



**Division of Local
Government Services**

Guidelines for Applicants to the Zoning Board of Appeals

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

A Division of the New York Department of State

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Guidelines for Applicants To the Zoning Board of Appeals

This publication has been written to aid potential applicants in understanding and appreciating the appeals process, and to provide an explanation of the rules and standards under which appeals and variance decisions must be made. Applicants and their representatives should be guided in advance by the standards in deciding whether an appeal would be appropriate. These standards have been set forth in law and by the courts of the State, and cannot be modified by the Zoning Board of Appeals.

Why might you consider an appeal to the Zoning Board of Appeals?

A person may want to appeal to the Zoning Board of Appeals (ZBA) for two basic reasons. First, he or she may disagree with a decision the enforcement officer has made or an action he or she has taken. Second, the appealing party may believe that an exception (variance) to the zoning laws should be made for his or her property.

How is the appeals process initiated?

Either the applicant or the applicant's representative must file a Notice of Appeal with the ZBA within 60 days after the enforcement officer has filed his or her decision or action. The enforcement officer's decision is filed in his or her office, unless the municipal governing board has authorized it to be filed instead in the municipal clerk's office. A copy of the Notice of Appeal must also be filed with the enforcement officer.

Under what circumstances may an appeal be made to the Zoning Board of Appeals?

Except in certain instances, an applicant must be "aggrieved" by an actual decision or action taken by the enforcement officer. The exceptions occur where an applicant has already submitted an application for subdivision, site plan, or special use permit approval which requires an area variance in connection with that approval. In those instances, no decision of the enforcement officer is necessary. The applicant may simply file a Notice of Appeal directly with the ZBA.

Who may apply to the ZBA for relief?

Anyone who could be "aggrieved" by the decision or action of the enforcement officer, has standing to take an appeal before the ZBA. A person is "aggrieved" if his or her property value is affected negatively by the enforcement officer's action. Commonly, a property owner who either has been refused a permit or has been served with an enforcement action, is the "aggrieved party." Also note, as stated above, that a landowner who has submitted an application for subdivision, site plan, or special use permit approval, may apply to the ZBA for an area variance without a decision of the enforcement officer. A neighboring landowner may also be an "aggrieved party", if he or she believes the enforcement officer's decision in issuing a permit was improper, and will negatively affect their property

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value. In addition, any officer, board or commission of the municipality may appeal a decision of the enforcement officer, whether or not that officer, board or commission is aggrieved.

What decisions or actions are appealable?

Any decision or action issued in writing by the enforcement officer, which affects anyone's rights, is appealable. These decisions include: the grant or denial of a permit, the issuance of an appearance ticket or summons, or any order which mandates certain action, such as a cease-and-desist or stop-work order.

I'm a resident who lives near the proposed project. What happens if I find out about the project more than 60 days after the permit is filed?

If you are a "third party", such as a nearby resident, you may still bring an appeal more than 60 days after the permit is filed, *if* you file within 60 days after you've had a reasonable opportunity to find out about the planned project. For example, you would have 60 days from the time a sign is posted on the property announcing the future construction of a new business (whether or not you actually see the sign), if the sign is posted after the permit has been issued.

What types of relief can the ZBA grant?

The ZBA can grant (or deny) two types of relief: interpretive and variance. In either case, the ZBA will either affirm, reverse, or modify the enforcement officer's decision. In so doing, it will either grant or deny the requested relief. If the appeal is for an interpretation, the ZBA's decision will be based on the municipal zoning regulations. On the other hand, if the appeal is for a variance, the ZBA's decision will be based on the standards of proof contained in the following state statutes: §267-b of the New York State Town Law, §7-712-b of the Village Law, or §81-b of the General City Law.

Because of the range of powers the ZBA has, it is essential that the applicant (or the applicant's representative) know what type of relief to request when making application to the ZBA. If the applicant believes the enforcement officer's decision is incorrect, the appropriate request is for an *interpretation* reversing the officer's decision. If the applicant (in this case, the landowner) believes that the officer's decision may be correct, but that he or she can show proof under the statutes that a variance is warranted, then the appropriate request is for a decision granting a *variance*. It is also 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.

After a Notice of Appeal has been filed, what must happen?

After a Notice of Appeal has been filed, the ZBA will take up the matter at a future meeting. The ZBA is required to schedule a hearing on the applicant's appeal within a reasonable time, and give notice of the hearing to the applicant. If a variance is requested, the ZBA may be required to take some preliminary steps before it may hear the case.

First, the ZBA may have to make a determination of significance under the State's Environmental Quality Review Act (SEQRA). Based on this determination, an Environmental Impact Statement (EIS) may or may not be required. If an EIS is required, the case cannot be heard until the EIS has been completed and accepted by the ZBA. Environmental review is not necessary for interpretations of the zoning regulations or for area variances relating to setbacks and lot lines, or for area variances relating to one-, two-, or three-family residences.

