

Topic: **Variance Process Review**

Date Introduced: **November 24, 2009**

Why on the list: This is the result of the 2008 law suit regarding "The District" project at Centennial Lakes. The City lost the suit in regard to the variance process. Before the law suit, single-family residential variances were reviewed by the Zoning Board of Appeals (ZBA). All other variances that were tied to other types of requests, such as a rezoning or final development plan, were reviewed by the Planning Commission and City Council.

As a result of the law suit, all variances are now required to go before the Zoning Board of Appeals, in addition to the Planning Commission and City Council. This process is awkward and cumbersome. Also, an issue has been raised in regard to when variances should be reviewed if they are part of a two stage development process.

History: The Zoning Board of Appeals was established in 1960's. The purpose was to make the variance process simple and relatively short for residents of single-family homes. (See the powers and duties of the ZBA on the attached documents.)

Decision Points:

1. Keep or dissolve the ZBA.
2. If the ZBA is kept, is it possible to have a ZBA panel consider variances at a regular Planning Commission meeting?
3. At what stage of a two stage project are variances considered? Currently, variances are considered at the Preliminary Development stage by the Planning Commission and City Council, but not acted on by the ZBA. Since variances are a binding action of the ZBA, the ZBA reviews variances at the Final Development stage. Decisions on items #1 and #2 above may resolve this issue.

Options:

1. Continue with the existing process.
2. Dissolve the current ZBA; the Planning Commission becomes the ZBA, and all variances are reviewed by the Planning Commission. This would require the Planning

Commission to meet twice per month to keep up with the volume of work generated by variance requests.

3. Modify the current process. Figure out a "legal" way to continue the ZBA in its present form, and allow variances as part of larger project to be reviewed by the Planning Commission as one of the ZBA panels.

Action:

In order to streamline the review process, the Planning Commission recommends dissolving the current ZBA. The Planning Commission would become the ZBA.

~~**Yard - Front.** An open, unoccupied space on the same lot as a building, which lies between the building and the front lot line, and extends from side lot line to side lot line.~~

~~**Yard - Rear.** An open, unoccupied space on the same lot as a building, which lies between the building and the rear lot line, and extends from side lot line to side lot line. Some accessory buildings may be placed in the rear yard.~~

~~**Yard - Side.** An open, unoccupied space on the same lot as a building, which lies between the building and the side lot line, and extends from the front lot line to the rear lot line. Some accessory buildings may be placed in the side yard.~~

~~**Year.** A period of 365 consecutive days.~~

850.04 Administration and Procedures for Variances, Rezoning, Transfer to Planned Districts and Conditional Use Permits.

Subd. 1 Variances and Appeals.

A. Zoning Board of Appeals. There is continued a separate Zoning Board of Appeals of the City. The Zoning Board of Appeals is the board of appeals and adjustments created pursuant to M.S. 462.354, Subd. 2. All members of the Commission, from time to time, shall be members, and the other members shall be six residents of the City appointed for a term of three years by the Mayor with the consent of a majority of the members of the Council. For hearings, the Board shall consist, at a maximum, of any five members, but three members shall constitute a quorum for conducting such hearings and making decisions. However, at least one Commission member shall be in attendance at each Board meeting, and shall be deemed to be the representative of the Commission for purposes of review and report by the Commission as required by M.S. 462.354, Subd. 2. The Board shall make no decision until the Commission, or a representative of it, has had reasonable opportunity, not to exceed 60 days, to review and report to the Board concerning the decision. All members shall serve without compensation. Members may resign voluntarily or be removed by a majority vote of the Council or pursuant to Section 180 of this Code. That Commission member in attendance at a meeting who has the then longest continuous service on the Commission shall be the Chair for that meeting. The Board shall adopt such bylaws as shall be necessary or desirable for conduct of its business. Staff services shall be provided by the Planning Department. Board members who discontinue legal residency in the City shall be automatically removed from office effective as of the date of such discontinuance. Vacancies shall be filled pursuant to Subsection 180.03 of this Code.

