BOARD OF ADJUSTMENT CASE STUDIES

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What are the legal requirements for a variance?

- **A.R.S. § 9-462.06, the municipal board of adjustment statute:**

  "A board of adjustment shall … hear and decide appeals for variances from the terms of the zoning ordinance only if, because of special circumstances applicable to the property, including its size, shape, topography, location, or surroundings, the strict application of the zoning ordinance will deprive such property of privileges enjoyed by other property of the same classification in the same zoning district"

What are the legal requirements for a variance?

- **A.R.S. § 9-462.06, the municipal board of adjustment statute (continued):**

  "A board of adjustment may not … grant a variance if the special circumstances applicable to the property are self-imposed by the property owner"

What are the legal requirements for a variance?

- **A.R.S. § 11-816, the county board of adjustment statute:**

  "The board of adjustment may … allow a variance from the terms of the ordinance if, owing to peculiar conditions, a strict interpretation would work an unnecessary hardship and if in granting the variance the general intent and purposes of the zoning ordinance will be preserved"

What are the legal requirements for a variance?

- Arizona statutes and cases establish four standards that **must all be met** before a board may legally grant a variance:
  1. A variance may be granted only where there are special circumstances that apply to the property
  2. Any hardship which is a basis for a variance must relate to the land, NOT the owner
     - A personal hardship does not justify a variance

What are the legal requirements for a variance?

- Arizona statutes and cases establish four standards that **must all be met** before a board may legally grant a variance:

3. The landowner's need to receive an adequate financial return on the property is not a legitimate basis for a variance
4. A variance may not be granted where the hardship was willfully and intentionally created by the landowner

How are these rules applied in real life?

- Facts of life your staff, and especially your attorney, does not want you to know:
  - You will get away with granting an illegal variance (or anything else, for that matter) if nobody challenges it
  - The government itself may, but seldom does, challenge an illegally granted variance or other improper action
  - Courts sometimes do strange things
- But illegal variances and other irregular actions create lots of problems and work….

Actual Case Studies

The cases you are about to study are true; the names have not been changed to protect the innocent….

Parking variance for new building

- Vacant lot across the street from the main gate of the University of Arizona
- Owner plans to build a fast food restaurant geared to pedestrian student traffic
- Owner applies for a parking variance
  - A restaurant as large as the one proposed is necessary to permit an adequate financial return
  - The area in which the restaurant is to be built has a high level of pedestrian traffic

Parking variance for a new building

- Is a variance appropriate?
  - BOA: Yes, variance granted
  - Trial court: Yes, BOA's decision affirmed
  - Court of Appeals: Reversed; variance denied

Parking variance for new building

- Court of appeals decision:

  "One cannot choose a particular use and then contend that that use will only be profitable if a variance is granted. Higher economic return can always be expected if zoning restrictions are waived. If that were a 'special circumstance,' everyone would be entitled to a variance"

Parking variance for new building

- Court of appeals decision:

  "we are required to find that strict application of the zoning ordinance would deprive the property of privileges enjoyed by other property of the same class in the same district. There is nothing in the record to demonstrate that [this] property does not have the same privileges as any other similarly sized property used for restaurant purposes in Tucson"

Parking variance for new building

- Practical realities of the case:
  - It is a classic “self-imposed hardship” case: How can the owner claim he doesn’t have enough room for parking for a not-yet-built restaurant?
  - It seeks to make a legislative, policy decision about how much parking is needed in the pedestrian-oriented University area
    - Changing the parking requirements for an entire district is the role of the legislative body (the city council or board of supervisors)
    - The variance gave this property owner special privileges

Haynes v City of Tucson, 162 Ariz. 509, 784 P.2d 715 (App. 1989)

Color variance for new home

- All of his life, Mr. DeMuro had hoped to build a Mediterranean home
- He specifically wanted a house with columns, a white house -- off-white, not “hospital white”
- The architecture and the entire house was designed around his dream of a white house with columns

Color variance for new home

- Paradise Valley regulations required houses to blend with the mountain background and to be made from materials or colors which would not unduly reflect light
- Is a variance appropriate?
  - BOA: Yes, variance granted
  - Trial court: Yes, BOA's decision affirmed

Color variance for new home

- The Court of Appeals threw out the variance:

  "The color of a house is not a factor pertaining to the real property or which would deprive the property of uses or privileges enjoyed by other property of the same zoning classification"

  It also violates basic variance requirements:

  - No "special circumstances" (there's no connection to the size, shape, topography, etc. of the property)
  - Self-created hardship
  - Constitutes a grant of special privileges
  - Served as a personal convenience to Mr. DeMuro

