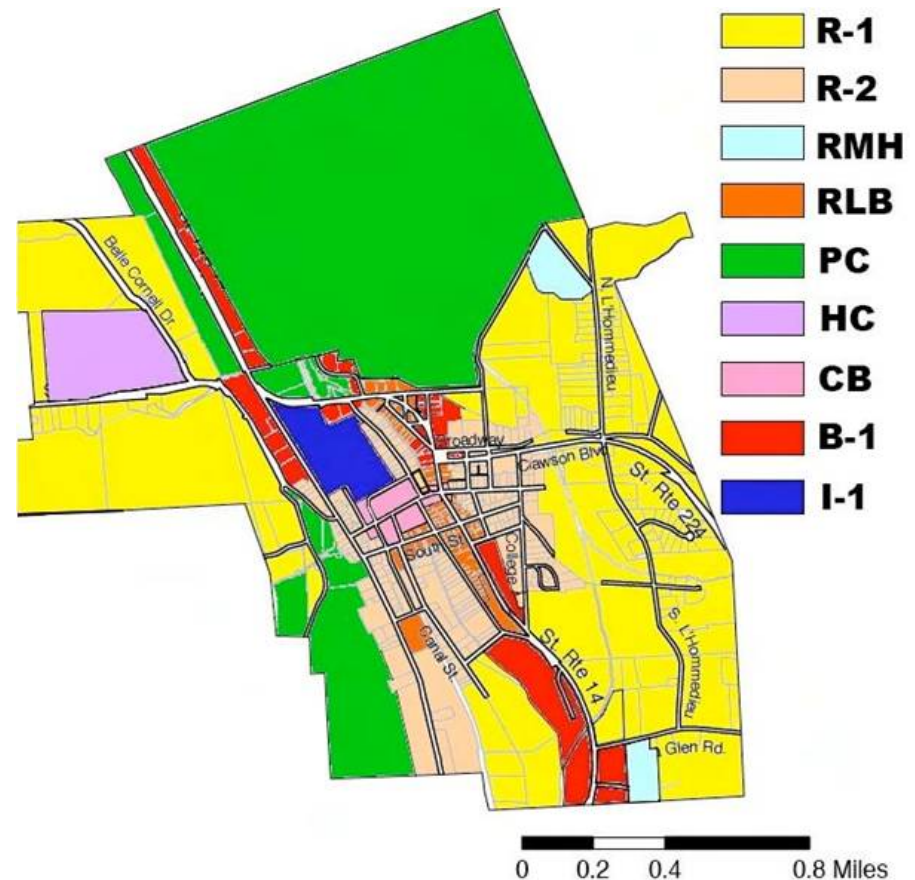


# ZONING BOARD OF APPEALS OVERVIEW

**NYS Department of State  
Division of Coastal, Local Government & Community  
Sustainability**

# 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 a zoning board of appeals.

The ZBA is a “buffer” for aggrieved applicants between decisions of the zoning enforcement officer and the State supreme court.



# 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/menugtf.cgi?COMMONQUERY=LAWS](http://public.leginfo.state.ny.us/menugtf.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
- “Oath of Office”
- Qualifications
- Removal reasons
- Training

“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

- At least four hours annually
- Excess hours carried over
- Necessary for reappointment
- Governing board approves training
- Requirements may be waived or modified
  - Resolution of governing board
  - Best interest of municipality
- Variety of sources & formats

Failure to comply does not void decisions

# ZBA powers and duties



- All ZBAs have APPELLATE JURISDICTION:
  - Interpret zoning regulations
  - Issue or deny appeals for variances
  
- Some ZBAs have ORIGINAL JURISDICTION (if authorized by governing board):
  - Example: Site plan review and special use permits

# Appellate jurisdiction

Before appeal can be made, ZEO must act to:

- Grant permit
- Deny permit
- Make decision on applying zoning regulations
- Issue citation for violation or take another enforcement action

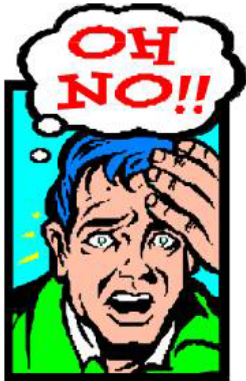
## Exception:

Direct appeal for area variance with applications for:

- Site plan review
- Subdivision review
- Special use permit



# Who has standing?



- One denied a permit, or cited for a violation
- One claiming ZEO's action was incorrect, or special circumstances exist



- Third party standing to be harmed by ZEO decision



- Any "officer, department, board or bureau" of the municipality

# When to file appeal

- Generally, within 60 days after ZEO files copy of action
- Exception: Third Parties must file within 60 days from date they should have known-- or could have knowledge of--ZEO's action

File by letter, or municipality may have form; send copy to ZEO and ZBA.



