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PRACTICE **VARIANCES**



Avoiding Idiotic Variances

By Lane Kendig

The drafters of the first zoning ordinances felt it was legally essential to provide a variance procedure to deal with unique circumstances that render a lot unbuildable.

All photos and diagrams by Lane Kendig



➡ Because these town houses have a variety of unit configurations, many communities would require variances before approving the project.

For example, an existing lot might have a small ravine on it, making it impossible to locate a home within the required setbacks. The ravine was a unique condition that differed from the conditions on neighboring lots and a variance could allow for a relaxation of the setbacks to make the lot buildable.

All state enabling laws delegate the power to grant variances to a zoning board or board of appeals (comprised either of elected or appointed officials). These state laws generally include criteria that should

be met in granting a variance. Some common ones are:

- There is a special condition on the site not present on other properties in the district.
- A literal enforcement of the provisions will result in unnecessary hardship.
- The condition is not self created.
- A strict interpretation would prevent the owner from enjoying the same rights as others in the district.

- A variance would not create a special privilege for the land owner.

The variance was an excellent tool for big cities where streets and blocks were often platted in advance of development and before the adoption of zoning. The initial intent of the variance was to grant relief to an existing lot that was rendered unbuildable, but planning and zoning objectives have expanded greatly since the first zoning codes. Consequently, there is now a second class of variances that develop-

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About the Author

Lane Kendig is the founder and former president of Kendig Keast Collaborative. He has been practicing and writing about the relationship between community design planning and regulatory tools for more than 40 years. In addition to the recent books *Community Character* and its companion, *A Guide to Planning with Community Character*, Kendig is the author of *Performance Zoning* and the PAS reports *Too Big, Boring, or Ugly*; *Traffic Sheds*; *Rural Highway Capacity*; and *Growth Management*; and *Performance Standards for Non-Residential Uses*.

ers seek because standards in the code do not permit a creative solution to laying out the development or result in the loss of lots or increased costs. A third class of variance applies to a whole series of controls in the zoning—none of which render a site unbuildable—that simply frustrate a developer’s attempt to build a different type of community. For example, in some communities developers might have to obtain more than a dozen variances to build a cluster subdivision, planned unit development (PUD), or a rural hamlet. Yet another class of variances is attributable to code amendments that create a host of nonconforming uses. These last three classes are foolish, or idiotic, variances because good planning is frustrated by the ordinance.

Unfortunately, the administration of variance requests in many communities can also be described as idiotic. It is not unusual for communities to grant 70 to 95 percent of all variance requests. When nearly every variance for a larger sign, enclosed porch, or reduced setback is granted, then it is foolish to force owners to go through the variance process. This means zoning boards are either ignorant of or not following the local zoning code and variance criteria established by state statute.

Leaving aside the possibility that zoning board members are incompetent, why is this happening? One reason is that zoning boards see themselves as problem solvers for the residents. In small communities this may be a “help your neighbor” attitude. In other cases zoning board members may not understand the role of their quasi-judicial body. In older cities it may simply

be a desire not to impede reinvestment. Too few communities use a hearing officer to create a truly quasi-judicial process, and there is rarely a review of the zoning board’s performance.

Planners often share the blame. For example, some planners fail to strongly recommend denial in staff reports when an application fails to meet the criteria. There are many communities where staff never makes recommendations. In the absence of strong recommendations it is easy for zoning boards to grant variances. Furthermore, many variances are the result of poorly written or obsolete codes. Citizens are left to muddle through the zoning board instead of planners proposing code amendments to fix the code and eliminate the need for a variance. If there are many approved variances to a specific provision, it is irresponsible not to amend the code.

The last reason for the idiotic variance is rigidity. The first zoning codes used a minimum lot size combined with setbacks from front, side, and rear property boundaries to control character. Over the last nearly 100 years, designers developed more creative approaches to development: cluster, PUD, mixed use, and traditional neighborhood design. Unfortunately, zoning has not kept up and Euclidean provisions remain the dominant form of ordinance.

In an attempt to provide flexibility, communities introduced conditional approval processes instead of writing flexible standards. In many codes there is a specific enumeration of variances required for cluster or planned development options. The problem with this approach is that it is pro-

cedural and does not address the underlying inflexibility and rigidity. Worse, the approval process quickly became a battleground between developers seeking flexibility and NIMBYists who would prefer no development. While new urbanists decry the failure of Euclidean zoning to permit mixed use and traditional designs, form-based codes are rigid too in their street design, setbacks, requirements for porches and fences, and architectural detailing.

