



# City of Bowie

2614 Kenhill Drive  
Bowie, Maryland 20715

## MEMORANDUM

**TO:** City Council  
**FROM:** David J. Deutsch, <sup>DJD</sup> City Manager  
**SUBJECT:** Variances  
**DATE:** March 8, 2007

The Bowie Advisory Planning Board (BAPB) requested a worksession to discuss several issues related to zoning variances (see attached). Both Elissa Levan and Karen Ruff, the attorneys who attend BAPB meetings, will be present for the discussion and will offer their observations and advice concerning the City's responsibilities.

The Prince George's County Council delegated variance authority to the City in 1998, and the City started hearing its own cases in 1999. Since 1999, the City reviewed 47 variance applications. Seven (7) of these cases (about 15%) were either called up by the Council or appealed to the Council for a final hearing and decision. In four (4) of the (7) cases, the Council overturned the BAPB's recommendation of denial and approved the request. In one case, the Council overturned the BAPB's recommendation of approval and denied the requested variance. In the two (2) remaining cases, the Council remanded the applications back to the BAPB for a second hearing and then accepted the revised recommendations of the BAPB (one approval and one denial).

Staff will facilitate the discussion between the BAPB and Council. The City Attorney will provide some legal background on the criteria for variances and planning staff will provide additional statistics on the City's performance in this area. This worksession represents an excellent opportunity to communicate about these matters in great detail.

Attachment



# City of Bowie

2614 Kenhill Drive  
Bowie, Maryland 20715

## MEMORANDUM

TO: City Council

FROM: Ronald Skotz, Chairman  
Bowie Advisory Planning Board

SUBJECT: Variances

DATE: February 8, 2007

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The Bowie Advisory Planning Board wishes to bring several issues related to zoning variances to City Council's attention. In recent months, the BAPB has seen an increasing number of applications for variances from lot coverage requirements. Lot coverage is defined by Prince George's County as the amount of a residential lot that is covered by buildings and off-street parking. It is the consensus of the BAPB that the County's zoning regulations are antiquated and do not provide sufficient flexibility to accommodate the kinds of additions desired by residents in today's lifestyle. Many homeowners desire minor improvements, such as sunrooms or additional living space located immediately to the rear of their homes, but are discouraged from making these improvements by the County's restrictive lot coverage regulations. The problem is the most acute in the Levitt sections of the City which are zoned R-R ("old" R-R), R-80 and R-55.

Another issue the Board has been finding is the apparent inequity in the Zoning Ordinance applying a more stringent standard of 25% lot coverage in the "old" R-R sections, which include the Rockledge section, parts of Whitehall and Pointer Ridge, and the Amber Meadows section of the City. A maximum of 30% lot coverage is permitted in the R-80 and R-55 zones. It should be noted that the same Levitt model homes are found in all of these zones. Although the zoning may be different, actual lot sizes are very comparable, because in many instances the developer subdivided land in the R-80 and R-55 zones into lots that are larger than the minimum lot size for those zones. It would be fair to the homeowner to apply the same standard across the board.

The BAPB has had difficulties reviewing these cases. It is extremely difficult to deny homeowners who come before the Board, asking to make reasonable additions to their property, and no good explanation exists for the lot coverage requirement. The BAPB desires a worksession with City Council in order to communicate with you directly regarding these matters. We feel that bringing these issues to Council's attention may lead to some solutions such as specific policies, interpretations or legislative recommendations.

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MEMORANDUM

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TO: Bowie City Council  
Bowie Advisory Planning Board

FROM: Elissa D. Levan, Esquire  
Karen P. Ruff, Esquire

RE: Variance Standards

DATE: March 8, 2007

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It has been some time since our last meeting with the Board concerning the function of the Board and the standards for granting a variance, and we thought it would be helpful for you to have some general guidance for carrying out your duties with respect to variance applications.

It is important to note that the Board is charged with implementing policy adopted by elected officials and sometimes to make policy recommendations to the Council, but not to create policy. When the Board is to implement policy, that policy is usually determined by the City Council, but sometimes it may be the County, or even the State that sets the parameters. With variances and departures, the condition upon which the power to decide them was conferred upon the City was that the City would not set its own policy or standards but would merely implement the County's policy.

Furthermore, with respect to variances and departures, the Board is not convened to be the voice of City homeowners, but is intended to be a neutral body that merely weighs the evidence and determines whether the facts meet the legal standard. In this respect, the Board's purpose may be different from its purpose in other contexts. When making a recommendation to the City Council about other development matters, it may be that the Council intends that the Board function, among other things, as a voice for City residents.

