NEW JERSEY LAWYER

August 2023

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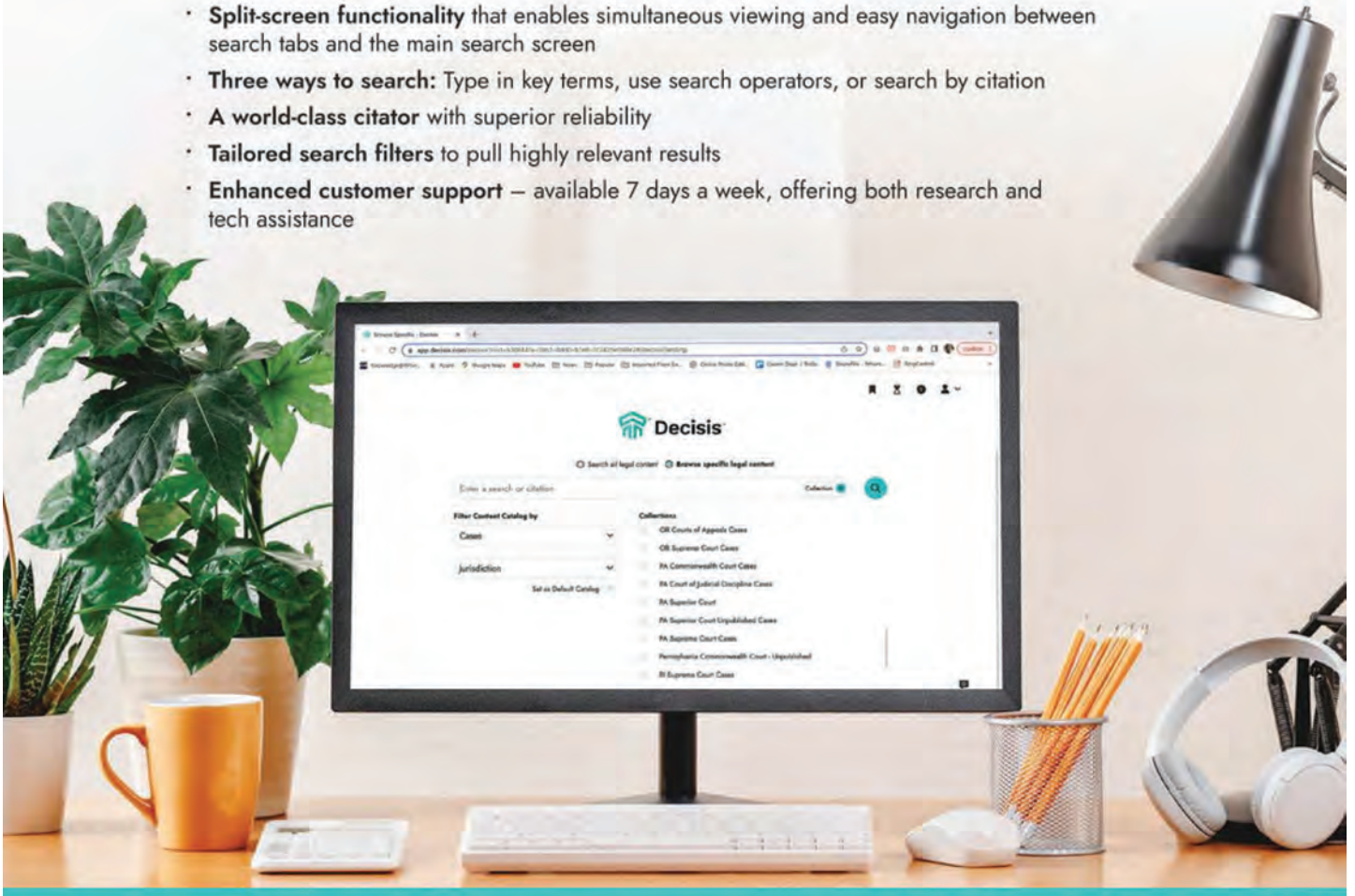

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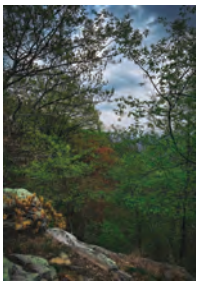

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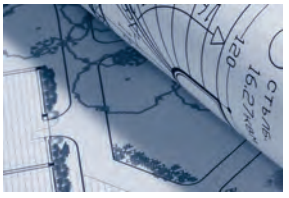

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DEPARTMENTS

TIMOTHY F. MCGOUGHRAN

Making Strides in Mental Health Support

When I took the oath as president of the New Jersey State Bar Association in May, I pledged to focus this year on the most basic tenets of the Association's mission—boosting membership, promoting member benefits and furthering our advocacy on issues that matter to lawyers. When we strive to improve the lives of NJSBA members, our clients, the legal profession and society are better served. Three months into my tenure, I am pleased to report great progress toward these goals, especially for legal professionals and those in the justice system who struggle with a mental health disorder.

To stem the decline in mental health and wellness among New Jersey's legal practitioners, the NJSBA has partnered with Charles Nechtem Associates—a well-respected mental health resource provider—to launch the Member Assistance Program (MAP). The new benefit provides 24/7 access to trained, experienced mental health professionals and resources. Whether by phone, text or mobile access, members can reach a mental health professional with at least seven years of experience, who will provide individual counseling and connect members with a wellness library of more than 25,000 self-help resources. The program is now available to all NJSBA members and those in their households.

MAP offers up to three free face-to-face counseling sessions, as well as unlimited phone, text and email support. As part of the service, if further counseling or treatment is needed, referrals are made to providers within the client's insurance network or to providers who will take reduced fees if the client is uninsured.

The inspiration for this expansive and indispensable benefit sprung from the Association's review of the New Jersey Lawyers Assistance Program and the NJSBA's Putting Lawyers First Task Force report that uncovered high rates of stress, burnout, suicidal ideations, anxiety and depression among the state's legal practitioners. Above all, MAP represents an investment in the health and well-being of our members, many of whom face barriers in accessing mental health care and the prospect of long wait times for an appointment or out-of-pocket expenses for treatment. I encourage all members in need, and those in their households, to avail themselves of the program and spread the word.

As NJSBA president, my signature project is an ad hoc committee to study and help expand mental health diversionary programs across the state. Thanks in part to the Association's lobbying efforts, the state Legislature passed a bill in June to do just that. Senate Bill S524/A1700, sponsored by Sen. Teresa Ruiz and Assemblywoman Annette Quijano, provides funding to expand court-based mental health diversion programs to three additional Superior Court vicinages in New Jersey, with the ultimate goal to have these programs in every vicinage in the state. These programs function much like a drug recovery court, offering a process for some nonviolent offenders with mental health disorders to avoid jail time and have their charges expunged if they graduate from a treatment program. This is not a "get out of jail free card" as some have opined. Through every step of treatment, eligible offenders are monitored by a mental health team that includes the judge, prosecutor, public defender and mental health professionals. The judge presides over all the participant's appearances and regular meetings of the diversion team. And those who do not comply with treatment are terminated from the program and proceed with the criminal matter.

I had the pleasure of testifying in support of this bill. In my 23 years of public service as a municipal judge and prosecutor, I have witnessed the plight of those facing charges that are directly related to their mental health. For many offenders in

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FROM THE SPECIAL EDITOR

The Widespread Impact of Land Use in New Jersey

By Philip W. Lamparello

It has been over 25 years since *New Jersey Lawyer* dedicated an issue solely to Land Use. Much has changed.

Contrary to popular belief, land use involves more than the construction of an apartment building or warehouse. It has widespread socio-economic impact on individuals, corporations and public entities. It determines whether a community will suffer from a catastrophic flood if another 1,000-year storm hits the state. It dictates whether new burgeoning businesses, like cannabis retail shops, will flourish in a small municipality. It governs whether a community's vision for economic

PHILIP LAMPARELLO *is a partner with the law firm Chasan Lamparello Mallon & Cappuzzo, PC. He leads the firm's commercial litigation practice group. He has been on the editorial board of* New Jersey Lawyer *for over 10 years and serves as a trustee of the New Jersey State Bar Association.*

growth through development can feasibly be achieved. Indeed, it controls whether residents can seek protection from overt and/or hidden discriminatory practices.

This issue attempts to explore the far-reaching effects that land use has in this state with contributions from key land use lawyers addressing the following topics:

- Jennifer Phillips Smith and Bisola Taiwo analyze the Inland Flood Protection Rule, which was recently adopted by the Department of Environmental Protection and became effective in July 2023.
- Jennifer Mazawey and Thomas Garlick explore the intersections of the Municipal Land Use Law and Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act to answer the question, "Are Cannabis Uses Eligible for Use and Conditional Use Variances?"
- Demetrice R. Miles and Thomas J. Trautner Jr. discuss development fees to fund COAH and analyze recent tax decisions interpreting the calculation of these fees.
- Dennis M. Galvin and Amanda C. Wolfe address best practices with resolution compliance and conditions of approvals.
- Lawrence Cutalo discusses the Supreme Court's recent decision in *Malanga v. Township of West Orange*, which considered the Local Redevelopment and Housing Law and provided a stern warning to municipalities when designating properties in need of redevelopment.
- Donna M. Jennings and Sarah Kennelly explore the power of RLUIPA to eviscerate discriminatory land use practices on religious institutions.
- And last, William L. Horner analyzes the Special Occasions Events Law, which, when followed properly, can be a great source of revenue to commercial farms without negatively impacting surrounding communities.

We are confident this issue will be a useful resource for New Jersey practitioners for years to come. ■

President's Message

Continued from page 5

the current system, there is no mechanism to diagnose or impose treatment for mental health and end the cycle of arrests these defendants face. Senate Bill S524/A1700 is a much-needed step in the right direction, and as we await the governor's signature, we know there is more work to be done. As legal professionals, lawmakers and taxpaying residents of New Jersey, it is our duty to ensure nonviolent defendants with mental health disorders have a chance at rehabilitation and redemption. That opportunity won't come until every courthouse in the state supports a mental health diversionary program.

Honoring a Devoted Public Servant

On a sad note, less than two weeks after my installation, New Jersey's legal community suffered the terrible and sudden loss of Superior Court Assignment Judge Lisa Thornton. Judge Thornton was a devoted public servant who passed away unexpectedly in May. A trailblazer in the legal community as the state's first Black female assignment judge, she led with integrity, passion, heart, and created a lasting positive impact on society.

I knew Judge Thornton since she was a Municipal Court Judge in Neptune. Throughout my career, as both a municipal court judge and Monmouth Bar Association president, she was a go-to person in my life for insightful guidance and gentle help or direction. Judge Thornton led by example with a tremendous work ethic. She was strong and serious when necessary, but she also had an infectious laugh, warm sense of humor and ever-present smile.

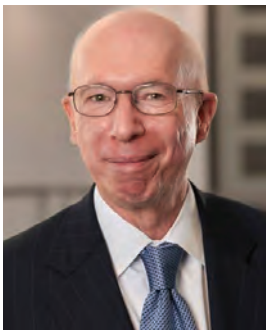
New Jersey Supreme Court Chief Justice Stuart Rabner noted upon her passing that "Lisa Thornton was more than a gifted judge, inspiring trailblazer, and natural leader. She was brilliant and plain spoken, insightful and honest, direct and witty, and a selfless friend. Judge Thornton also cared deeply about making this a better world through her words and deeds. Her sudden passing is a loss to the Judiciary and to humanity."

As a tribute to the late judge, the New Jersey State Bar Foundation has created a scholarship in her memory, intended to aid young women attorneys of color attending law school. I urge members to keep Judge Thornton's legacy alive by donating to the scholarship on the Foundation's website, njsbf.org.

As always if you have any concerns, thoughts, or ideas of how we at the NJSBA can help you or your practice give me a call at 732-660-7115 or send me an email at tmcgoughran@mcgoughranlaw.com. ■

PRACTICE TIPS

VIEW FROM THE BENCH



From the State Supreme Court, a Dedication to the Craft

A Q&A with retired New Jersey Supreme Court Justice Barry T. Albin

How did your career in public and private practice prepare you for the Supreme Court?

Each of us is a product of our experiences. My career allowed me to see the criminal and civil justice system in all its varied aspects—from prosecuting cases to sitting with someone's life and liberty in my hands as a defense attorney. I also handled many cases in the municipal courts, so I was experienced in what happens in the court that most greatly interfaces with the public.

Given my wide range of experience, many of the cases that came before the Court were not alien to me. I had some experience with them either in private practice or public service. That's not to say that there weren't many cases out of my wheelhouse. When you're on the Supreme Court, you have to become a generalist. That requires a lot of hard work, patience, dedication and research, and much help from your law clerks. The learning curve might not have been as steep for me as it was for others, because a good portion of the Court's docket are criminal cases. I was an expert in criminal law from my years as a prosecutor and defense attorney. That put me in good stead with much of the docket.

Your first years on the Court are probably the most difficult because you're being exposed to new areas. But that is true from the first day on the Court to the last. There are unique cases that come before you with which you have no prior experience. It is incumbent on you to learn that area, so you become at least as familiar with it, and hopefully more familiar than the people advocating before you.

You were remarkably prolific in your tenure as a justice, authoring 400 opinions and 230 majority opinions. Talk about the most consequential cases you ruled on and what makes an effective Supreme Court justice.

It's difficult because there are so many consequential cases. And in substance, every case is consequential to the litigants and will likely have an impact on future cases and affect thousands of fellow citizens. One case that comes to mind is *Lewis v. Harris*, a case that dealt with whether same-sex couples could enjoy the same rights that heterosexual couples have under the law. That was basically the stepping stone to our recognition of same-sex marriage in *Garden State Equality v. Dow*. I'm proud of the role I and other members of the Court played in advancing the rights of the LGBTQ community.

At the end of my career, there was a case called *Acoli v. N.J. State Parole Bd*. It dealt with a defendant who had committed a heinous offense—the killing of a police officer 50 years earlier. He had satisfied all the requirements for his release, but the parole board obstructed the law's command. Our ruling allowed for his parole. The question for the Court was really whether it would remain a stalwart defender of the law, however unpopular our decision might be. The law protects everyone, even those who commit the worst crimes. In my mind, that case revealed that we had the fortitude to stand for the rule of law.

A good justice is open to the ideas of others, is dedicated to the craft and has a high work ethic. There's nothing in life or any career in which a person can excel without hard work. Collegiality with other members of the Court is also important, along with the understanding that you may not have the market on the truth and knowing that everyone is capable of error.

