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The Planning and Zoning Officials Academy provides local elected and appointed officials with both basic and advanced topics addressing issues unique to the role as a local government representative.

Testing the practical difficulty of non-use variances

One of the several unique responsibilities of the zoning board of appeals (ZBA) is to hear variance requests. A variance is a "license to use property in a way not permitted under an ordinance." Variances must be considered carefully and under normal circumstances should be rarely granted.

There are two types of variances: non-use and use. A non-use variance (sometimes termed a dimensional variance) is a variance request that does not deal with the use of the property. The variances deal with setback, lot area, height, placement, and lot width; landscaping; signs; or development standards.

As deemed by the Michigan Courts, a proof of ***practical difficulty*** is the key criteria for an applicant to qualify for a non-use variance. This means the zoning board of appeals must find that the applicant has demonstrated a practical difficulty by satisfying four mandatory tests.

The first test to determine a practical difficulty is: *Are the regulations unreasonably restrictive? Would conformity with the code(s) be unreasonably burdensome?*

Before determining that a code is unreasonably restrictive, alternatives be considered. Any report furnished by staff, consultant, or other individuals should contain possible alternatives. If there is no staff or a consultant, as a ZBA member, consider alternatives when reviewing this application such as:

- If the applicant claims that he needs a pole barn to be taller than permitted to store a recreational vehicle, go measure a typical recreational vehicle.

Determine if the applicant's proposal is the minimum size needed to store such a vehicle.

- If the applicant claims he needs a 5-foot setback variance in order to build a new house, consider how much five feet is really going to matter. Could the house be slid over on the parcel and a variance no longer needed?
- If the applicant claims he needs a setback variance to build an attached garage to his house, consider if a detached garage could be built without a variance.

Consideration of alternatives brings perspective to the terms "unreasonably restrictive and burdensome" and enables a more objective conclusion to be reached.

The second test in determining a practical difficulty is: *Is the applicant receiving a privilege not available to other property owners? Would a variance do substantial justice to the applicant as well as the neighborhood?*

The second test determines whether the request is a good or bad idea for the community at large. This test determines if this request will be fair to the applicant and the community.

Ask yourself, the applicant, and other ZBA members the following types of questions:

- Is the bigger sign going to block views? Is it going to cause sign blight?
- Will the placement of the pole barn bother the neighbors-infringing on daylight and views?
- Have other applicants requested a similar variance and been denied?
- If parcels in the zoning district are of a similar share and size, what makes this request special?

The public hearing will give you insight into this question. Have residents spoken in favor of the request or against the request? Do they seem to have substantial concerns or does there appear to be a neighborhood dispute going on?

As a ZBA member, determine if this request represents a win-win situation for the applicant and the community. Commend an applicant on his craftsmanship, maintenance of his property, and design abilities. You may believe that the proposed design will be an asset to the community. However, if the evidence indicates that the needs of the community and the applicant are opposed, you must determine what is the greater and more compelling good.

The third test in determining a practical difficulty is: *Is the property unique?*

This is a relatively easy question to answer, but very often it is not asked. The applicant's situation (monetary, business, and the like) should not be considered. Do not consider that the applicant has a very large family. Do not consider that the applicant will lose his business deal if the request is denied. While the circumstances with the family or business may be unique and stressful, the property is what is in question. A variance goes with the property, not with the family or business.

As a ZBA member, ask yourself and the applicant questions like: is the applicant's property different in some way than all of his neighbors? Is the building located in an unusual place? Is the parcel more shallow, more narrow, significantly smaller? Are there natural features like a wetland, woods, or a steep slope that make this property unique?

If the lot or parcel is exactly the same size and shape as parcels within the same zoning district and has no unique features, then the answer to this question is no.

The fourth test in determining a practical difficulty is: *Is the problem self-created?*

The simplest way to explain self-creation is to present examples. Here are a few self-created scenarios:

- The applicant wants a side yard setback variance because he has a big truck for his home business and needs a big pole barn but he doesn't want to put the pole barn in the center of his backyard because he won't be able to have a swimming pool near the house.
- The new restaurant is designed with an atrium in the front. But as the atrium is made of glass, it is so airy and open that people won't see the building, so the restaurant needs a sign much bigger than the neighboring businesses.
- An applicant wants to build a house two-feet wider than permitted. He can't make the house any narrower and deeper because he won't be able to swing his truck into the detached garage at the rear of the property. The house cannot be any smaller because he won't be able to have a first-floor laundry room.

Variance requests are not always self-created. Here are some situations that were not self-created:

- A former residence is in an area zoned for commercial business. A retail business-a conforming use-moves into the former house. Given the unusual building, many customers cannot find the business. The business owner asks for a sign variance to permit another sign so customers can more easily locate his store.
- An applicant buys a house. The house has a porch that is in severe disrepair. The house is a nonconforming structure. Normal maintenance is permitted on nonconforming structures; however, structural changes are not. At this stage, the porch cannot be simply repaired; it must be demolished and reconstructed properly.

An applicant's exemplary design proposal and congeniality are not enough to overrule a self-created problem. Consistent application of the "self-created" test will catch many of your variance requests, resulting in fewer requests being approved and more requests being denied.

Remember, the burden of proof is on the applicant to provide sufficient information to the board in order for the ZBA to evaluate the practical difficulty tests.