

New Garden Township
Zoning Hearing Board Application

Date Hearing advertised: _____ Appeal Number: _____

\$ _____ Fee Paid: Yes No Receipt Number: _____ Date: _____

Date of Application: _____

Name of Applicant: _____

Address: _____

Phone #: _____ Fax #: _____ Email address: _____

Name of Owner: _____

Address: _____

Phone #: _____ Email address: _____

Is the Applicant represented by an attorney? Yes No

Name of Attorney: _____

Address: _____

Phone # _____ Fax # _____ Email address: _____

The above applicant does hereby appeal from the action of the Zoning Officer in (granting)
(refusing) a permit for: _____

An interpretation A Special Exception A variance Appeal Cease & Desist Order

Appeal Zoning Officer's determination Challenge Ordinance validity

Other _____

Article _____ Section _____ Subsection _____ Paragraph _____

It is an appeal for an interpretation of the Ordinance or map.

It is a Special Exception to the Ordinance on which the Zoning Hearing Board is required to pass.

It is a request for a variance relating to the; Use Area Frontage Yard

Or _____ provisions of the Ordinance.

(State, if request is for purpose other than enumerated)

The description of the property involved in this appeal is as follows:

Location: _____ Tax parcel number: _____

Zoning District: _____ Lot size: _____ Present use(s): _____

Present improvements upon the land: _____

Proposed Use: _____ Cost of work involved: \$ _____

I (we) believe that the Board (should) (should not) approve this request because: _____

Cite pertinent provisions of the Ordinance: _____

Has any previous application or appeal been filed in connection with these premises?

No Yes

What is the applicant's interest in the premises affected? _____

Following are the names and addresses of owners of every property within 500 feet of the property which is the subject of this application. The applicant is required to provide this information for the application to be complete. If the space provided is not sufficient please attach list.

| NAME | MAILING ADDRESS |
|-------|-----------------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

NOTE: This application must be filled out in quadruplicate and submitted with the filing fee and twenty (20) copies of plans deposited with the Zoning Officer.

Included with this application is a copy of Article XX from the New Garden Township Zoning Ordinance which provides information about the function of the Zoning Hearing Board and processing of applications for relief. Also included is information published by the Pennsylvania Department of Community and Economic Development which explains Special Exceptions, Conditional Uses and Variances. This information is provided for general reference and to assist you in preparing your application and presentation to the Zoning Haring Board.

ARTICLE XX
Zoning Hearing Board

§ 200-156. Membership, appointment and removal.

- A. Appointment. The membership of the Zoning Hearing Board shall consist of three residents of the Township, appointed by the Board of Supervisors in accordance with Article IX of the Pennsylvania Municipalities Planning Code, as amended (53 P.S. § 10901 et seq.). Each term of office shall be three years and shall be so fixed that the term of office of one member shall expire each year. The terms for the initial three members so appointed shall be one, two, and three years, respectively.
- B. Alternates. The Board of Supervisors may appoint at least one but no more than three residents of the Township to serve as alternate members of the Board. The term of office of an alternate member shall be three years. When seated in accordance with the provisions of § 200-157B, an alternate shall be entitled to participate in all proceedings and discussions of the Board to the same and full extent as provided by law for the Board members, including specifically the right to cast a vote as a voting member during the proceedings, and shall have all the powers and duties set forth in this chapter, by the Code, and as otherwise provided by law. Alternates shall hold no other office in the Township, including membership on the Planning Commission and the Zoning Officer. Any alternate may participate in any proceeding or discussion of the Board but shall not

be entitled to vote as a member of said Board nor will they be compensated pursuant to § 200-158D, unless designated as a voting alternate member pursuant to § 200-157B.

