

**BOARD OF ZONING APPEALS
MEETING MINUTES
Mayfield Village
Feb 20, 2024**

The Board of Zoning Appeals met in regular meeting session on Tues, Feb 20, 2024 at 6:00 p.m. at the Mayfield Village Civic Center, Main Conference Room. Chairman DiFranco presided.

ROLL CALL

Present:

Mr. Stivo DiFranco Chairman
Mr. John Michalko Chairman Pro Tem
Mr. Jim Kless P & Z Rep to BZA
Ms. Alexandra Jeanblanc
Mr. Bob Haycox Alternate

Absent:

Mr. Joseph Prcela
Mr. Bob Andrzejczyk Alternate

Also Present:

Ms. Diane Calta Law Director
Ms. Kathryn Weber Law Department
Mr. Daniel Russell Building Commissioner
Ms. Deborah Garbo Secretary

CONSIDERATION OF MEETING MINUTES:

Dec 19, 2023

Mr. Michalko, seconded by Ms. Jeanblanc made a motion to approve the minutes of Dec 19, 2023 as written.

ROLL CALL

Ayes: Mr. DiFranco, Mr. Michalko, Mr. Kless, Ms. Jeanblanc, Mr. Haycox

Nays: None

Motion Carried

Minutes Approved

ORGANIZATIONAL MEETING 2024

- Election of Chairman
- Election of Chairman Pro Tem
- Election of Secretary
- Election of P & Z Representative to the BZA

PROPOSAL

1. BZA General Refresher Workshop & Application Revisions
(Law Dept & Bldg Dept)

OPEN PORTION

Chairman DiFranco called the meeting to order. This is a meeting of the Mayfield Village Board of Zoning Appeals and Organizational Meeting Tues, Feb 20, 2024 at 6:00 p.m.

ORGANIZATIONAL MEETING 2024

- Election of Chairman
- Election of Chairman Pro Tem
- Election of Secretary
- Election of P & Z Representative to the BZA

Chairman DiFranco stated, this is the Organizational portion of our meeting where we as a group need to elect a Chairman, Chairman Pro Tem, Secretary and P & Z Rep to the Board of Zoning Appeals. We can do this as a slate or singularly.

Consensus is to vote as a slate.

Chairman DiFranco stated, I'd like to open the floor for nominations for Chairman, Chairman Pro Tem, Secretary and P & Z Rep to the BZA for 2024. Do I have any nominations?

Mr. Haycox, seconded by Mr. Kless nominated the existing slate for Chairman, Chairman Pro Tem, Secretary and P & Z Rep to the BZA for 2024.

Chairman DiFranco asked, are there any other nominations?

There were none.

Chairman DiFranco, seconded by Mr. Haycox moved to close the nominations.

Chairman DiFranco asked, any discussion? If not, that is our only nomination so we'll take a roll call vote please.

ROLL CALL:

Ayes: All

Nays: None

Motion Carried

Nominations Closed

Stivo DiFranco to serve as Chairman for 2024

John Michalko to serve as Chairman Pro Tem for 2024

Deborah Garbo to serve as Secretary for 2024

Jim Kless to serve as P & Z Rep to the BZA for 2024

Chairman DiFranco stated, tonight we have a BZA general refresher workshop and revisions to the BZA Appeals Application. Diane and Katie have prepared a letter of 'area' and 'use' variances. If you could go over what's been prepared please.

General Refresher Workshop *by* Law Dept

Ms. Calta stated this is a refresher but of course I think it's going to be more Katie's part where we get into examples. I think what started the whole thing was the application. Somebody had filled out the application and the applicant didn't do a great job with the application. I think they checked off a 'use' variance when in fact it was an 'area' variance. We started looking at the questions and saw they were all sort of mushed together, which could happen because there's an overlap between the two.

The first thing we did was take a look at the application and pull out what would be factors for 'area' variances and 'use' variances. We're proposing two separate pages even though some of these questions may sound very similar. Applicants may still need some help with what's an 'area' variance and what's a 'use' variance and we can certainly help them with that. Way back when I started working in the Village we didn't have 'use' variances. That was changed in 2015 to permit under our Charter 'use' variances but excluding residential.

