

TOWN LAW SECTION 280-A: REQUIREMENTS AND REMEDIES

Section 280-a is an important—yet frequently misunderstood—section within Article 16 [Zoning and Planning] of the Town Law of the State of New York. The section attempts to tie together, insofar as roadways are concerned, the jurisdiction of the building inspector (no building permits may be issued unless the requirements of the section are satisfied), the town board (possessed of the authority to establish town road and private road specifications) and the planning board (charged⁸ with ensuring that roads within subdivisions are adequate to accommodate prospective traffic).

Unfortunately, Section 280-a is a cumbersome and difficult section of law. Its restrictive terms address only the issuance of building permits, yet the section has great importance in the context of subdivision and site plan review as well. Section 280-a announces that its requirements must be met before a building permit may be issued. However, it also provides two potential forms of relief—a 280-a *variance* [subdivision “3”] and creation of an *open development area* [subdivision “4”]—when those requirements are not, or cannot be, met. The variance relief provision pulls in the zoning board of appeals and the open development area provision pulls in both the planning board and town board.

Some planning boards routinely send every applicant proposing a private road in his subdivision to the zoning board of appeals in order to obtain a “280-a variance” due to the private road nature of the application. Is this what Section 280-a requires? If not, when is such a variance required? To answer this question—indeed, to understand Section 280-a at all—it makes sense to begin with the spectrum-like concepts of public roads, private roads, easements and rights-of-way.

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PUBLIC V. PRIVATE ROADWAY

There is no requirement in the Town Law of the State of New York that roadways in subdivisions be town highways. The phrase, *town highway* means a roadway offered for dedication to the town and, after acceptance, controlled and maintained by the town as a town road. Section 277 (2)(a) of the Town Law does, however, direct that a planning board must ensure that “the streets and highways [in a subdivision] be of sufficient width and suitable grade and [that such roadways shall be suitably located to accommodate the prospective traffic, to afford adequate light and air, to facilitate fire protection, and to provide access of fire fighting equipment to buildings.”

Most local zoning codes echo the approach taken by Section 277, providing that roads *may* be offered for dedication as town roads but not requiring such dedication. A zoning law *requiring* dedication of roadways is not authorized by Section 277 and likely accomplishes a taking of property under the Fifth Amendment to the United States Constitution.⁹ Consistent with this approach, many towns promulgate a hierarchy of road specifications, often providing a less onerous specification for (presumptively less used) private roads. As an example, the zoning chapter in the Town of Monroe (Orange County) code provides, “[i]n the event that any roads are not offered for dedication or are not accepted by the town, [that] suitable legal agreements satisfactory to the Town Board shall be required....” and further provides two tiers for right-of-way widths: 30 feet “for any street not dedicated to the Town of Monroe,” and 50 feet for “[a]ny street dedicated to the Town of Monroe.”

What then is a private road? The term is not defined (or even mentioned) in Section 280-a. A private road is, however, generally understood to be a roadway shown as a road or street on a filed map providing access to lots within a subdivision, which road or street will not be owned or controlled by a municipality. Typically, the owners of properties abutting a private road own to

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the centerline of that road. A defined strip of that privately owned land at a width sufficient to provide a travelled-way then straddles that line. Within this strip, the roadway itself is constructed. Each owner of property fronting the private road has the right to use the road to access his property. As more fully explained below, utilization of a private road as just described does not itself require relief under Section 280-a of the Town Law of the State of New York; either under the variance provisions of subdivision "3" or under the open development area provisions of subdivision "4."

EASEMENTS AND RIGHTS-OF-WAY

Easements, in the most generic sense, are rights granted to someone to use land that they do not own. A common easement is an access easement, often called a right-of-way.¹⁰ The important concept here is that one having rights under an easement is permitted to use someone else's land for his own purpose. This is, of course, also true of a private road. However, there is an important distinction between a private road and a generic access easement of which a private road is a subclass. While the easement rights are generally recorded in either case, private easements are not shown as streets or roads on subdivision maps filed with the county clerk. Private roads are. Thus, a right-of-way is quite different from a private road, one of the essential characteristics of which is depiction as a roadway on a filed map.

TOWN LAW 280-A ACCESS

Enough background. Now to the issues. What is a 280-a variance? What is an open development area? When is a 280-a variance required? When can one be granted? When is 280-a variance relief unavailable? Under what circumstances must an open development area be created before a lot may receive a building permit?

