



**Division of Local
Government Services**

Zoning Board of Appeals Overview

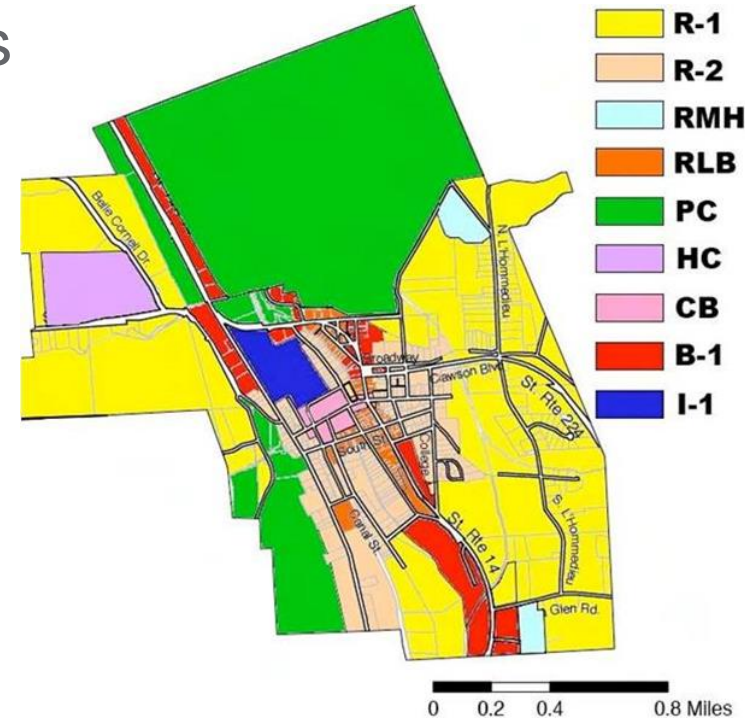
A Division of the New York Department of State

Introduction

- Zoning
 - Zoning Board of Appeals (ZBA)
 - Zoning Enforcement Officer (ZEO)
 - Appellant
- Interpretations
- Use variances
 - Proof of unnecessary hardship
- Area variances
 - Individual benefit vs. community detriment considerations
- Procedures
 - SEQRA
 - Meetings & hearings
 - County referral
 - Rehearing
- Decisions, filing & findings

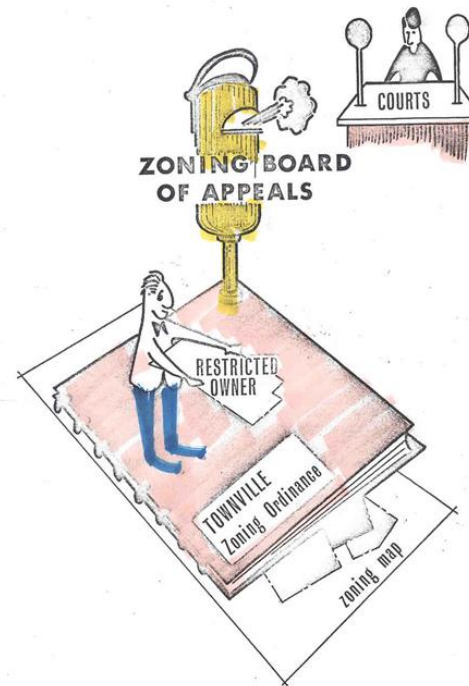
Zoning

- Goal: avoid incompatible land uses
- Regulates:
 - Land use
 - Density
 - Placement of structures on site
- Divides municipality into districts
- Optional



Zoning requires a safety valve

- Municipalities with zoning must have zoning board of appeals
- ZBA is a “buffer” for aggrieved applicants between decisions of zoning enforcement officer & State supreme court



Zoning enforcement officer

- Administrative official charged with enforcement of zoning code
 - Renders initial decision regarding conformity with zoning
 - Cites violations of zoning code
- Municipal official solely designated as ZEO, or official with dual responsibilities
 - Municipal planner
 - Code enforcement officer
 - Other

Statutory authority

	Town Law	Village Law	General City Law
Membership	§ 267	§ 7-712	§ 81
Procedure	§ 267-a	§ 7-712-a	§ 81-a
Variances	§ 267-b	§ 7-712-b	§ 81-b

Statutes online at:

<http://public.leginfo.state.ny.us/navigate.cgi>

Or in the DOS Publication: Guide to Planning and Zoning Laws of New York State

<https://dos.ny.gov/guide-planning-and-zoning-laws-new-york-state>

ZBA members are public officers

- Appointing authority
 - Town board
 - City mayor
 - Village mayor with approval of trustees
- Number of members
 - Three or five (unless still have seven)
 - Terms equal to number of members
 - Staggered expiration
- Oath of office must be filed



Qualifications for membership

- At least 18 years old
- United States citizen
- Resident of local municipality
 - Village members can be on town or village boards
- Governing board members may not serve on the ZBA



State training requirements

- Annual 4 hours minimum
 - Excess hours may carry over
 - Failure to comply
 - Does not void decisions
 - Ineligibility for reappointment
- Governing board approves and tracks training (or designates municipal clerk, for example)
 - Variety of sources & formats
 - Requirements may be waived or modified by resolution, if in best interest of municipality

Alternate member appointment

- NY statute allows for alternates to serve for conflicts of interest only
- For any other reason (i.e. quorum), local law or ordinance needed to supersede state law
- Local Governing board sets appointments:
 - Can set number of alternates
 - Can set terms of office for any time length

Appointment of chairperson

- Same appointing authority as for membership
- If no chairperson is appointed by mayor or town board, the board should select an acting chair
- Possible duties:
 - Presides at meetings & hearings
 - Supervise agenda preparation
 - Liaison with governing board
 - Sign official documents
 - Supervise filing of documents



Conduct and ethics

- Members may be removed from office for “cause”
- Municipality may specify reasons for removal in local law
 - Poor attendance
 - Continued inappropriate behavior
 - Failure to receive training
- Governing board must hold public hearing before removing member for cause

Appeals

- ZEO must first act based on zoning regulations to:
 - Grant permit
 - Deny permit
 - Issue citation for violation or take another enforcement action

Exception:

- Direct appeal for area variance within applications:
 - Site plan review
 - Subdivision review
 - Special use permit

Direct appeal

- When a direct appeal for an area variance is related to a Subdivision application the ZBA shall request a written recommendation from planning board

- Town Law §277(6)
- Village Law §7-730(6)
- General City Law §33(6)



Example: Relief from minimum frontage on a curved street

Appellant must have standing



- One denied permit or cited for violation
- Third party to be harmed by ZEO's decision
- A municipal "officer, department, board or bureau"

When to file appeal

- Within 60 days of ZEO filing action
 - Exception: Third parties must file within 60 days from date they should have known or could have knowledge of ZEO's action
 - File notice of appeal by letter if no ZBA form exists
 - File copies with ZEO & ZBA

Appeal “stays” enforcement proceedings



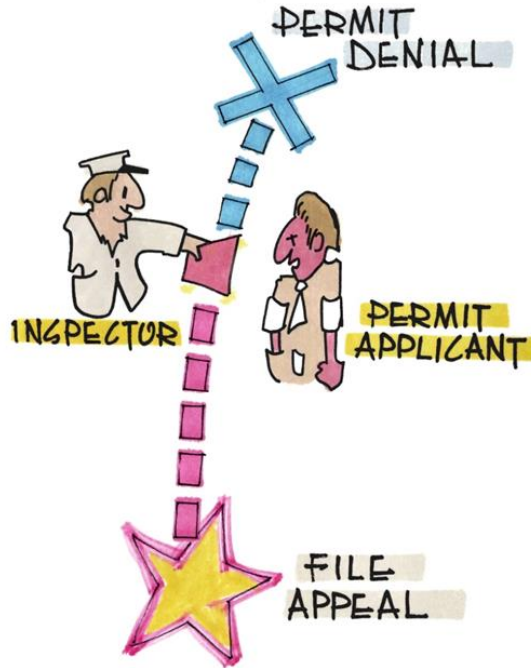
Interpretations

Appeal for interpretation

Appellant believes ZEO incorrectly applied the law

Common areas of interpretation:

- Definitions
- Method of taking measurements



Basis for interpretations decisions

Without concise definitions, board must come to consensus on what they think term or regulation means

- Past decisions on same regulations or similar facts
- Minutes, hearing comments & other records which reveal governing board's intention when zoning was adopted or amendment made
- Ordinary meaning of terms, if term is undefined

