ADDITIONAL MISSOURI MATERIALS REGARDING
BOARDS OF ADJUSTMENT AND VARIANCES

Missouri Statutes

§ 89.080. Board of adjustment—appointment—term—vacancies—meetings. Such local legislative
body shall provide for the appointment of a board of adjustment, and in the regulations and restrictions
adopted pursuant to the authority of sections 89.010 to 89.140 may provide that the board of adjustment
may determine and vary their application in harmony with their general purpose and intent and in
accordance with general or specific rules therein contained. The board of adjustment shall consist of five
members, who shall be residents of the municipality except as provided in section 305.410. The
membership of the first board appointed shall serve respectively, one for one year, one for two years, one
for three years, one for four years, and one for five years. Thereafter members shall be appointed for terms
of five years each. Three alternate members may be appointed to serve in the absence of or the
disqualification of the regular members. All members and alternates shall be removable for cause by the
appointing authority upon written charges and after public hearing. Vacancies shall be filled for the
unexpired term of any member whose term becomes vacant. The board shall elect its own chairman who
shall serve for one year. The board shall adopt rules in accordance with the provisions of any ordinance
adopted pursuant to sections 89.010 to 89.140. Meetings of the board shall be held at the call of the
chairman and at such other times as the board may determine. Such chairman, or in his absence the acting
chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall
be open to the public. The board shall keep minutes of its proceedings, showing the vote of each member
upon question, or, if absent or failing to vote, indicating such fact, and shall keep records of its
examinations and other official actions, all of which shall be immediately filed in the office of the board
and shall be a public record. All testimony, objections thereto and rulings thereon, shall be taken down by
a reporter employed by the board for that purpose.

§ 89.090. Board of adjustment—powers

1. The board of adjustment shall have the following powers:

   (1) To hear and decide appeals where it is alleged there is error in any order, requirement,
decision, or determination made by an administrative official in the enforcement of sections 89.010
to 89.140 or of any ordinance adopted pursuant to such sections;

   (2) To hear and decide all matters referred to it or upon which it is required to pass under such
ordinance;

   (3) In passing upon appeals, where there are practical difficulties or unnecessary hardship in
the way of carrying out the strict letter of such ordinance, to vary or modify the application of any
of the regulations or provisions of such ordinance relating to the construction or alteration of
buildings or structures or the use of land so that the spirit of the ordinance shall be observed, public
safety and welfare secured and substantial justice done, provided that, in any city with a population
of three hundred fifty thousand or more inhabitants which is located in more than one county, the
board of adjustment shall not have the power to vary or modify any ordinance relating to the use
of land.

2. In exercising the above-mentioned powers such board may, in conformity with the provisions of
sections 89.010 to 89.140, reverse or affirm wholly or partly, or may modify the order, requirement,
decision or determination appealed from and may make such order, requirement, decision or determination
as ought to be made and to that end shall have all the powers of the officer from whom the appeal is taken. The concurring vote of four members of the board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance or to effect any variation in such ordinance except as provided in section 305.410.

§ 89.100. Board of adjustment—appeals, procedure. Appeals to the board of adjustment may be taken by any person aggrieved, by any neighborhood organization as defined in section 32.105 representing such person, or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken. An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of adjustment after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause immediate peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of adjustment or by a court of record on application or notice to the officer from whom the appeal is taken and on due cause shown. The board of adjustment shall fix a reasonable time for the hearing of the appeal, give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

§ 89.110. Board of adjustment—decisions subject to review—procedure. Any person or persons jointly or severally aggrieved by any decision of the board of adjustment, any neighborhood organization as defined in section 32.105 representing such person or persons or any officer, department, board or bureau of the municipality, may present to the circuit court of the county or city in which the property affected is located a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within thirty days after the filing of the decision in the office of the board. Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of adjustment to review such decision of the board of adjustment and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less than ten days and may be extended by the court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by such writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take additional evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which a determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review. Costs shall not be allowed against the board unless it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice in making the decision appealed from. All issues in any proceedings under sections 89.080 to 89.110 shall have preference over all other civil actions and proceedings.
§ 29-6.4(d)(2). Criteria for approval. The board may approve an application for a variance from the terms and provisions of this chapter if it determines that all of the following are true.

(i) General criteria.

(A) The variance is required to address practical difficulties or unnecessary hardships related to the shape, size, terrain, location or other factors of the applicant's site, those difficulties or hardships are not generally applicable to property in the area, and the difficulties or hardships were not created by the actions of the applicant;

(B) The variance will not have the effect of permitting a use of land that is not indicated as a permitted or conditional use in section 29-3.1 (permitted use table) in the zone district where the property is located, nor shall a variance be granted to modify a standard that operates as part of the definition of any use;

(C) The variance will not permit a development that is inconsistent with the adopted comprehensive plan;

(D) The variance is the least change from the requirements of this chapter necessary to relieve the difficulty or hardship; and

(E) The variance will not harm the public health, safety, or welfare or be injurious to other property or improvements in the area where the property is located. * * *

RELEVANT MISSOURI CASES

707 S.W.2d 411
Supreme Court of Missouri,
En Banc.

Jon MATTHEW, Appellant,
v.
Elton SMITH, et al., Members of the Board of
Zoning Adjustment, etc., James Brandt and Susan
Brandt, Respondents.

No. 67396.
March 25, 1986.

WELLIVER, Judge. This is an appeal from a circuit court judgment affirming the Board of Zoning Adjustment’s decision to grant Jim and Susan Brandt a variance. The Brandts purchased a residential lot containing two separate houses upon a tract of land zoned for a single-family use. The court of appeals reversed the circuit court judgment, and the case was then certified to this Court by a dissenting judge. We reverse and remand.

The Brandts own a tract of land comprising one and one-half plotted lots. When they purchased the property in March of 1980, there already were two houses on the land, one toward the front of Erie Street and one in the rear. Each of the buildings is occupied by one residential family as tenants of the Brandts. The two houses apparently have been used as separate residences for the past thirty years, with only intermittent vacancies. The property is zoned for Single Family Residences. At the suggestion of a city official, the Brandts applied for a variance which would allow them to rent both houses with a single family in each house. After some delay, including two hearings by the Board of Zoning Adjustment of Kansas City, the Board granted the application. Appellant, Jon Matthew, a neighboring landowner challenged the grant of the variance and sought a petition for certiorari from the Board’s action. § 89.110, RSMo 1978. The circuit court affirmed the Board’s order; on appeal, the court of appeals held that the Board was without authority to grant the
requested variance. A dissenting judge certified the case to this Court.

Prompted by the persuasive opinions of both the majority of the Western District and the dissenting judge who certified the case to this Court, we believe that a review of the applicable law is warranted.

Zoning law developed during the early part of this century as a mechanism for channeling growth. Zoning acts authorize municipalities to pass ordinances, which designate the boundaries for districts and which define the allowable land uses in such districts. Board of Zoning Adjustments (Appeals) were created to review specific applications of the zoning ordinances.

Under most zoning acts, these boards have the authority to grant variances from the strict letter of the zoning ordinance. The variance procedure “fulfill[s] a sort of ‘escape hatch’ or ‘safety valve’ function for individual landowners who would suffer special hardship from the literal application of the ... zoning ordinance.” *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 633 (Alaska 1979). See also A. Rathkopf, 3 The Law of Zoning and Planning § 38 (1979); N. Williams, 5 American Planning Law § 129.05 (1985); Greenawalt v. Zoning Board of Adj. of Davenport, 345 N.W.2d 537, 541 (Iowa 1984); Ouimet v. City of Somersworth, 119 N.H. 292, 402 A.2d 159, 161 (1979); Otto v. Steinhiber, 282 N.Y. 71, 24 N.E.2d 851, 852 (1939); Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140, 142 (1980). It is often said that “[t]he variance provides an administrative alternative for individual relief that can avoid the damage that can occur to a zoning ordinance as a result of as applied taking litigation.” D. Mandelker, Land Use Law, at 169 (1982). The general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances. See e.g., A. Rathkopf, supra, § 37.06, at 69; Ivancovich v. City of Tucson Bd. of Zoning Adj., 22 Ariz.App. 530, 529 P.2d 242, 247 (1974); Lovely v. Zoning Bd. of Appeals of City of Presque Isle, 259 A.2d 666 (Me.1969); Brown v. Beuc, 384 S.W.2d 845, 851 (Mo.App.1964); Kensington South v. Zoning Bd. of Adj., 80 Pa.Cmwlth. 546, 471 A.2d 1317, 1319 (1984).

