



**Department of State**  
Local Government

# **SPECIAL USE PERMITS**

# Purpose

- Review process for uses permitted by zoning but subject to requirements and possible conditions to ensure:
  - Harmony with zoning
  - No adverse impacts to neighborhood
- Sometimes referred to as:
  - Special exceptions
  - Conditional uses

- General City Law § 27-b
- Town Law § 274-b
- Village Law § 7-725-b

# Purpose

- Allows for greater variety of land uses while recognizing that some uses may present challenges to compatibility within a zoning district
- Provides an added layer of review for uses that require special attention by the nature of their use
- Allows for mitigation of potential adverse impacts



*Light industry screened by landscaping to improve compatibility*

# **TYPES OF SPECIAL USES**

# Uses allowed by special use permit

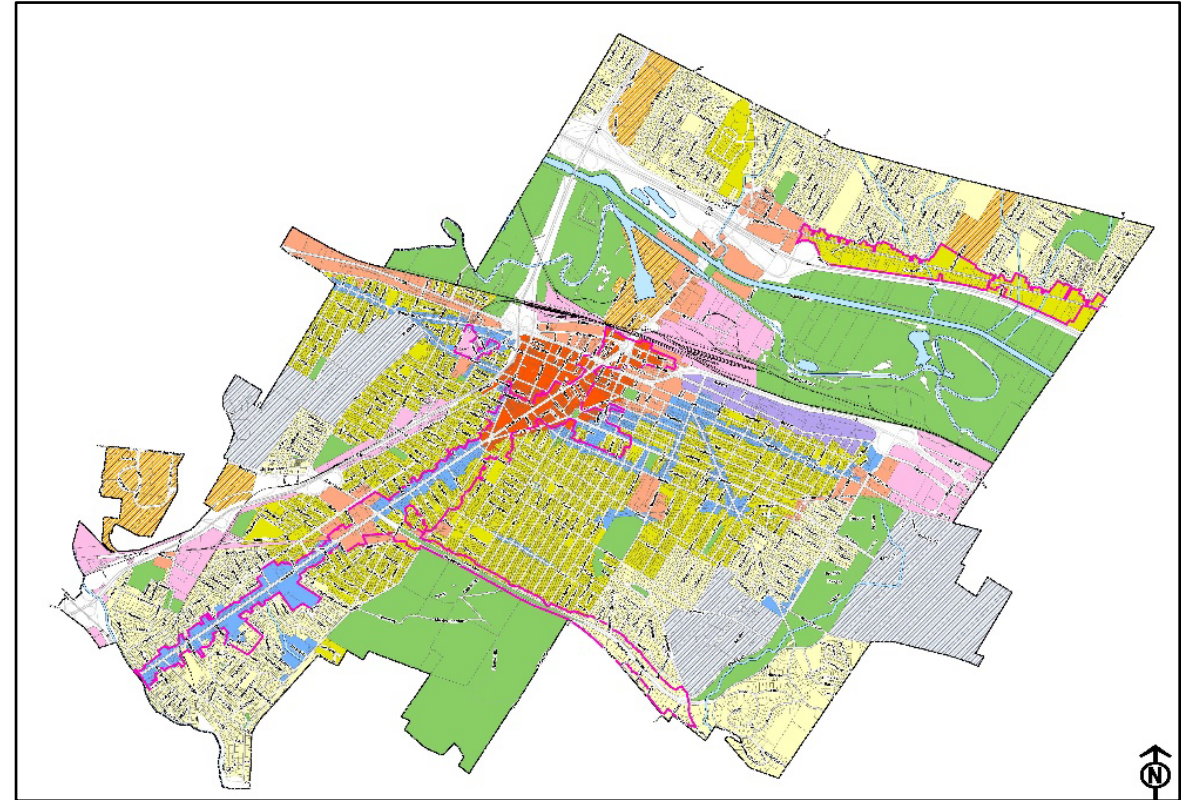
- Require SUP only when use impact(s) might need mitigation
- Clearly list and define uses in zoning
- Avoid phrase: “and other similar uses”



