

Zoning Board of Adjustment Roles

N.J.S.A. 40:55D-70 sets forth the powers of a zoning board of adjustment as follows:

1. A board may hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or refusal made by an "administrative officer" in the enforcement of the zoning ordinance. The nature of this relief is procedural, and an appeal from a decision of the appropriate officer or official must be made within 20 days of the administrative decision. A zoning board of adjustment's role under this section is only to determine whether the action of the administrative officer was correct or incorrect.
2. The zoning board has the power to hear and decide requests for interpretation of the zoning map or ordinance, or for decisions on other special questions within the board's authority. The board's interpretive powers are limited to the zoning ordinance, and the board can provide only an interpretation or construction of terms or provisions of the ordinance.
3. Under N.J.S.A. 40:55D-70c, a board may permit a deviation from a zoning ordinance requirement or standard. The focus in this subsection is on "bulk" or dimensional variances that affect the physical characteristics of property rather than the use of the property. Bulk or dimensional regulations and standards involve such matters as lot size, building size, lot coverage, setbacks, height, and other yard requirements. There are two types of bulk or dimensional variances under MLUL.

The first of these is a c(1) or "hardship" variance, which provides that a zoning board of adjustment possesses the power to grant variance relief if the denial of the variance would impose an undue hardship upon the applicant because of unusual and unique features of the property. The MLUL sets forth "unique features" to include such factors as exceptional narrowness, shallowness, or shape of a specific piece of property; exceptional topographical conditions or physical features; or any other extraordinary and exceptional situation uniquely affecting a specific piece of property.

The second type is the c(2) or "flexible c" variance. A zoning board of adjustment may grant bulk and dimensional variances under a c(2) standard if the board finds that the purposes of the MLUL would be advanced by a deviation from the zoning ordinance requirements and the benefits of the deviation would substantially outweigh any detriment. A variance under this subsection does not require a finding of "hardship," but only that the purposes of zoning as set forth in the

MLUL (specifically those listed in N.J.S.A. 40:55D-2) will be advanced. A zoning board of adjustment need not determine whether the specific characteristics of the property create a hardship on the owner, but rather which characteristics of the proposed development will present an opportunity for improved zoning and planning that will benefit the community in general.

4. The most significant development application that a zoning board of adjustment is called upon to deal with involves a variance under subsection "d." The MLUL allows a zoning board "in particular cases for special reasons" to grant variances from zoning and development regulations under this subsection. More specifically, under subsection "d," there are six categories of variances:
 - D-1: A board may grant a variance to permit a use or principal structure in a district that prohibits such a use or principal structure. In other words, under this subsection an applicant desires to use the property for a purpose other than those permitted by the zoning ordinance for this particular zone. This is also known as a "use variance."
 - D-2: A variance may be granted for an expansion of a non-conforming use. A "non-conforming use" is defined as a use or activity, which was lawful prior to the adoption, revision, or amendment of the zoning ordinance but now fails to conform with the requirements of the zoning district (N.J.S.A. 40:55D-5). Generally, if a property owner seeks to enlarge or expand a non-conforming use or structure, or seeks to increase or intensify the scope of activities at the site, then a use variance is required.
 - D-3: A variance to allow a deviation from a specification or standard pertaining solely to a conditional use. A planning board deals with applications for conditional uses, but the board is only empowered to act upon a conditional use if all of the conditions can be met. If any one or more of the conditions set forth in a local ordinance cannot be met, the zoning board (and not the planning board) has exclusive jurisdiction to hear a conditional use application (N.J.S.A. 40:55D- 60, 40:55D-70d).
 - D-4: A variance for an increase in the permitted floor area ratio. Floor area ratio (FAR) is defined as "the sum of the area of all floors of buildings or structures compared to the total area of the site" (N.J.S.A. 40:55D-4). FAR requirements are generally intended to control the intensity of the use on a particular piece of property by insuring that buildings are an appropriate size for the site. These requirements are applied primarily to non-residential and multi-family residential structures. FAR is usually

calculated by dividing the sum of the area of each floor by the number of the square feet contained in the specific lot proposed to be built upon. If the resulting ratio is higher than the ratio permitted by ordinance, then a variance is required.

- D-5: A variance for an increase in the permitted density, except as applied to the required lot area for a lot or lots for detached one- or two-dwelling unit buildings. N.J.S.A. 40:55D-4 defines density as "the permitted number of dwelling units per gross area of land to be developed." In density cases, the zoning ordinance is intended to address the cumulative effect of a development rather than individual lot sizes. For example, if a particular zoning ordinance allows five dwelling units per acre, and the applicant is proposing to construct in excess of this per acre limit, a variance under this subsection would be necessary.
- D-6: A variance if an applicant proposes a height of a principal structure that exceeds by 10 feet or 10 percent the maximum height permitted in the district for a principal structure. If the proposed height, however, does not exceed the height limitation by either 10 percent or 10 feet, but still exceeds the height permitted in the zone, the application may still go before the zoning board as a bulk or dimensional variance.

Because of the significance of a "d" variance and its possible negative impacts on long-range planning, the MLUL requires that a variance under subsection "d" be granted only by an affirmative vote of at least five members of the zoning board of adjustment, as opposed to four members for other types of variances. Further, no variance or other relief may be granted under either subsection "c" or subsection "d" 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 applicant must convince the board that the variance satisfies these criteria. Additionally, N.J.S.A. 40:55D-76 permits a zoning board of adjustment the power, to the same extent and subject to the same restrictions as the planning board, to grant subdivision, site plan approval, or conditional use approval when the proposed development requires approval of a "d" variance.

Although there are various other zoning board powers and responsibilities identified in the MLUL, there are two specific ones that should be mentioned. First, N.J.S.A. 40:55D-70.1 requires that a zoning board of adjustment, at least once a year, review its decisions on applications and appeals for variances. The board must prepare and adopt by resolution a report with findings on the zoning ordinance provisions that were variance requests. The report should include recommendations for zoning ordinance revisions or amendments, if any, and the zoning board of adjustment is required to forward copies of both the report and resolution to the governing body and planning board. The general purpose of this provision is to allow a board important input in recommendations for zoning ordinance changes or revisions. Given that it is

the planning board and governing body (and not the zoning board of adjustment) that are directly involved with the introduction, review, and adoption of zoning ordinances and amendments, the fact that a zoning board of adjustment is permitted under this section to offer its input is important and should be followed.

Further, under N.J.S.A. 40:55D-68, any non-conforming use or structure existing at the time of the passage of an ordinance may be continued upon the lot, or in the occupied structure, and any structure may be restored or repaired in the event of partial destruction. This section allows a prospective purchaser, or any other person interested in the non-conforming structure, to apply in writing for the issuance of a certificate that confirms the use or structure existed prior to the adoption of the ordinance that rendered the use or structure non-conforming. This type of certificate is extremely important to a bank, mortgage company, or other lender, and provides a level of comfort that the property is appropriate and lawful from a zoning standpoint. When applying for such a certificate under N.J.S.A. 40:55D-68, the applicant has the burden of proof. An application for such a certificate may be made to the appropriate administrative officer within one year of the adoption of the ordinance that rendered the use or structure non-conforming, or at any other time to the zoning board of adjustment.