



**Division of Local
Government Services**

Special Use Permits

A Division of New York Department of State

Special Use Permit

Use permitted by zoning but subject to requirements or conditions to ensure:

- Harmony with zoning
- No adverse impacts to neighborhood

Sometimes referred to as:

- Special exceptions
- Conditional uses

- General City Law § 27-b
- Town Law § 274-b
- Village Law § 7-725-b



Purpose

- Allows for greater variety of land uses while recognizing that some uses may present challenges to compatibility within a zoning district
- Provides an added layer of review for uses that require special attention by the nature of their use
- Allows for mitigation of potential adverse impacts



Special Uses

Uses allowed by special use permit

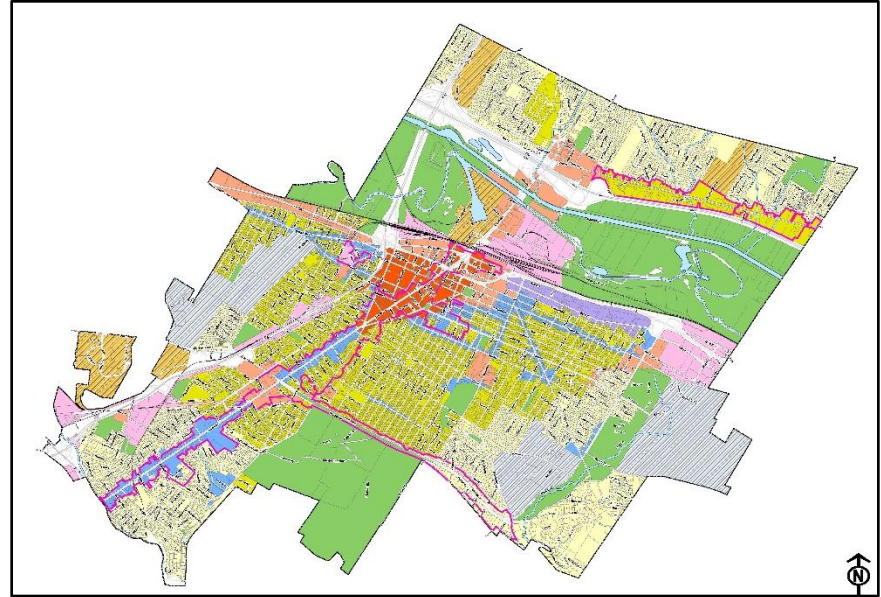
- Require SUP only when use impact might need mitigation
- Clearly list and define uses in zoning -- avoid “and other similar uses”



For example, for outdoor dining or events in neighborhood-commercial

Special uses allowed by location

- By zoning district
- By overlay zone
 - In sensitive/unique areas, some or all uses may require additional review for compatibility



Example of special use in district

Gas station
allowed by
SUP in
neighborhood
commercial
district



Example of special use in any district

Some uses
commonly require
SUP for aesthetic
impacts



Example of special use in overlay

- **Ridgeline Protection Overlay**
 - All new development above set elevation could require an SUP to consider aesthetic impact on viewshed
- **Waterfront Protection Overlay**
 - Protects natural shorelines and riparian buffers, water quality, viewsheds and public access
 - A SUP could be required for more intense uses to ensure environmental impacts are mitigated



Housing development on ridgeline impacts viewshed while house below ridgeline is barely visible

Different from site plan review

- If use is generally deemed appropriate, Site Plan Review (SPR) for a project may be all that is necessary
- Reviews all aspects of site design and development plans for **permitted** use – including mitigation of impacts created by proposed site development



Site development impacts for drive-throughs on auto-oriented commercial zone may be mitigated through SPR as the use is generally compatible

Special use criteria vs use regulations

Example additional standards that can be evaluated in Site Plan Review

Drive-through windows:

(4) Traffic circulation.

- (a) A traffic study addressing both on-site and off-site traffic and circulation impacts is required.*
- (b) Pedestrians should be able to enter the establishment from the parking lot or sidewalk without crossing the waiting or exit lanes, when practicable.*
- (c) Waiting lanes shall accommodate the following number of cars to be in a queue or stacked based on the use:*
 - [1] Fast-food restaurants and coffee shops: sufficient to accommodate a minimum queue of eight vehicles.*
 - [2] All other drive-through windows: sufficient to accommodate a minimum queue of four vehicles.*

Special use criteria vs use regulations

Example criteria that is more interpretive/situational – Special Use Permit appropriate:

Drive-through Windows:

A. Due to potential impacts on traffic volume, vehicular and pedestrian circulation and the environment, the following additional standards are required for the permitting of drive-through windows.

