

January 3, 2024

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Daniel Russell  
Building Commissioner  
Village of Mayfield  
6622 Wilson Mills Road  
Mayfield Village, Ohio 44143

[stivod@hotmail.com](mailto:stivod@hotmail.com)

Stivo DiFranco  
Chairman  
Board of Zoning Appeals  
Village of Mayfield  
6622 Wilson Mills Road  
Mayfield Village, Ohio 44143

Re: Board of Zoning Appeals

Dear Mr. Russell, Chairman DiFranco and Members of the Board of Zoning Appeals:

I have had several inquiries as to the authority and responsibilities of the Board of Zoning Appeals ("Board") in the Village, and specifically about the granting of variances. In order to avoid any confusion or misunderstanding of the types of variances and what the differences may be between the "practical difficulty" standard and the "unnecessary hardship" standard of review, I will attempt herein to give a general overview of the duties and responsibilities of the Board and to explain the various standards of review when considering whether or not to grant a variance.

Authority of the BZA

To begin with, the Board is created by the Village's Charter under Article 5, Section 12. The Board is given the authority to hear appeals from any persons or entities who wish to have an exception to, or variance in, the application of any ordinances or codes within the Village dealing



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with Zoning and Building. The Board shall have such other powers and duties and follow the procedures as prescribed by ordinance of Council. However, the Board shall have no power or authority to grant a change or modification of any land use classification or district from the existing zoning ordinances and the zoning map of the Village. (The term land “use” means residential versus commercial versus industrial, etc.) As of late 2020, the Village Charter was amended to give the Board limited power to grant “use” variances in non-residential districts. (Prior to 2020, use variances were expressly prohibited in the Village.) Otherwise, changing the zoning of a property requires the *legislative* action of Village Council and a vote of Village residents per the Village’s Charter at Article 3, Section 13; the Board is an *administrative* body whose power is to apply existing legislation, not to enact new legislation.

All decisions of the Board are appealable by any interested person or entity to the Village Council pursuant to Chapter 122 of the Codified Ordinances. Council may reverse, affirm or modify any decision of the Board. Affirmation or modification is by simple majority; reversal, however, requires a two-thirds vote of Council.

Council has adopted ordinances relating to the procedures and duties of the Board under Chapter 1105 of the Codified Ordinances. One of those requirements is the necessity for the Board, before granting a variance, to give notice of the request to all property owners within three hundred (300) feet, along with all adjoining and facing property owners.

#### Standard of Review

Section 1105.02(e) sets forth the standard of review as follows:

*The Board may not grant a variance or exception to the zoning regulations or building codes, unless the applicant has shown that the literal application of the provisions of the zoning code or building code would result in practical difficulties as a result of some peculiar or unique condition or circumstances pertaining only to the zoning lot in question.*

Section 1113.25 of the Codified Ordinances further defines a variance as a “modification of the zoning or building regulations, permitted in instances where a literal application of the provisions of the Zoning or Building Code would result in unnecessary hardships or practical difficulties as a result of some peculiar or unique condition or circumstance pertaining only to the zoning lot in question in accordance with procedures and standards set forth in the Zoning Code.”

The terms "practical difficulties" and "unnecessary hardship" are legal terms of art used throughout the municipal and township zoning codes in the State of Ohio. These terms have been interpreted and applied by courts repeatedly for many decades. Some municipal codes historically established that no variance can be granted unless the applicant can show an “unnecessary hardship,” a higher standard than "practical difficulty." However, the Ohio Supreme Court spoke on this subject in 1984 and made a clarifying decision that is now binding upon all public bodies in the State of Ohio. In the case of *Kisil v. Sandusky*, the Court held that in making a determination about an *area* variance, such as a variance from a code requiring a minimum lot size, a lesser standard is required than someone seeking a *use* variance. An *area* variance does not change the property’s zoning classification, only the requirements contained within the classification. In *Kisil*, the Court in citing to *Matter of Hoffman v. Harris* explained, “when the variance is one of area only, there is no change in the characteristic of the zoned district and the neighborhood considerations are not as strong as a use variance.” A *use* variance, on the other hand, effectively changes the classification. (For instance, attempting to put a commercial enterprise in a residential district.) An *area* variance is administrative; a *use* variance is typically *legislative*. The Court held that an unnecessary hardship can be used as the standard for a use variance, but nothing greater

than a practical difficulty standard can be used when talking about an area variance. The Board should be familiar with what constitutes practical difficulties and unnecessary hardship.

