

USE VARIANCES REVISITED by Richard Sheets

Prior to 1986, no one paid much attention to the practice of granting use variances. In fact, most municipal officials believed that use variances could not be granted. The Missouri Supreme Court believed otherwise. In Mathews v. Smith, the court ruled that a municipal board of adjustment does have authority to grant use variances. This decision caused many municipal officials to take notice of this previously unused practice. Why the concern? Municipal officials were concerned that by allowing the board of adjustment to grant use variances, the municipal zoning process would be undermined. In effect, the board of adjustment would be rezoning property. Efforts began shortly after the 1986 Missouri Supreme Court ruling to remove the statutory language authorizing the board of adjustment to grant use variances. It was not until 1992 that these attempts were successful. However, during the recent session of the General Assembly, the use variance language was placed back in the statutes.

What is a Variance?

There are two types of variances – area variances and use variances. An area variance allows a deviation from dimensional requirements of the zoning ordinance (yard setback, height). A use variance authorizes a land use that otherwise is prohibited in that zoning district.

Use variances are not an adequate substitute for the rezoning process and generally should not be granted. However, use variances are not inherently wrong. It is the reasons for which they are granted that cause problems. Granting of both types of variances can be a problem if granted for the wrong reasons. It is, therefore, important to understand what a variance is and under what circumstances it should be granted.

When developing a zoning ordinance, it is impossible to anticipate every special situation that might arise without making the ordinance unduly complicated. It is inevitable that some provisions of the zoning ordinance will produce practical difficulties. A typical example is where the topography of a particular lot makes it impossible to comply with normal front or side yard requirements. This is the primary reason state law requires the establishment of the board of adjustment and the granting of variances. Without the ability to grant variances everyone who alleges that the zoning ordinance is producing a hardship would have no choice but to take the issue to court.

Criteria For Granting Variances

The authority to grant variances should be exercised sparingly. Variances should be granted only when exceptional circumstances exist. Courts in Missouri and throughout the nation consistently have ruled that unique conditions must exist before variances can be granted. Before a variance is granted, the board of adjustment must determine:

1. That the property in question cannot reasonably be used for the purposes permitted in the district in which the property is located.

2. That issuance of the variance will not constitute a grant of special privilege to the property owner that is inconsistent with the permitted uses of other property in the same vicinity.
3. That the plight of the owner is due to unique circumstances that are not the general condition of the neighborhood and are not the result of the owner's actions.
4. That issuance of a variance will not be detrimental to the public welfare or health or injurious to other property nor contrary to the spirit and intent of the zoning ordinance.

It is the responsibility of the person requesting the variance to prove the existence of these conditions. It is the responsibility of the board of adjustment to determine whether the facts in the case prove that these conditions exist.

Variances are an important aspect of zoning. The ability to grant exceptions from the zoning ordinance in hardship situations adds an element of fairness to the zoning process. However, the integrity of the entire municipal zoning program will be jeopardized if inconsistent and arbitrary criteria are used to determine whether a variance should be granted.