

# ZONING BOARD OF APPEALS

## Overview and Procedures

March 30, 2011

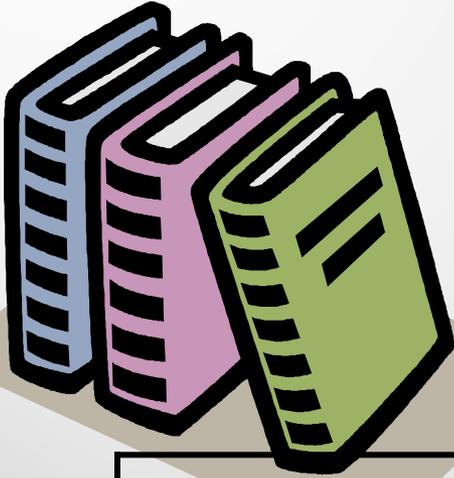
presented by

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George Lithco, Partner

Ulster County  
Planning Department

Adapted from Department of State  
Division of Local Government

# Statutory Authority

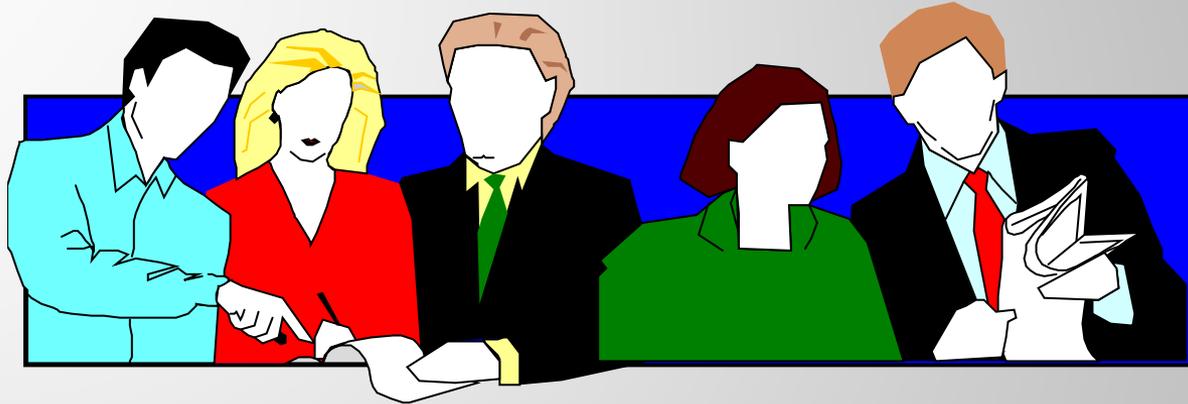


**Guide to Planning and Zoning Laws of  
New York State:**

**<http://www.dos.state.ny.us/lgss/publist.htm>**

	Town Law	Village Law	General City Law
MEMBERSHIP	267	7-712	81
PROCEDURE	267-a	7-712-a	81-a
VARIANCE STANDARDS	267-b	7-712-b	81-b

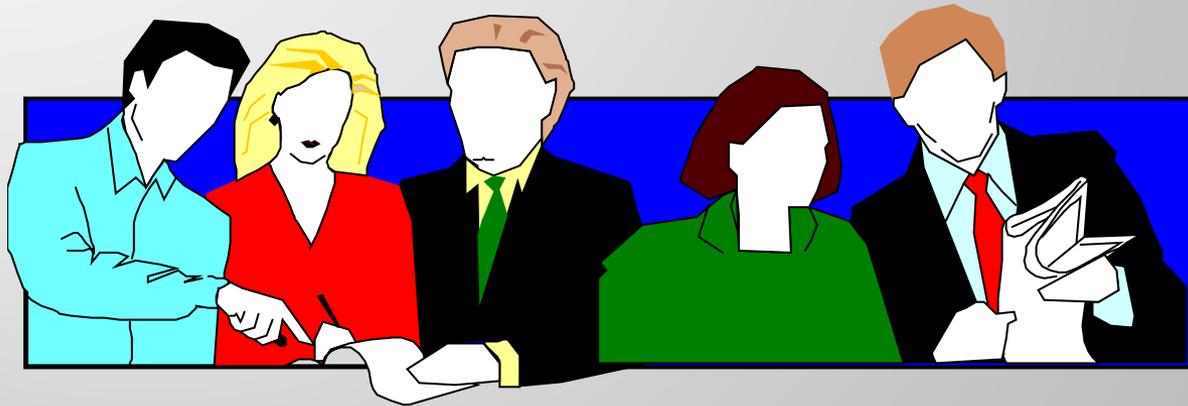
# Zoning Board Membership



- 3 or 5 Members
- Term is equal in years to the number of members on the Board
- Must be a resident of the municipality, a U.S. citizen, and at least 18 years of age

# Quorum

For business to be legally conducted at least a majority of the full membership of the Board must be present.



