# Variances

## CHAPTER 7

**Nature of the decision**

Sometimes a strict reading of the zoning ordinance creates an unusual hardship on a specific property owner. If the effect is significant and unnecessarily unfair, state statutes allow for granting a variance—a special waiver of some rules—under certain circumstances. If a variance is requested, the property owner or applicant is the one who initiates the application and bears the burden of proving that he is entitled to the variance.

A variance is a "waiver or modification of the requirements of a land use ordinance."[1] Variances can be granted for setbacks from streets, environmentally sensitive areas and ridges, and other minor adjustments that may be needed to allow property to be used in a manner similar to its neighbors. A variance cannot change the uses allowed in a zone but can address the minor details about how a permitted use can be configured on a lot in a zone where it is already legally allowed.[2]

While this process is common, it is very limited in scope.

The local ordinance will provide for the process of requesting a variance. Traditionally, variances have been considered by the local board of adjustment. This is no longer standard operating procedure, and a local ordinance can designate some other land use authority to hear requests for variances and other appeals, including an individual hearing officer.[3]

**Who makes the decision?**

Variances to the zoning ordinance can only be granted by the land use appeal authority designated in the local ordinances.[4]

**What notice is required?**

Only the 24-hour posted notice required under the Open and Public Meetings Act[5] would be necessary unless local ordinance provides otherwise. Check the local

ordinance. If the land use appeal authority hearing variances under a local ordinance is a single individual, no notice is required by state law since an individual is not a "public body" as defined there.[6]

**What public input is required?**

Only that required by local ordinance. There is no state requirement for public hearings by an appeal authority. The only requirement is that its meetings be public meetings if more than one person is acting as the appeal authority.[7]

**What are the issues?**

The burden of justifying the request for a variance rests on the property owner seeking it.[8]

The variance can only be granted if the appeal authority finds that all of the following standards are met:

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances.
2. There are special circumstances attached to the property that do not generally apply to other properties in the same zone.
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest.
5. The spirit of the zoning ordinance is observed and substantial justice done.[9]

These standards may be supplemented by additional standards set in local ordinance. It is important to note that the decision-maker must make specific findings in the record that each standard has been met or the approval of a variance is illegal.[10]

Conditions and additional requirements can be imposed on variance approvals.[11] For a more thorough discussion of what conditions can be imposed legally, see "Burdens on Development" in Chapter 8.

**How is the decision appealed?**

The decision by the land use appeal authority to deny or approve a variance is normally appealed only to the district court.[12] If a constitutional taking of private property is alleged, the property owner also can request arbitration by the Property Rights Ombudsman. See Chapter 13.

**Tips for participants**

There is hardly anything that local land use officials do that involves less discretion than the variance process, but the strict guidelines related to variances are routinely ignored. It is so tempting to listen to the concerns of neighbors or the compelling story of a property owner and to make the decision on the basis of emotion. Some appeals authorities considering variances never enter the findings required in the record. They make seat-of-the-pants decisions based on preferences, not fact.

Before embarking on the variance process, be certain that you need one. The variance is used to relieve landowners from the harsh application of the ordinance, but the first question is whether the ordinance actually prohibits the desired land use. See the discussion in Chapter 15 on interpreting the zoning ordinances. Perhaps an appeal for a different interpretation of the ordinance, which is a much easier case to make, is a better option than requesting a variance. If the ordinance does not clearly prohibit the action you want to take, appeal that before you get caught in the "variance box."

If a variance is needed, however, then the process is pretty straight forward.

## When is a Variance Legal?

### Case Law — Wells v. Salt Lake City Board of Adjustment

An example involves a business known as the Market Street Broiler in Salt Lake City. This is one of the flagship establishments of Gastronomy, Inc., the highly successful food service business which operates a number of restaurants in Salt Lake City. They also have been very active in historic preservation and saved some local landmarks.

