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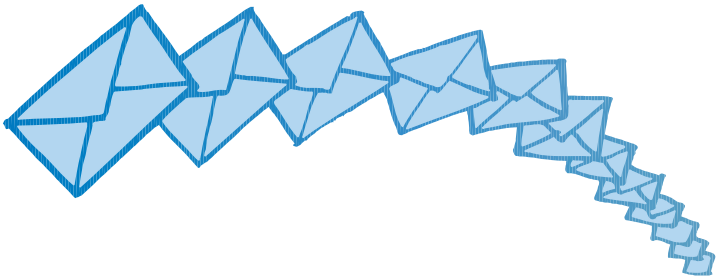

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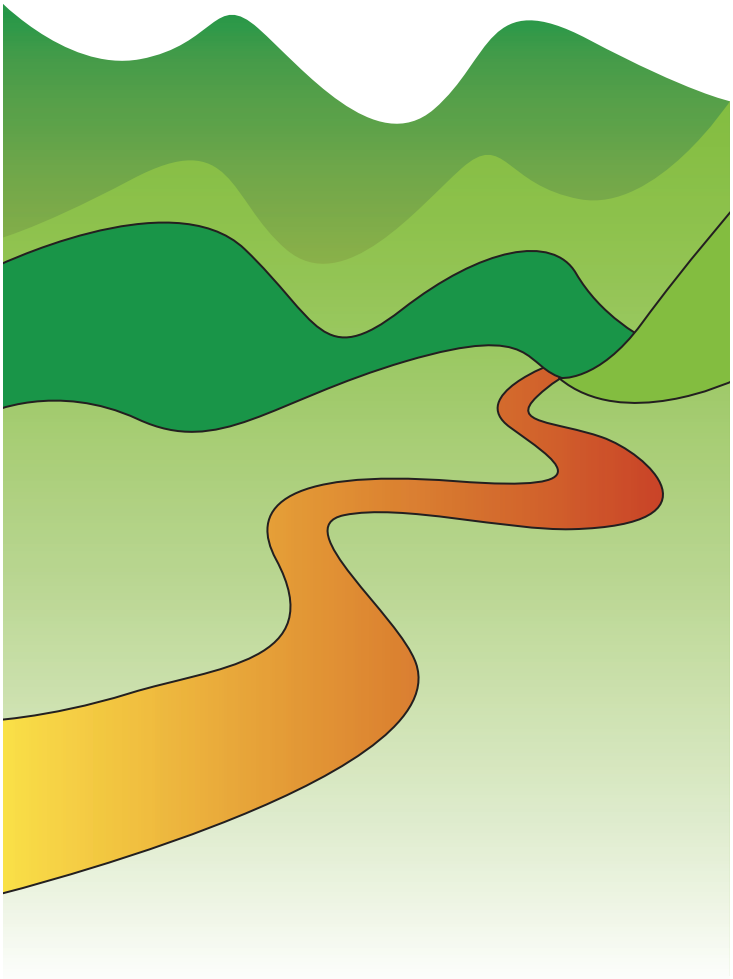
Municipal land use notice regs:

COMPLIANCE A DAUNTING TASK



Inadequate description of a proposed use or relief sought — or failure to notify just one person entitled to notice — will invalidate planning or zoning board proceedings. Here's where notice often fails. And how you avoid that happening to your client.

By Donna M. Jennings

The Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 *et seq.*, requires decisions of local planning and zoning boards be conducted in public at an open meeting which is properly noticed, permitting members of the community affected by the decision an opportunity to speak out in support of or against the proposed development.

At least 10 days prior to the public hearing date, notice must be given to certain designated groups and persons — discussed below — of the matters to be considered in such proceedings. Public notice is so essential that unless proper notice is given, a planning and/or zoning board has no jurisdiction to hear the matter. Thus, if no notice is given or the notice is somehow defective, any action taken by the board in such cases is a nullity. *Stafford v. Stafford Zoning Bd.*, 229 N.J. Super. 188, 196 (App. Div. 1997), *aff'd* 154 N.J. 62 (1998).

Notice content

The MLUL requires an applicant for development provide proper public notice. Notice is valid if it states: (1) the date, time and place of the hearing; (2) identifies the property proposed for development; (3) the nature of the matters to be considered; and (4) indicates the location and time at which supporting documents are available for review.

The purpose of the notice is "to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing." *Perlmart of Lacey, Inc. v. Lacey Twp. Planning Bd.*, 295 N.J. Super. 234, 237-38 (App. Div. 1996). The critical element in any public notice "is an accurate description of what the property will be used for under the application." *Pierro v. Borough of Hopatcong Bd. of Adjustment*, 2006 WL 3371544, *2 (App. Div. Nov. 22, 2006). *See also Scerbo v. Bd. of Adjustment of*

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City of Orange, 121 N.J. Super. 378, 388 (Law Div. 1972). In fact, most often challenges to an applicant's notice focus on whether the notice accurately reflects the "nature of the matters to be considered."

