

ZONING BOARD BASICS

Westchester Municipal Planning Federation

Land Use Training Institute

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Presented by Leslie Snyder, Esq.

Snyder & Snyder, LLP

94 White Plains Road, Tarrytown, New York

www.snyderlaw.net

(914) 333-0700



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

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 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

- 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.

Schweig v. City of New Rochelle, 170 A.D.3d 863 (2nd Dep't 2019)

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.

Dean, et al. v. Town of Poland Zoning Board of Appeals, et al., 185 A.D.3d 1485 (4th Dep’t 2020)

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.

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.
- Strict Construction: 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.
- Harmonize Provision: A zoning law must be construed as a whole, reading all of its parts together, which should be harmonized to ascertain legislative intent. The zoning law should be read to avoid a construction that render any of its provisions or words superfluous.
- Ordinary Meaning: In absence of definitions in code, the ZBA can look to ordinary meaning and dictionary definitions.

Albany Basketball & Sports Corp. v. City of Albany, 116 A.D.3d 1135 (3rd Dep't, 2014)

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.
- 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.

Lucas v. Board of Appeals of Vil. of Mamaroneck, 57 A.D.3d 784 (2nd Dep't, 2008)

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; NY 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, which are actions determined not to have a significant impact on the environment; however applications and findings must clearly state the Type of application and the relevant environmental review process.

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 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.

Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston, 30 N.Y.2d 238, 331 N.Y.S.2d 645 (1972)

Best Practices for a Successful Meeting 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.

Resources for ZBA 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 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



MANHATTAN
445 Park Ave
New York, NY

NEW JERSEY
1 Gateway Center
Newark, NJ

WESTCHESTER
94 White Plains Rd
Tarrytown, NY

THANK YOU!

For more information, please contact:

Leslie J. Snyder, Esq.

(914) 333-0700

lsnyder@snyderlaw.net