

# *Town of Canandaigua*

5440 Routes 5 & 20 West

Canandaigua, NY 14424

Phone: (585) 394-1120 / Fax: (585) 394-9476

## **ZONING BOARD OF APPEALS**

### **USE VARIANCE APPLICATION**

#### **NOTICE TO ALL APPLICANTS:**

The ZONING BOARD OF APPEALS reviews submitted applications on a first-come-first-served basis. The number of applications scheduled for review will vary depending upon the number and complexity of the applications received. The goal of the ZBA is to process all applications in a timely and efficient manner.

Applicant must see that all forms are filled out completely and accurately before the application can be processed. All completed applications are subject to the rules and regulations as established by the Town of Canandaigua and the State of NY. This department does not guarantee any board approvals for completed applications.

**Town of Canandaigua**  
**2016 Fee Schedule**  
(Effective January 1, 2016)

No permit or certificate shall be issued, no approval shall be granted, no application shall be considered complete, no park reservation shall be confirmed, and no public hearing shall be scheduled or held until the fees, as established by the Town Board, have been paid in full. Accepted forms of payment are: cash, check, or credit card (Visa, Mastercard, Discover, and American Express).

<b>DEVELOPMENT OFFICE:</b>	
<b>Zoning Board of Appeals:</b>	Area Variance, Use Variance, Interpretation (Per Requested Variance)
	\$100
<b>Planning Board:</b>	
Special Use Permit Application, Sketch Plan Application	\$100
Lot Line Adjustments (for each existing and proposed lot)	\$100 per lot
Major Subdivision (5 or more lots) – Preliminary Approval	\$1,000 plus \$100 per lot
Major Subdivision (5 or more lots) – Final Approval	\$1,000 plus \$100 per lot
Minor Subdivision (up to and including 4 lots) – Preliminary Approval	\$250 plus \$50 per lot
Minor Subdivision (up to and including 4 lots) – Final Approval	\$250 plus \$50 per lot
<b>Site Plan / Construction / Building Permits:</b>	
<u>Single-Family (Residential) Dwelling / Manufactured Home (AR1, AR2, R120, R130, RLD, RR3, SCR1)</u>	
Planning Board Site Plan Approval	\$150
Extension of Site Plan Approval	\$100
Construction, expansion or structural alternation, including accessory structures	\$50 plus 20¢ per sq ft (Minimum \$100)
Mechanical improvements and unlisted permits	\$50
Issuance of Special Use Permit	\$50
Sign Permit	\$150 per sign
Soil Erosion & Sedimentation	\$150
MS4 Acceptance Certificate	\$150
Hot Tub / Pool (Above Ground)	\$100
Hot Tub / Pool (In Ground)	\$150
Hot Tub / Pool Re-Inspection (for each re-inspection)	\$50
Certificate of Compliance (not associated with current building permit)	\$50
Certificate of Pre-Existing Non-Conforming	\$100
Certificate of Non-Conformity	\$100

Open Building Permit Extension	\$100
Release of Stop Work Order	\$100
Park & Recreation (Per Dwelling Unit)	\$1,000 per unit
Consultant Fees	See Town Code Chapter 11
<b>Multiple Family Dwelling (MR, MR281, MH)</b>	
Site Plans – Preliminary Approval	\$250 plus \$50 per dwelling unit
Site Plans – Final Approval	\$250 plus \$50 per dwelling unit
Extension of Site Plan Approval	\$100
New Construction, expansion or structural alternations	\$500 plus 30¢ per sq ft
Mechanical improvements and unlisted permits	\$200
Issuance of Special Use Permit	\$50
Sign Permit	\$150 per sign
Soil Erosion & Sedimentation	\$150
MS4 Acceptance Certificate	\$150
Hot Tub / Pool (Above Ground)	\$100
Hot Tub / Pool (In Ground)	\$150
Hot Tub / Pool Re-Inspection (for each re-inspection)	\$50
Open Building Permit Extension	\$100
Certificate of Compliance (not associated with current building permit)	\$50
Certificate of Pre-Existing Non-Conforming	\$100
Certificate of Non-Conformity	\$100
Release of Stop Work Order	\$100
Park & Recreation (Per Dwelling Unit)	\$1,000 per unit
Consultant Fees	See Town Code Chapter 11
<b>Commercial and Industrial (CC, NC, I, LI, RB1)</b>	
Site Plan Approval – Preliminary	\$250
Site Plan Approval – Final	\$250
Extension of Site Plan Approval	\$100
New Construction, expansion or structural alterations	\$500 plus 30¢ per sq ft
Mechanical improvements and unlisted permits	\$500
Issuance of Special Use Permit	\$50
Soil Erosion and Sedimentation	\$150
MS4 Acceptance Certificate	\$150
Sign Permit	\$250 per sign
Fire Safety Re-Inspection	\$100

Certificate of Compliance (not associated with current building permit)	\$50
Certificate of Pre-Existing Non-Conforming	\$100
Certificate of Non-Conformity	\$100
Open Building Permit Extension	\$100
Release of Stop Work Order	\$100
Park & Recreation Fee	\$1,000 per building
Consultant Fees	See Town Code Chapter 11

<sup>1</sup>Categories are defined by the occupancy classifications described in the NYS Uniform Fire Prevention and Building Code. Floor or ground area shall be based on the outside dimensions; living area to include breezeway, mud-room, enclosed porch, attached garage, attic and living area in the basement. This calculation shall apply to both new and/or renovated space.

