



Special Exceptions, Conditional Uses and Variances



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Special Exceptions, Conditional Uses and Variances

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Introduction

Practically every municipality has a variance procedure in its zoning ordinance. Most zoning ordinances contain special exception provisions or else allow conditional uses. Some zoning ordinances utilize both special exceptions and conditional uses. What is special about a special exception? Since conditions may be attached to special exceptions, how do they differ from conditional uses? How do conditions differ from express standards and criteria? What is being varied and who authorizes it to deviate from the ordinance? What types of variances are there? What is being varied and who does it deviate from the ordinance? How long does it last? This booklet attempts to explain these mysterious terms and how these provisions should be used.

MPC Authorization

Article VI of the Pennsylvania Municipalities Planning Code (MPC) contains the provisions of the law pertaining to zoning. Specific provisions allow the governing body to legislatively include uses as a special exception or conditional use. Constitutional principles and due process requires relief a mechanism (a variance) be provided. MPC Section 603 (c) of this Article states that a zoning ordinance may contain:

1. Provisions for special exceptions and variances administered by the zoning hearing board, which provisions shall be in accordance with this act. (Refer also to MPC Sections 912.1 and 910.2, respectively.)
2. Provisions for conditional uses to be allowed or denied by the governing body pursuant to public notice and hearing and recommendations by the planning agency and pursuant to express standards and criteria set forth in the zoning ordinances. In allowing a conditional use, the governing body may attach such reasonable conditions and safeguards, ***other than those related to offsite transportation improvements***, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Notes: The above, bold and italic exclusion regarding offsite transportation improvement was added by Act 68 of 2000. For more details about conditional use refer to MPC Section 913.2.) In addition, a subsection pertaining to special exceptions and conditional uses was added to the MPC by Act 130 of 1982. The subsection will be discussed later under Subdivision and Land Development.

The definitions of the terms special exception, conditional use, or variance – contained in MPC Section 107 merely refer the reader to pertinent articles of the MPC.

Special Exceptions

All zoning ordinances contain provisions for uses that are permitted by right. These are the basic uses that are permitted in the various zoning districts. For example, if a zoning ordinance contains both commercial and industrial zones, a person desiring to locate a shoe store in the commercial district is permitted to do so by right. A fabricating plant is also free to locate in an industrial zone by right. In both cases, since the zone for these specific uses is established in the zoning ordinance, they are uses permitted by right.

A special exception is a permission or approval granted an applicant to use land in a district for a purpose other than that generally permitted outright in that district. The permission or special exception is granted by the zoning hearing board in accordance with the standards contained in the zoning ordinance, provided generally that the specific application of the use would not prove injurious to the public interest.

It is important to realize that the term special exception is a misnomer. It is neither special nor is it an exception. It is not a deviation from the zoning ordinance. An applicant for a special exception is following the zoning ordinance. A special exception is a use envisioned by the ordinance, and, if the express standards and criteria established by the ordinance are met, the use is one permitted by the ordinance.

Special Exceptions Compared with Uses Permitted by Right

The difference between a use permitted without qualification and a use permitted by special exception, and it is a significant difference from the point of view of an applicant, is that an applicant for a special exception is subject to the jurisdiction of the zoning hearing board. The function of the board is to determine whether the application is consistent with the public interest as defined in specific standards and criteria established in the ordinance. This generally involves factual determinations, and the board is vested with discretion in evaluating the evidence presented to it. All special exceptions for each zoning district are specifically listed under the provisions for each district. If the use an applicant desires is not permitted in the zone by right, and is not specifically listed as a special exception, the application cannot be granted.

Why Include Special Exceptions?

Special exceptions exist because choosing uses permitted and prohibited for each zone is too narrow for sound planning. Many matters fall in between what is consistent and that which is inconsistent with a zoning classification. Also, there are usually certain uses or activities that might logically be located in certain districts, but that should for one reason or another be very carefully located or controlled. For example, a community may have a low density residential district with a specific use such as a day care center or a bed and breakfast use permitted only as a special exception. An individual wishing to utilize land in this district for such a purpose would have to apply for a special exception. The zoning hearing board would then have the opportunity to thoroughly examine the proposed land use to assure that the public interest is not violated and to attach any reasonable conditions or safeguards necessary to implement the purpose of the ordinance. If the use were permitted by right, the zoning officer would not have the opportunity to require any reasonable conditions and safeguards.

It is also customary for non-conforming uses and structures, home occupations and conversion of large single family homes to be regulated under the special exception device. Note that nonconformances violate the ordinance, but are protected by constitutional considerations.

