

VARIANCES

Purpose and Nature

Because those who draft a zoning ordinance cannot anticipate every land use question that will arise in a community, there needs to be some mechanism to give the ordinance flexibility. The board's authority to grant variances serves this purpose. A variance is permission granted by the board to build or develop in a way which is inconsistent with the dimensional standards contained in the ordinance.

The variance procedure allows the impact of the general rules to be varied in response to unusual circumstances which constitute "unnecessary hardship" or "practical difficulty." Any property owner who has been denied a building or development permit due to violation of *dimensional standards* has a right to request a variance. The petition for a variance must be heard by the board at a public hearing.

In deciding variance requests, the board of appeals acts as an agent of the local government, not the property owner. It is the board's duty to preserve the zoning ordinance without modification as far as possible, while ensuring substantial justice for the property owner.

A variance is not a convenience to the property owner. A variance may not be granted for reasons common to other properties. The appropriate remedy in this case would be to amend the ordinance.

A variance for a use that is not permitted by the ordinance (a "use variance") would alter the legislative intent of the ordinance. Use variances should not be granted by the board. A change in use requires a zoning map or text amendment. [See Snyder v. Waukesha County Zoning Board, 74 Wis. 2d 468 (1976).] If a change in use is necessary to make feasible use of the land, the applicant must file a petition for zoning amendment. [See State ex rel. Markdale Corp. v. Board of Appeals, 27 Wis. 2d 154 (1965).] use variances are specifically prohibited in floodplain and shoreland districts established under ss.59.971 and 87.30, Wis. Stats. and ss. NR 115.05(6)(e) and NR 116.21(4)(c), (e) and (f), Wis. Adm. Code.

Variance Standards

Variances are not to be granted routinely. The applicant for a variance must clearly show the board that three statutory standards that govern grant a variance will be met. These three standards require the existence of an unnecessary hardship, the presence of a unique property limitation, and the protection of the public interest. Additional court-established principles also apply, as follows:

1. **Unnecessary Hardship.** What constitutes unnecessary hardship is a matter to be determined from the facts and circumstances of each individual appeal. In applying the statutory standards, the board must abide by the following court-established principles:

- (a) **Unnecessary hardship is a situation where, in the absence of a variance, an owner can make no feasible use of a property.** Zoning board members must judge what is a feasible use for a particular parcel

as a whole. A variance is not warranted if the physical character of the property allows a landowner to build or develop in compliance with a zoning ordinance. [See State ex. rel. Markdale Corp. v. Board of Appeals, above; Just v. Marinette County 56 Wis. 2d 7 (1972); Buhler v. Racine County, 33 Wis. 2d 137, 146 N.W. 2d 403 (1966).]

- (b) The hardship or difficulty must be peculiar to the zoning parcel in question and different from that of other parcels, not one which affects all parcels similarly. Generally, hardship arises because of some unique property limitation (see 2., below) of a parcel, or because the property was created before the passage of the zoning ordinance and is not economically suitable for a permitted use, or will not accommodate a structure of reasonable design for a permitted use, if all area, yard and setback requirements are observed. [See Thalhofer v. Patri, 240 Wis 404 (1942).]
- (c) Loss of profit or pecuniary hardship is not in and of itself grounds for a variance. [See Snyder v. Waukesha County Zoning Board, above.]
- (d) Self-imposed hardship is not grounds for a variance. Reductions resulting from the sale of portions of a property that reduce the remainder below buildable size or cut off existing access to a public highway, or deed restrictions imposed by the owner's predecessor in title are generally considered to be self-imposed hardships. [See State ex. rel. Markdale Corp. v. Board of Appeals, above.]
- (e) The hardship cannot be one that would have existed in the absence of a zoning ordinance. Sometimes, a legitimate hardship results from the interaction of the provisions of the zoning ordinance with other actions or regulations adopted by public authorities. [See Thalhofer v. Patri, in (a) above.]

2. **Unique Property Limitation.** Unique physical characteristics of the property, not the desires of or conditions personal to the applicant, must prevent the applicant from developing in compliance with the zoning ordinance. [See Snyder v. Waukesha County Zoning Board, above.] These features may be a wetland, soil type, parcel shape or steep slope that limits the reasonable use of the property.

3. **Protection of the Public Interest.** Granting of a variance must not harm the public interest. The board's actions should reflect the objectives stated in their local ordinance, which has been adopted to meet minimum state statutory requirements. [See State v. Ozaukee County Board of Adjustment, 152 Wis. 2d 552 (Ct. App. 1989).] The public interest includes the interests of the public at large, not just that of nearby property owners. Lack of local opposition does not in itself mean that a variance will not harm the public interest.

- (a) In granting variances, as in granting conditional uses, the board may impose special conditions to ensure that the public welfare will not be damaged. The power of the board appeals to attach conditions to a variance, to protect adjoining property and to preserve the essential character of the neighborhood, is well established, but the power is not unlimited. The conditions must relate reasonably to the purpose and intent established in the zoning ordinance. [See Anderson, American Law of Zoning 3d, (1986) Vol. 3, ss. 20.70 and 20.71, pp. 587-95.]

- (b) A variance should include only the minimum relief necessary to allow reasonable use of a property. [See Anderson, American Law of Zoning 3d, (1986) Vol. 3, s. 20.86, pp. 624-5.]

4. *Additional Court-Established Principles.*

- (a) Violations by or variances granted to neighboring owners do not justify a variance. [See Von Elm v. Board of Appeals, 258 App. Div. 989 (N.Y. 1940).]
- (b) Variances attach to the property as a permanent right. Once a variance is granted, it is permanently attached to the property. A new owner of the property may make use of a variance that was granted to the previous owner if all of the conditions that are attached to the variance are met. [See Goldberg v. City of Milwaukee Bd. of Zoning App., 115 Wis. 2d 517, 340 N.W. 2d 458 (Ct. App. 1983).]

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