Way back there was a 2002 legal opinion done by Joe Diemert's office, the same thing we're going to refresh ourselves with tonight. We took this letter, updated it and added in the 'use' variances because that's a new layer that we have. I think everyone is very comfortable with their roles and I think everyone's been doing a great job. I think a lot of this also comes from what Katie and I do with applicants for other Boards. We could probably write a book at this point appearing before other Boards and what they do when they look at variances.

Ms. Calta said, let me go back for a second. Debbie was kind enough, I asked her to go back last couple of years to see how many 'use' variances came before the Board. There was just one from 2017, it was the Artis property, it was for a 'use' variance for a Memory Care Facility. It never actually got built. We're going to focus more on 'area' variances tonight because that's what you usually see and then we can answer questions on 'use' variances, they're just not as common.

Mr. Russell asked, so the 'use' variances are strictly for commercial.

Ms. Weber replied, correct.

BZA letter 1/3/24 *by* Ms. Calta, Director of Law

Ms. Calta stated, so we took the 2002 letter which believe it or not is over 20 years ago now. I think everybody got a copy of the letter and was able to read it. We talk about the types of variances and the differences and standards. We've got 'practical difficulty' and 'unnecessary hardship'. We're going to be focusing on the 'practical difficulties'. That's again where we took these factors and put them into the application. Hopefully the idea would be that applicants can answer these questions and then you guys have the application and that's what they use as their guide when they're presenting.

Chairman DiFranco stated, that's one of the things that we have to have. We have to have these questions answered effectively.

Ms. Jeanblanc stated, they have the right answers when we ask them. It's on them if they don't want to do the homework beforehand.

Chairman DiFranco asked, what's the point of the application if they're not going to fill it out?

Ms. Jeanblanc replied, to put them on the docket.

Chairman DiFranco stated, they need to fill out the application.

Ms. Weber stated, we thought this would be a good time to go over the two different tests. You have the 'practical difficulties' test and standard for 'area' variances and 'undue hardship' for 'use' variances and now separating them so if someone comes in for an 'area' variance, they'll get the 'area' variance application. If they come in for a 'use' variance, they'll get the 'use' variance application. Yes, in an ideal world we would like them to fill out the whole application, that's what we're putting in front of them. But this also clarifies for the applicant coming in who doesn't know how a variance works or what a variance is, the factors that the Board is going to be evaluating. I think what happens a lot is that people will put n/a or not applicable to a lot of those factors. Diane will go over how these apply, not all of them are going to relate to a specific project. But this is also putting the applicant on notice of what their burden is going to be to prove.

Ms. Calta stated, on the applicant side, you've got this project, you get these factors for whatever the variance might be, you look and you're like how am I supposed to answer this. Like what does a fence have to do with any sort of governmental services (factor #4). And that's part of this refresher. These factors are helpful in framing the issues. The whole concept is to determine number one, it's an exception to the code. You're here to not change the code even though that might feel a little bit of what you're doing because you're granting an exception. You're not technically changing the code, you're granting an exception. The code is sort of set in stone, but not every example can be contemplated in the code. So you have a Board of Zoning Appeals that has discretion to grant exceptions to the code in circumstances that justify it. How do you determine that? That's where you use these factors. There are going to be some factors that don't apply across the board. So if somebody says n/a, the better answer I think would be to say is "I'm requesting a variance for a 5' height fence instead of a 4' height fence and it will have no impact whatsoever on the delivery of governmental services, it's not going to impact Fire, Police, Service Dept, it won't impact anything." They could at least instead of saying n/a they could say there will be no impact on these services. That I think is going to be the hardest part, getting people to answer the factors. I think one thing administratively is to probably push back to say we need you to answer each of these questions or analyze each of these factors and if it doesn't apply you can say it doesn't apply. Dan, don't hesitate to push back and say hey can you take another stab at this. Then depending on what we get during the meeting, go through those factors. The Supreme Court has helped us out with these factors but they're not the only factors. That's good and bad, there could be other things that are more pressing. I remember recently hearing about the deer, they wanted a higher fence because then the deer wouldn't jump over the fence. Well, I have a gaggle of deer in my neighborhood and they'll go 7'.

