

SEMINAR FOR ZONING BOARDS: AREA & USE VARIANCES AND SPECIAL PERMITS

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2023 CASE LAW UPDATE FOR ZONING BOARDS

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AREA VARIANCES

AREA VARIANCES—*“the authorization by the zoning board of appeals for use of land in a manner, which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.”*

A ZBA’s determination to grant or deny an area variance will be upheld if it is rational and not arbitrary and capricious. A determination is rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition.

In determining whether to grant an area variance, the ZBA must engage in a balancing test, which is to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. The ZBA is also required to consider the following five (5) statutory factors:

- 1) 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;
- 2) whether the benefit sought by the applicant can be achieved by some method, feasible to the applicant to pursue, other than an area variance;
- 3) whether the requested area variance is substantial;
- 4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- 5) whether the alleged difficulty was self-created. With respect to this factor, New York Law provides that its consideration is relevant to the decision of the ZBA, but is not determinative.

See New York Town Law Section 267-b(3)(b) (see also Village Law Section 7-712-b(3); General City Law Section 81-b(4)). New York courts have ruled that the standards set forth in the five factors are exclusive so that no other factors other than those recited in the five factors can be considered.

AREA VARIANCES - CASES

- Matter of Foster v. DeChance, et al., 210 A.D.3d 1085 (2nd Dep't 2022)
- Matter of White Birch Circle Realty Corp. v. DeChance, et al., 212 A.D.3d 729 (2nd Dep't 2023)
- Matter of Pomponio v. DeChance, et al., 216 A.D.3d 1165 (2nd Dep't 2023)
- Matter of Nunnally v. Zoning Board of Appeals of the Town of New Windsor, et al., 217 A.D.3d 950 (2nd Dep't 2023)
- Schainuck v. Zoning Bd. Of Appeals of E. Hampton, 2023 NYLJ LEXIS 392 (Supreme Court, Suffolk County 2022)

USE VARIANCES

USE VARIANCES – *“the authorization by the zoning board of appeals for the use of land for a purpose, which is otherwise not allowed or is prohibited by the applicable zoning regulations.”*

In connection with a use variance, the applicant must demonstrate “unnecessary hardship” for each and every permitted use under the zoning regulations for the particular district where the property is located. To meet this standard, the applicant must demonstrate the following:

- 1) the applicant cannot realize a reasonable rate of return for every permitted use, provided that lack of return is substantial as demonstrated by competent financial evidence;
- 2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- 3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- 4) that the alleged hardship has not been self-created.

See New York Town Law §267-b(2)(b); Village Law §7-712-b(2)(b); General City Law §81-b(3)(b).

USE VARIANCES - CASES

- Matter of Source Renewables, LLC v. Town of Cortlandville Zoning Board of Appeals, et al., 213 A.D.3d 1178 (3rd Dep't 2023)
- Citizens United to Protect Our Neighborhood – Hillcrest v. Town of Ramapo, et al., 2023 NY Slip Op 31194(U) (Supreme Court, Rockland County 2023)

SEQRA

- Zoning Boards must comply with the New York State Environmental Quality Review Act (SEQRA).
- See 6 NYCRR.5 for Type II actions.
- Type II actions have been determined to categorically not have a significant adverse impact on the environment, and therefore do not require any further environmental review, including the preparation of an environmental assessment form (“EAF”).
- Pursuant to 6 NYCRR (c)(12), the construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density are Type II actions.
- Pursuant to 6 NYCRR Part 617.5(c)(16) and (17), the “granting of individual setback and lot line variances and lot line adjustments” and “granting of an area variance(s) for single family, two-family and three-family residence” are Type II actions.

DIFFERENT STANDARDS FOR PUBLIC UTILITIES: THE PUBLIC NECESSITY STANDARD

- It is important to note that where a zoning board is considering a variance application by a public utility, such as an electric company or wireless telephone company, there is a relaxed standard and the “unnecessary hardship” standard does not apply. See *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598 (1979); *Cellular Telephone Company d/b/a Cellular One v. Rosenberg*, 82 N.Y.2d 364 (1993).
- In Hoffman and Rosenberg, the New York Court of Appeals held that since utilities such as Con Edison and Cellular One are required by law to provide such service, an applicant must be granted a variance if the proposed use is necessary for the applicant to render safe and adequate service. The Court further found that customer needs are to be considered and, “where the intrusion or burden on the community is minimal, the showing required by the utility shall be correspondingly reduced.” Finally, the Court made clear that a zoning board may not exclude a utility from a community where the utility has shown a need for its facility.

SPECIAL USE PERMITS

SPECIAL USE PERMITS IN A NUTSHELL

BY: Elizabeth Marrinan, AICP

SPECIAL USE PERMITS IN A NUTSHELL

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 Special Use Permit is Not a Variance.
- A Special Use Permit is defined as: “[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).
- 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: REVIEW PROCESS

- Special Use Permit uses are outlined in Zoning Code as are the conditions and standards which must be met for approval. Typical Uses subject to Special Use Permits: private schools, assisted living facilities, museums, recreational uses, gas stations, wireless facilities and utility installations.
- 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.

CASE REVIEW

- *Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297 (Court of Appeals, 2004)
- *Matter of Pepe Porsche of Larchmont v. Planning Bd. Of the Town of Mamaroneck*, 216 A.D.3d 1163 (2nd Dep't 2023)