APPLICATIONS TO ZONING BOARDS OF APPEALS

PREPARING FOR A HEARING

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1. For what type of approval should your client apply?

A. What does your client want to do?

(1) What would your client like?

(2) What would your client be willing to accept?

(3) What is the best way of obtaining the most for your client? Should your client ask for exactly what it wants, or ask for more, anticipating a compromise approval? Do not ask for so much that you unnecessarily antagonize the zoning board of appeals ["ZBA"] and/or the community.

B. Does your client need a variance or a special use permit? What it needs from the ZBA is often called the "relief sought."

C. Although at one time the case law had been to the contrary, Village Law §7-725-b (3) now permits you to apply for an area variance in conjunction with a special use permit.

D. If you believe that the building official's determination that a variance is needed is incorrect, you can challenge that determination and, in the same application, seek a variance, as alternative relief, in the event that the ZBA upholds the building official's determination.

E. If appealing the building official's determination, you must file your appeal with the administrative official and with the ZBA within 60 days of the filing of the decision in the office of the administrative official [Village Law §7-712-a(5)(b)[1]].

F. When a variance is being sought, the building official will usually issue a "denial" letter.

(1) Review the letter and make sure that it is correct and includes all of the variances that your client may need.

(2) When you go before a ZBA, you must seek all of the variances that your client will need. If you believe the building official may have missed a

variance needed, check with the building department. If you do not get clear answers, check with the municipal attorney.

(3) Ultimately, the responsibility for obtaining all of the variances needed for your client's project rests with your client, and not the building department. If the building department overlooks a variance, the municipality will not be estopped from subsequently revoking the permit, even where there are harsh results[2].

(4) When there is doubt, you are better off asking for all of the variances your client may need. You can always add to your request for a questionable variance the words: "to the extent necessary, if at all." At the public hearing, you can still argue that the questionable variance was not required. If it is determined that you did not need the variance, there will be a record of that determination. If it is determined that you did need the variance, you have saved your client the unnecessary time, expense, and aggravation that would accompany a second application for the variance needed, but missed by the Building Department.

2. Know the criteria upon which your client's application will be considered.

The criteria upon which your application will be considered will vary depending upon the type of relief sought.

A. **Area Variance[3]:**

(1) An "area variance" means the authorization by a ZBA to use or improve land in a manner not allowed by the dimensional or physical requirements of the applicable zoning regulations.[4]

(2) In determining whether to grant an area variance, the ZBA must consider the benefit to the applicant if the variance is granted, as weighed against the detriment that the grant would pose to the health, safety, and welfare of the neighborhood or community. The ZBA must 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;

(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 (this consideration, while relevant to the decision of the ZBA, does not necessarily preclude the granting of the area variance).

(3) 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.

(4) Imposition of conditions. 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. Such conditions shall be consistent with the spirit and intent of the zoning local law, and shall be imposed for the purpose of minimizing any adverse impact such variance may have on the neighborhood or community.

B. **Use Variance[5]:**

(1) A "use variance" means the authorization by a ZBA to use land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.[6]

(2) The applicant's burden for a use variance is greater than that for an area variance. The applicant must show that the applicable zoning regulations have caused unnecessary hardship; that is:

(a) For each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;

(b) 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) The requested use variance, if granted, will not alter the essential character of the neighborhood;

(d) The alleged hardship has not been self-created.

(3) The ZBA is required to grant the minimum variance that it shall deem necessary and adequate to address the unnecessary hardship proved by

the applicant, and at the same time preserve and protect the character of the neighborhood and the health, safety, and welfare of the community.

