Agenda

Committee of the Whole

City and Borough of Juneau
Ben Haight, Chair

March 13, 2018
Assembly Chambers
5:30 PM

I. ROLL CALL

II. REGULAR AGENDA

A. Training Topic: Variances versus Conditional Use

III. OTHER BUSINESS

IV. ADJOURNMENT

COMPARISON OF VARIANCE AND CONDITIONAL USE

By Lee Sharp

Preston Gates & Ellis LLP

February 1997

Variance	Conditional Use
1. Purpose is to ensure that the application of zoning regulations does not operate to deny all reasonable uses of a property that is peculiar when compared to other nearby property to which the same regulations apply.	1. Purpose is to deal with uses that have a particular, potentially adverse, impact on the surrounding area that cannot be predetermined and controlled by general regulations. Is used to ensure such uses will be compatible with surrounding development by placing conditions on the use to minimize or eliminate adverse impacts.
2. To accommodate peculiarities of the land.	2. Not dependent upon peculiarity of the land, but triggered by the peculiar effect of the use on the neighborhood.
3. Exceptional hardship must be shown.	3. Hardship is not relevant.
4. Deals with density restrictions (and not use restrictions in most places in Alaska).	4. Deals with use and with restrictions on use and density.
5. Allows relaxation of density restrictions where peculiarity and undue hardships are shown. Relaxation not allowed for a trade off.	5. Not for the purpose of relaxing density restrictions but to permit additional restrictions to be placed on the use; however, relaxation of density restrictions may occur if the conditional use procedure is applied to planned unit developments where trade-offs are allowed.
6. Allows a condition expressly prohibited by the regulations.	6. Allows a use that is expressly permitted (but which requires special conditions).
7. Is a dispensation to violate the law.	7. Is a permitted use within the district.

8. Very strict standards apply.	8. More generalized standards apply, e.g., consistency with the comprehensive plan and purpose for the zoning ordinance.
9. Is a property owner right if property meets requirements; is not a flexible planning tool.	9. Generally is not a right if use cannot be made compatible with neighborhood; is a flexible planning tool.
10. Property owner is entitled to a variance if can show peculiarities of property leading to hardship under the regulations.	10. Generally entitled to a permit if property owner can show use is compatible with neighboring property and other permitted uses within the district.
11. Quasi judicial proceeding (little discretion involved in granting or denying).	11. Quasi legislative or quasi judicial proceeding depending on situation, but substantial discretion involved.

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PRESTON GATES & ELLIS LLP
ATTORNEYS

VARIANCES TO LAND USE AND PLATTING REGULATIONS

Planning Commissioners Seminar
Anchorage, Alaska
February 1997

Presented by:
Lee Sharp

"Remember, my friend, a variance is a special dispensation to violate a law that the rest of us must obey."

Anonymous

Extraordinary Remedy For An Extraordinary Situation.

Platting and zoning regulations apply to all property uniformly. Within a particular zone, zoning ordinances apply to all property uniformly. For a particular type of subdivision, the platting regulations apply to that subdivision and all similarly situated subdivisions in the same manner. There is a certain quid pro quo in platting and zoning regulations. A property owner who develops or subdivides his property is required to follow the applicable regulations. He does so knowing that everyone else similarly situated will also have to follow the same regulations. If the regulations were not uniformly applied and special favors were granted to those who applied for them, the regulation of the subdivision and use of land would become a sham.

However, it is also recognized that not every parcel is the same, and some property may be so unusual as to result in an undue substantial hardship on the owner of the property or a denial of all beneficial uses of the property if a uniform and strict application of the regulations is made. When a regulation makes property unusable for any purpose, courts will generally find that there has been a taking of the property. Thus, it is necessary to provide some flex in the joints of zoning and platting regulations to ensure that regulations that must be applied uniformly do not act as a taking of property because of some peculiarity of that property. As was noted by the Rhode Island Supreme Court in Reynolds v. Zoning Board of Review of Town of Lincoln, 191 A.2d 350 (R.I. 1963) at 352,

> A variance . . . is designed to preserve the constitutionality of the legislation. It is invoked to avoid the confiscatory effect that would follow a literal enforcement of some term of a zoning ordinance operating to deprive an owner of all beneficial use of his land.

It has been described as an escape hatch.

> A variance is designed as an escape hatch from the literal terms of an ordinance which, if strictly applied, would deny a property owner all beneficial use of his land and thus amount to a confiscation.

Lincourt v. Zoning Board of Review of the City of Warwick, 201 A.2d 482 (R.I., 1964) at 485-86. In Alaska, our Supreme Court has recognized that variances provide an escape hatch or safety valve for the individual landholder who would suffer special hardships from a literal application of a land use ordinance. City and Borough of Juneau v. Thibodeau, 595 P.2d 626 (Ak, 1979) at 632.

