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LMCIT RISK MANAGEMENT MEMO

**THE NECESSITY OF ADEQUATE FINDINGS/
REASONS TO SUPPORT MUNICIPAL LAND USE DECISIONS**

When a city's land use decision is challenged in court, the court's review is quite narrow. The standard of review of a city's land use decision is limited to whether the city had a rational basis for its decision. "Land use decisions are entitled to great deference and will be disturbed on appeal only in instances in which the city's decision has no rational basis." *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. App. 1995). That is, courts review a municipal body's decision to determine if it is unreasonably arbitrary or capricious. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988). This narrow scope of review accorded to the land use decisions of cities reflects judicial recognition that local governing bodies are in the best position to assess what zoning classifications and decisions best serve the public welfare. *Larson v. Washington County*, 387 N.W.2d 902, 905 (Minn. App. 1986).

In land use cases, Minnesota courts are looking for a sufficient statement of the reasons given by the city to grant or deny an application request. The role of the court is to examine the city's reasons and ascertain whether the record before the city council supports them. The reasons given by the city must be legally sufficient and have a factual basis.

Minnesota case law and statutory law demands that the reasons for a city's decision on a land use case be articulated on the record. We recommend the city adopt writing findings of fact, or "reasons," and conclusions of law when it makes land use decision. The city should approve a document that contains all the relevant facts. The document should then apply those facts to the relevant criteria.

When a city is presented with a land use application, the role of the city council/planning commission is to apply the facts presented to the law and to articulate the reasons for its decision. The role of the city council/planning commission is to determine and consider how the facts presented to them compare with the city's articulated standards. The city council and/or planning commission should base their decision on the facts presented at the hearing and then apply those facts to the legal standards contained in city ordinances and relevant state law. City staff reports should reference applicable city code provisions. (E.g. review standards in ordinance granting a variance.)

Example of A Variance Consideration

Under Minnesota law, a municipality may grant a variance where unique circumstances of the individual property create an undue hardship. Minn. Stat. Sec. 462.357, subd. 6. "Undue hardship" generally means:

The property in question cannot be put to a reasonable use if used under conditions allowed by the official controls, the plight of the landowner is due to circumstances unique to the property not created by the landowner, and the variance will not alter the essential character of the locality.

The "undue hardship" requirement does not mean a property owner must show that the land cannot be put to any reasonable use without the variance. Instead, the undue hardship standard requires a showing that the property owner would like to use their property in a reasonable manner that is prohibited by ordinance. Minnesota courts have explained there are three requirements for granting a variance under the "undue hardship" standard. The requirements are: (1) reasonableness; (2) unique circumstances; and (3) the essential character of the locality.

Sample of City Code Variance Standards

Is the proposed variance in conformity with the established criteria contained in the City Code:

- (1) Because of the particular physical surrounding, shape or topographic conditions of the specific parcel of land involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of the regulations were to be carried out;
- (2) The conditions upon which the petition for a variance is based are unique to the parcel of land for which the variance is sought;
- (3) The purpose of the variance is not based exclusively upon a desire to increase the value or income potential of the parcel of land;
- (4) The grant of the variance will not be detrimental to the public welfare or injurious to other land or improvements in the vicinity in which the parcel of land is located;
- (5) The proposed variance will not impair an adequate supply of light and air to adjacent property, or substantially increase congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values with the vicinity.
- (6) The granting of the proposed variance will not be contrary to the intent of this Code and the City's Comprehensive Plan.

Consider standards #1 and #2 pertaining to the unique circumstances of the subject property.

An example of an adequate reason, or "finding" to support a denial:

The existing topography involves slope and floodplain issues that limit development in some portions of this property. The property is located at the end of a cul-de-sac, has a stand of trees and a significant grade change of 44 feet. The proposed building has been placed to maximize the property despite the existing slope and floodplain issues.

VS.

An example of an unfounded reason:

Unique circumstances exist because the applicant mistakenly believed he could develop his property as proposed.

Consider standard #5 pertaining to the issue of traffic.

An example of an adequate reason, or “finding”:

The proposal will generate traffic that will have a significant negative impact on the transportation system capacity and will result in diminution of the level of service and safety of said system especially at the intersection of First Street and Main Street. Numerous adjacent property owners testified at the public hearing about current congestion and specifically that it currently takes “three to four light changes just to get through the intersection.”

VS.

An example of an unfounded reason:

The proposal will generate excess traffic.

In formulating adequate findings or reasons to support a land use decision, one of the key steps is to apply the facts presented to the standards contained in the city ordinances. In other words, use the standards already set forth in the city ordinances as the template or guide to the city council/planning commission consideration of a land use application.

