

**CITY OF LOMPOC  
PLANNING COMMISSION STAFF REPORT**



**MEETING DATE:** June 15, 2016  
**TO:** Members of the Planning Commission  
**FROM:** Lucille T. Breese, AICP, Planning Manager  
**RE:** Proposed Text Amendment

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**Commission Requests**

Planning Commission will consider a request by Commissioner Rodenhi to recommend additional language to Chapter 17.144 Interpretation of the Lompoc Municipal Code.

**Planning Commission Action**

1. Discuss the requested language; and
2. Provide direction to staff on how to proceed.

**Background**

At the February 10, 2016 meeting, Commissioner Rodenhi distributed the attached handout requesting the Planning Commission discuss the proposed language. (Attachment No. 1)

**Discussion**

Commissioner Rodenhi has requested the addition of language to the appeals section of 17.144.030 Appeal of Determination by the Community Development Director. The interpretative ability granted to the Community Development Director (Economic Development Director/Assistant City Manager and Planning Manager) is exercised on a regular basis during the course of the working day.

Each District in the Zoning Ordinance specifically calls out *Permitted, Conditionally Permitted, and Prohibited Uses*, Planning staff makes a determination each time a person comes in for a Business Tax Certificate (BTC) whether the use is substantially in conformance with the listed uses. The current Zoning Ordinance lists many outdated uses, which is one reason for the current comprehensive update now in process.

The City Council has listed Economic Development as one of their top priorities and maintaining a "business friendly" atmosphere is a large component identified by many as critical to attracting and retaining new business. In order to meet the Council goal and to provide customer service in an efficient and speedy manner, the Planning staff makes decisions on an almost daily basis that businesses are "in substantial conformance" with uses listed in the Ordinance. When staff has a question regarding the verbal description provided by the applicant, staff has the applicant submit a written description along with a plan of the tenant space showing how the space will be utilized. This will allow staff to have a more clear understanding of how the tenant intends to utilize the space. These descriptions and site plans are digitized and attached to the project address. If there is any problem at a later date about how a business is operating and a code enforcement complaint is filed, staff has the description provided by the applicant showing the intent and why the business was approved.


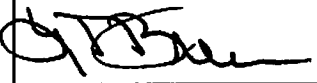
The proposed language would require staff to send a notice to all properties within 300 feet each time an interpretation was made. This would result in a burden for the business owner, who would have to pay for the mailing and wait for additional time, potentially three to four weeks for a response. The burden for staff would be the need to prepare and mail the notices and track any response received. Resources in the Planning Division are at an extremely low level and this additional work would slow down the processing of applications that staff is working on which have been identified as Council priorities.

It should be noted that this section of the Ordinance does not apply to only permitted uses but to Temporary Use Permits, Home Occupation Permits, Sign Permits, Code Enforcement, and other decisions that allow the division to operate in an efficient and customer friendly manner.

It is recommended that if the Commission wishes to limit staff's ability to make interpretations of the Zoning Ordinance language this be a topic more appropriate to the Zoning Ordinance hearings. During the hearings, the permitted, conditionally permitted, and prohibited uses for each District will be discussed and appropriate direction could be included in the update to the Ordinance.

**Attachments**

1. Handout of Proposed Language Amendments

Staff Report has been reviewed and approved for submission to the Planning Commission			
	6-6-16		June 6 2016
Teresa Gallavan Economic Development Director / Assistant City Manager	Date	Lucille T. Breese, AICP Planning Manager	Date

Chapter 17.144 INTERPRETATION

17.144.010 Generally.

Except as specifically provided herein, this Title shall not be interpreted to repeal, abrogate, annul or in any way affect any existing provision of any law or ordinance or regulations or permits previously adopted or issued relating to the erection, construction, moving, alteration, or enlargement of any building or improvement; provided, however, in any instances where this Title imposes greater restrictions upon the erection, construction, establishment, moving, alteration, or improvement of buildings or the use of any building or structure that is imposed or required by an existing law, ordinance or regulation, the provisions of this Title shall control. (Prior code § 8920)

17.144.020 Interpretation by Community Development Director.

Uses which the Community Development Director determines to be similar to the permitted or conditional uses in each district and which fall within the intent and purpose of the district, and that will not be obnoxious or detrimental to the public welfare, and which are of a comparable nature and of the same classes as the uses enumerated for said district, shall be allowed as permitted or conditional uses therein. The Community Development Director may also consider and render decisions on matters of slight modification and minor adjustment deemed necessary in connection with the efficient administration of the Zoning Ordinance. (Prior code § 8921)

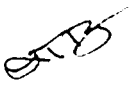
17.144.030 Appeal of Determination by the Community Development Director.

