

**Westchester Municipal Planning Federation
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**Zoning Board of Appeals Seminar:
Special Use Permits**

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The legislative body of the municipality is authorized to delegate approval authority for special use permits to “the planning board or such other administrative body that it shall designate to grant special use permits as set forth in such zoning ordinance or local law.” NYS Town Law 274-b(2); General City Law 27-b(2); Village Law 7-725-b(2). In many municipalities, the zoning board of appeals is designated as the approval authority for some or all of the special use permits set forth in the local zoning code. This program discusses the definition of a special permit, considerations for a board in reviewing a special permit application, and case law illustrating examples of the principles to be discussed.

I. WHAT IS A SPECIAL PERMIT?

“[A]n authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.” NYS Town Law 274-b(1); General City Law 27-b(1); Village Law 7-725-b(1).

It is not a variance. “Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right. The significance of this distinction is that the inclusion of the permitted use in the ordinance 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.” *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 746 N.Y.S.2d 662 (2002).

II. VARIANCES AND WAIVERS FROM SPECIAL PERMIT STANDARDS

The Zoning Board of Appeals may grant variances from special permit standards. “[W]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

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appeals for an area variance pursuant to section two hundred sixty-seven-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.” NYS Town Law 274-b(3); see also, General City Law 27-b(3); Village Law 7-725-b(3).

“Town Law 274-b(3) vests a ZBA with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit.” *Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297, 778 N.Y.S.2d 438 (2004).

The legislative body may authorize the special permit approval authority to waive requirements for approval of a special permit. “The town board 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. Any such waiver, which shall be subject to appropriate conditions set forth in the ordinance or local law adopted pursuant to this section, may be exercised in the event any such requirements are found not to be requisite in the interest of the public health, safety or general welfare or inappropriate to a particular special use permit.” NYS Town Law 274-b(5); General City Law 27-b(5); Village Law 7-725-b(5).

III. CONDITIONAL APPROVAL OF SPECIAL PERMITS

“The authorized board shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed special use permit. Upon its granting of said special use permit, any such conditions must be met in connection with the issuance of permits by applicable enforcement agents or officers of the town.” NYS Town Law 274-b(4); see also, General City Law 27-b(4); Village Law 7-725-b(4).

Dexter v. Town Bd. Of Town of Gates, 36 N.Y.2d 102 (1975)

Facts: Wegman Enterprises, Inc., as contract-vendee, petitioned the Town Board of the Town of Gates to rezone approximately 12 acres of land from an R-8A residential classification to a B-1 commercial classification. The purpose of the rezoning was to permit development of the site as a retail shopping center for a Wegmans Food Market and other stores. The Town Board resolved to rezone the property, but imposed a series of conditions upon its rezoning, including a condition that “said application for the construction of a retail supermarket by Wegman Enterprises, Inc., and related commercial structures, shall inure to the benefit of Wegman Enterprises, Inc., only, and for that specific purpose only.”

Holding: The Court of Appeals held that the condition was improper because it was personal to Wegmans itself and did not relate to the use of the property and the zoning thereof.

Rational: Zoning deals with land use and not with the person who owns or occupies it. While it is proper for a zoning board to impose appropriate conditions and safeguards in

conjunction with a change of zone or a grant of a variance or special permit such conditions and safeguards must be reasonable and relate only to the real estate involved without regard to the person who owns or occupies it.

Citrin v. Board of Zoning and Appeals of Town of North Hempstead, 39 N.Y.S.3d 229 (2d Dep’t 2016)

Facts: The petitioners owned property on a split-zone lot in the Town of North Hempstead. On that property is an established restaurant, which is located within the Town's business district, and an adjoining parking lot, which extends into the Town's residence district. The Town's Board of Zoning and Appeals granted the petitioners a permit pursuant to Town Code § 70–225(E) to continue the use of the parking lot in the residence district for a period of five years.

Holding: The Second Department determined that the five-year duration limit was improper.

Rationale: Town Code § 70–225(E) did not explicitly provide the Board with the authority to impose durational limits upon permits granted pursuant to that section.