Findings of Fact Examples

Criteria #1: Is the variance in harmony with the intent of the Comprehensive Plan, Zoning Ordinance and the State Shoreland Management regulations?

Good Example:

The proposal includes uses that are consistent with the Breezy Point Comprehensive Plan. The proposal meets the general intent of the zoning ordinance and shoreland regulations because of effective screening of the structure from the water.

Bad Example:

- The addition is in character with the style of the house.
- The addition is similar to the neighbors.
- The house was not built with children in mind.

Criteria #2 Without the variance, is the owner deprived of reasonable use of the property?

Good Example:

The proposal provides for conversion to a year round structure by adding interior plumbing, heating and reasonable kitchen facilities. The home will have 3 bedrooms and a total of 1200 sf of living space.

Bad Example:

- The applicant bought the property last month with every intent of converting to a year round home.
- The applicant needs 6 bedrooms and three decks as proposed in the site plan.
- The applicant threatened to take the County to Court unless the variance is granted.
- The realtor did not inform the applicant of zoning restrictions.

Criteria #3. Is the alleged hardship due to circumstances unique to this property?

Good Example:

The home is situated on a peninsula lot with river setbacks required on three sides of the property.

Bad Example:

The applicant was tired of sitting on his deck and swatting mosquitoes.

Criteria #4. Were the circumstances causing the hardship created by someone or something other than the landowner or previous landowner

Good Example:

The hardship is created by the presence of poor soils and wetlands and not by any action of the property owner.

Bad Example:

- The applicant's contractor told him that no permit was necessary unless you increased the size of the home.
- The existing house does not have a usable deck where the applicant can enjoy the river views.

Criteria #5. Will the issuance of the variance maintain the essential character of the locality?

Good Example:

The proposed addition is not visible from the river or from adjoining properties and therefore will not alter the essential character of the neighborhood.

Bad Example:

- The addition will make the run down house look good.
- None of the neighbors objected at the meeting.

Criteria #6. Does the alleged hardship involve more than economic considerations?

Good Example:

The applicant is requesting a lot width variance, however, the proposal does not involve of the creation of more lots that would normally be allowed in the underlying zoning district. The proposed split was created by an action of the court as part of a divorce settlement.

Bad Example:

The applicant needs the additional lot in order to make the development economically viable.

Findings of Fact

Criteria #1: The strict interpretation of the Ordinance would create undue hardship,

Criteria #2: The strict interpretation of the Ordinance would be impractical because of circumstances relating to lot size, shape, topographic or other characteristics of the property not created by the land owner,

Criteria #3: The deviation from the Ordinance with any attached conditions will still be in keeping with the spirit and intent of the Ordinance,

Criteria #4: The variance will not create a land use not permitted in the zone, and

Criteria #5: The variance will not alter the essential character of the locality,

Criteria #6: The variance is not for economic reasons alone, but reasonable use of the property does not exist under the Ordinance.

Public Hearing Procedure

1. **Staff Report** Staff gives report on application.
2. **Commission Questions Staff** Commission asks the staff questions on the application or Ordinance.
3. **Applicant Presentation** Applicant may present additional information to the Commission at this time.
4. **Commission Questions Applicant** Commission may ask the applicant questions or clarification.
5. **Public Questions** Public may ask questions of the Commission or the Applicant
6. **Public Comments in Support** Public may speak in support of the proposal.
7. **Public Comments Against** Public may speak against the proposal.
8. **Board Discussion/Action** The Commission may discuss the application and may vote or continue the application. This portion of the hearing is closed to public input. The commission reserves the right to ask questions of staff or the applicant.

Proving a practical difficulty for a dimensional variance request

Brad Neumann<neuman36@msu.edu>, [Michigan State University Extension](#) - August 24, 2022

While inherently rigid, there are mechanisms in zoning to allow for flexibility.

A zoning ordinance is inherently rigid. Within this rigid structure of zoning are the definitions of where suitable uses can take place, the bulk or scale of those uses allowed, how those uses are accessed, etc. There must also be mechanisms for flexibility based on statutory ([Michigan Zoning Enabling Act](#)) and Constitutional ([5th Amendment](#)) grounds. Zoning must allow for differences in types of allowed uses, physical characteristics of the land, unique needs of neighborhoods and to prevent infringement on constitutionally protected property interests.

One mechanism for flexibility in zoning is the variance. A variance is the authority to depart from the literal application of the zoning ordinance because of an *Unnecessary Hardship* (in the case of a use variance) or a *Practical Difficulty* (in the case of a non-use or dimensional variance) resulting from the physical characteristics of the land. This article will focus on dimensional variances and the principles that amount to a showing of a practical difficulty.