Ms. Jeanblanc stated, that would literally take a 10' fence.

Ms. Calta stated, I don't know if any of the factors would address how high a deer can jump. So we want everyone to think about the factors.

Ms. Jeanblanc stated, back to the deer example, our reasoning at the time was every property in Mayfield Village has the same deer problem, so there's nothing special about this one property that would let us grant an exception.

Ms. Calta replied, I agree with you.

Mr. Michalko stated, we've talked in the past about the type of fencing because people are coming in now with vinyl solid fencing. When the rules were written back in 74 there was no vinyl fencing. That has to be looked at and changed and that will alleviate some of the issues.

Ms. Weber clarified, that's actually already been changed. The way the process in the Village works for making changes to the Zoning Code is that the Planning Commission is who reviews changes and then recommends that up to Council, so it wouldn't have hit the BZA before going up to Council, but it was based on your guys recommendation that you were having all these variances come in for solid fencing.

Note added subsequent to mtg:

ORD 2023-02; Amending Section 1157.08 Fences
(P&Z approved 12/5/22) (Council passed 4/17/23)

Mr. Michalko stated, one more that's always coming up is front facing garages. You see so many in the Village even from the older homes. But every new development that goes in now, and I'm told that developments are different, but all of them have front facing garages.

Mr. Russell replied, that's something we could talk about taking out of the code eventually, I think the Mayor even wanted that taken out.

Mr. Michalko stated, those are two of the biggest items that come to us.

Ms. Calta stated, that's another point. When we start seeing some of the same variances come in, I can talk until the cows come home to say that every variance should be looked at independently and they don't set a precedent for other variances that come, that is the letter of the law.

However, what's the reality of the situation? The reality of the situation is someone's going to come in for a fence height, the next applicant comes in, asks for the same thing, they're going to say you gave it to them why can't you give it to me. But the idea is when you look at these factors there's meant to be unique circumstances that you can use to determine that it's right to grant an exception to the code. If we do start seeing a lot of the same variances come in, we like to say that's the time to look at the code and say hey do we want to make a change. It doesn't mean that we have to make a change because some of what we see in the code is meant to set a standard and set an aesthetic with a lot of these things. So when we talk about fences we talk

about for example chain link fences, those aren't necessarily favored in the Village. But now that they can be vinyl coated, they often times can serve a function where they almost blend into the landscaping. So if you need a fence and you don't really want to see the fence, then aesthetically that could be something that would be a benefit.

Ms. Calta continued, you're all volunteers here giving your time where I'm sure you could be doing a lot of other things. But that's Dan and Debbie when they start seeing a lot of the same things, that's the time for us administratively to go back and say do we need to make a change. It could be an easy yes but there also might be other factors to say yes we keep seeing these because that's what people want because they're less expensive. But that doesn't necessarily mean that we want to change the code. As far as front facing garages, I can't talk intelligently about that at this point but I know that that's something that comes up here and there. And again, that's an aesthetic.

Mr. Russell replied yes, it does.

Councilman Meyers stated, going back to the 6' fence they wanted for the deer. That fence is almost 200' off the road. It's got to go with the amount of property that you have. I think that was a 2 acre or 2 ½ acre lot on Wilson Mills we're talking about. The neighbor said he could put a 6' wood fence up, but why would I want to look at that. When you put the black vinyl fence up that far off the road nobody would ever see that. Those are the things I think you have to look at when you're looking at a variance, things like the area, the amount of property they have and what the people have to look at.

Ms. Calta said, that tends to bring up the next question which is what do the neighbors think. When I worked in Beachwood, they don't have a Board of Zoning Appeals, they have a P & Z Commission and the P & Z has the authority to grant variances, so they mush it all together. And they do not send notices to the neighbors when there's a variance application.

Councilman Meyers replied, which they should.