**Full membership includes any absences or vacancies.**

# Appointment of Alternate Members

Chapter 138 of the Laws of 1998 allows for the appointment of Alternate Members



For an alternate to serve in the event of an absence, the municipal Governing Body must pass a law superceding state law.



- Governing Board adopts a local law or ordinance which allows alternates;
- Alternates are appointed in the same manner as regular members;
- Terms of office are established by the Governing Board.

# Appointment of a Chairman

- ❑ Appointment by the Town Board or the Village Mayor with approval of Trustees;
- ❑ If no Chairman is appointed, the ZBA should then select a Chairman;
  - A vice-chairman should be selected as well;
- ❑ Presides at meetings & hearings.

Chairman when authorized duties may include:

- Supervise agenda preparation
- Liaison with Governing Body and other boards
- Sign official documents
- Supervise the filing of documents



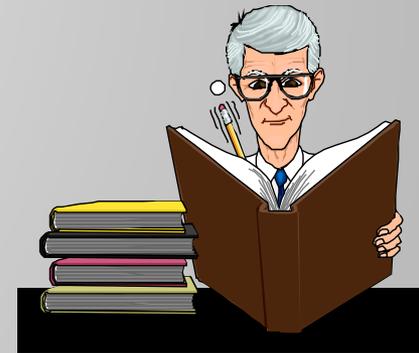
# **JURISDICTIONAL REQUIREMENTS FOR ZBA ACTION**

- **State Law Subject Matter Jurisdiction**
  - Use variance: ZEO determination
- **Local Law Subject Matter Jurisdiction**
  - Complete Application
- **SEQRA**

# All ZBAs Have Appellate Jurisdiction

To hear and decide appeals from determinations, decisions and orders of the administrative official who enforces the zoning code.

- Interpret the Zoning Regulations
- Issue or Deny Appeals for Variances



Other Duties which may be granted to the ZBA by the Governing Board are “Original” – they do not come to the ZBA upon an appeal

Example: Site Plan Review, Special Use Permits

# What is the Basis for an Appeal ?

Zoning Enforcement Officer (ZEO) must take an action

- Grant a permit
- Deny a permit
- Make a decision on how to apply the zoning regulations
- Issue a citation for a violation or take another enforcement action

# Who has standing to bring an Appeal?



**A person who has been denied a permit or has been cited for a violation**

The claim is that the action of the ZEO was incorrect or that special circumstances exist



**A third party who stands to be harmed by the ZEO Decision**



**Any “officer, department, board or “bureau of the Municipality**

# Who has standing to bring an Appeal?



## Exception:

Direct Appeal for an Area Variance in conjunction with an application for :

- Site Plan Review
- Subdivision Review
- Special Use Permit

# How Soon Must an Appeal be Filed?

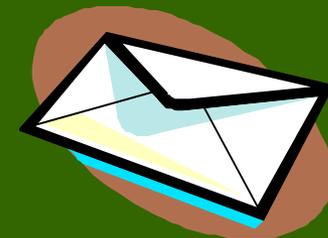


In general, within 60 days after the ZEO files a copy the action taken



**Exception:** Third Parties (ie. Neighbors) must file an appeal within 60 days from the date they should have known or could have knowledge of the ZEO's action

An appeal can be filed by letter or the Municipality can develop a form.  
A copy must go to the ZEO and the ZBA



# How does an Appeal affect enforcement proceedings that are underway?

An appeal “stays” enforcement proceedings



## Example of a Stay:

- Mr. Anderson is building a garage and is cited by the ZEO because it is too close to the property line and he is issued a “stop work” order.
- Mr. Anderson files an appeal of the ZEO’s action to the ZBA.
- The municipality may take no further enforcement action and may not pursue enforcement actions until the ZBA issues a decision.

# **JURISDICTIONAL REQUIREMENTS FOR ZBA ACTION**

**The following is a check list that should be part of the ZBA's procedures:**

- ✓ **Compliance with statutory notice requirements**
- ✓ **Timely appeal from ZEO determination (60 days)**
- ✓ **GML 239-nn: notice adjoining municipality**
- ✓ **The application has been determined to be complete**
- ✓ **UCPB - GML 239 m/n and Ulster County Charter referral**
- ✓ **Duly convened meeting**
- ✓ **Quorum**

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# REVIEW CRITERIA:

INTERPRETATIONS

AREA VARIANCES

USE VARIANCES

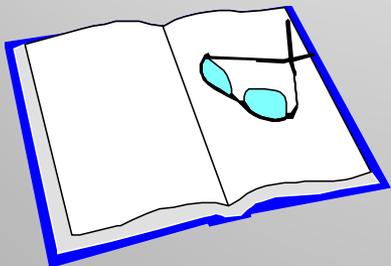
# What is an Appeal for an Interpretation?

