

ROLES OF THE ZONING BOARD OF ADJUSTMENT AND THE ZONING OFFICER

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This article seeks to explain the roles of the Zoning Board of Adjustment and the Municipal Zoning Officer, and the limits of their authority. It is essential that each respects the diligent efforts of the other.

THE ZONING BOARD OF ADJUSTMENT

The Zoning Board of Adjustment is an independent, quasi-judicial body, whose jurisdiction is found in N.J.S.A. 40:55D-70. The Zoning Board is exclusively responsible for the granting of all six types of “d” variances, including use variances. The Zoning Board also has the authority to hear bulk variances, also known as “c” variances, on applications that do not require a site plan or subdivision approval. Further, any improvement to a single family home that requires a variance must be heard by the Zoning Board of Adjustment.

In addition to granting variances, the Zoning Board is the only agency that is permitted to hear appeals of rulings by the Zoning Officer, as well as interpretations of the Master Plan and the Zoning Ordinance. N.J.S.A. 40:55D-70(a) and (b) respectively. With very few exceptions, the Zoning Board sits as if it were a Court. The best exception that comes to mind is when the Board issues its Annual Report; that function is quasi-legislative.

THE ZONING OFFICER

The Zoning Officer, also referred to as the code enforcer, is the enforcement arm of zoning, making it the police department to the Board's Court. Before an applicant can undertake a project, they are required to make a request for a zoning permit. The Zoning Officer is responsible for making the initial determination of whether the proposal conforms to the zoning ordinance. (Cox and Koenig, p. 16, Section 1-4.3). When the Zoning Officer reviews a request for a zoning permit, they must identify any and all variances, both existing and proposed. O'Donnell v. Koch, 197 N.J. Super. 134 (App. Div. 1984). The applicant, however, may make a direct request for relief to the Zoning Board, without first receiving a denial from the Zoning Officer. When the applicant does so, the Board, just like the Zoning Officer, is to consider any and all variances or permits that may be required, even those not raised by the applicant or the Zoning Officer. Id.

It is important to remember that the burden of proof is always on the applicant. When the Zoning Officer can confirm that the request is consistent with the Zoning Ordinance, the permit should be granted. When it is inconsistent, it should be denied.

The gray areas are easy for the Zoning Official. All Zoning Officers are schooled in the Mantra "when in doubt, deny." The idea is to leave uncertain matters to the Zoning Board, a public body made up of citizens making a decision in a public forum, which then insulates the Zoning Officer from criticism and questions of favoritism. (Cox and Koenig, p. 16, section 1-4.3). The Zoning Officer's decisions may only be

appealed to the Zoning Board. N.J.S.A. 40:55D-72(a). Once the Zoning Board rules, the Zoning Officer must respect and carry out the decision of the Board. Centennial Land & Dev. Co. v. Tp. of Medford, 165 N.J.Super. 220 (Law Div. 1979).

The same is true of requests for interpretations. When a Zoning Ordinance is unclear on a point, it sometimes happens that a Zoning Officer will be forced to interpret the ordinance. So, in a situation where the Ordinance does not define delis and restaurants, the Zoning Officer might do so by divining a formula, restaurants have seating and delis do not. This view may work well for years, but when challenged, it is the determination of the Board that controls. In other words, once the Board has ruled, the Zoning Officer must abide by the Board's interpretation. Colts Run Civic v. Colts Neck Tp., 315 N.J.Super. 240, (Law Div. 1998).

The supremacy of the Zoning Board in the area of interpretations was confirmed in DePetro v. Tp. of Wayne Planning Bd., 367 N.J.Super. 161, 169 (App.Div.), certif., den. 181 N.J. 544 (2004), where the Court found that an interpretation of the Ordinance that goes to the issue of jurisdiction must be heard by the Zoning Board. So although the Municipal Land Use Law favors one stop shopping, a Planning Board faced with such a determination is required to forward the matter to the Zoning Board for a ruling on jurisdiction first before it can act. This is a significant exception and reflects the important role of the Zoning Board as a quasi-judicial body.

