

ZBA Actions Permitted by NYS Village Law

Application Fee: \$90 Required at the time of filing – Non Refundable

Area Variance: An area variance is needed if you want to deviate from some dimensional requirement of the Zoning Ordinance, such as height, yard setback, or lot coverage. The area variance criteria the ZBA must use are found in Village Law 7-712-B(3)(b):

In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:

- (1) 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;
- (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (3) whether the requested area variance is substantial;
- (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) 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.

Use Variance: A use variance is needed if you want to use a structure or property for something not allowed by the Zoning Ordinance, such as a restaurant in the Residence District. The use variance criteria the ZBA must use are found in Village Law 7-712-B(2)(b):

No such use variance shall be granted by a board of appeals without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. In order to prove such unnecessary hardship the applicant shall demonstrate to the board of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located,

- (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- (2) 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;
- (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the alleged hardship has not been self-created.

Interpretation Request: An interpretation request is appropriate if you do not agree with the Zoning Officer's interpretation of the Zoning Ordinance. Such requests must be made within sixty (60) days of the Zoning Officer's determination that is being appealed. The interpretive role of the ZBA is found in Village Law 7-712-B(1):

The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, interpretation or determination appealed from and shall make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter by the administrative official charged with the enforcement of such local law and to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken.



**Division of Local
Government Services**

Guidelines for Applicants to the Zoning Board of Appeals

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

A Division of the New York Department of State

Andrew M. Cuomo, Governor

Rossana Rosado, Secretary of State

Guidelines for Applicants To the Zoning Board of Appeals

This publication has been written to aid potential applicants in understanding and appreciating the appeals process, and to provide an explanation of the rules and standards under which appeals and variance decisions must be made. Applicants and their representatives should be guided in advance by the standards in deciding whether an appeal would be appropriate. These standards have been set forth in law and by the courts of the State, and cannot be modified by the Zoning Board of Appeals.

Why might you consider an appeal to the Zoning Board of Appeals?

A person may want to appeal to the Zoning Board of Appeals (ZBA) for two basic reasons. First, he or she may disagree with a decision the enforcement officer has made or an action he or she has taken. Second, the appealing party may believe that an exception (variance) to the zoning laws should be made for his or her property.

How is the appeals process initiated?

Either the applicant or the applicant's representative must file a Notice of Appeal with the ZBA within 60 days after the enforcement officer has filed his or her decision or action. The enforcement officer's decision is filed in his or her office, unless the municipal governing board has authorized it to be filed instead in the municipal clerk's office. A copy of the Notice of Appeal must also be filed with the enforcement officer.

Under what circumstances may an appeal be made to the Zoning Board of Appeals?

Except in certain instances, an applicant must be "aggrieved" by an actual decision or action taken by the enforcement officer. The exceptions occur where an applicant has already submitted an application for subdivision, site plan, or special use permit approval which requires an area variance in connection with that approval. In those instances, no decision of the enforcement officer is necessary. The applicant may simply file a Notice of Appeal directly with the ZBA.

Who may apply to the ZBA for relief?

Anyone who could be "aggrieved" by the decision or action of the enforcement officer, has standing to take an appeal before the ZBA. A person is "aggrieved" if his or her property value is affected negatively by the enforcement officer's action. Commonly, a property owner who either has been refused a permit or has been served with an enforcement action, is the "aggrieved party." Also note, as stated above, that a landowner who has submitted an application for subdivision, site plan, or special use permit approval, may apply to the ZBA for an area variance without a decision of the enforcement officer. A neighboring landowner may also be an "aggrieved party", if he or she believes the enforcement officer's decision in issuing a permit was improper, and will negatively affect their property

value. In addition, any officer, board or commission of the municipality may appeal a decision of the enforcement officer, whether or not that officer, board or commission is aggrieved.

What decisions or actions are appealable?

Any decision or action issued in writing by the enforcement officer, which affects anyone's rights, is appealable. These decisions include: the grant or denial of a permit, the issuance of an appearance ticket or summons, or any order which mandates certain action, such as a cease-and-desist or stop-work order.