You were known for balancing wit with levity in your opinions and approach as a justice. Why was it important to bring those traits to the job?

I don't think I planned in advance to bring my wit and humor to the Court. I'd like to think that was an extension of my personality. When I wrote an opinion, I wanted it to be accessible not merely to other judges or lawyers, but to everyday people. I made an effort to make the language of my opinions clear and understandable to our judges, lawyers and the public as well. Our opinions should be clear to people who enforce or apply them, including our trial judges and members of the bar. It's important that they understand the rules of the game. Our opinions also have an educational feature to the public. People should be able to understand why we have decided a case in a particular way. If the language is too abstruse, and too far beyond the understanding of people, then we're not achieving our purpose.

This is an excerpt of an interview that first appeared in the NJSBA's July 3 edition of The Bar Report. *Justice Albin and Lawrence S. Lustberg are recipients of the New Jersey State Bar Foundation's 2023 Medal of Honor. They will be honored during an awards ceremony at the Park Chateau in East Brunswick on Sept. 26.*

WHAT I WISH I KNEW

More Deposition Tips for Young Lawyers

By Barry S. Sobel
Greenbaum Rowe, Smith & Davis, LLP

A deposition is only as effective as the lawyer taking it. As a result, lawyers—especially young lawyers—must be aware of this significant responsibility so they can be properly prepared and conduct the deposition in a successful manner. Last issue, we discussed how preparation and strategic approach can help an attorney's case. Here are more tips for young lawyers in conducting and defending depositions.

- **No notetaking:** The deposition is already recorded—either via written transcript, video, or both. Therefore, there is no need to write down the answers to your questions. That is not to say that no notes should ever be taken at a deposition. Notes are beneficial in the context of helping lawyers keep track of items and close the loop. Rather than scribing the answers, pay attention to the answers given, as it may spur additional inquiry not previously contemplated. If you want to hear a specific answer again, ask the reporter to repeat it.
- **Adapt to technology:** COVID-19 forced the practice of law to (somewhat) advance into the 20th century. Depositions now occur (mostly) by Zoom. This has created new issues that young lawyers must be keen to master. The first is getting familiar with Zoom—and/or other video-based deposition platforms—and all their provided features to make the experience as close to in-person as possible.

  This is especially true if you are presenting the witness with documents/ exhibits, so you don't waste time repeatedly breaking the deposition to email the documents. And, as you are not present, protect yourself and remember to ask the witness to confirm that no other people are present in the room. If you have doubts, ask the witness to scan the room to confirm.
- **Follow up:** At deposition, lawyers may request documents in response to an answer from the witness. That request, however, must be followed up by a formal written request. Too often, young lawyers forget to close the loop and follow up on their request for documents. Moreover, although commonly miscategorized as written discovery requests, requests for admissions are a useful tool to use after information is uncovered at a deposition. There is no limit, and the requests may not only narrow the issues, but force certain issues to the forefront—issues that may either facilitate or make futile future settlement negotiations.
- **Objections:** Be prepared to deal with objections—specifically improper objections. Pursuant to R. 4:14-3(c), the only objections permitted during a deposition are to form, to assert a privilege, or to assert a right of confidentiality or limitation pursuant to a previously entered court order. As we all know, however, lawyers repeatedly make objections that exceed this limitation—often with the specific intention to clue the deponent's response. For example, an improper objection asserting that a question was already asked and answered is presumably intended to clue the deponent to recall prior deposition testimony and/or conditionalize their response by referring to said prior testimony.

  Therefore, when taking a deposition and your adversary makes an improper objection, put it on the record, explaining why the objection was improper (citing R. 4:1403(c)), instruct them to avoid making subsequent improper objections, and inform them that if additional improper objections are made, you are permitted to (and likely will) pause the deposition and contact the court to obtain assistance in dealing with the improper objections. Do not get bullied—especially by "seasoned" attorneys—into accepting improper objections that seek to either limit the scope of the deposition or clue/inform the deponent into giving a desired response. Remember, YOU control the deposition.

A version of this article first appeared in the April 2023 edition of the NJSBA Family Law Section's New Jersey Family Lawyer *and has been adapted for* New Jersey Lawyer *and reprinted here with permission.*

WRITER'S CORNER

Word Budgets Keep Communications on Track

By Judge Nelson Johnson

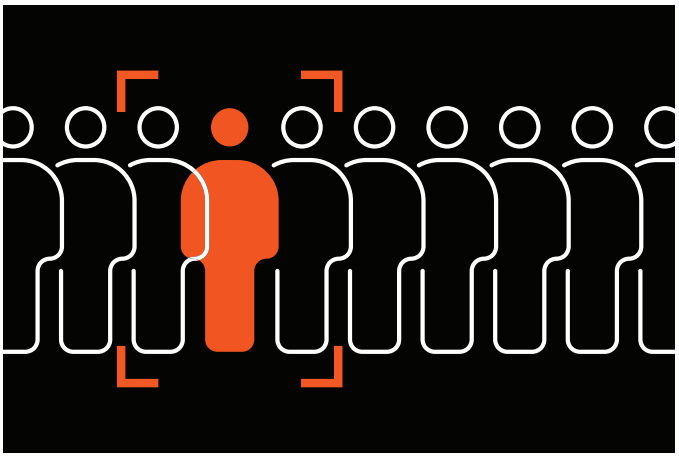
Word budgets are essential for everything you write. You need to make it part of your routine to create a budget for the number of words needed to express your thoughts on a given situation. Lawyers' communications are part of the "attention economy," and your message must be tailored to float to the surface among a torrent of random information, sales pitches and rubbish. If you fail to craft a tight message, you risk the reader concluding that what you've written is too long, and unworthy of the required investment in time. All your efforts in crafting your message may be ignored simply because of its length.

After you've gathered the relevant facts, and have a firm grasp of the issues, as well as your audience, decide on the minimum number of words required to express your thoughts on the issues at hand? What follows are proposed guidelines for the creation of word budgets:

1. **Emails:** 200–250 words. For many lawyers, emails are the principal means of communicating with colleagues, clients and, often, government officials. *First,* never send an email without proofreading it. *Second*, if you need more than 250 words to express yourself in an email, and don't want to write a formal letter, then prepare a memo and send it as an attachment with a brief explanation of what the attachment contains. *Third*, remember the forward button. A hasty email sent without giving it adequate thought can come back to haunt you.
2. **Routine Letters:** 300–500 words. Whether to a client, colleague or the court, letters of more than two pages are unwelcome by most recipients. To a large extent—for the better—emails have replaced lawyers' routine letters. Thus, when you decide to prepare a letter on law firm stationery, you should have something important to say. If you want your letter to be read, choose your words carefully and boil down your message to its basics. When you send a letter via email, always do so as an attachment, with a short, explanatory statement.
3. **Opinion Letters:** 3,000 words. Lawyers are often called upon to express formal opinions on diverse issues. Frequently, lawyers err on the side of trying to address every contingency. *Don't!* Focus on the issues essential to arriving at a conclusion that addresses the client's concerns. A word budget of 3,000 (seven to nine double-spaced pages) is ample to express an opinion. If you are concerned about leaving out something critical, consider attaching exhibits amplifying your opinion, or listing unanswered questions.
4. **Routine Memos:** 1,500–2,500 words. Associates write memos for partners and partners use them to make decisions in advising clients. A word budget of 1,500-2,500 (six to eight double-spaced pages) provides interested readers sufficient information to make preliminary decisions. If more research is required, the memo can be expanded; let your reader know that.
5. **Preamble to a Contract:** 250–500 words. As discussed in Chapter Six, Rule #1 for every lawyer responsible for preparing an agreement is to *know your deal*. If you have a full understanding of the transaction, 500 words is ample.
6. **Routine Legal Brief:** 4,000 words. Whether a motion involving unanswered discovery, a petition to compel a deposition or a request for a date certain for a trial, a word budget of 4,000 words (10–11 double-spaced pages) will usually suffice.
7. **Legal Brief on Summary Judgment:** 7,500 or less words. This is my favorite. During my time on the bench, I frequently saw briefs in connection with motions for summary judgment that, *sans* exhibits, exceeded 40 pages, more than 13,000 words. Most of those briefs were hundreds of sentences too few, and thousands of words too many. A long chapter in a serious work of history contains 7,500 words. No matter how complex, learn to distill your argument to the finer points.

These guidelines for word budgets are only suggestions. That said, seasoned attorneys who respect their audience likely adhere to similar word budgets. If you wish to avoid losing your reader because what you've written is too long, you will do your best to adhere to these suggested word budgets.

Judge Nelson Johnson (Ret.), the former state Superior Court judge who penned the book that inspired the HBO series Boardwalk Empire*, has a new book published by the NJSBA to help attorneys write and argue better. His latest work,* Style & Persuasion: A Handbook for Lawyers*, lists the most common writing and arguing mistakes lawyers make and includes practical tips for improvement. This is an excerpt from the book, which can be purchased at njsba.com.*



PRACTICE PERFECT

Insights on Legal Hiring and Recruiting from NJ Firm Leaders

Legal recruiting and hiring is never easy and especially now with five generations in the workplace and the working landscape forever changed by the pandemic, it can be incredibly challenging.

A group of New Jersey's law firm leaders offered insights into the strategies they employ that have proven to be meaningful at a New Jersey Institute for Continuing Legal Education seminar recently. While they agreed there is no magic bullet for finding and keeping good employees, open communications is important to any issue or approach.

Program moderator Craig M. Aronow, co-founder and partner at Rebenack, Aronow & Mascolo, said it is key to have a clear plan, or mission, to keep attorneys and staff engaged outside of just doing the legal work—and that is true for solo, small, mid-size and large firms.

"You have to be intentional about keeping them. It's not just about money. You have to give them a sense of fulfillment. If you are not intentional about making lawyers feel like you are listening to them and they are part of the mission of the firm... then you run the risk of losing them," he said.

Here are three key strategies to consider:

1. **Promote mental health and well-being**

   Kirsten Scheurer Branigan, who founded KSBranigan Law PC in Montclair, said caring for the mental health and well-being of attorneys and staff at the firm is especially important.

   "I shout from the rooftops to anyone who will listen about how important this is. People need to talk more about it, remove the stigmas associated with it. Firms are really starting to get it," she said. "We talk about mental health in my office constantly whether it is attorneys or staff because it is that important."

2. **Foster connection**

   Randi W. Kochman, co-managing shareholder at Cole Schotz PC, which is based Hackensack, said fostering a connection among everyone who works at a firm is critically important, especially in the wake of the pandemic where many people were isolated. The firm holds virtual and in-person events, has charity programs, and retreats to keep people feeling together. That helps the people at the firm and has an extended benefit outside the firm.

   "It's all about the connection that you are constantly trying to keep. Just being together is important," she said. "When you have that connection people feel it, clients feel it, recruits feel it, staff feels it. It is important."

3. **Be aware of differing needs**

   Diana C. Manning, managing principal of Bressler Amery & Ross, PC, based in Florham Park, said generational diversity in the workplace has required changes throughout the firm. For instance, younger attorneys seek out more feedback than prior generations. Communication and education are critical to helping firms navigate issues, grow and retain attorneys.

   "It's incredibly challenging. While there is always some truth to the generalizations about generations, it is important to remember that people are not monolithic and come at this from all different ways," Manning said. "Our newest lawyers come in every day, and I have boomers working every day but not coming in at all. There does need to be a lot of education (about generational differences and goals) both ways."

The conversation also covered topics like remote work and flexibility; diversity, equity and inclusion; and communication skills.

NJICLE is the educational arm of the New Jersey State Bar Association. The program will be available on-demand in the coming weeks. Visit NJICLE.com to see the full library of upcoming and on-demand programs.

WORKING WELL

The 'Culture' of Law

By Lori A. Buza
NJSBA Lawyer Well-Being Committee Chair
KSBranigan Law

Most people only think about their physical and mental health when thinking about "working well," but there is so much more to one's overall well-being. Cultural awareness and connections are other essential aspects of attorney well-being and performance.

How do you interact with others you work with who may have dissimilar backgrounds from you in terms of ethnicity, religion, gender, sexual orientation, and age? Do you avoid stereotyping and/or implicit bias against others who are culturally different from you? How do you maintain and value your own cultural identity (at work and home)?

If you can respect, accept, and value the different cultural aspects of others with whom you work and at the same time celebrate your own culture at work, you will enhance your own well-being. If your place of work supports you to express your religion, language, customs, and identity, you will feel better connected and more comfortable at work. Indeed, you will perform more competently and happily in your practice of law. Similarly, it is incumbent upon us as individuals to respect others' culture and beliefs at work.

It is important that the workplace creates an environment for these opportunities and for employers to promote programs and education supporting diversity and varying cultural tradition. Stakeholders should develop initiatives that foster respectful engagement and inclusivity. Attorneys should feel the freedom to express their identity and heritage and not be made to feel pressured into cultural norms that may be inconsistent with their own beliefs.

Making time outside of work to participate in recreational, creative, and cultural activities is also essential. Though we all know that an attorney's schedule is quite demanding, there needs to be time set aside for connection to family and friends through cultural expression. There is a whole world of cultural offerings in art, history, food, music, and dance that one may explore to activate joyfulness and connectedness. Studies indicate that those folks who have a strong sense of cultural identity are happier and more fulfilled.

It is important that lawyers make efforts to create connections with those who have different backgrounds. These experiences will facilitate relationships within the community at large as well as with prospective clients and colleagues alike. In short, cultural well-being (professionally and personally) enhances one's ability to be happier, more empathetic, feel more connected, and in turn to be a more successful attorney. ■

ETHICS AND PROFESSIONAL RESPONSIBILITY

Availability Of Diversion Expanded

By Bonnie Frost

Einhorn Barbarito

Diversion is a mechanism which may be offered to a lawyer to eradicate the possibility of having an ethical record. It must be offered to any lawyer who has committed minor ethical misconduct and the lawyer has had no determination of misconduct in the prior five years.

This administrative mechanism is known as Pretrial Intervention Program (PTI) for ethics where if, after entering an "Agreement in Lieu of Discipline" the respondent meets certain conditions within six months, conditions which usually are meant to remediate the cause of unethical conduct, the potential charge of unethical conduct is dismissed. The conditions may be: reimbursement of fees and costs to a client, completion of legal work, participation in a drug or alcohol program, psychological coun-

seling or the satisfactory completion of a course of study. The New Jersey State Bar Association offers a 3½ hour course for those admitted to diversion twice per year which many times is a requirement of any Agreement in Lieu of Discipline.