The appealing party believes that the Enforcement Officer wrongly applied the law



## Common areas of interpretation:

- Definitions
- Method of taking measurements



**Interpretations may only be made upon an appeal of an Enforcement Officers decision?**

# On what does the ZBA base its interpretation?

- Past decisions on the same provision of the regulations or on similar facts – precedence
- Minutes, hearing comments & other records which reveal what the governing board intended when they adopted the zoning provision
- Ordinary meaning of terms if a term is not defined



With no other guidance, board consensus on what they think the definition or regulation means

# When is a use variance requested?

A use variance is required in order for an applicant to use land for a purpose not allowed in the zoning regulations.  
**The alternative would be to rezone the property.**



- There is no question that the regulations were properly applied.
- The applicant believes there are special circumstances justifying a variation to the regulations as applied to the property.

# **A Four-Part Test Must be Applied** **Unnecessary Hardship?**

The applicant is responsible for proving the need

- 1) No Reasonable Return on Investment**
- 2) Unique Circumstances**
- 3) Not Self-Created**
- 4) No Change in the Character of the Neighborhood**

The applicant must pass **EVERY** test

# First Standard: No Reasonable Return

## **Reasonable Rate of Return:**

- Under Present Zoning any permitted or special permit use on the property
- The Property as a whole not just the portion which is the subject of the application

## **Example: R-1 Zoning District**

### **ALLOWED USES:**

Single Family Home

Two Family Home

### **SPECIAL PERMIT USES:**

Professional Office

# **First Standard: No Reasonable Return**

**The Applicant must provide competent financial evidence.**

**For example:**

- **Proof of failure to get purchase offers when marketed at an appropriate price**
- **Proof of inability to rent for amount that is typical in the neighborhood**
- **Cost of renovations relative to the potential return on investment**

**No hard and fast answer – particular facts of the application**

- **The ZBA can determine what is a reasonable rate of return - It need not agree with the applicant or his/her expert. (Petruzzelli v. Zoning Bd. Appeals Village of Dobbs Ferry, 181 A.D.2d 825 (2dDept. 1992))**

**Not because the applicant could get a better price or make a higher profit if the use variance were granted**

# Second Standard: Unique Circumstances



**Circumstances affect less than a majority of similar uses in a neighborhood**

**Not the plight of the owner but the uniqueness of the land/building that has caused the plight**

**Example:** encroaching commercial development?

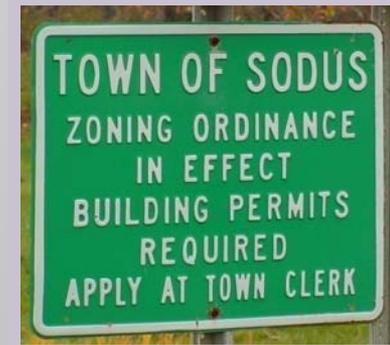
- Physical features
- Historic or Architectural Features
- Adjacent uses

**Not a general downturn in the market**

# Third Standard: Self-Created Hardship

## Is the hardship created by the applicant?

- Request is for a variance from restrictions which existed at the time of purchase;
- A property owner is bound by zoning restrictions, even if he or she does not have actual knowledge of them;
- Spending large sums of money on a project not allowed for in the zoning law.



It is not a self-created hardship for a “contract vendee” to apply for a variance as an agent of the owner

# Fourth Standard: Will Not alter the Essential Character of the Neighborhood

*“the proposed use is consistent with the pattern of development in the areas and will not have a significant detrimental impact on the neighborhood or community”*

**The ZBA needs to understand the proposed project/use**

- Incompatibility of uses
- Safety hazards
- Effect on traffic
- Disturbance from noise or lighting
- Potential parking problems



# When is an area variance requested?

**An area variance is required in order for an applicant to use land in a way that does not comply with the dimensional requirements of the zoning regulations**



