ARE "C" BULK VARIANCES SUBSUMED IN "D" USE VARIANCES?[1]

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Question

This article addresses the question of whether "c" bulk variances under *N.J.S.A.* 40:55D-70c are "subsumed" in the grant of a "d(1)" use variance under *N.J.S.A.* 40:55D-70d(1). In other words, is a "c" bulk variance necessarily included or encompassed as a component element within a "d(1)" use variance?[3]

There appears to be just one Supreme Court opinion and only four Appellate Division opinions that deal directly or indirectly with this issue and they create more confusion than clarity as to precisely what is intended when the courts have at times referred to a "c" bulk variance as being "subsumed" in the grant of a "d" use variance.

Brief Answer

This article concludes that "c" bulk variances are <u>not</u> subsumed – necessarily included or encompassed as a component element – within a "d(1)" use variance when a use variance is granted. While there are certain circumstances, discussed below, when deviations from bulk ordinance regulations may be required in order for a "d" variance to be granted, so that the same circumstances that constitute "special reasons" to warrant the "d" variance constitute an "exceptional situation or condition" to warrant the "c" variances, those sorts of circumstances do not result in the "d" variance's "subsuming" the "c" variances. In any event, the "best practice" is for a land use board "to clearly deal with all of the specific ["c" bulk] variances which are needed, bearing in mind that, as stated in *O'Donnell v. Koch*, [197 *N.J. Super.* 134, 143 (App. Div. 1984)], the board has a duty, as has the local zoning officer, to take cognizance of all variances required for a particular application even if the application doesn't address them." Cox and Koenig, *New Jersey Zoning and Land Use Administration* (Gann 2012), section 7-4 at page 182.

Discussion

The concept of a "c" bulk variance being subsumed within the grant of a use variance was raised indirectly for the first time in *DeSimone v. Greater Englewood Housing Corp.*, 56 *N.J.* 428 (1970). Without mentioning the word "subsumed," the

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[3] See, Merriam-Webster's Collegiate Dictionary (11th Ed.) in which "subsumed" is defined as included, placed or encompassed within as a subordinate or component element of something larger or more comprehensive.

DeSimone Court commented: "Little need be said about the bulk variance granted under [subsection "c" of the statute then in effect] … since the use variance granted approval of the specific [multifamily cluster type] project, the full layout of which was before the Board . . . [and] the relief granted by the (c) variance was from requirements which fitted single family dwellings but made no sense for a multifamily cluster type project…." *Id.* at 443-44.

That is where things stood until the issue was raised indirectly in *Kessler v. Bowker*, 174 *N.J. Super.* 478, 484 (App. Div. 1979), *certif. den.*, 85 *N.J.* 99 (1980). Without citing *DeSimone* and without mentioning the word "subsumed," the *Kessler* court noted that the trial court had ruled that plaintiff failed to satisfy the statutory prerequisites for a "c" variance but that the granting of a "d" use variance "entitled Bowker to build in violation of the side yard parking and bulk restrictions." The *Kessler* court noted that the trial court "determined that a finding of special reasons negated the need to proceed under subsection "c" of the statute." *Ibid.* However, *Kessler* does not stand for the proposition that a "c" variance is subsumed in the grant of a "d" variance. *Kessler* stands for the proposition that both "d" and "c" variances can be granted for "special reasons."

Specifically, plaintiff Kessler asserted that "the trial court erred in holding that when [the municipal board] has before it the proposed plans of an applicant who is seeking both a "c" and "d" variance and determines to grant the "d" variance, the "c" variance is granted with little further consideration." Ibid. The Appellate Division rejected plaintiff's contention and, in essence, held that the same "special reasons" that support the grant of a "d" variance can also support the grant of a "c" variance. *Ibid.* In fact, citing *Kessler*, the court in *Hudanich v. Borough Council of Avalon*, 183 *N.J. Super.* 244, 259-60 (Law Div. 1981) held that a board can grant "d" use and "c" side yard variances on the grounds of "special reasons."

The issue of whether a "c" bulk variance is "subsumed" in the grant of a "d" use variance was raised directly for the first time in *O'Donnell v. Koch*, 197 *N.J. Super.* 134, 143 (App. Div. 1984). The *O'Donnell* court noted that the trial court "held that it was unnecessary that there also be a separate hardship application to cover the bulk variance requirements, concluding that the bulk provisions of the ordinance were subsumed in the approval of the use variance." The *O'Donnell* court further noted that the trial court "relied on *Kessler*" for this proposition. *Ibid.* As set forth above, *Kessler* does not stand for that proposition. In any event, the *O'Donnell* appellate panel did not endorse the trial court's holding. The *O'Donnell* court specifically held that "we do not hold that in every use variance application the bulk requirements of the ordinance are subsumed in the grant of the use variance." *Id.* at 145 (emphasis added).

