

## Senie & Associates, P.C. Attorneys at Law

When a Zoning Board of Appeals (“ZBA”) grants applications for Variations and requests for Section 6 Findings, to a certain extent, they set aside their Town’s Zoning by-Laws. Zoning By-laws are ordinances that divide the town into zones and specify what uses are allowed in each zone, and what dimensional restrictions (height, number of stories, setbacks, coverage, etc.) will be applied to proposed structures to be built in each zone.

Such Zoning By-laws are adopted by the Town’s legislative branch of government; in cities – the City Council, in towns – the Town Meeting (whether open or representative). The State legislature, in adopting the zoning enabling statute, Chapter 40A, meant for town’s to have the power to adopt their own zoning ordinances, and they intended that these would be available to the public, predictable and relatively inflexible. In fact, it takes a 2/3<sup>rd</sup> vote at of the legislative branch of the local government to change them.

All property owners should be able to discern what they and their neighbors can do with their respective properties by looking at the Zoning By-laws. Therefore, case-by-case exceptions to those by-laws, while also envisioned and permitted under Chapter 40A, should be judiciously and carefully granted. This should be done only where, as to a variance, **hardship** is demonstrated, and, as to a Section 6 Finding, the increase in or change to a pre-existing legally non-conforming use or structure is not “**substantially more detrimental to the neighborhood.**” However, these two standards are difficult to describe, and are very subjective.

The law firm of Senie & Associates, P.C. of Westborough set out to create a log of ZBA Actions on these two kinds of applications. The firm’s interns spent two summers collecting data on all Variance and Section 6 Finding cases in eight towns in Central Massachusetts over the summers of 2008 and 2009. The Towns included: Auburn, Hopkinton, Northborough, Shrewsbury, Southborough, Upton, Westborough and Worcester. The years covered by the study are: 2005, 2006, 2007 and 2008. The interns are Karen Bacellar, Kate Senie and Peter Wentzell.

The interns divided the cases into four main categories: (1) Variations as to Use, (2) Variations as to Structure (3) Section 6 Findings as to Use, and (4) Section 6 Findings as to Structure<sup>1</sup>. They devised measuring criteria, and for each case determined the degree of neighbor opposition (0 neighbors opposed = “none”, 1-3 neighbors opposed = “slight” and over 3 neighbors opposed = “heavy”). They also measured degree of variation with the requirements of the Zoning By-laws; all requests were divided into “low”, “medium” and “high” variation levels.

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<sup>1</sup> When applications seek a relaxation of the dimensional requirements of the zone, i.e. height, setbacks, etc., these are referred to with the word “Structure” as opposed to “Use”, since it is the structure that will exceed the prescribed limitations.

Before getting into the results, it is important to understand what is different between a Variance and a Section 6 Finding. There is a subtle but important distinction. A Variance is sought if the requirements of the Zoning By-laws (as to Use or Dimensions) are being violated for the first time by the proposed project. Where either the use or the lack of compliance with the applicable dimensional requirements already exists and is considered legal, an application to alter or increase that use or structure is the subject of a Section 6 Finding.

Sometimes an existing non-conformance of a use or structure is “legal”, or what is called a “legally non-conforming use or structure”. This can result from two conditions. If a prior variance had been granted, the non-conformance is legal. Or, if the condition existed prior to when the Zoning By-laws were first adopted, or amended in such a way as to “up the requirements,” uses and structures in place are “grandfathered”.

Sometimes an application will actually involve both. If someone had a non-conforming use, say a restaurant in a residential zone, which is legally non-conforming (“grandfathered”), and wishes to expand the size of the building in which the restaurant is operated, there are two possibilities. Either, the proposed expansion meets (falls within) the present day Zoning By-law dimensional requirements (height, setbacks, etc.) or it does not. If it meets the present requirements, then only a Section 6 Finding that the expansion is not “substantially more detrimental to the neighborhood” is needed. But if the expansion will, for the first time, result in a violation of one of the dimensional requirements, say front yard setback, a variance as to the new non-conformity will be needed.

In addition to hearing and making decisions on Variance and Section 6 Finding applications, ZBAs do a host of other things. Most often, ZBAs are the Special Permit Granting Authority (SPGA), where a special permit is needed for a particular use or structure. It is important to understand an essential difference between actions where a ZBA is allowing some new non-conformity, and where it is acting as the SPGA. Uses that require a special permit are permitted in the zone. Where such a special permit is granted, the ZBA is not allowing a waiver or relaxation of the Zoning By-laws.<sup>2</sup>

One thing that made this study particularly time consuming is that ZBAs often use the phrase Special Permit in taking an action on a Variance application or Section 6 Finding: i.e. “finding that the proposed expansion is not substantially more detrimental to the neighborhood, the board grants the special permit”. While the ZBA minutes or approval resolution may say that the board granted a special permit, they don’t mean a permit granted as the SPGA. The summer interns were careful to look at the substance of each application and determine its true nature.