I'm a resident who lives near the proposed project. What happens if I find out about the project more than 60 days after the permit is filed?

If you are a "third party", such as a nearby resident, you may still bring an appeal more than 60 days after the permit is filed, *if* you file within 60 days after you've had a reasonable opportunity to find out about the planned project. For example, you would have 60 days from the time a sign is posted on the property announcing the future construction of a new business (whether or not you actually see the sign), if the sign is posted after the permit has been issued.

What types of relief can the ZBA grant?

The ZBA can grant (or deny) two types of relief: interpretive and variance. In either case, the ZBA will either affirm, reverse, or modify the enforcement officer's decision. In so doing, it will either grant or deny the requested relief. If the appeal is for an interpretation, the ZBA's decision will be based on the municipal zoning regulations. On the other hand, if the appeal is for a variance, the ZBA's decision will be based on the standards of proof contained in the following state statutes: §267-b of the New York State Town Law, §7-712-b of the Village Law, or §81-b of the General City Law.

Because of the range of powers the ZBA has, it is essential that the applicant (or the applicant's representative) know what type of relief to request when making application to the ZBA. If the applicant believes the enforcement officer's decision is incorrect, the appropriate request is for an *interpretation* reversing the officer's decision. If the applicant (in this case, the landowner) believes that the officer's decision may be correct, but that he or she can show proof under the statutes that a variance is warranted, then the appropriate request is for a decision granting a *variance*. It is also 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.

After a Notice of Appeal has been filed, what must happen?

After a Notice of Appeal has been filed, the ZBA will take up the matter at a future meeting. The ZBA is required to schedule a hearing on the applicant's appeal within a reasonable time, and give notice of the hearing to the applicant. If a variance is requested, the ZBA may be required to take some preliminary steps before it may hear the case.

First, the ZBA may have to make a determination of significance under the State's Environmental Quality Review Act (SEQRA). Based on this determination, an Environmental Impact Statement (EIS) may or may not be required. If an EIS is required, the case cannot be heard until the EIS has been completed and accepted by the ZBA. Environmental review is not necessary for interpretations of the zoning regulations or for area variances relating to setbacks and lot lines, or for area variances relating to one-, two-, or three-family residences.

Second, depending on the location of the property, the ZBA may be required by State law to refer requests for variances to the county planning agency for a preliminary recommendation. If such a referral is required, the ZBA must give the county 30 days to respond. It is also possible that the county's recommendation could result in an increase in the number of votes needed for the ZBA to approve the variance. Appeals for interpretations need not be referred to the county.

What is the responsibility of the applicant at the hearing?

At the hearing, the applicant may submit written evidence and/or argument to support his or her case. Obviously, the sooner that written testimony or material is received, the more time ZBA members will have to consider the case and reach a proper decision. Therefore, it is a good idea to submit written material with the application, or as soon thereafter as possible, so that it can be sent to ZBA members prior to the hearing. (Please note that the applicant can present written evidence at any time up to the close of the hearing, or even after the hearing if the ZBA allows the record to remain open.)

At the hearing, the ZBA will offer the applicant and/or the applicant's representative the opportunity to present a case for relief. The applicant may personally testify, call witnesses, or submit written evidence, including drawings and graphics. Because an appeal is an adversarial proceeding, the ZBA will offer the municipality an equal opportunity to present its side of the case (the side which supports the enforcement officer's decision). Each side will be given an opportunity to question the other, or the other's witnesses. In addition, ZBA members may ask questions.

After the applicant and the municipality have presented their cases, any other interested persons will be given the opportunity to speak and/or submit written material. If necessary, the hearing may be adjourned and continued at a later date. When all parties and interested persons have been granted the opportunity to be heard, the hearing will be closed.

Will the ZBA make a decision the night of the hearing?

Once the hearing is closed, the ZBA may begin discussing the case and reach a decision, or may postpone discussion and/or its decision until a later meeting. If the ZBA deems it necessary, the hearing may be reopened at any time. Once the hearing has been finally closed, the ZBA must make its decision within 62 days.

What is the basis for the ZBA's decision on an interpretation?

