NEW YORK STATE

Department of State
Local Government

AREA VARIANCES: A DEEPER DIVE

Variances

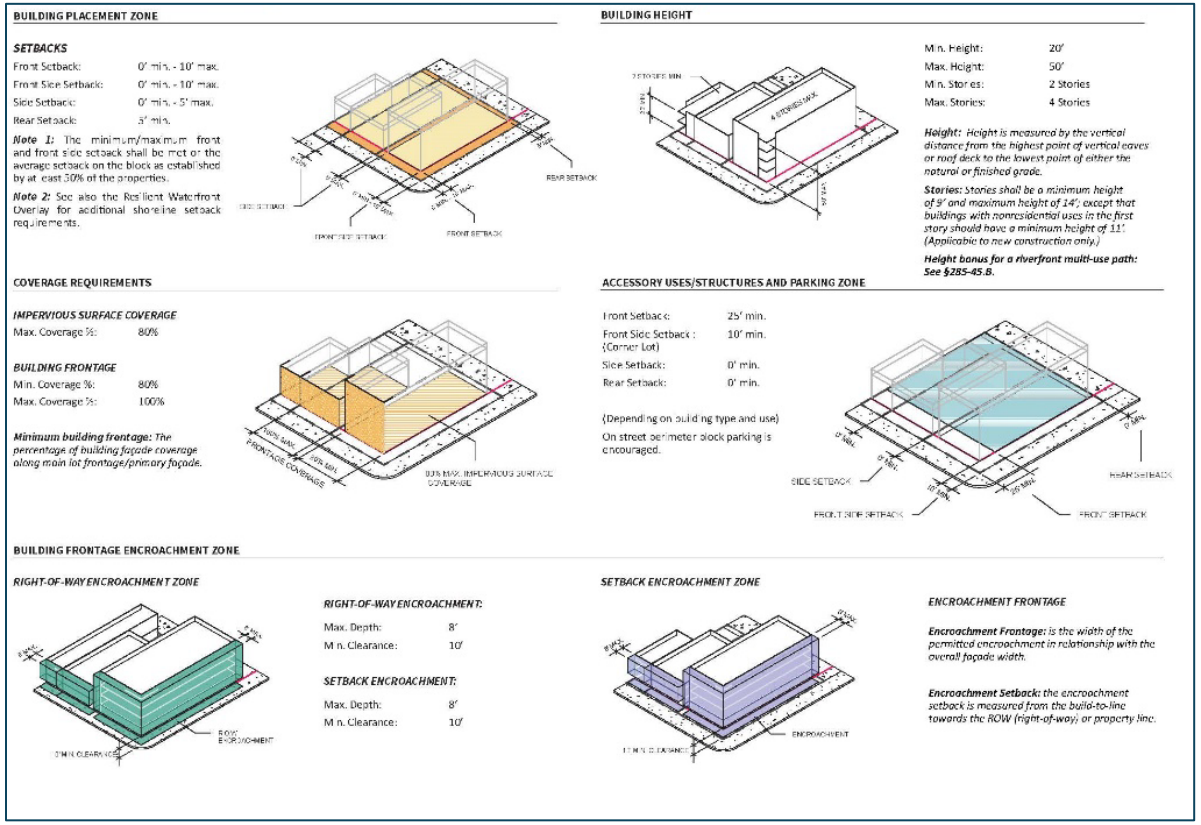
- **Use variance:**
  To use land for a purpose not allowed in the zoning regulations
- **Area variance:**
  Provides relief from dimensional/physical requirement of zoning regulations

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

"A reasonable amount of discretion is delegated to the ZBA because it is impractical for a town to adopt a zoning law that is completely definitive and all encompassing for every scenario."
Arceri v. Town of Islip ZBA

Examples of Dimensional/Physical Relief

- Lot size, width or depth
- Setbacks and build-to lines
- Location of accessory uses and structures
- Height
- Density/minimum floor area
- Lot coverage
- Parking min / max



