EXTENSIONS OF THE PERIOD OF FINAL SITE PLAN AND SUBDIVISION PROTECTION

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N.J.S.A. 40:55D-52 provides in subsection a, through the incorporation of *N.J.S.A.* 40:55D-49a, that the general terms and conditions on which preliminary approval was granted, including but not limited to use requirements, layout and design standards for streets, curbs and sidewalks, lot size, yard dimensions, and off-tract improvements, "shall not be changed for a period of two years after the date on which the resolution of final approval is adopted. . . ." *N.J.S.A.* 40:55D-52a further authorizes the granting of extensions of the period of final site plan and subdivision protection. This article will examine a number of issues arising under the statute.

THE STATUTE

N.J.S.A. 40:55D-52 provides in relevant part:

> a. If the developer has followed the standards prescribed for final approval, . . . the planning board may extend [the] period of protection for extensions of one year but not to exceed three extensions.
>
> c. Whenever the planning board grants an extension of final approval pursuant to subsection a . . . of this section and final approval has expired before the date on which the extension is granted, the extension shall begin on what would otherwise be the expiration date. The developer may apply for the extension either before or after what would otherwise be the expiration date.
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> d. The planning board shall grant an extension of final approval for a period determined by the planning board but not exceeding one year from what would otherwise be the expiration date, if the developer proves to the reasonable satisfaction of the planning board that the developer was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals from other governmental entities and that the developer applied promptly for and diligently pursued these approvals.

DISCRETIONARY AND MANDATORY APPROACHES TO EXTENSION REQUESTS

The statute directs three different approaches to requests for extensions of the period of final site plan and subdivision protection. First, *N.J.S.A.* 40:55D-52a directs a *discretionary* approach where the board "may" grant an extension of up to one year if the developer has "followed the standards prescribed for final approval," i.e., satisfied all standards and conditions of final approval within the two year protection period.[1]

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Second, *N.J.S.A.* 40:55D-52a directs a *mandatory* approach where the board must deny an extension if the developer fails to satisfy all standards and conditions of final approval within the two year protection period, as the statute does not authorize a board to extend the protection period under such circumstances. Third, *N.J.S.A.* 40:55D-52d directs a *mandatory* approach where the board must grant an extension if the developer proves to the reasonable satisfaction of the board that the developer was barred or prevented, directly or indirectly, from proceeding with the development because of governmental delay in obtaining a legally required approval.[2]

A wise course of action for a board with an extension request pending before it is to ask the applicant to state the basis for the request, the approach(es) claimed to apply, and the reasons urged in support of the request. The board can then compare the basis and reasons put forth in support of the request against the applicable approach.

Compared with the discretionary approach, the two mandatory approaches present easier situations for boards to deal with in terms of the exercise of judgment. For example, if the board finds that an otherwise diligent applicant has been prevented from obtaining a legally required approval by reason of governmental delay in obtaining the approval, the board has no discretion—it must grant the extension request. Conversely, if the board finds that the standards and conditions of final approval have not been timely satisfied (including the situation where the applicant fails to obtain another agency's approval for some reason other than delay), the board has no discretion—it must deny the extension request.

While these two mandatory approaches may be "easy" in terms of the ultimate conclusion to be reached on whether to grant or deny the extension, these cases can be "hard" in terms of the fact finding required of the board. For example, it may prove quite difficult to determine whether an applicant has shown that a governmental agency approval has been delayed by reason of that agency's inaction, or whether the applicant has been simply delayed for some other reason outside of his or her control, or whether the applicant has failed to satisfy a required approval condition relating to obtaining a governmental agency approval because of the lack of diligence by the applicant in pursuing the approval.[3] The bottom line is that the burden is on the applicant to establish that all applicable criteria have been satisfied and to show why the extension should be granted.[4]

The discretionary approach presents the issue of what standards a board should utilize in arriving at its conclusion of whether or not to grant an extension. Where the board finds that an applicant has satisfied the standards and conditions of final approval, the board "may" then grant the extension. But should it? Neither the statute or any case law provides any express standards against which to judge a discretionary extension request. The statute and two recent Superior Court cases do, however, provide some guidance in this area.

STANDARDS FOR JUDGING DISCRETIONARY EXTENSION REQUESTS

N.J.S.A. 40:55D-52b (which technically applies only to site plans or subdivisions for planned developments of 50 acres or more, conventional subdivisions or site plans for 150 acres or more, or site plans for developments of residential floor areas of 200,000 square feet or more) contains factors which may be considered by a board as general guidance in determining a discretionary extension request. That subsection of the statute provides that a board "may" extend the period of protection for

> such additional period of time as shall be determined by the planning board to be reasonable, taking into consideration (1) the number of dwelling units and non-residential floor area permissible under final approval, (2) the

> number of dwelling units and non-residential floor area remaining to be developed, (3) economic conditions and (4) the comprehensiveness of the development.

