

When facing zoning board of appeals, know what the process entails

By Jeffrey C. Hicks

A zoning board of appeals is charged with several tasks. However, the majority of a zoning board's time is spent hearing and deciding requests from applicants seeking permission to violate portions of the local zoning ordinance.

This "permission slip" of sorts is known as a variance. While requests for variances are not the only matters that fall within the purview of a zoning board, they certainly monopolize a substantial portion of most zoning boards of appeals' time.

There are two types of zoning variances that can be granted by a zoning board of appeals — use variances and non-use/dimensional variances, and in this article, I will explain the latter

These variances typically permit an applicant's construction, structural change, or alteration of a building or structure to violate an ordinance's dimensional requirements, such as setback, height, or square footage.

Most attempts to secure a variance begin with the filing of some form of application with the local planning department. The applicant also is usually required to explain the nature of their request and may be asked to provide a scaled drawing of the site, including the location of all structures (existing and proposed), surrounding streets, lot lines, and any unusual or unique features of the property. The application and any supporting documents are then submitted with the required application or processing fee.

Drafting the letter

Perhaps the most important supporting document that should accompany a client's application is a detailed letter addressing each of the zoning ordinance's requirements for obtaining the variance. This letter should serve as a guide for the presentation at the public hearing, and should begin by explaining why the client's current situation necessitates a variance.

Offering direct quotes from the ordinance, and then subsequently explaining how the client's situation satisfies each of the separate requirements will help to keep the zoning board members on track and focused on the issues.

In preparing the letter of support, it is important to remember that few, if any, members of the zoning board of appeals will have a legal background, and therefore may lack even a basic understanding of Michigan real property law outside of their experience on the board. Accordingly, the letter should be drafted with an eye toward assisting and educating the board members about the specifics of the client's project and/or property.

Moreover, it is wise to avoid assuming that the board members will visit the applicant's property prior to the public hearing. Board members many times only receive their board materials a day or two in advance of the

public hearing. Recognizing as much, it is often wise to include photographs with the variance application. Again the main purpose of the letter of support is to discuss the standards that apply, and explain how the client's situation satisfies the ordinance's requirements.

While the requirements to obtain a variance may differ slightly among each municipality, in addition to other more basic requirements, an applicant seeking a dimensional variance must generally establish a practical difficulty which prevents carrying out the strict letter of the ordinance. The Michigan Court of Appeals in *National Boatland, Inc v Farmington Hills Zoning Bd of Appeals* set forth three factors used in determining what a "practical difficulty" is:

Whether compliance with the strict letter of the restrictions governing area, set backs, 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;

Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners; and

Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Again, it is important that a supporting letter should clearly detail the specifics of how the applicant satisfies the practical difficulty requirement.

Public notice

After the application, fee, and supporting documents have been received, surrounding property owners will be notified, a public hearing will be scheduled, and a notice of the meeting will be published. For most municipalities with a planning department staff, a staff report will be prepared for the zoning board members.

Attorneys representing clients before the zoning board should obtain a copy of this report prior to the public hearing. In most instances the report will synthesize the applicants request, describe the surrounding properties' zoning classification and use, identify particular issues of concern, and provide details on how the request may be similar to previous variance requests heard by the board.

In some instances, the report may also provide the staff member's recommendation for approval or denial. Obtaining this report prior to the public hearing will enable an attorney to better anticipate questions or concerns that he or she may face at the hearing. If the report is obtained early enough, it may provide counsel with enough time to address any questions or concerns in a second letter prior to the hearing.

Because a client's neighbors will be notified of the pending variance request, it is often advisable for an applicant to approach his or her neighbors early in the process. This early contact will provide the applicant an opportunity to explain the variance request in his or her own words and hopefully assuage any neighbor concerns.

Often times, a visit to the neighbors will pay dividends in the form of them appearing at the hearing or submitting a letter in support of the requested variance. Zoning board members commonly inquire about the reaction to the variance request by surrounding property owners.

The usual order of business at the public hearing includes a call to order, roll call, agenda adjustment, and the approval of any previous meeting minutes before any new business is heard. At the hearing, an attorney's presentation should generally follow the order set forth in the supporting letter.

As with other boards or courts, questions may come at the conclusion of a presentation, as an interruption to a presentation, or at the moment the attorney takes the floor. Additionally, some zoning boards of appeals may even place a time limit on presentations. That time limit may even include the portion of time that the attorney

spends answering board member questions. It is in that instance where a thorough and persuasive letter becomes even more critical.

After completing his or her presentation, the board may inquire of the attorney, applicant, staff member, or other members of the zoning board. Additionally, members of the audience will be asked if they would like to offer comments to the board on the pending application. An applicant's previous contact with his or her neighbors will hopefully avoid any surprises at that stage of the hearing.

Rendering a decision

After affording those present in the audience the opportunity to speak, the board will usually move to close the public portion of the hearing. Generally, it is at that portion of the meeting where board members begin their open deliberations. In most instances, a decision will be rendered immediately. However, for a variety of reasons, the board may elect to table or adjourn the request until the next meeting. A concurring vote of the majority of the total number of board members is required to approve the variance request.

It is important to remember that the majority required is the majority of the board members comprising the entire zoning board of appeals, not the majority of those present at the hearing. Accordingly, in a municipality where a quorum only requires four members of a seven-member board, an attorney may be faced with only four board members deciding a client's application. Naturally, this leaves no room for a single "no" vote, as a majority requires the approval of all four members present.

Accordingly, if it appears from the tenor of the board members' questions or discussions that not all of the board members present are in agreement, it may be wise to suggest or request that the board table a client's request until a subsequent meeting where more or all of the board members may be present.

If an attorney is successful in obtaining the variance, the applicant will be able to proceed with his or her plans which would have otherwise been in violation of the zoning ordinance. The grant of a variance does not rezone the property. Rather, it simply provides the applicant with the ability to do something not otherwise permitted under the ordinance.

Once granted, a variance typically runs with the land (*Paragon Props Co v City of Novi*). Conversely, if an applicant's variance is denied, that decision is final (MCL 125.3605). If the applicant desires to challenge the decision on appeal, he or she must appeal to the circuit court of the county in which the property is located (MCL 125.3606).

It is important to bear in mind that I've provided a general overview of the process for obtaining a non-use variance. The zoning ordinance of a specific unit of local government may alter the process slightly. As always, it is prudent to inquire of the local zoning ordinance requirements prior to filing an application for a zoning variance.

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