



CDRPC Local Government Workshop Webinar

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Planning & Zoning Case Law Update

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What are we discussing today?

- Area Variances
- Use Variance
- ZBA Interpretation Cases
- Special Use Permits
- Site Plan
- Subdivision
- SEQRA
- Open Meetings Law
- Other



TEST FOR AREA VARIANCE (“Balancing Test”)

Change:

Will there be an undesirable **change** in character of neighborhood or detriment to nearby properties?

Self-Created: Whether the alleged difficulty was **self-created**?

Environment:

Will it have adverse impact on the physical **environment** of the neighborhood?

Substantiality:

Is the variance **substantial**?

Alternative:

Can the benefit to applicant be achieved by some **alternative** method?

AREA VARIANCE CASES

- **Pangbourne v. Thomsen (Second Department)**

- Two adjoining landowners entered a contract where one intends to sell some land to the other to allow for the demolition of an existing single-family home and construct two two-family dwellings.
- The result of the proposed land sale would be that both lots are rendered non-conforming under the zoning code. Therefore, both owners must seek variances for the transaction to proceed.
- The selling lot required a small side yard setback variance, while the buying lot required a height and lot coverage variance. All three variances were heard together by the ZBA and summarily denied.
- **Decision:** Appellate Division determined (1) the selling lot was entitled to the area variance for the side yard setback as of right because the evidence in the record was clear as to entitlement; and (2) remitted the purchasing lot's request for height and coverage variance under the 5-part test because the ZBA may not simply conclude the project does not have to be built as "the feasible alternative."

- **Schweig v. City of New Rochelle (2d Dept)**

- Owner had two adjoining parcels; one which was developed with a single-family home and one which was vacant (10,018 square feet).
- Moratorium that went into effect in 2004 and resulted in a new zoning area restriction for the vacant parcel which rendered it non-conforming by 5,000 square feet. City decides to include a savings clause which provides that lots which met the pre-2005 frontage requirement and were held in different ownership as of the date of the 2005 amendment were exempt.
- Fast forward about ten years, the owner sold the improved lot and then sought a building permit on the vacant piece – now substantially substandard and the ZBA said "no" to the requested variances.
- **Decision:** Court said the ZBA crafted an extensive resolution with findings of fact from the record on each of the 5 area variance factors – not the least of which was a 33% request on lot size. Notably, the Court said "the petitioners were on notice of the upzoning which took place ten years prior to when they listed their house for sale and eventually sold their home, and *could have included the adjacent lot in that sale.*"

AREA VARIANCE CASES

- Debordenave v. Village of Tuxedo Park BZA, (2d Dep't)
- Owner wanted to rebuild a stone fence along this property line and adjacent to the roadway which required a variance from the BZA.
- The initial application neglected to include a “line of sight” variance as part of the relief sought but was added to the hearing notice and considered by the BZA. The Board engaged in the requisite balancing test on all variance and granted the relief.
- A neighboring landowner challenged the relief, including the “line of sight” variance because it was not contained in the initial application and the public notice was insufficient on this point.
- **Decision:** The Court disagreed with the neighbor indicating that the jurisdiction of the zoning boards rules of procedure are not jurisdictional, unlike other bodies such as the state courts. The zoning board’s jurisdiction is to hear and determine requests for relief from the application of land use regulations on property.
- Mengisopolous v. Board of Zoning Appeals of the City of Glen Cove, 168 A.D.3d 943 (2d Dep’t 2019)
- Owner resides in a one and two-family residential zone and wanted to convert her one-family existing structure into a two-family.
- She applied to the City’s zoning board for a series of area variances which were all summarily denied. The owner filed an Article 78 challenge of the decision which was granted by the Supreme Court.
- **Decision:** The Appellate Division also agreed with the Supreme Court that there is a difference between engaging in the 5-part balancing test (i.e. merely going through the motions) and the requirement to “meaningfully consider the relevant statutory factors.” In this case, that consideration failed to provide thoughtful review of the undesirable impact on the neighborhood, physical or environmental impact, and detriment to the safe and health of the community (in other words – two out five IS bad).

TEST FOR USE VARIANCES

Applicant cannot realize a reasonable **return** if used for permitted purpose in the zone.

Hardship results from the **unique** characteristics of the property.

**Must Meet
All Four**

The variance will not alter the **essential character** of the neighborhood.

The hardship has not been **self-created**.

