

A PRIMER ON AREA VARIANCES IN NEW YORK

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Although municipal zoning regulations vary widely across the state, the process and standard by which a variance from those regulations may be granted is uniform.¹ This article surveys the state-wide area variance standard and the large body of New York State case law interpreting it. Its goal is to provide a clear and convenient reference for practitioners, board members, and officials looking to gain a basic understanding of area variance law and related issues.

Let's start at the beginning. As defined by state law, an "area variance" is "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."² In contrast, the more elusive use variance is defined as "[t]he 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."³ These standards were codified in early the 1990s to address certain ambiguities in the previously-existing body of variance law, particularly the law pertaining to area variances.⁴ Although generally whether an applicant requires a use or area variance is fairly clear, the courts of this state have been asked from time to time to delineate the line between the more flexible area variance and more stringent use variance. For example, courts have held that variances from off-street parking requirements,⁵ special use permit requirements prohibiting the establishment of a use within a certain distance of the same use,⁶ and dimensional requirements related to uses permitted pursuant to a use variance⁷ are in the nature of area variances. In contrast, variances to establish an accessory use on a lot without a principal use,⁸ or enable buildings on a lot to be configured in a manner which would allow them to be used for a prohibited use⁹ are in the nature of use variances. The guiding factor is generally whether the underlying use is permitted on the subject property. If it is, then a variance to relax zoning requirements should be classified as an area variance.¹⁰

If an area variance is what is required, the standard set forth below applies. Zoning boards of appeals *must* apply this standard, and may not supplement or replace it with elements of the former "practical difficulties" standard or import considerations not included in the factors listed below.¹¹

[T]he 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.

(c) 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.¹²

Whose Burden?

Unlike the use variance standard, which clearly places the burden of proof on the applicant,¹³ the area variance standard is not as direct. It provides that *the zoning board* may not grant the variance unless it determines that the benefit to the applicant outweighs the detriment to the health, safety, and welfare of the community. Although it is, of course, in the applicant's best interest to make the strongest record by introducing proof that the equities balance in its favor, when evaluating an area variance application the burden is on the zoning board to consider the facts and make a determination that is clearly supported by those facts; it should not rely on an applicant's lack of proof as a basis for denying a variance. Courts have annulled variance denials where the board failed to "clearly set forth 'how' and 'in what manner' the granting of a variance would be improper."¹⁴ If the subject of the variance application is a religious use, then the board has the added responsibility of suggesting measures to mitigate impacts to enable the variance to be granted.¹⁵

Highlighting the fact that a zoning board is required to affirmatively support by fact and reason its determination when granting *or* denying an area variance is not meant to suggest that the board's decision on an area variance application deserves any less deference than other administrative determinations. To the contrary, it is black letter law in this state that a determination of a zoning board of appeals will be upheld by a court unless the action taken by the board was illegal, arbitrary, or an abuse of discretion.¹⁶ It is simply a caution that courts are more likely to find a decision to be arbitrary and capricious when the record is not complete or a board's findings are not well reasoned.¹⁷

The Evidence

Zoning boards of appeals are quasi-judicial administrative agencies.¹⁸ Although the formal rules of evidence do not apply to their proceedings,¹⁹ several controlling principles govern the evidence that the board can consider. First, a zoning board of appeals must base its decision on the evidence in the record and reviewing courts will only look to the four corners of the administrative record and the board's findings when evaluating whether the decision had a rational basis.²⁰ In order for evidence to be considered part of the record, due process requires that it be introduced in a way and at a time that gives all interested parties the opportunity to review and respond to it.²¹ Typically evidence should be submitted in advance of or during the required public hearing on the application,²² or during a post hearing comment period specified by the board.²³ Zoning board members can use their familiarity with an area in which a subject property is located when evaluating a variance application,²⁴ however, if members wish to do so

they should incorporate that knowledge into the record (for example, through explanation at the hearing on the matter).²⁵

Municipal zoning regulations and application forms often specify the type of evidence that must be submitted by the applicant. Boards typically require a statement of how the variance requested satisfies the statutory standard, a plan showing the precise deviation from the code, photographs of the subject property and those surrounding it, and similar information. Although an applicant is not required to submit expert proof in support of a variance application,²⁶ it is often helpful, particularly on the topic of anticipated impacts. Where the record includes competing evidence of equivalent value (i.e. competing experts or competing lay observations), it is within the discretion of the board to evaluate it and determine its relative weight.²⁷ However, a zoning board may not favor lay testimony over expert testimony within the expert's field.²⁸

Likewise, although public participation in the public hearing on a variance application is welcome, and factual testimony from members of the public may properly be considered by the board,²⁹ a variance may not be denied based solely on generalized community opposition.³⁰ It is unclear from the case law when a statement offered by a community member crosses the line from permissible comment to generalized community opposition, and each case must be evaluated on its own facts. However, one hallmark feature of a board impermissibly succumbing to community opposition is a decision which discounts expert testimony in the record in favor of lay testimony on behalf of opposing community members.³¹

The Five Factors

As stated above, when considering whether to grant an area variance, a zoning board of appeals must balance the benefit to the applicant by the grant of the variance weighed against the detriment to the health, safety, and welfare of the community by such grant as informed by the consideration, weighing, and balancing of the five subsidiary factors, and no others.³² Courts will defer to boards that correctly apply this standard; boards that do not are routinely reversed.³³ Although at times courts will search a zoning board's record to evaluate whether the board properly considered the five factors and applied the statutory test,³⁴ such an approach is the exception rather than the rule. Courts will normally assess the validity of a variance decision based on the board's own findings. Therefore, boards should address each factor and the balancing standard as a whole in a written resolution granting or denying the variance.³⁵

Although the factors are exclusive, they are also broad and allow for the consideration of a wide variety of information.³⁶ Moreover, while the board must consider, weigh and balance the evidence in light of the five-factors, it does not have to justify its decision with supporting evidence for each of them, it just has to consider and weigh them in the application of the overriding balancing test.³⁷ Each of the five factors is addressed in more detail below.

a. 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.

The extent to which the granting of a variance will negatively impact the character of the neighborhood or surrounding properties is arguably the most important of the five factors; it is no coincidence that it is first.³⁸ Boards have wide discretion in what they may consider under this broad heading, and the relevant considerations will vary depending upon the character of the neighborhood, the configuration of the property, the configuration of surrounding properties, the proposed improvements, and the proposed use. Considerations relevant under this factor typically include, but are not necessarily limited to, the consistency or lack thereof of the proposed deviation from the bulk and area requirements with the density and physical aspects of surrounding properties,³⁹ traffic and parking impacts,⁴⁰ aesthetic impact,⁴¹ and noise and glare.⁴² Boards should also consider whether granting the variance will achieve a community objective, such as the demolition or reduction of a non-conforming structure.⁴³ Boards that do not consider the impact of a variance on neighborhood character or base their determination on factors not supported by the record will find their decisions reversed.⁴⁴

Whether the grant of a variance will set a negative precedent is also a permissible consideration.⁴⁵ As a quasi-judicial body, a zoning board of appeals must either adhere to its prior results or explain the factual or legal basis for departing from such results.⁴⁶ Although even fairly minor distinctions can be a basis for a zoning board to deviate from a prior decision provided the board explains its reasons for such deviation,⁴⁷ courts nonetheless give zoning boards great latitude to consider a decision's impact on precedent in its application of the variance standard.⁴⁸

For example, in *Russo v. City of Albany Zoning Board of Appeals*,⁴⁹ Petitioner Russo sought an area variance to permit him to park his vehicle in his home's front yard in contravention of Albany's prohibition against such activity. The board denied Mr. Russo's variance application finding, among other things, that the proposed configuration would cause an undesirable change in the character of the neighborhood. In support of this finding, the board cited proof demonstrating that Mr. Russo's parking configuration differed from other properties on which front yard parking occurred and "would undermine existing zoning regulations by encouraging further deviations where no unique hardship exists and set a poor precedent for other property owners in the neighborhood" to the detriment of the neighborhood's character.⁵⁰ The Third Department specifically affirmed this finding as a basis to conclude that the proposed variance would have a negative impact on neighborhood character.⁵¹

*Lodge Hotel Inc. v. Town of Erwin Zoning Board of Appeals*⁵² raises the somewhat novel question of whether the character of the neighborhood that forms the baseline for the evaluation of this factor is the existing condition or the character the municipality hopes to achieve through zoning and comprehensive planning. In that case, the lower court held that the existing, not the aspirational, character of the neighborhood controls, but the Fourth Department's affirmation of the lower court's decision leaves some room for doubt about whether and to what extent the community's land use goals can be considered.

