

Getting Permission to Break the Law:

An Exercise in the Basics of Zoning Variances

by Steven P. Joppich

Two weeks ago, you won the biggest trial of your career in a contract dispute between two large corporations. You've just managed to get your desk back in order when you get a phone call from the president of the company that you represented. You think she's calling to congratulate you again. While she does reflect back on your big victory, to your surprise she quickly moves the conversation to a personal matter. She explains that, with the court case successfully over and the company saved, she and her husband have decided to proceed with construction of the dream home they've always wanted in the city of Nature.¹ Unfortunately, when the city reviewed her building plans for a building permit, they indicated that the house was too close to the street and could not be built in the proposed location on the lot. They also told her that the eight-foot privacy fence that she wanted to build to enclose the backyard was too high. Bottom line is, they denied her building permit and she wants to know if they can sue the city. If so, she wants you to represent them.

It has been a number of years since you've done any work in the area of property law, but you do remember more than a thing or two about building codes and zoning ordinances. So, you indicate that you'd like to help out but there might be some options short of suing the city that you want to check into first. You also ask some follow-up questions to get more details. You learn that they can live without the fence if they have to, but they were hoping to put a dog run, pool and jacuzzi in the backyard, and were concerned about nosy neighbors. You also learn that adjusting the location of the house on the lot is out of the question, since there is a huge tree in the middle of the lot right behind the spot where they want to locate the house. You ask why they can't just cut down the tree, and learn that many years ago your client and her husband carved their names in the trunk of this tree when they were dating as teenagers. A few years later, they saw that a developer had platted the land as a subdivision of half-acre lots, and they bought the lot with this tree on it shortly after they were married, intending to build a home on it someday. You ask for a copy of the plans for the home and building

site, as well as any subdivision restrictions, and indicate that you will get back in touch with her soon.

Armed with this information, you begin your background research. From your prior experiences, you know that the city of Nature will have a set of zoning ordinances that you will need to review. So you do some quick online research of the city's Web site and find a link to the zoning ordinance at www.municode.com. First, you find the

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setback regulations in the ordinance and discover that the home must be set back a minimum of 35 feet from the road right-of-way and 50 feet from the rear yard property line. Next you find the fence regulations and learn that the maximum height of a fence is four feet on residential lots of less than one acre. You compare this information to your client's plans and confirm to your satisfaction that the proposed location of the house and fence height were clearly in violation of the zoning ordinance regulations.

From all this, you conclude that the city officials hadn't missed anything and had no choice but to deny the permit. But you remember that there is a right to appeal within the city before initiating a lawsuit to challenge this kind of a denial. So you continue on with the zoning ordinance and find the sections regarding the City of Nature's Zoning Board of Appeals and its authority to grant "variances" from the strict requirements of the zoning ordinance under certain circumstances. You also review the new Michigan Zoning Enabling Act² and applicable case law. Below is a summary of what you find about the procedure and burdens applicable to representing a client in a zoning variance situation.

General Powers of the Zoning Board of Appeals

A zoning board of appeals (ZBA) does not set policy or legislate for the municipality. It is considered a "quasi-judicial body" that is authorized by law to "hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with the enforcement of a zoning ordinance,"³ except for special land use and planned unit development decisions.⁴ "An appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of the state or local unit of government."⁵

A party may appear at the hearing in person, or through an agent or attorney. In deciding upon a petition for relief from the zoning ordinance:

[t]he zoning board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination and may issue or direct the issuance of a permit.

* * * * *

If there are practical difficulties for nonuse variances ... in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance ... 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 the approval of all types of variances. The zoning board of appeals may impose conditions as is otherwise allowed under this act.⁶

Generally speaking, a variance is a modification of the literal provisions of the zoning ordinance allowing a property owner to do something that would normally be in violation of the municipality's zoning ordinance (enacted by the municipality's elected legislative body) – it is essentially permission to break the law.

