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. ZBAs are in charge of determining both use and area variances. This program discusses the recent case law regarding the following topics which in addition to variances, ZBAs are often required to review.

- **I.** Area Variances
- **II.** Use Variances
- **III.** Different Standards for Public Utilities
- **IV.** The Telecommunications Act and the 2018 FCC Order (18-133)

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. *Cooperstown Eagles, LLC v. Village of Cooperstown Zoning Board of Appeals*, 161 A.D.3d 1433, 77 N.Y.S.3d 716 (3d Dep't 2018).

Facts: Petitioner is a domestic limited liability company that owns certain real property located in the Village of Cooperstown, Otsego County. The property is located in the Village's business zoning district and consists of a two-floor structure with a dental office on the ground floor and two residential apartments—a one-bedroom unit and a two-bedroom unit—on the second floor. In December 2016, petitioner submitted an application to respondent Village of Cooperstown Zoning Enforcement Officer (hereinafter "ZEO") seeking a tourist accommodation special use permit that would allow it to rent the property's two-bedroom apartment as a "tourist accommodation"—i.e., a short-term rental of seven days or less, as opposed to the otherwise applicable 30–day minimum rental. The ZEO denied petitioner's application for a special use permit on the ground that the property was not "owner-occupied," as required by the Code of the Village of Cooperstown. In March 2017, petitioner appealed to respondent Village of Cooperstown Zoning Board of Appeals (hereinafter the ZBA) for, among other things, approval of its special use permit and an area variance relieving petitioner from the owner-occupancy requirement applicable to tourist accommodations. On May 8, 2017, following a public hearing, the ZBA denied petitioner's appeal determining, among other things, that it was not entitled to an area variance relieving it from the applicable owner-occupancy requirement. As a result, petitioner thereafter conveyed a 25% ownership interest in the subject property to the tenant of its one-bedroom apartment and, on May 16, 2017, submitted a second application to the ZBA seeking a special use permit based on the fact that the property was now in compliance with the requisite owner-occupancy requirement. Following another public hearing on June 6, 2017, the ZBA granted the second application and issued petitioner a tourist accommodation special use permit. Two days later, petitioner commenced this CPLR article 78 proceeding seeking, among other things, a determination that the ZBA erred in denying its initial application for an area variance. Respondents answered, contending, among other things, that because petitioner's second application for a tourist accommodation special use permit was granted, petitioner had obtained the precise relief that it had previously requested in its initial application, thereby rendering this proceeding moot.

Holding: The Supreme Court agreed with respondents and dismissed the petition as moot. The Appellate Court reversed the mootness holding but upheld the ZBA's denial of the requested area variances.

Judicial Standard: As an initial matter, the Appellate Court found that the mootness doctrine was not implicated by the ZBA's subsequent grant of petitioner's tourist accommodation special use permit since the property rights that attach upon the issuance of an area variance compared to the issuance of a special use permit are distinct. The issuance of a tourist accommodation special use permit requires, among other things, that an applicant comply with the Code's owner-occupancy requirement and that each applicant renew their registration on an annual basis. The issuance of an area variance, on the other hand, would vest petitioner with an immediate property right relieving it from the Code's owner-occupancy requirement, without any corresponding temporal limitation or renewal requirement. Moreover, *the issuance of "a variance is not personal to the owner-applicant; it runs with the land."* Thus, a judicial determination in petitioner's favor would immediately vest petitioner with a property right greater and more valuable than what it presently possesses. Contrary to respondents' assertion, therefore, the issuance of the June 2016 special use permit did not grant petitioner the exact same relief that it requested in its initial application before the ZBA.

With respect to the ZBA's denial of the area variance, the Appellate Court reasoned that while the ZBA's resolution failed to set forth its specific factual findings, a review of the minutes of the May 2017 hearing and the ZBA's papers filed in response to the instant CPLR article 78 petition establishes that the ZBA appropriately applied the relevant balancing test and considered all five applicable statutory factors.

Analysis: Village zoning board did not abuse its discretion in denying property owner's application for area variance that would have relieved owner from owner-occupancy requirement for permits to rent apartments as short-term rentals. Board considered all statutory factors and noted the noise and disturbance complaints of short term and transient rentals of 30 days or less; Board recognized that economic benefits of variance could be achieved by other methods, including by having property owner living at property or by selling portion of property to tenant, and property owner had acquired property after owner-occupancy requirement was adopted, such that any hardship was self-created.

