



**Division of Local
Government Services**

Zoning Board of Appeals Overview

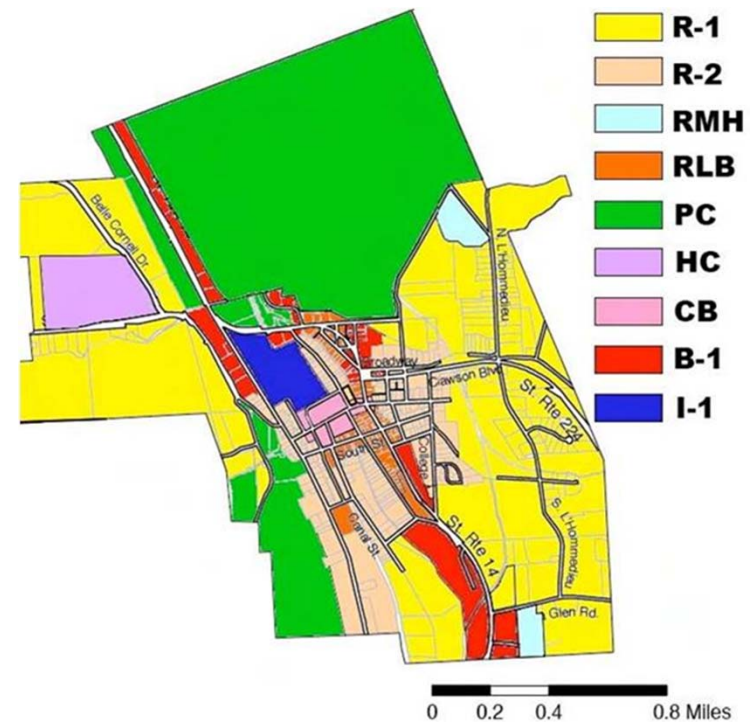
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Introduction

- 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

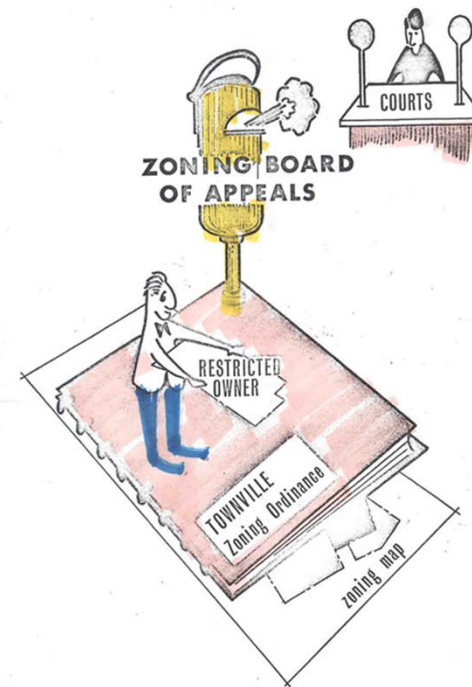
Zoning

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

Copies of state statutes may be found online at:

public.leginfo.state.ny.us/menugetf.cgi?COMMONQUERY=LAWS

Or in the DOS Publication:

Guide to Planning and Zoning Laws of New York State

ZBA members are public officers

- Term of office:
 - 3 or 5 years
- Qualifications:
 - age, citizenship, residency
- Removal:
 - attendance, cause

“I do so solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the [Zoning Board of Appeals Member], according to the best of my ability.”

Section 1, Article XIII –
NY Constitution

State training requirements

- Minimum of four hours annually
 - Excess hours may be carried over
 - Tracked locally
- Consequence of failure to comply
 - Ineligibility for reappointment
 - does not void decisions

- Governing board
 - Approves eligible training
 - May designate responsibility to track and approve
 - Variety of sources & formats
- Requirements may be waived or modified
 - Best interest of municipality
- Resolution

Powers & Duties

Appellate Jurisdiction

- All ZBAs
 - Interpret zoning regulations
 - Issue or deny appeals for variances

Original Jurisdiction

- Some ZBAs
 - When delegated by governing board
 - Special use permits
 - Site plan review

Subdivision review: NYS statute specifies Planning Board preform review.