THE SOLUTION

The tongue-in-cheek solution is to permit “idiot variances” when the code is foolish as applied or if it stifles creativity. The reality is this would exacerbate the problem. It is unconscionable for a community to force its citizens to seek a variance (at considerable time, effort, and expense) when relief is nearly always granted. The solution is to reduce the need for variances to a few unique conditions. The discussion in the following sections details various approaches that eliminate the need for a variance to be requested.

Annual Review

One simple procedural means of eliminating improper variance approvals is an annual review. At the end of the year all approved variances would be submitted to the elected officials for review. The staff would prepare a report as to whether the approvals conformed to the required standards. In the case of the municipality that approved numerous sign-size variations, the elected officials could indicate to the zoning board that their actions were either improper—



➞ This mix of single- and two-family homes in Serenbe Hamlet (Chattahoochee Hill Country, Georgia) shows how flexible standards can encourage high-quality design.

directing them not to approve similar requests, or proper—directing staff to change the maximum sign size. Either of the actions should eliminate the need for variances.

Neighborhood Conservation Districts

In cities and counties with a long development history, many subdivisions are nonconforming. Often the problem arose because areas were platted before zoning or because the zoning was changed. The problem of nonconforming residential lots is best addressed by creating a neighborhood conservation (NC) district that matches existing conditions. The NC district is applied to existing developed areas that were built to different standards than current districts, and no unplatted land may be zoned NC.

An example of the problem was a community that 20 years previously had changed the frontage requirement for their 5,000-square-foot lots from 50 to 60 feet. The result was that nearly half the homes in the zone were nonconforming, requiring many home owners to seek variances. This was corrected by creating two neighborhood conservation districts, an NC5n (narrow) and an NC5w (wide). The zoning map was revised to place all 5,000-square-foot lots in the proper class. The result was that

the existing 5,000-square-foot district was eliminated and the map revised so that all the nonconforming narrow lots became conforming. Since these are residential districts, all single-family NC districts can be treated as one with a single-use table entry and lot requirements in tabular form for each district.

The problem of nonconforming residential lots is best addressed by creating a neighborhood conservation (NC) district that matches existing conditions.

The NC district works very well when the nonconforming areas are entire developments or blocks, and in most municipalities or counties this will be the case. Occasionally single-family lot size may vary within the block or development, which would require parcel-by-parcel mapping that would be tremendously costly and prone to error. A different approach can be used for these types of areas. All such areas would be NC single family with a table showing ranges of lot sizes, with a setback related to each range. Thus, the table might show 20

to 25-, 26 to 30-, 31 to 35-, 36 to 40-, and 41 to 49-foot lot widths. The result of these two approaches is that all, or nearly all, existing lots become conforming, eliminating the need for a variance. Where setbacks of existing homes are not uniform, the community can use setback averaging to eliminate the need to request a variance.

Limited Uses

Limited uses are uses permitted by right, provided they meet specific performance criteria. The performance criteria could be location, history, design, or other factors. For example, in many older cities sizeable areas were developed in the 1920s through 1950s with single-family homes, even though the zoning permitted duplexes or multifamily buildings. Decades later, developers saw opportunities to replace single-family homes in these aging neighborhoods with permitted duplexes or

apartments. Predictably, residents often objected that the redevelopment was inconsistent with the character of their neighborhood. While downzoning is a logical response, all existing higher-intensity uses would then become nonconforming. This was a problem for about 25 percent of such areas. However, if the downzoned district permits duplexes or apartments as limited uses, provided they existed on the date of the downzoning all existing units remain conforming uses and can be remodeled or rebuilt. This approach increases the likelihood that residents will accept the existing units, while preventing teardowns that change neighborhood character.

A similar approach can be used to address corner stores, restaurants, or even bars that existed prior to the zoning and have continued as nonconforming uses. Despite the convenience these uses provide to residents, their value has depreciated because of the nonconforming status. Corner stores are a particular problem because it is difficult to convert the ground floor to residential use. As a consequence, they sit vacant, or the lower floor is abandoned, creating an eyesore. All of these uses could be made limited uses in the district, with conditions that the buildings not only had to be built prior to a specific date, but that they also had to have been built for commercial use. For some uses such as restaurants or bars, additional criteria could be added to prevent a neighborhood-serving use from becoming a regional use involving late-night music or street activity. In this strategy the neighborhood is protected from the introduction of high-intensity commercial uses or nuisances while still permitting local commercial services. If formerly nonconforming uses can invest in improvements, it enhances the value of the neighborhood.