However, because the law should apply uniformly to everyone who falls within its scope, variances are granted sparingly and only under exceptional circumstances. Variances are the exception, rather than the rule. Ivanovich v. City of Tucson Board of Adjustment, 529 P.2d 242 (Ariz. 1975); Heady v. Zoning Board of Appeals for Town of Midford, 94 A.2d 789 (Conn., 1953); Lovely v. Zoning Board of Appeals of City of Presque Isle, 259 A.2d 666 (Me. 1969). The courts rule that variances should be granted sparingly not only because they are justified only in exceptional circumstance, but because they also amount to a special dispensation to violate the law. Board of Adjustment of City of Fort Lauderdale v. Kremer, 139 So.2d 448 (Fla., 1962); Mitchell Land Co. v. Planning and Zoning Board of Appeals of Town of Greenwich, 102 A.2d 316 (Conn., 1953).

It can be seen that the granting of a variance is not an every day occurrence nor a matter that is to be handled lightly. Alaska Statutes Title 29, the Alaska municipal code, recognizes that the granting of variances is an integral part of land use regulations but it specifically prohibits use variances, variances based on self-imposed hardships and those sought solely to relieve pecuniary hardships or inconvenience. AS 29.40.040(b).

Included for your review as Attachment A are the variance provisions from Title 29.

Home rule municipalities are not bound by the above restrictions of Title 29 unless they are a home rule city within a general law borough (other than a third class borough). For example, although the City of Kenai is home rule, it is within the Kenai Peninsula Borough which is bound by the provisions of Title 29. Because a city within a borough may exercise only those planning and zoning powers delegated to it by the borough, its powers are limited to those possessed by the borough, even if the borough were to delegate its full zoning powers within the city to the city. The borough cannot delegate more power than it has.

If you examine the variance provisions of various home rule and general law municipalities within the state, you would find the following common threads running through these ordinances:

1. The property must be peculiar; that is, different from other property in the neighborhood or zoning district (not different from property in the municipality at-large); some ordinances address peculiarity of a building or structure.

2. The peculiarity arises out of natural conditions of the land or surrounding development.

3. Because of the peculiarity, a literal application of the zoning (or platting) regulation would work a hardship on the property owner, i.e., prevent reasonable use of the property or deny the owners rights or uses commonly enjoyed by others in the neighborhood.

4. The variance must be the minimum necessary and must be consistent with the comprehensive plan, safety, welfare, etc.

Peculiarity.

There are thus two main elements that must be considered before a property even qualifies for a variance. The first is the peculiarity element, and the second is the denial of reasonable use or undue substantial hardship element, often characterized as unnecessary hardship. The terms "undue hardship" and "unnecessary hardship" have been viewed as equivalent terms. Lively, supra. The peculiarity element has been viewed from two different aspects. Some courts have said that the regulation must have a peculiar impact on the property, that is, that the impact of the restriction on the applicant's property is different from the regulation's impact on other properties that are similarly situated. Township of West Deer v. Bowman, 333 A.2d 792 (Pa., 1975). Others have indicated that there must be a peculiarity of the property. In Ivanovich, supra, the Arizona Court of Appeals held that for a variance to be granted there must be a finding that the

> . . . situation or condition of the property in question is extraordinary and exceptional and that the application of the zoning requirement would cause peculiar and exceptional practical difficulties or exceptional and undue hardship.

Ivanovich, supra at 248 (emphasis in original). Other courts have indicated that the need for the variance must arise out of unique circumstances without focusing upon either the property or the regulation. Taxpayer's Ass'n of South East Oceanside et al. v. Board of Zoning Appeals of Town of Hempstead, 93 N.E.2d 645 (N.Y. Ct. App. 1950). In Turner v. Richards, 366 A.2d 833 (Del., 1976) the Delaware court held that the hardship justifying a variance had to be inherent in the particular property.

The Alaska Supreme Court stated it this way:

> Peculiarities of the specific property sufficient to warrant a grant of a variance must arise from the physical conditions of the land itself which distinguish it from other land in the general area.

Thibodeau, supra, at 635. Although AS 29.40.040 does not directly address the source of the peculiarity, it does prohibit variances where the "special conditions" are caused by the person seeking the variance, thus shifting the focus from the owner's situation to land.

