

Zoning Board of Appeals Handbook

Published by the Michigan Municipal League

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Printed March, 2000

Reprinted July 2006, December 2015

ISBN 1-929923-02-3

About the Author:

Steve Langworthy is retired from the firm of LSL Planning. His more than 25 years of planning experience includes six years as the Planning Director and Zoning Administrator for the city of Kentwood and extensive experience in a variety of communities as a consulting planner. Steve authored numerous master plans, zoning ordinances, and special studies for communities of all sizes and levels of government.

Forward:

Along with the other appointed and elected municipal officials in your community, members of a zoning board of appeals accept responsibility to protect the personality and vitality of your community. To carry out their duties, these volunteers must digest a mountain of information and negotiate a maze of delicate situations.

This handbook was written to help new zoning board of appeals members understand the scope of their role and responsibilities, and to provide them with a basis of understanding in order to capably perform their duties within the law. Topics covered include: the role of the zoning board of appeals as a whole and the roles and responsibilities of individual members; an explanation of the Michigan Zoning Enabling Act; the ZBA's relationship to other municipal bodies and individuals; how to identify and handle conflicts of interest; how to interpret a zoning ordinance; types of variances; preparing for and conducting meetings; and guidelines for making tough decisions.

As the state association of cities and villages, the Michigan Municipal League is committed to providing a variety of educational resources for both elected and appointed municipal officials to assist them in doing their jobs. The League is a non-partisan, nonprofit association working through cooperative effort to strengthen the quality of municipal government and administration.

This handbook is the latest step in our continuing effort to help municipalities meet the daily challenges of governing. Our thanks go to community planning consultant Steve Langworthy of LSL Planning for developing this text. His knowledge, creativity, insight and patience are most appreciated. Contributing to the legal accuracy of this book were attorney Gerald A. Fisher of Kohl, Secrest, Wardle, Lynch, Clark & Hampton and League Associate General Counsel Sue Jeffers. The Information and Publications staff of the League added a measure of common sense and smooth flavor.

The League's goal is to produce publications that will help to make your job easier. We welcome suggestions for additions to this publication and your comments in regard to all of our publications. Let us know how we are doing and how we can be of further assistance.

Daniel P. Gilmartin
Executive Director

Introduction—The Job

Congratulations!

§ 1 Your appointment to the zoning board of appeals (ZBA) is one that carries a significant responsibility for protecting your community and its future.

This handbook will provide you with some hints about how to be an effective member of the zoning board of appeals. It will tell you about the laws and regulations governing zoning and provide information about some of the expectations and methods you may use to prepare, make and enforce your decisions.

During your term you will encounter a wide variety of zoning related problems. Knowing some of the intricacies of zoning is only a part of your responsibilities. You will also learn how to deal with people, both applicants and neighbors, with patience, tact and diplomacy. Knowing how to act in stressful circumstances is one of the most important parts of the job, and one that is best learned through experience. The *Zoning Board of Appeals Handbook* is your head start on learning how to deal with these difficult situations.

You are encouraged to seek other sources for learning about the technical details of zoning and related topics. These, too, will be a significant part of your job as a member of the zoning board of appeals. The Michigan Municipal League can suggest a number of documents that can help you on your way, as well as an ongoing series of courses you may find helpful.

What's in a Name?

§ 2 Your zoning ordinance may have given a different name to your board than the zoning board of appeals, such as the Board of Appeals, Board of Zoning Appeals, Board of Appeals and Adjustment or some other

similar name. In townships this should not be confused with the Zoning Commission, which is a derivative of a planning commission. Regardless of the name, the duties and authority of the ZBA are largely the same.

The Job

§ 3 The future of your community will be greatly affected by the decisions you make as a member of the zoning board of appeals. Few voluntary, non-elected appointments have the kind of power granted to the ZBA. This is because it is one of only a few bodies that can permit someone to legally avoid compliance with an adopted ordinance. The exercise of this power is restricted by standards discussed in greater detail below that are to be applied in decision making.

It Begins with a Philosophy

§ 4 Becoming an effective ZBA member begins with a clear philosophy of your approach to the task. Perhaps you had a desire to give something back to the community, or something happened in your neighborhood that disturbed you or you wanted to help people. Most likely, you did not get into the job for the money (you did volunteer, after all).

Regardless of why you decided to accept the appointment, to be an effective member, your participation will require a serious commitment of time and energy, and a serious commitment to the laws governing the decisions of the ZBA.

It may help to understand why the job of the zoning board of appeals was created in the first place.

What is a Zoning Board of Appeals?

§ 5 Early in the history of zoning it was recognized that it was nearly impossible to write a set of regulations affecting the development of land that could be universally applied. Many communities in Michigan and throughout the country had hundreds or thousands of parcels of land to which zoning standards had to be applied. As a result, it was clear that a means of providing relief from the strict requirements of the zoning ordinance was needed for property owners with unique conditions related to their property.

To provide an avenue of appeal, each state's zoning enabling acts required that any community which adopted a zoning ordinance have a zoning board of appeals. The function of the ZBA was to be a quasi-judicial body, to carry out two principal functions:

1. To hear and decide appeals of administrative decisions made in implementing the zoning ordinance; and
2. To hear and decide requests for variances from the strict terms of the zoning ordinance. In addition, the ZBA is occasionally called upon to interpret the provisions of the zoning ordinance.

The Role of the ZBA

§ 6 As a member of the zoning board of appeals, you will be dealing with one of the most enduring elements of society – land. Decisions based on the land nearly always last forever because they are in place regardless of the owner. Therefore, your decisions can have a serious effect on the use and value of land.

At the same time, you will be dealing with people, both applicants and neighbors affected by your decisions. You will find that this can create uniquely challenging

situations. Consequently, your actions must be based on the long-term interests of the community which, in turn, must be guided by the decision-making standards of the zoning ordinance.

Every person who can meet the criteria for relief has the right to seek relief from a zoning ordinance requirement. If the standards used by the ZBA are carefully considered and followed, the integrity of the ordinance should be maintained. However, not following such standards leads to problems. Too often variances are granted simply because no one sees any harm. The ZBA soon gains a reputation for not following its ordinance. One merely has to go to the zoning board of appeals to obtain relief from the ordinance—getting a variance is no problem. Eventually, the offhand granting of variances harms the community's ability to enforce the ordinance. Moreover, poorly supported decisions can, over time, destroy the credibility of the zoning ordinance. It is up to the members of the zoning board of appeals to prevent this by strictly applying the standards of the ordinance.

These decisions will not always be easy. In some instances, you will know the land owners, neighbors or applicants personally. The key to acting in a responsible manner is to act in ways that will allow you to treat each person and property in a fair and consistent manner.

Chapter 1 The Basics

§ 7 In the Introduction we noted that being an effective ZBA member begins with a clear understanding of the job and each member's approach to it. Two important aspects with which you should be familiar are the legal basis for the zoning board of appeals and the relationship between the ZBA and other bodies and officials dealing with the zoning process.

The Zoning Enabling Act

§ 8 All zoning authority is granted by the state through the new Michigan Zoning Enabling Act, (PA 110 of 2006). Counties that have adopted a zoning ordinance have zoning authority over townships (but not over cities or villages) which do not have their own zoning ordinance. Cities, villages and townships that have their own zoning ordinances do not fall under county authority.

The zoning enabling act defines the membership, responsibilities and authority of the ZBA. It also describes general rules for the formation and operation of a zoning board of appeals. The chart on the following page outlines some of the differences in the organization of the ZBA at various levels of government.

Membership

§ 9 Qualifications for membership are generally minimal. Members are only required to be an elector and be representative of the population distribution and the "various interests present" in the community."

