

## **Standards for Granting Variances**

### **Packet Synopsis**

The **standards for granting variances** by boards of adjustment for counties or boards of appeals and adjustments for cities or townships are spelled out in Minnesota Statutes. Minnesota Statutes Chapter 462 applies to cities and townships outside of the seven metropolitan county area and Chapter 394 applies generally to counties outside of the seven county metro area. They are quoted below:

#### **462.357 Procedure to effect plan: zoning.**

Subd. 6. **Appeals and adjustments.** Appeals to the board of appeals and adjustments may be taken by any affected person upon compliance with any reasonable conditions imposed by the zoning ordinance. The board of appeals and adjustments has the following powers with respect to the zoning ordinance:

(1) To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer in the enforcement of the zoning ordinance.

(2) To hear requests for variances from the literal provisions of the ordinance in instances where their strict enforcement would cause undue hardship because of circumstances unique to the individual property under consideration, and to grant such variances only when it is demonstrated that such actions will be in keeping with the spirit and intent of the ordinance. "Undue hardship" as used in connection with the granting of a variance 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, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute an undue hardship if reasonable use for the property exists under the terms of the ordinance. Undue hardship also includes, but is not limited to, inadequate access to direct sunlight for solar energy systems. Variances shall be granted for earth sheltered construction as defined in section [216C.06](#), subdivision 14, when in harmony with the ordinance. The board of appeals and adjustments or the governing body as the case may be, may not permit as a variance any use that is not permitted under the ordinance for property in the zone where the affected person's land is located. The board or governing body as the case may be, may permit as a variance the temporary use of a one family dwelling as a two family dwelling. The board or governing body as the case may be may impose conditions in the granting of variances to insure compliance and to protect adjacent properties.

#### **394.27 Creation and duties of a board of adjustment.**

Subd. 7. **Variances; hardship.** The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control including restrictions placed on nonconformities. Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control in cases when there are practical difficulties or particular hardship in the way of carrying out the strict letter of any official control, and when the terms of the variance are consistent with the comprehensive plan. "Hardship" as used in connection with the granting of a variance means the property in question cannot be put to a reasonable use if used under the 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, if granted, will not alter the essential character of the locality. Economic considerations alone shall not constitute a hardship if a reasonable use for the property exists under the terms of the ordinance. Variances shall be granted for earth sheltered construction as defined in section [216C.06](#), subdivision 14, when in harmony with the official controls. No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located. The board of adjustment may impose conditions in the granting of variances to insure compliance and to protect adjacent properties and the public interest. The board of adjustment may consider the inability to use solar energy systems a "hardship" in the granting of variances.

Applying the statutorily defined **standards for granting variances** by boards of adjustment however is the conundrum. On the surface, it would appear to be simple matter to address "Undue hardship" as used in connection with the granting of a

variance 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, if granted, will not alter the essential character of the locality. However every "undue hardship" situation or claim is unique and therefore, there can be no "school solution" and hence boards must make decisions that often are subjective yet with the obligation of being objective.

For Minnesota, perhaps the best guidance for a city, county or township member of a board of adjustment are Minnesota court decisions where such decisions have been legally challenged **variance** actions. There is a body of appellate court decisions that are defining the whats, hows, whens and wheres for granting **variances**. The following have been selected for this packet as they illustrate how the courts have decided where variances have been challenged on various grounds. Copies of the selected cases that illustrate the essentials for granting or denying variances and conditional use permits follow.

1. STATE OF MINNESOTA IN COURT OF APPEALS, C2-00-1333, Mark Paper, et. al., Relators vs. In Re. the Application of: Ronald and Alice Trotter for a Conditional Use Permit to Expand Their Existing Resort, Respondents, Aitkin County Planning Commission, Respondent.

This case demonstrates the importance of gathering the facts, careful assessment of them and documenting/recording the process.

In this case, the granting of a conditional use permit by the Aitkin County Planning Commission was upheld. The Court noted that, “A *decision to grant or deny a conditional use permit is a quasi-judicial decision because it requires the county to determine facts about the nature of the proposed use and then exercise its discretion in determining whether to allow the use.*” The Court also noted that “*Case law distinguishes between zoning matters which are legislative in nature and those which are quasi-judicial (variances and special use permits). Even so, the standard of review is the same for all zoning matters, namely whether the zoning authority’s action was reasonable.*”

The Aitkin County Planning and Zoning Commission did carefully and methodically followed all of the above and documented the same in the official record.

In STATE OF MINNESOTA IN COURT OF APPEALS, 1-97-1926, Stuart Hamilton, Relator vs. County of Stearns, Respondent, the Court reversed the county’s denial of a conditional use permit because it failed “*to scrutinize the record as it exists, to make the appropriate decision on the that record, and to articulate that decision.*” The Court did remand giving the planning and zoning commission the opportunity to properly review and document its decision.

2. STATE OF MINNESOTA IN COURT OF APPEALS, C9-99-1967, Stuart Nolan, et al., appellants, Tom Hansen, et al., Plaintiffs, vs. City of Eden Prairie, Respondent, James Perkins, et al. Respondents.

This case illustrates the criteria which must be followed in determining Undue Hardship.

