

Westchester Municipal Planning Federation
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2021 Case Law Update for Zoning Board of Appeals

Prepared By:
Leslie J. Snyder, Esq.
Angela M. Poccia, Esq.¹

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. The ZBA is in charge of determining both use and area variances. This program discusses the recent case law regarding the following topics which the ZBA is often required to review and consider.

- I.** Area Variances
- II.** Use Variances
- III.** Standards for Public Utilities, including Wireless Telecommunications Facilities

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 ZBA’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.

SEQR Note: Pursuant to 6 NYCRR Part 617.5(c)(16) and (17), the “granting of individual setback and lot line variances and lot line adjustments” and “granting of an area variance(s) for single family, two-family and three-family residence” are Type II actions under the New York State Environmental Quality Review Act (“SEQR”). Type II actions 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”).

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.

Sample Cases:

A. *In the Matter of Jacqueline Zapson v. Zoning Board of Appeals of the City of Long Beach* 193 A.D.3d 948 (2nd Dep't 2021)

Facts: In August 2016, Petitioner applied to the Zoning Board of Appeals of the City of Long Beach ("ZBA") for area variances which would permit her to build multiple family dwelling on a substandard lot. The ZBA issued a resolution denying the application for variances and Petitioner commenced an Article 78 proceeding to review the ZBA's determination. Subsequently, the ZBA issued findings of fact setting forth the basis for its denial.

Holding: The Supreme Court, Appellate Division, upheld the ZBA's denial finding that that the ZBA engaged in the required balancing test and considered relevant statutory factors, and that the denial of the application had a rational basis on the record.

Judicial Standard: Local zoning boards have broad discretion in considering the applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. In this context, courts consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the board's determination.

Analysis: The Court determined that the ZBA engaged in the required balancing test and considered the relevant statutory factors and that the ZBA's decision had a rational basis. The proposed variances were substantial, and the evidence before the ZBA supported its findings that the proposed construction would produce an undesirable change in the character of the neighborhood, would have an adverse impact on the physical or environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community. The Court further found that the Petitioner's contention that the ZBA's determination was arbitrary and capricious because the ZBA had previously granted similar applications is without merit. To the extent such similar applications involved similar facts, the ZBA provided a rational explanation for reaching a different result here.

B. *In the Matter of FCFC Realty LLC v. David A. Weiss, etc., et al.*, 192 A.D.3d 683 (2nd Dep't 2021)

Facts: Petitioner applied to the Board of Appeals of the Town of Hempstead ("ZBA") for certain area variances and special exceptions to construct a building for a laundromat with 112 washers and 90 dryers and retail space. The ZBA denied each application in separate determinations. Petitioner commenced an Article 78 proceeding to appeal the ZBA's decision and then amended such petition to name the ZBA members as respondents. Thereafter, the ZBA issued its findings of fact.

Holding: The Supreme Court, Appellate Division upheld the ZBA's denial finding that the ZBA's denial of the variances was not arbitrary and capricious.

Judicial Standard: In considering an application for area variances, a zoning board must engage in a balancing test considering the factors set forth above. Local zoning boards have broad discretion in considering the applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion.

Analysis: With respect to the front and rear yard setbacks, the Court determined that the record demonstrated that the benefit sought by the Petitioner can be achieved by another method and the project posed risk to the health, safety, and welfare of the surrounding neighborhood. The ZBA relied on the Nassau County Planning Commission's recommendation to modify the proposal for a rear setback to allow for emergency access. The Petitioner was also presumed to have known about the local zoning restrictions when it purchased the property and therefore any hardship was self-created. The Court also confirmed the denial of the Petitioner's application for a variance from off-street parking requirements, since the record demonstrated that this variance would exacerbate already difficult traffic and parking conditions in the area. This denial was based on board members' own knowledge of the area and Petitioner failed to present any evidence with respect to this issue at the hearing. The Court also noted in its decision that, contrary to the Petitioner's contention, the ZBA's finding of fact was accepted despite their issuance more than a year after the hearing was held since these are quasi-judicial proceedings and no cross-examination is required. The issuance of these findings relieved the Court from having to remit the matter to the ZBA to provide its reasons for the denials of Petitioner's applications.

C. *In the Matter O'Connor and Sons Home Improvement, LLC v. Esteban Acevedo, et al.*, 2021 WL3889870 683 (2nd Dep't 2021)

Facts: Petitioner applied to the Zoning Board of Appeals of the City of Long Beach ("ZBA") for an area variance. Petitioner sought to subdivide a lot into two smaller lots and then construct a single family home on each lot, which required a variance from the minimum lot size set by the City of Long Beach for the neighborhood. After a hearing, the ZBA denied the Petitioner's application for an area variance. The Petitioner then commenced an Article 78 proceeding to annul the ZBA's determination.

