

NE Ohio Planning & Zoning Workshop
June 24, 2011

BZA: Powers and Duties

- Variance and Other Types of Applications
- Consequences of BZA Decisions and What Happens Next
- Pitfalls & Weaknesses of Zoning Provisions

R. Todd Hunt, Partner
(216) 928-2935
Facsimile: (216) 916-2372
Email: rhunt@walterhav.com

Walter & Haverfield LLP
attorneys at law

A. Jurisdiction



1. Role of Building Inspector or Code Enforcement Officer

- a. Judge, Jury, Police Officer, Resource Person
- b. County Zoning Inspector (O.R.C. 303.16)
- c. Township Zoning Inspector (O.R.C. 519.16)



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2. Three types of applications to the BZA

- a. Variances
- b. Appeals to Chief Zoning Official's Code Interpretations
- c. Special Permits/Conditional Uses/Adjustments to Nonconforming Uses/etc.

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3. Difference between Variances and Prior Nonconforming Uses

- a. A word about *res judicata*



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**B. “Use” vs. “Area/Size”
Variances**

1. “Use” Variances (“Unnecessary Hardship” Standard)

- Standards for Determining
 - Stems from a Unique Condition of Property
 - Hardship not created by Actions of Applicant
 - Not adversely Affect Adjacent Owners

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- Not adversely Affect Public Health, Safety or General Welfare
- Consistent with General Spirit and Intent of Code
- Minimum Relief to Applicant
- No Other Economically Viable Use Permitted



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2. “Area/Size” Variances (“Practical Difficulties” per *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83)

- ❑ **Factors to Determine**
 - **Yield a Reasonable Return or Any Beneficial Use Without Variance**
 - **Variance is Substantial**



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- **Neighborhood Character Substantially Altered/Substantial Detriment to Adjoining Properties**
- **Adversely Affect Delivery of Governmental Services**
- **Owner Purchase Property with Knowledge of Zoning Restrictions**
- **Other method is Feasible**

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- **Spirit and Intent of Code Observed/Substantial Justice Done by Granting Variance**

- 3. A Word About “Unnecessary Hardship” vs. “Practical Difficulties” for Township BZA’s.**
- 4. Reasonable Conditions may be Placed on a Variance.**

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Board of Zoning Appeals
Area/Use Variance Worksheet

Application for property located at: _____

Applicant: _____

After reviewing the application, the hearing of evidence under oath, reviewing all documentary submissions of interested parties, and by taking into consideration the personal knowledge of the property in question, the Board of Zoning Appeals finds and concludes:

1. The property in question [will/will not] yield a reasonable return and there [is/are] [is/are not] a beneficial use of the property without the variance because _____
2. The variance is [substantial/substantial] because _____
3. The essential character of the neighborhood [would/would not] be substantially altered or adjoining properties [would/would not] suffer a substantial detriment as a result of the variance because _____
4. The variance [would/would not] adversely affect the delivery of governmental services, (e.g. water, sewer, garbage) _____
5. The applicant purchased the property [with/without] knowledge of the zoning restriction _____
6. The applicant's proffered facility [is/is not] to be resolved through some method other than a variance _____
7. The spirit and intent behind the zoning requirement [would/would not] be observed and substantial justice [is/is not] done in granting the variance because _____

For all of the above reasons, I agree that the variance be [granted/denied] [granted] with the following conditions: _____

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C. Rehearings by BZA & Judicial Review of Decision of BZA

1. **30 Days to Appeal Final Decision to Court**
2. **Notice of Appeal & Praecipe Filed with Administrative Board in 30 Days**
3. **No Jurisdiction for Board to Rehear Decision After 30 Day Appeal Time or Appeal to Court**

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4. **Stay of Construction Not Obtained – Challenge to Variance Rendered Moot if Substantial Construction**
5. **Ohio Rev. Code § 2506.03 Standards (one must apply)**
 - a. **Transcript does Not Report All Evidence Admitted or Proffered**

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b. Appellant Not Permitted to Appear and be Heard and:

- i. Present his/her Position**
- ii. Offer & Examine Witnesses & Present Evidence in Support**
- iii. Cross-Examine Opposing Witnesses**
- iv. Offer Evidence to Refute Opposition**

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v. Proffer Evidence into Record

- c. Testimony Not Given Under Oath**
- d. Appellant Unable to Present (Necessary) Evidence by Lack of Subpoena Power**
- e. Board Failed to File Conclusions of Fact Supporting Final Order**

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7. Neighboring Property Owners May Have Standing to Appeal Variance

- a. Property directly affected by variance (adjoining property only?)
- b. "Appeared" at Board hearing
- c. Notice of Board hearing, if required



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- 8. **Lack of Standing to Appeal – Nonprofit Corporation and Unincorporated Associations**
- 9. **Charter Municipality Standing**
- 10. **Common Pleas Court Standard of Review:**
“preponderance of substantial, reliable and probative evidence on the whole record”



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- 11. **Constitutional Claims Raised by Property Owner = Court Trial (State and Federal Courts)**
- 12. **Court has Authority to Remand a Decision Back to Local Board based on Procedural Irregularities or Lack of Transcript.**

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**D. Ohio Sunshine Laws
 Applicability**

Sunshine Law May Not Always be Applicable to Quasi-Judicial Deliberations of BZA



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E. Typical Zoning Code/Resolution Pitfalls and Weaknesses

1. Substantive Problems

a. Sign Regulations (First Amendment Implications)

- i. Not Content Neutral
 - heightened scrutiny by courts



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- ii. Preferences given to commercial signs over political/opinion-related signs
- iii. Durational limits on posting of political/opinion-related signs
- iv. Inadequate levels of political/opinion-related signage not permitted on private properties



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- v. Requiring a permit and/or fee for non-commercial, political/opinion-related signs
- vi. Preferences to local government signage over private party signage
- vii. Factual basis for sign regulations – size, height, number, setbacks & other locational requirements



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b. Variance Standards/Factors

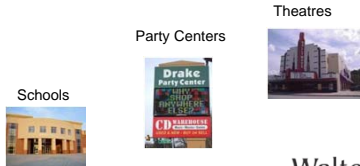
Many Codes/resolutions fail to make distinction between "use" variances and variances for area and size regulations

c. Zoning Codes/Resolutions in Conflict with Comprehensive/Master Plan



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d. Not treating Religious Land Uses the same as other types of Places of Assembly



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2. Procedural Problems

a. Failure of Code/Resolution to Specify what Constitutes a Final Decision of Local Board or Commission in an Administrative Hearing Matter

b. Failure of Board or Commission to Support Decision with Conclusions of Fact

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- c. Failure to Define who has Standing to Oppose the Granting of a Variance or Other Land Use Application for Purposes of Internal Appeals to a Higher Board or Entity within the Local Government or for Standing to Appeal or to be a Party in Court.**

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- d. Failure to Set Forth in your Code/Resolution a Process for Remedying Possible "Takings" Claims**
- e. Time Limitations on Conditional Uses**

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