- C. Vacancies. The Zoning Hearing Board shall promptly notify the Board of Supervisors of any vacancies which occur. Appointments to fill vacancies shall be only for the duration of the unexpired portion of the term.
- D. Limitation of responsibilities. Members of the Zoning Hearing Board shall hold no other office in the Township.
- E. Removal of members. Any member of the Zoning Hearing Board may be removed for malfeasance, misfeasance or nonfeasance in office or for other just cause by a majority vote by the Board of Supervisors. Such vote shall not take place until the member has received 15 days' advance notice of the intent to take such a vote. A hearing shall be held in connection with the vote if the member shall request it in writing.

§ 200-157. Designation of officers; seating of alternates; procedures.

- A. Conduct of the Board. The Zoning Hearing Board shall elect from its own membership its officers, who shall serve annual terms as such and may succeed themselves. For the conduct of any hearing and the taking of any action, a quorum shall be not less than a majority of all the members of the Zoning Hearing Board. The Zoning Hearing Board may appoint a hearing officer from its own membership to conduct any hearing on its behalf, and who shall perform such duties as required in § 200-160.
- B. Quorum. If, by reason of absence or disqualification of a member, a quorum is not reached, the Chairman of the Board shall designate as many alternate members of the Board to sit on said Board as may be needed to provide a quorum. Any alternate members of the Board shall continue to serve on that Board in all proceedings involving the matter or case for which the alternate was initially appointed until the Board has made a final determination of the matter or case. Designation of an alternate pursuant to this section shall be made on a case-by-case basis in rotation according to declining seniority among all alternates.
- C. Establishment of procedure. The Zoning Hearing Board may make, alter and rescind rules and forms for its procedure, consistent with ordinances of New Garden Township and the laws of the commonwealth. The Zoning Hearing Board may, subject to approval by the Board of Supervisors, employ or contract for secretaries, clerks, legal counsel, consultants and other technical and clerical services.

§ 200-158. Expenditures for services.

- A. Municipal fees for services. Within the limits of the funds appropriated by the Board of Supervisors and upon prior approval of the Board, the Supervisors may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services as limited by this chapter. The Board may employ legal counsel, but the attorney shall not be the Township Solicitor. Stenographers' fees shall be borne in accordance with Subsection C.

- B. Applicant fees. An applicant before the Zoning Hearing Board shall deposit with the Treasurer of New Garden Township the appropriate filing fee. Fees shall be established by resolution of the Board of Supervisors.
- C. Stenographer fees. The fee to hire a stenographer shall be paid equally by the applicant and the Township. The applicant shall pay a deposit as set from time to time by resolution of the Board of Supervisors for use of a stenographer. A transcript of the proceedings shall be paid by the party requesting it and the party appealing a decision will pay for the cost of a transcript.⁵⁹
- D. Compensation. Members of the Board may receive compensation for the performance of their duties, as may be fixed by the Board of Supervisors. In no case shall the rate of compensation exceed the rate of compensation authorized to be paid to the members of the Board of Supervisors. Alternate members of the Board may receive compensation, as may be fixed by the Board of Supervisors, for the performance of their duties when designated as alternate members pursuant to § 200-156B, but in no case shall such compensation exceed the rate of compensation authorized to be paid to the members of the Board of Supervisors.

§ 200-159. Functions and jurisdiction.

The Zoning Hearing Board shall function in strict accordance with and pursuant to the Municipalities Planning Code⁶⁰ and shall have all the functions set forth therein.

