

## STANDARDS OF PROOF

### USE VARIANCE – “UNNECESSARY HARDSHIP STANDARD”

The New York State Legislature has recently amended Town Law, Section 267 to specify more particularly the proof required to be furnished by a Use Variance applicant before a Use Variance can be granted by the Zoning Board of Appeals (ZBA) which reads as follows:

“Use variances. (a) The board of appeals, on appeal from the decision or determination of the administrative officer charged with the enforcement of such local law, shall have the power to grant use variances, authorizing a use of the land which otherwise would not be allowed or would be prohibited by the terms of the local law.

“(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 (1) under applicable zoning regulations the applicant is deprived of all economic use or benefit from the property in question, which deprivation must be established 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.

“(c) The board of appeals, in the granting of use variances, shall 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.”

Your attention is especially invited to Standard No. 1 set out in (b) above:

“The applicant must demonstrate that under applicable zoning regulations, the applicant is deprived of all economic use or benefit from the property in question, which deprivation must be established by competent financial evidence.”

What is meant by “deprivation of all economic use or benefit”? This involves the purchase price and current market value of the property . It must also involve “rate of return.”

## WHAT YOU MUST PROVE

A. In order to satisfy the “deprivation of all economic use or benefit standard”, the applicant must furnish competent financial evidence to the ZBA establishing:

1. The amount paid for the land in question.
2. Its present market value.
3. Annual maintenance expenses.
4. Annual land taxes and school taxes.
5. The unpaid balance of mortgages and other encumbrances.
6. The annual income from the land in question for each and every use permitted in this Zoning District.
7. Proof that this actual or estimated return for each permitted use is not reasonable under the circumstances.
8. If the subject premises are the subject of a contract of purchase contingent upon the grant of a use variance, then the applicant must establish the fair market value of the property independent of the purchase price, because in the absence of such proof, it will be presumed that the purchase price included a premium over fair market price at the time of purchase in expectation of favorable zoning relief. Professional Park v. Town of Bedford, 60 N.Y. 2d 492 (1983).
9. The rate of return for the current use and all other uses permitted in the zoning district.
10. The rate of return deemed necessary by applicant in order to gain a return equal to comparables in the neighborhood.

Proof of present market value and annual income can be best established through the testimony of an expert witness.

Where more than one use is permitted in the zoning district, the applicant must prove the projected annual income from each and every permitted use, and must prove that this annual return is not reasonable as compared to the return by like property in the community.

If, on the basis of this dollars and cents proof, the ZBA determines that the applicant will be deprived of all economic use or benefit of the property, then the applicant has proven the first part of the unnecessary hardship standard.

How can an applicant best prepare such proof for his case? By engaging a professional such as a licensed real estate appraiser (not a real estate salesman or broker) whose sole profession is appraising.

B. ESSENTIAL CHARACTER: In addition, the applicant must prove by competent evidence that the proposed use will not alter the essential character of the neighborhood. Describe accurately and fully the entire neighborhood. Use of tax maps, aerial photographs or ground level photographs may help.

C. UNIQUENESS: The applicant must prove that the hardship not so general throughout the zoning district as to require the conclusion that if all parcels similarly situated were granted variances, the zoning of the district would be materially changed. In other words, if the hardship is common throughout the area, then perhaps legislative action

by the Town Board in the nature of a zone change or zoning ordinance amendment may be in order.

D. SELF-CREATED HARDSHIP: If the hardship complained of is self-imposed, then the variance must be denied. The cases hold that a party who knowingly acquires land for a use prohibited by the Zoning Ordinance creates his own hardship. Even if he did not actually learn of the prohibition at the time of the purchase he is nevertheless chargeable with knowing the restrictions on use.

E. PERSONAL PROBLEMS: Is the plight of the owner due to personal problems as opposed to use of the land or buildings? If due to personal problems, then the use variance must be denied.

Your attention is especially invited to the new law which states:

“Which deprivation must be established by competent financial evidence.”

The bottom line in Use Variances is that the burden of proof is on the applicant. If the applicant does not satisfy each of those above standards, then the variance must be denied.