

PRACTICAL DIFFICULTY FOR DIMENSIONAL AND NON-USE VARIANCES

These comments are not meant to be all inclusive of issues regarding the topic of “practical difficulties”. They are meant to be helpful to ZBA members and Petitioners in understanding what is required for ZBA fact finding under the City of Troy Code of Ordinances.

Zoning Ordinance 15.04 E. Dimensional and Other Non-Use Variances.

1. “Where a literal enforcement of the provision of this ordinance would involve practical difficulties within the meaning of this Article, the Zoning Board of Appeals shall have the power to authorize such variations of the provision of this Ordinance with such conditions and safeguards as it may determine as may be in harmony with the spirit of this Article and so that public safety and welfare be secured and substantial justice done.”

Commentary: In general, for dimensional or non-use variance requests, if there are “practical difficulties” and the variance request is in harmony with good planning principals for the community, a variance may be granted if it does not harm the good of the public. *Heritage Hill Ass’n, Inc. v. Grand Rapids*, 48 Mich. App. 765 (1973).

Michigan appellate courts have held that ZBA’s cannot grant a non-use variance without substantial evidence. *Farah v. Sachs*, 10 Mich. App. 198 (1968). They have also held that a ZBA record must contain finding of fact (evidence) to support a variance based on a practical difficulty. *Reenders v. Parker*, 217 Mich. App. 373 (1996). Case law and sometimes State statute set out standards of review for appellate courts for different kinds of cases. An appeal from a ZBA requires an appellate court (Oakland County Circuit Court) to find that there was “competent, material, and substantial” evidence as set out on the record to support a grant or denial of a variance request. Looking at this from a reviewing court’s point of view, the courts have stated that meaningful judicial review of whether there was “competent, material, and substantial” evidence to support a zoning board decision requires that the record set

out the facts justifying the board's conclusion. *Tireman-Joy-Chicago Improvement Assn v. Chernick*, 361 Mich. 211 (1960). In other words, you must state during your discussions and in your motions, the factual reasons why you believe or do not believe that practical difficulties exists to grant or deny a variance. If an appellate court determines there are insufficient factual findings in a ZBA record, they can remand the case to the ZBA for further discussion and fact finding. The appellate court can also reverse the decision of the ZBA if it has ignored obvious practical difficulties presented by the petitioner or by anyone on the record. Of course, the reviewing court can also affirm the decision of the ZBA if there is competent, material and substantial evidence on the record supporting the decision.

2. Dimensional or other non-use variances shall not be granted by the Zoning Board of Appeals unless it can be determined that all of the following facts and conditions exists:

Commentary: Most ZBA petitioners have never been before a municipal board and have no knowledge of court cases. Hiring an attorney to represent them may be cost prohibitive. There is no a simple explanation of what constitutes a practical difficulty. This may result in a failure by a petitioner to adequately express themselves on the record or the failure to state any practical difficulties even if they exist. A board member may hear comments by a petitioner or other speaker or see something on the plans or in the Zoning and Compliance Specialist report to the board which, although not labeled a "practical difficulty" by the petitioner or speaker, may qualify as a practical difficulty or be evidence that there is no practical difficulty. A board member can use that information during a discussion of practical difficulties under one of the criteria listed for granting or denying a variance.

- a. Exceptional characteristics of property for which the variance is sought make compliance with the dimensional requirements substantially more difficult than would be the case for the great

majority of properties in the same zoning district. Characteristics of property which shall be considered include exceptional narrowness, shallowness, smallness, irregular shape, topography, vegetation and other similar characteristics.

Commentary: Exceptional characteristics of the property are physical characteristics. Your views should be expressed as to whether or not the physical characteristics of the property constitute a practical difficulty. Look to anything physical on the property, not neighboring properties (discussions of neighboring properties can be discussed under criteria 2. e.), to discuss on the record. Is it a small parcel, a very large parcel, an average parcel.? Is it narrow or wide, deep or shallow, irregularly shaped? Examples of irregularly shaped parcels include, but are not limited to, triangular (pie shaped), parcels that are more narrow at one end than the other, a corner parcel, a parcel adversely affected by the right-of-way, and a parcel cut in half by a drainage ditch. Look for environmental features such as trees on the lot which might be impractical (even aesthetically) to take down. Is there a wetland area? Are there berms, hills or swales? Is there something about this property that makes it something other than a squared off, average size lot with flat features and little or no vegetation? Analyze the property using the foregoing criteria. There may be nothing unusual about the property, and if that is the case, that finding should be stated on the record. The object is to make a record supporting your decision to grant or deny.