Prior to the Supreme Court receiving the Putting Lawyers First (PLF) Report on the Disciplinary System from the New Jersey State Bar Association, diversion could not be offered to a lawyer if the ethics investigator had already filed a complaint. This restriction resulted in lawyers who may have committed minor ethical misconduct having a disciplinary record. The PLF Committee Report recommended that diversion be available at any time in the disciplinary process if the infraction alleged was one of minor misconduct.

Understanding that facts are everything in every disciplinary matter, and the definition of minor misconduct can vary as applied to each matter, minor misconduct is defined as conduct, which, if proved, would not warrant a sanction greater than an admonition—the lowest form of sanction in the disciplinary system such as negligent record keeping errors, failure to communicate with a client, failure to have a signed retainer agreement or failure to turn over a file.

Minor misconduct is not: conduct which involves the knowing misappropriation of funds; conduct which might result in substantial prejudice or harm to a client; the respondent has been disciplined in the prior five years; the conduct involves dishonesty, fraud or deceit; or, the unethical conduct constitutes a crime.

Previously the *Rule* which addressed diversion, *Rule* 1:20-3(B)(i) provided that the Ethics Committee Chair *may* request that the Director of the OAE divert the matter and approve an Agreement in Lieu of Discipline. It further provided that diversion would *not* be available after a complaint had been filed.

Within weeks of receiving the PLF Committee recommendations, which were approved by the NJSBA Board of Trustees, the Supreme Court issued a Notice to the Bar on May 12, 2023, expanding the accessibility of lawyers for diversion for all cases involving minor misconduct. The *Rule*, as now amended, provides that an ethics chair *must* request the director divert a matter and "every effort must be made to consider diversion before the filing of a complaint, however, in appropriate circumstances diversion may be available subsequent to the filing of a complaint." The discretion to reject a proposed Agreement in Lieu of Discipline rests with the director of the Office of Attorney Ethics from which there is no appeal.

If an attorney fails to comply with the terms of the agreement, then the lawyer will be subject to discipline and the matter will proceed to conclusion via a complaint.

Practice Tip: Hire an attorney to represent you and immediately assess if the conduct alleged, if proved, could be defined as minor misconduct in order that your attorney can begin to immediately advocate for diversion on your behalf. ■

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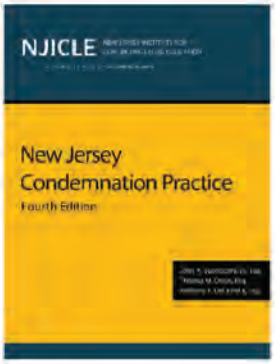

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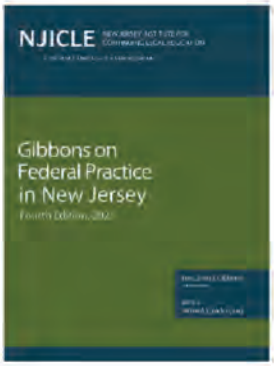

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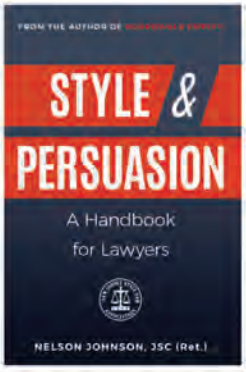

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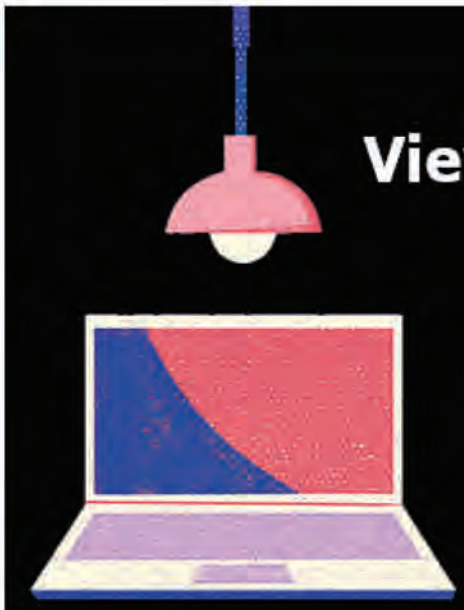

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NJDEP Adopts Substantial Amendments to Inland Flood Hazard Area and Stormwater Management Regulations

By Jennifer Phillips Smith and Bisola Taiwo

In June 2023, the New Jersey Department of Environmental Protection (NJDEP) filed the Inland Flood Protection Rule (IFPR), which became effective upon publication in the *New Jersey Register* in July 2023. The IFPR amends and supplements the Stormwater Management (SWM) rules[1] and Flood Hazard Area Control Act (FHACA) rules.[2] The IFPR was once contemplated as an emergency rule having an immediate effect, but the NJDEP ultimately engaged in traditional rulemaking, which included a public hearing on Jan. 11, 2023, and a 60-day comment period, which ran through Feb. 3, 2023.

The IFPR will have a significant impact on the design of stormwater facilities and buildings in areas subject to inundation during rain events, which will impact both private developer clients and municipal clients charged with enforcing stormwater and floodplain management requirements.

The IFPR is likely only the beginning of more stringent environmental regulation, as additional rulemaking is likely forthcoming. Although the flood hazard aspects of the new rule changes pertain only to fluvial flood areas and not to coastal flood areas, the NJDEP is planning to publish another wide-ranging package of rule revisions relative to coastal areas as part of its New Jersey Protecting Against Climate Threats initiative.

Inland Flooding and Climate Change

The NJDEP designed the IFPR to prevent future damage to communities in New Jersey's fluvial flood-prone areas, which are typically inland areas surrounding non-tidal rivers and streams. The NJDEP's stated goal in adopting the IFPR was to ensure the use of current precipitation data and climate science to prepare New Jersey communities to confront public safety threats presented by climate change, specifically the increased intensity and frequency of precipitation events that cause increased stormwater runoff and flooding. In adopting the IFPR, the NJDEP relied on patterns of increasingly dangerous flood events and various scientific studies indicating that climate change will only worsen and intensify inland flooding.

The NJDEP cited the devastation caused by Tropical Storm Ida in 2021 as a catalyst for adopting the IFPR. As many may recall, Tropical Storm Ida subjected northern and central New Jersey to record rainfall and flooding. Some communities faced 10 inches of rainfall in a short period, which contributed to record flooding, particularly in communities along rivers. For example, Manville recorded the Raritan River cresting at 27.6 feet, which was higher than it did during Hurricane Floyd in 1999. The resulting flood inundated the borough, causing at least 100 homes to become uninhabitable. The NJDEP cited similar fluvial flooding along the Passaic, Wanaque, Rockaway, Pompton, Saddle, Millstone, and Neshanic rivers. The adoption of the IFPR, in response, is an effort to improve stormwater facilities and mitigate the impacts of fluvial flooding to prevent further damage to property and loss of life.

Climate Change Projected Precipitation

Simply put, the regulations now require applicants to account for more rainfall, which is anticipated to cause more stormwater runoff and more expansive and deeper flooding in fluvial areas. To account for anticipated climate change, the IFPR fundamentally changes the data on which engineers must rely when calculating the depths of the two-, 10-, and 100-year storms.

Under the prior regulations, engineers relied on the NOAA Atlas 14 Precipitation-Frequency Atlas (NOAA Atlas 14), which analyzed daily and hourly rainfall records that were last revised in December 2000. The IFPR supplements the NOAA Atlas 14 with the results of a study conducted by Cornell University. Cornell's study analyzed rainfall data between 1950 and 2019 and used that data, with certain assumptions related to greenhouse gas emissions and climate change, to project rainfall depths for storms in two future periods, 2020 to 2069 and 2050 to 2099. As a result, Cornell concluded that rainfall is likely to be 17% to 50% higher during certain storm events, depending on the county, than what the NOAA Atlas 14 would have predicted.

JENNIFER PHILLIPS SMITH *is the co-chair of Gibbons's Real Property Group. She counsels clients on redevelopment matters, with a focus on long-term, multiphase transformative projects. She represents clients in connection with mixed-use, industrial, commercial, medical, educational, and senior living projects and maintains a niche practice in liquor licensing and alcoholic beverage control.*

BISOLA TAIWO, *a director, joined Gibbons P.C. in 2022, bringing a wealth of experience to the firm's Real Property Group after years of serving as the Assistant Director of Economic and Housing Development for the city of Newark. Her primary practice areas include redevelopment, land use, and real estate financing.*

Specific Changes to the Stormwater Design Regulations

The IFPR updated the SWM regulations to require that groundwater recharge standards, quantity standards, and best management practices be based on the enhanced county-specific projected precipitation totals, now calculated using Future Precipitation Change Factors. It also adjusted the methodology for calculating the current precipitation. Additionally, the IFPR eliminated the use of the rational method or the modified rational method, which were alternatives available under the prior regulations for calculating runoff. For many sites, the "new" stormwater calculations will result in the need for more stormwater infrastructure, such as larger or more stormwater retention areas, potentially reducing the developable area of a site and increasing the costs of construction.

Specific Changes to the Flood Hazard Regulations

In addition, the change in methodology will result in more areas of the state being within a regulated flood hazard area and more projects having to meet the flood hazard area design flood elevation. The exact design flood elevation for a particular project or property will depend on which regulatory methodology an applicant uses[3]. For example, where an applicant is relying on existing FEMA mapping and using Method 3 under the regulations, the NJDEP will require 2 feet (for a total of 3 feet) to be added to the FEMA flood elevation to arrive at the new flood hazard area design flood elevation. As an alternative, the IFPR maintains an applicant's ability to use Method 6 to conduct its own hydrologic and hydraulic studies to determine the design flood elevation, but such analysis must use the projected values anticipated by the Cornell study.

In addition to addressing methodologies for calculating the design flood elevation, the IFPR modified the framework for identifying the floodway. For reference, a floodway is the most restricted area, generally adjacent to a body of water, which is reserved for the conveyance of floodwaters. The IFPR now requires floodways to be updated based on current 100-year precipitation data, as augmented by the Cornell study, but *not* based on the enhanced projected future rainfall.

The IFPR also updated various provisions of the FHACA to incorporate standards under the Uniform Construction Code to ensure that all projects receiving a permit-by-registration, general permit-by-certification, general permit, or individual permit also comply with construction standards that are required by the National Flood Insurance Program.

Public Transportation Entity

In a nod to various transportation infrastructure projects currently in the planning stages and under development, the IFPR provided some flexibility for a "public roadway or railroad." Major developments of public roadways and railroads conducted by public transportation entities that have determined a preferred alternative or reached an equivalent planning and design milestone before the effective date of the IFPR will not be required to use the new future precipitation change factors for purposes of demonstrating compliance with the SWM rules. Roadways built by private developers that are intended to be dedicated to the public after construction explicitly do not qualify as a "public roadway or railroad" and will not receive special treatment under the regulations.

Legacy Applications

Although the IFPR took effect immediately on adoption, not all projects will be subject to the new rules.

If a development does not otherwise require NJDEP permitting, the new stormwater requirements will not apply to a major development[4] if, before the adoption of the IFPR, a developer filed a complete application for preliminary or final site plan approval, final municipal building or construction permits, or subdivision approval (where no site plan approval is required). The key to this provision will be ensuring that the application was filed timely and was complete. If a development required NJDEP permitting, the new stormwater requirements will not apply if the developer submitted a technically complete application to the NJDEP prior to the date of adoption.

Exemptions from the new flood hazard regulations will be more difficult to achieve. Flood hazard area approvals that are complete for review prior to the effective date of the IFPR will be exempt from the new regulations provided:

- the regulated activity has been approved under a prior valid permit; or
- the regulated activity is part of a project for which a complete flood hazard area application was submitted to the NJDEP prior to the effective date of the new rules and the application is subsequently approved.

If a project was not subject to the FHACA prior to the adoption of the IFPR, but is now within a regulated flood hazard area, it will be exempt from the IFPR only if one of the following circumstances apply:

- the regulated activity received preliminary or final site plan approval, final municipal building or construction permits, or subdivision approval (where no site plan approval is required) pursuant to the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. (the MLUL) prior to the effective date of the new rules; or
- the regulated activity did not require the aforementioned land use approvals, and the regulated activity commenced prior to the effective date of the new rules.

Accordingly, clients who find that their projects now fall within a fluvial flood hazard area with the adoption of the new rules should be particularly vigilant about verifying whether all necessary land use approvals were obtained prior to the effective date of the IFPR before commencing construction. ■

Endnotes

1. N.J.A.C. 7:8
2. N.J.A.C. 7:13
3. N.J.A.C. 7:13-3.3, -3.4 and -3.6
4. See N.J.A.C. 7:8-1.2 for definition of Major Development

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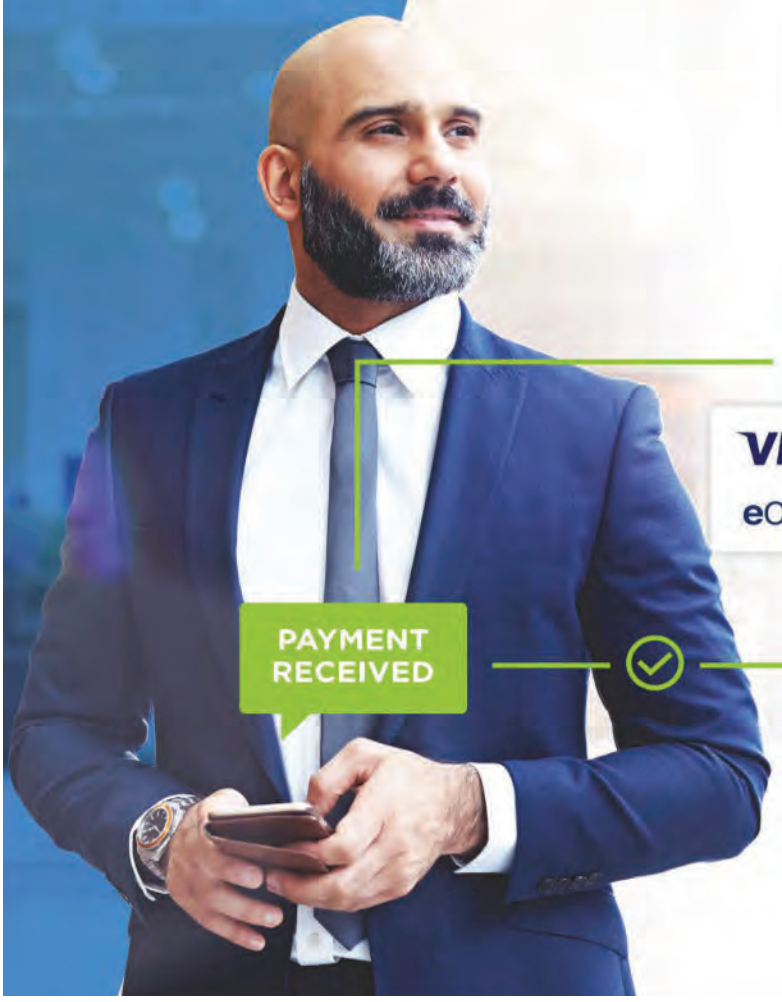

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Are Cannabis Uses Eligible for Use and Conditional Use Variances?

