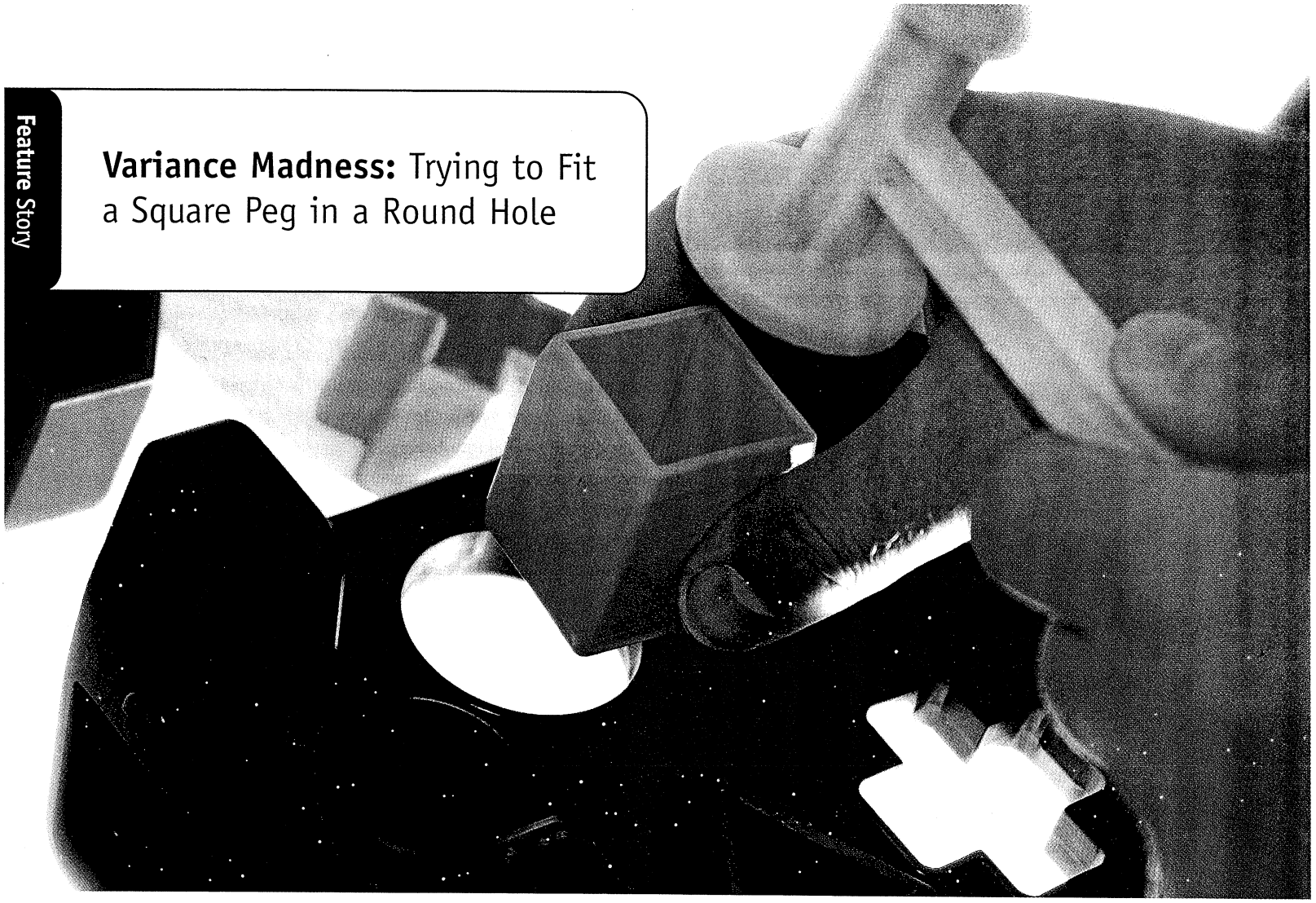
Feature Story

Variance Madness: Trying to Fit a Square Peg in a Round Hole



The granting of a variance from a municipal zoning ordinance has often been properly characterized as a license to violate the law. As such, a zoning board of appeals (ZBA) is entrusted with potent powers, which are supposed to be exercised in a very deliberative, careful and restrained fashion. The new Michigan Zoning Enabling Act (ZEA) MCL 125.3101, *[et seq.]* (Public Act 110 of 2006) calls the body a "zoning board of appeals," although some townships call the body the board of appeals or the board of zoning appeals, which are all the same thing.

