

## **THE EXPERT WITNESS\***

by

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It is not unusual for questions to be raised at meetings of a Planning Board or a Zoning Board of Adjustment regarding the qualifications of a witness offered by the applicant and whether that witness could testify on a point within the expertise of another licensed professional.

It may be useful, therefore, to review the standards applicable to "expert" witnesses and the qualification of an individual as an "expert" witness, as well as the distinction between an "expert" witness and a "fact" witness.

Boards are frequently presented with "expert" testimony in support of an application, and, on occasion, in opposition to a particular application. In most instances there is no dispute over the qualifications of the expert, since the expert is often the engineer who prepared the plan or the architect who designed the building or the surveyor who surveyed the property.

In each of those instances the plan submitted contains the information as to who prepared the plan and the appropriate information on whether the individual is licensed to practice their particular profession in New Jersey.

In other instances an expert may be offered on some other aspect of the application, such as issues regarding traffic design and flow; environmental issues; and similar subjects that may be appropriately addressed by experts.

It is not unusual that a challenge is presented with respect to the qualifications of a proposed expert witness, either from those in opposition to the party presenting the witness, or by a member of the Board who has a concern regarding the qualifications of the witness to testify regarding a particular point.

It is important that the members of the Board have an understanding of the standards to be applied in determining whether a particular witness should be recognized as an expert.

### **What is the Difference Between an Expert Witness and Other Witnesses?**

There are basically two types of witnesses that are presented in cases, whether that case is in a court or in an administrative proceeding or in a hearing before a zoning or planning board.

There are fact witnesses who present testimony based on facts within their own personal knowledge. An example of a fact witness would be the person who saw a car run a red light and

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hit another car. Another example would be an individual who testified before a Planning Board or a Zoning Board of Adjustment that the patrons of a restaurant were constantly parking on the street and on grass areas not intended for parking.

The other type of witness is the expert witness who, because of his or her training or experience, is entitled to offer opinion testimony.

The fact witness cannot offer opinion testimony, but the expert witness is expected to offer opinion testimony. An example would be the witness who operated an automobile body repair shop and who testified that the damage to the car would require \$2136.43 to repair. That witness would be drawing on his or her training and/or experience in the field of automobile repairs to examine the damage and to give an opinion as to the cost of repairs. Another example is the engineer who testifies that the proposed site plan would provide an additional 18 off-street parking spaces and that those additional spaces would relieve the parking problem at the restaurant. That witness would be drawing on his or her professional experience to offer an opinion based on that training and/or experience.

The difference between the two types of witnesses was set forth rather clearly in the case of *Glen Wall Associates v. Wall Township*:<sup>1</sup>

An observer is qualified to testify because he has firsthand knowledge which the trier of the facts does not have of the situation or transaction in issue. An expert has something different to contribute. His is the power to draw inferences from the facts which a trier of the facts would not be competent to draw. To warrant the use of expert testimony, then, two elements are required. First, the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman and second, the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth... The mere qualifying of a witness as an expert does not permit him to give unsupported opinions. The witness; expertise qualifies him to take facts and to conclude from those facts and to conclude from those facts an opinion relevant to the issue before the court which a non-expert, with the same data, could not do. The evidence, data and the totality of the facts on the basis of which the opinion is arrived at must be made known to the court so that it may evaluate the validity of the opinion and conclude what weight, if any, is to be given to that opinion.

### **How is it Decided that a Witness is an "Expert"?**

Experts are called upon to offer opinion testimony on subjects where the Board members, or the members of a jury, do not have the technical training or experience necessary to evaluate the case and cannot, without such assistance, form a valid judgment on the issue presented.

The test of whether a particular witness is competent to testify as an expert is whether the witness has sufficient knowledge of standards applicable to the situation to justify his expression of an opinion. That knowledge may be based upon formal educational experience,

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<sup>1</sup> *Glen Wall Associates v. Wall Township*, 6 N.J. Tax 24 (1983)

degrees received, licenses granted or upon experience in a particular field of endeavor. Qualification as an "expert" witness does not require that the witness be the best person to testify on a particular point, but only that the person has the level of experience, knowledge or training to enable the witness to offer opinion testimony.

It is the normal procedure for a proposed expert witness to first present a brief outline of his or her qualifications to enable the Judge, or the Board, to determine whether the person qualifies as an expert witness. That outline of qualifications might include information on formal education, degrees received, graduate work done, experience in the field, lectures given, articles or treatises written, professional recognition received, etc. There is then a ruling on whether the person will be recognized as an expert. If the person does not qualify as an expert, then they cannot offer any opinion testimony, although they can testify to facts that are within their personal knowledge.

