



## COMMUNITY DEVELOPMENT DIVISION *Planning & Design Section*

### BOARD OF VARIANCE INFORMATION PACKAGE

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The following information is derived from a circular issued by the Ministry of Municipal Affairs and Transit entitled: ***Board of Variance Guide - Implementing Bill 62*** (1986-OCT-27).

#### ***Function:***

Where a council or regional district board has enacted a Zoning Bylaw, or a regional district board has adopted a Rural Land Use Bylaw, Section 899 of the *Local Government Act* requires it to establish a Board of Variance. The Board of Variance is an avenue for appeal on the interpretation and the strict application of certain local government provisions and regulations in specific circumstances defined in the legislation. It functions separately from the local government that established it and has its own authority under the Act.

The Board of Variance is not an appeal board for local government policy decisions, and it cannot replace decisions of elected officials. The Board is confined to considering variances that will not impact adversely upon a policy decision or change the intent of a bylaw adopted by a municipal council or regional district board. Variances can be granted respecting bylaw requirements for the siting, dimensions, or size of buildings that are designed to deal with the most common circumstances and to be applied universally to these situations. In some special cases general regulations or ones prohibiting structural changes in a non-conforming building or requiring services upon subdivision may result in an undue hardship if applied to a particular site. A person may appeal to the Board for a variance only if the application of these general regulations to his or her particular site would impose such a hardship. The Board may also decide on the correctness of a certain type of decision made by a building inspector.

#### ***Appointments:***

In the City of Nanaimo, the Board of Variance consists of five persons. The members are appointed by City Council for a three-year term.

The members of the Board of Variance cannot be members of an advisory planning commission, elected officials or employees of the local government that appoints them. This is because their responsibilities include both assessing the correctness of an interpretation of the amount of damage given by the local government building inspector and modifying the strict application of local government regulations.

#### ***Categories of Appeal to Boards of Variance***

The duties of the Board are specified in Section 901 of the *Local Government Act*. There are five grounds for appeal, each of which involves different considerations. The precise wording of the Act is quoted here, and where there is a reference to another section, that wording is given as well.

The five categories of appeal have been characterised as follows:

1. relaxation of zoning regulations;
2. extension of non-conforming uses;
3. relaxation of servicing requirements;
4. reconstruction of a non-conforming building; and
5. relaxation of tree protection requirements.

### **Qualifiers**

The five categories of appeal in Section 901(2) are all based on the demonstration of "undue hardship" and are limited by the following:

*"901(2) - On an application under subsection (1), the Board of Variance may order that a minor variance be permitted from the requirements of the bylaw, or that the applicant be exempted from section 911(5), if the Board of Variance,*

- (a) has heard the applicant and any person notified under subsection (4),*
- (b) finds that undue hardship would be caused to the applicant if the bylaw or section 911(5) is complied with, and,*
- (c) is of the opinion that the variance or exemption does not:*
  - (i) result in inappropriate development of the site,*
  - (i.1) adversely affect the natural environment,*
  - (ii) substantially affect the use and enjoyment of adjacent land,*
  - (iii) vary permitted uses and densities under the applicable bylaw, or*
  - (iv) defeat the intent of the bylaw."*

This section requires that a Board hear an applicant and the owners and occupiers of the subject and adjacent properties. The wording of the legislation makes it clear that the decision as to whether undue hardship is demonstrated is the Board's to make. It must be satisfied a variation is justified by the presence of undue hardship. The scope of the variation, however, is limited by the word "minor" and by (a) to (c) of Section 901(2). The Board must be satisfied that all the criteria listed have been met. Each is explored below:

- a. **"Hardship"** - The application to vary the requirements of the bylaw must create a hardship. Increased cost or loss of an amenity is a hardship but is unlikely to be a sufficient reason on its own.
- b. **"Undue"** - The hardship created must be undue. The intent of this term is to limit the concerns of the Board to types of hardship that result from aspects of the site, as opposed to those that are personal to or generated by the owner. If a characteristic of a site is that bedrock protruding in the site's building area makes compliance with the siting provisions of a bylaw difficult and unreasonable, the hardship created, through no fault of the property owner himself, is undue. If other properties in the zone do not have the protruding rock, they would not be subject to the same degree of hardship.