In *Lodge Hotel, Inc.*, the applicant owned property in a generally commercial area. After the applicant purchased the property, the town rezoned it to prohibit retail use. The rezoning occurred as a part of a larger comprehensive planning and rezoning effort by the town which sought to transform the area in the vicinity of the property into a pedestrian-friendly downtown. The applicant obtained a use variance to permit construction of a retail tractor supply store on its property and then sought three area variances from provisions of the town's code to construct a building: (1) without a functional second story; (2) which would be taller than permitted in the town's code; and (3) which would lack required second floor windows. The zoning board of appeals denied the first and third variances and granted the second to a lesser extent than requested. The Supreme Court, Stuben County, reversed the denial of the first variance, remanded the second to the board for further consideration, and affirmed the denial of the third. When analyzing the proposed effect of the variances on the character of the neighborhood the board used the aspirational character included in the town's comprehensive plan, rather than the existing character, as the basis of its analysis. The lower court found this to be in error, reasoning that:

While the work the Town has put into its plan is commendable, denying area variances based upon what a municipality hopes the neighborhood will be like in some distant future is an impermissible restriction on the use of property not intended by the applicable statute and is contrary to case law. Courts have consistently placed great reliance on the effect that the granting of an area variance would have on the character of the neighborhood, and the analysis has always been to determine whether the plan sought to be implemented by the area variance is out of character with the *existing* scheme of development (emphasis original).⁵³

The Fourth Department affirmed, although its decision could be read to modify the above-quoted language. The Fourth Department held that:

The evidence presented by petitioner at the hearing established that the variance was necessary to accommodate the inventory of the store and that, because of the nature of the retail sales, it could not utilize a second floor. *We note that, although respondent properly considered its comprehensive plan for future development of the area to have a "walkable two story look,"* the record establishes that petitioner accommodated that comprehensive plan by its proposal to install windows that would give the appearance of a two-story building. Respondent's findings that the vaulted ceiling would break the "cohesiveness" of that plan and that the building "could not be used for anything else" in the event that it became vacant are not supported by substantial evidence (emphasis added).⁵⁴

The Fourth Department's reference to the board's "proper" consideration of the town's comprehensive plan suggests that the character of the neighborhood sought to be achieved through the comprehensive plan may be relevant in the application of the variance standard. The takeaway from *Lodge Hotel* is a bit unclear and will need to be clarified by the appellate courts.

But for applicants and boards perhaps the significance of the holding should be that the aspirational character of the neighborhood, if clearly defined in a formal comprehensive plan, can be considered and addressed.

b. Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance.

Although there are not many cases interpreting this factor, generally an applicant should explain why an area variance is the best way to accomplish the benefit it is trying to achieve. Typically, that will mean exploring whether additional land can be acquired to eliminate the need for the variance in instances in which surrounding vacant land is available⁵⁵ or whether the project can be redesigned in a way that achieves the benefit the applicant is seeking and eliminates or lessens the need for the variance.⁵⁶ When considering alternatives, it is important that they continue to accomplish the applicant's goals. For example, in *Baker v. Brownlie*,⁵⁷ the Second Department annulled the denial of a variance to permit the applicants to construct a patio on their property. The court rejected the board's finding that the patio could be relocated to a conforming location, and thus other alternatives to the variance were available to the applicant, when the applicants' goal was to construct a patio on their Shelter Island property facing Dering Harbor and the location suggested by the board lacked a view of the water.⁵⁸

Similar to this factor is the directive, presumably applicable following the completion of the consideration of the five factors, that boards should only grant the minimum variance necessary.⁵⁹ Boards may impose reasonable conditions (see discussion below) or may grant smaller or fewer variances than requested,⁶⁰ however, the benefit that the applicant is seeking to achieve should be considered. An effort by a board to minimize the variance or its impacts that is not practical or reasonable will not pass judicial muster.⁶¹

c. Whether the requested area variance is substantial.

Zoning boards of appeals and courts appear unsure of how to apply this factor. While most boards and courts will view a large numerical deviation from a municipal zoning ordinance as "substantial", the weight they will give that finding is heavily dependent on, and cannot be separated from, the impact that deviation will have on the community.⁶² Thus courts have upheld the grant of substantial variances because of a lack of associated impacts⁶³ and have reversed denials of substantial variances absent proof that the deviation will cause negative impacts.⁶⁴ However, where the grant of a variance is expected to negatively impact the surrounding community, the fact that it is substantial, meaning large in size, is often cited as additional support for the variance's denial.⁶⁵

Typically the category of area variance requested (e.g. variances from setbacks, height limitations, or coverage requirements) does not play a significant role in a zoning board's application of the statutory test. One potential exception to this rule is a variance that will permit the creation of substandard lots. Although such variances are granted from time to time,⁶⁶ the burden on the applicant to demonstrate its benefit appears heavier in cases in which it is seeking

to create and develop new nonconforming lots.⁶⁷ Although substantiality is not the only consideration in the decision on such variances, it is often cited as a basis for denial.⁶⁸

d. Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district.

At times it can be difficult to distinguish between impacts to the physical environment, as referenced in factor four, and impacts on the general character of the neighborhood identified in factor one. In practice, often factors one and four are considered together. However, impacts to the physical environment may become particularly relevant when the improvements that are the subject of the variance could affect, in either a positive or negative way, environmentally sensitive land such as wetlands.⁶⁹ Additionally, applicants and boards may wish to pay particular attention to this factor when the variance requested is a part of a project undergoing a coordinated review under the State Environmental Quality Review Act (“SEQRA”)⁷⁰ in which the zoning board is not lead agency. In *Luburic v. Zoning Board of Appeals of the Village of Irvington*,⁷¹ the Second Department annulled the village zoning board’s denial of a site capacity variance needed to construct a single family residence because the board’s findings with respect to environmental impacts were contrary to those of the SEQRA lead agency. Although the board rightly concluded that the variance was substantial and the applicant’s hardship was self-created, it failed to recognize and adequately consider the Village planning board’s conclusion that there would be no significant environmental impacts based on the applicant’s commitment to working with it to achieve a mutual acceptable project plan. The court held that:

the record reveals that, after approximately three years of, inter alia, working with the Village of Irvington Planning Board . . . , engaging in public hearings, and consulting with various experts, the petitioner obtained the requisite permit approval to build on the subject property if certain conditions were met. The Planning Board, as the lead agency under [SEQRA] issued a “Conditional Negative Declaration,” concluding that, so long as certain conditions were met, the proposed construction would not have a significant adverse effect on the environment. Despite the Planning Board’s extensive environmental review of the petitioner’s plans, the ZBA concluded that the petitioner’s proposed construction would have an adverse impact on the physical or environmental conditions of the neighborhood because the conditions imposed by the Planning Board were “impractical” and “implausible.” However, given the Planning Board’s role in addressing environmental concerns . . . and in the absence of any further evidence to support its conclusion, the ZBA’s finding on this factor lacked a rational basis.⁷²

e. 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 variance.