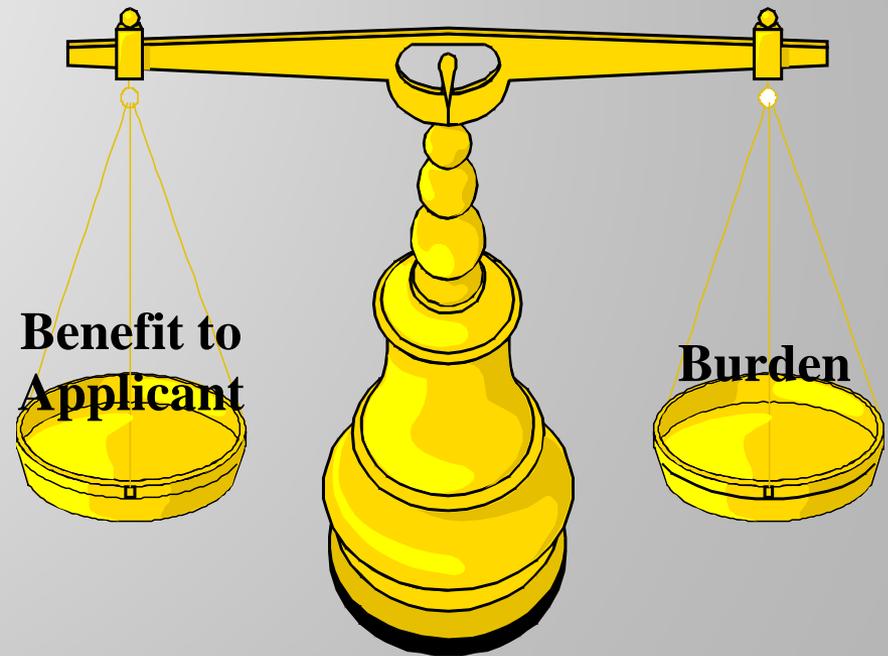
- Set back requirements:
- Size of signs
- Height restrictions

In this case - a side yard area variance to put in the drive-through in order to accommodate the driveway and fence.

# Area Variance Test is a Balancing of Interests

## Balance:

- The benefit to the applicant if the Area Variance is granted versus
- The burden to the Health, Safety and General Welfare of the community and its residents.



# **Five Factors Must be Considered When Deciding to Grant an Area Variance**

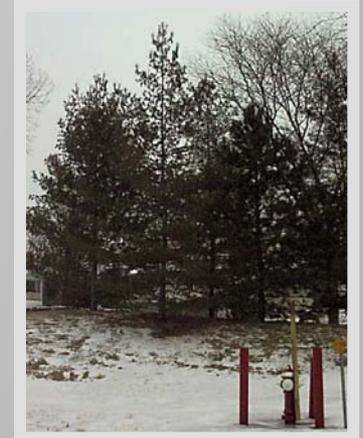
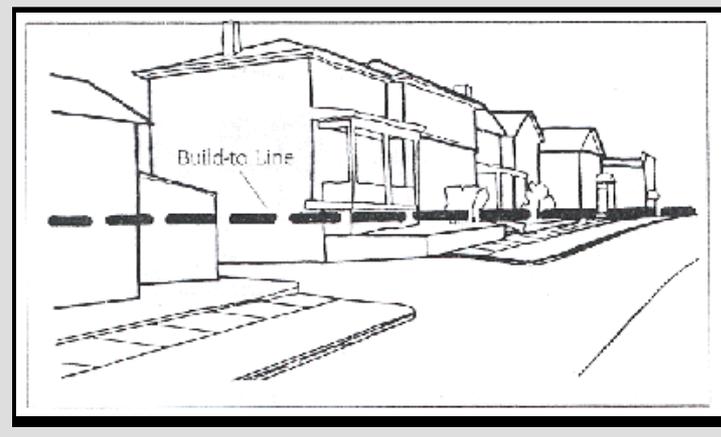
- 1) Undesirable change to neighborhood character**
- 2) Alternatives available that do not require a variance**
- 3) Substantiality of the request**
- 4) Effect on physical or environmental conditions if granted**
- 5) Is the situation self-created?**

# 1) Will there be undesirable change to the character of the neighborhood or detriment to nearby properties?



## Practice Point:

Would the undesirable change be eliminated if a condition were placed on the area variance request?



## 2) Are there alternative solutions that would not require a variance?



Consider placing the addition at the rear instead of the side

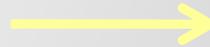


Applicant's should present reasons for not considering an alternative that would not require a variance

View, Internal Pattern, Construction Costs, Aesthetics, Environmental Restrictions

### 3) Is the requested area variance is substantial ?

- Amount of variance requested



5 feet versus  
50 feet?



- Magnitude of variance requested?



5 feet of the 10 foot  
setback  
or  
30 feet of the 300 foot  
frontage?

#### 4) Will the Area Variance have an adverse effect on physical or environmental conditions in the neighborhood or district?

- Block a view?
- Cause a drainage problem?
- Impact a wetland?
- Create a parking shortage?



Can the impact be mitigated by a condition being placed on the approval, such as construction of a berm?