By Jennifer Mazawey and Thomas Garlick

All 564 municipalities in New Jersey regulate land uses within their individual borders. The power to zone stems from the New Jersey Constitution, which grants the Legislature the right to delegate those powers to the municipalities.[1] The New Jersey Legislature has delegated those powers through the Municipal Land Use Law (MLUL).[2] Under the MLUL, a municipality's planning board adopts a master plan, which sets forth the objectives and principles of the municipality and lays out the land use element for the municipality.[3] A municipality's governing body, with the assistance of community input and its planning board, passes zoning ordinances which regulate uses, height, open space and other bulk standards.[4]

When an owner or developer of property proposes a use of land that is inconsistent with the use regulations adopted by a municipality, that entity has a right to seek a variance from the municipality's zoning board of adjustment.[5] For "special reasons," the zoning board may allow the proposed use to operate on the property, even though the governing body of the municipality, through its zoning ordinance, does not allow it.

Compare the MLUL with New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMM Act or "Act"), which allows municipalities to enact ordinances controlling the location, manner, and times of operation of cannabis establishments and which requires applicants for cannabis licenses to provide proof of local support for the "suitability of the location" for the cannabis establishment.[6] As a result of the authority granted to municipalities under the Act, many municipalities that support cannabis businesses have adopted ordinances permitting or conditionally permitting cannabis-related uses in their jurisdictions.

The CREAMM Act also provided municipalities with the opportunity to broadly prohibit any one or all classes of

cannabis uses throughout the municipality if the municipality timely enacted a prohibiting ordinance within 180 days of the effective date of the Act.[7] An ordinance prohibiting cannabis uses that predated the CREAMM Act were deemed null and void, requiring municipalities who chose to prohibit any one or all of the cannabis uses to enact new prohibiting ordinances within the 180-day period mentioned above.[8]

As discussed further below, location and site suitability are two important factors considered by New Jersey when reviewing an application for a cannabis-related license and those same factors are considered by the municipal boards of adjustment evaluating use variance applications.

Therefore, if a municipality choses to prohibit a particular cannabis use, can a property owner or developer seeking to establish a cannabis use within the municipality do so by successfully seeking a use variance? Does an applicant have a right to file an application to the municipality's board of adjustment to request such relief given the fact that municipalities were provided with statutory authority under the Act to broadly prohibit same? Similarly, in towns where a class of cannabis use is limited to certain geographical locations or zoning districts, does an applicant have the right to seek a use variance to establish the cannabis use elsewhere in the municipality, given the fact that the municipality has allowed it in only certain areas of their jurisdiction?

Proofs Necessary to Succeed on a Use Variance

A permitted use is one allowed as of right. A zoning officer may need to approve or confirm the use, but a formal application, notice and hearing may not be required so long as site plan approval is not otherwise necessary. A conditional use requires that an applicant, prior to commencing the use, demonstrate that the project has satisfied the enumerated conditions which the municipality has attached to the type of use.[9] Examples of such conditions may include distance requirements from other uses, such as houses of worship, schools, and parks; hours of operation; security; noise and odor control; lot size; and parking. If an applicant cannot satisfy the listed conditions under the zoning ordinance, it may seek relief from the municipality's board of adjustment for a conditional use variance from the listed conditions.[10] However, if the use is not a permitted use or a permitted conditional use, the use cannot be conducted on site unless a property owner or developer first obtains a use variance from the municipality's board of adjustment.

In order to successfully obtain a use variance pursuant to N.J.S.A. 40:55D-70d(1), an applicant must demonstrate that "special reasons" exist for granting the use variance (the "positive criteria") and that the "negative criteria" are met. "Special reasons" have been held to mean that 1) the refusal to allow the project would impose an undue hardship on the applicant; and/or (2) the proposed project carries out a purpose of the Municipal Land Use Law as listed at N.J.S.A. 40:55D-2.[11] An applicant can prove the undue hardship aspect of the special reasons by showing that an economic inutility results from the property not being reasonably adapted to a conforming use.[12] In other words, a conforming use is not possible on the subject property. Applicants should keep in mind that the inability to make *the most possible profit* or conduct any economically feasible use is not the same as an economic inutility.[13] Courts have made clear that the argument of a more profitable use than those permitted by ordinance does not constitute hardship or inutility.[14]

JENNIFER MAZAWEY *is a partner with the law firm of Genova Burns LLC. Her practice is devoted to commercial real estate with a focus on land use and redevelopment across multiple industries, including cannabis and mixed-use developments.*

THOMAS GARLICK *is an associate at Genova Burns LLC. He concentrates his practice in the representation of property owners, developers, and commercial tenants in a variety of real estate matters including land use and redevelopment approvals, representation before governmental agencies, commercial leasing, and transactions.*

As for promotion of the purposes of the MLUL, any one of the listed 15 purposes at N.J.S.A. 40:55D-2 may support a use variance.[15] However, demonstrating promotion of one or more of the purposes found under N.J.S.A. 40:55D-2 must be accompanied by a showing that the site is particularly suited for the proposed use.[16] Site suitability within the positive criteria is focused on two concerns: (1) why the location of the site within the municipality is particularly suited for the use despite its prohibition under zoning and (2) what particular characteristics of the property make it suitable for the proposed use rather than a permitted one. Factors to consider in determining the site suitability test are whether there is a current need for the particular use in the proposed zone and whether there will be a future need for same in parts of the zone not yet developed.[17]

Once the applicant satisfies the positive criteria, they must also show the board of adjustment that the development meets the "negative criteria," or

that the benefits of approving the otherwise unauthorized use substantially outweigh any negative impact the development will have on the zone plan.[18] If the proposed use will hinder sound zoning, for example by having insufficient onsite parking and the creation of traffic, or proposing a commercial use within a residential zone where other commercially zoned sites were available to the applicant, the application will not satisfy the negative criteria.[19]

Cannabis and Use Variances

Make no mistake, the proofs necessary to secure a use variance are significant and no easy feat. However, the question posed is whether a use variance under N.J.S.A. 50:55D-70d(1) is available at all for a property owner or developer seeking to establish a cannabis use in a zoning district or municipality where same is not permitted or expressly prohibited. As a condition of an application for either an annual license to operate a cannabis business establishment, or a conditional license for a proposed cannabis establishment, an applicant must provide the New Jersey Cannabis Regulatory Commission (CRC) with proof of local support for the suitability of the location, indicating that the intended location of the cannabis use is appropriately located or otherwise suitable for activities related to the operations of same.[20] If a municipality has prohibited the cannabis use or if it has allowed the use but the location the applicant intends to use is not within a zoning district that allows such class of cannabis, presumably, the applicant will not be able to obtain the necessary proof of local support from the municipality, making the license process almost impossible. Would a use variance approval from a zoning board take the place of a resolution of support from the local municipality?

Furthermore, can the zoning officer or board of adjustment reject a use variance application for relief under N.J.S.A. 50:55D-70d(1) on the substantive basis that same is prohibited at the subject property under the Act? If the class of cannabis use is prohibited across the municipality, one can imagine the zoning officer or board of adjustment taking the position that because the municipal governing body has taken affirmative steps to expressly prohibit the class of cannabis under the CREAMM Act, it would be quite difficult and therefore impossible to demonstrate that the "site suitability" test under the second prong of the positive criteria analysis of a use variance can be satisfied. Nevertheless, a substantive denial before a review, public hearing, testimony, and public comment on the application may give rise to grounds for appeal found under N.J.S.A. 40:55D-70a (appealing zoning officer/ administrative officer decision) and New Jersey Court Rules 4:69-1 through 7 (actions in lieu of prerogative writs for an appeal of a board of adjustment decision). A similar set of circumstances may present in a case where a cannabis use is proposed in prohibitive zone within a municipality that allows a cannabis use as a permitted use or conditional use elsewhere.

As the cannabis legal environment develops, there may be a dramatic change in the number of municipalities that permit cannabis uses and a change with regard to location of same within the municipal boundaries. Such a change may usher in different challenges not only to the municipal ordinances governing cannabis uses but also question whether a property owner or developer can successfully prosecute a use variance to allow a class of cannabis use in a zoning district where it is not otherwise permitted. ■

Endnotes

1. N.J. Constitution, Article IV, Section VI, Paragraph 2
2. N.J.S.A. 40:55D-1 et seq.
3. N.J.S.A. 40:55D-28
4. N.J.S.A. 40:55D-62
5. N.J.S.A. 40:55D-70(d)
6. N.J.S.A. 24:6I-45(a)(1).
7. N.J.S.A. 24:6I-45(b)
8. *Id.*
9. N.J.S.A 40:55D-3; see also *Omnipoint v. Board of Adjustment*, 337 N.J. Super. 398, 419 (App. Div.), certify. Den. 169 N.J. 607 (2001).
10. N.J.S.A. 50:55D-70d(1).
11. N.J.S.A. 40:55D-2; see also, *Burbridge v. Mine Hill Tp*. 117 N.J. 376, 386-87 (1990).
12. See *Medici v. BPR Co.*, 107 N.J. 1, 17 n.9 (1987).
13. *Id.* holding "[t]hat a parcel of land is zoned so as to preclude its most profitable use or even any economically feasible use has not been held in any reported decision to justify a subsection (d) variance; alleviation of economic hardship is not a purpose of zoning or by itself a special reason for a use variance."
14. *Charlie Brown of Chatham v. Board of Adjustment*, 202 N.J. Super. 312, 329 (App. Div. 1985); *Cerdel Constr. Co. v. East Hanover Tp.*, 86 N.J. 303, 307 (1981); *Bern v. Fair Lawn*, 65 N.J. Super. 435, 450 (App. Div. 1961).
15. *Burbridge*, 117 N.J. at 386.
16. *Fobe Assocs. V. Mayor and Council of Demarest*, 74 N.J. 519 (1977), holding that the rule of *Kohl v. Mayor and Council of Fair Lawn*, 50 N.J. 268, 279-280 (1967) that where there is a need for the proposed use, the general welfare is served because the use is peculiarly fitted to the subject property for which the variance is sought.
17. *Ward v. Scott*, 16 N.J. 16 (1954).
18. *Coventry Square v. Westwood Zoning Bd. of Adjustment*, 138 N.J. 285, 299 (1994).
19. *Northeast v. West Paterson Zoning Bd. of Adj.*, 327 N.J. Super. 476, 497-498 (App. Div. 2000); see also *Win v. Margate City*, 204 N.J. Super. 114 (Law Div. 1985).
20. N.J.S.A. 24:6I-36(d)(1)(c)(iii).

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Facing the Tougher Questions

How Recent Decisions Regarding the Statewide Non-Residential Development Fee Act Will Affect Your Client

By Demetrice R. Miles and Thomas J. Trautner Jr.

New Jersey Gov. Jon Corzine signed the Statewide Non-residential Development Fee Act into law on July 17, 2008, creating a uniform system for the collection of development fees to fund the creation of affordable housing. By signing the act, the governor voided all municipal ordinances that otherwise imposed development fees or payment in lieu fees on non-residential developers.

The act might not be considered the most exciting affordable housing topic, but to this day, questions from clients about how to navigate the act arise frequently.

The act imposes a fee on all construction resulting in non-residential development, as follows:

(i) A fee equal to 2.5% of the equalized assessed value of the land and improvements, for all new non-residential construction on an unimproved lot or lots; or
(ii) A fee equal to 2.5% of the increase in equalized assessed value, of the additions to existing structures to be used for non-residential purposes.

Pursuant to the act, the required fee must be collected by the municipality where the project is located before a certificate of occupancy is issued. But for a few exceptions, all non-residential development projects in New Jersey are potentially subject to the payment of a required fee. An over-simplified list of these exemptions includes:

(i) non-residential construction connected with houses of worship, property used for tax exempt educational purposes and the relocation of an on-site improvement to a non-profit hospital or a nursing home facility;
(ii) parking lots and parking structures;
(iii) non-residential development which is an amenity to be made available to the public (i.e. community centers);
(iv) projects that are located within a specifically delineated urban transit hub;
(v) projects that are located within an eligible municipality (defined as a municipality receiving state aid) when the majority of the project is located within a half-mile radius of the midpoint of a platform area for a light rail system; and
(vi) projects determined by the New Jersey Transit Corporation to be consistent with a transit village plan.

In 2023, if your client is sophisticated, it is probable that they are generally aware of the foregoing. That being said, it is also probable that your client imagines that because you work in the area of land use, you will be knowledgeable regarding:

- how to negotiate the appropriate fee where non-residential development is situated on real property that has been previously developed with a building, structure, or other improvement;
- what is supposed to happen if the non-residential development is subject to an exemption under the Long Term Tax Exemption Law (LTTEL); and
- the respective roles of the municipality versus the director of the division of taxation in the event of an appeal of the calculation of imposition of a fee under the act.

Fortunately, because you read *New Jersey Lawyer* and there are some recent tax court decisions that address some of these questions, you can sound knowledgeable and provide your client with practical guidance.

Valuing Previous Developed Property

The basic rule provides that whenever non-residential development is situated on real property that has been previously developed with a building, structure, or other improvement, the typical 2.5% fee is reduced by the equalized assessed value of the land and improvements on the property where the non-residential development is situated, as determined by the tax assessor of the municipality at the time the developer or owner, including any previous owners, first sought approval for a construction permit including but not limited to: (1) demolition permits pursuant to the state Uniform Construction Code; or (2) approvals under the Municipal Land Use Law. If this calculation results in a negative number, the non-residential development fee shall be zero.

In *Glenpointe Association IV, LLC v. Twp. of Teaneck,*[1] on appeal from the director of taxation, the court addressed whether a property was *improved* for purposes of the act. The subject property involved the development of vacant land into a 350-room 13-story hotel. However, prior to development of the hotel the property was listed on the municipal tax records as vacant land and assessed at $732,000, with the entire amount allocated to the land and $0 for the improvements. Although the property was only assessed a land value, prior to the construction of the hotel project, the property was improved with a parking lot, curbing, sewer lines, storm drainage lines and structures, signage, transformers, and a bus shelter.

