

Thousands of properties across the United States sit idle because they cannot be productively used under their current zoning designation. Your company may own some of these. In many instances these properties can be transformed into idyllic performers through a zoning variance.

# Zoning in on Value

By Randall L. Airst, Esq., LLM

## AMERICAN ZONING LAW

The traditional land use scheme in the United States is often referred to as Euclidean zoning. This system of zoning divides communities into “use” districts. The three primary use categories are: residential, commercial and industrial. Each of the three main categories is subdivided according to relatively fine-line distinctions. The objective of Euclidean or use zoning is to bring together similar, and therefore compatible uses. Ergo, dissimilar and incompatible uses are separated.

The authority to regulate the use and development of property is derived from the police power of the state. Police power is the term given to the general governmental power to protect the health, safety, morals, and general welfare of the citizenry. The concept of the public welfare is broad and inclusive. Consequently, it encompasses a broad range of interests extending from aesthetic to physical to monetary.

Although the power to protect the citizenry is extremely broad, it is not unlimited. For example, the Fifth Amendment to the Constitution—prohibiting the taking of private property for public use without just compensation—places important limits on governmental use of the police power. A taking also occurs when government regulation, and not a physical occupation, deprives an owner of all economically beneficial use of his property. Finally, a regulatory taking may be found when the regulation falls short of eliminating all economically beneficial use.

## ZONING RESTRICTIONS

Zoning ordinances are general legislative pronouncements, restricting the use of properties located within defined geographical boundaries. Problems often arise when these general zoning rules are applied to specific properties. The strict application of zoning restrictions invariably causes some properties to lay fallow. These properties simply do not conform with the general legislative requirements.

A short time ago, American Land Recycling (ALR) put a property under agreement that did not conform to dimensional requirements imposed by the zoning designation. The unusual dimensions were created when land was condemned for a nearby highway, I-95. As a result of that condemnation, properties were created that did not conform to the zoning requirements.

“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex combination of factors including the regulation’s economic impact on the land owner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Penn Central Transp. Co. v. New York City*, 438 U.S.104 (1978).



## ALR's Case Study: Philadelphia Electric Company Steam Generating Plant.

Rather than bear the legal and engineering costs, as well as the inconvenience associated with the pursuit of a variance, the owner allowed it to sit fallow for the past 23 years. ALR plans to secure a variance so that the property can be put to use. Without a variance, this property will remain unproductive. Despite the owner's inability to use the property productively, it is responsible for property taxes, insurance, and remains vulnerable to the same litigation other owners are subject to. In this, and many other instances, the downside of a variance application is limited, and pales by comparison to the potential gain.

### COMMUNITY BENEFITS

Under certain circumstances, a variance can facilitate the productive use of this and thousands of other idle properties across the United States, benefiting many different parties. The community benefits when jobs are created, taxes are generated, and the spread of blight is arrested. The owner benefits because of a return on his/her investment.

### RIGHT OF WAY BENEFITS

The Right of Way industry may be able to use variances to reduce the impact of condemnation, which often deprives owners of substantial portions of their property, leaving them with "fractional plots" not easily converted to productive use. These owners often institute litigation, seeking compensation for the diminution in value suffered by the fractional plot not "taken." Wealth can be generated, and the overall cost of projects reduced, through the use of variances. If compensation is paid for the entire property, why shouldn't the condemning authority, or its successor in interest, be able to productively use the two disparate properties resulting from the condemnation? This includes the portion taken for a highway, utility corridor or pipeline. It also includes the portion that remains, or the "condemnation remainder."

### ZONING BARRIERS

Right of way owners often confront zoning barriers which bar their ability to use properties productively. Several avenues of relief are open to those whose development plans exceed their rights. Relief may be sought through an attempt to rezone the property, which requires the assent of the local legislature. Alternatively, administrative relief may be available through a



### CASE STUDY:

#### FORMER PHILADELPHIA ELECTRIC COMPANY STEAM GENERATING PLANT

American Land Recycling (ALR) was informed that a former steam plant was being sold. The property was being marketed as environmentally clean, except for asbestos. With close proximity to the downtown core, excellent access to several highways, and environmental reps and warranties the property looked like a good prospect for Brownfield revitalization.

