The "Reasonable Return" Standard – An Antiquated Approach to the Use Variance Burden of Proof

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Since there has been zoning, there have been requests from property owners to bend the strict rules which govern how one may use their property. The specific dictates as to what kind of operations or uses may be undertaken in zoning districts have often been in conflict with property owners and other developers seeking to push the limits of what is suitable within a given area. New York's statutory standard for allowing uses which are typically prohibited in a designated zoning district is a particularly burdensome standard to meet. This is not unusual since obtaining a "use variance" is, and should be, the most difficult type of relief to secure from a land use board. In old-fashioned zoning parlance, a use variance lets the "pig in the parlor."[2]

Despite the seeming sagacity in making it difficult on property owners to obtain a use variance, the state legislature has clung to the standard of review which has guided decision makers since the advent of zoning in the beginning stages of the 20th Century. Of course, old does not always mean bad. Many times, it is quite the contrary. However, when it comes to use variances, the vestigial standard in place suffers from an ancient, myopic view of ordered land use development. In particular, it is the first prong of the four-part use variance test which has created this anomalous situation. This standard asserts that to obtain relief, an applicant must prove that she may not achieve a "reasonable return" on her property unless the use variance approval was granted. This arbitrary requirement offers nothing towards sound planning considerations, and runs afoul of the underlying purposes of zoning regulation. Originally intended to supply legitimacy to zoning itself, which is now entrenched as the definite way to

regulate land use, the "reasonable return" standard has outlived its useful life as a means to evaluate use variance applications.

The Use Variance Standard

In 1992, the New York Legislature brought the decades-old line of cases regarding use variances under the umbrella of statutory authority.[3] New York General City Law § 81-b(3), Town Law § 267-b(3) and Village Law § 712-b(3) set forth the burden that must be met by any applicant seeking to operate a use which is prohibited under the applicable municipality's zoning requirements. Under these statutory frameworks, a "use variance" is defined as "[t]he authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations."[4] In order to be granted a use variance, an applicant must show that the zoning limitations on the property at issue have caused an "unnecessary hardship."

"Unnecessary hardship" is established by meeting a four-pronged test, which encompasses the following standards:

> (1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
> (2) 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) the requested use variance, if granted, will not alter the essential character of the neighborhood; and
> (4) the alleged hardship has not been self-created.[5]

Prongs 2 through 4 are generalized standards which allow zoning boards to make a determination on a use variance application by taking into consideration why the particular property is of such an unusual nature which physically lends itself to a use typically prohibited, how the proposed

use would fit within the community and whether the property owner has caused the need for the variance as opposed to the parcel itself. However, it is standard 1, the "reasonable return" standard, which is most problematic in the modern age of land use development. This built-in requirement appears to sit in the number 1 position to remind municipalities that the State does not trust its localities, forcing them to abide by this added layer of bright-line, "dollars and cents" review, before they may take a deeper look at the effects of the proposed use on the surrounding community.

The "Reasonable Return" Prong in Practice

Under the "reasonable return" prong, the general rule is that: "[t]he applicant is required to demonstrate the impossibility of realizing a reasonable return by disproving the possibility of realizing a reasonable return for every permissible use, whether those uses are permitted by zoning ordinances, nonconforming use, or a previously granted variance."[6] This showing must be made with "dollars and cents" proof.[7] What "dollars and cents" proof means has varied amongst the decisions issued by the State's courts, but there are a few basic dictates which guide any such review. First, any proof must rely on actual data.[8] In conjunction with this component, the data must be supported with reasoned expert analysis interpreting it.[9]

The Evolution of the "Reasonable Return" Prong

But where did the "reasonable return" approach come from? And why was "dollars and cents" proof required? Digging a bit deeper into the history of the "reasonable return" standard, it may not be so definitive that such proof should be required when considering a use variance. To explore this question, the starting point is 1939, within *Otto v. Steinhilber*,[10] which is often cited as the genesis of the use variance standard in New York. In *Otto*, the property owner

wished to construct a skating rink on a large property in the Village of Lynbrook, in Nassau County, Long Island, which was zoned commercial to a depth of 150 feet, and beyond, residential. The Court ultimately ruled that the property owner provided insufficient evidence for the variance relief. But how did the court arrive at a suitable standard? Based on the discussion in the decision, it appears that the Village Law's then-enacted use variance standard had some generalized language regarding "unnecessary hardship," which continues to endure in the current statute.