Holding: The Supreme Court, Appellate Division refused to uphold the ZBA's denial, finding that the ZBA's determination was arbitrary and capricious.

Judicial Standard: As local zoning board have broad discretion in considering applications for area variances, courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure.

Analysis: The Court determined that the ZBA failed to set forth any factual basis in the determination to establish why it was reaching a different result on essentially the same facts as a prior application had been granted. Moreover, the Court found that the Petitioner supplied expert testimony while ZBA's findings were merely supported by generalized community opposition and were not corroborated by any empirical data or expert testimony. Therefore, the ZBA's denial of the variances was arbitrary and capricious.

D. *In the Matter of Parsome, LLC v. Zoning Board of Appeals of the Village of East Hampton*, 191 A.D.3d 785 (2nd Dep't 2021)

Facts: In 2004, Petitioner purchased commercial property that had a commercial building, together with a parking lot containing 23 spaces. In 1995, the Village amended its parking regulations but determined that compliance was not required with such amended parking regulations for buildings unable to add additional parking unless the building underwent an "intensification" of its use. In 2016, the Village notified Petitioner that it was in violation of its Certificate of Occupancy since the building contained 6 office units but was only permitted 4. The Petitioner then sought an area variance from the Zoning Board of Appeals ("ZBA") to permit it to retain the 2 additional office units without having to create additional parking. The ZBA determined that the additional units created an intensification of the of its use compelling compliance with the amended parking regulations. Petitioner commenced an Article 78 proceeding to review the ZBA's determination.

Holding: The Supreme Court, Appellate Division, upheld the ZBA's denial, finding that the ZBA's interpretation of the zoning ordinance was rational, that the ZBA engaged in the required balancing test and considered the relevant statutory factors, and that the determination was legitimate and had a rational basis.

Judicial Standard: Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken was illegal, arbitrary, or an abuse of discretion. A determination is rational if it has some objective factual basis as opposed to resting on entirely subjective considerations.

Analysis: The Court upheld the ZBA determination, which provided that the Petitioner's creation of additional units within the building constituted an intensification of its use compelling compliance with the amended parking regulations. The ZBA calculated that 20 more parking spaces were needed to comply with the regulations, and that the requested variance was therefore substantial. The ZBA further found that the building had no access to public parking and occasionally experienced a parking shortage, that the district in which the building was located had a parking shortage, and that the parking shortage had a detrimental impact on traffic circulation and the neighborhood generally. Moreover, the ZBA found that the hardship was self-created because the Petitioner is presumed to have known about the applicable zoning regulations when it purchased the property.

E. *Kaye v. Zoning Board of Appeals of the Village of North Haven*, 185 A.D.3d 820 (2nd Dep't 2020)

Facts: Petitioner purchased a residential lot with an area of 157,241 square feet and improved with a single family dwelling, located in a zoning district requiring a minimum lot size of 80,000 square feet.

Petitioner sought a variance from the Zoning Board of Appeals (“ZBA”) to subdivide the property into two lots, one of which would not meet the minimum lot size requirements. The ZBA denied the Petitioner’s application for an area variance and Petitioner brought an Article 78 proceeding to review the ZBA’s determination.

Holding: The Supreme Court, Appellate Division, upheld the ZBA’s denial, finding that the ZBA did not act illegally or arbitrarily or abuse its discretion.

Judicial Standard: Local zoning boards are vested with broad discretion in considering applications for area variances, and courts may set aside a zoning board determination only where the record reveals that that board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure. A determination of a zoning board should be sustained on judicial review if it has rational basis and is not arbitrary and capricious.

Analysis: The Court determined that the ZBA engaged in the required balancing test and considered the relevant statutory factors and that the ZBA’s decision had a rational basis. After a hearing, the ZBA found that, although the variance sought as a percentage was not substantial, the proposed substandard lot would have a detrimental effect on the character of the neighborhood which was characterized by oversized lots (much larger than that required by the code). The Court further noted that the ZBA was entitled to consider the effect its decision would have on precedent. The ZBA further found that the hardship was self-created since the applicable zoning provisions were in effect when Petitioner purchased the property and that Petitioner is presumed to have known about the applicable zoning restrictions.

F. *Simon v. Englert*, 185 A.D.3d 940 (2nd Dep’t 2020)

Facts: The Zoning Board of Appeals (“ZBA”) denied five (5) area variances that the Petitioner requested as part of an application to subdivide property. The Petitioner commenced an Article 78 proceeding to review that determination. The Supreme Court granted Petitioner’s amended petition and remanded the matter to the ZBA to grant the Petitioner’s application for the area variances. The ZBA appealed.

