

TECHNICAL PAPER SERIES

Zoning Board of Appeals Guide for Towns and Villages

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NEW YORK STATE TUG HILL COMMISSION

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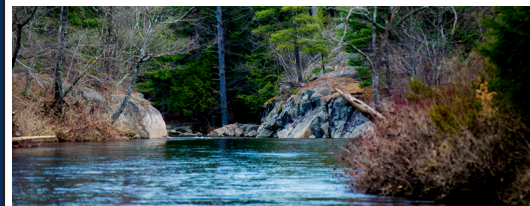
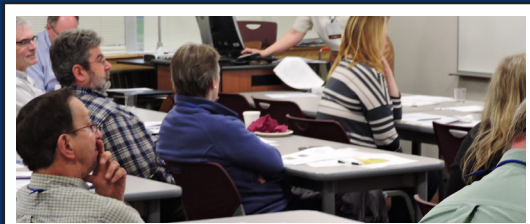


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Introduction

This guide is to educate the zoning board of appeals (ZBA) on its roles and responsibilities. New members can use it as an introduction and overview while seasoned veterans can use it as a refresher course. Even very knowledgeable ZBA members should review this guide to ensure that they understand and meet the requirements of NYS Town and Village Law. The guide does not contain specific information regarding zoning boards of appeals in cities, which is governed by separate enabling legislation. Town and village boards, planning boards, zoning enforcement officers, applicants and anyone interested in zoning procedures may find the information in this guide helpful.

Sample forms are included in the appendix to help with administration and record keeping. Feel free to modify and adapt these forms for your own use.

Local land use legislation may be enacted by local law in both towns and villages, or by ordinance in towns only. For simplicity, we will only refer to local laws.

This guide was originally produced in 1986 and updated in 1992, 2011, and 2015 by the Jefferson County Planning Department and the NYS Tug Hill Commission. Portions were used in the *Guide to Land Development* produced by the Fort Drum Land Use Team. It has been thoroughly reviewed, updated, and expanded by Mark Gebo, Esq., partner in Hrabchak, Gebo and Langone, P.C., Attorneys and Counselors at Law.

Organization

A zoning board of appeals (ZBA) must be created whenever a community adopts a zoning law. The ZBA serves as a safety valve to provide relief and to prevent the zoning law from creating inequities. Under NYS law, the ZBA has the power to hear and decide appeals (either variance requests or requests for interpretations). Even the best written zoning law will have certain instances where strict adherence to the law will create hardship for a landowner, and there will be instances where interpretation of the law is questionable. When the zoning law restricts the use of someone's land to the point where they cannot use it legally, or they suffer a significant loss, then the ZBA has the power to vary the regulations and help them. For this reason, NYS Law requires that a municipality that adopts a zoning law must also appoint a ZBA. [Town Law §267 (2); Village Law §7-712 (2)]

Membership

A ZBA must consist of three or five members appointed by the town/village board. [Town Law §267 (2); Village Law §7-712 (2)] Town and village board members may not be appointed to the ZBA. [Town Law §267 (3); Village Law §7-712 (3)] Terms of ZBA members are staggered so that one person's term expires each year. The length of the appointment is measured in years equal to the number of ZBA members

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(three years on a three-member board, five years on a five-member board, etc.). If there is a vacancy in ZBA membership, the vacancy is filled through appointment by the town/village board for the balance of the unexpired term. Salaries or compensation of ZBA members is set by the town/village board at budget time each year.

Alternate members may be appointed to substitute for regular members in cases of conflict of interest, if authorized by local law or ordinance. [Town Law §267 (11); Village Law §7-712 (11)] Many municipalities chose to expand the use of alternates to cover the absence of members, as well, by adopting a supersession law. The municipal board must establish the number of alternate members and their lengths of terms in the local law or ordinance. The ZBA chairman may select an alternate member to substitute when necessary and the alternate acts with all the powers and responsibilities of a regular member. The substitution should be entered into the minutes of the meeting.

Officers and Employees

Every ZBA must have a chairman. The chairman is designated by the respective town/village board. In the absence of such designation, the ZBA may appoint an acting chairman. [Town Law §267 (2); Village Law §7-712 (2)] The ZBA itself may designate other officers, such as a vice-chairman or secretary, through the adoption of by-laws (see Appendix A). A ZBA may hire a paid secretary, legal counsel or other consultants consistent with its budget allocation from the town/village board. The ZBA should include this in its annual budget request.

Ethics

Occasionally ZBA members may have an interest in an application before the board, either as a neighbor or as an applicant. Certain rules should apply in such cases (see Appendix B).

Jurisdiction

Appellate Jurisdiction

People seeking variances or interpretations must be appealing a decision of the administrative official charged with enforcing the law, before they can go to the ZBA.

Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only and shall be limited to hearing and deciding appeals from and reviewing any order, requirement, decision, interpretation, or determination made by the administrative official charged with the enforcement of any ordinance or local law adopted pursuant to this article. [Town Law §267-a (4); Village Law §7-712-a (4)]

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The “administrative official” mentioned above is usually called the building inspector, code officer, zoning officer, enforcement officer, or zoning enforcement officer (ZEO). This paper shall refer to this official as the “ZEO.” The ZBA hears and decides “appeals” of the actions of the ZEO. That is where the “A” in the ZBA comes from. It sounds simple, but it is very important – a person can't just wander into a board meeting and request an appeal. He must be appealing a decision made by the ZEO.

Let's take an example. Mr. Smith wants to build a house on a 39,990 square foot lot. The zoning law says that the lot must be 40,000 square feet in area. The ZEO, who has no choice in the matter, must deny Mr. Smith a zoning permit. (A ZEO cannot vary the zoning regulations, no matter how trivial the problem might seem). Mr. Smith can now appeal the ZEO's decision to the ZBA. Mr. Smith can't request a variance unless he is appealing the ZEO's decision, even if he knows that he needs a variance before he even applied for a zoning permit.

The same is true for “interpretations” of the zoning law. Say that Mr. Jones applies to the ZEO for a permit to open a mobile home park. The permit is denied based on the ZEO's interpretation of what a mobile home park is, under the terms of the law. Mr. Jones thinks the ZEO is wrong, and he can now appeal the decision to the ZBA.

Upon the hearing, any party may appear in person, or by agent or attorney. [Town Law §267-a (7); Village Law §7-712-a (7)]

The ZBA is specifically authorized to reverse, affirm or modify an order, requirement, decision, interpretation or determination appealed from, based upon its own interpretation of the law. [Town Law §267-b; Village Law §7-712-b] It is essential to remember that in exercising its original jurisdiction, the ZBA has only administrative authority. The ZBA has no authority to legislate.

The Exception to the Rule

There is an exception to the rule that an applicant to the ZBA must be appealing a decision of the ZEO for three situations--for area variance appeals during the course of subdivision review and approval [Town Law §277 (6); Village Law §7-730 (6)], site plan review [Town Law §274-a (3); Village Law §7-725-a (3)], and the review of special use permits [Town Law §274-b (3); Village Law §7-725-b]. Applicants in each of these three situations are able to go directly to the ZBA for an area variance, “without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations.”

In the case of an area variance in connection with a subdivision being reviewed by the planning board, the ZBA must request that the planning board provide a written recommendation concerning the proposed variance. [Town Law §277 (6); Village Law §7-730 (6)]

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Aggrieved persons

An appeal may be taken by “any person aggrieved, or by an officer, department, board or bureau” of the town/village [Town Law §267-a (4); Village Law §7-712-a (4)]. An aggrieved person may be a person denied a permit by the ZEO or another resident of the town or village who objects to a permit which has been issued. Neighbors in an adjacent municipality, even if adjacent to the property in question, are not considered aggrieved persons and may not appeal a ZEO decision. To be aggrieved, one must have a specific, personal and legal interest in the subject matter as opposed to a general interest as might be shared by all members of the community. To qualify as an aggrieved person, the issuance of the permit must have had a detrimental effect upon the use or value of his land.

An individual cited for being in violation of the zoning law is also an aggrieved person and may appeal the decision of the ZEO.

Other Granted Authority

The state law allows the ZBA to have other powers and duties in addition to its appellate authority, if such authority is specifically given by local law or ordinance:

Unless otherwise provided by local law or ordinance, the jurisdiction of the board of appeals shall be appellate only... [Town Law §267-a (4); Village Law §7-712-a (4)]

Where specifically so authorized by the zoning law, a ZBA may review such things as special use permits and site plan review applications. The zoning law should include standards by which to judge the appropriateness of the special permit or site plan use. The standards must be specific enough to preclude being construed as a grant of legislative authority to the board. In any case, this kind of review does not involve an appeal. If the zoning law says the ZBA has the authority to review and decide on such proposals, the applicant goes directly to the board.