*For example, for outdoor dining or events in neighborhood-commercial*

# Special uses allowed by location

- By zoning district
- By overlay zone
  - In sensitive/unique areas, some or all uses may require additional review for compatibility
  - Ex: waterfronts, steep slopes, ridgelines, historic areas, gateways



# Example of special use in district

Gas station  
allowed by  
SUP in  
neighborhood  
commercial  
district



# Different from site plan review

- If use is generally deemed appropriate, Site Plan Review (SPR) for a project may be all that is necessary
- SPR regulates all aspects of site design and development plans for permitted uses – including mitigation of impacts created by proposed site development



*Site development impacts for drive-throughs on auto-oriented commercial zone may be mitigated through SPR as the use is generally compatible*

# Special use criteria vs. use regulations

**Ex: additional standards that can be evaluated in Site Plan Review**

## ***Drive-through windows:***

### ***(4) Traffic circulation.***

- (a) A traffic study addressing both on-site and off-site traffic and circulation impacts is required.***
- (b) Pedestrians should be able to enter the establishment from the parking lot or sidewalk without crossing the waiting or exit lanes, when practicable.***
- (c) Waiting lanes shall accommodate the following number of cars to be in a queue or stacked based on the use:***
  - [1] Fast-food restaurants and coffee shops: sufficient to accommodate a minimum queue of eight vehicles.***
  - [2] All other drive-through windows: sufficient to accommodate a minimum queue of four vehicles.***

# Special use criteria vs. use regulations

**Ex: criteria that is more interpretive/situational – Special Use Permit appropriate:**

## ***Drive-through Windows:***

*A. Due to potential impacts on traffic volume, vehicular and pedestrian circulation and the environment, the following additional standards are required for the permitting of drive-through windows.*

*(1) Site location criteria. The site of the drive-through window shall meet all of the following criteria:*

*(a) The use shall not substantially increase traffic on streets in R-SF and R-MF Zoning Districts....*

# SUPS are not use variances

## Use Variance

- Required for a use **not permitted** by zoning
- Statutory test must be met
- Zoning Board of Appeals (ZBA)

## Special Use Permit

- Required for use **permitted** by zoning **but** subject to additional review criteria / requirements
- Local standards
- Planning Board, ZBA or other review board

*North Shore Steak House Inc, v. Board of Appeals of the Village of Thomaston*

**REVIEW  
AUTHORITY**

# Review Board

- Governing board may retain authority to review SUP applications

**OR**

- Delegate authority to another board
  - Planning board
  - Zoning Board of Appeals as “original jurisdiction”
  - Other boards
- Once delegated, governing board is no longer involved with application

# Delegation of authority

Option to further delegate specific review to different boards, for example:

- Planning Board authorized to conduct all reviews except those in historic district
- Those applications are reviewed by historic architecture preservation commission or board



**PERMIT TYPES  
& OTHER  
CONSIDERATIONS**

# “Permanent” permit

- SUPs run with land unless otherwise stated in zoning, use doesn't change, and meets any conditions of permit
  - *Dexter v. Town Board of Town of Gates*
- If use changes or conditions cease to be met, permit may be revoked by enforcement officer



# Temporary permit

- Allows review board to re-appraise application (new facts and circumstances)
- Most appropriate for seasonal uses
- Requires authorization from governing board (*Scott v. ZBA of the Town of Salina*; *S.V. Space Development Corp. v. Town of Babylon ZBA*)

# Renewable permit

- If renewal application is subject to same review as a new application, SUP can't be denied (provided all requirements and conditions are met)



# Special use permit review criteria

- **Critically important!**
- Decisions to deny or condition approval must be based on criteria or standards provided in local zoning or they may be invalidated
  - *Shepard v. ZBA of the City of Johnstown*
- At a minimum, a general set of criteria for different potential impacts (conformance with the comprehensive plan, neighborhood compatibility, design compatibility, traffic, infrastructure, noise etc.) should be included in local zoning
- Additional use-specific standards may also be included