Although less common, but still practiced, legislative bodies may also act as the ZBA, but only in cities and villages. In townships, an elected official may be a

member of the ZBA, but cannot be the chair.

In addition to regular members, up to two alternates may be appointed to the ZBA. Alternates serve in the event of a declared conflict of interest or absence of a regular member. When called, alternates serve until the application(s) is resolved. In the case of an absence, the alternate stays with the cases heard even if the absent member returns.

Bylaws

§ 10 The enabling act also permits the zoning board of appeals to adopt rules governing their operation, commonly referred to as bylaws. The bylaws should specify certain responsibilities, such as defining officers and their duties, quorum rules, special meeting procedures, conflict of interest procedures, and other aspects of the ZBA's operation. Bylaws are not part of the zoning ordinance but are adopted by the ZBA as its rules for operation.

Relationship to Other Bodies/Individuals

§ 11 It is also important to understand the relationship between the zoning board of appeals and others with responsibility in the zoning process. Zoning responsibilities are divided between several individuals and bodies.

Zoning Act:
Michigan Zoning Enabling Act
2006 PA 110
MCL 125.3101 et seq.

	Community
Number of members	Less than 5,000 population—not less than 3 members
	5,000 or more population—not less than 5 members
Membership	Planning commission member must be on the ZBA; elected official may be on ZBA. In cities and villages, the elected body may act as the ZBA.

Planning Act:
Municipal Planning Enabling Act
2008 PA 33
MCL 125.3081 et seq.

Purpose: to codify the laws regarding and to provide for county, township, city, and village planning; to provide for the creation, organization, powers, and duties of local planning commissions; to provide for the powers and duties of certain state and local governmental officers and agencies; to provide for the regulation and subdivision of land.

The Planning Commission

§ 12 The planning commission is given the responsibility of drafting the master plan; the legislative body must “approve the plan for distribution,” and may elect to become the adopting authority for the plan. After preparing a proposed plan, the planning commission must submit the proposed plan to the legislative body for review and comment. Before the adoption process can proceed, the legislative body must approve the distribution of the proposed plan. If it does not, it must return the plan to the commission with its objections. The

commission must then revise the plan until it is accepted by the legislative body.

The long-term effect of this change to the adoption process will have to be determined. But even if the planning commission is delegated the responsibility of completing and adopting the master plan, the legislative body should be involved in all of the critical steps of the process in order for the plan to be effectively implemented.

The master plan is intended to serve as a guide for the future development of the community. The plan is used to indicate locations for new development where natural features and the environment are not at risk, where community character will not be diminished, and where expenses for new roads and services will be at a minimum. It is essential that any action related to zoning, including those actions taken by the zoning board of appeals, should take into consideration the master plan.

The planning commission is also responsible for writing the first draft of the zoning ordinance. This was done to ensure a direct connection between the master plan and zoning ordinance. Local control of the use of land (with some exceptions, such as some state land uses and federal land

uses) is an accepted legal principle. Land use is controlled through the separation of land into various use areas, called zoning districts. The rules governing these districts are found in the zoning ordinance, which contains provisions controlling the type and intensity of development allowed.

The zoning ordinance should be established and amended as guided by the master plan. The future land use classifications of the ordinance's zoning districts are depicted on the zoning map that is part of the ordinance. The density and intensity planned for the land use districts are translated to the uses permitted, lot sizes and other regulations.

The courts of the State of Michigan do not recognize the master plan as authorizing land uses on its own. This authorization is contained in the zoning ordinance. However, the courts do lend much more credibility to land use actions supported by careful planning than those actions that appear to have been taken arbitrarily against an individual property owner.

The Legislative Body

§ 13 The elected governing body of the community has several responsibilities related to the zoning board of appeals. First, and most obvious, the members of the ZBA are appointed or approved by them, unless the legislative body itself decides to act as the ZBA (cities and villages only). Second, the legislative body is responsible for providing the funds necessary for the operation of the ZBA. This includes per diem (or per meeting) payments to members and other expenses such as mileage for site visits, attendance at conferences and training sessions, educational materials and other costs associated with the ZBA.

Finally, the legislative body is required to adopt the zoning ordinance and any

subsequent amendments, based on a recommendation from the planning commission. Ultimately, the legislative body decides what zoning regulations and policies will be adopted and followed by the community.

It is especially important for the ZBA to recognize its role in relation to the planning commission and legislative body, particularly with respect to the writing and adoption of the master plan and zoning ordinance. There is no formal process for the zoning board of appeals to play an advisory role in determining planning policies or zoning regulations. Accordingly, it is not the role of the ZBA to attempt to change those regulations or policies through their actions. This, of course, does not prevent the ZBA from communicating their thoughts regarding the ordinance during the course of performing its functions.

The Zoning Administrator

§ 14 The zoning administrator is the individual responsible for the day-to-day administration and enforcement of the zoning ordinance. In many communities the zoning administrator is a valuable contact between the ZBA and the applicant, ensuring that all relevant materials are provided, offering advice in filling out application forms, and advising the ZBA on important factual matters pertaining to the requests before them. In some communities the administrator is asked to provide written, advisory recommendations regarding applications.

In communities where staff or other assistance is available, some of the roles filled by the zoning administrator, including submission of recommendations, may be complemented or completed by these other individuals.

Duties and Responsibilities of the Zoning Board of Appeals

§ 15 The zoning board of appeals exercises three basic roles or functions. These include:

- a) Interpreting the ordinance (text and map),
- b) Deciding appeals from administrative decisions, and
- c) Granting variances (use and non-use).

The terms *appeal* and *variance* are often used interchangeably, but in fact are two entirely different concepts.

A variance, if granted, allows a departure from a particular requirement of the zoning ordinance.

An appeal is based on the fact that someone has made a decision related to the zoning ordinance, and another person disagrees with that decision.

Conflicts of Interest

§ 16 Knowing about conflicts of interest is important since the zoning act requires the use of an alternate when a member has a conflict. In some instances, failure to declare a conflict of interest may result in the removal of a ZBA member.

What Constitutes a Conflict of Interest?

§ 17 You probably have a conflict of interest if:

- you are the applicant;
- a close relative is the applicant;
- a business associate, lender or renter is the applicant;
- the proposal could allow you or a business associate to receive a financial gain or benefit;
- you are a planning commission representative to the zoning board of appeals and the matter to be heard is an appeal from a previous

planning commission decision in which you participated; or

If you have to ask...chances are others are asking as well. If you are in doubt about whether or not you have a conflict, it is often advisable to take a conservative approach and declare a conflict. This helps to avoid a public appearance of unfairness.

You may also consider the possibility of declaring a conflict of interest if your home falls within a notification radius used by your community for zoning board of appeals' actions. Since the sending of the notice automatically presumes some degree of interest, this fact should be recognized by declaring a conflict, particularly if a financial impact is likely.

Ultimately, the declaration of a conflict of interest becomes a personal issue and one that should be honored by the other members. If in doubt about whether a conflict of interest is present, it will generally be better to avoid the perception of a conflict, even though an individual member may conclude that a conflict does not exist.

What to Do

§ 18 In order to maintain public trust and insure fairness, it is important to follow some simple steps if a conflict is present. The ZBA bylaws should address fully those actions to be taken in the event of a conflict of interest. Suggested actions are:

1. Declare the apparent conflict of interest. If a member is aware of a conflict prior to the meeting, the staff/chair should be notified in order to allow an alternate to be called. If an alternate is called in, he or she serves on that case until it is completed.
2. Generally, voting by the other members on a conflict of interest is not necessary. However, if the ZBA adheres strictly to Robert's Rules of Order for all meeting procedures (not

just conflicts), members should be excused through a vote. However, declaring a conflict of interest should not be used as a means of avoiding a difficult or uncomfortable decision.

