

# New York Law Journal

## Real Estate Trends

WWW.NYLJ.COM

VOLUME 267—NO. 17

An ALM Publication

WEDNESDAY, JANUARY 26, 2022

### LAND USE AND PLANNING

# Area Variances as a Special Use Permit ‘Workaround’

By  
**Anthony S.  
Guardino**



Thirty years ago, in 1992, the New York Legislature enacted legislation that included new Town Law §274-b, defining and governing approval of special use permits, a widely used zoning device previously unmentioned in New York statutes. *See, also*, General City Law §27-b; Village Law §7-725-b (identical special use permit authority).

Town Law §274-b defines a special use permit as an authorization of a particular land use “permitted in a zoning ordinance or local law,” subject to requirements imposed by the zoning ordinance or local law to assure that the proposed use “is in harmony” with the zoning ordinance or local law and “will not adversely affect the neighborhood if such requirements are met.”

Generally speaking, a zoning board, zoning board of appeals (ZBA) or other board with jurisdiction over applications for a special use permit must grant an application if it satisfies the criteria set forth in the local zoning

law. By the same token, numerous courts made it clear that the failure to meet any one of the conditions set forth in the local ordinance was a sufficient basis upon which the zoning authority could deny the permit application. *See, e.g., Matter of Wegmans Enterprises v. Lansing*, 72 N.Y.2d 1000 (1988).

These courts reasoned that a zoning board “does not have authority to waive or modify any conditions set forth in the ordinance.” *Matter of Dost v. Chamberlain-Hellman*, 236 A.D.2d 471 (2d Dept. 1997); *Matter of Knadle v. Zoning Board of Appeals of Town of Huntington*, 121 A.D.2d 447 (2d Dept. 1986) (ZBA has no authority to waive or modify a setback requirement for a special use permit in the guise of a variance).

The New York Court of Appeals, however, issued a decision nearly 20 years ago that abrogated the rule from these prior decisions and confirmed the existence of a “workaround” to this situation. In *Matter of Real Holding Corp. v. Lehigh*, 2 N.Y.3d 297 (2004), the court held that zoning boards may grant area variances from the bulk requirements for a special permit. (Those require-

ments are the combination of controls including lot size, floor area ratio, lot coverage, open space, yards, height and setback that determine the maximum size and placement of a building on a zoning lot.)

The court’s holding is a subtle, yet useful, distinction for practitioners. Given that decision, zoning boards can modify, but not totally waive, bulk special permit requirements (unless, of course, the local legislative body has expressly granted that authority to the reviewing board).

### Background

The *Real Holding* case arose in 1992, when Real Holding Corp. (RHC) acquired a one-half-acre parcel of land situated within a “Highway Business District” as shown on the zoning map of the Town of Wappinger, in upstate Dutchess County. The property had served since the mid-1960s as the site of a gasoline filling station, which closed shortly before RHC’s purchase of the land.

After cleaning up the property to the satisfaction of state environmental authorities, RHC opted to develop a new gasoline filling station on it.

ANTHONY S. GUARDINO is a partner with Farrell Fritz, practicing in the areas of land use, zoning, and environmental law. He can be reached at [aguardino@farrellfritz.com](mailto:aguardino@farrellfritz.com).

To undertake this proposed use, RHC was obliged by Wappinger's town code to obtain a "gasoline filling station" special use permit from the town planning board.

RHC, however, was unable to satisfy two distance standards for the permit, mandating 1,000 feet between a gasoline filling station and the boundary line of certain residentially zoned lands, and mandating 2,500 feet between gasoline filling stations.

In 1995, RHC asked the town's ZBA for variance relief from these two standards. The ZBA turned RHC down in early 1996, opining that it lacked jurisdiction to waive or modify zoning requirements specific to a special use permit.

In 2000, RHC revived its campaign to reestablish a gasoline filling station on the property by applying to the planning board for a special use permit. The planning board denied the application for failure to conform with several zoning requirements, including the two distance standards for the special use permit, and advised RHC to seek variances from the ZBA.

RHC requested the necessary variances, and the ZBA voted to entertain the application. After several months of review, however, the ZBA concluded that it was powerless to grant an area variance from special use permit requirements absent an express grant of authority from the town board. Accordingly, the ZBA denied RHC's application.

RHC then commenced an Article 78 proceeding seeking to annul the ZBA's determination and a judgment directing the ZBA to hear and decide its application for area variances.

Supreme Court, Westchester County, granted RHC's petition and remitted the

matter to the ZBA for further proceedings, holding that Town Law §274-b(3) explicitly authorized a ZBA to grant area variances from special use permit requirements. The Appellate Division, Second Department, affirmed.

The case reached the Court of Appeals, which held that Town Law §274-b(3) vests a ZBA with authority to grant an area variance from any requirement in a zoning regulation, including those for a special use permit.

### The Court's Analysis

Two sections of the Town Law were at issue in the court's decision: Section 274-b(3), which addresses the circumstances under which an application may be made to a ZBA for an area variance from special use permit requirements, and Section 274-b(5), which addresses the waiver of special use permit requirements.