# 5) Is there self-created hardship?

## Examples:

- Not enough land to build an accessory structure in compliance with zoning
- Structure built in violation of setback
- Septic system constrains further construction



**A self-created hardship does not preclude granting an area variance**

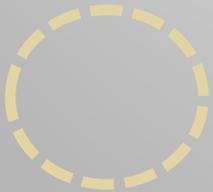
# Other Statutory Guidance

Statutes direct the ZBA to grant

*“the minimum variance that it shall deem necessary and adequate ... and at the same time protect and preserve the character of the neighborhood...”*



**The ZBA can impose reasonable conditions & restrictions on a variance that are directly related to and incidental to the proposed use of the property**



# STATUTES AFFECTING ZBA ACTION

- Public Officers Law
- “Open Meetings Law”
  - Meeting – Purpose and Quorum
  - Public Notice
  - Minutes
  - Statutory exceptions: legal action, personnel
  - Attorney’s fees

# STATUTES AFFECTING ZBA ACTION

- Public Officers Law
- “Freedom of Information Law”
  - Public access to documents
  - Existing documents
  - Maintained by agency
- Education Law 7209
  - Sealed plans

# STATUTES AFFECTING ZBA ACTION

- Agriculture and Markets Law
  - Section 305-a
  - Right to Farm
  - Unreasonable regulation
  - Farm operations
  - Within Agricultural District
  - Enforced by AML
  - Agricultural Data Statement
  - Notice to farming operations within 500'
- Town Law 283-a, Village Law

# STATUTES AFFECTING ZBA ACTION

- Federal Telecommunications Act
  - Cell towers
  - FCC Shot Clock Rule
- Public Utility Use Variance
- Complete Application
- SEQRA

# STATUTES AFFECTING ZBA ACTION

- Religious Land Use and Institutionalized Persons Act (RLUPA)
- NYS Uniform Fire and Building Code
- Floodplain Development Law
- Variance Standards in Zoning Enabling Legislation
- Local Wetlands Law
- Environmental Local Laws
- Mined Land Reclamation Act
- Planning Board actions

**ZBA**

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**PROCEDURES**

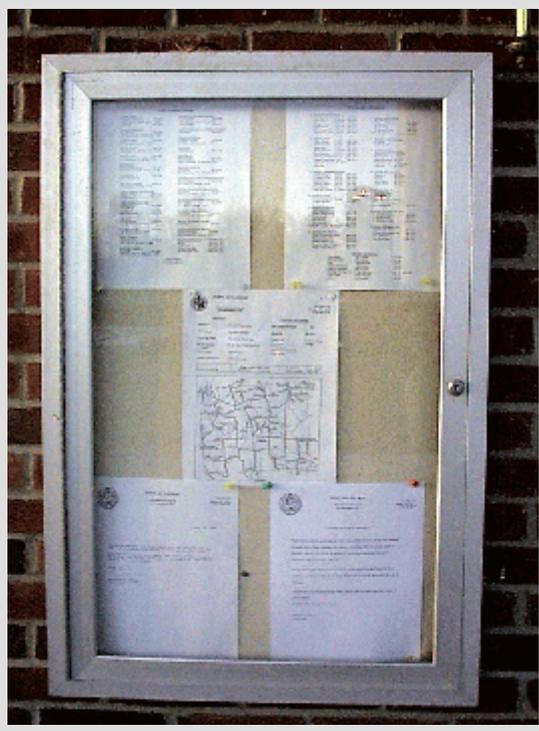
# Adoption of Board Procedures

In order to be binding, board procedures must be adopted by the governing board by local law or ordinance.

They may cover a variety of issues. For example:

- ❑ Duties of officers, committees
- ❑ Calling meetings, agendas, public input
- ❑ Referrals
- ❑ Minutes
- ❑ Signature on official documents

# The ZBA must let the press and the public know when it will meet to discuss applications



- Provide Access to the public
- Provide notice to the press
- Post notice in a conspicuous place

## **For meetings scheduled:**

- More than one week in advance - at least three days notice to the news media and the public must be provided
- Less than one week in advance - notice must be given to the media and to the public to the “extent practicable”

# LEGAL POINTS: NOTICE

- Proper notice must not mislead interested parties into foregoing attendance at the hearing
- Jones v. Zoning Bd of Appeals of the Town of Oneonta, 61 AD3d 1299 (3d Dept 1999)
- Use variance, erroneous address

# **The ZBA may NOT meet behind closed doors to discuss the merits of an application**

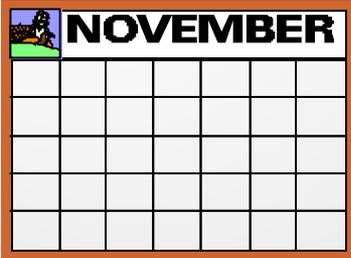
**Zoning Boards of Appeal must discuss applications and other board business at meetings open to the public**