Members of a ZBA should not let their personal opinions or emotions enter into the variance equation—they are only supposed to grant a variance if all of the specified listed standards are met. Why then, are a significant number of Michigan township officials and municipal attorneys increasingly concerned about the ease with which some ZBAs grant variances?

Although there is no rigid formula, a rough rule of thumb is that a ZBA is entering the "danger zone" if it grants more than approximately 30 percent of the nonuse (or dimensional) variance applications or more than about 10 percent of the use variance requests. Amazingly, in many municipalities, it is fairly common for a ZBA to grant 50 percent, 75 percent, or even over 90 percent of all variance requests. That prospect should be disturbing not only to officials of the municipalities involved, but also to the general communities.

A ZBA is not a "super-fairness board" or a municipal Robin Hood. Instead, it is a quasi-judicial body that is supposed to grant narrowly tailored relief from zoning regulations in certain limited cases. Michigan law mandates that a variance can be granted only if *all* of the standards listed in the local zoning ordinance are met—not if *some* of the standards are met, or *almost all* of the standards are met. Properly drafted variance standards relate to the land or structure itself, not to the individual situation, personal desires, likeability, or desired convenience of the property owner involved. If a ZBA member disregards the standards for a variance or lets emotion govern, he or she is effectively violating his or her oath of office. This is not unlike a jury member who practices "jury nullification," or even judges who disregard the law and simply do what they want.

No one ever said it is easy to be a ZBA member. In fact, it is often quite difficult to look an applicant in the eye—particularly if the

applicant is someone you know—and deny the applicant's request for something he or she desperately wants based upon standards which at times appear to be esoteric, heartless or overly technical. Everyone wants to be Santa Claus. However, granting variance requests where the standards do not warrant a variance is not only legally and ethically wrong, but it can create many practical problems as well.

THE NEW MICHIGAN ZONING ENABLING ACT

The new ZEA became effective on July 1 of this year. Although it did change prior law somewhat for township ZBAs, overall the prior law (including Michigan case law) remains intact. The most significant changes regarding ZBAs include clarification as to who can appeal (and when an appeal must occur), when a decision is "final" for purposes of an appeal to circuit court, issues regarding alternate ZBA members, hearing notice procedures, and court action. A resource toolkit on the act can be found at www.michigantownships.org/resourcetoolkits.asp.

WHY SHOULDN'T VARIANCES BE LIBERALLY GRANTED?

What is the harm in granting a variance in a particular situation, even though the variance standards might not be fully met? First and foremost, it undercuts the legitimacy and effectiveness of the zoning ordinance involved. What right does a ZBA have to cavalierly thwart the often time-consuming and expensive efforts spent by the planning commission and township board in drafting and adopting the zoning ordinance at issue?

Second, word gets out fairly quickly in the community if a given ZBA is "easy," which not only undermines confidence in the zoning ordinance (as well as makes a mockery of the idea of impartiality), but also breeds an increased number of variance requests ("I want the same deal that the ZBA gave to my neighbor.").

Third, although the granting of a particular variance does not set a legal precedent *per se* as to later cases, it does set an effective practical precedent—just try turning down a similar variance request later, as the applicant will throw the earlier variance approval in your face.

Fourth, granting an undeserved variance is a slap in the face to all of the other property owners in similar situations who fully comply with the zoning regulations.

Fifth, granting a variance where all of the standards are not met reflects poorly on the ZBA involved. Finally, granting too many variances tends to diminish the stature of the zoning administrator and make that official's job more difficult. ("Don't worry about what the zoning administrator says. Just go to the ZBA, since it approves everything.")

WHAT *NOT* TO DO

The following are reasons that should *never* be used to justify a variance:

- The applicant is a good person or a "good guy."
- The variance request is "reasonable."
- The variance makes "common sense."
- The applicant needs the variance to grow a business and compete.
- To deny the variance would have an adverse economic impact upon the business or the community (or it will cost jobs).
- The applicant has been a good corporate citizen and has paid taxes.
- The variance will help the business, and thus, the property tax base.
- In these troubling economic times, we should not impede the expansion of a good business.
- Let's not add to red tape or the bureaucracy.
- The ordinance provision makes no sense.
- We have to do justice and help fairness prevail.
- We have always granted this type of variance request.
- The variance will not hurt anyone.
- We have to help the applicant out.
- We must look out for the "little guy."
- Complying with the ordinance would be too expensive for the applicant.
- The ordinance provision is too tough and should be changed.
- The property owner should be able to do what he or she wants with his or her property.