Both the majority of courts and the commentators recognize two types of variances: an area (nonuse) variance and a use variance.

The two types of variances with which cases are customarily concerned are “use” variances and “nonuse variances.” The latter consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.

As the name indicates, a use variance is one which permits a use other than one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed “area variances.”


Past decisions in this State have placed Missouri within those jurisdictions not permitting a use variance. This line of cases would suggest that the Brandts are not entitled to the variance. They seek a variance to use the property in a manner not permitted under the permissible uses established by the ordinance. The ordinance clearly permits only the use of the property for a single family residence. § 8.A(1) North Kansas City Zoning Ordinance. The applicant is not seeking a variance from the area and yard restrictions which are no doubt violated because of the existence of the second residence. § 8.B–G North Kansas City Zoning Ordinance. Such an area variance is not necessary because the applicant has a permissible nonconforming structure under the ordinance. § 5.B North Kansas City Zoning Ordinance.

Commentators, however, have questioned the rationale underlying the Missouri cases. See e.g., A. Rathkopf, *supra*, § 37.02, at 25 n. 4; N. Williams, *supra* § 132.02, at 33–4. These past cases, beginning with *State ex rel. Nigro v. Kansas City*, 325 Mo. 95, 27 S.W.2d 1030 (Mo. banc 1930), are based upon the premise that the granting of a use variance would be an unconstitutional delegation of power to the Board to amend the ordinance. See generally Mandelker, “Delegation of Power and Function In Zoning Administration,” 1963 Wash. U.L.Q. 60, 68–71. This view has long since been repudiated by most jurisdictions, and it is contrary to the express language of § 89.090, RSMo.
1978, which grants the Board the “power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land” (emphasis added). We, therefore, hold that under the proper circumstances an applicant may obtain a use variance.

Section 89.090, RSMo 1978 delegates to the Board of Adjustment the power to grant a variance when the applicant establishes “practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance ... so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.” Missouri lifted this language out of the 1920 amendment to the General City Law of New York, which provided:

Where there are practical difficulties in the way of carrying out the strict letter of such ordinance, the board of zoning appeals shall have the power to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures, or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.

The New York statute served as the first general model for other jurisdictions; soon thereafter, however, many states adopted the Standard Zoning Act that had been prepared in the early 1920’s under the aegis of the United States Department of Commerce. Section 7 of the Act provides:

To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

See N. Williams, supra, § 130.01, at 21. The standards set forth in these two models, however, only became meaningful after being interpreted by the courts. See N. Williams, supra, § 131.02, at 28.

Almost all jurisdictions embellished the general concepts of “unnecessary hardship” or “practical difficulties” by further defining the conditions an applicant must satisfy before obtaining a variance. Quite often, local zoning ordinances “summarize that case law by spelling out the same more specific standards in the ordinance, for the convenience of everybody.” N. Williams, supra, § 131.02, at 28. The North Kansas City Ordinance, for example, provides in part:

Section 27. Board of Adjustment.

A. Purpose. The board of adjustment may grant variances from the provisions of this ordinance in harmony with its general purpose and intent and may vary them only in specific instances hereinafter set forth. The board of adjustment, based on standards hereafter prescribed and after hearing, may decide that there are practical difficulties or particular hardship in the way of carrying out the strict letter of these regulations. The concurring vote of four members of the board shall be necessary to reverse any order, requirement or decision of the party appealed from or to issue an order or variance or to decide in favor of an appellant.

B. Standards.

1. The board of adjustment may vary the provisions of this ordinance as authorized in this section, but only when it shall have made findings based upon evidence presented to it in the following specific cases:

(a) That the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations governing the district in which it is located;

(b) That the plight of the owner is due to unique circumstances; and

(c) That the variance, if granted, will not alter the essential character of the locality.

Local ordinances may further define the power of the Board of Adjustment to grant a variance, but they may not conflict with the statutory criteria and how courts have interpreted those criteria. This explains why courts examine a Board’s decision under the standard expressed in the statute and established through case law. See generally N. Williams, supra, §§ 131.01, .02.

Unfortunately, any attempt to set forth a unified structure illustrating how all the courts have treated these conditions would, according to Professor Williams, prove unsuccessful. Williams observes that the law of variances is in “great confusion” and that aside from general themes any further attempt at unifying the law indicates “either (a) [one] has not read the case law, or (b) [one] has simply not understood it. Here far more than elsewhere in American planning law, muddle reigns supreme.” N. Williams, supra, § 129.01, at 12. Yet, four general themes can be distilled from variance law and indicate what an applicant for a variance must prove:

(1) relief is necessary because of the unique character of the property rather than for personal considerations; and

(2) applying the strict letter of the ordinance would result in unnecessary hardship; and the
(3) imposition of such a hardship is not necessary for the preservation of the plan; and

(4) granting the variance will result in substantial justice to all.

See A. Rathkopf, supra, § 37.06; N. Williams, supra, § 129.06. Although all the requirements must be satisfied, it is generally held that “unnecessary hardship” is the principal basis on which a variance is granted.” D. Mandelker, Land Use Law, at 167. See also A. Rathkopf, supra, § 38.02, at 17; N. Williams, supra, § 129.06, at 15.

Before further examining the contours of unnecessary hardship, jurisdictions such as Missouri that follow the New York model rather than the Standard Act need to address the significance of the statutory dual standard of “unnecessary hardship” or “practical difficulties.” Generally, this dual standard has been treated in one of two ways. On the one hand, many courts view the two terms as interchangeable. D. Hagman, Urban Planning & Land Development Control Law § 111, at 205 (1975). See also A. Rathkopf, supra, § 37.02, at 24. E.g., McClurkan v. Bd. of Zoning Appeals, 565 S.W.2d 495, 497 (Tenn.App.1977); Currey v. Kimple, 577 S.W.2d 508 (Tex.Ct.Civ.App.1978). On the other hand, a number of jurisdictions follow the approach of New York, the jurisdiction where the language originated, and hold that “practical difficulties” is a slightly lesser standard than “unnecessary hardship” and only applies to the granting of an area variance and not a use variance. D. Mandelker, Land Use Law, at 167; A. Rathkopf, supra, § 38.01, at § 38.05. E.G., Puritan-Greenfield Improvement Association v. Leo, 7 Mich.App. 659, 153 N.W.2d 162, 166 (1967); Village Bd. of Fayetteville v. Jarrold, 53 N.Y.2d 254, 440 N.Y.S.2d 908, 423 N.E.2d 385 (1981); Kisil v. City of Sandusky, 12 Ohio St.3d 30, 465 N.E.2d 848, 851 (1984). See also Ivancovich v. City of Tucson Bd. of Adj., 22 Ariz.App. 530, 529 P.2d 242, 250 (1974); Monaco v. District of Columbia, Etc., 409 A.2d 1067, 1072 (D.C.App.1979); Metropolitan Bd. of Zoning v. McDonald’s Corp. 481 N.E.2d 141, 146 (Ind.App.1985) (statutorily required). The rationale for this approach is that an area variance is a relaxation of one or more incidental limitations to a permitted use and does not alter the character of the district as much as a use not permitted by the ordinance.

In light of our decision to permit the granting of a use variance, we are persuaded that the New York rule reflects the sound approach for treating the distinction between area and use variances. To obtain a use variance, an applicant must demonstrate, inter alia, unnecessary hardship; and, to obtain an area variance, an applicant must establish, inter alia, the existence of conditions slightly less rigorous than unnecessary hardship.6

While today we enter a field not yet developed by case law in our own jurisdiction, other jurisdictions provide some guidance for determining what is required to establish unnecessary hardship when granting a use variance. It is generally said that Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851, 853 (1939) contains the classic definition of unnecessary hardship:

Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.

Quite often the existence of unnecessary hardship depends upon whether the landowner can establish that without the variance the property cannot yield a reasonable return. “Reasonable return is not maximum return.” Curtis v. Main, 482 A.2d 1253, 1257 (Me.1984). Rather, the landowner must demonstrate that he or she will be deprived of all beneficial use of the property under any of the permitted uses:

A zoning regulation imposes unnecessary hardship if property to which it applies cannot yield a reasonable return from any permitted use. Lack of a reasonable return may be shown by proof that the owner has been deprived of all beneficial use of his land. All beneficial use is said to have been lost where the land is not suitable for any use permitted by the zoning ordinance.