- A. Appeals from the Zoning Officer. The Board shall hear and decide appeals where it is alleged that the Township Zoning Officer has failed to follow prescribed procedures or has misinterpreted or misapplied any provision of a valid ordinance or map of the Township or any valid rule or regulation governing the duties of the Zoning Officer.
- B. Special exceptions. The Board shall hear and decide requests for special exceptions authorized by this chapter in accordance with the standards or criteria set forth in § 200-163. The Zoning Hearing Board may attach such reasonable conditions and safeguards it may deem necessary as prescribed in § 200-163 to implement the purposes of the Comprehensive Plan, the Municipalities Planning Code, and this chapter. The burden of proof as to all specific standards and criteria, and all general standards and criteria, at all times remains with the applicant.
- C. Variances. The Board shall hear requests for variances where it is alleged that the provisions of this chapter create unnecessary hardship on an applicant when applied to a tract of land. In granting a variance, the Zoning Hearing Board may attach such reasonable conditions and safeguards it may deem necessary as prescribed in § 200-162 to implement the purposes of the Municipalities Planning Code, the Township Comprehensive Plan, and this chapter.
- D. Validity of the chapter. The Board shall hear and make findings on challenges to the validity of this chapter with respect to substantive questions. The Board shall also hear

59. Editor's Note: Amended at time of adoption of Code (see Ch. 1, General Provisions, Art. I).

60. Editor's Note: See 53 P.S. § 10101 et seq.

and decide procedural challenges to the validity of any land use ordinance within 30 days of enactment. This will include challenges that raise questions of defective enactment. A procedural appeal from the enactment of a zoning ordinance shall initially be heard by the Board rather than the court.

E. Appeals from determinations by the Zoning Officer or Municipal Engineer. The Board shall hear and make decisions on appeals from determinations by the Zoning Officer or Municipal Engineer with reference to:

- (1) Administration of the floodplain ordinance;⁶¹
- (2) The granting or denial of any permit, or failure to act on an application;
- (3) The issuance of any cease-and-desist order; and
- (4) The registration or refusal to register any nonconforming use, structure, or lot.
- (5) With reference to sedimentation, erosion control, and stormwater management not related to Articles V or VII of the Pennsylvania Municipalities Planning Code.

§ 200-160. Hearings.

The Zoning Hearing Board shall conduct hearings and make decisions in accordance with the following requirements:

A. Notice. [Amended 4-3-2006 by Ord. No. 165; 3-12-2007 by Ord. No. 170]

- (1) The Board shall set a reasonable time and place for public hearings and shall give notice thereof as follows:
 - (a) By publishing a notice thereof at least seven days before the date fixed for the hearing in a newspaper of general circulation in the Township.
 - (b) By mailing or delivering a hearing notice at least seven days prior to the hearing to the applicant.
 - (c) By mailing or delivering a hearing notice at least seven days in advance thereof to the Zoning Officer, the Township Secretary, the Board of Supervisors, the Township Planning Commission and to every other person or organization who shall have registered with the Board, in writing, for the purpose of receiving such notices.
 - (d) By posting notice of the hearing in a conspicuous location on the affected tract of land at least seven days prior to the hearing.
 - (e) By mailing or delivering a hearing notice to the owner or occupier of every parcel of property/lot within 500 feet of the property in question, provided that failure to give notice as required by this subsection shall not invalidate any action taken by the Board.

61. Editor's Note: See Ch. 96, Floodplain Management.

- (2) The notice herein required shall state the location of the lot or building and the general nature of the relief requested and/or issues to be decided by the Board.
- B. Timing. The hearing(s) shall be held within the time frames set forth in the Municipalities Planning Code,⁶² as amended. [Amended 4-3-2006 by Ord. No. 165]
- C. Parties to the hearing. The parties to the hearing shall be:
- (1) The Township;
 - (2) Any person affected by the application who has made a timely appearance of record before the Board; and
 - (3) Any other person including civic or community organizations permitted to appear by the Board.
- D. Powers of the Chairman. The Chairman or Acting Chairman of the Board or the hearing officer presiding shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.
- E. Rights of the parties. The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.
- F. Exclusion of evidence. Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.
- G. Record of the proceedings. The Board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings.
- H. Communications. The Board or the hearing officer shall not communicate, directly, or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings with any party or his representative unless all parties are given an opportunity to be present.

§ 200-161. Decisions.

