

# Harter Secret & Emery LLP

ATTORNEYS AND COUNSELORS

## Zoning Boards of Appeals: Powers, Roles & Responsibilities

Allison E. Bartlett, Esq.

[abartlett@hselaw.com](mailto:abartlett@hselaw.com) – (585) 231-1302

Alicia R. Stoklosa, Esq.

[astoklosa@hselaw.com](mailto:astoklosa@hselaw.com) – (585) 231-1397



# Overview

- Power of town boards to pass local laws
- How town codes can be interpreted and by “whom”
  - Area variances
  - Use variances
  - “Spot zoning”
  - Nonconforming uses
- Role of Code Enforcement Officers (CEO)
- ZBA’s ability to uphold or overturn Code Enforcement Officer decision
- Court review of ZBA determination



# Authority of towns to pass local laws

- “[E]very local government shall have the power to adopt and amend local laws not inconsistent with the provisions of the constitution or . . . any general law relating to its property, affairs or government.”  
MUNICIPAL HOME RULE LAW § 10(1)(I).
- “The town board shall provide for the manner in which [zoning] regulations, restrictions and the boundaries of such [zoning] districts . . . shall be determined, established and enforced.” TOWN LAW § 264 (1).

# Jurisdiction of the Zoning Board of Appeals

- The ZBA has primary jurisdiction to interpret a town's zoning ordinance. *Jordan's Partners v. Goehringer*, 204 A.D.2d 453, 455 (2d Dep't 1994).
- The ZBA can only make a determination **after** there is a notice of violation / citation by a Code Enforcement Officer. TOWN LAW § 267-b (1).
  - ZBA has broad authority to in part or whole affirm, reverse or modify Code Enforcement Officer decision
- Note that the ZBA may have authority to approve / deny site plans and special use permits without the participation of a Code Enforcement Officer.
  - Depends on local code authorization



# Variations

- All variations “run with the land” and will last forever unless “properly revoked.” *St. Onge v. Donovan*, 71 N.Y.2d 507, 527 (1998); *Collins v. Vil. of Head-of-the-Harbor*, 2018 NY Slip Op 50596[U] (Sup Ct, Suffolk County 2018).
- Two types:
  - **Area variance**: provides relief from dimensional standards (setbacks, yard & frontage requirements, etc.)
  - **Use variance**: permits use of land for a use not allowed in a parcel’s zoning district



# Criteria for granting area variances

- Balancing test of factors
- TOWN LAW § 267-b (3):
  1. Will the variance create an undesirable change in the neighborhood?
    - Look for dramatic increases or decreases in lot sizes, frontages, etc.
  2. Can the benefit sought be achieved by another method?
    - E.g., applicant can build addition elsewhere on property or applicant acquires adjacent property. *Pecoraro v. Board of Appeals of the Town of Hempstead*, 2 N.Y.3d 608 (2004).
  3. Is the requested variance substantial?
    - “Substantial” is not defined in Town Law; however, some municipalities use mathematical maximums. See, e.g., *Heitzman v. Town of Lake George Zoning Board of Appeals*, 309 A.D.2d 1126 (3d Dep’t 2003) (denial of variance exceeding lot coverage by 15% was valid).
  4. Will the proposed variance have an adverse effect on the physical or environmental conditions of the district / neighborhood?
    - Consider noise, drainage, traffic, odor, etc.
  5. Whether the alleged difficulty was self-created?
    - Not the same as “self-created hardship” for use variances; only one factor to be considered.
    - None of the factors are outcome determinative.



# Use variances

- Burden of proof for granting use variance is higher than area variance
- Should be granted **sparingly** to avoid zoning conflicts
  - “No administrative body may destroy the general scheme of a zoning law by granting variances indiscriminately.” *Clark v. Board of Zoning Appeals*, 301 N.Y. 86 (1950).

# Criteria for granting use variances

- Applicants must **prove all factors** listed in TOWN LAW § 267-b (2):
  1. The Applicant cannot realize a reasonable return from **each use in the district**.
    - Reduction in value of property not sufficient. *Goldstein v. Board of Appeals of Oyster Bay*, 102 N.Y.S.2d 922 (Sup. Ct., Nassau Co., 1951).
    - ZBA must look for “dollars and cents” proof. *Fayetteville v. Jarrold*, 53 N.Y.2d 254 (1981).
  2. The alleged hardship relating to the property is unique and does not apply to a substantial portion of the district / neighborhood.
    - Based on the uniqueness of the land, **NOT** the individual property owner. *Douglaston Civic Asso. v. Klein*, 51 N.Y.2d 963 (1980).
  3. The requested variance will not alter the essential character of the neighborhood.
    - Look to whether the proposed project will lead to creating a pattern of future development that will alter the neighborhood’s character. *Congregation Beth El of Rochester v. Crowley*, 30 Misc.2d 90 (Sup. Ct., Monroe Co., 1961).
  4. The alleged hardship has not been self-created.
    - Did the property owner acquire the property knowing of the existence of the condition complained of? *Clark v. Board of Zoning Appeals*, 301 N.Y. 86 (1950).



# “Spot zoning” – The Antithesis of Zoning

- Spot zoning is “[t]he process of singling out a . . . parcel of land for a use classification totally different from that of the surrounding area for the benefit of the owner of said property to the detriment of others.” *Rodgers v. Village of Tarrytown*, 302 N.Y. 115 (1951).
- Only occurs when an action “conflicts with the fundamental land use policies and development plans of the community.” *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 685 (1996).
- Change must support a “clearly identified public purpose.” *Save Our Forest Action Coalition, Inc. v. City of Kingston*, 246 A.D.2d 217 (3d Dep’t 1998).