Ms. Calta said, right? When I got there I remember saying how do they do this, this doesn't seem fair, the neighbors have a right. Well, it's a public meeting, the agenda's available. What happens though which is interesting, one of the questions from the Board always is "Have you talked to your neighbors and what did they say." Not because they have to, because they weren't notified but typically that's how they look at it. That goes into I think a lot of times when you have the neighbors, they've been notified, nobody objects to it. It's buried in somebody's backyard, nobody's going to see it, nobody's objecting to it. So a lot of times I feel like they make these decisions because there's no objections to them, not necessarily because it meets "practical difficulty" standard. That's tough, I know, I get it. But we're here to do the refresher on it and making sure that we try to focus on the factors. That all comes down to compatibility and compatibility lends itself more to a discussion about a "use" variance because you've got different uses going on and you're wanting to make sure those uses are compatible. It still also applies I think in the area of context because you don't want something that disruptive to the neighborhood, whatever that might be.

Ms. Weber stated, that really also goes to factor #3 too, whether or not adjoining properties would suffer substantial detriment or whether or not the essential character of the neighborhood would be affected. The more you read through the factors and think about them, they do encompass a lot of the things that you're already kind of thinking of. They provide a really great outline to follow.

Ms. Calta agreed, they do. A lot of times you'll hear people come in and say I talked to a Realtor and it's going to devalue my property and I'm never going to be able to sell my house, this is ruining my life. Anyone can come in and give their opinion. We don't tell them they can't come in and they can't do that. Again, that's another reason to go back to the factors. What evidence do we have that we can look at that's substantial, and not just an opinion.

Mr. Russell said, let me ask, why do we care what the neighbor thinks? You can paint your house any color you want. If your neighbor paints her house bright pink, there's nothing you can say about it.

Developments & HOA's

Ms. Jeanblanc replied, that actually relates to my question. With these Developments and Associations that might have rules about what color you can paint your house. Where do we fall in terms of that?

Mr. Russell stated, I don't enforce HOA rules.

Ms. Calta replied right, we don't do that. However, what I've seen happen is in practice, sometimes people don't realize that their HOA has these restrictions and they don't necessarily know the process. Just like sometimes they don't know about the Village's process. Often times it's just education to say hey, this is one process, but we know you have an HOA and you'd be well served to go to your HOA.

Ms. Jeanblanc asked, but do we know that? Let's say they're coming in for a fence variance but there's also a component with their HOA. Do we know that's a factor when we get the application? How do we find out?

Ms. Weber & Mr. Russell replied, we don't need to know that.

Ms. Calta said, we do have a list of HOA's in the Village. They really are separate but on the other hand you don't want somebody to go through the whole process here when they're not going to get approval with their HOA. So it's not our role, it's a totally separate process.

Ms. Jeanblanc asked, but do we have any kind of fiduciary responsibility?

Ms. Calta replied, we really don't, but I think in practice sometimes that does come up.

Mr. Michalko stated, basically the HOA's have more authority over what can be done in that Development than what we can say.

Ms. Weber replied, I wouldn't say more, I think it's different authority. Just how we have our code that we enforce, it has our set of restrictions. The HOA has their own set of restrictions that they're going to enforce and processes that you have to go through for that HOA. There could be lots of different Deed restrictions put onto an HOA.

Mr. Haycox stated, for example, a pink house that the Village allows, if an HOA does not allow, the HOA would have to sue that homeowner to get them to change it?

Ms. Calta replied, they would have to go through their process. One community I worked in, the unit was owned by the property owner, then everything else was common area. A lot of these units, the individuals wanted to add on to them, like a back porch. That was considered a structure and then also changed the boundary lines between what was the property owner and what was the common area which also impacted some of the setbacks. That's one where we have a bit of overlap. A lot of times in those instances it was a big Development with lots of units. They didn't know they had to come to the city. They had to get a lot split. When the unit changes then they had setback issues. That was one where we actually with the HOA said hey, if you've got these going on, your property owners need to know they need to come to the Village because they've got to get this approval along with whatever approvals you have. Yes, they could regulate the color, blue or pink.