Arkules v. Paradise Valley Board of Adjustment, 151 Ariz. 438, 728 P.2d 657 (App. 1986)

Sign variance for new car dealer

- SPA, a new car dealership, sought variances for a free-standing sign on its new Scottsdale Porche-Audi (+ 1 to be named) dealership
- SPA's agreements with the three automobile manufacturers:
  - prohibited their names and logos from being included in a single dealership name
  - required the manufacturers' logos to be individually displayed
- The sign had to be large enough to display three manufacturers' logos

Sign variance for new car dealer

- Is a variance appropriate?
  - BOA: Yes, variance granted
  - Trial court: No, BOA's decision reversed
  - Court of Appeals: Variance was improper:
    "The special circumstances or hardship created here were self-inflicted by SPA's decision to be a three-car dealership"
    "Personal hardships, regardless of how compelling or how far beyond the control of the individual applicant, do not provide sufficient grounds for the granting of a variance"

Burns v. SPA Automotive, 156 Ariz. 503, 753 P.2d 193 (App. 1988)

Mis-oriented sign interpretation

- Kingman's ordinance requires off-premises signs to be “oriented toward the street frontage of the zone in which it is located”
- Neal, the owner of McDonald’s at I-40 & Route 66, seeks sign for Route 66
- Administrator asks Neal to sign a list of permit conditions, one of which read that the sign "must be oriented to Arizona 66, meaning faces perpendicular to Arizona 66 r/w line. Cannot orient sign to I-40."

Mis-oriented sign interpretation

- Neal refuses to sign the permit and complains to the administrator's supervisor
- Neal eventually signs a permit that says: "Sign will comply with the requirements of sign code"
- Neal builds the sign
- The administrator then determines that the sign was oriented toward I-40, rather than toward Route 66, and "red tags" the sign to prohibit its use

Mis-oriented sign interpretation

- Neal appeals the sign orientation issue to the BOA
- Should Neal win?
  - BOA rules against Neal: Sign is oriented toward I-40
  - Neal appeals to trial court, which rules that Neal vested his rights in the sign (permit + construction)
  - Arizona Supreme Court:
    - Neal failed to pursue his sign-orientation argument
    - Neal was required to claim vested rights before the BOA and could NOT raise it for the first time in court

Neal v. City of Kingman, 169 Ariz. 133, 817 P.2d 937 (1991)

Size variance for too-big addition

- Rivera applied for a building permit to construct an addition to his residence
- Zoning code limits the square footage of improvements to 25% of the area of the lot
- Application submitted based upon “as-built” drawings of the existing residence provided by the previous owner
- Based on the drawings and the proposed changes, the City issued the permit

Size variance for too-big addition

- City inspection during construction showed the expanded residence at 40% coverage
- The drawings submitted with the application did not accurately reflect the lot coverage
- City waited a month to issue stop-work order
- Rivera spent $100,000 on the addition
- Rivera seeks
  - a variance for 40% lot coverage
  - a determination that he has vested rights
  - a decision of “estoppel” against the City

Size variance for too-big addition

- Is Rivera entitled to relief?
  - BOA: No variance, no vested rights, no estoppel
  - City Council: BOA's decision affirmed
  - Trial court: BOA's decision affirmed; demolition ordered
  - Court of Appeals: BOA's decision affirmed:
    - Variance not appropriate: self-imposed hardship
    - No vested rights: illegally issued permit
    - No estoppel: City's enforcement delay was not "affirmative misconduct"

Rivera v City of Phoenix, 186 Ariz. 600, 925 P.2d 741 (1996)

Department store height variance

- Levy's Department Store seeks variance to add a third story to its El Con Mall store
- Henry Quinto, president of Levy's, testified:
  - The store's business volume growth had been about 17%/year -- substantially larger than anticipated
  - When a store reaches $155 of sales per square foot, it must expand or it will become overcrowded
  - A loss in volume of about 15% will result if you go past the upper limits of space to volume
  - Expansion into the basement “just isn’t Levy’s”

Department store height variance

- Is a variance appropriate?
  - BOA: Yes, variance granted
  - Trial court: Yes, BOA's decision affirmed
  - Court of Appeals: BOA & trial court overruled; variance denied

    "The evidence before the Board of Adjustment of the City of Tucson at best shows only that Levy's, and in turn the owners of the property, can make more money if allowed to construct a third floor"

    "Financial considerations alone … cannot govern the action of the board"

Ivancovich v Tucson Board of Adjustment, 22 Ariz. App. 530, 529 P.2d 242 (1975)