Appeals

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

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

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



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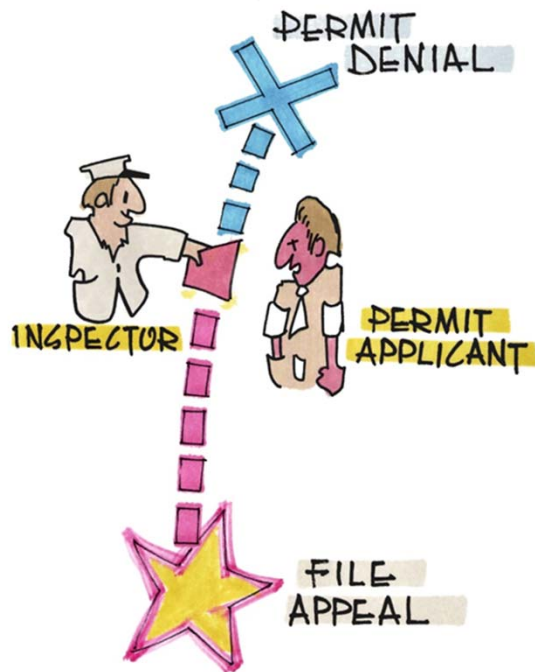
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Interpretations

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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

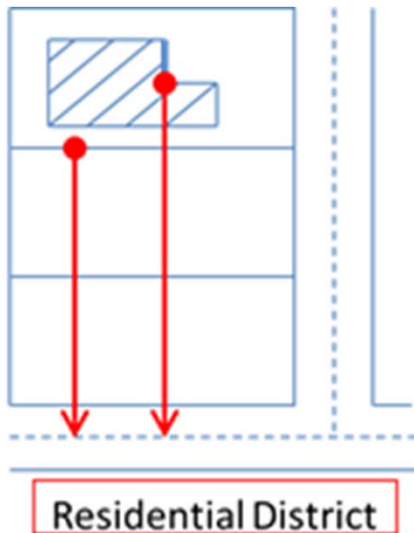
Cited, but no definition

- “Rave” style music events new to historic armory
- “Auditoria” principally permitted use in C-O District; no definition in zoning
- BZA: dictionary definition, 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



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- 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

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**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?



Nonconforming uses

- Legally existed prior to current zoning; “grandfathered”
- Do not need use variances to continue
- For use variances on properties with nonconforming uses, applicants must prove no reasonable return on allowed uses & nonconforming uses
- “Grandfathered” isn’t necessarily permanent: abandonment, amortization



Area variance

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Area variance

To vary from dimensional requirements of zoning regulations



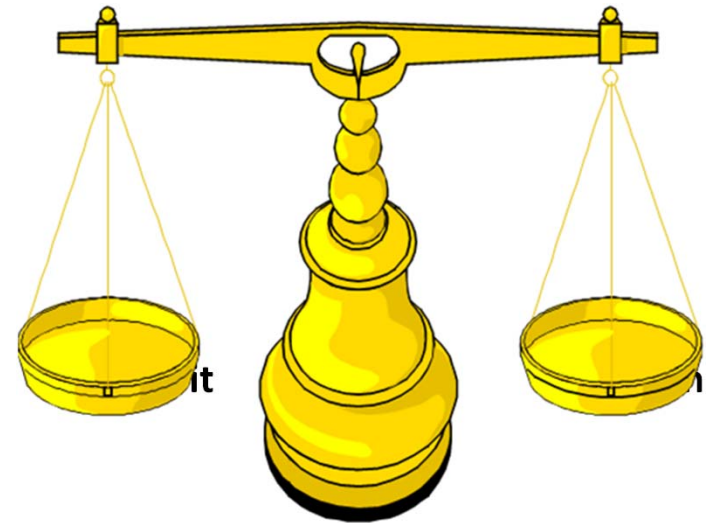
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Example:

- Property needed area variance for relief from setback requirements to construct driveway so 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?