<sup>2</sup>See Zoning and/or Code Enforcement Officer for Permit Requirements.

<sup>3</sup>“Structural Alteration” includes windows, doors, and load bearing modifications.

<sup>4</sup>“Mechanical Improvements” include HVAC, electrical, heating and roofs, etc.

# Town of Canandaigua

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## 2016 Board Calendar

Meeting dates are subject to change

*\* All Applications are due by 12:00pm on deadline day\**

<b>APPLICATION DEADLINE</b> 12:00 pm	<b>PRC MEETING</b> To review applications 9:00AM	<b>ZONING BOARD OF APPEALS</b> Public Hearings 6:00 PM	<b>PLANNING BOARD</b> Public Meetings and Hearings 6:30 PM	
<b>FRIDAY</b>	<b>MEETING DATE</b>	<b>MEETING DATE</b>	<b>MEETING DATES</b>	
December 11, 2015	December 14, 2015	January 19, 2016	January 12, 2016	January 26, 2016
January 15	January 19	February 16	February 9	February 23
February 12	February 16	March 15	March 8	March 22
March 11	March 14	April 19	April 12	April 26
April 15	April 18	May 17	May 10	May 24
May 13	May 16	June 21	June 14	June 28
June 17	June 20	July 19	July 12	July 26
July 15	July 18	August 16	August 9	August 23
August 12	August 15	September 20	September 13	September 27
September 16	September 19	October 18	October 11	October 25
October 14	October 17	November 15	November 9*	November 29**
November 10	November 14	December 20	December 13	----
December 16	December 19	January 17, 2017	January 10, 2017	January 24, 2017

\*Meeting date moved back one day due to Election Day

\*\*Meeting date moved back one week due to Thanksgiving holiday

The applicant will receive written notification of their scheduled meeting.

If your application is deemed incomplete, it will not be placed on an agenda until the requested information has been submitted to the Town Development Office.

All new Planning Board applications submitted on / before the application deadline will be first heard at 2<sup>nd</sup> meeting of the following month. Continued applications will be reviewed at the 1<sup>st</sup> meeting of the following month.

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## ZONING BOARD OF APPEALS REQUIRED PAPERWORK FOR APPLICATION SUBMITTAL

### Use Variance Application

- \_\_\_\_\_ Variance Application (Zoning Board of Appeals)
- \_\_\_\_\_ Map showing size and location of all existing and proposed structures, including lot width, lot area, setback dimensions and computations of percentage of lot coverage. (See attached Sketch Plan Checklist) Projects over 1,000 square feet will require a professionally prepared site plan.  
  
Per Section 220-64-C-1, Use variances granted by the Zoning Board of Appeals will require the property owner to obtain site plan approval from the Planning Board. A separate application for site plan approval will be required to be submitted by the applicant.
- \_\_\_\_\_ Front elevation or view of proposed structure showing the height measured from the average finished grade.
- \_\_\_\_\_ Agricultural Data Statement
- \_\_\_\_\_ Property owner signatures on all application forms and checklists

**You must submit the original application and attachments / survey map / site plan.  
Contact the Zoning Officer to determine which additional building/sign permit application is  
required to be submitted with this application.  
Additional copies of the site plan, etc. will be requested after the Planning Review Committee  
(PRC) has reviewed your application.**

### **FEES:**

1. The \$100 application fee is required upon submission of the application. This fee is non-refundable. A separate, additional fee will be rendered for the building permit.
2. Building permit fees vary – the fee will be determined by the Town Code Enforcement Officer.
3. The property owner is responsible for reimbursement of any Town Engineer and/or Town Attorney fees incurred during application review.

## **WHY YOUR VARIANCE MIGHT BE DENIED**

You have been told that something which you want to do on your land is prohibited. You have also learned that the ZBA has the power to authorize you to proceed despite the Zoning Law prohibition.

Hopefully, you have also learned from the materials you received from the Planning & Zoning Office that we may only approve your variance if you can show some practical difficulty in your particular situation. We seek, wherever possible, to help resolve your individual conflict with the zoning law in a manner which addresses your needs as well as the needs of the Town as a whole.

Unfortunately, because these needs are sometimes in conflict, we often find such an ideal solution impossible.

In our experience variances are most frequently denied for one of three reasons:

First, practical difficulty was not shown, even though it was shown, there is some means other than a variance available to the applicant to address the problem. These variances are denied because they are not considered to be necessary.