3. Abstain from voting and do not participate in deliberations, either as a member of the ZBA, or as a citizen. Although no one can be prohibited from speaking as a citizen, the comments from a fellow ZBA member will likely be viewed by the audience as being very influential and have the appearance of bias. This does not prevent the member from being represented by an attorney, family member or friend.
4. Once the conflict is declared, you may wish (but have no obligation) to leave the room. This will be a clear indication to the audience that the member has no part in the deliberation or decision, and it avoids any perception by the audience that the member is attempting to influence the others. By all means, the member with a conflict should vacate his or her seat during all proceedings involving the case.

Some Don'ts

§ 19 if you have a conflict of interest, Don't discuss the proposal, either formally or informally with any of the other members.

Don't use inside knowledge and contacts. Make sure that minutes, staff materials, etc., are obtained through the same procedures as any other applicant. It is best to have someone else collect this information.

Don't represent yourself if you are the applicant. Have someone else perform that function. It is acceptable to have other family members, an attorney or a personal representative speak for the member.

Interpretations

§ 20 The ZBA is authorized to issue an official interpretation of the zoning ordinance. Interpretations may be related to either the text of the zoning ordinance or to the boundaries of the zoning map. Unlike legal opinions or recommendations of consultants, an interpretation by the ZBA establishes the meaning of the matter being interpreted and is deemed to be the actual meaning of the ordinance from that point forward, unless the ZBA's interpretation is appealed to the courts.

Several rules of thumb may help in making interpretations.

a) Base map interpretations on the zoning ordinance itself and any relevant historical information. Commonly, these rules are of the "walk like a duck" variety. In other words, if it appears as though the zoning boundary follows a river, it should be assumed to follow the river, or a road right-of-way, or some other physical feature. Where the boundary is unclear, the ZBA should take into account past zoning history (if any) and the potential effect of a determination on surrounding properties.

b) Interpret the text of the zoning ordinance based on a thorough reading of the ordinance in order not to have the effect of amending the ordinance.

c) Give weight to reasonable practical interpretations by administrative officials if applied consistently over a long period of time.

d) Keep records of all interpretations. Once an interpretation is rendered, it is the official position of the community as to that provision. Consistency in decision making is important for the long-term.

e) Generally, if equally convincing points are put forth by the zoning administrator and an individual affected by an interpretation, fairness dictates that the person most affected by the interpretation should prevail. In other words, where two

interpretations are reasonably equal, the benefit of the doubt should be given to the property owner rather than the zoning administrator.

Once an interpretation is made, it is advisable for the planning commission to review the matter to determine whether or not an amendment to the ordinance is needed to further clarify the language (for a text interpretation), or to review the zoning map to determine a specific location of a zoning boundary (for a map interpretation).

Appeals

§ 21 The zoning board of appeals is empowered to hear and decide appeals from any person aggrieved by an administrative decision. An administrative decision is one made by a zoning administrator or the planning commission, or by the legislative body when they are acting in an administrative capacity, (if, for example, the legislative body approved all site plans). Most often, appeals are the result of a disagreement with a decision of the zoning administrator, or, in some cases, a person aggrieved by a site plan review decision by the planning commission. Appeals may be required to be filed within a specific time period set in the zoning ordinance.

The ZBA cannot hear two types of zoning decisions. The first is an amendment to the zoning ordinance (rezoning or text change)—this is reserved for the legislative body. The second type of decision is for special land uses and planned unit developments, which can only be heard by the ZBA if the zoning ordinance specifically allows for an appeal.

Although the ZBA may reverse or affirm, wholly or partly, or may modify a prior decision, its powers are generally limited to determining whether or not the official or body making the administrative

decision acted properly. The ZBA must recognize that the zoning administrator or planning commission has already made a decision regarding the issue as part of its delegated duties. The role of the ZBA is to determine whether the decision was authorized or supported by the zoning ordinance.

In addition, the ZBA should not treat the appeal as a new decision. Rather, review of the decision should be limited to the information that was available to the body or person who made the decision initially. Allowing testimony or evidence in addition to that previously submitted is inappropriate, unless the zoning ordinance directs otherwise.

In those instances where the official or body used proper procedures and standards, the ZBA should uphold the decision, even if the members personally disagree with the result.

Some communities attempt to make appeals and variances the same by allowing an application to the zoning board of appeals only after the denial of a requested permit, such as a building permit or zoning compliance permit. This can be an inefficient and cumbersome procedure since a permit application may require submission of a full application for the permit, even when it is obvious that some requirement of the zoning ordinance is not met and a variance will be needed before a permit can be issued.

Variances

§ 22 A variance grants permission to depart from a requirement or limitation of the zoning ordinance. There are two types of variances:

- a) Nonuse variances (dimensional variances)
- b) Use variances

Nonuse or Dimensional Variances

§ 23 A nonuse variance, also known as a dimensional variance, is a modification of a provision or requirement of the zoning ordinance authorized by the zoning board of appeals when the strict or literal application of the ordinance would cause “practical difficulties” for the applicant. Nonuse variance requests are typically associated with modifications of required yard setbacks, building heights, parking requirements, landscaping or buffering restrictions and related building or facility placement provisions.

To obtain a nonuse variance, the applicant must show that a *practical difficulty* exists on the property by demonstrating that the applicable review standards are met. A detailed examination of these standards is provided in Chapter 3.

Use Variances

§ 24 A use variance allows a use of land that is not permitted in the district in which the property is placed. Granting of a use variance requires that the applicant demonstrate that an “unnecessary hardship” would be imposed if the owner cannot use the property as requested.

Use variances are permitted in cities and villages but limited in townships and counties. According to the Michigan Zoning Enabling Act, only the following townships and counties are eligible to hear use variances:

1. Those that as of February 15, 2006 had an ordinance that used the phrase use variance or variances from uses of land to expressly authorize the granting of use variances; and

2. Those that granted a use variance before February 15, 2006.

However, even if permitted and eligible to hear use variances, the Zoning Enabling

Act allows community opt out of this procedure.

To prohibit use variances the community must adopt zoning ordinance language that prohibits submission of use variance requests.

From a community planning perspective, the indiscriminate granting of use variances is a poor zoning and planning practice. Given the long-term implications, it is important that the ZBA understand the ultimate effects of use variances on the master plan or zoning plan for the community. Approval of a use variance can change the overall land use character of a particular area. That is why strict attention to the use variance standards is necessary.

Following the Rules

§ 25 It is especially important that the zoning board of appeals establish a consistent method of processing applications, conducting meetings and handling other procedures. As noted earlier, the ZBA should have a set of written procedures, or bylaws, for those rules of operation not covered in the zoning ordinance.

Some common considerations follow.

- Incomplete applications (inadequate site plan, fee unpaid, etc.) should not be accepted, i.e., should not be placed on an agenda.
- If public notice was not properly completed, the process must be stopped and a new process begun using a correct notice as to form, content and publication.
- Action should not be taken on any application unless the applicant or a representative is present (unless legal time limits dictate otherwise).

Conclusion

§ 26 Variances are not intended to relieve requirements of the zoning ordinance that are simply preventing applicants from doing what they wish.

Instead, the zoning board of appeals was intended to serve as a safety valve in those relatively rare circumstances where the application of the zoning requirements results in a practical difficulty (for nonuse variances) or unnecessary hardship (for use variances). However, variances approved without sufficient justification can turn the safety valve into a leak. Eventually, this will erode the overall purpose and effectiveness of the zoning ordinance, particularly when it is commonly known that the ZBA is likely to approve virtually any request.

