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To: City of Independence, Iowa BOA

From: City Attorney Doug Herman, Lynch Dallas, P.C.

Date: April 28, 2024

Re: Application for Variance submitted by Revive Properties, LLC

Introduction:

The purpose of this Memorandum is to provide legal guidance related to the Board of Adjustments responsibilities, and/or duty, when presented with a “Variance” requests

The Memorandum will provide an overview of the purpose of the Board of Adjustment as it relates to the consideration of Variance requests, while taking into account and referencing relevant City of Independence Ordinances and Iowa law.

You will understand, after a review of this memorandum, that variances are to be given very rarely, are frowned upon by the Courts, and that to grant most variances you will be presented with will require you to ignore not only the City Ordinances but also State Law. You will also learn that neither past precedent and/or practices, nor the support of or lack of objections by neighbors to a Variance request are considerations during your analysis of a Variance request.

Golden Rule of Variance Consideration

***A variance should protect a landowner’s property right,
not grant a landowner a special privilege unavailable to
other landowners.***

Board of Adjustment as it pertains to Variance Consideration:

Authorize upon appeal in specific cases such *variance* from the terms of the ordinance as will not be contrary to the public interest, where owing to special conditions a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed, and substantial justice done. Iowa Code § 414.12

A variance is an authorization to allow a landowner *to do something that is generally forbidden* by the ordinance. The applicant carries the burden of proving to the board that strict enforcement of the terms of the ordinance will inflict an unnecessary hardship on the landowner for a variance to be granted. Iowa courts have set out specific criteria that must be satisfied before the zoning board of adjustment may find that an unnecessary hardship exists, sufficient to grant a landowner a variance. The landowner **must satisfy all three parts of the test** to be granted a variance:

1. The land in question **cannot yield reasonable return** if used only for purpose allowed in that zone,
2. The plight of the landowner is **due to unique circumstances** and not to general conditions in neighborhood, and
3. The use to be authorized by variance **will not alter essential character of locality**.

The Iowa courts have established guidelines to assess whether the above criteria have been met:

- Lack of a “**reasonable return**” may be shown by proof that the owner has been deprived of all beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.
 - o It is **not sufficient** to show that the **value of land** merely has been **depreciated** by the zoning regulations, or that a variance would permit a landowner to maintain a more profitable use.
 - o It is **not sufficient** to show mere **inconvenience** to the applicant.
- Problems common to several properties do not constitute “unique circumstances.” **The appropriate response is through a zoning amendment, NOT wholesale application of the discretionary power of the board of adjustment.**
- The “unique circumstances” **must not be created by the landowner’s own actions**. For example, a landowner cannot build a house to fill the building envelope of a lot (i.e., so that the walls are built to the minimum front, side, and rear setback lines), then seek a variance to put a porch or deck on that house that will violate a setback.
- When a landowner purchases property he or she assumes the circumstances created by the previous landowner.
- A variance that alters the “essential character of the area” is beyond the authority of the board of adjustment to grant. **The board cannot grant a variance that, in effect, constitutes a zoning amendment.** Factors to consider in determining whether a variance will alter the “essential character of the neighborhood” include the degree of variation from district regulations, the size of the parcel, and the parcel’s size and character in relation to the size of the district.

**(See Addendum A for other relevant Sections of the
Independence Code of Ordinances)**

Other Notes related to BOA operations.

It is generally viewed as inappropriate for Board Members to visit with parties either requesting a variance or parties objecting to a variance outside of the Public Meeting. These conversations are considered “ex parte” communications. As the BOA is a “quasi-judicial body” all conversations should be had publicly and with all parties given an opportunity to be present.