USE VARIANCE CASES

- 54 Marion Avenue, LLC v. City of Saratoga Springs (3d Dep't)

- Petitioner wants buy a vacant lot to construct a dental office if a use variance could be obtained in an otherwise residential zone. In 2018, the Appellate Division remitted the case to the Supreme Court to re-consider the facts of the case after finding that self-created hardship can be overcome by circumstances outside of the property owner's control (here, surrounding development pressure), as well uniqueness being articulated in the record.

- Supreme Court once again found a rational basis for the ZBA's denial of the use variance.

- **Decision:** Court said that the traffic and congestion complained of affected "a substantial portion of the neighborhood" and therefore was not unique. As to self-created hardship, the Court found (1) that the property was zoned residential when purchased in 1982; (2) evidence of commercialization was evident even back then and therefore foreseeable; (3) evidence of multiple prior use variance applications, marketing efforts as a commercial property, and contributing to the economic impact by demolishing the building.

- White Plains Rural Cemetery Association v. City of White Plains, (2d Dep't 2019):

- The local rural cemetery (not-for-profit) sought to add a crematory to its operations and claimed it was within its scope as a pre-existing non-conforming use. In the alternative, the applicant asked the ZBA to consider the crematory as a use variance. The ZBA denied all requests.

- **Decision:** First, the cemetery had asked the ZBA to use the broader use of the definition of "cemetery corporation" under the Not-for-Profit law, but the Court said that the Board was under no obligation to use a definition outside the City's own code. Second, with respect to the use variance, the Appellate Division found fault with the ZBA's (1) incorrect reading of the financial data submitted – confusing investment income accrued in the permanent maintenance fund with operating capital over the previous 5 years; (2) reliance on unrebutted evidence that the facility itself would be shielded from view, odorless, emit no visible smoke and passed all necessary air quality testing. The Board's focus on decreased property values were speculative and unsupported by the record – based solely on generalized community opposition.

USE VARIANCE CASES

- Delvecchio v. Collins, (3d Dep't 2019):
 - A landowner operates a stone and landscaping supply business pursuant to a site plan and use variance issued in 2001. The neighbor built his own adjacent to the business in 2003 and claims that expansion of the business in 2005 case excessive dust and noise that has impacted his use and enjoyment of his home.
 - Neighbor brought an action for private nuisance and to compel the enforcement of the zoning code as it relates to an unlawful expansion of a use variance.
 - **Decision:** Court does allow neighbor to seek private enforcement of the use variance. After the Court reviewed the original ZBA resolution granting the use variance and the site plan issued by the Planning Board, it determined that the variance was unrestricted about the size of the business BUT was restricted to the site plan. Therefore, a question of fact existed about how large the business was permitted to be based upon the approved plot plan from the Planning Board.
- Route 17K Real Estate, LLC v. Zoning Board of Appeals of the Town of Newburgh, et al (2d Dep't 2019):
 - An auto park was being redeveloped and a portion of the land was to be sold to a hotel provider but required several use variances.
 - The ZBA granted the area variances and a neighboring landowner filed an Article 78 action. The Town had a zoning code provision that uses, like hotels, have principal frontage on a state or county highway. One of the variances sought by the hotel applicant was for a variance on its principal frontage.
 - The objecting neighbor insisted that, because the variance involved relief from the principal use frontage requirement, the use variance standard should have applied.
 - **Decision:** The Court disagreed because area variance is always the proper standard when dimensional or physical requirements of the zoning regulations.

ZBA INTERPRETATIONS

- NEW YORK TOWN LAW § 267-b:
- The board of appeals may **reverse** or **affirm**, wholly or partly, or may **modify** the order, requirement, decision, **interpretation** or **determination** appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have **been made in the matter by the administrative official** charged with the enforcement of such ordinance or local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.