Mr. Russell stated, again, if the neighbor is complaining about this type of fence, same thing as the color, how do they have any type of right?

Ms. Calta replied, I think that's buried within property rights. What's an interested party? An interested party typically are abutting or adjacent to the property owners. They're the ones that could make an argument that somehow the height of the fence, the color of the fence, the shed, whatever it might be impacts their property in a way that's negative, it could be aesthetics. We had this man cave, do you all remember the man cave? Was it a shed? The is one where we went through and redid the whole code on all the accessory structures so that it was a lot clearer.

Mr. Russell stated, with a wood fence, you put it up and it's the raw material and he paints it later. What do you do? That changed the whole aesthetics of the fence.

Ms. Calta replied, we had somebody do that in Worton Pk. It was supposed to be natural looking and then it ended up being something that we left to be between the neighbors.

Mr. Russell stated, the reason I'm asking that is because they're looking over these 7 or 8 questions, I don't think that should be part of a question, the color of a fence.

Ms. Jeanblanc said, you can't stop the neighbor complaining they don't like the color of the fence but I'd like to think that we know that there's a difference between I don't like the color

they picked for the fence and this particular fence is going to mess up the drainage in my yard or create some kind of hazard.

Chairman DiFranco stated, we have to focus in on the variance being applied for. It's not for the color of a fence, it's that they want a taller fence and it's going to be pink. Whatever color you want, you're coming in here for a variance on the height of the fence.

Ms. Calta said, I use color as an example because if an applicant comes in and wants to put up a fence and they want to make it as least intrusive to the neighborhood as possible, the color might then come into play. I'm not going to be putting up a bright red or pink fence, I'm going to put up a fence that's going to blend in and aesthetically be a neutral color so you're not going to notice it. Right, we shouldn't focus on color but that's how the argument could come from an applicant to say I'm not going to impact my neighbor.

Ms. Calta said, we don't typically cut anyone off. I've had situations where people come in and they stack attack, that's where you have 5 people come in and say the same thing in opposition. That's where you can say hey, we've got a meeting here and we're going to let everyone speak, but if you're just going to be repeating what someone else has said, then you don't need to repeat what already has been said.

Mr. Michalko stated, as far as the usage, we had an application come in on Lander Rd. for a setback variance for a garage. We all knew they were lying on their application, nothing we could do about it. He was running a business out of his garage, his workers park there during the day, they turned it into a business lot. What's our recourse?

Ms. Calta replied, the easier ones are if you're granting a Conditional Use Permit and somebody comes in you can put conditions on it and you can enforce those conditions. Variances are granted for specific reasons. If that's being violated then we can do something about it.

Ms. Jeanblanc stated, we're not giving a variance for them to use it as a business, we're giving a variance for the garage. It's then up to the Village to enforce the fact that they're parking business vehicles there for improper periods of time.

Making a Quasi-judicial Decision *by* Ms. Weber

Ms. Weber stated, what may be helpful to think about as well is that if there's a court challenge, what is being challenged is whether or not this decision is based on substantial or reliable and probative of evidence. As a Quasi-judicial body, the reason that you swear everybody in is that you're taking evidence and testimony to decide whether or not you're going to grant the variance. Part of doing that is determining whether or not you think that that evidence is credible. You're going to listen to the property owner, you're going to be listening to neighbors and whoever else in going to come in. But you as the governing body can decide whether or not you think what they're saying is truthful or not. When determining whether or not the neighbor complaining is his substantial detriment, those are the factors what you're kind of weighing. You're kind of constrained to looking at exactly what the variance is, but you can be weighing

that kind of evidence in testimony. In a niche way, there's some Case Law on the books that just a neighbor's opinion testimony isn't necessarily substantial or reliable, that if you just get up with an unqualified opinion that my property value is going to be decreased but you don't have anything to back that up. It's got to be weighed with what the other side is saying, so that doesn't necessarily mean that that is reliable or probative of evidence.

