

# ZONING PRACTICE

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## PRACTICE USE VARIANCES



# The Use Variance: Zoning Savior or Annihilator?

By Josh Whitehead, AICP

Zoning is the municipal tool that, as U.S. Supreme Court Justice George Sutherland put it, ensures that the “pig is in the pen and not the parlor” (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). The use variance, when used appropriately, addresses not only the pig whose pen has gentrified into a parlor through no fault of his own, but also the pig whose parlor is in name only due to action by city hall.

Take the example pictured below, a classic apartment building in Memphis, Tennessee, that was once the home of the author of this article. While legal under the local zoning code when constructed in 1928, it later became nonconforming due to a subsequent change to code that prohibited residential buildings in its commercial zoning district. While this building may have been a very attractive pig and the darling of its block, it was a pig nonetheless. In most

jurisdictions in this country, its owner would have but one option to restore the legitimacy of its use as an apartment building: petition the city to rezone the property, a process wrought with difficulties. First, the rezoning process requires two separate public hearings with two separate bodies—the same two bodies that approved the downzoning in the first place, via a text or map amendment to the zoning code. In addition, many states require consistency between their cities’ land-use decisions and long-range plans, and since many zoning changes that create nonconforming uses are the result of a long-range plan, undoing the zoning change would be inconsistent with the plan and thereby potentially illegal. Tennessee, however, allows variance requests to be inconsistent with a long-range plan, thereby making it the only viable option for certain pig owners ([§13-4-202\(b\)\(2\)\(C\)\(iii\)](#)).

## THE HISTORY OF THE VARIANCE

Ever since zoning came to America, the debate over the variance has waged. For some, it is a safety valve providing relief from unnecessary or excessive governmental intervention in the marketplace; for others, it is a “cheat” for scofflaws seeking to avoid playing by the rules. In reality, the variance can be, and has been, both. The debate over the variance began nearly 100 years ago with the drafting of the Standard State Zoning Enabling Act, largely waged between two of its principal authors, Edward Bassett and Alfred Bettman. The model zoning act was written to promote municipal zoning. With the federal government taking the lead, states could easily adopt the model act, which in turn would allow its subunit municipal governments to adopt local zoning ordinances. Section seven of the act articulated the zoning ordinance’s relief valve:

The board of adjustment shall have the following powers . . .

3. To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done (U.S. DOC 1926).

The standard act did not explicitly allow for use variances or discourage their use; in fact, the word “use” is nowhere to be found. In addition, nothing extraordinary about the property was required as a predicate to any variance—just a “special condition.” No direction was given to the municipal zoning board on what constituted such a special condition. This language was a compromise



This apartment building became a nonconforming use after a zoning change prohibited exclusively residential uses in its zoning district.

Why did the two fathers of zoning approach variances so differently? One explanation has been provided by Tennessee land-use attorney George Dean, who has opined that Bassett was the more pragmatic of the two by lobbying for a “practicable remedy” to the zoning ordinance; without one, the ordinance may frequently be challenged in court and its “constitutionality . . . imperilled” (Dean 2009). Bassett was also a firm believer that the variance should be heard by an expert administrative panel (Salkin 2017). With a zoning board that understood the zoning ordinance and regularly administered the test for variances, courts would be less likely to invalidate not only the variance but also the entire zoning ordinance (Salkin 2017). An early New York opinion put it this way:

The creation of a board of appeals, with discretionary powers to meet specific cases of hardship or specific instances of improper classification is not to destroy zoning as a policy, but to save it. The property of citizens cannot and ought not to be placed within a strait-jacket. Not only may there be grievous injury caused by the immediate act of zoning, but time itself works changes which require adjustment. What might be reasonable today might not be reasonable tomorrow (*People ex rel. St. Basil's Church of City of Utica v. Kerner et al.*, 125 Misc. 526, 211 N.Y.S. 470).

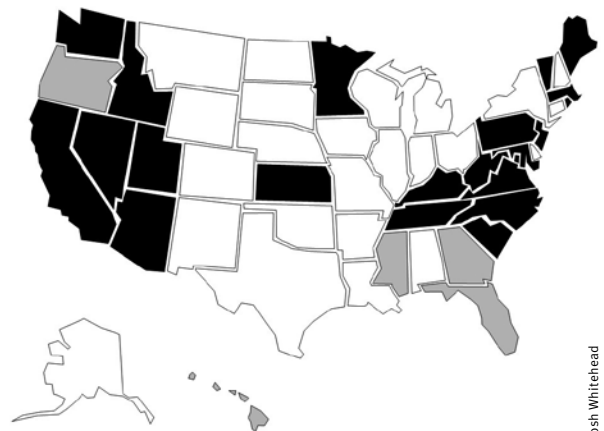
By 1930, the U.S. Department of Commerce reported that 35 states had adopted pieces of legislation based on their Standard Act (Knack et al. 1996). By the end of 1930, 786 municipalities had created planning commissions (Chase 1931). Of course, many states did not pass the act verbatim. Tennessee, for example, provided Alfred Bettman the opportunity to add language to the Standard Act that was blocked by Edward Bassett (Dean 2009). Its enabling act, adopted in 1935 and largely unaltered since, contains the following language with regard to variances:

