



Zoning Variances And the New York City Board of Standards and Appeals

The Municipal Art Society of New York, Inc.

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About the Study

This study of the New York City Board of Standards and Appeals was performed by the Municipal Art Society between January and April 2003. Christopher Rizzo, Esq., the Society's Menapace Fellow, drafted the report. The Society's Law Committee, chaired by Michael B. Gerrard, Esq. and composed of a wide range of attorneys in the private, public, non-profit and academic sectors, reviewed the data and worked to craft the conclusions and recommendations in this report. The Planning Center of the Municipal Art Society provided additional review, including the mapping of data. A subcommittee that included staff from the Society and members of its Law Committee was formed to oversee and assist in the preparation of the report.

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The Municipal Art Society is a private, non-profit membership organization whose mission is to promote a more livable city. Since 1893, the Society has worked to enrich the culture, neighborhoods and physical design of New York City. The MAS advocates for excellence in urban planning, contemporary architecture, historic preservation and public art.

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Table of Contents

The Study	ii
Table of Contents	iii
I. Introduction	1
II. General Conclusions	2
III. Recommendations (See Appendix B for Detailed Recommendations)	4
IV. The Law Governing the New York City Board of Standards and Appeals	
A. Foundations of the BSA	8
B. State Law and the BSA	8
C. City Law and the BSA	9
D. Notice	10
E. Pre-Application Process	10
F. Variances and the Courts	11
G. Standard of Review	14
H. Standing to Appeal the BSA decision	15
I. Enforcement of Variances	15
J. City Planning	16
V. Empirical Data on Variances: 2001 and 2002	
A. General Data	17
B. Use and Bulk Variances	17
C. City-wide Variances by Type	18
D. Resolution of Top 5 Variance Types	20
E. Borough Variances	21
F. Representation of Applicants	27
G. Variances and Community Districts	29
VI. Mapping of Variances	
Analysis of Mapping	29
Map 1: City-Wide Variances	31
Map 2: Use and Bulk Variances	32
Map 3: Variances by Type	33
Map 4: West Village, Manhattan	34
Map 5: Williamsburg, Brooklyn	35
VII. Further Analysis of Clusters (map 6)	36

VIII. Analysis of Case Law	
A. Case Law Analysis	38
B. Chart A: Challenges to Variances Between 1962 and 2003	40
C. Chart B: Challenges to Grants vs. Denials of Variances Between 1962 and 2003	41
IX. Case Studies	42
X. Other Variance Studies	
A. 1976 Municipal Art Society Study	47
B. 1962 Syracuse, New York Study	49
C. South Brooklyn Legal Services Study of Williamsburg 1997-1998	50
D. Zoning Administrators	50
Appendix A: Case Studies	56
A. 191-00-BZ, 184 Kent Avenue, Brooklyn	56
B. 287-00-BZ, 600 Washington Street, Manhattan	61
C. 126-99-BZ, 220-16 Jamaica Avenue, Queens	69
D. 174-97-BZ, 175-97-BZ, 19-35, 55 West Houston Street, Manhattan	73
Appendix B: Recommended Charter, Rule and Policy Changes	80
A. Improve the Application of the Five Findings	81
B. Provide Better Oversight of the BSA and the Variance Process	82
C. Add Expertise to the BSA	84
D. Strengthen the Variance Application Process	85
E. Create a Commission to Study the Creation of a Zoning Administrator Position and New Standards for Area Variances	85

I. Introduction

New York City has always been a land use law pioneer, having created the nation's first modern zoning law in 1916.¹ A model for municipalities around the country, this law has functioned in a thriving and diverse metropolis that can simultaneously accommodate some of the world's tallest buildings and stretches of single family homes.

Unfortunately, New York City's zoning variance process, governed by the Board of Standards and Appeals (Board or BSA), has suffered from the same problems as those of municipalities around the nation. Anecdotal accounts of abuse of the system, including loose application of the standards governing variances and a lack of oversight, have led the Municipal Art Society of New York (Society) to conduct this study. The Society's goal was to analyze the BSA objectively, considering if any problems existed, and if so, to contemplate solutions. The Society conducted a thorough search of relevant data on the BSA and variances. This review did not include the BSA's powers to grant special permits and hear appeals from other city agency decisions.²

The study that is summarized in this Report has produced findings which demonstrate clear problems with the variance process. First, with a shift over the past thirty years from "bulk" to "use" variances the BSA has taken on a planning role theoretically reserved for the City Planning Commission.³ Use variances, permitting residential units in a manufacturing zone for example, typically engender more significant changes to community character and composition. Second, clear clustering of variances in certain communities threatens community character while simultaneously providing precedents for further variances and eventual zoning change. Third, an extremely high variance approval rate calls into question the scrutiny that is applied to applications. Finally, there is a lack of expertise at the Board to deal with the extremely complicated financial reports often submitted with variance applications.

Sections II and III present the Society's Conclusions and Recommendations. Laws and court decisions governing the BSA were analyzed and are summarized in Section IV below. Section V reports on the empirical analysis of data collected from applications in 2001 and 2002. The Society mapped data to determine if geographic clustering was taking place; these maps and analysis are set forth in Section VI. A further analysis of two variance clusters is discussed in Section VII. Court decisions from 1962 to 2003 dealing with the BSA were reviewed and analyzed for Section VIII. To take an in-depth look at applications, and relate them to the empirical data, four controversial applications, three challenged in court, were reviewed and summarized for Section IX. A detailed analysis of them is presented in Appendix A. Finally a 1976 Municipal Art Society Study, a 1962 Syracuse Study, a recent Brooklyn study and other reports on alternatives to zoning boards of appeal are considered in Section X. Various drafts of this Report

¹ For a discussion of the events leading up to the passage of the Zoning Resolution, see GREGORY GILMARTIN, *SHAPING THE CITY* 181 (Clarkson Potter Publishers 1995).

² The BSA shares the power to grant special permits with the New York City Department of City Planning. These permits allow development that would otherwise not be allowed under the Zoning Resolution. Additionally, the BSA hears appeals from other city agencies, most notably the Department of Buildings.

³ See New York City Charter, ch. 8, §§ 191-240 [hereinafter Charter].

were reviewed several times by experts from government, private practice and other nonprofits, as well as members of the Society's Law Committee.

The Society believes that through careful analysis and the implementation of the very feasible recommendations, the goal of preserving the integrity of zoning laws can be achieved while still affording property owners the relief from genuine hardships that they deserve. Detailed recommendations are set forth in Appendix B.

II. General Conclusions

While the BSA adheres admirably to the existing procedural rules governing the variance process, the results documented in this report have raised serious concerns. In its daily routine, the BSA functions with efficiency. Hearings begin on time, are conducted with full public access, and efficiently move from applicant to applicant. Technical violations, relating to building and fire codes, are addressed. If need be, continued hearings are scheduled to permit applicants and the public to provide more input or revise submissions. Board members are almost always present and engaged in the hearings. In the Board's offices, the staff is very responsive and apparently keeps records fully accessible to the public. Anecdotal accounts indicate that the Board works with applicants before and after submission of the application to refine it, sometimes preventing unwarranted applications from being filed.

A more complete picture of the operations of the BSA with regard to variances, and its cumulative impact on the City, is revealed through the detailed analysis performed in the Society's study. A very high rate of decided variance applications are granted, 93%. There is little to compare this figure to, although it is higher than the 84% found in a 1976 study by the Society. Anecdotally, the figure is attributed to lenient review by the BSA. The case studies performed for this report do indicate that the scope of the variance sought is generally acceded to by the Board. However, a pre-application process also occurs, where the Board may prevent unwarranted applications from being filed.

In any event, this approval rate, coupled with a low court success rate for opponents, means that applicants are largely assured of obtaining the variances they seek. In other words, an application that follows the variance process is likely to be approved, and unlikely to be successfully challenged in court by opponents. Even with withdrawals considered as informal negative decisions, where the BSA might advise the applicant to terminate the variance request, 79% of applications are ultimately granted. When judicial challenges are brought, courts uphold BSA decisions 85% of the time. This percentage is consistent with the courts' review of other administrative decisions and likely reflects, in part, the discretion which is afforded by courts to such agencies.

While the overall number of applications, 258 in 2001-2002, is only a small percentage of overall Department of Building applications for building alterations and new construction, the BSA variance applications are often for sensitive locations. For example a motel proposed for Queens Village was situated in a single-family home community. The residential buildings proposed for 19-35, 55 West Houston were in the special Soho artists' community. The proposal at 184 Kent Avenue, another case study, was for a massive residential conversion in the midst of a manufacturing district with

existing heavy industry. Additionally the clustering which this report has demonstrated means that BSA variances, despite their overall low numbers, can have impacts on some communities. The Zoning Resolution provisions governing BSA decision-making does not address the impact of clustered variances, and in fact provide little guidance on it.

While the overall approval rate of 93% is similar to that found by the 1976 Report, 84%, the composition of cases is very different. In 1976, only 28% of variances were for use changes; today 64% are. Many of these applications in the 2001-2002 period were for residential uses in manufacturing zones. In some cases, these applications sought approvals of conversions that had already happened illegally. Thus, planning and use changes, theoretically City Planning's role in land use, are being addressed in the variance process.⁴ City Planning has acknowledged the role that BSA variances are playing in shaping land-use, citing them in the West Village "Hudson Square" rezoning recently-enacted.⁵ If City Planning is the agency traditionally charged with planning the City, the BSA has become a source of unexpected change in some communities.

The BSA also lacks guidance when considering use variances which when clustered may have a large impact on a community. The services and transportation needs of commercial or residential uses may not be met in a manufacturing area. Additionally, since residential uses are almost never permitted in manufacturing areas, the BSA must rely on comparisons with underlying bulk and density rules for manufacturing uses. These may not be relevant to the new residential uses and their impact on the community. As the South Brooklyn Legal Services study pointed out, these variances are adding hundreds of new residential units to discrete areas like Williamsburg, Brooklyn. This figure is startling when compared to units added as of right. Variances added at least 264 units in two years, versus 867 as of right. The impact on services and schools may be significant. Without a mechanism for considering cumulative impacts, these questions are not addressed in the variance process, and are rarely addressed in court.⁶ Similarly, the clustering of community facilities and bulk variances in areas like Ocean Parkway, Brooklyn may have significant impacts on those neighborhoods. Parking, traffic, school capacity, light and air, and reliance on city-services are all likely to be affected. Taken one by one, the variances may have marginal impacts. Taken as a whole, the impacts over time may be significant. If community members' concerns are any indication, the impacts are real.

To grant a variance the BSA must comply with a checklist of findings, the "five findings," contained in the Zoning Resolution of the City.⁷ These findings are discussed

⁴ See supra note 3.

⁵ New York City Department of City Planning, Hudson Square Rezoning, NYC DCP #02-23 1 (October 2002).

⁶ Interview with Sylvia Deutsch, Former Chairwoman of the Board of Standards and Appeals of New York, in New York, NY (Sept. 11, 2003).

⁷ The five findings that the BSA must make, and the applicant must prove are:

- a.) unique physical conditions make compliance with the Resolution unduly difficult.
- b.) there is no reasonable possibility that development in conformity with the district will yield a reasonable return.
- c.) the variance will not alter the essential character of the neighborhood or district.
- d.) the hardship has not been created by the owner or the predecessor in interest.
- e.) the variance requested is the minimum variance required to alleviate the hardship. See Section IV infra.

at length in this report and relate to the physical uniqueness of property, financial hardship, the proposed variance's impact on the community, whether the hardship was self created, and whether the minimum variance is being sought. The applicant must present evidence for each finding.

The clustering of variances in areas like northern Brooklyn undermines the argument that the physical hardships are unique. As demonstrated in the case studies as well, the same physical hardships are repeatedly raised in variance applications, from proximity to subway easements to the lack of demand for manufacturing space.

Invariably, applicants submit detailed economic feasibility studies to demonstrate how market conditions, physical limitations and regulatory constraints inflate the costs of construction, requiring additional bulk or altered uses. Even without the benefit of such economic expertise, community opposition has in some cases been able to point out flaws that if corrected would vastly increase the rate of return presented in the application. In some cases they might make the variance unwarranted. The complexity of these financial analyses makes it difficult to undercover errors and the true scope of the hardship faced by the applicant. Additionally, the tendency of applicants to modify their projects after obtaining a variance (as seen in the cases studies of this report), or seek additional variances for the same property, calls into question the basis for the original application.

In sum, even without detailed BSA analysis to review, the application of the five findings is producing some unintended results based on questionable data. Unique hardships appear to be shared by many lots city-wide, if not community-wide. While the BSA may not be responsible for considering community impact, it is charged with ensuring that hardships are unique.

Economic analyses are labyrinthine, yet still yield figures and assumptions that have been credibly questioned by opponents. Clustering over five to ten years raises the prospect of more serious community impact than the BSA review considers. Three of the case studies suggest that zoning and physical hardships might have been addressed at purchase in the sale price, rather than in the variance process, indicating overpayment by applicants. Failure to consider less radical use changes undermines the argument that the minimum variance was granted. In some cases, modifications are sought after the original variance, further undermining this fifth finding.

III. Recommendations

A summary of the Society's recommendations for reforming the variance process in New York City is set forth below. The Society stands ready to assist the City in identifying those portions of the New York City Charter, Rules and Zoning Resolution that might be amended to enact these recommendations. Finally, the Society recommends that alternatives to the current system be explored by the City Council or a Mayoral Commission. The improvements outlined below should remain relevant no matter what structural changes are implemented. The Study called for in Recommendation E should therefore not delay the immediate implementation of A-D.

Appendix B of this Report details where and how these recommendations can be implemented. It is very important to note that these recommendations are echoed in many reports on the BSA and other zoning boards of appeal including an earlier MAS report and a State Charter Review Commission Study. They also represent moderate proposals given what has been proposed elsewhere in the nation to deal with variance problems.⁸

A. Improve the Application of the Five Findings Through Rule-Making.

Set forth better guidance for the BSA through rule making. Common urban hardships, such as proximity to subway easements and rail lines, should not form the basis for variances; an exhaustive list is not presented in these recommendations. Construction on historic fill or the presence of an aged manufacturing building is common in New York City and can hardly be claimed as a unique physical hardship. Furthermore, the pursuit of a variance immediately following purchase must be discouraged by creating a rebuttable presumption that recent purchase price accounted for existing hardship. Physical hardships and zoning limitations that exist at the time of a recent purchase are clearly best addressed at purchase and should be reflected in the price. Finally, when considering community impact, the third required finding, the applicant should present a uniform study area, and not just a study of adjacent areas that support the application.

B. Provide Better Oversight of the BSA and the Variance Process.

Aside from the courts, the BSA and its variance-granting process receive little direct oversight. At a minimum the BSA's special permits, appeals and variances should be analyzed each year in the Mayor's Management Report. The BSA itself might be charged with compiling annual statistics on its workload. This review would provide a basis for year-to-year comparisons of the variance process and help identify trends that require the attention of the City Planning Commission or the City Council. To this end, the BSA should be required to map all variances as this Study has done. Such maps should be displayed prominently on the BSA website, in the BSA offices and at hearings. Rule-making should empower and require the City Planning Commission to draft a report considering the underlying zoning in a community district upon the filing of the eleventh variance in a twelve month period for that district. This "density alarm" would prevent the slow erosion of underlying zoning that the variance process can cause. Furthermore, a staff member at City Planning should be designated as the BSA coordinator. This person should be responsible for reviewing all BSA variances and overseeing the comments submitted by the borough offices of City Planning. These recommendations would permit greater government and public oversight of the process.

C. Add Expertise to the BSA.

If courts are to defer to the BSA as an expert body, the BSA must have the expertise to deal with the modern variance application. Legal and financial expertise are the most critical resources for dealing with the applications. In fact, the foundation of today's

⁸ For example, both Arizona and California prohibit the granting of use variances. See ARIZ. REV. STAT. § 9-462.06 (2003); CAL. GOVERNMENT CODE § 65906 (Deering 2003).

applications is the economic feasibility study. With hundreds of calculations, the potential for manipulation is great. Financial and real estate expertise needs to be added to the staff. The chair and commissioners of the BSA also need to have some planning background and familiarity with the City's planning process. Additionally, since the BSA is not composed of attorneys, training in case law and the interpretation of the findings should be required for staff and commissioners. For example, courts are constantly interpreting what a reasonable rate of return is and the requisite level of detail required in administrative decisions.

D. Strengthen the Variance Application Process.

Cross-referencing other local variances should be limited to prevent "boot-strapping" in changing communities. This occurs when an applicant relies on previous variances, either directly or indirectly, to establish grounds for the latest one. If mentioned, other variances must be related to the unique hardship of the applicant.

The minimum variance requirement can be better enforced as well by stipulating that all relevant lower use groups within a zoning category be addressed. For example, in M3 Heavy Manufacturing Zones, applicants should be required to calculate return on lighter industrial uses permitted in M1 and M2 zone before seeking radical changes. Renewal applications should prove that the original variance conditions were complied with as a factor in whether a new variance will be granted. Compliance history is relevant to the impact on the community, the "c" finding. Furthermore, mandatory penalties should be imposed for intentional submission of erroneous financial information.

E. Create a Commission to Study the Creation of a Zoning Administrator Position and New Standards for Area Variances.

The Society believes that rapid implementation of recommendations A through D will significantly improve the variance process. However, given the persistent problems that have been identified in this Study and throughout the BSA's history as well as the increasing use of zoning administrators nationwide, a study of the position of zoning administrator and its usefulness for New York City is in order. One of the first tasks of such a study will be to consider the experiences of other municipalities and the role the zoning administrator plays in the variance processes; the Society's study has begun this work. This will identify what options are available to the City and how they operate elsewhere. The official can serve in an administrative, advisory or adjudicatory capacity. The zoning administrator in New York City might simply improve the relationship between City Planning and the BSA by providing oversight and advice. In making this recommendation, the Society does not assume that a zoning administrator would improve the process or that such an official could function better than the BSA.

Additionally, there are structural and Zoning Resolution changes that have recently been suggested. For example, bringing the City's standards for area/bulk variances in line with New York State's may be appropriate. As part of the study of zoning administrators, a recent proposal from the City Council to give itself appellate review powers over variance decisions might be reviewed as well. Finally, legislation has been drafted in Albany to limit access to residential variances in manufacturing areas. The

Society has not reviewed the merits of these three proposals and does not take a position on their appropriateness. Rather, they should be considered in any comprehensive study of the variance process that is undertaken.

There is some cost associated with these recommendations, adding staff to the BSA and perhaps eventually City Planning. It is the Society's view that the sounder variance process that would result from the improved rules and more stringent oversight is well worth the effort and the cost.

IV. The Law Governing The New York City Board of Standards and Appeals

A. Foundation of the BSA.

The BSA owes its existence to the Fifth and Fourteenth Amendments of the United States Constitution, and their counterparts in the New York State Constitution, which forbid government from taking private property without compensation, or from regulating private property so as to deprive the owner of a reasonable economic use.⁹ The BSA was created to keep zoning out of the courts, protect zoning from takings claims and provide property owners a quasi-judicial procedure for addressing deprivation of the reasonable use of their property.¹⁰ Homeowners may not take their hardship claim to the courts before having brought them first to the BSA for a hearing on a variance.¹¹

B. State Law and the BSA.

Municipalities are empowered by State law to adopt local laws creating zoning boards of appeal. They are bound by the State's Town, Village or General City law in the boards' composition, procedure, and consideration of use and area variances.¹² However, cities with a population of more than one million, meaning New York City, are exempted from these laws.¹³ New York City has thus crafted its own rules for the BSA.

⁹ See U.S. CONST. amend. V; see also *Penn Central v. City of New York*, 438 U.S. 104, 121 (1978); see also *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 231 (1938).

¹⁰ See Robert M. Anderson, *The Board of Zoning Appeals-Villain or Victim*, 13 SYRACUSE L. REV. 353, 356, 1962.

¹¹ See *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991).

¹² See N.Y. TOWN LAW, § 267 (Consol. 2003); N.Y. VILLAGE LAW § 7-712 (Consol. 2003), N.Y. GEN. CIT. LAW § 81 (McKinney 2002). These laws are similar to those adopted locally by New York City. The General City Law for example has two separate sections relating to use and area variances. As will be further described in Section II.C of this Report, both the State law and the City law set forth required findings for zoning boards of appeal. The General City law requires the following for use variances:

3(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 for each and every permitted use under the zoning regulations for the particular district where the property is locate:

- i. the applicant cannot realize a reasonable return provided that lack of return is substantial as demonstrated by competent financial evidence
- ii. The alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood
- iii. The requested use variance, if granted, will not alter the essential character of the neighborhood; and
- iv. The alleged hardship has not been self-created.

3(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 proven 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.

See New York Gen. City Law § 81-b(3).

¹³ See N.Y. GEN. CIT. LAW § 81(1).

C. City Law and the BSA.

The New York City Charter (Charter) sets forth the composition, procedure and jurisdiction of the BSA.¹⁴ Composed of five members, the BSA must include a planner, an architect and an engineer.¹⁵ The executive director of the board is also charged with keeping the BSA staffed with such experts as necessary to carry out its duties.¹⁶ Both the Charter and the Rules of the City of New York (Rules) set forth detailed rules for all BSA proceedings which the public can attend.¹⁷ Extensive procedures are also in place to give the City's Community Boards a role in the BSA process.¹⁸ The BSA has jurisdiction over not just variances, but also appeals from several city agencies, like the Department of Buildings, and "any subject-matter jurisdiction whereof is conferred by law upon the board," like special permits.¹⁹ The Report considers only variances. Procedures for the BSA are provided in the Rules of the City of New York.²⁰

The most important law governing the BSA's variance process is Zoning Resolution section 72-21,²¹ which grants the BSA the authority "to hear, decide, and determine, in a specific case of practical difficulties or unnecessary hardship, whether to vary the application of the provisions of this Resolution."²² To grant a variance based on such a hardship the BSA must find all of the following:

- a.) unique physical conditions make compliance with the Resolution unduly difficult.
- b.) there is no reasonable possibility that development in conformity with the zoning will yield a reasonable return.
- c.) the variance will not alter the essential character of the neighborhood or district.
- d.) the hardship has not been created by the owner or the predecessor in interest.
- e.) the variance requested is the minimum variance required to alleviate the hardship.²³

¹⁴ See Charter, ch. 27, § 659 *et seq.*

¹⁵ See *id.* § 659(b).

¹⁶ See *id.* § 661.

¹⁷ For example the Charter states that "all hearings before the board shall be open to the public and shall be before at least three members of the board..." *Id.* § 663. The Rules delineate the procedures of the BSA including hearings, special hearings, review sessions. See Rules of the City of New York Title 2, § 1-01.1 (hereinafter "Rules"). The Charter further provides the right of "any person aggrieved" to appeal the grant of a variance. See Charter § 669.