C. **House of Worship or School:**

(1) New York State policy recognizes the inherently beneficial nature of religious schools and houses of worship, and a ZBA's obligation to attempt to accommodate such uses, while recognizing that a ZBA does have the right to exclude such uses when the specifically proposed use would endanger the public's health, safety, welfare, or morals.[7]

(2) The courts have recognized that the traditional concept of a small church serving the immediately surrounding neighbors has many times been replaced by the "modern" house of worship, with multiple social and community functions, which may not be serving those neighbors and which may require automobile transportation, often presenting problems of noise, traffic, and aesthetics, in addition to the loss of tax revenue to the local municipality. However, the courts have held that religion and state, separate and coexisting, do make demands on one another, and while the distinctions between the little church around the corner and the modern religious center must be acknowledged, the peculiarly pre-eminent status of houses of worship (and their ancillary functions) under the First Amendment provision for free exercise of religion remains an important factor and must be accommodated when weighed against the burdens upon and the needs and desires of the community. [8]

(3) The Religious Land Use and Institutionalized Persons Act of 2000, 42 USC §2000cc *et seq.* ("RLUPA"), provides, in substance, as it relates to land use, that the municipality shall not impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(4) In reality, RLUPA may not have granted any more substantive rights to houses of worship than they already enjoyed under existing New York case law. However, the fact that under RLUPA, a house of worship, if successful in court, is entitled to its legal fees (42 USC §1988(b)), cannot be overlooked by an applicant or a municipality.

(5) There is a substantial question as to whether or not RLUPA will be held unconstitutional, as was the Religious Freedom Restoration Act of 1993.[9]

D. **Public Utility:**

(1) The statutory criteria for use variances do not apply to public utilities.

(2) A ZBA may not exclude a public utility from a community where the utility has shown a need for its facilities. That does not mean that a public utility may place a facility wherever it chooses within the community. The public utility must show that the proposal is a public necessity in that it is required to render safe and adequate service, and that there are compelling reasons, economic or otherwise, to grant the application. Where the intrusion or burden on the community is minimal, the showing required by the public utility should be correspondingly reduced.[10]

E. **Cell Tower:**

(1) Cellular telephone service is deemed a public utility. Thus, to establish entitlement to a use variance, you need only establish that the proposed cellular telephone tower would enable the utility to remedy gaps in its service area that currently prevent it from providing adequate service to its customers and presents a minimal intrusion or burden on the community.[11]

(2) Additionally, the Federal Telecommunications Act of 1996 has established general criteria for the siting of telecommunications towers, which substantially limits the ability of a ZBA to deny or restrict such applications.[12] Among the more important provisions are:

(a) "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof.

[i] shall not unreasonably discriminate among providers of functionally equivalent services; and

[ii] shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 42 U.S.C. 332(c)(7)(B)(i).

(b) "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal

Communication] Commission's regulations concerning such emissions." 42 U.S.C. 332(c)(7)(B)(iv).

F. **Special Exception Permits (sometimes referred to as conditional use permits or special use permits).**

(1) There is a fundamental difference between a special exception permit and a use variance, and the criteria are different.

(2) A variance is an authority to a property owner to use property in a manner forbidden by the zoning regulations, while a special exception allows the property owner to put its property to a use expressly permitted by the regulations, so long as the property owner meets the conditions set forth in those regulations for such use. The inclusion of the special exception use in the ordinance is tantamount to a legislative finding that the use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Thus, the burden of proof on an applicant for a special exception permit is much lighter than that required to establish a "hardship" for a use variance.[13]

3. View the subject property.

A. It is always important to view the property to understand the facts and circumstances and potentially unique factors.

B. Consider possible issues with regard to:

(1) Topography.

(2) Setbacks and heights of existing structures.

(3) Wetlands.

(4) Trees.

(5) Wildlife.

C. View the adjacent areas.

(1) What are the nearby uses?

(2) What screening exists?

(3) If you are seeking a variance, are there existing non-conforming uses, structures, or properties in reasonably close proximity?

(4) How will the proposed project affect the nearby properties?

(5) How will the proposed project affect vehicle or pedestrian traffic in the vicinity?

4. Contacts with local municipality.

Depending upon the size and nature of the project and the willingness of the municipality, consider speaking with the chief executive officer, clerk, building inspector, and/or municipal attorney to gauge and if possible, garner their support. Although the ZBA is an independent body, the support of those officials may be pivotal to the success of the application.

