

ISSUE PAPER SERIES

How to Write a ZBA Decision

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NEW YORK STATE TUG HILL COMMISSION

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How to Write a ZBA Decision

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Purpose of the Zoning Board of Appeals

Zoning boards of appeals (ZBAs) were created in the New York State planning statutes as a “safety valve” for the zoning process. Because zoning can limit the freedom of a property owner to develop their property in a way that they may desire, a mechanism is needed to review specific instances of hardship or improper classification of a property and give owners a vehicle to possibly effect change.

The ZBA is primarily an appellate body with jurisdiction for this function given by state law ¹. This means that they have the power to hear and decide appeals from decisions of the officials charged with administration and enforcement of zoning laws (the zoning enforcement officer or ZEO). They are also empowered to issue interpretations of zoning regulations when an appeal is filed by parties contending that the ZEO has interpreted the law incorrectly. ZBAs are often referred to as “quasi-judicial” bodies when operating within this appellate jurisdiction.

Zoning boards of appeals are also in some instances granted original jurisdiction by the governing board of their municipality ². In these instances, the governing board has delegated the review and decision-making process for special use permits and/or site plan reviews to the ZBA. While good documentation is a necessity for these matters as well, it is not the focus of this paper.

The goal of the zoning boards of appeals is to come to a well-reasoned decision in any case before them. While a written decision is not required, one way that the ZBA’s hard work on each case can be shown is via the written record and ultimately by a well written decision. This paper will focus on the skills and tools needed to develop a good decision.

Appellate Jurisdiction Functions

In general, the job of the zoning board of appeals is to hear evidence and grant the relief necessary, while balancing the proposed intent and purpose of the zoning law or ordinance. In most cases for a matter to reach the ZBA, there must be a decision to appeal. Applications to appeal the decision of the ZEO must be filed within 60 days of the determination. There is an exception made for a direct appeal in specific circumstances. State statutes authorize a ZBA to hear a direct appeal when an applicant for a site plan³, special use permit⁴ subdivision review⁵ needs an area variance in connection with their application. The applicant in that case may apply to the ZBA without having a decision from the ZEO.

Appeals for Variances

Zoning regulations are adopted to protect everyone in a community from improper land use development. However, if the zoning law restricts the use of someone’s property so that it legally cannot be used at all or without significant loss, the zoning board of appeals has the

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power to adjust the regulations to provide the property owner relief. It is important to remember that a person should truly suffer a loss, not merely be inconvenienced to be granted a variance. This means the need for a variance for an individual property owner needs to be weighed against the rights and welfare of the whole neighborhood or community.

The variance granted should be the minimum that the ZBA deems “necessary and adequate” while preserving and protecting the character of the neighborhood and the health, safety, and welfare of the community⁶. Additionally, in granting the variance the ZBA is allowed by statute⁷ to add conditions and restrictions to the approval to help minimize adverse impacts that the approval of the variance may cause to the community. Once granted, variances run with the property forever, not just through the current ownership, so variance requests which are merely personal to the owner may not justify approval.

Use variances

Use variances allow the ZBA to grant use of the land for a purpose which is otherwise not allowed in a particular zone or prohibited altogether by the zoning law⁸. Examples of use variances are requests to place a gas station or other commercial building in a residential zone or to place a campground in a small lot, “hamlet” zone.

To grant a use variance, the applicant must prove that the zoning law has created an “unnecessary hardship”⁸. There are four specific tests, **all of which** must be passed for a use variance to be granted⁸:

- 1) the applicant cannot realize a reasonable return, as demonstrated by competent financial evidence; and
- 2) the alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood; and
- 3) the requested variance, if granted, will not alter the essential character of the neighborhood; and
- 4) the alleged hardship was not self-created.

Documentation of the evidence and testimony on these points should be recorded as this information will be essential to the ZBA in making their decision.

Area variances

Area variances provide relief from any situation which does not involve a use prohibited by the zoning law. These are variances for the property owner who wants to use their property for something which is allowed by the zoning law, but some dimension of their property and/or project cannot comply with the law’s area requirements. Examples of area variances include a proposed structure which would fall within the required setback from the lot lines, or which is proposed on a lot which is too small to meet minimum area requirements.