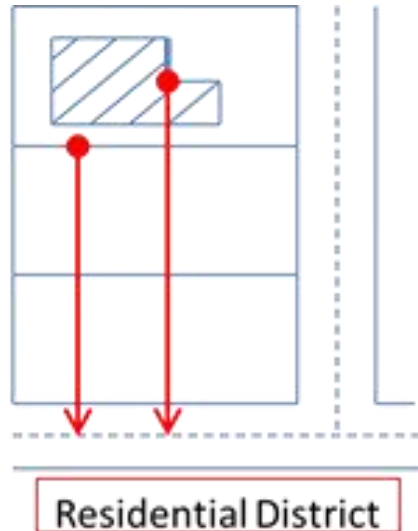
Cited, but no definition

- “Rave” style music events new to armory
- “Auditoria” permitted use in district although not defined in Albany’s zoning
- BZA relied on its limited interpretation of auditorium definition that used “fixed seating” (use akin to “nightclub” in zoning)
- Appellate Division ruled City must define “auditoria” in petitioner’s favor

Washington Avenue Armory v. City of Albany



Measurement for adult use permit



- Minimum “500’ radius from residential area” for adult uses
- Begin measurement from property line or building entrance
 - Appellate Division ruled
 - No statutory requirement
 - ZBA entitled to deference

Cupid's Video Boutique v. Town of Babylon ZBA

Use variance

To use land for a purpose not allowed by zoning

Alternative:
rezone
property



Use variance test

The
“burden
of proof”
is on the
applicant

- No reasonable return
- Unique circumstances
- No self-created hardship
- No alteration to essential neighborhood character

1. No reasonable return

- Applicant must demonstrate the land is not capable of making a reasonable return with:
 - any permitted use
 - a current lawful nonconforming use
 - any use currently allowed by previous use variance

ZBA must consider property as a whole, not just the portion which is the subject of the application

Reasonable rate of return

- No hard & fast numbers
 - Depends on particular facts of application
- ZBA determines
 - They do not have to agree with expert's opinion
 - Petruzzelli v. Zoning Bd of Appeals of the Village of Dobbs Ferry, 181 A.D.2d 825 (2d Dept. 1992)



2. Unique circumstances

- Parcel is only, or one of very few, affected to the extent zoning would create a hardship
- “Uniqueness of land” causing plight, not “uniqueness of the plight of the owner”



Other circumstances:

- Physical features
- Historic or architectural features
- Adjacent uses

3. Self-created hardship

Examples:

- Request relief from restrictions which existed at time of sale;
- Owner bound by zoning restrictions, even without knowledge of them;
- Spending money on project not allowed by zoning



4. Neighborhood character

- Is proposed use consistent with existing development?
- Is there significant adverse impact on neighborhood or community?



Pre-existing nonconforming uses



- Legally existed prior to current zoning
- Use variance not needed to continue, but needed for expansion
 - Must prove no reasonable return on allowed uses and nonconforming uses
- “Grandfathered” not necessarily permanent (abandonment, amortization)