A. Explain the project.

B. Seek advice as to the best manner in which to proceed.

C. Determine if there is a modification to your plans, agreeable to your client, which would garner their support.

5. Do you need any other approvals for the project to proceed?

A. Your client's project may require approval from another local, regional, state, or federal entity, including, but not limited to the following:

(1) Architectural Review Committee.

(2) Landmarks or Historical Preservation Committee.

(3) Planning Board – for subdivision approval or site plan review.

(4) County Planning Commission.

(5) Wetlands permits:

(a) The local municipality.

(b) New York State Department of Environmental Conservation. Its web site for the Division of Environmental Permits is:

http://www.dec.state.ny.us/website/dcs/index.html.

(c) Army Corps of Engineers.

B. If you need approvals from one or more of such entities, determine the order in which the applications should be made and which can be processed simultaneously.

6. The application.

A. Who will be filling out the application?

(1) The engineer, the architect, the attorney, or the owner?

(2) No matter who fills out the application, the attorney should review it.

B. Filling out the application.

(1) Make sure that it is correct and complete. If you believe any questions are not applicable, check with the municipal attorney, building department, or clerk to make sure, and save your client unnecessary delay that may arise if your application is deemed "incomplete," and, therefore, not processed, or scheduled and then adjourned.

(2) Notice to adjacent or nearby property owners.

(a) A list of adjacent property owners or property owners within a certain radius is usually required.

(b) Ask the clerk if the municipality wants you to obtain that information from the municipality's assessment roll, the county clerk's records, or some other source.

(c) If you are not sure whether or not a property should be included, include it. If you have more than one name for a particular property, send notices to all of the names. It is usually better to err on the side of providing more notice than is required, rather than providing insufficient notice.

(d) If a radius map is required for the purpose of notifying property owners within a specific radius of the subject property, the surveyor preparing the radius map will often provide the list of property owners, but you should confirm with the surveyor its source for the names and addresses.

(e) Although the courts have held that a defect in the municipality's required mailing is not jurisdictional[14], the municipality still has the right to adjourn the meeting for improper notification. It can be embarrassing for you, and an unnecessary delay for your client, if the notice was not properly sent.

(f) Check the property owners within the required notification radius and make sure that you do not have a conflict with an existing client. It can be very embarrassing and a real conflict of interest if you find that a major client is living or doing business within the radial area and opposes the application.

(3) If a radius map is being prepared:

(a) Make sure that it also shows the relevant boundaries required under General Municipal Law §239-m.

(b) If, in presenting your client's application, you plan to discuss other nonconforming properties or nonconforming uses, consider illustrating their relationship to your client's parcel on the same map. Color coordination of varied sized lots can help.[15]

C. Municipal clerks often follow checklists when they accept applications. If your papers deviate from the list, they may reject your filing as "incomplete." They may also remove any documents that are not on the checklist from the application packets sent to the ZBA members. Accordingly, when the papers are ready to be filed, hand deliver them to make sure that what you are filing is complete (as to both the documents and the required number of copies) and that all of the additional papers (legal arguments, photographs, floor plans, site plans, solar studies [showing shadow lines at the winter solstice, December 22nd, when the sun throws its greatest shadows], title reports, and other relevant documents) will actually be forwarded to the ZBA members. Call the municipal office first and make sure that the clerk will be available to see you when you get there. Develop a friendly relationship with the clerk - it can be invaluable.

D. Make a short, strong argument, with citations, in your application papers. If applicable, politely inform the ZBA and its attorney of your legal position. This will also help preserve your argument for an Article 78 proceeding if your client decides to challenge a denial.

E. Although many ZBA members visit the site, you cannot rely upon their doing so, or if they do, that they will see what you want them to see. Although you should usually have photographs of the site at the hearing, consider submitting photographs with the filing, so that the ZBA members will be better prepared to understand your argument before they come to the hearing. It may lead them to a more favorable view of your application, and avoid an adjournment that they might otherwise want, to go back to view the property. Of course, your submitting photographs does not mean that the ZBA members will look at the photos (or, for that matter, any of the other submissions) prior to the hearing.