Second, depending on the location of the property, the ZBA may be required by State law to refer requests for variances to the county planning agency for a preliminary recommendation. If such a referral is required, the ZBA must give the county 30 days to respond. It is also possible that the county's recommendation could result in an increase in the number of votes needed for the ZBA to approve the variance. Appeals for interpretations need not be referred to the county.

What is the responsibility of the applicant at the hearing?

At the hearing, the applicant may submit written evidence and/or argument to support his or her case. Obviously, the sooner that written testimony or material is received, the more time ZBA members will have to consider the case and reach a proper decision. Therefore, it is a good idea to submit written material with the application, or as soon thereafter as possible, so that it can be sent to ZBA members prior to the hearing. (Please note that the applicant can present written evidence at any time up to the close of the hearing, or even after the hearing if the ZBA allows the record to remain open.)

At the hearing, the ZBA will offer the applicant and/or the applicant's representative the opportunity to present a case for relief. The applicant may personally testify, call witnesses, or submit written evidence, including drawings and graphics. Because an appeal is an adversarial proceeding, the ZBA will offer the municipality an equal opportunity to present its side of the case (the side which supports the enforcement officer's decision). Each side will be given an opportunity to question the other, or the other's witnesses. In addition, ZBA members may ask questions.

After the applicant and the municipality have presented their cases, any other interested persons will be given the opportunity to speak and/or submit written material. If necessary, the hearing may be adjourned and continued at a later date. When all parties and interested persons have been granted the opportunity to be heard, the hearing will be closed.

Will the ZBA make a decision the night of the hearing?

Once the hearing is closed, the ZBA may begin discussing the case and reach a decision, or may postpone discussion and/or its decision until a later meeting. If the ZBA deems it necessary, the hearing may be reopened at any time. Once the hearing has been finally closed, the ZBA must make its decision within 62 days.

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What is the basis for the ZBA's decision on an interpretation?

If requesting a reversal on an interpretative basis, the applicant must prove that the enforcement officer's decision was incorrect, according to a proper reading of the municipality's zoning regulations. If the ZBA has heard a case in the past which involved an interpretation of the same provision, the ZBA's decision will be consistent with its prior ruling. If the ZBA has never interpreted the particular provision at issue, it will use its best judgment as to the municipal governing board's original intent in enacting the provision. Secondly, the ZBA will try to arrive at the best practical solution for future application by the enforcement officer.

Careful and thorough reference will be given to all definitions and other provisions of the regulations. If necessary, the ZBA will refer to authoritative publications on planning and zoning law. The applicant may, of course, use those resources in presenting his own case as well.

What must be proven in order to be granted a use variance?

If requesting a use variance, that is, permission to establish a use of property not otherwise permitted in the zoning district, the applicant must prove "unnecessary hardship." To prove this, State law requires the applicant to show *all* of the following:

- (1) that the property is incapable of earning a reasonable return on initial investment if used for any of the allowed uses in the district (actual "dollars and cents" proof must be submitted);
- (2) that the property is being affected by unique, or at least highly uncommon circumstances;
- (3) that the variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the hardship is not self-created.

If *any one or more* of the above factors is not proven, State law requires that the ZBA must deny the variance.

What must be proven in order to be granted an area variance?

If requesting an area variance, that is, permission to build in an otherwise restricted portion of the property (such as in the required front, side or rear yards, or above the required building height, or in excess of the lot coverage regulations), then State law requires the applicant to show that the benefit the applicant stands to receive from the variance will outweigh any burden to health, safety and welfare that may be suffered by the community. State law requires the ZBA to take the following factors into consideration in making its determination:

- (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;

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- (2) whether the benefit sought by the applicant can be achieved by some method which will be feasible for the applicant to pursue but would not require a 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 an alleged difficulty is self-created.

Unlike the use variance test, the ZBA need not find in favor of the applicant on every one of the above questions. Rather, the ZBA must merely take each one of the factors into account. The ZBA may also decide that a lesser variance than the one requested would be appropriate, or may decide that there are alternatives available to the applicant which would not require a variance.

Must the variance, if granted, be exactly what was applied for by the applicant?

Whether the ZBA decides to grant a use *or* area variance, State law requires the ZBA to grant the *minimum variance necessary* to provide relief, while at the same time taking care to protect the character of the neighborhood and the health, safety and welfare of the community. For these same reasons, the ZBA may also impose reasonable conditions on the grant of any variance.

If there is no opposition to my variance request, must the ZBA grant the request?

The above rules and standards have been set forth in law and by the courts of the State, and cannot be modified by the Zoning Board of Appeals. If they are not followed, the municipality would be subject to costly lawsuits. The public is entitled to speak in favor of, or against, a proposed project, but opinions in and of themselves are not enough.