(3) Where, ***by reason of exceptional narrowness, shallowness or shape of a specific piece of property*** at the time of the enactment of the zoning regulation, or by reason of ***exceptional topographic conditions or other extraordinary and exceptional situation or condition*** of such piece of property, the strict application of any [zoning] regulation . . . would result in peculiar and exceptional practical difficulties to or exception or undue hardship upon the owner of such property, authorize, upon an appeal relating to the property, a variance from such strict application so as to relieve such difficulties or hardship ([§13-7-207](#), emphasis added).

to the proposed improvement that could not be built under the regulations of the zoning code due to some “practical difficulty” or “undue hardship.” This was quite a high bar for property owners to meet, much less understand. In fact, many states neither define these terms nor differentiate between the two.

As opposed to Tennessee and other states that hired Bettman to tweak the Standard Act, some states' enabling legislation predated the Standard Act. For instance, Edward Bassett's first professional consultation in the field of zoning was in fact the very first zoning code in the country, New York City's. He is attributed as the coauthor of the 1916 resolution along with George McAneny, who was then the city's president of the board of aldermen. New York's varient language was even less specific than the Standard Act:

Article II, §7. Use District Exceptions. The Board of Appeals, created by chapter 503 of the laws of 1916, may, in appropriate cases, after public notice and hearing, and subject to appropriate conditions and safeguards, determine and vary the application of the use district regulations



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herein established in harmony with their general purpose and intent [of the zoning resolution] . . . (New York 1916).

So long as there were “safeguards” and “harmony with the general purpose and intent” of the zoning resolution, any zoning variance could be theoretically approved. In other words, no unique situation of the property was required. Most states are like Tennessee and New York: they either take the restrictive Bettman approach like the former or the looser Bassett approach like the latter.

### A LOOK AT A FEW STATES

Due to the imprecise and varying language of the many states’ pieces of enabling legislation, variances *vary* wildly from state to state. As noted city planner Frederick H. Bair, Jr., aptly put it, “There is probably no area of zoning law where higher courts point in so many directions as the field of variances” (1984). This is particularly true for use variances, which have the potential of an additional layer of legal and political murkiness, given they have the same result as a rezoning. Use variances are therefore the focus of a great deal of attention, particularly when a city’s council feels usurped by a process that varies from a zoning map and code that it adopted. The following case studies highlight this inevitable conflict.

In 1986, Jim and Susan Brandt were told to file for a variance before they could rent the two long-standing homes on their property to two separate families, as the property was in a single-family zoning district (*Matthew v. Smith*, 707 S.W.2d 411 (Mo. 1986)). The Kansas City Board of Adjustment approved the request, which was appealed up to the Missouri Supreme Court. In its *Matthew* decision, the court overturned a 1930 case largely interpreted as barring use variances in the state (*State ex rel. Nigro v. Kansas City*, 27 S.W.2d 1030, 325 Mo. 95 (1930)). It also set out a new rule for use variances: they must be predicated upon an “unnecessary hardship,” while area variances need only pass the “practical difficulties” test. As a result of *Matthew*, boards of adjustment in Missouri were explicitly given the green light to approve use

variances, including Kansas City’s. This was a drastic change to zoning law in the state. In fact, the reversal was so pronounced that a University of Missouri law review article exclaimed that the “Use Variance Comes to Missouri” (Scott 1987). But the city council of Kansas City was not impressed, feeling its legislative zoning powers were infringed by the advent of the use variance. It passed a resolution asking the Missouri General Assembly that its enabling legislation be amended to overturn *Matthew* (Kansas City 1992). The General Assembly obliged, and now the Missouri statutes have a carve-out prohibiting use variances in just one place in the state: Kansas City (§89.090).