F. For almost every application, you will have to prepare an Environmental Assessment Form. Find out if the municipality wants you to use the short or the full environmental assessment form. Usually the short form will suffice.

7. Will there be opposition?

A. Adjacent/nearby property owners.

(1) If you are dealing with a single-family home, will the affected neighbors provide written consents in favor of the application?

(2) If the neighbors may be in opposition, what would be their concerns:

(a) Screening?

(b) Traffic?

(c) Business Competition?

(d) Setting a precedent?

B. Civic and business groups.

(1) What civic and/or business groups are in the area?

(2) Is there a history of their support or opposition to such projects?

(3) Should they be contacted?

(4) Who would be the best person to make the contact?

8. Assembling the professional team.

A. What professionals will you need?

(1) Environmental.

(2) Historical/Landmarks.

(3) Flora and Fauna.

(4) Planner.

(5) Traffic.

(6) Financial:

(a) Appraiser.

(b) Real estate broker.

(c) Economist.

(7) Engineering.

(8) Architectural.

(9) Landscaping:

(a) Affect on existing trees and screening.

(b) Proposed trees and screening.

(10) Geological.

B. What experience should they have?

(1) General knowledge.

(2) Knowledge of the particular local community.

(3) Experience in successfully dealing with other agencies:

(a) New York State Department of Transportation.

(b) New York State Department of Environmental Conservation.

(c) Army Corps of Engineers.

(d) County:

[i] Department of Health.

[ii] Department of Public Works.

[iii] Fire Marshal.

9. The SEQRA[16] process.

A. Many applications to a ZBA have been defined as Type II actions and, therefore, require no environmental determination of significance [617.5]. Type II actions include, but are not limited to, the granting of individual setback and lot line variances, and variances for a single-family, two-family and three-family house. They also include the replacement, rehabilitation, or reconstruction of a structure or facility, in kind, with certain limitations. If the application is not a Type II action, before the public hearing required under SEQRA, there are certain requirements that must be completed.

B. The DEIS process.

(1) If more than one agency is involved and the action is not a Type II action, and there is going to be a "coordinated review" among those agencies, there must be a determination of which agency will act as the "lead agency" [617.6(a) and (b)].

(2) Once the lead agency is established (usually it will be the ZBA), a determination of environmental significance must be made [617.7].

(3) If a "positive declaration" is made, that is, that the proposed project may include the potential for at least one significant adverse "environmental"[17] impact, a draft environmental impact statement ["DEIS"] [617.7(a)] will be required, and the ZBA must determine if it wants to use the "scoping" process to focus the DEIS on potentially significant adverse impacts and to eliminate consideration of those impacts which are irrelevant or nonsignificant [617.8(a)][18]. The procedure and a timetable for the scoping process are set forth in the regulations [617.8]. Either the applicant or the ZBA may prepare the DEIS, at the applicant's option. If the applicant prepares the DEIS, the applicant must submit the DEIS to the ZBA, which will determine whether or not the DEIS is adequate with respect to its scope and content for public review ["complete"] [617.9(a)(2)].

(4) After the DEIS has been found to be complete, the ZBA must decide if it is going to hold a public hearing on the DEIS [617.9(a)(4)]. If there will be a hearing on the DEIS, will it be held simultaneously with the public hearing, if any, on the application? Since the ZBA is required to avoid unnecessary duplication and combine and consolidate proceedings to expedite the SEQRA process [617.3(h)], the public hearings are usually consolidated.

(5) Notices must be published and sent to certain involved and interested agencies and other persons throughout the SEQRA process. The specific provisions for those notices are set forth in 617.12.

10. Notice for the public hearings.

Notice of the public hearings is required by various state laws and most municipalities. Notice of the first public hearing and of each of the subsequent public hearings must be given in accordance with the following requirements, unless, at a properly noticed public hearing, the date, time, and place of the next public hearing is stated on the record.