Whenever the Zoning Ordinance provides for a decision, interpretation, or other action by the Community Development Director, any person affected thereby may appeal said action in accordance with Section 17.006.020. (Ord. 1569 § 24, 2011; prior code § 8922). The time allowed for appeal begins on the date the Community Development Director provides notice of the decision, interpretation or other action along with appeal rights to all property owners within 300 feet of the property affected.

handout by Commissioner  
Bodenhi @ 2-10-16  
PC mta

**CITY OF LOMPOC  
PLANNING COMMISSION STAFF REPORT**



**MEETING DATE:** June 8, 2016  
**TO:** Members of the Planning Commission  
**FROM:**  Lucille T. Breese, AICP,  
Planning Manager  
**RE:** Supplemental Information  
Commissioner Rodenhi's Request

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**Commissioner Request**

Please be advised that Commissioner Rodenhi requested the attached information be distributed. This information came in after the preparation of the packet.

## **Request for Amendment to Zoning Ordinance**

Chapter 17 of the Lompoc Municipal Code, commonly called the Zoning Ordinance results from the best efforts of the Planning Department and the Planning Commission over several decades. Still, this does not mean that it is free of errors. One section of the Zoning Ordinance is misleading and should be amended.

At the February 10<sup>th</sup> meeting of the Planning Commission, I asked that this section be considered for amendment because I felt that it was inappropriate for the Community Development Director to make decisions without notice to affected property owners and then have those decisions become binding 10 days later.

For some background on California law as it applies to land use variances, please take some time to read the attached definition of variance from [thefreedictionary.com](http://thefreedictionary.com), the attached section of California law that covers variances and the attached article from the July-August 2009 issue of the Los Angeles Lawyer. You can even test your comprehension if you want by taking the MCLE Test, but you probably won't get any Continuing Law Education credit.

This is the section of the Zoning Ordinance that is in question:

### **Lompoc Zoning Ordinance**

17.144.020 Interpretation by Community Development Director

Uses which the Community Development Director determines to be similar to the permitted or conditional uses in each district and which fall within the intent and purpose of the district, and that will not be obnoxious or detrimental to the public welfare, and which are of a comparable nature and of the same classes as the uses enumerated for said district, shall be allowed as permitted or conditional uses therein. The Community Development Director may also consider and render decisions on matters of slight modification and minor adjustment deemed necessary in connection with the efficient administration of the Zoning Ordinance. (Prior code § 8921)

The first sentence in this paragraph is usually read as follows: "Uses which the Community Development Director determines to be similar to the permitted or conditional uses in each district...shall be allowed as permitted or conditional uses therein." But, in fact there are additional requirements for those uses to be allowed:

- 1) the use must fall within the intent and purpose of the district,
- 2) the use must not be obnoxious or detrimental to the public welfare, and
- 3) the use must be of a comparable nature and of the same classes as the uses enumerated for said district.

There is a 10-day period during which the Community Director's decision can be appealed. The burden of proof should be on the Community Director to show that a decision was made. The other issues, according to the Zoning Ordinance do not have a time limit.

This section should be re-worked to make the requirements clear and ensure it complies with California law.

## Variance

*In Zoning law, an official permit to use property in a manner that departs from the way in which other property in the same locality can be used.*

The term *variance* is used both in litigation and in zoning law. In both instances it has the general meaning of a difference or divergence.

Most U.S. communities have zoning laws that control and direct the development of property within their borders according to its present and potential uses. Typically, a community is divided into zoning districts based on the type of use permitted: residential, commercial, and industrial. Additional restrictions may limit population density and building height within these districts. A *variance* is an exception to one or more of the zoning restrictions on a piece of property.

A variance is different from a nonconforming use, which permits existing structures and uses to continue when zoning is first instituted. Once a zoning plan has been established, a property owner who wishes to diverge from it must seek a variance from the municipal government. The variance will be granted when "unnecessary hardship" would result to the landowner if it were denied. Although other forms of administrative relief from zoning restrictions are available, such as rezoning the area, variances are most frequently used.