¹⁸ See Charter § 669.

¹⁹ See Charter § 666.

²⁰ See Rules at § 1-01(7).

²¹ NEW YORK CITY ZONING RESOLUTION § 72-21 (1961) [hereinafter Zoning Resolution]. See *Hirschfeld v. Foley*, 241 N.Y.S.2d 280 (1st Dep't 1963).

²² Zoning Resolution at § 72-01.7

²³ *Id.*

While the courts sometimes treat “bulk” (also known as “area”) variances and “use” variances differently, the findings enumerated above are required for both types of variances in New York City.

D. Notice.

The Board provides notice to the public of pending applications in several ways. It has a regular schedule of public hearings and its calendar is made available in hard copy and online, including the cases that will be heard.²⁴ Review sessions, which the public can attend but not speak at, are held regularly as well.²⁵ The burden of individually notifying interested parties is placed on the applicant. Notice of the filing of an application must be sent promptly to Community Boards, the local City Council Member, the Borough President, and City Planning.²⁶ Each has a limited time to respond. Notice of the hearing dates must be provided to these parties and nearby property owners, meaning those within 400 feet of the lot in question, as well.²⁷

E. Pre-Application Process

Anecdotal accounts of an informal pre-application process at the BSA were verified in this study. These off-the-record conversations may result in unwarranted applications not being filed and faulty proposals being modified. With regard to communications before formal submission, the rules governing the BSA state,

any communication from an applicant purporting to be an application or appeal and submitted in a manner other than as described in these rules shall be regarded as a mere notice of intention to seek relief and shall have not force or effect until it is made in the form required.²⁸

The rules, therefore, do not forbid pre-application communications, but they cannot be given any formal effect. An attorney familiar with the process before the BSA notes that he often meets first with the BSA counsel and some commissioners.²⁹ They review the proposed application and consider whether each of the five findings will be met. Occasionally a hopeless application is not filed. More often, it is revised to better conform to the Zoning Resolution. This attorney notes that this informal pre-application review also takes place before City Planning with regard to special permits. A former City Planning employee confirms that City Planning does utilize informal communications to “weed-out” inappropriate submissions and improve the process.³⁰ Additionally, City Planning may meet informally with the BSA before an application is formally brought to the latter agency as well. The proceedings described herein may

²⁴ Rules § 1-01.1(a).

²⁵ *Id.* § 1-01.1(d).

²⁶ *Id.* § 1.06(d).

²⁷ *Id.* § 1.06(h).

²⁸ *Id.* § 1-02(f).

²⁹ Off the record phone interview with an attorney who has regular practice before the BSA in New York City (December 18, 2003).

³⁰ Off the record phone interview with a former City Planning employee in New York City (December 18, 2003).

contribute to the high approval rate at the BSA and result in a more rapid review of cases, something the agency is credited with.

F. Variances in the Courts.

The State did not always require certain findings for variances to be granted. The first three findings were first required by the New York Court of Appeals in Otto v. Steinhilber in 1939.³¹ Steinhilber introduced the concepts of 1.) reasonable return, 2.) unique conditions and 3.) essential character of the surrounding community.³² These concepts were subsequently added to state and New York City law, as discussed above.³³

Complicating the courts' review of New York City variances is that judges are accustomed to state law, which treats use and area/bulk variances differently. New York State's General City Law, mirrored in the Town and Village Laws, requires the following analysis for bulk variances.

(b) In making its determination, the zoning board of appeals shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider:

(i) 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;

(ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance;

(iii) whether the requested area variance is substantial;

(iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and

(v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

(c) The board of appeals, in the granting of area variances, shall grant the minimum variance that it shall deem necessary and adequate and at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community.³⁴

The requirements for area variances in New York State law are thus different from New York City's Zoning Resolution Section 72-21. First, the State's law does not consider

³¹ 282 N.Y. 71 (1939).

³² Id.

³³ See supra note 11 and accompanying text.

³⁴ N.Y. GEN. CIT. LAW § 81-b (3)(b)-(c) (Consol. 2003); see also N.Y. Town Law § 267-b (3) (Consol. 2003) and N.Y. Village Law § 7-712-b (3) (Consol. 2003).

economic return and uniqueness, findings that may not be relevant to, or are burdensome for, small area variance applicants. Second, State law emphasizes community impact.³⁵ It follows that courts should evaluate New York City area variances differently from those in other municipalities.

1. Unique physical hardship.

One of the basic restrictions on the claim of unique physical hardship is the “hardship condition be not so generally applicable throughout the district as to require the conclusion that if all parcels similarly situated are granted variances the zoning of the district would be materially changed.”³⁶ This restriction reflects a concern that “zoning by variance” will occur, where a profusion of similar variances changes the character of the community at large, providing grounds for actual zoning changes.

While many personal difficulties might lead a property owner to seek a variance, the variance must be based on the physical condition of the land.³⁷ While the issue has never been directly addressed, programmatic hardships are not suitable bases for variances either. Courts have rejected, for example, the desire of growing family to add bedrooms to their home.³⁸ Physical condition of the land has been interpreted to mean buildings on the land as well.³⁹ Applicants have litigated many different types of physical conditions. For example, courts have determined that proximity to a landfill,⁴⁰ a shallow rear yard,⁴¹ and a non-rectangular property shape⁴² were not unique physical hardships when shared by nearby, although not adjacent, properties.

2. Reasonable Return.

To prove that the land cannot yield a reasonable return if used for purposes allowed by the zoning law, the applicant must submit “dollars and cents evidence.”⁴³ There is, however, no clear definition of what is a reasonable return. Courts have considered 3.6%,⁴⁴ 6.9%⁴⁵ and 9.9%⁴⁶ as a sufficient rate of return, emphasizing that different circumstances may dictate a different rate of return. Another recurrent issue with rate of return calculations is the geographic area of properties that will be used for valuing a parcel. For example, in Soho Alliance v. Bd. of Standards and Appeals of New York, in discussing objections to the variance, the court stated:

their main objection is that, in part, the exposition of the owner’s expert was based upon comparable properties from outside the zoning district. In actuality,

³⁵ See supra note 12.

³⁶ Douglaston Civic Ass’n v. Klein, 51 N.Y.2d 963 (1980).

³⁷ See Fasani v. Rappaport, 290 N.Y.S.2d 279 (3d Dep’t 1968).

³⁸ Karneil v. Bennet, 588 N.Y.S.2d 651 (2d Dep’t 1992).

³⁹ See UOB Realty v. Chin, 736 N.Y.S.2d 874 (1st Dep’t 2002).

⁴⁰ See Collins v. Carusone, 510 N.Y.S.2d 917 (3d Dep’t 1987).

⁴¹ See Kallas v. Bd. of Estimate, 455 N.Y.S.2d 288 (2nd Dep’t. 1982).

⁴² See Marchese v. Koch, 501 N.Y.S.2d 905 (2d Dep’t. 1986).

⁴³ Kingsley v. Bennet, 586 N.Y.S.2d 640, 641 (2d Dep’t 1992).

⁴⁴ Id.

⁴⁵ Douglaston Civic Ass’n v. Galvin, 36 N.Y.2d 1, 9 (1974).

⁴⁶ Soho Alliance v. Bd. of Standards and Appeals of New York, 703 N.Y.S. 2d 150 (2000); aff’d 95 N.Y.2d 437 (2000).

more than half of the properties examined were within the district, and virtually all the remaining properties within the survey were located in areas adjoining the district. . . **no inflexible rules exist which requires, as a matter of law, that an economic analysis to support a use variance must be restricted exclusively to data on properties within a particular zoning district.**⁴⁷ [Emphasis added]

3. Essential character of the neighborhood.

The concerns raised by community members have included views, congestion, community character, noise, building size, architectural design, and environmental issues.⁴⁸ As the New York City Department of City Planning stated in responding to a variance on Houston Street, “extensive departures from zoning requirements are unwarranted and will result in building types and forms so out of context with their surroundings that the essential character of the neighborhood will be impaired . . . Such land use changes which are as extensive as those posed in these applications should typically occur on the basis of well-considered reviews and revisions to the zoning framework.”⁴⁹

4. Self Created Hardship.

One of the most controversial, and unresolved, issues in variance law is whether purchase of a lot subject to the restrictions sought to be varied is a self-created hardship. Furthermore, to what extent can applicants receive relief for physical hardships that were apparent at the time of purchase? As one court aptly stated, “Ordinarily, one who purchases property under zoning restrictions is foreclosed from seeking a variance, for it is inferred that he paid a lower price . . . [t]here has been some tendency to relax the rigidity of the self-inflicted hardship rule.”⁵⁰ The United States Supreme Court has addressed this and rejected a firm rule that bars a takings or hardships claim based on the purchase of property subject to the land-use restrictions at issue.⁵¹

Zoning Resolution Section 72-21 states “where all other required findings are made, the purchase of the zoning lot subject to the restriction sought to be varied shall not itself constitute a self-created hardship. . . .”⁵² Common self-created hardships include erection of the structure which is the basis for the hardship⁵³ and paying an excessive purchase price, perhaps with a future variance contemplated.⁵⁴ In some cases, courts have required a showing that the applicant tried to sell the property before seeking a variance.⁵⁵

⁴⁷ 95 N.Y.2d 437, 441.

⁴⁸ See section IX infra.

⁴⁹ Letter from Joseph Rose, Director of City Planning to James Chin, Chair of the Board of Standards and Appeals (Feb. 2, 1998.)

⁵⁰ Bellamy v. Bd. of Standards and Appeals of Rochester, 223 N.Y.S.2d 1017, 1022 (Sup. Ct. Monroe Cty. 1962.)

⁵¹ Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

⁵² Zoning Resolution § 72-21.

⁵³ See Thomas v. Bd. of Standards and Appeals of New York, 290 N.Y. 190 (1943).

⁵⁴ See Kingsley, 586 N.Y.S.2d at 641.

⁵⁵ See Clark v. Bd. of Zoning Appeals of Hempstead, 301 N.Y. 86, 90 (1950).

5. Minimum Variance Necessary to Afford Relief.

The “minimum variance necessary” factor is rarely addressed specifically by the courts. In general, applicants must present evidence that “for each and every [permitted] use the property in question cannot yield a reasonable return.”⁵⁶ But courts have not always applied this rule strictly, permitting only a sampling of other permitted uses to be analyzed along with the use being sought.⁵⁷ It is likely that many small businesses purchase a property for a specific use, making consideration of other uses appear impractical.

G. Standard of Review.

Courts give weight to the BSA’s expertise and in interpretations of the Zoning Resolution. Its decision will be upheld if rational and supported by substantial evidence.⁵⁸ Substantial evidence is defined as “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.”⁵⁹ Such deference is not required for questions of pure legal interpretation.⁶⁰

⁵⁶ Park Hill Residents Ass’n v. Cianciulli, 651 N.Y.S.2d 159, 160 (2nd Dep’t 1996).

⁵⁷ State law does require that the applicant analyze each and every permitted use, but New York City’s five findings do not. See West Village Houses Tenants’ Ass’n v. Bd. of Standards and Appeals of New York, 755 N.Y.S.2d 377 (1st Dep’t 2003).

⁵⁸ Toys R Us v. Silva, 89 N.Y.2d 411, 419 (1996).

⁵⁹ Gramatan Ave. Assn. v. State Div. of Human Rights, 45 N.Y.2d 176, 180 (1978).

⁶⁰ See id.

H. Standing to Appeal the BSA Decision.

An appeal can be taken directly to the BSA by “any person aggrieved or by the head of any agency.”⁶¹ For court challenges, a more traditional standing test will be applied, requiring that petitioners have suffered harm and live in close proximity to the location of the variance.⁶² The City Charter also states that the City Planning Commission shall have standing to challenge BSA decisions in court in Article 78 proceedings.⁶³ Courts have construed this provision to preclude community boards from challenging BSA decisions in court.⁶⁴

I. Enforcement of Variances.

The BSA can, and does, impose conditions on the grant of variances.⁶⁵ The Charter specifically grants the BSA the authority to revoke a prior variance in the case where its conditions were not followed.⁶⁶ Not only does the Charter specifically confer that authority, but the Zoning Resolution states “[f]ailure to comply with such conditions or restrictions shall constitute a violation of this Resolution, and may constitute the basis for the denial or revocation of a building permit or certificate of occupancy and for all other applicable remedies.”⁶⁷

⁶¹ Charter § 669.

⁶² Generally plaintiffs must live in close proximity to where a proposed zoning change is going to take place to have standing to challenge it. In Oates et al. v. Village of Watkins Glen et al., the court refused standing to an individual who lived within 530 feet of a Wal-Mart development site. 736 N.Y.S. 2d 478, 482 (App. Div. 3rd 2002). The court reasoned that since the Plaintiff’s lot was separated by several other lots, and only touched the far end of the Wal-Mart parcel not the subject of litigation, no special injury had been alleged. Conversely, in Concerned Homeowners of Rosebank v. New York Power Authority, the court granted standing to a homeowner who lived within 400 feet of the proposed electric generating plant. 2001 N.Y. Misc. Lexis 530 (Richmond Cty. 2001). The court found that the petitions/property owners lived within “close proximity” such that their injury was different from the public at large. See id. at 16; see also Save our Main Street v. Green County et al., 740 N.Y.S. 2d 715, 717-18 (App. Div. 3rd 2002).

Plaintiffs must also demonstrate that they will suffer a harmful effect, different from the public at large, and that their interest in the matter is within the zone of interest of the law. See Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 N.Y.2d 668, 668 (1996). Organizations must meet the following standard: 1.) one or more of its members has standing, 2.) the interests to be advanced are germane to the organization’s purpose, and 3.) the participation of the individual members is not required to assert a claim or to afford the petitioner complete relief. See Aeneas McDonald Police Benevolent Association, Inc. v. City of Geneva, 92 N.Y.2d 326, 331 (1998); see also Society of Plastics Industry v. County of Suffolk et al., 77 N.Y.2d 761, 775 (1991).

⁶³ See id.

⁶⁴ See Community Bd. 4 (Manhattan) v. Bd. of Estimate of New York, 57 N.Y.2d 846 (1982).

⁶⁵ 1833 Nostrand Ave. Corp. v. Chin, 754 N.Y.S.2d 581, 581 (2003); see also Zoning Resolution § 72-22.

⁶⁶ See Charter § 666(11).

⁶⁷ Zoning Resolution § 72-22. These sections were apparently added to alter the impact of a court case finding that the BSA could not revoke variances. See Louzon v. Deutsch, 543 N.Y.S.2d 528 (2nd Dep’t 1989).

J. City Planning and the BSA.

City Planning has the authority to comment on variances, but exercises that authority infrequently. Borough offices submit comments and maintain records of comments submitted, but by all accounts, the offices do not make comments with any regularity. Off the record conversations with City Planning indicated that no central database or tracking of variances is performed by that agency and none is required under the law.

V. Empirical Analysis of 2001-2002 Variance Applications.

A. General Data.⁶⁸

For this study, an analysis of all applications for variances in 2001 and 2002 was performed. Although many applications remained unresolved as of April of 2003, for general analysis of the nature and location of variances, all resolved and unresolved applications were used.

Category	Number of Variance Applications: 258 Total	Percent of Total
Pending (as of April 2003)	83	32%
Application Withdrawn	24	9%
Dismissed ⁶⁹	14	5%
Decided	137	53%

Decision	Number of Cases: 137	Percent of Total
Granted	127	93%
Denied	10	7%

A very high percentage, 93%, of variances are granted, and only 7% are denied. Even when considering those withdrawn and dismissed as part of the “decided” pool, 79% of variances are granted. This second figure is important, because the BSA may negotiate results, advising certain applicants to withdraw faulty or unwarranted applications.

All the grants are conditional. These conditions may require compliance with certain Department of Building requirements or conversely, the BSA may affirmatively impose conditions to lessen the impact on communities. For example, a commercial use in a residential zone may have limitations on its hours of operation.

B. Use and Bulk.

The variance process is clearly being relied upon to achieve use changes in neighborhoods. As indicated below, the plurality of the use variances address residential uses in manufacturing zones. Also note that in the 1976 Study by the Municipal Art Society, discussed in Section X of this report, only 28% of variances were for use changes—a sharp contrast with the 64% now.⁷⁰

Bulk	85	33% (of total applications)
Use	164	64%
Use and Bulk	6	2%
Other	3	1%

⁶⁸ Figures throughout were rounded and may not add up to 100%.

⁶⁹ For lack of prosecution by the applicant.

⁷⁰ See Section X.A. Precise comparisons are not possible based on the way the data is presented in the 1976 Study.

Total:	258	
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C. Variance Applications by Type

The 258 variance applications were categorized into ten groups. An effort was made to use categories that include both bulk and use variances. For example, community facility expansion has been a concern in some neighborhoods, irrespective of whether the issue is use or bulk. The categories do not represent official classifications by the BSA.

Variance Type ⁷¹	Number of Applications	Percent of Total
1. Residential in Manufacturing Zone	107	42%
2. Commercial in Residential Zone	36	14%
3. Miscellaneous Bulk (large residential, commercial buildings)	32	12%
4. Community Facility (use or bulk)	25	10%
5. 1-2 Family Home Expansions	15	6%
6. Religious Facilities (use or bulk)	10	4%
7. Residential uses in Commercial Zones	8	3%
8. Misc. Changes in Commercial Zones (i.e. use groups)	7	3%
9. Parking	10	4%
10. Other	8	2%

⁷¹

1. Residential in Manufacturing Zone: Manufacturing zoning do not permit residences. This is thus a use change in all cases. See generally Zoning Resolution at § 42-03.
2. Commercial in Residential Zone: These are generally use changes for small-scale commercial uses like auto shops, medical offices and stores within low-density residential zones that prohibit any commercial uses.
3. Misc. Bulk: For small or large scale residential or commercial bulk variances including rear yard size, height, lot coverage etc.
4. Community Facility: Includes hospitals and universities. See Zoning Resolution at §§ 22-13, 22-14.
5. 1-2 Family Homes: Where possible, all expansions of 1-2 family homes included in this category.
6. Religious Uses: Includes religious schools.
7. Residential uses in Commercial zones: Residences in commercial zones that prohibit residences, as some do.
8. Misc. Changes in Commercial Zones: The various commercial zones allow only certain types of commercial uses.
9. Parking: Includes parking lot legalizations and new ancillary parking for apartment houses.

Total:	258	
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The use of the variance process to site residential uses in manufacturing zones is obvious. The plurality of these applications, as shown below, are in Brooklyn. These variances reflect only a two-year period. As discussed in Section VI, below, a recent study indicated that over 1,000 new residential units were proposed in Williamsburg in a five-year period. Similarly, while there may only have been twenty-five variances over two years for community facilities citywide, many of these are clustered on the Upper East and West Sides of Manhattan and Midwood/Ocean Parkway in Brooklyn.

D. Resolution of Top 5 Variance Types.

For the top five types of variances applications, the approval rate exceeds the BSA’s average rate of 79% (which includes withdrawals.) Only the rate for approval of applications for residential uses in manufacturing zones is below this average approval rate. This may be related to the low percentage of such cases that had been decided at the time of this report, less than 50%.

	Applications	Application withdrawn before decision	Denied	Granted on condition	Total decided or withdrawn	% of decided or withdrawn that were granted (79% average for all variances)
1. Residential in Manufacturing Zone	107	14	5	30	49	61%
2. Commercial in Residential Zone	36	2	2	25	29	86%
3. Miscellaneous Bulk (large residential, commercial buildings)	32	3	2	18	23	78%
4. Community Facility including religious uses(use or bulk)	25	1	0	17	18	94%
5. 1-2 Family Home Expansions ⁷²	15	0	0	11	11	100%

⁷² See Sheldon Lobel, *City Needs to Update Zoning and Land Use Laws; Business and Property Owners are Discouraged*, N.Y.L.J., September 26, 1994, at S5. While complaints have been made about the subjection of 1-2 family homeowners to the five findings, their success rates indicate that when they do choose to take their minor home adjustments to the BSA they will almost certainly be successful.

E. Variance Applications by Borough.

Variance applications are categorized below by borough and related to the each borough’s share of the City’s population. Overall, the variance applications for each borough resemble the boroughs’ shares of the city’s overall population. Only Brooklyn’s share of variances significantly exceeds its population. This may be due to the high level of redevelopment and renewed residential interest in parts of Brooklyn. Land area does not appear to correlate to a borough’s share of variances.

By Borough	Total Applications	Share of Total Applications	Borough’s portion of total City population (8,008,278) ⁷³	Borough’s portion of total City land area (321.8 sq. mi.) ⁷⁴
Staten Island	16	6%	6%	19%
Queens	68	26%	28 %	35%
Manhattan	38	15%	19%	7%
Bronx	28	11%	17%	25%
Brooklyn	108	42%	31%	14%

Set forth below are the types of variances applied for in each Borough. The five most common variance application types, city-wide, are in bold.

⁷³ CITY OF NEW YORK, THE 2002-03 GREEN BOOK, OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 646 (2002).

⁷⁴ Id.

1. Brooklyn Variances.

Of note in Brooklyn are the large numbers of variances for residential uses in manufacturing zones and to a lesser extent, community facility expansions. This Report's mapping indicates that these two types of variances are clustered in distinct sections of Brooklyn.

Variance Type	Total applications	Share of Borough Total
Bulk	34	
Use	69	
use/bulk	5	
Total variances	108	
1-2 family	4	4%
General community facility	9	8%
Residential in Manufacturing Zone	57	53%
Manufacturing in Residential Zone	0	0
Residential in Commercial Zone	4	4%
Commercial in Residential Zone	7	7%
Commercial in Manufacturing Zone	0	0
Manufacturing in Commercial Zone	0	0
Parking Lot	0	0
Community facility in Manufacturing Zone	1	Less than 1%
Community facility in Commercial Zone (where not permitted)	1	Less than 1%
School in Manufacturing Zone	1	Less than 1%
Misc. Religious use/bulk	6	6%
Miscellaneous Bulk	15	14%
Other Variances	1	Less than 1%
Commercial use in Commercial Zone where not permitted	2	2%
Total	108	

2. Bronx Variances

While there are some residential uses sought in manufacturing areas, the most interesting cluster in the Bronx is the proliferation of parking variances. Parking lots and parking lot legalizations have been sought seven times, all in the same general area of the borough.