A. Variance applications:

(1) Village Law §7-712-a(7) requires a public hearing on not less than 5 days' notice published in a paper of general circulation within the village (usually the "official" newspaper).

(2) Village Law §7-712-a(10) requires notice, by mail, to regional state park commissions at least five days before the hearing, if a state park or parkway within five hundred feet of the property is affected.

(3) You should always check with the clerk of the ZBA to determine whether or not the municipality has its own additional requirements. If mailings are to be made to adjacent property owners, or certain property owners within a specified radius, find out if the applicant is required to send those mailings or if they will be mailed by the clerk. If you are doing the mailing, find out if they must be sent by certified mail return receipt requested, which is a common requirement. In such cases an affidavit of mailing is usually required as well as the "white" receipts that you keep when you do the mailing. The "green return receipt cards" to be signed by the recipients when they receive the mail are usually requested but not required. As long as you do the proper mailing, if the recipient does not pick up the envelope and return the green card, it does not invalidate your mailing.

B. SEQRA - 617.12

(1) Multiple mailings are required. It is important to read 617.12 in full.

(2) Publication in a newspaper of general circulation in the area, at least 14 days in advance of the public hearing.

11. Meeting with the applicant and its professionals.

A. The attorney is akin to a master of ceremonies.

B. Know what your client and all of your professionals will say.

C. Have each professional provide *curricula vitae* for your review and submission to the ZBA.

D. Organize the order of the presenters.

E. Determine what visuals they can provide.

12. Handouts, charts, etc.

A. Charts.

B. Pictures.

C. Models.

D. Renderings. Often, renderings are made to enhance a building as to its size or grandeur as a selling point by an architect to a client. Unfortunately, that same "enhancement" can make a building look unnecessarily overbearing, creating an adverse impact upon the ZBA.

E. Overhead projections.

F. Computerized simulations.

G. Moving pictures.

H. Sight lines.

I. Consistency. [Make sure the documents are consistent with each other.]

J. Power point displays.

K. Consider having the non-professionals write out their statements. If they do, you should read the statements in advance. If the proposed speaker has a heavy accent, a speech impediment, or speaks in such a manner that he or she might not be fully comprehended, hand multiple copies of the statement (one for each ZBA member, the clerk of the ZBA, the counsel to the ZBA, and the court reporter, if any) before he or she begins to speak.

13. The presentation at the first public hearing.

A. Brief introduction of the project by the attorney.

B. Identify the principals and the professionals, and, if noteworthy, some specifics about their credentials and reputations.

C. The order in which they speak may vary - here is one example:

(1) Principal of the applicant, to acquaint the ZBA and the community with the applicant and its goals and to very briefly explain the project. The principal can also explain the proposed "program." If a school or house of worship is proposed, that would include all of the proposed uses on a daily, weekly, monthly, and annual basis, including the time of day and maximum number of occupants for each of the activities.

(2) Architect to describe the project in detail.

(a) Exterior appearance.

(b) Interior use. Include how the interior use drives the need for the size of the structures and the parking requirements.

(3) Engineer to describe:

(a) Surface water control.

(b) Waste water system.

(c) Topographical concerns.

(d) Screening.

(e) Traffic:

[i] On adjacent streets and at intersections.

[ii] On-site circulation.

[iii] Parking and loading areas.

(4) Planner.

How the proposed project will affect the values of adjacent property and the master plan of the municipality as a whole.

D. It is essential that you know everything that your professionals are supposed to present to the ZBA, so that if they fail to present important information or fully provide their professional opinion, you can remind them during their presentation. It is not a trial. Leading questions are permissible.

E. After you have finished presenting your application, the "opposition" will be given an opportunity to speak. Keep careful notes and make sure that you, or your professionals, respond to all of the substantive comments. Do not assume that the ZBA will remember what you said. Redundancy, at least to the point of refreshing the recollection of the ZBA, is worthwhile.