Ms. Jeanblanc stated, a lot of people will work through those issues where one will say I could plant some trees in front of it and that resolves the issue. I think there's opportunity to informally remediate these issues before they get ugly.

Chairman DiFranco stated, one of the things you brought up in this is that you're asking for members to state "I vote no on the variance request for the reasons of this and that". In other words, not just a yes/no vote, but to explain the vote. Is that a recommendation or something we should be doing individually?

Ms. Calta replied, it's a recommendation for everyone. It can also be part of the discussion. It's great when you go around the horn and start voting yes or no you can say I'm voting yes because of x, y & z. That might be a little clunky, I realize that because you've already had this long discussion, but the discussion might be between two people on the floor, not everybody. So for those people that didn't discuss anything and say this is a factor that I don't believe is being met. I should have brought that transcript from Warrensville Hts where they went around the horn and they said why they weren't voting in favor of a site plan and said it's "because we don't like it".

Chairman DiFranco replied okay, so that's appealable to Council. At the end of the day our decision is a decision that sits with record bonded and then the applicant or anyone else can appeal it to Council. So the record is clear on the reasons why we made our decisions, and when it goes in front of Council, they see that record and say BZA said they didn't like it and that's not a good enough reason, so we're going to overturn this. And they can even go beyond that, can they not?

Ms. Jeanblanc stated, we should never say "because we don't like it".

Ms. Calta stated, for us if something does end up in litigation, we have a record. And we're not saying that you should always grant variances or never grant. What this allows you to do, is in those situations when you want to grant it, it gives you the grounds to grant it. Likewise, if there's something you don't want to grant, these are the grounds that you use. Wasn't there a shed recently denied?

Ms. Weber replied, I think it was a shed caddy corner in the back of his property. I remember trying to help him out a little bit in asking how is your property unique? He said well, I could put it over there. Then you're not demonstrating whether your variance is substantial. Is your property unique that this is the only thing that you need the exception to the rule. So to be able to have your conversation and going through the factors is really helpful.

Ms. Calta said, and you don't have to go through all the factors. If you're saying I'm going to vote in favor of this because I believe that you have a practical difficulty because you have a stream that runs through the middle of your backyard and no matter where you put this shed it's going to be within the setback. Something as simple as that, you don't have to feel like you have to go through every single factor and if you think there's something else that's a little different than those factors that you think is persuasive enough, you can certainly include that.

Chairman DiFranco said, I think it's important for the applicant to hear these factors. I don't think they're on the application themselves?

Ms. Weber corrected, those factors are on the application and we added number 8 on the "area" variance application.

Chairman DiFranco stated, I think this is good. I think we went over "area" variances in discussing that these factors on the application are not the only factors we can evaluate a variance by. And then your recommendation to suggest why you might say; I think because of what this person has said, it meets a "practical difficulty" standard.

Ms. Calta stated, that helps the whole process. In the Village you mention interested parties. That could be an applicant that gets denied or it could be someone that actually receives an approval of a variance. We have the layer of going to Council, not all communities have that. Often times these decisions if you disagree with them, they go directly to court.

Chairman DiFranco said, for us we have the backing of Council.

Ms. Calta replied, right and I think there's some benefits to that process. I don't want anyone here to feel that whatever decision you make here, that Council will take it and do whatever they want with it. They are a body, all elected. Their rule in the way that they look at things-

Chairman DiFranco replied, they serve their constituents so they can certainly make their decisions.

Ms. Calta replied, right. But don't be discouraged if you see things that you've made a decision on here and it goes to them. You have a really important job to do here and they recognize that, but they also have to do their job too.

Chairman DiFranco stated, I think particularly on a denial, I think we really need to be able to have a good record in place if it does go to Council.

Ms. Jeanblanc stated, there have been yes' where I've just said yes, but if I say no I generally will say why. I'd be curious to know the number of cases to Council.

Councilman Meyers stated, there was a shed (studio structure) on Thornapple, they never even applied for a permit, they just did it. They came to Dan, wanted to put electric in it. At the end of

the day they came to Council. My question when they came to Council was, did you apply for a permit. They said no, we didn't know we had to.