Dimensional Variances

The [Michigan Court of Appeals](#) has applied the following principles in dimensional variance court cases, which **collectively** amount to the showing of a practical difficulty (*National Boatland, Inc. v. Farmington Hills ZBA*, 146 Mich App 380 (1985)):

- Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use or would render conformity necessarily burdensome.
- The particular request, or a lesser relaxation of ordinance standard, would provide substantial justice to the landowner and neighbors;
- The plight is due to unique circumstances of property and is not shared by neighboring properties in the same zone.
- The problem is not self-created.

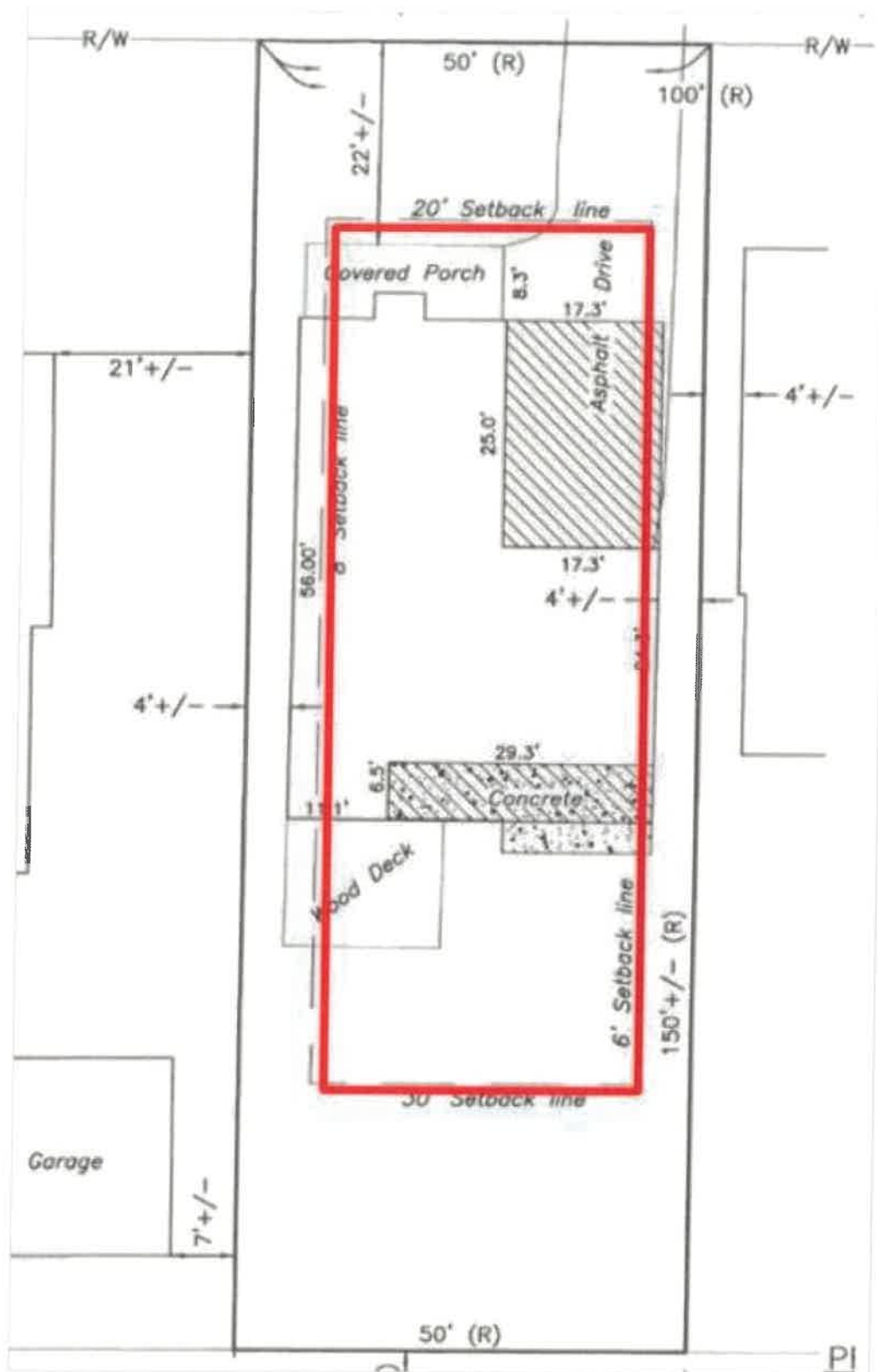


Figure 1: The home addition proposed in this plan requires a dimensional variance from the side yard setback. There are no unique characteristics of this lot or of the land and the design could be changed to meet the setback. Technically, this variance request should be denied.

