Basics of Variances

by Robert Widner, Esq.

Zoning regulations reflect the judgment of the local governing body – typically based on recommendations from the planning commission – on what land use regulations are needed to implement the policies set out in the local comprehensive plan. At their core, zoning regulations are designed to promote the statutory goals of protecting and promoting the "health, safety, and welfare" of the community. Given this, why do zoning codes include a mechanism for the issuance of variances, authorizing the use of a piece of property in a manner that would otherwise be prohibited by the zoning regulations?

The answer is that variances are essential for legal reasons and for reasons of fairness. Most zoning regulations, by both necessity and practice, employ general language and are uniform in application to an often-diverse collection of properties. A zoning regulation, when strictly applied to a particular property, may have the effect of denying a property owner all reasonable use of his or her property. Without the mechanism of variances, property owners would have no method of seeking relief other than going to the courts.

Variances are divided into two general types: area variances (sometimes called dimensional variances) and use variances. The most common variance is the area variance. Area variances authorize a deviation from the zoning regulations that govern physical location and improvement of a property, for example, setback, building height, lot width, or lot area.

In contrast, a use variance authorizes a use of property that would otherwise be prohibited within the property's zone district. The effect of granting a use variance is often similar to a change in the property's zone district classification.

Many states *prohibit* use variances, or authorize localities to prohibit them in their zoning codes. This is in recognition of the fact that: (1) allowing changes of use through variances can dramatically undermine the stability of neighborhoods, and (2) changes of use are much better considered by the legislative body through the zoning amendment process, not property-by-property through individual variance requests. Planning commissioners should carefully review their state law and local ordinances to determine if the granting of use variances is lawful in their jurisdiction.

> VARIANCES ARE NOT APPROPRIATE MERELY BECAUSE THE VARIANCE WOULD PERMIT A MORE PROFITABLE USE OF THE PROPERTY.

The Variance Process

In most communities, consideration of a variance request requires a public hearing, with notice given to neighboring property owners. Variance applications are usually reviewed by a "zoning board of adjustment" or "board of adjustment and appeals," typically appointed by the local governing body. In some communities (if allowed under state law) the authority to hear and decide variances is conferred upon planning commissions or reserved to the governing body itself.

Regardless of the composition of the reviewing board, the board acts in a quasi-judicial manner when considering variance applications. In most circumstances, the reviewing board's final decision regarding a variance request is subject to judicial appeal in the state courts.

Standards for Approval of Variances

The procedures and standards applicable to the granting of a variance vary widely among local governments. It is difficult, if not impossible, to summarize the diverse legislation and extensive body of judicial decisions governing variances. Moreover, these judicial decisions are largely based upon specific factual circumstances underlying the particular variance decision.

Nevertheless, some common threads can be found in most state and local variance criteria owing to the fact that variance provisions trace their origins to the same source: the model Standard Zoning Act published by the U.S. Department of Commerce in 1924. The Standard Zoning Act included the following brief criteria for the issuance of a variance:

"To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

The requirement that a "special (or unique) condition" exist and an "unnecessary hardship" be demonstrated by the owner remain widely imposed requirements in many statutes and local regulations governing variances.

However, a variety of other standards for approval of variances have evolved. For example, some state statutes or local ordinances require the property owner demonstrate that there exist "practical difficulties" caused by the strict application of the zoning regulation that precludes the owner's reasonable use of the

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property. The practical difficulty standard has evolved, in many jurisdictions, to be a lesser or more accommodating standard for variances than the unnecessary hardship standard. Additionally, many local governments will reject a request for a variance where the need for the variance was the result of the owner's actions, often-times phrased a "self-created hardship." *Self-Created Hardship.*

Even given the diversity of standards applicable to variances in communities across the country, some fairly uniform principles can be culled from the wealth of judicial decisions involving variances:

• Variances are most appropriate to address unique or special physical characteristics of the property that prevent reasonable use under the requirements of the applicable zoning regulations. These circumstances may include unique topography such as steep slopes, water bodies, wetlands, or other natural features that are atypical within the community or within other properties in the same zone district.

• Variances are not appropriate merely because the variance would permit a more profitable use of the property.

• Variances are also not appropriate to accommodate the particular limitations, characteristics, habits, or hobbies of the owner or occupants of the property. Because variances run with the property and are not usually limited to ownership, the fact that a zoning regulation would effectively prevent an owner from engaging in a particular hobby would not justify the granting of a variance to the regulation.[1]

The Effect of a Variance

It is important to keep in mind that the granting of a variance does not change the zone district or zoning classification of the affected property. Instead, a variance is a limited change or modification of a specific standard or restriction associated with a particular property. A variance should be memorialized in written form, identifying the property affected and employing clear and specific language to denote the zoning standard being modified and the extent of the permitted modification. Many administrative problems arise as the result of poorly documented variances or variances that fail to provide sufficient detail to determine the permissible extent of the granted modification.

Zoning regulations in some communities authorize the reviewing board to impose conditions upon the issuance of a variance. These conditions may enable the reviewing board to mitigate or eliminate potential adverse impacts upon adjacent property or the neighborhood caused by the variance. In addition, conditions may be authorized that would limit the duration or term of the variance where a limitation is justified based on the evidence presented to the reviewing body. One common condition to the granting of a variance is that the proposed development be commenced or completed within a specified time.

Planning Commission Role in Variances

Planning commissions should recognize that variances are an integral part of zoning, providing a "safety valve" that allows property owners, in certain limited situations (and in compliance with the strict criteria for issuance of a variance), to develop their property in a manner that would not otherwise be allowed under the zoning code.

On the other hand, variances should clearly be the exception, not the rule. To ensure this, planning commissions should keep abreast of the types of variance requests submitted within the jurisdiction, the basic circumstances underlying the request, and the final decisions on the request made by the reviewing body.

The frequent granting of variances may indicate a failure on the part of the zoning board to adhere to the ordinance's criteria for approval of variance requests. However, numerous requests for variances concerning the same standard or restriction of a zoning regulation may highlight a need for review of that standard and its suitability within the affected zone district. In contrast, relatively infrequent requests for variances and issuance of variances should signal that the process is working well. ◆

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1 There are, however, some limited exceptions to this general rule resulting from laws such as the federal Fair Housing Amendments Act and Americans with Disabilities Act where the variance might present an opportunity for a reasonable accommodation to a handicapped owner. Where such circumstances are present, the reviewing board should always seek legal advice.

Self Created Hardship

The self-created hardship standard provides that an owner cannot use his own ignorance or actions (or that of the prior owner) as a justification for the granting of a variance.

Variance requests based upon self-created hardships are quite common. Property owners who make unwise or poorly planned development decisions may later find that a variance is necessary either to properly complete the project or to accommodate some desired change in construction. In some circumstances, owners either unknowingly or intentionally construct buildings or engage in uses that violate the zoning regulations, only to later argue that the variance is necessary to prevent the expense and waste associated with the destruction of the building or cessation of the use.

Denying variance applications that are based on self-created hardships is a sound practice. To grant such a variance would excuse or reward an owner's lack of reasonable diligence. Not surprisingly, owners in communities that routinely grant such variances quickly learn to ask for forgiveness after the fact.