In calculating the non-residential development fee, the developer took the position that the pre-existing paved parking lot had a certain value and that along with the land value should be deducted when determining the fee. In opposition, the township asserted that no deduction for prior equalized assessed value of the land should be taken because the construction of the hotel constituted new non-residential construction on what was essentially a vacant unimproved lot. The township claimed that whatever parking lot improvements existed on the property were *de minimis* in nature and should be disregarded.

In deciding the case, the court noted that the Legislature did not establish a threshold for the level or quantum of improvements that must be present to qualify as an improvement under the act. The court found that for the purposes of the act, the subject property was improved, and therefore the equalized assessed value of the pre-existing improvements and land associated therewith were properly deducted in calculating the fee.

The moral of the story is that when calculating the non-residential development fee, do not assume that the tax assessment records of the municipality are definitive as to whether a property is *improved* for purposes of act. There could be many reasons,

DEMETRICE R. MILES *practices with CSG Law's Real Estate, Development & Land Use Group. His decades-long practice is heavily focused on litigation with a concentration in real estate, real property tax appeals and exemption claims, eminent domain, in rem tax foreclosures, public utility law, environmental law, public contracts law, Open Public Records Act, construction law, labor and employment, and complex commercial litigation. In the field of tax appeals and eminent domain, Demetrice has served as special counsel to various public entities throughout New Jersey.*

THOMAS J. TRAUTNER JR. *is a member of CSG Law, practicing with the firm's Real Estate, Development and Land Use Group. Tom regularly counsels clients on applications for development to planning and zoning boards as well as state agencies in connection with industrial, residential/multifamily, retail, hotel and mixed-use projects. He likewise focuses a substantial amount of his practice in assisting clients with navigating the redevelopment process and in real estate litigation (most notably, matters concerning affordable housing and eminent domain).*

Unless a non-residential development falls under one of the exceptions enumerated in the act, do not assume that a property is exempt from the fee imposed by the act simply because it is exempt from real estate taxation pursuant to another state statute.

explained or unexplained why the municipal tax rolls do not reflect a property as improved. It could be that an improvement was made to a property after the tax records were certified for a given tax year, or that the assessor considered an improvement to be of *de minimis* value. When calculating the non-residential development fee, make sure you undertake an independent evaluation as to whether to argue that property has pre-existing improvements.

Non-Residential Development Subject to an Exemption

Unless a non-residential development falls under one of the exceptions enumerated in the act, do not assume that a property is exempt from the fee imposed by the act simply because it is exempt from real estate taxation pursuant to another state statute. In *Erez Holdings Urban Renewal, LLC v. Director, Division of Taxation,*[2] a developer asserted that because the improvements of the development were exempt under the LTTEL, the non-residential development fee should be calculated by attributing a value of zero to the improvements. The court held that for purposes of the act, the equalized assessed value of a property is required to be determined under the laws governing local property taxation, and that such laws have no provision requiring the assessor to allocate or attribute $0 to the equalized assessed value of the improvements of properties which are subject to the LTTEL, and that no such mandate is provided in the LTTEL. It is important to note that under New Jersey's property tax scheme, even properties which are exempt from conventional taxes are required to be assessed at full and fair value. A property which receives a tax exemption is not carried on the tax records at a value of zero. Therefore, the equalized assessed value of an exempt property must be factored when calculating the non-residential development fee.

The Role of a Municipality Following an Appeal to the Director of the Division of Taxation

Your client is probably aware that in the event of a dispute over the amount of the required fee, the developer may pay the proposed fee under protest, at which point the local code enforcement official is required to issue the certificate of occupancy (provided that the construction is otherwise eligible for a certificate of occupancy). In the event the developer wishes to challenge the calculation of the required fee, the developer can file a challenge with the director—who is required to decide within 45 days receiving the challenge. The developer may thereafter appeal any determination by the director to the New Jersey Tax Court in accordance with the State Tax Uniform Procedure Law within 90 days of the date of the determination by the director of the division of taxation.

The act is silent regarding the role of a municipality when a developer files an appeal to challenge the calculation of the fee. The issue was brought to the forefront in *National Winter Activity Center v. Director, Division of Taxation,*[3] where the court held that when a municipality is authorized to impose fees under *N.J.S.A.* 52:27D-329.2, any appeal to the director or tax court of the municipality's decision must include the municipality as a named party. *National Winter Activity Center* concerned an appeal of the denial of a property owner's application for an exemption from payment of the fee. A formal protest was filed with the director which was denied. A timely challenge of the director's decision was made by filing an action with the tax court. The appeal to the tax court named the director as the sole defendant. In a pre-trial conference, the court instructed the director to advise the township of the litigation and invite it to file a motion. The township filed a motion to intervene pursuant to *R.* 4:33-1, claiming that it had a legitimate interest in the subject of the underlying action. In opposition to the township's motion, the property owner claimed that the township's position was identical to that of the director's and therefore its interests were adequately represented.

The court recognized that the act contains no provision to include or notify a local municipality of a pending tax court appeal of the director's final determination in non-residential development fee matters. The court noted also that although there was no authority, by statute or case law, in some cases the local municipality was included as a defendant in litigation and in others it was not. The court determined the township

had a legitimate interest in the subject of the litigation because it is authorized to use fees for the purposes of the Fair Housing Act. Further, the court reasoned that any ruling on the ultimate issue in the case would be binding on the township by virtue of the doctrine of collateral estoppel. Accordingly, if the township were denied participation in the litigation, it would be impeded from protecting its interests in the future.

The court also determined that the township's interest could not be adequately represented by the director because the township, provided it complied with the applicable statutory requirements, (1) is the ultimate user of the non-residential development fees, (2) the township is in control of much of the evidence needed to support the imposition of the fee (e.g., property record cards and the calculations used by the assessor to determine the assessed value of properties situated within the municipality), and (3) in cases where the director rules against the municipality the director would not be able to represent the municipality on an appeal.

The Takeaway

Helping your client determine whether it is subject to the non-residential development fee and the amount of such fee, if applicable, requires that you do more than fill in the blanks on the State of New Jersey Non-Residential Development Fee Certification/Exemption form. That being said, recent tax court precedent suggests that courts will employ a common-sense approach, e.g. narrowly construing the act to disfavor creative approaches to avoid paying any fee, but also remaining open to recognizing deductions for prior uses of the property. Accordingly, in order to give your client the best possible advice, you will need to have a firm understanding of how a municipality has previously assessed improvements for local tax purposes (which could be different from how the value of a property is applied for purposes of calculating the fee). Notwithstanding the act being silent, municipalities will be treated as an indispensable party to any challenge regarding the applicability or calculation of the non-residential development fee – something to keep in mind when advising your client whether to compromise or appeal. ■

Endnotes

1. 2019 WL 3037556 (Tax Ct., decided July 10, 2019)
2. 32 N.J. Tax 471 (Tax Ct. 2022)
3. 32 N.J. Tax 12 (Tax Ct. 2020)

Resolution Compliance

The Board Attorney's Perspective

By Dennis M. Galvin and Amanda C. Wolfe

DENNIS M. GALVIN *is a partner at Davison Eastman Munoz and Paone located in Freehold. He has written numerous articles that have been published in* New Jersey Planner, State League of Municipalities Magazine, New Jersey Lawyer *and* Local Government Law Review; *he is the author of* Local Government Law, 4th Edition, New Jersey Practice (Volumes 34-35 A), *published by West Services, Inc.*

AMANDA C. WOLFE *is counsel at Post Polak, located in Roseland. She represents several land use boards.*

Board attorneys are routinely asked what the board can do if it discovers an applicant is not complying with the terms of a resolution of approval. The board usually asks whether it can require the non-compliant applicant to appear before it and we, unfortunately, have to explain that enforcement is not the function of the board.

It is well-settled that hearings conducted before a Zoning Board of Adjustment are quasi-judicial proceedings.[1] A board deciding whether to approve a land use application is most similar to a court wherein there are rules of practice and an arbiter of the facts, and, ultimately a decision on the law. Like a court, a board is required to have jurisdiction to hear a case. Whether a board has such jurisdiction is dictated by the Municipal Land Use Law (MLUL). Of note, the powers of a board of adjustment "stem directly from the statute and may not in any way be circumscribed, altered or extended by the municipal governing body."[2]

Like a Court, a board can retain jurisdiction over certain aspects of the approval. A board also has the power to craft reasonable conditions to meet the needs of the approval and mitigate any detriment associated with the proposal. The board could even include a condition of approval that precludes the issuance of a building permit or certificate of occupancy until certain conditions are satisfied.For instance, a condition of approval could provide "Prior to the issuance of a final certificate of occupancy, the Applicant shall install five (5) arbor vitae having a planting height of no less than 6' at planting."

Cox 2-8.2 provides "...it should be emphasized that the boards are quasi-judicial bodies and are not involved with the enforcement of the ordinance. The enforcement

of the ordinance falls to the zoning officer, construction official, municipal attorney and governing body. Cox & Koenig, Section 2-8. Section 18 of the MLUL provides that the "proper local authorities of the municipality or an interested party" may institute any appropriate action, specifically, Section 18 provides as follows:

> In case any building or structure is erected, constructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this act or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities of the municipality or an interested party, in addition to other remedies, **may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land, or to prevent any illegal act, conduct, business or use in or about such premises. (emphasis added)**

Chapter 49 of Title 40 provides the authority for a governing body to establish penalties for ordinance violations. Specifically, *N.J.S.A.* 40:49-5 sets forth the penalties and fines as follows:

> The governing body may prescribe penalties for the violation of ordinances it may have authority to pass, by one or more of the following: imprisonment in the county jail or in any place provided by the municipality for the detention of prisoners, for any term not exceeding 90 days; or by a fine not exceeding $2,000; or by a period of community service not exceeding 90 days.
>
> The governing body may prescribe that for the violation of any particular ordinance at least a minimum penalty shall be imposed which shall consist of a fine which may be fixed at an amount not exceeding $100.
>
> The governing body may prescribe that for the violation of an ordinance pertaining to unlawful solid waste disposal at least a minimum penalty shall be imposed which shall consist of a fine which may be fixed at an amount not exceeding $2,500 or a maximum penalty by a fine not exceeding $10,000.

Almost all municipalities hire zoning officers to enforce their zoning ordinances and the conditions of land use approvals.It is generally expected that zoning officials will take action to enforce both. An applicant aggrieved by an action of the zoning official has three options under the law. The applicant could (1) file an appeal pursuant to *N.J.S.A.* 40:55D-72, (2) seek an interpretation pursuant to *N.J.S.A.* 40:55D-70(b) and/or (3) seek variance relief pursuant to *N.J.S.A.* 40:55D-70(c) or (d). Of course, the applicant could also simply comply with the ordinance requirements.

The Legislature has deemed the enforcement of zoning so important that *N.J.S.A.* 40:55D-18 allows the municipality, as well as any interested party, to take action. Neighbors can and have taken action to enforce zoning violations when the zoning department seems unwilling. Even competitors have brought enforcement actions.[3]

If compliance cannot be obtained easily, the zoning officer or enforcement official can, and often will, file a municipal Court complaint to encourage, if not require, compliance. Alternatively, the zoning officer or enforcement official could issue a ticket every day during which a use/structure contravenes the requirements of the resolution or the zoning ordinance. However, if the fines are not substantial enough, an applicant, may simply accept the fines as a cost of doing business. For example, imagine an illegal parking lot being used for beach parking. If the operator is earning $25 pervehicle, per day, a daily fine of $100 certainly will not alter this behavior.

As a practice tip, be aware that not all municipalities have amended their ordinance to these higher penalties.

In short, only the governing body, through its zoning officer or enforcement official, can enforce ordinance requirements and conditions of approval. The board simply cannot involve itself with enforcement directly. Indeed, if a board member were to file a complaint, they would then be precluded from hearing the matter if it returns to the board. As any board attorney can tell you, the board knows when its conditions are not being enforced and will often raise the issue at a meeting. The board spends significant time on each application and if conditions of approval are continually being ignored, the board chairperson can express concern to the township administrator about enforcement in general, but that is as far as the board can go.

The Well Written Condition

The goal of all zoning enforcement is compliance not punishment. Conditions should be carefully crafted with an eye toward enforcement. They should be clear, concise, and enforceable. Specificity is important. Zoning officers are not at the board hearings and cannot read the board's mind. If the board wants a 5-foot-tall, white, board-on-board fence, same should be stated in a condition of approval. For example, if the board requires additional landscaping, the condition of approval should be specific as to the number and type of plantings, as well as the species, and a minimum height at the time of planting. The board should also address what happens if the plantings fail. Occasionally mother nature fools all of us.

Another potential solution to enforcement issues is for the board to retain jurisdiction for a limited period of time over a specific aspect of the application. For example, the board could retain jurisdiction over landscaping to ensure that the trees that are planted thrive and, if they do not, they must be replaced. Notwithstanding, even retaining jurisdiction does not give the board the supervision, it merely provides a right to the neighbor or the zoning officer to raise a concern which would be reviewed by the board.

Ensuring that any conditions of approval are detailed enough to be clearly enforced can certainly help with making sure that said conditions are actually enforced by the designated municipal official. It is a good practice to ascertain whether the applicant will stipulate to certain conditions of approval because if stipulated to, it is less likely that said conditions can be validly challenged as being unreasonable after the fact. As a matter of practice, a board attorney may wish to repeat the stipulated to conditions in advance of the board's deliberation and vote to ensure that there is no disagreement as to whether the conditions were agreed upon by the applicant.

