

VARIANCE

Variance

- A minor departure or exception from the strict rule or literal enforcement or interpretation of zoning provisions.



Purpose:

- To permit amelioration of the strict letter of the law in individual cases.
- To provide a relief valve in unique situations so that zoning which would otherwise be unconstitutional as applied, can be made constitutional

- ***Variances almost always relate to individual hardships peculiar to the property for which a variance is sought; not the personal hardships of the owner.***
- ***Castle Manufactured Homes, Inc. v. Tegtmeier***

A variance is not to be granted because of

- (1) a personal hardship of a particular owner, unless constitutionally demanded; or
- (2) the desire to put the property to a more profitable use.

Bullet Points:

- Burden of Proof is on applicant, failure of an applicant to provide evidence will doom a variance request.



Bullet Points:

- In theory variances need not be permanent, if condition giving rise to variance is itself not permanent. In re Liverpool Township Zoning Board of Appeals.

Bullet Points:

- Can one seek a variance on one property because of a hardship to another. Mahoning Co. Court of Appeals says no, finding that the question of hardship relates only to the property for which the variance is sought.

Bullet Points:



- Variance once granted runs with the land, not with the property owner. Any conditions placed upon a variance also runs with land, i.e., time limit.

Bullet Points:

- Failure of local government to enforce a zoning ordinance does not entitle the applicant to a variance.

Bullet Points:

- Variance once granted cannot be changed unless a showing can be made that changed circumstances require it under the standards for granting variances.

Bullet Points:

- Power to grant variances is derived from the revised code, Township cannot restrict such in the zoning code.

Bullet Points:

- Courts have found requiring an owner to purchase land in order to build on it resulted in taking.

Bullet Points:

- Even if there is a hardship, if a variance would have a detrimental effect on the area or the comprehensive plan of the community it should not be granted.

Bullet Points:

- A self-imposed hardship is fatal to the issuance of a use variance, but is not necessarily fatal in the case of the area variance. In an area variance situation, all factors are to be balanced with the others.

Bullet Points:

- Where an individual acts in compliance with governmental decisions, Courts have found unnecessary hardship or practical difficulties.

- Champaign County found that where property owner converted from a carriage house to a multi-family use on the mistaken issuance of a permit, and later assurance that permit was valid (prior to conversion), approval of a variance on basis of hardship was appropriate.

CONDITIONAL USE

CONDITIONAL USE

- The Township Enabling Act authorizes a Board of Zoning Appeals to grant Conditional Zoning Certificates for specific uses that are provided for in the Zoning Code. (519.14) It theoretically provides the flexibility for a community to deal with use that might fit, but that may have serious impacts.

CONDITIONAL USE

- A conditionally permitted use is not, however, a use permitted as a matter of right.

CONDITIONAL USE

- To grant a conditional zoning certificate, the board must find that both general and specific requirements are met, along with any special conditions the board may impose for reasons of public health, safety and welfare.

CONDITIONAL USE

- Even though an applicant may comply with all the requirements listed in a zoning regulation for a conditional use, a permit may still be denied after the zoning authority considers the nature and condition of all adjacent uses and structures.

CONDITIONAL USE

- The board, however, does not have unlimited discretion in weighing impact and effect of a particular use on adjacent uses.
- The board in the exercise of its discretion may not act arbitrarily, unconstitutionally, unreasonably or illegally.

Remember

- a Board may not grant a Conditional Zoning Certificate independent of the Zoning Code.



OTHER
DECISIONS OF
INTEREST

OTHER DECISIONS OF INTEREST

- (1998) A hearing on a conditional use permit is an adjudicatory hearing, which although open to the public, is not a public hearing where the general public may speak. Witnesses at a hearing must be sworn and subject to cross-examination, and must testify about relevant facts, not their subjective and unsubstantiated opinions: Heiney v. Sylvania Twp. Bd. of Zoning Appeals, 126 OA pp3d, 710 NE2d 725.

OTHER DECISIONS OF INTEREST

- (1996) There is no public hearing upon an application for a variance or a conditional use permit but, instead, an adjudication hearing open to the public. The ploy of swearing in members of the public does not alter the fact that the bulk of these witnesses are merely offering their subjective and speculative comments and unsubstantiated opinions: Adelman Real Estate Co. v. Gabanic, 109 OApp3d 689, 672 Ned 1087.

OTHER DECISIONS OF INTEREST

- (1996) When a property has two primary uses, one permitted and one conditional, a board of zoning appeals may not, without authority in an ordinance, place a condition on the permitted use merely because it exists in conjunction with a conditional use: BP Oil Co. v. Dayton Bd. of Zoning Appeals, 109 Oapp3d 423, 672 NE2d 256.