While fatal to use variances, self-created hardships are not a death knell to area variances.⁷³ Indeed, the statute expressly provides that the fact that the applicant’s hardship is self-created does not preclude the granting of the variance.⁷⁴ Like the substantiality factor, the

self-created nature of the variance must generally be considered through the lens of the impact the variance will have if it is granted.⁷⁵ This factor often plays a more prominent role when the variance is required because the applicant made improvements or engaged in conduct contrary to the law or with the intention of not complying with the law without seeking first seeking the required approvals,⁷⁶ or engaged in other egregious conduct.

For example, in *Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh*,⁷⁷ the applicant received site plan approval from the Town's planning board to construct a furniture store on its property. The plan described the store as having a main floor and a cellar. As reflected in the Second Department's decision, during the site plan review process the applicant told the planning board that the cellar would be used for storage and mechanicals only; not as retail space. The required minimum number of parking spaces could be provided on the site if the building's cellar was not used for retail space, but would not be achieved if the cellar were devoted to that purpose. During construction, town's building inspector observed that the applicant was installing partitions, walls, moldings, finishes, and carpeting in the cellar and asked that the applicant provide a plan expressly labeling the cellar as "storage. Notwithstanding the building inspector's directive, the applicant used the cellar as a display area and, in the fall of 2003, the town served it with notices of violation alleging that the cellar was impermissibly being used as retail area in direct contravention of the representations the applicant made to the planning board and building department. In response to the notice of violation, the applicant applied to the respondent zoning board for variances from the town's floor area ratio and off-street parking requirements, and asserted that it was "unaware that it could not utilize the basement for retail sales."⁷⁸ The zoning board held a multi-session public hearing at which the applicant again maintained its ignorance. The applicant also submitted expert proof supporting its contention that the showroom/retail use of the cellar did not adversely impact the goals of the town's parking requirements, a position with which the board's expert agreed. Neighboring property owners spoke against the granting of the variance, citing the applicant's failure to comply with site plan conditions and arguing that granting the variance would result in negative impacts to the community. The zoning board ultimately denied the variances, basing its decision on the fact that:

Caspian had continuously deceived the Town as to the intended use of the cellar, such that the benefit of granting the variances was outweighed by the detriment that would be caused to the Town by allowing a diminution of respect for its planning, building, and tax laws. The ZBA found that the retail use of the cellar burdened neighboring property owners in terms of noise, truck movement, and traffic tie-ups; that the variance requests were substantial, as they represented a 100% increase in permissible FAR and a 50% decrease in permissible parking; and that Caspian's need for the variances was self-created by its deceptive conduct.⁷⁹

The applicant appealed the denial, arguing that it had always understood that the cellar could be used for a showroom and that its construction as such was in plain view to the building inspector. It asked the court to direct the board to grant the requested variance. Supreme Court, Westchester County, annulled the denial of the variances and remitted to the matter to the zoning board for further review finding that although "as a matter of fact, [the applicant] had deceived

the Town regarding the intended use and purpose of . . . the cellar” deception is not one of the statutory factors and the board’s reliance on the applicant’s lack of candor prevented it from properly assessing the five factors.⁸⁰ The Second Department reversed. It held that the board and the lower court had a basis for finding that the applicant deceived the town with respect to its proposed use of the cellar, and that, although the zoning board could not rely on the applicant’s deception standing alone as a basis for denial, it could be considered as a part of the self-created hardship component of the statutory balancing test. The Court reasoned as follows:

Town Law § 267–b(3) also requires consideration of whether the applicant's need for variances is self-created. While the self-imposed nature of a hardship is fatal to a use variance application. . . , the self-imposed nature of a hardship is significant, but not determinative, to an area variance An area variance may be denied based in part upon the self-created nature of the difficulty as viewed among other relevant factors. . . . Here, the ZBA determined that Caspian's difficulties were self-created by virtue of using the cellar of the building as a showroom without seeking or obtaining the required municipal approvals We agree with the ZBA that under the peculiar circumstances of this matter, Caspian's self-created difficulties represent a particularly compelling statutory factor, given its repeated and documentable misrepresentations to the planning board, building department, tax assessor, and zoning board, both prior to and after the issuance of the Town's site plan approval and certificates of occupancy, as to its true intended use of the cellar.⁸¹

Conditions

If a zoning board decides to grant an area variance, it may impose reasonable conditions to mitigate anticipated impacts of the variance. On this topic, Court of Appeals has explained that:

A zoning board may, where appropriate, impose “reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property”, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit Such conditions might properly relate “to fences, safety devices, landscaping, screening and access roads relating to period of use, screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area” Similarly, we have upheld, as a condition of rezoning property for commercial use, the imposition of a requirement that the owners of the property execute and record restrictive covenants relating to the maximum area to be occupied by buildings, the erection of a fence, and the planting of shrubbery Such conditions are proper because they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of that use. Conditions imposed to protect the surrounding area from a particular

land use are consistent with the purposes of zoning, which seeks to harmonize the various land uses within a community

On the other hand, zoning boards may not impose conditions which are unrelated to the purposes of zoning Thus, a zoning board may not condition a variance upon a property owner's agreement to dedicate land that is not the subject of the variance application Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located Such conditions are invalid because they do not seek to ameliorate the effects of the land use at issue, and are thus unrelated to the legitimate purposes of zoning.⁸²

Courts will affirm conditions that comply with this standard and will annul conditions that do not.⁸³ Boards and their counsel should be aware of the potentially significant impact of a defective condition, which “may be annulled although the variance is upheld[.]”⁸⁴ Further, in order to be enforceable, it is the zoning board’s obligation to ensure that the condition is clearly stated in its variance determination.⁸⁵

Other Considerations

Although most of the area variance case law pertains to the application or mis-application of the statutory standard, several cases address scenarios that do not directly relate to the test. Such cases have offered guidance for applicants and boards as follows:

- When a quorum of the board is present and participates in the proceedings on a variance application by actually casting votes, a tie vote failing to garner a majority to grant the variance is a denial and the aggrieved party may seek review of that denial pursuant to CPLR Article 78.⁸⁶ The fact that the Board was unable to agree to adopt findings on the application because of its inability to garner a majority to make a decision does not deprive the court of its ability to review the denial. The court will search the record and decide whether the denial had a rational basis.⁸⁷
- A board’s failure to file its decision with the municipal clerk within five days of the date the decision was rendered, as required by Town Law §267-a(9), Village Law §7-712-a(9) and General City Law §81-a(9), generally does not mandate the decision’s invalidation.⁸⁸
- The duration of a variance may be extended by a zoning board after it has expired provided that the applicant’s request for its extension is received by the board prior to the variance’s expiration. Moreover, “A zoning board's authority to issue variances includes the authority to modify previously imposed time limitations if an application for an extension is made while the variance is still valid. Such an application need not be treated as a new application for which public notice and a hearing are necessary.”⁸⁹

Conclusion

New York's reporters are filled with instructions on how to craft and analyze area variance requests under the state law standard. Although the case law is full of nuance, in general, boards that: (i) consider the statutory standard, (ii) ensure that the record includes all relevant and supporting facts, and (iii) memorialize their decision in an written resolution addressing each of the five factors and how they informed the board's application of the overriding balancing test will almost always enjoy the approval of the courts.