Second, even though practical difficulty was shown, a variance will be denied if the impact of the requested variance upon the neighborhood or surrounding properties would be too great. This board is required to take into account the good of the Town as a whole and not grant an individual relief if the common good would be too severely impacted.

Finally, variances are generally denied if the practical difficulty shown was not unique. We are required to determine whether the difficulty is unique to a given property or to circumstances peculiar to that property. State law prohibits us from approving a variance if an applicant establishes a difficulty which is not unique. The rationale for this limitation is that the granting of variances to address difficulties which are common to a given region or type of use amounts to actually changing the zoning law, one variance at a time. The proper legal procedure in such a case is not a variance, but a request to change the law. This board cannot act on such a request as the Town Board, which enacts all the laws of the town, is the only board which can make such a change. Regrettably, the Zoning Board of Appeals sometimes finds an applicant to have a legitimate concern, but is nonetheless compelled to deny the requested variance because the described difficulty is not sufficiently unique. In that instance the board will advise the Town Board of its finding both to assist the applicant and in the hope that the Town Board will take appropriate action to improve the zoning law itself.

# Variances

## What is a variance?

As was noted in the introduction, various "safety valves" were built into the original zoning ordinance in 1916; these include nonconforming uses and variances.

It was thought that nonconforming uses would eventually wither on the vine and die. But this has not been the case. Neither has the procedure of granting variances been an unqualified success. In fact, considerable doubt exists as to whether it has been a success at all. A leading writer in the field of zoning has observed:

"Although the variance remains in most of our zoning ordinances, its crude use to grant and deny favors was subjected to substantial criticism, not only from the courts but from the professional writers as well. The indictment has been that, far from being a safety valve, the variance is a handy gimmick to permit 'leakage' from the certainty provided by the concept of districting" (Babcock, *the Zoning Game*(1966)).

Whether the variance has indeed proved to be a safety valve, permitting relief where strict interpretation of the provisions of a zoning law create a positive hardship, or whether it is just a "handy gimmick" used to circumvent such laws for any - or no - reason, is open to question. The answer probably is both. Since the laws relating to zoning affect individuals to a greater extent than perhaps any other field of law, and are administered by fellow citizens and neighbors, such administration is naturally more prone to human error and failings. It is the purpose of the following portion of this memorandum to examine the variance procedure in New York State, with the hope that such examination can help lift the veil of the uncertainty surrounding the role of the variance in the general scheme of zoning.

In essence, a variance is permission granted by the zoning board of appeals so that property may be used in a manner not allowed by the zoning. It is *only* the zoning board of appeals that has the power to provide for such exceptions from the zoning. And since zoning

is meant to implement the municipality's development objectives and protect the health, safety and general welfare of the people, it follows that there are strict rules governing when exceptions may be provided.

There are two types of variances - use and area - and we will take them up separately since the rules for each are different.

## The use variance

The use variance has been defined as:

"... one which permits a use of land which is proscribed by the zoning regulations. Thus, a variance which permits a commercial use in a residential district, which permits a multiple dwelling in a district limited to single-family homes, or which permits an industrial use in a district limited to commercial uses, is a use variance" (Anderson, *Zoning Law and Practice in New York State*, 3d. section 23.05)

The Town Law and Village Law specifically incorporate this concept into the language of the statutes. Town Law, section 267(1) and Village Law, section 7-712(1) provide as follows:

"'Use variance' shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations."

Effective July 1, 1994, General City Law, section 81-b(1)(a) sets forth identical language applicable to cities.

Early cases in New York State recognized, without defining terms, that a zoning board of appeals had an important function in the granting of variances. In the case of *Fordham Manor Reformed Church v. Walsh* (244 N.Y. 280), the court observed:

"There has been confided to the Board a delicate jurisdiction and one easily abused. Upon a showing of unnecessary hardship, general rules are suspended for the benefit of individual owners, and special privileges



established."

Subsequent judicial decisions interpreting "practical difficulty and unnecessary hardship" noted that "... the hardship and its occasion must be exhibited fully and at large," and that a variance may be granted "... where the burden of a general restriction creates a special hardship upon a particular owner (and) the grant of a special privilege to him [can] in truth, promote equal justice" (*Young Women's Hebrew Association v. Board of Standards and Appeals of City of New York* (266 N.Y. 270); *Levy v. Board of Standards and Appeals of City of New York* (267 N.Y. 347)).

Thus the courts, up until 1939, had discussed general criteria for the granting of variances. Although these early decisions recognized the importance of the variance procedure and its inherent limitations, it was in that year that the landmark case of *Otto v. Steinhilber* (282 N.Y. 71) was decided, and laid down specific rules governing the finding of unnecessary hardship in the granting of use variances. In that case, the owner of a parcel of property which was located in both a residential and commercial zone applied for a variance enabling him to use the entire parcel for a skating rink, which was permitted commercial use. The lower court upheld the granting of the variance, which ruling was affirmed by the Appellate Division. The Court of Appeals, the highest court in the State, reversed these holdings and in doing so, set forth the definitive rules that are still followed today. Indeed, now, these rules are codified in the State statutes.