Appeals

Under state law, the ZBA has the power to hear and decide appeals of actions (orders, requirements, decisions, interpretations and determinations) taken by the administrative officer charged with enforcement of the zoning laws. Upon an appeal from a decision or determination of the ZEO, the ZBA is authorized by state law to grant use and area variances [Town Law §267-b (2), (3); Village Law §7-712-b (2), (3)]. This power to **grant variances** and to **interpret** the zoning law is given to the board for good reason, and it is not unlimited, by any means.

Appeals for Variances

There are two kinds of variances: **use variances** and **area variances**. In general, if the zoning law restricts the use of someone's land so that he either cannot use it legally, or suffers a significant loss, the ZBA has the power to vary the regulations to help him.

The important thing to remember is that a person must really be hurt by the zoning regulations, and not merely inconvenienced, to be granted a variance. This is because zoning regulations were adopted to protect everyone from the effect of poor land use. Therefore, an individual's need for a variance must be weighed against the rights and welfare of the whole community. In granting a use or area variance the ZBA has the authority “to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property.” Conditions may be imposed to minimize any adverse impacts on the neighborhood or community resulting from grant of the variance [Town Law §267-b (4); Village Law §7-712-b (4)].

Once a ZBA has granted a variance, that special privilege forever after runs with ownership of the land. Any subsequent owner of the land has the full right to that same variance. Therefore hardship, which is merely personal to the current owner, may not justify the granting of a variance. This is true for use and area variances alike, but, as noted under area variances, personal hardships such as an increase in family size may qualify the owner for a variance.

The next sections explain the specific criteria to be used by the ZBA in determining if an applicant (a person who is requesting a variance) really deserves a variance.

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Appeals for Area Variance

Area variances include all those that do not involve a use prohibited by the zoning law. The applicant complies with the zoning law as to the permitted uses, but cannot comply with one or more area requirements (i.e., setbacks or lot size). An area variance is defined by state law as “the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.” [Town Law §267 (1)(b); Village Law §7-712 (1)(b)].

Standards for Area Variance

Instead of requiring an applicant to meet specific tests such as those imposed for issuance of a use variance, or an overall test, the applicant simply applies for an area variance. The ZBA is then required to consider two factors in determining whether to grant the variance: 1) the benefit to the applicant if the variance is granted, and 2) the detriment to the neighborhood or community's health, safety and general welfare if the variance is granted. The state law specifies five factors the board must consider in weighing the interests of the applicant and the neighborhood or community:

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 [Town Law §267-b (3)(b); Village Law §7-712-b (3)(b)].

The statutory requirements for issuance of an area variance were substantially changed by the State Legislature in 1991. The state law no longer requires an applicant to meet the overall test of showing “practical difficulty.”

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Minimum Variance

In the granting of area variances, the ZBA is required to “grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.” [Town Law §267-b (3)(c); Village Law §7-712-b (3)(c)].

Appeals for Interpretations

All zoning laws are complex enough that, from time to time, there will be trouble interpreting them. The ZBA may interpret the zoning law for an applicant only where there is an appeal from a decision of the ZEO, as in the case of variances. If a ZEO denies a permit based on his interpretation of the zoning law, and the applicant disagrees, the applicant may appeal to the ZBA for a “second opinion,” or interpretation, of a particular section of the law. Likewise, a neighbor who disagrees with the issuance of a permit may appeal for an interpretation of the law.

The ZBA must determine the facts of the case. The board may use the opinions of town officials such as the town attorney and planning board, and the context provided by the comprehensive plan to help them determine the intent of the law. The interpretation must be consistent with precedents. The ZBA’s decision is final.

Administrative Procedures Heading

The ZBA must follow very specific procedures in its operation. If it does not, its decisions could be easily overturned in court should there be a challenge. These procedures relate to public notice, time limits, and record keeping.

Notice of Regular Meetings

Meetings of such board of appeals shall be open to the public to the extent provided in article seven of the Public Officers Law. [Town Law §267-a (1); Village Law §7-712-a (1)]

When the ZBA holds a meeting, it must make sure it has met the provisions of the Open Meetings Law. If the board decides to meet throughout the year on pre-arranged dates, it is a good idea to ask the local newspaper to run a brief notice (not a legal notice) to let people know. Otherwise, if the ZBA schedules a meeting a week or more in advance, it must post notice of the meeting at a designated place (wherever notices of events or meetings are posted) in your community at least 72 hours before the meeting. It must also “inform the media” according to the same time schedule. To be on the safe side, it is a good idea to send the local newspapers and/or radio/TV stations a short note describing the time and place of the

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meeting. If the board decides to meet less than a week in advance, it must still post notice and inform the media, but instead of doing so 72 hours in advance, it must do so “to the extent practicable.”

Caution: The requirements of the Open Meetings Law should not be mistaken for the requirements of public notice for public hearings. Public hearing requirements are discussed below.

Time Limit for Appeals/Application

Such appeal shall be taken within sixty days after the filing in the town/village clerk's office of any order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of such ordinance or local law by filing with such administrative official and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. [Town Law §267-a (5); Village Law §7-712-a (5)]

Application for review should be made on an application form approved by the ZBA (see Appendix C). The application should be reviewed for completeness by the ZEO and/or chairman. The application is normally accompanied by the payment of a filing fee, usually payable to the town/village clerk. It is up to the town/village board to establish a fee schedule. Fees should bear a reasonable relationship to the cost of review (ZBA members' compensation, public hearing notice cost, consultant fees, etc.). The ZBA should review these fees periodically with the town/village board. Use variance fees should generally be higher, as it is a more complicated review.

Other documents may also be required, depending on how the ZBA chooses to define a complete application in its by-laws. It may include:

- a. a map or drawing showing the area affected;
- b. an Environmental Assessment Form (See Compliance with SEQR below);
- c. an Agricultural Data Statement (See Agricultural Data Statement below); and
- d. a complete description of the ZEO action being appealed.

Compliance with State Environmental Quality Review Act (SEQR)

The ZBA is required by law to comply with the relevant SEQR provisions under Article 8 of the Environmental Conservation Law and its implementing regulations as codified in Title 6, part 617 of the New York Codes, Rules and Regulations [Town Law §267-a (11); Village Law §7-712-a (11)].

A Short Environmental Assessment Form (EAF) should be required with every application (see <http://www.dec.ny.gov/permits/6191.html>). However, if the short EAF does not provide enough

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information, the applicant can be requested to supply a full EAF. There are exceptions to SEQR review, called Type II actions, for the following ZBA-related actions:

1. The granting of individual setback and lot line variances and adjustments;
2. The granting of area variances for a single-family, two-family, or three-family residence;
3. The interpretation of an existing code, rule, or regulation. For example, SEQR review would not be necessary when a ZBA is deciding what zoning rules apply to a proposed new use not specifically named in the municipality's zoning law.

The actions above are classified as Type II (exempt) because they are unlikely to have negative environmental impacts. Procedurally, the board should document the Type II classification in the resolution approving the action or in a separate resolution prior to approving the action.

Actions that are not classified as Type II are classified as either Type I or Unlisted. Type I actions are those considered to be likely to have greater impacts on the environment. These are projects that meet or exceed certain thresholds listed in Part 617 of Title 6 of the New York Codes, Rules, and Regulations. Type I actions require completion of a long EAF and SEQR review must be coordinated among any agencies reviewing the project. Projects that are neither Type I nor Type II are considered Unlisted. Unlisted actions only require completion of a short EAF. There *are* situations where actions that would ordinarily be classified as Unlisted become Type I. This occurs when projects are in proximity to certain geographical features, such as agricultural districts, historic sites and structures, and publicly owned parkland and open space. In these cases, the Type I thresholds are reduced by 75%.

Common ZBA-related actions that require SEQR are use variances, area variances (other than for single-family, two-family, or three-family residences), and special use permits (if that responsibility is delegated to the ZBA). The ZBA must then try to identify any potential environmental impacts and decide how to deal with them as early as possible. Part 2 (i.e., Impact Assessment) of the Short EAF provides some guidance to the board in analyzing these issues.

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Short Environmental Assessment Form Part 2 - Impact Assessment

Part 2 is to be completed by the Lead Agency.