Variance Type	Total applications	Share of Borough Total
Bulk	23	
Use	5	
Use/bulk	0	
Total variances	28	
1-2 family	0	0
General community facility	0	0
Residential in Manufacturing Zone	8	29%
Manufacturing in Residential Zone	0	0
Residential in Commercial Zone	0	0
Commercial in Residential Zone	8	29%
Commercial in Manufacturing Zone	0	0
Manufacturing in Commercial Zone	0	0
Parking Lot ⁷⁵	7	25%
Community facility in Manufacturing Zone	0	0
Community facility in Commercial Zone (where not permitted)	0	0
School in Manufacturing Zone	1	4%
Misc. Religious use/bulk	0	0
Miscellaneous Bulk	3	11%
Other Variances	0	0
Commercial use in Commercial Zone where not permitted	1	4%
Total	28	

⁷⁵ This concentration of parking variances in the Bronx is unique among the five boroughs. These variances are all for legalizations of existing residential open parking lots.

3. Manhattan Variances.

The most common variances in Manhattan are for community facility expansions and residential uses in manufacturing zones. While the overall number of variances is relatively low, there have been several high profile cases, including two discussed in the Case Studies section of this report.

Variance Type	Total applications	Share of Borough Total
Use	21	
Use/bulk	0	
Bulk	17	
Total variances	38	
1-2 family	1	3%
General community facility	9	24%
Residential in Manufacturing Zone	9	24%
Manufacturing in Residential Zone	0	0
Residential in Commercial Zone	4	11%
Commercial in Residential Zone	6	16%
Commercial in Manufacturing Zone	0	0
Manufacturing in Commercial Zone	0	0
Parking Lot	0	0
Community facility in Manufacturing Zone	0	0
Community facility in Commercial Zone (where not permitted)	0	0
School in Manufacturing Zone	0	0
Misc. Religious use/bulk	1	3%
Miscellaneous Bulk	5	13%
Other Variances	1	3%
Commercial use in Commercial Zone where not permitted	2	5%
	38	1

4. Queens Variances.

This borough, the City's largest and second most populous, has a wide distribution of variance types. Note that at least 26 of 33 variances for residential uses in manufacturing zones are from one development in Northern Queens.

Variance Type	Total applications	Share of Borough Total
Use	19	
Use/bulk	1	
Bulk	48	
Total variances	68	
1-2 family	4	6%
General community facility	5	7%
Residential in Manufacturing Zone	33	49%
Manufacturing in Residential Zone	2	3%
Residential in Commercial Zone	0	0
Commercial in Residential Zone	9	13%
Commercial in Manufacturing Zone	0	0
Manufacturing in Commercial Zone	0	0
Parking Lot	2	3%
Community facility in Manufacturing Zone	0	0
Community facility in Commercial Zone (where not permitted)	0	0
School in Manufacturing Zone	0	0
Misc. Religious use/bulk	3	4%
Construction Testing Facility	1	2%
Miscellaneous Bulk	7	10%
Other Variances	0	0
Commercial use in Commercial Zone where not permitted	1	2%
bulk	1	2%
	68	

5. Staten Island Variances.

The number of variances on Staten Island is, overall, very low. Expansions of single and two family homes dominate the variance process. The siting of small-scale commercial uses, like medical offices and shops, has occurred with some frequency as well.

Variance Type	Total applications	Share of Borough Total
Use	6	
Use/bulk	0	
Bulk	10	
Total variances	16	
1-2 family	6	38%
General community facility	0	0
Residential in Manufacturing Zone	0	0
Manufacturing in Residential Zone	0	0
Residential in Commercial Zone	0	0
Commercial in Residential Zone	6	38%
Commercial in Manufacturing Zone	0	0
Manufacturing in Commercial Zone	0	0
Parking Lot	1	6%
Community facility in Manufacturing Zone	0	0
Community facility in Commercial Zone (where not permitted)	0	0
School in Manufacturing Zone	0	0
Misc. Religious use/bulk	0	0
Construction Testing Facility	0	0
Miscellaneous Bulk	2	13%
Other Variances	0	0
Commercial use in Commercial Zone where not permitted	1	6%
	16	

F. Representation of Applicants.

Anecdotal accounts that a small group of law firms, and in one case an architect, handle the majority of BSA cases are proven true by this analysis. A group of nine law firms, attorneys and architects represent 68% of all applicants. The remaining applications are handled by a wide variety of law firms, architects and in some cases the applicants themselves.

Top 9 Law Firms or Architects	176 of 258 applications	Percentage of total applications
Sheldon Lobel	72	28%
Rothkrug, Rothkrug, Weinberg & Spector LLP	39	15%
Augusta & Ross	18	7%
Klein & O'Brien	11	4%
Howard J. Goldman	10	4%
Stadtmauer Bialkin LLP	8	3%
Moshe M. Friedman (R.A.)	7	3%
Friedman & Gotbaum LLP	6	2%
Wachtel & Masyr LLP	5	2%

G. Variances by Community District.

The Community Board breakdown further demonstrates the clustering of variances in industrial northern Brooklyn. The number of variances in Community Board 2 in Queens is inflated by the almost twenty-six applications submitted for one development.⁷⁶

1BK = Community District 1, Brooklyn

Community District	Number of Variances	Community District	Number of Variances
1Bk	32	6M	7
2Q	26	6Bk	7
3Bk	24	14Bk	7
2SI	10	6Bk	6
2M	10	12Q	3
7Q	9	11Q	3
12Bk	9	7Bx	2
15Bk	8	5M	2
6M	7	5Bx	2
6Bk	7	3M	2
14Bk	7	2Bx	2
6Bk	6	2Bk	2
5Q	6	18Bk	2
7M	5	11Bk	2
4M	5	4Q	1
12Bx	5	4Bx	1
7Bk	4	4Bk	1
5Bk	4	3Q	1
3SI	4	3Bx	1
10Q	4	1M	1
1SI	3	17Bk	1
1Q	3	16Q	1
13Q	3	14Q	1
13Bk	3	10Bk	1
1Bk	32	8M	0
2Q	26	8Q	0
3Bk	24	9M	0
2SI	10	8Bx	0
2M	10	6Q	0
7Q	9	8Bk	0
12Bk	9	9Q	0
15Bk	8		

⁷⁶ Tapei Court, a new development.

VI. Mapping of Variances.

Three citywide maps were prepared to show the distribution of variances applied for in 2001 and 2002. Map one shows the distribution of variance applications citywide and by community district. The second shows the distribution of use and bulk variance applications. The final map highlights the five most common variance application types, 1.) residential uses in manufacturing zones, 2.) community facility bulk or use variances, 3.) religious use variances, 4.) parking legalizations or use variances and 5.) misc. bulk variances (*e.g.* residential). Close-ups of Williamsburg, Brooklyn and the West Village of Manhattan are provided to give a better sense of the clustering which is occurring in these communities.

A. The General BSA Variance Map.

1. Brooklyn is the site of at least three clusters of variances. The communities impacted include Williamsburg, Ocean Parkway/Midwood, and Red Hook.
2. Affluent neighborhoods in Manhattan are the focus of heavy variance activity. These are the areas on the Upper West and East Sides below 96th Street. Heavy variance activity below 14th Street is also occurring.
3. Much of the Bronx, Staten Island and Queens have evenly distributed variance activity. This may reflect the lower-density, residential character of these communities. Much of the North Bronx, Staten Island and Queens is characterized by single and two family homes.

B. Use v. Bulk Variances.

1. Brooklyn's Williamsburg is clearly the center of a profusion of use variances, followed by Manhattan below 14th Street.
2. Conversely, the Brooklyn communities of Ocean Parkway and Midwood are the subject of many of bulk variances.

C. Distribution by Variance Type.

1. Conversion of manufacturing sites to residential use is clearly the purpose of most variances in Williamsburg/Clinton Hill, followed by a minor cluster in Manhattan's West Village. Both communities have significant manufacturing zoning.
2. The many community facility and religious bulk variances likely reflect the heavy concentration of Hasidic and Orthodox institutions in central Brooklyn. A minimum of seven variances for synagogues or religious schools were sought in Community Boards Twelve and Fourteen in Brooklyn. Other concentrations of bulk variances on the Upper East and West sides of Manhattan may reflect the presence of hospital and educational institutions in those neighborhoods.

D. Withdrawals.

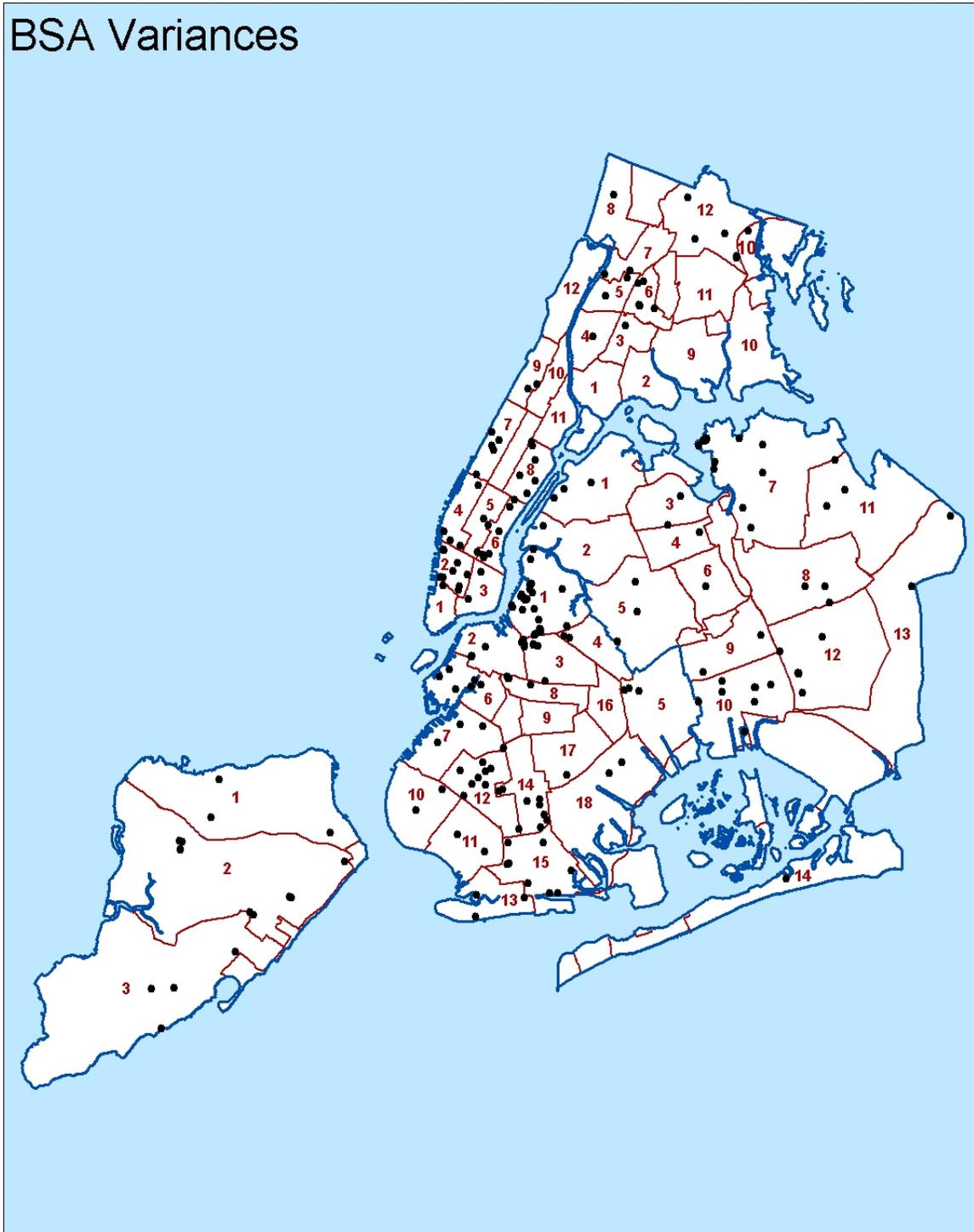
Of the twenty-three applications that were withdrawn, thirteen were in Brooklyn Community Boards One and Three. All of these were for residential uses in manufacturing zones. At least seven were from one development on Walsworth Avenue.

E. Variances for Pre-Existing Illegal Conversions.

Thirty-one applications were made for approval of readily discernable pre-existing illegal uses. It is likely that more existed. Of these, 11 were for residential units in manufacturing zones and eight were in Brooklyn Community Boards One and Three. The remainder of these applications has a wide geographic distribution and a variety of issues including an illegal dance studio, medical office, dentist office, restaurant, drug store, several parking lots and a religious school. Overall, existing illegal uses do not appear to increase the rate of approval at the BSA.

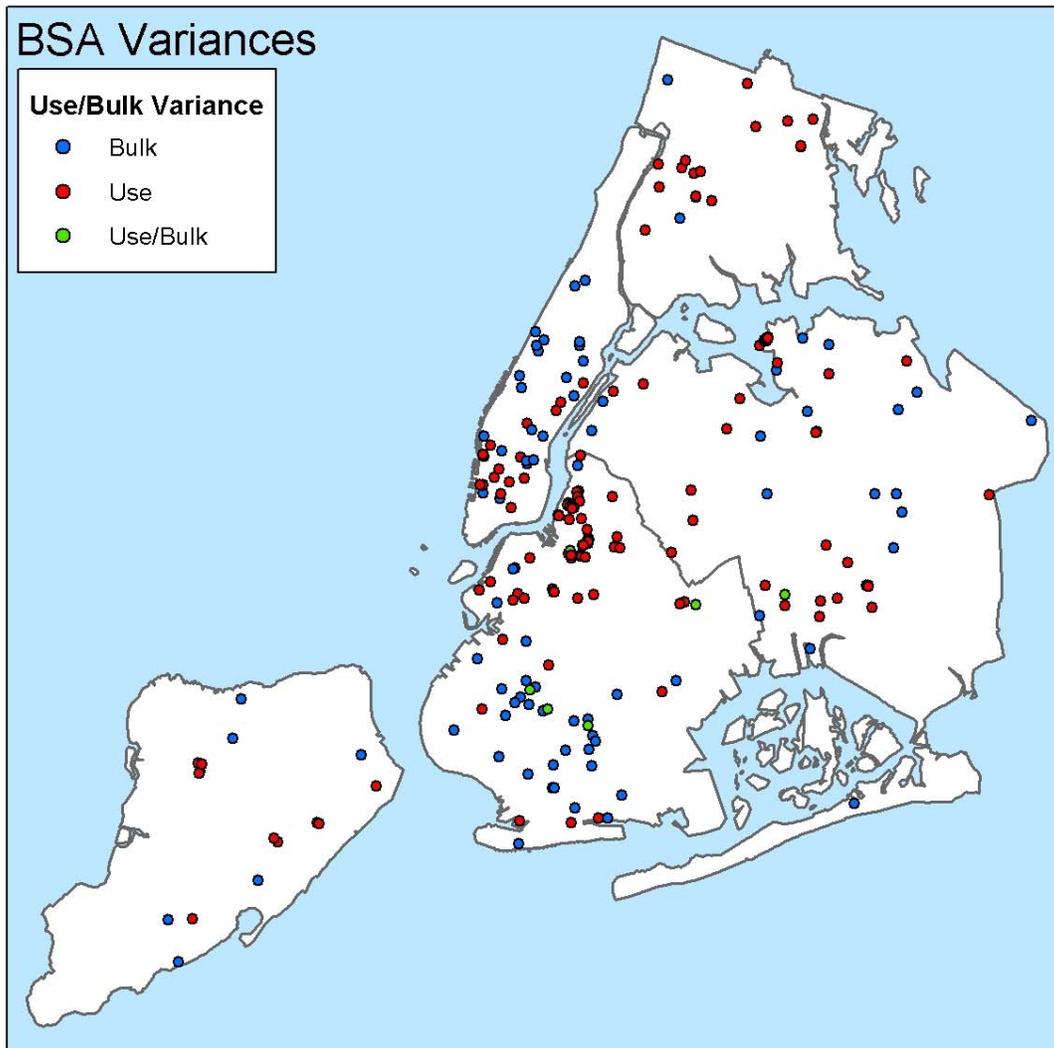
Disposition of Illegal Conversions	Number of Applications (31 Total)
Application Withdrawn	3
Dismissed for Lack of Prosecution by Applicant	5
Denied	2
Granted On Condition	12
Pending (as of April 2003)	9

Map 1: City-Wide BSA Variances Applications*

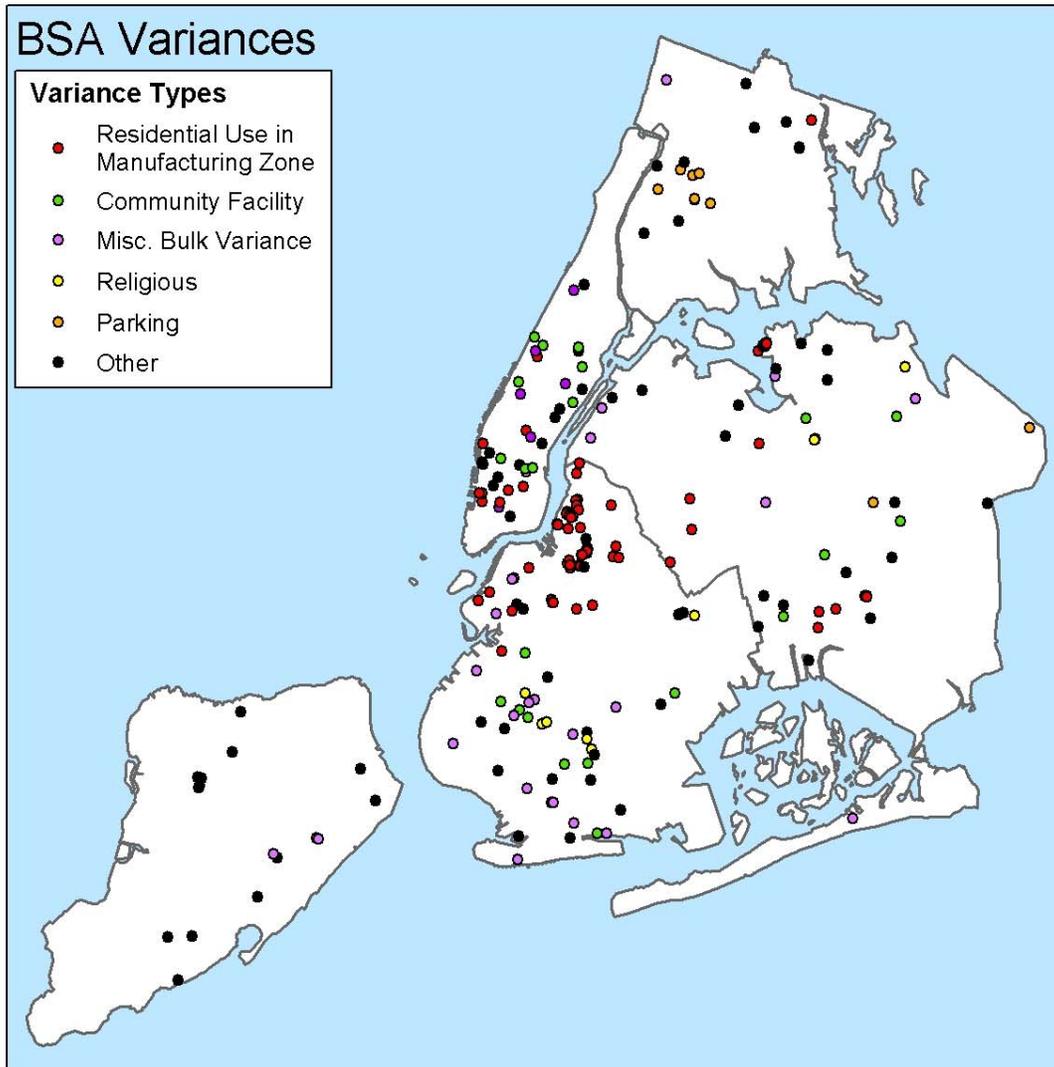


**Each dot represents one variance on each map. Clustering of variances may cause many dots to overlap. Some variances could not be mapped.*