- A. The Board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within the time frame set forth in the Municipalities Planning Code, as amended.⁶³ Each decision shall be accompanied by findings and conclusions together with the reasons for such conclusions. Conclusions based on any provisions of this chapter or of any act, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is

62. Editor's Note: See 53 P.S. § 10908.

63. Editor's Note: See 53 P.S. § 10908.

deemed appropriate in the light of the facts found. [Amended 4-3-2006 by Ord. No. 165]

- B. If the hearing is conducted by a hearing officer, and there has been no stipulation that this decision or findings are final, the Board shall make its report and recommendations available to the parties. The parties shall be entitled to make written representations to the Board prior to final decisions or entry of findings. Where the Board has power to render a decision and the Board or the hearing officer, as the case may be, fails to render the same within the period required by this clause, the decision shall be deemed to have been rendered in favor of the applicant.
- C. A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or by certified mail to him not later than the day following its date. The Board shall provide by mail or otherwise a brief notice of the decision or findings and a statement of the place where the full decision may be examined to all other persons who have filed their names and addresses to the Board no later than the last day of the hearing.
- D. Decisions made by the Board or the governing body are appealed to the Court of Common Pleas. However, any person aggrieved by a decision may appeal to the Board if they establish and prove that they had no notice, knowledge, or reason to believe that any action was being taken. That aggrieved party has 30 days from the date of the decision to appeal.

§ 200-162. Standards for review of variance requests.

The Zoning Hearing Board may grant a variance to a provision of this chapter, provided the following standards are satisfied where relevant in a given case:

- A. Unique or irregular conditions. The site shall have unique physical circumstances or conditions such as irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property. An unnecessary hardship must be created by such conditions, and not the circumstances or conditions generally created by the provisions of the chapter in the district in which the property is located.
- B. Strict conformity cannot occur. Because of the physical circumstances or conditions described in Subsection A, there is no possibility that the property can be developed in strict conformity with the applicable provisions of this chapter so the authorization of a variance is therefore necessary to enable the reasonable use of the property.
- C. Liability of the applicant. Such unnecessary hardship described in Subsection A has not been created by the applicant, subsequent to the adoption of this chapter, or prior ordinances, and strict application of the provisions of this chapter would deprive the applicant of the reasonable use of land, structure or building.
- D. Impact of variance on district. The variance, if authorized, will not alter the essential character of the applicable zoning district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent

property, nor impact negatively on buildings or districts of historical or architectural significance, nor be detrimental to the public welfare.

- E. Minimum variance. The variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulations in issue.
- F. Conditions. The variance, if authorized, shall be subject to such conditions as will assure that the adjustment to provisions of this chapter shall not constitute a grant of special privilege inconsistent with the limitations upon other properties in the vicinity and zoning district in which the property is situated.
- G. Financial gain. In no case shall a variance be granted solely for reasons of additional financial gain on the part of the applicant.

§ 200-163. Standards for review of special exception requests.

The Zoning Hearing Board shall hear and decide all requests for special exception uses as identified within this chapter in accordance with the following standards:

- A. Relationship to the Comprehensive Plan. Consideration of the size, scope, extent and character of the proposed special exception and assurance that such use is consistent with community goals and objectives of the New Garden Township Comprehensive Plan.
- B. Relationship to this chapter. Consideration of the proposed special exception with respect to promoting harmonious development within the spirit, purpose and intent of this chapter, so that the proposed use will not adversely affect the public health, safety and welfare of Township residents.
- C. Suitability of the tract. Consideration of the suitability of the tract, including environmental conditions, highway access, and availability of sewer and water facilities.
- D. Impact on existing neighborhood character. Consideration of the extent to which the proposed special exception will alter the character of the existing neighborhood and adjacent tracts, or impact negatively on buildings or districts of historical or architectural significance.
- E. Impact on circulation. Consideration of the effects of the proposed special exception will have with respect to traffic patterns and volumes, access, parking and undue congestion.
- F. Economic impact. Consideration of the character and type of development proposed as it relates to generating revenue for the Township and to the value of the property in the surrounding community.