Again, the standards come from case law. The Michigan Zoning Enabling Act does not define what a practical difficulty is, though the statute does state “the ordinance shall establish procedures for the review

and standards for approval of all types of variances” (Sec. 604(7)). Therefore, the zoning ordinance shall include these standards and may include additional standards that apply to dimensional variance requests.

Seeking Alternatives

For the first standard (above), the zoning board of appeals (ZBA) should figure out if there is a way to accomplish the same purpose without a variance even if it will be more inconvenient or more expensive for the applicant. If so, a variance should not be granted. For example, if the design for an addition proposed by the applicant can be changed such that a variance is no longer needed, the variance request should be denied (see Figure 1). A variance is granted for circumstances unique to the property (e.g. odd shape), not those unique to the property owner (e.g. large family).

Is there another option?

On the second standard, there are valid health and safety reasons for zoning setbacks, but when these regulations treat an applicant unfairly in relation to unique aspects of the land they should be relaxed. However, if a lesser variance than requested would provide substantial justice to the property owner, the lesser variance should be considered. For example, if the request is to encroach into the setback by 4 feet, but a 2-foot encroachment would allow the owner to use their property for the permitted use then the appeals board must not approve a greater variance than minimally necessary (see Figure 2).

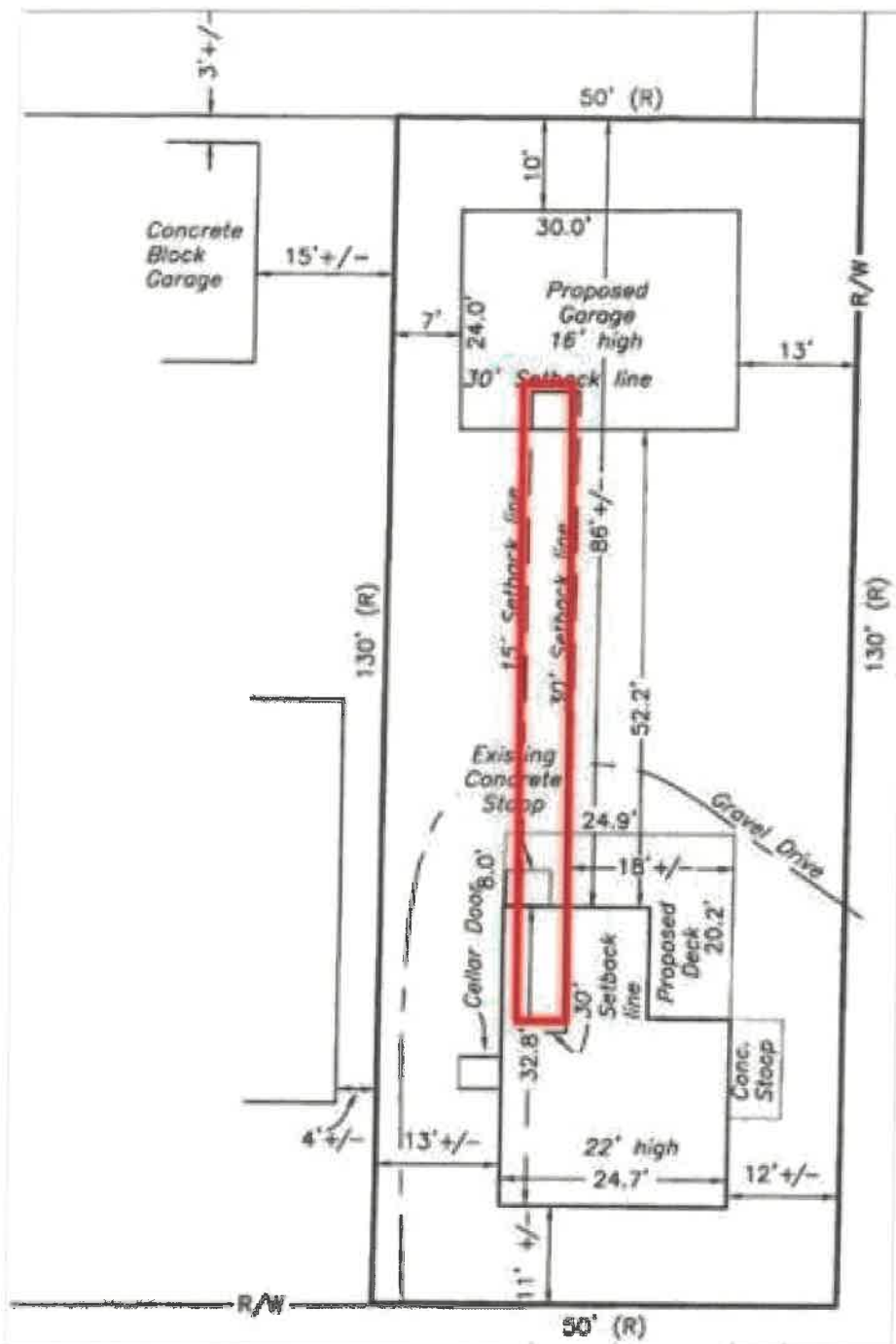


Figure 2: With two front yard setbacks (red line is the buildable envelope) this corner lot has unique circumstances for which a variance to construct a garage may be warranted. However, the proposed three-car garage in this plan is probably beyond the minimum necessary and may not be fair to neighboring properties in the single-family zone.

Amending an ordinance

Third, if the circumstances for which a variance is warranted are shared among numerous properties in the same zone, then the variance request should be denied. It may be better to consider amending the zoning ordinance. For instance, a historic portion of a community developed around the turn of the 20th Century might have 50-foot lots throughout a neighborhood of single-family homes. If this neighborhood is subject to the same zoning standards as neighborhoods developed later with 70-foot-wide lots, projects not requiring a

dimensional variance in the newer neighborhood will most likely require a variance in the historic neighborhood. The proper solution is to create a new zoning district for the historic neighborhood that is more reflective of the existing character (see [Study neighborhood typology to discover a library of information on form](#)).

Is the issue "self-created"?

The fourth standard is widely misunderstood among ZBA members. The proper interpretation is to ask whether the applicant took some affirmative action that created the need for the variance, such as making an unusual land division (shape), filling the entire building envelope so that a porch must necessarily extend into the setback area, digging a pond, etc. A practical difficulty cannot be self-created (*Norman Corp v. City of East Tawas*, 263 Mich App 194 (2004)). Being “self-created” includes actions of the current property owner and actions of all previous owners.