IV. PROCEDURAL CONSIDERATIONS

Public hearing required. “The authorized board shall conduct a public hearing within sixty-two days from the day an application is received on any matter referred to it under this section. Public notice of said hearing shall be printed in a newspaper of general circulation in the town at least five days prior to the date thereof. The authorized board shall decide upon the application within sixty-two days after the hearing. The time within which the authorized board must render its decision may be extended by mutual consent of the applicant and the board. The decision of the authorized board on the application after the holding of the public hearing shall be filed in the office of the town clerk within five business days after such decision is rendered, and a copy thereof mailed to the applicant.” NYS Town Law 274-b(6); see also, General City Law 27-b(6); Village Law 7-725-b(6).

NYS General Municipal Law 239-m Referral. “At least ten days before such hearing, the authorized board shall mail notices thereof to the applicant and to the county planning board or agency or regional planning council, as required by section two hundred thirty-nine-m of the general municipal law, which notice shall be accompanied by a full statement of such proposed action, as defined in subdivision one of section two hundred thirty-nine-m of the general municipal law.” NYS Town Law 274-b(7); General City Law 27-b(7); Village Law 7-725-b(7).

SEQRA. “The authorized board shall comply with the provisions of the state environmental quality review act under article eight of the environmental conservation law and its implementing regulations.” NYS Town Law 274-b(8); General City Law 27-b(8); Village Law 7-725-b(8).

Recent amendments to the SEQRA regulations added the following to the list of Type II actions: “reuse of a residential or commercial structure, or of a structure containing mixed residential and commercial uses, where the residential or commercial use is a permitted use under the applicable zoning law or ordinance, including permitted by special use permit, and the action does not meet or exceeds any of the thresholds in section 617.4 of this Part” (6 NYCRR 617.5(c)(18) emphasis added).

V. SUBSTANTIVE CONSIDERATIONS DURING DECISION-MAKING

The decision of the ZBA to grant or deny a special permit must have a rational basis supported by substantial evidence in the record. To obtain a special permit, the owner has the burden of proof to show compliance with any legislatively imposed conditions on the otherwise permitted use. Failure to comply with a condition of the special permit is a sufficient ground for denial of the permit.

“While a property owner is not entitled to a special use permit merely for the asking, once it is shown that the contemplated use is in conformance with the conditions imposed, the special use permit must be granted unless there are reasonable grounds for its denial, supported by substantial evidence.” *Sunrise Plaza Associates, L.P. v. Town Bd. of Town of Babylon*, 250 A.D.2d 690, 673 N.Y.S.2d 165 (2d Dep’t 1998).

Robert Lee Realty Co. v. Village of Spring Valley, 61 N.Y.2d 892, 474 N.Y.S.2d 475 (1984)

Facts: Owner of a burned-down supermarket sought a special permit to replace the supermarket with a building containing two retail stores and three mini-theatres. The village board denied the permit without making specific findings, but in its answer to the petition relied upon specific subdivisions of the village code setting required standards for uses to be permitted uses. The Village sought review for an order from the Second Department which affirmed a judgment that granted a petition to annul the determination by the village board.

Holding: The Court of Appeals modified the order by adding a provision that the permit was subject to such reasonable conditions and safeguards as the village board may have imposed, and as modified, affirmed the order.

Rationale: The village board’s denial of the permit was not supported by substantial evidence in the record. The court found that it appeared that the petition was denied not because of any objection that was peculiar to the proposed development, but because of community pressure. Thus, it was properly annulled, but because the zoning board was authorized by the ordinance to impose reasonable conditions, direction to issue the permit would be subject to such conditions.

Sunrise Plaza Associates, L.P. v. Town Bd. of Town of Babylon, 673 N.Y.S.2d 165 (2d Dep't 1998).

Facts: Town board issued a special use permit to a company to operate a restaurant in a shopping plaza, and the zoning board granted an application for a parking variance. An association of other tenants of the shopping plaza petitioned for review of both grants.