N.J.S.A. 40:55D-52b seems to suggest a legislative judgment that a local board should be able to protect a project for a longer period of time than generally permitted where the project is close to completion, comprehensive in scope and/or has been delayed due to economic conditions.

The Appellate Division in *Jordan v. Brigantine Planning Board*, 256 N.J. Super. 676 (App. Div. 1992), recently provided some additional guidance with respect to consideration of discretionary extension requests. To briefly summarize the facts of the *Jordan* case, a developer obtained a use variance, several bulk variances, and site plan approval from the board of adjustment for a condominium project on June 8, 1988. The building height proposed and approved was 45 feet. The developer then sold the project to the plaintiffs.

On October 3, 1988, Governor Kean extended the Department of Environmental Protection's (now Department of Environmental Protection and Energy) review authority over shore development to include the project. (That extension was later invalidated.) Plaintiffs, thus, had to process an application through the DEP.

In January 1989, the municipal zoning ordinance was amended to reduce the permitted height of buildings in the zone. While the project would be protected against this zoning change during the two year period of final site plan protection (by reason of the provisions of *N.J.S.A.* 40:55D-52a), the zoning change would affect the project upon the expiration of the protection period on June 9, 1990, unless the applicant obtained an extension of the protection period.

In early 1990, plaintiffs applied to the planning board (not the board of adjustment) for a ruling that the two year protection afforded by the site plan approval was tolled for eight months (which was the length of time plaintiffs claimed it took to obtain the DEP approval). On March 28, 1990, the planning board extended the protection period, but for only four months, to October 8, 1990.

In September 1990, plaintiffs returned to the planning board seeking an extension for the additional four months which had previously been denied, and also seeking a one year extension pursuant to *N.J.S.A.* 40:55D-52a. The planning board denied all relief sought and a lawsuit followed. The planning board's decision was affirmed both by the Law Division and the Appellate Division.

The Appellate Division ruled that a "soft real estate sales market permits but does not require a planning board to extend final approval of a development, especially in the case of a significant intervening zoning change." 256 N.J. Super. at 680. On the other hand, the court also ruled that "an intervening zoning change does not require a board to deny an extension." Id. The court's ultimate holding in *Jordan* was that:

> There must be a balancing process, in which the board weighs the public interest in the implementation of the zoning change, the developer's interest in extended protection, and the circumstances in which the need for extension arose. *Id.*

Additional guidance with respect to consideration of discretionary extension requests was provided by the Law Division in *Aronowitz v. Lakewood Planning Board*, 257 N.J. Super. 347 (Law Div. 1992). To briefly summarize the facts of *Aronowitz*, a developer obtained from the planning board simultaneous preliminary and final site plan approval to construct a co-generation facility. On June

18, 1991, the developer obtained the following relief from the board: a one year extension of the final site plan protection period under *N.J.S.A.* 40:55D-52, a declaration that the statutory protection period was tolled pursuant to *N.J.S.A.* 40:55D-21 for a period one year, and an amended final site plan approval for various changes to the initial site plan which were required by other agency action.

The plaintiffs filed suit on August 26, 1991, challenging the board's action. The parties thereafter entered into a consent order which set aside all relief granted on June 18, 1991 and remanded the case to the board for de novo hearing.

On December 9, 1991, the board held the de novo hearing and again granted the relief set forth above with the exception of the tolling request under *N.J.S.A.* 40:55D-21 which the developer chose not to pursue on remand. By the time of the remand, the township had adopted an ordinance which, if applied to the developers' project, would have required the developer to seek a variance for the height of its proposed venting stacks. On December 17, 1991, the board adopted memorializing resolutions regarding the grant of the extension and the grant of amended site plan approval.

The board's extension resolution noted that the developer "timely filed and diligently pursued all other development approvals required by other municipal, county, state and federal agencies without interruption." 257 N.J. Super. at 367. Next, the resolution noted that all other required approvals were obtained within the two year final site plan protection period and that no approvals remained outstanding other than the requested extension. *Id.* Finally, the resolution stated that the "applicant incurred substantial delays in the approval process which justified the granting of the extension." *Id.*

On December 24, 1991, the court granted plaintiffs' application to reopen the case. Plaintiffs attacked, among other things, the board's resolution and decision extending the period of final site plan protection. Plaintiffs did not challenge the resolution or decision approving the amended final site plan.