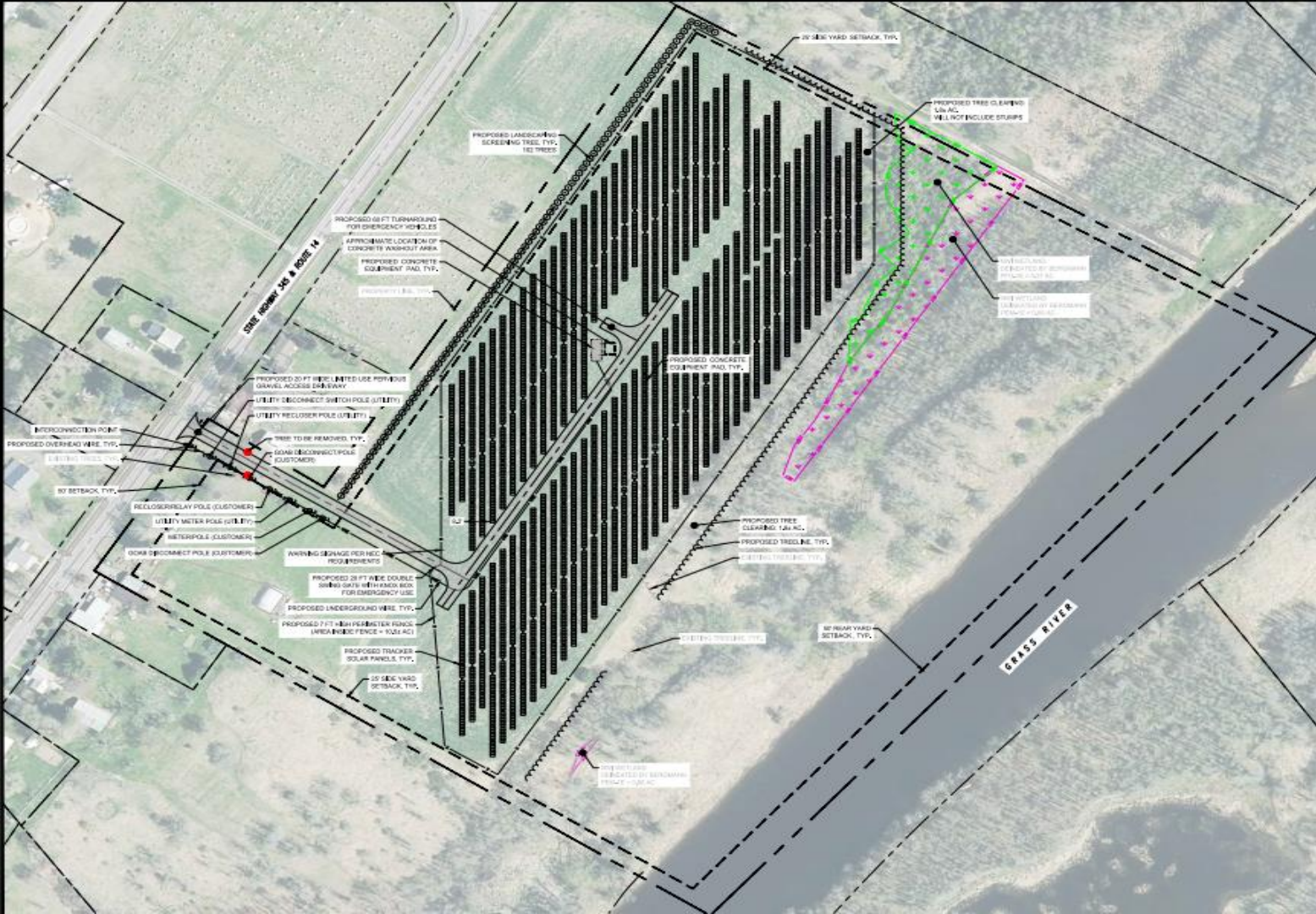
Local Case Study – Solar Array

- Town of Madrid
- Residential-Hamlet zone
- Utility-Scale Photovoltaic System (Not permitted in the zone)
- 10.5 acres from a 31.2 acre parcel



Staff Analysis

- The applicant did not meet any of the 4 legal tests for the following reasons:
 - Test 1
 - Did not provide competent financial evidence to support a lack of a reasonable return
 - Did not address every permitted use within the zone nor why none of these would provide a reasonable return
 - Test 2
 - The applicant stated that this is the only parcel in the zone that is both close to a 3-phase power line and large enough to accommodate a solar array
 - The applicant stated that this is a hardship because it is not a permitted use; this issue is relevant to the applicant and not the land
 - Test 3
 - The applicant did not take into account the uses of other properties within the zone; a Utility-Scale Photovoltaic System better fits the character of an industrial use
 - Test 4
 - In the first sentence, the applicant stated “Admittedly, the choice to develop land almost always runs with the developer and, thus, in that sense, difficulties are commonly self-created.” The applicant acknowledges the hardship was self-created
 - The issue of a self-created hardship relates to the land and not the applicant; it is always the applicant’s responsibility to know the permitted uses of the land before deciding to develop a project on that land



LEGEND

- PROPERTY LINE
- PROPERTY SETBACK LINE
- ADJACENT PROPERTY
- OVERHEAD WIRE
- TOP OF BANK
- CONTOUR - MAJOR
- CONTOUR - MINOR
- EXISTING TREELINE
- PROPOSED TREELINE
- EDGE OF ASPHALT
- ROAD CENTERLINE
- PROPOSED FENCE
- PROPOSED ADDRESS ROAD
- PALLIATIVE FORESTED WETLAND (PFD)
- PALLIATIVE EMERGENT WETLAND (PEM)
- UTILITY POLE
- HIGHER SIGN

