

Variations and Limitations

Genesee/Finger Lakes Regional Planning Council

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- A person whose use of land is restricted by a zoning regulation can seek relief in a number of ways.
 - **Judicial Relief**
 - Challenge constitutionality of regulation
 - Challenge its validity because it was not properly enacted
 - Challenge its validity because statute or charter does not authorize its enactment
 - **Legislative Relief**
 - Urge the legislative authority of the municipality to amend the zoning regulations.
 - ***Administrative Relief**
 - **Apply to the zoning board of appeals (ZBA) for a variance**

Variance Defined

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Variations

...an overview

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- We can define a variance as: the granting of permission by an administrative body (the ZBA) to use one's land in a manner which is not in accordance with or which is prohibited by the applicable zoning regulations. In short, a variance provides for an exception from the zoning law.

Variance Defined

Use Variance

- Use Variances allow property to be used for a type of land use which is prohibited on the particular parcel by the zoning.
- Example: If a zoning district permits the use of land for residential purposes only, a property owner who wished to use property in that district for a hardware store could not do so without first being granted a use variance

Area Variance

- Area Variance, on the other hand, does not seek to use the property for a use not allowed by the zoning regulations. Instead, it seeks relief from some dimensional requirement.
- Example: A typical area variance application might seek permission to build a house (a use allowed by the applicable zoning) several feet closer to the street than allowed by the setback requirement in that district.

Variances, an overview...

- A Variance is an exception from a zoning regulation. As such, variances have the potential to cause major havoc with municipal zoning patterns and thus with the community's ability to achieve its objectives for its growth and development. Nevertheless, they are an integral part of the institution of zoning.
- Variances exist to protect individual property from zoning provisions that are unbearably harsh. Properly administered, they are "safety valves" providing limited relief while still protecting the purposes of zoning.
- Such a potent device as the variance has very specific rules governing its issuance.

Variances, an overview...

- A variance application must be considered and a hearing held by the ZBA, since it is a quasi-judicial rather than a legislative action. If the test, or criteria are properly applied, the variance should be granted, whether or not it furthers the municipality's zoning objectives.
- Note: A variance does not change the zoning.
 - So for example, if a variance is granted to allow a hardware store in a residential zone than that is the precise use permitted. It does not allow for the construction of other commercial uses other than that which was applied for.

Variations, an overview...

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- The standard of judicial review for a variance determination requires decisions to be supported by substantial evidence.
- Judicial review of the granting or denial of variances is by an Article 78 proceeding, which is a lawsuit used to challenge action (or inaction) by agencies and officers of state and local government.

Variations, an overview...

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- Variance "runs with the land"
 - A variance is issued to a particular parcel of land, not to an applicant. The variance allows the land to be used in accordance with its terms and conditions, regardless of who may own the property or whether the property is transferred.

Variations, an overview...

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Use Variances

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- As of 1992, the State statutes (for towns and villages, 1993 for cities) now contain a definition of the term "use variance" and incorporates the tests that must be satisfied before a ZBA may grant the variance.
 - The statutes contain the following definition:
 - " 'Use variance' shall mean 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. "
 - Town Law §267
 - Village Law §7-712
 - General City Law §81-b

Use Variances

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• A brief history...

- The law of variance really got its start in 1939. At that time, the statutes had merely provided that "if there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance," a ZBA could vary or modify the application of the ordinance, which the courts had named a "variance".
- No distinction had ever been made between use variances and area variances, and what the application of practical difficulties and unnecessary hardship was.

Use Variances

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- In 1939, in a truly landmark case, *Otto v. Steinhilber*, 282 N.Y. 71 (1939), which clarified the law of area variance to the present day, the Court first made a distinction between a use variance and an area variance and in addition held that the test of “**unnecessary hardship**” applied to use variances.
- In order to be entitled to a use variance, then, the applicant had to show that under existing zoning regulation, the property suffers unnecessary hardship. To show this, the *Otto* case set out elements that must be demonstrated in order for a variance to be granted.

Use Variances

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- The elements have changed little over the years, although court decisions have expanded upon and refined them. The current State statutes now contain, with some refinement, the tests that the Court laid down in 1939.