A “work session” or “site visit” is a meeting subject to the OML if a quorum of the members have planned to gather to discuss public business



**Executive Sessions may only be held for reasons defined in the Open Meetings Law**

# Every matter before a ZBA requires a Public Hearing



The ZBA must schedule a public hearing within a reasonable period of time

Public notice of the hearing must be published in a newspaper of general circulation in the municipality at least five days prior to the date of the hearing

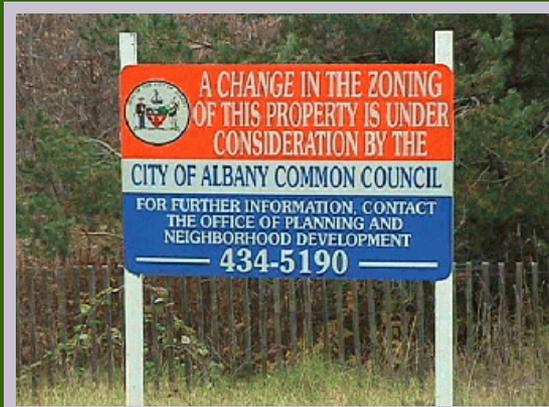


Publication or mailing fees must be paid by the appealing party prior to the board hearing the appeal

# Hearing Notices - Mail



- Parties to the appeal
- Regional or State park commission (if applicable)
- Anyone else required to receive a mailed notice by local law or ordinance



State law does **NOT** require that neighboring property owners be notified by mail when a public hearing is scheduled. (except certain agencies)

# Hearing Notice

## Variance and/or Interpretation

It is possible for an applicant to make a request for an interpretation, and, in the same application, ask for a variance if a favorable interpretation is not granted



### **LEGAL NOTICE (Excerpt)**

NOTICE IS HEREBY GIVEN .....

The Applicant requests an interpretation whether the Applicant's proposed single family dwelling complies with the sixty(60) foot setback from Pearl River Road. The Applicant also requests a variance from the sixty(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 sixty foot setback.**

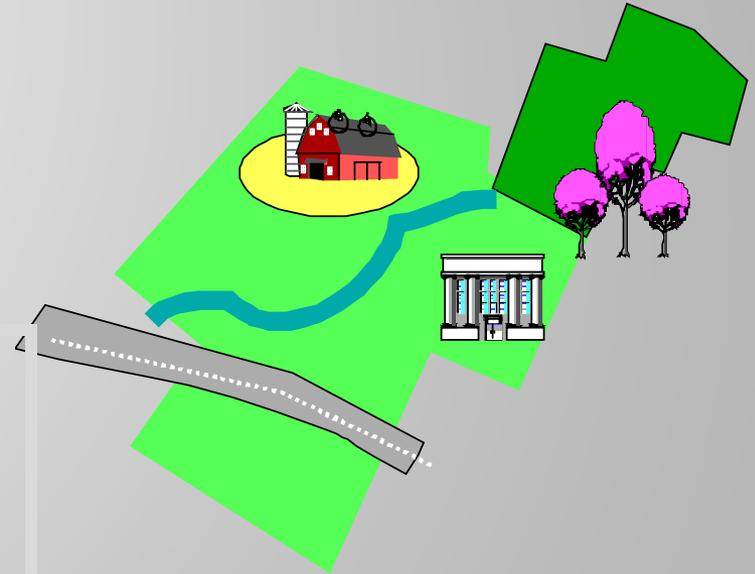
# Referral to the County or Regional Planning Agency

## Refer

- Variance
- Special Use Permits
- Site Plan
- Other zoning authorizations

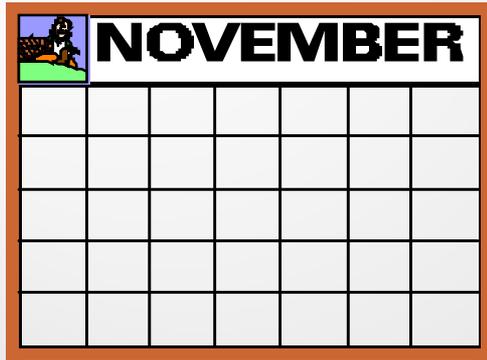
## Trigger (500 feet - Ulster County):

- Municipal boundaries
- State or county parks or highways
- State or county streams or institutions
- Land on which a state or county building is located
- Farm operations in State Agricultural districts



Ulster County Charter  
– Section C-51

# Waiting to Act



The time period may be longer if agreed to by the county and the ZBA

**The ZBA cannot take final action until the earlier of the following occurs:**

- The ZBA receives the report of the county planning agency, OR
- Thirty days have passed after the county's receipt of the full statement

# Building A Record

## What about the State Environmental Quality Review Act?

- Granting of Variances requires a determination under the SEQRA
- If there is an potential significant adverse environmental impact, it must be evaluated prior to a decision being made
- No SEQRA Review For:
  - Interpretations
  - Setback or Lot Line Variances
  - Area Variances for One, Two or Three-Family Residences

Are SEQRA determinations required prior to holding a public hearing?

