

VARIANCES

“USE”

A “use” variance is granted only upon the finding of an “unnecessary hardship” which generally means that the property owner cannot make any economically viable use of the property under the current zoning restrictions. A “use” variance is an application for a deviation from the permitted uses in the subject zoning district. “Use” means exactly what it says, a “use” of the property as opposed to zoning restrictions on setbacks, building, height, etc. The standards for determining a “use” variance are generally called the “Duncan Factors”. They are as follows:

DUNCAN FACTORS

1. The variance request stems from a condition which is unique to the property at issue and not ordinarily found in the same zone or district;
2. The hardship condition is not created by actions of the applicant;
3. The granting of the variance will not adversely affect the rights of adjacent owners;
4. The granting of the variance will not adversely affect the public health, safety or general welfare;
5. The variance will be consistent with the general spirit and intent of the zoning code;
6. The variance sought is the minimum which will afford relief to the applicant; and
7. There is no other economically viable use which is permitted in the zoning district.
8. Whether the subject property is adequate to meet the needs and requirements of the proposed use.

“AREA/SIZE”

Variances for area, size and setback requirements are judged by a less stringent legal standard than for “use” variances, i.e. “practical difficulty” in meeting code requirements is all that is required to be shown by a property owner, NOT an “unnecessary hardship”. (“unreasonable hardship” standard cannot be applied for an “area” variance).

The factors to be considered and weighed to determine whether a property owner has encountered practical difficulties are (but are not limited to) the following:

1. Whether the property in question will yield a reasonable return or whether there can be any beneficial use of the property without the variance;
2. Whether the variance is substantial;
3. Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer substantial detriment as a result of the variance;
4. Whether the variance would adversely affect the delivery of governmental services (i.e. water, sewer, garbage);
5. Whether the property owner purchased the property with knowledge of the zoning restrictions;
6. Whether the property owner’s predicament feasibly can be obviated through some method other than a variance; and
7. Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting a variance.

8. Whether the property in question has unique or exceptional circumstances or conditions that do not generally apply to other properties in the vicinity and within the same district.

The **Duncan** opinion does not limit the analysis to only these eight factors. For example, municipalities have added such factors as: whether the property has unique physical characteristics, i.e. exceptional narrowness of the lot or irregular terrain; or whether the practical difficulty exists solely through the actions of the property owner. An appellate court in Ohio has, however, used the seven **Duncan** factors to uphold a zoning board's decision in spite of other standards in the municipal code that were different. The **Duncan** factors may likely be applicable to township zoning board rulings on variances, in general, as set forth in ORC 519.14 (see Zoning Inspector for referenced cases)