ZBA INTERPRETATION CASES

- Fox v. Town of Geneva Zoning Board of Appeals, (4th Dep't 2019):
 - Owner constructed a breakwall and septic system wall along waterfront property which the code enforcement officer interpreted as a "fence" under a provision of the zoning code and violations were issued.
 - The owner appealed the decision to the ZBA for an interpretation of the code provision which defined fence as "any structure, regardless of composition. . . that is erected or maintained for the purpose of enclosing a piece of land or dividing a piece of land into distinct portions." The ZBA agreed with the code enforcement officer and found that the walls were fences under the code.
 - **Decision:** In reversing the ZBA, the Court found: (1) pure legal interpretation of code terms does not require deference to the ZBA as a finder of fact; and (2) all words within a code provision matter and cannot be interpreted so as to render them meaningless. Here, the undisputed evidence was that breakwall and septic walls were erected to protect from soil erosion related to the lake; NOT to enclose or divide off a parcel of land.
- Northwood School, Inc. v. Joint Zoning Board of Appeals for the Town of North Elba, (3d Dep't 2019):
 - Donor left a single-family home to a boarding school to be used as student housing with a live-in faculty supervisor.
 - The school was denied a certificate of occupancy and appealed to the ZBA to review the code enforcement officer's interpretation of "single family." The code defines "family" as "a group of people, related or not related, living together as a common household, with numbers of persons and impacts typical of those of a single family."
 - The ZBA held a hearing where evidence was introduced that student (1) identities would change from year to year; (2) would leave on breaks; (3) not maintain a permanent address at the location; and (4) meals would be eaten in a separate dining area.
 - **Decision:** The Court deferred to the ZBA's application of these facts to the definition and found it reasonable.

ZBA INTERPRETATION CASES

- HV Donuts, LLC v. Town of LaGrange Zoning Board of Appeals, (2d Dep't 2019):
 - Owner maintains a non-conforming gas station and convenience store when a fuel delivery truck hit a light pole and spilled 3,000 gallons of gasoline onto the property which closes the property for 2 years.
 - The Town's code sunsets non-conforming uses after discontinuance for more than one year unless that stoppage is due to a casualty. The owner of the Dunkin' Donuts challenged the building inspector's permit to allow the operation to re-open u, as well as one year to complete upgrades to the store itself (not damaged in the spill).
 - The ZBA affirmed the decision of building inspector to allow the re-establishment of the non-conforming use but denied the application to upgrade the store and the neighbor appealed.
 - **Decision:** The court determined that the ZBA had a rational basis to conclude that the cessation of the non-conforming use was directly tied to a casualty event (the spill) and that the store restoration was not. As a result, the determination was sustained.
- Yeshiva Talmud Torah Ohr Moshe v. Zoning Board of Appeals of the Town of Wawarsing, (3d Dep't 2019):
 - Yeshiva operates a not-for-profit school for boys of the Orthodox Jewish faith which is located in Brooklyn. Yeshiva also owns a parcel of land of about 23 acres in the Neighborhood Settlement District (NSD) within the Town.
 - The school applied for site plan review for the renovation of the existing structures on site into an overnight camp for males ages 12 to 17 for religious studies. The application was denied as being non-zoning compliant due to the use being outside the scope of a "places of worship" which is a permissible use in the zone. The decision was then affirmed by the ZBA because the use was more akin to a camp than a synagogue.
 - **Decision:** In reversing the ZBA on the "plain language" standard, the Court noted that the definition of "place of worship" included "related on-site facilities such as monasteries, convents, rectories, retreat houses, and fellowship and school halls." It was clear that the intent was for religious overnight stays and that the definition was unambiguous.

Town Law §274-b: “Special use permit” shall mean an authorization of a particular land use which is permitted in a zoning ordinance . . .[which] is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.

Special Use Permit

- A special use permit validates a use permitted in the zone but not permitted as of right. Standards for reviewing special use permits are generally found in the local laws.
- The classification of a use as specially permitted in the zone is “tantamount to a finding that the permitted use is in harmony with the zoning plan and will not adversely affect the neighborhood.”
- It is essentially a presumption of harmony.

SAMPLE STANDARD FOR SPECIAL USE PERMIT

P

- Extent of harmony with zoning code and Comprehensive Plan

E

- Overall compatibility with neighborhood

R

- Impact on vehicular congestion, parking and traffic

M

- Impact on infrastructure, services, utilities, and public facilities

I

- Impact on the environmental and natural resources

T

- Impact on long-term economic stability and community character

Saratoga Springs Zoning Code (240-6.4)