Holding: The Second Department held that: **(1)** grant of the on-site parking variance to the restaurant owners satisfied the requirements for the granting of an area variance, as well as those governing the award of a use variance, and **(2)** grant of the special use permit following the granted parking variance was proper.

Rationale: Generally, there must be compliance with the requirements of a zoning ordinance before a special use permit may be granted. Here, the special use permit was granted after the zoning ordinance was granted. The Town Board properly awarded the special use permit inasmuch as the proposed restaurant, operating with a parking variance, was found to be consistent with the surrounding area and would not pose a detriment thereto.

Pursuant to Town of Babylon Code § 213–129(G) (hereinafter the Code), the proposed restaurant was a permitted use, subject to the issuance of a special use permit. Summit submitted an application for a special use permit to the respondent Town Board of the Town of Babylon (hereinafter the Town Board). Contemporaneously therewith, Summit applied to the respondent Town of Babylon Zoning Board of Appeals (hereinafter the Zoning Board) for a variance to reduce the number of off-street parking spaces required under the Code. Sunrise contends that the Town Board lacked the authority to issue a special use permit because other relevant provisions of the zoning ordinance were not met. Specifically, Sunrise argues that because Summit's proposed restaurant did not comply with the pertinent off-street parking requirements under the Code, the Town Board could not grant Summit a special use permit. The Town Board properly granted the special use permit after the Zoning Board rendered its decision granting the parking variance. There are no provisions within the Code which preclude the Town Board from issuing a special use permit to an otherwise deserving property owner who previously secured a parking variance; the two permissions are not mutually exclusive. Contrary to the appellant's contentions, the Town Board did not attempt to exceed its authority by waiving parking requirements, but, rather, the Town Board properly granted the special use permit after the Zoning Board rendered its decision granting the parking variance.

QuickChek Corporation v. Town of Islip, 89 N.Y.S.3d 210 (2d Dep't 2018)

Facts: QuickChek Corporation applied to the Town of Islip Planning Board and the Town Board of the Town of Islip for special permits to use the subject property as a convenience market, a minor restaurant, and a gasoline service station. The Planning Board granted special use permits for the convenience store and minor restaurant, but the Town Board denied the application for a special permit to operate a gasoline service station.

Holding: The Second Department held the material findings of the Town Board were not supported by substantial evidence.

Rational: In reviewing a town board's determination on special permit applications, the court is limited to determining whether the action taken by the board is illegal, arbitrary, or an abuse of discretion and determines whether substantial evidence exists in the record to support the rationality of the board's determination. With regard to the alleged increased volume of traffic, there was no showing that the proposed use of a gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted. While there was evidence that traffic would be increased by 3%, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. Thus, the alleged increase in traffic volume was an improper ground for the denial of the special permit. The other reasons set forth by the Town Board in support of its denial of the application for a special permit were conclusory and unsupported by factual data and empirical evidence.

Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead, 98 N.Y.2d 190 (2002)

Facts: Board of Zoning Appeals of the Town of Hempstead denied a request by Retail Property Trust (RPT) for a special exception to expand the structure and parking facilities on its property, the Roosevelt Field Shopping Mall, to accommodate a Saks Fifth Avenue department store.

Holding: The Court of Appeals held that while a zoning board of appeals retains discretion to deny a special exception for failure to comply with a legislative condition, such a determination must nonetheless be supported by substantial evidence.

Rationale: Failure to comply with any condition upon a special exception is sufficient ground for denial of the exception if supported by substantial evidence. Where substantial evidence exists, a court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record.

Muller v. Zoning Board of Appeals of the Town of Lewisboro, 192 A.D.3d 805, 144 N.Y.S.3d 198 (2d Dep't 2021)

Facts: Property owner sought to operate a private dog kennel for 11 Siberian Huskies on his 2.1 acre property in the R-2A residential district. The Town Code requires a minimum of 4 acres to operate a private dog kennel and permits a maximum of 10 dogs over the age of 6 months. The owner sought a variance from the lot size requirement and the limitation on the maximum number of dogs permitted, and simultaneously sought a special permit for the private dog kennel. ZBA denied the variances and the special permit.

