

Having factors is very helpful when the Board denies a variance and the same is challenged in court but having factors does make it even more difficult to grant a variance. I also understand the concern of not wanting to make it too lax and worry that removing the factors will do that, but in my experience, the Board is going to grant the ones that make sense and have no opposition from neighbors. But, I actually do prefer to not have required factors that must be met to approve a variance as I do see variances are granted sometimes when the factors are not present. Instead, I prefer to just state variances can be granted upon showing of “practical difficulties” for non-use variances. If the Board needs further direction, give them possible items to consider rather than absolute factors that must be met. For example, the factors currently in the code could just be changed to items that should be considered when determining if the applicant met his/her burden of establishing practical difficulties. It does seem like he is interested in what Bryson feels is best for the Board so just let me know if you need anything from us at this point. In case it is helpful, below is from one of my training materials discussing practical difficulties and permissible considerations.

There is a no specific definition as to what constitutes practical difficulties. *Antioch Cmty. Church v. Bd. of Zoning Adjustment of City of Kansas City*, 543 S.W.3d 28, 37 (Mo. 2018) (citations omitted) (“[W]hat constitutes a practical difficulty is inherently fact-specific and so committed to the discretion of the zoning authority...”). Items for consideration can be:

- a. How substantial the variation is in relation to the requirement;
- b. Effect on available governmental facilities (fire, water, garbage) caused by increased population density?
- c. Substantial change in character of neighborhood or substantial detriment to adjoining properties?
- d. Any alternative method or other option besides the variance?
- e. Whether in view of the manner in which the difficulty arose and considering all of the above factors the interests of justice will be served by allowing the variance.

*Antioch Community Church v. Board of Zoning Adjustment of City of Kansas City*, 543 S.W.3d 28, 36-37 (Mo. 2018).

#### **D. Other Permissible Considerations:**

1. **A detriment to adjoining properties** can and should be considered. *Karelitz v. Soraghan*, 851 S.W.2d 85, 90 (Mo. App. 1993); *Slate v. Boone County Board of Adjustment*, 810 S.W.2d 361, 364 (Mo. App. 1991). As one court has observed, the "Board has an affirmative duty to uphold the spirit of the zoning ordinances... Where the result may affect neighboring property, consideration of the future use of that property is relevant." *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 245 (Mo. App. 1987).
2. **Financial considerations** may be taken into account in determining practical difficulties and unnecessary hardships. *Carlyle-Lowell, Inc. v. Ennis*, 330 S.W.2d 164, 169 (Mo. App. 1959). Practical difficulties and unnecessary hardships are not limited to physical impossibility of use but include **economic hardships**. [*However, the economic hardships must pertain to the nature of the property rather than the character of the owner*]. *Conner v. Herd*, 452 S.W.2d 272, 277 (Mo. App. 1970).

### 3. Did the Property owner cause the difficulty or hardship?

- a. "One who purchases realty with the intention of applying for a variance generally cannot contend that restrictions caused him such peculiar hardship that he is entitled to special privileges." *J.R. Green Properties v. City of Bridgeton*, 825 S.W.2d, 684, 686 (Mo. App. 1992); see also *Ogawa v. City of Des Peres*, 745 S.W.2d at 244 (in denying request for variance, the court noted that, prior to purchasing the property, petitioner had been informed that certain variances may have to be requested.); *State ex rel. Tucker v. McDonald*, 793 S.W.2d 616, 618 (Mo. App. 1990) (conditions causing hardship must be unique and peculiar to the property and not prevalent in the neighborhood; petitioner purchased property "with full knowledge of the zoning restrictions" and thus conditions for the variance were "personal and not directly affecting" the property).
- b. *Self-created Hardship or Difficulties*: A variance is also inappropriate when the financial hardship created by an ordinance results from the owner's action rather than economic impact of the ordinance on the land itself. *Wolfner v. Board of Adjustment of the City of Warson Woods*, 114 S.W.3d 298, 303-304 (Mo. App. 2003). The court denied the variance for failure to prove practical difficulties, noting that the applicants agreed to pay for the property "with full knowledge that it did not meet the minimum residential building requirements," and even made the agreement to purchase contingent upon receiving the necessary variances.
- c. "The practical difficulty or [unnecessary] hardship relied on as a ground for a variance **must be different from that suffered throughout the zone or neighborhood.**" *Ogawa v. Des Peres*, 745 S.W.2d 238, 243 (Mo. App. 1987). **Hardships pertain to the nature of the property rather than the character of the owner.** *Id.* at 245. **Thus, when granting a variance the Board must consider the present and future effect of such variances on that property and neighboring property.** *Id.* Variances run with the land; they are not personal to the owner. *Id.*; See also, *State ex rel. Klawuhn v. Board of Zoning Adjustment of City of St. Joseph*, 952 S.W.2d 725, 728 (Mo. App. 1997) (variance was improperly granted where Board based decision on conditions personal to applicant — "the size of the storage building was not dictated by the shape or topography of the lot but rather the [applicant's] desire to store their numerous vehicles and equipment inside"); *State ex rel. Sander v. Board of Adjustment of the City of Creve Coeur*, 60 S.W.3d 14 (Mo. App. 2001) (request for variance from 15 foot maximum setback requirement for a 234 foot setback was properly denied because the property "was not unique to other properties located within the Core Business District and no outstanding site characteristics appear[ed] on the site that prevent[ed] the site [from] being developed in accordance with the required building setbacks.").