Answer all of the following questions in Part 2 using the information contained in Part 1 and other materials submitted by the project sponsor or otherwise available to the reviewer. When answering the questions the reviewer should be guided by the concept "Have my responses been reasonable considering the scale and context of the proposed action?"

	No, or small impact may occur	Moderate to large impact may occur
1. Will the proposed action create a material conflict with an adopted land use plan or zoning regulations?	☐	☐
2. Will the proposed action result in a change in the use or intensity of use of land?	☐	☐
3. Will the proposed action impair the character or quality of the existing community?	☐	☐
4. Will the proposed action have an impact on the environmental characteristics that caused the establishment of a Critical Environmental Area (CEA)?	☐	☐
5. Will the proposed action result in an adverse change in the existing level of traffic or affect existing infrastructure for mass transit, biking or walkway?	☐	☐

Figure 1 Beginning of Page 1 of the Short EAF Part 2 - Impact Assessment

If the board finds that there will be no significant adverse impact on the environment, it should briefly document that decision in the project file and/or pass a resolution stating that there was a "Negative Declaration", or a negative determination of significance, under SEQR review. This must be done prior to a final action on the application. If the board finds that there may be a significant adverse impact on the environment, a "Positive Declaration" is documented and further review (i.e., scoping and an environmental impact statement) is required. If a conditioned negative declaration—a form of negative declaration for Unlisted actions only where the action may have significant environmental impacts that can be eliminated or mitigated by conditions imposed by the board—is made, then a reasoned explanation must be given as to why any areas of concern would not constitute significant adverse environmental impacts (i.e., a positive declaration).

A SEQR flow chart is included in Appendix I.

Agricultural Data Statement

For use variances only, if property is within 500 feet of a farm operation in a county agricultural district established through the Agriculture and Markets Law (not to be confused with an agriculture district in the local zoning law) an agricultural data statement must be included with the application. The statement must be mailed to all property owners designated on the form, informing them of the pending application. The cost of the mailing may be charged to the applicant. [Town Law §283-a; Village Law §7-739].

County Planning Board Referral

The granting of use and area variances may require referral of a "full statement" by the ZBA to the county planning agency having jurisdiction at least five days before the public hearing [Town Law §267-a (10);

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Village Law §7-712-a (10); General Municipal Law §239-m (3)(a)(iv)]. The referral requirement does not apply to interpretations. Matters requiring referral include any proposed action applying to real property within 500 feet of the following:

- (i) the boundary of any city, village or town; or*
- (ii) the boundary of any existing or proposed county or state park or any other recreation area; or*
- (iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or*
- (iv) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or*
- (v) the existing or proposed boundary of any county or state-owned land on which a public building or institution is situated; or*
- (vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, **except this subparagraph shall not apply to the granting of area variances** [General Municipal Law §239-m (3)(b)].*

The term “proposed,” for purposes of this section, is deemed to include only those recreation areas, parkways, thruways, expressways, roads or highways which are shown on a county plan adopted pursuant to §239-d (2) of Article 12-B of the General Municipal Law or adopted on an official map pursuant to §239-g of Article 12-B.

Counties may enter into agreements with municipalities to exempt certain matters from the referral requirement. The board, if in doubt, should contact the county planning board and determine whether referral is necessary.

Stay of Further Action

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the administrative official charged with the enforcement of such ordinance or local law, from whom the appeal is taken, certifies to the board of appeals, after notice of appeal shall have been filed with the administrative official, that by reason of facts stated in the certificate a stay, would, in his or her opinion, cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the administrative official from whom the appeal is taken and on due course shown. [Town Law §267-a (6); Village Law §7-712-a (6)]

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This section operates as a restraining order to any action taken in furtherance of what has been appealed. For example, if a landowner appeals notice of a violation, any justice court action is stayed until the appeal is decided by the ZBA. Likewise, where a landowner is granted a permit and a neighboring landowner appeals issuance of the permit, construction is prohibited until the ZBA has heard and decided the appeal. An exception to this provision may be allowed in circumstances where the stay would cause imminent peril to life or property.

Time of Public Hearings

The board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it... [Town Law §267-a (7); Village Law §7-712-a (7)]

The board must schedule a public hearing on any matter that has been referred to it, whether it is a variance request, an interpretive appeal, or a special permit application. Such a hearing must be scheduled within a “reasonable” time. That time will not run until there is a complete application, as determined by the board. The “completed application” can be defined in by-laws adopted by the ZBA (see Appendix A.). Although the town or village laws do not specify when the hearing must be held, many zoning laws include such provisions. Many municipalities specify a 62-day period as this is consistent with other statutory time periods.

Notice of Public Hearings

The board of appeals shall ... give public notice of such hearing by publication in a paper of general circulation in the town/village at least five days prior to the date thereof. [Town Law §267-a (7); Village Law §7-712-a (7)]

The ZBA must publish a legal notice in the official paper at least five days before the hearing date, not including the day of publication. The notice should include the subject, date, time, and place of the hearing (see Appendix D). **Caution:** Some zoning laws may require more than five days’ notice and may, in addition, require additional notice to adjoining property owners. If that is the case, those requirements must be met.

The board must also mail notices to the involved parties at least five days prior to the hearing. In most instances, this will mean the applicant. There are, however, some obvious exceptions. Mr. Smith may appeal a decision of the ZEO to issue a permit to Mr. Jones. In this case, both Mr. Smith and Mr. Jones are “parties,” and both must be notified. The board must also notify the regional state park commission if the property affected by the appeal is within 500 feet of a state park or parkway. [Town Law §267-a (10); Village Law §7-712-a (10)] It may also be necessary to give notice of the hearing to the county, metropolitan

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or regional planning agency if referral is required. See the section above on “County Planning Board Referral.”

A hearing for a use variance within 500 feet of an adjacent municipal boundary requires the notification of the clerk of the adjacent municipality ten days before the hearing. This notification may be done by electronic transmission. [General Municipal Law §239-nn]

The cost of sending or publishing any notices is payable by the appealing party. Payment must be made to the board prior to the hearing. [Town Law §267-a (7); Village Law §7-712-a (7)]

Conducting Hearings

Although a ZBA hearing is not a courtroom drama, it is serious stuff, and a certain formality should accompany the proceedings. The board should have a regular order of business. The hearing must be held at the time and place mentioned in the required notice. A majority of the board must be present at the hearing (although there must be a majority of the board at the hearing and a majority to make a decision, a board member does not have to be at the hearing to participate in the decision, as long as he has familiarized himself with the record).

At the advertised time, the chairman opens the hearing simply by stating that the public hearing is now open. Then, the chairman should read the legal notice, as it was published in the newspaper. A roll call of the members is encouraged, as it would establish in the minutes that there was a majority present. If the ZBA has any information, letters, permits, etc., they should be presented and noted in the minutes.

Next, the chairman should call on the applicant to explain the situation. After this, the board members can ask questions of the applicant to establish if the standards for variances are met. Anyone who wants to speak should be recognized by the chairman and then give his name and address before speaking. At hearings with a large attendance, the chairman may wish to limit each speaker to a certain time, perhaps five minutes. Control the hearing so that it remains orderly and civil. Informing those present at the hearing of the exact procedure will help keep things under control.

After everyone has spoken, the board should decide if it needs more information to make a decision before closing the hearing. If it does need more information, it should schedule another hearing to consider the additional information, adjourn the hearing to another day, and/or leave open a comment period to accept written comments.

Zoning Board of Appeals Guide for Towns and Villages

Time of Decision After Public Hearings

The board of appeals shall decide upon the appeal within sixty-two days after the conduct of said hearing. The time within which the board of appeals must render its decision may be extended by mutual consent of the applicant and the board. [Town Law §267-a (8); Village Law §7-712-a (8)]

ZBAs have 62 days from the close of the public hearing to make their decision. The state law provides flexibility for a longer decision-making period upon mutual consent of the board and the applicant. Beware that some zoning laws may impose a shorter time period for making decisions. Where this exists, it must be complied with. Annexed as Appendices E-G are three proposed forms for resolution by a ZBA for area variances (E), use variances (F), and interpretations (G).

Voting

Every motion or resolution of a board of appeals shall require for its adoption the affirmative vote of a majority of all members of the board of appeals as fully constituted regardless of vacancies or absences. [Town Law §267-a 13 (a); Village Law §7-712-a 13 (a)]

“A majority of all members” means all the members of the board, not just the ones present at a meeting. If three members of a five-member board vote two-to-one to approve a variance, the variance has not been approved.