Holding: The Court held that evidence in the record supported the ZBA's decision to deny the variances on the basis that the variances would produce an undesirable change in the character of the neighborhood, result in an adverse impact on the physical or environmental conditions of the neighborhood, and the variances were substantial and self-created. Having not secured variances from those requirements of the special

permit, the Court found “the owner’s failure to meet these requirements constituted a sufficient basis for the ZBA’s denial of the petitioner’s application for a special use permit to operate a private kennel.”

Rationale: Failure to comply with the requirements of the zoning code is a sufficient ground for denial of the special permit if supported by substantial evidence.

Rex v. Zoning Board of Appeals of the Town of Sennett, 195 A.D.3d 1398, 145 N.Y.S.3d 492 (4th Dep’t 2021)

Facts: Property owner sought a special permit to develop a mini-storage facility on property zoned agricultural/residential.

Holding: The Court held that the applicant’s failure to meet the conditions set forth in the ordinance provided a rational basis for the ZBA’s denial of the special permit.

Rationale: One of the standards required to be met for the issuance of a special permit was that the proposed use must be “[i]n the best interest of the Town of Sennett...[s]uitable for the property in question and designed, constructed, operated and maintained so as to be in harmony with and appropriate in appearance with the existing intended character of the general vicinity.” The Town’s comprehensive plan indicated that commercial development on land zoned agricultural/residential should be restricted and specified areas designated for such development. The applicant conceded that its property did not fall within one of those specified areas. The ZBA denied the special permit because the proposed use did not “meet the goals of the comprehensive plan” and would “alter the essential character of the neighborhood.”

Biggs v. Eden Renewables LLC, 188 A.D.3d 1544, 137 N.Y.S.3d 515 (3d Dep’t 2020)

Facts: Eden Renewables LLC (“Eden”) sought a special permit and site plan approval to construct a major solar energy system consisting of two five-megawatt solar panel arrays. The planning board granted the approvals and Petitioners sought to annul the approvals. Petitioners argued the planning board did not make the requisite findings required by the special permit and site plan standards under the Town Code.

Holding: The Court found the planning board’s approvals conformed with the standards imposed under the Town Code and the board’s decision had a rational basis and was not arbitrary and capricious.

Rationale: The planning board’s resolution contained findings that specifically addressed the requisite standards under the Town Code. The planning board made findings pertaining to the project’s positive economic benefits, production of renewable energy contributing to the state’s goal of replacing fossil fuel with renewable energy sources, lack of permanent impacts on traffic, groundwater, surface water and wetlands, and minimal impacts on plants, animals and neighboring properties. The board noted the project is not visible from the surrounding homes and roadways. In addition, the board held two public hearings, reviewed a full environmental assessment form and considered comments from outside agencies. The court found the board had ample evidence to support its determination.

Biography

Jennifer L. Gray is a partner at Keane & Beane, P.C. where her practice is devoted to the areas of planning and zoning, and litigation pertaining to land use, municipal and real estate matters. Jennifer regularly appears before municipal boards throughout the Hudson Valley on behalf of developers, businesses, franchises, religious institutions and individuals. She also serves as counsel to several local planning and zoning boards. Her litigation experience includes matters related to compliance with the New York State Environmental Quality Review Act (SEQRA), challenges to local planning and zoning board decisions, disputes concerning real property, as well as both prosecution and defense of zoning and building code violations. Jennifer is a lecturer on issues related to land development and zoning for the Westchester Municipal Planning Federation, New York Planning Federation and local bar associations.

Jennifer received her juris doctor, *cum laude*, from the Elisabeth Haub School of Law at Pace University in 2006, with a Certificate in Environmental Law, and received her bachelor's degree from the University of Vermont in 2002. Jennifer was selected as a "SuperLawyer" Rising Star and one of the New York Metro Region Top Women "SuperLawyers" in the field of land use and zoning. Jennifer was also selected by the Business Council of Westchester as one of the County's 40 Under 40 Rising Stars.