Use Variances

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- “No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused **unnecessary hardship**.”
- In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that **for each and every permitted use under the zoning regulations** for the particular district where the property is located,
 - (1) the applicant cannot realize a **reasonable return**, 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**.”

Statutory Test

Town Law
§267-b (2)(b)

Village Law
§7-712-b (2)(b)

General City Law
§81-b (3)(b)

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Reasonable Return

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- The *Otto* case held that the first test that had to be met for a use variance was a showing that "the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone."
- The term "no reasonable return" or "lack of reasonable return," means that the property owner cannot realize a reasonable return from **any use** permitted in the particular district. The property is not suited to any allowed purpose nor can it be sold, rented, leased, etc.
- This concept, well established in the cases beginning with *Otto*, has now been specifically included in the Town, Village, and General City Law.

Reasonable Return

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- No such use variance shall be granted by a Board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;

Reasonable Return

Town Law
§267-b (2)(b)(1)

Village Law
§7-712-b (2)(b)(1)

General City
Law §81-b (3)(b)(i)

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- It has been repeatedly held that lack of reasonable return can only be shown by "dollars and cents proof," or as the statutes now phrase it, "competent financial evidence."
- The Court of Appeals has held that an applicant failed to show that land will not yield a reasonable return where he or she has failed to prove:
 - the amount paid by the applicant for the entire parcel in issue
 - the present value of the parcel or any part thereof;
 - the expenses attributable to maintenance;
 - the amount of taxes on the land in issue;
 - the amount of mortgages and other encumbrances;
 - income from the land in issue; and
 - other facts relevant to the particular circumstances of the case [1]

Reasonable Return
 ...as demonstrated by competent financial evidence;

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- **Proof that land cannot be sold for any use permitted by the zoning regulations is evidence that the land will not yield a reasonable return if its use is confined to those permitted by existing zoning regulations.**
- For example, proof that property will not yield a reasonable return from a permitted use is adequate where the applicant showed that 41 potential buyers were not interested in the property when offered at a reasonable price. [2]
- Failure to sell land for a permitted purpose is evidence that it will not bring a reasonable return if used for such purpose only if the owner has made an active effort to sell. [3]

Reasonable Return
 ...each and every permitted use

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- The requirement that an applicant for a use variance show that s/he cannot derive a reasonable return from any permitted use can impose an especially heavy burden upon a nonconforming user.
- An applicant who maintains a nonconforming use or structure must show not only that all permitted uses will be unprofitable, but that the nonconforming use of the premises is incapable of yielding a reasonable return.

Reasonable Return
 ...reasonable return from nonconforming use

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- **If the property can be used for any use allowed by the zoning regulation and earn a reasonable return, the variance must be denied, even if the applicant shows that a better return or greater profit will be possible if the variance is granted.**
- Pecuniary loss to a single individual rarely has been held sufficient to support the granting of a variance. Showing that a property is worth substantially more when used for another purpose is insufficient to show financial hardship. [4]
- Although financial loss alone will not supply the essential element of unnecessary hardship, such loss may be considered by the zoning board of appeals along with other circumstances. The board may, for example, balance the financial loss of the applicant against the probable impact which the requested use will make on the neighborhood. [5]

Reasonable Return
...financial loss

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- A zoning board of appeals may not grant a variance solely on the ground that the variant use will yield a higher return than those permitted by the zoning regulations [6]

Reasonable Return
...variance to permit more profitable use

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- A landowner is not entitled to a variance on the basis of unnecessary hardship simply because adjacent land is being used for the purpose proposed by the landowner. The Court of Appeals has held that the owner of a lot which abutted a public garage was not entitled to a variance to construct a garage solely on the basis of the existing one. [7]

Reasonable Return
...effect of adjacent similar use

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- The existence of one or more variances, of the type sought by the applicant, does not entitle such applicant to the variance sought. The owner must prove unnecessary hardship, and the existing variant uses will be considered along with all of the circumstances of the case to determine whether such hardship exists. [8]
- Note: Where an earlier variance was granted on similar facts, the board, when denying such a use, must explain why it failed to follow its earlier decision. [9]