The court found that the object of a variance in favor of property owners suffering unnecessary hardship in the operation of a zoning law "... is to afford relief to an individual property owner laboring under restrictions to which no valid general objection may be made." After a discussion of the role of the zoning board of appeals in the granting of variances, the court found that a board could grant a variance only under certain specified findings:

"Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose

allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."

These rules have since become known by almost all practitioners as the "Otto" rules for granting use variances.

The court found that the petitioner was not entitled to the variance sought, because the three grounds cited above had not been proven. Of greater importance is the fact that once the court had enunciated these rules, a great element of certainty had been injected into this field of law. Cases since *Otto* have defined the necessary elements, such as "reasonable return," "unique circumstances" and "essential character of the locality" as discussed below, but hardly a court decision in this area has since been handed down that has not cited the rules formulated in the *Otto* case.

Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b) essentially codify the *Otto* rules, and those of cases following *Otto*, specifically regarding the issuance of use variances in towns and villages:

(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 located,

(1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;

(2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;

(3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and

(4) that the alleged hardship has not been self-created.

It will be noted that the overall statutory test for the issuance of use variances remains "unnecessary hardship" as the Court of Appeals held in the *Otto* case. The statutes now define that term, using the three criteria based upon the *Otto* case, as they have been refined by court decisions over the years. The fourth requirement in the above language is based upon court decisions after the *Otto* case, which held that a use variance cannot be granted where the unnecessary hardship was created by the applicant.

The *Otto* rules have been refined by court decisions over the years. In towns and villages, the statutory rules for granting use variances in towns and villages reflect these decisions. The best way to understand the rules is to examine each in its turn, together with the court decisions that shaped them.

#### Reasonable return

The *Otto* case held that the first test for the issuance of a use variance was that the applicant must show to the board of appeals that "the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone." It is clear that this means that there must be a demonstration that the zoning regulations impose requirements so severe that they amount to a "confiscation" of the property in question (See Rathkopf, *The Law of Zoning and Planning*, 4th Edition, section 38.02; *Williams v. Town of Oyster Bay*, 32 N.Y. 2d 78).

The mere fact that the property owner may suffer a reduction in the value of property because of the zoning regulations, or the fact that another permitted use may allow the sale of the property for a better price, or permit a larger profit, does not justify the granting of a variance on the grounds of unnecessary hardship (*Rochester Transit Corp. v. Crowley* (205 Misc. 933) citing *Young Women's Hebrew Association v. Board of Standards of City of New York* (266 N.Y. 270); *Thomas v. Board of Standards and Appeals of City of New York*

(290 N.Y. 109)).

It has been held that only by actual "dollars and cents proof" can lack of reasonable return be shown. In the case of *Everhart v. Johnston* (30 App.Div.2d 608), a variance was granted to the owner of a property in a residential zone to enable him to house an insurance and real estate agency. A State Supreme Court annulled the granting of the variance, which determination was affirmed by the Appellate Division, which found "a complete lack of the requisite proof as to the first requirement." (The land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.) The court explained its findings as follows:

"a mere showing of present loss is not enough. In order to establish a lack of 'reasonable return', the applicant must demonstrate that the return from the property would not be reasonable for each and every permitted use under the ordinance" (*Matter of Forrest v. Evershed*, 7 N.Y. 2d 256). Moreover, an applicant can sustain his burden of proving lack of reasonable return, from permitted uses only by "dollars and cents proof" ....(Id.).

The "dollars and cents proof" rule was again enunciated in a Court of Appeals case which held that "a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses" (*Fayetteville v. Jarrold*, 53 N.Y.2d 254).

Nor, the cases have held, does the fact that an individual desires to use the property for other, more profitable purposes constitute a hardship (*Goldstein v. Board of Appeals of Oyster Bay*, 102 N.Y.S.2d 922) or that a different use may be more profitable. The salient inquiry is whether the use allowed by the zoning ordinance is yielding a reasonable return (*Crossroads Recreation v. Broz*, 4 N.Y.2d 39).

Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b), provide that the first test for the issuance of a use variance is that the applicant must demonstrate to the board of appeals that:

"the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence."

In essence, this is a restatement, in the State statute, of the rules just discussed that have been established by the courts over the years since the *Otto* case was decided.

At this point, it would be good to mention briefly a property use that is especially hard hit by the reasonable return requirement. That is a nonconforming use, upon which an especially heavy burden falls when it must be shown that the user cannot derive a reasonable return from any permitted use. An applicant who maintains a nonconforming use must not only show that all permitted uses will be unprofitable, but also that the nonconforming use itself cannot yield a reasonable return. In a case in which the owner of a nonconforming gasoline station applied for a variance, the court pointed out this additional burden.

