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Governor Pete Wilson

**The Planner's Training Series:**  
**THE VARIANCE**

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## **The Planner's Training Series**

This publication is one in a series prepared by the Office of Planning and Research (OPR) on topics of general interest to planners. As with the rest of this series, its primary purpose is to provide both a reference for experienced planners and training materials for new planners, planning commissioners, and zoning board members. Citations are made to pertinent sections of the California statutes and to court decisions in order to provide the reader the opportunity to do additional research on their own. Unless otherwise noted, all statutory references are to the California Government Code.

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# The VARIANCE

## WHAT IS A VARIANCE?

Simply put, a variance is a limited exception to the usual requirements of local zoning. As the following discussion will explain, when a city or county is confronted with development on an unusual piece of property, the variance procedure can lend some flexibility to the usual standards of the zoning ordinance. Approval of a variance allows the property owner "to use his property in a manner basically consistent with the established regulations with such minor variations as will place him in parity with other property owners in the same zone" (*Longtin's California Land Use*, 2nd edition).

### ENABLING LEGISLATION

State law specifies the basic rules under which counties and general law cities may consider variance proposals. Charter cities are not subject to these procedures unless they have incorporated them into their municipal ordinance. The following discussion will take a detailed look at the state law relating to variances in counties and general law cities.

The authority to consider variances is as follows:

"Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."

"Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated."

"A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits." (Section 65906)

Later in this paper, we will take a brief look at three other variance statutes. Section 65906.5 authorizes the grant of a variance from the parking requirements of a zoning ordinance in order to allow parking to occur off-site or for in-lieu fees to be paid. Section 65911

authorizes the granting of variances in open space zones. Section 65852.1 provides that a variance may be approved allowing a second dwelling unit on property zoned for single-family residential use if the occupant is 62 years or older.

### PROCEDURE

Approval of a variance is an administrative act. Unlike a rezoning or an amendment to a general plan, consideration of a variance does not involve the establishment of new codes, regulations, or policies, but rather applies the provisions of the zoning ordinance to a particular circumstance. State law provides that the city council or county board of supervisors may delegate responsibility for considering and deciding variance requests. Commonly, responsibility is delegated to a board of zoning adjustment or a zoning administrator.

#### Public Hearing

Section 65905 requires the city or county to hold a public hearing on proposed variances. Ten-days advance notice of the hearing must be published in a newspaper of general circulation in the community and mailed directly to the applicant and land owner, as well as to owners of properties located within 300 feet of the site boundaries (Section 65091 provides detailed requirements). Nearby property owners must be provided notice even if their property is located outside the jurisdiction's boundaries (*Scott v. Indian Wells* (1972) 6 Cal.3d 541). The hearing must comply with the open meeting requirements set out in the Ralph M. Brown Open Meeting Act (Section 54950, et seq.).

The notice of hearing must include a description of the proposal and the variance process, the location of the property involved, the identity of the hearing body or administrator, and the date, time, and place of the public hearing (Section 65094). The notice must also specify whether the proposal has been determined to be categorically exempt or if a negative declaration or environmental impact report has been prepared. As much as possible, the hearing notice should be written in plain language and avoid planning jargon.

The purpose of the hearing is for the zoning board or zoning administrator to hear and consider the opinions of the proponent and nearby property owners. At the conclusion of the hearing, the board or administrator will decide whether or not to approve the variance. If the variance is approved, the board or administrator will adopt findings to support their action. Their decision, whether for approval or denial, can be appealed to a higher body (the planning commission, for example) in accordance with the city or county zoning ordinance.

Section 65901 allows the city council or county board of supervisors to specifically authorize its board of zoning adjustment or zoning administrator to decide variance applications without a public hearing. The local zoning ordinance must set out the particular types of variances subject to this rule, as well as the maximum extent of variation from standards which may be allowed. Notwithstanding the cavalier approach of Section 65901, the Office of Planning and Research recommends providing the applicant and neighboring property owners at least the opportunity to request a public hearing on any variance proposal which may affect their property rights. For example, the city may mail notice indicating that no hearing will be held unless specifically requested. This recognizes the due process guarantee of the U.S. Constitution and complies with the holding of the California Supreme Court in *Horn v. County of Ventura* (1979) 24 C.3d 605.

