Westchester Municipal Planning Federation
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Zoning Board Basics – What You Need to Know

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Powers of the Zoning Board of Appeals (hereinafter "ZBA")
The ZBA is both an administrative and quasi-judicial body that does not have legislative powers. Its principal responsibilities are:

- **I.** Area Variances
- **II.** Use Variances
- **III.** Nonconforming Uses
- **IV.** Interpreting zoning ordinances
- **V.** Special Permits where the ZBA is delegated authority
- **VI.** Telecommunications

I. AREA VARIANCES—*"the authorization by the zoning board of appeals for use of land in a manner, which is not allowed by the dimensional or physical requirements of the applicable zoning regulations."*

A Zoning Board's determination to grant or deny an area variance will be upheld if it is rational and not arbitrary and capricious. A determination is rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition. In determining whether to grant an area variance, the ZBA must engage in a balancing test, which is to weigh the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community. The ZBA is also required to consider the following five (5) statutory factors:

(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 to 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. With respect to this factor, New York Law provides that its consideration is relevant to the decision of the ZBA, but is not determinative.

See New York Town Law Section 267-b(3)(b) (see also Village Law Section 7-712-b(3); General City Law Section 81-b(4)). New York courts have ruled that the standards set forth in the five factors are exclusive so that no other factors other than those recited in the five factors can be considered.

[1] Disclaimer: These materials are to be used for educational purposes only. These materials are not legal advice, nor are they intended to be legal advice.

SEQR Note: Pursuant to 6 NYCRR Part 617.5(c)(12), the "granting of individual setback and lot line variances" are Type II actions under the New York State Environmental Quality Review Act ("SEQR"), which have been determined to categorically not have a significant adverse impact on the environment, and therefore do not require any further environmental review, including the preparation of an environmental assessment form ("EAF").

Sample Cases:

A. *O'Connor & Sons Home Improvement, LLC v. Zoning Bd. of Appeals of the City of Long Beach* (Nassau Sup. Ct., 2017)

Facts: Developer sought area variances related to a property in the City of Long Beach whose Zoning District required a minimum lot size of 80' x 57'. The property in question was a 120' x 57' corner lot with a dilapidated house that the City deemed had to be razed. The developer wished to raze the current structure and build two new houses on the property, with each lot being 60' x 57'. The developer presented evidence that the two houses would be consistent with the character of the neighborhood and that each home would have off-street parking for four cars, lessening the impact on street parking. Members of the ZBA voiced objections to the application and members of the public echoed those objections, with one objector stating that a similar application for variances to split a lot into two lots was only granted to that applicant to incentivize development in Long Beach after Hurricane Sandy. The ZBA eventually denied the application, but notably, did not publish its findings for two months after the hearing, and one month after it was served with the Article 78 petition.

Holding: The Supreme Court reversed the ZBA's denial of the requested area variances.

Judicial Standard: A ZBA "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community." Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth "how" and "in what manner" the granting of a variance would be improper.

Analysis: The Supreme Court found that the ZBA's findings regarding the potential negative impact to on-street parking was arbitrary since the developer could have built one large structure on the lot which housed several licensed drivers, all of which could potentially park their cars on the street. Additionally, the Court found that the ZBA failed to explain how granting the variances would produce a change in the character of the neighborhood, especially considering the fact that the developer produced evidence that many of the properties in the neighborhood have frontages of less than the required 80'. Finally, the Court took issue with the ZBA's consideration of the "need" for the application in the City of Long Beach. The Court noted that the ZBA was limited to the five factors and improperly considered whether or not Long Beach needed a development of this nature after Hurricane Sandy.

B. *Feinberg-Smith Associates Inc. v. Town of Vestal Zoning Bd. of Appeals*, 56 Misc. 3d 1217(A) (N.Y. Slip Op. 2017)

Facts: Developer sought area variances regarding proposed expansion of student housing development at Binghamton University. After the first ZBA meeting, the Board received over 80 emails or letters in opposition to the requested variances. The Board held a second meeting in which they made a SEQR determination of no adverse impacts. At the final meeting, the Board denied the variance requests and petitioner commenced an Article 78 proceeding alleging the Board's decision denying the variance requests was illegal, arbitrary, capricious and without substantial evidence.