If requesting a reversal on an interpretative basis, the applicant must prove that the enforcement officer's decision was incorrect, according to a proper reading of the municipality's zoning regulations. 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 its prior ruling. If the ZBA has never interpreted the particular provision at issue, it will use its best judgment as to the municipal governing board's original intent in enacting the provision. Secondly, the ZBA will try to arrive at the best practical solution for future application by the enforcement officer.

Careful and thorough reference will be given to all definitions and other provisions of the regulations. If necessary, the ZBA will refer to authoritative publications on planning and zoning law. The applicant may, of course, use those resources in presenting his own case as well.

What must be proven in order to be granted a use variance?

If requesting a use variance, that is, permission to establish a use of property not otherwise permitted in the zoning district, the applicant must prove "unnecessary hardship." To prove this, State law requires the applicant to show *all* of the following:

- (1) that the property is incapable of earning a reasonable return on initial investment if used for any of the allowed uses in the district (actual "dollars and cents" proof must be submitted);
- (2) that the property is being affected by unique, or at least highly uncommon circumstances;
- (3) that the variance, if granted, will not alter the essential character of the neighborhood; and
- (4) that the hardship is not self-created.

If *any one or more* of the above factors is not proven, State law requires that the ZBA must deny the variance.

What must be proven in order to be granted an area variance?

If requesting an area variance, that is, permission to build in an otherwise restricted portion of the property (such as in the required front, side or rear yards, or above the required building height, or in excess of the lot coverage regulations), then State law requires the applicant to show that the benefit the applicant stands to receive from the variance will outweigh any burden to health, safety and welfare that may be suffered by the community. State law requires the ZBA to take the following factors into consideration in making its determination:

- (1) 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;

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- (2) whether the benefit sought by the applicant can be achieved by some method which will be feasible for the applicant to pursue but would not require a variance;
- (3) whether the requested area variance is substantial;
- (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (5) whether an alleged difficulty is self-created.

Unlike the use variance test, the ZBA need not find in favor of the applicant on every one of the above questions. Rather, the ZBA must merely take each one of the factors into account. The ZBA may also decide that a lesser variance than the one requested would be appropriate, or may decide that there are alternatives available to the applicant which would not require a variance.

Must the variance, if granted, be exactly what was applied for by the applicant?

Whether the ZBA decides to grant a use or area variance, State law requires the ZBA to grant the *minimum variance necessary* to provide relief, while at the same time taking care to protect the character of the neighborhood and the health, safety and welfare of the community. For these same reasons, the ZBA may also impose reasonable conditions on the grant of any variance.

If there is no opposition to my variance request, must the ZBA grant the request?

The above rules and standards have been set forth in law and by the courts of the State, and cannot be modified by the Zoning Board of Appeals. If they are not followed, the municipality would be subject to costly lawsuits. The public is entitled to speak in favor of, or against, a proposed project, but opinions in and of themselves are not enough.

Applicants and their representatives should be guided in advance by the appropriate legal standards in deciding whether an appeal would be appropriate. If an appeal is taken, the applicant should present clear, definite facts showing that the standards have been met. The ZBA cannot grant relief where proper legal proof is not adequately presented.

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Andrew M. Cuomo,
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2015

Village of New York Mills
1 Maple Street, New York 13417

Tel: 736- 9212 Fax: 736-7561

Appeal to the Zoning Board for an Area variance,
Use Variance, Special Use Permit, and/or Interpretation

SECTION I: APPLICANT INFORMATION (to be filled in by applicant)

APPLICANT(S)*

OWNER(S) (if not applicant)

ATTORNEY/AGENT

NAME: _____

ADDRESS: _____

Tel. /Fax _____ / _____

Email: _____

* An applicant must be the property owner, lessee, or one with a contract to lease or purchase the property in question.
 Applicant's interest in the premises: Owner Lessee Under contract to lease or purchase

SECTION II: PROPERTY INFORMATION (to be filled in by applicant)