OTHER DECISIONS OF INTEREST

- (1996) A conditional use provision authorizing “local retail business,” but restricting the number of employees and the floor size of a business, was not unconstitutional: Loreto Dev. Co. v. Chardon, 119 OApp3d 524, 695 NE2d 1151

OTHER DECISIONS OF INTEREST

- Cannot require as condition of permit consent in advance to search of premises by zoning inspector, unlimited access to the property could easily be used to harass and obstruct the lawful operation of the business. Baughman v. Board of Zoning Appeals for Harrison Township

OTHER DECISIONS OF INTEREST

- Board cannot rescind its decision granting a Conditional Use Permit when period for appeal of Zoning Board's decision to Court has expired. Holiday Homes, Inc. v. Butler County Bd. of Zoning Appeals, 520 N.E. 2d GVS, 35 Ohio App.3d161

ORC ANN. 519.14
(ANDERSON 2002)

**Powers of Township
Board of Zoning
Appeals**

ORC ANN. 519.14

- (A)
- Hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sections 519.02 to 519.25 of the Revised Code, or of any resolution adopted pursuant thereto;

ORC ANN. 519.14

- (B)
- Authorize, upon appeal, in specific cases, such variance from the terms of the zoning resolution as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the resolution will result in unnecessary hardship, and so that the spirit of the resolution shall be observed and substantial justice done;

ORC ANN. 519.14

- (C)
- Grant conditional zoning certificates for the use of land, buildings, or other structures if such certificates for specific uses are provided for in the zoning resolution.

ORC ANN. 519.14

- (D)
- Revoke an authorized variance or conditional zoning certificate granted for the extraction of minerals, if any condition of the variance or certificate is violated.

ORC ANN. 519.14

- The Board shall notify the holder of the variance or certificate by certified mail of its intent to revoke the variance or certificate under division (D) of this section and of his right to a hearing before the Board, within thirty days of the mailing of the notice, if he so requests.

ORC ANN. 519.14

- If the holder requests a hearing, the Board shall set a time and place for the hearing, and notify the holder. At the hearing, the holder may appear in person, by his attorney or other representative, or he may present his position in writing. He may present evidence and examine witnesses appearing for or against him.

ORC ANN. 519.14

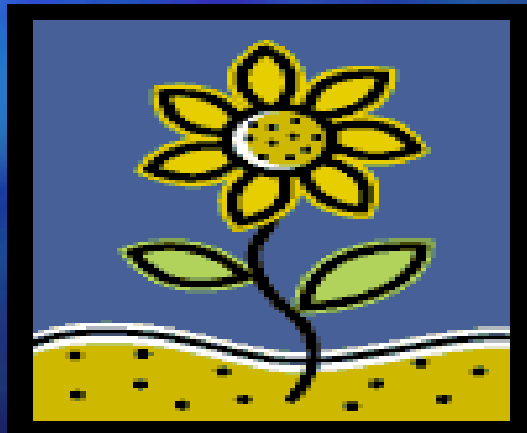
- If no hearing is requested, the Board may revoke the variance or certificate without a hearing. The authority to revoke a variance or certificate is in addition to any other means of zoning enforcement provided by law.

ORC ANN. 519.14

- In exercising the above-mentioned powers, such board may, in conformity with such sections, reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision, or determination as ought to be made, and to that end has all powers of the officer from whom the appeal is taken.

CHANGING TIMES

- The law is an evolving, growing, and changing body.



Question

- Is a Board's decision final no later than the signing of the minutes?

Answer

- **MAYBE**
- Geisert v. City of Willoughby Zoning Board, 1993 WL 407240 (Ohio App. 11th District).
- Not final until they make of finding of fact and conclusions of law.

Question



- Are all proceedings of the Board of Zoning Appeals subject to the Sunshine Law?

Answer

■ No.

Question

- Does a conditional permit run with land?



Answer

■ SOMETIMES

- That it is an improper condition to provide that a Conditional Permit terminate if the operation is sold. Court felt that a Conditional Controls land use and as long as operator meets conditions previously improved anyone should be able to utilize. Baughman v. Board of Zoning Appeals for Harrison Township (Ohio App. 3 District) 2002, Ohio 3931.

- It has been held that a conditional use may be abandoned by voluntarily ceasing the approved conditional use. Health Management, Inc. v. Union Township Board of Zoning Appeals, 118 Ohio App. 3d 281, 692 N.E. 2d 667 (Butler, 1997).

Question:



- How do you harmonize one and two?

Question



- Can a court remand a case back to a Board of Appeals for further proceedings?

Answer

- Appears so.