



NEW YORK STATE ZONING BOARD OF APPEALS

A Guidebook for Local Officials



**Environmental
Finance
Center**

Syracuse University





PREFACE

This guidebook is intended to aid local officials in understanding the Zoning Board of Appeals. This guidebook provides an introduction to the administrative body that is the Zoning Board of Appeals, common vocabulary associated with the responsibilities and actions the board will encounter, and a detailed description of the procedure which the board will follow and all associated tasks for which it is responsible for. Although the research presented herein this document is comprehensive pertaining to the creation, duties and responsibilities of the Zoning Board of Appeals, resources from which this material was derived, as well as additional resources are presented at the end of this document. The primary sources used in the generation of this document are two NYS Department of State documents from the James A Coon Government Technical Series titled “Guidelines for Applicants To the Zoning Board of Appeals” published in 2008 and “Zoning Board of Appeals” published in 2005.

Information for this guide was obtained from Department of State publications and consolidated to meet the needs of small, rural municipalities. The Zoning Board of Appeals is a necessary body within any sized government in order to uphold the strategic and/or comprehensive plan of towns or villages. This tool was created by the Syracuse University Environmental Finance Center (Syracuse EFC), with support from the USDA Rural Development.

Located at the Syracuse University Center for Sustainable Community Solutions (CSCS), Syracuse EFC enhances the administrative and financial capacities of state and local government officials, nonprofit organizations, and private sectors to make change toward improved environmental infrastructure and quality of life.

Syracuse EFC facilitates the development of sustainable and resilient communities across US EPA Region 2 (New Jersey, New York, Puerto Rico, the US Virgin Islands, and eight tribal nations), across the US, and internationally. More information can be found at

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INTRODUCTION TO THE ZONING BOARD OF APPEALS

The Zoning Board of Appeal (ZBA), otherwise known as the board of appeals or board of adjustment, is an administrative body that acts as a buffer between the property owner, or aggrieved applicant, and decisions made by the zoning enforcement officers (ZEO) and the State Supreme Court. The ZBA is “designed to interpret, to perfect, and to ensure the validity of zoning.”² In many ways, the ZBA is a safety valve to prevent oppressive operation of zoning laws in instances, where the zoning regulations are otherwise reasonable.

The ZBA is relevant as long as zoning exists. If a municipality has a zoning code, then the governing board “shall provide for the appointment of a board of appeals.”² Zoning, itself, is a set of land use regulations as described in the local law, dividing a municipality into districts. For example, zoning code may regulate each district uniformly as residential, commercial, or agriculture, among others.

The goal is to avoid incompatible land uses within districts and to regulate land use, density, and placement of structures on site.

Property owners may look at a zoning map (which may be found online) and determine how they may use their land, and also how their neighbors and others owners in the municipality may use their land. Problems arise because even though property may be in close proximity to one another and subject to the same zoning code, the features and nuances of the land may differ which may possibly lead landowners to desire to use the land differently, or in a way not specified in the zoning code.²

The ZEO is the administrative official charged with enforcing the zoning code set forth by the municipality. This official renders an initial decision with regard to conformity with zoning and may also cite violations of the zoning code. This individual may be solely the ZEO, or may have other responsibilities within the municipality (ex: municipal planner).



Copies of state statutes regarding zoning and the board of appeals may be found in the publication “Guide to Planning and Zoning Law of New York State” on the Department of State Website: http://www.dos.ny.gov/lg/publications/Guide_to_planning_and_zoning_laws.pdf.

ZONING BOARD OF APPEALS MEMBERSHIP

Statutory Authority for Membership: Town Law 267, Village Law 7-712, General City Law 81.

The board of appeals typically has three to five members, while seven members may exist in towns or cities due to old Town and City Laws.² Years of service on the board depends on the number of members on the board. For example, if three members exist, then they each serve for three years. The chairperson “is given the power to call meetings, administer oaths, and compel the attendance of witnesses.”²

Statutes allow the local government board to establish training and education requirements as a qualification for continuing service on the board of appeals.² However, the state employs training requirements of a minimum of four hours annually, with excess hours being carried over into the next year. This training is necessary for reappointment, with the governing board approving trainings. These training requirements may be waived or modified if that is in the best interest of the municipality and is the resolution of the governing board. Failure to comply with the training requirements does not void decisions made by the ZBA.