Whether the existing zoning permits of a reasonable return requires proof from which can be determined the rate of return earned by like property in the community and proof in dollars and cents form of the owner’s investment in the property as well as the return that the property will produce from the various uses permissible under the existing classification.

N. Westchester Prof. Park v. Town of Bedford, 60 N.Y.2d 492, 470 N.Y.S.2d 492, 458 N.E.2d 809, 814 (1983). Such pronouncements and requirements of the vast majority of jurisdictions illustrate that, if the law of variances is to have any viability, only in the exceptional case will a use variance be justified.

The record before this Court is fraught with personality conflicts and charges of bias on the part of one of the Board members.7 Also, the record is without sufficient evidence to establish unnecessary hardship.4 The only evidence in the record is the conclusory opinion of Brandt that they would be deprived of a reasonable return if not allowed to rent both houses. No evidence of land values was offered; and, no dollars and cents proof was presented to demonstrate that they would be deprived of all beneficial use of their property. Appellant, in fact, was not permitted to introduce such evidence. The Board, therefore, was without authority to grant a use variance upon this record.

The record, however, indicates that the Brandts may be entitled to a nonconforming use under the ordinance. A nonconforming use differs from a variance. Nonconforming uses are those that are in existence prior to and at the time of adoption of the zoning ordinance and which have been maintained from that time to the present. See Missouri Rock, Inc. v. Winholz, 614 S.W.2d 734, 739 (Mo.App.1981). See generally D. Mandelker, Land Use Law, at 134; N. Williams, supra, at § 115.03 (1965). Both the trial court and counsel for the Board suggest that the Brandts “may very well have a valid nonconforming use of the premises in question.” We do not believe that anything in the record indicates that the Brandts have waived their right to or abandoned their claim of a nonconforming use.

The judgment of the circuit court is reversed and the cause is remanded back to the circuit court with directions that the cause be remanded back to the Board of Adjustment with directions that the applicants be permitted to present evidence warranting the grant of a variance and to amend their application to claim a nonconforming use of the premises and for such hearing and decision as may be required consistent with this opinion.

ROBERTSON, Judge, concurring in result. I concur in the result reached by the principal opinion; however, I disagree with the reasoning by which the opinion reaches that result.

The property for which the variance is sought in the present case is improved with two single-family dwellings. The house nearest the street is the original dwelling on the parcel. The other house is a renovation of, and addition to, the former garage, located on the back of the parcel. The other house is a renovation of, and addition to, the former garage, located on the back of the parcel. The zoning ordinance in question defines “lot” as follows:

A parcel of land occupied by, or intended for occupancy by, one principal building, unified groups [sic] of buildings for principal use, and having access to a public street. A lot may be one or more platted lots, or tracts as conveyed, or parts thereof.

North Kansas City Code, Appendix A § 3(7), p. 477.

In the applicable zone, the “permitted uses” are defined to include “dwellings, one-family.” Id. §§ 7, 8, pp. 489–91. The zoning ordinance defines the pertinent “[l]ot area per family” as follows:

Every dwelling hereafter constructed, reconstructed, moved or altered shall provide a lot area of not less than three thousand eight hundred fifty square feet per family.
Id. § 8, pp. 491–92. The property on which the two houses are situated apparently contains approximately one and one-half times the number of square feet required for a single one-family residence.1

The back house was built several decades prior to the enactment of the zoning ordinance. However, there is some question whether occupancy of both houses as single-family dwellings would be acceptable under the ordinance as a pre-existing nonconforming use, since there may have been a lapse in occupancy terminating that status. The property owner therefore requested and obtained a variance to excuse strict compliance with the requirements of the zoning ordinance.

In its analysis prefatory to concluding that the judgment must be reversed, the principal opinion proceeds on the assumption that the variance requested here would be characterized under the “New York model” as a “use” variance, rather than a “non-use” or “area” variance. In distinguishing between the two, the discussion quoted by the principal opinion from Rathkopf’s Law of Zoning and Planning is apropos, with the addition of the sentence which follows the quoted language.

The two types of variances with which cases are customarily concerned are “use” variances and “nonuse variances.” The latter consist mostly of variances of bulk restrictions, of area, height, density, setback, side line restrictions, and restrictions covering miscellaneous subjects, including the right to enlarge nonconforming uses or to alter nonconforming structures.

As the name indicates, a use variance is one which permits a use other than the one of those prescribed by the zoning ordinance in the particular district; it permits a use which the ordinance prohibits. A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to required yards. Variance made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed “area variances.” These may consist of a variance of the minimum required area of lot for a permitted use, (the most common “area” variance) or a variance of the required width of the lot or its frontage on a street.

Rathkopf, 3, The Law of Zoning and Planning, § 38.01, pp. 38–1, –2 (1979) [emphasis added].

That part of the variance which alters the requirement imposed by § 3 that each lot on which principal residences are located have “access to a public street” is equivalent to a requirement that a lot have “frontage on a street.” Such a variance is therefore an “area” variance. Id. That part of the variance which alters the requirement that principal residences in the zone occupy a minimum of 3,850 square feet is also clearly an area variance. Hoffman v. Harris, 17 N.Y.2d 138, 216 N.E.2d 326, 269 N.Y.S.2d 119 (1966).

The North Kansas City Zoning Ordinance defines “use” as

The purpose or activity for which the land or building thereon is designed, arranged or intended, or for which it is occupied or maintained.

North Kansas City Code, Appendix A § 3(7), p. 481. In the context of multiple-family dwellings, the New York Court of Appeals stated that

... in an area zoned for apartment houses, to seek a variance of height, floor area, and density is to seek an area variance because the essential use of a land is not being changed. In such a situation, the essential use remains the same (apartments), although the particulars (height, lot area, floor area ratio) of said use may be different.


In Hoffman, two residences were situated on one parcel of land comprising just over two acres. The land was zoned for single-family residences, with a lot area requirement of two acres per residence. One of the residences had been the main house of a larger estate, and the other had been the “gatehouse.” At the time the zoning ordinance came into effect, the gatehouse had been occupied by the gardener for the main house, a permitted “accessory” use in the zoning district. Subsequently, however, the gatehouse was rented to a family who were not employed in the main house. Such a use was not a pre-existing nonconforming use, and a variance was therefore requested to excuse compliance with the zoning ordinance. The Board of Zoning Appeals granted the variance and the Court of Appeals affirmed, holding that the variance sought was an “area” variance rather than a “use” variance, and that proof of “practical difficulties” alone was therefore sufficient. Id., 216 N.E.2d at 330, 269 N.Y.S.2d at 124; see also Rathkopf, supra at p. 38–47 (citing Hoffman as a case to be “looked to for guidance” on the question of establishing “practical difficulties”). Hoffman is indistinguishable from the present case, and clearly establishes that the variance involved here is an “area” variance under the New York model.2

Because the present case does not involve a “use” variance, it is not necessary to address, as the principal opinion does, whether Missouri has historically rejected variances of that type. This Court has never held that “use” variances are prohibited, notwithstanding proof of “unnecessary
hardship,” although two Court of Appeals cases have arguably so held. State ex rel. Meyer v. Kinealy, 402 S.W.2d 1 (Mo.App.1966); State ex rel. Sheridan v. Hudson, 400 S.W.2d 425 (Mo.App.1966); contra, Beckmeyer v. Beuc, 367 S.W.2d 9 (Mo.App.1963).

Both the Meyer and Sheridan cases attribute their holdings to this Court’s opinion in State ex rel. Nigro v. Kansas City, 325 Mo. 95, 27 S.W.2d 1030 (Mo. banc 1930). In that case, a variance was sought to construct and use for retail business purposes a new building, to be situated on one corner of an intersection, on property zoned for residential purposes. The basis for the owner’s request was that the other three corners of the intersection were zoned for businesses, that new residential development in the area would create more need for retail businesses, and that denial of the variance would deprive him of potential profits. The circuit court reversed the zoning board’s denial of the variance, and this Court reversed the circuit court’s judgment, holding that the evidence did not demonstrate “practical difficulties” or “unnecessary hardship” within the meaning of both the zoning ordinance and the relevant statute, so as to authorize a variance. This Court also commented that

if in a specific case the enforcement of a regulation according to its strict letter would cause unnecessary hardship and the board can by varying or modifying the application of the regulation obviate the hardship and at the same time fully effectuate the spirit and purpose of the ordinance, they are authorized to so vary or modify the application. But the board can in no case relieve from a substantial compliance with the ordinance; their administrative discretion is limited to the narrow compass of the statute; they cannot merely pick and choose as the individuals of whom they will or will not require a strict compliance with the ordinance.