Plaintiffs' principal contention in the litigation was that the board was improperly "constrained" to grant the extension request based on the advice of the board's attorney that, in his judgment, a refusal to extend the final site plan protection period probably would not withstand judicial review. Plaintiffs argued that, to the contrary, the board should have denied the request. Plaintiffs listed five reasons in support of their contention that the request should have been denied. Finally, plaintiffs argued that the extension decision was arbitrary, capricious and unreasonable.

The first reason plaintiffs urged in support of denial of the request was that the developer brought the extension problem upon itself by seeking final site plan approval simultaneously with preliminary site plan approval. Had the developer not applied for final site plan approval simultaneously with preliminary site plan approval, the three year protection period conferred by the preliminary approval pursuant to *N.J.S.A.* 40:55D-49 would have applied rather than the two year protection period conferred by the final site plan approval pursuant to *N.J.S.A.* 40:55D-52.[5] The court rejected the argument, noting that "nothing in the Municipal Law Use Law precludes a developer from seeking both approvals simultaneously." 257 N.J. Super. at 366.

Second, plaintiffs charged that the conditions imposed by various other agencies in their approvals created "possible environmental effects which were not before the board in previous proceedings." Id. The court rejected this argument, noting that the hearings held by the board on the extension request provided ample opportunity for the objectors to develop this position and "for the board to weigh the strength of it." Id. The court thus implicitly recognized, as the *Jordan* court expressly ruled, that the board must engage in a balancing process. See *Jordan*, 256 N.J. Super. at 680.

Third, plaintiffs suggested that the developer had no standing to prosecute the extension request because it did not have title to the property at issue at the time of the extension. The *Aronowitz* court made short shrift of this argument, holding that the developer always remained an "interested party" as defined by *N.J.S.A.* 40:55D-4 and, as such, "had a right to continue seeking its approvals." 257 N.J. Super. at 366.

Fourth, plaintiffs postulated that the developer delayed the hearing on its extension request because it knew that the request would have been denied had it been heard promptly. The court summarily rejected this argument, noting that nothing in the record supported this "hypothesis." *Id.*

Finally, plaintiffs noted that the newly adopted township ordinance would have required the developer to seek a variance for the height of its proposed venting stacks if the amendment applied to its project. The court responded to the argument by stating that "of course, that argument begs the question, since the purpose of the land use law . . . is to provide the developer with a degree of repose from changes taking place within the two year approval period and any reasonable extensions thereof." *Id.* at 367. The court thus implicitly recognized, as the *Jordan* court expressly held, that an intervening zoning change does not require a board to deny an extension but is merely one factor which must be weighed in the balancing process. See, *Jordan*, 256 N.J. Super at 680.

After rejecting all five of plaintiffs' reasons supporting the contention that the Lakewood Planning Board was required to deny the extension request, the *Aronowitz* court then went on to review the board's extension resolution to determine whether the board's decision was arbitrary, capricious, or unreasonable. The court seems to have focused on one factor in the balancing process-namely the circumstances in which the need for the extension arose. The court held that the prosecution and defense of plaintiffs' litigation alone "could well support the board's finding that [the developers'] efforts were substantially delayed by factors not within its control." 257 N.J. Super. at 367. The court held that the record "amply support[ed] [the board's] conclusion" that the "applicant incurred substantial delays in the approval process which justified the granting of the extension." *Id.*

Aronowitz thus teaches us that delays in obtaining governmental approvals, even if not requiring the granting of a mandatory extension, may justify the granting of a discretionary extension. In fact, the court concluded its *Aronowitz* opinion by stating that on the face of it, "it appears that the board would have been unreasonable to deny the requested extension." 257 N.J. Super. at 368.

PROCEDURES FOR HEARING EXTENSION REQUESTS

There are a number of procedural questions under the statute on which the *Jordan* and *Aronowitz* decisions are silent, but which should be explored. Is public notice a jurisdictional requirement for hearing an extension request? Should the board require testimony under oath to support a request? Once the board makes its decision granting or denying the request, must the board adopt a formal resolution embodying its decision and must notice of the decision be mailed and published?

Public Notice

N.J.S.A. 40:55D-12a requires public notice of hearings on "applications for development." Where such public notice is required, our courts have held that same is a jurisdictional requirement and that the failure to notice means that any action taken by the board in such a case is a nullity.[6] Technically, a request for an extension does not fall within the strict definition of an "application for

development" as that term is defined in *N.J.S.A.* 40:55D-3.[7] As such, it can be argued that *N.J.S.A.* 40:55D-12a does not apply to a request for an extension and, therefore, there is no requirement for public notice.

