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ZONING AND LAND USE PLANNING

What's the Use of Applying For Use Variances?

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New York's Town Law, Village Law, and General City Law all permit property owners to apply for area and use variances when they want to develop their property in a way that is not permitted by local zoning rules.

Town Law §267(1), and corresponding sections of the Village Law and General City Law, define and distinguish between area and use variances. As they explain, an area variance is an authorization by a zoning board of appeals for the use of land in a manner that is not allowed by the dimensional or physical requirements of the applicable zoning regulations. By contrast, a use variance is an authorization by a zoning board of appeals for the use of land for a purpose that otherwise is not allowed or prohibited by the applicable zoning regulations.

Property owners seeking a variance are more likely to obtain relief when they apply for an area variance rather than a use variance. That's because, as the New York Court of Appeals observed in *Matter of Colin Realty Co., LLC v. Town of Hempstead*, 24 N.Y.3d 96 (2014), the standard for a use variance "is clearly harder to satisfy than the test for an area variance." Indeed, courts generally find that applicants fail to satisfy the requisite proof for the granting of a use variance, invalidating board decisions that grant this relief and upholding denials.

The Two Tests

As provided by state law, a local zoning board of appeals may grant an area variance after considering the benefit to the applicant if the variance is granted as weighed against the detriment to the health, safety, and welfare of the neighborhood or community by the grant. In making that determination, the board is required to consider the following five factors:

- Whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- Whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- Whether the requested area variance is substantial;
- Whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- Whether the alleged difficulty was self-created.

When considering a particular application for an area variance, no one factor is dispositive. Instead, each factor is one consideration in the broader balancing test. The board must weigh and balance the totality of the factors, and only may grant an area variance if it finds that, on balance, the factors weigh in favor of the applicant.

The test for a use variance is quite different. Under New York law, a local zoning board of appeals only may grant a use variance if the applicant demonstrates that applicable zoning regulations and restrictions have caused "unnecessary hardship." To prove unnecessary hardship, an applicant must demonstrate that for each and every permitted use under the zoning regulations for the particular district where the property is located:

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- The applicant cannot realize a reasonable return, provided that the lack of return is substantial as demonstrated by competent financial evidence;
- That the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood;
- That the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- That the alleged hardship was not self-created.

Importantly, a board considering an application for a use variance cannot weigh any of the four factors against each other. Rather, if it finds that the applicant has failed to meet any one factor, it must deny the application.

Consider how some courts have ruled recently when facing challenges to board decisions granting, or denying, use variances.

Use Variances Denied

In *Matter of Gray v. Village of Patchogue*, 164 A.D.3d 587 (2d Dept. 2018), the petitioner filed an application for a use variance to allow her to convert her two-car garage into living space as an accessory apartment for her elderly mother. Following a hearing, the village's zoning board of appeals denied the application, finding that the petitioner failed to satisfy the requirements for a use variance.

The petitioner went to court, challenging the board's decision. The Supreme Court, Suffolk County, agreed with the petitioner and remitted the matter to the board with a direction to grant the application for a use variance. The board appealed to the Appellate Division, Second Department, which reversed.

The Second Department explained that the "unnecessary hardship" test imposed a "heavy burden" on an applicant for a use variance. It then simply found that the petitioner had failed to make the requisite showing of unnecessary hardship for a use variance, and concluded that the Supreme Court should have denied the petition.

The Second Department reached the same result in *Matter of Monte Carlo 1, LLC v. Weiss*, 142 A.D.3d 1173 (2d Dept. 2016).

> Although use variances are recognized under New York law, courts rarely uphold decisions to grant them – and rarely reverse decisions denying them. Property owners should carefully weigh the costs of applying for a use variance against the high probability that they ultimately may not be successful.

This case arose when the owner of a two-story brick building with accessory parking located in a business district sought use variances to convert offices on the first floor into residential apartments. The zoning board of appeals denied the applications and the petitioner went to court.

The Supreme Court, Nassau County, ruled in favor of the board, and the petitioner appealed to the Second Department.

The appellate court found that the board's determinations denying the petitioner's applications were not illegal, arbitrary, or an abuse of discretion. The appellate court upheld the board's conclusion that the petitioner had not demonstrated "unnecessary hardship." According to the Second Department, the petitioner failed to show "based on competent financial evidence"—that is, "by dollars and cents proof" —that it could not yield a reasonable rate of return absent the requested use variances.