City of Troy, NY Ordinance

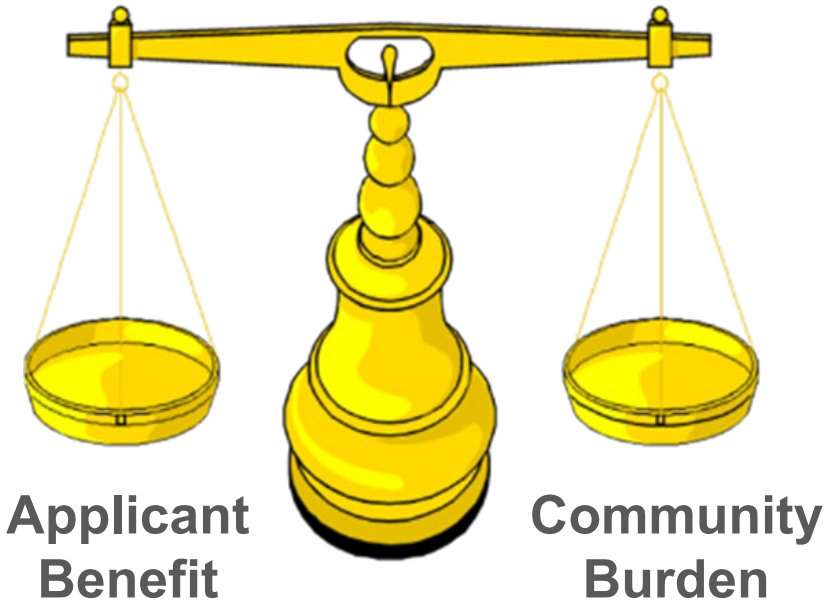
Increased Density – Area or use variance?

- **Use variance**: When a zoning district caps the number of units per dwelling (i.e., two-family), excluding higher density dwellings
- **Area variance**: when multi-family dwellings are permitted and the cap on the **number** of units is driven by lot size, floor area ratio etc.
- **Area variance:** when multi-family dwellings are permitted with a minimum square footage per unit and a decrease in square footage is sought

AREA VARIANCE TEST

Balance Test of 5 Factors

1. Change to neighborhood character or a detriment to nearby properties
2. Alternatives not requiring a variance
3. Substantiality of the request
4. Adverse effect on physical or environmental conditions
5. Alleged difficulty self-created



#1: Undesirable change to neighborhood character or detriment to nearby properties

- Is project consistent with existing development patterns & character?
- Would development contribute to or create an adverse impact?
- Base finding on facts / evidence not assumptions or community objection
- Conditions may be imposed to mitigate undesirable change to nearby properties/character

#1: Undesirable change to neighborhood

Dutt v. Bowers 207 A.D.3d 540 (N.Y. App. Div. 2022)

- Variance for an in-ground pool constructed 6’ from a side property line on a corner lot when 14’ was required
- Town of Islip ZBA denied the variance; lower court annulled decision; reversed on appeal upholding denial
- ZBA had applied all 5 factors determining that the pool in the required setback was inconsistent with the neighborhood as no structures/pools are located similarly, and would set a precedent for future variances that could change the character of the neighborhood; other factors also applied

#2: Are there alternatives not requiring a variance?

Applicants should present reasons for choosing one alternative over another:

- ✔ Better view
- ✔ Avoids adverse impacts
- ✔ Better internal layout
- ✔ Better overall aesthetics

#2: Are there alternatives not requiring a variance?

- Alternatives should be evaluated based on the project objective – not just feasibility
- Efforts to acquire/sell land to avoid a variance may be considered

While a structure may physically be able to be located elsewhere, it may not achieve an applicant's "legitimate goals."

#2: Are there alternatives not requiring a variance?