The difficulty in determining what undue hardship is revolves around whether the hardship would have been a hardship for everyone. If compliance with the general setback regulations is difficult or expensive, but that is the case for all properties within that zone, then one could not argue that there is undue hardship. If a circumstance penalizes one or only a few owners, it would be unfair and unduly onerous.

- c. "**Minor variance**" - This terminology limits the scope of the variances the Board may allow. Relaxation of a requirement of a bylaw cannot be a substantial variation. Because the statute limits the Board's authority in this way, the Board must consider this point most carefully. While the decision of the Board is final, the courts may review an appeal on a procedural or jurisdictional issue, including the scope or degree of a variation permitted by the Board.
- d. "**Inappropriate development**" - The legislation does not limit the interpretation of "inappropriate" solely to an opinion of the Board. It states that the variance must not be "inappropriate". A simple test would be to compare the proposed development with that existing on surrounding lots. The elected officials, to some measure, have defined what is appropriate by specifying general regulations in a bylaw. If these are "appropriate" for surrounding properties, the Board should determine why they would not be equally appropriate for the particular property which is the subject of appeal.
- e. "**Substantially affect**" - The full wording in the legislation refers to affecting the use and enjoyment of adjacent land, which includes a full range of considerations such as noise, dust, destruction of views as well as safety concerns. It is the Board's obligation to determine if the variance requested would cause significant impact on surrounding properties. A petition circulated by the applicant to adjoining owners indicating consent to the variance, although a helpful indication, does not satisfy this requirement. Ownership changes and what does not offend one neighbour may offend another. The Board must decide the issue.
- f. "**Vary uses and densities**" - Variations allowed by the Board cannot change permitted use or density. Such changes are not minor. They may only be made by elected officials through a Zoning Bylaw amendment, which is subject to full public scrutiny.

The issue of density may add complexity. Variances affecting setbacks, the size and dimensions of a building, site coverage, or the floor space ratio could result in allowing change in the density of a use. However, as long as any increase in density is within the limits established in the Zoning Bylaw, it is within the permitted density.

One example would be where relaxation of a 20m setback for an apartment building may allow a larger building to be constructed on the site. It should be clear in the decision that such a relaxation does not give any special right to the developer to increase the number of units over that allowed by bylaw simply because a larger building is now possible. More units beyond the limits of the bylaw would be an increase in density.

- g. "**Defeat the intent of the bylaw**" - The Board must try to determine, from reading the bylaw, what the local government intended to be the type of neighbourhood established by the zoning regulations, it must decide this by reading the bylaw because that is the only valid definition of the council or regional district board's intent.<sup>(1),(2)</sup> Any variance granted by the Board should not disrupt the basic harmony with other developments within a zone.

### **Procedures:**

- The *Local Government Act* requires that a Board of Variance follow certain procedures, but allows other procedures to be prescribed by a bylaw of the local government establishing the Board. (Bylaw 3152)
- Members of the Board of Variance do not receive compensation for their work. However, their individual expenses and all of the operating expenses of the Board are covered in the annual budget of the City.
- The legislation requires that the chairperson be selected by the members of the Board themselves and allows the chairperson to appoint a Board member to act as chairperson in situations where he or she must be absent.
- The Act requires that before hearing an application, the Board must notify the owners and occupiers of the land subject to appeal and of all real property adjacent to the property subject to appeal. The Notice must say what is being appealed and the time and place the appeal will be heard.
- The responsibility of local government extends only to the establishment of the Board and payment of operating expenses. The Board operates separately and autonomously under the specific authority of the *Local Government Act* and there are no requirements in the Act for the local government to be notified of every appeal. The local government may, by bylaw, set procedures not covered by the Act itself providing always that such procedures are generally fair.

### **Hearings**

The Board of Variance is given authority to hold its own hearings on any matters before it.

The legislation ensures that the applicant and occupiers of the subject property and adjacent properties have the right to be heard by the Board. This means then, that some measure of public scrutiny will be present at all hearings and that none can be closed.

The *Local Government Act* requires that all decisions of the Board be a matter of public record and that any interested person can have access to them. The results of hearings are therefore recorded and made available for public review during normal business hours.

