



**Practical Issues in
Deciding Area
Variances:
A Hands-On ZBA
Workshop**

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Outline of Tonight's Class

DISCUSS AREA VARIANCES: THE MAJORITY OF ZBA WORK

I. WHAT IS THE STANDARD:

- How the standard developed
- How it contrasts with Use Variance standard
- Analyze the standard and factors

II. PRACTICAL POINTERS

- Deliberation techniques
- Pitfalls to avoid in applying the standard

III. HANDS-ON PRACTICE

- Sample fact patterns

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Why are there Variances?

Variances are the "safety valve" that keeps zoning from being unconstitutional.

Every municipality that has zoning must also have a ZBA

Only the ZBA can grant variances. The Town Board cannot take away the power of a ZBA, or give it to a different Board.

There does not have to be a Planning Board.

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Why is Variance Power given only to the ZBA?

- ZBA is the local expert on the Zoning Law:
- Only the ZBA has full power to interpret zoning law.
- Courts give great deference to ZBA evaluation and interpretation. ZBA does not give deference to ZEO interpretation when appealed. ZBA review is de novo, and ZBA may affirm, reverse, or modify.

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Variations are the ZBA Core Mission

- Constitutional role—mediating between “the law” on the one hand, and “fairness” in the particular case.
- ZBA's are not the “Zoning Police,” and have no power to enforce their decisions.
- ZBA's are not Santa Claus either.

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A Few Limitations

- ZBA Variance power extends only to the Zoning Law, not the entire municipal code. (though appeal authority may be granted by municipality re: historic districts, flood plain laws, viewshed protection laws)
- ZBA has no appellate authority over other Boards.

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How did the Standards for Variances Develop?

- Until 1992, no statewide definitions of what was a "Use" or "Area" variance.
- Only standard was "unnecessary hardship" or a "practical difficulty."
- An Area Variance Applicant had an initial burden to:
 - "Practical difficulty" or "Significant economic injury"
 - "That he couldn't use his property without coming in to conflict with the ordinance."

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Major Change in Law: 1992 Eliminated Applicant's Burden of Proof for Area Variance

- State Commission formed.
- 1992 State Law amendments: eliminated the preliminary burden of proof and substituting a pure balancing test.
- The purpose of the amendment was to make it easier to obtain an Area Variance.

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As of 1992: One Statewide Test for Area Variances

A balancing test of:

The benefit to applicant if variance granted

vs.

(Any) detriment to the neighboring community if variance granted

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The 5 Factors are not in Themselves "The Test."

- They are factors you have to "consider" in applying the overall balancing test.
- The 5 factors aren't mathematically quantifiable
- Applicant does not have to "win" on all of them, or even win a majority of them.
- ZBA can exercise its judgment in according weight among the various factors.
- If we call this a "recipe", the ZBA decides how much of any ingredient to put in.

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Comparison with Use Variance Standards

We can learn a lot about Area Variances by Comparing the Standards with those for Use Variances.

See Handout Chart

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Comparison: Definition

USE	AREA
Definition - "Use variance" shall mean the authorization by the ZBA for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations	Definition - "Area variance" shall mean the authorization by the ZBA for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations

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Comparison: Alternatives

USE	AREA
<p>Applicant shall demonstrate:</p> <ul style="list-style-type: none"> He can't realize a reasonable return, which must be substantial and proved by "dollars and cents" proof. 	<p>The Board shall also consider whether:</p> <ul style="list-style-type: none"> The benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;

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Comparison: Neighborhood Impact

USE	AREA
<p>Applicant shall demonstrate:</p> <ul style="list-style-type: none"> That the requested variance will not alter the essential character of neighborhood. 	<p>The Board shall also consider whether:</p> <ul style="list-style-type: none"> That the requested variance will create an undesirable change in the character of the neighborhood or a detriment to nearby properties (Factor 1); The proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district (Factor 4);

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Comparison: Self-Created Hardship

USE	AREA
<p>Applicant shall demonstrate:</p> <ul style="list-style-type: none"> The alleged hardship is not self created. 	<p>The Board shall also consider whether:</p> <ul style="list-style-type: none"> 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.