ZBAs also hear zoning appeals, though this occurs less frequently. When a party is displeased by the action (or inaction) of a zoning administrator or zoning enforcement officer, they may, if they do so within 30 days of the action or inaction, take an appeal to the ZBA. This kind of appeal is not part of this study. In addition, ZBAs sometimes take actions on a special kind of permit called “Comprehensive Permit” under Chapter 40B; again, actions on this kind of matter were not treated in this study.

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<sup>2</sup> Zoning By-laws define some uses as permitted as of right, while others, often more intense uses, are permitted but only after the SPGA reviews the plans to insure that implementation of the project will meet all requirements.

### Summary of Data in All 8 Towns

A total of 1,095 variances were considered and acted upon by the eight ZBAs from 2005-2008. Of these 992 were approved, about 91%. During the same period, the eight ZBAs acted on 530 Section 6 Finding Applications, and of these 501 were approved, about 95%. The following two charts show the overall approval frequency.

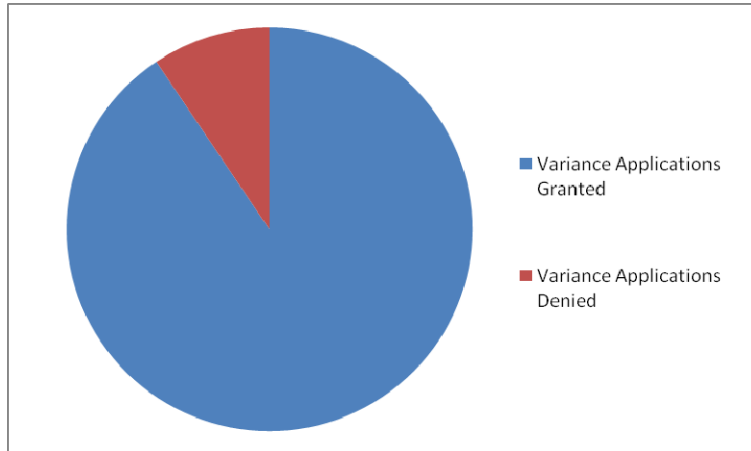


Figure 1. Percentage of Variance applications granted and denied by the ZBA.

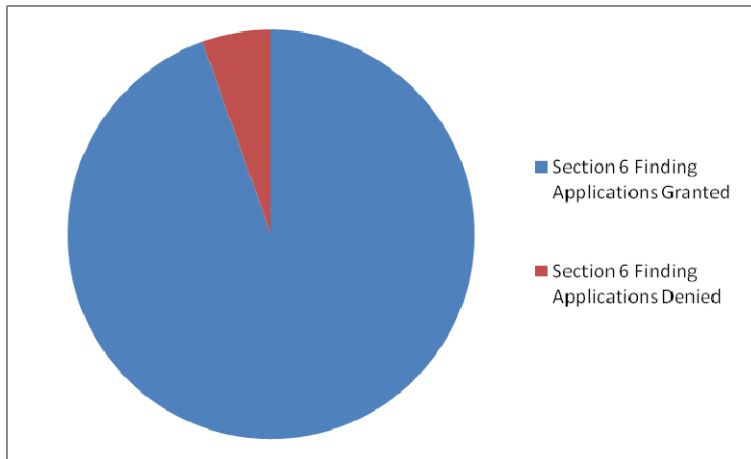


Figure 2. Percentage of Section 6 Finding Applications granted and denied by the ZBA.

Of all the 1625 Variance/Section 6 Finding applications acted upon 335 dealt with Use, only 21%. Of these, 316 were approved, about 94%. The interns then made the same analysis with regard to dimensional requirements, and found that 1,290 cases dealt with dimensional requirements, 79% of the total applications. Of those, 1,131 applications were granted, 88%. The following table breaks down all 1,625 acted upon applications, divided between Use and Dimensions:

	Use	Structure (Dimensional Requirements)	Total
Granted	316	1,131	1,447
Granted %	94%	88%	89%
Denied	19	159	178
Denied %	6%	12%	11%
Total	335	1,290	1,625
Total %	21%	79%	100%

Table 1. *The number and percentage of use and structure applications in regards to both Variances and Section 6 Findings.*

It was possible to assign a degree of variance value to 1063 applications based on documents in the file (of the total 1,625). The following table divides the applications into low, medium, and high percentage of change (variation from Zoning By-Law requirements). Not surprisingly, those with a high degree of variance achieved a lower approval percentage.

	Low	Medium	High	Total
Applications Acted Upon	530	456	77	1063
Granted	470	346	58	874
Granted %	89%	76%	75%	82.2%

Table 2. *The number and percentage of Variance/Section 6 Finding applications with low, medium, and high degree of variance, acted upon and granted by the ZBA.*

Degree of variance from the Zoning By-Laws was one of the variables measured in this study; the other was neighbor opposition. The interns broke neighbor opposition down into three categories: no neighbor opposition (0 persons opposed to the proposal), slight neighbor opposition (1-3 persons opposed), and heavy neighbor opposition (4 or more persons opposed). Out of all of the 1,625 Variance/Section 6 Finding applications in the eight towns, 190 were faced with neighbor opposition. Of the 190 cases, 141 were met with slight neighbor opposition, while the remaining 49 met with heavy neighbor opposition. Out of the cases that met with slight neighbor opposition, 96 were granted, only 68%. However, only 18 of the 49 cases that met with heavy neighbor opposition were granted, only 37%.