Whether the analysis proceeds from the basis that there must be some peculiarity of the land or there must be some peculiar impact of the regulation seems immaterial as it is difficult to conceive of a situation where there would be a peculiar impact of a regulation where there was not some peculiarity of the property that caused the unusual impact. In any event, the physical peculiarity of the land approach has been recognized by the Alaska Supreme Court. Stated another way, a condition that is personal to the owner is not relevant. For example, a couple that owns a single family home in a single family zoned area desires to put on a 600 square foot addition that encroaches upon a setback requirement. The addition is needed to house the couple's aged mother because they cannot afford the cost of the necessary nursing home care for her. Their application for a variance should be denied for several reasons, one of which is that the "peculiarity" is not one that is physical or inherent in the land itself; instead, it arises out of the particular needs and desires of the couple. There is no physical feature of the lot to distinguish it from other lots in the area; the lot is not peculiar.

Hardship.

The other major element that must be present is that the peculiarity give rise to a substantial or undue hardship, or deny reasonable use of the property. Numerous courts have been faced with the question of what is meant by an undue or unnecessary hardship. Remembering that the purpose of a variance is to prevent a land use regulation from amounting to a confiscation of property where there is some peculiarity, it is not difficult to understand that undue and unnecessary are equated with what amounts to a taking. Courts require a showing that there is no possible beneficial use of property or that the strict application of the ordinance to that particular parcel would cause a loss of all beneficial use of the property. It has also been interpreted as meaning that there must be a showing that the land cannot yield a reasonable return. Taxpayer's Assn. of South East Oceanside et al., supra; Lincourt, supra; Board of Adjustment of New Castle County v. Henderson Union Association, 374 A.2d 3 (Del. 1977); Franco v. Zoning Board of Review of Town of Smithfield, 156 A.2d 914 (R.I. 1959).

A variance applicant must show that denial of the variance would leave them with no other reasonable use of the property or that no reasonable return could be made on the property. Courts reject the plea of variance applicants that they are unable to make as much money on their property if the variance is denied. In Pincus v. Power, 376 Pa. 175, 101 A.2d 913 (1954),the Pennsylvania Supreme Court held that where the only hardship shown by the applicants for a variance was that their property would be worth 400% more if the variance were granted was not the basis for granting a variance. In Broadway, Laguna Vallejo Association et al. v. Board of Permit Appeals of the City and County of San Francisco et al., 59 Cal. Rptr. 146, 427 P.2d 810 (1967) the California Supreme Court recognized that

virtually any circumstance that could be translated into economic terms would lead a developer to apply for a variance and that the mere desire to construct a more profitable project was not a basis for relief from land use regulations. The court noted at p. 819 that "variances were never meant to insure against financial disappointments." At p. 815, the court noted that if the desire to increase profits was sufficient to justify a variance, then almost all developers would qualify for variances and the public interest "would inevitably yield to the private interest and the maximization of profits." Similarly, the Arizona Court of Appeals in Ivanovich, supra, noted that there would be no occasion for land use regulation if variances were to be granted on the basis of apparent monetary distress of the property owner. In West Deer, supra, the Pennsylvania court held that unnecessary hardship was not demonstrated by evidence showing that the applicant would benefit if relieved of the land use restriction. The loss of economic benefit has been uniformly rejected as a basis for a variance. Cohen v. Zoning Board of Adjustment of the City of Philadelphia, 276 A.2d 352 (Pa., 1971); Blackman v. Board of Appeals of Barnstable, 136 N.E.2d 198 (Me. 1956). And in Alaska, the Supreme Court noted in Thibodeau, supra at 635;

> The assertion that the ordinance merely deprives the landowner of a more profitable operation where the premises have substantially the same value for permitted uses as other property within the zoning classification argues, in effect, for the grant of a special privilege to the selected landowner. We do not believe that the variance provision in the instant ordinance is intended to achieve such an inequitable result.

Alaska Statute 29.40.040(b) dealing with the board of adjustment (zoning) makes this a statutory prohibition. That section provides in pertinent part:

> A variance . . . may not be granted . . . solely to relieve pecuniary hardship or inconvenience.

Self-Imposed Hardships.

As was noted in the preceding discussion, the peculiarity of the lot generally must arise out of some natural condition of the lot. An artificial condition of the lot generally is not relevant. A structure placed on a lot is an artificial condition, not a natural one. Therefore, the existence or placement of the structure on the lot does not generate a peculiarity. As it is the natural condition of the lot that must lead to the hardship; a qualifying hardship generally cannot arise out of an artificial condition of the lot.

Courts have long recognized that self-imposed hardships do not qualify for a variance. In Alaska, this restriction on variances is reinforced in Alaska Statute 29.40.040(b) which provides, in part:

> A variance . . . may not be granted if (1) special conditions that require the variance are caused by the person seeking the variance . . ..