There are two types of variances: area variances and use variances. An area variance is usually not controversial because it is generally granted due to some odd configuration of the lot or some peculiar natural condition that prevents normal construction in compliance with zoning restrictions. For example, if the odd shape of a lot prevents a house from being set back the minimum number of feet from the street, the municipality will usually relax the requirement.

Use variances are more controversial because they attempt a change in the permitted use. For example, if a lot is zoned single-family residential, a person who wishes to build a multifamily dwelling must obtain a variance. Residents of an area will generally object to applications for variances that seek to change the character of their neighborhood. Although the municipality may heed these objections, it will likely grant the variance if it believes unnecessary hardship would result without the variance. If, however, the owner seeking a variance for a multifamily dwelling bought the property with notice of the current zoning restrictions, the variance will probably be denied. Applicants for a variance cannot argue hardship based on actions they commit that result in self-induced hardship. If many use variances are sought in a particular area on the basis of unique or peculiar circumstances, it may be a sign that the entire neighborhood needs to be rezoned rather than forcing property owners to seek variances in a piecemeal fashion. Properly used, variances provide a remedy for hardships affecting a single lot or a relatively small area.

<http://legal-dictionary.thefreedictionary.com/variance>

## **CA Government Code Section 65906**

65906. Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

2009 Guide to Investigative Services

# Los Angeles Lawyer

July-August 2009 / \$4

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is the Association's  
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by JAMES R. REPKING and KATHRYN J. PARADISE

# ZONING DEFENSE

## Developers should consider more legally defensible alternatives to zoning variances

**P**roperty owners or project proponents may be lulled into complacency when their local planning department tells them, “Don’t worry about that zoning code requirement. We will just give you a variance.” However, this statement actually can be more dangerous than comforting. While a variance may be easy to attain if a project enjoys political support, it can be difficult to defend if challenged in court.

The requirements for variances under California law are very strict. As a result, variance approvals are often overturned in litigation due to insufficient findings or a lack of relevant evidence to support the findings.

A project opponent may seize upon the project proponent’s reliance on a variance as a weakness to be exploited in the opponent’s efforts to overturn the project. Therefore, project proponents—as well as engineers, planners, and lawyers—must 1) be mindful of the strict requirements for variances and their associated risks, 2) carefully craft variance findings to meet the applicable legal standards, and 3) consider alternatives to a variance that are more defensible if challenged.

A variance is a safety valve preventing a property from becoming unusable if the zoning code were strictly applied. It protects against an unconstitutional taking and allows the owner to enjoy the benefits afforded to other properties in the applicable zone.<sup>1</sup> One

typical use of a variance is to provide relief from design or development standards—such as height, density, setback, floor area ratio, parking, or other requirements—if those standards would prevent a property owner from using the property at issue.

Some jurisdictions may grant a variance to allow a land use that would otherwise be prohibited, such as a commercial use in a

James R. Repking and Kathryn J. Paradise are associates in the Los Angeles office of Cox, Castle & Nicholson LLP and are members of the firm’s Land Use and Natural Resources Group. Their practices involve representing developers, agencies, and others in the land use entitlement process and related litigation.

residential zone. This type of variance is referred to as a use variance. Charter cities<sup>2</sup> can approve these variances if permitted by their charter and zoning code.<sup>3</sup> In contrast, state law prohibits a general law city or county from granting use variances.<sup>4</sup>

Over the past four decades, case law addressing variances has evolved considerably. Prior to the mid-1960s, courts generally deferred to agencies' decisions and routinely upheld variances. Indeed, as of 1966, no

circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."<sup>11</sup> Charter cities may adopt their own standards for variances;<sup>12</sup> however, most jurisdictions have adopted requirements that mirror state law.<sup>13</sup> Other typical requirements are that the variance be consistent

conforming use. The applicant began detailing cars, and the city cited the applicant for illegally operating a car wash. In response, the applicant requested a variance for the detailing services, which the city approved.<sup>18</sup>

Nevertheless, the court overturned the variance based on a lack of hardship justifying the variance. The court viewed the key issue as whether the car-detailing operation was either so crucial that the property owner would "face dire financial hardship" without

**CLASSIC special circumstances are unusual physical characteristics of the property, such as size, shape, topography, location, or surroundings. For example, courts have found special circumstances when a lot was irregularly shaped and graded, had no real backyard, and faced a winding street.**

reported case had ever reversed a variance grant.<sup>5</sup> However, this all changed with the California Supreme Court's landmark decisions in *Broadway Laguna Homeowners Association v. Board of Permit Appeals*<sup>6</sup> and *Topanga Association for a Scenic Community v. County of Los Angeles*.<sup>7</sup>

