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Memorandum

To: Board of Zoning Appeals
From: Brian Running
Re: Standards for Zoning Variances

For the benefit of all Board members, especially new ones, here's a quick refresher on the standards for granting variances.

A variance is permission to deviate from the strict terms of the zoning code. It is permission not to have to follow a law that everyone else has to follow, so variances can only be granted when strict legal criteria are met.

There are two types of variances:

- **Use**
- **Area**, also referred to as dimensional

A **use** variance is permission **to conduct a use on the property that's otherwise not allowed**. For instance, to conduct a commercial business in an area zoned residential.

An **area** variance is permission **to locate a legal use in a location that's otherwise not allowed**. For instance, to build an addition within a yard setback.

Variances **are supposed to be difficult to obtain**. They are not to be granted solely on feelings of sympathy. Variances can **only** be granted when the applicant shows:

- An unnecessary **hardship**
- A **unique property condition**
- Granting a variance would **not be harmful to the public interest**

The standards for proving a hardship for use and area variances are different.

The criteria for granting a use variance are stricter, because use variances directly contradict the essential purpose of zoning.

- To show hardship sufficient for a **use** variance, the applicant has to show that without a use variance, **the property will have no reasonable use at all**.

- Not just the owner’s desired use – no reasonable use at all. Use restrictions are the very essence of zoning, and they can’t be ignored for reasons of desire or convenience.
- To show hardship sufficient for an **area** variance, the applicant has to show that **compliance with the zoning code will unreasonably prevent the owner from using the property for a permitted use, or unnecessarily burden the use.**
 - In the usual case, “unreasonably prevent” and “unnecessarily burden” mean “not able to do what everyone else in the neighborhood can do.”
- In either case, the hardship must be **caused by a condition of the property itself**, and not just be the owner’s personal wishes or desires.
 - A condition caused by the owner cannot constitute a hardship. A hardship **cannot be self-imposed.**
 - **Economic loss or financial considerations do not constitute a hardship.**

The Board can’t nullify the purpose of the zoning ordinance, in other words, the Board **can’t grant a variance just because it disagrees with the zoning ordinance.** That would be legislating by variance, and only the Common Council can legislate. The correct solution would be to bring the need for an ordinance amendment to the Common Council’s attention. The law must be followed unless the strict criteria are met.

Remember that equal application of the law to all property owners ensures the greatest fairness for everyone. There has to be a very special reason for allowing someone not to have to comply with a law that everyone else has to.

Whenever the Board has a variance request, it **must state the reasons for its decision, either to grant or deny, on the record.** Your findings should recite the standards for a variance and the reasons why the applicant either did or didn’t meet the standards. You should use the Variance Decision Form that’s attached – please review it carefully.

Please also read the attached FAQ from the League of Wisconsin Municipalities regarding variances. Further very useful resources for the Board can be found at:

<https://fyi.extension.wisc.edu/landusetraining/zoning-board-training/>

And a comprehensive Board handbook can be found here:

https://fyi.extension.wisc.edu/landusetraining/files/2020/01/Zoning_Board_Handbook-condensed.pdf

From the League of Wisconsin Municipalities, Zoning FAQ 3:

What are the primary standards for obtaining a zoning variance?

A city or village zoning board of appeals abuses its power if it routinely grants zoning variance requests. A zoning board may grant a zoning variance request only in limited circumstances and only when the applicant provides evidence that proves they have met all of the legal criteria for a requested variance.

There are three main criteria that a variance applicant must satisfy: unnecessary hardship, a unique property condition and no harm to the public interest.

The Wisconsin Supreme Court recognizes two types of zoning variances that may be granted by a zoning board: area variances and use variances. *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, 269 Wis.2d 549, 676 N.W.2d 401. However, these terms are not defined by state law. Consequently, this is a critical area for local action to define the terms in the local zoning code because case law establishes separate unnecessary hardship tests for use and area variances.

A use variance applicant must show that they will have no reasonable use of the subject property without the requested variance. *Ziervogel*, 269 Wis.2d at para. 31. This is an extremely difficult burden to satisfy and rightly so. A use variance is effectively a rezoning of property to allow a land use that the governing body of a municipality already determined is incompatible with other uses in the zoning district and risks great changes in neighborhood character.

An area variance applicant must show that “compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Snyder v. Waukesha County Bd. of Adjustment*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976). Thus, it is not enough that an area variance applicant show that a zoning regulation prevents or burdens their planned activity. They must show by competent evidence that the regulation **unreasonably** prevents or unnecessarily burdens the activity.

All zoning variance applicants must also show that the alleged unnecessary hardship is due to a unique property condition. *Snyder*, 74 Wis. 2d at 479. This phrase is not defined by statute but court decisions establish that it means a special physical feature of the property (soil conditions, steep slope, wetland, etc.) that is not shared by nearby land. *See Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 258, 469 N.W.2d 831 (1991). More importantly, if a variance applicant fails to prove the existence of a unique property condition and a connection between the condition and the hardship, even if the hardship is great, a zoning board has no power to grant the requested variance.

