

## VARIANCES

### Description:

A zoning ordinance regulates the use of land and the density and siting of development in each of a community's zoned districts—spelling out what can and cannot be done with property in each district (see *Zoning—Introduction* in the *Resource Manual*). A variance is permission granted to allow property to be used in a way that is not allowed by the zoning ordinance. A variance can be granted only by the municipality's zoning board of appeals.

There are two types of variances: a use variance and an area variance. A use variance applies to the purpose or function for which a parcel of land or a structure on the land will be used, and an area variance applies to the land itself.<sup>1</sup>

#### *Use variance—*

A use variance can only be granted if the owner of the property proves an inability to use the land as designated by the zoning ordinance. For example, if the owners of a parcel of land that is zoned for single-family homes apply for a use variance to build a multi-unit housing complex, in order to receive that use variance, they must prove that the land is incapable of realizing a reasonable return on their investment with any use that is allowed under the zoning ordinance. An applicant must pass a strict four-part statutory test (specified in New York State statute) to receive a use variance. The *overall* statutory test is "unnecessary hardship," and the applicant must show *all* of the following:<sup>2</sup>

- That under existing zoning ordinance, the applicant cannot realize a reasonable return on his investment in the property, 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 has not been self-created.

#### *Area variance—*

An area variance gives permission to use the land in a zoned district in a way that is not allowed by the dimensional and physical requirements of the zoning ordinance. For example, a property owner might request an area variance if a proposed garage were to encroach into the required setback from a property line or if the design of a new building exceeded the maximum allowed height in a certain district. To grant the area variance, members of the zoning board of appeals must agree that the benefit of the applicant's receiving the area variance is greater than the burden that granting the variance might impose on the surrounding community, after considering a five-part balancing test, which is specified in New York State statute. Overall, the board of appeals must balance the benefit to be realized by

the applicant against the potential detriment to the health, safety, and general welfare of the community if the variance were to be granted. For each application, the board must consider the following:<sup>3</sup>

- 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.
- Whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Though the area variance test is not as strict as that for use variances, if a municipality finds itself granting many similar area variances, it might be time for members of the local governing board to consider amending zoning ordinance itself.

#### **References:**

<sup>1, 2, 3</sup> (November, 2005; reprinted January, 2008), "Variances," *Zoning Board of Appeals*, James A. Coon Technical Series, pp. 17, 12, 17. Albany, NY: New York State Department of State. Includes all statutory changes through the 2005 Legislative session.

#### **Resource—statutory authority:**

- General City Law, §81-b (3)(4);
- Town Law, §267-b (2)(3);
- Village Law, §7-712-b (2)(3).

#### **Resource—written and web:**

- (November, 2005; reprinted January, 2008), "Variances," *Zoning Board of Appeals*, James A. Coon Technical Series, pp. 10-20. Albany, NY: New York State Department of State. Includes all statutory changes through the 2005 Legislative session.  
[http://www.dos.ny.gov/lg/publications/Zoning\\_Board\\_of\\_Appeals.pdf](http://www.dos.ny.gov/lg/publications/Zoning_Board_of_Appeals.pdf).
  - "Guidelines for Applicants to the Zoning Board of Appeals," *Zoning Board of Appeals*, James A. Coon Technical Series :  
[http://www.dos.ny.gov/lg/publications/Guidelines\\_for\\_Applicants\\_to\\_the\\_Zoning\\_Board\\_of\\_Appeals.pdf](http://www.dos.ny.gov/lg/publications/Guidelines_for_Applicants_to_the_Zoning_Board_of_Appeals.pdf)
  - "Zoning Board of Appeals Overview"—on-line interactive training course:  
[http://www.dos.ny.gov/lg/onlinetraining/zoning\\_board\\_of\\_appeals\\_course\\_outline.html](http://www.dos.ny.gov/lg/onlinetraining/zoning_board_of_appeals_course_outline.html).