

Variance

Area Variance

vs.

Use Variance

Board of Zoning Appeals

- You are an administrative body.
- Your function is to hear and decide appeals regarding:
 - zoning code enforcement
 - authorizing variances and
 - where authorized, grant conditional use

Your Decision

- Your decisions are considered to be quasi-judicial in nature and presumed by the Courts to be valid.
 - Therefore, unless the decisions made are deemed to be:
 - Unconstitutional
 - Illegal
 - Arbitrary
 - Capricious
 - Unreasonable
 - or Unsupported by a preponderance of the substantial, reliable and probative evidence on the whole record.

Your Decision will stand.

- Courts have extended a customary judicial deference to BZA decisions.



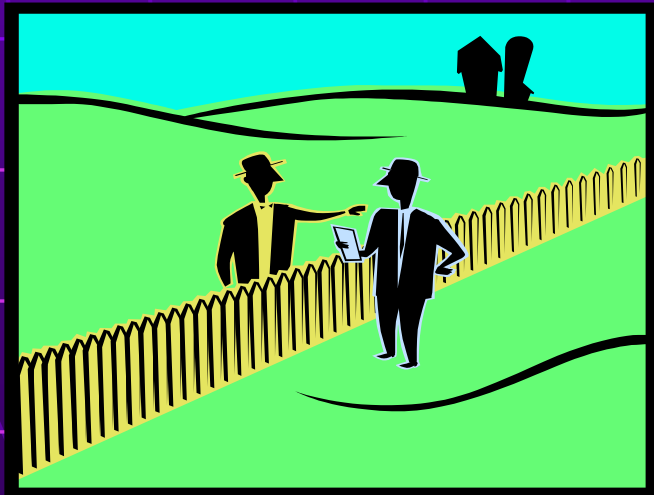
Area vs. Use Variance



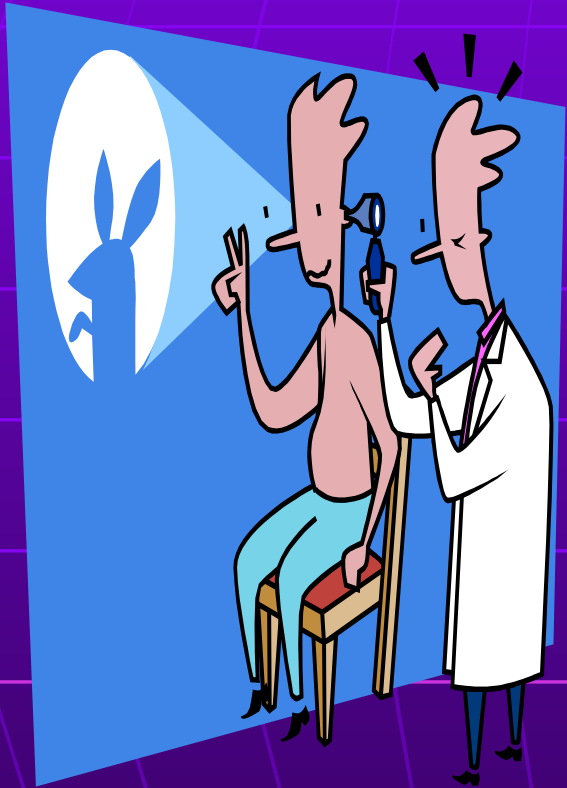
AREA VARIANCE

is an exception from a zoning requirement such as yard, lot, height standards

ie -- a family wants to convert a one-family dwelling into a two-family. It is permitted for their zone. However, the min lot area is too small



USE VARIANCE



allows a use not expressly or impliedly permitted by the zoning code.

ie --placing a doctor's office in a residential area, where the office would not otherwise be permitted.

Area vs. Use

■ AREA VARIANCE

■ **Standard -** Practical Difficulties

- practical difficulties exist whenever an area zoning requirement unreasonably deprives him of a **permitted** use of his property.

■ USE VARIANCE

■ **Standard -** Unnecessary Hardship

- unless granted a variance, the owner will be unable to viably use the property.

AREA VARIANCE

Duncan Factor # 1

- Whether the property will yield a reasonable return or whether there can be a beneficial use of the property without the variance;
 - can the property be sold for a reasonable amount without the variance?
 - Can the property be used without the variance?
 - You do not have to give the owner the best use of their property, just a use.

Duncan Factor # 2

- Whether the variance is substantial;
 - You are not required to provide the owner with the greatest possible benefit from use of his/her property.



Duncan Factor # 3

- Whether the essential character of the neighborhood would be substantially altered or adjoining properties suffer a “substantial detriment”

For Example



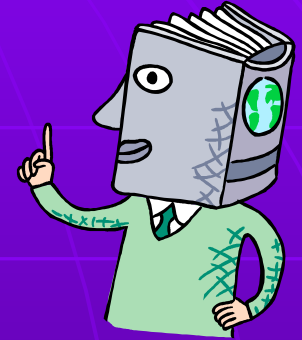
The owner would like to put a swimming pool on their property with a lot size of one acre. However, zoning regulations for pools in that area require two acres. Would there be a substantial detriment to having a pool in this neighborhood?