**APPENDIX 1****SECTIONS OF THE LOCAL GOVERNMENT ACT WHICH REFER TO THE BOARD OF VARIANCE*****Establishment of a Board of Variance***

899. (1) A local government that has adopted a zoning bylaw must, by bylaw, establish a board of variance.
- (2) If the population of a municipality is 25,000 or less, the board of variance for the municipality is to consist of 3 persons appointed by the council.
- (3) If the population of a municipality is more than 25,000, the board of variance for the municipality is to consist of 5 persons appointed by the council.
- (4) A board may establish one or more boards of variance, but, if more than one board of variance is established, the bylaw establishing them must specify the area of the regional district over which each board of variance is to have jurisdiction and those areas must not overlap.
- (5) Each board of variance in a regional district is to consist of 3 persons appointed by the board.
- (5.1) Two or more local governments may satisfy the obligation under subsection (1) by jointly establishing a board of variance by bylaw adopted by all participating local governments.
- (5.2) The bylaw in subsection (5.1) must
- (a) specify the area of jurisdiction for the board of variance, which may be all or part of the participating local governments, but must not overlap with the area of jurisdiction of any other board of variance, and
  - (b) establish rules for
    - (i) appointment and removal of members of the board of variance, and
    - (ii) appointment and removal of a chair of the board of variance, which apply in place of those established by this section and section 900.
- (5.3) As an exception to subsections (2) to (5) in relation to a board of variance established under subsection (5.1),
- (a) if a municipality is one of the participating local governments, the board of variance is to consist of
    - (i) 3 persons, if the population of the area of the jurisdiction of the board of variance is 25 000 or less, or
    - (ii) 5 persons, if the population of the area of the jurisdiction of the board of variance is more than 25 000, and
  - (b) if a municipality is not one of the participating local governments, a board of variance is to consist of 3 persons.

- (6) Subject to subsection (9) and to the rules established under subsection (5.2) (b) (i), an appointment to a board of variance is for the later of
- (a) 3 years, and
  - (b) if no successor has been appointed at the end of the 3 year period, until the time that a successor is appointed.
- (7) A person who is
- (a) a member of the advisory planning commission or of the local government, or
  - (b) an officer or employee of the local government
- is not eligible to be appointed to a board of variance.
- (8) If a member of a board of variance ceases to hold office, the person's successor is to be appointed in the same manner as the member who ceased to hold office, and until the appointment of the successor, the remaining members constitute the board of variance.
- (9) A local government may rescind an appointment to a board of variance at any time.
- (10) *Repealed.* [2003-15-15 (g)]
- (11) Members of a board of variance must not receive compensation for their services as a member, but must be paid reasonable and necessary expenses that arise directly out of the performance of their duties.
- (12) A local government must provide in its annual budget for the necessary funds to pay for the costs of the board.

### **Variance or Exemption to Relieve Hardship**

901. (1) A person may apply to a board of variance for an order under subsection (2) if the person alleges that compliance with any of the following would cause the person hardship:
- (a) a bylaw respecting the siting, dimensions or size of a building or structure, or the siting of a manufactured home in a manufactured home park;
  - (b) a bylaw under section 8 (3) (c) [*fundamental powers – trees*] of the *Community Charter*, other than a bylaw that has an effect referred to in section 50 (2) [*restrictions on authority – preventing all uses*] of that Act if the Council has taken action under subsection (3) of that section to compensate or mitigate the hardship that is caused to the person;
  - (c) the prohibition of a structural alteration or addition under section 911(5);
  - (d) a subdivision servicing requirement under section 938(1)(c) in an area zoned for agricultural or industrial use.
- (2) On an application under subsection (1), the board of variance may order that a minor variance be permitted from the requirements of the bylaw, or that the applicant be exempted from section 911(5), if the Board of Variance,