In other words, a self-created practical difficulty by a predecessor in title can bar a subsequent owner from a legitimate variance request (*Johnson v. Robinson Twp*, 420 Mich 115 (1984)). At the same time, the Court of Appeals recognizes that merely purchasing property with the knowledge of ordinance limitations does not preclude someone from applying for (and receiving) a variance (*City of Detroit v. City of Detroit BZA*, 326 Mich App 248 (2018)). The key is whether a property owner — present or past, took affirmative action to alter the property counter to the controlling ordinance at the time. The purchase of a unique lot, even with knowledge of the current ordinance, should not be held against a new owner. This standard is inappropriately applied if a ZBA member sees the presence of the applicant before the ZBA as a self-created situation. This mindset would lead to the conclusion that all variance requests are self-created. It is not an applicant's desire for a variance that is a self-created problem; it is an applicant's previous action to fill the buildable envelope with structures, or divide the parcel into an unusual shape that is the self-created problem.

Lastly, it is important to note that all the standards that amount to the showing of a practical difficulty must be satisfied in order for a variance to be granted. The list of standards from the Court of Appeals, and any additional standards in the zoning ordinance, must all be satisfied in order for the applicant to have a practical difficulty. The collection of facts that satisfy all of the applicable standards must then be captured in the record to document the reasons for the decision (see [How to take Minutes for Administrative Decisions](#)).

The role of the ZBA member is an unenviable one. Board members are asked to apply the standards described in this article (and possibly more) to the requests of perfect strangers, acquaintances, and friends alike (outside of a bona fide conflict of interest) and do so consistently and without bias. Doing so is easier when all members of the ZBA understand the standards in the ordinance and have reference material in

front of them at each meeting that spells out what constitutes a practical difficulty (or unnecessary hardship). Michigan State University Extension offers training for ZBA members to help them make more legally defensible decisions. Contact a land use educator to learn more.

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Resolution Adopting Findings of Fact, LMC Model Resolution

League staff thoughtfully develops models for a city's consideration. Models should be customized as appropriate for an individual city's circumstances in consultation with the city's attorney. Helpful background on this model may be found in League information on ["Land Use Variances."](#)



This icon marks places where the city must customize the model. They offer additional provisions, optional language, or comments for your consideration. The icon, and language you do not wish to include, should be deleted from this model before use. Make other changes, as needed, to customize the model for your city.

RESOLUTION NO. _____

A RESOLUTION ADOPTING FINDINGS OF FACT AND REASONS FOR _____ FOR VARIANCE APPLICATION OF _____ AT _____



Insert either "approval" or "denial" in the first blank. Insert the applicant's name and address in the second and third blanks.

FACTS

1. _____ is the owner of a parcel of land located at _____; and,



Insert the applicant's name in the first blank, and the address including city and state in the second blank.