The issue of whether the notice provisions of the statute apply does not, however, have to be determined to resolve the question of whether notice is required. This is because *N.J.S.A.* 40:55D-12a contains an exception to the notice requirement, which exception would apply if the statute applies.

Specifically, one of the three exceptions to the notice requirements contained in *N.J.S.A.* 40:55D-12a is for hearings on applications for final approval of site plans or major subdivisions.[8] Because there is no requirement to notice a final site plan or final major subdivision application, it follows that there should be no requirement to notice for an extension of the period of protections granted by the final site plan or final major subdivision approval. Thus, the general rule with respect to extension requests of final approval protection periods is that no notice of the requests is required.[9]

The general rule having been stated, it must be noted that there are circumstances in which the general rule does not apply. Those circumstances are where other relief is requested along with the extension request and the other relief cannot be granted unless on notice.[10] One example is where a variance has been granted along with the underlying approval and, by the terms of the resolution embodying the grant of the variance or by the terms of an applicable local ordinance, the variance will lapse and become void upon the expiration of the site plan or subdivision protection period. In such a case, the extension request would not only be for an enlargement of the final approval protection period but also for an extension of the variance.

As notice is required for any application for a variance pursuant to *N.J.S.A.* 40:55D-12a, it would circumvent the Municipal Land Use Law to allow the variance to be extended without notice. This is especially true where the board, if it desired, could require the filing of a new application for the variance upon its expiration.[11] As any such new application would unquestionably have to be made on notice, the request to extend the variance must be made on notice.

Another example is where amended preliminary site plan or major subdivision approval is sought along with the extension of the final approval protection period. *Aronowitz* is a prime example of such a situation. The developer there applied for a one year extension of the final site plan protection period along with amended preliminary and final site plan approval. 257 N.J. Super. at 349-350. The developer provided public notice of the hearing on its request in compliance with *N.J.S.A.* 40:55D-12, *Id.* at 353, presumably because *N.J.S.A.* 40:55D-12a, through the incorporation of the definition of "application for development" set forth in *N.J.S.A.* 40:55D-3, requires notice of hearings on applications for amended preliminary site plan approval.

Testimony Under Oath

As to the issue of whether a board should require testimony under oath to support an extension request, *N.J.S.A.* 40:55D-10d provides that "the testimony of all witnesses relating to an application for development shall be taken under oath . . . ." As set forth above, an extension request is technically not "an application for development" as defined in *N.J.S.A.* 40:55D-3. Thus, a technical argument can be made that, under the literal language of the statute, there is no requirement that testimony be taken under oath in support of an extension request.

It has long been the law in New Jersey, however, that where a literal reading of a statute will lead to a result which is not consistent with the essential purpose and design of the legislation, the spirit of the statute will control the letter. *N.J. Builders, Owners and Managers Association v. Blair*, 60 N.J. 330, 338 (1972). It has also been held that where the drafters of a statute did not consider or contemplate a specific situation, the enactment should be interpreted "consonant with the probable intent of the draftsman had he anticipated the situation at hand." *AMN, Inc., v. South Brunswick Tp. Rent Leveling Board*, 93 N.J. 518, 524-525 (1983).

One of the essential purposes and designs of the Municipal Land Use Law was to require local boards to conduct quasi-judicial proceedings on applications pending before them. *Seibert v. Dover Tp. Board of Adjustment*, 174 N.J. Super. 548 (Law Div. 1980). While the Municipal Land Use Law expressly dispenses with the technical application of the rules of evidence, *N.J.S.A.* 40:55D-10e, nowhere does the statute dispense with the other elements of quasi-judicial proceedings. And, it has long been the law in New Jersey that applicants appearing before quasi-judicial tribunals are entitled to a judicial trial type hearing. *Yellow Cab Corp v. Passaic*, 124 N.J. Super. 570, 578 (Law Div. 1973). At the very least, a judicial trial type hearing includes the requirement of taking testimony under oath subject to cross-examination.

A literal reading of the Municipal Land Use Law which would result in not requiring testimony to be taken under oath must be rejected and yield to the spirit of the law which requires a judicial trial type hearing. This is also consistent with what the drafters of the Municipal Land Use Law would have intended had the specific situation of an extension request been contemplated in terms of the procedural hearing requirements.

One final comment on the testimony question is in order. While a board must require that any testimony given in support of an extension request be given under oath, this is not to say that the board must take any testimony in determining an extension request which comes before it. In fact, many non-controversial, straight-forward extension requests made and granted during the current recession have been processed without testimony being offered or relied upon.

For example, where there are no zoning or other changes affecting a project, an applicant's attorney may simply forward a letter request to the local board which recites the facts that no zoning or other changes have taken place or are contemplated and that the present recession has hampered the ability to go forward with the project. The letter may also inquire of the board whether a formal appearance will be necessary.