ALR negotiated to purchase the building and eventually entered into an agreement for its acquisition. It turned out that the physical condition of the property was much worse than represented.

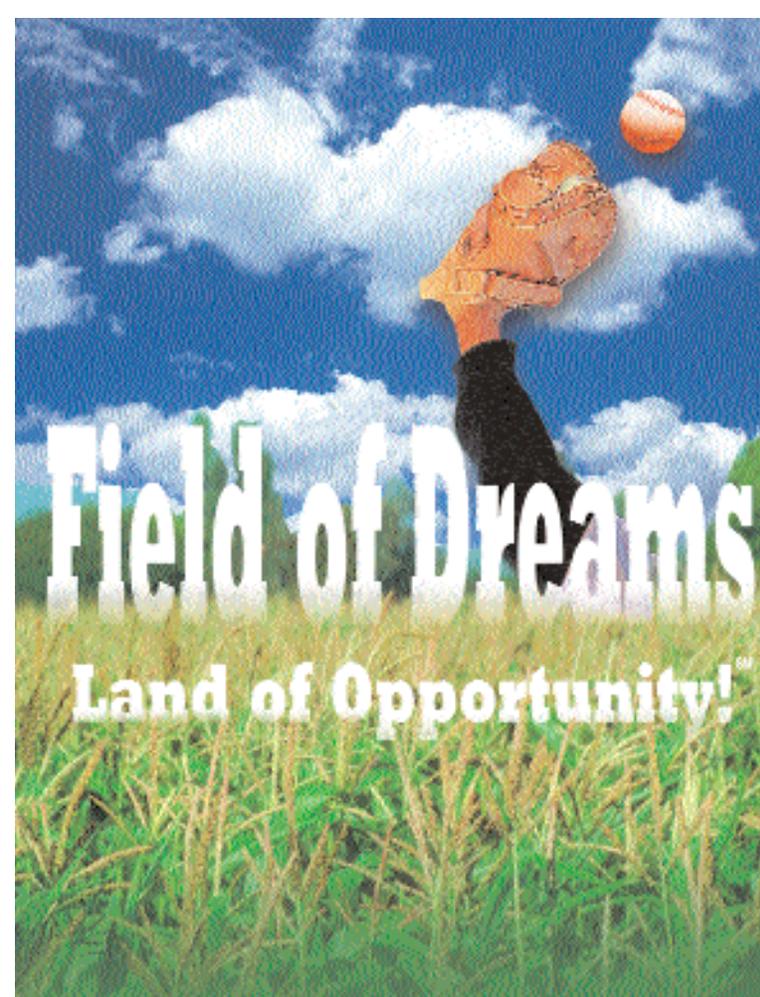
In fact, the cost to return the property to productive use under the prevailing zoning designation is in excess of \$6 million. The expenditure of these funds for the projected return makes the revitalization economically unproductive. The only way to revitalize this property is to secure a variance allowing outdoor media advertising to be placed on the exterior of the building. This is possible because of the building's visibility from a major highway. In fact, visibility is so high that signage would be referred to as a "spectacular" in the outdoor media industry. Presently, this visibility subjects drivers to an orphaned eyesore. ALR will be seeking a variance, and looks forward to transforming this blighted relic into an appealing landmark.

For more information, see [www.americanlandrecycling.com](http://www.americanlandrecycling.com) or e-mail: [rightofway@americanlandrecycling.com](mailto:rightofway@americanlandrecycling.com).



An example of how a variance created value.





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variance or a special permit issued by a board of adjustment or an administrative judge.