Mitigation

In theory nonconforming uses are supposed to disappear. In fact, nonconformities may continue for decades. When this happens, the nonconforming use often declines in value and appearance because the owner is unable to obtain financing for improvements. For this reason, communities should allow for conditional approvals to provide a means of mitigating nonconforming uses. A landowner can apply for mitigation via a conditional use. This requires a hearing to be held to examine the current effects of the use and to recommend improvements to make the use a better neighbor.

Converting a nonconforming use to a conditional use can remove the cloud that discourages investment and maintenance while protecting the neighbors. An example of this is a tire store on an arterial highway in a residentially zoned neighborhood. It has been nonconforming for decades and remains a viable business. For most residents, who have lived with it for years, the store is only a minor nuisance. The conditional use process would allow the owner to propose expansion of the use while providing things like screening walls or landscaping, facade renovation, or ensuring that tire work occurs indoors. Subject to a hearing that allows the neighborhood to review the proposal and suggest mitigation measures that improve the neighborhood, a conditional use permit can be issued.

ADDING FLEXIBILITY

Why are codes so rigid? First, mandating specific lot area, frontage, use, and other standards is easy to write or illustrate in drawings. No thought needs to be given to a problem with a particular property or to conflicting goals. One-dimensional thinking is easier than systemic thinking. As soon as one identifies a series of objectives that zoning is supposed to address, one needs to understand how all elements of design interact. Secondly, there is complexity associated with flexibility. If something is a problem, it is easier to throw the baby out with the bathwater than to write a section that identifies exceptions to a prohibition and rules governing permitting the design to be used. There are two basic approaches to dealing with rigidity: providing targeted flexibility and providing general flexibility.

Targeted Flexibility Using Modulation

As an alternate to variances or conditional uses, modulation is a tool that can address most flexibility issues. A great many regulations are written to eliminate a specific problem, by prohibiting the use of a design element or setting a limit. Unfortunately, this may mean prohibiting something that, while generally undesirable, can be a valuable tool in specific conditions. Providing flexibility requires looking beyond a specific problem and determining where or when the tool might be useful. Modulation provides staff with rules that permit modulation of the standards without having to appear before the zoning board.

For example, developers used flag lots in the past to avoid building a street. In extreme cases there may be two rows of lots

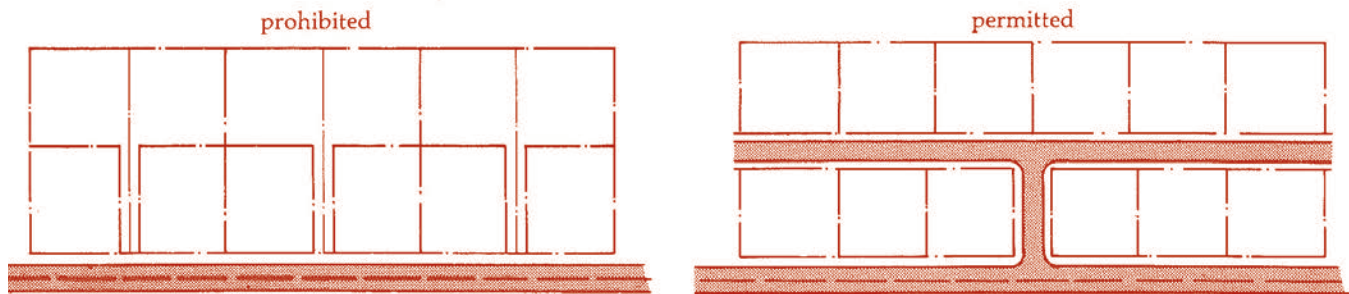
taking access off a street, resulting in numerous additional curb cuts and potential hazards. Consequently, most ordinances prohibit them. However, there are several situations where flag lots actually could result in better planning. As noted above, it is cumbersome and complex to write a series of exceptions to the prohibition. A better solution is a modulation article containing the conditions where the rules can specifically be relaxed, eliminating the need for a variance. Two exceptions illustrate the point. A flag lot that eliminated access on a collector road would be desirable. Another case would be using a shorter cul-de-sac with flag lots accessing several lots to reduce the disturbance of a wooded area created by a longer cul-de-sac.

A modulation chapter allows for simple base regulations while providing more complex rules in another article that is only used by those needing them. Rigid limits on block, cul-de-sac, or town house group length, or prohibitions on trapezoidal lots, are examples of regulations where flexibility is desirable. The key is providing staff with specific rules for the granting or denying of the modulation. Thus the areas of flexibility are pre-identified as are the rules for granting the flexibility.