Conflict of Interest / Abstention

Under the City Code, which references the State Code, a Conflict of Interest exists, from a legal standpoint, according to the following:

5.07 CONFLICT OF INTEREST. A City officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the City, unless expressly permitted by law. A contract entered into in violation of this section is void. The provisions of this section do not apply to: (Code of Iowa, Sec. 362.5)

There are also many times an elected or appointed official feels uncomfortable voting on a matter due to what may appear to be a conflict of interest or a bias. While not a “legal” conflict of interest, the member may assert a conflict of interest and abstain from voting on a matter in this situation. Whenever abstaining, a member shall explain the basis of their abstention and their basis, whether agreed with by others or not, cannot be challenged. (If I say I have a conflict, I have a conflict.)

When an elected or appointed official abstains due to a conflict of interest it is as if they are not on the Board and the size of the Board is reduced by one in the event of one abstention. So, a five-member board would become a four-member board for purposes of determining how many votes it takes to pass an action.

The State Code requires a five-member BOA to have at least three members present to have a quorum and at least three members voting in the affirmative to approve a matter. Your Code currently requires the assent of four members to approve a matter which is inconsistent with the Iowa Code, and because the Iowa Code is clear on this matter, has not left it to the discretion of the City, the State Code overrides the City Code.

A member with a Conflict of Interest should abstain as soon as the basis for the abstention becomes apparent. This member should not participate in any fashion in the discussion, the vote, or in any other manner. The official does not have to leave the room or their seat but should remain silent and not try to influence the remaining members. The abstaining member is still counted for purposes of determining whether a quorum exists.

Recent Iowa Supreme Court Decision:

Early v. Board of Adjustment of Cerro Gordo County, Iowa (Iowa Sup. Ct. Feb. 26, 2021)

Background:

A couple owned residential property with a patio. The patio ended within twenty-one inches of the boundary line. Local ordinances required a six-foot setback distance. The homeowners built a pergola over the patio to provide shade, but the structure did not extend past the patio.

In 2018, the County Planning and Zoning Administrator informed the homeowners they may have violated a county zoning ordinance because they did not have a permit when they built the pergola.

1. The homeowners applied for a permit, but it was denied because of the pergola's proximity to the lot line.
2. The homeowners appealed to the County Board of Adjustment seeking an area variance. At the hearing, no one appeared to dispute the request.
3. The Board granted a variance finding the pergola was already built, the patio and posts for the pergola preexisted the pergola, and the new structure did not create any safety concerns.
4. A neighbor who shared the boundary line with the patio and pergola petitioned for a writ of certiorari claiming the Board granted the variance illegally without substantial evidence.
5. The district court found the Board acted properly in granting the variance and did not abuse its discretion. The neighbor appealed.

District Court / Court of Appeals Analysis:

A board of adjustment may grant a variance if it does not harm the public and enforcing the zoning ordinance would create unnecessary hardship due to the special conditions of the area. Granting an **area variance** requires less justification than granting a **use variance**. Such an applicant must show they will experience unnecessary hardship without the variance. To prove unnecessary hardship, an applicant must show:

1. the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone;
2. the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood, which may reflect the unreasonableness of the zoning ordinance itself; and
3. the use to be authorized by the variance will not alter the essential character of the locality.

Graziano v Bd. of Adjustment, 323 N.W.2d 233, 236 (Iowa 1982). In this case, the applicants owned residential property not intended for profit. Because of this, the court considered whether denying the variance would result in preventing the homeowners from peacefully enjoying their property rather than considering the property's reasonable return. The court found the homeowners could not fully utilize their yard without the pergola which would decrease the property value.

Next, the applicant must also prove there are unique circumstances. The property had a preexisting patio. There was no evidence of when the patio was built, and the neighbor was only bringing a complaint regarding the pergola. Additionally, the neighbor's home had a significant separation from the pergola. The court found this qualified as a unique circumstance.

Finally, a variance can only be granted if it will not alter the character of the area. The Board found that because the patio already was built, the pergola did not create a change in character to the neighborhood. Additionally, several board members stated it was an attractive addition to the neighborhood.

Because the homeowner's demonstrated unnecessary hardship, the Court of Appeals affirmed the ruling that the Board did not act illegally when granting the variance.