B. *Healy v. Town of Hempstead Board of Appeals* (Nassau Sup. Ct., 2018)

Facts: Application by church to construct a cultural center and related parking on adjoining parcels as well as convert a house to office use. All of the zoning relief sought by the church relates to the construction of the cultural center, including, in pertinent part, special exception variances, lot area variances and parking variances. Residents in the area opposed the application, claiming the construction would adversely affect the environment. After the Town of Hempstead Board of Appeals ("BOA" or "Board of Appeals") granted the application, the residents sued, claiming that: (1) the hearing was defective; (2) the negative declaration issued under the State Environmental Quality Review Act ("SEQRA") was arbitrary, capricious, an abuse of discretion and affected by an error of law; (3) the Board of Appeals gave excessive deference to the Religious Land Use and Institutional Persons Act; and (4) one member of the BOA had a conflict of interest.

Holding: The Supreme Court reversed the BOA's approval of the application.

Judicial Standard: The Court rejected all of the asserted grounds for reversal except the SEQRA review. The Court found no defect in the Board of Appeals hearing. It noted that a zoning board of appeals can conduct informal hearings, is not required to use the rules of evidence at such hearings, and is not required to swear in witnesses or cross-examine them. The hearing that was conducted lasted 12 hours, included 16 witnesses in support of the church's application and 24 witnesses in opposition, and expert testimony. As to the supposed conflict of interest, one member of the Board of Appeals was the sister-in-law of an attorney who used to represent the church and the managing partner of that lawyer's law firm was currently the campaign manager for the board member's estranged husband. The Court rejected that ground, noting that the residents failed to demonstrate that the board member had any pecuniary or material interest in the outcome of the application and she did not cast the deciding vote as the decision was unanimous.

Analysis: The Court found the SEQRA review to be woefully inadequate since the BOA effectively granted a conditioned negative declaration but only adopted a negative declaration. If there is a conditioned negative declaration, a full Environmental Assessment Form was required. The Board had identified two concerns – the proposed application would result in a change in the use and intensity of the land and would change the character or quality of the existing neighborhood. The Board imposed various conditions on the zoning variances such as no ingress or egress from Annette Avenue and church employees not parking on the street which effectively made the negative declaration a conditioned negative declaration but the Board did not comply with the SEQRA in connection therewith.

C. *Edwards v. Zoning Board of Appeals of Town of Amherst* 163 A.D.3d 1511 (Sup. Ct. 4th Dept. 2018)

Facts: The petitioners commenced an Article 78 proceeding challenging the determination of respondent Zoning Board of Appeals ("ZBA") granting a special use permit to the respondent Upstate Cellular Network, d/b/a Verizon Wireless. Petitioners contend, among other things, (i) the ZBA's determination to grant the special use permit was inconsistent with the Town's comprehensive

plan; (ii) the ZBA's issuance of certain "variances" to the Town's zoning regulations did not comply with the requirements of Town Law § 267–b(3); and (iii) the ZBA improperly issued a negative declaration pursuant to the State Environmental Quality Review Act.

Holding: The Appellate Division upheld the ZBA's approval of Verizon Wireless' application.

Judicial Standard: The Court held that the inclusion of a permitted use in a zoning code "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 Court further held that the requirements for area variances set forth in Town Law § 267–b(3) are inapplicable in the case at bar inasmuch as the ZBA issued waivers pursuant to Town Law § 274–b(5).

Analysis: Town Law § 274–b(3) provides that where, as here, "a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to Town Law § 267–b." Additionally, Town Law § 274–b (5) provides that a town "may further empower the authorized board to, when reasonable, waive any requirements for the approval, approval with modifications or disapproval of special use permits submitted for approval." The Court held that subdivision (5) allows a town to establish one-stop special use permitting if it so chooses. Here, the Town has exercised its discretion under Town Law § 274–b(5) by authorizing in the wireless law, that the ZBA, in considering whether to grant a special use permit, may waive "any aspect or requirement" for wireless facilities as long as the applicant "demonstrates by clear and convincing evidence that, if granted, the relief, waiver or exemption will have no significant effect on the health, safety and welfare of the Town, its residents and other service providers"

D. *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. The property was in a zoning district which 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.

E. *Landstein v. Town of Lagrange* 2018 WL 4905436 (2d Dep't 2018) (**Reasonable consultant's fees**). The petitioner is an amateur radio hobbyist who applied for a special use permit and an area variance that would allow him to construct a radio antenna structure on his property in the Town of LaGrange. The Town incurred more than $17,000 in legal consulting fees in connection with the applications, and informed the petitioner that he was required to reimburse the Town for these fees before any determination would be made with respect to the applications. The Town subsequently, as "an accommodation to the petitioner," reduced the amount that it was demanding for previously incurred fees to the sum of $5,874, but also required the petitioner to maintain a minimum advance continuing escrow balance of at least $1,000 to cover the Town's future consulting costs in connection with the applications. The Court held that, because the Town did not limit the consulting fees charged to the petitioner to those necessary to the decision-making function of the Town's Planning Board and Zoning Board of Appeals so that the Town exceeded its State-granted authority by requiring payment of the consulting fees. *The Court found that the escrow direction made by the Town provided for unfettered spending by consultants without regard to the nature of the application and the burden placed upon the applicant, the necessity for consultants in the first instance, and the reasonableness of the consultant charges in light of comparable charges for similar services in connection with similar applications.*