 B. Powers and Duties of Board. The Board shall have the power and duty of hearing and deciding, subject to appeal to the Council, the following matters:

1. Requests for variances from the literal provisions of this Section.
2. Appeals in which it is alleged that there is an error in any order, requirement, decision or determination made by an administrative officer in the interpretation or enforcement of this Section; and

3. Requests for variances from the literal provisions of Section 1046 of this Code.
4. Requests for modifications from the requirements of Section 815 of this Code.

C. Petitions for Variances. The owner or owners of land to which the variance relates may file a petition for a variance with the Planning Department. The petition shall be made on forms provided by the Planning Department and shall be accompanied by the fee set forth in Section 185 of this Code. The petition shall be accompanied by plans and drawings to scale which clearly illustrate, to the satisfaction of the Planner, the improvements to be made if the variance is granted. The Planner may require the petitioner to submit a certificate by a registered professional land surveyor verifying the location of all buildings, setbacks and building coverage, and certifying other facts that in the opinion of the Planner are necessary for evaluation of the petition.

D. Appeals of Administrative Decisions. A person who deems himself or herself aggrieved by an alleged error in any order, requirement, decision or determination made by an administrative officer in the interpretation and enforcement of this Section, may appeal to the Board by filing a written appeal with the Planning Department within 30 days after the date of such order, requirement, decision or determination. The appeal shall fully state the order to be appealed and the relevant facts of the matter.

E. Hearing and Decision by the Board; Notice.

1. Within 60 days after the Planner determines that a variance petition is complete, and all required fees and information, including plans, drawings and surveys, have been received, or within 60 days after the filing of an appeal of an administrative decision, the Board shall conduct a public hearing and after hearing the oral and written views of all interested persons, the Board shall make its decision at the same meeting or at a specified future meeting.
2. Notice of variance hearings shall be mailed not less than ten days before the date of the hearing to the person who filed the petition for variance and to each owner of property situated wholly or partially within 200 feet of the property to which the variance relates insofar as the names and addresses of such owners can be reasonably determined by the Clerk from records maintained by the Assessor.
3. A notice of hearing for appeals of administrative decisions shall be published in the official newspaper of the City not less than ten days before the hearing. A notice shall also be mailed to the appellant.
4. No new notice need be given for any hearing which is continued by the Board to a specified future date.

F. Findings For Variances. The Board shall not grant a petition for a variance unless it finds that the strict enforcement of this Section would cause undue hardship

because of circumstances unique to the petitioner's property and that the grant of said variance is in keeping with the spirit and intent of this Section. "Undue hardship" means that (i) the property in question cannot be put to a reasonable use as allowed by this Section; (ii) the plight of the petitioner is due to circumstances unique to the petitioner's property which were not created by the petitioner; and (iii) the variance, if granted, will not alter the essential character of the property or its surroundings. Economic considerations alone shall not constitute an undue hardship if reasonable use for the petitioner's property exists under the terms of this Section. A favorable vote by the Board shall be deemed to include a favorable finding on each of the foregoing matters even if not specifically set out in the approval resolution or the minutes of the Board meeting.

G. Appeals from Decisions of the Board.

1. The following individuals may appeal a decision of the Board:

- a. any petitioner for a variance;
- b. any owner to whom notice of the variance hearing is required to be mailed pursuant to this Section;
- c. the appellant in the case of an appeal of an administrative decision;
- d. any person who deems to be aggrieved by the Board's decision on the appeal of an administrative decision; and
- e. any administrative officer of the City.

2. An appeal from a decision of the Board shall be filed with the Clerk no later than ten days after the decision by the Board. If not so filed, the right of appeal shall be deemed waived, and the decision of the Board shall be final.

H. Hearing and Decision by Council. The Council shall hear and decide all appeals from the decisions of the Board. The appeal shall be heard not later than 60 days after the date the appeal is filed. The Council shall follow the same procedures as to notices, hearings, findings for variances and decisions that the Board is required to follow relative to the subject matter of the appeal pursuant to this Section. A favorable vote by the Council shall be deemed to include a favorable finding on each of the required findings even if not specifically set out in the approval resolution or the minutes of the Council meeting.