This is quite a significant power given to ZBAs and, as one can imagine, the law intends that variances should be relatively difficult to obtain and they should only be granted if a petitioner has demonstrated to a ZBA that he/she meets the requirements of the appropriate legal standards. If the petitioner establishes the required legal standard, the ZBA should grant the variance. If the petitioner fails to meet the standard, then the application of the municipality's zoning ordinance should be upheld and the variance denied.

The applicable standards are referenced in the statute (see quote above) as the "practical difficulty standard" and "unnecessary hardship standard."⁷ The statutes, however, do not define these terms in any detail, so one must look to case law and the municipality's zoning ordinance for guidance.

Types of Variances and Standards Applicable to ZBA Review

There are two types of variances: a use variance and a non-use variance (sometimes also referred to as a dimensional or area variance). The unnecessary hardship standard applies to a use variance, and the practical difficulty standard applies to a non-use variance.

A use variance involves the ZBA considering a petitioner's request to use property for a use that is not permitted in a specific zoning district under the zoning ordinance (e.g., multiple-family apartments on property that is zoned for single-family houses, or an industrial manufac-

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turing facility in an office zoning district, or any of a multitude of other possible examples).⁸ A non-use, area or dimensional variance involves all other requests for deviations from the zoning ordinance regulations (e.g. regulations regarding setbacks, height, lot size, number of parking spaces, etc.).

Unnecessary hardship has been held by Michigan courts to be the standard that a petitioner must demonstrate before a ZBA can grant a *use variance*. The elements of unnecessary hardship are: (i) That the property can not be reasonably used for the purposes permitted in the zoning district, (ii) That the plight of the property owner is due to unique circumstances peculiar to his or her property and not to general neighborhood conditions, (iii) That the use variance will not alter the essential character of the area, and (iv) That the proponent's problem is not self-created.⁹ In considering a use variance, a ZBA must ensure that the spirit and objectives of the municipality's zoning ordinance are observed, public safety is secured and substantial justice done. A vote of 2/3 of the members of the ZBA is required to approve a use variance.¹⁰

Practical difficulty has been held by Michigan courts to be the standard that a proponent must demonstrate before a ZBA can grant a *non-use, dimensional or area variance*. Practical difficulty is a less stringent standard than unnecessary hardship and, therefore, non-use or area variances are typically not as hard to obtain as use variances. The elements of practical difficulty are: (i) Whether strict compli-

ance with the restrictions governing area, setbacks, frontage, height, bulk, and other similar items would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with said restrictions unnecessarily burdensome; (ii) Whether a variance would do substantial justice to the proponent as well as to other property owners in the zoning district or whether a lesser relaxation of the restrictions would give substantial relief to the proponent and be more consistent with justice to others (i.e., are there other, more reasonable alternatives?); (iii) Whether the plight of the property owner is due to unique circumstances of the property; and (iv) Whether the proponent's problem is self-created.¹¹ As with use variances, in considering non-use variances, a ZBA must ensure that the spirit and objectives of the zoning ordinance are observed, public safety is secured and substantial justice done. Unlike use variances, however, only a majority vote of the ZBA members is required for approval.¹²

The ZBA Hearing Process, Decision, and Circuit Court Appellate Rights

Following a hearing, a ZBA will typically make *factual findings* based upon the evidence and statements presented to it, which together constitute the "record." These factual findings will be set forth in the approved official minutes of the meeting. If the burden of meeting all of the standards for a variance are satisfied and a ZBA grants a variance, the variance will run with the land – in other words, it is not personal to the owner and, therefore, if the ownership of the property changes, the variance by law stays with the land. Any ZBA-imposed conditions with respect to the variance also run with the land.¹³

The decision of a ZBA is considered a *final* decision on the matter, but it is subject to circuit court *appellate* review.¹⁴ The appeal must be within 30 days after the ZBA certifies its decision in writing or approves the minutes of its decision.¹⁵ The circuit court review is based solely upon the "record and decision" of the ZBA.¹⁶ Such a review is conducted for the purpose of ensuring that the decision: "(a) Complies with the constitution and laws of this state; (b) Is based upon proper procedure; (c) Is supported by competent, material, and substantial evidence *on the record*; and (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals."¹⁷

Generally, where a ZBA has made factual findings based on the evidence and statements presented to it, a reviewing court will not second-guess the ZBA on such factual determinations, even where there is a dispute between witnesses – much like an appellate review of a trial court's factual determinations.