Function of the Zoning Hearing Board

Section 912.1 of the states the board's functions with respect to special exceptions:

Where the governing body, in the zoning ordinance, has stated special exceptions to be granted or denied by the board pursuant to express standards and criteria, the board shall hear and decide requests for such special exceptions in accordance with such standards and criteria. In granting a special exception, the board may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Need for Specific Criteria

The applicant for either a special exception or a conditional use must show that the proposed use meets the categorical definition as a use type and then that the specific requirements contained in the ordinance will be met. Specific criteria, for example, refer to such factors as lot size, increased setbacks, buffering or landscaping requirements or additional parking spaces.

When the ordinance contains general, non-specific or non-objective requirements, it is unfair to require the applicant to carry the burden of proof. Examples of non-specific criteria might include stipulations that the use not be more detrimental to the neighborhood, that the use be in harmony with the spirit and purposes of the district, or the site must be an appropriate location for such use. It is an unreasonable burden for the applicant to have to negate every conceivable and unvoiced objection to the proposed use engendered by such non-objective criteria.

The special exception (or conditional use) permit must be granted where there is compliance with the specific requirements set forth in the ordinance unless it can be shown that the approval is detrimental to public health, safety or general welfare. Perhaps, it should be re-stated more emphatically. In order to deny an application, if the applicant complies with the specific requirements, the express standards and criteria, the objectors (usually the municipality or neighbors aggrieved) must show a high degree of probability that the use will adversely impact on the public interest. The mere possibility of an adverse impact is not enough. However, if the objectors raise specific issues concerning health, safety and general welfare, then the burden would continue to be with the applicant. It would be the duty of the zoning hearing board in its discretionary power to determine whether or not the applicant had met his burden of proof.

An application for a special exception (or conditional use) should be denied only when the adverse impact upon the public interest exceeds that which might be expected in normal circumstances. For instance, general arguments claiming anticipated traffic increases are insufficient to warrant a denial.

The Commonwealth Court reversed a denial of a special exception to build apartments where the objectors failed to prove that there was a high probability the apartments would generate traffic patterns and storm water drainage not normally produced by that type of use. Furthermore, objectors must also prove that the abnormal traffic and drainage would pose a substantial threat to the health, safety and welfare of the community. The fact that a proposed use would contribute to projected traffic congestion primarily generated by other sources was not a sufficient basis for denying the special exception. *In re Appeal of Martin*, 108 Pa. Commonwealth Ct. 107, 529 A.2d 582 (1987), but compare *Berman v. Manchester Twp. ZHB*, 115 Pa. Commonwealth Ct. 339, 540 A.2d 8 (1988) where substantial evidence of a 79% increase in traffic was judged material and significant to uphold a denial of a special exception for a residential development.

If a given use such as a gas station or a day care center is permitted by special exception, the framers of the zoning ordinance presume a degree of increased traffic as a normal consequence. By including a given special exception use in the ordinance, the municipal legislative body has determined the use to be appropriate in the

district upon compliance with the specific requirements and, therefore, presumptively consistent with the public health, safety and general welfare. Objectors must prove that there is a high probability that the use will generate traffic patterns not normally generated by that type of use and that this abnormal traffic will pose a substantial threat to the health and safety of the community. Mere speculation is not sufficient.

Conversion of Special Exceptions

One of the most painful chores assigned to the drafters of the zoning ordinance is developing the mandated express standards and criteria for a given special exception use. Once the requisite objective standards have been developed, there are benefits to converting many of the special exceptions to uses permitted by right. The zoning officer rather than the zoning hearing board would determine if the express standards which would be retained were met before issuing a zoning permit.

It is bureaucratic to list a multitude of uses as special exceptions. Many ordinances contain too many routine uses as special exceptions causing unnecessary administrative inefficiencies. Why force a landowner to waste time and money going before an overworked zoning hearing board if the zoning officer can handle the application? For instance, depending upon the special exception, typical express standards and criteria usually deal with either increased setbacks, extra lot area, additional off-street parking, fencing or landscape buffering. Express standards such as these do not really need an adjudicative type hearing in order to make a decision. Specific standards can be expressed as specific standards in an ordinance, which the zoning official administers.

The drawback to conversion to uses by right is that the zoning hearing board's opportunity to attach reasonable conditions to a special exception approval is lost. However, careful selection of the uses to be converted and thoughtful crafting of the objective criteria can obviate or minimize the loss of the ability to attach reasonable conditions.

Conditional Uses

Conditions

The MPC permits the attachment of reasonable conditions and safeguards (other than those related to offsite transportation or road improvement) with the grant of a special exception in addition to the requirements expressed in the ordinance. Caution about conditions for an offsite transportation improvement is appropriate. Act 68 of 2001 makes clear reference to limitations placed on condition by Act 209 of 1990. Namely, MPC Section 503-A(c) that states:

“No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.”