It is established law that the qualifications of experts are left to the discretion of the trial court, or, in cases before a Planning Board or a Zoning Board of Adjustment, to the discretion of the Board. The decision is conclusive unless it is clearly shown to be erroneous as a matter of law.<sup>2</sup> The test of expert testimony is whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on that knowledge or experience an aid in determining the questions at issue.

The standard is broad and not precise. The Board may recognize a witness as an expert if it concludes that the witness has the knowledge or experience that will enable that witness to offer an opinion that will assist the Board in determining the issue presented.

The examination of the qualifications of the witness need not be so detailed or precise so as to consume an extended period of time, but it should be sufficient so that the Board will have an understanding of the background of the witness and will be able to evaluate the opinions rendered by the witness. Understanding the background qualifications of the witness will enable the Board to determine the weight to be given to the testimony, in relation to other witnesses with either more or less extensive qualifications.

In determining the qualification of a witness the question is often asked as to whether the witness has testified as an expert before other boards or before this Board. Certainly, if the witness has previously testified as an expert before this Board, it does not require extensive examination for the Board to again accept that person as qualified to give expert testimony. Likewise, if a witness has given expert testimony before other Boards, agencies or in courts, that is certainly persuasive that the person has the appropriate knowledge or experience to be recognized as an expert again. It is not, however, conclusive if the witness has not previously testified as an expert witness. There are many individuals who have the knowledge or experience to enable them to offer expert, opinion testimony, who have just not been previously called upon to do so. An example would be a pilot with years of experience in handling a certain type of airplane who was called upon to testify and give opinion on how certain conditions should be handled and how the airplane should react in those conditions.

It should also be noted that experts are normally offered for their knowledge in a particular field and their qualification would be in the field in which they have exhibited that

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<sup>2</sup> *Rempfer v. Deerfield Packing Corp.* 4 N.J. 135, 141 (1950)

knowledge. But, some witnesses may qualify in several fields, especially where the fields overlap. For example, it would not be uncommon for an individual to qualify as a professional engineer, as a land surveyor, as a professional planner and as an architect.

### **Must We Accept and Rely on the Expert Testimony?**

The testimony of an expert is offered to assist the Board in making a decision, but is not binding on the Board. In some cases the Board may be confronted with conflicting testimony from several expert witnesses. Since expert witnesses are offering opinion, it is not unusual to find experts disagreeing with each other. It is the function of the Board, as in a trial it is the function of a jury, to consider all of the testimony in making a determination.

In evaluating the testimony, the Board may be influenced by the background and qualifications of the various experts, by their apparent understanding of the facts on which they have based their testimony, by the thoroughness with which the expert has considered the factors that enter into the formation of the opinion, and by simple common sense.

By common sense I mean that the Board certainly has a right to apply its collective common sense to the case before it. For example, if a proposed parking area is adjacent to an area intended for grass and landscaping, the Board can conclude that if there is no curb or device used to stop cars, then cars will intrude from the designated parking area onto the grass and that there will be a deterioration of the grassed area at the edges. An expert might offer an opinion that curbing is not necessary or appropriate and the Board might justifiably decline to be convinced by that expert testimony.

The Board is in the same position as a jury or a judge hearing a case without a jury. Once all of the testimony has been offered, including possibly conflicting expert testimony, the Board may accept that testimony which appears to be sound and reliable, may reject all of the testimony or may accept all of it.

The factfinder is not bound by the expert testimony presented by either side in a case.<sup>3</sup> That is especially true where the expert testimony is conflicting on important points.

On the other hand, the expert testimony is offered to assist the Board in making a determination of an issue or subject matter that calls for an evaluation that is beyond the knowledge or experience of the average person. Where expert testimony is uncontradicted, the Board must exercise caution in disregarding that testimony. It must be noted, however, that expert testimony is offered by experts retained by applicants or by experts retained by objectors and that the testimony is offered in order to convince the Board of the correctness of the particular position being presented.

For that reason, the Board has available to it the assistance of its own "experts" including the Municipal Engineer and the Municipal Planner and those "experts" who are obtained to advise the Board on a particular subject and in a particular case. Normally, the consultants for the Municipality review the materials presented by applicants and objectors and advise the Board on the basis of that review.

