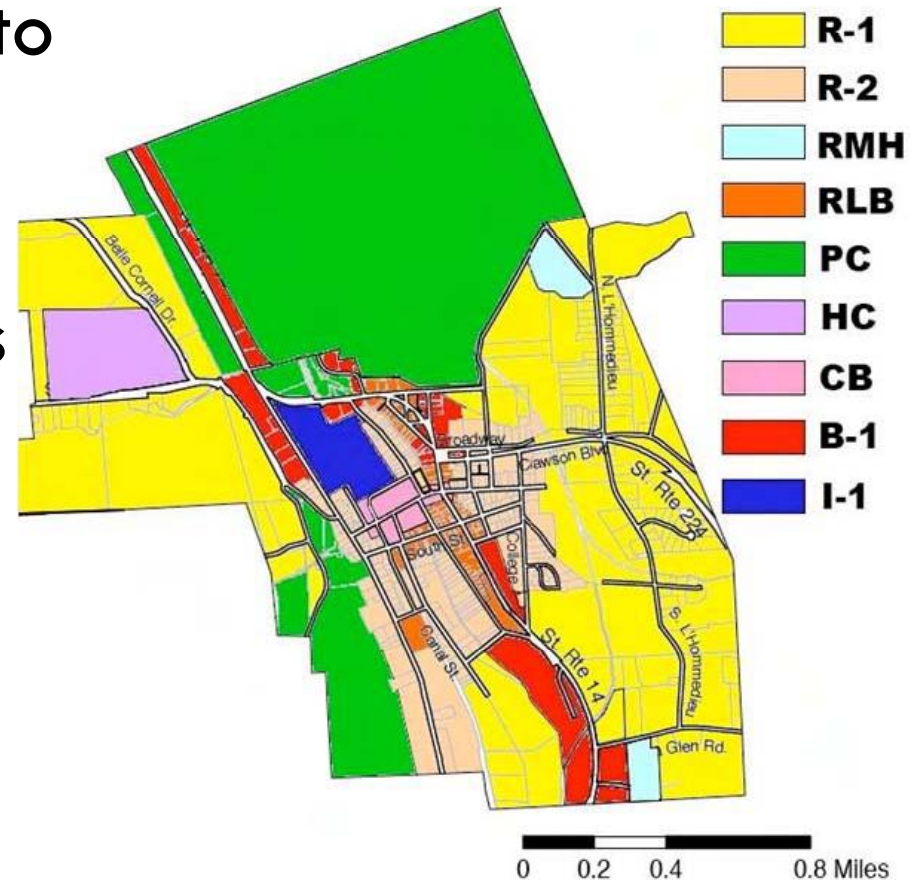


ZONING BOARD OF APPEALS OVERVIEW

New York Department of State

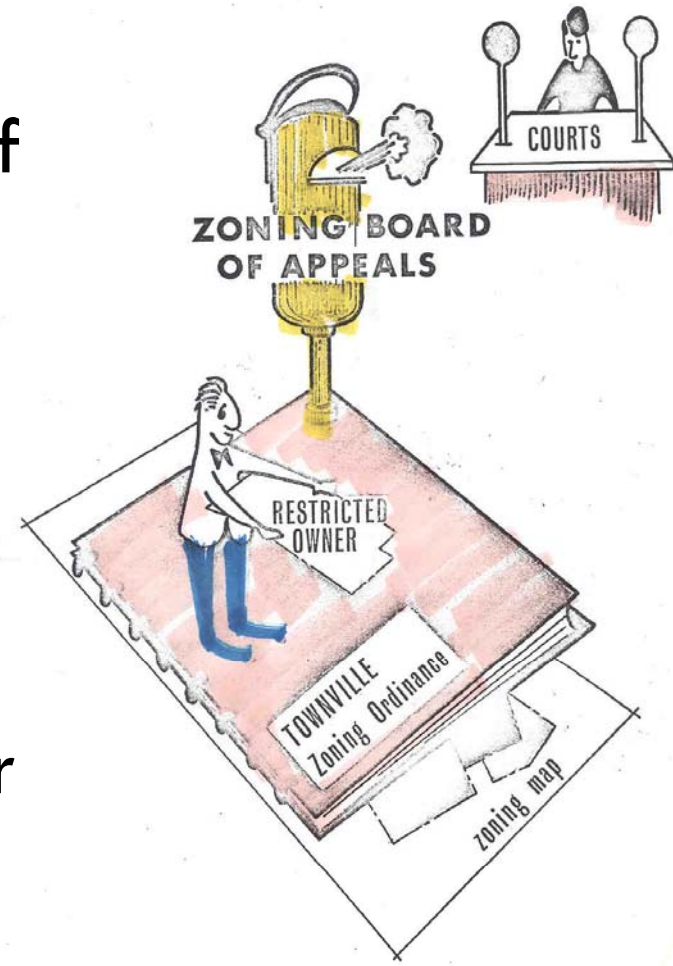
Zoning

- 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
- “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

- ❑ Minimum of 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
- ❑ Tracked locally

Failure to comply does not void decisions

ZBA powers & 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):
 - Site plan review
 - Special use permits

Before an appeal can be made

Zoning Enforcement Officer
(ZEO) must act to:

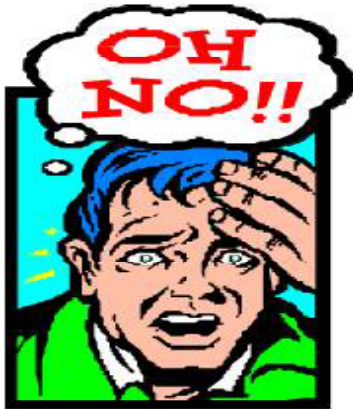
- Grant permit
- Deny permit
- Make decision on applying zoning regulations
