

Variance Standards

In 1992-1994, changes to the New York State Town, Village and City Laws went into effect that modified the way Zoning Boards of Appeal reviewed and approved requests for variances. This report highlights the state legislative changes and impacts.

Overview

The intent of the changes was to establish statutory tests for the issuance of variances that incorporated what the Legislature believed were the best features of existing court decisions in order to protect communities from lawsuits. The intent was not to change the tests for granting variances that had been established through the courts. However, the tests required for the granting of an area variance have been made more flexible. Despite diminishing the burden on applicants seeking area variances, the changes in no way grant Board of Appeals legislative powers to "amend" the zoning law by giving out wholesale variances to regulations that the Board is not in agreement with.

Where sections of the State Law are cited in this document, the applicable portions of Town Law were used as examples, similar changes were also made to Village and City Laws.

Definitions

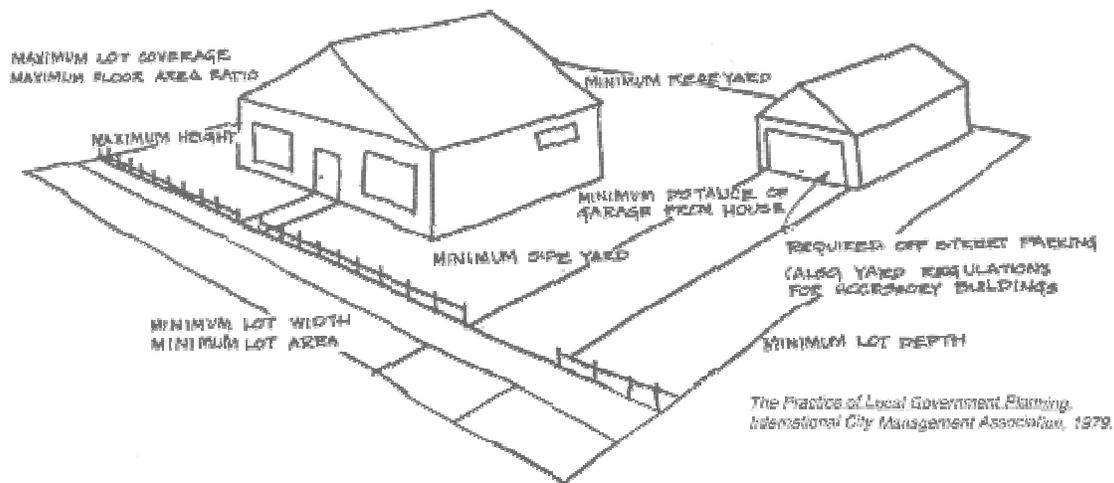
When an applicant requests relief from the strict application of a zoning ordinance, the Zoning Board of Appeals' first task is to determine what type variance relief is being requested. To assist in this task, State law now provides the following definitions for use and area variances:

Section 267.1.(a and b)

(a) "Use Variance" shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or-is prohibited by the applicable zoning regulations.

(b) "Area Variance" shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

The figure below shows examples of the type of regulations, which deal with physical or dimensional requirements, that could be varied through the granting of area variances.



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NOTE: This report on variances applies to New York State. Laws in other states/counties will differ.

Use Variances

The tests for granting use variances have not changed substantially. The applicant must still demonstrate that an unnecessary hardship is created by the strict application of the zoning ordinance.

Section 267-b(2)(b)

No such use variance shall be granted by a board of appeals without a showing of the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.

The required conditions for a proper granting of a use variance remain very difficult to meet. Applicants must demonstrate, through financial documentation, that they are unable to realize a reasonable rate of return from any of the permitted uses for the property in question. The conditions causing this inability cannot be self-created (i.e., paid too much for property with unreasonable expectations of development potential) and must be unique to the specific property in question. Even if these conditions are met, the granting of the variance cannot cause a change in the character of the community.

Area Variances

For the granting of an area variance the demonstration of "practical difficulty" is no longer required. The new test is a simple weighing of the benefit to the applicant receiving the requested relief against the detriment to the community.

Section 267-b(3)(b)

In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some, method feasible for the applicant to pursue, other than an area variance; (3) whether the requested variance is substantial; (4) whether the proposed variance is will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

With the removal of the requirement that the applicant first prove significant economic injury to qualify for an area variance, the consideration by the Zoning Board of Appeals of potential negative impacts on the community becomes more important. The detriment to the community can be undesirable changes to either the character or physical or environmental conditions in the neighborhood. The legislative changes also specifically allow Zoning Boards of Appeal to take into account any negative impact on nearby properties. It is the Board's responsibility to consider all the possible detrimental impacts to the community and provide a record of evidence to substantiate any of these impacts that they determine are significant in their decision to grant or deny area variances. With this in mind, the legislative body should include a clear statement of the intent and the valid public purpose served by any zoning regulation to be enacted and any specific standards which are to be included. Providing this information will assist Zoning Boards of Appeal in determining potential negative impacts on the community.

Recent court cases have upheld the Zoning Board of Appeals' consideration of the potential cumulative impacts of granting an area variance in situations where other properties exist that would have a similar case for requesting the same type of variance. Thus, even though the uniqueness of the situation is not mentioned as one of the listed statutory considerations, it must be considered to determine the overall impacts of granting an area variance. As the legislation now stands, the self-created nature of the need for an area variance can be considered, but it does not automatically disqualify the request, as is the case for use variance requests.

Minimum Relief Requirement and Conditions

For both use and area variances, State Law (in Sections 267-b.2.(c) and 3.(c))requires that the Board of Appeals grant the minimum variance 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".

Section 267-b.4. allows the imposition of conditions on the granting of use and area variances, so long as:

1. Such reasonable conditions and restrictions are directly related to and incidental to the proposed use of the property.

2. Such conditions shall be consistent with the spirit of the zoning ordinance or local law.

3. Such conditions shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

The inclusion in the updated state laws of the requirement to grant the minimum relief necessary and adequate and the ability to impose directly related conditions to both use and area variances, clearly gives Boards of Appeal the ability to grant less than the full relief sought by an applicant. The intent of allowing relief is to provide for a reasonable rate of return, not to maximize profit for a single landowner at the expense of others. Variances are to be used to provide equality with surrounding uses, not a windfall for the applicant.

Conclusions

The legislative changes to the applicable state laws provide a well defined process for the granting of variances. They also represent the intent of the legislature to have Boards of Appeal act as safety valves to provide relief in individual cases, where warranted, to protect the constitutionality of zoning restrictions and regulations and avoid the de facto taking of property. However, it is also clear that the established process for seeking relief is not intended to give Boards of Appeal legislative powers to rewrite zoning ordinances by granting wholesale exemptions to properly enacted regulations. Boards of Appeal must carefully consider whether the spirit of the ordinance is observed, public safety and welfare secured and substantial justice is done.

The potential for substantial negative impacts from the granting of use variances continues to be considered more significant than those related to the granting of area variances and thus the tests for issuing this type of relief are more stringent. However, as Zoning Boards of Appeal are faced with a far greater number of area variance requests, the potential cumulative impacts of granting these requests is at least as significant. Boards of Appeal, instead of granting wholesale variances to regulations that they do not believe are necessary or supportable, should recommend changes in the zoning laws to the legislative body (City Council, Village Trustees, Town Board).

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