2023-02-24-v3

"JURY CHARGE"

201 WALNUT AVENUE APPLICATION
APPLICATION PB-22-003

APPLICATION FOR PRELIMINARY AND FINAL SITE PLAN APPROVAL WITH ORDINANCE EXCEPTION TO ALLOW DIFFERENT FENCE MATERIAL AND RSIS EXCEPTION FOR NUMBER OF PARKING SPACES TO ALLOW CONSTRUCTION OF MULTI-FAMILY DEVELOPMENT ON PROPERTY DESIGNATED AS BLOCK 484, LOT 19.01 WITH A STREET ADDRESS OF 201 WALNUT AVENUE

PREPARED BY CRANFORD PLANNING BOARD ATTORNEY JONATHAN E. DRILL
FEBRUARY 24, 2023

TABLE OF CONTENTS

I. INTRODUCTION (which I will read into the record on March 1, 2023)

BOARD MEMBERS HAVE NOW EITHER HEARD IN PERSON, READ TRANSCRIPTS OF AND/OR VIEWED AND LISTENED TO VIDEO RECORDINGS OF THE FEBRUARY 1st AND 15th, 2023 HEARING SESSIONS ON THE 201 WALNUT APPLICATION. RECALL THAT THE APPLICANT STARTED THE HEARING FROM SCRATCH ON FEBRUARY 1, 2023. THE BOARD IS NOW GOING TO DELIBERATE AND VOTE ON THE APPLICATION THIS EVENING, MARCH 1, 2023. I HAVE PREPARED A 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 WHILE DELIBERATING 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 THE APPLICABLE CRIB SHEETS AND TRANSFORMED THE COLLECTION OF CRIB SHEETS INTO A COMPREHENSIVE DOCUMENT TAILORED TO THE 201 WALNUT APPLICATION.

(I will not read the remainder of this document into the record during the March 1, 2023 hearing session as Board members have had the document since Friday, February 24, 2023, and it has been posted on the Planning Board's webpage on the Township website so everyone involved has had the opportunity to read it prior to the deliberation and vote.)

II. THE PROPOSED DEVELOPMENT

The applicant proposes to construct on a 0.85-acre (37,026 square foot) lot which is designated on the Township's tax map as Lot 19.01 in Block 484 and has a street address of 201 Walnut Avenue (the "**property**") an inclusionary residential development consisting of a 3-story multifamily rental building (the "**proposed building**"), along with related site improvements (the "**proposed site improvements**") including but not limited to 55 parking spaces, lighting, landscaping, signage, and stormwater management structures and flood storage chambers (the proposed building and proposed site improvements are referred to as the "**proposed development**"). The property is situated entirely within "Subdistrict 2" of the Township's South Avenue & Chestnut Street Rehabilitation Area (the "**SACS area**"). The development of the property is governed by the South Avenue + Chestnut Street Rehabilitation Plan (the "**SACS Plan**") which was adopted by Ordinance No. 2022-03 on February 22, 2022.

In conformance with the SACS Plan, the proposed building will contain a total of 39 physical residential housing units, 34 of which will be for market rate rental, and five (5) of which will be set aside for rental by low- and moderate-income persons (the "**affordable housing units**"). Two (2) of the five (5) affordable housing units will be set aside for family rental housing (a 1-bedroom unit and a 3-bedroom unit) which will qualify as two (2) affordable housing credits, two (2) of the five (5) affordable housing units will be set aside for special needs independent living rental housing containing 2-bedrooms in each unit which will qualify as four (4) affordable housing credits, and one (1) of the five (5) affordable housing units will contain a four (4) bed room special needs group home rental unit which will qualify as four (4) affordable housing credits. Thus, the five (5) affordable housing rental units provided for in the proposed building will thus qualify for a total of 10 affordable housing credits towards the Township's affordable housing obligations under the amended affordable housing settlement agreement the Township entered into with Fair Share Housing Center ("**FSHC**") dated February 24, 2021,

which has been incorporated into a final judgment of Mount Laurel affordable housing compliance and repose entered by the Superior Court Law Division on July 5, 2022.