14. After the close of the SEQRA portion of the public hearing.

A. Preparation of a proposed FEIS [617.9(b)(8)].

B. Acceptance of proposed FEIS [617.9(b)(8)].

C. There is a minimum 10-day period for agencies and the public to "consider" the FEIS [617.11(a)]. What does it mean to let them "consider" it, as opposed to 617.9(a)(3), which lets the public "comment"?

D. The ZBA must make written SEQRA findings within 30 days after the filing of the FEIS [617.11(b)].

15. General Municipal Law §239-m.

A. General Municipal Law §239-m requires ZBAs to refer certain matters to the county planning agency or regional planning council and to await their report, before they can take final action.

B. Those matters include variance and special exception applications, when the action applies to real property within 500 feet of:

(1) The boundary of any city, village, or town.

(2) The boundary of any existing or proposed county or state park or any other recreation area.

(3) The right-of-way of any existing or proposed county or state parkway, thruway, expressway, road, or highway.

(4) The existing or proposed right-or-way of any stream or drainage channel owned by the county or for which the county has established channel lines.

(5) The existing or proposed boundary of any county or state owned land on which a public building or institution is situated.

(6) The boundary of a farm operation located in an agricultural district (except this provision shall not apply to area variances).

C. The time for the agency or council to act:

(1) The period starts from when a full statement is received. The agency or council may require "receipt" up to 12 days prior to its meeting date.

(2) "Full statement" includes all materials required by and submitted to the ZBA as an application on a proposed action, including a completed environmental assessment form and all other materials required by the ZBA in order to make its determination of significance. The Nassau County Planning Commission interprets that provision to require the written findings after the FEIS has been accepted. I question that interpretation based upon certain SEQRA[19]

provisions and the convoluted result, which requires the ZBA to accept the FEIS and make its findings before it receives the comments of the Planning Commission. The clear intent of a coordinated review is to obtain those comments prior to the acceptance of the FEIS and the making of the written findings.

(3) The agency or council then has 30 days to report. The ZBA is legally precluded from taking any action until the agency or council has rendered its report, or the 30-day period for it to do so has expired. (Note that the Nassau County Planning Commission has adopted a procedure for streamlined referrals, which, if the local municipality has agreed with the county to implement, can shorten that 30 day period.)

16. The required vote for the approval.

A. It is not always clear when the decision has been made.

(1) The Court of Appeals[20] has held that when a quorum of a board is present and participates in a vote on an application, a vote of less than a majority of the entire board is deemed a denial. Thus, a 2 to 1 vote from a five-member board, whether to approve or deny an application, is deemed a denial of the application.

(2) Although Village Law §7-712-a(4) provides that, unless otherwise provided by local law, the concurring vote of a majority of the members of a ZBA shall be necessary to reverse any order of an administrative official or to grant a variance; it does not state that such a majority is required to deny such an application .

(3) If there is, what used to be, a deadlock (for example, on a five-member board, a 2-2 vote with one abstention) you now may have a denial, and your limited 30-day time to take an appeal may be starting as soon as the minutes of the decision are filed with the Village Clerk[21].

(4) Accordingly, in a tough application, you may want an adjournment before a vote is taken in order to obtain a full board, or at least a greater number of ZBA members present to cast their votes.

B. General Municipal Law §239-m. If the agency or council recommends modification or disapproval of an application within the aforesaid 30-day period, or at least 2 days prior to final action by the ZBA, then the ZBA may not act contrary to the report, except by a vote of a majority plus one.

17. Required actions after the approval.

General Municipal Law §239-m. Within 30 days after the ZBA acts, it must file a report with the agency or council, and if it acts contrary to the agency or council report, the ZBA must state its reasons for doing so.

18. Court action if application is denied.

A. Short statute of limitations.

(1) An Article 78 proceeding must be commenced within 30 days after the filing of the decision with the village clerk [Village Law §7-712-c].