Additionally, a good board attorney will tend to include certain standard conditions of approval in all resolutions which include, but are not limited to, the following:

1. Any and all outstanding escrow fees shall be paid in full and the escrow account shall be replenished to the level required by ordinance within 30 days of the adoption of a resolution, within 30 days of written notice that a deficiency exists in the escrow account, prior to signing the site plan and/or subdivision plat, prior to the issuance of a zoning permit, prior to the issuance of construction permits, and prior to the issuance of a temporary and/or permanent certificate of occupancy, completion or compliance (whichever is applicable);
2. The applicant shall construct the proposed improvements in strict compliance with the documentary and testimonial evidence submitted to the board, including, but not limited to, any plans submitted or presented as part of the application, any exhibits introduced into evidence, and any statements made during the course of the hearing;
3. The applicant shall ensure that the property remains orderly during and after construction (i.e., building materials are appropriately stored, construction debris is timely removed);
4. Any conditions of approval stipulated to by the applicant are incorporated herein even if not specifically stated;
5. The aforementioned approval shall be subject to all requirements, conditions, restrictions and limitations set forth in all prior governmental approvals, to the extent same are not inconsistent with the terms and conditions set forth herein.[4]

Certain conditions arise from the facts of the case. Certain conditions of approval are appropriate in affordable housing cases, as well. In *Fair Share Hous. Ctr., Inc. v. Zoning Bd. of City of Hoboken*[5] the Appellate Division found the following conditions to be valid:

6. The applicant shall be responsible for obtaining any other approvals or permits from other governmental agencies, as may be required by law, including but not limited to the municipality's and state's affordable housing regulations; and the applicant shall comply with any requirements or conditions of such approvals or permits.
7. The applicant must comply with the Development Fee Ordinance of the City of Hoboken, if applicable, which Ordinance is intended to generate revenue to facilitate the provision of affordable housing.

Final Thoughts

The wise board attorney educates its board, works with the zoning staff and drafts easily understood conditions of approval, which make it easier for the appropriate municipal employee to enforce said conditions. ■

Endnotes

1. *Cent. 25, LLC v. Zoning Bd. of City of Union City*, 460 N.J. Super. 446, 464 (App. Div. 2019) the powers of a board of adjustment "stem directly from the statute (R.S. 40:55–39), and may not in any way be circumscribed, altered or extended by the municipal governing body."
2. *Apple Chevrolet, Inc. v. Fair Lawn Borough*, 231 N.J. Super. 91, 96 (App. Div. 1989) (R.S. 40:55–39) replaced by NJSA 40:55D-70.
3. *DePetro v. Twp. of Wayne Plan. Bd.,* 367 N.J. Super. 161, 172 (App. Div. 2004) a competitor may be particularly well equipped to frame the challenge and to provide the background that will illuminate its merits and faults
4. Mr. Galvin prefers to use a condition that provides: "The Applicant shall obtain any and all other approvals required by law."
5. *Fair Share Hous. Ctr., Inc. v. Zoning Bd. of City of Hoboken*, 441 N.J. Super. 483, 501 (App. Div. 2015)

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Speaker: **Jeffrey R. Schoenberger, Esq.**
Senior Consultant, Affinity Consulting

The Impact of *Malanga v. West Orange* on Areas in Need of Redevelopment Designations

LAWRENCE S. CUTALO *is a Partner at O'Toole Scrivo, LLC and focuses his practice in real estate development and cannabis. He routinely represents developers before local planning and zoning boards and assists clients with all phases of redevelopment projects and affordable housing projects. Lawrence has extensive litigation experience and has argued before the New Jersey Supreme Court. He is a member of the Board of Directors of the New Jersey State Bar Association Land Use Section and is the Second Vice President of the Morris County Bar Association.*

By Lawrence S. Cutalo

New Jersey's Local Redevelopment and Housing Law (LRHL) provides local governments broad authority to transform deteriorating areas of their municipalities provided certain statutory conditions are met. The LRHL has been used to redevelop both privately-owned property and publicly-owned property in the state. However, the power to redevelop is not unchecked, and designating an area in need of redevelopment must meet the strictures of the LRHL, as demonstrated by the Supreme Court's recent decision in *Malanga v. Township of West Orange*.[1]

New Jersey's Constitution empowered the Legislature to enact the LRHL.[2] Article VIII, section 3 permits "redevelopment of blighted areas."[3] The phrase "area in need of redevelopment," as used in the LRHL, has been held to be the equivalent of the term "blighted" as used in the New Jersey Constitution, Article VIII, section 3.[4]

While there are many steps in the redevelopment process, this article, like *Malanga*, focuses on the criteria a local governing body, working in conjunction with its planning board, must meet to designate an area in need of redevelopment. To designate an area in need of redevelopment, one of eight enumerated criteria in Section 5 of LRHL must be met.[5] The designation permits a municipality to, among other things, adopt a redevelopment plan for the area in need, rezone the area, enter into a redevelopment agreement with a private redeveloper, and provide long-term tax exemptions.[6]

Malanga involved the Township of West Orange's attempt to use the LRHL to redevelop its public library "to avoid the public bidding process and keep control over the project."[7] At the time, the township's "broader plan" was to work with a private developer to "build affordable senior housing" above the library.[8] The library was built in 1959, was expanded in 1979, and was visited more than 150,000 times a year.[9] A resident, Malanga, filed a lawsuit challenging West Orange's designation of the library site as an area in need of redevelopment.[10] Both the Law Division and Appellate Division rejected Malanga's legal challenge.[11] The Supreme Court granted certification to consider whether the township improperly designated the library as an area in need of redevelopment under criteria (d) of Section 5 the LRHL. Criteria (d) states that an area may be designated for redevelopment if the following conditions are found:

> Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.[12]

The township principally relied on three phrases in criteria (d) to support its redevelopment designation.[13] The township determined that the library "suffered from 'obsolescence,' 'faulty arrangement,' and obsolete layout."[14] The township found that such "conditions had a detrimental impact on the 'welfare' of the community."[15] The township, relying on its Planning Board's investigative report, found that the library's "age, physical deficiencies and lack of space provided evidence of obsolescence, faulty arrangement and obsolete layout."[16] In marshaling evidence to show "obsolescence," the township relied on the presence of asbestos in the interior and exterior of the library, a partial but repaired collapse of a brick façade, as well as improvements needed to lighting, electrical equipment, fire alarms, roofing and ADA accessibility.[17] The township further found that the library ranked poorly "in the number of programs offered and the numbers of computers available."[18]

The Court's first task was to evaluate whether there was substantial evidence in the record to support the township's conclusion that the library suffered from "obsolescence." To do so, the Court needed to consider the meaning of the term obsolescence and looked to two reported decisions and dictionary definitions of the term.[19] The Court referenced the Law Division's decision in *Spruce Manor v. Borough of Bellmawr* which looked to Webster's definition of obsolete for guidance: "no longer active or in use, disused or neglected."[20] In 1998, *Spruce Manor* rejected a municipality's attempt to designate a 30-year-old apartment building as an area in need of redevelopment.[21] The Law Division found that the occupied apartment complex's failure to meet current design standards relating to the number of units per acre, number of parking spots, recreational facilities and ADA accessibility[22] did not render it obsolete under the LRHL.[23]

The Court also looked to the Appellate Division's decision in *Concerned Citizens of Princeton, Inc. v. Borough of Princeton*.[24] As in *Malanga*, the Borough of Princeton designated several municipally-owned properties in its central business including a surface parking lot as an area in need of redevelopment.[25] To demonstrate that obsolescence under criteria (d) was satisfied, Princeton found that the surface parking lot suffered from "faulty design" and "irregular configuration" that negatively affected tax revenues and economic vitality.[26] In addition, Princeton found that surface parking lots were "yesterday's solution" in urban center uses where "structured parking is now the standard."[27] The Appellate Division found that there was substantial evidence that the redevelopment designation, including criteria (d), was met.[28]

After reviewing *Spruce Manor* and *Concerned Citizens*, the Court evaluated whether the library was obsolete under subsection (d). Parting ways with the Appellate Division, the Court concluded that the record lacked substantial evidence that the library suffered from "obsolescence."[29] In so doing, the Court appears to have determined the relevant standard for obsolescence under criteria (d) to be whether the subject area is "no longer in use or falling into disuse"[30]—which follows *Spruce Manor's* definition of obsolescence adopted from Webster's.[31] The Court found that conditions identified by the township including needed upgrades, improvements, repairs, the presence of capped asbestos, and changes in style of design standards do not render an older building obsolete under criteria (d).[32] Likewise, the Court

noted the library was not falling into disuse and that the township acknowledged that it was a "functioning building" with "more than 150,000 visits per year."[33]

Next, the Court considered whether the township demonstrated a "faulty arrangement" or obsolete layout" under criteria (d). To make this showing, the township found that the library lacked space for programming, "meeting rooms, quiet study areas," and had an "undersized teen area."[34] Similarly, the township found that the library's age and needed electrical improvements limited the ability to provide "additional computers, charging stations and multi media offerings."[35] The Court found "faulty arrangement" or "obsolete layout was a close question."[36]

Finally, the Court considered whether there was substantial evidence to support the township's conclusion that the conditions of the library were "detrimental to the...welfare of the community."[37] The Court amplified that this provision "requires a showing of actual detriment" rather than presuming harm.[38] Here, the Court drew a distinction between criteria (e), which "presumes" that the "stagnant and unproductive condition" of "potentially useful and valuable land" has a "negative social or economic impact or otherwise being detrimental to the safety, health, morals or welfare of the surrounding area or community in general."[39] Since the Legislature did not use the term "presume" in subsection (d), the Court held that actual harm must be established.[40] Specifically, the Court held that a municipality must demonstrate that the "specified problems [in subsection (d)] exist and that they cause actual detriment or harm" to the "welfare of the community."[41]

Ultimately, the Court found that there was not substantial evidence that the conditions of the library were detrimental to the community's welfare.[42] The township contended that the library was detrimental to the community because its physical obsolescence and layout prevented it from adding "more computers or programming" and "inhibit[ed] the provision of essential services."[43] The Court rejected these contentions, finding that the lack of "additional computers and programming" does not demonstrate that the building was causing actual harm."[44] In continuing to take the township to task, the Court found that the library's need for repairs, the collapsed brick façade, and the presence of asbestos was relevant to obsolescence or faulty arrangement but these conditions did not demonstrate actual harm or detriment.[45] To the contrary, such repairs had or could be done and library was safe despite the presence of capped asbestos.[46] Accordingly, the Court found the township's area in need designation of the library to be invalid and reversed the Appellate Division.[47]

The Court's decision in *Malanga* is a stern warning that municipalities should not attempt to overreach in designating areas in need of redevelopment. Municipalities relying on obsolescence, faulty arrangement, overcrowding, or other conditions specified in criteria (d) must be able to demonstrate that such conditions result in actual harm or detriment to the welfare of the community. Accordingly, municipalities considering redevelopment should take care in selecting and ensuring that an appropriate criteria for an area in need designation can be demonstrated. ■

Endnotes

1. 235 N.J. 291 (2023).
2. N.J. Const. art. VIII, § 3, ¶1.
3. *Id.*
4. *Forbes v. Board of Trustees*, 312 N.J. Super 519, 526-28 (App. Div.), *certif. denied*, 156 N.J. 411 (1998); *Concerned Citizens v. Mayor*, 370 N.J. 429, 436 (App. Div.), *certif. denied*, 182 N.J. 139 (2004).
5. N.J.S.A. 40A:12A-5(a) to (h).
6. N.J.S.A. 40A:12A-8.
7. *Malanga*, 235 N.J. at 323.
8. *Id.* at 298.
9. *Id.* at 296.
10. *Id.*
11. *Malanga v. Twp. of West Orange*, No. A-0178-20 (App. Div. July 6, 2021) (Slip Op. at 1).
12. N.J.S.A. 40A:12A-5(d)
13. *Malanga*, 235 N.J. at 313.
14. *Id.*
15. *Id.*
16. *Id.* at 314-15.
17. *Id.* at 300.
18. *Id.* at 302.
19. *Malanga*, 235 N.J. at 316.
20. *Id.* (citing *Spruce Manor Enters. v. Borough of Bellmawr*, 286 N.J. Super, 286, 295 (Law. Div. 1998)).
21. *Spruce Manor Enters.*, 286 N.J. Super at 295.
22. *Id.* at 288, 290-91
23. *Id.* at 296-97 (construing criteria (a) and (d)).
24. *Concerned Citizens of Princeton, Inc. v. Borough of Princeton*, 370 N.J. Super. 429, 435-36 (App. Div. 2004).
25. *Id.*
26. *Id.* at 458.
27. *Id.*
28. *Id.* at 458-60
29. *Malanga*, 253 N.J. at 317.
30. *Id.* at 317.
31. *Spruce Manor Enters.*, 286 N.J. Super at 295.
32. *Id.* at 319.
33. *Id.* at 317.
34. *Malanga*, 253 N.J. at 318.
35. *Id.*
36. *Id.* at 319.
37. *Id.* (citing N.J.S.A. 40A:12A-5(d)).
38. *Id.* at 313.
39. *Id.* at 312 (citing N.J.S.A. 40A:12A-5(e)).
40. *Malanga*, 253 N.J. at 297.
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43. *Id.* at 320.
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45. *Id.* at 323.
46. *Id.* at 323.
47. *Id.* at 323.

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RLUIPA: A Powerful Federal Law Available to Religious Entities as They Seek Local Land Use Approval to Construct or Expand a Religious Facility

By Donna M. Jennings and Sarah Kennelly

It is no secret that across our divided nation there has been a rising wave of anti-Semitism. The Anti-Defamation League reports anti-Semitic incidents are at its highest recorded level since 1979. It is not surprising to see a similar rise in anti-Semitic incidents in New Jersey—with 408 reported anti-Semitic incidents in 2022 alone.[1]

In one particularly disturbing event last year, the FBI arrested an individual who made credible threats to New Jersey synagogues, putting the state's Jewish community understandably on edge.[2] This year, a Clifton man, donning a ski mask outside of an Essex County synagogue, was caught on surveillance footage at 3 a.m. throwing a lit Molotov cocktail in an attempt to firebomb the building, which fortunately was unsuccessful.[3]

Similar threats and attacks have plagued Ocean County, which has a growing Orthodox Jewish community. In fact, Lakewood—home to a large Orthodox Jewish population—was New Jersey's fastest growing municipality between 2020 and 2022, according to the new U.S. Census data.[4] After Lakewood, New Jersey towns with the largest surges in population during that same time period were Toms River, Cherry Hill, Brick and Jackson. All but Cherry Hill, in Camden County, share a border with Lakewood. As noted, with the increasing Orthodox Jewish population there has been a similar rise in threats to the community.

In 2020, Facebook removed the page of an Ocean County group, "Rise Up Ocean County," citing its racist and anti-Semitic content.[5] The group, which also operates its own webpage, opposes the overdevelopment and growth in Ocean County communities, which has seen an influx of Orthodox Jewish developments in recent years. Their mission statement claims the group "was founded on the simple belief that the continued, unchecked growth in Lakewood is contributing to diminished quality of life in the surrounding communities of Toms River, Jackson, Brick and Howell."[6] The New Jersey Attorney General's Office had voiced concerns that the group promoted violence against the Orthodox community, with comments appearing on the page such as "[w]e need to get rid of them like Hitler did."[7]

While these overt displays of prejudice are unsettling, there are also more insidious ways that discrimination can infect a community, and not in the way one would expect.

