

Zoning Board of Appeals Overview

Presented by:

New York State Department of State
Division of Local Government

Statutory Authority



Copies of the state statutes may be found
online at:
<http://public.leginfo.state.ny.us/menugtf.cgi?COMMO>
NQUERY=LAWS

	Town Law	Village Law	General City Law
MEMBERSHIP	§ 267	§ 7-712	§ 81
PROCEDURE	§ 267-a	§ 7-712-a	§ 81-a
VARIANCE STANDARDS	§ 267-b	§ 7-712-b	§ 81-b

Zoning Board of Appeals Members are Public Officers

■ Term of Office

- 3 or 5 years
- Must file "Oath of Office"

■ Qualifications for Membership

- Age, Citizenship, Residency

■ Removal Reasons

- Attendance
- Cause

■ Training (next slide)

"I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [Zoning Board of Appeals Member], according to the best of my ability."
Section 1, Article XIII - NY Constitution

State Training Requirements

- Complete at least four hours of training each year
- Training in excess of four hours in any one year may be carried over by the member into succeeding years
- Training is approved by the governing board
- Training can come from a variety of sources and in a variety of formats.
- To be eligible for reappointment to such board, such member shall have completed the training
 - Requirements may be waived or modified by resolution of the governing board if judged to be in the best interest of the municipality to do so.

Failure to comply does not void decisions

All ZBAs Have Appellate Jurisdiction

- Interpret the Zoning Regulations
- Issue or Deny Appeals for Variances



Other Duties which may be granted to the ZBA by the Governing Board are "Original" – they do not come to the ZBA upon an appeal

Example: Site Plan Review, Special Use Permits

What must happen before an Appeal can be made?

Zoning Enforcement Officer (ZEO) must take an action

- Grant a permit
- Deny a permit
- Make a decision on how to apply the zoning regulations
- Issue a citation for a violation or take another enforcement action

Exception:

Direct Appeal for an Area Variance in conjunction with an application for :

- Site Plan Review
- Subdivision Review
- Special Use Permit

Who has standing to bring an Appeal?



A person who has been denied a permit or has been cited for a violation

The claim is that the action of the ZEO was incorrect or that special circumstances exist



A third party who stands to be harmed by the ZEO decision



Any "officer, department, board or bureau" of the municipality

How Soon Must an Appeal be Filed?



In General, within 60 days after the ZEO files a copy of his or her action



Exception: Third Parties (ie. Neighbors) must file an appeal within 60 days from the date they should have known or could have knowledge of the ZEO's action

An appeal can be filed by letter or the Municipality can develop a form. A copy must go to the ZEO and the ZBA



How does an Appeal affect enforcement proceedings that are underway?

An appeal "stays" enforcement proceedings



For example:

- Mr. Anderson is building a garage and is cited by the ZEO because it is too close to the property line and he is issued a "stop work" order.
- Mr. Anderson files an appeal of the ZEO's action to the ZBA.
- The municipality may take no further enforcement action and may not pursue enforcement actions until the ZBA issues a decision.

Review Criteria:

Interpretations
Use Variances
Area Variances

What is an Appeal for an Interpretation?

The appealing party believes that the Enforcement Officer wrongly applied the law



Common areas of interpretation:

- Definitions
- Method of taking measurements



Interpretations may only be made upon an appeal of an Enforcement Officers decision

On what does the ZBA base its interpretation?

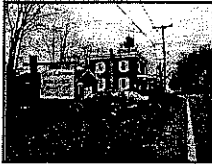
- Past decisions on the same provision of the regulations or on similar facts
- Minutes, hearing comments & other records which reveal what the governing board intended when they adopted the zoning provision
- Ordinary meaning of terms if a term is not defined



With no other guidance, board consensus on what they think the definition or regulation means

When is a use variance requested?

A use variance is required in order for an applicant to use land for a purpose not allowed in the zoning regulations. The alternative would be to rezone the property.



In this case the applicant believes there are special circumstances justifying a variation to the regulations as applied to him or her.

There is no question that the regulations were properly applied.

On what must the board make a use variance decision?

- The applicant is responsible for proving the need for a use variance.
- The standards for granting a use variance are contained in Village, Town & General City Laws.
 - 1) No reasonable return
 - 2) Unique circumstances
 - 3) No self-created hardship
 - 4) Not alter the essential character of the neighborhood
- The applicant must prove each of the four standards

Use Variance Test: Must be applied to every use allowed on the parcel

Example:

R-1 Zoning District

ALLOWED USES:

Single Family Home

Two Family Home

SPECIAL PERMIT USES:

Professional Office



1) Reasonable return

The applicant must show that he or she cannot obtain a reasonable return on the property under the present zoning for:

- any permitted use, except public uses such as parks
- any use currently allowed by previous grant of a use variance
- a current lawful nonconforming use

ZBA must consider property as a whole, not just the portion which is the subject of the application

“...the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence ...”