¹ *Cohen v. Board of Appeals of Village of Saddle Rock*, 100 N.Y.2d 395, 764 N.Y.S.2d 64 (2003)(holding that Village Law §7-712-b(3), which sets forth the statutory area variance standard, preempts the field in this area of regulation and prevents localities from adopting inconsistent variance standards).

² Town Law §267(1)(b); Village Law §7-712(1)(b); General City Law §81-b(1)(b)(emphasis added).

³ Town Law §267(1)(a); Village Law §7-712(1)(a); General City Law §81-b(1)(a)(emphasis added).

⁴ See discussion of the codification of the variance standard in *Sasso v. Osgood*, 86 N.Y.2d 374, 380-382, 633 N.Y.S.2d 259, 261-263 (1995).

⁵ *Colin Realty Co., LLC v. Town of North Hempstead*, 24 N.Y.3d 96, 996 N.Y.S.2d 559 (2014).

⁶ See *Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297, 778 N.Y.S.2d 438 (2004); see also Town Law §274-b(3); Village Law §7-725-b(3); and General City Law §27-b(3)(providing that a zoning board can grant area variances to modify special use permit criteria).

⁷ *Scarsdale Shopping Ctr. Assoc., LLC v. Bd. of Appeals on Zoning for City of New Rochelle*, 64 A.D.3d 604, 882 N.Y.S.2d 308 (2d Dep't 2009)(a use variance is not required to expand a use that previously received a use variance, but an area variance may be required, based on the circumstances, for such expansion).

⁸ *Barsic v. Young*, 22 A.D.3d 488, 489, 801 N.Y.S.2d 829, 831 (2d Dep't 2005)(holding that petitioner required a use variance to use his lot for the principal use of "outside storage of materials" when such use was permitted in the applicable zoning district only "in conjunction with and as accessory to the use of the main building or structure erected on the premises.").

⁹ *Doran v. Lewis*, 309 A.D.2d 1183, 764 N.Y.S.2d 899 (4th Dep't 2003)(holding that a variance to raze and reconstruct a garage on residential property to be taller than permitted in the city's code and to include a living quarters with a kitchen was a use variance since detached structures including a kitchen were not a permitted use in the underlying district).

¹⁰ *Colin Realty, Co., LLC*, 24 N.Y.3d at 112, 996 N.Y.S.3d at 568; *Mobil Oil Corp. v. Vil. of Mamaroneck Bd. of Appeals*, 293 A.D.2d 679, 740 N.Y.S.2d 456 (2d Dep't 2002).

¹¹ *Cohen, supra*; *Caspian Realty, Inc.*, 68 A.D.3d 62, 886 N.Y.S.2d 442 (2d Dep't 2009); *Mimassi v. Town of Whitestown Zoning Bd. of Appeals*, 124 A.D.3d 1329, 1330, 997 N.Y.S.2d 888, 889 (4th Dep't 2015)("Here, respondent based its determination upon factors and other criteria relevant to the former 'practical difficulty' test, which is no longer followed, rather than on the factors set forth in Town Law § 267-b (3)(b)(citations omitted)").

¹² Town Law §267-b(3); Village Law §7-712-b(3); General City Law §81-b(4).

¹³ See, e.g., Town Law §267-b(2)(b)("No such use variance shall be granted by a board of appeals without a showing by the applicant that the applicable zoning regulations and restrictions have caused an unnecessary hardship (emphasis added)").

¹⁴ *Marina's Edge Owner's Corp. v. City of New Rochelle Zoning Bd. of Appeals*, 129 A.D.3d 841, 842-43, 11 N.Y.S.3d 232, 233 (2d Dep't 2015); *Goldsmith v. Bishop*, 264 A.D.2d 775, 776, 695 N.Y.S.2d 381, 382 (2d Dep't 1999)("Without any valid independent evidence to controvert the petitioner's evidence, the findings of the ZBA have no rational basis, are not supported by substantial evidence, and its determination is arbitrary and capricious"); *Campbell v. Town of Mount Pleasant Zoning Bd. of Appeals*, 84 A.D.3d 1230, 923 N.Y.S.2d 699 (2d Dep't 2011)(record lacked evidence to support denial); *Cacsire v. City of White Plains Zoning Bd. of Appeals*, 87 A.D.3d 1135, 930 N.Y.S.2d 54 (2d Dep't 2011).

¹⁵ *Gospel Faith Mission Intern., Inc. v. Weiss*, 112 A.D.3d 824, 825, 977 N.Y.S.2d 333,335 (2d Dep't 2013)("[W]hile 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." ... A local zoning board is required to suggest measures to accommodate the proposed

religious use while mitigating adverse impacts” (citations omitted).); *Capriola v. Wright*, 73 A.D.3d 1043, 900 N.Y.S.2d 754 (2d Dep’t 2010); *Genesis Assembly of God v. Davies*, 208 A.D.2d 627, 617 N.Y.S.2d 202 (2d Dep’t 1994).

¹⁶ *Pecoraro v. Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 608, 781 N.Y.S.2d 234 (2004); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770, 809 N.Y.S.2d 98, 103 (2d Dep’t 2005) (clarifying that since zoning boards are quasi-judicial and quasi-administrative in nature and their hearings are informal, determinations of such agencies are reviewed under the “arbitrary and capricious” standard of CPLR 7803(3), and not the “substantial evidence” standard of CPLR 7803); *Harris v. Zoning Bd. of Appeals of Town of Carmel*, 137 A.D.3d 1130, 1131, 27 N.Y.S.3d 660, 661 (2d Dep’t 2016)(“a zoning board’s determination should be sustained if it is not illegal, is not arbitrary and capricious, and has a rational basis”).

¹⁷ *See, e.g., Marrov v. Libert*, 40 A.D.3d 1100, 836 N.Y.S.2d 691 (2d Dep’t 2007); *Rosasco v. Vil. of Head of Harbor*, 52 A.D.3d 611, 859 N.Y.S.2d 731 (2d Dep’t 2008); *Millpond Mgt., Inc. v. Town of Ulster Zoning Bd. of Appeals*, 42 A.D.3d 804, 839 N.Y.S.2d 355 (3d Dep’t 2007).

¹⁸ *Knight v. Amelkin*, 68 N.Y.2d 975, 510 N.Y.S.2d 550 (1986); *Halperin, supra*.

¹⁹ *Merlotto v. Town of Patterson Zoning Bd. of Appeals*, 43 A.D.3d 926, 929, 841 N.Y.S.2d 650, 653 (2d Dep’t 2007); *Halperin, supra*.

²⁰ *Merlotto*, 43 A.D.3d at 930, 841 N.Y.S.2d at 654 (holding that the lower court improperly considered photographs introduced by the petitioner in an Article 78 proceeding denying them an area variance because the photographs were not in the administrative record before the ZBA); *Kaufman v. Inc. Vil. of Kings Point*, 52 A.D.3d 604, 860 N.Y.S.2d 573 (2d Dep’t 2008)(A litigant is required to address his or her “complaints initially to administrative tribunals, rather than to the courts, and to exhaust all possibilities of obtaining relief through administrative channels before appealing to the courts); *Millpond Management Inc.*, A.D.3d at 805, 839 N.Y.S.2d at 356 (fn1: “We agree with Supreme Court’s decision not to consider affidavits submitted by two of respondent’s members to the extent that they addressed grounds beyond the one set forth in respondent’s determination, as these post hoc rationalizations are not permitted.”)

²¹ *Stein v. Bd. of Appeals of Town of Islip*, 100 A.D.2d 590, 473 N.Y.S.2d 535 (2d Dep’t 1984).