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<sup>3</sup> *County of Middlesex v. Clearwater Village, Inc.* 163 N.J. Super 166, 174 (App. Div. 1978)

## Must the Proposed Expert Witness be Licensed in New Jersey?

While it is generally held that an expert witness must be a licensed member of the profession whose standards he professes to know, that is not a firm rule. Sometimes the expert may well be offering testimony in a field where there is no licensing requirement. When the subject matter on which the expert is to testify falls distinctly within the province of a particular profession, such as medicine, the license to practice is evidence of the minimal technical training and knowledge essential to the expression of a meaningful and reliable opinion.<sup>4</sup>

That, however, is not an absolute rule. In the case of *Hudgins v. Serrano*<sup>5</sup> it was held that a proposed expert witness in a medical malpractice case who was not licensed as a physician in New Jersey or in any other jurisdiction was still qualified to testify as an expert. In that case the witness had his degree as a doctor of medicine and had his Ph.D. in experimental pathology. He had been on the faculty of two medical schools, had taught medical students, interns and residents, had published papers in medical journals and had served as a consultant to medical staff members. It was held that "the absence of a license from the walls of his office does not diminish those qualifications."

Where the members of a profession are licensed, the fact that the proposed expert witness has the license creates a presumption that the individual is qualified to offer testimony on subject matter that falls within the province of that profession.

It must be noted, however, that some subjects fall within the province of more than one profession and that witnesses on the same case may be qualified to offer expert testimony, although they have different professional backgrounds. One example would be in a case involving the construction of a building where one expert might be a structural engineer who would testify on construction materials used in a building, while another expert might be the architect who designed the building and specified the materials to be used. Both individuals could qualify as experts and could offer their opinions to assist in the decision to be made in the matter. Depending on the particular issue presented, another expert might be a contractor experienced in constructing buildings, even if he is not licensed as an engineer or architect.

As will be discussed later, there are specific licensing requirements in New Jersey applicable to engineers, architects, land surveyors and planners.

No plan or specification shall be accepted by a public body unless there is affixed to the plan the seal of the professional engineer, registered architect or land surveyor who has been licensed in accordance with the statute.<sup>6</sup>

Certainly no one can hold themselves out as a professional engineer, architect, surveyor or planner unless they have met the specific licensing requirements applicable to their profession.

It should be noted, however, that there are certain exemptions from the engineering licensing requirement for a person not a resident of and having no established place of business

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<sup>4</sup> *Sanzari v. Rosenfeld*, 34 N.J. 128 (1961)

<sup>5</sup> *Hudgins v. Serrano*, 186 N.J. Super. 465 (App. Div., 1982)

<sup>6</sup> N.J.S.A. 45:8-45

in New Jersey when his or her practice of professional engineering or land surveying in this State "does not exceed in the aggregate 30 consecutive days in any calendar year; provided such person is legally qualified by license to practice said professional engineering or land surveying in any State or country in which the requirements and qualifications for a certificate of license are at least comparable to those specified" in the statute. The statute, however, specifically provides that "no final plans or reports may be submitted under this provision."<sup>7</sup>

There is an additional exemption for an engineer not a resident of New Jersey and having no established place of business in New Jersey but who has recently become a resident of this State. If the new resident has applied for licensing in New Jersey but the appropriate board has not yet acted on the license application, the exemption applies. The exemption in that case continues only for such time as the board requires for the consideration of the application for licensing.<sup>8</sup>

There are other exemptions that will not be generally applicable to matters that come before zoning or planning boards.

It would appear, therefore, that an individual who is licensed as a professional engineer in another jurisdiction and who has certified, or given sworn testimony, that he has not appeared as a professional engineer in New Jersey for more than 30 consecutive days in the current calendar year may appear before the Board as a professional engineer.

It may be helpful to review the statutory provisions relating to the licensing of the various types of professionals who might appear before the Board as expert witnesses. The statutory provisions define the specific aspects of the particular professional and the areas of expertise which lead to their licensing.