The attachment of reasonable conditions and safeguards with the grant of a special exception in addition to the requirements expressed in the ordinance comes with some limitations. It is not a carte blanche nor is it a license to impose barriers to frustrate an applicant that has met the specific criteria stated within the ordinance. To the contrary, the power to impose conditions must be reasonably related to a valid public interest, but not related to offsite transportation improvements.

For instance, the zoning hearing board may not attach conditions to a special exception application, which essentially serve a nonzoning purpose. (Be careful imposing an owner-occupancy condition because the personal identity of an occupant has no relationship to public health, safety or welfare.) See, *Kulak v. ZHB of Bristol Township*, 128 Pa. Commonwealth Ct. 457, 563 A.2d 978 at 980 (1989).

Rather than denying a special exception request because of some adverse effect, it is preferable to ameliorate or reduce that harmful impact to an acceptable level by imposing conditions. See, Ryan, *Pennsylvania Zoning Law and Practice*, at chapter 5.2.7 and *Edgmont Township v. Springton Lake*, 154 Pa. Commonwealth Ct. 76, 622 A.2d 418 (1993).

The zoning hearing board may impose conditions on special exceptions, variances or expansions of nonconformances. Likewise, the governing body may impose conditions for conditional uses. Whether a given condition is fair and reasonable must be judged in relation to the evidence and facts surrounding each case. A condition is not a condition, however, unless it is stated in writing as an integral part of the application approval.

A promise or oral assurance of intent by the applicant is not the same as a condition and is not necessarily binding. Neither does a promise constitute evidence. An applicant for a special exception is required to show at the time of the hearing that it met the requirements. See, *Edgmont* at pages 419-420. However, if a condition is imposed and the developer does not contest or appeal from the conditions, he is bound by them.

As noted in the *Kulak* case, a condition cannot be personalized or tied to a particular person or owner. Like zoning, a condition runs with land. One should also avoid trying to cover all bets by footnoting the approval stipulating that the permission is automatically voided in the event the applicant appeals a condition and the condition is declared invalid. Judicial review cannot be prohibited.

Enforcement of Conditions

If a landowner violates a condition attached to grant of a special exception or variance, it is in essence a violation of the zoning ordinance. The zoning hearing board has no enforcement powers. It exists solely as an adjudicative body to review matters brought to it under the respective provisions of the MPC and cannot act as an enforcement officer even in respect to violation of one of its own previously issued approvals or conditions.

The zoning officer should order compliance where a specified condition has been violated, and if deemed necessary, issue a notice of revocation for noncompliance with conditions. The landowner would then be entitled to file a timely appeal with the zoning hearing board under MPC Section 909.1 (a)(3) to decide whether the landowner had in fact violated a condition. The municipality would also be able to initiate an equity action under MPC Section 617 if warranted.

Conditional Uses

A conditional use is nothing more than a special exception that falls within the jurisdiction of the governing body rather than the zoning hearing board. Conditional uses are optional; that is, conditional uses may be provided for in the zoning ordinance if desired. The governing body must adhere to the express standards and criteria set forth in the ordinance, or else the conditional use approval or denial could be overturned in court.

Uses, which could be provided as conditional uses rather than as special exceptions, are often those uses that could have a direct effect upon the lives of all persons within the community. Some examples of such land uses are airports, paper manufacturing plants, or land fills. Such uses would be specifically listed under the various districts, and to use land for any of these purposes a conditional use application would have to be filed. The governing body would then have the opportunity to thoroughly examine the proposal and to impose any reasonable safeguards necessary to implement the purposes of the ordinance and to protect the public's general welfare.

Procedure for Conditional Use

The Act 170 amendments to the MPC clarify that the governing body shall hold a hearing pursuant to public notice and recommendations by the planning agency. See, MPC Section 603(c)(2). The referenced hearing is defined in MPC Section 107 (b) as an administrative proceeding conducted by a 'board' pursuant to Section 909.1. Board is defined as any body granted jurisdiction under a land use ordinance or under this act to render final adjudications. The exclusive power to render a final adjudication for a conditional use is assigned to the governing body by MPC Section 909.1 (b)(3).

More recently, Act 165 of 1996 further clarified the required procedures a governing body must follow throughout the decision making process regarding a conditional use. Provisions added by Act 165, specifically Section 913.2 (b) (1), restate many of the mandatory steps detailed under MPC Section 908.

The governing body must follow the MPC Article IX procedures which apply to the zoning hearing board *and other administrative proceedings*. Thus, in a conditional use hearing, the governing body should follow the basic hearing requirements outlined in MPC Section 908 including the stenographic record requirement.

