

# VARIANCES

# How did we get here?

- ◆ Zoning ordinance adopted in places that were already developed, creating non-conforming uses.
- ◆ Zoning ordinances attempt to impose regularity on an irregular landscape.

The role of the variance is to give the local government an out when the application of a reasonable land use restriction would have an unreasonable or unjustifiable result as to a particular property.

**Why do we have variances:**

**A lawyer's perspective.**

# Administrative variances versus Board of Zoning Appeals variances.

- ◆ Less procedure
- ◆ Faster for applicant
- ◆ May put administrators in political situations

If you are going to allow an administrative official to grant variances:

- ◆ Make sure the ordinance clearly provides when an administrative variance is appropriate
- ◆ Provide due process
- ◆ If the administrative variance is denied, provide reasons and an appeal

# Question:

Is a variance hearing subject to the Zoning Procedures Law?

# Answer:

- ◆ No, but the ordinance should have procedures, and they must be followed.
- ◆ Potential procedures:
  - ◆ Publication and notice letters to neighbors
  - ◆ Signs on the property
  - ◆ Public hearing



# How do we handle a public hearing?

Fundamental rules for due process at a public hearing:

- ◆ Notice
- ◆ Applicant gets to present case and call witnesses, who should be sworn in.
- ◆ Interested parties should be allowed to speak, but Applicant always gets to cross examine and gets equal time to present rebuttal.

# Public hearing, continued.

- ◆ Keep a record (audio and minutes count, but remember an appeal will be a record review).
- ◆ Don't forget about open meetings law – generally no executive sessions.
- ◆ The decision should be in the form of a motion, with detailed reasons, which can and should be reduced to writing.

# Standards

The ordinance should have stated standards for grant of a variance.

Common standards:

- unjust hardship created by the ordinance,
- not a result of the property owner's act,
- usually related to a specific topographic character of the property

# Standards

- ◆ Consider the impact on neighbors
- ◆ Consider the impact on the public welfare
- ◆ Not contrary to the intent of the code

# Hard Issue # 1

What do you do if someone subdivides their property and sells part of it, only to find that the remaining property is below the minimum lot size?

- ◆ Can they still improve their property?
- ◆ Can you stop the subdivision?
- ◆ How do you prevent this in the first place?

# Hard Issue # 2

What do you do with really small lots that existed before the zoning ordinance, and before health department regulations that required certain size lots for septic tanks?

- ◆ Do you require people to combine lots or get on sewer?
- ◆ What if sewer is not available?
- ◆ What if there is no lot to combine with?

## King v. Putnam Cty Bd. of Comm's

Where a property owner had subdivided before land use ordinance was adopted *and* the new ordinance provided an exception for lots of record, he could build pursuant to that provision and was not required to get a variance.

# Lots of record provision:

*Any lot legally platted prior to the adoption of this Code and [, which] as a result of the adoption, does not meet the minimum lot or lot width requirements for the district in which it is located, may be developed with any use permitted in the district.*



# Hard Issue # 3

What if the ordinance did not have a lots of record provision?

## Hard Issue # 4

Can you grant a variance to allow a use that would not otherwise be allowed in that district if it is reasonable for the particular property and it would be a hardship to the property owner and maybe the surrounding property owners to require rezoning?

# Answer:

No. A use variance is another way of saying rezoning, but likely it will not comply with the zoning procedures law.

# Hard Issue # 5

What do you do when the owner of a legal non-conforming use wants to alter the structure, but the alteration itself complies with the zoning ordinance?

- ◆ Will a permit issue?
- ◆ Is a variance required?

# Hard Issue # 6

- ◆ Does the issuance of a variance give the property owner a vested right to build the structure that was the subject of the variance?
- ◆ What if a long period of time has passed since the variance was issued, and the structure still has not been built?

## Meeks v. City of Buford

Where property owner obtained property and prior owner had a variance, but over a 15-year period neither ever expended significant money to develop the property pursuant to the variance, and the zoning regulations changed, the property owner had no vested rights.

What if a property owner acquires a variance, transfers the property, and the new property owner immediately seeks to develop under the variance?

# Answer:

Variances (like rezonings) run with the land and not the property owner.

The new owner has the right to use the variance.



## DeKalb County v. Wal-Mart, Inc.

This was an appeal of the denial of a variance to allow a sign taller than what was permitted by the sign ordinance.

# Several important rules:

- ◆ Property owner must raise his constitutional objections.
- ◆ BZA can't amend the ordinance, but it can grant the variance and prevent the constitutional harm.
- ◆ Writ of certiorari is an appropriate appeal mechanism if it is stated in the ordinance.

# Amortization

- ◆ What is it?
- ◆ Is it a good thing, or a good way to get sued?
- ◆ How do you do it?
- ◆ Protect investment-backed expectations.