Area variance

An appeal “stays” enforcement proceedings

# Review Criteria

Interpretations  
Use variances  
Area variances



# Interpretations

# Appeal for interpretation

Appellant  
believes  
Enforcement  
Officer  
wrongly  
applied  
law



Common areas of  
interpretation:

- Definitions
- Method of taking measurements

# Interpretations

Definitions are important. Without them, 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 they adopted zoning provision
- Ordinary meaning of terms, if term is undefined



# Use Variance





To use land for a purpose not allowed by zoning

Alternative: rezone property

# Use variance test

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Applicant  
has  
burden  
of proof  
to prove  
each  
standard

1. No reasonable return
2. Unique circumstances
3. No self-created hardship
4. No alteration to essential neighborhood character

# No reasonable return

Applicant must demonstrate no reasonable return under present zoning for:

- any permitted use, except public uses such as parks
- any use currently allowed by previous use variance
- a current lawful nonconforming use

ZBA must consider property as a whole, not just the portion which is the subject of the application

# Reasonable rate of return

- No hard and fast number; depends on particular facts of application.
- ZBA can determine, and doesn't need to agree with an expert's opinion.  
*(Petruzzelli v. Zoning Bd of Appeals of the Village of Dobbs Ferry, 181 A.D.2d 825 (2d Dept. 1992))*



# 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”

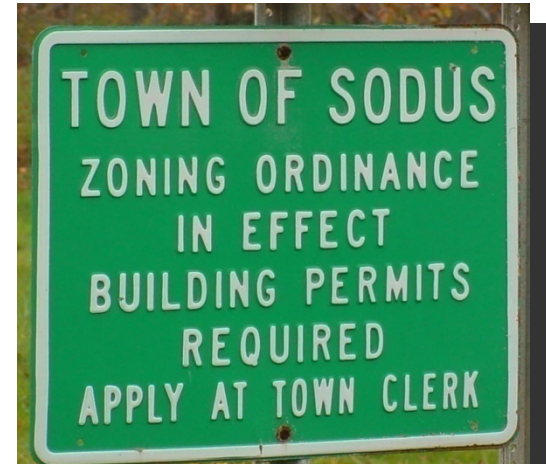


- Other circumstances:
- Physical features
  - Historic or architectural features
  - Adjacent uses

# Self-created hardship

## Examples:

- Request 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.



# Neighborhood character

- Is proposed use consistent with current pattern of development?
- Is there significant detrimental impact on neighborhood or community?