---

Although the decision in 'Real Holding' provides applicants for special use permits that do not comply with the applicable requirements with a mechanism for seeking relief from those requirements, a zoning board may deny an application after applying the statutory balancing test required for area variances.

The Wappinger ZBA contended that subdivisions (3) and (5) clashed and, at most, established that a ZBA may grant an area variance from general zoning requirements, but not from a special use permit requirement unless express authorization to do so had been bestowed by a town board in the town's zoning code. The court rejected that argument.

The court explained that subdivision (3) "plainly states" that "application may be made to the [ZBA] for an area variance" in those cases "where a proposed special use permit . . . do[es] not comply with the zoning regulations." Moreover, the court continued, a ZBA may grant these area variances "[n]otwithstanding any provision of law to the contrary."

Next, the court noted, subdivision (3) refers to "zoning regulations" without qualification. It then declared that "[n]othing in the statute's language suggests that area variances for special use zoning regulations should be treated differently than area variances from general, so-called bulk, zoning requirements."

In the court's view, to hold that a ZBA may vary certain zoning provisions only if expressly empowered to do so by the town board "overlooks the entire purpose of the ZBA, which is to provide relief in individual cases from the rigid application of zoning regulations enacted by the local legislative body."

The court also pointed out that Section 274-b is entitled "Approval of special use permits" and that subdivision (3) directs that application for an area variance may be made to the ZBA "pursuant to" Section 267-b (entitled "Permitted action by board of appeals"), which supplies the procedures for a ZBA to follow when issuing an area variance. Thus, the court continued, Section 274-b authorizes ZBAs to issue area variances from special use permit requirements, following the statutory procedures applicable to ZBAs in the exercise of their area variance jurisdiction.

Next, the court ruled that subdivision (5) did not conflict "in any way"

with subdivision (3) or diminish a ZBA's independent jurisdiction under subdivision (3). The court explained that subdivision (5) vests a town board with discretion to empower an "authorized board" to waive any requirement of a special use permit—an authority, according to the court, "broader than a ZBA's authority in subdivision (3)," which is restricted to granting area variances. The "authorized board" referred to in subdivision (5), the court said, is "the planning board or such other administrative body that [the town board] shall designate."

In effect, the court said, subdivision (5) allows a town board to establish "one-stop special use permitting" if it so chooses. Thus, where a town board exercises its discretion under subdivision (5), an applicant may have "two avenues to address an inability to comply with a given . . . requirement in connection with a special use permit," but this overlap "does not create discord in the Town Law or render either [subdivision (3) or subdivision (5)] superfluous."

It is worth noting that the court in *Real Holding* ruled that the distance standards at issue in the case, which specified how many feet must separate a gasoline filling station from certain residentially zoned areas and from other gasoline filling stations, were "clearly" dimensional or physical requirements subject to area variance relief.

### Area Variances

Although the decision in *Real Holding* provides applicants for special use permits that do not comply with the applicable requirements with a mechanism for seeking relief from those

requirements, a zoning board may deny an application after applying the statutory balancing test required for area variances. Consider, for example, the Second Department's recent decision in *Matter of Muller v. Zoning Board of Appeals Town of Lewisboro*, 192 A.D.3d 805 (2d Dept. 2021).

The petitioner in this case owned 11 Siberian Huskies that he kept on a 2.1-acre property situated in a residential district of the Town of Lewisboro, in Westchester County. In July 2017, the petitioner submitted an application to the town's ZBA for a special use per-

---

The court's holding is a subtle, yet useful, distinction for practitioners. Given that decision, zoning boards can modify, but not totally waive, bulk special permit requirements (unless, of course, the local legislative body has expressly granted that authority to the reviewing board).

mit to operate a private dog kennel and for a variance from the requirements of the town code only permitting private kennels on lots of four acres or more and providing that the total number of dogs over six months of age in such a kennel could not exceed ten.

The ZBA denied the application, and the petitioner commenced an Article 78 proceeding. Supreme Court, Westchester County, denied the petition, and the dispute reached the Second Department.

The Second Department explained that, in conjunction with seeking a special use permit, an applicant may seek an area variance from a special use permit condition. In determining

an application for an area variance, the appellate court said, a zoning board must apply a balancing test, citing to Town Law §267-b(3)(b).

The Second Department then ruled that, in denying the petitioner's application for variances, the ZBA "properly applied the required balancing test and considered the relevant statutory factors." The Second Department held that the evidence in the record supported the ZBA's findings that granting the requested variances would produce an undesirable change in the character of the neighborhood and have an adverse effect or impact on the physical or environmental conditions of the neighborhood, that the variances were substantial, and that any hardship was self-created. Accordingly, the appellate court concluded, the ZBA's determination to deny the variances was rational, and not illegal, arbitrary and capricious, or an abuse of discretion.

### Conclusion

When a property owner seeks a special use permit but does not meet all of the applicable requirements, it may be able to obtain that permit to the extent that the requirements it fails to meet are subject to area variance relief. This statutory—and court-approved—solution is one that counsel for property owners should keep firmly in mind when considering how to move their clients' projects forward.