Height variance requests constitute a good case study. If you think about it carefully, there are probably only one or two height variance requests out of 100 that should ever be granted. Almost always, the request for a height variance (particularly in the context of a residential dwelling or accessory building) is based on the applicant's personal desire or situation, as opposed to the land involved. Typical height variance requests can include a desire for a taller residential accessory building for storage needs (for example, the applicant's new motor home is so tall as to require higher garage doors and roof trusses) or taller residential dwellings on lakes for better views. Every one of such variance requests should be denied, since they all relate to personal desires, "toys" or individual situations.

One of the rare times that a height variance might be justified is in the commercial or industrial setting, where government-mandated safety features, HVAC units on the roof, and similar situations require a slightly taller building. ▶

REINING IN RUNAWAY BOARDS OR MEMBERS

How can municipal officials place a wayward ZBA back on the straight and narrow path? ZBA members should be urged—or even be required—to attend variance-related seminars every year or two. Also, a township board or planning commission should make their displeasure clear to a ZBA that is granting too many variance requests. Municipal officials should tally all of the variance requests over a multiple-year time period for the particular ZBA involved together with a calculation of how many variances were granted. Those statistics should then be presented to the ZBA. If the ZBA is granting more than about 30 percent of its dimensional variances or more than 10 percent of its use variances, it should be explained to the members why that constitutes a problem. In addition, the standards contained in the zoning ordinance should be placed in an outline or checklist form, and the ZBA members should be required to go through that form or checklist each time a variance is considered. Finally, the ZBA should adopt detailed rules of procedure which cover meeting rules, conflict of interest situations, *ex parte* communications, and similar matters.

It is often prudent to have the ZBA hold a joint meeting with the planning commission—and sometimes with the township board included—once a year to discuss the variances that were granted, whether or not changes should be made to the zoning ordinance, and similar matters. Of course, if such a meeting is held, it must properly posted under the Open Meetings Act for each municipal body involved.

USE VARIANCES

What about use variances? This has always been a controversial topic, particularly for Michigan townships. The ZEA does not appear to have squelched the controversy. While the new act specifies when and under what conditions a township ZBA can grant a use variance, the language contained in the act regarding use variances has been the topic of considerable debate since it was passed by the Legislature last winter.

The ZEA provides as follows with regard to use variances: (MCL 125.3604) ...

(7) *If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance*

shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as is otherwise allowed under this act.

(8) The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance.

(9) The authority to grant variances from uses of land is limited to the following:

(a) Cities and villages.

(b) Townships and counties that as of February 15, 2006, had an ordinance that uses the phrase 'use variance' or 'variances from uses of land' to expressly authorize the granting of use variances by the zoning board of appeals.

(c) Townships and counties that granted a use variance before February 15, 2006.

(10) The authority granted under subsection (9) is subject to the zoning ordinance of the local unit of government otherwise being in compliance with subsection (7) and having an ordinance provision that requires a vote of two-thirds of the members of the zoning board of appeals to approve a use variance.

(11) The authority to grant use variances under subsection (9) is permissive and this section shall not be construed to require a local unit of government to adopt ordinance provisions to allow for the granting of use variances.

In a nutshell, if a township either authorized the granting of use variances in its zoning ordinance at any time prior to February 15, 2006, or, regardless of what its ordinance provided, actually granted a use variance prior to that date, that township has the ability under the ZEA to authorize use variances under its zoning ordinance after February 15, 2006. If a township neither authorized use variances in its zoning ordinance nor granted a use variance prior to February 15, 2006, under the ZEA, the ZBA for that township cannot hereafter ever consider or grant a use variance, even if it desires to so provide in its zoning ordinance. Although a "qualifying township" can provide for use variances through its zoning ordinance under the act, it need not do so and can, if it so chooses, expressly prohibit the consideration or granting of a use variance by its ZBA.