The appointment of board members is conducted by the governing board, or town board, while in villages appointments are made by the mayor and is approved by the board of trustees.² The appointment of a chairperson is also made in the same manner. If a vacancy arises during the term of office, the mayor (in a village) may appoint a new member without the need for approval from the trustees.



Members of the governing board are not eligible for membership on the ZBA.² The term of the replacement member, or alternate, is set by the governing board in its zoning law.²

Members may be removed after a public hearing. Cause for removal of board members may include “the member’s persistent failure to attend meetings, failure to attend training requirements set by the municipality or the violation of the municipality’s code of ethics.”² All board members are subject to the requirements of the Public Officers Law. This “constitutional oath of office must be taken and filed at the beginning of each term of office on the board.”² This oath can be found in Section 1, Article XIII of the NY Constitution.

POWERS AND DUTIES OF THE ZONING BOARD OF APPEALS

All ZBAs have appellate jurisdiction, which is the “power to hear and decide appeals from decisions of those officials charged with the administration and enforcements of the zoning ordinance or local law.”² Simply, appellate jurisdiction allows the board of appeals to interpret zoning regulations and issue or deny appeals for variances. Appellate jurisdiction is the primary duty of the ZBA.

Some ZBAs may have original jurisdiction, which are powers in addition to appellate jurisdiction. These powers are authorized by the governing board, and granted by the zoning law or ordinance. Examples of original jurisdiction include the power to grant special use permits and the power to approve site plans.² For example, the ZBA may issue a special use permit for certain uses “only after an administrative decision, based on requirements fully set forth in the zoning law.”²



The ZBA can and may only issue a variance when the ZEO has acted first based on zoning regulations. A variance is permission granted by the ZBA so that land use may differ from that allowed in the zoning code, and is only granted by the ZBA. The ZEO can grant or deny permits, issue citations for violations or take other enforcement actions with regard to zoning. However, the ZBA “cannot determine restrictions to impose upon property in a specific district. It may not change legislative rules regulating land use, or change boundaries.”² After action by the ZEO, the ZBA may hear appeals claiming the issuance by the ZEO was incorrect. Precedent may have also been set with regard to the decision made by the ZEO, and therefore the ZBA should act according to this precedent when providing interpretations. “In order to follow precedents and aid in consistency, good record keeping is a must, with easy reference to prior decisions.”² Good record keeping information would then contain the zoning law interpreted, property in question, appealing parties names and addresses, as well as chronology.² Where no precedent has been made, “the board of appeals should attempt to determine the governing board’s original intent in enacting the provision in question,” considering “minutes of governing board meetings, testimony of local officials, and planning advisory documents with may have accompanied the enactment.”² Referring to case law may also be helpful in this instance.

INTERPRETATIONS

The ZBA has the appellate jurisdiction to interpret the municipalities zoning regulations. The ZBA may review decisions made by the ZEO and has the power to reverse, affirm, or modify the decisions appealed to it.² An interpretation is requested by the appellant who believes the ZEO may have wrongly applied the law. Common areas of interpretation include definitions and the method of taking measurements. The ZBA will render its decision as it interprets the law and agrees that is how the ZEO should have made the decision.



The decision should be made based on past decisions, or precedents, on the same regulation of similar facts. These precedents should be found in past meeting minutes, which will include hearing comments, and from other records which reveal the governing boards intention when the adopted the zoning provision. If no precedent exists, the ZBA shall “attempt to determine the governing board’s original intent in enacting the provision in question.”² The board should come to a consensus on what they think term of regulation means.

USE VARIANCE

A use variance is a type of variance which will permit land for a purpose not allowed by zoning. For example, a use variance would be the permitting of land for commercial use within a residential district. Prior to issuing a use variance, the “burden of proof” is on the applicant to prove the following:

- 1 No reasonable return:** Applicant must demonstrate there is no reasonable return under present zoning for land in question. This must apply for ALL/EACH permitted uses as set by the zoning code as well as currently lawful nonconforming uses, and any use allowed by previous use variances. The ZBA must consider the entire property.