Chapter 2 Preparing for and Conducting Meetings

§ 27 Membership on the zoning board of appeals can mean either just showing up for the meeting or being prepared to make informed decisions. While it is difficult to ask a volunteer to put forth an extra effort, your agreement to serve is also a commitment to do the best possible job for your community.

It is difficult for any member of the ZBA to reach a fair and impartial result without a firm base of knowledge about the matters on which he or she is asked to decide. To gain this knowledge, you will need assistance from the community's staff, the applicant and each member. There are some positive "fact finding" steps you can take to make sure you are ready to make the best possible decision.

Information

§ 28 In order to prepare properly for a meeting, you must review all available and relevant information. At a minimum, this will include copies of applications, site plans and other supporting material. This material should reach you early enough to allow adequate time to study and prepare, normally, at least one week before the meeting.

Public Hearing Notices

§ 29 A public hearing is required for all ZBA approvals (variances, interpretations, and appeals). The notices differ slightly.

For variances, a notice of the request must be published in a newspaper of general circulation.

Notice shall also be sent by mail or personal delivery to the owners of property for

which approval is being considered, to all persons to whom real property is assessed within 300 feet of the property, and to the occupants of all structures within 300 feet of the property regardless of whether the property or occupant is located in the community. If the name of the occupant is not known, the term occupant may be used in making notification.

The notice shall be given not less than 15 days before the date the application will be considered for approval. The notice shall do all of the following:

(a) Describe the nature of the request.

(b) Indicate the property that is the subject of the request. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property. If there are no street addresses, other means of identification may be used.

(c) State when and where the request will be considered.

(d) Indicate when and where written comments will be received concerning the request.

Public hearings for interpretations and appeals are the same, except that notices to individual property owners other than the applicant is necessary only if a specific property is involved in the interpretation or appeal.

Site Visits

§ 30 Visiting the site is a critical step in the decision making process. Even if you have lived in the community all your life, a site will look different to you when a specific request is made. Prior to the site visit you should review any site plans or sketches submitted as part of the application. This review will allow you to gain a proper perspective on the request and how it relates to surrounding properties and to the standards of review you are required to use to reach your decision.

Some precautions must be taken when doing site visits. First, all such visits should always be made individually rather than as a group. Meeting on site (even with less than a quorum) presents several potential problems.

- A site visit by a majority of the membership of a decision making body is a “meeting,” and must be advertised in accordance with the Michigan Open Meetings Act, MCL 15.261 et seq., and the requirements of the Americans With Disabilities Act (ADA) must be met.
- Practically, it is hard for the visiting members to avoid talking among themselves about the proposal. Such discussions can violate the spirit as well as the letter of the Open Meetings Act.

Second, do not go onto the site unless the property owner has granted specific written permission or unless the site is otherwise available to the public (such as an existing shopping center). Verbal approvals should not be relied upon as sufficient permission. Written permission helps avoid misunderstandings and problems with trespassing accusations.

Refusal by the applicant to allow you on the site can not influence your decision.

Many people are concerned about liability or are simply determined to protect their privacy.

The Michigan Open Meetings Act, MCL 15.261 et seq., was intended to make sure that the decision making process followed by government bodies always takes place under the watchful eye of the public. Even though you can simply meet the *letter* of the act, it is just as important that the *spirit* of open meetings be observed. *Don't look for ways around the act; look for ways you can make it work better.*

If permission has not been granted and you feel as though your decision cannot be made without viewing the site, look for other ways to get the same information. This might include aerial photos or surveys. You may also request that the applicant submit photographs, slides or video tape particularly for larger, inaccessible sites. This information may be available from community staff or you may ask for it from the applicant. There are many ways to gather the necessary information and you should not make a decision until it is obtained.

TIP: Consider adding a line to your application form that allows the applicant the option to grant permission for the members to conduct a site visit.

You may feel free to request information from the community's staff. Make sure whatever information you receive is also distributed to each of the other members. Similarly, written materials received at home from applicants or others

should be provided to the community's staff⁶ for distribution to the rest of the members.

Finally, do not talk to the property owner, neighbors or applicant outside of the meeting. The intent of information gathering is to ensure that everyone has the same information on which to base a decision. This is not possible if individual members contact or are contacted by others outside of the meeting.

If the applicant or others contact you, be prepared to tell them that you are required to conduct all of your discussions only when the other members of the ZBA are present. Encourage them to come to the meeting (tell them when and where) or ask them to submit their comments in writing (tell them to whom and by what date). If contact cannot be avoided, it should be reported to the rest of the members during the meeting, along with the general content of the conversation.

Remember - you are only one person on the ZBA; the only time you should act as a member of the zoning board of appeals is in the presence of the other members at a posted meeting.

Before Leaving Home

§ 31 Make sure you have everything. Follow this checklist.

1. Do you have your zoning ordinance and other applicable ordinances, if any?
2. Have you examined the agenda and related materials?
3. Have you written down your questions?
4. Have you completed the site visit? If not, at least drive by the site on the way to the meeting.
5. Have you reviewed the standards that will be used for each decision?

6. Remind yourself that the purpose of preparing for the meeting is not to make a decision; it is only to gather the information needed to prepare you for the decision that is to come.

Meeting the Public

§ 32 Land use issues, as you will no doubt discover, can bring out strong emotions. Faced with a roomful of angry and concerned people, you may sometimes find it difficult to maintain the decorum and professionalism needed. Although many zoning boards of appeal follow Robert's Rules of Order in one form or another, there are other, more subtle aspects that, while not unique to zoning, nevertheless are important.

Being Fair

§ 33 The foremost concern of any member of a public body should be to ensure fairness for all concerned. To accomplish this, it is helpful to keep some simple things in mind.

- Everyone must have the opportunity to speak and present evidence at public hearings. While some limitations may be placed on this right, as described later, no action should be taken that would deprive a person of his or her right to be heard within the confines of applicable rules of procedure.
- Recognize emotional responses and treat them with concern and understanding. Strong responses, within limits, should be expected and understood. Controlling your own emotions is essential, even if the comments get personal.
- One of mankind's greatest fears is public speaking. Make an effort to look beyond the mannerisms

and nervousness to find the speaker's message.

- Regardless of how many people show up to oppose or support a request, you must represent the long term interests of the entire community, not just those at the public hearing. Further discussion of this issue is presented later in this chapter.
- Listen. Public meetings are your chance to take the pulse of the community and to learn more about the neighborhood in which a request is pending. Take advantage of the efforts that those attending the meeting have made and learn as much as you can.

Follow the Rules

§ 34 Playing fair means playing by the rules. Having an effective set of meeting rules helps provide a sense of professionalism and ensures that meetings are orderly. Rules do not need to be rigid. Nor should they be too confining. Occasionally agendas will need to be altered to take unanticipated events into account.

Keeping a subtle balance between the degree of formality required and the informality that is sometimes needed is a learned art. For example, applicants should not be called by their first names. Doing so gives the impression of favoritism, that the person is "connected" in the community. Hearing rules should be made a part of the bylaws of the ZBA and a summary of those rules printed on the back of the meeting agenda so that everyone is aware of them.

Rules for Speakers

§ 35 You will soon learn that people do not often come to a meeting in support of a particular project. Most people have concerns they wish to address, while others are simply opposed to change in their

neighborhood. Having meeting rules for speakers are especially valuable when there are many people who wish to speak. Without a few basic rules (which should be approved by vote of the ZBA) it would be easy for one or two people to dominate the meeting, thus depriving others of the chance to speak their minds.