IF IN DOUBT, ADJOURN THE DECISION

ZBA members should keep in mind that if there is significant uncertainty as to whether or not a particular variance should be granted, more information is needed, or it is necessary to verify one or more claims made by the applicant or an opposing neighbor at a public hearing, it is normally entirely appropriate to adjourn the decision for a month or until the next meeting. It is also sometimes preferable to permit ZBA members to ponder an apparent "close call" for a while, which can be greatly assisted by an adjournment of the decision. As with everyone else, ZBA members are more apt to make mistakes if uncertain or they are under pressure to make a snap decision.

Generally, the only time a tabling would not be appropriate is if the zoning ordinance itself places a shorter time limit on when a ZBA must make a decision. However, such a provision should not be inserted into a zoning ordinance in the first place. If it appears that a variance request will be unusually complicated, controversial or contentious, it is also appropriate to have the township planner, the township attorney, or even both present to assist the board. Furthermore, a well-crafted zoning escrow fee policy can assist in funding the presence of those experts. ▶

VARIANCES THAT SHOULD GENERALLY NOT BE GRANTED

The following variance requests should *almost never* be granted, since the standards can almost never be met:

- Any use variance.
- Building height variances.
- A variance to permit a land division to occur where one or more of the resulting parcels would not meet the minimum lot size, width, road frontage, or other dimensional requirement.
- A variance to allow a building, yard or other dimensional matter to accommodate a vehicle or recreational item of the property owner.
- A variance to allow outdoor storage.
- A variance which will allow an increase in density.
- A variance involving the height or size of a sign or the number of signs.
- A variance to validate something that was done illegally (for example, building without a building permit, building something that is sited differently than was shown on the approved site plan, etc.).

RELATIONSHIP TO THE ZONING ADMINISTRATOR

The township zoning administrator position is unique. The zoning

administrator is the only township official who has the authority to render binding or determinative interpretations or decisions regarding the municipality's zoning ordinance. Unless a decision of the zoning administrator is overturned pursuant to a formal appeal to the ZBA, the zoning administrator's zoning decision stands. Contrary to popular misconception, apart from the ZBA, the decision of a zoning administrator (when acting within his/her scope as arbiter of the local zoning ordinance) cannot be overturned by a township supervisor (or any other elected township official), the planning commission or even the township board.

A ZBA should not issue advisory or speculative decisions regarding the interpretation of any provision of the local zoning ordinance. Accordingly, the zoning administrator should not seek advice from the ZBA (or the planning commission) regarding the meaning of a particular word, phrase or section of the zoning ordinance unless an aggrieved party has formally appealed the interpretation or determination by the zoning administrator to the ZBA (and the proper hearing is held with prior notice).

THE STANDARDS

ZBA members should never vote to approve a variance request unless all of the standards for a variance have been met. Period. Furthermore, the burden is on the applicant to prove that each and every standard is met.

For a nonuse (*i.e.*, dimensional) variance, the applicant must prove that he or she has "practical difficulty" in complying with the zoning ordinance provision at issue. Of course, the applicant must also meet any and all additional standards specified in the local zoning ordinance. Conversely, to obtain a use variance, the applicant must prove "unnecessary hardship" in addition to the other standards specified in the ordinance. It is much more difficult to prove unnecessary hardship than practical difficulty. The burden of proof necessary to justify a use variance is similar to the test required before a property owner can demonstrate that a "taking" of property has occurred. In essence, a use variance applicant must prove that his or her property is virtually unusable as currently zoned. If the unnecessary hardship standard is properly applied, it becomes obvious why use variances should almost never be granted.

Perhaps the best way of ensuring that ZBA members carefully consider *all* standards is to have a pre-printed checklist form available at all meetings (which incorporates the variance standards of the local zoning ordinance) for ZBA members to go through publicly before a variance decision is reached. It is also helpful to have one checklist sheet for nonuse/dimensional variances and another for use variances, since the standards are not identical.

FUNCTIONS OF THE ZBA

Everyone knows that a ZBA decides variance requests. However, it also has the power to determine the boundary line of a given zoning district, settle issues regarding nonconforming structures or uses, and decide appeals from an interpretation or determination of the zoning administrator regarding a provision of the zoning ordinance. In fact, it has become increasingly common for an applicant to join an appeal regarding a zoning interpretation with a request for a variance on the same application. In those cases, the applicant effectively gets "two bites at the apple."

