

**Town of Weaverville
Board of Adjustment
Regular Monthly Meeting
Monday, April 8, 2024, 6:00pm
Agenda**

	Pg#	
1. Call to Order		Chairman Lewis
2. Approval of the Minutes – 1/8/2024 Regular Meeting	2	Chairman Lewis
3. Variance Standards – What Is Hardship?	4	Planning Director Eller / Attorney Jackson
4. Adjournment		Chairman Lewis

**Town of Weaverville
Board of Adjustment
Regular Monthly Meeting
Monday, January 8, 2024, 6:00pm**

Minutes

The Board of Adjustment of the Town of Weaverville met for its regularly scheduled monthly meeting at 6:00 p.m. on Monday, January 8, 2024, in the Community Room and Council Chambers at Town Hall, 30 South Main Street, Weaverville.

Present: Chairman Tycer Lewis, Vice-Chair Cynthia Wright, Board Members Paul Clauhs, Roger Parkin, and Larry Murray, and Alternate Members Brent Koenig and Paul DeCrosta. Staff Present: Town Attorney Jennifer Jackson and Planning Director/Zoning Administrator James Eller, and Town Clerk Tamara Mercer

1. Call to Order

Chairman Lewis called the meeting to order at 6:00 pm. The staff introduced newly appointed Alternate Board Member Paul DeCrosta, who had previously taken his Oath of Office.

2. Annual Election of Officers

Chairman Lewis requested nominations for Chairman and Vice Chair.

Paul Clauhs moved to appoint Tycer Lewis as Chairman and Cynthia Wright as Vice Chair. Motions were seconded by Roger Parkin. Carried unanimously 5-0.

3. Adoption of Regular Meeting Schedule

Chairman Lewis requested a motion to approve the schedule. Paul Clauhs moved to adopt the 2024 calendar meeting schedule as presented and the motion was seconded by Cynthia Wright. Carried unanimously 5-0.

4. Approval of the Minutes – 3/13/2023 Regular Meeting

Chairman Lewis requested a motion and Roger Parkin moved to approve the March 13, 2023 meeting minutes as presented, seconded by Cynthia Wright. Carried unanimously 5-0.

5. Overview of Board of Adjustment Matters, Attorney Jackson

Attorney Jackson provided an overview of the quasi-judicial evidentiary hearing and decision process and procedures, variance requests, applications for special use permits, due process rights, and land development regulation standards. Focus on conflicts of interest, bias versus impartial decisions, witnesses and parties of standing, presentation of exhibits and evidence, criteria of testimony and North Carolina State Law were reviewed by Attorney Jackson. Majority votes and super majority vote decisions were clarified for the Board.

Planning Director Eller reviewed the upcoming cases expected to be coming before the Board of Adjustment. Mr. Eller elaborated on the Town's jurisdiction in variance requests, Special Use Permits (only a few in the Town), the fee in lieu system, Code of Ordinances, and recent text amendments, waivers, non-conforming uses, appeals, and animal control decisions.

There was a question-and-answer period regarding the status of various projects as discussed by Mr. Eller. By consensus the Board members agreed that a quarterly meeting even though no cases may come before the Board of Adjustment would be in order to review procedures and to receive training such as the School of Government quasi-judicial review for granting variances.

Mr. Eller noted that the Board of Adjustment should also appoint a secretary.

Chairman Lewis requested a motion and Larry Murray moved to appoint Town Clerk Tamara Mercer as secretary to the board, seconded by Paul Clauhs. Carried unanimously 5-0.

5. Adjournment

There being no further business, and without objection, Chairman Lewis requested adjournment.

Paul Clauhs moved to adjourn at 7:15 p.m. seconded by Cynthia Wright. Carried unanimously 5-0.

Attest:

Tamara Mercer, Town Clerk

TOWN OF WEAVERVILLE
BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, April 8, 2024
Subject: Variance Standards
Presenter: Planning Director / Town Attorney
Attachments: Variance Standards: What is hardship? And when is it unnecessary?