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For an area variance case, the applicant does not have to meet a specific test like a use variance, but instead the ZBA will weigh whether the benefit to the applicant outweighs the detriment to the neighborhood or the community's health, safety and welfare if the variance is granted. To affect this "balancing test," the state statutes outline five factors to be considered in making the determination ⁹:

- 1) will the variance cause an undesirable change in the character of the neighborhood or a detriment to neighboring properties; and
- 2) can the benefit sought by the applicant be achieved by some other feasible method; and
- 3) is the variance substantial; and

- 4) will the proposed variance have an adverse effect or impact on the physical or environmental conditions of the neighborhood; and
- 5) was the alleged difficulty self-created?

Once again, documentation of the evidence and testimony bearing on these points and the ZBA's determination on these factors in making their decision needs to be done clearly to make an effective decision.

Appeals for Interpretation

Interpretations are part of the zoning board of appeals appellate jurisdiction and so cannot be exercised unless an appeal to an enforcement officer's decision is undertaken. Basically, an applicant can appeal to the ZBA for an interpretation when they believe that the zoning enforcement officer has made an incorrect interpretation of the zoning law. In other words, they believe their proposal is allowed by the zoning law even though the ZEO has ruled otherwise and denied their zoning permit. Alternately, neighboring property owners can appeal for an interpretation when they disagree with the ZEO's determination that a proposal does comply with the zoning law and receives a zoning permit.

This interpretation function of the ZBA is a "quasi-judicial" function and as such requires that the board follow its own prior precedents. That means that if the ZBA has interpreted a certain section of the zoning law in a prior case, they should follow the decision made in the prior case in ruling on the current application. This emphasizes why good record keeping and clearly written decisions can be so important. If no prior precedent exists, the ZBA needs to attempt to determine the governing board's original intent in writing the provision in question. They can do this by considering the minutes of the municipal board meetings, testimony from local officials, planning documents including comprehensive plans, or in broader questions, such as intended definitions, by consulting case law or a dictionary.

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It is especially important in these cases to lay the groundwork for future appeals for interpretations by clearly documenting the evidence and justifications used to reach a decision and expressing these clearly within a written decision. The decision will set precedent for how this provision of the zoning law is interpreted going forward. The ZEO will use this interpretation of the law for future permit applications and additionally, a clear expression of how the board reached its determination will make the job of future boards easier if another appeal of the zoning provision is ever received.

Bear in mind that the zoning board of appeals in either its appellate or original jurisdiction functions is an administrative body, not a legislative one. The ZBA does not have any legislative powers and cannot make changes, amendments, additions to, or deletions from the zoning law. That power lays only with the legislative body of the municipality, namely the town or village board. The ZBA can only deal with the zoning law as it is written and grant variances to that law based on the criteria specified in the state statutes granting the ZBA's powers or interpret to the best of their ability the intent of the provisions that the governing board has approved.

Documentation of the Process

The application

To start the appeal process, several documents need to be filed with the board of appeals. The application should include:

- The application form with basic information about the request
- Proof of the application fee payment
- A copy of the original zoning permit application and the denial from the ZEO (if applicable)
- A tax map of the parcel in question
- A plot plan showing existing and/or proposed new structures, setback distances from property lines, roads, streams and waterways, slopes, etc.
- An explanation of the applicant's legal interest in the property or permission from the owner to speak on their behalf
- Any other documentation, including pictures of the site, which may be pertinent to the specific application

This documentation is used to help the ZBA understand the application and will be vital in making their decision.

Other requirements

Once the application is complete, the ZBA will take care of any other items which need to be completed to gain more information prior to a public hearing on the application. These other

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items can include a NYS State Environmental Quality Review (SEQR) and determination ¹⁰, a review by the county planning board ¹¹, town planning board recommendations ⁵ and hearing notices to neighboring municipalities depending on the circumstances of the case.

Any of these items which are required for the application will need to be reviewed by the board and properly documented, as they will be utilized in deciding on the application and will constitute part of the record used to document a good decision.

Public Hearing Notice

A public hearing is required to be held before the ZBA can grant a variance or rule on an interpretation of the zoning law. This hearing must be held within a “reasonable time” after an application is accepted as complete. Proper notice of the hearing must be given at least five days prior to the parties to the case and in certain statutorily required situations to other agencies such as the county planning board or a state park commission ¹².

Publication of this notice at least five days prior to the hearing is also statutorily required and must be done in the municipality’s officially designated newspaper. In cases where the municipality maintains a website, placing the public hearing notice there is also recommended¹². There may be additional notice requirements in a municipality’s zoning law which can include, for example, more than five days’ notice or notice to adjoining property owners, so care should be taken to follow any additional requirements specific to the municipality where the case occurs.

