

## ZONING

### *380 Attachment 2*

#### **Village of Liverpool**

#### **Zoning Commentary Use and Area Variances**

The following commentary is offered to aid the Board of Appeals in interpreting the requirements of this chapter with respect to variances. It summarizes case law interpretations of practical difficulty and unnecessary hardship.

- A. There are two types of variances that can come before the Board of Appeals: an area variance and a use variance. The distinction between the two is critical, as the burden of proof required differs according to the type of variance requested.
- B. Area variances.
  - (1) The area variance involves relief of a dimensional nature, typically involving yard requirements, setbacks, lot coverage, density, required parking spaces, etc. An area variance is one which does not involve a use which is prohibited by the zoning regulations. Area variances shall be granted only upon a showing by the applicant of practical difficulties. The following considerations should guide the Board of Appeals in determining practical difficulties:
    - (a) How substantial the variation is in relation to the requirement.
    - (b) The effect, if the variance is allowed, of the increased population density thus produced on available governmental facilities (fire, water, waste disposal and the like).
    - (c) Whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created.
    - (d) Whether the difficulty can be obviated by some method feasible for the applicant to pursue, other than a variance.
    - (e) Whether, in view of the manner in which the difficulty arose and considering all of the above factors, the interests of justice will be served by allowing the variance.
  - (2) Not every applicant is entitled to such a grant of relief, nor is an applicant necessarily entitled to the relief requested. In granting an area variance, the Board of Appeals should grant the minimum relief necessary to allow a reasonable use of the land in question.
  - (3) In order to satisfy the practical difficulty standard, the property owner must prove that the zoning regulations, as applied to his/her property, pose a significant economic injury. Significant economic injury is most readily apparent in the case of a lot with

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exceptional physical conditions which prevent the owner from building a structure which meets the district's dimensional requirements. Simple convenience to the property owner, however, does not constitute practical difficulty, nor does a projected increase in market value of the structure due to construction of an addition qualify as proof of significant economic injury.

- (4) If the applicant demonstrates competent proof of practical difficulty or significant economic injury, he/she is entitled to an area variance unless a Village representative comes forward with proof that enforcement of the zoning regulations in the particular instance will serve the public health, safety and welfare. If the municipality cannot show this, the significant economic injury entitles the applicant to the area variance. If the municipality does prove the relationship, the variance should be denied unless the restriction in question deprives the applicant of all reasonable use of his/her property.

### C. Use variances.

- (1) The second type of variance, the use variance, involves permission to utilize land for a use not allowed in the district. The Board of Appeals has the power to grant a use variance only when the applicant has proved that a literal application of the zoning regulations will result in unnecessary hardship. As clarified by the Court of Appeals in *Otto v. Steinhilber*, 282 NY 71, before the granting of a use variance upon the grounds of unnecessary hardship, the record must show that the following tests are met:
  - (a) The land in question cannot yield a reasonable return if used only for a purpose allowed in the zoning district (proof of a more profitable return is not in itself evidence of hardship).
  - (b) The plight of the owner must be due to unique circumstances, not to the general condition in the neighborhood.
  - (c) The modification, or use, to be authorized will not alter the essential character of the locality or the spirit of the chapter.
- (2) Recent court decisions have done away with the "unique circumstances" test; reasonable return and compatibility with the locality are the only tests to be met by the applicant for a use variance, together with the overriding test of harmony with the letter and spirit of the Zoning Local Law.
- (3) In relation to the "reasonable return" test, the applicant must positively establish that no permitted use will allow a fair return from the property. Each use must be separately addressed and the proof must be in dollars-and-cents terms; the applicant must definitely show the result upon the subject property of such factors as:
  - (a) Purchase price and present value.
  - (b) Expenses attributable to maintenance, taxes, mortgages and other encumbrances.
  - (c) Income from the property in question.

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- (4) Although the circumstances listed below constitute considerations which may contribute to the determination of a “no reasonable return” condition, any factor taken alone is insufficient to negate all possibility of fair yield from a property.
  - (a) An individual’s inability to sell a property for a permitted use. It may be sufficient if proof is provided that an active, documented effort to sell was made.
  - (b) Financial loss to an individual caused by imposition of the zoning regulations.
  - (c) Establishment of a use or investment in improvements based on an illegally granted building permit.
  - (d) Yielding of a higher return by a prescribed use.
  - (e) Proximity and/or harmful effects of a similar use which is nonconforming in the same district or located in a nearby district.
  - (f) Traffic conditions.
  - (g) Presence of obsolete or dilapidated uses on a lot.
  - (h) Existence of natural resources unusable due to zoning restrictions.
  - (i) Setting a bad precedent.
- D. In summary, the burden of proof is upon the applicant to establish that he/she is entitled to either an area or use variance. Standards of proof require that the applicant must present affirmative substantial evidence showing that he/she is entitled to the relief sought. The Board of Appeal’s decision must be supported by evidence that is substantial, which clearly supports the decision reached and which must appear in the record in detail.