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ZONING AND LAND USE

Use Variances

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An owner seeking to utilize property for a purpose that is not permitted under the applicable zoning law may apply for a use variance. Where a use variance is sought, the applicant must show unnecessary hardship. Although a local zoning board has substantial discretion in considering an application for a use variance,[1] its determination must have a rational basis and be supported by substantial evidence in the record.[2]

To obtain a variance on the ground of unnecessary hardship, an applicant must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood that may reflect the unreasonableness of the zoning ordinance itself; (3) the use to be authorized by the variance will not alter the essential character of the locality; and (4) the alleged hardship was not self-created.[3]

These factors have been considered

in a number of decisions arising in Long Island courts.

Reasonable Return

It is important to recognize that "reasonable return" does not mean "maximum return," as the petitioner discovered a decade ago in *Matter of Elwood Properties, Inc. v. Bohrer*.[4]

In that case, the owner of an approximately 12-acre unimproved parcel located in a residential zoning district of the Town of Huntington contracted to sell the property subject to the issuance of all permits necessary to construct a nursing home. The zoning board of appeals denied the contract-vendee's application for a use variance, and its decision was affirmed by the Appellate Division, Second Department.

The Second Department found that the applicant's evidence of an inability to realize a reasonable return under existing permissible uses was "inconclusive." As the appellate court observed, there was evidence that the value of the site as zoned was approximately $1 million and that the site could be developed with nine single-family homes that would probably sell for approximately $240,000 each. The court pointed out that a use variance need not be granted merely because the zoning ordinance proscribes the most profitable use of the land or because the use with the variance will yield a higher return. Courts are not required "to guarantee the investments of careless land buyers," it concluded.

The Second Department reached a different result, based on different facts, the following year in *Matter of Rothenberg v. Board of Zoning Appeals of the Town of Smithtown*.[5] In this case, the owners of an undeveloped parcel of land in Smithtown sought a use variance, arguing that the zoning restrictions limited them to certain uses, including the development of one-family dwellings, but that the property was unsuitable for such development because of its size and location on a major intersection. The town's zoning board of appeals

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determined that the owners had failed to establish that they could not realize a reasonable return on the property if developed residentially and denied the application for the use variance.

The Second Department ruled that the board had incorrectly determined that the owners could realize a "reasonable return" on the property. It noted that the board had decided that the property could be subdivided into three residential parcels, allowing the owners to realize a reasonable return on their investment; however, the appellate court declared, the board understated the petitioners' cost basis in the property, failed to account for the present value of the petitioners' investment, and computed the return on the property using construction costs and potential sale prices that "lacked any basis in the record."

In contrast, the Second Department pointed out, the petitioners' witness testified to the costs of subdividing the lot, including grading the land and installation of utility services, revealing that the net proceeds of the sale would fall "drastically short" of the initial investment.

Considering the evidence, along with the other possible uses of the property, the Second Department decided that the owners could not make any use of the property, as it then was zoned, that would afford a "reasonable return" on their investment.

When seeking a use variance, an applicant must demonstrate that the hardship is unique and does not apply to a substantial portion of the district or neighborhood.

As the Court of Appeals has explained, this avoids having a zoning board "destroy the general scheme of a zoning law by granting exemption from hardships common to all."[6] Where the hardship is common to an entire neighborhood, the proper remedy is to seek a change in the zoning law.

The "unique" requirement doomed the application for a use variance filed by a property owner in the Village of Lawrence that would have allowed him to put lighting around his tennis court so that it could be used until 10 p.m.[7]

As the Second Department pointed out, a provision of the village code prohibited illumination for recreational structures. The appellate court explained that this was the antithesis to a unique hardship because it applied "to all the other property" in the village equally.

After adding that the board also had concluded that the proposed use would alter the character of the neighborhood and adversely impact on the physical and environmental condition in the area, the Second Department found that the board had properly denied the application.

Self-Created Hardship

Finally, the requirement that the alleged hardship is not self-created was at the heart of the Second Department's recent ruling in *Matter of Miller Family Ltd. Partnership v. Trotta*.[8]

The petitioner in this case had purchased two adjacent properties zoned for single-family homes, and subsequently sought a use variance to permit the development of a multi-family planned retirement community on the properties.

The Second Department upheld the decision by the Board of Zoning Appeals of the Town of Brookhaven that the petitioner created the hardship by purchasing the land with knowledge that it was zoned for single-family homes and intended to develop multi-family housing on the property anyway.

As such, the appellate court stated, it could not conclude that the board had acted arbitrarily and capriciously in denying the application.[9]

Since a use variance permits land to be utilized for a use that is not otherwise permitted, or is even prohibited, by the applicable zoning laws, the showing required for entitlement to such relief is stringent.

As a result, applicants often find they are unable to make the necessary showing which, in turn, explains why such relief is sparingly granted.

1. See, e.g., *Conley v. Town of Brookhaven Zoning Bd. of Appeals*, 40 N.Y.2d 309 (1976).
2. See, e.g., *Matter of Fuhst v. Foley*, 45 N.Y.2d 441 (1978).
3. See, e.g., *Matter of Village Bd. of Fayetteville v. Jarrold*, 53 N.Y.2d 254 (1981).
4. 216 A.D.2d 562 (2nd Dept. 1995).
5. 232 A.D.2d 568 (2nd Dept. 1996).
6. *Matter of Clark v. Board of Zoning Appeals of the Town of Hempstead*, 301 N.Y. 86 (1950).
7. *Matter of Lifshitz v. Zoning Bd. of Appeals of the Inc. Village of Lawrence*, NYLJ, June 16, 1999 at 25.
8. 2005 N.Y. App. Div. Lexis 11817 (Nov. 7, 2005).
9. See also *Matter of RVC Associates v. Zoning Bd. of Appeals of the Village of Rockville Centre*, 240 A.D.2d 672 (2nd Dept. 1997) (hardship that was result of "imprudent financial decisions" found to be self-created hardship).