



Variations



**MICHIGAN ECONOMIC
DEVELOPMENT CORPORATION**

What you will learn:

There are different types of variances

What is the purpose of a variance

What are the standards for a dimensional or non-use variance

Whether or not it should be difficult to obtain a variance

A variance is official permission to deviate from a requirement of the zoning ordinance. There are two types of variances: Use Variances and Non-Use (Dimensional) Variances. The authority to grant a variance is discretionary and includes the standard of demonstrating a practical difficulty for dimensional variances and unnecessary hardship for use variances. The Michigan Zoning Enabling Act states that a Zoning Board of Appeals (ZBA) may grant a variance if the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. Additional standards can be adopted within a community's zoning ordinance.

Non-Use Variances

The most common variance is a dimensional, or non-use, variance. These requests typically pertain to buildings and structures that physically cannot be constructed in the location required by the zoning ordinance or there are other ordinance requirements that can't be met.

Common dimensional variance requests include:

- Front, side or rear yard setbacks
- Height
- Lot coverage regulations
- Parking requirements
- Sign regulations
- Landscaping/buffering requirements

Some aspect of the property must be unique, not just the applicant's business, family, or financial circumstances. Examples of unique circumstances that can be considered in a variance request include properties with odd dimensions, steep slopes or unusual easements. The ZBA cannot change its ruling when a new owner buys the

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What the Law Says:

The Michigan Zoning Enabling Act:

The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance.

If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act.

The authority to grant variances from uses of land is limited to the following:

- Cities and villages.
- Townships and counties that as of February 15, 2006 had an ordinance that uses the phrase “use variance” or “variances from uses of land” to expressly authorize the granting of use variances by the zoning board of appeals.
- Townships and counties that granted a use variance before February 15, 2006.

The authority granted under subsection (9) is subject to the zoning ordinance of the local unit of government otherwise being in compliance with subsection (7) and having an ordinance provision that requires a vote of 2/3 of the members of the zoning board of appeals to approve a use variance.

The authority to grant use variances under subsection (9) is permissive, and this section does not require a local unit of government to adopt ordinance provisions to allow for the granting of use variances.

business or home. A non-use variance runs with the land in perpetuity.

Practical Difficulties

In order to demonstrate that a dimensional variance is appropriate, the ZBA must find that there is a practical difficulty which affects the property where compliance with the zoning ordinance would cause an excessive burden to the development of the property.

In order to prove that a practical difficulty exists, the ZBA must review standards. These standards should be in the zoning ordinance. Standards may vary, but generally they consist of some or all of the following:

- There are unique circumstances that apply to the property.
- The variance is consistent with the spirit of the ordinance and is fair to adjacent properties.
- The need for the variance is not self-created.

- The variance requested is the minimum necessary to remedy the practical difficulty.
- Strict compliance with the zoning ordinance prevents the applicant from using the property for the purposes permitted in that zoning district.

Use Variances

A use variance permits a use of land that is otherwise not allowed in that district either as a permitted use or as a special land use.

State laws allows cities and villages and some townships and counties to consider them, but does not *require* local units of government to do so. Furthermore, if use variances are considered, the zoning ordinance must require a 2/3 vote of the entire ZBA membership to approve them. Why are use variances so tricky?

Use variances are in effect rezoning a piece of property

without the benefit of the planning commission and legislative body weighing in on the request. In many instances, the effect and resultant impact is similar to that experienced by spot zoning.

When done appropriately, use variances allow for administrative flexibility to address unique properties. But in many cases, a rezoning or a conditional rezoning may be the more appropriate route to take.

On the other hand, there are instances where a rezoning would negatively impact an area, as it would permit any of the uses allowed in that zoning district, not all of which are desired. A use variance would permit a specific use with specific conditions that would ensure compatibility with the surrounding area (similar to a conditional rezoning).