Exclusionary Zoning

Under the guise of "sound planning," municipalities have tried for years to hide behind zoning ordinances to keep the demographics of their community from changing. The methodology is usually inconspicuous, and it may take some parsing to see that religious institutions are often forced to jump through more regulatory hoops than nonreligious ones. For example, a zoning ordinance may impose a larger minimum lot size, more required parking, or greater setback requirements on a house of worship or related religious activities than a nonreligious assembly use, such as a municipal building, theater, or bowling alley. These more stringent requirements make it harder for the religious group to secure an approval for their proposed project than the nonreligious assembly use. For example, in one Ocean County municipality, houses of worship are permitted only as a conditional use in certain zones. A conditional use is a permitted use subject to the applicant meeting all of the conditional use standards. If the house of worship application meets all of the conditional use standards the application proceeds before the planning board where the applicant only needs to secure a simple majority of the board's vote. If the application cannot meet all of the conditional use standards, the applicant must seek use variance relief from the zoning board of adjustment where it must secure five affirmative votes for an approval.[8]

In order for a religious institution to be awarded a use variance, it must satisfy both the positive and negative criteria.[9] The positive criteria are established if an applicant can demonstrate "special reasons" for the grant of the variance. Those special reasons maybe satisfied if the proposed use is considered "inherently beneficial," which includes religious institutions.[10]

The negative criteria, on the other hand, are established if the applicant can show that the variance will not be a substantial detriment to the public good and will not substantially impair the intent and purpose of the municipal ordinance. For this determination, the case of *Sica v. Board of Adj. of Twp. of Wall*[11] is important because it established a four-part test to determine whether a proposed use satisfies the negative criteria. Specifically, the board must: 1) identify the public interest at stake; 2) identify the detrimental effect; 3) mitigate any detrimental effect by imposing reasonable conditions; and 4) weigh the benefits against the mitigated negative effects to determine if the variance would cause a substantial detriment to the public good.

If the application is ultimately denied by the zoning board, the congregation or religious institution may still want to

DONNA M. JENNINGS *is a shareholder on the land use team at Wilentz, Goldman & Spitzer in Woodbridge. She represents numerous religious groups before local municipal planning and/or zoning boards, and successfully litigated appeals in both state and federal courts on their behalf.*

SARAH KENNELLY *is a law clerk on the land use team at Wilentz, Goldman & Spitzer in Woodbridge. She is a graduate of Rutgers Law School and previously served as a judicial clerk to the Honorable Marlene Lynch Ford, A.J.S.C. (ret.).*

defend its interests and challenge the board's decision in the Law Division of the New Jersey Superior Court. Land use attorneys will know that a board's decision may be overturned if found to be arbitrary, capricious or unreasonable under the Municipal Land Use Law (MLUL). A more powerful tool, however, when representing a religious entity exists under federal law.

What is RLUIPA?

In 1985, Congress enacted the Religious Freedom Restoration Act (RFRA), a broadly tailored statute designed to prevent the government from enacting laws that substantially burdened the right to free exercise of religion, relying on the authority of Section 5 of the Fourteenth Amendment. Significantly, RFRA reinstated the compelling state interest test in free exercise cases, meaning that the government had to show a "compelling governmental interest" and the law is "the least restrictive means" to achieve its goal if the regulation substantially burdened a person's exercise of religion. However, in 1997, the United States Supreme Court in *City of Boerne v. Flores*[12] —a case involving the zoning of a church, struck down the compelling interest test, finding that Congress had overstepped its constitutional authority and invalidating RFRA as it applied to state and local governments.

In response, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000 to protect religious institutions against discriminatory regulations of their property through zoning restrictions. The act also protects the rights of individuals to assert their religious beliefs and practices while incarcerated.

While not intended to immunize religious institutions from land use regulations, RLUIPA prohibits the government from imposing a land use regulation that discriminates against an assembly or institution *on the basis of its religion*.[13] A "land use regulation" is defined under the act as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." Typically, the regulation will be a zoning ordinance or code that determines what type of building or land use can be located in what areas and under what conditions.[14]

The act's protections over "religious assemblies or institutions" include more than just houses of worship such as churches, mosques, or synagogues; religious activities are also protected, including summer camps, cultural centers, bookstores, etc. associated with a congregation. Further, the act permits plaintiffs to seek damages and attorney fees in addition to injunctive relief, remedies not available under state law.

How does RLUIPA Protect Religious Freedom?

Protection Against Substantial Burdens on Religious Exercise

Generally, the government may not impose a land use regulation that imposes a substantial burden on a religious assembly or institution. Issues under RLUIPA typically arise when the government is trying to make an individualized assessment of a proposed religious use for a property, thus placing higher standards on a religious use than a comparable nonreligious assembly use.

To prove a substantial burden, the plaintiff must show that the regulation places substantial pressure on an individual to modify their behavior and violate their beliefs.[15] Historically, this has been a difficult task for plaintiffs; therefore, the burden shifting under RLUIPA is a significant benefit to plaintiffs. Once a plaintiff has proven the substantial burden on their beliefs, the burden shifts to the government to demonstrate: 1) there is a compelling government interest, and 2) the regulation is the least restrictive means of furthering the government's compelling interest.[16] If the government cannot meet this burden, the regulation will be deemed unconstitutional.

A court's substantial burden inquiry is often fact-intensive, but generally considers whether a particular restriction or set of restrictions will be a substantial burden on a complainant's religious exercise based on factors such as the size and resources of the burdened party, the actual religious needs of an individual or religious congregation, space constraints, whether alternative properties are reasonably available, and the absence of good faith by the zoning authorities, for instance. Courts have upheld a government's compelling interest where there is "some substantial threat to public safety, peace, or order,"[17] but not to protect a municipality's interests in revenue generation and economic development, or aesthetics.

Protection Against Unequal Treatment

The equal terms provision of RLUIPA, Subsection b(1), provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[18] This provision prohibits the government from imposing a stricter land use regulation on a religious assembly or institution that places it on less than equal terms with a nonreligious assembly or institution.

This provision was designed to address the problem of zoning ordinance excluding places of worship where secular assemblies are permitted, both facially and in application. As such, it is applicable to any discriminatory regulation, even when there is no substantial burden on the individual's worship practices or beliefs.

Determining if a religious assembly is treated on "less than equal terms" than a nonreligious assembly or institution requires a comparison of how the two entities are treated on the face of a zoning code or in its application.[19] While there is no set test, a congregation may look at the other types of assembly uses permitted in the zoning district—if a reli-

gious use is prohibited while a private club or assembly hall is permitted, they may find an equal terms violation.

Protection Against Religious or Denominational Discrimination

RLUIPA also prohibits discrimination "against any assembly or institution on the basis of religion or religious denomination."[20] These types of regulations may be discriminatory on their face or facially neutral but applied in a discriminatory manner based on religion or religious denomination. An issue may arise under this provision if an applicant is denied where the same application would have been granted had it been part of a different religion or religious denomination, or if it is clear that the zoning officer or other municipal officer harbors personal animus toward a specific religious group.

This provision applies even where a municipality may not be discriminating against all members of a religion, but just a particular sub-group or sect.

Protection Against Total Exclusion or Unreasonable Limitation of Religious Assemblies

Subsections (b)(3)(A) and (B) of 42 U.S.C. § 2000cc state that the government may not impose a regulation that *totally excludes* religious assemblies from a jurisdiction, nor may it impose a regulation that *unreasonably limits* religious assemblies, institutions, or structure within a jurisdiction. An unreasonable limitation, for example, may include regulations that left only few available sites for the construction of a house of worship through bulk standards like excessive frontage and spacing requirements.

Filing An RLUIPA Claim

In order to file a RLUIPA claim, the claim must be ripe, which many courts interpret to require a "final" decision by the board. However, facial challenges are generally ripe the moment the challenged regulation or ordinance is passed.[21] Claims must be filed within four years of the alleged RLUIPA violation.

While a RLUIPA claim can of course be filed in federal court, it can be added in conjunction with a prerogative writ action in state court, and can be a valuable asset for land use attorneys to have in their vault. In towns that have traditionally been less than welcoming to certain religious groups, a successful RLUIPA claim can not only ensure that your client is compensated with damages and attorney's fees, but also permit them to practice their religious beliefs where they choose. ■

Endnotes

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WILLIAM L. HORNER *is the owner of Horner & Horner, L.L.C., in Salem and serves as a Trustee of the New Jersey Institute of Local Government Attorneys (NJILGA), and as Associate Legal Counsel to New Jersey Planning Officials (NJPO).*

Landowners Must Navigate Municipal Regulation of Special Occasion Events on Preserved Farms

By William L. Horner

Gov. Phil Murphy signed New Jersey's new Special Occasion Events law, P.L. 2023, c. 9 (Chapter 9) on Feb. 3. The law is codified at *N.J.S.A.* 4:1C-32.15, *et seq*. Chapter 9 allows owners and operators of commercial farms on preserved farmland to obtain permission to hold special occasion events (SOEs) despite the restrictions against non-agricultural activities that are imposed in the deeds of easement (DOEs) by which farmland is preserved. Chapter 9 requires the State Agriculture Development Committee (SADC) to adopt regulations governing the SOE permitting process, but the new law went into effect immediately and expressly allows DOE easement holders (defined in Chapter 9 as "grantees") to approve SOE permit applications even before any regulations are adopted.

Chapter 9 broadly defines SOEs as "a wedding, lifetime milestone event, or other cultural or social event conducted, in whole or in part, on preserved farmland on a commercial farm." The definition excludes RTFA-protected farming activities, since such activities are, for the most part, already allowed to occur on preserved farms without the need for special permission.

The purpose of this article is to emphasize that Chapter 9 only overrides the *restrictive covenants* by which farmland is preserved. Chapter 9 does not preempt local land use regulations. Accordingly, municipalities in which preserved farms are located should be prepared to regulate SOEs under existing or amended zoning and site plan requirements, and SOE permittees must understand, and should be informed during the SOE permit application process, that a DOE grantee's approval does not preempt local land use requirements, and that all applicable municipal land use approvals must be obtained. Although Chapter 9 authorizes an optional municipal permitting process for specific SOEs events under certain circumstances, the additional permitting option does not supersede municipal land use regulations.

Preserved Farms and Commercial Farms

Because Chapter 9 only allows SOEs to be conducted on "preserved farms" that are operated as "commercial farms" it is important to understand how these two terms are defined. "Preserved farmland" is land that is subject to the terms and conditions of a DOE that has been conveyed to, or retained by, the SADC, a county agriculture development board, a county, a municipality, or a qualifying tax-exempt nonprofit organization. A DOE grants (or reserves) certain property rights to the DOE easement holder in the form of a development easement[1] and "all nonagricultural development rights and credits,"[2] and imposes 23 enumerated restrictions that are derived from *N.J.A.C.* 2:76–6.15. The purpose of the restrictions is to ensure that the farmland will be used for agricultural production.[3]

By contrast, a "commercial farm" is a farming *operation* as defined under New Jersey's Right to Farm Act (RTFA) that can be conducted on either preserved or non-preserved farmland by the landowner or the landowner's tenant. Specifically, the RTFA defines a commercial farm as a *farm management unit* of no less than five acres producing agricultural or horticultural products worth $2,500 or more annually, and satisfying the eligibility criteria for farmland tax assessment pursuant to *N.J.S.A.* 54:4-23.1, *et seq*.[4] Chapter 9 incorporates the RTFA definition of commercial farm with a few modifications and exclusions, the most notable being a higher minimum annual agricultural production requirement of $10,000.

Special Occasion Events

Chapter 9 broadly defines SOEs as "a wedding, lifetime milestone event, or other cultural or social event conducted, in whole or in part, on preserved farmland on a commercial farm." The definition excludes RTFA-protected farming activities, since such activities are, for the most part, already allowed to occur on preserved farms without the need for special permission. Similarly, the Chapter 9 definition excludes various types of recreational uses that are already allowed on preserved farms by the terms and conditions of DOEs (such as hunting, fishing, cross country skiing, and ecological tours), and which would likely be regarded as permitted agricultural "accessory" uses in municipalities where preserved farms are located. Finally, Chapter 9 does not require SOE permits for weddings held on preserved farms for the commercial farm owner or operator, or their employees and certain specified categories of close relatives (these sorts of weddings, particularly if occurring only occasionally, rather than frequently or routinely, would also likely be regarded as permitted residential/agricultural accessory uses in municipalities where preserved farms are located).

Most of Chapter 9's requirements for SOEs are set forth in *N.J.S.A.* 4:1C-32.17. These include specifications for what qualifies as a single SOE (each event must have a maximum duration of two consecutive calendar days if the event is marketed as a single event); limitations on the areas in which SOEs may be held (the occupied area associated with an SOE can be no more than the lesser of 10 acres or 10% of the preserved farmland); and limitations on the frequency and intensity of SOEs (a commercial farm may hold up to 26 SOEs each calendar year, of which only six may have 250 guests *or more* in attendance at any time, provided that no more than one SOE per calendar day may be attended by more than 100 guests).

Chapter 9 goes to great lengths to ensure that SOEs will not interfere with the use of preserved farmland for agricultural or horticultural production. SOEs are required to have only *minimal effects* on the occupied area (defined as "any area supporting the activities and infrastructure associated with a special occasion

event" including existing buildings, temporary or portable structures, and areas for areas for parking, vendors, tables, equipment, infrastructure, or sanitary facilities), and must be "designed to protect the agricultural resources of the land and ensure that the land can be readily returned to productive agricultural or horticultural use after the event." No new permanent structures may be constructed or erected on preserved farmland for the purpose of holding an SOE, and any improvements to existing structures are limited to the minimum required for the protection of health and safety. The installation and use of temporary structures (such as tents, canopies, umbrellas, tables and chairs) is allowed from April 1 through Nov. 30 in conformance with the Uniform Construction Code and Uniform Fire Code. Extension of public utilities for SOEs is limited to electric and water service. Parking, "to the extent possible" must be provided "through the use of existing parking areas on the farm and curtilage surrounding existing buildings." Any additional "temporary" parking must comply with RTFA standards for "on-farm direct marketing facilities, activities, and events" (*N.J.A.C.* 2:76-2A.13.(h)).