## **Architects**

Architects are required to be licensed in New Jersey.<sup>9</sup> The term "architecture" is defined to mean

... the art and science of building design and particularly the design of any structure for human use or habitation. Architecture, further, is the art of applying human values and aesthetic principles to the science and technology of building methods, materials and engineering systems, required to comprise a total building project with a coherent and comprehensive unity of structure and site.<sup>10</sup>

The term "practice of architecture" is defined as

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<sup>7</sup> N.J.S.A. 45:8-40 (1)

<sup>8</sup> N.J.S.A. 45:8-40 (2)

<sup>9</sup> N.J.S.A. 45:3-1

<sup>10</sup> N.J.S.A. 45:3-1.1 c

... the rendering of services in connection with the design, construction, enlargement or alteration of a building or group of buildings and the space within or surrounding those buildings, which have as their principle purpose human use or habitations. These services include site planning, providing preliminary studies, architectural designs, drawings, specifications, other technical documentation, and administration of construction for the purpose of determining compliance with drawings and specifications.<sup>11</sup>

Any licensed professional engineer who has a college degree in an engineering program or curriculum of four years or more is entitled to engage in the practice of architecture and may be registered to practice architecture upon passing the parts of the examination relating to site and building design.<sup>12</sup>

## Engineers

Professional Engineers (PE) are required to be licensed in New Jersey.<sup>13</sup>

The terms "practice of engineering" or "professional engineering" are defined to mean

... any service or creative work the adequate performance of which requires engineering education, training and experience and the application of special knowledge of the mathematical, physical and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of land and water, engineering studies, and the administration of construction for the purpose of determining compliance with drawings and specifications; any of which embraces such services or work, either public or private, in connection with any engineering project including: utilities, structures, buildings, machines, equipment, processes, work systems, projects, telecommunications, or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services. The design of buildings by professional engineers shall be consistent with section 7 of the "Building Design Services Act,"<sup>14</sup>

An architect who has a college degree in a program or curriculum of four years or more may be licensed to engage in the practice of professional engineering upon satisfactorily passing that part of the examination limited to the specialized training of engineers.<sup>15</sup>

It is interesting to note that there is a requirement that the clerk of any political subdivision of the State is required to file with the secretary-director of the State Board of

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11 *N.J.S.A. 45:3-1.1 k*

12 *N.J.S.A. 45:3-5.1*

13 *N.J.S.A. 45:8-27*

14 *N.J.S.A. 45:8-28 (b)*

15 *N.J.S.A. 45:8-35.1*

Professional Engineers and Land Surveyors the name of any engineer "designated, appointed or employed, within 30 days after appointment."<sup>16</sup>

### **Certified Landscape Architects**

Certified Landscape Architects (CLA) are required to be licensed in New Jersey.<sup>17</sup> The term "certified landscape architect" means

... an individual who, by reason of his knowledge of natural, physical and mathematical sciences, and the principles and methodology of landscape architecture and landscape architectural design acquired by professional education, practical experience, or both, is qualified to engage in the practice of landscape architecture and is certified by the board as a landscape architect.<sup>18</sup>

The term "practice of landscape architecture" is defined as

... any service in which the principles and methodology of landscape architecture are applied in consultation, evaluation and planning, including the preparation and filing of sketches, drawings, plans and specifications, and responsible administration of contracts relative to projects principally directed at the functional and aesthetic use of land.<sup>19</sup>

The statute specifically provides that any person or corporation may engage in the practice of landscape architecture, but may not hold himself out as or use the title "certified landscape architect" unless certified under the provisions of the statute.<sup>20</sup>

Nothing in the provisions for the licensing of certified landscape architects is to be construed so as to prevent the practice of architecture, engineering, land surveying or professional planning by those properly licensed in those professions, but they may not use the term "landscape architect" unless certified under the provisions of the statute.<sup>21</sup>

### **Land Surveyors**

Land Surveyors (LS) are required to be licensed in New Jersey.<sup>22</sup>

The practice of land surveying includes

... surveying of areas for their correct determination and description and for conveyancing, and for the establishment or reestablishment of land boundaries

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16 *N.J.S.A. 45:8-43*

17 *N.J.S.A. 45:3A-1*

18 *N.J.S.A. 45:3A-2 a*

19 *N.J.S.A. 45:3A-2 b*

20 *N.J.S.A. 45:3A-2 b*

21 *N.J.S.A. 45:3A-3*

22 *N.J.S.A. 45:8-27*



and the plotting of lands and subdivisions thereof, and such topographical survey and land development as is incident to the land survey.<sup>23</sup>

A land surveyor has the authority to go on, over and upon the lands of others during reasonable hours when necessary to make land surveys, provided that there has been a reasonable attempt to notify the land owner or lessee and has given written notice within 7 days to the police department of the municipality in which the land is located.<sup>24</sup>