Interpretation Request – Non-conforming use/abandonment

- Property owner begins replacing 6’ pipe rail fence in front yard with 6’ stucco block wall
- Fences higher than 36” are prohibited in front yard
- Pipe rail fence was non-conforming use because it replaced wood fence built before annexation into city

Interpretation Request – Non-conforming use/abandonment

- During construction, neighbor objects to block wall because of lack of permit
  - Neighbor also insists owner needs a variance from 36” height limit
- Property owner halts construction to get permit files for variance, City later determines no need for variance due to non-conforming use
  - Process takes 7 months, ordinance deems non-use for 180 days abandonment of non-conforming use

Interpretation Request – Non-conforming use/abandonment

- Was non-conforming use abandoned?
  - Board of Adjustment – no, cessation in use was not caused by property owner
  - Trial court – no, Board decision affirmed

Request for Reconsideration

- Applicant files for two use permits (MMJ dispensary; MMJ infusion facility), plus two variances (for both within 1000 feet of a residential zoning district)
- Location of proposed MMJ facility is across Central Arizona Project canal from residential district
  - Three security fences
  - +/- 350’ canal ROW
  - +/- 30’ grade change
- ZAHO approves use permits and variances with stipulations

Request for Reconsideration

- Word begins to circulate in the residential district across the CAP that the MMJ facility was approved
- Claims begin to be made that proper notice was not provided for the ZA hearing
- City application process for ZA hearing asks that notice be mailed to all properties within 150’ and registered associations within 600’
  - Applicant must also provide signed affidavit that said notice was provided
  - Notice requirements are not explicitly stated in Zoning Ordinance

Request for Reconsideration

- ARS § 9-462.06 states:

  "The board shall fix a reasonable time for hearing the appeal, and shall give notice of hearing by both publication in a newspaper of general circulation in accordance with section 9-462.04 and posting the notice in conspicuous places close to the property affected."

- **Board of Adjustment Hearing**
  - **Many attend in opposition, more than at ZA hearing**
  - **Perceived improper notice is running theme in testimony**
  - **Staff provides opinion that notice was legal and complete**
  - **Board upholds decision of ZAHO and approves facility**

Request for Reconsideration

- Media picks up story at BOA hearing and complaints continue to file in regarding notice of original hearing
- Request for reconsideration is received by staff and scheduled for next BOA agenda
- Section 303.C.3 of the Zoning Ordinance:

  "An appeal may be reheard only when there has been a manifest error affecting the Board's action"
- "Manifest error" per Arizona case law:
  - "An error of law, fact, perception, consideration, reasoning, judgment, as well as procedure, may, depending on the facts and circumstances, constitute a manifest error." *Austin Shea vs. City of Phoenix*, 213 Ariz. 385, 391, 142 P.3d 693, 699 (App. 2006)

Request for Reconsideration

- **Board of Adjustment approves request for reconsideration**
  - Motion to reconsider prior approval cited a perception of procedural error that persisted
  - BOA Chair stated intent to remand back to ZAHO when case was reheard by BOA

- What happened?
  - **Case was withdrawn by applicant prior to reconsideration**

Staff as gatekeeper to BOA

- East Oaks owns 10 acres on Lake Gaston in Warren County, North Carolina
  - 2 acres of commercial, fronting the lake, used for boat storage & parking
  - 8 acres of vacant residential
- East Oaks applies for a CUP
  - to build townhouses on the residential
  - with a proposed driveway connecting the boat storage building to a boat launch area on Lake Gaston on the residential portion
- Zoning administrator issues opinion
  - No CUP needed for townhouse project; these are permitted uses

Staff as gatekeeper to BOA

- Morningstar Marinas, operator of a commercial marina 145 feet away from the East Oaks property
  - appeals the zoning administrator's opinion to the BOA and
  - demands specific focus on the boat launch driveway
- BOA reverses
  - Revokes the zoning permit for the townhouses
  - Says nothing of the driveway—the ZA refused to address it
- Appeal to court
  - East Oaks and Warren County enter into a 14 Oct 2011 consent order granting the townhouse permit, and
  - stipulate that Morningstar (non-party in case) has no standing

Staff as gatekeeper to BOA

- MEANWHILE, on 7 Oct 2011, Morningstar sues to:
  - compel the ZA to issue a ruling on the boat launch driveway
  - get a ruling that Morningstar has standing
- ZA issues a 16 Nov 2011 letter saying:
  - county zoning doesn't apply to the boat launch driveway, and
  - if it did, it's just a private access easement
- Morningstar files 14 Dec 2011 appeal to BOA
- ZA & county attorney don't let the BOA hear the case
  - Morningstar has no standing
  - Appeal barred by the 14 Oct 2011 East Oaks/Warren County consent order