In the Court’s Syllabus, it said, “*In reviewing the approval of a variance request for undue hardship ..... we consider whether the record adequately addresses the three statutory factors — reasonableness, unique circumstances and the essential character of the locality.*”

The city attorney explained the legal standard for variances as, “*The standard to which the council is held is not that there cannot be any other reasonable use of the property, but a determination of whether this is a reasonable use of the property under the circumstances, and one that would not otherwise be allowed because of the requirements of the code.*”

The important point made in this case is that although there can be alternate uses of property that may not require a variance, granting a variance is permissible if the three statutory factors are considered and applied.

The council did consider alternatives and most importantly did so within the framework of the three statutory factors and did “memorialize” its reasoning. It granted the variance request and was upheld upon an appeal.

3. STATE OF MINNESOTA IN COURT OF APPEALS, C9-00-65, Kismet Investors, Inc, Appellant vs. County of Benton, Respondent.

This case illustrates that the burden of establishing **undue hardship** as the basis for a variance rests with the requester of the variance.

The Appellant appealed its denial of its use variance request.

The Court stated in its opinion that, *“After a careful review of the variance statute and the relevant precedents, we conclude that Minnesota land owners seeking use variances must demonstrate that they will suffer particular hardship absent the variance. Practical difficulties alone cannot justify a use variance.”* and *“The landowner applying for a variance carries the “heavy Burden” to show that the variance is justified.”*

The Court also noted that Minnesota Statutes, in this case MS § 394.27, subd. 7, prohibit the granting of use variances if the use is not a permitted or conditional use in the zoning district.

The Appellant also claimed financial hardship as a basis for its variance request. The Court specifically rejected financial hardship as a basis for granting a **use variance** as differentiated from an **area variance**, i.e. such as set backs, heights, parking requirements, noting that *“some jurisdictions, including Minnesota, have more recently recognized that area variances may be granted on a lesser showing of practical difficulties.”*

The denial of the requested variance was upheld inasmuch as the requester of the variance was unable to establish “hardship”. The Court noted that financial hardship is not available as a justification in a **use variance** request.

4. STATE OF MINNESOTA IN COURT OF APPEALS, C7-02-1395, Randy Nelson, et al., Respondents vs. Wilson Township Board of Adjustment, et al., Respondents-Below, Dean Morgan, Appellant.

This case illustrates the importance of applying the standards established in your local zoning ordinance and the importance of precedents.

In its decision, the Court stated, *“Appellate review of zoning decisions is limited to determining whether the local zoning authority’s action was reasonable. .... This court will set aside the local authority’s decision if the decision is unreasonable, and reasonableness is measured by the standards set out in the zoning ordinance.”* ..... *“We examine the local authority’s decision to determine whether it was arbitrary or capricious or whether the reasons given for the decision are legally sufficient and have a factual basis.”*

The township’s iteration of its findings regarding its eight established criteria set forth in its zoning ordinance was thorough and thought out.

The township was upheld on its granting of the variance.

5. STATE OF MINNESOTA IN COURT OF APPEALS, C3-96-2078, Don D. Myron, petitioner, Appellant vs. The City of Plymouth

This case illustrates that that prior knowledge of nonconformance when buying property does not extinguish the right to a variance.

There were two separate issues addressed by the Court, one being the **variance** issue. The **variance** issue as described by the Court was “*Did knowledge of the applicable zoning restrictions at the time of purchase of the property make any undue hardship under Minn. Stat. § 462.357, subd. 6(2), self-created, thereby requiring the City to deny a variance?*”

The Court in its decision recognized “*the general property-law goal to preserve alienability*”, namely “*An owner who did not self-create a hardship is eligible for a variance. But that owner would in effect be barred from selling to someone else without, as a consequence of the sale, destroying the eligibility to receive a variance. We see no reason what an owner who sells should not be able to convey to the buyer the eligibility for a variance along with the land itself.*”

The Court ordered the city to reconsider its denial of the variance request.

6. STATE OF MINNESOTA IN COURT OF APPEALS, C3-01-2016, Marlyn Buss, Appellant, vs. Blue Earth County Board of Adjustment and Suzette Johnson, Respondents

This case addresses three issues:

- The statutory authority of a board of adjustment.
- The need to observe applicable ordinances.
- The need to document reasoning behind granting the variance.

In its decision, the Court states “*A board of adjustment has broad discretion to grant or deny variances and we review the exercise of that discretion to determine if it was reasonable.*” and “*In determining reasonableness, we are guided by the standards set out in the relevant county ordinance, but a board’s authority to grant variances under the ordinance may not exceed the power granted by statute.*”

In essence a board of adjustment has broad authority to grant a variance as long as it is a reasoned decision within the applicable local ordinance and state statute.

In this case, the Court upheld the variance granted.

In granting **variances**, the cases cited above, copies of which are included in this packet, illustrate the essential standards for considering variances as follows:

- Determine the facts.
- Apply the guidelines/criteria as spelled out in local ordinance.
- On the basis of fact and the application of the guidelines established in ordinance, make a reasoned and objective decision and, where possible, examining alternatives, if available.

- Document the process.

NOTE: Emphasis has been added.