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THE GRANTING OF VARIANCES FROM THE ZONING ORDINANCE BY THE LEXINGTON-FAYETTE COUNTY BOARD OF ADJUSTMENT

The problem of granting variances has been a constantly recurring one in administering the zoning ordinance in Lexington as well as most other urban communities. In order to have conformity, beauty, and protection of property values, the policy behind present zoning is to have similar uses in the same district. But often this works a serious hardship on a particular landowner and in these situations a variance, or relief from the literal enforcement of the ordinance, may be granted. The hardship may take several different forms. For instance, the land from which the use is excluded may be the only available land for that particular use. The topography or the irregular shape of the lot may allow for only a prohibited use or at least require a change in the set back lines or yard space requirements. Add to these reasons the ever present human and political elements and varying the strict application of the zoning ordinance presents some very unique and complex situations. For example, the petitioner often needs the additional income from the prohibited use, the attorney urging the variation is ordinarily extremely zealous as contrasted with the usual air of indifference and complacency on the part of the general public, the city planner, although conscious of its destructive effect on the comprehensive zoning plan has a relatively weak voice compared with the ordinary-board member who is very conscious of the desirability of commerce and industry in the community regardless of the zone. This paper will point up some of the problems presented in the granting of variations by the Lexington-Fayette County Board of Adjustment and present a classification of the various types of variances.

Before further development of the variance problems as related to Lexington, some background material as to variances should be discussed. They are not the only means of changing a zoning ordinance. In fact there are three different means: amendment, exception, and variance, and each of these should be defined because they are often confused with the variance. An amendment to the ordinance is obtained by asking the Planning and Zoning Board to rezone a particular area. In some instances this must be approved by the city legislative body, either the city council or board of aldermen. An exception differs from this procedure in that provision for it is made by the zoning ordinance itself and it is granted by the Board of Adjustment. The "facts and conditions" for the granting of an exception must be found
in the ordinance.\(^1\) A variance differs from the first two methods in that by this means a Board of Adjustment can provide relief from the literal enforcement of the zoning provisions where they would result in an “unnecessary hardship”.

[T]he difference is simply that a special exception is provided for in the ordinance itself wherein the existence of certain enumerated circumstances entitles the board in its discretion to grant the exception provided for; whereas a variance can be granted only in case of unnecessary hardship.\(^2\)

There are two general categories of variances, dimensional variances and use variances. The dimensional variance, often referred to as a height, bulk, and area variance, “permits a more intensive use of land, such as a smaller side yard, a taller building, or a greater percentage of lot coverage by a structure”.\(^3\) The use variance allows a particular use otherwise not permitted in the district.\(^4\) For example, a business use in a strictly residential zone is a form of use variation. Obviously, this is the more objectionable of the two because divergent uses within an area are more destructive to the overall zoning plan.

The granting of dimensional variances by the Lexington Board is a more constantly recurring problem, even though less serious, than use variances. These petitions usually ask for a variance of a side or back yard requirement, of a set back line, in a lot size, or in the height of a certain building. The area or lot size variance problems have been accentuated in residential areas by the increasing popularity of the “ranch style” home. Deep lots are now unfashionable and the current emphasis is on greater width in the frontage.\(^5\) Because past residential planning envisioned a different type home, and city lot areas were laid out on that premise, this particular trend has been a problem and must be considered in all future residential planning. But the difficulties encountered in granting dimensional variances are not confined to the “ranch style” home situation. For various and sundry reasons many property owners are asking for this type variance—to build an additional room in violation of the side or rear yard requirement, to build nearer the road than the set back line allows, etc. The Lexington Board of Adjustment grants these variations almost as a matter of course, even though many of them are granted conditionally, e.g. that adequate drainage be provided, or the resulting area adjacent to the property line be landscaped, etc.\(^6\)

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\(^1\) Horack and Nolan, Land Use Controls 176 (1955).
\(^2\) Ibid.
\(^3\) Ibid.
\(^4\) Ibid.
\(^5\) 1954 Ill. Law Forum 213, 229.
\(^6\) The only qualification to the Board’s authority to impose conditions on the granting of variances is that they must be reasonable conditions “for the purpose
55, for which the records were examined, there were few, if any, refused. And this is not a unique example because studies on other boards have reached a similar conclusion. One writer suggests that where use variances are permitted it would be conservative to estimate that seventy-five percent of the requests are granted, and that the "percentage of height, bulk, and area variances is probably even higher." However, this is not particularly bad provided that they are granted with serious consideration given to future city expansion because a variance as to any of the requirements may increase future fire hazards, parking problems, ruin a street pattern, or greatly increase the cost of a street widening program.