1. Property Address (No. & St.) _____

2. Tax Parcel No.: _____ 3. Current Zoning District: _____

4. Has a previous ZBA application/appeal Yes When: _____ For What: _____
been filed for this property? No

5. Is there a written violation for this parcel that is not the subject of this application? Yes No

6. Detailed description of project (include current and proposed use) _____

7. Has the work, use or occupancy to which relates to this appeal begun? Yes No

8. Identify the type of appeal you are requesting (check all that apply):

Area Variance (sec III) Use Variance (sec IV)

Special Use Permit Interpretation (sec V)

Address: _____

OFFICE USE ONLY

Date of Application _____

(Postmarked or Hand Delivered)

Date of Public Hearing _____

Date of Decision _____

Fee _____ Paid _____

SECTION III: AREA VARIANCE- PLEASE ANSWER THE FOLLOWING (add additional information as necessary):

The applicant requests relief from the following Zoning Code Article(s): _____
Requirement for which Variance is requested: _____

To grant an area variance, the ZBA must balance the benefits to the applicant and the health, safety and welfare of the neighborhood and community, taking into consideration the following:

1. CAN THE BENEFIT SOUGHT BY THE APPLICANT BE ACHIEVED BY OTHER FEASIBLE MEANS?

Identify what alternatives to the variance have been explored (alternative designs, attempts to purchase land, etc.) and why they are not feasible. _____

2. WILL GRANTING OF THE VARIANCE PRODUCE AN UNDESIREABLE CHANGE IN THE CHARACTER OF THE NEIGHBORHOOD OR A DETRIMENT TO NEARBY PROPERTIES? Granting the variance will not create a detriment to nearby properties or an undesirable change in the character for the following reasons: _____

3. IS THE REQUESTED VARIANCE SUBSTANTIAL? The requested variance is not substantial for the following reason: _____

4. WILL THE VARIANCE HAVE ANY ADVERSE PHYSICAL OR ENVIRONMENTAL EFFECTS ON THE NEIGHBORHOOD OR DISTRICT? The requested variance will not have an adverse physical or environmental effect in the neighborhood or district for the following reasons: _____

5. WAS THE ALLEGED DIFFICULTY SELF-CREATED? (this does not necessarily preclude granting of an area variance) Explain whether the alleged difficulty was or was not self-created: _____

Address: _____

SECTION IV: USE VARIANCE – PLEASE ANSWER THE FOLLOWING (add additional information as necessary)

The applicant requests relief from the following Zoning Code Article(s): _____
A Use Variance is requested to permit the following: _____

For the ZBA to grant a request for a use variance, an applicant must prove that the zoning regulations create an unnecessary hardship in relation to that property. In seeking a Use Variance, New York State law requires an applicant to prove all four of the following "tests".

1. **THE APPLICANT CANNOT REALIZE A REASONABLE FINANCIAL RETURN ON INITIAL INVESTMENT FOR ANY CURRENTLY PERMITTED USE ON THE PROPERTY.** "Dollars & cents" proof must be submitted as evidence. The property in question cannot yield a reasonable return for the following reasons: _____

A. Submit the following financial evidence relating to this property (attach additional evidence as needed):

- 1) Date of purchase: _____ Purchase amount: \$ _____
- 2) Indicate dates and costs of any improvements made to the property after purchase:
_____ Date _____ Improvement _____ Cost _____

- 3) Annual maintenance expenses: \$ _____ 4) Annual Taxes: \$ _____
- 5) Annual income generated from property: \$ _____
- 6) Assessed value: \$ _____ 7) Appraised value: \$ _____
- 8) Appraiser: _____ 9) Date: _____

Appraisal Assumptions: _____

B. Has the property been listed for sale with the Multiple Listing Service (MLS) Yes If "yes", for how long? _____
No Original listing price: \$ _____
1) Original Listing date: _____
If listing was reduced, explain when and to what extent: _____

2) Has the property been advertised in the newspapers or other publications? Yes No
If "yes", describe frequency and name of publications: _____

3) Has the property had a "For Sale" sign posted on it? Yes No
If "yes", list the dates when sign was posted: _____

