

SUBDIVISION AND ZONING VARIANCES

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GOALS OF TRAINING

- Provide general overview of legal standards for subdivision and zoning variances
- Provide general principles for consideration of variances
- Provide general overview of criteria for subdivision and zoning variances
- Provide general overview of process for review of subdivision and zoning variances

Variances

Defensible
Decisions

Process

Criteria

General Principles

Legal Standards

Legal Standard for Variances

- A variance decisions is reviewed for an “abuse of discretion”.
- A board abuses its discretion when it relies for its decision on information so lacking in fact and foundation that it is clearly unreasonable.
- A court does not examine the wisdom of a board's decision if it is established that the board acted within its jurisdiction and that its action was not illegal.

Carlson v. Yellowstone County Board of Adjustment,
2017 MT 186

What is a Variance?

- A variance is a process that a county can use to allow an exception to a part of zoning, subdivision or other land use regulation.
- It is a permitted departure from strict enforcement of the regulations as applied to a particular piece of property.
- Variances are authorized in county imposed zoning by Section 76-2-223(1)(c), MCA and in subdivision review by Section 76-3-506, MCA.

General Principles for Variances

- Variances may be granted if due to the characteristics of the land, strict compliance with the regulations will result in an undue hardship and strict compliance with the regulations is not essential to public welfare.
- Variances cannot be granted if the variance has the effect of nullifying the intent and purpose of the regulations.
- Variances cannot be granted for building purposes in areas that will result in noncompliance with other regulations, i.e. floodplain regulations.
- Granting a variance does not set precedence for future variances as each variance is evaluated for a unique property and set of circumstances.
- Denial of a variance request requires full compliance with the regulations.

General Principles for Variances

- **For subdivisions:**
 - Variances can be granted from the Design and Improvement Standards in the regulations.
 - Variances cannot be granted from the Definitions in the regulations.
- **For zoning:**
 - Variances can be granted from physical standards such as lot size, property setbacks, building heights.
 - Variances cannot be granted for uses restricted by the zoning.

General Principles for Variances

- The generous granting of variances can seriously undermine the purpose and integrity of the regulations.
- Frequent granting of variances may indicate:
 - Need to re-evaluate the regulations;
 - Need to re-evaluate the process or review criteria;
 - Need to amend the regulations to permit the design standard.

Subdivisions



Subdivision Variance Criteria

- Is the granting of the variance **not detrimental to public health, safety, or general welfare or injurious to adjoining properties?**;
- **Due to the physical surroundings, shape, or topographical conditions of the property** involved, would strict compliance with the regulations impose an undue hardship on the owner?
[Undue hardship does not include personal or financial hardship, or any hardship that is self imposed!!];
- Will the variance **not cause a substantial increase in public costs?**; and
- Will the variance **not place the property in nonconformance with any other regulations?**

