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Zoning Variance vs. Zoning Amendment: How to Decide

More often than not, a proposed development does not conform with at least one zoning requirement. The developer then must decide, early in the process, among four choices: (a) redesign the project to meet all zoning requirements; (b) abandon the project or seek another site; (c) apply for a variance; or (d) seek a modification of the zoning requirement(s) that the project does not meet. Redesigning or abandoning the project usually are not among the preferred alternatives, so this article will focus on how to decide between applying for a variance and seeking a zoning amendment.

What type of standards are violated? The first question to consider is whether the relief needed involves the proposed use, or whether it is limited to dimensional or bulk limitations. If the project involves a use that is not permitted, a use variance will be required. But if it involves building setbacks, coverage, signs, or other zoning deviations, an area or bulk variance will be required. Use variances are always difficult to obtain, so determining the nature of the necessary relief should be the first step.

What are the standards for a variance? Use variances are subject to stringent legal stan-



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dards and, in some jurisdictions, require a showing of economic hardship and are not legally available when the developer enters into a sales contract or lease with knowledge of the zoning restrictions that apply. This is known as "self-created" hardship. Even in jurisdictions where special reasons justify the grant of a use variance, it is always more difficult to secure approval than where the use is permitted as-of-right. Additionally, a use variance can be fairly easy for a neighbor or business competitor to successfully appeal.

On the other hand, if the use is permitted but the project deviates from bulk requirements or design standards, relief will take the form (depending on the jurisdiction) of a bulk or area variance. Typically, such relief involves less rigorous standards. Although hardship often will suffice,

self-created hardship may not be a bar to the grant of relief. Often, depending on the jurisdiction, a balancing is required whereby the benefits to the applicant if the variance were granted must be compared to the detriment to the community that would result should it be granted. Bulk and area variances are fairly commonplace and often are site-specific so that they have little or no community-wide impact by setting a precedent or altering standards throughout the zoning district.

What is the political climate? Zoning is generally a legislative function. In many jurisdictions, zoning is the responsibility of the elected governing body while in others, it is under the jurisdiction of a specially-created body such as a zoning commission. Usually, zoning must be in accordance with a comprehensive plan, although the entity with zoning authority may be empowered to adopt zoning which is inconsistent with the comprehensive plan if it does so in accordance with certain additional standards, such as by a supermajority vote, by stating specific reasons for the deviation, or both.

In view of the inherently political nature of the legislative process, particularly as elections approach, the political climate can determine the

outcome. For example, an otherwise meritorious request may fall on deaf ears if local officials fear it will become an election issue. On the other hand, a dubious request may be approved if officials can be persuaded of its merits or if they see some indirect benefit potentially resulting to them (e.g., support from a constituency they have been courting).

Time, costs and potential objections? A final consideration should be the time each process can be expected to take, its potential cost, and the reception it is likely to receive. Both the variance process and the legislative process can ultimately require an extended period of time. Unlike a variance, which in most jurisdictions must be decided within a fixed period of time, the zoning amendment process often does not require action within a fixed period of time; in fact, there may be no legal requirement that any action be taken at all.

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