IX. STANDARDS FOR DETERMINING WHETHER TO GRANT PRELIMINARY AND FINAL SUBDIVISION APPROVAL AND PRELIMINARY AND FINAL SITE PLAN APPROVAL

Finally, the Board must determine whether to grant preliminary and final subdivision approval and preliminary and final site plan approval to allow the construction of the proposed development. N.J.S.A. 40:55D-46b, -48b and -50a are the focal points for consideration of the preliminary and final subdivision and site plan applications. N.J.S.A. 40:55D-46b and -48b

provide that the Board "shall" grant preliminary site plan approval and preliminary subdivision approval if the proposed development complies with all provisions of the applicable ordinances. Similarly, N.J.S.A. 40:55D-50a provides that final site plan and subdivision approval "shall" be granted if the detailed drawings, specifications, and estimates of the application conform to the standards of all applicable ordinances and the conditions of preliminary approval. As such, if the application complies with all zoning ordinance and site plan ordinance requirements, the Board must grant preliminary and final subdivision and site plan approval. Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 219, 2323 (1994). If the application does not comply with all ordinance requirements, the Board must engage in the following analysis.

First, where a subdivision and/or site plan application does not comply with all ordinance requirements but the Board grants relief in terms of variances or exceptions, the Board then must review the application and site plan and subdivision plan against all remaining ordinance requirements and grant approval if there is compliance with all such remaining requirements. If the application complies with all remaining zoning ordinance and site plan ordinance requirements, the Board must grant preliminary and final subdivision and site plan approval. Second, where a subdivision and/or site plan application does not comply with all ordinance requirements, but a condition can be imposed requiring a change that will satisfy the ordinance requirements, the Board can either (a) grant subdivision and site plan approval on the condition that the application and/or plans are revised prior to signing the plans to comply with the ordinance requirements, or (b) adjourn the hearing to permit the applicant the opportunity to revise the application or plans to comply with the ordinance requirements prior to the Board granting preliminary approval.

As the application requires a number of variances and exceptions from zoning and site plan ordinance requirements, the Board will not be able to find that the application and site plan comply with all zoning and site plan ordinance requirements, so the applicant is not entitled to preliminary and final site plan approval. However, just because the application does not comply with all ordinance requirements does not mean the Board must deny approval. The Board must determine, after any variances and/or exceptions have been granted from the ordinance provisions at issue, whether the application and site plan comply with all remaining zoning and site plan ordinance requirements. If the application and site plan comply with all remaining ordinance provisions, then preliminary and final approval should be granted, subject to the imposition of conditions as will be discussed below. Conversely, if the application and site plan do not comply with all remaining ordinance requirements, the Board must then determine whether any conditions can be imposed to bring the application and site plan into ordinance conformance. Only if the Board determines that no conditions can be imposed to bring the application and site plan into ordinance compliance should the Board deny preliminary and final approval.

Assuming that all remaining ordinance requirements are not satisfied, but that conditions can be imposed which would bring the application and site plan into compliance, then Board members could vote to grant preliminary and final subdivision and site plan approval subject to the imposition and compliance with the conditions.

X. IMPOSITION OF CONDITIONS

As to the issue of the imposition of conditions, N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin, 137 N.J. at

232-233. See also, Urban v. Manasquan Planning Board, 124 N.J. 651, 661 (1991) (explaining that "aesthetics, access, landscaping or safety improvements might all be appropriate conditions for approval of a subdivision with variances" and citing with approval Orloski v. Ship Bottom Planning Board, 226 N.J. Super. 666 (Law Div. 1988), aff'd o.b., 234 N.J. Super. 1 (App. Div. 1989) as to the validity of such conditions.); Stop & Shop Supermarket Co. v. Springfield Board of Adj., 162 N.J 418, 438-439 (2000) (explaining that site plan review "typically encompasses such issues as location of structures, vehicular and pedestrian circulation, parking, loading and unloading, lighting, screening and landscaping" and that a board may impose appropriate conditions and restrictions based on those issues to minimize possible intrusions or inconvenience to the continued use and enjoyment of the neighboring residential properties).

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END OF JURY CHARGE