

Dane County Board of Appeals
Appeal 3707 – Thomas and Kimberly Walz
3071 Sunnyside Street

Applicants' Statement in Support of Variance

The Applicants, Thomas and Kimberly Walz (the Walzes) submit the following statement in support of their pending application for a variance dated December 8, 2020 (the Application).

The Walzes No Longer Need a Variance for their Existing House

The Walzes requested two variances in their Application: one for their existing house (because they believed that it encroached into the required aggregate side yard) and one for their proposed additions (because they also would encroach into the required aggregate side yard). After the Walzes submitted their Application, Mr. Hilbert advised the Walzes (for the first time) that the Board of Adjustment granted a variance in 1990 that retroactively approved their house, as built, by granting a variance of “.5 feet, more or less, from the required total combined side yards.” A copy of the minutes from the Board’s meeting is below:

1958. Kruschke/Jones grant a variance of 0.5 ft, more or less, from the required total combined side yards;

FINDING OF FACT:.

1. minimum side yard is complied with on each side, variance requested pertains to the combined side yard total.
2. variation is minimal, only 0.5 ft.
3. property is located in an area of substantial nonconformity with respect to building location requirements and several variances have been granted to other properties for similar situations.

CONCLUSION:

1. proven case of unnecessary hardship.
2. variance preserves the zoning ordinance as much as possible without injustice to applicant.
3. variance is necessary to provide right enjoyed by others.
4. variance is not contrary to rights of others or to the public interest.

Motion carried 4-0.

After the Walzes learned about the prior variance, the Walzes believed that they did not need a variance for their remodel project, but Mr. Hilbert advised the Walzes that they needed a second variance for their remodel project.¹

¹ The Walzes do not understand why they were not advised about the prior variance before they prepared and submitted their Application. The Walzes submitted detailed surveys and had substantial communication with Dane County Zoning about the side yard situation before the Application was filed.

The Walzes therefore will address only the second variance (which would apply to their proposed remodel project) in this Statement.

Introduction

To prepare for this hearing, the Walzes reviewed the legal “standards” for obtaining a variance. Those “standards” are found in Wisconsin’s statutes, and in Dane County’s Zoning Ordinance, both of which are set forth below.

The Walzes also reviewed the “Guidelines for Variance Applications” which are part of Dane County’s variance application form (“the Guidelines”). Copies of the relevant pages of the Guidelines are attached to this Statement, and the relevant portions of the Guidelines are also set forth below.

As explained below, the Walzes are submitting this Statement in part because they believe that the Guidelines are, to some extent, inconsistent with the applicable statutes and ordinances, and therefore could lead the Board members to conclude that they do not have discretion to grant the Walzes’ variance.

The Standards for Granting an “Area” Variance ²

A. Legal Standards

Section 59.694 of the Wisconsin Statutes authorizes the Dane County Board of Adjustment to grant variances. It creates a “three-part test” (highlighted below in yellow) and provides, in relevant part, as follows:

(7) Powers of board. The board of adjustment shall have all of the following powers:

...(c)

1. In this paragraph:

a. “Area variance” means a modification to a dimensional, physical, or locational requirement such as the setback, frontage, height, bulk, or density restriction for a structure that is granted by the board of adjustment under this subsection.

b. “Use variance” means an authorization by the board of adjustment under this subsection for the use of land for a purpose that is otherwise not allowed or is prohibited by the applicable zoning ordinance.

2. To authorize upon appeal in specific cases variances from the terms of the ordinance that will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in

² The Walzes are not seeking a “use” variance, which is governed by a different set of standards.

unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

3. A property owner bears the burden of proving “unnecessary hardship,” as that term is used in this paragraph, for an area variance, by demonstrating that strict compliance with a zoning ordinance:

- would unreasonably prevent the property owner from using the property owner's property for a permitted purpose; or
- would render conformity with the zoning ordinance unnecessarily burdensome.

In all circumstances, a property owner bears the burden of proving that the unnecessary hardship is based on conditions unique to the property, rather than considerations personal to the property owner, and that the unnecessary hardship was not created by the property owner.

Section 10.101(10)(g) of the Dane County Zoning Ordinance, on the other hand, is somewhat broader than the Wisconsin statutes, and creates a six-part test (also highlighted in yellow):

(g) Standards for approval of a variance. The Board of Adjustment shall not grant a variance unless it finds that all of the following standards are met:

1. There are conditions unique to the property of the applicant that do not apply generally to other properties in the district.
2. The variance is not contrary to the spirit, purpose, and intent of the regulations in the zoning district and is not contrary to the public interest.
3. For a variance from area, setback or dimensional standards in the ordinance, compliance with the strict letter of the ordinance would unreasonably prevent use of the property for a permitted purpose or would render compliance with the ordinance unnecessarily burdensome.
4. The alleged difficulty or hardship is created by the terms of the ordinance rather than by a person who has a present interest in the property.
5. The proposed variance shall not create substantial detriment to adjacent property.
6. The proposed variance shall be compatible with the character of the immediate neighborhood.

The Walzes will address each of these six legal standards below. However, before doing that, the Walzes will briefly address two common law variance standards that apply to the Walzes’ variance.

Common Law Standards

In addition to the legal standards recited above, there are “common law” standards developed by the courts over the years that also apply to variances. Dane County’s “Guidelines” (copy attached) include a discussion of two common law standards that come into play with respect to the Walzes’ variance. The Walzes will refer to these two common law standards as:

1. The “no alternative” standard; and
2. The “money doesn’t matter” standard.

Dane County’s “Guidelines” adopt an inflexible “no alternative” standard by stating:

“In addition to passing the 3-step test, you must also demonstrate that no other alternatives that would not require relief from zoning regulations exist. **An existing alternative demonstrates that relief is not warranted.**” (emphasis added).

The Walzes respectfully submit that this statement is inconsistent with the legal standards for a variance, and therefore inaccurate. The statement apparently is based on paragraph 3 of the Wisconsin statutory standards, and paragraph 3 of the Dane County ordinances, both of which provide for relief if strict compliance with the zoning requirement “would unreasonably prevent use of the property for a permitted purpose” (i.e., the applicant has “no alternative” to compliance).

However, in both the Wisconsin statute, and in the Dane County ordinance, this standard actually is a two-part test. The two-part test can be stated as follows:

1. Does the applicant have an alternative to compliance; and
2. If so, would compliance with the ordinance be “unnecessarily burdensome.”

