

## Variations and its Challenge to Zoning Regulations

Land use regulation has predominately been implemented this past century by zoning ordinances. The administrative exception to such land use regulation is a variance. There are two basic types of variances; use variances and area variances. Area variances can grant relief from objective physical standards, such as height, area, and setback restrictions.<sup>1</sup> A use variance permits a use other than that permitted in the district.<sup>2</sup> There is dispute whether a property owner who seeks relief from a density limitation requires a use variance or an area variance. The difference is often a moot point because many zoning boards will not grant a use variance. Courts have struck down use variances more than area variances, for the courts and legislatures too traditionally believe that use variances pose a greater threat to the integrity and fairness of a zoning scheme.<sup>3</sup> Also, since a use variance has the potential to lead to land speculation, some states do not allow use variances at all.<sup>4</sup>

Variations provide flexibility in the application of the zoning ordinance and afford the landowner an opportunity to apply for administrative relief from restrictive provisions of the code.<sup>5</sup> A property owner may seek a use or area variance when an application for a building permit is denied on the grounds that the proposal violates the use or dimensional requirements of

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<sup>1</sup> See Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 330 (1995) (stating that area variance usually is the way sought to create an exception from strict compliance requirement of an ordinance. Granting a variance is similar to triggering a permit.).

<sup>2</sup> See Cohen, note 1 at 330-31 (describing that use variances can unfairly assist one landowner receive a larger return on the property).

<sup>3</sup> See Cohen, note 1 at 331 (describing how there is a reluctance to grant use variances because it would hurt the premise of the zoning ordinances that established the segregation of uses). See also *Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986) (noting that use variances have been recognized as valid in a majority of states).

<sup>4</sup> *Zoning Bd. of Appeals v. Planning and Zoning Comm'n.*, 605 A.2d 885, 890 (Conn. App. Ct. 1992) (discussing that the zoning ordinance was amended to curtail the board from granting too many use variances).

<sup>5</sup> Variations, Pace Law School Land Use Law Center, available at <http://www.law.pace.edu/landuse/varia.html> (last visited Mar. 8, 2005).

the zoning ordinance.<sup>6</sup> Alternatively, the property owner could request the local legislative board to rezone the property, so that the requested use is "as of right."<sup>7</sup> Variances always involve a single parcel; the relief of one landowners hardship from the local zoning ordinance.<sup>8</sup> Of course, the burden of proof is on the property owner to demonstrate that he has met all the requirements in requesting a variance and incurred a hardship based on the zoning ordinance.<sup>9</sup> Zoning ordinances protect the health, safety, and welfare of the community and the granting of variances can be problematic. Variances have the potential to injure the public by undermining the purpose of the zoning ordinance for the benefit of one individual landowner and that they not do so is a typical requirement of the zoning board.

#### **Typical Variance Process:**

The granting of a variance is generally considered a final administrative action for "purposes of exhaustion."<sup>10</sup> When a landowner is denied a permit, he may apply to the local board authorized to grant a variance. The zoning board's power to grant a variance, and the circumstances that have to be met, is derived either by charter, ordinance or by statute and are

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<sup>6</sup> *See id.* For example, area variances can be requested if a property owner desires to build a deck that slightly overlaps an ordinance's set back area.

<sup>7</sup> *Id.* Legislatures usually do not desire to have use restrictions limit property owners to be denied a reasonable return because they cannot be enforced without compensation.

<sup>8</sup> *See id.* As will be explained later, the hardship must be unique to the owner's property; if common to the whole neighborhood, a change in zoning is more appropriate than a variance.

<sup>9</sup> *See id.* There is a list of five factors that a board weighs in the variance application process:

1. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of an area variance?
2. Can the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance?
3. Is the requested area variance substantial?
4. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district?
5. Is the alleged difficulty self-created? This consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance. *Id.*

<sup>10</sup> Joseph H. Bornong and Bradley R. Peyton, *Rural Land Use in Iowa: An empirical Analysis of Country Board of Adjustment Practices*, 68 Iowa L. Rev. 1083, 1211 (1983). The denial by a board of adjustment of relief opens the door to challenging the zoning ordinance in court.