Id. 27 S.W.2d at 1032. This Court also stated that, rather than seeking to establish the statutory standards for a variance, the landowner was in fact asking the board of zoning appeals to “rezone” property, which the board was not empowered to do. Id. Nothing in the Nigro opinion requires the conclusion that “use” variances are categorically prohibited under the statutory standard.1

Notwithstanding that the variance involved here is an “area” variance rather than a “use” variance, the ordinance itself requires proof which is similar to the “unnecessary hardship” standard as it is described by the principal opinion. Under the ordinance, the board is authorized to grant a variance only if it is demonstrated “[t]hat the property in question cannot yield a reasonable return if permitted to be used only under the conditions allowed by the regulations governing the district in which it is located....” North Kansas City Ordinance, Appendix A, § 27(B)(1)(a). It is the application of this standard that requires that the judgment in the present case be reversed and remanded.

As the principal opinion notes, proof under the “reasonable return” standard cannot be made by mere lay opinion, without a showing of the facts upon which such an opinion could be based. Such evidence was not before the board in the present case, and was in fact rejected when offered. In light of this deficiency, the board’s decision was unlawful, and the judgment affirming that decision must be reversed. Remand is advisable, however, to permit the landowners to submit proof under this standard if available.

I therefore concur in the principal opinion only to the extent of the result reached.

BLACKMAR, Judge, concurring. The property owner has laid the foundation for the grant of a variance by showing that two separate houses were located on a single lot at the time the zoning ordinance was adopted. There would be a substantial waste if habitable structures were required to be torn down. This showing should permit the Board to find, in its discretion, after hearing all evidence, that the tests of “unnecessary hardship” and “practical difficulties” are met.

Rate of return is an important consideration. Although initial cost may not be a controlling circumstance in determining the base from which reasonable return is to be calculated, it is a starting point. The Board was plainly wrong in denying the plaintiff the right to inquire about the initial cost. This error taints the hearing, and the order based on it cannot stand.

I concur, therefore, in the judgment of reversal and remand to the Board.
Footnotes


2 Treatise writers observe that Missouri cases establish that a use variance is not authorized. A. Rathkopf, supra, § 37.02 at 25; N. Williams, supra, § 132.02, at 33. See e.g., State ex rel. Negro v. Kansas City, 325 Mo. 95, 27 S.W.2d 1030, (1930); Rosedale-Skinker Imp. Ass'n v. Bd. of Adj. of St. Louis, 425 S.W.2d 929 (Mo.1968); State v. Kinealy, 402 S.W.2d 1, 5 (Mo.App.1966); State ex rel. Sheridan v. Hudson, 400 S.W.2d 425 (Mo.App.1966); Brown v. Beuc, 384 S.W.2d 845, 851 (Mo.App.1964); Bartholomew v. Bd. of Zoning Adj., 307 S.W.2d 730 (Mo.App.1958).

3 Initially, these statutes were challenged as constituting an overly vague delegation of legislative power. The majority of jurisdictions rejected such challenges, noting that courts would add further substance to the general language. See generically N. Williams, supra, § 132.02, at 29. See also Puritan-Greenfield Imp. Ass'n v. Leo, 7 Mich.App. 659, 153 N.W.2d 162, 167 n. 16 (1967).

4 Some courts, however, have held that such ordinances may not vary from the statutory language. See N. Williams, supra, § 131.02. Our statute requires that the ordinance be in harmony with the "general purpose and intent of the statute and be 'in accordance with [the] general or specific rules of the statute." § 89.080, RSMo 1978.

5 In City of Bor. of Juneau v. Thibodeau, 595 P.2d 626 (Alaska (1979), the court observed that in those cases adopting the "practical difficulties" test for area variances the standards (practical difficulties or unnecessary hardship) were phrased in the disjunctive, but when phrased in the conjunctive both standards must be satisfied.

6 Because the case law in this state focuses on the granting of area variances and does not reflect the widely held approach for defining unnecessary hardship, these cases still establish the guidelines for when an area variance may be granted due to "practical difficulties," regardless of the language used therein. E.g., Brown v. Beuc, 384 S.W.2d 845 (Mo.App.1964).

7 We need not reach appellant's charge of bias. Suffice it to say, that the Board acts as a quasi-judicial body and must assure a fair and impartial hearing. See generically D. Mandelker, Land Use Law, at 184–85; A. Rathkopf, supra, § 37.02, at 35; § 37.07, at 90.

8 The Constitution requires that the decision of the Board be reviewed to determine if it is authorized by law and supported by competent and substantial evidence. Mo. Const. art. V, § 18. When the Brandts initially applied for a variance and a hearing was held, there were no minutes of the proceeding and the circuit court had to send the case back to the Board before it could review the Board's order. Nothing in the record indicates why this occurred, but the statute expressly requires that such minutes be transcribed:

* * * All meetings of the board shall be open to the public. The board shall keep minutes of its proceedings, ... All testimony, objections thereto and rulings thereon, shall be taken down by a reporter employed by the board for that purpose.

§ 89.080, RSMo 1978. Compliance with this requirement is necessary if there is to be any meaningful review exercised by the circuit court upon the issuance of a writ of certiorari, which may:

If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take additional evidence or appoint a referee to take such evidence as it may direct and report the same to the court with his findings of fact and conclusions of law, which shall constitute a part of the proceeding upon which a determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.

§ 89.110, RSMo 1978. Cf. Board of Zoning Adjustment v. Mayfair Homes 634 S.W.2d 246, 248–49 (Mo.App.1982); Volkman v. City of Kirkwood, 624 S.W.2d 58, 59 n. 1 (Mo.App.1981). Although the circuit court does not exercise de novo review, the statute nonetheless contemplates a meaningful review that may extend beyond the record before the Board. While not deciding the point, it might be noted that both the ordinance and a growing number of jurisdictions suggest that the Board should issue findings of fact. See generically D. Mandelker, Land Use Law, at 172; H. Nichols, Powers & Duties of the Zoning Bd. of Adj., printed in 1975 Institute on Planning, Zoning & Eminent Domain 121; N.

That part of the judgment denying appellant costs and damages is affirmed.

The testimony and the parties refer to the property as constituting one and one-half “lots.” The ordinance contains a provision that, in single-family zoning districts, dwellings are to be “located on a lot,” and that “there shall be no more than one principal building on one lot except as may be approved in the planned zoning process.” Id. § 4(C), p. 483. Since the definition of “lot” applicable under the zoning ordinance has no relation to platted lots, and pertains only to parcels occupied by “one principal building,” this provision is superfluous and adds nothing to the pertinent zoning restrictions. Furthermore, since the term “lot” refers to no other particular standard, it may be presumed that the “lot” referred to is the “lot area” required for a single-family dwelling.

Were the variance involved here actually a “use” variance, the ordinance would appear to prohibit it under any circumstance. The ordinance conditions the authority of the board to grant a variance on proof “[t]hat the variance, if granted, will not alter the essential character of the locality.” North Kansas City Code, Appendix A § 27(B)(1)(c). This language is presumably derived from Wilcox, supra, which described an “area” variance as one involving “no change in the essential character of the zoned district.” Id. 217 N.E.2d at 634, 270 N.Y.S.2d at 571. However, since the variance here is not a “use” variance, this problem is not before us.

The remaining cases cited by the principal opinion in footnote 2 do not address the prohibition of “use” variances. Two of them concern “area” variances. Rosedale-Skinker Improvement Assn., Inc. v. Bd. of Adj. of St. Louis, 425 S.W.2d 929 (Mo. banc 1968); Brown v. Beuc, 384 S.W.2d 845 (Mo.App.1964). The third held that a board of zoning adjustment was not authorized to grant a “use” variance on the ground of financial hardship. Bartholomew v. Bd. of Adj. of Kansas City, 307 S.W.2d 730, 733 (Mo.App.1957).

ANTIOCH COMMUNITY CHURCH, Respondent,

v.

BOARD OF ZONING ADJUSTMENT OF the CITY OF KANSAS CITY, Missouri, Appellant.