(1) Site location criteria. The site of the drive-through window shall meet all of the following criteria:

(a) The use shall not substantially increase traffic on streets in R-SF and R-MF Zoning Districts....

SUPs are not use variances

Use Variance

- Required for a use **not permitted** by zoning
- Statutory test must be met
- Zoning Board of Appeals (ZBA)

Special Use Permit

- Required for use **permitted** by zoning **but** subject to additional review criteria / requirements
- Local standards
- Planning Board, ZBA or other review board

North Shore Steak House Inc, v. Board of Appeals of the Village of Thomaston

Administration

A Division of New York Department of State



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Review Board

Governing board may retain authority to review SUP applications

OR

Delegate authority to another board

- Planning Board
- Zoning Board of Appeals as “original jurisdiction”
- Other boards



“Permanent” permit

- SUPs run with the land unless otherwise stated in local zoning and as long as use remains the same and meets any conditions of the permit
 - *Dexter v. Town Board of Town of Gates*
 - *Weinrib v. Weisler*
- If use changes or conditions cease to be met, permit may be revoked by enforcement officer



Temporary permit

- Allows review board to re-appraise application (new facts and circumstances)
- Most appropriate for seasonal uses
- Requires authorization from governing board
(*Scott v. ZBA of the Town of Salina*; *S.V. Space Development Corp. v. Town of Babylon ZBA*)



Renewable permit

- If renewal application is subject to same review as a new application, SUP can't be denied (provided all requirements and conditions are met)

Special use permit review criteria

- Decisions to deny or condition approval must be based on criteria or standards provided in local zoning or they may be invalidated
 - *Shepard v. ZBA of the City of Johnstown*
- At a minimum, a general set of criteria for different potential impacts (conformance with the comprehensive plan, neighborhood compatibility, design compatibility, traffic, infrastructure, noise etc.) should be included in local zoning
- Additional use-specific standards may also be included.



Criteria for review

General

Will usually be upheld:

- “...in the consideration of public health, safety & general welfare”
- “..shall be in harmony with the general purposes & intent of the zoning ordinance & the comprehensive plan”

Specific

Best practice:

- “Design of new primary and accessory structures shall be consistent in scale, materials, and character with the existing vernacular architecture of the surrounding neighborhood or district”

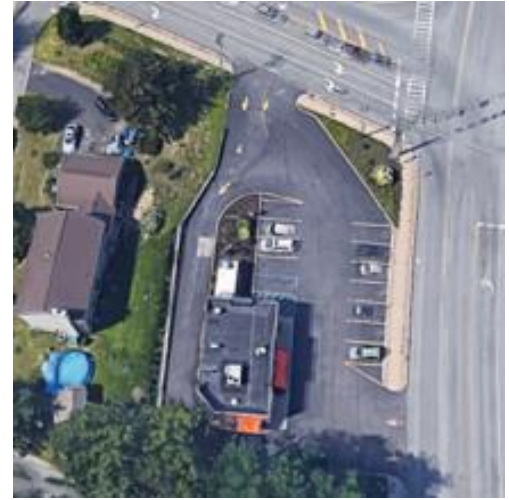
Waiver of requirements

- Review board may waive SUP submission/permit requirements with authorization in the local code
- Review board determines if requirement:
 - Is not needed in the interest of public health, safety or general welfare
 - Is not appropriate for that particular property
- **Must be authorized by governing board**