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Comparison: Uniqueness vs. Magnitude of Change

USE	AREA
<p>Applicant shall demonstrate:</p> <ul style="list-style-type: none"> The hardship is unique and does not apply to a substantial portion of the district/neighborhood. 	<p>The Board shall also consider whether:</p> <ul style="list-style-type: none"> The requested area variance is substantial;

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Comparison: Minimum Variance

USE	AREA
<p>Minimum - The ZBA shall grant the minimum variance that it shall deem necessary and adequate <u>to address the unnecessary hardship proven by the applicant</u>, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.</p>	<p>Minimum - The ZBA shall grant the minimum variance that it shall deem necessary and adequate [xxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxx], and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.</p>

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Comparison: Summary

- Use Variances: Applicant must prove each and every element enumerated in the statute. If any failure of proof, the use variance must be denied.
- Area Variances: Applicant has no initial burden of proof. The ZBA considers the 5 factors, and weighs them as needed in applying the overall balancing test.

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 **Section Two:
Practical Pointers**

- Deliberation Procedure and Technique
- Applying the 5 Factors/Balancing Test—some Pitfalls to Avoid
- The Concept of “Precedent” in Land Use Cases

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 **Practical Pointers:
Deliberation Techniques**

- No required procedure for applying the Area Variance Test
- Same common methods
 - Chair leads discussion of 5 factors and takes vote on each factor, followed by discussion of balancing test.
 - A member offers an overall analysis as part of a motion, and the board discusses
 - Some Boards assign cases to a particular member in advance of the meeting to offer an initial analysis

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 **Practical Pointers:
Deliberation Essentials**

- Be sure to discuss the 5 factors in your deliberations and decision.
 - Not enough to just mention the factors. The record must show good faith evaluation and not mere “rote recitation of the statutory factors without any reference to specific facts”.
- Be sure to discuss the overall balancing test.
 - The factors are only relevant to the extent that they inform the overall test of balancing of the benefit to the applicant vs. the harm to the community.

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Practical Pointers: Community Harm

- To support denial of a variance, the 5 factor discussion must lead to a conclusion of some articulated harm to the community that outweighs the benefit to the applicant. Any denial motion should specify what that harm would be.
- The harm can't be speculative.
- The harm must be attributable to the variance, and not merely the fact that vacant land will be developed.

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Practical Pointers: Community Harm

- "General community opposition" is not enough to constitute "Undesirable change in neighborhood:"
- Be particularly wary of finding an undesirable change in neighborhood when there is proof that other lots in the area have similar nonconformity with zoning, or have received variances.

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Practical Pointers: Does Applicant have means other than Variance to Obtain Benefit?

- This factor refers to other means to obtain the benefit the applicant seeks, not some lesser benefit.
- On the other hand, it is legitimate to consider reasonable alternatives that do achieve the desired benefit.

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 **Practical Pointers:
Substantiality**

- **SUBSTANTIALITY:** The biggest potential pitfall in area variance denials is relying solely on "substantiality" to deny. Substantiality alone is not a reason to deny a variance if the substantiality does not create an undesirable change in the neighborhood.

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 **Practical Pointers:
Precedent (looking back)**

- Don't be afraid of the idea of precedent. Precedent means that "Like cases must be treated alike."
- Precedent makes sense for Zoning Boards, in the same way it does for Courts. Courts *want* to treat like cases alike.
- But they are also able to *distinguish* a case that is not alike.
- Like a Court, a ZBA also has the authority to determine that its prior decisions were wrong.

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 **Practical Pointers:
Precedent (looking ahead)**

- It may be hard to ever justify a denial of a variance in a one-on-one balancing. But you can include evaluations of the cumulative effects of variances compelled by precedent.
- ZBA's have authority to consider the potential precedent-creating effect of a variance granted today, particularly if the lot is in a neighborhood with many similar lots.
- This doctrine should be limited to homogeneous neighborhoods.

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Practical Pointers: Conditions

- Always remember your authority to impose reasonable conditions.
- Make sure the conditions you impose are reasonable. An Article 78 can void an illegal condition, and leave the variance in place.

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Section Three: Hands On Training Practice Applications

- Volunteers for Chairs
- During the Break, review Fact Patterns
- After the break, the Chairs will lead a discussion to decide what procedure each Board will use to deliberate
- Then discuss Fact Pattern 1 and Deliberate
- We will then discuss as a Group
- As time permits, we will go to Fact Patterns 2 & 3.

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