- b. The characteristics which make compliance with dimensional requirements difficult must be related to the premises for which the variance is sought, not some other location.

Commentary: This is a finding of fact that the variance request relates only to the characteristics of petitioner's parcel. This does not mean that a petitioner cannot speak of issues on neighboring property which might affect his request (See Criteria 2.e.). If a petitioner argues that he/she should have a variance because everyone else in his neighborhood has one, that might be considered under 2.e., but this does not relieve the petitioner's burden of

showing what practical difficulties exist on his/her own property which makes it necessary to grant the variance.

Comments made by board members for other criteria may be repeated here. If the lot is an unusual shape that makes compliance with the ordinance difficult (2.a.) then the board may find the practical difficulty relates only to the characteristics of the petitioners premises. A finding that the characteristics of the petitioner's premises already discussed relate ONLY to his/her premises, would satisfy this criterion.

- c. The characteristics which make compliance with dimensional requirements shall not be of a personal nature.

Commentary: It can be argued that any request for a variance is of a "personal nature" since the petitioner's property is being affected. However, the ZBA should only be concerned with stated characteristics of the property which do not demonstrate a need for the variance other than the petitioner wants to have it. There are many personal concerns that the board can take into consideration that have already been stated under the other criteria. Those can be repeated under this criterion. The board can take into account the developmental history of the property that was not self-created by the petitioner. For example, a parcel developed under an older plat which resulted in dimensional setbacks that are not recognized under the new Zoning Ordinance. The board can consider a personal preference that has no impact on what already exists on the property. For example, adding a sun porch with the same or similar dimensions of an existing patio or deck that will not affect the neighbors. It is best to use your common sense and judgment in stating findings under this criterion. You can also consider stating your finds in a "negative" way. For example, you can find that since all the other criteria are met and the variance will not alter the essential characteristic of the area or unreasonably affect the neighbors, you believe it should be granted. You may want to include in this some of the findings listed for in Criteria 2. e.

A ZBA should not grant a variance based solely on financial considerations. A ZBA should not grant variances based on claims that the petitioner cannot afford to move or that the petitioner would be in a better financial position if it was granted a variance for an addition. Financial difficulties are not considered “practical difficulties” by the courts.

- d. The characteristics which make compliance with dimensional requirements difficult must not have been created by the current or a previous owner.

Commentary: This criterion requires you to look at the history of the property. Such items include, but are not limited to, the following: have other variances been granted in the past which, if they had not been granted, would not make a petition for the current variance necessary; has the petitioner acquired a lot split and is now requesting dimensional variances on that lot; or was there a change to the property which required a permit or a variance and the petitioner failed to get the permit or a variance.

If the property is compliant with the Zoning Ordinance in existence at the time of its development and there is no history of prior variances which affect this petition, you can state that on the record.

- e. The proposed variance will not be harmful or alter the essential character of the area in which the property is located, will not impair an adequate supply of light and air to adjacent property, or unreasonably increase the congestion in public streets, or increase the danger of fire or endanger the public safety, or unreasonably diminish or impair the public health, safety, comfort, morals or welfare of the inhabitants of the City.

Commentary: This criterion is an opportunity to discuss anything else relevant to your decision. It leaves wide open the issues the board can consider in the totality of the circumstances leading to its

decision. You can and are required to look at neighboring premises and the general public to determine if a grant of a variance would or would not be harmful to the neighborhood or the public. Discussions may include, but not be limited to, comments from other neighbors, a description of the general layout of the neighborhood, including other lots sizes, typography, aesthetics of the neighborhood, street traffic, sidewalk issues, the existence of easements and right-of-way and access to areas by police/fire, if appropriate. Under this criteria you can mention whether or not there are objections from the surrounding neighbors or anyone else and you can look at conditions on neighboring property that may present a practical difficulty for the petitioner as long as there is a comment that a variance would not unreasonably impair or diminish the health, safety, welfare, comfort or morals of the other residents of the City. A maker of a motion can summarize the comments made by other members of the board that the maker believes are appropriate for grant or denial of the variance.

3. The Zoning Board of Appeals shall not find that any of the above criteria have been met without substantial evidence provided by the applicant to that effect.
4. The proposed variance will be the minimum necessary, and no variance shall be granted where a different solution not requiring a variance would be possible.