

One point should be emphasized at the outset. Though it is not a legislated change in zoning, a variance is essentially a change in the zoning law as it applies to the subject parcel of land. It therefore applies to the land itself, and not merely to the owner who happens to have applied for it. While a variance may be conditioned so as to be temporary where the nature of the use will be temporary (e.g., a construction trailer), the typical variance must instead “run with the land.” It cannot be made to apply only to the current owner.

“It is basic that a variance runs with the land and, ‘absent a specific time limitation, it continues until properly revoked’ . . .”³⁶

The Use variance

The use variance has been defined as:

“. . . one which permits a use of land which is proscribed by the zoning regulations. Thus, a variance which permits a commercial use in a residential district, which permits a multiple dwelling in a district limited to single-family homes, or which permits an industrial use in a district limited to commercial uses, is a use variance.”³⁷

As the use variance grants permission to the owner to do what the use regulations prohibit, this power of the board of appeals must be exercised very carefully lest there be serious conflict with the overall zoning scheme for the community. The showing required for entitlement to a use variance is therefore intended to be a difficult one.

The General City Law, Town Law and Village Law specifically incorporate this concept into the language of the statutes. The statutes³⁸ provide as follows:

“‘Use variance’ shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.”

Early cases in New York State recognized, without defining terms, that a zoning board of appeals had an important function in the granting of variances. The courts, up until 1939, had discussed general criteria for the granting of variances. Although these early decisions recognized the importance of the variance procedure and its inherent limitations, it was in that year that the landmark case of *Otto v. Steinhilber, supra*, was decided, and laid down specific rules governing the finding of unnecessary hardship in the granting of use variances. In that case, the owner of a parcel of property which was located in both a residential and commercial zone applied for a variance enabling him to use the entire parcel for a skating rink, which was a permitted commercial use. The lower court upheld the granting of the use variance, which ruling was affirmed by the Appellate Division. The Court of Appeals, the highest court in the State, reversed these holdings and in doing so, set forth the definitive rules that are still followed today. Indeed, now, these rules are codified in the State statutes.

The court found that the object of a use variance in favor of property owners suffering unnecessary hardship in the operation of a zoning law “. . . is to afford relief to an individual property owner laboring under restrictions to which no valid general objection may be made.” After a discussion of the role of the zoning board of appeals in the granting of variances, the court found that a board could grant a use variance only under certain specified findings:

“Before the Board may exercise its

discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."³⁹

These rules have since become known by almost all practitioners as the "*Otto*" rules for granting use variances.

The court found that the petitioner was not entitled to the variance sought, because the three grounds cited above had not been proven. Of greater importance is the fact that once the court had enunciated these rules, a great element of certainty had been injected into this field of law. Hardly a court decision in this area has since been handed down that has not cited the rules formulated in the *Otto* case.

The statutes⁴⁰ essentially codify the *Otto* rules, and those of cases following *Otto*, specifically regarding the issuance of use variances in cities, towns and villages:

“(b) No such use variance shall be granted by a board of appeals 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 of appeals that for each and every permitted use under the zoning regulations for the particular district where the property is located, (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial

evidence; (2) 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; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created.”

It will be noted that the overall statutory test for the issuance of use variances remains "unnecessary hardship" as the Court of Appeals held in the *Otto* case. The statutes now define that term, using the three criteria based upon the *Otto* case, as they have been refined by court decisions over the years. The fourth requirement in the above language is based upon court decisions after the *Otto* case, which held that a use variance cannot be granted where the unnecessary hardship was created by the applicant.

The *Otto* rules have been refined by court decisions over the years. In cities, towns and villages, the statutory rules for granting use variances reflect these decisions. The best way to understand the rules is to examine each in its turn, together with the court decisions that shaped them.

Reasonable return

The statutes⁴¹ provide that the first test for the issuance of a use variance is that the applicant must demonstrate to the board of appeals that:

"the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence."

In essence, this is a restatement, in the State statute, of the first prong of the *Otto* test.

The salient inquiry is whether the use allowed

by the zoning law is yielding a reasonable return.⁴² An applicant must prove that he or she cannot realize a reasonable return from each of the uses permitted in the zoning district. The mere fact that the property owner may suffer a reduction in the value of property because of the zoning regulations, or the fact that another permitted use may allow the sale of the property for a better price, or permit a larger profit⁴³, does not justify the granting of a variance on the grounds of unnecessary hardship.⁴⁴

It has been held that only by actual "dollars and cents proof" can lack of reasonable return be shown. In the case of *Everhart v. Johnston*⁴⁵, a variance was granted to the owner of a property in a residential zone to enable him to house an insurance and real estate agency. A State Supreme Court annulled the granting of the variance, which determination was affirmed by the Appellate Division, which found "a complete lack of the requisite proof as to the first requirement (i.e., that the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone)." The court explained its findings as follows:

"A mere showing of present loss is not enough. In order to establish a lack of 'reasonable return', the applicant must demonstrate that the return from the property would not be reasonable for each and every permitted use under the ordinance (*Matter of Forrest v. Evershed*, 7 N.Y. 2d 256). Moreover, an applicant can sustain his burden of proving lack of reasonable return, from permitted uses only by 'dollars and cents proof' . . ." (Id.)