In exercising its appellate jurisdiction only, if an affirmative vote of a majority of all members of the board is not attained on a motion or resolution to grant a variance or reverse any order, requirement, decision or determination of the enforcement official ...the appeal is denied. [Town Law §267-a 13 (b); Village Law §7-712-a 13 (b)]

This “default approval” provision requires an affirmative vote of the board to reverse the decision of the ZEO. Any other outcome constitutes a failure to reverse the decision.

Such board of appeals shall keep minutes of its proceedings showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official acts. [Town Law §267-a (1); Village Law §7-712-a (1)]

Each individual board member should be polled when voting to decide a matter. When polled each board member should separately state their reasons for their decision. It is useful to have each board member complete a written list analyzing the factors for the decision (e.g., area variance tests).

Zoning Board of Appeals Guide for Towns and Villages

County Planning Board Recommendation

The county planning agency shall review any proposed action referred to it by the ZBA, and shall recommend approval, modification, or disapproval of the proposed action, or report that the proposed action has no county-wide or inter-community impact [General Municipal Law §239-m (4)(a)].

The county planning agency shall have 30 days after receipt of a full statement of the proposed action to report its recommendations back to the ZBA. If the county planning agency fails to report back to the ZBA within 30 days, the ZBA may act without the report. However, any county planning agency report that is received by the ZBA two or more days prior to final action must be considered by the ZBA, even if received back more than 30 days following referral [General Municipal Law §239-m (4)(b)].

If the county planning agency recommends modification or disapproval of a proposed action, the ZBA shall not act contrary to this recommendation except by a vote of a majority plus one of all its members [General Municipal Law §239-m (5)].

Filing Requirements

Every rule, regulation, every amendment or repeal thereof, and every order, requirement, decision or determination of the board of appeals shall be filed in the office of the town/village clerk within five business days and shall be a public record.
[Town Law §267-a (2); Village Law §7-712-a (2)]

This applies to the by-laws for a ZBA or other procedures or rules that a ZBA may adopt.

Time for Filing Decision and Notice

The decision of the board of appeals on the appeal shall be filed in the office of the town/village clerk within five business days after the day such decision is rendered, and a copy thereof mailed to the applicant. [Town Law §267-a (9); Village Law §7-712-a (9)]

A copy of notice of decision is included as Appendix H.

Recording

The board must keep minutes, record each vote, and file its decisions with the municipal clerk. In reviewing ZBA decisions, the courts must have adequate information to make a decision. This information comes from the records of the ZBA. If the record is incomplete, the court will have a difficult time judging the

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case. To ensure a proper review by the courts, should it be necessary, the ZBA should include the reasons for its decisions in the written record. These reasons are called “findings.”

If, for example, Mr. Smith appeals to the board for a use variance, and convinces it that his property cannot yield a reasonable return, the board should explain why the evidence was convincing in the written record. It is not enough to state simply that “Mr. Smith proved his property cannot yield a reasonable return under the zoning regulations.” The board must explain why it reached that conclusion.

Notifying Parties

The decision should be mailed to the involved parties, along with the board's reasons for approval, denial, or approval with conditions. In the case of an interpretation appeal, the board's reasoning for its final interpretation should be included (see Appendix H).

The decision should be made 62 days after the final hearing. This means that the board may hold more than one hearing on a particular appeal. However, it should be made clear at the original hearing that the board intends to hold additional hearings.

County Planning Board Report

Within 30 days after final action by the ZBA, the ZBA shall file a report of the final action it has taken with the county planning agency. If the ZBA has acted contrary to the recommendations of the county planning agency, shall set forth the reasons for the contrary actions in the report. [General Municipal Law §239-m (6)]

Record Keeping

The most careful and well-considered decisions of the ZBA do not mean much if it fails to keep good records. Therefore, the board should get organized from the beginning. Here are some suggestions.

- Keep all the information about a particular appeal in a separate folder. Give each case a number, and number each folder. One easy system is a “year-case” number. For example, the fifth appeal in 1986 would be numbered 86-5.
- If you can, tape-record public hearings. Then, you can either use the recording to write your minutes. The tape-recording must be retained for four months after transcription and/or approval of the minutes or proceedings.
- Make use of general letters and forms so you do not have to write everything from scratch.
- Make sure your written minutes include all resolutions, decisions, dates of meetings and hearings, and elections of officers, and are detailed enough to include all information relied on in making a decision. Each board member’s reasons for voting on an application must be noted.

Assistance to the Board

The ZBA may be authorized by the town/village board to request assistance from any department, agency or town/village employee as deemed necessary for the performance of its duties. “Such department, agency or employee may be reimbursed for any expenses incurred as a result of such assistance.” [Town Law §267-a (3); Village Law §7-712-a (3)] This is subject to budgetary restrictions. The ZBA should request a budget for this each year from the town or village board.

Repeat Appeals

ZBAs must allow more than one appeal from an applicant for a particular property if the appeal is for a different kind of relief (a different use or area variance) or if circumstances have changed since the original decision.

Appeal of ZBA Decision

Anyone aggrieved by a decision of the ZBA can appeal the decision by applying to the NYS Supreme Court for review under article 78 of the Civil Practice Law and Rules. An appeal must be made within 30 days of the filing of the ZBA decision with the municipal clerk. [Town Law §267-c; Village Law §7-712-c]

The best defense against such an appeal is to use this guide. Follow the ethics guidelines; make good records of proceedings, findings and decisions; follow correct procedures; and make well-reasoned decisions.

Appendix A: Model Bylaws

Section 1. General

- 1.1 The term *board* as used in these rules shall mean the duly appointed Zoning Board of Appeals of the Town/Village of _____.
- 1.2 The standards in any applicable local law or state statute shall take precedence over the standards of these bylaws whenever a conflict occurs. In all other instances, the more restrictive rule shall apply.

Section 2. Board Organization

- 2.1 **Officers.** The officers of the board shall consist of a chairman and vice-chairman and any other officers as deemed necessary by the board.
- 2.2 **Chairman.** The chairman shall be designated by the town/village board and preside at all meetings of the board. In the absence of designation by the town/village board, the chairman shall be designated by the zoning board of appeals. The chairman shall call all meetings of the board in accordance with NYS Public Officers Law and these bylaws. The chairman shall decide on all points of order and procedure, subject to these rules, unless directed otherwise by a majority of the board. The chairman shall appoint any committees found necessary to carry out the business of the board. The chairman may administer oaths and compel the attendance of witnesses as necessary to carry out the business of the board. The chairman's signature shall be the official signature of the board and shall appear on all decisions as directed by the board.
- 2.3 **Vice-Chairman.** A vice-chairman shall be designated by the board to serve in the absence of the chairman and shall have all the powers of the chairman during the chairman's absence, disability, or disqualification.
- 2.4 **Alternate Members.** The chairman may designate an alternate member to substitute for a board member when such board member is unable to participate because of a conflict of interest on an application or matter before the board. When so designated, the alternate member shall possess all the powers and responsibilities of such member of the board. Such designation shall be entered into the minutes of the initial board meeting at which the substitution is made.

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- 2.5 **Training.** Each member shall complete, at a minimum, four hours of training each year. Training received in excess of four hours may be carried over into succeeding years. Such training shall be approved by the town/village board.
- 2.6 **Vacancies.** Should any vacancy on the board occur for any reason, the chairman shall give immediate notice thereof to the town/village clerk, and the town/village board shall make appointment to fill the vacancy for the remainder of the unexpired term. Should such a vacancy occur among the officers of the board subject to election by the board, such office shall be filled by election, for the unexpired term, at the next meeting of the board.
- 2.7 **Resignations.** Resignations from the board shall be in writing and filed with the town/village clerk.

Section 3. Meetings

- 3.1 The regular meeting of the board shall be held on _____.
- 3.2 Special meetings of the board may be called by the chairman with the following requirements:
- (a) If the meeting is scheduled one week in advance, notice shall be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public shall be accomplished by posting in one or more designated public locations.
- (b) When a meeting is scheduled less than a week in advance, notice shall be given to the public and the news media to the extent practicable at a reasonable time prior to the meeting. Notice to the public shall be given by means of posting.
- 3.3 The chairman shall call a meeting within ten days of receipt of a written request from a majority of the entire membership of the board, which request shall specify the matters to be considered at such meeting.
- 3.4 The order of business at meetings shall be as follows:
- (a) Roll call and establishment of quorum
 - (b) Public hearing (when scheduled)
 - (c) General public comments
 - (d) Old business

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- (e) Reading and approval of the minutes of the preceding meeting
- (f) Correspondence
- (g) New business
- (h) Adjournment

- 3.5 The board shall keep minutes of its proceedings, showing the vote of each member upon every question, and shall also keep records of its examinations and other official acts. Every rule, regulation, decision or determination of the board shall be filed within five business days in the office of the town/village clerk, which shall be made part of the official record of the town/village and be kept at the town/village offices.
- 3.6 All Freedom of Information Law (FOIL) requests for any rule regulation, decision or determination of the board shall be made to the official FOIL officer of the town/village. All FOIL requests shall be in writing.