### HARDSHIP MUST RELATE TO THE LAND

When zoning restrictions impose unnecessary hardship on a property, a variance, authorizing an otherwise prohibited use or providing relief from dimensional restrictions, may be available. The language of the Standard State Zoning Enabling Act directs the Board of Adjustment to issue a variance from the ordinance "as will not be contrary to the public interest, where owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship." Enabling legislation differs across the United States, particularly in respect of the "hardship" which must be adduced.

The hardship must relate to the land. Personal hardship is irrelevant. The basis for the variance must be that the land cannot yield an economically viable return because of its physical features in relation to the zoning ordinances.

### CONSTITUTIONAL ZONING RIGHTS

A few weeks ago, I spoke with attorney Sandy Lindenbaum, who practices law in New York City, and is perhaps best known for his representation of Donald Trump, Harry Helmsley, Carnegie Hall and the Guggenheim Museum. Lindenbaum likes to think of zoning variances as a type of regulatory safety valve. He believes that variances are needed because you simply cannot write a zoning code that applies to each and every property. This safety valve allows zoning to be constitutional.

A variance provides relief when unique hardship would be suffered if the zoning ordinance were strictly applied. The variance procedure exists, at least in part, to ensure that each property has the economically viable use guaranteed by the Fifth Amendment. Without the variance procedure, an ordinance depriving property of an economically viable use may be constitutionally confiscatory in its application.

### WHO CAN INITIATE PROCEEDINGS FOR A VARIANCE?

- **The Legal Owner.** Of course, the owner of a property has standing to pursue a variance.
- **The Equitable Owner of a Property.** A prospective purchaser who has entered into an agreement to purchase a property is considered the equitable owner of that property. Equitable title passes to the buyer upon execution of the agreement; legal title is transferred at settlement. The equitable owner of a property generally has standing to pursue a variance.
- **The Tenant.** A tenant has the same standing as a landlord to pursue a variance. You need evidence of standing (i.e. a lease and evidence that the owner consents).
- **The Owner of an Option.** The owner of an option generally has standing to pursue a zoning appeal.

### REQUIRED CONTRACTUAL PROVISIONS

The array of parties with standing is generally broader today than in the past. However, the right to seek a variance will not be of assistance to non-owners unless they have secured the appropriate rights from the owner.

What contractual provisions are necessary for non-owners to pursue a variance? When negotiating with the owner what terms and conditions should an option holder, lessee, or prospective purchaser endeavor to secure? What concessions should the owner grant to these parties so that they can pursue a variance?

Right of way holders may find themselves on a particular side of this scenario at one property, and on the other side for a different property. A right of way owner may be trying to purchase a property, and wishes to use it in a manner not permitted under the zoning ordinance. In that situation, it must negotiate for enough time to pursue the zoning variance. This includes sufficient time to fend off appeals in the event it is successful at the zoning board level. The prospective purchaser must also allow for enough time to

initiate the appropriate appeal in the event that its petition to the zoning board is unsuccessful.

Prospective purchasers, lessees, option holders, and others must secure those contractual protections necessary to proceed prudently. At its most basic level, this begins with the owners written permission to pursue zoning relief. It continues with the owner's pledge of cooperation during the process, and the allotment of sufficient time for the initial application and subsequent administrative and judicial actions to run their course.

The pursuit of a variance is not devoid of costs, although it often proves to be an excellent investment. The process often involves the use of various professionals including surveyors, engineers, urban planners, traffic engineers and lawyers. This investment must be protected, and the applicant's rights preserved. Both parties must feel comfortable with the amount of time allocated for the various components of the process. Furthermore, the parties must negotiate and resolve specific time-related issues, including re-openers and extensions. The contract must address issues such as the applicant's ability to pursue the variance through a specified number of appeals.

Of course, all of the above issues will look different when the right of way owner is seeking to sell, lease, or provide an option on a property that it owns.