Status of Roadway

Town Law §280-a is, as noted already, a cumbersome and difficult section of law. The section prohibits issuance of a permit for the erection of a building on any lot in a town unless two requirements are met. First, the street or highway giving access to such proposed building must possess a certain formal status. This first requirement can be satisfied in one of two ways (with the second way having several variations). The first method is direct and simple. If the roadway giving access to the proposed building is a street duly placed on the official map or plan of the town, the requirement of formal status is fully satisfied [§280-a (1)]. If, however, the town has no official plan or map, then the requirement of formal status can only be satisfied under the second method.

Under this method, acceptable roadway status will exist only if:

- such street or highway is an existing state, county or town highway [§280-a (1)(a)], or if
- such street is one shown upon a plat approved by the planning board as provided in sections two hundred seventy-six and two hundred seventy-seven of [the Town Law], as in effect at the time such plat was approved [§280-a (1)(b)], or if
- such street is one shown on a plat duly filed and recorded in the office of the county clerk or register prior to the appointment of such planning board and the grant to such board of the power to approve plats [§280-a (1)(c)].

Note that we look to the bullets above only if the town has no official map. For modern subdivision approvals, this *only-if* rule matters little, for Town Law Section 279 [Subdivision review; record of plats] says, in subparagraph “3” [Effect of filing], that “[a]fter such plat is approved and filed, the streets, highways and parks shown on such plat shall be and become a part of the official map or plan of the town.” While some read “such plat” more broadly as including ancient plats (ones that predate planning boards), such a reading is of doubtful validity. Thus, in a town that has an official plan and map, a roadway shown on an ancient plat but not on that official map, does not satisfy the

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formality requirement of Section 280-a. This may mandate creation of an open development under 280-a (4) before a building permit may be issued for a structure on such roadway.

Suitably Improved

Section 280-a ties issuance of a building permit to satisfaction of a second requirement as well. Subdivision “2” directs that, before a building permit may be issued, the road providing access shall be *suitably* improved. This requirement is satisfied in one of two ways: either by improving the road to a specification set by the town board [§280-a (2)] or, at the permit-seeker’s election, by appealing to the zoning board of appeals [§280-a (3)] for an area variance allowing access from a roadway not satisfying the town road specification. The extent of roadway improvement required is the level of improvement sufficient—in the judgment of the zoning board of appeals—“to allow the ingress and egress of fire trucks, ambulances, police cars and other emergency vehicles.” [§280-a (5)]. An application for such relief to the zoning board of appeals constitutes an application for an area variance. While it is difficult to fit the review of an application for a §280-a (3) variance into the five-factor area variance analysis of Town Law Section 267-b (3), it is clear that a §280-a (3) variance is an area variance subject to that section¹¹ and, presumably, to the mandate that the zoning board articulates an appropriate five-factor balancing analysis supporting its decision.

Requirements Applied Together

What does all that mean? As noted, before a building permit may be issued, two requirements must be satisfied: (1) it must be demonstrated that the road providing access to the lot upon which construction is proposed is possessed of a certain formal status, and (2) the roadway must be *suitably* improved.¹² Both requirements must be satisfied before a building permit may be issued. It

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is irrelevant whether the street providing access has been dedicated or whether any such offer has been accepted by the town.¹³ Nor is it necessary that the applicant own¹⁴ the roadbed in question. Indeed, this will rarely be the case, for the intent of Section 280-a is to grant the town the authority to command improvements on property not owned¹⁵ by the applicant.

This is not to say that demonstration of a right of access across the roadbed is not an issue. Clearly it is. However, where a property owner takes title to property by reference to a lot shown on a filed map and that that lot abuts a street shown on that map, the law gives to that lot owner (indeed, to each such lot owner) the right to utilize that street for the purpose of ingress and egress to his property.¹⁶

Thus, if the roadway proving access satisfies the formal status requirement and is also improved to the appropriate road specification (i.e., the town road specification for a town road and the private road specification for a private road), then both requirements of Section 280-a are satisfied and a building permit may be issued. If the roadway, although satisfying the status requirement, does not meet the appropriate road specification requirement, a 280-a variance will then be required. As noted, the suitability of improvement determination to be made by the zoning board is governed by a test of adequacy of emergency vehicle access as defined in §280-a (5).