No. SC 96215

Opinion issued April 3, 2018

I. FACTUAL AND PROCEDURAL BACKGROUND

Antioch Community Church is located in the northern part of Kansas City, Missouri, on Antioch Road. Traffic is heavy on Antioch Road, a major thoroughfare with almost 14,000 vehicles passing by the Church daily. While other parts of Antioch Road are commercially developed, the church building is situated on a one-mile stretch of Antioch Road passing through a residential area zoned for single-family homes. The church building is immediately surrounded by single-family homes in all directions and, when standing on the church lot, one can see only single-family homes. But commercially zoned areas, including stores and gas stations, are located approximately half a mile to both the north and south of the Church.

More than 60 years ago, the Church placed a brick “monument” sign with a 36” x 42” manual display in front
of the church building and perpendicular to Antioch Road. Like similar monument signs in front of churches everywhere, the sign was used to display messages about such matters as the name of the pastor and the time for Sunday services. The sign worked by opening the glass front and forming the message by hanging changeable individual letters on rows of cup hooks behind the glass.

In 2010, using $11,426 from the bequest of a church member, the Church upgraded its monument sign to include a digital display in place of the individual removable hanging letters. The Church says this allowed it to increase the number of messages it could display while simultaneously making the messages easier and safer for motorists to view. This also allowed the church members to change the messages electronically from inside the church building, without the need for someone to go outside, open up the sign window, and replace the changeable lettering by hand. The Church credits the digital display for attracting several new members.

The Church sought neither a permit nor a variance prior to its 2010 installation of the digital lettering on its monument sign. While Kansas City’s zoning and development code permits institutions (such as schools and churches) located in residential areas to have monument signs, until 2015 institutions in residential zones could have only “[o]ne monument sign per street frontage which ... may include changeable copy, but the changeable copy feature must use direct human intervention for changes and may not include any form of digital or electronic display.” KANSAS CITY, MO., ZONING AND DEVELOPMENT CODE § 88-445-06-A-4 (2011).1 Beginning in 2015, an exception was adopted for institutions located on property of more than 10 to 15 acres, but the Church’s property was too small to qualify under this provision. KANSAS CITY, MO., ZONING AND DEVELOPMENT CODE § 88-445-11-B(2) (2015).

Approximately one year after the Church added the digital display to its monument sign, Kansas City issued a citation to the Church for violating section 88-445-06-A-4(a). The Church appealed the citation to the BZA, but before the appeal could be heard, the Church filed an application with the BZA for a variance “to allow [a] digital display on [the] existing monument sign.” The Church relied in part on section 88-445-12 of the zoning code, which provides, in relevant part, that the BZA “may grant variances to the requirements for signs, except as to type and number.” Id. (emphasis added).

After a public hearing, the BZA rejected the Church’s request for a variance because it determined the addition of a digital display would change the “type” of sign from a monument sign to a digital sign in violation of section 88-445-12 of the zoning code. The BZA also said it denied the variance because it found even if the addition of a digital display did not change the sign “type,” the Church “failed to establish [the] undue hardship or practical difficulty” necessary for granting a variance.3

The BZA had put the Church’s appeal of the citation for violating the sign ordinance on hold while the variance request was being considered, as the parties agreed granting the variance would have mooted the citation. Once the variance was denied, the BZA held a hearing on the Church’s appeal of the zoning violation citation at which the Church claimed that if residential zoning prohibited it and other churches of its size from using digital signs, then the zoning unconstitutionally deprived the Church of the opportunity to express religious messages to the public. The BZA found against the Church on the citation.

The Church filed a petition for writ of certiorari in the Clay County circuit court as to both the BZA’s denial of the variance request and its decision on the appeal of the citation. The petition was later supplemented to include a second count asking the court to find the zoning code’s prohibition against digital monument signs unconstitutionally discriminates against churches because it permits digital signs only on property larger than 10 to 15 acres, and most churches are located on smaller lots. The supplemental petition attempted to add the City of Kansas City as a defendant, but before service was made on the city the circuit court ruled in the Church’s favor on its claim the BZA erred in denying the variance.

The circuit court found in favor of the Church on two grounds: (1) the addition of digital lettering was not a change in sign type so the BZA had the authority to grant the variance; and (2) the Church adequately established the existence of “practical difficulties” so the denial of the variance was not supported by competent and substantial evidence. Because the circuit court found in favor of the Church on these grounds, it entered judgment for the Church without reaching the issues raised in the appeal of the citation. As Kansas City had not been made a party, and as the court had resolved the case on other grounds, the court also did not reach any issue regarding the constitutional validity of the sign requirement the Church sought to raise in its unserved supplemental petition. The BZA appealed. After decision by the court of appeals, this Court granted transfer. Mo. Const. art. V, § 10; Rule 83.02.

II. STANDARD OF REVIEW

An appellate court “reviews the findings and conclusions of the BZA and not the judgment of the trial court.” State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City, 24 S.W.3d 681, 684 (Mo. banc 2000). The scope of this Court’s review is governed by article V, section 18 of the
Missouri Constitution, which provides judicial review of an agency decision “shall include the determination whether the [decision is] authorized by law, and in cases in which a hearing is required by law, whether the [decision is] supported by competent and substantial evidence upon the whole record.” This means the “scope of judicial review of the decisions of the board of adjustment in a zoning proceedings is limited to a determination of whether the ruling is authorized by law and is supported by competent and substantial evidence upon the whole record.” Rosedale-Skinker Improvement Ass’n v. Bd. of Adjustment of City of St. Louis, 425 S.W.2d 929, 936 (Mo. banc 1968); see also Matthew v. Smith, 707 S.W.2d 411, 418 (Mo. banc 1986).

The question whether the decision is authorized by law is a legal question this Court determines de novo. Teefey, 24 S.W.3d at 684. Determining whether the decision is supported by competent and substantial evidence “does not mean that the reviewing court may substitute its own judgment on the evidence for that of the administrative tribunal.” Mann v. Mann, 239 S.W.2d 543, 544 (Mo. App. 1951). Rather, “an appellate court must view the evidence and reasonable inferences therefrom in a light most favorable to the decision.” Teefey, 24 S.W.3d at 684. The burden is on the party seeking the variance to demonstrate it should be granted. Baumer v. City of Jennings, 247 S.W.3d 105, 113-14 (Mo. App. 2008); USCOC of Greater Mo. v. City of Ferguson, Mo., 583 F.3d 1035, 1043 (8th Cir. 2009) (Missouri places the burden of demonstrating a practical difficulty on the party requesting the variance).

To the extent Highlands Homes Association v. Board of Adjustment, 306 S.W.3d 561, 565 (Mo. App. 2009), State ex rel. Branum v. Board of Zoning Adjustment of City of Kansas City, Mo., 85 S.W.3d 35, 39 n.1 (Mo. App. 2002), Hutchens v. St. Louis County, 848 S.W.2d 616, 617 (Mo. App. 1993), and similar cases suggest the “competent and substantial evidence” standard is used only when reviewing use variances, and an abuse of discretion standard is used when reviewing nonuse variances, they are incorrect and should no longer be followed. Missouri’s constitution specifically mandates the standard of review for variances is whether the decision is supported by competent and substantial evidence. It does not distinguish between types of variances, and this Court has no authority to depart from that standard. Mo. Const. art. V, § 18; Matthew, 707 S.W.2d at 418 n.8.

III. GRANT OF A VARIANCE ALLOWING DIGITAL LETTERING ON A MONUMENT SIGN WAS AUTHORIZED BY LAW

Section 88-810 defines “Sign Type” as a “group or class of signs that are regulated, allowed or not allowed in this code as a group or class.” It then lists and defines several possible sign types, such as monument signs, wall signs, digital signs, and electronic signs. Id.

The BZA suggests it had no authority to grant the Church’s request for a variance. In support, the BZA argues because digital signs are defined as signs having digital lettering, this means the Church’s addition of digital lettering to its monument sign must have changed the sign type from a monument sign to a digital sign. And, the BZA notes, section 88-445-12 prohibits it from granting a variance changing the sign type. The BZA concludes this means it was without authority to grant the Church a variance to add digital lettering to its monument sign.

The Church counters that the type of lettering on a sign is not included in the zoning code’s definition of what type of sign is a “monument sign.” It is correct. Section 88-810 defines a “monument sign” as a “sign placed upon a base that rests upon the ground where the width of the base of the sign is a minimum of 75 percent of the width of the longest part of the sign.” The Church’s sign fit within this definition of “monument sign” both before and after the change in the lettering from manual to digital, for the zoning code’s definition of “monument sign” does not include any language about what kind of lettering is required on a monument sign. It is a different section of the zoning code—section 88-445-06-A-4(a)—that prohibits “any form of digital or electronic display” on monument signs in residential areas. The digital lettering, not barred by the definition of monument sign, simply makes the Church’s sign one that fails to comply with one of the other requirements a monument sign should meet.