Supreme Court Analysis in Overturning the Court of Appeals Decision:

A board of adjustment may grant an individual a variance to deviate from the local zoning laws. Iowa Code § 335.15(3). An **area variance** allows for deviation from a specific requirement while a **use variance** permits a landowner to use their property in a manner not prescribed by the zoning ordinance. The board cannot grant a variance unless the applicant shows that the enforcement of a zoning provision will result in unnecessary hardship. To demonstrate unnecessary hardship, the applicant must show that:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood; and (3) the use to be authorized by the variance will not alter the essential character of the locality.

Deardorf v. Bd. of Adjustment of Plan. & Zoning Comm'n, 118 N.W.2d 78, 81 (1962).

The Court of Appeals held that a less strict burden than the *Deardorf* standard was required when approving an area variance. Based upon this determination, the Court of Appeals found there was substantial evidence to support the board's decision to approve the homeowners' request.

On appeal, the Supreme Court disagreed, explaining that Iowa courts and local zoning authorities had adopted the *Deardorf* standard for more than 60 years. While there are legitimate reasons to distinguish between use and area variances, under the principle of stare decisis, the Court ruled that adhering to precedent promotes stability and efficiency of the judicial process. Additionally, the Iowa Legislature had not initiated any type of legislative response to show its disapproval of the Court's past interpretation of Iowa Code § 335.15(3). **Therefore, the strict *Deardorf* standard applies equally to both use and area variances.**

After concluding that the *Deardorf* standard was the proper standard for an area variance, the Court next considered whether the homeowners had met that standard.

The Court first considered whether the homeowners had shown that their property could not yield a reasonable return without the variance. **To meet this standard, applicants must show that a reasonable return is not possible from the permitted use.**

In the variance application, the homeowners did not answer why the lack of a variance created a hardship. At the hearing, the homeowners did not testify or offer evidence of a hardship caused by denying the variance. The homeowners only offered evidence of the advantages the pergola provided, including shade and decorative value. The homeowners did not provide evidence that they were deprived of all beneficial use of their land, but instead only provided information on the benefits of the pergola. **Therefore, the homeowners did not establish their property could not yield a reasonable return without the variance.**

Next, the Court considered whether the homeowners established that the need for a variance was due to unique circumstances of the property. The homeowners built the pergola for shade, but this is not a circumstance unique to the property. The homeowners did not offer any additional information on this element. **Therefore, the homeowners did not establish the “plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood.”** *Deardorf*, 118 N.W.2d at 81. Finally, the homeowners argued that the variance should be granted because they completed the pergola construction in **good faith** without realizing it violated the zoning ordinance. In response, the **court ruled that a variance should not be granted because an applicant spent a substantial amount of financial resources.** Even though the pergola was already completed in good faith, the Court held this was immaterial to granting a variance. To hold otherwise would mean that an ordinance only applies to “persons who are conscientious enough to adequately inform themselves of its provisions and who have actual knowledge of its terms.” *Board of Adjustment v. Ruble*, 193 N.W.2d 497, 505 (Iowa 1972).

I do not know Independence’s history in considering and granting variances. Many communities grant variances based upon the following standard: “Does anyone object?” While this is understandable, it is not appropriate. What will happen eventually is that someone will want a variance, like others approved in the past where there were no objections, and the new request will face objections. The person wanting the variance, and facing objections, will point to every other variance granted in the past to support their request. In this circumstance what does the Board do; follow the “does anyone object” standard or follow “past practices”?

The best approach is to have well drafted ordinances and to stand by them and/or amend them when deemed appropriate, but to only grant variances on a very, very, limited basis, following the analysis and standards adopted by the Iowa Supreme Court.