However, looking for more guidance, the Court enlisted a contemporary zoning treatise, Bassett on Zoning,[11] to set forth the standard New York has altered only slightly since:

> Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.[12]

From this point, the standard was apparently born for the courts. Relying on the basic tenet that zoning code amendments should be left in the hands of municipal legislative bodies, the *Otto* Court established the primacy of a "reasonable return," leaving comprehensive planning as a secondary consideration.

By 1958, the use variance standard of *Otto* had taken hold. In *Crossroads Recreation v. Broz*,[13] the Court outlined the above standard, and moved to the question of "reasonable return." Therein, the applicant, a new tenant of the subject parcel, agreed to continue the existing gasoline service station use if approval were granted to enlarge and modernize the operation. The station had been operating on the property for approximately 30 years, and had not been substantially

improved in that time. However, ten years earlier, the Village of Mount Kisco had amended its zoning ordinance to prohibit gas stations in the applicable underlying zoning district. Therefore, the new applicant needed to seek a use variance to permit the upgrades to the nonconforming use. The main argument for the new operator was that in light of the new competitor station across the street, which recently was granted approvals to modernize its facilities, the proposed renovations were necessary in order to "'face the competition.'"[14] The new applicant offered little in the way of hard proof that a reasonable return could not be garnered from one of the permitted uses at the property. From this, the Court provided a laundry list in the instance before it of what types of information it wanted to see in order to stamp its imprimatur on a showing of a lack of "reasonable return," outlined as follows: (1) the purchase price of the subject property; (2) the current appraised value of the parcel; (3) customary expenses to maintain the site; (4) the tax burden; (5) the mortgages and other encumbrances remaining on the parcel; (6) any income derived from the site; and (7) other relevant information particular to the proofs involved.[15]

The Court then noted:

> [t]he only 'dollars and cents' proof offered – and, because it was isolated, it was indeed meaningless and innocuous – was that [the property owner] presently realizes a rental of $150 per month from [the new operator] under its one-year lease of the gasoline station and that, if the variance be granted, [the new operator] would spend $40,000 to $50,000 to erect a modern and much larger gasoline station, and would then pay [the property owner] a renal of $200 per month for 20 years.[16]

The court identified the "fatal omission" as "[n]o underlying facts adduced which permitted of the conclusion that the gasoline station of petitioners was – as a result of and after the modernization of [the competitor's] station – a losing proposition."[17] It is this analysis which

would become the focal point of the Court twenty-three years hence, and which would help to crystallize the "reasonable return" standard we know today.

In 1981, in *Village of Fayetteville v. Jarrold*,[18] the Court of Appeals revisited the issue of "reasonable return." In *Village of Fayetteville*, the property owner wished to renovate an existing, dilapidated barn in which he would operate a small furniture and reupholstering business. Because the barn was located in a residential zone, the property owner required use variance relief. The zoning board hearing the case found compelling the plan to refurbish a century-old structure that would preserve its historic exterior, with some retrofitting inside the building. Therefore, the board found that a strict application of the Village's zoning requirements to be an "unnecessary hardship" on the owner.[19] In order to make the site appropriate for a permitted residential use, significant additional work would be required to retrofit the site, not just the barn. Expert testimony demonstrated that the parcel was on an "'exceptionally steep'" slope, and sat on a high water table. A stream at the edge of the property was at risk of overflow. Therefore, substantial fill would be required to rectify this problem, which would make it cost prohibitive to realize a reasonable return on the property.[20] Despite all of these considerations, the majority believed that the record was devoid of hard proof of what a "reasonable return" on this property would be, and therefore it was "pure speculation" whether the property owner had met this standard.[21]

In a thoughtful dissent, former Chief Judge (then Associate Judge) Sol Wachtler argued that the majority overstepped its charge in conducting a judicial review of the zoning decision, stating that "[i]t has never been the law that there must invariably be a submission of 'dollars and cents proof' to support the grant of a variance."[22] Justice Wachtler argued that the majority, in

relying upon *Crossroads Recreation*, improperly extended the "dollars and cents" analysis set forth therein. Wachtler asserted that the "dollars and cents" approach in *Crossroads Recreation*:

> [w]as used [wherein] the board had determined that the proof submitted was not sufficient to justify granting the variance and in which we wrote to sustain the board's determination; we were not there addressing a situation in which, as here, the board had found the evidence submitted acceptable for its purposes.[23]

Essentially, Wachtler was arguing that the Court went too far, and should have relied on the discretion of the board in deciding whether there was enough evidence to support the variance. Wachtler continued by setting forth the general deference granted to land use boards, and the seemingly contrary result in the majority's opinion:

> Zoning board members are not expected to be theoreticians or doctrinaire specialists, but rather are representative citizens acting in the community interest through commonsense accommodations of conflicting community pressures. . . . For this reason, where a landowner seeking a variance attempts to show to the municipal body that without it he cannot obtain a reasonable return on his property, there is no need to impose rigid and technical constraints on the type of acceptable proof. To do so denigrates the local municipal body's expertness and familiarity with local conditions.[24]

Wachtler therefore called the new bright line rule "[a] rigid insistence on submission of numerical financial data."[25]

In the thirty years since *Village of Fayetteville*, the State's courts have followed this ruling, and applied the facts of the cases before them to the general requirement for competent financial evidence of a lack of return. For instance, in *SoHO Alliance v. New York City Bd. Of Standards and Appeals*,[26] the Court of Appeals found sufficient "dollars and cents" proof where a property owner presented financial evidence that a 9.9% rate of return was "reasonable" for the property, and that no permitted or nonconforming uses would yield such a profit.

Likewise, the Appellate Division's four departments have continued to hand down a collection of cases applying the "reasonable return" standard. For instance, in the Second Department, in *Westbury Laundromat, Inc. v. Mammina*,[27] the court found that the property owner's opining of a potential modest return on the rental of the property for a conforming use other than the nonconforming laundromat at the parcel was insufficient to demonstrate a lack of "reasonable return." In the First Department, in *West Village Houses Tenants' Assoc. v. New York City Bd. Of Standards and Appeals*,[28] the court, in applying a slightly different standard under the New York City Zoning Resolution, which does not require that a property owner show that no reasonable return could be derived from any permitted use (particularly in this case where there were 300 to choose from), still found sufficient proof of the absence of a reasonable return. In the Third Department, in *Sullivan v. City of Albany Bd. of Zoning Appeals*,[29] the court found sufficient proof from a dentist that wished to continue and expand his nonconforming business where the alternative was a costly conversion of the building to strictly residential use. Courts have, and continue to undertake these highly fact-sensitive analyses. However, taking a closer look, these "reasonable return" reviews seemingly have little to do with the appropriateness of the proposed use in the specific surroundings where it is proposed, which would seem to be the real purpose of zoning and land use planning.

"Reasonable Return" and Planning

It is true that prong (3) of the use variance standard, "the requested use variance, if granted, will not alter the essential character of the neighborhood," takes into account the surrounding community, as well as planning considerations, in reviewing a particular application.[30] However, the "reasonable return" requirement suggests in its very inclusion that planning is not enough in order to grant this level of relief. It also speaks to the general lack of

respect for planning undertaken in many New York municipalities. Further, instead of relying on a reasoned review of the surrounding area, and how the proposed use would fit in with the existing character of the neighborhood, the "reasonable return" prong essentially neutralizes this analysis, requiring the rather arbitrary determination of whether the property owner/applicant cannot find something else that would be profitable on the site. It is not uncommon that land use boards attempt to refer back to prior applications for similar uses, or even suggest their vision for the use of a particular property, which do not have a bearing on the actual application before them. The "reasonable return" prong actually allows this questionable and often prejudicial practice, confirmed by legislative dictate. This prong shifts the analysis from the particular use being proposed, to an insurmountable challenge to the municipality's ordinance, and a consideration of a potential litany of other mythical applications.

Basically, no matter the use variance standard, the basic assumption is that the zoning ordinance has properly planned and designated the appropriate permitted uses in the area. However, under the "reasonable return" standard, there is no room to question whether the zoning ordinance is right in all instances. It is simply assumed that they have zoned properly, even if conditions have changed in the area, and the ordinance has not been dusted off and reconsidered in decades. There is no consideration of changed circumstances, or the evolving needs of the community. Through such an analysis, it might actually question the continued sagacity of the zoning ordinance as it exists, rather than blindly concluding that the zoning ordinance is just fine how it is.