²² *See* Town Law §267-a(7), Village Law §7-712-a(7) and General City Law §81-a(7) (zoning boards must hold a public hearing on a variance application).

²³ *Stein*, 100 A.D.2d at 591, 473 N.Y.S.2d at 536 (board improperly considered evidence submitted after the close of the public hearing); *Hampshire Mgt. Co. v. Nadel*, 241 A.D.2d 496, 497, 660 N.Y.S.2d 64, 65-66 (2d Dep’t 1997)(“We note that while the Zoning Board, in making its determination, was permitted to consider, and properly disclosed its reliance upon, its members’ personal knowledge and observations of the site . . . it should not have relied on and considered an unspecified newspaper article, which was published the day after the public hearings were closed in this matter, without affording the petitioner an opportunity to rebut the information contained therein [citations omitted]”); *Greenvale Civic Ass’n, Inc. v. Zoning Bd. of Appeals of Town of Oyster Bay*, 248 A.D.2d 714, 670 N.Y.S.2d 549 (2d Dep’t 1998) (holding that the zoning board properly considered evidence submitted during a specified post-hearing comment period); *Sunset Sanitation Serv. Corp. v. Bd. of Zoning Appeals of Town of Smithtown*, 172 A.D.2d 755, 569 N.Y.S.2d 141 (2d Dep’t 1991)(zoning board improperly considered planning department report after the close of the public hearing); *but see Applebaum v. Vil. of Great Neck Bd. of Appeals*, 138 A.D.3d 830, 28 N.Y.S.3d 459 (2d Dep’t 2016)(permitting a zoning board of appeals to consider letters from the Village’s fire and building departments, presumably after the close of the public hearing, even though an opponent did not get to respond to the letters because they did not contain any new factual allegations and were prepared by municipal officials without a vested interest in the outcome of the proceeding).

²⁴ *Friedman v. Bd. of Appeals of Vil. of Quogue*, 84 A.D.3d 1083, 1085, 923 N.Y.S.2d 651, 653 (2d Dep’t 2011)(“in making that determination, the personal observations of members of the Board may be considered”); *Sacher v. Vil. of Old Brookville*, 124 A.D.3d 902, 903, 3 N.Y.S.3d 69, 71 (2d Dep’t 2015)(“making that determination, the personal observations of members of the zoning board may be considered”).

²⁵ *Stein*, 100 A.D.2d 590 at 591, 473 N.Y.S.2d at 536 (“A zoning board of appeals is not constrained by the rules of evidence and may conduct informal hearings In addition, it may act of its own knowledge, so long as its return sets forth the facts known to its members but not otherwise disclosed The findings of the board must disclose all evidence upon which it relied in reaching a decision [citations omitted]”).

²⁶ *Ifrah v. Utschig*, 98 N.Y.2d 304, 309, 746 N.Y.S.2d 667, 669 (2002); *Morando v. Town of Carmel Zoning Bd. of Appeals*, 81 A.D.3d 959, 960, 917 N.Y.S.2d 672 (2d Dep’t 2011)(“In determining whether to grant an area variance,

‘[s]cientific or other expert testimony is not necessarily required; objections based upon facts may be sufficient’”); *Merlotto*, 43 A.D.3d at 929, 841 N.Y.S.2d at 653.

²⁷ See *Retail Prop. Trust v. Bd. of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 196, 746 N.Y.S.2d 662, 666 (2002) (“expert opinion regarding traffic patterns, when presented, may not be disregarded in favor of generalized community opposition . . . However, where there are other grounds in the record on which to base denial, such as contrary expert opinion regarding traffic conditions, deference must be given to the discretion and commonsense judgments of the board.”); *Jonas v. Stackler*, 95 A.D.3d 1325, 1328, 945 N.Y.S.2d 405, 408 (2d Dep’t 2012); *White Castle System, Inc. v. Board of Zoning Appeals Town of Hempstead*, 93 A.D.3d 731, 732, 940 N.Y.S.2d 159, 162 (2d Dep’t 2012).

²⁸ See *Greenfield v. Bd. of Appeals of Vil. of Massapequa Park*, 21 A.D.3d 556, 800 N.Y.S.2d 728 (2d Dep’t 2005) (annulling board’s denial of a variance because it was based on generalized community opposition).

²⁹ See *Ifrac v. Utschig*, 98 N.Y.2d at 308, 746 N.Y.S.2d 669.

³⁰ *Greenfield, supra*; *Marina's Edge Owner's Corp.*, 129 A.D.3d at 841, 11 N.Y.S.3d at 233; see *Ramapo Pinnacle Properties, LLC v. Vil. of Airmont Planning Bd.*, 145 A.D.3d 729, 730–731, 45 N.Y.S.3d 105, 107 (2d Dep’t 2016) (“Although scientific or other expert testimony is not required in every case to support a zoning board’s determination, the board may not base its decision on generalized community objections’ . . . In contrast, a zoning board’s reliance upon specific, detailed testimony of neighbors based on personal knowledge does not render a variance determination the product of generalized and conclusory community opposition. (citations omitted)”).

³¹ *Necker Pottick, Fox Run Woods Builders Corp. v. Duncan*, 251 A.D.2d 333, 335, 673 N.Y.S.2d 740, 741 (2d Dep’t 1998); *Gonzalez v. Zoning Bd. of Appeals of Town of Putnam Valley*, 3 A.D.3d 496, 497–98, 771 N.Y.S.2d 142 (2d Dep’t 2004) (“The generalized and unsubstantiated concerns of neighboring owners, upon which the Zoning Board based its determination, that the character of the neighborhood would be detrimentally changed if the petitioner’s application for variances was granted, were unsupported by any empirical data or expert testimony and were insufficient to counter the evidence presented by the petitioner”).

³² See *Caspian Realty, Inc.*, 68 A.D.3d at 70-71, 886 N.Y.S.2d at 449. One potential exception from the rule that only the five factors may be considered are variances pursuant Town Law §280-a. In such applications the board may also consider whether the applicant “has the lawful right to build or utilize a proposed access road.” *Morando*, 81 A.D.3d at 960, 917 N.Y.S.2d at 674.

³³ *Kaufman*, 52 A.D.3d at 608, 860 N.Y.S.2d at 556-557 (“since the record does not reflect that the BZA considered each of the five factors enumerated in the statute, based upon the evidence before it, its determination was properly annulled.”); *Margaritis v. Zoning Bd. of Appeals of Inc. Vil. of Flower Hill*, 32 A.D.3d 855, 821 N.Y.S.2d 611 (2d Dep’t 2006) (reversing grant of variance because board did not issue specific findings, nor did it correctly apply the standard); *Mimassi*, 124 A.D.3d at 1330, 997 N.Y.S.2d at 889; *Nye v. Zoning Bd. Of Appeals of Town of Grand Is.*, 81 A.D.3d 1455, 917 N.Y.S.2d 499 (4th Dep’t 2011); *Hannett v. Scheyer*, 37 A.D.3d 603, 830 N.Y.S.2d 292 (2d Dep’t 2007); *Josato, Inc. v. Wright*, 288 A.D.2d 384, 733 N.Y.S.2d 214 (2d Dep’t 2001); *Miller v. Zoning Bd. of Appeals of Town of E. Hampton*, 276 A.D.2d 633, 714 N.Y.S.2d 908 (2d Dep’t 2000); *Millpond Mgt., Inc.*, 42 A.D.3d at 805-806, 839 N.Y.S.2d 356-357 (3d Dep’t 2007).