Holding: The Supreme Court affirmed the ZBA's denial of the requested area variances.

Judicial Standard: A ZBA "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community." The five factors to be balanced are listed above. "A ZBA is not

required to justify its determinations with supporting evidence as to each of the five factors, so long as its determinations balance the relevant considerations in a way that was rational."

Analysis: The Supreme Court found that the ZBA properly weighed the five criteria and found that there was evidence in the record to support their decision. The record indicated that although the Board granted a negative declaration with regard to the project, it found that there would be a moderate to large impact in the following areas 1) a change in the use or intensity of use of the land; 2) an impairment of the character or quality of the existing community; and 3) an adverse change in the existing level of traffic. The Court held that the Board concluded that those findings did not preclude a negative declaration, but they certainly could have rationally reached a different conclusion on the ultimate granting of the variances. The Court found that the ZBA properly noted that there was an alternative that was code compliant, and that the variances for minimum living area (750 square feet to 474 square feet permitted) and parking spaces (818 required and 309 provided) were substantial. While petitioner alleged that the ZBA was improperly influenced by public opposition to the project, the ZBA argued that it properly considered, but did not bow, to public concern and comment. The Court further held that reliance by the ZBA on specific testimony of neighbors was an appropriate consideration.

C. *Cohen v. Town of Ramapo Bldg., Planning & Zoning Dept.*, 150 A.D.3d 993 (2d Dep't 2017)

Facts: A yeshiva sought several area variances so that it could construct and operate a religious school on its property in Monsey. The ZBA granted the area variances after it heard testimony both in favor of and against the requested variances. The ZBA's grant of area variances was affirmed by the lower court and neighbors appealed.

Holding: The Appellate Division affirmed the ZBA's granting of area variances where ZBA engaged in the required balancing test and considered the five relevant statutory factors in granting the area variances.

Judicial Standard: While religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made.

Analysis: The record revealed that the ZBA's determination had a rational basis and was not arbitrary or capricious. A zoning board is not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations is rational.

D. *Crowell v. Zoning Bd. of Appeals of Town of Queensbury*, 151 A.D.3d 1247, 56 N.Y.S.3d 618, (3d Dep't 2017)

Facts: Respondent sought to reconstruct two single-family dwellings situated on their property which contained a density provision limiting each lot to one single-family structure. The two structures at issue predate the adoption of the Town's zoning code and, therefore, constitute prior nonconforming structures. Respondent applied to the ZBA for the necessary variances and variances were granted, despite petitioner's argument that a use variance, rather than an area variance was required. The ZBA resolution approving such variances was filed in the office of the Town Clerk on January 23, 2014. On November 26, 2014, the Town's Code Enforcement Officer issued building permits for the proposed reconstruction. On January 16, 2015, petitioner filed an appeal with the ZBA challenging the issuance of the building permits, again arguing that the construction of two single-family homes on the Respondents' lot requires a use, rather than an area variance pursuant to the Town's zoning code. At the conclusion of that hearing, the ZBA upheld its original determination and petitioner commenced an article 78 proceeding challenging the issuance of the building permits.

Holding: The lower court overturned the ZBA's determination granting the area variances, rescinded the building permits and enjoined any further construction of a second residence on the property. The Appellate Division reversed the lower court, finding that petitioner's challenge to the issuance of the building permits should have been dismissed as untimely.

Judicial Standard: In order to determine the applicable limitations period and the event that triggered its commencement, we must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner.

Analysis: The crux of petitioner's challenge to the issuance of the building permits is that a use variance, not an area variance, was required for the respondents' reconstruction of the two nonconforming structures on their property. That issue was squarely resolved by the ZBA in its resolution from January 2014, when it considered and rejected petitioner's claim that a use variance was required for the project and granted the respondents an area variance from the density requirement of the Town's zoning code. To challenge that determination, petitioner was required to commence an article 78 proceeding within 30 days after the filing of the resolution granting the variance. Petitioner failed to do so and, under these circumstances, "could not sit idly by and extend [his] time to commence a proceeding for judicial review until after the building permit[s] had been issued."