#### Area and Use Variances

In 1986 the Court in *Duncan v. Middlefield* enumerated seven (7) factors that officials should consider in determining area variances. In reviewing the substantial case law on the subject, it is evident that there is no single factor which controls the determination of "practical difficulties." Overall, the Supreme Court has held that a property owner encounters "practical difficulties" whenever the area zoning requirement unreasonably deprives the property owner of a permitted use of the property. Area variances would also be similar to yard variances, height variances, setbacks, and certain other dimensional restrictions found within our Codes. The Supreme Court's seven non-exclusive factors ("Duncan Factors") to be considered and weighed in determining whether a property owner has encountered "practical difficulties" include, but are not limited to, the following:

- (1) *Whether the property will yield a reasonable return, or whether there can be any beneficial use of the property without the variance;*
- (2) *Whether the variance is substantial;*
- (3) *Whether the essential character of the neighborhood would be substantially altered or whether adjoining properties would suffer a substantial detriment as a result of the variance;*
- (4) *Whether the variance would adversely affect the delivery of governmental services;*
- (5) *Whether the property owner purchased the property with knowledge of the zoning restriction;*
- (6) *Whether the property owner's predicament feasibility can be obviated through some other method other than a variance; and*
- (7) *Whether the spirit and intent behind the zoning requirement would be observed and substantial justice done by granting the variance.*

These are just the seven (7) enunciated factors by the Supreme Court in a particular case. The Board of Zoning Appeals can bring up any other reasonable, comparable factors which are objectively measurable and relevant to the request for the variance.

Understanding that practical difficulty is a lesser standard than unnecessary hardship, it might be said that an unnecessary hardship would always be a practical difficulty, whereas practical difficulties do not always include unnecessary hardships. An example of an unnecessary hardship would be the topography of a residential lot which is large enough to build a home, but which has a steep ravine in the middle of the property. Perhaps the ravine was widened over the years as a result of erosion or a stream. In considering a variance for a front yard setback or rear yard setback being decreased to allow a home to be built, it would be obvious that the makeup of the parcel has caused an unnecessary hardship to the owners as they would not be able to build a home at all if they had to meet all of the front and rear yard setbacks. This would also be considered a practical difficulty. Therefore, the Board of Zoning Appeals in Mayfield Village needs to understand that only a finding of "practical difficulties" is necessary for an area variance, while "unnecessary hardship" applies to use variances.

The courts have held that mere economic loss, or the inability to obtain a greater economic gain, does not constitute unnecessary hardship. On the other hand, it may be considered as one factor in determining practical difficulties. However, economic loss alone would not constitute a sufficient basis for granting an area variance.

At the time of our meeting to discuss these concepts in more detail, I will bring some other examples of what constitutes unnecessary hardships that have been reviewed by the courts in the past. Generally, unnecessary hardship occurs when it is not economically feasible to put a piece

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of property to a permitted use under its present zoning classification due to the property's unique characteristics. The correct standard for granting a use variance is that there are no other economically viable, permitted uses for the property under the applicable zoning.

#### The BZA Process

It has been well established that the Board is the only public entity within our government that has the authority to change the application of our codes on a case by case basis. The Board is considered to be quasi-judicial in nature. This means that its process is tantamount to a hearing conducted by a court of law. The Board has the ability to make a judgment which will allow a property owner to be exempt from a particular Code within our Village. No other body within the Village has that authority,

With this unique quasi-judicial authority, the Board is required by Ohio statute to examine all substantial, reliable, and probative evidence which an applicant wishes to put forth to support his or her request for a variance. Likewise, the evidence that is submitted by the Administration or Building Department which opposes or supports such a request for a variance must meet such standard of quality. When one accepts an appointment to the Board, that individual is agreeing to sit impartially in judgment of those cases that are presented, and to make a decision that will do substantial justice, while further advancing the health, safety, or welfare of our community. To decline a case, that is to refuse to make a decision, or to refrain from making a decision, would not be acceptable.