# Criteria for review

## General

Will usually be upheld:

- “...in the consideration of public health, safety & general welfare”
- “..shall be in harmony with the general purposes & intent of the zoning ordinance & the comprehensive plan”

## Specific

Best practice:

- “Design of new primary and accessory structures shall be consistent in scale, materials, and character with the existing vernacular architecture of the surrounding neighborhood or district”

# Waiver of requirements

- Review board may waive SUP submission/permit requirements with authorization in the local code
- Review board determines if requirement:
  - Is not needed in the interest of public health, safety or general welfare
  - Is not appropriate for that particular property
- **Must be authorized by governing board**

**Visit on the Web: NYS DOS Comments – “Court of Appeals’ Decision Addresses Special Use Permits, Variances and Waivers”**

# Waiver of requirements - example

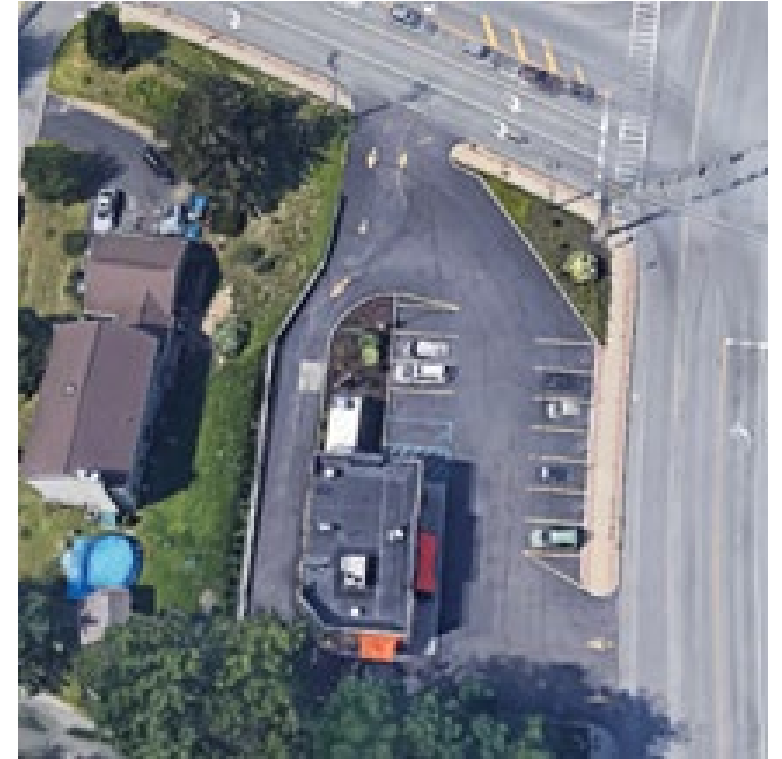
When existing or natural buffer is present, consider waiving required buffer or screening