Reasonable Return
 ...effect of variance on neighboring land

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- **Physical characteristics of a lot may be so peculiar as to prevent the owner from obtaining a reasonable return from any use permitted in the zoning regulations. Where this is true, unnecessary hardship exists and the applicant is entitled to a variance to permit a use which will not adversely affect the neighborhood.** [10]
- **Some Examples:**
 - The granting of a parking variance was proper where due to the shape of the lot the existing ordinances would have prohibited parking on all of the open space on the lot. [11]
 - The burden of proving lack of reasonable return is sustained by proof that single family dwellings can be constructed only upon pilings which would price them out of the market. [12]
 - Denial of a variance is improper where substantial geological problems prevent development consistent with the zoning regulations. [13]
 - A variance to permit construction of enclosed tennis courts will be sustained where the evidence shows that, due to the swampy subsoil, construction of dwellings would have cost three times their market value. [14]

Reasonable Return
 ...effect of size, shape, and grade of lot

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- Unnecessary hardship that will support the granting of a use variance must relate to the land, not to the applicant-owner. [15]
- Hardship which is merely personal to the current owner of real property will not justify the granting of a variance. [16]

Reasonable Return
 ...personal problem as hardship

"It is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight that is the criterion." [17]

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- Unnecessary hardship is not conclusively established by proof that the zoning regulations prevent the use of natural resources which exist on the zoned land.
 - This problem has arisen most frequently in the case of land which contains sand, gravel, or other valuable natural deposits, and which cannot be removed because of restrictions on quarrying.
 - If the land in question is capable of yielding a reasonable return from any use permitted by the zoning ordinance, the owner is not entitled to a variance based upon unnecessary hardship simply because the zoning regulations prohibit exploitation of natural resources of the land. ^[18]

Reasonable Return
 ...effect of existence of natural resources

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- At times, landowners experience difficulties in developing their land because of governmental rulings not related to zoning. The zoning board of appeals is not necessarily required to grant a variance to assist a landowner in such a dilemma, nor is a board required to permit a use simply because another agency has approved it.
- Example: Variance to construct disposal system may be denied although the system has been approved by the County Health Authorities. ^[19]

Reasonable Return
 ...miscellaneous governmental rulings

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- To summarize the first variance test, a zoning regulation imposes unnecessary hardship if the property to which it applied cannot yield a reasonable return from any permitted use.
- The mere fact that the individual owner may suffer financial hardship, or the fact that the grant of the variance may allow the sale of the property for a better price, or permit a larger profit does not justify the granting of a variance on the ground of unnecessary hardship.

Reasonable Return
 ...summary

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Unique Circumstances

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- An applicant for a variance whose property will not yield a fair return through any use permitted by the zoning regulations may fail to qualify for a variance because the hardship is not due to circumstances peculiar to the land. [20]
- This concept has been specifically included in the Town, Village, and General City Law.

Unique Circumstances

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• No such use variance shall be granted by a Board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, 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;

Unique Circumstances

Town Law
§267-b (2)(b)(2)

Village Law
§7-712-b (2)(b)(2)

General City Law
§81-b (3)(b)(ii)

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- The Court of Appeals articulated the requirement that unnecessary hardship be based upon unique circumstances as follows:
- "There must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation before a variance thereof can be allowed on the ground of 'unnecessary hardship.'" ^[21]
- Some Examples of Unique Circumstances:
 - The presence of underground caves and cellars, 25 foot high stone walls on certain sides and deep embankments was evidence that a parcel had "unique characteristics" making permissible construction on it difficult if not impossible. ^[22]
 - Under Town Law § 267-b, a hardship was found due to the unique circumstances of the property that included two separate areas of wetlands and its location at a major intersection. ^[23]

Unique Circumstances

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- In the past, the courts held that hardship was not peculiar to applicant's if it were shared by a neighborhood or an entire area; a shared hardship was held insufficient to support the granting of a use variance to relieve it. ^[24]
- Where the hardship imposed upon an applicant's property is no greater than that suffered by nearby lands, the zoning board of appeals may not grant a variance to relieve it. ^[25]
- To grant such relief would be unfair to owners who remain subject to the general restrictions of the zoning ordinance and it would endanger the community plan by piecemeal exemption. ^[26]

Unique Circumstances
Reasoning from case law...