### **Professional Planners**

Professional Planners (PP) are required to be licensed in New Jersey<sup>25</sup> and the term "practice of professional planning" is defined to mean the

administration, advising, consultation or performance of professional work in the development of master plans ... and other professional planning services related thereto intended primarily to guide governmental policy for the assurance of the orderly and co-ordinated development of municipal, county, regional, and metropolitan land areas, and the State or portions thereof. The work of the professional planner shall not include or supersede any of the duties of an attorney at law, a licensed professional engineer, land surveyor or registered architect of the State of New Jersey.<sup>26</sup>

It is further provided that any licensed professional engineer, land surveyor or registered architect may engage in any or all of the functions of a professional planner, except that they shall not hold themselves out as professional planners.<sup>27</sup> Additionally, a duly licensed professional engineer, land surveyor or registered architect may be licensed as a Professional Planner without meeting the other licensing requirements, including the examination requirement.<sup>28</sup>

While an engineer or surveyor who has a license as a professional planner may certainly qualify as an "expert" for the purpose of offering opinion testimony, the Board is entitled to request information on the experience of the individual in the field of professional planning in order to determine the weight to be accorded the testimony.

In addition, a professional designation to look for on any resume or statement of professional qualifications is AICP, the indication of membership in the American Institute of Certified Planners. In order to achieve the designation, a planner must qualify by passing an examination - in addition to meeting the state licensing requirements.

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23 *N.J.S.A. 45:8-28 (e)*

24 *N.J.S.A. 45:8-44.1*

25 *N.J.S.A. 45:14A-1*

26 *N.J.S.A. 45:14A-2 (c)*

27 *N.J.S.A. 45:14A-3*

28 *N.J.S.A. 45:14A-11; N.J. Chapter, American Institute of Planners v. N.J. State Board of Professional Planners, 48 N.J. 581 (1967).*

It has been held that a landscape architect may not properly use the terms "land planner" in reference to himself and "land planning" to describe the activities of himself or his firm.<sup>29</sup>

### Who Does What?

With respect to land use applications, the determination of which professional is authorized to perform the work is made on the basis of the statutory provisions discussed above and the regulations enacted under the authority of the statutes and found in the *New Jersey Administrative Code*.

### Site Plans

The survey depiction of existing conditions and the exact location of physical features, including metes and bounds, drainage, waterways, utility locations and easements must be prepared by a land surveyor. The information on the survey may be transposed to the site plan, however, provided that the date of the survey and by whom and for whom it was prepared is shown on the site plan. Vegetation, general flood plain determinations or general location of existing utilities, buildings or structures and landscaping, signs, lighting, screening and other information not specified in the regulations may be shown by an architect, certified landscape architect, planner, engineer, land surveyor or other person acceptable to the Board.<sup>30</sup>

Either an engineer, planner, architect or certified landscape architect may prepare the plan showing the location of proposed buildings and their relationship to the site and immediate environs.<sup>31</sup>

An architect, certified landscape architect, engineer or planner may prepare the general layout of a preliminary site plan for a multiple building project showing the development elements and may prepare a plan showing the location of drives, parking layout, pedestrian circulation and means of ingress and egress.<sup>32</sup>

Drainage facilities for site plans of 10 acres or more or involving storm water detention facilities or transversed by a water course may be prepared only by an engineer. Other drainage facilities may be prepared by an architect or an engineer.<sup>33</sup>

Utility connections and on-tract extensions may be prepared by an architect or an engineer, but only an engineer may prepare off-tract utility extensions or on-site sanitary sewage disposal or flow equalization facilities.<sup>34</sup>

An architect may prepare preliminary floor plans and elevation views of buildings, illustrating the architectural design of a project, except when the building is part of an

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<sup>29</sup> *State v. Bradley*, 174 N.J. Super. 154 (App.Div. 1980)

<sup>30</sup> N.J.A.C. 13:40-7.2 (b); N.J.A.C. 13:40-7.3 (i); N.J.A.C. 13:27-6.2 (b); N.J.A.C. 13:41-4.2 (b)

<sup>31</sup> N.J.A.C. 13:40-7.3 (j); N.J.A.C. 13:27-6.3 (j); N.J.A.C. 13:41-4.2 (j)

<sup>32</sup> N.J.A.C. 13:40-7.3 (b), (j); N.J.A.C. 13:27-6.2 (b) (i) and (j); N.J.A.C. 13:41-4.2 (j)

