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Real Estate and Zoning Law Bulletin

New York City's Unique Approach to Area Variances

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Land use practitioners outside of New York City often wonder why it is such a challenge to obtain even simple area variances in New York City, such as a minor height variance for a new multi-family building in Brooklyn or a small floor area waiver for a mixed-use building in Manhattan. The complexity is a result of the City's unique set of findings that govern the issuance of area variances, which are significantly more burdensome and establish a much higher threshold than the findings applicable to area variances in the rest of the State.

Area variances in towns, villages and cities throughout New York State are governed by Town Law § 267-b, Village Law § 7-712-b and General City Law § 81-b. These laws establish the authority of a zoning board to grant area variances, and also provide the statutory criteria that must be analyzed by the boards when granting area variances.

In determining whether to grant an area variance, a zoning board is required to engage in a balancing test "weighing the benefit to the applicant against the detriment to the health, safety and welfare of the neighborhood or community if the variance is granted." See *Matter of Sasso v. Osgood,* 86 N.Y.2d 374, 384 (1995); See also, Town Law § 267-b, Village Law § 7-712-b and General City Law § 81-b.

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In engaging in the balancing test, a zoning board is required to consider whether: (1) 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, (2) the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance, (3) the requested area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) 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. See Town Law § 267-b; Village Law § 7-712-b; General City Law § 81-b.

In applying the statutory balancing test for granting area variances, a zoning board is "not required to justify its determination with supporting evidence with respect to each of the five factors, so long as its ultimate determination balancing the relevant considerations was rational." See *Matter of Merlotto v. Town of Patterson Zoning Bd. of Appeals,* 43 A.D.3d 926, 929 (2d Dept. 2007). Moreover, a determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence. See *Matter of Ifrah v Utschig*, 98 NY2d 304, 308 (2002). The balancing test set forth above for area variances provides a zoning board significant discretion, and even where an adverse impact on the community has been

established, the zoning board may still grant the area variance if the benefit to the applicant outweighs the detriment to the community.

Although towns, villages and cities in New York State are bound by the State's Town Law, Village Law or General City Law with respect to the composition of the zoning boards, board procedure, and criteria for consideration for area variances, cities with a population of more than one million are exempted from these laws. See General City Law § 81-e. New York City, as a city with a population of more than one million, has therefore created its own rules for area variances.

In New York City, area variances are referred to as bulk variances, and are granted by the New York City Board of Standards and Appeals ("BSA"); the City's zoning board. The BSA contains five full-time commissioners, consisting of at least one expert in each of architecture, engineering and planning, charged with, among other things, the responsibility for varying and interpreting the NYC Zoning Resolution ("ZR"). Specifically, ZR § 72-21 authorizes the BSA to vary the regulations of the ZR.

Under ZR § 72-21, the BSA must make <u>each and every one</u> of the following findings before granting a variance:

> (a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular zoning lot; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the <u>*use or bulk*</u> provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the zoning lot is located;
>
> (b) that because of such physical conditions there is no reasonable possibility that the development of the zoning lot in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such zoning lot; this finding shall not be required for the granting of a variance to a non-profit organization;
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> (c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the zoning lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;
>
> (d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and
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> (e) that within the intent and purposes of this Resolution the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for. (*<u>emphasis added</u>*)

> "...the requirements for bulk variances in New York City under ZR § 72-21 differ greatly from the requirements for area variances in jurisdictions outside of New York City."

Therefore, the requirements for bulk variances in New York City under ZR § 72-21 differ greatly from the requirements for area variances in jurisdictions outside of New York City. Pursuant to State law, towns, villages and cities are not required to consider uniqueness or economic return for area variances. There is also no balancing test for bulk variances in New York City. Additionally, and perhaps most notably, all five findings must be made.[1] Thus, the threshold for obtaining a bulk variance in New York City is much higher and significantly more burdensome than the threshold for obtaining an area variance under State law. In fact, someone who practices land use law outside of New York City may look at the findings and notice that the findings for bulk variances under ZR § 72-21 look quite similar to the requirements to obtain a use variance in villages, towns and cities throughout the rest of the State. This is in fact true. In New York City, the statutory requirements to obtain a bulk variance are very similar to the unnecessary hardship standard that applies to use variances throughout the rest of the State.