Where the applicants are the ones who caused the nonconforming structure to be built or it was their agent who, for whatever reason, built the structure in violation of ordinance restrictions, it is clear that the "hardship" involved is "because of special conditions caused by actions of" the applicants. They may not point to their builder and cast the blame on him. Even if the builder is totally at fault, that has little or no relevance to the variance proceeding. What is before the board is a determination of whether the land itself meets the requirements of the conditions for granting a variance under the code, not whether the applicant is guilty or innocent or a third party is the direct cause of the violation.

If artificial or self-imposed hardships qualified for a variance, development restrictions on land would soon become a nullity. All one would have to do is build in violation of the regulation and hope that there is a substantial enough improvement in place by the time the administration discovers the violation that one will be able to show a self-imposed hardship of sufficient magnitude to qualify for a variance. If this is the standard adopted, the person who puts his life savings into a three story mini mansion would qualify for a variance while the wealthy person who built a 300 square foot summer cabin probably would not qualify. However, it should be obvious that the encroachment of the larger structure into a setback will have a far greater impact on the neighboring property or water body than would the same amount of encroachment by the smaller structure. Yet it is the larger structure that would be given a dispensation to continue its violation of the law while the smaller structure would not be given such a dispensation. This inconsistency should help bring home the fact that the regulation of the use of land is done independently of any characteristic of the owner. It makes no difference whether the owner is rich, poor, crippled or healthy, nor how "guilty" he or she is in causing the violation. The adverse impact on neighboring property of a nonconforming structure is the same without regard to any characteristic of the owner. It makes no difference whether the structure is the dream house the owners have planned for years and into which they have placed every penny of their assets or whether it is merely one of dozens of houses they might own. It makes no difference whether they ordered their contractor to place the structure in a violating location or to build it too large or too tall, or whether its placement and size were left totally to the discretion of their builder and they had nothing whatsoever to do with its placement or size. The impact on abutting property, the community (and in the case of shoreland property, the water body), will be the same.

The policymakers for the municipalities have determined that water bodies, streets and neighboring property should be protected and that one way to provide that protection is to prohibit any part of a building from being constructed within certain distances of water bodies, street lot lines and side or rear lot lines. There are also other density restrictions such as lot coverage, FARs, building heights, etc. Persons who own or build a structure in violation of these density requirements seek to justify a variance based on the hardship they would have to endure to bring their structure into compliance with the law. No one should be allowed to bootstrap themselves into such a dispensation and, indeed, the courts reject that approach. In Elwyn v. City of Miami, 113 S.2d 849 (1959) the Florida Third District Court of Appeal, at page 852, quoting from a Florida Supreme Court case said:

> The authorities are generally in accord on the proposition that in seeking a variance on the ground of a unique or unnecessary hardship, a property owner cannot assert the benefit of a 'self-created' hardship.

Elwyn, supra at 852.

The New Jersey Supreme Court in Place v. Board of Adjustment of Saddle River, 200 A.2d 601 (1964) ruled that self-imposed hardships were irrelevant. There, a homeowner, after measuring from what he thought were the stakes for his property, commenced construction of a fallout shelter. However, a later survey of the property indicated that the stakes from which the homeowner had taken his measurements were incorrectly located. He had constructed his fall-out shelter 25 feet from a side lot line from which there was a 40 foot setback requirement. The New Jersey Supreme Court noted:

> . . . the hardship to which . . . the statute refers must arise by reason of one of the specified conditions of the property. . . . hardship created by the owner which is unrelated to the physical characteristics of the land is not contemplated by [the statute] and accordingly is not sufficient grounds for the granting of a variance in this case.

Place, supra at 605.

In another New Jersey case, Deer-Glen Estates v. Board of Adjustment and Appeal of the Borough of Fort Lee, 39 N.J.Super. 380, 121 A.2d 26 (1956) the appellate division of the New Jersey Superior Court had before it the appeal of a variance granted where the owner had built a house encroaching eleven inches into a ten foot side yard setback. The court noted that the hardship of which the owner complained was one brought on by his own act or omission. Then, addressing the question of whether the eleven inch encroachment was significant enough for the municipality to require compliance, the court had the following to say:

> If the latter violation is permitted, where will the line be drawn? A municipality need not overlook, nor will we require it to overlook, such a deficiency merely because it arose through the negligence or inattention of the owner and his employees. A builder may not, after his structure is partially completed, come into the building inspector's office with a new plan, and request, belatedly, that a certificate of occupancy be issued because of an alleged mistake by the surveyor, architect, contractor, or any of their employees. To permit him to do so would open the door to unconscionable, if not fraudulent, conduct on the part of builders. "Mistake" would then become nothing more than a guise for evading the legal requirements of a zoning ordinance. The citizens of Fort Lee have a right to rely on the valid provisions of their zoning ordinance, and have a right to demand its protection. (emphasis added)

Deer-Glen, supra at 29. It would be difficult to state more forcefully the case for denial of a variance involving a self-imposed hardship. Other property owners have submitted to the burden of complying with ordinance requirements. Should we expect less of someone who violates the requirement, even through the neglect or inadvertence of themselves or someone they have hired? The adverse impact of the violation is the same, whether the mistake was made in good faith or in bad faith.

