

Appeal of Interpretation and Variance Fact Sheet

This fact sheet provides a synopsis of the operation/function of the Board of Adjustment, what a variance and/or an interpretation request is, and how such requests are processed. It also covers how a decision on a request is made and how you can participate.

1. What is the Board of Adjustment?

The Orange County Board of Adjustment is a quasi-judicial body responsible for hearing and deciding on variance requests, appeals of staff decisions, and acting on special use permit applications.

The Board is composed of 5 regular members and 2 alternates appointed by the Board of County Commissioners.

2. What does the term 'quasi-judicial' mean?

There are different types of decisions/processes employed by the County in the application of land use regulations, which are contained within the Unified Development Ordinance (UDO). These 'decisions' can be grouped into the following categories:

ADMINISTRATIVE: Typically made by professional staff covering day-to-day non-discretionary matters related to the implementation and enforcement of the UDO including approval/denial of:

- a. Zoning compliance permits (i.e. permits authorizing commencement of development activity);
- b. Site plan applications;
- c. Flood Development permits;
- d. Sign permits;
- e. Etc.

NOTE: Administrative decisions are subject to appeal by an aggrieved party to the Board of Adjustment for review.

LEGISLATIVE: Governing boards usually make legislative decisions. This is the most common review process employed by the County Board of Commissioners (BOCC) and is used to review multiple development proposals (i.e. zoning atlas amendments, amendments to the UDO, review/action on subdivision proposals, etc.).

Decisions are made based on multiple factors including the proposal's consistency with the adopted Comprehensive Plan, recommendations made by the Planning Board and staff, comments received from the public (both for and against a project), as well as the elected officials' experiences, opinions and judgment.

QUASI-JUDICIAL: In this process, the board responsible for rendering a decision acts much like a panel of judges, hearing factual evidence and sworn testimony.

Decisions on whether a permit request must be issued or not are based on the competent, substantial, and material evidence presented by all sworn parties with standing.

NOTE: The Board of Adjustment reviews matters before them in a quasi-judicial setting.

ADVISORY: Cover recommendation(s) made by County advisory boards (i.e. Planning Board, OUTBoard, Commission for the Environment, etc.) to the BOCC related to the processing of development applications (i.e. zoning atlas amendments, UDO text amendments, etc.).

3. What is a Variance?

Put simply, a variance is an approved deviation from County land use regulation(s), as contained within the UDO, for a specific parcel of property.

Example:

A property owner wishes to erect a house on their undeveloped parcel of property. Applicable regulations require structures observe a setback (i.e. be located a specific distance) from established property lines.

Unfortunately, the owner cannot locate the proposed structure on the parcel and meet applicable setback requirements.

A 'Variance' is an available tool for a property owner seeking relaxation of development regulations allowing for development to occur.

4. When are Variances issued?

Variances are issued in those instances where the Board is able to determine, based on available evidence, the strict application/interpretation of land use regulations create an unnecessary hardship on the property owner preventing or inhibiting their ability to make reasonable use of their property.

In issuing a Variance, Board members are required to determine the request supports all of the following findings:

- a. Unnecessary hardship would result from the strict application of the Ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;
- b. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or general public, may not be the basis for granting a variance;
- c. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship; and

- d. The requested variance is consistent with the spirit, purpose, and intent of the Ordinance, such that public safety is secured and substantial justice is achieved.

5. Who is responsible for demonstrating the need for a Variance?

Applicants have the burden of establishing by competent material and substantial evidence in the form of testimony, exhibits, documents, models, plans, and other materials, the request is necessary and should be approved.

6. How are Variance applications processed?

Variance requests are processed in the following manner:

- a. An application is submitted by the property owner;
- b. Staff prepares a record of the matter including detail(s) on the applicable regulations;
- c. A public hearing is scheduled to allow for the review of the request;
- d. Once the public hearing is called to order, individuals intending to provide testimony to the Board on the request are sworn by the Clerk to the Board of Adjustment;
- e. The Board of Adjustment accepts evidence into the record and hears sworn testimony from all parties; and
- f. Upon hearing all evidence associated with the application, the Board renders a decision granting or denying the request consistent with the requirements of the UDO.

7. Are their limits to the Variance process?

Yes. The Board is not empowered to issue Variances allowing for land uses prohibited under applicable regulations.

Example:

There is a parcel of property zoned residential. The UDO outlines allowable and prohibited land uses for this parcel based on its residential zoning. Development of a single-family residence is permitted, but development of a restaurant is prohibited.

Someone purchases the property and wants to develop a restaurant. The property is not zoned to allow for that type of development.

In this scenario, the property would have to be rezoned to allow for the development of a restaurant. The Board cannot issue variances in instances where there is no unique hardship.

Example:

Structures erected within the AR general use zoning district are required to observe a 20 ft. setback from common property lines. A property owner does not want to observe this setback and wants their house 10 ft. from all property lines.