Nonconforming uses include legal uses that existed prior to current zoning, or uses which have been “grandfathered” in; they typically don’t need use variance to continue.

- 2 Unique circumstances:** “The plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself.”² Unique circumstances may include physical features, historical or architectural features and adjacent uses.



- 3 **No self-created hardship:** “Use variance may not be granted where the unnecessary hardship complained of has been created by the applicant, or where the applicant acquired the property knowing of the existence of the condition that is now the complaint.”² An example of a self-created hardship includes the owner spending money on a project not allowed by zoning.

- 4 **No alteration to essential neighborhood character:** “Zoning is adopted regard to the comprehensive plan, therefore, if changes would alter the character of the neighborhood, it would” conflict with the purpose of zoning regulations.² Significant adverse impacts on the neighborhood or community should also be considered.

AREA VARIANCE

An area variance is a type of variance allowing variation from dimensional or physical requirements as set forth by zoning regulations. For example, an area variance would be sought if applicants seek to build an addition to the side of the house in a zone where there is side yard attraction codes.

There are specifically set rules for granting area variances stated in the statutes, therefore there are five factors to consider:

- 1 **Will area variance change neighborhood character?**
Certain conditions may be imposed so that undesirable changes are eliminated.

- 2 **Are there alternatives which do not require a variance?**
“The benefit sought by the applicant may be achieved by some other method, which is feasible for the applicant to pursue, other than the area variance.”² The applicant should provide justification for choosing one alternative over the other, such as better view, cheaper constructions, etc.



3 Is the area variance requested substantial?

Here, mathematical analysis is favorable, as well as the amount and magnitude of variance requested.

4 Will there be an effect on physical or environmental conditions in the neighborhood or district? Examples of these effects, whether negative or positive, include impacted wetlands, dust, noise, impact on emergency services, and drainage, to name a few.

5 Is the situation self-created? This does not necessarily prevent an area variance from being granted, but is relevant to the decision of the ZBA. An example would be seeking an area variance for shed setback relief because of substandard sized lot.

Conditions imposed for granted variance must be clearly stated.

“Conditions are meant to mitigate the impacts of the approved project on both the neighborhood and on the integrity of the zoning law.”²

Conditions must “relate directly to, and be incidental to, the proposed use of the real property and not to the manner of the operation of the particular enterprise conducted on the premises”² For example, conditions may relate to fences, screening, landscaping, and lighting which will be incidental to comfort, peace, enjoyment, etc.

The minimum variance the ZBA deems necessary and adequate while preserving and protecting the character of the neighborhood and values of the community shall be granted.² Therefore, the ZBA does not have to either grant or deny the variance requested; the ZBA may grant “only the approval that is absolutely necessary to afford relief.”²



PROCEDURE

Procedures for the ZBA are put into place to protect the board against legal challenges, ensure evenness and due process. This section will go over the proper parties to include, the general procedure matters, and what constitutes a proper decision.

Proper Parties

“The ZBA has jurisdiction only over appeals that involve zoning decisions of the enforcement officers,” except “decisions involving enforcement of the NYS Uniform Fire Prevention and Building Code.”² Typically there are two parties involved: “those who are appealing from decisions made by the ZEO, and those who are seeking a decision by the ZBA on some matter over which it has original jurisdiction.”² Those seeking an appeal, otherwise known as the appellant, must have standing. The appellant can fall into three categories:

- 1 One who has applied to the ZEO for a zoning permit and was refused, and is aggrieved by the refusal.*
- 2 One who was cited for a zoning violation and may be aggrieved.*
- 3 A third party who is aggrieved by the issuance of a zoning permit to someone else, such as a neighbor.*

An aggrieved person is one who is legally entitled to seek judicial review. **The party must have a legally cognizable interest that is or will be affected by the zoning determination. An aggrieved person must be within the municipality.** For example, an aggrieved person may be a neighbor whose property may depreciate in value because of a decision made by the ZBA.