Sincerely yours

Douglas D. Herman

Douglas D. Herman

Addendum A**Planning and Zoning / Zoning Ordinance Generally****Section 1.01. PURPOSE**

The various use districts which are created by this Ordinance and the various articles and sections of this Ordinance are adopted for the purpose among others of:

- 1.01.01. Carrying out the Comprehensive Plan for the City of Independence, Iowa;
- 1.01.02. Promoting the public health, safety, morals, comfort, general welfare, and preserving the natural, scenic and historically significant areas of the City;
- 1.01.03. Helping to achieve greater efficiency and economy of land development by promoting the grouping of those activities which have similar needs and are compatible;
- 1.01.04. Encouraging such distribution of population, classification of land use, and distribution of land development throughout the City that will tend to facilitate adequate and economic provision of transportation, communication, water supply, drainage, sanitation, education, recreation, and other public requirements;
- 1.01.05. Lessening or avoiding congestion in the public streets and highways;
- 1.01.06. Protecting against fire, explosion, noxious fumes, flood panic, and other dangers in the interest of public health, safety, comfort, and general welfare;
- 1.01.07. Helping to insure that all residential, commercial, and manufacturing structures as well as other types of structures will be accessible to fire fighting and other emergency equipment;
- 1.01.08. Prohibit the formation or expansion on nonconforming uses of land, buildings, and structures which are adversely affecting the character and value of desirable development in each district;
- 1.01.09. Promoting the development of residential neighborhoods which are free of noise, dust, fumes, and heavy traffic volumes in which each dwelling unit is assured of light, air, and open spaces;
- 1.01.10. Helping to prevent land development activities which lead to roadside blight, and to minimize the effects of nuisance producing activities;
- 1.01.11. Promoting and guiding the continued growth and expansion of the City while protecting the natural, economic, historic and scenic resources of the City;
- 1.01.12. Conserving the taxable value of land and buildings throughout the City; and
- 1.01.13. Defining the powers and duties of the Zoning Officer and other bodies as provided herein.

Section 1.02. NATURE.

This Ordinance classifies and regulates the use of land, buildings, and structures within the corporate limits of the City of Independence, Iowa, and hereinafter set forth. The regulations contained herein are necessary to promote the health, safety, convenience, morals and welfare of the inhabitants, and to preserve the natural, scenic and historically significant areas of the City by dividing the City into zoning districts and regulating there in the use of the land and the use and size of the buildings as to height and number of stories, the coverage of the land by buildings, and the density of population.

Section 1.03. AUTHORITY

This Ordinance, in pursuance of the authority granted by the Revised Statutes of the State of Iowa, Chapter 414, Section 1, shall be known and cited as the “Zoning Ordinance of the City of Independence, Iowa.”

Board of Adjustment Specific Ordinances**Section 4.13. VARIANCES.**

The Board of Adjustment may authorize upon request in specific cases such variances from the terms of this chapter as will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions of this chapter will result in unnecessary hardship. Variances granted must meet the following applicable standards:

4.13.01. Prohibited. No variance shall be granted for any development within the floodway which would result in an increase in the hundred (100) year flood level. Consideration of the effects of any development of flood levels shall be based upon the assumption that an equal degree of development would be allowed for similarly situated lands.

4.13.02. Cause. Variances shall only be granted upon (i) a showing of good and sufficient cause; (ii) a determination that failure to grant the variance would result in exceptional hardship to the applicant; and (iii) a determination that the granting of the variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public.

4.13.03. Required to Afford Relief. Variances shall only be granted upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

4.13.04. Notice to Applicant. In cases where the variance involves a lower level of flood protection for buildings than what is ordinarily required by this chapter, the applicant shall be notified in writing signed by the Zoning Administrator that (i) the issuance of a variance will result in increased premium rates for flood insurance and (ii) such construction increases risks to life and property.

4.13.05. Department of Natural Resources Approval. All variances granted shall have the concurrence or approval of the Department of Natural Resources. Section

4.14. HEARINGS BY BOARD OF ADJUSTMENT.

Upon the filing with the Board of Adjustment of an appeal, an application for a Conditional Use or a request for a Variance, the Board shall hold a public hearing. The Board shall fix a reasonable time for the hearing and give public notice thereof, as well as due notice to parties in interest. At the hearing, any party may appear in person or by agent or attorney and present written or oral evidence. The Board may require the appellant or applicant to provide such information as is reasonable deemed necessary and may request the technical assistance and/or evaluation of a professional engineer or other expert person or agency, including the Department of Natural Resources.