Section 4. Voting

- 4.1 A quorum shall consist of a majority of the constituted membership of the board. No hearing or meeting of the board shall be held, nor any action taken, in the absence of a quorum; however, those members present shall be entitled to request the chairman to call a meeting for a subsequent date.
- 4.2 All matters shall be decided by a roll call vote.
- 4.3 Decisions on any matter before the board shall require the affirmative vote of a majority of the entire membership of the board unless otherwise specified herein. In deciding appeals, an affirmative vote of the majority of the entire membership of the board is required to reverse the determination of the zoning officer, and a vote of a majority plus one of the entire membership is required to act contrary to the recommendation of the county planning board, as referred to in Section 5.6 below.
- 4.4 In deciding appeals, the board may amend a failed motion or resolution within the time allowed without being subject to the rehearing process as referred to in Section 8 below.

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- 4.5 No member of the board shall sit in hearing or vote on any matter in which he is personally or financially interested. Said member shall not be counted by the board in establishing the quorum for such matter.
- 4.6 No member shall vote on the determination of any matter requiring public hearing unless he has attended the public hearing thereon or familiarized himself with such matter by reading the record.

Section 5. Appeals and Procedures

- 5.1 ***Jurisdiction.*** The board shall hear and decide appeals from and review any order, requirement, decision, interpretation or determination made by the zoning officer. Such appeal may be taken by any person aggrieved, or by any officer or board of the town/village.
- 5.2 ***Filing of Appeal.*** An appeal shall be made within 60 days of the filing of an action of the zoning officer. The applicant shall file a notice of appeal with the zoning officer or with the chairman. Such notice shall be made on the form provided for that purpose. The zoning officer and town/village clerk shall be responsible for providing any applicant with the proper forms and for instructing the parties concerned on the proper manner for completing and filing such forms. All information required thereon shall be complete before an appeal is considered. Three copies, minimum, of the proper appeal form shall be filed with the board. Extra copies as may be deemed necessary may be required by the board.
- 5.3 ***State Environmental Quality Review (SEQR).*** The board shall comply with the provisions of the State Environmental Quality Review Act and its implementing regulations as codified in 6 NYCRR Part 617. The following actions have been specifically exempted from SEQR review:
- (a) the granting of individual setback and lot line variances and adjustments;
 - (b) the granting of area variances for a single-family, two-family, or three-family residence;
 - (c) the interpretation of an existing code, rule, or regulation.
- 5.4 ***Agricultural Data Statement.*** The board shall send an agricultural data statement to affected property owners for any use variance application that would occur on property within an agricultural district containing a farm operation or on property with boundaries within five hundred feet of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the NYS Agriculture and Markets Law.

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- 5.5 ***Town/Village Planning Board Referral.*** Where the application is for an area variance for a subdivision being reviewed by the planning board, the ZBA shall request that the planning board provide a written recommendation concerning the proposed area variance.
- 5.6 ***County Planning Board Referral.*** Applications for area or use variances as specified in Section 6 below, and notice of the hearing, shall be referred to the county planning agency at least five days prior to the public hearing. Matters requiring referral include any proposed action applying to real property within 500 feet of the following:
- (a) the boundary of any city, village or town; or
 - (b) the boundary of any existing or proposed county or state park or any other recreation area; or
 - (c) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or
 - (d) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or
 - (e) the existing or proposed boundary of any county or state-owned land on which a public building or institution is situated; or
 - (f) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the NYS Agriculture and Markets Law, except this subparagraph shall not apply to the granting of area variances.

If within 30 days after receipt of a full statement of such referred matter, the planning agency to which referral is made disapproves the proposal or recommends modification thereof, the board shall not act contrary to such disapproval or recommendation except by a vote of a majority plus one of the entire membership thereof and after the adoption of a resolution fully setting forth the reasons for such contrary action. If such a planning agency fails to report within such period of 30 days or such longer period as may have been agreed upon by it and the referring agency, the board may act without such report. However, if the county planning board report is received after such 30 days, but two or more days prior to final action by the referring body, then the board shall not act contrary to such recommendation except by a vote of a majority plus one of the entire membership.

- 5.7 ***Time of Hearing.*** The board shall schedule a hearing on all appeals or applications within a reasonable time of the filing of the appeal or application.
- 5.8 ***Notice of Hearing.*** The board shall give notice of the hearing at least five days prior to the date thereof by publication in a paper of general circulation in the town/village. The board shall mail notices of the hearing to the parties and to the Regional State Park Commission having

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jurisdiction over any state park or parkways within 500 feet of the property affected by such appeal at least five days prior to the hearing. Notice of a use variance hearing shall be given to the clerk of any adjacent municipality within 500 feet of the application at least ten days before the hearing and may be done by electronic transmission.

- 5.9 **Form of Notice.** Such notice shall state the location of the lot, site, building or structure, the general nature of the question involved, the time, date, and place of the hearing, and the nature of the appeal.
- 5.10 **Representation of Parties.** Any party making application to the board shall be present in person or through an agent or attorney at any public hearing held for the purpose of that application.

Section 6. Criteria for Variances

- 6.1 **Use Variance.** "Use variance" shall mean the authorization when granted by the board for the use of land in a manner or for a purpose which is otherwise not allowed or is prohibited by the zoning law. No use variance shall be granted 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 that for each and every permitted use under the zoning regulations for the particular district where the property is located,
- (a) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
 - (b) 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;
 - (c) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
 - (d) that the alleged hardship has not been self-created.
- 6.2 **Area Variance.** "Area variance" shall mean the authorization when granted by the board for the use of land in a manner which is not allowed by the dimensional or topographical requirements of the zoning law. In making its determination, the board 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:
- (a) 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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- (b) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- (c) whether the requested area variance is substantial;
- (d) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- (e) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board but shall not necessarily preclude the granting of the area variance.

6.3 **Minimum Variance.** The board, in the granting of use and area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.

6.4 **Conditions.** The board, in the granting of use and area variances, shall have the authority to impose such reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property. Such conditions shall be consistent with the spirit and intent of the zoning law and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

Section 7. Decisions

7.1 **Time of Decisions.** Decisions by the board shall be made not later than 62 days after the close of the public hearing. Such time may be extended by mutual consent of the applicant and the board.

7.2 **Form of Decisions.** The final decision on any matter before the board shall be made by written order signed by the chairman. Such decision shall state the findings of fact which were the basis for the board's determination. After such determination, the board may reverse or affirm, wholly or partly, or may modify the order or requirement of the zoning officer. The decision shall also state any conditions and safeguards necessary to protect the public interest.

7.3 **Basis for Decisions.** The board, in reaching said decision, shall be guided by standards specified in NYS law; the zoning law; community goals and policies as specified in the comprehensive plan; and by the findings of the board in each case.

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- 7.4 **Findings.** The findings of the board and the supporting facts shall be spelled out in detail regardless of whether it is based on evidence submitted or on the personal knowledge of the board. The board should show that:
- (a) it has made an intelligent review of the question;
 - (b) it has considered all of the information or evidence;
 - (c) it has heard all parties in question;
 - (d) any intimate knowledge it has of the subject under question has been considered;
 - (e) it has made a personal inspection of the parcel in question and from this examination certain findings were ascertained.
- 7.5 **Filing of Decisions.** Decisions of the board shall be filed with the town/village clerk within five business days after the day such decision is rendered and shall be made public record. The date of filing of each decision shall be entered in the official records and minutes of the board.
- 7.6 **Notice of Decision.** Copies of the decision shall be mailed to the applicant. Final action on any matter referred to the county planning agency shall be reported within 30 days to the county planning agency, including reasons for contrary action.
- 7.7 **Certification of Decision.** A certified copy of the board's decision, including all terms and conditions, shall be transmitted to the zoning officer.

Section 8. Rehearing

- 8.1 **Initiation of Rehearing.** Upon motion initiated by any member, and adopted by unanimous vote of the members present, the board may review at a rehearing any order, decision, or determination of the board not previously reviewed. An application for a rehearing may be made in the same manner as provided for the original hearing. The application for rehearing may be denied by the board if from the record it shall appear that there has been no substantial change in facts, evidence, or conditions.
- 8.2 **Decision on Rehearing.** Upon such hearing (and provided that it shall appear that no vested rights due to reliance on the original order, decision, or determination will be prejudiced thereby) the board may, upon concurrence of all the members present, reverse, modify, or annul its original order, decision, or determination.

