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NEW YORK STATE TUG HILL COMMISSION LOCAL GOVERNMENT CONFERENCE
Verona, NY

**ZBA REVIEW OF VARIANCE APPLICATIONS
AND INTERPRETATION APPEALS**

MARK SCHACHNER, ESQ.

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I. ZBA FUNCTIONS

- A. USE VARIANCE APPLICATION REVIEW
- B. AREA VARIANCE APPLICATION REVIEW
- C. "INTERPRETATION APPEALS"

II. BASIC GUIDELINES

- A. Identify type of application
- B. Consider and apply applicable criteria
- C. Remember to decide based on land/property and merits of application,
regardless of identity of applicant/property owner

III. BEST DECISION-MAKING (MOTION) PRACTICES

- A. Follow the process – proper notices, public hearings, SEQRA review,
voting requirements



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- B. Hear the Application – Open and Close the Public Hearing
- C. Identify the proper decision-making criteria
- D. Apply the proper decision-making criteria
- E. Discuss and deliberate prior to Decision (in open public meeting)
- F. Decide by formal Motion with stated reasons for Decision based on criteria as applied to particular application
- G. Make sure Minutes reflect discussion of criteria and Motion/Decision made

IV. USE VARIANCE APPLICATION REVIEW (UNNECESSARY HARDSHIP)

- A. Use Variance: authorization to use land for a purpose which is not allowed or is prohibited by the zoning regulations
- B. Use Variance Criteria:
 - 1. The applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence
 - 2. The alleged hardship relating to the property in question is unique and does not apply to substantial portion of the district or neighborhood
 - 3. The requested Use Variance, if granted, will not alter the essential character of the neighborhood
 - 4. The alleged hardship has not been self-created

ALL CRITERIA MUST BE MET

- C. Lack of “Reasonable Return” is Especially Difficult to Properly Demonstrate
 - 1. Lack of return if current use continued or if used for any allowed uses

2. “Reasonable return” – does not mean “enormous” return or “maximum” return or “desired” return – but no specific numerical threshold for “reasonable return” set forth in law or case decisions

3. “Competent financial evidence” – requires “dollars and cents proof” – not just “anecdotal”, subjective, speculative statements

D. If Criteria are Properly and Carefully Applied, it is Extremely Difficult for a Use Variance to be Lawfully Achieved

V. AREA VARIANCE REVIEW (BALANCING BENEFIT TO APPLICANT vs. DETRIMENT TO NEIGHBORHOOD/COMMUNITY)

A. Area Variance: authorization to use land in a manner which is not allowed due to the dimensional or physical requirements of the zoning regulations

B. Area Variance Criteria:

1. Whether undesirable change will be produced in character of neighborhood or detriment to nearby properties will be created
2. Whether benefit can be achieved by some other feasible method (other than Area Variance)
3. Whether requested variance is substantial
4. Whether variance will have adverse effect on physical or environmental conditions in neighborhood or district
5. Whether alleged difficulty was self-created (relevant but not determinative)

NOT ALL CRITERIA MUST BE MET, AS ZBA IS “BALANCING” FACTORS

C. Area Variances More Easily Obtained (and Less Easy to Challenge)

VI. FOR ALL VARIANCE DECISIONS

- A. ZBA should grant the minimum variance necessary while protecting neighborhood character and community health, safety and welfare
- B. ZBA can impose reasonable conditions related to proposed use of property to minimize adverse impacts upon neighborhood or community
- C. Important for ZBA to remember to focus on “property” and not nature, identity and/or personality of owner(s)

VII. “INTERPRETATION APPEALS”

- A. “Interpretation Appeals” are Least Exercised and Arguably Most Misunderstood ZBA Function
- B. What is a ZBA “Interpretation Appeal”?
 - 1. What can be appealed to ZBA for interpretation?
 - 2. What cannot be appealed?
- C. Applicant/Appellant must be “Aggrieved”
- D. “Interpretation Appeal” Process
 - 1. Interpretation appeal filed by “applicant/appellant”
 - 2. Appeal must be filed within 60 days of determination
 - 3. Public Notice and Public Hearing
 - 4. Decision-making and voting requirements
- E. Fundamental Zoning Presumption – Ambiguity Resolved in Favor of Private Property Interests (and Against Municipal Zoning Authority)
- F. Applicant/Appellant must be “Aggrieved”

- G. Further Appeal of ZBA Interpretation Appeal Decisions through Article 78 Proceedings

VIII. ZBA DECISIONS AS PRECEDENT

- A. “Precedent” – What it is and What it is Not
 - 1. Precedent – Same or substantially similar set of facts and circumstances should yield same result; but...
 - 2. Each variance application is supposed to be reviewed on its own unique, particular features and details
- B. How Can These Two Principles Fit Together?
 - 1. Legal rule is that ZBA Decisions do stand as precedent and, therefore, identical and/or substantially similar cases should receive identical and/or substantially similar Decisions unless...
 - 2. Different Decision is justified by changed or different facts or circumstances
 - 3. If ZBA is deviating from precedent, it is very important to set forth the reasons and explain why in the Decision Motion – Decision which differs from apparent precedent will still be upheld, so long as ZBA has rational justification for different result and explains it – however, Decision which deviates from precedent absent rational explanation is subject to nullification if challenged
- C. What Factors Might Constitute Appropriate Change of Circumstances
 - 1. Physical changes to property and/or nearby properties
 - 2. Substantial/material changes in adjacent, nearby and/or surrounding land use patterns
 - 3. Documented market changes (supported by competent financial evidence including “dollars and cents proof”)

- D. Factors Which Generally are Not Considered Appropriate to Justify Deviation from Precedent
1. New, different or change in identify of applicant
 2. Mere passage of time
 3. Change and/or “enlightenment” of ZBA membership
- E. ZBA May Be Able to Deviate from Precedent if it Feels that Previous Case(s) Decided Erroneously, but Needs to Explain Very Carefully – Challenge Standard is “Rational Basis” Justification for Different Result

Mark Schachner is the Senior Principal Attorney of MILLER, MANNIX, SCHACHNER & HAFNER, LLC in Glens Falls and Round Lake. While the firm maintains a general practice of law, Mr. Schachner’s efforts are concentrated in the areas of municipal, environmental, land use and planning/zoning law. Mr. Schachner and his colleagues represent numerous municipalities in Essex, Franklin, Fulton, Hamilton, Herkimer, Saratoga, Warren and Washington Counties. He also serves as Counsel to the Saratoga County Water Authority, the Gloversville-Johnstown Joint Sewer Board, Fonda-Fultonville Joint Sewer Board, Glens Falls Open Door Mission and LifeWorks Community Action (formerly Saratoga County Economic Opportunity Council). His practice includes extensive participation in regulatory proceedings before the New York State Department of Environmental Conservation, Adirondack Park Agency and Lake George Park Commission. Mr. Schachner is a graduate of Brown University and Boston University School of Law. He is author of the chapter entitled “Environmental Law - New York State Environmental Quality Review Act (“SEQRA”)” in the book Pitfalls of Practice published by the New York State Bar Association in 1993 and 2002. Mr. Schachner has lectured about municipal, environmental, planning and zoning law matters at numerous conferences throughout the State. He is a Vice President of the New York Planning Federation.