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Boards Have Broad Discretion To Decide Variances

By
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Several years after the July 1, 1992 effective date of amendments to the New York State Town Law establishing a statutory standard for local zoning boards to use when considering applications for area variances, the New York Court of Appeals issued its opinion in *Sasso v. Osgood*, 86 N.Y.2d 374 (1995). Although the court decided a number of important issues in *Sasso*, its conclusion was perhaps the most significant. The court upheld the zoning board's decision granting area variances to a property owner, finding that the determination was supported by "photographs and other materials in the record" and was "not irrational, arbitrary or capricious."

Two additional precedent-setting rulings by the court in subsequent cases involving challenges to zoning board decisions on applications for area variances—*Ifrah v. Utschig*, 98 N.Y.2d 304 (2002), and *Pecoraro v. Board of Appeals of Town of Hempstead*, 2 N.Y.3d 608 (2004)—also upheld zoning board decisions. These latter cases involved decisions denying applications for area variances.

In *Ifrah*, the court noted that zoning boards "have broad discretion in considering applications for variances" and that judicial review "is limited to determining whether the action taken by the board was illegal, arbitrary or an abuse of discretion."

Then, in *Pecoraro*, the court decided that the zoning board's decision "was not arbitrary or capricious."

Of course, as will be seen below, these trio of Court of Appeals opinions should not be seen as implying that courts will never reject a zoning board's decision on an application for an area variance. But when a zoning board follows the statutory standard, it is difficult to mount a successful challenge.

The Standard

Village Law §7-712-b, Town Law §267-b, and General City Law § 81-b all set forth the statutory criteria a zoning board must consider when deciding whether to grant an area variance. These laws provide that, in determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing "the benefit to the applicant if the variance is granted… against the detriment to the health, safety and welfare of the neighborhood or community by such grant." In that regard, a zoning board must consider:

- 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—a consideration

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"relevant" to the zoning board's decision but a factor that "shall not necessarily preclude the granting of the area variance."

Weighing the Five Factors

As courts have made clear, a zoning board is obliged to consider and weigh all five factors in making its determination, and only engaging in the "balancing test" is insufficient.

For example, *Matter of Mengisopolous v. Board of Zoning Appeals of Glen Cove*, 168 A.D.3d 943 (2d Dept. 2018), involved a petitioner living in a home in a Glen Cove neighborhood that was zoned for one-family and two-family residences. Most of the houses in the neighborhood, including the petitioner's, were built before the enactment of Glen Cove's city code in 1920 and were located on lots that did not comply with Glen Cove's current zoning laws.

The petitioner applied for five area variances to convert her one-family home into a two-family home. After a hearing, the zoning board denied the application.

The petitioner filed an article 78 proceeding to annul the zoning board's determination. Supreme Court, Nassau County, granted the petition, annulled the determination, and remitted the matter to the zoning board for reconsideration of the petitioner's application. The zoning board appealed to the Appellate Division, Second Department, which affirmed.

In its decision, the Second Department agreed with the trial court that, although the zoning board had engaged in the required balancing test, the zoning board had not "meaningfully" considered the relevant statutory factors. The appellate court acknowledged that the proposed variances were "clearly substantial" and that the alleged difficulty "was self-created," but it ruled that the zoning board's failure to "cite to particular evidence" as to whether granting the variances would have an undesirable effect on the character of the neighborhood, adversely impact physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community required that it reconsider the petitioner's application, "weighing all of these factors."

> Of course, these trio of Court of Appeals opinions should not be seen as implying that courts will never reject a zoning board's decision on an application for an area variance. But when a zoning board follows the statutory standard, it is difficult to mount a successful challenge.

An even more recent case, *Matter of Pangbourne v. Thomsen*, 175 A.D.3d 547 (2d Dept. 2019), similarly required a zoning board to consider every factor.