When to File an Appeal

The ZEO determination should be filed within 5 business days from the day it was rendered. The governing board may adopt a resolution to file at the municipalities clerk's office instead.

Appeals seek to "stay" enforcement proceedings. A "stay" means there is a return to the status quo prior to the action that is being appealed was taken. An appeal to the board must be taken within 60 days of the ZEO filing the determination. There are instances where 60 days has proven to be unreasonable, and may be interpreted to be 60 days from the date they could have knowledge of the ZEO's action. In any account, appeals should be timely. The notice of appeal should be submitted by letter if no formal ZBA form exists. Copies of appeal should be filed with the ZEO and ZBA.

Referral to a Planning Agency

If the board charged with taking zoning action is located within a county which has a planning agency, or is located within the jurisdiction of a metropolitan or regional planning council, then it shall refer to that planning agency or council prior to taking any action. "Referrals must occur at least five days prior to the board of appeals' public hearing on the proposed action."²

Referral to the planning agency is mandatory, except in situations when only an interpretation is requested. The referral body (most likely the ZBA) and the agency may agree that "matters are of local concern only and need not be referred to the planning agency."²

Referrals are required for variances including site planning or special use permit applications when the property in question is "within a distance 500 feet of the boundary of a city, town or village, or from the boundary of any existing or proposed county of state park, or from the right-of-way of any existing or proposed county or state parkway or thruway, expressway or highway, or from the existing of peopled



right-of-way of any stream of drainage channel owned by the county, or from county or state owned land on which a public building or institution is located, or (except for area variances) from the boundary of a farm operation located in an agricultural district as defined by Article 25-AA of the Agriculture and Markets Law.”²

Environmental Quality Review

Appeals to the ZBA require discretionary decisions by the board which invokes application of the State Environmental Quality Review Act (SEQRA).² The Environmental Assessment Form (EAF) is used to classify matters as Type I, II or as an Unlisted action; this form will be used by the lead agency (likely the ZBA) for determination of classification.² Type II actions never require an Environmental Impact Statement (EIS) and include such matters as rebuilding or replacement of structures on the same site, construction of minor structures such as a garage or swimming pool, and maintenance repair activities, to name a few. For a full list of Type II actions, visit the DEC website, <http://www.dec.ny.gov/permits/6208.html>. “If the board finds that the matter is Type II, it should document that finding, whereupon its SEQRA function is complete.”²

Matters requiring an EIS include most use variances as the board will be required to make a “determination of significance”, and may be categorized as Type I or Unlisted Actions.² Under SEQRA, the lead agency (ZBA) is required “to consider community character and aesthetics in making its Determination of Significance.”² Even where the board decides not to require an EIS—it has issued a “negative determination”—it must nonetheless apply these same factors in its later review of the merits of the application.² Only after an EIS has been completed, or deemed unnecessary may a hearing follow.



Redundancy may arise when the ZBA grants a use variance, but then must also issue a special use permit. Issuance of a special use permit typically requires a SEQRA review; therefore the same issues would be addressed during this review as were addressed during the use variance review. Repetition may be avoided if the SEQRA review is conducted of the entire potential project prior to statutory evaluation and the decision making process.

HEARINGS

Notice Requirements

According to the Open Meetings Law (OML), all board meetings are to be open to the public. Executive sessions are an exception for certain types of business that will exclude the submission of any new evidence, new witnesses, or new decisions made by the board. These exclusions to the executive sessions are only to be made during an open meeting to the public. Hearings are a requirement prior to the ZBA granting a variance or rule on an appeal.

The hearing is to occur in a timely manner, and at a reasonable time. “Statutes require at least five days notice of the public hearing to be provided to the parties, to the county, metropolitan or regional planning agency... and to the regional state park commission having jurisdiction over any state park or parkways within 500 feet of the property affected by the appeal.”² Information in the hearing notice should include the property in question, the nature of the hearing, as well as the time and place of the hearing. Also, records scheduled for discussion at an open meeting must be available for public review on the agency’s website in advance of the hearing. Therefore, the agency’s website must be regularly and routinely updated. Records to make available may include the proposed resolution, law, rule, or regulation, as well as the policy to amendment to a policy.