E. *Wenz v. Brogan*, 149 A.D.3d 970 (2d Dep't 2017)

Facts: After a hearing, the ZBA approved an application for area variances permitting the respondent to make improvements to his residential property, but the minutes of the ZBA meeting did not record each board member's vote. A short-form decision filed with the Village Clerk 20 days after the hearing set forth the vote of each ZBA member, but contained no specific findings as to the factors on which the ZBA based its determination. A notation on the short-form decision stated that any aggrieved party could, within 30 days, serve a written demand on the Village Clerk for a written long-form decision setting forth the ZBA's findings. The petitioner brought an article 78 proceeding to review the ZBA's determination which granted the variances. Specifically, petitioner contends that the ZBA violated several provisions of Village Law § 7–712–a with respect to the time in which a decision was required and in not setting forth the reasons for its determination in the short-form decision.

Holding: The Appellate Division affirmed the lower court which dismissed the Article 78 petition. The Court found that the village was not preempted from regulating issues of whether the ZBA renders a short form or long form decisions or the timing within which such decisions maybe made. Also, the Court found (i) ZBA's failure to file written decision to village clerk within requisite five-day period did not mandate annulment of its determination, (ii) ZBA's failure to record vote of each member in minutes of hearing did not render decision a nullity, and (iii) ZBA's determination to grant area variances had a rational basis and was not arbitrary and capricious.

Judicial Standard: Although local laws that are inconsistent with state laws are generally invalid, the Municipal Home Rule Law allows incorporated villages to amend or supersede provisions of the Village Law as they relate to zoning matters. Nevertheless, local lawmaking power under the supersession authority is of course in all instances subject to the State's transcendent interest where the Legislature has manifested such interest by expressly prohibiting a local law, or where a local law is otherwise preempted by State law.

Analysis: Village Law § 7–712–a does not preempt the Village from regulating the issues of whether its ZBA renders short-form or long-form decisions, or the time periods within which those decisions must be issued. The Legislature has not evinced an intent to preempt the field, and the legislative history of that section indicates that the Legislature envisioned no comprehensive and detailed regulatory scheme with respect to the form or timing of decisions of a zoning board of appeals. Additionally, contrary to the petitioner's contention, the ZBA's failure to file its short-form decision in the office of the Village Clerk within five business days after it was rendered at the hearing does not mandate the annulment of its determination. Village Law § 7–712–a(9) does not specify a sanction for the failure to comply with the five-day filing requirement and, while the ZBA offered no explanation for its delay, the delay was not extensive and the petitioner did not demonstrate any

prejudice resulting from the late filing. The Court would not let procedural defects in ZBA's determination to require petitioner's relief to be granted.

II. USE VARIANCES - "*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."*

In connection with a use variance, the applicant must demonstrate "unnecessary hardship" for each and every permitted use under the zoning regulations for the particular district where the property is located. To meet this standard, the applicant must demonstrate the following:

(1) the applicant cannot realize a reasonable rate of return for every permitted use, 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.

See New York Town Law §267-b(2)(b); Village Law §7-712-b(2)(b); General City Law §81-b(3)(b).

Sample Case:

Expressview Development, Inc. v. Town of Gates Zoning Bd. of Appeals, 147 A.D.3d 1427 (4th Dep't 2017)

Facts: Owner of landlocked, undeveloped parcels of land and potential purchaser of parcels brought an Article 78 proceeding challenging denial by town ZBA of application for use and area variances to construct billboards that would be visible from highway. The Petitioner also asked for a declaration that the town code section prohibiting commercial signs not located on site of business for which they advertised was unconstitutional.

Holding: The Appellate Division affirmed the lower court's decision upholding the ZBA's denial of the use and area variance for the billboards.

Judicial Standard: When reviewing the determinations of a ZBA, courts consider "substantial evidence" only to determine whether the record contains sufficient evidence to support the rationality of the Board's determination. "It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them."