In these decisions, the supreme court expressed its concern that if variances were routinely granted without satisfying the legal prerequisites, inferior administrative boards, such as planning commissions, could undermine the legislative role of a city council or board of supervisors by essentially rewriting the zoning code on an ad hoc basis.<sup>8</sup> Therefore, the court announced new, more stringent standards for variances to ensure that variances are the exception rather than the rule. Departing from the deferential treatment applied in earlier cases, the court stated that judicial review of variances could no longer be "perfunctory or mechanically superficial."<sup>9</sup> Instead, the court required agencies to adopt written findings, supported by substantial evidence in the record, that demonstrate compliance with each of the statutory criteria for a variance.

#### Required Findings

State law requires specific findings for granting a variance. For general law cities and counties, the State Planning and Zoning Law<sup>10</sup> mandates that a variance may be granted only "when, because of special cir-

with the purpose and intent of the zoning code, consistent with the general plan, and not injurious to the public or surrounding properties.<sup>14</sup>

Generally, the findings for a variance must meet a three-prong test. Applicants must show that 1) they will suffer practical difficulties and unnecessary hardships in the absence of the variance, 2) these hardships result from special circumstances relating to the property that are not shared by other properties in the area, and 3) the variance is necessary to bring the applicants into parity with other property owners in the same zone and vicinity.

The first finding, the hardship prong, generally is evaluated based on economics and whether the property can be put to "effective use" without the variance.<sup>15</sup> A variance is not intended to be used for the purposes of convenience or to increase the value of a property. If a property can be put to effective use, consistent with its existing zoning, the fact that a variance would make the property more valuable or increase the income of the owner is immaterial.<sup>16</sup>

The Second District Court of Appeal addressed the hardship prong in *Stolman v. City of Los Angeles*. The variance applicant in *Stolman* operated a gas station in Santa Monica Canyon.<sup>17</sup> The property was zoned for single-family uses only, but the gas station—which had been in operation since 1925—was grandfathered as a legal non-

the variance, or the owner sought to provide additional services simply to make the gas station more profitable. Holding that the evidence in the record was insufficient to support a finding of financial hardship, the court noted that although the applicant represented that he made a profit of eight cents per gallon of gasoline, he did not state how many gallons were sold or whether the profit was net or gross. Moreover, the applicant did not provide any information from which to determine whether the profit was so low as to amount to "unnecessary hardship." To the contrary, more than one person testified that the applicant sought the variance "not just to survive, but [to] earn even more money."<sup>19</sup>

The *Stolman* case exemplifies the strict approach most courts have taken with respect to hardships, highlighting the need for the applicant to document hardships with evidence in the record. The *Stolman* court suggested that this evidence include detailed financial documentation, creating concern for applicants who do not want to publicly divulge sensitive financial information. However, in contrast to *Stolman*, the court in *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* held last year that applicants do not need to address hardships solely in economic terms but can take into account other factors, such as safety hazards.<sup>20</sup> The court did so in ruling on a specific plan exception, which is similar to a variance. Thus, courts have differed over the

