

Hardships, Heartaches

Variances and Appeals

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Types of Appeals

- For an unwarranted hardship unique to a specific property.
- For a Special Exception for parking or a particular use specified in the Zoning Ord.
- From an adverse decision or interpretation by the Community Development Director.

Roots of Relief...

- Early zoning ordinances adopted for cities with a lot of development already in place.
- Development patterns often irregular.
- Long range “comprehensive” plans usually more simplified.
- Imposing regularity on reality can create inconsistencies.

Defining Zoning Districts



Roots of Relief...

Early zoning districts ended up with ...

- Some lots much larger or somewhat smaller than the “averaged” minimum.
- Some buildings not meeting minimum setback lines or max heights.
- Existing uses no longer allowed.
- Physical site conditions ignored.

Roots of Relief...

- Variance intended to deal with individual problems created when zoning ordinance is first adopted.
- Concept of “hardship” intended to avoid wholesale changes “just because...”
- Nonconforming use provisions to deal with individual mismatches while respecting property rights.

Consequences

- Many variances are requested as a convenience or for economic gain.
- “Hardship” standards are sometimes viewed as too harsh and ignored.
- Some view variances as an extension of zoning.
- Sometimes variances used to customize a development’s parameters.
- Some requests would be a grant of special privilege versus leveling the playing field.

Legislative v. Quasi-Judicial Decisions

● Legislative Decisions

- ... can be Subjective: Balance of Public Interest v. Private Property Rights.
- Adopted standards “govern” but do not dictate.

● Quasi-Judicial Decisions

- ... are Objective, Based on Findings of Facts.
- The hearing Board sits as judges, not juries.
- Decisions are based only on facts in evidence.
- Adopted standards must be met.

The Courts

- Appeal to Court is based ONLY on the record.
- The Judge looks at ...
 - Were all procedures followed?
 - Was the action “arbitrary and capricious”?
 - Does the record show that findings of fact were made regarding each of the adopted standards, based solely on the evidence submitted?
 - Does the record show that the decision was based on and consistent with those findings of facts?

BZA Members Role

- You are acting as Judges.
 - Personal contact with applicants, neighbors or opponents is inappropriate.
 - Personally gathering evidence, visiting the site or the neighborhood is inappropriate.
 - Expressing personal opinions about the qualifications, history or concerns about the applicant or others is inappropriate.
 - Conflicts of interest disqualifies a BZA member.

Variance/Appeal Procedures

- Critically important: the Record
 - All pertinent information must be submitted as evidence, including all exhibits.
 - A verbatim hearing transcript can be made available.
 - A finding of fact is to be made for every approval criteria.
- A Quasi-Judicial Hearing can include:
 - Sworn testimony.
 - Subpoena witnesses.
 - Require the applicant's presence.
 - Receive evidence.
 - Cross-examination by each side must be allowed.

Hardship Variance

- Approve if the hardship is “unwarranted” – not needed to protect the public safety, welfare etc.
- Approve only to the extent necessary.
- Approve if there is something unique about the property NOT CREATED by the Applicant.
- Approve if not merely for the convenience or profit of the Applicant.
- Approve if you find that all Approval Criteria have been appropriately met.

Zoning Ord Variances

- Approval Criteria (must meet ALL)

(1) is not detrimental to the public health, safety or welfare;

(2) is based on unique conditions not generally applicable to other properties and not created by the owner;

(3) is due to particular conditions, shape, size, orientation or topographic conditions;

(4) is the minimum necessary to afford relief;

(5) would relieve undue hardship and not mere inconvenience;

and

(6) would be consistent with the spirit and purpose of the zoning ordinance and the comprehensive plan.

Noise Ord Variances

- Approval Criteria (must meet ALL)

- (1) is due to exceptional conditions that were not created by the owner;
- (2) does not go beyond the minimum necessary to afford relief;
- (3) Is not materially detrimental to the public welfare or injurious to other property in the zoning district;
- (4) would relieve undue and unnecessary hardship; **and**
- (5) would be consistent with the purposes of the noise ordinance and would not exceed certain noise levels.

Special Exceptions

- Approval Criteria (pick one)
 - *Parking and loading reductions.* The ZBA may waive or reduce the required number of parking or loading spaces upon an expressed finding that:
 - (1) The character of the use makes the full provision of parking or loading spaces unnecessary;
 - (2) Alternative transportation or transit options exist; **or**
 - (3) It would relieve a deleterious effect on a historic building, site, district or archaeological resource.
- Retaining Wall Setback – Due to topography.

Special Exceptions

- Approval Criteria (must meet ALL)
 - *Other authorized special exceptions.* Other exceptions may be approved by the ZBA when approval criteria both specific and general are met:
 - (1) will not be detrimental to the public health, safety or welfare of the public or injurious to the property or improvements;
 - (2) does not go beyond the minimum necessary to afford relief; **and**
 - (3) is consistent with all relevant purpose and intent statements of the zoning ordinance.

Appeal of Admin Decision

- Approval Criteria

An appeal shall be sustained only upon a finding by the zoning board of appeals that the administrative official's action was based on an erroneous finding of a material fact or that the administrative official acted in an arbitrary manner.

Sign Ordinance Appeals

- Approval Criteria – Permit Denials

[Taken as an appeal of an administrative decision denying or revoking a permit.]

An appeal shall be sustained only upon an expressed finding by the board that the administrative official's action was based on an erroneous finding of a material fact, or that the administrative official acted in an arbitrary manner.

Sign Ordinance Variances

- Approval Criteria – Variances
 - Limited to the following hardships:
 - (1) Conflict with existing signs on adjoining lots; **or**
 - (2) Where visibility substantially impaired.
 - Variances shall be limited to the minimum relief necessary to overcome the hardship

Land Development Regs

● Approval Criteria – Environmental Requirements

- (1) request would be at least as protective as complying with the code requirements;
- (2) due to physical conditions which were not created by the owner or applicant, there is no opportunity for development under any design configuration allowed;
- (3) does not go beyond the minimum necessary for relief;
- (4) will not be materially detrimental to the public welfare or injurious to other property in the area; **and**
- (5) Would relieve an extreme hardship not created by the owner.

Land Development Regs

- Approval Criteria – Design & Improvements

To relieve an exceptional and undue hardship:

- (1) due to the shape or topographical conditions which were not created by the owner or applicant;
- (2) there is no opportunity for development under any design configuration allowed;
- (3) does not go beyond the minimum necessary for relief;
- (4) will not be materially detrimental to the public welfare or injurious to other property in the zoning district; **and**
- (5) will not vary the provisions of the zoning ordinance or map, or the comprehensive plan.

Variations/Appeals in General

RECAP

- “Relief” from a hardship is:
 - Not for the convenience of the Applicant
 - Not from self-imposed situations
 - Not to go beyond the minimum necessary
 - Not to cover the Applicant’s poor judgment
 - Not contrary to the intent of the ordinance
 - Not a grant of special privilege or economic advantage