What is a reasonable rate of return?

- There is no hard and fast number. It depends on the particular facts of the application.
- The zoning board of appeals can determine what is a reasonable rate of return. It need not agree with the applicant or his/her expert as to what is a reasonable rate of return.
Petruzzelli v. Zoning Bd of Appeals of the Village of Dobbs Ferry, 181 A.D.2d 825 (2d Dept. 1992)



Soho Alliance v. NYC Bd of Standards and Appeals, 264 A.D.2d 59 (1st Dept. 2000), aff'd. 95 N.Y.2d 437 (2000)

2) Unique Circumstances



Example: encroaching commercial development

The parcel is the only parcel in the neighborhood, or one of very few parcels, affected by the zoning ordinance to the extent that it would create a hardship for the applicant

It is not the uniqueness of the plight of the owner, but the uniqueness of the land causing the plight

OTHER CIRCUMSTANCES:

- Physical features ?
- Historic or Architectural Features
- Adjacent uses ?

3) Self-Created Hardship

The hardship is created by the applicant. Example:

- Request is for a variance from restrictions which existed at the time of purchase;
- A property owner is bound by zoning restrictions, even if he or she does not have actual knowledge of them;
- Spending large sums of money on a project not allowed for in the zoning law.



It is not a self-created hardship for a "contract vendee" to apply for a variance as an agent of the owner

4) Character of the Neighborhood

- Applicant must demonstrate that the proposed use is consistent with the pattern of development in the area and will not have a significant detrimental impact on the neighborhood or community



This is the time where the ZBA should be hearing about the proposed project/use

- Incompatibility of uses?
- Safety hazards ?
- Effect on traffic ?
- Disturbance from noise or lighting ?
- Potential parking problems ?

When is an area variance requested?

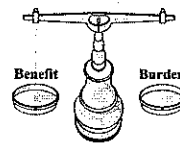
An area variance is required in order for an applicant to use land in a way that does not comply with the dimensional requirements of the zoning regulations



In this case the applicant would need a side yard area variance to put in the drive-through in order to accommodate the driveway and fence.

Area Variance Test

Balance the benefit to the applicant if the Area Variance is granted versus the burden to the Health, Safety and General Welfare of the community and its residents.



Consider:

- Possible change to neighborhood character
- Alternatives not requiring a variance
- Substantiality of the request
- Effect on physical or environmental conditions if granted
- Is the situation self-created?

One: Will the granting of the variance result in an undesirable change to the character of the neighborhood or will it be detrimental to nearby properties?



Practice Point:

Would the undesirable change be eliminated if a condition were placed on the area variance request?



2) Are there alternative solutions that would not require a variance?



Consider placing the addition at the rear instead of the side



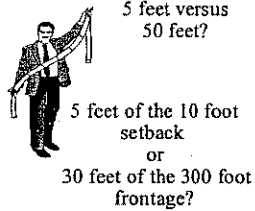
An applicant should present his/her reasons for choosing one alternative over another

- Better View
- Better internal pattern
- Cheaper construction
- Better overall aesthetics

Three: Consider whether the requested area variance is substantial

• Amount of variance requested?

• Magnitude of variance requested?



4) Consider whether the area variance will have an adverse effect on physical or environmental conditions in the neighborhood or district

- Block a view?
- Cause a drainage problem?
- Impact a wetland?
- Cause a parking shortage?

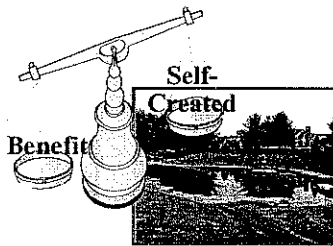


Could the impact be mitigated by a condition being placed on the approval, such as construction of a berm?

Five: Is there self-created difficulty?

Examples:

- Not enough land to build an accessory structure in compliance with zoning
- Structure built in violation of setback
- Septic system constrains further construction



Because it is self-created, the granting of the variance is not precluded

Conditions

- Board must clearly specify the conditions being imposed
- Conditions must be reasonably related to the impact of the proposal being considered (nexus)



"Such conditions might properly relate 'to fences, safety devices, landscaping, screening and access roads relating to period of use, screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area.'" *St. Onge v. Donovan*, 71 NY2d 507, 516)

Grant Minimum Variance Necessary

"... in the granting of use variances, shall grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community



ZBA doesn't have to grant or reject a variance as submitted.

ZBA Procedures

Adoption of Board Procedures

In order to be binding, board procedures must be adopted by the governing board by local law or ordinance. They may cover a variety of issues. For example:

- Duties of officers, committees
- Calling meetings, agendas, public input
- Referrals
- Minutes
- Signature on official documents

Examples available from DOS

What about the State Environmental Quality Review Act?