Analysis: The Court concluded that there was substantial evidence supporting the ZBA's determination that the billboards would have a negative and adverse effect upon the character of the neighborhood inasmuch as the relevant area could not aesthetically support additional signs. The billboards in the area which had been approved was pursuant to a federal lawsuit in 1999 and not a determination of the ZBA. Petitioners failed to establish the existence of earlier determinations by the ZBA that were based on essentially the same facts as petitioners' present application. The court found that members of the ZBA did not act upon consideration of their own surveys, and thus the members of the ZBA were not required to place on the record their personal observations of the area inasmuch as there was evidence contained in petitioners' submissions, including maps and photographs, establishing the quantity and nature of the billboards already in existence along the relevant portion of the highway. The Appellate Division also rejected petitioners' contention that the Town Code was an unconstitutional restraint of freedom of speech under the First Amendment on the ground that it improperly distinguishes between on-site and off-site commercial signs.

III. NONCONFORMING USES -- *The conditions for granting approvals for non-conformities often are given to the Zoning Board under the local zoning ordinance and the Zoning Board must follow that local zoning ordinance in addressing non-conforming uses or dimensional non-conformities and variance standards.*

Sample Case:
Cleere v. Frost Ridge Campground, LLC, 155 A.D.3d 1645 (4th Dep't 2017)
Facts: Respondent owns a parcel of land that has functioned as a campsite and provider of recreational activities since the 1950s. In 1998, the ZBA interpreted the Code to provide that a preexisting nonconforming use of land as a campsite runs with the land pursuant to section 165–13 of the Code, notwithstanding section 165–39(B), which required that an existing campsite of record be brought into compliance with the Code upon being sold. In 2010, respondent began selling tickets to concerts which were hosted on its property. In 2013, respondent applied for a special use permit to continue the performance of those concerts on the Property, but the ZBA determined that no special use permit was necessary and that use of Property as "campsite" included recreational activities such as live music performances. Petitioners commenced Article 78 proceeding seeking review of decision of ZBA, which determined that use of property owned by campsite operators to host live concerts was a preexisting nonconforming use.
Holding: The Court found that the ZBA's determination that hosting live concerts was consistent with prior use as a campsite was not arbitrary and capricious and was consistent with its own prior precedent.
Judicial Standard: A use of property that existed before the enactment of a zoning restriction that prohibits the use is a legal nonconforming use. The nature and extent of a preexisting nonconforming use generally will determine the amount of protection accorded that use under a zoning ordinance
Analysis: Here, there was substantial evidence that the Property was used for recreational activities and as a campsite prior to the adoption of the zoning ordinance. That evidence included the affidavit of a former employee of respondent's predecessor, who averred that the Property had been used for skiing and other recreational purposes since the 1950s. He averred that he began working there in the 1960s and observed numerous recreational activities on the Property, including winter sports, live music, and campsite rentals. The Code contains no definition of "campsite" or any enumeration of what activities are permitted there. The ordinance does, however, require that any large campsite "provide a common open area suitable for recreation and play purposes" (§ 165–39[C][8]), and thus expressly contemplates that a campsite is a place for recreation. Although the kind of recreation is open to interpretation, the Court found it rational to conclude that live music, along with swimming and other outdoor activities, is the kind of recreation to be enjoyed at a campsite. Moreover, the interpretation of the term "campsite" as including attendant recreational activities such as live music is consistent with the record evidence.

IV. INTERPRETATION OF ZONING ORDINANCE -- *Appeals from the building inspector's decisions are heard when it is alleged that the inspector has misapplied ordinance provisions in a particular case. Courts will give deference to ZBA interpretations (so long as the ZBA is neither irrational nor unreasonable) except when the question is one of pure legal interpretation of the code's terms.*

Sample Case:
Ravena-Coeymans-Selkirk Central School District v. Town of Bethlehem, 156 A.D.3d 179 (3rd Dep't 2017)
Facts: Petitioner school district inquired of respondent Town of Bethlehem whether any local law would prohibit it from replacing an existing traditional sign at one of its elementary schools with an electronic message board sign. The Town responded that such electronic signs were expressly prohibited under its zoning laws. Petitioner then applied for the necessary approvals in order to

install such a sign that had already been donated to the school. Although the Town promptly denied petitioner's application, the Town discovered that petitioner had, nevertheless, erected the electronic sign. The Town informed petitioner that it was in violation of various provisions of the Town's zoning law and needed to remove the sign, to which petitioner replied that, as a public school, it was not subject to local zoning requirements. As a precaution, petitioner then appealed the Town's variance denial to town ZBA. After a public hearing, the ZBA denied petitioner's application for a variance citing, among other things, traffic safety concerns. Petitioner commenced this combined CPLR article 78 proceeding and action for declaratory judgment seeking a declaration that it is immune and exempt from compliance with the Town's zoning law.