Coordination with Site Plan Review

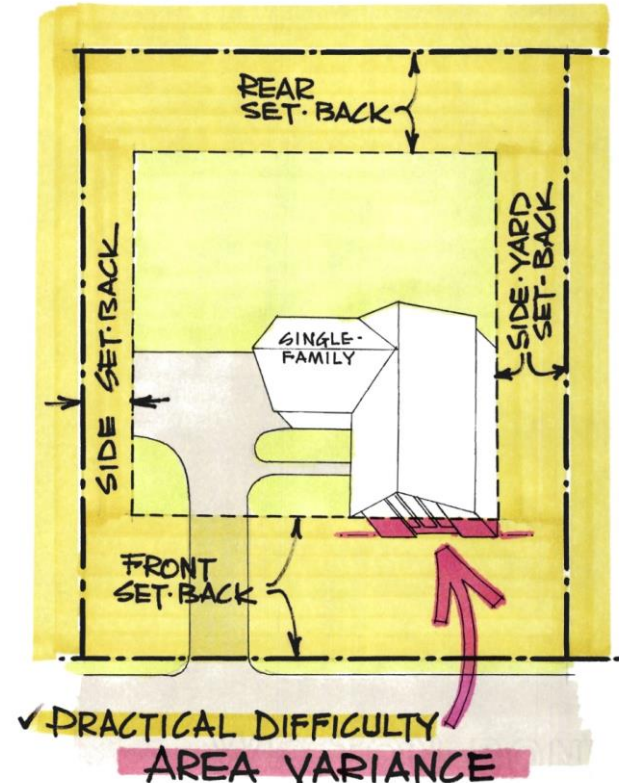
- SUP applications commonly require SPR
- SPR review should be conducted simultaneously
- If different review boards, coordination may be important for mitigating impacts through site development considerations
- If Planning Board reviewing both; both approved at once
- Streamlines review process for all



***Example:** Drive-through window requiring an SUP; traffic circulation impacts potentially mitigated through site development configuration*

When an area variance is also required

- SUP may not be approved without compliance with Zoning
- If an area variance is needed – a “*direct appeal*” can be made to the ZBA during SUP process
- Area variance must be approved prior to SUP approval



SEQRA compliance

- Must complete SEQR before making final local decision
- Require Environmental Assessment Form (EAF) with application submission
- Establish lead agency if coordinated review
- Make determination of significance (positive or negative declaration)
- “Complete application”
 - Negative declaration issued
 - Positive declaration issued and Draft Environmental Impact Statement (DEIS) accepted for public review
 - NYCRR Part 617.3



Public hearing

- Hold within 62 days of “complete application”
- If DEIS hearing, hold in conjunction with SUP hearing
- Open Meetings Law
- Publish legal notice in newspaper of general circulation at least 5 days prior
 - Extend to at least 14 days when DEIS hearing
- Mail notice 10 days prior:
 - Applicant
 - County planning (GML 239-m) if applicable
 - Adjacent municipality (GML 239-nn) if applicable
 - Other property owners if local zoning requires



Referrals

County Referral GML § 239-m

Application must be referred to county planning board if it applies to real property within 500 feet of:

- Municipal boundary
- Boundary of state or county
- Park or recreation area
- R-O-W of state or county road
- R-O-W of county-owned stream or drainage channel
- Boundary of state or county land on which public building is located
- Boundary of farm operation in state agricultural district (except for area variances)

Adjacent Municipalities GML § 239-nn

- SUP applications require notice when 500 feet from a municipal boundary
- Notice by mail or email to clerk of adjacent municipality at least 10 days prior to public hearing



Basis for Decision Making

Granting permits

- Must be approved if local requirements/criteria are met
 - *Pleasant Valley Home Construction v. Van Wagner*
- Mitigate environmental impacts before approval
 - Complete SEQR process prior to making decision
- Zoning regulates land; not applicant, landowner, or occupant
- SUP approval is granted to, and stays with, the property



Conditions

- Review board has express statutory authority to impose conditions
- Must directly relate to impact of development on land itself
- Should not relate to internal operations of business or activity

Regulate hours of operation only if:

- Authorized by governing board;
and
- Substantial evidence of impacts that relate to physical use of the land (Old Country Burgers v. Town of Oyster Bay)



Denying the permit

- Base denial on reasonable grounds:
 - Site not appropriate for use
 - Adjacent property depreciation
 - Traffic impact beyond permitted use (*YMCA v. Burns*)
- Support with evidence
 - For example: traffic study



Wrong reasons for denial: community opposition

Cannot base denial solely on:

“...generalized objections concerns of neighboring community members”

- *Chernick v. McGowan*

- *Pleasant Valley Home v. Van Wagner*



A dentist office located in a former residential building

Wrong reasons for denial

- **General objections to use as undesirable**
 - (i.e., tavern permit denied citing reasons of late hours, noise, traffic, etc.)
 - *Holbrook Assoc. Development Co. v. McGowan*
- **Unrelated or previous violation**
 - Application is attached to use, not applicant (i.e., applicant has violation on different property)



Decision

- Must render decision within 62 days after close of public hearing
- Decision document shall include “findings”
- File with municipal clerk within 5 business days