Use variances present far more complexities. These involve such requests as industrial uses in business zones, business uses in residential zones, etc. But before developing the various types of use variances the basic principle behind granting them should be examined. Both types of variances are granted on the theory that the application of the zoning ordinance to the property in question would result in "exceptional or unnecessary hardship," but difficulty in applying the test is most sharply illustrated in the use variance cases. Just what this phrase means, no one is sure. In theory it should not refer to economic hardship alone because all property in the neighborhood may be decreased in value as a result of the zoning ordinance, but in practice economic hardship becomes an important factor. One writer goes so far as to state that "... in general, the only hardship present in applications for use variances seems to be an economic one— the applicant can make more money if the variance is granted." Certainly, too, the hardship

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7 Horack and Nolan, Note 1, supra at 177, footnote 49.
should relate directly to the land in question and not to all land similarly situated. Essentially the hardship present should consist of three factors:

1. The land in question cannot yield a reasonable return if used only for a purpose allowed in the zone;
2. That the plight of the owner is due to unique circumstances and not to 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.

The Kentucky Court reviews a small percentage of the cases involving variances and in none of them seems to have clearly defined the term. It simply states that:

The question of hardship is a question of fact. The Zoning Commission has broad discretion in matters of this sort and this court is not authorized to substitute its judgment for the judgment of the Commission. We have held in recent cases that unless the action of the Zoning Commission is so arbitrary as to amount to a clear abuse of discretion this court (sic) will not interfere.

The Lexington ordinance provisions, relating to variances are a little more specific and point up four principal considerations in granting a variance, (a) the public interest and the general purpose and intent of the zoning ordinance, (b) the narrowness, shallowness and shape of the property, (c) the existence of exceptional topographic conditions, and (d) other extraordinary and exceptional situations or conditions. These considerations would indicate that the standard is very narrow and that variations will be obtained in only a limited number of exceptional cases, with emphasis on the physical characteristics of the particular lot. If primary emphasis is placed on parts (b) and (c) one possible interpretation of this is that it was intended to include only dimensional variances. For example, yard or building line requirements would be waived when building on an irregularly shaped lot or one with unusual topography. However this standard has also been broadly construed to include use variances.

In addition, in the application of the standard this Board has been very liberal and it appears from an examination of their records that

13 The reasons for this are (1) often there are no objectors interested enough to seek an appeal, (2) in very few of the cases do the parties make a record adequate enough for review by the Court of Appeals. This also seems to be true in other jurisdictions. In Indiana, for example, probably not one case in a thousand reaches an appellate tribunal. Horack and Nolan, supra at 1, 177 at footnotes 50 and 51.
14 Stout v. Jenkins, 268 SW 2d 843 at 845 (Ky. 1954).
15 The Lexington Zoning Ordinance-Resolution, secs. 24.422 and 24.4221.
most requests for use variances are granted, as the following examples will illustrate. A similar conclusion was reached in Chicago after a more intensive study. For example, in that city since 1923 there have been 4,260 variances granted, 2,640 of which have been allowed since the comprehensive zoning amendment of 1942. In 1951 there were 252 variations permitted out of a total of 360 applications. Because of the discrepancy between the theory for granting variations and the actual practice in granting them the best and most helpful way to determine the meaning of the concept and the attitude of the board toward use variances is to examine its application by a particular board to specific cases. Based on this theory the records of the Lexington Board of Adjustment were examined for a two year period, 1954-55, and the type of use variances classified along with some of the factions considered in granting them.

Single or Double Family to Multiple Family Dwellings

A constantly recurring problem is the request for residential variations. These involve a request for the erection of a duplex or the remodeling of a house so as to accommodate two families in a one family zone, or three families in a two family zone, etc. These requests, like the dimensional variances, are not particularly harmful to the overall zoning plan, but if the Board of Adjustment applies the "unnecessary hardship" test strictly very few of them would be granted.