Ms. Weber stated, there was the trash enclosure on Thornapple that went to Council and I think Council upheld your decision.

Mr. Russell said, the trash enclosure was before me.

Ms. Weber stated, the studio shed structure you guys denied, it then went up to Council and Council reversed your decision and then approved it.

Granting "Use" Variances

Mr. Michalko stated, in your letter it says we have no authority to change the use.

Ms. Calta replied, we talk about what's an "area" variance and what's a "use" variance. I always go to setbacks. It's the area that you're using and if you're supposed to be setback 20' but you can only setback 10', that's an "area" variance. You're not changing the use of the property, you have a residential property, you're going to put a shed on it, it's going to give you an encroachment, that's an "area" variance.

Ms. Weber stated, another common one would be sign sizes. We see sign variances come in in the commercial context. Whether or not you want a bigger sign than what the code allows or if you want a different sign than the code allows, even though that technically is an "area" variance.

Ms. Calta stated, another is parking, parking would be an "area" variance. For "area" variances, you're not changing the use of the property, just how you're using it. "Use" variances yes, you are changing the use. Years ago we didn't have "use" variances, now we do. You're never going to be looking at a "use" variance when you change a commercial property to residential or residential to commercial.

Ms. Jeanblanc asked, we're granting a "use" variance on a conditional format, so if that property got sold, that's not going to run with that, right?

Ms. Weber replied, actually a "use" variance does run with the land.

Ms. Calta added, so long as the use continues.

Ms. Jeanblanc said, let's say I get a "use" variance to change the kind of business and I sub it and the buyer wants to put in something completely different that would also not be within the scope of.

Mr. Russell asked, wouldn't that go in front of P & Z?

Ms. Weber replied no, they handle Conditional Use Permits. Let's say in our small office building district, somebody wanted to come in and put a manufacturing facility in, that's not a permitted use under that district, it's not a Conditional Use under that district. They would have to come in and either ask to rezone the property which would have to go on the ballot or ask for a "use" variance which would then be decided by this Board. There's a different standard and a higher standard in order to grant a "use" variance which is the undue hardship test which is a very high standard that you need to meet as a land owner. Diane & I will go through the factors in how that works. The point of it being a high standard is because this isn't a legislative body, Council is the legislative body who can decide to change how the code is written or change what uses we provide in what districts. You guys are interpreting and carrying out the code. You have a certain power that Council has delegated to you to make exceptions to the code and that still falls under these "use" variances that you're able to do. But it is a much higher standard that you need to prove, to demonstrate to you guys that they would be entitled to a "use" variance. That really comes down a lot to economic viability of it.

Ms. Calta stated, in the spectrum of variances, they're meant to be rare, difficult, higher standard. Not to say that they can't be granted.

Chairman DiFranco asked, why do Conditional Use Variances go through Planning & Zoning?

Ms. Weber replied, because it's not a variance. The way the zoning code is set up is that you have your expressly permitted uses and then you have your conditionally permitted uses. Conditionally permitted uses are uses that we're saying can be permitted if you go to Planning & Zoning Commission and they determine that based on the factors that we've set in our code for them to determine whether or not to permit a conditional use, that applicant can meet those.

Ms. Calta stated, you don't have the ability to change uses.

Mr. Michalko said, but you are changing it by giving a variance. In other words, my neighbor can come in and ask for a variance and put up an office building.

Ms. Calta replied, no. Number one, "use" variances cannot be granted in residential areas.

Mr. Michalko replied, that part I understand but it's not clear in the memo.

Ms. Weber stated, I see what you're referring to;

"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".

But then if you continue to read that, our Charter was amended to allow the Board of Zoning Appeals to grant "use" variances so long as it's not within the residential district.

Ms. Calta stated, I'll give you my opinion on "use" variances, there shouldn't be any. The process could be a Conditional Use or a Re-Zoning.

Ms. Jeanblanc asked about the University Hospital office complex that allows medical use.