### **California Environmental Quality Act**

Variances are subject to the California Environmental Quality Act (CEQA, Public Resources Code Section 21000, et seq.). Prior to the public hearing on the proposed variance, the city or county must evaluate the proposal to determine whether or not it may have a significant adverse effect on the environment. In most cases, a variance is sufficiently innocuous to be categorically exempt from environmental review (see Section 15305 of the state *CEQA Guidelines*). Where the proposal is not exempt, the city or county must prepare either a negative declaration indicating that the

variance is not exempt, but nonetheless will have no significant effect, or an environmental impact report which describes the expected impacts of the proposal and the means to avoid or lessen those impacts.

### **Permit Streamlining Act**

Variance proceedings are subject to the Permit Streamlining Act (Section 65920, et seq.). Accordingly, a variance proposal for which a negative declaration was adopted or a CEQA exemption used must be acted upon within three months of that action. If an Environmental Impact Report (EIR) was certified for the variance, the application must be acted upon within 6 months of that certification. Further, a variance cannot be disapproved solely to comply with these deadlines.

## **LIMITATIONS ON THE COMMON VARIANCES**

Pursuant to Section 65906, a variance may be granted when:

- (1) there are specific physical circumstances that distinguish the project site from its surroundings; and
- (2) these unique circumstances would create an unnecessary hardship for the applicant if the usual zoning standards were imposed.

Variances are limited to those situations where the peculiar physical characteristics of a site make it difficult to develop under standard regulations. A variance is granted in order to bring the disadvantaged property up to the level of use enjoyed by nearby properties in the same zone. For instance, where the steep rear portion of a residential lot makes the site otherwise undevelopable, a variance might be approved to reduce the front yard setback and thereby create sufficient room for a home on the lot. Similarly, a parcel's shape might preclude construction of a garage unless side yard setback requirements are reduced by approval of a variance.

Review of a proposed variance must be limited solely to the physical circumstances of the property. "The standard of hardship with regard to applications for variances relates to the property, not to the person who owns it" (*California Zoning Practice*, Hagman, et al.). Financial hardship, community benefit, or the worthiness of the project are not considerations in determining whether to approve a variance (*Orinda Association v. Board of Supervisors* (1986) 182 Cal.App.3d 1145). As *California Zoning Practice* suc-

cinctly explains, "[t]he test of bringing property to parity is based on equality of the property rather than equality of the owners." (emphasis added)

Furthermore, consideration of a variance must focus upon the zoning standard or standards from which an exception is being requested. "[A] variance applicant may not earn immunity from one code provision merely by overcompliance with others. Otherwise, the board charged with reviewing development proposals 'would then be empowered to decide which code provisions to enforce in any given case; that power does not properly repose in any administrative tribunal' (*Broadway, Laguna Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 767)." (*Orinda Association v. Board of Supervisors*, supra).

Variations are only for use in unusual, individual circumstances. There is no basis for granting a variance if the circumstances of the project site cannot be distinguished from those on surrounding lots. For example, all things being equal, in a subdivision where lots are uniformly 40 feet wide, there is no basis for allowing one lot to be developed with reduced side yard setbacks.

Conditions must be imposed on a variance when necessary to avoid granting the applicant a special privilege. As will be discussed later, these conditions must be reasonably related to the development being authorized.

A variance does not change the zoning of the project site, so it cannot permit uses other than those already allowed under existing zoning. Section 65906 prohibits the approval of "use variances." Nor is a variance intended to be used in place of design review standards. The law does not intend that every or even one-quarter of the properties on a block be granted the same kind of variance. If development within a particular area is commonly leading to requests for consideration of variances, then the city or county should reassess the standards of the applicable zone and, if necessary, change them.