# BUILDING A RECORD

## **SEORA – The Preliminaries**

- Determine if action is Type II
  - If so, make determination by resolution
  - If not, consider EAF and SEQRA
- Determine Type I or Unlisted Action
  - Establish lead agency
  - Determine if coordinated review is mandatory or appropriate given nature of action

# BUILDING A RECORD

## **SEORA – The Hard Look**

- Consider the action and the SEQRA standards of significance – 6 NYCRR 617.6
  - “Hard Look” to determine if the “action” may be potentially significant adverse environmental impact
  - Written, reasoned elaboration
- 
- **If Negative Declaration, file in accordance with 6 NYCRR 617.12**
  - **If Positive Declaration, EIS procedures**

**Include SEORA status in any subsequent notices**

# BUILDING A RECORD

## **SEORA – Segmentation:**

Consider the action and the SEQRA standards of significance – 6 NYCRR 617.6

The SEQRA “Action”

- **Impermissible segmentation:** considering only part of the “action” for the purpose of avoiding or “piecemealing” environmental review
- **Permissible segmentation:** considering one part of the SEQRA action in a manner that does not preclude environmental review

Example: height variance necessary for project to be feasible

Written, reasoned elaboration of basis

Set out limited effect of negative declaration

**Include SEQRA status in any subsequent notices**

# BUILDING A RECORD

- Minutes
- Creating a Stenographic Record
- Facts establishing jurisdiction
- Complete Application
- Notice, Proof of publication/mailing,  
Notice to ZEO, Read and Acknowledge  
Receipt for file
- Relief requested, Members Present

# BUILDING A RECORD

## **Recusal**

- Grounds: personal bias, GML 809 conflict (employment, contract, financial benefit in matter before Board), appearance of conflict
- Seek opinion of Ethics Board
- Recusal: Can't vote, can't participate as member, and balance participation as member of the public

**Best practice: leave the forum**

# BUILDING A RECORD

## **Recitals should include:**

- **Relevant provisions of law**
- **Personal knowledge of members**
- **Specific plans, reports or documents**
- **Put ex parte communications on the record**

**Provide opportunity for public participation  
before closing hearing**

# BUILDING A RECORD

- Marshal facts supporting action
- Reasoned written determination
- Written resolution setting forth legal standards, findings of fact and conclusions of law with respect to each standard, decision on relief requested, conditions of approval, vote
- Is a supermajority required - GML?

# Voting – Effect of County Recommendation

If the county recommends disapproval or modification within the time allowed ....



**Yes + Yes No**

A majority plus one vote for the municipality is required to approve the application without the recommended modifications.

# BUILDING A RECORD

## **Conditions**

- Articulate whether condition is imposed pursuant to SEQRA authority (CND or Findings Statement) or zoning authority
- Articulate the nexus between the condition and the standards governing the ZBA action
- Conditional approval
- Continuing conditions of a variance
- Fundamental limitations on conditions:
  - must affect property, not people
  - limited authority to impose restrictions on operation of use unrelated to land use or inconsistent with state regulatory scheme
- ATMs, farm operations in Ag District, SLA

# Taking Action

- ❑ A motion/resolution of the ZBA passes if it gets the support of a majority of the whole membership of the board
- ❑ When the motion fails:
  - If the motion was to approve a variance request or in favor of the applicant's interpretation of zoning, the request is denied.\*\*
  - If the motion was on a matter of original jurisdiction, such as site plan review, the motion fails and no action has been taken.

**\*\* Additional votes may be taken within the statutory time frame without triggering the rehearing process.**

# Decision and Filing

Decisions must be made within 62 days after the close of the Public Hearing



The ZBA must file with the municipal clerk all orders, requirements, decisions and determination s within five (5) days

## **Decision Tips:**

- Clearly worded motions
- Voting is on the motion
- Record each members vote

A ZBA Decision may only be appealed to the  
NYS Supreme Court

# Decisions should be supported by findings

## Findings:

- Describe the reasons for the denial or approval of an application, and supports any condition imposed.
- Provide an analysis which applies law to the facts, leading to conclusions.