# “Spot zoning” – factors to consider

- Municipalities can adopt zoning amendments and respond to changing community conditions as long as those actions “reflect a reasoned, and thought-out planning basis or goal.” *Town of Bedford v. Village of Mt. Kisco*, 33 N.Y.2d 178 (1973).
- *Save Our Forest Action Coalition v. City of Kingston*, 246 A.D.2d 217 (3d Dep’t 1998):
  - Size of the parcel (relevant but not determinative)
  - Consistency with comprehensive land use plan
  - Compatibility with surrounding uses
  - Likelihood of harm to surrounding properties
  - Recommendations of professional planning staff

# Nonconforming uses

- Nonconforming use:
  - Use that legally existed prior to current zoning code and was grandfathered in to be allowed under current zoning.
- No permit needed to continue.
- Cannot be expanded or enlarged. *Lindstrom v. Zoning Bd. of Appeals*, 225 A.D.2d 626 (2d Dep't 1996).

# Elimination of nonconforming uses

- Include a provision in the zoning code stating that any nonconforming use that is abandoned or discontinued for a period of time will revert back to the parcel's zoned for use.
- Two schools of thought:
  - Attempt to define abandonment in terms of intent to discontinue the use; OR
  - Provide a specific time limitation after which a discontinued use may not be resumed, regardless of intent

# Elimination of nonconforming uses

- Clearly define terms or issues may arise. *Toys "R" Us v. Silva*, 89 N.Y.2d 411 (1996).
- Difference in meaning between abandon (intent to relinquish + over act) and discontinue (stop for a period of time).
- Including a time frame renders the property owner's intent irrelevant:
  - “In New York, however, the inclusion of a lapse period in the zoning provision removes the requirement of intent to abandon - discontinuance of nonconforming activity for the specified period constitutes abandonment regardless of intent.” *Id.*
- Generally one or two years - *Toys "R" Us; Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656 (1983).



# Role of Code Enforcement Officer

- Town boards have authority to appoint an “administrative official charged with the enforcement of any ordinance or local law pursuant to [town zoning laws].” MUNICIPAL HOME RULE LAW § 10(4)(a); TOWN LAW § 267-a (4).
- Pass a local law to delineate the powers of a Code Enforcement Officer
  - Model Law from NYS can be found here:  
[https://dos.ny.gov/system/files/documents/2022/01/2022%2001%2018\\_REG\\_1203\\_Model%20Local%20Law.pdf](https://dos.ny.gov/system/files/documents/2022/01/2022%2001%2018_REG_1203_Model%20Local%20Law.pdf)
- Code Enforcement Officer can only enforce the law as written
  - no power to waive or modify, even if they disagree



# ZBA Ability to Uphold or Overturn Code Enforcement Officer Interpretation

- The ZBA cannot preemptively decide on an issue. There must first be a permit approval or denial, citation, challenge to zoning code interpretation, etc. TOWN LAW § 267-b (1).
- Challenges to Code Enforcement Officer decisions and notices of violation must be brought within **60 days** of the decision's filing in the Code Enforcement Officer office. TOWN LAW § 267-a (5)(b).
- Types of common interpretations:
  - Ordinary meaning of terms
  - Previous ZBA decisions on similar facts
  - Minutes, hearing comments, other records from when zoning code was adopted or amended



# Court review of ZBA determinations

- ZBA must make a decision on an application within 62 days of hearing. TOWN LAW § 267-A (8).
- Challenges to ZBA decisions must be brought through an Article 78 proceeding. TOWN LAW §§ 267-c (1); 282.
  - Subject to 30 day statute of limitations
  - Filing of draft minutes with the town clerk is sufficient to start the clock. *Mosher v. Town of Southport Zoning Bd. of App.*, 5 A.D.3d 840 (3d Dep't 2004).

# Court review of ZBA determinations

- ZBA has broad discretion and a determination will be upheld if it is “rational and not arbitrary and capricious.” *Sasso v. Osgood*, 86 N.Y.2d 374 (1995).
- What is rational?
  - Determinations should include an “objective factual basis” and cannot rest solely on “subjective considerations such as general community opposition.”

# When is a ZBA determination arbitrary and capricious?

- A decision of an administrative agency which neither ***adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts*** is arbitrary and capricious." *Knight v. Amelkin*, 510 N.Y.S.2d 550, 550 (1986).
  - Interpretations → follow precedent
  - Variance applications → substantive differences; document findings
    - *Mobil Oil Corp. v. Village of Mamaroneck Bd. of Appeals*, 740 N.Y.S.2d 456 (2002) (court reviewed a village zoning board's decision to deny a variance for additional construction on a gas station located in a C-1 district. The ZBA had recently granted a nearly identical variance to another gas station. Based on that decision, the court held that the ZBA failed to properly distinguish its prior determination granting an area variance).

# Additional resources

- New York State Division of Local Government Services
  - Zoning Board of Appeals -  
<https://dos.ny.gov/system/files/documents/2021/09/zoning-board-appeals-.pdf>
  - Zoning and the Comprehensive Plan -  
<https://dos.ny.gov/system/files/documents/2021/09/zoning-and-the-comprehensive-plan.pdf>

# Questions?

- Contact information:

Allison E. Bartlett, Esq.

[abartlett@hselaw.com](mailto:abartlett@hselaw.com) – (585) 231-1302

Alicia R. Stoklosa, Esq.

[astoklosa@hselaw.com](mailto:astoklosa@hselaw.com) – (585) 231-1397





# Harter Secret & Emery LLP

ATTORNEYS AND COUNSELORS

[WWW.HSELAW.COM](http://WWW.HSELAW.COM)

ROCHESTER • BUFFALO • ALBANY • CORNING • NEW YORK CITY