Targeted Flexibility Using Pattern Books

Because poor design may make a unit undesirable, a means of permitting good design while avoiding the undesirable is important. For example, to avoid the monotony of row houses, communities often require facade offsets. Unfortunately, the same pattern of setbacks repeated on 100 or more units is equally monotonous. The uniformity of front setbacks makes great sense in cities where blocks are platted and uniformity is desirable. However, for hamlet, village, small traditional neighborhood, or estate developments this can be a severe design restriction. A pattern book includes the site plan but also all the essential design elements, building types, lot standards, setback, facades, and all the design details. It is akin to a final planned development approval in that it locks the developer into building what has been shown in the pattern book submission.

The conditional approval process used by most local governments includes review criteria that have nothing to do with design. Worse, they introduce nondesign issues into the approval process, most of which can be used to deny the approval, lower density, or otherwise frustrate a good design. The



➡ Without carefully written standards, developers may use flag lots to avoid building new roads.

approval of the pattern book addresses the value of the modulation in achieving a superior design. While a single front yard setback makes sense in a large urban area, in a small hamlet or a traditional mixed use neighborhood decreasing setbacks as lots approach the center is one design technique to emphasize the pedestrian-oriented nature of the center. The modulation article should provide for approval of the pattern book-controlled modulation where it creates a desirable design, and the approval criteria should be limited to design considerations. When the regulations prohibit modulation to modify density, land use, and height, many common concerns of citizens at conditional use hearings are taken off the table. Also, limiting modulation to interior lots ameliorates the concerns of citizens worried about impacts on the character of adjoining development.

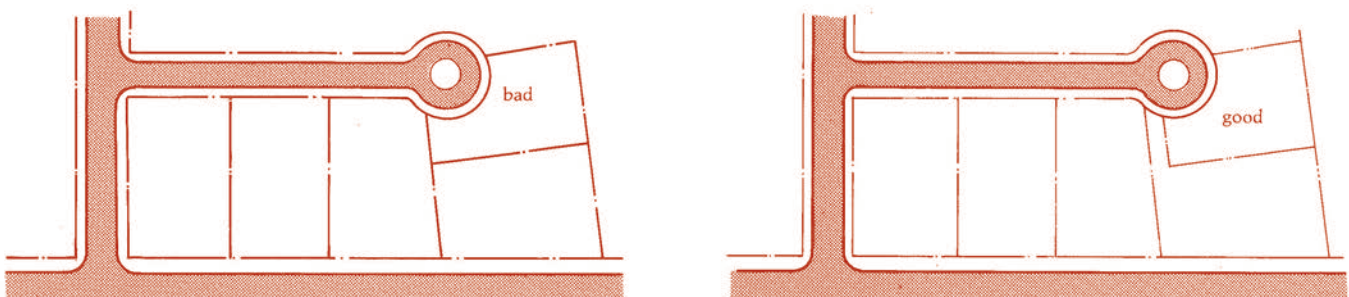
General Flexibility Permitting All Development Forms

Euclidian zoning is very inflexible. Other approaches like clustering, planned developments, traditional neighborhood development, and mixed uses have all been found to be more desirable forms of development. In some states this finding is included in the statutes. Despite this, alternative development patterns are often forced to seek conditional approvals. In the 1960s, when clustering and planned