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- The hardship cannot prevail so widely throughout the district that the problem should be addressed by the local legislative body, by rezoning for example.
- Where a hardship is shared by several parcels of land or by an entire area, the remedy is not administrative, but legislative. ^[27]
- The applicant should seek a change in the zoning ordinance rather than a variance from its literal language.

Unique Circumstances
When hardship is wide spread....

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- The location of a property near a district boundary may present a hardship where a landowner is unable to realize a fair return from permitted uses of his land because it is located near the boundary of a less restricted district.
- For example, residential land adjacent to a commercial or industrial district may be reduced in value or entirely destroyed as a potential site for residential use.
- Where this occurs, hardship exists, but it is hardship shared by other residential land which abuts the boundary of a commercial or industrial district. It is not hardship peculiar to a particular parcel of land, and it will not support the granting of a variance. [28]

Unique Circumstances

Location near District Boundary as Unique Circumstance...

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- "Difficulties or hardships shared with others go to the reasonableness of the ordinance generally and will not support a variance relating to one parcel upon the ground of hardship." [29]

Unique Circumstances

Summary...

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Essential Character of the Neighborhood

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- The *Otto* case and now the statutes set forth a third test that must be met before a use variance may properly be granted. This third test is that the use to be authorized by the variance will not alter the essential character of the neighborhood.

Essential Character

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- No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, 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.

Essential Character

Town Law
§267-b (2)(b)(3)

Village Law
§7-712-b (2)(b)(3)

General City Law
§81-b (3)(b)(iii)

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- Where the facts of hardship and unique circumstances are proved, the power of the zoning board of appeals to grant a variance remains limited by the requirement that the permitted use not alter the essential character of the neighborhood. [30]
- Determining the probable effect of a proposed use is a matter within the competence of the zoning board of appeals, but the courts will review board decisions in regard to whether a variant use will alter the essential character of the locality where it is maintained. [31]
- For example, a new use may not produce traffic, pollution, etc., and, therefore, should not be denied on the ground that it will change the character of the area. [32]

Essential Character

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- The denial of a variance to maintain a commercial use in a residential district was upheld by the Court of Appeals because it appeared that the intrusion of retail stores would disrupt the residential character of the area. [33]
- In determining whether a proposed variant use will change the character of a neighborhood, the courts will consider the effect of the proposed use on existing nearby uses. [34]
- In estimating the impact of a new use, the courts will consider the safety hazards inherent in the use. It is the duty of the owner to show that the proposed use will not be injurious to the neighborhood. [35]
- The effect of a proposed use on the traffic problems of an area is a proper consideration. Denial of a permit to establish a funeral parlor was upheld on the ground that because of its large capacity it would generate sufficient traffic to injure the surrounding residential area. [36]

Essential Character
some examples...

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- If uses similar or identical to the one sought by the applicant already exist in the vicinity of the proposed site, the likelihood that the new use will change the essential character of the locality is reduced. The existence of such uses does not deprive the zoning board of appeals of its power to deny the variance, but it does constitute prima facie proof that an additional use of the type already established in the neighborhood will not alter the essential character of the area.
- The courts will, of course, consider not only the zoning classification of a district in which a variance is requested, but will examine the exact situation which exists in the vicinity of the proposed use. If the variant use is compatible with the area, it will not change the essential character thereof, although it is inconsistent with the zoning restrictions of the district.

Essential Character
Summary and conclusions...

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Self-Created Hardship

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- A use variance cannot be granted where the unnecessary hardship complained of has been created by the applicant, or where the applicant acquired the particular property knowing of the condition he now seeks to have varied by the ZBA.
- The "self-created hardship" rule was not part of the *Otto* decision. But in a subsequent decision, the Court of Appeals held that one who "knowingly acquires land for a prohibited use cannot thereafter have a variance on the ground of 'special hardship.'" [37]
- The self-created hardship rule is now specifically provided for in the zoning statutes.