SITE PLAN DATA TABLE

PROJECT LOCATED AT THE 1347 BIRCHMOUNT HAMLET ZONING DISTRICT
 1347 BIRCHMOUNT DRIVE
 HENRIEVILLE, NEW YORK 12528

PROJECT: 6500000
 TOWN OF: RAMAPO, COUNTY OF ST. LAWRENCE
 STATE OF: NEW YORK

APPLICANT: CARROLL R. FERRERI
 107 WASHINGTON AVE, SUITE 300
 WATKINSVILLE, NY 13068
 (518) 345-8000

PLANS PREPARED BY: BECOMING
 2 FRENCH CREEK, SUITE 201
 60 ALBANY, NY 12208
 (518) 852-0000

DESCRIPTION	REQUIRED	PROPOSED
■ FILL LOT (SEE PLAN)	2 AC	2.93 AC
■ 30' FRONT YARD SETBACK	SO FT	30 FT
■ 30' REAR YARD SETBACK	SO FT	30 FT
■ 15' SIDE YARD SETBACK	SO FT	15 FT
■ MIN. LOT COVERAGE (INCLUDING DRIVEWAYS)	N/A	35.1%

Staff Recommendation & CPB Decision

- Disapproval based on a failure to meet all four legal tests
- Conditions were added in the event the Town overrules the County
 - Ensure displacement of prime soils is minimized
 - Include all requirements for “Solar Energy Systems” as stated in the Madrid Town Code
 - This approval is valid for one (1) year for the purpose of obtaining a building permit. Failure to secure a building permit during this one-year period causes this approval to become null and void.
- Non-Binding Recommendations were also added
 - Submit a malware prevention, detection, and mitigation software to minimize cybersecurity threats
 - Submit PILOT documentation, if PILOT agreement is being sought
- The County Planning Board disapproved the project with the suggested conditions and recommendations if the Town overrules the County

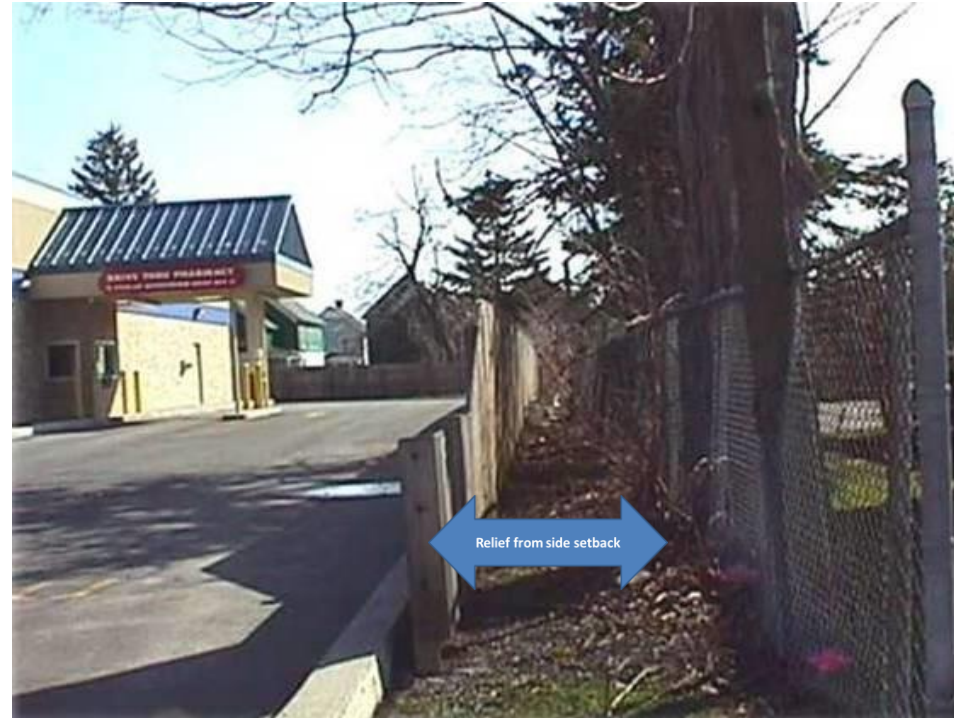
Area variance

Area variance

To vary from dimensional requirements of zoning regulations

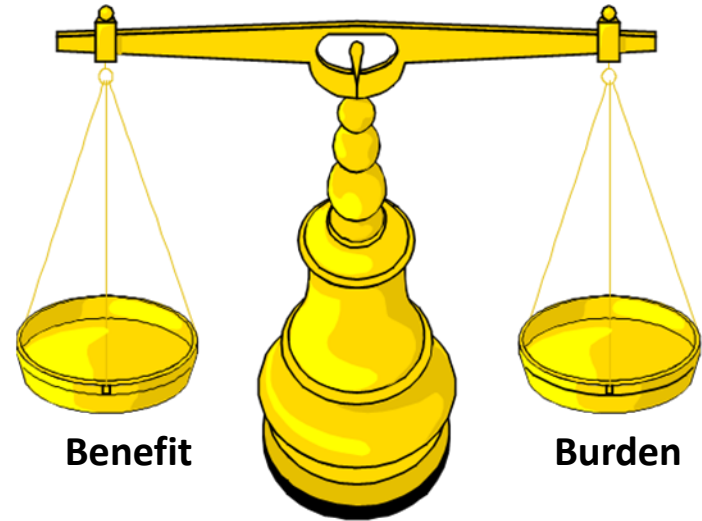
Example:

Property needed area variance for relief from setback requirements to construct driveway too close to lot line



Area variance test

- Change to neighborhood character
- Substantiality of the request
- Effect on physical or environmental conditions
- Alternatives not requiring a variance
- Is the situation self-created?



1. Change to neighborhood character

Would undesirable changes be eliminated with conditions imposed?



2. Alternatives not requiring variance



Consider placing addition in rear instead of side



Applicants should present reasons for choosing one alternative over another:

- ✓ Better view
- ✓ Cheaper constructions
- ✓ Better internal pattern
- ✓ Better overall aesthetics

3. Substantiality of request

- Amount of variance requested
- Magnitude of variance requested



5' vs. 50' ?

5' of a 10' setback
or
50' of a 300' frontage?

4. Physical or environmental impacts



Examples:

- blocked views
- drainage problems
- impacted wetlands
- parking shortages

5. Is situation self-created?

If so, the owner is not necessarily precluded from being granted an area variance.



Examples:

Shed needs setback relief because of substandard sized lot
Addition begun in violation of height restrictions

Conditions

- Clearly specify conditions imposed
- Must be reasonably related to the impact of proposal being considered
- Nexus



“Such conditions might properly relate ‘to fences, safety devices, landscaping, screening, and access roads related to period of use, screening outdoor lighting and noises...incidental to comfort, peace, enjoyment, health, or safety of the surrounding area.’”

St. Onge v. Donovan, 71NY2d 507, 516 (1998)

Grant minimum variance necessary

Board need not grant or deny variance request as submitted:

“The Board of appeals, in the granting of... 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.”

- Town Law §267-b
- Village Law §7-712-b
- General City Law §81-b

Local Case Study - NYSARC

- Village of Canton
- Reduction in the rear yard for an addition to the service garage (25' to 3')
- Commercial Park (C-3) zone
- Proposed two new additions to garage used to repair and maintain buses and vans

