

# Best Presentation Practices for Gross Floor Area Variances

State law authorizes municipalities to enact zoning laws to protect and preserve public health, welfare, and safety.<sup>1</sup> Not every parcel of property conforms in all respects to the zoning laws as enacted. Therefore, state law also authorizes zoning boards to grant variances from the application of zoning laws on a case by case basis. Courts long ago recognized that zoning boards are the “safety valve” of zoning code enforcement.<sup>2</sup> Zoning variances are characterized as use or area variances. This article focuses on certain types of area variances.

## Balancing Test for Area Variances

When deciding applications for area variances, zoning boards are required by statute to apply a five-factor balancing test that weighs the benefit to the applicant if the variance is granted, against the detriment to the health, safety and welfare of the community.<sup>3</sup> This test applies uniformly to all area variances. The statutory test for area variances does not make any distinctions between dimensional variances, such as property line setback requirements, and bulk variances, such as gross floor area or lot coverage. Although the five-factor test remains constant regardless of the type of variance sought, in practice, bulk variances often receive a heightened level scrutiny from boards.

Zoning boards tend to give more scrutiny to bulk variances, like gross floor area, than other area variances. Knowing this will help practitioners appropriately prepare for bulk variance cases.

Gross floor area is a measurement of the square footage of a dwelling, garage, shed, and any other structure or improvement included under a particular section of a municipal code. Nearly every municipality on Long Island has adopted restrictions on the amount of gross floor area that an owner can build on a lot of a particular size. Often, GFA limitations are codified in the form of a floor-area-ratio restriction, or “FAR.” By way of example, given a 10,000 square foot parcel and a zoning code with a 30% FAR restriction, an owner is permitted to construct a dwelling containing 3,000 square feet of gross floor area as of right. What constitutes or is defined as “gross floor area” varies by municipality. Moreover, each municipality usually has several residential zoning districts, each with a different FAR.

## McMansions

The reason local zoning boards give more scrutiny of GFA variances likely stems from the first prong of the five-factor balancing test under N.Y. Town Law § 267-b(3)(b), “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.”<sup>4</sup> Zoning regulations exist to preserve and protect the integrity and character of neighborhoods. Zoning boards want to protect neighborhood character by denying variances perceived as undermining that central goal. In practice, zoning boards are sensitive to GFA variances given the general perception that such variances



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result in “McMansions.” “McMansion” has become a pejorative term that refers to large, over-built residences that often lack desirable architectural features and frequently replace the much more modest homes that preceded them.

The perceived proliferation of McMansions has prompted municipalities to enact legislative changes designed to combat against a perceived threat to the open, suburban community character. FAR restrictions have a similar effect in curtailing McMansions by adjusting the gross floor area of a home in proportion to the size of a lot.

Some municipalities have taken further steps to address the rise of McMansions. Take, for example, the Town of Oyster Bay. In 2005, Oyster Bay adopted a six-month moratorium on issuing any variances for new residences within the Oyster Bay Hamlet Moratorium Study Area.<sup>5</sup> Oyster Bay was concerned with the “potential impact of new development and/or redevelopment of residential properties in the Oyster Bay Hamlet on the environment and on the character and intensity of new development in existing residential neighborhoods.”<sup>6</sup> Like other towns and villages, Oyster Bay was concerned with teardowns and the construction of McMansions in their place. After a lengthy study period, the Town enacted the “Oyster Bay Hamlet Residence Design District Overlay,” in 2007, which regulates GFA on a sliding scale based on lot size; the maximum permitted GFA incrementally increases as lot sizes increase.

## Greater Scrutiny for GFA Variances

Courts have, in some respects, acknowledged a zoning board’s right to apply greater scrutiny to GFA variances.<sup>7</sup> Preliminarily, courts have elucidated three rules a zoning board must abide by when handling GFA variance applications: (1) a zoning board has broad discretion in considering an application for a GFA variance;<sup>8</sup> (2) a zoning board cannot make an illegal, arbitrary or capricious decision;<sup>9</sup> and (3) if the zoning board’s decision has a rational basis, then the court will affirm the board’s decision, even if a contrary determination is supported by the record.<sup>10</sup>

