When the answer is “No.”

How to defensibly disapprove site plans, subdivisions and other land use applications.



NELSON POPE VOORHIS
environmental • land use • planning

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Session Overview



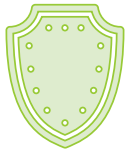
Understanding the authority of boards to deny land use applications



Understanding common discretionary approvals



Common arguments by appellants to disapprovals



Best practices for making defensible decisions



Understanding how disapprovals relate to SEQR and GML 239-m and n review.

Introductions

Max Stach, AICP

- Partner at Nelson, Pope & Voorhis, an environmental and planning services firm with offices in Kingston, Suffern and Melville, NY.
- Over 25 years of experience in comprehensive planning, zoning preparation, site plan, subdivision and SEQRA.
- Advises both private clients and Planning Boards throughout the Hudson Valley on site plan, special permit subdivision review and State Environmental Quality Review.
- Project manager for Comprehensive Plans, including the award-winning Village of Haverstraw Plan, special planning studies and zoning, addressing housing needs, agricultural preservation, sustainability and environmental protection, economic development and redevelopment.
- Broad experience with SEQR and preparing and reviewing Environmental Impact Statements for Comprehensive Plans, Zoning and development projects, ranging from religious communities, resort/casino developments, traditional neighborhood development, mixed-use waterfront developments, and large industrial buildings and sites.

Introductions

Adriana Beltrani, AICP

Unavailable due to “scheduling conflict…”



Introductions

Bonnie Franson, AICP CEP

- Partner at Nelson, Pope & Voorhis, an environmental and planning services firm with offices in Kingston, Suffern and Melville, NY.
- Professional and licensed planner with over 30 years of experience in comprehensive planning, zoning preparation, site plan, subdivision and SEQRA review.
- Graduated from Bucknell University cum laude, with a Bachelor's degree in biology, and from Rutgers University with a Masters degree in city and regional planning. Completed a graduate certificate in geographic information systems from Penn State.
- Presently municipal planner to several Towns and Villages throughout the Hudson Valley and regularly advises clients on land use, zoning, environmental, and SEQRA matters.
- Member of the American Institute of Certified Planners, holds an advanced certification in Environmental Planning (AICP CEP); Holds a Certificate from the National Charrette Institute.
- Planning Board Chairwoman for the Town of Monroe (7 years).

Understanding the authority of boards to deny land use applications

Article X of the Bill of Rights	"Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
Police Power	"Public safety, public health, morality, peace and quiet, law and order -- these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." Berman v. Parker 348 U.S. 26 (1954)
MHR; TWN; VIL; GCT; GMU;	Authorize municipalities to enact laws, with certain limitations; enable local legislatures to enact plans, zoning laws, subdivision regulations, zoning maps, appoint PBs, approve plans, and establish the limited authority of the County Planning Commission. Requires the creation of ZBAs and establish procedures where a community adopts zoning.
Local Code	Local zoning regulations and subdivision regulations authorize planning boards to make certain land use decisions. Planning Board ONLY has authority delegated to it by the local legislature.

Understanding the authority of boards to deny land use applications

Special considerations

Religious Uses and Schools

- Inherently beneficial
- Cannot be excluded
- Burden of proof on municipality
- Lightest touch req'd

Other Government

- Schools and higher levels of gov't are exempt
- Other munis = Monroe test

Limited Private Uses with Public Purposes

- Mines
- Airports
- Certain group housing
- Cannabis
- Private Telecom on public land

Agriculture

- Limited immunity for legitimate farm operations, but on a case-by-case basis

Understanding common discretionary approvals

Discretionary vs Non-Discretionary

Discretionary – involves judgment

- Whether something is substantial
- Whether something is consistent with existing neighborhood character
- Whether a landscape plan is necessary
- Whether times of parking demand will vary based on technical analysis

Non-discretionary – no judgment

- Whether front setback is met
- Whether something is a spire or belfry
- If lighting is “full cutoff”
- If a tree is >6” DBH
- If a water availability letter has been received

Understanding common discretionary approvals

Zoning Board – limited discretion, well-practiced

Use Variances

- No reasonable return
- Hardship is unique
- Will not alter character
- Not self-created.