At the same time, the approval or denial of a variance does not create a precedent for subsequent variance requests. Because each variance is based upon special circumstances relating to the site for which it is proposed, the past grant or denial of variances for other properties in the area does not mandate similar action on the part of the hearing body (*Miller v. Board of Supervisors of Santa Barbara County* (1981) 122 Cal.App.3d 539).

The applicant for a variance bears the burden of proving that special circumstances exist to justify its granting (*PMI Mortgage Ins. Co. v. City of Pacific*

*Grove* (1982) 128 Cal.App.3d 724). The hearing body must not approve a variance unless it can make written findings, supported by substantial evidence in the record, that the variance meets the criteria of Section 65906.

A variance runs with the land. Subsequent owners of the land continue to enjoy the variance. The original land owner cannot transfer the variance to another site, nor can the local agency approve a variance on the condition that it remain owned by a particular person (*Cohn v. County Board of Supervisors* (1955) 135 Cal.App.2d 180).

## OTHER TYPES OF VARIANCES

State law also allows variances to required parking regulations, to open space zoning, and for "granny" units. Each of the following statutes has its own findings requirements, some of which differ from those of Section 65906. In all cases, public notice and hearing must be provided pursuant to Section 65905.

### Parking variance (Section 65906.5):

"Notwithstanding section 65906, a variance may be granted from the parking requirements of a zoning ordinance in order that some or all of the required parking spaces be located offsite, including locations in other local jurisdictions, or that in-lieu fees or facilities be provided instead of the required parking spaces, if both the following conditions are met:

- (a) The variance will be an incentive to, and a benefit for, the nonresidential development.
- (b) The variance will facilitate access to the non-residential development by patrons of public transit facilities, particularly guideway facilities."

Section 65906.5 authorizes variances to the non-residential (i.e., commercial, industrial, recreational, etc.), on-site parking requirements contained in a local zoning ordinance. Such a variance may authorize locating required parking spaces off site. It may also authorize the landowner to provide in-lieu fees or facilities instead of required parking spaces. It does not authorize reducing the number of required spaces unless in-lieu fees or facilities are provided.

The local agency must adopt findings describing the incentive and benefit being provided to the non-residential use. These findings must also describe how the variance will facilitate access to the development by riders of public transit.

**Open-Space variance** (Section 65911):

“Variances from the terms of open-space zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location, or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

“Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which the property is situated. This section shall be literally and strictly interpreted and enforced so as to protect the interest of the public in the orderly growth and development of cities and counties and in the preservation and conservation of open-space lands.”

This statute is nearly identical to Section 65906 and is subject to basically the same findings requirements. Its purpose is to clarify that variances may be granted to the terms of open-space zoning provided that the provisions of that zoning are not compromised.

**“Granny” unit variance** (Section 65852.1):

“Notwithstanding section 65906, any city, including a charter city, county, or city and county may issue a zoning variance, special use permit, or conditional use permit for a dwelling unit to be constructed, or which is attached to or detached from, a primary residence on a parcel zoned for a single-family residence, if the dwelling unit is intended for the sole occupancy of one adult or two adult persons who are 62 years of age or over, and the area of floor space of the attached dwelling unit does not exceed 30 percent of the existing living area or the area of the floor space of the detached dwelling unit does not exceed 1200 square feet.”

Section 65852.1 allows a variance to be used like a conditional use permit in order to allow construction of an accessory dwelling for elderly residents. Prior to approval of a variance under Section 65852.1 the city or county must find that the resident or residents meet the age criteria, and that the floor area of the proposed unit does not exceed that allowed by the statute. The findings required for a common variance under Section 65906 do not apply.

In contrast to Section 65906, the granny unit statute applies both to charter and general law cities and specifically authorizes the granting of a “use” variance.

**VARIANCE FINDINGS**

When approving a variance, the hearing body must make “findings of fact” to support its action (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 C.3d 506). The agency must also make the findings required by the California Environmental Quality Act (CEQA) and by local ordinance, if any.