Most people would agree that if the only alternative to complying with a zoning ordinance would cost a million dollars, and if the variance required to avoid spending a million dollars was only a matter of a couple of inches, it would be reasonable for a board of adjustment to exercise its discretion and grant a variance. However, if the board followed a strict “no alternative” standard (such as the one set forth in Dane County’s Guidelines), the board would have no discretion to grant the variance.

This perceived “lack of discretion” created by a rigid application of the “no alternative” standard led the Wisconsin Supreme Court to change the standards that apply to “area” variances in the *Ziervogel* case, which was decided in 2004. The Supreme Court stated:

The "no reasonable use" standard is largely disconnected from the purpose of area zoning, fails to consider the lesser effect of area variances on neighborhood character, and operates to virtually eliminate the statutory discretion of local boards of adjustment to do justice in individual cases.

A copy of the *Ziervogel* case is attached for your reference.

The Walzes therefore submit that, when addressing an “area” variance, the Board has discretion to consider whether an available alternative is “reasonable” in light of the hardship that it would impose on the applicants, the size of the requested variance, and the harm (if any) to the public interest.³

Dane County’s “Guidelines” also include a discussion of the role of money in a variance decision, as follows:

The expenditure of money does not constitute a legal hardship. In other words, the courts do not recognize financial hardship as a basis upon which a Board of Adjustment can give a variance (i.e., the fact that a structure erected in violation of the Zoning Code would be expensive to move, that an alternative location which would be in compliance with zoning regulations might be somewhat more expensive on which to build, etc.). The courts have uniformly held that, when a hardship was created by the applicant's own acts, they are not entitled to relief.

The Walzes believe that this statement also needs clarification. The Walzes agree that the expenditure of money, by itself, is not a basis for a variance. The Walzes further agree, that if an owner creates a violation of a zoning ordinance, the owner is not entitled to a variance simply because it would cost money to correct the violation. However, the Walzes submit that when there is a unique limiting condition on the property that was not “created by the applicant’s own acts”, the expenditure of money is one of several factors that the Board can weigh in determining whether compliance with the ordinance is “unnecessarily burdensome.”

The Walzes therefore respectfully submit that the “no alternative” and “money doesn’t matter” standards in Dane County’s Guidelines can and should be applied by the Board in a flexible manner based on the facts and circumstances of each case.

The Walzes will address the application of the common law and statutory variance standards to their Application below.

³ The Walzes can’t think of a situation where there is “no alternative” to an area variance. An “area variance” is, by definition, a relaxation or adjustment of the dimensional standards in a zoning ordinance that would allow a structure of a different shape or size, or in a different location.

Application of the Standards to the Walzes' Variance

Common Law Standards 1 and 2: No Alternative and Money Doesn't Matter

The Walzes are requesting relief from the aggregate side yard setback. Since the aggregate side yard setback is a combination of the setbacks on each side of the house, the Walzes could comply with the ordinance by making modifications on either side of their house, as described below.

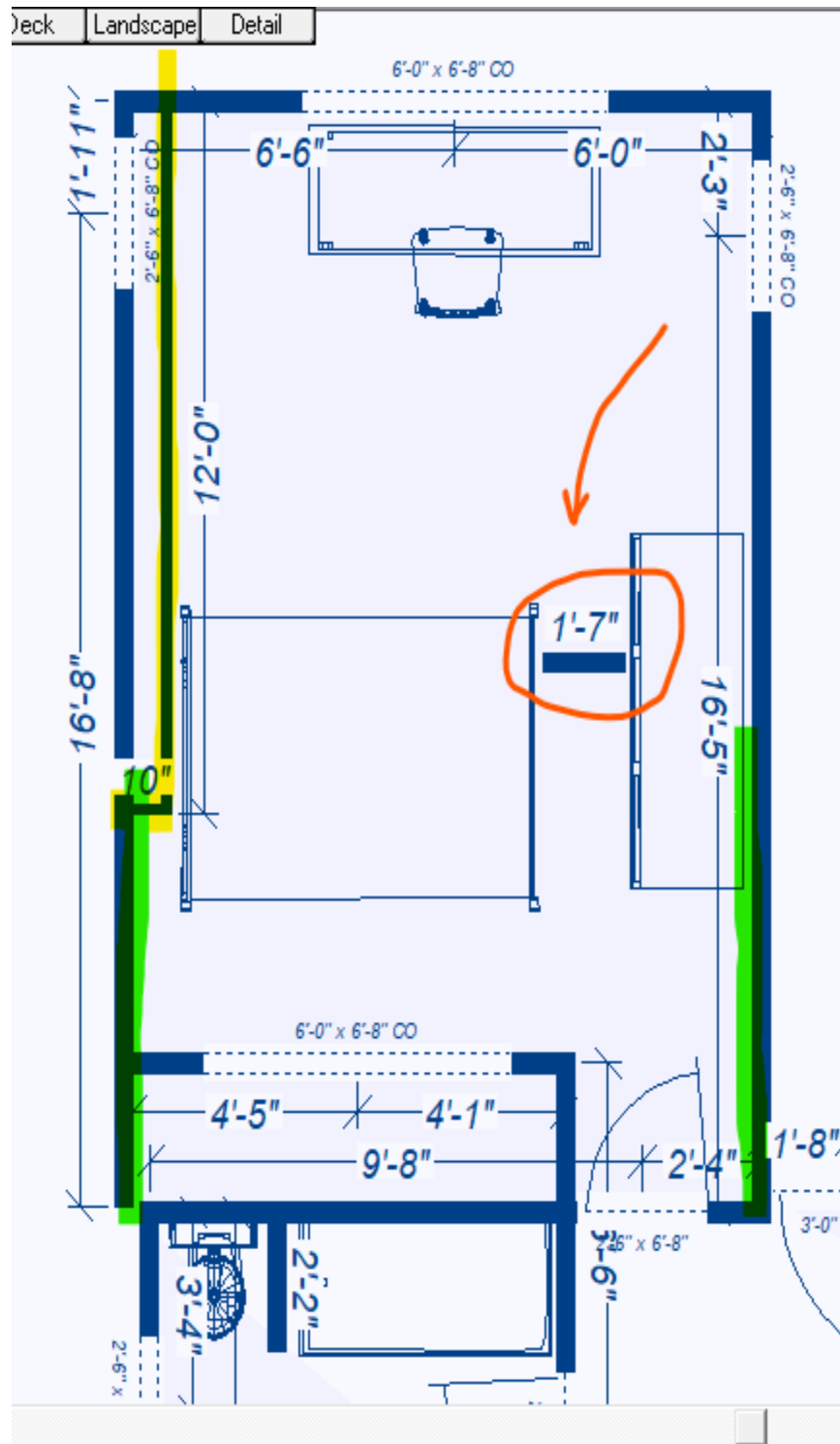
Alternative One:

On one side of their house, the Walzes are proposing to construct an addition that would serve as both a second bedroom and a home office. The Walzes could construct the new exterior wall in that room approximately 10 inches farther from the side lot line, as shown in the drawing on the next page.⁴

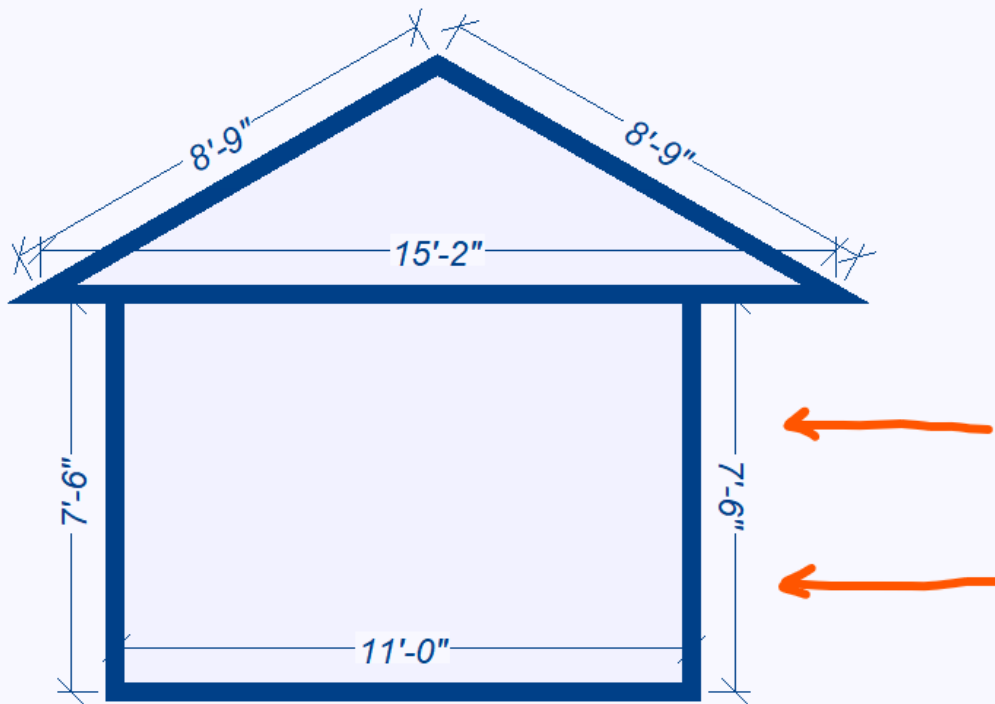
⁴ The wall would need to encroach around 10 inches into the house because the existing walls extend around six inches into the side yards, and our builder wants a "cushion" of around four inches between any new walls and the setback line to avoid another unintended side yard setback violation.

Alternative Wall in Proposed Bedroom/Home Office

(Yellow line – new exterior wall; Green lines – existing exterior walls)



This alternative is burdensome because, as shown on the drawing, it would leave only around 19 inches between a standard size bed and a standard size dresser. It would be cumbersome to even pull out the dresser drawers, and tight getting to the desk in the “home office” area of the room. The “inset” wall also would result in the roof of the addition being “off center”, as shown on the drawing below:



Alternative Two

On the other side of the house, the Walzes are proposing to extend their existing one-car garage, and build an addition for a laundry/mud room and a larger kitchen. The Walzes could “inset” the new exterior walls on this side of the house around 10 inches, as shown on the drawings below. To meet the setback on this side of the house, the Walzes would have to remove six linear feet of concrete foundation under the existing garage wall; tear down six linear feet of their existing garage walls and roof; and build the new garage with an exterior wall that is approximately 10 inches farther from the side lot line. The Walzes’ builder has estimated the cost of this additional work at approximately \$10,000.

Despite this additional cost, the Walzes intend to pursue Alternative Two if their variance is denied. The Walzes would much rather give up 10 inches of space in their garage than 10 inches of space in their bedroom/home office. In

practical terms, the Walzes decided to spend several months and around \$3,000⁵ applying for a variance from a burdensome condition that they did not create, rather than spend around \$10,000 to comply with the ordinance and still end up with an awkward and difficult-to-construct “inset” wall in their garage.

The Walzes therefore are respectfully requesting that the Board exercise its discretion and allow a variance of approximately 11 square feet⁶ rather than force the Walzes to waste \$10,000 and tear down part of their existing garage. The Walzes believe that they meet all of the statutory standards for a variance, as discussed below.

Statutory Standard 1: Unique Condition

There is no dispute about the “unique condition” that creates the need for the Walzes’ variance. The surveys attached to the Application clearly show that when the house was built in 1989, the side walls of the house failed to meet the aggregate side yard requirement by approximately six inches. If the house had been constructed to meet the aggregate side yard requirement, there would be no need for a variance for the Walzes’ project.

The condition is “unique” because houses typically are not constructed in violation of setback ordinances. The zoning code requires the builder to provide a location survey after the concrete foundation is poured before the house can be finished. It is not clear whether a location survey was prepared when this house was constructed, or how this house was able to be completed without meeting the setback requirement. In any event, as noted above, the former owner/builder eventually obtained a variance that permitted the house as constructed, and Dane County then issued a certificate of compliance.

Standard 2: Variance is Not Contrary to the Public Interest

Harm to the public interest is determined by the impact of the variance on the purposes of the Zoning Code, which are set forth below.

Purpose. The purpose of this chapter [Chapter 10 of the Zoning Code] is to:

- (a) promote the public health, safety, convenience and general welfare;

⁵ The variance filing fee for the Town of Pleasant Springs was \$200, the filing fee for Dane County was \$500, and the Walzes’ survey fees and copy fees for the variance application to date are over \$2,300.