Holding: The Appellate Division upheld the lower court's decision finding the school district was not immune from town's zoning ordinances and the ZBA's denial was not arbitrary or capricious.

Judicial Standard: The Court clarified the holding in *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 510 N.Y.S.2d 861, 503 N.E.2d 509 (1986), that it never intended to render municipalities powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be, and renewed its rejection of the existence of any conclusive presumption of an entitlement to an exemption from zoning ordinances for schools.

Analysis: The Court noted that the holding in *Bagnardi* did not apply to the petitioner's application to install the electronic sign, finding that "these general rules...were interpreted by some courts to demand a full exemption from zoning rules for all educational and church uses—an interpretation that is mandated neither by the case law of our state nor common sense." Accordingly, the Court held that the presumed beneficial effects of schools and churches "may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like, because the inherent beneficial effects...must be weighed against their potential for harming the community". Furthermore, the Court declined to extend the "balancing of public interests" test and found that there was no duplication of review—nor the possibility of conflicting determinations—by state and local entities because the Education Department did not have jurisdiction over sign placement.

V. SPECIAL PERMITS -- *Special permits are "an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to conditions imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such conditions are met." See Nee York Town Law Section 274-b. A special use permit is generally granted if the applicant satisfies all of the conditions in the Zoning ordinance. Like variances, special permits run with the land. Only reasonable conditions can be applied.*

Sample Case:

Troy Sand & Gravel Co., Inc. et al., v. David F. Fleming Jr., as Supervisor of the Town of Nassau, et al., 156 A.D.3d 1295 (3d Dep't 2017) **(Character and appearance of a proposed use must be in harmony with the character and appearance of the surrounding neighborhood)**

Facts: Petitioner applied for a mining permit from the DEC to operate an open pit hard rock quarry on a 214 acre parcel located in a rural residential land use district that is zoned to allow commercial excavation by special use permit subject to site plan review. Petitioner applied for the required special use permit and site plan approval from the Town Board of the Town of Nassau. DEC approved the project and granted the mining permit. The parties have been engaged in related litigation that brought the matter before the Court on six prior occasions. In July 2015, over the protest of Petitioner, the Town Board and the Planning Board held a second public hearing on the application, after which the Town Board denied Petitioner's application as recommended by the Planning Board. Petitioner commenced an Article 78 proceeding seeking to annul the Town Board's determination.

Holding: The Appellate Division affirmed the Supreme Court's dismissal of the petition, upholding the Town Board's denial of a special use permit.

Judicial Standard: When a zoning law enumerates a use as allowable by a special use permit, it is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood. The character and appearance of the proposed use shall be in harmony with the character and appearance of the surrounding neighborhood.
Analysis: The Appellate Division notes that the "spirit and intent" of the rural residential land use district, the district in which Petitioner sought a special permit, is to maintain and protect the rural character and environmental quality of the Town while allowing for a mixture of housing types, home occupations and rural living opportunities. The Town is home to a considerable number of lakes, streams, wetlands and wildlife, including camp communities. Petitioner's proposed project, which would mine and excavate 79 of the 214 acre parcel with solid rock to be sold onsite or hauled off by truck, would create a highly intensive industrial land use in an area where only one small commercial entity currently exists. Further, the project would alter the essential character of the Town and the immediate neighborhood, which is comprised of residential lots and undeveloped forest land.

Note: Different Standards for Public Utilities: The Public Necessity Standard
It is important to note that where a zoning board is considering a variance application by a public utility, such as an electric company or wireless telephone company, there is a relaxed standard and the "unnecessary hardship" standard does not apply. See *Consolidated Edison Co. of New York, Inc. v. Hoffman*, 43 N.Y.2d 598 (1979); *Cellular Telephone Company d/b/a Cellular One v. Rosenberg*, 82 N.Y.2d 364 (1993).