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Section 9. Adoption and Amendment of Bylaws

- 9.1 ***Adoption.*** Upon adoption of these rules by the board, the chairman shall file a copy of these rules with the town/village clerk and they shall be a public record.
- 9.2 ***Amendment.*** These rules may be amended by an affirmative vote of not less than a vote of a majority plus one of the entire membership of the board, provided that such amendment be presented in written form at a meeting at which the vote was taken. All amendments adopted shall be filed in the same manner as provided for in Section 9.1 above.

Appendix B: Working Rules on Ethics

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Part I

Introduction

Zoning Boards are considered to be “quasi-judicial” bodies. They are not courts, but they act somewhat like courts because they interpret the municipality’s zoning law and apply it to particular cases. For that reason, the actions of the zoning board members must be above suspicion, particularly when the board is dealing with a controversial case.

So zoning board members, perhaps more than any other municipal officials, need clear ethics guidelines as to what they may and may not do. Unfortunately, few towns have a clear and complete code of ethics to guide their officials. And the state conflicts of interest provisions for municipal officials are a disgrace. They often

make no sense. They contain enormous gaps – and so give officials little guidance. And they are almost unintelligible to non-lawyers.

This article will attempt to explain the requirements of the state conflicts of interest law as it affects zoning board members. But board members should be aware that their own town may have additional or stricter ethics requirements. For example, a town might prohibit certain town officials from accepting a gift of any size from someone doing business with the town, even though the state law might permit a gift up to \$75. So zoning board members should also check their town’s local ethics law.

The state conflicts of interest law is found in article 18 of the New York State General Municipal Law (sections 800-813). Article 18 contains three areas of concern to zoning board members:

- (1) A prohibition on having an interest in a contract with the town (sections 800-805);
- (2) Certain disclosure requirements (sections 803 & 809)¹; and
- (3) Certain miscellaneous conflicts of interest rules (for example, on accepting gifts) (section 805-a).

Each of these areas is discussed below. At the end of this article is a checklist of common ethics questions.

Interest in Contracts

The state’s conflicts of interest law prohibits a town officer or employee from having an interest in a contract with the town if the officer or employee has some control over the contract. For example, a town zoning board could not hire one of its members as a stenographer for a ZBA hearing, but the town board could hire a ZBA member to paint the town hall.

This rule against interests in contracts is complicated, tricky, and dangerous for town officials. In deciding whether the rule applies in a particular case, the town official has to answer four questions:

- (1) Is there a contract with the town?
- (2) Does the town official have an interest in the contract?
- (3) Does the town official have any control over the contract?
- (4) Do any of the various exceptions apply?

NOTES:

1. There are also annual financial disclosure requirements for towns having a population of 50,000 or more. These financial disclosure requirements are in section 810-813 of the General Municipal Law but are not discussed in this article.
2. Opinion of the State Comptroller No. 83-114.
3. *People v. planto*, 88 Misc. 2d 303, 387 N.Y.S.2d 385 (Mt. Vernon City Ct. 1976).
4. 1979 Op Atty Gen (inf) 231.
5. See *Landau v. Percacciolo*, 50 N.Y.2d 430, 429, N.Y.S.2d 566 (1980).
6. Town Law Sections 20(1)(d), 20(4), 267(3), 271(3).
7. 1986 Op Atty Gen (ing) 131; 1988 Op Atty Gen (inf) 124; 1986 Op Atty Gen (inf) 53; 1986 Op Atty Gen (inf) 94; 1984 Op Atty Gen (inf) 172; 1988 Op Atty Gen (inf) 47; 23 Op State Compt 283 (1967); 1982 Op Atty Gen (inf) 100; 27 Op State Compt 24 (1971).
8. 1990 Op Atty Gen (inf) 1135.
9. Town Law Section 267(3); 1990 Op Atty Gen (inf) 1099; 93 Op Atty Gen (inf) 1005.
10. 1990 Op Atty Gen (inf) 1099; 1964 Op Atty Gen (inf) Jan. 23.
11. 1993 Op Atty Gen (inf) 1062; 1988 Op Atty Gen (inf) 89.
12. See 1993 Op Atty Gen (inf) 1098; 1988 Op Atty Gen (inf) 115.
13. See 1982 Op Atty Gen (inf) 178;

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Each of these questions is discussed below. In addition, zoning board members should be aware of the penalties for violating this law. Lastly, they should be aware of restrictions on holding more than one town position (dual public employment). These topics are also discussed below.

(1) Is there a contract with the town?

The law's definition of "contract" is odd. It includes not only an agreement with the town, "express or implied," but also "any claim, account or demand" against the town. So a lawsuit against the town is a "contract" with the town.

The State Comptroller's Office has said that an application for a zoning change and the granting of that application is not a "contract."² It would seem that a zoning variance is not a contract either. But one court held that an application for a building permit, and the issuance of the permit, is a contract.³ (A building permit is a bit different from a zoning variance though, because a building permit does not involve much discretion. A zoning variance does. So it makes sense to say that a building permit can be a "contract" but a zoning variance is not.) Also, an article 78 proceeding maybe a contract since it is a "claim or demand."

Putting all this together, a zoning board member is allowed to apply

for a zoning variance for his or her own property (for example, to build a deck that extends into the setback). When zoning board members, however, apply for a variance on their own property, they should "recuse" themselves – that is, they should not take part in the zoning board's discussion and should not vote on the variance. If possible, zoning board members asking for a variance on their own property should not appear before the zoning board in person, especially if there is any opposition to the variance. If they can, they should probably have someone else appear for them before the board (like an attorney, an architect, or a friend).

(2) Does the town official have an interest in the contract?

A town official has an "interest" in a contract with the town if the official receives some financial benefit as a result of the contract. *The town official does not have to be a party to the contract.* For example, if the town board hires a firm to paint the town hall, and the firm subcontract part of the job to the part-time deputy town clerk, that deputy clerk has an interest in the firm's contract with the town because the deputy clerk gets a financial benefit as a result of that contract (although it is not a prohibited interest).

Under the law, a town official is said to have an interest in:

- (a) Any contract of the official's spouse, minor children, or dependents;
- (b) Any contract of the official's outside business or employer; and
- (c) Any contract of a corporation in which the official owns or controls stock.

Suppose, for example, that a town board member is a part owner of a moving firm and that the town board contracts with that moving firm to move furniture out of the town hall. The town board member has an interest in that contract, *even if the board member receives no financial benefit as a result of that contract.*

In other words, a town official has an interest in a contract:

- (a) If the town official receives a financial benefit as a result of the contract (even if he or she is not a party to the contract); *or*
- (b) If the contract is with the town official's spouse, outside business or employer, or a corporation in which the

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official owns or controls stock (even if the official does not personally receive any financial benefit from the contract).

There is an exception to this rule. A town official does not have an interest in a contract just because his or her spouse, minor child, or dependent is employed by the town. This means that nepotism is allowed. For example, the town board could hire the spouse of a town board member. In fact, the town board member could even vote to hire his or her own spouse. But to avoid appearances of favoritism, a town official should recuse (disqualify) himself or herself from any involvement in the town's hiring of a relative of the official.

(3) Does the town official have any control over the contract?

Even if a town official has an interest in a contract with the town, that interest is illegal only if the official has some control over the contract. There are four kinds of control:

- (a) The official – either individually or as a member of a board - has the power or duty to negotiate, prepare, authorize, or approve the contract; or

- (b) The official – either individually or as a member of a board – has the power or duty to authorize or disapprove payment under the contract; or

- (c) The official – either individually or as a member of a board – has the power or duty to audit bills or claims under the contract; or

- (d) The official – either individually or as a member of a board – has the power or duty to appoint an officer or employee who has any of the powers or duties listed in paragraphs (a) through (c).

The official does not have to act on the matter. It is enough if he or she has the power or duty to act on the matter. For this reason, *a violation of law still occurs even if the official recuses (disqualifies) himself or herself from voting or acting on the matter.* So, too, competitive bidding does not prevent a violation.⁴

(4) Do any of the exceptions apply?

There are 15 exceptions to the rule on prohibited interests in contracts. They are listed in section 802 of the General Municipal Law. Some of these

exceptions are rather rare. Some are quite common. The most common exceptions are the following:

(a) Outside employment.