# Area variance



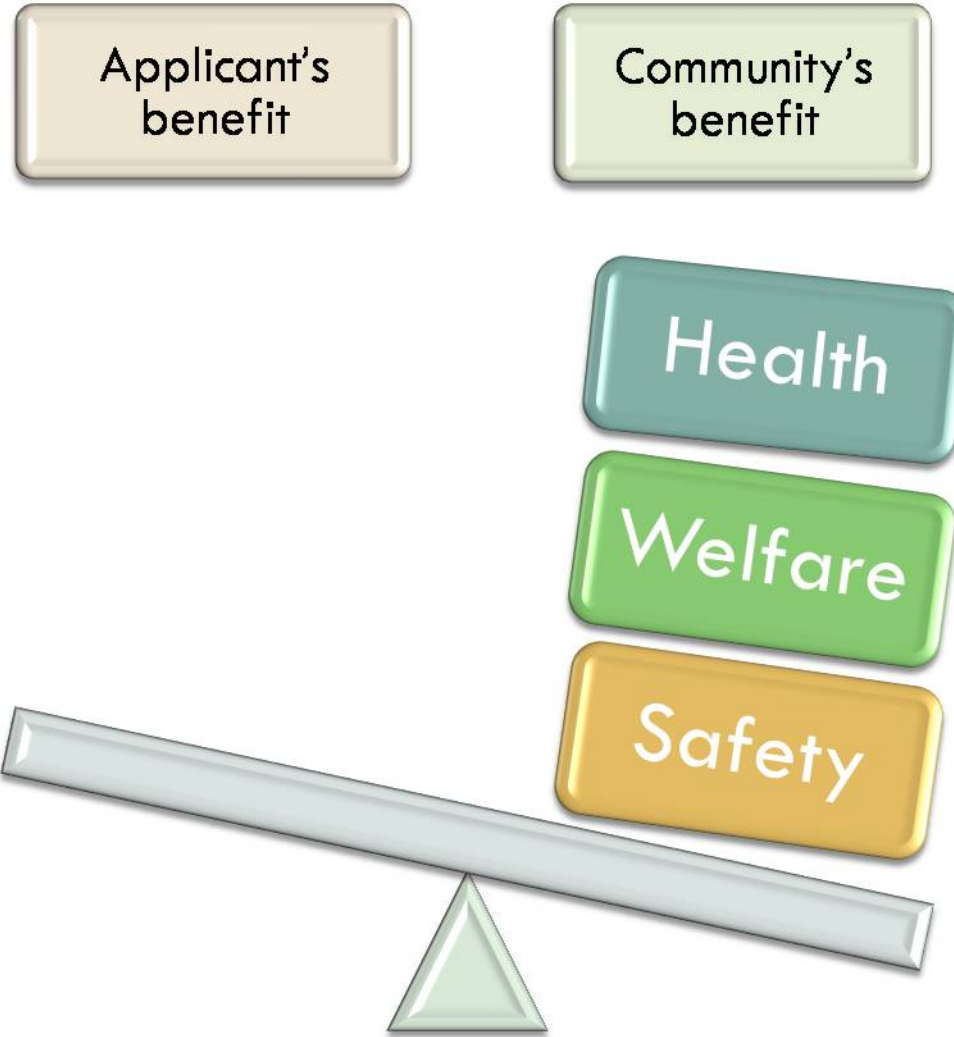
## Area Variances:

For applications not in compliance with dimensional requirements of zoning regulations

To accommodate driveway and fence, this applicant needs side yard area variance.



# Balance: Applicant benefit vs. Community benefit



# Area Variance test



1. Change to neighborhood character
2. Alternatives not requiring a variance
3. Substantiality of the request
4. Effect on physical or environmental conditions
5. Is the situation self-created?

# Change to neighborhood character

Would undesirable change be eliminated with conditions imposed?



# Alternatives not requiring variance



Consider placing addition in rear instead of side



Applicant should present reasons for choosing one alternative over another:

✓ Better View

✓ Better internal pattern

✓ Cheaper construction

✓ Better overall aesthetics

# 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?

# Effect on physical/environmental conditions

## Examples:

- blocked views
- drainage problems
- impacted wetlands
- parking shortages



Could impact be mitigated by conditional approval, such as berm use?

# Is situation self-created?

## Examples:

- ❑ Not enough land to build accessory structure in compliance with zoning
- ❑ Structure build in violation of setback
- ❑ Septic system constrains further construction



If self-created, then variance is not necessarily precluded



# Conditions

- Clearly specify conditions imposed
- Must be reasonably related to impact of proposal being considered

- **NOISE**



“Such conditions might properly relate ‘to fences, safety devices, landscaping, screening and access roads relating to period of use, screening, outdoor lighting and noises, and enclosure of buildings and relating to emission of odors, dust, smoke, refuse matter, vibration noise and other factors incidental to comfort, peace, enjoyment, health or safety of the surrounding area.’”  
St. Onge v. Donovan, 71 NY2d 507, 516 (1998).