- Direct comments to the chair. This rule can help avoid debates between members of the audience, between the presenter and the audience, and between ZBA members and the audience or presenter. It also helps ensure that the chair controls the meeting.
- Limit speaking time, when necessary. If there are many people who wish to speak, it is appropriate to limit the time of each speaker to 3-5 minutes, with the exception of the applicant. The applicant should be given as much time as needed, within reason, to present his or her case. During the public comment period, the applicant may wish to respond to individual issues or questions raised. It is generally best to ask that the applicant respond to (or rebut) those questions after all comments have been received.
- Limit the number of times one person may speak. Generally, each person needs to be given only a single opportunity to speak. At the discretion of the chair, persons may be allowed to speak a second time to respond to earlier comments. However, the chair should emphasize that repeat comments are not desired. Your rules may also require a sign-up sheet for those persons wishing to speak, with

- the chair only recognizing those who have signed the sheet.
- The chair may also ask if there is a spokesperson for the audience, and ask that the spokesperson speak for others present who agree with his or her point of view. The chair should allow those for whom the spokesperson is speaking to be recognized, either through a show of hands or by standing. The spokesperson may be given additional time in recognition of his or her role.
 - After the public hearing is closed, it should remain closed. Further comments should not be accepted unless specifically requested by a member of the ZBA.

And the Applause Meter Says...

§ 36 Zoning cannot be a popularity contest, decided by a show of hands in the audience or names on a petition. Many zoning approvals require public input, usually in the form of a hearing. The dilemma in which most decision makers find themselves is trying to determine what weight to give public comments and complaints.

It will quickly be obvious to you that most people do not generally come to a meeting in support of a particular project. Most have concerns they wish addressed or they may simply oppose any development. Some may come to complain about things having little or nothing to do with the issue at hand.

While public input is a valuable part of decision making, the ZBA cannot simply mirror the wishes of those who come to the meeting or send letters. Your job is to follow the standards and requirements of the zoning ordinance. You are obligated to protect the interests of the applicant, those having a direct interest, and the entire

community, not simply the desires of those who happen to attend the meeting.

If it were simply a matter of counting hands in the audience, only one ZBA member would be needed to count the votes or read the applause meter. Simply because a roomful of people shows up to oppose a project, this is not a reason for denial. Similarly, petitions, letters and other written expressions of concern are useful, but only to the point where they provide relevant information.

Ultimately, the role of the public is to provide information to the decision maker. The public can provide a unique perspective on an issue, which may create the need for further study by the community or identify additional information to be provided by the applicant.

Making everyone happy in most cases is impossible, and probably shouldn't be tried. One of the most difficult aspects of planning and zoning is the need to balance the various, often competing, interests of property owners and residents. Michigan law dictates that the public has a legitimate interest in maintaining the important health, safety and welfare aspects of their neighborhood and in having their property values protected.

"*My home is my castle*" is not an idle remark. Those who follow the NIMBY and BANANA principles sometimes represent this view. The *NIMBYs* believe that the project is well designed, and needed, but located in the wrong place. Not In My Back Yard is their battle cry.

Others may believe that the project should not be built anywhere in their community, or perhaps anywhere at all. Their motto is Build Absolutely Nothing Anywhere Near Anything—*BANANA*.

On the other hand, we are also told that owners of property have a right to a reasonable return on their investment and

that zoning cannot unreasonably deprive the owners of that return.

Satisfying all of these conflicting views is simply not possible. The intent of zoning is to avoid the necessity of trying to judge between them. Instead, zoning decisions should treat each person, property, and point of view in a fair and consistent manner. It is not the responsibility of the ZBA to create zoning classifications for rezoning property. Rather, the ZBA must merely determine whether, after considering all evidence presented, the applicant has satisfied the necessary level of proofs for the particular case in order to be entitled to relief.

Rules for ZBA Members

§ 37 As members of a public body, you should follow the same set of rules when presenting yourselves to the public.

- All comments should be directed through the chair. Just as the audience must be recognized by the chair, so too should the members. Not only does this respect the role of the chair, it also sets an example for the audience to follow.
- All deliberations should be in the open. This is a strict legal requirement. It is important that the citizens view the zoning board of appeals as an open, fair and deliberative body. Remember, people are generally suspicious of government. Don't add substance to that perception.
- Stay in the public eye. Do not hold private conferences prior to meeting. Don't meet in a group in a small room or other place outside the meeting chamber. When arriving at the meeting, stay in the chamber. While socializing is acceptable, make

sure the citizens do not get the wrong impression.

- Speak up. Make all of your comments aloud during the deliberations. If you have a question, ask the applicant or the chair, rather than your neighbor. Don't allow yourself to be caught up in private discussions with other members.
- Make all of your comments loudly enough so everyone can hear.
- Express your opinions. Don't just vote without letting everyone know why you are voting, whether for or against the issue. Your comments may help others decide (or change their vote). It also lets the applicant and the audience know the strengths or weaknesses of the proposal. Moreover, it may add to the record if the case goes to court.
- Do not always attempt to answer every question. Some comments cannot be answered and may be asked just to express frustration. When this happens, calmly try to narrow questions down to specifics. Once you get a handle on the real problem, you may be able to suggest a solution.

It is also important that neither the chair nor members of the ZBA attempt to answer questions from audience members that are better answered by the applicant.

- If things get out of hand, take a recess. Long evenings and emotional topics can make for short tempers. A breather may be helpful.

- Do not feel compelled to make a hasty decision the night of the hearing. Everyone should feel comfortable with his or her vote. If he or she does not, obtain whatever additional information is needed before proceeding with the decision.
- Always use the review standards of the zoning ordinance. The standards are your guarantee of reaching fair, consistent and reasonable decisions. Failing to follow the standards of review can easily lead to discriminatory, subjective and inconsistent decisions.

The Experts Say...

§ 38 The question may also arise about how much influence staff reports and opinions should have on a decision. In most cases, staff members are trained in their various fields and are providing their professional opinion. Consequently, their advice and direction are likely to be useful and should be taken seriously. However, that advice and direction should be supported by the facts and by application of the ordinance standards just as the ZBA's decisions are expected to be. The professional's opinions of how the facts relate to the standards may differ from the ZBA's. But ultimately, it is the decision of the zoning board of appeals that will stand.

Keeper of the Gavel

§ 39 The chair is entrusted with enforcing meeting rules. Having a strong chair is important both to the operation of the ZBA and to public's perception of their professionalism. The role of the chair is to maintain order throughout the meeting. The chair should announce each agenda item and note the rules that apply to the hearing. During the meeting, the chair

should ensure that courtesy is maintained and that speakers are not interrupted.

Keeping Faith with the Public

§ 40 Too often, people feel that government works against them rather than in their best interests. While you will not always be able to satisfy everyone, you can make sure that the public knows that they have been heard and that you are acting responsibly. Following rules of fairness, preparing for meetings and making effective decisions can affirm the confidence placed in you by those who appointed you and those whom you serve.

Making Your Decisions Stick

§ 41 It won't matter how much attention is paid to the principles of the previous chapters if the decisions made are not properly documented. New members may have a tendency to rely on those who have the most experience to remember past actions. There is no doubt that their memories are valuable, but their recall may not be complete. The only reliable method of documenting actions is the written word and exhibits.

Meeting Minutes

§ 42 In smaller communities, keeping minutes may be one of the least glamorous parts of building a written record. The task of keeping minutes should be taken seriously. There are no firm rules or formats for minutes, but there are some basic principles. As a minimum, section 9 of the Open Meetings Act, MCL 15.269, requires the minutes to show the date, time, place, members present, members absent, any decisions made and all roll call votes taken. In general, minutes should contain enough detail so that a person not present can understand:

- What matters were discussed (the nature of the request, applicant, location);

- Receipt of any correspondence or other communications on the matter (including name and address, if known, and general content);
- Who spoke at the meeting and the general content of his or her comments (including name and address);
- What action was taken by the ZBA (including the motion, vote and any conditions attached to approved applications); and
- Why an action was taken and how the standards of review of the zoning ordinance were or were not met, i.e., the detailed findings that support the decision.

