

FEDERAL STANDARD ABSTRACT

TITLE NEWS

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Can I Do Something About the Zoning of My New York City Property?

Occasionally we receive inquiries from property owners who are particularly affected by the New York City Zoning Resolution (“ZR”). While hardly related to real property ownership rights, as a courtesy to our clients we describe below the most common path for obtaining relief from the ZR.

Relief from the ZR is often sought from the Board of Standards and Appeals (“BSA”), an organ of NYC, composed of five mayorial-appointed members, created for the specific purpose of providing relief from the ZR and other laws. It is expected that the extensive regulations of the ZR will affect lots differently, because of their size, location, depth or subsurface characteristics. For example, an L-shaped lot may be unable to comply with all front, back and side yard requirements. Hence, the BSA was created to grant specific exceptions to the ZR, where the exception is needed to provide the owner “a reasonable economic return” on real property.

An exception to the ZR made by the BSA on a specific lot is more properly called a “variance.” In order to grant a variance, the BSA must make five findings: (1) that application of the ZR result in practical difficulties or hardship because of the *unique physical conditions* of the lot; (2)

that there is no reasonable possibility of obtaining a *reasonable economic return*; (3) that the variance requested will not alter the *essential character* of the neighborhood; (4) that the practical difficulty or hardship *has not been created by the owner*; and (5) that the variance requested is the *minimum necessary* to afford relief.

Examples of *unique physical conditions* are small, shallow, irregular lots, subsurface soil conditions, including high water table, rock or contamination, or the inability to use old buildings. Conditions that are overall common to the particular area are not considered *unique physical conditions*.

The *reasonable economic return* is measured through neighboring comparable properties. A showing that a neighboring lot of a similar size is allowed under the ZR to have a larger building and produce more income, is persuasive that the subject lot may be prejudiced by the ZR as applied. Not-for-profit entities applying for variances are not required to prove this finding.

The *essential character* of a neighborhood is too factual in nature to provide guidelines. However, the BSA always requires pictures to be submitted with the application and often carries out physical inspections of the subject lots.

A *self-created hardship* is a condition caused by the owner. For example, an owner who creates an illegal subdivision cannot expect the BSA to grant him a variance so that he may obtain certificates of occupancy. An owner who sells his development rights cannot subsequently claim that he cannot develop his property to obtain a satisfactory return.

Lastly, the variance application must also show that the requested exception is the *minimum necessary* to obtain in relief. In other words, you may obtain a variance if you can show that the ZR affects your lot a particular way that prevents you from enjoying your property to the same extent as your neighbors enjoy theirs, but the variance will only bring you to the same level of return as your neighbors. It will not provide you with an opportunity to obtain more than what your neighbors have.

Variations can be limited in time. They can be set to expire after a specific term

(which would require their renewal) or on the happening of specific events, such as the transfer of ownership of the lot or the abandonment of a specific use (e.g. “for as long as the premises is used as a day care center”). Purchasers of real property would be wise to keep this in mind and request copies of variances for review on the least notice of an existing variance.

This article has only explained variances, but it should be noted that there are other ways to obtain relief from the ZR. For example, in specific instances described in the ZR the BSA and the City Planning Commission have the authority to grant “special permits”, which can allow for property to be used in ways otherwise prohibited in the district (such as a commercial gym in a residential district) or can waive specific rules, such as setback or rear yard requirements. Lastly, different City agencies (including the Mayor’s office) may be interested in the development and be instrumental in obtaining approvals.

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