Roadway Providing Actual Access: Frontage Not Sufficient

It is important to note that the "roadway providing access" in both requirements outlined above must be the roadway that will actually provide access; Section 280-a focuses on the status and adequacy of the access proposed to actually be used, not merely on the roadway onto which the property fronts. Therefore, a property that has frontage on a fully improved, well-maintained town road must still satisfy the requirements of Section 280-a (or obtain a variance modifying the suitability of improvement requirement) if the access the

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owner of that property intends to use is through another roadway of qualifying status but unsuitable condition.¹⁷

Failure to Satisfy the Formal Roadway Status Requirement

As noted already, a zoning board of appeals may give relief from the second requirement (by fixing the suitable level of improvement of the roadway). Does the zoning board also have the authority to vary the first requirement of qualifying roadway status? Section 280-a (3)(a) suggests, although the language is not at all clear, that it *might* have that authority. Section 280-a (3) reads, in pertinent part, as follows:

3. The applicant for such a permit may appeal from the decision of the administrative officer having charge of the issue of permits to the board of appeals or other similar board... having the power to make variances or exceptions in zoning regulations for: (a) an exception if the circumstances of the case do not require the structure to be related to existing or proposed streets or highways, and/or (b) an area variance pursuant to section two hundred sixty-seven-b of this chapter, and the same provisions are hereby applied to such appeals and to such board as are provided in cases of appeals on zoning regulations. The board may in passing on such appeal make any reasonable exception and issue the permit subject to conditions that will protect any future street or highway layout...

Does the grant of authority to the zoning board to “make... an *exception* if the circumstances of the case do not require the structure to be *related to* existing proposed streets or highways” [280-a (3), emphasis added] give the zoning board the authority to relieve an applicant from the requirement that the roadway providing access to a proposed structure be possessed of the required formality? Or is this phrase intended instead to provide additional criteria by which a zoning board should decide whether the level of improvement of a proposed access is *suitable under the circumstances*? There is little law on this

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issue but, based upon what law there is, it appears that the courts view this language as providing criteria for suitable access determinations, and not as a separate grant of authority to forgive the roadway status requirement.¹⁸ It is thus the rule that when the roadway in question does not satisfy the status requirement of Section 280-a, no building permit may be issued for any structure on that property. Is any relief available to the property owner in such circumstances?

OPEN DEVELOPMENT AREAS

The creation of an open development area¹⁹ under Section 280-a (4) allows issuance of building permits for homes on lots that obtain their access by an easement or right-of-way not shown on a filed map rather than by means of a road of the status required by Section 280-a (1). Absent creation of an open development area, the owner of a lot obtaining access by means of a non-qualifying access-way could not (as noted already) obtain a building permit because the first requirement of Section 280-a is not satisfied. It is important to understand this essential difference between 280-a (3) relief [issuance of a variance on condition that a roadway be suitably improved] and 280-a (4) relief [open development area authorization]. The focus is not on whether the access-way is public versus private.²⁰ Instead, the focus is on whether the proposed access-way is a roadway of the requisite status versus an easement or right-of-way that fails to satisfy that roadway status requirement.

What then are the procedural requirements for creation of an open development area? Town Law Section 280-a (4) [which allows the creation of open development areas] requires that the town board seek the *advice* of the planning board before establishing an open development area. The section sets no time period for the planning board to give such advice other than “a reasonable time to report.” Here is the full subparagraph:

4. The town board may, by resolution, establish an open

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development area or areas within the town, wherein permits may be issued for the erection of structures to which access is given by right of way or easement, upon such conditions and subject to such limitations as may be prescribed by general or special rule of the planning board, if one exists, or of the town board if a planning board does not exist. If a planning board exists in such town, the town board, before establishing any such open development area or areas, shall refer the matter to such planning board for its advice and shall allow such planning board a reasonable time to report.

What should be the content of the planning board's advisory report? The statute provides no particulars. However, because the purpose of Section 280-a is to insure that provision is made for suitable access to land before a building permit is issued, suitability of access will often be the primary focus of the planning board's report. How many lots will be served? Is the easement access proposed of sufficient width and suitable grade? Can it accommodate the traffic anticipated to use it? Can emergency services personnel obtain access to the building or buildings to be constructed? How many lots can the roadway serve? The planning board may also look to the town's comprehensive development plan to see if it offers any guidance.

The planning board is additionally given the authority, under authority of Section 280-a (4), to promulgate "general or special rule[s]" setting "conditions" and "limitations" on the creation and design of open development areas within the town. These rules may presumably, be promulgated in advance in the generic sense ("general" rules) or upon the specific application referred to the planning board ("special" rules) for that particular open development area.

The planning board is bound by Town Law Section 280-a (4) to provide the town board with its advice upon referral; deliver of its "advice" is not optional. Because some of the issues the planning board will likely face will touch upon an examination of the land in question and the nature of the easement itself, the planning board may wish to have the assistance of an engineer or planner in

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