The Connecticut Supreme Court in Highland Park, Inc. v. Zoning Board of Appeals of the Town of Newhaven, 229 A.2d 356 (CN 1967) rejected a variance where the hardship was due to either the property owner's own error or an error committed by someone employed by the owner. There, a corporate developer had constructed a house encroaching five feet into a ten foot side yard setback. The variance was sought on the basis that the location of the house was due to an error made either by the surveyor or by the foundation contractor employed by the corporation. They also claimed that the owner of the adjoining lot had demanded an exorbitant price for a strip of land necessary to relocate the dividing line between the lots and that the house could not be remodeled or moved and would have to be demolished unless the variance was granted. The variance request was denied by the board and the denial was appealed. The Connecticut Supreme Court disposed of the appeal in one paragraph. In denying the appeal (upholding the denial of the variance), the Court noted that the board had no power to grant a variance when the claimed hardship arose out of the property owner's own actions.

Owners will often seek to put as much distance between themselves and their contractor as possible and then to cast the blame upon the contractor. However, as noted in the cases above, the owner-builder is responsible for the acts of those whom he or she hires. Even where there is more distance between the applicant for the variance and the person who committed the error, the courts have refused to give such distance any weight. Pollard v. Zoning Bd. of Appeals of Norwalk, 186 Conn. 32, 438 A.2d 1186 (1982) is one such case. There the executrix of an estate hired a surveyor to divide a parcel into two parcels. Through a surveying error one lot was 5.6 feet short of the minimum 50 foot frontage required, although the plat produced by the surveyor showed the lot as meeting the minimum 50 foot requirement. The beneficiaries of the estate who had nothing to do with subdividing the property were denied a variance to the minimum frontage requirement. Even though the surveyor was hired by the executrix, and not the beneficiaries of the estate, the court ruled that the beneficiaries were to benefit from the subdivision of the lot and were suffering from a self-imposed hardship. The court overturned the grant of the variance, recognizing that the lot could not be lawfully used under the zoning ordinance. The court went on to note that the beneficiaries were not without remedy and, in fact, they were already involved in litigation with the errant surveyor. The court also addressed the public policy problem of letting the variance stand. The beneficiaries had claimed that the denial of a variance would have been unfair because they had no knowledge of the errors committed by the surveyor and because the hardship arose out of circumstances that were totally beyond their control. The court believed that in balancing the rights of the beneficiaries and those of the executrix who hired the surveyor against those of the municipality whose regulations had been violated the burden had to fall on the beneficiaries and the executrix. The court concluded:

> The hardship, in this case, arose as the result of voluntary acts on behalf of one whom the variance would benefit and, therefore, was self-created.

Polland, supra at 1191.

Where there is even more distance between the current owner and the person who actually created the nonconformity the courts have refused relief. Where the prior owner of a large parcel consisting of several undersized lots sold the undersized lots, the New Jersey court refused to reverse the denial of a variance to a subsequent owner stating that,

> . . . the claimed hardship was self-created because the plaintiff's predecessor in title had created the nonconformity by selling the undersized lot . . . (emphasis added)

Barnes v. Wyckoff Tp. Bd. of Adjustment, 174 NJ Super. 301, 416 A.2d 431, 432 (1980).

Persons are presumed to have knowledge of ordinance requirements. Country Estates, Inc. v. Schermerhorn, 380 N.Y.S.2d 325, 326 (N.Y.App.Div. 1976). Further, the owner's lack of knowledge of a zoning violation when purchasing the property is not relevant. Camaron Apartments, Inc. v. Zoning Board of Adjustment of Philadelphia, 324 A.2d 805 (Pa.Commw. 1974).

It will be very tempting for a board to respond to the plea that a variance is the applicant's only hope and that they have no responsibility for the situation in which they now find themselves. The case law clearly runs against such applicants and any hardship arising out of their contractor's error is a self-imposed hardship that is not relevant to the grant of a variance. In fact, as noted by several of the courts, boards are not authorized to grant variances based on self-imposed hardships. The Connecticut Supreme Court in Pollard, supra, summed it up quite well at page 1192 as follows:

> 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 . . .. It is not the function or responsibility of the Board of Appeals to seek ways to extricate [the applicant] from his self-created difficulties. (citations omitted) (emphasis added)

Knowledge of Law, Guilt, Innocence, and Good Faith Reliance Are Not Relevant.