Failure to properly notice the public hearing can be grounds for a case being overturned or a decision invalidated upon appeal.

The Hearing

Hearings are considered “quasi-judicial” matters and need to be conducted with some formality. The ZBA should follow a set order of business to keep the hearings consistent. The following is a general outline of a hearing:

- The chairman of the board opens the hearing at the designated time and affirms for the record that there is a quorum of the board present via roll call.
- The chairman reads the public hearing notice as published and any other pertinent materials which have been received, such as the recommendations from the county planning board or written comment into the record.
- The chairman recognizes the applicant to present his or her case and then the board would ask any questions about the testimony.
- Anyone opposed to the application would be recognized by the chairman to speak and then the board would ask any questions on this testimony.

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- Any other public comment would be heard from any person wishing to speak as well as any rebuttal testimony from the parties offered. Anyone addressing the board should state their name for the record.
- Any final questions from the board would be asked prior to the closing or adjournment of the hearing to a later date if more time is required for comment.

The ZBA can adopt rules for the conduct of their hearings including the order of business, the time each speaker is allowed, the expected conduct of attendees, etc. If such rules have been adopted, they should be made available to the attendees prior to the commencement of the comment period.

The matters discussed are considered part of the evidence that the board will use to render its decision. Good minutes of the hearing are essential for the ZBA to be able to document an effective decision. Care should be taken to include all the pertinent comments and answers to the board's questions in the written record via the minutes to achieve this end.

The Decision

Following the closing of the public hearing, the ZBA may conduct a meeting or meetings to review and discuss the documentation and the testimony from the hearing. This information is all utilized to make their decision on the case. New York State statute requires that a decision on the case be rendered within 62 days of the close of the public hearing¹³. There is some flexibility in the statute for a longer time to render the decision upon mutual consent of the parties and the board, but documentation of the reason for the delay, the mutual agreement to the extension, and a proposed timeframe for the decision should be clearly stated in the written record. Additionally, some local zoning laws may require a shorter time for the decision to be made, so be sure to comply with the timeframes in the zoning law of the municipality in question.

The decision of the board must be made by a majority of all the members of a fully constituted board, not just a majority of those members present at the meeting¹⁴. There are three basic decisions the board can make on an application - they can approve, approve with some conditions imposed on the approval, or deny the appeal. If a majority decision of the board cannot be reached to approve the appeal or overturn the ZEO's decision, then the appeal must be denied¹⁵. For example, if three members of a five-member board are present at the meeting and the vote is two in favor of the appeal and one opposed, the appeal to overturn the ZEO's denial would have to be denied. To verify this majority necessary for the decision, the vote of each member on the application - in favor, opposed, abstaining, or absent must be recorded in the written record.

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Writing a Decision

Writing a Decision

Once the ZBA has made its decision on any application, that decision should be put into written form, approved by the board, signed by the chairman and added to the record of the case. A written decision is a vital component to any board of appeals case as it is the document which summarizes the board's work and provides their justification for their decision. A good written decision explains to the applicant and the ZEO not only the outcome of the case, but also how the ZBA came to their determination. Although there always remains a chance an appeal of the decision will be filed, a clearly outlined decision can help reduce the chances that an applicant will appeal the decision as the board's reasoning on the matter has been clearly explained.

In the case that an appeal is filed anyway, a written decision is one part of the record which will be scrutinized by the reviewing court. While writing the decision, keep in mind that a court reviewing the case will have no familiarity with the situation, the municipality in question, and its conditions or neighborhoods or the broad goals of the municipality's comprehensive plan. The decision will need to clearly outline the local issues that weighed on it for a reviewing court to understand how the outcome of the case was reached and for the court to rule to uphold the ZBA's decision.

Additionally, a good written decision allows a future board of appeals looking at the case as a precedent for an application they are currently reviewing, to be able to see the specific circumstances of the past case and what, if any, aspects might be applicable to their current case. This helps assure that the precedent set by the original case is clear and easily followed, not open to interpretation, or guesses about what the ZBA's intent was with their original decision.

Parts of the Decision

Facts

The first section of any decision should be a statement of the facts associated with the case. These include:

- The property location, tax map number, and owners
- The type of action under the NY State Environmental Quality Review Act (SEQRA) and any declaration that has been made. (* NOTE: most area variances and interpretations are considered Type II or "Exempt" actions under SEQRA. The decision should note this fact in place of a positive or negative declaration in these cases).
- Whether or not a review by the county planning board was required under NYS General Municipal Law Article 12-b, Section 239 (commonly called a 239 Review) and if comments were received from the county planning board following their review.