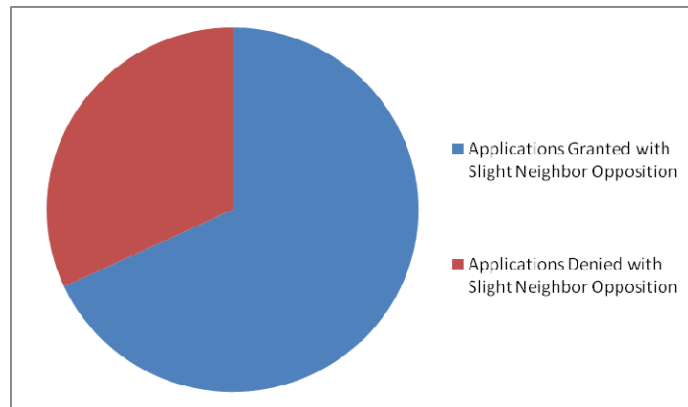


Figure 4. Percentage of applications with slight neighbor opposition granted, or denied by the ZBA.

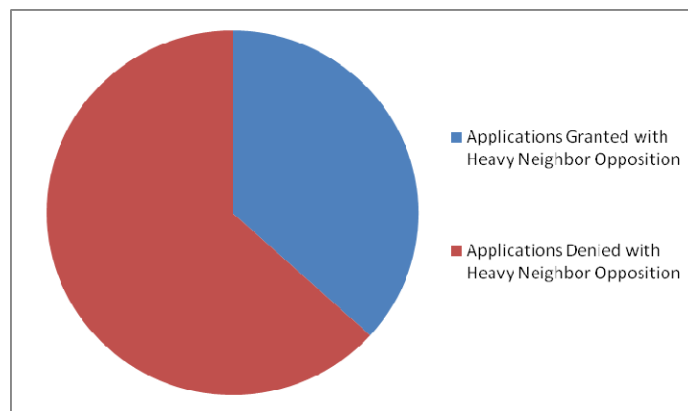


Figure 5. Percentage of applications with heavy neighbor opposition granted, or denied by the ZBA.

#### General Observations:

1. Obtaining a Section 6 Finding request (changing a non conformity) is slightly easier than obtaining a Variance - the authors had expected a greater difference.
2. Quite surprisingly, obtaining a Use Variance or Section 6 Finding was slightly easier than obtaining a Variance or Section 6 Finding as to Dimensional Requirements (94% vs. 88%).
3. Not surprisingly, asking for less of a variance (degree of change, or Variance from Zoning By-Law requirements) increases one's chances to almost 90%, more ambitious requests falling in the 75-76% chance of being granted.
4. Heavy neighbor opposition reduces the chance of obtaining a Variance or Section 6 Finding to under 40%.

Town by town and year by year data is available by request at no charge. On the next page is a form that ZBA Clerks can use if they would like to have their board's 2009 decisions included in next year's study (to be completed in the summer of 2010).

## REQUEST FORM

If you are interested in having Senie & Associates, P.C. include your town in next summer's Zoning Action Report, please fill out the form below for every application filed and acted on in 2009. Please mail the forms to the following address:

**Senie & Associates, P.C.**

5 East Main Street  
Suite 4  
Westborough, MA 01581

Please call 508-366-9845 if you have any questions.

***To be filled out for each Variance or Section 6 Finding Application.***

**Town:** \_\_\_\_\_

**Date Filed:** \_\_\_\_\_

**Date of Decision:** \_\_\_\_\_

**Category of Application:** (Please select one of the following.)

√ as appropriate (can be more than 1 for category of application)

\_\_\_ Variance of Use

\_\_\_ Variance of Dimensional Requirements

\_\_\_ Section 6 Finding as to Use

\_\_\_ Section 6 Finding as to Dimensional Requirements

**Decision:**

\_\_\_ Granted

\_\_\_ Denied *(please don't submit forms for withdrawn applications)*

**Degree of Variance from Requirements of Zoning By-Law:**

\_\_\_ Low

\_\_\_ Medium

\_\_\_ High

**Neighbor Opposition:**

\_\_\_ None (0)

\_\_\_ Slight (1-3 opposed)

\_\_\_ Heavy (4+ opposed)

Please provide on the back of this sheet a summary of relevant facts and describe the nature of the Variance/ Section 6 Finding sought (give dimensions if applicable). Where practical, please provide reasons given for the action taken, or attach the minutes or resolutions showing such reasons.