Area Variances

- No undesirable change or detriment
- Not achieved by other method
- Not substantial
- No adverse physical or environmental effects
- Not self-created, but not fatal

Understanding common discretionary approvals

Planning Board – wide discretion, considerations vary widely

Subdivision

Example of a local standard:

The Planning Board shall study the practicability of the preliminary plat, taking into consideration the requirements of the community and the best use of the land being subdivided. Particular attention shall be given to the arrangement, location and width of streets, their relation to the topography of the land, water supply, sewage disposal, drainage, lot sizes and arrangement, …

Site Plan

Example of a local standard:

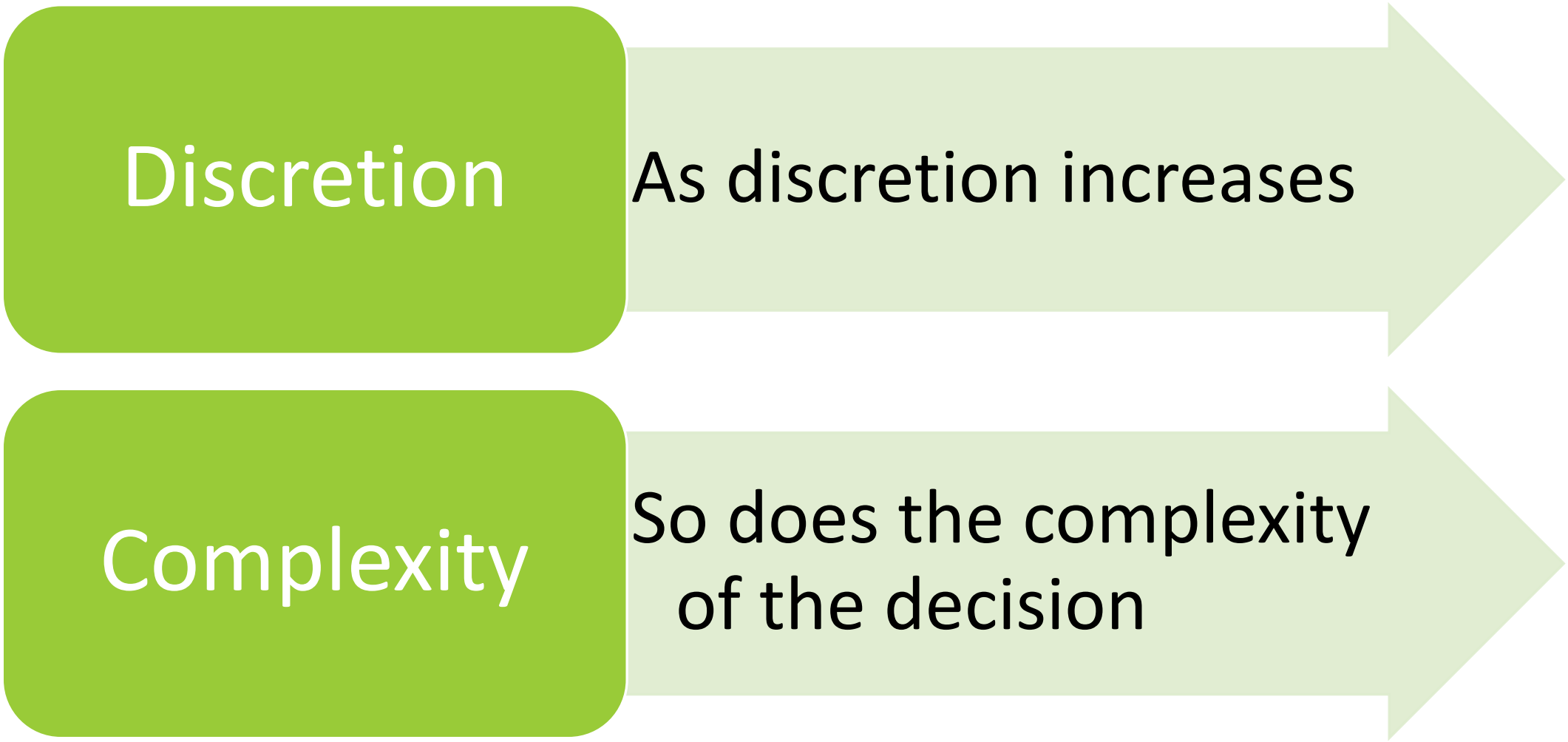
The site shall be planned to create a desirable relationship to the streetscape, and to provide for adequate landscape plantings, safe pedestrian movement, and adequate parking areas.