4) How many times has the property been shown and with what results? _____

Address: _____

2. **THE FINANCIAL HARDSHIP RELATING TO THIS PROPERTY IS UNIQUE AND DOES NOT APPLY TO A SUBSTANTIAL PORTION OF THE NEIGHBORHOOD.** (This hardship may not apply to a substantial portion of the zoning district or neighborhood). This previously identified financial hardship is unique for the following reasons:

ILLUSTRATIONS OF UNIQUENESS

- Topographic or physical features preventing development for a permitted use.
- Why would it be possible to construct the applicant's proposal and not any of the permitted uses?
- Board member observations of the property and surrounding area

3. **THE VARIANCE, IF GRANTED, WILL NOT ALTER THE ESSENTIAL CHARACTER OF THE NEIGHBORHOOD.**

Changes that will alter the character of a neighborhood or district would be at odds with the purpose of the Zoning Code. The requested variance will not alter the character of the neighborhood for the following reasons:

ILLUSTRATIVE NEIGHBORHOOD CHARACTERISTIC FACTORS

- Board members' observations of neighborhood
- Expected effect of proposal on neighborhood, for example, change in parking patterns, noise levels, lighting, traffic

4. **THE ALLEGED HARDSHIP HAS NOT BEEN SELF-CREATED.** An applicant (whether the property owner or one acting on behalf of the property owner) cannot claim unnecessary hardship if that hardship was created by the applicant, or if the applicant acquired the property knowing (or was in a position to know) the conditions for which the applicant is seeking relief. The hardship has not been self-created for the following reasons:

SELF-CREATED

- What were the permitted uses at the time the property was purchased by the applicant?
- Were substantial sums spent on remodeling for a use not permitted by zoning?
- Was the property received through inheritance, court order or divorce?

Address: _____

SECTION V: INTERPRETAION -- PLEASE ANSWER THE FOLLOWING (add additional information as necessary)

1. Identify the section(s) of the Zoning Code for which you are seeking an interpretation:

Section(s): _____

2. How do you request that this section be interpreted? _____

3. If interpretation is denied, do you wish to request an alternative zoning relief? Yes No
4. If the answer to #3 is "yes," what alternative relief do you request? Use Variance Area Variance

SECTION VI: DISCLOSURE AND APPLICANT SIGNATURE

DISCLOSURE

Does any Village officer, employee or family member thereof have a financial interest in this application?

Yes No

If "yes", the name, address and nature and extent of this interest must be detailed below:

Name: _____

Address: _____

Nature/Extent of Interest: _____

Address: _____

APPLICANT CERTIFICATION

I / we, the property owner(s), or purchaser(s)/lessee(s) under contract, of the landing question, hereby request an appearance before the Zoning Board of Appeals.

By the signature (s) attached hereto, I/we certify that the information provided within this application and accompanying documentation is, to the best of my/our knowledge, true and accurate. I / we further understand that intentionally providing false or misleading information is grounds for immediate denial of this application.

(Applicant signature) _____
(Date)

(Applicant signature) _____
(Date)

AREA VARIANCE CONSENT TO ACCESS THE PROPERTY

I / we, hereby consent to allow members of the Zoning Board of Appeals the right of access to my / our property for the purpose of viewing and inspecting the proposed area variance, which is a subject matter of the proceeding herein before the Zoning Board of Appeals.

(Applicant signature)

(Applicant signature)

Applications for an area variance to a single-family residence shall submit a plot plan map showing:

- Existing property boundary lines with existing structures
- Include photos of the structures
- Any proposed changes indicated as "new" on the drawing
- Show proposed variances with specific dimensions listed and shown on the drawing

For all other applications, the plan/drawing shall include:

- A professionally prepared site plan/drawing with title block, project name and address by a licensed professional
- Boundary data to include length, bearings or angles, tie distance to nearest intersection and adjacent property owner
- North arrow and preliminary topographic data (taken from County maps) at a minimum of 5 feet intervals
- Location of physical features such as woods, creeks, ponds, roads, existing structures, etc.
- Site data showing proposed uses, subdivision layout, parking locations, landscaping, preliminary utility layout and properly evaluate the application

Address: _____ Page 6 of 6