Many boards receiving this sort of letter have granted the requested extension at the next scheduled board meeting without requiring or having the appearance of the applicant or its attorney. Generally, boards in these situations have taken judicial notice of the facts that no zoning or other changes have taken place, that no changes are pending or contemplated, and that the project has been affected by the recession.[12]

Of course, an applicant's attorney must evaluate the specific situation to determine whether it is advisable to proceed in such a manner. If a project is at all controversial, involves anything but straight-forward facts, and/or is opposed by any objectors, it is far safer to make a detailed record with testimony under oath so that a subsequent reviewing court will have a solid record to review. See e.g., *Aronowitz*, 257 N.J. Super. at 367 (holding that the record "amply support[ed]" the board's conclusion).

Written Decisions

The final question involved with the procedures for hearing extension requests is whether a board must adopt a resolution embodying its decision on the request and whether the decision must be mailed and published. At first blush, the answer to this question seems to be "of course." And, I believe that the ultimate answer is "yes." However, as with the issue of testimony under oath, the language of the Municipal Land Use Law does not make the answer (at least as to the first part of the question) at all clear.

N.J.S.A. 40:55D-10.4 provides that local boards "shall include findings of fact and conclusions based thereon in each decision on any application for development and shall reduce the decision to writing." The statute goes on to require that the written decision be in the form of either: "(1) a resolution adopted at a meeting held within the time period provided for action by the board; or (2) a memorializing resolution adopted at a meeting held not later than 45 days after the date of the meeting at which the board voted to grant or deny approval." *Id.*

As twice set forth above, an extension request is technically not an "application for development" as defined by *N.J.S.A.* 40:55D-3. Thus, the same reasoning supporting the technical argument that there is no requirement to take testimony under oath can be advanced to make a technical argument that a board's decision on an extension request need not be in the form of a written resolution. As also set forth above, however, a literal reading of the Municipal Land Use Law which would lead to a result which is not consistent with the essential purpose and design of the legislation must be rejected and yield to the spirit of the law.

As indicated above, the spirit and essential purpose of the Municipal Land Use Law is to require local boards to conduct quasi-judicial proceedings on applications pending before them. Written decisions containing specific factual findings and conclusions are critical in any judicial type proceeding for purposes of appellate review, *Curtis v. Finneran*, 83 N.J. 563, 569-570 (1980), and are "key to sound municipal design-making." *Kaufmann v. Warren Tp. Planning Board*, 110 N.J. 551, 566 (1988).

A literal reading of the Municipal Land Use Law which would dispense with written decisions containing factual findings and conclusions must be rejected and the spirit of the law must prevail in this situation. A board which makes a decision on an extension request must reduce its decision to a written resolution containing specific factual findings and conclusions based thereon. It should be noted that the board in *Aronowitz* adopted a resolution which the court held "contained persuasive reasons for granting the extension." 257 N.J. Super. at 367.

As to the Municipal Land Use Law requirements governing mailing and publication of decisions, *N.J.S.A.* 40:55D-10h requires that a copy of the board's decision must be mailed by the board "within ten days of the date of decision[13] to the applicant or if represented then to his attorney." *N.J.S.A.* 40:55D-10i requires that a "brief notice of the decision shall be published in the official newspaper of the municipality, if there be one, or in a newspaper of general circulation in the municipality."[14]

Unlike the statutory provisions governing notice of applications, testimony of witnesses, and written resolution decisions, the statutory language governing the requirements for mailing of and publication of notice of decisions makes no reference to "applications for development." As such, there can be no dispute that the mailing and publication requirements set forth in the statute apply to a decision on an extension request.

In any event, both applicants and local boards would be well advised to make sure that an extension request decision is mailed and that a brief notice of the decision is published because the R. 4:69-6(b)(3) 45 day limitation period for instituting a prerogative writ action challenging a decision runs from the publication of the notice or the mailing of the decision, whichever is later.[15]

WHICH BOARD HAS JURISDICTION OVER AN EXTENSION REQUEST

Returning to some other substantive issues arising under *N.J.S.A.* 40:55D-52, the *Jordan* court raised an interesting issue which it then declined to decide. The issue is whether the planning board or the board of adjustment has jurisdiction to decide an extension request where the initial approval is granted by the board of adjustment.