The governing body is acting as a quasi-judicial body in a conditional use hearing and cannot advocate a particular position. In this situation, the planning commission could become a party to the hearing to testify before the governing body to promote a given viewpoint. Similarly, in a special exception situation, the zoning hearing board cannot advocate the municipal position which should be presented by a member of the governing body or municipal manager.

Subdivision and Land Development

Whenever a subdivision or land development is permitted as a special exception or conditional use, the zoning approval should be obtained first. The applicant can be spared the expenditure of substantial sums to prepare the preliminary subdivision plan in the event the zoning (special exception or conditional use) application is denied. Once the developer has filed the zoning application for the special exception or conditional use, no intervening change or amendment to the zoning, subdivision or other governing ordinance may adversely affect the development plan.

After the zoning approval is obtained, the applicant may submit the subdivision or land development plans within six months and is entitled to have the plans processed under the terms of the ordinance(s) as they existed on the date of the filing for the special exception or conditional use. Furthermore, the developer's period of vested rights outlined in MPC Section 508(4) commences with the filing date under the subdivision and land development ordinance. Refer to MPC Section 603 (c)(2.1).

Variances

A variance is a means of solving the problems created by attempting to apply the general terms of the ordinance to fit the land that is regulated. It is necessary because a zoning requirement could possibly prevent any use of a property if strictly applied. A variance procedure prevents problems in applying general legislation to specific situations. All zoning ordinances contain many detailed pre-set regulations designed to be self-executing. Various setbacks and height limitations are examples of these provisions, which omit administrative discretion. Variances act as a relief valve for the rigid ordinance.

Variances Compared with Special Exceptions and Conditional Uses

An application for a variance seeks permission to do something which is not in conformance with or violates the zoning ordinance. A variance is an overriding of the legislative judgment, justified by the existence of unnecessary hardship. In contrast, an applicant for a special exception does not seek to vary the ordinance. The permission the applicant seeks is one envisioned by the ordinance. Accordingly, an applicant for a variance must show both (a) unnecessary hardship and (b) consistency with the public interest. A special exception or conditional use case generally involves only the latter.

Requirements for a Variance

The zoning hearing board hears requests for variances where it is alleged that the provisions of the zoning ordinance inflict unnecessary hardship upon the applicant. The board may, by rule, prescribe the form of application and may require preliminary application to the zoning officer. Pursuant to MPC Section 910.2, the board may grant a variance provided that all of the following findings are made where relevant in a given case:

1. That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located;
2. That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
3. That such unnecessary hardship has not been created by the appellant;
4. That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare and
5. That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

In granting any variance, the board may attach such reasonable conditions and safeguards as it may deem necessary to implement the purposes of this act and the zoning ordinance.

Variance Procedure

Typically, a request for a variance arises when an application for a zoning or building permit is rejected or turned down by a zoning officer because the proposed activity does not meet all the requirements of the zoning ordinance. The applicant then makes application to the zoning hearing board for a variance as a result of this denial. The zoning hearing board has the authority to vary the terms of the ordinance in proper instances. A decision of the zoning hearing board may be appealed to the court of common pleas.

Types of Variances

Dimensional Variance

The most common variance granted is a dimensional variance. It is used where an applicant's property does not quite comply with a setback or yard requirement or has insufficient lot size. Dimensional variances are subject to the rules of Section 910.2 designed to permit an adjustment of the strict application of the zoning ordinance to a specific property. In brief, the variance should be the minimum relief to alleviate the unnecessary hardship which is peculiar or unique to the property provided the variance is not injurious to the public interest.

Unnecessary hardship is sometimes erroneously confused with economic hardship. Unnecessary hardship, according to court decisions, requires that the physical characteristics of the property be such that it cannot be used for any permitted purpose, or that it can be used for a permitted purpose but only at a prohibitive expense, or that the property has no value or only a distressed value if restricted to a permissible use. It is not sufficient justification for a variance to show mere economic hardship or that the property could be utilized more profitably if a variance were granted.

De Minimis Variance

There also exists a species of dimensional variances bearing the Latin term *de minimis* which is to be issued only in rare circumstances. A *de minimis* variance is a minimal or minor deviation from bulk requirements that does not require proof of unnecessary hardship. These *de minimis* variances have been limited to dimensional cases thus far in the belief that there is less adverse impact upon the public interest than with use variances. For example, a variance from a one-acre lot minimum zoning requirement, where their subdivision of a two-acre lot would result in one lot being one acre and another lot being 15 square feet short of one acre, or .99966 of an acre, was properly upheld on a *de minimis* basis.

Use Variance

A use variance flirts with an illegal usurpation of the governing body's power to rezone. Because a use variance requests permission to use property in a manner prohibited by the particular zoning district, i.e., a commercial use in a single family residential zone, its impact is usually greater upon the public interest than a dimensional variance.

