A variance is an administrative determination by the Board of Adjustment (or, in some states, the Board of Zoning Appeals) excusing an existing or planned violation of a zoning ordinance.

Missouri ZEA (Cities): The BOA

- 5 members who serve staggered 5 year terms; meetings must be open to public, minutes taken, testimony recorded [RSMo. § 89.080]
- Vote of 4 is required to grant variance or reverse permitting decision [RSMo. § 89.090]
- Appeal of an adverse decision may be made to Circuit Court w/in 30 days [RSMo. § 89.110]
RSMo § 89.090.1(3) [City ZEA]

[BOA may act] “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....

**Two Types of Variances**

- **Use Variance**: Authorizes *use* of land for a *purpose* not allowed by the ordinance
- **Area Variance**: Authorizes improvement of land in *manner* not allowed by “*height*” or “*bulk*” *requirements* of the ordinance
Some states (e.g., Kansas, Arkansas, Connecticut) do not allow use variances at all, only area variances.

Why not?

Does Columbia’s zoning ordinance allow use variances?

Also, note § 89.090(3): in MO, BOA shall not have the power to grant use variances “in any city with a population of three hundred fifty thousand or more inhabitants which is located in more than one county.”
Use Variance, or Area Variance?

- Owner wants to turn boat house into “boatel” [note 3, p. 35]
- Owner wants to erect pole sign for gas station; ordinance prohibits pole signs [note 6, p. 37]
- Owner wants to rent 2 homes located on 1 lot in 1-family zone [Matthew]

Variances in Missouri

- Missouri’s enabling act allows use variances, as reflected in Matthew v. Smith
- Standard for obtaining variance
  - Use variance: “unnecessary hardship”
  - Area variance: “practical difficulty” (“slightly less rigorous”) [State ex rel. Klawuhn v. St. Joseph BZA, 952 S.W.2d 725 (1997)]
Unnecessary Hardship Standards

• Relief is necessary because of the unique character of the property, rather than for personal considerations
• Land in question cannot yield a reasonable return if used only for a purpose allowed in that zone
• The variance won’t alter the essential character of the neighborhood

• What sort of evidence would have been offered by the Brandts (the owners) when the case gets remanded, in order to justify the grant of a use variance?

Matthew
• What did the Brandts pay to acquire the parcel?
• What would be the value of the parcel if the Brandts could not rent out the second home?
• What would be the value of the parcel if the Brandts could rent out the second home?
• Can the Brandts establish a right to rent the second home as a “nonconforming use” (which would obviate need for a variance)?

• Matthew: To show “unnecessary hardship,” Brandts must show they “will be deprived of all beneficial use of the property under any of the permitted uses” [p. 6]
• Suppose evidence shows that:
  – Brandts paid $300,000 for the parcel
  – Parcel would be worth only $280,000 if second home can’t be rented
• Would these facts have justified an “as applied” challenge to the zoning ordinance (e.g., as in Nectow)?
• Would they justify granting a variance?
• Financial hardship tests are commonly required for use variances, but typically not for area variances (e.g., Sasso)
• Still, Board can take financial hardship into account in considering an area variance [State ex rel. Branum v. BZA of the City of Kansas City, 85 S.W.3d 35 (Mo. Ct. App. 2002)] (hardship may be a “plus” factor for granting a variance)
Henderson Harbor (Lake Ontario)

- What kind of variance is Speach asking for?
- Why undermine the minimum lot size by granting an exception?
- What standard did Board use to decide to grant the variance?
- What standard governs the Court’s review?
• Original NY ZEA [former Town Law § 267] was similar to current MO city ZEA [RSMo. § 89.090]
• I.e., it explicitly referenced “practical difficulties” for grant of an area variance, but did not define the term
  – Courts thus fleshed out whether “practical difficulties” existed on a case-by-case basis

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**Judicial Factors: “Practical Difficulty”**

• Unusual topography limits “buildability”
• Substantiality of variance
• Substantial change in neighborhood character or impact to nearby parcel
• Alternative method of achieving the objective that is feasible for the applicant?
• Will the interests of justice be served?
• Significant economic injury (can’t be used for a permitted use without variance being granted)
Revised NY ZEA [new Town Law § 267-b(3)] lists numerous criteria developed in prior cases under “practical difficulties” test, but does not specifically list “practical difficulties” as one of the criteria.

Q: Does this mean that the owner does not have to show “significant economic harm” to obtain a variance? [pp. 31-32]

New NY Criteria for Area Variances

- Undesirable change in neighborhood character or undesirable spillover effect to neighboring parcel
- Can benefit be achieved in another way?
- Substantiality of variance
- Adverse effect on conditions in the district
- Was difficulty “self-created” (relevant, but not sufficient to justify denial by itself)
• **Sasso**: Board granted variance; decision was not arbitrary and was supported by the evidence:
  – No undesirable change in character of the neighborhood (boathouses and marinas)
  – No increase in traffic/noise
  – Minimal added impact on neighbors (complied with other height/bulk restrictions)
  – Variance is substantial, but there are no other alternatives (no land to buy to increase lot size)

• Would **Sasso** be decided the same way in Missouri?
**Antioch Community Church v. Kansas City BZA (Mo. 2018)**

- Church replaced old “letter”-based sign w/digital display
- City issued citation for ordinance violation (no digital signs in residential zone)
- Church sought variance

**Antioch Community Church**

- Church appealed BZA’s denial of variance to replace its old “letter” sign with digital sign
- Court: Church shown “practical difficulties”?
  - Circuit court: yes
  - Court of Appeals and Supreme Court: no
- Do you agree with the Court’s judgment?
- Would/should variance be granted under the standard used by NY in *Sasso*?
Note 7: Opposition

- Some empirical data suggests real standard is public opposition
  - If 4 or more people object, variance almost inevitably denied
  - If few/no objections, results vary
- If this is true, is it really a problem?

In light of the serious problems raised by public opposition, what does the smart developer (or lawyer) do prior to the public hearing?
Ike obtains a variance to build a detached garage that would violate the side lot setback. Ike later sells the home and lot to Jane. Does Jane need a new variance?

No. The variance is granted to the parcel, not to the owner. This makes sense, given that the underlying problem is the unsuitability of the parcel to the strictures of the zoning ordinance.

Judicial Review of Board Decisions

• *Antioch*: “Scope of judicial review of the decisions of the board of adjustment in a zoning proceeding 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.”
Judicial Review of Board Decisions

- If Board **denies** a variance, will a court reverse the denial and **order the Board to issue the variance**? If so, under what circumstances?
- If the Board **grants** a variance, will a court reverse it and **revoke the variance**? If so, under what circumstances?

How should a court view variances **granted** for the following reasons?
1. Because of a ravine on Al’s property, he can build a house of reasonable size only if he violates the side-lot setback.

2. Barbara wants a variance to build a home on a lot she bought from Joe; variance needed for her to comply with lot coverage ratio.

| Kept by Joe | Sold to Barbara (.25 ac) |
3. Dawn wants a variance to put a 4-plex on a lot in an R-1 zone, for which she paid $500K. She says “I can’t earn a reasonable return with only 1 rental unit.”

4. Ed (owner of swim club) wants a variance to reduce parking from 175 (required by Code) to 140, for beautification/privacy.
5. Graham owns 200-acre parcel that is zoned agricultural, and seeks a variance to allow residential use (250 lot subdivision)