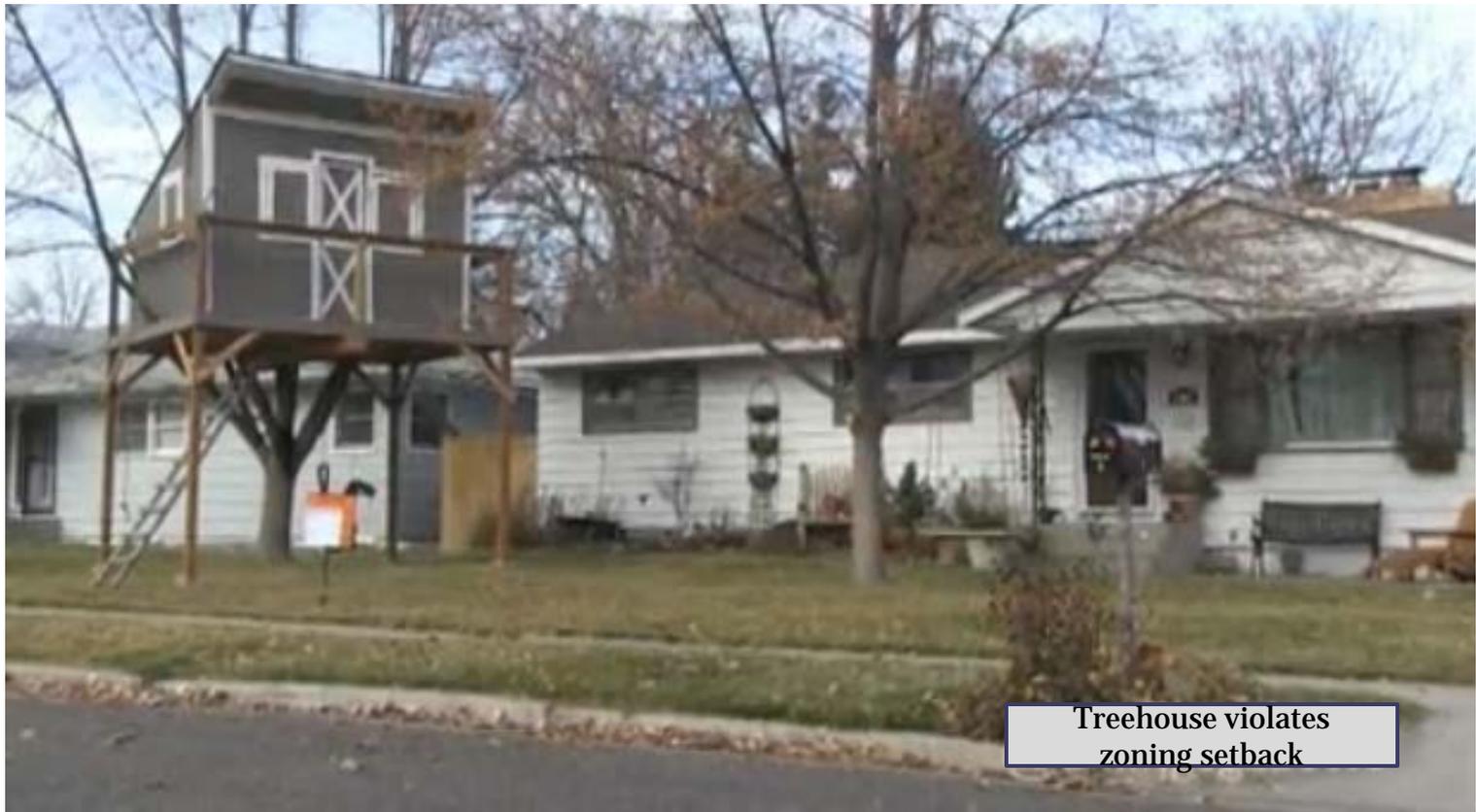
Process for Subdivision Variances

- **Subdivider:**
 - The subdivider includes the request for a variance with submission of the preliminary subdivision plat application.
 - The variance request should include a statement describing and justifying the requested variance, evaluate the variance criteria and set forth a requested alternative.
 - The variance request should include supporting documentation, including, but not limited to, photographs of the requested variance area, drawings, topographical maps, and letters from professionals.

Process for Subdivision Variances

- **Planning Board and/or County Commission:**
 - The Board reviews the variance request first and before reviewing the subdivision application.
 - The Board must review and evaluate all of the variance criteria as they relate to the variance request.
 - In its motion to approve or deny the variance, the Board must include a statement describing the variance and the facts (findings) to approve or deny the variance.
 - The Board may impose reasonable conditions on a variance request to insure the objectives of the regulations are met.
 - Even if the variance is denied, the Board should continue with the review of the subdivision application to determine whether the subdivision can or cannot be approved without the variance.

Zoning



Zoning Variance Criteria

- Is the granting of the variance **not contrary to the public interest?**;
- **Due to special conditions**, will a literal enforcement of the regulations result in unnecessary hardship? [Undue hardship does not include personal or financial hardship, or any hardship that is self imposed!!]; and
- Will the **spirit of the regulations** still be observed and **substantial justice** done if the variance is granted?

Process for Zoning Variances

- **Applicant:**
 - The applicant submits a variance request application.
 - The variance request should include a statement describing and justifying the requested variance, evaluate the variance criteria and set forth a requested alternative.
 - The variance request should include supporting documentation, including, but not limited to, photographs of the requested variance area, drawings, topographical maps, and letters from professionals.

Process for Zoning Variances

Part 2 (County Imposed Zoning)

- **Zoning Administrator:**
 - The zoning administrator first reviews the variance request, evaluates the facts against the criteria and issues findings approving or denying the variance.
 - The zoning administrator may impose reasonable conditions on a variance to ensure the objectives of the regulations are met.

Process for Zoning Variances

Part 2 (County Imposed Zoning)

- **Board of Adjustments:**
 - The zoning administrator decision can be appealed to the Board of Adjustments.
 - The Board of Adjustments reviews the record and may reverse or affirm, wholly or partly, or modify the decision.
 - The Board of Adjustments may make such order, requirement, decision or determination as ought to be made and to that end shall have all the powers of the zoning administrator.

Process for Zoning Variances

Part 2 (County Imposed Zoning)

- **County Commission:**
 - If set forth in the zoning regulations, the decision of the board of adjustments can be appealed to the County Commission.
 - The appeal is through a verified petition setting forth why the board of adjustments decision is illegal, in whole or in part, and specifying the grounds of the illegality.
 - The petition must be presented within 30 days of the filing of the decision of the board of adjustments and the Commission must make a final decision within 60 days.