# **REVIEW PROCEDURES**

# Coordination with Site Plan Review

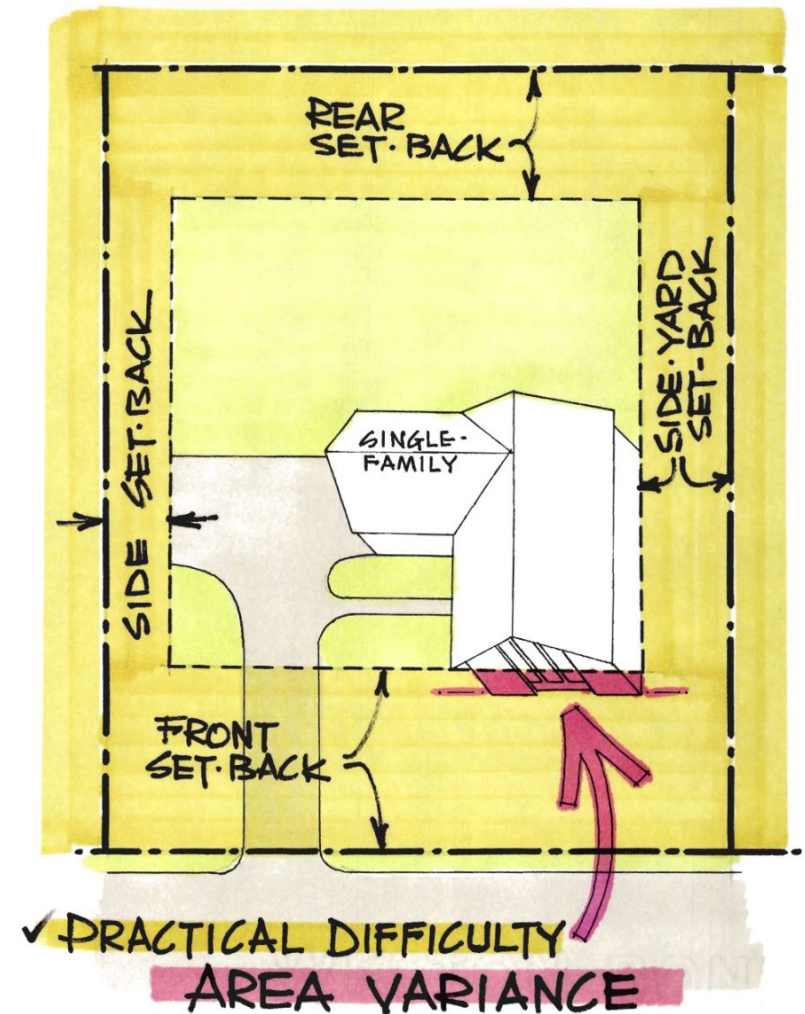
- SUP applications commonly require SPR
- SPR review should be conducted simultaneously
- If different review boards, coordination may be important for mitigating impacts through site development considerations
- If Planning Board reviewing both; both approved at once
- Streamlines review process for all



*Example: Drive-through window requiring an SUP; traffic circulation impacts potentially mitigated through site development configuration*

# When an area variance is also required

- SUP may not be approved without compliance with Zoning
- If an area variance is needed – a “*direct appeal*” can be made to the ZBA during SUP process
- Area variance must be approved prior to SUP approval



# SEQRA Compliance

- Must complete SEQR before making final local decision
- Require Environmental Assessment Form (EAF) with application submission
- Establish lead agency if coordinated review
- Make determination of significance
  - Positive or negative declaration issued

6 NYCRR  
Part 617.3

**SEQR homepage:** <https://www.dec.ny.gov/permits/357.html>

**SEQR EAF Mapper:** <https://gisservices.dec.ny.gov/eafmapper/>

# Public hearing

- Hold within 62 days of a complete application
- If DEIS hearing, hold in conjunction with SUP hearing
- Open Meetings Law
- Publish legal notice in newspaper of general circulation at least 5 days prior
  - Extend to at least 14 days when DEIS hearing
- Mail notice 10 days prior to:
  - Applicant
  - County planning (GML 239-m) if applicable
  - Adjacent municipality (GML 239-nn) if applicable
  - Other property owners if local zoning requires

## Adjacent Municipalities GML § 239-nn

- Notice when 500 feet from a municipal boundary
- Notice by mail or email to clerk of adjacent municipality

# County referrals GML § 239-m

Must be referred to County Planning Agency if within 500 feet of the boundary of:

- Municipality
- State or county park or recreation area
- R-O-W of state or county road
- R-O-W of county-owned stream or drainage channel
- State or county land on which a public building is located
- Farm operation in a state agricultural district
  - Except for area variances

# **BASIS FOR DECISION MAKING**

# Granting permits

- Must be approved if local requirements/criteria are met
- Mitigate environmental impacts before approval
- Zoning deals with land use; not applicant, landowner, or occupant
  - Must make SEQRA findings prior to making decision
- SUP approval is granted to, and stays with, the property

# Conditions

- Review board has express statutory authority to impose conditions
- Must directly relate to impact of development on land itself
- Should not relate to internal operations of business or activity