In New York, comprehensive planning generally receives short strife, with a memorialization of this principle within its statutes. Currently, New York Law does not require municipalities to prepare a master plan for its community. New York Town Law 272-a(1), and

its companion New York Village Law § 7-722(1), extoll the virtues of long-term community planning. However, at each respective subsection (1)(h), the statutes conclude, "[i]t is the intent of the legislature to encourage, *but not to require*, the preparation and adoption of a comprehensive plan." (Emphasis added.)[31] Recently, the Long Island Regional Planning Council, formed in 2008 pursuant to New York State General Municipal Law § 239-h to offer a forum for more comprehensive zoning, lost much of its funding from Nassau County, one of the two counties supporting the Council, due to budget cuts.[32] Although the Council is seeking to continue to operate using other funding sources, the Council's predicament is symptomatic of the priority of planning in the State.[33] The "reasonable return" standard perpetuates this lack of esteem held generally for comprehensive planning, relegating to the back seat a board's consideration of whether new uses within certain zones may actually be appropriate based on changing circumstances in the community.

Reconsideration of the "Reasonable Return" Standard

Notwithstanding the continual following of the *Village of Fayetteville* "dollars and cents" standard, what if Judge Wachtler was right? What if "dollars and cents" proof is not necessarily required in order to meet the "reasonable return" prong? At its core, this position calls into question the importance of the "reasonable return" prong, which is oftentimes the reason practitioners advise their clients against seeking a use variance from a land use board in New York. It is a tough road to prove that the typical laundry list of uses within a particular zoning district would not return a reasonable profit, when factors such as financial loss, whether there is a more profitable prohibited use available and absence of a willing buyer/tenant are typically insufficient to meet the "reasonable return" prong.[34] If hard "dollars and cents" proof is not required to meet the "reasonable return" prong, then perhaps this standard would not be the

threshold impediment that it currently is, and maybe use variances would be more feasible – provided of course planning considerations can establish the need for the requested relief.

Further underlying Judge Wachtler's dissent in *Village of Fayetteville* is an undercurrent of discomfort with the "reasonable return" prong itself. Judge Wachtler spent the remainder of his opinion outlining why the variance should have been granted to the property owner. In his factual analysis, Judge Wachtler strained to remain affixed to the "reasonable return" standard, arguing that the "dollars and cents" requirement was the issue that prevented boards from exercising its proper discretion. However, in doing so, he also questioned the underlying standard itself. Focusing on the proposed use, how it would fit in with the surrounding community and its history, and the unusual nature of the property, he undertook a fuller, planning-oriented view of the proposal, rather than focusing on an analysis of "reasonable return" which does not evaluate the actual merits of the application itself. Essentially the standard requires an applicant to step away from her proposal, and, regardless of what is being proposed, that there is nothing else permitted under the applicable zoning code which would somehow be better.

Interestingly, the *Village of Fayetteville* majority attempts to justify the "reasonable return" standard by not touting its importance, but rather by saying that municipal boards cannot be relied upon to evaluate the merits of each application:

> [a]bsent a uniform and rigorous standard, it is apparent that even a well-intentioned zoning board 'by piecemeal exemption which ultimately changes the character of the neighborhood . . . [may create] far greater hardships than that which a variance may alleviate.' . . . Unjustified variances likewise may destroy or diminish the value of nearby property and adversely affect those who obtained 'residences in reliance upon the design of the zoning ordinance' [ ]. These evils, not unlike those associated with the

> universally condemned practice of spot zoning, have been zealously guarded against by this court.[35]

The Court sets forth this rather anti-home rule explanation without even considering whether the board in *Village of Fayetteville* committed the ills set forth therein. It simply relied on the "reasonable return" standard, which does not actually evaluate the application itself. Also, if the Court is charged with preventing municipal abuses, why is the "reasonable return" analysis required to perform this duty? Essentially, the Court is making an argument for a more comprehensive planning approach under the guise of the "reasonable return" standard.