Description:

At your previous meeting in January, the Board noted a desire to meet on a quarterly basis in the event that no actionable applications have been received. No such applications have been received and staff is electing to take this opportunity to provide the Board with some continuing education on the topic of unnecessary hardship within variance standards.

The following is the applicable section of ordinance dealing with variance standards:

Sec. 20-3108. Quasi-judicial zoning decisions.

- (d) *Variations.* When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the board of adjustment shall vary any of the provisions of the zoning regulation when, based on competent, material, and substantial evidence, it finds all of the following:
- (1) **Unnecessary hardship** would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made on the property;
 - (2) **The hardship** results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability;
 - (3) **The hardship** did not result from the actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship;
 - (4) The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved;
 - (5) The requested variance is not a request to permit a use of land, building, or structure which is not permitted in the zoning district in which the property is located; and
 - (6) The requested variance is not a request to permit a prohibited sign.

Appropriate conditions may be imposed on any variance, provided the conditions are reasonably related to the variance. Other development regulations that regulate land use or development, including the subdivision regulations, may provide for variances from the provisions of those ordinances consistent with the provision of this section. The concurring vote of four-fifths

(4/5) of the board of adjustment shall be necessary to grant a variance. Approved variances are required to be recorded with the Buncombe County Register of Deeds upon approval.

Action Requested:

No action from the Board is requested.

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>



Coates' Canons NC Local Government Law

Variance Standards: What is hardship? And when is it unnecessary?

Published: 05/27/14

Author Name: Adam Lovelady

Generally, development regulations like zoning and subdivision standards apply equally to all properties. But sometimes a particular property is unfairly burdened by the general rules, creating an unnecessary hardship for the owner. The general statutes authorize the local board of adjustment to grant a variance from the rules in those limited circumstances. But what is an unnecessary hardship? Recent amendments to the state statute clarify what can (and what can't) qualify as unnecessary hardship. This blog explores those new standards.

General Statute section 160A-388(d) sets forth the standards for granting a zoning variance (The standards also may be applied to subdivision and other development regulation). These mandatory standards apply to zoning variances for all counties and municipalities in the state, and the new standards override any contrary ordinance provisions that may have been in place prior to 2013. For a summary of the other changes to the board of adjustment statute, see this [blog](#) from my colleague David Owens.

Under the new statute a board of adjustment *shall* vary the provisions of the zoning ordinance if strict application of the ordinance would create unnecessary hardship. In order to obtain the variance, the applicant must show all of the following:

- Unnecessary hardship would result from the strict application of the ordinance
- The hardship results from conditions that are peculiar to the property
- The hardship is not a self-created hardship

This website uses cookies and similar technologies to understand visitor experiences. By using this website, you consent to UNC-Chapel Hill's cookie usage in accordance with their [Privacy Notice](#).

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

Additionally, the applicant must show that the variance will

- Be consistent with the intent of the ordinance
- Secure public safety
- Achieve substantial justice

This website uses cookies and similar technologies to understand visitor experiences. By using this website, you consent to UNC-Chapel Hill's cookie usage in accordance with their [Privacy Notice](#).

Copyright © 2009 to Present School of Government at the University of North Carolina.

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

Finally, the statute prohibits any use variance.

To be sure, a variance is not a free pass from regulations or a tool to subvert the zoning ordinances. In order to obtain a variance, the applicant bears the burden of providing competent, substantial and relevant evidence to convince the decision-making board that the property meets all of the statutory standards for a variance. Merely showing some hardship is insufficient.

Let's consider each of the standards in more detail.

Unnecessary Hardship from Strict Application

Whenever there is regulation, there is some level of necessary hardship and inconvenience shared by all of the community. An applicant for a variance must show *unnecessary* hardship. What is enough hardship? Unfortunately, there is no simple formula. It is determined on a case-by-case basis. That is why the board of adjustment holds a quasi-judicial hearing and considers the evidence presented.

The hardship must be more than mere inconvenience or a preference for a more lenient standard. Cost of compliance may be a factor, but cost is not determinative. It is not enough for an applicant to say that development will cost more in order to comply. The applicant must show the substantial and undue nature of that additional cost as compared to others subject to the same restriction.