Map 2: City-Wide BSA Use and Bulk Variance Applications

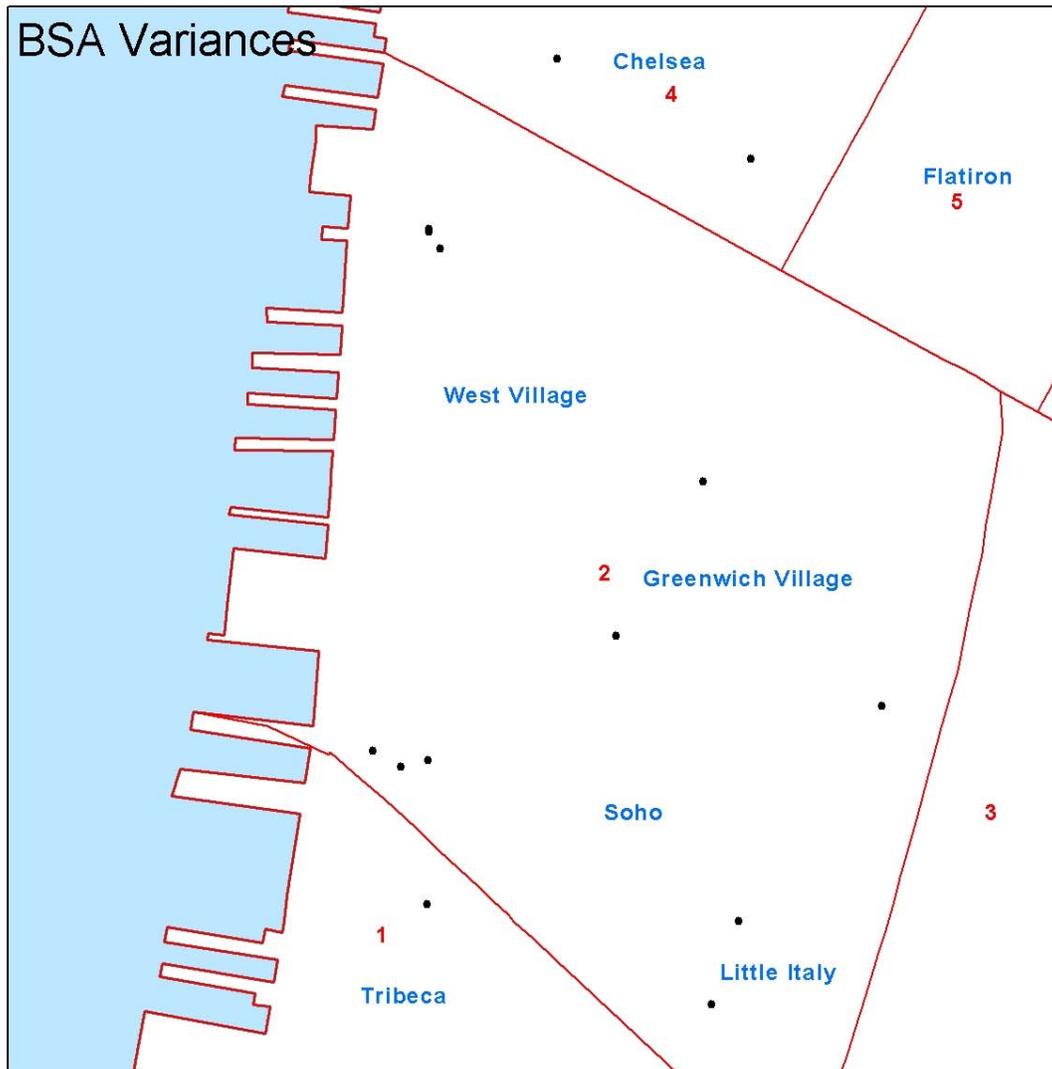


Map 3: Five Kinds of BSA Variance Applications

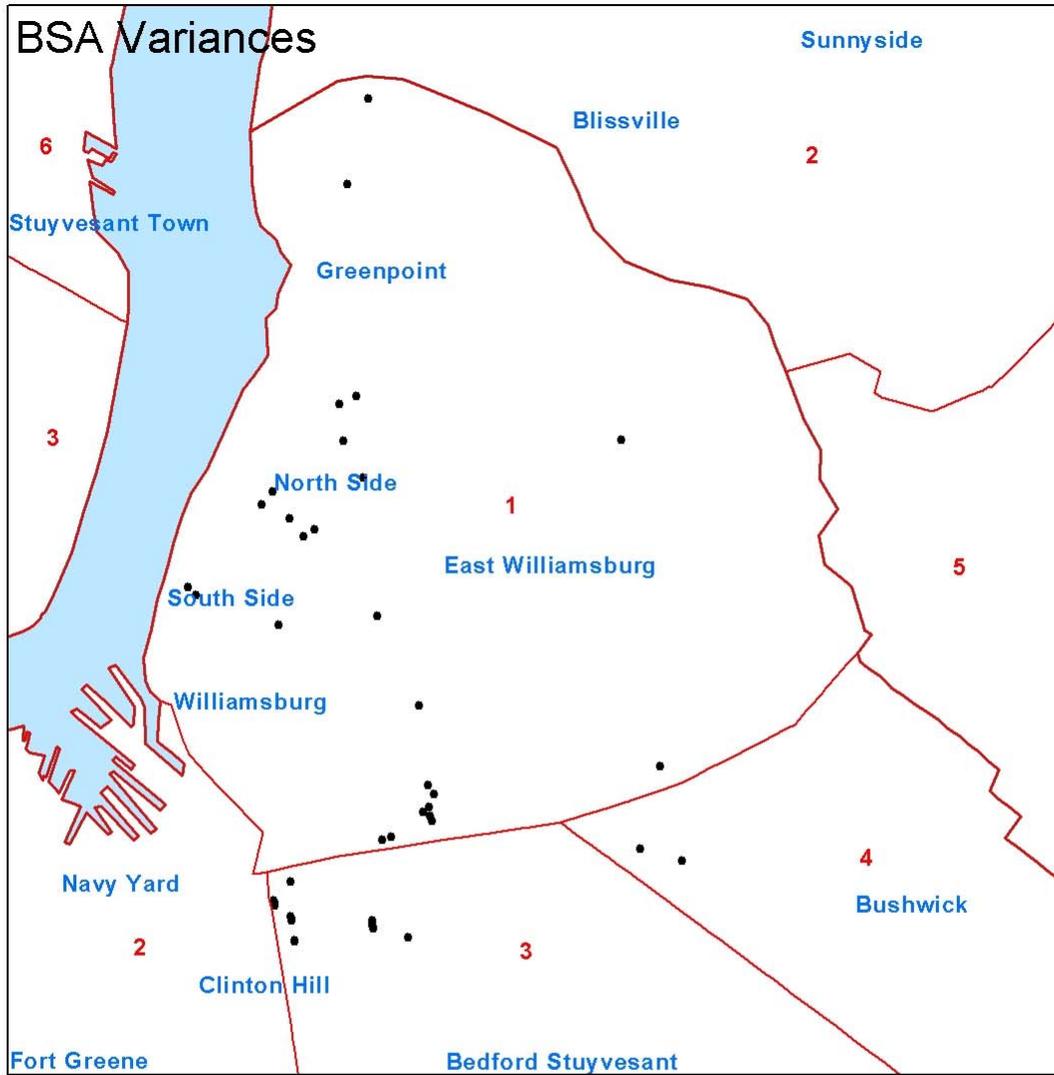


Map 4: West Village, Manhattan Variance Applications

Numbers indicate Community Boards (e.g. Chelsea, Community Board 4)



Map 5: BSA Variance Applications in Williamsburg, Brooklyn



VII. Further Analysis of Clusters.

Two cluster areas, the West Village and Williamsburg, were chosen for further analysis. These two communities have been the focus of numerous variance applications, enough that City Planning's attention has turned to the underlying zoning there. A look at City Planning rezoning plans for the areas, more detailed maps, and a comparison with as of right development permits granted by the Department of Buildings (DOB) provides a fuller picture of the transition from manufacturing to residences and the role the BSA has played in that process. The West Village map above, Map 4, contains ten variances that were applied for in 2001-2002. These variances for residential uses in manufacturing areas of the far West Village motivated City Planning to propose its recently passed zoning changes.⁷⁷

The result of this rezoning is that two pockets of the neighborhood, at the northern and southern ends, have been rezoned for residential uses. Where manufacturing is concentrated the existing zoning has been left intact. Importantly, the northern rezoning area includes 600 Washington Street, one of the most controversial and litigated variances in recent years, as further analyzed in the Case Studies section of the Report. The neighborhood is a prime location for developers; there were thirty-five applications for new buildings filed in 2001 and 2002 in Community Board Two of Manhattan.⁷⁸

While the planning for a rezoning in Williamsburg has not proceeded to completion as it has in the West Village, there is a clear recognition that residential growth now requires a zoning change. In its Strategic Plan, City Planning outlines its plans for Williamsburg, calling it a an "Unproductive Manufacturing Area."⁷⁹ Rezoning of several areas that currently permit only industrial uses has been proposed.⁸⁰ Map 6 below, shows a close-up of this neighborhood and the density of residential variances. Some areas, like the one immediately north of the Williamsburg Bridge, are slated to be zoned for residences. Additionally, the area labeled "Northside" on Map 6, will become a residential area. Coincidentally this area contained at least four manufacturing conversion variances during 2001-2002 alone.

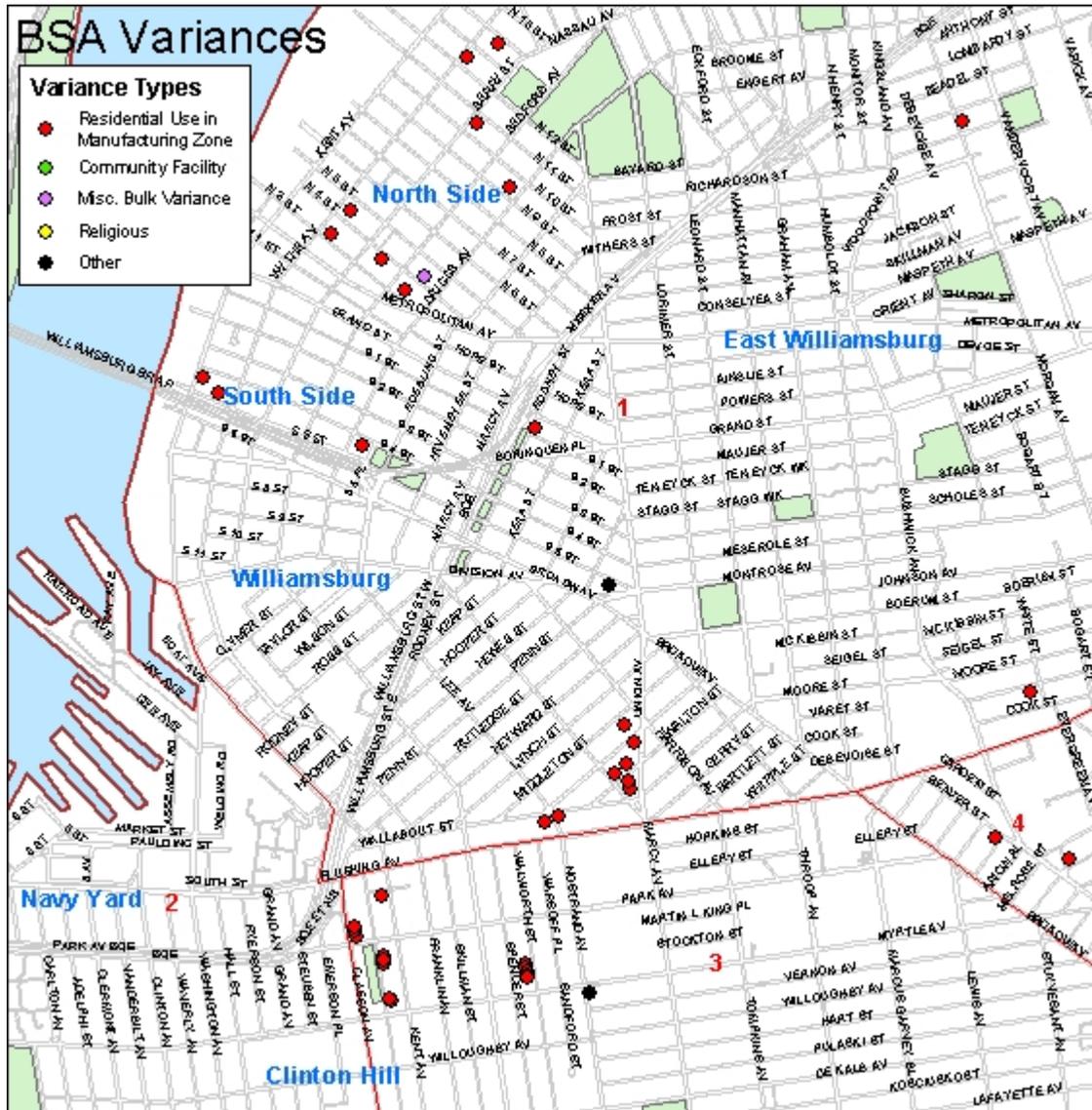
⁷⁷ New York City Department of City Planning, *Hudson Square Rezoning*, NYC DCP #02-23 1 (October 2002).

⁷⁸ See E-mail from Julie Lubin, Director, Program Management & Analysis, New York City Department of Buildings to Christopher Rizzo, Menapace Fellow, Municipal Art Society (July 31, 2003, 3:47 P.M. EST) (on file with author).

⁷⁹ New York City Department of City Planning, *Strategic Plan* at 23 (Spring 2003).

⁸⁰ See *id.* at 24.

Map 6: Manufacturing Variances in Williamsburg.



Map 6 also show a profusion of variances in the area labeled Williamsburg and Clinton Hill. The corner of Union Avenue and Wallabout Street contains eight. Overall, the majority of the manufacturing to residential variances in this community are for high-density residential uses. Note that many of the applications were not acted on by the BSA at the time of this study. However, the summary below demonstrates the large scale of the variances sought.

- 24 (out of 56 total) variances were sought for 4-6 story residential buildings in the manufacturing zones.
- 8 legalizations were sought including for a 58 unit warehouse conversion and a 34 unit conversion

The Report does not explore the number of residential units that were sought in the community boards as a whole. However, a study by South Brooklyn Legal Services, described in Section 10 below, did conduct such an inquiry. Variance applicants proposed 1102 new residential units during the study period; at least 528 were approved. There were 187 new building permits in Community Board One and 261 for Community Board Three in 2001 and 2002, adding 867 new residential units to these community boards in 2001 and 2002.⁸¹ Using the 1996-1999 numbers from South Brooklyn Legal Services as a guide, at least 264 units might have been added to manufacturing areas of Community Districts One and Three in 2001-2002, while 867 were added to the Districts overall.

VIII. Analysis of Case Law

Reported judicial cases involving BSA variances from 1962 until the present were analyzed for the Report. 1962 was chosen because the Zoning Resolution was revised effective December 15, 1961 and it was at this time that the five findings requirement were added. Overall, sixty-eight cases were analyzed.⁸² As demonstrated by the data presented below, the majority of BSA variances are upheld by courts, regardless of whether the challenge is to a grant or a denial of a variance. The low success rate for opponents of a BSA decision may be related to the deferential standard used by courts in evaluating the Board's decisions, as discussed earlier.

BSA Variances in Court 1962-2003⁸³	Ultimately Upheld by Court	Ultimately Overturned by Court
67 total	57 (85%)	10 (15%)

Success of Challenges to BSA Decisions	Challenges to Grants of Variances	Challenges to Denials of Variances
Number of Cases	36	31
Success of Plaintiffs	6 grants overturned	4 denials overturned

Court Decisions	Decisions Which Upheld BSA	Decisions Which Overruled BSA
Supreme Court (67 cases heard)	49	18
Appellate Division (63	52	7

⁸¹ See *supra* note 78.

⁸² These sixty-eight cases were reported and are available on Lexis or through the *New York Law Journal*.

⁸³ The Board of Estimate (BOE) had a significantly different record before its abolition, ten BSA variances were overturned and only one was upheld. A study of cases heard by the BOE by former BSA Chairwoman Sylvia Deutsch found that the BOE overturned 71% of BSA decisions. Where court action resulted, the BOE was upheld in 60% of its cases.

heard, 4 reversed and remanded)		
Court of Appeals (12 cases heard)	11	1

Presumably community groups and neighbors initiated most challenges to grants of variances.⁸⁴ Similarly, it was likely the applicants who challenged most denials. The court is as likely to uphold a BSA decision against a community group as it is an applicant’s challenge. The case law study indicates that of thirty-six challenges to grants of variances, only six were successful. Of thirty-one challenges to denials, only four were successful. In some of these successful cases, the court remanded the matter to the BSA and the same result, a grant or denial, may have occurred. While courts at all levels generally uphold the BSA’s decisions, the success rate of plaintiffs drops even further in the Appellate Division and Court of Appeals.

Charting the cases by year of final disposition yields some additional information. Chart A indicates that the number of cases fluctuates from year to year. Two spikes are noticeable, one in the early 1990s and the other after 2000. Both of these spikes occurred after major real estate booms in New York City, those of the late 1980s and the late 1990s. It is possible that challenges increase as economic and real estate activity increases. While the actual spikes in court cases may actually occur during the recessions that followed the economic booms, it is likely that the cases were initiated earlier.

Chart B indicates that the majority of denials that were challenged occurred between 1989 and 1994. Conversely, recent challenges to BSA decisions have been almost entirely based on the grant of a variance. The change in the nature of court challenges may be based on the number of overall variances granted by the BSA and its disposition with regard to applicants.

It is important to recall, as discussed in the Empirical Analysis, that the vast majority of BSA variance applications are granted; therefore court challenges represent only a fraction of the variances. During 2001 and 2002, at least 93% of decided variance applications were granted. Presumably, the applicants generally achieve the results they seek in the BSA and usually have little reason to challenge the result. If they do, they are no more likely than opponents to be successful.

Courts are deferential to BSA decisions, as they generally are with governmental decision makers.⁸⁵ The case law analysis in this study compares favorably to a recent one performed on challenges based on the State Environmental Quality Review Act (SEQRA). Project opponents prevailed in just 11% of challenges to Environmental Impact Statements and 28% percent of challenges for failure to prepare Environmental Impact Statements.⁸⁶ Thus, while the results of the case law study are not surprising,

⁸⁴ There have been no identifiable challenges to BSA variances by other New York City government bodies (e.g. City Planning) although the Society received an anecdotal account of at least one.

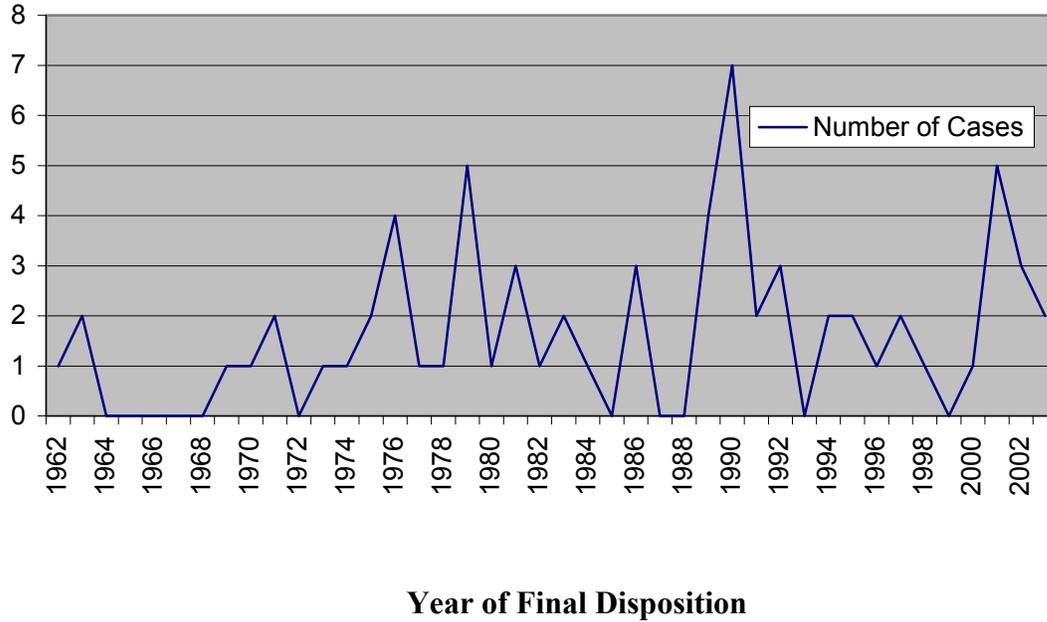
⁸⁵ See section IV.G.

⁸⁶ Michael B. Gerrard, *SEQRA: A Statistical Study*, 65 ALBANY L. REV. 365, 367 (2001).

when coupled with the high approval rate at the BSA, it is clear that applicants are very likely to achieve and maintain the variances sought.

Chart A⁸⁷

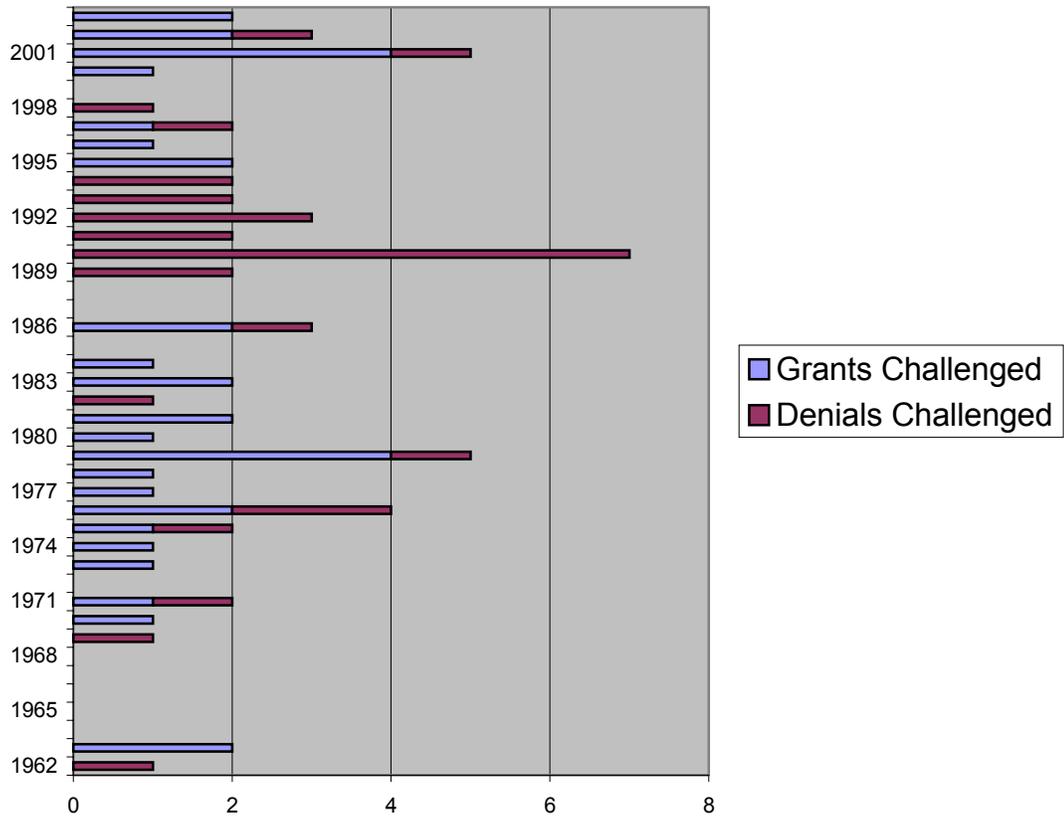
Court Cases Involving BSA Variances



⁸⁷ There are likely numerous unreported cases that were not analyzed for this study. A study of court cases by former BSA chair Sylvia Deutsch was referenced, along with Lexis/Nexis and the New York Law Journal.

Chart B

Judicial Cases 1962-2003 Challenges to Grants vs. Denials of Variances



IX. Case Studies.

Four case studies were chosen because of their location, representation of the trends identified in this study, and level of community opposition that they created. These cases were not chosen randomly. They were chosen specifically to identify and examine problems that have been alleged to exist in the variance process.

Three of the cases were for residential uses in manufacturing zones, a variance type which represents over forty percent of the total variances applied for in 2001-2002. In these three cases, opponents challenged the variances in court and lost. This section synthesizes the cases studies, which are detailed in Appendix A. In sum they demonstrate the need for more expertise in the BSA with regard to financial aspects of variance applications. Situated in sensitive areas of the city, like manufacturing zones, they also illustrate the competition between lucrative residential uses and viable manufacturing.

The entire file for each matter was reviewed, including materials submitted by the applicant and the opponents. In most cases, there was little written evidence from the BSA itself, besides the final resolution. Where there was, it generally consisted of handwritten notes from BSA staff members. Most review apparently takes place orally, in hearings. Citations in this Report to specific documents in the BSA files are made where appropriate and where possible.⁸⁸

In summary, the cases studies reflect the overwhelming complexity of many variance matters, especially the financial data and rate-of-return calculations submitted by applicants. Some matters became battles of experts, with the applicants generally submitting fuller and more detailed economic data than their opposition. Despite this, numerous inconsistencies and questionable findings were observed and these are noted where applicable.

