



# Spot Zone or Grant the Illegal Use Variance

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## Course Outline

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- Zoning
- The Use Variance
- Spot Zoning
- Cases



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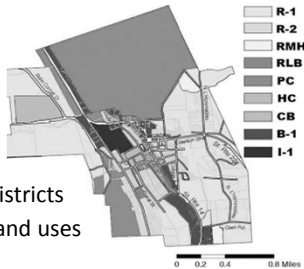
## Zoning

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- Regulates:

- Land use
- Density
- Placement of structures on site

- Divides municipality into districts
- Goal: avoid incompatible land uses
- Optional



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# The Use Variance

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**To use land for a purpose not allowed by zoning**

Alternative:  
rezone  
property



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## Permitted action by zoning board of appeals

Town Law  
267-b  
  
Village Law  
7-712-b  
  
General City Law  
81-b

- No reasonable return
- Unique circumstances
- No self-created hardship
- No alteration to essential neighborhood character

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### 1. No reasonable return

Applicant must demonstrate the land is not capable of making a reasonable return with:

- any permitted use
- a current lawful nonconforming use
- any use currently allowed by previous use variance

ZBA must consider property as a whole, not just the portion which is the subject of the application

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### Reasonable rate of return

- No hard & fast numbers
  - Depends on particular facts of application
- ZBA determines
  - They do not have to agree with expert's opinion



Petruzzelli v. Zoning Bd of Appeals of the Village of Dobbs Ferry, 181 A.D.2d 825 (2d Dept. 1992)

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### 2. Unique circumstances

- Parcel is only, or one of very few, affected to the extent zoning would create a hardship
- "Uniqueness of land" causing plight, not "uniqueness of the plight of the owner"



- Other circumstances:
- Physical features
  - Historic or architectural features
  - Adjacent uses

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### 3. Self-created hardship

- Examples:
  - Request relief from restrictions which existed at time of sale;
  - Owner bound by zoning restrictions, even without knowledge of them;
  - Spending money on project not allowed by zoning



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### 4. Neighborhood character

- Is proposed use consistent with existing development?
- Is there significant adverse impact on neighborhood or community?



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### Nonconforming uses

- Legally existed prior to current zoning; "grandfathered"
- Do not need use variances to continue
- For use variances on properties with nonconforming uses, applicants must prove no reasonable return on allowed uses & nonconforming uses
- "Grandfathered" isn't necessarily permanent: abandonment, amortization



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# Spot Zoning

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# Spot Zoning

- To rezone one or a few parcels for the benefit of the owners and the detriment to those around them



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# Spot Zoning

"...the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community"

-Rodgers v Village of Tarrytown,  
New York Court of Appeals, 1951

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### Rustuccio v City of Oswego

2014, Appellate Division, 4<sup>th</sup> Department

- Court found rezoning for hotel underwent review by county planning staff, city planning board, city council planning committee before council acted.
- Said "strong presumption of validity" exists in zoning amendments and that such amendments will not be disturbed unless they're found to be in conflict with comprehensive plan
- Court found legitimate interest consistent with 2020 Vision Plan

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### Hart v Town Board of Huntington

2014, Appellate Division, 2<sup>nd</sup> Department

- Rezoning of tract from 1 unit per acre to Retirement Community. Proposal for 66 units, several affordable.
- "Master Plan" included goals of maintaining low density, but acknowledged changing demographics and need for diversity of housing, including affordable and senior housing
- Proposal higher density but preserved open space and provided senior and affordable housing.
- Court found rezoning consistent with overall priorities of comp plan. Not spot zoning.

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### VTR FV, LLC v Town of Guilderland

2012, Appellate Division, 3<sup>rd</sup> Department

- Zoning amendment expanded definition of "nursing home." Owners of nearby assisted living facility challenged, fearing competition.
- Court said no standing because zoning does not protect business interests.
- Still ruled amendment does not constitute illegal spot zoning. Original enactment was to "encourage the creation of mixed use neighborhood."
- Changed definition furthered purpose of original law.

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**Rotterdam Ventures v Town Board of Rotterdam**  
2012, Appellate Division, 3<sup>rd</sup> Department

- 2008 purchase of former military property zoned industrial but immune from zoning and used for multifamily housing. New owner requested town update comprehensive plan and rezone for multifamily housing.
- Neighbor operating industrial park charged spot zoning.
- Court said factors considered for spot zoning: consistency with comp plan; compatibility with surrounding uses; likelihood of harm to surrounding property, etc.
- Court agreed with town: proposal would benefit community.