# MCLE Test No. 183

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. A general law city can grant a "use" variance.  
True.  
False.
2. California law requires that an agency make findings supporting the adoption of a variance.  
True.  
False.
3. Applicants for a variance are forbidden from providing an agency with proposed variance findings.  
True.  
False.
4. A "special circumstance" justifying a variance may involve:
  - A. Existing historic structures.
  - B. Unusual topography.
  - C. Characteristics of the users of the proposed project.
  - D. Overlapping regulations.
  - E. All of the above.
5. A variance may not be used:
  - A. To relieve a property owner from height and density limitations.
  - B. To allow for the use of a property when a strict application of the zoning code would render the property unusable.
  - C. To increase an applicant's property values regardless of whether the property is usable under its current zoning status.
  - D. To bring a property owner into parity with other similarly situated properties.
6. There must be a "logical relationship" between the identified special circumstance and the requested variance.  
True.  
False.
7. A property owner may be able to obtain a variance even when the hardship justifying the variance was self-imposed.  
True.  
False.
8. A variance is a safety valve that protects property owners from an unconstitutional taking.  
True.  
False.
9. Charter cities may impose additional variance requirements, including:
  - A. The variance must be consistent with the purpose and intent of the zoning code.
  - B. The variance must be consistent with the general plan.
  - C. The variance must not be injurious to the public or surrounding properties.
  - D. All of the above.
10. The standard of review for a zoning change is stricter and less deferential than for a variance.  
True.  
False.
11. Special circumstances claimed to justify a variance must be related to the physical nature of the property.  
True.  
False.
12. California courts did not reverse a variance grant in a reported decision prior to 1966.  
True.  
False.
13. A charter city must impose the same variance findings required by Government Code Section 65906.  
True.  
False.
14. Which of the following facts is relevant to justify a variance?
  - A. Project design and amenities.
  - B. Benefits to the community.
  - C. The superiority of the proposed project to the viable alternatives.
  - D. None of the above.
15. A court hearing a challenge to an agency's variance grant or denial may consider extra-record evidence in determining whether the agency's action was proper.  
True.  
False.
16. A variance is the only way property owners can obtain relief from regulations limiting the use of their land.  
True.  
False.
17. Courts generally defer to agencies' decisions granting variances.  
True.  
False.
18. A developer's voluntary adoption of stricter building standards is a hardship justifying the approval of a variance.  
True.  
False.
19. In deciding whether to grant a variance, agencies must consider similarly situated properties in the same zone and geographic area.  
True.  
False.
20. Applicants seeking a variance for a project should use the required variance findings to focus on project benefits to sell the project to decision makers and the public.  
True.  
False.

## MCLE Answer Sheet #183

### ZONE DEFENSE



Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

Phone \_\_\_\_\_

State Bar # \_\_\_\_\_

#### INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.
2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may be submitted; however, this form should not be enlarged or reduced.
3. Mail the answer sheet and the \$15 testing fee (\$20 for non-LACBA members) to:

Los Angeles Lawyer  
MCLE Test  
P.O. Box 55020  
Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.
5. For future reference, please retain the MCLE test materials returned to you.

#### ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.  True  False
2.  True  False
3.  True  False
4.  A  B  C  D  E
5.  A  B  C  D
6.  True  False
7.  True  False
8.  True  False
9.  A  B  C  D
10.  True  False
11.  True  False
12.  True  False
13.  True  False
14.  A  B  C  D
15.  True  False
16.  True  False
17.  True  False
18.  True  False
19.  True  False
20.  True  False

factors and level of hardship that must be present in upholding a variance or plan exception, depending on the facts and equities of a particular case.

Some property owners have attempted to create a hardship to justify a variance, but courts have roundly condemned this practice.<sup>21</sup> In one case, a property owner deliberately sold a portion of its land to create a claimed "hardship" that allegedly justified a front-yard tennis court prohibited by the zoning code.<sup>22</sup> Not surprisingly, the court upheld the city's denial of the variance.<sup>23</sup> Similarly, in another case, a court held the developer's use of "attractive architectural features" and voluntary adoption of stricter building standards were self-imposed hardships that did not justify a variance from floor-area-ratio requirements.<sup>24</sup> Self-imposed hardships also include circumstances in which property owners purchase property in anticipation of obtaining a variance for a use forbidden at the time the owners bought the property.<sup>25</sup> Hardships created by the previous owner of a property also may be considered self-imposed and thus are insufficient for a variance.<sup>26</sup>

The "special circumstances" finding required for a variance—the second prong of variance analysis—involves distinguishing the property from other properties in the zone. Classic special circumstances are unusual physical characteristics of the property, such as size, shape, topography, location, or surroundings.<sup>27</sup> For example, courts have found special circumstances when a lot was irregularly shaped and graded, had no real backyard, and faced a winding street.<sup>28</sup> These special circumstances warranted the granting of a variance from building setback and fence height requirements.<sup>29</sup> Similarly, a variance from off-street parking requirements was appropriate because of the special circumstances involving a parcel partially submerged by the San Francisco Bay. To meet the parking requirements, the owner would have needed to fill the submerged area and demolish an existing building on the parcel.<sup>30</sup> Special circumstances also can include existing historic structures and landscaping.<sup>31</sup>

The particular characteristics of the expected occupants or users of a building can be a special circumstance. For example, special circumstances supported a reduction in parking for a neighborhood synagogue, to which most regular attendees walk rather than drive.<sup>32</sup> Another court found that reduction in parking for an apartment building was supported by the fact that most prospective residents would not own cars.<sup>33</sup> Close proximity to other parking facilities can also be a special circumstance supporting a parking variance.<sup>34</sup>