A use variance is often requested when the property owner claims his property is practically valueless as restricted by the zoning uses permitted, or that similar uses to the one requested already exist nearby. Even if the applicant's property value is depressed for residential use because of traffic conditions or existence of some commercial use across the street, such conditions have been held not to constitute a hardship when the entire neighborhood is affected in addition to the applicant's tract. The evidence offered by the applicant must be conclusive.

If a zoning hearing board were to approve use variances to individual properties because the neighborhood has lost its zoning purity, a piecemeal rezoning would result. It could amount to spot zoning, or if done repeatedly, constitute a creeping form of spot zoning. The proper remedy is rezoning, a legislative act, which rests with the governing body, not the zoning hearing board.

Validity Variance

As noted above, a hardship that is not unique to a variance seeker's property does not justify a variance. However, if the zoning is confiscatory, that is if it denies any reasonable use of the land, a validity variance can be issued regardless of the fact that neighboring properties might be affected. Unlike a curative amendment challenge, a validity variance does not attack the constitutionality of the ordinance. The test for a validity variance is not whether the owner could make more profit from this proposed use but whether the zoning allows a reasonable use thereby avoiding confiscation.

Pennsylvania zoning expert Robert S. Ryan in his treatise *Pennsylvania, Zoning Law and Practice* has commented that relief from a confiscatory effect can be denied if the particular use selected by the applicant is injurious to the public interest, or if the relief sought is greater than the minimum which would permit a reasonable use of the land. Of course, a variance can be denied if the hardship is self-created. A validity variance is governed by MPC Sections 909.1(a)(1) and 916.1(a)(1).

A validity variance case belongs with the zoning hearing board and should not be confused with a curative amendment proceeding. According to Mr. Ryan, if the landowner were allowed to proceed with a curative challenge under MPC Section 916.1(a)(2), it could result in placing a great and undue burden on municipal governing bodies. If the landowner with a validity variance claim could shortcut the review process, bypass the zoning hearing board, and go directly to the governing body for a disposition, the usefulness and legislatively intended function of local zoning hearing boards would be greatly diminished.

To recap, a person aggrieved by a use or development permitted on the land of another who desires to challenge the substantive validity of the ordinance must submit the validity challenge to the zoning hearing board (ZHB). A validity challenge must be in writing and contain reasons for the challenge, but unlike the curative amendment, no plans and explanatory materials describing the proposed use or development must be filed. If the ZHB finds that the validity challenge has merit, the decision must include recommended amendments to the challenged ordinance in order to cure the defects. The ZHB must also consider five planning criteria enumerated in subsection (5) of Section 916.1(c). In abbreviated terms, these five factors include:

- (i) impact on roads and public facilities;
- (ii) impact on regional housing needs and effectiveness of the proposal in providing affordable housing;
- (iii) suitability of the site for the intensity of the use proposed by the site's soils, slopes, woodland, wetlands, floodplains, aquifers, and other natural features;
- (iv) impact of the proposed use on the site's natural features; and
- (v) impact on preservation of agriculture and other land uses which are essential to public health and welfare.

Although the board has the usual 45 days from the hearing or last hearing on the validity challenge to render its decision, a failure by the board results not in the usual deemed approval, but instead in a deemed denial. A deemed denial occurs on the 46th day after the close of the last hearing. A deemed denial also occurs with respect to a validity challenge if the hearing is not held within the obligatory 60-day time limit.

Variance by Estoppel

The Pennsylvania Courts have established the possibility of granting relief for the continuation of an illegal use under the theory of a variance by estoppel or vested right. The landowner primarily bases this type of claim to a variance on the failure of the municipality to either enforce its ordinance over a long time period, or the acquiescence by the municipality in the illegal use for a long time. The landowner is attempting to assert a form of vested right to a variance. (See *Planning Series No. 9, The Zoning Officer*, for a related discussion of the factors that must be advanced by a landowner claiming a vested right to a permit issued in error.)

In this type of variance application, the MPC provides no guidance. Fortunately, judicial decisions provide several relevant factors for the zoning hearing board to consider when adjudicating a request for a variance by estoppel. The four factors are:

1. A long period of municipal failure to enforce the law, wherein the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence by the municipality in the illegal use;
2. Whether the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceedings;
3. Whether the landowner has made substantial expenditures in reliance upon his belief that his use was a permitted use; and
4. Whether the denial of the variance would impose an unnecessary hardship on the applicant, such as the cost to demolish an existing building.