The variance standards created by Prince George's County and adopted by the City are fairly common and therefore the rationale of most of the cases discussing variance standards from other jurisdictions can easily be applied here. They generally require, as does the City's

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ordinance, that the applicant show that the property has unique geographic or topographic circumstances and that the strict application of the law would cause undue hardship or practical difficulty to the property owner.

Frequently the statutes have additional criteria, such as the requirement that the grant of the variance not conflict with other laws or impair a public policy articulated in an adopted planning document such as, in the City's case, the County's master plan.

Questions that frequently come up in applying variance standards, then, are, "What kinds of property conditions qualify?", "What does it mean for those conditions to be 'unique'?", and "What does 'hardship' mean?"

"Uniqueness" does not refer to the extent of improvements upon the property, or upon neighboring property, but rather requires that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects.

Hardship arises where property, due to unique circumstances applicable to it, cannot reasonably be adapted to use in conformity with the restrictions. It is the restrictions of the ordinance as applied to the subject property that must give rise to the hardship. In *Lewis v. Dept. of Natural Resources*, the Court said, "The unwarranted hardship standard, and its similar manifestations, are equivalent to the denial of reasonable and significant use of the property."

If the property owner has by his own actions created the need for the variance, a variance must be denied under the self-created hardship rule. Thus, by way of example, a property owner who has converted an existing garage to another use would not ordinarily qualify for a variance to build another garage on the grounds that the absence of a garage is a hardship that denies him reasonable use of the property.

Furthermore, it cannot be overemphasized that hardship for variance purposes does not refer to personal circumstances of the property owner. Except with respect to ADA/disability cases, discussed below, one should ask oneself whether the hardship asserted by the property owner would apply equally to any purchaser of the property. So it would not ordinarily constitute a hardship for a property owner to say, for example, that he needs a variance because he does not have sufficient bedrooms for his adult children and their family to come and live with him.

Thus, in granting a variance, the Board must find from the evidence "more than that the building allowed would be suitable or desirable or could do no harm or would be convenient for or profitable to its owner. The Board must find there was proof of 'urgent necessity, hardship peculiar to the particular property....'"

The general rule, then, is that variances should be exercised sparingly and only under exceptional circumstances. One indication of the general rule that variances are rarely appropriate is that, between the creation of the state zoning enabling act in 1927 and 1995, when the Court of Appeals did a fairly exhaustive review of the law of variances in *Cromwell v. Ward*, there were only five reported Maryland cases in which the grant of a variance has been affirmed or the denial of a variance has been reversed. All of these cases were decided over a twelve-year period and the last of them was decided more than (now) thirty years ago. The *Cromwell* Court observed that three of them "appear to be somewhat at odds with accepted Maryland law."

Since *Cromwell*, there have been a few additional cases in which the courts have upheld the grant of a variance or reversed the denial of a variance. Of note particularly, is *Mastandrea v. North*, in which the Court held that the Board of Appeals had improperly denied a variance, holding that the Mastandreas had been denied reasonable and significant use of their entire lot. It is apparent, although perhaps not well articulated, that the basis for the Court's decision in *Mastandrea* was the impact of the ADA, as the property owners required the variance to allow their disabled daughter to have a degree of use of the property that would comport with the accommodation requirements of the ADA.

For further guidance, we give some examples of cases in which variances were denied. In the recent case of *Montgomery County v. Rotwein*, the appellee was seeking variances to enable her to build an enclosed two-car garage and walkway on her property. The Court said,

In support of her "peculiar or unusual practical difficulties" claim, Rotwein asserts two bases. The first is that, as an elderly woman, she wishes to have the ability to exit her car and enter her house without being exposed to "the elements." The second is that other sizes or locations for the garage would be substantially more expensive than the size and location proposed. But neither of these two grounds necessarily amounts to "peculiar or unusual practical difficulties," and, therefore, the Board did not err in denying Rotwein's requests for variances.

The Board found that, because there was ample room elsewhere within the setbacks to build a garage, Rotwein's chosen location, set some distance apart from the house, was "a matter of convenience, and [did] not rise to the level of a practical difficulty." The Board also found that any hardship that Rotwein did demonstrate was the result of improvements to the property and, therefore, self-created and did not justify the variances. These findings were supported by substantial evidence. ...

Rotwein also argues that, as an elderly woman, she needs to have an enclosed garage to protect her from exposure to "the elements." That may be so, but it does not constitute "peculiar or unusual practical difficulties." ...

... There was nothing "substantial and urgent" about Rotwein's desire not to be exposed to the elements when entering her house, and, therefore, it did not constitute "peculiar or unusual practical difficulties" warranting a special exception.