1. 184 Kent Avenue, Brooklyn. The building owners applied for a variance to permit residential uses in a large manufacturing building in Williamsburg, Brooklyn. This case is further complicated by the existing illegal residential uses at the time of the variance application. Community opponents questioned the forty percent vacancy rate in the manufacturing building, pointing to a strong demand for such space in Brooklyn. This suggested that had the owner wanted to rent the space for manufacturing he could have. After a long review process, however, the BSA granted the variance. A court challenge by opponents was unsuccessful.

2. 600 Washington Street, Manhattan. This variance was also for a residential project in a manufacturing zone. In this case, the lot was arguably set among many more existing residential buildings, in contrast to 184 Kent Avenue, which sits in an almost exclusively manufacturing setting. The applicants pointed to the profusion of residential uses surrounding the site, where manufacturing once

⁸⁸ Copies of documents cited are on file with the Municipal Art Society and can be accessed at the Board of Standards and Appeal.

existed. The variance was granted based on several physical hardships, the merits of which are analyzed below. A court challenge was not successful.

3. 220-16 Jamaica Avenue, Queens. This unique matter began in the late 1980s when the applicant obtained a building permit for an as-of-right motel in Queens Village, ostensibly seeking to serve visitors entering New York's two major airports. Neighboring residents feared that the site would not attract a sufficient number of visitors and would instead turn into a motel of ill-repute. A subsequent zoning change barred motel uses in the community, although this project would have been grandfathered. The owner's financing fell through and the project was halted. When financing was re-obtained, the Department of Buildings issued a new building permit, in contravention of the new zoning. Again financing fell through. On the third try, the Department of Buildings granted, then withheld the building permit. The BSA variance application that followed relied heavily on this unfortunate development history as well as several physical conditions like a non-rectangular lot shape and adjacency to the Long Island Railroad. The resulting variance granted by the BSA omitted the development history, relying instead on these "unique" lot conditions.

4. 19-35, 55 West Houston Street, Manhattan. This matter consists of two lots for which joint applications were filed. Applicants, as in 184 Kent Avenue and 600 Washington Street, questioned the outmoded manufacturing zoning. In this case the zoning was for "Joint Living and Working Quarters for Artists," a special zoning category created to foster Soho's artist community. Relying on a "L" shaped lot configurations, a nearby subway easement and special designs required to achieve Landmarks Preservation Commission approvals, the applicant successfully created its case for a variance. Strenuous community opposition, in the form of hundreds of formal community member objections, resulted. A court challenge was not successful.

A. The Five Findings.

1. Unique Hardship.

In the three case studies dealing with residential uses in manufacturing zones, applicants successfully demonstrated that their lots' zoning was outmoded. The underlying zoning is not a basis for unique physical hardship. Nonetheless, the applicants in 184 Kent Avenue argued that a profusion of surrounding residential uses and an inability to rent their space for continued manufacturing use made a variance warranted. Similarly, the applicants for 600 Washington Street pointed to nearby residential uses. The 19-35, 55 West Houston Street applicants argued that artists' housing did not dominate the surrounding area. The applicants thus directly and indirectly raised the issue of whether the underlying manufacturing zoning was still appropriate for the community. There are varying opinions on the continued viability of manufacturing in New York City.⁸⁹ It has

⁸⁹ See Tina Traster, *Hot Brooklyn Properties Put Freeze on Industry*, CRAINS N.Y., May 12, 2003, at 39. The author cites growing and frustrated demand for manufacturing space in industrial areas of the city. Other authors cite declining manufacturing sectors; see also Diane Cardwell, *Where Blue Collars Grow*

always been understood, however, that the Department of City Planning would ultimately be responsible for determining what zoning changes are warranted.

In addition, similar physical hardships were at issue in four of the cases studies. Proximity to rail or subway lines and easements was cited in three of the four cases. In 600 Washington Street and 19-35, 55 West Houston Street the applicants argued that nearby subway easements would require special foundations to protect the integrity of the underground tunnels. Complex economic analyses were presented to demonstrate these costs and cannot be analyzed in this Report. Non-rectangular lot sizes/shapes were raised in all four cases. In none of the cases, however, did applicants explicitly address how those shapes would preclude economical construction. In 19-35, 55 West Houston Street the “L” shaped lot was apparently created by the prior owner; if divided into separate lots, the size and shape would not be unique. With regard to such physical conditions that are shared by nearby lots, courts have repeatedly held that such conditions alone do not warrant variances.⁹⁰ In these cases, the applicants made strong efforts to relate the conditions to increased building costs.

2. Reasonable Return.

In general, the size and general complexity of the economic reports makes full analysis, without financial expertise, difficult. Records of the BSA did not indicate what sort of analysis the BSA itself undertook. Opponents pointed out some discrepancies that were ultimately discounted. In 184 Kent Avenue, for example, testimony was submitted that argued that the building owners were using manufacturing rental figures that were half of market rent. In 600 Washington Street, the opponents noted that the river-facing units were proposed for rentals. Condominium sales would have dramatically increased the rate of return. The owners are currently marketing all units for sale, after having obtained the variance.⁹¹ Similarly, opponents argued in 19-35, 55 West Houston that increasing the size of the units and making them for sale, rather than rent, would dramatically increase the rate of return. The applicants proceeded and were granted their variance based on small rental units. The buildings have been subsequently marketed as large luxury condominiums. There is also a troubling practice, found in 184 Kent Avenue, “Soho Alliance”, and 600 Washington Street, where applicants are granted variances and later seek modifications that further increase the number or nature of units to be created.

Endangered, N.Y. TIMES, June 24, 2003, at B1 and Municipal Art Society, *Making It in New York, The Manufacturing Land Use and Zoning Initiative*, 2001. The later indicates a small but viable manufacturing presence in many parts of the City; space was a key issue for these employers.

⁹⁰ See Section IV.F of this Report.

⁹¹ See Edwin McDowell, *West Village Condominiums with a Garden*, N.Y. TIMES, June 6, 2003, at 11-1.

3. Community Character.

The BSA provided extensive opportunity for opponents and the applicant alike to present evidence regarding the variances at issue in all four case studies. In at least two of the case studies the Community Board vigorously opposed the variances. In 19-35, 55 West Houston Street the BSA aptly noted, however, that 200 new residents, in a community of over 10,000, would probably not have a tremendous impact. The question of clustering and cumulative impacts, in Community Districts One of Brooklyn and Two of Manhattan, was not addressed. In fact to demonstrate that the variance would have a minimal impact on the surrounding community, the applicant for 184 Kent Avenue went to great lengths to point out nearby residential uses. For 600 Washington Street the same was done. There the applicant went to great lengths to point out the reduced building heights and well-located vehicle entrance in discussing the impact on the community.

4. Self-Created Hardship.

As noted in Section II of this report, the relevance of pre-existing physical hardships and existing zoning in determining whether a hardship was self-created has not been fully resolved by the courts. In three of the four case studies, existing physical and regulatory limitations were in place at the time of purchase. In fact, a bidding war preceded the purchase of 600 Washington Street. With regard to the West Houston property, the combining of lots apparently created the unique lot shape. Finally, as 184 Kent Avenue illustrates, there are serious questions about whether owners considered all permitted or more compatible uses. For example, manufacturers interested in 184 Kent Avenue were apparently willing to pay higher rents than were used in the applicant's economic analysis, which was used to demonstrate the non-profitability of industrial uses. Only in 220-16 Jamaica Avenue did the owner suffer the consequence of a zoning change after he purchased the property and planned the motel-arguably the clearest case of a hardship that is not self-created.

5. Minimum Variance.

There are continuing questions about whether an economic analysis must consider only uses permitted in a zoning district, or those that are not permitted but are less of a departure from that zoning. For example, with regard to 184 Kent Avenue, warehousing might have been less of a departure from the underlying heavy manufacturing zoning than the proposed residences. This possibility was not fully explored. With regard to 220-16 Jamaica Avenue, commercial uses and small-scale medical offices were not considered in the economic analysis. While also not permitted by the underlying residential zoning, they were arguably less of a departure than the motel proposed by the applicant.

As noted, applicants sometimes seek alterations to the variances after the original variance is granted. Owners of 184 Kent Avenue later returned to the BSA for a variance to build thirty additional rooftop units. With views of Manhattan, these units could command very high rents or sale prices. The rate of return, deemed marginal in the original application, was increased. Furthermore, in 19-35, 55 West Houston, applicant sought approval for a reduction in units from 43 to 15. The reduction in the number of

units, and conversion of the project into larger luxury condominiums was actually suggested by the opposition from the beginning.

B. Analysis of Case Studies.

While the impact of each of the variances granted in the above cases was sharply debated, the clustering of variances is an item that applicants and the BSA do not address. The BSA did not address the cumulative impact of variances, especially near 184 Kent Avenue and 600 Washington Street, although it was raised by opponents.

Variances like these may actually provide the basis for future zoning change. Indeed, City Planning has recently proposed rezonings for both Williamsburg and the West Village's manufacturing areas, increasing residential uses.⁹² With regard to the efficacy of opposition, Community Boards and even City Planning were not effective in preventing variances in any of these four matters.

Courts have sought to uphold the great flexibility that zoning boards of appeal possess with regard to variances.⁹³ The goal is to permit zoning boards to respond appropriately to the unique circumstances forming the basis for a variance application. However, the sets of hardships that form the foundations for variances are often similar from case to case. For example, in three of the case studies, the obsolescence of the underlying zoning was the indirect basis for the applications. Furthermore, certain physical hardships like nonrectangular lot shape, proximity to an underground rail easement, and other foundation costs were cited. Finally, the question of whether purchase price reflected physical and zoning limitations obvious at a recent purchase was never resolved in any case but 220-16 Jamaica Avenue. The complexity of the economic analysis makes a hard look at the variance applications difficult in all cases. These common themes arise in the case studies, court cases, and applications in the empirical analysis. It is possible, therefore, that more definitive rules can be created to guide the BSA in these circumstances, strengthening the five findings and the variance process. The issues raised in the case study analysis form the basis for many of the recommendations made, especially the need for financial expertise at the BSA.

See Appendix A for a Full Analysis of the Case Studies

⁹² See *supra* Section VII.

⁹³ See *supra* Section IV.G.

X. Other Variances Studies.

A. 1976 Municipal Art Society Study.

1. Introduction.

The 1976 Society study raised many of the same concerns currently being discussed.⁹⁴ This early study raised issues about the BSA's alleged intrusion on City Planning's jurisdiction, its high approval rate and its failure to consider community impact. Comparing the figures of this early report to the current Report demonstrates that the original bases for these concerns have remained, including a high approval rate and a reliance on the variance process for use changes.

2. Facts and Data.

With the help of two Columbia Law school students,⁹⁵ the author of the 1976 Report analyzed variances from 1971-1975. Only original variance applications from Brooklyn and Manhattan were considered. The 1976 Report went into depth on several items that the current Report does not, including the role of the Community Boards, the facts that formed the basis for each application, and the type of representation the applicants had.

From Brooklyn and Manhattan, 168 variances over four years were analyzed.⁹⁶ Of those, 13 were withdrawn and 3 were dismissed. The overall approval rate was 83.8% and the denial rate 7.7%.⁹⁷ The approval rate of variances granted has increased by about 10%, since it is currently at 93% for variances decided.⁹⁸ The withdrawal and dismissal rate in 1976 was about 10%, versus 14% today.⁹⁹

The greater difference in data is the shift from bulk variances to use variances. While the data in the 1976 Report is presented differently, making perfect comparison impossible, approximately 72% of variances in the early 1970s were for bulk and 28% for use.¹⁰⁰ This stands in stark contrast to the 33% and 64% for bulk and use today.

The geographical shift is also clear in comparing the two data sets. The following chart compares the two data sets for the two Brooklyn Community Districts that had the highest number of variances in 2001-2002.

⁹⁴ Nancy E. Haycock, Municipal Art Society, *The Board of Standards and Appeals: An Analysis of the Decision Making Process* (1976) (on file with the Municipal Art Society) [hereinafter *1976 Study*].

⁹⁵ Leonard Easter and Jane Wiznitzer.

⁹⁶ *1976 Study* at 9.

⁹⁷ The other 8.3% was listed as "couldn't tell."

⁹⁸ See *Supra* Section V, Empirical Analysis.

⁹⁹ See *id.*

¹⁰⁰ See *1976 Study* at 14-15.

Brooklyn Community Boards	1971-1975 Variances 90 total	% of 1971- 1975 Brooklyn total	2001-2002 Variances 108 total	% of 2001- 2002 Brooklyn total
1Bk	6	7%	32	30%
3Bk	4	4%	24	22%

The table above suggests that since 1975 variance activity has shifted to manufacturing communities, which constitute a substantial portion of Community Boards One and Three. In 1975, Brooklyn Community Boards One and Three had a low percentage of the borough's variances. Now the variance activity is clustered in these areas.

3. Recommendations

The 1976 Report discussed various improvements to the variance system, as summarized below.

- i. Consider creating a model or standard formula for calculation of economic return.¹⁰¹
- ii. Add economic and real estate expertise to the BSA or its staff to give the board the ability to scrutinize rate of return calculations.
- iii. Require greater detail in resolutions and findings of fact.
- iv. Require sworn testimony from witnesses and applicants, including their representatives.
- v. Give greater importance to testimony and evidence from parties opposing the variance (embodied in several recommendations).
- vi. Require the BSA to map the variances to indicate if clustering is taking place.¹⁰²

The recommendations from the current study draw upon recommendations two, five and six. Given the myriad of economic factors considered, a model form for calculations would prove very challenging to create. Recommendation three, regarding details in resolutions, is a good one. However courts have repeatedly admonished the BSA to provide such detail.¹⁰³ With regard to the weight given to opponents' submissions, this study does not focus on the efficacy of them and recommendation five is not repeated in the present study. However, the greater oversight, review and expertise called for in this Study will give opponents, City Planning and the BSA itself better tools for considering variance applications. Finally, recommendations ii and vi are embraced by this reporty.

¹⁰¹ At the time, the New School for Social Research had apparently proposed such a model. *1976 Study* at 35.

¹⁰² See *1976 Study* at 35-40.

¹⁰³ Most recently in *Enopac Holding, LLC. v. Board of Standards and Appeals*, N.Y.L.J. Oct. 20, 2003 at 18, where the Supreme Court, New York County called the BSA's findings conclusory and inadequate to support judicial review. See *Montauk Improvement v. Proccacino*, 41 N.Y.2d 913 (1977). The Court of Appeals stated in that case "A court cannot surmise or speculate as to how or why an agency reached a particular conclusion. Failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review." See *id.* at 914.

B. 1962 Syracuse New York Study

1. Introduction

The 1962 Syracuse New York Study was actually a review of several studies, with added data, by a leading zoning commentator and Syracuse Law School professor.¹⁰⁴ It compared several pieces of data gathered on the Syracuse Zoning Board of Appeal. The resulting article was based on the familiar premise that zoning variances were eroding the zoning scheme for the benefit of the few.¹⁰⁵ It also questioned a premise underlying the creation of the zoning board of appeal, that to keep zoning out of the courts, a body of experts would be created to review property owner hardships. The results of the study questioned whether the board had lived up to this standard.

2. Facts and Data

As with the 1976 Municipal Art Society Study, the factual conclusions of the Syracuse Study raise many of the same concerns the present study does. For example, it noted that 68% of variance applications between 1958 and 1961 were granted.¹⁰⁶ While it did not consider the details of local variances that the Municipal Art Society studies do, it did analyze court cases dealing with variances.

Apparently using a statewide search of variance cases, the author determined that 65% of judicial challenges to grants of variances were successful.¹⁰⁷ Conversely, only 25% of challenges to denials were successful. It is unclear why these results differ so markedly from the current statistics.¹⁰⁸ As discussed in Section V above, 85% of challenges to BSA decisions are upheld, and opponents fare as poorly as applicants in their challenges.

3. Recommendations

The author considered various solutions proposed by others, without choosing to endorse any. A summary of the solutions considered is set forth below:

- a. Prohibit zoning boards of appeal from granting use variances, leaving property owners to resort to the courts or legislative process. The author doubted that many homeowners would be able to prove a “taking” in the courts.¹⁰⁹
- b. Add expertise to the board. The author noted that if courts are to consider the boards expert bodies, as they do, then the BSA should have the expertise they are credited with having.¹¹⁰

¹⁰⁴ Robert M. Anderson, *The Board of Zoning Appeals-Villain or Victim*, 13 SYRACUSE L. REV. 353, 354 (1962).

¹⁰⁵ See id.

¹⁰⁶ Id. at 371.

¹⁰⁷ Id. at 365.

¹⁰⁸ Id.

¹⁰⁹ Id. at 387.

¹¹⁰ Id.

- c. Consider transferring some or all of the variances to a zoning administrator within the city planning department.¹¹¹

It is unclear whether any of these proposals were implemented in Syracuse. The first is somewhat troublesome, given that the BSA, and other zoning boards of appeal, were created to keep the courts free of zoning challenges. The potential for parts of the code to be overturned or altered in court on a regular basis is perhaps more troubling than any threat posed by the BSA. In any event, following the studies that the author considered and the author's article, a follow-up study noted a marked drop in approvals at the Syracuse board, down to 50.7% within a few years.¹¹²

C. South Brooklyn Legal Services, 2000.

The South Brooklyn Legal Services (SBLS) study simply looks at variances in Williamsburg, Brooklyn between 1996 and 2000.¹¹³ SBLS represented the community opposition in their unsuccessful court challenge at 184 Kent Avenue, discussed above in the Case Studies section of this Report.¹¹⁴ To undermine the applicant's argument that its hardship was unique and that no impact on the community would result, SBLS compiled an extensive list of variances in the immediate vicinity of 184 Kent Avenue. They found that at least 28 applications for residential uses in manufacturing zones were filed.¹¹⁵ Applicants proposed 1102 units during the study period and at least 558 of them were approved.¹¹⁶ These figures are compared with as of right units in Section VII of this Report.

D. Zoning Administrators.

1. Zoning Administrators Generally.

The most common alternative to zoning boards of appeal is the zoning administrator, sometimes called a zoning examiner. The powers of this officer, typically housed in a department of city planning, vary by municipality. The zoning administrator can be responsible for a broad array of zoning enforcement and oversight, or limited to hearing variances and special permits under the zoning code.

The most accepted model for zoning law is the American Planning Association's, contained most recently in the "Growing Smart Legislative Guidebook, 2002 Edition."¹¹⁷ It specifically deems the zoning examiner a possible replacement for zoning boards. It also recognizes that the official may just make recommendations to the actual decision

¹¹¹ Id.

¹¹² David H. Cook & Robert D. Trotta, Note, *Syracuse Board of Zoning Appeals—An Appraisal*, 16 SYRACUSE L. REV. 632 (1965).

¹¹³ South Brooklyn Legal Services, BSA Variance List: Community Boards 1 and 3, Williamsburg (2000) [hereinafter SBLS Report].

¹¹⁴ See Kent Ave. Block Ass'n v. Bd. of Standards and Appeals of New York, 721 N.Y.S.2d 498 (1st Dep't 2001).

¹¹⁵ SBLS Report.

¹¹⁶ Id.

¹¹⁷ American Planning Association, Growing SmartSM Legislative Guidebook (2002), available at www.planning.org.

making body.¹¹⁸ In highlighting this alternative, the APA acknowledges the intense criticism that zoning boards of appeal have been subject to and finds that “[o]ne oft-recommended solution that has enjoyed increasing use is the hearing examiner.”¹¹⁹ Many states now authorize municipalities to create the position of zoning examiner and this memorandum will examine San Francisco’s system in detail.

2. New York State and Variances.

State law exempts New York City from the general municipal zoning laws of the state, thus empowering the City to craft its own system.¹²⁰ The City’s findings for variances, for example, currently vary from the State’s. No law or case has addressed the issue of whether a municipality can eliminate a zoning board of appeals, and there is no precedent for it. Note that some New York municipalities have a zoning administrator, but this official is not responsible for considering variances. Rather, the official oversees zoning, enforcement etc. Finally, as noted by many land use scholars however, takings law requires that states have forums to address hardships, but does not specify the form that they may take. This indicates that alternatives may be acceptable for New York City.

3. Past Proposals for Reform in New York City.

The abolition or reform of the BSA has been proposed before in New York City. Most notably, the State Charter Review Commission of 1975 (Commission), chaired by the Society’s future general counsel Edward Costikyan, suggested that a zoning administrator position be created. The proposal was not adopted, although it has been discussed informally ever since its release. The Commission’s report summarized the proposal by stating,

A new Office of Zoning Administrator shall be created within the Department of City Planning with jurisdiction over hardship variances from the Zoning Resolution, such special permits as are assigned by joint action of the Planning Commission and the Board of Estimate, and such other matters of an administrative nature as may be delegated by the Board of Estimate on recommendation of the Planning Commission. All decisions of the Zoning Administrator shall be filed with the Board of Estimate, which may, in its discretion, review and overrule a decision of the Zoning Administrator by majority vote.¹²¹

In proposing the elimination of the BSA and creation of a zoning administrator the Commission hoped to eliminate jurisdictional conflicts between the Planning Commission and BSA that “undermine the integrity of the Zoning Resolution.”¹²² Furthermore, the Commission pointed to the success of the system in other cities like San

¹¹⁸ *Id.* at 10-45.

¹¹⁹ *Id.* at 10-13.

¹²⁰ *See* N.Y. GEN. CIT. LAW § 81(1).

¹²¹ Press Release, State Charter Revision Commission for New York City, Charter Commission Proposes New Planning Process, (March 27, 1975).

¹²² State Charter Revision Commission for New York City, Planning for Land Use Recommendations at 28 (March 26, 1975).

Francisco.¹²³ While beginning with variances and special permits, the Commission suggested that other tasks, like minor map changes, be within the jurisdiction as well. The Zoning Administrator would be appointed by the Mayor and serve at his pleasure. The suggestion was echoed by others at the time.¹²⁴ In fact by the mid-1980s, many West Coast cities had eliminated or supplemented zoning boards of appeal with zoning administrators.¹²⁵

4. Assessment of the Zoning Administrator Position.

Set forth below are some of the benefits and disadvantages of this alternative.

Advantages of the Zoning Administrator

1. Increased access to expertise housed at City Planning.
2. Avoid competition and conflicts in planning between the two agencies.
3. Increase communication between planning and variance granting elements in city government.
4. Eliminate institutional isolation of the BSA.
5. Increased accountability with one individual decision maker.
6. Greater flexibility in time and hearings with one decision maker.
7. Possibility for Zoning Administrator to have background in both planning and law.
8. Combination of Zoning Administrator and BSA appellate review would improve record for any eventual court review.

Disadvantages of the Zoning Administrator.