Special circumstances do not necessarily

need to be physical. Overlapping regulations that create a disparate impact can be grounds for a variance.<sup>35</sup> In *Craik v. County of Santa Cruz*, a Federal Emergency Management Act (FEMA) regulation prohibited the owner of a beachfront parcel from using the ground floor as living space.<sup>36</sup> The local zoning code also imposed various height, setback, and floor-area-ratio limits that further constrained development of the parcel.<sup>37</sup> The court found that although the FEMA and related zoning regulations applied in the abstract to all owners in the applicable zone, in reality the regulations only affected a few vacant parcels because most of the other properties in the zone were already developed.<sup>38</sup> The court concluded that this disparity was a special circumstance that could support a variance.<sup>39</sup>

Finally, in order to qualify as a special circumstance, there must be a "logical relationship" between the condition identified and the variance requested.<sup>40</sup> This means that the unusual condition must cause the hardship. For example, in *Broadway Laguna*, the applicant presented evidence the property had unusual topsoil conditions; however, he was requesting a variance from floor-area-ratio requirements, and he failed to show any link between the topsoil and the need for additional floor area ratio. Therefore, the court concluded a variance was improper.<sup>41</sup> In another case, a property was closer to the freeway than other similarly regulated properties, but the findings failed to provide a rationale for why the property's proximity to the freeway justified a height variance.<sup>42</sup>

The third finding establishes that the variance is necessary to bring the property owner into parity with other properties in the same zone and vicinity. Conversely, a variance cannot grant the applicant a special privilege.<sup>43</sup> Thus, the particular characteristics of a property are not by themselves sufficient to support the grant of a variance.<sup>44</sup> The applicant must show that these characteristics differ from other similarly situated properties.<sup>45</sup> For example, in *Topanga*, the staff report described the property's "rugged features" but did not conclude that the property was any different from neighboring land.<sup>46</sup>

Therefore, agencies must examine the characteristics of similarly situated properties in the same zone and geographic area.<sup>47</sup> For example, a yard variance to allow a 4,000-square-foot residence might not be justified if other homes in the neighborhood are generally half that size. In one case dealing with a variance for a hotel, the court upheld a variance because the agency had compared the hotel with a competitor hotel in the same zone and concluded that the variance was necessary to create parity between them.<sup>48</sup>

Additionally, in *Stolman*, part of the court's reason for overturning the variance

allowing detailing operations at a gas station was because the similarly situated properties relied upon by the city to approve its variance findings were not in the same zone or even the same city.<sup>49</sup> The closest property was in Eagle Rock, over 19 miles from the gas station, which was located in Santa Monica Canyon.<sup>50</sup> The court found that the city's reliance on these other properties was "not only a reach but [was] an irrational stretch."<sup>51</sup> With *Stolman* and other case law as a guide, counsel should ensure that variance findings provide sufficient detail regarding similarly situated properties in the same zone and located as close as possible to the subject property.

Many agencies permit or even require the applicant to prepare an initial draft of the agency's written findings to support the variance. Even when the agency drafts its own findings, it is essential that the applicant review them to ensure the variance findings are tailored to the applicable legal requirements.

One common problem with variance findings is that an applicant or planning staff will often focus on project benefits in order to "sell" the project to the decision makers and the public, ignoring the relevant legal requirements. However, courts have been clear that project design, amenities, benefits to the community, and the superiority of the proposed project design to ones developed in conformity with zoning regulations are irrelevant when considering whether to grant a variance.<sup>52</sup> As one court explained, the agency cannot use a variance to balance one code provision against another and "earn immunity from one code provision merely by over-compliance with others."<sup>53</sup> Variance findings should demonstrate that the agency based its approval on the relevant legal requirements and did not simply grant a variance because it favored the particular project.

Variance findings should be as detailed as possible, providing specific facts 1) demonstrating the hardship—preferably the economic hardship, 2) describing the unusual circumstances and showing that those circumstances are different from other properties, and 3) showing that the unusual circumstances cause the hardship. Furthermore, the findings should provide details about many properties in the same zone and vicinity, as close as possible to the property, to show that the variance is necessary to bring the property into parity with others similarly situated.