⁶ The new exterior walls that would need to be farther away from the side lot line are approximately 22 linear feet, multiplied by around six-inches is approximately 11 square feet of encroachment into the side yard.

- (b) encourage planned and orderly land use development;
- (c) protect property values and the property tax base;
- (d) permit the careful planning and efficient maintenance of highway systems;
- (e) ensure adequate highway, utility, health, educational and recreational facilities;
- (f) recognize the needs of agriculture, forestry, industry and business in future growth;
- (g) encourage uses of land and other natural resources which are in accordance with their character and adaptability;
- (h) provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems;
- (i) encourage the protection of groundwater resources;
- (j) preserve wetlands;
- (k) conserve soil, water and forest resources;
- (l) protect the beauty and amenities of landscape and man-made developments;
- (m) provide healthy surroundings for family life;
- (n) promote the efficient and economical use of public funds;
- (o) to promote creation of employment opportunities; and
- (p) to support the continued existence of strong and economically viable towns as vital communities of Dane County.

The only factors that are relevant to side yard setbacks (highlighted above) are safety (fire and rescue), planned and orderly land use development, and protection of property values and tax base. Granting a variance to the Walzes will not compromise or harm the public interest in these factors in any way, for the following four reasons.⁷

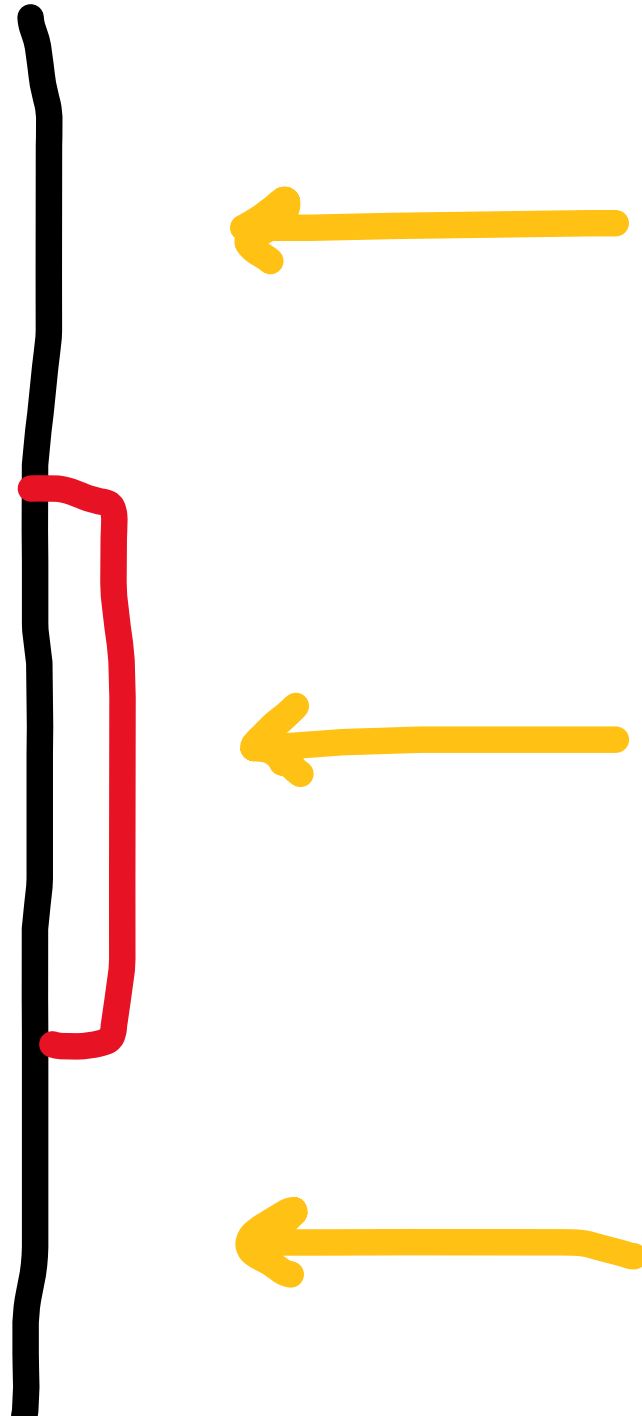
1. The Requested Variance Does Not Extend Further into the Side Yard.

In the typical situation where an existing structure was built in compliance with the setback requirement, a side yard variance would allow the proposed addition to extend further into the side yard. The Walzes are referring to such a variance as a “convex” variance. A drawing of a “convex” variance is on the following page.

⁷ It is difficult to “prove a negative”, and Dane County has not specified how or why the requested variance would harm the public interest, so the Walzes will attempt to address all possible negative impacts.

“Convex” variance that extends further into the setback than the existing walls

(Black line – existing wall; Red line – new wall; Yellow arrows - setback)



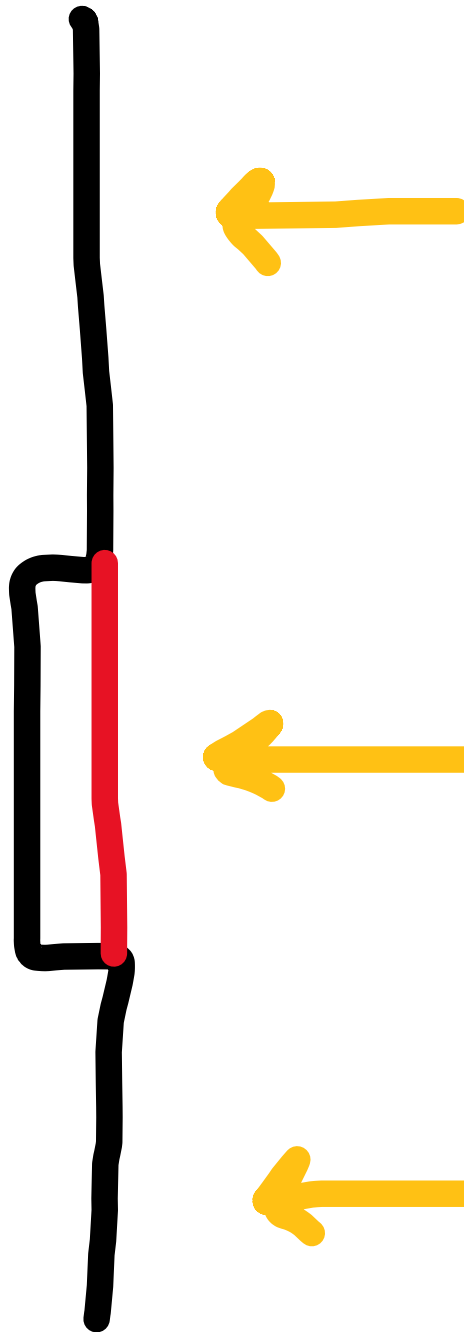
The Walzes are not asking for a “convex” variance. The Walzes would never consider applying for a “convex” variance because it would involve additional cost to create the outward “jog” in the wall, and because the variance would certainly be denied as “unnecessary.”