While this approach may sound desirable especially in transitional and historic residential areas, it is important to consider the long-term implications of use variances in relation to a community's master plan. When considering use variances, the ZBA should remember that the primary purpose of the variance is to allow a reasonable use of the land (e.g. to allow a reasonable return on one's investment).

Unnecessary Hardships

To obtain a use variance, the applicant must prove an unnecessary hardship. Standards may vary, but generally they consist of some or all of the following:

- The property owner demonstrates that the property cannot yield a reasonable return.
- The need for the variance is due to a situation that is unique to the property and would not generally be found elsewhere in the same zoning district.
- The property owner must show the zoning ordinance gives rise to hardship amounting to confiscation or the disadvantage must be so great as to deprive the owner of all reasonable use of the property.

- The hardship is not self-created.

It is the ZBA's job to uphold the requirements of the zoning ordinance, except in unusual circumstances related to the condition of the property. The variance process recognizes that not all properties have the same physical character, but decisions must be based on standards written in the ordinance.

Variances were never intended to allow property owners to avoid compliance with the zoning ordinance and those granted with little or no justification may have the effect of encouraging others to avoid compliance with the ordinance

Legislation, zoning or otherwise, is the responsibility of the legislative body--not the ZBA. Granting of unwarranted variances has the long-term effect of shifting that responsibility of zoning policy and legislation away from elected officials (where it belongs) and to the ZBA (where it doesn't).

Use Variances and Rezonings - What the Court Says:

In *Paragon Properties Company v. City of Novi*, Michigan Supreme Court indicated courts should not hear zoning cases unless all administrative remedies for a rezoning denial have first been exhausted. If the community has the ability to grant use variances, the use variance would be considered one of the administrative remedies that would have to be tried first.

If the court challenge is based on denial of constitutional rights or procedures, then the rule of exhausting all administrative remedies does not apply, and one can go immediately to court.

Thus, if the community has decided not to hear use variances, it is no longer an available remedy, and an application would not be required.

This tear sheet was developed by the Michigan Association of Planning (MAP) for the Michigan Economic Development Corporation (MEDC). The Michigan Association of Planning is a 501 c 3 organization, dedicated to promoting sound community planning that benefits the residents of Michigan. MAP was established in 1945 to achieve a desired quality of life through comprehensive community planning that includes opportunities for a variety of lifestyles and housing, employment, commercial activities, and cultural and recreational amenities.



Untangling Practical Difficulties and Unnecessary Hardships

What happens when a proposed project does not fit nicely into the zoning ordinance’s standards? A variance! But, which type? The two types of variances are dimensional (or non-use) variances and use variances.

The tests for these two kinds of variances are different. Dimensional variances require that “practical difficulty” be demonstrated. Use variances require that “unnecessary hardship” be shown. These tests are similar, but different: one relating to physical development and characteristics of a parcel, and the other to the use of the parcel.

Dimensional Variance Factors – Practical Difficulty

Most variances are dimensional: setbacks, building height, parking, screening, etc. . . These variances, otherwise known as “non-use variances” are the bread-and-butter of a typical zoning board of appeals. The vast majority of variance requests heard are of this variety.

A practical difficulty applies to a dimensional variance. Since the Michigan Zoning Enabling Act (MZEA), PA 110 of 2006, does not define “practical difficulty”, we rely on the courts, specifically principles from *National Boatland, Inc. v. Farmington Hills ZBA*, 146 Mich App 380 (1985) which are outlined to the right. Since the collective demonstration amounts to the showing of a practical difficulty, all of the standards below apply.