³⁴ *Frank v. Zoning Bd. of Town of Yorktown*, 82 A.D.3d 764, 917 N.Y.S.2d 697 (2d Dep’t 2011); *Fund for Lake George, Inc. v. Town of Queensbury Zoning Bd. of Appeals*, 126 A.D.3d 1152, 6 N.Y.S.3d 171 (3d Dep’t 2015); *Jonas*, 95 A.D.3d at 1328, 945 N.Y.S.2d at 408.

³⁵ *Margaritis*, 32 A.D.3d at 856, 821 N.Y.S.2d at 613 (annulling a zoning board’s determination because it “failed to issue specific findings or reasons that it relied upon in making its determination to grant the variance.”).

³⁶ *Caspian Realty, Inc.*, 68 A.D.3d at 74, 886 N.Y.S.2d at 452 (holding that although the applicant’s deceptive conduct could not be considered on its own, it was properly considered under the self-created hardship factor of the variance standard)

³⁷ *Patrick v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, 130 A.D.3d 741, 15 N.Y.S.3d 50 (2d Dep’t 2015); *John Hatgis, LLC v. DeChance*, 126 A.D.3d 702, 5 N.Y.S.3d 236 (2d Dep’t 2015); *Harris*, 137 A.D.2d at 1131, 27 N.Y.S.2d at 662.

³⁸ See *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 512 (Sup. Ct. Stuben Co. 2007), *affd*, 43 A.D.3d 1447, 843 N.Y.S.2d 744 (4th Dep’t 2007) (“While no one factor is dispositive, the effect on the prevailing character of the neighborhood is a highly significant consideration in evaluating an area variance.”)

³⁹ Density and physical impacts: *Defreestville Area Neighborhood Ass'n, Inc. v. Planning Bd. of Town of N. Greenbush*, 16 A.D.3d 715, 790 N.Y.S.2d 737 (3d Dep’t 2005) (zoning board properly considered all aspects of a

proposed project, including density relative to density in the surrounding neighborhood, traffic impacts, the provision of recreation space and parking in its determination to grant the requested area variance); *Gonzalez*, 3 A.D.3d at 497, 771 N.Y.S.2d at 144 (“The record reveals the existence of several substandard lots adjacent to, or across the street from, the subject parcel, and other nearby nonconforming garages, similar to that sought to be erected by the petitioner, some of which were granted area variances from the street setback requirements of the relevant zoning ordinance.”); *Crystal Pond Homes, Inc. v. Prior*, 305 A.D.2d 595, 759 N.Y.S.2d 366 (2d Dep’t 2003); *Traendly v. Zoning Bd. of Appeals of Town of Southold*, 127 A.D.3d 1218, 1219, 7 N.Y.S.3d 544, 545-546 (2d Dep’t 2015)(upholding board’s determination to deny the requested variance because it would allow the applicant to create the most nonconforming lot in a unique community); *Kaiser v. Town of Islip Zoning Bd. of Appeals*, 74 A.D.3d 1203, 1205, 904 N.Y.S.2d 166, 168-169 (2d Dep’t 2010)(upholding board’s denial of a variance to permit the applicant to install an above ground pool on its substandard lot finding that there were no swimming pools on substandard lots within 500 feet of the petitioners’ property. Moreover, within the relevant community of approximately 300 homes, only two permanent above-ground pools were permitted by prior variances); *Allstate Properties, LLC v. Bd. of Zoning Appeals of Vil. of Hempstead*, 49 A.D.3d 636, 637, 856 N.Y.S.2d 130, 132 (2d Dep’t 2008).

⁴⁰ *Ifrah*, 98 N.Y.2d at 309, 746 N.Y.S.2d at 669-670 (“These undisputed facts, corroborated by the maps, support the concerns expressed to the Board that the variances would exacerbate the already difficult traffic and parking situation along Fenimore Drive, including blind turns and the difficulty snow plows have negotiating the narrow streets. Based upon this objective evidence, the Board could rationally conclude that the proposed subdivision would have substantial adverse impacts on the neighborhood.”); *Rivero v. Voelker*, 38 A.D.3d 784, 785, 832 N.Y.S.2d 616, 617 (2d Dep’t 2007)(upholding denial because grant of variance would exacerbate existing traffic and parking problems).

⁴¹ *Rosewood Home Builders, Inc. v. Zoning Bd. of Appeals of Town of Waterford*, 17 A.D.3d 962, 964, 794 N.Y.S.2d 152, 154 (3d Dep’t 2005); *Ifrah*, 98 N.Y.2d at 308, 746 N.Y.S.2d at 669 (“Here, there was evidence of the distinctive neo-Tudor architectural style of the houses lining Fenimore Drive, popular when those homes were built more than 60 years ago, which would be disturbed by the addition of a modern home on the subdivision.”)

⁴² *Isle Harbor Homeowners v. Town of Bolton Zoning Bd. of Appeals*, 16 A.D.3d 830, 831, 790 N.Y.S.2d 585, 586 (3d Dep’t 2005)(“In denying petitioner’s application, respondent reasoned that a metal dock would potentially create more noise than a wooden dock, that sunlight reflected off a metal dock would be a potential nuisance for petitioner’s neighbors and that the physical appearance of a metal dock did not aesthetically conform with the surroundings.”).

⁴³ *Schumacher v. Town of E. Hampton, New York Zoning Bd. of Appeals*, 46 A.D.3d 691, 693, 849 N.Y.S.2d 72, 75 (2d Dep’t 2007)(“by constructing a new home the petitioners would actually increase the distance between the wetlands and their residence”); *Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653.

⁴⁴ *Daneri v. Zoning Bd. of Appeals of Town of Southold*, 98 A.D.3d 508, 949 N.Y.S.2d 180 (2d Dep’t 2012); *Cassano v. Zoning Bd. of Appeals of Inc. Vil. of Bayville*, 263 A.D.2d 506, 693 N.Y.S.2d 621 (2d Dep’t 1999); *Russia House at Kings Point, Inc. v. Zoning Bd. of Appeals of Vil. of Kings Point*, 40 A.D.3d 767, 835 N.Y.S.2d 450 (2d Dep’t 2007); *Suffern v. Zoning Bd. of Appeals of Town of Greenville*, 17 A.D.3d 373, 792 N.Y.S.2d 562 (2d Dep’t 2005).

⁴⁵ *Kaiser*, 74 A.D.3d at 1205, 904 N.Y.S.2d at 169.

⁴⁶ *Knight*, 68 N.Y.2d at 975, 510 N.Y.S.2d at 550; *Pecoraro*, 2 N.Y.3d at 615, 781 N.Y.S.2d at 238 (“The Board was also entitled to consider that granting a variance for an illegally substandard parcel with 40 feet of frontage width could set a precedent within the neighborhood.”); *Genser v. Bd. of Zoning and Appeals of Town of North Hempstead*, 65 A.D.3d 1144, 1147, 885 N.Y.S.2d 327, 330 (2d Dep’t 2009); *Amdurer v. Vil. of New Hempstead Zoning Bd. of Appeals*, 146 A.D.3d 878, 879, 45 N.Y.S.3d 186, 187 (2d Dep’t 2017)(“Here, the Zoning Board’s failure to set forth a factual basis as to why it was departing from its prior precedent rendered its determination arbitrary and capricious.”); see *Campo Grandchildren Trust v. Colson*, 39 A.D.3d 746, 834 N.Y.S.2d 295 (2d Dep’t 2007).

⁴⁷ *Waidler v. Young*, 63 A.D.3d 953, 882 N.Y.S.2d 153 (2d Dep’t 2009); *Todd Kramer v. Zoning Bd. of Appeals of Town of Southampton*, 131 A.D.3d 1170, 16 N.Y.S.3d 832 (2d Dep’t 2015); *Blandeburgo v. Zoning Bd. of Appeals of Town of Islip*, 110 A.D.3d 876, 972 N.Y.S.2d 693 (2d Dep’t 2013); *Monte Carlo 1, LLC v. Weiss*, 142 A.D.3d 1173, 1175, 38 N.Y.S.2d 228 (2d Dep’t 2016).