In *Perlmart*, *supra*, the developer had accurately set forth the date, time and place of the meeting, identified the street address of the property and advised when and where members of the public might have access to the application. However, the notice failed to mention the project proposed a conditional use shopping center, simply stating "[t]he minor subdivision will result in the creation of [three] commercial lots with a total of 42.53 acres." Based on this language, the court invalidated the developer's application for site plan approval, variances and a conditional use permit finding the notice defective for failing to inform the public of the proposed nature of the use — a K-Mart shopping center — and failing to advise conditional use approval was also being sought. In construing the statutory requirement, the Appellate Division found that:

> "It is, to us, plain that the purpose for notifying the public of the 'nature of the matters to be considered' is to ensure that members of the general public who may be affected by the nature and character of the proposed development are fairly apprised thereof so that they may make an informed determination as to whether they should participate in the hearing, or at the least, look more closely at the plans and other documents on file." *Perlmart*, at 237-38.

The Appellate Division further cautioned that the notice should:

> " … fairly be given the meaning it would reflect upon the mind of the ordinary layman, and not as it would be construed by one familiar with the technicalities solely applicable to the laws and rules of the zoning commission."

In other words, the notice should accurately describe what the property will be used for under the application in layman's terms, *e.g.* "gasoline station" or "fast-food restaurant." Failure to advise the public of the proposed use or activity in a "common sense manner" invalidates the notice. Again, when the notice is deficient the board lacks jurisdiction to consider the application.

More recently, in *Pond Run Watershed Assn., v. Twp. of Hamilton Zoning Bd. of Adjust.*, approved for publication January 10, 2008, the Appellate Division found the developer's notice was inadequate under N.J.S.A. 40:55D-11 and *Perlmart*, because it referred only to age-restricted housing and "retail/office units" and made no mention of the planned sit down restaurant with potential liquor license. The court held the "notice's generic allusion to "retail/office units" would not reasonably alert a recipient of the notice that such a dining establishment was anticipated."

Adequate as to nature of matter

This case again illustrates the importance of ensuring notice adequately informs the public of the "nature of the matters to be considered." Unfortunately, in this case three years have passed since the filing of the application, the board's decision and the Appellate Division's reversal of the board's approval, in part, because of the defective notice.

The Appellate Division did agree with the trial court, however, that even though the notice incorrectly listed the property's block number as '2713' instead of '2173' it reasonably complied with N.J.S.A. 40:55D-11. In so finding, the Appellate Division noted the MLUL does not require lot and block designations be included in the notice; an applicant may simply include a street address. Since the applicant included a cross-reference to tax map 213, the court found the notice sufficient to inform an individual reading it of the site's correct location.

Importantly, the Appellate Division dismissed plaintiff's other claims challenging the notice, finding "neither the MLUL nor *Perlmart* requires the notice to be exhaustive." Plaintiff's other notice claims included certain nondisclosures such as the quality of the storm water management plan, or other topics not involving a description of what the property would actually be used for.

However, even though the notice need not be exhaustive, an applicant should attempt to include all bulk variances or waivers requested in the application.

Significant vs. insignificant

In *Silverman v. Kempner*, Law Div. 2004, not officially reported but published in full 27 Mun. Law. Rev. No., page 244 (Sept. 2004), the court set aside the board's approval because the notice only included the request for a side yard setback variance and failed to mention the application also required a height variance. The court found, "If a variance is significant enough to be included in the application, it becomes part of the 'nature of the matters to be considered' as defined in N.J.S.A. 40:55D-11 and must be included in the public notice."

In an effort to ensure the notice is accurate, an applicant should include the following catch-all language in any notice: "Any other relief, variances or waivers deemed necessary by the Board and/or its consultants" or something similar thereto. This way, if the board or its consultants require a modification to the proposed application during the public hearing necessitating a bulk variance not previously required nor noticed — but not considered substantial — the board would retain jurisdiction without new notice, *e.g.*, installation of a fence exceeding the ordinance's height requirements to appease an adjoining property owner.

If, however, the board or its consultants require modifications to the application triggering significant additional variances, the applicant should probably re-notice before the board considers the revised application at the next public hearing, thereby avoiding any challenges to the original notice, which lacked mention of these new variances.

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Finally, a municipality does not have the authority to impose additional requirements on the content of notice not otherwise set forth in the MLUL.

For example, some municipalities require an applicant to include ordinance sections or the zoning district in which the property is located. While a notice would not be deemed defective for inclusion of this information, a board could not on its own refuse to accept jurisdiction if the notice lacked such information. The legislature intended "uniformity in the scope and method of notice" to "bring consistency … and predictability to the approval process." *New York SMSA Limited Partnership v. Twp. Council of Edison*, 382 N.J. Super. 541, 550 (App. Div. 2006). In *New York SMSA*, Edison adopted an ordinance enhancing the public notice requirements of subsection a of N.J.S.A. 40:55D-12. Pursuant to Edison's new ordinance, an applicant was required to post a sign on the subject property that included additional information and provide notice to owners within 300 feet of the property, instead of 200 feet.