On the other hand, the Walzes’ house was built six inches into the side yard, so the setback line extends into the house. The Walzes are applying for a variance that will allow the new walls to be constructed on a straight line, but will not allow the existing structure to extend any further into the side yard, and will not reduce the minimum distance between the Walzes’ house and their neighbor’s house (currently 18 feet).

The Walzes refer to such a variance as a “concave” variance. A drawing of a “concave” variance is on the next page.

“Concave” variance that does not extend further into the setback than the existing walls

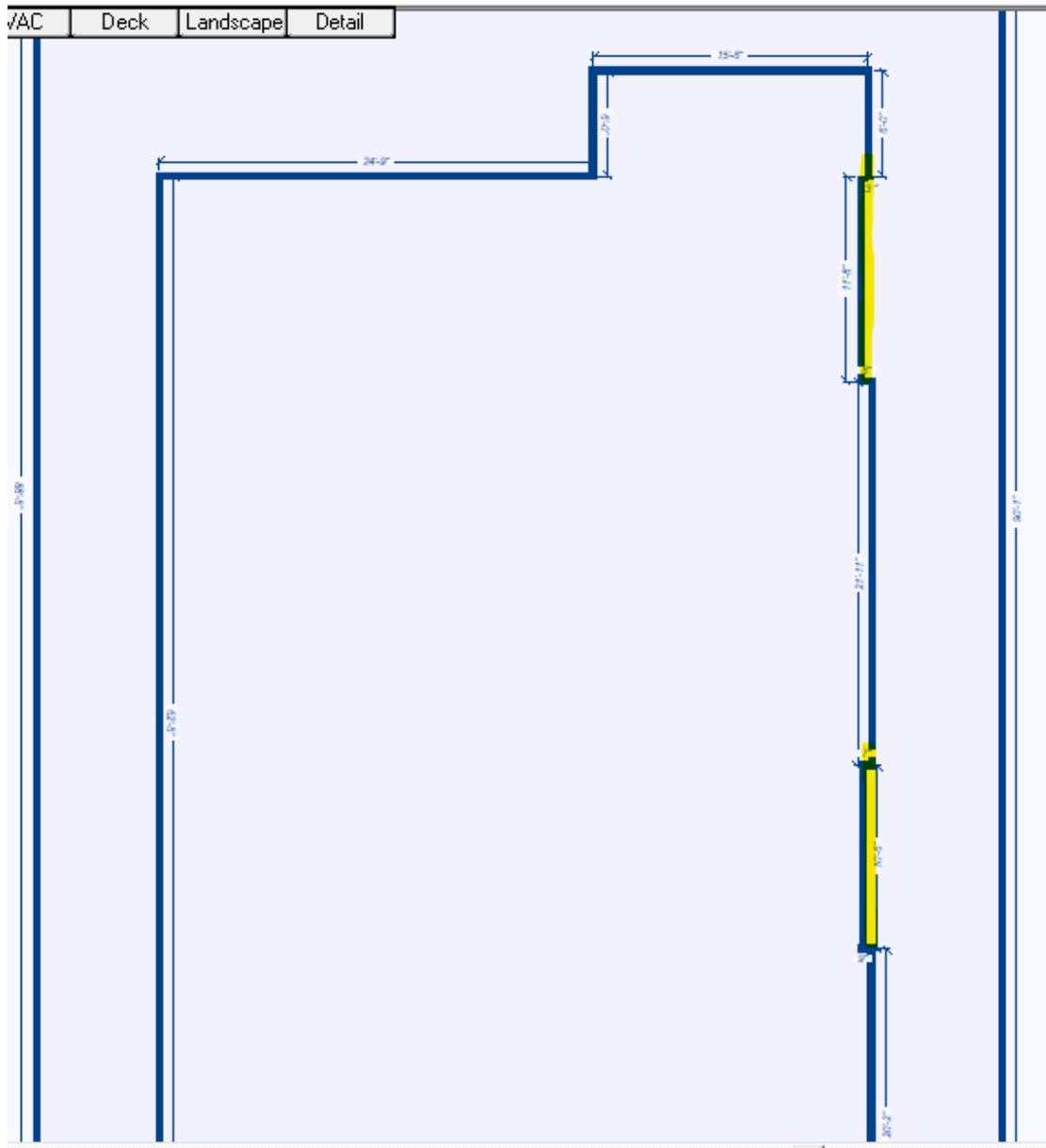
(Black line – existing setback line; Red line – new wall)



A scaled drawing of the “concave” variance that the Walzes are requesting is shown below.

Walz “Concave” Variance

(Blue line – existing setbacks; Yellow lines – proposed new walls)



2. The Variance Requested by the Walzes is Less than the Minimum Setback.

The second reason that the variance requested by the Walzes will not harm or compromise the public interest in safety (fire and rescue), planned and orderly land use development, or protection of property values and tax base is that, even with the requested variance, the proposed exterior walls will not even approach the minimum side setback for the lot.

