

# Case Law Update: What's the Latest?

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# What topics came before the Courts this past year?

Typical areas that come up year-in-year-out. No groundbreaking/major cases that shake the landscape. Instead, continued emphasis on bread and butter issues.

1. Use Variances
2. Area Variances
3. SEQRA
4. Miscellaneous topics.

# Use Variance Test

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

# *Sullivan v. Board of Appeals of the Town of Hempstead*

- Can you impose owner-occupancy as a short-term rental use variance condition?
- Yes! Where appropriate, reasonable conditions and restrictions directly to and incidental to a proposed use of property, that are aimed at minimizing adverse impacts, can be imposed.
- Appropriate here, because owner-occupancy minimizes the potential nuisance of short-term rentals.

# *Dean v. Town of Poland Zoning Board of Appeals*

- When considering the question of reasonable return, what evidence should be in the record, and can you limit your review to only a portion of the property?
- Must have evidence concerning **all** permitted uses, and must consider the **entire** property, not just a portion.

# Questions on Use Variances?

# Area Variance Test

1. Will granting the variance produce an undesirable change in the neighborhood's character, or be a detriment to nearby properties?
2. Can the benefit sought be achieved by some other feasible method that does not require a variance?
3. Is the variance substantial?
4. Will the variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?
5. Is the alleged difficulty self-created?

# *209 Hudson Street LLC v. City of Ithaca Board of Zoning Appeals*

- Can community opposition to a project justify denial of an area variance?
- No! Community opposition to a project by itself does not provide a rational basis to deny a variance. Other information is required.
- Other take-away: when reaching a decision, ZBAs can consider the proposed use of a property, and purpose in seeking the variance. You don't need to strictly limit consideration to the specific variance, and are allowed to consider the overall project.



# *DPR Scrap Metal Inc. v. Board of Zoning Appeals of Town of North Hempstead*

- Can anonymous and unsubstantiated complaints regarding a business justify denial of a variance?
- No! Actual evidence must be presented at the hearing to demonstrate undesirable effects on the neighborhood/environmental conditions.

# *Kaye v. Zoning Board of Appeals of Village of North Haven*

- Is community character defined by your code, or by the actual built environment?
- Actual built environment! Even where the variance would be relatively minor in size, the fact that a community was characterized by lots much larger than required by code, showed that allowing a substandard lot would result in an undesirable change in the neighborhood's character.

# *Gerbino v. Whalen*

- Can a court substitute its judgement for the ZBA's?
- No! If the record supports the ZBA's determination, the court's review should end.

# *Simon v. Englert*

- If the planning board reviews SEQRA as lead agency, and makes a negative declaration, can the ZBA reach a different conclusion as to neighborhood character?
- Yes! SEQRA review and the variance test are not identical.
- What type of explanation and evidence is needed, to support a different conclusion?
- A reasoned explanation, based on empirical data.

Questions on Area Variances?

# State Environmental Quality Review Act

Planning and Zoning Boards must undertake a 'hard look' at the potential environmental consequences of an action.

Failure to take a 'hard look' is grounds for invalidating an action.

Type I – requires preparation of a full environmental assessment form (FEAF).

Type II – are deemed by regulation to not have a significant adverse impact, so no further review is required.

Unlisted – requires preparation of a short environmental assessment form (SEAF).

# *Brunner v. Town of Schodack Planning Board*

- Are you required to prepare an Environmental Impact Statement when the project is a Type I action?
- No! Negative declarations can be issued without an EIS, if the lead agency finds no adverse environmental impacts, or that the impacts will be insignificant.
- What evidence should be in the record? As much as possible. Engineering reports and recommendations, impact studies/analyses, and anything else that's helpful.

# *Neeman v. Town of Warwick*

- Does an unpermitted use's presence for multiple years change the impact analysis under SEQRA?
- No! Even where an unpermitted use has been operating for decades, SEQRA requires you to consider the environmental impacts of the development as if it wasn't in existence.



# *Cady v. Town of Germantown Planning Board*

- General reminder that thorough SEQRA review does take time, but a thorough review cuts off one of the likeliest sources of challenge to your decisions.
- Other take aways: listen to the public, but pay special attention to issues/concerns raised by direct neighbors, as they're the ones most likely to show actual harm as the result of your decisions.
- Also, pay attention to your code's phrasing. If a standard is set forth as a guideline, instead of a strict requirement, then the planning board on its own can authorize deviations from the standard without need of a ZBA variance.

Questions on SEQRA?

# *Miscellaneous Topics*

- Wallace v. Town of Grand Island: short term rentals can be restricted. If your community adopts a short term rental restriction, consider allowing owner-occupied short term rentals.
- Circle T Sterling LLC v. Town of Sterling Zoning Board of Appeals: you have the duty of weighing conflicting evidence and making a decisions. When information in the record is contradictory, your decision won't be overturned if substantial evidence supports your conclusion.
- Favre v. Planning Board of the Town of Highlands: if application changes are minor, you are not required to hold additional public hearings or re-submit the project for 239 review.

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Final Questions?