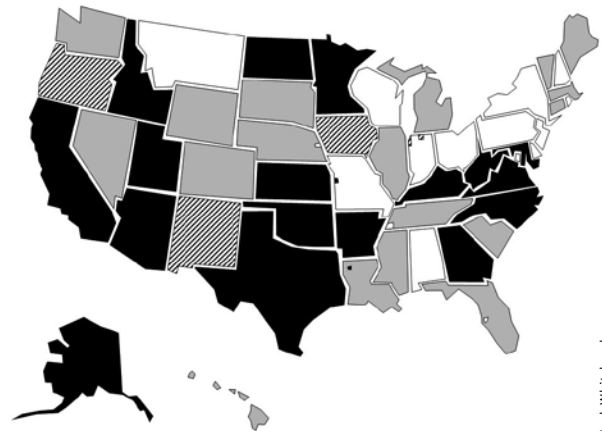
A situation similar to the that in Kansas City transpired in Tulsa, Oklahoma, in the late 1970s. Don Nucholls and his partner Lee Rhodes applied for a variance to the Tulsa Board of Adjustment for the operation of their real estate office in a residential zoning district (*Nucholls v. Board of Adjustment of City of Tulsa*, 560 P.2d 556, 1977 O.K. 3 (1977)). The board ruled that it could not act upon the applicant’s request because the Tulsa zoning code prohibited use variances (*Nucholls v. Board of Adjustment of City of Tulsa*, 1977, p. 557). The matter was appealed to the Oklahoma Supreme Court, which found that the Tulsa ordinance barring use variances was nullified by enabling legislation (*Nucholls v. Board of Adjustment of City of Tulsa*, 1977, p. 560). As a result of the *Nucholls* decision, the Oklahoma legislature amended the Oklahoma Statutes to explicitly outlaw local use variances, with the notable exception of those related to “oil and/or gas applications”

(§§11-44-104.3-4). Unlike in Missouri, this legislation had statewide applicability, reflecting a more widespread disdain throughout the state over the use variance.

Similar across-the-board prohibitions of use variances have recently passed by the Minnesota and North Carolina legislatures. In Minnesota, a pro-use variance ruling by the state supreme court triggered the legislative change (§394.27(7) & §462.357(6), in response to *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (2010)). Meanwhile, in North Carolina, the legislature codified long-established case law adverse to the concept (§160D-705(d) in response to *Lee v. Board of Adjustment of the City of Rocky Mount*, 226 N.C. 107 (1946)).

On the other end of the spectrum is New York. Its statute states that zoning boards “shall have the power to grant use variances . . .” (General City Law §81-B.3(a)). Similar language is found in New Jersey’s zoning statutes (§40:55D-70.57.d).

The Indiana Court of Appeals rebuked Shelby County when its zoning board



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- ➡ Jurisdictions shown in white allow use variances, while those that disallow use variances are shown in black. States shown in gray are either silent on the issue or allow their cities to prohibit use variances. Jurisdictions shown in hatching either require use variances to be approved by the local legislative body and not the zoning board or allow use variance appeals to be heard by the local legislative body.

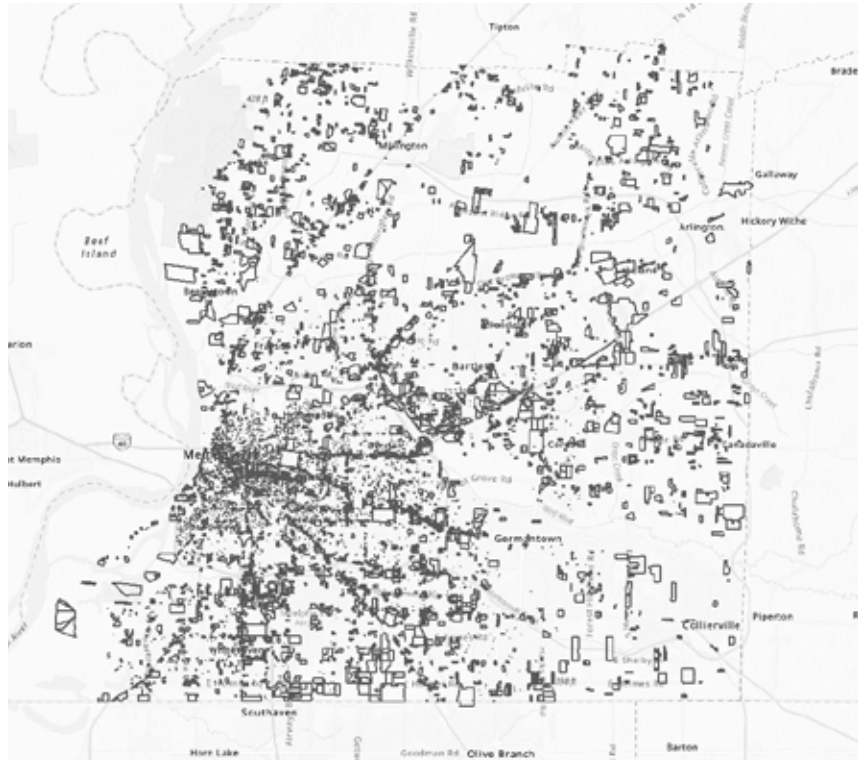
refused to consider a use variance due to a local ordinance banning them, finding “a zoning ordinance may not in any way restrict the authority of the board of zoning appeals to grant a variance where the enabling statute endows such board with powers to authorize variances . . .” (*Strange v. Board of Zoning Appeals of Shelby County*, 428 N.E.2d 1328 (Ind. Ct. App. 1981)). Following that opinion, the Indiana General Assembly amended the Indiana Code to require final approval of use variances by the municipal legislative body in the two jurisdictions presumably disturbed by this ruling: St. Joseph County (which includes South Bend) and Lake County (which includes Gary) (§36-7-918.6(b)(3)).