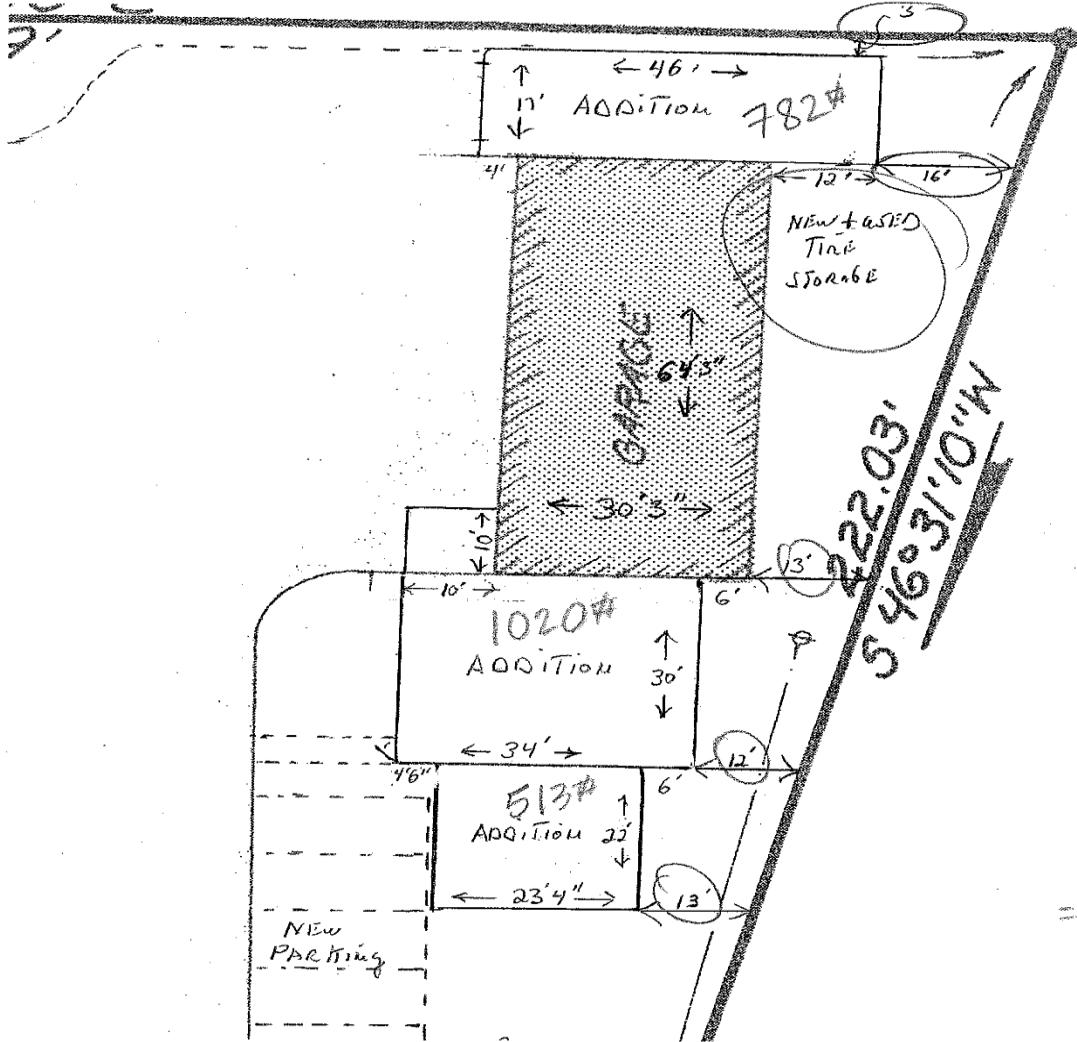


Staff Analysis

- Parking lot and three bay garage east of the NYSARC building
- Surrounding land uses include Cerebral Palsy of the North Country's Health Care Center and administrative offices, Law Lane Apartments, Community Development Program's administrative offices
- Staff site visit showed the building appears closer to the residential apartments than depicted in the aerial imagery
- Existing walls of the garage are clearly visible from the parking area of the Law Lane Apartments

Staff Analysis Cont.

- Test 1
 - If built, the addition increases the bulk of an auto service garage that is adjacent to a residential use and reduces a separation of uses
- Test 2
 - There is ample land north of the NYSARC office building that could easily accommodate a garage and provide plenty of separation from Law Lane Apartments
- Test 3
 - The request is substantial; the minimum yard requirement would be reduced by 70%
- Test 4
 - Staff feel if the parcel was adjacent to a residential district, the proposal would face local opposition due to its elimination of open space
- Test 5
 - The hardship is self-created because while it would be more expensive to build a new garage elsewhere on the property, it would satisfy all setbacks and provide adequate separation



Existing
± 1,943 #

Proposed
782
1020
513

= 2,314 #

Staff Recommendation & CPB Decision

- Disapprove for failing to meet the five tests
 - While not specifically prohibited, the proposed outside storage of tires along the side yard line will be clearly visible from the Cerebral Palsy of the North Country, and could have a detrimental impact on the organization's staff and clients, as well as to Law Lane residents
 - Outside storage could also result in an incremental expansion in the size of the storage area, and result in storing other items, both of which could lead to an unregulated junk pile
 - If it is granted, the ZBA should impose a condition to plant evergreen landscaping along the length and width of the expanded building
- The County Planning Board disapproved the request

Procedures

Board rules of procedures

To be binding, board rules of procedures must be adopted by governing board by local law or ordinance. They cover a variety of issues, including:

Officer and
committee duties

Calling meetings,
agendas, public
input

Referrals

Minutes

Official
document
signatures

State Environmental Quality Review Act

- Board determines environmental impacts if variance were granted
- Evaluate potential environmental impacts prior to decision

Type II classification ends SEQR

- Examples:
 - Interpretations
 - Setback relief

SEQR homepage: <https://www.dec.ny.gov/permits/357.html>

SEQR EAF Mapper: <https://gisservices.dec.ny.gov/eafmapper/>

Open meetings

- Notice to media
 - Post in conspicuous place & on municipal website
 - If scheduled 1 week or more ahead, 72 hours notice
 - If scheduled 1 week or less ahead, to the extent practicable
- Access for public
- Executive sessions
 - No meeting behind closed doors to discuss applications or board business
 - Only held for reasons defined in OML
 - Open Meetings Law *Article 7 Public Officer's Law §105*

A “work session” or “site visit” is a meeting subject to OML if quorum gathers to discuss public business