In this instance, we have a property owner who simply does not want to follow a development standard that is universally applicable to all parties.

There is no unique hardship in this instance, merely a desire to deviate from an applicable standard. A Variance should not be issued.

8. What is an appeal?

Staff make decisions on the administration and enforcement of County land use regulations on a daily basis. This includes approval and/or denial of permits/applications and the making of binding determinations on the application of land use regulations on a given parcel of property.

These decisions are subject to review by the Board of Adjustment with the submittal of an appeal application.

9. What is subject to appeal?

When staff makes a 'final and binding' determination with respect to the application of land use standards, regulations, or on a specific land use that decision is appealable to the Board of Adjustment.

Examples, for illustrative purposes, include:

- a. Approval/denial of a zoning compliance permit related to the use of a parcel of property;
- b. Approval/denial of a site plan;
- c. Application of performance standards (i.e. parking, sign regulations, landscaping/buffering, impervious surface limits, etc.).

10. Who can submit an appeal application?

A person with the legal right to initiate an appeal is said to have "standing" to initiate the appeal. A person with standing is entitled to be a "party" in the appeal.

Unlike a court proceeding, a quasi-judicial case coming to the Board does not have formal plaintiffs and defendants. The person who initiates the action (an applicant is a "party" to the proceeding. To qualify to become a party, a person must be directly affected by the decision in a way different from the public at large.

A definition of standing has been written into State law and includes:

- a. The owner of the property, someone with an option to purchase the property, and the applicant for a development approval;
- b. Any other person who will suffer "special damages" as a result of the decision being appealed.

STAFF COMMENT: A number of court cases have addressed what is necessary to establish "special damages." Receipt of notice does not indicate status in regards to standing. While physical proximity in and of itself is not sufficient, that is an important factor. An allegation that the action would diminish the property value of the person is not necessary, but it is the "damage" that is most frequently alleged and generally evidenced by the testimony of a professional appraiser.

- c. An association of neighborhood property owners that would be affected, provided that at least one of the association members would have standing as

- an individual and that the association was not formed in response to the particular application being appealed; and
- d. The unit of local government that has made the decision being appealed.

11. How are appeal requests handled?

An appeal is processed in the following manner:

- a. An appeal application is submitted by an aggrieved party with standing;
- b. Staff prepares a record of the matter subject to appeal including all relevant facts utilized in rendering the disputed decision and the rationale for any and all determinations made;
- c. A public hearing is scheduled to allow for the review of the appeal application;
- d. The Board of Adjustment accepts evidence into the record and hears testimony from all parties; and
- e. Upon hearing all evidence associated with the application, the Board renders a decision to affirm, modify or revise staff's decision.

12. Won't staff be mad and retaliate against me if I appeal a decision?

No. All staff decisions/determinations are subject to appeal. It is a right guaranteed under applicable local and State regulations.

13. Who may speak at a public hearing where a Variance or Appeal request is being reviewed?

Applicants and those individuals supporting, or opposed to, the request are encouraged to attend. Only those with standing may speak or present evidence and are required to be 'sworn in'.

Individuals may represent themselves or be represented by an attorney and they may have expert witnesses testify for them. The cost for attorneys or expert witnesses is borne by the individual seeking counsel or expert testimony, not the County. The County will not pay for, or reimburse, expenses incurred by an individual in their quest to support or oppose a Variance application.

While not required by State or County regulations, all parties with an interest in a Variance request are strongly advised to have an attorney represent them. Engineers, architects, real estate agents, planners and other non-attorneys may only appear as expert witnesses; they may not represent an applicant or those opposed to an application.

14. Can I discuss a Variance or Appeal request with staff or members of the Board of Adjustment?

You can discuss the application/request with staff during normal business hours. Unfortunately, members of the Board of Adjustment are not able to discuss a case with you. This is commonly referred to as 'ex-parte communication'.

Persons affected by a decision have the legal right to hear all of the information presented to members of a board who will be rendering a decision on a variance/appeal application.

Specifically they have a right to know all of the “facts” being considered. Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing. Only facts presented to the full board at the hearing may be considered.

Please note Board members are not trying to be rude or unsympathetic to your concerns. They are prohibited from engaging in the conversation in the first place as they are required to guarantee an impartial hearing where the ‘facts’ are weighed as they are presented as to whether or not an application should be granted.

15. Is there a record of Variance and Appeal proceedings?

Yes. Minutes from the Board of Adjustment public hearing where an application is reviewed/discussed/acted upon are maintained by the County. The Planning Department maintains the application components and become a part of the file on that case.

16. Are decisions on Variance or Appeal applications subject to further review?

Yes. Decisions are subject to review by the Superior Court. Appeal applications must be filed within 30 days with the court from the date the decision is made available. Please refer Section 2.12.5 (A) of the UDO for additional information.