§ 200-164. Stay of proceedings.

Upon filing of any proceeding before the Zoning Hearing Board and during its pendency before the Board, all land development pursuant to any challenged ordinance, order or approval of the Zoning Officer, and all official action, shall be stayed unless the Zoning Officer or any other appropriate agency or body certifies to the Board facts indicating that

such stay would cause imminent peril to life or property. In such cases, the development or official action shall not be stayed other than by a restraining order, which may be granted by the Board or by the court having jurisdiction of zoning appeals after notice to the Zoning Officer or other appropriate agency or body. When an application for development has been duly approved and proceedings designed to reserve or limit the approval are filed with the Board by persons other than the applicant, the applicant may petition the court having jurisdiction of zoning appeals to order such persons to post bond as a condition to continuing the proceedings before the Board.

THE ZONING HEARING BOARD

Introduction

As required by the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, as re-enacted and amended by Act 170 of 1988, any community enacting a zoning ordinance must also create a zoning hearing board. The primary purpose of such a board is to help assure fair and equitable application and administration of the zoning ordinance by hearing appeals on the zoning officer's determinations and by granting relief from the literal enforcement of the ordinance in certain hardship situations. Since the board has no legislative power, it can neither make nor modify zoning policy. Neither does the zoning hearing board have enforcement powers. It is a quasi-judicial body; that is, its powers are to some extent judicial in nature. The board schedules hearings on applications and appeals that come before it, takes evidence, and issues written decisions with findings of fact and conclusions of law. It must limit its scope of activities to those permitted by the MPC and by the local zoning ordinance.

It is important that the zoning hearing board members have a thorough knowledge not only of its specific functions, but also of its place within the arena of local planning decisions. While the board is not responsible for the contents of the zoning ordinance, it nevertheless plays a vitally important role in the overall effectiveness of the ordinance. In addition the board may detect weaknesses in the zoning ordinance perhaps as a result of frequent and similar variance requests. Thus, the board may request the planning commission or governing body to consider a zoning amendment to correct an ordinance flaw. The board certainly needs to be aware of the governing body's zoning goals and objectives. The comprehensive plan provides necessary insight into the purposes of the zoning ordinance.

Since the board has some discretion in carrying out its functions, it is important to understand not only the letter of the law but also the spirit of the law. That is, in hearing a specific case, the board must look not only at the language of the zoning ordinance, but also at the objectives the regulations are to achieve. In the absence of continuing communication with the governing body and the planning commission, the board may be forced to make decisions in the abstract, devoid of the rationale which prompted any municipal legislative decision concerning any given section of the zoning ordinance. Unless the ordinance contains intent or purpose sections, it may be difficult to always thoroughly understand each and every portion of the ordinance and the objective that it is intended to achieve. The comprehensive plan should be a valuable tool for the board in determining the intent of many zoning provisions.

Board members should be aware of MPC Section 603.1 which incorporates the judiciary's strict construction rule to aid in interpretation of ordinance provisions. Where doubt exists as to the intended meaning of the ordinance, it must be interpreted in favor of the property owner.

The zoning hearing board has the power to assure the fair and equitable application of the zoning ordinance in the cases that it hears. Abuse of this power can, in effect, undermine the ordinance.

Local officials should not take an appointment to the board lightly, nor should an appointee. It is an extremely responsible and demanding position, one that will play an important role in the growth and development of your community.

Variances

A variance is a means of solving the problems created by attempting to apply the general terms of the ordinance to fit the land that is regulated. It is necessary because a zoning requirement could possibly prevent any use of a property if strictly applied. A variance procedure prevents problems in applying general legislation to specific situations. All zoning ordinances contain many detailed pre-set regulations designed to be self-executing. Various setbacks and height limitations are examples of these provisions, which omit administrative discretion. Variances act as a relief valve for the rigid ordinance.

