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Deviations from Sign Limitations: Dimensional Variance or Use Variance

Municipal zoning codes typically contain restrictions that limit the number, size and placement of signs, both freestanding signs and signs attached to a building facade. Retailers often require variances in order to utilize their typical corporate signage package. However, due to inartful wording and poor organization, the applicable sign regulations sometimes leave uncertainty with respect to whether the variance properly should be characterized as a dimensional variance (typically called a bulk or area variance), a use variance, or whether a variance is even required at all.

Burden of Proof

From the applicant's perspective, the standards and the burden of proof applicable to a dimensional variance almost always will be easier to meet than those for a use variance. From the municipality's perspective, treating on-site sign deviations as requiring a dimensional variance makes sense since in virtually every case, signs are accessory to the principal use or uses of the property (the principal exception being billboards which constitute the principal use of the property). Municipalities, particularly those bent on making it more difficult for a retailer to obtain sign variances, may not so easily be persuaded.

Signs Characterized as an "Accessory Use"

Consider a sign regulation



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which designates signs as "accessory uses" in each commercial zone, but permits as an accessory use only "wall signs" but not other sign types. Initially, one could conclude that a freestanding sign would not be permitted, and would require a use variance, because it is not among the permitted accessory uses. A thoughtful analysis, however, could lead to the opposite conclusion for at least two reasons:

(1) The zoning code may permit accessory uses which are "customary, incidental and subordinate" to the principal use, even those which are not specifically listed among the permitted accessory uses. A freestanding sign would in most cases constitute a use "customary, incidental and subordinate" to the principal retail use and would be permitted under this provision, subject to height, setback and area requirements. Deviations from those requirements,

however, would require a dimensional rather than a use variance.

(2) The zoning code may permit accessory structures. A freestanding sign, depending on the applicable definition of "accessory structure", may appropriately be so characterized. In that instance, the freestanding sign would be permitted under this provision, but as above, deviations from height, setback and area requirements would require a dimensional rather than a use variance.

Signs Characterized as a Building

Next, consider a sign regulation which provides that "ground signs shall be considered buildings and must observe all applicable setback lines and height restrictions." The intent seems to be that freestanding signs are to be subject to the same bulk requirements as buildings, yet this result could be accomplished by simply establishing the desired setback requirements and making them applicable to signs, rather than characterizing them as "buildings." In administering this provision, the municipality initially contended that a use variance was required to permit a freestanding sign which exceeded the applicable height limitation, based on a state statute under which a use variance is required for a principal structure which deviates from the maximum permitted height by 10% or 10 ft.

Although the provision

suffers from inartful draftsmanship by stating that ground signs "shall be considered buildings," such a literal reading makes no sense since it would mean, for example, that ground signs require a certificate of occupancy (even though they are not occupied), and that the area they occupy would have to be included in computing floor area ratio. Clearly, that could not have been the intent. Ultimately, the argument which prevailed contended that the provision should be read to require that ground signs comply with setback and height requirements that apply to buildings, not that such signs are themselves buildings.

Conclusion

In virtually all instances, on-site signs associated with retail development (other than billboards) that deviate from the applicable zoning requirements will require a dimensional variance rather than a use variance. In those rare instances where a use variance is required, that very fact may rightfully cause the applicant to question the likelihood of securing the necessary relief.

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