Under the old statutes, many jurisdictions applied a standard that the applicant must show that there is no reasonable use of the property without a variance. Under current statutes, that stringent standard is no longer allowed. A property owner can prove unnecessary hardship, even if the owner has some reasonable use of the property without the variance.

Peculiar to the Property

The unnecessary hardship must be peculiar to the property, not general to the neighborhood or community. Such peculiar characteristics might arise, for example, from location of the property, size or shape of the lot, or topography or water features on the site.

Imagine a lot that narrows dramatically toward the front yard and where the side yard setbacks prohibit the property owner from building an addition. The hardship (not being allowed to build an addition) flows from the strict application of the ordinance (the setback) and is peculiar to the property (because of the shape of the lot). A variance may be appropriate if the owner presents evidence to show she meets all of the standards.

By contrast, a variance is not the appropriate remedy for a condition or hardship that is shared by the neighborhood or the community as a whole. Consider that same narrowing lot. If all of the houses on

the street share that hardship, a variance would not be appropriate. Such conditions should be addressed through an ordinance amendment.

Hardships that result from personal circumstances may not be the basis for granting a variance. The

Copyright © 2009 to Present School of Government at the University of North Carolina.

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

board is looking at the nature of the property and the land use ordinances, not the nature of the applicant and their circumstances. Bringing an elderly parent to live with the family, for example, is a change in personal circumstance, not a condition peculiar to the property.

The reverse is also true. An applicant's personal circumstances cannot be the basis for denying a variance. The board should consider the property, not the applicant's bank account and ability to cover the cost of the hardship. Moreover, the fact that the applicant owns property nearby is irrelevant to the consideration of whether this particular property deserves a variance (*Williams v. N.C. Dept. of Env. & Nat. Resources*, 144 N.C. App 479, 548 S.E. 2d 793 (2001))

Not Self-Created Hardship

You can't shoot yourself in the foot and then ask for a variance. The hardship must not result from actions taken by the applicant or property owner.

So what is self-created? Suppose a property owner sells part of a conforming lot and makes the remainder of the lot nonconforming. The hardship (limitations on the non-conforming lot) was self-created (by the owner selling the sliver off the parcel. The owner may not seek a variance for building on the substandard lot. Similarly, where an owner failed to seek zoning and building permits and then incorrectly placed foundation footings in the setback, the hardship is self-created. No variance is allowed. Ignorance of the law is no excuse.

What if the owner relied in good faith on seemingly valid surveys and obtained building permits? After construction began, a neighbor objected, citing a new survey and arguing that the foundation wall is within the setback. Is the owner's hardship self-imposed? Our North Carolina courts have held that hardships resulting from such good faith reliance on surveys and permits are eligible for a variance (*Turik v. Town of Surf City*, 182 N.C. App. 427, 642 S.E.2d 251 (2007)).

An important statutory provision applies here: "The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship." For example, if the original owner had a legitimate case for a variance, someone buying the lot from that owner would have the same legal position as the original owner. They could seek a variance. This rule aligns with the broader zoning concept that land-use permissions run with the land, and land-use decisions are based on the property and impacts of development, not based on the

This website uses cookies and similar technologies to understand visitor experiences. By using this website, you consent to UNC-Chapel Hill's cookie usage in accordance with their [Privacy Notice](#).

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

particular owner. Is this a loophole for an unscrupulous owner to overcome the limit on variances for self-created hardship by selling the property to a spouse or sham LLC? Maybe, but the requirement for substantial justice (discussed below) probably protects from someone gaming the system.

Restrictive covenants and other legal limitations *may* be a factor in determining hardship. Consider a property that has limited development ability due to a privately-imposed covenant for a street setback and a publicly-imposed stream setback. Can the owner seek a variance from the public stream setback? The NC Court of Appeals—interpreting a specific local ordinance—found that the board should consider physical *and* legal conditions of the property, including restrictive covenants (*Chapel Hill Title & Abstract Co., Inc. v. Town of Chapel Hill*, 362 N.C. 649, 669 S.E.2d 286 (2008)).