DOS has Sample  
Finding Forms



Findings should  
be in the Record

# Rehearing the Matter

When a ZBA votes to reconsider a matter it previously acted on, it is a “rehearing”

## **Requirements for reconsideration:**

- The matter must not have been previously reheard
- A motion must be made to rehear the matter and must pass by a unanimous vote of all present
- Notice provisions must be complied with
- A unanimous vote of all present is required in order to change a decision

## **Notice Provisions**

Persons heard as part of the original decision

# BUILDING A RECORD

## **Checklist**

- ✓ Close the hearing?
- ✓ SEQRA Compliance
- ✓ Applicant has created its record by submitting sufficient evidence demonstrating entitlement to relief
- ✓ Board has no need for further testimony or evidence
- ✓ No project modifications likely to affect relief requested
- ✓ GML 239 review complete: complete submission
- ✓ GML supermajority required?
- ✓ Public afforded adequate opportunity to review and comment on application and evidence
- ✓ Written public comment period?
- ✓ Record should indicate if hearing is closed, any written comment period, or if adjourned, date of meeting adjourned to or procedure for notice

# BUILDING A RECORD

- **File and mail resolution** or record of decision in accordance with zoning, SEQRA, GML requirements
- **Trigger 30 day period** to bring Article 78 challenge
- **Provide written decision** to Building Department and other involved agencies that must still act

# PERIODIC AUDIT OF ZBA ACTION

- ✓ Annual reorganization
- ✓ Official newspaper(s)
- ✓ Review rules of procedure
- ✓ Review application forms and instruction
- ✓ Review referral procedures to Planning Board, UCPB, consultants: timeliness, effectiveness
- ✓ Review coordination with Building Department on appeals, application of conditions
- ✓ Members/Alternates: terms of office and vacancies, training
- ✓ Review decisions: precedent, consistency, definitions
- ✓ Identify issues for legislative action
- ✓ Maintain consistency with comprehensive plan
- ✓ Recognize land use trends and anticipate consequences

# LEGAL POINTS: LITIGATION TRENDS

Reporting Cases with Zoning Board as  
party

1900-1950	88	1.8
1950-2000	1980	39.6
2000-2011	566	55.2

# LEGAL POINTS: LITIGATION TRENDS

- Section 1983 Claims
- Constitutional Rights
- Equal Protection
- Procedural Due Process
- Substantive Due Process
- Attorney's fees

# PLANNING RESOURCES – ON THE WEB

**New York State Department of State, Local Government Services, Land Use Training and Technical Assistance**  
<http://www.dos.state.ny.us/lg/lut-index.html>

**Zoning Board of Appeals (2005, NYSDOS, Coon Local Government Technical Series**  
<http://www.dos.state.ny.us/lg/publications/Zoning Board of Appeals.pdf>

**Guide to Planning and Zoning Laws in New York State (2007)**  
<http://www.dos.state.ny.us/lg/publications/Guide to Planning and Zoning Laws.pdf>

**Conducting Public Meeting and Public Hearings (2008), NYSDOS, Coon Local Government Technical Series**  
<http://www.dos.state.ny.us/lg/publications/Conducting Public Meetings and Public Hearings.pdf>  
**SEQRA Regulations, DEC (2000)**

<http://www.dec.ny.gov/regs/4490.html>

**SEQRA Handbook, DEC (2010)**

[http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf)

**SEQRA Cookbook, DEC (2004)**

[http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/cookbook1.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/cookbook1.pdf)

**The Planning and Zoning Clerk (2006), Municipal Planning Primer Series, Westchester Municipal Planning Federation**  
<http://www.westchestergov.com/planning/regionalplan/WMPF/Primers/ClerksPrimer06.pdf>

**Beginner's Guide to Land Use Law, Land Use Law Center, Pace Law School**  
<http://www.pace.edu/lawschool/files/landuse/LandUsePrimer.pdf>

*- Caution: Out of State Sources -*

**Zoning Board Handbook (2006), Center for Land Use Education**  
<http://www.uwsp.edu/cnr/landcenter/Publications/BOA2006/BOA2006.pdf>

**Zoning Board of Appeals Handbook (2006), Michigan Municipal League**  
<http://www.mml.org/pdf/zbabook.pdf>

**Dealing with Contentious Public Hearings, Planning Commissioners Journal (2010)**  
[http://www.plannersweb.com/PCJ77\\_PublicHearings.pdf](http://www.plannersweb.com/PCJ77_PublicHearings.pdf)

**How to Conduct a Meeting (Foonberg's Ten Rules)**  
[http://www.plannersweb.com/PCJ77\\_PublicHearings.pdf](http://www.plannersweb.com/PCJ77_PublicHearings.pdf)

# Resources



Dennis Doyle, Director  
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