Just like in *Village of Fayetteville*, in *Crossroads Recreation*, the "reasonable return" analysis prevented the Court from evaluating the application itself. Under the standard, courts have to simply ignore the facts provided, and strain to adhere to a requirement which may not be in the best interests of a community. Moreover, it is contrary to the hallmark of deference granted to land use boards in all other cases. In *Crossroads Recreation*, the Court does note that the property is an oddly-shaped, triangular site which presents difficulty in operating a permitted office or retail use because of parking constraints, that the gasoline station across the street received approvals to modernize, and that the applicant is left with an outmoded facility which lacks restrooms and areas to perform basic car maintenance services.[36] Despite all of this, the Court focused on the "dollars and cents" proof.[37] As a result of the reduction in sales due to the new modern station across the street, the Court concluded that "[t]here is no basis for the conclusion that its income was less than a reasonable return."[38] For the Court, this was enough.

The decision in *Crossroads Recreation* is less anomalous than *Village of Fayetteville*, however, because the *Crossroads Recreation* Court upheld the board's decision on the absence of sufficient proof. In *Village of Fayetteville*, the majority overturned a board's decision to grant

the variance based on what the board viewed as sufficient evidence. This result is part of the reason for Judge Wachtler's vehement dissent. Nonetheless, the *Crossroads Recreation* majority still ignored the reality of the situation in which the applicants have been placed in operating a gasoline service station at the parcel at issue. Therefore, Judge Van Voorhis offered a dissent similar to Judge Wachtler's tone, but with a different spin.[39] Judge Van Voorhis, swayed by the facts of the situation, particularly the new store across the street, strained to argue that the applicants were not seeking to expand an existing nonconforming use (which they clearly were). However, in doing so, he took a more comprehensive review of the situation. Swayed more by his pro-growth leanings than necessarily sound planning, he nonetheless captured how the newly refurbished station would fit in with the surrounding community:

> [t]he renovated premises would be better looking, would conform to present day standards and would be preferred by the neighbors, judging from the circumstance that none of the people who appeared at the public hearing objected to the issuance of this permit and many spoke in favor of it. Although similar modernization permits have been granted to competitors in the vicinity, permission has been denied to appellants to do likewise.[40]

The majority simply stopped at the "dollars and cents."

"Reasonable Return" and Takings

Another interesting point about the *Village of Fayetteville* and *Crossroads Recreation* cases is that the issue of "confiscation" is raised in both. Each of these cases pre-date the more recent jurisprudence from the U.S. Supreme Court on "takings law," or analyses under the Fifth Amendment of the U.S. Constitution which provides, in relevant part, that "nor shall private property be taken for public use, without just compensation." In *Village of Fayetteville*, the majority noted that the standards for use variances and for establishing whether a zoning ordinance is confiscatory, and therefore void, are similar. The Court points to *Williams v. Town*

of Oyster Bay,[41] as the point when the variance standard was actually applied to a confiscation question. It then goes on to explain:

> [t]he similarity of the two rules has created confusion, leading some to contend that dollars and cents proof of hardship is required only where a zoning board denies a variance. Under this view, the two standards would be commingled and denial of a variance would be annulled where the landowner showed that he could not receive a reasonable return under any permissible use – i.e. that because of the unique nature of the particular parcel, the current zoning is confiscatory. By contrast, the zoning board would be permitted to grant a variance on some lesser showing.[42]

The Court then continues by confirming its commitment to the "reasonable return" standard, and its discouragement in the grant of variances.[43] In *Crossroads Recreation*, it is within the dissent where the parallels between confiscation and nonconforming uses are discussed. "There is a constant urge driving planners and officials of municipalities to undermine the rule of law permitting the continuance of pre-existing uses, and to confiscate them under the guise of the police power."[44] Later, Judge Van Voorhis noted, "[c]onfiscation of a prior nonconforming use by denial of this permit is the principal ground for granting this petition. . . ."[45]

It is ironic that both cases discuss the concept of "confiscation" in the context of the "reasonable return" standard. The seeking of a variance is not about confiscation at all. They are two very distinct concepts. As previously stated, the State statutes define a "use variance" as "the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations."[46] The purpose of the "reasonable return" standard, according to the Court of Appeals, is to prevent variances from being issued. In contrast, the purpose of the takings clause, in the regulatory context, is the opposite, i.e., to prevent the government from being too restrictive on what a property owner can

and cannot do. But can the same type of "dollars and cents" analysis serve both purposes? Even if it can, is this where the inquiry should lie?