Right or wrong, the Board should always make a decision. A decision needs to be made so that all interested parties can continue the process. If anyone with legal standing dislikes the decision, that individual or entity has the right to appeal to Council, who will review it. Council is similarly required by the same statutory requirements to render a legally supportable decision

based upon competent evidence. After Council makes its decision, any interested party then has the right to appeal the decision to the Court of Common Pleas of Cuyahoga County. That decision can then be appealed to the Court of Appeals, and then potentially to the Supreme Court of Ohio, and ultimately even to the United States Supreme Court. Therefore, you can see that there are multiple levels of courts to review the initial decision to determine whether or not it is fair and equitable. Thus, any harm that you may feel is caused by your decision can and will be reviewed and if necessary corrected at one level or another.

Because of the quasi-judicial nature of your hearings, it is necessary to swear in witnesses, have exhibits identified in the record, and have accurate minutes of the proceedings. All decisions should be supported by a statement of factors supporting the vote of each individual member. For instance, "I vote no on the variance request for the reason that I feel no practical difficulties have been shown." Alternatively, "I vote yes in granting the variance for the reasons that practical difficulties have been shown by the property owner in the following ways ...."

For the purpose of an example, if the Board were asked to review an application for a height variance one might question, first off, whether or not the Board has the lawful authority to grant a variance on height. As you can see from the outline above, there are no absolute restrictions on the granting of a height variance. The only restrictions upon the Board found within the Charter and the Code relate to "use" variances. A variance is only applicable to one individual on one piece of property for the one instance in time. The Board is not changing the Code requirement or lessening the maximum height requirement for an entire zoning district, but only for one parcel and one applicant with a specific set of facts. Granting a variance, by definition, does not "set a precedent." Therefore, if the Board were to determine that there were sufficient factors supporting "practical

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difficulties," then it would have the authority and discretion to grant a variance on the maximum height restriction.

I look forward to talking over these matters and answering questions for the Board at our meeting in February.

Very truly yours,

*Diane A. Calta*

Diane A. Calta  
Director of Law

cc: Debbie Garbo



# MAYFIELD VILLAGE



6622 Wilson Mills Road  
Mayfield Village, OH 44143

*Existing Application*

## Board of Zoning Appeals Application

**Application Date:**

**Meeting Date:**

**B.O.A. Application Fee: \$50 + 3% State Fee**

Pursuant to the Village of Mayfield Charter and Zoning Code, the undersigned hereby submits attached information and requests a hearing before the Board of Zoning Appeals for the following purposes:

- (Please Check Request)     **AREA VARIANCE**                       **NON-CONFORMING USE**  
 **USE VARIANCE**     **OTHER APPEAL**

Owner

Representative at Hearing (if different than Owner)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

E-mail: \_\_\_\_\_

Nature of Request (e.g., side yard setback variance )	Code Section	Description
1.		
2.		
3.		

**NOTE: A narrative is required with the application when applying for “use” variance, demonstrating PRACTICAL DIFFICULTY per Section 1105.02.**

APPLICANT’S  
SIGNATURE: \_\_\_\_\_

PROPERTY OWNER’S  
SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

**Use Variance Application Supplemental Information**

**Application for property located at:**

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“Use” Variances from the terms of the Code shall not be granted by the Board of Zoning Appeals unless the *“evidence demonstrates that the literal enforcement of this Planning and Zoning Code will result in practical difficulty.”*

In determining “practical difficulty”, the Board of Zoning Appeals will consider the following factors:

1. Do special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable generally to other lands or structures in the same zoning district?

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2. Will the property in question yield a reasonable return or can there be any economical beneficial use of the property without the variance?

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3. Is the variance substantial and is it the minimum necessary to make possible the economically reasonable use of the land or structures?

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4. Would the essential character of the neighborhood be substantially altered or would adjoining properties suffer substantial detriment as a result of the variance?

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5. Would the variance adversely affect the delivery of governmental services, such as water, sewer, or trash pickup?

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6. Can the property owner’s predicament feasibly be obviated through some method other than a variance?

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7. Would the spirit and intent behind the zoning requirement be observed and substantial justice done by granting a variance?

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8. Will the granting of the variance requested confer on the applicant any special privilege that is denied by this regulation to other lands, structures, or buildings in the same district?

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9. Would a literal interpretation of the provision of this Code deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Code?

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10. The Applicant may submit evidence and the Board may also consider whether the property cannot be put to any economically viable use under any of the permitted uses in the zoning district in which the property is located.

