



Yes, dealing with Zoning Variances can be stressful!

Varying the Variance!

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Part of the stress of dealing with zoning variances is caused by a mismatch between the zoning code's criteria for granting a variance and the reality of how variances are used in the development process.



There is a tendency among local officials to view the applicant for a Variance as someone asking for permission to break the law!



... and to view the job of the BZA as preventing that crime from taking place!



In reality, those of us who write zoning codes recognize that they are imperfect tools.

No zoning code can fully anticipate all future development circumstances.

Zoning codes are not divinely given!



In fact, variances are essential to the proper functioning and administration of a zoning code.



Those who seek zoning variances are neither sinners nor saints!

They are using zoning the way it was intended!

STANDARD STATE ZONING ENABLING ACT - 1926

Sec. 7 BOARD OF ADJUSTMENT. Such local legislative body may provide for the appointment of a board of adjustment and may provide that said board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, **make special exceptions to the terms of the ordinance in harmony with its general purpose and intent.....**

.....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.

SOURCE: Advisory Committee on City Planning and Zoning; US Department of Commerce, Hebert Hoover, Secretary, 1926

ZONING VARIANCES IN OHIO REVISED CODE FOR TOWNSHIPS

519.13 Township board of zoning appeals.

In any township which adopts zoning regulations the board of township trustees shall appoint a township board of zoning appeals composed of five members who shall be residents of the unincorporated territory in the township included in the area zoned.

519.14 Powers of township board of zoning appeals.

The township board of zoning appeals may:

(A) Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto;

(B) Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done;

(C) Grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution.

ZONING VARIANCES IN OHIO REVISED CODE FOR MUNICIPALITIES

713.11 Administrative board - powers and duties.

(A) The legislative authority of a municipal corporation **may create** an administrative board to administer the details of the application of the regulations under sections 713.06 to 713.12 of the Revised Code, and may delegate to such board, in accordance with general rules to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, **to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations**, and to administer the regulations as specified therein. Such administrative powers and functions may be delegated by the legislative authority to the planning commission or board.

.....taking a step back



WHAT IS ZONING?

Zoning is the way a local government controls the physical development of land and the uses of property.

Zoning takes the form of a map showing zoning districts and a code presenting applicable regulations.

Zoning is designed to protect the welfare of a community by facilitating desired development in appropriate locations and prohibiting development that is undesirable (“incompatible”) in particular locations.

Ideally, zoning implements a comprehensive plan for a community.

PLANNING vs. ZONING

A plan is a “*guide*”
for development.



Zoning is the “*law*”!



WHAT IS A ZONING VARIANCE?

A *zoning variance* permits an applicant to develop property or use property in a manner not otherwise permitted by a community's zoning regulations.

There are two types of variances: 1) an “area variance,” which varies regulations pertaining to setbacks, yards, height and other “dimensional” requirements; and 2) a “use variance,” which varies the permitted use of property.

Classically, a *zoning variance* is granted in cases where the literal application of zoning regulations would result in practical difficulty or unnecessary hardship that inheres in and is peculiar to the premises sought to be built upon or used because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district.

“APPEAL” vs. “VARIANCE”

Although both can be called “appeals,” there is a big difference between the appeal of a decision made by an administrator and the appeal for a variance.



In the first case, the appellant is alleging that an error was made in interpreting or applying the law. In the second case, the appellant is acknowledging the legitimacy of a denial but is asking for a variance or an exception from the zoning regulations, as the code provides.

“VARIANCE” vs. “SPECIAL EXCEPTION”

In addition to zoning variances, some codes include what are often called “*special exceptions*.”

Typically, in the case of a special exception, the code will list *specific criteria* (beyond general variance criteria) for approving a special exception for a particular use or circumstance.

For example, a code may say that required parking may be permitted on a lot other than the site of the use it serves if the Board determines that it is impractical to provide the parking on the subject lot and that the parking can be provided within 400 feet of that lot in a manner that ensures safe pedestrian and vehicular access.

“VARIANCE” vs. “CONDITIONAL USE”

Some codes permit particular uses as “conditional uses,” with Board of Zoning Appeals approval.

The most common type of conditional use is an institutional use (like a church or school) in a residential district, which may be permitted:

“if approved by the Board of Zoning Appeals after public notice and public hearing, and if adequate yard spaces and other safeguards to preserve the character of the neighborhood are provided, and if in the judgment of the Board such buildings and uses are appropriately located and designed and will meet a community need without adversely affecting the neighborhood”

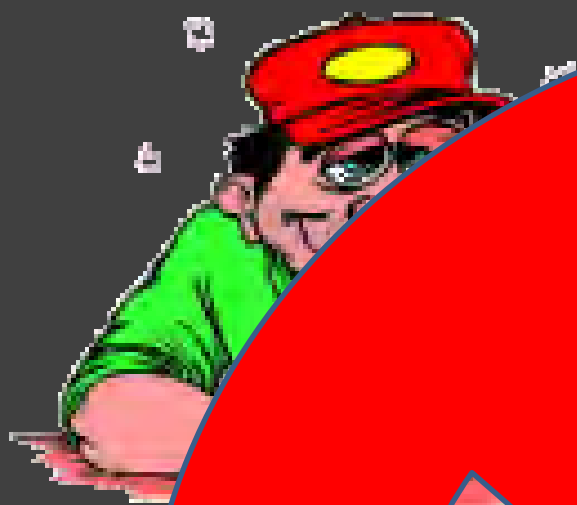
WHY GRANT A ZONING VARIANCE?