The BZA’s narrower interpretation of what constitutes a monument sign appears to be premised on the belief a sign can be of only one sign type at a time, which would mean a monument sign, by definition, cannot include a digital display as the zoning code provides that a sign with a digital display is a digital sign. The language of the zoning code does not support the BZA’s premise.

This Court interprets ordinances using “the same general rules of construction as are applicable to the statutes of the state.” Fleming v. Moore Bros. Realty Co., 363 Mo. 305, 251 S.W.2d 8, 15 (Mo. 1952). When interpreting a statute, “no portion of [it] is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions.” Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1, 4 (Mo. banc 2012). This means the definition of monument sign in section 88-810 must be harmonized with other sections of the zoning code.

Looking at the zoning code as a whole, it is evident the sign types set out in the code are inherently overlapping. For example, section 88-445-06-A-4(b) includes “wall signs” among the type of signs allowed in residential areas but
then regulates their use of digital lettering. While wall signs with digital lettering may fit within the definition of digital signs, the zoning code does not preclude them from also being wall signs.

Similarly, section 88-445-08-A(3) of the zoning code recognizes monument signs may have digital lettering and remain monument signs. It provides that, in certain non-residential districts, “Electronic, digital, or motorized monument signs are permitted” so long as they comply with certain additional requirements. Section 88-445-08-A(3) thereby expressly permits monument signs to have electronic, digital, or motorized components in non-residential districts. Addition of an electronic, digital, or motorized component, therefore, cannot preclude a sign from being of the monument sign type.

See Briggs v. State Farm Fire & Cas. Co., 680 S.W.2d 444, 445 (Mo. App. 1984) (“An adjective modifies a noun to denote a quality of the thing named, or to indicate its quantity or extent.”) (emphasis added). To accept the BZA’s argument that the addition of a digital component to a monument sign automatically converts the monument sign into solely a digital sign, this Court would have to ignore the language in section 88-445-08-A(3) acknowledging the existence of digital monument signs.

For these reasons, the presence of digital lettering on a monument sign does not prevent the sign from continuing to be of the monument sign type, as the zoning code itself implicitly recognizes in section 88-445-08-A(3) by setting out requirements for digital lettering on monument signs in non-residential areas. While the zoning code provides monument signs located in residential zones cannot have digital lettering, the addition of a digital display to the Church’s monument sign did not change its sign type. It remained a monument sign, albeit with an unpermitted digital display. The BZA therefore had the authority to grant the Church’s request for a variance if other requirements were met.

IV. THE BZA’S DECISION TO DENY THE VARIANCE WAS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

A. Law Governing Nonuse Variances

Section 89.090.1(3), RSMo 2008, provides boards of adjustment shall have the power to grant variances when:

there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the construction or alteration of buildings or structures or the use of land so that the spirit of

the ordinance shall be observed, public safety and welfare secured and substantial justice done....

Id. In applying section 89.090, this Court has held the “general rule is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” Matthew, 707 S.W.2d at 413. It is “generally held that [the existence of a practical difficulty or] unnecessary hardship is the principal basis on which a variance is granted.” Id. at 416 (citations and quotations omitted).

A “use” variance “permits a use which the ordinance prohibits.” Id. at 413. Although prior Missouri cases had recognized nonuse variances, Matthew was the first case to recognize a “use” variance in Missouri. Matthew determined Missouri would follow the New York approach and require an applicant to prove “unnecessary hardship” to obtain a use variance. Id. at 415. In the absence of prior guidance in Missouri cases as to what criteria to apply when deciding whether to approve a use variance, Matthew looked to outside authority, stating an applicant must show:

(1) relief is necessary because of the unique character of the property rather than for personal considerations; and (2) applying the strict letter of the ordinance would result in unnecessary hardship; and the (3) imposition of such a hardship is not necessary for the preservation of the plan; and (4) granting the variance will result in substantial justice to all.

Id. at 415-16, citing, A. Rathkopf, 3 The Law of Zoning and Planning § 38 (1979); N. Williams, 5 American Planning Law § 129.05 (1985).

In addition, Matthew cited approvingly to three criteria utilized in New York law in determining whether the second factor, unnecessary hardship, exists:

(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality.


Here, the Church’s use of its property as a church is a permitted use, and what it seeks is a variance to permit
“deviations from restrictions which relate to a permitted use.” Matthew, 707 S.W.2d at 413. The Church, therefore, seeks a “nonuse” variance rather than a “use” variance. Matthew recognized that nonuse variances may be granted if “practical difficulties” are shown and that, under section 89.090, the “practical difficulties” standard is a “slightly less rigorous” version of the “unnecessary hardship” standard. Id. at 416. Unfortunately, neither Matthew nor other variance cases from this Court set out specific criteria for determining when “practical difficulties” have been shown. As this Court noted in Rosedale-Skinker, this lack of a specific definition stems in part from the fact that determining what constitutes a practical difficulty is inherently fact-specific and so committed to the discretion of the zoning authority:

There is no all-inclusive definition of what constitutes a sufficient showing of practical difficulty and undue hardship to warrant granting a variance; whether such difficulties of hardship exist is a question of fact as to which the Board of Adjustment is accorded a discretion to be exercised within the guidelines of the zoning legislation.

Rosedale-Skinker, 425 S.W.2d at 933.

Nonetheless, Rosedale-Skinker identified certain guiding principles that apply when determining whether practical difficulties have been shown. First, “the power to grant variances must be exercised sparingly and in keeping with the general purpose of the zoning plan and the public welfare.” Id. at 936; see also § 89.090 (“that the spirit of the ordinance shall be observed”).

Second, as noted earlier, “The scope of judicial review ... is limited to a determination of whether the ruling is authorized by law and is supported by competent and substantial evidence upon the whole record.” Id., citing, Mo. Const. art. 5, § 22 (1945). The courts may not substitute their discretion for that of the board. State ex rel. Nigro v. Kansas City, 325 Mo. 95, 27 S.W.2d 1030, 1033 (Mo. banc 1930); Brown v. Beuc, 384 S.W.2d 845, 850 (Mo. App. 1964).

Third, in the absence of specific additional local zoning requirements, section 89.890 does not require a showing that the need for a nonuse variance is due to topographical limitations or the condition of the land itself, as some prior cases erroneously had stated. Rosedale-Skinker, 425 S.W.2d at 932-33. Rather, “The topography or physical characteristics of the land itself giving rise to difficulties and undue hardships is one, but not the sole, ground upon which variances in the application of zoning regulations may be granted.” Id. at 933-34. But to ensure it is practical difficulties with the zoning that cause the need for a variance, later nonuse cases have followed Matthew’s requirement for use variances that the applicant show “relief is necessary because of the unique character of the property rather than for personal considerations.” Matthew, 707 S.W.2d at 415; see, e.g., Behrens v. Ebenrech, 784 S.W.2d 827, 829 (Mo. App. 1990) (“Further, the practical difficulty relied on as a ground for a variance must be ‘unusual or peculiar to the property involved and must be different from that suffered throughout the zone or neighborhood.’ ”); accord, Ogawa v. City of Des Peres, 745 S.W.2d 238, 242-43 (Mo. App. 1987).

Slate v. Boone County Board of Adjustment, 810 S.W.2d 361, 364 (Mo. App. 1991), gave further guidance as to what is meant by “practical difficulties.” Noting Matthew explicitly followed the “New York model” of variance analysis for use variances, Slate adopted the rule followed in New York that “a non-use variance applicant must show that as a practical matter the property cannot be used for a permitted use without coming into conflict with certain of the ordinance’s restrictions.” Id. at 364 (emphasis omitted).