For example, suppose a property owner desires to build an outdoor deck within the side yard setback area. The zoning ordinance is unclear as to whether a deck is a "structure" for purposes of setback requirements. For setback purposes, the zoning administrator determines that the proposed deck *is* a structure. Pursuant to an appeal, the property owner could request that the ZBA reverse the zoning administrator's determination and hold that a deck is not a structure for purposes of setback requirements, and in the alternative, can also request that the board issue the appropriate variance. If the ZBA determines that the proposed deck is not a structure, the variance request becomes moot.

When exercising any of the above-mentioned powers (including hearing the appeal of an interpretation or determination by the

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zoning administrator), the ZBA should act formally and only pursuant to a public hearing. In fact, even with the appeal of an interpretation or determination, it is recommended that not only should the newspaper public hearing notice be utilized, but every occupant/property owner within 300 feet of the property at issue should also receive a hearing notice. Why? Because the decision by the ZBA regarding the appeal of an interpretation or determination regarding a zoning ordinance provision will set a true precedent and will be binding on all properties throughout the township unless the zoning ordinance is otherwise amended. By giving all property owners/occupants within 300 feet notice of the hearing, a public hearing will likely prompt a more vigorous public debate and will help "sharpen" the issue.

WHO CAN APPEAL?

Essentially, there are two levels of appeal regarding the ZBA. The first involves who can appeal a decision of the zoning administrator. The second level involves who can appeal a decision by the ZBA with which they disagree to the circuit court. In both cases, the ZEA provides that an appeal can be made only by a "party aggrieved." Typically, the landowner who is the subject of the zoning issue (and on occasion, a tenant, option purchaser or other person with an interest in the property) is the party aggrieved. However, in some cases, an objecting neighbor or governmental unit might have standing to appeal as a "party aggrieved." It should be noted that the ZEA made appeals slightly more difficult for anyone other than the property owner directly involved and changed the appeal language from an "affected party" to a "party aggrieved."

Few people realize what a significant role an aggrieved neighbor can play with regard to the zoning interpretation process. For example, if a zoning administrator makes an interpretation or determination which permits a property owner to commence construction or a use on the property at issue, an aggrieved neighbor can appeal that interpretation or determination to the ZBA (if, in fact, the neighbor is even aware that the zoning administrator has taken such action). In such an instance, the construction or commencement of the use must generally cease until after the ZBA has made its decision. Thereafter, if the aggrieved neighbor does not prevail at the ZBA level, the neighbor can appeal the ZBA's decision to the circuit court.

COURT ACTION

An aggrieved party, as defined above, can appeal the denial or approval of a variance (or any other decision of a ZBA) to the county circuit court where the property is located. Although such court action is referred to as an "appeal," it actually resembles a conventional lawsuit, but with some differences. Pursuant to such an appeal lawsuit, the review powers of the circuit court involved are very limited and the court review is very narrow. The law states that the court must be very deferential to the ZBA and municipality involved. The court's review is limited to determining whether a ZBA's decision meets the following:

- Complies with the Constitution and laws of Michigan.
- Is based upon proper procedure.
- Is supported by competent, material and substantial evidence on the record.
- Represents the reasonable exercise of discretion granted by law to the ZBA.

In actuality, a court is supposed to be less concerned about the ultimate or substantive decision made by the ZBA than with *how* the decision was made (*i.e.*, Were the standards properly applied? Were the proper procedures utilized?). In fact, the court's review is limited to "the record" established at, and prior to, the time of the decision of the ZBA. New evidence generally cannot be introduced or considered during the court proceedings. Accordingly, it is always important for the township and ZBA to make a good record

in case an appeal occurs. That means keeping all relevant documents (including any application, letters, notices, a township planner's recommendation, etc.) and taking good minutes.

How does a nonprofessional ZBA properly document its decision, particularly when litigation appears likely? The courts require a ZBA not only to make a decision on a variance (or other requests before that body), but also to properly apply the standards and make appropriate findings of fact. If that is done pursuant to an oral approval or denial motion, that motion could end up being five to 10 minutes long or even longer! It is not enough to simply "parrot" the standards—an individualized finding must be made for each standard.