The *Jordan* court noted that the language of *N.J.S.A.* 40:55D-52a expressly authorizes only "the planning board [to] extend such period of protection for extensions of one year but not to exceed three extensions." 256 N.J. Super. at 681. On the other hand, the court also noted that an "overriding policy of the Municipal Land Use Law, *N.J.S.A.* 40:55D-1 et seq., is to avoid the ping-ponging of development applications between the board of adjustment and the planning board" and that the Municipal Land Use Law contained a legislative scheme of " 'one-stop shopping' which gives one board or the other all the authority it needs to decide every aspect of the development application, and to bar participation by the other board." Id.

While the *Jordan* court was of the view that "it seems best" to seek extension relief from the board that granted the underlying approval (i.e., the board of adjustment where that board granted the development approval at issue), the court was of the opinion that the statute by its express terms set forth in *N.J.S.A.* 40:55D-52a and *N.J.S.A.* 40:55D-20 gave only the planning board authority to extend approvals.

This author respectfully disagrees with the *Jordan* court in this regard. By its express terms, *N.J.S.A.* 40:55D-76b gives a board of adjustment the authority to grant "to the same extent, and subject to the same restrictions subdivision and site approval under Article 6 of the Municipal Land Use Law whenever the proposed development requires approval by the board of adjustment of a ["d" or "use"] variance pursuant to [*N.J.S.A.* 40:55D-70d]." Because the section of the statute authorizing the extension of approvals (namely *N.J.S.A.* 40:55D-52) is part of Article 6 of the Municipal Land Use Law, it is this author's opinion that *N.J.S.A.* 40:55D-76b *mandates* that any extension request for an approval initially granted by the board of adjustment must be heard by the board of adjustment.

N.J.S.A. 40:55D-76b gives a board of adjustment exclusive jurisdiction to hear extension requests relating to site plan and subdivision approvals it initially granted just as that section of the act gives the board of adjustment exclusive jurisdiction to hear site plan and subdivision applications where a "d" variance is also involved.

N.J.S.A. 40:55D-20 does not compel a different result. In fact, that statutory provision further supports the board of adjustment's having jurisdiction over requests for extensions of approvals it initially granted. *N.J.S.A.* 40:55D-20 provides that "[a]ny power expressly authorized by this [a]ct to be exercised by (1) planning board or (2) board of adjustment shall not be exercised by any other body, except as otherwise provided in this [a]ct." In this author's opinion, *N.J.S.A.* 40:55D-70b is the section of the Municipal Land Use Law which "otherwise provides" that a board of adjustment has the authority to determine extension requests for approvals it initially granted, not the planning board.

Although this author disagrees with the *Jordan* court's view of the jurisdiction issue, once the court called the issue to the attention of the Bar and Legislature and left it unsettled, I wholeheartedly agree with the court's call for "statutory rectification," 256 N.J. at 682, if for no other reason than to avoid needless litigation of this issue in the future.

BEFORE THE FACT AND AFTER THE FACT EXTENSIONS

One final issue under the statute merits discussion. Since the August 13, 1991 effective date of the most recent amendments to the Municipal Land Use Law, *N.J.S.A.* 40:55D-52 has provided that a "developer may apply for [an] extension either before or after what would otherwise be the expiration date." *N.J.S.A.* 40:55D-52c. Although the prior statutory language was silent on the issue of when an extension could be applied for, at least one court views the amendment as simply expressing what was "a common sense interpretation" of the prior language. *Aronowitz*, 257 N.J. Super. at 364-365.

Until the statutory amendment, however, some land use attorneys routinely took the position that an extension had to be applied for prior to the expiration of the protection period. Other attorneys took the even more extreme view that the extension itself had to be actually granted by the board prior to the expiration of the protection period. See *Aronowitz*, 257 N.J. Super. at 362 (rejecting that view). The more enlightened view, however, was that an extension could be applied for either before or after what would otherwise be the expiration date.

The basis for the enlightened view that an extension could be applied for either before or after the expiration date is that, legally, a site plan or subdivision does not "expire" at the end of the period set forth in *N.J.S.A.* 40:55D-52a. The only thing which expires is the protections against zoning and other changes. In fact, if at the expiration of the protection period there is no zoning or other change, the site plan or subdivision continues to be in full force and effect until such time as the developer determines to proceed with the development. Cox, New Jersey Zoning and Land Use Administration, § 15-5.2, at page 240 (1992).

In any event, the statutory amendment now expressly provides that a developer may apply for an extension either before or after what would otherwise be the protection period expiration date. The amendment should foreclose future litigation on this issue.

CONCLUSION

The amendments to *N.J.S.A.* 40:55D-52 which became effective on August 13, 1991, as well as the two recent Superior Court decisions, clarified and provided guidance on many issues involved with extensions of the final approval protection period. Other issues discussed in this article, however, remain to be litigated in the future. With the recent adoption of the Permit Extension Act,[16] however, it is unlikely that there will be much litigation on these issues until after the automatic extensions which are granted by that act expire on December 31, 1994.