As the court of appeals subsequently clarified in Highlands Homes, 306 S.W.3d at 566, this standard does not mean the applicant must show it cannot make any permitted use of the property absent a variance. The latter is the standard for unnecessary hardship, not for practical difficulties. Matthew, 707 S.W.2d at 417. Rather, it means the applicant seeks to use the property for a specific permitted use but cannot do so without conflicting with the zoning requirement as to which the applicant seeks a variance. See Highlands Homes, 306 S.W.3d at 566. Slate also looked to New York cases for five additional principles that New York applies in considering applications for nonuse variances:

1. how substantial the variation is in relation to the requirement,
2. the effect, if the variance is allowed, of the increased population density thus produced on available governmental facilities (fire, water, garbage and the like),
3. whether a substantial change will be produced in the character of the neighborhood or a substantial detriment to adjoining properties created,
4. whether the difficulty can be obviated by some method, feasible for the applicant to pursue, other than a variance, and
5. whether in view of the manner in which the difficulty arose and considering all of the above factors the interests of justice will be served by allowing the variance.

810 S.W.2d at 364, quoting, Wachsberger, 191 N.Y.S.2d at 624. While this Court has not had occasion to further address relevant criteria to be evaluated in nonuse variance cases, a myriad court of appeals decisions have followed
Slate in considering these criteria. A few cases have shortened the list by eliminating the second criteria, as it is fact-specific to applications affecting zoning density. See, e.g., Highlands Homes, 306 S.W.3d at 566; Branum, 85 S.W.3d at 41.

This Court agrees consideration of these four or five criteria can be helpful in understanding the requirements of section 89.090 for granting a variance, although they are not themselves elements, but rather guidelines, a zoning board should consider in determining whether practical difficulties have been shown. As this Court held in Rosedale-Skinker, ultimately the question of whether practical difficulties have been shown “is a question of fact as to which the Board of Adjustment is accorded a discretion to be exercised within the guidelines of the zoning legislation.” 425 S.W.2d at 933.

Finally, as this Court noted in Matthew, local ordinances, such as Kansas City’s zoning code, “may further define the power of the Board of Adjustment to grant a variance, but they may not conflict with the statutory criteria and how courts have interpreted those criteria.” 707 S.W.2d at 415. As relevant here, section 88-565-06 of Kansas City’s zoning code further defines the authority of the BZA to grant a variance, and its requirements have not been shown to be inconsistent with section 89.090. The zoning code authorizes the BZA to grant a variance if there is substantial evidence in the record that: (1) a “strict application of one or more standards or requirements of this zoning and development code would result in unnecessary hardships or practical difficulties for the subject property,” (2) those practical difficulties “are not generally applicable to other property in the same zoning district,” (3) the variance “is generally consistent with all relevant purposes and intents” of the zoning code, and (4) the variance “will result in substantial justice being done.” KANSAS CITY, MO., ZONING AND DEVELOPMENT CODE § 88-565-06 (2011).

Here, the parties do not claim applying the local ordinance changes the analysis as to whether a nonuse variance should be granted. Rather, the focus is on whether the variance requested from the specific signage requirements of the zoning code would meet the various criteria recognized in the cases, and it is to that issue this Court turns.

B. Application of Nonuse Variance Criteria to the Church

The Church seeks a nonuse variance for its monument sign. The Church says it is entitled to the variance under section 89.090 because it has shown it faces practical difficulties in using the property as a church absent a variance allowing it to have a digital monument sign, and the variance can be granted consistent with the “spirit of the ordinance” and in accordance with “public safety and welfare” and “substantial justice.” See § 89.090.1(3).

At the BZA hearing, the Church argued the lack of a digital sign impedes the church’s ability to “meaningfully convey its non-commercial religious messages” because the Church’s aging membership found it “extremely difficult” to go outside and manually change the lettering on the old non-digital sign, especially in inclement weather. The Church argued the new digital display also was more useful because it allows the Church to post an increased volume of messages by simply changing the message from inside.

Second, the Church argued the cup letters on the non-digital display were small and difficult for passing motorists to see, and the larger digital letters allow it to more clearly convey its messages and so helps recruit new church members. The Church relatedly suggested the very fact the Church is located on a public street with large traffic flow meant its membership uniquely would benefit from having a digital sign more than most churches, while it agreed a church in a more secluded area would not need a digital sign.

Third, the Church argued it showed economic hardship and “unique factual circumstances” in that the monument sign had existed since 1956, and the Church spent more than $11,000 on the digital display because it knew another church in a different city had no issues upgrading its sign to include a digital display.

While the offered reasons explain why the Church finds a digital display preferable and more convenient, they do not show practical difficulty in carrying out the Church’s use of the property as a church. Going outside in inclement weather may be inconvenient, but “[l]egislation granting relief by way of variance to zoning codes is not intended to relieve mere inconvenience.” Volkman v. City of Kirkwood, 624 S.W.2d 58, 61 (Mo. App. 1981). Moreover, the inconvenience does not arise from the bar on monument signs having digital components or from any unique aspect of the property or its use as a church; it is a personal
difficulty related to the particular demographics of the current Church members. It can be cured without practical difficulty by having a younger member of the church change the lettering or by hiring someone to change the lettering. A variance is not needed to address this problem. See Cousin’s Advert., Inc., 78 S.W.3d at 784 (finding a variance inappropriate when a “proposed sign could be erected in compliance with the [ordinance] by [simply] locating it in front of the existing building on the ... property”).

For these reasons, the Church has failed to show “as a practical matter the property cannot be used for a [specific] permitted use without coming into conflict with certain of the ordinance’s restrictions.” Slate, 810 S.W.2d at 364 (emphasis omitted). Neither do the problems the Church identified show “relief is necessary because of the unique character of the property rather than for personal considerations.” Matthew, 707 S.W.2d at 415-16.

Similarly, while the ability to exhibit larger bright electronic lettering and to change messages more often and more quickly might improve the Church’s ability to convey messages to passing motorists and help with church membership drives, the test for a variance is not whether the variance would be beneficial or allow the Church to expand but whether the Church experiences practical difficulties in operating without the variance. The Church admits that if it were located on a smaller street it would not need the variance to operate as a church. It says it needs the variance only because of its location on a busy thoroughfare. While that location might give the Church a unique opportunity to benefit from the addition of a more visible sign, this does not mean the absence of the digital sign will cause it practical difficulty in operating as a church. See Raulls, 170 S.W.3d at 52 (a board “is not bound to grant a variance which it believes would benefit [Applicant] financially but would also lead to the detriment of the surrounding existing communities”). The Church has existed as a church at this same location sign since 1853 without a sign with digital lettering and has failed to show it cannot continue to do so absent this new, potentially useful modern-day tool.

Finally, while the Church’s reliance on the situation of another church in a different city may explain why it spent the $11,000 bequest on the digital upgrade without requesting a variance, these circumstances cannot be said to be unusual or peculiar to the property involved. Neither can the fact that this money would effectively be wasted if a variance is not granted, itself, justify the variance.

However understandable, this failure and the resulting cost are the epitome of a problem that is personal in nature rather than resulting from the unique nature of the property involved. The unfortunate waste of resources was caused by the Church’s expenditure without checking on the zoning requirements, not due to the requirements themselves. The fact it would be costly to remove the digital sign and reinstall a manual one does not show “as a practical matter the property cannot be used for a permitted use without coming into conflict with certain of the ordinance’s restrictions.” Slate, 810 S.W.2d at 364.

The Church has not met its burden of establishing the existence of a practical difficulty absent the grant of a variance for its digital sign.

V. FIRST AMENDMENT CLAIM

The Church alternatively asks this Court to hold the portion of Kansas City’s zoning code prohibiting digital monument signs in residential zones violates the First Amendment by favoring commercial speech over non-commercial speech. In support, the Church’s brief on appeal notes most churches are located in residential areas and argues this means ordinances imposing limitations on signs in residential areas but not in commercial areas inherently discriminate against churches because of their location in residential areas. The Church describes this as “content-based” discrimination because, it says, the impact is felt by churches, whose signs would have a different content than would the signs put up by businesses in commercial areas, and argues this means the ordinances barring digital signs must be subjected to strict scrutiny. It asks that this Court hold the zoning ordinance prohibiting digital signs unconstitutional. There are multiple problems with the Church’s First Amendment argument.