One of the reasons that minutes are especially important has to do with the appeal procedure that occurs once the ZBA has made its decision. As noted earlier, there are no other levels of review by the community itself after the zoning board of appeals. The next avenue of appeal is to the circuit court of the county in which the property is located.

The zoning enabling act directs the circuit court to decide an appeal on the basis of the record presented by the ZBA and the applicant. In other words, the only information seen by the court will be the written record created at the ZBA hearing. Accordingly, it is essential that the ZBA provide a suitable written record of the proceedings.

Motions

§ 43 One of the important features of documenting decisions is the record of the action taken, as evidenced by the specific motion and vote. There are several essential elements of a motion:

- a maker and seconder;
- a description of the nature of the request;

- the action taken (approval, approval with conditions, denial, postponement of the decision);
- any conditions attached to affirmative decisions; and,
- the reasons for the action taken (the standards of review and how they were or were not satisfied) based upon the facts and evidence presented at the hearing—the findings that support the decision.

Some ZBAs have found it useful to have a blank format to help them word their motions. This can be an effective practice, as long as the motions are not completed prior to the meeting. Having staff or legal counsel prepare a motion or several motions in advance can create the perception that decisions have already been made if a case is highly controversial, and is likely to go to court, there may be a desire to have legal counsel assist in formulating the language of the decision. If such assistance does occur, consideration should be given to seeking such assistance on a decision granting the relief requested as well as a decision denying the relief.

Some hints about motions:

§ 44

- Be sure everyone is clear on the motion by restating it. Do not ask the person writing the minutes to “clean it up later,” or say, “you know what we want to say.” Take the time to get the wording right. Have the person who is writing down the motion read it back to ensure its accuracy.
- Include specific references to the ordinance’s review standards. If discussion on the issue is thoroughly documented and referenced in the minutes, they may be adequate to represent information related to

compliance with the standards of the ordinance. Otherwise, a summary of the discussion on the standards is appropriate.

- Properly stated and supported motions are particularly important. Simply referring to the standards of review is not enough; saying a standard is met doesn't make it so. A motion that states "this variance is approved (or denied) because it meets (or does not meet) the standards of Section ____" is not sufficient. There must be enough information presented to indicate specifically which standards were or were not met, and the reasons, in terms of the specific facts and evidence presented, the ZBA made the finding.
- Conditions may be imposed on any affirmative decision. Conditions attached to a decision should have a clear purpose: to ensure that the standards used to make the decision are met. In other words, the condition should strengthen the decision to grant relief. Any condition placed on an approval must have a direct relationship to one or more of the specifications stated in the zoning enabling act for conditions.

One informal way to test the appropriateness of a proposed condition is to review the decision without the condition in place. For example, one of the review standards noted in Chapter 3 is "(T)he variance will not be injurious to the neighborhood or otherwise detrimental to the general welfare." If, during their deliberations, the board members become concerned that the approval of a variance could have an adverse affect on adjacent

properties, a possible condition might be a requirement that a fence or landscaping be installed. If the fence or landscaping were not required, this review standard would not be met. Accordingly, this condition would be an appropriate one to attach to the approval.

- If the motion includes the need for further action, it should state who will be responsible to see that action completed. For example, the required landscaping shall be reviewed and approved by the zoning administrator."

Findings of Fact

§ 45 It is worth emphasizing the obligation to make Findings of Fact. Findings of Fact are embodied in a concise statement of the action taken by the members, and include the reasons for the decision, including the specific facts and evidence supporting the decision. In the absence of such findings, it is quite difficult for a reviewing court to sustain the decision of the ZBA.

The Findings, which are part of the minutes, are not official until reviewed and adopted by the ZBA at the next meeting, or certified as approved at the same meeting. One reason this is important is that the applicant or other person disagreeing with the decision has a specific time limit in which to file an appeal to the circuit court (30 days). The clock on the time limit does not begin ticking until the minutes of the meeting at which the action was taken are officially approved.

If the ZBA only meets on demand, or infrequently, another option would be to schedule a meeting after the minutes are completed to review and adopt them.

Post-Decision Documentation

§ 46 Once the decision is made, some administrative steps should be taken to help complete the record. The applicant and

secretary of the ZBA should each sign and date 2-3 copies of the site plan or sketch submitted as part of the application. The applicant should keep one copy and the community at least one other. This provides a record of what was approved and when.

A copy of the minutes should be sent to the applicant following review by the approving bodies along with a letter specifically noting the action taken by the ZBA, including any conditions placed on the approval, if appropriate.

This letter may include further instructions regarding the proposal. For example, if a variance was granted, the letter may state that a site plan approval by the planning commission is necessary prior to issuance of a building permit.

Record Retention

§ 47 The community's records for each application should include, at a minimum:

- Relevant pages of minutes at which the proposal was discussed;
- Staff notes, meeting notes, correspondence, telephone conversation notes, etc.;
- Copy of the application and supporting material;
- Approved/signed copy of the site plan; and
- Follow-up correspondence (as noted above).

If You Build It, We Will Come...

§ 48 ...to make sure it complies with the approvals that were granted. Someone should be given the direct responsibility to make sure that any conditions or changes required by the zoning board of appeals are accomplished. Sending the building official and zoning administrator a copy of the approved application and meeting minutes could help this process.

Remember, building a complete record is important. Should a decision be legally

challenged, the written record will provide the background needed to help defend the decision of the ZBA. Also, a suitable record of past actions is needed to ensure that decisions are implemented and that they are enforced over a long period of time.

Reliance on someone with a good memory is not enough.

Chapter 3 - Making the Tough Decisions

§ 49 In these days of increasing litigation and public participation, it is not enough to approve or deny an application for a variance or appeal because of a vague notion that the request is or is not a good idea, or that it will hurt the neighborhood, or make things better. If challenged, any decision must have a solid, well-supported foundation.

Decisions related to zoning are rarely easy. And, they are not usually a matter of right or wrong. The duties of the zoning board of appeals require a balancing of the needs of the community and the rights of a private property owner.

- The community has a strong interest in maintaining the integrity of the rules under which zoning operates, through the zoning ordinance. Variances granted without proper foundation can eventually, or even quickly in some cases, lead to a weakening of the ordinance.
- On the other hand, private property owners do have certain rights to use their property and the inappropriate application of the zoning ordinance to that property should not deprive them of those rights.

Proper decision making starts with the basics: knowledge of the zoning ordinance, knowledge of relevant case facts and using review standards to reach a decision.

Knowledge of the zoning ordinance

§ 50 While it is not necessary for each member to know the intimate workings and details of a zoning ordinance, they must

be familiar with the relevant parts of the ordinance when reviewing applications. But more important, it is essential that each member understands the purpose and need for the regulation being discussed.

Intent and Purpose

A front yard setback variance is being considered by the ZBA. A new member asks, "Why can't the building be built all the way to the property line?"
What would be your answer?

One of the standards of review typically applied to variance requests asks that the decision not impair the intent and purpose of the ordinance. If the intent and purpose of the regulation would be materially affected, it is possible that the variance would not be appropriate. For example, one of the recognized purposes of a side yard setback is to provide access for safety personnel to the rear of a building. Should a variance be permitted that eliminates this access, the intent and purpose of the ordinance would not be fulfilled.

