

Zoning Board Basics

Westchester Municipal Planning Federation

Land Use Training Institute

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Regulatory Framework

- Provisions governing Zoning Boards of Appeals (sometimes referred to as Boards of Appeals, or in New York City, Board of Adjustment) are contained in New York State enabling statutes –
- Village Law §§7-712, 7-712-a and 7-712-b
- Town Law §§267, 267-a and 267-b
- General City Law §§81, 81-a and 81-b

Resources for Zoning Board of Appeals Members

- Read the statutes above which are applicable to your municipality AND your Local Zoning Code
- WMPF Web site www.wmpf.org has a Zoning Board Primer as well as a variety of webinars which address common land use issues
- NYSDOS Division of Local Government Services provides information and resources as does NYCOM and the New York State Planning Federation
- Your Municipal Attorney and Planner are good sources of information
- TRAINING – each land use Board member is required to have four hours of training annually. The organizations noted above provide accessible courses

Zoning Board of Appeals Purpose

- Every community with a Zoning Ordinance must have a Zoning Board of Appeals (ZBA) to consider appeals from determinations of the building inspector and to consider variances
- The ZBA provides a relief valve from zoning provisions which do not necessarily work in every situation
- The ZBA provides flexibility as every piece of property has different environmental, topographical and prior developmental constraints
- The ZBA considers area and use variances, interpretations from the determination of the Building Inspector and, in some cases, special use permits for certain uses

Area Variances and Standards for Review

- An Area Variance is the authorization by the ZBA to use land in a manner which is not allowed by the Dimensional or Physical Requirements of the zoning code
- Area Variances are the most common applications to the ZBA
- The Court of Appeals has held that the Standard for granting an area variance is a balancing test weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or the community

Five Statutory Factors for Area Variances Which the Board Must Consider

- Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance
- Whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance
- Whether the requested area variance is substantial
- Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district
- Whether the alleged difficulty was self-created which consideration shall be relevant to the decision of the Board but shall not necessarily preclude the granting of the area variance

Use Variances and Standards for Review

- A Use Variance is authorization by the ZBA for the use of land for a purpose which is otherwise not permitted by the zoning ordinance
- The Use variance standard is very restrictive as the applicant must demonstrate “unnecessary hardship” for each permitted use in the district where the property is located. To meet this standard, the applicant must demonstrate the following:
 - The applicant cannot realize a reasonable rate of return for each permitted use in the district, provided that the lack of return is substantial as demonstrated by competent financial evidence
 - The alleged hardship relating to the property is unique and does not apply to a substantial portion of the district or neighborhood
 - The requested use variance, if granted, will not alter the essential character of the neighborhood
 - The alleged hardship has not been self-created

Interpretations

- The Building Inspector is the interpreter of the Zoning Code. The ZBA is charged with interpreting the code if an aggrieved party appeals the Building Inspector's interpretation
- Zoning is in derogation of Common Law so must be strictly construed against the municipality and any ambiguity resolved in favor of the property owner
- In absence of definitions in code, the ZBA can look to ordinary meaning and dictionary definitions

Findings and Decisions

- Before making a decision, each Zoning Board member should review the applicable zoning code, carefully read all of the materials in the application, make a site visit to the property, if possible, and listen to the testimony at the Public Hearing
- It is critical for the ZBA to make written findings which in the case of Area Variances show that the Board considered the balancing test and addressed each of the five factors. Similarly, when considering Use Variances, the Board must make written findings which address each of the four factors
- In recent years, courts have generally upheld ZBA decisions and given deference to the Board if the record shows the Board undertook the proper balancing test and addressed the relevant factors
- Judicial review is limited to a determination of whether the action taken was illegal, arbitrary or an abuse of discretion

Precedent

- A 1926 Court decision set a standard that the ZBA is not bound by prior variance decisions, but if the Board doesn't follow an earlier variance decision, it must set forth reasons for reaching a different result so as to avoid being considered "arbitrary and capricious"
- There are rarely the same facts as each piece of property and the particular variance request is unique

SEQRA

- The New York State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law is both a law and process that requires the consideration of environmental factors early in the planning stages of actions that are directly undertaken, funded or approved by local and state agencies of government
- Not all actions are treated the same; NYS SEQRA law includes several “Types” of Actions: Type 1 Actions are larger, more impactful projects which are likely to involve extensive environmental review; Type II Actions have been determined to require no substantial environmental review; and Unlisted Actions which are neither Type 1 or II
- Most ZBA applications are for Type II Actions and involve little environmental review; however, applications and findings must clearly state the Type of application and the relevant environmental review process

Best Practices for a Successful Meetings and Decisions

- Be Prepared
- Listen to public comment attentively and encourage the public to bring “new” information to the Board, not to repeat each other
- Encourage the public to address the Board, not the applicant or their representatives
- Remember, a ZBA member is a public official and all emails, texts and other written comments regarding a particular application are subject to the Freedom of Information act. As such, it is best to discuss the applications only at a public meeting

Special Use Permits: What's So Special About Special Use Permits?