Use Variance Factors – Unnecessary Hardship

A use variance can allow a use not listed in a zoning district, for example, a dentist office in a single-family zone where offices are not allowed. They allow needed zoning flexibility. However, these variances should

Dimensional Variances

PRINCIPLE	IN OTHER WORDS
<i>Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use or would render conformity necessarily burdensome.</i>	It is not about the applicant, it is about the zoning ordinance. Full compliance may be inconvenient and/or expensive for the applicant, but, if there is a way for them to comply, they should adhere to the regulations.
<i>The particular request, or a lesser relaxation of ordinance standard, would provide substantial justice to the landowner and neighbors.</i>	Less is more. When an exception is warranted, it should be the least amount, not necessarily what the applicant requested.
<i>The plight is due to unique circumstances of property and is not shared by neighboring properties in the same zone.</i>	It is not about the applicant, it is about the property. Large families, disabled family members, or employee technology needs are all people reasons, not property reasons. By contrast, an oddly-shaped lot, unusual topography, limiting natural features are land-related reasons that could justify a variance. However, if neighboring properties share the same challenge, the zoning ordinance should be changed instead of a variance granted.
<i>The problem is not self-created.</i>	“Who did what when” matters. If an applicant or a previous owner created the situation, e.g. he split the land into that oddly shaped lot, which has created the need for the variance, then the zoning board of appeals should not grant the variance.

not be a way for developers and property owners to short-cut the rezoning process. Rather, they should be used rarely and only in specific circumstances.

Not all municipalities can consider use variance requests. Townships do not have the authority to allow use variances as outlined in the MZEA. Except, when they do. According to the MZEA, a township

may hear requests for use variances if:

1. As of February 15, 2006, a township had an ordinance that allowed use variances, or
2. A township granted a use variance before February 15, 2006.

To determine if these provisions apply to your community, research would need to be done. Finally, the MZEA clearly states

Use Variances

PRINCIPLE	IN OTHER WORDS
<i>The property cannot reasonably be used for the purposes permitted in its zoning district.</i>	Is the ordinance so restrictive that all reasonable use of the parcel is not available to the property owner? Can the property be used as zoned and yield a reasonable return? Using our dentist office example, just because a dentist office can yield a greater return on profit than a single-family home, it does not mean that this factor has been met. This standard would likely take some analysis on the part of both the applicant and the municipality.
<i>The circumstances giving rise to the variance request are unique to the property and not general conditions of the neighborhood itself.</i>	Is the parcel unique? Using the dentist office example, if the site is on a busy corner adjacent to other non-residential land uses, or it is nonconforming (maybe oddly shaped), the construction of a single-family home may not be viable and this standard would be met.
<i>The use authorized by the variance will not alter the essential character of the area.</i>	Would the proposed use change the character of the area? This subjective factor allows for a review of the character of both adjacent properties and the general vicinity. Some uses will have a greater impact than others (for example, an automobile service station versus a dentist's office), so each use variance should be reviewed on an individual basis.
<i>The applicant's problem is not self-created.</i>	Has the applicant's past actions caused the hardship? A land division by the applicant which caused the hardship by making the subject parcel not suitable for a permitted use would be considered a self-created hardship.

that use variances are a permissive right and not a requirement, even for a city or village.

When a use variance is the right option, an applicant must show what the MZEA refers to as “unnecessary hardship”, which is similar to “practical difficulty,” but not identical. This term is mentioned in the MZEA, but not explicitly defined, so that task has been left to the courts.

In *Janssen v. Holland Charter Township Zoning Board of Appeals*, 252 Mich App 2002, the court found that the following four factors must be demonstrated to be considered an “unnecessary hardship.” Those factors are outlined above.

Variances are tricky. It is difficult to review an application and tell an applicant, “no”. But if your zoning ordinance is in good shape, you’ve done your homework, and made sound findings, know that “no” is often the correct decision.

In March 2024, MAP will be hosting two workshops for zoning board of appeals members: Zoning Board of Appeals virtually on March 6 and Advanced ZBA: Beyond the Fundamentals in person on March 19. In addition, MAP publishes the comprehensive Zoning Board of Appeals Toolkit. Details on purchasing publications or registering for workshops can be found at MAP’s website, www.planningmi.org.

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