Also, it is essential that the administrative record contain evidence in support of those findings. This evidence can be in the form of photographs, view simulations, maps, technical reports from experts, and other documentation. Counsel should submit the evidence to the agency as part of the administrative proceedings relating to the

variance. The law prohibits extra-record evidence from being submitted after the variance has been challenged in court.<sup>54</sup>

### Alternatives to Variances


Because variances are one of the most difficult entitlements to defend in court, it is important to consider alternatives that are more legally defensible. For example, an applicant can request a zone change or a zoning code amendment. A zone change constitutes a legislative approval, even if it affects only one single parcel, and under state law is afforded more deference than an agency's adjudicative decisions.<sup>55</sup> Additionally, a zone change does not require explicit findings,<sup>56</sup> is entitled to a strong presumption of correctness, and can only be overturned "if it has no reasonable relation to the public welfare."<sup>57</sup> However, although a zone change is easier to defend in court, the drawback is the approval process is more time consuming. A zone change takes longer because a public hearing must be held before the planning commission and legislative body of the agency (such as the city council or board of supervisors) prior to approval, unlike a variance, which can be approved by a planning commission or a hearing officer.<sup>58</sup> Furthermore, some agencies may be reluctant to process zone changes without an elected official sponsoring the amendment.

"Variance-light" procedures are another alternative adopted by many jurisdictions. These allow minor adjustments and modifications of development standards but do not require the same strict findings as those needed for a variance. For example, the City of Los Angeles allows a zoning administrator to approve adjustments and minor modifications in yard, area, building line, and height requirements, sometimes even without a public hearing if the matter is not controversial.<sup>59</sup> Likewise, the County of Los Angeles has a parking permit procedure that allows the planning director to reduce the amount of required parking spaces if certain requirements are met.<sup>60</sup> The requisite findings for these adjustments are similar but less strict than for a variance.

Nevertheless, it is presently unclear whether a court would be more deferential regarding these approvals or would apply the same standards for unnecessary hardships and special circumstances otherwise applicable to variances. One of the only reported cases that has addressed a variance-light procedure (in that case, a specific plan exception) generally applied the same hardship and special circumstances standards that apply to variances.<sup>61</sup> Thus, an applicant should always ensure that adequate written findings address each requirement of the applicable code and the record contains evi-

dence supporting these findings.

Other alternatives may be available for relief from otherwise applicable restrictions. Depending on the jurisdiction, these alternatives may be included in overlay zones or other zoning provisions. Furthermore, the recently strengthened density bonus law may provide relief from certain requirements for residential projects that incorporate affordable housing.<sup>62</sup> This relief involves permitting additional density beyond code mandates as well as other concessions and incentives, such as a reduction in setbacks and parking requirements. These incentives should be considered as an alternative to a variance.

Relying on a variance is always a matter of calculated risk. A variance can speed the approval of a project initially but can dramatically slow down the process if the variance is challenged and overturned by a court. With this risk in mind, an applicant should gauge potential opposition before applying for a variance. If a variance is opposed, the applicant should consider changing course and pursuing an alternative entitlement strategy. In any event, the applicant should not blindly rely on planning staff or other government officials to ensure the record is adequate. Considering variance alternatives and bullet-proofing variance findings can make the difference in preventing a project from being overturned in court and incurring years of costly delays. 

<sup>1</sup> See *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267, 271 (1944); *Hamilton v. Board of Supervisors*, 269 Cal. App. 2d 64, 66 (1969).

<sup>2</sup> A charter city is organized pursuant to its own city charter. CAL. CONST. art. XI, §§5-6, 8. A general law city is organized under the general laws of the state. GOV'T CODE §§34100-34102.

<sup>3</sup> See, e.g., L.A. MUN. CODE §12.27.

<sup>4</sup> GOV'T CODE §65906.

<sup>5</sup> *Allen v. Humboldt County Bd. of Supervisors*, 241 Cal. App. 2d 158, 163 (1966).

<sup>6</sup> *Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767 (1967).

<sup>7</sup> *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506 (1974).

<sup>8</sup> *Id.* at 517.

<sup>9</sup> *Id.*; *Orinda Ass'n v. Board of Supervisors*, 182 Cal. App. 3d 1145, 1161 (1986).

<sup>10</sup> GOV'T CODE §§65000 *et seq.*

<sup>11</sup> GOV'T CODE §65906.

<sup>12</sup> GOV'T CODE §65700. The Planning and Zoning Law is not applicable to charter cities.

<sup>13</sup> See, e.g., L.A. MUN. CODE §12.27; L.A. COUNTY CODE §22.56.330.