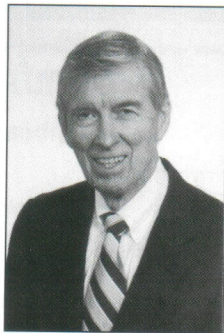
What Does Your Client Have for the ZBA to Consider?

Having regained a comfort level with the law and process, you meet with your client and are able to inform her that there is an avenue for possible relief with the city that must be pursued before proceeding with costly litigation against the city. You also inform her that the types of

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variances she needs are called non-use variances, and you review the practical difficulty standard that has to be met.

You then explore with her whether there is any other relevant information beyond the plans and story she has already given you that can be supplied to the City of Nature ZBA as part of a petition for a variance. She thinks for a moment and, although seemingly unsure of its relevance, tells you that the tree is very old and very large – in fact, its trunk measures about four feet in diameter and some people from the local historic society called her recently about it, saying that they think it might be a “historic tree” dating back to the last century. Further inquiry reveals that some swampy wetlands and a part of a pond encroach onto the rear of the property and extend into the adjoining woods. As a result, the house can’t be built on the other side of the tree without filling in the swampy area and clear-cutting a lot of trees and vegetation.

Referring back to the practical difficulty standards, you realize that your “case” before the ZBA has suddenly gotten a lot stronger. But you explain that further research is now necessary to see if either, or both, Michigan’s environmental statutes and/or City of Nature’s ordinances regulate and protect historic trees and wetlands, which might further bolster your client’s argument that a practical difficulty exists and the variance for the house setback from the front road should be granted in order to preserve these natural features in the backyard. You also recognize, however, that this new information will make it even more difficult, if not impossible, to establish a practical difficulty and get relief from the ZBA for a fence in these backyard areas. Upon explaining this to your client, you suggest that she consider focusing solely on the necessary variance for the house location.

In describing the ZBA petition and hearing process, you also mention to your client that the neighbors within 300

feet of her property will be notified of the hearing and given an opportunity to speak for or against her request for a variance.¹⁸ You inquire about, and she provides you with, a copy of the subdivision restrictions, which indicate that only decorative fences (such as split rail fences) are permitted, but the wetlands and pond are not addressed. She also informs you that she gets along well with the neighbors she has met, and doesn’t think that any of them will object at the ZBA hearing, especially if she and her husband decide not to proceed with requesting the fence variance.

After she thanks you for your thorough research and clear explanation, you end the meeting and begin the next phase of your research and preparation for the hearing before the ZBA, knowing that you are on the correct path toward preparing a good argument for getting your client the relief she needs most.

Steven P. Joppich is a partner in the Farmington Hills offices of Secrest Wardle, P.C. He is a member of the firm’s Municipal Practice Group and Real Estate Practice Group, and is currently serving as vice-chairperson for the OCBA’s Municipal Law Committee. Mr. Joppich specializes in providing legal representation to a number of municipalities in the tri-county area as well as private clients in his areas of practice.