Gastronomy collided with the historic district ordinance on a restaurant they once owned at 1300 East, however, when it was noted that its restaurant in a historic fire station did not comply with the local regulations. Since the building was located within a historic district, the ordinance provided (among other restrictions) that it could only be used for commercial purposes if a 10-foot, landscaped buffer area existed in the rear yard of the building. Over time, both the patronage and the volume of trash generated soared. As the trash piled up, so did the complaints. A remodeling project resulted in the dumpsters being relocated to an area within the 10-foot buffer area and the neighbors objected.

As a result, Gastronomy sought to have its garbage solution ratified by the granting of a variance allowing them to build a two-dumpster trash enclosure in the buffer strip. The Salt Lake Board of Adjustment must have been impressed by the general proposal and granted the variance, stating "the neighborhood would be better served by addressing the garbage issue and the only available space should be used as a buffer after both dumpsters are enclosed." The board made no other express findings in the record.[37]

*This trash enclosure behind the former Market Street Broiler on 1300 East in Salt Lake City was the focus of a variance battle involving the Salt Lake Board of Adjustment.*

Not willing to put up with that decision, the neighbors appealed to the district court. The trial court held that the variance was properly granted, but the Court of Appeals reversed and held that the single sentence justifying the issuance of the variance did not even come close to the findings necessary to justify a variance.

The court noted that the board's actions would generally be entitled to substantial deference if the board had acted within the boundaries established by statute, but then went on to hold that the board gave them nothing to support its decision.

According to the court, if the board wanted its decisions upheld, it had no choice but to provide the required findings. The board could not grant variances except for the reasons stated in the statute. The court refused to "define" the findings or intentions of the board since it said there was no evidence in the record that the board had individually considered each of the statutory requirements. Even

*There is little room between the historic fire station that housed the Market Street Broiler and the north property line. Lot restraints in historic neighborhoods can sometimes justify variances.*

if such consideration had been made, however, the board's decision would have had to have been supported by substantial evidence in the record.[13]

If you drove up the alley behind the Market Street Broiler a few years later, you would have seen the offending dumpsters behind the obscuring chain link enclosure. While there may be some organic activity in the dumpsters, this is clearly not "landscaping" as required by the local code. How can this be if the court found the variance was given in a manner that was arbitrary, capricious, and illegal?

Answer? Gastronomy asked for a variance a second time, and this time the board did its job and placed the required findings, backed up by substantial evidence, in the record. Thus supporting, the conclusion that the variance was legal and would have survived appeal. The trash enclosure was installed within the buffer area.

This convoluted odyssey points out the strictness of the process. The board could have saved everyone a lot of grief by making the proper findings or denying the variance in the first place. Consider the issues, specifically:

**1. Literal enforcement would cause a hardship that is unreasonable and unnecessary.**

To support a variance, the board could have noted that the options were to put the trash in front of the restaurant (to the east) or on the south side which is also public. This factual situation could have been noted and a finding entered in the record that the best location for trash in the historic district would be on the least significant historic façade. The board could have found that the west facade was the least historic and that the ordinance prohibits placing the trash container there absenting a variance. Perhaps a historical consultant could have noted on record that the east and south façades were more historic than the west façade, in the rear. The ordinance itself is specifically geared to preserving historic values, so the facts related to what is historic and what is not would have been very relevant.

The testimony of the applicant could have noted that the presence of trash in the front of a fine dining establishment would be detrimental to the business. Certainly, the principals of Gastronomy, Inc., would be credible experts on such

matters and statements to that effect could have been entered on the record. It would be a hardship to require that trash be kept in the front or side yard of an historic building.

**2. Special circumstances apply to this property.**

Supporting a variance as uniquely necessary should have been some- what easy when dealing with a specific property in a historic district, especially when it is the only old fire station. Each historic building is unique by definition. All that would have been required to provide the required evidence in response to this standard would have been to note again the building is historically significant, its location on the property is unique, and the city is blessed by its preservation. Any commercial use would generate trash and it would have to be stacked somewhere. It cannot be placed on the north because the lot line is too close. If the dumpsters are not placed on the west, they must be placed on the historic south or east façades. Since there is no room for both landscaping and trash bins in the rear, those special circumstances may support a decision that the landscaping requirement must be varied.