While the proposed development's 39 units requires a 20% affordable housing set aside in accordance with section 4.13 of the SACS Plan – which totals 8 affordable housing credits – the proposed development includes 10 affordable housing credits. The reason for this is because the two (2) affordable family rental units being provided as part of the proposed development will be credited towards the affordable housing requirement of the South Avenue inclusionary development which is located in Subdistrict 1 of the SACS area and also subject to the SACS Plan. Specifically, the 39 residential units in the proposed development and the 55 residential units that are proposed in the related development proposed at 108-126 South Avenue, 32 High Street and 2 Chestnut Street (Block 478, Lots 2-6 and Block 483, Lot 18), which application will be heard next by the Board, totals 94 residential housing units which creates an obligation to provide 19 affordable housing credits, with 55% of the affordable housing credits – 11 actual units – having to be provided through family rental units. The 11 affordable family rental housing units are being provided across the two projects: 2 in the proposed development at Walnut Avenue and 11 in the development proposed at South Avenue, High Street and Chestnut Street.

Returning to the property at issue and the proposed development, the lot is roughly rectangular in shape and has street frontage on three sides: Walnut Avenue to the west, Chestnut Street to the north, and High Street to the east. The property currently contains a building and drive-thru formerly used as a bank, all of which will be demolished as part of constructing the proposed development. The site plans proposed an egress only driveway onto Walnut Avenue and a two-way ingress and egress driveway from and to High Street. The "front" of the proposed building will face Chestnut Street. There are no stormwater management structures currently located on the property. As shown on the Flood Insurance Rate Map ("**FIRM**") for the

Township, the property is located in Zone X (area of minimal flood hazard), Zone X-Shaded (area located within the 0.2% Annual Chance Flood Hazard Area), and Flood Zone AE (are located within the 1.0% Annual Chance Flood Hazard Area, which is commonly referred to as the "100-year floodplain"). As shown on sheet 1 of the NJDEP prepared Delineation of Floodway and Flood Hazard Area plan, the property is also located within the State Flood Fringe area. Because of the property's location vis-à-vis these flood areas, the proposed development provides for not only stormwater management but also for flood storage.

III. THE REQUIRED AND REQUESTED RELIEF

For the applicant to construct the proposed development, the following relief is required and has been requested:

1. Exception from paragraph 4.11.j(2) of the SACS Plan, which requires that all fences comply with ordinance section 255-26, which requires fences to consist of wood or brick material, to allow the fencing proposed for the rear of the property abutting the neighboring lot to the south to consist of white vinyl material.

2. De minimis exception from N.J.A.C. 5:21-4.14(b), the RSIS provision which requires 72 parking spaces based on the number of bedrooms in each unit in the proposed building (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 55 parking spaces based on 1.4 spaces per multifamily unit in the proposed building in accordance with paragraph 4.6 of the SACS Plan.

3. Preliminary and final site plan approval to allow construction of the proposed development.

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 will be addressed.

IV. 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."

V. BELIEVABILITY AND ACCEPTANCE AND/OR REJECTION OF WITNESS TESTIMONY AND EXPERT OPINION 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. Finally, 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.

VI. STANDARDS FOR DETERMINING WHETHER TO GRANT THE EXCEPTION FROM THE ORDINANCE REQUIREMENT

As set forth above, in this application the applicant seeks one exception from site plan ordinance requirements. The Board must determine whether to grant the requested exception. In my opinion the standards for determining whether to grant the exception 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 at 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 exception is reasonable and within the general purpose and intent of the provisions for site plan review and approval and that the literal enforcement of the requirement is impracticable or will exact undue hardship because of peculiar

conditions pertaining to the land in question, they should vote to grant the exception 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 exception, then they should vote to grant the exception 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 exception, it is my opinion that they must vote to deny the exception.

VII. STANDARDS FOR DETERMINING WHETHER TO GRANT DE MINIMIS EXCEPTION FROM THE RSIS REQUIREMENT

As set forth above, in this application the applicant seeks a de minimis 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 55 parking spaces for the residential lot which is the amount required by the SACS Plan. 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 DEVELOPMENTS

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 by 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 request for exception from the ordinance requirement at issue and from the RSIS requirement at issue 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 and RSIS 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." As such, those requirements not protecting public health and safety do not need to be "flexibly" applied and the usual standards for reviewing requests for such relief as set forth above in this memo would apply.