F. *Schulz v. Town of Hopewell Zoning Board of Appeals*, 163 A.D. 3d 1477 (4th Dep't 2018).
Facts: The Town Zoning Code provided that the Zoning Board ("ZBA") shall refer applications for variance requests to the Planning Board for review and comments. The Planning Board is required to forward comments within 30 days of a close of a public hearing. The Planning Board voted to approve the variances. The ZBA postponed its hearing until residents could comment at another Planning Board hearing. The Planning Board reopened the matter and reversed its initial determination. The ZBA found that the Planning Board did not have authority to reverse its determination and voted to approve the variances without considering the Planning Board subsequent review and comment.
Holding: The Appellate Division held that the ZBA grant of the area variances was made in violation of lawful procedure and granted the petition.
Judicial Standard: A ZBA must act in accordance with lawful procedure and if it fails to do so, it is an error of law. The Court found that the ZBA hearing was held after the Planning Board subsequent determination that the variances should be denied.

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:
Gray. v. Village of Patchogue, 164 A.D.3d 587 (2nd Dep't 2018)
Facts: Property owner brought Article 78 proceeding challenging denial of use variance by village Zoning Board ("ZBA") to convert two car garage into living space.
Holding: The Appellate Division upheld the ZBA's denial of the use variance and reversed the lower court's decision granting the petition and directing the ZBA to issue the use variance.
Judicial Standard: The ZBA was obligated to look at the factors under applicable law and the court found that the petitioner failed to make the requisite showing of "unnecessary hardship" for a use variance. The Appellate Division found there is no evidence that the ZBA failed to adhere to any prior precedent of granting use variance in similar situations. The lower court seemed to base its decision on a ZBA's member comment at the hearing which stated "not many such applications have been granted at all." The lower court had found that the ZBA had granted previous applications and administrative due process prohibited inconsistent treatment of similarly situated parties.

III. 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.

IV. THE TELECOMMUNICATIONS ACT AND THE SEPTEMBER 2018 FCC 18-133 ORDER

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."

On September 26, 2018, the Federal Communications Commission took another important step in its ongoing efforts to remove regulatory barriers that inhibit the deployment of infrastructure necessary for 5G and other advanced wireless services and adopted FCC Order 18-133.

The Commission's Order includes a Declaratory Ruling focusing primarily on local fees for the authorizations necessary to deploy small wireless facilities. Specifically, the Declaratory Ruling:

- Explains when a state or local regulation of wireless infrastructure deployment constitutes an effective prohibition of service prohibited by Sections 253 or 332(c)(7) of the Communications Act;
- Concludes that Section 253 and 332(c)(7) limit state and local governments to charging fees that are no greater than a reasonable approximation of objectively reasonable costs for processing applications and for managing deployments in the rights-of-way.
- Removes uncertainty by identifying specific fee levels for small wireless facility deployments that presumably comply with the relevant standard; and
- Provides guidance on when certain state and local non-fee requirements that are allowed under the Act—such as aesthetic and undergrounding requirements—may constitute an effective prohibition of service.

In addition, the FCC Order 18-133 provides for the following:

- Establishes two new shot clocks for small wireless facilities (60 days for collocation on preexisting structures and 90 days for new builds);

[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).

- Codifies the existing 90 and 150 day shot clocks for wireless facility deployments that do not qualify as small cells that were established in 2009;
- Concludes that all state and local government authorizations necessary for the deployment of personal wireless service infrastructure are subject to those shot clocks;
- The test for whether a locality is "effectively prohibiting" service is now *only* that the state or locality's legal requirement "materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service." The test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities. The carrier need not demonstrate a significant gap in coverage, lack of feasible alternatives, or least intrusive means; and
- Adopts a new remedy for missed shot clocks by finding that a failure to act within the new small wireless facility shot clock constitutes a presumptive prohibition on the provision of services.

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 wireless communications facilities, retail centers, private schools, religious centers, 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. Lenny works on a variety of projects involving utility infrastructure and sports complexes. He graduated cum laude from Pace Law School in 2017 (J.D. Real Estate & Land Use Certificate) and served as an Associate Editor for the PACE ENVIRONMENTAL LAW REVIEW.

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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