Knowledge of Relevant Case Facts

§ 51 Facts are critical to good decision making. Sources of facts include:

- a) The application and supporting materials;
- b) The master plan or other relevant governmental plans;
- c) Staff and agency reports regarding impacts on public services, natural resources, character of the area, traffic and parking, and others;

- d) A visit to the site to see the physical characteristics of the property and adjacent parcels (see Chapter 2) and;
- e) Public hearing comments.

However, what is a fact is not always clear. Sometimes it will be necessary for the members to use their own experience and common sense (a concept not often applied to zoning).

Use of Ordinance Standards

§ 52 Following an effective and consistent decision making process is one of the most important methods of supporting your decisions. Proper and consistent use of the standards of the zoning ordinance or other ordinances is essential. If all ordinance standards and state law standards are met, the application must be approved. Before any variance should be approved, the applicant should be required to demonstrate that either a practical difficulty or unnecessary hardship exists. While these terms are sometimes used interchangeably, they are, in fact, distinct and different terms.

- *Practical difficulty* is applied only to nonuse, or dimensional variances;
- *Unnecessary hardship* is relevant only for use variances.

The wording and number of standards will often differ from one community to another, but the following standards have been considered by various court decisions and are common to ordinances.

Standards for Nonuse or Dimensional Variances

§ 53 Granting of a nonuse variance requires the existence of a practical difficulty, which is demonstrated by showing that:

1. *Special or unique conditions and circumstances exist which are peculiar to the land, structure, or*

building involved and which are not generally applicable to other lands, structures, or buildings in the same district.

§ 54 Meeting this standard requires the requested variance to be related to the characteristics of the property and not to the personal situation of the applicant. Should a variance be granted because of a perceived special condition related to the applicant, that condition would no longer exist if the applicant leaves the property. But the variance remains with the land.

Similarly, trying to distinguish between individual circumstances related to individuals is nearly impossible. Nearly every person has some situation that may consider unique. You are not expected to be able to draw a line between various applicants' special conditions.

This dilemma cannot be resolved by restricting the approval to a particular individual. Variances, like other zoning approvals, cannot be restricted solely to the benefit of or use by a specific person. Variances, once granted, run with the land, not with the property owner.

Special conditions or circumstances that are related to the property are generally physical characteristics that may normally include:

- exceptional narrowness, shallowness or shape;
- exceptional topographic conditions or other extraordinary situations related to the property; or
- use or development of the property immediately adjoining the property in question.

Also, the characteristics of the property asserted as the basis for relief must not be common among other properties in the same district or vicinity. As with all

variances, the principle is that the variance is needed to relieve a practical difficulty caused by the unique conditions present on the land. Common conditions or situations should be addressed by a change in the text of the ordinance, rather than by the granting of individual variance applications.

2. A literal interpretation of the provisions of this ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this ordinance; and that the variance is the minimum necessary.

§ 55 Property owners are given certain rights to use their property within the limits allowed by the zoning ordinance. If the conditions present on the property are such that owners are deprived of these rights, the zoning board of appeals should find this standard (but not necessarily the variance) in favor of the applicant. However, this does not entitle the applicant to the maximum benefit that might be available. For example, while the ordinance provides that property owners may have accessory buildings, it does not grant the authority to allow any size building desired by the applicant.

This standard also permits the ZBA to modify the request of the applicant to accommodate the special condition or circumstance but only approve the amount of variance that is necessary to do so. For example, an applicant may wish to construct a garage closer to the lot line to avoid a large tree. The ZBA could approve a variance that would miss the tree, but in order to protect an adjoining property, not come as close to the property line as requested.

3. The special conditions and circumstances do not result from the actions of the applicant.

§ 56 This standard, often referred to as self-created, is often misunderstood and the subject of differing opinions. There are circumstances when the applicant has clearly taken some action creating a need for the variance. For example, if an applicant splits a lot which previously conformed to the requirements of the zoning ordinance into two smaller ones, one or both of which then do not meet the ordinance, the action is clearly self-created.

On the other hand, a buyer of a lot that cannot be developed without a variance may ask that the ZBA grant a variance to allow use of the lot. In this case, the applicant did not take an affirmative action by creating the lot. Accordingly, this standard should not be used as a reason for denial (although the variance still must meet the other standards of the ordinance).

4. The granting of the variance will be in harmony with the general purpose and intent of this ordinance.

§ 57 While the intent and purpose portion of this standard may sometimes seem like a catchall phrase, it does have meaning. The construction of the zoning ordinance was a carefully considered process that was begun by the planning commission, reviewed by the public and adopted by the legislative body. Each provision of the ordinance has a reason for its existence and it is important that the ZBA understand that reason and not act to impair that purpose.

Whether the ZBA agrees or disagrees with any provision in the ordinance is irrelevant. The ZBA's function is to enforce the provisions of the ordinance, except in very specific instances where conditions

exist that would make compliance with the requirements impractical. Those conditions are defined by the review standards of the ordinance.

It is equally important that the zoning ordinance be reviewed frequently to ensure it is kept current and relevant to today's conditions. This includes making sure that binding court rulings are included and new legislation recognized. Often, an outdated ordinance will tend to generate additional variance requests.

One way the ZBA can help keep the ordinance current is to review its decisions at the end of each year to determine if there are provisions of the ordinance that are consistently being requested for variances. If the review highlights some particular parts of the ordinance, it may be an indication that these provisions need to be updated.

A joint meeting with the planning commission to discuss these provisions will be useful. One of two outcomes is possible. The planning commission may agree that a provision needs updating and begin the actions necessary to amend the ordinance. Or, the commission may determine that the ordinance does not need to be updated and that the provision should remain unchanged. If this is the outcome, the ZBA should respect that decision and only approve variances in those cases where the standards of review are clearly met.

5. The variance will not be injurious to the neighborhood or otherwise detrimental to the general welfare.

§ 58 As with any zoning action, the result of the proposed variance should not be harmful to adjacent properties. Potential harm could be in the form of restricted access or view, noise, lights or any other effect not normally experienced by property owners in similar circumstances.

While the opinions of surrounding property owners are useful, they should not be given absolute weight. The role of the public is not to give their blessing or veto, but to provide the ZBA with information useful to its decision making process. As an illustration, a current adjoining property owner may be a relative or close friend and not object to a variance. But since the variance goes with the land, the next property owners may find themselves with an objectionable situation.

On the other hand, it is appropriate for the ZBA to take the comments of the public into consideration to determine whether or not the variance may adversely affect nearby property or the neighborhood. (See Chapter 2.) Note, however, that simply because a variance is not harmful to the neighborhood does not mean that it meets all of the other applicable standards.

6. The spirit of this ordinance shall be observed, public safety secured and substantial justice done.

§ 59 The concepts of this standard, though broad, are important. Observing the spirit of the ordinance will mean that the ZBA understands the potential effects one or several variances could have on the effectiveness of the zoning ordinance. For example, if the ZBA's reputation is one of easy approvals, applicants are more likely to seek variances in other than special conditions and circumstances.

"Public safety secured" indicates that the variance, if approved, will not create an unsafe condition.

While "substantial justice" directly addresses fairness to the applicant, it also applies to others who might be affected by the variance, such as neighboring property owners. Often the initial expectations of neighbors are that the ZBA will follow the

requirements of the zoning ordinance. The substantial justice requirement dictates that the variance should not be granted if it would undermine the purpose and intent of the zoning ordinance as it relates to adjoining properties. This includes a consideration of the extent of variance to be granted. In this context, substantial justice requires the variance to be the minimum necessary to afford relief.