Findings are important. They explain the hearing body’s reasons for approving the proposal before it. The purpose for making findings is to “bridge the analytical gap between the raw evidence and ultimate decision” (Topanga, supra). In the event that the decision is challenged, a court will examine the evidence embodied in the findings to determine whether the hearing body abused its discretion when acting on the variance. An abuse of discretion will be found when the agency did not proceed in a manner prescribed by law, when the decision is not supported by findings, and when the findings are not supported by evidence in the administrative record.

Variance findings must describe the special circumstances that physically differentiate the project site from its neighbors. Further, the findings must specify the “unnecessary hardship” that would result from these circumstances in the event that a variance was not approved.

Defensible findings are based on the pertinent evidence that was available to the decisionmakers. Findings should be more than a mere recitation of statutory requirements; they must provide the factual basis that leads to the conclusion drawn by the approving agency.

In the absence of findings, approval of the variance “would [amount] to the kind of ‘special privilege’ explicitly prohibited by Government Code section 65906.” (*Orinda Association v. Board of Supervisors*, supra) For a detailed discussion of findings requirements, see OPR’s publication entitled Bridging the Gap.

## CONDITIONS OF APPROVAL

Section 65906 requires that the variance be subjected to those conditions of approval necessary to ensure that it will not be a grant of special privilege. The conditions are meant to maintain parity between the variance site and surrounding properties. For example, if an increase in fence height is requested due to a steeply sloping rear yard, the approved height might be required to be low enough so that neighbors' views would not be obstructed and the increased height would not be noticeable.

The conditions which may be placed on a variance are limited by Section 65909. It requires that dedications of land must be "reasonably related" to the use of the property for which the variance is granted. In addition, a performance bond cannot be required for the installation of public improvements that are not reasonably related to the property use. Limitations on impact fees are described in the Mitigation Fee Act (Section 66000, et seq.).

Generally, the conditions applied to the variance must have an "essential nexus" to some legitimate public need or burden created as a result of the variance approval (*Nollan v. California Coastal Commission* (1987) 97 L.Ed2nd 677). Furthermore, there must be a "rough proportionality" between the extent of the condition and the particular demand or impact of the project. (*Dolan v. City of Tigard* (1994) 129 L.Ed2nd 304). For instance, if a variance is granted allowing a back yard fence to be built two feet higher than usual, there are probably no grounds to impose a condition requiring the landowner to contribute to a road improvement fund. However, it would be proper to regulate the design of the fence. The burden of proof to justify proposed exactions rests with the city or county (*Dolan*, supra)

## EXAMPLES

The following court cases illustrate when it may be proper to grant a variance and when it may not be. These cases are illustrations only and should not be used as the sole basis for granting or denying a variance.

### Cases Upholding Variance Approvals

#### *Special Circumstances*

- Special circumstances supported approval of a variance from off-street parking requirements for

an apartment building when the building was to be located near three public parking garages and many of the tenants would not own cars (*Siller v. Board of Supervisors* (1962) 58 C.2d 479).

- A variance reducing the amount of required off-street parking was justified when the landowner would otherwise have had to partially demolish a building and fill a portion of the bay below high tide line in order to meet the parking standard (*Zakessian v. City of Sausalito* (1972) 28 Cal.App.3d 794).

#### *Distinction of the Site From its Surroundings*

- A court upheld issuance of a variance allowing expansion of a hotel without satisfying a requirement that 80% of its accommodations consist of detached cottages (*Miller v. Board of Supervisors of Santa Barbara County* (1981) 122 Cal.App.3d 539). The court held that the hotel in question could be distinguished from the other hotels in its zone because of landscaping and design features that dated from before zoning was enacted.