<sup>14</sup> *Id.*

<sup>15</sup> *Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 775, 777-78 (1967); *Stolman v. City of Los Angeles*, 114 Cal. App. 4th 916, 926-27 (2003).

<sup>16</sup> *Hamilton v. Board of Supervisors*, 269 Cal. App. 2d 64, 67 (1969).

<sup>17</sup> *Stolman*, 114 Cal. App. 4th at 919-20.

<sup>18</sup> *Id.* at 920.

<sup>19</sup> *Id.* at 926.

<sup>20</sup> *Committee to Save the Hollywoodland Specific Plan*

*v. City of Los Angeles*, 161 Cal. App. 4th 1168, 1184, n.12 (2008).

<sup>21</sup> *Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 778 (1967); see also L.A. MUN. CODE §12.27(D) ("The Zoning Administrator may deny a variance if the conditions creating the need for the variance were self-imposed.")

<sup>22</sup> *Atherton v. Templeton*, 198 Cal. App. 2d 146, 153-54 (1961).

<sup>23</sup> *Id.*

<sup>24</sup> *Broadway Laguna*, 66 Cal. 2d at 776-78.

<sup>25</sup> *San Marino v. Roman Catholic Archbishop*, 180 Cal. App. 2d 657, 672 (1960); *Minney v. Azusa*, 164 Cal. App. 2d 12, 31-32 (1958).

<sup>26</sup> See *PMI Mortgage Ins. Co. v. City of Pacific Grove*, 128 Cal. App. 3d 724, 731-32 (1981) (holding that the illegal subdivision of a property by a previous owner was not a hardship justifying a variance).

<sup>27</sup> See GOV'T CODE §65906.

<sup>28</sup> *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles*, 161 Cal. App. 4th 1168, 1183-84 (2008).

<sup>29</sup> *Id.* at 1184.

<sup>30</sup> *Zakessian v. City of Sausalito*, 28 Cal. App. 3d 794, 802 (1972).

<sup>31</sup> *Miller v. Board of Supervisors*, 122 Cal. App. 3d 539, 546 (1981).

<sup>32</sup> *Lucas Valley Homeowners Ass'n v. County of Marin*, 233 Cal. App. 3d 130, 152-53 (1991).

<sup>33</sup> *Siller v. Board of Supervisors*, 58 Cal. 2d 479, 485 (1962).

<sup>34</sup> *Id.*; *Lucas Valley Homeowners Ass'n*, 233 Cal. App. 3d at 153.

<sup>35</sup> *Craik v. County of Santa Cruz*, 81 Cal. App. 4th 880, 890 (2000).

<sup>36</sup> *Id.* at 886.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 890.

<sup>39</sup> *Id.*

<sup>40</sup> *Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 767, 774 (1967).

<sup>41</sup> *Id.* at 774-75.

<sup>42</sup> *Orinda Ass'n v. Board of Supervisors*, 182 Cal. App. 3d 1145, 1166 (1986).

<sup>43</sup> GOV'T CODE §65906; *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506, 520 (1974).

<sup>44</sup> *Topanga*, 11 Cal. 3d at 520.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Stolman v. City of Los Angeles*, 114 Cal. App. 4th 916, 929 (2003).

<sup>48</sup> *Miller v. Board of Supervisors*, 122 Cal. App. 3d 539, 544-45 (1981).

<sup>49</sup> *Stolman*, 114 Cal. App. 4th at 929.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Orinda Ass'n v. Board of Supervisors*, 182 Cal. App. 3d 1145, 1166 (1986).

<sup>53</sup> *Id.* at 1165.

<sup>54</sup> See CODE CIV. PROC. §1094.5.

<sup>55</sup> *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 514 (1980); *Mira Dev. Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1218 (1988).

<sup>56</sup> *Arnel Dev. Co.*, 28 Cal. 3d at 522.

<sup>57</sup> *Mira Dev. Corp.*, 205 Cal. App. 3d at 1213.

<sup>58</sup> Compare GOV'T CODE §§65853-65856 with §65901(a).

<sup>59</sup> L.A. MUN. CODE §12.28.

<sup>60</sup> L.A. COUNTY CODE §§22.56.990 *et seq.*

<sup>61</sup> *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles*, 161 Cal. App. 4th 1168, 1183-84 (2008).

<sup>62</sup> GOV'T CODE §65915. See Aamir Raza & Ted M. Handel, *Gimme Shelter*, LOS ANGELES LAWYER, Jan. 2009, at 29.