I. Conditions on Variance Approvals. In granting a variance, the Board, or the Council on appeal, may impose conditions to ensure compliance with the purpose and intent of this Code and to protect adjacent properties.

J. Form of Action Taken and Record. The Board, or the Council on appeal, shall maintain a record of its proceedings which shall include the minutes of its meetings and final order concerning the variance petition or appeal of administrative decision. If a variance is granted, the petitioner, at the petitioner's expense, shall duly record the final order in the proper office to give constructive notice. A verified copy of such order, with the recording data, shall be delivered to the Planner. The Board, or the Council on appeal, may require such order to be recorded and such verified copy to be delivered to the Planner before the variance shall be effective.

K. Lapse of Variance By Non-User, Extension of Time.

1. If, within one year after the date of the meeting of the Board, or the Council on appeal, at which the variance was granted, the owner or occupant of the affected land shall not have obtained a building permit, if one is required, and commenced the work or improvement described in such petition, the variance shall become null and void unless a petition for extension of time in which to commence the proposed work or improvement has been granted.

2. A petition for extension shall be in writing and filed with the Clerk within such one year period. The petition for extension shall state facts showing a good faith attempt to use the variance and shall state the additional time requested to begin the proposed work or improvement. The petition shall be presented to the Board for hearing, findings and decision in the same manner as then required by this Section 850 for an original petition for variance. The Board may grant an extension of the variance for up to one year upon finding that a good faith attempt to use the variance has been made, that there is a reasonable expectation that the variance will be used during the extension, that speculation will thereby not be fostered, and that the facts and circumstances under which the original variance was granted are not materially changed.

L. Denial: No application for a variance which has been denied in whole or in part shall be resubmitted within twelve (12) months of the date of the order of denial, except that a new application may be permitted to the same denying board, if new evidence or a change of circumstances warrant it.

Subd. 2 **Rezoning.**

A. Initiation of Rezoning Process.

1. A petition for rezoning may be initiated by the owner of land proposed for transfer to another district or subdistrict, the Council or the Commission.

2. A petition by an owner shall be on forms provided by the Planner, shall be submitted with plans, data and information required by this Section, and such other information that the Planner believes necessary for evaluation of the petition. The petition shall be accompanied by the fee set forth in Section 185 of this Code.

B. Sign. The petitioner for rezoning shall erect, or cause to be erected, at least one sign per street frontage on the land described in the petition. The sign or signs shall be of a design approved by the Planner, shall be 36 inches by 60 inches in size, shall have letters at least four inches high using Helvetica medium typeface or other letter style approved by the Planner, shall be constructed of sturdy material, shall be neatly lettered, and shall be easily viewable from, and readable by persons on, the adjoining street. The sign or signs shall contain the following information:

"This property proposed for rezoning by:
(Name of Petitioner or Applicant)
(Telephone of Petitioner or Applicant)

For information contact Edina Planning Department:

Planning Commission Minutes for Meeting of November 24, 2009

TOPIC: Variance Process

DATE INTRODUCED: November 24, 2009

DISCUSSION: 11/24/2009

Introduction

Planner Teague explained that in 2007 a lawsuit was filed against the City regarding the variance process, adding that before the lawsuit the Planning Commission heard, reviewed and acted on all variance requests for all major developments at their regularly scheduled meetings. The Zoning Board of Appeals (a five member rotating board comprised of Planning Commissioners and Zoning Board of Appeals members) heard all residential and minor variance requests. As a result of the lawsuit all variances are now heard by the Zoning Board of Appeals.

Planner Teague stated this change in policy has created confusion and conflict with major projects that require multiple actions. Presently the Zoning Board of Appeals hears a variance request for a major project after it has received preliminary development approval from both the Commission and Council. This order can be awkward for Zoning Board members because they are making a decision on a project that has received preliminary approval. After the Zoning Board of Appeals acts on the variance request their action is forwarded to the Commission and Council for the final approval phase of the project.