Baker v. Brownlie, 284 A.D.2d 527, 670 NYS 2d (1998)

- Project to construct a waterfront patio with removable awning posts
- Town deemed patio a “building” and required a 40’ setback where there would be only a 12+’ setback
- Denied variance on all 5 tests including that the patio could be placed elsewhere without a variance
- Reversed on appeal citing no evidence to support findings on several factors - placing the patio in an alternative location not facing the water was not the <u>desired benefit</u> and finding was “clearly erroneous”

#3: Substantiality of request

- "Substantial" can be subjective and must be evaluated on a case-by-case basis
- Magnitude vs. just measurement
- If more than one variance is sought, the cumulative magnitude may be measured

5' of a 30' Setback
vs.
5' of a 10' Setback

50' of 150' of frontage
vs.
50' of 300' of frontage

#3: Substantiality of request

Context – the magnitude for a 10’ side or front yard setback variance would be different in each of these residential scenarios

Urban lot

Suburban lot

Rural lot

#3: Substantiality of request

Tetra Builders v. Scheyer, 251 A. D. 2d 589, 674 NYS 2d 764 (1998)

- Proposed building a single-family home on a substandard lot
- Requested three variances:
  - 10% front yard setback
  - 12% minimum lot size
  - 70% rear yard setback
- Taken separately, variances are relatively minor, but the cumulative effect of all variances was considered substantial
- Court upheld denial

#4: Adverse physical or environmental impacts

- Examples: blocked views, drainage problems, impacted wetlands, parking shortages
- Impacts mitigated through conditions of variance
- Impacts may also be avoided by granting a variance (avoidance of tree removal, viewshed blockage, building alignment to maintain neighborhood character)

Bio-retention filter could be required to address exceeding lot coverage for parking

#4: Adverse physical or environmental impacts

Fund for Lake George, Inc. v. Town of Queensbury Zoning Board of Appeals, 2015 N.Y. Slip Op. 2030

- Variances related to vegetation clearing, setback and depth in order to site a stormwater management system for a new residence
- ZBA approved the variances in part because the project represented a significant effort to mitigate potential adverse environmental impacts even though variances were needed
- Court upheld ZBA decision because the ZBA presented evidence that they had considered the environmental impacts and the other four factors

#5: Is difficulty / situation self-created?

- If so, Statute states the owner is not necessarily precluded from being granted an area variance
- Board must demonstrate other factors are part of decision

Examples:

- Shed needs setback relief because lot is small
- Addition begun in violation of height restrictions

#5: Is difficulty / situation self-created?

Commonly Self-Created

- Failure to know the regulations
- Construction without a permit that will require additional cost to move or alter project
- Ownership of a lot too small for all desired uses and structures
- Failure to know property boundary and construction on adjoining property

Potentially Not Self-Created

- Ownership of a substandard lot prior to zoning adoption
- Acquisition of a permit improperly administered by a ZEO

#5: Is difficulty / situation self-created?

Addressing substandard lots

- "Undersized lots of record" at the time of zoning adoption could be a case of hardship
- Due to early case law decisions, many zoning laws permit some development of substandard vacant lots in "single and separate ownership" without a variance
- More recent cases: if local zoning does not permit development of such lots, an area variance must be sought, and all factors considered
  - See *Matter of Kahn v. Zoning Bd. of Appeals of Vil. of Irvington*, 87 NY2d 344 (1996)

OTHER CONSIDERATIONS

Grant minimum variance necessary

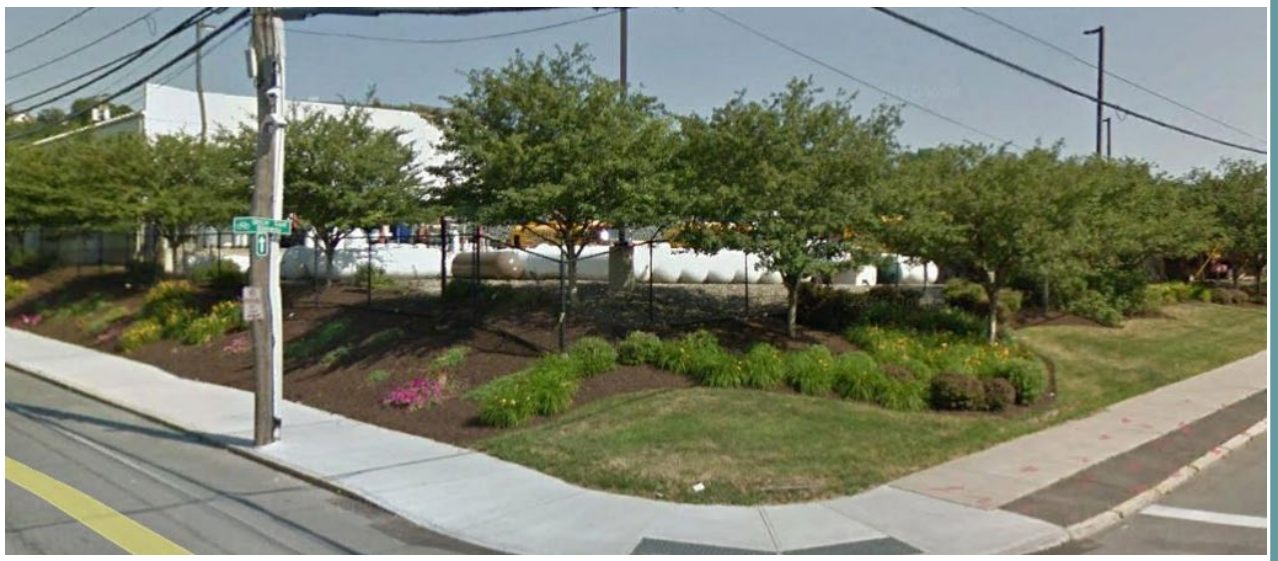
Board need not grant or deny variance request as submitted:

"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."

General City Law § 81-b(3)(c)
Town Law § 267-b(3)(c)
Village Law § 7-712-b(3)(c)

Conditions

- Must be reasonably related to the impact of proposal being considered – **clear nexus**
- Run with the land, not property owner
- Clearly specify conditions imposed in decision documents



Require specific landscaping to screen a parking lot as part of variance to locate parking lot in the front yard

Conditions

St. Onge v. Donovan, 71NY2d 507, 516 (1988)

"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."

The Question of Precedent

- Often cited factors in case law:
  - Are variance requests and development scenarios **factually similar**
  - Has evidence been presented substantiating factually similar cases
  - A ZBA may change its views as to what is in the best interest of the municipality
- Provide specific rationale for decision to avoid setting generalized, widespread precedents
- Provide a *rational* explanation for reaching a different result on similar facts

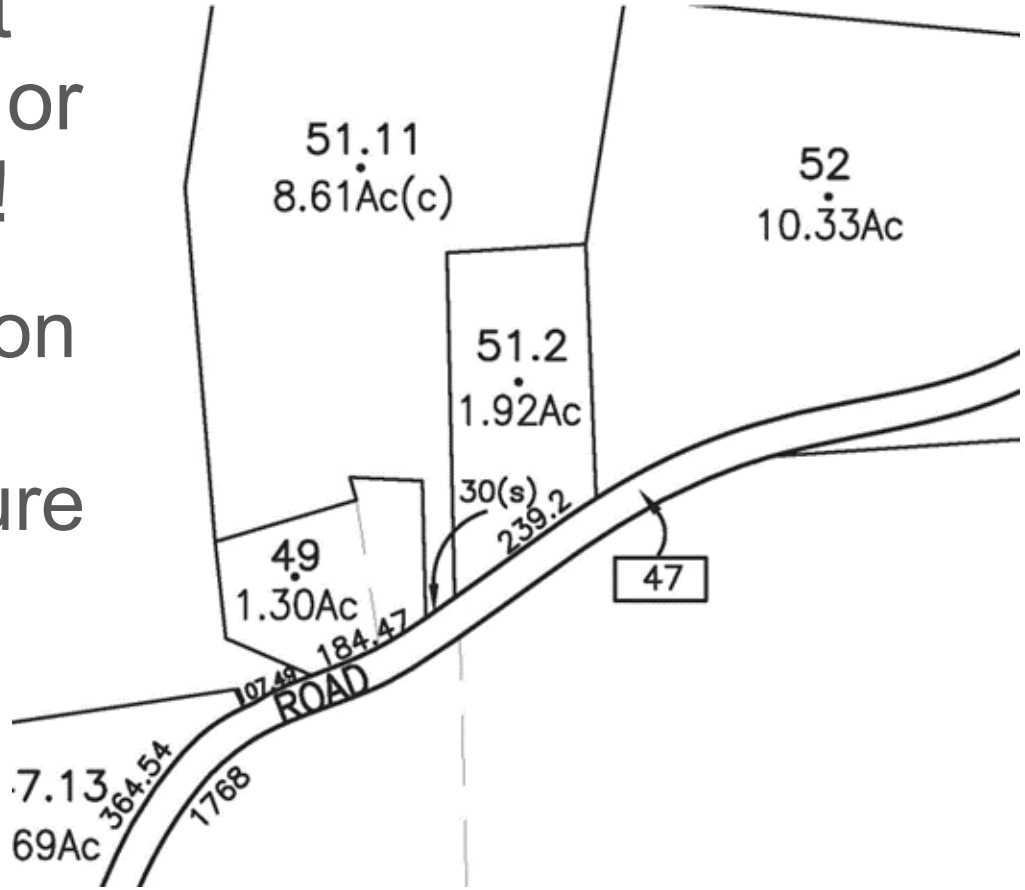
The Question of Precedent

- **Tall Trees Construction Corp. *v.* ZBA of Town of Huntington**, 761 N.E.2d 565 (NY 2001) – ANNULLED denial in part because prior factually similar variances had been approved with no explanation for a different conclusion
- **Waidler v. Young, 63 A.D. 3d 953, 2009** – UPHELD granting of variance citing the explanation provided by the board regarding differences between this application and prior ones