Emphasis provided in original, *Spargo v. ZHB of Municipality of Bethel Park*, 128 Pa. Commonwealth Ct. 193, 563 A.2d 213 at p. 217 (1989), citing *Crawford Appeal*, 110 Pa. Commonwealth Ct. 51, 531 A.2d 865 (1987), cross appeals denied, 518 Pa. 656, 544 A.2d 1343 (1988).

In addition, the board may also consider whether there is sufficient evidence to show that the use is a threat to the public health, safety, or morals. For instance, intrusion of a commercial dental office into an otherwise residential zone is enough in and of itself to show detriment to the public health, safety and welfare. See *Spargo*.

In regard to the first factor, it is well-settled in case law that a mere showing that a municipality has failed to enforce the law for a long period of time is insufficient in itself to support the grant of a variance. Commonwealth Court in *Crawford* could find no case where pure municipal failure to take action, even coupled with some knowledge of the violation by municipal officials, was held sufficient to grant a variance by estoppel.

In assessing the second factor, concerning a landowner's innocent reliance upon municipal inaction, it must be remembered that a landowner is, absent some municipal validation of the use, duty bound to check the zoning status of the property before purchase.

In regard to the third factor, the cost of an addition to a garage and erecting a storage shed for a building contractor's use at his residence, or remodeling a home to accommodate dental equipment, were rejected because all or a portion of the expenses could be recouped. See, *Crawford Appeal* and *Spargo*, respectively.

The fourth factor permits denial of the variance even if substantial sums were expended for improvements consistent with the permitted use such as a garage or storage shed with a residence. The cost of modifying a structure to legal status does not appear to rise to unnecessary hardship unless it is necessary to demolish the existing building.

Variations versus Rezoning

If a property owner feels his land is being confiscated should he approach the governing body to rezone his property or approach the zoning hearing board for a variance?

A zoning hearing board need not feel particularly obligated to issue a variance unless the necessary standards and provisions are met. If the standards and provisions are met, but the use requested is detrimental to the community, a variance for that use should not be granted (possible consideration could be given to other uses).

A hardship which is unique to the particular property involved or which admits of no special legislative solution can be remedied by a variance whether or not the applicant has sought legislative relief. As an example, if a lot is too small to be used as zoned, then a variance may be granted to permit a reasonable use of the property without any prior attempt to rezone the land. The governing body cannot grant a variance and must be careful to avoid spot zoning.

On the other hand, before any sizeable tract of land becomes the subject of a validity variance, it is reasonable to give the governing body a chance to rezone the land. Only where the governing body fails to meet its responsibility is a variance an appropriate method for granting relief to a large tract of land provided the problem is non-legislative in nature. Confiscation of a large tract is uncommon but possible, for instance, where specific topographic factors preclude reasonable use.

Priority between Variations

The Pennsylvania Municipalities Planning Code contains an express mandate in Section 910.2(a)(5) that a lesser variance be granted if it will provide relief upon a finding:

“That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.”

Expiration of Approvals

Some zoning ordinances contain provisions that stipulate that a grant of a variance or special exception (or conditional use) will automatically expire within a reasonable period of time such as one or two years if a building permit has not been obtained and construction commenced. An expiration provision, it should be noted, runs with the land and should not be made personal to a given owner. If the zoning ordinance contains no time limitation and no time limitation was imposed by way of a condition, the ZHB approval can be exercised by a new owner years later. However, Commonwealth Court has ruled that a reasonable time limitation may be amended into the zoning ordinance which would apply to previous grants of approvals. See *Pyle v. Municipality of Penn Hills*, 102 Pa. Commonwealth Ct. 220, 517 A.2d 583 (1986). In this retroactive situation, the time limitation would commence on the effective date of the zoning amendment. Flexibility can also be drafted into the ordinance to allow the board to grant a time extension for good reason in order to avoid an automatic expiration and the subsequent need for the applicant to seek a new approval.

Conclusion

Special exceptions, conditional uses and variations are important elements of a community’s zoning ordinance, and a thorough knowledge of each is indispensable to the proper functioning of the ordinance. The preceding pages have tried to explain these terms and eliminate some of the misconceptions and misunderstandings associated with each.

Appendix I

Pertinent Definitions

Section 107 (a)

Conditional use - a use permitted in a particular zoning district pursuant to the provisions in Article VI.

Public hearing - a formal meeting held pursuant to public notice by the governing body or planning agency, intended to inform and obtain public comment, prior to taking action in accordance with this act.

Public meeting - a forum held pursuant to notice under the act of July 3, 1986 (P.L. 388, No. 84), known as the Sunshine Act.

Public notice - notice published once each week for two successive weeks in a newspaper of general circulation in the municipality. Such notice shall state the time and place of the hearing and the particular nature of the matter to be considered at the hearing. The first publication shall not be more than 30 days and the second publication shall not be less than seven days from the date of the hearing.