#### HOW LONG?

In order to secure a variance the applicant must initially proceed through an administrative process. This includes an appeal to the local zoning board, whose decision can be appealed by the applicant or by someone contesting the applicant's right to a variance. A party who protests against or contests the application for a zoning variance is called a "protestant." Protestants are sometimes required to live within a certain distance of the subject property. In some jurisdictions, standing to protest is granted more liberally, and any taxpayer in the municipal area may protest the application.

When the applicant wins at the zoning board level, it may proceed to use the property in a manner consistent with the variance. However, this is not always prudent, as the zoning board's decision may be appealed and overturned in court. If a zoning board's grant of a variance is overturned, the use allowed under the variance, but prohibited under the zoning ordinance, must cease. This can obviously result in significant damages. The risk of reversal on appeal often causes successful zoning board applicants to wait until all appeals have been exhausted before proceeding with their project.

In many cases, there are two levels of judicial appeals. The first involves a trial level court, imbued with the ability to overturn zoning board decisions. Trial courts will overturn the decision of the zoning board if it is:

- An abuse of discretion,
- An error of law, or
- Not supported by substantial evidence in the record.

Remember that judicial review in your jurisdiction may involve a different standard. The second level of appeal is to a state appellate court. Depending on the nature of the issues, an appeal to the state Supreme Court is sometimes available.

#### USE VARIANCE VS DIMENSIONAL VARIANCE

There are two classes of variances: use variance and dimensional variance. The standards for granting these are generally different, with dimensional variances being more readily granted.

**Use variance.** The applicant for a use variance petitions to utilize its property in a manner that has been legislatively proscribed. Applications for a use variance are thoroughly scrutinized. After all, the proposed use is prohibited in the district, in contrast with a dimensional difference, where the use is allowed but dimensions of the proposed use fail to meet prevailing requirements.

**Dimensional variance.** A dimensional variance is required when the contemplated use is allowed under the zoning ordinance, but the area or size



**Location, location, location.  
Highway proximate to case study property.**



**The cost of asbestos abatement at the case study produces a barrier to revitalization. A variance constitutes the only tool that can overcome this impediment.**

contemplated exceeds that which is permitted. Examples of dimensional variances are density, side or rear yard requirements, lot coverage limitations, height limitations, lot size or width requirements.

Area or dimensional variances are typically subjected to a less-stringent burden. Courts may consider many factors in determining whether to grant a dimensional variance.

#### CRITERIA EMPLOYED TO DETERMINE A USE VARIANCE

To determine when a use variance should be granted, courts often employ variations on the following four-part test:

1. Under the prevailing zoning designation the property is suffering from unnecessary hardship;
2. The landowner's plight is due to unique or unusual circumstances and not conditions generally prevailing throughout the neighborhood;
3. The variance requested is tightly tailored to alleviate the hardship; and
4. The variance requested will not adversely affect the health, safety or welfare of the community.

#### UNNECESSARY HARDSHIP

Those applying for a use variance must establish that the property is suffering from unnecessary hardship. (Bear in mind that zoning law is local.) There are variations on the hardship theme. One standard requires that the applicant establish the property in question, as valueless without the variance. While this standard will secure a use variance, it is on the more onerous end of the scale used to determine whether the hardship standard has been fulfilled.

Courts will often examine a number of factors in determining whether the requisite unnecessary hardship has been established. These factors can be termed "indicia of hardship." They include: the prohibitive expenditure required to develop the property (these costs often arise from contamination, a problem many right of way owners must confront); and the need for extensive reconstruction or demolition to utilize the property in any of the ways permitted under the zoning ordinance.

One of the more difficult standards requires that the petitioner establish that the property cannot physically be used for the purpose for which it is zoned. Under this standard, the applicant must prove that, without a variance the property will remain barren, and economically unproductive. A variation on this difficult standard requires that the property have either no value or distress value as it is currently zoned. These standards are difficult, and may be more demanding than those you will have to surmount.