Special Use Permit

Example of a local standard:

The character and appearance of the proposed use, buildings, structures, outdoor signs and lighting shall be in general harmony with the character and appearance of the surrounding neighborhood and that of the Town, and shall not adversely affect the general welfare of the inhabitants of the Town…

Understanding common discretionary approvals



Common arguments by appellants to disapprovals



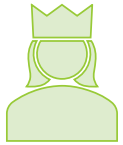
Arbitrary and capricious



Prejudicial



Failure to act



Exceeded Jurisdiction



Improper Procedure

Best practices for defensible decisions



Arbitrary and capricious

- Provide a well-reasoned elaboration for the Board's decision in a drafted resolution.
- Treat similar applications similarly but explicitly address differences for those applications that do deserve different treatment.
- Deliberate on the record. Tape meetings. Employ court reporter for difficult/controversial/large applications.
- Express concerns and problems with applications early and often. Feel free to debate other board members.
- Do not adopt a SEQR Negative Declaration prior to disapproving.

Best practices for defensible decisions



Prejudicial

- Disclose both conflicts/appearance of conflicts regardless of recusal.
- Consider public comment, but do not compromise judgment.
- Understand pre-judgment vs expression of concerns
  - "I can't approve this. You've heard the public. Nobody wants this."

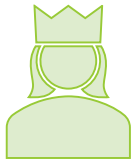
  Vs.
  - "While it is early, you should know I have serious concerns about traffic and odor impacts to the adjoining neighborhood. Both would impede neighbors from enjoying their homes."

Best practices for defensible decisions



- Know and follow statutory timeframes.
- Log submission dates, appearance dates, consultant memo responses, etc.
- Where timeframes are prescribed in local code but not required by state enabling legislation, recommend amendment to your local legislative board.
- Where timeframes reasonably need to be exceeded, request consent of applicant
  - No consent for extension + not ready to approve = disapproval!
- Do not weaponize SEQR! SEQR is never required to disapprove a project (check with your local attorney).
- If the applicant is not providing the information necessary to reach a decision, request that information from your own consultants so you may act in a reasonable timeframe.

Best practices for defensible decisions



Exceeded Jurisdiction

- Stay within the lines. Reference and directly quote your code requirements. Avoid paraphrasing, particularly in decisions.
- Rely more heavily on those requirements that are less subjective when possible but list all facts/reasons leading to the disapproval.
- Understand that the “zoning enforcement official” is the only official charged with a plain-reading interpretation of the code. The ZBA is the appropriate authority to appeal the interpretation of the ZEO. A Planning Board should not reject the interpretation of ZEO absent an appeal – check timeframes for appeal!
- Understand that any ambiguity in the code should be interpreted as least restrictive to the applicant’s property rights. For competing provisions, some codes clarify that the more restrictive shall apply, but absent that, a ZEO must interpret as least restrictive prevails.

Best practices for defensible decisions



Improper Procedure

- Know the appropriate sequencing of "complete applications," opening and CLOSING public hearings, GML referrals, time frames for decision, etc.
  - SEQR Neg Dec or complete DEIS BEFORE closing public hearing as a general rule, but particularly for subdivisions.
  - No decisions can be made contingent upon GML responses.
  - Substantive changes require resubmission to County for GML review.
  - File decisions with the Town Clerk and Applicant.
- Train administrative staff on notice mailings/publications, website posting, etc. but monitor and track them for each application.

Best practices for defensible decisions



Improper Procedure

- Timing of resolutions -
  - Where consensus of the board is clear, the Board can authorize its professionals to prepare a draft resolution, working with the Chairperson as necessary.
    - Board should summarize key factors/reasons when requesting a resolution.
    - Account for default approval timing when requesting resolutions, especially disapprovals.
  - Where there is diverging opinions, an approval and disapproval resolution could be prepared, with the professional working with a board member representing each outcome, with the final vote reserved. Be aware that for actions subject to SEQR, a Negative Declaration usually signals approval so the vote to approve or disapprove may actually be the vote to adopt a Negative Declaration. Where the Neg Dec fails, a decision must be made to disapprove the application or proceed to a Pos Dec (where the Board is not inclined to disapprove but has identified an impact).

Best practices for defensible decisions



Improper Procedure

- Implications of County GML 239-m or –n disapprovals or approvals with conditions.
  - Don’t rely on the County to make your decision.
  - A simple majority vote to approve an application that was the subject of a County disapproval upholds the County disapproval. The county disapproval may be subject to challenge by the applicant. Court action overriding the disapproval may present the local board with difficulty then disapproving the application, where the application does not change.
- Understand Open Meetings Law
  - Executive session vs. seeking attorney-client privilege.
  - Making materials available on the Town’s website and to the applicant in advance of meetings.

Questions??

