

## Chapter 31: Variances & Waivers

Most zoning ordinances contain provisions allowing the local jurisdiction to grant a variance or a waiver for certain requirements. For example, if someone wants to build a garage but they cannot meet, say, a 10-foot property line setback, but they can keep the garage eight-feet away, then they may get a variance, particularly if they proved that the variance was needed because of some unusual characteristics of their property and other criteria are met. Many local jurisdictions also require the applicant to demonstrate that the variance is needed to relieve hardship. In some localities a variance is called a “modification.”

In their book *Land Use*<sup>213</sup>, law professors Robert Wright and Morton Gitelman said the following of variances:

*The variance is the most controversial, most abused, and usually the most used administrative relief that can be granted in requests for zoning changes.*

Professors Wright and Gitelman cited a Pennsylvania Supreme Court decision<sup>214</sup> as offering an excellent description of four factors that should be met prior to the granting of any variance. These factors are:

1. “that an unnecessary hardship exists which is not created by the party seeking the variance and which is caused by unique physical circumstances of the property for which the variance is sought;
2. that a variance is needed to enable the party's reasonable use of the property;
3. that the variance will not alter the essential character of the district or neighborhood, or substantially impair the use or development of the adjacent property such that it is detrimental to the public's welfare; and
4. that the variance will afford the least intrusive solution.”

The professors went on to say that...

*If every board of adjustment and every court were more aware of these factors and applied them more rigorously in place of bending them to meet the economic aims of developers and landowners, use variances would no longer constitute a synonym for evasion of zoning*

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<sup>213</sup> *Land Use in a Nutshell*, published by West Group, St. Paul, MN, 2000

<sup>214</sup> *Larsen v. Zoning Board of Adjustment of the City of Philadelphia*, 543 Pa. 415, 672 A.2d 286 (Pa. 1996).

*restrictions. As matters stand today, zoning is as much characterized by the variances from it as by the adherence to it.*

A variance may be granted to a use restriction or an area restriction.

**Use Variance:** Most zoning ordinances specify the uses (activities) permitted within each zoning district. The ordinance, enabling statutes, or court precedents may allow the local jurisdiction to grant a variance to the use restriction when certain factors, like the four presented above, are met. For instance, apartments may be prohibited in a district intended primarily for single-family homes. But it may be possible to obtain a variance for the addition of a granny apartment within a single-family home.

**Area Variance:** An *area* variance would be needed to reduce, say, the minimum setback required from the front of a proposed building to the edge of a street or a variance might be granted to the minimum acreage required to build a home.

In my experience, it is rare that variances are granted to zoning requirements that directly affect public health and safety. I have never seen a variance to the 100-foot minimum setback a number of states require between a shallow well and a septic system. Nor have I seen a variance to intersection sight-distance requirements though some applicant traffic engineers do come up with creative arguments that less distance is required than called for by generally accepted guidelines.

The criteria for granting variances to environmental standards will frequently contain factors in addition to the four presented above. These factors may include a condition that the decision-making find that a variance will not cause a net increase in water pollution or that other specific environmental requirements are met before a variance can be granted.

**Waivers:** Occasionally land use ordinances will allow for a *waiver* of specific requirements if certain conditions are met. For instance, an applicant might receive a waiver from stormwater management requirements if it was determined the project would not cause adverse impacts downstream.

In many jurisdictions, an applicant must go before the local Board of Zoning Appeals or Zoning Adjustments to obtain a variance. However, some jurisdictions have granted the planning director the authority to issue a variance but allow citizens to contest the decision to a local Board of Zoning Appeals. A similar appeals process is sometimes available for waivers. In fact, some jurisdictions allow citizens to appeal virtually all land use decisions made by the local government.