The Appellate Division invalidated Edison's ordinance finding "there is no ambiguity and no implication of a grant of authority to alter these precisely drafted notice requirements in the plain language of N.J.S.A. 40:55D-12."

Types of notice

Public notice must be given for all applications, with the exception of minor subdivisions or final approval, unless otherwise required by municipal ordinance. Thus, even applications appealing a decision of an administrative officer pursuant to N.J.S.A. 40:55D-70(a) or requesting an interpretation pursuant to N.J.S.A. 40:55D-70(b) require notice before the board has jurisdiction to hear the application. See *Stafford*, *supra*. Importantly, if an applicant seeks a bulk variance pursuant to N.J.S.A. 40:55D-70(c) while simultaneously seeking a minor subdivision, the notice must mention both variance and subdivision even though a minor subdivision is exempt from the notice requirements.

In addition to personal service, notice must also appear in the official newspaper of the municipality or one of general circulation within the municipality. It is important to inquire early on in the application process as to which paper the municipality has chosen as its official newspaper since some papers only publish once a week and publication deadlines may be 20 days or more before the publication date. In those cases, you should arrange to publish the legal notice well in advance of the ten day window. Again, failure to place the legal notice in the paper ten days prior to the hearing date violates the jurisdictional requirements and the application would not be able to proceed since the board would lack authority.

Personal notice

All owners of real property within 200 feet of the property which is the subject of the hearing are entitled to notice. See N.J.S.A. 40:55D-12(d). The administrative officer or designated municipal official must prepare the 200 foot list within seven days of applicant's request for same. Importantly, the applicant is entitled to rely on the official list. For example, if there is an error in the official list — *e.g,* someone within 200 feet does not appear on the list and therefore does not get notice — the matter may proceed before the appropriate municipal board despite this deficiency. There is no requirement applicants must obtain this list from the municipality. However, if the applicant wishes to generate his or her own list, it is the applicant's responsibility to make sure the list is accurate. Should an individual inadvertently be omitted from that list, the board would lack jurisdiction to begin the hearing.

In addition to those persons owning property within 200 feet, there are several other individuals and/or entities that may be entitled to receive notice. For example, if the subject property is within 200 feet of another municipality, the clerk of the adjacent municipality is entitled to notice. The county planning board must receive notice if the subject property is within 200 feet of an existing or proposed county road, adjacent county land or situated within 200 feet of another municipality. The Commissioner of the Department of Transportation is entitled to notice if the subject property is located adjacent to a State Highway. As a practical matter it is prudent to simply send a notice to the county planning board and the Commissioner rather than finding out after the fact the property does abut a county or state highway since again failure to send notice to just one individual or entity entitled to such notice will invalidate the approval. Finally, the Office of Smart Growth (formerly the State Planning Commission) is entitled to notice if the proposed development exceeds 150 acres or 500 dwelling units. In this situation, an applicant must also provide a copy of all documents submitted to the municipality. Again, if even one person or entity is missed, the board lacks jurisdiction to hear the matter.

Waiver of notice

Importantly, it should be noted that receipt of notice is not required; the statute simply mandates notice be sent ten days prior to the public hearing. Thus, if an individual entitled to notice is on vacation and only receives the notice a day before or after the public hearing the matter may proceed at the public hearing.

In addition, a person entitled to notice may waive service of it and/or it may be deemed waived if the person appears at the public hearing. As the Appellate Division concluded in *Izenberg v. Board of Adjust., City of Paterson*, 35 N.J. Super. 583 (App. Div. 1955):

> "Since the plaintiffs did appear or were represented before the board of adjustment, made no objection to service there, were apprised of all of the particulars of the application and had full opportunity to contest it on the merits, the defects complained of were waived. See *Wilson v. Township Committee of Union Township*, 123 N.J.L. 474, 476 (Sup. Ct. 1939)."

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However, if an individual shows up at the hearing to state he did not receive notice and is prejudiced because he did not have time to prepare, the board should adjourn the matter to give the person the opportunity to review the application and present any comments or objections they may have at a later hearing.

Conclusion

Although simple in concept, service and publication of notice is a daunting task in which the land use practitioner must devote adequate time to prepare and review. An inadequate description of the proposed use or relief sought and/or failure to notify just one person entitled to notice will invalidate the entire proceedings — the board lacking jurisdiction in the first place. Hopefully, any challenges to the adequacy of notice are raised and addressed at the first public hearing on the matter. Unfortunately, a plaintiff who never received notice has the right to challenge any approval based on, among other things, inadequate notice within 45 days of the date of publication of the Board's approval. Thus, even if the applicant just spent two years attending numerous public hearings, a successful challenge on notice grounds can nullify the approval and the applicant would be required to begin the process anew — after sending proper notice.

Donna M. Jennings is a shareholder in the Land Use Department at Wilentz, Goldman & Spitzer in Woodbridge. She represents developers and redevelopers in all phases of land use approvals, and related environmental and regulatory matters, as well as litigation and appeals involving the approval and permitting process. Reach her at (732) 855-6039; djennings@wilentz.com.

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