Applicants and their representatives should be guided in advance by the appropriate legal standards in deciding whether an appeal would be appropriate. If an appeal is taken, the applicant should present clear, definite facts showing that the standards have been met. The ZBA cannot grant relief where proper legal proof is not adequately presented.

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The procedures for obtaining a variance and an interpretation are almost identical and the procedures listed below apply to both.



Town Law § 267-a/b, Village Law § 7-712-a/b, and General City Law § 81-a/b set forth the procedures and permitted actions of the zoning board of appeals and provide the statutory criteria that must be used in handling and deciding applications for variances.

SUBMISSION

- The applicant must first apply to the zoning enforcement officer and receive a denial based on the officer's interpretation of the zoning law.
- The applicant must file a notice of appeal (an application for a variance) with the zoning board of appeals for a variance or interpretation within 60 days after the zoning enforcement officer's decision.
- The applicant must submit, with the notice of appeal, a completed environmental assessment form (EAF) pursuant to SEQR. Most appeals filed with the zoning board of appeals may be classified as Type II which will end the SEQR process. Additional processing steps may be required if the appeal is classified as Type I or Unlisted.

 The initial denial of an application by the zoning enforcement officer or building inspector must be filed in the office of that official, rather than the municipal clerk's office, within five business days from the day it is rendered. Municipalities may adopt a resolution to require that such filings instead be made in the municipal clerk's office. Be sure to check with local laws and procedures.

PUBLIC HEARING

State laws require the zoning board of appeals to hold a public hearing on all variance applications. The laws do not oblige the board to hold a hearing within a specific time period, although the hearing must be held "within a reasonable time."



Municipalities may require a more specific time period so be sure to check local laws and procedures.

NOTICE

A variance can give relief to a landowner from a strict enforcement of the zoning code, but everyone who may be affected by this adjustment in regulations deserves an opportunity to be heard at a public hearing. State law requires that the public be given notice of the hearing by publication in a newspaper at least five days prior to the date of the hearing. Some municipalities require the mailing of notices or post cards to nearby property owners. Notice may also be placed on a municipal web site or local public access channel. According to Village, City and Town law, the applicant must bear the actual cost of these notice requirements or be assessed a reasonable fee to cover such costs. Such a fee may be included as part of the filing or application fee.

REFERRAL TO COUNTY PLANNING BOARD

Notice must be given to the County Planning Board of all applications for a **use variance** at least ten days prior to the public hearing. If the proposed use would create 5,000 square feet or more of new or renovated floor area or it would require the disturbance of 10,000 square feet or more

Variance Standards

In 1992-1994, changes to the New York State Town, Village and City Laws went into effect that modified the way Zoning Boards of Appeal reviewed and approved requests for variances. This report highlights the state legislative changes and impacts.

Overview

The intent of the changes was to establish statutory tests for the issuance of variances that incorporated what the Legislature believed were the best features of existing court decisions in order to protect communities from lawsuits. The intent was not to change the tests for granting variances that had been established through the courts. However, the tests required for the granting of an area variance have been made more flexible. Despite diminishing the burden on applicants seeking area variances, the changes in no way grant Board of Appeals legislative powers to "amend" the zoning law by giving out wholesale variances to regulations that the Board is not in agreement with.

Where sections of the State Law are cited in this document, the applicable portions of Town Law were used as examples, similar changes were also made to Village and City Laws.

Definitions

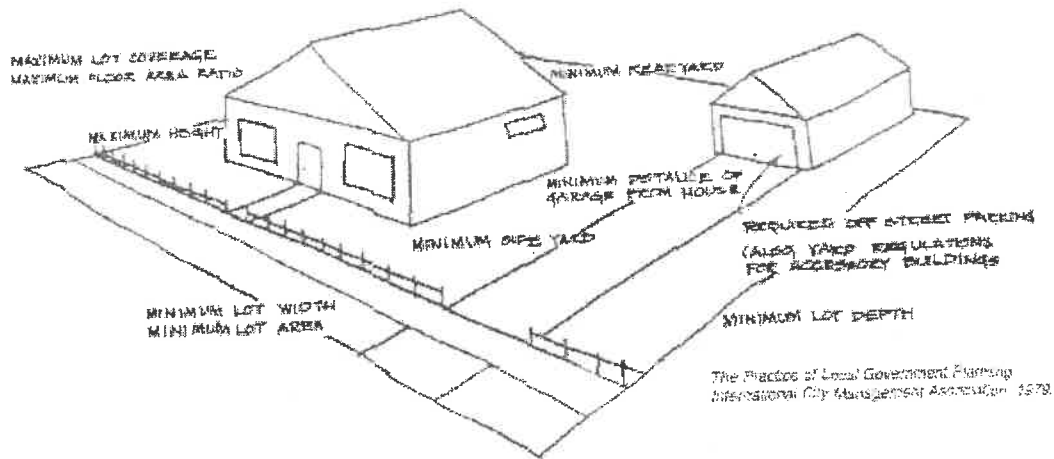
When an applicant requests relief from the strict application of a zoning ordinance, the Zoning Board of Appeals' first task is to determine what type variance relief is being requested. To assist in this task, State law now provides the following definitions for use and area variances:

Section 267.1.(a and b)

(a) "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.