If a town official's interest in a contract is illegal merely because the official is an officer or employee of the person or business that has the contract with the town, then the official may keep that interest, provided that (a) the pay the official receives from the employer is not affected by the contract (e.g., the official does not receive a commission or bonus as a result of the contract) and (b) the official's duties for the outside employer do not involve the contract. Note that the exception does not apply if the official is a director, partner, member, or stockholder of the outside employer.

(b) Non-profit organizations.

A town official's interest in a contract with the town is allowed if the contract is with a non-profit organization.

(c) Grandfathered contracts.

A town official's interest in a contract with the town is allowed if the contract was entered into before the official became an officer or employee of the town. But this exception does not apply to a renewal of the contract. For example, if someone is elected to the town board and at the time she is elected her husband has the town's insurance business, that

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contract is allowed. But the town cannot renew the insurance contract as long as the town board member remains in office.

(d) Stocks.

Where a town official's interest in a contract with the town is illegal because the official owns or controls stock in a corporation that has the contract, the interest is allowed if the stock is less than five percent of the corporation's outstanding stock.

(e) Small contracts.

If the total money payable under all town contracts the official has an interest in is \$100 or less during the fiscal year, then the official's interest in the contract is allowed.

(5) What are the penalties for violating this law:

If a town officer or employee "willfully and knowingly" violates the law against having a prohibited interest in a contract with the town, the official has committed a misdemeanor. The official may also be subject to disciplinary action, including removal from office. Moreover an official "willfully and knowingly" violates this law if the official knows the facts that make the interest prohibited. *The official does not have to know that his or her interest in the contract is illegal.* In addition, the contract, if willfully entered into, is "null,

void, and wholly unenforceable". The town cannot go through with the contract even if it wants to.⁵

Suppose, for example, that a town board member is a part owner of a local hardware store. The highway Department buys a snowblower from the hardware store. The town board member has a standing order with his partner that whenever any town employee buys anything for the town, the partner keeps 100% of the profit from the sale and also sends a notice to the board member and the town clerk that the sale was made.

It would seem that the town board member acted ethically, but in fact he violated the law and committed a misdemeanor. The snowblower sale was a contract. The town board member has an interest in that contract because the contract is with his hardware store, even though the board member receives no money from the sale. The exception for outside employment does not apply because the board member is an owner not an employee of the store. Since he knew these facts, he "willfully and knowingly" violated the law, and the sale is null and void.

Luckily for zoning board member, they do not have control over very many contracts. However, because the penalties for violation of this law are so serious, zoning board members must be aware of it. If they have any questions at all, they will need to ask their town attorney.

(6) What about dual public employment?

The law on prohibited interests in contracts also applies to something called "compatibility of public offices" – that is, to employment in two municipal positions, either two town positions or a town position and a position with another municipality. The New York State Town Law also has rules in this area.⁶

For example, a member of a town zoning board of appeals may also serve:

- (a) One the board of trustees of a village within the town; or
- (b) As town director of finance; or
- (c) As administrative assistant to the supervisor, provided that the town board does not make decisions subject to review by the zoning board; or
- (d) As the town assessor; or
- (e) On the board of education; or
- (f) As the town superintendent of highways; or

Appendix B: Working Rules on Ethics

- (g) As a member of the town police department; or
- (h) As a commissioner of the town water district; or
- (i) As the deputy town supervisor.⁷

Also, the same person may serve as secretary to both the zoning and planning boards.⁸ However, a ongoing board member should recuse (disqualify) himself or herself if any matter relating to his or her other municipal position comes before the zoning board. For example, a zoning board member who is also on the board of education should recuse himself or herself from participating in the discussions and vote if a matter involving school districts property comes before the zoning board.

On the other hand, a member of a town zoning board of appeals may not serve:⁹

- (a) On the town board; or
- (b) On the town planning board, if local zoning regulations give the zoning board the power to review decisions of the planning board.

Also, the secretary to the town zoning board may not at the same

time be a member of the town board, and the clerk to the zoning board may not be the assistant town building inspector.¹⁰

The service of relatives on different town bodies usually presents no problem, unless a town ordinance or local law provides otherwise. For example, a person may serve on the zoning board even if his son or wife serves on the planning board.¹¹

It is sometimes hard to know whether two offices are compatible. The New York State Attorney General's office has published hundreds of opinions in this area. Zoning board members with compatibility of office questions should contact that office (518-474-3429).

Disclosure

Apart from annual financial disclosure, which state law requires only in municipalities with a population of 50,000 or more, zoning board members face another kind of disclosure: disclosure of interests in contracts. In addition, applicants for approvals in land use matters must make certain disclosures.

(1) Disclosure of interests in contracts

If a town zoning board member has, will have, or later obtains an interest in an actual or proposed contract with the town, he or she

must publicly disclose that interest under section 803 of the General Municipal Law, *even if the interest is not illegal*. (There are some exceptions to disclosure.) The zoning board member must make the disclosure in writing to the town board as soon as he knows he has or may have a possible interest in a contract with the town. The written disclosure becomes part of the town board's records.

Once the zoning board member has made the disclosure about a particular contract, he or she does not have to disclose any additional contracts with the same part for the rest of the fiscal year. Also, the law does not require that the board member recuse (disqualify) himself or herself in the matter, although often recusal is a good idea if it would otherwise appear that the board member was doing something improper.

If a zoning board member "willfully and knowingly" fails to disclose, the member commits a misdemeanor. It would seem that a "willful and knowing" violation occurs if the zoning board member knows that he or she has an interest in the contract, *even if the board member did not know that he or she was required to disclose that interest*.

(2) Disclosure in land use applications

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Article 18 requires disclosure in certain land use applications. This disclosure is made by the *applications*, not by the zoning board member. Specifically, the disclosure must be made in every application, petition, or request:

- (a) For a variance, amendment or change of zoning; or
- (b) For approval of a plat or exemption from a plat or official map; or
- (c) For a license or permit under the town's zoning or planning law or regulations.

The application, permit, or request must state, to the extent the applicant knows:

- (a) The name and home address of any New York State Officer, of any town officer or employee, and of any officer or employee of the county who has an interest in the applicant; and
- (b) The nature and extent of the interest.

Under the law, town officers and employees are said to have an interest in the applicant if they or their spouses or their brothers or sisters or their parents or their children or their grandchildren or the spouse of any of them.

- (a) Is the applicant, or
- (b) Works for the applicant, or
- (c) Owns or controls stock of the applicant (with certain exceptions), or
- (d) Is a member of a partnership or association applicant, or
- (e) Has an agreement with the applicant to receive anything if the application is approved.

A "knowing and intentional" violation is a misdemeanor.

This law requires only disclosure by the applicant. It does not require disclosure by the zoning board member nor does it require the zoning board member to recuse (disqualify) himself or herself from acting on the application. *Court decisions, however, do require recusal by the*

zoning board member. So any time that either the zoning board member or a member of his or her family has a connection with an applicant before the zoning board, the member should disclose that fact and disqualify himself or herself from acting on the application if the connection falls into one of the above categories.

In addition, zoning board members should recuse themselves from acting on a matter if they have already spoken publicly about the matter. For example, if a zoning board member speaks out, as a neighbor, before the planning board on a particular case, the zoning board member should recuse himself or herself from considering that case if it later comes before the zoning board.¹²

On the other hand, zoning board members should not recuse themselves unless one of the above situations occurs, for two reasons. First, zoning board members are appointed to the board to review and decide cases, not to disqualify themselves. Second, since it takes a majority of all of the members of the board to act on a matter, a recusal is, in effect, a no vote since the recusal does not count toward approving the application. To avoid this problem, some towns have established alternate members of the zoning board, or appoint ad hoc members, who only act on a case if a regular zoning board

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member has a conflict of interest.¹³

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This appendix was re-typed by the New York State Tug Hill Commission for the purpose of this paper.

Appendix C: Application Form

Tax Parcel Number: Section: _____ Block: _____ Lot: _____
Log No.: _____

APPLICATION FOR APPEAL OF THE ZONING LAW

Application Date: _____

Application for (*check one*): ☐ Interpretation ☐ Area Variance ☐ Use Variance

Request relates to the following provisions of the Zoning Law (*check one*):

☐ Zoning Map ☐ Text: Article: _____ Section: _____ Subsection: _____

1. Applicant's Name: _____

Owner of Property (*if different*): _____

Applicant's Address: _____

Applicant's Phone Number: _____

2. Property Location: _____

_____ Zoning District: _____

3. Purpose of Request (*attach extra sheet if more space is needed*): _____

4. Justification of Request (*attach extra sheet if more space is needed*): _____

5. Previous Appeals: Appeal Number: _____ Date: _____

6. (*If applicable*) Application denied by Zoning Enforcement Officer/Building Inspector/ Planning Board on _____, 20____. (*Attach copy of denial.*)

The applicant will submit with this application supporting materials, including plans, elevations, landscaping diagrams, traffic circulation diagrams, neighborhood land use maps, and any other materials that will assist the board to understand the request.