The ZBA's Reputation

A zoning board of appeals known for easy approvals may find itself barraged with variance requests. As the word spreads that the ZBA grants almost any variance, the attitude among builders, attorneys, planners, and others who frequently advise property owners is, "Don't bother trying to meet the zoning ordinance, All you need to do is apply for a variance and you will get it."

Standards for Use Variances

§ 60 As noted in Chapter 1, a use variance allows a use of land that is not permitted in the district in which the property is placed. Because this type of relief is so significant, granting of a use variance requires the existence of an unnecessary hardship, which is demonstrated by showing that:

1. *The property could not be used (be put to a reasonable use) for the purposes permitted in that zone district.*

§ 61 The principle behind a use variance is that it is necessary because the property is not usable as it is zoned. Therefore, a thorough review is needed to first establish that none of the uses currently allowed in the district, either as permitted by right or through a special land use, are appropriate

for the property. While it is true that financial considerations are not generally the subject of review for variances, this standard may be satisfied by a finding that the property would essentially be valueless if an attempt were made to develop it as zoned.

Part of this review will require determining if the property can be reasonably used for any of the uses permitted in the district. This does not mean that the use has to be the most profitable, or the use proposed by the applicant. It only requires a finding that there is one or more uses permitted in the district which could reasonably be placed on the property.

2. *The plight is due to unique circumstances peculiar to the property and not to general neighborhood conditions.*

§ 62 This standard is generally similar to that for nonuse variances, particularly with respect to the necessity for having unique circumstances that are specific to a property and not related to the applicant's personal situation. The other important aspect is the requirement that the situation on the property not be common in the area. If conditions are common to the area, a use variance would not be appropriate because the area should be reviewed by the planning commission to determine if the zoning for the entire area should be changed. But that is the function of the planning commission and not that of the zoning board of appeals.

The use would not alter the essential character of the area.

§ 63 Probably the most difficult aspect of this standard is determining what the essential character of an area is, and if the

use variance is approved, what effect might the variance have on that character.

One of the easiest ways to determine the essential character of an area is through a site visit to examine the area and see the various land uses that exist.

In some cases the character may be evidenced simply by the dominance of one land use over any others. In others it may not be as obvious. For example, some areas may have a wide variety of uses, occupying different sizes of lots. Viewing the area may not directly lead to a conclusion as to the character of the area and may require some degree of judgement.

What is the "area" affected by a use variance?

The "area" which may be affected by a use variance will depend on the nature of the request and the size of the property that is the subject of the requested use variance. For example, a small residential lot requesting a use variance for an office will affect a smaller area than a request on a large site for an intensive commercial use.

Another way to determine the character of an area and the possible effect of a use variance is to examine the community's master plan. The plan may clearly indicate the existing or intended character of an area. The ZBA may also seek the advice of the planning commission to help interpret the master plan, or to provide guidance when there is no plan or if it is out-of-date. Any opinion of the commission is simply advice, and should be considered only as input to the ZBA's deliberations.

After determining the essential character, the next step is to evaluate

whether or not approval of the use variance would alter that character. This decision might hinge on whether or not the proposed use variance may tip the scales in one direction or another. If an area appears to be in transition from a residential to commercial area, for example, a commercial use variance may be appropriate. However, if the specific character of the area is unclear, a use variance may not be appropriate since it could tend to establish a specific character. This type of decision will require the exercise of discretion by members of the ZBA, as assisted by staff and consultants.

4. The problem is not self-created.

§ 64 This standard is essentially the same as that for nonuse variances. If the applicant created a particular situation that made a property essentially unusable as zoned, that applicant would not be entitled to relief by approval of a use variance. For example, if a property owner subdivides a large, residentially zoned property, leaving a corner lot as an isolated parcel, an argument that the parcel should only be used for nonresidential purposes could fail because the parcel was created by the direct action of the applicant.

5. The other general requirements are met.

§ 65 As in the case of nonuse variances, an applicant must show that the variance meets the state law requirements, that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.

Use Variances and Rezonings - The Paragon Rule

§ 66 Understanding use variances was made

more important by a 1996 decision of the Michigan Supreme Court, *Paragon Properties Company v City of Novi*, (452 Mich 568, 550 NW2d 772 (1996)) in which the court required a “final decision” of the municipality. Under the *Paragon* decision, it will not be deemed that a final decision has been rendered by the municipality until the property owner seeks a use variance from the zoning board of appeals. The *Paragon* decision, therefore, requires submission of a use variance application following a rezoning request denial by the legislative body before any legal disputes may be brought before the court.

The Michigan Zoning Enabling Act allows a community to choose whether or not it wishes to have a use variance procedure in its ordinance. Therefore, if the use variance procedure was not available, the applicant would not have to exhaust this remedy, and *Paragon* would not apply.

Even if provided for by statute, some communities have language in their zoning ordinances that prohibits consideration of use variances. Often this language is in the form of not permitting the zoning board of appeals to hear variances that would have the effect of changing land use or zoning.

For those communities that continue to hear use variances further definition of the meaning of the *Paragon* decision will likely require additional litigation and clarification.

In general, the full effect of this decision has yet to be felt and the interpretation of its language will likely result in some confusion as individual county circuit courts utilize this case.

What about precedents?

§ 67 One of the concerns often expressed by ZBA members is the fear that by approving or not approving a request they may be setting or violating a precedent. This concern can be real if the ZBA is not

using the standards of review of the zoning ordinance. Failure to use these standards consistently requires the ZBA to make up the rules as they go. As a result, future applicants gain the right to be considered by the same considerations used by the ZBA in previous meetings.

Consequently, the way to avoid setting a precedent is to base every decision on the standards of review of the zoning ordinance, and include findings of fact that distinguish cases from one another. When the standards are used and findings made consistently, the ZBA is less likely to be bound by past decisions because the facts of each case are different. On the other hand, where the facts are very similar the same decision should be reached, not because of a precedent but because the same facts were applied against a consistent set of review standards.

Therefore, consistent and faithful use of the review standards for variances allows the ZBA to reach decisions based on the facts of each individual case. This, together with the detailed findings of fact, helps ensure consistency and fair treatment for every applicant by avoiding the arbitrary and capricious labels often given to zoning decisions that are not well supported.

As each application is debated, each of the applicable standards should be specifically reviewed and individual findings made for each. No approvals should be granted until the members clearly agree that all the standards of review are satisfied. Zoning decisions are permanent. Care must be taken to ensure that each decision is well supported. It is essential that the decisions are well documented and that the records pertaining to all applications are complete.

How to Avoid Litigation

§ 68 The short answer to avoiding litigation is simple—you can't! Governments are

always open to lawsuits, regardless of the quality of their decisions. Far too often, disappointed applicants or neighbors look to the courts to solve their problems. As a result, the ZBA cannot be overly influenced by threats or concerns about whether a decision will result in a lawsuit, provided, of course, that the ZBA has acted properly and thoroughly supported and documented the decision.

However, there are some actions that can strengthen the ZBA's legal position should any decision be challenged.

- Follow a standard decision making process. The zoning process involves a wide variety of technical, administrative and judgmental factors. Making sure that the requirements of the ordinance are followed, including proper notices, use of standards of review and proper documentation of decisions is a good start.
- Use review standards and make findings. The most important step you can take is the proper use of the review standards provided in the zoning ordinance to guide your decisions. These standards outline a clear path to reaching fair and consistent decisions. All decisions must be based on these standards and the facts that are used to apply them. Therefore, apply and make findings on each review standard.
- Follow proper procedures. The community should ensure that adequate procedures are in place to ensure that application procedures are clear, notices are properly completed, and adequate records are kept. The ZBA should ensure that proper hearing procedures are followed.

This includes creating a suitable record of the actions taken and the reasons for those actions as part of the ZBA minutes.