As far as the findings of fact expected to be made by zoning boards for the different types of variances, New York leads the way in setting apart use and non-use variances: the “practical difficulty” standard found in many statutes is used for area variances and the presumably more difficult “undue” or “unnecessary hardship” standard is used for use variances ([General City Law §81-B](#)). As discussed earlier, this is also the judicially established standard now followed by *most* jurisdictions in Missouri, based on *Matthew*.

The map above reflects the current status of use variances around the country. States are evenly split on the issue of use variances: 16 require localities to hear use variance requests, 17 prohibit use variances, and 18 are somewhere in between. Note that Omaha, Nebraska; Kansas City, Missouri; Memphis/Shelby County, Tennessee; Tampa, Florida; Shreveport, Louisiana; and two counties in Indiana are shaded differently from their states; this is due to special enabling legislation for these jurisdictions that differ from the rest of the state.

#### POTENTIAL MODEL LEGISLATION

In 2002, the American Planning Association published the *Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change*. This model legislation prohibits the use variance altogether, due to the potential for great abuse (§10-503). This broad approach, however, fails to recognize truly unique situations



This map reflects the 14,000 or so variances approved by Memphis and Shelby County's Board of Adjustment over the past 95 years.

such as the apartment building pictured earlier. This section of the article will take a brief look at one community's experience with such abuse and its solution.

Memphis, Tennessee, and its county, Shelby County, have a long history of coordinating planning and zoning matters. The city's and county's planning commissions and zoning boards of adjustment were formally merged in 1956 and 1970, respectively, but they have shared the same staff since 1931. At the same time, the community has a long history of addressing zoning issues by variance. While most of these are bulk variances, many are use variances. The use variance in Memphis and Shelby County was sent into overdrive in 1964 with a Tennessee Supreme Court case that upheld the local zoning board's approval of a gas station in a residential district (*Reddoch v. Smith*, 379 S.W.2d 641, 214 Tenn. 213 (1964)). In

*Reddoch*, the court found that test of use variances under the special enabling acts in Shelby County was either a practical difficulty or unnecessary hardship and this was met in this circumstance given the history of the subject site, including its previous use by the state highway patrol and a nursery, as well as its position on a busy highway near a new highway interchange. This arguably low bar was later applied by the state's supreme court to the special enabling act in Memphis (which largely mirrored that of Shelby County's) in a case where the practical difficulty or unnecessary hardship was found where the cost of filling land zoned for single-family housing above the 100-year floodplain warranted its use for multifamily housing (*Glankler v. City of Memphis*, 481 S.W.2d 376 (Tenn. 1972)).

With the blessing from the judiciary, many developers in Memphis and Shelby

County in the ensuing decades either went straight to the zoning board to rezone by use variance or did so after their rezoning request was rejected by the appropriate elected legislative body. This was met with continued resistance in the community, the Memphis City Council, and the editorial boards of the city's two daily newspapers. The Tennessee General Assembly never did, however, amend the pertinent enabling legislation. So, the local legislative bodies decided to try the next best thing: amend the local ordinance, but not by prohibiting use variances as they were explicitly permitted in the enabling legislation and recognized by the courts. Instead, all use variances would go to the elected bodies after a review by the planning commission, the same process for a rezoning (Covington 1999).