COAH's rules also address the issue of variances and exceptions involved in affordable housing developments. [3] COAH's Second Round rules, specifically N.J.A.C. 5:93-10.1, requires municipal land use boards to review an affordable housing inclusionary development "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" and provides 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." N.J.A.C. 5:93-10.2 provides further that the standards and requirements governing affordable housing development shall be the RSIS requirements and that a number of "excessive requirements" which are listed in the rule are to be avoided, which list includes "excessive . . . parking requirements."

[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 COAH's failure to promulgate valid Third Round affordable housing rules, 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).

COAH's Third Round rules go a bit further in that N.J.A.C. 5:97-10.3 provides 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 ordinances" and that the land use board "shall cooperate with developers of affordable housing developments in granting reasonable variances and waivers [technically, exceptions] necessary to construct the affordable housing development." (emphasis added). As was the case under the Second Round rules, the Third Round rules include a list of "excessive requirements" and, although revised in one respect, the list set forth in N.J.A.C. 5:97-10.2 still includes "excessive . . . parking requirements" as an excessive requirement that must be avoided.

Finally, 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. . . ." As such, and consistent with Mount Laurel case law, those requirements not protecting public health and safety do not need to be flexibly applied and the usual standards for reviewing requests for such relief as set forth above in this memo would apply.

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

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

preliminary approval. As such, if the application complies with all zoning ordinance and site plan ordinance requirements, the Board must grant preliminary and final site plan approval. Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 219, 232 (1994). If the application does not comply with all ordinance requirements, the Board must engage in the following analysis.

First, where a 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 the site 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 site plan approval. Second, where a 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) 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 at issue here requires exceptions from a Township ordinance requirement and a RSIS requirement, 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 exceptions have been granted from the requirements 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 requirements, 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 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 site plan approval subject to the imposition and compliance with the conditions.

Finally, if the Board finds that all remaining ordinance requirements have been satisfied so the Board would be required to grant preliminary and final site plan approval, the Board has the authority to impose conditions on such a conforming site plan, even where the Board would be unable to deny the application for refusal by an applicant to voluntarily revise the site plan to conform to the condition, as will be explained below.

X. IMPOSITION OF CONDITIONS ON CONFORMING SITE PLANS

N.J.S.A. 40:55D-49a authorizes a board to impose conditions on a preliminary approval, even where the proposed development fully conforms to all ordinance requirements, and such conditions may include but are not limited to issues such as use, layout and design standards for streets, sidewalks and curbs, lot size, yard dimensions, off-tract improvements, and public health and safety. Pizzo Mantin Group v. Twp. of Randolph, 137 N.J. 219, 232-233 (1994). 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).

That said, there are certain conditions that the Board cannot lawfully impose on any site plan approval it may grant in this particular case. For example, N.J.S.A. 40:55D-42 prohibits land use boards from imposing a condition requiring an applicant to construct, or pay for construction of, off-tract improvements unless there is an ordinance in place that authorizes such a condition, said ordinance provides a mechanism for the municipality to pay for or for "pro-rata" cost sharing of the costs of constructing the off-tract improvements where other property owners will benefit from the improvement [4] and, additionally, the condition can be imposed only if the off-tract improvement at issue is reasonable and necessary. Citing N.J.S.A. 40:55D-42, the New Jersey Supreme Court held that contributions for off-tract improvements cannot be demanded from a developer where the improvement is not necessitated by the development itself or as a direct consequence of the development. Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington, 194 N.J. 223, 244 (2008). It is my opinion that, while the Board is permitted to impose a condition requiring the applicant to request that the Township Committee provide additional green space in the rights-of-way at the two corners of Chestnut Street, the condition cannot require that the applicant construct, or pay for the construction of, the additional green space because the improvement is off of the property and the improvement is not necessitated by the development itself but, rather, is a general improvement to advance the community's general welfare.

[4] The Township has such an ordinance in place, specifically, ordinance section 255-30.