What is even more peculiar to an attorney who practices outside of New York City is that use variances and bulk variances in New York City are treated alike under ZR § 72-21 (see underlined/italicized part of (a) finding in ZR § 72-21 above). This seems to

fly in the face of the seminal case of *Matter of Sasso v. Osgood*, which sets forth the distinction between use and area variances in New York State. See *Matter of Sasso*, 86 N.Y.2d 374. However, since New York City is not governed by General City Law and has created its own rules for variances, the distinction between use and area variances under *Matter of Sasso v. Osgood* does not apply, and it may treat use and bulk variances similarly.

Thus, it is not surprising that the BSA sees a relatively small number of new variance cases each month when considering it has jurisdiction over all five boroughs. Just as it is extremely difficult to obtain a use variance outside of New York City, it is just as difficult to obtain a bulk variance in New York City.

It is particularly difficult to meet the (a) and (b) findings (i.e., threshold findings) under ZR § 72-21 for a bulk variance. With respect to the (a) finding, an applicant must establish unique physical conditions "peculiar to and inherent in the particular zoning lot." See ZR § 72-21(a). These physical conditions might include small, shallow or irregularly shaped lots, sub-surface soil conditions, such as rock, soft soil, contamination or a high water table, or even the proximity of subway tunnels, or the inability to reuse obsolete buildings. In many cases it may be a combination of factors that support the uniqueness of a zoning lot. For example, in one recent BSA variance case, the application requested floor area ratio and height variances for a new mixed-use development in downtown Manhattan, and successfully met the (a) finding by predicating the uniqueness on a combination of factors, including, among other things, the proximity and depth of the N/Q/R subway tunnel adjacent to the property, and the small size and underdeveloped nature of the property.

It is also important to note that the uniqueness causing the hardship cannot be a persistent condition in the general area, which would suggest that the area should be considered for a rezoning. Although, the applicant need not prove that it is the only lot with the unique condition. See *Douglaston Civic Association v. Klein,* 51 N.Y.2d 963 (1980).

> "Unlike New York City, State law does not consider uniqueness or economic return for area variances."

With respect to the (b) finding, the applicant must show that as a direct result of the uniqueness, it is not possible to have a reasonable return from the property with an as-of-right development. This generally requires the submission of various technical financial analyses by a qualified expert, which includes comparables for sales and rentals, construction costs and special costs, projected returns, etc. What is critical is that there must be a clear link between the unique condition that presents the hardship and the inability to achieve a reasonable return from the property. In the example discussed above, the unique and significant hardship prevented a reasonable return from the property, by, for example, requiring a more expensive deep drilled mini-pile system for the foundation as a direct result of the proximity and depth of the subway tunnel. This was a very specific and quantifiable hardship, which made it feasible to demonstrate that it caused a failure to achieve a reasonable return with an as-of-right development. Establishing, quantifying and presenting this link clearly and concisely require great expertise. This is usually the most time-consuming and complex part of the variance process before the BSA.

While meeting the (a) and (b) findings of ZR § 72-21 can be the greatest challenge, all other findings must also be made. A failure to meet any one of them can result in a denial of an application to obtain a bulk variance.

Unlike New York City, State law does not consider uniqueness or economic return for area variances, and requires a balancing of interests; a much lower threshold and an arguably more discretionary review. In New York City, all bulk variances, big or small, require a comprehensive application pursuant to the Board's rules and instructions clearly meeting all five of the BSA's findings under ZR § 72-21. The process is more complex and prolonged than the process for obtaining area variances throughout the rest of the State.

[1] The BSA applies different standards to the (a) and (b) findings for not-for-profit uses. Generally, not-for-profit uses do not need to meet the (b) finding, and some not-for-profit uses can rely on the programmatic needs of the not-for-profit organization to meet the (a) finding.