⁴⁸ *Pecoraro, supra*; *Genser, supra*; *Kearney v. Vil. of Cold Spring Zoning Bd. of Appeals*, 83 A.D.3d 711, 714, 920 N.Y.S.2d 379 (2d Dep’t 2011).

⁴⁹ *Russo v. City of Albany Zoning Bd.*, 78 A.D.3d 1277, 910 N.Y.S.2d 263 (3d Dep't 2010)

⁵⁰ *Russo*, 78 A.D.3d at 1280, 910 N.Y.S.2d at 265-266.

⁵¹ *Id.*

⁵² *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 21 Misc.3d 1120(A), 873 N.Y.S.2d 512 (Sup Ct 2007), *aff'd*, 43 A.D.3d 1447, 843 N.Y.S.2d 744 (4th Dep't 2007.)

⁵³ *Id.*

⁵⁴ *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals*, 43 A.D.3d 1447, 1448, 843 N.Y.S.2d 744, 745 (4th Dep't 2007).

⁵⁵ *Chandler Prop., Inc. v. Trotta*, 9 A.D.3d 408, 780 N.Y.S.2d 163 (2d Dep't 2004).

⁵⁶ *Johnson v. Town of Queensbury Zoning Bd. of Appeals*, 8 A.D.3d 741, 777 N.Y.S.2d 562 (3d Dep't 2004) ("Although the record reflects that there were reasonable alternatives had the application been made preconstruction, it is significant that no alternatives or compromises have since been proposed by petitioners despite a request for a compromise from at least one member of respondent."); *see Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653 (proposed alternative not feasible because it would impact views of neighboring property owners).

⁵⁷ *Baker v. Brownlie*, 248 A.D.2d 527, 670 N.Y.S.2d 216, 218 (2d Dep't 1998).

⁵⁸ *Id.* ("Moreover, even assuming that a concrete patio with removable supports and a cloth awning constitutes a building, the proposed patio will face the water and will have no genuinely detrimental impact upon neighboring parcels, several others of which have received variances for other recreational improvements. Furthermore, since the petitioners' desired benefit is to have a patio facing the water, the Board's finding that it could be located elsewhere on the petitioners' property is clearly erroneous.")

⁵⁹ Town Law §267-b(3)(c); Village Law §7-712-b(3)(c); General City Law §81-b(4)(c).

⁶⁰ *Braunstein v. Bd. of Zoning Appeals of Town of Copake*, 100 A.D.3d 1091, 1094, 952 N.Y.S.2d 857, 859 (3d Dep't 2012); *Merlotto*, 43 A.D.3d at 929-930, 841 N.Y.S.2d at 653; *Friedman*, 84 A.D.3d at 1085, 923 N.Y.S.2d at 653; *Jonas*, 95 A.D.3d 1325, 945 N.Y.S.2d 405 (upholding the granting of some but not all of the variances applied for).

⁶¹ *Rosasco v. Vil. Of Head of Harbor*, 52 A.D.3d at 611, 859 N.Y.S.2d at 732.

⁶² *Lodge Hotel, Inc. v. Town of Erwin Zoning Bd. of Appeals, supra* ("Looking at the variance request in such a vacuum is not an adequate indicator of the substantiality of Petitioner's application. Substantiality cannot be judged in the abstract; rather, the totality of relevant circumstances must be evaluated in determining whether the variance sought is, in actuality, a substantial one. *Aydelott v. Town of Bedford Zoning Board of Appeals*, 6/25/03 N.Y.L.J. 21 (col.4) (Supreme Court, Westchester Co., 2003). When reviewing the application in the context of the overall impact it would have on the neighborhood, it is clear that the variance request is not substantial, especially when considering that the structure will have the outside appearance of a two-story building. *Aydelott v. Town of Bedford Zoning Board of Appeals*, 6/25/03, N.Y.L.J. 21 (col.4); *Cortland LLC v. Zoning Board of Appeals, Village of Roslyn Estates*, 8/13/03 N.Y.L.J. 24 (col.1) (Supreme Court, Nassau Co., 2003)").

⁶³ *Wambold v. Vil. of Southampton Zoning Bd. of Appeals*, 140 A.D.3d 891, 893, 32 N.Y.S.3d 628, 630 (2d Dep't 2016) ("While we agree with the petitioner that the proposed variance was substantial, there was no evidence that the granting of the variance would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community."); *Marina's Edge Owner's Corp.*, 129 A.D.3d at 843, 11 N.Y.S.3d at 843; *Borrok v. Town of Southampton*, 130 A.D.3d 1024, 1025, 14 N.Y.S.3d 471, 473 (2d Dep't 2015); *Goodman v. City of Long Beach*, 128 A.D.3d 1064, 1065, 10 N.Y.S.3d 302, 304 (2d Dep't 2015); *Friends of Shawangunks, Inc. v. Zoning Bd. of Appeals of Town of Gardiner*, 56 A.D.3d 883, 886, 867 N.Y.S.2d 238, 241 (3d Dep't 2008).

⁶⁴ *L & M Graziose, LLP v. City of Glen Cove Zoning Bd. of Appeals*, 127 A.D.3d 863, 7 N.Y.S.3d 344 (2d Dep't 2015) (affirming the boards' finding that the variance was substantial, but reversing the denial of the variance on that basis because the granting of the variance would not cause any undesirable impacts); *Quintana v. Bd. of Zoning Appeals of Inc. Vil. of Muttontown*, 120 A.D.3d 1248, 992 N.Y.S.2d 332 (2d Dep't 2014) (reversed denial; even though the variance was substantial, there was no proof that it was detrimental to the character of the neighborhood); *Cacsire*, 87 A.D.3d at 1135, 930 N.Y.S.2d at 54; *Lodge Hotel, Inc.*, 43 A.D.3d at 1448, 843 N.Y.S.2d at 745; *Filipowski v. Zoning Bd. of Appeals of Vil. Of Greenwood Lake*, 38 A.D.3d 545, 547, 832 N.Y.S.2d 578, 581 (2d Dep't 2007).

⁶⁵ *Affordable Homes of Long Is., LLC v. Monteverde*, 128 A.D.3d 1060, 1062, 10 N.Y.S.3d 283, 284 (2d Dep't 2015) ("the BZA engaged in the required balancing test and considered the relevant statutory factors. In its written determination, the BZA concluded that the petitioner's need for variances was self-created, the requested 20%

variance from the required minimum lot area was substantial, and the proposed variances would create a negative impact on the physical and environmental conditions of the neighborhood, which had existed in its present form for over 50 years”); *Millennium Custom Homes, Inc. v. Young*, 58 A.D.3d 740, 873 N.Y.S.2d 91 (2d Dep’t 2009); *Nathan v. Zoning Bd. of Appeals of Vil. of Russell Gardens*, 95 A.D.3d 1018, 943 N.Y.S.2d 615 (2d Dep’t 2012); *JSB Enterprises, LLC v. Wright*, 81 A.D.3d 955, 917 N.Y.S.2d 302 (2d Dep’t 2011) *Mary T. Probst Family Trust v. Zoning Bd. of Appeals of Town of Horicon*, 79 A.D.3d 1427, 913 N.Y.S.2d 813 (3d Dep’t 2010); *Traendly*, 127 A.D.3d at 1218, 7 N.Y.S. at 546.