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**Riya Finnegan LLC v Township of S. Brunswick**  
2008, Supreme Court of New Jersey

- Developer filed site plan application for professional office and retail buildings that met requirements of C-1 zone.
- Residents asked township to rezone to Office, arguing that because area was already developed more retail would create more “traffic, noise, dust, and pollution.”
- Council amended zoning, admitting that it was inconsistent with the “Master Plan” but added it would “prevent an intensification of traffic congestion” that would result from further commercial development.

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**Riya Finnegan LLC v Township of S. Brunswick**  
**Reverse Spot Zoning**

- Supreme Court of New Jersey held action was 1) arbitrary, capricious, and unreasonable; and 2) impermissible spot zoning.
- Court’s test: intent and effect of action
  - If intent or action was to further comprehensive planning, it was planned zoning.
  - Intent and effect in this case was to benefit the neighboring community by rezoning one parcel differently than those around it, to the detriment of the owner: reverse spot zoning

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# Illegal Use Variances

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## Elam Sand and Gravel v Town of West Bloomfield 2016, Appellate Division, 4<sup>th</sup> Department

- Owner of a mine leased land when mining was permitted.
- Town passed a moratorium on sand and gravel mining before SUP was issued and ultimately prohibited mining in low density zone in which property was located.
- Owner appealed to the ZBA for a use variance. ZBA denied: applicant failed to prove 3 of 4 factors.
- Court found test was properly applied and upheld.

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## Defeo v ZBA of the Town of Bedford 2016, Appellate Division, 2<sup>nd</sup> Department

- Site plan for car wash with express lube and detail mostly in "Roadside Business" with a portion in "Residential ½ Acre"
- ZBA granted area and use variances.
- Neighbor challenged. Supreme court found use variance not supported by a rational basis.

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**Defeo v ZBA of the Town of Bedford**  
2016, Appellate Division, 2<sup>nd</sup> Department

- Appellate court agreed: hardship must be demonstrated by dollars and cents proof. Owners: without use variance property available for business was reduced by 27%, for retail by 35%, and for office 53%
- Court: Developers entitled to reasonable, not necessarily most profitable, return.

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**Nemeth v Village of Hancock ZBA**  
2015, Appellate Division, 3<sup>rd</sup> Department

- Nonconforming industrial manufacturing business expanded unlawfully. Court issued an injunction prohibiting further expansion on the site for nonresidential purposes.
- Owners appealed for and were granted a use variance.
- Neighbors challenged, arguing owners hadn't proven property couldn't make a reasonable return.

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**Nemeth v Village of Hancock ZBA**  
2015, Appellate Division, 3<sup>rd</sup> Department

- Owners suggested that it would cost much more to find a site of similar size and that they would "go out of business" without the use variance.
- Appellate court determined claim did not constitute "dollars and cents" proof that the property could not realize a reasonable return.
- Lacking that proof, court argued, the use variance should not have been granted, and invalidated the use variance.

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**Hejna v Board of Appeals, Village of Amityville**  
2013, Appellate Division, 2<sup>nd</sup> Department

- Application for an autobody shop on a parcel in two zones.
- Special use permit granted for expansion. Use variance granted for parking in residential zone.
- Neighbors appealed.
- Appellate court upheld special use permit for expansion in zone in which use was among permitted special uses but annulled use variance because applicant failed to prove inability of property to make a reasonable return.

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**Edwards v Davison**  
2012, Appellate Division, 2<sup>nd</sup> Department

- City of Mount Vernon ZBA granted use and area variances for a business not permitted in one of the general business zones.
- When challenged, court found failure to demonstrate the owner was unable to make a reasonable return on any of the permitted business uses in the zone.

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**Vomeo v City of New York**  
2009, Appellate Division, 2<sup>nd</sup> Department

- City's board of appeals granted a use variance for the construction of a commercial building on a parcel zoned residential.
- Court of Appeals reversed decision of the appellate court, finding the uniqueness factor was not satisfied.

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### Washington Avenue Armory v. City of Albany

- “Rave” style music events in historic armory
- “Auditoria” principally permitted use in C O District; no definition in zoning
- BZA: dictionary definition, fixed seating; use akin to “nightclub” in zoning
- Appellate Division ruled City must define “auditoria” in petitioner’s favor
- Council could simply have amended zoning, but for use variances granted




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### Use variance never acted upon

- Use variance granted for a tavern 15 years ago
- Tavern never opened
- Does variance go away?
- Only if a provision exists in zoning that a variance not acted upon expires within X months (usually 12)
- Rehearing?




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### An informal survey

- Court reversal of denial of area variances: many
- Court upholding denial of area variances: many
- Court reversal of grant of area variances: a few
- Court reversal of grant of use variances: a few
- Court upholding grant of use variances: fewer
- Court upholding denial of use variances: many
- Court **reversing** denial of use variances: **none**

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