Finally, all variance applicants must show that the requested variance will not be contrary to the public interest. *Arndorfer*, 162 Wis. 2d at 256. This criteria requires the zoning board to consider the purposes of the ordinance at issue and determine “whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied.” *Ziervogel*, 269 Wis.2d at para. 34.

City of Waukesha Board of Zoning Appeals
Variance Decision Form

The Board may only grant a variance if the applicant provides evidence that they meet all three legal standards below.

1. Unnecessary hardship (check area variance or use variance)

- For an area variance**, unnecessary hardship exists when, ordinance standards that are strictly applied would unreasonably prevent a permitted use of a property, or render conformity with such standards unnecessarily burdensome. Circumstances of an applicant, such as a growing family or desire for a larger garage are not legitimate factors in deciding variances. A personal inconvenience is not sufficient to meet the unnecessary hardship standard.
- For a use variance**, unnecessary hardship exists only if there is no reasonable use of the property without a variance.

The literal enforcement of the ordinance standards **(will) (will not)** result in an unnecessary hardship because...

2. The hardship must be due to unique property limitations such as steep slopes or wetlands that prevent compliance with the ordinance, and that are not shared by nearby properties. Further, the entire property must be considered, if a code-compliant location(s) exists, a hardship due to unique property limitations **does not exist**.

The hardship **(is) (is not)** due to unique conditions of the property because...

3. A variance may not be granted which results in harm to the public interest. The public interest is described in the purpose section of the zoning code:

Purpose. The purpose of this Chapter is to:

Protect the public health, safety, and welfare,

Promote the quiet enjoyment of property and prevent public and private nuisances,

Implement the City's Comprehensive Plan, consistent with Wis. Stat. §66.1001,

Provide adequate light and air; secure safety from fire, panic, and other dangers,

Promote safe and efficient access for all users of the transportation system,

Encourage efficiency and economy in the use and development of land,

Facilitate adequate provisions for transportation, water, sewage, schools, parks, and other public requirements, and

Allow for the development of residential, commercial, public and institutions, and industrial areas which function in an orderly and harmonious manner, both internally and in relation to each other, and which promote the convenience and prosperity of the public and institutions.

The variance **(will) (will not)** harm the public interest because...

Order and Determination: The Board member shall vote on the application and direct the zoning department accordingly. The Board member must refer to specific evidence when rendering a decision.

The application **(does) (does not)** meet all three of the above tests and therefore the variance should be **(granted) (denied)**.

If the applicant has met all three tests, the Board may apply conditions to the variance to ensure the public interests are not harmed.

Conditions that apply to this variance:

Board Member Signature

_____ Date _____

Guiding Principles to Grant a Variance

There is ample case law concerning variances that provide the following guiding principles that a Board should rely on in their decision whether to grant a variance.

Parcel-as-a-whole. The entire parcel, not just a portion of a parcel, must be considered when applying the unnecessary hardship test. *State v. Winnebago County*, 196 Wis. 2d 836, 844-45 n.8, 540 N.W.2d 6 (Ct. app. 1995)

Self-imposed hardship. An applicant may not claim hardship because of conditions created by his/her actions. *State ex rel. Markdale Corp. v. Bd. of Appeals of Milwaukee*, 27 Wis. 2d 468, 479, 247 N.W.2d 98 (1976)

Circumstances of applicant. Specific circumstances of the applicant, such as a growing family or desire for a larger garage are not a factor in deciding variances. *Snyder v. Waukesha County Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 478-79, 247 N.W.2d 98 (1976)

Financial hardship. Economic loss or financial hardship do not justify a variance. The test is not whether a variance would maximize economic value of a property or be the least expensive option for the applicant. *State v. Winnebago County*, 196 Wis. 2d 836, 844-45, 540 N.W.2d 6 (Ct. App. 1995); *State v. Ozaukee County Bd. of Adjustment*, 152 Wis. 2d 552, 563, 449 N.W.2d 47 (Ct. App. 1989)

Uniqueness of the property. Where the hardship imposed upon an applicant's property is no greater than that suffered by nearby lands, the Board may not grant a variance to relieve it. To grant such relief would be unfair to owners who remain subject to the general restrictions of the zoning ordinance, and it would endanger the community plan by piecemeal exemption. *Arndorfer v. Sauk County Bd. Of Adjustment*, 162 Wis. 2d 246, 469 N.W.2d 831 (1991).

Nearby violations. Nearby ordinance violations, even if similar to the requested variance, do not provide grounds for granting a variance. *Von Elm v. Bd. of Appeals of Hempstead*, 258 A.D. 989, 17 N.Y.S.2d 548 (N.Y. App. Dev. 1940)

Previous variance requests. Previously granted or denied variances, even if similar to the requested variance, cannot be used in deciding a variance. The decision must be based on the facts of the individual case before the BOA.

Objections from neighbors. The lack of objections from neighbors does not provide a basis for granting a variance. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis. 2d 246, 254, 469 N.W.2d 831 (1991)

Variance to meet code. Variances to allow a structure to be brought into compliance with building code requirements have been upheld by the courts. *Thalhofer v. Patri*, 240 Wis. 404, 3 N.W.2d 761 (1942); *State v. Kenosha County Bd. of Adjustment*, 218 Wis. 2d 396, 419-420, 577 N.W.2d 813 (1998)