Let me emphasize that covenants and other legal limitations *may* be a factor. In that case, the decision was based on the local ordinance, and the decision pre-dated the statutory variance standards. A self-imposed legal limitation—like an easement across a property that limits buildable area—that was created after a zoning ordinance limitation became effective, could be viewed as a self-imposed hardship so that no variance should be granted.

Ordinance Purpose, Public Safety, and Substantial Justice

In addition to those standards for “unnecessary hardship,” the statutory standard for granting a variance requires the applicant to show that “[t]he requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.”

Where an ordinance expresses a clear intent, a variance cannot subvert that intent. But, alternatively, a variance may help to give effect to the ordinance intent. In one North Carolina case, an applicant was seeking a variance to allow an additional sign at a secondary entrance. Among other things, the ordinance purpose was to provide “adequate and effective signage,” “prevent driver confusion,” and “allow for flexibility to meet individual needs for business identification.” The purpose, the court

This website uses cookies and similar technologies to understand visitor experiences. By using this website, you consent to UNC-Chapel Hill's cookie usage in accordance with their [Privacy Notice](#).

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

found, called for the flexibility that the applicant sought, and the variance was allowed. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 369, 713 S.E.2d 511, 515 (2011)).

The applicant also must show that the variance does not harm public safety. Even if an applicant met the standard for unnecessary hardship, a variance may be denied for public safety concerns. A property owner may prove an unnecessary hardship exists from limitations on on-site drives and parking for a commercial use. But, if neighbors presented expert evidence that the increased traffic and stormwater effects will harm public safety, the board may be justified in denying the variance.

Additionally, the statute requires the applicant to show that through the variance “substantial justice is achieved.” The concept of substantial justice raises issue of fairness for the community and neighbors. This concept echoes the requirement that hardship must be peculiar to the property—not shared by the community. If everyone bears this hardship, then one lucky person should not be relieved through a variance. Similarly, the justice standard draws upon a notion of precedence. Suppose Joe sought a variance last year and was denied. If Karl is seeking variance this year that is essentially the same request for a similar property, then the variance outcome should be the same.

The substantial justice standard also can play in favor of the applicant. If an applicant relies in good faith on a city permit, and that permit turned out to be wrongly issued, the applicant would have no vested rights in that mistakenly issued permit. Substantial justice might argue for allowing a variance for the applicant.

No Use Variance

North Carolina courts long ago established that use variances are not permitted, and that rule is now part of the statutory standards. If a land use is not permitted on the property, a variance cannot be used to, in effect, amend the ordinance and allow the use. If only single family residences are permitted in a district, a variance cannot permit a duplex (*Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E.2d 103 (1985)).

If the use is already permitted on the property, a variance to allow the expansion of the permitted use is permissible. So, for example, if a sign is permitted for a commercial property, a variance to permit an additional sign is allowable. It is an area variance, not a use variance. (*Premier Plastic Surgery Ctr., PLLC v. Bd. of Adjustment for Town of Matthews*, 213 N.C. App. 364, 713 S.E.2d 511 (2011)).

Conclusion

Making decisions about variances is a hard job. How much hardship is enough hardship? Is justice being served? Does the variance preserve the spirit of the ordinance? Rarely are there clear answers for these questions. Seeking those answers is the hard task of the board of adjustment. The applicant must

Copyright © 2009 to Present School of Government at the University of North Carolina.

<https://canons.sog.unc.edu/2014/05/variance-standards-what-is-hardship-and-when-is-it-unnecessary/>

present competent, material, and substantial evidence that they meet all of the standards. And the board must consider the issues on a case-by-case basis; they must weigh the evidence, apply the required statutory standards, and decide if a variance is warranted.

All rights reserved. This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919.966.4119; or fax 919.962.2707.

This website uses cookies and similar technologies to understand visitor experiences. By using this website, you consent to UNC-Chapel Hill's cookie usage in accordance with their [Privacy Notice](#).

Copyright © 2009 to Present School of Government at the University of North Carolina.