A case history will illustrate some of the problems involved. The ordinance provides that the principal use in a R-2 district is the two family dwelling. A retired postal employee asked for a permit to remodel a residence for three living units in a R-2 district. The additional income was needed to supplement his pension. The Investigation and Findings Report prepared, by the staff, stated that this was a use first permitted in a R-3 district, therefore the Board had no authority to grant it. Because the express language of the ordinance allows this type use for the first time in the R-3 district a change in the provision would require an amendment to the ordinance, instead of a variance, clearly outside of the Board's authority. The petitioner's letter to the board alleging the "unnecessary hardship" stated that (a) he was living on a pension and needed the extra money, and (b) set out a petition with thirty-three neighbor-signers to the effect that the

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17 Minutes of the Lexington Board of Adjustment, Application of H. L. Wells, May 20, 1955. (This will subsequently be referred to as simply, "Application of . . .").
petitioner was an "upstanding citizen" and they did not object to the change. The Board granted the permit, even though in doing so it was probably over-extending its authority, and considerable doubt remained as to whether there was a sufficient hardship. In spite of this the residence variation probably should be granted in most of the cases. An additional family in a block will add very little to traffic congestion, fire hazard, or destroy property values. The "unnecessary hardship" requirement is perhaps too stringent in these cases if applied literally since it would mean that very few if any of the residence variations would be allowed. The adoption of "performance standards" (more fully discussed later) is a preferable test, particularly in granting this type variation. In any event the Board should consider the number of petitioners within a particular area requesting these variations and if there are a considerable number, the variances should be denied and relief sought by a request for a zone change to the Planning and Zoning Commission.

Business Variations

Another problem much more harmful to the comprehensive plan is the granting of business variations. An incidental effect of this type variance often gives the petitioner an inherent competitive advantage as a result of other businesses being excluded from the area. But a more serious objection is the destructive effect on the comprehensive zoning plan resulting from allowing business encroachments into residential or other districts from which they are excluded. Thus these variances should be granted only in extreme cases.

The Lexington Board of Adjustment adheres to this in theory (apparently as do most Boards) but generally grants the variance. In a typical wrangle over a business variance the petitioners will first go to the Planning and Zoning Commission and request a zone change. After denial, an appeal to the Board of Adjustment follows. A good example of this was a request for a permit to operate a retail seed and plant store in an Agricultural I district.\(^{18}\) The provision governing Agricultural I areas, under the subdivision, *Accessory Uses Permitted*, lists:\(^{19}\)

> Accessory uses and structures customarily incident to any aforesaid permitted principal use. . . . not including any business, trade or industry nor any access driveway or walk thereto, unless clearly incidental to a permitted principal use. (Emphasis added)

This clearly was not an incidental use because it was specifically excluded from the zone. Apparently it was not even a desirable one

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\(^{18}\) Application of Mrs. Audella Pickett, Feb. 21, 1955.

\(^{19}\) Lexington Zoning Ordinance-Resolution, p. 8.
in this zone since the Planning and Zoning Commission had previously denied a zone change to a Business 3 zone. Despite this the petitioner appealed to the Board of Adjustment, alleged an “unnecessary hardship”, and obtained a variance. In setting out the hardship the letter to the Board stated such factors as:

(a) The business is essential to the public.
(b) It cannot be detrimental.
(c) There is no objection from adjoining property owners.
(d) This is the only piece of property petitioner owned.

These allegations would probably apply to most of the lots in the zoning district and if this is true all the lot owners could obtain a variance. But assuming the hardship is present the Board seemed to have been exceeding its prescribed authority under the ordinance. The ordinance in the above cited section specifically excluded “any business” from this zone and a change in this condition would require an amendment. This will be discussed more fully later. In short, the tendency of this Board, along with others, is to play the good fellow and substitute for the tests prescribed by the ordinance the following, “(1) Will the variance help the applicant, (2) Are the neighbors complaining?”

Industrial Variances

Usually the most destructive variance to the comprehensive plan is the industrial one. These may be followed by serious traffic difficulties, obnoxious odors, an increase in fire hazards, or a blight on the beautification of the area. Despite this they may be granted if there is a sufficient showing of hardship.