The state statutes set forth as the general purposes of municipal zoning regulations:

> For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes. . . .[47]

If the point is for "promoting the health, safety, morals, or the general welfare of the community," what is the purpose of "dollars and cents" in making this determination? With the "reasonable return" standard, there is essentially no deference granted to local boards until this threshold is met; a threshold that does not even relate to any of the elucidated purposes of zoning.

Proponents of the "reasonable return" standard would argue that if the circumstances of community have changed to the extent that the general character were to permit additional types of uses therein, then the local governing body is charged to amend the ordinance to allow these uses. However, maybe it is not appropriate for the entire zoning district to permit the use, and instead, it would be more appropriate for the use variance mechanism be employed. This is particularly true in the case of a nonconforming use, where an applicant is merely seeking to update the use to comport with modern times, like in the *Crossroads Recreation* instance. To require that an entire zoning district be amended to permit the use may be overbroad in application, in that the single property seeking the variance may be appropriate for the use, but not the entire district – the proverbial howitzer where a carbine would be more appropriate. But

this situation can never reach discussion under the current statutory standard, unless it is proved that other uses, which have never been conducted at the parcel, and would never have been contemplated be to constructed there, would not yield a tidy enough profit. Only after overcoming this extraneous red herring can the true consideration of whether a use is appropriate at the site be discussed.

Conclusion

The "reasonable return" prong under the New York State statutory framework for municipal zoning is a contraption that has reached the end of its useful life. With its origins in the earliest days of zoning, it no longer meets the needs of dynamic, mature settlements throughout the State. The origins of the "reasonable return" standard arise from the early days of zoning, where it was meant to apply to existing, built-up municipalities that would have to struggle with the new dictates of zoning ordinances envisioning what these locales "should" look like. In this setting, where there were countless new nonconforming uses on the zoning map, there was a need to provide property owners with options once the issue arose to either expand the existing nonconformities, or move on to other uses. By having the "reasonable return" standard, it added another layer to the process, outside of simply questioning the new zoning requirements. It provided further legitimacy to zoning itself, without putting the entire onus on municipalities grappling with how to order their land masses. Now that we are almost a century into the zoning experiment, it would seem this prophylactic protection is no longer needed, as municipalities have embraced zoning, and have a more astute picture of where their communities came from, where they are today and where they are headed tomorrow. Handing this power to the State's land use boards would create a large responsibility, but also a great opportunity. The door would be able to open to an increased focus on planning as the guide to reviewing all land

use applications, not just those seeking use variances. The concern that a flood of variances will be granted is averted by the enormous responsibility placed on land use boards, and their desire, and legal mandate, to only grant use variances in the most worthy of cases, based on sound planning principles, rather than mythical proposals that would neither be proposed nor built in the real world. Judge Wachtler said it best when he explained, the role of zoning boards.[48] It is time to allow them to do the job which has been assigned to them.