Applicant Signature

Date

Appendix D: Notice of Public Hearing

NOTICE OF PUBLIC HEARING

PLEASE TAKE NOTICE that the [Town/Village] Zoning Board of Appeals will hold a public hearing on ____
_____*(date)* at ____ P.M. at _____*(location)* to consider the application of
_____ for a [variance/interpretation] of Article _____, Section _____ of
the [Town/Village] of _____ Zoning Law.

The applicant is appealing the decision of the zoning enforcement officer denying a permit to: _____
_____. Persons wishing to appear at such
hearing may do so in person or by attorney or other representative. Written comments will also be
entertained. Anyone requiring special accommodations to participate in the hearing should notify the
[town/village] clerk at least three business days prior to the hearing.

Dated: _____, 20____

[Town/Village] of _____ Zoning Board of Appeals

by _____ [Town/Village] Clerk

Appendix E: Resolution Regarding Area Variance

Tax Parcel Number: Section: _____ Block: _____ Lot: _____
Log No.: _____

RESOLUTION--DECISION ON AREA VARIANCE

At a regular meeting of the [Town/Village] Zoning Board of Appeals of the [Town/Village] of _____,
_____ County, held at the [Town/Village] Offices in said [Town/Village] on the ____ day of
_____, 20__, at _____ [A.M./P.M.], prevailing time. The meeting was called to order by
_____ and upon roll being called, the following were:

PRESENT: _____

ABSENT: _____

The following resolution was offered by Board Member _____, who moved
its adoption, and seconded by Board Member _____, to wit:

WHEREAS, the Zoning Board of Appeals of the [Town/Village] of _____ has received
an application from _____ for a variance of Section(s) _____ of the Zoning Law of
the [Town/Village] of _____ to permit _____

_____ ; and

Appendix E: Resolution Regarding Area Variance

WHEREAS, in connection with such application, the Zoning Board has received and reviewed an application [and Environmental Assessment Form], 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:

A. The requested variance [will/will not] create an undesirable change in the character of the neighborhood or detriment to nearby properties in that: _____

_____;

B. The benefits sought by the applicant [can/cannot] be achieved by some other feasible method because: _____

_____;

C. The requested variance [is/is not] substantial in that: _____

_____;

D. The proposed variance [will/will not] have an adverse effect or impact on the physical and environmental conditions of the neighborhood or district because: _____

Appendix E: Resolution Regarding Area Variance

_____; and

E. The alleged difficulty [was/was not] self-created because: _____

_____.

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

for approval of a variance of Section _____ of the Zoning Law of the [Town/Village] of _____

_____ is hereby [granted/denied] for the reasons stated above, subject to the following conditions: _____

_____.

Appendix E: Resolution Regarding Area Variance

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

	Yes	No
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

Dated: _____, 20__

_____, New York

By order of the Zoning Board of Appeals of the [Town/Village] of _____

Chairman, Zoning Board of Appeals

Appendix F: Resolution Regarding Use Variance

Tax Parcel Number: Section: _____ Block: _____ Lot: _____
Log No.: _____

RESOLUTION--DECISION ON USE VARIANCE

At a regular meeting of the [Town/Village] Zoning Board of Appeals of the [Town/Village] of _____,
_____ County, held at the [Town/Village] Offices in said [Town/Village] on the ____ day of
_____, 20__, at _____ [A.M./P.M.], prevailing time. The meeting was called to order by
_____ and upon roll being called, the following were:

PRESENT: _____

ABSENT: _____

The following resolution was offered by Board Member _____, who moved
its adoption, and seconded by Board Member _____, to wit:

WHEREAS, the Zoning Board of Appeals of the [Town/Village] of _____ has received
an application from _____ for a variance of Section(s) _____ of the Zoning Law of
the [Town/Village] of _____ to permit _____

Appendix F: Resolution Regarding Use Variance

_____; and

WHEREAS, in connection with such application, the Zoning Board has received and reviewed an application [and Environmental Assessment Form], 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:

A. The applicant [is/is not] cannot realize a reasonable return from the property in question, as has been shown by the financial evidence that: _____

_____;

B. The hardship alleged [is/is not] unique to the property in question and does not affect substantial portions of the district or neighborhood because: _____

_____;

C. The requested variance [will/will not] alter the essential character of the neighborhood because: _

_____;

and

Appendix F: Resolution Regarding Use Variance

D. The alleged difficulty [was/was not] self-created because: _____

_____.

NOW, THEREFORE, BE IT RESOLVED that the application of _____
for approval of a variance of Section _____ of the Zoning Law of the [Town/Village] of _____
_____ is hereby [granted/denied] for the reasons stated above, [subject to the following conditions: _____

_____.

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

	Yes	No
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

Dated: _____, 20____

_____, New York

Appendix F: Resolution Regarding Use Variance

By order of the Zoning Board of Appeals of the [Town/Village] of _____

Chairman, Zoning Board of Appeals

Appendix G: Resolution Regarding Interpretation

Tax Parcel Number: Section: _____ Block: _____ Lot: _____
Log No.: _____

RESOLUTION--DECISION ON INTERPRETATION

WHEREAS, The [Town/Village] of _____ at a meeting duly convened on _____, 20____, reviewed the facts in an application for an interpretation of the [Town/Village] Zoning Law, _____ (*case number and description*), and

WHEREAS, Said application requests an interpretation of _____ (*article and section*), and

WHEREAS, The board held a public hearing, duly published and posted, on _____ 20____, and

WHEREAS, At said hearing all who desired to be heard were heard and their testimony recorded, and

WHEREAS, All testimony has been carefully considered and the following pertinent facts noted:

NOW, THEREFORE, BE IT RESOLVED by the zoning board of appeals that Case No. _____, an application for an interpretation by _____ (*applicant's name*), is hereby interpreted to be defined as:

Appendix G: Resolution Regarding Interpretation

Filed with the chairman of the zoning board of appeals on _____, 20__.

Chairman, Board of Appeals

Appendix H: Notice of Decision

ZONING BOARD OF APPEALS CERTIFICATION

Log No.: _____ Applicant: _____

We, the [Town/Village] of _____ Zoning Board of Appeals, hereby find that this appeal:

☐ conforms ☐ does not conform ☐ conforms with conditions

to the Zoning Law and its intended purposes.

The Board of Appeals shall complete the following section (*whichever is appropriate*):

- A. INTERPRETATION – Decision rendered in interpreting the zoning law or map (*must conform with the intent of the law and master plan*):

- B. AREA VARIANCE – Decision rendered in granting or denying of an area variance and conditions (*e.g., why physical lot restrictions hinder the intended use, size of variance, etc.*)
 - 1. State whether an undesirable change in the neighborhood character will be created, and reason why:

Appendix H: Notice of Decision

2. State whether there is an alternative method to achieve what the applicant desires, and reason why:

3. State whether the variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and reason why:

4. State whether the alleged difficulty (variance needed) was self-created, and reason why:

List conditions prescribed by the Zoning Board of Appeals in granting this variance:

- C. USE VARIANCE – Decision rendered in granting or denying of a use variance (*e.g., a use that is not permitted under the law*):

Appendix H: Notice of Decision

1. State why the uses allowed in the district will not allow the applicant a reasonable return:
2. State what unique conditions exist that make the applicant's land difficult to use:
3. Will the proposed use alter the essential character of the neighborhood or be disruptive?
4. Was the alleged hardship self-created? *(If so, the variance should not be granted.)*

Appendix H: Notice of Decision

List all conditions prescribed by the Zoning Board of Appeals in granting this variance.

Upon review of the above criteria for the respective appeals action, the [Town/Village] Board of Appeals hereby ☐ grants ☐ denies this appeal.

Chairman of Board of Appeals

Date

Appendix I: SEQR Flowchart



Tug Hill Commission
317 Washington Street, Watertown, NY 13601
315-785-2380/2570 || tughill@tughill.org || www.tughill.org

Source: SEQR FLOW CHART (NYSDEC Division of Environmental Permits 2019)