But denying the variance also could have been justified. The board could have found the circumstances are not unique enough, and the trash could have been kept in an enclosure toward the back of the south façade, albeit with a loss of parking. It would have been a matter of discretion, and their decision could have been supported either way.

**3. Variance essential to a substantial property right.**

To support the variance, the board could have noted that an efficient parking layout, the ability to avoid having trash in the front yard, and the opportunity to enjoy an expanding business if you create it were substantial property rights. The property owner could have produced testimony from the State Historical Society that if the trash enclosure were located on the south façade, perhaps the property would not have been eligible for historic tax credits, or it could have lost its listing on the National Register of Historic Places.

A denial of the variance under this standard could have been supported if the board had determined (1) the parking configuration proposed was not the only

acceptable arrangement, (2) the trash did not have to be exposed even if placed on the south side of the building, or (3) the business owners could have seen the obvious restraints on their expansion when they started a business here and, thus, should not expect to change the rules now. The board also could have determined that parking, trash placement, and business growth were not substantial property rights.

**4. Impact on the general plan and public interest.**

Supporting approval gets even easier under this standard. If the goal of the general plan is to promote business, save cultural amenities, and keep trash out of front yards, then a variance would seem to be in the public interest. The board would only need to note factual findings based on the applicant's testimony that the variance would enhance its business, keep it cleaner, and help it continue to preserve the fire station.

A denial is not out of the question, however. If the board was not persuaded, it could inquire of the applicant (1) whether the business would fail if the variance were denied, (2) if the front and rear are in fact the only places to keep the trash, and (3) whether the owners intend to demolish the building if the board does not grant the variance. It could enter the facts so determined in the record and note that the routine granting of variances runs counter to the general plan and is not in the public interest. The public interest might be better served by denial if the neighbors bring evidence in the form of the testimony of a real estate professional that the change will lower the value of adjoining properties or the testimony of people adjacent to other restaurants that discarded seafood, in particular, creates foul odors and is a nuisance.

Again, evidence supporting either option would be upheld by the courts on appeal if the appropriate findings and evidence are placed in the record.

**5. Preserving the spirit of the ordinance and doing substantial justice.**

This is the final judgment call. Evidence in support of the variance might include a finding that (1) a positive vote would help save the building, (2) keep it in use by a viable occupant with a sterling reputation for preservation, or (3) enhance the historic district. An opposing real estate professional could counter

the testimony of the owners' expert and testify that adjoining properties would be less valuable if the variance were granted. The board could believe either scenario.

In denying the variance, however, the board could conclude the historic district ordinance was designed to save the entire district, not just individual buildings, and the landscaping requirement does that by preserving the neighbors' residential uses and keeping the area from deteriorating. In denying the variance, the board could note that the compatibility of a business with its neighbors and the entire character of the historic district may be more important than a few parking spaces plus the cost of an appropriate screen wall. The applicant should figure out how to make a trash enclosure on the south side of the building in a way that does not destroy its historic value. The board could find the ordinance has already struck the proper balance without needing to issue variances.

As you see, the board still has a lot of discretion in choosing who to believe. It does not have the freedom to disregard its duty to explain its conclusions and to justify them on the record.

*Important note: In order to grant the variance, the board must find substantial evidence to satisfy every one of the five standards. If there is evidence to support only four, but not five, the variance must be denied.*

**Summary**

Note that the hardships associated with property must come from the property and not from the actions of the current property owner or a previous property owner.

For example, a variance could be granted in these cases:

- A property owner wants to encroach into an area where slopes exceed 30 percent in violation of the slope ordinance because if a typically sized house is placed closer to the front of the lot so it would not impact the slope, the new location of the house might be so close to the street that it would violate the front yard setback standards.
- A property owner with no garage wants to build one. But the side yard setback cannot be met because the city widened the street in a road improvement project after the house was built and took away part of the side yard.

- Archaeologists have discovered an ancient Native American site on the property. To keep the area undisturbed, the property owner wishes to locate his building closer to the street than the setback standards allow.

