

Zoning Appeals Without Zoning Officer Denial

Under normal circumstances, matters are brought before the ZBA in two ways. First, a zoning officer denies an application for a permit, and the applicant then appeals the decision of the zoning officer to the ZBA for a use variance, area variance or an interpretation of the law. Second, a neighbor of a property where a permit has been issued has become aware of and objects to the issuance of the permit, and appeals the decision of the zoning officer to the ZBA for an interpretation. In both of these instances, an application has been submitted to an administrative official prior to the matter being handled by the ZBA.

New provisions relating to special permit, site plan reviews and subdivisions have been added to Town and Village Law which allow the ZBA to hear applications for area variance appeals where there has been no denial by the zoning officer. These have created some confusion about possible administrative procedures. These statutory provisions which read the same for both towns and villages are as follows:

Site Plan Review:

Application for area variance. Notwithstanding any provisions of law to the contrary, where a proposed site plan contains one or more features which do not comply with the zoning regulations, applications may be made to the zoning board of appeals for an area variance pursuant to section 7-712-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. (Village Law Section 7-725-a 3)

Application for area variance. Notwithstanding any provision of law to the contrary, where a proposed site plan contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section 267-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. (Town Law Section 274-a 3)

Special Use Permit:

Application for area variance. Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section 7-712-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. (Village Law Section 7-725-b 3.)

Application for area variance. Notwithstanding any provision of law to the contrary, where a proposed special use permit contains one or more features which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section 267-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. (Town Law Section 267-b 3)

Subdivision Review:

Application for area variance. Notwithstanding any provision of law to the contrary, where a plat contains one or more lots which do not comply with the zoning local law regulations, application may be made to the zoning board of appeals for an area variance pursuant to section 7-712-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. In reviewing such application the zoning board of appeals shall request the planning board to provide a written recommendation concerning the proposed variance. (Village Law Section 7-730 6)

Application for area variance. Notwithstanding any provision of law to the contrary, where a plat contains one or more lots which do not comply with the zoning regulations, application may be made to the zoning board of appeals for an area variance pursuant to section 267-b of this article, without the necessity of a decision or determination of an administrative official charged with the enforcement of the zoning regulations. In reviewing such application the zoning board of appeals shall request the planning board to provide a written recommendation concerning the proposed variance. (Town Law Section 277 6)

These provisions have eliminated the traditional necessity for a decision of the zoning officer before a matter is put before the ZBA for an area variance. However, this raises the question of whether an applicant may make an appeal to the ZBA prior to the submission of an application for a site plan, special permit or subdivision to the agency reviewing it. This has not been addressed by statute and appears to be a matter of local practice.

The most practical approach to this would be for the ZBA to review applications for area variances in these cases ONLY after a complete application for the site plan, special permit or subdivision has been submitted and accepted by the reviewing board. An appeal may then be initiated by either having the reviewing board refer the application during the course of their review, or by having the reviewing board deny the application, thus allowing the applicant to make appeal to the ZBA.

Application to the reviewing board FIRST would seem to be the only reasonable, practical way for both the reviewing board and the ZBA to coordinate their reviews, make for a smooth review process, and prevent the applicant from being subjected to conflicting board decisions. The ZBA would then have a more complete picture of the context of the application, and the reviewing board can take the lead on the SEQR process. The reviewing board can shape their review around the variance, rather than having the variance issued out of context with the normal review process.