The factual background of *O'Donnell* is critical to understanding the holding. In *O'Donnell*, defendant Koch applied for and obtained a use variance to allow his funeral home to construct a parking lot on an adjacent lot, which necessitated a "d" variance because parking lots were not permitted in the zone district at issue. Neighboring objectors appealed the approval of the "d" variance to the governing body, which affirmed the approval. Plaintiff O'Donnell then challenged the approval, which resulted in a first remand because the trial court found the approving resolutions deficient in their

findings and conclusions. When the matter was again heard by the trial court, the findings were still found to be legally insufficient and the matter was remanded a second time. The board and the governing body thereafter considered the matter anew and adopted new resolutions. The board found that permitting the parking lot would eliminate a dangerous and hazardous traffic condition and alleviate parking congestion in the area and these were sufficient special reasons to warrant the grant of relief. The governing body agreed. This time the trial court affirmed. The final approval not only granted the use variance for the parking lot on the adjacent lot but also authorized a 15-foot curb cut and lighting in the parking lot, both of which apparently necessitated "c" variance relief, which had not been expressly applied for but which had, in effect, been considered and was supported by evidence in the record. It was this final approval that the trial court affirmed and held that it was unnecessary that there also be a separate hardship application to cover the bulk variance requirements, concluding that the bulk provisions of the ordinance were subsumed in the approval of the use variance.

With the above factual background, the *O'Donnell* court ruled that the record supported the determination of the municipal authorities to authorize a curb cut as well as the lighting, the court noting that the "lighting was modified from the proposed erection of 20 or 25 foot poles to lights on 48 inch stanchions." *Id*. at 144-45. The court thereupon ruled that, "[w]hile we do not hold that in every use variance application the bulk requirements of the ordinance are subsumed in the grant of a use variance, we conclude here that the factual findings of the Board and the governing body after the second remand by the trial court are sufficient, and that under the circumstances of this case those deviations from the ordinance were necessarily included in the grant of the variance for the parking lot." *Id*. at 145. As the *O'Donnell* explained, "although we might well have affirmed just the use variance and remanded once more for findings based on the criteria in subsection "c", we are satisfied that the application as finally approved by the Board and Council warrant the placement and size of the curb cut . . . [and] the modified lighting. . . ." *Id.* at 146. In fact, the *O'Donnell* court ruled that the same reasons that constituted "special reasons" to warrant the "d" variance constituted an "exceptional situation or condition" to warrant the "c" variances. *Id*. at 145.

The issue was next raised indirectly in *Anfuso v. Seeley*, 243 *N.J. Super*. 349 (App. Div. 1990). The *Anfuso* court affirmed a board's grant of a use variance for a marina but reversed the board's grant of "any other incidental variance required to continue to utilize the premises operated as a marina," because the court ruled that such a grant would result "in an imprecise delegation of power by the Board to either the applicant or the construction official" and so had to be "stricken as beyond the Board's power." *Id.* at 375. While not mentioning the word "subsumed" or citing *Kessler* or *O'Donnell*, *Anfuso's* essential holding is that the grant of a "d" use variance cannot subsume the granting of "c" bulk variances without impermissibly intertwining the powers conferred on the board by *N.J.S.A.* 40:55D-70c and *N.J.S.A.* 40:55D-70d.

The most recent reference to this issue is found in *Price v. Himejji*, 214 *N.J.* 263, 301 (2013), where our Supreme Court cites *Puleo v. North Brunswick Board of Adj.*, 375 *N.J. Super*. 613 (App. Div.), *certif. den*., 184 *N.J.* 212 (2005). Without citing any case law as authority, the *Puleo* court explained:

> Generally, application for a "c" variance and a "d" variance cannot coexist. If the application is for a use not permitted in the zone, the bulk requirements designed for that zone cannot be applicable to the intended use. For example, an application for a gasoline service station in a residential zone should not be held to the bulk requirements of the residential zone. Lot area requirements and front and side yard setbacks for a residence were not contemplated to be made applicable to a service station. A Zoning Board, in considering a "use" variance, must then consider the overall site design. In essence, the "c" variances are subsumed in the "d" variance. *Id*. at 621.

Puleo's reference to the "c" variances being "subsumed" in the "d" variance does not, however, mean that a "c" bulk variance is necessarily included or encompassed as a component element within a "d" use variance when a use variance is granted. *Puleo's* reference to the "c" variances being "subsumed" in the "d" variance means that the bulk requirements at issue are not applicable to the use.

Finally, N.J.S.A. 40:55D-70c was amended to add language to the effect that "the fact that a proposed use is an inherently beneficial use shall not be dispositive of a decision on a variance under this subsection." If a "c" variance is not necessarily included or encompassed as a component element within a "d" use variance for an inherently beneficial use, it is surely not so included or encompassed within a "d" variance for a non-inherently beneficial use.

Conclusion

Under New Jersey case law, "c" bulk variances are not subsumed – necessarily included or encompassed as a component element – within a "d" use variance when a use variance is granted.

There are, however, certain circumstances such as those described in *O'Donnell*, 197 *N.J. Super*. at 145, when deviations from bulk ordinance regulations may be required in order for the "d" variance to be granted, so that the same circumstances that constitute "special reasons" to warrant the "d" variance constitute an "exceptional situation or condition" to warrant the "c" variances. Significantly, those sorts of circumstances do not constitute the "d" variance's "subsuming" the "c" variances.

In any event, the "best practice" is for a land use board "to clearly deal with all of the specific ["c" bulk] variances which are needed, bearing in mind that, as stated in *O'Donnell v. Koch*, [197 N.J. Super. 134, 143 (App. Div. 1984)], the board has a duty, as has the local zoning officer, to take cognizance of all variances required for a particular application even if the application doesn't address them." Cox and Koenig, *New Jersey Zoning and Land Use Administration* (Gann 2012), section 7-4 at page 182.