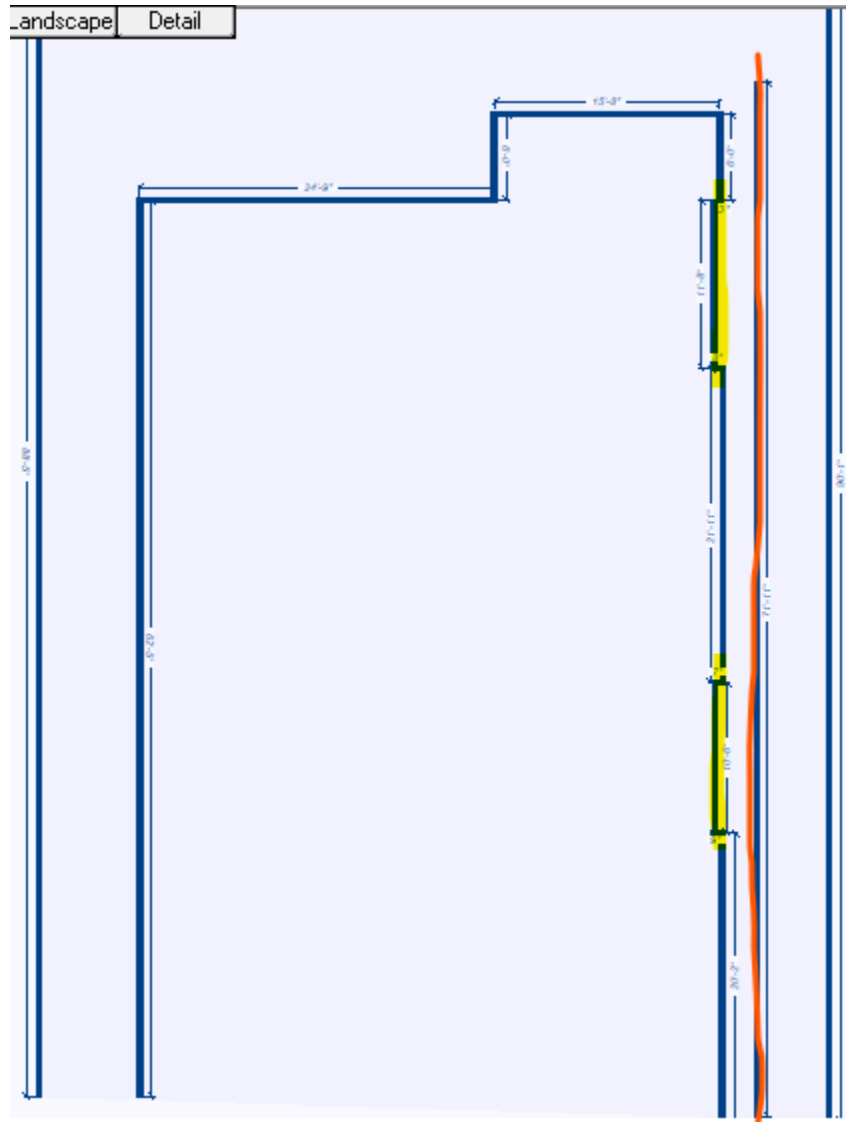
The side setbacks for the Walzes' lot are a total of 15 feet, with a minimum of five feet on either side. The Walzes' house was constructed in the middle of the lot, approximately seven feet from the one side lot line and approximately eight feet from the other side lot line.

The existing side of the house in question is 7.8 feet from the side lot line. If the new walls line up with the existing walls, the new walls also will be 7.8 feet from the side lot line, substantially more than the minimum of five feet.

A scaled drawing of the proposed new exterior walls in comparison to the minimum setback is on the following page.

Walz Minimum Setback Line – (5 feet)

(Red line – 5 feet from side lot line; Yellow lines – 7.8 feet from side lot line)



3. The Zoning Code Allows Larger Intrusions into the Side Yard.

The third reason that the variance requested by the Walzes will not harm or compromise the public interest in safety (fire and rescue), planned and orderly land use development, or protection of property values and tax base is that the Zoning Ordinance itself allows much larger intrusions into the side yard than the modest “concave” variance requested by the Walzes.⁸

The Zoning Code allows bay windows to extend into side yards. The section that addresses bay windows reads, in relevant part, as follows:

[Dane County Zoning Ordinance Section 10.102\(10\)](#)

[\(10\) Setback measurements and exceptions.](#)

...

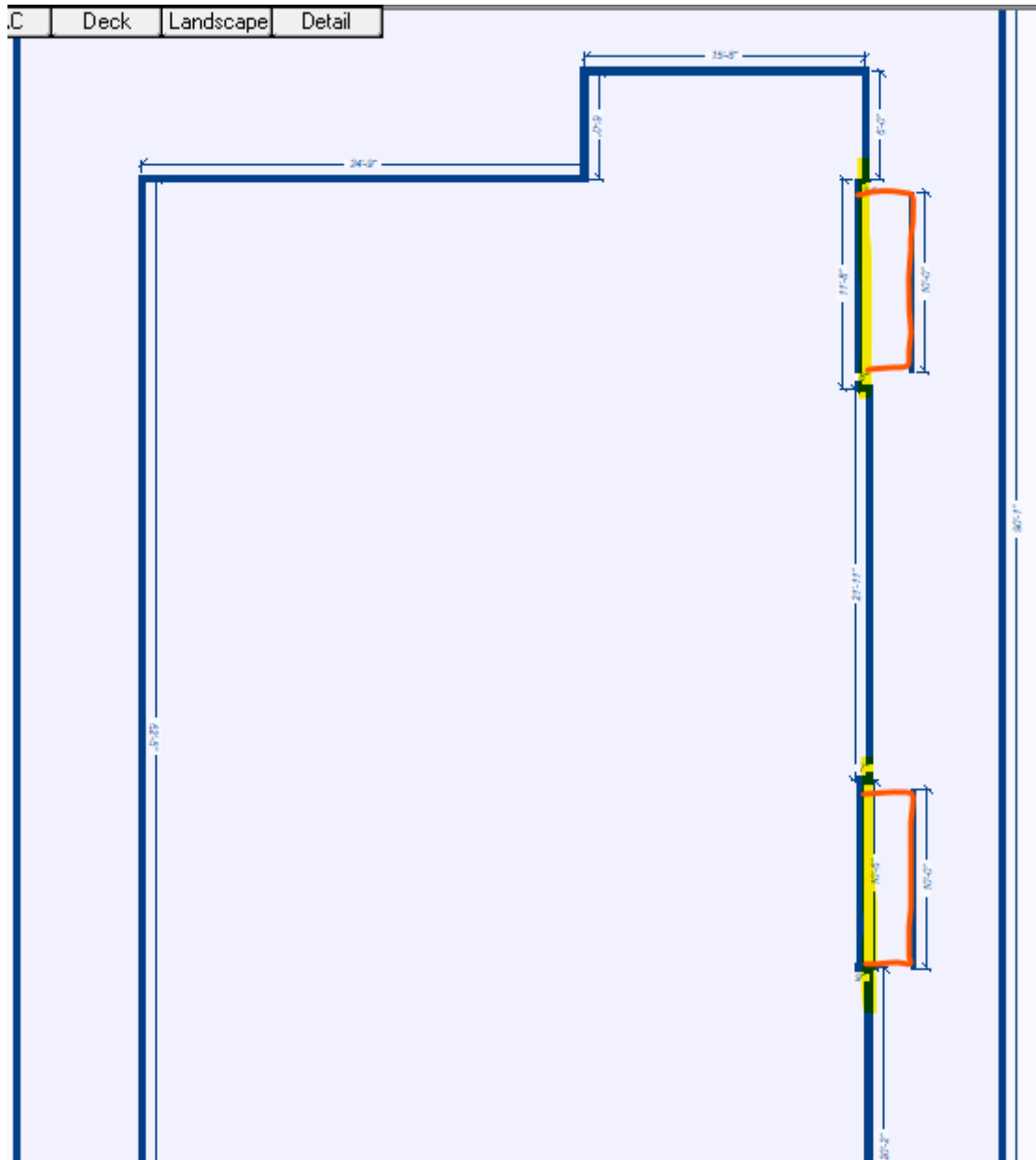
- [\(b\) For single family residences or duplexes, single story bay windows may be constructed in such a manner that they project three \(3\) feet or less into a required yard or setback area provided that such windows do not occupy, in the aggregate, more than one-third \(1/3\) of the wall of the building.](#)

