

## CAUTION: 'PROCEDURAL HISTORY' ALONE WILL NOT SUPPORT AN EXTENSION REQUEST

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An unpublished New Jersey Superior Court, Appellate Division opinion serves as a reminder to developers, applicants and attorneys alike, that an extension request of a previous approval is not simply granted after its requested.[1] Specifically, when requesting an extension, developers must explain to the municipal land use board why they were unable to secure all necessary approvals to begin construction.[2]

In Cape Jetty, LLC, v. City of Cape May, et al. (“Cape Jetty 2”), the Appellate Division ruled that a developer’s reliance on the “procedural history,” as a basis for an extension request of a previous approval, fails to meet their burden to be entitled to an extension under N.J.S.A. 40:55D-52(d).[3]

### Background

In August 2019, the Cape May City Planning Board (“Board”) adopted a resolution approving Cape Jetty, LLC’s (“Cape Jetty”) application for land development. [4] However, without obtaining any building permits under their 2019 approval, Cape Jetty sought to expand their development.[5] In March 2021, Cape Jetty applied to the Board seeking bulk variance relief and simultaneously sought an extension request of their 2019 approval.[6] The Board eventually adopted a resolution denying the 2021 application and contemporaneously heard the parties on the extension request.[7] In support of their extension request, Cape Jetty “explained the extension was required due to the COVID-19 state of emergency and [their] preparation of the 2021 Application.”[8] However, in support of their request, Cape Jetty relied exclusively on the “procedural history” of the application, and thus the Board denied their extension request for failing to provide any witness testimony or evidence explaining the delay, which would otherwise warrant an extension.[9]

Soon after, Cape Jetty filed a complaint in the Trial Court, where the Judge reversed the Board’s denial of the

extension request.[10] The Trial Judge found that it was unreasonable to deny the request for “lack of record, unclear legal positioning of the parties, and overlapping considerations.”[11] On appeal, the Appellate Division vacated the Trial Court’s decision to remand the extension request issue to the Board, and remanded for the Trial Court to determine whether denial of the extension request was arbitrary, capricious, or unreasonable.[12]

On remand, the Trial Judge found that the Board did not arbitrarily, capriciously, or unreasonably deny Cape Jetty’s extension request for three (3) reasons: (1) Cape Jetty pursued an amended application rather than pursuing building permits; (2) the Municipal Land Use Law (“MLUL”) did not require the Board to grant an extension absent a showing of good cause; and (3) although Cape Jetty solely relied on the procedural history before the Board, it failed to produce witness testimony or evidence to explain the reasons for their inability to obtain building permits in two (2) years.[13] The Trial Judge further found that the Board’s memorializing resolution contained sufficient findings of facts and conclusions of law to support their decision denying Cape Jetty’s extension request, and thus the resolution was not deficient.[14]



On appeal in Cape Jetty 2, Cape Jetty asserted that “the record did not support the Board’s conclusion that [their] 2019 Approval expired” and their “2019 Approval fully complied with Cape May’s zoning ordinance.”[15]

The Appellate Division gives deference to local boards on discretionary decisions, which are accorded a rebuttable presumption of validity.[16] Nevertheless, a Court may set aside the Board’s decision “only when it is arbitrary, capricious[,] or unreasonable.”[17] Moreover, N.J.S.A. 40:55D-52(d) requires Boards to grant an extension request as long as the applicant meets their burden in satisfying the statutory criteria.[18] Specifically, the applicant must demonstrate “to the reasonable satisfaction of the board that the [applicant] 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.”[19]

If satisfied, the Board’s role becomes ministerial as it shall grant the extension and determine the length of the extension.[20] However, if a board denies an extension request, “[the] court reviewing the denial of such an extension must determine whether there is sufficient credible evidence in the record to support the [ ] board’s findings that the applicant failed to establish the facts that would entitle it to an extension.”[21]

In evaluating whether Plaintiff met their burden, the Court applied the statutory criteria outlined in N.J.S.A. 40:55D-52(d).[22] The Court concluded that in failing to provide any testimony or evidence to explain the reasons for the delays, and simply relying on the “procedural history” as the basis for the request, Plaintiff did not meet their burden.[23] Ultimately, the Court affirmed the lower court’s decision and found that the Board’s denial of Plaintiff’s extension request was not arbitrary, capricious, or unreasonable.[24]

This decision clarifies the principle that requesting an extension of a previous approval will not always be granted by a Board. Land developing teams must work diligently to satisfy all conditions and requirements outlined in the resolution after receiving an approval in order to obtain resolution compliance. However, if unforeseen conditions occur or pending permit approvals delay a project, this opinion stresses that applicants must substantiate the reasons for the delay with evidence and testimony to warrant an extension of their approval.

#### References:

[1] Cape Jetty, LLC, v. City of Cape May, Cape May City Planning Board, and Cape May City Council, No. A-3934-23 (App. Div. Nov. 3, 2025) (slip op. at 3-4).; [2] Id.; N.J.S.A. 40:55D-52(d).; [3] Id.; [4] Cape Jetty, LLC, v. City of Cape May, Cape May City Planning Board, and Cape May City Council, No. A-1418-22 (App. Div. Apr. 8, 2024) (slip op. at 1).; [5] Id. (slip op. at 2).; [6] Id.; [7] Id. (slip op. at 3).; [8] Id.; [9] Id.; [10] Id. (slip op. at 4).; [11] Id.; [12] Id.; [13] Cape Jetty, No. A-3934-23 (slip op. at 1); [14] Id. (slip op. at 2).; [15] Id.; [16] Harvard Enters., Inc. v. Bd. of Adjustment, 56 N.J. 362, 368 (1970).; [17] Cell S. of N.J., Inc. v. Zoning Bd. of Adjustment, 172 N.J. 75, 81 (2002) (quoting Medici v. BPR Co., 107 N.J. 1, 15 (1987)).; [18] Knowlton Riverside Estates, Inc. v. Planning Bd. of Tp. of Knowlton, 347 N.J. Super. 362, 368 (App. Div. 2002) (citing Rowatti v. Gonchar, 101 N.J. 46, 51-2 (1985).; [19] N.J.S.A. 40:55D-52(d). [20] Knowlton Riverside Estates, 347 N.J. Super 362 at 369.; [21] Id.; [22] Cape Jetty, No. A-3934-23 (slip op. at 3).; [23] Id.; [24] Id.

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