

LAND USE TRAINING PROGRAM

Tutorial Component V – *Variances*

Excerpts – ZBA Authority and Area Variance Criteria

NEW YORK MUNICIPAL INSURANCE RECIPROCAL
LAND USE LAW CENTER - PACE UNIVERSITY SCHOOL OF LAW
NEW YORK PLANNING FEDERATION

VARIANCES

A variance allows property to be used in a manner that does not comply with the literal requirements of the zoning ordinance. There are two types of variances, area and use.

- A use variance permits "a use of the land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations." For example, if a piece of land is zoned for single-family residential use and the owner wishes to operate a retail business, the owner could apply to the zoning board of appeals for a use variance.
- An area variance allows for a "use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulation." An area variance is needed when a building application does not comply with the setback, height, or area requirements of the zoning ordinance. If an owner wants to build a deck on his house that encroaches slightly into a side yard setback area, he could apply to the zoning board of appeals for an area variance.

PURPOSE & AUTHORITY

Variances provide flexibility in the application of the zoning law and give landowners an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a use or area variance when the zoning enforcement officer or building inspector denies an application for a building permit because the proposed development violates the use or dimensional requirements of the zoning law.

Town Law § 267-b, Village Law § 7-712-b, and General City Law § 81-b set forth the definitions of a use and area variance, establish the authority of the zoning board of appeals to issue use and area variances, and provide the statutory criteria that must be met before variances may be awarded.

If an application for permission to build is made to the zoning enforcement officer or local building inspector that does not comply with the literal requirements of the zoning law, the proposal must be denied. If the reason for the denial is that the proposed development violates the use or area provisions of the zoning law, the applicant may then apply to the zoning board of appeals for a use or area variance of the literal provisions as applied to the particular parcel.

A property owner must first be denied a building permit because the request violates use or dimensional requirements of the zoning law. The property owner may apply for a variance to the zoning board of appeals.

VARIANCES AND THE ZONING BOARD OF APPEALS

The zoning board of appeals has been delegated the authority to issue use and area variances. No other board or authority, not even the local legislature, may hear and grant variance requests. The zoning board of appeals has appellate jurisdiction only, which means that the board is limited to reviewing the decisions of, or hearing appeals from, the determinations of the administrative official charged with zoning enforcement. This means that an applicant must first receive a denial from the building inspector or zoning enforcement officer confirming that the proposal is not permitted under the provisions of the zoning law. After such a denial is received, the property owner may apply to the zoning board of appeals for a variance. The board is limited to granting the minimum variance necessary to address the need for the variance while preserving the character, health, safety, and welfare of the community. A vote of the majority of the board in favor of the variance is necessary in order to grant a use or area variance.

Why are variances allowed?

Variances provide flexibility in the application of the zoning law and afford the landowner an opportunity to apply for administrative relief from certain provisions of the law. A property owner may seek a use or area variance when an application for a building permit is denied on the grounds that the proposal violates the use or dimensional requirements of the zoning ordinance. Alternatively, the property owner could request the local legislative board to rezone the property so that the requested use is allowed.

Authority to issue variances

The zoning board of appeals has been delegated the statutory authority to issue use and area variances. The jurisdiction of the zoning board of appeals is limited to reviewing the decisions of, or hearing appeals from the determination of an administrative official charged with enforcing the zoning law. In other words, a landowner may not go directly to the zoning board of appeals for an interpretation of the zoning law or for a variance. The zoning enforcement officer must rule on the matter first and that ruling be appealed to the board. In order to grant a use or area variance, a concurring vote of the majority of the board is necessary. The board is limited to granting the minimum variance necessary that addresses the need for the variance while preserving the character, health, safety, and welfare of the community.

How variances work

When an application for permission to build is made to the local building inspector or department that does not comply with the literal requirements of the zoning law, the proposal must be denied. If the reason for the denial is that the application violates the use or area provisions of the law, the applicant may apply to the zoning board of appeals for a use or area variance.

New York law provides statutory standards for the issuance of use and area variances. The statutes impose a heavy burden upon an applicant of demonstrating that a use variance should be granted, as that applicant is requesting the zoning board of appeals to alter the local legislature's

determination that a specific use is not appropriate in the zoning district. The legal burden is less stringent when applying for an area variance as the potential impact on the surrounding area is significantly reduced.

Statutory Standard for Area Variances

For a zoning board of appeals to grant a variance from the dimensional and area requirements of a zoning ordinance, it must find that the benefits to the applicant of the requested variance outweigh the detriment it will cause to the health, safety, and welfare of the neighborhood. The board must weigh the benefits of the requested variance to the applicant against the five factors set forth in the statute:

1. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of an area variance?
2. Can the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than an area variance?
3. Is the requested area variance substantial?
4. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?
5. Is the alleged difficulty self-created? This consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.