A scale drawing of the bay windows that would be allowed to extend into the Walzes’ side yard in relation to the “concave” variance being requested by the Walzes is on the following page.

⁸ The two walls affected by the variance total approximately 22 linear feet. 22 linear feet x 6 inches equals around 11 square feet of encroachment into the side yard.

Allowable Bay Windows in a Side Yard

(Red lines – allowable bay windows; Yellow lines – Walz requested variance)



4. The Town and Neighbors Have No Objection to the Variance.

The fourth reason that the variance requested by the Walzes will not harm or compromise the public interest in safety (fire and rescue), planned and orderly land use development, or protection of property values and tax base is that Town of Pleasant Springs conducted full public hearings on the variance, without objection.

As noted in the Application, the Walzes were required to file a separate application for a variance with the Town of Pleasant Springs in order to obtain the required letter from the Town to Dane County acknowledging the Application.⁹ The Town sent notice to area property owners, and conducted hearings before the Plan Commission and Town Board.

The seven members of the Plan Commission and the four members of the Town Board who were present all voted in favor of recommending approval of the variance.¹⁰ During the hearings, the members of the Plan Commission and Town Board did not raise any concerns about safety (fire or rescue), orderly land use, or tax base. On the other hand, the members appeared to be sympathetic to the Walzes' predicament, glad to see that a "vacation" house that has been neglected over the years was slated for improvement, and receptive to the positive effects that the Walzes' proposed improvements would have on the neighborhood.

The Walzes showed the plans for their remodel project to the neighbors on both sides, and both of them have submitted statements that they have no objection to the variance.¹¹ Those statements should eliminate any concern that the proposed variance would somehow negatively affect property values.

Standard 3: Compliance with the Ordinance is Unnecessarily Burdensome

It is clear that compliance with the existing setback will create a "burden" on the Walzes. In order to comply with the existing aggregate setbacks, the Walzes will have to remove approximately six linear feet of existing concrete foundation, twelve linear feet of existing garage walls, and six linear feet of existing garage roof. If there is no harm to neighboring properties, or to the public interest (as the Walzes have demonstrated), then that burden is "unnecessary" and the variance should be granted.

⁹ The Walzes filed the application with the Town first because the Board was not scheduling hearings due to the pandemic.

¹⁰ No members of the public appeared at either hearing.

¹¹ Copies of the signed statements are attached to the Application.

Standard 4: Hardship Not Created by a Person Who Has a Present Interest in the Property

The Walzes are the current owners of the property, and they had nothing to do with the side yard violation. The Walzes were shocked to find that their house did not meet the side yard requirements. The condition was not disclosed when the Walzes purchased the property.

Standard 5: Substantial Detriment to Adjacent Property

As noted above, the Walzes showed the plans for their remodel project to the neighbors on both sides, and both of them have submitted statements that they have no objection to the variance. Those statements address whether there will be any detriment to adjacent property, and eliminate any concern that the proposed variance would somehow negatively affect property values.

Standard 6: Compatible with the Character of the Immediate Neighborhood

As noted in the Application, the Walzes house is located in a neighborhood that was platted years ago with 50-foot wide lots.¹² The current side yard requirement for a 50-foot lot is five feet on either side. So, there are many houses in the Walzes' neighborhood that are located 10 feet from the houses on either side.

On the side of the Walzes' lot at issue, the distance between the Walzes' house and the adjacent house varies, but is never less than 18 feet.¹³

Granting the 6-inch variance requested by the Walzes will not harm the public interest in planned and orderly land use and development because the distance between the Walzes' house and the adjacent houses will remain substantially more than what prevails in the neighborhood.

¹² A copy of the plat that includes the Walzes' lot is attached to the Application. The Walzes' lot is 55 feet wide, rather than 50 feet, because it includes five feet from an adjacent lot.

¹³ A Site Plan showing the location of the neighbors' house is attached to the Walzes' application. The Walzes' house is 7.8 feet from the common lot line, and the neighbors' house is 10.3 feet, for a total of 18.1 feet. The minimum distance between the new walls on the other side of Walzes' house and the adjacent house is approximately 24 feet.

No “Floodgate”

As a Board member, you also may have some concern that granting a variance to the Walzes when they have an “alternative” will create a dangerous precedent, and lead to a “flood” of similar variance applications. The Walzes submit that that is not the case. As noted above, the variance process is expensive, and filing for a variance can delay the permitting and construction process for months, even if the variance is approved without objection. The Walzes’ situation is unique because they inherited a setback problem, and because they are requesting a “concave” variance. The only property owners who could ever request a “concave” variance in good faith would be innocent property owners whose property originally was constructed in violation of a setback requirement without their knowledge. Granting a variance to the Walzes will not lead to a flood of variance applications.

