



M E M O R A N D U M

TO: Terry Martino
FROM: Brian Grisi
DATE: July 3, 2012
RE: Local Government Services Committee Meeting

The Local Government Services Committee July meeting will focus on the Agency's review of variances issued by local Zoning Boards of Appeals (ZBAs). Discussion of amendments to Agency approved local land use programs is deferred to a future Agency meeting.

To assist with Board discussion, the following documents are attached for your use:

- Land Use Training Program
- Sample cover letter to ZBA Chair (***note that measurements provided are for illustrative purposes only***)
- Sample supporting Memorandum (***note that measurements provided are for illustrative purposes only***)
- Agency Review of Variance Referrals from Approved Local Land Use Programs 2008 Rule Making

It is important to emphasize the Agency's review of variances issued by ZBA's in approved local land use programs (ALLUP) is an administrative review which focuses on the process and adequacy of the procedures and decision criteria of the Zoning Board. Agency review of local ZBA decisions should not be construed as a specific review of a variance request or application from a property owner. There is a fundamental difference in the scope of review under 9 NYCRR Part 582.6 (Local Land Use Programs) from variance review completed in accordance with 9 NYCRR Part 576 (Agency Standards for Review of Variances) which set up specific application procedures for applicants and define Agency review and hearing procedures. Local ZBA variance review processes are governed by Town and Village Law as described in the attached background & training

information from the NY Planning Federation and Pace University Land Use Law Center.¹

The vast majority of ALLUP variances which involve detail review by Agency staff are area variances. Due to the 30-day statutory time clock (APA Act, Section 808.3)², the Agency Delegation Memorandum delegates review decisions to the Executive Director. A sample of a variance reversal letter and staff supporting memorandum are attached for Agency members' reference.

It is important to note that there is slightly different language for variance review criteria specified in Part 576 in contrast to Town and Village Law. "Practical difficulty" variance review criteria was eliminated from Town Law in 1992 and replaced by the "balancing test" between "benefit to the applicant" vs. "potential detriment to the neighborhood and community." Recognizing this revision to Town Law, Legal Division developed a fact sheet & guidance on **Agency Review of Variance Referrals** (see attached). The information was developed in conjunction with a 2008 rulemaking when Agency shoreline regulations related to lawfully existing, non-conforming structures were revised. Key components of Agency review of ZBA referrals are the following:

- Agency Local Government Services staff will promptly identify any missing but essential part of the record;
- Agency staff review works with the record developed under Town Law to determine whether the ZBA decision used the appropriate statutory basis;
- In granting an area variance, Section 267-b(3)(b) requires a record addressing five considerations of undesirable change in the character of the neighborhood, whether the benefit sought can be achieved without a variance, whether the request is substantial, whether the proposed variance will have an adverse effect or impact on physical or environmental conditions, or whether the difficulty was self created;
- A ZBA may only grant the minimum variance deemed necessary and adequate to provide relief;

¹ Land Use Training Program Tutorial Component V - Variances

² "If such variance is granted (by the ZBA), it shall not take effect for thirty days after the granting thereof . . . If, within such thirty day period, the Agency determines that such variance . . . was not based upon the appropriate statutory basis of practical difficulties or unnecessary hardships, the Agency may reverse the local determination to permit the variance."

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- Town Law empowers the ZBA to impose reasonable conditions to minimize impacts to water quality, character of the neighborhood and/or visibility of shoreline structures.

A detailed example of administrative review of ZBA referrals will be provided by staff at the July meeting of the Local Government Services Committee. The presentation will also include an analysis of local variance referrals and a summary of Agency actions taken.

JEC:BFG:lhb
Attachments