

**APPLICANTS, PLEASE NOTE:**

**The Board of Variance requires that applications be submitted with complete information and drawings. (Certificate of title, dimensions and drawings at a readable scale, in dark ink for photocopying, and full information re: mailing, address, phone, etc.)**

**Your application will be received and reviewed by District of Highlands Staff prior to inclusion on the agenda of the Board of Variance.**

**If information is incomplete or further information is required, you will be notified.**



**Page 2 – Appeal to the Board of Variance Application.**

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**NOTES: (Please review sample for information to be supplied.)**

- 1) A legible plan of the property (suitable for Xeroxing), in black in showing building profile, setbacks and area to be appealed must be included before application can be processed. (Example attached)
- 2) A certificated of title and any covenant registered at Land Title Office must be submitted with the application.
- 3) Sites in a mobile home park must submit mobile home park owner's permission to proceed together with square footage for the mobile home space, mobile home additions, site plan showing setbacks of the mobile home from existing mobile homes and from the front, rear and sides of the mobile home space.

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Owner's Signature

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Date

**PLEASE RETURN TO:**

District of Highlands  
1980 Millstream Road  
Victoria, BC V9B 6H1

Tel: (250) 474-1773

Fax: (250) 474-3677

**IF THE APPLICATION, INCLUDING MAPS AND OTHER PERTINENT INFORMATION, HAS NOT BEEN COMPLETELY FILLED OUT, THE APPLICATION MAY NOT BE PROCESSED.**

## **APPEALS TO BOARDS OF VARIANCE**

This chapter reviews the exact wording of the legislation which establishes the responsibilities of the Board of Variance. An explanation is given for each of the factors a Board must consider in making decisions specifically authorized by the legislation. The most significant sections of the *Local Government Act* which refer to Boards of Variance are cited in full in Appendix 1.

## **CATEGORIES OF APPEALS TO BOARDS OF VARIANCE**

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

- relaxation of zoning regulations;
- relaxation of tree protection bylaws;
- structural alteration where a non-conforming use is present; and
- relaxation of subdivision servicing requirements

In addition the Board has a special role with respect to non-conforming uses and structures which is discussed in 3.4 below.

## **RELAXATION OF REGULATIONS FOR SITING, DIMENSIONS OR SIZE OF A BUILDINGS . 901(1)(a)**

Probably the most common type of appeal heard by Boards of Variance is a request for relaxation of certain siting regulations under s.901(1)(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;*

The variations requested under this section deal only with buildings and structures in terms of their size, dimensions and location on a parcel or the siting of a manufactured home in a manufactured home park. The Board cannot rule on policy issues of the local government such as an increase in density or a change in use. Variances granted under s901(1)(a) are limited by s.901(2) and s.901(3) which will be explained subsequently.

## **PROTECTION OF TREES s.901(1)(b)**

s.901(1)(b) of the legislation provides that a Board can provide a variance from a provision of a tree protection bylaw as follows:

- (b) a bylaw under Division 2 Part 22 other than
  - (i) a bylaw under section 711, or*
  - (ii) a bylaw that has an effect referred to in 714(1), if the Council has taken action under subsection (2) of that section to compensate or mitigate the hardship that is caused to the person;**

The first of the two exceptions to a Board of Variance's authority to provide a relaxation protects the right of a Council by bylaw to remove hazardous shrubs or trees where there is a concern about safety of people, damage to property or seriously inconvenience to the public. Examples could be diseased trees, trees blocking the view of stop signs or trees which block a pathway or sidewalk.

The second exception to a board's authority is where a council has taken action to compensate or take mitigation actions to offset limiting the use of a property or the density of development on the property. In this case, the property owner cannot appeal to the Board of Variance. In this case the Council is acting as an appeal board and has made a judgment.

## **STRUCTURAL ALTERATION OR ADDITION WHERE NON-CONFORMING USES s901(1)(c)**

s.901(1)(c) of the legislation provides for an appeal from; as follows:

- (c) the prohibition of a structural alteration or addition under section 911(5)*

Section 911(5) specifies:

*A structural alteration or addition, except one that is required by an enactment or permitted by a board of variance under section 901(1)(c), shall not, subject to subsection (9), be made in or to a building or structure while the non-conforming use is continued in all or any part of it.*

Where the non-conformity relates only to siting, size, dimensions or parking requirements, s.911(9) allows the building or structure to be repaired, extended or altered without referral to the Board of Variance. However, Board of Variance approval is required, however, if this work would result in a further bylaw contravention. The Board would consider such a request in its normal manner under s.901(1)(c).

A structural change is not the same as a repair; rather, it is a modification to a floor, or roof, or bearing wall whether an internal or an outside wall. A new doorway in a bearing wall would be a structural change whereas new paneling or new shingles on a roof would not.

When structural alterations of a non-conforming building have been approved by a Board of Variance, these changes must also meet the requirements of statutes including regulations under statutes, for example, the Provincial Building Code, and any other bylaw provisions applicable at the time.