"In order to demonstrate hardship, the petitioners had the burden of showing that 'the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone.' Since the operation of their gasoline station, as it presently exists, was a nonconforming use which was suffered to continue because it had been devoted to such a use before the prohibitory zoning ordinance took effect, it was a use which was allowed in that zone.' Business 'A' uses, such as retail stores generally, real estate offices, etc., were also, of course, 'allowed in that zone.' Hence, the petitioners had the burden of proving that their property could not yield a 'reasonable return' if used for a gasoline station (as it presently exists) or for any business 'A' use (retail stores generally, real estate offices, etc.)" (*Crossroads Recreation v. Broz*, 4 N.Y.2d 39).

#### Unique circumstances

The second test that an applicant for a use variance must adhere to under the *Otto* rule, is that his plight is due to unique circumstances and not to general neighborhood

conditions. As a leading text writer has observed:

"Difficulties or hardships shared with others go to the reasonableness of the ordinance generally and will not support a variance relating to one parcel upon the ground of hardship" (Rathkopf, *The Law of Planning and Zoning*, 4th ed. pg. 38-33).

The Court of Appeals, in the early case of *Arverne Bay Construction Co. v. Thatcher* (278 N.Y. 222), had before it a case involving the owner of land in a district classified as residential, in an area almost completely undeveloped, who sought a variance enabling him to operate a gasoline station. The Court of Appeals held a variance should not have been granted. The court stated:

"Here the application of the plaintiff for any variation was properly refused, for the conditions which render the plaintiff's property unsuitable for residential use are general and not confined to plaintiff's property. In such case, we have held that the general hardship should be remedied by revision of the general regulation, not by granting the special privilege of a variation to single owners."

This finding of "uniqueness" has also been referred to by the Court of Appeals as that of "singular disadvantage" by the virtue of a zoning ordinance. In the case of *Hickox v. Griffin* (298 N.Y. 365), the court stated:

"There must at least be proof that a particular property suffers a singular disadvantage through the operation of a zoning regulation before a variance thereof can be allowed on the ground of 'unnecessary hardship'."

In the recent case of *Douglaston Civic Association, Inc. v. Klein* (51 N.Y.2d 963), the Court of Appeals discussed the "unique circumstances" requirement and held that the property was indeed unique, justifying the grant of the variance:

"Uniqueness does not require that only the parcel of land in question and none other be

affected by the condition which creates the hardship.... What is required is that 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. What is involved, therefore, is a comparison between the entire district and the similarly situated land."

A use variance was properly granted in *Douglaston* where the land in question was shown to be swampy, even though other land in the vicinity shared that characteristic. The uniqueness requirement must be addressed in the context of the nature of the zone in general. Such a relationship makes sense when it is remembered that a variance should not be used in lieu of a legislative act. A parcel for which a variance has been granted, therefore, need not have physical features which are peculiar to that parcel alone (as required in *Hickox*, above). On the other hand, the hardship caused by physical features cannot prevail throughout the zone to such an extent that the problem should be addressed by legislative action, such as a rezoning.

This second test of "uniqueness" is now part of the State statutes governing the grant of use variances by town and village zoning boards of appeals, Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b) provide that the second test that an applicant must meet is to demonstrate to the board:

"that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood."

This is a restatement of the rule enunciated by the Court of Appeals in the *Otto* case, as later refined in the *Douglaston* case discussed above.

#### Essential character of locality

The third test that must be met pursuant to the *Otto* rule before a variance may properly be granted, is that the use to be authorized by the variance will not alter the

essential character of the locality. Because one of the basic purposes of zoning is to adopt reasonable regulations in accordance with a comprehensive plan, it follows that changes which would disrupt or alter the character of a neighborhood, or a district, would be at odds with the very purpose of the zoning ordinance itself. Thus, in the case of *Sepulchre Cemetery v. Board of Appeals of Town of Greece* (271 App. Div. 33), a nonprofit cemetery corporation sought a variance to enable it to establish a cemetery where such use was not provided for in the applicable zoning ordinance. The court conceded the fact that the area surrounding the property in question was sparsely settled and practically undeveloped, but upheld the action of the board denying the variance sought. The court recognized the right of the zoning board of appeals to take notice of the fact that a residential building boom could reasonably be expected in a few years, and that the proposed cemetery could quite possibly interfere with the residential development of the section.

In another case, a transit corporation sought to lease land in a residential zone, used as a bus loop, to an oil company, which planned to erect a gasoline station. The court found that the zoning board of appeals properly refused to grant a variance, because the variance, if granted, would interfere with the zoning plan and the rights of owners of other property, and that the evidence before the board was sufficient to sustain its findings that the requested use, if permitted, "... would alter the essential residential character of the neighborhood". (*Rochester Transit Corp. v. Crowley*, 205 Misc. 933).