APPLICATION AND REVIEW

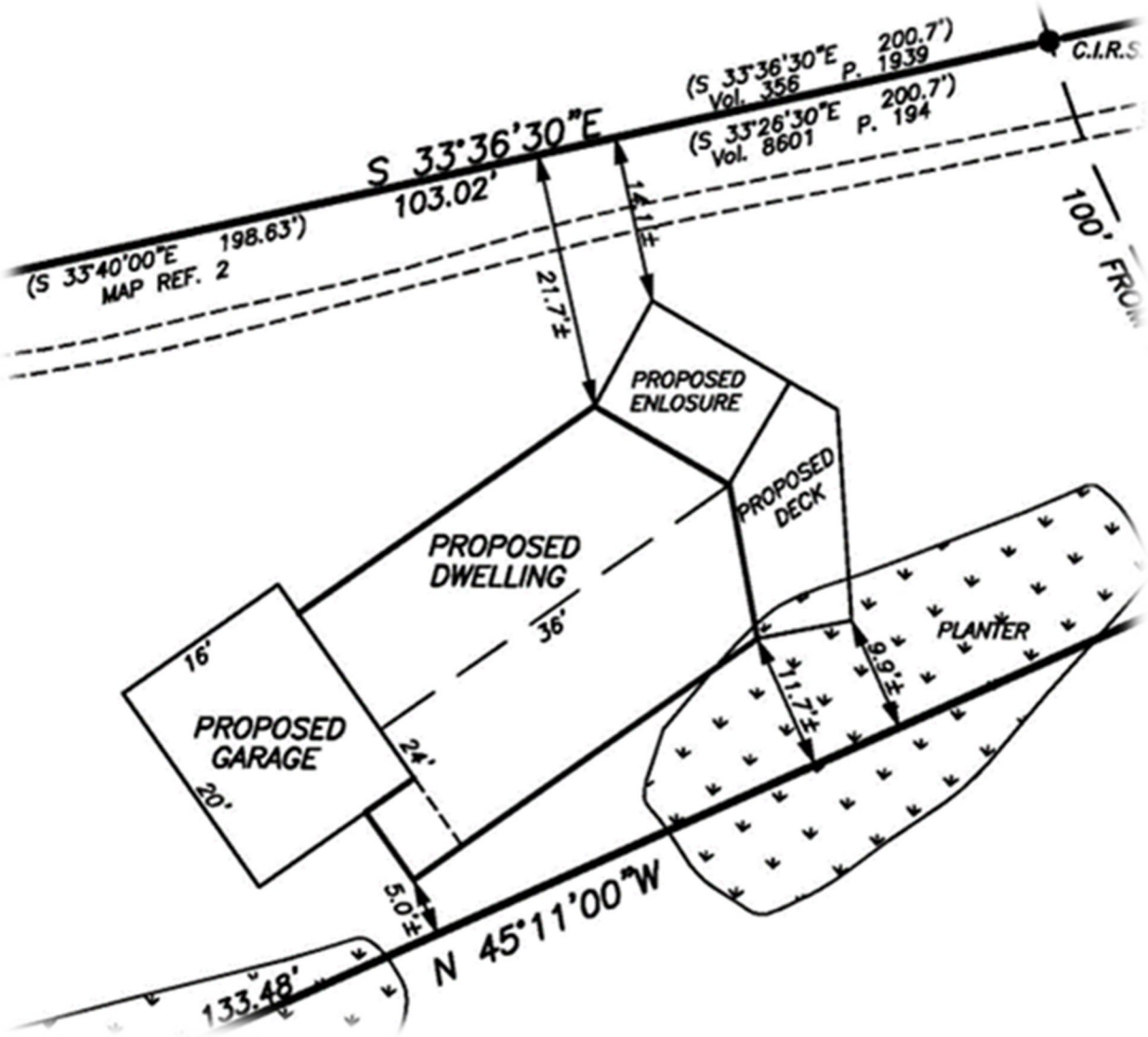
Application and Review

- Does the Board have all the information it initially needs? Don't consider the application complete or set the public hearing until you do!
  - Do a **site visit** – include permission to visit site as part of application with an acknowledgement signature
  - Be wary of using tax maps or antiquated surveys



Application and Review

- Don’t be afraid to require a **site plan/survey**
- On an irregularly shaped lot and building orientation, a survey and site plan is often necessary to accurately convey and illustrate requested variances



Application and Review

- For principal building setback variances, consider **elevation drawings** – plan view surveys and site plans do not provide the full picture when considering the impact of building mass (Ex: seasonal camps replaced with waterfront homes)

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Area Variances and Subdivisions

- For all area variances related to a proposed subdivision, the ZBA **must** request a written recommendation from the Planning Board

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

Seeking relief from minimum frontage in subdivision on cul-de-sacs / curved streets

DECISION AND FINDINGS

Decision and Findings

Courts will not substitute their judgement for the Board's if all factors are considered, and the decision is rationally supported by fact