SOE Permit Applications and Municipal Land Use Approvals

Commercial farm owners or operators who want to hold SOEs on preserved farms must apply for a permit from the DOE grantee for all SOE events proposed during a given calendar year. If the commercial farm applicant is not the owner of the farm, then the application must be authorized by the landowner. Pursuant to Chapter 9, the permit from the DOE grantee effectively waives the DOE restrictions for the specific SOE activity as provided at *N.J.S.A.* 4:1C-32.17.a.:

> Notwithstanding any law, or any rule or regulation adopted pursuant thereto, to the contrary, a person may hold a special occasion event on preserved farmland, provided that the grantee determines the preserved farm complies with the terms of the Farmland Preservation Program deed of easement recorded against the preserved farmland, the person complies with the requirements set forth in [Chapter 9], and the special occasion event is held in compliance with the requirements of [*N.J.S.A.* 4:1C-32.17] and the rules and regulations adopted by the committee pursuant to [*N.J.S.A.* 4:1C-32.20].

The SOE application must provide information sufficient to confirm compliance with these requirements, rules and regulations, and the preserved farmland must also be in compliance with all requirements of the DOE. If the DOE grantee does not respond to an application within 90 days the application is deemed approved. If the application is denied, the DOE grantee must provide reasons for the denial and an opportunity for the applicant to reapply with an amended application. Once approved, the SOE applicant is required to certify to the DOE grantee annually regarding approved SOEs that were held during the prior calendar year, including the date, occasion, and approximate number of attendees of each event, and the DOE grantee must forward copies of these certifications to the SADC. Chapter 9 also sets forth provisions and requirements for inspections, penalties for noncompliance, and periodic reports to the governor and Legislature.

Although Chapter 9 allows a DOE grantee to permit SOEs to be held on a preserved farm, Chapter 9 is not a land use regulation and does not supersede local land use approvals. Chapter 9 expressly provides, at *N.J.S.A.* 4:1C-32.17b.(4)(a), that SOEs are subject to "all applicable state and local laws, regulations, resolutions, and ordinances including, but not limited to, those concerning food safety, litter, noise, solid waste, traffic, and the protection of public health and safety shall apply to the special occasion event and all activities related thereto." This means the Municipal Land Use Law, *N.J.S.A.* 40:55D-1, *et seq.* (MLUL), whose purposes include promotion of "public health, safety, morals and general welfare," applies to SOEs, as do all municipal land use and development regulations adopted pursuant to the MLUL, and the requirements and conditions of any municipal planning or zoning board *resolutions* by which SOEs are approved. Although Chapter 9 authorizes "optional" municipal SOE permits for specific SOE "events" under certain circumstances (as discussed below), this authorization supplements, and does not replace, traditional zoning and land use authority.

Chapter 9 makes it clear that SOEs are *not* agricultural activities and, since SOEs are a new statutorily-created type of land use, it is unlikely that any New Jersey municipality has included them as "permitted" or "conditionally-permitted" in any zoning district. As such, SOEs cannot be regarded as the sorts of principal or accessory "agricultural" uses that would typically be permitted by right in a municipal zoning district where agriculture is allowed, because most municipal zoning ordinances provide that any use not specifically allowed in a zoning district is prohibited. Accordingly, municipal land use approvals for SOEs would likely include "use variance" approval pursuant to *N.J.S.A.* 40:55D-70.d. in addition to site plan review.

It is also important to bear in mind that, due to Chapter 9's strict constraints against interference with agricultural production and alteration of farmland, SOE permittees who apply for municipal use variance and site plan approvals will be unable to implement the full array of

site improvement options that are available to non-SOE land use applicants. Consequently, it is possible that a municipal planning or zoning board reviewing an SOE land use application might determine that the minimal site improvements allowed by Chapter 9 are simply insufficient to accommodate an applicant's proposed SOEs safely in the context of the applicant's particular preserved farm, and that, in order to be approved, the nature, scope and intensity of the proposed SOEs must be changed or diminished. So, although Chapter 9 allows DOE grantees to permit events involving "250 guests or more in attendance at any time," the terms and conditions of municipal land use approvals for a preserved farm might allow far fewer guests, and impose other necessary limitations on the frequency, duration, locations, and nature of SOE activities.

It should be noted that an SOE permit issued by a DOE grantee to a commercial farm owner or operator is *personal* to that applicant, but the municipal land use approvals for SOEs on a particular preserved farm "run with the land" comprising that farm and are therefore not personal to any individual SOE permittee. Accordingly, MLUL approvals do not have to be re-obtained or renewed in connection with a commercial farm owner or operator's successive SOE permit applications, or any subsequent SOE permit applications of successor commercial farm owners or operators on the preserved farmland, as long as the SOEs continue to be conducted in compliance the previously obtained MLUL approvals.

For the above reasons, New Jersey municipalities should begin reviewing and updating their land development regulations to ascertain whether SOEs (or certain types of SOEs) are or should be permitted or conditionally permitted in zoning districts where preserved farms are or might be located, and to provide site plan review requirements ensuring that adequate (albeit minimal) site improvements and operating conditions can be implemented to appropriately accommodate proposed SOEs and protect public health, safety and welfare.

Further, DOE grantees, and the SADC in its preparation of SOE regulations, should be cognizant of, and should implement SOE application procedures that properly anticipate, the need for municipal land use approvals. This is critical because SOEs, by definition, involve innocent third parties who will in most cases be planning far in advance and relying heavily on SOE permits and approvals for their important "lifetime milestone events." The need to obtain municipal land use approvals must not be ignored or otherwise left to last-minute discovery by a municipal zoning officer who might then initiate last-minute enforcement actions that could jeopardize these sorts of third-party plans. Accordingly, the SADC and all DOE grantees should encourage advance municipal review of SOEs by *notifying* applicants that SOEs are subject to municipal land use approvals, and by *requiring* SOE applications to include proof, in the form of zoning permits and/or planning/zoning board resolutions, that all required municipal land use approvals have been obtained. Alternatively (but potentially less effectively), SOE permits should at least be expressly conditioned upon the permittee's receipt of municipal land use approvals before any SOE may be held. SOE permit applicants should also be informed in advance that municipal site plan review triggers the need for county planning board review pursuant to *N.J.S.A.* 40:27-6.6.

Finally, it should be noted that Chapter 9 is *inapplicable* to an SOE or part thereof that is *not* held on preserved farmland, or that is held within an exception area of a preserved farm, meaning that under such circumstances there would be no need for an SOE permit from the DOE grantee. Commercial farm owners and operators should be aware that such activities nonetheless require the same municipal land use approvals as SOEs that are subject to Chapter 9.

"Optional" Municipal SOE Permits

Chapter 9 authorizes an optional municipal SOE permitting process if a particular SOE is anticipated to generate parking or traffic flow that might "unreasonably interfere with the movement of normal traffic or emergency vehicles" in or upon any street, park, or other public place within the municipality, or that might "require the expenditure of municipal resources or inspections from agencies or authorities of the municipality." These optional SOE permit applications are to be reviewed by a designated office or agency on a case-by-case basis "to comply with municipal laws, regulations, resolutions and ordinances" (which would include review for compliance with any municipal planning or zoning board resolutions that address these issues). This optional permitting process can give municipal officials helpful advance notice of particularly large or otherwise impactful SOEs that might require deployment of special traffic and crowd control measures.

Municipalities are prohibited from charging more than $50 for these types of SOE permit applications, or from requiring information beyond "an identification of locations of where tents and other temporary structures, sanitary facilities, parking, and access and egress will be located for each event, where music will be played, the number of expected guests, and other information that may be of public concern and would be required of a similar event when conducted at a public park or another public

venue." Such limitations effectively prevent municipalities from improperly imposing repeated "site plan reviews" upon farms that have already received municipal land use approvals for SOEs.

Conclusion

As expressed by SADC Executive Director Susan E. Payne in her Feb. 7 announcement of Chapter 9's enactment, the law does indeed "open an exciting new chapter for the agricultural community." However, it is important to bear in mind that the "proper oversight" envisioned in Chapter 9's legislative findings can be achieved only through proper compliance with municipal land use and development regulations. SOEs are a good way for commercial farms to earn additional income, but they have great potential for negatively impacting farm communities if municipal land use and development regulations are disregarded. Municipalities in which preserved farms are located should consider SOE land uses in connection with master planning initiatives to determine whether and to what extent zoning and site plan requirements applicable to SOEs should be enacted or amended.

Most importantly, SOE applicants should be advised through the DOE grantees' permitting processes to obtain advance site plan and/or variance approvals before applying for SOE permits, and that, to obtain municipal land use approvals, SOE applicants must propose SOEs that can operate safely within Chapter 9's minimal site improvement allowances. SOE permit applications to DOE grantees should include proof that all municipal zoning and land use approvals have been obtained, and SOE permits should be conditioned upon ongoing compliance with all applicable municipal zoning and land use regulations, and planning/zoning board resolutions of approval. ■

A version of this article previously appeared in the New Jersey Planning Officials' March/April 2023 edition of The New Jersey Planner *and the New Jersey State League of Municipalities' May 2023 edition of* NJ Municipalities *and has been published here with permission.*

Endnotes

1. A "development easement" is "an interest in land, less than fee simple absolute title thereto, which enables the owner to develop the land for any nonagricultural purpose as determined by and acquired under the provisions of the Agriculture Retention and Development Act, and any relevant rules or regulations promulgated pursuant thereto." *N.J.A.C.* 2:76-6.2
2. "Nonagricultural development rights and development credits" are property interests derived from the development easement that can be sold or otherwise transferred to and utilized by third party land developers pursuant to legislatively-created market mechanisms such as the Pinelands Comprehensive Management Plan and "transfer of development rights" ("TDR") programs. See *N.J.S.A.* 4:1C-32.a.
3. For example, restriction number 2 of *N.J.A.C.* 2:76–6.15 provides: "The Premises shall be retained for agricultural use and production in compliance with *N.J.S.A.* 4:1C-11, *et seq.*, and all other rules promulgated by the State Agriculture Development Committee. Agricultural use shall mean the use of the premises for common farmsite activities including, but not limited to: production, harvesting, storage, grading, packaging, processing and the wholesale and retail marketing of crops, plants, animals and other related commodities and the use and application of techniques and methods of soil preparation and management, fertilization, weed, disease and pest control, disposal of farm waste, irrigation, drainage and water management, and grazing."
4. "Farm management unit" is defined by RTFA as "a parcel or parcels of land, whether contiguous or noncontiguous, together with agricultural or horticultural buildings, structures and facilities, producing agricultural or horticultural products, and operated as a single enterprise." See *N.J.S.A.* 4:1C-3. The RTFA definition of "commercial farm" includes certain beekeeping and apiary-related farming operations generating $10,000 or more annually, as well as farm management units of *less than* five acres that produce agricultural or horticultural products worth $50,000 or more annually (although a "preserved farm" would typically exceed five acres).

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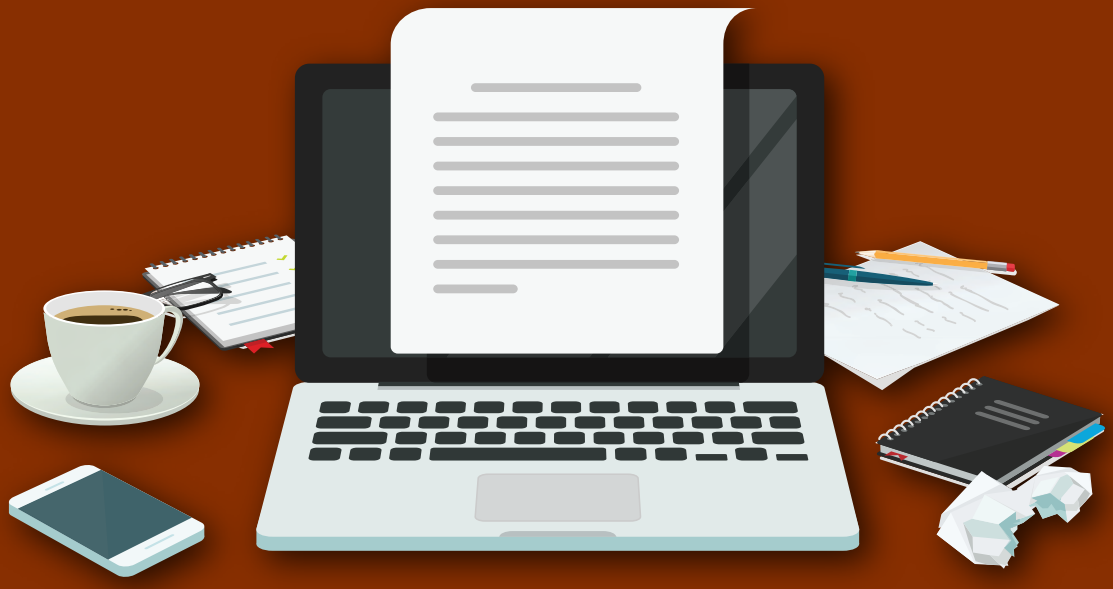

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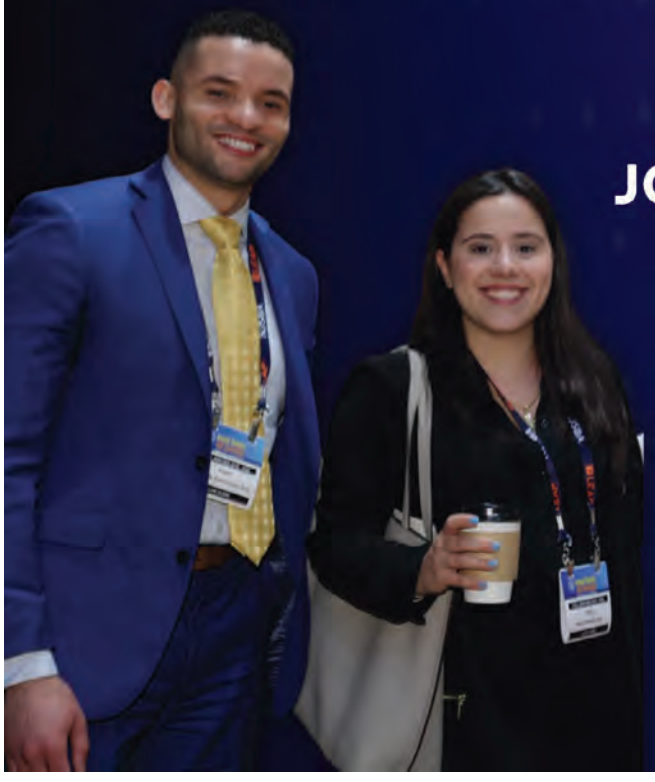

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SPEAKER

Charles "Chuck" Nechtem, therapist and president and CEO, Charles Nechtem Associates