The "dollars and cents proof" rule was again enunciated in a Court of Appeals case which held that "a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses."⁴⁶

At this point, it would be good to mention briefly a property use that is especially hard hit by the reasonable return requirement. That is a nonconforming use, upon which an especially heavy burden falls when it must be shown that the user cannot derive a reasonable return from any permitted use. An applicant who maintains a nonconforming use must not only show that all permitted uses will be unprofitable, but also that the nonconforming use itself cannot yield a reasonable return. In a case in which the owner of a nonconforming gasoline station applied for a variance, the court pointed out this additional burden.

"In order to demonstrate hardship, the petitioners had the burden of showing that 'the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.' Since the operation of their gasoline station, as it presently exists, was a nonconforming use which was suffered to continue because it had been devoted to such a use before the prohibitory zoning ordinance took effect, it was a use which was allowed in that zone.' Business 'A' uses, such as retail stores generally, real estate offices, etc., were also, of course, 'allowed in that zone.' Hence, the petitioners had the burden of proving that their property could not yield a 'reasonable return' if used for a gasoline station (as it presently exists) or for any business 'A' use (retail stores generally, real estate offices, etc.)."⁴⁷

Unique circumstances

The second test that an applicant for a use variance must adhere to under the state statutes, is that the property's plight is due to unique circumstances and not to general neighborhood conditions.

The statutes⁴⁸ provide that an applicant must demonstrate to the board:

"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."

As a leading text writer has observed:

"Difficulties or hardships shared with others go to the reasonableness of the ordinance generally and will not support a variance relating to one parcel upon the ground of hardship."⁴⁹

The Court of Appeals, in the early case of *Arverne Bay Construction Co. v. Thatcher*⁵⁰, had before it a case involving the owner of land in a district classified as residential, in an area almost completely undeveloped, who sought a variance enabling him to operate a gasoline station. The Court of Appeals held a variance should not have been granted. The court stated:

"Here the application of the plaintiff for any variation was properly refused, for the conditions which render the plaintiff's property unsuitable for residential use are general and not confined to plaintiff's property. In such case, we have held that the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners."

This finding of "uniqueness" has also been referred to by the Court of Appeals as that of "singular disadvantage" by the virtue of a zoning ordinance. In the case of *Hickox v. Griffin*⁵¹, the court stated:

"There must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation before a variance thereof can be allowed on the ground of 'unnecessary hardship'."

In *Douglaston Civic Association, Inc. v. Klein*⁵², the Court of Appeals discussed the "unique circumstances" requirement and held that the property was indeed unique, justifying the grant of the variance:

"Uniqueness does not require that only the parcel of land in question and none other be affected by the condition which creates the hardship . . . What is required is that the hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed. What is involved, therefore, is a comparison between the entire district and the similarly situated land."

A use variance was properly granted in *Douglaston* where the land in question was shown to be swampy, even though other land in the vicinity shared that characteristic. The uniqueness requirement must be addressed in the context of the nature of the zone in general. Such a relationship makes sense when it is remembered that a variance should not be used in lieu of a legislative act. A parcel for which a variance has been granted, therefore, need not have physical features which are peculiar to that parcel alone (as required in *Hickox*, above). On the other hand, the hardship caused by physical features cannot prevail throughout the zone to such an extent that the problem should be addressed by legislative action, such as a rezoning.

The uniqueness relates, therefore, to the hardship, which in turn relates to the land, and not to the personal circumstances of the owner. In *Congregation Beth El of Rochester v. Crowley*⁵³, a religious organization whose synagogue had burned down applied for a use variance so that it could sell the now-vacant property for construction of a gasoline service

station. The organization argued that the uniqueness standard was satisfied in that it was financially impracticable to rebuild a synagogue on the site. The court instead held that "It is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion."

Essential character of the neighborhood

The third test that must be met pursuant to state statutes⁵⁴ before a use variance may properly be granted, is that

"the requested use variance, if granted, will not alter the essential character of the neighborhood."

Because one of the basic purposes of zoning is to adopt reasonable regulations in accordance with a comprehensive plan, it follows that changes which would disrupt or alter the character of a neighborhood, or a district, would be at odds with the very purpose of the zoning regulation itself. Thus, in the case of *Holy Sepulchre Cemetery v. Board of Appeals of Town of Greece*⁵⁵, a nonprofit cemetery corporation sought a variance to enable it to establish a cemetery where such use was not provided for in the applicable zoning ordinance. The court conceded the fact that the area surrounding the property in question was sparsely settled and practically undeveloped, but upheld the action of the board denying the use variance sought. The court recognized the right of the zoning board of appeals to take notice of the fact that a residential building boom could reasonably be expected in a few years, and that the proposed cemetery could quite possibly interfere with the residential development of the section.