Staff as gatekeeper to BOA

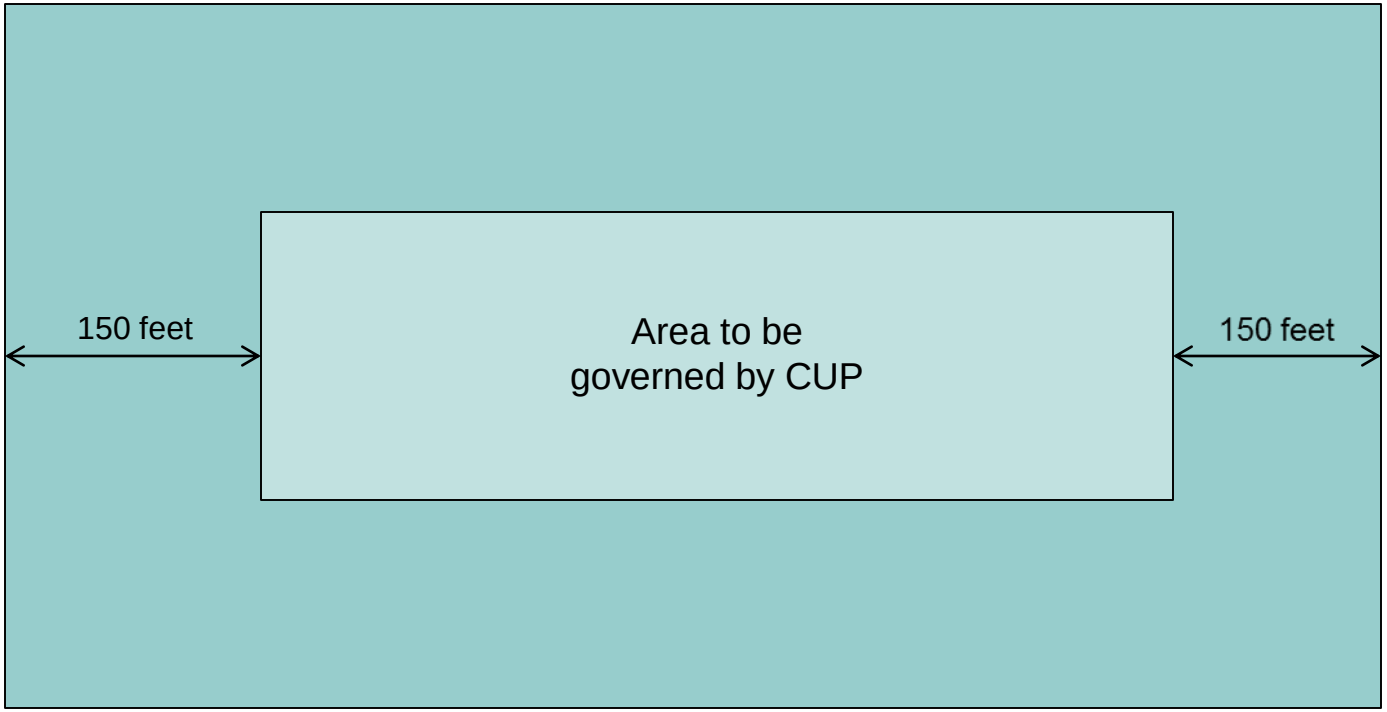
- North Carolina statute:
  - Only “a person aggrieved … may take an appeal” to the BOA
- Case goes all the way to the North Carolina Supreme Court, which holds:
  - The Zoning Administrator and county attorney cannot act as gatekeeper to the BOA—they MUST send the case to the BOA
  - The BOA gets to decide for itself whether a party is a “person aggrieved” and has “standing” to appeal to the BOA

Morningstar Marinas/Eaton Ferry, LLC v. Warren County, 2015 N.C. LEXIS 1056 (N.C. S.Ct. Nov. 6, 2015)

Interpretation Request – Right to Appeal to Board of Adjustment

- Planning commission issues conditional use permit (“CUP”) for a metal shredding plant
- CUP may be appealed to board of supervisors by “applicant or any person, firm, corporation, group or association owning real property within one hundred fifty feet of the conditional use applicant’s property, aggrieved or affected by the decision”
  - Applicant creates an “interior” parcel within a larger parcel for purposes of CUP to keep it > 150 feet away from any other private property

Interpretation Request – Right to Appeal to Board of Adjustment



Interpretation Request – Right to Appeal to Board of Adjustment

- Property owner 150 feet away from the larger parcel (but more than 150 feet from parcel created for CUP) files appeal
- Zoning administrator: because owner not within 150 feet of area affected by CUP, appeal improper
  - ZA agrees that property owner was “aggrieved” by decision to issue CUP, but that ordinance requires both distance and impact prongs to be met