Process for Zoning Variances

Part 2 (County Imposed Zoning)

- **County Commission:**
 - **The Commission may:**
 - Remand the variance to the board of adjustments;
 - Reverse or affirm, wholly or partly the decision of the board of adjustments; or
 - Modify the decision of the board of adjustments.

Defensible Decisions

- **As with any decision, in order to be defensible the findings should evaluate the facts based on the criteria and the findings must be reasonable and legal.**
- **Likewise, any conditions imposed on a variance must be reasonable and legal.**

Airport Affected Areas

- 67-7-303. Variance. (1) A person intending to erect or increase the height of a structure, permit the growth of a tree, or use property in a manner that is not in accordance with the requirements of the regulations adopted pursuant to this chapter may apply to the governing body or an enforcement officer appointed for this purpose by the governing body for a variance from the regulations.
- (2) If an enforcement officer has been appointed by the governing body, the decision of the officer is final unless it is appealed to either the governing body or the airport appeals board, if one exists.
- (3) A variance must be granted when a **literal application or enforcement of the regulations would result in substantial practical difficulty or unnecessary hardship and when the variance would not be contrary to the public interest.**
- (4) A variance must be granted for a nonconforming use when there is **no immediate hazard to safe flying operations or to persons and property in the vicinity of the airport and when the noise or vibrations from normal and anticipated normal airport operations would not be likely to cause damage to structures.**
- (5) A variance granted under this section may require the owner of a structure or tree to allow the political subdivision, at the owner's expense, to install, operate, and maintain the lights and markers necessary to warn pilots of the presence of an airport hazard.
- (6) A person who builds a structure pursuant to a variance from the airport affected area regulations or who takes or buys property in an airport affected area for which a variance has been granted is on notice that the airport existed before the variance was granted and that normal and anticipated normal operations of the airport will result in noise, vibrations, and fumes being projected over the property. A person using a structure built pursuant to a variance may not collect damages from a governing body or local government or from an airport authority, airport operator, or airport owner for interference with the enjoyment of that structure caused by noise, vibrations, and fumes from normal and anticipated normal airport operations.

Military Area Compatibility Act

- 10-1-1515. Variance. (1) A person intending to erect or increase the height of a structure or use property in a manner that is not in accordance with the requirements of the regulations adopted pursuant to this part may apply to the governing body or an enforcement officer appointed for this purpose by the governing body for a variance from the regulations.
- (2) If an enforcement officer has been appointed by the governing body, the decision of the officer is final unless it is appealed to either the governing body or the military affected area appeals board, if one exists.
- (3) A variance must be granted when a **literal application or enforcement of the regulations would result in substantial practical difficulty or unnecessary hardship and when the variance would not be contrary to military missions.**
- (4) A variance must be granted for a nonconforming use when there is **no immediate hazard to safe flying operations or to persons and property in the vicinity of the military affected area and when the noise or vibrations from normal and anticipated normal military operations would not be likely to cause damage to structures.**
- (5) A variance granted under this section may require the owner of a structure to allow the political subdivision, at the owner's expense, to install, operate, and maintain the lights and markers necessary to warn pilots of the presence of a military affected area hazard.
- (6) A person who builds a structure pursuant to a variance from the military affected area regulations or who takes or buys property in a military affected area for which a variance has been granted is considered to be aware that the military affected area existed before the variance was granted and that normal and anticipated normal military operations may result in noise, vibrations, and fumes being projected over the property. A person using a structure built pursuant to a variance may not seek damages from a governing body, a local

Floodway and Floodplain

- 76-5-405. Variance for obstruction or nonconforming use. (1) The department or the responsible political subdivision may issue permits for the establishment or alteration of artificial obstructions and nonconforming uses that would otherwise violate [76-5-401](#) through [76-5-404](#). The application for the permit must be submitted to the department or the responsible political subdivision and **contain the information that the department requires, including complete maps, plans, profiles, and specifications of the obstruction or use and watercourse or drainway.**
- (2) Permits for obstructions or uses to be established in the designated flood plain or designated floodway of watercourses must be approved or denied within a reasonable time by the department or the responsible political subdivision. Permits for obstructions or uses in the designated flood plains or designated floodways are conclusively considered to have been granted 60 days after the receipt of the application by the department or the responsible political subdivision or after a time that the department or the responsible political subdivision specifies, unless the department or the responsible political subdivision notifies the applicant that the permit is denied. The responsible political subdivision shall send to the department a copy of each permit granted pursuant to [76-5-406](#) and this section.
- (3) The department or the responsible political subdivision may issue the permit with reasonable conditions. The permitted obstruction or use must be maintained in compliance with the permit.