In Hoffman and Rosenberg, the New York Court of Appeals held that since utilities such as Con Edison and Cellular One are required by law to provide such service, an applicant must be granted a variance if the proposed use is necessary for the applicant to render safe and adequate service. The Court further found that customer needs were to be considered and, "where the intrusion or burden on the community is minimal, the showing required by the utility shall be correspondingly reduced." Finally, the Court made clear that a zoning board may not exclude a utility from a community where the utility has shown a need for its facility.

This year, another variance case cited to the important Rosenberg decision but the case was in the context of an area variance. In *Decarr v. Zoning Bd. of Appeals for Town of Verona*, --- N.Y.S.3d (2017), the court found that the telecommunications provider seeking an area variance need only establish that there is a gap in service, the location of the proposed facility will remedy said gap and the facility presented a minimal intrusion. The applicant did not have to show that its proposal was the least intrusive means to address a significant gap in service like in a use variance case. In *Decarr*, Petitioners brought article 78 proceeding seeking to annul determination of ZBA, which granted a special use permit and area variance to telecommunications provider for construction of wireless telecommunications facility. The Appellate Division affirmed the Supreme Court's decision and upheld the ZBA's granting of a special permit and area variance to permit construction of the facility. The Court found that when addressing an area variance, telecommunications provider is not required to establish that their proposal is the "least intrusive means" to address a "significant gap" in service in order for the ZBA to grant their application. Rather the Court held that the provider only needs to establish the existence of a gap in service, that the location of the proposed facility would remedy that gap, and that the facility presented a minimal intrusion.

VI. THE TELECOMMUNICATIONS ACT, THE SHOT CLOCK AND THE 2014 ORDER REGARDING ELIGIBLE FACILITY REQUESTS

In 1996, Congress adopted the Telecommunications Act as "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced

telecommunications and information technologies and services."[2] 47 U.S.C. § 332(c)(7)(A) preserves the "authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities…." However, 47 U.S.C. § 332(c)(7)(B) makes it clear that there are five (5) limitations on state or local regulation of the placement, construction and modification of personal wireless facilities which are as follows:

1. Regulations shall not unreasonably discriminate among providers;
2. Regulations shall not prohibit or having the effect of prohibiting the provision of personal wireless services;
3. Regulations shall not regulate the placement, construction or modification of personal wireless service facilities on the basis of the "environmental effects of radio frequency emissions" so long as the facilities meet the FCC standards;
4. Any denial of an application to place, construct, or modify personal wireless services shall be in writing and supported by substantial evidence; and
5. Any request to install wireless service facilities shall be acted on within a "reasonable period of time".

After the enactment of the Telecommunications Act, the "reasonable period of time" language of 47 U.S.C. § 332(c) (7) (B) was subject to different interpretations and implementations among municipalities, which had the cumulative effect of delaying and hindering the deployment of personal wireless services nationwide. On November 18, 2009, the FCC issued a Declaratory Ruling regarding the timely review of applications for siting of wireless facilities, WT Docket NO. 08-165 ("Shot Clock Order" or "Shot Clock").[3] The Shot Clock Order was intended to ensure the timely review of "zoning approvals" and "siting requests" for wireless facilities. To this end, the Shot Clock Order finds that a "reasonable period of time" for a local government to act on a collocation application is 90 days, and 150 days for all other applications.[4] The attachment of transmission equipment to an existing structure, building or tower is referred to as a collocation. The Shot Clock provides municipalities with an initial 30 day period to review applications for completeness. If the municipality fails to reach a determination as to completeness of the application within 30 days, the application is deemed "complete" and the Shot Clock is deemed to run from the date of submission. If the municipality determines the application is incomplete and requests further information from the applicant, the applicable Shot Clock period begins to run from the later of (a) the applicant providing the requested information or (b) the expiration of the 30 day completeness review period. *See* *Bell Atlantic Mobile of Rochester, L.P. v. Town of Irondequoit*, 848 F.Supp.2d 391 (W.D.N.Y. 2012) (wireless application deemed complete upon the filing of supplemental papers required for the original application triggering Shot Clock). Despite the fact that it has been over 20 years since the TCA, municipalities have still been enacting moratoriums. However, as decided in *Upstate Cellular Network v. City of Auburn*, 2017 WL 2805820, the Court found that the moratorium did not toll the TCA's 150-day "shot clock".