None of the potential problems advanced by Rotwein - exposure to the elements or the expenditures required to build a new front door or re-grade the property or the undesirability of a one car garage in a two-car garage neighborhood - rise to the level of "peculiar or unusual practical difficulties."

... Economic loss alone does not necessarily satisfy the "practical difficulties" test, because, as we have previously observed, "[e]very person requesting a variance can indicate some economic loss." *Cromwell*, ... Indeed, to grant an application for a variance any time economic loss is asserted, we have warned, "would make a mockery of the zoning program." *Cromwell*, 102 Md. App. at 715.

Financial concerns are not entirely irrelevant, however. The pertinent inquiry with respect to economic loss is whether "it is impossible to secure a reasonable return from or to make a reasonable use of such property." *Marino v. City of Baltimore*, 215 Md. 206, 218, 137 A.2d 198 (1957). But Rotwein has not demonstrated that, unless her application is granted, it will be "impossible [for her] to make reasonable use of her property." *Id.* Indeed, she has made more than reasonable use of her property, as it houses not only her residence, but, among other things, a swimming pool and a tennis court.

Furthermore, the "hardships" about which Rotwein complains are self-created and, as such, cannot serve as a basis for a finding of practical difficulty. *See Cromwell*, 102 Md. App. at 722. Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's. *See id.*; *see also Steele v. Fluvanna County Bd. of Zoning Appeals*, 246 Va. 502, 436 S.E.2d 453, 456-57, 10 Va. Law Rep. 504 (Va. 1993).

Finally, there was substantial evidence to support the Board's conclusion that the variance requested would not be "the minimum reasonably necessary" under § 59-G-3.1(b). ... . Because there was, as the Board found, "sufficient room within the building envelope of the property to locate a reasonably sized garage," the Board's conclusion that "the requested variances for the construction of a one-story addition [were] not the minimum reasonably necessary" should not have been disturbed.

In *Ummerly v. People's Counsel*, the appellate court reversed the grant of a variance, holding that the applicants failed to demonstrate uniqueness, saying, "The Umerleys only point to evidence that shows that their operations predate the 1976 trucking facility regulations, that their facility has always been in violation of those regulations, that their operations cannot comply with those regulations, and that their operation is important to the economy of both

Baltimore County and the State of Maryland. Because the uniqueness requirement mandates that the subject property "have an inherent characteristic not shared by other properties in the area," such evidence cannot support a finding that the Umerleys' property is unique within the meaning of Maryland law. A review of the record fails to reveal any other evidence that would support such a finding."

In *North v. St. Mary's County*, the court also reversed a grant of a variance, holding that the applicants failed to demonstrate uniqueness, saying, "The evidence in this case relied upon by appellees is just the opposite. Mr. Enoch proffered that the neighboring properties were similarly situated, including having points of land with views. His argument was basically that his land was unique because he had not already built on the point of land and the other property owners had. In other words, his uniqueness claim was based on the existence of permitted ... structures and uses on adjoining properties. Mr. Enoch did not offer any evidence establishing any zoning uniqueness as to his property, and the basis upon which he attempted to argue uniqueness is expressly forbidden by section 4 of the ordinance. ('That the variance request [does] not . . . arise[] from any condition relating to land or building use, either permitted or non-conforming, on any neighboring property.')

The applicant, Mr. Enoch, the county, and the trial judge for that matter, when discussing the reasonable use of the property seem to restrict their considerations to just the part of the property where Enoch desires to construct the gazebo. That is incorrect. The property at issue here is the 4 + acre site already developed with a ranchhouse of approximately 1,100 square feet with extensive decking, an improved walkway, and a pier, from which expansive views are present. Thus, the property already is subject to a reasonable use.

The instant case focuses on unwarranted hardship; it is a denial of *reasonable* use that creates an unwarranted hardship. If reasonable use exists, generally an unwarranted hardship would not. In the present case, extensive reasonable use is already being made of the property. Under the appellees' theory, it would be unreasonable and an unwarranted hardship to deny Mr. Enoch anything he wants.

In *Cromwell*, the Court reversed a grant of a height variance. In that case, the property owners obtained building permits and constructed a two-story garage; after construction was complete, inspectors discovered that the building was too high. The owners thereupon sought a variance, which was granted. The appellate court reversed, on the grounds that the variance criteria were not properly met; the lost cost of construction to the homeowners was not deemed hardship for variance purposes.

The *Cromwell* court concluded with a warning to local zoning authorities, saying, "It is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of the statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers.

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That is improper." The risks of doing so include the establishment of ill-advised precedent and reversal by the courts (sometimes sternly worded).

We hope that this summary of the law of variances is helpful to you in assessing the validity of applications in the future. Please do not hesitate to contact me if I can provide further information that might be of assistance to you.