Chair Fischer asked Planner Teague if the City Attorney has weighed in on the City's current process. Planner Teague responded that Mr. Knutson has expressed some concern with the current process; especially the rotating aspect of the Board.

Planner Teague stated he sees three options to administer variance requests:

1. Continue as is.
2. Dissolve the Zoning Board of Appeals. The Planning Commission would become the "Zoning Board of Appeals".
3. Modify the current process. The Planning Commission acting as one of the Zoning Board of Appeals panels would hear and act on major development variances at the same time they consider the development proposal (Rezoning, Conditional Use, Final Development Plan, etc.). Residential and minor variances would continue to be heard as is. Try to establish a legal way to do this.

Chair Fischer stated that whatever is suggested would have to be reviewed by the City Attorney. Planner Teague agreed.

Commissioner Grabiell commented that the Zoning Board may be easy to dissolve but historically there was value in creating a separate Zoning Board of Appeals. Commissioner Grabiell acknowledged that since the lawsuit there has been a certain awkwardness in process for larger projects; however, the residential variances do well in the present format. Commissioner Grabiell suggested the possibility of creating a hybrid. The Planning Commission (all Commissioners are members of the Zoning Board of Appeals) would hear and act on large project variances and the "residential" variances would continue to be heard by the Zoning Board of Appeals.

Commissioner Carpenter said in his opinion it appears that the state statute is very clear, agreeing with Chair Fischer that any suggestion from the Planning Commission on the future of the Zoning Board should be reviewed by the City Attorney. Commissioner Carpenter suggested that staff research how others cities handle variances.

Commissioner Staunton stated he is a bit concerned with the City's current process, adding if he is correct in his interpretation of the statute it appears to him that the City could be in violation of the statute.

A discussion ensued with Commissioners considering whether to dissolve the Zoning Board or to reconfigure the Board. Commissioners acknowledged there is a difference in variances. A resident requesting a variance to enlarge their garage vs. a variance to construct a five-story office building is very different.

Commissioners listed the following as concerns with dissolving the Board:

- If the Planning Commission is appointed as the Zoning Board should residential and minor variances be heard differently?
- At the beginning of each meeting. Hearing residential and minor variances first would help with the flow of the meeting enabling residents with a residential variance request the opportunity to leave immediately after their issue is heard.
- Hold two meetings per month. Residential and minor variances would be heard at the first meeting of the month and at the second meeting of the month large project variances would be heard.
- Start the residential and minor variance hearing at 5:30 pm and proceed to the regularly scheduled Planning Commission meeting at 7:00. At that time if there are large projects that require variances the hearing would take place.
- Staff would need to develop a new agenda style to accommodate the different public hearing requests.

Commissioners acknowledged that dissolving the Zoning Board does create timing challenges. Commissioners said in their opinion the goal should be to create clarity in the hearing process and in the ordinance. It was pointed out that there is a number of overlapping public hearings that create confusion for the residents.

Planner Teague interjected and informed the Commission he previously worked for two different cities that did not have a separate Zoning Board of Appeals (City Council heard variances) and those cities had certain variances that would be “tagged” as consent items and placed on the Council agenda as consent. Planner Teague pointed out allowing consent items expedites the variance process, by being handled with one motion. Planner Teague further clarified that a “consent” item could be pulled from the agenda at any time and discussed more thoroughly.

Commissioner Schroeder pointed out during the zoning ordinance updating process the Commission has indicated it would recommend establishing a PUD classification, adding if that was to occur large project variances would be reduced. Commissioner Carpenter agreed, also adding if during the updating process the Commission focuses on modifying and clarifying the ordinance language to better address some of the more routine variance requests the need for a variance would be reduced.

Commissioner Grabiell acknowledged that while having a separate Zoning Board of Appeals to hear variance requests worked well in the past the change in the review process as the result of the lawsuit has created a more cumbersome confusing process with an additional step.

