

## **GENERAL INFORMATION ON THE ZONING BOARD OF APPEALS**

### **THE JOB OF THE ZONING BOARD OF APPEALS**

Authority to vary the provisions of the zoning law is granted to zoning boards of appeals by Town Law, Village Law, and General City Law. These laws require that a municipality with zoning must have a zoning board of appeals. The board acts as a "safety valve" to keep the zoning restrictions from being overly rigid.

The zoning board of appeals exists primarily for its appellate functions, in which it acts as a buffer for aggrieved applicants between decisions of the zoning enforcement officer and the State Supreme Court.

ZBAs are granted two appellate functions: the review of applications for use and area variances, and the power to render interpretations of the zoning regulations.

The zoning board of appeals can also be given "original" jurisdiction by the local governing board. Examples of original jurisdiction are the review of special use permits, site plans, and historic preservation certificates.

### **POTENTIAL APPLICANTS**

There are three types of people who have legal standing to bring an appeal to the zoning board of appeals.

The first is an applicant for a land use approval or permit, or a person cited with a zoning violation. He or she may file an appeal of an enforcement officer's determination within 60 days after the ZEO files the decision in his or her office.

The second type of person who has standing to appeal is a neighbor or other third party who stands to be harmed by the decision of the zoning enforcement officer. This category of appellants has 60 days from the date they obtain or should have obtained knowledge of the ZEO's decision to file their appeal.

The third category is a group of people specifically mentioned in the statutes. They include any officer, department, board or bureau of the municipality. For example, a planning board member, even one who doesn't live anywhere near the subject property, would fall into this category.

### **INTERPRETATIONS OF LAND USE LAWS**

An applicant may apply to the zoning board of appeals for an interpretation when he or she believes the ZEO has wrongly interpreted the local zoning regulations. Applicants for interpretations most often believe their proposals are permitted by zoning, although the zoning enforcement officer has ruled otherwise. Neighboring property owners may also appeal for interpretations when they disagree with the ZEO's determination that a proposal does comply with zoning and qualifies for a zoning permit.

Often interpretations are sought about what the correct method is of measuring required distances.

## REQUEST FOR A VARIANCE

The other type of appellate jurisdiction is the granting of variances. A variance can be granted *only* by the zoning board of appeals in response to successful arguments by an applicant that the zoning regulations should not be strictly applied to a particular property. Variances are granted to the property not the property owner, thus they are said to “run with the land.”

**There are two types of variances.** We'll begin with area variances, which are requested by applicants wishing to use their property in a manner that does not comply with the *dimensional* or *physical requirements* of the zoning regulations.

Zoning restrictions from which area variances are often requested include:

- setback requirements
- height restrictions
- lot coverage maximums
- frontage requirements

## AREA VARIANCE CONSIDERATIONS

The statutes contain five items which ***must be considered*** by the ZBA when deciding whether to grant an area variance. These five considerations are used to balance the benefit to the applicant of receiving the variance against the burden to the health, safety, and welfare of the community if the variance is granted.

Area variance standards are applied to the physical characteristics of the property, not the use. Applicants do not have to “pass” the five factors of the area variance balancing test, but each factor should be carefully considered by the zoning board of appeals.

The five factors include:

- 1) effect on neighborhood character
- 2) whether there is an alternative solution that wouldn't require a variance
- 3) how substantial the request is
- 4) what the effect granting the variance may have on the environment.
- 5) whether the difficulty necessitating the area variance is self-created

## USE VARIANCES

A use variance provides relief from the use restrictions on a parcel of land.

Applicants who request *use variances* would like to utilize their property for a use not on the list of permitted uses in the zoning regulations for that zoning district. There is no argument as to whether the regulations were properly applied.

Since the governing board has already established a vision for the zoning district through their comprehensive plan and zoning regulations, the test is strict and few use variances should be granted. However, property owners who can meet the test and demonstrate that the zoning provisions are too harsh as applied to their entire parcel of land – not just a part of it – can receive limited relief while protecting the zoning plan.

## USE VARIANCE STANDARDS

In order for the zoning board of appeals to grant a use variance, the applicant ***must meet all four criteria***. Each standard will be explained.

- 1) The applicant must prove that the property is unable to achieve a *reasonable return* for any use allowed in that zoning district.

The argument that the property cannot yield a reasonable return for any allowed use must be supported by competent financial evidence. Only by actual "dollars and cents" proof can a lack of reasonable return be shown.

There is no hard number or formula for determining reasonable return. Each application should be treated separately, based on the factual situation of the parcel. The zoning board of appeals does not need to agree with the applicant on what is or is not a reasonable rate of return.

Please note, the opportunity for the owner to make more money from a property's sale or rental if the zoning is changed or a use variance is granted is NOT the same as being unable to make a reasonable return on the property in its current zoning status.

- 2) The applicant must prove that *unique circumstances* apply to the property for which the variance is requested.

The plight of the subject parcel, through the operation of the zoning restrictions, must be due to unique circumstances and not general neighborhood conditions. To be unique, the problem with the zoning must not be shared by a substantial portion of other properties in the zoning district. A shared problem might indicate a larger concern about the appropriateness of the uses listed in that zoning district.