In the case of *Matter of Style Rite Homes, Inc. v. Zoning Board of Appeals of the Town of Chili* (54 Misc.2d 866), the plaintiff corporation owned property in a one-family residential district, part of which was appropriated by the State for highway purposes. The plaintiff then applied for a variance permitting it to use its remaining land for a garden apartment development. In upholding the decision of the zoning board of appeals denying the variance, the court held that:

"Finally, it seems clear that the plaintiff's proposed use of the property for a 60-family multiple dwelling complex is incompatible with the over-all plan and policy for development of

the town and would create conditions distinctly different from those existing in the locality by adding problems incident to an increase in population density as well as unquestionably altering the essential character of an otherwise residential neighborhood developed in reliance on the stability of the ordinance."

This third test is now part of the State statutes. Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and, effective July 1, 1994, General City Law, section 81-b(3)(b), provide that the third test for the issuance of a use variance is that the applicant must demonstrate to the board:

"that the requested use variance, if granted, will not alter the essential character of the neighborhood;"

This codifies the third test required by the *Otto* case.

### Self-created hardship

While it was not a factor in the *Otto* decision, there is one more important consideration that must be noted before leaving the discussion of use variances. That is the so-called rule of "self-created hardship." It is well settled that a use variance cannot be granted where the "unnecessary hardship" complained of has been created by the applicant, or where she/he acquired the property knowing of the existence of the condition he now complains of. In the case of *Clark v. Board of Zoning Appeals* (301 N.Y. 86), the Court of Appeals, before proceeding to discuss the grounds necessary for the granting of a variance, noted that the property in question was purchased to be used as a funeral home in a district where such use was not permitted under the zoning ordinance. The court observed that:

"Nevertheless [plaintiff]...purchased the lot, then applied for the variance. We could end this opinion at this point by saying that one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship'." (For similar holdings see *Holy Sepulchre Cemetery v. Board*

*of Appeals of Town of Greece*, 271 App. Div. 33; *Thomas v. Board of Standards and Appeals of City of New York*, 290 N.Y. 109; *Everhart v. Johnstown*, 30 App. Div.2d 608; *Henry Steers, Inc. v. Rembaugh*, 284 N.Y. 621).

The self-created hardship rule has now been codified in Town Law, section 267-b(2)(b); Village Law, section 7-712-b(2)(b); and effective July 1, 1994, in General City Law, section 81-b(3)(b).

### A final word on use variances

The rules laid down by the *Otto* case (and the rules set forth in the statutes as discussed above) are *requirements*. They *must* be used by zoning boards of appeals in reviewing applications for use variances. Furthermore, the board must find that *each* of the tests has been met by the applicant.

The board must also consider the effect of the variance on the zoning law itself. As one court said,

"Thus, the statute makes plain that both the general purpose and intent of the ordinance, reflecting the policy of the legislative body, and the special case of the individual property owner, reflecting a practical difficulty or unnecessary hardship, must be considered by the board of appeals in varying the application of the ordinance" (*Van Deusen v. Jackson*, 35 App. Div. 2d 58, aff'd 28 N.Y.2d 608).

The statutes all provide that in granting variances, boards must grant the minimum variance necessary and must at the same time preserve and protect the character of the neighborhood and the health, safety and welfare of the community (Town Law, section 267-b(3)(c); Village Law, section 7-712-b(3)(c); and General City Law, section 81-b(3)(c).

In addition, the statutes expressly allow boards of appeals to impose reasonable conditions when granting variances. Such conditions must be directly related to and incidental to the proposed use of the property, or the period of time the variance is to be in effect. The conditions must be "consistent with the spirit and intent" of the zoning regulations, and would be imposed

for the purpose of minimizing any adverse impact which the granting of the variance might have on the neighborhood or the community. (Town Law, section 267-b(4); Village Law, section 7-712-b(4); General City Law, section 81-b(5).)

This power to impose conditions is a codification of the well-settled rule that boards of appeals have the inherent power, when granting variances, to impose appropriate and reasonable conditions to protect the neighborhood (*Matter of St. Onge v. Donovan*, 71 N.Y.2d 507; *Pearson v. Shoemaker*, 25 Misc. 2d 591).



6. What is your proposed new project and the variance(s) or interpretation requested?

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7. Have the necessary building permit applications been included with this form? If not, please verify with the Development Office which forms are required to be submitted.

8. With your completed application for an Area Variance, attach a tape map/survey/site plan, elevation of the proposed structure, and other documentation necessary describing the requested variance(s) illustrating why it is practically difficult for you to conform to the Zoning Law.

All maps, surveys, or site plans shall accurately depict the property including all existing and proposed structures, setbacks, and dimensions. *All dimensions must be precise.*

9. With your completed application for a Use Variance, attach a current survey map/site plan of the subject parcel with a detailed description of the proposed use, a statement as to why you feel this use variance is necessary, and a completed Environmental Assessment Form.

10. With your completed application for an Interpretation, attach a current survey map/site plan of the subject parcel with a detailed description of the proposed use, a statement as to why you are appealing the zoning law determination, and a copy of the zoning law determination of which said appeal is requested.