2. The subject property is legally described as found on Exhibit A; and,

3. _____ has applied to the City for a variance to build _____ as described on Exhibit B



Insert the applicant's name in the first blank and the proposed project in the second blank.

4. The proposal would vary from (Ordinance Requirement) in that it would (Deviation Sought).



Insert the ordinance requirement in the first blank and the deviation sought in the second blank.

5. Following a public hearing on the application, the _____ Planning Commission has recommended (approval/denial) of the variance on (date).



Insert the city's name in the first blank; either "approval" or "denial" in the second blank and the date of the Commission's action in the last blank.

6. The City Council of the City of _____ reviewed the requested variance at its Meeting of _____.



Insert the city's name in the first blank and the month, day and year of the council meeting in the next blank.



Add more facts about the project using additional numbers as may be necessary and relevant.

APPLICABLE LAW

7. Minnesota Statute Section 462.357, subd. 6 provides:

- a. Variances shall only be permitted (a) when they are in harmony with the general purposes and intent of the ordinance and (b) when the variances are consistent with the comprehensive plan.
- b. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance. "Practical difficulties," as used in connection with the granting of a variance, means that (a) the property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance; (b) the plight of the landowner is due to circumstances unique to the property not created by the landowner; and (c) the variance, if granted, will not alter the essential character of the locality.

8. City Ordinance allows variances if _____



Cite to relevant city variance standard, if applicable.

9. City Ordinance requires _____



Cite to applicable ordinances, including that being varied from.

CONCLUSIONS OF LAW

10. The requested variance _____ in harmony with the purposes and intent of the ordinance because _____



Insert either "is" or "is not" in the first blank, and your reasons in the second blank.

11. The requested variance _____ consistent with the comprehensive plan because _____



Insert either "is" or "is not" in the first blank, and your reasons in the second blank.

12. The property owner _____ propose to use the property in a reasonable manner because _____



Insert either "does" or "does not" in the first blank, and your reasons in the second blank.

13. There _____ unique circumstances to the property not created by the landowner because _____



Insert either "are" or "are not" in the first blank, and your reasons in the second blank.

14. The variance _____ maintain the essential character of the locality because _____



Insert either "will" or "will not" in the first blank, and your reasons in the second blank.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF _____, MINNESOTA AS FOLLOWS:

The application to issue a variance to allow _____ to build _____ so as to deviate from _____ is hereby _____.



Insert the applicant's name in the first blank, the proposed project in the second blank, the ordinance requirement in the third blank, and either "approved" or "denied" in the last blank.

Passed by the City Council of _____, Minnesota this _____ day of Month, Year.

Zoning Code Variation Guidelines for Particular Hardship and Practical Difficulty Criteria

Seeking a variation is a legal process that allows property owners to build structures or use land in a way that is contrary to the local zoning regulations. Variations are meant to be used sparingly. Granting a variation should be based on a practical difficulty or a particular hardship that is directly related to the property and related uses. The Glen Ellyn Zoning code reads:

"The Zoning Board of Appeals shall not recommend, and the Village Board shall not vary, the provisions of this Zoning Code, except in cases where there are practical difficulties or particular hardship in the way of carrying out the strict letter of any regulation of this Zoning Code relating to the use, construction or alteration of buildings or structures or the use of land."

It is very important to consider what constitutes a practical difficulty or particular hardship. Unfortunately, there is more information about what is not a practical difficulty or particular hardship than there is to define one. This is probably because there are an infinite number of variation probabilities and scenarios.

The courts have ruled that a practical difficulty or particular hardship cannot be self created, cannot be just showing that the property would be worth more if a variation were granted, and it cannot be just a demonstration that a property is better suited for a use that is prohibited than a use that is permitted.

In trying to define the practical difficulty or particular hardship the person making the decision on whether or not to support the variance will need to evaluate if:

1. The property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations governing the district in which it is located; or
2. The plight of the owner is due to unique circumstances; and that the Variation, if granted, will not alter the essential character of the locality;

The first test above essentially applies to the variety of uses that could be developed on the land. The applicant or owner must show more than a loss. The applicant or owner must demonstrate that there would be a loss or lack of reasonable return from each and every permitted use on the property. The second test implies that the hardship conditions shall not be generally applicable to a similar situation in the same zoning district. If that were the case, then the zoning of the district would be materially changed. Uniqueness relates to hardship, which refers to the land and not to the personal circumstances of the applicant or owner.