Assuming for present purposes the Church were correct that an ordinance imposing additional restrictions on signs in residential areas could be considered content-based and discriminatory because churches tend to be located in residential areas, the Church did not preserve this claim. It was not included in its initial petition, which named the BZA as the only defendant. And while the circuit court permitted the Church to file a “supplemental petition” in which the Church named the city of Kansas City as a defendant and raised for the first time a claim that Kansas City’s zoning ordinance violated the First Amendment, that supplemental petition was not served before the case was resolved, and Kansas City, therefore, has never been a party to this action, nor has it had an opportunity to file an answer. Yet the constitutional claim the Church makes—that Kansas City violated the First Amendment in enacting the portion of its zoning code disallowing digital monument signs—is a claim directed at Kansas City. The parties acknowledge the BZA did not adopt the zoning code and has no authority to adopt or modify ordinances, so the circuit court could not grant relief in Kansas City’s absence.
Aware of these problems in granting it relief on appeal, the Church alternatively requests if it loses on its other claims, that this Court remand for a determination of the constitutional issue raised in its supplemental petition, and presumably for joinder of Kansas City as a party. This Court declines to do so. A constitutional claim must be raised in the first instance and cannot be changed on appeal. State v. Kenley, 952 S.W.2d 250, 260 (Mo. banc 1997); State v. Parker, 886 S.W.2d 908, 925 (Mo. banc 1994); State v. Flynn, 519 S.W.2d 10, 12 (Mo. 1975). The First Amendment claim the Church now raises is not the claim it attempted to raise below in its supplemental petition. There, the Church argued the zoning code allows churches located on large lots of more than 10 or 15 acres to have digital signs even when located in residential areas, but not churches like it located on smaller lots. It argues because most churches are located on smaller lots, the zoning code discriminates against religious messages.

The Church’s claim on appeal does not cite to or make any argument about this alleged new ordinance, however. Instead, the Church essentially now argues the zoning code’s prohibition against digital signs in residential areas has a disparate impact on churches because the zoning code does not allow churches to obtain variances allowing them to have a digital display. But this Court has found the Church is not barred from obtaining a variance if it meets the requirements for a variance. The Church simply failed to meet those requirements. The Church does not and cannot argue the ordinance was unconstitutional when the reason for denial of the variance was its own failure of proof.

VI. CONCLUSION

For these reasons, the BZA’s decision to deny the Church’s variance request is affirmed.

All concur.
Footnotes

1 All subsequent references are to KANSAS CITY, MO., ZONING AND DEVELOPMENT CODE (2011) unless otherwise noted.

2 The 10-acre limit applies to institutions located on arterial roads, while the 15-acre limitation applies to institutions located on other residentially zoned property.

3 The transcript of the hearing shows the BZA denied the variance on the motion of a board member who stated, “I ... feel that [the Church] failed to establish undue hardship or practical difficulty as those terms are defined in law and, furthermore, do not believe that the ordinance permits [the BZA] to grant this request, and I move that the application be denied on both of those grounds.” The BZA unanimously voted in favor of the motion and denied the variance request without further written explanation.

4 It is worthwhile to note the cited source in Highlands Homes, Branum, and Hutchens for use of an abuse of discretion standard is this Court’s decision in Rosedale-Skinker, 425 S.W.2d at 933. But Rosedale-Skinker does not so hold. This Court merely noted, correctly, a zoning board has discretion in determining whether the facts support the grant of a variance. Id. When setting out a court’s standard of review of a zoning board’s discretionary decision, however, Rosedale-Skinker correctly and clearly stated the appellate court’s role was to determine whether the board’s decision exercising discretion was “supported by competent and substantial evidence.” Id. at 936.
It may seem somewhat semantically awkward to apply the “competent and substantial evidence” standard when the issue is, as in this case, whether the board properly found the applicant did not present sufficient evidence to support the grant of a variance. Indeed, this may be what led courts to apply the more familiar abuse of discretion standard. But the “competent and substantial evidence” standard is what is required to be applied. And it is met when the record supports the board’s determination the applicant failed to present evidence showing practical difficulties or the other requirements for a variance.

5 Section 88-810 separately defines a digital sign as a “sign or component of a sign that uses changing lights to form a message or series of messages that are electronically programmed or modified by electronic processes.”

6 Rosedale-Skinker upheld grant of a variance when Southwestern Bell had shown, as a practical matter, it could not conduct its telephone line business as needed by the public desire for telephone connections without a height variance of 10 feet, as horizontal connections would disrupt phone service and put a terrible burden on the public. 425 S.W.2d at 936-37. This Court said the unique difficulty arose not out of topography but due to the “existing building and hence the situation in which Bell found itself was unique and peculiar in that this special sort of building,” which was developed to be used as a telephone building but “was of no use to the applicant unless it had the authority for 10 feet more.” Id. at 937. Brown, 384 S.W.2d 845, which had erroneously required a topographic or related difficulty, was overruled in this regard in Rosedale-Skinker, although Matthew did reaffirm that Brown properly set out the general standards for nonuse variances in other regards. Matthew, 707 S.W.2d at 416 n.6.

7 And, indeed, this is exactly what the case relied on by Slate held. See Wachsberger v. Michalis, 19 Misc.2d 909, 191 N.Y.S.2d 621, 624 (Sup. Ct. 1959). In effect, this is a restatement of this Court’s position in Rosedale-Skinker that Southwestern Bell met its burden by showing that, without the variance, it could not effectively use the building as a telephone building, which was a permitted use. 425 S.W.2d at 937.

8 See, e.g., Brown v. City of Maplewood, 354 S.W.3d 664 (Mo. App. 2011); Baumer, 247 S.W.3d 105; Verna Props., L.L.C. v. Bd. of Adjustment of City of Maryland Heights, 188 S.W.3d 50 (Mo. App. 2006); State ex rel. Charles F. Vatterott Const. Co. v. Rauls, 170 S.W.3d 47 (Mo. App. 2005); Cousin’s Advert., Inc. v. Bd. of Zoning Adjustment of Kansas City, 78 S.W.3d 774 (Mo. App. 2002); Kareilitz v. Soraghan, 851 S.W.2d 85 (Mo. App. 1993); Hutchens, 848 S.W.2d 616.

9 While Antioch notes the BZA did not put on any evidence contradicting its claims that the zoning change would benefit it, the BZA did not have any burden to do so. It was up to Antioch to present competent and substantial evidence supporting a variance, and up to the BZA to determine, in its discretion, whether that evidence supported a variance. See supra § II; cf. Mo. Church of Scientology v. State Tax Comm’n, 560 S.W.2d 837, 843 (Mo. banc 1977) (finding an “administrative agency may base its decision solely on a finding of lack of credible testimony, though such testimony is
The Court disagrees with those court of appeals cases suggesting, when the cost of removing an improvement is asserted as a reason for a nonuse variance, the applicant must show "economic hardship" to obtain a variance by showing "that the land in question cannot yield a reasonable return if the variance is not granted." *Branum*, 85 S.W.3d at 41, quoted with approval in *Highlands Homes*, 306 S.W.3d at 567-68. As authority for this proposition, *Branum* cited *State ex rel. Holly Investment Co. v. Board of Zoning Adjustment of Kansas City*, 771 S.W.2d 949, 951-52 (Mo. App. 1989), which in turn cited this Court's decision in *Matthew*.

But the cited point *Matthew* was discussing was whether "unnecessary hardship" had been shown as is required for use variances. While it suggested a component of unnecessary hardship must or should be economic hardship, it nowhere suggested that, to obtain a nonuse variance, the applicant must show "economic hardship" or that the property could not yield a reasonable return without the variance. *707 S.W.2d at 416-17*. That is the antithesis of the standards, which require only that the applicant show it is seeking to make a permitted use of the property but is unable to do so without practical difficulty.

This Court rejects the BZA's argument that the Church waived its constitutional argument by failing to cross-appeal the circuit court's dismissal of Count II as moot. The Church received all the relief it needed when the circuit court ordered the BZA to grant it a variance. It was not aggrieved by the judgment, therefore, and had no standing to file a cross-appeal. See *Kennedy v. Dixon*, 439 S.W.2d 173, 180 (Mo. banc 1969) ("A respondent on appeal may attack erroneous rulings of the trial court in order to sustain a judgment in his favor" without filing a cross-appeal.).

It is worthy of note that the cases the Church cites do not suggest signs regulating residential areas are inherently content-based. To the contrary, they state that political or church signs within a residential area, and similar signs within a commercial area, must be treated equally without regard to their content. See, e.g., *Reed v. Town of Gilbert, Ariz.*, — U.S. —, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015); *Whitton v. City of Gladstone*, 54 F.3d 1400 (8th Cir. 1995). None of the cited cases state churches in residentially zoned areas must be treated like commercial entities in commercially zoned areas. Indeed, one might argue such disparate treatment of churches based on their religious nature would itself be an unconstitutional content-based distinction between entities based on the nature of their message.