LEGAL Q&A

Q **Where a developer seeks to have a municipality approve a particular use that is not expressly permitted under the zoning ordinance and the proposed use is not "inherently beneficial", does the developer then have the burden of proving an "enhanced quality of proof" standard?**

A Yes. Developers, or any land use applicant, must prove both the "positive criteria" and "negative criteria" to convince a zoning board of adjustment that the requested use variance should be granted, even where the local zoning regulations exclude the use under the local zoning scheme. Significantly, uses qualifying as "inherently beneficialm," e.g., hospitals, schools and rehabilitation facilities, are automatically deemed to satisfy the "positive criteria," absent extraordinary circumstances. In such cases, however, a board of adjustment is entitled to evaluate whether the proposed use meets the "negative criteria," i.e., whether the use will create a substantial detriment to the public good, or substantial impairment of the intent and purpose of the zone plan and zoning ordinance". N.J.S.A. 40:55D-70d.

Where the use proposed is not inherently beneficial, the applicant must establish the positive criteria, the negative criteria, and also demonstrate satisfaction of the enhanced quality of proof standard. In short, the applicant must reconcile the zoning ordinance (which does not permit the use) with the specific use variance requested. The developer must explain why the granting of the use variance is nonetheless consistent with the intent and purpose of the master plan and zoning ordinance. To meet this heightened standard, planning testimony must focus on the current, past and future uses of the property, as well as the intent of the existing ordinance and intent of the master plan.

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