State requirements include legal notice to be in a newspaper of general circulation, five days prior to the hearing date. Notice shall be mailed to the parties involved. Local notice requirements may vary, but may include signage on application property (considered a best practice), mailings to neighbors and those on the municipal listserv. Lastly, if the property in question is located within 500 feet of an adjacent municipality, notice must be given to the clerk of that municipality at least ten days prior to the hearing.² This notice may be delivered by mail or email. “Representatives from the adjacent municipality may appear at the hearing and be heard.”²

Notice Language

If the decision of an interpretation will dictate whether or not variance will be required, language should be included in the notice for variance request in the event the interpretation isn't in the applicant's favor.

An example of legal notice is as follows: “Notice is hereby given: The applicant requests an interpretation whether the applicant's proposed single family dwelling complies with the 60 foot setback from Pearl River Road. The Applicant also requests a variance from the 60 foot setback from Pearl River Road in the event the Zoning Board of Appeals determines that the proposed dwelling's location does not comply with the 60 foot setback.”²

The Hearing

The purpose of the hearing is to “determine the facts involved in the application” and to “determine whether the applicant is entitled to what he or she is asking for.”² A factual record of the hearing must exist and may be written as a narrative instead of a verbatim transcript. Witnesses need not be sworn in. Personal knowledge of the board may be evidence, as any “planning board information, reports, and



recommendations may also be considered by the board of appeals.”² The board may also act contrary to the county’s recommendations by a supermajority vote (majority vote plus one).

THE DECISION

Decisions must be rendered within 62 days after the conclusion of the hearing. Should an extension be desired, it may be granted upon mutual consent of the applicant and the ZBA. Decisions must be supported by findings which constitute “substantial evidence.”² If the ZBA has heard a case in the past, which involved an interpretation of the same provision, the ZBA’s decision will be consistent with the precedent. A motion or resolution will only pass with a majority vote of members of the entire board, in contrast to the majority of members present. Decision wording examples include “stop-work order affirmed,” “special use permit denied,” or “variance granted.”²

The decision of the ZBA is subject to a lawsuit; therefore it should be shown that the ZBA acted according to facts and testimonies. This entails immaculate record keeping. According to the statutes, minutes are to be recorded, indicating the vote of each member as well as those voting members who failed to show and therefore failed to vote. Furthermore, in order for findings to be comprehensive, an analysis applying the law to facts which lead the board to its conclusions should be presented, as well as a description for denial or approval, or if conditions were imposed, supporting statements as to why those particular conditions were imposed. These findings should be approved by the board members and filed. With all of this information, should a court review occur, a determine can be made as to whether the decision found by the ZBA is “supported by substantial evidence on the record.”²



If the matter in question is an appeal which resulted in a denial, the “board may amend the failed motion and vote on the amendment, within the 62-day period after the close of the public hearing”.² The board will then not be required to follow the rehearing process guidelines.

A copy of the hearing findings shall be sent to the applicant and county, if applicable.

REHEARING

The ZBA can vote to reconsider a matter it previously acted on if the matter has not been previously reheard and the motion to rehear the matter receives a unanimous vote of all present. A unanimous vote is also required to change the original decision. **Don't forget that if a matter is to be reheard, the hearing notice requirements still apply.**

Filing

“Every rule, regulation, amendment, repeal thereof and every order, requirement, decision, or determination of the board” shall be filed in the office of the municipal clerk within 5 business days after the decision is rendered.² A copy of the filings shall also be sent to the applicant via mail. The municipal clerk is responsible for stamping all records received. The start of the 30 day appeals period begins the date the board’s decision is filed.



Contacting the New York Department of State

- Training Unit: (518) 473-3355
- Legal Department: (518) 474-6740
- Toll Free: (800) 367-8488
- Email: localgov@dos.ny.gov
- Website: www.dos.ny.gov

Statutes

For membership: Town Law §267, Village Law §7-712, General City Law §81.

For procedure: Town Law §267-a, Village Law §7-712-a, General City Law §81-a.

For variances: Town Law §267-b, Village Law §7-712-b, General City Law §81-b.

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