One of the most flagrant examples of abuse of this concept by the Lexington Board concerned one of these. The petitioner first requested a zone change and was refused. Then followed an appeal to the Board of Adjustment for a variation to permit the erection and operation of a gasoline bulk plant and oil station in an Industrial I district (light industrial). The variance was allowed. Here again the ordinance not only failed to provide for the use but listed under the heading, “Especially Objectionable Industries” the sub-heading “Petroleum or inflammable liquids production, refining, and storage,” referring to the use in question. And even in an Industrial 2 district this type use is only allowed when permitted by the Board.

20 Horack and Nolan, supra at 1, 177.
22 Lexington Zoning Ordinance-Resolution, sec. 18.7.
In an effort to show the requisite hardship the petitioner alleged the following:

(a) no available property in an Industrial 2 district
(b) this was not contrary to the public interest
(c) failure to grant the variance would result in an unnecessary hardship
(d) the spirit of the ordinance would be observed and substantial justice done.

After this successful attempt followed a similar request by another oil company to use an Industrial I area for the same purpose in which the argument was made that since storage up to 25,000 gallons was permitted, a permit for storage of 250,000 gallons was not a use variance. Obviously the smaller figure was only a liberal allowance for a service station and not intended to allow future use as a gasoline bulk plant, but the argument appealed to the Board and this industrial variation was also granted.23

But even assuming an unnecessary hardship in these cases the Board probably was exceeding its authority under the provision of the ordinance. In effect the Board was passing an amendment, not granting a variance, because this type use is specifically prohibited in the district. The Kentucky Court of Appeals has stated,24

However, the power of authorizing special exceptions to and variations from the general provisions of the zoning law is designed to be exercised only under exceptional circumstances and not for the purpose of amending the law or changing its scheme in essential particulars such as . . . authorizing the erection of a building forbidden by the zoning law to be erected. (Emphasis added)

The Court felt that to permit a use forbidden by the terms of the ordinances would be contrary to its spirit and intent. A use classified as "especially prohibited" is certainly forbidden and a permit allowing it would be amending the ordinance. In summary, there is a limitation on the authority to grant variances when two conditions are present: (a) when the request is for a use or structural variation, and (b) when the proposed variation is prohibited by the terms of the ordinance. This is clearly outside the jurisdiction of the Board and could only be accomplished by rezoning the district.

There are two other methods used to affect a zone change neither of which are variances technically, but both should be mentioned be-

23 Application of Ashland, Aetna, and W. T. Young, Jan. 27, 1956.
24 Bray v. Beyer, 292 Ky. 162 at 167, 166 SW 2d 290 at 293 (1942); also see 168 A.L.R. 1, 38.
cause they are often requested in lieu of them and have the same destructive effect on the comprehensive zoning plan. These are requests for (a) rezoning and (b) temporary uses.

Requests for rezoning are directed to the Planning and Zoning Commission. It may then grant or deny the petition depending on the effect on the master zoning plan. But this possibility will only be mentioned and not gone into in any detail because it is more properly the subject for a separate discussion.

But the second alternative, temporary uses, is a variance in disguise. (It is not a variance because it is provided for in the ordinance itself and therefore similar to an exception.) The Lexington Ordinance-Resolution provides that the Board of Adjustment has authority to grant:

The temporary use of a building or premises in any district for a purpose or use that does not conform to the regulations prescribed by the Ordinance-Resolution; provided, that such use be of a true temporary nature and does not involve the erection of substantial building. Such permit shall be granted in the form of a temporary and revocable permit for not more than a twelve (12) month period, subject to such conditions as will safeguard the public health, safety, convenience and general welfare.

This provision is subject to abuse because it may result in some very permanent “temporary” structures. In one case arising under this provision the petitioner requested a permit to establish a temporary repair shop and storage yard in a Suburban Residence 1 district. The ordinance pertaining to this district, under the heading of Principal Uses Permitted, listed:

Public buildings and properties of the cultural, administrative or public service type, except such uses as storage yards, warehouses, garages, or similar uses. (Emphasis added)

Even though the storage yard was not a use permitted in the area under this provision, the Board granted a temporary use under the temporary use provision of the ordinance. This case was followed sometime later by a request to erect and operate a greenhouse and florist shop in a Residence 3 district. By this legal device the local Board may obtain almost complete discretion in these cases and is not hampered even by a concept as vague as “unnecessary hardship”.

