

VARIANCES

A Brief Explanatory Guide

This document is intended to help landowners understand (1) what variances are, and (2) what the law requires a landowner to prove in order to obtain a variance. Further explanation of each of the items on this page can be found on the pages that follow.

Introduction

A variance is an approval to use property in a manner that would not otherwise be allowed under the zoning regulations. In other words, a variance excuses a landowner from having to comply with regulations that all other landowners in the same zoning district must obey.

In most instances, an applicant for a variance will have to prove two things: (1) that because of some peculiar characteristic of the land itself, it would be especially difficult for the landowner to make a reasonable use of the property in conformance with all of the applicable zoning regulations; and (2) that the variance would not have a significantly detrimental effect on the overall zoning plan or on the neighborhood.

Hardship

A hardship means that it is unusually difficult for a landowner to comply with the regulations because of some *unique or peculiar aspect of the property itself*. Hardship does not relate to the personal needs or wishes of the landowner, but only to the quality of the property itself. A hardship also must not be "self-created."

Applications for Variances

When a landowner applies for a variance, he or she must be ready to prove to the Zoning Board of Appeals that there is some unusual or unique aspect of his or her property that makes it much more difficult to carry on a reasonable use of the property under the zoning regulations. In addition, the Zoning Board of Appeals has a responsibility to assure that any variance it grants is the minimum necessary to allow a reasonable use of the property.

Conditions of Approval

The Zoning Board of Appeals has the right to place conditions of approval on the granting of a variance or variances. Such conditions are intended to help assure that the variances will not have an unnecessarily harmful impact on the overall scheme of zoning or on the neighborhood. The Board examines the overall size and scope of the project, including all portions of the project that would, without the variance(s), comply with the Zoning Regulations, and may find that the proposed variance would have acceptable impacts if the project is built in accordance with the specific plans presented to the Board, but that it may not otherwise be acceptable. In granting such a variance the Board will place a condition that all future construction must be in accordance with the plans presented to the Board, and any future construction or modifications, including any construction or modifications that would not require a variance in the absence of this condition, will not be permitted unless the Board approves a modification of the variance granted.

Introduction

This document is intended to help landowners understand (1) what variances are, and (2) what the law requires a landowner to prove in order to obtain a variance. The law regarding variances is very complicated, so this guide cannot be exhaustive. However, it addresses some of the fundamental aspects of variances to help landowners know whether they are likely to qualify for one.

Simply stated, a variance is an approval to use property in a manner that would not otherwise be allowed under the zoning regulations. In other words, a variance excuses a landowner from having to comply with regulations that all other landowners in the same zoning district must obey. Because the zoning regulations have been adopted with the goal of serving the best interests of Town residents, businesses, and taxpayers, the courts have frequently said that variances should be only sparingly granted, and only when there is evidence of a special hardship. These rules are also important to help assure the community that special favors are not being given for arbitrary reasons, and that variances are limited to especially compelling and unusual circumstances.

In most instances, an applicant for a variance will have to prove two things: (1) that because of some peculiar characteristic of the land itself, it would be especially difficult for the landowner to make a reasonable use of the property in conformance with all of the applicable zoning regulations; and (2) that the variance would not have a significantly detrimental effect on the overall zoning plan or on the neighborhood.

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Hardship

The concept of hardship is perhaps the most difficult aspect of variances to understand. In zoning law, a hardship means that it is unusually difficult for a landowner to comply with the regulations because of some unique or peculiar aspect of the property itself. Hardship does not relate to the personal needs or wishes of the landowner, but only to the quality of the property itself. For example, the fact that a landowner may find it desirable or more convenient to conduct business operations from his or her residence would not be grounds for a variance from the residential use restrictions.

Similarly, financial considerations are not usually a sufficient reason to approve a variance. For example, if a landowner owns a 1.98-acre parcel in a zoning district that requires a minimum of one acre per lot, the fact that a division into two lots would make the land much more valuable to the landowner, and that a 0.98-acre lot would be close to the required minimum lot size, would not generally justify a variance.

In contrast, a setback variance may be appropriate if the peculiar shape of a lot would make it extremely difficult to build a reasonably sized house that conforms to all of the zoning setback regulations. Likewise, the location of extensive wetlands areas on one side of a lot may make a variance appropriate to allow development closer to the opposite lot line. The difficulties in these cases arise from the condition of the lot itself, and not just from the wishes or goals of the landowner.

On the other hand, hardship must not be "self-created." For instance, if a landowner chose to divide a parcel into two irregularly shaped lots, the irregularity might be viewed as a self-created hardship, which would preclude the granting of a variance.

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Applications for Variances

For the reasons given above, when a landowner applies for a variance, he or she must be ready to prove to the Zoning Board of Appeals that there is some unusual or unique aspect of his or her property that makes it much more difficult to carry on a reasonable use of the property under the zoning regulations. Neighboring property owners are often concerned when variances are sought, because they fear that the variances will have a negative effect on their adjoining property. If such neighbors appeal the granting of a variance to the Superior Court, the court will examine the evidence presented to the Zoning Board of Appeals to see whether the applicant sufficiently demonstrated the existence of a true (as opposed to personal) hardship. The courts have overturned many variances that were given without a satisfactory explanation of the nature of the hardship.

In addition, the Zoning Board of Appeals has a responsibility to assure that any variance it grants is the minimum necessary to allow a reasonable use of the property. Again, this is because a landowner should not be excused from compliance with the zoning regulations unless it would be unusually difficult to comply. Therefore, the landowner should generally have detailed site plans showing exactly how much of a variance will be necessary. The landowner should also be prepared to explain why a lesser variance would not be adequate.

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Conditions of Approval

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In carrying out its responsibilities, the Zoning Board of Appeals will often condition its approval of a variance on construction in accordance with the specific plans presented to it. For example, if a variance applicant seeks to place a small portion of a proposed building within 15 feet of a property line in a zone in which the setback is 20 feet, the Zoning Board of Appeals usually will not simply grant a variance "from 20 to 15 feet." If it did so, the landowner might argue that he or she was entitled to build within 15 feet of the entire property line, rather than just the portion shown on the site plan. Such a result could be harmful to neighboring property owners. Instead, the Zoning Board of Appeals will usually have a condition of approval, limiting the variance to the specific area of encroachment that was shown on the site plan presented to it.

Additionally, in granting a variance, and following its statutory duty to give due consideration to conserving the public health, safety, convenience, welfare and property values, the Board examines the overall size and scope of the project, including all portions of

the project that would, without the variance(s), comply with the Zoning Regulations. The Board may find that the proposed variance would have acceptable impacts if the project is built in accordance with the specific plans presented to the Board, but that it may not otherwise be acceptable. In granting such a variance the Board will place a condition that all future construction must be in accordance with the plans presented to the Board, and any future construction or modifications, including any construction or modifications that would not require a variance in the absence of this condition, will not be permitted unless the Board approves a modification of the variance granted.

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