Requiring use variances to go through the same steps as a rezoning certainly put an end to many frivolous use variance requests, but it failed to serve those property owners who were in desperate need of a real safety valve to the local land-use regime. Take, as an example, the case of William Lee, the longtime owner of a classic 1920s corner store in North Memphis pictured at right. In 1988, the store was inexplicably downzoned to an exclusively residential district, making the property nonconforming. Twenty years later, he closed the store for a period exceeding 365 days to care for his dying wife—thus extinguishing his nonconforming status. When he pursued reopening the store, he had to go through a fairly arduous use variance process with the two bodies that downzoned his property, rather than a nimble review by an independent zoning board.

I was appointed as the administrator of the zoning department in Memphis and Shelby County shortly after Lee's request was heard by the Memphis City Council. Shortly thereafter, I began work on addressing the use variance process in such a way that would both discourage situations like the gas station and apartment building built on greenfields that had been sanctioned by the Tennessee Supreme Court but also provide a fair and reasonable process for individuals in William Lee's position. In 2012, the Memphis City Council and Shelby County



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A corner store in Memphis that inspired an update to Memphis and Shelby County's use-variance standards.

Board of Commissioners approved a zoning code amendment that brought the ordinance in line with the enabling legislation by placing the duties of reviewing use variances to the body bestowed with that responsibility, the zoning board, and required a finding that none of the uses permitted on the property are practical given some peculiarity of the site ([Memphis and Shelby County Unified Development Code §9.22.6B](#)). The amendment also prohibited any use variance on a property that had been subject to a rezoning request at any time in the prior 18 months.

One of the first applications of the new use-variance process dealt with a nearly 100-year-old church building in a single-family neighborhood. The parish had outgrown the church and moved to a much larger building, leaving it empty. In 2013, a developer sought to rezone the property to a multifamily zoning district to allow it to be converted to apartments. As this would not have guaranteed the restoration of the old church building, the developer was encouraged by planning staff to refile for a use variance, which could be specifically conditioned on the utilization of the church building for the desired multifamily use. The question for the zoning board was fairly straightforward under the

new ordinance: Would the conversion of a relatively large structure originally built as a place of worship to a single-family home be practical? Another, more recent, example involved the usage of the rear one-fifth of an old theater building that was incredibly included in a residential zoning district at some point in the 1950s. After the theater building was closed for 365 days and lost its nonconforming status, its rear one-fifth required zoning action before the building could be rehabilitated. Again, the use-variance question to the board was simple: Was it practical to use the rear portion of an old theater for residential purposes?

A similar approach to the use variance that could also serve as model legislation may be found in Tampa, Florida. Like Memphis and Shelby County, zoning in Tampa is pursuant to special legislation passed by the Florida Legislature specifically for that city. This special act prohibits use variances for new construction on unimproved property ([Laws of Florida, Special Acts of 1969, Chapter 69-1651 §1](#)). In other words, a completely undeveloped “green” piece of property is unlikely to exhibit any unique qualities that would prevent the property owner from adhering to the zoning ordinance. Tampa's special statute also requires all

use variances to be reviewed for comments by the local planning commission, which helps Tampa's zoning board make more informed decisions that are in keeping with the various long-range plans and objectives of the municipality.

Likewise, Rhode Island's enabling act specifically requires that a zoning board must find that "the subject land or structure cannot yield any beneficial use" under the zoning ordinance in order for a use variance to be granted ([§45-24-41\(e\)](#)).

## CONCLUSIONS

Some communities throughout the nation allow an unfettered utilization of the use

variance; others restrict them entirely. Both may find it helpful to follow the lead represented by Tampa's and Rhode Island's enabling legislation and Memphis and Shelby County's zoning code. Depending on the pertinent statutory and case law governing communities' zoning regulations, this may require state action but could also be as easy as amending the local zoning code. Such a move would be welcome news to the millions of property owners in those states that outlaw use variances, particularly as more localities strive for consistency between long-range comprehensive plans and individual land-use decisions. Use variances should be the rare

exception to consistency, thereby strengthening the consistency requirements for all other zoning requests.

## ABOUT THE AUTHOR

Josh Whitehead, AICP, is a sixth-generation Memphian who was appointed as the head of the zoning office in Memphis and Shelby County in 2010. As such, he serves as the secretary of the communities' planning commission and zoning board. He holds a master's in community planning from the University of Cincinnati and a juris doctor from the University of Memphis, where he currently serves as adjunct professor. Whitehead has been published in law review journals on issues related to housing and blight but is most active on [cremedemph.com](#), a blog that features his take on Memphis' design, history, and architecture.

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