1. Eliminating BSA altogether would consolidate authority in one mayoral agency, City Planning. Separation of this authority may be beneficial.
2. Several decision makers (the BSA Commissioners) may enhance review, dialogue etc.
3. Board permits incorporation of several areas of expertise one person can never possess.
4. Having the BSA maintains general uniformity with New York State as a whole, even if such uniformity is not actually required of New York City. This may be relevant to court review of variances.

¹²³ Los Angeles, Pittsburgh, San Diego, Baltimore, Chicago and Rochester.

¹²⁴ Nancy E. Haycock, *Municipal Art Society, The Board of Standards and Appeals: An Analysis of the Decision Making Process* (1976); *Zoning Variances in New York City*, 33 COLUMBIA J. L. & SOC. PROBS., 120, 134. (1967); *Alternatives to ZBA's*, ZONING NEWS (American Planning Association), June 1985, at 1; *Many West Coast Cities Don't Have ZBAs*, ZONING NEWS, May 1986 at 1. A competing proposal was unsuccessfully launched by Mayor Dinkins in 1991, calling for the consolidation of the BSA with the Office Administrative Trials and Hearings. The savings of \$420,800 hardly seem worth the trouble the proposal might have generated had it proceeded. A competing proposal was unsuccessfully launched by Mayor Dinkins in 1991, calling for the consolidation of the BSA with the Office Administrative Trials and Hearings. The savings of \$420,800 hardly seem worth the trouble the proposal might have generated had it proceeded. See Memorandum of Frank T.W. New, Director of City Legislative Affairs, Office of the Mayor (April 30 1991).

¹²⁵ See *Many West Coast Cities Don't Have ZBAs*, ZONING NEWS, May 1986 at 1.

5. Additional costs may result from creating new a department in City Planning, even if BSA staff is correspondingly reduced and/or transferred to this new department.

5. Other States.

Alternatives to the traditional zoning board of appeals (ZBAs) have been tried in various states. Within each state there may be municipal discretion to use a ZBA, a zoning administrator (ZA) or a combination of the two. Categorizing the systems is difficult. For example, Massachusetts permits municipalities to create a position of the ZA to relieve the burden on the ZBA.¹²⁶ However, the ZBA actually appoints the ZA and sets his duties.¹²⁷ Other states vest the authority to appoint a ZA in the City Council. The following is a partial list and general categorization of the systems that exist in the United States.

i. Administrative role for the Zoning Administrator. Some ZAs merely oversee zoning enforcement and administratively process variance applications. ZBAs are designated to hear variance cases. States where some municipalities have created the administrative post of ZA include Alabama,¹²⁸ Arizona,¹²⁹ Illinois,¹³⁰ New Mexico,¹³¹ North Carolina¹³² and Tennessee.¹³³

ii. Advisory role for the Zoning Administrator. In some states ZAs review variance applications and make a recommendation to the ZBA. States that permit this system include Connecticut,¹³⁴ Minnesota,¹³⁵ Ohio,¹³⁶ South Carolina,¹³⁷ Washington D.C.¹³⁸ and Wisconsin.¹³⁹

iii. Zoning Administrator Takes Action on Variance Applications, Appeals are Permitted to the ZBA. ZAs can be authorized to hear and decide variance

¹²⁶ See MASS. GEN. LAWS ANN. 40A, § 13 (2003).

¹²⁷ See *id.*

¹²⁸ See CODE OF ALA. § 11-52-80 (2003); see also *Beaird v. Hokes Bluff*, 595 So. 2d 903 (1992).

¹²⁹ See ARIZ. REV. STAT. §§ 9-462.05, 9-462.06 (2003).

¹³⁰ See 65 ILL. COMP. STAT. 5/11-13-11; see also *Armour v. Mueller*, 343 N.E.2d 251 (1976).

¹³¹ See N.M. STAT. ANN. § 3-21-8; see also *Bogan v. Sandoval Cty.*, 890 P.2d 395 (1995).

¹³² See N.C. GEN. STAT. § 160A-381 (2003); see also *Hemphill-Nolan v. Town of Weddington*, 568 S.E.2d 887 (2002).

¹³³ See TENN. CODE ANN. § 13-7-206 (2003); see also *Baker v. Bd. Of Zoning Appeals of Nashville*, 1989 Tenn. App. Lexis 36.

¹³⁴ See CONN. GEN. STAT. § 8-6 (2003); see also *Kronberg v. Zoning Bd. Of Appeals*, 1991 Conn. Super. Lexis 2686.

¹³⁵ See MINN. STAT. § 394.29 (2003); see also *Girvan v. Cty. Of Le Sueur*, 232 N.W.2d 888 (1975).

¹³⁶ See OHIO REV. CODE ANN. § 519.14 (Anderson 2003); see also *Sich v. Bd. Of Zoning Appeals, Middletown*, 1984 Ohio App. Lexis. 10305.

¹³⁷ See S.C. CODE ANN. § 6-29-800 (2002); see also *Restaurant Row Assocs. V. Horry Cty.*, 489 S.E.2d 641 (1997) and *Rehm v. Tlorigan*, 2002 Minn. App. Lexis 592 (2002).

¹³⁸ See D.C. CODE ANN. § 6-641.07(d) (2003); see also *Concerned Citizens of Brentwood v. D.C. Bd. Of Zoning Adjustment*, 634 A.2d 1234 (D.C. 1993).

¹³⁹ See WIS. STAT. § 59.694(7) (2002); see also *69 Op. Atty. Gen. Wis. 146* (1980) and *State v. Outagamie Cty. Bd. Of Adjustments*, 628 N.W.2d 376 (2001).

applications with an appeal permitted to the ZBA. Colorado,¹⁴⁰ Maryland,¹⁴¹ Massachusetts¹⁴² and Virginia.¹⁴³

iv. Zoning Administrator Takes Action on Variance Applications, ZBA can be eliminated. In states where municipalities are empowered to delegate variance functions to a ZA, an appeal is generally permitted to the local legislative body before court review. States that permit a truly alternative system include Alaska,¹⁴⁴ California,¹⁴⁵ Indiana¹⁴⁶ and Washington.¹⁴⁷ Many municipalities in these states nonetheless retain ZBAs as an appeals body.

6. San Francisco as a Model.

California municipalities are empowered to create either a board of zoning adjustment or a zoning administrator to handle variances to zoning codes.¹⁴⁸ San Francisco has created a hybrid system that affords a zoning administrator the authority to grant variances which are then appealable to the Board of Appeals.¹⁴⁹ The powers of the zoning administrator are broad including adoption of zoning rules and regulations, ensuring compliance with the code, inspecting premises, maintaining and updating the zoning code, coordinating planning work with other city departments and granting variances.¹⁵⁰ Use variances are prohibited. In granting variances the zoning administrator must find,

1. Exceptional or extraordinary circumstances that do not apply to other properties in the district.
2. Enforcement of zoning would result in hardship not attributable to owner.
3. Variances are necessary for “preservation and enjoyment of a substantial property right” possessed by others in the district.
4. The variance will not be detrimental to public welfare or injurious the community.
5. Granting of variance will be in harmony with the general purpose and intent of the zoning code and master plan.¹⁵¹

Finding five represents a significant departure from New York City’s findings, requiring a comprehensive and perhaps cumulative assessment of a variance’s impact. In hearing an appeal from the zoning administrator the Board considers whether the application met or failed to meet the five requirements. The review is limited, as stated by the Supreme

¹⁴⁰ See COLO. REV. STAT. § 31-23-307 (2003); see also Kinder-Care Learning Centers, Inc. v. Bd. Of Adj., Denver, . 721 P.2d 162 (1986).

¹⁴¹ See MD. CODE ANN. art. 28, § 8-110 (2002).

¹⁴² See MASS. GEN. LAWS ANN. 40A, § 13 (2003).

¹⁴³ See VA. CODE ANN. § 15.2-2286 (2003); see also Adams Outdoor Advertising, Inc. v. Bd. Of Zoning App., 544 S.E.2d 315 (2001).

¹⁴⁴ See ALASKA STAT. § 29.40.050 (2003);

¹⁴⁵ See CAL. GOV. CODE §§ 65901, 65903 (2003).

¹⁴⁶ See IND. CODE ANN. § 36-7-4-923 (Michie 2003).

¹⁴⁷ See WASH. REV. CODE § 35A.63.170 (2003).

¹⁴⁸ See CAL. GOV. CODE § 65901 (2003).

¹⁴⁹ San Francisco Planning Code, § 308.2.

¹⁵⁰ See id. §§ 305-306.

¹⁵¹ See id. § 305(c).

Court of California “[r]ecognizing the need to accord appropriate weight to the expert administrator’s rule, the draftsmen of the City Planning Code provided that his determination could be overcome only by relevant and specific findings by the Board of Permit Appeals.”¹⁵²

¹⁵² Broadway, Laguna, Vallejo Association v. Board of Permit Appeals of the City and County of San Francisco, 427 P.2d 810, 813 (1967).

Appendix A: Case Studies

A. 184 Kent Avenue, Brooklyn: 184 Residential Units in a Manufacturing Zone

Williamsburg, Brooklyn has been shown in the Report to be the center of dozens of use variances for the conversion of manufacturing space to residential uses. 184 Kent Avenue is one such conversion. It exemplifies a discrepancy between many building owners and manufacturers, the former claiming that there is little viable demand for manufacturing space and the latter expressing a strong desire to find quality space within the City.

1. Lot Characteristics and Case Background.

a. Lot Description.

Constructed in 1914, 184 Kent Avenue is a six-story building located on the northwest corner of the intersection of Kent Avenue and North 3rd Street in Williamsburg, Brooklyn. (Block 2348, Lot 1). The west side of the building overlooks the East River.

184 Kent is in a M3-1 zoning district. Typical facilities in such heavy industry districts include chemical factories, power plants and foundries.¹⁵³ At the time of the variance application, the area surrounding 184 Kent was surrounded by heavy industrial users. Next door to 184 Kent, there is a recycling and storage facility maintained by Waste Management Inc., the city's largest commercial carter. Directly east, there is an open-yard concrete manufacturer. And due south there are two industrial facilities, a Con Ed oil storage facility and a manufacturer of barrels and drums.

At the time of the variance, the property's owner of record was the New York City Industrial Development Agency. The variance was sought by 184 Kent Avenue Associates, which apparently leased the property pursuant to a sale-leaseback agreement. In July 2000, 184 Kent Avenue Associates applied for a variance to construct 184 residential studio loft units on floors two to six of the building.

b. Pre-Variance Property Use.

The materials supporting the variance application indicated (1) that 40% of the building was vacant at the time of application and (2) that portions of the building were being used for wholesale and warehouse functions. Handwritten notes from BSA examiner Rory Levy indicate that the building was also being used for residential occupancy even before the variance was granted.¹⁵⁴ Levy's notes indicate that as of September 21, 2000, one floor of the building was already "under construction and occupied" by residential

¹⁵³ See Zoning Resolution §§ 41-13, 42-14.

¹⁵⁴ See Rory Levy, Board of Standards and Appeals of New York, Worksheet (Oct. 10, 2000).

tenants. The notes also indicate “[b]ldg. currently has 21 occupied residential units. [V]iolations exist for illegal occupancies.”¹⁵⁵ In a letter dated November 2, 2000, the president of Adelpia Container Corporation also indicated that residential tenants had moved into 184 Kent long before the variance was approved; “[b]ecause of illegally parked cars owned by illegal residents of 184 Kent Ave., we are already having serious problems receiving and making deliveries.”¹⁵⁶

c. Procedural History.

The applicant applied for a variance in the summer of 2000 and by December had the variance approved, after numerous public hearings. Furthermore, it returned to the BSA the following year and received a grant of an additional thirty rooftop units.¹⁵⁷ A court challenge by a community organization, Kent Avenue Block Association, was unsuccessful.¹⁵⁸

2. The Five Findings.

a. Unique Physical Condition.

In its Statement of “Facts and Findings,”¹⁵⁹ 184 Kent Avenue Associates stated that the lot’s footprint is unique in that “the northwest lot line deflects southerly at an angle of approximately 169 degrees.” However, the applicant’s statement of facts and findings failed to demonstrate any practical difficulties or unique hardships resulting from the lot’s unique physical attributes. Instead, the applicant focused its argument on the physical configuration of the building. The applicant stated, “The building is a six-story concrete structure erected in 1914. The vertical space provided in the existing building does not meet current manufacturing needs for one-story buildings.”

Subsection 72-21(a) of the zoning resolution states that the BSA must make a finding that the “alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of [zoning] provisions in the neighborhood or district in which the zoning lot is located.”¹⁶⁰ Despite this requirement, the applicant argued that the zoning code was at odds with current patterns of development in the neighborhood.¹⁶¹ This was done by claiming that there was little demand for manufacturing, that many residential and commercial uses were coming into the neighborhood and that this building was no longer viable for permitted uses. In its Statement of Facts and Findings, the applicant

¹⁵⁵ See *id.*

¹⁵⁶ Letter from Joseph M. Alloco, President, Adelpia Container Corporation, to the Board of Standards and Appeals of New York (Nov. 2, 2000) (on file with the Municipal Art Society).

¹⁵⁷ See BSA Resolution 191-00-BZ, Dec. 19, 2000.

¹⁵⁸ See *Kent Ave. Block Ass’n v. Bd. of Standards and Appeals of New York*, 721 N.Y.S.2d 498 (1st Dep’t 2001).

¹⁵⁹ This document provides facts related to the five findings.

¹⁶⁰ See Zoning Resolution at § 72-21(a).

¹⁶¹ See Fischbein Badillo Wagner and Harding, Statement of Facts and Findings for 184 Kent Avenue Association (July 24, 2000) [hereinafter 184 Kent Ave. Statement].

also stated, “[i]n a changing neighborhood, the existing building is obsolete for intended and permitted uses.”¹⁶²

The resolution makes no findings on whether the physical configuration of the building is unique.¹⁶³ Presumably, there are other multi-story industrial buildings within the zoning district. Finally, a BSA staff member’s notes described the evidence proffered for this finding as “unconvincing.”¹⁶⁴

b. Reasonable Return.

The applicant submitted an economic analysis prepared by Freeman/Frazier Associates, Inc. to demonstrate that the configuration of the building prevented it from realizing a reasonable return from as-of-right uses. The analysis compared existing and conforming development for manufacturing uses with the proposed residential development. The analysis showed the following rates of return: 1.24% for existing uses, 1.80% for other as-of-right uses, and 6.31% for the proposed residential development.¹⁶⁵

Community opponents of the variance argued that this economic analysis was based on flawed economic assumptions. The Greenpoint Manufacturing and Design Center (GMDC) argued that the analysis underestimated the rental value of manufacturing space.¹⁶⁶ Instead of the \$4.87 per square foot assumption employed, GMDC argued that the rental assumption should have been \$9 per square foot. Based on this assumption, GMDC projected an 11.74% rate of return for manufacturing use.¹⁶⁷ Using a more conservative rental assumption -- \$8/square foot – GMDC projected a 7.01% rate of return for manufacturing rental.¹⁶⁸

The last paragraph of GMDC’s letter suggests that the 184 Kent variance was based on a desire to capitalize on a strong residential market rather than an inability to generate reasonable rates of return from rental for as-of-right uses. “During the last twelve months, GMDC has encountered a broad cross-section of manufacturers facing eviction because of residential conversions and skyrocketing rents. Given the increasingly limited supply of and overwhelming demand for high-quality, well-located manufacturing space, we believe that the Kent Avenue building holds great promise as a profitable industrial facility.”¹⁶⁹ There is no factual evidence submitted to indicate how strong this demand actually is and it is currently being debated citywide.

¹⁶² See 184 Kent Ave. Statement.

¹⁶³ See Resolution, 191-00-BZ (December 19, 2000).

¹⁶⁴ See Rory Levy, Board of Standards and Appeals of New York, Worksheet (Sept. 21, 2000).

¹⁶⁵ See Economic Analysis by Freeman/Frazier Associates for 184 Kent Avenue Association 8 (July 10, 2000).

¹⁶⁶ See Letter from David Sweeney, CEO, GMDC, to Peter Gillepsie, Lead Organizer, Neighbors Against Garbage (Oct. 18, 2000).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

c. Essential Character of Neighborhood.

The BSA’s resolution granting the variance agreed with the applicant that the project would not alter the essential character of the neighborhood because the area in question already supported a variety of uses.¹⁷⁰ In the statement of facts and findings, the applicant wrote, “The five blocks north of the site on the east side of Kent Avenue are primarily residential. The area has changed from heavy industrial to mixed-use. The variance will permit the existing industrial building to be occupied by residential and commercial uses and conform to the current needs and uses in the area.”¹⁷¹

To support this argument, the applicant submitted a survey map compiled by Ethan C. Eldon Associates, Inc. allegedly showing the location of 355 residential units in the vicinity of 184 Kent Avenue.¹⁷² The survey included a map. BSA staff member Rory Levy’s notes indicate that BSA staff held serious reservations about the validity and relevance of the Eldon Associates survey.¹⁷³ In his notes, Levy points out that all 355 residential units are east of Kent Avenue and states that “[u]nit count of 52 on block 2341 is unconvincing from cursory look at . . . map.”¹⁷⁴ These types of discrepancies that the Society addresses with the geographic study area in its recommendations.

d. Self-Created Hardship.

The applicant states that Kent Avenue Associates acquired the property in 1985, and subsequently conveyed it to the New York City Industrial Development Agency in a leaseback transaction.¹⁷⁵ It also alleges that since its initial acquisition, the demand for manufacturing and commercial uses at this site diminished and no longer provided the applicant with a reasonable return.¹⁷⁶ Opposing evidence indicates that due to a strong demand for manufacturing space, the building could have been fully rented.¹⁷⁷ It is unclear if the existing illegal residential units negatively impacted the ability to rent space, or perhaps just occupied the supposedly un-rentable space.

¹⁷⁰ See BSA Resolution, 191-00-BZ, Dec. 19, 2000.

¹⁷¹ See 184 Kent Ave. Statement.

¹⁷² See *id.*

¹⁷³ See Worksheet, Rory Levy, Oct. 10, 2000 (on file with the Municipal Art Society).

¹⁷⁴ See *id.*

¹⁷⁵ See 184 Kent Ave. Statement.

¹⁷⁶ See *id.*

¹⁷⁷ Tina Traster, *Hot Brooklyn Properties Put Freeze on Industry*, CRAINS N.Y., May 12, 2003, at 39.

e. Minimum Variance Necessary to Afford Relief.

In its statement of facts and findings, the applicant argued that the “variance requested will permit residential uses on the upper floors of an existing building and affords minimum relief as set forth in the economic analysis report.”¹⁷⁸ Community groups raised questions concerning the suitability of the 184 Kent building for use as high tech office space or as workspace for local artists. The applicant responded by providing an opinion letter from Anthony Spina of Thorn Communications stating that the property’s ceilings were too low for telecommunications use.¹⁷⁹ The applicant also submitted opinion letters from Freeman/Frazier indicating that rental for artist work space would not generate a reasonable rate of return.¹⁸⁰ However, the record is silent on whether a reasonable rate of return could be generated through use of the property for warehousing or other forms of light industrial use.

3. Analysis and Conclusion

The matter of 184 Kent Avenue raises some typical issues in New York neighborhoods zoned for manufacturing. There was clearly an intense pressure on the buildings to convert to residences, with this building already housing many illegal residential units. Furthermore, the applicants raised the changing character of the community as a factor in their application, a self-fulfilling prophecy as one variance-approved conversion becomes the basis for another.

There are real questions about the rent that was being charged and the potential manufacturing rent. If the rental figures of the GMDC were accurate the entire Economic Analysis might have been different. Even if continued M3 zoning was not appropriate, other lighter manufacturing district uses, permitted under M1 and M2 zoning, may have been. The claims of the building owner are at odds with the sentiment of those in the manufacturing community, that space is desperately needed for manufacturing space.¹⁸¹ Businesses indicate that “food producers, textile makers, woodworkers and other light manufacturers...want to continue to do business in Williamsburg, Greenpoint and Sunset Park neighborhoods of Brooklyn...The dearth of available real estate frustrates business owners who need more space to grow their companies....”¹⁸² Residential uses clearly yield a higher rate of return, but the argument that manufacturing is no longer viable in these areas is questionable.

¹⁷⁸ See 184 Kent Ave. Statement at 4.

¹⁷⁹ See Letter from Anthony Spina, Thorn Communications, to 184 Kent Avenue Associates (Nov. 1, 2000).

¹⁸⁰ See Letter from Jack Freeman, Freeman Frazier & Associates, Inc., to Howard Hornstein, Fishbein Badillo Wagner Harding (Nov. 6, 2000).

¹⁸¹ See Traster, *Hot Brooklyn Properties*, *supra* note 178, at 39.

¹⁸² See *id.*



184 Kent Avenue, Brooklyn (June 2, 2003)

B. 600 Washington Street: Residential High-rise in a Manhattan Manufacturing Zone

Located in Manhattan’s ever-shrinking downtown manufacturing zone, this property made for a very unlikely hardship case. As further detailed below, it was one of the West Village’s most sought after properties, located near the Hudson River and largely vacant. When the new owner sought a variance application for construction of high-end residential apartments it employed several surprising and very successful arguments to demonstrate hardship.

1. Lot Characteristics and Case Background.

a. Lot Description.

This property occupies a full city block in an M1-5 zoning district in Manhattan’s West Village. The property is located at the northwestern border of an area generally known as the “Graphics Arts District.” The zoning permits only light manufacturing that complies with performance standards specified in the Zoning Resolution.¹⁸³ Such light industry typically includes knitting mills, printing plants and wholesale service facilities.¹⁸⁴ The maximum FAR is 5.0.¹⁸⁵

It is marketed by real estate brokers as part of the “Hudson Square” residential and office district. The areas directly south and southeast of the property contain a mix of industrial

¹⁸³ See Zoning Resolution at § 41-11.

¹⁸⁴ See NEW YORK CITY DEPARTMENT OF CITY PLANNING, ZONING HANDBOOK 94 (1990)[hereinafter ZONING HANDBOOK].

¹⁸⁵ See Zoning Resolution at § 43-12.

buildings and some residential structures. The areas north and east of the property are primarily residential.

b. Pre-Variance Use and Permitted Uses.

From the mid-1970s to the mid-1990s, Yellow Freight Lines used the property as a trucking terminal. Its proximity to an arterial highway, West Street, made it well suited for this purpose. Today, there is a Federal Express facility across from the corner of the property.¹⁸⁶ In 1997, Federal Express leased the open portions of the 600 Washington site for the parking and storage of vehicles.¹⁸⁷

The 600 Washington development project will entail the construction of 147 housing units in three buildings.¹⁸⁸ The project was described succinctly in The New York Times,

One building will be a 14-story condominium on Morton Street. Another is to be a six-story structure on Morton Street with six town houses at the base and loft apartments above. The third will be a seven-story rental on Washington Street. Completion is scheduled for the spring of 2004. Since the side streets and inland avenues have a more residential character than West Street, all the entrances to these buildings will be on Morton Street or Washington Street. But one leg of the 147-unit L-shaped condominium will border West Street and provide 52 apartments with head-on river views. About 12,000 square feet of commercial space will be provided at street level, a third of it on West Street.¹⁸⁹

The proposed project had an FAR of 6.0.¹⁹⁰ This was thus a use and bulk variance application.