⁶⁶ See *Waidler*, 63 A.D.3d at 954, 882 N.Y.S.2d at 153 (upholding grant of area variance to create substandard lots); *Saunter v. Amster*, 284 A.D.2d 540, 540, 728 N.Y.S.2d 54, 55-56 (2d Dep’t 2009) (reversing denial of variance to create two substandard lots).

⁶⁷ *Ifrah*, 98 N.Y.2d at 309, 746 N.Y.S.2d at 735 (upholding denial of area variance to create two substandard lots notwithstanding the fact that many of the surrounding lots in the neighborhood were substandard); *Gebbie v. Mammia*, 13 N.Y.3d 728, 885 N.Y.S.2d 450 (2009); *Rossney v. Zoning Bd. of Appeals of Inc. Vil. of Ossining*, 79 A.D.3d 894, 914 N.Y.S.2d 190 (2d Dep’t 2010); *Petikas v. Baranello*, 78 A.D.3d 713, 910 N.Y.S.2d 515 (2d Dep’t 2010); *Grigoraki v. Bd. of Appeals of Town of Hempstead*, 52 A.D.3d 832, 860 N.Y.S.2d 216 (2d Dep’t 2008); *Nathan*, 95 A.D.3d at 1019, 943 N.Y.S.2d at 618.

⁶⁸ See, e.g., *Ifrah*, *supra*; *Rossney*, *supra*; *Petikas*, *supra*.

⁶⁹ See, e.g., *Wambold*, 140 A.D.3d at 893, 32 N.Y.S.3d at 630 (“In fact, as noted by the Zoning Board, the proposed variance would have a beneficial impact on the environment by eliminating wetlands set-back nonconformities and removing the existing septic system, which is located within the wetlands regulated area.”)

⁷⁰ SEQRA, collectively referring to Article 8 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 617.

⁷¹ *Luburic v. Zoning Bd. of Appeals of Vil. of Irvington*, 106 A.D.3d 824, 826, 966 N.Y.S.2d 440, 442-442 (2d Dep’t 2013).

⁷² *Id.*

⁷³ *Compare Millpond Management Inc.*, A.D.3d at 805, 839 N.Y.S.2d at 356 (a self-created hardship does not preclude the granting of an area variance) *with Friends of Lake Mahopac v. Zoning Board of Appeals of the Town of Carmel*, 15 A.D.3d 401, 790 N.Y.S.2d 470 (2d Dep’t 2005) (annulling the grant of a use variance because the applicants acquired the property subject to the objectionable use regulations and thus the hardship was self-created, precluding the grant of a use variance).

⁷⁴ Town Law §267-b(3)(b)(5); Village Law §7-712-b(3)(b)(5); General City Law §81-b(4)(b)(5); *Sasso*, 86 N.Y.2d at 385, 633 N.Y.S.2d at 260 (“Nevertheless, the statute expressly states that the fact that the applicant's difficulty was self-created does not necessarily preclude the granting of the area variance (Town Law § 267-b[3][b][5]).”).

⁷⁵ *Goodman*, 128 A.D.3d at 1065, 10 N.Y.S.3d at 304; *Gonzalez*, 3. A.D.3d at 497, 771 N.Y.S.2d at 144; *Daneri* 98 A.D.3d at 510, 949 N.Y.S.2d at 182.

⁷⁶ *Inlet Homes Corp. v. Zoning Bd. of Appeals of Town of Hempstead*, 2 N.Y.3d 769, 770 (2004) (“the alleged difficulty here was self-created in that when purchasing the property, petitioner was aware that the Board had previously denied to the contract vendor an area variance for the same lot and under the same circumstances.”); *Switzgable v. Bd. of Zoning Appeals of Town of Brookhaven*, 78 A.D.3d 842, 844-45 (2d Dep’t 2010) (*Rosewood Home Builders, Inc.*, 173 A.D.3d at 963, 794 N.Y.S.2d at 153-154; *Merlotto*, 43 A.D.3d at 929, 841 N.Y.S.2d at 653; *Sacher*, 124 A.D.3d at 904, 3 N.Y.S.2d at 70).

⁷⁷ *Caspian Realty, Inc.*, 68 A.D.3d at 65, 886 N.Y.S.2d at 442.

⁷⁸ *Caspian Realty, Inc.*, 68 A.D.3d at 65, 886 N.Y.S.2d at 444.

⁷⁹ *Caspian Realty, Inc.*, 68 A.D.3d at 66, 886 N.Y.S.2d at 445.

⁸⁰ *Caspian Realty, Inc.*, 68 A.D.3d at 66, 886 N.Y.S.2d at 446.

⁸¹ *Caspian Realty, Inc.*, 68 A.D.3d at 74, 886 N.Y.S.2d at 451.

⁸² *St. Onge v. Donovan*, 71 N.Y.2d 507, 515-517, 527 N.Y.S.2d 721, 725 (1988); see also *Baker v. Brownlie*, 270 A.D.2d 484, 485, 705 N.Y.S.2d 611, 613-614 (2d Dep’t 2000).

⁸³ *Voetsch v. Craven*, 48 A.D.3d 585, 852 N.Y.S.2d 225 (2d Dep’t 2008) (affirming one condition to a variance and annulling another); *Zupa v. Zoning Bd. of Appeals of Town of Southold*, 31 A.D.3d 570, 817 N.Y.S.2d 672 (2d Dep’t 2006) (affirming imposition of a condition); *Gentile v. Vil. Of Tuckahoe Zoning Bd. Of Appeals*, 87 A.D.3d 695, 929 N.Y.S.2d 167 (2d Dep’t 2011) (invalidating a condition because record lacked proof that it would be feasible for the applicant to comply it and it was therefore unreasonable); *Martin v. Brookhaven Zoning Bd. of Appeals*, 34 A.D.3d 811, 825 N.Y.S.2d 244 (2d Dep’t 2006).

⁸⁴ See, e.g., *Citrin v. Bd. of Zoning and Appeals of Town of N. Hempstead*, 143 A.D.3d 893, 895, 39 N.Y.S.3d 229, 230 (2d Dep’t 2016) (“[I]f a zoning board imposes unreasonable or improper conditions, those conditions may be annulled although the variance is upheld”); *Baker*, 270 A.D.2d at 485, 705 N.Y.S.2d at 614.

⁸⁵ *Sabatino v. Denison*, 203 A.D.2d 781, 783, 610 N.Y.S.2d 383, 385 (3d Dep’t 1994) (“We disapprove of respondents’ assumption that every item discussed at the public hearings on the application became an express condition of the approval. To the contrary, it was the Zoning Board’s obligation to clearly state the conditions it required petitioners to adhere to in connection with the approval.”).

⁸⁶ *Tall Trees Const. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 735 N.Y.S. 2d 873 (2001); *Jonas*, 95 A.D.3d at 1327–1328, 945 N.Y.S.2d at 408 (“[W]hen a quorum of the board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial” That no factual findings were provided or articulated does not preclude judicial review. Where there is no formal statement of reasons for the rejection, “an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in the article 78 proceeding can provide a sufficient basis for determining whether the denial was arbitrary and capricious (citations omitted).”)

⁸⁷ *Id.*

⁸⁸ *Frank*, 82 A.D.3d at 764-765, 917 N.Y.S.2d at 699; *but see Barsic*, 22 AD3d at 489, 801 N.Y.S.2d at 831 (remitting a variance application to the board for a new determination because the board waited 27 months to file the decision in the town clerk’s office and offered no explanation for the delay).

⁸⁹ *420 Tenants Corp. v. EBM Long Beach, LLC*, 41 A.D.3d 641, 643, 838 N.Y.S.2d 649, 651 (2d Dep’t 2007).

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