Special exception - a use permitted in a particular zoning district pursuant to the provisions of Articles VI and IX.

Variance - relief granted pursuant to the provisions of Articles VI and IX.

Section 107 (b)

The following words and phrases when used in Articles IX and X-A shall have the meanings given to them in this subsection unless the context clearly indicates otherwise:

Board - any body granted jurisdiction under a land use ordinance or under this act to render final adjudications.

Decision - final adjudication of any board or other body granted jurisdiction under any land use ordinance or this act to do so, either by reason of the grant of exclusive jurisdiction or by reason of appeals from determinations. All decisions shall be appealable to the court of common pleas of the county and judicial district wherein the municipality lies.

Determination - final action by an officer, body or agency charged with the administration of any land use ordinance or applications thereunder, except the following:

- (1) the governing body;
- (2) the zoning hearing board; or
- (3) the planning agency, only if and to the extent the planning agency is charged with final decision on preliminary or final plans under the subdivision and land development ordinance or planned residential development provisions.

Determinations shall be appealable only to the boards designated as having jurisdiction for such appeal.

Hearing - an administrative proceeding conducted by a board pursuant to Section 909.1.

Land use ordinance - any ordinance or map adopted pursuant to the authority granted in Articles IV, V, VI and VII.

Report - any letter, review, memorandum, compilation or similar writing made by any body, board, officer or consultant other than a solicitor to any other body, board, officer or consultant for the purpose of assisting the recipient of such report in the rendering of any decision or determination. All reports shall be deemed recommendatory and advisory only and shall not be binding upon the recipient, board, officer, body or agency, nor shall any appeal lie therefrom. Any report used, received or considered by the body, board, officer or agency rendering a determination or decision shall be made available for inspection to the applicant and all other parties to any proceeding upon request, and copies thereof shall be provided at cost of reproduction.

Selected Definitions from the Sunshine Act (Act 84 of 1986)

Deliberation - the discussion of agency business held for the purpose of making a decision.

Meeting - any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action.

Official action -

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

Special meeting - a meeting scheduled by an agency after the agency's regular schedule of meetings has been established.

Appendix II

Planning Assistance from the Governor's Center for Local Government Services

The Governor's Center for Local Government Services is available to assist municipalities. Assistance is offered to assist municipalities in assessing the impact of state agency decisions on local planning and zoning activities. Municipalities with an adopted comprehensive plan and zoning ordinance located within a county with an adopted comprehensive plan have the benefit of Commonwealth agencies considering the documents when reviewing applications for the funding or permitting of municipal infrastructure or other facilities. In addition, the Center offers grant assistance to prepare and/or update these important land use documents.

The Land Use Planning and Technical Assistance Program (LUPTAP) is an important component of the Growing Smarter Action Plan of the Governor's Center for Local Government Services. The LUPTAP provides matching grants for municipalities preparing to develop and strengthen community planning and land use management practices.

Guidelines for LUPTAP incorporate the principles of the Land Use Planning Executive Order and the recent changes to the MPC. The guidelines make clear that priority consideration for funding is given to municipalities that incorporate multimunicipal approaches into their planning efforts. Similarly, those municipalities that strive for general consistency between their comprehensive plan, the county comprehensive plan and local zoning ordinances also receive priority consideration.

LUPTAP funding is one of the Center's most significant support programs. It allows municipalities to use funds to develop new or update existing comprehensive plans and land use implementation ordinances. It also allows municipalities to prepare strategies or special studies that will support the comprehensive planning process. LUPTAP funds can also be used to develop or update zoning or subdivision and land development ordinances, or to utilize advanced technology, such as Geographic Information Systems. Municipalities are permitted and encouraged to use up to \$1,000 of the funding received toward educational programs on planning issues for local officials. The training and education program offered by the Center's training partners represent an excellent use of the funds.