Variances Compared with Special Exceptions and Conditional Uses

An application for a variance seeks permission to do something which is not in conformance with or violates the zoning ordinance. A variance is an overriding of the legislative judgment, justified by the existence of unnecessary hardship. In contrast, an applicant for a special exception does not seek to vary the ordinance. The permission the applicant seeks is one envisioned by the ordinance. Accordingly, an applicant for a variance must show both (a) unnecessary hardship and (b) consistency with the public interest. A special exception or conditional use case generally involves only the latter.

Requirements for a Variance

The zoning hearing board hears requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may, by rule, prescribe the form of application and may require preliminary application to the zoning officer. Pursuant to MPC Section 910.2, the board may grant a variance provided that all of the following findings are made where relevant in a given case:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
3. That such unnecessary hardship has not been created by the appellant;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare and
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Variance Procedure

Typically, a request for a variance arises when an application for a zoning or building permit is rejected or turned down by a zoning officer because the proposed activity does not meet all the requirements of the zoning ordinance. The applicant then makes application to the zoning hearing board for a variance as a result of this denial. The zoning hearing board has the authority to vary the terms of the ordinance in proper instances. A decision of the zoning hearing board may be appealed to the court of common pleas.

Types of Variances

Dimensional Variance

The most common variance granted is a dimensional variance. It is used where an applicant's property does not quite comply with a setback or yard requirement or has insufficient lot size. Dimensional variances are subject to the rules of Section 910.2 designed to permit an adjustment of the strict application of the zoning ordinance to a specific property. In brief, the variance should be the minimum relief to alleviate the unnecessary hardship which is peculiar or unique to the property provided the variance is not injurious to the public interest.

Unnecessary hardship is sometimes erroneously confused with economic hardship. Unnecessary hardship, according to court decisions, requires that the physical characteristics of the property be such that it cannot be used for any permitted purpose, or that it can be used for a permitted purpose but only at a prohibitive expense, or that the property has no value or only a distressed value if restricted to a permissible use. It is not sufficient justification for a variance to show mere economic hardship or that the property could be utilized more profitably if a variance were granted.

De Minimis Variance

There also exists a species of dimensional variances bearing the Latin term *de minimis* which is to be issued only in rare circumstances. A *de minimis* variance is a minimal or minor deviation from bulk requirements that does not require proof of unnecessary hardship. These *de minimis* variances have been limited to dimensional cases thus far in the belief that there is less adverse impact upon the public interest than with use variances. For example, a variance from a one-acre lot minimum zoning requirement, where their subdivision of a two-acre lot would result in one lot being one acre and another lot being 15 square feet short of one acre, or .99966 of an acre, was properly upheld on a *de minimis* basis.

Use Variance

A use variance flirts with an illegal usurpation of the governing body's power to rezone. Because a use variance requests permission to use property in a manner prohibited by the particular zoning district, i.e., a commercial use in a single family residential zone, its impact is usually greater upon the public interest than a dimensional variance.

A use variance is often requested when the property owner claims his property is practically valueless as restricted by the zoning uses permitted, or that similar uses to the one requested already exist nearby. Even if the applicant's property value is depressed for residential use because of traffic conditions or existence of some commercial use across the street, such conditions have been held not to constitute a hardship when the entire neighborhood is affected in addition to the applicant's tract. The evidence offered by the applicant must be conclusive.

If a zoning hearing board were to approve use variances to individual properties because the neighborhood has lost its zoning purity, a piecemeal rezoning would result. It could amount to spot zoning, or if done repeatedly, constitute a creeping form of spot zoning. The proper remedy is rezoning, a legislative act, which rests with the governing body, not the zoning hearing board.