## Regulate hours of operation only if:

- Authorized by the governing board;  
and
- Substantial evidence of impacts that relate to physical use of the land (*Old Country Burgers v. Town of Oyster Bay*)



# Denying a permit

- Base denial on reasonable grounds:
  - Site not appropriate for use
  - Adjacent property depreciation
  - Traffic impact beyond permitted use (*YMCA v. Burns*)
- Support with evidence
  - For example: traffic study



# Wrong reasons for denial

- Community Opposition Only
  - *Pleasant Valley Home v. Van Wagner*
- General objections to use as undesirable
  - *Holbrook Assoc. Development Co. v. McGowan*
    - Tavern permit denied citing reasons of late hours, noise, traffic, etc.
- Unrelated or previous violation
  - Application is attached to use, not applicant (i.e., applicant has violation on different property)



# Decision

- Must render decision within 62 days after close of public hearing
- Decision document shall include “findings”
- File with municipal clerk within 5 business days

# Findings

- Demonstrate reason for approval or denial (applicant did or didn't meet required standards)
- Disclose all evidence relied on in reaching decision
- Include analysis of evidence
- Relate facts to legal standards
- File with decision document

**See NYS DOS Legal Memorandum LG02: Role of Findings in Local Government Decisions**

When reviewing administrative body's decision, courts will limit review to "ascertaining whether the determination has a rational basis and is supported by substantial evidence."  
*(Hanson v. Valenty)*

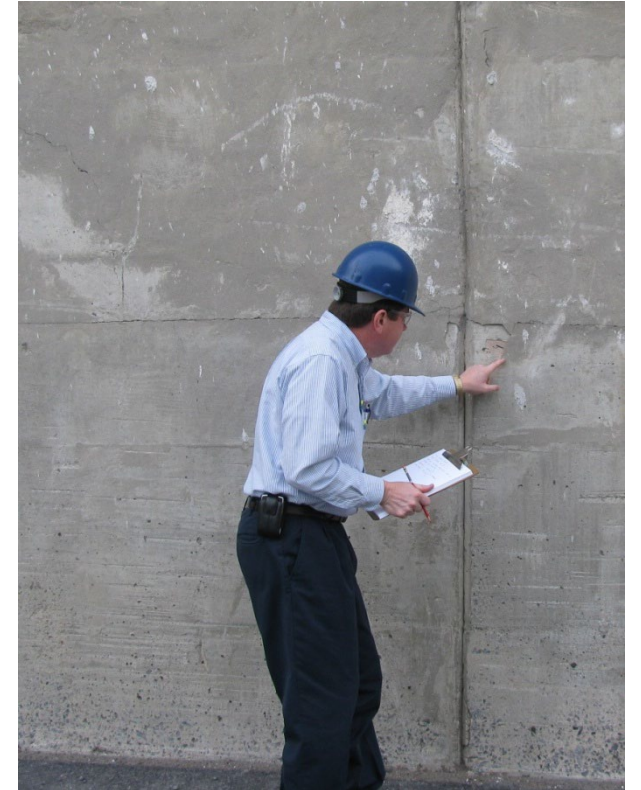
# Appeals

- 30-day statute of limitations for appeal
  - Clock starts on date decision “filed” with municipal clerk
- Decisions are not appealed to governing board
- Aggrieved parties may file appeals under Article 78 Civil Practice Law and Rules
  - NYS Supreme Court
  - Appellate Division
  - Court of Appeals