11. If the variance requested is related to signs, attach a Sign Detail Sheet, a site plan, and colored renderings of the proposed signage, and any other documentation required in Article IX (Sign Regulations) of the Town of Canandaigua Zoning Law.

*I have examined this application and declare that it is true, correct, and complete. I understand that my application and all supporting documentation will be examined by the Zoning Board of Appeals as an integral component of deliberations.*

***I hereby grant my designee permission to represent me during the application process.***

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(Signature of Property Owner)

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(Date)



# Town of Canandaigua

5440 Routes 5 & 20 West

Canandaigua, NY 14424

Phone: (585) 394-1120 / Fax: (585) 394-9476

***Property Owner is responsible for any consultant fees  
(Town Engineer, Town Attorney, etc.) incurred during the application process.***

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Please note that the **Property Owner** is responsible for all consultant fees during the review of this application including legal, engineering, or other outside consultants. Applications submitted to the Town of Canandaigua Planning Board will normally receive chargeback fees of at least five hours to ten hours for planning services including intake, project review, resolution preparation, SEQR, and findings of fact. PLEASE NOTE that the number of hours will be SIGNIFICANTLY INCREASED due to incomplete applications, plans lacking detail, or repeated continuations. Subdivision applications and larger commercial or industrial projects traditionally require more hours of engineering, legal, and other consultant review and preparation and will incur higher costs. Applications for new construction may be referred to the Town Engineer for engineering review which may include at least an additional eight to twelve hours of review time. The **Property Owner** will also be responsible for legal fees for applications submitted to the Town of Canandaigua Planning Board, Zoning Board of Appeals, or the Town of Canandaigua Development Office. Fees for engineering and legal expenses traditionally range between one hundred and one hundred fifty dollars per hour. A copy of the Town's annual fee schedule is available upon request from the Development Office or the Town Clerk's Office. The **Property Owner's** signature below indicates that the **Property Owner** understands that the **Property Owner** will be responsible for all outside consultant fees incurred as a result of the submitted application, and consents to these charges. Additionally projects approved by the Town of Canandaigua Planning Board may be required to pay a parks and recreation fee as established by the Town Board (currently \$ 1,000 per unit) if required as part of the conditions of approval.

\_\_\_\_\_  
(property owner)

\_\_\_\_\_  
(property owner)

# TESTS FOR GRANTING USE VARIANCES

## BE VERY SPECIFIC WHEN ANSWERING THESE QUESTIONS

“Use variance” shall mean the authorization by the Zoning Board of Appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.  
(Town Law Section 267, subsection 1.(a)).

To enable the Zoning Board of Appeals to grant “use variances,” the applicant must demonstrate to the ZBA unnecessary hardship. Such demonstration includes *all* of the following for each and every permitted use within the district. Please provide supporting evidence for each point. Attach additional sheets if necessary.  
(Town Law Section 267-b, subsection 3.(b)).

- (1) Under applicable zoning regulations, you cannot realize a reasonable return provided that lack of return from the subject property is substantial as demonstrated by competent financial evidence.

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- (2) The alleged hardship relating to the property in question is unique and does not apply to a substantial portion of the district or neighborhood.

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- (3) The requested use variance, if granted, will not alter the essential character of the neighborhood.

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- (4) The alleged hardship has not been self-created.

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# *Town of Canandaigua*

5440 Routes 5 & 20 West  
 Canandaigua, NY 14424  
 Phone: (585) 394-1120 / Fax: (585) 394-9476

CPN #: \_\_\_\_\_

## *Sketch Plan Checklist*

Applicant: \_\_\_\_\_

Project Address: \_\_\_\_\_

Tax Map #: \_\_\_\_\_

Zoning District: \_\_\_\_\_

Project Description Narrative: \_\_\_\_\_

Sketch Plan Checklist – Chapter 220 §220-66 (Not required for any property in a major subdivision)	Shown on Plan by Applicant	Initial PRC Review	PRC Follow Up Review
A. The sketch plan shall be clearly designated as such and shall identify all existing and proposed:			
1) Zoning classification and required setbacks.			
2) Lot lines.			
3) Land features including environmentally sensitive features identified on the NRI. (woods, streams, steep slopes, wetlands)			
4) Land use(s). (residential, agricultural, commercial, or industrial)			
5) Utilities. (i.e. location of electric, gas, well, septic, sewer, cable)*			
6) Development including buildings, pavement and other improvements including setbacks.			
7) Location and nature of all existing easements, deed restrictions and other encumbrances.			
B. Sketch plans shall be drawn to scale.			
C. It is the responsibility of the applicant to provide a sketch plan that depicts a reasoned and viable proposal for development of the lot.			

**I have reviewed my submitted application and drawings against the above noted criteria and hereby certify that the submitted application matches this check list.**

\_\_\_\_\_  
 Signature of Applicant / Representative

\_\_\_\_\_  
 Date

\*May be obtained from UFPO – dial **811** for assistance.