As was noted above, the personal situation of the applicant is not relevant. For example, the applicant's health, age, wealth, family size or the number of cars or dogs in the household have no bearing on whether a variance applicant should be granted a dispensation to violate the law that his neighbor, who does not suffer from the same condition, cannot violate.

The focus is on an inherent peculiarity of the property that gives rise to an undue substantial hardship, not on the particular needs, desires or personal situation of the property owner.

Although the old saw "ignorance of the law is no excuse" is familiar to everyone, the argument is nevertheless often raised that the applicant did not know of the restriction and their innocence of any knowledge of the law should be taken into account in granting the variance. In other words, those who do not know of the law need not obey it while those who are aware of the law will be bound by it. As noted in the discussion above, this argument is generally rejected by courts. The court in Denton v. Zoning Board of Review of City of Warwick, 133 A.2d 718 (R.I. 1957) disposed of this assertion in the variance context when it stated that the hardship flowing from a literal application of a zoning ordinance is in no way dependent upon the applicant's knowledge or lack of knowledge of the existence of land use restrictions affecting his land. Further, as noted above, each person is presumed to know the law, Country Estates, supra and each purchaser is responsible for determining whether the property violates the law, Camaron Apartments, supra.

A more troublesome situation arises when the applicant for a variance asserts an equitable plea. The plea asserted in a variance case is sometimes referred to as good faith or detrimental reliance and may also involve a plea of "clean hands." The situation in which such an argument might arise would be as follows. The property owner applies for a building permit. He shows on his permit application an accurate drawing of a plot of his property and the location of the proposed structure. The application is reviewed by the building official and the zoning administrator. The latter notes on the application that all zoning requirements are met. After the house is built in accordance with the plot plan submitted, it is discovered that a setback violation exists and should have been evident from the plot plan. In such a case, the property owner will claim that he relied to his detriment on the issuance of the building permit with the specific notation relating to zoning compliance. He will claim that his hands are clean; that is, he did not mislead anyone, that he relied to his detriment on the permit and the municipality should be equitably estopped from denying a variance. In a few such situations, courts might prohibit a municipality from enforcing the ordinance against the owner. However, there is a vast difference between the ability of the municipality to enforce an ordinance and whether a property meets the requirements for a variance. Detrimental reliance is not one of the standards set out for the grant of a variance. A property is either qualified or not qualified for the variance depending on its peculiarity and the hardship that would be involved in making a reasonable use of the property. Equitable estoppel is a defense to be asserted by the property owner when the municipality attempts to enforce the ordinance. Fields v. Kodiak City Council, 628 P.2d 927 (Alaska 1981). In the case of a setback violation, that might be the demand that the owner move the structure or otherwise bring it into compliance. It could also involve, upon the owner's refusal, a subsequent civil or criminal action against the owner. However, it is up to the courts, and not boards of adjustment, to decide matters of equity such as detrimental reliance. The board decides only whether or not a variance should be granted based on the standards set out in the ordinance. If a variance is granted, no enforcement action could be taken. If a variance is not granted because the property does not qualify under the ordinance then the municipality is in a position to consider what enforcement action it might take. Only if the municipality attempts to

enforce the ordinance would the owner's equitable defenses come into play; and then, it would be up to the enforcing agency, or the courts to deal with the equitable defense.

Do not get the idea that detrimental reliance will usually work for a property owner. For example, such a defense can be defeated if the property owner could have discovered the potential violation by conducting his or her own investigation of the regulations. In New York, the owner of a 31 story building was required to remove the top 12 stores that exceeded the 19 story limit for the zoning district, even though the city had issued a building permit for a 31 story building and the building had been constructed before the error was discovered, Parkview Associates v. City of New York, 525 N.Y.S.2D 1976, 519 N.E.2d 1372 (1988). The building owners were unable to obtain a variance and were not able to assert detrimental reliance as a defense to enforcement.