¹⁸⁶ See id.

¹⁸⁷ See id.

¹⁸⁸ Edwin McDowell, *West Village Condominiums with a Garden*, N.Y. TIMES, June 6, 2003, at 11-1.

¹⁸⁹ Alan Oser, *Along West Street, A Residential Makeover*, N.Y. TIMES, Nov. 24, 2000, Section 11 at 1.

¹⁹⁰ See WSA Statement of Facts at 3.

c. Procedural History.

The owner, Washington Street Associates, LLC (“WSA”), was denied a building permit on November 30, 2000 on the grounds that the proposed development project “contained residential uses in an M1-5 district” and the proposed number of “accessory off-street parking spaces” exceeded the number permitted by the Zoning Resolution.¹⁹¹ Wachtel and Masyr law firm applied to the BSA for a variance on behalf of WSA in November 2000.¹⁹² The Zoning Committee of Community Board 2 enacted a resolution in opposition to Washington Street Associate’s variance.¹⁹³ Joseph B. Rose, Chairman of the City Planning Commission (CPC), also wrote to the BSA in opposition to the Washington Street’s variance application.¹⁹⁴

In response to community concerns, BSA required WSA to modify its proposal. The mid-portion of the development was reduced in height and an 8 foot setback from the street line was provided beginning at the eighth story. The Washington Street and Leroy Street frontages were increased to 7 stories and the Morton Street frontage was increased to 6 stories. Based on these modifications, BSA voted unanimously to grant the variance. The court challenge by a community group, the West Village Houses Tenants Association (“WVHTA”), was unsuccessful.¹⁹⁵

¹⁹¹ See The City of New York Department of Buildings, Objections to Application for 600 Washington Street, Nov. 15, 2000.

¹⁹² See Washington Street Ass’n, LLC, Application to the Board of Standards and Appeals of New York, (Nov. 15, 2000).

¹⁹³ See Community Board 2 Resolution, Mar. 1, 2001.

¹⁹⁴ See Letter from Joseph B. Rose, Chairman, City Planning Commission of the City of New York, to James Chin, Chair, Board of Standards and Appeals of New York, April 26, 2001 [hereinafter City Planning Letter, April 26, 2001].

¹⁹⁵ West Village Houses Tenants’ Ass’n v. Bd. of Standards and Appeals of New York, 755 N.Y.S.2d 377 (1st Dep’t 2003).

2: The Five Findings.

a. Unique Physical Condition.

The explicit bases for the BSA resolution's "a" finding were two factors, 1.) the site's location on narrow streets and, on one side, an arterial highway and 2.) that the site is largely undeveloped.¹⁹⁶ In their court papers, opponents of the development address both of these findings. First, they argue that the surrounding streets did not prevent a reasonable return from as-of-right use.¹⁹⁷ Indeed, Yellow Freight Systems, they argue, operated profitably on the site for some 20 years.¹⁹⁸ Furthermore, Federal Express, which constructed a freight forwarding facility across the street, resolved a similar problem simply by using interior loading docks.¹⁹⁹ The second factor cited by the BSA, the property's development history, is peculiar in that the vacancy of a lot would normally provide great development potential, not be deemed a hardship.

Other factors included relied on in the application included:

i. Irregular Shape

The lot dimensions (200' x 322' x 200' x 301')²⁰⁰ are nearly perfectly rectangular. They were nevertheless called irregular by the applicant. As stated in WVHTA's court papers, "it is unclear why the BSA relied on the shape at all in its Resolution."²⁰¹

ii. Subsurface Soil Conditions

As described in WSA's statement of facts, the site is partially comprised of land reclaimed from the Hudson River in the mid 1800s.²⁰² Piling sand, wood, gravel, cobble and other construction debris atop the river's naturally occurring clay and sand created the site.²⁰³ This subsurface fill ranges from 15' to 30' in depth.²⁰⁴ In its Resolution, the BSA concluded that these subsurface soil conditions would "require an extensive pile foundation system creating an unnecessary hardship in developing the site with conforming manufacturing or commercial uses . . ."²⁰⁵

¹⁹⁶ See BSA Resolution, 174-97-BZ, 175-97-BZ, .

¹⁹⁷ See Brief for Appellant at 12, West Village Houses Tenants Ass'n v. Bd. of Standards and Appeals of New York [hereinafter WVHTA Brief].

¹⁹⁸ See id.

¹⁹⁹ See id.

²⁰⁰ See WVHTA Brief at 14.

²⁰¹ Id. at 14.

²⁰² WSA Statement of Facts at 2.

²⁰³ Id.

²⁰⁴ Id.

²⁰⁵ See BSA Resolution, 287-00-BZ, June 12, 2001.

iii. Adjacency to New Jersey PATH

The Resolution stated that the “tunnels of the Path Train system turn and descend at the corner of Morton and West Streets and come within 4’ of the site creating additional construction contingencies and expenses. . . .”²⁰⁶ WSA argued that “Case drilled piles will be required in the [portion of the lot within 50’ of the PATH tubes]. Vibration monitoring of the PATH tubes will be undertaken during construction to demonstrate and insure vibrations are within acceptable limits.”²⁰⁷ As above, WVHTA rejected the arguments that adjacency to the PATH train constituted a unique physical condition. WVHTA argued that most or all of Manhattan’s industrial districts are adjacent to the PATH or other subway lines. Moreover, WVHTA asserted that the PATH ran adjacent to other lots in the M1-5 district in question.²⁰⁸

b. Reasonable Return.

Freeman/Frazier Associates prepared the economic analysis and determined that as-of-right development on the site, with theaters, retail use and office space, would yield a 1.89% return on equity (“ROE”).²⁰⁹ The analysis determined that the proposed mixed-use residential building, with retail and local commercial uses on the ground floor, would earn an ROE of 6.84%.²¹⁰

Based on this analysis, the BSA resolution stated, “evidence in the record, including detailed feasibility analyses characterized by comparables, cost break down and cost estimates demonstrates that a conforming and complying development would not yield a reasonable rate of return . . .” The court also noted that “unlike Town Law . . . and General City Law . . . Zoning Resolution § 72-21 does not require an applicant for a use variance to show that it cannot realize a reasonable return ‘for each and every permitted use under the zoning resolution.’”²¹¹

i. As-of-Right Return on Equity

The projects used by the WSA to show as-of-right development included a hypothetical movie theatre and an office use.²¹² Opponents criticized this approach, arguing that movie theatres do not generate as much revenue as other permitted uses, especially in such quiet areas, far from public transportation.²¹³ In the calculation the ROE of one such permitted use, office space, the applicants failed to consider rent from two newly

²⁰⁶ See *id.*

²⁰⁷ See WSA Statement of Facts at 2.

²⁰⁸ See WVHTA Brief at 13.

²⁰⁹ See Freeman/Frazier, Economic Analysis for Washington Street Ass’n, Nov. 21, 2000, at Schedule A1. [hereinafter WSA Economic Analysis].

²¹⁰ See *id.*

²¹¹ *West Village Houses Tenants Ass’n v. Bd. of Standards and Appeals of New York*, 755 N.Y.S.2d 377, 378 (1st Dep’t 2003).

²¹² See WSA Economic Analysis at 2.

²¹³ See WVHTA, Appendix A, March 27, 2001, at 5.

constructed office spaces.²¹⁴ One is directly across the street from the subject property. Rents for new office construction, like 600 Washington's neighbor, would be higher than the comparison rents which the applicants actually used. In the court challenge by opponents, however, the court noted that no "iron clad" rule on geographic boundaries studied in variance applications.²¹⁵

ii. Proposed-Use Return on Equity

One of the most critical factors, in a complex economic feasibility study, was the use of rental income rather than condominium sales income. Opponents argued that proposing to rent, rather than sell, apartments with head-on river views was disingenuous, as sales would generate much higher and more rapid returns.²¹⁶ Indeed, since their variance approval and defeat of the opponents' court challenges, the developers have been marketing the units as condominiums at premium prices expected from the neighborhood and river views.²¹⁷

c. Essential Character of the Neighborhood.

The BSA determined that the proposed development would not adversely affect the neighborhood.²¹⁸ In contrast to the BSA, the CPC concluded that the development would have significant effects on the neighborhood. For this reason, CPC Commissioner Joseph Rose argued that the proper way to address development trends in the neighborhood was through a comprehensive zoning amendment and not through the piecemeal granting of variances.²¹⁹ Likewise, the Zoning Committee of Community Board 2 opposed the granting of the variance on the grounds that it would adversely affect the neighborhood.²²⁰ Finally,

²¹⁴ See *id.* at 5.

²¹⁵ See *West Village Houses Tenants Ass'n*, 755 N.Y.S.2d at 378.

²¹⁶ See *id.* at 6.

²¹⁷ Edwin McDowell, *West Village Condominiums with a Garden*, N.Y. TIMES, June 6, 2003, at 11-1.

²¹⁸ The Resolution stated:

[T]he record and numerous site inspections indicate that an increase in the number of parking spaces and the proposed mixed use development with a combination of studios, one, two and three bedroom apartments, town house style units, loft like units combined with the retail and restaurant component is compatible with this mixed- use neighborhood . . .

[T]he Board finds that the contentions that the proposal will cast undue shadows, worsen existing sewage problems, cause displacement and adversely impact the neighborhood are not supported by the evidence in the record . . .

[T]he Board finds that this proposal, as modified, will not alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, nor will it be detrimental to the public welfare . . .

²¹⁹ See City Planning Letter, April 26, 2001.

²²⁰ See Community Board Resolution on 600 Washington Street, March 1, 2001.

WVHTA argued that WSA significantly understated the new demands that the proposed development would place on neighborhood services.²²¹

d. Self-Created Hardship.

The BSA resolution contains a single conclusory statement on the “d” finding: “[T]he hardship herein was not created by the owner or a predecessor in title” Presumably, this determination was based on WSA’s Statement of Findings.²²²

WVHTA argues that WSA paid well above the as-of-right market rate for the property.²²³ There was evidence that the purchase price was inflated in a bidding war. As noted in the press, “[t]he property was hotly sought by developers and brokers. They besieged the owner with unsolicited offers since the brick warehouse was padlocked three years ago.”²²⁴ [Any buildings existing on the largely vacant lot were demolished by the applicant, WSA.]

e. Minimum Variance Necessary to Afford Relief.

The BSA addresses the “e” finding with another conclusory statement: “this proposal, as modified, is the minimum necessary to afford the owner relief”²²⁵ This finding is presumably based at least in part on WSA’s original Statement of Findings, which argues that the “proposed variance . . . generates a ROE of 6.84%, which is the minimum necessary to permit development of the site.”²²⁶ As noted above, there is no strict rule on the range of other permitted uses within a zoning classification that must be explored.

²²¹ For example, WVHTA argued that WSA should have based its projection of new residents on an assumption of 3.0 persons per household rather than 1.56 persons per household. Likewise, WVHTA argues that there are likely to be some 136 school-age children living in the development (and consuming city educational services). WSA had projected the figure at 27.

²²² See WSA Statement of Facts. The Statement of Findings states:

The variance requested arises out of the unique physical conditions described in the (a) finding: the large site located on three narrow streets and one arterial highway, subsurface soil conditions and the location adjacent to the PATH tubes, all of which place extraordinary development costs on any new development of the site and create practical difficulty and unnecessary hardship in developing the site. These conditions were not created by the owners or predecessors in title but are inherent in the site itself.

²²³ See Opposition Rebuttal for Ad Hoc Committee to Oppose Variance, May 22, 2001, at 6 (on file with the Municipal Art Society).

²²⁴ Lore Croghan, *Developer Lands Big Deal for Prime Site in West Village*, CRAINS N.Y., May 8, 2000 at 4.

²²⁵ See BSA Resolution, 287-00-BZ, June 12, 2001.

²²⁶ See WSA Statement of Findings

3. Analysis and Conclusion

The physical hardships and the financial information used in the applicant's analysis were creditably questioned by opponents. The court never reached the depth of review needed to uncover these issues. It is clear that thousands of lots in Manhattan are near, but not directly over, subway and Path trains. Most of the shoreline of the island was extended with fill. Neither of these constitutes a unique physical condition, even if they did inflate the costs of construction. Furthermore, the inability to do loading on the street, because of narrowness, is also not a unique condition. Many warehouses in Manhattan must use interior loading docks. Finally, describing the vacancy of a lot as a physical hardship is dubious when vacant lots in Manhattan are valued at a premium.

There are also serious questions regarding the financial analysis. The failure to consider office rental rates from new construction immediately adjacent to the proposed development was unexplained. These rentals were more appropriate because of their recent construction and proximity to the proposed development. Additionally, in calculating the rate of return on the proposed residential building, there was a failure to consider the sale price for condominiums commanding views of the Hudson River. Recent evidence suggests that the developer is now going to offer all units for sale, just as opponents suspected would happen.²²⁷ The rate of return may now be much higher. No conditions restricting the use to the rental/sale composition indicated in the Economic Analysis are included in the resolution of the BSA.²²⁸

Finally, there are serious doubts about the purchase price for the property. Courts have found that a purchase price that reflects the value of the property with the anticipated variance cannot form the basis for a variance.²²⁹ In this case a major bidding war preceded the applicant's purchase of the property.²³⁰ It is peculiar, at the least, that the property was later characterized as saddled with physical and financial hardships.

²²⁷ Edwin McDowell, *West Village Condominiums with a Garden*, N.Y. TIMES, June 6, 2003, at 11-1.

²²⁸ See BSA Resolution, 287-00-BZ (June 12, 2001).

²²⁹ See *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1 (1974)

²³⁰ See *supra* note 224.

C. 220-16 Jamaica Avenue, Queens: Motel in a Low Density Residential Community

Motels in Queens are not unexpected since the borough contains the city's two airports. However, this location, many miles from either airport in a low-density residential community was a very unexpected location for a motel. Fearing that the hotel would quickly morph into a location for prostitution or drug dealing, the community mobilized, unsuccessfully, to fight the variance.

1. Lot Characteristics and Case Background.

a. Lot Description.

The lot in question is located at 220-16 Jamaica Avenue in Queens Village. The south side of the property is adjacent to the elevated tracks of the Long Island Railroad, bordering it for eighty feet.²³¹ The surrounding density was low, permitting an FAR of .5.²³²

b. Pre-Variance, Permitted and Proposed Uses.

Applicants sought a use variance to permit construction and operation of a motel in a C1-2 district. Such C-1 districts "accommodate the retail and personal service shops needed in residential neighborhoods. . . . Typical uses include grocery stores, small dry cleaning establishments, restaurants and barber shops. All cater to the daily needs of the immediate neighborhood."²³³ Motels are not permitted.

c. Procedural History.

On May 28, 1999, Sheldon Lobel P.C. filed an application for a variance on behalf of property owner Har Har Har Mahadev, Inc ("HHHM").²³⁴ Substantial community opposition met the application. For example, Community Board 13 voted to oppose the variance application.²³⁵ The variance was also opposed by Queens Borough President Claire Shulman²³⁶ and City Council Member Archie Spigner.²³⁷ Nevertheless, the variance application was approved on March 28, 2000.²³⁸

²³¹ See Sheldon Lobel, P.C., Statement of Facts and Findings on Har, Har, Har Mahadev, Inc., May 17, 1999, at 1 [hereinafter HHHM Statement].

²³² *Id.* at 7.

²³³ Zoning Handbook, at 76.

²³⁴ Har, Har, Har Mahadev, Inc., Application to the Board of Standards and Appeals of New York (May 28, 1999).

²³⁵ See BSA Resolution 126-99-BZ, Nov. 16, 1999 (noting that all 32 members of Community Board 13 who voted disapproved of the application).

²³⁶ See Letter from Claire Shulman, Queens Borough President, to James Chin, Chairman, Board of Standards and Appeals of New York (Nov. 22, 1999).

²³⁷ See Letter from Archie Spigner, Deputy Majority Leader of the New York City Council, to James Chin, Chair, Board of Standards and Appeals of New York (Feb. 29, 2000).

²³⁸ See BSA Resolution, 126-99-BZ, (Mar. 28, 2000).

The variance was granted subject to twelve conditions. These conditions were designed to prevent utilization of the hotel for prostitution and other uses that the community considered undesirable and are further explained below.

2. 5 Findings

a. Unique Physical Condition.

The BSA resolution listed the following characteristics of the lot: its irregular shape, its pre-existing underground storm sewers and its adjacency to the Long Island Railroad elevated tracks. The resolution concluded that these characteristics “combine to create unique conditions inherent in and peculiar to the subject zoning lot.”²³⁹

But the BSA Resolution is peculiarly silent on the chain of events that led HHHM to seek a variance.²⁴⁰ In 1989 HHHM received a building permit for a motel, only to lose its financing and shelve the project.²⁴¹ Subsequently, the Zoning Resolution was amended to prohibit motels in this district. Despite this, DOB issued a building permit once again. Construction never proceeded due to the recurrent financing problem.²⁴²

In April, 1998, DOB issued HHHM a third work permit, and construction resumed. According to HHHM extensive construction had taken place.²⁴³ However, on November 23, 1998 DOB issued a Stop Work Order on the grounds that the proposed development was not permitted in the zoning district, apparently noticing its mistake in issuing the building permit.²⁴⁴

Although this prior history featured prominently in HHHM’s variance application, the BSA resolution fails to mention it, leaving open questions about the ground on which this variance was granted.²⁴⁵ Furthermore, one of the allegedly unique conditions—adjacency to the Long Island railroad tracks—affects countless other lots in Queens.

b. Reasonable Return.

The BSA concluded that these allegedly unique conditions created “practical difficulties and an unnecessary hardship” in developing the subject zoning lot.²⁴⁶ The BSA stated “evidence in the record, including a feasibility study, demonstrates that as a result of the constraints placed on the subject zoning lot, development of the site with a conforming use would not yield a reasonable return . . .”²⁴⁷

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See HHHM Statement of Facts and Findings.

²⁴² See *id.*

²⁴³ See *id.* In its Statement of Facts and Findings, HHHM estimated that it invested more than \$1.2 million in construction costs between April and November of 1998. HHHM Statement of Facts and Findings at 2.

²⁴⁴ See *id.*

²⁴⁵ See BSA Resolution, 126-99-BZ (Mar. 28, 2000).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

The treatment of the development history of the parcel and the zoning changes is unclear. HHHM cited *Jayne Estates, Inc. v. Raynor* for the proposition that any “good faith expenditure” made in reliance on an invalid permit can be taken into account for purposes of determining whether the “b” finding has been met.²⁴⁸ There was a considerable basis for this variance based on the work permit issued. However the final BSA resolution does not address this issue, relying instead on physical aspects of the lot.²⁴⁹

Various recalculations were made during the course of the application process. For example, the first version of the study projected a 1.79% ROE for development of the property as apartment rental units, an as-of-right use.²⁵⁰ The ROE for the proposed hotel was projected at 16.03%.²⁵¹ On January 5, 2000 VRP revised its ROE projections. The revised as-of-right ROE was projected at 1.49%.²⁵² The revised ROE projection for the proposed development was 11.35%.²⁵³

The 30% reduction in the proposed project’s development’s ROE was achieved by changing the estimated cost paid for the lot from \$640,046 to \$1,018,255.²⁵⁴ Neither the feasibility study nor the BSA resolution offers any explanation for how VRP could have underestimated the purchase price of the lot so dramatically. The revising of the submissions indicates that the BSA was working with the applicant to put the application in a more approvable form, as a 16.03% rate of return was excessive.²⁵⁵

c. Essential character of the Neighborhood.

Opponents of the variance expressed grave concerns that the motel, because of its substantial distance from Kennedy Airport and its proximity to the LIRR tracks, would fail to attract guests for extended stays. Opponents of the variance argued that when such legitimate guests failed to materialize, HHHM would instead rent the rooms out on an hourly basis to generate revenue, attracting an unsavory clientele.²⁵⁶

²⁴⁸ 22 N.Y.2d 417 (1968)

²⁴⁹ See BSA Resolution, 126-99-BZ (Mar. 28, 2000).

²⁵⁰ See Vista Realty Partners, Feasibility Study 23 (May 28, 1999) (hereinafter HHHM Feasibility Study).

²⁵¹ See *id.*

²⁵² See *id.* at 3 (inserted in previous Study before page 23).

²⁵³ See *id.*

²⁵⁴ May have been based on the general increase in real estate values in New York City in the 1990s.

²⁵⁵ An additional revision was made. VRP submitted two ROE projections for development of the site as a community medical facility – an as-of-right use. On February 22, 2000, VRP submitted a projection that such a development would generate a 3.59% ROE. On March 13, 2000, VRP submitted to BSA a revised ROE projection for the medical facility. Explaining that the February 22, 2000 estimate had overstated the likely per-square-foot rental price by \$4.00, the March 13th projection cut the medical center ROE down to 2.4%. The revised ROE was 33% smaller than the original estimate.

²⁵⁶ See Report of Susan M. Norieka, Chairperson, Community Board 13Q, Nov. 17, 1999. Ms. Norieka stated: “The owner of the property met with me and our previous District Manager . . . We told him that we did not believe there was a need for a motel at that location and that it would not be a viable business for him since he would not be able to keep the rooms filled. We told him, then, that we were concerned that he would have such difficult renting that he would resort to the short stays that are used by prostitutes. We told him that we already had a motel on Hempstead Avenue that was near the Belmont Race Track. This motel already had problems of having enough customers staying the entire night even though it was near the race track.”

The BSA Resolution addressed these concerns by imposing conditions on the variance. For example, the Hotel was required to (1) operate as part of nationally recognized franchise or chain, (2) rent rooms on a daily basis only, (3) provide a security guard 24 hours a day, seven days a week, (4) provide outdoor lighting for the parking area and (5) monitor common areas of the premises via security cameras.²⁵⁷ The variance term is twenty years and all conditions were subject to verification by the New York City Department of Buildings.²⁵⁸

d. Self-Created Hardship.

The BSA concluded that the owner or a predecessor in title did not create the hardship.²⁵⁹ They did not address the financing issues and whether this was the true reason that a hardship existed.²⁶⁰ If the hotel had been built under its first permit, no variance would have been required.