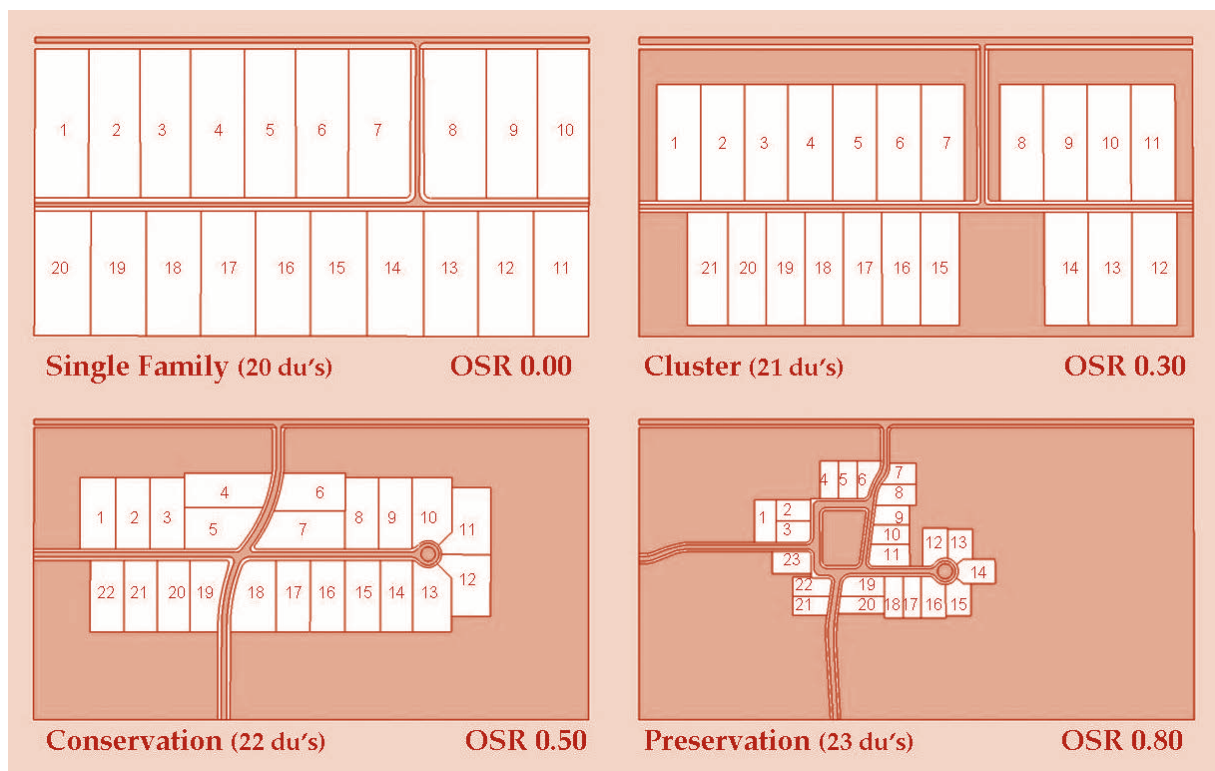
The modulation article should provide for approval of the pattern book-controlled modulation where it creates a desirable design, and the approval criteria should be limited to design considerations.

developments were new and planners had no experience with them, the conditional approval made sense. But now it makes no sense for a better design form to have to go through a lengthy, costly, and uncertain process.

Communities can provide general flexibility by adopting ordinances that are designed to allow a developer multiple ways of meeting the standards of a district. For residential areas, all dwelling unit types should be permitted in the district subject to meeting density, open space, or design standards to protect the character of the district and to encourage traditional neighborhood, planned, and cluster developments. Permitting all dwelling units eliminates the exclusionary nature of many zoning districts. Development forms such as clustering, planned and traditional neighborhood, and mixed use should be permitted as a matter of right. The zoning standards would still regulate district intensity through density, open space, use mix, scale, average and maximum height, and form requirements. These basic controls are essential to ensure the design intent or character is met. Street width can be varied with general rules that address traffic volumes on the street, unit frontage, and parking needs. Quality should be addressed by sign and other controls that address quality of design by setting high standards that should not be modulated. Landscape can be addressed



➡ With targeted flexibility, communities can permit flag lots only in special cases, such as when a flag lot would eliminate lot access from a collector road.



➡ Communities can use general flexibility to encourage residential clustering by offering increasing density with increasing levels of clustering.

with flexible tools that describe the degree of opacity of the vegetation that is to be required, allowing the landscape architect flexibility in choosing the plant material to achieve the desired result.

Design Rules for Special Cases

There are relatively unique development forms like hamlets, villages, transit-oriented development, or new (very large) new communities where specific design standards are needed over and above density and other controls. For example, a hamlet or village needs a center where commercial and the highest intensities are located, perhaps an employment area for industrial uses, interior open space, provisions for a rural buffer, and setbacks from other developments. These design rules should be included in a modulation or a design article. The rules should be highly generalized, using ranges and illustrations so as not to force a rigid template. Pattern book approval allows a designer freedom to work site constraints and the forms of development in a design review.

CONCLUSION

The excessive use of variances, in conflict with state enabling legislation or through poor planning and zoning, is very costly. The

general solution is to eliminate the need for variations. This can be accomplished by providing a legal path for transitioning existing nonconforming uses to conditional uses and by adopting zoning standards that acknowledge historic development patterns and permit both targeted and general flexibility. All of the tools above can be used in

combination to virtually eliminate the need for a variance. In small communities it should be rare to even have variance request. In larger cities and counties a combination of these rules should also make legitimate variances rare. When variances are necessary, a professional hearing examiner should hold a quasi-judicial hearing for each request.

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