**ENFORCEMENT**

# Enforcement

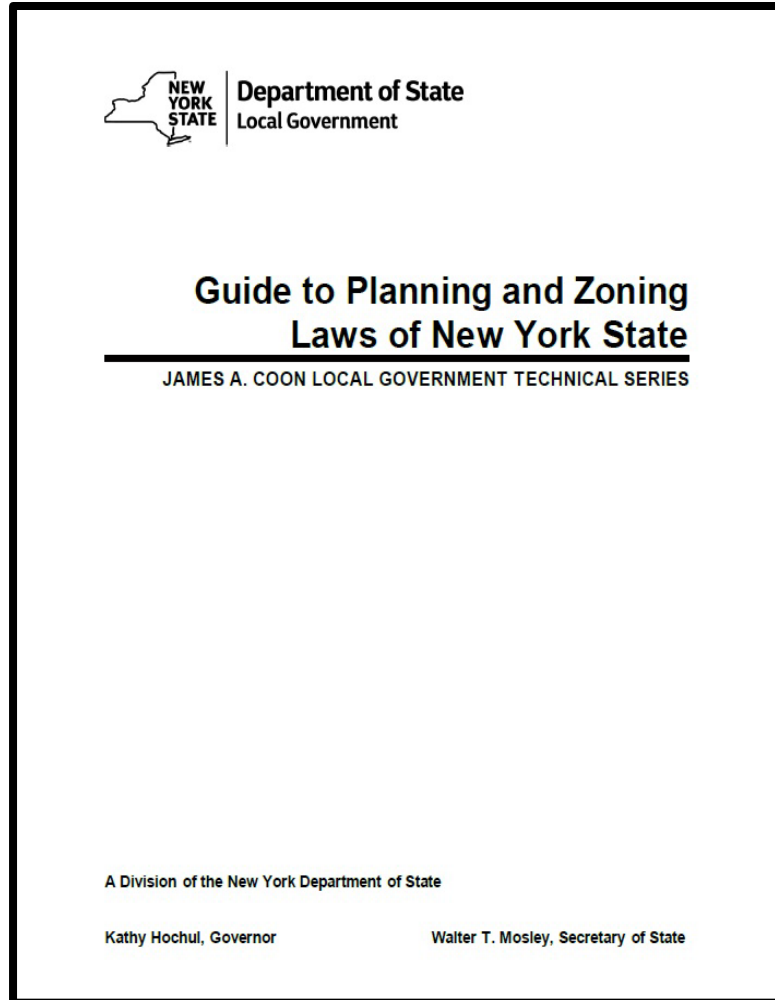
- Zoning or code enforcement officer authorized to enforce zoning/SUP conditions
- Could be stated in
  - Zoning law
  - CEO/ZEO duties
- Require conditions be met before issuing building permit or certificate of occupancy



# Revoking special use permit

- Non-compliance
- Substantial evidence
- Failed to comply with imposed conditions
  - *Persico v. Incorporated Village of Mineola*
- Permit holder entitled to hearing before revocation

# Resources on New York State Laws



<https://dos.ny.gov/publications>

- Legal Memorandum LG02: Role of Findings in LG Decisions: NYS DOS
- Legal Memorandum LU15: Regulating Hours of Operation
- NYS DOS Comments – “Court of Appeals’ Decision Addresses Special Use Permits, Variances and Waivers”



**Department of State**  
Local Government

## **Division of Local Government Services**

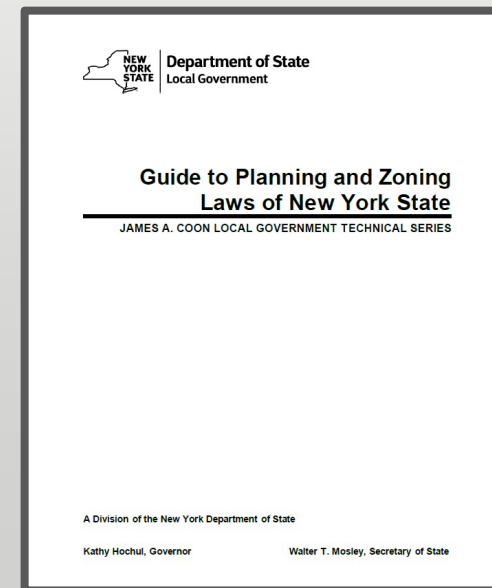
**(518) 473-3355**

**[localgov@dos.ny.gov](mailto:localgov@dos.ny.gov)**

**<https://dos.ny.gov/training-assistance>**

## **Publications:**

**<https://dos.ny.gov/publications>**





**Department of State**  
**Local Government**