Holding: The Supreme Court, Appellate Division refused to uphold the ZBA’s denial, finding the ZBA’s denial of Petitioner’s requested area variances lacked a rational basis.

Judicial Standard: A determination of a zoning board of appeals on whether to grant an area variance will not be deemed rational on appeal if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis.

Analysis: The Petitioner spent over a year revising the proposal and developed an evidentiary record addressing issues of concern to the ZBA, including whether the proposal would negatively impact views from neighboring properties and views of the neighborhood from the Hudson River. The Planning Board, acting as lead agency, determined that the proposal would not have a significant adverse impact on the environment and issued a negative declaration. Despite the Planning Board’s extensive environmental review and final determination, the ZBA denied the requested variances, concluding that they were of a substantial nature and would produce an undesirable change in the character of the neighborhood. The ZBA did not explain its departure from the Planning Board’s determinations. Additional evidence before the ZBA consisted of claims that the variances would adversely effect property values and views but the Court deemed these claims as conclusory and uncorroborated by empirical data. Further, the ZBA provided no explanation for denying several of the variances that were similar in nature to variances granted to other nearby property owners. The Court therefore agreed with the Supreme Court’s determination that the ZBA’s denial of the variances lacked a rational basis.

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 Cases:

A. *In the Matter of WCC Tank Technology, Inc., et al., v. Zoning Board of Appeals of the Town of Newburgh, New York, et al.*, 190 A.D.3d 860 (2nd Dep’t 2021)

Facts: Petitioner WCC Tank Technology, Inc. operates a fuel tank lining business on the subject property. In 1982, the then-owner of the property applied for a use variance to operate a “fuel tank lining business”, which variance was granted by the Zoning Board of Appeals of the Town of Newburgh, New York (“ZBA”) subject to certain terms and conditions. In 2017, after receiving complaints from neighborhood residents, the Town’s Code Compliance Department requested an interpretation from the ZBA regarding whether certain uses and/or activities were permitted under the terms of the 1982 use variance. The ZBA found that the 1982 use variance did not authorize the use of the premises for an in support of a hydro-excavation business and did not allow for outdoor parking of freightliner trucks on which hydrovac equipment was mounted. Petitioner requested a referral to the ZBA for an interpretation regarding the ability of Petitioner to construct an addition on the property for indoor parking of trucks with mounted hydrovac equipment. By letter, the Code Compliance Department advised Petitioner that it had determined the ZBA’s decision regarding the terms of the 1982 use variance did not allow for such indoor parking and storage of vehicles with mounted hydrovac equipment. Petitioners applied to the ZBA seeking (1) an interpretation that the indoor parking and storage is a permitted use pursuant to the 1982 use variance; (2) alternatively, the grant of a use variance allowing same; and (iii) a reversal of the order to remedy issued by the Code Compliance Department. The ZBA denied the Petitioner’s application and Petitioner commenced an Article 78 proceeding to review the denial.

Holding: The Supreme Court, Appellate Division upheld the ZBA’s denial, finding that the ZBA’s determination was not illegal, arbitrary and capricious, or an abuse of discretion.

Judicial Standard: A use for which a use variance has been granted is a conforming use and, as a result, no further use variance is required for its expansion, unlike a use that is permitted to continue only by virtue of its prior lawful, non-conforming status. The use of a property remains subject to the terms of a use variance and, where a board of appeals has previously determined that the development is limited only to a certain extent by the terms of the variance, the board is not free to later disregard that determination.

Analysis: The Court found that the terms of the 1982 use variance were very specific and limited to the operation of a fuel tank lining business only. Although the Petitioner claims that it would be using the hydrovac vehicles in connection with their fuel tank lining business, the testimony of the Petitioner’s representative at the public hearing was clear that the Petitioner was proposing to use the hydrovac vehicles in connection with an entirely different business that is not permitted under the terms of the 1982 use variance. Thus, the ZBA’s determination had a rational basis and was consistent with its 2017 decision wherein it found that the 1982 use variance did not permit the premises to be used for and in support of a hydro-excavation business. Similarly, the ZBA’s determination denying the Petitioner’s application for a use variance was not illegal, arbitrary and capricious, or an abuse of discretion. The ZBA weighed the factors listed above and found that the Petitioner failed to show, based on competent financial evidence, i.e., by dollars and cents proof, that they cannot yield a reasonable rate of return absent the requested use variance.