26 Application of Hart and Lovell, April 26, 1954.
27 Lexington Zoning Ordinance-Resolution, sec. 7.16.
28 Application of Mr. Nel Phillips, May 27, 1954.
CONCLUSION

Obtaining an accurate analysis of the applicable standards of a Board of Adjustment is a very difficult problem. The records of the proceedings are very incomplete and leave much to be desired when an attempt is made to discern the general principles running through the cases. Then, too, the Board itself does not give adequate reasons for its decisions, and as a result only an attorney who handles zoning cases periodically before a particular board can have an accurate idea as to the standards applicable when formulating an effective argument of his case. Of course, this enables the Board to avoid being bound by precedent and to decide each case primarily on its own facts, which may be particularly desirable in granting variances because so many unique fact situations arise. However true this may be, the problem remains of finding criterion for the Board's decisions.

Because of the general confusion in this area of zoning law and the abuse by many boards of the power to grant variances, there is a trend toward abolishing the use variance altogether. But use variances as well as dimensional variances, serve a very functional purpose in the overall administration of zoning regulations and should not be eliminated. A multitude of situations arise in which variations are proper: changes in the neighborhood, built up areas with odd sized lots left over, widening highways, depletion of residential areas, etc., all may call for variances. To abolish them would prevent the most efficient use of these areas. The proper approach is to recognize that variations are a necessity for full utilization of land resources and then attempt to formulate a systematic approach in granting them.

In Lexington and in most other cities utilization of the land has been accomplished by the traditional method of "categorical" zoning with provision for use variations to be granted in only a few instances. By this method each zone is thought of as designed for one principal use, and in theory the variances were to be granted sparingly. But, as evidenced by the Lexington Board, this procedure often breaks down. It assumes that city planners have an uncanny ability to predict future needs by anticipating the possibilities in future city growth. A solution to the problem requires a reorientation in zoning thinking with recognition of the idea that use variances are not inherently evil, but are only so as they adversely affect surrounding property. For example there may be nothing wrong with certain heavy industry in light industrial areas, or certain businesses in residential zones, etc. And after all, classification of all industry, business, or residences, into clear cut categories is at best artificial and arbitrary.
The adverse effect of variances on surrounding property values could be remedied by adoption of "performance standards" as criteria for allowing the change. By this method the use could be permitted regardless of land classification wherever the requested use is not injurious to adjacent land or to the zoning plan of the city. Instead of the present nebulous concept of "unnecessary hardship", boards would simply determine the effect of the particular use in question on the area by noting the amount of smoke, dust, dirt and flying ash, noise and sound, electro magnetic radiation and interference, and industrial wastes resulting from it. For instance in allowing industrial activity into a particular zone standards of the following character could be adopted.29

Smoke—not equal to or denser than Ringleman #1, except for periods aggregating four minutes in any 30 minutes, or Ringleman #2, except for periods aggregating three minutes in any fifteen when starting a new fire. Smoke of such capacity as to impede vision . . . greater than #1 on the Ringleman Chart is not permitted.

Dust, Dirt and flying Ash—shall not exceed 0.3 grains per cubic foot of flue gas, at stack temperature at 500 degrees Fahrenheit, of which amount, not to exceed 0.2 of a grain per cubic foot shall be of such size as to be retained on a 325 Mesh United States Standard Sieve.

Noise and Sound—A maximum of 70 decibels at the property line where the property adjoins residential or business districts. Noise is required to be muffled so as not to be objectionable due to intermittance, best frequency, or shrillness, may equal but not exceed street noise during a normal day shift work period.

Standards of similar character should be adopted regulating all the other factors which might make a particular use abhorrent in an area and if the use conforms to the minimum requirement it should be permitted regardless of its nature. This would have several advantages—

(a) It would make land available for a greater variety of uses.

(b) It would do away the concept of "unnecessary hardship" and substitute in its place an objective criterion with some scientific basis for allowing varying uses.

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29 Horack and Nolan, supra 1 at 82.