The Variance Process

Critical Area Commission for the
Chesapeake and Atlantic Coastal Bays Coastal Training Program

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Annapolis
When Is a Variance Necessary?

- To develop on lots with site constraints created by the Critical Area Program
- To allow for reasonable expansion – may not be possible to fully comply with Critical Area requirements
- Address changes in site conditions
- For repairs and reconstruction
- Not needed to accommodate persons with disabilities as long as provisions in a local program
Typical Variance Applications

- New dwellings on vacant “grandfathered” lots in the Buffer
- Dwelling additions, patios and decks in the Buffer
- Grading in the Buffer
- Exceeding lot coverage limits
- Exceeding clearing limits
- Disturbing or building on steep slopes
But …

- More than 300 applications each year
- Over 90% granted
- Application review is time consuming
- Variance process can be costly for landowners
- Outcome can be variable
- Often better site design, creative engineering could eliminate the need for a variance
Variances Can Be Problematic

- Boards grant too many for the wrong reasons
- Treated as “minor” regardless of impacts to natural resources
- Not treated as a rare exception
- Standards, especially “unwarranted hardship” difficult for Boards to apply effectively
- Often granted “after-the-fact” and treated as a “solution” to a violation
- Often granted on sites with other violations
- Mitigation sometimes considered optional, not implemented, or not effective
Variance Standards - Must Meet All 5

- Special features of a site – literal enforcement would result in an unwarranted hardship
- Applicant deprived of use permitted to others under a local Critical Area program
- Cannot confer a special privilege that would be denied others in the Critical Area
- Not based on actions by the applicant or related to a neighboring property
- Will not adversely affect water quality or habitat and will be in harmony with the general spirit and intent of the law and regulations
Unwarranted Hardship

- Consider special features of the site relating to an applicant’s land or structure
- Without the variance, applicant would be denied reasonable and significant use of the entire parcel or lot
- Very high standard – goes well beyond “practical difficulty” (strengthened by General Assembly in 2004)
- Should not be considering:
  - Landowner convenience
  - After-the-fact construction
  - Owner not knowing regulations
- Boards often don’t consider creative site design or engineering options
What Is Reasonable Use?

- Some structures cannot meet the unwarranted hardship standard (pools, gazebos, detached decks)
- "Reasonable use" must analyze the whole site
- Comparison to surrounding properties developed under a local program may be helpful
- Multiple variance requests – proposal may not be "reasonable"
- Must design to site constraints
Rights Commonly Enjoyed

- Applicant deprived of rights enjoyed by other properties
- “Rights enjoyed” must have been implemented under the Critical Area program
- Other properties must be in the Critical Area
- Other land should be physically similar (size, shape, topography)
No Special Privilege Conferred

- Approval must not allow activities that would be denied on other properties in the Critical Area under the law
- Difficult not to personalize or attempt to “balance”
- Board’s consideration of “unique needs” of applicant often often lead to special privilege
- BOA cannot consider other environmental stewardship activities
Variance Not Related to Actions by the Applicant or Off-Site Conditions

- Boards often don’t consider that a hardship can be self-created
- Variance should not be based on applicant’s actions – construction, disturbance without authorization
- General Assembly stated that jurisdictions shall consider this
- Variance should not relate to conditions on a neighboring property
- Variance should not be based on impacts associated with removal
No Adverse Impacts on Water Quality or Habitat

- Impacts of individual variances may seem small
- Law specifically addresses cumulative impacts
- Must consider thousands of variances over time
- Must consider overall environmental sensitivity of the Bays’ ecosystems
- Boards must seek to minimize impacts for every application
Harmony with Spirit and Intent of the Critical Area Program

- Boards must consider if request is the minimum necessary
- Reduction in size, change in location often feasible
- Board should always require mitigation (mandatory in the Buffer)
- Mitigation should address water quality and habitat
- Mitigation should be in addition to penalties or restoration for a violation
Local Government Role in the Variance Process

- Balance landowner desires with protection of resources
- Variances should not be granted lightly
- Explore alternatives with applicants
- If granted, mitigation is essential to meeting “spirit and intent” of the Program
- Clearly identify and explain required mitigation
Be Creative to Avoid Unnecessary Variances

- **Avoidance**
  - Avoid the need for a variance through creative design
  - Relocate or reconfigure development

- **Minimization**
  - If impacts are unavoidable – minimize them
  - Reduce footprint

- **Mitigation**
  - Address conservation of existing resources (forest, wetlands, etc.)
  - Provide water quality improvement
  - Provide habitat enhancement
Commission’s Role in the Variance Process

- Review and comment on all variance requests based on information submitted
- Evaluate “grandfathered status”
- In some cases perform site visits to assess actual conditions
- Provide technical assistance and design guidance
- Try to eliminate the need for a variance or minimize impacts
Commission’s Role in the Variance Process

- Provide consistent State-wide guidance in the application of standards and overall variance review
- Assist local governments by appearing before local BOAs when necessary
- Facilitate interpretation of local program, State law, and Criteria
- Assess adequacy and comment on proposed mitigation
Good Decisions by Local Boards

- Based on an accurate site plan
- Address conditions of the site and overall lot constraints
- Must include substantiated written findings for each variance standard
- Identify the unwarranted hardship and lack of reasonable use
- Include design alternatives explored; why they were rejected
- Ensure environmental impacts are minimized
- Include mitigation to address water quality and habitat impacts
Appeals to Courts - Should Not Be Way Around BOA