## Short Environmental Assessment Form

### Part 1 - Project Information

#### Instructions for Completing

**Part 1 - Project Information.** The applicant or project sponsor is responsible for the completion of Part 1. Responses become part of the application for approval or funding, are subject to public review, and may be subject to further verification. Complete Part 1 based on information currently available. If additional research or investigation would be needed to fully respond to any item, please answer as thoroughly as possible based on current information.

Complete all items in Part 1. You may also provide any additional information which you believe will be needed by or useful to the lead agency; attach additional pages as necessary to supplement any item.

<b>Part 1 - Project and Sponsor Information</b>				
Name of Action or Project:				
Project Location (describe, and attach a location map):				
Brief Description of Proposed Action:				
Name of Applicant or Sponsor:		Telephone:		
		E-Mail:		
Address:				
City/PO:		State:	Zip Code:	
1. Does the proposed action only involve the legislative adoption of a plan, local law, ordinance, administrative rule, or regulation? If Yes, attach a narrative description of the intent of the proposed action and the environmental resources that may be affected in the municipality and proceed to Part 2. If no, continue to question 2.			<b>NO</b>	<b>YES</b>
			<input type="checkbox"/>	<input type="checkbox"/>
2. Does the proposed action require a permit, approval or funding from any other governmental Agency? If Yes, list agency(s) name and permit or approval:			<b>NO</b>	<b>YES</b>
			<input type="checkbox"/>	<input type="checkbox"/>
3.a. Total acreage of the site of the proposed action? _____ acres				
b. Total acreage to be physically disturbed? _____ acres				
c. Total acreage (project site and any contiguous properties) owned or controlled by the applicant or project sponsor? _____ acres				
4. Check all land uses that occur on, adjoining and near the proposed action.				
<input type="checkbox"/> Urban <input type="checkbox"/> Rural (non-agriculture) <input type="checkbox"/> Industrial <input type="checkbox"/> Commercial <input type="checkbox"/> Residential (suburban)				
<input type="checkbox"/> Forest <input type="checkbox"/> Agriculture <input type="checkbox"/> Aquatic <input type="checkbox"/> Other (specify): _____				
<input type="checkbox"/> Parkland				



<p>18. Does the proposed action include construction or other activities that result in the impoundment of water or other liquids (e.g. retention pond, waste lagoon, dam)?</p> <p>If Yes, explain purpose and size: _____</p> <p>_____</p> <p>_____</p>	<p><b>NO</b></p> <p><input type="checkbox"/></p>	<p><b>YES</b></p> <p><input type="checkbox"/></p>
<p>19. Has the site of the proposed action or an adjoining property been the location of an active or closed solid waste management facility?</p> <p>If Yes, describe: _____</p> <p>_____</p> <p>_____</p>	<p><b>NO</b></p> <p><input type="checkbox"/></p>	<p><b>YES</b></p> <p><input type="checkbox"/></p>
<p>20. Has the site of the proposed action or an adjoining property been the subject of remediation (ongoing or completed) for hazardous waste?</p> <p>If Yes, describe: _____</p> <p>_____</p> <p>_____</p>	<p><b>NO</b></p> <p><input type="checkbox"/></p>	<p><b>YES</b></p> <p><input type="checkbox"/></p>
<p><b>I AFFIRM THAT THE INFORMATION PROVIDED ABOVE IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE</b></p> <p>Applicant/sponsor name: _____ Date: _____</p> <p>Signature: _____</p>		

# Town of Canandaigua

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## AGRICULTURAL DATA STATEMENT

CPN #: \_\_\_\_\_

In accordance with NYS Town Law § 283-a, the Town of Canandaigua will use the following information to evaluate possible impacts that would occur on property within an agricultural district containing a farm operation or on property with boundaries within 500 feet of a farm operation.

A. Name and Address of Property Owner: \_\_\_\_\_  
\_\_\_\_\_

B. Name and Address of Applicant: \_\_\_\_\_  
\_\_\_\_\_

C. Description of the proposed project: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

D. Project Location: \_\_\_\_\_

E. Tax Map #: \_\_\_\_\_

F. Is any portion of the subject property currently being farmed? \_\_\_\_\_ Yes \_\_\_\_\_ No

G. List the name and address of any land owner within the agricultural district that the land contains farm operations and is located within 500 feet of the boundary of the property upon which the project is proposed.

Name / Address

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

H. Attach a tax map or other map showing the site of the proposed project relative to the location of farm operations identified in this Agricultural Data Statement.

\*\*\*\*\*

**FOR TOWN USE ONLY**

**Circle Type of Application:**

Special Use Permit

Site Plan Approval

Subdivision

Use Variance

**Circle Review Authority:**

Zoning Board of Appeals

Planning Board

Town Board

**Notice Provision:**

Date when written notice of the application described in Part I was provided to the land owners identified in the Agricultural Data Statement.

\_\_\_\_\_

Date referral sent to the Ontario County Planning Department:

\_\_\_\_\_

\_\_\_\_\_  
Name of Official Completing Form

\_\_\_\_\_  
Date