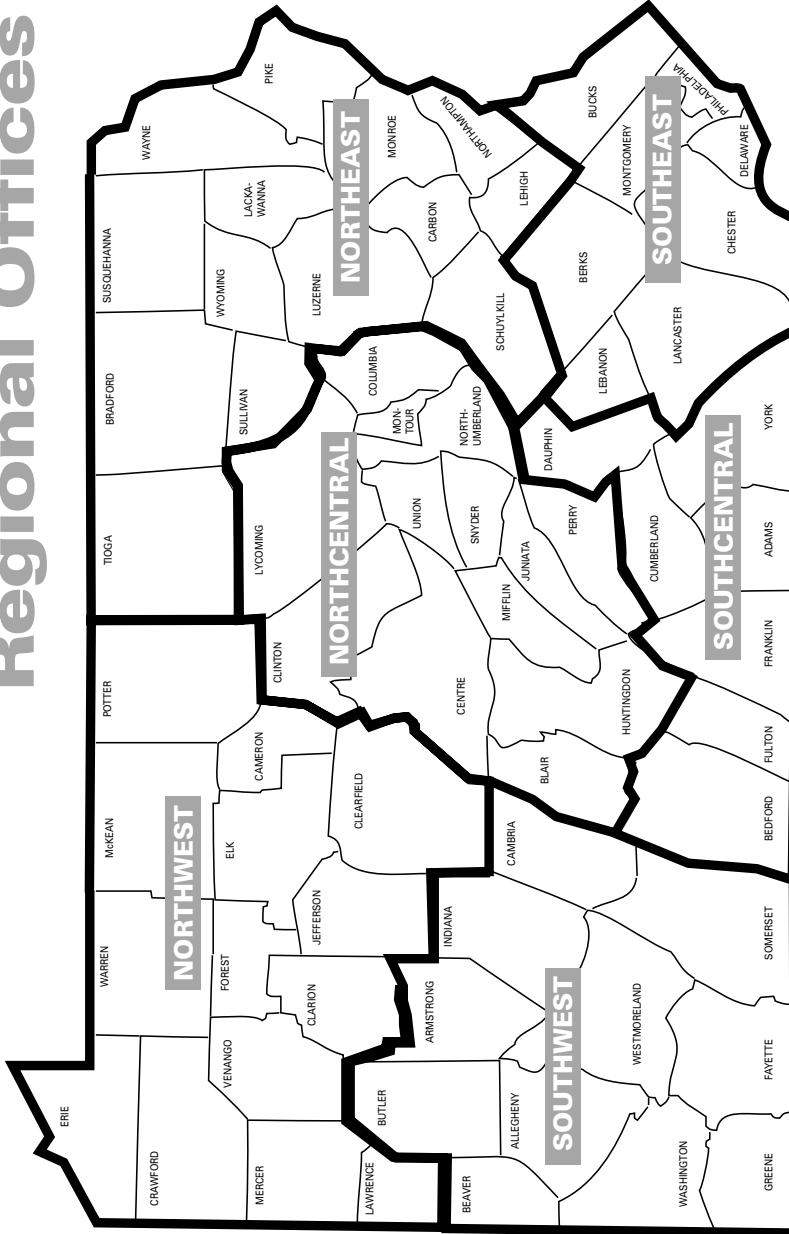
The goal of the Center is to enhance the existing planning curriculum by offering new courses to local government officials through established partnerships with the Pennsylvania State Association of Boroughs (PSAB) and the Pennsylvania State Association of Township Supervisors (PSATS). The Center is proud to partner with PSAB and PSATS and draw on their understanding and experience in planning and growth issues to develop, promote and conduct new courses.

The courses offered by PSAB are directed primarily at economic development and downtown revitalization efforts as alternatives to sprawl. The courses PSATS offers focus on best practices and conservation. The primary audience for education and training programs is local government officials, however, other groups such as professional planners, municipal solicitors, elected officials, and citizens, in general, can benefit from these enhanced planning programs.

A community or individual desiring information on planning or planning assistance, either financial or technical, should contact the appropriate Department of Community and Economic Development Regional Office in their area. Some of the issues that the Department's staff can provide assistance in are:

- Community planning and comprehensive plans;
- Zoning;
- Subdivision and land development;
- National Flood Insurance and Management;
- Other planning related areas such as Planned Residential Development provisions, historic districts, mobile home parks, sign control, etc.; and
- Procedural questions involving the Municipalities Planning Code.

Governor's Center for Local Government Services Regional Offices



- **Southwest**

Michael S. Foreman
(412) 565-5199

William D. Gamble
(412) 565-2552

Keith C. Robb
(412) 565-2361

Governor's SW Regional Office
1403A State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222
Fax: (412) 565-7983
- **Northwest**

Samuel Wagner
(814) 871-4189

Tony Mottle
(814) 871-4191

Governor's NW Regional Office
100 State Street, Suite 202
Erie, PA 16507
Fax: (814) 871-4896
- **Southcentral**

Mitch Hoffman
Governor's SC Regional Office
4th Floor, Commonwealth
Keystone Building
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(888) 223-6837
Fax: (717) 783-1402
- **Northcentral**

Kenneth P. Johnson
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Fax: (717) 783-1402
- **Southeast**

Bruce Fosselman
Governor's SE Regional Office
Bellevue
200 South Broad Street, 11th Floor
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(215) 560-2374 or (610) 530-8223
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- **Northeast**

Joseph Krumsky
Governor's NE Regional Office
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Pennsylvania Department of Community & Economic Development
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