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SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_



6622 Wilson Mills Road  
 Mayfield Village, OH 44143

## Board of Zoning Appeals Application

**Application Date:**

**Meeting Date:**

**B.O.A. Application Fee: \$50 + 3% State Fee**

Pursuant to the Village of Mayfield Charter and Zoning Code, the undersigned hereby submits attached information and requests a hearing before the Board of Zoning Appeals for the following purposes:

(Please Check Request)     **AREA VARIANCE**                       **NON-CONFORMING USE**  
     **USE VARIANCE**                                       **OTHER APPEAL**

<b>Owner</b> Name: _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____	<b>Representative at Hearing (if different than Owner)</b> Name: _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____
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Nature of Request (e.g., side yard setback variance)	Code Section	Description
1.		
2.		
3.		

**NOTE:** A narrative is required with this application. When applying for an “area” variance, the attached supplemental information demonstrating “PRACTICAL DIFFICULTY” is required. When applying for a “use” variance, the attached supplemental information demonstrating an “UNNECESSARY HARDSHIP” is required. (MVCO 1105.02.)

Also see the Procedural Outline for Applicants for further information and instructions.

APPLICANT’S SIGNATURE: _____  DATE: _____	PROPERTY OWNER’S SIGNATURE: _____  DATE: _____
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**BOARD OF ZONING APPEALS**

**Area Variance Application Supplemental Information**

**Application for property located at:**

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“Area” Variances from the terms of the Code shall not be granted by the Board of Zoning Appeals unless the *“evidence demonstrates that the literal enforcement of this Planning and Zoning Code will result in practical difficulty.”*

In determining “practical difficulty”, the Board of Zoning Appeals will consider the following factors:

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1. Will the property in question yield a reasonable return or can there be any economical beneficial use of the property without the variance? Please include in your answer why the variance is required in order to be able to improve the property.

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2. Is the variance substantial and is it the minimum necessary to make possible the economically reasonable use of the land or structures? Please include in your answer whether you are requesting the smallest variance for the particular project.

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3. Would the essential character of the neighborhood be substantially altered or would adjoining properties suffer substantial detriment as a result of the variance? Please include in your answer how the character of the neighborhood will change if the variance is granted.

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4. Would the variance adversely affect the delivery of governmental services, such as emergency services, water, sewer, or trash pickup? Please include in your answer how the delivery of these services will continue or be changed if the variance is granted.

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5. Did the property owner purchase the property with knowledge of the zoning restriction? Please include in your answer a statement as to whether or not the zoning restriction was in effect when the property was purchased.

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6. Can the property owner’s predicament feasibly be obviated through some method other than a variance? Please include in your answer whether or not the project can be changed in order to not require a variance.

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7. Would the spirit and intent behind the zoning requirement be observed and substantial justice done by granting a variance? Please include in your answer why the purpose of the zoning code, to protect the health, safety and welfare of the residents, will continue if the variance is granted.

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8. Do special conditions and circumstances exist which are peculiar to the land or structure involved and which are not applicable generally to other lands or structures in the same zoning district? Please include in your answer any conditions such as if the property is shaped differently than surrounding properties or has different topography than surrounding properties.

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SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_

**BOARD OF ZONING APPEALS**

**Use Variance Application Supplemental Information**

**Application for property located at:**

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“Use” Variances from the terms of the Code shall not be granted by the Board of Zoning Appeals unless the *“evidence demonstrates that the literal enforcement of this Planning and Zoning Code will result in an unnecessary hardship.”* Use variances are not permitted if the property is located in a residential district.

In determining “unnecessary hardship”, the Board of Zoning Appeals will consider the following factors:

1. Did the property owner purchase the property with knowledge of the zoning restriction? Please include in your answer a statement as to whether or not the zoning restriction was in effect when the property was purchased.

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2. If the property owner purchased the property with knowledge of the zoning restrictions, has there been a change in conditions on adjacent property that creates a hardship? Please include in your answer whether or not the surrounding uses have changed since the purchase of the property.

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3. What unique characteristics of the property justify the granting of the variance? Please include in your answer any differences in the property from surrounding properties.

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4. Is there no economically feasible use of the property without the granting of the variance? Please include in your answer why the property cannot be used without the granting of the variance.

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5. Is the property unsuitable for any of the uses permitted by the zoning code? Please include in your answer what the property can be used for under the zoning code.

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6. Would the spirit and intent behind the zoning requirement be observed and substantial justice done by granting a variance? Please include in your answer why the purpose of the zoning code, to protect the health, safety, and welfare of the residents, will continue if the variance is granted.

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SIGNATURE \_\_\_\_\_ DATE \_\_\_\_\_