Self-Created Hardship

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- No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, 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.

Self-Created Hardship

Town Law
§267-b (2)(b)(4)

Village Law
§7-712-b (2)(b)(4)

General City Law
§81-b (3)(b)(iv)

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- The self-created hardship rule applies whether the applicant purchased the land with actual or constructive knowledge that the desired use was prohibited, and whether the knowledge was available to the applicant through a reading of the zoning regulations or an examination of the premises. [38]
- One court articulated this rule as follows:
- "Even if a property owner does not have actual knowledge of the applicable provisions of the ordinance, he is bound by them and by the facts and circumstances concerning the use of the property which he may learn by exercising reasonable diligence." [39]

Self-Created Hardship

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- A use variance to allow petitioner to install lighting to enable the use of a recreational tennis court after dark was properly denied as the petitioner failed to meet the "self-created hardship" leg of the statutory test. The court found that the hardship presented by the applicant (the he gets home at 8 p.m. and would like to play tennis until 10 p.m.) was self created.

Self-Created Hardship

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- Hardship is self-created if it is caused by improvements to the land constructed by the applicant with knowledge of the restrictions from which relief is sought. An applicant's hardship is not, however, self-imposed where restrictive amendments to the zoning ordinance are made subsequent to the purchase of the property. [40]
- Finally, while self-created hardship is fatal to an application for a use variance, it does not foreclose the landowner from challenging the validity of the ordinance that prohibits the desired use. [41]

Self-Created Hardship

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Area Variance

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- As we have seen, a use variance is permission granted to use a parcel of land for a type of land use which is prohibited by the zoning regulations. In contrast, the **area variance** seeks relief only from dimensional requirement imposed by the zoning.
 - The statutes contain the following definition:
- **"Area variance" shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.**
 - Town Law §267
 - Village Law §7-712
 - General City Law §81-b

Area Variance

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- Area variance involve matters such as setback lines, frontage requirements, lot-size restrictions, density regulations, and yard requirements.

Area Variance

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- In 1992, the enabling acts were amended, codifying a new balancing test for area variances, which replaced the old practical difficulties test.
- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant...

Area Variance
Balancing Test

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In making such determination the board shall also consider:

Statutory Test

- (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 for 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, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Town Law §267-b (3)(b)
 Village Law §7-712-b (3)(b)
 General City Law §81-b (4)(b)

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- The requirement that an applicant show practical difficulties of significant economic injury no longer exists. The five factor balancing test enumerated in the enabling statutes is the standard for granting area variances. [42]

Area Variance

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- The Court of Appeals has ruled that the State intended to preempt the field for the applicable test for the granting of area (and use) variances when it enacted the current statutory procedures. Localities may not use their home rule powers to enact local laws with differing standards or tests. [43]

Area Variance

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Undesirable change in the neighborhood

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- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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;**

Undesirable change in the neighborhood

- Town Law §267-b (3)(b)(1)
- Village Law §7-712-b (3)(b)(1)
- General City Law §81-b (4)(b)(i)

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- The first prong of the balancing test requires a consideration of two items:
 - (1) whether an undesirable change will be produced in the character of the neighborhood; or
 - (2) whether there will be a detriment to nearby properties.
- The ZBA should look at development patterns in the community to determine whether the requested area variance would produce this change or impact.
- Where the requested variance is consistent with the prevailing pattern of development, the variance is usually granted. [44]
- Where current development patterns, however, have created an existing condition such as traffic congestion, the zoning board of appeals may not deny the area variance on this ground without a showing that the variance will cause additional material impacts. [45]

Undesirable change in the neighborhood

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- Sources of information for demonstrating prevailing patterns of development and the impact to the character of the community include, but are not limited to:
 - municipal tax maps and records;
 - photographs of the surrounding area;
 - letters from neighbors;
 - reports from appraisers or real estate brokers;
 - a report from an architect or historian; and board precedent.
- A comparison of surrounding properties to the subject property is also relevant. For example, where the requested area variance is necessitated by a substandard lot, the number of other substandard lots in the area becomes an important consideration. [46]