(b) "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.

The figure below shows examples of the type of regulations, which deal with physical or dimensional requirements, that could be varied through the granting of area variances.



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NOTE: This report on variances applies to New York State. Laws in other states/counties will differ.

Use Variances

The tests for granting use variances have not changed substantially. The applicant must still demonstrate that an unnecessary hardship is created by the strict application of the zoning ordinance.

Section 267-b(2)(b)

No such use variance shall be granted by a board of appeals without a showing of 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.

The required conditions for a proper granting of a use variance remain very difficult to meet. Applicants must demonstrate, through financial documentation, that they are unable to realize a reasonable rate of return from any of the permitted uses for the property in question. The conditions causing this inability cannot be self-created (i.e., paid too much for property with unreasonable expectations of development potential) and must be unique to the specific property in question. Even if these conditions are met, the granting of the variance cannot cause a change in the character of the community.

Area Variances

For the granting of an area variance the demonstration of "practical difficulty" is no longer required. The new test is a simple weighing of the benefit to the applicant receiving the requested relief against the detriment to the community.

Section 267-b(3)(b)

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 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 variance is substantial; (4) whether the proposed variance is 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.

With the removal of the requirement that the applicant first prove significant economic injury to qualify for an area variance, the consideration by the Zoning Board of Appeals of potential negative impacts on the community becomes more important. The detriment to the community can be undesirable changes to either the character or physical or environmental conditions in the neighborhood. The legislative changes also specifically allow Zoning Boards of Appeal to take into account any negative impact on nearby properties. It is the Board's responsibility to consider all the possible detrimental impacts to the community and provide a record of evidence to substantiate any of these impacts that they determine are significant in their decision to grant or deny area variances. With this in mind, the legislative body should include a clear statement of the intent and the valid public purpose served by any zoning regulation to be enacted and any specific standards which are to be included. Providing this information will assist Zoning Boards of Appeal in determining potential negative impacts on the community.

Recent court cases have upheld the Zoning Board of Appeals' consideration of the potential cumulative impacts of granting an area variance in situations where other properties exist that would have a similar case for requesting the same type of variance. Thus, even though the uniqueness of the situation is not mentioned as one of the listed statutory considerations, it must be considered to determine the overall impacts of granting an area variance. As the legislation now stands, the self-created nature of the need for an area variance can be considered, but it does not automatically disqualify the request, as is the case for use variance requests.

Minimum Relief Requirement and Conditions

For both use and area variances, State Law (in Sections 267-b.2.(c) and 3.(c)) requires that the Board of Appeals grant the minimum variance 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".

Section 267-b.4. allows the imposition of conditions on the granting of use and area variances, so long as:

- 1. Such reasonable conditions and restrictions are directly related to and incidental to the proposed use of the property.**

2. Such conditions shall be consistent with the spirit of the zoning ordinance or local law.

3. Such conditions shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

The inclusion in the updated state laws of the requirement to grant the minimum relief necessary and adequate and the ability to impose directly related conditions to both use and area variances, clearly gives Boards of Appeal the ability to grant less than the full relief sought by an applicant. The intent of allowing relief is to provide for a reasonable rate of return, not to maximize profit for a single landowner at the expense of others. Variances are to be used to provide equality with surrounding uses, not a windfall for the applicant.

Conclusions

The legislative changes to the applicable state laws provide a well defined process for the granting of variances. They also represent the intent of the legislature to have Boards of Appeal act as safety valves to provide relief in individual cases, where warranted, to protect the constitutionality of zoning restrictions and regulations and avoid the de facto taking of property. However, it is also clear that the established process for seeking relief is not intended to give Boards of Appeal legislative powers to rewrite zoning ordinances by granting wholesale exemptions to properly enacted regulations. Boards of Appeal must carefully consider whether the spirit of the ordinance is observed, public safety and welfare secured and substantial justice is done.

The potential for substantial negative impacts from the granting of use variances continues to be considered more significant than those related to the granting of area variances and thus the tests for issuing this type of relief are more stringent. However, as Zoning Boards of Appeal are faced with a far greater number of area variance requests, the potential cumulative impacts of granting these requests is at least as significant. Boards of Appeal, instead of granting wholesale variances to regulations that they do not believe are necessary or supportable, should recommend changes in the zoning laws to the legislative body (City Council, Village Trustees, Town Board).

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