<sup>33</sup> N.J.A.C. 13:40-7.3 c, d

<sup>34</sup> N.J.A.C. 13:40-7.3 e, f, g

engineering or industrial project, when the floor plans and elevation views may be prepared by an engineer.<sup>35</sup>

## Subdivisions

The regulations contained in the *New Jersey Administrative Code* provide that the general location of facilities, site improvements and lot layouts may be prepared by an architect, certified landscape architect, engineer, land surveyor or planner. The design and construction details of all public improvements, including street pavements, curbs, sidewalks, sanitary sewage and storm drainage are the exclusive province of the professional engineer. A land surveyor is required for the preparation of final subdivision maps with metes and bounds.<sup>36</sup>

There is a pre-emption of local authority to define what work may be performed by which licensed professional. The provisions in the *New Jersey Administrative Code* applicable to Architects, Certified Landscape Architects, Professional Engineers, Land Surveyors and Professional Planners all contain identical provisions that

No municipal or county ordinance, policy or action purporting to define the scope of professional activity of architects, engineers, land surveyors, planners or certified landscape architects in the preparation of site plans or major subdivisions shall reduce or expand the scope of professional practice recognized by the boards.<sup>37</sup>

While the statutory and regulatory schemes define the responsibilities of the various professionals who address different aspects of a plan which may be reviewed by a Planning Board or Zoning Board of Adjustment, it must be noted that the standard discussed above for the qualification of expert witnesses does allow some flexibility in the presentation of testimony.

Obviously, an engineer or architect who has prepared a site plan in reliance on the survey prepared by a land surveyor is qualified by education, training and experience to testify as an expert on the plan, including the aspects which were prepared by the surveyor. The Board could determine, however, that the weight to be given to the testimony of the engineer or architect would be less credible on a point involving a metes and bounds question than the weight which would be given to the testimony of a land surveyor.

The determination of the weight to be given to the testimony of an expert must be decided by the members of the Board, just as the members must weight the credibility and weight to be given to any testimony received. The issue of the weight to be accorded to particular testimony is separate and distinct from the determination as to whether a particular witness qualifies as an expert.

In a courtroom setting, the general rule is that the "best evidence" must be presented and a surveyor would be required to offer the testimony on matters falling within his or her particular specialized knowledge and experience.

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<sup>35</sup> N.J.A.C. 13:40-7.3 h.

<sup>36</sup> N.J.A.C. 13:40-7.4 (a); N.J.A.C. 13:27-6.6 (a); N.J.A.C. 13:41-4.4 (a)

<sup>37</sup> N.J.A.C. 13:40-7.5 (b); N.J.A.C. 13:27-6.5 (b); N.J.A.C. 13:41-4.5 (b))

Proceedings before an administrative agency, such as a Planning Board or a Zoning Board of Adjustment, however, are not bound by the formal rules of evidence and the *Municipal Land Use Law* specifically provides that the "Technical rules of evidence shall not be applicable to the hearing, but the agency may exclude irrelevant, immaterial or unduly repetitious evidence."<sup>38</sup>

There are occasions when there may be testimony offered from other professionals, such as witnesses who may have experience with a particular type of business or those with special educational qualifications in environmental and air quality evaluations, or from specialized areas of the licensed professions, such as traffic engineers. On those occasions, the Board may well want some testimony on the particular experience, education or training which would qualify the person to testify as an "expert" in the particular field.

The determination as to whether a witness is an "expert" should not be so narrowly or strictly applied that useful testimony is not received, but the Board should always remember that the evaluation of the testimony and ultimate acceptance or rejection of the opinions offered must be made by the Board.

While the Board cannot arbitrarily or unreasonably ignore the "expert" testimony, the Board members should always have the freedom to reject the expert testimony which they determine to be weak or not credible. In that instance it would be useful for the Board members to include in their statements on the record the reasons why the testimony was not persuasive, so that a reviewing Court will be able to understand the reasons for rejecting what might initially appear to be "expert" testimony entitled to substantial deference.

Where, however, there is conflicting testimony, the Board must decide whether to accept all or part of the testimony offered. Where the choice made by the Board is reasonably made, that decision is generally conclusive and will not be overturned on appeal.<sup>39</sup>

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38 *N.J.S.A. 40:55D-10 e.*

39 *Kramer v. Board of Adjustment of Sea Girt*, 45 N.J. 268 (1965; *Allen v. Hopewell Township Zoning Board of Adjustment*, 227 N.J. Super. 574 (App.Div. 1988)