Undesirable change in the neighborhood

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Alternatives to the variance

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- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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 for the applicant to pursue, other than an area variance;**

Alternatives to the variance

Town Law §267-b (3)(b)(2)

Village Law §7-712-b (3)(b)(2)

General City Law §81-b (4)(b)(ii)

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- Applicants for an area variance should demonstrate that they have considered whether the desired result can be achieved without obtaining the variance. Failure to do so weighs against the applicant in the balancing test. [47]

Alternatives to the variance

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- In an effort to demonstrate consideration of alternatives, applicants may:
 - present efforts to purchase or sell substandard lots to adjoining property owners. [48]
 - submit evidence regarding the feasibility of moving structures [49]
 - detail the economic infeasibility of compliance with the applicable regulations; [50]
 - show compliance with directives or conditions imposed by the planning board; [51]
 - the desire to respect aesthetic and architectural features;
 - the desire to save natural resources;
 - the impact of the privacy, light, and air of neighbors; and safety conditions.

Alternatives to the variance

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Size of Variance

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- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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 for the applicant to pursue, other than an area variance; **(3) whether the requested area variance is substantial;**

Size of Variance

Town Law
§267-b (3)(b)(3)

Village Law
§7-712-b (3)(b)(3)

General City
Law §81-b (4)(b)(iii)

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- One court upheld the zoning board of appeals' finding of substantial variance where the requested variance was 16 percent of the property size. [52]
- On the other hand, a 270 parking space variance was found not to be substantial where the requested variance would not cause an increase to the concern over existing traffic congestion. [53]
- In another case, the court found that where 66 of the dwellings in the area exceeded the maximum building volume requirement, the impact of a variance request for a 45 percent increase in building volume was not substantial. [54]
- Where a lot otherwise complied with all zoning requirements but its odd shape necessitated a variance from a frontage requirement, an area variance may be properly granted even where the required variance amounts to a substantial percentage of the minimum requirement. [55]

Size of Variance when size matters...

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Adverse physical or environmental effect

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- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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 for 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;**

Adverse physical or environmental effect

Town Law §267-b (3)(b)(4)

Village Law §7-712-b (3)(b)(4)

General City Law §81-b (4)(b)(iv)

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- Although this factor may overlap the first in terms of effect of character of the neighborhood, this prong addresses elements including: natural environmental characteristics such as drainage, flooding, and runoff; other topographical changes such as grading, trees, and vegetation; and traffic. [56]
- In making a determination as to environmental concerns, the zoning board of appeals must consider the evidence presented, and must not rely solely on the speculation of community residents opposed to the variance. [57]
- Accordingly, real evidence or expert testimony of some nature should provide the basis for a determination on this factor.** [58]

Adverse physical or environmental effect

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Self-created hardship

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- In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (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 for 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, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.**

Self-created hardship

Town Law
§267-b (3)(b)(5)

Village Law
§7-712-b (3)(b)(5)

General City
Law §81-b (4)(b)(v)

73

- As we discussed earlier, an applicant is not eligible for a **use variance** if the hardship from which s/he seeks relief was self-created. However, the self-created hardship rule has not been made fully applicable to **area** variances.
- In fact, the balancing test identifies self-created hardship as a consideration but not a factor in and of itself determinative. [58]

Self-created hardship

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- In general, a landowner who is subjected to practical difficulties through a literal application of the zoning regulations is entitled to an area variance, although the difficulties are self-imposed.
- An area variance may not be denied solely on the ground that the applicant's hardship was self-created. [59]

Self-created hardship

75

- Accordingly, a person can buy a lot with full knowledge of the zoning restrictions and still qualify for a variance to avoid the restrictions, provided he or she can meet their burden with respect to other prongs of the balancing test.
- A landowner can construct an improvement and get an area variance which validates it, although the applicant has created the difficulties within the meaning of the self-created hardship cases. [60]
- While self-created hardship is not decisive in the case of an area variance, it has great weight. [61]