Remote participation & videoconferencing

Non-public locations

- OML §103-a authorizes public bodies to adopt local law for Boards to participate & vote via videoconference in **non-public location under “extraordinary circumstances”** (undefined)
- Quorum required in public location(s)
- Public location(s) notice and access required

Public locations

- Boards may participate via videoconferencing where they are seen, heard, AND their remote location is open to public (i.e.; member participates via videoconference in another state in public location)
- Remote public location(s) notice and access required
- No local law needed for this option

More info and model law: <https://opengovernment.ny.gov/>

State hearing notice requirements

- Public meeting requirements
- Legal notice in official newspaper
5 days prior to hearing date
- Mail notice to parties to the appeal
 - Regional state park commission, if 500'
from state park or parkway
 - Other agencies, if applicable
 - GML §239-m & GML §239-nn

Notice content:

- Date, time & place
- Nature of proposed action
- Location of subject property, if applicable

Local hearing notice requirements

- Municipalities may adopt additional local noticing requirements:
 - Signs on application property (best practice)
 - Mailings to neighbors
 - Municipal ListServ

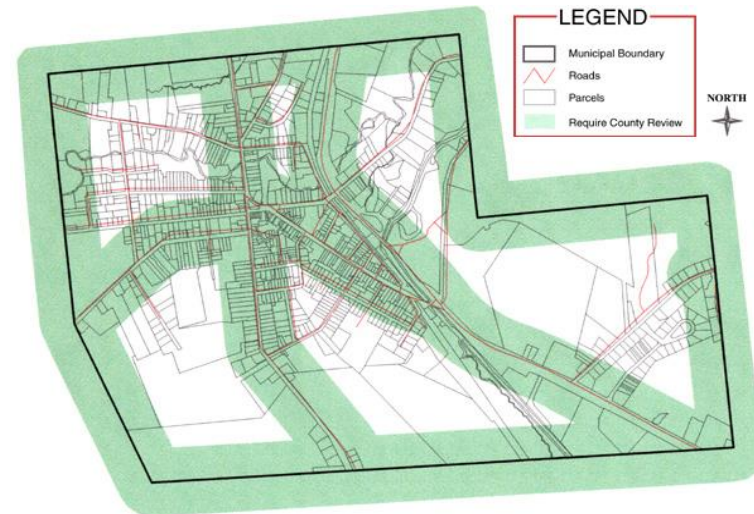


Notice to adjacent municipality

- GML §239-nn
 - Special Use Permits or Use Variances within 500' of adjacent municipality require notifying neighboring clerk:
 - by mail or electronic transmission
 - at least 10 days prior to any hearing

County referral

- GML §239-m applies to applications within 500' of:
 - Municipal boundaries
 - State or county parks, highways, streams, or institutions
 - Land on which a state or county building is located
 - Farm operations in State Agricultural Districts
 - Area variances exempted



Waiting to act

- ZBA cannot take final action until:
 - ZBA receives the county planning agency's report

OR

- 30-days after county receives full statement



Two day rule

Time period may be extended by mutual agreement

Effect of county referral

- If county recommends disapproval, or approval with conditions, local board may act contrary to that recommendation by a supermajority vote (majority vote plus one)
- Send “Report of Final Action” within 30 days of local decision



Yes +

Yes

No

Taking action

- Motion/resolution only passes with a majority of ENTIRE board
- If motion fails:
 - Variance request or zoning interpretation request is denied*
 - “No action” on matters of original jurisdiction, such as special use permit
 - Additional votes taken within statutory time frame won’t trigger rehearing process

Rehearing

ZBA can vote to reconsider a matter it previously acted on if:

- Matter has not been previously reheard
- Motion to rehear matter receives unanimous vote of all present
- Change of original decision receives unanimous vote of all present

Note: rehearing must comply with notice provisions

Decisions, Findings, and Filing

Decisions

- Must be made within 62 days after hearings close
- Minutes must contain record of each vote
- Should include language of motion and any conditions passed
- Send copy with findings to applicant, and county if applicable

Findings

Should be able to support decision if challenged in court

- Analysis applying law to facts, leading to conclusions
- Describe denial or approval reasons
- May also support why conditions were imposed
- Should be approved by board, not simply drafted by attorney and filed

Filing

- Begins when records are placed “under municipal clerk’s control”
- File decisions within 5 business days after decision is rendered (or sooner)
- Start of 30-day appeals period for Article 78 proceeding is established



New York Department of State

Division of Local Government Services

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localgov@dos.ny.gov

<https://dos.ny.gov/training-assistance>