Alaska has had one case before its supreme court where an equitable defense was asserted as a basis for the grant of a variance. This assertion was rejected by our court. In Fields, supra, our court stated:

> In the zoning context, estoppel is a defensive claim raised to prevent enforcement of a zoning ordinance. . . . But "[i]t is not the function of . . . [the board of adjustment] to consider matters such as estoppel . . . in determining whether a variance should be granted." Nor is the board to decide equitable questions of "clean hands." Rather, the board's power is restricted to that provided by zoning ordinance and its enabling legislation. Thus the Kodiak board of adjustment's function was to determine whether the requirements for a variance were met and, if so, to grant the variance.
> (citations omitted)

As tempting as it might be to take equitable considerations into account, they are not included in the statute nor local ordinances as a basis for granting a variance and are thus not relevant to a variance proceeding. If such considerations are relevant, they will be taken into account outside the variance proceeding.

However, one home rule city in Alaska has what it calls an "exception" it grants in the same manner as it grants variances. As long as the structure was erected in good faith and the violation is from an innocent error that does not violate the spirit or intent of the zoning code, the exception may be granted if not contrary to (but not necessarily consistent with) the comprehensive plan and would not be detrimental to the public health, safety and welfare, and would not result in material damage to other properties. The humanitarian policy that drives this exception approach is clearly at odds with the policy and law as it has developed relating to variances. This approach is not available to general law municipalities nor to any city (home rule or general law) within a borough.

Platting Variances.

Many municipalities have variance procedures for obtaining variances from the requirements of the platting regulations. The standards for granting platting variances are often more relaxed and more general. Because the variance restrictions found in Title 29 apply only to land use regulations, and not to platting regulations, general law municipalities have more leeway in dealing with variances from platting regulations; however, there does not appear to be any basis in policy for a more relaxed standard for granting platting variances than for land use variances.

Findings.

Turning now from some of the substantive elements involved in a variance to the procedural aspects it should be noticed first of all that the variance procedure is handled in two distinct phases. The first is a determination of whether the property qualifies for a variance; the second is a determination of what degree of variance from the regulations should be granted. The distinction between whether and what is often blurred or completely ignored in variance proceedings. Courts, on the other hand, clearly recognize the need for the variance applicant to meet the threshold requirement by showing both peculiarity and hardship. These showings are a condition precedent to the grant of a variance. Nash v. Zoning Board of Appeals of East Hartford, 345 A.2d 35 (Conn. 1973); Ivanovich, supra; BOA of Newcastle County, supra. Not only must the necessary showing be made before the board may even consider granting a variance, but the failure to show any one of the requirements is fatal to the applicant. Blackman, supra; Kunz v. Waterman, 283 N.E.2d 371 (Ind., 1972). Note also that many ordinances require the board to find all of several elements set out in the ordinance. After all the elements have been shown, then the board may decide how much of a variance it will grant. Within many ordinances, however, the elements that go to the extent and effect of the variance are often mingled with the elements that go to hardship and peculiarity.

Not only must all elements be shown to have been met before the board may grant a variance, but the board must make findings setting out the basis for the showing that all elements have been met. Broadway, Laguna, supra. In addition, there must be evidence supporting the findings of the board. Heath et al. v. Mayor and City Council of Baltimore, 49 A.2d 799 (Md. 1946); Broadway, Laguna, supra. In the Heath case, the Maryland Court of Appeals noted at 804 that the board had

> . . . the duty of deciding in accordance with the evidence, and it is arbitrary and unlawful to make an essential finding without supporting evidence.

While it does not appear that the Alaska Supreme Court has gone quite this far, it has recognized that findings must be made. Findings serve at least two important functions. First, findings help the decision making body to focus on the statutory or ordinance elements that must be shown in the particular case before the body. Second, it gives the parties a clear statement of the board's decision so that they may analyze whether or not an appeal is

appropriate. In addition, it eliminates the need for an appellate body to speculate as to the basis for a decision that may be appealed to such appellate body. Mobile Oil Corp. v. Local Boundary Commission, 518 P.2d 92 (Alaska, 1974). See also Kunz, supra.

In Fields, supra, the Alaska Supreme Court had before it the appeal of a variance action. A major issue in that case was the existence and adequacy of the findings below. The Supreme Court discussion on this matter helps illuminate both the need for findings and the detail of such findings. The court noted:

> The statute requires an aggrieved party seeking review to specify the grounds for the appeal. This requirement is also found in the governing local ordinance. A board's failure to provide findings, that is, to clearly articulate the basis of its decision, precludes an applicant from making the required specification and thus can deny meaningful judicial review. We believe that implicit in AS 29.33.130(b) is the requirement that the agency rendering the challenged decision set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the board's action is supported by substantial evidence. Thus we hold that regardless of whether a local ordinance requires findings, a board of adjustment ruling on a variance request must render findings "sufficient both to enable the parties to determine whether and on what basis they should seek review and, in event of review, to apprise a reviewing court of the basis for the board's action."....
>
> Our ruling finds support in persuasive policy considerations and in other jurisdictions. As the court in Topanga Association noted, a findings requirement forces the administrative body to draw legally relevant subconclusions that are supportive of its ultimate decision. This facilitates orderly analysis on the part of the board and "minimize[s] the likelihood that the agency will randomly leap from evidence to conclusions."
>
> More importantly, findings enable the reviewing court to meaningfully examine the agency's mode of analysis. Absent findings, a court is forced into "unguided and resource-consuming explorations," groping through the record to determine "whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order and decision" of the board. Finally, as previously noted, findings enable the parties to determine whether and on what basis they should seek review. (citations omitted)