Error in Staff Report

The Walzes want to point out that the “Staff Report” that was filed in this appeal inaccurately states that the Walzes are requesting a variance of only one-tenth of a foot, rather than the six-tenths of a foot that is requested in the Application, and was recommended for approval by the Town.¹⁴

Conclusion

The Walzes have submitted this Statement in lieu of presenting testimony and exhibits during the hearing as an accommodation to the Board because the hearing will be conducted virtually for the first time, and it is not clear how smoothly that will go. The Walzes are willing to answer any questions and submit any additional information that might assist the Board in hearing the Application.

The Walzes submit that they have more than met their burden to show that the proposed variance meets the applicable standards, is consistent with the spirit and intent of the Zoning Ordinance, and will not harm or compromise the neighborhood or the interest of the public in any of the purposes set forth in the Zoning Ordinance.

The Walzes have respectfully submitted proposed Findings of Fact, Conclusions and a sample Motion that the Board may use in making its ruling if the Board decides to grant the variance.

Dated January 20, 2021

Respectfully submitted,

/s/ Thomas and Kimberly Walz

¹⁴ Yesterday, the Walzes asked Mr. Hilbert to correct that part of the Staff Report, but he declined.



Dane County Planning & Development Division of Zoning

Three-Step Test to Qualify for a Variance:

The Dane County Board of Adjustment uses the following "Three Step Test" as standards by which it judges the "Real hardship(s)" presented by the applicant when considering variance appeals. The Board includes Findings of Fact and Conclusions at Law when it takes action on an appeal, using specific language from each of the three requirements.

To qualify for a variance, your property must meet the following requirements:

1. Unnecessary Hardship

Strict application of an ordinance requirement (dimensional standard) must result in unnecessary hardship. Wisconsin case law describes hardship as being present where, in the absence of a variance, no reasonable use can be made of the property. In some more extreme cases, open space uses may be the only reasonable use of a property, while in others a scaled down home and some relaxation of a setback requirement may provide a reasonable use. The zoning board will balance public interests in preserving the objectives of the ordinance and private interests in a property in determining which uses are reasonable. If a parcel as a whole (but not necessarily each portion of the parcel) provides some reasonable use for its owner, then this test is not met and a variance cannot be granted. An applicant may not claim hardship because of conditions which are self-imposed or created by a prior owner (for example, excavating a pond on a vacant lot and then arguing that there is no suitable location for a home). Courts have determined that loss of profit or financial hardship do not, by themselves, justify a variance. Decks and similar minor accessory structures are not essential to the reasonable use of property and are not eligible for variances.

2. Hardship Due to Unique Physical Limitations of the Property

Hardship must be due to unique physical limitations of the property, i.e. compliance with ordinance requirements is prevented by limitations (steep slopes, wetlands, etc.) that are not generally shared by other properties. The circumstances of an applicant (growing family, need for larger garage, etc.) are not a factor in deciding variances. Nearby ordinance violations, prior variances or lack of objections from neighbors do not provide a basis for granting a variance. Minor property limitations that prevent ordinance compliance and are common to a number of properties should be addressed by amendment of the ordinance.

3. No Harm to Public Interests

A variance may not be granted which results in harm to public interests. In applying this test, the board must consider impacts of your proposal and the cumulative impacts of similar projects on the interests of the entire community. These interests are listed as objectives in the purpose statement of an ordinance and may include general public health, safety and welfare as well as more specific issues such as environmental protection, clean drinking water and other concerns.

In addition to passing the 3-step test, you must also demonstrate that no other alternatives that would not require relief from zoning regulations exist. An existing alternative demonstrates that relief is not warranted.

Source: Zoning Board Handbook for Zoning Boards of Adjustment/Appeals by Michael D. Dresen and Lynn Markham, published July 2001 by the Land Use Education Center, The College of Natural Resources and Cooperative Education, University of Wisconsin – Stevens Point, pp.42-43



Dane County Planning & Development

Division of Zoning

GUIDELINES FOR VARIANCE APPLICATIONS DANE COUNTY BOARD OF ADJUSTMENT

Introduction

The County Zoning Ordinance is adopted and enacted by the Dane County Board of Supervisors. The Dane County Board of Adjustment is the body that reviews and makes decisions on requests for variances from the County Zoning Code. The Board of Adjustment is comprised of five citizen members. The Board of Adjustment's general grant of authority is found in Section 59.694, Wis. Statutes, as follows:

"The Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained."

A zoning ordinance cannot anticipate every land use question that will arise in a community. The Board of Adjustment's authority to grant a variance gives the ordinance limited flexibility. The Board of Adjustment acts as a quasi-judicial administrative arm of the County Board. It is the Board of Adjustment's duty to preserve the zoning ordinance without modification as far as possible while ensuring substantial justice for the individual. The variance procedure allows the general rules to be varied in response to unusual circumstances, which constitute a legal hardship.

The Board of Adjustment uses a "three-step" test to determine if an appeal warrants the granting of a variance. A description of the three-step test for variance appeal hardships can be found below.

Additional Information Regarding Standards Followed by the Dane County Board of Adjustment in Considering Variance Applications

1. It is the responsibility of the applicant who is seeking the variance to provide "proof" that strict enforcement of zoning regulations will result in a legal hardship. A variance cannot be granted as a convenience to the property owner.
2. The legal hardship must come from the zoning regulations. A self-imposed hardship cannot serve as justification for a variance; i.e., the problem was self-created by the action or negligence of the applicant; the applicant commenced work on a project without first obtaining required permits or had failed to inform him/herself on permit requirements, etc.
3. The legal hardship or difficulty stated as the reason why a variance is necessary must be particular to the zoning parcel in question and different from that of other area parcels. The applicant for a variance must clearly show the Board that the request is due to the very unusual qualities of the property.
4. The expenditure of money does not constitute a legal hardship. In other words, the courts do not recognize financial hardship as a basis upon which a Board of Adjustment can give a variance (i.e., the fact that a structure erected in violation of the Zoning Code would be expensive to move, that an alternative location which would be in compliance with zoning regulations might be somewhat more expensive on which to build, etc.). The courts have uniformly held that, when a hardship was created by the applicant's own acts, they are not entitled to relief.