Validity Variance

As noted above, a hardship that is not unique to a variance seeker's property does not justify a variance. However, if the zoning is confiscatory, that is if it denies any reasonable use of the land, a validity variance can be issued regardless of the fact that neighboring properties might be affected. Unlike a curative amendment challenge, a validity variance does not attack the constitutionality of the ordinance. The test for a validity variance is not whether the owner could make more profit from this proposed use but whether the zoning allows a reasonable use thereby avoiding confiscation.

Pennsylvania zoning expert Robert S. Ryan in his treatise *Pennsylvania, Zoning Law and Practice* has commented that relief from a confiscatory effect can be denied if the particular use selected by the applicant is injurious to the public interest, or if the relief sought is greater than the minimum which would permit a reasonable use of the land. Of course, a variance can be denied if the hardship is self-created. A validity variance is governed by MPC Sections 909.1(a)(1) and 916.1(a)(1).

A validity variance case belongs with the zoning hearing board and should not be confused with a curative amendment proceeding. According to Mr. Ryan, if the landowner were allowed to proceed with a curative challenge under MPC Section 916.1(a)(2), it could result in placing a great and undue burden on municipal governing bodies. If the landowner with a validity variance claim could shortcut the review process, bypass the zoning hearing board, and go directly to the governing body for a disposition, the usefulness and legislatively intended function of local zoning hearing boards would be greatly diminished.

To recap, a person aggrieved by a use or development permitted on the land of another who desires to challenge the substantive validity of the ordinance must submit the validity challenge to the zoning hearing board (ZHB). A validity challenge must be in writing and contain reasons for the challenge, but unlike the curative amendment, no plans and explanatory materials describing the proposed use or development must be filed. If the ZHB finds that the validity challenge has merit, the decision must include recommended amendments to the challenged ordinance in order to cure the defects. The ZHB must also consider five planning criteria enumerated in subsection (5) of Section 916.1(c). In abbreviated terms, these five factors include:

- (i) impact on roads and public facilities;
- (ii) impact on regional housing needs and effectiveness of the proposal in providing affordable housing;
- (iii) suitability of the site for the intensity of the use proposed by the site's soils, slopes, woodland, wetlands, floodplains, aquifers, and other natural features;
- (iv) impact of the proposed use on the site's natural features; and
- (v) impact on preservation of agriculture and other land uses which are essential to public health and welfare.

Although the board has the usual 45 days from the hearing or last hearing on the validity challenge to render its decision, a failure by the board results not in the usual deemed approval, but instead in a deemed denial. A deemed denial occurs on the 46th day after the close of the last hearing. A deemed denial also occurs with respect to a validity challenge if the hearing is not held within the obligatory 60-day time limit.

Variance by Estoppel

The Pennsylvania Courts have established the possibility of granting relief for the continuation of an illegal use under the theory of a variance by estoppel or vested right. The landowner primarily bases this type of claim to a variance on the failure of the municipality to either enforce its ordinance over a long time period, or the acquiescence by the municipality in the illegal use for a long time. The landowner is attempting to assert a form of vested right to a variance. (See *Planning Series No. 9, The Zoning Officer*, for a related discussion of the factors that must be advanced by a landowner claiming a vested right to a permit issued in error.)

In this type of variance application, the MPC provides no guidance. Fortunately, judicial decisions provide several relevant factors for the zoning hearing board to consider when adjudicating a request for a variance by estoppel. The four factors are:

1. A long period of municipal failure to enforce the law, wherein the municipality knew or should have known of the violation, *in conjunction with* some form of active acquiescence by the municipality in the illegal use;
2. Whether the landowner acted in good faith *and* relied innocently upon the validity of the use throughout the proceedings;
3. Whether the landowner has made substantial expenditures in reliance upon his belief that his use was a permitted use; and
4. Whether the denial of the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building.

Emphasis provided in original, *Spargo v. ZHB of Municipality of Bethel Park*, 128 Pa. Commonwealth Ct. 193, 563 A.2d 213 at p. 217 (1989), citing *Crawford Appeal*, 110 Pa. Commonwealth Ct. 51, 531 A.2d 865 (1987), cross appeals denied, 518 Pa. 656, 544 A.2d 1343 (1988).