For example, the owners of a single-family home in a densely developed area, zoned for one- and two-family homes on a busy road in a tight real estate market, might have trouble selling their house and hope their chances might be better if they were to obtain a use variance to add commercial space to the house.

- 3) The applicant must prove that the hardship is *not self-created*.

An applicant for a use variance must prove the hardship the property suffers was not created by the owner. A common hardship that is claimed is that the applicant did not know that what they want to do with the property is not allowed by zoning. However, this is a case where the old saying, "Ignorance of the Law Is No Excuse" applies. Property owners are bound by zoning restrictions, even if they are unaware of those zoning restrictions.

An applicant who buys a property is presumed to know whether his or her intended use of it is not allowed by the zoning regulations. If it is not allowed, the applicant is essentially creating his or her own hardship when the property is acquired. The ZBA must deny that applicant's requested relief. The potential purchaser of the property, acting as a "contract vendee" would be wise to apply for a variance before the property changes hands. The information on which the ZBA would base its decision would be that of the existing owner, not of the potential purchaser.

Sometimes hardship is created by an action of the property owner after they purchase the property. For example: A couple purchases residential property with a large room above the detached garage, spends large sums of money converting the room into a

dance studio, and then finds out they cannot operate legally when the zoning enforcement officer finds out about the studio and issues them a citation. If they apply for a use variance, they cannot use the costs of renovation in their hardship argument because the costs would be considered "self created."

- 4) The applicant must prove that the *essential character of the neighborhood* will not be altered if the use variance is granted.

If statutory standards are properly applied, "passing" the first three parts of the use variance test is quite difficult. But applicants who pass those first three parts of the test must also demonstrate that the use for which the variance is requested, if granted, will fit into its surroundings and not have a detrimental effect on the neighborhood around it.

#### **GRANT MINIMUM VARIANCE NECESSARY**

New York State statutes direct local zoning boards of appeals to grant the *minimum* variance they "shall deem necessary and adequate, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community." In other words, the zoning board of appeals does not necessarily have to grant or reject a variance application exactly as submitted. The ZBA need not grant a permit for a superstore when a variance for a neighborhood store would relieve the hardship.

#### **PUBLIC HEARING**

A public hearing is required before the zoning board of appeals may grant a variance or rule on an appeal or decide any other matter.

Public hearings, which must be held within a *reasonable time* after receipt of the appeal, give the public the opportunity to be heard. Every matter that comes before a zoning board of appeals requires a public hearing.

#### **CONDITIONS OF APPROVAL**

The statutes empower the board of appeals, when granting a use or area variance, to impose reasonable conditions and restrictions directly related to and incidental to the proposed use of the property. Conditions are meant to mitigate the impacts of the approved project on both the neighborhood and on the integrity of the zoning law.

Sometimes attaching a condition to the approval, such as the specification of materials or design changes to a higher fence or larger sign, will eliminate or reduce the undesirable changes to the neighborhood from granting the area variance.

#### **STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)**

Agencies with land use review authority, including zoning boards of appeals, must consider the New York State Environmental Quality Review Act when reviewing some appeals and applications.

The State Environmental Quality Review (SEQR) process encourages review agencies to consider the environmental implications of proposed projects before making decisions. Applicants should be aware that SEQRA reviews can take time and need to allow time for this process to take place.

Interpretations and all area variances involving one-, two-, and three-family residences are "Type II" actions under SEQR. Also, area variance applications seeking relief from the setback and lot-line requirements of the zoning regulations are Type II actions. Type II actions are presumed as having no adverse environmental impact and therefore not subject to review. Zoning boards of appeals should note in the record that they are Type II actions for SEQR purposes.

If a variance request is not on the Type II list, the SEQR process must continue. The lead agency must either issue:

- a negative declaration, which finds that the project will not result in a significant adverse environmental impact; or
- a positive declaration, which finds it may have one or more significant adverse affects on the environment. If an agency issues a positive declaration, an environmental impact statement must be prepared prior to the zoning board's ruling on the application.

### **TAKING ACTION ON APPLICATIONS**

A resolution for any action by a zoning board of appeals can only pass if it is approved by a majority of the entire board within 62 days following the close of the public hearing.

### **CHALLENGING A DECISION OF THE ZBA**

If a party with standing is unhappy with the decision of the zoning board of appeals they have two options. They may appeal the matter to the State Supreme Court in what's referred to as an Article 78, or they may request a rehearing before the ZBA.

A zoning board of appeals may, at any time, vote to reconsider a matter on which it already has rendered a determination, even in the absence of new facts or circumstances. This allows an applicant the opportunity to convince the ZBA that its original decision was erroneous.

- The matter must **not** have already been **reheard**.
- A motion must be made to rehear the matter and that motion must pass by a unanimous vote of all members present.
- The hearing must be noticed in accordance with state and local law, as was the original one.
- Following the new hearing, a unanimous vote of all present is required in order to change the original determination.

It's possible an applicant could have been granted a variance, and on review and rehearing the board can reverse the original determination and rescind the variance. The zoning board of appeals may not do so, however, in cases in which the applicant acted in good faith on the original decision and either completed the project or invested sufficient resources to gain vested rights to complete it.

This material has been prepared as a general education material and is comprised of excerpts from a variety of sources including:

New York Conference of Mayors  
NYS - James Coons Publications