A variance could not be granted in these cases:

- An elderly neighbor is pleased her grandson came over and built a carport on the side of her house over the weekend. But the carport is located in the side yard set-back area where the local ordinance does not allow it. The carport could have been built on the back of the house and been in full compliance. She does not want to have to tear off the carport and seeks a retroactive variance. It must be denied.
- A property owner divided his land to make two commercial properties. He now wants a variance allowing a drive- way to be closer to the corner than the ordinance allows on the second lot. If he had not divided the property, no variance would be necessary. Since he created the hardship, no variance can be given.
- A property owner sold an easement to the natural gas company across a residential lot. Now he cannot build on the gas line easement. There is not enough land left on the lot to meet setback standards in the ordinance and build a normal-sized house. The gas company paid him damages for the loss of his right to build, but now he wants a variance so the land can be developed anyway. There is no hardship. He has already been compensated for the loss of use. He created the problem by selling the easement to the gas company. A variance cannot be given.

Three important concepts to understand:

1. A variance cannot be given to resolve hardships that were created by the property owner or a predecessor owner if the ordinance from which the owner wants a variance was in effect when the owner created the hardship.[14]
2. A variance may not be needed if the ordinance could be interpreted as allowing the proposed use and does not clearly prohibit it. The property owner could appeal the decision that interpreted the ordinance against the use instead of seeking a variance. See the discussion about local land use appeals that follows in Chapter 15.

3. The land use appeal authority does not have the power to legislate, to amend the ordinance, or to grant use variances.[15] For example, it cannot allow someone to build a gas station in a residential zone, because doing so would create a use variance. Just because the board cannot approve a variance does not mean that the local government cannot offer some help to the property owner. It may mean that the property owner is before the wrong body. The council or county commission has the power to amend the ordinance in such a way that a variance is not necessary. That is where the issue should be resolved if the appeal authority cannot issue a variance. It is not the job of the appeal authority to correct the ordinance as it was enacted by the legislative body. While the appeal authority can grant variances where variances are clearly justified by situations that fit the requirements, it is not a legislative body and cannot correct defects in the ordinance just because it disagrees with what the clear meaning of the ordinance requires.

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1 Utah Code Ann. §10-9a-701(2) (municipalities); Utah Code Ann. §17-27a-701(2) (counties).

2 Utah Code Ann. §10-9a-701(5) (municipalities); Utah Code Ann. §17-27a-701(5) (counties).

3 Utah Code Ann. §10-9a-701(1) (municipalities); Utah Code Ann. §17-27a-701(1) (counties).

4 Utah Code Ann. §10-9a-701(2) (municipalities); Utah Code Ann. §17-27a-701(2) (counties).

5 Utah Code Ann. §52-4-202(1)(a).

6 Utah Code Ann. §52-4-103(9)(a) (A single individual acting as a hearing officer does not meet the definition of a public body, so the Open and Public Meetings Act does not apply).

7 *Supra note* 19.

8 Utah Code Ann. §10-9a-702(3) (municipalities); Utah Code Ann. §17-27a-702(3) (counties).

9 Utah Code Ann. §10-9a-701(2)(a) (municipalities); Utah Code Ann. §17-27a-701(2)(b) (counties).

10 *Wells v. Board of Adjustment of Salt Lake City*, 936 P.2d 1102 (Utah App. 1997) (Holding that a local board of adjustment failed to make specific findings in the record).

11 Utah Code Ann. §10-9a-701(6) (municipalities); Utah Code Ann. §17-27a-701(6) (counties).

12 Utah Code Ann. §10-9a-103(31) (municipalities); Utah Code Ann. §17-27a-103(35) (counties) (The decision to grant or deny a variance is a "land use decision"). See Also Utah Code Ann. §10-9a-801(2) (municipalities); Utah Code Ann. §17-27a-801(2) (counties) (A land use decision may be appealed to the District Court. While local administrative remedies must be exhausted under the code before filing in district court, there is no administrative appeal from a variance decision because the decision is made by the entity which has been appointed by the legislative body to hear administrative appeals).

13 See generally *Wells,* 936 P.2d 1102.

14 Utah Code Ann. §17-27a-702(2)(b)

15 Utah Code Ann. § 17-27a-702(5)