Self-created hardship

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- Minimum Variance Necessary
- "The board of appeals, in the granting of area variances, shall grant the minimum variance that it 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."
 - Town Law §267-b (3)(c)
 - Village Law §7-712-b (3)(c)
 - General City Law §81-b (4)(c)
- The statutory requirement directs the zoning board of appeals to grant the minimum variance necessary. To successfully accomplish this, the board must consider any impact on the community and devise a solution to accommodate the applicant and the community. [62]

Minimum Variance Necessary

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Limitations upon the power to grant variance

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- The zoning board is subject to a variety of limitations, including restrictions on the authority of a board to:
 - amend the zoning ordinance
 - vary the building code
 - vary a safety ordinance
 - vary a consent requirement
 - refuse to decide a matter within the province of the board and
 - deny a permit on grounds other than those specified in the zoning regulations

Limitations

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- As we have discussed, the ZBA is an administrative body, not a legislative one. Accordingly it is without authority to **amend the zoning ordinance** which it administers.
- It is necessary to distinguish sharply between a variance which may be granted by a zoning board of appeals and an amendment which can be adopted only by the legislative body of the municipality.

Limitations

...cannot amend a zoning ordinance

80

- A variance is, of course, a use of land authorized by a zoning board of appeals upon a showing of circumstances previously required by the legislative authority. It does not alter the zoning regulations; it merely permits a use which is proscribed by such regulations.
- A variance may be regarded as an amendment if it alters in any fundamental respect the zoning scheme articulated in the ordinance. **If a variance is destructive of the purpose to be achieved by the zoning ordinance, there is a clear invasion of the legislative process.** [63]

Limitations

...cannot amend a zoning ordinance

81

- Easier to articulate than to apply. The cases suggest some clues which are useful in detecting a variance in form which may be annulled as an amendment in fact.
- Most variances involved a single lot or at least a small parcel of land. Where a variance granted by a zoning board of appeals purports to permit the use of a large tract of land for a proscribed purpose, there is a strong possibility that the purported variance will be called an amendment.
- Example: A zoning board of appeals refused to grant a variance for the commercial use of 5.5 acres of land which constituted an entire residential district. The court sustained the board on the ground that such a variance would, in effect, be an amendment. [64]

Limitations
...cannot amend a zoning ordinance

82

- The authority of a zoning board of appeals to vary the strict application of the zoning regulations does not include the power to vary the application of the municipal building code or from the application of an ordinance imposing a specific safety requirement. Building codes are enacted by the municipal legislative authorities pursuant to statutes other than the zoning enabling acts.
- Zoning boards of appeals are without authority to grant variances from specific safety requirements, unless the legislative body, or agency, that enacted the safety requirements has delegated the board that authority.

Limitations
...cannot vary a building code or safety requirement

83

- Where a zoning ordinance requires that a certain number of consents be obtained before the zoning board of appeals may consider an application for a variance, it appears that the board may not vary such requirement. [65]

Limitations
...cannot vary a consent requirement

84

- Where a matter within the jurisdiction of a zoning board of appeals has not been decided by the board, it is beyond the power of a reviewing court to review it. [67]
- Accordingly, an applicant may be faced with a difficult problem where a matter has been submitted to a zoning board of appeals, but the board has failed or refused to act. A board, under these circumstances, may be required to consider and pass upon an application which is properly within its jurisdiction. [68]

Limitations
...cannot refuse to decide

85

- A zoning board of appeals cannot grant a variance specifically proscribed by the zoning ordinance, nor can it deny relief on grounds not authorized by the zoning ordinance or the enabling acts.
- A board has exceeded its powers, for example, where it refuses to approve a permit to construct a cement factory in an industrial district where such use is permitted, founding its decision upon the traffic implications of the proposed use. [66]
- While the traffic congestion which may result from a new use may be relevant in determining the effect of a proposed use which requires a variance, a permitted use may be established as of right, and its effect upon the traffic-control problems of the neighborhood is not a sound basis for a denial of a permit.

Limitations
...cannot deny relief on grounds not authorized by ordinance

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