Fields v. Kodiak City Council, 628 P.2d 927, 933-34 (Alaska, 1981) (citations omitted) (emphasis in original).

It stands to reason that if all elements required by the ordinance must be shown and that the board must render a decision containing its findings, the board must, as a minimum, address each of the minimum requirements set out in the ordinance and make findings as to each, if the board grants a variance. Of course, if it denies a variance, it could do so upon the mere finding that one element had not been met.

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ATTACHMENT A

(2) land use permit requirements designed to encourage or discourage specified uses and construction of specified structures, or to minimize unfavorable effects of uses and the construction of structures;

(3) measures to further the goals and objectives of the comprehensive plan.

(b) A variance from a land use regulation adopted under this section may not be granted if

(1) special conditions that require the variance are caused by the person seeking the variance;

(2) the variance will permit a land use in a district in which that use is prohibited; or

(3) the variance is sought solely to relieve pecuniary hardship or inconvenience. (§ 11 ch 74 SLA 1985)

NOTES TO DECISIONS

Requirement for comprehensive plan. — A comprehensive zoning plan is required to be adopted prior to zoning regulations. Lazy Mt. Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals, 904 P.2d 373 (Alaska 1995).

Quoted in Price v. Dahl, 912 P.2d 541 (Alaska 1996).

Collateral references. — 56 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions, § 140 et seq.; 82 Am. Jur. 2d, Zoning and Planning, § 1 et seq.

62 C.J.S., Municipal Corporations, § 224.

Constitutionality of zoning based on size of commercial or industrial enterprises or units. 7 ALR2d 1007.

Exclusion from municipality of industrial activity that is inconsistent with residential character. 9 ALR2d 683.

Zoning regulations applicable to tourist or trailer camps, motor courts or motels. 22 ALR2d 793.

Remedies to compel municipal officials to enforce zoning regulations. 35 ALR2d 1135.

Validity of zoning regulation prohibiting residential use of industrial district. 38 ALR2d 1141.

Spot zoning to permit neighborhood shopping centers. 51 ALR2d 298.

Zoning regulations as to business of selling motor vehicles. 57 ALR2d 1295; 7 ALR3d 1173; 82 ALR4th 624; 51 ALR Fed. 812.

Applicability of zoning regulations to governmental projects or activities. 61 ALR2d 970.

Inquiry, upon review of zoning regulation, into motive of members of municipal authority approving or adopting it. 71 ALR2d 568.

Standing of municipal corporation or other governmental body to attack zoning of land lying outside its borders. 49 ALR3d 1126.

What constitutes "school," "educational use," or the like within zoning ordinance. 64 ALR3d 1087.

Zoning regulations as applied to colleges, universities, or similar institutions for higher education. 64 ALR3d 1138.

Adoption of zoning ordinance or amendment thereto as subject of referendum. 72 ALR3d 1030.

Zoning regulations as applied to private and parochial schools below the college level. 74 ALR3d 14.

Zoning regulations as applied to public elementary and high schools. 74 ALR3d 136.

Sec. 29.40.050. Appeals from administrative decisions. (a) By ordinance the assembly shall provide for an appeal from an administrative decision of a municipal employee, board, or commission made in the enforcement, administration, or application of a land use regulation adopted under this chapter. The assembly may provide for an appeal to a court, hearing officer, board of adjustment, or other body. The assembly shall provide for an appeal from a decision on a request for a variance from the terms of a land use regulation when literal enforcement would deprive a property owner of rights commonly enjoyed by other properties in the district.

(b) By ordinance the assembly may provide for appointment of a hearing officer, or for the composition, appointment, and terms of office of a board of adjustment or other body established to hear appeals from administrative actions. The assembly may define proper parties and prescribe evidentiary rules, standards of review, and remedies available to the hearing officer, board of adjustment, or other body. (§ 11 ch 74 SLA 1985)

NOTES TO DECISIONS

Exhaustion of administrative remedies. — Plaintiff, who claimed that the state had violated his due process rights by revoking his permits to renovate apartment buildings, waived his right to pursue that