

### LAND USE AND PLANNING

# Help, I Can't Comply With the Zoning Resolution! No Worries, Seek a Variance

By Neil Weisbard

March 24, 2023

**B**ad news and ... great news! Your rich Aunt Rose just passed away, but she has left you a 3,000 square foot vacant lot in Brooklyn! The property is transferred over to you (along with the real estate taxes), and you hire an architect to determine what building you can construct to maximize the potential of this incredible stroke of fortune. You hear back from the architect, and she lets you know that there is nothing you can build on the site, or at least nothing of value. What? How? Why? WTF am I going to do?

Let's start with the how and why, then we will get to the what to do.

The architect proceeds to tell you that due to the unique irregular triangular shape of the property, a building that fully complies with the Zoning Resolution would have a small, inefficient floor plate that no reasonable prospective user would ever want to occupy. This is terrible news (and probably why it has been vacant for all these years).

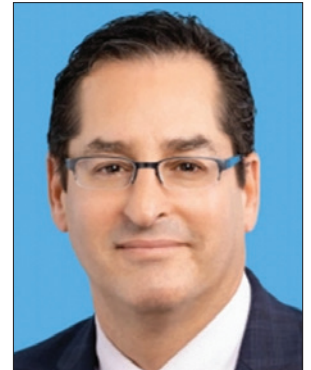
The good news is that there is relief in such a situation, and that relief is found in Section 72-21 of the Zoning Resolution, which provides that when there

are practical difficulties or unnecessary hardships in fully complying with the provisions of the Zoning Resolution, the New York City Board of Standards and Appeals (the BSA) may grant variances (modifications) of the Zoning Resolution, "so that the spirit of the law shall be observed, public safety secured and substantial justice done."

In order to grant a variance, an applicant must satisfy five findings (or in the case of not-for-profits and one- and two-family homes, four findings).

#### The 'A' Finding

There are unique physical conditions, including irregularity, narrowness of lot size or shape, soil conditions, including highwater tables, contamination or rocky sub-surface conditions, or the reuse of an obsolete building, which are peculiar to and inherent in a particular parcel, that create practical difficulties in complying strictly with the bulk, parking or use provisions of the Zoning Resolution.



Neil Weisbard

Meaning, not only can the BSA modify bulk (e.g., floor area, height, yards) and parking regulations, but also allow a use that may not be permitted as-of-right. For example, permitting a residence in a Manufacturing District.

The subject site does not have to be the only site in the surrounding area suffering from such hardship, but a Uniqueness Study is typically performed to evidence the fact that the parcel is one of the few sites burdened by the claimed uniqueness.

It is also important to note that an educational or religious or institution or an affordable housing development may rely on its programmatic needs (and the limitations of the site in satisfying such programmatic needs) to satisfy the “A” Finding (*Cornell University v. Bagnardi*, 68 NY2d 583 (1986)).

Also, if the New York City Department of Buildings conducted a thorough review of a proposed development and approved such development as being in compliance with the Zoning Resolution, then rescinded its approval after substantial expenditures had been made, an applicant may utilize a good-faith reliance argument to satisfy the “A” Finding (*Jayne Estates v. Raynor*, 22 NY2d 417 (1968), *Pantelidis v. Board of Standards and Appeals*, 10 N.Y.3d 846, (2008), *Woods v. Srinivasan*, 108 AD3d 412 (1st Dept 2013)).

The “A” finding is often the hardest to satisfy, and along with the “B” Finding, discussed below, involves the most in-depth analysis by the BSA. However, with a detailed, substantiated Uniqueness Study, Programmatic Needs Study, or good-faith reliance argument, the “A” Finding should not be too onerous of an obstacle to overcome.

### **The 'B' Finding**

Due to the hardship claimed in the “A” Finding, there is no reasonable possibility that a development, enlargement, or change of use developed in strict conformity the Zoning Resolution will result in a reasonable return.

All applicants, with the exception of not-for-profit institutions and owners of one- or two-family homes, must satisfy the “B” Finding. The New York courts have consistently held that the claimed hardship must be demonstrated by a third-party independent financial feasibility analysis, which demonstrates that the claimed “hardship” prevents the possibility of obtaining a reasonable return when the provisions of the Zoning Resolution are strictly applied to the development of the subject site.

The financial feasibility report analyzes two development scenarios: an as-of-right development (made in strict compliance with the Zoning Resolution); and the proposed variance develop-

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ment (minimum variance necessary to realize a reasonable return). The analysis utilizes assumptions based on appraised site value, hard and soft development costs (utilizing industrial cost manual, such as Marshall & Swift), comparable sales or leases in the surrounding area, capitalized value of net operating costs, and capitalization rates (based on a survey of 312 lenders and investors published by RealtyRates.com).

Typically, when the value of a project, created by capitalizing the net operating income and sales revenue (if applicable), is approximately equal to the total development cost, the project is considered producing a reasonable rate of return and would not satisfy the “B” Finding.

However, when the value is significantly less than the project cost, there is no reasonable return and such project could satisfy the “B” Finding. Conversely, if the value of a proposed variance is significantly more than

the project cost, then, as discussed in the “E” Finding below, the variance would not be the minimum variance necessary to be afforded relief and must be modified.

The analysis does not take into account the purchase price or financing terms, otherwise the “B” Finding may incentivize developers to purposely overpay or overfinance a property solely to tilt the numbers toward a lack of reasonable return and thus an increase in the degree of the variance.

### **The 'C' Finding**

That the variance will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of an adjacent property, and will not be detrimental to the public welfare.

A variance application typically requires an environmental review (either Type I or Unlisted action, depending on the size and scope), which will analyze, among other things, the impacts of the proposed development (versus an as-of-right development) on land use, neighborhood character, public policy, open space, shadows, hazardous materials, water and sewer infrastructure, air quality, and transportation. An environmental study that results in a negative declaration (little to no adverse impacts) can lay the groundwork for an argument to satisfy the “C” Finding.

Educational or religious institutions variance applications will be granted, unless it can be shown to have a net negative impact on the health, safety, or welfare of the community.

General concerns about traffic and disruption of the residential character of the neighborhood are insufficient grounds for denial.

### **The 'D' Finding**

That the claimed practical difficulties or unnecessary hardships have not been created by the owner or by a predecessor in title.

For example, if a developer subdivides a regularly shaped zoning lot into two zoning lots, thereby creating irregular shaped lots that make development infeasible. Also, as purchase price does not factor into the value of the land in satisfying the “B” Finding, the Zoning Resolution explicitly provides that “where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.”

### **The 'E' Finding**

The variance, if granted, is the minimum variance necessary to afford relief.

The purpose of a variance is to essentially make a property owner who is unnecessarily burdened by the restrictions of the Zoning Resolution whole, not to provide a developer with a windfall. Often, the BSA will eventually approve a variance, but the proposed development will be smaller than the designs shown in the initial application material.

That's the skinny on variances, with a couple of important notes. Variances are subject to public hearings before the local community board (neighbors within 400 feet of the site are provided with notification of the variance application) and the BSA. Once the variance is granted by the BSA, the site will remain under the jurisdiction of the BSA, meaning any changes to the site will require either an amendment to the variance (which requires another round of public hearings before the local community board and the BSA) or by a Letter of Substantial Compliance (minor changes to the BSA approval).

So fear not, if you are put in the unenviable position that your Aunt Rose left you in, the Zoning Resolution (and the BSA) are here to save the day!