Duncan Factor # 4

- Whether the variance would adversely affect the delivery of governmental services;
 - ie - Can fire and ambulance services respond to the property in question?



Duncan Factor # 5



- Whether the property owner purchased the property with knowledge of the zoning restrictions:
 - **Self imposed hardship is NOT fatal.** Rather, the hardship should be balanced with the other Duncan factors.

Duncan Factor # 6

- Whether the problem can be solved by some manner other than the granting of a variance:

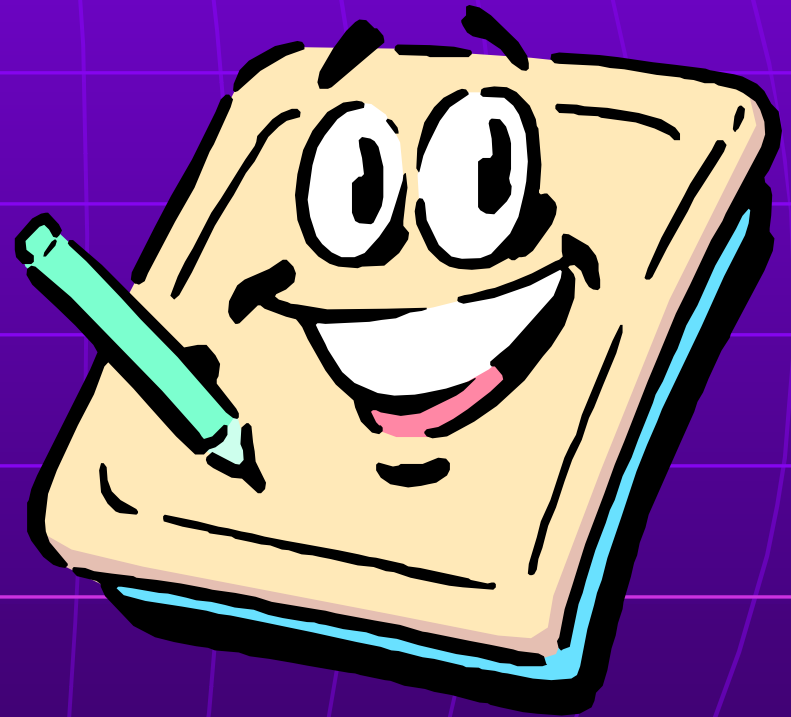


Duncan Factor # 7

- Whether the variance preserves the “spirit and intent” of the zoning requirement and whether “substantial justice” would be done by granting the variance
 - There is no need to follow the “strict letter of the law” when working with area variances. It is much more important to work toward the spirit of the and intent of the zoning code

You Must Apply Duncan Factors to Area Variances

- For Courts to give BZA decision's deference.
- You may apply additional factors of your choosing.



Applying Duncan

- Remember, you can not consider only one factor. Rather, you must consider all 7 Duncan factors when deciding on Area Variances.



Applying Duncan

- You may also consider ANY additional factors you may determine are important.

Applying Duncan

- You do not have to satisfy each of the seven factors.
- Rather you should weigh the factors



For the RECORD



- You must articulate on the record all of the factors, including the Duncan factors you consider important in deciding whether to grant or deny a variance.

For Example

Three Duncan factors and three additional factors are discussed at a BZA hearing. The vote denies the variance. If there is a 2506 hearing, the record will support the BZA's decision in that the Duncan factors were considered.



Create a Check List

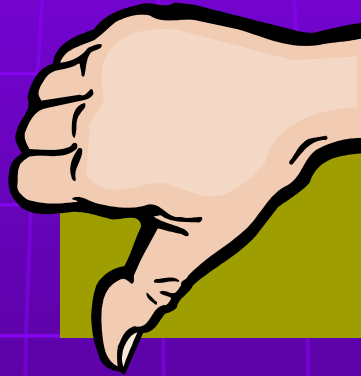
List the 7 Duncan Factors and any additional factors you may consider important and check them off.

USE VARIANCE

Use Variances

Should be RARE!

Unnecessary Hardship



- Viable Use of the Property
 - To show unnecessary hardship, the property owner must show that there is NO viable use of property under the code, not simply that their desired use of the property is not permitted.

For Example

owner wishes to build an apartment complex in a residential area.

Applies for a use variance, citing that he would not have viable use otherwise. Should be denied, b/c under code could have a house or a duplex. Therefore, there is a viable use.

Viability Use of Property

You are not required to give the best, most profitable use of the property, simply a viable use of the property is sufficient.

Taking



- If the owner is not able to have any viable use of the property, it will be considered a **TAKING**.

For Example

The variance is denied. In order to build anything on the property, the owner will have to purchase additional land.

Hardship



- **Self imposed hardship is fatal.**
 - **If the owner created the hardship, he/she can not then ask for a use variance.**