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To notice or not to notice . . . that is the question

As Shakespeare might have pointed out if he were born several hundred years later, public noticing is one of the most important elements of a NJ



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land use application. It is a jurisdictional prerequisite, and failure to provide proper notice is often, if not always, fatal to a NJ land use board's approval. It is, therefore, essential for an applicant to be aware of its noticing obligation.

The Municipal Land Use Law ("MLUL") requires an applicant to mail and publish notice of an "application for development." The MLUL defines "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 . . ." Most appearances before planning and zoning boards fall under one of these application

categories, thereby necessitating proper notice. However, before proceeding to the formal hearing, a land use board will often require an applicant to appear at a technical review hearing. The MLUL does not shed light on whether an applicant must mail and publish notice for such technical reviews.

In an unpublished decision, the Appellate Division held that an applicant is not required to mail and publish notice for a post-application, pre-hearing technical review that occurs before a board deems an application complete. *Hartz Mountain Industries, Inc. v. The Planning Bd. of the Village of Ridgefield Park et al.* In *Hartz*, an applicant participated in several post-application, pre-hearing discussions with the land use board and did not provide notice of such discussions. These discussions occurred before the board deemed the application complete. An objector alleged that those



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discussions violated the MLUL because the discussions took place without public notice. The court disagreed and concluded that a Planning Board may discuss a development application after the application has been filed but before a formal hearing is commenced as long as the application has not been deemed complete.

In reaching its conclusion, the court distinguished the facts in *Hartz* from those presented in connection with the Law Division's holding in *Stewart v. Planning Bd. of Manalapan*, which prohibited post-application, pre-hearing discussions. The court highlighted that, unlike *Stewart*, the discussions occurred before the board deemed the application complete. Further, discussions of the details of the application were not extensive and centered around the deficiencies in the application's completeness. Additionally, the board and the applicant discussed no "issues of consequence." The court did not clarify the meaning of "issues of consequence." *See also Gandolfi v. Town of Hammonton.* Finally, there was no evidence

that any of the discussions impacted the ultimate approvals.

Although applicants seek to avoid noticing unnecessarily, based on the above case law, an applicant that has been asked to participate in a technical review must be extremely careful before it determines that public notice is not required. As demonstrated by *Hartz*, the analysis is fact sensitive and appears to turn on whether (1) the review occurs before the board has deemed the application complete; (2) there are discussions regarding "issues of consequence"; and (3) the discussions impact the ultimate approvals. Although application completeness is a clear standard, the lack of clarity in the phrase "issues of consequence" and the potential for argument that the discussions impact the ultimate approvals leaves an applicant with a difficult decision regarding notice that should only be made after consulting with its professionals.

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