SPECIAL USE PERMIT CASES

- Micklas v. Town of Halfmoon Planning Board, (3d Dep't 2019):
 - In the 1990s, the Town issued a golf course a special use permit in order to operate a clubhouse, pro shop, restaurant and banquet house.
 - In 2017, the owner sought to expand business operations to include an addition with brewing of beer for on-site consumption. Two neighbors opposed the application for the amendment to the special use permit on the grounds that the "brewpub" use was not permitted in the Agricultural-Residential Zone.
 - **Decision:** The Court sustained the code enforcement officer's determination that the brewpub was an "extension" of the special use permit granted in the 1990s, rather than a stand-alone use for review under the zoning code. As such, the Planning Board undertook a review of the application pursuant to the special use permit criteria as set forth in the Town's code and set conditions intended to minimize negative impact to neighbors. Those conditions were narrowly tailored to ensure that the brewpub truly functioned as an amenity of the existing restaurant/bar as opposed to a stand-alone brewery.
- Matter of QuickChek Corp. v. Town of Islip (2d Dept 2018)
 - Owner has a two-acre parcel with a used car dealership, car repair shop, and storage for boats and vehicles. In order to redevelop the site, QuickChek applied for a special use permit to use the site as a convenience market, a minor restaurant, and a gasoline service station.
 - After conducting two public hearings, the planning board granted a special use permit for the convenience store and minor restaurant and denied the application for a special permit to operate a gasoline service station. QuickChek challenged.
 - **Decision:** Court held there was no showing use of a gasoline service station would have a greater impact in traffic than would other uses that were unconditionally permitted. Thus, the court held that the alleged increase in traffic volume was an improper ground for the denial of the special use permit and any other reasons set forth by the town board in support of the denial were conclusory and unsupported by factual data and empirical evidence. As such, the court held that the material findings of the town board were not supported by substantial evidence and upheld the Supreme Court's decision to grant the special use permit.

STANDARDS FOR SITE PLAN

Statutory law gives municipalities the right to set specifications for site plan review and lists some common inclusions.

S	• Parking
I	• Means of Access
T	• Screening
E	• Signs
P	• Landscaping
L	• Architectural Features
A	• Location and Dimensions of Buildings
N	• Adjacent Land Uses

NYS REQUIREMENTS FOR SUBDIVISION

Plat can be safely used for building purposes

Adequate width and grade of roads

Map contains suitable marks and block corners

Character of the development

Compliance with all other zoning regulations

If required by Board, suitable parks and parkland

LOCAL LAWS OFTEN SUPPLEMENT

SITE PLAN

- Town of Mamakating v. Village of Bloomingburg, (3d Dep't 2019):
 - The Town and Village were subject to an intermunicipal agreement regarding the review a project for townhouse complex located in the Village.
 - In summary, the Town sought to annul decisions made by the Village to permit the project nearly 6 years beforehand and a 2016 reaffirmation of those decisions led to the current dispute.
 - Essentially, the Town claimed that reaffirmation of the 2010 site plan approval was arbitrary and capricious, but the Court disagreed.
 - **Decision:** The Court noted that the applicant had submitted extensive analyses from engineering experts regarding the roadway expansion involving stormwater and traffic impacts. While the Town made competing findings, it was within the Village Planning Board's authority to rely on the recommendation of its own engineer's review of the reports and he found no impacts. Moreover, the Planning Board was entitled to credit the evidence submitted by the applicant's engineers over that of the Town's engineer
- Sagaponack Ventures LLC v. Board of Trustees of the Village of Sagaponack, (2d Dep't 2019):
 - In 2007, the owner submitted subdivision and site plans to build 4 single family homes on a 43.5 acre parcel in the agricultural overlay district which received conditional approval and then amended the plans in 2013.
 - None of the Planning Board's approvals permitted construction in the northwestern corner of the lot. By 2015, the owner had switched to one single-family home on the lot in the northwest corner.
 - **Decision:** The record reflected that the Board properly considered the factors set forth in the Village Code governing site plan applications and determined that development in the northwestern corner of the property would contribute to the *loss of agricultural soil*, that such development would *negatively impact the views and vistas of farmland areas*, and that such development would have a *negative impact on any future subdivision of the property*. A finding of a lack of suitable location for development was not illegal, arbitrary and capricious, or an abuse of discretion, it was upheld by the court.