Furthermore, the Zoning Board must also consider other standards prescribed in the Glen Ellyn Zoning Code when deciding on variations:

1. That the particular physical surroundings, shape or topographical condition of the specific property involved would bring particular hardship upon the owner as distinguished from a

- mere inconvenience, if the strict letter of the regulation were to be carried out;
2. That the conditions upon which the petition for Variation is based would not be applicable generally to other property within the same zoning district;
 3. That the purpose of the Variation is not based exclusively upon a desire to make more money out of the property;
 4. That the alleged difficulty or particular hardship has not been created by any person presently having an interest in the property or by the applicant;
 5. That the granting of the Variation will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located;
 6. That the proposed Variation will not:
 - a). Impair an adequate supply of light and air to adjacent property;
 - b). Substantially increase the hazard from fire or other dangers to said property or adjacent property;
 - c). Otherwise impair the public health, safety, comfort, morals or general welfare of the inhabitants of the Village;
 - d). Diminish or impair property values within the neighborhood;
 - e). Unduly increase traffic congestion in the public streets and highways;
 - f). Create a nuisance; or
 - g). Result in an increase in public expenditures;
 7. That the Variation is the minimum Variation that will make possible the reasonable use of the land, building or structure.

A zoning variation runs with the land indefinitely. This reinforces that variations should not be granted based on personal circumstances; while the people eventually will go away, the variation does not. The New York Supreme Court defined a variance as:

"An authority to a property owner to use the property in a manner forbidden by the ordinance."

The owners seeking variations are expected to bear a "higher burden of proof". Where a request for a variation is not unique or changes the essential character of the area, the petitioner should seek an amendment to the zoning code that would then apply throughout the district, rather than a variation. Variations are meant to be used sparingly, which is intentional as suggested in a reference from the case of *Real Properties v. Board of Appeals of Boston* that reads:

"The power of variances is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others."

Here are a couple of examples of variation requests that have hardships:

1. A platted lot that is uniquely shaped and when the zoning code is applied, interferes with the buildable area of the lot.
2. Unusual topography or natural conditions within a parcel.

These are a few variations requests that do not include hardships:

1. The cost of a project would be greater if it were constructed in an area that would be otherwise permissible.
2. Request to accommodate the size of ones family or personal health issues.
3. Request to expand beyond conditions created by a previous owner. For example, the previous owner may have elected to build the structure up to the setback line even though there was ample space to provide more distance from the property line.

In conclusion, a hardship is not just ordinary inconvenience or difficulty and the owner must be able to show that there is an inability to make reasonable use of the land. The hardship or difficulty must be unique and should not generally apply to other properties. Hardships cannot be self-created, which even applies to action taken by previous owners, including work performed without a permit. According to the courts, a hardship does not include a potential for economic loss or less than maximum return. Finally, the use or modification must not alter the essential character of the area. The ultimate question that must be asked is "Is the property owner deprived of rights or deprived of their desires?"



INFORMATION MEMO

Land Use Variances

Learn about variances as a way cities may allow an exception to part of their zoning ordinance. Review who may grant a variance and how to follow and document the required legal standard of “practical difficulties” (before 2011 called “undue hardship”). Links to a model ordinance and forms for use with this law.

RELEVANT LINKS:

Minn. Stat. § 462.357, subd. 6.

Minn. Stat. § 462.357, subd. 6.

Minn. Stat. § 462.357, subd. 6.

I. What is a variance

A variance is a way that a city may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply.

Sometimes a landowner will seek a variance to allow a particular use of their property that would otherwise not be permissible under the zoning ordinance. Such variances are often termed “use variances” as opposed to “area variances” from dimensional standards. Use variances are not generally allowed in Minnesota—state law prohibits a city from permitting by variance any use that is not permitted under the ordinance for the zoning district where the property is located.

II. Granting a variance

Minnesota law provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission or even the city council may serve that function. A variance decision is generally appealable to the city council.

A variance may be granted if enforcement of a zoning ordinance provision as applied to a particular piece of property would cause the landowner “practical difficulties.” For the variance to be granted, the applicant must satisfy the statutory three-factor test for practical difficulties. If the applicant does not meet all three factors of the statutory test, then a variance should not be granted. Also, variances are only permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

III. Legal standards

When considering a variance application, a city exercises so-called “quasi-judicial” authority. This means that the city’s role is limited to applying the legal standard of practical difficulties to the facts presented by the application. The city acts like a judge in evaluating the facts against the legal standard. If the applicant meets the standard, then the variance may be granted. In contrast, when the city writes the rules in zoning ordinance, the city is exercising “legislative” authority and has much broader discretion.

A. Practical difficulties

“Practical difficulties” is a legal standard set forth in law that cities must apply when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied.