- Issue citation for violation or take another enforcement action

Exception:

Direct appeal for area variance with applications for:

- Site plan review
- Subdivision review
- Special use permit

Who has standing?



- ❑ One denied permit, or cited for 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 municipality

When to file appeal

- 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 the ZEO's action

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



An appeal “stays” enforcement proceedings

Review Criteria

Interpretations

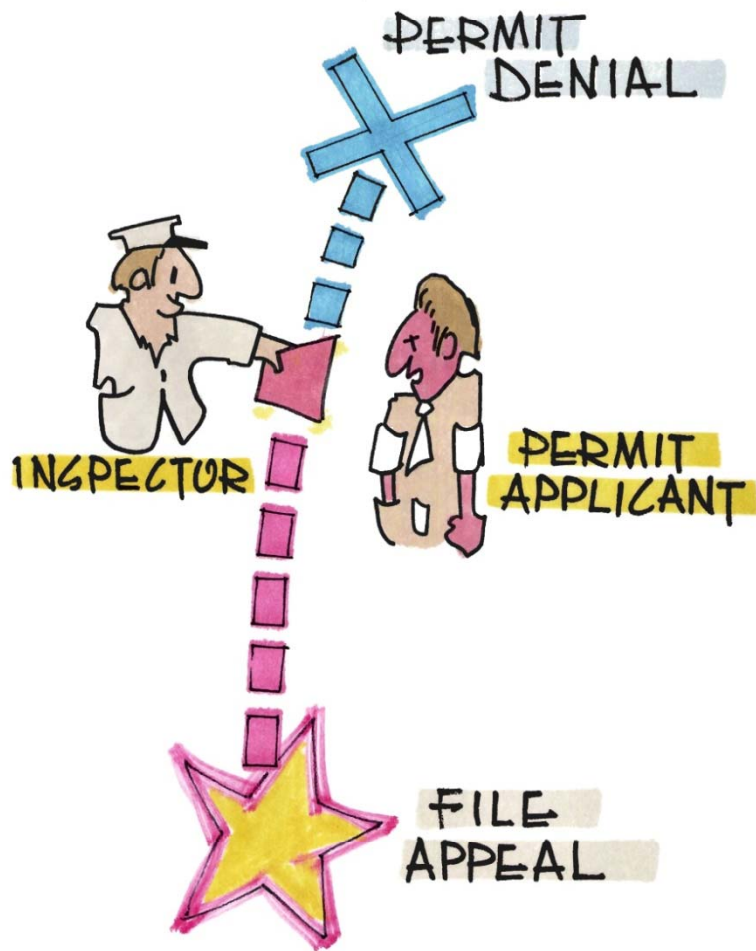
Use variances

Area variances



Interpretations

Appeal for interpretation



- Appellant believes ZEO wrongly applied the law

Common areas of interpretation:

- Definitions
- Method of taking measurements

Interpretations

Without definitions, the 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

The
“burden
of proof”
is on the
applicant

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

1. No reasonable return

Applicant must demonstrate no reasonable return under present zoning for:

- ❑ 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”



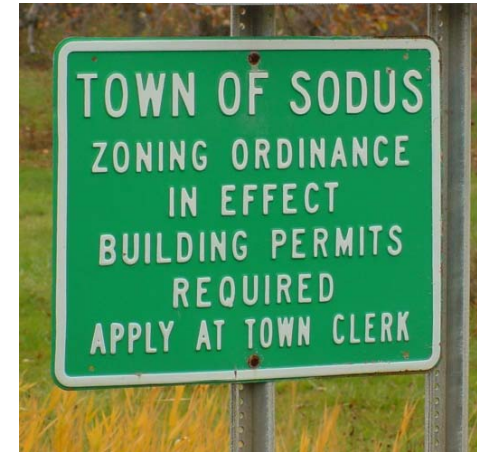
Other circumstances:

- 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

- Legal, existed prior to current zoning; “grandfathered”
- Don’t generally need use variances to continue
- For use variances on properties with nonconforming uses, applicants must prove no reasonable return on allowed uses and nonconforming use
- “Grandfathered” isn’t necessarily permanent:
 - Abandonment
 - Amortization





Area variance

Area Variance

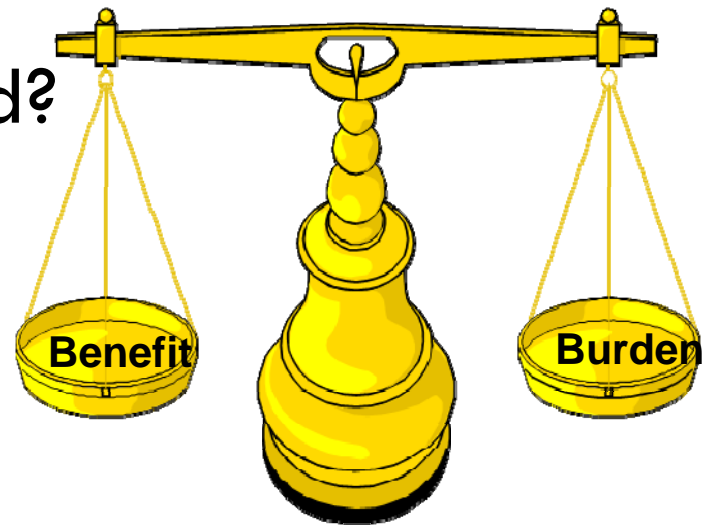
- To vary from dimensional requirements of zoning regulations



- Example:
 - ▣ Property needed area variance for relief from setback requirements to construct driveway so close to lot line

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?



1. Change to neighborhood character

Would undesirable changes be eliminated with conditions imposed?



2. Alternatives not requiring variance



**Consider
placing
addition in
rear instead
of side**



Applicant should present reasons for choosing one alternate over another:

- ✓ **Better view**
- ✓ **Better internal pattern**
- ✓ **Cheaper construction**
- ✓ **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(3)(c)
- Village Law 7-712-b(3)(c)
- General City Law 81-b (4)(v)(c)



Procedures, Meetings, Hearings

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:

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

Examples of Type II Actions

- Interpretations
- Area variances from setbacks or for 1, 2, & 3-family residences

Open meetings

- Notice
 - ▣ Media
 - ▣ Posted in conspicuous place
 - ▣ Municipal website
- 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



Hearing notice requirements

- State notice requirements:
 - Public meeting requirements
 - Legal notice in official newspaper
 - 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)
- Examples of local notice 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

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 not 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 recommendation

- 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 vote



Yes +

Yes

No

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 & any conditions passed
- ❑ Send copy with findings to applicant, & 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 & filed

Contacting the Department of State

(518) 473-3355

Training Unit

(518) 474-6740

Legal Department

(800) 367-8488

Toll Free



Email: localgov@dos.state.ny.us

Website: www.dos.state.ny.us