On October 17, 2014, the Federal Communications Commission adopted the Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies order ("2014 Order"). Under the 2014 Order, municipalities shall approve an "eligible facilities request" within 60 days of receiving all materials required to determine whether the proposed facility is in fact an "eligible facilities request" or the request will be deemed granted. The 2014 Order deems an "eligible

[2] H.R. Conf. Rep. No. 104-458, at 113 (1996). The Telecommunications Act has been referred to by the U.S. Supreme Court as "an unusually important legislative enactment," establishing a national goal of encouraging the "rapid deployment of new telecommunications technologies." *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

[3] In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) To Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals as Requiring a Variance, 24 F.C.C.R. 13994, 1400, 2009 WL 3868811 (F.C.C. 2009), petition for review denied, 668 F.3d 229 (5th Cir. 2012) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

[4] Rule, ¶71.

facilities request" as the co-location of transmission equipment on a tower or base station that does not constitute a "substantial change". The 2014 Order lists six criteria for a "substantial change":

1. Increase in the height of a tower by more than 10% or 20 feet, or a base station by more than 10% or 10 feet, whichever is greater;
2. Protrusion from the edge of a tower more than twenty feet, or protrusion from the edge of a base station more than 6 feet;
3. The installation of more than four equipment cabinets; or
4. Excavation or deployment outside the site of the tower or base station.
5. If the existing concealment elements of the tower or base station would be defeated; or
6. It does not comply with conditions associated with the prior approval of construction other than conditions related to height, width, cabinets, or excavation.

See Village of Portchester 2016 Local Law No. 05 as an example of a municipality codifying the streamlined process for "eligible facilities requests".

Biography

Leslie J. Snyder is a founding partner with her late husband, David, of the law firm Snyder & Snyder LLP located in Tarrytown, New York. Leslie heads the firm's real estate transaction practice. She has appeared before numerous municipal agencies throughout the New York metropolitan area and garnered approvals for various projects ranging from retail centers, private schools, telecommunication switching facilities, medical facilities and transfer stations. She is a frequent lecturer on real estate, environmental and telecommunications matters. She is a graduate of the University of Pennsylvania's Wharton School, and New York University School of Law. Leslie has served as outside counsel to the Town of Harrison in connection with environmental, real estate and land use matters, and currently serves as director of the Westchester County Municipal Planning Federation.

Leonard Cohen, Esq. is an associate at Snyder & Snyder, LLP, concentrating in land use and environmental permitting. He graduated Pace Law School in 2017 (J.D. cum laude, Real Estate & Land Use Certificate) where Lenny was an Associate Editor for the PACE ENVIRONMENTAL LAW REVIEW. At Pace, Lenny was selected to participate in the New York State Pro Bono Scholars Program where he spent his final semester of law school as a student attorney at Legal Services of the Hudson Valley working on a variety of landlord/tenant and family law matters. Lenny was also chosen as the 2015/2016 American Planning Association - Planning and Law Division Daniel J. Curtin Fellow. As Fellow, Lenny organized a training webinar for municipal officials offering insight into how municipalities can manage sharing economy services such as Airbnb and Uber in their communities.

About the Firm

Snyder & Snyder, LLP is a regional law firm founded in 1990 with a team of 18 attorneys and paralegals. The firm maintains practice areas in land use and zoning, environmental law, real estate development, commercial transactions, telecommunications, and litigation. The firm's attorneys have been responsible for securing land use approvals for a wide variety of projects including wireless communications facilities, private schools, religious institutions, medical facilities, retail complexes, fiber optic networks, landfills and resource recovery plants. For additional information, please contact Leslie Snyder at lsnyder@snyderlaw.net, 914-333-0700.

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