### Cases Overturning Variance Approvals

#### *Special Circumstances*

- Subsoil conditions that would increase the cost of building a high-rise and reduce its anticipated income, but which were common to similar high-rise structures, were not "special circumstances" sufficient to support the grant of a variance (*Broadway, Laguna, Etc. Assn. v. Board of Permit Appeals* (1967) 66 C.2d 767). The court reversed the city's approval.
- Where a showing could not be made that special circumstances existed sufficient to distinguish the subject property from its neighbors, the city was not required to issue a variance (*PMI Mortgage Ins. Co. v. City of Pacific Grove* (1981) 128 Cal.App.3d 724).
- Desirable project design, community benefit, and the alleged superiority of the proposed design to development under existing zoning regulations were irrelevant for purposes of judging whether or not to grant a variance (*Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145). The court held that a building height variance could not be granted, regardless of the alleged benefits of the project, absent a finding detailing the special circumstances that justified its issuance.

***Distinction of the Site From its Surroundings***

- A variance allowing a 96-space mobilehome park on 28 acres in a mountainous area that was zoned for single residences on 1-acre minimum lots was overturned because the county's findings only described the subject property and not the conditions which distinguished it from surrounding properties (Topanga Assn. for a Scenic Community v. County of Los Angeles 91974) 11 C.3d 506).

***Unnecessary Hardship***

- Self-induced hardship is not grounds for variance approval. Voluntary sale of an adjoining parcel of land leaving a remainder parcel that was too small for the intended purpose was not an "unnecessary hardship" for purposes of granting a variance (Town of Atherton v. Templeton (1961) 198 Cal.App.2d 146.

***Procedure/Public Notice***

- A property owner's failure to receive notification of a zone change was not sufficient basis for later granting a variance from the new zone's floor area ratio standards (Cow Hollow Improvement Club v. Board of Permit Appeals (1966) 245 Cal.App.2d 160). The variance approval was overturned by the court.
- A hearing notice which notified neighbors of a variance for a proposed garage "to provide shelter and security for vehicles now parked on [the] driveway" was insufficient to apprise them of the potential impacts on their property rights of the actual consideration of a two-story dwelling and garage unit (Drum v. Fresno County Department of Public Works (1983) 144 Cal.App.3d 777). The inaccurate project description failed to meet statutory and Constitutional due process notice requirements.



# APPENDIX

## Variance Checklist

If a variance is to be approved, all of the following questions must be answered affirmatively.

1. Are there special circumstances applicable to the proposal site which distinguish it from nearby properties with the same zoning?

YES  NO

If yes, check at least one of the following to identify the circumstances:

size  shape  topography  location  surroundings.

2. Do the above circumstances create an "unnecessary hardship" unique to the involved property which would deprive it of privileges enjoyed by nearby properties with the same zoning?

YES  NO

If yes, explain.

3. Is the use for which the variance is proposed already allowed in that zone?

YES  NO

If yes, cite the applicable code.

4. Are the proposed conditions of approval related to and proportional to the impacts caused by the use proposed by the variance?

YES  NO

If yes, explain.

5. Do the proposed conditions of approval ensure that the variance will not be a grant of special privilege?

YES  NO

If yes, explain.

6. Have findings been drafted which specify the facts supporting approval of the variance on the basis of each of the above items?

YES  NO

## BIBLIOGRAPHY

For more information about variances, we recommend the following references.

*Bridging the Gap: Using Findings in Local Land Use Decisions*, by Robert Cervantes, second edition (Governor's Office of Planning and Research), 1989. This booklet outlines the principles of findings in detail.

*California Land Use and Planning Law*, by Daniel J. Curtin Jr., 1996 edition (Solano Press, Point Arena, CA), revised annually. A look at the planning, zoning, subdivision, and environmental quality laws, including variances, as interpreted by numerous court cases.

*California Zoning Practice*, by Donald Hagman, et al., April 1996 Supplement by John K. Chapin (Continuing Education of the Bar, Berkeley, CA), 1969. This text reviews state zoning law in detail.

*Longtin's California Land Use*, 2nd edition, by James Longtin, 1996 Supplement (Local Government Publications, Malibu, CA), 1988. This reference text on planning and land use law contains an excellent discussion of the variance, legal considerations, and limits on exactions.

"Variances and the Zoning Board," by Frederick H. Bair, Jr., *Planning*, July 1984, pp. 20