(2) Although Village Law §7-712-a(9) requires that the decision of the ZBA be filed in the office of the village clerk within five business days after the day such decision is rendered, and a copy thereof mailed to the applicant, I am not aware of any basis for extending the 30-day period based upon the failure or delay of the mailing of the decision to the applicant.

B. Should you appeal?

(1) Have you developed the record?

(2) Can your client outlast the municipality?

(3) Remember, if the basis of your appeal is that the building inspector and the ZBA misinterpreted the local zoning code, the municipal board may amend the code during the appeal, and the court will apply the law in effect when it is making its decision, not the law as it was in effect at the time of your appearance before the ZBA.[22]

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[1] I have limited my statutory references to the Village Law. Comparable provisions are set forth in Town Law Article 16 [§§261 *et seq.*] and General City Law Article 5-A [§§81 *et seq.*].

[2] *Parkview Associates v. City of New York*, 71 N.Y.2d 274 (1988).

[3] Village Law §7-712-b(3).

[4] Village Law §7-712(1)(b).

[5] Village Law §7-712-b(2).

[6] Village Law §7-712(1)(a).

[7] *Cornell v. Bagnardi*, 68 N.Y.2d 583 (1986).

[8] *Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorporated Village of Roslyn Harbor*, 38 N.Y.2d 283 (1975).

[9] *City of Boerne v. P.F. Flores,* 521 U.S. 507 (1997).

[10] *Consolidated Edison Co., of New York v. Hoffman*, 43 N.Y.2d 598, 611 (1978).

[11] *Cellular Tower Co. v.* Rosenberg, 82 N.Y.2d 364 (1993) and SBA*, Inc. v Schwarting*, 299 A.D. 2d 940 (4th Dept. 2002).

[12] I recommend reviewing the manual entitled *Planning and Design Manual for the Review of Applications for Wireless Telecommunications Facilities, A Practical Guide for Communities Managing Wireless Telecommunications Facilities Siting in New York State,* March 2001, prepared by the Town of Pittsford under a contract with the New York State Department of State, Division of Local Government. Behan Planning Associates, LLC, consulting planners to the town coordinated the production of the report. Copies are available from New York State Department of State, Division of Local Government at 41 State Street, Albany, NY 12231, (518) 473-3355. Its web site is http://www.dos.state.ny.us.

[13] *North Shore Steak House, v. Board of Appeals Inc. Village of Thomaston*, 30 N.Y.2d 238, 243-244 (1972).

[14] (*Velez v. Board of Appeals*, 147 A.D.2d 648 (2nd Dept. 1989), *motion for leave to app'l denied* 74 N.Y.2d 760, (1989).

[15] For example, if your application involves an area variance for an undersized lot, you may want to use two or more colors to indicate different sized nonconforming parcels on the map to show that the size of your property is not different from many of the other existing developed parcels, either to show that the granting of the variance will not substantially alter the character of the community, or that, if your application was to be denied, your parcel would be the proverbial "island of conformity in a sea of nonconformity." *Fulling v. Palumbo*, 21 NY2d 30 (1967).

[16] "SEQRA" and "617" references are to the State Environmental Quality Review Rules and Regulation adopted by the Department of Environmental Conservation, 6 NYCRR Part 617. Part 617 can be found at http://www.dec.state.ny.us/website/regs/617.htm.

[17] "Environment" is very broadly defined [617.2(l)].

[18] Although the "scoping" process appears to benefit the applicant by narrowing the issues to be discussed in the DEIS, the inherent delay and expense of the scoping may not always be beneficial to the applicant.

[19] 617.3(c) implies that an application is complete when a negative declaration or a DEIS has been accepted as satisfactory with respect to scope, content, and adequacy.

[20] *Matter of Tall Trees Construction Corp. v. Zoning Board of Appeals of Town of Huntington*, 97 NY2d 86 (2001).

[21] Village Law §7-712-c.

[22] *Sexton v. Zoning Bd. of App. Of Oyster Bay,* 300 A.D.2d 494 (2nd Dept. 2002).