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- Whether an Agricultural Data Statement was required, and any pertinent information obtained from it.
- A basic description of the what the applicant is requesting and the section of the municipality's zoning law which conflicts with the application.
- Any other pertinent facts specific to the application.

Findings

The next section of the decision, which can be listed after the facts above is called the “findings” of the board. This is the “evidence” that the ZBA used to make their decision and it needs to be substantial enough to support the board's decision. For example, simply stating that a “variance is substantial” without explaining why the board felt that the variance was substantial could be a costly error upon a review of the decision. The “findings” of the ZBA should include:

- That the board has made a review of each question required by NY State statutes (see the sections on use and area variances above) and that they have linked the local conditions and requirements of the zoning law to each point.
- That the board has considered all the submitted documentation and the testimony of all parties at the public hearing (the testimony should be supported by the minutes of the public hearing) and linked this information to the statutorily required points.
- That the board has applied their knowledge of the particular location, the facts of the case, and the intent of the municipality's planning documents and laws as they apply to the statutorily required points.

Statement of Decision

The final section of the decision will be the statement of the ZBA's decision to approve, approve with conditions applied, or disapprove the application. If conditions are applied prior to approval of the application, they need to be clearly stated in this section. The decision would then be signed and dated by the chairman of the ZBA.

The decision when it is completed should follow from point to point and fact to fact to allow anyone reading it to follow the ZBA's deliberation on the application and subsequent action. Board of appeals actions are one of the most litigated fields of law for local municipalities. A good decision and an associated written record will enable a reviewing court to determine how and why the board of appeals made its decision and decrease the chances of a case being overturned or remanded to the ZBA for re-hearing and a new determination.

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Finishing the Case

Following the decision by the ZBA, the decision and case file with all the written documentation associated with the case should be filed with the municipal clerk within five business days ¹⁶.

The clerk will note the filing date and the matter will become public record. Any party who wishes to appeal a decision of the ZBA must do so within 30 days of this filing date, so prompt filing of the decision is important to start the clock on the appeal timeframe.

A copy of the decision should also be forwarded to:

- The applicant
- The county planning board within 30 days of filing the decision with the clerk, in the event a 239 review was required, and comments were received; and especially if the decision acts in contrary to the county planning board's recommendation
- The zoning enforcement officer.

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References

- 1 NYS Town Law Section 267-a(4), Village Law Section 7-712-a(4)
- 2 NYS Town Law Section 274-a(2), 274-b(2), Village Law Section 7-725-a(2), 7-725-b(2)
- 3 NYS Town Law Sections 274-a(3), Village Law 7-725-a(3)
- 4 NYS Town Law Sections 274-b(3), Village Law 7-725-b(3)
- 5 NYS Town Law Section 277 (6), Village Law Section 7-730(6)
- 6 NYS Town Law Section 267-b(2)(c), 267-b(3)(c), Village Law 7-712-b(2)(c), 7-712-b(3)(c)
- 7 NYS Town Law Section 267-b (4), Village Law 7-712-b(4)
- 8 NYS Town Law Section 267-b(2)(a and b), Village Law 7-712-b(2)(a and b)
- 9 NYS Town Law Section 267-b(3)(a and b), Village Law Section 7-712-b(3)(a and b)
- 10 NYS Town Law Section 267-a(11), Village Law 7-712-a(11)
- 11 NYS Town Law Section 267-a(10), Village Law 7-712-a(10)
- 12 NYS Town Law 267-a(7), Village Law 7-712-a(7)
- 13 NYS Town Law Section 267-a(8), Village Law 7-712-a(8)
- 14 NYS Town Law Section 267-a(13)(a), Village Law 7-712-a(13)(a)
- 15 NYS Town Law Section 267-a(13)(b), Village Law 7-712-a(13)(b)
- 16 NYS Town Law Section 267-a(9), Village Law 7-712-a(9)

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Appendix A – Poorly written decision

APPENDIX A-Poorly written decision

RESOLUTION--DECISION ON AREA VARIANCE

At a special meeting of the Anytown Zoning Board of Appeals held for the Town of Anytown, in Anycounty County, held at the Town Offices in said Town on the 15th day of June, 2019, at 7:00 P.M., prevailing time. The meeting was called to order by Joe Bossman, Chairman and upon roll being called, the following were:

ALSO PRESENT: Mary Smith _____
 Sue Jones _____
 Jack Judge _____
 Sam Boardman _____

ABSENT: _____

The following resolution was offered by board member _____ Mary Smith _____, who moved its adoption, and seconded by board member _____ Sam Boardman _____, to wit:

WHEREAS, the Anytown Zoning Board of Appeals has received an application from:

John Doe _____

for a variance of Section(s) 250 of the Zoning Law of the Town of Anytown to permit construction of a new shed; and

WHEREAS, in connection with such application, the Zoning Board has received and reviewed an application, held a public hearing, and received comments thereat; and

WHEREAS, after review, the Zoning Board has weighed the effects of the requested variance on the health, safety, and welfare of the neighborhood and community, and made the following findings:

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- A. The requested variance will not create an undesirable change in the character of the neighborhood or detriment to nearby properties because it's just a shed; and
- B. The benefits sought by the applicant cannot be achieved by some other feasible method because it is too expensive to move it; and
- C. The requested variance is not substantial in that the new shed is away from the property line some.
- D. The proposed variance will not have an adverse effect or impact on the physical and environmental conditions of the neighborhood or district because no one objected; and
- E. The alleged difficulty was self-created.

NOW, THEREFORE, BE IT RESOLVED that the application of:

John Doe

for approval of a variance of Section 250 of the Zoning Law of the Town of Anytown is hereby granted for the reasons stated above.

The question of the foregoing resolution was duly put to a vote as follows:

	Yes	No
<u>Joe Bossman</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Mary Smith</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Sue Jones</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Jack Judge</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
<u>Sam Boardman</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Dated: June 15, 20_19_

Anytown, New York

By order of the Anytown Zoning Board of Appeals

Joe Bossman Chairman, Zoning Board of Appeal

Appendix B – Well written decision

APPENDIX B – Well written decision

Town of Anytown Zoning Board of Appeals

DECISION and ORDER

The Town of Anytown Zoning Board of Appeals has made the following findings of facts bearing upon the application presented by John Doe, requesting an area variance of the Town of Anytown's Zoning Law (2019)

- 1) The property on Main Street in the Town of Anytown (tax map #100.00-01-01.100) is owned by John Doe and that the property is in the A district; and
- 2) That this is a Type II Exempt Action under the State Environmental Quality Review process, and that no determination of environmental impact is required to be made by the Town of Anytown Zoning Board of Appeals (ZBA); and
- 3) That a General Municipal Law 239 referral to the Anycounty County Planning Board was not required; and
- 4) That there is an existing shed located on the proposed side of the property which is approximately five feet from the side lot line of Mr. John Smith; and
- 5) That the layout of the lot would require a substantial investment of effort and/or money to affect an alternate location for the proposed structure and that an alternate location for the proposed structure would decrease the ease of accessing the residence; and
- 6) That the applicant desires to remove an existing shed and replace it with a pole structure which would act as a garage for the residence, and would be approximately 34 feet from side lot line, which is in violation of the side yard setback of 50 feet, found in Article 2, Section 250 of the Town of Anytown's Zoning Law (2019); and
- 7) That the requested variance would not create an undesirable change in the character of the neighborhood or detriment to nearby properties in that the existing non-compliant shed would be removed and the proposed structure would be farther from the side lot line and thus more compliant with the zone requirements; and
- 8) That the benefits sought by the applicant could not be achieved by any other feasible method without a large expenditure of money and/or effort as placing the structure any further from the side lot line would infringe on the existing driveway access, that the other side of the lot drops off significantly in elevation and is wet and this would place the new structure not on the same side as the entrance to the residence; and

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- 9) That the requested variance was not substantial in that there is more than half of the required setback remaining (68%) and the proposed new structure would be farther from the side lot line than the current structure; and
- 10) That the proposed variance would not have an adverse effect or impact on the physical and environmental conditions of the neighborhood or district because the natural surroundings will not be disturbed as the proposed building replaces an existing building and there are no reported issues from the neighboring property owners; and finally
- 11) That the difficulty is self-created, as the proposed building does not have to be constructed nor the existing shed removed.

Therefore, it is hereby ordered that the application for an area variance submitted by John Doe be granted without condition.

That is the Order of this Board.

Joe Bossman

Joe Bossman, Chairman

Dated