Community Comment

Janey Westin, 6136 Brookview Avenue, addressed the Commission and stated that she learned the process by attending numerous meetings, but acknowledged she still isn't clear why some issues are heard by this Board vs. that Board. Ms. Westin suggested that a review chart be added to the ordinance and the City's website indicating the process and steps an application needs to go through. Concluding, Ms. Westin asked that the Commission consider adding a community rebuttal period to the public hearing process.

Chair Fischer commented that creating a chart system may be a good idea, adding that making the review process easier to understand would benefit everyone. Commissioner Grabiell commented that instead of creating a chart or graph to better understand the review process the goal at this time should be to draft a clear and precise zoning ordinance that more clearly addresses the review process. Charts and graphs could also be a matter of confusion and open to wrong interpretation.

Jackie Whitbeck, 6128 Brookview Avenue, commented that her property has suffered as a result of conflict in the ordinance. Ms. Whitbeck encouraged the Commission to clarify the ordinance not only for the applicant but for the public as well. Continuing, Ms. Whitbeck said she agrees with the suggestion that if the Commission becomes the official Zoning Board that adopting some form of "issue order" makes sense with the smaller "issues" heard first. Concluding, Ms. Whitbeck asked the Commission to remember that residents believe they are protected by the Planning Commission and current ordinances and therefore may not attend meetings they are notified of.

Chris Rofidal, 5037 56th Street West and Chairman to the Heritage Preservation Board stated his only comment is where in the variance process would a proposal be heard that also requires a Certificate of Appropriateness. There was confusion in the past with a driveway width variance. Who hears it first Zoning Board or HPB.

Action

Chair Fischer commented from the discussion so far it appears that the best direction for the City to take would be to dissolve the Zoning Board of Appeals and have the Planning Commission hear all variance requests. Chair Fischer stated if the Commission deems it appropriate to be the body that hears variance requests more needs to be discussed (how to deal with routine items, when is an item heard, how many meetings, etc.) Concluding, Chair Fischer directed Planner Teague to research how neighboring cities administer variances without separate Board's of Appeals and bring that information to the ZOUC work session scheduled on December 9th. He also requested the City Attorney attend the December 9th meeting.

City	Consent Agenda	ZBA
Apple Valley	Yes – Both PC & Council	City Council
Blaine	No	Planning Commission*
Bloomington	Yes – City Council	Planning Commission**
Coon Rapids	Yes – City Council	ZBA***
Cottage Grove	No	Planning Commission*
Eagan	Yes – City Council	City Council
Minnetonka	Yes – Both PC & City Council	Planning Commission*
Lakeville	Yes – City Council	City Council
Maple Grove	Yes – Both PC & City Council	City Council
New Brighton	Yes – City Council	City Council
Plymouth	Yes – City Council	City Council
St. Louis Park	Yes – City Council	ZBA****
Richfield	Yes – City Council	City Council*****
Eden Prairie	Yes – City Council	Planning Commission*
Wayzata	No	City Council

* Planning Commission takes final action on variances, unless a variance is attached to another application; then the City Council makes the final decision.

** Council still reviews all variances after planning commission decision.

*** Coon Rapids ZBA only reviews sign variances and appeals of staff decisions.

**** Process is the same as Edina. A separate ZBA for variances.

***** Residential variances are reviewed and approved/denied by staff.

Further discussion pointed out that at the present time the ZOUC is considering the option of implementing a PUD process and if the ordinance incorporates a PUD, the variance process for large development projects would change.

Mr. John Bohan said in his opinion regardless of what is decided variance review should be front ended. Hardship should be demonstrated by the applicant.

From past and present discussions the Committee indicated there are two clear options; 1. establish the Planning Commission as the Zoning Board of Appeals; 2. suggest that the City Council act as the Zoning Board of Appeals with the current Zoning Board of Appeals reviewing and recommending residential variances and Planning Commission reviewing and recommending commercial variances. The ZOUC decided to continue the discussion regarding the variance review process until such time as the group discusses the PUD process and how framing PUD's within the ordinance could affect the variance process.

Action

Continue discussion with the PUD discussion.