Zoning Variances
as Examined by the Courts

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Baldwin County Planning & Zoning Department

In § 45-2-261.12(a)(3), the *Code of Alabama* grants the Baldwin County Boards of Adjustment the power to "authorize upon appeal in specific cases the variance from the terms of the zoning regulations as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the zoning regulations will result in unnecessary hardship and so that the spirit of the ordinance or regulations required shall be observed and substantial justice done." It also states that "[T]he foregoing provisions shall not authorize the board of adjustment to approve a use not permitted by the zoning regulations." This report highlights some of the common questions from variance applicants that have been addressed by the courts.

What is a variance?

Generally a variance is a relief granted from the literal and strict application of zoning regulations, thereby allowing property to be used in a manner otherwise forbidden by the terms of the regulations. *Lindquist v. Board of Adjustment of Jefferson County*, 490 So.2d 16, 17 (Ala. Civ. App. 1986). However, while some counties or municipalities allow for a variance in the property's use, notice that Baldwin County's statute does not allow for a use variance. Variance granted by the Baldwin County Board of Adjustment will be limited to area variances (e.g. setback variances, etc.)

What does the Board of Adjustment consider when determining whether to grant a variance?

The interest of the public as affected by the contrary interest of the people within the district is a factor to be considered. *Priest v. Griffin*, 222 So.2d 353, 356 (Ala. 1969). The courts have looked to whether a variance would "downgrade the neighborhood," taking into account issues such as increases in traffic or noise, depreciation in property values, retaining privacy of neighbors, and maintaining the architectural character of the neighborhood. *Pipes v. Adams*, 381 So.2d 86, 88 (Ala. Civ. App. 1980).

Though this balancing of interests is crucial, "the pivotal and primary question or issue is whether or not, due to special conditions, a literal enforcement of the ordinance establishing the residential district will result in unnecessary hardship." *Priest v. Griffin*, 222 So.2d 353, 356 (Ala. 1969).

What constitutes an "unnecessary hardship?"

"No one factor determines the question of what is practical difficulty or unnecessary hardship, but all relevant factors, when taken together, must indicate that the plight of the premises in question is unique in that they cannot be put reasonably to a conforming use because of the limitations imposed upon them by reason of their classification in a specified zone." *Brock v. Board of Adjustment of the City of Huntsville*, 571 So.2d 1183, 1184 (Ala. Civ. App. 1990), quoting *Bracket v. Board of*

Appeal, 39 N.E.2d 956, 961 (1942). Though the case above tells us that there is no one factor that determines what is an unnecessary hardship, there a few "rules" as to what will *not* constitute a hardship. These "rules" are explained below.

There will be no hardship found if the circumstance is not unique, but is common to all of the property within that area. "Variances from the terms of the zoning ordinance should be permitted only under peculiar and exceptional circumstances. Hardship alone is not sufficient. The statute says 'unnecessary hardship,' and mere financial loss of a kind which might be common to all of the property owners in a use district is not an 'unnecessary hardship.'" *Nelson v. Donaldson*, 50 So.2d 244, 251 (Ala. 1951).

There will be no hardship found if the circumstance is linked to the individual instead of the property. "The applicant must show that a strict application of the zoning ordinance produces a unique or unnecessary hardship with reference to his parcel of land." *Josephson v. Autrey*, 96 So.2d 784, 789 (1957). Notice that the hardship must be in reference to the parcel itself, not to the applicant. The court in *Ex parte Chapman* stated "'the grant of a variance runs with the land and is not a personal license given to the landowner. Accordingly, the necessary hardship which will suffice for the granting of a variance must relate to the land rather than to the owner himself. Mere personal hardship does not constitute sufficient ground for the granting of a variance.'" *Ex parte Chapman*, 485 so.2d 1161, 1164 (Ala 1968), quoting 82 Am.Jur.2d, *Zoning and Planning* § 275.

There will be no hardship found if the circumstance was caused by the owner himself. When seeking a variance due to an unnecessary hardship, "a property owner cannot assert the benefit of a 'self-created' hardship… When the owner himself, by his own conduct, creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it." *Josephson v. Autrey*, 96 So.2d 784, 789 (1957).

What are my chances of having a variance granted?

There is no way to predict each applicant's chances of having their variance request granted, as each case must be considered on it's particular facts, evidence, circumstances and credibility. However, the Alabama Supreme Court is of the opinion that "variances should be sparingly granted, and that the spirit of the zoning ordinance in harmony with the spirit of the law should be carefully preserved, to the end that the structure of a zoning ordinance would not disintegrate and fall apart by constant erosion at the hands of a board of zoning adjustment or the courts." *Priest v. Griffin*, 222 So.2d 353, 357-358 (Ala. 1969).