•The Board must determine if there would be an environmental impact if the variance were granted

•If there is a potential significant adverse environmental impact, it must then be evaluated prior to a decision being made



No SEQRA Review For:

- Interpretations
- Setback or Lot Line Variances
- Area Variances for One-, Two- or Three-Family Residences

The ZBA may NOT meet behind closed doors to discuss the merits of an application

Zoning Boards of Appeal must discuss applications and other board business at meetings open to the public

Provide notice to the media and public

A "work session" or "site visit" is a meeting subject to the OML if a quorum of the members have planned to gather to discuss public business

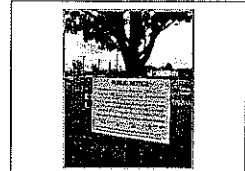
Executive Sessions may only be held for reasons defined in the Open Meetings Law



Every matter before a ZBA requires a Public Hearing

Send notice of the hearing to:

- Parties to the appeal
- Regional or State park commission (if applicable)
- Anyone required to receive a mailed notice by local law or ordinance
- Depending on the location of the property:
 - County Planning Agency
 - Adjacent Municipalities



State Law does not require that neighboring property owners be notified by mail when a public hearing is scheduled. (Except certain public agencies.)

What should my hearing notice say if I'm not sure if I need a variance?

It is possible for an applicant to make a request for an interpretation, and, in the same application, ask for a variance if a favorable interpretation is not granted.

LEGAL NOTICE (Excerpt)
NOTICE IS HEREBY GIVEN

The Applicant requests an interpretation whether the Applicant's proposed single family dwelling complies with the sixty(60) foot setback from Pearl River Road. The Applicant also requests a variance from the sixty(60) foot setback from Pearl River Road In the event the Zoning Board of Appeals determines that the proposed dwelling's location does not comply with the sixty foot setback.

Some Applications Require Notice to the Clerk of an Adjacent Municipality

Send notice by mail or electronic transmission to the clerk of the adjacent municipality at least ten days prior to any hearing on a proposed:

- Special Use Permit
- Use Variance

General Municipal Law
§239-nn
(Effective 7/1/06)

If application property is within 500 feet of an adjacent municipality

Referral to the County or Regional Planning Agency

The ZBA must refer applications for use and area variances to county planning agency if they apply to real property within 500 feet of the following:

- Municipal boundaries
- State or county parks or highways
- State or county streams or institutions
- Land on which a state or county building is located
- Farm operations in State Agricultural districts (does not apply to area variances)



General Municipal Law §239-m

Waiting to Act



The time period may be longer if agreed to by the county and the ZBA

The ZBA cannot take final action until the earlier of the following occurs:

- The ZBA receives the report of the county planning agency, OR
- Thirty days have passed after the county's receipt of the full statement

Taking Action

- A motion/resolution of the ZBA will only pass if it gets the support of a majority of the whole membership of the board
- When the motion fails:
 - If the motion was to approve a variance request or in favor of the applicant's interpretation of zoning, the request is denied.**
 - If the motion was on a matter of original jurisdiction, such as site plan review, the motion fails and no action has been taken.

** Additional votes may be taken within the statutory time frame without triggering the rehearing process.

Actions Requiring Agreement of More than a Majority of the Board

Applications subject to County Referral

If the county planning agency recommends disapproval or modification within the time allowed, a majority plus one vote is required for the municipality to approve the application without the recommended modifications.

Reconsideration of a Matter Previously Decided

- A motion to rehear a matter must pass by a unanimous vote of all present
- After the matter is reheard, in order to change the original decision a unanimous vote of all present is required.

Decision, Filing, Findings

A Decision Must be Made within 62 Days after the Close of the Hearing

- Clearly word motions
- Record each member's vote
- File with municipal clerk within 5 days

CLERK'S OFFICE



The ZBA must file with the municipal clerk all orders, requirements, decisions and determinations within 5 Days.

Support decisions with findings

Findings should be approved by the board, not simply drafted by the attorney and put in the file.

Continuing Education Credits

Attorneys:

- This course has been approved for 2 transitional credits of Continuing Legal Education (CLE) credits towards Professional Practice requirements. See the Attorney Instructor for the paperwork

Code Enforcement Officers:

- This course has been approved for 1 hour Area E and 1 hour Area G (2 hours total). You must sign in for each class and turn in a pink card in order to receive credit.
 - Course Number - 49-5003
 - In-Service Number - 680000-0507-1010

Contacting the Department of State

- (518)473-3355 Local Gov.
- (518)474-6740 Legal
- (800)367-8488 Toll Free
- localgov@dos.state.ny.us

www.dos.state.ny.us