Findings

- Demonstrate reason for approval or denial (applicant did or didn't meet required standards)
- Disclose all evidence relied on in reaching decision
- Include analysis of evidence
- Relate facts to legal standards
- File with decision document

When reviewing administrative body's decision, courts will limit review to "ascertaining whether the determination has a rational basis and is supported by substantial evidence."
(Hanson v. Valenty)

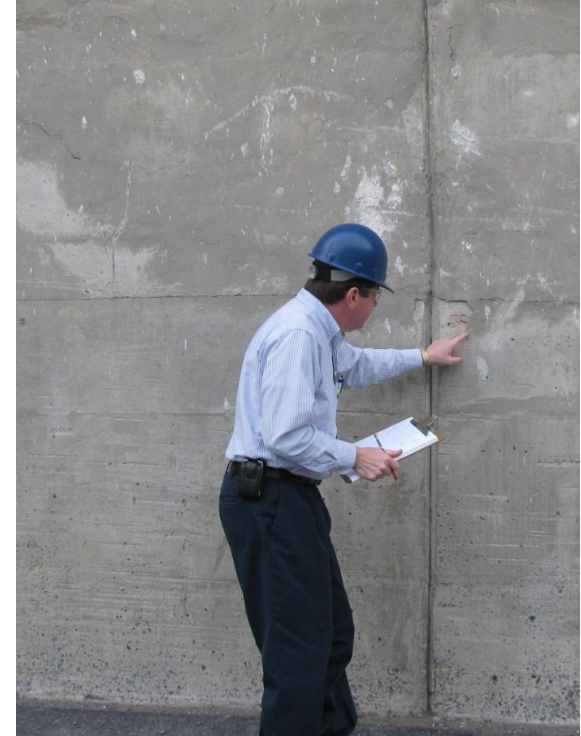
Appeals

- 30-day statute of limitations for appeal
 - Clock starts on date decision “filed” with municipal clerk
- Decisions are not appealed to governing board
- Aggrieved parties may file appeals under Article 78 Civil Practice Law and Rules
 - NYS Supreme Court
 - Appellate Division
 - Court of Appeals



Enforcement

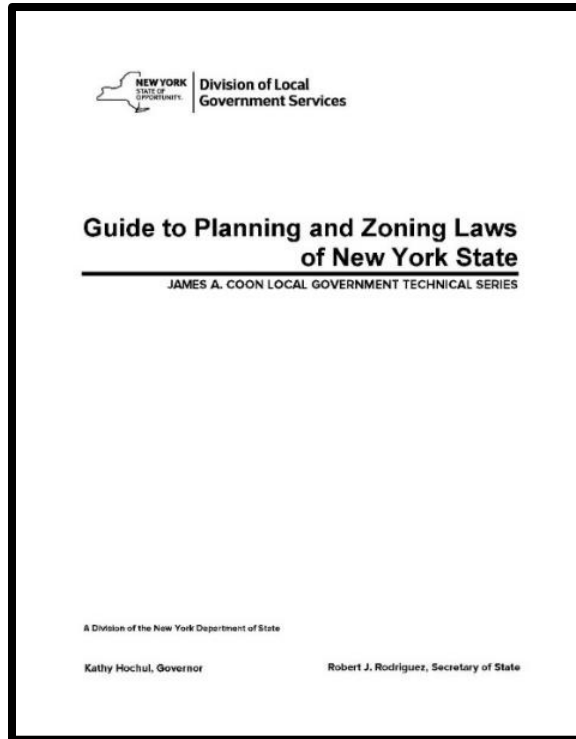
- Zoning or code enforcement officer authorized to enforce zoning/SUP conditions
- Could be stated in
 - Zoning law
 - CEO/ZEO duties
- Require conditions be met before issuing building permit or certificate of occupancy



Revoking special use permit

- Non-compliance
- Substantial evidence
- Failed to comply with imposed conditions
 - *Persico v. Incorporated Village of Mineola*
- Permit holder entitled to hearing before revocation

Resources on New York State Laws



www.dos.ny.gov/publications

- Legal Memorandum LG02: Role of Findings in LG Decisions: NYS DOS
- Legal Memorandum LU15: Regulating Hours of Operation
- NYS DOS Comments – “Court of Appeals’ Decision Addresses Special Use permits, Variances and Waivers”

New York Department of State

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



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