The applicant purchased the lot knowing that it narrowed in the back and that the LIRR ran along the southern side of the lot. Since it took the property with this knowledge, it is arguable that hardship was self-created to the extent that the applicant chose to encounter it. However, if the hardship is defined as applicant's expenditures in reliance on the DOB permit, then the hardship is clearly not self-created. Neither the BSA resolution nor any of the documents in the record of the application indicate why the BSA chose to define the hardship in terms of the physical characteristics of the lot rather than the applicant's conduct in reliance on the DOB permits.

e. Minimum Variance Necessary to Afford Relief.

The BSA concluded that the proposal was the minimum necessary to afford the owner relief.²⁶¹ The resolution doesn't appear to address proposals advanced by community advocates that the lot be developed as either a community health facility or a housing facility for the elderly, arguably less-intrusive uses.

3. Analysis and Conclusion.

This matter demonstrates ongoing problems in the variance process. The BSA resolutions did not include all relevant details and bases for variances. In this case, the applicant's history of DOB applications and the change in zoning were critical and unexplored aspects of the variance. Hardship caused by failures of financing are not grounds for a variance. The change in zoning may have been.

Some of the hardships cited in this matter, as in other variance cases, are not so unique. Many lots in New York City are not perfectly symmetrical. More importantly, railroad tracks border thousands of properties throughout Queens. This condition is not a unique physical hardship; it is a common physical condition.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See BSA Resolution, 126-99-BZ, (Mar. 28, 2000).

²⁶⁰ See HHHM Statement of Facts and Findings at 2.

²⁶¹ See BSA Resolution, 126-99-BZ (Mar. 28, 2000).

With regard to physical lot conditions, they are apparent when the land was purchased. Finding “d” states that if the other findings are met purchase of the lot subject to the zoning restrictions sought to be varied is not a self-created hardship.²⁶² But this does not apply to physical limitations. Purchase of an oddly shaped lot is a condition that can be addressed at purchase, not in a variance process. The variance process cannot compensate for a purchase price that far exceeded fair value based on the true physical condition of the lot.

There is also some concern that figures in the economic analysis were altered, raising the issue of how BSA works with applicants to put variances applications in approvable form. Were return figures reduced to make the application approvable? For example the rental value of a medical facility, calculated as a conforming use, were reduced mid-application. Additionally, the ROE for the proposed hotel was reduced from 16.03% to 11.35%,²⁶³ the former was clearly in excess of a reasonable return.²⁶⁴

Finally, there is no known process for following up on the conditions that are attached to almost all approved variances. In this matter the conditions were essential to ensuring that a legitimate hotel was operated.

D. 19-35, 55 West Houston Street, Manhattan: Residential Units in a Special Manufacturing Zone

This project, a residential development, has come to be known as the “Soho Alliance” matter. Having been litigated in Soho Alliance v. New York City Board of Standards and Appeals,²⁶⁵ the matter embodies the complexities inherent in variance applications, the conflicting opinions of government agencies, and the degree to which applicants’ and opponents’ assessments of a project can vary. Rather than the scale of the project, one of the main issues was its proposal for purely residential units in a manufacturing district created to foster the special artists community in Soho.

1. Lot Characteristics and Case Background.

a. Lot Description.

The Continuum Company, LLC submitted two BSA applications together, one for 19-35 West Houston Street and the other for 55 West Houston Street in Soho in 1997.²⁶⁶ 19-35 West Houston had a length of 200 feet and a width varying from 50 feet to 25 feet. 55 West Houston had a length of 200 feet and a width varying from 45 to 20 feet.²⁶⁷ The two parcels were considered together for the various reasons set forth below.

²⁶² See Zoning Resolution § 72-21(d).

²⁶³ See HHHM Feasibility Study at 23 (and revised page inserted before page 23).

²⁶⁴ See supra section IV F.2.

²⁶⁵ 95 N.Y.2d 437 (2000).

²⁶⁶ The original applications were not found. The docket book marks the date of original applications however.

²⁶⁷ See Robert B. Pauls, Economic Analysis for The Continuum Company LLC 2 (July 1997) [hereinafter Pauls Analysis].

b. Pre-variance, permitted and proposed uses.

Located on the south side of Houston Street, the parcels are located within the Soho Cast Iron Historic District. This district was created in 1973 to preserve the unique industrial architecture of the district reflective of its light manufacturing past as well as its flourishing role as a center for the creation and sale of art.²⁶⁸

Regarding use, much of Soho is zoned as M1-5A, permitting only joint living and working quarters for artists (“JLWQA”) as new uses in industrial loft buildings.²⁶⁹ The proposed residential rental buildings with street level commercial uses were therefore not as-of-right developments in manufacturing districts.²⁷⁰



Looking West on Houston Street at Project Sites (June 2, 2003), a rendering of one of the two buildings is on the billboard

Regarding bulk, the applicant proposed two distinct buildings for the site that exceeded permitted FAR. On 55 West Houston the building would consist of 43 apartments, 8 stories and a 6.85 FAR.²⁷¹ At 19-35 West Houston the building would have 60 rental units, 9 stories and a FAR of 7.95.²⁷² These FARs exceeded the maximum allowable FAR of 6.5.

²⁶⁸ See *Soho-Cast Iron Historic District Designation Report*, Landmarks Preservation Commission, 1973.

²⁶⁹ See *Zoning Resolution* §§ 42-131, 42-14(D); see also *Zoning Handbook*.

²⁷⁰ Some questions were raised about whether the law was applicable to this proposed new construction or only conversion of existing buildings.

²⁷¹ See Pauls Analysis at 2.

²⁷² See *id.* at 2.

c. Procedural History.

The application was submitted in Fall of 1997 and the matter dragged on, with numerous public hearings, through Spring 1998. A uniquely divided opinion granted the variance, with three commissioners voting in favor, one against and one commissioner absent.²⁷³ Legal challenges by a community group, Soho Alliance, were unsuccessful.²⁷⁴

2. The Five Findings.

a. Unique Physical Hardship.

The Applicant based its (a) finding on the following information.

- i. *Unique Lot Size and Shape.* The lots were in L shapes after having been combined.
- ii. *Subway easement near.* The subway and Path run near and in one location, across the property causing an increase in foundation cost of 40%, up to \$350,000 in additional costs.²⁷⁵
- iii. *Compatible Design.* The LPC required that floors be taller to conform to character of Soho and the industrial buildings.²⁷⁶ The additional costs for this building design were estimated at \$564,000 to \$1,174,000.
- iv. *Distinctive Façades.* The LPC required that the buildings each have a unique design and that they have facades that are compatible with the Historic District.²⁷⁷
- v. *Vacant lots.* Because the lots were vacant they required greater conformance with LPC standards and higher construction costs for foundation, façade and floor heights.²⁷⁸

The opposition countered with the following.

- i. Lots of 25 by 100 feet are common in Soho and are in fact adjacent to the property.

²⁷³ See BSA Resolutions, 174-97-BZ, 175-97-BZ (April 12, 1998.) BSA decisions are almost always unanimous. The study indicated only two votes that were not unanimous in decided applications for 2001-2002.

²⁷⁴ See *Soho Alliance v. Bd. of Standards and Appeals of New York*, 703 N.Y.S. 2d 150 (1st Dep't 2000), *aff'd* 95 N.Y.2d 437 (2000).

²⁷⁵ See Memorandum of DeSimone, Chaplin and Dobryn Consulting Engineers P.C., Nov. 5, 1997.

²⁷⁶ See Letter from Jennifer Raab, Chair, The New York City Landmarks Preservation Commission, to James Chin, Chairman, Board of Standards and Appeals of New York (Nov. 12, 1997) (on file with the Municipal Art Society).

²⁷⁷ See *id.*

²⁷⁸ See generally Continuum Company LLC, Statement of Facts and Findings (Aug. 12, 1997, revised Nov. 7, 1997) [hereinafter Continuum Statement].

- ii. No evidence of a subway easement was submitted. Such an easement is common to many properties in any event.
- iii. Vacant lots are generally considered an asset.²⁷⁹

b. Reasonable Return.

This provision of the Five Findings, as always, proved the most difficult to analyze. Complex calculations involving construction costs, rental and sale values, management costs and varying fixture requirements were estimated to produce the rate of return. There are two results in the applicant's own economic analysis which are notable. First, they claimed that an 11.1% rate on 19-35 and 6.4% on 55 West Houston are necessary to achieve financing for the project; a 'blended' rate of 8.5% resulted.²⁸⁰ Second, the continued use for parking would generate a return of 6.29%, a rate of return that has often been found by the courts to be adequate.²⁸¹ The Appellate Division did not address this problematic factor, stating "[i]nterestingly, [the] Supreme Court did not enunciate this as a basis for annulling the BSA's determination, and the opponents have not enunciated this argument on appeal. Thus an issue has been framed that does not seem to be contested at this juncture." Thus what might have been the most significant issue in the case, that no variance was required to continue providing the owners a reasonable return, was never fully addressed.

Working as a consultant on behalf of the opponents, Craig Whitaker Architects ("CWA") questioned the economic analysis of the applicants on two bases. The first was on the basis of the comparable condominium sales used by the applicants. They demonstrated that of the 70 condominium sales used in the analysis only 43 were from Soho.²⁸² The average sale, per square foot, would have been \$282.21 rather than the \$262 used.²⁸³

The application's financial analysis was later revised to reflect an average sale price of \$317.64.²⁸⁴ Again Craig Whitaker challenged this by pointing out that only one of the addresses, of 16, was from Soho.²⁸⁵ That sale was \$383.78 per square foot.²⁸⁶ They also cited a speech by Barbara Corcoran, a noted real estate specialist, which asserted that the average sale for Soho condominiums was \$380-400 square foot.²⁸⁷ In the judicial challenge by community opponents, the court firmly rejected an inflexible rule that would permit the use of only comparable sales from the immediate neighborhood.²⁸⁸

²⁷⁹ See Letter from Craig Whitaker, Craig Whitaker Architects, to James Chin, Chairman, Board of Standards and Appeals of New York (March 30, 1998) (on file with the Municipal Art Society) [hereinafter March CWA Letter].

²⁸⁰ See Pauls Analysis.

²⁸¹ See *supra* notes 29-31.

²⁸² See Letter from Craig Whitaker and Kenneth LeBrun, Craig Whitaker Architects to James Chin, Chairman, Board of Standards and Appeals of New York (Feb. 6, 1998).

²⁸³ See *id.*

²⁸⁴ See Letter from Robert B. Pauls, Robert B. Pauls, LLC, to James Chin, Chairman, Board of Standards and Appeals of New York (March 19, 1998), at 2.

²⁸⁵ See March CWA Letter.

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *Soho Alliance v. Bd. of Standards and Appeals of New York*, 703 N.Y.S.2d 150, 155 (1st Dep't 2000).

The result of using these alternate figures, and increasing the “efficiency” of the project by increasing apartment size, would have produced a rate of return of 15.80% to 20.68%.²⁸⁹ Rebutting these allegations, the applicant noted that if the Soho-only sales were for penthouses or apartments with good views they would not be relevant. Furthermore, increasing the apartment sizes would drive up the price and decrease their salability.²⁹⁰ The BSA relied on the applicant’s submissions and did not explore the opposing information; the Court simply noted the substantial evidence upon which the BSA relied.²⁹¹

c. Community Impact.

Opponents of the project cited a variety of ways in which the proposed project would negatively impact the community, including views, congestion, character, noise, character as an artists’ community, architecture, and the threat of soil contamination from the former gas station.²⁹²

City Planning presented modest opposition to the project that ultimately was used by the applicant as a basis for demonstrating both unique hardship and no negative impact on the community.²⁹³ To begin with, the letter stated, in support of finding “A,” “the subject properties, however, present a highly unique situation which is unlikely to occur in other parts of Soho.”²⁹⁴ They also found that pure residential development “may not, in itself, alter the essential character of the Soho neighborhood.”²⁹⁵ Instead, they simply argued that a lower FAR, of 6.5 percent, and fewer units, would mitigate the impact substantially.

The applicant quickly seized upon this letter to justify its physical hardship and correlate City Planning’s letter to that of the LPC which stated “[the LPC] voted to approve a proposal to construct a new nine-story building and a new eight-story building....”²⁹⁶ Implicit in the LPC approval is that the development would have minimal negative impact on the community.

Indeed the applicant was able to counter each argument, including sewerage capacity, school overcrowding, and population density. The court accepted these statements, finding that “[i]n view of this [that 10,000 people live in and near Soho] it is obvious that the character of Soho will not be destroyed by an additional 185 people living on the northernmost fringe.”²⁹⁷

²⁸⁹ See *id.*

²⁹⁰ See Robert S. Paul, Memorandum on behalf of The Continuum Company (Jan. 14, 1998).

²⁹¹ See *Soho Alliance*, 703 N.Y.S.2d at 155.

²⁹² Compiled from a review of over 150 opposition statements submitted to the BSA and on file.

²⁹³ See Letter from Joseph Rose, Chairman of the City Planning Commission of the City of New York, to James Chin, Chair, Board of Standards and Appeals (Feb. 2, 1998) [hereinafter February City Planning Letter].

²⁹⁴ *Id.* at 2.

²⁹⁵ *Id.* at 3.

²⁹⁶ See LPC letter.

²⁹⁷ See *id.* at 159.

d. Self-Created Hardship.

The applicant rightly noted that the size of the lots had been created by the City itself with the widening of Houston Street in 1963.²⁹⁸ City Planning called the lot configurations “idiosyncratic.”²⁹⁹ However, the lots are not uniquely shaped or sized. As noted, lots of 25x100 are quite common all over the City, including Soho. The only reason the lots had a unique L shape was because each had been combined years earlier.³⁰⁰ If divided into smaller parcels, it would not have a unique shape or size, as aptly noted by the Community Board, “the combining of the lots into an unwieldy shape would seem to be a self-created hardship.”³⁰¹

e. Minimum Variance Necessary to Afford Relief.

The applicant notes that the 8.5% blended return is the minimum required to obtain financing for a project of this size.³⁰² Thus, any smaller variance would not be viable. Numerous scenarios including as of right uses, like a hotel, and smaller residential or commercial structures, produced smaller rates of return.³⁰³ However the issue of the continued viability of the parking lot was not addressed.

The notes of an unnamed BSA staff member in the file state that the (e) finding is of concern. The apparent 6.29% return on continued use as a parking lot and even 4.1% for a less bulky residential use have been found by other courts to be a “reasonable return.”³⁰⁴

3. Analysis and Conclusions

Clearly, the key factors in this matter were economic. The proposed building was not vastly out of scale with the community and would not have introduced any alien uses into the surrounding area. Sewers, schools and roads are equipped to handle the proposed density.

No final resolution was ever reached on the issues of 1.) the proper sale price for condominiums in Soho and 2.) the necessity and true cost of the special foundation to protect the alleged subway easement. If the opponents’ allegations were borne out, they claim that a rate of 15%-20% rate of return would be generated, clearly in excess of what is required to finance the project. The apparent reasonable rate of return that would be generated from continued use for parking was also inadequately addressed.

It is also worth noting the role the LPC and City Planning opinions played in the process. The BSA court clearly relied upon the LPC to dismiss allegations of negative community

²⁹⁸ See Continuum Statement at 2.

²⁹⁹ February City Planning Letter.

³⁰⁰ 19-35 West Houston consists of lots 12 and 21, Block 513. 55 Houston consists only of lot 14, block 514.

³⁰¹ Resolution of Community Board 2, Feb. 24, 1998.

³⁰² See Memorandum of Robert B. Pauls, *supra* note 291.

³⁰³ See Pauls Analysis.

³⁰⁴ See *id.*

impact. City Planning's letter was used by the applicant to substantiate its unique physical condition. The agencies unintentionally facilitated the successful variance application.

Appendix B: Recommended Charter, Rule and Policy Changes

Appendix B sets forth the proposed Charter, Rule and Policy Changes based on the recommendations from earlier in the report. They can be viewed in two tiers. The first set, A-D, are measures that can be implemented immediately to improve the variance process and the function of the BSA. The second tier, set forth in Section E, concerns studying ways to further improve the process by transferring variance authority to a zoning administrator in City Planning, or at least making such an office the first stop for applications. It is also important to study ways to improve the City's findings for area variances, perhaps by using the state law's changes outlined in Section IV as a model. The study should not hold up implementation of recommendations A-D.

While it may be simplest to address these changes through a City Council Resolution and subsequent changes to the City Charter and Rules of the City of New York,³⁰⁵ the Zoning Resolution has traditionally contained the substantive guidelines for zoning variances and the BSA.³⁰⁶ The process for amending the Zoning Resolution is more involved, and is initiated by the City Planning Commission. The Rules generally expand on the functions for the BSA described in the City Charter.³⁰⁷ No matter where the improvements are eventually codified, they will not change the text of the five findings. Rather, they would be added to supplement, improve and interpret them for the BSA, applicants and the public.

The Society considered the legality of these changes and their efficacy in depth. They conform to existing statutory and case law governing land use and should not present constitutional issues, especially in that they largely relate to **process** and **oversight**. Recall that the state laws that govern zoning boards of appeal for other municipalities do not apply to New York City, leaving it some additional freedom to craft its own system.³⁰⁸ Along those lines, additional suggestions for improving the standards and procedures for the zoning variance process can be found in the American Planning Association's *Growing Smart* guidebook.

It will take the cooperation of the Mayor, City Council, City Planning and the BSA to make reform of the system a success. Since the changes are feasible as Charter and Rule amendments, it may eventually be appropriate for the City Council to hold hearings on the issues and consider a comprehensive legislative proposal to effect the changes. The Land Use Committee and Subcommittee on Zoning's review and insight will be essential.

³⁰⁵ See Rules, Title 2, § 1.

³⁰⁶ See Zoning Resolution §72-21.

³⁰⁷ Note that the Administrative Code of the City of New York does not address variances or the BSA.

³⁰⁸ See supra section IV B.

A. Improve Application of the Five Findings.

<i>Issue</i>	<i>Proposed Location of new rule</i>	<i>Findings Implicated</i>	<i>Explanation/ Summary of Rule</i>
1. Variances sought for recent purchases	Rules or Zoning Resolution	-Self created hardship -Reasonable Return	Create a rebuttable presumption that a recent purchase price did reflect any hardship. Examples of reasons that it would not reflect the hardship include hidden physical conditions, an unexpected increase in value, zoning changes etc. ³⁰⁹
2. Failure to evaluate all permitted uses	Rules or Zoning Resolution	-Minimum Variance Necessary	All relevant use groups within a zoning category (M, C, R) should be considered before evaluating another zoning category. Thus, a change to R zoning should be prohibited before a full evaluation of all relevant M-1, 2 and 3 uses and use groups is completed.
3. Geographic Area used in evaluating unique physical conditions community character findings and a possible rate of return.	Rules or Zoning Resolution	-Unique Physical condition -community character -rate of return	There should be a rebuttable presumption that the study area commonly submitted for applications shall continue in an equal radius around the site of at least ¼ mile from the lot's boundary. If the study area is larger it

³⁰⁹ See Bellamy v. Board of Appeals of the City of Rochester, 223 N.Y.S.2d 1017, 1022 (1962).

			shall still include an area equidistant from the parcel in question. Exceptions may include a water body or major geographic obstruction that makes such a study area illogical. The BSA may in its discretion require an appropriate level of analysis in the geographic study.
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B. Provide Better Oversight of the BSA and the Variance Process.

<i>Issue</i>	<i>Proposed Location</i>	<i>Explanation of Change</i>
1. Mapping	Rules or Zoning Resolution	The BSA should map, updating it monthly, its variances. The map should include all variances that have been applied for, going back at least two years. The Map shall be posted on the BSA website and prominently in the offices of the BSA.
2. Density alarm	Charter	City Planning should prepare a report on a community district's zoning after the filing of an eleventh variance application in any given district. This report shall be prepared within three months of the filing. It shall focus on the zoning and its continued relevance as well as any other issues that City Planning chooses to address. This number, eleven, is chosen from this study where in 2001-2002 only three community districts would have

		triggered one of the reports. Alternatively an environmental impact statement to address the cumulative impacts of the variances might be required, and perhaps funded by the applicants themselves.
3. City Planning Oversight	Mayoral Directive, Rules or Zoning Resolution	Require City Planning to appoint a staff member as the BSA liaison, who may already exist unofficially. This person's duties shall include monitoring variance applications, knowing when a study of zoning variances is required, receiving maps on a monthly basis, and overseeing and compiling testimony by City Planning and its borough offices to the BSA.
4. Mayoral Oversight	Mayoral Direction, Charter	Include the BSA and its special permits, appeals and variances in the Mayor's Management Report. This will make year to year comparisons of the Board's approvals, case-load etc. possible. A formal means of conveying variance information to City Planning must be created.

C. Add Expertise to the BSA.³¹⁰

<i>Issue</i>	<i>Proposed Location</i>	<i>Explanation</i>
1. Financial Expertise	Mayoral Directive, Charter (Chapter 27, Section 661).	Adding financial expertise requires no immediate legislative action, the mayor can direct the Executive Director, as empowered by Charter Section 661 to hire

³¹⁰ “[C]ounties that have the assistance of planning staff or a lawyer produce better opinions than counties that don’t. Their opinions are less likely to be reversed by a circuit court, even if the court arrives at a different conclusion about the case.” Jack S. Hawbaker, *Appeals Boards Need to Clean Up Their Act*, PLANNING, November 1982, at 23.

		the staff needed to conduct adequate reviews. Charter Section 661 should also be amended to require financial expertise for the BSA.
2. Planning Expertise	Mayoral Directive, Charter	Members and certainly chairs of the BSA should have a planning background. Evidence of such expertise, and a good working relationship with City Planning, should be part of the selection process. Chairs might be chosen from the City Planning Commission. At the very least some staff members need to be hired that have planning backgrounds.
3. Training	n/a	Provide annual training for Commissioners in application of the five findings and the latest case law on variances.

D. Strengthen the Application Process.

<i>Issue</i>	<i>Proposed Location</i>	<i>Explanation</i>
1. Variance Renewals	Rules	Renewals should contain a sworn statement that conditions imposed on the original variance were followed, with supporting evidence as appropriate. ³¹¹
2. Penalties	Rules	Require penalties for intentional submission of erroneous information
3. Cross-referencing other variances	Rules or Zoning Resolution	Rebuttable Presumption that other variances cannot be referenced in a variance application or testimony.

E. Create a Commission to Study Zoning Administrators and the Standards for Area Variances.

As stated in the beginning of this report, a study of how a zoning administrator might improve the current system should be undertaken. The commission should also take up recent proposals for reform of the BSA and variance process as well as the disparity in standards for variances at the state and city levels. This study should not hold up implementation of recommendations A-D.

³¹¹ Appropriate for Special Permits as well.