# Grant minimum variance necessary

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“... grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proven by the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community”



# ZBA Procedures

# Board procedures

- To be binding, board procedures must be adopted by governing board by local law or ordinance. They cover a variety of issues, including:

Officer and  
committee duties

Calling meetings,  
agendas, public  
input

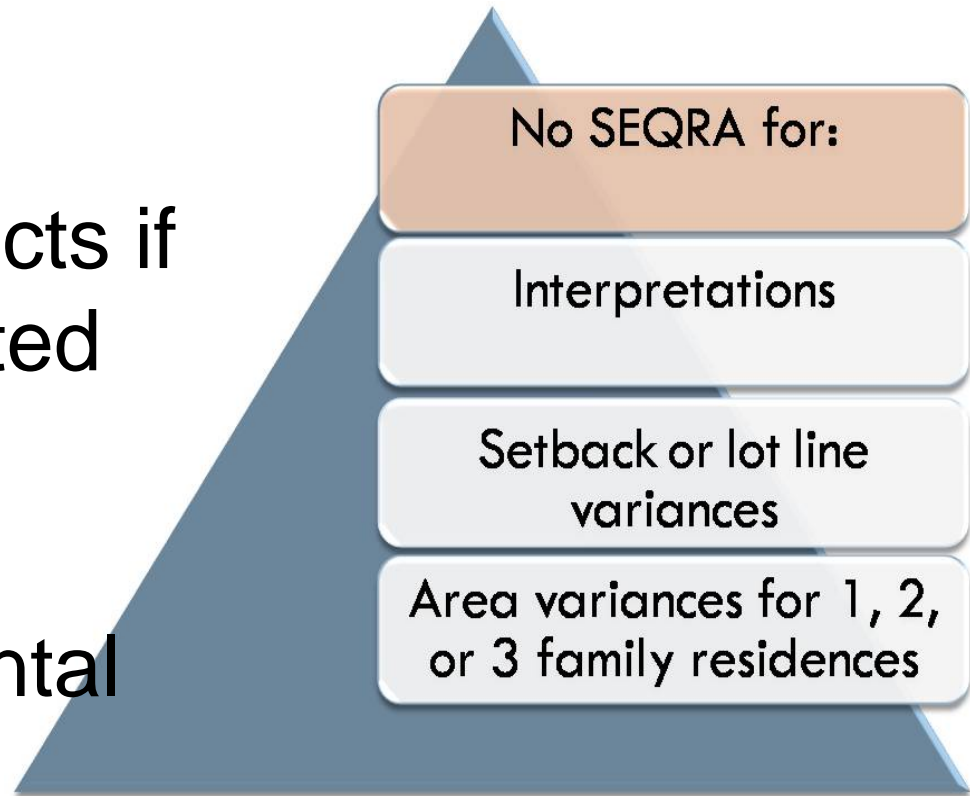
Referrals

Minutes

Official  
document  
signatures

# State Environmental Quality Review Act

- Board determines environmental impacts if variance were granted
- Potential significant adverse environmental impacts must be evaluated, prior to decision



# Open meetings

- ZBA may not meet behind closed doors to discuss applications or board business
- ZBA must provide notice to media and public

A “work session” or “site visit” is a meeting subject to OML if quorum gathers to discuss public business

Executive Sessions may only be held for reasons defined in Open Meetings Law



# ZBA matters require public hearings

Send hearing notice to:

- Parties to the appeal
- Regional or State park commission (if applicable)
- Anyone required to receive a mailed notice by local law or ordinance
- Depending on property location:
  - County Planning Agency
  - Adjacent Municipalities



State Law does not require neighboring property owners be notified by mail when public hearing is scheduled.  
(Except certain public agencies.)

# Hearing notice

What should a hearing notice say if I'm unsure if I need a variance?

If requesting an interpretation, include a request for variance if 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



## **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
- GML §239-nn

# County referral

For all 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 Ag. districts (does not apply to area variances)
- GML §239-m



# Waiting to act

ZBA can't take final action until one of the following occurs first:

1.) ZBA gets county planning agency's report

**OR**

2.) 30 days after county receives full statement



Time period may be longer if agreed to by county and ZBA

# Effect of county recommendation

If county recommends disapproval or approval with conditions, and local board wants to proceed without recommendations...



Yes

+

Yes

No

It must have **supermajority** (majority plus one vote) to continue action.

# 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, Filings, and Findings

# Decisions



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



# Filings

Municipal clerk should stamp all records with the date they are received

- 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



RECEIVED

# Findings

Finding should be able to support a decision if 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 and filed

# Contacting the Department of State

(518) 473-3355

Training Unit

(518) 474-6740  
Department

Legal

(800) 367-8488

Toll Free



Email: [localgov@dos.state.ny.us](mailto:localgov@dos.state.ny.us)

Website: [www.dos.state.ny.us](http://www.dos.state.ny.us)

New York Department of State