- Special Use Permits authorize land uses which are beneficial to the community while regulating potential impacts.
- These are uses which, although permitted, are subject to special review and conditions.
 - “[A]n authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.” Gen. City Law § 27-b(1); Town Law § 274-b(1); Village Law § 7-725(b)(1) (emphasis added).
- A Special Use Permit is not a Variance.
- Courts have held that inclusion of a use as requiring a special use permit is tantamount to stating that the use is in harmony with the surrounding neighborhood as opposed to a variance which seeks an exception to the zoning code.
- Special Use Permits give permission to use the property in a way that is consistent with the zoning ordinance while tailoring the use to limit potential impacts.

Special Use Permits: Uses and Conditions

- Special Use Permits allow municipalities flexibility to regulate uses that are beneficial to a community but have qualities that may impact the immediate neighborhood.
- Typical Uses subject to Special Use Permits: private schools, assisted living facilities, museums, recreational uses, gas stations, wireless facilities and utility installations.
- Special Use Permit conditions typically address neighborhood impacts including: traffic, noise, aesthetics, screening, access, setbacks and parking.

Special Use Permit Review Process

- Special Use Permit uses are outlined in Zoning Code as are the conditions and standards which must be met for approval.
- A municipality's legislative body determines the reviewing authority which can be the Zoning Board, the Planning Board or, in some cases, the legislative body itself.
- The review process should be included in the Zoning Code and must involve notice and a public hearing.

Variance & Waivers

- Variances: If a proposed Special Use has features which do not comply with the area requirements of the zoning ordinance, the applicant may apply to the zoning board without first having to go to the building inspector or zoning official. NYS Town Law 274-b(3); see also, General City Law 27-b(3); Village Law 7-725-b(3).
- Waivers: The local legislative body may empower the Special Use Permit approval body to, where reasonable, waive any requirements for the approval. NYS Town Law 274-b(5); General City Law 27-b(5); Village Law 7-725-b(5).

Final Determinations

- As with any land use board decision, the final determination to approve, approve with conditions or deny a Special Use Permit must be based on substantial evidence in the record.
- The approving board may attach reasonable conditions to its approval.
- To obtain a Special Use Permit, the burden of proof is on the applicant to show compliance with the required conditions and standards.
- A Special Use Permit cannot be denied based solely on generalized community opposition. A denial must also show that the proposed use would have negative impacts that exceed the impacts associated with the uses permitted “as-of-right” in the zoning district.

Biographies

Leslie J. Snyder, Esq. is a founding partner of the law firm Snyder & Snyder, LLP located in Tarrytown, New York. Leslie heads the firm's real estate transaction practice. Snyder & Snyder, LLP is a women owned business and has been listed in the New York Law Journal as one of the largest women owned law firms in New York State. She has appeared before numerous municipal agencies throughout the New York metropolitan area and garnered approvals for various projects ranging from wireless communications facilities, retail centers, private schools, religious centers, medical facilities, computer service centers, and transfer stations. She is a frequent lecturer on real estate, environmental and telecommunications matters. She is a graduate of the University of Pennsylvania's Wharton School, and New York University School of Law. Leslie has served as outside counsel to the Town of Harrison in connection with environmental, real estate and land use matters, and currently serves as a director of the Westchester County Municipal Planning Federation.

Elizabeth Marranin, AICP is a former planner for the Village of Scarsdale and is a director of the Westchester Municipal Planning Federation. She served as Scarsdale's Village Planner for over 20 years, acting as staff to the Planning and Zoning Boards and advising the Village Board on a wide range of land use issues. Prior to her time with Scarsdale, Liz was the Community Development Director for the Town of Greenburgh where she administered the Community Development Block Grant (CDBG) program. She also worked for the City of Mount Vernon Planning Department as Development Director, advising the Planning Board and preparing planning studies, and for the City of New York as the first Director of the very successful Business Improvement District program. Liz graduated with a BA from Wellesley College, and was a special student at Massachusetts Institute of Technology and Pratt Institute.