1. Reasonableness

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

2. Uniqueness

The second factor is that the landowner’s problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

RELEVANT LINKS:

2011 Minn. Laws, ch. 19,
amending Minn. Stat. §
462.357, subd. 6.

*Krummenacher v. City of
Minnetonka*, 783 N.W.2d 721
(Minn. June 24, 2010).

Minn. Stat. § 462.357 subd.
6.
Minn. Stat. § 394.27, subd. 7.

See Section I, *What is a
variance*.

See Section IV-A, *Harmony
with other land use controls*.

3. Essential character

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor, consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

B. Undue hardship

“Undue hardship” was the name of the three-factor test prior to a May 2011 change of law. After a long and contentious session working to restore city variance authority, the final version of HF 52 supported by the League and allies was passed unanimously by the Legislature. On May 5, Gov. Dayton signed the new law. It was effective on May 6, the day following the governor’s approval. Presumably it applies to pending applications, as the general rule is that cities are to apply the law at the time of the decision, rather than at the time of application.

The 2011 law restores municipal variance authority in response to a Minnesota Supreme Court case, *Krummenacher v. City of Minnetonka*. It also provides consistent statutory language between city land use planning statutes and county variance authority, and clarifies that conditions may be imposed on granting of variances if those conditions are directly related to, and bear a rough proportionality to, the impact created by the variance.

In *Krummenacher*, the Minnesota Supreme Court narrowly interpreted the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance. The new law changes that factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling.

The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retained the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. Also included is a sentence new to city variance authority that was already in the county statutes.

RELEVANT LINKS:

Issuance of Variances, LMC model ordinance.

Variance Application, LMC model form.
Adopting Findings of Fact, LMC model resolution.

Minn. Stat. § 462.357, subd. 6.

See LMC information memo, *Taking the Mystery out of Findings of Fact*.

Minn. Stat. § 462.357, subd. 6.

C. City ordinances

Some cities may have ordinance provisions that codified the old statutory language, or that have their own set of standards. For those cities, the question may be whether you have to first amend your zoning code before processing variances under the new standard. A credible argument can be made that the statutory language pre-empts inconsistent local ordinance provisions. Under a pre-emption theory, cities could apply the new law immediately without necessarily amending their ordinance first. In any regard, it would be best practice for cities to revisit their ordinance provisions and consider adopting language that mirrors the new statute.

The models linked at the left reflect the 2011 variance legislation. While they may contain provisions that could serve as models in drafting your own documents, your city attorney would need to review prior to council action to tailor to your city's needs. Your city may have different ordinance requirements that need to be accommodated.

IV. Other considerations

A. Harmony with other land use controls

The 2011 law also provides that: "Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan." This is in addition to the three-factor practical difficulties test. So a city evaluating a variance application should make findings as to:

- Is the variance in *harmony with* the purposes and intent of the ordinance?
- Is the variance *consistent with* the *comprehensive plan*?
- Does the proposal put property to use in a *reasonable manner*?
- Are there *unique circumstances* to the property not created by the landowner?
- Will the variance, if granted, alter the *essential character* of the locality?

B. Economic factors

Sometimes landowners insist that they deserve a variance because they have already incurred substantial costs or argue they will not receive expected revenue without the variance. State statute specifically notes that economic considerations alone cannot create practical difficulties. Rather, practical difficulties exist only when the three statutory factors are met.

RELEVANT LINKS:

Minn. Stat. § 462.357, subd.
6.

C. Neighborhood opinion

Neighborhood opinion alone is not a valid basis for granting or denying a variance request. While city officials may feel their decision should reflect the overall will of the residents, the task in considering a variance request is limited to evaluating how the variance application meets the statutory practical difficulties factors. Residents can often provide important facts that may help the city in addressing these factors, but unsubstantiated opinions and reactions to a request do not form a legitimate basis for a variance decision. If neighborhood opinion is a significant basis for the variance decision, the decision could be overturned by a court.

D. Conditions

A city may impose a condition when it grants a variance so long as the condition is directly related and bears a rough proportionality to the impact created by the variance. For instance, if a variance is granted to exceed an otherwise applicable height limit, any conditions attached should presumably relate to mitigating the effect of excess height.

V. Variance procedural issues

A. Public hearings

Minnesota statute does not clearly require a public hearing before a variance is granted or denied, but many practitioners and attorneys agree that the best practice is to hold public hearings on all variance requests. A public hearing allows the city to establish a record and elicit facts to help determine if the application meets the practical difficulties factors.

B. Past practices

While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors for each and every variance request. In evaluating a variance request, cities are not generally bound by decisions made for prior variance requests. If a city finds that it is issuing many variances to a particular zoning standard, the city should consider the possibility of amending the ordinance to change the standard.