The Fourth Department, in *Matter of Leone v. City of Jamestown Zoning Board of Appeals*, 151 A.D.3d 1828 (4th Dept. 2017), also relied on the "by dollars and cents" requirement, in this instance to reverse the grant of a use variance.

The case arose when Lynn Development, Inc., offered to purchase a building from Jamestown Community College if a use variance could be obtained allowing Lynn to locate its corporate headquarters there. After an environmental review and a public hearing, the zoning board of appeals granted the use variance, although without making any findings of fact or reaching any conclusions of law addressing whether the college or Lynn had met their burden of establishing the four requirements of unnecessary hardship.

City residents went to court seeking to annul the board's determination as legally deficient and arbitrary and capricious.

The Supreme Court, Chautauqua County, dismissed the residents' petition, concluding that the college and Lynn had "presented substantial evidence, especially regarding the four-pronged hardship test, providing the [board] with a rational basis upon which to issue a variance." The residents appealed, and the Fourth Department reversed.

In its decision, the appellate court decided that the college and Lynn

had not presented "any evidence" to the board to satisfy the first requirement of unnecessary hardship—that is, that they "could not realize a reasonable return on the property by any conforming use."

According to the Fourth Department, in the absence of evidence "in dollars and cents form," there was no rational basis for the board's finding that the property would not yield a reasonable return in the absence of the requested use variance. For that reason, the appellate court concluded, it had to annul the board's determination.

Other recent cases have reached the same result. *See, e.g., Matter of Jenkins v. Leach Properties LLC*, 151 A.D.3d 1419 (3d Dept. 2017). But even the cases that have upheld requests for use variances demonstrate how rare those situations are in practice.

Use Variances Granted

One case, *Matter of Abbatiello v. Town of North Hempstead Board of Zoning Appeals*, 164 A.D.3d 785 (2d Dept. 2018), involved the owner of a two-family home that was constructed in 1920 on a 5,000-square-foot lot. The home was located in what later became a business district, which prohibited all residential use. Before the town's zoning code was amended in 1945, however, two-family residences were permitted on all 5,000-square-foot lots in that district.

In October 2013, the petitioner applied for a use variance to permit him to continue using the property as a two-family dwelling. The zoning board of appeals denied the application and the petitioner went to court.

The Supreme Court, Nassau County, denied the petition, and the dispute reached the Second Department.

The appellate court reversed. It reasoned that because the use of the property as a two-family dwelling existed before the town prohibition, it was a "legal nonconforming use" and the board's decision denying the proposed use variance was "irrational, and arbitrary and capricious."

Therefore, it concluded, the Supreme Court should have granted the petition, annulled the board's determination, and remitted the matter to the town for the issuance of the requested use variance.

> Importantly, a board considering an application for a use variance cannot weigh any of the four factors against each other. Rather, if it finds that the applicant has failed to meet any one factor, it must deny the application.

The petitioner in *Matter of White Plains Rural Cemetery Ass'n v. City of White Plains*, 168 A.D.3d 1068 (2d Dept. 2019), used property in White Plains as a cemetery and sought a use variance to construct an on-site crematory. The city's zoning board of appeals denied the application but the Supreme Court, Westchester County, directed the board to issue the use variance.

The Second Department affirmed. It pointed out that the cemetery had established the requisite unnecessary hardship to justify a use variance by submitting, among other things, evidence consisting of projections from a financial analyst and profit and loss statements that demonstrated that it had operated at a loss for the five-year period preceding the filing of its application. Therefore, it ruled, there was no rational basis for the board's finding that the cemetery was not experiencing a financial hardship.

Moreover, the appellate court decided that the board had improperly determined that the proposed 1,800-square-foot crematory would alter the essential character of the neighborhood. It cited the "unrebutted evidence" that the crematory would be shielded from view, would be odorless and not emit visible smoke, and had passed all necessary emissions and air quality testing.

Finding that the cemetery had satisfied the remaining statutory criteria for the grant of a use variance, the Second Department agreed with the Supreme Court's determination annulling the board's denial of the petitioner's application.

Conclusion

Use variances are recognized by New York law. Courts, however, rarely uphold decisions granting them—and rarely reverse decisions denying them. Property owners, therefore, should carefully weigh the costs of applying for a use variance against the high probability that, if challenged, their quest may not be successful.