In the interim, there will be ample time to further amend the statute to settle the remaining questions. Specifically, the statute can be amended to: clarify the jurisdiction issue regarding whether the planning board or board of adjustment is required to hear extension requests arising from approvals initially granted by the board of adjustment; provide more precise standards against which to judge discretionary extension requests; clearly set forth what must be proven to be entitled to a mandatory extension; and modify the applicable statutory language to expressly provide that requests for extensions either are "applications for development" or should be treated like "applications for development" for procedural purposes. Perhaps the Municipal Land Use Law "Drafting Committee"[17] can take up these issues the next time it meets to consider and suggest amendments to the statute.

END NOTES

[1] The Appellate Division in *YM-YWHA of Bergen County v. Washington Tp.*, 192 N.J. Super. 340, 341-342 (App. Div. 1983), equates the satisfaction of the conditions of final approval within the two year protection period with "following the standards prescribed for final approval."

[2] The Appellate Division in *Jordan Developers, Inc. v. Brigantine Planning Board*, 256 N.J. Super. 676, 680 (App. Div. 1992), ruled that *N.J.S.A.* 40:55D-21 (the Municipal Land Use Law's tolling provision) is not designed to extend the protection period to allow an applicant to obtain approvals from other agencies but makes no mention of *N.J.S.A.* 40:55D-52d which mandates the grant of an extension for a period of up to one year in duration where the developer proves that it was delayed in obtaining a legally required approval from another governmental entity and that the developer applied promptly for and diligently pursued the approval. See, *Aronowitz v. Lakewood Planning Board*, 257 N.J. Super. 347, 363 (Law Div. 1992).

There are two reasons why *Jordan* contains no mention of the provisions contained in *N.J.S.A.* 40:55D-52d. First, subsection d of the statute was adopted and became effective August 13, 1991, after the planning board in *Jordan* considered the extension and tolling request in September, 1990. Second, the West Publishing Company's 1992-1993 pocket part to *N.J.S.A.* 40:55D which contained the amended version of the statute was not shipped to subscribers until June 24, 1992, twenty days after *Jordan* was decided on June 4, 1992.

[3] As to the statutory requirements contained in *N.J.S.A.* 40:55D-52d governing what must be proved to be entitled to a mandatory extension, the language utilized is susceptible to two possible meanings. The first is that all that must be proven is: 1) diligent pursuit of the other required approvals and 2) any delay in obtaining the approvals (other than delay on the part of the applicant). The second possible meaning is that the developer must prove not only both diligent pursuit and delay but that the delay in obtaining the other required approvals was caused by the approval agency at issue and further that such delay was longer than usual for the particular agency issuing the particular approval, i.e., inaction or non-promptness on the part of the other approval agency.

[4] If the applicant does not put before the board the evidence necessary for it to decide, in light of the statutory requirements, whether to grant the relief sought, the board has no alternative but to deny the application. *Tomko v. Vissers*, 21 N.J. 226, 238 (1956); *Chirichello v. Monmouth Park Board of Adjustment*, 78 N.J. 544, 559-560 (1979).

[5] *N.J.S.A.* 40:55D-52a provides that the granting of final approval terminates the preliminary approval protection period.

[6] This was true under the predecessors to the Municipal Land Use Law, *Oliva v. City of Garfield*, 1 N.J. 184, 190 (1948); *Virginia Construction Corp. v. Fairman*, 39 N.J. 61, 70 (1962) and is also true under the current act. *City of South Amboy v. Gassaway*, 101 N.J. 86, 93 (1985). As held in *Auciello v. Stauffer*, 58 N.J. Super. 522, 527 (App. Div. 1959), "*none* of [a board's] authorized powers may be exercised except after public hearing, and upon at least ten days personal notice to all owners within 200 feet of the property in question." (emphasis added)

[7] *N.J.S.A.* 40:55D-3 defines an "application for development" as "the application form and all accompanying documents required by ordinance for approval of a subdivision plat, site plan, planned development, conditional use, zoning variance or direction of the issuance of a permit pursuant to [*N.J.S.A.* 40:55D-34 or *N.J.S.A.* 40:55D-36]." This definition does not include within its express terms

applications for various relief under the Municipal Land Use Law, including but not limited to: requests for extensions of the preliminary and final approval protection periods pursuant to *N.J.S.A.* 40:55D-49 and 52; appeals from administrative officers' decisions pursuant to *N.J.S.A.* 40:55D-70a; and requests for interpretations pursuant to *N.J.S.A.* 40:55D-70b.