4.15. DECISIONS OF BOARD OF ADJUSTMENT.

The Board shall arrive at a decision on an appeal, Conditional Use or Variance within a reasonable time. In acting on an appeal, the Board may, so long as such action is in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or modify the order, requirement, decision, or determination appealed from, and it shall make its decision, in writing, setting forth the findings of fact and the reasons for its decision. In granting a Conditional Use or Variance, the Board shall consider such factors as contained in this section and all other relevant sections of this chapter and may prescribe such conditions as contained in subsection (4.15.02.) of this section.

4.15.01. Factors Upon Which the Decision of the Board Shall Be Based. In passing upon applications for Conditional Use or requests for Variances, the Board shall consider all relevant factors specified in other sections of this chapter and:

- (a) The danger to life and property due to increased flood heights or velocities caused by encroachments.
- (b) The danger that materials may be swept on to other lands or downstream to the injury of others.
- (c) The proposed water supply and sanitation systems and the ability of these systems to prevent disease, contamination and unsanitary conditions.
- (d) The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner.
- (e) The importance of the services provided by the proposed facility to the community.
- (f) The requirements of the facility for a flood plain location.
- (g) The availability of alternative locations not subject to flooding for the proposed use.
- (h) The compatibility of the proposed use with existing development and development anticipated in the foreseeable future.
- (i) The relationship of the proposed use to the comprehensive plan and flood plain management program for the area.
- (j) The safety of access to the property in times of flood for ordinary and emergency vehicles.
- (k) The expected heights, velocity, duration, rate of rise and sediment transport of the flood water expected at the site.
- (l) Such other factors which are relevant to the purpose of this article.

4.15.02. Conditions Attached to Conditional Uses or Variances. Upon consideration of the factors listed above, the Board may attach such conditions to the granting of Conditional Uses or Variances as it deems necessary to further the purpose of this Article. Such conditions may include, but are not necessarily limited to:

- (a) Modification of waste disposal and water supply facilities.
- (b) Limitation on periods of use and operation.
- (c) Imposition of operational controls, sureties, and deed restrictions.
- (d) Requirements for construction of channel modification, dikes, levees, and other protective measures, provided such are approved by the Department of Natural Resources and are deemed the only practical alternative to achieving the purposes of this article.
- (e) Flood proofing Measures. Flood proofing measures shall be designed consistent with the flood protection elevation for the particular area, flood velocities, durations, rate of rise, hydrostatic and hydrodynamic forces and other factors associated with the regulatory flood. The Board of Adjustment shall require that the applicant submit a plan or document certified by a registered professional engineer that the flood proofing measures are consistent with the regulatory flood protection elevation and associated flood factors for the particular area. Such flood proofing measures may include, but are not necessarily limited to the following:

- 1. Anchorage to resist flotation and lateral movement.
- 2. Installation of watertight doors, bulkheads, and shutters, or similar methods of construction.
- 3. Reinforcement of walls to resist water pressures.
- 4. Use of paints, membranes, or mortars to reduce seepage of water through walls.
- 5. Addition of mass or weight structures to resist flotation.
- 6. Installation of pumps to lower water levels in structures.
- 7. Pumping facilities or comparable practices for subsurface drainage systems for building to relieve external foundation wall and basement flood pressures.
- 8. Construction of water supply and waste treatment systems so as to prevent the entrance of flood waters.
- 9. Construction to resist rupture or collapse caused by water pressure or floating debris.
- 10. Installation of valves or controls on sanitary and storm drains which will permit the drains to be closed to prevent backup sewage and storm waters into the buildings or structures.
- 11. Location of all electrical equipment, circuits and installed electrical appliances in a manner which will assure they are not subject to flooding.

- (f) Appeals to the Court. Any person or persons, jointly or severally, aggrieved by any decision of the Board of Adjustment may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty (30) days after the filing of the decision in the office of the Board.