In general, there are three techniques available for making a "good" record regarding a decision made by the ZBA, particularly in a complex or contentious case. First, if the township has a professional planner who is significantly involved with the variance process, the township planner makes a recommendation for denial or approval and the ZBA happens to follow the township planner's recommendation, the ZBA can often adopt the planner's written report as its findings of fact (which often incorporates specific conditions of approval if the variance is approved).

Second, the township planner can write out detailed approval and denial motions ahead of time (which would include application of the standards, findings of fact and any possible conditions if a variance is approved), which can be utilized (and modified) by a member of the ZBA who desires to make a motion. However, such motions can still be time-consuming and unwieldy.

Finally, the ZBA can direct the township attorney and staff to draft the proper approval or denial resolution. Procedurally, however, this can be difficult. To have the township attorney and staff draft separate approval and denial resolutions before the meeting can be time-consuming, expensive and wasteful.

Alternately, if the township attorney and staff simply draft either an approval or denial resolution before the meeting at which the ZBA makes its final decision, it can appear that matters are preordained and that the board made its mind up ahead of time. In some municipalities, the ZBA makes a tentative decision at a meeting, thus giving the township attorney and staff the ability to draft the final resolution for the next meeting. For example, a member of the ZBA could make the following motion:

> *I hereby move to tentatively [approve/disapprove] the requested dimensional variance contingent upon the township attorney and township staff drafting the appropriate written resolution of decision for our next meeting and the ZBA adopting that resolution with any modifications at its next meeting.*

THE NEGATIVE MOTION MYTH

There is a common myth regarding motions by ZBAs which should be cleared up once and for all. Some township officials mistakenly believe that a ZBA cannot or should not make a motion in the negative—that is, a motion to deny a variance or other request. Accordingly, under that view, all motions must be motions to approve, and if a variance does not receive sufficient votes to pass, it is *de facto* denied, and the ZBA is done with the matter and moves on. ▶

However, the notion that a ZBA cannot or should not entertain a negative motion is absurd. In fact, at times, this misconception can get a township into a great deal of trouble. If a ZBA is inclined to deny a variance, a negative motion should be utilized, and it should also properly incorporate all findings of fact and application of the standards. If only approval motions are utilized and the ZBA moves on after an approval motion has failed to pass, there is no formal decision for a circuit court to review and no adopted findings of fact, application of standards, etc.

This notion about not utilizing negative or denial motions appears to have arisen based on someone's fear that members of a ZBA would misunderstand or would get mixed up when voting "yes" on a denial motion or resolution. With respect, if a ZBA member could be so easily confused, he or she should not be on that body! Also, it is perfectly appropriate for a ZBA member to ask that a motion be read a second time (or more) before a vote occurs if anyone is confused.

TIPS FOR YOUR ZONING ORDINANCE

It is very important to have a well-drafted chapter in your local municipal zoning ordinance regarding the ZBA, variances, interpretations and similar matters. The following are some of the provisions that should be contained within such a chapter, but are often overlooked or poorly drafted:

1. A clause that requires the property owner or aggrieved party to file a written appeal to the ZBA within a relatively short period of time (for example, 14, 21 or 30 days) of when the zoning administrator makes a determination or their appeal rights are barred. This can greatly assist the township in litigation.
2. List very specific and clear standards for the granting of a variance. Ideally the standards for a nonuse/dimensional variance versus a use variance should be spelled out separately. It should also be made clear that a variance cannot be granted unless the ZBA finds that all of the listed standards are met.
3. The township board should carefully consider whether or not use variances should be available (if, in fact, the township involved even qualifies). If the zoning ordinance provides for use variances, then, in addition to the two-thirds membership vote of the ZBA required to grant a use variance (which should be expressly stated in the ordinance), the township involved may desire to add an additional clause indicating that before the ZBA can grant a use variance, the matter must be referred by the ZBA to the planning commission which would produce a recommendation to the ZBA regarding whether or not the use variance should be granted.
4. For the appeal of an interpretation or determination by the zoning administrator, it should be made clear that not only should a notice of public hearing regarding that matter be put in the newspaper, but that the hearing notice should also be mailed to all property owners/occupants within a 300-foot radius of the property where the issue arose.
5. If the township involved has a zoning escrow fee policy (or the equivalent), the written policy and/or the zoning ordinance should expressly allow the township to require a zoning escrow fee (or fees) for certain cases before the ZBA that are particularly complex, contentious or extensive.

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