- Bad variance cases often lead to bad decisions
- CAC has “standing” to appeal decisions
- Applicants often view going to Court as a part of the variance process
- Court process is typically lengthy and unpleasant
- Court decisions can sometimes make the situation worse
- Court decisions set legal precedent that can be harmful to the Critical Area Program
How the Courts Support the Critical Area Law

- Review variance decisions based on the standards
- Remand or reverse decisions that do not properly apply the Critical Area law, or that lack complete findings
- Ensure that relief provided is the minimum necessary for reasonable use
- Consider alternative designs, construction techniques, strategies that may be practical and effective
- Ensure that approved variances include appropriate mitigation and that the mitigation gets implemented
- Consider the sensitivity of the Bays’ watersheds and the degradation caused by thousands of “minor impacts”
Alternatives to BOA Variances

- Creative site design
- Creative building design
- Better staff and applicant coordination
- Administrative variance process
- Use of Modified Buffer Areas
- Creative zoning approaches
Is a Variance Necessary?

- Variance – often not the best answer
- Process can be time-consuming, expensive, and burdensome
- Before proceeding – ensure the variance is really necessary:
  - Are plans accurate
  - Do plans reflect site conditions
  - Are calculations (slopes, lot coverage, clearing, etc.) accurate?
- Are there alternatives that could meet the applicant’s needs?
Creative Site Design

- Many Critical Ares sites have design constraints
- Problems result when they are ignored
- “Site design process” may not exist
- Property owner picks a design and then tries to make it fit on property
- If it doesn’t – next step is to request a variance
Use Site Analysis and Creative Approach

- Concept first written about by Ian McHarg in "Design With Nature"
- Used layers of tracing paper to delineate site constraints and identify "optimal suitability"
- Geographic Information Systems and layer technology make the process easier, faster, and more accurate
Site Design Process

- Analyze site to identify all constraints
- Identify “optimal suitability” or buildable area
- Design project to fit this area
- Explore alternatives
- Document options
- If constrained areas can’t be avoided, minimize impacts
- Develop mitigation specific to site and design
- Present entire package
Graphic Illustration of Site Constraints

- Buffer
- Expanded Buffer
- Wetlands
- Steep slopes
- Hydric Soils
- Highly erodible soils
- Forest cover
- Significant plant and wildlife habitat
Identify Buildable Area First

- Delineate all sensitive environmental areas
- Delineate zoning setbacks
- Determine areas that must be reserved for SRAs or other utilities
- Determine maximum lot coverage (LDA and RCA)
- Determine maximum forest clearing (LDA and RCA)
Process Often Works In Reverse

- Property owner selects a house plan
- Locates house on property
- Applies for permit
- Finds out about site constraints
- Goes “back to the drawing board” or applies for a variance
Design Project to Fit the Buildable Area
Creative Site Design
Creative Building Design
Use Professional Expertise

- Professional guidance from an architect, landscape architect, engineer, planner, or ecologist may be necessary.
- Professionals have specialized training in addressing difficult sites.
- Often provide ideas that result in better design, cost savings, and fewer adverse impacts.
If Unavoidable – Minimize Impacts
Mitigation Is Essential

- That the granting of a variance:
  - Will not adversely affect water quality
  - Will not adversely impact fish, wildlife, and plant habitat
  - Will be in harmony with the spirit and intent of the Critical Area Law and regulations

- All variances have adverse impacts – mitigation is **required**
  - Must be comprehensive
  - Must be substantive and provide actual resource benefits
  - Must be part of a plan submitted with variance application
Develop An Appropriate Mitigation Plan

- Conservation of habitat
- Water quality improvement
  - Treat stormwater
  - Use nitrogen removing septic systems
  - Minimize fertilizer and pesticide application by minimizing lawn area
- Improve and increase habitat
  - Create wetlands
  - Create living shorelines
  - Establish forest (more than just planting trees and shrubs)
Mitigation – Should Be on the Project Site

- Purpose of mitigation – offset adverse impacts
- Most effective when it is physically near the source of the impacts
- Design of mitigation plan – should be part of site design
- Out of sight – out of mind does not promote resource protection
Mitigation Must Provide Resource Benefits

Provides some benefits ...

Provides comprehensive water quality and habitat benefits!
Staff and Applicant Coordination

- Planning staff qualified to help applicants avoid variances
- If variance is unavoidable, they can recommend designs that minimize impacts
- Can assist applicants in developing effective mitigation plans
Administrative Variance Process

- Specifically authorized in Annotated Code 8-1808 (c)(1)(ii)
- Can streamline process for applicants, local staff
- Can avoid burdensome and unpredictable BOA process
Use of Modified Buffer Areas

- Designed to address developed areas with grandfathered lots
- Acknowledge “pattern of development”
- Existing Buffer does not perform buffer functions
- Difficult or impossible to relocate structures, development, or disturbance outside the Buffer
- Areas must be officially mapped
Modified Buffer Areas: Emphasis is on Mitigation

- Local programs have varying provisions
- No variance but mitigation at 2:1 usually required
- Minimum shoreline setback recommended
- Water quality improvement and habitat creation or enhancement
- Can involve off-site practices or collection of fee-in-lieu
Creative Zoning Approaches

- Local governments have flexibility to explore alternatives
- Commission needs to be involved in the process
- Proposals must meet “spirit and intent” of the Program
  - Buffer trading
  - Lot coverage trading
  - Buffer expansion methodologies
  - Slope measurement techniques
Many variance applications can be, and should be avoided through the site design process
Site analysis should come first
Project should be designed to fit the site
If a variance is necessary – should be minimum necessary
Applicant should properly address variance standards
Mitigation should be multi-faceted and comprehensive to ensure “no adverse impacts”