B. *In the Matter of Matthew I. Brennan v. Kevin Hobbs, etc., et al.*, 193 A.D.3d 725 (2nd Dep’t 2021)

Facts: Petitioner applied to the Zoning Board of Appeals of the Town of Clarkstown (“ZBA”) for a use variance allowing him to use his residence as a two-family residence. The ZBA denied the application and Petitioner commenced an Article 78 proceeding to review the ZBA’s determination.

Holding: The Supreme Court, Appellate Division upheld the ZBA’s denial, finding that the ZBA’s determination was not illegal, arbitrary or an abuse of discretion.

Judicial Standard: Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal. Arbitrary or an abuse of discretion. To qualify for a use variance premised on unnecessary hardship, the Petitioner must demonstrate the factors set forth above.

Analysis: The Court agreed the Petitioner did not establish unnecessary hardship warranting the issuance of a use variance. He failed to make the requisite showing that he could not yield a reasonable return if the property were used only for permitted purposes as currently zoned, that the hardship resulted from unique characteristics of the property, that the proposed use would not alter the character of the neighborhood, or that the alleged hardship was not self-created.

C. *Dean, et al. v. Town of Poland Zoning Board of Appeals, et al.*, 185 A.D.3d 1485 (4th Dep’t 2020)

Facts: Company purchased 2 acres of an approximately 17-acre parcel contingent on the issuance of a use variance allowing Company to operate a Dollar General store. The Zoning Board of Appeals (“ZBA”) granted the use variance after an environmental review and public hearing, although made no findings of fact regarding whether the application established the requisite unnecessary hardship. Petitioners, some of whom were homeowners adjacent to the 2-acre parcel, opposed the granting of the use variance and commenced an Article 78 proceeding seeking to annul the ZBA’s determination. The Supreme Court dismissed the petition, concluding that the record was sufficient to establish that ZBA’s determination had a rational basis and was not arbitrary and capricious. Petitioners appealed, and the Appellate Division remitted the matter back to the ZBA to set forth the factual basis for its determination and articulate the reasons for it. Upon remittal, the ZBA individually addressed each of the 4 factors listed above. Petitioners contend that Company failed to meet the unnecessary hardship requirement and that the ZBA’s determination was not supported by substantial evidence.

Holding: The Supreme Court, Appellate Division refused to uphold the ZBA’s decision to grant the variance for the Dollar store, finding that the Company failed to establish that it could not realize a reasonable return for the property as any conforming use, as required to warrant a use variance.

Judicial Standard: An applicant’s failure to establish that he or she cannot realize a reasonable return as any conforming use requires a denial of use variance by a ZBA.

Analysis: The Court agreed with Petitioners that the Company failed to meet the unnecessary hardship requirement for a use variance and that the ZBA’s determination was not supported by substantial evidence. In order to establish unnecessary hardship, an applicant must establish that for each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot realize a reasonable return for the property and that the lack of return is substantial as demonstrated by competent financial evidence (“dollars and cents proof”). Here, Company only submitted evidence of the cost of removing a house from the parcel, including the costs of asbestos remediation and air monitoring required to sell the parcel as vacant land. Company failed to submit any evidence establishing whether it could realize a reasonable return on the parcel for any other conforming use. Therefore, Company failed to meet the burden.

It should also be noted that the Company only discussed the possible return on the 2-acre parcel and did not consider the return on the 17-acre parcel as a whole. The Court similarly found this limited discussion and the Company’s failure to address the ability to obtain a reasonable return on the entire parcel fatal to the application.

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 are 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.

Biography

Leslie J. Snyder is a founding partner of the law firm Snyder & Snyder, LLP located in Tarrytown, New York. Leslie heads the firm’s real estate transaction practice. Snyder & Snyder, LLP is a women owned business and has been listed in the New York Law Journal as one of the largest women owned law firms in New York State. 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, computer service centers, 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 a director of the Westchester County Municipal Planning Federation.

Angela M. Poccia is an associate at Snyder & Snyder, LLP, concentrating on land use and leasing transactions. A graduate of the City University of New York School of Law (J.D., 2019), Angela was chosen to participate in the law school’s clinical program as a student attorney. Angela worked for the firm as a paralegal while obtaining her J.D. in the evening program. Prior to joining the firm, Angela was selected to intern with the Westchester County District Attorney’s Office. She received her undergraduate degree from Iona College in 2010 (B.A., Cum Laude) and was nominated to two honor societies.

About the Firm

Snyder & Snyder, LLP is a regional law firm founded in 1990 with a team of 18 attorneys and paralegals. The firm is a certified women’s business enterprise. 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.