In another case, a transit corporation sought to

lease land in a residential zone, used as a bus loop, to an oil company, which planned to erect a gasoline station. The court found that the zoning board of appeals properly refused to grant the use variance, because the variance, if granted, would interfere with the zoning plan and the rights of owners of other property, and that the evidence before the board was sufficient to sustain its findings that the requested use, if permitted, ". . . would alter the essential residential character of the neighborhood."⁵⁶

In the case of *Matter of Style Rite Homes, Inc. v. Zoning Board of Appeals of the Town of Chili*⁵⁷, the plaintiff corporation owned property in a one-family residential district, part of which was appropriated by the State for highway purposes. The plaintiff then applied for a use variance permitting it to use its remaining land for a garden apartment development. In upholding the decision of the zoning board of appeals denying the use variance, the court held that:

"Finally, it seems clear that the plaintiff's proposed use of the property for a 60-family multiple dwelling complex is incompatible with the over-all plan and policy for development of the town and would create conditions distinctly different from those existing in the locality by adding problems incident to an increase in population density as well as unquestionably altering the essential character of an otherwise residential neighborhood developed in reliance on the stability of the ordinance."

One court has held that the applicant will fail this third test if it is shown that the proposed project would "stimulate a process which in time would completely divert . . . [the neighborhood's] . . . complexion." In other words, the proposed project need not *in and of itself* alter the character of the neighborhood if it is shown that the project would set a pattern

for future development that would, in time, alter the neighborhood's character.⁵⁸

Self-created hardship

While it was not a factor in the *Otto* decision, there is one more important consideration that must be noted before leaving the discussion of use variances. That is the so-called rule of "self-created hardship." The self-created hardship rule has now been codified in the statutes.⁵⁹

It is well settled that a use variance cannot be granted where the "unnecessary hardship" complained of has been created by the applicant, or where she/he acquired the property knowing of the existence of the condition she/he now complains of. In *Carriage Works Enterprises, Ltd. v. Siegel*⁶⁰, in addressing self-created hardship, the court stated "The courts should not be placed in the position of having to guarantee the investments of careless land buyers." The same advice should apply to zoning boards of appeals.

In the case of *Clark v. Board of Zoning Appeals*⁶¹, the Court of Appeals, before proceeding to discuss the grounds necessary for the granting of a use variance, noted that the property in question was purchased to be used as a funeral home in a district where such use was not permitted under the zoning ordinance. The court observed that:

"Nevertheless . . . [the owner] . . . purchased the lot, then applied for a variance. We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship' . . ."⁶²

Note, however, that a contract vendee – i.e., a person who enters into an agreement with the

owner to purchase the property contingent on the grant of a variance – is a legitimate "person aggrieved" (see "Who are proper parties before the board," below). Since the contract vendee has yet to purchase the property, he/she cannot be said to present self-created hardship, but must rely on the circumstances of the owner with whom he/she has a contract.

A final word on use variances

The rules laid down in the statutes and in the applicable cases are *requirements*. They must be used by zoning boards of appeals in reviewing applications for use variances. Furthermore, the board must find that *each* of the elements of the test has been met by the applicant.

The board must also consider the effect of the grant of the use variance on the zoning law itself. The Court of Appeals pointed out in the *Clark* decision, *supra*,

" . . . no administrative body may destroy the general scheme of a zoning law by [granting variances indiscriminately] . . ."

The Area variance

The statutes⁶³ define an area variance as follows:

"'Area variance' shall mean 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."

Area variances are thus, as a practical matter, distinguished from use variances in that a use variance applies to the use to which a parcel of land or a structure thereon is put, and an area

variance applies to the land itself. In most cases, the difference is clear-cut. If an applicant for a variance wishes to use his property in a residential district for a funeral home, he obviously wants a use variance; if, however, he wishes to build an extra room on his house, and it would violate a side yard restriction, an area variance is just as obviously called for.

The rules for the issuance of area variances in all municipalities have changed dramatically since 1992. Prior to July 1, 1992, the standard for the issuance of all area variances was that of "practical difficulty." This term had appeared in the statute for many years and had been interpreted by the courts in a great number of cases significant to its understanding. Since July 1, 1992, however, the Town Law and the Village Law no longer employ this standard, and, since July 1, 1994, the term is no longer applicable in cities. The historic cases interpreting "practical difficulty" will, therefore, not be discussed here.

The statutes now specifically set forth the rules for the granting of area variances.⁶⁴ They provide that in making its determination on an application for an area variance, the board of appeals must balance the benefit to be realized by the applicant against the potential detriment to the health, safety and general welfare of the neighborhood or community if the variance were to be granted. In balancing these interests, the board of appeals must consider the following five factors:

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.
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.

The best way to understand the rules is to examine each in its turn, together with the court decisions that rely on them.

Undesirable change in the neighborhood

The board must consider whether the dimensional alteration being proposed will result in a structure or a configuration that will be seriously out of place in the neighborhood. In *Pecoraro v. Board of Appeals of the Town of Hempstead*⁶⁵, the Court of Appeals upheld the denial of an area variance that would have reduced the minimum lot size from 6,000 square feet to 4,000, and would have reduced the required frontage from 55 feet to 40. The court held that the board of appeals could rationally conclude that the proposal would seriously compromise the character of the neighborhood, which consisted overwhelmingly of parcels which met the required minimums.