SITE PLAN

- Livingston Development Group LLC v. Zoning Board of Appeals of the Village of Dobbs Ferry, (2d Dep't 2019):
- Applicant sought site plan approval to construct two, six-unit condominium buildings overlooking the Hudson River.
- The Planning Board conducted the SEQRA review which included a viewshed analysis and recommended that the Village Board granted site plan approval. The Board of Trustees issued the site plan but conditioned it upon the review of the Architectural and Historic Review Board (AHRB).
- The AHRB denied approval on the grounds that the character of the buildings was “excessively dissimilar” to the surrounding neighborhood and the ZBA affirmed the determination. Applicant appealed stating that the Planning Board had jurisdiction over views under its SEQRA and site plan authority and the other review boards are prohibited from making findings inconsistent with its findings.
- **Decision:** the Court notes that the ZBA’s determination was not solely based on the viewshed impact and therefore could not be deemed arbitrary and capricious.
- Campaign for Buffalo History Architecture & Culture, Inc. v Zoning Bd. of Appeals of City of Buffalo, (4th Dep't 2019):
- The owner brought application for variance and site plan approvals related to a project that would demolish an existing residence and garage and replace them with a three story mixed use building with an art gallery and eight apartments.
- The owner also planned to renovate a former church building located on an adjoining parcel and it had already received approvals to develop it as a performing arts center.
- A concerned citizens group sued to challenge the site plan approval, among other things.
- **Decision:** The court disagreed that the Planning Board’s approval of the site plan was inconsistent with the city’s comprehensive plan and held instead that its determination had a rational basis and was supported by substantial evidence.

STANDARD FOR SEQRA (“ILR”)

I

- **Identify** areas of environmental concern

L

- Take a “**hard look**” at those identified areas

R

- Make a “**reasoned elaboration**” thereon in reaching a decision

SEQRA CASES

- Brunner v. Town of Schodack Planning Board, (3d Dep't 2019):
 - In 2018, the applicant submitted for site plan approval and special use permit to the Town Planning Board for a sales distribution center.
 - The Planning Board issued a SEQRA negative declaration and notices of decision granting the application.
 - Neighbors challenged on the ground that the Planning Board failed to comply with SEQRA by not taking a hard look at several areas of environmental concern such as impact on groundwater quality, traffic, public safety and community character, and that the preparation of an EIS was required.
 - **Decision:** The Court found there was evidence in the record of a geotechnical engineering report, a stormwater management report, the recommendation of the Town Engineer, aquifer impact and traffic impact studies. For all these reasons, the Court concluded that the Planning Board undertook a hard look.
- Berg v. Planning Board of the City of Glen Cove, 169 A.D.3d 669 (2d Dep't 2019):
 - In 2008, Applicant sought to develop a 56-acre waterfront development project where the Planning Board declared itself the lead agency and thereafter issued a positive declaration. After conducting several years' worth of hearings and public review, it adopted an FEIS and granted the applicant a special use permit.
 - In 2015, concerned citizens challenged the Planning Board's approval an amendment to the development plan decreased the footprint and density while increasing the area devoted to parks, public amenities, and open space; but failure to require a supplemental EIS because the proposed modifications did not result in any adverse environmental impacts which had not already been studied and addressed.
 - **Decision:** The Court found that the decision to prepare a supplemental environmental impact statement must be based on two criteria: *the importance and relevance of the new information, and the present state of information in the EIS.*

NY OPEN MEETINGS LAW



OPEN MEETINGS LAW

- Chestnut Ridge Associates, LLC v. 30 Sephar Lane, Inc., (2d Dep't 2019):
 - Applicant wanted to locate a landscaping business in a laboratory office zone within the Village and the objecting neighbors requested a determination by the ZBA.
 - The ZBA determined that the use was not permitted in the zone but the Court found that, without a finding from the code enforcement officer to appeal from, the ZBA lacked jurisdiction to hear an interpretation appeal from the opponents.
 - According to the record, the discussion relevant to the appeal was held during a workshop where a lack of proper notice violated the Open Meetings Law.
 - **Decision:** The Court wrote, *"In enacting the Open Meetings Law, the Legislature sought to ensure that public business performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."* However, the Court went on to note that not every violation warrants the penalties and sanctions which was the case here because this was one meeting in a series of meetings which were properly noticed and open to the public.
- Davis v. Zoning Board of Appeals of the City of Buffalo, (4th Dep't 2019):
 - A redevelopment project was proposed which would demolish 14 existing structures and a four-story mixed use project would be built in its place. The project is located in a National Register of Historic Places.
 - The Planning and Zoning Boards for the City granted eight variances, SEQRA approval, site plan and a minor subdivision. Concerned citizens challenged the determinations of both boards in court.
 - **Decision:** While the ZBA notices did not contain an enumeration of each of the 8 variances requested, the Court found that there was sufficient information to apprise the public of a mixed-use project, as well as the methods to receive more information. Due to the heavy attendance at the meetings for the variances, the public comments were limited to three minutes each and one hearing closed before all members of the public could speak. However, the ZBA indicated that it would accept written comments after the hearing. The Court concluded that the "restrictions were reasonable in nature and allowed the public an opportunity to be heard."



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