Ms. Calta replied, medical was not previously permitted in the Office-Lab district. Those medical uses are on Conditional Use Permits, not “use” variances.

Councilman Meyers stated, that front first 200’ was residential and the rest was Office-Lab. They went on the ballot to rezone that front half to a surgery center.

Ms. Calta said, the Mt. Vernon office complex has some medical as well under Conditional Use Permits.

Ms. Calta stated, there was a big zoning change with Beta Drive so some of these uses were put within the zoning classifications. That took away some of the need for some of the Conditional Use Permits and also really should take away some of the stressors that might come from “use” variances too. So if you have a commercial zoning classification and it has a bunch of permitted uses and you add permitted uses or you add additional conditional uses, that should take away the need to do any sort of “use” variances.

Ms. Weber stated, in the unlikely event that there’s ever a “use” variance that comes down the pike, we’ll make sure to give you the full standard at the beginning of that meeting. Since that’s something you don’t see every day, we’ll make sure we give you all those factors right before you have to consider that.

Ms. Calta asked Katie, did you want to give some examples?

“Use” Variance Court Case Examples *by* Ms. Weber

Ms. Weber stated, just to bring home what we did, in terms of the “practical difficulties” standard there was a case that recently came out in January where it was found that the Board of Zoning Appeals, there was no where in the record that they even discussed the Duncan factors. It had been challenged in court and it reversed and remanded it back down to that BZA and they basically overturned the BZA because the court found that there wasn’t anything in the record that showed that you went over the factors. Just a reminder that courts do pay attention to it.

I tried to find some examples of “use” variances to give you guys but again the standard is so high in order to get a “use” variance. In the world of litigation on these matters, local Boards and Commissions are given a lot of due deference because it seemed in Ohio Law that the local authorities are going to have a better understanding of what should and shouldn’t be in the community.

Ms. Weber stated, a lot of times “use” variances are challenged by the person who has been denied a “use” variance. But in this case, it was a neighbor who brought this challenge. This was a Cleveland Board of Zoning Appeals in talking about the Harp Restaurant. It’s over on the Detroit Shoreway, kind of on its own little island if you will. The City of Cleveland Zoning Code

at the time did not allow for live music, at least in the zoning district that the Harp was located in. They got a citation from the city that they were having live music so they had to come in and apply for a "use" variance in order to allow them to continue doing live music. To meet the unnecessary hardship standard, what they were able to demonstrate is because the property is so unique in that it's by itself, there's nothing else around and that the live music is bringing in the revenue, that without the live music they wouldn't be able to generate the revenue and be an operating business. The Board of Zoning Appeals granted the variance. So a neighbor brought a challenge, there were some procedural issues. Eventually it got to where the court had to decide whether or not the Cleveland Board of Zoning Appeals had properly applied the test and whether or not the Harp had demonstrated that they had an undue hardship in order to get the variance, and the court upheld it saying yes, they have proven that their property is unique enough that without this, they wouldn't have any economic viability but for being able to have this variance.

Mr. Russell asked, how long ago did that happen?

Ms. Weber replied, 2017.

Mr. Russell asked, so the business has been there forever and ever as the Harp and they were perfectly fine making revenue and all of a sudden they weren't making revenue because they didn't have a band.

Ms. Weber replied no, because they always had the band. It was that they had gotten some complaints and then they found that technically they weren't under the zoning code allowed to have loud music there. I will say to not bore you, this was like 6 or 7 years of litigation. It went up and down and sideways if you will on a handful of different legal issues. But I wanted to boil it down to just the "use" variance issue. You can see that that is such a unique situation to really prove that you wouldn't have any economically viable use of your property without the "use" variance. That's a pretty high standard.

Chairman DiFranco stated, thank you. We appreciate this, it's been very helpful to talk this out. If nobody has anything further, I'll entertain a motion to adjourn.

ADJOURNMENT

Ms. Jeanblanc, seconded by Mr. Michalko made a motion to adjourn the meeting.

ROLL CALL

Ayes: All

Nays: None

Motion Carried

Meeting adjourned at 7:00 p.m.

Chairman

Secretary