[8] *N.J.S.A.* 40:55D-12a provides that "public notice of a hearing on application for development shall be given except for (1) conventional site plan review pursuant to [*N.J.S.A.* 40:55D-46], (2) minor subdivisions pursuant to [*N.J.S.A.* 40:55D-46], or (3) final approval pursuant to [*N.J.S.A.* 40:55D-50] ...." *N.J.S.A.* 40:55D-50 governs final approval of site plans and major subdivisions. Thus, one of the three exceptions to the notice requirements contained in *N.J.S.A.* 40:55D-12a is for hearings on applications for final approval of site plans or major subdivisions.

[9] This would not hold true for extensions of the period of protections conferred upon a preliminary major subdivision pursuant to *N.J.S.A.* 40:55D-49 because *N.J.S.A.* 40:55D-12a requires public notice of a hearing on an application for preliminary major subdivision approval.

[10] It should be noted that *N.J.S.A.* 40:55D-12a provides that "public notice shall be given in the event that relief is requested pursuant to [*N.J.S.A.* 40:55D-60 (planning board review in lieu of board of adjustment) or *N.J.S.A.* 40:55D-76 (other powers of board of adjustment)] as part of an application for development otherwise excepted herein from public notice."

[11] See *Ramsey Associates v. Bernardsville Board of Adjustment*, 119 N.J. Super. 131, 133 (App. Div. 1972), where the court held that it was not unreasonable or improper to require a new application for a building permit or a variance if construction pursuant to the permit or variance previously granted was not begun within the applicable time limitation.

[12] As held in *Reinhauer Realty Corp. v. Nucera*, 59 N.J. Super. 189, 202-203 (App. Div. 1959), certif. den., 32 N.J. 347 (1960), a board may take "judicial notice" of such matters as are so notorious as not to be the subject of reasonable dispute. In *Charlie Brown of Chatham v. Chatham Board of Adjustment*, 202 N.J. Super. 312, 326 (App. Div. 1985), the court referred to the New Jersey Rules of Evidence as a source to determine which matters may be judicially noticed by a board. Interestingly, New Jersey Evidence Rule 9(1), unlike its federal rules of evidence counterpart, mandates that judicial notice be taken of "such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute." One such proposition of generalized knowledge deemed to be so universally known as to be beyond reasonable dispute is that the real estate market is currently in a "downswing." *Glatthorn v. Wisniewski*, 236 N.J. Super. 504, 508 (Ch. Div. 1989).

[13] The date of the adoption of the resolution constitutes the date of the decision for purposes of the mailing of the decision. *N.J.S.A.* 40:55d-10g(2).

[14] While the statute provides that publication "shall be arranged by the applicant unless a particular municipal officer is so designated by ordinance," the law goes on to provide that "nothing contained in this act shall be construed as preventing the applicant from arranging such publication if he so desires." *N.J.S.A.* 40:55D-10i.

[15] Technically, *R.* 4:69-6(b)(3) provides that the 45 day limitation period runs from either the publication of the notice of the decision or "the mailing of the notice to the applicant." While the mailing of the *notice* of the decision rather than the actual decision itself thus satisfies the criteria for commencing the 45 day limitation period, this would not satisfy the requirement set forth in *N.J.S.A.* 40:55D-10h that the actual written decision be mailed. Significantly, mailing the actual decision rather than a notice of the decision should satisfy the criteria for commencing the limitation period under *R.* 4:69-6(b)(3) because the actual decision is more inclusive, providing more information, than mere notice of the decision.

[16] The Permit Extension Act, *N.J.S.A.* , was adopted and became effective on August 7, 1992. The Act provides that "any government approval which expired or is scheduled to expire during . . . the period beginning January 1, 1989 and continuing through to December 31, 1994 . . . is automatically extended until December 31, 1994 . . . ." Nothing in the act "shall prohibit the granting of such additional extensions as are provided by law when the extensions granted by this act shall expire."

[17] The so-called "Drafting Committee," which has been functioning since about 1969, is responsible for the drafting of the Municipal Land Use Law in 1976 as well as the drafting of the major amendments to that law. The Committee is made up of volunteers representing the following organizations and associations, among others: New Jersey League of Municipalities, New Jersey Planning Officials (formerly the Federation of Planning Officials), Institute of Municipal Attorneys, New Jersey State Bar Association, American Planning Association, and New Jersey Association of Home Builders. The committee meets regularly to consider problems with and suggestions for changes to the Municipal Land Use Law. Once a consensus on a particular issue is reached, the Committee prepares drafts of amendments to the law which will effect the desired change. Cox, New Jersey Zoning and Land Use Administration (1992), at page ix.