The case arose when a property owner agreed to sell a portion of her property to a real estate development partnership that owned adjacent property. The developer intended to demolish the one-family dwelling on its property and replace it with two new two-family dwellings.

The developer applied to the village's zoning board for height and coverage area variances to allow the construction of the new houses.

The zoning board refused to grant the variances, and the developer went to court. Supreme Court, Nassau County, refused to annul the zoning board's determinations denying the developer's applications for height and coverage area variances. The dispute reached the Second Department.

In its decision, the appellate court pointed out that local zoning boards have "broad discretion in considering applications for area variances" and that judicial review is limited to determining whether the action taken by the board was "illegal, arbitrary, or an abuse of discretion." The Second Department added that, where a zoning board's determination was made after a public hearing, its determination should be upheld if it had a "rational basis" and was "supported by evidence in the record."

The appellate court then decided that the record did not reflect that the zoning board had weighed the benefit to the developer against the detriment to the health, safety, and welfare of the neighborhood by considering the five statutory factors. In particular, the Second Department ruled, the zoning board's determinations did not reflect that it had considered whether there was no feasible method to achieve the benefit sought by the developer without height and coverage area variances—that is, the second of the five statutory factors.

Accordingly, it annulled the determinations denying the developer's applications and remitted the matter to the zoning board.

Required Evidence

It should be emphasized that although a zoning board must consider all five statutory factors when weighing the benefit of the area variance to the applicant against the detriment to the neighborhood, each factor need not necessarily be supported by evidence to support the granting of a variance.

That was the message from the recent decision by Supreme Court, Suffolk County, in *Mejia v. Bowwers*, 61 Misc.3d 1225(A) (Sup. Ct. Suffolk Co. 2018).

The case arose when homeowners filed an application with their town's zoning board for an area variance seeking both a relaxation of the rear yard setback to 10.1 feet from the permitted 25 feet and a relaxation of the side yard setback to 11.2 feet from the permissible 14 feet.

After a public hearing, the zoning board denied the application, reasoning that the relaxation of the rear yard setback was "extremely substantial," it had never previously granted similar variances in the surrounding neighborhood, it had previously denied an application a number of years earlier seeking permission to erect a one story addition to the dwelling that would have left a rear yard setback of 13 feet, and the owners had created their own hardship.

The owners went to court, alleging that the zoning board's determination lacked substantial evidence and was conclusory.

The court denied the owners' petition.

The court first stated that a zoning board did not have to "justify its determinations with evidence as to each of the five statutory factors" as long as its determinations balanced the relevant considerations in a way that was "rational."

The court then decided that the zoning board's determination denying the owners' application was not arbitrary and capricious and was supported by substantial evidence in the record. The court noted, among other things, that the zoning board had previously denied an application that would have included a rear yard setback at only 13 feet; that it had reasonably determined that the requested back yard variance was substantial, requiring a 60 percent reduction from the permissible setback; that the need for a variance was a self-created hardship; and that it had reasonably determined that the variance "would produce an undesirable change in the character of the neighborhood," as no similar variance had previously been granted there.

It should be emphasized that although a zoning board must consider all five statutory factors when weighing the benefit of the area variance to the applicant against the detriment to the neighborhood, each factor need not necessarily be supported by evidence to support the granting of a variance.

Accordingly, the court concluded, the zoning board's denial of the owners' petition was "rationally based." *See, also, Carr v. Village of Lake George Village Board*, 64 Misc.3d 542 (Sup. Ct. Warren Co. 2019) (although third factor was not addressed in zoning board's written determination, minutes from its meeting made clear that it nonetheless had been considered).

Conclusion

When a property owner seeks to develop property in a way that would fail to meet a local zoning code's dimensional or physical requirements, the owner may seek an area variance as a way to move forward with its project. By providing the zoning board with adequate information to consider all five statutory factors, the property owner will put itself in the best position to succeed. As the decisions discussed in this column suggest, a zoning board ruling made under these circumstances is difficult to overturn in court.