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2. Alternatives not requiring variance



Consider placing addition in rear instead of side



Applicant should present reasons for choosing one alternative over another:

- ✓ Better view
- ✓ Cheaper construction

- ✓ 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

Procedures

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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:



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

SEQRA publication for local governments:
www.dos.ny.gov/LG/seqr.html

Open meetings

- Notice
 - Media
 - Posted in conspicuous place
 - Municipal website (5/12/09)
- Access
- 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

Open meetings – effective 2/2/12

- Records scheduled for discussion at an open meeting must be available for public review on the agency's website in advance
- Website:
 - Routinely updated high speed internet connection
- Records include:
 - Proposed resolution; law, rule or regulation; policy or amendment to a policy

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

- Content of notice:
 - 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



Hearing notice

- If decision on interpretation will dictate whether or not variance will be required...
- ...include language in notice for variance request in the event interpretation isn't in applicant's favor

LEGAL NOTICE (Excerpt) NOTICE IS HEREBY GIVEN

.....

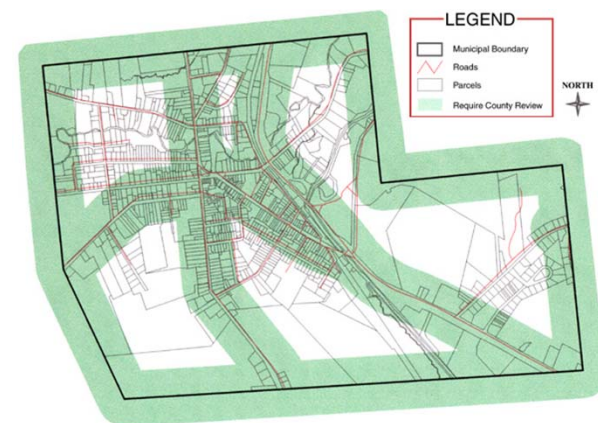
The Applicant requests an interpretation whether the Applicant's proposed single family dwelling complies with the sixty(60) foot setback from Pearl River Road. The Applicant also requests a variance from the sixty(60) foot setback *from* Pearl River Road in the event the Zoning Board of Appeals determines that the proposed dwelling's location does not comply with the sixty foot setback.

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

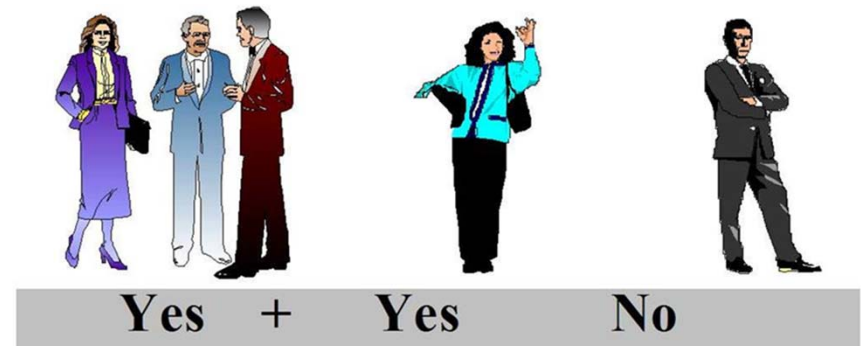


Two day rule

Time period may be extended by mutual agreement

Effect of county referral

- If county recommends disapproval or approval with conditions, the local board may act contrary to the county's recommendations by a supermajority vote
- A majority vote plus one



Taking action

- Motion/resolution only passes with the majority of ENTIRE board
- If motion fails:
 - Variance request or zoning interpretation request is denied*
 - No action on matters of original jurisdiction, such as site plan review

*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

Remember: rehearing must comply with notice provisions

Decisions, Findings, and Filing

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Decisions

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

Findings

Findings should be able to support decision if it's 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 & 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 State Department of State

- 518-473-3355 Division of Local Government
- 518-474-6740 Counsel's Office
- 800-367-8488 Toll Free
- Email: localgov@dos.ny.gov
- Website: www.dos.ny.gov
www.dos.ny.gov/lg/index.html