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[2] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 368 (1926).
[3] *See, e.g.*, Salkin, NEW YORK ZONING LAW AND PRACTICE, 4TH ED. § 29:6 (2008).
[4] *See* N.Y. General City Law § 81(a), N.Y. Town Law § 267(a) and N.Y. Village Law § 7-712(a).
[5] *See* N.Y. General City Law § 81-b(2)(b), N.Y. Town Law § 267-b(2)(b) and N.Y. Village Law § 7-712-b(2)(b).
[6] *See, e.g.*, Salkin, at § 29:7.
[7] *See, Village of Fayetteville v. Jarrold*, 53 N.Y.2d 254, 423 N.E.2d 385, 440 N.Y.S.2d 908 (1981). *See also,* Salkin, at § 29:11.
[8] *See, e.g.*, Salkin, at § 29:11.
[9] *See, e.g., id*.
[10] 282 N.Y. 71, 24 N.E.2d 851 (1939).
[11] Edward M. Bassett (1863-1948), sometimes called "The Father of American Zoning," was instrumental in the drafting of the original 1916 Zoning Resolution adopted by New York City, and also is credited with originating the limited-access, high-speed "freeway" concept which would be adopted as the chief means to effectively (or not so effectively) move commercial traffic around metropolitan areas. His treatise continues to be quoted by courts, even into the current century.
[12] *Otto*, 282 N.Y. at 76, 24 N.E.2d at 853.
[13] 4 N.Y.2d 39 (1958).
[14] *Id.*, 4 N.Y.2d at 43.
[15] *See id; see also,* Salkin, at § 29:11 (2008).
[16] *Otto*, 4 N.Y.2d at 44.
[17] *Id.*, 4 N.Y.2d at 45.
[18] *See* note 7, *supra*.
[19] *Village of Fayetteville*, 53 N.Y.2d at 261-62, 423 N.E.2d at 388-89, 440 N.Y.S.2d at 911-12.
[20] *Id.*, 53 N.Y.2d at 262, 423 N.E.2d at 389, 440 N.Y.S.2d at 912.
[21] *Id.*, 53 N.Y.2d at 260, 423 N.E.2d at 388, 440 N.Y.S.2d at 911.
[22] *Id.*, 53 N.Y.2d at 261, 423 N.E.2d at 388, 440 N.Y.S.2d at 911.
[23] *Id.*, 53 N.Y.2d at 262, 423 N.E.2d at 389, 440 N.Y.S.2d at 912.
[24] *Id.*, 53 N.Y.2d at 261, 423 N.E.2d at 388, 440 N.Y.S.2d at 911.
[25] *Id.*, 53 N.Y.2d at 263, 423 N.E.2d at 389, 440 N.Y.S.2d at 912.
[26] 95 N.Y.2d 437, 741 N.E.2d 106, 718 N.Y.S.2d 261 (2000).
[27] 62 A.D.3d 888, 879 N.Y.S.2d 188 (2d Dep't 2009).
[28] 302 A.D.2d 230, 755 N.Y.S.2d 377 (1st Dep't 2003).
[29] 20 A.D.3d 665, 798 N.YS.2d 200 (3d Dep't 2005).
[30] It should also be noted that prongs 2 and 4 of the use variance standard focus on the property itself, with prong 2 focusing on the unique standing of the parcel in relation to its surroundings, and prong 4 evaluating the property

owner. *See* N.Y. General City Law § 81-b(2)(b), N.Y. Town Law § 267-b(2)(b) and N.Y. Village Law § 7-712-b(2)(b).

[31] Curiously, N.Y. Town Law § 263, N.Y. Village Law 7-703, sets forth that zoning regulations "[s]hall be made in accordance with a comprehensive plan. . . ." However, case law has interpreted this seeming requirement as not necessarily requiring a written plan to accomplish its objectives. *See* Salkin, at § 4.03.

[32] "Planning Chair Upbeat About Funds," NEWSDAY, August 2, 2011, at www.newsday.com.

[33] There is a long history of attempts to create state-level planning frameworks, all of which failed to pass the legislature. *See* Salkin, at § 9.01. Nonetheless, such regional ventures as the Adirondack Park Agency and the Central Pine Barrens Joint Planning & Policy Commission have been implemented for specific, environmentally sensitive areas.

[34] *See* NEW YORK JURISPRUDENCE 2D §§ 373-75 (2007).

[35] *Village of Fayetteville*, 53 N.Y.2d at 259-60, 423 N.E.2d at 387-88, 440 N.Y.S.2d at 910.

[36] *Crossroads Recreation*, 4 N.Y.2d at 43.

[37] *See* notes 15 through 17 and accompanying text, *supra*.

[38] *Crossroads Recreation*, 4 N.Y.2d at 43.

[39] *Id.*, 4 N.Y.2d at 48.

[40] *Id.*

[41] 32 NY2d 78, 81 (1973).

[42] *Village of Fayetteville*, 53 N.Y.2d at 258, 423 N.E.2d at 387, 440 N.Y.S.2d at 910.

[43] *Id.*, 53 N.Y.2d at 258-59, 423 N.E.2d at 387, 440 N.Y.S.2d at 910.

[44] *Crossroads Recreation*, 4 N.Y.2d at 49-50.

[45] *Id.*, 4 N.Y.2d at 52.

[46] *See* note 4, *supra*.

[47] *See* N.Y. General City Law § 20(24), N.Y. Town Law § 261 and N.Y. Village Law § 7-700.

[48] *See* note 24, *supra*.