

NE Ohio Planning & Zoning Workshop
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**BZA: Powers and Duties-Variance Authority
and Those Other Pesky Applications**

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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
 Article 16a, Chapter 153
 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 the considerations the personal knowledge of the property in question, the Board of Zoning Appeals finds and concludes:

1. The project is in conformance with the zoning ordinance and does not constitute a substantial use of the property without the variance because _____
2. The variance is substantial/trivial _____
3. The essential character of the neighborhood is not affected by the substantially altered or adjoining property _____
4. The variance would not adversely affect the delivery of governmental services, for example, police, fire, or garbage _____
5. The applicant purchased the property with knowledge of the zoning ordinance _____
6. The applicant's professional liability is not increased by the variance through some method other than a variance _____
7. The spirit and intent behind the zoning ordinance is not affected and substantial justice is done by granting the variance because _____

For all of the above reasons, I move that the variance be 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. **Former *Supersedeas* Bond Requirement Eliminated**
5. **Stay of Construction Not Obtained – Challenge to Variance Rendered Moot**
6. **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 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**
- 12. **Court has Authority to Remand a Variance Case Back to Local Board based on Procedural Irregularities or Lack of Transcript.**

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D. Alternatives to Variance Requests

- 1. **Zoning Changes/Amendments (Legislative Remedy)**
- 2. **Declaratory Judgment Actions**



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E. Ohio Sunshine Laws Applicability

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



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F. 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




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





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



Schools



Party Centers



Theatres

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 Remediating Possible "Takings" Claims**
- e. **Time Limitations on Conditional Uses**

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