As I mentioned earlier, the tried and true test for granting a variance goes something like this:

A *zoning variance* is granted in cases where the literal application of zoning regulations would result in

- a practical difficulty or
- an unnecessary hardship
- that inheres in and is peculiar to the premises
- because of physical size, shape or other characteristics of the premises or adjoining premises which differentiate it from other premises in the same district.

..... but this not always the case!



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Sometimes a Board of Zoning Appeals will grant a variance because it will make for a better development, one that is more beneficial to the community –

even though a conforming development could be built!



Mixed-use building with vacant ground floor in Residential District



Mixed-use building with vacant ground floor in Residential District
Proposed to be occupied by an antique store

Variance granted for replacement of an expired nonconforming use

New use deemed to be compatible in this urban setting with one- and two-family houses, multi-family buildings, churches, etc.



Mariner's Watch Apartments at 3219 Detroit Avenue in Ohio City



Mariner's Watch 62-Unit Apartment Building at 3107 Detroit Avenue

Variances granted for:

side yards

rear yard

lot coverage

The project met planning goals for pedestrian-oriented, high-density living





Proposed 60-Unit Apartment Building at 3219 Detroit Avenue

Variances granted for:

side yards
rear yard
lot coverage
height

The project met planning goals for pedestrian-oriented, high-density living

Criteria for Granting a Zoning Variance in Ohio

Courts in Ohio have differentiated between “*area variances*” and “*use variances*” with respect to the criteria considered by a Board of Zoning Appeals in granting a variance.

In granting a *use variance*, the Board must find that denial of the variance would result in an “*unnecessary hardship*” for the applicant. In granting an *area variance*, the Board must find that denial would result in a “*practical difficulty*” for the applicant – a less stringent standard.

NOTE: The courts have ruled inconsistently on whether the “practical difficulty” standard applies in townships.

See the analysis of attorney R. Todd Hunt of Walters & Haverfield

Criteria for Granting an “Area Variance” in Ohio

In the case known as “*Duncan vs. Middlefield*,” the Ohio Supreme Court laid out the following criteria for granting an area variance:

1. *whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;*
2. *whether the variance is substantial;*
3. *whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;*
4. *whether the variance would adversely affect the delivery of governmental services (e.g., water, sewer, garbage);*
5. *whether the property owner purchased the property with knowledge of the zoning restrictions;*
6. *whether the property owner's predicament feasibly can be obviated through some method other than a variance; and*
7. *whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.*

A Modest Proposal for Varying the Variance!

The “Area Variance”

- (1) In granting an Area Variance, the Board shall determine that *one or both* of the following factors are met by the request:
- a. The conditions upon which an application for a Variance is based are **particular to the subject property** with respect to the **physical size, shape or other characteristics** of the premises or adjoining premises, differentiating it from other premises in the same district; **or**
 - b. The Variance would **result in an improvement of the property that is more appropriate and more beneficial to the community than would be the case without granting of the Variance.**

(2) In granting an Area Variance, the Board shall also determine that *all of the following factors* are met by the request:

- a. The *essential character of the neighborhood* would not be substantially altered, and *adjoining properties would not suffer* a substantial detriment as a result of the Variance;
- b. The *spirit and intent* behind the subject zoning requirement would be observed and substantial justice done by granting the Variance;
- c. The Variance is *not substantial and is the minimum necessary* to afford relief to the applicant and *achieve an appropriate and beneficial improvement* of the property; and
- d. The Variance would *not adversely affect the delivery of governmental services* (e.g., water, sewer, garbage).

(3) In granting an Area Variance, the Board shall **also consider** the following factors:

- a. whether the property owner purchased the property with **knowledge of the zoning** restriction;
- b. whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the Variance; and
- c. whether the property owner's predicament feasibly can be obviated **through some method other than a Variance**.

The “Use Variance”

*In granting a Use Variance, the Board shall determine that **all** of the following conditions are met by the request.*

- (1) The **property cannot be put to any economically viable and appropriate use** under any of the permitted uses in the zoning district;
- (2) The Variance requested stems from **conditions that are particular** to the subject property and are not applicable, generally, to other properties within the same zoning classification;
- (3) The hardship condition is **not created by actions of the applicant**;
- (4) Granting of the variance will **not adversely affect** the rights of adjacent property owners or residents;
- (5) Granting of the variance will not adversely affect **the community character, public health, safety or general welfare**;
- (6) The Variance will be consistent with the **general spirit and intent** of the Zoning Code; and
- (7) The Variance sought is the **minimum** that will afford relief to the applicant.



So What do you think?