Variances and Other Quasi-Judicial Development Decisions

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A seldom understood aspect of the planning practice is the quasi-judicial hearing. Quasi-judicial hearings are a unique function of the planning process and require higher levels of fact finding, with public input limited to sworn, factual testimony. This type of development decision making process is most often used with regards to variances, however, there are other situations in which a city may need to act in a quasi-judicial manner. Such hearings can be difficult for local governments, as staff may not be fully cognizant of the meeting requirements and level of detail needed for such decisions. By having a sound understanding of quasi-judicial hearings and the role they play in city policymaking, city governments can better protect themselves from legal liability.

Understanding Variances

A variance is a policy mechanism found within zoning codes that authorizes the use of an individual property in a way that would not be allowed under the existing code.[1] Variances exist as a form of regulatory relief in situations where zoning may have the effect of denying a property owner all reasonable use of their property. Variances are most frequently used in situations where lot area requirements such as building setbacks, lot width, or building height need to be modified. These types of variances are known as area variances.

There are many quasi-judicial features of the variance process. One basic feature is that a variance is subject to appeal in courts of law. However, the primary quasi-judicial feature of variances is the way in which variance hearings are structured. A quasi-judicial hearing is similar to a court hearing in that witnesses are sworn in, testimony is focused on facts relevant to the case, and participants in the hearing must have legal standing.[2] Approval of the variance must be based on the evidence at hand and the standards set forth in the ordinance. Upon approval, the board granting the variance needs to memorialize the variance in writing, which identifies the property affected and the extent of the modification that is permitted.

Some states place limits on a jurisdiction's variance authority. In the state of North Carolina, statutory standards do not permit use variances, which means that a variance cannot be used to change an existing land use put in place by the zoning ordinance.[3] In some instances, cities have worked with their state legislatures to enact special enabling legislation that changes the conditions in which variances can be granted. In Florida, special legislation was passed that prohibits use variances for new construction on unimproved property within the city of Tampa. The legislation also requires all use variances to be reviewed by the city's planning commission, which provides an added layer of oversight to the variance process.

In other instances local governments are given expansive power to grant variances. Special enabling acts by the Tennessee General Assembly granted Shelby County and the City of Memphis considerable power in issuing variances. This power was further bolstered by a 1972 Tennessee Supreme Court case in which the city's variance power was upheld in *Glankler v. City of Memphis*, where the city deemed filling land zoned for single-family above the 100-year floodplain to be an unnecessary hardship and approved its use for multifamily housing.[4] Over a period of 95 years, Memphis and Shelby County's Board of Adjustment have approved around 14,000 variances. In 2012, the City of Memphis, in response to its high volume of variances granted, prohibited any use variances on a property that had been subject to a rezoning request at any time within an 18-month period.

Credit: Paul Chandler

Learning from Variances

A city shouldn't rest comfortably if its zoning is resulting in a high volume of variances. A large number of variances can be an indicator of some deficiency in the zoning ordinance that is in need of review.[5] Local government staff may look into revising existing setbacks or lot dimension standards, especially if a high number of variances are centered around a specific development scenario or land use context. One solution utilized in Beaufort County, South Carolina was to authorize staff to give modulation permits, which provided for minor modifications to dimensional or development standards. Cities can also attach conditions to the approval of a variance, which ensures that variances are executed in a quick and timely manner. For example, a board of adjustment could stipulate that the development be completed within a specified time frame.

Planners need to address how city variance stipulations interact with the legislative duties of the planning commission. If a city grants too many variances, it can deeply undermine the legislative authority of the planning commission and its ability to enforce zoning provisions. This is why many cities and states prohibit use variances, as changes of use are best addressed through legislative bodies through the zoning amendment process.

In Alabama, state law does not prohibit use variances, however cities and counties in the state can enact statutes barring use variances within their jurisdiction.[6] Baldwin County's Board of Adjustment, for example, cannot grant use variances, only area variances. In Mississippi, the City of Madison also prohibits use variances.[7] Such measures help ensure that variances don't become a tool for evading land use provisions.

As mentioned previously, area variances are quite common and are generally seen as a legitimate exercise of variance authority. Use variances are permissible in many states, but they should be used infrequently so as not to undermine the authority of the planning commission. Then there are variances associated with development provisions that directly impact the life and safety of local residents. For example, local jurisdictions can grant variances to authorize construction that is not in keeping with the floodplain management ordinance.[8] Since such variances may have a direct impact on the life and safety of residents by increasing collective flood risk, they should be very rare and granted only if the property hardship is "exceptional, unusual, and specific to the property involved."

Other Circumstances that Require a Quasi-Judicial Framework

Other situations in which quasi-judicial decision making can be applied include: special exceptions, subdivision plats, and zoning code violations.[9] These situations can be fraught with uncertainty in the same way variances are, as local boards may not always be aware of when circumstances necessitate a quasi-judicial hearing.

In North Carolina special use permit requests are done through the quasi-judicial framework. Like variances, special use permits are approved only if the applicant provides "competent, material, and substantial evidence" that the ordinance's standards for approval will be met. In the case of *PHG Asheville, LLC v. City of Asheville*, the North Carolina Supreme Court ruled that Asheville lacked the authority to deny PHG, a developer, a special use permit.[10] The Court stated that PHG had produced "competent, material, and substantial evidence" indicating it met the ordinance's required conditions. By comparison, the city provided no such evidence to counter the applicant's claims, and the Court noted that the city council's concerns were not relevant to the ordinance language under consideration.

Another issue at play in quasi-judicial hearings is how to best deal with situations where legislative bodies become involved in the quasi-judicial deliberation process. One solution arrived at in many communities is the use of a hearing examiner system to conduct quasi-judicial land use hearings. In the State of Washington hearing examiners are employed frequently in local jurisdictions.[11] Hearing examiners will have extensive legal backgrounds, and because they are not elected officials, they are less subject to political pressures that might hinder their ability to render objective decisions. While this does not fully isolate the city council from quasi-judicial decision making it does provide a kind of safety valve in which quasi-judicial permits can be delegated to the hearing examiner, such as conditional use permits, variances, planned unit developments, and design review approvals.

Hillsborough County, Florida has had a hearing examiner system in place since 1978.[12] The county's land development code allows for hearing officers for a variety of special property rights cases, along with many other specialty appeals boards. Though such an approach may be too unwieldy for smaller jurisdictions, in Hillsborough County this system is highly effective. Though there have been a number of appeals to reach state courts, only one land development case reached the state appellate court related to the way a property was sited and whether it was consistent with the county's comprehensive plan.

Conclusion

Variances and other forms of quasi-judicial decision making are an important part of the planning process. In some situations states have legislation that limits the variance granting power of a city; however, cities cannot wholly rely on state law to set boundaries on quasi-judicial decision making. Cities with a sound understanding of quasi-judicial processes will educate their elected officials and advisory boards on the meeting framework while also establishing clear boundaries between the quasi-judicial and legislative functions of local governance.

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Endnotes

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