



DOCKET ITEM #5
Text Amendment #2011-0001
Variance Standards

Issue: Consideration of an amendment to section 11-1103(A) of the zoning ordinance to change the standard for the granting of a variance.	Planning Commission Hearing:	February 1, 2011
	City Council Hearing:	February 12, 2011
Staff: Barbara Ross, Planning and Zoning		

This text amendment will change the standard for the Board of Zoning Appeal's grant of a variance, making it easier for a variance to be granted, but making the standard consistent with Virginia law.

I. Background

In 2009 the General Assembly passed legislation (HB 2326) changing the statute that addresses the Board of Zoning Appeals and the standards for variances. Specifically, the legislation removed the language, "approaching confiscation" from the required hardship finding. Prior to the legislation a variance could only be granted to "alleviate a clearly demonstrable hardship [to a property owner] approaching confiscation." Sec. 15.2-2309(2). HB 2326 changed the language by striking the words "approaching confiscation." The new standard makes it considerably easier to for the BZA to grant a variance. Last year, the City sought and had approved a change to section 9.18 of the City Charter, making the language identical to the new statutory standard. Both the statutory and charter changes were effective as of July 1, 2009.

II. Proposed Text Changes

The Zoning Ordinance implements the charter provisions with regard to the BZA and variances and therefore should be changed to be consistent. The attached language at section 11-1103(A) will make the necessary change.

III. Analysis

The Board of Zoning Appeals is authorized to grant a variance when a property owner shows that he is entitled to relief because the zoning regulations' effect on his property creates a hardship. As an example, the zoning ordinance requires four yards on each single family lot; those rules anticipate a classic rectangular lot. The owner of a triangular-shaped lot might well be entitled to a variance because if four yards are required, it would likely make building a house on the lot impossible, depriving the owner of the use of his residentially zoned property. Prior to the statutory and charter changes, the variance standard had required that a property owner show that the hardship was one "approaching confiscation" of the property. In other words, the zoning regulation, when applied to the property, creates a circumstance that effectively acts as a taking of the property, prohibiting any reasonable use. The statute and city charter have been changed to still require a hardship but not one "approaching confiscation," thus necessitating a lesser showing.

Although there are occasionally cases that meet the "approaching confiscation" standard, it is rare in Alexandria because most land has already been developed, and the typical variance case seeks to build an addition to a mid-twentieth century single family home.

It was for this reason that several years ago Alexandria added a new mechanism, the “special exception,” to allow Alexandria landowners to seek changes to the zone regulations under a standard that is more lenient than the variance standard, and designed to review the case for planning and neighborhood compatibility issues. See Section 11-1300 of zoning ordinance.

Other jurisdictions evidently found the variance standard difficult also and, instead of adopting a new mechanism to address common neighborhood issues, began granting variances that did not meet the strict “approaching confiscation” standard. In *Cochran v. Fairfax County Board of Zoning Appeals*, 267 Va 756, 594 S.E.2d 571 (2004), the Virginia Supreme Court ruled that “approaching confiscation” in the statute means what it says: a BZA may issue a variance only to avoid an unconstitutional result, one that results in the denial of all beneficial uses of the property. The 2009 legislative change was a reaction to the court’s strict reading of the statute, making the “approaching confiscation” standard no longer applicable.

Although the proposed change is necessary and straightforward, its effect is less certain. It will clearly make achieving a variance easier for property owners. However, the new language is so recently effective that there has not been adequate time for case law to develop or for the standard to be otherwise analyzed in great detail. Staff has scheduled a work session with the Board of Zoning Appeals on February 10 to discuss this issue and will be following it closely as cases arise in the future.

IV. Staff Recommendation

Staff recommends that the PC initiate and recommend approval of the text amendment.

Staff: Barbara Ross, Deputy Director, Planning and Zoning
Peter Leiberg, Principal Planner

Attachments: Proposed Zoning Text Changes

PROPOSED TEXT CHANGES

- 11-1103 Standards for variances. The board of zoning appeals shall not vary the regulations of this ordinance as authorized above unless it finds that:
- (A) The particular physical surroundings, shape, topographical condition or other extraordinary situation or condition of the specific property involved would effectively prohibit or unreasonably restrict the utilization of the property or would constitute a clearly demonstrable hardship ~~approaching confiscation~~, as distinguished from a mere inconvenience, if the strict letter of the regulations were carried out.
 - (B) The conditions upon which the petition for a variance is based are not applicable generally to other property within the same zoning classification.
 - (C) The property was acquired in good faith and any hardship produced by the ordinance was not created by the owner of such property.
 - (D) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood in which the property is located, or diminish or impair the values thereof.
 - (E) The proposed variance will not impair an adequate supply of light and air to adjacent property, or cause or substantially increase congestion in the public streets, or increase the danger of fire or the spread of fire, or endanger the public safety.
 - (F) The variance, if granted, will not alter the essential character of the area or be a substantial detriment to adjacent property.
 - (G) The strict application of this ordinance would produce undue hardship.
 - (H) Such undue hardship is not shared generally by other properties in the same zone and vicinity.
 - (I) No other remedy exists whereby the same relief was, is or may be available from another approval body of the city as part of its review of a site plan or other development application.

~~Strikethrough~~ indicates text to be deleted.