Footnotes

- 1 This is, of course, intended to be a fictitious city.
- 2 The Michigan Legislature recently adopted a single “Michigan Zoning Enabling Act,” being 2006 PA 110, which replaces, modifies and consolidates the three prior zoning enabling statutes, being the City and Village Zoning Act (1921 PA 207, MCL § 125.581, *et seq.*, repealed eff. July 1, 2006), the Township Zoning Act (1943 PA 184, MCL § 125.271 *et seq.*, repealed eff. July 1, 2006) and County Zoning Act (1943 PA 183, MCL § 125.201 *et seq.*, repealed eff. July 1, 2006). Governor Granholm approved this new legislation on April 7, 2006, and it is ordered to take effect on July 1, 2006.
- 3 2006 PA 110, § 603(1) (formerly MCL § 125.585(3)). This subsection of the Michigan Zoning Enabling Act also authorizes the ZBA to “hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps,” and provides the municipality with the authority to grant additional powers, under its zoning ordinance, to a zoning board of appeals. Among such additional powers, zoning ordinances will often include the power to interpret textual provisions of the zoning ordinance.
- 4 A ZBA may hear appeals relating to special land uses and planned unit developments, if specifically authorized in the municipality’s zoning ordinance. 2006 PA 110, § 603(1) (formerly MCL § 125.585(3)). These are special discretionary types of decisions for a municipality, usually made by the municipality’s planning commission and/or its city council/township board/village council.
- 5 2006 PA 110, § 604(1) (formerly MCL § 125.585(5)).
- 6 2006 PA 110, § 604(6) and (7) (formerly MCL § 125.585(9)).
- 7 *Id.*
- 8 It is important to note that *townships* and *counties* do not have authority to grant use variances under the new law, unless they have a provision in their zoning ordinance existing as of February 15, 2006, that expressly authorizes the ZBA to grant use variances. 2006 PA 110, § 604(9).
- 9 *Puritan-Greenfield Association v. Leo*, 7 Mich App 659 (1977). See also, *Paragon Properties Company v. City of Novi*, 425 Mich 568, 550 NW2d 772 (1996) (A property owner may not initiate a lawsuit attacking the constitutionality of a zoning ordinance, including attacking the denial of a rezoning request, unless the property owner has first sought a use variance from the ZBA.)
- 10 2006 PA 110, § 604(10) (formerly MCL § 125.585(4)).
- 11 *National Boatland v. City of Farmington Hills*, 147 Mich App 380 (1985). See also *Johnson v. Robinson Township*, 420 Mich 115 (1984); *Puritan-Greenfield Improvement Association v. Leo*, 7 Mich App 659 (1967); and *Faucher v. Grosse Isle Township*, 321 Mich 193 (1948).
- 12 2006 PA 110, § 603(2) (formerly MCL § 125.585(4)).
- 13 Under 2006 PA 110, §§ 604(7) (formerly MCL §§ 125.585(10)), a ZBA has the discretionary authority to impose reasonable conditions upon a decision to grant a variance.
- 14 2006 PA 110, §§ 605 and 606 (formerly MCL § 125.585(11)).
- 15 2006 PA 110, §§ 606(3). The time for appeal was not established under the former zoning enabling acts. Instead, case law applied the MCR appellate filing requirements to appeals from ZBAs, thus requiring the appeal to be filed within 21 days. The new enabling act now gives a statutory 30-day period.
- 16 2006 PA 110, §§ 606(1).
- 17 *Id.* (emphasis added).
- 18 2006 PA 110, § 604(5) (formerly MCL § 125.585(8)).

OCBA Board of Directors 2006 Election Results

With a total of 1,038 valid ballots counted – and an additional seven ballots invalidated due to lack of signature and/or P number on the outer envelope – here are the final results of the 2006 OCBA Board of Directors election. Elected to three-year terms ending June 30, 2009, are:

Michael J. Sullivan
Michael D. Schloff
Jennifer M. Grieco
Hon. Susan M. Moiseev
David Carl Anderson

Elected to a one-year term ending June 30, 2007, is:
James G. Derian

Our sincere thanks and congratulations go to Freeman L. Farrow, David C. Anderson, Ashley E. Lowe, Thomas J. Tallerico, Lisa J. Hamameh and James J. Parks for their hard work and steadfast commitment to the Oakland County Bar Association.