- Provide evidence that each factor was separately considered
- Avoid general conclusionary statements not supported by facts
- Community opposition is not a valid basis for denial of an application
- Findings may support imposition of conditions
- Facts and case distinctions may provide clarity for precedents (past and future)

Support decision with clear rationale

This:	Not This:
The height variance to exceed the maximum allowable height by eight feet will not impact neighboring properties. The potential impact to the adjoining neighbor's scenic views was analyzed and the proposed dwelling will not impede the neighbor's viewshed due to the offset location of the proposed dwelling.	The height variance will not impact neighboring properties.

Decision Document

- Decision document (resolution, form, meeting minutes) should provide detailed description of variance(s) approved/disapproved
  - When a site plan/survey is involved, reference version/date and attach a copy
  - Provide clear detail of any conditions
  - Remember that lots and building orientation are often irregular so a 5 feet setback at one corner may be a 10 feet setback at another

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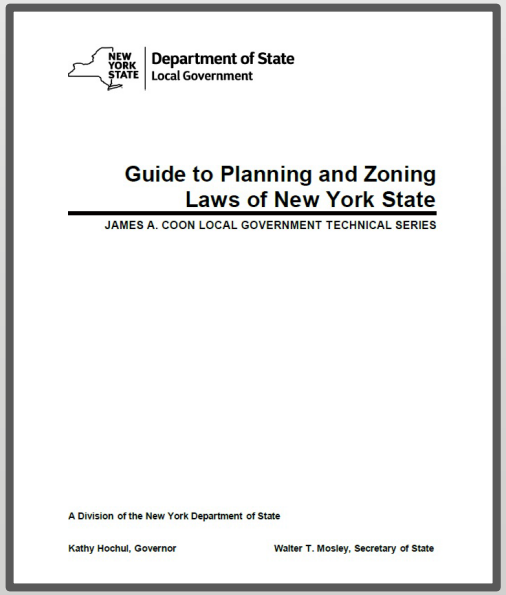
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Guide to Planning and Zoning Laws of New York State

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