#### UNNECESSARY HARDSHIP FOR DIMENSIONAL VARIANCES

Courts are generally more receptive to entreaties for dimensional variances. Courts may, and often do, consider many factors before deciding whether or not to grant a dimensional variance. These include: economic detriment to the applicant if the variance is not granted; the financial burden which will be borne by the applicant if it is forced to perform work needed to bring the building(s) into strict compliance with the zoning ordinance; and the vitality of the surrounding neighborhood. Courts have considered blighted conditions in the surrounding neighborhood, and have decided to encourage revitalization by granting variances.

#### NO RIGHT TO USE THE ENTIRE PROPERTY

A variance will not be granted simply because a portion of the property cannot be used. This situation often arises when part of the property is located in a flood plain, has been designated as wetlands, or is contaminated. So long as the owner is using part of the property productively, and is not suffering economic hardship as a result of the condition, the unnecessary hardship standard will not have been satisfied. The constitution does not guarantee property owners the use of their entire property. Nor does it guarantee owners the right to optimize their return on a real estate investment.

#### UNIQUE OR UNUSUAL CIRCUMSTANCES

A variance will not be granted simply because the applicant meets the jurisdictional criteria for establishing unnecessary hardship. The hardship must result from factors unique to the applicant's property. More precisely, the hardship must result from the circumstances as they apply to the applicant's property.

No bright-line test exists to clearly demarcate those zoning problems, which are within the purview of the courts, from those properly left to legislative resolution. In deciding whether to exclude itself from a controversy, a court must determine whether the hardship should be addressed through the judicial or legislative branch. The issue is whether the variance would be legislative in character as to fall beyond the jurisdiction of the zoning board and the courts. Judicial determination is appropriate when a zoning ordinance affects an applicant's property in a unique manner. Under these circumstances the same ordinance impacts the applicant's property differently than it affects neighboring properties. This "unique impact" often occurs because of the way the zoning ordinance interacts with a property's physical characteristics.

The existence of the requisite hardship will not prompt courts to write a blank "zoning check." Courts will provide that degree of relief necessary to ease the hardship that has been established.

Even when an applicant has established the requisite hardship, a variance will not be granted if it would detrimentally affect the health, safety or welfare of the community. This criteria generally does not prevent the grant of a variance, although in some instances it does force the applicant to pursue a more suitable means of circumventing the hardship.



Barricade from the past.  
Or, canvas for outdoor media.



Vestige of a bygone era.



Today, these smokestacks are an eyesore.  
The grant of a variance will facilitate ALR's  
transformation of this site.



## BURDEN OF PROOF

The burden of establishing each of the elements required for a variance rests with the party seeking the variance. There can be conditions attached to the grant of a variance.

## A CHECKLIST FOR PROCEEDING

1. Inventory property. A right of way owner must examine each of its properties to determine which are not being put to productive economic use.
2. Identify the zoning classification of each hardship property.
3. Ascertain why the property has not been used. There may be environmental or other problems, which have prevented the property from being used.
4. If the zoning ordinance allows non-hardship use of the property, options other than a variance should be considered. If the zoning ordinance does not permit the productive use of the property, ascertain whether a variance would facilitate the fiscally prudent implementation of such a productive use.
- 5a. Consult with the appropriate team members to ascertain the cost of seeking the variance, the time it will take to deal with appeals (initiated by you or neighbors seeking to block the variance), the chances of success, and the economic upside (i.e. rental income, sales price) if a variance is in fact secured.
- 5b. Determine whether the potential rewards of the variance outweigh the risk inherent in the application.
- 6a. In the event that the risks outweigh the rewards, partner with a company willing to underwrite the risk in exchange for a piece of the resulting value in the event that a variance is granted.
- 6b. Sell the property to a party willing to underwrite the cost of the variance process.



Case Study's proximity to major highway.



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Division offices: Albany, NY • Tampa, FL • Houston, TX • Walnut Creek, CA • Surrey, BC, Canada