Interpretation Request – Right to Appeal to Board of Adjustment

- Board of adjustment agrees with ZA, denies owner the right to appeal
- Trial court overturns the BOA
  - Property owner was within 150 feet of the "conditional use applicant's property," i.e. the larger parcel
  - Property owner was "aggrieved" by decision to issue CUP

Variance for undersized, unimproved waterfront lot

- Muellers build summer home on lot 66
- Muellers then buy adjacent lot 67
- Area then rezoned; lot 66 and lot 67 are each below minimum lot size & width, but they conform if they’re combined
- Muellers then sell lot 66 & seek variances to make vacant lot 67 buildable
- Several homes in the area are built on combined lots

Variance for undersized, unimproved waterfront lot

- Is a variance appropriate?
  - BOA: Yes, variance granted
  - Lower court: BOA reversed; variance denied as being a self-imposed hardship
  - Court of Appeals: Lower court reversed; variance granted; not a self-created hardship:

The typical self-created hardship arises from an act of commission by the owner or his predecessor. Here, the Muellers acquired lot 67 years after building their residence on lot 66. When lot 67 was acquired, it was buildable. Neither lot 66 nor lot 67 was rendered nonconforming by virtue of actions taken by the Muellers after the zoning law was enacted

Mueller v. People's Counsel for Baltimore County, 2007 WL 3227552 (Md.App. 2007)

Garage setback variance for new waterfront house

- The Chesleys bought a waterfront bungalow
- They consulted the city planning department regarding their wish to replace the existing residence with a new house with attached garage and pool
- After 18 months of negotiations, during which the department pressed for a public view corridor and design changes, the Chesleys amended their plans to show a detached garage

Garage setback variance for new waterfront house

- The department notified the Chesleys that a detached garage would require side and front yard setback variances, but told them the department would “support” the request
- The city approved the plans for everything but the garage, and the Chesleys proceeded to build their house without the garage
- The Chesleys then petitioned for a variance that would allow them to build the detached garage within three feet of the street

Garage setback variance for new waterfront house

- Is a variance appropriate?
  - BOA: No, variance denied
    - No hardship – “mere convenience”
    - A self-created hardship
  - Lower court: BOA decision affirmed
  - Court of Appeals: Affirmed
    “the Chesleys' need for this variance resulted from their unilateral decision to build a large house before obtaining a decision on whether the garage variance would be granted”

Chesley v City of Annapolis, 176 Md.App. 413, 933 A.2d 475 (2007)

After-the-fact front-yard variance

- 125’ minimum setback from road centerline
- House originally constructed 114’ from the centerline before adoption of zoning, making it a legal nonconforming structure
- Thinking they were not subject to zoning, owner built a 14’ addition into the setback
- The owner then sought a variance, claiming:
  - The expansion accommodates a sister with post-polio syndrome who lived with the owner
  - Expansion in any other direction would require utility and septic relocation

After-the-fact front-yard variance

- Is a variance appropriate?
  - BOA: Variance denied; self-created hardship
  - Lower court: BOA decision reversed
  - Court of Appeals: Affirmed lower court (!!!)

"the hardship at issue is the need for a full living area on the ground floor to accommodate Debbie's sister. There was substantial evidence, primarily the [owner's] testimony,…that the need to accommodate Debbie's sister…is extraordinary and unique…."

Arkell v Middle Cottonwood Zoning Board of Adjustment, 338 Mont. 77, 162 P.3d 856 (2007)

Camelback Hospital use permit

- Camelback Hospital sought to increase the size of its facilities from 26,000 square feet to 56,000 square feet
- New construction will not increase the patient load beyond the present 89, but will provide a more desirable facility for existing patients
- BOA authorized to issue a use permit where "the use covered by permit, the manner of conducting the same, and any building which is involved will not be detrimental to persons residing or working in the vicinity, to adjacent property, to the neighborhood or the public welfare"

Camelback Hospital use permit

- Homeowners not given the specific facts about the expansion until the hearing
- The hearing started at 7 pm and went through to 3 am the next morning
- Was the process fair, and should the BOA grant the permit?
  - BOA: Permit granted with conditions; process was fair
  - Trial court: BOA affirmed; conditions modified
  - Court of Appeals: BOA's decision affirmed; trial court was authorized to modify the conditions

East Camelback HOA v Arizona Fdn for Neurology & Psychiatry, 18 Ariz.App. 121, 500 P.2d 906 (1972)