A non-conforming use is not confined only to that part of a building or structure occupied when the non-conformity was established, but can be extended throughout the whole building or structure. However, no structural alterations or additions may be made unless required by an enactment or permitted by the Board of Variance under s.901(1)(c):

### **Relaxation of Subdivision Servicing Requirements in Area Zoned for Industrial or Agricultural use s.901(1)(d)**

Boards of Variance may approve the relaxation of servicing requirements for subdivisions. S.901(1)(d) of the legislation states as follows:

*a subdivision servicing requirement under section 938(1)(c) in an area zoned for agricultural or industrial use,*

Section 938(1)(c) specifies that a council or board may:

*require that within a subdivision, a water distribution system, a fire hydrant system, a sewage collection system, a sewage disposal system, a drainage collection system or a drainage disposal system be provided, located and constructed in accordance with the standards prescribed in the bylaw.*

An appeal from this provision is only available where land is zoned for agricultural or industrial uses.

### **Scope of Board of Variance Authority**

s.901(2) lays out the scope of authority of a board of variance. It indicates that the board may upon application order that a minor variance be permitted from the requirements of a bylaw, or that the applicant be exempted from s.911(5) if the Board of Variance has considered a number of factors. Each of the factors is considered below.

#### **“Hardship”**

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 s.901(2)(c) discussed below in 3.3. The application of 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.

#### **“Undue”**

The hardship created must be an *undue hardship*. 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 which 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.

### ***“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 variation permitted by the Board.

### ***“Result in 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 the 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.

### ***“Adversely affect the natural environment”***

This condition is a relatively recent addition. It is designed to ensure that the Board of Variance considers the impact of its decisions on the natural environment and does not make decisions that have an adverse effect.

### ***“Substantially affect” adjacent lands***

The full wording in the legislation refers to “substantially affect the use and enjoyment of adjacent land” which includes a full range of considerations such as noise, dust, deconstruction 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 neighbor may another. The Board must decide the issue.

### ***“Vary permitted 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 ration 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 20 meter 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.

### ***“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 neighborhood 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. Any variance granted by the Board should not disrupt the basic harmony with other developments within a zone.

### **Limits on Board of Variance Authority**

The limitations placed on the nature of the orders a Board may make as listed and described above are further restricted by those matters listed in s.901(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 24A of the Land Registry Act, R.S.B.C. 1960, c208, before the repeal of that Act, or section 215 of the Land Title Act, or*
- (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 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 970.1(3)(b) or contains a feature or characteristic identified under section 970.1(3)(c), or*
  - (iii) for which a heritage revitalization agreement under Section 966 is in effect*

This section provides a checklist for a Board to aid in its determination of jurisdiction.

The Board of Variance is not an avenue of appeal against provincial floodplain regulations or negotiated agreements between developers and local governments or approving officers reflected in a covenant, development permit, land use contract or other agreement. All of the matters contained with Section 901(3) fall within one of those two categories. Other remedies are available to people wishing to modify these matters.

### **Extend of Damage Preventing Reconstruction of a Non-Conforming Building**

Certain decisions of a building inspector regarding repair or reconstruction of a building which does not conform to the bylaws can be appealed to a Board of Variance under s.902. Specifically, “if a person alleges that the determination by a building inspector of the amount of damage under s.911(8) is in error.”

s.911(8) specifies:

*Where a building or a structure, the use of which does not conform to the provisions of a rural land use bylaw or 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 shall not be repaired or reconstructed except for a conforming use in accordance with the bylaw.*

Although in this type of appeal the decision has the effect of allowing or disallowing a use contrary to a bylaw, the issue before the Board of Variance is simply where or not the building inspector's decision on the degree of damage is correct. If an applicant believes something less than 75% of the value of his building has been destroyed, but the building inspector believes 80% has been destroyed, that decision may be appealed to the Board of Variance.

If the Board concurs with the inspector, the owner of the non-conforming structure may not rebuild or repair that structure as the protection afforded by s.911(8) for continuing the non-conforming use would cease. However, if the Board concurs with the applicant and believes less than 75% has been destroyed it can allow the appeal and the owner may rebuild.

The wording of s.902 does not restrict the applicant to being the owner of the building. For example, a neighbor or corporate body may challenge a decision of a building inspector if he has claimed 70% is destroyed, and they feel 80% is destroyed and prefer not to have the non-conforming use continue in a rebuilt building.

s.902(2) clarifies the effect of a successful appeal:

*On an application under subsection (1), the board of variance may set aside  
The determination of the building inspector and make the determination  
Under section 911(8) in its place.*

This gives immediate effect to the decision of the Board. The applicant can take action without having to use a court to direct a reluctant building inspector, who has been found in error, to make a different determination.

Either the applicant or the local government can appeal a decision of the Board of Variance under this subsection to the Supreme Court.

### **Time Limits**

Decisions of a Board of Variance apply to land irrespective of ownership, and are lawful for the existing and subsequent owners unless the Board has limited the time period for initiation of the variance in the original order as provided for in s.901(7):

- In relation to an order under subsection (2),*
- (a) if the order sets a time within which the construction of the building, structure or manufactured home park must be completed and the construction is not completed within that time, or*
  - (b) if that construction is not substantially started within 2 years after the order was made, or within a longer or shorter time period established by the order,*
  - (c) the permission or exemption terminates and the bylaw or section 911(5), as the case may be, applies.*

For example, a Board may feel that a minor variation would be appropriate if the development was carried out before in filling or development on adjacent properties. Subsequent development on adjacent properties could be designed or sited to take account of the variation. However, ten years later, it may not be appropriate, because other construction would have taken place without anticipation of a modified siting or servicing regulation. In such circumstances the Board can use the provisions of s.901(7) to ensure the variance is acted upon within a reasonable time frame. It is entirely a decision of the Board to employ this provision or not in any specific case.

### **Check – the Local Government Act – Section 901**