While the Zoning Board and the Zoning Officer have the combined goal of protecting the integrity of the Master Plan and the Zoning Ordinance, the Board, unlike the Zoning Officer, is not an enforcing agency. The Board can only undertake matters when it has obtained jurisdiction, just like a Court. (Cox and Koenig, p. 107, section 4-

4.3). It would be unfair for a Zoning Board Member to participate in enforcement in some way, and then proceed to sit and review the validity of such a claim. This would amount to serving as both prosecutor and judge; this violates the American notion of judicial impartiality and fair play. You are not allowed to be Judge Dredd.

Moreover, while the Zoning Board is critical to the process and enjoys wide authority in the interpretation of the Ordinance, the Board does not participate in the creation of the Master Plan, which is exclusively within the responsibility of the Planning Board. The Zoning Ordinance is enacted by the governing body after review and comment by the Planning Board. The Zoning Board affects the process by preparing its Annual Report and by making recommendations at that time. This report is submitted to the Planning Board and the Governing Body for their information. Zoning Boards have a unique insight into what works in local zoning, and the Planning Board and Governing body would be wise to consider the Board's Annual Report; but there is nothing in the law which requires them to take any action after receipt of the report.

CERTIFICATION OF NON-CONFORMING USES

For one year following the implementation of a Zone change, the Zoning Officer, under the Municipal Land Use Law (MLUL), has the right to issue a Certificate of Nonconforming Use, provided the use is in fact a "valid pre-existing non-conforming use". N.J.S. 40:55D-68. After that initial 12-month period, only the Zoning Board can rule on the validity of a pre-existing, nonconforming use. Stafford v. Stafford Zoning Bd., 154 N.J. 62, 69 (1998). An applicant must provide proof that the use either pre-existed all zoning, or that the existing use was a permitted use at some point, prior to the

Zoning change. Berkeley Square v. Trenton Zoning Board of Adjustment, 410 N.J.Super. 255, 269 (App.Div. 2009), certif.. den. 202 N.J. 347 (2010). Or in the alternative, the applicant must be able to show that a use variance was granted at some point.

ENFORCEMENT

The Board expects that an applicant will comply with his or her testimony given at the time of the hearing, and will completely comply with the conditions of approval. Enforcement issues come about in two contexts. The first is when a Board Member observes that an applicant seems to be ignoring its promises to the Board, the conditions of an approval. My recommendation in that instance is to have the Chairman ask the Zoning Officer to make sure that the conditions of approval are being met, as the Zoning Officer is responsible for ensuring compliance with the resolution of approval. When an applicant cannot, or does not comply, the Zoning Officer must order the applicant to return to the Board to explain the noncompliance, or to request amended relief. If the applicant refuses, the Zoning Officer should issue a notice of violation.

Enforcement issues also arise when Board Members receive inquiries from the public. In those instances, it is expected that the complaining member of the public be directed to contact the Zoning Officer directly. Although Board Members may want to help the public by getting involved, they are infringing on the role of the Zoning officer. The act of listening to members of the community is not in and of itself a problem; but once you (as a Board Member) comment or give an opinion, you have been compromised, and you must recuse yourself from hearing the matter, should it come before the Board. (Cox and Koenig, p. 109).

WORKING TOGETHER

To gain the respect of the Zoning Board, a Zoning Officer needs to identify all variance relief needed on a given property, when a referral is made; vigorously enforce conditions of approval; and reflect a good working knowledge of the Zoning Ordinance. Zoning Officers should not be concerned with their win-loss record before the Board. As the Zoning Officer must be extra cautious and deny when doubt exists, the fact that the Board reverses the Zoning Officer is not like correcting a mistake. It really amounts to shifting the decision-making to a public body, which is a good thing.

Board Members should always be respectful of a Zoning Officer's decision to deny, even as they decide to reverse that decision. Denials provide the opportunity to make sure the right outcome occurs. If a Zoning Officer becomes overly confident and grants improvident permits, there is very little a Board can do; because like a Court, the Board can only act when it has jurisdiction. Occasionally, a neighboring property owner might appeal that decision to the Board, but that is rare. Therefore, the Public is much better served when the Zoning Officer sends close calls to the Board; and treating the Zoning Officer with respect encourages this outcome.