- (a) has heard the applicant and any person notified under subsection (4),
  - (b) finds that undue hardship would be caused to the applicant if the bylaw or section 911(5) is complied with, and,
  - (c) is of the opinion that the variance or exemption does not
    - (i) result in inappropriate development of the site,
    - (i.1) adversely affect the natural environment
    - (ii) substantially affect the use and enjoyment of adjacent land
    - (iii) vary permitted uses and densities under the applicable bylaw, or
    - (iv) defeat the intent of the bylaw.
- (3) The board of variance must not make an order under subsection (2) that would do any of the following:
- (a) be in conflict with a covenant registered under Section 219 of the Land Title Act or section 24A of the Land Registry Act, R.S.B.C. 1960,c.208;
  - (b) deal with a matter that is covered in a permit under Division 9 of this Part or covered in a land use contract;
  - (c) deal with a flood plain specification under section 910(2);
  - (d) apply to a property
    - (i) for which an authorization for alterations is required under Part 27,
    - (ii) that is scheduled under section 880(3)(b) or contains a feature or characteristic identified under section 880(3)(c), or
    - (iii) for which a heritage revitalization agreement under section 966 is in effect.
- (4) If a person makes an application under subsection (1), the board of variance must notify all owners and tenants in occupation of
- (a) the land that is the subject of the application, and
  - (b) the land that is adjacent to land that is the subject of the application.
- (5) A notice under subsection (4) must state the subject matter of the application and the time and place where the application will be heard.
- (6) The obligation to give notice under subsection (4) must be considered satisfied if the board of variance made a reasonable effort to mail or otherwise deliver the notice.
- (7) If a board of variance orders under subsection (2) that a minor variance be permitted or an exemption from section 911(5) be allowed, it may order that, unless the construction of the building, structure or manufactured home park is completed within a time set in the order, the permission or exemption terminates and the bylaw or section 911(5), as the case may be, applies.
- (8) A decision of the board of variance under subsection (2) is final.

### **Non-Conforming Uses and Siting**

- 911 (1) If, at the time a bylaw under this Division is adopted,
- (a) land, or a building, or other structure, is lawfully used, and
  - (b) the use does not conform to the bylaw,

- the use may be continued as a non-conforming use, but if the non-conforming use is discontinued for a continuous period of 6 months, any subsequent use of the land, building or other structure becomes subject to the bylaw.
- (2) The use of land, a building or other structure for seasonal uses or for agricultural purposes is not discontinued as a result of normal seasonal or agricultural practices, including
- (a) seasonal, market or production cycles,
  - (b) the control of disease or pests, or
  - (c) the repair, replacement or installation of equipment to meet standards for the health or safety of people or animals.
- (3) A building or other structure that is lawfully under construction at the time of the adoption of a bylaw under this Division is deemed, for the purpose of this section,
- (a) to be a building or other structure existing at that time, and
  - (b) to be then in use for its intended purpose as determined from the building permit authorizing its construction.
- (4) If subsections (1) and (2) authorize a non-conforming use of part of a building or other structure to continue, the whole of that building or other structure may be used for that non-conforming use.
- (5) A structural alteration or addition, except one that is required by an enactment or permitted by a board of variance under Section 901(2), must not be made in or to a building or other structure while the non-conforming use is continued in all or any part of it.
- (6) In relation to land, subsection (1) or (4) does not authorize the non-conforming use of land to be continued on a scale or to an extent or degree greater than that at the time of the adoption of the bylaw under this Division.
- (7) For the purposes of this section, a change of owners, tenants or occupants of any land, or of a building or other structure, does not, by reason only of the change, affect the use of the land or building or other structure.
- (8) If a building or other structure, the use of which does not conform to the provisions of a bylaw under this Division is damaged or destroyed to the extent of 75% or more of its value above its foundations, as determined by the building inspector, it must not be repaired or reconstructed except for a conforming use in accordance with the bylaw.
- (9) If the use and density of buildings and other structures conform to a bylaw under this Division but
- (a) the siting, size or dimensions of a building or other structure constructed before the bylaw was adopted does not conform with the bylaw, or
  - (b) the siting, size, dimensions or number of off-street parking or loading spaces constructed or provided before the bylaw was adopted does not conform with the bylaw,
- the building or other structure or spaces may be maintained, extended or altered to the extent authorized by subsection (10).



- (10) A building or other structure or spaces to which subsection (9) applies may be maintained, extended or altered only to the extent that
- (a) the repair, extension or alteration would, when completed, involve no further contravention of the bylaw than that existing at the time the repair, extension or alteration was started, and
  - (b) in the case of protected heritage property, the repair, or alteration is permitted or authorized in accordance with the provisions governing the heritage protection of the property.
- (11) Subsections (5) and (8) do not apply to alterations, additions, repairs or reconstruction of a protected heritage property if the alteration, addition, repair or reconstruction is authorized by a heritage alteration permit under section 972.