Applying these rules, the courts have held that if a zoning board had any objective, factual basis to believe that an “undesirable change” to the neighborhood would result from granting a GFA variance, then the zoning board had a rational basis in the record for denying it.<sup>11</sup> In other words, when a zoning board rationally concludes that a GFA variance will disrupt the “har-

mony” or “status quo” of the neighborhood’s character, the courts will not overrule the zoning board’s decision.<sup>12</sup> In this way, courts show deference to a board’s determination. The courts have justified taking this position by ruling that a “critical aspect” of the zoning board’s responsibility is to preserve the neighborhood and community when balancing the interests of the municipality and the property owner.<sup>13</sup>

With the above in mind, a zoning attorney needs to take special care in preparing a presentation for a GFA variance case. First, the zoning attorney should review the plans to be presented to the zoning board and work with the client and the architect to try and reduce the GFA variance to the smallest amount of relief necessary to accomplish the client’s goal for the project. Boards will often look for applicants to make concessions on the size of their new home or extension and may even question the purpose or need for specific rooms or amenities in the design plans.

Second, the attorney should work with the architect to ensure that there are sufficient architectural design features included in the plans to soften the curb appearance of the proposed dwelling and provide a richer architectural façade.

Third, the attorney should review the building department’s records on other, similarly situated homes in the surrounding neighborhood. It is important to know and show the board, on the record, whether other homes in the neighborhood have received a similar GFA variance, or, in the alternative, have applied for, and were denied a GFA variance. Overall, it is essential that your client’s plan comports with the prevailing character of the surrounding neighborhood and that your presentation to the board addresses community character (often through testimony of a land use planner).

## Advice for Practitioners

It is clear that Long Island zoning boards will continue to scrutinize GFA

variances. It therefore falls to zoning practitioners to understand the nuances of how to approach obtaining a GFA variance for their clients. That being said, zoning boards usually have a deep understanding of their community. Supreme Court Justice William Douglas said it best when he remarked, “I’ve often thought that if our zoning boards could be put in charge of botanists, of zoologists and geologists, and people who know about the earth, we would have much more wisdom in such planning than we have when we leave it to the engineers.”<sup>14</sup>

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1 *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 118 (1949).

2 *In re Cobb*, 128 Misc. 67, 67 (Sup. Ct. 1926); *New York City Housing Authority v. Foley*, 32 Misc. 2d 41, 47 (Sup. Ct. 1961).

3 Town Law §267-b (3)(b).

4 *Id.* Town Law §267-b (3)(b)(1).

5 Fredrick P. Clark Associates, Inc., *Oyster Bay Hamlet Moratorium Study*, October 2006 at 1. The Oyster Bay Hamlet Moratorium Study Area was approximately 405 acres. *Id.*

6 *Id.* at 12.

7 See *Matter of Davydov v. Mammina*, No. 010314/10, 2010 WL 4567831 (N.Y. Sup.), *aff’d* 97 A.D.3d 678 (2d Dep’t 2012); *Chou v. Board of Zoning Appeals of the Town of North Hempstead*, No. 16300/09, 2010 WL 620644 (N.Y. Sup.).

8 *Zanieuski v. Zoning Board of Appeals of Town of Riverhead*, 64 A.D.3d 720, 722 (2d Dep’t 2009).

9 *Aliano v. Oliva*, 72 A.D.3d 944, 947 (2d Dep’t 2010).

10 *Retail Property Trust v. Board of Zoning Appeals of Town of Hempstead*, 98 N.Y.2d 190, 196 (2002).

11 See *Kaiser v. Town of Islip Zoning Board of Appeals*, 74 A.D.3d 1203, 1204 (2d Dep’t 2010); *Kessler v. Town of Shelter Island Planning Board*, 40 A.D.2d 1005, 1005 (2d Dep’t 1972); *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 772 (2d Dep’t 2005).

12 See, e.g., *Matter of Davydov v. Mammina*, No. 010314/10, 2010 WL 4567831 (N.Y. Sup.), *aff’d* 97 A.D.3d 678 (2d Dep’t 2012); *Chou v. Board of Zoning Appeals of the Town of North Hempstead*, No. 16300/09, 2010 WL 620644 (N.Y. Sup. Ct.).

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14 Justice William Douglas, *Remarks at a conference sponsored by the American Historical Cultural Exchange Institute*, Harriman, NY, (Feb. 17 – 19, 1967).



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