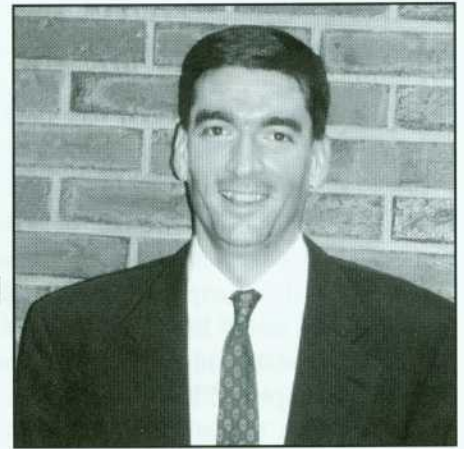




# Report From Counsel's Corner



## APPLES AND ORANGES: THE DIFFERENCE BETWEEN SPECIAL USE PERMITS AND USE VARIANCES



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**F**or people who do not deal with zoning and planning matters on a daily basis, it is sometimes easy to become perplexed about certain terms and concepts. Such confusion often occurs when discussing special use permits and use variances. These zoning terms are often confused with one another even though they are distinct zoning functions that have little in common. This article seeks to dispel the murkiness and provide an understandable and workable knowledge of both zoning concepts.

### USE VARIANCES

Every city and village with a zoning code must also appoint a zoning board of appeals.<sup>1</sup> The board's primary role is to hear appeals from decisions of zoning officials. Zoning boards of appeal have the authority to issue "variances" from a zoning code. There are two type of variances that may be granted by a board of appeals; use variances and area variances.<sup>2</sup> It is use variances that are most often confused with special use permits.

When the proposed or actual use of a parcel of property is found to violate applicable zoning regulations, the appropriate municipal official will deny a building permit. A property owner may then appeal such denial to the zoning board of appeals and may request a "use variance". Thus, the property owner effectively admits that the use of their property does not meet zoning requirements and requests that the board vary the application of the code to their particular piece of property. This "variance" from the zoning code would allow the property owner to

begin or continue using the property in the otherwise impermissible way. For example, a property owner in village ABC wishes to construct and operate a medical office on their property. The property, however, is located in a residential zoning district that does not allow medical offices. As a result, the application for a building permit is denied. The applicant may then appeal to the zoning board of appeals and seek to operate a medical office even though such uses are prohibited in that zone. If the board approved the application, they would confer a use variance to allow the property to be used in

a way not permitted by the zoning code. State law contains the appropriate test that the board would apply when determining whether to grant the variance request.<sup>3</sup>

It is extremely important to remember that the board of appeals in the above hypothetical has not amended the text of the zoning code; medical offices would still be prohibited in residential zones pursuant to the code. The board has granted to one specific parcel of property an exception from the general restriction against medical offices in residential districts. Adjoining property owners, for example, would still be prohibited from operating medical offices. They, too, would have to apply for a use

variance to operate one on their property.

### SPECIAL USE PERMITS

A variety of terms are used to describe special use permits. They may be called conditional use permits, special exception permits or special permits. All such terms refer to what state law terms "special use permits". State statute defines special use permits "as authorization of a particular land use which is permitted

**A "Use Variance" is permission to use property in a way that is prohibited by the zoning code while a "Special Use Permit" is permission to use property in a way that is allowed by the zoning code, but only if certain conditions are met.**

in a local zoning law, subject to requirements imposed by such local law to assure that the proposed use is in harmony with such local law and will not adversely affect the neighborhood if such requirements are met".<sup>4</sup> In simpler terms, a city or village zoning code may list certain uses that are allowed in a zoning district but only after review and approval by a municipal board. This extra level of review is based upon a determination by the village or city that some property uses require additional restrictions or conditions be placed upon them to prevent unreasonable interference with other properties in the zoning district. Such permitting scheme recognizes that some uses are acceptable near others, but only if properly regulated. For example, a number of zoning codes allow funeral homes in residential districts but only if a special use permit is first obtained. This is, in effect, saying that funeral homes are generally okay in residential areas so long as there exists additional municipal review to ensure that certain aspects of a funeral home use such as parking or outside lighting, for example, do not interfere with the use and enjoyment of

other nearby properties.

A local code must specifically name the uses requiring special use permits and state the municipal board designated to review and approve special use permit applications.<sup>5</sup> By requiring special use permits for certain uses, a municipality is, in effect, saying that the particular use is allowed, but only when certain criteria or conditions are met. It becomes the role of the municipal board which has the authority to approve special use permits to ensure that such criteria or conditions are met.

Many municipalities give the zoning board of appeals the power to review special use permit applications. This can create additional confusion between special use permits and use variances. For example, in city XYZ, the zoning code provides that medical offices are a specially permitted use in residential zones and the zoning board of appeals has the authority to review and approve special use permits. In city XYZ, just as in village ABC mentioned previously, a person seeking to operate a medical office would apply to the zoning board of appeals. However, in city XYZ, the applica-

tion would be for a special use permit and not a variance. The application before the zoning board of appeals in city XYZ would seek to demonstrate that the property meets all of the criteria and conditions set forth in the zoning code related to operating a medical office so as to be entitled to a special use permit. It would not be requesting a variance from code provisions.

The fundamental difference between a use variance and a special use permit can be summed up by stating that: a use variance is permission to use property in a way that is prohibited by the zoning code while a special use permit is permission to use property in a way that is allowed by the zoning code but only if certain conditions are met.

For more information or sample local laws related to variances, special use permits, or other zoning matters, contact NYCOCM.

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1. *Village Law §7-712(2), General City Law §81*

2. *Village Law §7-712, General City Law §81-b*

3. *See Village Law 7-712-b(2), General City Law §81-b(3)*

4. *Village Law §7-725-b, General City Law §27-b*

5. *Id.*