In addition, the board may also consider whether there is sufficient evidence to show that the use is a threat to the public health, safety, or morals. For instance, intrusion of a commercial dental office into an otherwise residential zone is enough in and of itself to show detriment to the public health, safety and welfare. See *Spargo*.

In regard to the first factor, it is well-settled in case law that a mere showing that a municipality has failed to enforce the law for a long period of time is insufficient in itself to support the grant of a variance. Commonwealth Court in *Crawford* could find no case where pure municipal failure to take action, even coupled with some knowledge of the violation by municipal officials, was held sufficient to grant a variance by estoppel.

In assessing the second factor, concerning a landowner's innocent reliance upon municipal inaction, it must be remembered that a landowner is, absent some municipal validation of the use, duty bound to check the zoning status of the property before purchase.

In regard to the third factor, the cost of an addition to a garage and erecting a storage shed for a building contractor's use at his residence, or remodeling a home to accommodate dental equipment, were rejected because all or a portion of the expenses could be recouped. See, *Crawford Appeal* and *Spargo*, respectively.

The fourth factor permits denial of the variance even if substantial sums were expended for improvements consistent with the permitted use such as a garage or storage shed with a residence. The cost of modifying a structure to legal status does not appear to rise to unnecessary hardship unless it is necessary to demolish the existing building.

Variations versus Rezoning

If a property owner feels his land is being confiscated should he approach the governing body to rezone his property or approach the zoning hearing board for a variance?

A zoning hearing board need not feel particularly obligated to issue a variance unless the necessary standards and provisions are met. If the standards and provisions are met, but the use requested is detrimental to the community, a variance for that use should not be granted (possible consideration could be given to other uses).

A hardship which is unique to the particular property involved or which admits of no special legislative solution can be remedied by a variance whether or not the applicant has sought legislative relief. As an example, if a lot is too small to be used as zoned, then a variance may be granted to permit a reasonable use of the property without any prior attempt to rezone the land. The governing body cannot grant a variance and must be careful to avoid spot zoning.

On the other hand, before any sizeable tract of land becomes the subject of a validity variance, it is reasonable to give the governing body a chance to rezone the land. Only where the governing body fails to meet its responsibility is a variance an appropriate method for granting relief to a large tract of land provided the problem is non-legislative in nature. Confiscation of a large tract is uncommon but possible, for instance, where specific topographic factors preclude reasonable use.

Priority between Variations

The Pennsylvania Municipalities Planning Code contains an express mandate in Section 910.2(a)(5) that a lesser variance be granted if it will provide relief upon a finding:

“That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.”

Expiration of Approvals

Some zoning ordinances contain provisions that stipulate that a grant of a variance or special exception (or conditional use) will automatically expire within a reasonable period of time such as one or two years if a building permit has not been obtained and construction commenced. An expiration provision, it should be noted, runs with the land and should not be made personal to a given owner. If the zoning ordinance contains no time limitation and no time limitation was imposed by way of a condition, the ZHB approval can be exercised by a new owner years later. However, Commonwealth Court has ruled that a reasonable time limitation may be amended into the zoning ordinance which would apply to previous grants of approvals. See *Pyle v. Municipality of Penn Hills*, 102 Pa. Commonwealth Ct. 220, 517 A.2d 583 (1986). In this retroactive situation, the time limitation would commence on the effective date of the zoning amendment. Flexibility can also be drafted into the ordinance to allow the board to grant a time extension for good reason in order to avoid an automatic expiration and the subsequent need for the applicant to seek a new approval.

Conclusion

Special exceptions, conditional uses and variations are important elements of a community's zoning ordinance, and a thorough knowledge of each is indispensable to the proper functioning of the ordinance. The preceding pages have tried to explain these terms and eliminate some of the misconceptions and misunderstandings associated with each.